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TORTS—DAMAGES—UNDER NEW JERSEY'S WRONGFUL DEATH ACT, AN
AWARD OF THE PECUNIARY VALUE OF THE PARENTS' LOSS OF
THEIR CHILD'S COMPANIONSHIP, ADVICE AND
GUIDANCE IS APPROPRIATE.

Green v. Bittner (N.J. 1980)

While on a date in the spring of her senior year at high school, Donna Green was killed in an automobile accident.¹ Her parents and minor siblings brought an action for her wrongful death under New Jersey's Wrongful Death Act.² The defendant was found liable for Ms. Green's death, and a separate trial was held to determine damages.³ At that trial, the jury was instructed that Ms. Green's survivors could be compensated for any pecuniary losses they suffered because of her death,⁴

1. *Green v. Bittner*, 85 N.J. 1, 3, 424 A.2d 210, 211 (1980). Donna was described as 'everybody's daughter'; a level-headed and dependable young woman, hard-working and conscientious both at home and at school. *Id.* at 3-4, 424 A.2d at 211.

2. *Id.* at 4, 424 A.2d at 211. The pertinent section of New Jersey's Wrongful Death Act provides in part:

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured

2A N.J. STAT. ANN. § 31-1 (West 1952). For the full text of the Wrongful Death Act, *see* 2A N.J. STAT. ANN. §§ 31-1 to 31-6 (West 1952 & Supp. 1980-1981).

3. 85 N.J. at 4, 424 A.3d at 211. With respect to damages, the New Jersey Wrongful Death Act provides:

In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased, to the persons entitled to any intestate personal property of the decedent.

2A N.J. STAT. ANN. § 31-5 (West Supp. 1980-1981).

4. 85 N.J. at 5, 424 A.2d at 212. The trial court charged the jury that its assessment of damages, in accordance with § 31-5 of the Wrongful Death Act, was to reflect only past, present and future pecuniary losses to the survivors, including any direct financial contributions that the decedent might have made, but was not to include compensation for grief and sentimental losses. As to the losses sustained by the decedent's minor brothers and sisters, the judge stated that the jury should consider the service, assistance, guidance and training afforded them by the decedent, as well as the probabilities of whether and how long the decedent would have continued to have made such contributions. *Id.* at 5-6, 424 A.2d at 212. With regard to the parents' losses, the trial judge explained that the jury should consider the household services, such as babysitting and cleaning, that the decedent had performed in the past, and the likelihood of any additional household chores which she would have undertaken had she lived. *Id.*

but that this sum should be offset by what it would have cost Ms. Green's parents to support her until her majority.⁵ The jury returned a verdict of no damages.⁶ The plaintiffs' motion for a new trial on damages was denied,⁷ and, on appeal, the New Jersey Superior Court Appellate Division affirmed.⁸

The Supreme Court of New Jersey reversed and remanded for a new trial on the issue of damages,⁹ holding that in a wrongful death action brought for the death of a child, the jury should be allowed, under appropriate circumstances, to award damages for the pecuniary value of the parents' loss of their child's companionship, advice and guidance as they grow older. *Green v. Bittner*, 85 N.J. 1, 424 A.2d 210 (1980).

In the landmark English case of *Baker v. Bolton*,¹⁰ Lord Ellenborough established the rule that in a civil court the death of a human being could not be complained of as an injury.¹¹ Consequently, it was to the defendant's benefit to kill the victim rather than to merely injure him.¹² This anomalous result was changed by the passage of the Fatal Accidents Act of 1846,¹³ more commonly known as Lord Campbell's Act.¹⁴ Although the language of the Act, as it related to damages,

5. *Id.* at 6, 424 A.2d at 212. From the value of the decedent's household services, the jury was instructed to deduct what it would have cost to feed, clothe, and educate the decedent until her majority. *Id.*

6. *Id.*

7. *Id.* The trial judge concluded that a clear and convincing miscarriage of justice had not occurred, since it would have been reasonable for the jury to conclude that the value of the decedent's household services, such as babysitting and drying dishes, was exceeded by the cost to the family of feeding, clothing and educating her. *Id.* He noted that the jury followed the literal language of the statute in reaching its decision. *Id.* The judge further commented that it is unusual for a jury to return a verdict of no recovery. *Id.*

8. *Id.* The denial of the plaintiffs' motion for a new trial was affirmed in an unreported opinion. *Id.*

9. *Id.* at 4, 424 A.2d at 211. Chief Justice Wilentz, joined by Justices Sullivan, Pashman, Schreiber, Handler and Pollock, delivered the opinion of the court. Justice Clifford did not participate.

10. 170 Eng. Rep. 1033 (K.B. 1808).

11. *Id.*

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 902 (4th ed. 1971). Prosser refers to the familiar legend, quite unfounded, that "this was the original reason that passengers in Pullman car berths rode with their heads to the front" and that "fire axes in railroad coaches were provided to enable the conductor to deal efficiently with those who were merely injured." *Id.* at 902 n.43.

