
**Damages - Calculation of "Loss of Support" in Death Action -
Brown v. Bourg & Sons, Inc., 239 La. 473, 118 So.2d 891 (1960)**

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would seem difficult to draw a line short of such absurdities if it were held that a policeman has the *public* duty to prevent himself from violating the law and to detect his own infractions.

DAMAGES—CALCULATION OF “LOSS OF SUPPORT” IN DEATH ACTION

A surviving widow sued under the Louisiana Civil Code for the wrongful death of her husband. After disposition of the question of liability in favor of the plaintiff, the Supreme Court of Louisiana held that factors to be considered in the calculation of damages, included, among other things, (1) the divorce rate, (2) the percentage of remarriages of widows, particularly to second husbands whose earnings are greater than those of the first, and (3) the possible retirement of the deceased husband. *Brown v. Bourg & Sons, Inc.*, 239 La. 473, 118 So. 2d 891 (1960).

In the particular area of calculation of damages for “loss of support” the law is quite clear, and *all contra* to the principal case. In the *Brown* case defendant’s truck was carrying a load of pipes at night which extended beyond the rear of the truck; there was no red light attached as required by statute. The truck driver, without signal, stopped suddenly, causing a taxi to run into the truck; the pipes smashed into the head of the passenger in the taxi, resulting in his death. In the lower court it was held that the truck driver was negligent, entitling the widow to recover for damages. The trial court then went into the problem of calculation of damages. “The decedent was 52 years old . . . his life expectancy was 19.49 years. For the purpose of computation we can consider this figure to be 20 years . . . [I]t is safe to conclude that he had been providing about \$500.00 per year for her support. . . .”¹ This means that the anticipated contribution was \$10,000.00. To this, the trial court added \$2,000.00 for love and affection, and \$800.00 for the cost of the funeral. Thus, the widow was awarded \$12,800.00. This was “standard operating procedure,” and the manner in which courts have always computed damages in such cases. However, upon appeal, the Supreme Court of Louisiana said that the lower court was in error. The “loss of support” was not to be computed merely by multiplying the average contribution of decedent by the number of years of life expectancy. The court stated tersely:

There are . . . other factors to be taken into consideration. The life expectancy of the survivor, *the divorce rate, the percentage of remarriages of widows, particularly to second husbands whose earnings are greater than those of the first,*

¹ *Brown v. Bourg & Sons, Inc.*, 239 La. 473, 118 So. 2d 891, 895 (1960).

*the condition of health of the decedent, his possible retirement, the possibility of an increase or decrease in his annual earnings, and the change in value of the dollar over a long period of years are among other factors to be taken into consideration.*²

The award was then reduced to \$8,731.00.

As far back as 1893 it was held not admissible to show that plaintiffs and deceased were Negroes, for the purpose of reducing damages, on the hypothesis that family ties are not strong with the Negro race.³ Insofar as damages are concerned "the reasonable expectation of the plaintiff of benefits from [decedent]"⁴ is the proper measure of the award.

In *Consolidated Stone v. Morgan*,⁵ the decedent was working near a derrick, and because of the defendant's negligence in checking a guy-rope, the derrick fell and killed the decedent. The defendant wanted to have the jury instructed that as the decedent's widow had remarried, the damages should be lessened. The court refused, saying that the remarriage "should not be considered . . . in assessing the damages. . . ."⁶ Illinois has held the same.⁷ Where plaintiff's intestate was employed by the defendant to load coal from defendant's scow onto the steamer Petoskey, and while so doing, intestate fell off and drowned, the defendant wanted to make mention of the fact that the plaintiff remarried. In refusing the instruction, the Illinois Appellate Court held:

It is contended that the amount awarded as damages is excessive, and, in support of this contention, it is urged that the widow of the deceased has married again, and has thus secured a new means of support, and that her present husband stand in *loco parentis* to the children. *We think this view untenable. . . .*⁸

Yet, in the principal case, we are to consider such things as "the divorce rate." Certainly, the direct conflict of theory is clearly visible.

By the great weight of authority, evidence showing that the surviving spouse has remarried since the death complained of, is not to be considered in mitigation of the damages recoverable, and in fact, is inadmissible.⁹ Nor does the fact that the widow remarries at any time during the

² *Id.* at 895. (Emphasis added.)

³ *Texas & Pac. Ry. v. Moody*, 23 S.W. 41 (Texas, 1893).

⁴ *Id.* at 42.

⁵ *Consolidated Stone v. Morgan*, 160 Ind. 241, 66 N.E. 696 (1903).

⁶ *Id.* at 247, 66 N.E. at 698, 699.

⁷ *O.S. Richardson Fueling Co. v. Peters*, 82 Ill. App. 508 (1898).

⁸ *Id.* at 512, 513. (Emphasis added.)

