

# OPPOSING DEFENSE MOTIONS TO EXCLUDE EVIDENCE OF GRIEF AND ANGUISH IN WRONGFUL DEATH CASES

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## INTRODUCTION

Increasingly, defense counsel in Vermont wrongful death cases are seeking orders to exclude evidence of plaintiffs' grief and anguish flowing from the death of their loved ones and to bar any damages for such relational losses. They argue that these damages are not available under Vermont's Wrongful Death Act ("WDA" or "Act"),<sup>1</sup> and therefore that evidence regarding such losses is irrelevant under V.R.E. 401,<sup>2</sup> and unfairly prejudicial under V.R.E. 403.<sup>3</sup> While several trial courts have denied such motions, recognizing the expansive damages available under the Act, a number of courts have issued orders excluding such evidence.<sup>4</sup>

This Article argues that a close reading of the Vermont Supreme Court's decisions interpreting and applying the WDA—particularly since the statute was amended in 1976<sup>5</sup>—confirms the Court's willingness to define compensable "pecuniary injuries" broadly enough to include grief and mental anguish. In Vermont, as well as in a growing number of

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1. VT. STAT. ANN. tit. 14, § 1492(b) (2010) ("The court or jury before whom the issue is tried may give such damages as are just, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin or husband and next of kin, as the case may be. In the case where the decedent is a minor child, the term pecuniary injuries shall also include the loss of love and companionship of the child and for destruction of the parent-child relationship in such amount as under all the circumstances of the case, may be just.").

2. VT. R. EVID. 401 (relevant evidence means evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence).

3. VT. R. EVID. 403 (even if some evidence is relevant, it may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the opposing party).

4. For trial court decisions allowing recovery for grief and anguish damages, see generally Decision on Motion for Partial Summary Judgment, *Allen v. Sw. Vt. Med. Ctr., Inc.*, No. 334-9-10 Bncv (Vt. Super. Ct., Nov. 28, 2011), 2011 Vt. Super. LEXIS 62; *Culnane v. Ultramar Energy, Inc.*, No. 13-1-05 Bncv, at 5 (Vt. Super. Ct. Mar. 19, 2009) (on file); *Nielsen v. Spaulding*, No. S1209-93 CnC, 11 (Vt. Super. Ct. Jan. 11, 1996) (on file). For trial court decisions denying such damages, see generally *Leach v. Fletcher Allen Health Care, Inc.*, No. S0125-02 CnC, 2004 Vt. Super. LEXIS 40, at 5 (Vt. Super. Ct. Nov. 1, 2004); *Estate of Kennison v. Cent. Vt. Med. Ctr.*, No. 616-9-08 Wncv (Vt. Super. Ct. Oct. 26, 2010) (on file); Order Granting the Defendant's Motion to Exclude Plaintiff's Evidence of Mental Anguish, *Bargeil v. Spring Lake Ranch*, No. 807-10-09 Rdev (Vt. Super. Ct. Dec. 15, 2010) (on file); Ruling on Motion for Partial Summary Judgment at 4-5, *Murphy v. Sentry Ins.*, No. S0653-06 (Vt. Super. Ct. Oct. 15, 2009) (on file).

5. See 1975 Vt. Acts & Resolves 277 (amending tit. 14, § 1492(b)).

jurisdictions nationally,<sup>6</sup> recovery for pecuniary injuries has broadened to include the full range of emotional harms experienced by survivors who have lost a close family member, regardless of which next of kin seeks such damages.<sup>7</sup>

### I. HISTORICAL PERSPECTIVE<sup>8</sup>

Wrongful death has been a statutory cause of action in Vermont since 1849.<sup>9</sup> The WDA protects individuals in various relational capacities to the victim of the wrongful act, based on the Vermont Legislature's recognition of the catastrophic financial and emotional injuries suffered by surviving family members.<sup>10</sup> The statutory cause of action "introduced principles wholly unknown to the common law, or to any previous statute [in Vermont],"<sup>11</sup> and designated the damages recoverable in such actions as those "deem[ed] just" by the trier of fact, "with reference to the pecuniary injury resulting from such death."<sup>12</sup>

The Vermont Supreme Court has made clear that the WDA is "remedial in nature, designed to alleviate the harsh common law rule of no liability because the person injured had died."<sup>13</sup> "Whether or not in

6. See *infra* Part III.

7. See, e.g., *Lazelle v. Town of Newfane*, 70 Vt. 440, 444, 41 A. 511, 512 (1898) ("It has been held that loss of intellectual and moral training and proper nurture by a child, and loss of her husband's care and protection by a widow, are within the meaning of the term 'pecuniary loss.'" (citation omitted)). This was an influential case and has been quoted in part by *Walker v. Firestone Tire & Rubber Co.*, 412 F.2d 60, 65 (2d Cir. 1969). See also *Hartnett v. Union Mut. Fire Ins.*, 153 Vt. 152, 156, 569 A.2d 486, 488 (1989) (holding that, in case of minor child decedents, 1976 amendment allowing damages for "'destruction of parent-child relationship' must include grief, mental anguish and suffering or it is largely a meaningless concept."); *Clymer v. Webster*, 156 Vt. 614, 622, 623, 626-27, 629, 596 A.2d 905, 910, 911-914 (1991) (holding that such loss of companionship damages are available to parents of adult child decedents, as well as to spouses and children of adult decedents, despite 1976 amendment's express reference only to minor child decedents); *Dubaniewicz v. Houman*, 180 Vt. 367, 372, 910 A.2d 897, 900-01 (2006) (holding that an adult decedent's sibling may recover loss of companionship damages, upon proof of "the physical, emotional, and psychological relationship between himself and the decedent," because "we see no sufficient reason to differentiate between the deprivation of companionship, guidance, advice, love and affection suffered by brothers and sisters upon the death of a family member from that suffered by parents or children") (emphasis added) (quoting *Schmall v. Vill. of Addison*, 525 N.E.2d 258, 265 (Ill. Ct. App. 1988)).

8. Much of this section is heavily borrowed from Emily J. Joselson, *Parents' "Pecuniary Injuries" For the Wrongful Death of an Adult Child: Where Is the Love?*, 12 VT. L. REV. 57 (1987).

9. Act of Nov. 7, 1849, Vt. Pub. Act No. 8. §§ 2-3 (codified at VT. STAT. ANN. tit. 14, § 1492(b) (2010)).

10. tit. 14, § 1492(c)(1-3).

11. *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294, 304 (1865).

12. *Id.* at 302 (quoting Vt. Pub. Act. No. 8 § 3).

13. *Vaillancourt v. Med. Ctr. Hosp. of Vt.*, 139 Vt. 138, 141, 425 A.2d 92, 94 (1980) (holding viable fetus a "person" within meaning of WDA, for whose death recovery may be had).

