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BULLARD v. BARNES:* PIECEMEAL PRECEDENT FOR THE LOSS OF A CHILD'S SOCIETY IN WRONGFUL DEATH ACTIONS

Prior to June, 1984, Illinois courts refused to allow recovery¹ for the loss of a child's society² in actions under the Wrongful Death Act.³ The term "society" embraces a broad range of mutual benefits which each family member receives from the others' continued

* 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).

1. For a general discussion on the subject of damages for the wrongful death of a child, see Belfance, *The Inadequacy of Pecuniary Loss as a Measure of Damages in Actions for the Wrongful Death of Children*, 6 OHIO N.U.L. REV. 543 (1979) (criticism of the pecuniary loss rule in wrongful death actions); Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197 (1971) (discussion of child death cases in relation to three types of statutes: loss to survivors, loss to estate, and punitive); Comment, *A Modern View of Wrongful Death Recoveries: Herein of the Infant and the Aged*, 54 NW. U.L. REV. 254 (1959) (discussion of wrongful death statutes as they pertain to actions in death of minors and the aged) [hereinafter cited as *Infant and the Aged*]; Comment, *Damages for the Wrongful Death of Children*, 22 U. CHI. L. REV. 538 (1955) (historical development of child contributions to families). See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127 (4th ed. 1971) (general discussion of wrongful death actions); S. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 4:21 to 4:40 (2d ed. 1975) (discusses specific situations, for example, infants, aged, loss of society, emotional distress); Annot., 49 A.L.R. 3d 934 (1973) (adequacy of damages for the wrongful death of a minor).

2. Trotter v. Moore, 113 Ill. App. 3d 1011, 447 N.E.2d 1340 (1983) (denying recovery for loss of society as an element of damages in a wrongful death action). See also Jones v. Karraker, 98 Ill. 2d 487, 475 N.E.2d 23 (1983) (wrongful death of viable fetus); Kaiserman v. Bright, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978) (see *infra* note 44). For purposes of this note, the term "society" shall be used to mean an association based on friendship, intimacy, or companionship. FUNK & WAGNALLS STANDARD DESK DICTIONARY 638 (3d ed. 1969). "An 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." Wycko v. Gnodtke, 361 Mich. 331, 339-40, 105 N.W.2d 118, 122 (1960). Some jurisdictions have similar language in their statutes. See, e.g., HAWAII REV. STAT. § 663-3 (1976) (loss of love and affection including loss of society); KY. REV. STAT. ANN. § 411.135 (Bobbs-Merrill 1972) (parents may recover for loss of affection and companionship that would have been derived from the deceased child); OKLA. STAT. tit. 12, § 1053 (1983) (loss of companionship of the parents of the decedent).

3. ILL. REV. STAT. ch. 70, §§ 1-2 (1983). The pertinent section of the statute states:

Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, . . . the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.

Id. at § 2.

existence, including love, affection, care, and companionship.⁴ In *Bullard v. Barnes*,⁵ the Illinois Supreme Court addressed the issue of whether the Wrongful Death Act's limitation of damages to pecuniary loss⁶ should be interpreted to include loss of a child's society.⁷ The court concluded that juries should be instructed to consider parental loss of a child's society when determining pecuniary loss.⁸ In addition, the court held that jurors should deduct projected child-rearing expenses from any damage award.⁹ Although the supreme court aptly changed the law to reflect societal values, its opinion in *Bullard* failed to resolve significant issues.¹⁰

Scott Bullard, a seventeen-year-old unemancipated youth, was fatally injured on October 1, 1979, when his automobile collided with another vehicle.¹¹ Scott's car was forced off the road when a semi-trailer truck owned by the defendant, Livingston County Ready-Mix, moved into Scott's lane to pass another vehicle.¹² Scott's automobile went out of control and collided with a truck.¹³

The decedent's parents sued the defendants under sections 1

4. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585 (1974) (widow's action for death of longshoreman resulting from injuries sustained while aboard defendant's vessel). See *supra* note 2.

5. 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).

6. The definition of "pecuniary" is: Monetary; relating to money; financial; consisting of money or that which can be valued in money. BLACK'S LAW DICTIONARY 1018 (5th ed. 1979). "Pecuniary loss" is a term used to distinguish between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative. *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 71 (1913). Words with the same or similar meaning to the word pecuniary are: monetary, fiscal, financial, economic, budgetary, capital, commercial. THE DOUBLEDAY ROGET'S THESAURUS 492 (1st ed. 1977).

7. 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).

8. *Id.* at 514-15, 468 N.E.2d at 1233.

9. *Id.* at 518, 468 N.E.2d at 1235.

10. See *Vestal, Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1959) (courts can and should consider intervening changes in the law even though they are not argued to the court). See also *Schmidt v. Equitable Life Assur. Soc.*, 376 Ill. 183, 198, 33 N.E.2d 485, 492 (1941) (supreme and appellate courts have power to receive evidence not produced at trial; this infers that appellate level courts can address issues not originally established by the litigants).

Justice Clark's concurring opinion in *Bullard* and the plaintiff's petition for rehearing stated there was a need to address the issue of whether loss of society should be allowed for children of majority age, and that child-rearing expenses should not be offset against a jury award. *Bullard*, 102 Ill. 2d at 520, 468 N.E.2d at 1236.

11. *Bullard*, 102 Ill. 2d at 509, 468 N.E.2d at 1230.

12. *Id.* The defendant passed two vehicles, one driven by Robert Graves and the second Harold Bohm. Both men testified at the trial that the Bullard car swerved onto the west shoulder of the road to avoid a collision with the Ready-Mix truck. The second vehicle the defendant passed was a truck driven by Bohm. After swerving off the road and losing control, the Bullard car crossed in front of the truck Bohm was driving, causing the collision. *Id.*

13. *Id.*

and 2 of the Illinois Wrongful Death Act (Act).¹⁴ The defendants admitted liability,¹⁵ and the trial court proceeded to address the issue of damages.¹⁶ The trial judge modified the plaintiff's instruction concerning pecuniary loss¹⁷ to include consideration of the parents' loss of their child's society.¹⁸ The jury returned a verdict in favor of the plaintiffs, which included damages for the loss of

14. ILL. REV. STAT. ch. 70, §§ 1-2 (1983). See *supra* note 3. An eight-count complaint was filed against the defendants. *Bullard v. Barnes*, 112 Ill. App. 3d 384, 386-87, 445 N.E.2d 485, 488 (1983), *aff'd*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984). Counts I and II were based on sections 1 and 2 of the Wrongful Death Act, alleging willful and wanton misconduct in Count I and negligence in Count II. *Id.* Counts III and IV alleged property damage to the Bullard automobile under both willful and wanton misconduct and negligence. *Id.* The willful and wanton count sought compensatory and punitive damages. Counts V and VI sought to recover funeral expenses under the Family Expense Act, ILL. REV. STAT. ch. 40, § 1015 (1983). *Id.* Counts VII and VIII were brought under the Survival Act, ILL. REV. STAT. ch. 110 1/2, § 27-6 (1983). *Id.* The Survival Act counts sought damages for the suffering of the decedent from the time of the collision until the time of his death. *Id.*

