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## Torts--Wrongful Death--How Much Is a Good Wife Worth

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## TORTS—WRONGFUL DEATH—"HOW MUCH IS A GOOD WIFE WORTH?"

## I. INTRODUCTION

In the past twenty or thirty years, the size of judgments in personal injury and wrongful death cases has increased substantially. Unfortunately, wrongful death cases involving wives and mothers have not kept pace with this trend. Until recently, defense attorneys and claims office representatives have placed such cases in the relatively low \$10,000 to \$20,000 range, even in those states having liberal or no statutory limitations on recovery.<sup>1</sup> One of the principal reasons for this is the failure of courts and attorneys to recognize the various elements of harm for which damages may be recoverable. Even if each element is isolated, there is typically a lack of adequate proof, often hampered by unwarranted judicial restrictions on the type and manner of proof. Without specific proof covering the manifestations of the loss, damages for the death of a wife have been regarded as merely speculative.

This comment is designed to call attention to developments which will allow expanded recoveries for the death of a wife, and to note some changes which can be expected in the future.

## II. WRONGFUL DEATH STATUTES—GENERALLY

At common law there could be no recovery for the death of a human being killed by the negligence or wrongful act of another.<sup>2</sup> Now all states have statutes or judicial decisions permitting recovery for wrongful death. The scheme most commonly followed is that first used by Lord Campbell's Act.<sup>3</sup> While there is a wide variance as to who may sue, for whose benefit the action is brought and the measure, elements and distribution of damages, statutes of this type designate certain beneficiaries, usually the spouse, children, parents, executor or administrator, who are authorized to bring suit. Although such statutes often contain a statement authorizing suit only where the party killed would have been able to sue had death not ensued, it must be made clear that the suit is for the injuries to the beneficiary and not to the deceased.

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1. *Horton v. State*, 50 Misc.2d 1017, 1024, 272 N.Y.S.2d 312, 320 (1966): "For many years our courts and juries have placed what seems in retrospect to be a small or minimum value on the damages sustained to the next of kin on the death of a housewife and mother. It has only been in the last two decades that our courts have come to recognize the true value of a housewife and the services she performs." See also SPEISER, RECOVERY FOR WRONGFUL DEATH 568 (1966); Glaser, *Evaluating and Proving the Loss of Services of a Housewife*, in LEGAL ESSAYS OF THE PLAINTIFF'S ADVOCATE 249 (Klonsky ed. 1961); Lambert, *How Much is a Good Wife Worth?*, 41 B.U.L. REV. 328 (1961), reprinted in DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES 424 (Schreiber ed. 1965); Lambert, *How Much is a Good Wife Worth?*, 26 NACCA L. J. 45 (1960); 13 AM. JUR. PROOF OF FACTS 193 (1963).

2. *Baker v. Boulton*, 1 Campb. 493, 170 Eng. Rep. 1033 (1808).

3. 9 & 10 Vict. c. 93 (1846).

The Missouri statute is similar to Lord Campbell's Act. Although still retaining the same basic theory, the statute was substantially changed in 1967.<sup>4</sup> The maximum amount recoverable was increased to \$50,000 and the spouse and minor children were given equal standing to sue. If the spouse or children sue separately, the suit is deemed to be for the benefit of the spouse and all the children, but the total damages recoverable by them may not exceed \$50,000. The jury does not specify the amounts to be received by each, but only determines the total amount. The judge "shall then enter a judgment as to such damages, apportioning them among those persons entitled thereto as determined by the court."<sup>5</sup> This language departs from the scheme of Lord Campbell's Act which permitted the jury to apportion the damages.

### III. DAMAGES FOR THE DEATH OF A HOUSEWIFE

#### A. *In General—Pecuniary Loss Rule*

Lord Campbell's Act and most statutes following it are based on the theory that when someone is killed their family suffers a loss which can be compensated, at least to some extent, in money. Either through express statutory language or by judicial construction of general language, most states with this type of statute have stated that this loss will be limited to the "pecuniary loss" suffered by the surviving beneficiaries.<sup>6</sup> As will be seen, however, many states have construed this term so broadly that it may now be questioned, although lip service is still given to the rule. Missouri's statute has always contained the following standard: "the necessary injury resulting from the death."<sup>7</sup> On many occasions this language has been construed to express the pecuniary loss rule,<sup>8</sup> although as will be seen, Missouri has departed from the rule somewhat. Missouri has also allowed additional damages amounting to a penalty so long as the total does not exceed the statutory maximum.<sup>9</sup>

4. §§ 537.080-100, RSMo 1967 Supp.

5. § 537.095, RSMo 1967 Supp.

6. *E.g.* *Burke v. City and County of San Francisco*, 111 Cal. App.2d 314, 244 P.2d 708 (1952); *Horton v. State*, 50 Misc.2d 1017, 272 N.Y.S.2d 312 (1960); *Sutfin v. Burton*, 91 Ohio App. 177, 104 N.E.2d 53 (1951); *Prauss v. Adamski*, 195 Or. 1, 244 P.2d 598 (1952); *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 302, 153 A.2d 490 (1959); *Kramer v. Portland-Seattle Auto Freight*, 43 Wash.2d 386, 261 P.2d 692 (1953).

7. § 537.090, RSMo 1967 Supp.

8. *E.g.* *Caen v. Feld*, 371 S.W.2d 209 (Mo. 1963); *Oliver v. Morgan*, 73 S.W.2d 993 (Mo. 1934); *Miller v. Kansas City Ry.*, 233 S.W. 1066 (Mo. 1921); *Szofran v. Century Elec. Co.*, 255 S.W.2d 443 (St. L. Mo. App. 1953).

9. *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609 (Mo. 1965); *Contestible v. Brookshire*, 355 S.W.2d 36 (Mo. 1962); *La Bella v. Southwestern Bell Tel. Co.*, 224 Mo. App. 708, 24 S.W.2d 1072 (K.C. Ct. App. 1930). This is explained by: "There is no recovery in a death case for punitive damages, as such. Such a petition may plead, and appropriate instructions may submit, the question of 'mitigating or aggravating circumstances' if the evidence justifies it . . . While added damages because of 'aggravating circumstances' may, in a sense, be considered punitive in nature, they are not to be submitted as such nor are they to be submitted separately; nor is any total verdict and judgment to exceed the statutory limit." *Glick v. Ballentine Produce, Inc.*, *supra* at 616.

Although the courts have used many definitions, most, such as the following, are very broad.

The word "pecuniary," as used in death statutes, has been said not to be used in a sense of the immediate loss of money or property but to look to the prospective advantages of a pecuniary nature that have been cut off by the premature death of the person from whom they would have come. Although the term "pecuniary loss" has been defined as a loss of money or something by which money or something of money value may be acquired, loss of wages earned by the deceased for the support of his family is not the only matter to be considered in determining the family's pecuniary loss . . . . The pecuniary loss is said to consist not only of the loss of financial assistance that the beneficiaries might reasonably have expected, but also the loss of the mother's care and attention to the physical, moral and educational welfare of her children, and a husband's loss of services in the household.<sup>10</sup>

Under this broad definition, if the decedent were the husband or father, the primary measure of damages would be the loss of his financial assistance. When it is the wife that is killed, the damages are composed of several, but less obvious factors.

#### B. *Employment Outside the Home*

If the wife has worked outside the home there is little question that the loss of this income is recoverable to the extent the family was benefited thereby.<sup>11</sup> Even with a large number of wives now working, it will be the unusual case where this loss is a major element of damages. If employment were to continue for the full course of her life this loss could be substantial, but wives often do not continue to work for very many years.

#### C. *Services in the Home*

##### 1. Meaning of "Services"

Currently the loss of services in the home will constitute the major portion of any recovery for the death of a housewife. Even if a wife works outside the home, it is very likely that she does all or a major part of the work necessary to maintain the home and raise the children. Occasionally the estate of the wife may try and recover the value of lost services but this has not been permitted. It is settled that, under the pecuniary loss type statute, the services of the wife belong to the husband and he alone is entitled to recover therefor.<sup>12</sup>

10. 22 AM. JUR. 2d *Death* § 123 (1965).

11. *Burke v. City and County of San Francisco*, 111 Cal. App.2d 314, 244 P.2d 708 (1952); *Combs v. Combs*, 284 S.W.2d 423 (Mo. 1955); *Horton v. State*, 50 Misc.2d 1017, 272 N.Y.S.2d 312 (1966); *Union Transports v. Braun*, 318 S.W.2d 927 (Tex. Civ. App. 1958); *Texas & N. O. Ry. v. Landrum*, 264 S.W.2d 530 (Tex. Civ. App. 1954).

12. *E.g. Baldwin v. Kansas City Ry.*, 231 S.W. 280 (K.C. Mo. App. 1921); *Martin v. St. Louis-S. F. Ry.*, 227 S.W. 129 (St. L. Mo. App. 1921), *rev'd on other grounds*, 289 Mo. 479, 233 S.W. 219 (1921); *Snickles v. City of St. Joseph*, 155 Mo. App. 308, 136 S.W. 752 (1911). See also 16 AM. JUR. *Death* § 197 (1938); 27 AM. JUR. *Husband and Wife* § 497 (1940).

