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## Wrongful Death of Minors: Missouri Ends the Fiction

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## Tort Law: Mitchell v. Buchheit

### Wrongful Death of Minors: Missouri Ends the Fiction

Adherence to the principle of *stare decisis* produces stability and predictability, but when precedent perpetuates a rule outmoded by time and reason, fiction and injustice result. "It is revolting," Oliver Wendell Holmes, Jr. once commented, "to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."<sup>1</sup> Unfortunately, the treatment of wrongful death cases involving minors illustrates such blind imitation of the past. Prior to the Missouri Supreme Court's decision in *Mitchell v. Buchheit*,<sup>2</sup> Missouri courts limited recovery of parents seeking damages for the wrongful death of their minor children to the value of the child's services to the parents during his minority. Probable expenses of rearing the child, including support, education and medical care were deducted from the parents' recovery.<sup>3</sup> Parents of minor children could not, however, recover for services reasonably expected after the child's twenty-first birthday, even though parents of adult children were permitted such recovery.

This rule, when Missouri courts carved it from the state's first wrongful death statute,<sup>4</sup> was defensible. The rule reflected the mores and legal standards of the time, when employment of children was common and acceptable and a child's pecuniary contributions frequently were substantial and probable.<sup>5</sup> The rule, however, became a fiction in a modern context. Today, public policy opposes child labor,<sup>6</sup> and children's contributions to their parents rarely exceed the estimated \$20,000 to \$33,000 it costs to raise a child to age 18.<sup>7</sup> Nonetheless, prior to *Mitchell*, Missouri courts tenaciously adhered to the rule even while acknowledging that it was "subject to criticism on the basis of logic . . . ."<sup>8</sup> The fiction finally ended with the supreme court's decision in *Mitchell* that parents seeking damages for the wrongful death of their child may establish "a reasonable probability of pecuniary benefit from the continued life of [the] child beyond the age of minority."<sup>9</sup> With the *Mitchell* decision, Missouri joined the majority of

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1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. 559 S.W.2d 528 (Mo. 1977).

3. *Oliver v. Morgan*, 73 S.W.2d 993 (Mo. 1934).

4. MO. REV. STAT. ch. LI, § 4 (1855), which stated in part:

[I]n every such action, the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and, also, having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default.

5. The 1900 U.S. census reported 26% of males 10 to 15 years of age, or 1.3 million, and 10.2%, or almost 500,000, of females the same age were gainfully employed. U.S. BUREAU OF THE CENSUS, TWELFTH CENSUS OF THE UNITED STATES: OCCUPATIONS, Table LIII (1904).

6. 29 U.S.C. §§ 203(1), 212 (1961) and MO. REV. STAT. § 294.021 (1969) prohibit gainful employment of any kind for children under 14 years of age. MO. REV. STAT. §§ 294.011-.040 (1969) restrict the hours and type of employment for those 14 to 16 years of age.

7. Reed & McIntosh, *Costs of Children*, ECONOMIC ASPECTS OF POPULATION CHANGE 337 (E. Morss and R. Reed eds. 1972); *Anderson v. Lale*, 216 N.W.2d 152, 156-58 (S.D. 1974).

8. *Collins v. Stroh*, 426 S.W.2d 681, 686 (Mo. App. 1968).

9. *Mitchell v. Buchheit*, 559 S.W.2d 528, 533 (Mo. 1977).

state court decisions and legislative enactments in this area.<sup>10</sup>

It is reasonable to expect the ruling to increase future awards in wrongful death cases involving minors. However, because of the courts' prior attempts to soothe the harshness of the previous premajority-contributions-only rule, the increase may be small. Prior to *Mitchell*, the courts had permitted sizeable judgments in an effort to avoid the harsh consequences of the previous rule. In addition, the ruling may have only minimal impact on the criteria the courts will allow jurors to use for determining damages. Standards used in the only Missouri case prior to *Mitchell* permitting recovery of after-majority contributions generally mirrored those used in states already allowing such recovery.<sup>11</sup> Apparently, extensive development of case law precedent will be unnecessary.

