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DAMAGES--WRONGFUL DEATH

INTRODUCTION

Previously at common law, actions for personal injuries were abated if, before a verdict was returned, the plaintiff died from the injuries for which he sued. *Susemiehl v. Red River Lumber Co.,* 376 Ill. 138 (1941). This was true in spite of the Survival Statute. 755 ILCS 5/27-6. The law was changed by the Illinois Supreme Court in *Murphy v. Martin Oil Co.,* 56 Ill. 2d 423 (1974). The Survival Statute now has the same application to all cases resulting in death that it has always had in cases where death resulted from a cause other than the initial tortious injury.

If death results from the initial tortious injury, the Wrongful Death Act creates a cause of action in the name of the personal representative for the benefit of the widow and next-of-kin for their "pecuniary injuries." 740 ILCS 180/1, 180/2. The term "pecuniary injuries" has been interpreted to include benefits of a pecuniary value, which includes money, goods, and services received by the next of kin of the deceased. When there are surviving children, it also includes the instruction, moral training, and superintendence of education that the children would have received from the deceased parent. "Pecuniary injuries" has also been held to include the loss of consortium by the surviving spouse, *Elliott v. Willis,* 92 Ill. 2d 530 (1982); the loss of a minor child's society by the parents, *Bullard v. Barnes,* 102 Ill. 2d 505(1984); the loss of an unmarried adult child's society by the parents, *Prendergast v. Cox,* 128 Ill. App. 3d 84 (1st Dist. 1984); the loss of a parent's society by an adult child, *In re Estate of Keeling,* 133 Ill. App. 3d 226 (3d Dist. 1985); and the proven loss of a sibling's society, *In re Estate of Finley,* 151 Ill. 2d 95 (1992).

If there is both a survival action and a wrongful death action, pecuniary injuries, such as those for loss of support, should be carefully confined to the period after death. This helps avoid duplication of those damages allowable under the survival action for lost wages during the lifetime of the injured party.

Where the decedent leaves direct lineal kin, or a widow or widower, there is a presumption that they have suffered some substantial pecuniary loss by reason of the death. *Ferraro v. Augustine,* 45 Ill. App. 2d 295 (1st Dist. 1964); *Hall v. Gillins,* 13 Ill. 2d 26 (1958); *Dukeman v. Cleveland, C., C. & St. L. Ry.,* 237 Ill. 104 (1908); *Dodson v. Richter,* 34 Ill. App. 2d 22 (3d Dist. 1962). This presumption applies even where the decedent was an adult and the next of kin are also adults. *Ferraro, supra*; *Dukeman, supra*. The presumption of some substantial pecuniary loss will be an element which the jury must consider with other evidence, if there is other evidence, or alone, if there is no other evidence, to determine what they will award if they decide in favor of the plaintiff. The power of the jury to determine the weight that should be given to this presumption was upheld in *Flynn v. Vancil,* 41 Ill. 2d 236, 239 (1968); the court cites these instructions with approval.

Bullard, supra, held there is no longer a presumption of loss of earnings upon the death of a minor child, but there is a presumption of pecuniary injury to the parents in the loss of a minor child's society. *Ballweg v. City of Springfield*, 114 Ill. 2d 107 (1986), and *Prendergast v. Cox, supra*, extended this presumption to include the loss of an adult child's society by the parents. No such presumption attaches in the case of siblings. *In re Estate of Finley, supra*.

It is now also possible to recover for the wrongful death of an unborn child if the fetus was viable at the time of the tortious act. *Green v. Smith,* 71 Ill. 2d 501 (1978). The presumption of the parents' loss of society injury extends to a stillborn child. *Seef v. Sutkus,* 145 Ill. 2d 336 (1991). Of course, there can be no cause of action against a physician for the wrongful death of a fetus caused by an abortion which was permitted by law and where the requisite consent was given. 740 ILCS 180/2.2.

Punitive damages may not be recovered in an action under the Wrongful Death Act. *Mattyasovszky v. West Towns Bus Co.,* 61 Ill. 2d 31 (1975). Nor may a common law action for punitive damages survive under the Survival Act. *Froud v. Celotex Corp.,* 98 Ill. 2d 324 (1983). However, a statutory right to punitive damages, such as that provided for under the Public Utilities Act, may pass unabated to decedent's estate under the Survival Act. *Nat'l Bank of Bloomington v. Norfolk & W. Ry.,* 73 Ill. 2d 160 (1978); *Churchill v. Norfolk & W. Ry.,* 73 Ill. 2d 127 (1978). (Effective January 1, 1986, the Public Utilities Act was amended to exclude railroads and certain other entities from its coverage. 220 ILCS 5/3-105.).

Under the "Family Expense Statute" (750 ILCS 65/15), a spouse or parent may be liable for medical and funeral expenses. Therefore, an independent cause of action may be maintained by a surviving spouse for any of these expenses not recoverable under the Survival Statute. *Thompson v. City of Bushnell*, 346 Ill. App. 352 (3d Dist. 1952) (spouse); *Saunders v. Schultz*, 20 Ill. 2d 301(1960) (spouse); *Graul v. Adrian*, 32 Ill. 2d 345 (1965) (spouse); *Ragan v. Protko*, 66 Ill. App.3d 257 (5th Dist. 1978) (parent); *Rodgers v. Consol. R.R. Corp*., 136 Ill. App. 3d 191 (4th Dist. 1985) (parent). Alternatively, the administrator of an estate can bring an independent action for medical and funeral expenses. *Eggimann v. Wise*, 56 Ill. App. 2d 385 (3d Dist. 1964).