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Pecuniary Injuries Under the Illinois Wrongful Death Act: Is the Loss of a Child’s Society Included?

INTRODUCTION

The Illinois Wrongful Death Act1 ("the Act") creates an action for the death of any person caused by the default, neglect, or wrongful act of another. The action may be brought by the personal representative of the deceased,2 and the damages received are for the exclusive benefit of the spouse or next of kin.3 In providing for damages, the Act states: "[T]he jury may give such damages as they deem a fair and just compensation with reference to the pecuniary injuries resulting from such death."4

The legislature did not define the term "pecuniary injuries" in the statute, instead leaving this task to the judiciary. Illinois courts have focused primarily on the decedent's economic contribution: the monetary value of the services and financial support the decedent would have provided to the spouse and next of kin.5 Wrongful death damages are meant to be compensatory in nature, however, and this narrow focus does not recognize that

2. The first Illinois Supreme Court decision to interpret the Wrongful Death Act was City of Chicago v. Major, 18 Ill. 349 (1857). There the court construed the statutory language "personal representative" as including the executor or administrator of the decedent's estate. The Act was amended in 1977 to allow an action to be brought by a special administrator appointed by the court. 1977 Ill. Laws 2227 (codified at Ill. Rev. Stat. ch. 70, ¶ 2.1 (1981)).
3. As originally enacted, the Act provided that the damages awarded were to be distributed to the next of kin according to the laws of intestacy. The Act was amended to provide distribution on the basis of the next of kin's dependency upon the deceased. 1955 Ill. Laws 7006 (codified at Ill. Rev. Stat. ch. 70, ¶ 2 (1981)). This change did not alter the definition of pecuniary injuries, only the method of distribution. See Barrow v. Lence, 17 Ill. App. 2d 277, 451 N.E.2d 120 (1958). See also infra text accompanying notes 57-63.
4. The phrase "next of kin" has been interpreted to preclude actions brought by employers or friends not related by blood. E.g., Mattyasovskv v. West Towns Bus Co., 61 Ill. 2d 31, 330 N.E.2d 509 (1975).
beneficiaries often sustain more than mere economic losses.\(^6\)

In recognition of the potentially harsh results of this narrow interpretation, Illinois courts have expanded the term “pecuniary injuries” on a case by case basis to include certain intangible elements of family relationships. Specifically, courts have held that the loss of a spouse’s consortium,\(^7\) the loss of a parent’s instruction and training,\(^8\) and the the loss of a parent’s felicity and care\(^9\) are pecuniary injuries. The question of whether pecuniary injuries include the loss of the intangible elements of other family relationships remains unanswered.\(^10\) Recently, however, the Illinois Supreme Court granted leave to appeal in the case of Bullard v. Barnes\(^11\) to determine whether a parent’s loss of a child’s society\(^12\) should be recoverable as a pecuniary injury.\(^13\)

This note first examines the history of the Illinois Wrongful Death Act and the interpretation of pecuniary injury under the Act as it has been formulated by the courts. The expansion of the term “pecuniary injury” is then examined, followed by an analysis of the appellate court decision in Bullard. This note will then

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7. In Elliott v. Willis, 92 Ill. 2d 520, 442 N.E.2d 163 (1982), the Illinois Supreme Court held a spouse’s loss of consortium to be a pecuniary injury. Consortium was defined to include society, guidance, companionship, felicity, and sexual relations, and was held to be unique to the marriage partner. Id. at 535, 442 N.E.2d at 166. See infra text accompanying notes 64-81.


10. The Illinois Supreme Court has not considered whether collateral relatives, such as siblings, may recover for the loss of intangible elements. See infra note 123.


12. A definition of the term “society” has not been formulated by the Illinois courts. The United States Supreme Court has defined society to include the broad range of mutual benefits each family member receives from the others’ continued existence, including love, affection, care, attention, companionship, comfort, and protection. Sealand Servs. v. Gaudet, 414 U.S. 573 (1974), reh’g denied, 415 U.S. 986 (1974). For the purposes of this note, this definition will be used to represent the elements of a child’s society.

13. Two Illinois Appellate Court decisions have held that the loss of a child’s society is not compensable as a pecuniary injury. See Bullard v. Barnes, 112 Ill. App. 3d 384, 445
look to prior statutory interpretation and public policy to determine whether the loss of a child's society should be recognized as a pecuniary injury under the Illinois Wrongful Death Act.

**HISTORY OF WRONGFUL DEATH ACTS**

At common law, civil suits for damages sustained as the result of a wrongful death of a family member were barred. The impetus for this rule was a brief nisi prius decision rendered in 1808 which held that the death of an individual could not be claimed as an injury by family members in a civil court. Although today the basis for barring common law wrongful death actions is generally discredited, this prohibition was previously accepted and relied upon in the United States for some time. The absurd effect of this rule was that a defendant's liability could be established when his negligence caused an injury, but not when it

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14. Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). The English trial court stated: "In a civil court the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence." Id. at 493, 170 Eng. Rep. at 1033. The felony merger doctrine has been identified as a principle justification for the holding in Baker. According to this doctrine, if an act such as a homicide is punishable as a felony, no civil action case arises because the sovereign pre-empts the entire case. Smedley, Wrongful Death—Bases of the Common Law Rules, 13 VAND. L. REV. 605, 609-10 (1960).

15. See Malone, The Genesis of Wrongful Death, 17 STAN. L. REV. 1043 (1965). Another thoughtful criticism appears in Sweeney, Right of Surviving Spouse to Damages for Loss of Consortium, 26 TRIAL LAW. GUIDE 221 (1982-83), in which the author finds that Baker fails as precedent because, "first, it was dictum; second, it was a nisi prius decision; third, it was contrary to English precedent; fourth, it was decided in 1808, two centuries after ... most states ... had adopted the common law of England ...; [and,] fifth, it is not supported by natural justice." Id. at 227. For a complete discussion of the case, see Holdsworth, The Origin of the Rule in Baker v. Bolton, 32 L.Q. REV. 431 (1916).

caused a death. In England, recognition of this intolerable inequity led to the enactment of Lord Campbell's Act, which has been the model for most subsequent state wrongful death statutes.

Lord Campbell's Act provided that an action could be brought against a person who had caused another's death by wrongful act, neglect, or default. In referring to damages, the statute states: "[I]n every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." This broad language was first interpreted narrowly in Blake v. Midland Railway, an 1852 case which held that the statute was designed to compensate the family of the deceased and not to provide solace for their wounded feelings. Although Blake only denied recovery for mental suffering under Lord Campbell's Act, subsequent cases interpreted the Blake decision to limit all damages to actual pecuniary inj-

17. Prosser relates an unfounded legend that "this was the original reason that passengers in Pullman car berths rode with their heads to the front. Also fire axes in the railroad coaches were provided to enable the conductor to deal efficiently with those who were merely injured." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 902 (4th ed. 1971).

18. The official title was "An Act Compensating the Families of Persons Killed by Accidents." It was also known as the Fatal Injuries Act of 1846, 9 & 10 Vict., ch. 93. The inequity of the common law rule denying recovery for a wrongful death became apparent with the advent of industrialization. The development of the railroads and factories resulted in an increased incidence of fatal accidents. Malone, supra note 15, at 1043.


20. The text of the Act states "[t]hat whatsoever the death of a person shall be caused by Wrongful Act, Neglect or Default and the Act, Neglect or Default is such as would (if Death had not Ensued) have entitled the Party injured to maintain an action and recover damages thereof." Fatal Injuries Act of 1846, 9 & 10 Vict., ch. 93.

21. Id.


23. The court formulated the question before them as "whether the jury in giving damages . . . may add a solatium to those parties (bringing the action) in respect of the
ries suffered as a result of the death. As originally interpreted, a pecuniary loss was one which could be specifically measured, and usually represented the dollar value of the lost income and services that were previously provided by the decedent.

Notwithstanding the criticism that this narrow interpretation of Lord Campbell's Act had received, the pecuniary loss limitation was adopted by most states, either by an express statutory provision or by judicial construction of the wrongful death statute. This ready adoption of the pecuniary loss limitation resulted from the fear that, absent some limitation, the awards would be based on sentiment or vengeance.

