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Canadian and Australian courts have held the above arguments to be sufficient basis for recognition of *per quod servitium amisit* without the *Hambrook* limitation. A recent Canadian case, not involving a menial or domestic servant, added an interesting modification to the interpretation of "loss of services." Reasoning that loss of profits to an employer due to injury to his servant is unforeseeable to the negligent defendant, the court in *Genereux v. Peterson, Howell & Heather (Canada) Ltd.*,²⁶ refused to allow damages for loss of profits and limited the defendant's liability to payment to the employer of the amount spent in acquiring substitute services. This limitation is one that the Missouri court and other American jurisdictions rejecting *per quod* would do well to consider. It allows recovery by an employer who has been out the expense of obtaining substitute help without placing undue burdens on negligent defendants. This Canadian gloss might present a suitable compromise for courts that feel the action is outmoded. In analyzing this limitation, however, one should consider whether it provides adequate compensation to the master of a "unique" or "key" employee.

An analysis of the Missouri court's opinion in *Horton* shows a decision which is in keeping with a general trend in American courts. However, a closer examination of the action *per quod*, its history, and the reasons for which it is still recognized in other jurisdictions tends to make one wonder if the court was hasty in permanently razing a cause of action which allows one economically damaged to recover from one responsible for the injury causing the loss. This question becomes one of prime importance where a damaged master finds himself remediless for the loss of services of a key employee.

BOBETTE SANDERS

WRONGFUL DEATH STATUTE—LIMITATION OF ACTIONS—PERIOD WITHIN WHICH BENEFICIARY MUST SUE STILL STRICTLY CONSTRUED

*State ex rel. Kansas City Stock Yards Co. v. Clark*¹

Roy Ruis died on June 12, 1970, from injuries he received while employed by Kansas City Stock Yards Company. He was survived by his wife, three minor children, and his parents. Shortly after Ruis' death, his widow and minor children filed a claim against Stock Yards under the

935; Fridman, *Loss of Services*, 24 SOLICITOR 10 (1957); Note, *Commissioner for Railways (N.S.W.) v. Scott*, 2 MEL. U.L. REV. 413 (1960).

26. [1973] 34 D.L.R.3d 614.

1. 536 S.W.2d 142 (Mo. En Banc 1976).

Kansas Workmen's Compensation Law.² That claim was denied on August 9, 1971. Plaintiffs then filed a wrongful death claim in the Jackson County Circuit Court on May 25, 1972. Upon Stock Yard's application for a writ of prohibition, the Missouri Supreme Court ruled that the wrongful death claim of the widow and minor children was barred when brought more than one year, but less than two years, after decedent's death because he was survived by his parents.³ Furthermore, the period of limitations was not tolled by the pendency of plaintiffs' Workmen's Compensation claim.⁴ In *Selsor v. Zenith Radio Corp.*,⁵ decided concurrently with *Stock Yards*, the essential facts were similar. The court again denied the decedent's widow and minor child the right to maintain a wrongful death claim more than one year after death when decedent's parents also survived.

The practice of paying compensation to the relatives of a person killed through the negligence of another is rooted in Anglo-Saxon history.⁶ But the development of a common law wrongful death claim was curtailed by the case of *Baker v. Bolton*⁷ in which Lord Ellenborough ruled that there was no cause of action at common law for the death of a person.⁸ The subsequent adoption of this rule by both English and American courts created a void in the common law. The English were the first to remedy the situation by enacting Lord Campbell's Act in 1846.⁹ American legislatures

2. The claim, filed on November 30, 1970, was denied not on its merits, but on the ground that Stock Yards had not elected to be covered by Workmen's Compensation and was not engaged in one of the hazardous occupations for which such coverage was mandatory. A denial of the claim on June 8, 1971, was appealed. By the time this decision was affirmed on August 12, 1971, it was already more than one year since Ruis' death. *Id.* at 146, 149-50.

