

## Remarriage and Wrongful Death

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# COMMENTS

## REMARRIAGE AND WRONGFUL DEATH

### INTRODUCTION

This article will analyze whether a jury should be allowed to consider a surviving spouse's remarriage or the possibility thereof when awarding wrongful death damages. Factually, the question usually arises when the decedent's surviving spouse has remarried or becomes engaged prior to the time he or she comes to trial to collect wrongful death damages arising from the decedent's death. However, if only actual remarriage and not its possibility were allowed to be considered by the jury, "The widow who remarries the day after trial would receive an unjust preference over the widow who remarries the day before trial."<sup>1</sup> The surviving spouse, therefore, may be found in one of the following situations at the time of trial: He or she may (1) actually have remarried, (2) have definite plans to remarry soon after trial, or (3) have only the possibility of remarriage of any unmarried person at some uncertain future date. This article will deal primarily with the situations where the surviving spouse has actually remarried or has definite plans to remarry soon after the trial since most of the courts discussing this problem have considered these two situations. However, the English court in *Hall v. Wilson*<sup>2</sup> did allow the consideration of evidence of the mere possibility of remarriage. The court in that case stated that:

Although this lady is quite firmly of opinion and perhaps rightly of opinion, that she will never marry again, she is an attractive young woman who might marry again; one cannot ignore the possibility that she may marry again, and I take that into consideration.<sup>3</sup>

Since the admission of evidence of remarriage or the imminent possibility thereof may cause a reduction of the spouse's death damages, it is important to determine whether such a reduction is in accord with or contrary to the theory of tort damages. Thus, it is necessary to review, for a moment, the very nature of tort damages themselves. It is well recognized in tort law that the award of damages to an injured party is for the purpose of compensating that party for his actual loss: ". . . a person injured by the commission of a tort is entitled to pecuniary compensation for the actual injury sustained. . . ."<sup>4</sup> The total loss suffered by the injured party must be distinguished from that party's actual loss. A portion of the total loss sustained by the injured party is

<sup>1</sup> *Reynolds v. Willis*, 209 A.2d 760, 763 (Del. 1965).

<sup>2</sup> [1939] 4 All E.R. 84.

<sup>3</sup> *Id.* at 87.

<sup>4</sup> 22 AM. JUR. 2d *Damages* §80 (1965).

often compensated for by any number of factors, such as employer compensation funds, free hospitalization and so forth. The actual loss figure, thus, is arrived at by subtracting these compensating benefits from the total loss sustained. In the trial of a tort case, the actual loss figure can be arrived at only by admitting evidence of both the total loss and the amount by which this loss has been satisfied. This latter evidence is designated as "mitigating" evidence and hence the term mitigating damages. Thus, actual damages refers to the total damage figure as reduced by mitigating evidence.

Although the term "actual loss" refers to a mitigated loss, it has been generally held by the courts that ". . . benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer."<sup>5</sup> This rule, known as the "collateral source"<sup>6</sup> rule, is recognized as an exception to the previously described actual damage rule. Since this rule is in conflict with the theory of mitigated or actual damages, the essential question in this article is whether the collateral source rule should be applied in those wrongful death cases in which the surviving spouse's marital status may have affected his or her actual loss.

#### SCOPE OF DEATH STATUTES AND DEATH DAMAGES

There are two types of statutory wrongful death remedies which allow death damages to a surviving spouse: the survival remedy and the wrongful death remedy. This article will be limited to those statutes which create a new cause of action in the survivors of the decedent since the issue of the surviving spouse's remarriage will only be a factor in the determination of damages in an action for the surviving spouse's loss. The issue of remarriage is not relevant in determining damages which the defendant inflicted on the decedent himself before his death.

Since the wording of the wrongful death statutes in the various jurisdictions differ, it is impossible to lay down a rule for wrongful death damages applicable to all jurisdictions in this country. However, most of the death acts in the United States are patterned after the English "Fatal Accidents Act," which is more commonly known today as the Lord Campbell's Act.<sup>7</sup> The death damages discussed in this article will refer only to those damages which are allowed by those statutes which are patterned after the Lord Campbell's Act.