Although most states initially adopted the potentially restrictive pecuniary loss limitation, there has since been a trend toward expanding the scope of compensable injuries. In several states, the legislatures have amended their wrongful death acts to provide specifically for the compensation of traditionally non-economic injuries such as the loss of society and the loss of consortium. Several statutes go so far as to allow damages for the mental suffering occasioned by such death." Blake, id. at 108, 118 Eng. Rep. at 40-41. The court concluded that the trial judge should have instructed the jury that they should not take into consideration the mental sufferings of the plaintiff for the loss of her husband. Id. at 111-12, 118 Eng. Rep. at 42.

24. For a discussion of the early English decisions, see H. TIFFANY, DEATH BY WRONGFUL ACT § 154 (2d ed. 1913).

25. See, e.g., Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913). The Court was construing the Employer's Liability Act of 1908, which did not expressly state that recovery was limited to pecuniary injuries, but was previously interpreted to so limit recovery. The Court in Vreeland held that to recover, the loss must be measurable by some standard, and that the Act did not allow recovery for an inestimable loss such as the loss of a spouse's companionship.

26. "[A]t best this interpretation was a dubious one, since Lord Campbell's Act sets forth no limitation on the recovery other than that the damages should be proportionate to the injury suffered by the beneficiary. At worst, what the English Court did was an outright amendment of the statute." J. STEIN, DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS 518 (1972).


28. For a discussion of the states which have construed their statutes as limiting awards to pecuniary injuries, see S. SPEISER, supra note 6, at 109 n.7.

29. E.g., J. STEIN, supra note 26, at 482.

30. Michigan amended its Wrongful Death Act in 1972 to allow recovery for the loss
grief and emotional harm that results from the loss of a loved one.\textsuperscript{31} Those statutes which do not specifically limit recovery to pecuniary injury have been interpreted to also include recovery for these noneconomic losses.\textsuperscript{32} This general broadening of allowable recovery has resulted in some courts interpreting statutes that expressly limit recovery to pecuniary losses as broad enough to include loss of society and loss of consortium.\textsuperscript{33} This broadening is reflected in the seminal Michigan Supreme Court decision of \textit{Wycko v. Gnodtke}.\textsuperscript{34} The \textit{Gnodtke} court rejected of society and companionship of the deceased. MICH. COMP. LAWS § 27A.2922 (1981). Other states that have amended their wrongful death acts include: Florida, FLA. STAT. § 768.21 (1982); Hawaii, HAWAII REV. STAT. § 663-3 (Supp. 1982); Kansas, KAN. STAT. ANN. § 60-1904 (1976); Maryland, MD. CTS. \& JUD. PROC. CODE ANN. § 3-904(d) (1980); North Carolina, N.C. GEN. STAT. § 28-174(4)c (Supp. 1981); and Vermont, VT. STAT. ANN. tit. 14, § 1942(b) (Supp. 1983).


31. Eight states allow recovery for mental anguish in a wrongful death action: Arkansas, ARK. STAT. ANN. § 27.090 (1979); Florida, FLA. STAT. § 768.21 (1982); Kansas, KAN. STAT. ANN. § 64-1904 (1976); Maryland, MD. CTS. \& JUD. PROC. CODE ANN. § 3-904(d) (1980); Nevada, NEV. REV. STAT. § 41.084 (1979); Oklahoma, OKLA. STAT. tit. 12, § 1053 (1981); Virginia, VA. CODE § 8.01-52 (Supp. 1983); and West Virginia, W. VA. CODE § 55-7-6 (Supp. 1983).

32. For example, the California statute provides for “such damages as may be just.” CAL CIV. PROC CODE § 377 (West 1984 Supp.). This was interpreted to permit recovery for the loss of society, comfort, and companionship in a parent’s action for the death of their child. Bond v. United R.R. of San Francisco, 159 Cal. 270, 113 P. 366 (1911). In Montana, the statute states that “such damages may be given as, under all the circumstances of the case, may be just.” MONT. CODE ANN. § 93-2810 (1977) The Montana Supreme Court interpreted this language to allow recovery for the pecuniary value of decedent’s companionship, comfort, and society. Mize v. Rocky Mountain Bell Tel., 58 Mont. 521, 100 P. 971 (1909). The Pennsylvania statute allows compensation for “any damages for a death,” 12 PA. CONS. STAT. ANN. § 1601 (Purdom 1970), which has been interpreted to allow for companionship, comfort, society, guidance, solace, and protection. Spangler v. Helms N.Y. Pittsburgh Motor Express, 396 Pa. 482, 153 A.2d 490 (1959).

33. See, e.g., Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961). The pecuniary value of a child’s advice and guidance as well as his companionship was held compensable in Green v. Bittner, 95 N.J. 1, 424 A.2d 210 (1980). But see Liff v. Schldkrout, 49 N.Y.2d 622, 404 N.E.2d 1288 (1980) (deferring to the legislature on the question of whether the loss of consortium is an element of pecuniary injury). The result of the different state interpretations of their wrongful death acts is that a life can be worth considerably more in some jurisdictions than in others. See Note, supra note 6, at 255-56 n.8.

34. 361 Mich. 331, 105 N.W.2d 118 (1960). At the time \textit{Wycko} was decided, the Michigan Wrongful Death Act was similar to the Illinois Act. It expressly limited the recovery
a strict value measure of pecuniary loss when it allowed a parent to recover for the loss of a child's companionship in a wrongful death action.\textsuperscript{35} The historical reasons that supported the strict measure of loss were found by the court to be no longer sufficient.\textsuperscript{36}

The United States Supreme Court recognized the legislative and judicial trend toward expanding the scope of recovery in \textit{Sea-Land Services v. Gaudet},\textsuperscript{37} in which the Court permitted recovery by a spouse for the loss of her husband's society under a maritime wrongful death action. In allowing damages for the loss of society,\textsuperscript{38} the Court noted that it was aligning the maritime wrongful death remedy with a majority of state wrongful death acts.\textsuperscript{39}

\begin{itemize}
\item of damages to pecuniary injuries suffered as a result of the wrongful death. Prior to this decision, the Michigan courts had used a balance sheet approach to compute the amount of damages that a parent sustained. The courts subtracted the speculative costs of rearing the child from the hypothetical earnings of the child prior to his majority. The remaining sum, if any, was deemed to be the pecuniary loss. \textit{See supra} notes 34-36.
\item The court adopted, in part, the lost investment theory of recovery. This theory suggests that the cost of birth, food, clothing, medicine, instruction, nurture, and shelter may be compensated as the amount of money the parent has invested in raising the child. \textit{See Note, supra} note 6, at 262. The court expanded upon this theory by including the value of the child's society as part of the compensable damages. The lost investment theory has not been readily accepted, however, it was discussed with approval in \textit{Anderson v. Lale}, 216 N.E.2d 152 (S.D. 1974). \textit{But see Wallace v. Woods}, 149 Ind. App. 157, 271 N.E.2d 487 (1971); Gravely v. Sea Gull Marines, Inc., 269 N.W.2d 896 (Minn. 1978); Selders v. Armentrout, 190 Neb. 275, 207 N.W.2d 686 (1973).
\item The court carefully examined the economic contributions that children in the past made to their families. The court rejected the child-labor measure of pecuniary loss and stated:
\begin{quote}
There still exists in the law this remote and repulsive backwash of time and civilization, untouched by the onward march of society, where precedents we alone honor tell us that the value of the life of a child must be measured by the standards of the day when he peddled the skill of his hands and the strength of his back at the factory gates.
\end{quote}
361 Mich. at 335, 105 N.W.2d at 121.
\item \textit{Sea-Land} illustrates that courts have not adopted a standard definition of the term "society." Although \textit{Sea-Land} involved a spouse's action, the Supreme Court did not use the term "consortium." Instead, the court used the term "society" and did not distinguish between a spouse's action and a parent's or child's action. The Court was careful, however, to distinguish between the loss of society and recovery for mental anguish. Mental anguish was held to represent an emotional response to a wrongful death that is not compensable under most wrongful death statutes. \textit{Id.} at 585-86 n.17.
\item \textit{Sea-Land} is a case of great significance. S. \textit{Speiser, supra} note 6, at 319. Although it was a maritime action, the Court indicated that it was summarizing the rules of law regarding damages compensable under state wrongful death statutes. The Court allowed the plaintiff widow to recover damages for the loss of support, services, and society.
\end{itemize}
The Illinois Wrongful Death Act was enacted in 1853\(^{40}\) to create a statutory remedy for pecuniary injuries sustained as a result of a death caused by wrongful act, neglect, or default.\(^{41}\) The term “pecuniary injury” is not defined in the Illinois statute.\(^{42}\) The Illinois courts have interpreted the phrase to include tangible elements such as the financial worth of the decedent, as well as the monetary value of the support and services provided to the spouse and next of kin.\(^{43}\) Courts have not limited recovery to

\(^{40}\) Wrongful Death Act of Feb. 12, 1853, 1853 Ill. Laws 97 (codified at ILL. REV. STAT. ch. 70, \$ 1-2 (1981)).


