

Louisiana Law Review

Volume 41 | Number 3

Symposium: Maritime Personal Injury

Spring 1981

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Docia D. Wyatt

Repository Citation

Docia D. Wyatt, *Wrongful Death in Louisiana: Too Often a "Cause" Without a "Right"*, 41 La. L. Rev. (1981)

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WRONGFUL DEATH IN LOUISIANA: TOO
OFTEN A "CAUSE" WITHOUT A "RIGHT"

Alice and Joseph Roche planned to adopt the two abandoned children who had been living with them for several years. But before the adoption proceedings were completed, Joseph Roche was killed. One month later, Alice Roche signed the final decree of adoption.¹ On behalf of her two newly adopted children, she filed a wrongful death action against the defendant. The Supreme Court of Louisiana held that since the decree was not final at the time of the decedent's death, the children were not included within the first class of beneficiaries² in Louisiana Civil Code article 2315 and thus had no action for the wrongful death of their prospective father.³ *Roche v. Big Moose Oil Field Truck Service*, 381 So. 2d 396 (La. 1980).

The first Louisiana decision involving a claim by survivors for damages suffered from the death of a relative was the 1851 case of *Hubgh v. New Orleans and Carrollton Railroad Company*.⁴ In

1. Under R.S. 9:429-32, the procedure for adopting a child is not completed (thus no "adoption" occurs) until the final decree has been granted. "Adoption is a creature of statutory law, and being in derogation of the natural right of a parent to his or her child such statutes are always strictly construed." *Rodden v. Davis*, 293 So. 2d 578, 580 (La. App. 3d Cir. 1974).

2. Civil Code article 2315 limits the action for wrongful death to certain named beneficiaries, one of whom is "children." The article further provides that "the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively." LA. CIV. CODE art. 2315.

3. Since the purpose of this note is to examine Louisiana's statutory delimitations of those survivors entitled to bring an action in wrongful death, this note will not address the second holding in *Roche* which concerns an issue in workers' compensation. The court held that when an employer files suit for indemnification against a third-party tortfeasor, the injured employee does not have to intervene in the employer's pending lawsuit but may maintain a separate action for damages against the third-party tortfeasor. *Roche v. Big Moose Oil Field Truck Ser.*, 381 So. 2d 396, 401-02 (La. 1980). For a discussion of this issue, see *Developments in the Law, 1979-1980—Workers' Compensation*, 41 LA. L. REV. 557 (1980).

4. 6 La. Ann. 495 (1851). As early as 1856, in *Hermann v. The New Orleans & Carrollton R.R. Co.*, 11 La. Ann. 5, 22 (1856), the court expressed some doubt about the wisdom of the *Hubgh* decision, but nevertheless opted to go with precedents: "The authorities on which the decisions in the case of *Hubgh* was based, have been subjected to the severest tests of examination and criticism, and were the question *res nova*, we should feel great difficulty in arriving at a satisfactory conclusion." Once the legislature responded by "creating" a cause of action, the court's discussion was usually a merely perfunctory reiteration of the *Hubgh* decision: "It is too well settled for dispute that . . . under the Civil Code of 1825 . . . no action would lie for damages for the death of a free person." *Vaughn v. Dalton-Lard Lumber Co., Ltd.*, 119 La. 61, 63, 43 So. 926, 927 (1907). But in *King v. Cancienne*, 316 So. 2d 366, 369 (La. 1975), Justice Barham, after examining the history of wrongful death and article 2315, wrote:

Hubgh, Louisiana adopted the questionable common law maxim that no wrongful death cause of action exists except that which has been created by the legislature.⁵ The wisdom of judicial approval of this maxim in England,⁶ the United States,⁷ and Louisiana,⁸ in particular, has been in considerable doubt for some time.⁹

The simple concept behind the wrongful death action is that he who is injured by the wrongful death of another should recover damages from the tortfeasor.¹⁰ But since this concept must serve a society complex in its competing demands and not often given to careful introspection, the principle behind wrongful death often is obscured when state legislators attempt to "create" wrongful death

"*Hubgh* was in error and the legislature in 1884 attempted to correct this error by naming certain survivors who could claim this independent right of action." Since *King*, the courts have ventured increasingly to criticize *Hubgh*. *Callais v. Allstate Ins. Co.*, 334 So. 2d 692 (La. 1975); *Branch v. Aetna Cas. & Sur. Co.*, 370 So. 2d 1270, 1273 (La. App. 3d Cir. 1979) ("[I]t is clear that the right to recover for wrongful death in Louisiana originated long before the 1855 and 1884 amendments to Article 2315"); *Viau v. Batiste*, 332 So. 2d at 513 (La. App. 4th Cir. 1976) (Lemmon, J., concurring specially). For a strong criticism of the *Hubgh* decision, see Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TUL. L. REV. 201 (1931).