<sup>5</sup> *Id.* at §206.

<sup>6</sup> *Ibid.*

<sup>7</sup> RESTATEMENT, TORTS §925 comment a (1939). The following forms of death statutes have been enacted in the minority of jurisdictions: (1) the survival statutes which also provide for an additional award for the decedent's death, and (2) the statutes which impose death damages based upon the defendant's culpability. PROSSER, LAW OF TORTS 924-925 (3d ed. 1964.)

In his examination of the beneficiary's wrongful death recovery under the Lord Campbell's Act, Dean Prosser states that ". . . in general, however, it is still repeated that the measure of recovery is the value of the support, services and contributions which the beneficiary might have expected to recover if death had not intervened."<sup>8</sup> As to this measure of recovery, the question is whether the amount "the beneficiary might have expected to recover if death had not intervened" should be mitigated by the fact that the surviving spouse has remarried or has the possibility thereof.

REMARRIAGE OR ITS POSSIBILITY AND THE MITIGATION  
OR NON-MITIGATION OF DEATH DAMAGES

1. Present Status of the Law

The vast majority of the jurisdictions in this country maintain that the surviving spouse's marital status should not be considered by the jury when it determines the spouse's wrongful death damages.<sup>9</sup> The majority of courts thus uphold the position that the wrongful death damages are not to be mitigated by factors such as remarriage. This position is also in accord with the "collateral source" rule.

Wisconsin, at the present time, is the only American jurisdiction which recognizes that "The possibility of marriage or remarriage is always an element which is proper for the jury to consider in determining damages in a wrongful death action."<sup>10</sup> The Wisconsin Supreme Court recognized this rule in the 1964 case of *Jensen v. Heritage Mut. Ins. Co.*<sup>11</sup> But in that case the court added that:

We are not prepared, however, to hold as a matter of law that the instant damages are excessive merely because of the early marriage . . . it is pure speculation that the new husband will be able to provide plaintiff with the same amount of support that the deceased husband would be likely to have provided. Loss of society and companionship is an intangible which is extremely difficult to measure in the terms of dollars and cents. Likewise there is no assurance that plaintiff will be as happy in her new marriage as allegedly in the prior one.<sup>12</sup>

Prior to Wisconsin's acknowledgment of this rule, Michigan was recognized as the only jurisdiction which allowed the jury to consider the surviving spouse's present and future marital status.<sup>13</sup> Then, in the

<sup>8</sup> PROSSER, LAW OF TORTS 930 (3d ed. 1964).

<sup>9</sup> Annot., 87 A.L.R.2d 252, 253 (1963).

<sup>10</sup> *Jensen v. Heritage Mut. Ins. Co.*, 23 Wis.2d 344, 355, 127 N.W.2d 228, 234 (1964). It should be noted that in *Truesdill v. Roach*, 11 Wis.2d 492, 105 N.W.2d 871 (1960), the Wisconsin Supreme Court held that Wis. STAT. §895.04 (1965) creates a new cause of action for the loss sustained by the beneficiaries.

<sup>11</sup> 23 Wis.2d 344, 127 N.W.2d 228 (1964).

<sup>12</sup> *Id.* at 355, 127 N.W.2d at 234.

<sup>13</sup> See Note 9 *Supra*.

1965 case of *Bunda v. Hardwick*,<sup>14</sup> the Michigan Supreme Court expressly overruled those Michigan decisions which allowed the jury to consider the surviving spouse's marital status. The court overruled its prior decisions on the grounds that the rule in the prior decisions was mistakenly adopted<sup>15</sup> and contrary to Michigan's adherence to the "collateral source" rule.<sup>16</sup>

As to the foreign jurisdictions, the English<sup>17</sup> and Australian<sup>18</sup> courts have recognized that the marital status of the surviving spouse should be taken into consideration.