Although Missouri joined the majority of states which permit recovery for after-majority contributions, the *Mitchell* court declined to follow a strong trend allowing recovery of such nonpecuniary losses as society, companionship, grief and mental anguish. The court did not, however, preclude such recovery. The supreme court merely set the issue aside as one "not raised on appeal,"<sup>12</sup> therefore avoiding the compelling arguments for permitting recovery of nonpecuniary losses.

### THE CASE

The parents of Sidney Mett Mitchell, 19 years and 10 months of age, brought a wrongful death action arising out of a February 3, 1971 traffic accident. The youth was unmarried and living with his parents when he was killed in a collision between the dump truck he was driving and the defendant's tractor-trailer rig. He had earned \$1176.21 before his death and had voluntarily contributed a minimum of \$40 a week to his parents. In addition, he frequently purchased family groceries and performed chores around the house and farm. The youth owned his own automobile and paid for its insurance. Trial testimony indicated that he had never expressed an intention of getting married or leaving his parents' home.<sup>13</sup>

The jury awarded the plaintiff parents \$12,500 but they appealed the trial court's ruling that restricted evidence of damages to the one year and two month period from the decedent's death to his twenty-first birthday. Plaintiff's counsel argued on appeal that it was:

[P]ure nonsense to require a conclusion as a matter of law that on his 21st birthday he would have packed his belongings, left the home, abandoned his parents and ceased all contributions when he had so regularly and unselfishly given the same as a matter of desire rather than legal obligation in the past. There being substantial evidence that his contributions and services would certainly continue into the future, beyond the age of majority, the jury's verdict is

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10. The majority comprises Arizona, Arkansas, California, Colorado, District of Columbia, Illinois, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Vermont and Wisconsin. *Id.* at 533-34.

11. *Collins v. Stroh*, 426 S.W.2d 681 (Mo. App. 1968).

12. *Mitchell v. Buchheit*, 559 S.W.2d 528, 533 (Mo. 1977).

13. Brief for Respondent at 3, 4, *Mitchell v. Buchheit*, 559 S.W.2d 528 (Mo. 1977).

inadequate because they were illegally refused the opportunity to consider such future damages.<sup>14</sup>

The supreme court agreed and ordered a new trial on damages including “the reasonable probability of pecuniary benefit from the continued life of said child beyond the age of minority.”<sup>15</sup>

### HISTORICAL BASIS OF THE COURT’S RULING

The rule restricting recovery to the decedent’s premajority contributions originated, but was not explained, in *Rains v. St. Louis, Iron Mountain & Southern Railway Co.*<sup>16</sup> Later, in *Parsons v. Missouri Pacific Railway Co.*,<sup>17</sup> the court reasoned that since Missouri’s wrongful death statute<sup>18</sup> did not allow parents to recover for the death of their adult child, recovery for a minor child should also be restricted to the child’s minority. The reason for prohibiting recovery for adult children, the court said, was the lack of legal obligation between the child and the parents. The court interpreted the wrongful death statute’s reference to “necessary injury” as indicating that damages are to be measured by a “reasonably certain and fixed rule growing out of the relations existing between a parent and his minor child, and the corresponding duties, rights, and obligations of that relation.”<sup>19</sup> In other words, parents could not recover for after-majority contributions because the child’s legal obligation to his parents ended on his twenty-first birthday, even though there might be every reason to believe that the child would continue to provide services to his parents.

The justification for restricting recovery to premajority contributions ended in 1905 when the state legislature revised the wrongful death statute to permit administrators of a decedent’s estate to initiate a wrongful death action where the decedent was an unmarried minor and there were no parents.<sup>20</sup> There was, therefore, no legislative basis to justify a court’s insistence upon a legal obligation between the child and his parents as a condition precedent to recovery. Nevertheless, instead of revising their position concerning after-majority recovery, Missouri courts began applying a dual standard—one for adult children and quite another for minors.

