RECOVERY UNDER THE NEBRASKA SURVIVAL AND WRONGFUL DEATH STATUTES

INTRODUCTION

The English common law allowed no recovery for wrongful death. This prohibition resulted from Lord Ellenborough's unprecedented holding in the 1808 decision in Baker v. Bolton. The American treatment of actions for wrongful death prior to, and even several decades after, that decision differed substantially from the English view. Nonetheless, in 1848, an American court, claiming the issue before it in Carey v. Berkshire Railroad Co., was one of first impression and denied a

2. Baker v. Bolton, 170 Eng. Rep. 1033 (1808). The plaintiff's wife was killed when a stagecoach overturned. The plaintiff sought damages for the loss of comfort, assistance and fellowship of his wife and for his own grief, vexation and anguish of mind. Lord Ellenborough permitted recovery of only those damages the husband sustained between the time of the accident and the wife's subsequent death, saying: "In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence." Id. at 1033. Basically, the case announced two principles. First, the court held that a third person could not sue a tortfeasor for the victim's death. Second, the deceased victim's right of action against the tortfeasor did not survive in his personal representative. There were, however, exceptions to these rules. Lord Ellenborough, for example, permitted recovery for the services lost between the time of injury and the subsequent death. Id. Another exception, as illustrated in Jackson v. Watson & Sons, 2 K.B. 193 (1909), was that the rule of Baker did not apply to actions brought on a breach of contract theory, but only actions brought in tort. Id. at 197.
3. See, e.g., Malone, supra note 1, at 1062-66 for a survey of colonial American wrongful death law. See also Cross v. Guthery, 2 Root 90, 1 Am. Dec. 61 (Conn. 1794) where a widower successfully brought an action for damages against a surgeon when his wife died from breast surgery. Although the "plaintiff demanded damage for his costs and expense, and deprivation of the service and company of his wife, in the sum of one thousand pounds," the jury only awarded forty pounds and costs. Id. at —, 1 Am. Dec. at 61-62.
4. See, e.g., Plummer v. Webb, 19 F. Cas. 894, 896-97 (D. Me. 1825) (No. 11,234) (father allowed to maintain action for loss of services of decedent son; action for child's pain and injury may be revived for benefit of his estate); James v. Christy, 18 Mo. 100, 100 (1853) (personal representative of the plaintiff could maintain an action for the loss of services of the plaintiff's son).
5. E.g., Malone, supra note 1, at 1062. See notes 3-4 supra.
7. Id. at 477. In deciding to deny the cause of action, the court explained: If these actions, or either of them, can be maintained, it must be upon some established principle of the common law. And we might expect to find that principle applied in some adjudged case in the English books; as occasions for its application must have arisen in very many instances. At the least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel; and we cannot find...
widow a cause of action for her husband's death. In its holding, the Supreme Judicial Court of Massachusetts acknowledged the existence of an 1846 English statute, commonly called Lord Campbell's Act, which abrogated the common law rule against recovery for wrongful death. However, fearful of overreaching its judicial powers, the Court adhered to the common law rule and concluded: "If such a law permitting maintenance of a cause of

any. This is very strong evidence, though not conclusive, that such actions cannot be supported.  

Id. at 478.

9. Carey, 55 Mass. (1 Cush.) at 475-77. The court stated: "the death of a human being is not the ground of an action for damages."  

Id. at 478.

Other courts have different rationalizations for the rule.  See, e.g., Van Beeck v. Sabine Towing Co., 300 U.S. 342, 345 (1937) (impossibility of determining the pecuniary value of a life is sufficient reason for denying any recovery); Hyatt v. Adams, 16 Mich. 179, 191 (1867) ("To the cultivated and enlightened mind, looking at human life in the light of Christian religion as sacred, the idea of compensating its loss in money is revolting."). It was not until Moragne v. States Marine Lines, Inc., 398 U.S. 375, 377, 381-82, 409 (1970), that a court not only condemned the common law rule, but permitted a recovery for wrongful death although no statute controlled.  See also Major v. Burlington, C.R. & N. Ry., 115 Iowa 309, 310-11, 88 N.W. 815, 815 (1902) (inquiring whether a widow could maintain an action for the wrongful killing of her husband).

This rule has been harshly criticized.  See, e.g., W. Prosser, HANDBOOK OF THE LAW OF Torts § 121, at 901 (4th ed. 1971) (stating that it is difficult to conceive of a reasonable basis for a rule which makes it "more profitable for the defendant to kill the plaintiff than to scratch him," and that Lord Ellenborough was one "whose forte was never common sense.").  See, e.g., Bedore v. Newton, 54 N.H. 117, 118-19 (1873) (in dicta, the court did not comprehend the force or admit the soundness of the principle).

10. Carey, 55 Mass. (1 Cush.) at 478. The court also discussed an American statute permitting recovery for wrongful death, but held that it applied only to the death of passengers carried by certain enumerated modes of transportation.  Id. at 478-80.

11. 9 & 10 Vict. Ch. 93 (Aug. 26, 1846). The statute in relevant part provided: Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, by the Authority of the same, That whencesoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.
action after the victim’s death] would be expedient for us, it is for
the legislature to make it.”

Indeed, that is exactly what was to happen. Today, wrongful
death and survival statutes have been

12. 55 Mass. (1 Cush.) at 480.

13. ALA. CODE § 6-5-201 to -204 (1973 & Supp. 1981); ALASKA
STAT. § 09.55.201 to -202 (1973 & Supp. 1981); ARIZ.

In addition, there are four federal statutes which allow recovery for wrongful
(1976), provides a remedy for death/injuries of railroad employees in interstate or
foreign commerce; Jones Act: 46 U.S.C. § 688 (1976), extends terms of FELA to
seamen; Federal Tort Claims Act: 28 U.S.C. § 2674 (1976), provides that the govern-
ment will be liable for torts resulting in death under the same circumstances as a
a remedy for a death on the high seas beyond a marine league from the U.S. shore
or shore of a U.S. territory.

enacted in most every state.

The ways in which these two statutes intermingle and the resultant remedies they provide are varied. This article summarizes the elements of recovery granted under wrongful death and survival statutes generally, as it more closely examines the remedies available in Nebraska. Special emphasis is placed on the determination and award of lost future earnings as between the two statutes and the determination of pecuniary losses under the wrongful death statute.

THE SURVIVAL STATUTE AND IMPAIRMENT OF LOST FUTURE EARNINGS

Lord Campbell's Act marked the legislative reform in recovering death damages.\(^\text{15}\) The Act created a cause of action for the benefit of the next of kin in every case where the wrongdoer would have been liable to the victim had death not followed.\(^\text{16}\) In addition, the Act is the prototype of many modern day wrongful death statutes.\(^\text{17}\)

There are two causes of action which may arise out of tortious conduct causing death. Recovery is governed by the appropriate wrongful death statute, survival statute, or both.\(^\text{18}\) Although the two causes of action often are joined in the same suit,\(^\text{19}\) the statutes provide for separate remedies. Typically, the survival statute provides for a recovery that would accrue to the benefit of the decedent's estate. Specifically, it allows the cause of action the vic-

\(^{15}\) Wycko v. Gnodtke, 361 Mich. 331, —, 105 N.W.2d 118, 119 (1960) (affirming $14,000 verdict which included damages for loss of companionship of 14-year-old boy).

\(^{16}\) See note 11 supra.


\(^{18}\) See notes 20-21 and accompanying text infra.

tim would have had against the wrongdoer to continue in the
decedent's personal representative.20 A typical wrongful death
statute, in contrast, creates a new cause of action in the decedent's
survivors for personal losses they sustained because of the death.21

Generally, the survival statutes provide recovery for pain and
suffering,22 medical and hospital expenses,23 funeral expenses24

wrongful death remedy permits beneficiaries to recover for losses of support, serv-
ices and society, notwithstanding fact that decedent had recovered in personal in-
jury action during his lifetime). In permitting recovery, the court said:
Wrongful-death statutes are to be distinguished from survival statutes.
The latter have been separately enacted to abrogate the common-law rule
that an action for tort abated at the death of either the injured person or the
tortfeasor. Survival statutes permit the deceased's estate to prosecute any
claims for personal injury the deceased would have had, but for his death.
Id.
The Nebraska survival statutes, NEB. REV. STAT. §§ 25-1401 to -1402 (Reissue
1979), provide:
Causes of action which survive. In addition to the causes of action which
survive at common law, causes of action for mesne profits, or for an injury
to real or personal estate, or for any deceit or fraud, shall also survive, and
the action may be brought, notwithstanding the death of the person enti-
tled or liable to the same.

