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Comment

Is There Consortium Before Birth? Expanding the Availability of Loss of Society Damages in Wrongful Death Actions

I. INTRODUCTION

Under the Illinois Wrongful Death Act, a decedent's next of kin can recover damages for pecuniary injuries resulting from the decedent's death.¹ In recent decisions, the Illinois Supreme Court has held that pecuniary injuries² encompass loss of society damages³ and has expanded the categories of next of kin entitled to recover these damages.⁴ In 1982, the court held that pecuniary injuries recoverable under the Illinois Wrongful Death Act included loss of consortium of a spouse.⁵ Subsequent decisions expanded previously unavailable loss of society damages to wrongful death actions arising from the parent-child relationship.⁶ Recently the court resolved conflicts among the lower courts and expanded the potential liability of tortfeasors by holding that loss of society damages are available to parents of a stillborn viable fetus⁷ and to siblings of a

1. ILL. REV. STAT. ch. 70, para. 1-2.2 (1991).

2. Although not defined in the Illinois Wrongful Death Act, pecuniary injuries have been defined elsewhere:

Within [the] meaning of [a] wrongful death statute . . . [the] term "pecuniary injury" means a reasonable expectation of pecuniary benefits from the continued life of the deceased. . . . Such compensation includes damages for deprivation of support, of companionship, guidance, advice, love, and affection of deceased.

BLACK'S LAW DICTIONARY 1131 (6th ed. 1990) (citations omitted).

3. These damages are described to some Illinois juries as follows:

Damages—Loss of Society—Definition

When I use the term "society" in these instructions, I mean the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection.

ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) No. 31.11 (3d ed. 1992).

4. See *infra* notes 29-40 and accompanying text.

5. *Elliott v. Willis*, 442 N.E.2d 163 (Ill. 1982).

6. See *Ballweg v. City of Springfield*, 499 N.E.2d 1373 (Ill. 1986) (loss of a minor child); *Bullard v. Barnes*, 468 N.E.2d 1228 (Ill. 1984) (loss of an adult child).

7. *Seef v. Sutkus*, 583 N.E.2d 510 (Ill. 1991).

decedent.⁸

This Comment will review both the wrongful death action and loss of society damages as they have evolved under Illinois statutory and case law. The Comment will then discuss the recent Illinois Supreme Court decisions resolving conflicts over the damages that may be recovered in wrongful death actions based on the loss of a stillborn viable fetus or a sibling. It will analyze these decisions in order to determine whether they are reasonable extensions of the law. Finally, the Comment will suggest an approach for dealing with the siblings of an unborn decedent and the parents of a stillborn nonviable fetus, including principles to consider in extending the availability of loss of society damages and in determining the nature of the losses encompassed by these damages.

II. BACKGROUND

A. *The Wrongful Death Action in Illinois*

Under English common law, a civil action for wrongful death did not exist, and dependents and heirs of a decedent could not recover for their losses arising from a victim's death.⁹ The harsh consequences of this principle eventually led Parliament to adopt a wrongful death statute, commonly known as Lord Campbell's Act, in 1846.¹⁰ Since then, all jurisdictions in the United States have enacted wrongful death statutes.¹¹ Early English courts construed Lord Campbell's Act narrowly, providing compensation only for the survivors' pecuniary losses, and excluding recovery for intangible losses such as loss of society and mental anguish.¹² Wrongful death statutes in many states, including Illinois, adopted "pecuniary" loss as the measure by which juries award damages.¹³

8. *In re Estate of Finley*, 601 N.E.2d 699 (Ill. 1992).

9. The rule precluding a civil action for wrongful death was initially stated in the English case of *Baker v. Bolton*, 170 Eng. Rep. 1033 (Q.B. 1808).

10. Act for Compensating the Families of Persons Killed by Accidents 1846, 9 & 10 Vict., ch. 93 (Eng.).

11. For an enumeration of these statutes, see MARILYN MINZER ET AL., 4 DAMAGES IN TORT ACTIONS 29 (1992).

The statutes vary with regard to the methods of calculating damages and to whom the cause of action belongs (decedent's next of kin or estate), but their purpose is to compensate the decedent's next of kin for their losses. For an overview of the history of the wrongful death action, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 125A-127 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

12. See, e.g., *Blake v. Midland Ry. Co.*, 118 Eng. Rep. 35 (Q.B. 1852).

13. The Illinois Wrongful Death Act provides:

Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive

Under the Illinois Wrongful Death Act, the personal representative of the decedent may bring a wrongful death action for the benefit of the surviving spouse and next of kin of the decedent to recover damages for their pecuniary injuries resulting from the victim's death.¹⁴ The Act does not define *pecuniary injuries*, although the construction of the phrase at the time the Act was adopted included the lost income and services of the decedent.¹⁵ Courts have defined *next of kin* as those blood relatives of the decedent who would have taken his or her property if the decedent had died intestate.¹⁶ In the absence of a spouse or descendants, next of kin includes parents and siblings.¹⁷

Early Illinois courts recognized a presumption of pecuniary loss when the next of kin were lineal heirs.¹⁸ This presumption applied to the death of a child because child labor was prevalent at the time; thus, a child was an economic asset to his or her family.¹⁹ In creating this presumption, courts acknowledged that pecuniary loss might be difficult to quantify and shifted the burden of proof to the defendant to show the absence of damages.²⁰

Historically, this presumption of pecuniary injury did not encompass loss of society damages, which plaintiffs could not recover under the Act.²¹ Some wrongful death statutes, however, specifi-

benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.

ILL. REV. STAT. ch. 70, para. 2 (1991).

14. ILL. REV. STAT. ch. 70, para. 1-2.2 (1991).

15. See Adrienne Lehrbaum-Weiss, *Bullard v. Barnes—Parental Recovery for Lost Society and Companionship of a Minor Child Under the Illinois Wrongful Death Act*, 34 DEPAUL L. REV. 803, 807-11 (1985) [hereinafter Lehrbaum-Weiss] (describing how early Illinois courts adopted the narrow English construction of damages available under the Wrongful Death Act).

16. See *In re Estate of Finley*, 601 N.E.2d 699, 701 (Ill. 1992); see also ILL. REV. STAT. ch. 110½, para. 2-1 (1991) (Probate Act of 1975—Rules of descent and distribution).

17. ILL. REV. STAT. ch. 110½, para. 2-1(d) (1991).

18. This would include the parent-child relationship. See *Baird v. Chicago, B. & Q. R.R.*, 349 N.E.2d 413, 417 (Ill. 1976) (stating that a presumption of pecuniary loss applies to lineal next of kin of the deceased in a wrongful death action brought by the parents of decedent children).

19. See *Wycko v. Gnodtke*, 105 N.W.2d 118, 121 (Mich. 1960) (discussing factors that now keep children out of the labor market).

20. For a discussion of the history of the presumption, see Lehrbaum-Weiss, *supra* note 15, at 811-13.

21. *Trotter v. Moore*, 447 N.E.2d 1340, 1344 (Ill. App. Ct. 2d Dist. 1983) (holding that a jury may not consider loss of a deceased child's society as a pecuniary injury under the Wrongful Death Act).

cally allow recovery of damages for loss of society.²² The Illinois legislature has had several opportunities to amend the Act to provide for such recovery but has failed to do so.²³ Therefore, neither the language of the Illinois Wrongful Death Act nor its legislative history mandates that loss of society damages be available to plaintiffs as pecuniary injuries.²⁴

B. *Loss of Society Damages in Illinois*

The loss of consortium (loss of society) action originated in the right of a master to recover for injuries sustained by his servant, since in addition to the servant's actual injuries, the master had also sustained a loss of his servant's services.²⁵ Since the law historically considered a wife to be her husband's servant or property, courts extended this doctrine to the marital relationship and allowed a husband to bring an action to recover for losses resulting from injuries to his wife.²⁶ Loss of consortium damages in this setting include loss of sexual attentions, society, and affection.²⁷ This

22. John F. Wagner, Annotation, *Recovery of Damages for Loss of Consortium Resulting from Death of Child—Modern Status*, 77 A.L.R. 4TH 411, 416-17 (1990) [hereinafter Wagner].

