Wrongful Death in Illinois: A Statute Comes of Age - Bullard v. Barnes

Thomas S. Orr
WRONGFUL DEATH IN ILLINOIS: A STATUTE COMES OF AGE

_Bullard v. Barnes_  
102 Ill. 2d 505, 468 N.E.2d 1228 (1984)

THOMAS S. ORR*

INTRODUCTION

The Illinois Supreme Court in _Bullard v. Barnes_ ¹ attempted to modernize the Illinois Wrongful Death Act ² by holding that the parents of a minor child may recover under the Act for the loss of society of their deceased child.³ This decision abrogates the traditional view that recovery for the wrongful death of a child is limited strictly to the parents' pecuniary injury, defined as the reasonable monetary value of the child's services and economic contribution to the family unit.⁴ Specifically, the _Bullard_ court announced a presumption that the parents' loss of a child's society is a pecuniary injury under the Wrongful Death Act.⁵ In addition, the historical Illinois presumption of loss of earnings by the death of a minor was struck down as a useless anachronism of a former era.⁶ Finally, to more accurately reflect the parents' true pecuniary injury, the court concluded that reasonably anticipated child rearing expenses must be deducted from any award for loss of society and any proved loss of income.⁷

By its decision in _Bullard_, the Illinois Supreme Court has significantly expanded the scope of damages available under the Wrongful Death Act. Although the court has followed the predominate trend in this area of the law, it has, in its haste to join the judicial crowd, lost sight of the legislative intent of the Illinois statute. The court's inappropriate reliance on case law from other states and its failure to carefully


1. 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).
2. ILL. REV. STAT. ch. 70, §§ 1-2.2 (1983).
3. _Bullard_, 102 Ill. 2d at 517, 468 N.E.2d at 1234.
5. _Bullard_, 102 Ill. at 517, 468 N.E.2d at 1234.
6. Id.
7. Id. at 518, 468 N.E.2d at 1234-35.
analyze Illinois legislative history and judicial precedent has resulted in an unwarranted modification of a legislative remedy.

**HISTORICAL BACKGROUND**

The Illinois General Assembly first enacted a wrongful death statute in 1853. That act created a right of action in the deceased's personal representative to recover damages sustained by the surviving spouse or next of kin resulting from the death of the deceased person. The statute provides for damages which are "fair and just compensation with reference to the pecuniary injuries resulting from such death." The original statute limited the amount of any award for pecuniary injury to $5,000, and although increased from time to time by legislative amendment, the monetary limitation on damage awards was not completely eliminated until 1967. The pecuniary injury limitation, however, has never been changed or withdrawn by the legislature.

Despite the narrow scope of recovery seemingly allowed by the statute, Illinois courts have traditionally accepted a broad interpretation of the term "pecuniary injury." For example, in the death of a father, a child has long been able to recover damages for loss of instruction and moral, physical, and intellectual training as pecuniary injuries. Moreover, recovery is not limited to the child's minority but also includes the reasonable expectation of future benefits from the father during the child's adult life. Similarly, a surviving spouse is now permitted to recover for loss of society and consortium as an element of pecuniary damages due to the wrongful death of the other spouse. Thus, it is clear that the definition of pecuniary injury in Illinois is broad enough to include various intangible items.

Although the broad definition of pecuniary injury did not extend to

---

8. ILL. REV. STAT. ch. 70, §§ 1-2.2. The original Illinois Act was a copy of the New York statute which in turn was a copy of the first two sections of 9th and 10th Victoria, ch. 93 (1846) commonly known as Lord Campbell's Act. ILL. REV. STAT. ANN. ch. 70, § 2, Historical Note (Smith-Hurd 1984). For a concise history of the development of and need for a statutory remedy for wrongful death, see generally, PROSSER & KEETON, THE LAW OF TORTS 5th Ed. § 127 (1984); Speiser and Malawer, An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions, 51 TUL. L. REV. 1 (1976).

9. ILL. REV. STAT. ch. 70, § 2.


recovery for loss of society in the death of a child, the apparent harshness of the Illinois rule was mitigated in two respects. First, if the wrongful death action was brought on behalf of the surviving spouse or lineal next of kin, there existed as a matter of law a presumption of pecuniary loss arising from that relationship which shifted to the defendant the burden of establishing contrary facts to rebut the presumption. Accordingly, for the death of a child, the law presumed that the parents had suffered a pecuniary injury for which they could be compensated regardless of whether there was any evidence of pecuniary assistance from the deceased. This presumption applied even when the decedent was an adult. Second, the parents' recovery was not limited to the earnings or services of the child during his minority. Damages could be awarded for the pecuniary benefit which the parents might reasonably expect to obtain from the child at any time in the future. These two factors tended to broaden the scope of pecuniary loss and therefore provided a judicial atmosphere supportive of substantial monetary awards in cases involving deaths of children.

