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# Elements of Damages for Wrongful Death in Louisiana

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## COMMENTS

### Elements of Damages for Wrongful Death in Louisiana

This Comment is directed to a consideration of (a) the elements of damages recoverable for wrongful death in Louisiana, (b) the factors considered by the court in determining the amount of recovery, and (c) the devices used by the court to control the amount of recovery. As the scope of this Comment is limited to the damage aspect of wrongful death, there will be no consideration of the cause of action other than a brief review of its history.

#### EVOLUTION OF WRONGFUL DEATH ACTION

The early common law did not recognize a civil cause of ac-

tion for wrongful death and the only recourse against the wrongdoer was a criminal action.<sup>1</sup> However, recovery for wrongful injury was allowed.<sup>2</sup> Thus it was more advantageous to the wrongdoer if his injured victim died.<sup>3</sup> This anomalous situation led to the passage of Lord Campbell's Act, which allows designated beneficiaries a right of action for the injury suffered by them because of the victim's death.<sup>4</sup> The primary requisite for bringing the action is that the deceased would have had a cause of action for his wrongfully inflicted injury.<sup>5</sup>

Early Louisiana jurisprudence refused to grant a recovery under Article 2315 of the Civil Code.<sup>6</sup> The leading case relied on common law, in addition to old Roman and Spanish law, that declared the life of a free man was insusceptible of evaluation.<sup>7</sup> The court, in refusing to follow the French view that allowed recovery under an identical article in the Code Napoleon, concluded that it was for the legislature to provide a cause of action.<sup>8</sup> By a series of amendments to Article 2315 the legislature added first a survival action,<sup>9</sup> and a few years later a wrongful death action.<sup>10</sup> As amended, Article 2315 grants a right of action to certain beneficiaries, named in the order of preference as (a) spouse and/or minor children; (b) major children; (c) father and/or mother; and (d) blood brothers and/or sisters. The vesting of the action in one group of beneficiaries prevents the cause of action from ever vesting in any other group.

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#### ELEMENTS OF DAMAGES

Article 2315 does not mention the damages to be allowed. The court has interpreted this to mean that there are no restrictions on the elements of damages to be considered.<sup>11</sup> The major

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1. HARPER & JAMES, TORTS § 24.1 (1956); PROSSER, TORTS § 105 (2d ed. 1955).

2. PROSSER, TORTS § 105 (2d ed. 1955).

3. *Ibid.*

4. Fatal Accidents Act, 9 & 10 VICT. c. 93 (1846).

5. *Ibid.* See PROSSER, TORTS § 105, at 710 (2d ed. 1955): "Every American state now has a statutory remedy for wrongful death. Most of the statutes were modeled upon Lord Campbell's act."

6. *Amburg v. Vicksburg, Shreveport & Pac. R.R.*, 37 La. Ann. 650 (1885); *Vredenburg v. Behan*, 33 La. Ann. 627 (1881); *McCubbin, Tutor v. Hastings*, 27 La. Ann. 713 (1875); *Frank v. New Orleans & Carrollton R.R.*, 20 La. Ann. 25 (1868); *Earhart v. New Orleans & Carrollton R.R.*, 17 La. Ann. 243 (1865); *Hubgh v. New Orleans & Carrollton R.R.*, 6 La. Ann. 495 (1851).

7. *Hubgh v. New Orleans & Carrollton R.R.*, 6 La. Ann. 495 (1851).

8. *Ibid.*

9. LA. CIVIL CODE art. 2294 (1825), as amended, La. Acts 1855, No. 223.

10. LA. CIVIL CODE art. 2315 (1870), as amended, La. Acts 1884, No. 71.

11. *Bourdier v. Louisiana Western Ry.*, 133 La. 50, 52, 62 So. 348 (1913):

elements of damage which the Louisiana courts have come to recognize are as follows:<sup>12</sup> (a) loss of support, (b) loss of society, and (c) grief and anguish of the beneficiaries. It should be noted that survival damages are frequently intermingled with death damages.<sup>13</sup>

### *Loss of Support*

Loss of support damages are recoverable upon proof that the deceased had been contributing to the support of the plaintiff. They are generally awarded without any explanation of how they were determined.<sup>14</sup> Moreover, damages for loss of society and for anguish are frequently lumped with loss of support awards, making it more difficult to determine what the court relied on in granting the award.<sup>15</sup> However, it seems clear that the courts consider both the life expectancy and the earnings of the deceased in determining what the loss of support may be.<sup>16</sup>

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"The damages recoverable are neither defined nor restricted, and it is left to the courts to determine both the motive and quantum of damages recoverable under the statute."

12. *Aymond v. Western Union Tel. Co.*, 151 La. 184, 91 So. 671 (1922); *Downing v. Morgan's L. & T. Ry. & S.S. Co.*, 104 La. 508, 29 So. 207 (1900); *Randall v. Baton Rouge Bus Co.*, 114 So.2d 98 (La. App. 1959); *Freeman v. United States Cas. Co.*, 88 So.2d 423 (La. App. 1956); *Todd v. New Amsterdam Cas. Co.*, 52 So.2d 880 (La. App. 1951); *Buford v. Combs*, 50 So.2d 489 (La. App. 1951); *DeHart v. State*, 46 So.2d 366 (La. App. 1950); *O'Connor v. Chicago, R.I. & P. Ry.*, 40 So.2d 663 (La. App. 1949); *Hebert v. Texas & Pac. Ry.*, 28 So.2d 151 (La. App. 1946); *Cooper v. Garrett*, 6 So.2d 209 (La. App. 1942); *Holland v. Gross*, 195 So. 840 (La. App. 1940); *Clinton v. City of West Monroe*, 187 So. 561 (La. App. 1939); *Maddox v. Pattison*, 186 So. 894 (La. App. 1939); *Smith v. Monroe Grocer Co.*, 179 So. 495 (La. App. 1938); *Boykin v. Plauche*, 168 So. 741 (La. App. 1936); *Embry v. Reserve Natural Gas Co.*, 124 So. 572 (La. App. 1929).