\(^{42}\) There is no express language in the Act which states that it is to be the exclusive remedy for the wrongful death of an individual. The Illinois courts, however, have interpreted the Act to preclude common law death actions, stating that since there was no action at common law, the right to bring a wrongful death action is purely statutory. Li Petri v. Turner Constr. Co., 36 Ill. 2d 597, 224 N.E.2d 841 (1964); Dougherty v. American McKenna Process Co., 225 Ill. 369, 99 N.E. 619 (1912). For a discussion of the limitations of the Act and the suggestion that Illinois courts recognize common law death actions, see McElvain, The Illinois Wrongful Death Act and the Common Law, 1979 S. Ill. U.L.J. 251.


\(^{43}\) The term “pecuniary injury” is examined in depth in a 1928 Illinois Supreme Court decision, Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928), in which the court defined pecuniary loss, as follows:

> What the life of the deceased was in a pecuniary sense worth to them and such loss is to be determined from proof of... the amount of his usual earnings, as proof of what he might in all probability earn for the future support of his wife and children. The amount to be recovered is the pecuniary value of such addition to his estate as the deceased in reasonable probability would have made and left if his death had not been wrongfully caused.

\(\text{Id. at 575, 162 N.E. at 173.}\) For example, evidence of the deceased father’s ability to make home improvements and repairs has been held sufficient to prove a pecuniary loss.
these tangible elements, however. Rather, in Illinois, the scope of the phrase has been expanded through judicial interpretation. The courts have done this in two ways: first, by recognizing a presumption of pecuniary loss in the event of a wrongful death; and, second, by expanding the term to include certain intangible elements of loss.

Presumption of Pecuniary Loss

Illinois is one of a number of states utilizing a presumption of pecuniary loss when the decedent leaves a direct lineal heir or spouse. The Illinois Supreme Court first articulated this presumption in City of Chicago v. Scholten. The Scholten court held that the plaintiff father was not required to prove actual services of a pecuniary value provided by his deceased son, but that the court would presume a pecuniary loss for which compensation could be given. Such a presumption can be supported by establishing personal attributes of the deceased to be considered in assessing the amount of pecuniary loss sustained. Subsequent to Scholten, Illinois courts have not limited the use of the presumption to a parent’s action in which it is difficult to prove economic contribution by the child. Its use has been expanded to apply in cases in which the decedent was an adult and the next of kin were also adults. The presumption


44. Other states which use a presumption of pecuniary loss include Arkansas, Indiana, Maine, Minnesota, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, and Wisconsin. S. Speiser, supra note 6, at 309. See also Annot., 14 A.L.R.2d 485, 514 (1950). For a discussion of the nature and effect of presumptions in wrongful death actions, see S. Speiser, supra note 6, at 310.

45. 75 Ill. 468 (1874).

46. The plaintiff's son was 12 years old at the time of his death. The court realized the difficulty inherent in proving pecuniary loss, because a child has not developed his habits of industry. In addition his potential financial worth, which is an element of pecuniary loss, cannot easily be determined. See infra notes 98-101. In formulating the presumption, the court relied on the earlier cases which had allowed the jury to estimate the pecuniary damages from the facts proven in connection with their own knowledge and experience. E.g., City of Chicago v. Major, 18 Ill. 349 (1857).

47. Scholten, 75 Ill. at 472. The court found that the damages to be awarded to the father could be increased by “evidence of the child’s mental and physical capacity to be of service to his father in his business, his habits of industry and sobriety, where the deceased is old enough to have established a character.” Id. at 472-73.


is outlined in the pattern jury instructions, and is used routinely in cases involving lineal heirs and spouses.\textsuperscript{50} It ensures that an award above nominal damages will be granted.\textsuperscript{51}

The presumption of loss, although strong, is not conclusive. In a recent Illinois Supreme Court decision, \textit{Flynn v. Vancil},\textsuperscript{52} the presumption was held to be rebuttable. In \textit{Flynn}, the father brought suit for the wrongful death of his two week old daughter. During the trial, evidence of an incurable congenital defect that impaired the health of the child was presented. The jury found the defendant liable but awarded no damages. In upholding the verdict, the Supreme Court found that the jury could reasonably have concluded that the facts regarding the health of the infant rebutted the presumption of pecuniary loss sustained by the parents.

Since the presumption is rebuttable, there is the possibility that no damages will be awarded when the defendant offers

\textsuperscript{50} See Recent Decisions, supra note 48, at 685. The presumption has never been extended to collateral heirs, who must show proof of monetary loss to recover more than nominal damages. See Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928); Rhodes v. Chicago & Alton R.R., 227 Ill. 328, 81 N.E. 371 (1907). The jury instruction reads, in pertinent part, "[T]he law recognizes a presumption that the (lineal heir) has (have) sustained some substantial pecuniary loss by reason of the death." ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) No. 31.01 (2d ed. 1971).

\textsuperscript{51} 41 Ill. 2d 236, 242 N.E.2d 237 (1968). \textit{Flynn} was the first case to state that the presumption is, in fact, rebuttable, although the presumption was first formulated in 1874. Before \textit{Flynn}, there were no cases analyzing the effect of the presumption, but its existence was recited as a matter of course by reviewing courts as they upheld verdicts. See Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928) (lineal next of kin presumed to suffer pecuniary loss from the fact of death); Dukeman v. Cleveland, St. Louis R.R., 237 Ill. 104, 86 N.E. 712 (1909) (the law presumes substantial pecuniary damages from the relationship alone); Ferraro v. Augustine, 45 Ill. App. 2d 295, 196 N.E.2d 16 (1964) (a presumption obtains in favor of pecuniary loss and substantial damages which operate in favor of lineal kinsmen). Perhaps it was this treatment of the presumption that caused authors Mirza and Appleman to state, incorrectly, that the presumption is not rebuttable. J. MIRZA & J. APPLEMAN, ILLINOIS TORT LAW AND PRACTICE 446, 449 (1974).
proof that no pecuniary loss was sustained.\(^{53}\) This creates difficulty in determining the effect the presumption has on the burden of proof because it is unclear what evidence will be sufficient to overcome the presumption.\(^{54}\) The rebuttable nature of the presumption may therefore mean that parents' recovery for
the loss of a child could be minimal. A child will rarely contribute enough to a household to exceed the amount spent by the parents in raising the child, and thus the presumption of loss may be easily overcome.

Expansion of the Term "Pecuniary Injury"

The second means of expanding the pecuniary loss limitation has been the broad interpretation of the term "pecuniary injury" to include certain non-financial injuries. The Illinois Supreme Court examined the scope of pecuniary injury in Hall v. Gillins and Knierim v. Izzo. Both cases were common law actions, and in neither case did the plaintiff seek statutory recovery under the Illinois Wrongful Death Act. The plaintiffs in Hall had sought recovery for the loss of support, guidance, advice, and affection of the decedent as husband and father. In Knierim, the spouse claimed damages for loss of consortium. The court reasoned in both cases that the remedies sought were not significantly different from the statutory remedy provided by the Wrongful Death Act. In Hall, the court stated: "[T]he term pecuniary injury has received an interpretation that is broad enough to include most of the items of damage that are claimed by the plaintiffs in this case." Similarly, in cases brought under the

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excellent relationship with her parents was submitted at trial. The jury awarded $188,000 to the parents. On review, both verdicts were upheld. The court in Trotter recognized the disparity in the amounts of awards granted in the wrongful death of young people. The court cited its decision in Long v. Benett, 55 Ill. App. 3d 50, 370 N.E.2d 627 (1977), in which an award of $5,000 compensatory damages for the death of a high school aged son was held to be inadequate. The court in Trotter, however, concluded that the $7,000 awarded in this case was not insubstantial as a matter of law nor so nominal so as to be inadequate. For further discussion of Trotter, see supra note 97.