A review of the case law prior to Bullard discloses clear uniformity among the Illinois courts in applying the pecuniary injury rule for the wrongful deaths of children. Four of the five districts of the Illinois Appellate Court had held within the last five years that loss of a child's society could not be recovered by the parents in a wrongful death action. Kaiserman v. Bright is typical of the earlier cases. Here, a mi-

16. Flynn v. Vancl, 41 Ill. 2d 236, 242 N.E.2d 237 (1968) (presumption of pecuniary loss applied to potential recovery of the father where the decedent was a two-week old child); Rusher v. Smith, 70 Ill. App. 3d 889, 388 N.E.2d 906 (5th Dist. 1979) (if the next of kin are parents, a presumption of pecuniary loss obtains that is sufficient to sustain a verdict awarding substantial damages even without any proof of actual loss); Mortensen v. Sullivan, 3 Ill. App. 3d 332, 278 N.E.2d 6 (2d Dist. 1972) (presumption of substantial damage arising by reason of the relationship between a father and an 18 year-old son killed in an automobile accident).
19. See, e.g., Baird v. Chicago, B. & Q. R.R., 63 Ill. 2d 463, 349 N.E.2d 413 (1976) (Awards of $188,000 each for the wrongful deaths of a 17 year-old high school girl and a 19 year-old college boy survived by at least one parent were not excessive); Mattyasovszky v. West Towns Bus Co., 21 Ill. App. 3d 46, 313 N.E.2d 496 (1974), aff'd, 61 Ill. 2d 31, 330 N.E.2d 509 (1975) (Award of $75,000 for the wrongful death of a 12 year-old boy who contributed monetarily to the family income and helped care for younger siblings was not excessive); Maca v. Rock Island-Moline City Lines, 47 Ill. App. 2d 31, 197 N.E.2d 463 (1964) (Award of $30,000 statutory limit for the wrongful death of a 7 year-old was not excessive).

nor boy was struck and killed by a taxi cab after alighting from a school bus in front of his house. In holding that the parents could not recover for loss of the child’s society, the court apparently felt this conclusion was so obvious that it limited its reasoning to a terse statement that Illinois law did not allow recovery for loss of society in wrongful death actions.22

The clarity of this position was partially obscured by the Illinois Supreme Court in Elliott v. Willis.23 In this case, a widow whose husband was killed in an automobile collision with the defendant sought damages in a wrongful death action for loss of consortium. The court held that a spouse’s society, companionship, and sexual relations were capable of monetary evaluation by a jury and were therefore recoverable as pecuniary injuries under the Wrongful Death Act.24

Nonetheless, the appellate court in Trotter v. Moore25 was able to distinguish Elliott from cases involving the deaths of children. First, the Trotter court observed that the supreme court carefully limited its holding in Elliott to the loss of consortium of a spouse.26 Second, recovery for loss of consortium of a deceased spouse, which was allowed in Elliott, was recognized as arising out of a similar remedy at common law for non-fatal injuries. Since there is no comparable remedy at common law for loss of society for a non-fatal injury to a child, there was no basis for including the remedy under the Wrongful Death Act.27 Thus, when Bullard v. Barnes came before the Illinois Supreme Court, the Illinois appellate courts were in unanimous agreement that loss of a child’s society was not recoverable under the Wrongful Death Act.

THE COURT’S DECISION

Scott Bullard, a seventeen year old youth, was killed early one foggy morning when the automobile he was driving collided with another vehicle. Bullard was driving south on a two lane highway while a semi-trailer truck owned by Redi-Mix, Inc. and driven by one of its employees, Barnes, was proceeding north behind two other vehicles. Despite the fog, Barnes pulled into the southbound lane to pass both of the vehicles

22. Id. at 70, 377 N.E.2d at 264.
23. 92 Ill. 2d 530, 442 N.E.2d 163 (1982).
24. Id. at 540, 442 N.E.2d at 168.
26. Id. at 1016, 447 N.E.2d at 1344.
27. Id.
ahead of him forcing Bullard's vehicle off the road and out of control. After veering back onto the pavement, Bullard's automobile crossed the center line striking one of the northbound vehicles. Bullard died in the hospital later that morning of injuries sustained in the crash.

Bullard's parents filed a multi-count complaint against Barnes and Redi-Mix, Inc. seeking compensatory and punitive damages for negligence and willful and wanton misconduct under the Wrongful Death Act, the Survival Act, and the Family Expense Act. The defendants admitted liability under both the negligence and willful and wanton counts. In a bifurcated trial, the court first considered damages due under the Wrongful Death Act and the Survival Act and instructed the jury that in determining the amount of the parents' pecuniary injury, they could consider the parents' loss of society with the decedent. The jury awarded damages of $285,000 in the wrongful death claim and $40,000 in the survival claim.

The defendants argued on appeal that the trial court's instruction which included loss of society as an element of damages violated the pecuniary injury limitation of the Illinois Wrongful Death Act. The appellate court agreed surmising that the trial court's decision to give the instruction was based on a misinterpretation of the recent Elliott decision allowing recovery for loss of consortium for the death of a spouse. The appellate court did not interpret Elliott as applying in this case since the court believed there is a qualitative difference between the consortium of a spouse and the society of a child based on their common law histories. This difference led the court to conclude that the holding in Elliott was strictly limited to the loss of consortium for a deceased spouse. Thus, the jurors in Bullard had been improperly instructed, and, accordingly, the case was remanded for a new trial on damages.