13. *Hill v. Big Creek Lumber Co.*, 108 La. 152, 32 So. 372 (1902); *Amburg v. Vicksburg, Shreveport & Pac. R.R.*, 37 La. Ann. 650 (1885); *Toney v. Pope*, 110 So.2d 226 (La. App. 1959); *Perot v. United States Cas. Co.*, 98 So.2d 584 (La. App. 1957); *Payton v. Great Am. Indem. Co.*, 83 So.2d 575 (La. App. 1955); *Davies v. Consolidated Underwriters*, 14 So.2d 494 (La. App. 1943); *Scott v. Electric Co-op. Inc.*, 13 So.2d 524 (La. App. 1943); *Pondexter v. Service Cab Co.*, 161 So. 40 (La. App. 1935). See *Andrus v. Louisiana Western Ry.*, 142 La. 318, 76 So. 727 (1917) (allowing survival damages for the mental pain of deceased occasioned by his realization of the fatal nature of his injuries); *Underwood v. Gulf Refining Co.*, 128 La. 968, 55 So. 641 (1911).

14. E.g., *Andrus, Tutrix v. White*, 236 La. 28, 106 So.2d 705 (1958); *Stansbury v. Mayor of Morgan City*, 228 La. 880, 84 So.2d 445 (1955); *Tolle v. Higgins Indus., Inc.*, 212 La. 173, 31 So.2d 730 (1947); *Navarrette v. Joseph Laughlin Inc.*, 209 La. 417, 24 So.2d 672 (1946).

15. See note 14 *supra*.

16. See, e.g., *Andrus, Tutrix v. White*, 236 La. 28, 106 So.2d 705 (1958); *Stansbury v. Mayor of Morgan City*, 228 La. 880, 84 So.2d 445 (1955) (the court noticed that the deceased was 24 years old, and earned \$57 a week); *Tolle v. Higgins Indus., Inc.*, 212 La. 173, 31 So.2d 730 (1947) (deceased had a life expectancy of 14 years and made about \$12,000 a year); *Navarrette v. Joseph Laughlin Inc.*, 209 La. 417, 24 So.2d 672 (1946); *Russo v. Texas & P. Ry.*, 189 La. 1042, 181 So. 485 (1938).

In cases involving an award to the widow for loss of support, the courts have recently evolved what may be termed the community property approach. This is based on the idea that the widow has been deprived of her prospective share of the community property.<sup>17</sup> The formula utilized in this approach may be stated as the annual net wage of the deceased times his life expectancy, divided by two, and discounted to its present value.<sup>18</sup> The annual net wage is considered to be the deceased's previous year's earnings, less any business expenses.<sup>19</sup> It should be noted that the court in its discretion may disregard this new approach and grant an amount for loss of support which it feels does substantial justice to the plaintiff.<sup>20</sup> It would seem that when the court grants an award merely on this basis, the widow may not be fully compensated, since the actual loss is not determined. The community property approach does attempt to ascertain the widow's actual loss.<sup>21</sup> Furthermore, this approach takes into consideration the property she may have lost by the dissolution of the community, going beyond mere loss of support.<sup>22</sup> While a complete consideration of the merits of the community property system for measuring the loss to the widow is beyond the scope of this Comment, it does seem that a more uniform application of this system would be desirable. The remarriage of the widow prior to trial should be a factor in ascertaining the amount of damages. The present view is that the remarriage does not mitigate any damages.<sup>23</sup> It would probably be better to allow remarriage to mitigate loss of support damages, because the only loss of support is sustained during the period between the death of the former husband and the remarriage.<sup>24</sup> Possibly this view

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17. *Duree v. Maryland Casualty Co.*, 114 So.2d 594 (La. 1959) (reversed as to state on other grounds); *Stephens v. Natchitoches Parish School Board*, 110 So.2d 156 (La. App. 1959) (reversed on other grounds); *Marler v. State*, 78 So.2d 26 (La. App. 1955). See also *Finn v. National Fire Ins. Co.*, 106 So.2d 815 (La. App. 1958).

18. *Stephens v. Natchitoches Parish School Board*, 110 So.2d 156 (La. App. 1959). *Present value* is defined by the court in *Fontenot v. National Transfer Co.*, 99 So.2d 795, 810 (La. App. 1957) as "the sum of money which invested at the rate of five percent per annum would produce with withdrawals from principal over the 37 years an annual income of \$5,680.00 per year." Here the deceased had a life expectancy of 37 years and earnings for the previous year of \$5,680.

19. *Duree v. Maryland Cas. Co.*, 114 So.2d 594 (La. 1959).

20. *Andrus, Tutrix v. White*, 236 La. 28, 106 So.2d 705 (1958); *Fontenot v. National Transfer Co.*, 99 So.2d 795 (La. App. 1957).