The plaintiffs also sought recovery for emotional distress. *Id.* Shortly after the accident, Mrs. Bullard and her younger son came upon the scene on their way to school. *Id.* Mrs. Bullard observed that Scott was rubbing his left shoulder, and he did not respond to her questions. 102 Ill. 2d at 510, 468 N.E.2d at 1230. The court denied recovery, under an emotional distress theory, even though the mother arrived at the scene shortly after the accident. *Id.* at 511-12, 468 N.E.2d at 1231 (citing *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983)). The *Bullard* court denied recovery to the Bullards because neither had been in close proximity to the accident when it occurred. 112 Ill. App. 3d 384, 394, 445 N.E.2d 485, 493 (1983), *aff'd*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984). For a discussion of *Rickey*, see Note, *Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois*, 17 J. MAR. L. REV. 563 (1984) (status of the law in Illinois regarding alleged negligent inflictions of emotional distress).

15. *Bullard*, 102 Ill. 2d at 510-11, 468 N.E.2d at 1231. During *voir dire* proceedings, defendants admitted liability under both the willful, wanton and the negligence counts. They further admitted liability under the Family Expense Act, ILL. REV. STAT. ch. 40, § 1015 (1983). *Id.*

16. *Bullard*, 102 Ill. 2d at 510, 468 N.E.2d at 1231. Defendants requested severance of the damage issues between the counts seeking compensatory and punitive damages. *Id.* at 510-11, 468 N.E.2d at 1231. The motion was granted by the trial court. *Id.*

17. See *supra* note 6 for the definition of pecuniary.

18. *Bullard*, 102 Ill. 2d at 511, 468 N.E.2d at 1231. The trial court improvised somewhat on the pattern jury instruction. *Id.* The instruction given by the trial court stated:

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 have reasonably been expected to contribute to his parents and brothers had the decedent lived, bearing in mind what you find the evidence shows concerning the decedent's age, sex, health, physical and mental characteristics, habits and the parents' loss of society with the decedent.

Id. (quoting ILL. CIVIL PATTERN JURY INSTR. 31.01 (2d ed. 1971) (trial court added emphasized material)).

society.¹⁹

Rejecting the jury instruction concerning the parents' loss of their child's society,²⁰ the appellate court reversed and remanded for a new trial on the issue of damages.²¹ The court noted that no prior supreme court opinion had acknowledged the loss of a child's society as an element of damages under the Act.²² The Illinois Supreme Court affirmed the appellate court's decision regarding the need for a retrial on damages.²³ The court, however, did not adopt the appellate court's reasoning. The supreme court directed the trial court to allow the instruction for loss of a child's society,²⁴ but added that the damages for such loss should be offset by expenditures that parents would have been likely to incur had the child lived.²⁵

The supreme court's analysis initially focused on jurisdictions that limit damages for wrongful death to pecuniary loss,²⁶ but allow monetary recovery for loss of a child's society.²⁷ The court noted

19. *Bullard*, 102 Ill. 2d at 511, 468 N.E.2d at 1231. The verdicts were \$285,000 in the wrongful death action and \$40,000 in the survival action. *Id.* In the second part of the trial, \$750 was stipulated as compensatory property damages and the jury returned a verdict of \$500 in punitive property damages against Barnes. *Id.* See *supra* note 16 (severance of property damage issue).

20. 112 Ill. App. 3d 384, 389, 445 N.E.2d 485, 489 (1983), *aff'd*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).

21. *Id.* at 395, 445 N.E.2d at 494.

22. *Id.* at 389, 445 N.E.2d at 490.

23. 102 Ill. 2d at 519, 468 N.E.2d at 1235.

24. *Id.* (affirming for reasons other than an improper jury instruction regarding loss of a child's society).

25. *Id.* at 518, 468 N.E.2d at 1234-35. Although the supreme court affirmed the decision, it did not agree with the appellate court's reasoning because the supreme court held that loss of a child's society was a proper element of damages in a wrongful death action. The supreme court agreed with the appellate court's holding, however, that a remand was necessary to determine damages. *Id.*

26. *Id.* at 512, 468 N.E.2d at 1232. See *supra* note 6 for a definition of pecuniary.

27. The opinion stated that of the 23 jurisdictions with statutes or decisions limiting wrongful death recoveries to pecuniary losses, fourteen now allow parental recovery in a wrongful death action for the loss of society of a child. *Bullard*, 102 Ill. 2d at 512, 468 N.E.2d at 1232. See *Krouse v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977) (interpreting a judicially imposed standard); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982) (interpreting a judicially imposed standard); *Smith v. City of Detroit*, 388 Mich. 637, 202 N.W.2d 300 (1972) (interpreting a judicially imposed standard); *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1961) (interpreting a Minnesota statute); *Sanders v. Mount Haggin Livestock Co.*, 160 Mont. 73, 500 P.2d 397 (1972) (interpreting a judicially imposed standard); *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973) (interpreting a judicially imposed standard); *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980) (interpreting a New Jersey statute); *Williams v. Dowling*, 318 F.2d 642 (3d Cir. 1963) (interpreting a judicially imposed standard); *American R.R. Co. v. Santiago*, 9 F.2d 753 (1st Cir. 1926) (interpreting a judicially imposed standard); *Anderson v. Lale*, 88 S.D. 111, 216 N.W.2d 152 (1974) (interpreting a South Dakota statute); *Sanchez v. Schindler*, 651 S.W.2d 249

that the trend in recent Illinois wrongful death actions has been to expand the scope of pecuniary injury to include non-monetary items.²⁸ Rejecting the defendant's argument that this was an issue properly left for the General Assembly,²⁹ the court stated that it would be anomalous to deny parents such damages for a child's death when the court has allowed damages for a child's loss of a parent's society and a spouse's loss of a spouse's society under the Act.³⁰

The supreme court also observed that *Bullard* provided the court with an opportunity to "thoroughly review" the presumption of pecuniary loss as it applied in actions to recover for the wrongful death of children.³¹ The court traced the presumption that parents incur a pecuniary loss upon the death of a child to its 1857 decision in *City of Chicago v. Major*.³² The court noted that this presumption arose from the common law rule that a parent is entitled to the services and earnings of an unemancipated minor child.³³ This presumption of pecuniary loss remained unaltered for over 125 years prior to the *Bullard* decision.