Actions which abate by death of defendant. No action pending in any court
shall abate by the death of either or both the parties thereto, except an
action for libel, slander, malicious prosecution, assault, or assault and bat-
tery, or for a nuisance, which shall abate by the death of the defendant.
21. See, e.g., Gaudet, 414 U.S. at 575 n.2. See also Runyon v. District of Colum-
bria, 463 F.2d 1319 (D.C. Cir. 1972) ($65,000 award in joint wrongful death and survival
action). The court explained that: "the proper recovery under the wrongful death
act is principally the amount of financial loss to the spouse and next of kin." id. at
1322; Thornton v. Insurance Co. of North America, 287 So.2d 262, 267 (Miss. 1973)
damages recovered by beneficiaries under wrongful death action were not subject
to debts of deceased). In construing the Mississippi wrongful death statute, the
court quoted a prior holding which stated, "The 'wrongful death statute' creates a
new cause of action for the benefit of the persons named in the act, and is not a part
of the estate of the deceased intestate." id. at 266; see Farmers Ins. Exch. v. Brown,
252 Cal. App. 2d 120, —, 60 Cal. Rptr. 1, 3 (1967) (declaratory judgment holding that
insurer was not liable to wife's heirs for wife's death).
22. See notes 28-32 infra for specific recoveries of pain and suffering under sur-
vival statutes. However, damages for pain and suffering may not be recovered
under a wrongful death statute. Logically, beneficiaries do not suffer injury be-
cause of the decedent’s pain and suffering (although they might experience mental
anguish of their own because of the death). See, e.g., Bond v. United R.R.'s of San
Francisco, 159 Cal. 270, —, 113 P. 366, 369 (1911) (wrongful death action brought
by parents of deceased minor was limited to their pecuniary losses); Saunders v.
Schultz, 20 Ill. 2d 301, —, 170 N.E.2d 163, 166 (1960) (wrongful death action for pecu-
niary loss suffered by widow); Steckman v. Silver Moon, Inc., 77 S.D. 206, —, 90
N.W.2d 170, 172 (1958) (action for wrongful death and conscious pain and suffering
of widow's decedent husband who was killed in a bar room brawl).
It should be noted here that in those jurisdictions where punitive damages
would have been a part of the decedent's personal injury action had he lived, they
are generally allowed in the survival action. See California, Colorado, Georgia,
Massachusetts, Montana and Wisconsin statutes, cited at note 15 supra.
and actual lost wages.\textsuperscript{25} The damages collectible in such actions are usually limited to those sustained by the decedent between the time of injury and the time of death.\textsuperscript{26} Thus, if death is instantaneous, there is no action for damages under a survival statute.\textsuperscript{27}

Damages for pain and suffering are limited to conscious pain and suffering.\textsuperscript{28} The plaintiff has the burden of showing that the decedent experienced pain,\textsuperscript{29} although pain may be inferred from the type of injury\textsuperscript{30} or from the fact that the decedent was conscious before death.\textsuperscript{31} The extent of a monetary award for the de-

\begin{itemize}
\item \textsuperscript{23} See, e.g., Florida, Indiana, Massachusetts and West Virginia statutes, cited at note 14 supra. See also notes 33-35 infra.
\item \textsuperscript{24} See notes 36-37 infra.
\item \textsuperscript{25} See notes 38-45 infra.
\item \textsuperscript{26} See, e.g., Beaven v. Seaboard Air Line R.R. Co., 100 F. Supp. 336, 337 (N.D. Fla. 1951) (holding where death was instantaneous, no recoverable expenses could occur between time of injury and time of death).
\item \textsuperscript{28} See, e.g., In re Sincere Navigation Corp., 329 F. Supp. 632, 659 (E.D. La. 1971) (where ship sank, court held that pain and suffering prior to death was only conjectural; some men were likely asleep and others may have lost consciousness in a minute or less); Addison v. Travelers Ins. Co., 281 So. 2d 805, 813 (La. App. 1973) (where there was no evidence that child consciously suffered any pre-death pain, award for pain and suffering was disallowed); Covell v. Colburn, 308 Mich. 240, —, 13 N.W.2d 275, 276-77 (1944), overruled on other grounds, Thompson v. Ogemaw County Bd. of Rd. Comm’rs., 357 Mich. 482, —, 98 N.W.2d 620, 624 (1959) (Covell court held no basis for a finding of damages for pain and suffering where child suffered a cerebral concussion which immediately rendered her unconscious); Burrous v. Knotts, 482 S.W.2d 358, 363 (Tex. Civ. App. 1972) (verdict held excessive where jury had failed to distinguish between periods of consciousness and unconsciousness).
\item \textsuperscript{29} See, e.g., Intelisano v. Greenwell, 155 Conn. 436, —, 232 A. 2d 490, 494 (1967) (burden of proof on the issue of pain and suffering was on administrator; where no evidence of pain, rather, only unconsciousness, the only issue is consciousness and where there is no evidence of pain issue should not be submitted to jury); Tuten v. Black, 247 So. 2d 67, 67 (Fla. Dist. Ct. App. 1971) (where evidence, although far from overwhelming, was sufficient to show by a preponderance thereof that decedent consciously suffered pain); Baker v. Slack, 319 Mich. 703, —, 39 N.W.2d 403, 404-5 (1949) (evidence that pedestrian cried out at moment she was struck was insufficient to meet burden to establish by preponderance of evidence that she was conscious during half hour prior to death); Carlisle v. Duncan, 461 S.W.2d 254, 256-57 (Tex. Civ. App. 1970) (evidence insufficient to support finding for conscious pain and suffering, mere testimony of a “groan” was lacking in probative value and did not meet appellees burden to establish existence of conscious pain by a preponderance of the evidence).
\item \textsuperscript{30} See, e.g., Campbell v. Romanos, 346 Mass. 361, —, 191 N.E.2d 764, 768 (1963) (evidence was sufficient to warrant a finding of conscious suffering where it appeared decedent was in contact with the fire, that her hair was burned, and that she ran away from the flames and was later found dead); Interstate Life and Accident Co. v. Cox, 55 Tenn. App. 40, —, 396 S.W.2d 80, 86 (1965) (pain and suffering could reasonably be inferred from the very nature of the injury, the wearing of a cast, the excessive nervousness after the fall, and the fact decedent died from an embolism).
\item \textsuperscript{31} See e.g., Florida v. New York Cent. Rd. Co., 170 Ohio St. 185, —, 183 N.E.2d 902, 905 (1959) (affirmative evidence tended to show that decedent was not completely
cedent's conscious pain and suffering is left to the jury's discretion.\textsuperscript{32}

Medical expenses incurred in an attempt to cure the injured person are also recoverable in survival actions.\textsuperscript{33} The right to recover such expenses is granted expressly by statute in some states.\textsuperscript{34} In other states medical expenses are awarded simply as an element of those damages which the decedent could have recovered had death not occurred.\textsuperscript{35} Some survival statutes also specifically provide for the recovery of funeral expenses.\textsuperscript{36} However, in other jurisdictions, the right to recover such expenses is determined by finding who incurred the legal obligation for their payment.\textsuperscript{37}

unconscious during the interval between the accident and death; thus, he could experience pain); Plank v. Heirigs, 83 S.D. 173, —, 156 N.W.2d 193, 203 (1968) (evidence sufficient to show that decedent was conscious a substantial portion of time between injury and death, and, therefore, capable of experiencing pain and suffering). \textit{But see} Whalen v. Daugherty, 30 A.D.2d 604, —, 290 N.Y.S.2d 3, 5 (1968) (affirming jury's rejection of damages where some evidence indicated decedent was conscious before death, but there was no evidence that he was experiencing pain).