5. 6 La. Ann. at 496. "[W]ithout a special statute authorizing such actions, they cannot be maintained. It is a strong argument in favor of this view of the law, that in a country where private rights are so well protected as they are in England, it is settled that those actions do not exist at common law." *Id.* The court, after admitting that article 2294 (now article 2315) was a literal translation of Code Napoléon article 1382 and that the Cour de Cassation had granted a right of action for wrongful death under that article, nevertheless contended that "great as our deference is for that enlightened tribunal, we are unable to adopt their conclusions." *Id.* at 497. A statutory remedy for wrongful death now exists in every state. For a thorough analysis of wrongful death statutes, see S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* (1966). For criticism of the common law position, see note 9, *infra*. For the current French position, see note 50, *infra*.

6. *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808). Lord Ellenborough, a man "whose forte was never common sense," according to Dean Prosser, W. PROSSER, *LAW OF TORTS* 901 (4th ed. 1971), declared in *Baker* that "in a civil Court, the death of a human being could not be complained of as an injury . . ." 170 Eng. Rep. at 1033.

7. *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475 (1848), generally is accorded the dubious honor of establishing this maxim in the United States. Without examining the validity of Lord Ellenborough's decision in *Baker*, the *Carey* court parroted the "rule" established in England in 1808: "Such, then, we cannot doubt, is the doctrine of the common law; and it is decisive against the maintenance of these actions." *Id.* at 478. See note 9, *infra*.

8. See note 5, *supra*.

9. See generally Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960). See note 4, *supra*.

10. Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386, 429 (1942).

actions in an *ad hoc* and piecemeal fashion.¹¹ Each hastily constructed remedy is designed primarily to rectify some flaw, but unfortunately too often results in creating only more confusion. The inability to see through the specifics of particular situations to the underlying principle also may account for the initial erroneous directions taken by courts.¹²

From the outset Louisiana's experience with wrongful death¹³

11. The criticism of wrongful death statutes is unending; for the . . . approach . . . was frequently conceived in haste by the lawmakers and tended to break down when placed into practical operation. Too often there was imposed upon the statutory structure an agglomerate of judicial patchwork as courts attempted to obscure the problems or to reconcile the irreconcilable. The need to evolve a single adequate and realistic approach for the handling of wrongful death has proffered a baffling challenge to legislatures and courts for more than a century . . . Malone, *American Fatal Accident Statutes—Part I: The Legislative Birth Pains*, 1965 DUKE L.J. 673, 719.

12. It is impossible to understand the confusion surrounding wrongful death without knowing something about its history:

Up until [the nineteenth century] unnatural death meant largely death by violence in the popular sense of the word. It was the work of the robber, the burglar, or the hot-blooded man. Usually the culprit was executed or confined behind bars. Even if he were left free in society he was usually without any means to compensate the bereaved family of the victim. In this setting, wrongful death was a matter of little concern to the civil law, and lawmen developed no tools for the handling of it. Then, suddenly at mid-century society faced up in panic to a virtually new phenomenon—accidental death through corporate enterprise. Tragedy as a result of indifference and neglect was suddenly upon us in the factory, on the city streets, and on the rails. Nor was the principal villain of the piece any longer the impecunious felon. In his place stood the prospering corporation with abundant assets to meet the needs of widows and orphans.

It is obvious that law was destined to respond to this violent shift in the human equation—but through which agency and by what means was the change to take place? Many have taken the position that common-law judges were staggered at this point, that they could not adapt their archaic conceptions to the new need, and that the resulting void was finally filled when the legislatures came to the rescue.

Malone, *supra* note 9, at 1043.

13. See *Van Amburg v. Vicksburg, Shreveport & Pac. R.R. Co.*, 37 La. Ann. 650, 651 (1885). The *Van Amburg* decision illustrates the court's reaction in denying a right of action to a particularly deserving plaintiff because the newly enacted statute did not become effective until a few days after plaintiff's cause of action arose:

Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a freeman cannot be made the subject of valuation, and under the domination of that dogmatic utterance, . . . the singular spectacle has been witnessed of courts sanctioning damages for short-lived pains and refusing them for long-life sorrow and the pecuniary losses consequent upon the death of one from who was derived support, comfort and even the necessary stays of life.

See note 17, *infra*, for a history of the amendments to LA. CIV. CODE art. 2315. See also Malone, *supra* note 9, at 1071.

has been consistent with that of other states.¹⁴ The first decision in Louisiana rejected the argument that article 2315 of the Civil Code, without amendment, could serve as the basis for a cause of action for wrongful death.¹⁵ Repeated legislative amendments have failed to produce a flexible, workable statute.¹⁶ The main flaw that has plagued Louisiana's wrongful death statute is simply that adherence to the terms of the statute often cannot produce a just result.

The "creation" of Louisiana's wrongful death cause of action came in 1884.¹⁷ From its inception the action has been limited to certain named beneficiaries.¹⁸ These beneficiaries are listed in three mutually exclusive classes; thus, once a beneficiary is found in a

14. In the common law only the idea of a general wrongful death statute was new. States had attempted to deal with wrongful death in specific situations. As a result, a few very narrow statutes granted death actions (e.g., an action for death caused by a defect in a highway), but these statutes were totally inadequate for handling the sudden proliferation of wrongful death actions. See note 12, *supra*. For examples of these early statutes, see *Gaudette v. Webb*, 284 N.E.2d 222, 227 (Mass. 1972). See also *Malone, supra* note 9, at 1071; *Malone, supra* note 11. The first wrongful death statutes were, not surprisingly, also rather narrow and short-sighted, and, in fact, have continued to the present to be plagued by inflexibility.