The Springfield Court of Appeals correctly construed the 1905 statutory revision as signalling an end to the requirement of a legal obligation between

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14. *Id.* at 27.

15. *Mitchell v. Buchheit*, 559 S.W.2d 528, 533 (Mo. 1977).

16. 71 Mo. 164 (1879).

17. 94 Mo. 286, 6 S.W. 464 (1888).

18. MO. REV. STAT. § 2123 (1879) had virtually the same wording as the original 1855 statute.

See note 4 *supra*.

It is interesting to note that in interpreting the “necessary injury” wording in the statute, the Missouri Supreme Court commented in 1904 that the words “may or may not include the net loss of services, but it also covers other injuries besides loss of services. It includes loss of the comfort, society, and love of the child.” *Sharp v. Nat’l Biscuit Co.*, 179 Mo. 553, 78 S.W. 787 (1904). However, a later Kansas City appellate court nonetheless applied the *Parsons* rule. “[W]e think the statement [in the *Sharp* case] was inadvertently made and it doubtless was the cause of the trial court giving the instructions complained of in the case.” *Marshall v. Consolidated Jack Mines Co.*, 119 Mo. App. 270, 95 S.W. 972 (1906).

19. *Parsons v. Missouri Pacific Ry. Co.*, 94 Mo. 286, 296, 6 S.W. 464, 467 (1888).

20. MO. REV. STAT. § 5425 (1909) survives as § 537.080(3) (1969).

a parent and child in wrongful death cases involving adult children. In such cases, the court ruled, it was sufficient that there was "a reasonable probability of pecuniary benefit to one from the continuing life of another."<sup>21</sup> Oddly enough, the court ignored the statutory revision in cases involving minors. The courts continued applying the *Parsons* rule as though the legislature had never acted. The illogical result was that if an unmarried child was wrongfully killed the day before his twenty-first birthday, the parents were limited to recovery for one day. If the child lived until his birthday, however, the parents were entitled to damages for his continued life.

The courts later acknowledged the validity of arguments questioning the rule's logic. In 1954, the supreme court hesitantly applied the *Parsons* rule in *McCrary v. Ogden*.<sup>22</sup> "Whether our past interpretations of [Mo. Rev. Stat. § 537.090 (1949)],<sup>23</sup> to the effect that recovery is limited to pecuniary loss and in the case of an infant, to the value of services during minority only, are basically correct, may be debatable—we have consistently so construed the section." The St. Louis Court of Appeals was also troubled by the rule when it stated: "[W]hile the rule has been subject to criticism on the basis of logic as well as on the basis that such a rule seemingly conflicts with what the Missouri Supreme Court has stated to be the legislative intent of § 537.090 . . . the rule remains in force and effect to the present time and we would be compelled to apply it."<sup>24</sup> Thus, although the foundation had vanished, the court blindly adhered to the rule.

The *Mitchell* court noted that at times the judiciary had attempted "to avoid the harshness of the rationale of the *Parsons* case."<sup>25</sup> In *Mudd v. Quinn*,<sup>26</sup> the supreme court sustained a \$30,000 judgment for the parents of a girl nearly 18 years of age. The court ruled that a fatigued driver operating a truck with faulty brakes was a sufficiently aggravating circumstance to justify the large award. The court permitted the maximum award of \$25,000 to stand in *Tripp v. Choate*,<sup>27</sup> an action for the wrongful death of a 16 year-old boy. The court held that evidence of the boy's poisoning by a chemical spray and painful death to be aggravating enough to support the judgment.

The status of after-majority recoveries was further confused by the Missouri Approved Jury Instruction which called only for damages which plaintiffs were "[reasonably certain to sustain in the future] as a direct result of the death of their child . . . ."<sup>28</sup> The instruction did not restrict recovery to premajority contributions. The Missouri Supreme Court Committee on Jury Instructions,

21. *McCullough v. W.H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (1919).

22. 267 S.W.2d 670, 676 (Mo. 1954).