55. Note, supra note 6, at 260. In practice, the presumption has not been easily overcome. This practice has been criticized as abrogating the standard tort rule that proof of damages are an inherent part of the plaintiff's case. See Recent Decisions, supra note 48, at 686.

56. See supra notes 98-101 and accompanying text.

57. 13 Ill. 2d 26, 147 N.E.2d 352 (1958).

58. 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

59. In Hall, the widow and son of the deceased brought a common law action to avoid the statutory limit of damages then in effect under Wrongful Death Act. The wife had requested damages of $142,450 and the son had requested $47,500. The maximum recovery for all damages in 1957 under the Act was $30,000. Ill. Rev. Stat. ch. 70, ¶ 2 (1957).

60. In Knierim, the wife of the deceased sought recovery for the alleged murder of her husband under the Wrongful Death Act and under a common law action for the loss of consortium. The court found that a cause of action was stated under the Act but dismissed the common law complaint. 22 Ill. 2d 26, 147 N.E.2d 352 (1958).

61. Hall, 13 Ill. 2d at 31, 147 N.E.2d 355.
Wrongful Death Act, the Illinois Supreme Court has held that the jury may award damages for the decedent’s felicity and care as a father, and has allowed awards for the child’s loss of instruction and moral training due to the death of the father.

The most explicit expansion of the term “pecuniary injury” occurred only one year ago in Elliott v. Willis. Paul Elliott was killed when his car collided with a truck. At trial, evidence concerning the companionable nature of the relationship between the decedent and his wife was admitted, but the court did not instruct the jury as to the use or effect of the evidence. The court refused to instruct the jury on the loss of consortium as an element of damages, and the jury returned a verdict of $4,500. The plaintiff estate appealed, contending that the refusal to give the proffered instructions was reversible error, and that the judgment was too low as a matter of law. The appellate court reversed, and held that the plaintiff estate should have been permitted the instruction on lost consortium.

The Illinois Supreme Court affirmed on the issue of loss of consortium. In the majority opinion, Justice Clark formulated the issue succinctly: Is a spouse’s loss of consortium compensa-
ble as a pecuniary injury under the Wrongful Death Act? Con-
sortium was defined to include society, guidance, companion-
ship, felicity, and sexual relations, and was deemed unique to the marriage partner. In answering the question affirmatively, the court focused on prior interpretations of the term “pecuniary injury,” relying on Hall v. Gillins and Knierim v. Izzo to define the many elements generally considered compensable under the Wrongful Death Act. The court then examined cases which had allowed recovery under the Wrongful Death Act for a child’s loss of a father’s felicity and care and for the loss of instruction and moral training. The court concluded that to be consistent with this broad interpretation of pecuniary injury under the Act, loss of consortium must be included. The court reasoned that “since we have held that the felicity and care of a father are capable of evaluation as ‘pecuniary injuries’ under the

cases to conclude that the jury instruction was not justified by the case law in the state. The court looked at Knierim and Hall, two cases in which the Illinois Supreme Court refused to acknowledge common law actions for the loss of consortium and destruction of the family unit because similar remedies were available under the Wrongful Death Act. See supra notes 57-61 and accompanying text. The court held that a wife could maintain an action for the loss of consortium that resulted from the non-fatal injuries suffered by her husband. The court concluded, “Thus Illinois case law permits either spouse to sue for loss of consortium following non-fatal injuries to the other spouse and implies that for death, the Wrongful Death Act provides compensation sufficient to obviate a common-law action for lost society or consortium.” 89 Ill. App. 3d at 1147, 412 N.E.2d at 641.

69. Id. at 534-35, 442 N.E.2d at 165.
70. The court relied on the definition that had been formulated in Dini v. Niaditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960). In Dini, the court recognized a wife’s action for loss of consortium following non-fatal injuries, holding that consortium includes, “in addition to material services, elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity.” Id. at 427, 170 N.E.2d at 891.
71. In Mitchell v. White Motor Co., 58 Ill. 2d 159, 317 N.E.2d 505 (1974), the Illinois Supreme Court set forth the rule for the statute of limitations in actions for the loss of consortium following non-fatal injuries. In finding that the statute of limitations was five years, the court characterized loss of consortium, not as an injury to the plaintiff’s person, but as an injury to a personal relationship established by the marriage contract. Consortium is thus considered unique to the husband and wife as joined in a marriage contract.

73. 13 Ill. 2d 26, 147 N.E.2d 352 (1958). See supra notes 62, 64 and accompanying text.
74. 92 Ill. 2d at 535-36, 442 N.E.2d at 166.
75. The court cited Allendorf v. Elgin, J. & E. R.R., 8 Ill. 2d 164, 133 N.E.2d 288 (1956), cert. denied, 352 U.S. 853, reh’g denied, 352 U.S. 937 (1967). In Allendorf, the court had construed pecuniary injury to allow the jury to award damages for such intangibles as the decedent’s felicity and care. The court also referred to Goddard v. Enzler, 222 Ill. 462, 78 N.E. 205 (1906), and Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N.E. 1109 (1902), as cases in which the court upheld awards for a child’s loss of instruction and training due to the death of their father.
Wrongful Death Act, we are compelled to conclude that the companionship and conjugal relationship of a spouse are equally compensable as 'pecuniary injuries'.

Further support for the court's decision in Elliott was drawn from the purpose of the Illinois Wrongful Death Act and from the interpretation of the term "pecuniary injury" in other jurisdictions. The purpose of the Act was characterized as providing the surviving spouse the benefits that would have been received from the continuing life of the decedent. Loss of consortium was included as one of these benefits. The court recognized the difficulty of calculating a precise value of consortium, but said that "[t]he damages for loss of a husband's society, companionship and sexual relations are not immeasurable. All of the elements that comprise what is to be loss of consortium may not be the most tangible items, but a jury is capable of putting a monetary worth on them."

The court looked to other jurisdictions to acknowledge the expansion of the term. The court quoted a Michigan Supreme Court case that had analyzed the pecuniary value of a human life in terms of the relationships shared within a family. The value of the mutual society and protection that each family member contributed was deemed to have a substantial pecuniary value. Following this reasoning, the Elliott court concluded

76. Elliott, 92 Ill. 2d at 538, 442 N.E.2d at 167. The court examined an appellate court decision, Kaiserman v. Bright, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978), in which, the appellate court had affirmed the trial court's dismissal of one count of a parent's wrongful death complaint that sought compensation for the loss of their child's society. The court cited Zostautas v. St. Anthony De Padua Hosp., 23 Ill. 2d 326, 178 N.E.2d 303 (1961), as authority for excluding loss of society from the scope of pecuniary damages. The supreme court in Elliott disagreed with this reasoning, finding that Zostautas denied recovery for emotional distress, not for the loss of society. The Elliott court did not expressly overrule Kaiserman, but it criticized the basis for the court's holding that the loss of a child's society was not compensable under the Wrongful Death Act.

77. 92 Ill. 2d at 540, 442 N.E.2d at 168.

78. Id.


81. The pecuniary value of a human life is a compound of many elements... [A]n individual member of a family has a value to others as part of a functioning social and economic unit. This value is the value of mutual society and protection, in a word, companionship. The human companionship thus afforded has a definite, substantial and ascertainable pecuniary value and its loss forms a part of the "value" of the life we seek to ascertain.
that the widow's loss of consortium is one compensable element of the pecuniary value of the decedent's worth.