The *Bullard* court recognized the substantial expenses associated with child-rearing.³⁴ The court also noted that a number of jurisdictions instruct jurors to consider child-rearing expenses in arriving at a damage verdict.³⁵ The court concluded that Illinois

(Texas 1983) (revising a judicially imposed standard); *Jones v. Carvell*, 641 P.2d 105 (Utah 1982) (interpreting a judicially imposed standard); *Lockhart v. Besel*, 71 Wash. 2d 112, 426 P.2d 605 (1967) (interpreting a judicially imposed standard); IOWA R. CIV. P. 8 (parents may sue for actual loss of services and society).

28. *Bullard*, 102 Ill. 2d at 514, 468 N.E.2d at 1232.

29. *Id.* at 515, 468 N.E.2d at 1233. See also *infra* note 73.

30. *Bullard*, 102 Ill. 2d at 515, 468 N.E.2d at 1233. In *Elliott v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982), a widow recovered damages for loss of consortium. In *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958), a child recovered damages for loss of the companionship, guidance, and love of a deceased parent.

31. 102 Ill. 2d at 515, 468 N.E.2d at 1233. A presumption of pecuniary loss exists under the Wrongful Death Act where the next of kin are lineal heirs because the familial relationship, by itself, is enough to sustain a judgment awarding substantial damages without proof of actual loss. *Howlett v. Doglio*, 402 Ill. 311, 316, 83 N.E.2d 708, 711 (1949).

32. *Bullard*, 102 Ill. 2d at 516, 468 N.E.2d at 1233 (citing *City of Chicago v. Major*, 18 Ill. 349 (1857) (four year old boy fell into a water tank constructed by the city and drowned)).

33. *Bullard*, 102 Ill. 2d at 516, 468 N.E.2d at 1233 (citing *City of Chicago v. Scholten*, 75 Ill. 468, 471 (1874)) (12 year old boy died when a city sidewalk caved in; court held proof of actual loss of services not necessary where next of kin is a parent and deceased is a minor)). The presumption of pecuniary loss of earnings upon the death of a child no longer represents a reflection of the typical family experience. *Bullard*, 102 Ill. 2d at 516, 468 N.E.2d at 1233. See *infra* note 63 and accompanying text.

34. 102 Ill. 2d at 518, 468 N.E.2d at 1234.

35. *Id.* The *Bullard* court makes a blanket statement that many of the jurisdictions which have held that pecuniary loss encompasses loss of a child's society have also indicated that jurors are to consider child-rearing expenses in

trial courts should likewise instruct jurors.³⁶

The *Bullard* opinion is best understood by viewing the history of the Illinois Wrongful Death Act in relation to deceased children. Illinois case law limits parental recovery for the wrongful death³⁷ of a child to an amount representing pecuniary injury.³⁸ Prior to *Bullard*, damages were limited to that portion of the child's future

arriving at a verdict. *Id.* The court only cited five jurisdictions that require an offset. *Id.* See *Fuentes v. Tucker*, 31 Cal. 2d 1, 187 P.2d 752, 757 (1947) (mother received \$15,000 for the wrongful death of two 12 year old boys); *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 17 (Iowa 1977) (parents recovered \$60,000 for wrongful death of their son); *Sellnow v. Fahey*, 305 Minn. 375, 382-83, 233 N.W.2d 563, 568 (1975) (jury awarded damages of \$28,500 to parents of son who was 17 years old at the time of death); *Jones v. Carvell*, 641 P.2d 105, 107 (Utah 1982) (mother recovered for wrongful death of five year old including loss of society); *Clark v. Icicle Irrigation District*, 72 Wash. 2d 201, 205-10, 432 P.2d 541, 544-47 (1967) (\$15,000 recovered for loss of society of a 20 month old boy).

A closer look at two of the opinions cited by the *Bullard* court indicates, however, that the offset of expenses applies to jury awards for damages other than loss of society. In *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7 (Iowa 1977), the parents of a deceased child were awarded \$60,000 for an action under the state's wrongful death statute. The estate of the deceased also sued for the loss of future earnings of the deceased and recovered \$100,000. *Id.* No offset was applied against the award to the estate. The court, however, did note that the present value of the cost of the decedent's support and maintenance prior to majority should be offset against the present value of the loss of services. *Id.* at 17. In *Clark v. Icicle Irrigation Dist.*, 72 Wash. 2d 201, 432 P.2d 541 (1967), parents of a deceased twenty month old son were awarded \$15,000 in a wrongful death action. The supreme court, in reviewing the trial court's award of \$30,000, held that \$15,000 was for loss of "services" until the age of majority. *Id.* at 206-207, 432 P.2d at 544-45. The court further stated that loss of services would only be allowed upon a clear showing that such damages existed, and only then would costs to support be deducted from any award. *Id.* at 206-10 & n.4, 432 P.2d at 544-46 & n.4. Thus, there was no offset for loss of companionship. See *infra* notes 94-95 and accompanying text.

36. *Bullard* 102 Ill. 2d at 518-19, 468 N.E.2d at 1235. Three other issues addressed by the supreme court on appeal, are not discussed in this casenote. First, the court agreed with the defendant that evidence regarding defendant Barnes' passing maneuver or failure to stop after the collision was inadmissible because of lack of relevancy. *Id.* at 519, 468 N.E.2d at 1235. Since the defendant admitted liability, these issues were not in controversy. *Id.* Second, the court affirmed the use of morgue photographs of the decedent on the grounds that they could have probative value to help a jury determine the extent of decedent's pain and suffering. *Id.* at 519-20, 468 N.E.2d at 1235. Defendants argued that the photographs were gruesome or inflammatory, and that their probative value was outweighed by their prejudicial nature. *Id.* Finally, the supreme court ruled that an instruction regarding decedent's pain and suffering was not confusing to the jury and did not constitute reversible error. *Id.* at 520, 468 N.E.2d at 1235.

In the plaintiff's original complaint, damages were sought for emotional distress. *Bullard v. Barnes*, 112 Ill. App. 3d 384, 445 N.E.2d 485 (1983), *aff'd*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984). That portion of the complaint was dismissed for failure to state a cause of action, and was not addressed by the supreme court. 102 Ill. 2d at 510, 468 N.E.2d at 1231 (1984). See *supra* note 14.

37. ILL. REV. STAT. ch. 70, §§ 1-2 (1983). See *supra* note 3 for excerpts of the statute pertaining to § 2.

38. For a definition of pecuniary loss, see *supra* note 6.

earning potential in which the parents were expected to share.³⁹ This was true even though elements identical to loss of society were allowed for the wrongful death of a spouse.⁴⁰ In *Elliott v. Willis*,⁴¹ the supreme court noted that a broad definition of pecuniary injury was allowed in an action involving the wrongful death of a spouse. In *Elliott*, the term pecuniary injury was defined to include deprivations of society, companionship and conjugal relations.⁴² Prior to *Bullard*, the supreme court created a contradiction in the law by implicitly allowing for loss of a spouse's society and not for loss of a child's society.