13. See Fatal Accidents Act, 1846, 9 & 10 Vict., c.93. The Act provided for compensatory damages and the jury was to award such damages as it felt were "proportioned to the injury resulting from such death." *Id.* at c.93, § 2.

14. See W. PROSSER, *supra* note 12, at 902.

supported a broad construction,¹⁵ it was soon held that damages for fatal accidents should be limited to pecuniary losses.¹⁶

Every American state currently has a wrongful death statute,¹⁷ and most are modeled after Lord Campbell's Act.¹⁸ And as with Lord Campbell's Act, most American statutes have been interpreted to limit recovery to pecuniary loss.¹⁹ The most common element of damages for the death of a minor is the contribution which he would have made in the form of earnings or services from the date of death, or, infrequently, from the date of injury, until he would have reached his majority.²⁰ This amount is reduced by the probable expense of rearing the child during that period.²¹ In addition to recovery for contributions which a child would have made *during* his minority, a majority of states allow parents to recover for the contributions of earnings or services which the parents might reasonably have expected from the child *after* his majority.²²

15. See note 13, *supra*.

16. See *Blake v. Midland Ry. Co.*, 118 Eng. Rep. 35 (Q.B. 1852). The *Blake* court was concerned with the difficulty of evaluating the intangible emotional injuries resulting from a wrongful death. *Id.* at 42.

17. For a state-by-state analysis, see Belfance, *The Inadequacy of Pecuniary Loss as a Measure of Damages in Actions for the Wrongful Death of Children*, 6 OHIO N.U.L. REV. 543 (1979); Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME L. REV. 197 (1971).

18. See W. PROSSER, *supra* note 12, at 902. New Jersey's original wrongful death statute was a virtual copy of Lord Campbell's Act.

19. See W. PROSSER, *supra* note 12, at 907. Pecuniary loss has been defined as the reasonable expectation of pecuniary benefit from the continued life of the deceased. BLACK'S LAW DICTIONARY 1018 (5th ed. 1979). See, e.g., *Butler v. Steck*, 146 Conn. 114, 148 A.2d 246 (1959); *Hooper Const. Co. v. Drake*, 73 So.2d 279 (Fla. 1954); *Denton v. Midwest Dairy Products Corp.*, 284 Ill. App. 279, 1 N.E.2d 807 (1936); *Cardamon v. Iowa Lutheran Hosp.*, 256 Iowa 506, 128 N.W.2d 226 (1964); *Burke v. Burnham*, 97 N.H. 203, 84 A.2d 918 (1952); *Gluckauf v. Pine Lake Beach Club, Inc.*, 78 N.J. Super. 8, 187 A.2d 357 (Super. Ct. App. Div. 1963); *Hogsett v. Hanna*, 41 N.M. 22, 63 P.2d 540 (1937); *Candle v. Southern Ry. Co.*, 242 N.C. 466, 88 S.E.2d 138 (1955); *Hansen v. Mayes*, 175 Or. 358, 154 P.2d 202 (1944).

20. Annot., 14 A.L.R.2d 485, 502 (1950 & Supp. 1973). Such damages are allowed by Ark., Cal., Colo., Fla., Hawaii, Ind., Iowa, Kan., La., Me., Md., Mich., Miss., Mo., Mont., Neb., N.J., N.Y., N.C., N.D., Okla., Or., Pa., Tex., and Wash. *Id.* at 502-05. Additionally, most courts have agreed that if a parent has incurred funeral, medical or other expenses as a result of the death of a child, an award may be made for such expenses as a part of the pecuniary loss. *Id.* at 535.

21. *Id.* at 504. If the child had been supporting himself, the court may eliminate this element from the consideration of the jury. *Id.*

22. Annot., 14 A.L.R.2d 485, 506-09 (1950 & Supp. 1973 & 1979); Decof, *supra* note 17, at 198-99, 213-28. States that allow the recovery of post-majority contributions include: Ariz., Ark., Cal., Colo., D.C., Ill., Kan., Md., Mich., Minn., Miss., Mo., Mont., Neb., N.J., N.Y., N.C., Ohio, Okla., S.D., Tex., Utah, Vt., Va., and Wis. Annot., 14 A.L.R.2d 485, 506-09.

