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Recommended Citation

Hans, Richard F. Jr. (1992) "New York Reaffirms Exclusion of Loss of Consortium from Recoverable Damages in Wrongful Death Action," *St. John's Law Review*: Vol. 66 : No. 1 , Article 9.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol66/iss1/9>

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DEVELOPMENTS IN THE LAW

New York reaffirms exclusion of loss of consortium from recoverable damages in wrongful death action

Wrongful death statutes provide a cause of action for the injuries suffered by a decedent's family members as a result of the wrongful act that "caused the decedent's death."¹ New York law, which limits the recovery of damages for wrongful death to the "fair and just compensation" of pecuniary injuries, has traditionally excluded from wrongful death awards such intangibles as loss of the decedent's society, companionship, or consortium.² Recently, in *Gonzalez v. New York City Housing Authority*,³ the New York Court of Appeals reaffirmed its strict interpretation of "pecuniary

¹ See EPTL §§ 5-4.1, -4.3 (McKinney Supp. 1991). Pursuant to this statute, "[t]he personal representative . . . of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act . . . which caused the decedent's death . . ." *Id.* § 5-4.1. These damages, however, are expressly limited to the "pecuniary injuries" suffered by the decedent's distributees. *Id.* § 5-4.3. The term "pecuniary injuries," when used "[w]ithin . . . [a] wrongful death statute . . . means a reasonable expectation of pecuniary benefits . . . [and] includes damages for deprivation of . . . companionship." BLACK'S LAW DICTIONARY 1131 (6th ed. 1990). Courts have found the valuation of human life to be a "vexing problem." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 150 (2d ed. 1977); see also *infra* note 28 (common-law history and statutory development of wrongful death claim).

² See *Liff v. Schildkrout*, 49 N.Y.2d 622, 633-34, 404 N.E.2d 1288, 1291-92, 427 N.Y.S.2d 746, 749-50 (1980). The *Liff* court noted that the phrase "'pecuniary injuries' . . . has been consistently construed by the courts as excluding recovery for grief, and loss of society, affection and conjugal fellowship—all elements of the generic phrase 'loss of consortium.'" *Id.* at 633, 404 N.E.2d at 1292, 427 N.Y.S.2d at 750.

The terms "society," "companionship," and "consortium" have been used interchangeably so often that the definitional distinction has been blurred. See *id.*; see also *Valicenti v. Valenze*, 68 N.Y.2d 826, 828-29, 499 N.E.2d 870, 871, 507 N.Y.S.2d 616, 617 (1986) (referring to consortium in both marital and parent-child relationships); cf. *Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 589 (1974) (loss of consortium arose in seventeenth century civil actions in which husbands sued for loss of their wives' conjugal services).

"[S]ociety' embraces a broad range of mutual benefits each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Id.* at 585. Although originally limited to describing the conjugal right of husband and wife, "consortium" now includes the additional ingredients of companionship and comfort. See *Stanford v. McLean Trucking Co.*, 506 F. Supp. 1252, 1258 (E.D. Tex. 1981); see also Anne E. Seman, Note, *Pecuniary Injuries Under the Illinois Wrongful Death Act: Is the Loss of a Child's Society Included?*, 15 *Loy. U. Chi. L.J.* 595, 596 n.7 (1984) (discussing Illinois wrongful death case in which recovery for loss of consortium allowed, but limited to loss of society and sexual relations with marital partner). See generally STUART M. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3:49, at 308-22 (2d ed. 1975) (discussing modern trend of expanding definition of pecuniary loss). Unless otherwise stated, this Survey will refer to the term "loss of consortium" in the generic sense.

³ 77 N.Y.2d 663, 572 N.E.2d 598, 569 N.Y.S.2d 915 (1991).

injuries" by rejecting the adult plaintiffs' claim for the loss of their grandmother's consortium.⁴

In *Gonzalez*, the plaintiffs,⁵ whose grandmother had been slain in her apartment, brought a wrongful death action against the New York City Housing Authority.⁶ Following trial in the Supreme Court, New York County, a jury awarded damages to the plaintiffs for the loss of their grandmother's services, nurture, care, and guidance,⁷ and for the pain and suffering experienced by the dece-

⁴ *Id.* at 667-68, 572 N.E.2d at 600-01, 569 N.Y.S.2d at 917-18. In *Gonzalez*, the court limited recovery to "[l]oss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incident to death." *Id.* at 668, 572 N.E.2d at 601, 569 N.Y.S.2d at 918.

The plaintiffs, who were raised by the decedent, remained close to her until her death and were awarded pecuniary damages even though they were financially independent, beyond the age of majority, and living apart from the decedent. *Id.* at 666, 572 N.E.2d at 599-600, 569 N.Y.S.2d at 916-17. That the plaintiffs were clearly the decedent's "distributees" and thus within the "class the legislature intended should be permitted to maintain this action" was not at issue. *Id.* Moreover, that the grandchildren were "self supporting adults" did not bar their recovery. *Id.* The court might have treated the issue of the plaintiffs' relationship with the decedent too lightly. By not attempting to draw some appropriate line, the court has opened the possibility of recovery to a large class of plaintiffs. *Cf. Note, Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991) (discussing need for recognition of nontraditional family relationships).