"Services" is a broad term consisting of many elements. To realize its breadth, a careful consideration of all the activities of the wife in the home must be made. Several writers in this area have made attempts to catalogue these various activities. One such writer states:

Investigation into the past family life will usually disclose that the decedent did all the marketing, the housecleaning, the decorating and re-decorating, the wardrobe planning and buying for the children, the mending, washing and ironing, the planning and management of educational trips to the museum, the zoo and points of historical interest, the arrangements for birthday parties and holiday celebrations, the supervision of schooling and homework, the nursing during illness, the moral training, and the direction of religious training, and often much of the gardening.<sup>13</sup>

Many more items could be added to the list, in fact "there is probably no limit to the type of service for which value may be recovered, and the ingenuity of trial counsel can be given full rein."<sup>14</sup>

While the list of what "a housewife" *might do* could be endless, a major part of any suit for the death of a wife will be to show what "the housewife" in the particular case *did in fact do*. Among other things, testimony should show that the "housewife did all (or a certain percentage) of the housework, devoting a definite number of hours each week to cooking, sewing, housecleaning and so on; that she was an energetic, industrious and dependable worker devoted to homemaking; and that the size of the family, the type and size of the dwelling they occupied, and the ages and needs of the children and of the surviving husband necessitate the replacement of those services lost to the family because of the housewife's death."<sup>15</sup> Personal characteristics, including health, age, race, economic background and the education of the deceased wife are also important. As will be seen later, this background can have a considerable effect on the ultimate recovery.

Much of the needed information will be available from the husband and children, but substantiation by friends, relatives and neighbors may be helpful.<sup>16</sup>

13. Spangenberg, *Proof of Damages for Wrongful Death*, in *WRONGFUL DEATH AND SURVIVORSHIP* 72 (Beall ed. 1958). See also Lambert (Schreiber ed.), *op. cit. supra* note 1, at 463; Jan. 1959, *THE AMERICAN HOME* 34; Kiert, *Proof of Damages Arising From the Death of a Housewife*, 8 *LA. B.J.* 215, 218 (1961).

14. SPEISER, *op. cit. supra* note 1, at 198. See also 16 *AM. JUR. PROOF OF FACTS* 701, 855 (1965): "A computation in establishing the money value of a woman's life stems from the virtually infinite number of combinations of homemaking activities and outside employment that are possible to a woman over her life span."

15. SPEISER, *op. cit. supra* note 1, at 281. See also 31 *AM. JUR.2d Expert and Opinion Evidence* § 144 (1967).

16. 11 *AM. JUR. TRIALS* 1 (1966). For cases illustrative of this method of proof see: *Fabrizi v. Griffin*, 162 F. Supp. 276 (W.D. Pa. 1958), *aff'd*, 261 F.2d 594 (3d Cir. 1958); *Burke v. City and County of San Francisco*, 111 Cal. App.2d 314, 244 P.2d 708 (1952); *Chase v. Fitzgerald*, 132 Conn. 461, 45 A.2d 789 (1946); *Handorf v. Currie*, 251 Iowa 896, 101 N.W.2d 836 (1960); *Gulf Transport Co. v. Allen*, 209 Miss. 206, 46 So.2d 436 (1950); *Combs v. Combs*, 284 S.W.2d 423 (Mo. 1955); *Hartzler v. Metropolitan St. Ry.*, 140 Mo. App. 665, 126 S.W.

Not only must the individual characteristics of the wife be shown, but any other factors which make her services unique or more valuable should be included. This is shown by *Connie's Prescription Shop v. McCann*,<sup>17</sup> where the mother was a registered nurse and spent some time every day treating her daughter's skin allergy which would continue for an indefinite number of years. A similar case is *Continental Bus Lines v. Toombs*,<sup>18</sup> in which the son was an asthmatic and required additional care.

## 2. Proof of Value of Services

### a. *By Presumption*

The simplest, although perhaps not always the best, method will be to present no proof of the value of the services of the wife. Proof, in such a case, would be limited to what services were actually performed.

If this method is adopted, the courts are split. The majority rule is stated:

Although it is true that where the damages to a husband through the death of his wife are based upon the value of her services to him, and it is incumbent on him to prove such services and their value, the plaintiff may be aided in meeting the burden by a presumption. This presumption is based upon the view that where the beneficiaries named in a wrongful death statute have a legal relationship to the deceased by blood or marriage, it is presumed that they would have been pecuniarily benefited by his or her continuance of life.<sup>19</sup>

The majority rule is based on the idea that the value of such services is within the common knowledge of the jury and therefore no other evidence need be presented.<sup>20</sup> In *Allendorf v. Elgin, J. & E. Ry.*,<sup>21</sup> an Illinois FELA case, the court said:

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760 (K.C. Ct. App. 1910); *Horton v. State*, 50 Misc.2d 1017, 272 N.Y.S.2d 312 (1966); *Sutfin v. Burton*, 91 Ohio App. 177, 104 N.E.2d 53 (1951); *Prauss v. Adamski*, 195 Or. 1, 244 P.2d 598 (1952); *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 153 A.2d 490 (1959).

17. 316 P.2d 823 (Okla. 1957).

18. 325 S.W.2d 153 (Tex. Civ. App. 1959).

19. SPEISER, *op. cit. supra* note 1, at 310.

20. *Thomas v. S. H. Pawley Lumber Co.*, 303 F.2d 604 (7th Cir. 1962); *O'Connor v. United States*, 269 F.2d 578 (2d Cir. 1959); *Burke v. City and County of San Francisco*, 111 Cal. App.2d 314, 244 P.2d 708 (1952); *Pollard v. Kent*, 59 Ga. App. 118, 200 S.E. 542 (1938); *Blue's Truck Line v. Harwell*, 57 Ga. App. 136, 194 S.E. 399 (1937), *rev'd on other grounds*, 187 Ga. 78, 199 S.E. 739 (1938); *Allendorf v. Elgin, J. & E. Ry.*, 8 Ill.2d 164, 133 N.E.2d 288 (1956); *Dobson v. Richter*, 34 Ill. App.2d 22, 180 N.E.2d 505 (1962); *Gulf Transport Co. v. Allen*, 209 Miss. 206, 46 So.2d 436 (1950); *Moses v. Mathews*, 95 Neb. 672, 146 N.W. 920 (1914); *Carter v. West Jersey & S. Ry.*, 76 N.J.L. 602, 71 A. 253 (1908); *Dahl v. North Am. Creameries*, 61 N.W.2d 916 (N.D. 1953); *Connie's Prescription Shop v. McCann*, 316 P.2d 823 (Okla. 1957); *Prauss v. Adamski*, 195 Or. 1, 244 P.2d 598 (1952); *Delaware, L. & W. Ry. v. Jones*, 128

We are of the opinion that it is unnecessary to undertake to prove the value of the financial loss of such care, etc. any more than it would be necessary to prove the value of pain and suffering or of inconvenience and annoyance when they are elements of damage. The jury should assess the value of such loss in the exercise of their best judgment based on the facts of each case.<sup>22</sup>

These cases do not indicate, however, that other types of evidence will be excluded; merely that a presumption will be raised which will be adequate to take the case to the jury without further proof. Unless very detailed evidence is presented as to what services were performed, this approach could result in a lower judgment. In *Wente v. Shaver*,<sup>23</sup> Missouri adopted the majority rule:

The fact of pecuniary benefit does not require definite and exact proof in actions for wrongful death under the statute, but whenever there is a reasonable probability of pecuniary benefit to one from continuing life of another, however arising, the untimely extinguishment of that life raises a presumption of pecuniary injury.<sup>24</sup>

Not all cases accept this view. In *Nelson v. Lake Shore & M. S. Ry.*,<sup>25</sup> the Michigan Supreme Court specifically required some evidence of value to be presented on the theory that the jury needed a standard to follow and if none was placed before them, they might compensate for loss of companionship, wounded feelings or suffering, either of the deceased or of the beneficiary, which would not be permissible under the pecuniary loss standard. No Michigan case has specifically overruled this case, but language can be found in later cases to the effect that a case may go to the jury without such specific proof.<sup>26</sup>

The presumption may be particularly useful where there is a very low maximum recovery under the statute or where it is apparent that the recovery is likely to be small because of other factors such as the age of the decedent. If, for example, a wife of twenty-five, with three children, were killed in a state having a maximum of \$10,000, it is doubtful that an expert would be of much aid in increasing the amount of the verdict since it is likely to be near the statutory maximum anyway. Even if some increase were obtained, it could be more than offset by the expense of hiring an expert.

Pa. 308, 18 A. 330 (1889). See also Page, "Pecuniary" Damages for Wrongful Death, 1963 TRIAL LAW GUIDE 398; 22 AM. JUR.2d Death § 248 (1965); 25A C.J.S. Death § 103 (1966).