Though Illinois courts consistently refused to instruct juries to include the loss of a child's society⁴³ as an element of pecuniary in-

39. See *supra* notes 32-33 and accompanying text. For additional background regarding the presumption of pecuniary loss, see generally Belfance, *supra* note 1, at 551; Decof, *supra* note 1, at 198. A more recent case discussing the presumption of pecuniary loss is *Trotter v. Moore*, 113 Ill. App. 3d 1011, 447 N.E.2d 1340 (1983). In *Trotter*, the court held that the family of a deceased 16 year old could recover only economic contributions that decedent could be expected to make to the family. *Id.* at 1016, 447 N.E.2d at 1344. See *infra* note 99 and accompanying text.

40. *Elliott v. Willis*, 92 Ill. 2d 530, 442 N.E.2d 163 (1982). The *Bullard* court noted that, in *Elliott*, it had unanimously held that a widowed spouse had the right to recover damages for loss of consortium under the Wrongful Death Act. 102 Ill. 2d at 514, 468 N.E.2d at 1232 (1984).

41. 92 Ill. 2d 530, 442 N.E.2d 163 (1982).

42. *Id.* at 535, 442 N.E.2d at 168. The *Elliott* court relied upon the definition used in *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958). The *Hall* court refused to allow a common law action to recover for destruction of the family unit caused by the death of the father because an adequate remedy existed under the Wrongful Death Act. *Id.* at 32, 147 N.E.2d at 355. The supreme court in *Hall* stated: "The term 'pecuniary injuries' has received an interpretation that is broad enough to include most of the items of damage that are claimed by the plaintiffs. . . . Each plaintiff alleges deprivation of support as well as deprivation of the companionship, guidance, advice, love and affection of the deceased." *Id.* at 31, 147 N.E.2d at 355.

The *Hall* court recognized that damages under the Wrongful Death Act were very similar to an action for destruction of the family unit, thus, the court refused to recognize a new tort for destruction of the family unit. *Id.* The plaintiffs, in *Hall*, were seeking recognition of a new tort because the legislative limit of a maximum recovery of \$25,000 for wrongful death actions was applicable at the time *Hall* was decided. *Id.* at 28, 147 N.E.2d at 353-54.

Note that the plaintiffs, in *Bullard*, argued that there was no logical, qualitative difference between the elements of relationships that exist between children and their next of kin and decedent's spouses and their surviving spouses and next of kin. Brief for Appellant at 10, *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984) (citing *Trotter v. Moore*, 113 Ill. App. 3d 1011, 447 N.E.2d 1340 (1983)). The loss of society, companionship, and felicity are no less measurable in the one context than in the other. *Id.* In his argument in support of recognizing loss of society, the appellant stated that apparently the *Bullard* appellate court had equated society with sexual relations because it concluded that society was inherent in the marital relationship, but not in the parent-child relationship. Brief for Appellant at 9, *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).

43. See *supra* note 2 and accompanying text for a discussion of loss of a child's society.

jury,⁴⁴ jury awards *implicitly* included amounts for loss of society, companionship, and emotional distress.⁴⁵ As a practical matter, juries often base wrongful death awards on sympathy, thereby implicitly considering injuries not strictly related to pecuniary injury.⁴⁶ Further, courts have permitted as much of the damages to stand as can be encompassed within the confines of the pecuniary loss rule.⁴⁷ "The whole process is awkward and the results are unfavorable because [the] pecuniary rule of damages is a legal fiction."⁴⁸

44. *Kaiserman v. Bright*, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978). In a wrongful death action involving a deceased minor, the court stated "we feel that it is firmly established in Illinois that no recovery may be obtained in a wrongful death action for the loss of society." *Id.* at 70, 377 N.E.2d at 264. *See also Jones v. Karraker*, 109 Ill. App. 3d 363, 440 N.E.2d 420 (1982), *aff'd*, 98 Ill. 2d 487, 457 N.E.2d 23 (1983). In *Jones*, the court did not allow loss of society in a wrongful death action regarding a viable fetus. *Id.* The court noted, however, that the trial court allowed a substantial verdict (\$125,000) based almost entirely upon the presumption of pecuniary loss. *Id.* The *Jones* court stated that in reality, there was nothing in the way of supporting evidence relating to the pecuniary loss suffered from this death. *Id.* at 371, 440 N.E.2d at 425. Therefore, it appears that jury awards implicitly included elements other than strict pecuniary loss.

45. *See Decof, supra* note 1, at 198-99.

46. *Decof, supra* note 1, at 198.

47. *Id.*

48. *Id.* *Decof* pointed out that parents of a deceased child who bring an action under a survivor statute usually have difficult problems of proof in ascertaining the pecuniary value of the services which the decedent would have rendered. *Id.* The damages under those statutes are typically held to be pecuniary. *Id.*

Despite all the lip service paid to so-called pecuniary rules of damages, in child death cases these often are mere artifacts. Isn't the true damage the bereavement, the suffering, and the loss of the love and affection of the child? And shouldn't the courts recognize this most grievous of all injuries and respond to it, directly, without having to resort to logic stretching arguments to comply with antiquated rules?

Id. at 206.

Another writer stated that an examination of a sampling of large and small awards for wrongful death actions involving children indicated that the variance between awards arose from the intermittent application of the pecuniary loss rule. Belfance, *supra* note 1, at 555. "When [the rule] is applied, the awards are very small; when it is winked at by judge and jury bent on doing higher justice, the awards are very large." *Id.* Belfance concluded that "[i]t is generally accepted that any substantial damage award in a child death case permits the inference that . . . mental anguish and grief of the parents is being considered by the jury in determining the amount of recovery." *Id.* *See also Finkelstein, Pickrel & Glasser, The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884 (1974) (legislation could promote uniformity by removing conflict in pecuniary loss jurisdictions between rules of law and the impulse of emotion).

An Illinois appellate court also suggested that emotional factors influence juries who are supposed to base verdicts on pecuniary losses only. *Wallace v. City of Rock Island*, 323 Ill. App. 639, 56 N.E.2d 636 (1944). The *Wallace* court stated that verdicts differ materially in cases where the circumstances are not dissimilar. *Id.* at 641, 56 N.E.2d at 637.

In their brief, appellants in *Bullard* pleaded that it was time for lawyers and courts to stop relying on a legal fiction, and to recognize that society places value on the life of a child greater than the monetary benefits a parent might

As previously noted, the *Bullard* court stated that consideration of the question of loss of a child's society provided an opportunity to "thoroughly review" the presumption of pecuniary loss.⁴⁹ Although the supreme court appropriately recognized the trend of other jurisdictions that recognize loss of a child's society,⁵⁰ it failed to follow the comprehensiveness of those decisions.⁵¹ The *Bullard* opinion left significant issues unresolved that will likely cause

receive from the child's service. Brief for Appellant at 11-12, *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984). See also *Infant and the Aged*, *supra* note 1, at 260-61. (test of pecuniary loss in most of the children-death cases seems to be a fiction and damages are probably based upon emotional factors).