23. See 1 LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1982 SESSION OF THE 82ND GENERAL ASSEMBLY, at 697 (Legislative Reference Bureau, February 11, 1983); 1 FINAL LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1981 SESSION OF THE 82ND GENERAL ASSEMBLY, at 974 (Legislative Reference Bureau, December 18, 1981); 2 FINAL LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1980 SESSION OF THE 81ST GENERAL ASSEMBLY, at 1863 (Legislative Reference Bureau, February 19, 1981); 2 FINAL LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1979 SESSION OF THE 81ST GENERAL ASSEMBLY, at 1544-45 (Legislative Reference Bureau, January 14, 1980). All of these sources reflect attempts to amend the Wrongful Death Act to provide the right to recover for the loss of society of the deceased as well as for pecuniary injuries.

24. One commentator has criticized extending the availability of loss of society damages beyond the marital relationship as being inconsistent with legislative intent. See Thomas S. Orr, *Wrongful Death in Illinois: A Statute Comes of Age*, 62 CHI.-KENT L. REV. 75, 86-87 (1985) [hereinafter Orr]. However, court decisions construing these damages as pecuniary injuries have not elicited a legislative response. See *Ballweg v. City of Springfield*, 499 N.E.2d 1373, 1379 (Ill. 1986) (loss of society of an adult child); *Bullard v. Barnes*, 468 N.E.2d 1228, 1234 (Ill. 1984) (loss of society of a minor child); *Cooper v. Chicago Transit Authority*, 505 N.E.2d 1239, 1244 (Ill. App. Ct. 1st Dist. 1987) (loss of society of a parent).

25. PROSSER AND KEETON, *supra* note 11, § 125, at 931.

26. Taking a more appropriate view of the status of women, the majority of jurisdictions now also allow a woman to seek loss of consortium damages for injuries sustained by her husband. *Id.* § 125, at 931-32; see also *Dini v. Naiditch*, 170 N.E.2d 881 (Ill. 1960) (awarding loss of consortium damages to the wife of a fireman who sustained severe burns).

27. PROSSER AND KEETON, *supra* note 11, § 125, at 931. Illinois courts allow recovery of loss of society damages for *nonfatal* injuries to another only when the plaintiff is a spouse in a valid marital relationship. See *Medley v. Strong*, 558 N.E.2d 244 (Ill. App. Ct. 1st Dist. 1990). In *Medley*, a woman was not allowed to recover loss of consortium

is a derivative action that compensates one party for losses that he or she has sustained as a result of injuries to another person.²⁸

In 1982, in *Elliott v. Willis*,²⁹ the Illinois Supreme Court held that loss of society damages were available to spouses as *pecuniary injuries* under the Wrongful Death Act. The court noted that prior courts had permitted children to recover for the loss of their deceased father's care, guidance, attention, instruction, training, and advice.³⁰

In 1984, in *Bullard v. Barnes*,³¹ the court extended this line of reasoning. The *Bullard* court held that parents could recover loss of society damages for the death of a minor child as pecuniary injuries under the Wrongful Death Act.³² The court recognized that in current society the benefits that parents derive from children are intangible rather than financial.³³ As such, the court replaced the presumption of pecuniary loss of the child's earnings with a presumption of pecuniary loss of the child's society.³⁴

damages from a physician whose alleged negligent management of her boyfriend's urologic problem resulted in penile amputation. *Id.* at 246. The couple had lived together for 10 years and represented themselves as married but were not legally married. *Id.* at 245; *see also* *Sostock v. Reiss*, 415 N.E.2d 1094, 1099 (Ill. App. Ct. 1st Dist. 1980) (holding that husband may not recover loss of consortium damages from the date of his subsequent marriage for injuries sustained by his wife during their engagement).

28. *See* *Blagg v. Illinois F.W.D. Truck & Equip. Co.*, 572 N.E.2d 920, 925-26 (Ill. 1991) (finding that under comparative negligence principles, recovery for loss of consortium is limited by the physically injured spouse's negligence).

29. 442 N.E.2d 163, 170 (Ill. 1982) (permitting a wife whose husband died in a motor vehicle accident to recover damages for loss of consortium as a pecuniary injury under the Illinois Wrongful Death Act).

30. *Id.* at 167; *see also* *Allendorf v. Elgin, Joliet & E. Ry.*, 133 N.E.2d 288, 295 (Ill.), *cert. denied*, 352 U.S. 937 (1956) (holding that pecuniary injuries can include loss of a father's care, attention, instruction, training, advice, and guidance).

31. 468 N.E.2d 1228 (Ill. 1984). In *Bullard*, the parents of a 17-year-old driver who was killed trying to avoid an oncoming truck sued for wrongful death, seeking loss of society damages. *Id.* at 1230. For a discussion of the law of various states on this topic, *see* *Wagner*, *supra* note 22.

32. *Bullard*, 468 N.E.2d at 1233. The court noted but refused to decide whether its holding also applied to actions based on the death of a child who had reached the age of majority. *Id.* at 1234. However, in 1986 it extended a presumption of loss of society damages to this setting. *Ballweg v. City of Springfield*, 499 N.E.2d 1373 (Ill. 1986).

33. *Bullard*, 468 N.E.2d at 1234. The court also noted that this precluded parents from recovering the costs of rearing a healthy child in a "wrongful birth" action. *Id.*; *see* *Cockrum v. Baumgartner*, 447 N.E.2d 385 (Ill. 1983) (denying recovery of child-rearing costs in a wrongful birth action because the benefit of life outweighs the expense of supporting it). *Contra* *University of Ariz. v. Superior Ct.*, 667 P.2d 1294, 1301 (Ariz. 1983) (allowing recovery of child-rearing costs in a wrongful birth action but deducting the benefits of the child's society from the costs of raising it).

34. *Bullard*, 468 N.E.2d at 1234. The court also allowed child-rearing costs to be deducted from loss of society damages in determining an appropriate award. *Id.* at 1235. One author has argued that this is of little practical significance. *See* Charles E. Schmidt,

The *Bullard* court believed that its decision was a logical extension of *Elliott*, making damages which were considered pecuniary losses under *Elliott* available to another category of plaintiffs entitled to recover under the Act.³⁵ However, *Bullard* also departed from *Elliott* by allowing damages to a next of kin who could not recover for similar but nonfatal injuries in a derivative tort action.³⁶

Following *Bullard*, courts considered whether loss of society damages were available to other categories of next of kin entitled to recover under the Wrongful Death Act.³⁷ Courts agreed that in wrongful death actions, children losing a parent were entitled to a presumption of loss of society.³⁸ Until recently, however, the Illinois courts disagreed about whether loss of society damages were available to parents losing an unborn child³⁹ or to siblings of a decedent.⁴⁰

Recovery for Loss of Society and Companionship in Wrongful Death and Personal Injury Actions, 13 S. ILL. U. L.J. 319, 324 (1989) [hereinafter Schmidt] ("As a practical matter, rare is the case that a defendant's attorney would want to alienate a jury by arguing about how much money the defendant has saved the grieving parents by causing the death of their child.").

35. *Bullard*, 468 N.E.2d at 1233.

36. The court noted this discrepancy in *Dralle v. Ruder*, 529 N.E.2d 209, 212 (Ill. 1988). In *Dralle*, the court denied loss of society damages to parents of a child whose severe, but nonfatal birth defects were allegedly due to the use of Bendectin during pregnancy. *Id.* at 210. The court reconciled this decision with *Bullard* by noting that the victim of nonfatal injuries still retains a cause of action against the tortfeasor:

The chief distinction between the claim for loss of society in a wrongful death action and its assertion here is that the nonfatally injured victim retains his own cause of action against the tortfeasor. Thus, there is no danger that the injury caused by the tortfeasor will go uncompensated, or that similar conduct in the future will be undeterred. In contrast, an action under the Wrongful Death Act affords the sole remedy for the surviving family members.

Id. at 212.

37. See Schmidt, *supra* note 34, at 334 (discussing situations in which such claims may be asserted).

38. See *Jackson v. Pellerano*, 569 N.E.2d 167, 172 (Ill. App. Ct. 1st Dist. 1991); *Adams v. Turner*, 555 N.E.2d 1040, 1042-43 (Ill. App. Ct. 5th Dist. 1990); *Cooper v. Chicago Transit Auth.*, 505 N.E.2d 1239, 1244 (Ill. App. Ct. 1st Dist. 1987).

39. Compare *Hunt v. Chettri*, 510 N.E.2d 1324 (Ill. App. Ct. 5th Dist. 1987) (recovery denied) with *Smith v. Mercy Hosp. and Medical Ctr.*, 560 N.E.2d 1164 (Ill. App. Ct. 1st Dist. 1990) (recovery allowed).

