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**ELLIOTT V. WILLIS—
LOSS OF CONSORTIUM RECOVERABLE
IN WRONGFUL DEATH ACTION**

Under the Illinois Wrongful Death Act,¹ a decedent's family is compensated for damages sustained due to his or her death.² Traditionally, the damages for wrongful death have been measured by various losses³ sustained by survivors.⁴ A controversy arises, however, in determining the proper statutory scope of the term "pecuniary injuries."⁵ Recently, in *Elliott v. Willis*,⁶ the Illinois Appellate Court for the Fourth District addressed the issue of whether loss of consortium is recoverable in wrongful death actions. Favoring a liberal definition of pecuniary loss, the fourth district held that a trial court's refusal to give a jury instruction regarding the loss of consortium in a wrongful death action was reversible error.⁷ Justice Trapp voiced a strong dissent.⁸

In *Elliott*, the decedent Paul Elliott was killed when his car collided with a pick-up truck driven by Hilda Willis.⁹ Elliott's estate prevailed in a wrongful death action against Willis but was denied a proffered jury instruction on loss of consortium.¹⁰ Contending that the jury award was insufficient as a matter of law and that the trial court's refusal to instruct the jury on loss of

1. ILL. REV. STAT. ch. 70, §§ 1, 2 (1979).

2. The Wrongful Death Act provides that an action may be brought against the tortfeasor whenever the death of a person is caused by the wrongful act of another under circumstances that would have permitted the injured to recover if death had not ensued. The action must be brought by the personal representative of the deceased, for the benefit of the widow and next of kin. *Id.*

3. The basis for recovery is the pecuniary value of decedent's life measured by his or her personal characteristics, prospects, habits, and earnings. *See Zostautas v. St. Anthony DePadua Hosp.*, 23 Ill. 2d 326, 178 N.E.2d 303 (1961); *Wilcox v. Bierd*, 330 Ill. 571, 162 N.E. 170 (1928). Pecuniary damages, however, have not been limited to the present loss of money. *See Graul v. Adrian*, 32 Ill. 2d 345, 205 N.E.2d 444 (1965) (loss of instruction or training to a minor); *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958) (loss of services); *Slone v. Morton*, 39 Ill. App. 2d 495, 188 N.E.2d 493 (1st Dist. 1963) (loss of support); *Chapman v. Gulf Mobile & O.R.R.*, 337 Ill. App. 611, 86 N.E.2d 552 (3d Dist. 1949) (nominal damages).

4. The persons entitled to recover under the Act are the surviving spouse and next of kin. *Nudd v. Matsovkas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Barrow v. Lence*, 17 Ill. App. 2d 527, 151 N.E.2d 120 (4th Dist. 1958).

5. ILL. REV. STAT. ch. 70, § 2 (1979). *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.4, at 558 (1973).

6. 89 Ill. App. 3d 1144, 412 N.E.2d 638 (4th Dist. 1980).

7. *Id.* at 1147, 412 N.E.2d at 641.

8. *Id.* at 1151, 412 N.E.2d at 643 (Trapp, J., concurring in part and dissenting in part). *See* notes 40-48 and accompanying text *infra*.

9. 89 Ill. App. 3d at 1145, 412 N.E.2d at 639. Hilda had driven her daughter's mail route that day, and the daughter was therefore joined as a principal and co-defendant. *Id.*

10. *Id.*

consortium was reversible error, the decedent's estate appealed.¹¹ The primary issue raised on appeal was whether the lower court erred by failing to give the tendered jury instruction.¹²

The fourth district court began its analysis by examining three Illinois Supreme Court decisions dealing with loss of consortium. In two of these cases, *Hall v. Gillins*¹³ and *Knierim v. Izzo*,¹⁴ widows had initiated common law tort actions for "destruction of the family unit,"¹⁵ rather than statutory wrongful death actions. In both decisions the supreme court reasoned that because the statutory remedy preempted the common law and was not significantly different from the common law tort, it could not permit a tort action.¹⁶ The *Elliott* court treated this analysis as indicating that the statutory action contemplated recovery analogous to tort damages, which include loss of consortium.¹⁷ Further, according to the court, neither *Hall* nor *Knierim* had specifically excluded any type of recovery in wrongful death actions.¹⁸ Thus, the *Elliott* court concluded that neither case precluded damages for loss of consortium in wrongful death cases.¹⁹ The court also considered *Dini v. Naiditch*,²⁰ a case in which the supreme court had permitted a wife to recover for loss of consortium when her husband was injured.²¹ If recovery is allowed when a spouse is injured, the *Elliott* court reasoned, logic dictates that recovery be available when an injury proves fatal.²²

11. *Id.* There were actually two counts to the appeal. The estate also argued that the jury should have been instructed to include as damages the loss to the estate caused by the payment of death taxes. This issue was not related in any germane sense to the loss of consortium issue. The appellate court held that the denial of such instruction by the trial court was proper, and the dissenting justice agreed. *Id.* at 1149, 412 N.E.2d at 642.

