Bullard v. Barnes - Parental Recovery for Lost Society and Companionship of a Minor Child under the Illinois Wrongful Death Act

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INTRODUCTION

A growing number of jurisdictions allow parents to recover damages in wrongful death actions for the loss of a minor child's society and companionship. This deprivation of society and companionship is referred to as a loss of consortium. Until recently, Illinois courts adhered to the traditional


2. “Society” and “companionship” are the two most frequently-cited elements of a parent-child loss of consortium action. Although consortium includes other elements such as love, aid, guidance, felicity, care, and advice, this Note refers to “society and companionship” or “society” when discussing a parent’s cause of action for loss of a child’s consortium. See Sea Land Serv., Inc. v. Gaudet, 414 U.S. 573, 585 (1974) (“‘society’ embraces a broad range of mutual benefits each family member receives from the others’ continued existence, including love, affection, care, attention, companionship, comfort, and protection”).

approach,⁴ which denied recovery for loss of consortium to the parent despite the absence of such a proscription⁵ in the Illinois Wrongful Death Act.⁶ The Illinois statute provides that the parent⁷ may recover "fair and just compensation with reference to the pecuniary injuries"⁸ resulting from the child's death. Illinois courts nevertheless defined "pecuniary injuries"⁹ narrowly and limited parental recovery to the economic value of the earnings and services that the child would have contributed had the child lived.¹⁰ The courts' restrictive interpretation of "pecuniary injuries" denied parents compensation for the loss of their child's society and companionship.

The Illinois Supreme Court recently reviewed its narrow pecuniary-loss interpretation as applied to child death cases.¹¹ The court, in Bullard v. Barnes,¹² reasoned that in light of present social realities, the loss that parents suffer when their child dies is not limited to the value of the child's expected

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⁸ ILL. REV. STAT. ch. 70, § 2 provides:

Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the 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 person.

Id. (emphasis added)

⁹ "Pecuniary injuries" is defined as the deprivation of a reasonable expectation of a pecuniary, i.e., monetary or financial, advantage which would have resulted if the deceased's life had continued. BLACK'S LAW DICTIONARY 1018 (5th ed. 1979). See also Halvorsen v. Dunlap, 495 F.2d 817, 820 (8th Cir. 1974) ("pecuniary injuries" denotes a financial or monetary loss); Johnson, Wrongful Death and Intellectual Dishonesty, 16 S.D.L. REV. 36, 39 (1971) (pecuniary injury or loss is extensive with the pocketbook value of the probable contributions and support which decedent would have rendered to survivors).


¹¹ The term "child death" will be used in this Note to refer to the wrongful death of a child.

¹² 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).
economic contributions. The court concluded that the statutory phrase "pecuniary injuries" is broad enough to include parental recovery for the substantial loss of society and companionship of a deceased child. Illinois therefore joins a majority of jurisdictions that compensate parents for the pecuniary loss of consortium suffered upon the wrongful death of a minor child. This Note examines the evolution of the wrongful death action and the concept of loss of consortium. The Note concludes, after a complete analysis of the Bullard decision, that the legislature should amend the Illinois Wrongful Death Act to expressly include lost consortium recovery for the spouse and next of kin.

**HISTORY AND BACKGROUND**

**A. Emergence of the Wrongful Death Action**

At common law, no civil action existed for the wrongful death of a human being. This harsh rule originated in the 1808 English case of Baker v. Bolton, in which Lord Ellenborough stated that "in a civil suit, the death of a human being could not be complained of as an injury." Lord Ellenborough neither cited authority nor gave supporting rationale for his opinion.

13. Id. at 517-18, 418 N.E.2d at 1234-35; see infra text accompanying notes 89-98.


Commentators agree, however, that the Baker holding was probably derived from the felony-merger doctrine. The felony-merger doctrine provided that no civil cause of action existed when the wrongful act constituted both tort and felony. Punishment of the felony, which in the nineteenth century generally lead to the felon’s execution, preempted the tort action. Following the felon’s death, the felon’s possessions were forfeited to the Crown. The felony-merger doctrine eliminated the possibility of a third party recovering damages for the victim’s death since no assets remained in the felon’s estate once the crime was punished. The doctrine rendered the felon’s estate judgment proof.

Although civil actions for wrongful death did not exist at common law, civil actions for wrongful injury were permitted. Damages could be awarded

18. F. TIFFANY, DEATH BY WRONGFUL DEATH 12 (2d ed. 1913) ("no satisfactory reason for the rule has ever been suggested").

W.S. Holdsworth commented on the inadequacy of the Baker decision:

It has been upheld in all the reported cases, not by reasoning based upon a discussion of the question of its policy or impolicy, not by any sufficient technical or historical reasons, but by the assertion that it is a rule of the common law which must be followed. If a broad legal principle, not manifestly just, is thus laid down as a rule of the common law, we should expect that some sufficient reasons, historical or technical, or both, would be adduced for it. But none of the cases adduce any such reasons.


19. The felony-merger doctrine, which denied wrongful death recovery, dates as far back as 1607. In Higgins v. Butcher, 1 Brownl. & Golds. 205, Yelv. 89, 80 Eng. Rep. 61 (K. B. 1607), the English Court ruled that a husband who lost his wife as a result of an assault could not sue for her death because of the felonious nature of the assault. The Higgins court stated:

If a man beats the servant (of another) so that he dies of the battery, the master shall not have an action against the other for battery and loss of the service, because the servant's dying of the extremity of battery, has now become an offense to the Crown, being converted into felony and that drowns the particular offense and private wrong offered to the master before, and his action is thereby lost.

Id.

In a similar case, the same principle was stated that "[i]f A beat the wife of B, so that she dies, B can have no action of the case for that; because it is criminal, and of a higher nature." Smith v. Sykes, 1 Freem. 224, 89 Eng. Rep. 160 (K. B. 1677). The felony-merger doctrine was later qualified so that the private wrong was not entirely destroyed by the merger into the felony but only suspended until criminal prosecution was completed. Holdsworth, supra note 18, at 431. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 382 (1970) (Court's discussion and explanation of the "felony-merger doctrine").


21. See Johnson, supra note 9, at 37 n.5.

22. See C. MCCORMICK, DAMAGES §§ 91, 93 (1935); 22 DRAKE L. REV. 200, 200 (1972) (at common law damages could only be awarded where the negligent act produced a non-fatal injury).
when a negligent act produced a non-fatal injury. Thus, "it was more profitable for the defendant to kill the plaintiff than to scratch him." To correct this inequity, England's Parliament in 1846 adopted a wrongful death statute, commonly known as Lord Campbell's Act. The Act provided a new cause of action that permitted "the families of persons killed by accidents" to recover for damages "proportioned to the injury resulting from such death." The damages provision gave juries great discretion in assessing damages in wrongful death actions. The early English courts, however, narrowly interpreted Lord Campbell's Act to allow recovery only for the "pecuniary" injuries or losses suffered as a result of the family member's death. No such pecuniary loss limitation was expressed in the statute itself.

In cases involving the wrongful death of a minor child, English courts limited the parental recovery to the value of the services and wages the child would have provided the household had the child lived, minus the expense of nurturing and raising the child to adulthood. This pecuniary loss rule


25. Lord Campbell's Act is the common name of the Fatal Accidents Act. Section One of the Act provides in part:

[W]hensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been under such circumstances as amount in law to felony.

Lord Campbell's Act (Fatal Accidents Act), 9 & 10 Vict., ch. 93 (1846). See generally Prosser & Keeton, supra note 3, § 127, at 945 (Lord Campbell's Act enacted to provide remedy for the victim's family, who were frequently left destitute).

Aside from the inequity at common law of allowing an action for negligent injury and not for wrongful death, another major reason for the enactment of Lord Campbell's Act was the Industrial Revolution and the resulting "new phenomenon" of "corporate negligence." Fatal accidents were no longer solely intentional or "the work of the robber, the burglar or the hot-blooded man." Rather, many fatal accidents were due to negligent acts directly related to the railroad, the streetcar, and the factory. Many families were left destitute when the breadwinner was killed. Lord Campbell's Act provided a remedy for this phenomenon. Malone, supra note 17, at 1070; 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, 547-48 (1979).

26. Lord Campbells' Act (Fatal Accidents Act) 9 & 10 Vict., ch. 93 (1846). Family members allowed to benefit under Lord Campbell's Act were the wife, husband, parent, and child. Id.

27. The leading cases interpreting Lord Campbell's Act to allow only pecuniary loss recovery were Blake v. Midland Ry. Co., 18 Q.B. 93, 118 Eng. Rep. 35 (Ex. 1852), and Duckworth v. Johnson, 4 H. & N. 653, 157 Eng. Rep. 997 (1859); see also S. Speiser, supra note 15, at § 3:1.

accurately reflected the social conditions of the nineteenth century. In Lord Campbell’s day, child labor in factories and on farms was customary, and children were considered economic assets or “servants” of their parents. Because a parent, as “master,” was legally entitled to the services and earnings of the unemancipated minor, the British wrongful death statute provided an appropriate remedy when the death of a child had a direct impact on the family’s income.


Under the common law doctrine of pater familias, the father was vested with authority to bring an action for injuries to his family that were caused by third-party tortfeasors. Similar to the master’s recovery for the lost services of an injured servant, the husband-father had an ownership interest in his family and therefore was entitled to the pecuniary value of his wife’s and child’s earnings and services. Foster, Relational Interests of the Family, 1962 U. Ill. L.F. 493, 497. For a discussion of the doctrine of pater familias, see Themaa v. City of Kenosha, 117 Wis. 2d 508, 511-12, 344 N.W.2d 513, 514 (1984); Fisher, Pater Familias—A Cooperative Enterprise, 41 Ill. L. Rev. 27 (1946). The father was the logical choice to bring a cause of action because the mother-wife was considered inferior and without legal existence to bring actions. The mother-wife’s identity was automatically merged with the husband’s upon marriage. See Love v. Moynihan, 16 Ill. 277, 280 (1855); see also Dini v. Naiditch, 20 Ill. 2d 406, 421-22, 170 N.E.2d 881, 889 (1960) (wife, as servant, could not sue for loss of services of the master). The common law perceived the husband and wife as one, and the husband was their man. Betser v. Betser, 186 Ill. 517, 538-39, 58 N.E. 249, 249 (1900). However, if the father deserted the family, the mother became head of the family and was entitled to sue for loss of the child’s earnings and services. Brisco v. Prince, 275 Ill. 63, 68, 113 N.E. 881, 883 (1916).

In 1861, the Illinois Married Woman’s Act, 1861 Ill. Laws 143, removed the wife’s legal disability and gave her capacity to sue. Although the common law allowed the husband a right of action for loss of consortium due to negligent injury to his wife, no similar right was granted to the wife under the Married Woman’s Act. Dini v. Naiditch, 20 Ill. 2d 406, 428, 170 N.E.2d 881, 891 (1960).