The court held that whether pecuniary injuries were suffered by adult children or grandchildren was a question of fact for the jury and that because the decedent in *Gonzalez* provided ongoing services to her adult grandchildren, damages for pecuniary injuries resulting from the loss of the decedent's guidance were properly granted. *Gonzalez*, 77 N.Y.2d at 669, 572 N.E.2d at 602, 569 N.Y.S.2d at 919.

Additionally, the plaintiffs were awarded damages for the decedent's conscious pain and suffering. *Id.* at 670, 572 N.E.2d at 602, 569 N.Y.S.2d at 919; *see also infra* notes 11 and 32 (discussing speculative nature of damages for pain and suffering).

⁵ *See Gonzalez*, 77 N.Y.2d at 665, 572 N.E.2d at 599, 569 N.Y.S.2d at 916 (action was brought individually and on behalf of distributees by decedent's granddaughter and administratrix, Marta Gonzalez, pursuant to EPTL § 5-4.1 (McKinney Supp. 1991)). Although Ms. Gonzalez's brother, the decedent's grandson, was not a named plaintiff, the court referred to the grandchildren collectively as the "plaintiffs." *Id.*

⁶ *Id.* at 665, 572 N.E.2d at 599, 569 N.Y.S.2d at 916. The decedent was brutally murdered in her apartment in a Manhattan housing project. *Id.* at 665-66, 572 N.E.2d at 599, 569 N.Y.S.2d at 916. Her assailant was later convicted of her murder as well as the rapes of two neighboring tenants. *Id.*

The decedent essentially acted as a parent to her two grandchildren throughout their lives. *Id.* at 666, 572 N.E.2d at 599-600, 569 N.Y.S.2d at 916-17. The children's father, the decedent's son, died when the children were young, and their mother, though living at home, was mentally ill. *Id.* at 666, 572 N.E.2d at 599, 569 N.Y.S.2d at 916. Consequently, the decedent cared not only for the children but also for their mother. *Id.* at 666, 572 N.E.2d at 600, 569 N.Y.S.2d at 917.

⁷ *Id.* at 665-66, 572 N.E.2d at 599-600, 569 N.Y.S.2d at 916-17 (describing fatal attack on decedent and reviewing damages awarded). The court noted that the plaintiffs frequently

dent during the brutal attack preceding her death.⁸ The plaintiffs, however, were not awarded damages for loss of the decedent's consortium.⁹ The defendant appealed, contending that the plaintiffs had failed to establish pecuniary injury, but the appellate division affirmed the damages award.¹⁰

In unanimously affirming the judgment of the appellate division,¹¹ the Court of Appeals stressed its refusal to join the increasing number of jurisdictions allowing recovery for loss of consortium in wrongful death actions.¹² Writing for the court, Judge Kaye ob-

dined with the decedent and that the granddaughter sought the decedent's guidance and assistance during a period of "marital problems." *Id.* at 666, 572 N.E.2d at 600, 569 N.Y.S.2d at 917. In addition, the granddaughter was "pregnant, and together she and the [decedent] planned that the [decedent] would care for the child while she returned to school." *Id.*

⁸ See *Gonzalez v. New York City Hous. Auth.*, 161 A.D.2d 358, 358-59, 555 N.Y.S.2d 107, 108-09 (1st Dep't 1990) (awarding damages for decedent's evident pain and suffering prior to death and for pecuniary loss suffered by her next of kin), *aff'd*, 77 N.Y.2d 665, 572 N.E.2d 599, 569 N.Y.S.2d 916 (1991).

⁹ *Gonzalez*, 77 N.Y.2d at 665, 572 N.E.2d at 599, 569 N.Y.S.2d at 916. The defendants, arguing that plaintiffs did not establish "pecuniary injuries," appealed the damages award; whether the plaintiffs vigorously pursued damages for loss of consortium in the lower courts is unclear. See *id.* Loss-of-consortium damages are not even discussed in the appellate division's decision. See *Gonzalez*, 161 A.D.2d at 358-59, 555 N.Y.S.2d at 108-09 (discussing damages for pecuniary injuries and pain and suffering). Yet the Court of Appeals reviewed the topic at some length and expressly reaffirmed its rule that loss of consortium is not recoverable in wrongful death actions. See *Gonzalez*, 77 N.Y.2d at 667-68, 572 N.E.2d at 600-01, 569 N.Y.S.2d at 917-18.

¹⁰ *Gonzalez*, 161 A.D.2d at 358, 555 N.Y.S.2d at 108.