⁹ *St. Louis, I.M.&S.Ry. v. Cleere*, 76 Ark. 377, 88 S.W. 995 (1905); *Davis v. Springfield Hospital*, 204 Mo.App. 626, 218 S.W. 696 (1920); *Lees v. New York Consol. R.*, 109 Misc. 608, 180 N.Y. Supp. 546 (1919).

pendency of the suit affect her right of recovery.¹⁰ Aptly put, "The pecuniary injury resulting to her from his death . . . is to be measured . . . unaffected by the fact that subsequently she may have entered into new relations."¹¹ Further, Louisiana has stated that evidence is inadmissible to show that since her husband's death the widow has become engaged to marry again.¹² In *Jones v. Kansas City So. Ry.*, the court held, in an action for damages by a widow, that "evidence as to the engagement of the plaintiff . . . was irrelevant."¹³

In a suit under Louisiana's provision for wrongful death,¹⁴ it has been held that in a wrongful death action "there can be no exact rule for measurement of damages applicable to all cases, for the facts of each case must be the basis upon which the amount of the award is predicated."¹⁵ In other words, there are no fixed rules for determining the amount of damages.¹⁶

There are certainly, however, basic areas to be considered in mitigation of the amount of award. Among these are included a study of the purchasing power of the dollar,¹⁷ the defendant's ability to respond in damages,¹⁸ and other peculiar circumstances.¹⁹ Under the Federal Employers' Liability Act, recovery is limited to pecuniary loss to beneficiaries, and in the computation a discount is made for lost future benefits at a fair rate at which money might be loaned or invested safely for each year of life expectancy.²⁰

Just last year, it was held that an "acceptable formula for computation of widow's recovery for loss of support, based upon average net earning power of husband at time of his death, should be set forth as follows:

$$\frac{\text{Annual Net Wage} \times \text{Life Expectancy} - \text{Discount}^{21}}{2}$$

2

¹⁰ *Archer v. Bowling*, 166 Ky. 139, 179 S.W. 15 (1915).

¹¹ *Chicago, St.P., M.&O. Ry. v. Lagerkrans*, 65 Neb. 566, 91 N.W. 358, 363 (1902), *aff'd*, 95 N.W. 2 (Sup. Ct. 1903).

¹² *Jones v. Kansas City So. Ry.*, 137 La. 173, 68 So. 401 (1915).

¹³ *Id.* at 405.

¹⁴ LA. STAT. ANN. art. 2315 (Supp. 1959).

¹⁵ *Dowell, Inc. v. Jowers*, 166 F. 2d 214 (5th Cir. 1948), *cert. denied*, 334 U.S. 832 (1949).

¹⁶ *Smith v. Monroe Grocer Co.*, 179 So. 495 (La App. 1938).

¹⁷ *Killian v. Modern Iron Works*, 15 So. 2d 532 (La App. 1943).

¹⁸ *Seither v. Potter*, 194 So. 467 (La App. 1940).

¹⁹ *Russell v. Tagliavore*, 153 So. 44 (La App. 1934).

²⁰ *Jones v. Kansas City So. Ry.*, 143 La. 307, 78 So. 568 (1918).

²¹ *Stephens v. Natchitoches Parish School Bd.*, 110 So. 2d 156, 164 (La. App. 1959).

"In the assessment of damages . . . much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages . . . as will fully indemnify the creditors."²² Basically then, damages should equal the loss sustained, and where the damage is certain, but the pecuniary value of the damages are not, much discretion is left to the trier of fact.²³

Recently, where the father of the deceased paid numerous bills (such as hospital and funeral costs) but did not claim against deceased's minor son, the court held that the "minor child . . . [had] not suffered any loss or been damaged in any way in the amount of these bills, and for this reason recovery should not be permitted."²⁴

It appears that certainly nowhere in the Louisiana Civil Code, or in any of the cases, is there anything which even borders on the area of suggesting a consideration of the "divorce rate, the percentage of remarriages of widows, particularly to second husbands whose earnings are greater than those of the first,"²⁵ insofar as calculation of "loss of support" is concerned. Rather than allowing it to become a precedent, therefore, it would seem best to treat this "sociological decision" as a derelict in the stream of law.

²² Block v. McGuire, 18 La. App. 417 (1866).

²³ Duree v. State, 96 So. 2d 854 (La. App. 1957).

²⁴ Andrus, Tutrix v. White, 236 La. 28, 33, 106 So. 2d 705, 707 (1958). *Contra*, Aymond v. Western Union, 151 La. 184, 91 So. 671 (1922), wherein, the parent of a fourteen year old boy who was not assisting his father in any way, but on the contrary, was dependent upon him, was awarded \$5,000.00.

²⁵ Brown v. Bourq & Sons, Inc., 239 La. 473, 118 So. 2d 891, 895 (1960).

DOMESTIC RELATIONS—ALIMONY DOES NOT TERMINATE WITH HUSBAND'S DEATH

On July 7, 1937, the plaintiff obtained an absolute divorce from her husband upon the ground of habitual intemperance. The divorce decree entered by the court required "that the defendant pay to the plaintiff the sum of \$50.00 on the first of each and every month . . . said payments to continue until the remarriage of said plaintiff or her death. . . ."¹ The plaintiff's ex-husband died May 26, 1954; she made a claim against his estate for alimony payments that accrued subsequent to his death. The county court disallowed the claim, but the District Court of Cass County, North Dakota, reversed the county court. In affirming the district court's decision, the Supreme Court of North Dakota held that since the statute²

¹ Stoutland v. Stoutland, 103 N.W. 2d 286, 287 (N.D. 1960).

² N.D. REV. CODE § 14-0524 (1943).