3. The Missouri wrongful death act contains two periods of limitation. The general limitation, § 537.100, RSMO 1969, states that "[e]very action instituted under section 537.080 shall be commenced within two years after the cause of action shall accrue" But § 537.080, RSMO 1969 provides that an action may be brought:

- (1) By the spouse or minor children . . . or
- (2) If there be no spouse or minor children *or if the spouse or minor children fail to sue within one year after such death . . .* then by the father and mother (emphasis added).

4. Plaintiffs sought to make applicable to their petition a provision which tolls the limitation for wrongful death claims for one year after a nonsuit is suffered. § 537.100, RSMO 1969. The court rejected this argument on the ground that the Workmen's Compensation Claim was not an "action" within the meaning of § 537.100, RSMO 1969. 536 S.W.2d at 146. *See also* King v. Smith Baking Co., 228 Mo. App. 721, 71 S.W.2d 115 (K.C. Ct. App. 1934).

5. 536 S.W.2d 157 (Mo. En Banc 1976).

6. *See generally* 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:2 (2d ed. 1975) [hereinafter referred to as SPEISER].

7. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

8. It has been noted that *Baker v. Bolton* was tried in a local court before a single judge, and there was neither supporting authority nor clear reasoning given for the rule of law. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 614-15 (1960).

9. An Act for Compensating the Families of Persons Killed by Accidents, 1846, 9 & 10 Vict., c. 93.

soon followed this example by passing wrongful death statutes.¹⁰ Missouri's first wrongful death act, adopted in 1855, was patterned after Lord Campbell's Act.¹¹

Because of the adoption of the rule that there was no cause of action for wrongful death at common law, wrongful death statutes are often construed strictly as in derogation of the common law.¹² This strict constructionist attitude often frustrates the compensatory purpose of the statute by causing a denial of benefits to the persons the statutes were designed to protect. Plaintiffs have special difficulties pursuing wrongful death claims in Missouri because of the complexity of the statute and the multiplicity of rules which have been developed to aid in its interpretation.¹³ The remainder of this casenote will critically examine the case authority underlying the *Stock Yards* court's pronouncement of ten "uniformly followed principles"¹⁴ of interpretation of the wrongful death statute and will identify areas of interpretation of the wrongful death statute in which the strict constructionist attitude has been replaced by a more liberal one. These are the areas in which plaintiffs are most likely to persuade Missouri courts to change the wrongful death laws.

The first principle set out in *Stock Yards* stated that the wrongful death statute provides but one indivisible claim for the death of a person which accrues on the date of death.¹⁵ This principle has two parts: the first deals with the indivisibility of wrongful death claims, and the second with the accrual of the cause of action. According to the "indivisibility principle," there is only a single right of action, no matter how many parties are guilty

10. New York's law was first in the United States. An Act Requiring Compensation for Causing Death by Wrongful Act, Neglect, or Default, ch. 450, 1847 N.Y. Laws, p. 575.

11. An Act for the Better Security of Life, Property and Character, ch. 51, §§ 1-8, RSMO 1855. The statute contained two sections under which claims for wrongful death could be brought, one providing a penalty for deaths caused by common carriers, ch. 51, § 2, RSMO 1855 (repealed 1955), and the other for all other cases of deaths caused by wrongful acts, ch. 51, § 3, RSMO 1855.

12. For a list of jurisdictions so holding (including Missouri) see 1 SPEISER, *supra* note 6, § 1:12.

13. The Missouri death statute gives the wrongful death cause of action first to the surviving spouse and minor children, then if they are not living or fail to sue within a year, to the father and mother. If no one in this first or second class of beneficiaries exists, then the personal representative may bring an action for the benefit of heirs. § 537.080, RSMO 1969. There are also two time limitations in the statute (note 3, *supra*) and innumerable problems of interpretation. The Missouri statute is somewhat unusual in this respect. Most American death acts follow Lord Campbell's Act and give the right to bring the action to the deceased's personal representative immediately, thereby avoiding many of the problems of sequential timing of claims faced under the Missouri statute. See 2 SPEISER, *supra* note 6, § 11:29 for a list of all states showing who is entitled to bring the action in each.

14. 536 S.W.2d at 145.

