Wrongful Death Damages in California: On the Brink of Full Compensation

Thomas E. Courtney Jr.
Comments

WRONGFUL DEATH DAMAGES IN CALIFORNIA: ON THE BRINK OF FULL COMPENSATION

Since the 19th century, California courts have mechanically denied recovery for mental anguish damages in wrongful death actions, despite strong policy reasons to the contrary. This Comment discusses the inconsistencies that exist when outdated legal doctrine precludes compensation for a recognized, legitimate element of damages, and proposes that mental anguish damages be recognized in wrongful death actions. Additionally, this Comment explores the concept of "hedonic value" and its potential application in wrongful death damage assessment.

INTRODUCTION

The decedent was a loving husband and devoted father of three.¹ His nine year marriage, which had produced a close-knit family, ended abruptly when he was killed at age thirty-three in an air crash.² Despite the family's sudden, tragic loss, the California Fourth District Court of Appeal reiterated the harsh rule that damages for grief and sorrow are not recoverable in an action for wrongful death. Though confronted with the argument that the awardable damages were "out-of-touch with 20th century reality,"³ the court responded that the doctrine of stare decisis⁴ compelled its conclusion. Wrongful death decisions for the last century⁵ have echoed the same refrain: Damages for mental anguish⁶ are not recoverable in California.

2. Id. at 518-19, 196 Cal. Rptr. at 85.
3. Id. at 519, 196 Cal. Rptr. at 86.
4. Id.
6. The term "mental disturbance" is used to encompass fright, shock or other mental or emotional harm and resulting physical consequences. W. P. KEETON, D. DOBBS,
Although the California Supreme Court has been hailed as the most creative, progressive judicial body in the United States, it has refused to reassess its justification for denying wrongful death mental anguish claims in light of modern negligence precepts. As wrongful death scholar Steven Speiser wrote, "[t]he reasons for denial of mental anguish damages in death cases have long ago disappeared, but the rule lingers on as an historical anomaly."  

Wrongful death damages have been examined carefully by writers, especially as tort law has grown to acknowledge the authenticity of mental or emotional suffering. One notable analysis is provided by coauthors Speiser and Malawer, who argue persuasively for universal recognition of mental anguish damages in death actions. Judicial and legislative response has been hesitant, indicating a willingness to cling to long accepted and well known principles rather than to incorporate much needed change.

California common law provides an appropriate backdrop for discussion of the existing inconsistencies in the law of wrongful death damages. Recent California developments have provided courts with the legal resources necessary to more fully compensate wrongful death plaintiffs. This Comment's objective is to identify reasons founded in policy and law that require recognition of mental anguish damages in death actions. Further, this Comment will discuss the possibility of complete reform of wrongful death damages based upon new economic theory concerning the value of human life.

R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts 359-60 (5th ed. 1984) [hereinafter Prosser & Keeton]. Courts and writers have used the terms "mental and emotional disturbance," "mental and emotional distress" and "mental anguish" interchangeably to describe all forms of psychic damage. No uniform identifiable meaning seems to have been attached to each phrase, and careful reading of opinions and articles can lead to confusion.

This Comment will refer to "mental anguish" as a subcategory of mental disturbance, defined as follows: "[A]s a ground for divorce or damages or an element of damages, [mental anguish] includes the mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc." Black's Law Dictionary 889 (5th ed. 1979).

9. Prosser & Keeton, supra note 6, at 360.
11. In 1976, eight states allowed mental anguish damages in wrongful death actions. Id. Fourteen states now allow such damages. See infra notes 111-12.
BACKGROUND

The Evolution of Wrongful Death Damages

Lord Ellenborough's ruling in Baker v. Bolton, an 1808 English case, has controlled wrongful death common law development in England and the United States. He stated, "[I]n a civil Court, the death of a human being [can] not be complained of as an injury." Courts throughout the United States adopted the Baker standard, cementing the notion that, in the absence of statute, no recovery for wrongful death existed.

Lord Campbell's Act, passed by Parliament in 1846, laid to rest the rule of Baker v. Bolton in England. The statute allowed beneficiaries of the deceased to bring a separate action in which the jury could award damages proportional to the survivors' injury. Although the language of the Act was broad and seemed to afford the jury a great deal of discretion, English courts quickly restricted the scope of awardable damages.

Six years after the passage of Lord Campbell's Act, Lord Coleridge, in Blake v. Midland Railway Co., ruled that wrongful death damages would be subjected to a "pecuniary loss" limitation, and on that basis denied the plaintiffs compensation for injured emotions. The Blake court's reasoning, however, is self-contradictory. Pecuniary damages are defined as those damages capable of being estimated in, and compensated by, money. Thus, imposing a pecuniary loss limitation served no purpose other than to restate the function of the jury — to reduce legitimate damage elements to monetary terms. Nevertheless, courts and legislatures following the Blake rea-

13. Id.
14. Early American courts were not opposed to providing recovery. See Cross v. Guthery, 2 Root 90 (Conn. 1794). However, as courts began to follow the Baker v. Bolton holding, those early decisions were ignored. See generally S. Speiser, supra note 8, § 1:4.
15. Hawaii, however, created and retained a common-law right of action. See Kake v. Horton, 2 Haw. 209 (1860).
17. Id. Beneficiaries were allowed to sue although the conduct resulting in death was a felony.
soning construed pecuniary loss to mean a death beneficiary’s expectation of future monetary benefit,\(^{21}\) thereby preventing recovery for mental anguish and other legitimate damage elements.

