WRONGFUL DEATH RECOVERY: QUAGMIRE OF THE COMMON LAW

*Robert D. VanHorne**

TABLE OF CONTENTS

I. INTRODUCTION

In the now famous, or infamous, case of *Baker v. Bolton*, decided in 1808, Lord Ellenborough reportedly proclaimed that "in a civil court, the death of a human being could not be complained of as an injury."[1] The path of English speaking jurisprudence regarding wrongful death recovery was unwittingly directed into a quagmire from which only recently it has begun to emerge. Although the supposedly off-hand statement was dictum in a lower level trial court decision, representing a confused application of legal doctrine,[2] it has been, for some inexplicable reason, widely quoted and cited on both sides of the Atlantic.[3] Both the principle and Lord Ellenborough have been targets of many able critics,[4] yet the doctrine remains a millstone

---

* Boston University School of Law, J.D. 1972; practicing with Wilkinson & VanHorne, Cedar Rapids, Iowa.

1. 1 Camp. 493, 170 Eng. Rep. 1033 (K.B. 1808).

2. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); S. SPEISER, RECOVERY FOR WRONGFUL DEATH ch. 1 (2d ed. 1975) [hereinafter cited as SPEISER]; Smedley, *Wrongful Death - Basis of the Common Law Rule*, 13 VAND. L. REV. 605 (1960) [hereinafter cited as Smedley]; Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965) [hereinafter cited as Malone].

3. Moragne v. States Marine Lines, Inc., 398 U.S. at 386. *See also* SPEISER, *supra* note 2, at § 1:1.

4. Davis, *Wrongful Death*, 1973 WASH. U.L.Q. 327, 328 [hereinafter cited as Davis]. On this side of the ocean the doctrine "spread like the dutch elm disease." *Id. See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 121 (4th ed. 1971), who notes that Lord Ellenborough's "forte was never common sense," *id.*; SPEISER, *supra* note 2, at § 1:5.

around the neck of almost every survivor[5] of a wrongful death who attempts to exercise what otherwise would have become a normal right of recovery. It is not necessary here to further discredit the Ellenborough pronouncement, beyond noting its almost incomprehensible beginnings and development,[6] and its thorough repudiation by the United States Supreme Court.[7] Any analysis of wrongful death damages, however, inevitably encounters the doctrine periodically.[8]

The notion that a wrongdoer who so seriously injured his victim that death ensued is entitled to escape civil responsibility has never blended well with American jurisprudential development.[9] The old maxim recognizing that a tortfeasor who negligently drove his car over a pedestrian would reduce his liability for damages by putting it in reverse and backing over the victim is a sardonic acknowledgment that the legal system has attributed less responsibility for a death-dealing blow than for one producing relatively minor injury.[10] In England, and, more emphatically, in this nation, the rank

---

5. There are several terms which have been used to designate the various persons who might have a legally protected interest in the life of another, or the right to make a claim for the death of another; "survivors" has been used predominantly herein because it was deemed advisable to use the term which was least exclusive and which would permit the greatest flexibility. But even this term has some limitations. When considering issues of abatement, for example, a family member who dies shortly after the fatally injured decedent or who dies at any time before a recovery is effectuated may not be considered a *present* "survivor" even though that person was a "survivor" of the other person's death. At any rate, it usually is considered broader than: "beneficiary," which evinces connotations of being one who receives a bequest under a will or by operation of intestacy laws, which may not be a consideration in many circumstances for wrongful death recovery; "family member" or "heirs," which may exclude closely-related persons, such as spouses or parents, as well as certain dependents or relatives by marriage; and "dependents," which may exclude close family members who are financially independent.

6. In an early opinion, Judge Dillon traced the origin of the doctrine to Lord Ellenborough and isolated the *Baker v. Bolton* opinion before analytically decimating the principle. In his conclusion, Judge Dillon noted:

> Considering that it is not reasoned and cites no authorities, and the time when it was made, and that the rule it declares is without any reason to support it, my opinion is that it ought not to be followed in a state where the subject is entirely open for settlement. It would be different if the rule had been settled in England by a long course of decisions, made prior to the settlement of this country, as in that event the courts here would find it more difficult to reject it.

Sullivan v. Union Pac. R.R., 23 F. Cas. 368 (C.C.D. Neb. 1874)(No. 13,599). *See also* SPEISER, *supra* note 2, at §§ 1:3 & 1:4.

7. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

8. *See generally supra* note 2.

9. *See* Malone, *supra* note 2; Smedley, *supra* note 2; Davis, *supra* note 4. Davis notes that "[t]he average person would think it ridiculous to question the right of a widow to recover damages from a person whose irresponsible conduct had caused the death of her husband." Davis, *supra* note 4, at 327.

10. *See* remarks of Professor Thomas Lambert, 1967 Nebraska State Bar Association Proceedings at 303, for an account of the often-told tale about Pullman cars being designed so that passengers would sleep with their heads toward the front of the train and with axes in each car

injustice of such a circumstance produced juristic antibodies in various forms, including ameliorative statutes,[11] antagonistic and apologetic appellate decisions,[12] and vituperative periodical literature.[13] Potentially harsh results probably produced "grass roots" justice, both in the form of generous jury verdicts by compassionate jurors, who disregarded unreasoning and inflexible legal principles that allowed only minimal recovery,[14] and in the form of appellate decisions which "looked the other way," even though it was obvious that jurors had not followed the letter of the law.[15]

It is important to be mindful of the fact that before 1848[16] there was no prohibition against recovery of wrongful death damages in this nation and probably not in England either.[17] One legal researcher, noting historical precedents for wrongful death recoveries in the laws prepared in 1682 for William Penn's colony and in the legal proceedings in the Massachusetts Bay Colony,[18] "discovered no observation in colonial statutes or decisions lending any support to a belief that a death claim would have been denied by our colonial ancestors."[19] Prior to *Baker v. Bolton*, a Connecticut deci-

---

for use by the conductors after the accident to assure that there would be no *injured* survivors; *see also* Smedley, *supra* note 2, at 624 n.88; SPEISER, *supra* note 2, § 1:5.

11. *See* SPEISER, *supra* note 2, at §§ 1:8 & 1:9, in conjunction with app. A.

12. *See* Malone, *supra* note 2, at 1073; SPEISER, *supra* note 2, at § 1:5. *See also* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972); Goheen v. General Motors Corp., 263 Or. 145, 502 P.2d 223 (1972).

13. *See* SPEISER, *supra* note 2, at § 1:5; *see also infra* note 27.

14. *See generally* Johnson, *Wrongful Death and Intellectual Dishonesty*, 16 S.D.L. REV. 36 (1971), where it is noted:

> For over a century each generation of lawyers, judges and legal commentators have . . . strived to sustain the archaic pronouncements and statutes of the 19th century in connection with damages for wrongful death. The result is that today a lawyer . . . must try to play "Alice in Wonderland" in courtrooms designed to resolve actual disputes rather than fantasies . . . such lawyers may also advise their clients that there are numerous devices by which it is possible to get the courts and juries to ignore this great tradition and partially award damages for the loss anyway.

Id. at 36.

15. *See* Note, *Blind Imitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions*, DEN. L.J. 99 (1972), where it is observed that Colorado has a distinct line of cases where the court "gives lip service to the pecuniary loss rule, and then allows a broader rule of damages." *Id.* at 108. *See also* Johnson, *Wrongful Death and Intellectual Dishonesty*, 16 S.D.L. REV. 36 (1971), suggesting that lawyers, trial judges, juries, clients and appellate courts have considered themselves free to approve verdicts based upon evidence and inference that were not strictly permissible under the law.

16. It is generally acknowledged that the first American court to follow the *Baker* rule was Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475 (1848), *overruled by* Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972). *See* SPEISER, *supra* note 2, at § 1:3; Malone, *supra* note 2, at 1067.

17. *See* Malone, *supra* note 2, at 1043.

18. *Id.* at 1062-63.

19. *Id.* at 1065-66.

sion in 1794[20] clearly recognized a civil right to recover for wrongful death.[21] Even after the *Baker* case, a federal district court in Maine recognized in 1825[22] that the felony-merger doctrine did not prohibit a civil action for wrongful death.[23] The 1848 decision of a Massachusetts court in *Carey v. Berkshire Railroad*[24] to follow Lord Ellenborough's dictum marks a clear break with American jurisprudential history. Nevertheless, the assumption that no recovery existed for wrongful death, in the absence of ameliorative statutory provisions, expressed the law in Massachusetts and, almost without exception, the remainder of the states until the 1970's.[25] Although every jurisdiction in the nation eventually implemented ameliorative statutes,[26] the assumption that such provisions were required has proved inaccurate. A common law right to recover for wrongful death was suggested at various times after *Carey*[27] but never acknowledged by a court of last resort until 1970, in the landmark decision of *Moragne v. States Marine Lines, Inc.*[28]

Between 1848 and the *Moragne* decision a jumbled conglomeration of wrongful death recovery systems prevailed throughout the United States. Each jurisdiction developed its own separate system, usually with significant variations derived from irregular statutory provisions.[29] Even though states apparently tried to use Lord Campbell's Act as a starting point, they frequently interjected their own unique insights, either statutorily or by judicial interpretation.[30] One commentator identified over eleven categories of jurisdictions, classified according to designation of persons authorized to

---

20. Cross v. Guthery, 2 Root 90 (Conn. 1794).

21. *Id.*

22. Plummer v. Webb, 19 F. Cas. 894 (D. Me. 1825) (No. 11,234).

23. *Id.* at 895.

24. 55 Mass. (1 Cush.) 475 (1848).

25. There were some notable exceptions, including Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 443, 369 P.2d 96 (1961), *overruled by* Greene v. Texeira, 54 Hawaii 231, 505 P.2d 1169 (1973). In the *Rohlfing* decision it was noted that the enunciation of the maxim against wrongful death recoveries in *Baker v. Bolton* had been rejected a hundred years earlier by the Supreme Court of Hawaii in *Kake v. Horton*, 2 Hawaii 209 (1860), which had created a nonstatutory right of recovery. Rohlfing v. Moses Akiona, Ltd., 45 Hawaii at __, 369 P.2d at 101.

26. *See* SPEISER, *supra* note 2, at app. A (Table of Applicable Statutes); *see also* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), where it was noted that legislatures have evidenced "unanimous disapproval" of the old rule. *Id.* at 389; Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402 (1966) [hereinafter cited as *Wrongful Death Recovery*].

27. *See* the admirable effort by Judge Dillon in *Sullivan v. Union Pac. R.R.*, 23 F. Cas. 368 (C.C.D. Neb. 1874)(No. 13,599), which was later rejected in *Insurance Co. v. Brame*, 95 U.S. 54 (1877). *See also* Pound, *Comment on State Death Statutes — Application to Death in Admiralty*, 13 NACCA L.J. 188 (1954); Landis, *Statutes & the Sources of Law*, HARV. LEGAL ESSAYS 213 (1934); Panama R.R. v. Rock, 266 U.S. 209, 216 (1924)(Holmes, J., dissenting).

28. 398 U.S. 375 (1970).

29. *See* SPEISER, *supra* note 2, app. A.

30. *Id.*

maintain a wrongful death action.[31] Had he attempted to categorize by the various elements of damages allowed, the organization would have completely disintegrated.[32] In overly simple terms, some states passed what became known as "survival" statutes, the theory of which was that the action of the decedent was deemed to have survived his death and to have passed to the personal representative of the decedent's estate.[33] Most states passed what became known as "true" wrongful death statutes, or Lord Campbell-type acts, based on the premise that a completely new right of action was created on behalf of family members irrespective of any claim that might have belonged to the decedent.[34] Some states had both types,[35] and still others provided for recovery of punitive damages.[36] What emerged was often an unsatisfying or distorted system of recovery; sometimes the method of calculating allowable damages ran counter to the larger social policy which was intended to be advanced.[37] For example, while the express goal of Lord Campbell's Act and most of the ameliorating legislation was to provide support, if not solace, to family members of the decedent and presumably allowing greater recoveries for larger families, at least one jurisdiction devel-

---

31. 12 AM. JUR. TRIALS *Wrongful Death Actions* § 10, at 337 (1966); Davis, *supra* note 4, at 331, concludes that the categories "are so numerous that they defy analytical classification." *Id.*

32. *Id.*

33. It is probably more typical of the nineteenth century outlook to hold that an ameliorative statute, providing that "[a]ll causes of action shall survive," meant only that *actions* survive and that *causes of action* do not survive; hence, in an action initiated by the decedent before death, pain and suffering of the decedent is a proper element of damages. In an action initiated by the personal representative after the death, however, pain and suffering of the decedent is not allowable as an element of damages. *See* Union Mill Co. v. Prenzler, 100 Iowa 540, 69 N.W. 876 (1897); Rose v. Des Moines Valley R.R., 39 Iowa 246 (1874); Muldowney v. Illinois Cent. Ry., 36 Iowa 462 (1873); Donaldson v. Mississippi & Mo. R.R., 18 Iowa 280 (1865). This was not rectified until *Fitzgerald v. Hale*, 247 Iowa 1194, 78 N.W.2d 509 (1956).

34. *See* Davis, *supra* note 4, at 329-31; SPEISER, *supra* note 2, at § 3:2.

35. *See* SPEISER, *supra* note 2, at § 3:1 (discussing, *e.g.*, Georgia, Maine, Michigan, and Pennsylvania statutes).

36. 12 AM. JUR. TRIALS *Wrongful Death Actions* § 18; SPEISER, *supra* note 2, at §§ 3:3 & 3:4.

37. As concluded over 20 years ago in Note, *Wrongful Death Damages in Iowa*, 48 IOWA L. REV. 666 (1963):

> The major defect in the Iowa law of wrongful death damages must surely be the net estate measure of lost future earnings. It is an irrational distinction with relevance to social desirability . . . . Even though the dependents of the deceased suffer the loss of their support, they serve to decrease the amount of recovery. For example, if two men had equal earnings but one was single and the other was married with several dependents, the recovery for wrongful death of the single man should logically be substantially larger than the recovery for the wrongful death of the married man. However, recoveries in such situations in Iowa have not differed noticeably. Apparently neither the courts nor the juries strictly follow the net estate theory.

Id. at 693-94.

oped a "loss of accumulation" or a "net loss to the estate" system.[38] Under this system, damages were calculated by determining the projected lifetime earnings of the victim and reducing this amount by such factors as taxes and maintenance or support of the family.[39] This method produced increasingly smaller recoveries as the size of the family increased, so that the representative of an unmarried adult with no family, who would presumably leave a larger net estate, would recover much more than a similarly situated plaintiff whose decedent had a large family and numerous dependents. Not only was this result out of harmony with the rationale of most legislative enactments and public policy, which focused on compensating the family, it was offensive to popular notions of fairness and common sense.[40] When the assumption that there was no common law basis for wrongful death recovery was combined with each state's unique statutory network and judicial interpretations, courts eventually were beguiled into determining elements of damages and other issues by "looking solely at the statute" and concentrating on judicial interpretations within the forum state.[41] Thus, it was customary for courts to describe the right to recover for wrongful death as "purely statutory"[42] and to tie the rights of the survivors exclusively to that system rather than applying the flexible principles used in personal injury cases.[43] The characteristic perspicacity of nineteenth century America tended to view wrongful death recoveries as a Pandora's box of the legal system, ever-threatening to unleash floods of litigation and unharnessed jury verdicts and to stain courtrooms with contrived or false evidence.[44]

---

38. DeMoss v. Walker, 242 Iowa 911, 48 N.W.2d 811 (1951); Anderson v. Strack, 236 Iowa 1, 17 N.W.2d 719 (1945); Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948).