¹¹ *Gonzalez*, 77 N.Y.2d at 671, 572 N.E.2d at 602, 569 N.Y.S.2d at 919. The Court of Appeals held that sufficient evidence existed to support the award of damages for the decedent's conscious pain and suffering and pecuniary injuries to the surviving grandchildren. *Id.* at 668, 572 N.E.2d at 601, 569 N.Y.S.2d at 918. The decedent was found bound and gagged and severely beaten; she suffered a broken neck and numerous other injuries. *Id.* at 665-66, 572 N.E.2d at 599, 569 N.Y.S.2d at 916. The trial court's conclusion that the decedent was conscious during the attack was based solely upon circumstantial evidence that the attacker would not have bound and gagged the decedent had she been knocked unconscious immediately. *Id.* at 670, 572 N.E.2d at 602, 569 N.Y.S.2d at 919. Such a conclusion seems at a minimum highly speculative as to both the duration and quality of the decedent's final conscious moments. Yet the court affirmed this finding with little explanation. *Id.*; see also POSNER, *supra* note 1, at 149-52 (difficult to valueate life properly with respect to pain and suffering); *infra* note 32 (discussing certain allowable, yet speculative damages).

Additionally, the court held that the adult plaintiffs, though financially independent, were not precluded from recovering for pecuniary injuries even though they were not living with the decedent at the time of her death. *Gonzalez*, 77 N.Y.2d at 669-70, 572 N.E.2d at 602, 569 N.Y.S.2d at 919; see also *infra* note 32 and accompanying text (rejecting argument that adult distributee cannot suffer pecuniary injury based on loss of decedent's nurture and guidance).

¹² See *Gonzalez*, 77 N.Y.2d at 667-68, 572 N.E.2d at 600-01, 569 N.Y.S.2d at 917-18 (citing *Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 587 n.21 (1974)).

served that because New York's adoption of wrongful death legislation in 1847 was "in derogation of common law," a strict construction of the statute was required.¹³ Judge Kaye's opinion thus implicitly restated the earlier holdings of the court that specifically relegated revision of the wrongful death recovery system to the legislature.¹⁴

¹³ *Id.* at 667, 572 N.E.2d at 600, 569 N.Y.S.2d at 917. The court recognized New York's steadfast refusal to permit recovery for "grief, loss of society, affection, conjugal fellowship and consortium." *Id.* at 667-68, 572 N.E.2d at 600-01, 569 N.Y.S.2d at 917-18; see also *Smith v. Hub Mfg., Inc.*, 634 F. Supp. 1505, 1512 (N.D.N.Y. 1986) (damages for loss of child's society and affection not available in wrongful death claims); *Liff v. Schildkrout*, 49 N.Y.2d 622, 634, 404 N.E.2d 1288, 1292, 427 N.Y.S.2d 746, 750 (1980) ("Legislature . . . clearly intended that damages for loss of consortium should not be recoverable in wrongful death actions."); *Close v. Nathan Littauer Hosp.*, 90 A.D.2d 580, 581, 456 N.Y.S.2d 134, 134 (3rd Dep't 1982) (no scenario exists in wrongful death actions that would justify recovery of damages for loss of consortium). However, *stare decisis* should not bind a court with "bands of steel." *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 784, 391 N.E.2d 1002, 1005, 417 N.Y.S.2d 920, 923 (1979).

¹⁴ See *infra* notes 15 and 40 and accompanying text (discussing bill now pending in New York State Senate). The court of appeals has stated unequivocally that any change in the existing law must originate in the New York Legislature. See *Liff*, 49 N.Y.2d at 634, 404 N.E.2d at 1292, 427 N.Y.S.2d at 750. The *Liff* court stated that

the courts of this State have consistently honored this legislative policy of limitation on damages and, given the failure of the Legislature to amend the statute, we conclude that the Legislature has approved this finding and implementation of legislative intent. . . . If a change should be made, it is for the Legislature, and not the courts, to make.

Id. However, because the definition of "pecuniary" is "judge-made," it certainly should be subject to being "judge-unmade." *Thornton*, 47 N.Y.2d at 784, 391 N.E.2d at 1005, 417 N.Y.S.2d at 923 (Fuchsberg, J., dissenting). The issue is not whether the Legislature intended to limit wrongful death recovery to merely "pecuniary" damages, as that is self-evident, but rather, whether a pecuniary value may be assigned to the loss of consortium. That assessment may properly be made by judges. See *McIntyre v. New York Cent. R.R.*, 37 N.Y. 287, 295 (1867) (Fullerton, J., concurring) ("it is taking too narrow a view of the matter, to say that the word *pecuniary* was used in so limited a sense, as to embrace only the loss of money").