In a few jurisdictions it has been held that past systematic and consistent contributions to the parents by the deceased minor are a condition

In 1960, the Michigan Supreme Court, in the groundbreaking decision of *Wycko v. Gnodtke*,²³ relaxed the strict pecuniary approach to damages for a child's wrongful death by holding that the loss of companionship sustained by a parent as a result of a child's death is a compensable loss.²⁴ The *Wycko* court examined the traditional pecuniary loss rule and found it to be a product of the child-labor era.²⁵ The court, conceding that the damages must be based upon the pecuniary value of a human life, concluded that an individual member of a family has a value to others as part of a functioning social and economic unit.²⁶

precedent to a recovery for the loss of such benefits after the child's majority. See, e.g., *Missouri Pac. Ry. Co. v. McKinney*, 189 Ark. 69, 71 S.W.2d 180 (1934); *Memphis, D. & G. Ry. Co. v. Buckley*, 99 Ark. 422, 138 S.W. 965 (1911); *St. Louis, I.M. & S. Ry. Co. v. Davis*, 55 Ark. 462, 18 S.W. 628 (1892); *Gulf Refining Co. v. Miller*, 153 Miss. 741, 121 So. 482 (1929); *Cumberland Tel. & Tel. Co. v. Anderson*, 89 Miss. 732, 41 So. 263 (1906). A similar rationale has given rise to the rule that if a child was too young at death to have earned wages, no award for post-majority contributions can be made. See *Missouri Pac. Transp. Co. v. Parker*, 200 Ark. 620, 140 S.W.2d 997, cert. denied, 311 U.S. 696 (1940).

Another method of ascertaining damages for the wrongful death of a child is the "lost investment" theory. See Decof, *supra* note 17, at 200-01. With this approach, damages awarded to the surviving parents include funds spent by them in rearing and caring for the child. *Id.* This theory was established by the Michigan Supreme Court. See *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960). In *Wycko*, the court held that damages could be measured, in part, by "the expenses of birth, of food, of clothing, of medicines, of instruction, of nurture, and shelter." *Id.* at 339, 105 N.W.2d at 122.

23. 361 Mich. 331, 105 N.W.2d 118 (1960).

24. *Id.* at 336, 105 N.W.2d at 122. *Wycko* was later overruled in *Breckon v. Franklin Fuel Co.*, 383 Mich. 251, 174 N.W.2d 836 (1970). The Michigan legislature responded by amending its wrongful death statute to include recovery for the loss of companionship. See MICH. COMP. LAWS § 600.2922 (Callaghan 1974).

25. 361 Mich. at 335-37, 105 N.W.2d at 120-21. The court stated:

It is not surprising that the courts of such a society should have read into the statutory words "such damages as they [the jury] may think proportional to the injury resulting from such death" not only the requirement of a pecuniary loss, but moreover, a pecuniary loss established by a wage benefit-less-costs measure of damages. Other losses were unreal and intangible and at this time in our legal history the courts would have no truck with what Chief Baron Pollock termed . . . "imaginary losses."

Id. at 336-37, 105 N.W.2d at 121, quoting *Duckworth v. Johnson*, 157 Eng. Rep. 997 (Exch. 1859). The court expressed its dismay that the development of the law in this area had failed to parallel the enlightened social conscience:

That this barbarous concept of the pecuniary loss to a parent from the death of his child should control our decisions today is a reproach to justice Yet there still exists in the law . . . precedents we alone honor [which] tell us that the value of the life of a child must be measured solely by the standards of the day when he peddled the skill of his hands and the strength of his back at the factory gates.

361 Mich. at 337-38, 105 N.W.2d at 121.

26. 361 Mich. at 339, 105 N.W.2d at 122.

The *Wycko* court defined this value as "the value of mutual society and protection, in a word, companionship."²⁷

Since the *Wycko* decision, several states have abrogated or modified the traditional pecuniary loss rule by attaching pecuniary value to non-economic interests, such as parents' loss of society and companionship, as well as loss of care, guidance and support.²⁸ A small number of states expressly permit recovery for emotional injury in the wrongful death of a child.²⁹

New Jersey subscribes to the majority rule³⁰ that recovery in any wrongful death action is limited to pecuniary loss.³¹ The two major reasons advanced for not recognizing emotional harm as a basis for compensation in wrongful death actions are the subjectivity of non-corporal injuries³² and the fear that sympathetic juries will return

27. *Id.* at 339-40, 105 N.W.2d at 122 (footnote omitted).

28. See Belfance, *supra* note 17, at 553, 557-60; Decof, *supra* note 17, at 205-07. These states include Ala., Ariz., Ark., Cal., Fla., Hawaii, Idaho, Kan., La., Md., Mich., Minn., Miss., Neb., Nev., S.C., S.D., Tex., Utah, Va., Vt., Wash., Wis., and Wyo. See also 14 A.L.R.2d 485, 498-500; 85 N.J. at 13 n.4, 424 A.2d at 216 n.4.

29. See Decof, *supra* note 17, at 206. The statutes of three states allow recovery for mental anguish. Arkansas' wrongful death statute permits recovery for such damages as the jury may deem fair and just, including loss of services and companionship of the spouse and/or mental anguish resulting from such death, to the surviving spouse and next of kin of the deceased. ARK. STAT. ANN. § 27-909 (1979). The Florida wrongful death statute provides: "Decedent's parent may recover, not only for loss of services of such minor child, but also such sum for the mental pain and suffering of the parent . . . as the jury may assess." FLA. STAT. ANN. § 768.03 (1964). Maryland's statute provides that damages may include compensation for "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education where applicable." MD. ANN. CODE art. 67, § 4 (1957).