39. Adams v. Duer, 173 N.W.2d 100, 105 (Iowa 1969); DeToskey v. Ruan Transp. Corp., 241 Iowa 45, 50-51, 40 N.W.2d 4, 7 (1949).

40. *See supra* note 37.

41. Professor Miller observes in his article *Dead Men in Torts: Lord Campbell's Act Was Not Enough*, 19 CATH. U.L. REV. 283 (1970), that he "[w]ould not try to write a textbook on death cases. There are countless decisions which can be related only to experiences in certain states . . . . Anyone can find cases and statutes to support something different from most of my propositions." *Id.* at 283 n.1.

42. *See, e.g.*, Weitl v. Moes, 311 N.W.2d 259, 270 (Iowa 1981); Wilson v. Iowa Power & Light Co., 280 N.W.2d 372, 373 (Iowa 1979). In *Weitl* it was assumed that since the right to recovery for wrongful death was "purely statutory, our sole task is to construe the survival statute to determine if the plaintiff comes within its terms." 311 N.W.2d at 270.

43. In *Major v. Burlington C.R. & N. Ry.*, 115 Iowa 309, 88 N.W. 815 (1902), the court sternly noted that "it seems to be the general rule that whenever a right is created by legislation, and at the time a remedy is prescribed, such remedy is part of the right and exclusive." 115 Iowa at 314, 88 N.W. at 816. But in *Wardlow v. City of Keokuk*, 190 N.W.2d 439 (Iowa 1971), the Supreme Court of Iowa gave a rather broad reading to a legislative provision approving damages for "actual loss of services" in the death of a minor to include by inference "loss of companionship and society of the minor," justifying its holding by noting that since the legislative provision was "remedial in character . . . it is the court's duty to construe it in the light of current social conditions." 190 N.W.2d at 448.

44. *See* Speiser & Malawer, *An American Tragedy: Damages for Mental Anguish of Be-*

This fierce determination to tie recovery to fixed dollar limitations or to strict interpretation of statutory provisions created a study in disarray.[45] Each jurisdiction developed its own tightly cordoned line of precedents interpreting its own unique statutory provisions. Each seemed almost compelled to disregard the opinions of sister states on this subject,[46] further suppressing normal common law development.

The rebirth of wrongful death recovery did not occur until 1970, when the full power of the United States Supreme Court was used in *Moragne v. States Marine Lines, Inc.*[47] to usher in a new era. This pronouncement appears to be the catalyst which will reverse the direction of the law of wrongful death, and coalesce existing and evolving systems of various jurisdictions into an amalgamated body of laws which, although not always uniform, should now cooperatively mature. Without dissent, the *Moragne* Court first took note of this "unjustifiable anamoly"[48] in the law represented by one of its own prior opinions following the *Baker v. Bolton* doctrine, and acknowledged the error of this long-cited principle:

> One would expect, upon an inquiry into the sources of the common-law rule, to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death.[49]

The court then analyzed Lord Ellenborough's reasoning, and issued an excoriating repudiation of *Baker v. Bolton*.[50] Before turning to the facts of the case at hand, the court aligned itself with the undercurrent of dissatisfaction faithfully expressed by esteemed commentators and legislatures alike, and announced a new direction based upon the widest imaginable support:

> These numerous and broadly applicable statutes, taken as a whole, make

---

reaved Relatives in Wrongful Death Actions, 51 TUL. L. REV. 1, 1 (1976) [hereinafter cited as Speiser & Malawer]; Miller, *Dead Men in Torts: Lord Campbell's Act Was Not Enough*, 19 CATH. U.L. REV. 283 (1970), notes that "[a] hundred years ago judges listened willingly to scare stories from defendants' counsel," *id.* at 285, and that "[b]efore 1915 it was a defendant's word." *Id. See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4 (4th ed.).

45. As one writer has phrased the situation: "[t]here are countless decisions which can be related only to experience in certain states." Miller, *Dead Men in Torts: Lord Campbell's Act Was Not Enough*, 19 CATH. U.L. REV. 283, 306 (1970). *See also* Moragne v. States Marine Lines, Inc., 398 U.S. at 405.

46. After noting the "fundamental differences between the statutes following Lord Campbell's Act and the Iowa statute" in *Cardamon v. Iowa Lutheran Hosp.*, 256 Iowa 506, 520, 128 N.W.2d 226, 235 (1964), the court concluded that Iowa's system was "entirely different." *Id.*

47. 398 U.S. 375.

48. *Id.* at 378.

49. *Id.* at 381.

50. *Id.* at 381-89.

> it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery.[51]

The *Moragne* opinion is devoted more to a discussion of general principles than to the specific case being decided; it is apparent that it was intended not only to be instructional but the harbinger of an entirely new direction. The *Moragne* Court was not impressed with the need for a sweeping or comprehensive solution in rectifying "the present disarray in this area"[52] of the law, but was comfortable in relying upon matured common law doctrines:

> [O]ur decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law. In most respects the law applied in personal injury cases will answer all questions that arise in death cases.[53]

Since "the courts will not be without persuasive analogy for guidance,"[54] each jurisdiction will be able to appropriately contribute to the general development of the law of wrongful death recovery as it decides its own cases with guidance from personal injury law.[55]

The purpose of this article is to consider the fresh perspective on this important area of the law suggested by the *Moragne* decision, to ponder some of the new directions that the law may begin to follow, and to offer some suggestions for this interplay of common law principles, with occasional and special reference to the shaping of Iowa law. Given the advent of common law principles being applied to wrongful death cases, it is neither possible to consider all areas of important change nor advisable to attempt to construct a comprehensive scheme which might only short-circuit the exciting process of discovering the proper application of well-developed, flexible, and equitable doctrines and principles of common law to an area from which, until recently, they have been largely excluded. No attempt is made to suggest solutions to problems primarily focusing upon statutes of limitations,[56] abatement of certain types of actions,[57] decedents without survivors,[58] and other interesting but complex issues. The solutions suggested are

---

51. *Id.* at 390.
52. *Id.* at 405.
53. *Id.* at 405-06.
54. *Id.* at 408.
55. *Id.* at 406 ("In most respects the law applied in personal-injury cases will answer all questions that arise in death cases.").
56. *See* SPEISER, *supra* note 2, at §§ 11:5 - 11:27; Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972).
57. *See* SPEISER, *supra* note 2, at §§ 8:17 - 8:21; Bohannon v. McGowan, 222 So. 2d 60 (Fla. Dist. Ct. App. 1969); McDaniel v. Bullard, 34 Ill. 2d 487, 216 N.E.2d 140 (1966); Gray v. Goodson, 61 Wash. 2d 319, 378 P.2d 413 (1963).
58. *See* SPEISER, *supra* note 2, at § 4:39; *see also* Merchants Nat'l Bank v. Waters, 447 F.2d 234 (8th Cir. 1971).

neither comprehensive nor exclusive, but rather represent one writer's consideration of how the matured principles and doctrines of the common law, applied to personal injury cases, might also be applied to wrongful death recovery.

One suggestion is to allow survivors to press independent claims for certain elements of damage in their own right, in addition to and along with those claims being made by the personal representative of the decedent's estate for those elements of damages deemed to survive and accrue to the estate.[59] This procedure could clarify the application of legal principles, such as the effect of contributory negligence on the strength of a claim. The negligence of the decedent would affect the representative's recoverable damages while the negligence of a survivor would only affect his separate damages.[60]

Another suggestion is to abandon the artificial distinction between grief and mental anguish. Jurors then would no longer be asked to perform the difficult mental gymnastics of making such a distinction, an exercise frequently disregarded in the past[61] and likely to be ignored in the future without such modification. By this means survivors can gain whatever therapeutic effect might be derived from ventilating such an injury instead of having the legal system tell them they must swallow their grief once they pass through the courthouse doors.[62]

A final suggestion is to continue to fashion reasonably resilient guidelines to determine which persons will and will not be allowed to make claims for damages to relational rights.[63] This might be achieved by limiting such claims to persons within certain degrees of consanguinity or affinity, except in unusual circumstances.[64]

II. Moragne and the Common Law

The outcry against an obviously unjust rule, now recognized to have been created out of misunderstanding, has been virtually unanimous.[65] Even

---

59. *See infra* Sections III-V.

60. *See infra* Section IV.

61. *See* Speiser, *supra* note 2, at 2, it is anomalous that juries are permitted to consider and quantify the damaging effects of mental anguish in personal injury cases, but are prohibited from even considering mental anguish of bereaved relatives in most American wrongful death cases. *See also* Note, *Blind Imitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions*, 49 Den. L.J. 99, 108-10 (1972)(concluding that the Colorado Supreme Court had long followed two inconsistent lines of cases, one taking narrow view of pecuniary damages and the other giving lip service to that rule while allowing a broader rule of damages, undefined but not based upon pecuniary loss).

62. Grief and sorrow have been considered in some jurisdictions. *See infra* notes 206-10 and accompanying text.

63. *See generally infra* Sections VI & VII.

64. *See infra* notes 240-258 and accompanying text.

65. *See infra* note 67 and accompanying text; *see also* Moragne v. States Marine Lines, Inc., 398 U.S. at 379 ("the legislatures both here and in England began to evidence unanimous

legislatures lumbered into the void, beginning in England with Lord Campbell's Act in 1846,[66] and later expanding to each of the American jurisdictions. The unmistakable implication of this landslide reaction was expressed almost a century later by the Restatement (Second) of Torts:

> *Common law action for wrongful death.* The prevalence of the wrongful death statutes, which are to be found in all jurisdictions, and their existence for substantially more than a hundred years, have given rise to some decisions holding that the principle of a right of action for wrongful death has now become a part of the common law itself. In view of the "lack of any discernible basis" for the 1808 holding in Baker v. Bolton and its "harsh result" and of the scholarly criticism of the holding, it has been concluded that "there is no present public policy against allowing recovery for wrongful death," so that the right of action can now be regarded as arising under the common law. Most of the details of the right may be controlled by an existing statute or taken by analogy from one. When recognized, this common law right has been utilized to fill in unintended gaps in present statutes or to allow ameliorating common law principles to apply.[67]

Early decisions, though, did not reflect a sweeping awareness of any consensus opposing restrictive rules against wrongful death recoveries.[68] On the contrary, judges assumed the role of protectors of the legal system against what must have been perceived a runaway barge, if not a pirate ship, and almost immediately began to chain this new vessel to any available mooring.[69]

The initial reaction of the nineteenth century judiciary to ameliorating legislation was, in keeping with the spirit of that era,[70] highly constrictive, to say the least. The first English case considering Lord Campbell's Act, *Blake v. Midland Railroad*,[71] construed the statute as permitting recovery of "pecuniary" losses only. As many commentators have noted,[72] the statute al-

---

disapproval of the rule against recovery for wrongful death").

66. 1846, 9 & 10 Vict., ch. 93 (1846). The Iowa legislature was one of the first to react in 1851, only three years after the first decision in this nation recognizing the rule in *Baker v. Bolton*, by passing three statutes.

67. Restatement (Second) of Torts, § 925(k) (1965).

68. Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475 (1848), *overruled by* Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972); Blake v. Midland R.R., 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

69. Carey v. Berkshire R.R., 55 Mass. (1 Cush.) 475 (1848), *overruled by* Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972); Blake v. Midland R.R., 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

70. *See* Note, *Blind Imitation of the Past: An Analysis of Pecuniary Damages in Wrongful Death Actions*, 49 Den. L. Rev. 99, 105-06 (1972). *See also* Speiser, *supra* note 2, at 1-8; Malone, *supra* note 2, at 1059.

71. 18 Q.B. 93, 118 Eng. Rep. 35 (1852).

72. Wycho v. Gnodtke, 361 Mich. 331, 331, 105 N.W.2d 118, 119 (1960). *See also* Davis, *supra* note 4, at 347, noting that limiting recovery to "pecuniary" damages "would appear to be

lowed the jury to award "such [d]amages as they may think proportioned to the [i]njury from such [d]eath to the [p]arties"[73] and made no mention of "pecuniary" losses or any other comparable restriction on damages. Although many jurisdictions have followed the "pecuniary" phraseology either by statute or case law,[74] there is a wide disparity in its connotation not only across jurisdictional lines but also within a given jurisdiction over a period of time.[75] Some decisions kept a tight rein on the meaning of "pecuniary" damages.[76] Other decisions display a willingness to give expansive readings to the term, permitting claims for general or intangible damages, such as for loss of consortium.[77]

Other devices also have confined recoverable damages. One survival statute has been determined inapplicable to wrongful death cases on the premise that surviving actions only constituted those recognized by the common law.[78] At least one state which had both a survival statute and a true wrongful death act held, probably in light of overconcern with allowing double recovery, that there must be an election to pursue damages under only one theory to the exclusion of possible claims brought under the other.[79] Some states have refused to permit recovery of funeral costs, though others have allowed such recovery.[80] At least one state which permits recovery of costs limits that amount to the interest incurred in being required to pay this inevitable expense prematurely.[81] Other states will not recognize

---

nothing more than a gratuitous and muddle-headed inference drawn by some misguided nineteenth century judges." *Id.*

73. 1846, 9 & 10 Vict., ch. 93, § 2.

74. *See* SPEISER, *supra* note 2, at app. A, for a collection of state statutes, indicating the following states, among others, as specifying pecuniary damages: Arkansas, Maine, Minnesota, New Jersey, New Mexico, New York, South Dakota, and Vermont. *Id.*

75. As noted in SPEISER, *supra* note 2, at § 3:49, several jurisdictions apparently bound to "pecuniary" damages have interpreted this to include loss of consortium, society or companionship. *Id.*

76. *See* Niven v. Falkenburg, 553 F. Supp. 1021 (D. Colo. 1983)(strictly applying Colorado law limiting recovery to pecuniary damages).

77. *See* Myers v. Harter, 76 Wash. 2d 772, 459 P.2d 25 (1969). *See also* Holder v. Key Systems, 88 Cal. App. 925, 200 P.2d 98 (1948). There the court distinguished between "pecuniary" damages and "dollars and cents" damages in order to allow a claim for loss of consortium to qualify as pecuniary damages:

> Another factor to be considered in cases involving damages for loss of a member of a family is that, although damages must be measured by pecuniary loss to the plaintiffs, in fixing such loss the trier of facts is not limited to proof of loss in dollars and cents, but may properly consider pecuniary value of such non-economic interests of a family as loss of comfort, society and companionship.

88 Cal. App. at 940, 200 P.2d at 106.

78. *See* Boyd v. Sibold, 7 Wash. 2d 279, 109 P.2d 535 (1941).