15. See note 5, *supra*.

16. General dissatisfaction with wrongful death in Louisiana is evidenced by the numerous articles on the subject. See, e.g., *Johnson, Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1 (1976); *Oppenheim, supra* note 10; *Voss, supra* note 4; *Comment, Survival of Actions in Article 2315 of the Louisiana Civil Code: The Victim's Actions and the Wrongful Death Action*, 43 TUL. L. REV. 330 (1969); *Note, Wrongful Death Action by a Surviving Putative Spouse—How Large an Extension*, 22 LOY. L. REV. 359 (1976).

17. 1884 La. Acts, No. 71. Louisiana Civil Code article 2315 has been amended seven times. The original article contained only what is now the first sentence: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Act 223 of 1855 granted a survival action in favor of the widow and minor children, and in their default, to the surviving mother or father. Act 71 of 1884 added the action for wrongful death. Act 120 of 1908 expanded the beneficiaries to include brothers and sisters and permitted major children to recover if no widow or minor children survived the decedent. Act 159 of 1918 changed the word "widow" to "surviving spouse." Act 159 of 1932 and Act 333 of 1948 added language to include beneficiaries by adoption. The final amendment, Act 30 of 1960, merely restructured the article to reflect changes made in the Code of Civil Procedure.

18. Louisiana currently gives the following individuals a right of action under article 2315:

- (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children;
- (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and
- (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving

For a thorough discussion of beneficiaries entitled to an action, see *Johnson, supra* note 16, at 13-21.

preferred class, no one in the remaining classes can recover.¹⁹ The jurisprudence consistently has refused to expand the listed beneficiaries by going beyond the literal wording of the statute.²⁰

This arbitrary listing of named beneficiaries in mutually exclusive classes has been the source of both difficulty and injustice in Louisiana. The family member who suffers damage from the decedent's wrongful death frequently is not a listed beneficiary;²¹ consequently, the injured party has no remedy. For example, grandchildren never have been accorded an action for wrongful death.²² Thus when two orphaned grandchildren (whose sole source of support had been their grandfather) sought to recover damages resulting from the wrongful death of their grandfather, the court denied a remedy.²³ Stepparents have suffered the same fate. When the stepfather, who had been a father to the deceased in every way but biologically, attempted to bring an action for the wrongful death of his stepdaughter, the court denied him redress because he was not a "father" under article 2315. Only the "real" father could qualify as the proper plaintiff; the designated beneficiary was the plaintiff's biological father, who had seen his daughter only once between her birth in 1944 and her death in 1959.²⁴

19. Whether the beneficiary in the preferred class actually can recover is irrelevant. The court first looks to the status of the beneficiaries at the time of the decedent's death. *Brock v. Friend*, 4 La. App. 723 (La. App. 1st Cir. 1925) (plaintiff was decedent's widow at the time of death but had remarried when she brought suit). Then the court examines each class successively to determine which survivors have a right of action. The fact that the preferred beneficiary may have died, *Wakefield v. Government Employees Ins. Co.*, 253 So. 2d 667 (La. App. 4th Cir. 1971), or may have been barred from recovery by contributory negligence, *Gonzales v. Succession of Medica*, 141 So. 2d 887 (La. App. 2d Cir. 1962), does not "empty" the preferred class. If a beneficiary exists in a preferred class, no one in the remaining classes is entitled to an action. See note 26, *infra*, and accompanying text.

20. "Those not included are excluded, and [the article] cannot be construed so as to confer the right upon persons not expressly mentioned in it." *Walton v. Booth*, 34 La. Ann. 913, 914 (1882). "Laws conferring rights of action to sue for damages upon persons bearing certain relationship to a deceased are strictly construed. They may not be extended by interpretation to persons not clearly embraced therein." *Thompson v. Vestal Lumber & Mfg. Co.*, 16 So. 2d 594, 596 (La. App. 2d Cir. 1943). See *Chatman v. Martin*, 245 So. 2d 423, 426 (La. App. 2d Cir. 1971).

21. See *Johnson*, *supra* note 16.

22. See note 18, *supra*. Grandchildren consistently have been denied an action despite the definition of children contained in Civil Code article 3556(8): "Children—Under this name are comprehended, not only the children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line . . ." For other cases denying grandchildren an action, see *Viau v. Batiste*, 332 So. 2d 512 (La. App. 4th Cir. 1976); *Smith v. Manchester Ins. & Indem. Co.*, 299 So. 2d 517 (La. App. 4th Cir.), *cert. denied*, 302 So. 2d 617 (La. 1974).

23. *Walker v. Vicksburg*, 110 La. 718, 34 So. 749 (1903).