In 1950, a wife’s cause of action for lost consortium caused by negligent injury to her husband was recognized in Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950). In allowing the wife’s claim for loss of her husband’s “aid, assistance, enjoyment, and sexual intercourse,” the Hitaffer court held that the lost consortium action was based on an interference with the marital relationship and that both spouses have always had an equal right to each other’s love and companionship by virtue of the marriage relationship. Id. at 816; see Feldman, Parent’s Cause of Action in Tennessee for Injured Child’s Lost Earnings and Services, Expenses, and Lost Society: A Comparative Analysis, 51 Tenn. L. Rev. 83, 86 (1983); Foster, supra note 29, at 497.

30. See Wycko v. Gnodtke, 361 Mich. 331, 335, 105 N.W.2d 118, 120 (1960) (“It was an era when ample work could be found for the agile bodies and nimble fingers of small children”); Selders v. Armentrout, 190 Neb. 275, 278, 207 N.W.2d 686, 688 (1973) (children went to work on farms and in factories at age 10 and even earlier in the nineteenth century).

31. See City of Chicago v. Scholten, 75 Ill. 468, 471 (1874) (father entitled to unemancipated minor’s services). For a historical discussion of a father’s right to the services of his children, see Pickle v. Page, 252 N.Y. 474, 169 N.E. 650, 652-53 (1930); Ardy v. Jeffries, 1 Cro. Eliz. 55 (Q.B. 1587) (basis for father’s enticement action was the loss of his child’s services).

32. The Michigan Supreme Court traced the pecuniary loss doctrine back to Lord Campbell’s era and stated:

This, then, was the day from which our precedents come [sic], a day when employment of children of tender years was the accepted practice and their pecuniary contributions to the family both [sic] substantial and provable . . . . Loss meant only money loss, and money loss from the death of a child meant only his lost wages. All else was imaginary.

Today all jurisdictions in the United States have wrongful death statutes. Although these statutes differ in their provisions, they can be classified into two basic categories: loss-to-survivor statutes and loss-to-estate statutes. A great majority of jurisdictions have enacted loss-to-survivor statutes, modeled after Lord Campbell's Act, which allow an action to be brought on behalf of certain survivors or beneficiaries of the decedent. The designated survivors are considered foreseeable victims of the wrongdoer’s conduct, and may recover damages for the losses which they suffer due to the wrongful death. A minority of jurisdictions have statutes that measure damages by the loss to the decedent's estate. Both types of statutes measure damages in terms of the pecuniary injuries suffered. Courts must interpret the scope of pecuniary loss.

The Illinois wrongful death statute was enacted in 1853. Modeled after Lord Campbell's Act, the Illinois statute provided that an action may be brought by the personal representative of the deceased on behalf of the spouse and next of kin for "pecuniary injuries" that result from the victim's death. The statute, which has remained virtually unchanged since its en-
actedment, created both the right and the remedy for recovering damages caused by a wrongful death.

In child death cases, Illinois courts, as well as most other jurisdictions, adopted the English approach that limited parental recovery solely to the loss of the child's economic contributions. Courts adopted this limitation to prevent recovery based on conjecture or sympathy. The loss of a child's society and companionship was excluded from the computation of damages as an injury not "susceptible of pecuniary valuation." The pecuniary loss rule works well when the decedent is an adult or the breadwinner for his beneficiaries. When the decedent is a minor child, however, the pecuniary loss standard is difficult to apply because a child's earning capacity has not yet been established and evidence of pecuniary worth cannot be accurately determined.

Illinois courts recognized the inequity of the pecuniary loss limitation on parental recovery in child death cases and gave the phrase "pecuniary injuries" an expansive interpretation. As in most jurisdictions, Illinois juries

42. The language of the Illinois Wrongful Death Act has basically remained unchanged since its passage in 1853. The only major changes have dealt with limitations on recovery. The original Act set a maximum limit for recovery of pecuniary injuries at $5,000. In 1903, the limit was increased to $10,000, 1903 Ill. Laws 217, then $15,000 in 1947, 1947 Ill. Laws 1094, $20,000 in 1951, 1951 Ill. Laws 393, $25,000 in 1955, 1955 Ill. Laws 2006, $30,000 in 1957, 1957 Ill. Laws 1939, and ultimately all limits were abolished in 1967. 1967 Ill. Laws 3227. The Act was also amended in 1955 with respect to distribution of recovery. Prior to the 1955 amendment, damages were distributed based on the laws of intestacy. After 1955, damages were distributed based on the percentage of the dependency of each person on the decedent. Ill. Rev. Stat. ch. 70, § 2 (1955). For a discussion of the 1955 amendment, see Maca v. Rock Island Moline City Lines, Inc., 47 Ill. App. 2d 31, 35, 197 N.E.2d 463, 466 (3d Dist. 1964).

43. See Hall v. Gillins, 13 Ill. 2d 26, 29, 147 N.E.2d 352, 354 (1958) (Illinois Wrongful Death Act created both the right and the remedy). Remedies in a wrongful death action are limited to spouses and next of kin. Thus, the decedent's employer who contracted for decedent's services, a creditor, or an insurer who sought payment for contractual obligations could not obtain recovery in a wrongful death action. See City of Chicago v. Major, 18 Ill. 349, 358 (1857); Smedley, supra note 20, at 620.


45. See Prosser & Keeton, supra note 3, § 127, at 9.


48. The first Illinois Court to interpret the statute said:

This is a new cause of action given by this statute, and unknown to the common law, and should not be extended beyond the fair import of the language used; but this it would be difficult to do, for the language is very broad and comprehensive, embracing, in direct and positive terms, all cases where, if death had not ensued, the injured party could have maintained an action for the injury.

are instructed to consider not only the loss of the child's economic contributions during minority, but also to assess the probable earnings the child would have contributed during the continuation of his life. Yet, contrary to the majority of jurisdictions, Illinois did not require that juries deduct child rearing expenses from pecuniary injuries. Illinois courts presumably recognized that the value of a child's wages and services will only rarely exceed the cost of raising the child to the age of majority. Consequently, including the cost of rearing a child would defeat the remedial purpose of the Wrongful Death Act, which is to provide compensation for the wrongful death of a family member.

To further mitigate the harshness of the pecuniary loss rule, the Illinois courts relaxed certain proof requirements. The courts created a presumption.


51. In an Illinois wrongful death action, juries are asked to calculate damages based on a reasonable expectation of pecuniary benefit from the continuance of the deceased's life. McFarlane v. Chicago City Ry., 288 Ill. 476, 482, 123 N.E. 638, 640 (1919); see supra note 49 and infra note 64. This author has found only one Illinois case where child rearing costs were deducted from the pecuniary benefit expected. Wall v. Greene, 321 Ill. App. 161, 52 N.E.2d 303 (2d Dist. 1943). Because child rearing costs are generally not considered in Illinois wrongful death cases, it would be objectionable for defense counsel to argue that the expense of raising a child far exceeds the child's pecuniary value. Pavalon, Damages—Wrongful Death of Children, 50 ILL. B. REC. 84 (1968).

52. See Elliott v. Willis, 92 Ill. 2d 530, 540, 442 N.E.2d 163, 168 (1982) (purpose of wrongful death act is to compensate surviving spouse and next of kin for pecuniary losses sustained due to decedent's death). In Hoyt v. United States, 286 F.2d 356 (5th Cir. 1961), a United States court of appeals refused a child rearing deduction in a wrongful death action brought under the Federal Tort Claims Act stating:

[W]e cannot believe that Congress intended to allow any such cold-blooded deduction. Such a deduction is not actually logical for it would treat an incalculable loss as a "pecuniary gain". What makes life worth living more than the privilege of rearing a son? Shall that privilege be treated by law as a liability of which the child's death relieves the parent? Is it not still the law in that most sacred of relationships that it is more blessed to give than to receive? We are entirely without doubt that Congress intended no deduction to be made for the cost of rearing the child to majority.

Id. at 362 (emphasis added).

53. “Presumption” has been defined as “an inference as to the existence of one fact from the existence of some other basic fact established by the proof.” Flynn v. Vancil, 41 Ill. 2d
of pecuniary loss when the surviving family member was a spouse or lineal kin. Because a parent was considered the deceased child's lineal next of kin, and would have been legally entitled to the child's services until the age of majority, the presumption was applied in child death cases. As a result, parents did not have to prove that they suffered actual loss, even if the child had never been gainfully employed and had not contributed services to the household. The law presumed that upon the child's death, the parent and lineal next of kin suffered substantial pecuniary injury.

The presumption of pecuniary loss, however, did not apply to collateral kindred of the decedent, such as a brother or sister. Unlike lineal next of kin, collateral kin are not in the decedent's direct line of descent. Even with the presumption, collateral kin could only recover actual damages. Thus, in *Baird v. Chicago Baltimore & Quincy Railroad* 236, 239, 242 N.E.2d 237, 240 (1968); see also *McElroy v. Force*, 38 Ill. 2d 528, 531, 232 N.E.2d 708, 710 (1967) (presumption is an inference which common sense draws from the known course of events).


56. See *Minneapolis & St. L. R.R. v. Gotschall*, 244 U.S. 66, 68 (1917) (applying Minnesota law); City of Chicago v. Hesing, 83 Ill. 204, 207 (1876) (holding that presumption of pecuniary loss arises from parent's legal right to minor child's services).

57. See cases cited supra note 54.

58. See *Stafford v. Rubens*, 115 Ill. 196, 198, 3 N.E. 568, 569 (1885); *Chicago v. Hesing*, 83 Ill. 204, 207 (1876); City of Chicago v. Major, 18 Ill. 349, 360 (1857).

59. See *Dodson v. Richter*, 34 Ill. App. 2d 22, 25, 180 N.E.2d 505, 507 (3d Dist. 1962) (stating that whether plaintiffs were in the habit of claiming and receiving pecuniary assistance from the deceased is immaterial).

60. See cases cited supra note 54.


62. Ferraro v. Augustine, 45 Ill. App. 2d 295, 301, 196 N.E.2d 16, 19-20 (1964); see also *Chicago P. & St. L. R.R. v. Woolridge*, 174 Ill. 330, 334, 51 N.E. 701, 702 (1898) (court held that collateral kindred must establish that "they were in the habit of claiming and receiving pecuniary assistance from the deceased")


64. *Flynn v. Vancil*, 41 Ill. 2d 236, 238-39, 242 N.E.2d 237, 240 (1968) (no award of damages affirmed when evidence showed deceased infant had congenital disease); City of Chicago v. Scholten, 75 Ill. 468, 471 (1874) (upheld $2,833.33 verdict based on evidence of deceased's age, names of next of kin, and that his parents were laboring people); *Bohnen v. Wingereid*, 80 Ill. App. 3d 232, 241, 398 N.E.2d 1204, 1211 (1st Dist. 1979) (upheld $15,000 verdict for deceased 16-year-old who worked part-time, sewed the family's clothes, and contributed generously to her family); *Maca v. Rock Island Moline City Lines, Inc.* 47 Ill. App. 2d 31, 37, 197 N.E.2d 463, 466-67 (3d Dist. 1964) (upheld $30,000 judgment on evidence that deceased child was healthy, average, obedient, cooperative, and well-behaved); *Ferraro v.*
the Illinois Supreme Court upheld an award of $188,000 to each of the parents for the death of two high school students where the evidence established that the decedents were “healthy, well-adjusted, intelligent young people who attended church regularly and who enjoyed excellent relationships with their parents.” When no direct proof of loss was established in child death cases, the burden shifted to the defendant to establish contrary facts which the jury would be obliged to weigh. Since the presumption was rebuttable, the absence of any evidence of pecuniary loss suffered by the plaintiff would likely militate against any substantial recovery. For example, in Flynn v. Vancil, the Illinois Supreme Court denied recovery when the defendant rebutted the presumption of loss by evidence showing that the deceased minor was afflicted with an incurable congenital condition. In general, recovery was left to the jury’s discretion and was based on the evidence presented and the jury’s common sense and experience. Proceeds of recovery must then be apportioned to the next of kin in accordance with the pecuniary loss each person suffered.