‘derogation’ of the common law, a question perhaps open to debate, the statute is clearly designed to remedy an inequity in the common law, and to fill a void repugnant to general equitable principles.”<sup>14</sup>

Bearing in mind the remedial purpose of the statute, the Court has repeatedly reminded litigants and trial courts that damages recoverable in such actions must be interpreted broadly to maximize recovery:

It would seem to follow from this rule absolutely limiting the damages in every case to the pecuniary loss occasioned by the death, and upon a consideration of that justice which the statute itself invokes, that this pecuniary loss should be extended to, and should include, all pecuniary loss of every kind which the circumstances of the particular case establish with reasonable certainty will be suffered by the beneficiary of the statute in the future, because of the death of the victim.<sup>15</sup>

The Court has also stressed that the particular facts of each case, and evidence regarding the individual relationships between those who have suffered such losses, are central to the factfinder’s damages analysis:

Human lives are not of equal pecuniary value, and the value of services rendered depends upon the wants of the beneficiary. Therefore it is competent to show the situation of the persons who claim to have been so injured, and the occasion for and value to them of the services of the deceased.<sup>16</sup>

And more recently:

In determining damages, the factfinder may “consider the physical, emotional, and psychological relationship” of the parties, as well as their “living arrangements . . . , the harmony of family relations, and the commonality of interests and activities.”<sup>17</sup>

Finally, the Court has repeatedly refused to confine the term “pecuniary injury” to purely economic losses. Early on, the Court established that where the decedent is a parent or spouse, “loss of

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14. *Id.*

15. *D’Angelo v. Rutland Ry., Light & Power Co.*, 100 Vt. 135, 138, 135 A. 598, 599 (1927) (quoting *Bond v. United R.R.s of S.F.*, 113 P. 366, 369 (Cal. 1911)).

16. *Lazelle v. Town of Newfane*, 70 Vt. 440, 444, 41 A. 511, 512 (1898).

17. *Mears v. Colvin*, 171 Vt. 655, 657–58, 768 A.2d 1264, 1267 (2000) (quoting *Clymer v. Webster*, 156 Vt. 614, 630, 596 A.2d 905, 914 (1991)).

intellectual and moral training and proper nurture by a child, and loss of her husband's care and protection by a widow, are within the meaning of the term 'pecuniary loss.'"<sup>18</sup> Although not ordinarily considered economic in character, such intangible losses as the care, nurture, assistance, and protection of a loved one are nevertheless of real pecuniary value to the survivors who, but for the wrongful act of another, could reasonably have expected to enjoy a lifetime of the decedent's services and attention.<sup>19</sup>

As such, in 1976 the Vermont Legislature amended the WDA, in recognition of the fact that the value of a minor child to his or her parents could not equitably be limited to the child's pecuniary value,<sup>20</sup> which in modern times would likely result in a negative worth.<sup>21</sup> The amended statute made clear that, "[i]n the case where the decedent is a minor child, the term pecuniary injuries shall also include the loss of love and companionship of the child and for destruction of the parent-child relationship in such amount as under all the circumstances of the case, may be just."<sup>22</sup> However, both before and after this amendment, the Vermont Supreme Court has repeatedly broadened the damages available under the WDA.<sup>23</sup>

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18. *Lazelle*, 70 Vt. at 445, 41 A. at 512 (citation omitted).

19. *See, e.g.*, *Green v. Bittner*, 424 A.2d 210, 211 (N.J. 1980) (holding that, in death of child, parents may recover as "pecuniary loss" not just the financial value that child may have contributed, but "damages for the parents' loss of their child's companionship as they grow older, when it may be most needed and valuable, as well as the advice and guidance that often accompanies it").

20. *See* 1975 Vt. Acts & Resolves 277-78.

21. *See, e.g.*, *Sanchez v. Schindler*, 651 S.W. 2d 249, 251 (Tex. 1983) ("Strict adherence to the pecuniary loss rule could lead to the negligent tortfeasor being rewarded for having saved the parents the cost and expense of rearing a child.").

22. 1975 Vt. Acts & Resolves 278.

23. *See, e.g., Lazelle*, 70 Vt. at 445, 41 A. at 512 (providing that pecuniary injury includes intangible, noneconomic losses to surviving spouse and children); *D'Angelo v. Rutland Ry.*, 100 Vt. 135, 137, 135 A. 598, 599 (1927) (explaining that parents' recovery is not limited to loss of services during child's minority); *Mobbs v. Central Vt. Ry.*, 150 Vt. 311, 314-15, 553 A.2d 1092, 1095 (1988) (ruling that siblings of a minor child decedent may recover pecuniary injuries for "loss of love and companionship"); *see also Hartnett v. Union Mut. Fire Ins.*, 153 Vt. 152, 156, 569 A.2d 486, 488 (1989) (explaining that for the loss of minor children, damages for "destruction of parent-child relationship must include grief, mental anguish and suffering, or it is largely a meaningless concept"); *Clymer v. Webster*, 156 Vt. 614, 629, 596 A.2d 905, 914 1991 (holding that parents of adult children—as well as a decedent's spouse and children—may recover loss of companionship damages); *Mears v. Colvin*, 171 Vt. 655, 657, A.2d 1264, 1267-69 (2000) (mem.) (holding pecuniary injuries are not limited to economic losses, but may include recovery for loss of child or spouse's companionship, as well as loss of care, nurture and protection; reversing as unduly prejudicial admission of surviving spouse's homosexual extramarital affair, and daughters' difficult teenage years, multiple pregnancies by different fathers, failures to complete high school, and marital problems); *Dubaniewicz v. Houman*, 2006 VT 99, ¶ 11, 180 Vt. 367, 372, 910 A.2d 897, 903 (confirming that an adult decedent's sibling may recover loss of companionship damages).

## II. GRIEF DAMAGES ARE INCLUDED IN LOSS OF COMPANIONSHIP

The Vermont Supreme Court has already made clear that parents who have suffered the loss of a minor child may seek to recover damages for their own grief and mental anguish as part of their claims for pecuniary injuries.<sup>24</sup> The Court has also refused to differentiate between the harms suffered by a parent who has lost a child, or a sibling who has lost a brother or sister, since “[n]owhere in the wrongful death statute is there a distinction between the types of damages recoverable based upon who the next of kin is.”<sup>25</sup> This compels the conclusion that, when presented with the appropriate case, the Court will continue to expand the definition of pecuniary losses to include the survivors’ grief and mental anguish, regardless of who has died and which surviving family members bring the claims.