21. *Supra* note 20.

22. *Id.* at 180, 133 N.E.2d at 296.

23. 350 Mo. 1143, 169 S.W.2d 947 (1943). See also: *Bryan v. East St. Louis Ry.*, 39 S.W.2d 376 (St. L. Mo. App. 1931) (applying Illinois law); *Baldwin v. Kansas City Ry.*, 231 S.W. 280 (K.C. Mo. App. 1921); *Martin v. St. Louis-S. F. Ry.*, 227 S.W. 129 (St. L. Mo. App. 1921), *rev'd on other grounds*, 289 Mo. 479, 233 S.W. 219 (1921); *Samohoviec v. American Mfg. Co.*, 218 S.W. 684 (St. L. Mo. App. 1920); Note, 1963 Wash. U.L.Q. 125.

24. *Supra* note 23, at 1156, 169 S.W.2d at 954.

25. 104 Mich. 582, 62 N.W. 993 (1895).

26. *Crook v. Eckhardt*, 281 Mich. 703, 275 N.W. 739 (1937).

b. *Amounts Actually Paid*

If, after the death of the wife, the husband has employed persons to perform her tasks, this amount may be proved and recovered, if reasonable.<sup>27</sup> As a practical matter, this will tend to provide a relatively low recovery. There are additional elements for which compensation may be had, and in a great many families the budget will not permit the hiring of adequate replacements. Many jobs may be left undone and friends and relatives may provide care for the children at times when the father is unavailable to do so. As will be seen, most courts will not consider the subsequent remarriage or engagement of the husband, but if amounts actually paid were the sole measure of damages, damages would cease on remarriage. The husband would not have to hire anyone to perform such services after his remarriage.

Proof of this type will serve the purpose of providing a floor figure for recovery and will be at least some indication of what services of this type will cost in the community. Care should be taken, however, in relying too heavily on this because the defendant may desire to use the amounts already paid to show what services will be required when actually the person hired may not adequately fill the job or possess the required qualifications.

c. *Testimony of Family and Friends*

As stated above, it is advisable to have testimony of family and friends to show what services were actually performed. Because of this intimate knowledge of the activities of the wife, some courts have allowed these same people, including the husband, to testify as to the value of her services.<sup>28</sup> In *Burke v. City and County of San Francisco*,<sup>29</sup> testimony of the husband estimating that it would cost \$225 to \$250 per month to replace his wife was admitted and said not to violate the opinion rule on the theory that nobody would be better qualified than the man who has been living with the person who must be replaced.

In *Combs v. Combs*,<sup>30</sup> the Missouri court allowed the wife of the defendant, who had known the decedent eighteen months, to testify as to the value of her services.

It is submitted that the cases permitting such testimony are based on the superior knowledge of the witness as to the services performed and not on any superior knowledge of the cost of replacing such services. On this basis, it would be preferable to exclude such testimony unless some actual superior knowledge of the cost of services in the community can be shown.

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27. *Herro v. Northwestern Malleable Iron Co.*, 181 Wis. 198, 194 N.W.383 (1923). Glaser, *op. cit. supra* note 1; Kierr, *supra* note 13.

28. *Grand Trunk W. Ry. v. Gilpin*, 208 F. 126 (7th Cir. 1913); *Burke v. City and County of San Francisco*, 111 Cal. App. 2d 314, 244 P.2d 708 (1952); *Olstead v. Fahise*, 204 Minn. 118, 282 N.W. 694 (1938); *Murphey v. Blankenship*, 120 S.W.2d 309 (Tex. Civ. App. 1938).

29. *Supra* note 28.

30. 284 S.W.2d 423 (Mo. 1955).

d. *Expert Testimony*

If admitted by the court, expert testimony can be used to establish what services will have to be replaced and what the cost will be. Only a few cases have considered the question of the admissibility of expert testimony. No case has considered the question whether there are persons qualified as experts in this area. Of the cases considering whether this is a proper subject for expert testimony, all have admitted the testimony.<sup>31</sup> In *Merill v. United Air Lines, Inc.*,<sup>32</sup> the court said:

Popular knowledge and common sense may be and indeed are valuable. But they are not the sole recourse. The fact that parents from time immemorial have taken care of their children does not establish that the views of a professional home economist may not be sounder than those of untrained laymen in determining the cost of these elements that go into the home in order to provide the children with so-called "substitute mother" care.

As knowledge becomes more professionalized, specialists will more frequently be called upon as expert witnesses. This is a judicial by-product of an age of pervasive technology and expanding social sciences.<sup>33</sup>

Several of the legal writers in this area recommend use of expert testimony, and none question its admissibility.<sup>34</sup>

Missouri has no case involving either expert testimony as to the value of services or what services will have to be replaced in any type of wrongful death

31. *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705 (5th Cir. 1967); *Curnow v. West View Park Co.*, 220 F. Supp. 367 (W.D. Pa. 1963), *rev'd on other grounds*, 337 F.2d 241 (3d Cir. 1964); *Legare v. United States*, 195 F. Supp. 557 (D. Fla. 1961); *Merill v. United Air Lines, Inc.*, 177 F. Supp. 704 (S.D. N.Y. 1959); *Atlantic Coastline Ry. v. Braz*, 182 So.2d 491 (Fla. 1966), *modified*, 196 So.2d 109 (Fla. 1967), *vacated*, 196 So.2d 449 (Fla. 1967); *Smith v. Whidden*, 87 So.2d 42 (Fla. 1956); *Lithgow v. Hamilton*, 69 So.2d 776 (Fla. 1954); *Zaninovich v. American Airlines, Inc.*, 47 Misc.2d 584, 262 N.Y.S.2d 854 (1965), *modified*, 26 A.D. 2d 155, 271 N.Y.S.2d 866 (1966); *Weiss v. Rubin*, 11 App. Div.2d 818, 205 N.Y.S.2d 274 (1960), *aff'd*, 213 N.Y.S.2d 65, 173 N.E.2d 791 (1960). In *Connie's Prescription Shop v. McCann*, 316 P.2d 823 (Okla. 1957) the court held the value of services to be within the common knowledge of the jury as discussed above but then said "expert testimony would not necessarily be any more accurate or stable than the personal opinions of individual jurors." *Id.* at 825. It is not clear from this language whether the Oklahoma court would exclude the use of expert testimony if the question were squarely presented to them.

32. *Supra* note 31.

33. *Id.* at 705.

34. 13 Am. Jur. Proof of Facts 193, 200 (1963); "No difficulty should be encountered in establishing the need for expert testimony or in qualifying the witness as an expert, for although the services under decision are within the common knowledge of every juror, the current economic value of these services is a matter of expert proof." See also Berman, *Expert Testimony as to the Value of Services of Deceased Mother and Housewife*, in 1959 TRIAL AND TORT TRENDS 238 (Belli ed.); SPEISER, *op. cit. supra* note 1; Eden, *The Use of Economists and Statisticians in Impaired Earning Capacity Cases*, March 1964 THE PRACTICAL LAWYER 23; Note, 25 NACCA L.J. 186 (1960); 16 AM. JUR. PROOF OF FACTS 701, 705 (1965).

case. The Missouri cases, in general, have been fairly restrictive concerning whether expert testimony is available in a particular area. The usual rule is stated in the recent case of *Houseman v. Fiddymont*:<sup>35</sup>

When the jurors, for want of experience or knowledge of the subject under inquiry are incapable of reaching an intelligent opinion without outside aid the courts out of necessity admit the testimony of an expert in the field. Allowing an expert to give an opinion upon a subject of inquiry, instead of requiring that the witness give only facts, is an exception to the general rule that witnesses must state facts.<sup>36</sup>

In the *Houseman* case, the court refused to allow a nationally recognized expert to testify as to the point of impact in an automobile collision, although experts have been allowed to testify as to speed determined from skid marks.<sup>37</sup> The distinction made is whether this subject is within the common knowledge of the jury. In cases involving the cost of replacement of a wife, the same general principal would probably be followed. While not directly in point, Missouri does have some case law on the question of admissibility of expert testimony on the question of value of services. In *Ryan v. Hospes*,<sup>38</sup> plaintiff served as a nurse for deceased for several years on the promise of being provided for in the will. When he died, no provision was made. The court allowed a man trained in hiring physicians and nurses for other elderly people to testify as to the value of such services. In the same case a professional nurse was also permitted to testify as to the cost of hiring a nurse. Other Missouri cases have approved the use of testimony of attorneys<sup>39</sup> and real estate agents<sup>40</sup> to value the services of others of the same profession.

Even if the Missouri courts would not directly approve the use of an expert in this type of case, the rule that "admission of expert testimony in a given situation rests in the first instance in the sound discretion of the trial court, and its decision in those respects is not to be set aside in the absence of showing an abuse of discretion"<sup>41</sup> has received strong support. Under this rule, if there was any serious doubt as to whether this was common knowledge, the testimony would come in.