12. *Id.* at 1145, 412 N.E.2d at 639. The current Illinois Pattern Jury Instructions exclude consortium as an element of loss. ILL. PATTERN JURY INSTRUCTIONS (CIVIL) § 31.07 (2d ed. 1971) (IPI).

13. 13 Ill. 2d 26, 147 N.E.2d 352 (1958).

14. 22 Ill. 2d 73, 174 N.E.2d 157 (1961).

15. The difference between the common law cause of action for destruction of the family unit and the statutory wrongful death action relates to the parties who can bring the action and the elements of damage that may be considered in determining the amount compensable. *Hall v. Gillins*, 13 Ill. 2d 26, 29, 147 N.E.2d 352, 353 (1958).

16. In *Hall v. Gillins*, 13 Ill. 2d 26, 147 N.E.2d 352 (1958), the plaintiff had alleged loss of support, companionship, guidance, advice, and love and affection. Although the court found the statutory term "pecuniary injuries" sufficiently broad to encompass most of these losses, it did not indicate which losses were excluded. *Id.* at 31, 147 N.E.2d at 355. A similar conclusion was reached in *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961). The *Knierim* court held that the differences between an action for loss of consortium and an action for pecuniary loss under the statute did not justify treating loss of consortium as an additional remedy. *Id.* at 82-83, 174 N.E.2d at 162-63.

17. 89 Ill. App. 3d at 1147, 42 N.E.2d at 640.

18. *Id.* at 1146-47, 42 N.E.2d at 639-40.

19. *Id.* at 1147, 42 N.E.2d at 640.

20. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).

21. *Id.* at 430, 170 N.E.2d at 893. In *Dini*, the plaintiff sought recovery for loss of consortium for the period after her spouse's injury but before his death. *Id.*

22. 89 Ill. App. 3d at 1146, 42 N.E.2d at 639. Other jurisdictions have taken this position. See, e.g., *Pesce v. Summa Corp.*, 54 Cal. App. 3d 86, 90, 126 Cal. Rptr. 451, 454-55 (1975).

Having decided that Illinois precedent implies loss of consortium damages in a wrongful death action, the *Elliott* court proceeded to examine the method established by the Wrongful Death Act for measuring damages.²³ The defendant argued that the statute only granted damages to compensate the survivors for their financial dependency on the deceased family member; thus, consortium was beyond the statutory scope as its loss affects only the surviving spouse.²⁴ The majority responded that by limiting recovery to only those losses affecting all survivors, much compensation now awarded in wrongful death cases would fall by the wayside.²⁵ Juries would have to be instructed, for example, to disregard a child's loss of guidance due to one parent's death because the surviving spouse would not suffer the same loss,²⁶ and to disallow recovery by parents for death of their minor child unless they could show dependency on the child for support.²⁷ Significantly, the court stressed that pecuniary damages have not been limited to the present loss of a minor's financial contributions to the family unit,²⁸ but have been predicated, at least in part, on intangible considerations such as a child's health,²⁹ mental ability,³⁰ and life expectancy.³¹ The statute was intended, in the majority's view, to provide broad based relief, including loss of consortium.³²

Despite a contrary decision by the first district only two years before,³³ the *Elliott* court maintained that because evidence of the companionable nature of the decedent's relationship with his widow was properly admitted, the decedent's estate was entitled to an instruction on loss of consortium.³⁴ In *Kaiserman v. Bright*,³⁵ the Illinois Appellate Court for the First District refused to allow recovery for loss of consortium in wrongful death actions.³⁶ Acknowledging the first district's decision in *Kaiserman*, the *Elliott* court stated that it was not bound by the decision and declined to follow it.³⁷

23. The statute provides: "[T]he jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased spouse." ILL. REV. STAT. ch. 70, § 2 (1979).

24. 89 Ill. App. 3d at 1148, 412 N.E.2d at 641.

25. *Id.*

26. *Id.* See *Graul v. Adrian*, 32 Ill. 2d 345, 205 N.E.2d 444 (1965).

27. 89 Ill. App. 3d at 1148, 412 N.E.2d at 641. See *Prendergast v. Chicago Ry.*, 114 Ill. App. 156 (1905).

28. 89 Ill. App. 3d at 1148, 412 N.E.2d at 641.

29. See *Flynn v. Vancil*, 41 Ill. 2d 236, 242 N.E.2d 237 (1968).

30. See *Long v. Bennet*, 55 Ill. App. 3d 50, 370 N.E.2d 627 (4th Dist. 1977).

31. See *Baird v. Chicago, Burlington & Quincy R.R.*, 63 Ill. 2d 463, 349 N.E.2d 413 (1976).

32. 89 Ill. App. 3d at 1148, 412 N.E.2d at 640-41.

33. See *Kaiserman v. Bright*, 61 Ill. App. 3d 67, 377 N.E.2d 261 (1st Dist. 1978).

34. 89 Ill. App. 3d at 1147, 412 N.E.2d at 640.