21. *Duree v. Maryland Cas. Co.*, 114 So.2d 594 (La. 1959).

22. See note 20 *supra*.

23. *Stephens v. Natchitoches Parish School Board*, 110 So.2d 156 (La. App. 1959). *But see O'Connor v. Chicago, R.I. & P. Ry.*, 40 So.2d 663 (La. App. 1949) (small recovery for love and affection when remarried at time of trial).

24. *O'Connor v. Chicago, R.I. & P. Ry.*, 40 So.2d 663 (La. App. 1949) (widow remarried within the year and a half preceding trial; the court allowed her

should be modified in the situation where the widow's present husband earns less than her former husband, since she has been damaged to the extent of this difference.

In determining the amount to be awarded for loss of support to the minor children, the court has held that the loss includes only that amount which the children could reasonably expect to receive until majority.<sup>25</sup> This award is the amount that the judge feels is adequate under the circumstances, and is frequently lumped with the loss of society and anguish awards.<sup>26</sup> Sometimes this award is distributed on the basis of the minor children's ages.<sup>27</sup> It is submitted that a definite means of ascertaining the proper amount to compensate for this loss might be derived, such as the actual amount of support and educational funds that may be anticipated in view of the family's circumstances. Another aspect of awarding the children damages is the extent to which they benefit from the mother's award.<sup>28</sup> Where the community property approach is used to determine the widow's damages, the children recover their entire award from the deceased father's share of the community.<sup>29</sup> It is suggested that this permits a double recovery. Since both the father and mother are obligated to support the children,<sup>30</sup> the children's support actually comes from the community. Therefore, one-half of the children's award should be deducted from the mother's award.

When a child who is contributing to the support of his parents is killed, the parents may sue for that loss.<sup>31</sup> The award

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\$1500 for loss of support, noting that this was a proper amount because her former husband's annual income was \$1248).

25. *Eichorn v. New Orleans & C.R., Light & Power Co.*, 114 La. 712, 38 So. 526 (1905).

26. *Andrus, Tutrix v. White*, 236 La. 28, 106 So.2d 705 (1958); *Guidry v. Crowther*, 96 So.2d 71 (La. App. 1957); *Keith v. Royal Indemnity Co.*, 90 So.2d 534 (La. App. 1956). *But see Duree v. Maryland Casualty Co.*, 114 So.2d 594 (La. 1959) (state held immune from liability, but affirmed as to other defendant—child's loss of support awarded separately).

27. *Eichorn v. New Orleans & C.R., Light & Power Co.*, 114 La. 712, 38 So. 526 (1905); *Kern v. Knight*, 127 So. 133 (La. App. 1930). *But see* later cases: *Stansbury v. Mayor & Councilmen of Morgan City*, 228 La. 880, 84 So.2d 445 (1955); *Toney v. Pope*, 110 So.2d 226 (La. App. 1959); *Rosier v. State*, 50 So.2d 31 (La. App. 1951); *DeHart v. State*, 46 So.2d 366 (La. App. 1950); *Alford v. Louisiana & Ark. Ry.*, 38 So.2d 258 (La. App. 1949).

28. *Eichorn v. New Orleans & C.R., Light & Power Co.*, 114 La. 712, 38 So. 526 (1905).

29. See note 17 *supra*.

30. LA. CIVIL CODE art. 227 (1870): "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children."

31. *Watson v. McEacharn*, 99 So.2d 138 (La. App. 1957); *Bradford v. Wertz*, 52 So.2d 47 (La. App. 1951); *Salone v. Shreveport Ry.*, 41 So.2d 240 (La. App.

apparently is made in the discretion of the court as to amount and is usually lumped with the awards made for loss of society and for anguish.<sup>32</sup> The probable continuance of the contributions is considered.<sup>33</sup> Thus when the child contributing support is shiftless and irregular in his contributions,<sup>34</sup> or is soon to be married,<sup>35</sup> the court has allowed small awards. It should be noted that a minor's earnings may not be recovered, since the parents are only entitled to the usufruct of them.<sup>36</sup>

In cases where the brothers and sisters are plaintiffs, loss of support may be proven as in any other case.<sup>37</sup> This is true even though the law does not require collateral relatives to support one another.<sup>38</sup> The court will look to the contributions and life expectancy of the deceased and grant an award that appears just.<sup>39</sup> The court has not yet evolved a specific criterion for accurately determining loss of support damages due collateral relatives.

It is suggested that in ascertaining the duration of loss of support a more accurate determination might be reached by considering the life expectancies of both the plaintiff and the deceased, and using the shorter, rather than just considering the expectancy of the deceased.

### *Loss of Society, and Grief and Anguish of the Beneficiaries*

Louisiana recognizes loss of society and the grief of the beneficiaries as distinct elements of damage in wrongful death actions.<sup>40</sup> Loss of society is the deprivation of the companionship

1949); *Gautreaux v. Landry*, 37 So.2d 405 (La. App. 1948); *Hebert v. Texas & Pac. Ry.*, 28 So.2d 151 (La. App. 1946); *Richie v. Natchitoches Oil Mill*, 178 So. 752 (La. App. 1938).