15. *Id.*

of causing a wrongful death. An attempt by a beneficiary to enforce a claim against *anyone* is an appropriation of the entire wrongful death claim.¹⁶ In *Spencer v. Bradley*¹⁷ a surviving spouse released some of the tortfeasors responsible for his wife's death while expressly reserving the right to sue the others. He did not file a claim during the limitations period applicable to spouses. His children then brought a wrongful death action against the unreleased tortfeasors. Their claim was denied because the husband's release of some tortfeasors had appropriated the entire wrongful death claim, barring the children's rights even as to unreleased tortfeasors. The wrongful death cause of action cannot be split between classes of beneficiaries. This principle is applied uniformly,¹⁸ and at times defeats the compensatory purpose of the statute.¹⁹

The "accrual principle" establishes that the cause of action accrues at death. This principle is uniformly applied in Missouri.²⁰ In *Frazer v. Partney*²¹ plaintiff's wife was the victim of a hit and run driver. By the time plaintiff discovered the identity of the driver, the statute of limitations had run. His argument that the cause of action did not accrue until he found the defendant was rejected. The unfairness which can result from application of the "accrual principal" is mitigated by allowing certain situations to toll the statute of limitations. For example, if a defendant absents himself from the state so that personal service cannot be had on him, the time period during which he is absent does not count as part of the two year limitation period.²² Also, if in a timely filed action plaintiff suffers a nonsuit, or judgment is arrested or reversed, the plaintiff can bring a new

16. *Packard v. Hannibal & St. J.R.R.*, 181 Mo. 421, 80 S.W. 951 (1904).

17. 351 S.W.2d 202 (Mo. 1961).

18. *Blessing v. Chicago B. & Q.R.R.*, 357 Mo. 1006, 171 S.W.2d 602 (1943); *McNamara v. Slavens*, 76 Mo. 329 (1882).

19. Courts should allow a second claim to be filed in cases where plaintiff has sued the wrong defendant and does not discover the mistake until the statute of limitations has run. In *Packard v. Hannibal & St. J.R.R.*, 181 Mo. 421, 80 S.W. 951 (1904) a widow had sued the wrong railroad for her husband's death. The defendant's motion to dismiss was granted after the widow's time for bringing an action was barred by the statute of limitations. As there was at the time no provision for tolling the statute in cases of nonsuit, she could not refile the claim. It was decided that her children could not then sue the proper defendant, although their claim was not yet barred by the statute of limitations, since the claim filed by the widow had appropriated the "one single indivisible cause of action" and forever cut off the rights of her children. Not allowing a second claim to be filed because of the "indivisibility principle" does serious injustice to the decedent's beneficiaries in cases such as this.

20. *Kennedy v. Burrier*, 36 Mo. 128 (1865); *Deming v. Williams*, 321 S.W.2d 720 (K.C. Mo. App. 1959).

21. 314 S.W.2d 915 (Mo. 1958).

22. § 537.100, RSMo 1969. A non-resident motorist would not come under this section, since personal service *can* be had upon him through the long arm statute, § 506.210, RSMo 1969. See *Haver v. Bassett*, 287 S.W.2d 342 (K.C. Mo. App. 1956).

action within one year.²³ The general statutes of limitations are tolled during any time in which defendant's improper act prevents plaintiff from commencing an action.²⁴ Plaintiff in *Frazee* was not allowed the benefit of this tolling provision, because provisions which toll the general statutes of limitations are not applicable to the wrongful death "special statute of limitations."²⁵ *Frazee* serves as a warning that courts construe the wrongful death statute strictly in deciding what will toll the statute of limitations.

Another principle relied on by the *Stock Yards* court requires the suit for wrongful death to be filed within two years from the date of death unless a tolling situation exists.²⁶ Under this "general limitation principle" Missouri courts have adopted a liberal policy toward permitting amendments made after the statute of limitations has run to relate back to the original petition. Many cases state the requirement that a claimant for wrongful death must bring himself strictly within the terms of the statute to state a claim.²⁷ Thus one would expect that a defective petition which failed to state a claim under the express terms of the statute could not be cured by allowing an amendment to relate back after the statute of limitations had run. However, such relation back has been allowed frequently.²⁸ Although Missouri had no rule of procedure on the relation back of amendments prior to 1973, it had been established by *Slater v. Kansas City Terminal Railway Co*²⁹ that a petition which contained the essential elements of a

23. § 537.100, RSMO 1969.