On appeal by the plaintiffs, the supreme court held that the loss of a child's society was an element of pecuniary damages recoverable under

---

28. ILL. REV. STAT. ch. 110 1/2, § 27-6 (1983) provides, *inter alia*, for survival of personal injury and property damage claims which, of course, died with the victim at common law.

29. ILL. REV. STAT. ch. 40, § 1015 (1983) provides, *inter alia*, for the recovery of medical, hospital and funeral expenses which are not recoverable by the family under the Wrongful Death Act.

30. The parties also agreed to damages of $3,236.10 under the Family Expense Act. 102 Ill. 2d 505, 511, 468 N.E.2d 1228, 1231.

31. The second part of the trial included a stipulation to compensatory property damage of $750 and a jury verdict of $500 in punitive property damage against defendant Barnes only. *Id.*


33. *Id.* at 390, 445 N.E.2d at 490.

34. *Id.*
the Wrongful Death Act.\textsuperscript{35} The court observed that most other states with similar statutes include recovery for the loss of a child's society as an element of pecuniary injury.\textsuperscript{36}

More importantly, the court noted that the trend in its own decisions suggested an expansion of the scope of pecuniary damages to include nonmonetary losses. The court relied on its previous decisions in \textit{Hall v. Gillins}\textsuperscript{37} and \textit{Knierim v. Izzo},\textsuperscript{38} where the term "pecuniary injuries" was said by the court to be broadly interpreted. In each of these cases, the plaintiffs initiated common law tort actions for "destruction of the family unit" in addition to statutory wrongful death actions. The damages sought in \textit{Hall} consisted of loss of support, companionship, guidance, advice, and affection of the husband and father.\textsuperscript{39} Similarly, the damages sought in \textit{Knierim} included loss of consortium on behalf of the widow.\textsuperscript{40} In each case, the court rejected the plaintiffs' claims at common law because the action was abated by the Wrongful Death Statute which provided an adequate remedy for the damages sought.\textsuperscript{41}

The court in \textit{Bullard} also relied on its most recent decision in \textit{Elliott v. Willis}.\textsuperscript{42} In addition to sanctioning the recovery for a spouse's loss of consortium, the court pointed out that the decision in \textit{Elliott} also made a sharp distinction between damages for mental anguish, which are never recoverable under the Wrongful Death Act, and damages for loss of society.\textsuperscript{43} The purpose of drawing this distinction in \textit{Elliott} was to criticize

---

\textsuperscript{35} Bullard v. Barnes, 102 Ill. 2d at 517, 468 N.E.2d at 1234.

\textsuperscript{36} In support of this observation the court cited the following cases: Williams v. Dowling, 318 F.2d 642, 644 (3d Cir. 1963); American R.R. Co. v. Santiago, 9 F.2d 753, 758 (1st Cir. 1926); Krouse v. Graham, 19 Cal. 3d 59, 68, 562 P.2d 1022, 1025, 137 Cal. Rptr. 863, 866 (1977); Volk v. Baldazo, 103 Idaho 570, 573, 651 P.2d 11, 14 (1982); Wardlow v. City of Kenokuk, 19 N.W.2d 439, 448 (Iowa 1971); Smith v. City of Detroit, 388 Mich. 637, 649, 202 N.W.2d 300, 303 (1972); Fossner v. Andert, 261 Minn. 347, 359, 113 N.W.2d 355, 363 (1961); Sanders v. Mount Haggin Livestock Co., 160 Mont. 26, 147 N.E.2d 352 (1958). In this case, Owen Hall was fatally injured in an automobile accident. His widow and surviving nine-year-old son filed suit against the defendant alleging negligence and requesting damages of $142,450 for the widow and $47,500 for the son.

\textsuperscript{37} 111. 2d 26, 147 N.E.2d 352 (1958). In this case, Owen Hall was fatally injured in an automobile accident. His widow and surviving nine-year-old son filed suit against the defendant alleging negligence and requesting damages of $142,450 for the widow and $47,500 for the son.

\textsuperscript{38} 22 Ill. 2d 73, 174 N.E.2d 157 (1961). In this case, the plaintiff brought suit against an individual and several tavern operators alleging that the individual defendant while intoxicated had murdered her husband.

\textsuperscript{39} \textit{Hall}, 13 Ill. 2d at 27, 147 N.E.2d at 353.

\textsuperscript{40} \textit{Knierim}, 22 Ill. 2d at 81, 174 N.E.2d at 162.

\textsuperscript{41} \textit{Hall}, 13 Ill. 2d at 30-32, 147 N.E.2d at 355; \textit{Knierim}, 22 Ill. 2d at 82, 83, 174 N.E.2d at 162-63.