49. 102 Ill. 2d at 515, 468 N.E.2d at 1233 (1984).

50. *Id.* at 512-13, 468 N.E.2d at 1232. See *supra* note 27. See generally Belfance, *supra* note 1, at 557-60. In 1979, a survey was taken of statutory provisions and case law relating to the measure of damages in actions for wrongful death. At that time 19 states had statutes interpreted by the courts to allow pecuniary losses only. Belfance, *supra* note 1, at 557-60. An additional 25 states allowed damages for loss of society. See, e.g., *Anderson v. Lale*, 88 S.D. 111, 216 N.W.2d 152 (1974) (loss of companionship, society proper in action for wrongful death of a minor); *Balmer v. Dilley*, 81 Wash. 2d 367, 502 P.2d 456 (1972) (damages recoverable for loss of companionship and destruction of the parent-child relationship); MICH. COMP. LAWS § 27A.2922 (1983) (damages include recovery for loss of society). Alabama and Massachusetts allowed punitive damages, but not loss of society. ALA. CODE § 6-5-391 (1975); MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1973). Three states, West Virginia, Florida, and Tennessee allowed mental anguish damages. *Panagopoulous v. Martin*, 295 F. Supp. 220 (S.D.W. Va. 1969) (held that action could be maintained for sorrow, distress and bereavement); FLA. STAT. § 763.21 (1984); TENN. CODE ANN. § 20-5-113 (1980). In addition, one state, Pennsylvania, allowed those damages recoverable in personal injury actions, except loss of consortium. PA. STAT. ANN. tit. 42 § 8301 (Purdon 1982).

Since 1979, there has been a substantial change in the makeup of statutory provisions and case law interpretations regarding the measure of damages in actions for wrongful death. Only five states allow only pecuniary losses for wrongful death actions (pecuniary losses without consideration for loss of society, emotional distress or punitive amounts). See COLO. REV. STAT. § 13-21-203 (1973) (fair and just; limit to \$45,000); CONN. GEN. STAT. § 52-555 (West 1969) (just damages, no judicial allowance for loss of society); N.M. STAT. ANN. § 41-2-3 (1978) (fair and just damages considering the pecuniary injury); N.Y. EST. POWERS & TRUST LAW § 5-4.3 (McKinney 1979) (fair and just compensation for the pecuniary injuries resulting from the decedent's death); N.D. CENT. CODE § 32-21-02 (1976) (jury shall give such damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery). Thirty-nine states now allow loss of society. See, e.g., *supra* note 27. Alabama allows punitive damages apart from pecuniary losses, ALA. CODE § 6-5-391 (1975), and five states that do not allow loss of society do allow parents to recover for mental anguish. See *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979) (damages allowed for anguish, bereavement and grief); ARK. STAT. ANN. § 27-909 (1979); DEL. CODE ANN. tit. 10, § 3724 (1982); FLA. STAT. § 768.21 (1984); TENN. CODE ANN. § 20-5-113 (1980).

51. Many of the cases cited in *Bullard* discussed damages for children who are of majority age and other cases outlined elements to include in determining the loss of society. See, e.g., *Fussner v. Andert*, 261 Minn. 347, 113 N.W.2d 355 (1961) (in the wrongful death of a 19 year old daughter, the court stated that the survivor should be compensated for loss of advice, comfort, assistance, and protection); *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973) (measure of damages includes loss of society, comfort, and companionship of the child);

problems for trial courts and future litigants.⁵²

The supreme court failed to resolve three major issues. First, even though Scott Bullard was an unemancipated minor, the court should have considered whether the loss of a child's society applies to emancipated children⁵³ and to children who have reached their majority.⁵⁴ Second, the court bypassed an excellent opportunity to rid Illinois courts of their dependency on the legal fiction that the term "pecuniary" has other than distinct economic characteristics. Finally, the court's holding that damage awards should be offset by child-rearing expenses⁵⁵ creates the likelihood of disparate treatment of similarly situated litigants.

The potential for future litigation is self-evident when one considers application of the loss of society rule to emancipated minors or children of majority age.⁵⁶ The supreme court stated that, inasmuch as *Bullard* concerned an unemancipated minor, it did not need to decide the question of whether the loss of society presumption applied to children of majority age.⁵⁷ In so doing, the court contemplated a distinction without a difference. The loss of a child's society should not cease upon his reaching the age of majority. Other states have allowed parents to recover for the loss of a child's society even though the child is past the age of majority.⁵⁸ These states reason that parents continue to benefit from their chil-

Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980) (allowed damages for the parents' loss of their child's companionship as they grow older).

52. Since there are unanswered questions presented by the opinion (*see infra* notes 53 and 54 and accompanying text) trial courts will have to guess what the supreme court intended when confronted with these issues.

53. The definition of "emancipate" is, to release from paternal care and responsibility. BLACK'S LAW DICTIONARY 468 (5th ed. 1979).

54. *Bullard*, 102 Ill. 2d at 517, 468 N.E.2d at 1234 (1984) (court refused to address the issue regarding children who are emancipated).

55. *Id.* at 518, 468 N.E.2d at 1235.

56. *See supra* note 51.

57. 102 Ill. 2d at 517, 468 N.E.2d at 1234 (1984).

58. A number of jurisdictions have specifically addressed this question and have allowed parents to recover for children over the age of majority. *See, e.g.*, Sawyer v. United States, 465 F. Supp. 282 (1978) (parents recovered \$100,000 for loss of society of a 34 year old son in a federal district in Virginia); Riley v. California Erectors, Inc., 36 Cal. App. 3d 29, 111 Cal. Rptr. 459 (1973) (mother received \$32,500 for loss of son's comfort and society; the son, 21, died on his twenty-first birthday); Mitchell v. Buchheit, 559 S.W.2d 528 (Mo. 1977) (parents entitled to establish reasonable probability of pecuniary benefit from continued life of child beyond age of minority); Jones v. Carvell, 641 P.2d 105 (Utah 1982) (damages for loss of society in death of a minor are not limited to period during which deceased would have been a minor); Butterfield Est. v. Community Light & Power Co., 115 Vt. 23, 49 A.2d 415 (1946) (damages for death of child not confined to minority, but may include majority); Balmer v. Dille, 81 Wash. 2d 367, 502 P.2d 456 (1972) (recoverable damages include loss of society and are not limited to the period of the child's minority); MO. REV. STAT. § 537.090 (1983) (without limiting such damages to those which would be sustained prior to attaining the age of majority of the deceased). *But cf.* IDAHO CODE § 5-310 (1980)

dren's love, comfort, and society even though the children no longer reside in the same household.⁵⁹ Therefore, the emancipated minor should not be treated differently from an unemancipated minor.