In 1862, the California Legislature enacted the state’s first wrongful death statute,\(^{22}\) which allowed the jury to award those pecuniary and exemplary damages deemed fair and just under the circumstances. In 1873, the words “pecuniary and exemplary” were removed from the statute, an amendment that remains in effect today.\(^{23}\) The current section 377 of the California Code of Civil Procedure reads, in pertinent part, “[i]n every action under this section, such damages may be given as under all the circumstances of the case, may be just . . .”\(^{24}\)

Although the language of the wrongful death statute imposed no restriction on damage awards other than a requirement of fairness, California courts imitated the judicial conservatism of the earlier English courts. The pecuniary loss limitation was quickly adopted, appearing in California Supreme Court opinions as early as 1890. In Munro v. Pacific Coast Dredging and Reclamation Co.,\(^{26}\) a wrongful death action was brought after an individual was killed by defendant’s negligent blasting.\(^{28}\) Relying upon Blake v. Midland Railway Co.,\(^{27}\) the court allowed damages for plaintiff’s pecuniary loss and for the loss of comfort, society, support and protection of the de-

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\(^{21}\) Id. at 1018.

\(^{22}\) An Act Requiring Compensation for Causing Death by Wrongful Act, Neglect, or Default, 1862 Cal. Stat. 447.

\(^{23}\) See Code Amendments 1873-1874, ch. 383, § 40. For a history of the amendments to the wrongful death statute, see CAL. CIV. PROC. CODE § 377 (West 1973) and CAL. CIV. PROC. CODE § 377 (Deering 1972).

\(^{24}\) CAL. CIV. PROC. CODE § 377 (West Supp. 1986) provides:

> When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

\(^{25}\) 84 Cal. 515, 24 P. 303 (1890).

\(^{26}\) Id. at 517, 24 P. at 305.

\(^{27}\) See supra notes 18-21 and accompanying text.
ceased. However, the court ruled that damages for mental anguish were too vague and uncertain to be recoverable, noting that permitting recovery for grief, sorrow and mental suffering would allow the jury an opportunity to return wild, excessive verdicts. In a subsequent decision, the California Supreme Court clarified that recovery for comfort, society, support and protection also was limited to pecuniary value. The resulting Munro doctrine governed California decisions for the next eighty-one years.

Adherence to a strict Blake "pecuniary" standard for recovery of clearly intangible items caused confusion both to juries and to lower courts. Opinions containing circular language and reasoning abound. One court stated, "It is not possible to measure in exact terms of money the loss which a surviving husband, wife, or child may have sustained through being deprived of the comfort and society of the deceased . . . . But in fixing the amount, the jury is always bound by the fundamental rule that pecuniary damage is the limit of recovery . . . ." However, this artificial pecuniary standard began to lose its meaning as courts expanded the scope of recoverable damages to include advice and training, family closeness, warmth of feeling between members of the family, and the kind, loving character of the deceased.

In 1977 the California Supreme Court in Krouse v. Graham acknowledged that certain aspects of wrongful death damage awards were not pecuniary in nature:

To direct the jury, on one hand, to limit plaintiff's recovery to pecuniary losses alone while also compensating the plaintiff for loss of such nonpecuniary factors as the society, comfort, care and protection of a decedent is calculated to mislead and invite confusion. Instead, a simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice.

28. Munro, 84 Cal. at 524-25, 24 P. at 305.
37. Id. at 69, 562 P.2d at 1026, 137 Cal. Rptr. at 867.
Although the court allowed recovery for some nonpecuniary loss, the opinion, without adequate explanation, denied recovery for mental anguish damages.

*Krouse* has become the cornerstone case for modern assessment of wrongful death damages in California. The California Book of Approved Jury Instructions reflects the *Krouse* standards; juries are directed to award reasonable damages for loss of love, companionship, comfort, affection, society, solace or moral support, loss of enjoyment of sexual relations and loss of assistance in the home. However, juries may not award damages for grief or sorrow suffered by wrongful death plaintiffs.\(^8\)

**Damages for Mental Anguish**

The unusual history of wrongful death damages inhibited the possible development of a common law right of recovery for mental anguish. Writers have stated convincingly that had courts not refrained from fashioning common law remedies, developments in wrongful death actions probably would have paralleled those in personal injury actions.\(^9\) Although Lord Campbell’s Act did not prevent courts from acting independently, a belief persisted after *Baker v. Bolton* that recovery for wrongful death was not permitted at common law.\(^40\)

The statutory origins of wrongful death law in California indicated a legislative intent to leave the issue of damages to judicial discretion. California courts were presented with an opportunity to correct the injustice of *Baker v. Bolton*; instead, judges tied themselves to English historical coattails.