*A. Grief Damages Are Available to Parents of Minor Child Decedents*

In 1989, in *Hartnett v. Union Mutual Fire Insurance*, the Court affirmed an award of grief and mental anguish damages to the mother of minor child decedents, despite the fact that such damages were not expressly included in the 1976 statutory amendment.<sup>26</sup> The Court recognized that, since the statutory language of the amendment was taken from a Washington State statute “which, in all respects material to this case, is identical to §1492(b) as amended. . . . the presumption is that the Legislature also adopted the construction given the statute by the courts of the other state.”<sup>27</sup> The Court therefore followed the rulings of “[t]he Washington Supreme Court [which] has, on a number of occasions, interpreted its statute to allow recovery for grief and mental anguish.”<sup>28</sup> Referring to *Wilson v. Lund*, the Court emphasized that:

[R]ecovery for mental anguish is the *only category of damages* which we can conceive could have been intended by the legislature in enacting the disputed statutory phrase [“loss of love” and “destruction of the parent-child relationship”]. Simply and directly stated, *no legally recognizable category or element*

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24. *Hartnett*, 153 Vt. at 156, 569 A.2d at 488.

25. *Dubaniewicz*, 2006 VT 99, ¶ 11 (quoting *In re Estate of Finley*, 601 N.E.2d 699, 702 (Ill. 1992)).

26. *Hartnett*, 153 Vt. at 156, 569 A.2d at 488.

27. *Id.* at 154, 569 A.2d at 487.

28. *Id.* at 155, 569 A.2d at 488.

*of damages remains—other than the category describable as compensation for mental anguish.*<sup>29</sup>

Moreover, because “lay persons can understand grief reactions,” expert testimony is not required.<sup>30</sup> Noting that “[o]ur statute requires the jury to award such non-pecuniary loss damages as they find ‘under all the circumstances of the case, may be just,’” the Court quoted with approval a federal court’s interpretation of “a similar Virginia statute”:<sup>31</sup>

Needless to say, loss of comfort, guidance and society, like sorrow, mental anguish and solace, are virtually incalculable except in a rough and gross manner . . . . Money is no substitute, and under our statute the amount which may be awarded is what “may seem fair and just.” Such an award is not suggested or intended to be replacement of the loss sustained. . . . Damages in a death case where the measure is what is fair and just, like in personal injury actions, is to be determined from all of the facts and circumstances. . . . [D]amages for loss of society can be left to turn mainly upon the good sense and deliberate judgment of the trier, as “insistence on mathematical precision would be illusory,” and the judge or jury must be allowed to make a reasonable approximation, guided by judgment and practical experience. It is enough if the evidence shows the extent of damages as a matter of a just and reasonable inference, although the result be only an approximation.<sup>32</sup>

Finally, the Court referred to the “detailed and extensive analysis of the factors bearing on an award for mental anguish and the evidence to be admitted on the factors,”<sup>33</sup> articulated by the Arkansas Supreme Court in *St. Louis Southwestern Railway v. Pennington*,<sup>34</sup> including the value of the relationship between the decedent and the survivor, the duration and intensity of sorrow and grief, and the nature of the death.<sup>35</sup> The Vermont Supreme Court concluded:

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29. *Id.* (quoting *Wilson v. Lund*, 491 P.2d 1287, 1292 (Wash. 1971)).

30. *Id.* at 160, 569 A.2d at 491.

31. *Id.* at 161, 569 A.2d at 491 (quoting VT. STAT. ANN. tit. 14, § 1492(b)).

32. *Id.* at 161–62, 569 A.2d at 491 (quoting *Sawyer v. United States*, 465 F. Supp. 282, 292 (E.D. Va. 1978)).

33. *Id.* at 162, 569 A.2d at 491.

34. *St. Louis Sw. Ry. v. Pennington*, 553 S.W.2d 436, 450 (Ark. 1977).

35. *Id.*

We do not believe that any of these factors involve such technical and scientific issues that a jury is incapable of understanding and weighing the evidence without expert testimony. All involve matters within the common knowledge and experience of the jury. We believe that the jury can evaluate all the circumstances of the case and make a just award without expert testimony.<sup>36</sup>

*B. Equivalent Grief Damages Are Available to Parents of Adult Child Decedents*

In 1991, the Court decided *Clymer v. Webster*, expanding the scope of damages available to parents of an adult child decedent:

The question confronting us herein is whether the WDA permits a parent to recover damages for the loss of companionship resulting from the death of an adult child. The 1976 amendment recognizes a right of recovery for loss-of-companionship damages when the decedent is a minor child, but it makes no mention of adult children.<sup>37</sup>

While uncertain as to the reason for the “omission,” the Court concluded from its legislative history “that the Legislature was more concerned with clarifying the scope of damages available to the relatives of minor decedents than limiting the damages available upon the death of an adult decedent.”<sup>38</sup>

The Court went on:

In any case, the amendment neither expressly nor implicitly precludes a plaintiff who is seeking compensation for the death of an adult child from showing that, under the circumstances of a particular case, he or she is entitled to loss-of-companionship damages . . . . [W]e do not believe the statute should be narrowly construed to foreclose the recovery of loss-of-companionship damages for parents of decedent adult children. As previously noted, the WDA is to be liberally construed. The negative inference that defendants would have us adopt—that loss-of-companionship damages are not available to a parent of a deceased adult child—does not rise to the level of “plain

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36. *Hartnett*, 153 Vt. at 162, 569 A.2d at 492.

37. *Clymer v. Webster* 156 Vt. 614, 618, 623, 596 A.2d 905, 908, 911 (1991).

38. *Clymer*, 156 Vt. at 623, 596 A.2d at 911.

meaning” so as to require us to hold otherwise, and we decline to do so.<sup>39</sup>

With regard to loss-of-companionship damages for parents of decedent adult children, the Court explicitly rejected the argument that Hartnett held to a narrower statutory interpretation:

In *Hartnett*, the issue was whether specific terms within the 1976 amendment—“loss of love and companionship of the child” and “destruction of the parent-child relationship”—encompass damages for grief and mental anguish. We noted that the “statutory language of the 1976 amendment to §1492(b) was taken from a Washington statute which, in all respects material to [that] case, is identical to §1492(b) as amended,” and that the Washington Supreme Court had interpreted the statute to permit recovery for grief and anguish. We then adopted the Washington court’s analysis, citing the rule of statutory construction that presumes the legislature of the adopting state adopts the construction given the statute by the courts of the other state.<sup>40</sup>

Indeed, in confirming the breadth of damages available under Vermont’s WDA, the *Clymer* Court expressly endorsed the expansive scope of relational damages warranted by the statute’s “remedial purpose”:

By 1976, in Vermont, as elsewhere, the case law concerning the nature and extent of pecuniary loss available under the WDA was in a state of gradual intermittent development. Although no Vermont case had held that relational damages available for the death of a parent or spouse were also available for the death of a child, . . . [i]t had already long been established that pecuniary loss was not restricted to loss of services, and that damages resulting from a child’s death need not be restricted to damages accruing during the decedent’s minority.<sup>41</sup>

Moreover, the Court rejected just the sort of negative implications to be gleaned from the 1976 amendment argued recently in motions to bar grief and mental anguish damages:

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39. *Id.* at 624, 596 A.2d at 911.

40. *Id.* at 624 n.6, 596 A.2d at 911 n.6 (citing *Hartnett*).

