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REMARRIAGE AND THE ILLINOIS WRONGFUL DEATH ACT: THE EFFECT OF CHANGES IN STATUS OF BENEFICIARIES ON DAMAGES IN WRONGFUL DEATH ACTIONS

INTRODUCTION

For years a controversy has been simmering in the law of damages over remarriage of beneficiaries in wrongful death actions.[1] Defendants in such actions have repeatedly sought to introduce the fact of remarriage into evidence in mitigation of damages. Thus far, American courts, with one or two notable exceptions,[2] have answered these attempts with a resounding "no."[3] Illinois courts have been no less stubborn than the rest in rebuffing such attempts.[4]

Nevertheless, despite the fact that courts have traditionally awarded these defendants no more than a collective frown for their efforts, they keep beating a steady path to the appellate door. Illinois in particular has seen a flurry of activity in this area in the past two years, producing at least one significant procedural adjustment in the law. Defendants in Illinois wrongful death actions are now permitted to disclose the beneficiary's remarriage to the jury during *voir dire* examination.[5] But this change offers no substantive advantages to the trial attorney,[6]

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[1] *See generally* 25A C.J.S. *Death* § 114 (1966); 17 C.J. *Death* § 226 (1919): 22 AM. JUR. 2d *Death* § 164 (1965).

[2] Wisconsin is currently the only American jurisdiction that allows evidence of remarriage to be offered in mitigation. *See* Jensen v. Heritage Mutual Ins. Co., 23 Wis. 2d 344, 127 N.W.2d 228 (1964). Michigan at one time allowed it. *See* Stuive v. Pere Marquette Ry., 311 Mich. 143, 18 N.W.2d 404 (1945). *Stuive* was *overruled by* Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965). England allowed even the possibility of remarriage to be shown in mitigation, Meade v. Clarke Chapman & Co., Ltd., [1956], 1 W.L.R. 76 (C.A.), but this rule was abolished by statute. Law Reform (Miscellaneous Provisions) Act, 1971 (c.43), § 4(1); *construed in* Howitt v. Heads, [1972], 2 W.L.R. 183 (Assize). Other members of the British Commonwealth, such as Canada, still permit introduction of the changed status into evidence. Lefebvre v. Dowdall & McLean, [1965], 1 Ont. 1 (pecuniary advantage of remarriage had to be proved).

[3] *See* Annot., 87 A.L.R.2d 252, 255-56 (1963).

[4] Chicago & E.I. Ry. v. Driscoll, 207 Ill. 9, 16, 69 N.E. 620, 623 (1903); Moore v. Atchison, T. & S.F. Ry., 28 Ill. App. 2d 340, 356, 171 N.E.2d 393, 400 (1960) (Action under the Federal Employers' Liability Act); O.S. Richardson Fueling Co. v. Peters, 82 Ill. App. 508, 512-13 (1899).

[5] Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd*, 53 Ill. 2d 591, 294 N.E.2d 689 (1973), *but see* dissenting opinion, 53 Ill. 2d at 600, 294 N.E.2d at 694; Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973).

[6] The change does, however, offer a degree of tactical advantage to the trial attorney. *See* discussion in text accompanying note 19 *infra*.

and subsequent attempts to introduce the fact of remarriage into the case in chief have failed.[7]

What, then, are the reasons for this perpetual and expensive parade of defendants advancing an apparently outworn proposition on unsympathetic reviewing courts? There are some practical explanations. One is that the subject of the beneficiary's remarriage is often included with other substantive contentions on appeal,[8] thereby lessening the importance of the cost consideration. Another reason is that intuition alone suggests that a jury which is allowed to take into account the remarriage of the beneficiary will be much more conservative in awarding damages. Still another reason is that most states no longer impose a statutory limitation on the amount of damages recoverable in a death action.[9] Illinois provides a good illustration of what happens when that limitation is removed. After the Illinois legislature abolished its limitation in 1967,[10] the size of awards increased from the previous maximum of $30,000[11] to sums running into millions of dollars.[12] The brunt of this increase is born by insurance companies, who have both the financial resources and the newfound incentive to prosecute the appeals.

But cost factors, intuition, and the woes of insurance companies do not provide sufficiently compelling reasons to induce courts to reverse their traditional antagonism to the introduction of the fact of remarriage. A solid legal foundation is needed, and so far, none satisfactory to the courts has been supplied. In the past, the chief rationale for its introduction — that the beneficiary's injuries will be partially diminished by the support she receives from her second husband — has been shut off by the courts' unswerving adherence to the collateral source rule. This rule, which prohibits disclosure of payments from third parties in compensation for a plaintiff's injury, is deadly to any defendant who so much as alludes to the fact that the plaintiff has already been compensated from some other source.[13]

If a defense attorney does not want to challenge the sacred collateral source rule, he must advance some other rationale that avoids the rule altogether. One such rationale might be found

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[7] *E.g.*, Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973); Hardware State Bank v. Cotner, 55 Ill. 2d 240, 302 N.E.2d 257 (1973).

[8] For instance, in Hardware State Bank v. Cotner, 55 Ill. 2d 240, 302 N.E.2d 257 (1973), most of the Supreme Court's opinion was occupied with issues of negligence.

[9] For an account of those states which have recently abolished their statutory limitations, *see* Note, 54 NW. U.L. REV. 254, 255-56 (1959).

[10] LAWS OF ILLINOIS OF 1967, vol. II 3227, § 1, *amending* ILL. REV. STAT. ch. 70, § 2 (1965).

[11] ILL. REV. STAT. ch. 70, § 2 (1957).

[12] Demos, *Measure of Damages — Wrongful Death*, 60 ILL. B.J. 518 (1972) [hereinafter cited as Demos].

[13] *See* discussion in text accompanying notes 107-16 *infra*.

in an examination of the nature of damages in a death action and the predictive function of the jury. Part of a jury's task in fixing damages in a death action is to predict the extent and duration of benefits the deceased would have provided for the beneficiary had he lived.[14] Some of these benefits spring from the beneficiary's right to support from the decedent[15] — a right which is cut off by the decedent's death. When the beneficiary remarries before the trial, it seems somehow incongruous to allow the jury to make its prediction without considering the fact that the beneficiary has reacquired that right.

DISCLOSURE OF REMARRIAGE ON *VOIR DIRE* EXAMINATION

The extent and pervasiveness of this incongruity can be illustrated by the recent rash of Illinois cases dealing with disclosure of remarriage during *voir dire* examination. In *Mulvey v. Illinois Bell Telephone Co.*,[16] the defendant succeeded in slipping the disclosure of remarriage into the proceedings during *voir dire*,[17] on the rationale that "[i]t would be offensive to the integrity of the judicial process if the plaintiff, after taking an oath to be truthful, were permitted to misrepresent her marital status to the jury."[18] Success breeds its own following. The *Mulvey* opinion was hardly off the press when the defense counsel in *Watson v. Fischbach*[19] not only utilized this new advantage, but tried to improve upon it. Just to make sure that the jury did not forget that the widow had remarried, the subject was brought up again during defense counsel's cross-examination of the widow.[20] This home-grown extension of *Mulvey* was squashed by the Illinois Supreme Court, which was unwilling to sanction any reference to remarriage other than during *voir dire*.[21]

Watson by no means ended the matter. On its heels came

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[14] I.P.I.2d 31.04. Court opinions in general have tended to combine consideration of a decedent's earning potential with the beneficiary's expectancy of future contributions. For purposes of discussing the status of beneficiaries, they will be treated separately.