**RECOVERY FOR EMOTIONAL DISTRESS: Dillon AND Molien**

California courts have had a rich legacy of revolutionizing tort law concepts. In particular, personal injury cases indicate the willingness of California jurists to expand recovery for mental disturbance damages. Nonetheless, this forward-looking approach has not been utilized in assessing damages in wrongful death actions. Speiser and Malawer wrote, "[J]uries are permitted to consider and quantify the damaging effects of mental anguish in personal injury cases, but are prohibited from even considering mental anguish of bereaved relatives in most American wrongful death cases . . . ."\(^41\)

The authors concentrated on *Dillon v. Legg*,\(^42\) decided in 1968. In

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38. 2 California Jury Instructions Civil 14.50 (7th ed. 1986).
40. See Speiser & Malawer, supra note 10, at 8.
42. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
Dillon, the California Supreme Court allowed a woman to recover for emotional distress suffered when she witnessed her daughter's death. The court asserted that the decision released state law from its nineteenth century chains.43 Though Dillon expanded the field of potential plaintiffs, the holding limited recovery to those who experienced a physical manifestation of distress, a requirement imposed at the time for all emotional distress victims.44 In 1980, the California Supreme Court again acted on behalf of emotional distress plaintiffs in Molien v. Kaiser Foundation Hospitals.45 In Molien, the plaintiff alleged that his marriage failed after his wife's illness was negligently diagnosed as syphilis.46 The court held that a cause of action would lie for negligent infliction of emotional distress without a showing of physical injury.47

The two landmark decisions are distinguished by the respective plaintiffs: Dillon allowed recovery to bystanders experiencing emotional distress as a result of contemporaneous sensory observance of negligently inflicted harm toward another; Molien permitted emotional distress recovery for foreseeable “direct” victims of an actor’s negligence.48

The cases differ in another significant way. The Dillon court interpreted emotional distress to mean “shock” or “trauma,” conﬁning the term to the more readily perceivable aspects of mental disturbance. Although the Molien court used similar language, the phrase “emotional distress” was construed more broadly: “[T]he attempted distinction between physical and psychological injury merely cloud[ed] the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classiﬁcation scheme.”50

The Molien court abolished the distinction between physical and psychological injury by allowing recovery for emotional distress in the form of mental anguish. The court stated, “[I]t is rational to anticipate that both husband and wife would experience anxiety, sus-

43. Id. at 748, 441 P.2d at 925, 69 Cal. Rptr. at 85.
44. Id. at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
45. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).
46. Id. at 919-20, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.
47. Id. at 928, 616 P.2d at 820, 167 Cal. Rptr. at 838.
48. Dillon, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
49. Molien, 27 Cal. 3d at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.
50. Dillon, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.
51. Molien, 27 Cal. 3d at 929-30, 616 P.2d at 821, 167 Cal. Rptr. at 839.
picion, and hostility when confronted with what they had every reason to believe was reliable medical evidence of a particularly noxious infidelity. After Dillon and Molien, plaintiffs could expect compensation for the entire range of mental disturbance injuries; the difficulty lay only in classifying plaintiffs as bystanders or direct victims. Goodwin v. Reilly, a recent appellate court opinion, held that to state a valid cause of action as a direct victim, the plaintiff must allege facts showing a relationship with the physically injured party such that the tort has been committed against plaintiff himself. Under this formulation, wrongful death beneficiaries clearly may be viewed as direct victims. When an actor's conduct causes death, bereaved relatives are unquestionably foreseeable; because the injury has resulted in death, if emotional distress has been inflicted, grieving survivors are the only possible recipients.

One court has implicitly recognized wrongful death beneficiaries as emotional distress victims. In Sesma v. Cueto, parents brought concurrent actions for emotional distress and wrongful death when, as a result of medical malpractice, their child died at birth. The Fourth District Court of Appeal focused upon the Molien principle that negligently administered medical care could be directed not only to the patient, but also to the patient's spouse. The court extended the principle to include the parents of a patient, holding that both the father and mother could allege facts to state a Molien direct victim cause of action.

Although Sesma potentially has broadened the meaning of "direct victim," it does not suggest that courts will apply the Molien criteria to wrongful death actions in the future. The narrow Sesma holding allowed recovery to wrongful death plaintiffs only when the defendant has engaged in medical malpractice, and only in a companion suit for negligent infliction of emotional distress. One year later, in Canavin v. Pacific Southwest Airlines, the Fourth District Court of Appeal rejected an argument, based on both Molien and Sesma, to extend mental anguish recovery to plaintiffs in a wrongful death action. The court denied recovery because the plaintiffs failed to plead an independent cause of action for emotional distress, and because emotional distress damages are not recoverable in an action for

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52. Anxiety, suspicion and hostility are three "poignant emotions" which may be classified in the "mental anguish" subcategory of mental disturbance. See supra note 6.
53. Molien, 27 Cal. 3d at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.
56. Id. at 116-17, 181 Cal. Rptr. at 16.
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The reasoning of the Canavin court is internally inconsistent, yet the case probably marks the line beyond which the direct victim concept will not reach. However, further expansion of Molien may not be necessary in order to compensate wrongful death beneficiaries for mental anguish. Another line of California cases provides an established basis for compensating the emotional upheaval accompanying the death of a loved one.