\textsuperscript{42} Bullard, 102 Ill. 2d at 514-15, 468 N.E.2d at 123.
the appellate court in *Kaiserman v. Bright* 44 for failing to make that distinction. The court suggested its criticism of this appellate opinion, in which recovery for loss of a child's society was not allowed under the Wrongful Death Act, was a strong indication that it did not agree with the conclusion of the appellate court. 45 In view of its previous holdings in *Hall, Knierim* and *Elliott*, the court concluded that it would now be anomalous to deny recovery for loss of a child's society. 46

The *Bullard* court also eliminated the presumption of loss of earnings and replaced it with a presumption of pecuniary injury based on loss of the child's society. In reflecting on the history and purpose of wrongful death actions as they pertain to children, the court noted that the presumption that parents receive significant economic contribution from their children, while perhaps true in the nineteenth century, is completely unrealistic in today's family life. 47 Although the presumption of loss of earnings would no longer apply, the court stated that recovery could be obtained where it was proved that the child earned income used to support the family. 48 Since the question was not before the court, the majority chose not to decide whether the new presumption applied to adult children. 49

Finally, the court held that in computing a wrongful death award, the jurors must be instructed to deduct reasonable, projected child-rearing expenses from any award for loss of society and any proved loss of income. 50 Here, the court carried its previous argument concerning the

---

44. 61 Ill. App. 3d 67, 377 N.E.2d 261 (1978). The supreme court accused the 1st District Appellate Court of misciting the supreme court's decision in Zostautas v. St. Anthony De Padua Hosp., 23 Ill. 2d 326, 178 N.E.2d 303 (1961) as support for its holding in *Kaiserman*. In reality, said the supreme court, the decision in *Zostautas* held that the parent's mental anguish was not recoverable in a wrongful death action and did not discuss recovery for loss of society. *Elliott*, 92 Ill. 2d at 538-39, 442 N.E.2d at 167.

45. All of this confusion over *Kaiserman* led the appellate court in *Bullard* to conclude that the supreme court's failure to overrule *Kaiserman* in *Elliott* meant that *Kaiserman* was still good law. *Bullard* v. *Barnes*, 112 Ill. App. 3d at 389, 445 N.E.2d at 490. Unfortunately, the appellate court in *Bullard* failed to consider that *Elliott* dealt only with the loss of consortium of a spouse. The *Elliott* court did not overrule the *Kaiserman* holding because the question of recovery for a child's loss of society was not the question before the court.

46. *Bullard*, 102 Ill. 2d at 515, 468 N.E.2d at 1233.

47. Id. at 516, 468 N.E.2d at 1233. In explaining this position the court quoted the Minnesota Supreme Court in *Fussner v. Andert*, 261 Minn. 347, 352-53, 113 N.W.2d 355, 359 (1961):

'It must be conceded that the majority of today's children render far less service to their parents than did children in the last century . . . . Because of child-labor laws and the great increase in school and college attendance, fewer children work outside the home. It should be agreed that generally the child's earnings may go no further than to supplement the parent's considerable financial outlay in educating and rearing him.'

Id.

48. Id. at 517, 468 N.E.2d at 1234.

49. Id.

50. Id. at 518, 468 N.E.2d at 1234-35.
economic role of children in modern family life one step farther by recognizing the substantial expenses associated with child-rearing. After noting that many jurisdictions which hold pecuniary injury to include loss of a child’s society also deduct child-rearing expenses in arriving at a final damage figure,\(^{51}\) the court concluded that the deduction of child-rearing expenses was the only accurate method of determining the parents’ true pecuniary loss.\(^{52}\) Since the jury in this case was not instructed to deduct child-rearing expenses from its award, the case was remanded for a new trial on damages.

In a brief concurring opinion, Justice Clark agreed with the majority in allowing parents to recover damages for the loss of society in the wrongful death of their children. However, he did not agree with the set-off of child-rearing expenses which he considered to be an inequitable reduction in the award.\(^{53}\) In addition, Justice Clark disagreed with the majority’s decision to limit the opinion to minor children. He believed that the same logic applies to the loss of society of an emancipated child as to a minor child, and that consequently the computation of damages should be the same.\(^{54}\)

**ANALYSIS**

The decision in *Bullard v. Barnes* will no doubt receive overwhelming support as a long needed reform to an outdated system.\(^{55}\) Indeed, there is little question that this decision follows the modern trend and aligns Illinois with the majority of states in allowing parents to recover for loss of society in the wrongful death of their children.\(^{56}\) Nonetheless,

---

51. See the cases cited at 102 Ill. 2d at 518, 468 N.E.2d at 1234.

52. *Id.* at 518, 468 N.E.2d at 1234-35.

53. *Id.* at 521, 468 N.E.2d at 1236 (Clark, J., concurring). Justice Clark noted that since the decedent was 17 years old at the time of his death, a setoff for college and other living expenses could substantially reduce the award.

54. *Id.* For example, the advice, companionship, and assistance of an adult child is just as beneficial to a parent as the society of a minor child. *Id.*

55. The pecuniary injury rule has come under increasing criticism in recent years. Most commentators have focused on the harshness of the rule which, if strictly applied, may preclude recovery altogether where the deceased child made no economic contribution to the family. *See, e.g.,* Note, *Wrongful Death Damages in Pennsylvania: A Suggestion for Expanded Recovery,* 22 DUQ. L. REV. 887, 893 (1984). Others have questioned the fairness of a rule which fails to provide any consideration for the parents’ emotional loss or mental anguish. *See, e.g.,* Speiser & Malawer, *supra* note 8. Still others have noted that in modern society significant economic contributions are not expected from children rendering the pecuniary injury rule woefully out of date. *See, e.g.,* Note, *Wrongful Death of Children—The Real Injury,* 5 WEST. ST. U.L. REV. 253, 59 (1978). Finally, some commentators have theorized that the pecuniary injury rule is difficult for juries to understand and apply thus resulting in wildly erratic verdicts. *See Finkelstein, Pickel & Glasser, The Death of Children, A Non-Parametric Statistical Analysis of Compensation for Anguish,* 74 COLUM. L. REV. 884, 892 (1974).