[15] *See* discussion of the significance of the right to support in death actions in the text accompanying notes 119-28 *infra*.

[16] 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd*, 53 Ill. 2d 591, 294 N.E.2d 689 (1973).

[17] *Id.* at 1060-61, 284 N.E.2d at 358.

[18] Dubil v. Labate, 52 N.J. 255, 261, 245 A.2d 177, 180 (1968); *quoted in* Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 1061, 284 N.E.2d 356, 358 (1972), *and* Watson v. Fischbach, 54 Ill. 2d 498, 501, 301 N.E.2d 303, 305 (1973).

[19] 54 Ill. 2d 498, 301 N.E.2d 303 (1973). *Watson* involved an action under the Illinois Dram Shop Act, but the applicable principles regarding remarriage and *voir dire* are the same.

[20] *Id.* at 499, 301 N.E.2d at 304.

[21] *Id.* at 503-04, 301 N.E.2d at 306, where the court stated:

> [The] cross examination . . . clearly exceeded the scope of the direct examination. Its purpose was to and it did emphasize plaintiff's remarriage. . . . The questions and resulting answers were clearly irrelevant under earlier decisions. . . .

Hardware State Bank v. Cotner.[22] In *Hardware,* the decedent was killed in a farming accident, leaving behind a widow and an infant son. The decedent's administrator brought a wrongful death action against the farm owner, with the widow and son designated as beneficiaries of the action. By the time the case went to trial, the widow had remarried and the son had been adopted by none other than the defendant himself.[23] It takes little imagination to realize the lethal effect that disclosure of adoption in these circumstances could have upon the size of the jury's verdict. Not surprisingly, the question of disclosure of adoption found its way into the Illinois Supreme Court's opinion. The court conceded that in some cases the disclosure of the information might be necessary during *voir dire*:

> The reason for disclosure of remarriage during *voir dire* was to alleviate false testimony by the surviving spouse concerning marital status. The same result is appropriate to adoption of the deceased's surviving children.[24]

But not in this case:

> The trial court need not disclose information concerning adoption where, as here, there exists the greater probability that nondisclosure may be accomplished without false testimony.[25]

One interpretation of this statement is that, if the beneficiary is capable of lying to the jury about his change of status, that change should be disclosed to the jury; but if he is not capable of lying to the jury, the disclosure should be prohibited. This rather crude summation of the court's position merely illustrates that it has not retreated one iota from its theoretical opposition to the introduction of evidence of remarriage or adoption into the case in chief. The court's position is a tacit admission that the court, like the defense counsel in *Watson,* views any disclosure of such a change in status as having a potentially marked influence upon the jury's award.

This feeling is shared with other jurisdictions, where there is a split of opinion as to the desirability of disclosure of remarriage on *voir dire.*[26] In *Wiesel v. Cicerone,*[27] the Rhode Island

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[22] 55 Ill. 2d 240, 302 N.E.2d 257 (1973).

[23] *Id.* at 248, 302 N.E.2d at 260.

[24] *Id.* at 249, 302 N.E.2d at 263.

[25] *Id.*

[26] The cases in which disclosure of remarriage on *voir dire* was allowed are: Watson v. Fischbach, 54 Ill. 2d 498, 301 N.E.2d 303 (1973); Mulvey v. Illinois Bell Tel. Co., 5 Ill. App. 3d 1057, 284 N.E.2d 356 (1972), *aff'd,* 53 Ill. 2d 591, 294 N.E.2d 689 (1973); Thompson v. Peters, 386 Mich. 532, 194 N.W.2d 301 (1972); and Dubil v. Labate, 52 N.J. 255, 245 A.2d 177 (1968).

Cases holding *contra* include: Wiesel v. Cicerone, 106 R.I. 595, 261 A.2d 889 (1970); Rodak v. Fury, 31 App. Div. 2d 816, 298 N.Y.S.2d 50 (1969); Cherrigan v. City and County of San Francisco, 262 Cal. App. 2d 643, 69 Cal. Rptr. 42 (1968); Helmick v. Netzley, 12 Ohio Misc. 97, 229 N.E.2d 476 (1967).

[27] 106 R.I. 595, 261 A.2d 889 (1970).

Supreme Court shied away from allowing any disclosure of remarriage.[28] So zealous was the *Wiesel* court in keeping the fact of remarriage from the jury, that it expressly prohibited the beneficiary from being sworn in under her new name at trial.[29]

It appears that courts considering the *voir dire* problem have been confronted with the choice of either fostering an illusion in the interest of keeping their substantive theoretical position intact, or fostering the truth in the interest of maintaining the procedural integrity of the trial. This choice presents the court with a dilemma. On the one hand, if the surviving spouse is allowed to lie on the stand about her subsequent change in identity, there is no danger that a jury will be prejudiced by disclosure of remarriage, but the court comes dangerously close to sanctioning perjury. On the other hand, if the surviving spouse is forced to testify truthfully as to any subsequent change in identity, the court's theoretical position that remarriage of the beneficiary has no effect upon the damages recoverable might well be rendered moot by the jury. Some courts, such as the Rhode Island court, have chosen the first alternative. Others, such as the Illinois courts, have chosen the second. Those that have chosen the second apparently believe that a judge's stern admonition to the jury not to consider the change of status in assessing damages will be sufficient;[30] but the Illinois Supreme Court's handling of the adoption question hardly indicates that the courts are secure in that belief. On the contrary, both *Wiesel* and *Hardware State Bank* betray an apprehension that a jury will include a consideration of the beneficiary's change of status, admonition or no admonition. The only conflict between these decisions is over where to draw the line and prohibit disclosure.

HARDWARE STATE BANK AND THE *VAN BEECK* RULE

Hardware State Bank is an important decision, not only because it dealt with the remarriage and adoption problems for purposes of *voir dire* examination, but also because it introduced a new rationale for disclosure of these changes of status in the case in chief. In *Hardware* the defendant advanced a rather

[28] To inject information concerning a widow's remarriage would, in our judgment, not only introduce irrelevant matter, but what is more important, it would be admitting evidence which could very well have a tendency to confuse the jury and adversely prejudice the plaintiff. This would in our opinion be putting a premium on form and overlooking substance.
Id. at 607, 261 A.2d at 895.

[29] *Id.*

[30] In Dubil v. Labate, 52 N.J. 255, 262, 245 A.2d 177, 181, the New Jersey Supreme Court stated: "[W]e have no doubt that the jury, after proper instructions by the court, will be capable of returning a verdict uninfluenced by the plaintiff's remarriage."

attractive argument attacking the constitutionality of the exclusion of evidence of these changes.