32. See cases cited note 31 *supra*.

33. *Blackburn v. Louisiana Ry. & Nav. Co.*, 128 La. 319, 54 So. 865 (1911); *Brown v. Wertz*, 52 So.2d 54 (La. App. 1951); *Thibodaux v. Culotta*, 192 So. 712 (La. App. 1939); *Edwards v. Texas & Pac. Ry.*, 185 So. 111 (La. App. 1933); *Williams v. Brown*, 181 So. 679 (La. App. 1937).

34. *Blackburn v. Louisiana Ry. & Nav. Co.*, 128 La. 319, 54 So. 865 (1911).

35. *Brown v. Wertz*, 52 So.2d 54 (La. App. 1951); *Thibodaux v. Culotta*, 192 So. 712 (La. App. 1939). See also *Williams v. Brown*, 181 So. 679 (La. App. 1937) (court said that since Negro daughter was 20 years old, it was not to be presumed that she would have stayed at home much longer; rather it was likely that she would soon marry).

36. *Bourg v. Brownell-Drews Lumber Co.*, 120 La. 1009, 45 So. 972 (1908).

37. *Freeman v. United States Cas. Co.*, 88 So.2d 423 (La. App. 1956); *Quaid v. Heymann*, 150 So. 867 (La. App. 1933); *Langenstein v. Reynaud*, 127 So. 764 (La. App. 1930).

38. *Freeman v. United States Cas. Co.*, 88 So.2d 423 (La. App. 1956).

39. *Ibid.*; *Quaid v. Heymann*, 150 So. 867 (La. App. 1933).

40. *Barber v. Louisiana Ry. & Nav. Co.*, 141 La. 1059, 76 So. 199 (1917); *Engeron v. LeBlanc*, 29 So.2d 497 (La. App. 1947).

and love of the deceased; grief is that occasioned by the untimely death and the loss of society. The acceptance of these losses as elements of damage places Louisiana in the minority group of states allowing such damages.<sup>41</sup> Since the relationship of grief to loss of society is so close, the factors affecting both elements may be considered together. The main factors usually considered are the ages<sup>42</sup> and the closeness of the relationship existing between the plaintiff and deceased.<sup>43</sup> The court has recognized that it is impossible actually to compensate for these losses<sup>44</sup> and that there can be no standardization of awards made for these elements.<sup>45</sup>

The closeness of the relationship between the deceased and the plaintiff is a factor of utmost importance in determining the amount of damages for grief and loss of society. In considering the closeness which existed between spouses, the courts look to the habits of the spouses,<sup>46</sup> the apparent love and affection between them, and the marital harmony.<sup>47</sup> Thus where the hus-

41. *Steele v. Miami Transit Co.*, 160 Fla. 362, 34 So.2d 530 (1948) (parents may recover for anguish suffered because of death of minor child, by statutory provision); *Ginoza v. Takai Elec. Co.*, 40 Hawaii 691 (1955) (recovery for loss of society); *Checketts v. Bowman*, 70 Idaho 463, 220 P.2d 682 (1950) (recovery for loss of society; but not for anguish); *Duran v. Mission Mortuary, Inc.*, 174 Kan. 565, 258 P.2d 241 (1953) (recovery for loss of society and for anguish); *Delta Chevrolet Co. v. Ward*, 211 Miss. 256, 51 So.2d 443 (1951) (recovery for loss of society); *Nelson, Adm'r v. Charleston & W. Carolina Ry.*, 231 S.C. 351, 98 S.E.2d 798 (1957) (damages include loss of society and anguish); *Simons v. Kidd*, 73 S.D. 306, 42 N.W.2d 307 (1950) (loss of society and anguish are elements of damage); *Van Cleave v. Lynch*, 109 Utah 149, 166 P.2d 244 (1946) (recovery includes loss of society); *Matthews v. Hicks, Adm'r*, 197 Va. 112, 87 S.E. 2d 629 (1955) (both loss of society and anguish are elements of damages); *Black v. Peerless Elite Laundry Co.*, 113 W.Va. 828, 169 S.E. 447 (1933) (recovery for anguish); *Muir, Adm'r v. Haggerty, Inc.*, 77 Wyo. 280, 314 P.2d 948 (1957) (loss of society recovered); PROSSER, TORTS § 105 (2d ed. 1955); Annot., 74 A.L.R. 11 (1931).

42. *Churchill v. Texas & Pac. Ry.*, 151 La. 726, 92 So. 314 (1922); *Bond v. Spiller*, 107 So.2d 706 (La. App. 1958); *Walker v. Jarnevic*, 102 So.2d 770 (La. App. 1958); *Gautreaux v. Landry*, 37 So.2d 405 (La. App. 1949).

43. *Saxton v. Plum Orchards, Inc.*, 215 La. 378, 40 So.2d 791 (1949); *Moore v. Nola Cabs, Inc.*, 70 So.2d 404 (La. App. 1954); *Walker v. Chicago, R.I. & P. Ry.*, 40 So.2d 668 (La. App. 1949).

44. *Kent v. Baton Rouge Elec. Co.*, 154 La. 142, 97 So. 344 (1923); *Bond v. Spillers*, 107 So.2d 706 (La. App. 1958); *Bodin v. Texas Co.*, 186 So. 390 (La. App. 1939); *Biagginin v. Toye Bros. Yellow Cab Co.*, 163 So. 780 (La. App. 1935); *Horrell v. Gulf & Valley Cotton Oil Co.*, 131 So. 709 (La. App. 1930).