56. Thirty-seven states and territories now allow recovery for loss of society in the wrongful...
there remain some lingering doubts concerning the methodology used to effect this modernization of the Illinois Wrongful Death Act. First, the court's reliance on case law from other jurisdictions is inappropriate considering the differences in language among the various wrongful death acts in other states. Second, the inclusion of loss of society as an element of pecuniary damages violates the strict intent of the statutory language. Finally, Illinois judicial precedent does not lead inexorably, as claimed by the court, to its conclusion in Bullard as a matter of logic. In view of these analytical weaknesses it is perhaps more appropriate that such a significant liberalization of a statutorily created remedy be made by the legislature.

The court in Bullard first attempted to justify its judicial amendment of the Illinois Wrongful Death Act by suggesting that the majority of states which limit wrongful death recovery to pecuniary damages now allow parental recovery for loss of a child's society. Although literally true, this characterization is oversimplified and misleading. Wrongful death statutes may be classified into three categories in reference to their treatment of recovery for loss of society and companionship of a deceased child: (1) statutes expressly allowing recovery; (2) statutes allowing damages which are fair and just; and (3) statutes expressly limiting recovery to pecuniary loss. While the twenty-two statutes in category one can easily be distinguished and eliminated from further discussion, the court in Bullard failed to make any distinction between the category two and the category three statutes.

Wrongful death statutes falling within category two generally permit damages to be recovered which are fair and just without specifically death of children. Arizona, Arkansas, California, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Missouri, Nebraska, New Jersey, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Puerto Rico, and the Virgin Islands.

57. The court points out that 14 states out of 23 allow parental recovery for loss of a child's society. See supra note 36.


limiting the damages to economic or pecuniary losses. Typical examples are the Utah statute, which provides that "such damages may be given under all circumstances of the case as may be just," and the Texas statute, which provides that "[t]he jury may give such damages as they may think proportionate to the injury resulting from such death. . . ." Although there is no express limitation in category two statutes, courts in many of the states having such statutes established a pecuniary injury limitation through early judicial interpretation. As times changed and the pecuniary injury limitation came under increasing criticism, it was a relatively easy matter for these courts to "modernize" their wrongful death acts by simply modifying or overruling their previous decisions. The list of states with category two statutes which now allow recovery for loss of a child's society include ten of the fourteen states cited by the Bullard court.

In contrast, category three wrongful death acts contain specific language expressly limiting recovery to pecuniary loss. A good example is section 2 of the Illinois statute which provides that "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. . . ." The

60. UTAH CODE ANN. tit. 78, § 11-7 (1983 Supp.).
62. Most of the American state wrongful death acts were copied from the English Fatal Accident Act of 1846, 9 & 10 VICT., c. 93 (1846) also known as Lord Campbell's Act. The English Act provided that "the jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought . . ." Id. at § 2. Despite the broad measure of damages quoted above, the English courts invariably interpreted Lord Campbell's Act to limit the award for damages to pecuniary loss. Thus, in Blake v. Midland Ry., 118 Eng. Rep. 35, 41 (Q.B. 1852), where the plaintiff sued a railroad company for negligence resulting in the wrongful death of her husband, the court stated, "[i]t seems to us that, if the Legislature had intended to go to the extreme length of giving, not only compensation for pecuniary loss, but a solatium to all the relations . . . language more clear and appropriate for this purpose would have been employed." Similarly, in Gillard v. Lancashire & Y. R.R., 12 L.T.R. 356 (1848), the jury was instructed that Lord Campbell's Act did not allow for recovery of damages for the grief of the survivors. Since most of the American wrongful death acts were based on the English Act, the English cases interpreting Lord Campbell's Act became logical precedent for the American courts resulting in a narrow interpretation of available damages. Speiser & Malawer, supra note 8, at 5-8.
64. ILL. REV. STAT. ch. 70, § 2.
distinction between a judicially imposed limitation and a legislatively mandated limitation is significant and accounts for the fact that only four (Minnesota, Michigan, Nebraska, and New Jersey) category three statutes have been interpreted to include loss of a child’s society as an element of damage.