His argument developed in this manner: There is a line of cases holding that where a right of action for wrongful death has accrued to a beneficiary, and the beneficiary dies before the action is prosecuted, the action does not abate[31] as it did at common law.[32] Instead, it survives for the use of the beneficiary's estate, but with one important qualification: the estate may collect damages only for the time the beneficiary was living after the decedent's death.[33] This rule was crystallized by Justice Cardozo in *Van Beeck v. Sabine Towing Co.*,[34] and was only recently adopted by the Illinois Supreme Court in *McDaniel v. Bullard*.[35] In *Hardware* the defendant used the rule to form the basis of his constitutional assault upon the remarriage problem.

Defendant's argument was actually a three-stage effort involving two assertions and a conclusion. The assertions were (1) that under the *Van Beeck* rule the death of the beneficiary is actually a change of status that reduces the amount of damages recoverable, and (2) that adoption and remarriage are also changes of status strongly analogous to the death of the beneficiary.[36] The conclusion was that to allow a jury to consider the one change of status (death) in mitigation, but not to consider the others (remarriage and adoption), "is arbitrary and violative of due process and equal protection."[37] The Court disposed of this argument in five sentences:

> Specifically, we find no equal-protection violation in refusing to admit evidence of remarriage and adoption in mitigation of damages in a wrongful death action. There exists no invidious discrimination between this evidence and that of the death of the beneficiary because there is a reasonable basis for differentiation. It has been recognized that to allow evidence of remarriage would permit the introduction of matters of a highly speculative nature. . . . This same rationale is applicable to adoption. However, we believe that evidence of the death of the beneficiary does not pose this problem.[38]

The defendant set up a general analogy between the effect of death upon damages and the effect of remarriage or adoption. Unfortunately, a general analogy can often fall prey to distinctions, and the court had no trouble finding one here. It chose the

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[31] *See* Annot., 43 A.L.R.2d 1291 (1955).
[32] Hall v. Gillins, 13 Ill. 2d 26, 28, 147 N.E.2d 352, 354 (1958).
[33] *See* Annot., 43 A.L.R.2d 1291 (1955).
[34] 300 U.S. 342 (1937).
[35] 34 Ill. 2d 487, 216 N.E.2d 140 (1966).
[36] Hardware State Bank v. Cotner, 55 Ill. 2d 240, 248, 302 N.E.2d 257, 262 (1973).
[37] *Id.* at 248, 302 N.E.2d at 263.
[38] *Id.* at 249, 302 N.E.2d at 263.

distinction quoted above, which intimated that the defendant's constitutional argument breaks down because the effect of the beneficiary's death on damages is readily ascertainable, while the effect of remarriage or adoption is not.

But does the defendant's argument and the court's answer properly address the problem presented by the *Van Beeck* rule? The defendant's contention was only that the effect of death as a change of status was to place that fact before the jury to consider in mitigation of damages. In reality, the effect of the beneficiary's death is to limit the jury's inquiry to the monetary benefits that had already accumulated before that death. The point is not that damages are mitigated; the point is simply that after the occurrence of the beneficiary's death they do not accrue at all.[39]

The defendant could have claimed that remarriage or adoption also has the effect of limiting the jury's inquiry to benefits accruing before remarriage. That contention would have rendered the court's distinction untenable, as the effect of each change of status would be equally ascertainable. Now it is obvious that the defendant could not have maintained that death as a change of status is identical in effect to remarriage or adoption in all respects, for in the first instance the beneficiary no longer exists and cannot receive compensation, while in the others she still does and can. However, he could have maintained that all three changes of status would have cut off the beneficiary's right to support from the breadwinner (had he remained alive), and that to this extent the changes of status are identical. An approach such as this would require a reappraisal of both the nature of damages in wrongful death actions and the present reasons for exclusion of remarriage from evidence.

IN BRIEF: DAMAGES UNDER THE ACT

The Illinois Wrongful Death Act[40] creates a distinct cause of

[39] McDaniel v. Bullard, 34 Ill. 2d 487, 493, 216 N.E.2d 140, 144 (1966).

[40] ILL. REV. STAT. ch. 70, §§ 1, 2 (1973).

The Illinois Wrongful Death Act is one of the many offspring of Lord Campbell's Act, 9 & 10 VICT. c.93 (1846). *See* MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 95 (1935). Lord Campbell's Act was a response to various criticisms of the old common law rule that a personal injury action abated with the death of the person injured. *See* Van Beeck v. Sabine Towing Co., 300 U.S. 342, 344 (1937); Hall v. Gillins, 13 Ill. 2d 26 28, 147 N.E.2d 352, 354 (1958).

action[41] that vests, upon the decedent's wrongful[42] death, in his personal representative. The personal representative has only a nominal interest in the action,[43] as "the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person. . . ."[44] Thus, the real parties in interest are the beneficiaries, to whom damages are awarded.[45]

It is important to keep in mind that the Act is not a survival statute.[46] While the right of action flows from the defendant's wrongful act,[47] it is not the same right of action that the decedent had while he lived. It is the beneficiary's injuries[48] — not the decedent's[49] — that the statute attempts to compensate.

Accordingly, a measure of compensation consistent with the beneficiary's injuries must be employed.[50] To ascertain the damages a jury must predict not only the value of the decedent's life, but the share of that value which the beneficiary could expect

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[41] Maney v. Chicago, B.&Q.R.R., 49 Ill. App. 105, 114 (1892). This is the prevailing view in American jurisdictions. *See* cases cited in 22 AM. JUR. 2d *Death* § 13, nn.14&17 (1965). But *cf.* IOWA CODE ANN. § 611.20 (1950), which is, in essence, a survival statute. *See also* Floyd v. Fruit Industries, 144 Conn. 659, 136 A.2d 918 (1957), *and* cases cited in 22 AM. JUR. 2d *Death* § 13, n.20 (1965). *See also* Annot., 163 A.L.R. 253-54, where the author stated:

> [I]t is not always clear whether the statute under which a particular action is brought is a 'survival statute' or a 'wrongful death statute.' Some statutes which are designated as 'death statutes' by the courts appear to possess some of the familiar features of 'survival statutes,' that is to say, the damages which they provide may be recovered are damages to the estate of the deceased, as distinguished from some particular relative or relatives, or are damages for the pain and suffering of the deceased.

[42] No right of action exists if the defendant's act was not in some way wrongful. The Illinois act provides that the right of action arises when ". . . the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action. . . ." ILL. REV. STAT. ch. 70, § 1 (1973).

[43] McDavid v. Fiscar, 342 Ill. App. 673, 678, 97 N.E.2d 587, 589 (1951).

[44] ILL. REV. STAT. ch. 70, §§ 1, 2 (1973).

[45] Wright v. Royse, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963).

[46] Knierim v. Izzo, 22 Ill. 2d 73, 82, 174 N.E.2d 157, 162 (1961). This is the prevailing view where Lord Campbell-type death acts are in force (note 41 *supra*). This view is also the reason that under the Illinois act the award cannot be reached by creditors of the decedent. Wright v. Royse, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963).