## 2. The Validity of the Majority Position

The reason the majority of courts do not allow the jury to consider the surviving spouse's marital status is aptly stated in the much cited case of *The City of Rome*.<sup>19</sup> The court reasoned that:

[I]f we should enter upon an inquiry as to the relative merits of the new husband as a provider coupled with his age, employment, condition of health, and other incidental elements concerning him, unavoidably we would embark upon a realm of speculation and be led into a sea of impossible calculation. Moreover, adherence to the rule followed by the commissioner [in disallowing consideration of the surviving spouse's marital status] seems essential to consistency with the holding that, upon the death of the first husband there was "an immediate, final and absolute vesting in his widow, if the statutory beneficiary, of a cause of action on that account."<sup>20</sup>

Thus, the refusal to consider the surviving spouse's marital status is attributed to two basic reasons: (1) wrongful death damages are determinable immediately at the time of the decedent's death and at no time thereafter; and (2) a comparison of the prospective earnings, services, and contributions of the deceased spouse with those of the new spouse would be highly speculative.<sup>21</sup>

With regard to the first proposition, the majority of courts would maintain that wrongful death damages are determinable only in relation to the facts and circumstances existing at the time of the decedent's death without any consideration of any changes which have occurred by the time of the trial. Thus, Dean Prosser apparently interpreted wrongful death damages as unmitigated when he stated that:

. . . under Lord Campbell's Act and the great majority of the death acts, however, the action proceeds on the theory of

<sup>14</sup> 376 Mich. 640, 138 N.W.2d 305 (1965).

<sup>15</sup> *Id.* at 648, 138 N.W.2d at 311.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Hall v. Wilson*, [1939] 4 All E.R. 84; *Mead v. Clarke Chapman & Co.*, [1956] 1 Weekly L.R. 76, [1956] 1 All E.R. 44 (C.A.).

<sup>18</sup> *Willis v. Commonwealth*, 73 Commw. L.R. 105 (1946).

<sup>19</sup> 48 F.2d 333 (2d Cir. 1930).

<sup>20</sup> *Id.* at 343.

<sup>21</sup> See Note 9 *supra*.

compensating the individual beneficiaries for the loss of the economic benefit which they might reasonably have expected to receive from the decedent in the form of support, services or contributions during the remainder of his lifetime if he had not been killed.<sup>22</sup>

Prosser would apparently maintain that even though the surviving spouse in one way or another has been fully compensated for his or her losses by means *other than* wrongful death damages, this spouse would still be entitled to wrongful death damages in the amount he or she could have reasonably expected "to receive from the decedent in the form of support, services or contribution during the remainder of his lifetime if he had not been killed." If Prosser's interpretation is accurate, then the jury should not be allowed to consider the surviving spouse's marital status for the purpose of mitigating the wrongful death damages.

This proposition appears to rely on inconsistent theories. *Simoneau v. Pacific Elec. Co.*<sup>23</sup> is an illustration of this. Evidence which detailed various illnesses suffered by members of the deceased's family after his death was held inadmissible for the following reason:

Changed conditions in the family of the deceased, adverse circumstances, or misfortunes in the way of sickness, which are in no way connected with or related to the death of the deceased, but occur subsequently thereto . . . are inadmissible for any purpose.<sup>24</sup>

However, the court allowed evidence which pertained to the crippled condition of two of his children because they were crippled prior to his death. The court stated that:

By reason of their permanent afflictions existing at the death of their father, they had a right to expect from him, had he lived, a future measure of comfort, care, and assistance than had their afflictions not existed.<sup>25</sup>

This latter reason, however, could also be applied to the family's later misfortunes since the father would presumably support the family through all later misfortunes. The former, however, would disallow jury consideration of any of the family's misfortunes, whether past or present, as not "connected with or related to" the decedent's death in any way. It is only a coincidence that the decedent's death occurred at a time when his children were crippled.

Furthermore, statutory construction also leads to the conclusion that death damages should be mitigated. The original wrongful death statute was enacted in England in 1848 under the title "Fatal Accidents

<sup>22</sup> PROSSER, LAW OF TORTS 928 (3d ed. 1964).

<sup>23</sup> 166 Cal. 264, 136 Pac. 544 (1913).

<sup>24</sup> *Id.* at 272, 136 Pac. at 550.

<sup>25</sup> *Id.* at 271, 136 Pac. at 549.