35. 421 S.W.2d 284 (Mo. En Banc 1967).

36. *Id.* at 289.

37. *Edwards v. Rudowicz*, 368 S.W.2d 503 (St. L. Mo. App. 1963); *Dillenschneider v. Campbell*, 350 S.W.2d 260 (K.C. Mo. App. 1961).

38. 167 Mo. 342, 67 S.W. 785 (1902).

39. *State ex. reb. First Nat. Bank of Fresno, Cal. v. Flarsheim*, 137 Mo. App. 1, 119 S.W. 17 (K.C. Ct. App. 1909).

40. *Glover v. Henderson*, 120 Mo. 367, 25 S.W. 175 (1894). For another case expressing a similar view see *Beebe v. Columbia Axle Co.*, 233 Mo. App. 212, 117 S.W.2d 624 (K.C. Ct. App. 1938).

41. *Yocum v. Kansas City Pub. Serv. Co.*, 349 S.W.2d 860, 864 (Mo. 1961). See also, *e.g. Capra v. Phillips Inv. Co.*, 302 S.W.2d (Mo. En Banc 1957); *Eickmann v. St. Louis Pub. Serv. Co.*, 363 Mo. 651, 253 S.W.2d 122 (1952); *Fair Mercantile Co. v. St. Paul Fire & Marine Ins. Co.*, 237 Mo. App. 511, 175 S.W.2d 930 (St. L. Ct. App. 1943).

The cases dealing with the use of an expert have approved the testimony of experts in the following categories: (1) an employment specialist, usually the manager or an employee of a private or government employment agency;<sup>42</sup> (2) a professional home economist or other person trained in economics;<sup>43</sup> (3) a family relations expert, including managers and employees of community service, welfare and philanthropic organizations.<sup>44</sup>

In allowing the use of experts, two distinct methods have been suggested to illustrate the loss to the surviving husband.

The first is the so-called "substitute mother" approach. The theory is that recovery should be based on what it would cost to replace the deceased wife with a person or persons of equal ability and qualifications.<sup>45</sup> Although previous testimony would have shown what the wife did in the home, it will usually be in very general terms such as "she did all the housework." To break this down a professional home economist could be used to show exactly what services go into "housework" and the manner in which they will have to be replaced.<sup>46</sup> The economist may or may not be familiar enough with wages and employment practices in the area to qualify as an employment expert. If not, an employment expert would be used. If it is assumed that the wife performed all the household duties including care of the children, this expert will indicate that at least two persons will be required to provide the most essential services. One will be a live-in governess who may also perform light housekeeping duties.<sup>47</sup> To fill this position adequately, the governess will have to be as similar as possible to the deceased wife in all respects; which will include age, race, religion, education and economic background.<sup>48</sup> The employment expert can also indicate the availability of such persons and what it will cost to hire them. If the wife was young or had some particular skill needed in the home, it may be difficult to find someone with these qualifications. The cost will be increased if the children are young or if there are several.

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42. *Atlantic Coastline Ry. v. Braz*, 182 So.2d 491 (Fla. 1966), *modified*, 196 So.2d 109 (Fla. 1967), *vacated*, 196 So.2d 449 (Fla. 1967); *Smith v. Whidden*, 87 So.2d 42 (Fla. 1956); *Lithgow v. Hamilton*, 69 So.2d 776 (Fla. 1954). See also SPEISER, *op. cit. supra* note 1, at 199; Spence, *Demonstrative Evidence*, in *WRONGFUL DEATH AND SURVIVORSHIP* 109 (Beall ed. 1958); Kierr, *supra* note 13; 16 AM. JUR. PROOF OF FACTS 701 (1965); 13 AM. JUR. PROOF OF FACTS 193 (1963).

43. *Har-Pen Trucklines, Inc. v. Mills*, 378 F.2d 705 (7th Cir. 1967); *Merill v. United Air Lines, Inc.*, 177 F. Supp. 704 (S.D. N.Y. 1959); SPEISER, *op. cit. supra* note 1, at 293; 16 AM. JUR. PROOF OF FACTS 701 (1965).

44. *Curnow v. West View Park Co.*, 220 F. Supp. 367 (W.D. Pa. 1963), *rev'd on other grounds*, 337 F.2d 241 (3d Cir. 1964); *Horton v. State*, 50 Misc.2d 1017, 372 N.Y.S.2d 312 (1966); *Berman, op. cit. supra* note 42; SPEISER, *op. cit. supra* note 1 at 302; Kierr, *supra* note 13; *Lambert, supra* note 1; 13 AM. JUR. PROOF OF FACTS 193 (1963).

45. *Spangenberg, op. cit. supra* note 13; SPEISER, *op. cit. supra* note 1; *Lambert, supra* note 1; Kierr, *supra* note 13; 16 AM. JUR. PROOF OF FACTS 701, 714 (1965).

46. SPEISER, *op. cit. supra* note 1, at 292.

47. *Lassiter, Estimating the Monetary Value of Damages in Negligence Cases Involving Death*, in *DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES* 463 (Schreiber ed. 1965); SPEISER, *RECOVERY FOR WRONGFUL DEATH* 306 (1966).

48. *Spangenberg, op. cit. supra* note 13, at 72; SPEISER, *op. cit. supra*, note 47, at 199, 306.

The other person will perform the heavier housekeeping and cooking, but because of lesser contact with the family and the type of work being done, her qualifications need not be so high.<sup>49</sup>

"In addition to the basic personnel requirements, additional replacement help must be made available to provide permanent employees with time off, vacations and sick leave. Adequate allowance for such replacement help must be made to minimize the turnover of basic employees."<sup>50</sup> This usually means two days off each week, two weeks vacation and two weeks sick leave each year.

These two basic employees plus replacement help will have to be supplemented by hourly workers for special services such as interior decorating, gardening, etc., which the wife may have performed.<sup>51</sup>

As to all employees, the cost should include taxes, workmen's compensation and the cost of any meals or housing provided.<sup>52</sup> With employees of this type there will be a fairly rapid turnover so some allowance should also be made for the cost of finding replacements.

The total when computed by this method has varied widely, but it is not unrealistic to suppose that the present total would be \$6,000 to \$8,000 per year.<sup>53</sup>

When the children are grown, the amount of services required will be greatly decreased. The primary need then will be for someone like the housekeeper. No live-in help would necessarily be required.<sup>54</sup>

49. Lassiter, *op. cit. supra* note 47.

50. *Id.* at 464. See also Kierr, *supra* note 13, at 210.

51. Spangenberg, *op. cit. supra*, note 13; SPEISER, *op. cit. supra* note 47, at 199.

52. Kierr, *supra* note 13, at 220.

53. In *Legare v. United States*, 195 F. Supp. 557 (D. Fla. 1961), the expert testimony was that it would cost \$8,500 per year to replace the wife. Similarly in *Lithgow v. Hamilton*, 69 So.2d 176 (Fla. 1954) a \$100,000 judgment was affirmed on testimony by an expert that a person would have to be employed that would be a combination of governess, counsellor and housekeeper at a rate of \$250 per month (\$3,000 per year) plus one day off each week. In addition, someone would be needed three days a week at \$10 per day plus carfare and meals to do the laundry and heavy housecleaning. In *Horton v. State*, 50 Misc.2d 1017, 1027, 272 N.Y.S.2d 312, 323 (1966), the expert testified that "the family would require a homemaker to act as substitute mother and the minimum fair and reasonable cost would be \$84.00 per week until Barbara became 20 years of age. In addition, a domestic would be required for at least four hours a day at \$1.25 per hour for the balance of Robert Horton's life, or for 20.45 years. These estimates do not include the cost of meals, social security compensation and unemployment insurance, substitute domestic service during vacations or transportation costs.

"These are bread and butter figures. The services rendered by a domestic and homemaker fall far short of the true pecuniary loss of a wife and mother."

A \$67,000 judgment was affirmed in *Connie's Prescription Shop v. McCann*, 316 P.2d 823, 824 (Okla. 1957) where the daughter had a skin condition for which special treatment was required and which the mother had provided. The court found that "the cost of a housekeeper who would also discharge these additional duties toward the child would have been a minimum of \$300 monthly plus room and board."

See also Kierr, *supra* note 13, who estimates the average yearly replacement value to be \$3,090.36. Lassiter, *supra* note 47, at 464 calculated the cost of a governess as \$5236 per year and \$2336 for domestic help.