[47] Clarke v. Storchak, 384 Ill. 564, 52 N.E.2d 229, 234 (1943), *appeal dismissed*, 322 U.S. 713 (1944). *See* cases cited in 22 AM. JUR. 2d *Death* § 18, n. 3, and § 22, n. 9.

[48] ILL. REV. STAT. ch. 70, § 2 (1973).

[49] In Ohnesorge v. Chicago City R.R., 259 Ill. 424, 430, 102 N.E. 819, 821 (1913), the court stated:

> The cause of action brought by the personal representative was not intended to permit the widow and next of kin to recover for the pain and suffering of the deceased or for medical attendance and other expenses incurred in and about being healed of the injury. It was not designed by the Legislature to give damages for any injury received by the deceased. . . .

[50] *See* 16 I.L.P. *Death* § 55 (1971); 22 AM. JUR. 2d *Death* §§ 115-78 (1965).

from him.[51] This presents two thorny problems: First, the common law was traditionally reluctant to value the life of a human being,[52] and it is the loss of life that gives rise to a beneficiary's injuries.[53] Hence under a non-punitive wrongful death act[54] a jury must try to predict the value of that which was once regarded as totally unsusceptible of valuation.[55] Second, the statute provides that the jury should award only "fair and just compensation with reference to the *pecuniary* injuries resulting from such death. . . ."[56] It makes no attempt to compensate the beneficiary's non-monetary injuries, such as mental anguish or bereavement.[57] However, a sympathetic jury shepherded by a good plaintiff's lawyer might well be influenced by such factors, the statute and the judge's admonitions to the contrary[58] notwithstanding.[59] Hence, the jury could err to the advantage of the beneficiary by overvaluing the decedent's life, or by overvaluing the beneficiary's true monetary interest in that life.

The original statute minimized this risk by imposing a limitation on the amount of recoverable damages.[60] While the limitation was in force, courts could console themselves with the knowledge that if there were an error in the beneficiary's favor, at least that error could never exceed the upper boundary imposed

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[51] I.P.I.2d 31.04. Court opinions in general have exhibited a tendency to combine considerations of the decedent's earning potential with the beneficiary's expectancy of future contributions. For purposes of discussing the status of beneficiaries, they will be treated separately.

[52] In Coliseum Motor Co. v. Hester, 43 Wyo. 298, 304-05, 3 P.2d 105, 106 (1931), the court stated:

> [W]hen Lord Ellenborough in 1808, in the case of Baker v. Bolton, 1 Campbell, 493, announced that 'in a civil court the death of a human being cannot be complained of as an injury,' he was fundamentally right. The public conscience had simply not yet awakened to the fact that life as such has a pecuniary value. The age of chivalry with its continuous combats and the system of duels doubtless contributed to this fact. And the cheapness of human life is no less indicated by the multitude of capital offenses, and the scaffolds erected as a punishment for many crimes, which we, in this age of enlightenment, would consider minor in character.

[53] It is necessary to distinguish between the wrongdoer's act, from which the liability arises, and the death of the decedent, from which the damages arise. *See* Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 70 (1913).

[54] Punitive damages are not allowed in wrongful death actions in states such as Illinois, where damages are assessed in accordance with the *beneficiary's* pecuniary injuries. Conant v. Griffin, 48 Ill. 410 (1868). However, in those states having wrongful death acts which merely provide for the survival of the *decedent's* cause of action, as opposed to the creation of a new right of action for the beneficiary, punitive damages may be awarded. 22 AM. JUR. 2d *Death* §§ 136-39 (1965).

[55] *Cf.* note 52 *supra.*

[56] ILL. REV. STAT. ch. 70, § 2 (1973) (emphasis added).

[57] Zostautas v. St. Anthony De Padua Hospital, 23 Ill. 2d 326, 336-37, 178 N.E.2d 303, 308 (1961).

[58] I.P.I.2d 31.07.

[59] *See* Kissel, *Sympathy in Wrongful Death Litigation,* 58 ILL. B.J. 442 (1970).

[60] LAWS OF ILLINOIS OF 1853, 97, § 2 (limit of $5,000). The limit was raised several times. *See* ILL. REV. STAT. ch. 70, § 3, *Historical Note* (Smith-Hurd 1959).

by the statute. But aside from the limitation, it fell to the courts to develop standards for measuring the beneficiary's "pecuniary injuries." Now that the Illinois legislature has abolished the limitation,[61] it is solely the employment of these court-created standards that produces the measure of damages in a death action.[62]

The first set of standards deals with the unmeasurable: the monetary value of the decedent's life. No beneficiary suing under a non-punitive wrongful death statute[63] may recover more than an amount representing the present value[64] of what the decedent could have earned[65] or contributed as services.[66] To the extent that a recovery exceeds that amount, that recovery does not reflect pecuniary injuries, and is punitive.[67] The value of the decedent's life, then, represents the upper limit beyond which damages are not recoverable.[68]

Since a jury must determine the present value of the decedent's future earnings and services, each wrongful death action involves a series of predictions relevant to that value and based on presently known facts about the decedent. For instance, when the parties disagree over how long the decedent would have lived,[69] they may introduce mortality tables[70] and evidence of his state of health as it existed prior to death[71] in order to enhance their contentions. Likewise, a jury may predict what the de-

[61] LAWS OF ILLINOIS OF 1967, vol. II 3227, § 1, *amending* ILL. REV. STAT. ch. 70, § 2 (1965).

[62] It should be remembered, however, that at no time did Illinois statutory law allow the jury to be informed of the limitation on damages. ILL. REV. STAT. ch. 70, § 2 (1973). Hence, the jury could return a verdict considerably higher than the statutory limit. It should also be remembered that Illinois courts have kept the power of remittitur available in wrongful death awards. Freer v. Rowden, 108 Ill. App. 2d 335, 247 N.E.2d 635 (1969).

[63] *See* note 54 *supra.*

[64] I.P.I.2d 31.04. *See* Demos, *supra* note 12.

[65] *See* note 51 *supra.*

[66] Eggimann v. Wise, 56 Ill. App. 2d 385, 389-90, 206 N.E.2d 472, 475 (1964). Loss of a parent's instruction and training is also compensable under the Act. *See* Slone v. Morton, 39 Ill. App. 2d 495, 188 N.E.2d 493 (1963).

[67] However, the recovery is not necessarily punitive in the sense that it represents a public policy of penalizing the wrongdoer. It is punitive only in that it exceeds the amount that the decedent could possibly have contributed to the beneficiaries. The foregoing situation is rare. If a jury becomes overgenerous, the court still has the power of remittitur. *See* note 62 *supra.*

[68] There is a possible exception to this postulate: the presumption of loss in favor of a widow or lineal next of kin. *See* text accompanying notes 81-84 *infra.* Theoretically a jury could award substantial damages because of the beneficiary's relationship to the decedent, even though, due to the decedent's age at death, the value of his life was less than the award. *See* Note, 54 NW. U.L. REV. 254, 258-59 (1959).

