emption to be decided by the courts.[36] Although this may have been a suitable solution at the time, the rapid growth of the nuclear power industry, coupled with an increased demand for electrical power, has occasioned the construction of numerous nuclear utilization facilities, offering the prospect of increased litigation concerning the extent of federal authority. This would suggest the present need for a clear delineation of state-federal authority, especially in light of the great interest shown in this litigation by other states.

In addition, the problem of environmental degradation has been dealt with legislatively in several widely different enactments since the original passage of the Atomic Energy Act and its subsequent amendments. These enactments have recognized the special interest which the states have in protecting the natural environment in the interest of the health and safety of their citizens.[37]

Section 274(k) of the 1959 amendment to the Atomic Energy Act provides that nothing contained in the Act should be construed so as to affect the authority of the states to regulate activities other than protection against radiation hazards.[38] As stated previously, the concurrent regulation of the discharge of radioactive effluents as pollution control measures may impair the federal superintendence in other facets of radiation protection. Thus, section 274(k) would appear to indicate a need for congressional action to eliminate possible conflicts between the policies of regulation of atomic energy and environmental protection.

Sections 102(2)(a) and (b) of the National Environmental Protection Act (NEPA)[39] anticipate the use of an interdisciplinary approach which gives consideration to environmental factors in addition to technological and economic considerations. The AEC is charged with the responsibility of observing the requirements of the NEPA. When first created, the AEC was charged with the dual functions of both promoting and regulating the atomic energy industry—a combination of objectives which may in certain circumstances become mutually exclusive or the basis for numerous administrative difficulties. When combined with the environmental directive of the NEPA, these administrative difficulties may become almost insurmountable.

Although it is readily apparent that Congress has impliedly pre-empted the field of atomic energy, the delicate balancing process required by the NEPA would seem to suggest the need for a legislative clarification of responsibilities so as not to impair the highly sensitive right of the states to legislate for the protection of the health and safety of their citizens.

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[36] Note, *Jurisdiction—Atomic Energy*, 68 MICH. L. REV. 1294, 1303-04 (1970).

[37] Environmental Education Act, 20 U.S.C. § 1531 (1970); Water Quality Improvement Act of 1970, 33 U.S.C. § 1151 (1970); Air Quality Act of 1967, 42 U.S.C. § 1857 (1970); Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4372 (1970). An extremely thoughtful discussion of these acts may be found in *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1111-29 (D.C. Cir. 1971).

[38] 42 U.S.C. § 2021(k) (1970).

[39] National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970).

Damages—RECOVERY FOR LOSS OF MINOR'S COMPANIONSHIP AND SOCIETY WAS ALLOWED IN A WRONGFUL DEATH ACTION BY PARENTS WITHOUT GIVING ANY CONSIDERATION FOR GRIEF, MENTAL ANGUISH, OR SUFFERING OF THE PARENTS BY REASON OF SUCH CHILD'S WRONGFUL DEATH.—*Wardlow v. City of Keokuk* (Iowa 1971).

Four minor children were killed by drowning in a public park owned and maintained by the city of Keokuk, Iowa. All four children, while playing in a stream of water, were swept into a storm sewer opening in or near the park and drowned. In an action by the parents for wrongful death of the children, the trial court struck from the petitions allegations concerning loss of companionship and society and those relating to mental anguish of the parents as not constituting a proper measure of damages. *Held*, affirmed in part, reversed in part, and remanded with directions. Where an action is prosecuted by the father, or in circumstances where it is permitted, by the mother for wrongful death of a minor under Iowa law, loss of companionship and society of a minor during his minority is a proper element to be considered by trier of fact in fixing amount awarded for "loss of services" without giving any consideration for grief, mental anguish, or suffering of the parents by reason of such child's wrongful death.[1] *Wardlow v. City of Keokuk*, 190 N.W.2d 439 (Iowa 1971).