45. *Broussard v. Louisiana Western R.R.*, 140 La. 517, 73 So. 606 (1916); *Bourdier v. Louisiana West. R.R.*, 133 La. 50, 62 So. 348 (1913); *Dobyns v. Yazoo & M.V.R.R.*, 119 La. 72, 43 So. 934 (1907); *Biagginin v. Toye Bros. Yellow Cab. Co.*, 163 So. 780 (La. App. 1935).

46. *Eichorn v. New Orleans & C. R., Light & Power Co.*, 114 La. 712, 38 So. 526 (1905); *Hebert v. Lake Charles Ice, Light & Water Works Co.*, 111 La. 522, 35 So. 731 (1903); *Ryan v. Dendinger, Inc.*, 9 So.2d 849 (La. App. 1942).

47. *Bond v. Spillers*, 107 So.2d 706 (La. App. 1958); *Fontenot v. National Transfer Co.*, 99 So.2d 795 (La. App. 1957); *Perot v. United States Cas. Co.*,



band was a drunkard and spent most of his time away from home,<sup>48</sup> or lived in adultery with another,<sup>49</sup> the court considered such evidence as indicating the relationship was not close and awarded only small damages. However, where the husband was a good provider, faithful and hard working,<sup>50</sup> or the mother was affectionate and ran a happy, contented household,<sup>51</sup> the court concluded that there was a very close relationship, and allowed substantial damages. Where the parents sue for a child's death, the industry of the child around the home,<sup>52</sup> the time spent at home, and the general companionship of the child and parents<sup>53</sup> tend to prove closeness of relationship. If the parents are separated, legally or otherwise, the parent with custody will recover more than the other.<sup>54</sup> When the child seeks recovery for the loss of a parent, the guidance, moral counsel, love, affection and aid rendered by the parent are indicative of the closeness.<sup>55</sup> More detailed proof of the closeness of relationship is apparently required by the court in suits for the death of a brother or sister.<sup>56</sup>

98 So.2d 584 (La. App. 1957); *Marler v. State*, 78 So.2d 26 (La. App. 1955). See also *Patrick v. T. Smith & Sons, Inc.*, 58 So.2d 353 (La. App. 1952).

48. *Ross v. Tynes*, 14 So.2d 80 (La. App. 1943); *Rice v. Kansas City Southern Ry.*, 194 So. 444 (La. App. 1940); *Shipp v. St. Louis Southwestern Ry.*, 188 So. 526 (La. App. 1939).

49. *Poindexter v. Service Cab. Co.*, 161 So. 40 (La. App. 1935).

50. *Patrick v. T. Smith & Sons, Inc.*, 58 So.2d 353 (La. App. 1952); *Wright v. Texas & New Orleans R.R.*, 79 So.2d 894 (La. App. 1944); *Scott v. Claiborne Elec. Cooperative*, 13 So.2d 524 (La. App. 1943); *McNeil v. Boagni*, 153 So. 352 (La. App. 1934).

51. *Toney v. Pope*, 110 So.2d 226 (La. App. 1959); *LeBlanc v. Louisiana Hwy. Commission*, 5 So.2d 204 (La. App. 1941); *Biagginin v. Toye Bros. Yellow Cab Co.*, 163 So. 780 (La. App. 1935).

52. *Watson v. McEacharn*, 99 So.2d 138 (La. App. 1957); *Himes v. Avinger*, 85 So.2d 304 (La. App. 1956); *Salone v. Shreveport Ry.*, 41 So.2d 240 (La. App. 1949); *Hebert v. Texas & Pac. Ry.*, 28 So.2d 151 (La. App. 1946).

53. *Himes v. Avinger*, 85 So.2d 304 (La. App. 1956); *Gautreaux v. Landry*, 37 So.2d 405 (La. App. 1949); *Frazier v. Ayres*, 20 So.2d 754 (La. App. 1945) (court saying that grief might be assuaged to some degree by the presence of the plaintiffs' other children in the home); *Bateman v. Louisiana Highway Commission*, 4 So.2d 507 (La. App. 1941); *Smith v. Monroe Grocer Co.*, 179 So. 495 (La. App. 1938).

54. *Joyner v. Williams*, 35 So.2d 812 (La. App. 1948); *Williams v. Missouri Pacific R.R.*, 11 So.2d 658 (La. App. 1942); *Kaough v. Hadley*, 165 So. 748 (La. App. 1936).

55. *Andrus, Tutrix v. White*, 236 La. 28, 106 So.2d 705 (1953); *Keith v. Royal Indemnity Co.*, 90 So.2d 534 (La. App. 1956); *Rosier v. State*, 50 So.2d 31 (La. App. 1951); *LeBlanc v. Louisiana Highway Commission*, 5 So.2d 204 (La. App. 1941); *Clinton v. City of West Monroe*, 187 So. 561 (La. App. 1939). See also *Peart v. Orleans-Kenner Traction Co.*, 123 So. 822 (La. App. 1928) (deceased father divorced and not supporting child—\$9000 recovery).

56. *Freeman v. United States Casualty Co.*, 88 So.2d 423 (La. App. 1956) (extensive consideration of factors determining closeness of the relationship); *Cox v. Gross*, 47 So.2d 102 (La. App. 1950); *Chustz v. Negrotto*, 165 So. 479 (La. App. 1935); *Quaid v. Heymann*, 150 So. 867 (La. App. 1933). *But see Warrick v. Louisiana Highway Commission*, 4 So.2d 607 (La. App. 1941); *Pegg v. Toye Bros. Yellow Cab Co.*, 167 La. 896 (La. App. 1936) (very little discussion of closeness of relationship).