\textsuperscript{32} \textit{See}, e.g., Southern Pac. Co. v. Heavingham, 236 F.2d 406, 409 (9th Cir. 1956) (even though it was a mere matter of speculation as to whether decedent lost consciousness, the question of pain and suffering was for the jury because they were the fact finding body and drawers of the ultimate conclusions); Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 443, —, 389 P.2d 96, 108 (1961), \textit{overruled on other grounds}, Greene v. Texeira, 54 Hawaii 231, 505 P.2d 1169, 1172 (1973) (recovery for pain and suffering in death by drowning is not beyond bounds of possibility; the jury must consider whether and to what extent such were sustained); Nadeau v. Inhabitants of Taunton, 247 Mass. 104, —, 141 N.E. 608, 608 (1923) (question of pain and suffering allowed to go to jury although case was "close" on issue as to whether any was felt); Necaise v. Blalock, 210 So.2d 637, 640 (Miss. 1968) (jury had right to value, as it saw fit, pain which decedent suffered, considering she remarked "Oh, me!" and, therefore, was not instantly killed).

\textsuperscript{33} \textit{See}, e.g., Betesh v. United States, 400 F.Supp. 238, 248 (D.D.C. 1974) (construing Maryland survival statute to include medical expenses); Hernandez v. United States, 383 F. Supp. 168, 173, (D. Colo. 1974) (under Colorado survival statute recovery may be had for all medical, hospital and related expenses incurred by and charged to decedent's estate prior to his death); Coulson v. Shirk's Motor Express Corp., 48 Del. 561, —, 107 A.2d 922, 924-25 (1954) (construing Delaware Non-Abatement Statute to include expenses incurred in endeavoring to cure decedent of injuries).

\textsuperscript{34} \textit{See} Florida, Indiana, Massachusetts and West Virginia statutes, cited at note 14 supra.

\textsuperscript{35} Stang v. Hertz Corp., 81 N.M. 69, —, 463 P.2d 45, 55 (1970) (holding that statutory language authorizes recovery for medical and related care since the defendant would have been liable had there been no death); Skoda v. West Penn Power Co., 411 Pa. 323, —, 191 A.2d 822, 829 (1963) (recovery for medical, nursing and hospital services since decedent in his lifetime could bring an action for these damages).

\textsuperscript{36} \textit{See} Maryland, New York, Rhode Island and West Virginia statutes, cited at note 14 supra.

\textsuperscript{37} \textit{See}, e.g., Sinclair Refining Co. v. Butler, 190 So. 2d 313, 319 (Fla. 1965) (right to recover reasonable funeral expenses vests in personal representative, subject to reimbursement to person who paid for them). \textit{See also}, Kopera v. Moschella, 400 F. Supp. 131, 135 (S.D. Miss. 1975) (parents entitled to recover burial expense and the
Impairment of future earnings is a relevant consideration in both survival\textsuperscript{38} and wrongful death actions.\textsuperscript{39} The allocation of a decedent's lost future earnings presents difficulty in jurisdictions which have concurrent wrongful death and survival statutes. The difficulty arises because courts must determine how to avoid a potential double recovery. Double recovery may occur in cases where the beneficiaries' recovery for loss of support in the wrongful death action overlaps with the damages for lost future earnings which survive in the decedent's personal representative.\textsuperscript{40}

One method employed by the courts to avoid this overlap of damages is to limit the recovery of the estate in the survival action to an amount based solely on the probable net future earnings of the deceased. This net amount is arrived at by determining the decedent's gross future earnings and subtracting all expenditures, including the amount necessary to support the beneficiaries qualified to recover in a wrongful death suit.\textsuperscript{41} In the wrongful death action, the beneficiaries are entitled to recover the contributions toward their maintenance that the deceased most likely would

\textsuperscript{38} By definition, the personal representative can sue to recover the same elements of damages that the deceased could have recovered in a personal injury action in his lifetime. Thus, this sum includes compensation for impairment of lost future earnings. As will be shown, however, most courts place limitations on the amount recoverable. See notes 41-45 and accompanying text infra.

\textsuperscript{39} In a wrongful death action, survivors may recover that portion of the deceased's lost future earnings which they would have received for support. See notes 44, 143 and accompanying text infra.

\textsuperscript{40} For example: assume a family of four. The husband/father earns $12,000 per year. He spends $4,000 per year on maintenance and support of his family, i.e., food, clothes, medical expenses, etc. If he dies, the wife and children may bring a wrongful death action to recover for their losses, including loss of support, i.e., $4,000 for every year of the deceased's normal expectancy. If, at the same time, the deceased's personal representative is allowed to recover the total lost future earnings accruing to the estate, i.e., $12,000 for every year of the deceased's normal expectancy, then the wrongdoer would be required to pay a total of $16,000 for each year of expectancy. Four thousand dollars per year would be recovered twice, and in excess of the total earnings of the deceased.

\textsuperscript{41} Runyon v. District of Columbia, 463 F.2d 1319, 1321-22 (D.C. Cir. 1972) (although court had previously stated that "double recovery should of course be avoided," the court had not previously addressed the question of the recovery permissible under both statutes). See also Prince v. Adams, 229 Pa. Super. 150, —, 324 A.2d 358, 360 (1974) ($1,000 awarded under survival statutes for total net earnings which boy would have accumulated during adult life held patently inadequate); Ferne v. Chadderton, 363 Pa. 191, —, 69 A.2d 104, 107-08 (1949) (since recovery under death statute included amount beneficiaries would have received from decedent's earnings for support, that amount was deducted from recovery to estate, thus avoiding duplication).
have made.\textsuperscript{42}

A second method used by courts\textsuperscript{43} to prevent any double recovery to the plaintiff focuses on the time of death. Damages recoverable under the survival action are limited to those accruing prior to the time of death, thus there is no recovery by the estate of lost future earnings. On the other hand, damages recoverable under the wrongful death statute are limited to the beneficiaries' pecuniary loss accruing after the time of death.\textsuperscript{44} The possibility of a double recovery is avoided because the damages accruing in each action do not overlap in time. This is the approach taken in Nebraska.\textsuperscript{45}

Sixty years ago, in \textit{Hindmarsh v. Sulpho Saline Bath Co.},\textsuperscript{46} the Nebraska Supreme Court went to great lengths to delineate the damages recoverable under the two statutes.\textsuperscript{47} In \textit{Hindmarsh}, the decedent died from injuries he sustained after he leaped from a window of the defendant's private hospital.\textsuperscript{48} While the decedent was alive,\textsuperscript{49} an action was commenced to recover the damages resulting from his injuries, which were allegedly caused by the de-
fendant's negligence. After his death the action was revived, and "recovery was allowed for the pain and suffering endured by the deceased; for his hospital and medical expenses; and for all loss of earnings for the full period of his expectancy, based upon his age and condition of health prior to the injury."

Subsequently, the deceased's widow brought an action pursuant to the wrongful death statute for the benefit of herself and her child. It was recovery under this second action that was specifically at issue in Hindmarsh. The court held that recovery in the first action barred recovery in the second action. The court reasoned that the quantum of loss already sustained by the parties had been recovered in the first action; to permit another action would result in a double recovery. Since recovery in the first action was had for the decedent's total lost future earnings, that amount necessarily included the portion to which beneficiaries were entitled in the wrongful death suit. In effect, the first action was a joinder of the decedent's cause of action and the beneficiaries' cause of action. The court explained:

In the revived action the personal representative may recover damages for pain and suffering endured by the deceased; for the expenses incurred, necessitated by the injuries, in the nature of medical and hospital expenses and the like; and he may recover the loss of earnings, which are sustained by the injured party, during his lifetime as a result of the injuries. But in the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, the recovery must be measured by the pecuniary loss suffered by those beneficiaries by being deprived of what they would have received from the earnings of the injured party from the date of his death, had he lived at his full expectancy. Under this construction, a double recovery is avoided, although the double remedy is recognized.