The Court of Appeals has noted that when legislative change is not forthcoming, it is within the province of the court to overturn "unsound precedent in the area of tort law." *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508, 239 N.E.2d 897, 903, 293 N.Y.S.2d 305, 313 (1968). Moreover, it is well-established that a "legislature legislates by legislating, not by doing nothing, not by keeping silent." *Wycko v. Gnodtke*, 105 N.W.2d 118, 121-22 (Mich. 1960). Judicial reluctance to encroach upon the duties of the legislature has not been limited to issues of wrongful death. See *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 297, 448 N.E.2d 86, 87, 461 N.Y.S.2d 232, 233 (1983) (general reluctance to invade legislative sphere regarding employment law). The majority of courts, however, recognize that because numerous possible reasons exist for legislative silence, such inaction should not be construed as evidencing a desire to approve a judicial doctrine. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1395 (10th ed. 1958) ("[b]oth state and federal courts have generally been leery of relying on such inaction as . . . failure to repudiate administrative or

The Court of Appeals' continued refusal to reconsider the issue of assigning pecuniary value to the loss of a decedent's consortium in wrongful death actions invites critical analysis. Because no substantive justification exists for declaring such an injury non-compensable, the New York courts have become increasingly isolated in their restriction of wrongful death recovery.¹⁵ Furthermore, because New York allows plaintiffs asserting other claims to receive damages for loss of consortium,¹⁶ its denial of a similar award in wrongful death cases is clearly inequitable. Although it appears that the courts' reluctance to expand recovery in this area stems from a fear of prompting an avalanche of new tort claims,¹⁷ it is suggested that a carefully tailored approach to allowing compensation for loss of consortium in wrongful death actions, whether

judicial interpretations of a statute"); see also *Patterson v. McClean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (noting impossibility of ascertaining whether silence of Congress represents affirmative approval of judicial interpretation); Daniel A. Farber & Phillip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 723 (1991) (asserting that *Patterson* "comes close to rejecting completely the idea of relying on legislative silence"); Thomas W. Holm, Note, *Aliens' Alienation from Justice: The Equal Access to Justice Act Should Apply to Deportation Proceedings*, 75 MINN. L. REV. 1185, 1212 (1991) ("legislative silence is not reliable as an interpretive tool").

¹⁵ The *Gonzalez* court admitted that "other states now permit recovery for loss of society." *Gonzalez*, 77 N.Y.2d at 667, 572 N.E.2d at 600, 569 N.Y.S.2d at 917. Furthermore, the United States Supreme Court has recognized that a "clear majority of States" have widened the scope of damages to allow recovery for loss of consortium. See *Sea-Land Servs.*, 414 U.S. at 587 n.21. In *Sea-Land*, Justice Brennan noted that of the twenty-seven different jurisdictions permitting loss of society to be used as a measure of damages awardable to the beneficiaries, nine "have equivocal statutory language that has been judicially interpreted to include recovery for loss of society." *Id.*; see also *Domanaque v. Eastern Airlines*, 542 F. Supp. 643, 646 (E.D. La. 1982) (Louisiana law permits recovery of damages in wrongful death arising from loss of decedent's love and affection), *rev'd in part*, 722 F.2d 256 (5th Cir. 1984). Eight of these jurisdictions "either expressly or by judicial construction limit recovery to pecuniary losses," but, by judicial interpretation, permit recovery for loss of consortium. *Sea-Land Servs.*, 414 U.S. at 587 n.21. The trend, even in 1974, clearly pointed toward expansion of the plaintiff's recovery beyond mere economic loss. See SPEISER, *supra* note 2, § 3:49, at 313-22 (majority of jurisdictions have permitted recovery of technically non-pecuniary damages). Currently, a bill on the floor of the New York Senate seeks to amend New York's wrongful death statute. N.Y.S. 2367-B, 214th Sess. (1991). Sponsored by Senator Christopher Mega of Brooklyn, the bill proposes the elimination of the term "pecuniary" from the statute and would allow recovery in wrongful death actions for sorrow and mental anguish arising from the loss of the decedent's companionship. See *id.* But see Marcia Chambers, *New York Bill Weighs Value of Victims*, NAT'L L.J., July 15, 1991, at 13, col. 3 (approval of bill would only increase already soaring number of tort claims).

¹⁶ See *infra* notes 30-36 and accompanying text (discussing anomalies created by refusal of New York courts to allow loss of consortium damages in wrongful death actions but allowing them in others).

¹⁷ See Chambers, *supra* note 15, at 13, col. 3.

taken by the legislature or the judiciary, would have no such effect.

New York courts traditionally held that damages for loss of consortium were not capable of accurate calculation and were therefore not pecuniary in nature.¹⁸ In the 1968 case of *Millington v. Southeastern Elevator Co.*,¹⁹ the Court of Appeals deemed "without merit" the view that damages for loss of spousal consortium were too "conjectural" to value.²⁰ Unfortunately, the *Gonzalez* court, by observing that "injuries to the affections and sentiments . . . cannot be measured or recompensed by money,"²¹ appears to have revived the incalculability theory without considering the argument's glaring deficiencies.