The pecuniary loss rule in child death cases has come under much scrutiny and criticism from modern courts. Many states, including Illinois, have found the rule to be an archaic and inadequate measurement of the parents’ loss. These states view the pecuniary loss rule from the standpoint of Augustine, 45 Ill. App. 2d 295, 302, 196 N.E.2d 16, 20 (1st Dist. 1964) ($17,000 verdict upheld for deceased who performed work around the house and contributed income).

65. 63 Ill. 2d 463, 349 N.E.2d 413 (1976).
66. Id. at 466, 349 N.E.2d at 414.
67. See Flynn v. Vancil, 41 Ill. 2d 236, 238-39, 242 N.E.2d 237, 240 (1968) (defendant rebutted presumption of pecuniary loss by showing that deceased infant had a congenital disease); see also Baird v. Chicago B. & Q. R.R., 63 Ill. 2d 463, 472, 349 N.E.2d 413 (1976) (plaintiffs usually buttress presumption with evidence relating to good health, industrious habits, and potential longevity of deceased minor); Carr, supra note 48, at 579 (stating that because presumption seems to be more shadow than substance, it should be ignored by plaintiff’s attorney who has any proof of pecuniary loss).
68. Flynn v. Vancil, 41 Ill. 2d 236, 239, 242 N.E.2d 237, 240 (1968) (“conclusive presumptions cannot be contravened by opposing evidence; whereas rebuttable presumptions may be disputed and eliminated if they do not correspond with the circumstances actually proved”).
69. 41 Ill. 2d 236, 242 N.E.2d 237 (1968).
70. Id. at 240, 242 N.E.2d at 240.
71. City of Chicago v. Hesing, 83 Ill. 204, 207 (1876) (jury can estimate pecuniary injuries from facts and their own knowledge and experience).
73. Justice Smith’s statement in Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960), clearly demonstrates the courts’ reluctance to uphold the pecuniary loss rule:

That this barbarous concept of the pecuniary loss to the parent from the death of his child should control our decisions today is a reproach to justice. We are still turning, actually, for guidance in decision, to ‘one of the darkest chapter’s in the history of childhood’ . . . . In most [other] areas the development of the law has paralleled the enlightened conscience of our people.

Id. at 337, 105 N.W.2d at 121.
current economic and social conditions, under which child labor laws and
compulsory education laws have vastly reduced the number of employed
children. In contemporary society, a child is seldom considered to be an
economic asset to the family; more likely, the child is deemed a "blessed"
financial liability.\textsuperscript{75} Moreover, most jurisdictions realize that it is illogical to
allow lost consortium recovery for other family members, such as a spouse
and child, and yet deny such recovery to the parent for the death of a child.\textsuperscript{76}
For example, in \textit{Green v. Bittner},\textsuperscript{77} the New Jersey Supreme Court was
influenced in its decision to recognize similar recovery for parents by the
fact that a child could recover for loss of guidance and counsel when the
parent died.\textsuperscript{78}

In response to the inadequacy of the nineteenth century pecuniary loss
rule, twenty-five jurisdictions amended their wrongful death statutes within
the last twenty years to provide recovery for loss of consortium.\textsuperscript{79} An
additional fourteen jurisdictions have expressly adopted lost consortium
recovery through judicial decisions.\textsuperscript{80} The modern trend, therefore, is un-
mistakably in favor of compensating parents for the lost society and com-
panionship of a deceased child.\textsuperscript{81}

\begin{footnotesize}
\begin{enumerate}[75.]
\item Wycko v. Gnodtke, 361 Mich. 331, 341, 105 N.W.2d 118, 123 (1960) (today a child is
a "blessed expense") [note 29]; Foster, \textit{supra} note 29, at 501 (social interest in the integrity and stability
of the family, instead of a pseudoproperty interest in the child, should be the basis for wrongful
death actions).
\item Selders v. Armentrout, 190 Neb. 275, 277, 207 N.W.2d 686, 689 (1973); Green v.
\item \textit{Id.} at 5, 424 A.2d at 213.
\item \textit{See supra} note 1.
\item See McKee v. Thompson, 558 F. Supp. 68 (D.N.D 1983); Kopera v. Moschella, 400 F.
Supp. 131 (S.D. Miss. 1975), \textit{aff'd}, 526 F.2d 1405 (5th Cir. 1976); Adams v. Hunter, 343 F.
Supp. 1284 (D.S.C. 1972), \textit{aff'd}, 471 F.2d 648 (4th Cir. 1973); City of Tucson v. Wondergem,
105 Ariz. 429, 466 P.2d 383 (1970); Fields v. Riley, 1 Cal. App. 3d 308, 81 Cal. Rptr. 671
(1969); Gardner v. Hobs, 69 Idaho 288, 206 P.2d 539 (1949); Wardlow v. City of Keokuk,
190 N.W.2d 439 (Iowa 1971); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961);
Swanson v. Champion Int'l Corp., 646 P.2d 1166 (Mont. 1981); Selders v. Armentrout, 190
Neb. 275, 207 N.W.2d 686 (1973); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980); Anderson
v. Lale, 216 N.W.2d 152 (S.D. 1974); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); Jones
v. Carvell, 641 P.2d 105 (Utah 1982).
\item Forty states, including Illinois, now allow lost consortium recovery for the death of a child
by statute or by judicial decisions. Eleven states expressly deny such recovery to the parent.
\textit{See supra} note 4. Alabama is not included among these states because it has a punitive statute.
\item For a discussion of the development of the social and economic conditions which have
made the presumption of loss of a child's services largely fictional, see Wycko v. Gnodke, 361
Mich. 331, 105 N.W.2d 118 (1960). In response to the rigid common law rules that limited
recovery for wrongful death to the loss of pecuniary benefits, Dean Prosser said:

\textit{Recent years, however, have brought considerable modification of the rigid common
law rules. It has been recognized that even pecuniary loss may extend beyond mere
contributions of food, shelter, money or property; and there is now a decided
tendency to find that the society, care, and attention of the deceased are 'services'
to the survivor with a financial value, which may be compensated. This has been
true, for example, not only where a child has been deprived of a parent, . . . but
also where the parent has lost a child.}
\textit{W. Prosser, supra} note 24, § 127, at 908.
\end{enumerate}
\end{footnotesize}
B. "Pecuniary Injuries" in Illinois

The Illinois Supreme Court first interpreted the "pecuniary injuries" phrase of the Wrongful Death Act in the 1857 decision of City of Chicago v. Major. In Major, the supreme court allowed the father of a deceased four-year-old child to recover $800 in damages even though there was no proof of the pecuniary value of the child's life, other than evidence showing that the child was healthy. Although the father did not present proof of pecuniary loss, the court stated that it was within the jury's discretion to exercise its own judgment in reaching a verdict. Moreover, the court held that the jury was properly instructed to consider only the pecuniary loss the father suffered from the child's death and not the parent's "mental anguish or bereaved affections." The Major decision represented the first recognition of the presumption of pecuniary loss in Illinois. The decision was also the first to interpret "pecuniary injuries" as including only the loss of a child's services and earnings. Recovery for emotional losses, which later would include loss of a child's society and companionship, or consortium, was excluded.

At common law, consortium referred only to the "company and assistance" of a wife; recovery for loss of consortium was therefore limited solely to the husband. By 1960, Illinois allowed recovery for loss of consortium to a wife. Recovery came not from the Wrongful Death Act, but from the negligent injury to her husband. In Dini v. Naiditch, the Illinois Supreme Court concluded that there was no basis in modern society for the denial of the wife's common law action for loss of consortium. The husband and wife were "equal in the eyes of the law." The Dini court defined consortium broadly to include "elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity." The court extended the lost consortium action to the wife to protect the family as the "unit upon which our society is founded."

Illinois courts recognized earlier that consortium was present in parent-child relationships as well as the husband-wife relationship. In Allendorf v. Elgin, Joliet & Eastern Railway, a 1956 decision, the Illinois Supreme Court upheld a $20,000 award to the decedent's four children. The Allendorf

82. 18 Ill. 349 (1857).
83. Id. at 360.
84. Id.
86. See Carr, supra note 48, at 596-98; Comment, Judicial Treatment of Negligent Invasion of Consortium, 61 COLUM. L. REV. 1341, 1344 (1961); see also supra note 29.
87. 20 Ill. 2d 406, 170 N.E.2d 881 (1960).
88. Id. at 429, 170 N.E.2d at 891.
89. Id. at 427, 170 N.E.2d at 891.
90. Id. at 430, 170 N.E.2d at 892.
91. See Goddard v. Enzler, 222 Ill. 462, 78 N.E. 805 (1906); Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N.E. 1109 (1902).
92. 8 Ill. 2d 164, 133 N.E.2d 288, cert. denied, 352 U.S. 937 (1956).
court recognized that the loss of a deceased father's "felicity, care, attention, and guidance" were compensable as pecuniary injuries under the Illinois Wrongful Death Act.93 Two years later, in Hall v. Gillins,94 the court again recognized that loss of a father's "support, . . . companionship, guidance, advice, love and affection" was recoverable in a wrongful death action.95 In Hall, a widow and her minor child brought a common law action for "destruction of the family unit"96 by the wrongful death of her husband. The plaintiffs alleged deprivation of the husband's companionship, guidance, advice, love, and affection.97 The Illinois Supreme Court refused to recognize such a common law action because an adequate remedy already existed under the Wrongful Death Act,98 unanimously holding that the term "pecuniary injuries" was broad enough to include most of the items of damage that the plaintiffs had claimed in the case.