24. § 516.280, RSMO 1969.

25. The period of limitations for wrongful death claims is tolled only by the two provisions specifically included in the wrongful death act. See text accompanying notes 22, 23 *supra*. See also *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958), criticized in *Rahoy, Torts—Wrongful Death Statute in Missouri—Application of General Statutes of Limitation*, 24 MO. L. REV. 397 (1959). The statutes of limitations applicable to torts generally may be tolled: when service cannot be had on defendant because of his absence from the state (§ 516.200, RSMO 1969); when the plaintiff is under a disability such as minority, insanity, etc. (§ 516.170, RSMO 1969); when a plaintiff suffers a nonsuit, or reversal or arrest of judgment in a related judicial proceeding (§ 516.260, RSMO 1969); when defendant's improper acts keep plaintiff from suing (§ 516.280, RSMO 1969); when a party entitled to sue but under a disability dies (§ 516.170, RSMO 1969); when a plaintiff or primary defendant dies (§§ 516.180, .240, .250, RSMO 1969). If the wrongful death period of limitations were construed as other statutes of limitations, all these provisions would be available for wrongful death plaintiffs. For a study of the structure of statutes of limitation in Missouri, see *Davis, Tort Liability and the Statutes of Limitation*, 33 MO. L. REV. 171 (1968).

26. 536 S.W.2d at 145.

27. *Chandler v. Chicago & A.R.R.*, 251 Mo. 592, 600-01, 158 S.W. 35, 37 (1913); *Barker v. Hannibal & St. J. Ry.*, 91 Mo. 86, 94, 14 S.W. 280, 282 (1886).

28. *Nelms v. Bright*, 299 S.W.2d 483 (Mo. En Banc 1957); *Slater v. K.C. Terminal Ry.*, 271 S.W.2d 581 (Mo. 1954); *Cytron v. St. Louis Transit Co.*, 205 Mo. 692, 104 S.W. 109 (En Banc 1907).

29. 271 S.W.2d 581 (Mo. 1954). A widow filed as administratrix of her husband's estate under FELA, but the suit could not be maintained because defendant was not her husband's employer. After the statute of limitations had run on

claim but was defective for failure to allege some necessary fact could be amended to cure the deficiency after the statute of limitations had run. New defendants could not be added after the statute of limitations had run,³⁰ but could be added after the expiration of the six months preferential period by a beneficiary of the first class who had appropriated the wrongful death claim within this shorter period.³¹

The courts' approach to relation back of amendments should become even more liberal because of the adoption of Missouri Rule of Civil Procedure 55.33(c). Under this rule an amendment relates back to the date of the original pleading whenever the claim or defense in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ."³² The new Missouri rule is identical to the first paragraph of rule 15(c) of the Federal Rules of Civil Procedure. If Missouri courts follow the construction given federal rule 15(c) by the federal courts, an amendment will be allowed to relate back if the original claim was adequate to notify the defendant of the facts upon which relief is sought.³³ Thus, addition of both defendants and plaintiffs may be possible after the statute of limitations has run.³⁴ The new rule should permit courts to avoid some of the harsh results reached in earlier cases, but it is not yet clear how liberal Missouri courts will become in allowing relation back of amendments under the new rule.³⁵

her claim, she was permitted to file an amended claim as widow under the wrongful death act.

30. *Deming v. Williams*, 321 S.W.2d 720 (K.C. Mo. App. 1959).

31. *Meyer v. Pevely Dairy Co.*, 333 Mo. 1109, 64 S.W.2d 696 (1933).

32. MO. R. CIV. P. 55.33(c).

33. The federal courts have used a "notice" test in determining when amended claims arose out of the conduct, transaction or occurrence set forth in the original pleading. The policy behind this test is that if the original pleading notified defendant of the facts on which plaintiff's claim is based, defendant can then prepare a defense to any claims arising out of the same factual situation. The construction given a federal rule is persuasive authority for Missouri courts in construing Missouri rules which are identical to the analogous federal rule. See Crahan, *Expansion of Permissive Joinder of Defendants in Missouri*, 41 MO. L. REV. 199 (1976).