41. *Id.* at 626, 596 A.2d at 912 (citations omitted).

We believe that rather than intending to restrict the development of case law recognizing that pecuniary loss is more than loss of services, the 1976 amendment intended to further that development by ensuring that such damages would be available for the death of a minor child. Because the type of damages available to adult decedents is not essential to the principal remedial purpose of the amendment, we shall not adopt the negative implication of the amendment argued by the defendants.<sup>42</sup>

In so doing, the Court quoted with approval Justice Cardozo's words: "Death statutes have their roots in dissatisfaction with the archaisms of the law. . . . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied."<sup>43</sup>

Having determined that the 1976 amendment did not "foreclose an award of loss-of-companionship damages to relatives of adult decedents," the Court next held that such losses do, in fact, constitute "pecuniary injury."<sup>44</sup>

We now hold that the loss of the comfort and companionship of an adult child is a real, direct and personal loss that can be measured in pecuniary terms. Children have an intrinsic value to their parents regardless of who is supporting whom at the time of death. Whether the decedent child is an adult or a minor, society recognizes the destruction of the parents' investment in affection, guidance, security and love.<sup>45</sup>

Indeed, the Court quoted with approval the following language, from an Arizona case, rejecting the assertion that relational losses end when a child reaches age eighteen:

Surely nature recoils from the suggestion that the society, companionship and love which compose filial consortium automatically fade upon emancipation; while common sense and

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42. *Id.* at 626, 596 A.2d at 912.

43. *Id.* at 626, 596 A.2d at 913 (quoting *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 350–51 (1937)).

44. *Id.* at 627, 596 A.2d at 913.

45. *Id.* at 629, 596 A.2d at 914. The Court also rejected a suggestion in *Hartnett v. Union Mut. Fire Ins. Co.*, 153 Vt. 152, 154, 569 A.2d 486, 487 (1989), that damages for mental anguish and loss of companionship were non-pecuniary in nature, noting that the suggestion was not "the result of legal analysis." *Clymer*, 156 Vt. at 629, 596 A.2d at 914 n.8.

experience teach that the elements of consortium can never be commanded against a child's will at any age. The filial relationship, admittedly intangible, is ill-defined by reference to the ages of the parties and ill-served by arbitrary age distinctions. Some filial relationships will be blessed with mutual caring and love from infancy through death while others will always be bereft of those qualities. Therefore, to suggest as a matter of law that compensable consortium begins at birth and ends at age eighteen is illogical and inconsistent with common sense and experience. Human relationships cannot and should not be so neatly boxed.<sup>46</sup>

Finally, the Court laid out the factors to be considered by the jury in awarding such damages:

Every case must stand upon its own facts and circumstances. In determining whether and what amount of damages are appropriate for loss of companionship, the court or jury should consider the physical, emotional, and psychological relationship between the parents and the child. Accordingly, among other things, the factfinder should examine the living arrangements of the parties, the harmony of family relations, and the commonality of interests and activities.<sup>47</sup>

*C. Comparable Emotional Damages Are Available to Surviving Spouses, Children, and Siblings*

In *Mears v. Colvin*, the Court confirmed that the breadth of damages available to a surviving spouse and children arising from the wrongful death of a spouse and parent includes comparable emotional losses:

Under the Wrongful Death Act, the spouse and next of kin of a person whose death is caused by the wrongful act, neglect or default of another may recover "such damages as are just, with reference to the pecuniary injuries resulting from such death." This and other courts have held that such injuries are not limited "to purely economic losses," and may include recovery for the loss of companionship of a spouse or child, as well as "compensation for lost intellectual, moral and physical training, or the loss of care, nurture and protection." In determining

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46. *Clymer*, 156 Vt. at 629, 596 A.2d at 914 (quoting Howard Frank, M.D., P.C. v. Super. Ct. of Ariz., 722 P.2d 955, 960 (Ariz. 1986)).

47. *Clymer*, 156 Vt. at 630, 596 A.2d at 914.

damages, the fact finder may “consider the physical, emotional, and psychological relationship” of the parties, as well as their “living arrangements . . . , the harmony of family relations, and the commonality of interests and activities.”<sup>48</sup>

Then, in *Dubaniewicz v. Houman*, the Court extended the right to recover such emotional damages to the adult sibling of an adult decedent.<sup>49</sup> Importantly, the Court refused to limit such relational damages “based upon who the next of kin is.”<sup>50</sup> “Under our society’s concept of the family, we see no sufficient reason to differentiate between the deprivation of companionship, guidance, advice, love and affection suffered by brothers and sisters upon the death of a family member from that suffered by parents or children.”<sup>51</sup> The Court concluded: “Because this Court has held that damages for loss of companionship are available under § 1492(b), plaintiff may obtain such damages to the extent that he can prove them by submitting evidence of the physical, emotional, and psychological relationship between himself and the decedent.”<sup>52</sup>

Moreover, the Court rejected the dissent’s argument that *Clymer* was wrongly decided and should be reversed:

According to the dissent, because *Clymer* is a less compelling precedent, we should not expand its reasoning to extend loss-of-companionship damages to siblings, even though there is no logical basis for drawing the line between types of next of kin . . . . Our holding, which has been left undisturbed by the Legislature, was based on an extensive historical and statutory analysis. Neither defendants nor the dissent has offered any rational basis for limiting the holding to adult children, and not siblings. Therefore, we reject such a limitation as imposed by the superior court.<sup>53</sup>

#### *D. Grief and Mental Anguish Damages Have Been Awarded by Several Trial Courts*

For all of these reasons, in *Allen v. Southwestern Vermont Medical Center, Inc.*, a wrongful death action brought by an adult daughter seeking

48. *Mears v. Colvin*, 171 Vt. 655, 657–58, 768 A.2d 1264, 1267 (2000) (mem.) (citations omitted).

49. *Dubaniewicz v. Houman*, 2006 VT 99, ¶ 11, 180 Vt. 367, 372, 910 A.2d 897, 901.

50. *Id.* ¶ 11 (quoting *In re Estate of Finley*, 601 N.E.2d 699, 702 (Ill. 1972)).

51. *Id.* ¶ 10 (quoting *Schmall v. Vill. of Addison* 525 N.E.2d 258, 265 (Ill. Ct. App. 1988).

52. *Id.* ¶ 11.