23. Wording of the statute is virtually the same as the original 1855 statute. See note 4 *supra*.

The Supreme Court construed the legislative intent of the statute to include admission of evidence of mitigating or aggravating circumstances and of "pecuniary loss of every kind and character." *Steger v. Meehan*, 63 S.W.2d 109, 115 (Mo. 1933).

24. *Collins v. Stroh*, 426 S.W.2d 681, 686 (Mo. App. 1968) (footnote omitted).

25. *Mitchell v. Buchheit*, 559 S.W.2d 528, 533 (Mo. 1977).

26. 462 S.W.2d 757 (Mo. 1971).

27. 415 S.W.2d 808 (Mo. 1967).

28. MAI § 5.03 (West 1969). That portion of the instruction enclosed in brackets may be added at plaintiff's option where there is evidence of future damage.

unable to reconcile the *Parsons* rule with reality, settled upon a "broad pecuniary loss standard."<sup>29</sup> In the comments accompanying the instruction, the Committee stated that it doubted whether "the Supreme Court intends to . . . limit the recovery of a widowed mother whose only son and sole support was killed a week before his 21st birthday. This is a question of substantive law which the Committee cannot resolve."<sup>30</sup> The supreme court did little, if anything, to end the confusion when it suggested in *Mudd* that the parties use the required instruction and that at the same time the defense counsel argue the *Parsons* rule to the jury.<sup>31</sup>

The confusion and fiction finally ended in 1973 when the Missouri General Assembly spoke so emphatically on the issue that the *Mitchell* court had little choice but to abandon the *Parsons* rule completely. The new statute permitted "such damages as will fairly and justly compensate such party or parties for any damages he or they have sustained and are reasonably certain to sustain in the future as a direct result of such death."<sup>32</sup> By replacing the "necessary injury" statutory language with language providing for recovery of damages "reasonably certain to [be] sustain[ed] in the future," the legislature clearly indicated its intent to extend recovery beyond minority. The *Mitchell* court, therefore, acknowledged that the old rule could not "stand on its own logic."<sup>33</sup> Aside from its lack of statutory support, it was pure conjecture to believe that a child was a financial asset to his parents.<sup>34</sup> In fact, "strict adherence to the rule could lead, *reductio ad absurdum*, to the conclusion that the tortfeasor should be reimbursed for having saved the parent money."<sup>35</sup>

Now that the supreme court has ended its illogical, blind imitation of the past, future courts must establish acceptable criteria for jurors to use in determining the reasonable probability of after-majority contributions. The standards of proof which develop, however, may not be much different than what is already required by the Missouri courts.

### CRITERIA FOR DETERMINING AFTER-MAJORITY CONTRIBUTIONS

The Missouri Court of Appeals has granted a sketchy preview of the proof that will be required in determining a deceased minor's probable after-majority contributions to his parents. In *Collins v. Stroh*,<sup>36</sup> the jury considered the after-majority contributions of a minor who was two months short of her twenty-first birthday at the time of her death. The court permitted the precedent-breaking decision to stand because the defense counsel had failed to object and to preserve the error for appeal. Thus, the appellate court considered whether the

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29. *Id.*

30. *Id.*

31. *Mudd v. Quinn*, 462 S.W.2d 757, 759-60 (Mo. 1971).

32. MO. REV. STAT. § 537.090 (1973).

33. *Mitchell v. Buchheit*, 559 S.W.2d 528, 533 (Mo. 1977).

34. See note 7 *supra* and accompanying text.

35. Decof, *Damages in Actions for Wrongful Death of Children*, 47 NOTRE DAME LAW. 197, 198 (1971).

36. 426 S.W.2d 681 (Mo. App. 1968).

evidence presented was adequate to justify a \$15,000 judgment for the decedent's parents. Although there was no proof that the decedent made monetary contributions to her parents, the court held that evidence that she had a full-time job, visited her parents once a month and during vacations, helped with housework and cared for her 14 year-old brother when she visited was sufficient to justify the jury's inference that her "services" would continue after majority.