24. *Palmer v. American Gen. Ins. Co.*, 126 So. 2d 777 (La. App. 1st Cir. 1960). Since the plaintiff could not prove that he had been damaged, he received only a

Even if he is a named beneficiary, the injured party often is precluded from bringing an action because he is preempted by a beneficiary in a preferred class.²⁵ Thus when the husband, wife, and son were killed instantly and the daughter survived two hours before dying, the action belonged to the unconscious daughter. Since the action lodged in the first class of beneficiaries, all other survivors (in this case the parents of the deceased husband and wife) effectively were precluded from bringing an action.²⁶ Another injured survivor in the second class of beneficiaries was denied redress when the judicially separated spouse was granted the sole right of action to the exclusion of the deceased's mother, who had been totally dependent upon her son for her livelihood.²⁷ In an early case, the court denied standing to the deceased's major children, granted an action to the deceased's wife, who was living with another man, and

nominal award of \$500. Thus while the court has a mechanism (limitation of damages) for assuring that the "wrong" plaintiff (*e.g.*, the legal father) is not rewarded, no mechanism exists for assuring that the "right" plaintiff (*e.g.*, the stepfather) is compensated for his injury. For a similar case, see *Cosey v. Allen*, 316 So. 2d 513 (La. App. 1st Cir. 1975), in which the court refused to reward a "named" beneficiary:

It is offensive to reason, human dignity and the memories of these little children that their father who callously ignored them during their lives should now reap benefits from their deaths. . . . While the law compels the conclusion that Willie Cosey is the legal father of these children, it does not compel the conclusion that he was damaged by their deaths. This is a matter which depends not upon a codal presumption but upon the facts, and the facts require us to hold that he was not damaged at all, not even nominally.

Id. at 516-17.

25. See note 18, *supra*.

26. *Leitch & Wakefield v. Government Employees Ins. Co.*, 253 So. 2d 667 (La. App. 4th Cir. 1971). The grandparents could have inherited the deceased granddaughter's wrongful death action, but they could recover only what she could have recovered—which would be nothing since she never regained consciousness after the accident. Thus the action effectively perished with the deceased. For a similar case, see *Walker v. St. Paul Ins. Cas.*, 343 So. 2d 251 (La. App. 1st Cir. 1977), in which the wife lived fifteen minutes and the husband lived forty-five minutes after a head-on automobile collision. This unfortunate need to ascertain the time of death for purposes of determining the proper beneficiary in wrongful death actions sometimes gives rise to the macabre. In a murder-suicide case the court was able to grant an action to the parents of the deceased wife only after closely examining the evidence and concluding that the husband's self-inflicted wound had resulted in instantaneous death and that the wife had lingered long enough to attempt to crawl from the blood-smeared bed, thus outliving her husband—the only person who could have preempted the parents as a beneficiary. *von Dameck v. St. Paul Fire & Marine Ins. Co.*, 361 So. 2d 283 (La. App. 1st Cir. 1978).

27. *Harris v. Lumbermen's Mut. Cas. Co.*, 48 So. 2d 728 (La. App. 1st Cir. 1950). In a similar case the decedent left his wife shortly after they married. He lived with and supported his mother for three-and-one-half years before his death; the estranged wife, not the dependent mother, was the designated survivor entitled to maintain an action. *Clark v. Tenneco, Inc.* 353 So. 2d 418 (La. App. 4th Cir. 1978).

commented that the "article makes no distinction between a faithful and unfaithful wife."²⁸

Preoccupation with adherence to the letter of the law has led even to constitutional problems. The Supreme Court of Louisiana held repeatedly that illegitimates did not have a right of action under the wrongful death statute²⁹ until the United States Supreme Court declared in *Levy v. Louisiana*³⁰ that such an exclusion constitutes invidious discrimination and violates the equal protection clause of the fourteenth amendment. Thrusting illegitimates into the statutory scheme enmeshed the Louisiana courts in an even more complicated search for the proper plaintiff, because natural mothers and fathers then had to be defined.³¹ Now the court must decide such issues as whether the plaintiff is "plainly"³² the father if the deceased child is illegitimate. The focus of these cases, as in many other cases,³³ is not on whether the plaintiff indeed was injured, but on whether he is a named beneficiary.

The instant case is a typical example of the problems inherent in Louisiana Civil Code article 2315's listing of named beneficiaries.

28. *Jones v. Massachusetts Bonding & Ins. Co.*, 55 So. 2d 88 (La. App. 1st Cir. 1951).

29. Any illegitimate relationship has served to deny the plaintiff a right of action: *Youchican v. Texas & Pac. R.R. Co.*, 147 La. 1080, 86 So. 551 (1920); *Green v. New Orleans, S. & G. I. R. Co.*, 141 La. 120, 74 So. 717 (1917); *Lynch v. Knoop*, 118 La. 611, 43 So. 252 (1907); *Thompson v. Vestal Lumber & Mfg. Co.*, 16 So. 2d 594 (La. App. 2d Cir. 1943). The court has acknowledged the harsh results often attendant upon such decisions: "The result may have its hard phases. It is none the less the law." *Landry v. American Creosote Works, Ltd.*, 119 La. 231, 43 So. 1016 (1907).