[69] Swift Co. v. Gaylord, 229 Ill. 330, 337-38, 82 N.E. 299, 302 (1907).

[70] Allendorf v. Elgin, J.&E. Ry., 8 Ill. 2d 164, 133 N.E.2d 288, *cert. denied,* 352 U.S. 833 (1956).

[71] I.P.I.2d 31.04.

cedent's future income would have been,[72] based upon his past record of earnings,[73] his work habits,[74] and his physical and mental potential.[75] To determine the monetary value of any future loss of services the jury may consider the nature and extent of personal services rendered to the beneficiary in the past.[76] These standards present problems no more serious than those encountered in determining prospective damages in any personal injury action.[77]

While the first set of standards concerns the pecuniary value of the decedent's life, the second concerns the pecuniary interest that a beneficiary has in that life.[78] That interest varies according to the class into which the beneficiary falls. The statute provides for two classes of beneficiaries: surviving spouses and next of kin.[79] Illinois case law subdivides the latter into "lineal" and "collateral" next of kin.[80]

This subdivision is important. Widows, widowers,[81] and lineal next of kin (*i.e.*, direct descendants and immediate ancestors of the decedent)[82] are presumed to have suffered pecuniary injuries from the mere fact of death.[83] So far as securing a jury

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[72] *See* note 51 *supra.*

[73] I.P.I.2d 31.04; *See* Demos, *supra* note 12, at 520.

[74] I.P.I.2d 31.04.

[75] Paul v. Garman, 310 Ill. App. 447, 463, 34 N.E.2d 884, 891 (1941) (decedent was "strong and healthy").

[76] Pennell v. Baltimore & O.R.R., 13 Ill. App. 2d 433, 439, 142 N.E.2d 497, 501 (1957) (handiness of deceased around the home).

[77] For a discussion of damages for impairment of future earning capacity in personal injury actions, *see* McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 86 (1935).

[78] *See* note 51 *supra.*

[79] ILL. REV. STAT. ch. 70, § 2 (1973).

[80] This subdivision appears to have originated in Chicago & A.R.R. v. Shannon, 43 Ill. 338, 346 (1867).

[81] The surviving husband may recover damages for his wife's wrongful death. *In re* Estate of Dillman, 8 Ill. App. 2d 239, 131 N.E.2d 634 (1956).

[82] The rules of descent and distribution, found in ILL. REV. STAT. ch. 3, § 11 (1973), are followed when determining next of kin. Wilcox v. Bierd, 330 Ill. 571, 581-82, 162 N.E. 170, 175 (1924), *overruled on other grounds in* McDaniel v. Bullard, 34 Ill. 2d 487, 216 N.E.2d 140 (1966).

[83] This rule is not well-considered. It was first fully enunciated in City of Chicago v. Scholten, 75 Ill. 468, 471 (1874), where a twelve-year-old child had been killed, and his parents could offer no proof as to the pecuniary value of his life. The court cited City of Chicago v. Major, 18 Ill. 349, 360 (1857), which merely held that a jury must consider the extent of the pecuniary loss suffered by the parents. The *Scholten* case was followed by Chicago & A.R.R. v. Shannon, 43 Ill. 338 (1867), which introduced the distinction between lineal and collateral next of kin, but did not voice any presumption of substantial loss. The presumption was inadvertently extended to the surviving spouse by dicta in Howlett v. Doglio, 402 Ill. 311, 316, 83 N.E.2d 708, 712 (1949), even though the widow had been required to show pecuniary injuries to recover more than nominal damages in Goen v. Baltimore & O.S.W.R.R., 179 Ill. App. 566, 570 (1913). The scope of the presumption was limited in Barrow v. Lence, 17 Ill. App. 2d 527, 151 N.E.2d 120 (1958) (daughter was an adult), and in Rust v. Holland, 15 Ill. App. 2d 369, 146 N.E.2d 82, *annotated in* 67 A.L.R.2d 739 (1957) (decedent's minor children who had been adopted by a foster parent before decedent's death were denied recovery).

verdict is concerned, this advantage may well be illusory, as juries may hesitate to award substantial damages without some proof of loss.[84] But at least the presumption will carry the case to a jury if the other elements of the cause of action are shown. When no lineal kindred are alive at the decedent's death, the action may be brought for the use of the collateral next of kin having the nearest degree of blood relationship to the decedent.[85] A collateral next of kin, however, has no presumption of loss running in his favor, and must prove that he could expect to receive substantial support from the decedent, otherwise he is entitled to only nominal damages.[86]

Aside from the operation of the presumption, the standards applied to the beneficiary's interest in a decedent's life are also based upon predictions. These predictions concern what the beneficiary could reasonably expect, in monetary terms, from the decedent had he lived.[87] Again, many present facts may be admitted to show the extent of this expectancy. For instance, did the decedent have a generous nature,[88] or did he confer specific benefits upon the widow or next of kin in the past?[89] A minor child cannot expect to receive the same amount of support or other pecuniary assistance upon attaining his majority; nor can a wife expect her spouse to shower benefits upon her estate after she dies. Hence the ages of beneficiaries are relevant in assessing damages.[90]

Changes of Status and the *Van Beeck* Rule

Any consideration of a beneficiary's expectancy must sooner or later involve a contemplation of a beneficiary's status, for this expectancy must, to a large extent, be governed by the relation to the decedent. This relation is partially expressed by the class into which the beneficiary falls: widow(er), lineal next of kin, or collateral next of kin. It is obvious that this relation is subject to change while the decedent is still living. The spouse could get divorced, the child could be adopted, or the worthless brother could become self-supporting. Moreover, any of these persons could die, thereby terminating the relation. Courts have generally been willing to predict a change in the relation, and a corresponding change in pecuniary injuries, if the change were

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[84] *See* Demos, *supra* note 12, at 521.
[85] Ill. Rev. Stat. ch. 3, § 11 (1973).
[86] Rost v. Noble & Co., 316 Ill. 357, 375, 147 N.E. 258, 265 (1925).
[87] *See* note 51 *supra*. *See also* cases cited in 22 Am. Jur. 2d *Death* § 119, nn. 1 & 2 (1965).
[88] *See* 22 Am. Jur. 2d *Death* § 168 (1965).
[89] Kulvie v. Bunsen Coal Co., 253 Ill. 386, 392, 97 N.E. 688, 691 (1912).
[90] Swift Co. v. Gaylord, 229 Ill. 330, 337-38, 82 N.E. 299, 302 (1907). *See* The City of Rome, 48 F.2d 333, 337 (S.D.N.Y. 1930), as to the possibility of damages being limited to those accruing during a next of kin's minority.

anticipated by the beneficiary before the decedent's death. Thus, an interlocutory divorce decree[91] or an attempt to obtain a divorce[92] have been held relevant on the issue of damages, because such a contemplated change in a beneficiary's status would arguably change the beneficiary's expectancy.