54. Lassiter, *supra* note 47, at 463.

The second approach involves a very complex process. All the services performed are broken down into the greatest possible detail, the number of hours per week spent at each activity is determined and this is multiplied by the prevailing hourly rate for that kind of job in the community. An example of this approach is found in *The American Home*.<sup>55</sup> The work of the housewife was broken down into: cook, dishwasher, dietician, baker, waitress, private nurse, baby sitter, governess, chambermaid, purchasing agent, veterinarian, laundress, home economist, dressmaker, handyman, hostess, general housekeeper, secretary, gardener, chauffeur and recreation worker. Based on this analysis, the author arrived at a total of \$193.95 per week. In another application of this approach, the author reached a total of \$145.99 per week based on a 106 hour week at fifteen different occupations.<sup>56</sup>

This method may set the highest possible recovery if used properly. No case has fully discussed and approved the use of this method, but in *Har-Pen Truck Lines, Inc. v. Mills*,<sup>57</sup> the expert, a professor of economics, used the concept of "utility producing power" which involved determining the market rate for each service she was performing. It has been suggested that:

In the future a more precise measure based on a job analysis of the work she actually performs in her home may be utilized. This in turn might be translated into standard work units. Home economists are already assigning local wage rates to the various types of home tasks for which standard work units have been developed in order to establish the minimum value of the homemaker's contribution in performing these tasks. Meal preparation, for example, usually commands a higher rate of pay than weekly cleaning and laundry. Estimating the money value of work done in the home, thus, may in the future be scientifically standardized.<sup>58</sup>

#### D. *Intangibles in Addition to the Cost of a Mere Housekeeper*

If either of the approaches described above are taken, recovery will be based on a theory of cost of replacement. It is obvious that to replace a wife and mother adequately is an impossibility. In recognition of this fact there have been many cases allowing additional compensations over replacement cost. This element is to be distinguished from loss of comfort and society or loss of consortium which is discussed in the following section. The loss that is being considered here is composed of those unique qualities of an individual which another hired as a replacement will not possess. An example is the value of the advice of the wife in running the home and raising the children.

In *Fabrizi v. Griffin*,<sup>59</sup> the wife and mother was killed in an automobile-truck collision. In holding the verdict not to be excessive, the court said:

55. "Man's Best Investment—His Wife," Jan. 1959, THE AMERICAN HOME 34.

56. Spence, *op. cit. supra* note 42, at 118.

57. 378 F.2d 705 (5th Cir. 1967).

58. 16 AM. JUR. PROOF OF FACTS 701, 857 (1965).

59. 162 F. Supp. 276 (W.D. Pa. 1958), *aff'd*, 261 F.2d 594 (3d Cir. 1958).

Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention and tender solicitude of a wife surely make her services greater than those of an ordinary servant and therefore worth more. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value.<sup>60</sup>

Similarly, in *Continental Bus System v. Toombs*,<sup>61</sup> the court stated:

Rather would there be included along with recovery of the value of her services such counseling, advising, inspiring, comforting and otherwise serving her husband as would reasonably have been expected from a wife who was the kind of person she is shown to have been.<sup>62</sup>

This theory has been applied in several states, including some which have refused to grant relief for loss of comfort and society.<sup>63</sup>

Missouri has not considered the question, but there are many cases indicating that the jury has very wide discretion in assessing damages for every pecuniary loss.<sup>64</sup> A loss to be classified as pecuniary does not have to be one which can be replaced by hiring someone else or otherwise spending money. From this broad language, and from Missouri's position on the loss of comfort and society, recovery for this element probably would be allowed.

#### E. Loss of Comfort and Society

If a wife is injured the husband may recover damages for loss of consortium or loss of comfort and society, but if she dies from her injuries, the courts are split. A total of twenty-two jurisdictions, by statute or judicial decision, have permitted or denied recovery with regard to the death of a wife.

At least seven states have express statutory language permitting recovery either as a part of the pecuniary injury or as a separate measure of damages.

60. *Id.* at 278. For identical language see *The Pa. R.R. v. Goodman*, 62 Pa. 329, 339 (1869).

61. 325 S.W.2d 153 (Tex. Civ. App. 1959).

62. *Id.* at 167.

63. *Brest v. Philadelphia Transp. Co.*, 216 F.2d 331 (3d Cir. 1954); *Chase v. Fitzgerald*, 132 Conn. 461, 45 A.2d 789 (1946); *Pollard v. Kent*, 59 Ga. App. 118, 200 S.E. 542 (1938); *Blue's Truckline, Inc. v. Harwell*, 194 S.E. 399, 57 Ga. App. 136 (1937), *rev'd on other grounds*, 199 S.E. 739, 187 Ga. 78 (1938); *Horton v. State*, 50 Misc.2d 1017, 272 N.Y.S.2d 312 (1966); *Prauss v. Adamski*, 195 Or. 1, 244 P.2d 598 (1952); *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 153 A.2d 490 (1959); *Gaydos v. Domabyl*, 301 Pa. 523, 152 A. 549 (1930).

64. *E.g. Steger v. Meehan*, 63 S.W.2d 109, 115 (Mo. 1933), stating: "apparently the legislative intent as expressed in the . . . statutes . . . is to give the jury broad discretion in computing damages in actions for wrongful death, within the limit prescribed, based upon the pecuniary loss of every kind and character which, under all the circumstances of the particular case, will be sustained by those entitled to recover as a direct result of the death, and based upon circumstances in mitigation or aggravation of the wrongful act, neglect or default which caused it, and that this discretion given the jury in computing fair and just damages should not be interfered with unless it has been abused."

These include Alaska,<sup>65</sup> Arkansas,<sup>66</sup> Hawaii,<sup>67</sup> Kansas,<sup>68</sup> Nevada,<sup>69</sup> Wisconsin,<sup>70</sup> and Wyoming.<sup>71</sup> No state has a statute expressly denying recovery.

Judicial decisions in seven other states have permitted recovery; these include California,<sup>72</sup> Georgia,<sup>73</sup> Indiana,<sup>74</sup> Michigan,<sup>75</sup> Missouri,<sup>76</sup> New York,<sup>77</sup> and Washington.<sup>78</sup> The theory on which these cases and statutes are based was explained by the court in *Miller v. Southern Pac. Ry.*,<sup>79</sup> while construing the California wrongful death statute:

They are founded upon the theory that the wrongdoer ought not to be permitted to destroy the home or to take away the support, society and comfort and care which one enjoys, and of which he has a moral right to expect the continuance and escape liability to the extent of purely pecuniary compensation for the wrong on the ground that there are things, however important they may be to the life and future of the sufferer are too intangible to be cognized by law.<sup>80</sup>

A similar position has been taken by those writers who have commented upon it.<sup>81</sup>

65. ALASKA STAT. ANN. § 13.20.340 (1962).

66. ARK. STAT. § 27-909 (1947).

67. HAWAII REV. LAWS § 246-2 (1955).

68. KANSAS GEN. STAT. ANN. § 60-3203 (1949).

69. NEV. REV. STAT. § 41.100 (1963).

70. WIS. STAT. ANN § 331.04 (1958).

71. WYO. STAT. ANN § 1-1066 (1957).

72. *Burke v. City and County of San Francisco*, 111 Cal. App.2d 314, 244 P.2d 708 (1952); *Custodio v. Bauer*, 251 Cal. App.2d 308, 59 Cal. Repr. 463 (1967).

73. *Complete Auto Transit, Inc. v. Floyd*, 249 F.2d 396 (5th Cir. 1958), *cert. denied*, 356 U.S. 949 (1958).

74. *American Carloading Corp. v. Gary Trust & Savings Bank*, 216 Ind. 649, 25 N.E.2d 777 (1940).

75. *Stuive v. Pere Marquette Ry.*, 311 Mich. 143, 18 N.W.2d 404 (1945).

76. *In Re Wood's Petition*, 145 F. Supp. 848 (W.D. Mo. 1956), *aff'd*, 245 F.2d 306 (8th Cir. 1957); *Simpson v. Simpson*, 221 Mo. App. 550, 288 S.W. 69 (K.C. Ct. App. 1926); *Martin v. St. Louis-S. F. Ry.*, 227 S.W. 129 (St. L. Mo. App. 1921), *rev'd on other grounds*, 289 Mo. 479, 233 S.W. 219 (En Banc 1921). See also 1963 WASH. U.L.Q. 125, 144.

77. *Finkel v. State*, 37 Misc.2d 757, 237 N.Y.S.2d 66 (1962). The New York decisions are not clear. The court in this case made the following statement: "In the case of a wife and mother we are not unmindful that while not awarding damages for sentiment and emotion, a mother's care, guidance and control with respect to the members of her family is something for the loss of which the family suffers pecuniarily." *Id.* at 761, 237 N.Y.S.2d at 70. This language could be construed as only allowing something in addition to the cost of a mere housekeeper, but it could also be construed to mean "comfort and society."

78. *Kramer v. Portland-Seattle Auto Freight*, 43 Wash.2d 386, 261 P.2d 692 (1953).

79. 266 Mo. 19, 178 S.W. 885 (1915).

80. *Id.* at 47, 178 S.W. at 893.

81. SPEISER, *op. cit. supra* note 47, at 218; Kierr, *Proof of Damages Arising from the Death of a Housewife*, 8 LA. B.J. 215 (1961); Page, "Pecuniary" Damages for Wrongful Death, 1963 TRIAL LAW. GUIDE 398.