53. *Id.* ¶ 16.

grief and anguish damages arising from the death of her father, Vermont trial court Judge Katherine Hayes rejected the argument that such damages were only available to parents who had lost a minor child.<sup>54</sup>

Judge Hayes first reviewed the history of the WDA, and the “well-established” case law that “pecuniary injuries” are not limited to economic losses.<sup>55</sup> She reviewed the Court’s holding in *Hartnett* that “the term ‘destruction of the parent-child relationship’ must include grief, mental anguish and suffering or it is largely a meaningless concept.”<sup>56</sup> She noted that, “[a]lthough the *Hartnett* case does not directly state that loss of love and companionship also includes grief and mental anguish, it relies on the Washington case *Wilson v. Lund* . . . which makes reference to ‘loss of love’ as well as destruction of the parent-child relationship.”<sup>57</sup>

She then turned to the Court’s decision in *Clymer*, which noted that “loss of love and companionship of an adult child is a real, direct and personal loss that can be measured in pecuniary terms. Children have an intrinsic value to their parents regardless of who is supporting whom at the time of death.”<sup>58</sup> Since 1991, she noted, “the Court has gone on to clarify that the right to recover for loss of companionship under the Act also extends to adult siblings.”<sup>59</sup> She concluded that, based on the reasoning of these cases, “‘pecuniary injury’ under §1492 does include grief and mental anguish directly caused by the destruction of the parent-child relationship and loss of love and companionship, whether the claim is made by a child or a parent.”<sup>60</sup> Furthermore, Judge Hayes continued:

[t]his court recognizes that before the 1976 amendments, grief and mental anguish were viewed as non-pecuniary and therefore not compensable under the Act. *Lazelle*, 70 Vt. at 443-44 (“[T]he jury are confined to the pecuniary loss sustained by the widow or next of kin, and cannot take into consideration their grief or suffering . . .”). However, this court concludes that the amendment to the statute in 1976, and the Supreme Court’s subsequent decisions in *Mobbs*, *Hartnett*, *Clymer*, and *Dubaniewicz* clearly signaled that the same kinds of damages are available in all wrongful death claims in Vermont, whether for

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54. Decision on Motion for Partial Summary Judgment at \*7, *Allen v. Sw. Vt. Med. Ctr., Inc.*, No. 334-9-10 Bncv (Vt. Super. Ct., Nov. 28, 2011), 2011 Vt. Super. LEXIS 62.

55. *Id.* at \*4.

56. *Hartnett v. Union Mut. Fire Ins.*, 153 Vt. 152, 156, 569 A.2d 486, 488 (1989).

57. Decision on Motion for Partial Summary Judgment, *Allen*, 2011 Vt. Super. LEXIS 62, at \*5-6 (citing *Wilson v. Lund*, 491 P.2d 1287, 1290 (Wash. 1971)).

58. *Id.* at 6 (quoting *Clymer v. Webster*, 156 Vt. 614, 629, 596 A.2d 905, 914 (1991)).

59. *Id.* (citing *Dubaniewicz v. Houman*, 2006 VT 99, 180 Vt. 367, 910 A.2d 897).

60. *Id.* at \*6.

the deaths of adult relatives or minor children, and whether brought by parents, children, or other next-of-kin. This court concludes that it is bound by the Supreme Court's unambiguous statement that the 1976 amendment of the Act was intended "not to limit the damages available to the relatives of adult decedents, but rather to further the remedial purposes of the WDA by developing the definition of pecuniary injuries."<sup>61</sup>

Judge Hayes' careful analysis in *Allen* strongly supports the right of Vermont plaintiffs to seek recovery for the destruction of spousal and parental bonds, including their grief and anguish, as evidenced by the "physical, emotional, and psychological relationship"<sup>62</sup> between spouses, and between parents and children of any age.

Almost sixteen years earlier, in *Nielsen v. Spaulding*,<sup>63</sup> Judge Alden Bryan presaged Judge Hayes' expansive analysis in *Allen*. In *Nielsen*, the court denied a defense motion to dismiss the claims of decedent's spouse and adult child for grief and mental anguish as beyond the scope of pecuniary injuries permitted by the WDA.<sup>64</sup>

Judge Bryan started by reviewing the 1976 amendment, which expanded the definition of pecuniary injuries to include the loss of society suffered by a minor child. The court then reviewed the Vermont Supreme Court's decision in *Hartnett*, that pecuniary injuries include grief, mental anguish and suffering, as well as *Clymer*'s further expansion to allow parents to recover such emotional losses resulting from the death of their adult children.<sup>65</sup> Said Judge Bryan:

It seems clear that, while framed in a discussion of the loss of society of an adult child, the Vermont Supreme Court has adopted an expansive definition of the statutory term "pecuniary injury" which would allow this court to define pecuniary injury as including the surviving spouse's and next of kin's loss of the decedent's companionship. This comports with common sense, the reality of family relationships, and the remedial nature of the WDA and is in line with the modern trend.<sup>66</sup>

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61. *Id.* at \*6–7 (citing *Clymer*, 156 Vt. at 625–26, 596 A.2d at 912).

62. *Clymer*, 156 Vt. at 630, 596 A.2d at 914.

63. *Nielsen v. Spaulding*, No. S1209-93 CnC, at 11 (Vt. Super. Ct. Jan. 11, 1996) (on file).

64. *Id.*

65. *Id.* at 8.

66. *Id.* at 8–11 (citing W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 127, 952 (5th ed. 1984) ("[S]ome form of mental distress damage is explicitly recognized in a number of states and the list appears to be growing . . .")).

Finally, Judge Bryan recognized that the Vermont Supreme Court had already conflated loss of consortium damages with those for grief and mental anguish, and held that both are recoverable as pecuniary injuries under the statute:

Therefore, the court holds that the definition of pecuniary injuries under 14 V.S.A. § 1492(b) includes loss of companionship suffered by the surviving spouse and next of kin. Plaintiff's claim for loss of companionship under the WDA § 1492(b) may be maintained under that statute. Also, as Hartnett makes clear, grief and anguish are an essential aspect of these injuries and these claims may also be prosecuted.<sup>67</sup>

So, too, in *Culnane v. Ultramar Energy, Inc.*, Judge Suntag denied a defense motion to dismiss the mental anguish claims of a surviving spouse and children for the loss of their spouse and parent.<sup>68</sup> Noting that ““pecuniary injuries”” had long since been expanded to include ““lost intellectual, moral and physical training, or the loss of care, nurture and protection,””<sup>69</sup> the court rejected the contention that making such ““garden variety”” mental suffering claims requires putting one's mental health at issue.<sup>70</sup>

Of the four trial court orders which granted defense motions to dismiss the survivors' claims of grief and mental anguish, and to bar evidence of such losses,<sup>71</sup> only two—*Leach* and *Murphy*—were issued with written decisions.<sup>72</sup>

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67. *Id.* at 11.

68. *Culnane v. Ultramar Energy, Inc.*, No. 13-1-05 Bncv, at 5 (Vt. Super. Ct., Mar. 19, 2009) (on file).

69. *Id.* at 4 (quoting *Mobbs v. Cent. Vt. Ry.*, 150 Vt. 311, 316, 553 A.2d 1092, 1095 (1988)).

70. *Id.* at 4–5 (citing 81 AM. JUR. 2d *Witnesses* § 486 (2004) (““The usual claims for mental suffering resulting from a personal injury or the death of a relative alleged in a wrongful-death case not exceeding the suffering an ordinary person would likely experience in similar circumstances, and not requiring expert testimony to establish, do not place the plaintiff's mental health at issue.””)).