30. See note 19 and accompanying text *supra*. For the text of the New Jersey Wrongful Death Act regarding damages, see note 3 *supra*.

31. See, e.g., Graf v. Taggart, 43 N.J. 303, 308-09, 204 A.2d 140, 143-44 (1964); Bohrman v. Pennsylvania R.R. Co., 23 N.J. Super. 399, 405, 93 A.2d 190, 194-95 (Super. Ct. App. Div. 1952); Cooper v. Shore Elec. Co., 63 N.J.L. 558, 567, 44 A. 633, 636 (Ct. Err. & App. 1899). In *Cooper*, the court stated that "the pecuniary injury designated by the statute is nothing more than a deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased." 63 N.J.L. at 567, 44 A. at 636.

32. See Decof, *supra* note 17, at 206. In recent years, however, most courts have agreed that emotional distress is capable of medical proof. Note, *Recovery for Negligently Inflicted Mental Distress Permitted to Mother Who Witnessed the Violent Death of her Child Even Though the Mother Was Outside Line of Danger*, 25 VILL. L. REV. 195, 197 n.13 (1979-1980). It should be noted that a separate cause of action is available in New Jersey which permits recovery for physical and emotional injuries sustained when a parent actually witnesses a child's death. See *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980). See also Annot., 145 A.L.R. 1104 (1943).

excessive verdicts.³³ Furthermore, until *Green v. Bittner*,³⁴ New Jersey was one of only a handful of states adhering to the traditional narrow view of pecuniary loss.³⁵ Prior to the *Green* decision, the New Jersey courts had consistently taken the position that damages in the wrongful death of a child were to be measured by the deprivation of the probable earnings of the child during minority and the services which the child might have rendered during his minority, had he survived.³⁶ *May v. West Jersey & S.R. Co.*³⁷ exemplifies the traditional approach. The decedent in *May* was a fifteen year old boy who, at the time of his death, had an earning capacity of about twenty dollars per month.³⁸ The court held that the father's recovery was limited to the damages represented by the boy's earning capacity until he reached his majority, and not beyond that time.³⁹

In the second half of this century, New Jersey courts began to make inroads on the strict pre-majority lost wages and services rule by allowing juries to consider evidence concerning the possibility of post-majority direct financial help to survivors.⁴⁰ *McStay v. Przychocki*⁴¹ involved the wrongful death of two boys, aged ten and twelve.⁴² The court stated that the probable earnings of the two boys during their minority were

33. W. PROSSER, *supra* note 12, at 907-08.

34. 85 N.J. 1, 424 A.2d 210.

35. See notes 20-22 and accompanying text *supra*.

36. See, e.g., *Wimberly v. City of Paterson*, 75 N.J. Super. 584, 183 A.2d 691 (Super. Ct. App. Div. 1962); *Clifford v. McCloskey*, 13 N.J. Super. 96, 80 A.2 134 (Super. Ct. Law Div. 1951).

37. 62 N.J.L. 67, 42 A. 165 (Sup. Ct. 1899).

38. *Id.* at 67, 42 A. at 165.

39. *Id.*

40. See, e.g., *Bohrman v. Pennsylvania R.R. Co.*, 23 N.J. Super. 399, 405, 93 A.2d 190, 194-95 (Super. Ct. App. Div. 1952). In *Bohrman*, the decedent was an eighteen year old who worked in her father's beauty shop and assisted her mother with the cooking, cleaning, washing, ironing, and care of the house. *Id.* at 401-02, 93 A.2d at 191. In finding that an award of \$15,000 for her death was not excessive, the *Bohrman* court stated:

Not only were her parents deprived of her probable earnings during her minority . . . but they were also deprived of the reasonable expectancy of contributions of a pecuniary nature which decedent might have made after reaching her majority. These are proper elements to be considered together with the loss of direct services, having a money value, which would have been rendered during the minority in and about the home and beauty shop.

Id. at 408, 93 A.2d at 195.

41. 7 N.J. 456, 81 A.2d 761 (1951).