50. 108 Neb. at 170, 187 N.W. at 807.
51. Id.
52. Id.
53. Id.
54. It is important to realize that two separate actions were brought, although only the first one was successful. Id. at 170-75, 187 N.W. at 807-10.
55. Id. at 177, 187 N.W. at 810.
56. Id. at 172-73, 187 N.W. at 808.
57. Id.
58. Id. at 170-73, 187 N.W. at 807-08.
59. Id. at 177, 187 N.W. at 810.
60. Id. at 175, 187 N.W. at 809.
These remedies are concurrent.\textsuperscript{61} They acknowledge the fact that a single act may result in injury to more than one person.\textsuperscript{62} By limiting the damages recoverable under each statute, the parties are allowed to recover the full extent of their individual losses without exceeding the total maximum loss.\textsuperscript{63}

If the decedent had been able to prosecute the first action to completion before his death, he would have been able to recover his total lost future earnings based upon his full life expectancy.\textsuperscript{64} Such a judgment would be a complete bar to a wrongful death action.\textsuperscript{65} However, when he died, the actual duration of his life became fixed;\textsuperscript{66} his recovery was then limited to the span of time between injury and death.\textsuperscript{67} This limitation, according to the court, was necessary because it was the unexpressed intention of the legislature that the recovery of the statutory beneficiaries for pecuniary loss, growing out of the death, should be exclusively for the beneficiaries.\textsuperscript{68}

This frequently used method of allocating damages between concurrent survival and wrongful death statutes achieves its goal of avoiding a double recovery to the beneficiaries.\textsuperscript{69} However, it has been called "patently unfair,"\textsuperscript{70} criticized as being based on fallacious reasoning,\textsuperscript{71} and labelled as providing a "disguised wind-
One of these criticisms may be found in the dissenting opinion in Greene v. Texeira. In Greene, the Hawaii Supreme Court limited damages recoverable in a survival action to those accruing between injury and death. To reach this result, the court was compelled to overrule a previous decision that had been praised for its utilization, in a wrongful death action, of the net lost future earnings method of dividing damages among the parties. The completely denied to the creditors. All of that recovery is allocated to the wrongful death action and does not pass through the estate. Certainly the interests of the dependents justify exempting a substantial portion of the future earnings recovery from the claims of the creditors. However, it is questionable whether the complete exemption which results from this judicial balance is justifiable.

See also Note, Damages for Wrongful Death in Pennsylvania, 91 U. PA. L. REV. 68, 72 (1942), where the author states:

The rule of thumb may be unsatisfactory, however, in some situations. For example, where none of the survivors can sue under the death statute, the prospective earnings of the deceased are a total loss to the beneficiaries of the estate, and no remedy is available to them. Inasmuch as the beneficiaries of the estate may include close relatives and creditors, both of whom may have sustained substantial injury from the death, the rule of thumb prejudices the interests of the innocent injured persons in favor of the interests of the tort-feasor.

A somewhat similar situation occurs in the case of a child who is injured and dies of the injury while still a minor. The parents may recover the loss of services and the loss of earnings up to the time the child would have been twenty-one years old, but not beyond that age, because they then have no claim to his earnings. Unless the personal representative under the survival statute can recover the loss of the child's prospective earnings from the age of twenty-one to the limit of his normal life expectancy, neither the estate nor the relatives have a remedy.

Even where the survivors are able to bring suit under the survival statute and thereby be compensated in full for their own pecuniary loss, it is evident that if the personal representative is unable to recover prospective earnings from the time of death, the tort-feasor is paying less than he would have paid if the decedent had lived. The prospective earnings recovered under the death statute are clearly not equal to all the prospective earnings of the deceased, yet the tort-feasor would have been liable for this amount if he had been sued during the life of the deceased. It seems eminently unfair to thus allow the wrong-doer to profit by the death of his victim.

Fleming, supra note 72, at 607.
dissenters in *Greene* questioned the court's motive in changing the statutory scheme since the net lost future earnings method already avoided the possibility of a double recovery.\(^7\)

A number of defects in the newly adopted method were alluded to by the dissent.\(^7\) However, one criticism was most noticeably advanced:

Perhaps the most important shortcoming of the majority's position is its refusal to acknowledge the impact of its broad-ranging language upon the distribution of damages. To rule that the probable future excess earnings of the decedent are not a proper item of damages in this [survival action] allows future defendants to obtain windfall from their own actions. A benefit will be reaped when a victim is killed rather than injured.

There are a number of readily conceivable situations in which a tortfeasor will benefit under the majority's holding when an injury results in death rather than disability, thereby allowing the wrongdoer to escape all or part of his liability. Any situation in which a decedent has beneficiaries under his will or heirs who do not fall within those categories empowered to bring actions under the wrongful death statute, that is, any heir or beneficiary not supported by, or beneficiary not related to, the decedent, would result in the complete loss of an otherwise compensable damage.\(^7\)

This passage, although written ten years ago, foreshadows the recent Nebraska case of *Rhein v. Caterpillar Tractor Co.*\(^8\) In

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77. *See Greene*, 54 Hawaii at —, 505 P.2d at 1176 (Levinson & Kobayashi JJ., dissenting).

78. *Id.* at —, 505 P.2d at 1175-77 (Levinson & Kobayashi, JJ., dissenting). The dissent first criticized those jurisdictions which limit recovery in survival actions to damages accrued between the time of injury and the time of death as misinterpreting the statutes. The correct construction should be that the cause of action in a survival statute arises out of the injury. Therefore, recovery should be had for the total amount of income decedent would have had had he lived his life normally, as determined from the moment the injury occurred. Second, the dissent accused the majority of overlooking the primary goal of compensating the injured parties and, instead, concentrating on how to avoid punishing the tortfeasor. *Id.* This worry has troubled many courts, including the Nebraska Supreme Court, which do not allow punitive or exemplary damages. *E.g.*, *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 173, 187 N.W. 806, 808 (1973). If a double recovery is allowed, the windfall to the beneficiaries and estate results in damages that overcompensate, thus becoming impermissible punishment. The third and final criticisms are that the interests of creditors, and the interests of the state under an escheat statute, are detrimentally affected. 54 Hawaii at —, 505 P.2d at 1176-77.

79. *Id.* at —, 505 P.2d at 1177.

80. 210 Neb. 321, 314 N.W.2d 19 (1982). As will be illustrated, the alleged wrongdoers in *Rhein* escaped liability because no recovery was allowed under the survival statute and the decedent's widow had failed to bring a wrongful death action...
Rhein, the decedent was killed instantaneously\textsuperscript{81} when a tree trunk fell on the bulldozer he was operating, crushing him in the driver's seat.\textsuperscript{82} No wrongful death action was brought before the statute of limitations expired.\textsuperscript{83} Instead, Rhein, the decedent's wife and personal representative, filed a survival action against the manufacturers and sellers of the bulldozer, alleging various acts of negligence and claiming those damages which the decedent would have been entitled to had he lived.\textsuperscript{84} The issue posed by Rhein was:

[W]hether the decedent has a cause of action separate from the personal representative cause of action under the Lord Campbell Act for the decedent's loss of future earning capacity and enjoyment of life which survives his death and is recoverable by his personal representative on behalf of decedent's estate even though the wrongful death cause of action is barred by the 2-year statute of limitations.\textsuperscript{85}

In her brief, Rhein contended that recovery should be allowed since the survival action did not abate at death, and, since there could be no wrongful death suit, there would be no double recovery.\textsuperscript{86} She argued that "the Hindmarsh case should be overruled to the extent that it holds that the survival of actions will not include damages for future earning where the wrongful death action is barred by the statute of limitations."\textsuperscript{87} Despite this contention, the court denied recovery.\textsuperscript{88}

The courts of other jurisdictions have made exceptions to their

\begin{notes}
81. The plaintiff refused to concede that the death was instantaneous, although the pleadings did not allege that it was not. Rhein, 210 Neb. at 326, 314 N.W.2d at 22. In Nebraska, it follows that no cause of action can survive under the survival statute in the case of instant death, because only those actions which are "pending" survive. The decedent would have been incapable of initiating suit in his lifetime. See note 20 supra. However, in Wilfong v. Omaha & C.B. St. Ry. Co., 129 Neb. 600, 262 N.W. 537 (1935), the administrator of decedent's estate was permitted to bring a survival action pursuant to a self-executing provision of the constitution, despite that no such action had been commenced during the victim's lifetime. Id. at 608, 611, 262 N.W. 541-42.
82. 210 Neb. at 323, 314 N.W.2d at 21.
83. Id. NEB. REV. STAT. § 30-810 (Reissue 1979) provides that a wrongful death action must be brought within two years from the date of death. The facts are unclear as to why this was not done in Rhein.
84. Rhein, 210 Neb. at 323-24, 314 N.W.2d at 21.
85. Id. at 324, 314 N.W.2d at 21.
86. See Brief for Appellant at 6, Rhein v. Caterpillar Tractor Co., 210 Neb. 321, 314 N.W.2d 19 (1982).
87. Id. at 7.
88. 210 Neb. at 330, 314 N.W.2d at 24-25.
\end{notes}
otherwise rigid construction of survival statutes. These exceptions have allowed the decedent's personal representative to recover for lost future earnings where an action is not maintainable under the wrongful death statute. Such exceptions are taken where there is no longer a danger of double recovery. For example, in *Hudson v. Lazarus*, the District of Columbia Appellate Court analyzed a fact situation similar to that in *Rhein*. The court held that where there is no possibility of double recovery, an action under the survival statute included the right to recover lost future earnings. The court stated:

If Hudson in his lifetime had recovered judgment in this action, his damages would have included an allowance for prospective loss of earnings during his normal life expectancy, discounted to present worth, and with such other adjustments as the facts may require. When he died his right to these damages passed under the Survival Act to his administratrix. In the present case no action has been or can be maintained under the Wrongful Death Act. We find no basis for an inference that Congress intended us, in these circumstances, to give less than full effect to the terms of the Survival Act. Double recovery for the same elements of damage should of course be avoided.