With the exception of Minnesota, the other state court decisions interpreting pecuniary injury limitations in their statutes are not particularly persuasive support for the Illinois court. In Selders v. Armentrout, the Nebraska Supreme Court noted that the pecuniary loss rule was essentially judicially created and that the word “pecuniary” in its wrongful death statute referred only to the method of apportioning the amount of recovered damages among the beneficiaries. The Michigan Supreme Court’s decision allowing parental recovery for loss of a child’s society in Wycko v. Gnodtke was questioned and restricted to its facts by a subsequent supreme court decision. It was only after the legislature passed an amendment to the Wrongful Death Act specifically allowing recovery for loss of society that the decision in Wycko was reinstated by the court. Finally, in Green v. Bittner, the New Jersey Supreme Court was so tentative in construing the statutory pecuniary injury limitation to allow recovery for loss of a child’s society that the court restricted recovery to the value of equivalent services which could be obtained from a hired stranger. Although these decisions support the Bullard court in expanding the pecuniary loss standard, they are hardly effective in providing strong support for the argument that the reform is best accomplished by the courts.

65. In Fussner v. Andert, 261 Minn. 347, 354, 113 N.W.2d 355, 359 (1961), the court said unequivocally that “it should be acknowledged that the death-by-wrongful-act statute is remedial in character and it is the court’s duty to construe it liberally in light of current social conditions.”
70. 85 N.J. 1, 424 A.2d 210 (1980).
71. Id. at 12, 424 A.2d at 215. The court explained its rigid posture as follows: Companionship and advice in this context must be limited strictly to their pecuniary element. . . . [a]nd its value must be confined to what the marketplace would pay a stranger with similar qualifications for performing such services. No pecuniary value may be attributed to the emotional pleasure that a parent gets when it is his or her child doing the caretaking rather than a stranger, although such pleasure will often be the primary value of the child’s service, indeed, in reality, its most beneficial aspect . . . . We recognize that our prohibition against such damages deprives the surviving parent of compensation for the real loss. That prohibition is not a matter of our choice, rather it is fundamental to the legislation.
Id. at 12-13, 424 A.2d at 215-16 (footnotes omitted).
72. Courts in other jurisdictions with category three wrongful death statutes have not interpreted the phrase “pecuniary injuries” to include loss of a child’s society and continue to limit
Other jurisdictions have recognized that authority for reform of their wrongful death statutes rests with the legislature. For example, New York courts have often criticized the strict pecuniary loss limitation in their statute and have urged the legislature to change it.73 Yet they have not attempted to usurp the legislature's authority in that regard. In Ohio, the supreme court, in *Keaton v. Ribbeck* held that the term pecuniary injury used in their wrongful death statute did not include loss of a child's society.74 The court noted that it was bound by the legislative intent at the time of the statute's enactment, and the fact that the legislature did not eliminate the pecuniary loss requirement when it last amended the recoverable damages section of the Act signified its acceptance of the strict meaning of that provision.75 The court concluded that any change in the statute should therefore come from the legislature. Shortly after this decision, the Ohio General Assembly did amend the Wrongful Death Act to specifically include recovery for loss of a child's society.76

The Illinois legislature similarly has had several opportunities to consider the adequacy of damages recoverable under the Wrongful Death Act. The original damage limitation of $5,000 was legislatively increased five times77 until it was eliminated entirely in 1967.78 In addition, section two of the Act has been amended three other times in recent years.79 Since Illinois courts consistently refused to include loss of society as pecuniary injury under the Wrongful Death Act,80 the restrictive recovery to economic damages. See, e.g., *Liff v. Schildkrout*, 49 N.Y.2d 622, 635, 404 N.E.2d 1288, 1292, 427 N.Y.S.2d 746, 750 (1980); *Jones v. Hildebrant*, 191 Colo. 1, 4, 550 P.2d 339, 342 (1976); *Turncotte v. Ford Motor Co.*, 494 F.2d 173, 183-85 (1st Cir. 1974) (interpreting Rhode Island's wrongful death act); *Stang v. Hertz Corp.*, 81 N.M. 69, 463 P.2d 45, 48 (1969), aff'd, 81 N.M. 348, 467 P.2d 14 (1970).


74. 58 Ohio St. 2d 443, 444-45, 391 N.E.2d 307, 308 (1979).

75. *Id.* The pecuniary injury limitation contained in § 2125.02 was first construed to exclude loss of society in *Karr v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946). The statute was last amended on November 21, 1969 to expand recoverable damages to include funeral expenses. *Id.*


77. The original limitation was increased to $10,000 in 1903 (1903 Ill. Laws 217); to $15,000 in 1947 (1947 Ill. Laws 1094); to $20,000 in 1951 (1951 Ill. Laws 393); to $25,000 in 1955 (1955 Ill. Laws 2006); and to $30,000 in 1957 (1957 Ill. Laws 1939).