The supreme court further seemed to ignore that the trial court must determine for what length of time a deceased child's parents are entitled to the loss of their child's society.⁶⁰ For example, whether Scott Bullard's parents should be entitled to the loss of Scott's society over their remaining life expectancy, the normal life expectancy of Scott, or until he would have reached the age of majority or emancipation is unclear. Noting the subjective considerations inherent in determining the loss of a child's society,⁶¹ the supreme court will likely be required to address this issue in the future. Regardless of what new rule of law the supreme court would have adopted if it had addressed the issue, some standard should have been chosen so that future litigants and trial courts could treat the issue consistently.

The court also bypassed the opportunity to alleviate Illinois courts' dependency on a narrow interpretation of the term "pecuniary" in evaluating damage awards in wrongful death actions.⁶² The *Bullard* court's decision was partially based on the theory that because of societal change, parents no longer benefit from a child's potential earnings capacity.⁶³ Thus, the court recognized that the

(parents may maintain an action only for a minor and only if the minor is unmarried).

Other jurisdictions allow the decedent's estate to recover damages for future lost earnings for the decedent's remaining life expectancy. This in effect allows the parents to recover damages for the decedent past his/her age of majority if the decedent is unmarried and the parents are beneficiaries of the estate. See, e.g., *Humble v. Mountain State Construction Co.*, 441 F.2d 816 (6th Cir. 1971) (compensatory damages for wrongful death in Kentucky is loss to decedent's estate caused by destruction of his earning power); *Pagitt v. City of Keokuk*, 206 N.W.2d 700 (Iowa 1973) (measure of damages for estate is the present value of estate which decedent would have accumulated to the term of his natural life).

Illinois has allowed parents to recover damages based upon their child's expected earnings after age of majority had the child lived. In *Baird v. Chicago, Burlington & Quincy R.R. Co.*, 63 Ill. 2d 463, 349 N.E.2d 413 (1976), the court allowed evidence regarding projected future earnings of two deceased minors to their life expectancies in determining the amount of injuries suffered by the parents. Thus, it would be anomalous for the supreme court to say the loss of society of children ceases at the age of majority or emancipation.

59. See *supra* note 58.

60. 102 Ill. 2d 505, 468 N.E.2d 1228 (1984). The court never considered the issue.

61. See *supra* note 2.

62. See *supra* note 3 for pertinent portions of the statute.

63. 102 Ill. 2d at 517, 468 N.E.2d at 1233-34 (1984). In changing the nature of the presumption of pecuniary injury to one of loss of a child's society, the supreme court apparently agreed with the trial judge when he stated:

I would simply observe that there was time when people had as many children as possible because they provided help in the house, on the farm and

presumption of pecuniary injury required another basis.⁶⁴ In resolving this issue, the court shifted from an objective determination of a presumption of pecuniary injury⁶⁵ based upon economic projections of a child's earnings, to a subjective determination of a presumption of loss of society.⁶⁶ The *Bullard* court observed that a defendant in a wrongful death action may present evidence that the plaintiff-parent and deceased child were estranged and thereby rebut any presumption of pecuniary injury.⁶⁷ Therefore, the presumption of pecuniary loss is very subjective because it relies upon notions of estrangement, love, companionship, and family harmony.⁶⁸ This subjective approach to determining pecuniary injury is not only problematic but unnecessary under a reasonable interpretation of the Act.

The language in the Act does not explicitly limit damages to

so forth, and children were a pecuniary benefit to their parents However, it does seem to me that the law must progress with society to a certain extent and I don't think that anybody today has children for the pecuniary benefit they confer upon the parents as a practical matter. I have two children and I certainly don't regard [that] they confer any pecuniary benefit to me. In fact, they are a pecuniary loss, an absolute loser for sure from a financial viewpoint. . . . You don't find people taking their children in and checking them in to the nearest Department of Children and Family Services office and say, 'here, you take them, . . . they are dependents and I don't want them anymore.' That doesn't happen with very great frequency and there must be a very good reason for that, and I conclude that reason is that the society of one's children is valuable . . . the loss of society with one's children is a valuable thing to parents and it is not something that parents would give up lightly and it is something that parents would pay a great deal of money to avoid, if they had a choice. (R. 1085-1088).

Brief from Amicus Curiae for the Illinois Trial Lawyers Association at 25-26, *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).

64. *Bullard*, 102 Ill. 2d at 517, 468 N.E.2d at 1234 (1984).

65. See *supra* notes 32 and 33 and accompanying text.

66. *Bullard*, 102 Ill. 2d at 517, 468 N.E.2d 1234 (1984). In his brief, the appellant noted that our society values the life of a child for companionship, love, and affection, not for the monetary benefits a parent can receive from the child's services. Brief for Appellant at 11, *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984). The old strict economic value idea of pecuniary injury in regard to a child's earnings is not practicable for the recent past or future, yet presumptions have existed in lieu of legislative or judicial change. See, e.g., *Trotter v. Moore*, 113 Ill. App. 3d 1011, 1016-17, 447 N.E.2d 1340, 1344 (1983) (rebuttable presumption of substantial pecuniary loss).

67. 102 Ill. 2d at 517, 468 N.E.2d at 1234 (1984). If defendants are allowed to show estrangement between a parent and child, extremely close families should be allowed to show exceptional cases of a very tight family unit.

68. Prior to *Bullard*, subjective elements were used to show evidence of pecuniary injuries. For example, a child's age, health, intelligence, and general nature were used to determine what the child's potential for future earnings were. See *Baird v. Chicago, Burlington and Quincy R.R. Co.*, 63 Ill. 2d 463, 349 N.E.2d 413 (1976) (healthy, well-adjusted, intelligent young people who enjoyed excellent relationships with their parents). See also *Decof*, *supra* note 1, at 199 (child's age, sex, intelligence, health, character and all evidence that contributes to an analysis of the child as a total being).

pecuniary injuries.⁶⁹ The Act provides for fair compensation "with reference to" the pecuniary injuries, but not limited to such injuries.⁷⁰ Other jurisdictions have fashioned recovery in wrongful death actions on the basis of both pecuniary and non-pecuniary injuries.⁷¹ These jurisdictions reason that there is no special and discrete limitation on recovery for the wrongful death of a child.⁷² The Illinois General Assembly, however, has not made a distinction between pecuniary and non-pecuniary injuries recoverable under the Act.⁷³

In *Bullard*, the supreme court chose to persist with the legal fiction and inherent contradiction of using the term pecuniary injury to encompass the loss of a child's society, rather than to interpret the Act to include non-pecuniary injuries. In this respect, *Bullard's* interpretation of the language "with reference to" is in-