79. Chesapeake & O.R.R. v. Banks, 142 Ky. 746, 135 S.W. 285 (1911); Parsons v. Roussalis, 488 P.2d 1050 (Wyo. 1971).

80. *See* SPEISER, *supra* note 2, at §§ 3:58 - 3:61.

81. *See* SPEISER, *supra* note 2, at §§ 3:58 - 3:59; Hurtig v. Bjork, 258 Iowa 155, 138 N.W.2d 62 (1965).

actions maintained under a survival statue in cases of instantaneous death. The convoluted rationale underlying this refusal is that a cause of action never existed on behalf of the decedent since the death coincided in point of time with the wrongful act.[82] These special rules and the generally restrictive treatment of wrongful death cases were based largely on the assumption that allowing rights of recovery in such cases would be in derogation of the common law. The appropriate perspective on the use of conflicting rules of statutory construction in cases such as these has been well stated in *Alfone v. Sarno*:[83]

> It is . . . a general rule . . . in statutory construction that statutes in derogation of the common law should be strictly construed . . . .
>
> A contrasting rule of statutory construction provides that a remedial statute must be liberally construed to effectuate its purpose . . . . The Wrongful Death Act is remedial in nature . . . . Doubts as to the meaning of the statute must be resolved in favor of advancing this purpose.[84]

Considering that, after *Moragne*, wrongful death statutes realistically cannot be considered to be in derogation of the common law, there appears to be little justification for giving them a strict construction and therefore denying recovery.

Although *Moragne* was a maritime case originally brought in a federal district court in Florida, the repercussions of the opinion are enormous because it dispels the notion that wrongful death recovery should not be considered part of the common law. The *Moragne* Court emphasized that the proscription against recovery from wrongful death was not only a bad rule but was never rationally tied to our common law:

> The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age . . . . Such nearly automatic adoption seems at odds with the general principle, widely accepted during the early years of our nation, that while "[o]ur ancestors brought with them [the] general principles [of the common law] and claimed it as their birthright, . . . they brought with them and adopted only that portion which was applicable to their situation." The American courts never made the inquiry whether this particular English rule, bitterly critisized in England, "was applicable to their situation," and it is difficult to imagine on what basis they may have concluded that it was.
>
> The historical justification marshaled for the rule in England never existed in this country. In limited instances American Law did adopt a vestige of the felony merger doctrine, to the effect that a civil action was delayed until after the criminal trial. However, in this country the felony

---

82. *See* SPRISER, *supra* note 2, at § 14:4 (identifying Arkansas, Florida, and South Carolina as examples).

83. 87 N.J. 99, 432 A.2d 857 (1981).

84. *Id.* at _, 432 A.2d at 863.

> punishment did not include forfeiture of property; therefore, there was nothing, even in those limited instances, to bar a subsequent civil suit.[85]

Following the views expressed twenty years earlier by Dean Pound[86] and sixty years previously by Justice Holmes,[87] Massachusetts acknowledged that recovery for wrongful death has a common law basis in *Gaudette v. Webb*,[88] relying on the *Moragne* opinion:

> Based upon its view that recovery for wrongful death had now become a part of our common law, the Court in the *Moragne* case held that there was a common law right to recovery from wrongful death under general maritime law . . . and it is thus applicable with equal force to non-maritime actions for wrongful death.
>
> Upon consideration of the *Moragne* decision and the sound reasoning upon which it is based, we are convinced that the law in this Commonwealth has also evolved to the point where it may now be held that

---

85. 398 U.S. at 386-87 (citations omitted). Later opinions have interjected some doubts as to the appropriate application of the *Moragne* opinion in light of *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 681 (1978) and *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), as noted in the illuminating opinion of Circuit Judge John R. Brown in *Bodden v. American Offshore, Inc.*, 681 F.2d 319 (5th Cir. 1982). Regardless of the correct application of *Moragne* to maritime actions, it thoroughly has debunked the notion that wrongful death recovery is still to be considered in derogation of the common law. In predicting the positions that state courts will adopt in following *Moragne*, the federal courts have, so far, resembled the beleaguered meteorologist. In *Neal v. Buler Aviation Int'l, Inc.*, 422 F. Supp. 850 (E.D.N.Y. 1976), District Judge Dooling found the position in *Gaudette* persuasive and predicted, with understandable confidence:

> [T]hat the New York Courts when directed to *Moragne* and *Gaudette* would reach the same conclusion. The rationale of *Moragne* is compelling, and *Gaudette* is clear that the existence of a wrongful death statute (an exotic and restrictive one, in fact) does not suppress the recognition of the common right of action . . . . The New York statute is intended as a statute of beneficence; it makes good a supposed defect in the common law, and, while it has not the most expansive measure of damages, it discloses no purpose to annul rights that might exist independently of the statute.

422 F. Supp. at 855-56. After the opinion in *Ratka v. St. Francis Hosp.*, 44 N.Y.2d 604, 378 N.E.2d 1027, 407 N.Y.S.2d 458 (1978), which purported to distinguish between the statutory provisions in New York and Massachusetts, Judge Dooling changed his decision, even if not his persuasion, in *Neal v. Butler Aviation Int'l, Inc.*, 460 F. Supp. 98 (E.D.N.Y. 1978). Likewise, in *Bowen v. Pan Am. World Airways, Inc.*, 474 F. Supp. 563 (S.D.N.Y. 1979), the court declared that since it was not provided with any explanation as to why *Moragne* and *Gaudette* should be extended beyond cases under the general maritime law, 474 F. Supp. at 565, the plaintiff's contention that the Alaska Supreme Court would follow *Moragne* and *Gaudette* was rejected out of hand. *Id.* at 566. Only about six months later, in *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979), the Supreme Court of Alaska recognized the common law right of recovery for wrongful death as set forth in *Gaudette*, 600 P.2d at 1090, and "extended" *Moragne* beyond cases under the general maritime law. *Id.* at 1091-92.

86. Pound, *Comments on Recent Important Admiralty Cases*, 13 NACCA L.J. 162, 189 (1954).

87. *Id.* (cited in Cox v. Roth, 348 U.S. 207, 210 (1954)); Panama R.R. v. Rock, 266 U.S. 209, 216 (1924)(Holmes, J., dissenting).

88. 284 N.E.2d 222 (Mass. 1972).

> the right to recovery for wrongful death is of common law origin, and we so hold . . . .
>
> Consequently, our wrongful death statutes will no longer be regarded as "creating the right" to recovery for wrongful death.[89]

The conclusion reached by the Massachusetts Supreme Court, that the recognition of this common law right to recovery was "applicable with equal force to nonmaritime actions for wrongful death,"[90] has not been unanimous. The opposing view was well-stated in *Wilbon v. D. F. Bast Co., Inc.*,[91] in the dissenting opinion of Justice Ryan:

> [T]he Supreme Court of the United States, in *Moragne*, created a common law remedy for wrongful death to supply a remedy for a unique situation that somehow remained not covered by other statutory remedies. Recently, the Supreme Court of the United States again considered *Moragne* in *Mobil Oil Corp. v. Higginbotham*. The [C]ourt noting that *Moragne* was decided to fill a gap not provided for in the statutes, refused to extend its holding to other areas where Congress had specifically acted . . . no matter how erroneous the historical concept concerning death actions may be, as noted in *Moragne*, in areas where the legislature has specifically provided for an action for wrongful death, *Mobil Oil Corp.* holds that statutory provisions concerning time limitations, damages, beneficiaries, and other specific statutory provisions are controlling.
>
> This is purely a statutory cause of action and . . . [u]nless this court is willing to go to the extent that the Massachusetts court did in *Gaudette v. Webb*, we should not tamper with a cause of action that is strictly the creature of the legislature by carving out a little exception to accommodate a special case. The decision in this case . . . substantially weakens the concept that the Wrongful Death Act is solely the creature of the legislature . . . .[92]

---

89. *Id.* at 229.

90. *Id.* at _.

91. 73 Ill. 2d at _, 382 N.E.2d at 784.

92. *Id.* at _, 382 N.E.2d at 792-93 (Ryan, J., dissenting) (citations omitted). Several other opinions have declined to follow *Gaudette v. Webb*. In *Huntington v. Samaritan Hosp.*, 101 Wash. 2d 466, 680 P.2d 58 (1984), the Supreme Court of Washington relegated this issue and *Gaudette* to a footnote. *Id.* at _, 680 P.2d at 60 n.1. There was a strong dissenting opinion by Justice Rosellini. *Id.* at _, 680 P.2d at 60-63 (Rosellini, J., dissenting). The Court of Appeals of New York doggedly adheres to its denial of any basis for a common law right of recovery by begging the question; in *Liff v. Schildkrout*, 49 N.Y.2d 622, 404 N.E.2d 1288, 427 N.Y.S.2d 746 (1980), one hears the rigid incantation of the rule about strict statutory construction of legislation in derogation of the common law. "[T]he rights accorded by statute being in derogation of the common law, the right to sue for injury sustained due to the death of another must be founded in statutory authority." *Id.* at 632, 404 N.E.2d at 1291, 427 N.Y.S.2d at 749. This bromide is invoked one paragraph after the acknowledgment of the baselessness of the underlying proposition as set forth in *Moragne*:

> [W]hile we recognize the attractive nature of plaintiffs' arguments, we decline the invitation to change the law of this state . . . that all causes of action arising from the death of an individual must be maintained in accordance with statutory authority.

The decisions which have declined to follow the Massachusetts lead have predominately done so on the basis of "legislative preclusion" or "legislative preemption" without addressing the issue of whether there were interstices within the legislation or areas for statutory construction. The *Moragne* decision did not declare any statutes unconstitutional, and the opinion should not be interpreted to mean that lower courts should totally disregard statutory provisions and forge a new and complete body of law on wrongful death recovery; the Supreme Court specifically rejected such an approach.[93] It is clear from *Moragne*, however, that the time has come to disregard the notions that recovery for wrongful death is antithetical to the common law and that ameliorative legislation is in express derogation thereof.[94] Where public

---

> Although the origin of the common law notion that "[i]n a civil court, the death of a human being could not be complained of as an injury" . . . has been the subject of much speculation and the cited theoretical underpinnings of the rule itself have drawn serious questions as to their continued vitality . . . there is simply no room left for debate that the common law of this State, despite numerous opportunities and forceful requests to change, does not recognize suits to recover damages for the wrongful death of an individual.

Id. at 631-32, 404 N.E.2d at 1290, 427 N.Y.S.2d at 748-49.

The court chose to ignore the obvious implication that, once it was recognized that *Moragne* had destroyed the assumption that statutory rights were in derogation of the common law, there is no requirement to base these rights on a statutory foundation. The Supreme Court of California stated in *Justus v. Atchinson*, 19 Cal. 3d 586, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), that it did "not question the soundness of Justice Harlan's historical research in *Moragne*; but we decline to follow the Massachusetts court, which concluded therefrom that state law" on wrongful death was now considered to be of common law origin. *Id.* at 573, 565 P.2d at 128, 139 Cal. Rptr. at 103. The California decision was based upon what the court saw as the more general application of the state statute, compared with the limited reach of the federal statutes considered in *Moragne*, indicating that the legislative branch intended to occupy the field. In a concurring opinion, however, Justice Tobriner rejected the rationale of "legislative preclusion" and urged a recognition of the "universally recognized right." *Id.* at 586, 565 P.2d at 136-37, 139 Cal. Rptr. at 111-12 (Tobriner, J., concurring). The Supreme Court of Virginia has characterized *Moragne* as applying only to "unseaworthiness" issues. Brown v. Brown, 226 Va. 320, _, 309 S.E.2d 586, 590 (1983); *see also* Short v. Flynn, 118 R.I. 441, 374 A.2d 787 (1977); Hebert v. Hebert, 120 N.H. 369, 415 A.2d 679 (1980).

93. 398 U.S. at 404-05.

94. This message is pounded home in *Moragne*, 398 U.S. at 390-92:

> These numerous and broadly applicable statutes, taken as a whole, make it clear that there is no present public policy against allowing recovery for wrongful death. The statutes evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery. This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law . . . Dean Pound subsequently echoed this observation, concluding that: "Today we should be thinking of the death statutes as part of the general law."
>
> . . . As Professor Landis has said, "much of what is ordinarily regarded as 'common law' finds its source in legislative enactment." It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to in-

policies are clearly expressed in the legislation or where specific statutory provision exist, courts should not attempt to use *Moragne* as a mandate to rewrite a statute.[95] Most wrongful death legislation, however, was intended to ease the burdens of survivors by providing a remedy, often a broad array of remedies, which is or are open-ended; the legislature has assumed through such enactments that the common law provided no recourse. *Moragne* has obliterated the basis for any strict construction of such laws, and made it apparent that courts should use this legislation and common law principles developed in personal injury law to remedy the situations created by tortiously caused deaths.

Several states have either expressly adopted *Gaudette v. Webb* or embraced its underlying rationale, that no need exists to strictly construe these statutes against the survivors. The Supreme Court of Alaska specifically followed *Gaudette v. Webb* and unleashed itself from strict construction of wrongful death statutes in *Haakansom v. Wakefield Seafoods, Inc.*:[96]

> [B]ecause the statutes were in derogation of the common law, they were narrowly construed by the courts . . . .
> Commentators and courts have criticized this construction because it ignores the remedial purpose of the wrongful death statutes . . . .
> Many courts appear to be moving away from the traditional construction of wrongful death statutes. Some have gone so far as to find that the common law has evolved to the extent that it now includes a common law action for wrongful death. These courts interpret the action as any other tort action . . . .
> Although we do not deem it necessary to base our holding on the common law, we are in agreement with the spirit of these decisions . . . .
> Although an action for wrongful death is statutory, we have found no legislative intent to treat it differently than the common law tort

---

terweave the new legislative policies with the inherited body of common-law principles — many of them deriving from earlier legislative exertions.

The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations, and where the generality of the underlying principle is attested by the legislation of other jurisdictions . . . . However, it is sufficient at this point to conclude, as Mr. Justice Holmes did 45 years ago, that the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

Id. (citations omitted).

95. *See id.* at 405-06; *see also* Holzsager v. Warburton, 452 F. Supp. 1267 (D.N.J. 1978).

96. 600 P.2d 1087 (Alaska 1979).

actions.[97]

Except where specifically indicated, these wrongful death statutes do not limit the common law rights of survivors, but instead supplement these rights. After *Moragne* there is no justification for withholding the application of flexible common law doctrines and principles to either a wrongful death cause of action or the normal remedies of survivors. It is on the application of these common law doctrines and principles that this Article now focuses.