71. *Leach v. Fletcher Allen Health Care, Inc.*, No. S0125-02 CnC, 2004 Vt. Super. LEXIS 40, 5 (Vt. Super. Ct., Nov. 1, 2004); *Estate of Kennison v. Cent. Vt. Med. Ctr.*, No. 616-9-08 Wncv (Vt. Super. Ct., Oct. 26, 2010) (on file); Order Granting the Defendant's Motion to Exclude Plaintiff's Evidence of Mental Anguish, *supra* note 4; Ruling on Motion for Partial Summary Judgment, *supra* note 4, at 4–5.

72. In *Kennison*, Judge Crawford's two sentence entry order simply concludes that “[n]o witness will be permitted to testify concerning issues of grief and anguish since these lie beyond the permitted scope of recovery by family members who have suffered the loss of a parent and spouse.” *Kennison*, No. 616-9-08 Wncv, at 1. In *Bargiel*, Judge Teachout's entry order states that it “adopts the analysis set forth by Defendants' counsel, and rules inadmissible evidence of decedent's surviving mother's mental anguish or grief, experienced as a consequence of decedent's death.” Order Granting the Defendant's Motion to Exclude Plaintiff's Evidence of Mental Anguish, *supra* note 4.

In *Leach*, Judge Norton recognized the expanding interpretations of pecuniary losses in *Hartnett* and *Clymer*, but noted, incorrectly, that the Court had not yet “construed the Wrongful Death Act so as to extend the definition of ‘pecuniary injuries’ to include loss of companionship for a child or spouse of a decedent.”<sup>73</sup> On that basis, the trial court determined that where the “individuals seeking recovery . . . are the decedent’s spouse and children, . . . the Wrongful Death Act does not permit recovery for the loss of companionship under the circumstances of this case.”<sup>74</sup> The trial court also questioned whether loss-of-companionship damages were distinct from grief and emotional upset, but, having already determined that a decedent’s spouse and children could not recover lost companionship damages, “even if grief and emotional upset evidence were related to loss of companionship, it would be irrelevant.”<sup>75</sup>

Five years later, in 2009, Judge Toor ruled that neither the decedent’s surviving spouse nor his children could recover for their grief, anguish, and depression under the WDA.<sup>76</sup> The court started by citing the 1898 decision in *Lazelle v. Town of Newfane* for the proposition that, while “‘pecuniary injuries’ include not only the lost economic contributions of the deceased, but also ‘lost intellectual, moral and physical training, or the loss of care, nurture and protection,’” they do not include grief and mental suffering.<sup>77</sup> She also relied on a treatise for that proposition.<sup>78</sup>

Judge Toor reviewed the *Hartnett* Court’s conclusion that “the term ‘destruction of the parent-child relationship’ must include grief, mental anguish and suffering.”<sup>79</sup> Yet, she distinguished that holding by stating that “the Court has not held that recovery for the surviving parties’ ‘grief,

73. *Leach*, 2004 Vt. Super. LEXIS 40 at 3. In fact, in *Mears v. Colvin*, 171 Vt. 655, 657–58, 768 A.2d 1264, 1267 (2000), the Court had done just that, holding that pecuniary injuries could include recovery for loss of child or spouse’s companionship, as well as loss of the care, nurture and protection of the decedent.

74. *Leach*, 2004 Vt. Super. LEXIS 40, at 3–4.

75. *Id.* at 4.

76. Ruling on Motion for Partial Summary Judgment, *supra* note 4, at 6.

77. *Id.* at 3 (citing *Lazelle v. Town of Newfane*, 70 Vt. 440, 443, 41 A. 511, 512 (1898) (explaining that “in estimating the damages the jury are confined to the pecuniary loss sustained by the widow or next of kin, and cannot take into consideration their grief and mental suffering, nor give damages by way of solatium”)).

78. *Id.* (citing 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:38, at 3-154 (3d ed. 1992) (“It remains the predominant view of American jurisdictions, even those recognizing the compensability of nonpecuniary losses, that the mental anguish and grief experienced by the survivors of the decedent are not compensable.”)). *But see* STUART SPEISER & JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH, § 7:1 (4th ed. 2005) (“[T]he number of jurisdictions allowing such recovery [for grief and anguish damages] is growing.”).

79. Ruling on Motion for Partial Summary Judgment, *supra* note 4, at 3 (quoting *Hartnett v. Union Mut. Fire Ins.*, 153 Vt. 152, 156, 569 A.2d 486, 488 (1989)).

mental anguish and suffering’ applies to the loss of any family member other than a minor child.”<sup>80</sup> She also predicted, correctly, that the Court would likely expand the scope of pecuniary losses recoverable by all survivors to include loss of companionship damages,<sup>81</sup> but then determined that “loss of companionship is not the same as grief, anguish, and emotional upset.”<sup>82</sup>

### III. THE NATIONAL TREND IS TOWARD INCLUSION OF GRIEF AND ANGUISH DAMAGES FOR WRONGFUL DEATH ACTIONS

A growing number of jurisdictions have explicitly broadened wrongful death damages to include grief and anguish.<sup>83</sup> Today, at least twenty-four states allow such damages in wrongful death cases.<sup>84</sup>

In modern times, “a child’s chief value to his family is emotional, not economic.”<sup>85</sup> In contrast, in the 1800s—an age of child labor and family farms—wrongful death acts compensated parents for the lost earnings and services they would have received from their children. The trend has steadily been moving away from a strictly monetary valuation of wrongful death, such that now, the jurisdictions are approximately equally split on whether to permit grief and anguish damages in a wrongful death action.

In 2007, Illinois became the twenty-fourth state<sup>86</sup> to allow recovery for “grief, sorrow and mental suffering at the loss of their loved one.”<sup>87</sup> Such

80. *Id.* at 3–4.

81. *Id.* at 4.

82. *Id.* (citing DAN B. DOBBS, *THE LAW OF TORTS*, § 297 (2001) (“Loss of companionship, society and the like—consortium rights—are usually viewed as something distinct from anguish or grief . . .”).

83. *See* VT. STAT. ANN. tit. 14, § 1492(b) (2010) (broadening Vermont’s damages to explicitly include the loss of love and companionship in wrongful death suits).

84. *See* SPEISER, *supra* note 78, at §§ 6:41–6:42, 7:27–7:28 (providing a national summary on recovery for mental anguish); James L. Isham, Annotation, *Recovery of Damages for Grief or Mental Anguish Resulting from Death of Child—Modern Cases*, 45 A.L.R. 4th 234 § 2 (1986) (listing several states that provide for grief and mental anguish damages); Helen W. Gunnarsson, *Mental Suffering Now Compensable in Wrongful Death Cases*, 95 Ill. Bar Journal 400 (2007) (discussing how Illinois became the twenty-fourth state to allow wrongful-death plaintiffs to recover for grief, sorrow, and mental suffering). “In the past few decades, however, there has been a widespread, though hardly universal, movement among American courts and legislatures explicitly to provide redress for [intangible emotional injuries]” resulting from wrongful death of a loved one. 49 AM. JUR. PROOF OF FACTS 2D *Death of Child* 191 § 1 (1987).