78. 1967 Ill. Laws 3227.


nature of that provision must have been clear to the legislature. Yet de-
spite reviewing the damages provision of the Act on numerous occasions,
the General Assembly chose not to alter or eliminate the pecuniary in-
jury standard. Moreover, legislation which would have expanded dam-
geages under the Wrongful Death Act to include loss of society was
considered and rejected by the 82nd General Assembly in both its 1981
and 1982 sessions.\textsuperscript{81} This is a clear indication of the legislature's intent
to maintain the pecuniary injury limitation which, therefore, should not
be disturbed by the court.\textsuperscript{82}

The supreme court's second premise was that its previous decisions
interpreting the Wrongful Death Act provided strong precedent to ex-
and the scope of pecuniary injuries in the death of a child. This prem-
ise, however, was partially based on an unfounded reliance on \textit{Hall v.
Gillins}.\textsuperscript{83} In this case, the plaintiffs' primary purpose was to circumv-
ent the statutory $25,000 recovery limit in a wrongful death action by cre-
atuing a new cause of action for "destruction of the family unit." The \textit{Bul-
lard} court read \textit{Hall} as indicating that the Wrongful Death Act provided
damages analogous with those being sought by the plaintiffs in their im-
aginative common law actions.\textsuperscript{84} On the contrary, the \textit{Hall} court did not
state that the wrongful death remedy contained all the damage elements
sought by the plaintiffs, but merely that the current remedy was adequate
enough to preclude the creation of a new claim.\textsuperscript{85}

In noting that the term "pecuniary injury" has been interpreted
broadly in past decisions, the \textit{Hall} court was referring to the "presump-
tion of pecuniary loss [which] obtains from the relationship, alone, suffi-
cient to sustain a verdict and judgment awarding substantial damages,

\begin{itemize}
\item \textsuperscript{81} I Legislative Synopsis and Digest of the 1982 Session of the 82nd General Assembly 697
( Legislative Reference Bureau, February 11, 1983).
\item \textsuperscript{82} Union Electric Co. v. Illinois Commerce Comm'n, 77 Ill. 2d 364, 380, 396 N.E.2d 510, 517
(1979) (the reenactment of a statute which has been judicially construed is an adoption of that
construction by the legislature unless a contrary intent appears). See \textit{also}, Stryker v. State Farm
Mut. Auto. Ins. Co., 74 Ill. 2d 507, 386 N.E.2d 36 (1978); Hupp v. Gray, 73 Ill. 2d 78, 382 N.E.2d
\item \textsuperscript{83} 13 Ill. 2d 26, 147 N.E.2d 352 (1958). The court also cited \textit{Knierim v. Izzo}, 22 Ill. 2d 73,
174 N.E.2d 157 (1961). However, \textit{Knierim} relies exclusively on the holding in \textit{Hall} so the discussion
of \textit{Hall} applies to \textit{Knierim} as well.
\item \textsuperscript{84} Bullard, 102 Ill. 2d at 514, 468 N.E.2d at 1232 where the court quotes the \textit{Hall} decision as
follows:
\begin{quote}
The term "pecuniary injuries" . . . has received an interpretation that is broad enough to
include most of the items of damage that are claimed by plaintiffs in this case. Each plain-
tiff alleges deprivation of support as well as deprivation of companionship, guidance, advice,
love and affection of the deceased." (Emphasis added). 13 Ill. 2d 26, 31, 147 N.E.2d 352,
355.
\end{quote}
\item \textsuperscript{85} Hall, 13 Ill. 2d at 31, 147 N.E.2d at 355.
\end{itemize}
without proof of actual loss.”

This is quite different than the court's implication in Bullard that the broad interpretation of pecuniary injury referred to in Hall could include loss of society or consortium for the death of a child. The court went on to say in Hall that several older cases already held that a child could recover the pecuniary value of "the loss of instruction and moral, physical and intellectual training brought about by the death of a father." Thus, Hall did not expand the scope of damages recoverable under the Wrongful Death Act at all. Rather, Hall maintained the status quo.

A more reliable precedent for the court in Bullard was its decision in Elliott v. Willis. This case clearly expanded the scope of pecuniary injuries by allowing recovery for loss of consortium by a wife for the death of her husband. The Elliott court also read Hall as implicitly approving the availability of loss of consortium as an element of damages under the Wrongful Death Act. Since it had been previously held that intangibles such as a child's loss of a father's guidance, attention, advice, training and instruction were recoverable as pecuniary injuries, the Elliott court concluded that logic compelled the finding that a spouse's loss of consortium was equally recoverable as a pecuniary injury.

Although the court in Bullard relied heavily on the Elliott decision, it did not attempt to establish a logical relationship between a spouse's loss of consortium and a parent's loss of a child's society. Clearly, there are differences, and accordingly the law has treated the concepts differently. The spouse's loss of consortium is a claim recognized at common law which is derived from the marital relationship and includes damages for loss of society, affection, and sexual attention. Illinois case law allows either spouse to sue for loss of consortium as a result of nonfatal injuries to the other spouse. The existence of this common law action thus provides a basis for the saving of the claim by the Wrongful Death Act. On the other hand, a parent's loss of a child's society has never been recognized as a claim at common law and cannot be recovered by

87. Bullard, 102 Ill. 2d at 514, 468 N.E.2d 1232. (See the italicized portion of the quote from Hall, supra note 84).
88. Hall, 13 Ill. 2d at 31, 147 N.E.2d at 355 citing Goddard v. Enzler, 222 Ill. 462, 78 N.E. 805 (1906); Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N.E. 1109 (1902); Illinois Central R.R. v. Weldon, 52 Ill. 290 (1869).
89. 92 Ill. 2d 530, 540, 442 N.E.2d 163, 168 (1982).
90. Id. at 535-36, 442 N.E.2d at 166.
91. Id. at 537-38, 442 N.E.2d at 168.
93. Dini v. Naiditch, 20 Ill. 2d 406, 170 N.E.2d 881 (1960) (extended the common law in Illinois to allow a wife to sue for loss of consortium as a result of injuries to her husband).
the parents if a child is negligently injured. Consequently, there is nothing for the Wrongful Death Act to obviate when death occurs so there is no basis for including loss of society in the elements of damage. The failure of the Bullard court to reconcile these differences leaves an interesting argument unresolved.