III. Parties

One problem encountered in wrongful death cases but not in those involving claims of personal injury has confounded or confused many courts: To whom do claims for the various elements of damage belong?[98] A correlative issue is whether negligence or comparative negligence on the part of a decedent or survivor will proportionately reduce the right to recover.[99]

In most jurisdictions the representative of the decedent's estate is the

---

97. 600 P.2d at 1091-92. In *Wilbon v. D.F. Bast Co.*, 73 Ill. 2d 58, 382 N.E.2d 784 (1978), the Supreme Court of Illinois refused to find that the wrongful death statutes of that state created the right of recovery, *id.* at __, 382 N.E.2d at 788-89, apparently enlarging upon the previous opinion in *Mattasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975). Although the *Wilbon* court did not specifically endorse the broad reading of *Gaudette v. Webb*, the implication of the holding, as noted in the dissent of Justice Ryan, is that it was determined by common law principles. Wilbon v. D.F. Bast Co., 73 Ill. 2d at __, 382 N.E.2d at 791-92 (Ryan, J., dissenting). In *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983), the Supreme Court of Missouri, citing *Moragne* but not *Gaudette v. Webb*, rejected the contention that it was necessary to apply strict construction to the statute there at issue:

> Respondents assert that this statute must be "strictly construed" because it is "in derogation of the common law." We do not agree. The wrongful death statute is not, strictly speaking, in "derogation" of the common law . . . . Wrongful death acts do not take away any common law right; they were designed to mend the fabric of the common law, not weaken it. Remedial acts are not strictly construed although they do change a rule of the common law . . . .
>
> This principle was recently enunciated in a unanimous opinion authored by Justice Harlan in Moragne v. States Marine Lines, Inc. [sic]

654 S.W.2d at 907-08. It rejected the device of "legislative preemption" used by the California court in *Justus*, *id.* at 911, and embraced the rationale expressed in the concurring opinion of Justice Tobriner, which was indistinguishable from the rationale expressed in two dissenting opinions by Justice Bardgett in *State ex rel. Kansas City Stock Yards Co. v. Clark*, 536 S.W.2d 142, 149 (Mo. 1976), and *Kausch v. Bishop*, 568 S.W.2d 532, 537 (Mo. 1978), which in turn relied heavily upon *Gaudette v. Webb*.

98. *See* 398 U.S. at 406, where the Court noted this problem but declined to make a specific holding. Many courts take the position that "inasmuch as the statute is in derogation of the common law, the class for whom the remedy is provided may not be expanded beyond its terms." Alfone v. Sarno, 432 A.2d at 871. Some, however, have relied upon the principle of statutory construction that a remedial statute should be liberally construed to effectuate its object.

99. *See* Speiser, *supra* note 2, at ch. 5.

primary or exclusive person eligible to make most claims.[100] Likewise, most jurisdictions have concluded that any negligence of either the decedent or a beneficiary is a legal impediment to recovery.[101] Although many courts have not hesitated to find "independent" claims for spousal consortium in the personal injury context, it is commonly assumed that once the victim dies this independent right is transferred to the personal representative through the decedent.[102] Even though it must be conceded that the decedent did not own nor have a right to recover on the claims for spousal consortium before the event of death, it is assumed, nevertheless, that the surviving spouse is somehow "divested" of the claim by the event of death, and that the claim passes to the representative.[103] Thus, it usually is determined that the consortium claim is "derivative."[104]

In determining who should be the appropriate person to make a claim, or similarly, who should be a proper party plaintiff in an action to recover damages, the key appears to be whether in fact the action may be consid-

---

100. Beginning with Lord Campbell's Act, which provided that "every such action . . . shall be brought by and in the name of the Executor or Administrator of the Person deceased," most jurisdictions have designated the representative of the estate as the logical vehicle for pursuing the claims of the deceased's spouse, children, parents, grandchildren, grandparents, step relatives, etc. *See also* SPEISER, *supra* note 2, at app. A, for a sampling of statutes nominating the representative of the estate.

101. *See generally* Note, *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 FORDHAM L. REV. 1344 (1982)[hereinafter cited as Note, FORDHAM L. REV.].

102. *See* Madison v. Colby, 348 N.W.2d 202 (Iowa 1984); Audubon Exira Ready Mix, Inc. v. Illinois C.G.R.R., 335 N.W.2d 148 (Iowa 1983).

103. *See supra* note 102 and accompanying text.

104. *See* White v. Lunder, 66 Wis. 2d 563, 575, 225 N.W.2d 442, 449 (1975). There the court declared "[w]e deem it appropriate to declare . . . that . . . loss of consortium shall be deemed derivative; and that the causal negligence of the injured spouse shall bar or limit the recovery of the claiming spouse," but then added, perhaps apologetically, that "[t]o declare both of these causes of action derivative might not be entirely logical, but in our opinion does little violence to the prior expressions of this court and serves to simplify the rule in applying the comparative negligence statute." *Id.* The equitable instincts of the court were on target because the jury apportioned the negligence 30% to the defendant, 30% to the injured wife, and 33% to the consortium-claiming husband. In this unusual factual pattern, the consortium claimant was guilty of active negligence, making it clearly unnecessary to pronounce the applicability of the derivative action theory. *See also* Eggert v. Working, 599 P.2d 1389, 1390 (Alaska 1979); Nelson v. Busby, 246 Ark. 247, __, 437 S.W.2d 799, 803 (1969).

A comparable theory states that the consortium claimant is similar to an assignee and should be barred "not based on the theory of imputed negligence, but . . . in accord with the familiar principle of law that the assignee of a cause of action stands in the shoes of the assignor." Stuart v. Winnie, 217 Wis. 298, __, 258 N.W. 611, 614 (1935). The imprecise use of this term has led to confusion, but there may be no general definition. One writer has asserted that "[a]lthough there is no precise definition of a derivative action, it is generally an action that owes its existence to a preceding cause of action and is often no more than a separate right to enforce the preceding claim." Note, FORDHAM L. REV., *supra* note 61, at 1351 (footnotes omitted). Typical examples include a shareholder's derivative action seeking redress on behalf of the corporation, and an insurance carrier's action to enforce subrogated rights.

ered derivative.[105] Most jurisdictions, probably through inertia, have retained in substantial form the personal representative system of the nineteenth century, a period during which women were considered legally incompetent and usually represented in court by their husbands or other legal appointees. So little questioning or analysis has been given this system that the derivative action concept itself has seldom been mentioned.

An outstanding example of progressive action in this area may be found in a line of Iowa cases which have analyzed and, with one notable exception, produced a series of opinions which are models of jurisprudential clarity in this context. To highlight the analysis of these opinions, it is helpful first to examine the exception. In *Wilson v. Iowa Power & Light Co.*,[106] the principal question was "whether the entirety of a personal representative's wrongful death action is subject to a defense based upon contributory negligence of the decedent."[107] Betty Wilson claimed various elements of damage, both as administrator and individually, for the instantaneous death of Gilbert Wilson, her husband. She claimed damages for loss of consortium but abandoned her individual claim during trial and urged that insofar as her wrongful death claim was based on loss of services and support the defense of contributory negligence was inapplicable.[108] The court recognized that the so-called "exclusiveness" of the wrongful death remedy did not preclude the spouse from bringing a separate claim for loss of consortium during the limited period between the time of injury and the time of death, an inapplicable principle in *Wilson* because of the instantaneous nature of death. The court reserved any determination of whether a spouse's "separate action for loss of consortium during the limited period between injury and death would have been subject to the contributory negligence defense,"[109] but rejected Mrs. Wilson's argument regarding the defense to her wrongful death claim: "In keeping with the derivative nature of a wrongful death action, we have held that a defense which would have been available against the decedent if he had survived is good against his personal representative."[110]

The *Wilson* court twice cited the pivotal opinion of *Irlbeck v. Pome-*

---

105. *See* Gutman, *A Separate Cause of Action for Loss of Consortium in Death Cases: Exorcising Ghosts of the Past*, 43 ALB. L. REV. 1 (1978); Note, *Recovery for Loss of Consortium in a Wrongful Death Action*, 49 BROOKLYN L. REV. 605 (1983); Note, 50 FORDHAM L. REV., *supra* note 101, at 1344 (1982).

106. 280 N.W.2d 372 (Iowa 1979). It should be noted that there are other jurisdictions which acknowledge the right to an independent claim. Lantis v. Condon, 95 Cal. App. 3d 152, 157 Cal. Rptr. 22 (1979); Feltch v. General Rental Co., 383 Mass. 603, 421 N.E.2d 67 (1981); Palmer v. Clarksdale Hosp., 213 Miss. 611, 57 So. 2d 476 (1952); Kraut v. Cleveland Ry., 132 Ohio 125, 5 N.E.2d 324 (1936).

107. 280 N.W.2d at 373.

108. *Id.* at 374.

109. *Id.* at 375.

110. *Id.* at 373-74.

roy.[111] As will be seen, the analysis offered in *Irlbeck*, especially when combined with *Moragne*, the advent of comparative negligence,[112] and the subsequent opinions in *Fuller v. Buhrow*[113] and *Audubon Exira Ready-Mix Co. v. Illinois Central Gulf Railroad Co.*,[114] undermines the result reached in the *Wilson* case.

Less than a year after *Wilson* was decided, the issue reserved in that decision was addressed in *Fuller*. The husband, Harold Fuller, claimed loss of consortium for his negligently injured wife, who was not killed instantaneously. The defendant alleged negligence on the part of Mrs. Fuller. In noting that "consortium is a separate property right"[115] deserving of judicial protection, the court quoted from a California case[116] in stating that a negligent defendant "owes a separate duty of care"[117] to a consortium claimant. The court then ruled that Mr. Fuller's consortium claims should remain unaffected by any negligence attributable to his spouse. The court held "that the contributory negligence of an injured spouse which is not the sole proximate cause of that spouse's injury does not bar a claim by the other spouse for loss of consortium."[118] Indeed, it is doubtful that any other conclusion could have been reached, given the pre-*Wilson* opinion in *Handeland v. Brown*,[119] where the corresponding issue relating to the barring of a claim for parental consortium based upon the negligence of the injured child was also resolved in favor of the consortium claimant. The *Handeland* court had analyzed the situation thoroughly and acknowledged that it was rejecting the position of a majority of other jurisdictions on the issue before holding that "a child's contributory negligence, not the sole proximate cause of his injury, is not a defense to a parental claim . . . for . . . loss of . . . companionship and society . . . ."[120] Such phrasing seems to have been borrowed in the *Fuller* holding.[121] There was, however, a particular factual difference to be noted later between *Fuller* and *Wilson*, one which arguably was not significant, yet may well have accounted for the inconsistent results in the two cases.

Before considering the viability of *Wilson* further, it is instructive to go

---

111. 210 N.W.2d 831 (Iowa 1973).
112. *See* Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982).
113. 292 N.W.2d 672 (Iowa 1980).
114. 335 N.W.2d 148 (Iowa 1983).
115. Fuller v. Buhrow, 292 N.W.2d at 675.
116. Lantis v. Condon, 95 Cal. App. 3d 152, 157, 157 Cal. Rptr. 22, 24 (1979).
117. Fuller v. Buhrow, 292 N.W.2d at 675.
118. *Id.* at 676.
119. 216 N.W.2d 574 (Iowa 1974).
120. Handeland v. Brown, 216 N.W.2d at 579.
121. Fuller v. Buhrow, 292 N.W.2d at 676. The court stated: "We hold that the contributory negligence of an injured spouse which is not the sole proximate cause of that spouse's injury does not bar a claim by the other spouse for loss of consortium." *Id.*

back to that most incisive opinion, *Irlbeck v. Pomeroy*.[122] Damages were claimed under Rule 8 of the Iowa Rules of Civil Procedure for lost services, companionship, and society when the plaintiff's daughter was fatally injured in an auto accident. The precise issue was whether the state's guest statute was "a defense to a negligence claim by the parent of a minor guest . . . , against the owner and operator of the motor vehicle in which the child was riding."[123] The opinion focused immediately upon the analytical core of the matter: whether the claim of a consortium-denied parent was a derivative action.[124] The reasoning seems impeccable:

> A true derivative action is one which a person may institute to redress a wrong done to another.
>
> The present case is not that kind of derivative action. Rule 8 was analyzed in *Wardlow v. City of Keokuk*. We noted the common law roots of the rule insofar as it governs actions by a parent for non-fatal injuries to his child and observed that it extends recovery to situations where death results. Under Rule 8 the parent has a cause of action for a legal wrong to himself independent of that of the child. It is derivative only in the sense it is based on injury to or death of the child.[125]

Indeed, this distinction between a *true* derivative and a quasi-derivative or independent action had been touched upon in *Wardlow*, also a child death case. The *Wardlow* court, though without using the "derivative-independent" dichotomy, clearly made the same distinction:

> [T]he wrongful or negligent death of a minor gives rise in Iowa to two causes of action, one on behalf of the minor's administrator for those injuries which are personal to the decedent, section 611.20, the other on behalf of the father. Actions brought under rule 8 are not for the injury to the child but for the injury to the father as a consequence of the injury to the child.[126]

The "independent claim" rationale was also used in *Sea-Land Services, Inc. v. Gaudet*[127] in which a defendant claimed that a settlement and release executed during the lifetime of the decedent had extinguished the consortium rights of the survivors. In applying the principles of *Moragne*, the Supreme Court noted that "*Moragne* had already implicitly rejected that argument; for we there recognized that a single tortious act might result in two distinct, though related harms, giving rise to two separate causes of ac-

---

122. 210 N.W.2d 831 (Iowa 1973).

123. Irlbeck v. Pomeroy, 210 N.W.2d at 831-32.

124. *Id.* at 832.

125. *Id.* at 832-33 (citation omitted). *See also* Davis, *supra* note 4, at 332-33, noting that "[t]he wrongful death act is occasionally characterized as 'derivative' but that description is inaccurate."

126. Wardlow v. City of Keokuk, 190 N.W.2d at 443.

127. 414 U.S. 573 (1974).

tion."[128] The results in *Fuller* and *Handeland* appear axiomatic, given the analysis of the distinction between derivative actions and quasi-derivative or independent actions established in *Irlbeck*.[129]

How is the *Wilson* opinion to be squared with the others? Perhaps it cannot be reconciled. The distinction alluded to earlier between *Fuller* and *Wilson* which should not, but which probably did, make a difference was that *Fuller* was not a death case and did not involve a claim by a personal representative of an estate.[130] This feature confused the analysis in *Wilson* by presenting a claim which may have appeared to be derivative although in fact it was not. Though the action of the personal representative of an estate is a derivative action in the sense that the representative claimant is "standing in the shoes" of the decedent to present claims belonging to the decedent, and "derives" the right to do so from the decedent,[131] the same is not true of the claim of a spouse for loss of consortium.[132] It should be obvious that rights to consortium belong to the survivors and not to the decedent. Ironically, this distinction was acknowledged in part in *Wilson*, when, discussing the right to claim consortium loss for the period between injury and death, the Iowa Supreme Court observed that:

> The exclusiveness of the wrongful death remedy does not defeat a surviving spouse's cause of action for loss of consortium for the period between the decedent's injury and death. This is because the consortium action would have vested in the spouse prior to the death, would not have belonged to the decedent if he had survived, and is not affected by the survivorship statute.[133]

In *Wilson* the court added that since the representative's action was derivative and the representative was authorized to recover for loss of spousal consortium after the spouse died, the defendant's claim of negligence by the decedent was a valid defense against any derivative action.[134] This inconsistent holding is based upon the unacknowledged assumption that the estate representative derives the right to claim for post-death spousal consortium loss from the decedent, which is clearly false. If the representative can be said to derive this right from anyone, it must be from the surviving spouse and not from the decedent, who never owned it. This is a good illustration of the logic and coherence of designating the surviving family member as a proper party to seek recovery, rather than to have a repre-

---

128. *Id.* at 577-78.