Unlike New York, the majority of states allow the assignment of pecuniary value to the loss of consortium in wrongful death actions.²² In *Wycko v. Gnodtke*,²³ for instance, the Supreme Court of Michigan recognized a plaintiff's right to recover for loss of consortium and declared that to allow outdated precedents to control present-day decisions would be "a reproach to justice."²⁴ In recent

¹⁸ See, e.g., *Etherington v. Prospect Park & Coney Island R.R.*, 88 N.Y. 641, 643 (1882) (impossible to "ascertain mathematically" damages arising from grief felt by next of kin).

¹⁹ 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

²⁰ *Id.* at 507, 239 N.E.2d at 902, 293 N.Y.S.2d at 312; see also *Liff v. Schildkrout*, 49 N.Y.2d 622, 633-34, 404 N.E.2d 1288, 1292, 427 N.Y.S.2d 746, 750 (1980) (citing *Millington*, 22 N.Y.2d at 507, 239 N.E.2d at 907, 293 N.Y.S.2d at 312).

²¹ *Gonzalez*, 77 N.Y.2d at 667, 572 N.E.2d at 600, 569 N.Y.S.2d at 917.

²² See, e.g., MICH. COMP. LAWS § 600.2922(6) (1986) (MICH. STAT. ANN. § 27A.2922 (Callaghan 1991)) (allowing recovery for companionship and society); see also FLA. STAT. ANN. § 768.17 (West 1991) (mandating liberal construction of statute); *id.* § 768.21(3) (familial recovery for loss of companionship); HAW. REV. STAT. § 663-3 (1985) (permitting recovery for loss of familial society); KAN. STAT. ANN. § 60-1903 (1991) (placing \$100,000 cap on recovery for loss of consortium); ME. REV. STAT. ANN. tit. 18-A, § 2-804(b) (West Supp. 1990) (\$75,000 cap for loss of society, comfort, and companionship, specifically including emotional distress).

Several lower courts in New York have attempted in vain to break away from the "present archaic strictures" of wrongful death recovery. See *Lehman v. Columbia Presbyterian Medical Ctr.*, 93 Misc. 2d 539, 543, 402 N.Y.S.2d 951, 954 (Sup. Ct. N.Y. County 1978); see also *Ventura v. Consolidated Edison Co.*, 65 A.D.2d 352, 358, 411 N.Y.S.2d 277, 280 (1st Dep't 1978) (legislative inaction should not "relegate the judiciary to remaining impervious to an anachronism shorn of all vitality"), *rev'd sub nom.* *Liff v. Schildkrout*, 49 N.Y.2d 622, 404 N.E.2d 1288, 427 N.Y.S.2d 746 (1980).

²³ 105 N.W.2d 118 (Mich. 1960).

²⁴ *Id.* at 121. In an oft-cited decision, the Supreme Court of Michigan lashed out at blind adherence to precedent. See *id.* The *Wycko* court criticized the rule that assigned a pecuniary value to the life of a child, calculated merely from what the child might earn in the years of minority, by proclaiming that

there still exists in the law this remote and repulsive backwash of time and civilization, untouched by the onward march of society, where precedents we alone honor tell us that the value of the life of a child must be measured solely by the

years, several states, including Michigan, have enacted wrongful death statutes that specifically allow recovery for loss of consortium.²⁵ Indeed, the United States Supreme Court acknowledged this legislative and judicial trend by affording recovery for loss of consortium in a maritime wrongful death action.²⁶

The New York courts' insistent adherence to a strict construction of the wrongful death statute contrasts with the view adopted by a number of other jurisdictions that because wrongful death legislation is remedial in nature, such statutes must be construed liberally.²⁷ Wrongful death statutes were intended to remedy the deplorable common-law rule that permitted a surviving victim to recover for wrongfully inflicted injury, while denying any recovery for an injury that resulted in the victim's death.²⁸ Providing reme-

standards of the day when he peddled the skill of his hands.

Id. The court concluded that it is necessary to include the value of companionship in pecuniary damages in recognition of the individual's role in a "functioning social and economic unit." *Id.* at 122.

²⁵ See, e.g., MICH. COMP. LAWS § 600.2922(6) (1986) (MICH. STAT. ANN. § 27A.2922 (Callaghan 1991)) (allowing recovery for companionship and society); see also Sandra L. Hodgson, Comment, *Dunn v. Rose Way, Inc.: No Recovery for Wrongful Death of a Viable Fetus Under Section 611.20 of the Iowa Code*, 70 IOWA L. REV. 545, 545-47 (1985) (wrongful death recovery allowed for parents of viable fetus). Hodgson notes that § 8 of the Iowa Rules of Civil Procedure provides that "[a] parent, or the parents, may sue for the expense and actual loss of services, companionship and society resulting from . . . [the] death of a minor child." *Id.* at 546 n.7 (quoting IOWA R. CRV. P. 8).