Thus, the court expanded the scope of the term "pecuniary injury" to encompass another intangible element, the loss of a spouse's consortium. The Illinois Appellate Court, however, has not continued this expansion. Rather, subsequent appellate court decisions have limited the scope by refusing to allow recovery for a parent's loss of a child's society.\(^2\) One of these decisions, *Bullard v. Barnes*, is currently on review before the Illinois Supreme Court.\(^3\)

**DENIAL OF RECOVERY FOR THE LOSS OF A CHILD'S SOCIETY:**

*Bullard v. Barnes*

Scott Bullard, a seventeen year old high school student, suffered fatal injuries as a result of a traffic collision.\(^4\) Scott's parents filed a multi-count action against the defendants and included counts under the Wrongful Death Act.\(^5\) The trial court, interpreting *Elliott v. Willis*, gave instructions to the jury to consider the parents' loss of society resulting from the death of their child in determining the amount of pecuniary loss.\(^6\) The jury returned


\[^4\] *Bullard v. Barnes*, 112 Ill. App. 3d at 386, 445 N.E.2d at 488.

\[^5\] Counts were brought under the Wrongful Death Act, the Family Expense Act, Ill. Rev. Stat. ch. 401, ¶ 1015 (1979), and the Survival Act, Ill. Rev. Stat. ch. 110-1/2, ¶ 27-6 (1979). The plaintiffs also alleged property damage to the car. They were subsequently allowed to amend their complaint to add counts which alleged general emotional agony and suffering by the parents. At pretrial, the emotional agony and suffering counts were dismissed. After voir dire had begun, defendants admitted liability for counts brought under the Wrongful Death Act, the Family Expense Act, and the Survival Act, and for the property damage. The trial court severed the punitive property damage count from the compensatory claims brought under the Survival and Wrongful Death Acts and ordered that a bifurcated trial be held.

\[^6\] The instructions given were adopted from the ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) No. 31.03 (2d ed. 1971). In determining pecuniary loss to the parents and the weight to be given to the presumption of pecuniary loss to the parents, you may consider what benefits of pecuniary value, including money, goods and services the decedent might reasonably have been expected to contribute to his parents and brothers had the
a general verdict for wrongful death in the amount of $285,000. The appellate court reversed on the issue of the propriety of the jury instructions and remanded the case for a new trial on the issue of damages. The appellate court examined the language and rationale of the decision in Elliott v. Willis and reached the conclusion that the trial court had erred in giving the modified jury instructions that included loss of society as an element of compensable damages. The court found no express language in either the appellate or supreme court decisions in Elliott that would allow the loss of society of a child to be considered. Elliott was not extended to this factual setting because the court determined that there was a qualitative difference between the society of a spouse and that of the child. The court did not elaborate as to the difference, stating only that society is inherent in the marital relationship.

The court held that an action brought under the Wrongful Death Act is analogous to an action brought at common law for non-fatal injuries. The Wrongful Death Act was designed to provide the same compensation for fatal injuries as are available for non-fatal injuries. The court in Bullard concluded that since there was no common law action for the loss of society of an

deceased lived, bearing in mind what you find the evidence shows concerning the decedent's age, sex, health, physical and mental characteristics, habits and the parent's loss of society with the decedent. Bullard, 112 Ill. App. 3d at 389, 445 N.E.2d at 489 (emphasis added to indicate that portion of the instruction added by the court to the pattern instruction).

87. The jury also returned a general verdict of $40,000 for the decedent's pain and suffering under the Survivor's Act.
88. The defendant argued for post-trial motions for a new trial and a judgment n.o.v., claiming that improper and repetitive jury instructions had been given.
89. 112 Ill. App. 3d at 389, 445 N.E.2d at 489. The plaintiffs cross-appealed the dismissal of the counts alleging general emotional agony and suffering by the parents. Defendants appealed various issues concerning inconsistent and repetitive language in the instructions and improper evidentiary admissions.
90. Id. at 390, 445 N.E.2d at 490.
91. The court found that although the supreme court in Elliott had criticized Kaiserman v. Bright, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978), which denied recovery for parents' loss of their child's society, the case had not been overruled. See supra note 76.
92. 112 Ill. App. 3d at 390, 445 N.E.2d at 490.
93. The court drew the analogy from the reasoning of the appellate court's decision in Elliott. See supra note 68. The Bullard court stated, "If, as the appellate court opinion in Elliott implies, the Wrongful Death Act is to supply the gap for fatal injuries and is the obverse of common law nonfatal actions, there is no basis for including within its damage provisions the loss of society of a child." Id. at 390, 445 N.E.2d at 490.
injured child, there was no reason to allow recovery for the loss of a child’s society under the Wrongful Death Act.\(^9\)

Although the Bullard court acknowledged that the Illinois Supreme Court favored a broad interpretation of the term “pecuniary injury,”\(^9\) the appellate court was not willing to extend the interpretation to a parent's loss of society. Bullard did not address the purpose of the Wrongful Death Act and did not address the overall trend of the courts toward recognizing intangible elements of family relations, as did the Illinois Supreme Court in Elliott.\(^9\) Rather, the court adopted a narrow interpretation of Elliott, holding that it applied only to the loss of consortium in the spousal relationship.\(^9\)

**Bullard on Review**

To clarify the issue of damages awarded for the loss of a child’s society, the Illinois Supreme Court must provide new guidance beyond the holding in Elliott. In making this analysis, the court should further define the scope of the term “pecuniary injury.” The court must analyze the trend of recent decisions and the purpose of the Wrongful Death Act to determine the manner in which to compensate parents for the loss of a child.

The severity of the traditional pecuniary loss limitation, which is incorporated into the Illinois Act, is most apparent when imposed on a parent’s action for the wrongful death of a child. Historically, children may have provided a significant economic contribution to their families,\(^9\) but social and economic changes

\(^9\) Id.

\(^9\) Id.

\(^9\) See supra notes 77-81 and accompanying text.

\(^9\) 112 Ill. App. 3d at 390, 445 N.E.2d at 490. An appellate court decision subsequent to the Bullard decision also denied recovery for the loss of a child’s society. See Trotter v. Moore, 113 Ill. App. 3d 1011, 447 N.E.2d 1340 (1983). Although the Trotter holding follows that of Bullard, there are important distinctions in the court's reasoning. The Trotter court considered the Elliott decision carefully in formulating its decision. While the court in Trotter agreed that Elliott confined its holding to the spouse's fatal loss of consortium, it did not find that there was a qualitative difference between the loss of society and the loss of consortium, as had the court in Bullard. Instead, the Trotter court stated that it found no qualitative difference between the elements of the relationship that exists between children and their next of kin and between spouses. The Trotter court, however, was persuaded by the reasoning that since there is no recovery for the loss of a child's society in non-fatal actions, there should be no recovery under the Wrongful Death Act.

\(^9\) Wrongful Death of a Child, supra note 6, at 542. Employment of children of eight years or older was common in the 19th century and children were wage earners in a real
have rendered the child's contribution negligible.99 Furthermore, the expense in raising and supporting a child has become proportionately greater.100 As a result, it is very difficult to prove a significant economic loss upon the wrongful death of a child.101 This requirement, that a parent must prove an economic injury to receive compensation, has been criticized as being inconsistent with the purposes and policies that underlie a wrongful death statute.102

**WRONGFUL DEATH COMPENSATION:**

*Policy Considerations*

The language in the Illinois Act conveys its remedial purpose clearly:103 "[T]he jury may give such damages as they deem a fair and just compensation . . . ."104 The courts' concern with providing fair and just compensation is evidenced by the ever expanding interpretation of the limit of pecuniary loss.105 The

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99. Today the child is no longer a wage earner in any significant capacity. Mandatory school attendance laws and almost universal child-labor laws keep children out of the labor market. For a discussion of the evolution of these social changes see generally Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

100. *See* Wrongful Death of a Child, *supra* note 6, at 537.

101. The most common element of damages awarded for the death of a minor is the amount the child would have earned and would presumably have contributed to the household or to his upbringing until he reached his majority. In addition, most states allow damages for the amount contributed by the child to his parents after reaching his majority. Annot., 14 A.L.R.2d 485, 506-09 (1950). Although the post-majority approach provides a broader basis for an award, the problem of proving that the child would have conferred financial benefits upon the parents is a significant one. *See, e.g.*, Decof, *supra* note 19, at 199. Illinois courts allow recovery for the child's financial contribution until the child reaches the age of 21 after deducting the cost of his maintenance for the same period. Furthermore, the parents may recover the amount of money they could reasonably have expected the child to have contributed after the child reached 21. U.S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N.E. 1081 (1908).

102. "That this barbarous concept of the pecuniary loss to a parent from the death of a child should still control our decisions today is a reproach to justice." Wycko v. Gnodtke, 361 Mich. 333, 105 N.W. 2d at 120.

103. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 54.05 (4th ed. 1975). Justice Cardozo, in construing the Merchant Marine Act of 1920, stated: "Death statutes have their roots in dissatisfaction with the archaisms of the law. . . . It would be a misfortune if a narrow or guiding process of construction were to exemplify and perpetuate the very evils to be remedied." Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350-51 (1937).


105. *See supra* text accompanying notes 62-93.
The legislature's concern is also apparent in that the statutory limit for recovery was increased five times until it was finally abandoned.\textsuperscript{106} The public policy that prompts courts and legislatures to assure fair and just compensation should be studied in conjunction with the recognized value of the family unit, which inherently includes the parent-child relationship. It is the specific policy of promoting, fostering, and preserving the family that mandates the recognition of the totality of the parent's loss.

The judiciary across the nation has expressly recognized the value of the family unit.\textsuperscript{107} In allowing a common law maritime action for the loss of consortium, the United States Supreme Court specifically considered the word "society" as it relates to the family unit.\textsuperscript{108} The Court recognized that family members receive a broad range of mutual benefits from each other. These benefits include love, affection, companionship, comfort, and protection.\textsuperscript{109} In allowing recovery for the death of a family member, the Court recognized the value of family relationships and the substantial injury that results from the destruction of these relations.\textsuperscript{110}

The recognition of the value of the family unit is apparent in Illinois as well. The Illinois legislature recites the policy of promoting and preserving the family to guide the implementation of statutes that impact the family structure.\textsuperscript{111} The Illinois courts

\textsuperscript{106} ILL ANN. STAT. ch. 70, § 1 historical note 530 (Smith-Hurd 1975).
\textsuperscript{107} See, e.g., Wycko v. Gnodtke, 361 Mich. 331, 105 N.W. 2d 118 (1960) (an individual family member has a value as part of a functioning social and economic unit); Fusner v. Andert, 261 Minn. 347, 113 N.W. 2d 355 (1962) (the benefits of a family relationship are not solely economical; the Wrongful Death Act should be liberally construed to compensate for the full extent of a parent's loss of a child); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980) (family relationships encompass more than the exchange of physical chores; companionship, advice, and guidance are also elements of family relationships); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) (injuries to the familial relationship are significant injuries and are worthy of compensation).
\textsuperscript{109} Sea-Land, 414 U.S. at 585.
\textsuperscript{110} After identifying the mutual benefits that each family member receives from the other, the Court continued, "The deprivation of these benefits by wrongful death is a grave loss to the decedent's dependents." Id. at 585-86.
\textsuperscript{111} The Illinois legislature articulated one purpose of the Illinois Marriage & Dissolution of Marriage Act ("IMDMA") as to "strengthen and preserve the integrity of marriage and safeguard family relationships." Illinois Marriage & Dissolution of Marriage Act, § 102-2, ILL REV. STAT. ch.40, ¶ 102(2) (1981). A stated purpose of the Juvenile Court Act is to "preserve and strengthen the minor's family ties." Illinois Juvenile Court Act,
have turned to this policy when faced with difficult issues involving family relationships.\textsuperscript{112}

The same policy considerations that compel identification of the value of the family unit support the recognition of true and just compensation for the loss of a child. An award for the loss of a child's society and companionship comes closer than an award for the child's economic contribution to compensating parents for their true loss.

The Illinois courts have not yet followed the trend of other jurisdictions in recognizing, to the same extent, the parents' injury for the loss of a child.\textsuperscript{113} The courts have recognized, however, that the loss suffered in the destruction of other family relationships extends beyond pure economic loss.\textsuperscript{114} In a child's action for the loss of a parent, the term "pecuniary injury" includes the loss of the decedent's felicity and care, instruction, and moral training.\textsuperscript{115} In a spouse's action, the term includes the loss of consortium.\textsuperscript{116} The reasoning that has led the Illinois courts to hold that these intangible elements of family relationships are pecuniary injuries should lead to the conclusion that the loss of society between a parent and child is also a pecuniary

\textsuperscript{112} For example, courts have recited the purpose clause of the IMDMA in difficult settlement cases. \textit{E.g.}, Hewitt \textit{v.} Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979) (judicial recognition of mutual property rights would violate the policy of the IMDMA); In re Marriage of Gunther (marriage to a bigamist following divorce contravenes legislature's desire to safeguard family relations).

In Cockrum \textit{v.} Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983), the Illinois Supreme Court considered the issue of damages in wrongful birth actions. The court limited the recovery to the expenses that resulted from the pregnancy and the birth, rejecting the plaintiff's claim for damages including the cost of raising the child. In examining the policies that necessitated the limited award the court stated: "[I]t is clear that public policy commands the development and the preservation of family relations." \textit{Id.} at 201, 447 NE.2d at 390.

\textsuperscript{113} S. Speiser, \textit{supra} note 6, at 308; Note, \textit{supra} note 6, at 257. \textit{See also} Sea-Land Servs. \textit{v.} Gaudet, 414 U.S. 573 (1973) (spouse may recover for loss of her husband's society under a maritime wrongful death action); Fusner \textit{v.} Andert, 261 Minn. 347, 113 N.W.2d 355 (1962) (father may recover for the pecuniary value of his daughter's advice, comfort, assistance, and protection); Green \textit{v.} Bittner, 85 N.J. 1, 424 A.2d 210 (1980) (jury may award damages for parents' loss of their child's companionship as they grow older as well as the advice and guidance that often accompanies it); Sanchez \textit{v.} Schindler, 651 S.W.2d 249 (Tex. 1983) (parents may recover damages for the loss of companionship and society and damages for mental anguish for the death of their child).

\textsuperscript{114} \textit{See supra} notes 57-63 and accompanying text.

\textsuperscript{115} \textit{See supra} notes 62-63.

\textsuperscript{116} \textit{See supra} notes 64-81 and accompanying text.
injury. The Illinois Supreme Court has determined that the purpose of the Wrongful Death Act is to provide to the decedent's family the benefits that would have been received from the continued life of the decedent. A child's loss of society is a benefit that the parents would have enjoyed had the child lived. The loss of consortium, felicity, care, instruction, and moral training result from the injury to the relationship that occurs upon death. The loss of society is a similar injury and should be compensated in a similar manner.

The argument asserted by the appellate court that the Illinois Wrongful Death Act can serve only to compensate for the same injuries which are compensable in a common law action for non-fatal injuries reflects neither the purpose of the Wrongful

117. Elliott v. Willis, 92 Ill. 2d at 540, 442 N.E.2d at 168. In Elliott, the court was only concerned with the spouse's benefits that were lost upon the death of the other spouse. In this decision, however, the court did not limit its analysis to cases involving the spouse's loss of consortium. The court discussed cases involving a child's action, Goddard v. Enzler, 222 Ill. 462, 78 N.E. 805 (1906), as well as cases involving a parent's action for the loss of a child's society, Kaiserman v. Bright, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978); Wycko v. Gndtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

118. The Nebraska statute provides that the jury shall give a judgment for the amount of damages suffered. NEB. REV. STAT. § 30-810 (1972). There is no explicit limitation of pecuniary damages, but the Nebraska Supreme Court had construed the statute to limit damages to the pecuniary loss, although it allowed recovery for the loss of the society, comfort, and companionship of a spouse in Ensor v. Compton, 110 Neb. 522, 104 N.W. 458 (1918). Subsequently, in Selders v. Armentrout, 190 Neb. 2d 275, 207 N.W.2d 686 (1973), the question of whether a parent could recover for the loss of a child's society was presented to the court. In allowing the parents' recovery, the court said, "[T]here is no logical reason for treating an injury to the family relationship resulting from the wrongful death of a child more restrictively." Id. at 279, 207 N.W.2d at 689.

The New Jersey Supreme Court has suggested that there is an inconsistency between the recovery allowed to a child when a parent dies and the recovery allowed in a parent's action. The child may recover for care and training, yet the parent cannot recover for the child's society, which includes this same care. The court remedied the double standard by finding that the loss of a child's society is a compensable injury. Green v. Bittner, 85 N.J. 1, 8, 424 A.2d 210, 213, (1980).