Such a contemplated change of status, however, occurs within the marriage relation and influences the extent of monetary benefits that may be expected to flow from the relation. What happens when a change occurs outside a relation that has been terminated already? Until recently, the rule has been that all such changes were irrelevant and inadmissible in death actions in Illinois.[93] *McDaniel v. Bullard*[94] altered that doctrine and instituted the *Van Beeck* rule, and the consequences of that adjustment have not yet been fully appreciated.

In *McDaniel*, the decedent's infant daughter was the sole surviving next of kin, having lived through an automobile accident that claimed the lives of her sister and parents. The decedent's estate commenced a wrongful death action, but before trial the infant died of causes unrelated to the accident. The trial court held that the action abated. In reversing this ruling, the Illinois Supreme Court borrowed heavily from Justice Cardozo's opinion in *Van Beeck v. Sabine Towing Co.*:[95]

> The general rule was said to be that 'executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate.' When we remember that under the death statutes an independent cause of action is created in favor of the beneficiaries for their pecuniary damages, the conclusion is not difficult that the cause of action once accrued is not divested or extinguished by the death of one or more of the beneficiaries thereafter, but survives, like a cause of action for injury to a property right or interest, to the extent that the estate of the deceased beneficiary has been impaired. To that extent, if no farther, a new property right or

[91] Chapman v. Gulf, M.&O.R.R., 337 Ill. App. 611, 620, 86 N.E.2d 552, 556 (1949).

[92] This proposition is tenuous. In Chapman v. Gulf, M.&O.R.R., 337 Ill. App. 611, 619-20, 86 N.E.2d 552, 556 (1949), the court cited Peterson v. Pete-Erickson Co., 186 Minn. 583, 244 N.W. 68, 69 (1932), to this effect, but no case on point has arisen in Illinois. As to whether and how the personal relations of the spouses affect damages in a wrongful death action, *see* Annot., 19 A.L.R. 1409 (1922), *and* Annot., 90 A.L.R. 920 (1934).

[93] Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928), *overruled in* McDaniel v. Bullard, 34 Ill. 2d 487, 216 N.E.2d 140 (1966); O.S. Richardson Fueling Co. v. Peters, 82 Ill. App. 508 (1898) (remarriage of widow). Adoption as a change of status did not arise until Rust v. Holland, 15 Ill. App. 2d 369, 146 N.E.2d 82, *annotated in* 67 A.L.R.2d 739 (1957), and there the children were adopted *before* the decedent's death. No case dealing with adoption *after* the decedent's death arose until *Hardware State Bank.*

[94] 34 Ill. 2d 487, 216 N.E.2d 140 (1966).

[95] 300 U.S. 342 (1937).

interest, or one analogous thereto, has been brought into being through legislative action.[96]

If the decedent's death is considered an injury to property from the standpoint of the beneficiary's estate, is it considered an injury to property from the standpoint of the beneficiary himself? Probably not, for if at the decedent's death the "property interest" were considered a totally vested interest in the value of the decedent's entire projected life span, that interest should logically pass in full to the beneficiary's estate. In reality, the injury is one merely "analogous" to injury to a property right. This analogy does nothing more than provide Justice Cardozo with a peg on which to hang his intellectual hat while adjusting an inequitable facet of the common law.[97]

The important feature of the *Van Beeck* rule is that the decedent's death had already terminated the relation between beneficiary and decedent before the beneficiary died. By allowing the action to survive while limiting damages to those accruing before the beneficiary's death, the rule sets up the death of the beneficiary before trial as a secondary event (the death of the decedent being the primary event) to which the jury looks in assessing damages. *Van Beeck* and *McDaniel* in effect constitute a breach of the traditional rule that events occurring between a decedent's death and trial are irrelevant to the assessment of damages.

The remaining question is the significance of the breach of tradition perpetrated by the *Van Beeck* rule. Can or should this breach logically be extended to cover the remarriage or adoption of beneficiaries? The defendant in *Hardware State Bank* tried unsuccessfully to secure this extension,[98] but it was his approach to the problem, and not necessarily the merits of the rule, that caused his failure. An examination of the courts' reasons for the exclusion of remarriage from evidence shows that the rule strikes at the foundation of one of these reasons and requires reappraisal of the nature of damages in wrongful death actions.

DISCLOSURE OF REMARRIAGE AND THE *VAN BEECK* RULE

The courts have employed three basic rationales to support their refusal to allow disclosure of a beneficiary's remarriage

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[96] *Id.* at 348-49.

[97] Allowing the death action to abate is inequitable for this reason: Assume that H is wrongfully killed and W is left to fend for herself. Later, after filing a wrongful death action, she dies before the case goes to trial. During the time she was alive she had to make up for the loss of her husband's earnings out of her own pocket. This diminishes the size of her estate when she dies. If the action abates, the estate has no way of recovering the value of that depletion, which would have been possible had she recovered a judgment before her death.

[98] *See* text accompanying note 36 *supra.*

into evidence. The first goes to the prospective nature of recoveries under the Wrongful Death Act. The argument here is that damages are determined as of the time of decedent's death, and are predicated upon what benefits the spouse could at that time have expected from him had he lived; hence, after the decedent's death, events changing the beneficiary's status are immaterial.[99] The second rationale, often espoused in conjunction with the first, goes to a well-entrenched judicial policy that the wrongdoer should not be exonerated by benefits received by the victim as compensation from a third party.[100] This is actually an expression of the so-called "collateral source rule."[101] The third, which was employed in *Hardware State Bank*,[102] is that disclosure of remarriage forces a court to engage in undue speculation centered on a comparison of the new spouse with the old; hence for policy reasons such disclosure should be prohibited.[103] All three theories are interrelated, and all three have weaknesses.

The first rationale is the one called into question by the *Van Beeck* rule. One of the fundamental tenets of case law relating to wrongful death actions is that damages are assessed by viewing the situation from one vantage point: the decedent's death.[104] Since the beneficiary's right of action arises with the decedent's death, and since the injury is compensated only according to the loss of those pecuniary benefits that can reasonably be expected, it would seem logical to pick death as the point at which this expectancy is measured.

But when does the expectancy materialize? If the decedent had lived, the beneficiary's expectancy would have materialized day by day, and might have been cut off or reduced in any of three ways: (1) by events affecting the decedent's power to give, (2) by events affecting his duty to give, and (3) by events affecting his inclination to give. It is obvious that death terminates the decedent's power, duty, and inclination, and thereby produces the injury to the beneficiary. It is just as obvious that if only decedent's power is reduced, he, and not the beneficiary,

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[99] *E.g.*, Gulf, C.&S.F. Ry. v. Younger, 90 Tex. 387, 391, 38 S.W. 1121, 1122 (1897); St. Louis, I.M.&S. Ry. v. Maddry, 57 Ark. 306, 310-11, 21 S.W. 472, 473 (1893).

[100] McFarland v. Illinois C.R.R., 241 La. 15, 19, 127 So. 2d 183, 186, 87 A.L.R.2d 246 (1961). It is notable that the reasoning of the *McFarland* case is actually a combination of the first two rationales.