"[T]he jury's award must be based, not upon direct, positive *evidence*," the *Collins* court stated, "but upon probabilities which the jury might reasonably find exist, considering the child's age, condition, health, mentality, personality and perspective, and the parents' ages, attitude and circumstances."<sup>37</sup> The court stated that jury instructions should not require application of mathematical equations, but should give jurors broad latitude. "[T]he award of damages can rest only on considerations of the most general character and much must be left to the common sense of the jury."<sup>38</sup>

The *Collins* standard is markedly similar to that employed in other states allowing recovery for after-majority contributions. Several states permit juries to consider the deceased minor's relations with and intention to lend assistance to his parents.<sup>39</sup> A decedent's promise to aid his parents is generally admissible into evidence.<sup>40</sup> Evidence of the parents' economic need is also admissible.<sup>41</sup> Missouri courts generally have admitted evidence of the parents' economic status "because poor parents are likely to have more pressing need for, and reasonably may have more confident expectation of, future contributions by their children than would affluent parents."<sup>42</sup> Michigan courts have also admitted evidence of the parents' economic need, reasoning that such evidence serves as an indicator that the minor decedent would have begun working at an early age.<sup>43</sup> Parents in a Minnesota case "possessed so little of this world's goods that there was a reasonable possibility of their becoming dependent later," and were therefore permitted to introduce evidence of their financial status.<sup>44</sup> Courts in at least

37. *Id.* at 689, quoting *Hornbuckle v. McCarthy*, 295 Mo. 162, 243 S.W. 327 (1922).

38. *Id.* In a federal diversity of citizenship case applying Missouri wrongful death law, the federal district court ruled that the plaintiff could enter into evidence the probability of the deceased minor's after-majority contributions to meet the \$10,000 minimum claim requirement. The court agreed with the plaintiffs that "the proper test is the reasonable probability of pecuniary loss resulting from the decedent's death . . .," and the jury "may take into consideration the probable willingness and ability of the deceased to continue the pecuniary benefits to his parents after his majority . . ." *Allen v. Denver-Chicago Trucking Co.*, 221 F. Supp. 217, 218 (W.D. Mo. 1963).

39. *Sutherland v. State*, 189 Misc. 953, 68 N.Y.S.2d 553 (N.Y. Ct. Cl. 1947); *Butterfield v. Community Light & Power Co.*, 115 Vt. 23, 49 A.2d 415 (1946); *Rio Grande, El Paso & Sante Fe R.R. Co. v. Dupree*, 56 S.W.2d 900 (Tex. Civ. App. 1933); *Pacific Gas & Elec. Co. v. Almanzo*, 22 Ariz. 431, 198 P. 457 (1928); *Ptak v. Kuetemeyer*, 182 Wis. 357, 196 N.W. 855 (1924); *Cincinnati St. Ry. Co. v. Altemeier*, 60 Ohio 10, 53 N.E. 300 (1899).

40. *Missouri Pac. Transp. Co. v. Parker*, 200 Ark. 620, 140 S.W.2d 997, *cert. denied*, 311 U.S. 696 (1940); *Sandeen v. Willow River Power Co.*, 214 Wis. 166, 252 N.W. 706 (1934); *Southwestern Gas & Elec. Co. v. Thomas*, 249 F. 325 (5th Cir. 1918). *Contra*, *Leary v. West Jersey & S.R. Co. Boyajian*, 1 N.J. Misc. 549, 146 A. 359 (1923) (such evidence is in a sense hearsay and a mere expression of an opinion as to the future).

41. *Hildreth v. Key*, 341 S.W.2d 601 (Mo. App. 1960).

42. *Id.* at 615 (footnote omitted).

43. *Robins v. Director Gen. of Railroads*, 207 Mich. 437, 174 N.W. 124 (1919).