34. Addition of defendants should be permitted where the original pleadings notify defendants of the facts on which relief is sought, and there is such identity of interest between original and substitute defendants that defendant should know that but for a mistake he would be the one sued. If the original pleadings are adequate to notify defendant that other persons are entitled to sue him on the wrongful death claim, it should be possible to add these other persons by amendment after the statute of limitations has run. If necessary, a plaintiff should be able to amend the capacity in which he sues after the statute has run. See Marlow, *Amendments to Pleadings After the Statute of Limitations Has Run—A Change in Missouri*, 40 MO. L. REV. 489 (1975).

35. One case dealing with relation back of amended pleadings in a wrongful death case has been decided since the new rule became effective. In *State ex rel. Jewish Hospital v. Buder*, 540 S.W.2d 100 (Mo. App., D. St. L. 1976) a petition changing the capacity in which plaintiff sued from adult child to administratrix was not permitted to relate back. The court cited the new rule on relation back of

The remaining principles cited by the court deal with the existence of two periods of limitation in the wrongful death statute. Beneficiaries sometimes have less than the full statutory period of limitations in which to bring a suit. According to the "long limitation period principle" if there is no father or mother, the spouse and minor children have the full two years in which to sue. Likewise, if there is no spouse or minor child, the father and mother may sue at any time within the two year period.³⁶ The courts have allowed such suits anytime within the two year period if there exists only one class of beneficiaries entitled to the wrongful death claim.³⁷ This "longer limitation period principle" was recently applied in *Almcrantz v. Carney*³⁸ and *Montemayor v. Harvey*.³⁹ In those cases a surviving spouse was permitted to sue anytime within the two year limitation period where there were no parents living. Judge Bardgett filed concurring opinions in *Almcrantz* and *Montemayor*. He would have allowed suit by the surviving spouse anytime within two years after death even if deceased's parents had also survived based upon the reasoning that "[t]he period of limitations is not shortened, as far as the tortfeasor is concerned, by the existence of more than one class of persons. . . ."⁴⁰ This reasoning has been used to enable a surviving spouse who appropriates the cause of action within the shorter limitation period to then bring an action anytime within the longer limitation period, despite the existence of other classes of beneficiaries.⁴¹ As noted by the dissent in *Stock Yards*, the application of this portion of the "longer limitation period principle" to *Stock Yards* would require a different result.⁴² Nowhere in the wrongful death act does it specifically state that

amendments, and then merely stated that it does not authorize an amendment to state an entirely new claim. Since the court did not even consider whether the original pleading was sufficient to notify the defendant of the facts on which the claim against him was based, it did not give the new rule fair treatment, and the case is of questionable value as a precedent. It would have been fair to defendant to allow this amendment to relate back if the petition had informed him of adequate facts on which to prepare a defense. Had the court followed the "notice" test used by federal courts, the amendment would have related back. *See Crowder v. Gordon Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967), in which an amendment changing the capacity in which a widow sued from that of administratrix to that of next friend of her two minor children was allowed to relate back to the original petition.

36. 536 S.W.2d at 145.

37. *Aley v. Missouri Pac. Ry.*, 211 Mo. 460, 111 S.W. 102 (1908); *Barker v. Hannibal & St. J. Ry.*, 91 Mo. 86, 14 S.W. 280 (1886).

38. 490 S.W.2d 59 (Mo. 1973).

39. 490 S.W.2d 61 (Mo. 1973).

40. *Almcrantz v. Carney*, 490 S.W.2d 59, 61 (Mo. 1973).

41. *See, e.g., Huss v. Bohrer*, 317 Mo. 204, 295 S.W. 95 (1927). Suit under the existing wrongful death statute could be brought first by the surviving spouse, then if he or she failed to sue within six months, by the minor children. § 4217, RSMO 1919. All actions for wrongful death had to be brought within one year from death. § 4221, RSMO 1919. In this case the widow filed and dismissed a suit within six months. She was permitted to file a new suit eight months after death, even though there were minor children.