[101] Harding v. Town of Townshend, 43 Vt. 536 (1871), is the first case in which the term "collateral source" is used. *See* Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962) *and* Averbach, *The Collateral Source Rule*, 21 OHIO ST. L.J. 231 (1960), for discussions of the origins of the rule.

[102] 55 Ill. 2d 240, 249, 302 N.E.2d 257, 263 (1973), *citing* Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972).

[103] Smith v. Wells, 258 S.C. 316, 188 S.E.2d 470 (1972); The City of Rome, 48 F.2d 333 (S.D.N.Y. 1930).

[104] *See* note 101 *supra*.

gains the right of action. If, on the other hand, only his duty or inclination is reduced, then the beneficiary's expectancy is also reduced, and that reduction should be reflected in a smaller award. This is the reason for concluding that courts are correct in allowing an inquiry into changes of status that were already contemplated at the decedent's death, such as a pending or threatened divorce.[105] It is also the reason that the *Van Beeck* and *McDaniel* decisions are sound from the standpoint of logic as well as policy.[106] The death of the beneficiary would probably terminate the decedent's duty and inclination to give, if he were still alive.

The *Van Beeck* rule raises the inference that the beneficiary's expectancy still materializes day by day, even though its source has been wrongfully cut off. It implies that the jury may take a second look at the extent of a beneficiary's expectancy should some event subsequent to the decedent's death but prior to judgment prevent or influence materialization. For although the right of action arises upon the decedent's death, that does not mean that the beneficiary sustains all his injuries at that time. The beneficiary is compensated as if this were the case for the simple reason that in personal injury suits it is usually impractical to hold the case open until all of the beneficiary's injuries are ascertained. The beneficiary's injuries are a day by day affair, while a court's disposition of a case is not. This is the reason a jury must, of necessity, make predictions as to future damages.

Yet, it would be ludicrous to put blinders on the jury by compelling them to predict the prospective pecuniary injuries of a beneficiary who no longer exists, simply because damages are traditionally assessed as of the time the right of action arose. There is no doubt that the beneficiary's death is an event relevant to the assessment of damages. The real problem with remarriage or adoption, on the other hand, is relevancy. At this point we encounter the most formidable obstacle to the introduction of remarriage or adoption: the collateral source rule.

The collateral source rule has been hotly debated in discussions on the law of damages,[107] but attacks upon it have failed to dislodge its firm hold. It has become entrenched in the law of most American jurisdictions. The rule states that compensation

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[105] *See* note 91 *supra*.

[106] The policy rationale behind the *McDaniel* decision is that "the doctrine of abatement would place a premium on delaying tactics on the part of defendants in these cases, who would be relieved of all liability if the case should be prolonged long enough." 34 Ill. 2d 487, 492, 216 N.E.2d 140, 143 (1966).

[107] *See* Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

from a third party — a "collateral source" — does not mitigate the damages recoverable by the injured party.[108] Thus, for example, the defendant in a personal injury suit cannot introduce the fact that the plaintiff, who is asking for damages for time lost from his work, was gratuitously paid for that time by his employer.[109] Likewise, a defendant in a dramshop action cannot complain that the decedent carried a life insurance policy, the proceeds of which were payable to his widow.[110]

The rule has been upheld for punitive reasons,[111] but its main thrust goes to the uniqueness of the duty of compensation in personal injury actions. Courts emphatically insist that a plaintiff's loss that is not compensated by or through the defendant remains uncompensated no matter how much the plaintiff receives from ancillary sources. The compensation is unique in that it simply must come from the defendant, or one stepping into his shoes. Hence, in *Shea v. Rettie*,[112] the Massachusetts Supreme Court stated:

> There is no joint relationship between the city whose obligation to the plaintiff arises under a contract of employment . . . and the defendant whose obligation originates in his wrongful conduct. The duty imposed by law upon him is to compensate the plaintiffs for all the damage done by his negligence including impairment of earning capacity. That obligation is not fulfilled because it happens that the plaintiffs have a contract with the city which entitles them to be indemnified by disability payments during absence from duty. Compensation for the defendant's wrong is not thereby furnished by the defendant. Such payments by the city do not concern and should not benefit the defendant.[113]

Insofar as the rule touches wrongful death actions, it has been utilized in both its punitive and unique aspects.[114] For those states with non-punitive wrongful death statutes, the unique aspect of the rule was well explained by the New York district court in *The City of Rome*:[115]

> It may often happen that, by reason of inheritance, or insurance, or by reason of her own industry and superior capacity, a widow may be much better off pecuniarily after her husband's death than she ever had been in his lifetime. No one has ever suggested that such considerations must be taken into account in computing her pecuniary loss. Her remarriage is analogous. The fundamental question is, not her financial situation after her husband's death,

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[108] McCormick, Handbook on the Law of Damages § 90 (1935).
[109] Cooney v. Hughes, 310 Ill. App. 371, 378, 34 N.E.2d 566, 570 (1941).
[110] Deel v. Heiligenstein, 244 Ill. 239, 241-42, 91 N.E. 429, 430-31 (1910).
[111] "If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing." Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958).
[112] 287 Mass. 454, 192 N.E. 44, *annotated in* 95 A.L.R. 571 (1934).
[113] *Id.* at 457, 192 N.E. at 46, *annotated in* 95 A.L.R. at 574.
[114] *See* note 100 *supra*.
[115] 48 F.2d 333 (S.D.N.Y. 1930).

but what she might reasonably have expected to receive from him had he lived.[116]

This rule is not the only obstacle to a theory based on mitigation. The courts' third rationale, which is based upon policy considerations, also imposes a restriction. This theory states that disclosure of remarriage would lead to a speculative comparison of the economic abilities of the new spouse with those of the decedent.[117] Standing alone, this theory does not seem convincing. Predicting the value of a person who is still living is no more speculative than predicting the value of one who is dead. The only difference is that in the former case a jury's prediction can later be proven wrong, whereas dead men tell no tales. But the point is that the jury is already inundated with speculative matter concerning its predictions of the value of the first husband's life and the beneficiary's interest in it. Courts seem to think that the jury is confused enough with these two variables, and that consideration of the additional factor would lead to an intolerable situation. Hence:

The highly speculative inquiry into the prospective value of the second marriage would not contribute to the certainty of the ultimate determination of the damages, and could only serve to inject considerations which would serve to confuse the issues.[118]

If a defendant attempts to introduce evidence of a beneficiary's remarriage, so long as he proceeds on a theory of mitigation of damages, he will be defeated by the collateral source rule and policy considerations. Only by arguing that the beneficiary's expectancy no longer materializes after remarriage can a defendant evade the grasp of these two rules. His position must be that damages, or a specific portion of them, simply do not accrue after such a change of status. This is an easy proposition to sustain when the beneficiary dies; it is more difficult when the beneficiary remarries. The reason for the difficulty is this: While death ends the beneficiary's ability to receive benefits, remarriage does not. Remarriage simply thrusts the beneficiary back into a relation of the same general kind as was terminated by the defendant's wrongful act. The relations are not identical; even from a pecuniary standpoint each marriage is unique. There is, therefore, a good chance that if all damages

[116] *Id.* at 338.