30. 391 U.S. 68 (1968).

31. See, e.g., *Warren v. Richard*, 296 So. 2d 813 (La. 1974) (legitimate child of one man has right of action for wrongful death of biological father); *Simmons v. Brooks*, 342 So. 2d 236 (La. App. 4th Cir. 1977) (adopted child has no right of action for wrongful death of biological father); *Moore v. Thunderbird*, 331 So. 2d 555 (La. App. 1st Cir. 1976) (natural father has right of action for wrongful death of biological illegitimate child); *Honeycutt v. City of Monroe*, 253 So. 2d 597 (La. App. 2d Cir. 1971) (natural mother has right of action for wrongful death of illegitimate child). These cases provide good examples of the tangential problems created when the court focuses on defining beneficiaries as opposed to measuring damages. The impact of such decisions is far-reaching. For example, "[t]hey breach a hitherto impregnable bastion of our codal scheme—the presumption that the husband of the mother is the father of all children conceived during the marriage." Spaft & Shaw, *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59, 60 (1976). In *Danos v. St. Pierre*, 383 So. 2d 1019 (La. App. 1st Cir. 1980), and *Diefenderfer v. La. Farm Bur. Mut. Ins.*, 383 So. 2d 1032, (La. App. 1st Cir. 1980), the court wrestled with the complicated and wide-ranging issue of whether a fetus is a person. The real issue should be whether an action in wrongful death should even give rise to that inquiry.

32. *Honeycutt v. City of Monroe*, 253 So. 2d 597, 602 (La. App. 2d Cir. 1971).

33. See notes 21-28, *supra*.

The "almost adopted" children of *Roche* were not designated specifically in the statute as survivors entitled to bring an action;³⁴ therefore, despite the plaintiff's efforts³⁵ and the court's obvious sympathy, no redress existed for the children's loss.³⁶ But while the holding is consistent with the prior jurisprudence³⁷ and is in accordance with the terms of the statute, the result is unsatisfactory. The purpose and spirit of the wrongful death action are not being served, because technically correct decisions under the existing statute too often are not only unjust but illogical.³⁸

One possible solution is to recognize a separate cause of action under the first sentence of article 2315. A few common law jurisdictions have "discovered" such an action in order to avoid a perceived injustice.³⁹ However, despite general agreement that an action for

34. See note 2, *supra*.

35. Plaintiff presented five arguments: (1) the minor children were totally dependent upon deceased; (2) the Roches had committed themselves twice through contract to care for the children; (3) the doctrine of equitable adoption should apply; (4) the prospective adoptive children should be treated as well as illegitimates; and (5) the children should be treated as "posthumous children" entitled to the benefits of Civil Code article 29. 381 So. 2d at 399. For a discussion of the equitable adoption doctrine in wrongful death actions, see Note, *Decedent's Heirs Under the Utah Wrongful Death Act*, 1979 UTAH L. REV. 77, 89-90.

36. The court freely admitted that the children were dependent upon the deceased for economic and emotional support, but concluded that that fact was irrelevant, since the children were "neither [decedent's] biological nor his adoptive 'children.'" Despite the equity of the plaintiff's position, none of his arguments served "to make these children the adoptive children of decedent within the meaning of Article 2315." 381 So. 2d at 399.

37. See notes 18-21, *supra*, and accompanying text.

38. See note 16, *supra*.

39. Two states, Hawaii and Georgia, have recognized a common law right of action. See *Kake v. Horton*, 2 Hawaii 209 (1860); *Rohlfing v. Moses Akinona, Ltd.*, 45 Hawaii 373, 369 P.2d 96 (1961), *reh. denied*, 45 Hawaii 443, 369 P.2d 114 (1962); *Shields v. Yonge*, 15 Ga. 349 (1854). Recently the United States Supreme Court recognized a wrongful death action under general maritime law and noted that the *Baker* "rule has been criticized ever since its inception, and described in such terms as 'barbarous.'" *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 382 (1970). Using *Moragne* as precedent, *Gaudette v. Webb*, 284 N.E.2d 222, 229 (Mass. 1972), "held that the right to recovery for wrongful death is of common law origin . . ." An action for wrongful death under general maritime law is to be distinguished from a common law action which is *in addition to* an existing statutory action. *Moragne* applies to maritime wrongful death actions *not covered* by the Death on the High Seas Act. 46 U.S.C. § 761 (1976). Thus, when plaintiff attempted to recover damages for loss of society (recoverable under a general maritime wrongful death action but not available under DOHSA) in a death action that clearly fell within the ambit of DOHSA, the Court stated:

The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival and damages The Act does not address every issue of wrongful

wrongful death could have been granted under the first sentence of article 2315 in the *Hubgh* case,⁴⁰ an action nevertheless was not granted, and the legislature has acted. Only more confusion would result if the courts were to attempt to circumvent the wrongful death statute⁴¹ and to expand the classes of beneficiaries by allowing parties to bring an action under the first sentence of Civil Code article 2315.⁴²