At common law there was no civil cause of action for the negligent killing of a human being.[2] Damages could only be awarded when the negligent act produced a non-fatal injury.[3] Although a fatal negligent act was tortuous, at common law the cause of action died with the plaintiff. The result was that it was more profitable for the defendant to kill the plaintiff than to merely injure him.[4] Since this was intolerable, it was changed in England by the passage of the Fatal Accidents Act of 1846, commonly known as Lord Campbell's Act.[5] Every American state now has a wrongful death statute.[6] Most of these statutes were modeled after Lord Campbell's Act. These are true death acts which create a new cause of action for the death in favor of certain designated persons, usually relatives. The designated survivors of the decedent have a cause of action for their own personal loss due to the death of the decedent. A minority of states merely have "survival acts" which proceed upon the theory of preserving the cause of action vested in the decedent at the moment of his

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1 Wardlow v. City of Keokuk, 190 N.W.2d 439 (Iowa 1971).
2 C. McCORMICK, DAMAGES § 93 (1935).
3 *Id.*
4 W. PROSSER, LAW OF TORTS § 121 (3d ed. 1964).
5 9 & 10 Vict. c.93 (1846).
6 W. PROSSER, LAW OF TORTS § 121 (3d ed. 1964). See Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAWYER 213 (1971) for a state by state survey of the statutes and case law on recovery for wrongful death of a child.

death.[7] Under survival acts, damages are awarded only for the loss to the decedent's estate without regard to who benefits from the recovery.

Recovery for wrongful death of a child in the United States is entirely statutory. In most states there is no special statute providing for recovery for the wrongful death of a child. Instead, the children's cases are tried under the general wrongful death act of the state. The choice of forum thus becomes a critical factor in the type of damages the plaintiff may recover. Iowa's general wrongful death act is of the survival type.[8] In addition, Iowa has a survival statute which provides the measure of recovery for injury or death of a spouse.[9] Iowa also has a death type statute which was applied in *Wardlow* that allows a parent to recover damages for the wrongful death of a minor child.[10] Under Iowa Rule of Civil Procedure 8: "A father, or if he be dead, imprisoned or has deserted the family, then the mother, may sue for the expense and actual loss of services resulting from injury to or death of a minor child."[11] This provision is a true death act in that compensation is given individual beneficiaries for loss of the economic benefit which they might reasonably have expected to receive from the decedent child. Actions brought under Rule 8 are not for the injury to the child but are for the injury to the father as a result of the father's loss of the child.

The major elements of damages recoverable under Rule 8 are (1) expenses and (2) loss of services. Expenses recoverable include cost incurred for medical attendance, nursing and the cost of a suitable burial.[12] Usually the major element of damages recoverable is "loss of services." Lord Campbell's Act, the original death act, did not specify what the measure of damages would be.[13] Instead, the Act provided for recovery by beneficiaries of "damages proportionate to the injury resulting from such death."[14] Case law in England soon after passage of the Act, however, limited recovery for the wrongful death of a human being to the "pecuniary" injury to the plaintiff.[15] It was felt that this interpretation would prevent excessive verdicts based on intangibles like sorrow and grief which could ruin the defendant financially.[16] Prior to *Wardlow,* Iowa followed this pecuniary loss doctrine in wrongful death cases. The measure of damages for the loss of services in the case of a minor was the present value of what the decedent would have earned during his minority[17] minus the amount it would have cost for his support and mainte-

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7 W. PROSSER, *supra* note 6, § 121.
8 IOWA CODE § 611.20 (1971).
9 IOWA CODE § 613.15 (1971).
10 IOWA R. CIV. P. 8.
11 *Id.*
12 Carnego v. Crescent Coal Co., 164 Iowa 552, 554, 146 N.W. 38, 39 (1914). For a survey of wrongful death damages in Iowa see Note, *Wrongful Death Damages in Iowa,* 48 IOWA L. REV. 666 (1963).
13 9 & 10 Vict. c.93 (1846).
14 *Id.* See MINN. STAT. § 573.02 (1971) for a typical death-type act patterned after Lord Campbell's Act.
15 Blake v. Midland Ry., 18 Q.B. 93, 118 Eng. Rep. 35 (1852).
16 *Id.* at 111, 118 Eng. Rep. at 41-42.
17 There can be no recovery for the death of an emancipated child under

nance during such period.[18] Loss of society, love, and companionship have been held not recoverable under Iowa's wrongful death act when applied to the death of a parent or spouse.[19] Prior to *Wardlow*, there were no Iowa decisions indicating whether parents could recover these elements in the wrongful death of a child. Mental suffering of the deceased's relatives has not been recoverable,[20] nor does *Wardlow* provide for such recovery.[21]