42. *Id.* at 456, 81 A.2d at 763. The two boys were described by the court as bright, healthy, normal boys, who did well in school, actively helped with the work in and about the home, and assisted in caring for the younger children. *Id.* at 460, 81 A.2d at 763. During the summer preceding his death, the twelve year old had earned between three and five dollars per week as a newspaper boy. *Id.* On these facts, the *McStay* court sustained a verdict of \$6,000 as damages for the death of each child. *Id.* at 464, 81 A.2d at 765.

proper elements of damage, as was the estimated value of direct services they might have rendered their mother during their minority.⁴³ In addition, the court found that damages based on a reasonable expectation of financial contributions which the boys might have made *after* reaching their majority could also be awarded.⁴⁴

Until the *Green* decision, the pecuniary loss of a child's anticipated companionship or support was not regarded as compensable by the New Jersey courts.⁴⁵ And, recognizing the limitations imposed by the New Jersey Wrongful Death Statute,⁴⁶ which restricts recovery to pecuniary loss,⁴⁷ the New Jersey courts have uniformly denied compensation for emotional loss sustained by parents.⁴⁸

Against this background, Chief Justice Wilentz, writing for the court, addressed the correctness of the jury instructions given in *Green*⁴⁹ and decided that the focus on the value of household chores⁵⁰ was substantially in accord with decisional law.⁵¹ He noted, however, that case law did not preclude an instruction concerning the pecuniary value of the companionship and advice which the decedent might have rendered her parents in later years.⁵²

43. *Id.* at 459, 81 A.2d at 764.

44. *Id.* at 462, 81 A.2d at 764.

45. 85 N.J. at 9, 424 A.2d at 214. No cases prior to *Green v. Bittner* can be found in which the court has discussed the possibility of separating the economic elements of companionship and support from the non-economic elements of damages.

46. See 2A N.J. STAT. ANN. §§ 31-1 to 31-6 (West 1980 & Supp. 1981).

47. For the text of the section governing damages, see note 3 *supra*.

48. See *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964). The *Graf* court declared "[our] courts have consistently construed pecuniary loss to exclude damages for mental suffering and loss of society." *Id.* at 308-09, 204 A.2d at 144. See, e.g., *McStay v. Przychocki*, 7 N.J. 456, 460, 81 A.2d 761, 763 (1951); *Brennan v. Biber*, 93 N.J. Super. 351, 369, 225 A.2d 742, 752 (Super. Ct. Law Div. 1966); *Bohrman v. Pennsylvania R.R. Co.*, 23 N.J. Super. 399, 405, 93 A.2d 190, 193 (Super. Ct. App. Div. 1952).

New Jersey courts have, however, allowed recovery for emotional injury to parents in at least two areas of tort law. See, e.g., *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980) (allowing father to recover damages for emotional injury suffered as the result of witnessing his child's death); *Magee v. Holland*, 27 N.J.L. 86 (Sup. Ct. 1856) (allowing father to recover damages to redress his wounded feelings following the abduction of his three children).

49. 85 N.J. at 6-7, 424 A.2d at 212-13.

50. See note 5 *supra*.

51. 85 N.J. at 6, 424 A.2d at 212; see notes 40-48 and accompanying text *supra*. The court suggested that the limits on parental recovery may be at least partially due to the "apparent absence in infant death cases of the kind of expert testimony that might have helped courts to perceive a greater extent of loss than previously recognized." 85 N.J. at 11, 424 A.2d at 215. For a discussion of the current use of expert testimony to prove damages for the wrongful death of a child, see *Decof*, *supra* note 17, at 207-11.

52. 85 N.J. at 7, 424 A.2d at 213. See, e.g., *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *McStay v. Przychocki*, 7 N.J. 456, 81 A.2d 761 (1951); *Cooper v. Shore Elec. Co.*, 63 N.J.L. 558, 44 A. 633 (Ct. Err. & App. 1899); *Brennan v. Biber*, 93 N.J. Super. 351, 225 A.2d 742 (Super. Ct. Law Div.

Chief Justice Wilentz, in considering the desirability of express approval of recovery for loss of companionship and advice, proceeded to discuss the double standard that exists in measuring damages in wrongful death cases.⁵³ In contrast to the limited recovery available to a parent in the event of a child's death,⁵⁴ children have long been able to recover the pecuniary value of the guidance and counsel lost as a result of the parent's death.⁵⁵ The court noted that this double standard was not statutorily mandated,⁵⁶ and that the desire to abolish it was probably a significant factor in the expansion of recovery for the wrongful death of a child in other states.⁵⁷ The court also found that the concern with the inability to place a monetary value on a child's companionship and advice is no longer persuasive in view of the fact that damages are regularly awarded in wrongful death cases despite these difficulties.⁵⁸ Chief Justice Wilentz went on to say that just as the law recognizes that a child may continue to perform household services for, and make financial contributions to, his parents after reaching his majority, it

1966); *Bohrman v. Pennsylvania R.R. Co.*, 23 N.J. Super. 399, 93 A.2d 190 (Super. Ct. App. Div. 1952). Noting that counsel for the plaintiff had not requested such an instruction, Chief Justice Wilentz commented that in no prior case had an attorney attempted to separate the emotional from the pecuniary aspects of loss of society and companionship and seek recovery for the latter. 85 N.J. at 18, 424 A.2d at 219.

53. 85 N.J. at 7-9, 424 A.2d at 213.