40. Compare *Moss v. Whitaker*, 573 N.E.2d 333 (Ill. App. Ct. 4th Dist. 1991), *appeal allowed*, 580 N.E.2d 118 (Ill. 1991) (no recovery allowed) and *Carter v. Chicago & Ill. Midland Ry.*, 522 N.E.2d 856 (Ill. App. Ct. 2d Dist. 1988) (no recovery allowed) with *Schmall v. Village of Addison*, 525 N.E.2d 258 (Ill. App. Ct. 1st Dist. 1988) (recovery allowed) and *Singh v. Air Ill., Inc.*, 520 N.E.2d 852 (Ill. App. Ct. 1st Dist. 1988) (recovery allowed) and *Sheahan v. Northeast Ill. Regional Commuter R.R. Corp.*, 496 N.E.2d 1179 (Ill. App. Ct. 1st Dist. 1986) (recovery allowed).

C. *Recovery For the Wrongful Death of an Unborn Child*⁴¹

In 1973, the Illinois Supreme Court held for the first time that for the purposes of the wrongful death statute, a viable fetus⁴² was a person.⁴³ As a result, the next of kin could recover for injuries sustained by a viable fetus if it was stillborn.⁴⁴ The legislature eliminated any viability requirement in 1980,⁴⁵ thus providing a cause of action for a death or injury occurring at any time after conception. The Illinois Supreme Court further extended the possibility for plaintiffs to recover when it held that there is a presumption of pecuniary damages in wrongful death actions based on the loss of a viable fetus.⁴⁶

Following this rapid expansion of plaintiffs' recovery options, lower courts disagreed over whether pecuniary injuries included loss of society in a wrongful death action based on the death of a stillborn child.⁴⁷ For example, the Illinois Court of Appeals for the Fifth District refused to award damages in this setting,⁴⁸ while the Court of Appeals for the First District found loss of society damages to be appropriate.⁴⁹

41. For a recent review of prenatal torts, see Michael P. McCreedy, Note, *Recovery for the Wrongful Death of a Fetus*, 25 U. RICH. L. REV. 391 (1991).

42. A viable fetus is one whose state of development renders it capable of independent existence outside its mother's womb. See BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).

43. *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88 (Ill. 1973) (holding that parents of a fetus whose injuries resulted in its stillbirth could recover in a wrongful death action if the fetus was viable at the time of the injury).

44. *Id.* at 91.

45. The 1980 amendment provides:

The state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default.

ILL. REV. STAT. ch. 70, para. 2.2 (1991).

46. *Jones v. Karraker*, 457 N.E.2d 23, 25 (Ill. 1983). Here, the presumption was found sufficient to sustain an award of \$125,000 when the only evidence presented on the question of damages was the fact that the fetus was viable and that absent the alleged malpractice, the plaintiff would have had a healthy child. *Id.* at 29 (Simon, J., dissenting). The court did not address whether pecuniary damages included loss of society.

47. See *supra* note 39. Both the *Hunt* and *Smith* courts acknowledged that pecuniary injuries could include loss of society, and that a cause of action existed for the wrongful death of a fetus. *Hunt v. Chettri*, 510 N.E.2d 1324, 1325-26 (Ill. App. Ct. 5th Dist. 1987); *Smith v. Mercy Hosp. and Medical Ctr.*, 560 N.E.2d 1164, 1168 (Ill. App. Ct. 1st Dist. 1990). However, the courts differed in their analysis of whether case law and the amended wrongful death statute required that these damages be available in a wrongful death action in this setting. See *Hunt*, 510 N.E.2d at 1326; *Smith*, 560 N.E.2d at 1169.

48. *Hunt*, 510 N.E.2d at 1326-27.

49. *Smith*, 560 N.E.2d at 1173.

In *Hunt v. Chettri*,⁵⁰ the plaintiffs alleged that an obstetrician's negligence had resulted in the stillbirth of their child. The trial court dismissed the portion of the complaint requesting loss of society damages.⁵¹ On appeal, the court rejected the parents' argument for extending the presumption of these damages to the loss of a stillborn.⁵² Although both the Wrongful Death Act⁵³ and prior decisions⁵⁴ provided for a wrongful death action based on the death of a viable fetus, the court decided that neither the Act nor the decisions delineated the bases for awarding damages.⁵⁵

The *Hunt* court noted that *Bullard* created a presumption of loss of society damages that could "be rebutted by presenting evidence that a parent and child were estranged."⁵⁶ Without a tangible relationship, the court reasoned, it would be impossible to demonstrate estrangement.⁵⁷ Moreover, the court believed that an existing relationship was implicit in the rationale of the Illinois Supreme Court in presuming loss of society damages for minor and adult children.⁵⁸ The court concluded that to allow these damages when no society had ever been exchanged would confuse recovery for loss of society with recovery for the parents' grief.⁵⁹ Since bereavement and mental anguish are distinguishable from loss of society, with only the latter constituting pecuniary injuries,⁶⁰ the appellate court upheld the dismissal of the count seeking recovery of loss of society damages.⁶¹

The *Hunt* court also noted the anomaly of allowing recovery to parents of a child dying immediately after birth but denying it to parents of a stillborn child when the apparent losses are nearly identical.⁶² Reasoning that the parents' loss is determined by the "length, intensity, and quality of the parent-child relationship," the court took note of the "bonding" that takes place at birth.⁶³ As a result, the court held that birth is the proper point at which courts

50. 510 N.E.2d at 1325.

51. *Id.*

52. *Id.* at 1326.

53. ILL. REV. STAT. ch. 70, para. 1-2.2 (1991).

54. *Jones v. Karraker*, 457 N.E.2d 23 (Ill. 1983); *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88 (Ill. 1973).

55. *Hunt*, 510 N.E.2d at 1326.

56. *Id.* (citing *Bullard*, 468 N.E.2d at 1234).

57. *Hunt*, 510 N.E.2d at 1326.

58. *Id.*; see also *supra* notes 31-34.

59. *Id.*

60. See *Bullard*, 468 N.E.2d at 1233; *Elliott*, 442 N.E.2d at 167.

61. *Hunt*, 510 N.E.2d at 1326-27.

62. *Id.* at 1326.

63. *Id.*

should begin to measure the loss of a child's society.⁶⁴

The issue of whether parents may recover loss of society damages for the loss of their stillborn child was also considered in *Smith v. Mercy Hospital and Medical Center*,⁶⁵ a wrongful death action in which the plaintiffs alleged that their obstetrician's negligence resulted in the stillbirth of an otherwise viable fetus in its third trimester.⁶⁶ Following *Hunt*, the trial court struck the portion of the complaint seeking loss of society damages.⁶⁷ On appeal, the First District rejected *Hunt*, concluding that a presumption of loss of society damages exists in a wrongful death action based on the loss of a viable fetus.⁶⁸

Unlike the *Hunt* court, which found no guidelines in the Wrongful Death Act for determining the nature of available damages, the *Smith* court believed that the Act wed a right to a recovery.⁶⁹ By amending the Act, the court reasoned, the legislature had intended to place parents of a stillborn in just as favorable a position as those of a liveborn.⁷⁰ The court agreed with the *Hunt* court that the Illinois Supreme Court had created the presumption of pecuniary injuries for the wrongful death of a viable fetus at a time when damages did not include loss of society for the death of a child.⁷¹ It noted, however, that in *Elliott* the supreme court had already recognized loss of society as a pecuniary injury in a spousal wrongful death action and that the *Bullard* court cited this holding in extending the presumption of loss of society damages to the parent-child relationship.⁷² Rejecting the significance that the *Hunt* court placed on the initial parent-child bonding at birth, the *Smith* court

64. *Id.*

65. 560 N.E.2d 1164 (Ill. App. Ct. 1st Dist. 1990). In 1987, the United States District Court for the Northern District of Illinois considered the issue in *Denham v. Burlington N. R.R. Co.*, 699 F. Supp. 1253 (N.D. Ill. 1988). Applying Illinois law in the absence of contrary authority, the court considered the holding of *Hunt* dispositive in granting defendant's motion for partial summary judgment. *Denham*, 699 F. Supp. at 1256.

66. *Smith*, 560 N.E.2d at 1165.

67. *Id.*

68. *Id.* at 1173.

69. *Id.* at 1169.

70. *Id.*; see also *supra* note 45. This result is difficult to reconcile with the fact that the legislature considered but did not enact legislation that would have expanded damages under the Wrongful Death Act to include loss of society. See *supra* note 23. Additionally, had the fetal injuries been nonfatal, the parents would not have been able to recover for loss of society. See *supra* note 36.