[117] In Smith v. Wells, 258 S.C. 316, 320, 188 S.E.2d 470, 471, the court said:

While testimony of the remarriage of the widow is rejected by the decisions upon several grounds, we think the soundest reason rests upon policy. These authorities point out that such testimony would involve an inquiry into the relative merits of the two husbands, which could only be determined by a comparison of their prospective earnings, contributions, services, society, and companionship.

[118] *Id.* at 321, 188 S.E.2d at 472.

are cut off after remarriage, the beneficiary will have been undercompensated for her pecuniary loss.

Yet perhaps it is possible to find an element, constant from marriage to remarriage, on which part of the pecuniary loss is based. For many years the law has been that a beneficiary's recovery is not limited to merely the amount representing the right to support, but includes the amount of benefits reasonably expected over and above that right.[119] It cannot be denied, however, that the latter amount includes the former amount, and that the loss of support is an ingredient of the recoverable damages.[120] Assume that a beneficiary has been receiving benefits because of her status within a relation, whether marriage or lineal kinship. Some of these benefits accrue as a result of her legal right to support,[121] according to the husband's[122] — or father's[123] — power and duty to supply them. But other benefits are mere expectations. These accrue according to the decedent's inclination to supply them.

Now assume that the relation is one of marriage. A wife's right to support is a right common to marriages generally;[124] hence, insofar as that right is concerned, her particular marriage is not unique. What is not common to marriages generally is the expectancy of other benefits, such as gifts, personal services, love and affection, companionship, etc. In this regard each marriage is unique. When the marriage is terminated by divorce, the expectancy dies with it, but the right to support remains[125] through the statutory authority of courts to award alimony.[126] Both death[127] and remarriage[128] terminate these alimony payments and end the right. Divorce law recognizes no difference in the effects of the two changes of status upon the right, nor does it take into account the financial abilities of the second husband.

When a marriage is terminated by wrongful death, both the beneficiary's general expectancy and the included right die with it; but the monetary manifestations are revived and compen-

[119] Railroad Company v. Barron, 72 U.S. (5 Wall.) 90, 106 (1866) (construing the Illinois Wrongful Death Act).

[120] *See* Wood v. Philadelphia, B.&W. R.R., 24 Del. 336, 76 A. 613 (1910).

[121] Lyons v. Schanbacher, 316 Ill. 569, 573, 147 N.E. 440, 442 (1925), *overruled on other grounds in* Laleman v. Crombez, 6 Ill. 2d 194, 199-200, 127 N.E.2d 489, 491 (1955).

[122] Richheimer v. Richheimer, 59 Ill. App. 2d 354, 359, 208 N.E.2d 346, 349 (1965).

[123] Dwyer v. Dwyer, 366 Ill. 630, 634, 10 N.E.2d 344, 346 (1937).

[124] *See* Arndt v. Arndt, 399 Ill. 490, 495, 78 N.E.2d 272, 275 (1948) (right of support is a common law right).

[125] Herrick v. Herrick, 319 Ill. 146, 150, 149 N.E. 820, 823 (1925).

[126] ILL. REV. STAT. ch. 40, § 19 (1973).

[127] Kramp v. Kramp, 2 Ill. App. 2d 17, 21, 117 N.E.2d 859, 861 (1954).

[128] ILL. REV. STAT. ch. 40, § 19 (1973).

sated through the Wrongful Death Act. The fact that these manifestations arise from two different sources — one a unique expectancy and the other a common right — has apparently not been advanced before the courts. Now if the right is common, when the beneficiary remarries she steps into the same right she originally had. The only difference is in its value, which varies according to the second husband's power to give. The question is, must the second husband's power be compared with the first, merely because the right to support varies in value? If so, the courts will exclude the fact of remarriage from evidence under the collateral source rule and policy considerations. Or should a court take a second look when a widow reassumes the status of wife before trial, and cut off those damages reflecting the right of support from the decedent at the point of the beneficiary's remarriage? The *McDaniel* case indicates that such an action would be procedurally sound; the *Mulvey* decision indicates that the knowledge of remarriage is already before the jury; and divorce law provides an analogous result. In essence, these two cases and divorce law provide the three legs upon which an approach is based aimed at disclosing remarriage without involving a consideration of the second spouse's contributions.

This approach would have two definite advantages. First, it would sidestep the operation of both the collateral source rule and the courts' policy considerations. These objections to the disclosure of remarriage center on the notion that the second spouse is providing compensation for the beneficiary's injury. If the disclosure does not invoke a discussion of benefits coming from the second spouse, these objections are irrelevant. Second, this approach would resolve the conflict among courts over the effect upon a jury of the disclosure during *voir dire* examination. The courts would be given an opportunity to provide specific standards for how a jury should consider such disclosure.

The approach would have one drawback: the reacquired right may not be worth as much in the second marriage as in the first, and this approach must not attempt to measure the difference in value. Therefore, situations could still arise in which not all of the beneficiary's pecuniary injuries were compensated in a death action. But the Illinois Wrongful Death Act merely says that the jury should award "fair and just compensation *with reference* to the pecuniary injuries. . . ."[129] The statute seems flexible enough to accommodate this approach. It must be remembered that because of the predictive function of

[129] ILL. REV. STAT. ch. 70, § 2 (1973).

the jury, each award will either overcompensate or undercompensate a beneficiary. It must also be remembered that remarriage would only exclude benefits accruing as a result of the basic, bottom-line right of support, which will amount to considerably less than all the benefits that one spouse could reasonably expect from the other.

In any event, a solution such as this seems preferable to allowing disclosure of remarriage on *voir dire* examination, on the dubious premise that the jury will obey the judge's instructions not to consider the change in status during the case in chief. This approach could give the jury some criteria for considering the effect of such disclosure, rather than leaving the matter to the imaginations of the jurors and the defense attorney. In addition to predicting the value of the beneficiary's general expectancy, the jury would predict what part of that value was based upon her right to support. In his instructions the judge could define this right in terms of what the wife could have demanded from the deceased in a court of law had the parties obtained a separation. The value of this amount (computed from the time of remarriage) could then be subtracted from the value of the beneficiary's general expectancy (computed from the time of the decedent's death). This formula would also limit the effect of the presumption of loss in favor of widows and lineal next of kin, which at present is not well-considered.[130]

CONCLUSION

It appears that the problem of disclosure of remarriage and adoption is not settled in Illinois. The court never quite came to grips with the ramifications of the *Van Beeck* rule, and the *Watson* case illustrated the lengths to which a defense counsel will go to get mileage out of the disclosure of remarriage on *voir dire*. There is a basic conflict between the Illinois Supreme Court's position regarding *voir dire* and its refusal to allow disclosure of remarriage in the case in chief. One or the other of these positions, preferably its position on the disclosure of remarriage, should be reversed.

Perhaps in the near future some insurance company will prosecute still another appeal and secure a resolution of the conflict. Until then, the remarriage problem will continue to provide a test for the ingenuity — and honesty — of defense counsel.

Thomas E. Cowgill

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[130] *See* note 83 *supra*.