54. See notes 35-48 and accompanying text *supra*.

55. 85 N.J. at 7-8, 424 A.2d at 213.

56. *Id.* at 11, 424 A.2d at 215. In New Jersey, as in most states, there is no special statute for the wrongful death of a child; wrongful death actions for the death of a parent or child are tried under the same wrongful death statute. See W. PROSSER, *supra* note 12, at 902.

57. 85 N.J. at 7, 424 A.2d at 213.

58. 85 N.J. at 15, 424 A.2d at 217. Chief Justice Wilentz stressed that New Jersey courts currently allow pecuniary damages for the *prospective* loss of a child's wages and household services even though such loss is speculative and the damages difficult to estimate. *Id.*, citing *Cooper v. Shore Elec. Co.*, 63 N.J.L. 558, 567, 44 A. 633, 636 (Ct. Err. & App. 1899); *Paulmier v. Erie R.R. Co.*, 34 N.J.L. 151, 158 (Sup. Ct. 1870); *McStay v. Przychocki*, 10 N.J. Super. 455, 458, 77 A.2d 276, 278 (Super. Ct. App. Div. 1950). Moreover, Chief Justice Wilentz added, when a parent dies, loss of advice, guidance and counsel is allowed to the surviving children without any showing that the parent had actually been rendering valuable advice or was likely to do so. 85 N.J. at 15, 424 A.2d at 217. In both types of cases, he observed, "the proof that suffices is the parent-child relationship and what we assume the jury can conclude from that relationship alone." *Id.* Chief Justice Wilentz declared that "[i]t will be up to the jury to decide what services would have been rendered, and what their value is, subject to no more or no less control, direction, and guidance from the court than occurs in other wrongful death cases." *Id.* at 16, 424 A.2d at 218. However, he observed, the use of an expert, as well as such detailed information concerning family circumstances as is available, could be most helpful in these, as in all, wrongful death cases. *Id.* at 17, 424 A.2d at 218. The Chief Justice concluded that the jury should not be left to pure conjecture on these matters. *Id.*

should similarly recognize that a child may provide valuable companionship and care to his parents if or when they become aged or infirm.⁵⁹

Having concluded that there was no persuasive reason *not* to allow parents to recover for the loss of a child's companionship and advice, the court considered the correct measure of damages.⁶⁰ The Chief Justice stressed that recovery would be limited to the pecuniary element of companionship and advice,⁶¹ despite the fact that such a limitation denies a parent compensation for his emotional suffering, which is the true loss.⁶² He explained that the limitation is one of legislative mandate and that the judiciary does not have the discretion to waive it.⁶³

The court proceeded to analyze: 1) the pecuniary value to be placed on a child's companionship,⁶⁴ and 2) the value to be placed on a child's advice and guidance.⁶⁵ The court held, as a matter of law, that the value of a child's companionship compensable under the wrongful death statute is the fair market cost of comparable companionship purchased from a stranger.⁶⁶ This element of companionship was defined as those services "substantially equivalent to those provided by the 'companions' often hired today by the aged or infirm, or substantially equivalent to services provided by nurses or practical nurses."⁶⁷ Chief Justice Wilentz

59. 85 N.J. at 11, 424 A.2d at 215. Moreover, in the Chief Justice's view, the loss of companionship and advice which a parent suffers upon the death of a child is sometimes as great as that suffered by a child upon a parent's death. *Id.* at 11-12, 424 A.2d at 215.

60. *Id.* at 12-17, 424 A.2d at 215-18.

61. *Id.* at 12, 424 A.2d at 215.

62. *Id.* at 12-13, 424 A.2d at 216. Chief Justice Wilentz noted that, given New Jersey's vastly expanded scope of tort liability and of recoverable damages, there is no public policy which would prohibit awarding damages to fully compensate for the emotional loss and suffering caused by a child's death. *Id.* at 13, 424 A.2d at 216. Moreover, the court observed that as early as 1964, the New Jersey Supreme Court had taken note of the growing number of jurisdictions which had abandoned the pecuniary loss rule altogether or interpreted pecuniary loss to cover such items as loss of society or companionship. *Id.* at 13 n.4, 424 A.2d at 216 n.4, citing *Graf v. Taggart*, 43 N.J. 303, 308-09 n.1, 204 A.2d 140, 143 n.1 (1964).

63. 85 N.J. at 13, 424 A.2d at 216.

64. *Id.* at 12-13, 424 A.2d at 215-16.

65. *Id.* at 14, 424 A.2d at 216-17.

66. *Id.* at 12, 424 A.2d at 215-16. Chief Justice Wilentz added that no compensation can be allowed for the parents' lost prospective emotional satisfaction that would have been derived from the child's performance of caretaking and companionship services, as opposed to that of a stranger. *Id.* at 12, 424 A.2d at 216. The court noted that even though "such pleasure will often be the primary value of the child's service, indeed, in reality, its most beneficial aspect," the loss of this type of satisfaction is more akin to emotional suffering than to pecuniary loss and thus cannot be recovered under the statute. *Id.* at 12-13, 424 A.2d at 216.

