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Damages—Recovery for Child’s Wrongful Death: *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973)

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DAMAGES—RECOVERY FOR CHILD'S WRONGFUL DEATH *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973).

The Nebraska Supreme Court in *Selders v. Armentrout*¹ overturned approximately forty years of decisional law,² governing the damages recoverable for the death of a minor child under Nebraska's wrongful death statutes.³ For a four-man majority, Justice McCown wrote:

We hold that the measure of damages for the wrongful death of a minor child should be extended to include the loss of the society, comfort, and companionship of the child. To the extent this holding is in conflict with prior decisions of this court, they are overruled.⁴

Selders was an appeal by parents from a verdict finding the defendants negligent, and awarding the parents damages for the wrongful deaths of three minor children. The jury had been instructed that in addition to medical and funeral expenses, damages should include the dollar value of the services and contributions which the parents could have expected to receive from the children. From this sum was to be subtracted the amount the parents would have expended in supporting the children.⁵ The verdict returned represented the exact total of the medical and funeral expenses.

At common law, there could be no civil recovery for wrongful death.⁶ This view was generally accepted in most United States jurisdictions.⁷ The rule was subjected to much criticism, largely

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1. 190 Neb. 275, 207 N.W.2d 686 (1973).
 2. Prior to 1919, the "procedural" section of the wrongful death statute read in part: "[T]he jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death. . . ." Neb. Laws c. 47, § 2 at 190 (1907). In 1919, the legislature removed the word "pecuniary", changing this provision to "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained." Neb. Laws c. 92, § 1, at 236 (1919). Since 1919 recovery has been limited to pecuniary loss by judicial construction only.
 3. NEB. REV. STAT. § 30-809 (Reissue 1964); NEB. REV. STAT. § 30-810 (Supp. 1972).
 4. 190 Neb. at 280, 207 N.W.2d at 689.
 5. *Id.* at 275-76, 207 N.W.2d at 687.
 6. *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808).
 7. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:3 (1966).

because it provided no recovery against a wrongdoer who killed his victim, while holding him liable for mere injury.⁸ Today, statutes have modified the common-law rule in all states.⁹ A number of states have only statutes which allow causes of action to survive the victim's death.¹⁰ The more common provision is a wrongful death statute creating a wholly new cause of action unrelated to any the decedent may have had during his lifetime.¹¹ The two types of statutes often co-exist within a jurisdiction.¹² Nebraska's wrongful death statute¹³ is of the latter type, which are derived generally from Lord Campbell's Act.¹⁴ Such wrongful death statutes create new causes of actions in behalf of named survivors. They vary widely as to proper beneficiaries and plaintiffs, and as to how damages are to be computed and distributed.¹⁵

Under some wrongful death statutes, damages are measured by the loss to the decedent's estate.¹⁶ Others base damages upon the loss to the beneficiaries by reason of the wrongful death, as does Nebraska's act.¹⁷ Most states following the loss to survivors theory have restricted recovery to pecuniary loss only, either by express statutory provision¹⁸ or by judicial construction.¹⁹ Nebraska

8. *Id.* § 1:6. See also W. PROSSER, LAW OF TORTS § 127, at 902 (4th ed. 1971).
9. Note, *Torts-Wrongful Death-Unborn Child-The Estate of an Unborn Child Has a Cause of Action for Wrongful Death*, 70 MICH. L. REV. 729, 733 (1972).
10. Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538, 539 (1955).
11. Note 9 *supra*, at 733.
12. See NEB. REV. STAT. §§ 25-1402 to -1414 (Reissue 1964). The problems caused by the presence of both types of statutes within a jurisdiction is beyond the scope of this note. See Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386 (1942). *Rasmussen v. Benson*, 135 Neb. 232, 280 N.W. 290 (1938), allows joinder of both in separate courts.
13. Note 3 *supra*.
14. 9 & 10 Vict., c. 93 (1846).
15. See Decof, *Damages in Actions for Wrongful Death of Children*, 47 N. D. LAW. 197, 213-228 (1971), for a compilation of statutory provisions relating to damages recoverable. See also statutes collected in S. SPEISER, *supra* note 7, §§ 3:1, 11:16.
16. S. SPEISER, *supra* note 7, § 3:2. See *Lorenzen v. Continental Baking Co.*, 180 Neb. 23, 141 N.W.2d 163 (1966) (applying Iowa law), for a comparison of damages recoverable under a "loss to survivors" statute and under a "loss to estate" provision.
17. NEB. REV. STAT. § 30-810 (Supp. 1972), provides in part, "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained."
18. S. SPEISER, *supra* note 7, § 3:1 at 58.
19. *Id.*

would have been placed in the latter category²⁰ prior to *Selders*.