Furthermore, loss of consortium has been a recognized element of damages under Wisconsin's wrongful death statute since 1931. See Brian J. Williams, Comment, *The Child's Action for Loss of Society and Companionship: The Next Logical Step*, 62 CHI.-KENT L. REV. 55, 60 n.43 (1985). See generally SPEISER, *supra* note 2, § 3:49, at 308-22 (thorough analysis of wrongful death statutes).

²⁶ See *Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 587 n.21 (1974); see also *supra* note 15 (reviewing Supreme Court's jurisdictional polling). The Jones Act, which affords federal statutory recovery in a maritime wrongful death action, was not applicable because the death complained of in *Sea-Land* occurred inside the territorial waters of Louisiana. See *Sea-Land Servs.*, 414 U.S. at 574-77; see also 46 U.S.C. § 688 (1988). The *Sea-Land* Court, however, applied the equitable principles enunciated in its earlier decision of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), and concluded that the respondent could assert a common-law wrongful death action despite the decedent's recovery of personal injury damages during his lifetime. *Sea-Land Servs.*, 414 U.S. at 591-92; see also *Moragne*, 398 U.S. at 408-09 (recognizing maritime common-law action for wrongful death).

²⁷ See *Moragne*, 398 U.S. at 408. This elementary maxim is often considered against another canon of statutory construction—"statutes penal in nature should be construed strictly." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (noting that maxims of equal weight to support each side of given argument often exist).

²⁸ See *Seman*, *supra* note 2, at 598. England enacted what became known as "Lord Campbell's Act," which provided the first relief for this "intolerable inequity." *Id.* This statute allowed recovery of damages "proportioned to the injury" sustained by the decedent's

dial relief for the extraordinary inequity caused by the common law's failure to compensate for the full value of human life should outweigh any judicial reluctance to extend that which is in derogation of the common law.²⁹

The Court of Appeals' unyielding commitment to stare decisis has left New York wrongful death law replete with anomalies.³⁰ New York courts have determined that in selecting the term "pecuniary," the Legislature clearly intended to exclude recovery for injuries "incapable of being defined by any recognized measure of value."³¹ At the same time, New York courts have assigned "pecuniary" value to the loss of a parent's nurture, care, and guidance.³²

family members. *Id.* (quoting Fatal Injuries Act of 1846 (Lord Campbell's Act), 9 & 10 Vict., ch. 93). Most of the United States later adopted similar statutes, but many jurisdictions placed a pecuniary loss limitation on the recovery of damages. See SPEISER, *supra* note 2, § 1:9, at 29-30; see also Seman, *supra* note 2, at 599 (acknowledging trend toward expanding scope of compensable injuries). The New York wrongful death statute contains such a limitation, but neglects to define "pecuniary" within its context. See EPTL § 5-4.1, -4.4 (McKinney 1981 & Supp. 1991).

The common-law rule with which the wrongful death statutes conflict arose from dicta in Lord Ellenborough's *nisi prius* decision in *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808). SPEISER, *supra* note 2, § 1:1, at 2. In *Baker*, Lord Ellenborough reasoned that "in a civil court, the death of a human being could not be complained of as an injury." *Baker*, 170 Eng. Rep. at 1033. Prior to *Baker*, the common law was unsettled; at times the courts permitted liberal recovery for a person's death and on other occasions they restricted or denied recovery altogether. See SPEISER, *supra* note 2, § 1:2, at 5-10.

Although regarded as harsh and inequitable, the *Baker* rule, along with nearly all other principles of English common law, was adopted by American jurisdictions seeking to avoid reinventing the jurisprudential wheel. See *id.* § 1:3, at 10-11; see also Seman, *supra* note 2, at 597 (discussing general reliance on *Baker* rule in the United States). The ironic effect of this rule was that a negligent or reckless defendant would be liable for injuries if the victim survived, but not if the victim died. *Id.* Indeed, at common law it was cheaper to kill than to injure. *Gonzalez*, 77 N.Y.2d at 667, 572 N.E.2d at 600, 569 N.Y.S.2d at 917 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 127, at 945 (5th ed. 1984)).

²⁹ See *Wycko*, 105 N.W.2d at 121-22 (legislative silence should not be construed as acquiescence to prior court interpretations); see also *supra* note 22 (reviewing lower court efforts to end inaction in New York).

³⁰ Compare *Liff v. Schildkrout*, 49 N.Y.2d 622, 631-34, 404 N.E.2d 1288, 1290-92, 427 N.Y.S.2d 746, 748-50 (1980) (surviving spouse may recover for loss of deceased spouse's consortium during period of incapacity prior to death) with *id.* at 634, 404 N.E.2d at 1292, 427 N.Y.S.2d at 750 (loss of consortium not awardable in wrongful death action brought by spouse); see also *infra* notes 31-37 and accompanying text (discussing unexplained contradictions in New York law).