POST-MORTEM ANGUISH

Prior to Molien and its progeny, California courts required a physical manifestation of emotional distress in order to ensure claim validity. Prosser and Keeton noted that a physical manifestation was not required by courts in two special circumstances: cases involving negligent transmission of a message announcing death and those concerning negligent mishandling of a corpse.

58. Id. at 520, 196 Cal. Rptr. at 86. The court stated:

Preliminarily, Molien and [Sesma] are inapposite, because the Canavins neither pleaded an independent cause of action for personal injury based upon emotional distress arising from PSA's negligent killing of decedent, nor alleged they had suffered any damage as a result of grief and sorrow. Neither did they offer to amend their pleadings to state an action for emotional distress. The Canavin court's reasoning reflects the difficulties courts have encountered in attempting to justify the denial of mental anguish damages in death actions. The court here did not dismiss the possibility of recovery for emotional distress; instead, the court inferred that the plaintiffs could prevail in a separate action for emotional distress. Unfortunately, all of the legitimate damages suffered by the family were not compensable in the most appropriate forum — the wrongful death action.

The court continued,

More basically, Molien is inapposite because emotional injuries to the heirs are not relevant to a cause of action for wrongful death. "Rather, the measure of damages [in a wrongful death action] is the value of the benefits the heirs could reasonably have expected to receive from the deceased if [he or she] had lived . . . ." In other words, "[i]t is the probable value of the decedent's life to those for whom the action is brought . . . ." It does not include the value of the independent, non-derivative effects of the loss of the decedent upon the heirs.

Id., 196 Cal. Rptr. at 86. The court's statement here is based upon language in Syah v. Johnson, 247 Cal. App. 2d 534, 55 Cal. Rptr. 741 (1966), which stated, "The measure of damages in a wrongful death case is the amount the heirs were receiving at the time of the death of the decedent and what such heirs would have received had the decedent lived." Id. at 546, 55 Cal. Rptr. at 749 (emphasis added). The Canavin court ignores the italicized words and fails to recognize the invasion of the heirs' right to mental tranquility — destroyed by the absence of the decedent. See infra notes 106-07 and accompanying text. The court simply errs in labeling mental anguish "independent" and "non-derivative"; the death of the decedent is a cause in fact of the heirs' mental anguish — "but for" the death of the decedent, the heirs would not have suffered emotionally.

59. Molien, 27 Cal. 3d at 925, 616 P.2d at 816, 167 Cal. Rptr. at 835.
60. Prosser & Keeton, supra note 6, at 362.
Although no message transmission cases have been decided in California, two appellate decisions have made clear that mishandling of a corpse gives rise to a cause of action for survivors’ emotional distress. The first, Carey v. Lima, Salmon & Tully Mortuary,61 decided in 1959, awarded damages for mental and emotional distress to children who became ill upon discovering that their father’s improperly preserved body had been damaged in shipment.62 The complaint asserted that damages occurred as a result of defendants’ negligence. Because the plaintiffs alleged that they had suffered physical manifestations of distress, the court held that a question of fact existed for jury consideration.63

Twenty-one years later, a second case firmly established the legal precepts governing recovery for corpse mishandling. In Allen v. Jones,64 the plaintiff sued a mortuary to recover for mental distress suffered when his brother’s cremated remains were lost in transit while in the defendant’s care.65 The court acknowledged California decisions awarding damages for mental distress for the breach of a mortician’s service contract,66 and held that the plaintiff stated a cause of action in tort.67 Justice Tamura wrote for the majority:

We conclude that damages are recoverable for mental distress without physical injury for negligent mishandling of a corpse by a mortuary. Public policy requires that mortuaries adhere to a high standard of care in view of the psychological devastation likely to result from any mistake which upsets the expectations of the decedent’s bereaved family.68

The court accepted the Restatement of Torts position that rejected the supposed property basis of the cause of action,69 recognizing that the plaintiffs stated a claim for mental distress alone.70

Four months before the California Supreme Court decided Molien, the Allen court applied the principle of recovery for negli-
gent infliction of emotional distress without physical injury to a corpse mishandling case. The Allen court, concerned with plaintiffs already bereaved by the loss of a family member, awarded damages for the additional anguish suffered as a result of corpse mishandling. The court was able to distinguish and quantify a specific portion of the survivors’ mental anguish; the same court would have felt constrained by precedent and therefore unable to respond if the death itself had been caused by a tortfeasor’s negligence, and the mental anguish had been claimed in an action for wrongful death.