Most jurisdictions limit recovery under death legislation applicable to minors to pecuniary loss caused by death.[22] There is sharp conflict among authorities whether the loss of the deceased minor's society and companionship are elements of damages in a wrongful death action and whether an award may be made for the grief and mental anguish of the parents of the deceased minor.[23] Under the pecuniary loss doctrine, a satisfactory measurement can be made only when it can be shown by the deceased's past earnings and contributions to the beneficiary what he would probably have received in the future. When Lord Campbell's Act was passed children were an economic asset because child labor was common in the fields and factories. Today, however, it is unrealistic to view all children as economic assets.[24] The cost of maintaining the child is usually far greater than any monetary contributions he may make to his parents. Strictly applied, few awards could be recovered under the pecuniary loss doctrine. In *Fussner v. Andert*[25] the Minnesota supreme court, in applying their pecuniary loss statute[26] said:

IOWA R. CIV. P. 8. *See* Lipovac v. Iowa Ry. and Light Co., 202 Iowa 517, 210 N.W. 573 (1926). Any recovery for the death of an emancipated child would be under Iowa's survivor's statute, IOWA CODE § 611.20 (1971); such recovery would be for the loss to the decedent's estate only.

[15] Carnego v. Crescent Coal Co., 164 Iowa 552, 146 N.W. 38 (1914); Benton v. Chicago R.I. & P. Ry., 55 Iowa 496, 8 N.W. 330 (1881). Prior to *Wardlow*, the Iowa supreme court had not specifically decided whether loss of companionship and society were proper elements of damage in the wrongful death of a minor. In *Leahy v. Morgan*, 275 F. Supp. 424 (N.D. Iowa 1967), the court refused to dismiss the plaintiff's claim of damages for loss of companionship and affection of a minor child because there appeared to be no clear Iowa stand on that issue.

[19] DeMoss v. Walker, 242 Iowa 911, 48 N.W.2d 811 (1951); Cerney v. Secor, 211 Iowa 1232, 234 N.W. 193 (1931).

[20] Cerney v. Secor, 211 Iowa 1232, 234 N.W. 193 (1931) (the action, however, was brought under Iowa's survivor's statute and not Rule 8).

[21] 190 N.W.2d 439 (Iowa 1971).

[22] Pierce v. Connors, 20 Colo. 178, 37 P. 721 (1894); Benton v. Chicago R.I. & P. Ry., 55 Iowa 496, 8 N.W. 330 (1881); American Barge Line Co. v. Leatherman, 306 Ky. 284, 206 S.W.2d 955 (1947). *See generally* Annot., 14 A.L.R.2d 485, 502 (1950); Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAWYER 213 (1971).

[23] *See* Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAWYER 213 (1971); *see generally* Annot., 14 A.L.R.2d 485, 502 (1950).

Presently six states have statutes which expressly allow loss of companionship as an element of damages in actions for wrongful death: HAWAII REV. LAWS § 633-3 (1971); KANSAS STAT. ANN. § 60-3203 (1971); NEV. REV. STAT. § 41-090(A) (1971); R.C.W.A. 4.24.010 (1971) (Washington); WIS. STAT. ANN. § 895.04(4) (1972); WYOMING STAT. ANN. § 1-1066 (1971).

[24] Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538 (1955).

[25] 261 Minn. 347, 113 N.W.2d 355 (1961).

[26] MINN. STAT. § 573.02 (1971) reads as follows:

> We must view the death-by-wrongful-act statute in the light of present-day conditions. It must be conceded that the majority of today's children render far less service to their parents than did children in the last century when the test was formulated. . . . With the passage of time the significance of money loss has been diminished. Conversely, there is a growing appreciation of the true value to the parent of the rewards which flow from the family relationship and are manifested in acts of material aid, comfort, and assistance which were once considered to be only of sentimental character.[27]

The court in *Fussner* went on to hold that the loss of advice, comfort, assistance and protection to the parents might be found to be of a pecuniary value and thus proper elements in setting damages.

Prior to 1967, the state of Washington's measure of recovery in wrongful death of minors cases was the loss of services minus cost of maintenance (pecuniary loss). In *Lockhart v. Besel,*[28] however, the Supreme Court of Washington allowed recovery for loss of love, companionship, and destruction of the parent-child relationship in addition to loss of services and support.[29] Indicating approval, the Washington legislature amended their wrongful death statute to include loss of love, companionship, and destruction of the parent-child relationship.[30]

Probably the first case to include loss of society and companionship as "pecuniary loss" was *Wyko v. Gnodtke,*[31] a Michigan case which has apparently since been overruled,[32] but not without confusion.[33] *Breckon v. Franklin Fuel Co.*[34] may be distinguished from *Wyko* in that the plaintiffs in *Breckon* were suing for the death of their parents, whereas in *Wyko* the suit was for the wrongful death of the plaintiff's child. *Breckon* seems to take a giant step backward in reaffirming the old pecuniary measure of damages in wrongful death actions. Although it is difficult to determine loss of companionship by a monetary standard, it generally forms an actual and very real loss to the relatives of the decedent.