³¹ See *Gonzalez*, 77 N.Y.2d at 667, 572 N.E.2d at 600, 569 N.Y.S.2d at 917 (quoting *Tilley v. Hudson River R.R.*, 24 N.Y. 471, 476 (1862)). It should be noted that the Court of Appeals, in 1864, cautioned against narrowing the statutory definition of "pecuniary." *Tilley v. Hudson River R.R.*, 29 N.Y. 252, 286-87 (1864) ("The statute has set no bounds to the sources of these pecuniary injuries.").

³² See *Gonzalez*, 77 N.Y.2d at 668-70, 572 N.E.2d at 601-602, 569 N.Y.S.2d at 918-19

Some commentators have argued that by granting damages for loss of nurture, care, and guidance, the courts are merely affixing a different label to a recovery for loss of consortium.³³ Indeed, it is asserted that the average juror, and perhaps the average court, is incapable of distinguishing between the actual or predicted effects of the loss of a parent's nurture and those of the loss of a parent's consortium. Thus, the perpetuation of this artificial distinction by the New York courts is difficult to explain.³⁴

Another anomaly in New York law appears in the disparate treatment of loss-of-consortium claims in personal injury and wrongful death cases. For example, damages for the temporary loss of a spouse's consortium are recoverable in personal injury and survival actions, but relief for the permanent loss of a spouse's consortium in wrongful death actions is denied.³⁵ It is submitted that loss of consortium is a substantial injury resulting from the death of a family member and that the difficulties in calculating damages

(assigning pecuniary value to care and guidance afforded by decedent to her grandchildren); *Tilley*, 29 N.Y. at 286 (if jury finds that pecuniary injury arose from "the loss of bodily care, or intellectual culture, or moral training, which the mother had before supplied, [it is] at liberty to allow for it").

It appears inconsistent for courts to attach a pecuniary value to the loss of parental guidance, while at the same time asserting that damages for loss of consortium are too speculative to be assessed properly. See *Shu-Tao Lin v. McDonnell-Douglas Corp.*, 742 F.2d 45, 52 (2d Cir. 1984) (noting that damages for loss of a parent's nurture, care, and guidance are speculative and sometimes arbitrarily assigned). In reality, the courts commonly grant damages for speculative injuries. For instance, in *Gonzalez* the court allowed recovery for the decedent's pain and suffering despite the lack of direct evidence that she was conscious immediately prior to death. *Gonzalez*, 77 N.Y.2d at 670, 572 N.E.2d at 602, 569 N.Y.S.2d at 919; see also *supra* note 11 (discussing pain and suffering awards); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 263-70 (1989) (damages for pain and suffering based in part on subjective experience of victim).

³³ See *KEETON ET. AL.*, *supra* note 28, § 127, at 952 (loss of nurture and care is merely one form of loss of consortium).

³⁴ *Cf. Stanford v. McLean Trucking Co.*, 506 F. Supp. 1252, 1258 (E.D. Tex. 1981) ("Any distinction made between an incapacitated spouse in a negligence action and one wrongfully killed as a result of negligence is an artificial one at best.").

³⁵ See, e.g., *Osborn v. Kelley*, 61 A.D.2d 367, 370, 402 N.Y.S.2d 463, 464-65 (3d Dep't 1978) (wife had derivative cause of action to recover for loss of consortium for period prior to husband's death, but no cause of action for period following his death); see also *Walsh v. Armstrong World Indus.*, 700 F. Supp. 783, 787 (S.D.N.Y. 1988) (woman who marries injured man before his death may not recover for loss of consortium). Spousal consortium may be a more complex issue than mere companionship, for it often involves issues of conjugal relations between the marital partners. See *supra* note 2. Although its rule seems anomalous, New York does not stand alone in denying recovery for loss of consortium in wrongful death actions. See *DeHoyos v. John Mohr & Sons*, 629 F. Supp. 69, 73-74 (N.D. Ind. 1984) (Indiana law allows recovery for loss of consortium only for period between injury and death).

for such a loss do not justify assigning no value at all. Rather than purporting to compensate a plaintiff for the "increased expenditures required" to replace such "services" as a parent's nurture and guidance,³⁶ the New York courts should adopt the view of states that have recognized consortium to be an integral and measurable factor in wrongful death claims.³⁷

A significant obstacle to expanded recovery for wrongful death is the fear that it would trigger a litigation explosion and generate excessive verdicts that could be damaging to New York's economy.³⁸ Because plaintiffs in wrongful death actions are drawn from a limited pool, however, it is unlikely that awarding damages for loss of consortium would launch a sudden increase in wrongful death litigation.³⁹ Moreover, several states have protected against excessive awards without precluding recovery by simply establishing statutory caps on damages for loss of consortium.⁴⁰

The courts of New York have stubbornly clung to precedent that bars damages for loss of consortium in wrongful death actions, thereby denying recovery for the true and full value of human life. Furthermore, an examination of the language of the *Gonzalez* opinion demonstrates that the Court of Appeals is content to maintain its present stance on this issue.⁴¹ Fortunately, the New

³⁶ *Gonzalez*, 77 N.Y.2d at 668, 572 N.E.2d at 601, 569 N.Y.S.2d at 918.