ANALYSIS

Debate over mental anguish damage awards in wrongful death actions is not new; courts repeatedly have been criticized for their inflexible denial of recovery. The Molien court stated that whether a plaintiff has suffered a compensable injury is a matter of proof to be presented to the trier of fact. In wrongful death actions, however, compensation for mental anguish injury always has been rejected as a matter of law. The rationale, stated in Krouse v. Graham, is that “[n]othing can be recovered as [solace] for lost feelings” — an unsupportable position in light of Molien and Allen.

Mental anguish damages clearly have been established as compensable. Judicial efficiency is frustrated by a system that denies such damages in a death action, yet satisfies the same claim by the same plaintiff in a companion suit for negligent infliction of emotional distress. The task facing the California judiciary is one of acknowledgment: courts must recognize that strong policies already exist to support recovery for mental anguish by wrongful death beneficiaries. Mental anguish should be treated as any other issue in dispute — as a matter to be alleged and proven by the plaintiff. As Speiser and

71. Allen has provided a basis for large emotional distress damage awards arising from corpse mishandling. A recent verdict awarded the plaintiff $72,500 when the wrong body was sent by the mortuary to the viewing. Durr v. Humphrey Mortuary, No. 394204 (Orange Cty. Super. Ct. 1985). A jury in another case awarded a 67-year-old man $1 million in damages for emotional distress suffered when the mortuary switched his wife’s body for the viewing. Thompson v. Palmer d. Whitted & Co., No. 496202-3 (Alameda City Super. Ct. 1984).

72. See generally S. SPEISER, supra note 8, § 3:55.

73. Molien, 27 Cal. 3d at 930, 616 P.2d at 820, 167 Cal. Rptr. at 839.
74. Krouse, 19 Cal. 3d at 69, 562 P.2d at 1026, 137 Cal. Rptr. at 867.
Malawer stated, “Substantial grief should not be assumed to result automatically from the death of any relative, nor should it be excluded arbitrarily . . . . In every case, damages for mental anguish should be based upon proper proof.”

Unfortunately, courts have had difficulty with proof of mental anguish in death actions. Allowing awards for such allegedly nebulous injuries as “grief” and “sorrow” seems to create conceptual obstacles for courts, but calculation of mental anguish damages by a jury is no more problematic than calculation of other intangibles such as loss of love or companionship. Courts and juries are now particularly well-equipped to assess intangible damage elements due to the availability of scientific and psychological data and expert testimony. Attorney and psychiatrist Joseph T. Smith stresses that expert testimony is invaluable to the jury function: “A duly qualified expert can explain the nature of mental suffering, of the grieving process . . . . When the jury understands the psychological reasoning and when it believes in the reality of the phenomenon, it is more likely to award appropriate damages.”

Cases such as Dillon and Molien suggest that California courts have come to trust the judgment capabilities of modern juries, but the greatest obstacle to wrongful death damage reform still may be the concern expressed in the 1890 Munro decision — that juries, left to their own devices, will produce extravagant awards. However,
even assuming that juries are incapable of acting sensibly, several options exist to ensure damage limitation. First, judicial review of jury verdicts allows courts to verify the reasonableness of damage awards. The verdict in a wrongful death action is subject to the approval of the trial judge, and on appeal, a reviewing court may intervene if the facts suggest that passion, prejudice or corruption influenced the amount of the award. But the jury is given deference; the award will not be disturbed unless it is so disproportionate as to suggest impropriety.

Legislative action is another option to assure reasonable wrongful death damage awards. Section 3333.2 of the California Civil Code provides that, in medical malpractice actions, damage awards for noneconomic losses may not exceed $250,000. In *Fein v. Permanente Medical Group*, the California Supreme Court upheld the constitutionality of section 3333.2: "While the general propriety of such damages is, of course, firmly imbedded in our common law jurisprudence . . . no California case of which we are aware has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision." The court recognized that no principle of federal or state law prevented the legislature from limiting recovery of damages in furtherance of a legitimate state interest. The state interest involved in *Fein* was the concern over rising medical malpractice insurance premiums, a situation that had reached crisis proportions. A similar worry seems to plague judges in wrongful death actions, "a lively fear [that] the overenthusiasm of sympathetic juries would lead to excessive awards and increased insurance premiums." Because of the perception that juries may tend to favor injured plaintiffs, because defendants generally are insured, a legislative cap on damages might reduce potential judicial and societal concern about acceptance of mental anguish awards in death actions.