It would seem that all wrongful death actions, since they are all under the same statute, would be dealt with in the same manner. Missouri, however, has taken a rather unique position. If the wife is suing for the death of the husband<sup>82</sup> or a child is suing for the death of a parent<sup>83</sup> or a parent is suing for the death of a child,<sup>84</sup> there may be no recovery for the loss of the comfort and society of the deceased person. However, if the husband is suing for the death of the wife, damages may be recovered for loss of comfort and society.<sup>85</sup> This is illustrated by the following statement from *In Re Wood's Petition*<sup>86</sup> that he may recover

not only for the pecuniary loss but also for loss of companionship and other elements incidental to the marriage relationship, but this does not apply to a son or daughter, and the measure of damages in the latter case must be measured by the actual pecuniary or monetary loss which has been sustained by the parent.<sup>87</sup>

On the other hand, eight other jurisdictions; Iowa,<sup>88</sup> Maryland,<sup>89</sup> New Jersey,<sup>90</sup> North Dakota,<sup>91</sup> Pennsylvania,<sup>92</sup> Tennessee,<sup>93</sup> Texas,<sup>94</sup> and the federal courts under the Federal Tort Claims Act,<sup>95</sup> have decided that the loss of comfort and society was not includible as an element of damages.

One basis for this view is shown by *McGown v. International & G. N. Ry.*<sup>96</sup> where the court said:

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82. *Atchinson, T. & S. F. Ry. v. Wilson*, 48 F. 57 (8th Cir. 1891); *Truesdale v. Wheelock*, 335 Mo. 924, 74 S.W.2d 585 (1934); *Miller v. Kansas City Ry.*, 233 S.W. 1066 (Mo. 1921); *Schaub v. Hannibal & St. J. Ry.*, 106 Mo. 74; 16 S.W. 924 (1891); *Haines v. Pearson*, 107 Mo. App. 481, 81 S.W. 645 (K.C. Ct. App. 1904); *Knight v. The Sadtler Lead & Zinc Co.*, 75 Mo. App. 541 (K.C. Ct. App. 1898).

83. *Caen v. Feld*, 371 S.W.2d 209 (Mo. 1963); *Patison v. Campbell*, 337 S.W.2d 72 (Mo. 1960).

84. *Acton v. Shields*, 386 S.W.2d 363 (Mo. 1965); *Bolino v. Illinois Terminal Ry.*, 355 Mo. 1236, 200 S.W.2d, 352 (1947); *Oliver v. Morgan*, 73 S.W.2d 993 (Mo. 1934); *Leahy v. Davis*, 121 Mo. 227, 25 S.W. 941 (1894); *Szofran v. Century Elec. Co.*, 255 S.W.2d 443 (St. L. Mo. App. 1953); *Pyle v. City of Columbia*, 263 S.W. 474 (K.C. Ct. App. 1923); *Howard v. Scarritt Estate Co.*, 161 Mo. App. 552, 144 S.W. 185 (K.C. Ct. App. 1912); *Dando v. Home Tel. Co.*, 126 Mo. App. 242, 103 S.W. 103 (St. L. Ct. App. 1907); *Marshall v. Consolidated Jack Mines Co.*, 119 Mo. App. 270, 95 S.W. 972 (K.C. Ct. App. 1906).

85. See cases cited note 76 *supra*.

86. 145 F. Supp. 848 (W.D. Mo. 1956).

87. *Id.* at 859.

88. *Kilmer v. Gustason*, 211 F.2d 781 (5th Cir. 1954).

89. *State of Md. ex rel. Ungolo v. Miller*, 210 F. Supp. 193 (E.D. Pa. 1962) (Applying Md. law).

90. *Carter v. West Jersey & S. Ry.*, 76 N.J.L. 602, 71 A. 253 (1908).

91. *Larson v. Meyer*, 135 N.W.2d 145 (N.D. 1965).

92. *Byrne v. Matczak*, 254 F.2d 525 (3d Cir. 1958); *The Pa. R.R. v. Goodman*, 62 Pa. 329 (1869).

93. *Knight v. Nurseryman Supply, Inc.*, 248 F. Supp. 925 (E.D. Tenn. 1965); *Phillips Buttorft Mfg. Co. v. McAlexander*, 15 Tenn. App. 618 (1932).

94. *Simpson v. Barham*, 292 S.W.2d 874 (Tex. Civ. App. 1955); *McGown v. International & G. N. Ry.*, 85 Tex. 289, 20 S.W. 80 (1892).

95. *Hoyt v. United States*, 286 F.2d 356 (5th Cir. 1961).

96. 85 Tex. 289, 20 S.W. 80 (1892).

The idea of damages as solatium or for sentimental reasons, such as one caused by grief or loss of society is excluded. The damages contemplated are purely pecuniary and compensatory. They rest upon considerations such as the value of the services or advantage in money, reasonably to be expected by the survivor if the deceased had lived.<sup>97</sup>

Thus, the court says this element does not come within the pecuniary loss standard. Additional bases for this rule have been that damages, although within the pecuniary standard, are too speculative for determination or that the jury will not have adequate standards on which to base a judgment and may be unduly influenced by this factor.

The reasoning of these courts denying recovery is questionable. What these courts have consistently failed to explain is why, when the wife is only injured, loss of consortium (including loss of comfort and society) is an element of damages in a suit by the husband, while it is refused if the wife dies. Prior to the enactment of Lord Campbell's Act in 1847, the distinction between injury and death was greater. No recovery could be had by the survivor on any theory if the victim died. By denying recovery for the loss of comfort and society, these cases have carried this archaic distinction over into the modern law. The absurdity of this position becomes apparent in the situation where the wife is so injured that she sinks into a deep coma for many years before death. Compare this with the situation where she is killed instantly. The loss to the husband is as great in either, but under the rule adopted by these courts, recovery for loss of comfort and society would be allowed in the former, but not the latter. In response to those cases that contend that such damages are too intangible and speculative, it should be sufficient to point out that this does not bar recovery when the wife is merely injured.

#### F. *Computation of the Judgment*

##### 1. Life Expectancy

Obviously, the size of the judgment will vary considerably with the number of years over which it is computed. In a personal injury case, the life expectancy of the injured person will be of primary importance. In a wrongful death case, however, it is the pecuniary or other injury to the statutory beneficiary which supplies the measure of damages. The beneficiary could not expect these services for a period longer than his own life or the life of the spouse. Therefore, the general rule is that the joint life expectancy will have to be used to determine the period for which damages are to be computed. This could be a significant factor where the husband is suing because he is often slightly older. Even at the same age the expectancy of the wife will be somewhat greater.

The general rule is stated in *Illinois Cent. R. R. v. Crudup*:<sup>98</sup> "In all cases of this character it must be the expectation of that one who would soonest dies

97. *Id.* at 293, 20 S.W. at 81.

98. 63 Miss. 291 (1885).

which would control.<sup>99</sup> Similar language can be found in most jurisdictions,<sup>100</sup> including Missouri.<sup>101</sup> However, in the old Pennsylvania case of *Emery v. City of Philadelphia*,<sup>102</sup> a contrary position was taken:

The life of the husband has been terminated by the accident, its probable duration in the regular course of nature must, as already said, be approximated by the best evidence attainable, even though that leads only to conjecture. But the widow, plaintiff, is living, and is entitled now to compensation for what she has lost by her husband's death. To complicate the question by another conjecture as to her expectation of survivorship would add further uncertainty in the result without being so clearly demanded by reason or justice as to be imperative or even advisable.<sup>103</sup>

Mortality tables can be used to show the life expectancy of the beneficiary as well as of the deceased,<sup>104</sup> but they are only evidence and the jury is not bound by them.<sup>105</sup>

99. *Id.* at 303.

100. *E.g.* *Montellier v. United States*, 202 F. Supp. 384 (E.D. N.Y. 1962), *aff'd*, 315 F.2d 180 (2d Cir. 1963); *Valente v. Sierra Ry. of Cal.*, 151 Cal. 534, 91 Pac. 481 (1907); *Smith v. Whidden*, 87 So.2d 42 (Fla. 1956); *Duval v. Hunt*, 34 Fla. 85, 15 So. 876 (1894); *Handorf v. Currie*, 251 Iowa 896, 101 N.W.2d 836 (1960); *In Re Olney's Estate*, 309 Mich. 65, 14 N.W.2d 574 (1944); *Stuive v. Pere Marquette Ry.*, 311 Mich. 143, 18 N.W.2d 404 (1945); *Horton v. State*, 50 Misc.2d 1017, 272 N.Y.S.2d 312 (1966); *Union Transports, Inc. v. Braun*, 318 S.W.2d 927 (Tex. Civ. App. 1958).