In Elliott v. Willis,99 a 1982 decision, the Illinois Supreme Court extended wrongful death coverage to families by allowing a spouse to recover for the loss of consortium under the Illinois Wrongful Death Act. In Elliott, a wife whose husband was killed in a car accident sought recovery for loss of his society, companionship, and conjugal relationship.100 The Illinois Supreme Court held that loss of consortium is a compensable pecuniary injury under the broad wording of the Wrongful Death Act.101 The Elliott court relied on both the Dini v. Naiditch and Hall v. Gillins decisions. The Elliott court reasoned that if damages were recoverable for loss of consortium when a spouse is injured,102 and if the Wrongful Death Act has been broadly interpreted to include recovery for loss of consortium,103 then damages for loss of consortium should also be recoverable when injury to a spouse proves fatal.104

While Illinois law evolved to allow a spouse or a child to recover for loss of consortium under the Wrongful Death Act, Illinois lagged in providing a parental cause of action for the loss of consortium of a child. Illinois courts at an early date allowed a father to recover for loss of society and comfort from a man who seduced his daughter.105 These courts observed

93. Id. at 176, 133 N.E.2d at 295.
94. 13 Ill. 2d 26, 147 N.E.2d 352 (1958).
95. Id. at 31, 147 N.E.2d at 355.
96. Id. at 27, 147 N.E.2d at 353.
97. Id..
98. Id. at 30-31, 147 N.E.2d at 354-55.
99. 92 Ill. 2d 530, 442 N.E.2d 163 (1982).
100. Id. at 533, 442 N.E.2d at 164.
101. Id. at 545, 442 N.E.2d at 170.
102. Dini, supra notes 87-90 and accompanying text.
103. Hall, supra notes 94-98 and accompanying text.
104. 92 Ill. 2d at 535, 442 N.E.2d at 167.
105. See Ball v. Bruce, 21 Ill. 161 (1859) (guardian in loco parentis allowed to recover lost society in seduction action); Anderson v. Ryan, 8 Ill. 583 (1846) (value of society and attentions of a virtuous and innocent daughter may be properly considered); Grable v. Margrave, 4 Ill. 372 (1842) (parent allowed to recover loss of daughter's society and comfort caused by seduction of daughter).
that the real basis for recovery was not the loss of the child’s services; rather, intangible elements such as degradation to the family reputation, emotional distress, and mental anguish formed the real basis of the father’s recovery.\footnote{106}

Despite the seduction cases and the wrongful death cases that allowed consortium recovery for spouses and children, compensation for the loss of consortium of a deceased child was rejected until recently. The primary reasons for denying parental loss of consortium recovery were: the absence of precedent,\footnote{107} the intangible nature of such losses, and the belief that lost consortium recovery was limited to spouses.\footnote{108} Since Illinois courts awarded damages for the lost consortium of a spouse and parent, the lost consortium of a child should also be compensable. This logic was finally adopted by the Illinois Supreme Court in \textit{Bullard v. Barnes}.\footnote{109}

\textbf{THE Bullard Decision: FACTS AND PROCEDURAL HISTORY}

On October 1, 1979, seventeen-year-old Scott Bullard was killed in a traffic accident.\footnote{110} Scott’s parents filed a lawsuit\footnote{111} which included counts based on

\footnotesize{106. See Yundt v. Hartrunft, 41 Ill. 9, 13 (1866) (injury to character of family, distress, and mental anguish, and not loss of services, are gravamen of a seduction action); Ball v. Bruce, 21 Ill. 161 (1859) (parents’ wounded feelings, family disgrace and lost society); Anderson v. Ryan, 8 Ill. 583, 587 (1846) (recovery for loss of society and loss suffered by parents from daughter’s defilement and corrupted mind).}

\footnotesize{107. See Bohnen v. Wingereid, 80 Ill. App. 3d 232, 241, 398 N.E.2d 1204, 1211 (1st Dist. 1979) (“perhaps this law is heartless and perhaps it should be changed . . . but that would be a matter for the legislature”).}

\footnotesize{108. See Bullard v. Barnes, 112 Ill. App. 3d 384, 445 N.E.2d 485 (4th Dist. 1983). One Illinois appellate court, however, reluctantly stated:

\textbf{[I]f} felicity and companionship, \textit{i.e.}, loss of society as between a decedent and his child or a decedent and his spouse are capable of evaluation the damages would be no less capable of evaluation where the decedent was a child and the survivors were the next of kin.}


\footnotesize{109. 102 Ill. 2d 505, 468 N.E.2d 1228 (1984).}

\footnotesize{110. \textit{Id.} at 509, 468 N.E.2d at 1230. Mrs. Bullard and Scott’s brother, Todd, arrived at the scene shortly after the accident. Mrs. Bullard spoke to Scott, but he did not respond; she saw Scott rubbing his shoulder. Todd saw Scott’s swollen neck and blood dripping from his mouth. Scott died shortly after arriving at the hospital. Scott’s parents and brother sought recovery for mental anguish. \textit{Id.} The Illinois appellate court, however, affirmed the trial court’s dismissal of the mental anguish claim because none of the plaintiffs had personally witnessed the collision.}


\footnotesize{111. \textit{Bullard}, 102 Ill. 2d at 508, 468 N.E.2d at 1230. Robert G. Bullard, Scott’s father, filed a cause of action individually and as administrator of Scott’s estate. Sharon Bullard, Scott’s mother, and Scott’s brothers also filed actions individually.}
both the Wrongful Death Act$^{112}$ and the Survival Act.$^{113}$ The trial court instructed the jury that in determining pecuniary loss to the parents under the wrongful death count, the jury may consider the "money, goods, and services the decedent might have reasonably been expected to contribute," as well as "the parents' loss of society with the decedent."$^{114}$ The jury returned a general verdict in the wrongful death count of $285,000 and a general verdict in the survival action for the decedent's pain and suffering of $40,000.$^{115}$

The Illinois Appellate Court for the Fourth District reversed the wrongful death verdict,$^{116}$ holding that the jurors had been improperly instructed to consider the parents' loss of their son's society as an element of damages under the Wrongful Death Act.$^{117}$ The court observed that, although the Illinois courts permit recovery for loss of a spouse's society, such recovery had not been extended to the loss of a child's society.$^{118}$ The court assumed a "qualitative difference" between the society of a spouse and that of a child; it also presumed that "society is inherent [in] the marital relationship."$^{119}$

The Illinois appellate court also observed that the Wrongful Death Act was an extension of the common law and therefore only allows recovery for

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112. ILL. REV. STAT. ch. 70, § 2 (1984-85).
113. ILL. REV. STAT. ch. 110 1/2, § 27-6 (1984-85). The plaintiffs sought damages for decedent's conscious pain and suffering from the time of the collision until his death. In addition, two counts were included for property damage to the automobile Scott Bullard was driving at the time of the accident. The defendant admitted liability for the property damage in the sum of $750. The jury awarded $500 in punitive damages for the property loss. 102 Ill. 2d at 511, 468 N.E.2d at 1228.
114. Bullard v. Barnes, 112 Ill. App. 3d 384, 389, 445 N.E.2d 485, 489 (4th Dist. 1983). The trial court gave the following modification of I.P.I. Civil Instruction No. 31.03 to the jurors:

In determining pecuniary loss to the parents and the weight to be given for the presumption of pecuniary value, including money, goods, and services the decedent might have reasonably been expected to contribute to his parents and brothers had the decedent lived, bearing in mind what you find the evidence shows concerning the decedent's age, sex, health, physical and mental characteristics, habits and the parents' loss of society with the decedent.

Id. (emphasis added.)
115. Bullard, 102 Ill. 2d at 571, 463 N.E.2d at 1228.
117. Id. at 389-90, 445 N.E.2d at 490.
118. Id. at 390, 445 N.E.2d at 490.
119. Id. Apparently the appellate court equated "society" with sexual relations. The term "society," however, connotes love, affection, companionship, and felicity, which clearly are inherent in the parent-child relationship as well as in the husband-wife relationship. A subsequent Second District Illinois Appellate Court opinion refuted the appellate court's rationale in Bullard and concluded:

We find no logical qualitative difference between the elements of relationships that exist between children and their next of kin and decedent's spouses and their surviving spouse and next of kin. The loss of society, companionship, and felicity are no less measurable in the one context than in the other.

actions recognized at common law in non-fatal injury cases. The court recognized that the common law did not allow parents recovery for the loss of a child's society and companionship if the child's injury was not fatal, and that no cause of action existed at common law for wrongful death. The appellate court concluded that the Wrongful Death Act was not intended to provide parental recovery for lost society and companionship of a minor child. The court reasoned that if "the Wrongful Death Act is to supply the gap for fatal injuries and is the obverse of common law non fatal actions, there is no basis for including within its damage provision the loss of society of a child." The case was remanded for a new trial on the issue of damages, in which the loss of society instructions were to be excluded.

The Illinois Supreme Court affirmed the appellate court's decision concerning the need for retrial on damages, but based its decision on different

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120. 112 Ill. App. 3d at 390, 445 N.E.2d at 490.
121. Id.; see Curtis v. County of Cook, 109 Ill. App. 3d 400, 440 N.E.2d 942 (1st Dist. 1982); see also supra notes 22-23 (discussing the common law remedy for non-fatal injuries).
122. See Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949); supra notes 15-21 and accompanying text.
123. 112 Ill. App. 3d at 390, 445 N.E.2d at 490.
124. Id. The Illinois appellate court in Trotter v. Moore, 113 Ill. App. 3d 1011, 447 N.E.2d 1340 (2d Dist. 1983), adopted the Bullard court's rationale. The Trotter court noted that there was no recovery at common law for loss of a child's society for a non-fatal injury and, thus, no "shortcoming" or "gap" existed for the Wrongful Death Act to obviate where the loss of society arises from the wrongful death of a child. Id. at 1016, 447 N.E.2d at 1343.

It appears that the appellate courts in Bullard and Trotter refused to extend lost consortium recovery to the parent based on a narrow reading of the Illinois Supreme Court decision of Elliot v. Willis, 92 Ill. 2d 530, 442 N.E.2d 163 (1982). The Elliot court allowed lost consortium recovery to a surviving spouse under the Illinois Wrongful Death Act based on a broad interpretation of the statutory phrase "pecuniary injuries." Id. at 540, 442 N.E.2d at 168. The Trotter and Bullard courts narrowly interpreted Elliot as limiting consortium recovery to spouses only. The Elliot court, however, recognized that the modern trend was to expand, not restrict, consortium recovery under the Wrongful Death Act. Id. at 540, 442 N.E.2d at 167. Further, the Elliot court recognized that loss of advice, training, and guidance, see Goddard v. Enzler, 222 Ill. 462, 78 N.E. 805 (1906), and other intangible elements such as felicity and care, see Allendorf v. Elgin, J. & E. Ry. Co., 8 Ill. 2d 164, 133 N.E.2d 288, cert. denied, 352 U.S. 937 (1956), were previously held compensable as "pecuniary injuries" under the Illinois Wrongful Death Act in actions brought by a child for the wrongful death of a parent. The Elliot court, therefore, felt compelled to similarly extend the intangible lost consortium recovery to a spouse. 92 Ill. 2d at 538, 442 N.E.2d at 167. The Elliot court's expansive interpretation of "pecuniary injuries" and recognition of the recent trend to allow lost consortium recovery should have persuaded, not dissuaded, the Bullard and Trotter courts to logically extend recovery to cases involving the wrongful death of a child.