119. This was the rationale of the court in Bullard and in Trotter in denying a parent's recovery for the loss of the child's society. Both courts relied on the language of the appellate court decision in Elliott v. Willis, 89 Ill. App. 3d 1144, 412 N.E.2d 638 (1980), aff'd, 92 Ill. 2d 530, 442 N.E.2d 163 (1982). The language in Elliott states, "[T]hus, Illinois case law permits either spouse to sue for the loss of consortium following nonfatal injuries to the other spouse and implies that for death, the Wrongful Death Act provides compensation sufficient to obviate a common law action for lost society or consortium." Elliott, 89 Ill. App. 3d at 1144, 412 N.E.2d at 641. See supra note 68. This language was cited in Bullard, 112 Ill. App. 3d at 390, 445 N.E.2d at 490. This reasoning was not reiterated by the supreme court when it affirmed Elliott. Furthermore, this reasoning was not the basis for allowing a child to recover for the loss of a father's felicity and care. E.g., Goddard v. Enzler, 222 Ill. 462, 78 N.E. 803 (1906). Therefore, while the appellate court in Elliott may have reasoned that it was logical to allow compensation for the loss of a spouse's consor-
Loss of a Child's Society 617

Death Act nor the trend of courts in other jurisdictions in focusing on the nature and definition of pecuniary injuries. The supreme court's attention to the nature of the injury when assessing the pecuniary value and the recognized value of the family unit indicates that the loss of society could be recognized as a pecuniary injury and thus compensated for under the Wrongful Death Act.

The impact on future litigation of recognizing the loss of society as a pecuniary damage will be significant for several reasons. The court will have a consistent interpretation of the term pecuniary injury. This will allow trial courts to direct the jury to compensate for recognized elements of damages in future wrongful death actions. Confusion as to which damages are recoverable when other family relations are destroyed may result if the court retreats from expanding the scope of pecuniary injury.

Allowing the jury to consider the loss of society as an element of damages will enable the trial and reviewing courts to insure that the proper elements of the injury are being considered. The

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120. See supra notes 74-76 and accompanying text.
121. See supra notes 107-12 and accompanying text.
122. The supreme court held in Elliott that the jury may be instructed as to a spouse's loss of consortium in wrongful death cases not finally adjudicated as of the date of this decision. 92 Ill. 2d at 545, 442 N.E.2d at 170.
123. The question that may arise next is whether collateral kin, such as a brother or sister, will be able to recover for the loss of their sibling's society. It has been argued that by allowing a parent to recover for the loss of society, the door will be open to allow the same recovery by all next of kin. Brief for Defendants-Appellees at 56, Bullard v. Barnes, No. 58-203 (Ill. Sup. Ct. filed Aug. 30, 1983). This, however, is not necessarily true. The Illinois courts have distinguished between the damages compensable to a parent, child, or spouse and those compensable to collateral kin. The presumption of pecuniary loss that is held to apply in all cases involving lineal heirs, see supra notes 52, 55, and accompanying text, has not been applied in cases involving collateral kin. See Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949). In Mugavio v. Chicago B. & Q. R.R., 238 Ill. App. 544 (1926), the court held that there is no presumption that the brothers and sisters of a deceased minor suffered more than nominal damages by his death. Thus, the supreme court might have some precedent for limiting the award of damages to a brother or sister. In other jurisdictions, it appears that fewer courts allow recovery for the loss of a sibling's society than allow for the loss of a child's society. See S. SPEISER, supra note 7, at 316 n.95. This distinction may not be warranted, however, because the Wrongful Death Act itself makes no distinction between the damages to be awarded for the loss of a parent, a spouse, or a brother. The Act provides compensation for pecuniary injuries to
The jury can be instructed to consider the economic contribution the child would have provided and the value of the companionship as established by the evidence. The jury can also be instructed not to compensate for the grief and bereavement suffered by the parents, which has been held to be uncompensable in Illinois. This, in turn, will allow the trial and reviewing courts to determine the reasonableness of the award. An evidentiary record is essential to enable the appellate court to decide whether the damages are excessive, nominal, or reasonable. The disparity among jury awards thus may be eased by the appellate courts’ increased ability to review the award of damages.

In addition, by allowing recovery for the loss of a child’s society, the true elements of a parent’s loss will be recognized. Although it is true that the emotional pain suffered as the result of a child’s death is a substantial injury, the parents will also suffer greatly from the loss of the child’s company. Recognizing this directly by allowing compensation for the loss of the spouse and next of kin. If the term “pecuniary injury” is defined to include loss of a child’s society, it would be consistent to include the loss of a sibling’s society. Just as there is no qualitative difference between the society of a spouse and that of a child, Trotter, 113 Ill. App. 3d at 1015, 447 N.E.2d at 1344, there is no qualitative difference between the society of a child and that of a sibling. See supra note 97.

124. See S. SPEISER, supra note 6, at 322, and Pavalon, Damages—Wrongful Death of Children, 50 CHI. B. REC. 84 (1968), for discussion of the circumstances that establish evidence of a loss of society in a wrongful death action.


126. See supra notes 122-26 and accompanying text.

127. See supra note 123 for a discussion of the disparity in jury awards. The reviewing courts have noted the difficulty in reviewing jury awards. For example, in Jones v. Karraker, 109 Ill. App. 3d 363, 440 N.E.2d 420 (1982), the plaintiff brought a medical malpractice action to recover for the wrongful death of an unborn fetus. The jury found the defendant liable and awarded $125,000 in damages. The appellate court noted that since there could be no supporting evidence as to the child’s health or life expectancy, the award was based almost entirely on the presumption of pecuniary loss. In assessing the role of the reviewing court, the court stated: “[W]here there is a reversal by a reviewing court, it is often not based on [a] specific evidentiary basis but upon a conclusion, within its discretion, that the award was simply too high or too low.” Id. at 367, 440 N.E. at 422.


129. Pavalon, supra note 124, at 84. The author states, “[O]ur Illinois courts have not as yet allowed compensation for the greatest loss of all suffered by the surviving parents, the loss of the society and companionship of the child.” Id.
society instead of allowing recovery through the use of a presumption is a forthright means of assuring that parents are compensated for their losses.

Calculating Damages

Once pecuniary injury is defined to include loss of society, there remains the problem of calculating the amount of the loss. Mere difficulty in assessing the amount of damages, however, is not a sufficient reason for denying the remedy. One method of determining the amount of loss was adopted by the Connecticut Supreme Court in Green v. Bittner. The court held that the jury should be instructed to assess damages in consideration of the cost of hiring an actual companion and the cost of obtaining guidance, advice, and counsel. This method limits the recovery to the actual dollar value of employing a companion that may provide the daily care to an aged parent that the child would have provided. It is not necessary under this method to prove that the parent would purchase such services; it is sufficient to show that the child would have provided them. The loss of guidance, advice, and counsel are also compensable upon proof

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130. It has been argued that the operation of the presumption adequately compensates the plaintiffs and that there is therefore no reason to expand the scope of the term pecuniary damage. Brief of Defendants-Appellees at 58, Bullard v. Barnes, No. 58-203 (Ill. Sup. Ct. filed Aug. 30, 1983). This argument fails to recognize, however, that the purpose of the Wrongful Death Act is to compensate for actual injury. See Ill. Rev. Stat. ch. 70, § 2 (1981). See also City of Chicago v. Major, 18 Ill. 349 (1857).

131. See Elliott v. Willis, 92 Ill. 2d 330, 442 N.E.2d 163 (1982).

132. 85 N.J. 1, 424 A.2d 210 (1980). The parents brought a wrongful death action after their daughter, a high school senior, was killed in an automobile accident. The language of the New Jersey statute limits recovery to pecuniary injuries. The jury apparently found that the parents had sustained no pecuniary loss since they awarded no damages. The New Jersey Supreme Court found that the verdict was a miscarriage of justice and remanded the case for a new trial on the issue of damages. For a discussion of the case, see Recent Developments, Under New Jersey's Wrongful Death Act, An Award of the Pecuniary Value of the Parent's Loss of Their Child's Companionship, Advice and Guidance is Appropriate, 27 Vill. L. Rev. 224 (1980-81).

133. The court held that, in addition to the loss of the value of the child's anticipated help with the household chores, or the loss of anticipated direct financial contributions, the jury may award damages for the "loss of their child's companionship as they grow older, when it may be most needed and valuable, as well as the advice and guidance that often accompanies it." 85 N.J. at 3, 424 A.2d at 211.

134. The value of the child's companionship is the fair market value of comparable companionship purchased from a stranger. The court added that no compensation can be allowed for the emotional satisfaction that would have been derived from the child's performance of the services as opposed to that of a stranger. Id. at 12, 424 A.2d at 215-16.