42. If this reasoning had been applied in *Stock Yards*, the widow and children

a single surviving class of beneficiaries, or a class which has appropriated the cause of action within the first year, shall have the full two years in which to sue; thus this principle embodies a liberal reading of the statute by the courts. Its uniform application advances the goal of compensating relatives of the deceased by affording them adequate time to prepare suit.

According to another principle dealing with the sequential timing of beneficiaries' claims, the wrongful death claim passes to another class of beneficiaries if not enforced by one class during the specified period.⁴³ There has been no uniform interpretation of what constitutes sufficient "appropriation" of a claim to entitle a preferred class of beneficiaries to the full two year limitations period in which to sue. According to early cases, beneficiaries could appropriate a claim only by instituting a suit.⁴⁴ Later cases have ruled that a plaintiff may appropriate the entire cause of action by settling with the tortfeasors without first bringing a suit.⁴⁵ Recently a surviving spouse was allowed to appropriate the claim against all tortfeasors merely by executing a full release of some but not all of them.⁴⁶

The historical trend under this "appropriation principle" is to allow a wider variety of acts by beneficiaries to constitute an appropriation of the wrongful death cause of action. It should have been argued in *Stock Yards* that the filing of the Workmen's Compensation claim was an appropriation of the wrongful death claim by the widow and children. This would have vested the cause of action exclusively in them, giving them the full two years in which to file their wrongful death claim. Such an argument might have succeeded because of the liberal construction in this area, and the absence of contrary authority.⁴⁷

The problem in both *Stock Yards* and *Selsor* focused upon determining when the members of the second class of beneficiaries could cut off the claim of the first class in less than the full two year period of limitations in the wrongful death act. Missouri courts have uniformly held that when there is no act of appropriation by the first class during their shorter one year limitation period, their right is cut off at the end of one year by the existence of a second class of beneficiaries entitled to sue.⁴⁸ While this

should have had the full two years in which to sue. But it has never been applied in cases where there are two classes of beneficiaries, and the first does not appropriate the claim in the shorter period.

43. 536 S.W.2d at 145.

44. *McNamara v. Slavens*, 76 Mo. 329, 331 (1882).

45. *Blessing v. Chicago B. & Q.R.R.*, 357 Mo. 1006, 171 S.W.2d 602 (1943); *Hamilton v. Missouri Pac. Ry.*, 248 Mo. 78, 154 S.W. 86 (1913).

46. *Spencer v. Bradley*, 351 S.W.2d 202 (Mo. 1961).

47. In *King v. Smith Baking Co.*, 228 Mo. App. 721, 71 S.W.2d 115 (K.C. Ct. App. 1934) the court did not really deal with the problem of whether or not the Workmen's Compensation claim was an "appropriation" of the claim for wrongful death, but based the decision on a ruling that the Workmen's Compensation claim was not an "action" such as would toll the statute of limitations.

48. *Forehand v. Hall*, 355 S.W.2d 940 (Mo. 1962); *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W.2d 1 (1937); *Barker v. Hannibal & St. J. Ry.*, 91

"shorter limitation period principle" has been uniformly applied, one might question whether it is logically consistent. It conflicts with the "longer limitation period principle" by shortening the period of limitations solely for the reason that there is more than one class of beneficiaries.⁴⁹ A logical interpretation of this statute would have been to allow the wrongful death claim to be maintained anytime within the two year period of limitations by anyone entitled to do so, but should a spouse or minor child survive, the parents would not be able to appropriate the claim unless the spouse or child failed to appropriate within the one year preferential period.⁵⁰ The first class would then lose only its preferential right, not the entire opportunity to bring a suit.