85. Isham, *supra* note 84, § 2.

86. For a national summary, *see* SPEISER & ROOKS, *supra* note 72, at §§ 6:42, 7:1 (4th ed.); Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 23 n.129 (2005).

87. Gunnarsson, *supra* note 84, at 400.

damages are now also allowed in Alaska,<sup>88</sup> Arizona,<sup>89</sup> Arkansas,<sup>90</sup> Delaware,<sup>91</sup> Florida,<sup>92</sup> Illinois,<sup>93</sup> Kansas,<sup>94</sup> Louisiana,<sup>95</sup> Maryland,<sup>96</sup> Montana,<sup>97</sup> Nevada,<sup>98</sup> North Dakota,<sup>99</sup> Ohio,<sup>100</sup> Oklahoma,<sup>101</sup> South Carolina,<sup>102</sup> Texas,<sup>103</sup> Vermont, Virginia,<sup>104</sup> and West Virginia,<sup>105</sup> as well as Puerto Rico.<sup>106</sup>

Grief and mental suffering are not recoverable wrongful death damages in the remaining states, including Alabama,<sup>107</sup> California,<sup>108</sup> Colorado,<sup>109</sup>

88. *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038, 1047 (Alaska 1986).

89. *Mullen v. Posada Del Sol Health Care Ctr.*, 819 P.2d 985, 986 (Ariz. Ct. App. 1991) (“Allowable items of injury under the statute are loss of love, affection, companionship, consortium, personal anguish and suffering.”).

90. ARK. CODE ANN. § 16-62-102(f) (2014); *McMullin v. United States*, 515 F. Supp. 2d 914, 929 (E.D. Ark. 2007).

91. DEL. CODE ANN. tit. 10, § 3724(d)(5) (2015).

92. FLA. STAT. § 768.21 (2014); *Wilbur v. Hightower*, 778 So. 2d 381, 383 (Fla. Dist. Ct. App. 2001).

93. *Ford-Sholebo v. United States*, 980 F. Supp. 2d 917, 1000 (N.D. Ill. 2013) (“In 2007 . . . the Illinois Legislature amended the Wrongful Death Act to allow recovery for grief, sorrow, and mental suffering of the decedent’s lineal next of kin.”).

94. KAN. STAT. ANN. § 60-1904(a) (2014).

95. *Bryant v. Solomon*, 712 So. 2d 145, 147 (La. Ct. App. 1998) (“In addition, the jurisprudence recognizes that the survivors of the decedent may also be awarded damages for their mental pain, suffering and distress resulting from the death.”).

96. MD. CODE ANN., CTS. & JUD. PROC. § 3-904(d) (2014).

97. *Dawson v. Hill & Hill Truck Lines*, 671 P.2d 589, 594 (Mont. 1983).

98. NEV. REV. STAT. § 41.085 (West 2014); *Donaldson v. Anderson*, 862 P.2d 1204, 1205–07 (Nev. 1993) (requiring additur of \$400,000 for death of 17-year-old son where jury awarded zero damages for grief, sorrow, and loss of consortium).

99. *Hopkins v. McBane*, 427 N.W.2d 85, 93 (N.D. 1988) (“The fact that damages for mental anguish may be difficult to measure in a wrongful death action is an insufficient reason to deny them altogether.”).

100. OHIO REV. CODE ANN. § 2125.02 (B)(5) (West 1996).

101. OKLA. STAT. tit. 12, § 1053(B) (2014).

102. *Knoke v. S.C. Dep’t. of Parks, Recreation and Tourism*, S.E.2d 258 (S.C. 1996).

103. *Sanchez v. Schindler*, 651 S.W.2d 249, 253 (Tex. 1983).

104. *In re Sept. 11 Litig.*, No. 21 MC97(AKH), 2007 WL 3036439, \*2 (S.D.N.Y. Oct. 17, 2007) (allowing a Virginia jury to award damages in a wrongful death action for “[s]orrow, mental anguish, and solace which may include the loss of society, companionship, comfort, guidance, kindly offices and advice of the decedent” (quoting VA. CODE ANN. § 8.01-52))

105. *Stump v. Ashland, Inc.*, 499 S.E.2d 41, 53 (W.Va. 1997).

106. *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1196 (1st Cir. 1995).

107. ALA. CODE § 6-5-410 (2003); *Cherokee Elec. Coop. v. Cochran*, 706 So. 2d 1188, 1193 (Ala. 1998) (ruling that the statute “authorizes punitive damages but . . . not . . . compensatory damages”).

108. *See Corder v. Corder*, 161 P.3d 172, 183 (Cal. 2007) (“[N]o damages can be given for the pain or anguish suffered by the person who is killed, the damages . . . being limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given by reason of the death of the victim.”).

109. *Jones v. Hildebrand*, 550 P.2d 339, 342 (Colo. 1976), *overruled by Espinoza v. O’Dell*, 633 P.2d 455 (Colo.) *Espinoza* was subsequently overruled in part on grounds not germane to this Article.

Georgia,<sup>110</sup> Hawaii,<sup>111</sup> Idaho,<sup>112</sup> Indiana,<sup>113</sup> Iowa,<sup>114</sup> Massachusetts,<sup>115</sup> Michigan,<sup>116</sup> Mississippi,<sup>117</sup> Missouri,<sup>118</sup> Nebraska,<sup>119</sup> New Jersey,<sup>120</sup> New Mexico,<sup>121</sup> New York,<sup>122</sup> Oregon,<sup>123</sup> Pennsylvania,<sup>124</sup> South Dakota,<sup>125</sup> Tennessee,<sup>126</sup> and Wyoming,<sup>127</sup> as well as the Virgin Islands.<sup>128</sup>

A closer review of case law and statutes from other states is instructive. In *St. Louis Southwestern Railroad Co. v. Pennington*, an Arkansas jury awarded damages for grief and anguish to the surviving family members following the death of an adult child.<sup>129</sup> The Arkansas Supreme Court specifically sustained the damages award, not only to the decedent's adult

See also *Bradshaw v. Nicolay*, 765 P.2d 630, 632 (Colo. Ct. App. 1988) (finding parental grief is not element of damages under Wrongful Death Act).

110. *Carroll Fulmer Logistics Corp. v. Hines*, 710 S.E.2d 888, 890 (Ct. App. Ga. 2011).

111. HAW. REV. STAT. § 663-3 (2014) (omitting grief and anguish as allowable damages).

112. IDAHO CODE ANN. §5-311 (2014); *Volk v. Baldazo*, 651 P.2d 11, 14 (Idaho 1982) (stating that “grief and mental anguish are not to be considered” in wrongful death actions).