125. 112 Ill. App. 3d at 395, 445 N.E.2d at 494. The appellate court's reversal was also based on admission of the following evidence, which it deemed irrelevant: testimony concerning defendant Barnes' passing maneuver and his failure to stop after the collision, and two "prejudicial" morgue photographs of the decedent. Id. at 393-95, 445 N.E.2d at 493-95. On appeal, the Illinois Supreme Court held that the appellate court's denial of admission of testimony regarding the passing maneuver and Barnes' failure to stop was correct. The court, however, disagreed with the appellate court's decision that the morgue photographs were inadmissible, stating that there was no evidence that the trial judge had abused his discretion in admitting the photographs into evidence. Thus, on retrial the photographs were held admissible "assuming adequate foundation is laid." Id. at 519-20, 468 N.E.2d 1235.
reasoning. The court held that the loss of society of a minor child is a compensable pecuniary injury under the broad wording of the Illinois Wrongful Death Act;\(^{126}\) the jurors had been properly instructed to consider the loss of society of the Bullards' son.\(^{127}\) The court, however, ordered that the verdict be reviewed and the case remanded on the ground that the jurors had not been instructed to deduct anticipated child rearing expenses from the value of the child's lost income and society.\(^{128}\)

**The Court's Holding and Rationale**

The *Bullard* court held that a parent could recover damages under the Wrongful Death Act for the loss of society and companionship of a minor child. The *Bullard* court based its decision on three considerations. First, the court adopted the "modern trend" in jurisdictions with wrongful death statutes similar to Illinois, which extended recovery for lost society to the child-death cases.\(^{129}\) Second, the court broadened the definition of the statutory phrase "pecuniary injuries" to include loss of society to the parent, in accordance with similar Illinois decisions allowing such recovery to a spouse or child.\(^{130}\) Finally, the court reassessed and overturned the presumption that the parent suffers only a loss of earnings and services from the death of the child.\(^{131}\)

The *Bullard* court first looked to other jurisdictions for guidance.\(^{132}\) The court noted that among the twenty-three jurisdictions with statutes or decisional law limiting recoveries to pecuniary loss or injuries,\(^{133}\) fourteen currently allow parental recovery for a child's lost society and companionship.\(^{134}\) The court also reviewed Illinois decisions and concluded that Illinois reflected a similar trend to expand the scope of pecuniary injuries to include "non-monetary losses" such as society and companionship.\(^{135}\) This conclusion was

\(^{126}\) 102 Ill. 2d at 515, 468 N.E.2d at 1233.

\(^{127}\) Id. at 515, 468 N.E.2d at 1233.

\(^{128}\) Id. at 518-19, 468 N.E.2d at 1235.

\(^{129}\) Id. at 512-14, 468 N.E.2d at 1232.

\(^{130}\) Id.

\(^{131}\) Id. at 515-17, 468 N.E.2d at 1233-35.

\(^{132}\) For other decisions noting the recent trend among the states in favor of permitting lost society recovery, see Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587 (1974); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983).


\(^{134}\) 102 Ill. 2d at 512, 468 N.E.2d at 1232.

\(^{135}\) Id. at 514, 468 N.E.2d at 1232.
based primarily on its prior holdings in *Elliott v. Willis* and *Hall v. Gillins*.137

In *Elliott*, the Illinois Supreme Court unanimously held that a surviving spouse may recover for the loss of her decedent husband’s society under the Wrongful Death Act.138 The *Bullard* court observed that the *Elliott* decision was “based on a broad interpretation of pecuniary injury.”139 The *Bullard* court also noted that in *Hall*, the supreme court similarly recognized that the statutory phrase “pecuniary injuries” was broad enough to include recovery to a wife and child for the loss of “companionship, guidance, advice, love, and affection of the deceased.”140 In light of the *Elliott* and *Hall* decisions, the *Bullard* court reasoned that since the court had previously endorsed recovery for lost society to a spouse and child,141 and had recognized the broad scope of the phrase “pecuniary injuries,”142 it would be anomalous to deny parents recovery for loss of society.143 The court concluded that in cases involving the death of a minor child, the parents may recover for lost society and companionship under the Wrongful Death Act.144

The *Bullard* court next addressed the presumption in Illinois that the parent suffers only the pecuniary loss of the child’s earnings and services from the child’s death.145 The court observed that the pecuniary loss limitation arose from common law courts’ interpretation of Lord Campbell’s Act146 in

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136. 92 Ill. 2d 530, 442 N.E.2d 163 (1982).
137. 13 Ill. 2d 26, 147 N.E.2d 352 (1958).
138. 92 Ill. 2d at 540, 442 N.E.2d at 168; see supra notes 99-104 and accompanying text.
139. 102 Ill. 2d at 514, 468 N.E.2d at 1232.
140. Id. (quoting *Hall* 13 Ill. 2d at 31, 147 N.E.2d at 354-55). See also supra notes 94-98 and accompanying text (discussion of *Hall*).
142. Id. at 515, 468 N.E.2d at 1233; see cases cited supra note 141.
143. 102 Ill. 2d at 515, 418 N.E.2d at 1233.
144. Id.
145. Id. at 515-16, 468 N.E.2d at 1233; see also Baird v. Chicago, B. & Q. R.R., Co., 63 Ill. 2d 463, 349 N.E.2d 413, 417 (1976) (Wrongful Death Act permits damages for pecuniary loss); Stafford v. Rubens, 115 Ill. 196, 198, 3 N.E. 568, 569 (1885) (loss of child’s services is pecuniary loss sustained by father); City of Chicago v. Hesing, 83 Ill. 204, 206-07 (1876) (only pecuniary damages available to next of kin when death caused by negligence); City of Chicago v. Scholten, 75 Ill. 468, 471 (1874) (without pecuniary loss, only nominal damages recoverable); City of Chicago v. Major, 18 Ill. 349, 360 (1857) (Wrongful Death Act provides recovery for father’s pecuniary loss, without consideration of mental anguish); Dodson v. Richter, 34 Ill. App. 2d 22, 24-25, 180 N.E.2d 505, 507 (3d Dist. 1962) (damages under Wrongful Death Act are to compensate for pecuniary injuries).
146. 102 Ill. 2d at 515, 468 N.E.2d at 1233.
light of the social conditions of the nineteenth century. The court further noted that since the Illinois Wrongful Death Act was modeled after Lord Campbell's Act, the measure of damages has been similarly restricted to pecuniary loss. The court, however, recognized that the pecuniary loss rule was "traceable to an era far removed in time and values of the 1980's," and concluded that the rule was an anachronism in modern society. The Bullard court observed that the common law rule that limited parental recovery to the actual or pecuniary loss of the child's income was formulated in an era "when children were valued largely for their capacity to contribute to the family income." Today, the court noted, children do not account for as great a percentage of the family income as they did in the previous century. Child labor laws, compulsory education, and college draw children away from employment. Because children today rarely contribute to family income, the court reasoned that the common law pecuniary loss rule enunciated in Lord Campbell's day should not apply to the relationship between parent and child in the twentieth century. Consequently, the court held that parents would be entitled to a presumption of pecuniary injury from the loss of a child's society and companionship, and that such losses would be recoverable under the Illinois Wrongful Death Act. Any claimed loss of a child's income will no longer be presumed but must actually be proven.

The Bullard court also set forth a formula by which juries were to assess damages. The court stated that trial judges should instruct juries to deduct the anticipated expenses of child rearing from any award for loss of society and proven loss of income. The court based its decision to include a set-off for child rearing on persuasive authority in other jurisdictions and its recognition that upon a child's birth, the parent automatically is burdened

147. Id.
148. Id.
149. Id. at 516, 468 N.E.2d at 1233.
150. Id.
151. Id. at 516, 468 N.E.2d at 1233 (citing Fussner v. Andert, 261 Minn. 347, 352-53, 113 N.W.2d 355, 359 (1961)).
152. Id.
153. Id. at 517, 468 N.E.2d at 1234. Although the Bullard court repudiated the loss of earnings presumption, the court did state that when "the child earned income that was used to support the family, these facts may, of course, be proved and a recovery had." Id. The court also held that the presumption of loss of a child's society is not conclusive, but may be rebutted by the defendant through evidence that the parent and child were estranged. Id.
154. Id. at 518-19, 468 N.E.2d at 1234-35.
155. Id. at 518-19, 468 N.E.2d at 1235.
by additional financial responsibilities. The court concluded that jurors should be instructed to deduct from the lost society award those “expenditures the parent would have been likely to incur had the child lived.”

Justice Clark concurred in the majority opinion and generally approved the decision. Justice Clark, however, disagreed with the majority’s formula for calculating damages. Justice Clark stated that a “set-off” for child rearing expenses, such as college tuition and living expenses, would result in an inequitable measurement of damages by substantially reducing the amount of damages received. He also suggested that the Bullard opinion should not be limited to wrongful death cases involving minor children, but should be extended to allow loss of society recovery for the death of a child who has reached the age of majority. Justice Clark concluded that the presumption of a parent’s pecuniary loss of advice, companionship, and assistance is “legally valid for [both] adult and minor child[ren].”

ANALYSIS AND CRITIQUE

The Bullard court properly defined “pecuniary injuries” under the Illinois Wrongful Death Act to include loss of society and companionship of a deceased minor child. The court recognized that the loss suffered when a child dies can no longer be calculated merely on the basis of the child’s economic contributions. The majority included loss of society in the calculation of damages to better reflect the value of the child and the substantial loss that parents suffer upon the child’s death. Under Illinois law existing prior to Bullard, a spouse and a child could recover for loss of society as a pecuniary injury under the Wrongful Death Act; courts have long noted that the Act deserves liberal interpretation. The court’s extension of the

157. Bullard, 102 Ill. 2d at 518, 468 N.E.2d at 1234 (citing Cockrum v. Baumgartner, 95 Ill. 2d 193, 447 N.E.2d 385 (1983), which acknowledged the substantial expenses associated with child rearing). The court observed that although cases that allow lost society recovery to spouses and children provided persuasive precedent for extending such recovery to parents, “neither children nor spouses bear the same heavy financial responsibility for either their parent or spouse that a parent automatically assumes upon the birth of a child.” Thus, loss of child rearing expenses was included in the court’s formula for computing pecuniary injury to the parent. Id. at 517-18, 468 N.E.2d at 1234.

158. Id. at 518, 468 N.E.2d at 1234.

159. Id. at 520-21, 468 N.E.2d at 1236 (Clark, J., concurring).

160. Id. at 521, 468 N.E.2d at 1236 (Clark, J., concurring). Justice Clark specifically cited college tuition and living expenses as deductions which would substantially reduce the award. Id.

161. The majority opinion expressly confined its analysis to the facts in the case, stating “this case does not present, and we therefore need not decide, the question of whether the loss-of-society presumption applies to children who have reached the age of majority.” Id. at 517, 468 N.E.2d at 1234.

162. Id. at 521, 468 N.E.2d at 1236 (Clark, J., concurring).

163. Id. (Clark, J., concurring).


165. See City of Chicago v. Major, 18 Ill. 349 (1857); see also supra note 48.
measurement of damages under the Act to include recovery for a parent's loss of a child's society was the next logical step.