129. Irlbeck v. Pomeroy, 210 N.W.2d at 833.

130. Harold Fuller's wife, Elrita, was a pedestrian who was struck by the defendant's car but not killed. Fuller v. Buhrow, 292 N.W.2d at 672.

131. Irlbeck v. Pomeroy, 210 N.W.2d at 832.

132. *Id.* at 832-33.

133. Wilson v. Iowa Power & Light Co., 280 N.W.2d at 373 (citing Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956)).

134. *Id.* at 373-74.

sentative make all claims for consortium losses.

The anomalous position occupied by *Wilson* within this area can be demonstrated by applying it to a hypothetical comparative negligence case. If husband Gilbert were to negligently collide with another negligent driver, and survive for six months before dying of his injuries, what would happen to wife Betty's claim for consortium? Applying *Wilson*, Betty's consortium claim for the six months following the accident would be undiminished by the percentage of negligence found to be attributable to Gilbert, but her consortium claim for the remainder of the joint-life expectancy would have to be reduced or denied. In other words, the point at which her right is diminished or denied is determined by the point at which the victim dies, but, as acknowledged in *Audubon-Exira*, this is precisely when "the loss is exacerbated."[135] This sort of result might have been a little too much even for Lord Ellenborough.

Another hypothetical case might further illustrate the point. If husband Gilbert had been negligently driving a Ferrari, titled solely in wife Betty's name, which was demolished in the accident with another negligent driver, what would happen to the claims for property damage to the Ferrari and for loss of spousal consortium? Applying *Wilson*, the conclusion might be that the consortium claim brought by the representative of the estate was reduced or denied based upon the negligence of the decedent, but that the property damage claim, which undeniably belongs to Betty, would *not* be reduced or denied, since no "magical" transfer of this claim to the representative could occur at the instant of death. There is obviously no logical basis for requiring Betty's claim for loss of consortium to be held by the representative while her claim for loss of property remains hers alone; nor is there any logic in reducing or denying one or the other when Betty was an innocent victim of the accident on both counts.

Had the common law system been allowed to develop normally in this area, it seems highly likely that the right to claim a consortium loss, acknowledged even in *Wilson* to "vest" in the surviving family member prior to death,[136] would be claimed solely and in its entirety by the survivor as an independent cause of action. It is almost inconceivable that a flexible pattern of growth under the common law would have produced a system in which the independent right of a survivor belongs to and is vested in that individual only for a certain period of time, only to be almost inexplicably transferred to a representative at a later point and subject to defenses not applicable before the transfer. Neither would it appear reasonable that the tortfeasor, who owed "a separate duty of care" to a surviving family mem-

---

135. 335 N.W.2d at 153.

136. 280 N.W.2d at 373. As noted in the dissenting opinion of Justice Rosellini in *Huntington v. Samaritan Hosp.*, 101 Wash. 2d 466, 680 P.2d 58 (1984): "The wrongful death statute is remedial in nature and should be liberally construed to protect the 'vested' interests of the minor beneficiaries." *Id.* at ___, 680 P.2d at 63.

ber, could be afforded the benefit of "springing" defenses arising from bodily actions of a now-deceased family member.

The proper person to pursue wrongful death damages under Lord Campbell's Act was the personal representative of the decedent.[137] The various statutory systems established in American jurisdictions have tended to follow this model;[138] in approximately half the states the personal representative is the only person authorized to recover; in approximately a fourth the spouse has a right or option to pursue such damages; in almost one-half the parents or children or other heirs are designated as optional plaintiffs; and most likely no jurisdiction fails to permit a personal representative to pursue such damages.

It is doubtful that the common law of consortium was highly refined in England in 1846. It must be remembered as well that the right of parental consortium is not widely recognized and has been acknowledged only recently in Iowa.[139] While many courts in the United States gave early recognition to the right of a husband to recover for loss of consortium when his wife was injured,[140] early agreement could not be reached on the question of whether the woman had a corresponding right when her husband was injured. Iowa, for example, did not rule directly on the wife's right to an independent action for loss of spousal consortium until 1956, in *Acuff v. Schmit*.[141] One writer has given this summation of the availability of consortium claims in Iowa prior to the *Acuff* decision:

> During early common law days, the status of the wife and mother was different from her status today. She was part chattel, part servant. What was hers, was her husband's property. They were one, and the husband was that one. All of her personal property, money, goods, and chattels of every description, became his upon marriage. Since she was under the power of her husband, it followed that she had no will of her own, and having no will of her own could not enter into a contract. The hus-

---

137. 1846, 9 & 10 Vict., ch. 93, states that "every such action . . . shall be brought by and in the name of the Executor or Administrator of the Person deceased." *Id.*

138. SPEISER, *supra* note 2, at § 11:39. Although the use of the personal representative may promote a certain amount of orderliness in processing claims and avoiding multiple claims, it sometimes leads to unjust results by confusing the analysis of the issues, unless it is remembered that the representative is only a nominal party for the most part. As noted in *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979):

> While the personal representative is the party who brings suit for wrongful death . . . he or she is a nominal party only. When the decedent is survived by a spouse, child, or dependent, the action is brought on their behalf, for their direct benefit and damages are measured by their loss. The primary purpose of the wrongful death statute is to compensate those who suffer a direct loss.

Id. at 1090.

139. Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981).

140. Goebel, *Loss of Consortium in Iowa*, 10 DRAKE L. REV. 33 (1960) [hereinafter cited as Goebel].

141. 248 Iowa 272, 78 N.W.2d 480 (1956). *See also* Goebel, *supra* note 140.

> band was entitled to the services of his wife and if he should lose them, through the wrongful acts of another, he had a right to be compensated for his damages.[142]

Given this, it should not be difficult to understand that in the context of an unrefined law of consortium in England in 1846, legislatures may logically have looked to a legally recognized entity, such as the personal representative of the estate, especially if the deceased was a male, as the appropriate person to pursue rights accorded under the law of wrongful death.

It is the opinion of this writer that it is simpler, more logical, and more conducive to the appropriate application of legal doctrines to important issues that arise to allow the consortium or relational rights claimant, whether spouse, parent, child, or other person, to individually and independently claim appropriate consortium or relational rights either as a preferred option or to the actual exclusion of the personal representative. Indeed, once the right has "vested" in the survivor, there is no common law principle which divests the person of that right, or transfers it to the personal representative.[143] The Iowa legislature has expressed that the public policy of the state allows surviving family members to recover on wrongful death claims directly, without diminution on account of any debts of the decedent or rights of his creditors.[144] It seems obvious then that an established preference exists for having consortium or relational rights enforced by the legal system and fully enjoyed by survivors. It is an unnecessary and often confusing procedural step to first sift these recoveries through the personal representative of the estate.

While the personal representative will, under this proposal, pursue certain of the elements of damage, including everything which is determined to have been a right or claim belonging to the decedent at the time of death and which has been preserved by the survival statute to pass to the personal representative, independent or nonderivative claims would be raised by other individuals. Defenses which the tortfeasor could have raised against the decedent, had he survived, would be available for use against claims of the personal representative, who derives rights from, and stands in the shoes of, the decedent; no other defenses could be raised. The defenses which the tortfeasor has against the survivors, which may be either nonexistent or greater than those available against the personal representative, may be used to protect the defendant from consortium or other claims raised by survivors. The proposed system blends easily with other common law princi-

---

142. Goebel, *supra* note 140, at 35.

143. The independent nature of the survivor's claim was noted in 1925 by Dean Jones in analyzing the significance of the maxim, *actio personalis moritur cum persona*: "it does not cover, even in its terms, the case of the master, parent or husband because that person's action is for injuries suffered by himself and not for the injuries suffered by the decedent." 10 IOWA L. REV. 169, 170 (1925).

144. IOWA CODE § 633.336 (1985).

ples and theories, eliminating much confusion and wasted effort.

While more than a small amount of consideration was devoted to notions of compulsory joinder or feasible joinder in *Weitl v. Moes*[145] as a means of avoiding a multiplicity of claims or actions, this is an area which will become clearer with time. Defendants can certainly inform themselves as to the existence of possible claimants possessing consortium or relational rights through the use of discovery procedures. Trial courts may be urged to postpone trial dates in cases in which a defendant may suspect that the parties-plaintiff are in collusion with prospective non-party claimants who hope to derive some tactical advantage by remaining uninvolved in pending litigation.

Iowa courts have adhered to the familiar procedure used in Lord Campbell's Act of having the personal representative make the recovery for virtually all elements of damage,[146] while at the same time have considered the practical as well as theoretical advantages to abandoning any rigid method under a common law system requiring one person to be the recovery agent for all claims. Since the fact finder could make a separate determination as to individual damages recoverable by each survivor instead of returning a verdict in one lump sum and leaving appropriate allocation to the trial judge or probate court, it serves no purpose to require recovery to pass from the defendant through the hands of the personal representative before reaching the survivors. In practice, survivors are frequently in somewhat of an adversarial position with one another, especially where animosity exists, for example, among surviving children or between the children and the decedent's second spouse. In these situations, the estate's attorney cannot present claims of the various survivors without facing inherently conflicting interests. Hence, in many cases, separate claims should be urged by separate survivors represented by separate counsel.[147] Circumstances may arise in which it will not be possible for the court to obtain personal jurisdiction over one or more survivors, but it is difficult to imagine any serious practical

---

145. 311 N.W.2d at 270.

146. Madison v. Colby, 348 N.W.2d 202, 209 (Iowa 1984); Audubon-Exira Ready Mix, Inc. v. Illinois C.G.R., 335 N.W.2d 148, 151-53 (Iowa 1983).

147. As noted by Davis, *supra* note 4, at 340-41, "[e]ven when the jury apportions the award, there is the argument that the competing claimants are adverse to each other and should be represented independently." This would avoid many awkward situations, such as that arising in *In re Estate of Parsons*, 272 N.W.2d 16 (Iowa 1978), where the probate court approved a settlement yielding proceeds of approximately $75,000, allocating $70,000 to the decedent's surviving widow and $5,000 to his two adopted sons by previous marriage. This allocation (but not the settlement) was reversed on appeal on the basis that the amended probate statute allowing allocation was construed not to have retrospective application; a reallocation was required under intestacy guidelines mandating a $33,333 share to the children instead of $5,000. This obvious creation of a financial windfall for the children after an apparently equitable apportionment by the judge was not a result that was fully satisfactory to the judicial system, and even in *Parsons* it stirred a lengthy and bitter dissenting opinion. *Id.* at 19-24 (Allbee, J., dissenting).

problems in entertaining the dawdling claims of some survivors, once the estate has lumbered into action, notified the survivors, initiated a lawsuit, and applicable statutes of limitation begin to run on a straggler's claim.

IV. Negligence of Decedent or Survivor

Generally, a decedent's negligence presents a bar to, or at least an impairment of, an action for recovery stemming from a fatal accident.[148] Applicability of this rule appears to depend on whether a "true" wrongful death action or a survival statute is deemed to govern the action. The theory underlying this rule, as explained in the *Restatement of Torts*, is that "the right of decedent to have maintained an action had he survived is a condition precedent to maintaining the action"[149] under most of the "true" wrongful death statutes. Likewise, there is strong logic to the position that when, under a survival statute, the decedent's cause of action would have been barred or abated during life by that person's negligence, liability issues in the surviving action should not be enhanced or otherwise transmuted by death.[150]

Provisions of some "true" wrongful death statutes, allowing direct or independent actions by survivors, have been the basis for strong criticism of the rule by commentators[151] and its rejection by some courts.[152] While a survival statute implies that a lawsuit should continue as though it had been brought by the decedent during his lifetime, thereby creating no new right of action, it is often noted that a true wrongful death statute creates "an entirely new cause of action, distinct from and independent of any right of action decedent might have had during his lifetime."[153] Insofar as a court may be dealing with an *independent* right of a beneficiary, the negligence of a person other than the one asserting the right should not serve to bar or impair the rights of the survivor.[154] To flesh out this assertion, consider the following example: Why should the comparative negligence of a mother in operating her car inure to the benefit of her negligent counterpart by barring or diluting the right of her blameless son or daughter to recover for losses such as parental consortium?

Most jurisdictions encounter even greater confusion and frustration in

---

148. *See* Speiser, *supra* note 2, at ch. 5.

149. Restatement (Second) of Torts § 494 (1965).

150. *See* Speiser, *supra* note 2, at § 5:2.

151. *See, e.g.*, Wettach, *Wrongful Death and Contributory Negligence*, 16 N.C.L. Rev. 212 (1937-38); Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death — A Survey and a Proposal*, 16 Tul. L. Rev. 387, 396 (1942); 2 F. Harper & F. James, The Law of Torts § 24.4 at 1289 (1956).

152. *See* Speiser, *supra* note 2, at §§ 11:28 - 11:40. *See also* Madison v. Colby, 348 N.W.2d at 209.

153. Fitzgerald v. Hale, 247 Iowa 1194, 1198, 78 N.W.2d 509, 511 (1956).

154. *See, e.g.*, Fuller v. Buhrow, 292 N.W.2d 672 (Iowa 1980) and Handeland v. Brown, 216 N.W.2d 574 (Iowa 1974).

considering and determining the effect of the negligence of a survivor.[155] Speiser concludes that "the general rule is that causal negligence of an heir or distributee does not bar recovery, not even to the extent of the share of such negligent heir or distributee."[156] This holds true regardless of whether the issue is considered under a true wrongful death act or a survival statute.[157] There appear to be many exceptions to this general rule, which is entirely understandable.

An obvious reason courts have recognized such exceptions is the ancient legal maxim that no one should profit from his own wrong.[158] Speiser acknowledges that the great weight of authority is that a sole beneficiary, one who is entitled to all of the damages, is prohibited by his own negligence from realizing any recovery,[159] but points out that this defense does not apply to all survivors when only one has been found negligent.[160] In short, a wide diversity of rules inheres in this area, as well as no small degree of change and near-confusion.

Even though Speiser has accurately stated the general rules and prevailing viewpoints, it is the opinion of this writer that fair and logical application of common law principles will yield repudiations of most of them. Once it is recognized that a) survivors possess an independent, common law right of action to recover certain elements of damage, such as loss of support, services or consortium; and b) rights of recovery to which a decedent would otherwise have been entitled, such as for pain and suffering, loss of earnings, or medical expenses, survive his death and pass to the personal representative, the matter diminishes to an exercise in elementary logic: applying pertinent rules regarding the contributory or comparative negligence of a decedent or survivor as applicable to relevant claims of damage by a party plaintiff while recognizing their inapplicability to others. Put another way, insofar as a given element of damages, e.g., pre-death pain and suffering, is recoverable by the decedent through the personal representative, then the decedent's own negligence would affect recovery, but the negligence of a survivor would not. Insofar as another element of damages, for instance, loss of consortium, is recoverable by the survivor independently, then the individual survivor's negligence would affect that element of damages, but the negligence of any other person, whether it be the decedent or another survivor, would not apply. This approach avoids the "all or nothing" solutions which seem to plague many decisions, and which can and do produce harsh and

---

155. *See generally*, SPEISER, *supra* note 2, at §§ 5:5 - 5:8. It may be important to determine whether the person who seeks to recover is entitled as a beneficiary of the will or estate of the decedent or as some type of beneficiary under a statutory or independent right.