Justice McCown, in *Selders*, viewed the "pecuniary loss" limitation as being of judicial origin only. He read the statutory use of the word "pecuniary" as being strictly limited to the method of distributing the proceeds of a wrongful death action, and inapplicable to the determination of what elements of damage were recoverable.

In a vigorous dissent, Chief Justice White argued in *Selders* that the limitation of recovery to pecuniary loss was not a rule of judicial construction, but required by the statute.²¹ He based this argument upon a 1945 amendment to § 30-810. This amendment, however, did not alter the general language of § 30-810 relating to damages recoverable.²² Prior to 1945, § 30-810 had provided that the amount recovered in a wrongful death action should be "distributed as personal property of an estate under inheritance laws"²³ The amendment changed the method of distribution of proceeds: "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."²⁴

One is inclined to wonder, along with Chief Justice White, why the legislature would make this change if it intended to permit recovery for more than pecuniary loss. Nevertheless, a literal reading leads to the conclusion that "pecuniary loss" is statutorily binding only as to the method to be used in apportioning the proceeds of the action. Since the 1919 amendment²⁵ the Nebraska Supreme Court itself appears to have never treated the pecuniary loss rule as statutory. A case perhaps supporting Justice McCown's reading of the 1945 amendment²⁶ is *In re Estate of Lucht*,²⁷ decided in 1941. There a husband desired a share of the recovery for his minor son's wrongful death, yet the husband had lived apart from his family since the son's birth and had never contributed to his support. The father sought a share simply on

20. See note 2 *supra*. See also *Fisher v. Trester*, 119 Neb. 529, 533, 229 N.W. 901, 903 (1928).

21. 190 Neb. at 281-83, 207 N.W.2d at 690-91.

22. Neb. Laws c. 66, § 1 at 263 (1945).

23. Neb. Laws c. 75, § 1 at 265 (1937).

24. Neb. Laws c. 66, § 1 at 263 (1945).

25. See note 2 *supra*. See also *Elliot v. City of University Place*, 102 Neb. 273, 166 N.W. 621 (1918), where the court regards the rule as statutory.

26. 190 Neb. at 276, 277, 207 N.W.2d at 687, 688.

27. 139 Neb. 139, 296 N.W. 749 (1941).

the basis of his relationship to the decedent, showing no pecuniary loss. The court refused him a share of the recovery, stating:

We hold that the amount recovered by the personal representative of a deceased, under the provisions of section 30-810, Comp. St. 1929, as amended by chapter 92, Laws 1919, shall be paid to and distributed among such of the widow, widower and next of kin of such deceased as suffer a pecuniary loss by the death of such deceased.²⁸

The court went on to say:

The finding of which of the surviving spouse and next of kin suffered a pecuniary loss . . . is left to the court, for determination subsequent to the recovery of the amount to be distributed²⁹

It is at least arguable, in light of *In re Lucht's Estate*, that the 1945 amendment added the reference to "pecuniary loss" to insure that those who have shown little involvement with the decedent in the past not share in the proceeds of a wrongful death action.

The Nebraska Supreme Court has previously allowed recovery of other items of damage than simply the lost services of a decedent. In *Draper v. Tucker*,³⁰ the court allowed recovery of the probable contributions from a child beyond his majority. The court has also permitted recovery of medical and funeral expenses expended by the survivors.³¹ The court has indicated that a surviving husband or wife may recover for the lost companionship of a spouse to the extent that

[t]he evidence shows a reasonable probability that such service and companionship afforded the survivor was of such a character that it would be of advantage to such survivor, and that a disallowance thereof would cause a pecuniary loss to him or her.³²

It appears, then, that the Nebraska Supreme Court has not generally looked upon recovery for lost companionship as being absolutely taboo, but rather as an item about which the jury

28. *Id.* at 145, 296 N.W. at 752.

29. *Id.* at 146, 296 N.W. at 752.

30. 69 Neb. 434, 95 N.W. 1026 (1903).

31. *State Farm Mut. Auto. Ins. Co. v. Selders*, 187 Neb. 342, 190 N.W.2d 789 (1971). In regard to this case, see dissent of Clinton, J. in the principal case, 190 Neb. at 288, 207 N.W.2d at 693, relating to the doctrine of "law of the case."