67. *Id.* at 12, 424 A.2d at 215. Chief Justice Wilentz carefully scrutinized the type of lost services to which a pecuniary value could be attached:

Hired companions today perform a variety of services, primarily, however, simply keeping the employer company and administering to basic needs. They may prepare and serve meals, do grocery shop-

maintained that to allow for the pecuniary loss of a child's companionship is consistent with prior decisions and is an extension of recovery only in the sense that prior cases had not explicitly recognized this element of damage.⁶⁸ The court also held, as a matter of law, that the value of a child's advice, guidance and counsel is the fair market cost of similar services purchased from a professional.⁶⁹

Chief Justice Wilentz concluded by predicting that allowing juries under appropriate circumstances to award damages for the parents' loss of their child's companionship and advice will result in verdicts which will more closely reflect the actual pecuniary losses suffered.⁷⁰ The Chief Justice noted that in the past, juries have wanted to give awards to parents for emotional loss, but having been instructed that they could not, have often set an unrealistically high value on household chores.⁷¹

It is submitted that given the statutory constraints placed on the *Green* court,⁷² Chief Justice Wilentz appropriately modified New Jersey's approach to compensation for the wrongful death of a child. In allowing recovery for loss of companionship and advice,⁷³ New Jersey has joined the ranks of progressive and forward looking jurisdictions.⁷⁴

ping, perform other errands, keep the home tidy, give medicines, make telephone calls, and generally make themselves useful—including making it possible for the employer to be outdoors. Care given by children to aging and infirm parents is often indistinguishable from those services. Children also often provide many of the services ordinarily rendered by practical nurses, such as bathing the bedridden, changing bandages, moving an immobilized patient, administering medication, spoon-feeding invalids, preparing special meals, keeping a sickroom tidy—even removing visitors if they tire the invalid.

Id. at 12 n.2, 424 A.2d at 215 n.2.

68. *Id.* at 17-18, 424 A.2d at 218. See note 52 and accompanying text *supra*.

69. 85 N.J. at 14, 424 A.2d at 216-17. As with the loss of companionship, Chief Justice Wilentz maintained that compensable loss in this regard is devoid of emotional elements: "[I]t is certainly not the loss of the pleasure which accompanies such an exchange [which is compensable] It must be the kind of advice, guidance or counsel that could be purchased from a business adviser, a therapist, or a trained counselor, for instance." *Id.*

70. *Id.* at 19, 424 A.2d at 219.

71. *Id.* at 18-19, 424 A.2d at 219. The court noted that juries often attempt to "find a way to do some kind of justice despite the judge's charge." *Id.* at 19, 424 A.2d at 219. Chief Justice Wilentz remarked:

A compassionate jury, wanting to give the parents something substantial for their emotional loss but being told, in effect, that the measure of recovery is the value of the household chores that might have been performed less the future cost to the parents of maintaining the child, is inclined to set an unrealistically high value on those household chores. A more conscientious jury will add up the numbers and come in with zero.

Id. at 18-19, 424 A.2d at 219.

72. See note 3 *supra*.

73. See notes 59-63 and accompanying text *supra*.

74. For a list of states which allow recovery for parental loss of interests such as society and companionship or care, guidance and support, see note 28 *supra*.

It is suggested, however, that allowing recovery for the pecuniary value of a child's lost wages, services, companionship and advice, but not for the emotional suffering occasioned by the child's death, is a sorely inadequate remedy, albeit the only one within the power of the New Jersey judiciary to award.⁷⁵

It is submitted that the New Jersey legislature should modify the present Wrongful Death Statute to explicitly permit recovery for non-pecuniary losses.⁷⁶ It is suggested that disturbance or destruction of the family relationship should be an element of damages.⁷⁷ Courts have recognized that a child is an integral part of the family unit,⁷⁸ and there is precedent in other areas of the law for allowing recovery for interference with the family relationship.⁷⁹

It is further suggested that compensatory damages should be allowed for the emotional harm suffered as a result of a child's death. Subjective measurement of emotional harm suffered is not beyond the scope of present psychological knowledge.⁸⁰ Moreover, New Jersey courts have allowed recovery for emotional distress in other tort actions.⁸¹

75. See notes 61-63 and accompanying text *supra*.

76. This is not to suggest that pecuniary damages should be eliminated. In a relatively small percentage of cases parents do suffer an economic loss upon the death of a child. Children killed near the end of minority often are employed and make financial contributions to the family or have indicated the intent to do so. Moreover, in exceptional cases, contributions to the family are established at a relatively early age and are capable of proof.