156. *Id.* at § 5:6.

157. *Id.*

158. *Id.* at § 5:7.

159. *Id.*

160. *Id.* at § 5:8.

unfair results.

Although the rule applied in Iowa, relating to the effect of a decedent's negligence upon damages for loss of consortium as announced in *Wilson*,[161] seems in disagreement with the suggested rationale, a more thorough analysis, employed in *Kuehn v. Jenkins*,[162] lends it support. In *Kuehn*, the decedent's mother, driver of one of two vehicles involved in an accident, was appointed the personal representative of her 21 year-old unmarried daughter's estate, and brought one action on behalf of the estate and a separate action for her own personal injuries and damages.[163] The defendants contended that since one of two survivors was driving the car in which decedent was a passenger, the negligence of that survivor in contributing to the subsequent, fatal accident would bar recovery of those damages which ordinarily would accrue to the benefit of the surviving driver. The court concluded that:

> We have said our statutes are survival statues in *Fitzgerald v. Hale*. Survival acts are distinguished from those statutes patterned after Lord Campbell's Act, which provide that the action is maintained for the benefit of designated persons. As to the latter the contributory negligence of a beneficiary is generally held to be a defense.
>
> But under survival acts contributory negligence of a beneficiary is not a defense, under the general rule.[164]

It should be noted that there was probably no claim in *Kuehn* for loss of consortium by or on behalf of a survivor, nor any for loss of services or support, so that the cause of action pursued is perhaps best characterized as a survival claim in its entirety rather than one partially concerning wrongful death.[165]

That Iowa's public policy and general common law principles generate this suggested rationale also finds some support in the system of recovery employed in dram shop actions in Iowa.[166] Two of the basic purposes of this

---

161. Wilson v. Iowa Power & Light Co., 280 N.W.2d at 373-74.

162. 251 Iowa 718, 100 N.W.2d 610 (1960).

163. *Id.* at 720-21, 100 N.W.2d at 612. Review of Mrs. Kuehn's claim for her personal injuries appears at 251 Iowa 557, 557-66, 100 N.W.2d 604, 606-10, and her claim in the capacity of administrator is found at 251 Iowa 718, 718-42, 100 N.W.2d 610, 610-24. In the former she was the appellant and in the latter she was the appellee.

164. Kuehn v. Jenkins, 251 Iowa at 732, 100 N.W.2d at 618 (citations omitted).

165. *See id.* at 628-34, 100 N.W.2d at 618-19. There is no separate discussion of the elements of damage considered by the jury in arriving at its verdict of $25,000.00 for the administrator in *Kuehn*. There is, however, emphasis in the opinion upon the significance of the case being one brought under survival-type statute rather than a wrongful death or Lord Campbell's-type statute. The decedent was the 21 year-old, unmarried daughter of Clara Kuehn and there is no reference in the opinion to any loss of consortium.

166. *See, e.g.*, Rippel v. J.H.M. of Waterloo, Inc., 328 N.W.2d 499 (Iowa 1983); Rigby v. Eastman, 217 N.W.2d 604 (Iowa 1974); Brooks v. Engel, 207 N.W.2d 110 (Iowa 1973); Pose v. Roosevelt Hotel Co., 208 N.W.2d 19 (Iowa 1973); Robinson v. Bognanno, 213 N.W.2d 530 (Iowa 1973); Williams v. Klemsrud, 197 N.W.2d 614 (Iowa 1972); Berge v. Harris, 170 N.W.2d 621

system are to compensate family members for loss of support, services, or income, as well as to render licensees strictly liable for other common law compensatory damages caused by intoxicated patrons. Hence, at least one unusual situation may be compensable: the wife and children of an intoxicated driver may recover damages even though he drives his car off of the road, causing his own injuries.[167] Although the negligent or inebriated family member cannot recover for personal injuries, this negligence does not preclude recovery by other family members for those elements of damage which independently belong to each.[168] Likewise, in tacit recognition of the principle that persons should not profit by their own wrongs, defendants in dram shop actions have been given the benefit of the defense of assumption of risk when a claimant voluntarily agreed to become a passenger in an intoxicated patron's car,[169] and of the defense of complicity when the claimant participated in the drinking activities of the intoxicated person.[170] Even though the dram shop action is often characterized as one imposing "strict liability,"[171] Iowa courts do not allow a recovery for damages where the claimant has contributed to the occurrence; conversely, the claimant's individual or independent elements of damage are preserved against any defenses available against the injured person.[172]

The common law principles involved embody an attempt to apply common sense to legal problems. When a single tortious act causes two or more distinct and independent, although related, harms, it also gives rise to two or more separate causes of action. The close relationship of such separate actions, or the fact that they arose out of a single incident, does not merge them for all purposes; there must be a proper analysis of each issue with respect to each cause of action. The negligence of a decedent or a survivor should be taken into account only in considering the elements of damage recoverable by that individual. While this would appear to be a solution without equal for simplicity, it is one a majority of courts seem to be missing.

(Iowa 1969); Evans v. Kennedy, 162 N.W.2d 182 (Iowa 1968); Wendelin v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966); Hindman v. Jensen, 259 Iowa 1074, 147 N.W.2d 8 (1966); Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1959); IOWA CODE § 123.92 (1985).

167. Robinson v. Bognanno, 213 N.W.2d 530, 531 (Iowa 1973); Evans v. Kennedy, 162 N.W.2d 182, 184 (Iowa 1968).

168. *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. at 578.

169. Rippel v. J. H. M. of Waterloo, Inc., 328 N.W.2d 499, 500 (Iowa 1983); Bessman v. Harding, 176 N.W.2d 129, 134 (Iowa 1970); Berge v. Harris, 170 N.W.2d 621, 627 (Iowa 1969).

170. Berge v. Harris, 170 N.W.2d 621, 625 (Iowa 1969)(citing several earlier Iowa cases, including Engleken v. Hilger, 43 Iowa 563 (1876)).

171. Berge v. Harris, 170 N.W.2d 621, 627 (Iowa 1969).

172. *See, e.g.*, Rigby v. Eastman, 217 N.W.2d 604 (Iowa 1974); Brooks v. Engel, 207 N.W.2d 110 (Iowa 1973); Pose v. Roosevelt Hotel Co., 208 N.W.2d 19 (Iowa 1973); Wendelin v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966).

V. Mental Anguish, Solace, Grief, and Bereavement of Survivors

A court system which proclaimed that "the death of a human being could not be complained of as an injury,"[173] and which read into ameliorating legislation a sharp restriction on pecuniary recovery, could hardly be expected to turn a favorable ear to the less constrainable and less definable claims which generally can be termed ones for "mental anguish." The same common law courts which were inwardly compelled to acknowledge that the right to recover for wrongful death was "entirely statutory"[174] might be expected to express reservation about approving any claim without some clear precedent or additional legislative expression.

Had this area experienced the usual type of common law development, such as that for damages for personal injury, claims for mental anguish, grief or bereavement may well have been acknowledged long ago. The distinction between recognizing recovery for mental anguish in personal injury cases and denying it in those involving wrongful death is baseless under any common law principle,[175] and logically must be attributed to the assumption that the latter was considered in derogation of the common law and subject to tighter restraints.

Iowa is one of a category of jurisdictions which gave early recognition to the legitimacy of claims for mental anguish, not only when associated with or deriving from physical injury, but also when no accompanying injury had been suffered.[176] In a turn of the century case, *Cowan v. Western Union Telegraph Co.*,[177] the plaintiff eschewed any claim of physical injury either at the time of the incident or afterward, probably in reliance upon a strongly-worded, similar case decided several years earlier, *Mentzer v. Western Union Telegraph Co.*,[178] in which the Supreme Court of Iowa ruled that damages were recoverable from a telegraphic service provider for mental anguish without accompanying physical injury. The defendant in *Cowan*,

---

173. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808).

174. Wilson v. Iowa Power & Light Co., 280 N.W.2d 372, 373 (Iowa 1979).

175. Speiser & Malawer, *supra* note 44, at 2-3. See also *Smith v. Allstate Yacht Rentals, Ltd.*, 293 A.2d 805 (Del. Super. 1972), noting that *Moragne* had created a broad action for wrongful death in maritime cases and that the "debilitating effect of grief and its resultant depression . . . are no less real than pecuniary losses," *id.* at 812-13, thus permitting recovery for grief of decedent's parents, brothers and sisters.

176. In *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N.W. 1 (1895), the negligent failure of the defendant to deliver a telegram to the plaintiff, advising him of the death of his mother and of the funeral plans in time for him to attend the funeral, caused him no pecuniary loss or subsequent injury but only mental anguish; still the court allowed recovery, noting precedent in *Shepard v. Railway Co.*, 77 Iowa 54, 41 N.W. 564 (1889). Mentzer v. Western Union Tel. Co., 93 Iowa at 764, 62 N.W. at 5. In *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N.W. 281 (1904), recovery was permitted when the defendant failed to deliver a telegram sent by plaintiff-widow requesting family members in another town to meet her at the station.

177. 122 Iowa 379, 98 N.W. 281 (1904).

178. 93 Iowa 752, 62 N.W. 1 (1895).

however, based its appeal on the interim overruling of an Indiana case[179] formerly relied upon in the *Mentzer* opinion. The *Cowan* court noted that while many jurisdictions had confined recovery "to cases of mental suffering arising from physical injury wrongfully or negligently inflicted"[180] or merely had held that bare mental anguish "affords no cause of action against the wrongdoer,"[181] no less than six different categories of cases[182] had allowed such damages. Citing support in several cases decided in jurisdictions other than Indiana, the court found itself "not disposed to concur in their recantation."[183] Even more interestingly, the *Cowan* opinion, with a clear tone of approval, alluded to:

> [A] California statute, permitting the father to maintain an action for the death of a minor child, and providing that such damages may be given as, under all the circumstances, may be just, it is held that the parent's mental anguish may be considered by the jury in finding its verdict.[184]

Even so, not everyone was surprised in 1971 in *Wardlow* when the court announced: "Our research does not convince us the element of mental anguish incurred by the parents as a result of the death of their children is a proper matter for consideration in fixing the amount of recovery under rule 8."[185] A steady line of cases over the span of a hundred years had indicated the likely outcome on this issue.[186] Twenty years earlier, in *DeMoss v. Walker*,[187] the court had excluded "sentiment or solace for grief" as a proper consideration for awarding damages either to survivors or to the personal representative. The *Wardlow* court determined that rule 8 was a remedial measure, and the remedy it created was to be interpreted liberally to achieve its intended purpose, thereby allowing judicial cognizance of a claim for loss of child consortium even before the rule was legislatively changed to specify such a recovery. Even the favorably-disposed *Wardlow* court, however, apparently did not dwell much on the possibility of granting recovery for grief or related types of mental anguish.

Like many other jurisdictions, Iowa has long recognized that recovery may be awarded for mental anguish in the absence of physical injury or im-

---

179. Reese v. Western Union Tel. Co., 213 Ind. 294, 24 N.E. 163 (1890).

180. Cowan v. Western Union Tel. Co., 122 Iowa at 382, 98 N.W. at 282.

181. *Id.*

182. *Id.* at 383, 98 N.W. at 282.

183. *Id.* at 381, 98 N.W. at 281.

184. *Id.* at 383, 98 N.W. at 282.

185. Wardlow v. City of Keokuk, 190 N.W.2d at 448; *see also* Haafke v. Mitchell, 347 N.W.2d 381, 389 (Iowa 1984); Iowa-Des Moines Nat'l Bank v. Schwerman Trucking Co., 288 N.W.2d 198, 204 (Iowa 1980).

186. "Bereavement" had been rejected in *Cerny v. Secor*, 211 Iowa 1232, 234 N.W. 193 (1931); "mental suffering" had been rejected in *Kelley v. Central R.R.*, 48 F. 633 (C.C. Iowa 1883); "grief" was rejected in *Donaldson v. Mississippi & Mo. R.R.*, 18 Iowa 280 (1865); "anguish" had been rejected in *Morris v. Chicago, M. & St. P.R.*, 26 F. 22 (C.C. Iowa 1885).

187. 242 Iowa 911, 915, 48 N.W.2d 811, 814 (1951).

pact, where the act was intentional as opposed to merely negligent[188] and where other special circumstances were present.[189] More recently, in 1981, Iowa joined other progressive courts in *Barnhill v. Davis*,[190] acknowledging a right of recovery for mental anguish or emotional distress accruing to a bystander who, although not in any physical danger himself, had witnessed peril or injury to another caused by a defendant's negligence.[191] In 1982, in *Walker v. Clark Equipment Co.*,[192] this rule was extended to cover bystanders claiming strict liability in tort against the manufacturer of a product, which had caused an accident witnessed by the plaintiff.[193] Such opinions clearly indicate that an enlightened court need not fear "that the door will be open to a flood of litigation,"[194] or "that fraudulent claims might be successfully asserted,"[195] as soon as these types of claims are recognized. Following the seminal opinion of the California Supreme Court in *Dillon v. Legg*,[196] the *Barnhill* opinion focused upon the "reasonable foreseeability" test in determining whether such damages should be recoverable.[197] It is significant that in *Barnhill* the anguished plaintiff's mother, whose peril he had witnessed, had suffered no real physical injury,[198] although involved in a collision. Still the court was willing to permit recovery, as long as it could be shown that "a reasonable person in the position of the bystander at least [had] reason to believe, and the bystander must [have] believe[d], that the direct victim of the accident would be seriously injured or killed . . . ."[199] Should a court which has found it foreseeable "that a bystander may be emotionally distressed even though not himself in any physical danger"[200] be more severe or demanding in the case of a family member suffering mental anguish or emotional distress upon learning of an accident which not only *could have caused* serious injury but did, in fact, cause injury serious enough to be fatal? Logic, justice, and fairness would seem to demand that the victims of the ultimate tort, by which the wrongful death of a family member was caused, should have the broadest and most liberal remedies available. Indeed, perhaps the additional requirement of "serious" emo-

---

188. *See* Amos v. Prom, 115 F. Supp. 127 (N.D. Iowa 1953); Holdorf v. Holdorf, 185 Iowa 838, 169 N.W. 737 (1918).

189. *See supra* note 176 and authorities cited therein; *see also* Blakely v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945)(shock and distress at discovering corpse of defendant's decedent who spitefully committed suicide).

190. 300 N.W.2d 104 (Iowa 1981).

191. *Id.* at 105-06.

192. 320 N.W.2d 561 (Iowa 1982).