Factors utilized by the court include the difference in ages, which tends to show companionship when the plaintiff and the deceased have been living near each other,<sup>57</sup> the degree of association between the parties, which is determined by the actual visits made and the opportunities to visit,<sup>58</sup> and the feeling of the plaintiff for the deceased as indicated by correspondence, gifts, and other expressions of affection.<sup>59</sup>

The early view of the court was that in actions for the death of the very young and the very old the amount of recovery should be less than the amount awarded for the death of those whose age falls in between these extremes.<sup>60</sup> This notion was applied to actions for the death of very young children because it was felt that the parents were not as attached to such children.<sup>61</sup> While the court has never specifically rejected this view, it now appears to make no such distinction.<sup>62</sup> Where the plaintiff and deceased were both elderly, the court apparently felt that they had little time left on earth and consequently the duration of the loss was not as great as if the parties had been younger.<sup>63</sup> The court has

57. *Freeman v. United States Casualty Co.*, 88 So.2d 423 (La. App. 1956); *Cox v. Gross*, 47 So.2d 102 (La. App. 1950); *Chustz v. Negrotto*, 165 So. 479 (La. App. 1936).

58. *Freeman v. United States Casualty Co.*, 88 So.2d 423 (La. App. 1956); *Cox v. Gross*, 47 So.2d 102 (La. App. 1950).

59. *Cox v. Gross*, 47 So.2d 102 (La. App. 1950).

60. *Hebert v. Baton Rouge Elec. Co.*, 150 La. 957, 91 So. 406 (1922); *Reed v. Sievers*, 146 La. 393, 83 So. 685 (1920); *Schick v. Jenevein*, 145 La. 333, 82 So. 360 (1919); *Patton v. Frost-Johnson Lumber Co.*, 142 La. 117, 76 So. 580 (1917); *Robertson v. Town of Jennings*, 128 La. 795, 55 So. 375 (1911); *Sundmaker v. Yazoo & M.V. Ry.*, 105 La. 111, 30 So. 285 (1901); *Rice v. Crescent City R.R.*, 51 La. Ann. 108, 24 So. 791 (1899); *Moore v. Nola Cabs, Inc.*, 70 So.2d 404 (La. App. 1954); *Dupuy v. Godchaux Sugars, Inc.*, 184 So. 736 (La. App. 1938); *Meaux v. Gulf Ins. Co.*, 182 So. 158 (La. App. 1938); *Davidson v. American Drug Stores, Inc.*, 175 So. 157 (La. App. 1937); *Pizzitola v. Letellier Transfer Co.*, 167 So. 158 (La. App. 1936); *McNeil v. Boagni*, 153 So. 352 (La. App. 1934); *Santos v. Duvic*, 133 So. 399 (La. App. 1931); *Drago v. Dorsey*, 125 So. 724 (La. App. 1930).

61. *Hebert v. Baton Rouge Elec. Co.*, 150 La. 957, 91 So. 406 (1922); *Patton v. Frost-Johnson Lumber Co.*, 142 La. 117, 76 So. 580 (1917); *Robertson v. Town of Jennings*, 128 La. 795, 55 So. 375 (1911); *Sundmaker v. Yazoo & M.V. R.R.*, 106 La. 111, 30 So. 285 (1901); *Rice v. Crescent City R.R.*, 51 La. Ann. 108, 24 So. 791 (1899); *Meaux v. Gulf Ins. Co.*, 182 So. 158 (La. App. 1938) (discussion of reasons for giving small amount); *Drago v. Dorsey*, 126 So. 724 (La. App. 1930). *But see Embry v. Reserve Natural Gas Co.*, 124 So. 572 (La. App. 1929). For an interesting proposal on allowing damages for the death of infants and elderly persons, see Comment, 4 N.W.U.L. Rev. 254 (1959).

62. Young child; *Randall v. Baton Rouge Bus Co.*, 114 So.2d 98 (La. App. 1959) (\$12,000 to each parent for each child's death; children 7 and 3 years old).

63. *Reed v. Sievers*, 146 La. 393, 83 So. 685 (1920); *Schick v. Jenevein*, 145 La. 333, 82 So. 360 (1919); *Moore v. Nola Cabs Inc.*, 70 So.2d 404 (La. App. 1954); *Dupuy v. Godchaux Sugars Inc.*, 184 So. 736 (La. App. 1938); *Davidson v. American Drug Stores, Inc.*, 175 So. 157 (La. App. 1937); *Pizzitola v. Letellier Transfer Co.*, 167 So. 158 (La. App. 1936); *McNeil v. Boagni*, 153 So. 352 (La. App. 1934); *Santos v. Duvic*, 133 So. 399 (La. App. 1931); *But see Rose v. L'Engle*, 148 La. 310, 86 So. 822 (1920).