³⁷ See, e.g., *Hinde v. Butler*, 408 A.2d 668, 670 (Conn. Super. Ct. 1979) (allowing spousal recovery of damages for loss of consortium in wrongful death); see also *Wheat v. United States*, 630 F. Supp. 699, 720 (W.D. Tex. 1986) (in Texas, "injuries to the familial relationship are significant . . . and are worthy of compensation"); *Stanford*, 506 F. Supp. at 1258 ("The time has come . . . for there to be recovery in Texas . . . for loss of consortium in a wrongful death action.").

³⁸ See *Chambers*, *supra* note 15, at 14, col. 2. Of particular concern has been the effect that any expanded legislative mandate of recovery would have on uninsured cities such as New York. *Id.*; see also *infra* note 39 (fear of excessive verdicts led to limits on recovery). Yet, based upon the evaluation of those states utilizing systems of recovery similar to that proposed, the fears of economic doomsday appear unfounded. See David Fiol, *Recovery for Survivors' Anguish Isn't Rare*, NAT'L L.J., Sept. 9, 1991, at 14, col. 2 (Ohio's cities have fared well economically during ten years of expanded recovery).

³⁹ See *id.*; see also *KEETON ET. AL.*, *supra* note 28, at 951 (fear of excessive verdicts for loss of consortium led to statutory caps).

⁴⁰ See *supra* note 22 and accompanying text (statutory caps on recovery for loss of society increased in Kansas and Maine without apparent harm). Placing a cap on recovery should prevent the grossly exaggerated awards feared by some, and thus minimize the cumulative effect. See, e.g., *Chambers*, *supra* note 15, at 14, col. 2 (fearing payouts by New York City of \$25 to \$250 million per year). Unfortunately, as proposed, the New York Senate bill does not provide for a cap on recoveries. See N.Y.S. 2367-B, 214th Sess. (1991).

⁴¹ See *Gonzalez*, 77 N.Y.2d at 667-68, 572 N.E.2d at 600-01, 569 N.Y.S.2d at 917-18 ("New York . . . has steadfastly restricted recovery to 'pecuniary injuries,' . . . and denied

York State Senate is currently considering a bill that proposes a capped recovery for grief arising from the loss of a decedent's consortium.⁴² It is regrettable, however, that until legislative action is taken, the New York courts will continue to apply outdated precedent blindly and to award less than the full value of human life in wrongful death cases.

Richard F. Hans, Jr.

New York County Supreme Court refuses to apply discovery rule to case brought by victim of childhood sexual abuse after expiration of statute of limitations

In New York, the statute of limitations¹ for a cause of action commences when the claim "accrues."² In the absence of a statutory definition, the New York Court of Appeals has interpreted the term "accrues" as the date upon which the wrongful act occurred, "even though the injured party may be ignorant of the existence of the wrong or injury."³ The harshness of this "strict accrual rule"⁴

recovery for . . . loss of society, affection, conjugal fellowship and consortium.") (citation omitted). No specific mention is made in *Gonzalez* of the need for statutory change.

⁴² See *supra* note 15; see also *supra* notes 38-40 and accompanying text (discussing proposed statutory alterations).

¹ See BLACK'S LAW DICTIONARY 927 (6th ed. 1990). A statute of limitations sets "maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed." *Id.* The underlying purpose of a limitations period is to force a plaintiff to institute suit within a reasonable period of time. See Developments in the Law, *Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950). A well-established policy reason in support of statutes of limitation is that a defendant's "right to be free of stale claims in time comes to prevail over the [plaintiff's] right to prosecute them." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). Insulating a defendant from stale claims, however, promotes justice only when the plaintiff has "slumber[ed on his rights] until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 349 (lack of "reckless haste" in pressing claim did not bar action); see also 1 WK&M para. 201.01 (noting concerns regarding passage of time on reliability and availability of evidence).

² See CPLR 203(a) (McKinney 1991) ("The time within which an action must be commenced . . . shall be computed from the time the cause of action accrued to the time the claim is interposed.")

³ *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936). In *Schmidt*, the Court of Appeals held that the limitations period on an asbestos exposure claim commenced when the plaintiff first inhaled the asbestos particles and not when the plaintiff was diagnosed with asbestosis. *Id.*; accord *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 1010-11, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981), *cert. denied*, 456 U.S. 967 (1982); *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781, 391 N.E.2d