113. *Johnson Controls, Inc. v. Forrester*, 704 N.E.2d 1082, 1084 (Ind. Ct. App. 1999).

114. *Wardlow v. Keokuk*, 190 N.W.2d 439, 454 (Iowa 1971).

115. MASS. GEN. LAWS ch. 229, § 2 (2014); *MacCuish v. Volkswagenwerk A.G.*, 494 N.E.2d 390, 401 (Mass. App. Ct. 1986) (“[A] simple instruction calling for the exclusion of grief, anguish, and bereavement of the survivors would have been proper and advisable.”).

116. MICH. COMP. LAWS § 600.2922 (West 2004); *Haupt v. Yale Rubber Co.*, 185 N.W.2d 161, 163 (Mich. Ct. App. 1970) (disallowing damages to “be awarded on the basis of the grief endured by the surviving dependents”).

117. *Bridges v. Enter. Prods. Co.*, 551 F. Supp. 2d 549, 557 (S.D. Miss. 2008).

118. MO. ANN. STAT. § 537.090 (West 2014); *Price v. Schnitker*, 239 S.W.2d 296, 300 (Mo. 1951) (holding a jury could not consider “the pain, anguish or bereavement which may have been suffered by the parents or surviving sister”).

119. *Williams v. Monarch Transp., Inc.*, 470 N.W.2d 751, 756 (Neb. 1991) (“In a wrongful death action, damages are not recoverable for mental suffering or anguish, bereavement, or solace.”).

120. *Green v. Bittner*, 424 A.2d 210, 215 (N.J. 1980); see *Carey v. Lovett*, 622 A.2d 1279, 1290 (N.J. 1993) (finding that parents’ emotional distress caused by death of child was not compensable).

121. N.M. STAT. ANN. § 41-2-1 (West 2003); *Folz v. State*, 797 P.2d 246, 260 (N.M. 1990) (disallowing damages “for grief or sorrow normally attending the death of a family member”).

122. N.Y. EST. POWERS AND TRUSTS LAW § 5-4.3 (McKinney 2013); see *Bell v. Cox*, 54 A.D.2d 920 (N.Y. 1976) (refusing “recovery . . . for grief, loss of society or loss of companionship”).

123. OR. REV. STAT. § 30.020 (West 1995); see *Demars v. Erde*, 640 P.2d 635, 637 (Or. Ct. App. 1982) (interpreting statute as “not includ[ing] compensation for mental suffering of surviving parents or relatives”).

124. *Schorr v. Borough of Lemoyne*, 265 F. Supp. 2d 488 (M.D. Pa. 2003) (ruling there is no right of action or damages for parental loss of consortium for the loss of a minor child in Pennsylvania).

125. *Anderson v. Lale*, 216 N.W.2d 152, 158–59 (S.D. 1974) (permitting damages for loss of companionship but not for grief and anguish).

126. *Thurmon v. Sellers*, 62 S.W.3d 145, 161 (Tenn. Ct. App. 2001) (“[P]arents cannot recover for the sorrow and anguish endured as a result of the child’s death.”).

127. *Knowles v. Corkill*, 51 P.3d 859, 863 (Wyo. 2002) (“Wyoming . . . does not allow damages for mental anguish.”).

128. *Williams v. Dowling*, 318 F.2d 642 (3d Cir. 1963) (applying law of Virgin Islands).

129. *St. Louis Sw. Ry. Co. v. Pennington*, 553 S.W.2d 436, 446 (Ark. 1977).

siblings, but also to the decedent's mother.<sup>130</sup> The court wrestled with the difficulty of quantifying mental anguish and grief<sup>131</sup> but concluded that difficulty in quantifying such damages was no reason to exclude them.<sup>132</sup>

Similarly, in *Hern v. Safeco Insurance Co. of Illinois*, the Montana Supreme Court relied on its state's wrongful death statute<sup>133</sup> to affirm damages for grief and anguish to a parent of an adult child. "[W]e affirm the jury's award of \$450,000.00 to Ardell for grief, sorrow, and mental anguish. It is well established that a jury may award reasonable compensation for grief, sorrow and mental anguish in wrongful death actions."<sup>134</sup>

Florida's Wrongful Death Act also allows parents to claim mental pain and suffering damages for the loss of an adult child: "Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors."<sup>135</sup> So, too, West Virginia's Wrongful Death Act allows for the recovery of grief and anguish, and does not limit such recovery to the death of minor children: "The verdict of the jury shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent."<sup>136</sup> Wrongful death recoveries under Louisiana law include both the loss of the decedent's love and affection, and the grief and mental and physical anguish suffered by survivors.<sup>137</sup>

## CONCLUSION

Damages available under Vermont's WDA are not limited to economic losses. Rather, the trajectory of Vermont case law has steadily been to expand both the emotional damages available under the Act and the

130. *Id.* at 452.

131. *See id.* at 449 ("The difficulty in finding practical approaches to measuring grief in an effort not to cure it, but to compensate it, by the clumsy remedy of money damages is not a problem peculiar to the one we are addressing here.").

132. *See id.* at 446 ("[W]e have no quarrel with the policy decision of the General Assembly on this score, fully recognizing that there were good arguments supporting the attempt to provide for compensation for grief.").

133. MONT. CODE ANN. § 27-1-323 (2014).

134. *Hern v. Safeco Ins. Co.*, 125 P.3d 597, 609 (Mont. 2005) (quotation marks omitted).

135. FLA. STAT. § 768.21(4) (2014).

136. W. VA. CODE. § 55-7-6(c)(1) (2014).

137. LA. CIV. CODE. ANN. art. 2315.2 (2013); *see also* *Diefenderfer v. La. Farm Bureau Mut. Ins. Co.*, 383 So. 2d 1032, 1034 (La. App. 1980) (granting of damages for mental anguish and grief not reviewed).

permissive claimants who may seek such damages. Under *Hartnett*, *Clymer*, and *Dubaniewicz*, surviving family members who have lost children or siblings, regardless of whether their decedents are minors or adults, are clearly entitled to recover grief and anguish damages. And as the *Dubaniewicz* Court stated, “we see no sufficient reason to differentiate between the deprivation of companionship, guidance, advice, love and affection suffered by brothers and sisters upon the death of a family member from that suffered by parents or children.”<sup>138</sup> Based on the reasoning of these cases, as well as the growing trend in other jurisdictions, there is simply no justification for denying grief and anguish damages to surviving family members whose loved one is killed by the negligence of another, whether such decedent is a spouse, a parent, or a sibling.

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138. *Dubaniewicz v. Houman*, 2006 VT 99, ¶ 10, 180 Vt. 367, 372, 910 A.2d 897, 900 (quoting *Schmall v. Vill. of Addison*, 525 N.E.2d 258, 265 (Ill. Ct. App. 1988)).