changed its view and now seems to recognize no distinction based on the age of the plaintiff or the deceased.<sup>64</sup> This has resulted from the adoption of the idea that the loss of society, and grief and anguish, are present losses.<sup>65</sup> In line with this, the court determines the amount of damages on the basis of the relationship existing between the plaintiff and deceased at the time of death, rather than attempting to determine the loss on the basis of its prospective duration. The difficulty presented under the early view, which weighed the probable duration and intensity of the loss in light of the ages of the plaintiff and deceased, is aptly illustrated by two situations which confronted the court. In one, the elderly plaintiff was allowed a smaller recovery than a younger person would have been allowed because the loss of society would be of short duration.<sup>66</sup> In the other, the elderly plaintiff was considered entitled to more than a younger person because the longer time spent with the deceased indicated a greater closeness, thus producing a loss of greater intensity.<sup>67</sup> It is suggested that the view now entertained by the courts is sound, since the pertinent evidence indicating the closeness of relationship is fairly easy to obtain, insuring a reasonably accurate determination of the actual closeness of relationship that had existed between the parties. This type of evidence gives the courts an actual, rather than a speculative, basis upon which to predicate their judgment.

### *Other Pecuniary Damages*

Other pecuniary damages of lesser importance allowed by the courts include such items as medical,<sup>68</sup> hospital,<sup>69</sup> and funeral expenses,<sup>70</sup> as well as loss of wages by the plaintiff.<sup>71</sup> In order

64. Elderly persons: *Bond v. Spillers*, 107 So.2d 706 (La. App. 1958) (deceased husband 76½ years old; amount to widow \$17,932.10).

65. *Andrus, Tutrix v. White*, 236 La. 28, 106 So.2d 705 (1958) (see court of appeal opinion in 101 So.2d 7 (La. App. 1958), classifying loss of society an "immediate" damage as opposed to loss of support being a "prospective" damage).

66. *Pizzitola v. Letellier Transfer Co.*, 167 So. 158 (La. App. 1938).

67. *Walker v. Chicago, R.I. & P. Ry.*, 40 So.2d 668 (La. App. 1949).

68. *Johnson v. Industrial Lumber Co.*, 131 La. 897, 60 So. 608 (1912); *Hagan v. State Farm Mut. Automobile Ins. Co.*, 76 So.2d 36 (La. App. 1954); *Mayer v. Slaughter*, 35 So.2d 166 (La. App. 1949); *Pegg v. Toye Bros. Yellow Cab Co.*, 167 So. 896 (La. App. 1936); *Constabel v. Miller*, 131 So. 699 (La. App. 1931).

69. *Hagan v. State Farm Mut. Automobile Ins. Co.*, 76 So.2d 36 (La. App. 1954). See also *Andrus, Tutrix v. White*, 236 La. 28, 106 So.2d 705 (1958).

70. *Randall v. Baton Rouge Bus Co.*, 114 So.2d 98 (La. App. 1959); *Bond v. Spillers*, 107 So.2d 706 (La. App. 1958); *Finn v. National Fire Ins. Co.*, 106 So.2d 815 (La. App. 1958); *Perot v. United States Casualty Co.*, 98 So.2d 584 (La. App. 1957).

71. *Davis v. Surebest Bakery, Inc.*, 38 So.2d 624 (La. App. 1948).

to recover these the plaintiff must prove actual damages sustained.

#### METHODS OF CONTROL AVAILABLE TO THE COURT

Since the Louisiana courts may review both the facts and the law on appeal and alter the judgment if they believe it necessary, they have sometimes relied on judicial precedent, the cost of living, and the ability of the defendant to pay as a justification for their modification or affirmation of a judgment.<sup>72</sup> These items also appear to be considered at times by the trial judge in fixing the amount of damages. It is suggested that such a use adds an aura of greater fairness to the disposition of the case in which they are used. By their use they become tools for controlling the amount awarded.

#### *Judicial Precedent*

By the use of judicial precedent the court apparently seeks to preserve uniformity of the amounts awarded in similar factual situations. This is done by citing similar cases and the amount granted in each case.<sup>73</sup> While this resulting uniformity tends to indicate the impartiality of the law, it seems that a decision at least as fair could be reached based upon the factual situation of each case without the use of precedent.

#### *Cost of Living*

When granting awards<sup>74</sup> the court has constantly taken judicial notice of the change in the purchasing power of the dollar.

72. See notes 73-78 *infra*.

73. *Stansbury v. Mayor of Morgan City*, 228 La. 880, 84 So.2d 475 (1955); *Tolle v. Higgins Industries, Inc.*, 212 La. 173, 31 So.2d 730 (1947); *Randall v. Baton Rouge Bus Co.*, 114 So. 98 (La. App. 1959); *Bond v. Spillers*, 107 So.2d 706 (La. App. 1958); *Watson v. McEacharn*, 99 So.2d 138 (La. App. 1957); *St. Julian v. State*, 98 So.2d 284 (La. App. 1957); *DeHart v. State*, 46 So.2d 366 (La. App. 1950); *Davis v. Surebest Bakery, Inc.*, 38 So.2d 624 (La. App. 1948); *Paquet v. Renken*, 30 So.2d 218 (La. App. 1947); *Hebert v. Texas & Pac. Ry.*, 28 So.2d 151 (La. App. 1946); *Levy v. New Orleans & Northeastern R.R.*, 20 So.2d 559 (La. App. 1945); *Barnes v. Red River & G.R.R.*, 128 So. 724 (La. App. 1930); *Johnson v. Hibernia Bank & Trust Co.*, 5 La. App. 649 (1927) (citing 27 cases with the amount awarded to support verdict). See also *Walker v. Jarneveh*, 102 So.2d 770 (La. App. 1958).