193. *Id.* at 562-63.

194. Barnhill v. Davis, 300 N.W.2d at 106.

195. *Id.*

196. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

197. Barnhill v. Davis, 300 N.W.2d at 106-08.

198. *Id.* at 105.

199. *Id.* at 108.

200. *Id.* at 107.

tional distress[201] should be discarded where death was not only feared but actually followed. To deny survivors the right to recover for mental anguish under the present statutes or the common law in this state would be to admit of this sort of anomalous posture: If Mr. Barnhill's mother, Mrs. Marin, had been killed in the accident, then he could not recover for mental anguish because, under the *Wardlow* and *DeMoss* analysis,[202] his claim would be one based upon "sentiment or solace for grief;" but since his mother fortuitously survived, his mental anguish is a proper element of damages under the *Dillon* rationale.[203]

It cannot seriously be suggested that the mental anguish, emotional distress or other consortium-type loss of a family member is, in fact, eliminated or diminished if the imperiled person suffers something greater than a slight physical injury, or more than a mere feared injury that never materializes. Indeed, the loss or damage to the family member not involved in the accident without doubt will be greater if the other family member is killed. As noted in *Audubon-Exira*,[204] "the loss is exacerbated"[205] when a spouse claims loss of consortium for an injured husband who dies rather than remaining permanently injured. Common sense dictates that there must be a corresponding "exacerbation" of mental anguish when any family member is killed as opposed to suffering only slight or feared injury.

It should be reason enough to abandon the rule against recovery for "sentiment or solace for grief" by considering the thousands of personal injury cases each year which permit recoveries for almost the same kind of mental anguish. Additionally, the *Barnhill*[206] and *Dillon*[207] category of cases demonstrates that recoveries in many jurisdictions, including Iowa, are based on a type of mental anguish that defies any meaningful distinction when compared with the suffering still denied compensation in cases such as *Wardlow*[208] for grief and bereavement. Moreover, several states possess statutes or judicial interpretations which permit these recoveries.[209] There have

---

201. *Id.* at 107-08. The *Barnhill* opinion required that both the emotional distress to the bystander and the perceived or apparent injury to the direct victim be serious. While the latter requirement of "serious" injury is necessarily met in a death case, the former is not necessarily present. The suggestion here is that while "serious" emotional distress of the bystander might be retained in a personal injury case, the "serious" emotional distress of a family member might be presumed in a death case.

202. *See supra* notes 190-201 and accompanying text.

203. *See supra* notes 196-97 and accompanying text.

204. *See supra* note 135 and accompanying text.

205. Audubon-Exira Ready Mix, Inc. v. Illinois C.G.R.R., 335 N.W.2d at 153.

206. Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981). *See supra* notes 190-91, 197-200 and accompanying text.

207. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *See also supra* note 196 and accompanying text.

208. Wardlow v. City of Keokuk, 190 N.W.2d 439 (Iowa 1971); *see also supra* notes 125-26 and accompanying text.

209. *See* ARK. STAT. ANN. § 27-909 (1979) (allowing "damages as will be fair and just" and

been no widely reported examples of serious injustice produced by decisions in those states which for many years have recognized these damages.[210]

VI. Survival of Decedent's Claims

Early on, almost every American jurisdiction adopted some version of a Lord Campbell's Act statute, and many now have an additional statutory provision usually characterized as a "survival" statute. For a substantial period of time, only two states had *only* a "survival" system, without the accompanying Lord Campbell's Act statute.[211] The two systems are usually distinguished on the basis that the survival statute only provides for the survival and subsequent transfer of the decedent's existing claims to the personal representative, including any claim that could have been maintained had the decedent lived.[212] The other type of statute is a "true" wrongful death act which creates a new cause of action for the benefit of certain classes of beneficiaries or survivors of the decedent's family, depending upon specific statutory provisions, and the right to bring the action rests with the personal representative or, in some jurisdictions, with the survivor or at the survivor's option.[213] Jurisdictions which adopted survival statutes frequently did so as a means to add certain elements of damage, such as pain and suffering of the decedent, to whatever meager recovery elements originally applied.[214] It was assumed that there could be no recovery for the

---

including "mental anguish resulting from such death"); Fla. Stat. Ann. § 768.21 (West 1976) (allowing recovery to the surviving spouse, minor children, and parent "for mental pain and suffering from the date of injury" of the decedent); Kan. Stat. Ann. § 60-1904 (1983) (allowing damages for "mental anguish, suffering, or bereavement"); Md. Cts. & Jud. Proc. Code Ann. § 3-904 (1984) (specifying no limitation to "pecuniary" losses and allowing "damages for mental anguish, emotional pain and suffering" and other general damages for surviving family members); Va. Code § 8.01-52 (1984) (allowing damages for "[s]orrow, mental anguish, and solace"); W. Va. Code § 55-7-6 (1981) (allowing recovery for "[s]orrow, mental anguish and solace"). *See also* Speiser & Malawer, *supra* note 30A, at 18 & 21 (identifying Louisiana and South Carolina as other states which allowed these recoveries).

210. *See* Speiser and Malawer, *supra* note 44, at 18.

211. *See* Speiser, *supra* note 2, at § 1:23, indicating that a majority of states now have some form of survival statute permitting a cause of action to survive after the death of a tort victim, in favor of his personal representative, for the injuries to the decedent.

212. *See* Note, *Damages—Recovery for Pain and Suffering of the Deceased under Iowa Survival Acts*, 42 Iowa L. Rev. 622 (1957), where the two types of statutes are noted with the observation that while many states have both types, "Iowa and Connecticut have only one statute dealing with the problem." *See also* 12 Am. Jur. Trials *Wrongful Death Actions* § 3, which refers to these two states as having a "continuation type" of statute. *Id.* A 1965 amendment, however, engrafted a wrongful death system onto the Iowa survival or continuation procedure. *See* Estate of Johnson, 213 N.W.2d 536 (Iowa 1973).

213. *See* Jones, *Civil Liability for Wrongful Death in Iowa*, 10 Iowa L. Rev. 169, 180 (1925); McCoullough v. Chicago R.I. & P. Ry., 160 Iowa 524, 142 N.W. 67 (1913).

214. As Miller, *Dead People in Torts: A Second Installment*, 22 Cath. U.L. Rev. 73 (1972), observes: "[h]ow legislators moved in to fill the gap in the common law and judges responded to the remedial legislation is the heart of the story on death and survival." *Id.* at 73.

decedent's own individual injuries in the absence of a "survival" statute.[215] The common law right recognized in *Moragne*[216] implies that such statutes are no longer to be regarded as creating the exclusive right to recover for wrongful death.[217]

The uniqueness, or near-uniqueness,[218] of the system which developed in Iowa for calculating damages in wrongful death cases seems to fly counter to the development of wrongful death recovery elsewhere. Only Iowa and Connecticut originally operated systems relying solely on survival statutes.[219] The initiation of this unique survival system in 1851 was probably fortuitous.[220] Although the Iowa statutes provided for survival of the action,[221] accompanying provisions concerning compensable damages for the death of an adult were conspicuously absent until 1911, when the legislature provided some guidelines to rectify inequities created by a series of decisions leaving survivors of female victims virtually remediless.[222] Under the Iowa system:

> [T]he measure of recovery is the present worth of the decedent's life to his estate. It is not controlled or varied by the identity or circumstances of the particular person or persons to whom the recovery inures. The damages personally suffered by the next of kin are not to be considered. The elements of damage are those of the original cause of action which existed in the injured party before his death . . . .[223]

With perhaps one exception,[224] however, the rule in every other jurisdiction, including the various federal or admiralty rules,[225] clearly required consideration of the identity or circumstances of the particular person or persons to

---

215. 12 AM. JUR. TRIALS *Wrongful Death Actions* § 4 (1966), notes that although Lord Campbell's Act "provided for an action by the administrator, the act was construed by the English courts as creating a new cause of action and not as providing for the survival of any action that the party injured might have had against the wrongdoer." *Id.*

216. 398 U.S. at 375. *See also supra* notes 65-97 and accompanying text.

217. *See* Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972), where it was noted that "our wrongful death statutes will no longer be regarded as 'creating the right' to recovery for wrongful death" based upon the *Moragne* decision. *Id.* at _, 284 N.E.2d at 229.

218. Although Connecticut also had only a survival statute, it was worded differently. *See* Sherman v. Western Stage Co., 24 Iowa 515, 549 (1868). The system which evolved in that state was soon to be noticeably different from Iowa's. The only true wrongful death act provision in Iowa was IOWA R. CIV. P. 8 and its predecessors, providing for recovery for the wrongful death of a child.

219. *See supra* note 212 and accompanying text.

220. *See* Jones, *Civil Liability for Wrongful Death in Iowa*, 10 IOWA L. REV. 169, 184-85.

221. IOWA CODE §§ 611.20, 611.22 (1985).

222. *See* Nolte v. Chicago R.I. & P. Ry., 165 Iowa 721, 147 N.W. 192 (1914); Myers v. Chicago B. & Q.R.R., 152 Iowa 330, 131 N.W. 770 (1911).

223. Jones, *Civil Liability for Wrongful Death in Iowa*, 10 IOWA L. REV. at 180 (footnote omitted).

224. Connecticut also had a system based solely on a "survival" system. *See supra* note 140C and accompanying text.

225. *See* SPEISER, *supra* note 2, at §§ 1:17 - 1:22.

whom the recovery insures rather than to attempt to evaluate the decedent's life to his estate. The Iowa system has always been difficult to administer and to reconcile with public policy considerations, or even to reconcile with itself. As early as 1925, Dean Jones was questioning whether Iowa opinions reported to date were "logical and consistent."[226]

Even the unusual absence of a Lord Campbell's-type statute and the dependence upon survival legislation does not fully account for Iowa's development of the "loss of accumulations to the estate" theory as the appropriate measure of damages.[227] Wrongful death recovery in Nineteenth Century and early Twentieth Century cases, before "support and services" elements were added, was labeled as that available under a "survival" system,[228] but looked more like a well-restricted Lord Campbell's-type method of calculating damages.[229] There was no meaningful distinction between the Iowa "loss of accumulations" calculation of damages and the "loss of inheritance" theory used in some true wrongful death jurisdictions to calculate damages.[230] The other state which applied only a survival statute, Connecticut, had developed a far different structure which did not enter the morass of attempting to project ultimate losses to the estate. The Connecticut system has been described succinctly:

> [D]amages for wrongful death, under the basic survivorship theory of our law, are assessed on the basis of the loss to the *decedent* had he lived, and, except in that sense, not on the basis of loss to his estate. It follows that in many respects damages are assessed in the same way as in a non-fatal case involving a total and permanent destruction of capacity to carry on life's activities.[231]

The Connecticut system of calculating "the loss from the standpoint of the party injured, and thus, in a sense, tak[ing] the value of his life to him"[232] probably has proven to be a more coherent system.[233]

The logic of measuring damages either by attempting to evaluate the

---

226. Jones, *Civil Liability for Wrongful Death in Iowa*, 10 IOWA L. REV. at 180.

227. Note, *Specific Performance and Dower Rights*, 11 IOWA L. REV. 97, 98 (1926).

228. *Id.*

229. *Id.*

230. For an explanation of the "loss of inheritance" theory, see the celebrated case *O'Toole v. United States*, 242 F.2d 308 (3d Cir. 1957), and SPEISER, *supra* note 2, at §§ 3:39 - 3:42. While the size of the verdict in the *O'Toole* case was enough to raise eyebrows at the time, the theory of recovery is a rather restricted one for all but the extraordinary case.

231. Floyd v. Fruit Indus., Inc., 144 Conn. 659, 669-70, 136 A.2d 918, 925 (1957). *See also* Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271 (D. Conn. 1974) (superbly analyzed opinion by Judge Blumenfeld in one of those rare cases where wrongful death action was tried to the court).

232. Broughel v. Southern N.E. Tel. Co., 73 Conn. 614, _, 48 A. 751, 753 (1901).

233. Dean Henry Craig Jones noted that "the application of the survival theory has been more consistent in the Connecticut cases than in the Iowa decisions. . . ." Note, *Specific Performance and Dower Rights*, 11 IOWA L. REV. at 34.

loss to a person who is now deceased or by attempting to evaluate the resulting losses to persons who survived the decedent can be debated, but both methods have a certain logic and coherence. The estate of the decedent is little more than a legal fiction or device through which recovery can be channeled and appropriately allocated or proportioned. The attempt to establish amounts of recovery by "measuring the damages to the estate" is a fictional exercise because, in the final analysis, the estate in fact has no damages and realizes no recovery, being in existence only for a few months, ideally, or at most a couple of years; rather it serves as a distribution mechanism, and the damages measured really are those of the beneficiaries or deceased victim.[234] The traditional Iowa method may be said to have measured damages to the survivors by calculating the size of the loss of their expected inheritance[235] as opposed to measuring any loss of support or services to the beneficiaries, or measuring any loss to the decedent. Expressed in these terms, the traditional Iowa method recognized the right of survivors to recover only their lost inheritance, augmented by part or all of the funeral expenses. Until 1956, when *Fitzgerald* granted a right, previously denied, to recover for the decedent's pain and suffering during the period between the time of injury and the instant of death, the Iowa method for calculating recovery had the effect of allowing none of the decedent's causes of action to survive,[236] unless the action had been instituted by the decedent during his own lifetime.[237]

---

234. See *id.* at 41.

235. *See* O'Toole v. United States, 242 F.2d 308 (3d Cir. 1957); Sullivan, *Wrongful Death Damages—Loss of Prospective Inheritance*, 24 AM. JUR. P.O.F. 2d 211 (1980). The *O'Toole* case was hailed as one of the most significant death-damage cases in modern times. *See* SPEISER, *supra* note 2, at § 3:40; but, other than the size of the verdict, it was not more remarkable than any other case that used, under one label or another, a lost inheritance element of damage plus a lost support element of damages.

236. As Dean Jones noted in discussing the difficulty encountered in attempting to reconcile Iowa decisions with those of other jurisdictions:

> [T]he disagreement between the Iowa decisions and those in other states having survival statutes apparently is due to the failure of the Iowa court to follow the survival principle in the early cases dealing with the damage to be compensated. Having held that the injury to be cured was not that suffered by the injured person plus recovery for the death, as was held in other jurisdictions having survival statutes, but that the damage to be assessed was that suffered by the estate, the Iowa court was led to rely for support upon decisions under death statutes modeled upon Lord Campbell's Act.

Note, *Specific Performance and Dower Rights*, 11 IOWA L. REV. at 41. He goes on to point out the difficulty in determining evidentiary problems was compounded by selecting the "damage to the estate" rule "which ignored the survival theory as to the damage to be compensated and was consistent only with the rules set out in death statutes." *Id.* at 41-42.