> The recovery in such action [wrongful death] is such an amount as the jury deems fair and just in reference to the *pecuniary loss* resulting from such death. . . . (emphasis added)

[27] Fussner v. Andert, 261 Minn. 347, 351, 113 N.W.2d 355, 359 (1961).

[28] 71 Wash. 2d 112, 426 P.2d 605 (1967).

[29] *Id.* at 116, 426 P.2d at 609.

[30] R.C.W.A. 4.24.010 (1971) provides:

> In such an action, . . . damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amounts . . . as may be just.

[31] 361 Mich. 331, 105 N.W.2d 118 (1960); followed in Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965).

[32] Breckon v. Franklin Fuel Co., 383 Mich. 251, 174 N.W.2d 836 (1970). In an action under Michigan's wrongful death statute for the death of both parents, after reconsidering *Wyko,* the court in a 5-3 decision remanded the case with instructions not to use at all the loss of companionship as an element of the plaintiff's pecuniary loss.

[33] Rohm v. Stroud, 35 Mich. App. 257, 192 N.W.2d 388, 389 (1971). In a concurring opinion, Justice O'Hara said "Frankly, I am not sure what *Breckon* did to *Gnodtke,* if anything."

[34] Breckon v. Franklin Fuel Co., 383 Mich. 251, 174 N.W.2d 836 (1970).

Although the Minnesota,[35] Michigan,[36] and Washington[37] decisions are based on statutes distinct from Iowa Rule of Civil Procedure 8, they all purport or have been held to limit recovery to pecuniary loss to the beneficiaries. Pecuniary loss has been extended beyond mere contributions if food, shelter, money, or property and "services" was found to include society and companionship as having a pecuniary value.[38] *Wardlow* follows these decisions which represent the trend in the United States today.[39] Realistically, what is the injury to the parents in a child death case? In the vast majority of cases, it cannot be argued that the prime injury suffered by the parents is the deprivation of the child's income. The child's meaning to the parents transcends monetary value. The real loss is the child's companionship, society, and the destruction of the parent-child relationship.

In the past, recovery for noncorporal injuries at common law was denied on the basis of their subjectivity.[40] Expansion of the term "pecuniary damage" to include mental anguish and loss of society and companionship was avoided because the emotional nature of unlawful death actions might have resulted in excessive verdicts. This argument was considered in a recent South Dakota case,[41] an action involving the issue of whether there should be extended to the wife the right to recover for loss of consortium resulting from the negligent injury of her husband. There, the court said "[j]uries are being asked daily to place values for similar damages in alienation of affection actions, on pain and suffering, . . . and in other cases which are as difficult . . . so this should not be set up as a bar or argument against such recovery."[42] In addition, courts were reluctant to compensate for injuries they could not see, probably because such injuries were easily feigned.[43] In the case of wrongful death, especially of a child, there is little chance of a feigned mental and emotional injury. Infliction of mental anguish and anxiety are now recognized as compensable torts.[44] There is no reason for denying parents damages for the mental distress suffered by the loss of a child through a wrongful act. This type of pain and suffering is just as real as physical pain and is more likely to extend for a longer period of time.

In Iowa the administrator of the deceased's estate may recover the value of services and support the decedent would have provided as a parent or spouse had he not been wrongfully killed.[45] The value of services rendered by a

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[35] Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961).
[36] Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965); Wyko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).
[37] Lockhart v. Besel, 71 Wash. 2d 112, 426 P.2d 605 (1967).
[38] *See* W. PROSSER, *supra* note 6, § 121 at 930.
[39] *Id.*
[40] Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAWYER 197, 206 (1971).
[41] Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959).
[42] *Id.* at 95, 98 N.W.2d at 682.
[43] Decof, *Damages in Child Wrongful Death Cases*, 7 TRIAL 33, 38 (1971).
[44] *See generally* W. PROSSER, *supra* note 6, § 11.
[45] IOWA CODE § 613.15 (1971).

woman in her capacity as a mother have been held compensable.[46] The parent-child relationship is largely reciprocal and it should be assumed that damages are as real to one as the other. Loss of comfort and society have been held in other states to be compensable for the loss of a wife[47] or husband.[48] Clearly, the child-parent relationship is just as meaningful as the husband-wife relationship and destruction of either should result in compensation to the survivor.