32. *Ensor v. Compton*, 110 Neb. 522, 524, 194 N.W. 458, 459 (1923). This case closely followed the removal of the "pecuniary" limit from the statute. See note 2 *supra*. See also *Wood v. City of Omaha*, 87 Neb. 213, 127 N.W. 174 (1910); *Dow v. Legg*, 120 Neb. 271, 231 N.W. 747 (1930), indicated that a child could recover for the lost guidance and companionship of a deceased father. Justice McCown's reliance on *Ensor* is at least partially misplaced. The case still speaks of pecuniary loss.

should not be free to speculate.³³ However, the court has not in the past found itself strictly bound, at least when the death of a child is involved, to proven damages. In *Draper v. Tucker*³⁴ the court said:

But a verdict for only \$10, for the pecuniary loss caused by the death of a bright, intelligent child, three years and four months old, shocks the sensibilities of all fair-minded persons, and if any recovery is to be had in this case, . . . it should be for a reasonable and substantial sum.³⁵

*Mabe v. Gross*³⁶ involved a suit in behalf of a three-year-old daughter arising from the death of her divorced father. There was no proof of any pecuniary loss. The court ruled that the mere existence of a duty to support is enough to free the jury to compute pecuniary loss.³⁷

In Nebraska, as in most states where loss to survivors has been restricted to pecuniary loss, the damages have been computed by adding up the value of the future services and contributions the survivors could have expected to receive. From this is subtracted the amount the survivors would have expended in support. This method has some basis in reality in the case of a dead husband with a demonstrated record of contributions. In the case of a minor child, it is purely speculative, even though restricted to "pecuniary loss." Therefore, any recovery at all for the death of a minor child today probably indicates that the jury has considered something other than "pecuniary loss."

The traditional method of computing damages for the death of

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33. This appears to be one of Chief Justice White's chief objections to the majority opinion. 190 Neb. at 286, 207 N.W.2d at 692. At one point Justice White seems to misread the majority. He says, 190 Neb. at 283, 207 N.W.2d at 691, that the majority has forbidden introduction of any evidence of the "pecuniary nature of a child's services, parent's expenses, etc." He indicates a belief that all guidance for the jury has been taken away. What Justice McCown was doing, 190 Neb. at 280, 207 N.W.2d at 689, was rejecting the "lost investment" method of computing pecuniary loss which was adopted by the Michigan Supreme Court in *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960). Under the "lost investment" method, damages are computed by adding up the expenses the parent had already incurred to the date of death. Justice McCown has merely rejected evidence of past expenses. Evidence of the value of *future* services and parental expenses will still be needed in Nebraska, as actual pecuniary loss is still a proper element of damages.
34. 69 Neb. 434, 95 N.W. 1026 (1903).
35. *Id.* at 440, 95 N.W. at 1028.
36. 167 Neb. 593, 94 N.W.2d 12 (1959).
37. *Id.* at 599, 94 N.W.2d at 17. The court emphasized the lack of need for precise proof of loss. *Id.* at 597-99, 94 N.W.2d at 16-17.

a minor child was applicable only, if ever, in a day long gone.³⁸ Were the rule strictly applied, verdicts such as that in *Draper v. Tucker*³⁹ should be commonplace. It seems safe to assume that in allowing an action for the death of a minor child, the legislature intended that there should be some recovery. The decision of the Nebraska Supreme Court in *Selders v. Armentrout* is statutorily permissible. It is desirable as it will allow juries to fulfill the legislative intent without resort to legal fictions. Although allowing recovery for the lost society, comfort, and companionship of a minor child may, to some extent, be an attempt to compensate an emotional loss monetarily,⁴⁰ past cases show that juries have been doing so for some time without guidance as to computation. With this decision, the Nebraska Supreme Court joins a growing number of other state courts⁴¹ which have recognized that the loss of a child is only incidentally, at best, a pecuniary loss. *Selders v. Armentrout* recognizes that if a parent is to be compensated for what he or she has lost, as the legislature has intended, then elements of damage other than those strictly monetary must be included.

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38. 190 Neb. at 278, 207 N.W.2d at 688.

39. It is a rare case today where the contributions of a child could honestly be shown to exceed the cost of rearing him to majority. See Comment, *supra* note 10, at 541-42.

40. See 190 Neb. at 281, 207 N.W.2d at 690 (White, C.J. dissenting).

41. See *Wardlow v. City of Keokuk*, 190 N.W.2d 439 (Iowa 1971); *Stang v. Hertz Corp.*, 81 N.M. 348, 467 P.2d 14 (1970); *Lockhart v. Besel*, 71 Wash. 2d 112, 426 P.2d 605 (1967); *Boies v. Cole*, 99 Ariz. 198, 407 P.2d 917 (1965); *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1961).