71. *Smith*, 560 N.E.2d at 1168.

72. *Id.* at 1169. The court also found support in the fact that *Bullard* had cited an Idaho case allowing a presumption of loss of society damages for the wrongful death of a viable fetus. *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982). Differences in the wording of

found it illogical to permit recovery for a death occurring immediately after birth but not for one occurring immediately before birth, when proof of damages would be similar in both settings.⁷³

The *Smith* court also perceived the nature of loss of society damages differently from the *Hunt* court. The *Hunt* court concentrated on the nature of the existing relationship, concluding that society must be exchanged to be lost.⁷⁴ In *Smith*, the plaintiffs were willing to introduce testimony that the maternal-fetal relationship consisted of more than mere tissue pressure.⁷⁵ However, this type of testimony may not have been necessary, since the *Smith* court perceived the Wrongful Death Act as permitting compensation for future loss and not only for the destruction of an existing relationship.⁷⁶

Addressing the *Hunt* court's concern that a defendant could not rebut the presumption of these damages, the *Smith* court offered several suggestions.⁷⁷ These included presenting evidence of inevitably fatal congenital infirmities,⁷⁸ intent of the mother to abort the fetus⁷⁹ or place the child for adoption,⁸⁰ or abandonment of the

wrongful death statutes, coupled with different judicial constructions, make comparisons across jurisdictions difficult. See Orr, *supra* note 24, at 83-84.

Volk, a wrongful death action for the loss of a viable fetus, was based on an Idaho statute allowing recovery of damages "as under all the circumstances of the case as may be just." IDAHO CODE § 5-311 (1979). Idaho courts had construed loss of society damages as being recoverable under this statute. *Volk*, 651 P.2d at 14. However, the Idaho court also noted that punitive damages may properly be awarded in Idaho, *id.*, which is not the case in Illinois. See *Howe v. Clark Equip. Co.*, 432 N.E.2d 621 (Ill. App. Ct. 4th Dist. 1982).

In *Bullard*, the reference to *Volk* occurs in a string cite of cases from jurisdictions allowing "parental recovery in a wrongful death action for the loss of society of a child." *Bullard*, 468 N.E.2d at 1232. No mention is made of the fact that the death occurred before birth.

73. *Smith*, 560 N.E.2d at 1170; see also *Villamil v. Elmhurst Memorial Hosp.*, 529 N.E.2d 1181 (Ill. App. Ct. 1st Dist. 1988), *appeal denied*, 535 N.E.2d 922 (Ill. 1989) (permitting a presumption of loss of society when a child was killed in a delivery room fall immediately after birth).

74. *Hunt*, 510 N.E.2d at 1326.

75. *Smith*, 560 N.E.2d at 1170.

76. *Id.*

77. *Id.* at 1171-72.

78. See *Flynn v. Vancil*, 242 N.E.2d 237, 240 (Ill. 1968) (using evidence that an infant suffered from severe congenital anomalies to rebut the presumption of pecuniary injuries and to sustain an award of no damages).

79. See *Light v. Proctor Community Hosp.*, 538 N.E.2d 828, 830 (Ill. App. Ct. 3d Dist. 1989). This case was a medical malpractice action in which a pregnant woman underwent an abortion after a radiologist negligently exposed her to radiation. *Id.* at 829. The court rejected the mother's wrongful death action, holding that the abortion, rather than the radiation exposure, was the cause of death, with the former being excluded under the Act. *Id.* at 830; see also ILL. REV. STAT. ch. 70, para. 2.2 (1991) (excluding lawful abortions done with consent from the Wrongful Death Act).

family by the parent claiming injury.⁸¹ The court believed that with proper instructions, a jury could distinguish loss of society damages from impermissible damages for mental bereavement.⁸² Finally, the First District also followed *Bullard* by rejecting a presumption of loss of the unborn child's services but, instead, allowing plaintiffs the opportunity to prove their loss.⁸³

D. Recovery for the Wrongful Death of a Sibling

The first Illinois court to consider whether loss of society damages could be awarded to a sibling was the Court of Appeals for the First District in *Prendergast v. Cox*.⁸⁴ *Prendergast* was a wrongful death action arising from the death of a thirty-eight-year-old bachelor in a car accident.⁸⁵ At trial, the court had refused a jury instruction allowing loss of society as an element of his siblings' damages.⁸⁶ The appellate court affirmed, noting the distinction between lineal and collateral heirs.⁸⁷ The court found that the former may rely on a presumption of substantial pecuniary damages but that the latter are entitled only to provable damages.⁸⁸ In declining to extend *Bullard's* presumption of loss of society damages to siblings of the decedent, the court noted that the *Bullard* court had been cautious in declining to consider whether its holding would apply to a child who had attained majority.⁸⁹

Two years after *Prendergast*, in *Sheahan v. Northeast Illinois Regional Commuter Railroad*,⁹⁰ the court reconsidered its ruling. In *Sheahan*, siblings of a decedent killed in a railroad-crossing accident appealed dismissal of their claim for loss of society damages.⁹¹ There, the court found that siblings are entitled to recover for proven loss of society.⁹² The court distinguished *Prendergast* by noting that in that case the issue had not been the dismissal of a complaint but the failure to give the jury a specific instruction.⁹³

80. *Smith*, 560 N.E.2d at 1172.

81. *Id.*

82. *Id.*

83. *Id.* at 1173-74.

84. 470 N.E.2d 34 (Ill. App. Ct. 1st Dist. 1984).

85. *Id.* at 35.

86. *Id.*

87. *Id.* at 37.

88. *Id.*

89. *Prendergast*, 470 N.E.2d at 37; see also *Bullard v. Barnes*, 468 N.E.2d 1228, 1234 (Ill. 1984) (limiting its holding to minor children).

90. 496 N.E.2d 1179 (Ill. App. Ct. 1st Dist. 1986).

91. *Id.* at 1180.

92. *Id.* at 1182.

93. *Id.* at 1181. Since collateral siblings are not entitled to a presumption of dam-

Since siblings are entitled to proven pecuniary damages, the court found that the plaintiffs could recover for loss of society if they could prove such a loss.⁹⁴

In *Carter v. Chicago & Illinois Midland Railroad*,⁹⁵ the Fourth District disagreed with the First District, holding that loss of society damages were unavailable to siblings of a decedent killed in a railroad-crossing accident. Noting that *Bullard* had been cautious in extending the availability of loss of society damages, the *Carter* court saw no public policy reason to expand damages to this setting, since loss of society damages are difficult to calculate and do not alleviate the burden of the injury.⁹⁶

When it made loss of society damages available as pecuniary injuries in wrongful death actions based on the spousal and parent-child relationships in *Elliott* and *Bullard*, the Illinois Supreme Court provided little direction to lower courts on how to apply these decisions to wrongful death actions based on other relationships. By reserving the option to make these decisions, the court took a conservative approach that would require the court to revisit the issue when conflicts developed between the lower courts.

III. DISCUSSION

By ruling that loss of society damages are available to the parents of a stillborn viable fetus and to the siblings of a decedent, the Illinois Supreme Court continued its previous approach of considering the nature of the particular relationship and deciding whether it would be equitable to allow loss of society damages in

ages, the refusal of the instruction could have been based on the sufficiency of the evidence. *Id.*

94. *Id.* at 1182; see also *Singh v. Air Ill.*, 520 N.E.2d 852 (Ill. App. Ct. 1st Dist. 1988). In *Singh*, the plaintiff's sibling died in an airplane crash. *Singh*, 520 N.E.2d at 855. The defendant appealed a \$400,000 jury verdict because the jury had been instructed that it could consider proven loss of society. *Id.* at 857. The court held that the evidence presented was sufficient to allow the instruction. *Id.* at 858; see also *Schmall v. Village of Addison*, 525 N.E.2d 258 (Ill. App. Ct. 2d Dist. 1988). In *Schmall*, the court agreed with *Sheahan* and allowed siblings to recover proven loss of society damages. *Schmall*, 525 N.E.2d at 265. Rejecting concerns that *Bullard's* conservative approach indicated an intent not to expand the availability of these damages, the court noted the subsequent extension of its holding to adult children. *Id.* The court also noted that *Bullard* dealt with presumed rather than proven damages and reasoned that it would not be inconsistent to permit siblings to recover proven damages. *Id.*

95. 522 N.E.2d 856, 861 (Ill. App. Ct. 4th Dist. 1988).