237. *See* Fitzgerald v. Hale, 247 Iowa 1194, 78 N.W.2d 509 (1956); *see also* Boyle v. Bornholtz, 224 Iowa 90, 275 N.W. 479 (1937), where it is noted that "[t]he measure of damages is not the same in actions commenced by the injured party and in actions commenced by his administrator" and that "[i]f the action is commenced by the administrator he cannot recover for loss or pain and suffering sustained by the decedent" because the administrator's claim "is

The necessity of having a survival statute has been all but completely eliminated by *Moragne*. The time has arrived to take a fresh look at the elements of damage recoverable by a decedent's representative in the absence of historical inhibitions associated with a "purely statutory" right. Care must be exercised to avoid duplication of those damages deemed allowable to the representative of the estate and those damages deemed allowable to the survivors. As previously suggested,[238] if overlapping areas exist, public policy may indicate a preference for one claimant, probably the survivor, over another, or defenses such as contributory or comparative negligence may be available against one claimant which are unavailable as against the claim of another. The process of sorting out the preferences to be accorded to one claimant or the other, and of sorting through the applicability of defenses against each individual claimant should be no more difficult in death cases than it is in the context of personal injury. As the *Moragne* opinion suggested, "the law applied in personal injury cases will answer all questions that arise in death cases."[239]

VII. Classes of Claimants

Though logic and justice demand that the legal system open its doors to the surviving spouse, parent or child of a wrongfully killed person to recover for several types of losses, the demand may not be so pronounced when claims are made on behalf of grandparents, siblings, other heirs or next of kin, collateral relatives, dependents, or beneficiaries.[240] While grandparents, grandchildren, stepparents, and stepchildren were expressly included in the class of permissible claimants under Lord Campbell's Act,[241] together with the customary categories (spouse, parent and child), case law in some jurisdictions has denied recovery to some of these ancillary categories.[242] On the other hand, several states now have provided statutory recovery for classes other than the customary three.[243] It is difficult to generalize about the rules

---

for the purpose of repairing the damages to his estate" only but not "to right the wrong done to" the decedent. Boyle v. Bornholtz, 224 Iowa at 93, 275 N.W. at 482. In other words, actions survive but not rights to actions or causes of action. *See also* the analysis of Dean Jones, Note, *Specific Performance and Dower Rights*, 11 Iowa L. Rev. at 44-45. *Compare* Muldowney v. Illinois C. Ry., 36 Iowa 462 (1873) *with* Donaldson v. Mississippi & Mo. R.R., 18 Iowa 280 (1865).

238. *See supra* Section III.

239. Moragne v. States Marine Lines, Inc., 398 U.S. at 406.

240. *See* Speiser, *supra* note 2, at ch. 10.

241. 1846, 9 & 10 Vict., ch. 93 states: "[t]he Word 'Parent' shall include Father and Mother, and Grandfather and Grandmother, and Stepfather and Stepmother; and the Word 'Child' shall include Son and Daughter, Grandson and Granddaughter, and Stepson and Stepdaughter." *Id.*

242. *See* Acton v. Shields, 386 S.W.2d 363 (Mo. 1965) (denying recovery to grandparents of an unborn child who left no surviving parents).

243. *See, e.g.*, Ark. Stat. Ann. § 27-909 (1985) (naming "brother, sister or persons stand-

for "other classes" of claimants, but no plurality appears to expressly oppose direct claims by such classes of survivors among the various jurisdictions.

Some jurisdictions merely permit claimants other than spouse, parent and child to recover as legal beneficiaries of the estate. Even this condonation of indirect benefit to other classes of claimants represents some degree of acceptance of their rights and acknowledgment of their claims for damages. But, it is important to recognize that many jurisdictions have gone far beyond allocating recovery only to first degree relatives, simply as first in the line of inheritance to pecuniary damages awarded to the estate, and have based recovery on the direct and personal losses, including consortium, suffered by survivors who were not necessarily a part of the decedent's nuclear family.[244] Statutes and cases in these jurisdictions exemplify the broad

---

ing *in loco parentis* to the deceased, and persons to whom the deceased stood *in loco parentis*," as classes of persons who might recover for "mental anguish"); FLA. STAT. § 768.18 (1985) (naming "any blood relatives and adopted brothers and sisters who are at least partially dependent on the decedent for support or services"). Several states allow recovery for other class members who can show dependency. *See, e.g.*, LA. CIV. CODE ANN. art. 2315 (West 1985) (naming "brothers and sisters" only in the event that there were no survivors in the customary three classes). Other jurisdictions similarly condition the recovery of such classes. *See* MICH. COMP. LAWS § 27A.2922 (1985), which establishes certain rights for a claim of loss of consortium by "next of kin." *Id.* This appeared to some litigants to be a limitation of such rights to the highest surviving ranked class, or *nearest* of kin, but was interpreted in *Crystal v. Hubbard*, 414 Mich. 297, 324 N.W.2d 869 (1982), to allow consortium claims for the decedent's five surviving brothers and sisters (second-degree kin) even though the decedent was also survived by her parents (first-degree kin) who also recovered for loss of consortium. *Id.* at _, 324 N.W.2d at 870, 873, 880-81. Mississippi, MISS. CODE ANN. § 11-7-13 (1972), includes brothers and sisters; New Mexico, N.M. STAT. ANN. § 22-20-3 (1978), lists grandparents, grandchildren, brothers and sisters; Virginia, VA. CODE § 8.01-53 (1950), names grandparents, grandchildren, brothers and sisters as possible distributees; and Wisconsin, WISC. STAT. ANN. § 895.04 (West 1983), names brothers and sisters as possible distributees. To this list might be added Maryland and Washington and other jurisdictions which merely designate the class as "next of kin," "related by blood," "heirs," etc.

244. In *Estate of Scott v. Burger King Corp.*, 95 Mich. App. 694, 291 N.W.2d 174 (1980), the parents and siblings of the decedent sought to intervene as plaintiffs in a suit initiated by their decedent's administrator, his surviving spouse, for the benefit of herself and their minor child, and the appellate court agreed with the parents and siblings, even though they were not the nearest surviving relatives, based upon statutory language, reversing the trial court's ruling against the motion to intervene. The court noted that "[l]oss of companionship, and pecuniary support from a decedent should not turn on the vagaries of survival of a person more closely related by blood to a decedent than another who sustained a loss." *Id.* at _, 291 N.W.2d at 178; *see also* Wilson v. Pittman, 307 So. 2d 804 (La. Ct. App. 1975)(recovery in the amount of $5,000.00 allowed for each of five adult children of the 59-year-old decedent who, although not residing with all of the children, had maintained a close relationship); Scoville v. Missouri P.R.R., 458 F.2d 639 (8th Cir. 1972) (recovery allowed for mental anguish to each of several siblings of the decedents, even though parents survived and also recovered in the same action and even though the estates made separate recoveries); Jordan v. Delta Drilling Co., 541 P.2d 39 (Wyo. 1975)(recovery allowed for parents of decedent, as well as for illegitimate child who had never received support from the decedent, the child's natural father). Although most jurisdictions limit the ability to maintain an action to cases where designated survivors exist, even

acknowledgment of the seriousness of such losses, and form the basis for a common law recognition of the independent right of such persons to recover damages for wrongful death.[245]

An early Iowa case, *Walter v. Chicago, Rhode Island & Pacific Railroad*,[246] rejected the right of next of kin to claim damages where a railroad employee was killed leaving no surviving spouse, parent or child. Even current Iowa wrongful death and survivor statutory provisions focus upon the rights of the spouse, parent, and child.[247] This writer has not found an Iowa opinion in which the mental anguish or consortium-type loss of a person other than a spouse, parent or child of the decedent was recognized in a wrongful death case. It is almost uniformly assumed that the established and inflexible rules applicable in this area prohibit such elements of damage.

If, however, it is assumed that the flexible doctrines of the common law are to be appropriately applied to determine the proper elements of damage in such cases, as suggested in *Moragne*, this presumption of nonrecoverability must be altered, since common law principles applicable to personal injury cases which recognize such claims. Has the common law of Iowa ever recognized in personal injury cases a right of recovery for mental anguish or loss of consortium for a family member of the victim, other than a spouse, parent or child? Clearly, an affirmative answer was given in the *Barnhill* case. Although the plaintiff in *Barnhill* was claiming damages for injury or apprehension of injury to a parent rather than a second-degree relative, the Supreme Court of Iowa went on record as approving such claims in cases where the victim or apparent victim was a second-degree relative of the person claiming damages for mental anguish.[248] The *Barnhill* court reasonably fixed the appropriate limit of such claims to persons who were "related within the second degree of consanguinity or affinity."[249] Other factors to be considered include the court's requirement of "serious" injury, "sensory and

---

though a personal representative of the estate has been appointed (*see* SPEISER, *supra* note 2, at § 10:1), there are exceptions. In *Park v. Rockwell Int'l Corp.*, 121 N.H. 894, 436 A.2d 1136 (1981), it was held that the absence of surviving dependents did not defeat the action as a matter of equal protection to persons who die without such survivors; Connecticut, which may stand alone in this regard, has a statutory provision which designates that recovery for wrongful death is to be distributed, after payment of certain expenses and support of surviving spouse and family, to the beneficiaries of and in accordance with the decedent's last will and testament, and if no will exists, then by the laws of intestacy, thereby allowing recovery by survivors who may be only collateral relatives, completely unrelated by blood or marriage, or nondependents. CONN. GEN. STAT. § 45-280 (1981). Perhaps this should not be a surprising development in a state which historically has followed the "survival" statute system rather than the Lord Campbell's or wrongful death act system.

245. *See* RESTATEMENT (SECOND) OF TORTS § 925(k) (1965).

246. 36 Iowa 458 (1873).

247. IOWA CODE § 613.15 (1985) (specifying recovery by or on behalf of "spouse or parent"); *see also* IOWA R. CIV. P. 8.

248. Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981).

249. *Id.*

contemporaneous observance of the accident," and physical presence "near the scene of the accident."[250]

Thus, Iowa has allowed bystander claims for mental anguish to second-degree relatives in situations where the direct victim might have pursued a common law personal injury claim, provided that certain other specified circumstances were present. While many death cases would not present situations in which the second-degree relative physically was present at the scene of the fatal accident, as required in *Barnhill* or *Dillon*, the additional, inherent requirement of actual death rather than serious injury or merely the potential for serious injury, along with the requisite evidentiary showing of a consortium or other loss, provides the guarantee of genuineness that the court was seeking to secure in cases like *Barnhill*.[251] There can be no serious question about the element of foreseeability of such damages in the event of a fatal incident.

Based on *Barnhill*, then, it would appear that a person could recover damages for mental anguish when personal injury was inflicted upon a sibling.[252] It would not be logical or fair to hold that Mr. Barnhill could recover for mental anguish as a bystander who witnessed his sister narrowly escaping injury in an automobile accident, but could not recover for such elements if he watched his sister being killed.

Has the Supreme Court of Iowa ever considered a wrongful death case where a second-degree relative claimed damages for mental anguish? In one sense, it has. In *Walker v. Clark Equipment Co.*,[253] in which the court responded to certified questions from a federal court, a claim of mental anguish was pressed by the sister of the victim.[254] The victim's sister alleged she had witnessed the incident, rather than learning about it afterwards, and without question her brother had been killed, not merely injured.[255] It was unclear in *Walker* whether the defendant ever attempted to claim an exclusion of the sister's claim by operation of rules regarding claims for wrongful death, and it was not one of the certified questions, but there was no repudiation of the claim on this basis by the court. Although *Walker* did not present the issue of the recoverability of a loss of sibling consortium in wrongful death cases, still it indicates how closely the flexible doctrines of the common law have come to this issue without suggesting rejection.

There would appear to be no reason to exclude grandparents, stepchildren, and other classes of wrongful death claimants, where such rights have

---

250. *Id.*

251. *Id.* at 107. The court speaks of "some guarantee of genuineness." *Id.*

252. Although in *Barnhill* the relative who was threatened with harm was the plaintiff's mother, the court imposed the express limitation that victim and bystander be "related within the second degree of consanguinity or affinity," which would allow for situations involving injury to siblings. *Id.* at 108.

253. 320 N.W.2d 561 (Iowa 1982).

254. *Id.* at 562.

255. *Id.* at 562-63.

been recognized broadly and over a period extending as far back as 1846 and Lord Campbell's Act. Iowa, like many other states, protects the visitation rights between grandparents and grandchildren;[256] if such relationships are significant enough to deserve that level of protection, then it seems plausible that damages might accrue to those persons if the relationship was suddenly terminated by wrongful death. Modern courts are seldom impressed by arguments that if such claims are allowed "the door will be open to a flood of litigation,"[257] or that "fraudulent claims might successfully be asserted,"[258] when to accept these arguments would result in "a wholesale rejection"[259] of claims that might otherwise be valid. Rather, courts are more concerned with appropriately "defining limits to the liability"[260] of defendants to such claims. When the damage to a second-degree relative is real, and when evidence is marshalled which convinces the jury of its genuineness, there is no strong reason to categorically deny such a claim. Since *Moragne* has instructed the application of common law personal injury principles to such issues, claims by this class should be allowed, perhaps within appropriate guidelines similar to those set forth in cases such as *Barnhill*.

VIII. Conclusion

When the law follows common sense it becomes stronger and enjoys greater force and support. Insofar as the average person might consider it "ridiculous" that a widow or child had no common law right to sue for the death of a husband or father, faith in our judicial system has been eroded. A cursory reading of Justice Harlan's opinion in *Moragne* would leave an average person puzzled as to how the legal system in this nation allowed itself to become so thoroughly mired in impractical notions concerning wrongful death for such a long time. The process of applying common sense to wrongful death issues by using common law principles, developed over several generations in nonfatal personal injury cases, is one to be welcomed and celebrated. As this process evolves in each jurisdiction, the principled judgment of one state will begin to provide guidance to others, in keeping with the tradition of common law development so long held in abeyance in the context of wrongful death issues.

The contours of wrongful death recovery a generation from now may be significantly at variance with some of the suggestions offered herein. These future contours, however, will be far more at variance with the shape of wrongful death recovery in most jurisdictions at present and with that which has persisted for the past century or more. Wrongful death cases will

256. *See* Iowa Code §§ 598.35, 252.5 (1985).
257. Barnhill v. Davis, 300 N.W.2d at 106.
258. *Id.*
259. *Id.*
260. *Id.*

someday cease to be the stepchild of the legal system. The catastrophic nature of most fatal accidents will be treated as such by the courts; the legal system will function as freely in these cases as it has in the area of personal injuries, where the consequences often are not as catastrophic.

Not all of the significant issues arising in wrongful death cases have been touched upon here — only some of the more obvious ones. It is essential to eliminate the artificial obstacles which have obscured proper resolution of these issues, obstacles which have been established, for the most part, by the assumption that death cases are governed by special, inflexible rules. Negligence should be apportioned to appropriate persons in a common sense manner rather than by the use of rules which do not provide for accurate analysis. Claims of various survivors should be considered on a common sense basis from the perspective of the individual claimant rather than through the often confusing, artificial lens of the personal representative. Special claims and unusual damages merit consideration on a common sense basis, underlying a structure of useful, but flexible, guidelines from appellate courts. Once the process of determining these issues by the application of common law rules, as *Moragne* advises, has taken hold, the development of wrongful death law will begin to mature at a rapid pace.