135. Id. at 18, 424 A.2d at 218.
of the cost of obtaining the services from a qualified person.\textsuperscript{136}

In Illinois, the courts have not required a monetary definition of the instruction and training provided by the parent.\textsuperscript{137} Thus, it is probable that if Illinois recognized loss of society as pecuniary injury, the courts could follow the same procedures used when calculating the loss of consortium between spouses.\textsuperscript{138} By instructing the jury that loss of society is an element of damages\textsuperscript{139} and allowing them to weigh the evidence as to the nature of the relationship in assessing the award, the award for loss of society would not be automatic. Evidence would have to be presented, not only to establish what economic contribution the child might have rendered, but also to establish the extent of the companionship and society that existed in the parent-child relationship.\textsuperscript{140} The loss would be analyzed in light of the facts of each case.

**CONCLUSION**

Wrongful death acts were necessary to overcome the common law prohibition against civil suits for a wrongful death of a family member. The Illinois statute limits recovery to pecuniary injuries suffered as a result of the death. The phrase “pecuniary injuries” has been judicially construed to include both tangible elements, such as the monetary value of support and services, and intangible elements, such as consortium. The Illinois Su-

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\textsuperscript{136} The court stated that the advice, guidance, or counsel that is compensable under the Wrongful Death Act is the kind that “could be purchased from a business advisor, a therapist, or a trained counselor.” \textit{Id.} at 14, 424 A.2d at 216-17.

\textsuperscript{137} The courts allow the jury to determine the value of the instruction and moral training provided by the father prior to this death. Goddard v. Enzler, 22 Ill. 462, 78 N.E. 805 (1906).

\textsuperscript{138} \textit{Elliott}, 92 Ill. 2d at 540, 442 N.E.2d at 168. The Court held that ILLINOIS PATERN JURY INSTRUCTION (CIVIL) NO. 31.01 (2d ed. 1971), which reads, “In determining ‘pecuniary injuries’ you may not consider . . . the loss of the decedent’s society to the next of kin,” is no longer valid in a spouse’s action. To determine the pecuniary value of a spouse, the society, companionship and conjugal relationship that constitute the loss of consortium, may now be considered by the jury.

\textsuperscript{139} The ILLINOIS PATERN JURY INSTRUCTION (CIVIL) NO. 31.01 (2d ed. 1971), now directs the jury to consider “benefits of pecuniary value including money, goods and services, the decedent might have contributed to his parent.” Society could be added as another benefit to be considered by the jury in determining the pecuniary value of the decedent child. \textit{See supra} note 86 for the jury instructions given by the trial court in \textit{Bullard}.

\textsuperscript{140} In assessing damages for loss of consortium, evidence of the nature of the spousal relationship may be submitted. \textit{See Elliott}, 92 Ill. 2d at 541, 442 N.E.2d at 168.
Supreme Court's case by case approach to defining the scope of pecuniary injury has not established whether the loss of a child's society is compensable under the Act.\textsuperscript{141}

\textsuperscript{141} As this note was going to press, the Illinois Supreme Court issued a decision in Bullard v. Barnes, No. 58203 (Ill. Sup. Ct. June 29, 1984). In a unanimous decision, authored by Justice Underwood with a special concurrence by Justice Clark, the court concluded that the term "pecuniary injury" does encompass the loss of a child's society in a wrongful death action. The court determined, however, that while the jury will be instructed to calculate the dollar amount of such a loss, they must likewise calculate the amount of future expenses a parent would incur in raising the child. The amount of loss must be offset by the amount of expenses; the remainder will be the amount awarded as damages.

The court considered the statutory reference to pecuniary injuries and examined how the pecuniary limitation had been interpreted in other jurisdictions. Of twenty-three jurisdictions with a statutory or judicially imposed limitation, the court stated that fourteen allow parental recovery for the loss of a child's society in a wrongful death action. \textit{Id.} at 4.

The trend in Illinois law to expand the scope of pecuniary injury to encompass nonmonetary losses was noted by the court as it reviewed its decisions which illustrate this expansion. The court cited Elliott v. Willis, 92 Ill. 2d 530, 442 N.E.2d 163 (1982) as the most recent example of the broadening definition of pecuniary injury and noted that there it relied on Hall v. Gillins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) and Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961). \textit{See supra} notes 57-63 and accompanying text. In reviewing its decision in Elliott, the court noted its criticism of Kaiserman v. Bright, 61 Ill. App. 3d, 377 N.E.2d 261 (1978) in which the court erroneously based its decision to dismiss a count for the loss of society in a wrongful death action on a case which denied recovery for mental suffering. \textit{See supra} note 76. The \textit{Bullard} court reiterated the distinction between recovery for mental anguish and recovery for the loss of society and emphasized that damages for mental anguish as an element of loss of society cannot be awarded under the Wrongful Death Act. Bullard v. Barnes, No. 58203, slip op. at 5. The defendant's argument that the court await legislative action before judicially expanding the scope of pecuniary injury was disregarded as the court found "in view of our earlier decisions indicating similar recoveries would have been allowed in cases involving loss of a parent (Hall) and spouse (Elliott, Knierim), that it would be anomalous to now deny parents this form of recovery." \textit{Id.} at 6.

The court then turned to a closely related issue, the presumption of pecuniary loss as it is applied in actions to recover for the wrongful death of children. \textit{See supra} notes 44-56 and accompanying text. The origin of the presumption was attributed to Lord Campbell's Act and the subsequent British cases which established the narrow rule that parents could only recover for actual loss of a child's income. \textit{See supra} notes 18-25 and accompanying text. The incorporation of this rule into the Illinois Wrongful Death Act enacted in 1853, was reflective of the economic and social conditions of the time. Bullard v. Barnes, No. 58203, slip op. at 6. To balance the harshness of the limitation, the presumption was developed beginning with the cases, City of Chicago v. Major, 18 Ill. 349 (1857) and City of Chicago v. Scholten, 75 Ill. 468 (1874). \textit{See supra} notes 45-47 and accompanying text. The court noted, however, that the judicially created rule that parents are entitled to a presumption that they have incurred a pecuniary loss upon the death of a child bears little resemblance to the realities of modern family life. Bullard v. Barnes, No. 58203, slip op. at 6. The court therefore concluded that there can be no presumption for loss of earning upon the death of a child. If the parents can present evidence that there
In deciding this issue, the court must consider the history of the Wrongful Death Act and the policies that underlie its interpretation. If the court follows its trend of expanding the term "pecuniary injury," it may find society to be included within that term. Such a decision would reflect the public policy of preserving and strengthening family relations and would reflect the purpose of the Illinois Wrongful Death Act.

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truly was a loss of earnings suffered upon a death of a child, they may recover the proven amount.

The presumption was not entirely abandoned however as the court held that parents are entitled to a presumption of pecuniary injury in the loss of a child's society. Defendants may rebut the presumption by demonstrating that the parent and child did not enjoy a close relationship. *Id.* at 7.

Although the court relied on wrongful death cases involving the loss of a parent or spouse to find that the loss of society is within the pecuniary injury requirement, the court made a careful distinction between the loss of a child and the loss of parents and spouses stating, "[a]s a general rule, neither children nor spouses bear the same heavy financial responsibility for either their parents or spouse that a parent automatically assumes upon the birth of a child." *Id.* at 8. The court therefore concluded, as held in five other jurisdictions, that jurors must consider child rearing expenses in arriving at a verdict. Specifically, jurors must be instructed to assign a dollar value to the loss of the child's society and to arrive at a figure which represents expenditures the parents would have been likely to incur had the child lived. These expenses must be deducted from any award for the loss of society and proved loss of income. *Id.*

The court remanded the case for a new trial as to damages and limited the scope of the decision to minor children. The court specifically did not decide whether the loss of society presumption applies to children who have reached the age of majority. *Id.* at 7.

Justice Clark took issue with two points of the majority opinion although he concurred in the result. First, Justice Clark found that since the set-off for childrearing expenses could substantially reduce an award for the loss of society, the formula developed by the majority to compute damages was not equitable. Second, the Justice disagreed with limiting the decisions to minor children since the logic of the majority opinion would dictate the same result in the case of children who had reached the age of majority. *Id.* at 11.