44. *Luther v. Dornack*, 179 Minn. 528, 229 N.W. 784 (1930).

two states have admitted evidence of occupation of the decedent's father, since children frequently pursue the same general class of business.<sup>45</sup>

Courts permitting after-majority recovery have allowed sizeable judgments even though the deceased minor was too young to have worked.<sup>46</sup> These courts permitted juries to consider, in addition to evidence of a child's intent to aid his parents, unusual skills or talents of the deceased; the child's character or morals; his generosity, economy and thrift; and the parents' plans concerning their child's future.<sup>47</sup>

### IMPACT OF THE MITCHELL RULING

If the Missouri courts had been faithfully adhering to the *Parsons* rule, although criteria for determining damages in wrongful death cases involving minors would remain much the same, jury awards would likely increase with application of the *Mitchell* ruling. However, when a legal tradition is in direct conflict with reality, courts frequently find covert ways to circumvent precedent in an attempt to ensure justice. Since application of the *Parsons* rule had been avoided in several Missouri decisions, the impact of the *Mitchell* decision on jury awards should be only minimal.

The *Mitchell* court commented that "judicial efforts [had been made] to avoid the harshness of the rationale of the *Parsons* case . . .,"<sup>48</sup> citing, among others, the *Mudd* case. In these cases, the courts liberally construed provisions in the wrongful death statutes for the jury's consideration of "the mitigating or aggravating circumstances attending the wrongful act, neglect or default."<sup>49</sup> In the *Mudd* and *Tripp* cases, for example, the court upheld judgments of \$30,000 and \$25,000 respectively to the parents of decedents in their late teens. A comparison of the *Mudd* and *Tripp* awards with the \$15,000 judgment in the *Collins* case, where the jury considered only after-majority contributions, suggests that the *Mitchell* ruling will have only a minimal impact on the size of future awards. Rather than increase the awards, the ruling may tend to stabilize the discrepancies in jury awards which resulted from judicial attempts to soothe conflicts between the *Parsons* rule and notions of fair compensation.

### EXTENDING MITCHELL TO INCLUDE RECOVERY OF NONECONOMIC LOSSES

A more stabilizing effect on jury awards would be achieved by dropping the pecuniary loss rule in favor of all-inclusive recovery.<sup>50</sup> "Specifically, in the pecuniary and general loss states, the pecuniary loss doctrine has been softened to allow substantial recoveries, while in the all-inclusive loss states restraint gener-

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45. *Love v. Detroit, J. & C. R. Co.*, 170 Mich. 1, 135 N.W. 963 (1912); *Fox v. Oakland Consol. St. Ry.*, 118 Cal. 55, 50 P. 25 (1897).

46. *Love v. Detroit, J. & C. R. Co.*, 170 Mich. 1, 135 N.W. 963 (1912); *Russell v. Windsor Steamboat Co.*, 126 N.C. 961, 36 S.E. 191 (1900).

47. S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 4:31 (2d ed. 1975).

48. *Mitchell v. Buchheit*, 559 S.W.2d 528, 533 (Mo. 1977).

49. Mo. REV. STAT. § 537.090 (1969).

50. Finkelstein, Pickrel & Glasser, *The Death of Children: A Nonparametric Statistical Analysis of Compensation for Anguish*, 74 COLUM. L. REV. 884 (1974).

ally has been exercised in assessing amounts for anguish."<sup>51</sup> An *amicus curiae*<sup>52</sup> in the *Mitchell* case argued that the legislators intended all-inclusive recoveries when they substituted "any damages" for "necessary injury" in the state's wrongful death statute. Instead of denying the validity of the amicus' argument, the *Mitchell* court set it aside, stating that the argument was "not applicable to this case or dispositive of any issue presented by the parties."<sup>53</sup>

Prior to the state's first wrongful death statute, Missouri common law permitted recovery of nonpecuniary damages. In *James v. Christy*,<sup>54</sup> the Missouri Supreme Court recognized a father's right to recover for the lost "society and comforts" of his deceased 15 year-old son. However, the father died before the court rendered judgment and the justices ruled that the right to recover for loss of society and comforts was a personal one which did not survive a parent's death. Nonetheless, two years later the legislature abrogated the parents' right to recover for such losses. Still, as the *amicus curiae* argued, there was at that time "a statutory directive that law enacted in derogation of the common law had to be strictly construed."<sup>55</sup> Therefore, the court's later construction of the statute's phrase "necessary injury" as eliminating "an existing, substantive, common law right of a parent . . . to recover damages for tortious loss of the society and companionship of his slain son" fell far short of the demands for strict construction.<sup>56</sup>