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89. In Michigan, if death is instantaneous, a cause of action arises under the wrongful death statute. Where death is not instantaneous, a cause of action arises under the survival statute. *Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N.W. 623 (1903) stands for the proposition that under the survival statute the administrator could recover for the estate the same amount the decedent could have recovered if he had lived. The court said that damages were not limited to those accruing between time of injury and time of death. Here decedent died a day after he fell off a telephone pole; because death was not instantaneous, no wrongful death action could have been brought. *Id.* at —, 93 N.W. at 623-24. This holding was subsequently followed in *Spillman v. Weimaster*, 275 Mich. 93, —, 265 N.W. 787, 790 (1936). In *McCafferty v. Pennsylvania R.R. Co.*, 195 Pa. 339, 44 A. 434 (1899), only a survival action was maintainable. In Pennsylvania, a wrongful death action can only be brought if the decedent had not commenced his own action prior to death. The court held that under these circumstances recovery could be had for diminution of earnings during his lifetime without injury. *Id.* at —, 44 A. at 435-36. In *Kriesak v. Crowe*, 36 F. Supp. 127 (D.C. Pa. 1940) decedent died leaving no relatives. Although the suit was brought by the decedent's administrator, the court held that where the beneficiaries were dead and there was no potential for double recovery, a claim for lost future earnings could be maintained under the survival statute, despite the fact that these damages would normally overlap with damages under a wrongful death statute. *Id.* at 129.


91. 217 F.2d 344 (D.C. Cir. 1954).

92. In *Hudson*, there was no possibility of a double recovery since the statute of limitations on the wrongful death action had run. *Id.* at 345.

93. *Id.* at 348-49.
In *Rhein*, the Nebraska Supreme Court, however, refused to make an exception to the rule it believed had been established in *Hindmarsh*. As a result of that refusal, the petition was summarily dismissed and the alleged tortfeasors remained unscathed. In its refusal to make an exception, the Nebraska Supreme Court is not an anomaly. Other jurisdictions have also dismissed appeals by plaintiffs' who sought to expand the scope of damages permitted in a survival action.

However, a discrepancy appears within the opinion in *Rhein*, where the court explained its holding in the 1914 decision in *Murray v. Omaha Transfer Co.* This latter decision was also distinguished in *Hindmarsh*. Yet, the *Rhein* court felt compelled to redistinguish *Murray*, and did so in a manner that is questionable in light of the facts of the *Murray* decision.

In *Murray*, Henry Miller had been run over by a horse and wagon on August 27, 1910. On August 29, he commenced an ac-
tion for personal injuries. A few hours after his petition was filed, Miller died without leaving any beneficiaries. Subsequently, the action was revived in the name of the decedent's administrator, Thomas Murray. After revivor, an amended petition, also demanding damages for Miller's injuries, was filed by the administrator for the benefit of the decedent's estate. Judgment was for the plaintiff in the amount of $4,000. Because of the importance of the question in Murray, the court thought it necessary to give further reasons for its original holding in a subsequent affirming opinion. After doing so, the court concluded:

Construing these statutes in the light of history and of present conditions, we conclude that the intention of the legislature was that, when an action has been begun by the party injured to recover damages suffered because the wrongful act of another the action does not abate, nor any part thereof, by the death of plaintiff, and the administrator takes the place of the plaintiff therein and can recover

101. Id. at 177, 145 N.W. at 361.
102. Id. at 177, 145 N.W. at 361.
103. Murray II, 98 Neb. at 488, 153 N.W. at 490 (Barnes, J., dissenting).
104. 95 Neb. at 176, 145 N.W. at 361. See notes 113-17 and accompanying text infra. The court in Rhein incorrectly asserted that "an amended petition was filed demanding damages for Murray's injuries for the benefit of his heirs under the Lord Campbell Act." Rhein, 210 Neb. at 326-27, 314 N.W.2d at 23. It was specifically stated, however, by Justice Barnes, in his dissent in Murray II that, "Plaintiff decedent, Miller, in the case at bar, left no widow or next of kin and no one dependant in any manner upon him for support." 98 Neb. at 488, 153 N.W. at 490 (Barnes, J., dissenting). Justice Barnes elaborated on the importance of this point:

By the majority opinion the administrator of the estate of Miller is allowed to recover, not only for the pain and mental suffering actually sustained by his decedent, the physical injury suffered by him, the expense incurred for necessary medical and surgical attention in treating him for his injuries, but, in addition thereto, such sum as decedent would have earned for the whole term of his life expectancy, as shown by the Carlisle Table, if he had not died as a result of his injuries. As to this last element of recovery, I am convinced that the majority of the court is wrong.

The dissent went on to explain that the purpose of the wrongful death act was to allow the beneficiaries to recover the pecuniary losses resulting to them. But, [i]t appears that the statutes of this state have made no direct provision for a recovery by the administrator of the estate of one who is killed by a wrongful act, of any amount whatever, representing the earning capacity of a deceased person after his death, except such recovery as may be had for the benefit of the widow or widower and next of kin of his decedent. Justice Barnes then reminded the court that there were no beneficiaries, "[i]therefore, the plaintiff in this action could not recover anything representing the earning capacity of decedent after his death occurred." Referring to the construction of the statutes as they had been interpreted in the past, and claiming there were no exceptions, his dissent stressed: "The statutes have not made any provision for a recovery for decedent's earning capacity, excepting such as provided for the benefit of the widow and next of kin. . ." Id. at 487-489, 153 N.W. at 490-91.

105. 95 Neb. at 176, 181, 145 N.W. at 361, 363.
106. Murray II, 98 Neb. at 482, 153 N.W. at 488.
any and all damages that the injured party could have recovered if he had survived, including injuries to or loss of his earning power.\textsuperscript{107}

Subsequently, the supreme court reconciled the Murray decision with its holding in Hindmarsh.\textsuperscript{108} In analyzing Murray, the Hindmarsh court stated:

The effect of that decision, however, is only that, where no statutory beneficiaries exist who can recover under the statute for wrongful death, the administrator may then recover, for the benefit of the estate, \textit{in the revived action}, full compensation for the loss caused by and resulting from the injuries and consequent death, and that recovery may then be in an amount equal to that which the deceased could have recovered had he survived and been permanently deprived of his earning capacity.\textsuperscript{109}

The court explained that it was not necessary to limit the recovery for the benefit of the estate in the survival action when there were no beneficiaries to bring an action in wrongful death.\textsuperscript{110} In effect, the recovery the estate “might otherwise have been entitled to receive” is cut down where beneficiaries exist, since the wrongful death act “gives them the right to a specific recovery to the exclusion of the estate.”\textsuperscript{111}

However, the holding in Murray was explained differently in Rhein. The court stated:

\textit{Murray} stands for the proposition that an action for damages incurred by the decedent up to the date of his death and an action for damages suffered by his widow or widower and next of kin after his death may be joined in a single action. The fact that the court in \textit{Murray} permitted the jury to consider loss of Murray’s [sic] earnings for the balance of his life expectancy does not support Rhein’s position in this case. The jury was permitted to consider the life expectancy tables and future loss of earnings in connection with the wrongful death action brought on behalf of the widow and next of kin and not in connection with the negligence action brought on behalf of the decedent for damages incurred prior to his death.\textsuperscript{112}