Another available method of preventing windfall recovery is par-

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86. *Id.* at 159-60, 695 P.2d at 681, 211 Cal. Rptr. at 384.
87. *Id.* at 162, 695 P.2d at 682, 211 Cal. Rptr. at 385.
88. *Id.* at 163, 695 P.2d at 682, 211 Cal. Rptr. at 385.
90. PROSSER & KEETON, *supra* note 6, at 590.
tial modification of the collateral source rule.\textsuperscript{91} At common law, a jury calculating damages could not consider insurance payments and other independent benefits that the plaintiff received to compensate for the injury sustained.\textsuperscript{92} The California Legislature in Civil Code section 3333.1 modified the traditional rule in connection with medical malpractice actions.\textsuperscript{93} The effect of the statute was to reduce damage awards by allowing evidence of plaintiff's net collateral benefits.\textsuperscript{94} In death actions, evidence of the heir's wealth or poverty is inadmissible; damages are assessed based solely upon loss to the beneficiaries.\textsuperscript{95} An appropriate modification of the collateral source rule could allow wrongful death defendants to introduce evidence of plaintiffs' life insurance benefits, but other indications of wealth or poverty of beneficiaries would remain inadmissible.

Perhaps the most compelling reason to award mental anguish damages to wrongful death beneficiaries is a practical one: Mental anguish \textit{is} a serious form of injury. The \textit{Allen} court relied heavily upon Dean Prosser's assessment that, in a corpse mishandling situation, "an especial likelihood of genuine and serious mental distress [exists], arising from the special circumstances, which serves as a guarantee that the claim is not spurious."\textsuperscript{96} Wrongful death actions involve a similar guarantee. When the tortious conduct of an individual results in the death of another, the grief suffered by close family members is undeniably genuine — often it is greater than if the death had occurred from natural causes. Dr. Smith asserts that the grief process takes years to complete and that early recovery is not normal. He states, "The [survivor's] life has been ripped to shreds and rebuilding is a long and painful process. Significant numbers of survivors remain depressed long after the original death."\textsuperscript{97} In a personal injury case, the victim's relatives may cling to hope, no matter how slight, for full or partial recovery. Wrongful death beneficiaries have no such comfort.

The mental anguish suffered by surviving relatives is compounded by what would seem to be an unresponsive judicial system.\textsuperscript{98} Courts

\begin{itemize}
  \item \textsuperscript{91} See \textit{Fein}, 38 Cal. 3d at 164, 695 P.2d at 684, 211 Cal. Rptr. at 387.
  \item \textsuperscript{92} \textit{Id.} at 165, 695 P.2d at 684, 211 Cal. Rptr. at 387.
  \item \textsuperscript{93} \textit{Id.}
  \item \textsuperscript{94} \textit{Id.} at 165-66, 695 P.2d at 684-85, 211 Cal. Rptr. at 388.
  \item \textsuperscript{95} \textit{Webb v. Van Noort}, 239 Cal. App. 2d 472, 48 Cal. Rptr. 823 (1966).
  \item \textsuperscript{96} \textit{Allen}, 104 Cal. App. 3d at 213, 163 Cal. Rptr. at 449 (quoting W. PROSSER, \textit{HANDBOOK OF THE LAW OF TORTS} 329-30 (4th ed. 1971)).
  \item \textsuperscript{97} Smith, \textit{supra} note 80, at 53.
  \item \textsuperscript{98} Speiser and Malawer, discussing the injustice of denying mental anguish damages, state:
\end{itemize}
may have a duty to avoid inflicting further damage on plaintiffs through application of the legal process; courts must at a minimum provide a remedy for legitimate injury. Prosser and Keeton, discussing mental disturbance in negligence actions, state, “[T]he law is not for the protection of the physically sound alone. It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied. . . .”

As discussed, policy reasons do not prevent courts from fully compensating wrongful death plaintiffs. Instead, California courts have erected a *stare decisis* barrier that has withstood the most compelling arguments for its elimination. However, the contradiction inherent in denying mental anguish damages in death actions, while allowing recovery for other intangible damage elements, is readily exposed through careful scrutiny of the *Krouse* opinion.

In *Krouse v. Graham*, the California Supreme Court reaffirmed that, under principles of California law, damages for “grief and sorrow” are not recoverable in wrongful death actions. At the same time, the court fully approved an award for loss of society, relying upon *Sea-Land Services, Inc. v. Gaudet*: “It is greatly persuasive with us that . . . the [United States] Supreme Court interpreted the term ‘society’ as including ‘a broad range of mutual benefits each family member receives from the others’ continued existence, including love, affection, care, attention, companionship, comfort, and protection . . . .’”

The *Krouse* court did not acknowledge, and some courts have rejected, the fact that loss of society has the same policy underpin-
ning as mental anguish: the right of the individual to mental tranquility. Peace of mind is the result of the benefits derived from the society of another, as well as the contentment and security received from the mere fact of the other's existence. In that sense, the loss of the loved one's existence deprives grieving survivors of a positive contribution to peace of mind; the loss of that contribution is manifested by mental anguish. Krouse represents an incomplete attempt to provide compensation for loss of mental tranquility. Although the mental disturbance resulting from loss of society is recognized, the most obvious and serious form of disturbance, mental anguish, remains barred from consideration.