69. ILL. REV. STAT. ch. 70, § 2 (1983) (*supra* note 3).

70. *Id.*

71. See *Packard v. Joint School Dist.*, 104 Idaho 604, 661 P.2d 770 (Ct. App. 1983) (there is no special, discrete limitation as a matter of law upon recovery for the wrongful death of a child); *Wittel v. Baker*, 10 Md. App. 531, 272 A.2d 57 (1970) (damages not limited to pecuniary loss, but under statute, may include loss of society); *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980) (supreme court held damages should not be limited to the well known elements of pecuniary loss); *Nance v. State Bd. of Educ.*, 277 S.C. 64, 282 S.E.2d 848 (1981) (beneficiaries entitled to pecuniary loss, mental shock, and loss of society). The decisions of the above jurisdictions indicate that loss of society is an element of damages in addition to and apart from pecuniary losses. Various state statutes recognize that damages for loss of society of a child do not properly fit within the term pecuniary injuries. See, e.g., KAN. STAT. ANN. § 60-1903 to 60-1904 (1983) (damages, other than pecuniary loss including mental anguish and loss of society); OHIO REV. CODE ANN. § 2125.02 (Page 1976 & 1983 Supp.) (this statute used the term pecuniary to identify recoverable damages, however, in the 1983 supplement the term pecuniary was expunged from the statute). But cf. *Riley v. California Erectors, Inc.*, 36 Cal. App. 3d 29, 111 Cal. Rptr. 459 (1973) (parent may recover for loss of society and comfort, provided these elements are considered in reasonable relation to pecuniary loss); *Beaman v. Martha Washington Mining Co.*, 23 Utah 139, 63 P. 631 (1901) (father's recovery included deprivation of society and comfort as element of pecuniary loss); *Johnson v. Hoisington*, 134 Vt. 544, 367 A.2d 680 (1976) (the term pecuniary injuries shall also include the loss of love and companionship of the child). See also *Decof*, *supra* note 1. *Decof* advocates that because of the subjective nature of loss of society, damages of such do not adapt to the concrete monetary definition of the term pecuniary. *Id.* See *supra* note 6 for definition of pecuniary.

72. See *supra* note 71.

73. The last legislative change to the wrongful death statute regarding the elements of damages available was in 1967 when the limit on recovery was eliminated. In 1958, the supreme court in *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958), stated "[f]urther legislative action appears likely, and the likelihood of legislative action has always militated against judicial change." *Id.* at 32, 147 N.E.2d at 356. The plaintiff, in *Bullard*, noted in his brief that the Illinois legislature considered legislation in its 1981 and 1982 sessions that would expressly include loss of society in the Wrongful Death Act. Reply Brief for Appellant, at 8, *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984). This legislation, however, was not adopted. *Id.* The failure of the legislature to act shows its acceptance of the court's construction on the statute. *Id.*

consistent with a reasonable interpretation of the damages recoverable under the Act.⁷⁴ The *Bullard* court should have simply broadened its interpretation of the language used in the wrongful death statute to include non-pecuniary injuries.⁷⁵ This interpretative approach would have alleviated potential confusion of both jurors and litigants in future lawsuits under the Act.

Adhering to its unreasonable interpretation of the Act, the *Bullard* court held that child-rearing expenses were a proper offset⁷⁶ in any award for loss of a child's society.⁷⁷ The court recognized the substantial expenses involved in rearing a child.⁷⁸ Other jurisdictions were cited⁷⁹ in support of the view that juries should be instructed to deduct projected child-rearing expenses from any award for the loss of a child's society.⁸⁰ This view, however, does not account for the true loss which parents suffer when their child dies, and is not entirely consistent with the court's recent decision in *Cockrum v. Baumgartner*.⁸¹

In *Cockrum*,⁸² a recent wrongful birth action, the Illinois Supreme Court commented on the relationship of child-rearing expenses to the intangible benefits parents receive by having children.⁸³ The court recognized that child-rearing costs are negligible in comparison to the bond of affection, comfort, counsel, and society parents derive from their child.⁸⁴ The *Bullard* court recognized the holding in *Cockrum*, noting that the chief value of children to their parents is the intangible benefits they provide in the form of comfort, counsel and society.⁸⁵

Despite its recognition of the intangible benefits of a parent-child relationship in *Cockrum*, the *Bullard* court chose to offset

74. See *supra* note 3 for excerpts of the statute.

75. See *supra* note 71 and accompanying text.

76. The *Bullard* court noted that, as 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. 102 Ill. 2d at 517-18, 469 N.E.2d at 1234 (1984). Thus, for a wrongful death verdict to accurately reflect the parent's pecuniary injury, juries must be instructed to arrive at a figure which represents expenditures the parents would have been likely to incur had the child lived. *Id.* at 518, 468 N.E.2d at 1234-35.

77. *Id.*

78. See *supra* notes 34 and 35 and accompanying text.

79. *Bullard*, 102 Ill. 2d at 518, 468 N.E.2d at 1234 (1984).

80. *Id.*

81. 95 Ill. 2d 193, 447 N.E.2d 385 (1983). In *Cockrum*, parents of a child born after the defendant performed a sterilization operation sued for the wrongful birth of the child. *Id.* The damages sought were for the costs of rearing the child to the age of majority. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 199-200, 447 N.E.2d at 389-90.

85. *Bullard*, 102 Ill. 2d at 516-17, 468 N.E.2d at 1234 (1984).

child-rearing expenses against the jury's award of damages.⁸⁶ In so doing, the *Bullard* court viewed child-rearing expenses as a parental liability, while in *Cockrum*, the court did not consider the same liability sufficient to allow recovery to parents who consciously took measures to avoid such liability.⁸⁷ The offset of child-rearing expenses has no place in the subjective determination of the value of a child's society to his parents, just as the *Cockrum* court noted that benefits of child-rearing significantly outweigh the related costs. By allowing such an offset, the defendant in a wrongful death action partially benefits from the taking away of the satisfaction, joy, and affection that a deceased child's parents would ordinarily have received from educating and providing for the child had he lived. The *Bullard* court, in effect, held that culpable defendants who wrongfully kill a child provide a real economic benefit to the child's bereaved parents. The court erroneously reasoned that defendants are sparing parents the economic burden of raising a child, notwithstanding any intangible benefits which they may have derived from the endeavor.⁸⁸

The *Bullard* opinion, moreover, provides plaintiff's attorneys with a powerful basis on which to build an appealing argument. Future child-rearing expenses incurred before the child would have become emancipated are at best a mere fraction of the value of a child's life in terms of the intangible benefits of society his parents receive.⁸⁹ If it were possible to use rearing expenses as a basis of measuring damages, plaintiffs could argue that a child's society is worth at least three to four times the probative child-rearing costs. Affluent parents who can justify and substantiate high child-rearing costs,⁹⁰ therefore, will likely recover higher net jury awards

86. *Id.* at 518, N.E.2d at 1234-35. See also *supra* note 76.

87. 95 Ill. 2d 193, 447 N.E.2d 385 (1983).