Act."<sup>26</sup> Today, this Act is more commonly known as Lord Campbell's Act. The statute was enacted to contravene the existing common law decisions which left the decedent's family and dependents without a remedy.<sup>27</sup> The purpose of this statute was to provide the decedent's dependents with a sufficient monetary award against the person whose negligent or wrongful acts caused the decedent's death in order to enable them to subsist without becoming wards of society. It is quite apparent that it was not within the reason of this statute to provide the dependents with an award so that they could live more prosperous lives than they would have had the decedent lived.

This conservative view of wrongful death damages is indicated in the very wording of Lord Campbell's Act itself. It provides that "in every such action [for wrongful death] the jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."<sup>28</sup> It is worthy to note that the statute speaks of "damages . . . proportionate to the injury resulting from such death. . . ." To consider the proportionate damages resulting from the decedent's death, the jury must be given a true picture of the surviving spouse's actual loss due to the decedent's death. Thus, the original wrongful death statute apparently supports the proposition that the death damages can, and should, be mitigated and that they are not determinable immediately upon the decedent's death. One factor which would mitigate a surviving spouse's loss would be his or her remarriage or the possibility of remarriage.

This limited purpose of wrongful death damages is suggested in the following cases. In considering the nature of damages allowable under the Washington wrongful death statute, the Washington Supreme Court in *Upchurch v. Hubbard*,<sup>29</sup> quoting the language of *Hedrick v. Ilwaco*,<sup>30</sup> stated that:

The object and purpose of these statutes is to provide a remedy whereby the family or relative of the deceased, who might naturally have expected maintenance or assistance from the deceased had he lived, may recover compensation from the wrongdoer *commensurate with the loss sustained*.<sup>31</sup> (Emphasis added.)

In *State v. Cambria*,<sup>32</sup> the Connecticut Supreme Court maintained that the Connecticut wrongful death statute provided the relatives of the decedent with "a substitute, at least in part, for the support and comfort

<sup>26</sup> 9 & 10 Vict., c. 93.

<sup>27</sup> PROSSER, LAW OF TORTS 923-924 (3d ed. 1964).

<sup>28</sup> 9 & 10 Vict., c. 93 §2.

<sup>29</sup> 29 Wash.2d 599, 188 P.2d 82 (1947).

<sup>30</sup> 4 Wash. 440, 30 Pac. 714, 715 (1892).

<sup>31</sup> 29 Wash.2d 599, 604, 188 P.2d 82, 85 (1947).

<sup>32</sup> 137 Conn. 604, 80 A.2d 516 (1951).

which they had lost."<sup>33</sup> It is interesting to note that these two jurisdictions apparently have not considered whether the surviving spouse's remarriage or its possibility is a factor in determining wrongful death damages.<sup>34</sup>

This proportionate or mitigated loss concept of wrongful death damages is reflected in some states' Workmen's Compensation statutes. As of 1961, the marital status of the surviving spouse has had an effect on the death benefits allowable under the Workmen's Compensation statutes of seventeen states.<sup>35</sup> For example, the Maryland Workmen's Compensation statute provides that:

. . . in case of the remarriage of a dependent widow of a deceased employee, without dependent children at the time of the remarriage, she shall receive compensation for one year after compensation previously awarded her outstanding.<sup>36</sup>

These statutes, enacted subsequent to the wrongful death statutes,<sup>37</sup> are explicit expressions of the legislative intent to mitigate wrongful death recovery because of the remarriage of the surviving spouse. Thus, the purpose and spirit of both the wrongful death and Workmen's Compensation statutes lend strong support to the doctrine that the surviving spouse's marital status should be a factor in the determination of the spouse's *actual* rather than her hypothetical loss.

Although the allowing of death damages to be mitigated by evidence of the surviving spouse's remarriage or the imminent possibility thereof would contravene the "collateral source" rule, the discussion just concluded would seem to question whether the "collateral source" rule should be applied to wrongful death actions.

As previously noted, the majority of courts maintain, as their second reason for denying evidence or remarriage, that if the surviving spouse's marital status were allowed to be considered by the jury, the comparison of the prospective earnings, services, and contributions of the deceased

<sup>33</sup> *Id.* at 608, 80 A.2d at 519.