Another possibility is to treat the listing of beneficiaries as illustrative rather than exclusive. Since Louisiana is a civil law jurisdiction, the rule that statutes must be construed strictly because they are in derogation of the common law does not obtain. Thus, as commentators have urged,⁴³ the court is not bound to a strict con-

death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

40. See note 4, *supra*.

41. Malone, *supra* note 9, at 1071-76; Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. A.R. L. 1, 12 (1978). Frustration with the injustice resulting from wrongful death statutes has prompted several commentators to urge that a common law cause of action be recognized as a solution to inflexible and limiting statutes. That solution would provide only instantaneous and momentary relief, for the inevitable inconsistencies that necessarily would exist between the "new" cause of action and the wrongful death statute undoubtedly would create confusion. For articles urging that a common law action be recognized, see Note, *Wrongful Death in Tennessee—New Solutions to Recurring Problems*, 9 MEM. ST. U.L. REV. 85, 103 (1979); Note, *Decedent's Heirs Under the Utah Wrongful Death Act*, 1979 UTAH L. REV. 77, 93; Note, *Wrongful Death Recovery in Colorado—A Reward for a Timely Demise*, 49 U. COLO. L. REV. 431, 436-37 (1978).

42. In *Sutton v. Rogers*, 222 So. 2d 504 (La. App. 2d Cir. 1969), the court, using Civil Code articles 229 and 2315 in conjunction, allowed a grandfather to collect limited damages for his grandson's death:

For the payment of these expenses, the grandfather was under a clear legal obligation produced and thrust upon him by the wrongful acts of the defendant. The provision of LSC—C.C. Art. 2315 that "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it . . ." is obviously appropriate to the situation here. Except for defendant's tortious acts, plaintiff would not have been required to furnish his minor grandson hospital and medical expenses and to provide for his interment. To the extent of these expenditures, the amount of which is stipulated, plaintiff directly and individually sustained damages to which he is entitled to be reimbursed by the defendant.

Id. at 507. *But see* *Young v. McCullium*, 74 So. 2d 339, 341 (La. App. 1st Cir. 1954) (uncle was denied funeral expenses; "[i]f the deceased were still living, the petitioner might have a just cause of action against him for funds expended on his behalf. However the said codal articles [articles 2315, 2316] give no such right of action against a third party").

43. Note, *Peremption—Effect of Pending Suit on Period of Limitation of Surviving Tort Action—Article 2315, Louisiana Code of 1870*, 24 TUL. L. REV. 373, 375 (1950). Professor Johnson wrote:

Article 2315 is not in derogation of the common law; it is not in derogation of

struction of the statute.⁴⁴ A few recent cases also have alluded to the possibility of expanding the classes by an illustrative reading.⁴⁵ But while support exists for such an approach, and while it would be preferable to the present unduly strict and exclusive reading of the statute, expansion by an illustrative reading is not the best solution. An illustrative reading would have no effect on the mutually exclusive classes, and even though some plaintiffs who previously were denied standing might be granted a right of action,⁴⁶ the court's efforts would continue to be directed toward forcing the plaintiff within the confines of the statutory enumeration of possible beneficiaries. As in the past, the most important issue—the extent of plaintiff's injuries—would be relegated to secondary importance, to be addressed only if a plaintiff falls within the arbitrary dictates of the statutory scheme.

The best solution is to amend the statute so that members of the family unit who actually are damaged by the wrongful death of the deceased can recover their losses from the tortfeasor. A close examination of wrongful death reveals that the state's interest in protecting the family unit is at the very core of the statute.⁴⁷ The

anything. There was no reason at all to adopt the common law maxim of strict interpretation of statutes which departed from the common law. And yet, for years and years, the Louisiana jurisprudence has confidently concluded that the article has to be strictly construed, when in fact there is no reason to interpret the article in a different fashion from any other article or statute.

Johnson, *supra* note 16, at 7.

44. See Keeton, *supra* note 41, at 11-12 for an observation that could be used to support an illustrative reading of the statute. Professor Keeton points out that courts often confuse "lack of authorization *in the statute* to a prohibition in the *law* as a construction of the statute . . . (even though the construction is by necessity judicial handiwork)." *Id.* at 11.

45. *Roche v. Big Moose Oil Field Truck Serv.*, 381 So. 2d at 402-03 (La. 1980) (Dennis, J., dissenting in part and concurring in part). As Justice Dennis maintained in *Roche*:

Because of the wrongful act of another of [sic] the children in the present case were injured. They were deprived of support, love and affection, and of a father. Although they may not fit technically within any of the present categories of 2315 I believe that an examination of the purpose of the statute would require that person who caused the damage to repair it.

Id. at 403. See *King v. Cancienne*, 316 So. 2d 366, 369 (La. 1975).

46. The "almost adopted" children of the instant case surely would have been granted an action under an illustrative reading. Such a reading also should open the door for unadopted stepchildren, stepparents, and grandchildren. But inherent inequities would still exist. See notes 25-28, *supra*, and accompanying text.