88. *The Restatement (Second) of Torts* indicates that if damages are to be reduced, the benefit conferred must be to the interest that was harmed: "When the defendant's tortious conduct has caused harm to the plaintiff . . . and in so doing has conferred a *special benefit* to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." RESTATEMENT (SECOND) OF TORTS § 920 (1979) (emphasis added). It would be unconscionable to suggest that parents are conferred a special benefit by not having to expend monies on rearing a child wrongfully killed by a tortfeasor.

89. The society, companionship and comfort which children provide to parents is generally a coveted relationship. However, in wrongful birth actions that premise is questioned. See *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 447 N.E.2d 385 (1983). For a discussion of *Cockrum*, see *supra* notes 81 to 87 and accompanying text.

90. Using the idea that the value of a child is a mere fraction of the cost to raise, plaintiff attorneys would likely try to prove as much expense as possible in order to generate a high multiple to increase the potential damages for the loss of a child's society.

than less affluent parents.⁹¹ This result is disturbing because both sets of parents suffer the same type of loss, the death of a child. Defense attorneys, on the other hand, will likely seek to bifurcate the damage elements. A bifurcated determination of damages will conversely favor families with lower verifiable costs, assuming that a jury would return consistent verdicts for rich and poor parents regarding only the loss of society aspect of damages.⁹²

Other jurisdictions provide an alternative way of evaluating the loss of a child's society. Washington and Utah, for example, offer well-reasoned approaches to determining damages involving nebulous concepts such as loss of society. The Washington Supreme Court has held that child-rearing expenses should be offset against that portion of the award relating to pecuniary damages for loss of services.⁹³ Because the loss of companionship is non-pecuniary, the court noted that no offset was required against that portion of the award.⁹⁴ The Utah Supreme Court stated that damages should not

91. Children of affluent parents are likely to attend college and post-graduate universities. Likewise, their parents will likely spend more for them on clothes, vacations, and private grammar or high schools.

The old interpretation of pecuniary injuries advocated by supporters of the old law and definition leads to an interpretation of the law which favors those families who have the economic background to protect a large income for their children. Brief from Amicus Curiae for the Illinois Trial Lawyers Association at 22, *Bullard v. Barnes*, 102 Ill. 2d 505, 468 N.E.2d 1228 (1984). This was because rich parents could show more easily the likelihood of their children attending college and/or becoming professionals, thus projecting a higher expectation of future pecuniary benefit to the parents.

92. If defense attorneys are successful at getting a judge to agree to bifurcate damage elements by sending the jury out for two separate determinations—one for loss of society, and one for child-rearing expenses—less affluent families benefit. Higher probative expenses will make a net damage award more favorable to poor people. See *supra* note 91 for a converse effect if bifurcation is not allowed.

93. *Clark v. Icicle Irrigation Dist.*, 72 Wash. 2d 201, 206, 432 P.2d 541, 544-45 (1967). See *supra* note 35.

94. *Clark*, 72 Wash. 2d at 206, 432 P.2d at 544-45 (1967). See also *Balmer v. Dilley*, 81 Wash. 2d 367, 502 P.2d 456 (1972) (recoverable damages not limited to the period of the child's minority).

A good example of thorough treatment for loss of society by a legislature is the Ohio Wrongful Death Act. OHIO REV. CODE ANN. § 2125.02 (Page Supp. 1983). Portions of this statute provide:

In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(B) Compensatory damages may be awarded in an action for wrongful death and may include damages for the following:

- (1) Loss of support from the reasonably expected earning capacity of the decedent;
- (2) Loss of services of the decedent;
- (3) Loss of the society of the decedent, including loss of companionship . . . suffered by the surviving spouse, minor children, parents, or next of kin.

be limited to the duration of the decedent's minority,⁹⁵ recognizing that the emotional and psychological relationship between the child and his parents does not cease upon the child's emancipation.⁹⁶ The reasoning of these courts is preferable to that of the *Bullard* court because it better reflects the realities of modern society in two ways. First, it correctly acknowledges the intangible aspects of the loss of a child's society. Second, it considers the perpetual essence of a parent-child relationship.

Fair and just compensation⁹⁷ should imply fair and just treatment of litigants from various trial and lower level appellate courts. The *Bullard* decision, however, will make this goal difficult if not impossible. Although the *Bullard* court recognized the modern trend in the parent-child relationship, it failed to resolve other issues. The court failed to address whether the loss of a child's society applies to an emancipated child, it failed to eliminate the inherent contradiction in the language used in legislation, and it failed to alleviate the likelihood of disparate treatment between rich and poor litigants. Because the Illinois Supreme Court left significant issues presented by its *Bullard* opinion unresolved,⁹⁸ litigants will be faced with the likelihood of inconsistent treatment

Id.

Many states have made attempts to fully address the issues presented in a wrongful death action. The thoroughness of the opinions and the Ohio statute will only foster judicial economy and fair and consistent treatment of litigants.

95. *Jones v. Carvell*, 641 P.2d 105, 108 (Utah 1982). *Jones* involved the wrongful death of the plaintiff's five year old son. The *Jones* court addressed numerous issues presented in any action for wrongful death of a child and established well-reasoned and thorough precedent on which Utah courts and future litigants could be guided. The *Jones* opinion stated that recoverable damages are *not limited to economic or pecuniary losses*, but also include loss of intangible injuries such as loss of society, love, companionship, protection, and affection. *Id.* (emphasis added). Noting the intangible nature of the action, the *Jones* court stated that in assigning monetary value to loss of comfort, society and companionship, the trier of fact may consider factors relating to the physical, emotional and psychological relationship between the deceased and those entitled to recover. *Id.* The *Jones* court also noted that the ability of the mother to bear more children is a material fact to be considered in determining damages. *Id.*

96. *Id.*

97. See *supra* note 3.

98. See *supra* notes 50 to 55 and accompanying text.

caused by confused jurors and potential disparate treatment from lower courts in wrongful death actions involving children.⁹⁹

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99. See, e.g., *Trotter v. Moore*, 113 Ill. App. 3d 1011, 447 N.E.2d 1340 (1983). In *Trotter*, a rebuttable presumption that the decedent's death resulted in a substantial pecuniary loss to the parents gave rise to a total award of \$7,000 for a 16 year old killed in an automobile accident. *Id.* at 1016-17, 447 N.E.2d at 1344. The appellate court, however, denied loss of society as an element of damages. *Id.* at 1016, 447 N.E.2d at 1344. Although there is no retroactive application for judicial precedent, the supreme court in *Bullard* can mitigate the potential for future inconsistent adjudications by addressing the standards for determining damages for wrongful deaths of children bypassed in its opinion. Unfortunately, due to the unresolved issues presented in the *Bullard* opinion numerous plaintiffs like *Trotter* will be denied their just awards. This is not fair or just compensation, nor is it consistent treatment of culpable wrongdoers.