77. See Decof, *supra* note 17, at 206-07.

78. See *Wycko v. Gnotke*, 361 Mich. 331, 105 N.W.2d 118 (1960). The *Wycko* court stated:

[J]ust as an item of machinery forming part of a functioning industrial plant has a value over and above that of a similar item in a showroom, awaiting purchase, so an individual member of a family has a value to others as part of a functioning social and economic unit.

Id. at 339, 105 N.W.2d at 122.

79. Decof, *supra* note 17, at 206-07. For example, parents have been allowed to recover damages for injury sustained because of the abduction or seduction of their child. *Magee v. Holland*, 27 N.J.L. 86 (Sup. Ct. 1856). One commentator has stated that "[a]lthough various rationales have been employed by the courts in [abduction or seduction] cases, it can reasonably be argued that common to them all is the principle of compensating parents for the temporary loss of the child, its companionship, its society, in other words, the disturbance of the family relationship." Decof, *supra* note 17, at 207.

80. See Goodrich, *Emotional Disturbance as Legal Damages*, 20 MICH. L. REV. 497 (1922); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Note, *Recovery for Negligently Inflicted Mental Distress Permitted to Mother Who Witnessed the Violent Death of her Child Even Though the Mother Was Outside Line of Danger*, 25 VILL. L. REV. 195, 197 n.13 (1979-1980). Most courts, including New Jersey's, agree that emotional distress is capable of medical proof. See *Carter v. Public Service Coord. Transport*, 47 N.J. Super. 379, 136 A.2d 15 (Super. Ct. App. Div. 1957).

81. See notes 48 & 80 *supra*.

It is submitted that recovery for the emotional loss occasioned by a child's death is less speculative than recovery for pecuniary loss because emotional injury, unlike pecuniary loss, can be assessed by looking at the parent-child relationship at the time of the child's death, without speculating about future events.⁸²

It is further submitted that a more stabilizing effect on jury awards would result if the pecuniary loss rule were dropped in favor of an all-inclusive recovery rule.⁸³ Effective legislation could promote uniformity by removing the conflict between rule of law and the impulse of emotion with which juries must struggle in pecuniary loss jurisdictions.⁸⁴

The *Green* court, by continuing to allow juries to compensate for a parent's emotional loss under the guise of compensating for purely pecuniary loss, albeit the only loss recognizable under New Jersey's Wrongful Death Act,⁸⁵ will lend little credibility to future wrongful death awards.⁸⁶

82. Pecuniary loss, on the other hand, must be assessed by speculation as to such factors as the child's longevity, the parent's longevity, the earning capacity of the child, the possibility that the child, had he lived, would have rendered services, financial aid, companionship or advice to his parents, and the value of such services. For a listing of the elements of proof which are usually material in an assessment of pecuniary loss in child death cases, see Decof, *supra* note 17, at 199. For a discussion of Chief Justice Wilentz's reasoning that pecuniary damages in wrongful death cases are highly speculative, see note 58 and accompanying text *supra*.

83. See Finkelstein, Pickrel, & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884, 892-93 (1974). In a nonparametric study conducted to evaluate the effect that statutes expressly providing for recovery for emotional injury have on the size of jury awards, it was found that there is a greater variance in awards in pecuniary loss states than in states which expressly allow recovery for emotional injury. *Id.* An examination of a sampling of large and small awards indicates that the intermittent application of the pecuniary loss rule is the cause of the variance: "When it is applied, the awards are very small[;] when it is 'winked at' by judge and jury bent on doing higher justice, the awards are very large." *Id.* at 892. Prosser has observed that:

As any parent is well aware, any realistic view of the prospects must mean that the cost of rearing the child will far exceed any conceivable pecuniary benefits that might ever be optimistically expected of him; and damages honestly calculated on this basis could never be anything but a minus quantity. Nevertheless, in such cases substantial verdicts have been sustained, where it is very evident that the jury have taken the bull by the horns, and in reality have compensated for the prohibited sentimental aspects of the family relation, with the court benevolently winking at the flagrant violation of the rule it has laid down.

W. PROSSER, *supra* note 12, at 908-09.

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

85. For the pertinent portion of the Wrongful Death Act, see note 3 *supra*.

86. See W. PROSSER, *supra* note 12, at 909. Prosser comments that such rule-bending "[does] not appear very likely to command respect for the administration of justice; but it seems evident that it is the theory which is wrong, and not the result." *Id.*

The *Green* court has, it is suggested, begun the task of freeing itself from a rule lacking both logic and express statutory support.⁸⁷ However, a legislative enactment is long overdue which will more adequately compensate the harm suffered by a parent when a child is killed. It is asserted that the better view would be to allow a jury to award compensatory damages for whatever harm has occurred—emotional or economic, or both.⁸⁸ Such an approach would allow an honest assessment of the real impact which results from the death of a child.

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87. See text accompanying note 56 *supra*.

88. The court would retain its power to control improper jury verdicts. See Speiser & Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions*, 51 TUL. L. REV. 1, 19 (1976).