47. See notes 12, 13 & 17, *supra*. Wrongful death statutes exist in all fifty states, and though the statutory designation of beneficiaries varies from state to state, all statutes evidence a concern for the family. For a compilation of all state wrongful death statutes, see S. SPEISER, *supra* note 5.

family is a unit whose sum is greater than its parts, for its members provide one another with stability, strength, and mutual protection. When this unit is impaired by the wrongful death of one of its members, the tortfeasor should repair that damage in order to help assure the preservation of the damaged family unit.

The present wrongful death statute reflects this idea; in fact, given the traditional background of the family, the statute's organization is logical. Ordinarily, an individual would be expected to be a member of a family unit consisting of a spouse and children. If he were not a member of that unit, the next most likely unit would encompass the decedent and his parents. And if he were not a member of either of these groups, he probably would be associated closely with his brothers and sisters.⁴⁸

However logical in light of traditional family groupings, article 2315's arbitrary listing of named beneficiaries leaves no room for flexibility.⁴⁹ At the turn of the century, the statutory scheme may have effectively protected the family. Unfortunately, the statute presupposes the existence of a family unit that, especially in today's society, too often is at odds with reality. Changing lifestyles and the increasing rate of divorce have altered the traditional composition of the family unit.⁵⁰ Nonetheless, the state's interest in preserving the

48. See notes 18-19, *supra*.

49. The legislator should remember that one cannot "anticipate all the drawbacks that practice alone can reveal; [for] to anticipate everything is a goal impossible of attainment." Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 767-69 (1969).

50. In fact, the traditional concept of the word "family" is also in a state of flux. The writer uses the word to denote a certain relationship among individuals that does not depend upon a legal or a blood connection.

In France, the Cour de Cassation determines who may bring an action under wrongful death by using French Civil Code article 1382, which is the equivalent of the first sentence of article 2315. In the past, the French courts required the existence of a juridical relationship between the deceased and the plaintiff asking for compensation, but a landmark decision in 1970 declared that article 1382 does not require "*l'existence d'un lien de droit*." Cass.Ch. mixte, 27 fevrier 1970; *veuve Gaudras c. Dangereux*. S.J. 1970. II. 16305. In *Gaudras*, the court allowed a concubine to recover damages sustained as a result of the wrongful death of her paramour. Continental decisions are extremely brief, but the report of the case stated that *this* concubine had a *stable* relationship with the deceased. *Id.* The same emphasis on the stability of the relationship is found in *Henderson v. Travelers Ins. Co.*, 354 So. 2d 1031 (La. 1978), in which a concubine collected workers' compensation benefits for the death of her paramour. After noting that the couple "had been living together as man and wife for eleven years . . . in a stable, loving relationship," the court stated that a "dependent member of the family group is entitled to compensation regardless of blood relationship or the technicalities of inheritance law." *Id.* at 1032. For a suggestion that the same result might obtain under wrongful death, see Note, *Death Benefits for a Concubine Under Louisiana's Workmen's Compensation Law*, 39 LA. L. REV. 269, 277-78 (1978).

family unit should not depend upon that unit's composition.⁵¹ The symbolic importance of the family remains as a source of order, stability, nurture, and protection. In fact, the state's interest is harmed when protection is denied to such a damaged family, for the state often will have to bear the economic burden of caring for the family. Indeed, the family may not be able to remain intact, thus indirectly harming the state even more; for the disruption of the family unit is not conducive to the common good.

The task, then, is to devise a statute that will accord effective protection to the family unit damaged by the wrongful death of one of its members. The statute should be flexible, yet limited. Since the wrongful death action is designed to protect the family, the tortfeasor should owe a duty only to members of the deceased's family unit.⁵² But if the statute is to function effectively in actual practice, the exact composition of the hypothetical family cannot be specified with any degree of precision.⁵³ Most families, however, will conform to the traditional patterns contained in the present statute.⁵⁴ Treatment of family members who do not fall within the confines of the presently designated beneficiaries should not present much difficulty to the courts; identifying family members is simply a matter of using common sense. Thus, although the beneficiaries should not be

51. That a member of this unit might be technically a stepfather rather than a "legal" father should be irrelevant. See note 24, *supra*, and accompanying text. The court even now examines the actual relationship (as opposed to the "legal" relationship) when damages are measured. If the survivors were part of the deceased's family unit (using the term to indicate a particular relationship among the members), then these beneficiaries inevitably would be damaged by a member's wrongful death. Conversely, regardless of the plaintiff's legal relationship to deceased, recovery is denied when no "family" relationship exists. See *Mitt v. Security Ins. Co.*, 361 So. 2d 465 (La. App. 4th Cir. 1978), in which the legal father and the biological mother were denied recovery, and the biological father, with whom the deceased had lived, was compensated.

52. The term "family unit" should be read broadly and not limited unnecessarily by an artificial criterion, such as living in the same house. For example, a divorced parent and his children would certainly comprise a family unit, regardless of whether or not he had custody of those children as long as a relationship of economic or emotional dependency existed.