<sup>34</sup> There are no cases from these jurisdictions cited in the annotation of this subject in Annot., 87 A.L.R.2d 252 (1963) or in the annotated statutes of these jurisdictions.

<sup>35</sup> 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION 548-549 (1961). Of the seventeen states listed by Larson which either required widowhood as a condition for receiving Workmen's Compensation death benefits or reduced these benefits upon the widow's remarriage, the following six jurisdictions have ruled according to Annot., 87 A.L.R.2d 252 (1963) that the surviving spouse's marital status cannot be taken into consideration in determining death damages under the wrongful death statutes: Illinois, Minnesota, Missouri, New York, Oregon and West Virginia.

<sup>36</sup> SB ANN. CODE OF MD., ART. 101, §36(8) (i) (1957).

<sup>37</sup> Tiffany writing in 1893 stated that ". . . all the states and territories of the United States have followed the example of England, and have granted a remedy to the families of the persons killed by wrongful act, neglect, or default." TIFFANY, DEATH BY WRONGFUL ACT §19 (1893). And Larson states that the first Workmen's Compensation statute was enacted in Maryland in 1902. This Maryland statute provided a cooperative accident fund for minors. 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION §5.20 (1961).



spouse with those of the new spouse would be highly speculative.<sup>38</sup> However, the jury's determination of wrongful death damages appears to be highly speculative by nature. Examining the beneficiaries' wrongful death recovery, Dean Prosser states that:

. . . in general, however, the measure of recovery is the value of the support, services and contributions which the beneficiary might have expected to receive if death had not intervened. This necessarily involves a large element of speculation, turning on such matters as life expectancy, income, character, habits and health of the deceased, and his past contributions to his family, together with the vicissitudes of an uncertain future.<sup>39</sup>

The Indiana Supreme Court, in *American Motor Car Co. v. Robbins*,<sup>40</sup> stated that wrongful death damage award "bears some semblance to conjecture."<sup>41</sup> In that case, the jury was concerned with the death damages due to a father for the death of his eight year old child.

Since the amount of death damages "bears some semblance to conjecture" and "involves a large element of speculation," the speculative argument of the majority of courts with respect to remarriage, while perhaps having merit, could be extended to frustrate the award of all wrongful death damages.

Although the Louisiana Appellate Court in *Stephens v. Nathchitoches Parish School Board*<sup>42</sup> ruled that the jury may not consider the surviving spouse's marital status, it cited the following from *Pennington v. Justiss-Mears Oil Co.*<sup>43</sup>

[M]ost that the court can do in such [wrongful death] cases is to exercise sound judicial discretion and award such amounts as, all the circumstances considered, may seem just to both litigants and not unduly oppressive to either.<sup>44</sup>

It appears, however, that the jury would not be considering all the circumstances if it did not consider the surviving spouse's marital status. Such oversight could be unduly oppressive on the defendant's pocketbook. And the court, in such an instance, would not be exercising its sound judicial discretion.

#### CONCLUSION

Although the majority of courts maintain that the surviving spouse's marital status should not be considered in determining wrongful death damages, the reasoning used by those courts should be re-examined. The very purpose and language of the wrongful death statutes them-

<sup>38</sup> See Note 9 *supra*.

<sup>39</sup> PROSSER, LAW OF TORTS 930-931 (3d ed. 1964).

<sup>40</sup> 181 Ind. 417, 103 N.E. 641 (1913).

<sup>41</sup> *Id.* at 421, 103 N.E. at 643.

<sup>42</sup> 137 So.2d 116 (La. App. 1962).

<sup>43</sup> 242 La. 1, 134 So.2d 53 (1961).

<sup>44</sup> 137 So.2d 116, 120 (La. App. 1962).

selves supports the proposition that these damages should be mitigated by such factors and circumstances as the surviving spouse's marital status. Furthermore, the reasoning of the majority of courts that the comparison of the prospective earnings, services, and contributions of the deceased spouse with those of the new spouse would be highly speculative has little merit when the speculative nature of death damages themselves is examined.

ALLEN J. HENDRICKS