96. *Id.* When asked to reconsider *Carter* in light of contrary decisions in other districts, the Fourth District reaffirmed in *Moss v. Whitaker*, 573 N.E.2d 333, 335 (Ill. App. Ct. 4th Dist.), *appeal allowed*, 580 N.E.2d 118 (Ill. 1991), noting that the line between the appellate court districts was clearly drawn.

each setting. Conspicuously absent was a pronouncement that loss of society constitutes a pecuniary injury in all wrongful death actions.

A. Seef v. Sutkus:⁹⁷ Allowing Parental Recovery of Loss of Society Damages for the Wrongful Death of a Stillborn Fetus

In 1991, the Illinois Supreme Court resolved the dispute between lower courts over whether loss of society damages should be available for the wrongful death of a viable fetus.⁹⁸ In *Seef v. Sutkus*,⁹⁹ the plaintiffs alleged that the failure of their obstetrician and hospital personnel to monitor their fetus and to perform a timely cesarean section resulted in the stillbirth of an otherwise viable fetus. Relying on *Hunt*, the trial court dismissed portions of the complaint seeking recovery for loss of society.¹⁰⁰ The Illinois Court of Appeals for the First District reversed the dismissal of the loss of society claim, focusing on the existing rather than on the future parent-child relationship.¹⁰¹ Although it acknowledged that the existence of a relationship between the parents and their unborn child might be difficult to prove, the First District was not willing to concede that no society existed as a matter of law.¹⁰²

Rejecting *Hunt*'s contention that it would be impossible to show estrangement in this setting, the appellate court suggested that a defendant could introduce evidence showing that the mother had endangered the fetus by abusing alcohol or drugs or by otherwise neglecting her own health.¹⁰³ Characterizing the nature of the prenatal mother-child relationship as an "unproven factual question," the First District refused to decide the issue as a matter of law

97. 583 N.E.2d 510 (Ill. 1991).

98. *Id.*

99. 562 N.E.2d 606, 608 (Ill. App. Ct. 1st Dist. 1990), *aff'd*, 583 N.E.2d 510 (Ill. 1991).

100. *Id.*

101. *Id.* at 612-13; *see also infra* note 103. The *Seef* court took a somewhat different approach in reaching the same conclusion as the intervening decision in *Smith*. *Seef*, 562 N.E.2d at 610. Although it found *Smith*'s holding to be more in accord with the amended Act, the court acknowledged that Illinois law did not fully delineate the bases for awarding damages for the wrongful death of a stillborn. *Id.* This conformed with *Hunt*'s perception of the law, *Hunt*, 510 N.E.2d at 1326, rather than with *Smith*'s, which had found that the Act wed a right to a remedy, placing the parents of liveborn and stillborn children on equal footing. *Smith*, 560 N.E.2d at 1169.

102. *Seef*, 562 N.E.2d at 612.

103. *Id.* at 611. Unlike the examples in *Smith*, these examples involve maternal behavior occurring during the existing maternal-fetal relationship rather than the future parent-child relationship. *See supra* notes 77-81 and accompanying text.

without giving the plaintiff the opportunity to present evidence.¹⁰⁴ The defendants appealed, and the supreme court granted leave to appeal solely on the issue of whether there could be recovery for loss of society of a stillborn child.¹⁰⁵

The Illinois Supreme Court affirmed, noting that the Wrongful Death Act allows parents of a stillborn to recover damages for pecuniary injuries resulting from its death.¹⁰⁶ The court felt that it would be illogical to allow recovery of loss of society damages for the death of a newborn but to deny it for the death of a nearly full-term stillborn.¹⁰⁷ The court also held that a rebuttable presumption of loss of society damages exists in this setting.¹⁰⁸

In a concurring opinion, Chief Justice Miller considered the conflicting decisions of the lower courts.¹⁰⁹ He argued that although the Illinois Supreme Court had recognized loss of society as a pecuniary injury, it did not follow that loss of society was an element of the damages for which compensation need always be allowed in a wrongful death action.¹¹⁰

Chief Justice Miller next considered the nature of loss of society damages and rejected the *Hunt* court's contention that society must be exchanged before it can be lost.¹¹¹ Rather, since compensation includes future loss, recovery of loss of society damages need

104. *Seef*, 562 N.E.2d at 612. The court also considered the inequities that could arise by drawing a line at birth, noting that a child born alive at seven months would actually be physically less mature than an eight-month-old stillborn. *Id.* Citing the often-quoted example of viable unborn twins who suffer the same prenatal injury, where one dies before and the other after birth, *Chrisafogeorgis*, 304 N.E.2d at 91 (quoting *Stidam v. Ashmore*, 167 N.E.2d 106, 108 (Ohio Ct. App. 1959)), the court felt that it would be inequitable to allow parents to recover for one but not the other. *Seef*, 562 N.E.2d at 612.

105. *Seef v. Sutkus*, 567 N.E.2d 342 (Ill. 1991).

106. *Seef v. Sutkus*, 583 N.E.2d 510, 511 (Ill. 1991).

107. *Id.* at 512.

108. *Id.*

109. *Id.* at 512 (Miller, C.J., concurring).

110. *Id.* (Miller, C.J., concurring). In arriving at this conclusion, he considered the approach that the Illinois Supreme Court had taken in recognizing loss of society as a pecuniary injury in various settings. *Id.* For example, were such damages always recoverable, it would have been unnecessary after *Elliott* to decide the issues presented in *Bullard* and *Ballweg* or the issue subsequently decided in *Finley*. *Id.* at 512-13.

111. Chief Justice Miller stated:

Contrary to *Hunt*, the parents' right to recovery for loss of society does not depend upon whether there has been an exchange of society in the past. . . . Rather, it depends upon whether *but for* defendant's negligence society *would have been* exchanged. . . . [T]hat there may have been no society in the past is irrelevant; it is the loss into the future which is compensable.

Seef, 583 N.E.2d at 513 (Miller, C.J., concurring) (citing *Smith*, 560 N.E.2d at 1170-71).

not depend on an existing relationship.¹¹² The length, intensity, and quality of the existing relationship would instead relate to the amount of damages and not to the right to recover.¹¹³

Chief Justice Miller observed that the difficulties in ascertaining loss of society damages would be similar whether the death occurred immediately before or immediately after birth. Thus, he agreed with the majority that it would be inappropriate to deny recovery because of the timing of the defendant's wrongful act.¹¹⁴ Although the nature of such damages would not be susceptible to the same in-depth analysis and calculation as other damages, Chief Justice Miller concluded that a jury would be capable of assigning a monetary value to loss of society damages.¹¹⁵

B. In re Estate of Finley:¹¹⁶ Siblings May Recover Proven Loss of Society Damages

Shawn Finley died from injuries sustained when a semitrailer struck him.¹¹⁷ He was survived by his parents, two brothers, a half-brother, and a half-sister.¹¹⁸ His father, as special administrator of his estate, filed a wrongful death action.¹¹⁹ The parties agreed to a settlement in which the decedent's siblings were not allowed to recover under the Wrongful Death Act.¹²⁰ The court had appointed a guardian to represent the interests of the siblings but had approved the settlement despite the guardian's objection.¹²¹ The appellate court affirmed in an unpublished order.¹²² The supreme court granted the guardian's petition for leave to appeal in order to decide whether siblings could recover loss of society damages under the Wrongful Death Act.¹²³

The court began by noting that siblings could recover for pecuniary injuries as next of kin under the Wrongful Death Act if the decedent left no spouse or descendants.¹²⁴ Next, the court re-

112. *Id.* at 514 (Miller, C.J., concurring).

113. *Id.* (Miller, C.J., concurring).

114. *Id.* at 514-15 (Miller, C.J., concurring).

115. *Id.* at 514 (Miller, C.J., concurring).

116. 601 N.E.2d 699 (Ill. 1992).

117. *Id.* at 699.

118. *Id.* at 699-700.

119. *Id.* at 700.

120. *Id.*

121. *Finley*, 601 N.E.2d at 700.

122. *In re Estate of Finley*, 209 Ill. App. 3d 1112 (1991), *rev'd*, 601 N.E.2d 699 (Ill. 1992).

123. *In re Estate of Finley*, 580 N.E.2d 115 (Ill. 1991).