The flaw in the \textit{Rhein} decision results from the court’s misinterpretation of the facts of Murray. If indeed there had been statu-

\begin{footnotesize}
\begin{enumerate}
\item 107. \textit{Id.} at 486, 153 N.W. at 490 (emphasis added).
\item 108. 108 Neb. at 176, 187 at 809.
\item 109. \textit{Id.} at 176, 187 N.W. at 809-10 (emphasis added).
\item 110. \textit{Id.} at 176, 187 N.W. at 810.
\item 111. \textit{Id.} at 176-77, 187 N.W. at 810.
\item 112. \textit{Rhein}, 210 Neb. at 327, 314 N.W.2d at 23.
\end{enumerate}
\end{footnotesize}
tory beneficiaries capable of bringing a wrongful death action in Murray, then the case could very well have stood for the proposition as stated by the Rhein court. However, there were no statutory beneficiaries in Murray. Thus, a wrongful death action could not have been filed for their benefit and subsequently joined with a survival action. Rather, as originally held in the case and as acknowledged in Hindmarsh, Murray may be limited to the proposition that recovery under the survival statute may include compensation for all lost future earnings where there is no beneficiary who could recover a double or excess recovery.

At the time it decided Rhein, the Nebraska Supreme Court had already established an exception to the general rule that lost future earnings were not recoverable in a survival action. Rather than misconstruing the facts of Murray, and denying that the recovery allowed in that survival action was different than the recovery allowed by the Hindmarsh construction of survival statutes, the Nebraska Supreme Court could have chosen one of several alternatives to reach the same conclusion without employing such questionable reasoning. For instance, the court could have distinguished Murray from Rhein by stating that Murray allowed lost future earnings in a survival action only where no statutory beneficiaries existed who could have brought a wrongful death action, whereas in Rhein, there existed such a statutory beneficiary. Furthermore, the wrongful death beneficiary in Rhein could have been denied recovery based on the expiration of the statute of limitations. Another option available to the Rhein court would have been to overrule Murray to the extent it allowed for any expansion of the scope of damages recoverable in a survival action beyond the time of death. In addition, the court could have disallowed the survival action, based on the theory that the death had been instantaneous.

Alternatively, the court could have acknowledged that the purpose in limiting damages under a survival action to those accruing

113. See notes 103-04 and accompanying text supra.
114. In Nebraska, the only persons entitled to benefit from a wrongful death action are the surviving spouse and next of kin. See note 127 and accompanying text infra.
115. 95 Neb. at 179, 145 N.W. at 352. See also, note 108 and accompanying text supra.
117. See notes 104, 109-11 and accompanying text supra.
118. See notes 102, 106-09 and accompanying text supra.
119. The rule followed in Rhein can be found in notes 95-96 and accompanying text supra.
120. See note 79 and accompanying text supra.
before the time of death was to prevent a double recovery where a wrongful death action may be maintained. In *Rhein*, as previously noted, the expiration of the statute of limitations barred recovery through a wrongful death action. Therefore, recovery of lost future earnings under the survival statute could have been allowed in *Rhein*, under an alternative interpretation of *Murray*, because there was arguably no potential for double recovery. However, the court, if it should so rule in the future, should consider the widespread results of such a decision.

121. See note 83 and accompanying text *supra*.

122. This argument, however, was attacked by the appellees in the present case who said to allow plaintiff to do so under these circumstances would effectively defeat the intent of the legislature in creating a statute of limitations in the wrongful death action. In their brief, appellees Hartford Sand & Gravel Co. and Rogert contended:

The only conceivable situation which could generate the issue now before the Court is that with which the Court must currently deal: one would obviously not attempt to recover for lost earning capacity subsequent to death under the Survival section in an instance where the provisions of the Wrongful Death Act—which was enacted for this very purpose—remain available. It is respectfully submitted that should the Court decide to overrule this aspect of the *Hindmarsh* decision it would effectively repeal the Wrongful Death Act’s two year period of limitation by judicial mandate.


123. If such an exception were allowed, it should be recognized that where a statutory beneficiary in the foregoing wrongful death claim is also a taker under the estate, this individual may receive more by virtue of a survival action (which includes recovery by the estate of lost future earnings) than would have been recovered in a timely wrongful death claim. Certainly courts should not allow the claimant behind the personal representative’s actions to manipulate the statute of limitations in such a manner.

In order to prevent inequitable results, the legislature should consider re-drafting and merging the current statutes to allow the personal representative to bring one suit for lost future wages in all tortious death cases, both where death occurs instantaneously or in a traditional survival context. A recovery by the personal representative of a one-time award for lost future earnings would be in behalf of both statutory beneficiaries and takers under the estate. This recovery of lost future earnings would then be allocated between the statutory beneficiaries and the takers under the estate through the net method of distribution. The statutory beneficiaries share of the lost future earnings would be that portion representing the amount which the deceased would have contributed from this source for the support of the statutory beneficiaries. The takers under the estate (and possibly creditors) would recover the remaining portion of the lost future earnings according to their share under the estate plan or the laws of descent and distribution.

Such a statutory scheme would:

1. Provide statutory beneficiaries with recovery for the pecuniary loss of future support, as is the practice under the current wrongful death statutes.
2. Prevent a windfall to the defendant which would otherwise accrue if the estate is not allowed to recover the loss of future earnings, e.g., where no survival action is allowed under current law. See note 72 *supra*.
3. Prevent a “double recovery” to the statutory beneficiary, as there could only be one award as to lost future earnings, and this award would be
NEBRASKA'S WRONGFUL DEATH STATUTE

An action for wrongful death in Nebraska exists by virtue of statutory section 30-809. The damages that may be recovered and their subsequent disposition are controlled by section 30-810.

(4) Provide that statutory beneficiaries, takers under the estate and creditors are treated equally, regardless of whether the deceased died instantaneously or lived for a short time after the tortious injury.

In the event that a statutory beneficiary is also a sole or substantial taker under the estate, while this individual would recover more under this proposal than under the current wrongful death statute, this does not provide a "double recovery," as there is only one recovery of lost future earnings, and this amount is allocated according to the distribution which would likely have occurred had the deceased lived. The fact the individual receives demonstrated lost support in the capacity of statutory beneficiary, and the remainder of lost future earnings in the capacity of sole devisee or heir, would not be inequitable, as the two classes are treated equally in all cases. Such is not the case under current law.

The statute should also provide an additional recovery for individuals currently classified as statutory beneficiaries under wrongful death statutes. Where the jury can place a value on pecuniary loss due to loss of companionship, society or consortium, statutory beneficiaries should be able to recover this amount—in addition to and conceivably in excess of—their allocation of lost support from the deceased's lost future earnings. This follows since such losses—caused by the defendant's tort—are not dependent upon the future earnings capacity of the deceased. Of course, non-statutory beneficiaries who take under the estate are not entitled to such a recovery, since by definition non-beneficiaries do not sustain such losses.

124. See Mabe v. Gross, 167 Neb. 593, 595, 94 N.W.2d 12, 15 (1959). The Nebraska wrongful death statute provides:

Action for wrongful death; creation. Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, 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, or company or corporation which 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.

NEB. REV. STAT. § 30-809 (Reissue 1979).

125. Action for wrongful death; limitation in whose name brought; judgment; disposition of avails; compromise of claim; procedure. Every such action, as described in section 30-809, shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. The avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons. A personal representative shall not compromise or settle a claim for damages hereunder until the court by which he was appointed shall first have consented to and approved the terms thereof. The amount so received in settlement, or recovered by judgment, shall be reported to and paid into such court for distribution, subject to the order of such court, to the persons entitled thereto after a hearing thereon and after notice of such
Recovery under the wrongful death statute is for the pecuniary losses of the beneficiaries resulting from the decedent's death. The beneficiaries, as designated by the statute, are the widow or widower and the "next of kin." The next of kin is defined as those persons who take the decedent's personal estate under the statutes of descent.