74. *Perot v. United States Casualty Co.*, 98 So.2d 584 (La. App. 1957); *Freeman v. United States Casualty Co.*, 88 So.2d 423 (La. App. 1956); *Himes v. Avinger*, 85 So.2d 304 (La. App. 1956); *Bergeron v. Saia*, 37 So.2d 866 (La. App. 1948); *Gautreaux v. Landry*, 37 So.2d 405 (La. App. 1949); *Short v. Central La. Elec. Co.*, 36 So.2d 658 (La. App. 1948); *Levy v. New Orleans & Northeastern R.R.*, 20 So.2d 559 (La. App. 1945); *Scott v. Claiborne Elec. Coop., Inc.*, 13 So.2d 524 (La. App. 1943); *Donaldson v. Riddling's Succ.*, 145 So. 804 (La. App. 1933).

This purports to give about the same value of damages to plaintiffs in similar situations which arise in different years.<sup>75</sup> Used in conjunction with precedent this application appears equitable, though, if precedent were to be discarded, unnecessary.

#### *Ability of the Defendant To Pay*

The ability of the defendant to pay is generally used by the court to restrict or reduce the amount of damages.<sup>76</sup> When the defendant has little means or income, and little or no insurance, the court will grant damages in an amount substantially lower than if the defendant had more money.<sup>77</sup> To be consistent, in considering the ability of the defendant to pay, the court would have to allow a greater amount of damages when the defendant is a wealthy person. Apparently this is not done. When this ability to pay is considered, the plaintiff is compensated only insofar as the amount awarded does not impose a great hardship upon the defendant. In the light of the Louisiana principle that only compensatory damages are awarded,<sup>78</sup> it would seem that the courts should not consider the ability of the defendant to pay in any case.

#### CONCLUSION

The Louisiana courts have been realistic in recognizing the elements of loss sustained by the beneficiaries on account of the deceased's wrongful death. However, the criteria by which the elements are measured generally appear to permit only rough approximations. It is suggested that each element of damage that is susceptible of definite calculation should be subjected to a criterion that accurately measures that loss. As indicated by

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75. See *Levy v. New Orleans & Northeastern R.R.*, 20 So.2d 559 (La. App. 1945).

76. *Robideaux v. Hebert*, 118 La. 1089, 43 So. 887 (1907); *Vail v. Spampinato*, 108 So.2d 262 (La. App. 1958) (cert. granted); *Freeman v. United States Casualty Co.*, 88 So.2d 423 (La. App. 1956); *Bergeron v. Saia*, 37 So.2d 866 (La. App. 1948); *Wright v. Texas & N.O. R.R.*, 19 So.2d 894 (La. App. 1944); *Killian v. Modern Iron Works, Inc.*, 15 So.2d 532 (La. App. 1943); *Seither v. Potter*, 194 So. 467 (La. App. 1940); *Donaldson v. Riddling's Succ.*, 145 So. 804 (La. App. 1933).

77. *Bergeron v. Saia*, 37 So.2d 866 (La. App. 1948); *Wright v. Texas & N.O. R.R.*, 19 So.2d 894 (La. App. 1944).

78. *Vincent v. Morgan's La. & T.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917); *Underwood v. Gulf Refining Co.*, 128 La. 968, 55 So. 641 (1911); *Robertson v. Town of Jennings*, 128 La. 795, 55 So. 375 (1911); *Cherry v. Louisiana & Ark. Ry.*, 121 La. 471, 46 So. 596 (1908); *LeBlanc v. Sweet*, 107 La. 355, 31 So. 766 (1901). See also *Loeblich v. Garnier*, 113 So.2d 95 (La. App. 1959) (although dealing primarily with damages for trespass to property, the case contains an interesting explanation of Louisiana's treatment of mental suffering damages as being compensatory rather than punitive).

the community property approach to determine the widow's loss, the courts have already begun to evolve such criteria. A further extension of the establishment of definite criteria to measure the loss of different plaintiffs will probably result in more awards that actually compensate for the damage sustained.

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## **Problems of the Retained Employee in Louisiana Workmen's Compensation Law**

### INTRODUCTION

The problems created by the retention of an injured employee are some of the most confusing in Workmen's Compensation Law. A retained employee is one who has suffered a disability compensable under the Workmen's Compensation Statute, but has been retained by the employer to do such work as he is still able to perform.<sup>1</sup> Retention of the injured employee is thought to be socially desirable since rehabilitation often results from the continued employment.<sup>2</sup> However, several problems arise when the injured employee resigns, is dismissed, or seeks to have his compensation fixed when he is receiving wages. These problems generally are as follows: (1) whether to allow the employer credit for wages paid after the injury; (2) whether an action by the employee to have his compensation fixed, brought during the retention period, is premature; (3) whether prescription has accrued against the claim. Since the issues of wage credit, prematurity, and prescription are closely related, the courts have attempted to achieve consistency within the various rules to be applied to each individually. The result has been confusion because it is impossible to maintain consistency and at the same time reach a desirable solution to the retained employees problem. For instance, it seems desirable for an employee to be able to bring suit to have his compensation claim set even while he is receiving wages. At the same time it appears undesirable to force him to go to court by having prescription run on his claim. It also seems desirable to give an employer credit for wages paid to the employee on a subsequent

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1. See MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 401 (1951).

2. *Ibid.*