In his dissent in *Stock Yards*, Judge Bardgett suggested that the above interpretation could be reached most easily by following the lead of the Supreme Court of Massachusetts in *Gaudette v. Webb*⁵¹ and recognizing a common law action for wrongful death. As a result, wrongful death statutes would no longer be strictly construed. The limitations period in the death act would become a limit upon the *remedy*, not the right to sue, and defendants could plead only the two year limitations period as a bar to plaintiff's remedy.⁵² The court decided in an earlier case not to recognize that a common law action for wrongful death existed in Missouri prior to enactment of the first wrongful death statute.⁵³ It should reconsider that decision in view of the length of time since the case was decided, the persuasive arguments in *Gaudette*,⁵⁴ and the failure of the Missouri Legislature to take action.⁵⁵

In construing the wrongful death statute, courts should remember that the purpose of the Act is to provide compensation for those who have

Mo. 86, 14 S.W. 280 (1886); *Coover v. Moore*, 31 Mo. 574 (1862); *Wessels v. Gipfel*, 522 S.W.2d 653 (Mo. App., D. St. L. 1975).

49. See notes 40-42 and accompanying text *supra*.

50. See *Davis, Wrongful Death*, 73 WASH. U.L.Q. 327, 356 (1973).

51. 362 Mass. 60, 284 N.E.2d 222 (1972).

52. In *Gaudette* the court decided that the right to recover for wrongful death was of common law origin, and therefore the statute itself did not create the right to recover. It was held that statutes limiting the period for bringing a wrongful death action should be construed in the same manner as general statutes of limitations, and should be tolled by all the provisions which would toll the general statutes of limitations. 362 Mass. at 71, 284 N.E.2d at 229.

53. *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609, 614 (Mo. 1965), *appeal dismissed*, 385 U.S. 5 (1966).

54. 362 Mass. 60, 284 N.E.2d 222 (1972). See also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970). The Supreme Court held that an action for wrongful death existed under general maritime law, reversing the rule of maritime law that absent a statute, there can be no recovery for wrongful death.

55. In 1971 the Missouri Bar Association approved a revised wrongful death act. It eliminated the worst problems of the statute by abolishing the preferred system of beneficiaries, and making all tolling provisions in the general statutes of limitations applicable to wrongful death. The proposed act was introduced into the Missouri Legislature in 1971, but failed to pass. For the text of the proposed revision see *Davis, Wrongful Death*, 73 WASH. U.L.Q. 327, 369-78 (1973).

been deprived of the benefit of a familial relationship. There is no policy reason to treat the limitations period differently in wrongful death than in other tort actions. For defendants, there are no greater problems in preparing evidence for trial than in other accident cases.⁵⁶ For the plaintiffs, the fact that periods of limitations are treated differently from general statutes of limitations often creates confusion and misunderstanding. It frequently leads to an otherwise qualified beneficiary forfeiting the right to recover for the loss of the family wage earner. The court can alleviate such harsh results by construing the wrongful death statute so as to carry out its clear compensatory purpose.

Technically, the court's interpretation of the limitations period in *Stock Yards* was correct. However, it was based on earlier decisions which strictly construed the wrongful death statute as in derogation of the common law. As the *Stock Yards* dissent pointed out, it is questionable whether the wrongful death cause of action really is in derogation of the common law.⁵⁷ If the wrongful death statute is to fulfill its liberal compensatory purpose, this strict constructionist attitude must be eliminated. The courts would be unrealistic to wait for the problem to be solved by the legislature; plaintiffs deprived of wrongful death claims are unlikely to join together to lobby the legislature for change in the wrongful death laws. Courts should not lightly overrule many years of case precedent, but in this instance, the burden of reform has clearly fallen on the courts. The court should consider the words of the United States Supreme Court when they decided to overrule prior case law stating that there was no general maritime wrongful death cause of action other than that provided for by statute.⁵⁸ The Court was impressed by the "weighty considerations" underlying *stare decisis*, but concluded that "a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason. . . ."⁵⁹ The decision in *Stock Yards* should be reconsidered at the earliest possible opportunity. Until that time, plaintiffs facing a period of limitations problem under the wrongful death act must bring their claims within the scope of the areas where liberal policies already have been allowed.

MARY C. DOESBURG

56. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1296 (1956).

57. 536 S.W.2d at 150-56.

58. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970).

59. *Id.* at 405.