Prior to 1973, the major element of damages was loss of support, with a further allotment for expenditures made for medical and funeral services rendered to the decedent. Recently, however, the beneficiaries have been able to recover for loss of society, comfort and companionship of the decedent to the extent that a monetary value can be affixed to such a loss by the jury.

The action must be maintained by the legal representative of the deceased. By statute, the beneficiaries have no vested right

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128. See Selders v. Armentrout, 190 Neb. 275, 280, 207 N.W.2d 686, 689 (1973) (overruled all prior decisions construing wrongful death damages to the extent that they were in conflict with its holding). See notes 163-64 and accompanying text infra.

129. Medical and funeral expenses are recoverable if there is proof that the amount claimed equals the reasonable value of the services rendered. Shields v. County of Buffalo, 161 Neb. 34, 71 N.W.2d 701, 714 (1955). See also Kroeger v. Sanfranek, 161 Neb. 182, 72 N.W.2d 831, 843 (1955) (where beneficiaries legally obligated themselves to pay such expenses, they may be recovered in a separate cause of action).


132. Swift v. Sarpy County, 102 Neb. 378, 380, 167 N.W. 458, 459 (1919) ("An action for negligently causing such death shall be brought in the name of the administrator of the deceased individual."). But see Russell v. New Amsterdam, 303 F.2d 674 (8th Cir. 1962). The deceased's wife, lacking the legal capacity to sue, improperly filed suit. However, after she was appointed special administratrix, she was permitted to amend her complaint despite the fact that the statute of limitations for bringing a wrongful death action had run. Id. at 675-76, 680-81.
to any of the proceeds recovered in the action until after a hearing has been held before the county court, and a determination made as to who is entitled to receive specified amounts of the proceeds.\(^{133}\)

Generally, a single verdict is handed down that includes all elements of damage recoverable by all the statutory beneficiaries.\(^{134}\) This sum is then divided among the beneficiaries in "the proportion that the pecuniary loss suffered by each bears to the pecuniary loss suffered by all such persons."\(^{135}\) Although the size of the verdicts has varied greatly, the Nebraska Supreme Court has consistently refused to overrule a verdict as excessive or inadequate unless it was manifestly unjust.\(^{136}\) In essence, therefore, the fixing of damages in a wrongful death action is peculiarly within the

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There is no vested interest in any person in the proceeds of such action at the time the suit is filed. It may well be that one who appears to be a probable recipient of benefits of a wrongful death action may turn out not to be so at all, any may not receive any such benefits.

Note, however, that although distribution is made through the county court, it is a function of the district court to ascertain the amount to be distributed. Because the specific terms of the statute provide that the verdict should be for the amount of damages which the beneficiaries have sustained, the jury may ascertain specifically, under proper instructions, the amount of damage to each individual. See Peetz v. Masek Auto Supply Co., 161 Neb. 588, 600, 74 N.W.2d 474, 481 (1956).

134. See, e.g., Oyster v. Burlington Relief Dept. of Chicago, B. & Q. R.R. Co., 65 Neb. 789, 792-93, 91 N.W. 699, 700 (1902) (fact that widow, as administratrix, failed to name herself as beneficiary in petition did not bar her from obtaining a share of the damages).

135. NEB. REV. STAT. § 30-810 (Reissue 1979).

136. See Moses v. Mathews, 95 Neb. 672, 676-77, 146 N.W. 920, 922 (1914) (action for wrongful death of poisoned wife). See also Wright v. Hoover, 329 F.2d 72 (8th Cir. 1974), where the court stated:

Nebraska cases dealing with excessive or inadequate damage awards can be cited pro and con—some reversing a jury award as inadequate, i.e., Gross v. Johnson, 174 Neb. 273, 117 N.W.2d 534 (1962); Ambrozi v. Fry, 158 Neb. 18, 62 N.W.2d 259 (1954); Draper v. Tucker, supra, 95 N.W. 1026; some reversing an award as excessive or requiring remittitur, i.e., Fisher v. Trester, supra, 229 N.W. 901; Trute v. Holden, 118 Neb. 449, 225 N.W. 238 (1929); Ramirez v. Chicago, B. & Q. R. Co., 116 Neb. 740, 219 N.W. 1 (1928)—some affirming an award attacked as inadequate, i.e., Cooper v. Hastert, supra, 124 N.W.2d 387; Forrest v. Masters, supra, 63 N.W.2d 777; Dorsey v. Yost, supra, 36 N.W.2d 574—and some affirming an award attacked as excessive or unsupported by evidence, i.e., Langford v. Ritz Taxicab Co., 172 Neb. 153, 109 N.W.2d 120 (1961); Kroeger v. Safranek, 165 Neb. 636, 87 N.W.2d 221 (1957); Shields v. County of Buffalo, supra 71 N.W.2d 701; Moses v. Mathews, 95 Neb. 672, 146 N.W. 920 (1914). But these cases must each be considered on their particular facts—and the prevailing principle found throughout all these authorities is that fixing damages is peculiarly a jury function and its award will be sustained unless shown to indicate prejudice, mistake, or a complete disregard of law and evidence.

Id. at 76.
province of the jury.\textsuperscript{137}

\begin{itemize}
\item Wright, 329 F.2d at 76. \textit{See also} Shields, 161 Neb. at 57, 71 N.W.2d at 715; Dorsey \textit{v.} Yost, 151 Neb. 66, 68, 36 N.W.2d 574, 575-76 (1949) (action for death of 11-year-old).
\end{itemize}

Although such discretion is allowed, the jury is guided by the instructions given at trial. Section 4.6 of the Nebraska Jury Instructions provides:

1. If you find that (name of plaintiff) is entitled to recover, you must then fix the amount of money, reduced to its present cash value, which will fairly compensate (name of surviving spouse, [and] names of next of kin) for (his, their) pecuniary loss resulting from the death of the decedent. Pecuniary loss means a loss which has a money value.

2. In determining pecuniary loss, you should consider that money and other things to which a money value can be assigned the decedent would have furnished to the (surviving spouse, next of kin) if he had lived, bearing in mind the following:
   a. The past contributions of the decedent;
   b. His life expectancy immediately before the injury causing his death;
   c. His health, age, habits, talents, and success;
   d. His occupation;
   e. His past earnings;
   f. His likely future earnings, and prospects of bettering himself had he lived;
   g. The decedent's personal living expenses (cost of supporting the deceased child);
   h. The fact that a legal obligation to support the (surviving spouse, next of kin) existed and the likelihood of that obligation being fulfilled had he lived;
   i. The companionship, counseling, and advice he would have given the (surviving spouse, next of kin); and
   j. All reasonable medical and funeral expenses that were incurred after and as a result of the injuries causing his death and which the (surviving spouse, next of kin) has paid or is obligated to pay.

In considering the amount of pecuniary loss suffered by the death of the decedent, you may allow recovery only for the shorter of the life expectancy of (name of decedent) and of the (surviving spouse, next of kin).

3. In considering the length of time during which the surviving spouse and next of kin would have received contributions from the deceased, you cannot find that time to be longer than the life expectancy of the deceased nor longer than the longest life expectancy of the surviving spouse and next of kin.

4. You must not include any amount (for punishing the defendant, for bereavement, mental suffering, or as a solace of [the surviving spouse, next of kin]). Neither may you include any amount for the pain and suffering of the deceased before his death (since that is the subject of the second cause of action).

5. If you return a verdict for the plaintiff it should be a single sum representing the pecuniary loss of (all of the next of kin, [and] the surviving spouse). It is my duty to report this sum to the county court, which will divide that sum between (the next of kin, [and] the surviving spouse).

6. You should entirely disregard the fact that:
   The [surviving spouse, next of kin] [may have received, may receive] money or other property from the decedent’s estate or [may collect, has collected] insurance or workmen’s compensation benefits on account of the decedent’s death.
   [The surviving spouse had remarried.]
   [The need of the (surviving spouse, next of kin).]
   [The minor children have been emancipated.]
   [There is no legal obligation to support the next of kin.]
In a wrongful death action, a presumption arises that a pecuniary loss exists in favor of those legally entitled to service or support from one killed by the act of another. In these actions, however, the jury must consider both the condition of the parties, and all of the circumstances disclosed by the evidence in determining what amount will equal full compensation for the loss sustained.