53. The civilian approach to drafting statutes is "to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of questions which may arise in particular instances." Levasseur, *supra* note 48, at 769. The judge and the legislator then work in tandem, for "having been entrusted by the legislator with the principles most favorable to the common good, the civilian judge can go about his task to consider men as individuals, where the legislator considered them en masse." Levasseur, *Bridging the Channel*, 41 LA. L. REV. 74 (1980).

54. See note 18, *supra*.

named specifically, as they are now, the remedy need not be available to everyone.⁵⁵

To determine whether an individual falls within the ambit of the protected family circle, the court should look to those elements that are most characteristic of such a unit. The most common characteristic of any family unit is economic dependency. Examination of this factor should present no difficulty for the court, in light of the large body of case law already existing in workers' compensation,⁵⁶ and to some extent, in wrongful death actions.⁵⁷ However, in a wrongful death action, unlike in workers' compensation,⁵⁸ the court should look to the entire relationship. For wrongful death purposes, the family is recognized largely by identifying its members as part of the total economic unit.

Another characteristic element of the family unit is emotional dependency. Unless emotional support is a factor in defining the

55. For purposes of judicial economy, the immediate family (those presently listed under article 2315) could be accorded a presumption of standing to bring suit under the statute. Other individuals seeking redress could be required to show cause (*i.e.*, facts tending to show membership in the family unit) for being allowed an action. Thus a long-lost cousin who suddenly appears would not qualify as a beneficiary, regardless of the cousin's professed grief. Even if the cousin's grief is genuine and he is damaged, his interest is not one that wrongful death historically has sought to protect.

56. Economic dependency must be proved. In *Samoyoa v. Michel Lecler, Inc.*, 310 So. 2d 162 (La. App. 4th Cir. 1975), the good faith putative spouse and children were held to be the "legal dependents" of the deceased and therefore entitled to workers' compensation benefits. The deceased had a legal wife and children, but since he had not supported them in years, they were not economically damaged by the deceased's death.

57. Since economic dependency is not used to identify the beneficiaries in wrongful death actions, the court's treatment of damages under article 2315 is not as useful as the court's examination of economic dependency under workers' compensation. However, the elements of damages recoverable under wrongful death provide useful guidelines for defining the ambit of the family circle. The "courts have consistently held . . . that funeral expenses; loss of support; compensation for sorrow, grief and mental anguish occasioned by death; loss of love, affection, companionship, and guidance, are recoverable elements of damages." *Zagar v. Romero*, 134 So. 2d 696, 699 (La. App. 3d Cir. 1961).

58. In *Branch v. Aetna Cas. & Sur. Co.*, 370 So. 2d 1270 (La. App. 3d Cir. 1979), the parents of a negligently killed nineteen-year-old boy were restricted to workers' compensation as the only available redress for their son's death. Since the parents were not economically dependent on the deceased, they were effectively denied compensation. Perhaps partially in reaction to *Branch*, the legislature amended Revised Statutes 23:1231 by Act 509 of 1980, which states in pertinent part:

if the employee leaves no legal dependents, the sum of twenty thousand dollars shall be paid to each surviving parent of the deceased employee, in a lump sum, which shall constitute the sole and exclusive compensation in such cases.

The identity and number of these "parents" no doubt will be the subject of future litigation.

family members, the court would have to create fictions in order to justify compensation for family members who lack an economic relationship with the decedent (*e.g.*, no economic relationship exists between a nonworking mother and her child). Since the success of the family largely depends upon pooling talents and dividing labor, to evaluate the worth of a member solely on the basis of his economic contribution is to ignore one of the primary attributes of the family unit.⁵⁹ In short, the basic examination of the family unit should focus on the interdependence of its members for economic and emotional support.⁶⁰

Administrative problems and initial uncertainty may accompany any revision of article 2315, but these difficulties certainly would not be insurmountable. To avoid multiple suits by various members of the family, the action could be brought by a personal representative.⁶¹ All interested parties could be required to join this action.⁶² Since the action would be granted to protect those who fall within the ambit of the deceased's family circle, notice should not be a problem. The very nature of the relationship among the beneficiaries should assure their awareness of the proceeding.

The state can and should protect and foster relationships that provide stability and mutual support for its citizens. Surely the legislature did not mean to deny protection to "almost adopted" children damaged by the wrongful death of their prospective father. Article 2315 should be amended so that, in the words of the article itself, survivors who have been injured may "recover the damages which they sustain through the wrongful death of the deceased." Those who have a "cause" of action should also have the "right" to bring it.

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59. See, *e.g.*, *Marceleno v. State*, 367 So. 2d 882 (La. App. 2d Cir. 1979).

60. Each member's loss will not be identical. See *Dyson v. Gulf Modular Corp.*, 345 So. 2d 1222 (La. App. 1st Cir. 1977), for the court's assessment of the amount of damages due to each of five major children, five minor children, and one estranged wife.

61. The Death on the High Seas Act (DOHSA) provides that "the personal representative of the decedent may maintain a suit for damages . . . for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. § 761 (1976). The wrongful death statute in Ohio also calls for a personal representative to bring suit for "the surviving spouse, the children, and other next of kin of the decedent." OHIO REV. CODE ANN. § 2125.02 (Page).

62. See note 61, *supra*.