While the Bullard decision is commendable for allowing recovery for loss of society when a minor child dies, the decision is ambiguous. By choosing to limit its holding to the facts before it, the Bullard court both expressly and implicitly refused to address the following closely connected issues: 1) Whether the jury may extend its calculation of damages for loss of society beyond the period of the child's minority; 2) Whether recovery for loss of society is limited to the parent, or may collateral kin recover for the loss of a child's society; 3) Whether parents can recover for loss of society when a child is negligently injured but not killed; and 4) Whether the Bullard holding extends to situations in which a child beyond the age of majority is wrongfully killed?

The Bullard court failed to mention whether the formula for recovery may include the value of lost society and companionship after the child reaches the age of majority. Bullard limits the set-off of child rearing expenses, such as education, maintenance, and support, to those incurred before the child reaches majority. Once the child reaches the age of majority, parent and child no longer owe each other obligations of support and service. The court, however, did not set a time limit on calculations for compensating loss of society. The loss of a child's economic contributions and household services has always included the reasonable expectation of benefits from the child's entire life and should not be limited to the child's minority. Consequently, because Bullard essentially replaces the loss of services formula with a loss of society formula, the latter formula should similarly permit the parent to recover for loss of society the child would have contributed beyond the age of majority. Nothing in the Illinois Wrongful Death Act, however, distinguishes between these damages.

The best solution to this problem would be to measure future lost society on the basis of the parent's or child's projected life expectancy, whichever is shorter. The court should recognize that the child could have provided society and companionship as well as economic assistance to the surviving parents. The parent-child relationship does not terminate at the arbitrary

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166. See also Clark v. Icicle Irrigation Dist., 72 Wash. 2d 201, 205-10, 432 P.2d 541, 544-47 (1967).
167. See Feldman, supra note 29, at 96; Prosser & Keeton, supra note 3, § 125 at 935.
168. See Lichtenstein v. Fish Furniture Co., 272 Ill. 191, 198-99, 111 N.E. 729, 732 (1916) (upholding jury instruction which allowed computation of lost services beyond age 18); City of Chicago v. Keefe, 114 Ill. 222, 229, 2 N.E. 267, 270 (1885) (holding that a jury instruction restricting recovery for lost earnings to age 21 was properly refused); Mortenson v. Sullivan, 3 Ill. App. 3d 332, 336, 278 N.E.2d 6, 10 (2d Dist. 1972) (the consensus of Illinois courts regard children to be responsible for the parents' pecuniary needs in old age).
169. Usually, a parent's life expectancy would be shorter than that of a child's. However, evidence of a pre-existing terminal disease in the child would require lost society to be based on the child's life expectancy. See Parson v. Easton, 184 Cal. 764, 195 P. 419 (1921); Note, Wrongful Death of Children—The Real Injury, 5 W. St. U.L. Rev. 253, 256 (1978).
point of the child's majority. 171 Rather, the relationship between the parent and child continues beyond majority for reasons of gratitude or obligation. Many children remain devoted companions to their aged and often infirm parents. Moreover, parents should receive the value of lost society and companionship beyond the age of majority because parents' life expectancies are increasing and children contribute valuable companionship in their parents' declining years. 172 Juries can infer that when the child and parents enjoyed a close relationship, the child would have contributed society and companionship after reaching majority. The prospective aid, comfort, society, and companionship that a child would have given, regardless of age, should be recognized as a compensable loss. 173 Therefore, juries should be instructed to compensate parents for loss of their child's society and companionship beyond the age of majority. 174

One commentator has noted that juries must speculate when they calculate the value of lost society for the child's post-majority years. 175 Questions of whether the child would have married and had dependents, and how close the relationship between the parent and child would have remained had the child lived, arise in such determinations. 176 It is no more difficult, however, for juries to measure anticipated loss of society, than to determine other abstract or intangible concepts with which juries are required to deal. 177 Illinois juries must often place a value on pain and suffering, loss of spousal consortium, emotional distress, and future loss of a minor's services, and have done so successfully. 178 It would not be unreasonable for juries to estimate the future lost society of the child.

172. Id.
173. Id. at 11-14, 424 A.2d at 215-17. See also Barrett v. Charlson, 18 Md. App. 80, 305 A.2d 166 (1973) (recovery under wrongful death statute not limited to period of minority).
174. See Jones v. Carvell, 641 P.2d 105, 111 (Utah 1982) ("damages for the wrongful death of a child is in reality recompense for a future loss—the loss of future sharing of love, companionship and society"); see also Decof, Damages in Actions for Wrongful Death of Children, 47 Notre Dame Law. 197, 198-200 (1971) (recovery for child's post-majority contributions is reasonable basis for recovery and is accepted by a majority of courts).
175. See Decof, supra note 174, at 199 (greatest problem with post-majority calculations is proving that child would have conferred the benefits).
176. Id.
178. See D'Ambra v. United States, 481 F.2d 14, 21 (1st Cir. 1973); Hoekstra v. Helgaland, 78 S.D. 82, 107, 207 N.W.2d 669, 682 (1959); Johnson, supra note 9, at 44.

Moreover, the "speculation" argument is inadequate because future loss of society and companionship can be valued easily in terms of a "pecuniary" injury to the parent. For example, loss of companionship can be given a monetary value based on substantially equivalent services that a nurse or companion would provide. Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980). Similarly, the loss of prospective advice, guidance, and counsel can be evaluated by considering the pecuniary value of equivalent services that a business advisor, a therapist, or a counselor would provide. Id. In Illinois, where the law presumes that a substantial loss results from the child's death alone, evidence that the parents would have actually purchased such professional services because of the child's death is not necessary. Evidence that the deceased child would have rendered such pecuniary benefits to the parents would be sufficient. Id. See also Bridge v. Borack, 524 S.W.2d 773, 776 (Tex. Civ. App. 1975) (holding that the advice and counsel that deceased 21-year-old would have given his parents as to business decisions, family financial decisions, and personal dilemmas have monetary value).
The supreme court did not discuss the potential extension of *Bullard* to other family relationships. The *Bullard* decision recognized that the parents' interest in compensation for loss of the deceased child's society outweighs the negligent defendant's interest in being free from liability for such a loss. The defendant's liability, however, must have some reasonable limitation. Requiring a wrongdoer to pay for the lost society of every person who had some relationship with the decedent would place an unreasonable burden on human activity and would create liability disproportionate to the defendant's culpability.179 Thus, public policy dictates that liability for loss of consortium be limited at some point.

One logical point of demarcation could be set at the parent-child and husband-wife relationships, where the losses are immediate, real, and severe. Recovery for lost society suffered by the defendant's siblings is an apparently unreasonable extension of the defendant's liability. Arguably the impact of a brother's or sister's death on the surviving sibling may be as severe as the impact of a child's death on the parent. In some circumstances, the siblings might have spent more time with the decedent than the parents.180 Nevertheless, the presumption of pecuniary injury from the loss of society afforded to parents of the decedent should not be extended to siblings; Illinois does not consider collateral kin to suffer more than nominal damages from the child's death unless they prove otherwise.181 Sibling recovery, therefore, should be decided on a case-by-case basis.

In *Prendergast v. Cox* an Illinois appellate court did not allow lost society to siblings in the wrongful death of an adult.182 The court stated that lineal kin, unlike collateral kin, are presumed to suffer pecuniary loss because of the "special" relationship that exists only between lineal kin.183 Collateral kin must therefore prove actual loss.184 Illinois has traditionally distinguished

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179. *Prosser & Keeton*, supra note 3, § 54, at 366; see *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 301 N.Y.S.2d 554, 561, 249 N.E.2d 419, 424 (1969) ("Every injury has ramifying consequences, like the rippling of the waters, without end . . . . [The problem] is to limit the legal consequences of wrongs to a controllable degree.").


183. *Id.* at 90, 470 N.E. 2d at 37. The court, however, does not define "special" relationship.

between lineal and collateral kin when granting recovery.\textsuperscript{185} The \textit{Prendergast} court also observed that in the \textit{Bullard} case, only parents (lineal kin) were permitted to claim the lost society of a minor.\textsuperscript{186} The \textit{Prendergast} court would not expand \textit{Bullard} to permit sibling recovery for lost society.\textsuperscript{187}

It is unclear whether the \textit{Prendergast} court denied sibling recovery because it felt that only parents should recover for lost society or because the decedent’s siblings in this particular case did not prove actual loss of society. At trial, the decedent’s brothers and sisters presented evidence that the decedent had given them gifts and done various home maintenance and repair work for them.\textsuperscript{188} All of the siblings were also friendly with the decedent.\textsuperscript{189} The court’s denial of recovery might have been based on the lack of proof presented at trial since lost society suffered by collateral kin is not presumed. The court might also have cautiously chosen, as a matter of law, not to expand defendant liability to adult siblings who reside outside the decedent’s home. Regardless of the basis of the \textit{Prendergast} decision, the legislature should set the limits of recovery for lost society since it is best equipped to make such a policy decision regarding the Wrongful Death Act.

The most equitable extension of \textit{Bullard} would be to allow recovery to persons acting \textit{in loco parentis}\textsuperscript{190} with the decedent. Whether a person served as a “parent” to the child would be a question for the courts to determine on a case by case basis. If, for example, the plaintiff is a foster parent\textsuperscript{191} or a grandparent who raised the child prior to the child’s death, there is no basis for denying an action for lost society.\textsuperscript{192} The loss of the child’s society and companionship will often be as great as in the natural parent-child relationship.\textsuperscript{193}

Another issue that remains after \textit{Bullard} is whether the court’s rationale can be extended to cases in which a child is negligently injured. In such

\begin{itemize}
  \item \textsuperscript{185} Hall v. Gillins, 13 Ill. 2d 26, 147 N.E.2d 352 (1958); \textit{Prendergast v. Cox}, 128 Ill. App. 3d 84, 470 N.E.2d 34 (1st Dist. 1984); see \textit{Howlett v. Doglio}, 402 Ill. 311, 83 N.E.2d 708 (1949); Rusher v. Smith, 70 Ill. App. 3d 889, 388 N.E.2d 906 (5th Dist. 1979); see also supra notes 61-63.
  \item \textsuperscript{186} 128 Ill. App. 3d at 89, 470 N.E.2d at 37.
  \item \textsuperscript{187} \textit{Id}.
  \item \textsuperscript{188} \textit{Id}. at 86, 470 N.E.2d at 35.
  \item \textsuperscript{189} \textit{Id}.
  \item \textsuperscript{190} \textit{In loco parentis} is defined as “in the place of a parent; instead of a parent; charged factitiously, with a parent’s rights, duties, and responsibilities.” \textsc{Black’s Law Dictionary} 708 (5th ed. 1979).
  \item \textsuperscript{191} \textit{Hollis v. Thomas}, 42 Tenn. App. 407, 303 S.W.2d 751 (1957) (allowing foster parents to act \textit{in loco parentis}).
  \item \textsuperscript{192} See \textit{Feldman}, supra note 29, at 94 (if courts deny recovery to persons \textit{in loco parentis}, but allow natural parents to recover, courts might be violating state and federal equal protection guarantees); see also \textit{Niewiadomski v. United States}, 159 F.2d 683 (6th Cir. 1947), \textit{cert. denied}, 331 U.S. 850 (1947) (parent, as well as person \textit{in loco parentis} entitled to child’s earnings); \textit{Ball v. Bruce}, 21 Ill. 161 (1859) (sister-in-law could recover loss of services of a minor girl seduced by defendant).
  \item \textsuperscript{193} \textsc{Love}, \textit{Tortious Interference with the Parent-Child Relationship: Loss of An Injured Person’s Society and Companionship}, 51 Ind. L.J. 590, 622 (1976).
\end{itemize}
cases, the child’s society is diminished but not lost. After Bullard, many of the traditional arguments against recovery in such cases are obsolete. For example, Bullard rejected the argument that a spouse’s claim for loss of consortium differs from the parents’ claim for loss of a child’s consortium due to the sexual element of the marriage relationship. The Bullard court noted that loss of consortium broadly includes not only sexual relations, but also aid, society, love, and companionship, which are equally present in the husband-wife and parent-child relationships. Moreover, Bullard rejected the argument that loss of society is an intangible injury incapable of pecuniary valuation.