The amount recovered, which is discounted to present value, includes that amount of future earnings of the deceased which the beneficiaries would have received had death not occurred. To this end, evidence of the decedent's past contributions can be used as projections of likely future contributions. In determining to what value the decedent's lost future earnings would accrue, evidence is admissible as to the personal habits.

138. Tate v. Barry, 144 Neb. 517, 522, 13 N.W.2d 879, 882 (1944) (action for death of pedestrian husband struck by auto); Killion v. Dinklage, 121 Neb. 322, 324-25, 236 N.W. 757, 759 (1931) (action for wrongful death of unmarried minor child).

139. See notes 145-47 and accompanying text infra.

140. Mabe v. Gross, 167 Neb. at 598-99, 94 N.W.2d at 16. The opinion states: There is no certainty, and perhaps not even a probability, that the present earnings of an active young man of that age are the limit of his full capacity. What were the reasonable probabilities of his future earnings, and the future necessities of the beneficiaries? It is always difficult in such cases to determine the exact measure of the pecuniary loss, and this duty devolves upon the jury. They must take into consideration the condition of the parties and all of the circumstances disclosed by the evidence and determine what sum will make full compensation for the loss sustained.

Id. (quoting Armstrong v. Union Stock Yards Co., 93 Neb. 258, 263, 140 N.W. 158, 160 (1913)).


142. See notes 39-45 and accompanying text supra. See also Darnell v. Panhandle Coop. Ass'n, 175 Neb. 40, 51-52, 120 N.W.2d 278, 286 (1963). The court cautioned that: Although plaintiff may introduce evidence as to the earnings of the deceased, the plaintiff may not recover the value of the earnings lost. The instructions should clearly state that so far as earnings are concerned, the recovery must be limited to the value of the amount which the beneficiaries would have received from the earnings of the deceased.

Id.

143. Id. See also Moore v. Palen, 228 Minn. 148, —, 36 N.W.2d 540, 543-44 (1949) (the way deceased would have used his income to support family is substantial element of damages).

144. Logically, it is first necessary to determine decedent's total prospective lost earnings before it can be determined what portion he would have contributed to his beneficiaries' support.


and age of the deceased. This evidence serves to illustrate to the finder of fact the probability that the decedent's earnings would have changed over time.

A second element of damages recoverable in a wrongful death action is the value of services and consortium the decedent would have rendered had death not occurred. Although the exact pecuniary loss is impossible to ascertain, the jury is deemed to have general knowledge, based on experience, concerning these services. Therefore, the valuation is left to the jury's good judgment and ordinary common sense. Nebraska courts have consistently held that recovery may be had for the loss of a decedent's services in connection with the customary duties of a wife and mother, including the care, education, and maintenance of children. In addition, awards have been made for the father's maintenance of the home and garden and supervision and raising of the children.

A parent's recovery for the wrongful death of a child may also include elements of pecuniary loss of support and services. It is generally accepted that parents are entitled to the services and

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146. Litwiller v. Graff, 124 Neb. 460, 461, 246 N.W. 922, 923 (1933), quoting Moses: The evidence furnished by a table of expectancy is not conclusive, but may be received with other evidence in the case and its statement as to expected duration of life may be varied, strengthened, weakened, or entirely destroyed by other competent evidence on the question of the expected continuance of life of the injured party.

Id. 147. Hoffman v. Chicago & N.W. R.R. Co., 91 Neb. 783, 785-86, 137 N.W. 878, 879 (1912) (court held a $20,000 verdict as excessive in light of evidence that decedent's drinking habits would have thwarted a possible promotion).

148. See Thevenot v. Sieber, 204 F. Supp. 15, 16 (S.D.N.Y. 1962) ("consortium" in Nebraska law has been construed as not to be the equivalent of companionship, and, therefore, has always been recoverable in wrongful death actions).

149. Moses, 95 Neb. at 677, 146 N.W. at 922. See also Thomas v. S.H. Pawley Lumber Co., 303 F.2d 604, 609 (7th Cir. 1962) (holding that the plaintiff's burden was only to show the existence of lost services).

150. Kroeger v. Safranek, 165 Neb. 636, 642, 87 N.W.2d 221, 225-26 (1957) (no "special" services of which jury would have knowledge).

Id. 151. Id.

152. See Thevenot, 204 F. Supp. at 16. See also Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 585 (1974) (general rule that parent's wrongful death resulted in pecuniary damage to the child through loss of nurture, education and moral training; Omaha Water Co. v. Schamel, 147 F. 502, 509 (8th Cir. 1906) (where the loss of a mother's care, nature, training and instruction was an element to be considered in determining pecuniary loss to three-year-old); Gaydos v. Domabyl, 301 Pa. 523, —, 152 A. 549, 554 (1930) (recovery for providing attention to a child which only a mother could give).


154. See notes 155-58 and accompanying text infra. When the decedent is a child, courts generally allow recovery for the value of the child's services, compan-
earnings of their minor children. If a child had reached majority, however, the parent must show that there was a reasonable expectation of future financial contributions.

The unique perspective of the jury concerning its determination of losses accruing to parents from a child's wrongful death was expressed in Dorsey v. Yost:

The amount to which a parent is entitled cannot be accurately determined because of the numerous contingencies involved. The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parent's position in life, the physical and mental condition of the child, his surroundings and prospects and any other matter that sheds light upon the subject. Members of juries generally have children of their own and have information as to the pecuniary value of children's services and the expense involved in their care and education. A jury is peculiarly fitted to determine the loss sustained by a parent in such a case. At best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with exactness.

Apart from the factors stated in Dorsey, recovery may also be had for loss of comfort, companionship and society. The allowance of these damages has had a significant impact on verdicts in actions by parents recovering for the loss of their children. In these cases, where previously damages were nominal at best, recoveries can now be had in the thousands of dollars.

The loss of comfort, companionship and society cannot be readily translated into a specific pecuniary loss. This fact was
noted in *Selders v. Armentrout*,162 which set Nebraska in line with the modern trend in jurisdictions which have broadened the measure of damages in a wrongful death action to include those losses.163

The inclusion of those damages is not without limitation, however. In a 1979 case164 involving the death of a twenty-year old girl whose parents appealed a verdict denying damages, the court reminded the appellants of a prior decision165 which construed the statutory amendment that altered the requirement of pecuniary loss:

The change, while significant, does not provide a wide open door to all sorts of claims for damages. The loss under the statute is still a pecuniary loss. Nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death. Only such damages can be recovered as are shown by the evidence to have a monetary value.166

As a result, the court refused to find the verdict inadequate because the parents could not show a pecuniary loss based on a result of losing the daughter's comfort, companionship and society. Instead, it found that the jury could have concluded from the evidence that the pecuniary loss to the parents was relatively small.167

CONCLUSION

Damage awards vary significantly in wrongful death verdicts.

\[\text{\textsuperscript{162}}\text{190 Neb. 275, 276-77, 207 N.W.2d 686, 687 (1973).} \]
\[\text{\textsuperscript{163}}\text{See Note, 7 CREIGHTON L. REV. 147, 156 (1973).} \]
\[\text{\textsuperscript{164}}\text{Garvin v. Coover, 202 Neb. 582, 276 N.W.2d 225 (1979).} \]
\[\text{\textsuperscript{165}}\text{Id. at 585, 276 N.W.2d at 227.} \]
\[\text{\textsuperscript{166}}\text{Id.} \]
\[\text{\textsuperscript{167}}\text{Id. at 587, 276 N.W.2d at 228.} \]
By its own admission, the Nebraska Supreme Court considers it impossible to "colormatch" fact situations among wrongful death actions. This, combined with liberal discretion granted the jury in establishing verdicts, leaves the litigant with little solid foundation with which to predict the amount of potential recovery in a case. The award being essentially left to the jury's determination, the litigant should be sensitive to its sympathies as the action proceeds.

Despite the questionable reasoning employed in the Rhein decision, its holding has specifically distinguished the damages recoverable between the wrongful death and survival statutes. The litigant should take care to follow those guidelines when bringing an action, for the court appears steadfast in its construction of what elements of damage are recoverable under the respective statutes. Of interest in the future may be the court's treatment of a fact situation identical to Murray. Until the court has cause to reconsider the matter, the litigant should follow the guidelines of Rhein.

Lynn Ann Mitchell—'84

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168. Id. at 585, 276 N.W.2d at 227.