124. *Finley*, 601 N.E.2d at 701.

viewed the series of decisions in which it had held that loss of society could be considered a pecuniary injury¹²⁵ and noted that the Wrongful Death Act did not distinguish between the types of damages available based on the category of next of kin.¹²⁶ Since the Wrongful Death Act provides that next of kin can recover for pecuniary injuries, the court held that in a wrongful death action, siblings who are next of kin can recover proven loss of society damages.¹²⁷

Next, the court addressed the issue of whether a presumption of damages applied.¹²⁸ The court first acknowledged that the parent-child and spousal relationships differ from the relationship between siblings in both emotional and economic interdependence.¹²⁹ It found this difference sufficient to result in a different application of the presumption, although the different nature of the relationship would not preclude recovery of proven damages.¹³⁰ The court then remanded the action for possible reopening of the settlement should the guardian be able prove such damages.¹³¹

IV. ANALYSIS

Following these decisions, the issue arises about whether judicial construction of the phrase *pecuniary injuries* to include loss of society damages in some settings requires that these damages be available in all wrongful death actions. In his concurring opinion in *Seef*, Chief Justice Miller correctly noted that if the *Elliott* court had intended to make loss of society damages available as pecuniary injuries in every wrongful death action, then the *Bullard* court would not have had to decide the issue of whether parents could recover such damages for the death of a minor child.¹³² An intent in *Elliott* to extend loss of society damages to all wrongful death actions would also have been inconsistent with the *Bullard* court's refusal to extend its holding to a child having reached majority¹³³ and with the *Seef* court's failure to provide guidance on whether fetal viability is necessary to recover.¹³⁴ Although it has yet to

125. *Id.* at 701-02.

126. *Id.* at 702.

127. *Id.*

128. *Id.*

129. *Finley*, 601 N.E.2d at 702.

130. *Id.*

131. *Id.* at 703.

132. *Seef*, 583 N.E.2d at 512 (Miller, C.J., concurring).

133. *Bullard v. Barnes*, 468 N.E.2d 1228, 1234 (Ill. 1984).

134. *See infra* notes 159-63 and accompanying text.

deny a plaintiff in a wrongful death action the opportunity to prove loss of society damages, the supreme court has refused to extend the presumption to all wrongful death actions, suggesting that limits to recovery exist and are being approached.

A. *Equitable Considerations*

The argument that it is inequitable to consider loss of society as a pecuniary injury in one setting but not in another has been persuasive in decisions expanding the availability of these damages.¹³⁵ Future plaintiffs can be expected to forward this argument in new settings. Plaintiffs who believe they are entitled to damages will inevitably seek to recover them,¹³⁶ and courts will eventually be asked to decide whether these damages are available to parents of a nonviable stillborn fetus or to siblings of an unborn decedent. Parents seeking loss of society damages for the death of a nonviable fetus could argue that it would be inequitable to allow recovery after but not before viability. Similarly, siblings of an unborn decedent could note the inequity of allowing proven damages for a death occurring shortly after but not for one occurring shortly before birth.¹³⁷ Extending this rationale to its logical conclusion would permit loss of society damages in all wrongful death actions. However, despite numerous opportunities, the supreme court has not taken this step. If future courts deny these damages, their decisions will undoubtedly hinge on an analysis of the loss for which these damages compensate.

B. *What Is "Loss of Society"?*

The Illinois Supreme Court has interpreted *loss of society* to be deprivation of the companionship, guidance, advice, love, and af-

135. *Finley*, 601 N.E.2d at 702 (stating that "this court . . . recognize[s] the 'special relationship between spouses, and between parent and child,' [and] we reject the suggestion that there can be no 'special relationship' between siblings"); *Seef*, 583 N.E.2d at 512 (stating that "logic requires that if we allow loss of society damages for infants, that we allow such damages where the nearly full-term child dies before birth"); *Ballweg*, 499 N.E.2d at 1379 (stating that "[w]e fail to see how a presumption of loss of society suddenly disappears upon a child's 18th birthday").

136. *See Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084 (Ill. App. Ct. 1st Dist. 1987) (refusing to extend loss of society damages available under *Bullard* to the owner-pet relationship, leaving damages to be determined by the law relating to loss of personal property of sentimental value).

137. In the *Seef* majority opinion, substitution of the word "sibling" for "parent" and appropriate changes in the case citations would lead to this conclusion. *See Seef*, 583 N.E.2d at 511-12.

fection of the deceased.¹³⁸ As a pecuniary loss in wrongful death actions, loss of society encompasses damages for many facets of family relationships.¹³⁹ The majority opinion in *Seef* failed to discuss the nature of these damages, leaving unresolved the question of whether they compensate for the destruction of the existing society with the decedent¹⁴⁰ or the loss of future society.¹⁴¹ This distinction is obviously important when compensating for the loss of society of a stillborn.¹⁴²

Significant problems exist with both approaches in this setting. For example, if only the existing relationship mattered, the fact that the fetus had suffered from defects precluding survival after birth would not be relevant.¹⁴³ Sometimes, prenatal "society" can be detrimental to maternal health.¹⁴⁴ Under this approach, a mother who had nurtured herself through a difficult pregnancy would presumably recover less than a mother who had had no problems. Finally, not only is the nature of the existing maternal-fetal relationship difficult to evaluate, but it changes and eventually terminates as the natural consequence of a normal pregnancy.

Awarding damages based on the loss of prospective society also poses difficulties. Theoretically, if a couple was unaware of an early pregnancy until they lost the child, they could still recover for the loss of a lifetime of the child's society. The society that a child would have provided during its life would be no different had it been lost in the first trimester of pregnancy or the last. Under this scheme of compensation, the child's gender, or the fact it had been fathered by the Nobel sperm bank,¹⁴⁵ would be more impor-

138. See *Finley*, 601 N.E.2d at 702; *Bullard*, 468 N.E.2d at 1232 (citing *Hall v. Gills*, 147 N.E.2d 352, 355 (Ill. 1958)).

139. *Seef*, 583 N.E.2d at 511; *Finley*, 601 N.E.2d at 702.

140. *Seef*, 562 N.E.2d at 612.

141. *Seef*, 583 N.E.2d at 514 (Miller, C.J., concurring); *Smith*, 560 N.E.2d at 1170.

142. The example of the surrogate mother illustrates this distinction. For a fee, the surrogate contracts to carry the child of a couple who would otherwise be unable to have children. At birth, the surrogate turns the child over to the couple. Prior to birth, the surrogate is the beneficiary of the child's existing "society," with the parents having only an expectation of future (prospective) society. For a review of the legal issues that have arisen from such arrangements, see *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1546-51 (1990).

143. See *supra* note 78.

144. See generally JACK A. PRITCHARD, M.D., ET AL., *WILLIAMS OBSTETRICS* (1985). Examples would include morning sickness, *id.* at 260-61, hyperemesis gravidarum, *id.* at 613, gestational diabetes, *id.* at 598-604, and preeclampsia, *id.* at 540-41.

145. For an account of some of the remarkable children who have been fathered by this sperm bank, see Pascale Le Draoulec, *The Children of the Nobel Sperm Bank*, 69 MED. ECON. No.4, at 106 (Feb. 17, 1992).

tant than the fact that the couple had spent years trying to conceive. Inner-city parents might recover less than suburban parents if statistics showed that their child would most likely have turned to drugs and crime. The couple's ability to have another child would not seem relevant to the society that the lost child would have provided them.

Considering the problems of the loss of society approach in compensating the parents of a stillborn, questions arise about whether loss of society is actually the "pecuniary injury" for which these damages are intended. Perhaps the *Hunt* court was correct in maintaining that the award of such damages was not meant to compensate for loss of society but rather for the couple's mental anguish.¹⁴⁶ Had it actually intended to compensate for mental anguish, the *Seef* court would have provided much better guidance to juries had it so held. Perhaps the court felt that compensating for mental anguish could not be reconciled with the pecuniary injuries constraint of the wrongful death statute, and could not be accomplished through another tort mechanism.¹⁴⁷ If this had been the case, the apparent alternative would have been to leave the decision to the legislature rather than employing convoluted reasoning to circumvent the statutory limitation.

146. *Hunt*, 510 N.E.2d at 1326. Loss of parent-child society and negligent infliction of emotional distress have been considered together in discussions of compensating plaintiffs for intangible injuries. See John L. Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 *HASTINGS L.J.* 477, 479-80 (1984).

Factors such as the stage of the pregnancy, difficulty of conception, and ability to replace the child would be more relevant to the determination of the parents' mental anguish than to the nature of the society that the child would have provided.