Some courts have recognized that loss of society and mental anguish are virtually inseparable. For example, in City of Tucson v. Wondergem, the Arizona Supreme Court found inconsistent the denial of mental anguish damages with the grant of recovery for loss of companionship, comfort and guidance. The court stated that because loss of companionship and comfort results in sorrow, failure to permit mental anguish damages would violate notions of fairness. In any event, courts' efforts to prevent jury consideration of mental anguish damages may be in vain. "The juror may find it quite difficult indeed to distinguish a spouse's loss of love from the forbidden 'mental anguish,' with the result, probable in many cases, that substantial awards will be made for intangible losses under one name or another." Some courts and legislatures have begun to accept the propriety of awarding mental anguish damages in wrongful death actions. Nine states now have statutory provisions specifically providing for mental anguish damage recovery; five other states have accomplished the same result through judicial decree. Despite fears of runaway jury

106. The state of mind fostered by the existence of a relative is not necessarily limited to feelings of contentment and security. Clearly, the continued life of another may be a source of anxiety, fear, anger, and other unpleasant emotions. Proof of the plaintiff's completely negative state of mind toward the decedent could be introduced by the defendant at trial to negate the existence of severe mental anguish.

107. The loss of mental tranquility that gives rise to mental anguish may be analogized to the loss of monetary income that gives rise to undesirable economic consequences. Courts traditionally compensate the latter, even if the economic consequences are minimal. In comparison, a survivor may feel the residual effects of mental anguish for years after his or her monetary situation has stabilized.

109. Id. at 433, 466 P.2d at 387.
110. PROSSER & KEETON, supra note 6, at 952.
111. See ARK. STAT. ANN. § 27-909 (1979); FLA. STAT. ANN. § 768.21 (West 1986); KAN. STAT. ANN. § 60-1903 (Supp. 1985); MD. CTS. & JUD. PROC. CODE ANN. § 3-904 (1984); NEV. REV. STAT. § 41.085 (1985); OHIO REV. CODE ANN. § 2125.02 (Anderson Supp. 1985); OKLA. STAT. ANN. tit. 12, § 1053 (West Supp. 1985); VA. CODE § 8.01-52 (1984); W. VA. CODE § 55-7-6 (1981).
112. See Tucson v. Wondergem, 105 Ariz. 429, 466 P.2d 383 (1970); Dobyns v. Yazoo & M.V.R.R., 119 La. 72, 43 So. 934 (1907); Dawson v. Hill & Hill Truck Lines,
verdicts, statistics indicate that awards and settlements in "mental anguish" states generally tend to parallel those in jurisdictions that reject mental anguish damages.\(^1\)

**"HEDONIC" VALUE OF HUMAN LIFE**

Wrongful death damage law is far from settled, even in the states that recognize mental anguish damages. The volatile nature of the subject is assured, due to the sensitive nature of death and the difficulty involved with placing a value on the loss of human life. While the debate in California has narrowed to a single aspect of nonpecuniary damages, expert testimony assessing the value of life has persuaded courts in other states to re-evaluate the standards used to award wrongful death damages.

Some courts have admitted a different type of evidence in wrongful death cases, in an attempt to assess the value of life. For example, in *Sherrod v. Berry*,\(^1\) an Illinois federal district court allowed an economist's testimony concerning the "hedonic" value of human life. The court noted that legal scholars, economists, and social scientists have struggled, with little success, to formulate a method by which the value of a human life can be measured in terms understood by a jury.\(^1\) Hedonic value, economist Stanley Smith testified, referred to the expected pleasure of life, distinct from economic value, including all the value with which life might be held.\(^1\) The court accepted Mr. Smith's opinion that the hedonic value of human life may be worth up to thirty times the economic value of the per-

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113. Jury awards statistics for 1985 indicate the following average amounts (categorized by type decedent):

<table>
<thead>
<tr>
<th>Decedent Type</th>
<th>&quot;Mental Anguish&quot; states</th>
<th>Other states</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children:</td>
<td>$658,250</td>
<td>$759,420</td>
</tr>
<tr>
<td>Single Adults:</td>
<td>1,034,500</td>
<td>1,110,057</td>
</tr>
<tr>
<td>Married Men:</td>
<td>874,714</td>
<td>1,023,150</td>
</tr>
<tr>
<td>Married Women:</td>
<td>1,679,574</td>
<td>689,460</td>
</tr>
<tr>
<td>Other decedents:</td>
<td>629,500</td>
<td>245,160</td>
</tr>
</tbody>
</table>

Statistics are based upon data compiled in VERDICTS & SETTLEMENTS 8-13 (1986) (Cumulative Index January-December 1985).


115. 629 F. Supp. at 164.

116. *Id.* at 163.

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son’s life.” The court stated, “The fact that the hedonic value of human life is difficult to measure did not make either [the] testimony or the damages speculative . . . . The rule against recovery of ‘speculative damages’ is generally directed against uncertainty as to cause rather than uncertainty as to measure or extent.”