101. *Stottle v. Chicago, R. I. & P. Ry.*, 321 Mo. 1190, 18 S.W.2d 433 (1929), *cert. denied*, 280 U.S. 589 (1929); *McIntyre v. St. Louis-S. F. Ry.*, 286 Mo. 234, 227 S.W. 1047 (1920), *cert. denied*, 255 U.S. 573 (1921); *Morton v. Southwestern Tel. & Tel. Co.*, 280 Mo. 360, 217 S.W. 831 (1920); *McCord v. Schaff*, 279 Mo. 558, 216 S.W. 320 (1919); *Cervillo v. Manhattan Oil Co.*, 226 Mo. App. 1090, 49 S.W.2d 183 (K.C. Ct. App. 1932); *Heath v. Salisbury Home Tel. Co.*, 27 S.W.2d 31 (K.C. Mo. App. 1927), *aff'd*, 326 Mo. 875, 33 S.W.2d 118 (1930); *Stevens v. Kansas City Power and Light Co.*, 200 Mo. App. 651, 208 S.W. 630 (K.C. Ct. App. 1919); *Chambers v. Kupper-Benson Hotel Co.*, 154 Mo. App. 249, 134 S.W. 45 (K.C. Ct. App. 1911). See however *Morrow v. Missouri Gas and Elec. Serv. Co.*, 315 Mo. 367, 286 S.W. 106 (1926) where the instructions to the jury did not consider the life expectancy of the plaintiff but no error was found by the Supreme Court: "It appears from the evidence that the wife was junior in age and hence her life expectancy was longer than that of the deceased. Plaintiff's damages were properly predicated upon the shorter life expectancy of the deceased. The jury had some visual evidence of the health of the plaintiff for she appeared before them as a witness at the trial." *Id.* at 389, 286 S.W. at 116. It is difficult to conceive how the jury could be expected to take the factor of the joint life expectancy into account unless told to do so even if they did have some visual experience.

102. 208 Pa. 492, 57 Atl. 977 (1904).

103. *Id.* at 499, 57 Atl. at 979. A similar position was taken in Missouri, *O. & G. Ry. v. Lee*, 175 Pac. 367 (Okla. 1918), but the case was overruled in *Whitehead Coal & Mining Co. v. Wintoom*, 230 P. 509 (Okla. 1924). Despite this fact, in *Simpson v. St. Louis-S. F. Ry.*, 334 Mo. 1126, 70 S.W.2d 904 (1934) the Missouri Supreme Court stated the Oklahoma rule to be as in the 1918 case.

104. *E.g.* *Montellier v. United States*, 202 F. Supp. 384 (E.D. N.Y. 1962), *aff'd*, 315 F.2d 180 (2d Civ. 1963); *Jones v. McMillan*, 129 Mich. 86, 88 N.W. 206 (1901); *McIntyre v. St. Louis-S. F. Ry.*, 286 Mo. 234, 227 S.W. 104 (1920), *cert. denied*, 255 U.S. 573 (1921).

105. *E.g.* *Morton v. Southwestern Tel. & Tel. Co.*, 280 Mo. 360, 217 S.W. 831 (1920); *Stevens v. Kansas City Power and Light Co.*, 200 Mo. App. 651, 208 S.W. 630 (K.C. Ct. App. 1919).

An additional consideration occasionally mentioned is the concept of "work life expectancy." This takes into account the fact that as one advances in age he may retire or his productivity will be reduced. In cases of the death of a husband, it is sometimes applied because of the practice of actual retirement before death. It is of limited use with respect to a wife because, although there may be some slowing down, services in the home usually continue to be rendered until a relatively short time before death.<sup>106</sup> Any difference between actual life expectancy and work life expectancy in such cases would normally be so small that it need not be taken into account.

## 2. Cost of Maintenance

The rule in most jurisdictions is that the amount which decedent would have required for his own personal use and maintenance or personal living expenses must be deducted in determining the value of his life . . . . In an action by a husband to recover for the wrongful death of his wife, the cost of suitably maintaining her is to be deducted from the amount estimated as the value of her services.<sup>107</sup>

The great weight of authority agrees with the above statement of the rule.<sup>108</sup> Missouri has no case involving the death of a wife, but in *Oliver v. Morgan*,<sup>109</sup> the cost of maintenance of a minor son was required to be deducted thereby indicating that the theory is recognized in Missouri.

Not all states agree. In the Georgia case of *Har-Pen Truck Lines, Inc. v. Mills*,<sup>110</sup> the court refused to allow the cost of maintenance to be deducted because it construed the statute to be both compensatory and punitive and therefore not to require it. The plaintiff was allowed to recover the "full value of the life of the decedent" rather than just any actual pecuniary loss that was suffered.

106. *Stuive v. Pere Marquette Ry.*, 311 Mich. 143, 18 N.W.2d 404 (1945); *In Re Olney's Estate*, 309 Mich. 65, 14 N.W.2d 574 (1944); *Lindenfeld v. Michigan Interstate Truck Co.*, 274 Mich. 681, 265 N.W. 501 (1936); See also SPEISER, RECOVERY FOR WRONGFUL DEATH 109 (1966).

107. 25A C.J.S. Death § 114 p. 962 (1966).

108. *Grand Trunk Western Ry. v. Gilpin*, 208 F. 126 (7th Cir. 1913); *Curnov v. West View Park Co.*, 220 F. Supp. 367 (W.D. Pa. 1963), *aff'd*, 337 F.2d 241 (3d Cir. 1964); *Fabrizi v. Griffin*, 162 F. Supp. 276 (W.D. Pa. 1958), *aff'd*, 261 F.2d 594 (3d Cir. 1958); *Stafford v. Roadway Transit Co.*, 70 F. Supp. 555 (W.D. Pa. 1947), *modified*, 165 F.2d 920 (3d Cir. 1948); *Denver & R. G. R.R. v. Gunning*, 33 Colo. 280, 80 Pac. 727 (1905); *Lithgow v. Hamilton*, 69 So.2d 776 (Fla. 1954); *Grimes v. King*, 311 Mich. 399, 18 N.W.2d 870 (1945); *In Re Olney's Estate*, 309 Mich. 65, 14 N.W.2d 574 (1944); *Lindenfeld v. Michigan Interstate Truck Co.*, 274 Mich. 681, 265 N.W. 501 (1936); *Gorton v. Harmon*, 152 Mich. 473, 116 N.W. 443 (1908); *Baker v. Salvation Army, Inc.*, 91 N.H. 1, 12 A.2d 514 (1940); *Phillips v. Pickell*, 57 Berks 107 (Pa. Com. Pl. 1965); *Siidekum v. Animal Rescue League of Pittsburgh*, 353 Pa. 408, 45 A.2d 59 (1946); *Gaydos v. Domabyl*, 301 Pa. 523, 152 A. 549 (1930); *Gulf, C. & S. F. Ry. v. Southwick*, 30 S.W. 592 (Tex. Civ. App. 1895); *Mertens v. Lundquist*, 15 Wis.2d 540, 113 N.W.2d 149 (1962). See also 22 AM. JUR.2d *Death* § 170 (1965).

109. 54 Mo. 285, 73 S.W.2d 993 (1934).

110. 378 F.2d 705 (5th Cir. 1967).

Despite the great weight of authority requiring the deduction of the cost of maintenance, very few courts have made any real attempt to delineate exactly what elements are to be considered to be within "maintenance." This is illustrated by the following statement from *Curnow v. West View Park Co.*<sup>111</sup> which contains a good discussion of the problem:

While there is no requirement that the evidence as to probable cost of maintenance be direct and precise, there is a requirement that it be sufficient to enable the jurors to make a fair determination.<sup>112</sup>

If properly considered, the cost of maintenance could become a substantial deduction from the judgment. In many cases, however, this cost can largely be offset by the cost of room and board of a live-in governess or other domestic help. Deduction of the cost of maintenance is entirely in keeping with the compensatory idea of damages, but there should be more of an attempt to outline its components. If this element is to have any real significance, it must be one on which proof can be presented with some accuracy.

### 3. Remarriage of Surviving Spouse

If a truly pecuniary loss standard were used, all factors which could affect the amount of the actual pecuniary loss would have to be taken into account. The husband will commonly have to hire various persons to perform the services formerly performed by the wife. Should he remarry, this will no longer be necessary and it would logically seem that remarriage or the possibility thereof should be considered.

It is illustrative of the lip service given the pecuniary loss standard to note that of the few cases considering this question, in a case involving the death of a wife, the unanimous holding is that remarriage of the husband will not be considered in any way in determining damages.<sup>113</sup> Missouri<sup>114</sup> and several other states<sup>115</sup> have considered cases involving the death of a husband and the remarriage of the wife and have held the remarriage to be irrelevant. Only Wisconsin

111. 337 F.2d 241 (3d Cir. 1962).

112. *Id.* at 242.

113. *Coleman v. Moore*, 108 F. Supp. 425 (D.D.C. 1952); *Lees v. New York Consol. Ry.*, 109 Misc. Rep. 608, 180 N.Y.S. 546 (1919); *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N.E. 350 (1887); *Prauss v. Adamski*, 195 Or. 1 244 P.2d 598 (1952); *International & G. N. Ry. v. Boykin*, 85 S.W. 163 (Tex. Civ. App. 1905), *rev'd on other grounds*, 99 Tex. 259, 89 S.W. 639 (1905); *Gulf, C. & S. F. Ry. v. Younger*, 90 Tex. 387, 38 S.W. 1121 (1897); *Dimmey v. Wheeling & E. G. R.R.*, 27 W. Va. 37, 55 Am. Rep. 292 (1885).