Courts in other jurisdictions have allowed recovery to parents when their child is negligently injured only when the injury is severe. For example, the Wisconsin case of Shockley v. Prier involved a child who was negligently administered an excessive amount of oxygen during delivery, which resulted in disfigurement and total blindness. In allowing damages for lost society and companionship to the parents of the injured child, the Shockley court stated that the injury would likely have a “shattering effect” on the child’s relationship with his parents. The Shockley court reasoned that since the Wisconsin Wrongful Death Act recognized consortium as a compensable injury, it should also recognize loss of consortium when a child is severely injured. In order to prevent double recovery, however, the court concluded that parents have a right to maintain an action for the loss of society of a negligently injured child only if the parents’ cause of action was joined with the child’s cause of action for his own injuries.

A recent Illinois Appellate Court decision, employing an analysis similar to that of the Shockley court, allowed recovery for the loss of an injured minor’s society and companionship in accordance with the Bullard rationale. In Dymek v. Nyquist, a father brought an action against his former wife and a psychiatrist who was treating the plaintiff’s nine-year-old son. The

195. 66 Wis. 2d 394, 225 N.W.2d 495 (1975).
196. Id. at 401, 225 N.W.2d at 499. The plaintiff’s counsel could raise the argument that it is a violation of the equal protection clause to allow recovery to the parents of a deceased child, but not to parents of an injured child. One commentator suggested that a court should apply an intermediate standard of review. Love, supra note 193, at 607-13. An intermediate analysis would require the court to consider whether the injury-death classification rests “upon some ground of difference having a fair and substantial relation to the object of the legislation.” Id. at 612. After careful analysis, the commentator concluded that it would be unlikely that the court would find justification for the “death-injury” classification “despite its purported objective of assuring that only genuine claims are compensated.” Id. at 612-13.
197. 66 Wis. 2d at 400, 225 N.W.2d at 499.
198. Id.
199. 128 Ill. App. 3d 859, 469 N.E.2d. 659 (1st Dist. 1984).
plaintiff alleged that the defendants conspired to "gain physical and mental custody and control of plaintiff's son" so as to "injure and destroy the society and companionship of the child" with respect to his father. Since the Bullard court concluded that "parents are entitled to a presumption of pecuniary injury in the loss of a child's society" under the Illinois Wrongful Death Act, the Dymek court reasoned that the presumption should also apply to cases involving the non-fatal injury of a minor child. The Dymek court concluded that "[it] should . . . recognize a cause of action for parental loss of a minor (injured) child's society and companionship.

Although the Dymek case did not involve a seriously injured child, as in Shockley, the underlying reason for allowing recovery in both cases was that it would be anomalous to cut off recovery merely because the child survived a non-fatal injury. The Illinois Supreme Court had adopted a similar rationale in the past in cases that involved the loss of consortium of a spouse. Regardless of the rationale, after Dymek, Illinois courts can no longer rely on the absence of precedent as a basis for denying recovery for the loss of society of an injured child.

The last question left unanswered by Bullard is whether the presumption of loss of society can be applied to a decedent who has reached the age of majority. Because Scott Bullard was seventeen years old when he died, the court found it unnecessary to consider whether its holding should extend to adult children. The concurring opinion, however, believed that the majority should have addressed the issue and that "the logic embodied in the majority opinion would dictate a similar result if this case involved a twenty-seven-year-old rather than a seventeen-year-old."

200. Id. at 861, 469 N.E.2d at 661.
201. Id. at 867, 469 N.E.2d at 666.
202. Id.
203. Id. The Dymek court reasoned that even though Bullard concerned a wrongful death action, the Bullard rationale could be applied in Dymek where the defendant's wrongful conduct had the non-fatal consequence of "brainwashing" the child. Id.
204. Id. at 868, 469 N.E.2d at 666. See also Stephens v. Weigel, 336 Ill. App. 36, 82 N.E.2d 697 (2d Dist. 1948). In Stephens, the court held that the husband-father was properly entitled to assert a claim for the loss of services and society of his wife and daughter. The Stephens court, however, did not discuss the issue of lost society of an injured child nor did it include citation of authority. Nevertheless, other jurisdictions and legal commentators have repeatedly cited Stephens for the proposition that Illinois accepts the theory of compensating the parent for loss of society of a negligently injured child. See Baxter v. Superior Court, 19 Cal. 3d 461, 464 n.1, 563 P.2d 871, 873 n.1, 138 Cal. Rptr. 315, 317 n.1 (1977); Shockley v. Prier, 66 Wis. 2d 394, 402-03, 225 N.W.2d 495, 500 (1975); Feldman, supra note 29, at 112 n.143; Love, supra note 193, at 591 n.1; Note, The Parental Claim for Loss of Society and Companionship Resulting from the Negligent Injury of a Child: A Proposal for Arizona, 1980 Ariz. St. L.J. 909, 916; Annot., 69 A.L.R. 3d 553, 568 (1976); Cf. Curtis v. County of Cook, 109 Ill. App. 3d 400, 408, 440 N.E.2d 942, 947 (1st Dist. 1982) (Stephens court did not address issue of parent's action for lost society of a deceased child).
205. Supra notes 195-198.
206. See supra text accompanying notes 86-104.
207. 102 Ill. 2d at 517, 468 N.E.2d at 1234.
208. Id. at 521, 468 N.E.2d at 1241 (Clark, J., concurring).
Prior to Bullard, the law presumed that, whether the decedent was a minor or an adult, the lineal kin incurred substantial loss of earnings and services. Just as the Bullard decision overruled the use of lost earnings as the sole measure of damages in child death cases, Bullard's rationale should be extended to the adult child death case. Clearly, since many adult children today still live at home or are supported by parents while at college, the friendship, companionship, and society between parent and child remain a continuing and reciprocal part of the relationship. Unfortunately, with respect to awarding damages in wrongful death actions, the Bullard court did not resolve the ambiguity between two classes of offspring: minor children and adult children.

Since Bullard, two Illinois appellate courts have considered actions for loss of consortium for the death of an adult child and reached contrary results. The Illinois Appellate Court for the First District, in Prendergast v. Cox, recognized a presumption of lost society for the wrongful death of an adult child. In Prendergast, a mother claimed loss of society following the death of her thirty-eight-year-old unmarried son, with whom she had been living at the time of death and on whom she depended for "advice, companionship, and assistance." Based on the concurring opinion in Bullard, the Prendergast court reasoned that the presumption of lost society could be extended to the parents of deceased adult children. The court concluded that the age of the child at the time of death should not determine a parent's recovery for loss of society.

The Illinois Appellate Court for the Fourth District, however, held that the presumption of loss of society cannot be extended to adult children in wrongful death cases. In Ballweg v. City of Springfield, the court analyzed Bullard's newly created presumption and also examined the basis for the supreme court's refusal to consider extending the presumption to compensate the parents of deceased adult children. The Ballweg court noted that the Bullard decision defined presumption as "an inference which common sense draws from the known course of events." The court in Ballweg stated that the relationship between parents and their adult children differs from rela-

209. The presumption of pecuniary loss was originally created for minor child-death cases where the child's habits of industry and potential work were difficult to prove. Flynn v. Vancil, 41 Ill. 2d 236, 242 N.E.2d 237 (1968); City of Chicago v. Major, 18 Ill. 349 (1857). The presumption of lost services was later applied to adult-child death cases. Davis v. Hazen, 582 F. Supp. 938 (C.D. Ill. 1983) (presumption applies even when decedent was an adult); Ferraro v. Augustine, 45 Ill. App. 2d 295, 196 N.E.2d 16 (1964) (allowing parental recovery for lost services of a 35-year-old son residing in his parents home at time of death).

210. The following cases allowed lost consortium recovery for the death of an adult-child: Halvorsen v. Dunlap, 495 F.2d 817 (8th Cir. 1974); Currie v. Fiting, 375 Mich. 440, 136 N.W.2d 840 (1965); McCorkell v. City of Northfield, 272 Minn. 24, 136 N.W.2d 840 (1965).


212. Id.

213. Id. at 85-89, 470 N.E.2d at 36-37.

214. Id.


216. Id. at 29, 473 N.E.2d at 346.
tions among adults. Accordingly, the court held that "it is reasonable to require a [parent] to prove lost society rather than to presume such a loss in all cases."217

Both Prendergast and Ballweg recognize the parent’s right to recover for the loss of society of an adult child. The courts differ, however, as to whether recovery for lost society should be based on actual proof or should be presumed in all cases. The Illinois Supreme Court must resolve this conflict in a clear and comprehensive opinion.

IMPACT

The positive impact of Bullard substantially outweighs the problems created by its ambiguities. Illinois courts will no longer need to justify damage awards to bereaved parents for the wrongful death of a child on the legal fiction of pecuniary loss of earnings and services.218 Courts and juries can now base damage awards on the "real"219 loss suffered when a child is negligently killed—the loss of the child’s society and companionship. Moreover, the decision will reduce the number of unjust damage awards imposed by juries under the restrictive pecuniary loss standard.220 For example, in 1983, an Illinois appellate court affirmed a mere $7000 judgment to a father whose sixteen-year-old daughter had been negligently killed.221 With remedies for lost society available to compensate parents, juries need no longer return such nominal verdicts.

Decisions expanding defendant’s liability for personal injury often raise concerns over increases in insurance costs to the public.222 The public will

217. Id.
218. See Baird v. Chicago, B. & Q. R.R., 63 Ill. 2d 463, 349 N.E.2d 413 (1976) ($180,000 verdicts affirmed for wrongful death of two college students who were not then contributing to their parents).
219. See Decof, supra note 174, at 206. The "real" losses a parent suffers when deprived of a child’s society include:
the joy of watching a child taking his first steps or utter his first words; the thrill in seeing a son score a touchdown or a daughter perform ballet; the pride in watching a child graduate from high school, college, or medical school; and the comfort from a Sunday visit and the holidays, filled with the cheer that children and grandchildren bring.

222. Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 893 (1980); Koskela v. Martin, 91 Ill. App. 3d 568, 572, 414 N.E.2d 1148, 1150 (1980); Theama v. City of Kenosha, 117 Wis. 2d 508, 344
likely bear the burden of paying for lost consortium awards through increased premiums since insurance policies will satisfy most such awards under the Wrongful Death Act. As a result, potential defendants may choose to go without insurance rather than pay the increased costs. Increases in insurance premiums and the number of uninsured tortfeasors, however, does not justify denying recovery to the parents, who are least able to prevent the loss. Furthermore, if this insurance argument were valid, the proper solution would be to eliminate the cause of action for loss of consortium entirely, rather than indiscriminately deny recovery to parents.

To date, there is neither supporting evidence nor precise predictions as to the effect the Bullard decision will have on insurance premiums. If compensation for loss of society of children proves to be too great a strain on insurance costs, the legislature can place a statutory ceiling on the amount recoverable for loss of society and companionship. Since compensation for loss of society has been deemed appropriate in cases involving the loss of a child, maximum limits on damage recovery is preferable to no redress at all. Also, if juries return unreasonably excessive verdicts, courts are empowered to reduce the award to an amount reasonably commensurate with proven losses.

N.W.2d 513 (1984); Prosser & Keeton, supra note 3, § 82, at 591.

The issue of an increase in premiums was specifically raised in the Michigan Supreme Court decision of Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965). The Currie court upheld a damage award in the amount of $32,788.32 for lost society and companionship of a wrongfully killed 21-year-old girl. In his dissent, Justice Black argued that:

> What today's usurpation of legislative power, by the judiciary, will do to contemporaneously rising liability insurance rates is visible for all to see. Loss of a decedent's companionship knows no "pecuniary" base and no evidentiary limit. Foreseeable are extravagant awards to those who, by the wrongful death of some relative, lose nothing beyond piously shed tears and so are unjustly enriched at expense of the premium-paying public.

Id. at 486, 134 N.W.2d at 632.


224. See Dini v. Naiditch, 20 Ill. 2d 406, 428, 170 N.E.2d 881, 892 (1960) (concept of consortium is not "ready for the discard pile").

225. Prosser & Keeton, supra note 3, § 82, at 591.


227. Love, supra note 193, at 605.

228. Comment, Torts—Parent’s Recovery for Loss of Society and Companionship of Child, 80 W. Va. L. Rev. 340, 349 (1977-78). Apparently, the Bullard court was concerned with the possibility that excessive verdicts would result from its decision to allow parental lost consortium recovery. To mitigate the possibility of juries overcompensating parents for their loss, the court included a child rearing expense set-off in its formula for recovery. The court also reiterated that mental anguish, a purely emotional loss, was not a compensable pecuniary injury under the wrongful death statute. Bullard, 102 Ill. 2d at 515-19, 468 N.E.2d at 1233-35.

Prior to *Bullard*, no child rearing set-off had been employed in an Illinois wrongful death case. The effect of such a set-off, as Justice Clark predicted, will be to substantially reduce the amount of the parents' lost society award due to the *Bullard* court's belief that the wrongdoer is sparing the parents the financial burden of raising the child. Because Scott Bullard was seventeen years old at the time of his death, a deduction for college tuition and living expenses would have substantially reduced the loss of society award in the *Bullard* case. Consequently, the set-off will reduce the likelihood of excessive verdicts. However, the set-off will also make it difficult for parents to recover substantial pecuniary damages, particularly when the deceased is an infant. The ultimate unfairness of the set-off is that the wrongdoer would profit as a result of the parents' support obligations. The best solution, perhaps, would be for the legislature to set a reasonable maximum limitation on lost society recovery and completely eliminate the set-off for child-rearing expenses.

It is arguable that the Illinois Supreme Court lacked the authority to extend lost society recovery to the parent of a deceased child. The defendants in *Bullard* argued that the court should have awaited an indication from the General Assembly on whether loss of society should be recoverable following the death of a child. Although the legislature has twice attempted to amend the Illinois Wrongful Death Act to allow damages for lost society, neither bill was passed. Faced with a similar factual and legislative background, the Texas Supreme Court in *Sanchez v. Schindler* abandoned the pecuniary

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Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960); Green v. Bittner, 85 N.J. 1, 424 A.2d 210 (1980). A minority of jurisdictions, however, permit recovery for mental anguish. See, e.g., Dawson v. Hill & Hill Truck Lines, 671 P.2d 589 (Mont. 1983); Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983); Wolfe v. Lockhart, 195 Va. 479, 78 S.E.2d 654 (1953); FLA. STAT. ANN. § 768.21 (West 1984); KAN. STAT. ANN. § 60-1904 (1984); MD. [CTS. & JUD. PROC.] ANN. CODE § 3-904(d) (1984); WASH. REV. CODE ANN. § 4.24.010 (1985). One commentator notes four reasons for the majority view: 1) the rule is well-settled by statute or case law; 2) spurious, inequitable claims and runaway jury awards would be likely; 3) damages would be speculative and difficult to measure; and 4) in states measuring damages by loss to decedent's estate, mental anguish is not viewed as part of the estate. 4 DAMAGES IN TORT, supra note 14, § 24.22[1].

229. *See supra* note 51.

230. *Bullard*, 102 Ill. 2d at 520-21, 468 N.E.2d at 1236 (Clark J., concurring). Alternatively, in order to fully compensate parents, juries will resort, once again, to a fiction by setting unusually high values for loss of society to offset the required child rearing deductions. *See supra* note 81 (discussing the fiction of pecuniary injuries). Otherwise, the child rearing deduction will result in the parents of a deceased 17-year-old receiving more than the parents of a deceased 17-month-old.


232. 102 Ill. 2d at 515, 468 N.E.2d at 1233.


234. 651 S.W.2d 249, 252 (Tex. 1983).
loss limitation in favor of recognizing lost society and mental anguish, even though the Texas legislature had failed to pass bills allowing such recovery. The Sanchez court concluded that it was not bound by legislative inaction in an area of tort law that had primarily developed through the judicial process.235

Similarly, in Illinois, the legislature's prior inaction should not prohibit judicial review of the pecuniary loss limitation.236 In 1982, the Illinois Supreme Court held in Elliott v. Willis that lost consortium is a recoverable pecuniary injury under the Wrongful Death Act.237 Subsequent legislative sessions failed to amend the statute to include or exclude lost consortium recovery. The legislature's failure to act demonstrates their acquiescence to the Elliott court's broad interpretation of the statute. When a statute has been judicially construed and no subsequent amendment is evoked, it will be presumed that the legislature has accepted the court's construction of the legislative intent.238

By allowing recovery for the loss of society of a deceased child, the Illinois Supreme Court has chosen not to compound the error caused by the legislature's failure to act.239 The Bullard decision does not create a new cause of action, and does not represent a usurpation of the amending powers of the legislature.240 The decision represents a proper judicial reappraisal of common law concepts in light of present day realities.241 Courts created the rule that denied recovery for lost society and companionship. Courts can

235. Id.; see also Green, Protection of the Family Under Tort Law, 10 Hastings L.J. 237, 245-46 (1959) (judicial decision is best way to develop tort law; it is difficult to reduce refinements of tort law into statutory form).
237. 92 Ill. 2d 530, 442 N.E.2d 163 (1982).
239. As Justice Bristow stated before granting a wife the right to maintain an action for loss of consortium of her injured husband:

   We find no wisdom in abdicating to the legislature our essential function of re-evaluating common-law concepts in the light of present day realities. Nor do we find judicial sagacity in continually looking backward and parroting the words and analyses of other courts so as to embalm for posterity the legal concepts of the past. On the contrary . . . "we do indeed have a 'charge to keep' but that charge is not to 'perpetuate error,' or to allow our reasoning or conscience to decay, or to turn deaf ears to new light and new life."

also change the rule when it no longer meets society's needs.\textsuperscript{242} Moreover, the \textit{Bullard} decision neither upsets nor abolishes the legislatively created pecuniary loss rule. The decision simply expands the recovery allowed under that rule.\textsuperscript{243} The court's decision to allow lost society recovery to a parent was well within the province of the judiciary.\textsuperscript{244}

\textbf{CONCLUSION}

The \textit{Bullard} decision is an overdue solution to the inequitable pecuniary loss standard, which denied parental recovery for loss of a child's society and companionship. The limited remedy was tolerated for over a century. In an attempt to more accurately reflect the parental loss, the Illinois Supreme Court realistically expanded the damages recoverable under the Illinois Wrongful Death Act to include lost society and companionship. The \textit{Bullard} decision recognizes that the child is an integral part of the family unit and that the death of a child does not merely result in an economic loss to the family. Instead, a child's death destroys the parent-child relationship and creates a loss of the myriad pleasures that can be derived from that relationship.

The extent of \textit{Bullard}'s impact in future cases remains unclear. In one appellate court decision subsequent to \textit{Bullard}, the court extended the \textit{Bullard} presumption of pecuniary loss of society to a child who was injured rather than killed.\textsuperscript{245} Yet, in another case, the court concluded that \textit{Bullard} could not be expanded to include recovery to siblings.\textsuperscript{246} Two appellate districts also differ on the impact of \textit{Bullard}'s holding in cases involving the wrongful death of an adult child.

\textit{Bullard} unambiguously entitles Illinois parents to recover for the lost society and companionship of their minor children in a wrongful death action. The court abandoned the outmoded pecuniary loss limitation set over one hundred years ago. The decision aligns Illinois law with the current trend in most jurisdictions. Next, the legislature must amend the Illinois Wrongful Death Act to expressly include lost consortium recovery for the

\textsuperscript{242} See \textit{Theama v. City of Kenosha}, 117 Wis. 2d 508, 344 N.W.2d 513 (1984); \textit{Shockley v. Prier}, 66 Wis. 2d 394, 397, 225 N.W.2d 495, 497 (1975).


\textsuperscript{244} See \textit{Renslow v. Mennonite Hosp.}, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (Dooley J., concurring). Justice Dooley stated that all "courts create law. If it were otherwise the common law would be as out of touch with life as is a corpse. Courts must take an active part in the development of the common law, although this may mean creativeness." \textit{Id.} at 361, 367 N.E.2d at 1257; see also \textit{Dini v. Naiditch}, 20 Ill. 2d 406, 416, 170 N.E.2d 881, 892 (since plaintiff's loss of consortium action was "judge-invented," it can be judicially altered to fit new cases); \textit{Sanchez v. Schindler}, 651 S.W.2d 249 (Tex. 1983) (stating that it is courts' duty to broaden the Wrongful Death Act to include social conditions).

\textsuperscript{245} See \textit{ supra} notes 199-205 and accompanying text.

\textsuperscript{246} See \textit{ supra} notes 182-93 and accompanying text.
spouse and next of kin. Such clarification would serve to benefit the courts handling future wrongful death cases.

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