The Illinois Supreme Court did not seem to be particularly concerned with presenting a strong analytical argument for its decision in Bullard. The fact that similar recoveries were already allowed in cases involving the death of a parent and a spouse was apparently all the precedent the court thought it needed in this case. Moreover, the court could feel secure in the knowledge that it was joining a majority of the states in bringing an old statute up to present day standards. Nonetheless, the primary role of the General Assembly in modifying its own statutes was given short shrift by the court in this decision.

**EFFECT OF THE DECISION**

Despite the court's specificity in establishing the elements of damage recoverable, questions remain concerning the application of the Bullard decision. The court purposely left unresolved the question of whether its decision will extend to the wrongful deaths of adult children. In addition, it is not clear whether collateral heirs (siblings) will also be able to recover for loss of society. It is not surprising, however, that shortly after the Bullard decision was announced, these two questions were reached by the 1st District Appellate Court in Prendergast v. Cox.

In this case, a thirty-eight year old man was killed in an auto accident. The decedent was a bachelor who, at the time of his death, lived with his widowed mother in a house owned by the decedent. The decedent was also survived by four siblings each of whom lived nearby and was friendly with him. Relying on the trend in Illinois to broaden the scope of pecuniary injury and also specifically relying on Justice Clark's

---

94. At common law, a father was entitled to the services of his child. If the child was negligently injured, then the father was entitled to recover against the tortfeasor for the value of the child's lost services or earning capacity. Since the father was also obliged to provide medical services, he also could recover the cost of the child's medical expenses. He could not, however, recover intangible items such as loss of companionship or society as part of his claim. PROSSER & KEETON, supra note 92, at 935.


96. Bullard, 102 Ill. 2d at 515, 468 N.E.2d at 1233.

concurring opinion in Bullard, the First District Court held that the presumption of pecuniary injury for loss of a child's society applied to an adult, unmarried child. The court, however, also held that the loss of society would not extend to the adult siblings since they were only collateral heirs and did not enjoy the same favored position as lineal heirs under the Wrongful Death Act.

The Illinois Supreme Court's recent history in interpreting the pecuniary injury standard suggests that given the opportunity to review Pendergast or a similar case, it would continue its recent trend of expanding recovery under the Wrongful Death Act. Presumably, the court would extend the loss of society presumption generally to all adult children allowing the defendant to overcome the presumption with evidence showing little or no contact between the parents and their child. This would eliminate separate rules for children who are married or who do not live with the parents and would allow the jury to determine the value of the loss of society based on the evidence in each case.

The true effect of the Bullard decision will be seen in the future verdicts awarded in wrongful death actions involving children. Critics of the court's set-off procedure for child-rearing expenses are already objecting to this requirement because it may allow tortfeasors to profit from their wrongs. Indeed, one of the chief historical criticisms of the pecuniary loss standard was that it created a situation in which it was cheaper to negligently kill a child than to negligently injure the child. The decision in Bullard has not changed this. The cost of raising a child is substantial. Recent estimates run from $80,000 to $100,000 up to age eighteen without any consideration given for the cost of a college education. Applying the set-off procedure based on these figures suggests that in the death of a young child where the majority of child-rearing expenses are still outstanding, awards will remain at their present relatively low levels despite the new element of recovery for loss of society. On the other hand, there is little doubt that the addition of the loss of

98. Id. at 88, 470 N.E.2d at 36-37.
99. Id. at 89, 470 N.E.2d at 37.
100. Gordon, Wrongful Death/Loss of Society, 73 ILL. B.J. 292, 294 (1984). The author points out that the setoff procedure could result in a situation where a defendant who kills a child will have less monetary liability than a defendant who seriously injures a child. When this occurs, he argues that the defendant would be profiting from his wrong. If the setoff rule accurately reflects the parents true injury, then to the extent that a damage award is not set off, the award becomes a windfall to the parents and punitive to the defendant. Given these choices, the author concludes that it is better to allow the parents a windfall than to allow the defendant to profit from his wrong. Id. at n.37.
society element will significantly enhance awards in the deaths of older children.

CONCLUSION

In summary, the Illinois Supreme Court in Bullard v. Barnes held that (1) parents may recover for loss of their child's society in wrongful death actions; (2) there is a presumption of pecuniary injury in the loss of a child's society although loss of earnings may not be presumed; and (3) anticipated child-rearing expenses must be deducted from any award for loss of society and any proved loss of income. This is a significant expansion of damages under the Illinois Wrongful Death Act which brings Illinois in line with the majority of other jurisdictions. Although the court's holding restricted the expansion specifically to minor children, it is quite likely that future litigation will further liberalize the pecuniary injury standard to include recovery for loss of society in the death of an emancipated child.