114. *Katz v. North Kansas City Dev. Co.*, 223 Mo. App. 606, 14 S.W.2d 701 (K.C. Ct. App. 1929); *Platt v. Cape Girardeau Bell Tel. Co.*, 12 S.W.2d 933 (St. L. Mo. App. 1929); *Davis v. Springfield Hospital*, 204 Mo. App. 626, 218 S.W. 696 (Spr. Ct. App. 1920). See also SPEISER, *op. cit. supra* note 106, at § 6:12; 22 AM. JUR.2d *Death* § 164 (1965); 25A C.J.S. *Death* § 114 (1966).

115. *Seaboard Air Line R.R. v. Connor*, 261 F.2d 656 (4th Cir. 1958); *The City of Rome*, 48 F.2d 333 (S.D. N.Y. 1930); *Blumenthal v. United States*, 189 F. Supp. 439 (E.D. Pa. 1960); *United States v. The S. S. Washington*, 172 F.

now follows a contrary rule,<sup>116</sup> but prior to 1965, Michigan also allowed it to be considered.<sup>117</sup>

The cases supporting the majority do so either on the theory that the damages are determined at the time of the decedent's death or that it would be too speculative to consider remarriage because of the comparison that would be made between the respective earnings, services and contributions of the new spouse with those of the deceased spouse.<sup>118</sup>

#### 4. Economic Trends, Taxes and Present Value

Those factors previously discussed are unique to this particular type of case. As in any case involving future damages, however, several other factors must also be considered. One of the most important may be the economic trend at the time. The judgment will, of course, have to be in terms of present day money, but the economic trend may be considered and the courts have often taken judicial notice of the decline in the value of the dollar.<sup>119</sup>

In cases where the loss is based primarily on the loss of future earnings of the decedent, there is a split of authority as to whether possible future income taxes

Supp. 905 (E.D. Va. 1959), *aff'd*, 272 F.2d 711 (4th Cir. 1959); Jones v. Baltimore & O. R.R., 143 F. Supp. 15 (W.D. Pa. 1956), *aff'd*, 239 F.2d 385 (3d Cir. 1957); St. Louis, I. M. & S. Ry. v. Cleeve, 76 Ark. 377, 88 S.W. 995 (1905); Wood v. Alves Serv. Transp. Co. 191 Cal. App.2d 723, 13 Cal. Repr. 114 (1961); Gallo v. Southern Pac. Co., 43 Cal. App.2d 339, 110 P.2d 1062 (1941); Reynolds v. Willis, 209 A.2d 760 (Del. 1965); Georgia R.R. and Banking Co. v. Garr, 57 Ga. 277, 24 Am. Rep. 492 (1876); Chicago & E. I. R.R. v. Driscoll, 207 Ill. 9, 69 N.E. 620 (1903); O. S. Richardson Fueling Co. v. Peters, 82 Ill. App. 508 (1898); Wabash R.R. v. Gretzinger, 182 Ind. 155, 104 N.E. 69 (1910); Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N.E. 696 (1903); Arder v. Bowling, 166 Ky. 139, 179 S.W. 15 (1915); McFarland v. Illinois Cent. R.R., 241 La. 15, 127 So.2d 183 (1961); Stephens v. Natchitoches Parish School Bd., 110 So.2d 156 (La. App. 1959), *rev'd on other grounds*, 238 La. 388, 115 So.2d 793 (1959); Bunda v. Hardwick, 376 Mich. 640, 138 N.W.2d 305 (1965); Murphy v. Barlow Realty Co., 175 Pa. 570, 34 A. 856 (1896); Dixie Motor Coach Corp. v. Shivers, 131 S.W.2d 677 (Tex. Civ. App. 1939); Gulf, C. & S. F. Ry. v. Moser, 277 S.W. 772 (Tex. Civ. App. 1925), *rev'd on other grounds*, 275 U.S. 133 (1927).

116. Jensen v. Heritage Mut. Ins. Co., 23 Wis.2d 344, 127 N.W.2d 228 (1964) on the theory that damages are to be determined as matters stand at the time of trial. When plaintiff had remarried before trial this could be considered. The Wisconsin court specifically rejected the theory that damages are to be determined from facts as they existed at the date of death.

117. *Stuive v. Pere Marquette Ry.* 311 Mich. 143, 18 N.W.2d 404 (1945); *Lindenfeld v. Michigan Interstate Truck Co.*, 274 Mich. 681, 265 N.W.501 (1936); *Sipes v. Michigan C. Ry.*, 231 Mich. 404, 204 N.W. 84 (1925).

118. See Annot., 87 A.L.R.2d 252 (1963).

119. *E.g. Fabrizi v. Griffin*, 162 F. Supp. 276 (W.D. Pa. 1958), *aff'd*, 261 F.2d 594 (3d Cir. 1958); *Burke v. City and County of San Francisco*, 111 Cal. App.2d 314, 244 P.2d 708 (1952); *Holley v. St. Joseph Lead Co.*, 356 Mo. 390, 201 S.W.2d 941 (1947); *Horton v. State*, 50 Misc.2d 1017, 272 N.Y.S.2d 312 (1966); *Zaninovich v. American Airlines, Inc.*, 262 N.Y.S.2d 854 (1965); *Sutfin v. Burton*, 91 Ohio App. 177, 104 N.E.2d 598 (1952); *Connie's Prescription Shop v. McCann*, 316 P.2d 823 (Okla. 1957); *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 153 A.2d 490 (1959).

on those earnings would have to be taken into account. The majority would refuse to consider future income taxes, usually on the ground that the computation is too speculative.<sup>120</sup> There is some support for the minority view.<sup>121</sup>

In the usual case involving the wife, the damages will be based on loss of future services on which there is no possibility of tax, rather than future earnings and there is no possibility of the question of future taxes being taken into account.

As in any case in which future damages are involved, the judgment must be discounted to present value.<sup>122</sup> As stated in *Chesapeake & O. Ry. v. Kelly*,<sup>123</sup> "It is self-evident that a given sum of money in hand is worth more than the like sum in the future."<sup>124</sup> Due to the complicated nature of the computation required, courts have generally allowed the use of an actuary or mathematician as an expert witness.<sup>125</sup> There is a split of authority as to whether the actual figures involved in the case or neutral figures must be used.<sup>126</sup>

#### IV. CONCLUSION

The attorney suing for the wrongful death of a wife and mother will be faced with numerous problems of judgment and technique, but by the use of those methods discussed in this article, more rapid change can be expected in this area in the next few years. Missouri has taken a big step forward in raising the limitation from \$25,000 to \$50,000. Any further development will depend on the courts and attorneys.

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120. *E.g.* N.Y. Cent. R.R. v. Delich, 252 F.2d 522 (6th Cir. 1958); Allendorf v. Elgin, J. & E. Ry., 8 Ill.2d 164, 133 N.E.2d 288 (1956); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952) (Note, however, that this case would require an instruction that the amount received would not be taxable); Hilton v. Thompson, 360 Mo. 177, 227 S.W.2d 675 (1950). See also SPEISER, *op. cit. supra* note 106, at 529; Spangenberg, "Proof of Damages for Wrongful Death," in WRONGFUL DEATH AND SURVIVORSHIP 89 (Beall ed. 1958); 63 A.L.R.2d 1394 (1959).

121. *E.g.* Floyd v. Fruit Industries, Inc., 144 Conn. 659, 136 A.2d 918 (1957). See also, HARPER & JAMES, TORTS 1326 (1956).

122. *E.g.* Montellier v. United States, 202 F. Supp. 384 (E.D. N.Y. 1962), *aff'd*, 315 F.2d 180 (2d Cir. 1953); Heppner v. Atchinson, T. & S. F. Ry., 297 S.W.2d 497 (Mo. 1956); Sieberell v. St. Louis-S. F. Ry., 320 Mo. 916, 9 S.W.2d 912 (1928).

123. 241 U.S. 485 (1916).

124. *Id.* at 489.

125. Few cases have dealt with the question of whether the testimony of such an expert is admissible. Most apparently have assumed its admissibility. *E.g.* Pennell v. Baltimore & O. Ry., 13 Ill. App.2d 433, 142 N.E.2d 497 (1957). The problem involved in most cases is the proper scope of examination and the proper bases for computation. See Lease, How to Prove Reduction to Present Worth, 21 Ohio St. L. J. 204 (1960); 79 A.L.R.2d 259 (1961).

126. *E.g.* Allendorf v. Elgin, J. & E. Ry., 8 Ill.2d 164, 133 N.E.2d 288 (1956) (the court held that although neutral figures were not used that they should have been. Missouri may take the opposite view: Heppner v. Atchinson, T. & S. F. Ry., 297 S.W.2d 497 (Mo. 1956).