147. The plaintiff in *Seef* had originally sought damages for negligent infliction of emotional distress. *Seef*, 562 N.E.2d at 607. This claim was denied since the mother did not plead that she feared for her own safety within a zone of danger. *Id.* at 609; see also *Hunt*, 510 N.E.2d at 1327 (dismissing a complaint alleging negligent infliction of emotional distress, since the plaintiff did not allege that she feared for her own safety within the zone of danger).

In *DiDonato v. Wortman*, 358 S.E.2d 489, 493 (N.C. 1987), the North Carolina Supreme Court recognized that a stillborn was a person under its wrongful death statute. N.C. GEN. STAT. § 28A-18-2 (1984). Despite the fact that the statute explicitly provided for loss of society damages, N.C. GEN. STAT. § 28A-18-2(b)(4)(c) (1984), the court refused to award them, stating:

When a child is stillborn we simply cannot know anything about its personality and other traits relevant to what kind of companion it might have been and what kind of services it might have provided. An award of damages covering these kinds of losses would necessarily be based on speculation rather than reason.

Id. at 494. However, the court did note that recovery for the mother's mental anguish at having lost her child would be available in the mother's own personal injury action. *Id.* at 494 n.3.

C. *Effect of the Presumption*

The term *presumption* has been defined as "an inference which common sense draws from the known course of events."¹⁴⁸ For the loss of a child, the presumption eliminates the difficulties inherent in proving the traditional pecuniary injuries of lost wages and services, allowing the jury to estimate them on the basis of its knowledge and experience.¹⁴⁹ Once *Bullard* made loss of society damages available, the ease of proving these losses reduced the significance of the presumption.¹⁵⁰ However, *Seef* has restored the pre-*Bullard* importance of the presumption by extending it from a relationship whose pecuniary value is difficult to estimate to a relationship whose existence is difficult to determine.¹⁵¹

The *Seef* court apparently intended the presumption to enable parents to recover losses that were difficult to determine because of the timing of the defendant's wrongful act.¹⁵² This would be consistent with the original purpose of the presumption: to benefit parents who would otherwise have difficulty proving traditional pecuniary injuries.¹⁵³ Since it is equally difficult to calculate the loss of the existing society and the prospective society with an unborn child, the rationale behind the presumption is consistent with either view of the nature of loss of society damages. In extending the presumption, the *Seef* majority offered little insight into its reasoning, noting only the inequity of allowing the presumption for the loss of a newborn child but not for an unborn one.¹⁵⁴

In *Finley*, the court held that the existence of the presumption depends on the nature of the relationship.¹⁵⁵ By denying a presumption of loss of society to a decedent's siblings, the court followed the rule that a sibling is only entitled to proven pecuniary damages.¹⁵⁶ When it noted the differing emotional and economic interdependence between parent and child, spouses, and siblings,

148. See *Bullard*, 468 N.E.2d at 1234 (citing *McElroy v. Force*, 232 N.E.2d 708 (Ill. 1967)).

149. *City of Chicago v. Major*, 18 Ill. 349, 360 (1857).

150. See *Schmidt*, *supra* note 34, at 329-32 (noting that loss of society could be proven by simply calling the surviving next of kin and asking him to chronicle his relationship with the decedent).

151. See *Seef*, 562 N.E.2d at 612 (noting that determining the existence and extent of this relationship requires medical expertise).

152. *Seef v. Sutkus*, 583 N.E.2d 510, 514 (Ill. 1991) (Miller, C.J., concurring).

153. See *supra* notes 14-20 and accompanying text; see also *Bullard*, 468 N.E.2d at 1233.

154. *Seef*, 583 N.E.2d at 512.

155. *Finley*, 601 N.E.2d at 702.

156. *Id.*

the *Finley* court may have implicitly recognized the legal duties and obligations inherent in these relationships.¹⁵⁷ In the absence of these parent-child or spousal duties and obligations, a sibling must prove the nature of his society with the decedent in order to recover. By analogy, the absence of a parental duty to a nonviable fetus¹⁵⁸ would argue against applying the presumption to this setting.

D. Unresolved Issues

The approach taken in *Seef* and *Finley* assures that courts will revisit the issue of loss of society damages in other settings. Parties will undoubtedly ask for jury instructions reflecting their perception of these damages, generating appeals that ask courts to better define the nature of the damages. The decision of whether the sibling of an unborn decedent is entitled to prove loss of society damages will hinge on whether these damages compensate for loss of existing society or of prospective society. In the absence of an existing relationship, the plaintiff could only attempt to prove the society that the unborn sibling would have provided. Were the plaintiff allowed to make such attempts, a prospective view of loss of society would be implicit in the decision.

An issue left unresolved by *Seef* is whether a presumption of these damages also applies to the nonviable fetus,¹⁵⁹ although the *Seef* court did use language suggesting a viability requirement. While acknowledging that the Wrongful Death Act recognized the fetus as a "person," the *Seef* majority found no reason to deny similar recovery for the death of a "viable" fetus.¹⁶⁰ It later noted

157. See *Sheahan*, 496 N.E.2d at 1181 (noting the obligations of parents to their children and children to their parents). This would also be consistent with limiting recovery of loss of consortium damages for nonfatal injuries to plaintiffs who have incurred the obligations of a valid marriage. See *supra* note 27.

158. The Illinois Wrongful Death Act explicitly provides an exclusion for lawful abortion: "There shall be no cause of action against a physician or a medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given." ILL. REV. STAT. ch. 70, para. 2.2 (1991).

This portion of the Act was construed in *Light v. Proctor Community Hosp.*, 538 N.E.2d 828, 829 (Ill. App. Ct. 3d Dist. 1989), a wrongful death action in which a woman underwent an abortion after a radiologist negligently exposed the fetus to radiation. *Id.* Although the radiologist had originally placed the fetus at risk, the actual cause of death was the abortion, for which no wrongful death action could lie. *Id.* at 830.

159. *Smith* established this as precedent in the First District. 560 N.E.2d at 1173 (holding that the amended Wrongful Death Act had eliminated the need for the plaintiff to prove fetal viability). The *Seef* court did not have to address the viability issue. 583 N.E.2d at 511 (fetus described as being 38 weeks old and viable).

160. *Seef*, 583 N.E.2d at 511.

that it would be illogical to allow loss of society damages for infants but deny them when the "nearly full-term child" dies before birth.¹⁶¹ In both the majority and concurring opinions, the court held that a rebuttable presumption of lost society exists for the wrongful death of a "stillborn child."¹⁶² The court did not use the term *unborn fetus*. If *stillborn child* indicates that the death occurred near term, this distinction could imply a viability requirement. If asked whether *Seef* applies before fetal viability, the court's decision will establish whether the presumption arises from the biological relationship between the plaintiffs and decedent or from the legal duties and obligations between parent and child, which may not exist before viability.¹⁶³

E. Impact

These decisions increase the number of potential plaintiffs and the damages available to them in wrongful death actions. Being speculative, damages for the lost society of an unborn child are difficult to estimate with any certainty. Not only does the potential to recover greater damages¹⁶⁴ create a financial incentive to sue, but the speculative nature of the damages makes it difficult for defendants to estimate liability exposure in settlement negotiations. This could result in more actions being filed and also in a greater percentage of them going to trial. If siblings of an unborn decedent are allowed to recover, this problem could be compounded. Unlike *Seef*, however, *Finley* requires that damages be proven, thus providing some guidance for defendants trying to estimate liability exposure.

Since wrongful death claims based on stillbirths are commonly made against obstetricians,¹⁶⁵ obstetricians will be particularly affected by the *Seef* decision. If liability is further expanded to in-

161. *Id.* at 512.

162. *Id.* at 512, 515.

163. *See supra* note 158.

164. Citing the *Seef* decision, an Illinois appellate court sustained a jury award for \$400,000 in a wrongful death action based on a stillborn fetus. *Riley v. Koneru*, 593 N.E.2d 788, 790 (Ill. App. Ct. 1st Dist. 1992) (failing to mention viability). The court noted the standard by which an appellate court determines whether a jury's award is excessive:

A reviewing court will not disturb a jury's award of damages unless it is obviously the result of passion or prejudice. Furthermore, an award is not excessive unless it falls outside the necessary limits of fair and reasonable compensation or it shocks the judicial conscience.

Id. at 790-91 (citations omitted).