35. 61 Ill. App. 3d 67, 377 N.E.2d 261 (1st Dist. 1978).

36. *Id.* at 70, 377 N.E.2d at 264.

37. 89 Ill. App. 3d at 1148, 412 N.E.2d at 642. The obvious conflict between the *Elliott* and *Kaiserman* cases once again illustrates the continuing problem of the stare decisis effect of Illinois Appellate Court decisions. One commentator suggests that if each of the five Appellate Districts in Illinois would recognize that the decisions of the coordinate branches of the court cast a stare decisis net upon them individually, the Illinois Appellate system would become more uniform

Justice Trapp, in a partial dissent,³⁸ maintained that if the supreme court had determined that intangibles such as loss of society were within the statute's scope, it would have so held in *Hall*, *Knierim*, or *Dini*.³⁹ Because it did not, and because the language of the Wrongful Death Act has remained unchanged since its adoption in 1853 despite restrictive supreme court interpretations, Judge Trapp concluded that the legislature must be satisfied with the Act's present construction.⁴⁰ In addition, he argued that just as the supreme court had previously refused to read loss of consortium into the Illinois Dramshop Act⁴¹ the *Elliott* court should not have "under the guise of statutory construction, enlarge[d] the classifications of actionable injuries under the Act."⁴² Moreover, Justice Trapp contended that the majority's conclusion after examining *Dini*—that loss of consortium should not be denied merely because an injury results in death—was erroneous because to allow recovery for loss of consortium would be to allow double recovery.⁴³ Finally, the dissenting judge disputed the majority's contention that intangible factors have always been a part of wrongful death damages determinations. Citing the same Illinois precedent the majority used,⁴⁴ he asserted that non-financial considerations are only allowed into evidence to show the scope of the actual pecuniary loss sustained, not to establish an additional element of damages.⁴⁵

Historically, Illinois courts have strictly construed the wrongful death statute.⁴⁶ Losses recoverable under the Illinois Wrongful Death Act have been limited to those "susceptible of pecuniary valuation."⁴⁷ The rationale underlying this limitation was to prevent damage awards based upon conjec-

and stable and the conflict among the separate Districts could be lessened or avoided. Mattis & Yalowitz, *Stare Decisis Among [Sic] the Appellate Court of Illinois*, 28 DEPAUL L. REV. 571 (1979).

38. 89 Ill. App. 3d at 1151, 412 N.E.2d at 643 (Trapp, J., concurring in part and dissenting in part).

39. *Id.*

40. *Id.* at 1152, 412 N.E.2d at 644.

41. In *Knierim v. Izzo*, 22 Ill. 2d 73, 174 N.E.2d 157 (1961), the court specifically held that "mental anguish, disgrace, and loss of society do not constitute an injury to persons within the meaning of the [Dram Shop Act]." *Id.* at 80, 174 N.E.2d at 161.

42. 89 Ill. App. 3d at 1152, 412 N.E.2d at 644 (quoting *Knierim v. Izzo*, 22 Ill. 2d 73, 80, 174 N.E.2d 157, 161 (1961)).

43. *Id.* But see *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960). In *Dini*, the court stated that the "double recovery" argument is merely a convenient cliché for denying the wife's action for loss of consortium. The contention, the court maintained, emphasizes only one element of recovery, the loss of support. *Id.* at 427, 170 N.E.2d at 891.

44. 89 Ill. App. 3d at 1152-53, 412 N.E.2d at 645. See notes 13, 14 & 20 and accompanying text *supra*.

45. 89 Ill. App. 3d at 1153, 412 N.E.2d at 645.

46. See, e.g., *Schlavick v. Manhattan Brewing Co.*, 103 F. Supp. 744 (N.D. Ill. 1952); Comment, *Wrongful Death Recovery Limitations—R.I.P.*, 17 DEPAUL L. REV. 385, 392 (1968) (courts have held that the statute's benefits "should not be extended to causes not fairly within its language nor fairly inferable therefrom").

47. *Howlett v. Doglio*, 402 Ill. 311, 317, 83 N.E.2d 708, 712 (1949). *Accord*, *Flynn v. Vancil*, 41 Ill. 2d 236, 242 N.E.2d 237 (1968).

ture.⁴⁸ The contention has been that intangible elements such as sentiment and affection are difficult to evaluate and capable only of speculation.⁴⁹ In *Elliott*, however, the fourth district court broadly construed the statutory definition of pecuniary injury to include loss of consortium. Unpersuaded by the traditional view, the court indicated that the scope of pecuniary loss as determined by Illinois courts encompasses some intangible considerations.⁵⁰ The *Elliott* decision signifies a refusal to adopt an arbitrary rule allowing recovery for some intangible losses but not for others.

48. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127, at 907 (4th ed. 1971).

49. See *Howlett v. Doglio*, 402 Ill. 311, 317, 83 N.E.2d 708, 712 (1949) (loss of society and companionship of deceased incapable of pecuniary valuation).

50. See notes 29-31 and accompanying text *supra*.