The Sherrod court’s determination to award hedonic value damages represents a bold break from traditional assessment of wrongful death damages. Hedonic value recovery is an entirely new method of loss evaluation. Every aspect of damage may be considered as the jury reaches a lump-sum verdict based not upon an economic entity, but upon the value of the person as a whole. Damages for hedonic value address the more realistic idea that the true injuries to be compensated in wrongful death actions are intangible in nature; the economic loss to beneficiaries is merely one part of the void created by the death of a loved one.

Hedonic valuation presents an attractive method of achieving full compensation for wrongful death plaintiffs, but implementation of the concept poses problems for California and many states. In Sherrod v. Berry, the court awarded damages for hedonic value to the decedent’s father as executor of his son’s estate. California’s wrongful death statute precludes awarding to a beneficiary damages that are recoverable by the estate. Damages for hedonic value may still be recoverable, but not in the form contemplated by Sherrod. Damages awarded in Sherrod reflected the full hedonic value of the decedent’s life that the decedent would have received, had he lived. An heir in California, to come within the purview of the wrongful death statute, would have to prove the derivative hedonic value that he or she would have received from the decedent’s life, had the decedent lived.

117. Id. Mr. Smith, when testifying as an expert witness, informs juries that the total value of a person’s life may be expressed as the sum of that person’s pecuniary and hedonic values. Mr. Smith testifies that hedonic value has been measured to be several hundred thousand to several million dollars. Total economic value has been found to be consistently greater than and measured up to thirty times pecuniary value alone.

Although hedonic value damages are expressed as a ratio to economic value damages, the two are assessed separately by a jury and have no interdependence. Mr. Smith testifies that each year of life expectancy has a hedonic value and that as far as economists can determine the value does not vary from person to person. So, a fifty year old person with a physical or mental disability has the same hedonic value as a fifty year old person with no disability. Also, hedonic value for each year remains constant for a person’s entire life span, such that a person with twenty years to live would have exactly four times the hedonic value of a person with only five years to live. Telephone interview with economist Stanley Smith (Sep. 3, 1986).

118. Sherrod, 629 F. Supp. at 164.
119. Id. at 163.
120. CAL. CIV. PROC. CODE § 377 (Deering 1972).
121. The heir’s derivative hedonic value could be expressed as a percentage of the hedonic value of the decedent. Mr. Smith has not yet completed study on the theoretical framework of the hedonic value structure; an evaluation of how hedonic value of one
As long as judges consider themselves limited to granting recovery for economic damages only, little hope exists for adoption of hedonic valuation. Courts insisting on exact computation of economic losses face situations in which the ascertainment of damages becomes as arbitrary as the forbidden damages that courts refuse to acknowledge. Questions arise, for example, concerning the economic value of a decedent who was unemployed. Courts are then forced to consider the person's potential for future employment, the education accumulated to date and that likely to be pursued in the future, and so on. The end result is to reduce to a meaningless number the value of the life of an individual whose economic potential is unknowable. Recovery for hedonic value, while admittedly difficult to ascertain, at least confronts the inevitable truth that the value of human life cannot and should not be so crudely quantified.

**CONCLUSION**

California courts have continued to deny recovery for mental anguish damages in wrongful death actions despite strong countervailing policy and established law mandating change. This Comment has concentrated on California wrongful death case law, noting the inconsistency and unfairness inherent in a system reflecting outdated principles. The potential exists, however, for progress toward full compensation for wrongful death plaintiffs; in *Krouse v. Graham*, the California Supreme Court reaffirmed that reform can be effected when the need is recognized.

The general nature of California's wrongful death statute has placed responsibility for damage development wholly within the province of the courts. Justice Tobriner recognized the trend toward complete judicial control, stating, "I find nothing in the statute or its history which anticipates and forbids the evolution of recovery for wrongful death into a universally recognized right of common law status." The need for further reform in death actions is evident, especially as substantial damage awards for emotional distress in corpse mishandling and personal injury cases become more commonplace. Courts should strive for consistency in the law; the unjustifiable rift

person is transmitted to another will be discussed in his forthcoming paper. Telephone interview with economist Stanley Smith (Sep. 3, 1986).


between damages allowed in wrongful death actions and damages allowed in other cases is the epitome of inconsistency. The step toward correction is a small one: the California Supreme Court need simply declare that juries may award damages for legitimate, established forms of injury.\footnote{California courts traditionally have been viewed as pioneers in the tort law field. A California decision to recognize mental anguish damages likely would influence other courts to do the same. One example of California's influence is the Montana Supreme Court's decision to allow damages for mental anguish. The dissenting justice argued that the court should not recognize such damages because California courts, confronted with a similar wrongful death statute, have refused to grant recovery. \cite{Dawson} (Mont. 1983) (Weber, J., dissenting).}

Although a decision to allow hedonic value damages is not likely in the near future, recognition of mental anguish damages in death actions is supported by common law and common sense. Wrongful death actions represent the culmination of a traumatic emotional experience for the heirs of the deceased. Damage awards must be considered carefully to ensure that deserving plaintiffs are as fully compensated in wrongful death actions as they are in personal injury litigation.

\begin{flushright}Thomas E. Courtney, Jr.\end{flushright}