The courts missed an opportunity to correct the situation in 1955 when the General Assembly revised the wrongful death statute to allow recovery of damages "for the death" of, in addition to the pre-existing right to damages for "necessary injury resulting from such death."<sup>57</sup> This arguably indicated that the legislature intended to abandon the restriction on recovery of nonpecuniary losses, especially in light of the 1973 statutory change permitting recovery for "any damages."<sup>58</sup> The supreme court failed to detect any significance in the 1955 revision and in subsequent cases failed to mention it, relying instead on pre-1955 case law authority. The legislature has clearly indicated its intent to permit recovery for both pecuniary and nonpecuniary losses by amending the statute to allow awards for "any damages."

Meanwhile, other states with similarly worded wrongful death statutes allow recovery under statutes calling for "such damages as the jury may determine to be just, taking into consideration all the damages of every kind . . ." <sup>59</sup> California has retained its pecuniary loss rule under a statute allowing "such

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51. *Id.* at 890.

52. Amicus Curiae Brief of Missouri Association of Trial Attorneys, *Mitchell v. Buchheit*, 559 S.W.2d 528 (Mo. 1977) [hereinafter cited as Amicus Curiae Brief].

53. *Mitchell v. Buchheit*, 559 S.W.2d 528, 532 (Mo. 1977).

54. 18 Mo. 162 (1853).

55. Amicus Curiae Brief, *supra* note 52, at 13, *Mitchell v. Buchheit*, 559 S.W.2d 528 (Mo. 1977).

56. *Id.*

57. MO. REV. STAT. § 537.090 (1959) stated: "[T]he jury may give to the surviving party or parties who may be entitled to sue such damages . . . as the jury may deem fair and just for the death and loss thus occasioned, with reference to the necessary injury resulting from such death . . . ."

58. Amicus Curiae Brief, *supra* note 52, at 16, 17, *Mitchell v. Buchheit*, 559 S.W.2d 528 (Mo. 1977).

59. MISS. CODE ANN. § 11-7-13 (1977); *Avery v. Collins*, 171 Miss. 636, 157 So. 695 (1934).

damages . . . as under all of the circumstances of the case may be just . . . .”<sup>60</sup> However, the state still allows what amounts to noneconomic damages by permitting juries to attach pecuniary value to the noneconomic interests. While California’s approach would provide a means for Missouri to broaden wrongful death recoveries to include nonpecuniary damages without abandoning its long-lived commitment to the pecuniary loss rule, such an approach would perpetuate the fiction which tainted the pre-*Mitchell* case law.

### CONCLUSION

Missouri has finally freed itself from an illogical rule lacking statutory support. The court’s struggle to rectify the rule’s injustices, while at the same time respecting the doctrine of *stare decisis*, illustrates the difficulties that result when courts are compelled to adhere to case law precedent. As a result, fiction shrouded the judiciary’s treatment of wrongful death cases involving children. The *Mitchell* court has begun the task of breaking these bonds, but it will be only a halfway measure if future courts do not permit recovery of nonpecuniary damages.

The rationale for allowing recovery for damages is to right a wrong suffered. Money is only part of the damages suffered when parents’ children are killed. The rule prohibiting recovery for the whole of damages—monetary as well as emotional—stems from a time when courts felt noneconomic losses were imaginary and immeasurable, and therefore inappropriate. Our economic system has changed, and along with this change has come a realization that, especially in the case of children, money losses are the least significant damages. The General Assembly was cognizant of this fact when, in 1973, it insisted on recovery of “any damages.” Adherence to the pecuniary loss rule is, therefore, logically and legislatively impermissible.

***Paul M. Spinden***

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60. CAL. CODE CIV. PROC. § 376 (West 1975).