Contrary to the expectation that only nominal damage may be awarded under a pecuniary loss doctrine, awards of substantial damages are commonplace.[49] In case after case, excessive verdicts have been allowed in amounts which have apparently exceeded the measure permitted by the pecuniary loss rule and apparently allowing compensation for damages which are not strictly of a pecuniary nature.[50] It is probably the emotional harm and not the pecuniary harm that is being recognized by the jury.[51] These judicial gymnastics are no longer necessary in view of recent developments in tort law.[52] It is time to recognize loss of society and companionship and infliction of mental anguish as proper elements in determining damages for the wrongful death of a minor. They need not be pigeonholed as "pecuniary" losses to fit the statutes or decisions in a given jurisdiction. They are nonpecuniary but nevertheless real damages to the beneficiaries of the deceased child.

Wardlow is a step in the right direction but it did not go far enough. Loss of society and companionship should be recognized as valid nonpecuniary damages. In addition, mental grief, anguish, and suffering of the parents should be recognized as proper nonpecuniary damages compensable in the wrongful death of a minor. The Iowa legislature should amend Iowa Rule of Civil Procedure 8 to include (1) actual pecuniary losses, (2) loss of society and companionship, and (3) mental anguish and suffering of the proper beneficiaries as proper elements in determining damages for the wrongful death of a minor.

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[46] Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632 (Iowa 1969); *see also* DeMoss v. Walker, 242 Iowa 911, 48 N.W.2d 811 (1951).

[47] Skoglund v. Minneapolis St. Ry., 45 Minn. 330, 47 N.W. 1071 (1891).

[48] Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960); Montgomery v. Stephan, 359 Mich. 33, 101 N.W.2d 227 (1960); Hoekstra v. Helgeland, 78 S.D. 82, 98 N.W.2d 669 (1959).

[49] Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538, 541 (1955).

[50] Fussner v. Andert, 261 Minn. 347, 352, 113 N.W.2d 355, 360 (1961).

[51] Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538, 548 (1955).

[52] Decof, *Damages in Child Wrongful Death Cases*, 7 TRIAL 33, 38 (1971).

Domestic Relations—MINNESOTA MARRIAGE STATUTE DOES NOT PERMIT MARRIAGE BETWEEN TWO PERSONS OF THE SAME SEX AND DOES NOT VIOLATE CONSTITUTIONALLY PROTECTED RIGHTS.—*Baker v. Nelson* (Minn. 1971).

Appellants, applicants for a marriage license, were denied their request that a marriage license be issued to them on the sole ground that they were of the same sex (male). The district court, Hennepin County, Minnesota, ruled that the clerk of the county district court was not required to issue a marriage license to applicants of the same sex and specifically directed that a license not be issued to appellants. *Held*, affirmed, that the Minnesota statute governing marriage[1] does not authorize marriage between two persons of the same sex and the marriage of two persons of the same sex is prohibited. The court also held that the statute does not offend the first, eighth, ninth, or fourteenth amendments to the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

The Minnesota supreme court made two distinct holdings concerning marriage between persons of the same sex. First, even though no specific prohibition can be found, the court held "that Minn. St. c. 517 does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited."[2] Second, in holding that "same-sex" marriage is prohibited by the statute, the court held "that Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution."[3]

Examining the applicable statute, it appears that the Minnesota court correctly interpreted the legislative intent as prohibiting marriage between two persons of the same sex. As the court stated, in defining marriage, "the term is of contemporary significance as well, for the present statute is replete with words of heterosexual import such as 'husband and wife' and 'bride and groom'."[4] In

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[1] MINN. STAT. ch. 517 (1969). The section dealing with the validity of a marriage reads as follows:

> 517.01 MARRIAGE A CIVIL CONTRACT. Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

[2] Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971). MINN. STAT. ch. 517.03 (1969) reads as follows:

> MARRIAGES PROHIBITED. No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; excepting re-intermarriage between such parties; nor within six months after either was a party to a marriage which has been adjudged a nullity, excepting intermarriage between such parties; nor between parties who are nearer than second cousins; . . . nor between persons either one of whom is imbecile, feeble-minded, or insane; nor between persons one of whom is a male person under 18 years of age or one of whom is a female person under the age 16 years. . . .

[3] 191 N.W.2d 185, 187 (Minn. 1971).

[4] *Id.* at 186. *See* MINN. STAT. §§ 517.03, 517.08 (1969).