165. Obstetrical malpractice cases cited in this Comment include: *Seef v. Sutkus*, 583 N.E.2d 510 (Ill. 1991); *Smith v. Mercy Hosp. and Medical Ctr*, 560 N.E.2d 1164 (Ill.

clude siblings of the stillborn or to parents of a nonviable fetus, then liability exposure would increase in an already high-risk medical specialty. Malpractice insurers would presumably cover this exposure by raising premiums, but these costs would then be passed on to patients. Higher premiums coupled with physician aversion to litigation could decrease the availability of obstetrical services. If loss of society damages were made available for the destruction of frozen embryos,¹⁶⁶ the storage of embryos would become an extremely high-risk activity and this could have a chilling effect on advanced reproductive technology.

The brunt of *Seef* will ultimately be borne by juries, who will be asked to place a cash value on the lost society of a stillborn. Case law provides conflicting guidance, with the decisions differing on the type of loss for which loss of society damages compensate. Awards will undoubtedly be inconsistent and unpredictable until further judicial or legislative guidance is provided.

V. PROPOSAL

Rather than asking the jury to make the difficult determination of the value of a relationship that was lost before it came into being, it could instead be asked to determine the loss of the investment the parents had made in the hope of acquiring this "society." In purely economic terms, children are generally a liability, and parents have children with other considerations in mind. During the pregnancy, the parents make an investment with the expectation of intangible future benefits (society) and the uncertain prospect of eventual monetary benefits.¹⁶⁷ As a child becomes older, both the society exchanged with its parents and its monetary contributions become more ascertainable as the return on the parents' investment is realized.

App. Ct. 1st Dist. 1990); *Hunt v. Chettri*, 510 N.E.2d 1324 (Ill. App. Ct. 5th Dist. 1987); *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982).

166. The Wrongful Death Act provides for a cause of action despite "the state of gestation or development." ILL. REV. STAT. ch. 70, para. 2.2 (1991) (emphasis added). *Gestation* is defined as "the carrying of young in the uterus." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 515 (1987). A construction of the phrase *or development* to include extrauterine embryos could have this effect.

167. The Illinois Supreme Court acknowledged this in extending the presumption of loss of society injuries to an adult child in *Ballweg*, 499 N.E.2d 1373, in which it stated:

The return on parents' investment in their children is very real, even though it may not be in the form of money. When children are wrongfully killed, the parents' investment of money and in affection, guidance, security and love is destroyed. Society recognizes the destruction of that value, whether the child is a minor or an adult.

Id. at 1379.

Compensating parents for the investment they had made in a pregnancy whose purpose had been defeated by the tortfeasor would be particularly appropriate in the early stages of a pregnancy, when "actual" consortium is negligible and "prospective" consortium is difficult to determine.¹⁶⁸ Here, the parents' actual pecuniary loss is better reflected in the expenses and burdens incurred as a result of the pregnancy, including any difficulties experienced in conceiving the child.¹⁶⁹

Although it would be inappropriate to require a couple to mitigate damages by having another child, the parents' decision not to have another child may suggest that they did not value the lost child's prospective society more than the burdens of another pregnancy. Were the couple to have another child after recovering loss of society damages, the recovery could be disproportionate to the actual loss.¹⁷⁰

Awarding damages based on the parents' lost investment would be more consistent with the original spirit of pecuniary injuries under the Wrongful Death Act, and would be an alternative to extending *Seef's* holding to the nonviable fetus. A couple's investment in the pregnancy would be subject to a more objective determination, with the potential benefit of more uniform and predictable awards. From the perspective of the courts, this approach would have the added advantage of favoring settlement of these actions rather than encouraging litigation over highly speculative damages. The court may find it difficult to resist the temptation of further expanding the availability of loss of society

168. Complete restoration might not be possible if the couple could no longer have children (i.e., if one spouse had been killed or rendered infertile). Examples would include a situation in which the mother lost both her unborn child and her spouse in an accident or in which the injuries causing the loss of the unborn child also necessitated a hysterectomy. However, in the first instance, she could recover for the lost consortium of her spouse under the Wrongful Death Act, and in the second she could recover damages in a negligence action for the injuries that resulted in her loss of fertility.

169. Damages could include pregnancy-related medical expenses, lost wages incident to the pregnancy, and the cost of the infertility treatments that led to the pregnancy.

170. The loss of marital consortium is measured until the time of remarriage. *See Carter v. Chicago & Illinois Midland R.R. Co.*, 474 N.E.2d 458 (Ill. App. Ct. 4th Dist. 1985). There, the court observed:

So in the instant case, if loss of consortium is sought, it must be actual loss; that is, loss up to the time of remarriage. It may be true, as plaintiff argues, that consortium with the deceased spouse may have been of a different quality from that with the present spouse, but such speculations could lead only to Aristophanes' Nephelococytia.

Id. at 463; *see also Dotson v. Sears Roebuck, & Co.*, 557 N.E.2d 392, 394 (Ill. App. Ct. 1st Dist. 1990).

damages,¹⁷¹ but it should carefully consider the implications of doing so. The goals of tort law are compensatory, and damages disproportionate to the injuries sustained appear to be punitive rather than compensatory.

If courts followed an approach that considered the nature of the actual relationship destroyed as well as the plaintiff's investment in it,¹⁷² siblings of an unborn decedent could not recover loss of society damages. The sibling has incurred no legal obligations or duties as a result of an unborn child's existence and has made no investment in the pregnancy. Unlike the maternal-fetal relationship, no actual relationship exists between a sibling and the unborn child; and unlike the parents, the sibling is not responsible for the unborn child's existence. Drawing a line at birth may result in inequities, but a line must nevertheless be drawn.¹⁷³ The requirement that a sibling be an heir in existence at the time of the death precludes recovery by siblings born thereafter.¹⁷⁴ Would it be fair to deny recovery to a sibling born shortly after the wrongful death but not to one born shortly before¹⁷⁵ when calculation of damages in each case would be equally difficult? Should a defendant escape liability because of the timing of his wrongful act? The application of this reasoning to all settings leads to patently absurd results.

The parents of a nonviable fetus may not have assumed any legal duties or obligations toward,¹⁷⁶ or established a demonstrable relationship with the fetus, but they have made an investment in the

171. The court would not be the first to permit recovery of loss of society for the death of an unborn sibling. See *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1236 (5th Cir. 1986) (applying Louisiana law, a federal court held that such damages are permissible).

172. The latter could include both actual expenses and legal obligations incurred as part of the relationship.

173. Some argue that birth is a better place to draw the line, even in the parent-child setting. It is a definite, precise, and observable occurrence, unlike viability, which is uncertain, indefinite, and unpredictable as the state of technology advances. See *Chrisafogorgis*, 304 N.E.2d at 92 (Ryan, J., dissenting).

174. In *Finley*, 699 N.E.2d at 701, the court stated: "the phrase 'next of kin,' for purposes of the Wrongful Death Act, are those blood relatives of decedent in existence at decedent's death who would take decedent's property if decedent had died intestate." See also ILL. REV. STAT. ch. 110½, para. 2-3 (1991) (providing that a posthumous child of a decedent may inherit as if the child had been born in the decedent's lifetime; no similar provision is made for a decedent's other descendants or siblings).

175. Courts have even found defendants liable for injuries caused by torts occurring before the plaintiff's conception. See *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1977) (holding a physician liable for negligence occurring prior to plaintiff's conception, where a transfusion of incompatible blood to the mother resulted in development of maternal antibodies causing injury to the subsequently conceived child).

176. See *supra* note 157.

pregnancy and have been responsible for the relationship's existence. Presumably, the parents' investment in the pregnancy would be easy to establish. However, if the plaintiffs believed that destruction of the maternal-fetal relationship before viability also resulted in lost society, it would be reasonable to require them to prove the nature of the relationship destroyed and its value rather than allowing them to rely on a presumption of damages.

VI. CONCLUSION

By expanding the presumption of loss of society damages to a wrongful death action based on the loss of a viable fetus, the Illinois Supreme Court has greatly expanded the potential damages available to plaintiffs. Its failure to provide guidance on the nature of loss of society damages compounds the already high potential for jury confusion and inconsistent verdicts. Although the *Finley* court increased the number of potential plaintiffs, its requirement that damages be proven should reduce the potential for such problems in wrongful death actions brought by siblings.

Neither the amended Wrongful Death Act nor common sense mandates expanding the availability of loss of society damages to siblings of an unborn decedent or expanding the presumption to parents losing a nonviable fetus. Such an expansion would be inconsistent with the pecuniary damages limitation of the Illinois wrongful death statute, and it could actually obscure factors that should more appropriately be considered.

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