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The Unemployed Housewife-Mother: Fair Appraisal of Economic Loss in a Wrongful Death Action

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proof of mere presence at an illegal still as allowing a presumption of possession and control of it, "with all due deference to the judgment of Congress."[68]

Romano would appear to indicate that the mere presence of a defendant in a car in which a dangerous drug is found cannot by itself be held as presumptive evidence of his knowing possession of the drug. The words "presumptive evidence" should be construed either to mean "circumstantial evidence," requiring the prosecution to produce additional facts besides presence in order to sustain its burden of proof beyond a reasonable doubt, or, at most, to apply only to the owner or driver. Otherwise, the statute must be considered to be in violation of the fourteenth amendment's due process of law clause. In any event, these last decisions of the Supreme Court must be interpreted as having seriously weakened the validity of section 220.25 of the New York Penal Law, and it is hoped that this statute will soon be appropriately challenged.

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THE UNEMPLOYED HOUSEWIFE-MOTHER: FAIR APPRAISAL OF ECONOMIC LOSS IN A WRONGFUL DEATH ACTION*

I. INTRODUCTION

For many years our courts and juries have placed what seems in retrospect to be a small or minimum value on the damages sustained to the next of kin on the death of a housewife and mother. It is only in the last two decades that our courts have come to recognize the true value of a housewife and the services she performs.[1]

Once the courts recognized these services as an ingredient to be used in determining injuries to the survivor of a decedent housewife and mother, the amount of recovery for the loss of

68. 382 U.S. at 144.

*The author wishes to express his indebtedness to Aaron J. Broder, Esq., New York, New York whose work provided the inspiration for the development of this topic.

1. Horton v. State, 50 Misc. 2d 1017, 1024, 272 N.Y.S.2d 312, 320 (Ct. Cl. 1966).

such services increased.[2] Determinations in many jurisdictions have been aided by the type and extent of expert testimony utilized in formulating this appraisal.[3]

In an era where women are demanding liberation from second class status in social, political and economic arenas, the New York courts have not provided a definitive answer as to whether expert testimony can be considered in evaluating damages in a wrongful death action. Nor have sufficient guidelines been provided to be utilized in determining the value of a "substitute mother-housewife."[4]

The purpose of this comment is to consider the rationale of those cases allowing expert testimony to establish the value of the services of a housewife-mother. More importantly, the author intends to illuminate the conflict that exists in New York law and suggest the pitfalls to be avoided by the Court of Appeals when and if this matter is considered by that court.

II. Wrongful Death Statutes—Damages

Prior to the enactment of Lord Campbell's Act,[5] common law did not provide recovery for the death of a human being who died as a result of the negligence or wrongful act of another.[6] As one ardent critic of the common law position states: "Compressed into one sentence, at common law death did not create liability: rather, death extinguished liability."[7] Most sta-

2. *Id.* at 321.

3. *See* text accompanying note 20 *infra.*

4. *See* text accompanying note 16 *infra.*

5. 9 & 10 Vict. c. 93 (1846).

6. *See* Baker v. Bolton, 1 Comp. 493, 170 Eng. Rep. 1033 (1808) holding that the infliction of death was not a tort against either the survivor or the decedent; *cf.* Ford v. Monroe, 20 Wend. 210 (N.Y. Sup. Ct. 1838) which appeared to refute the common law rule expounded in *Baker, supra. But see* Green v. Hudson R.R., 28 Barb. 9, 16 How. Pr. 230 (N.Y. Sup. Ct. 1858), *aff'd,* 41 N.Y. (2 Keyes) 294 (1866), which dismissed the holding in *Ford, supra* as mere dicta. For the common law rule in New York, see Kelliher v. New York C. & H.R.R., 212 N.Y. 207, 105 N.E. 824 (1914); Sharrow v. Inland Lines, 214 N.Y. 101, 108 N.E. 217 (1915).

7. Lambert, *History and Future,* in Wrongful Death and Survivorship 3 (NACCA 6th Circuit Seminar Beall ed. 1957). See Morange v. States Marine Lines, 398 U.S. 375 (1970) for further criticism of the *Baker* rule.

tutory responses,[8] enacted to fill this gap left by the common law, are modeled after the provisions set forth in Lord Campbell's Act[9] and generally use the following scheme:

> The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a *wrongful act, neglect or default* which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.[10]

While wrongful death statutes authorize the institution of an action only where the party killed would have been able to sue had death not ensued, it is important to understand that the awarding of damages must be based on injuries to the survivor and not to the decedent.[11]

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8. For an excellent discussion of the historical development of wrongful death statutes, see Lambert, *History and Future,* in WRONGFUL DEATH AND SURVIVORSHIP 3-37 (NACCA 6th Circuit Seminar Beall ed. 1957). *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH app. A at 778-904 for the text of the individual state wrongful death and survival statutes. *See also* Holdsworth, *The Origin of the Rule in Baker v. Bolton,* 32 L.Q. REV. 431 (1916); Malone, *Genesis of Wrongful Death* 17 STAN. L. REV. 1043 (1965).

9. 9 & 10 Vict. c. 93 (1846).

10. N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967) (emphasis added) which can be considered a pure death act and not amalgamated with survival features. *See* Western Union Tel. Co. v. Cochran, 277 App. Div. 625, 102 N.Y.S.2d 65 (3d Dep't 1951), *aff'd,* 302 N.Y. 545, 99 N.E.2d 882 (1951), interpreting the New York statute to create a right of action unknown to the common law. For an analysis of New York Law, see 7B O. WARREN, NEGLIGENCE IN THE NEW YORK COURTS § 1-10.03 [2]. For an informative discussion of the history, purpose and application of the New York wrongful death statute, see Holmes v. City of New York, 269 App. Div. 95, 54 N.Y.S. 289 (1st Dep't), *aff'd,* 295 N.Y. 615, 65 N.E.2d 449 (1945).

Wrongful death statutes in the following states all incorporate and base recovery on the commission of a *wrongful act, neglect, or default.* ARIZ. REV. STAT. ANN. § 12-611 (1956); ARK. STAT. ANN. § 27-906 (1962); COLO. REV. STAT. ANN. § 41-1-2 (1964); D.C. CODE ANN. § 16-2701 (1970); HAWAII REV. LAWS § 663-3 (1968); ILL. REV. STAT. ch. 70, § 1 (1969); ME. REV. STAT. ANN. tit. 18, § 2551 (1964); MD. ANN. CODE art. 67, § 1 (1957); MICH. COMP. LAWS § 600.2922 (1968); MO. STAT. ANN. § 537.080 (1952); NEB. REV. STAT. § 30-809 (1964); NEV. REV. STAT. § 12.090 (1968) (excludes default); N.J. REV. STAT. § 2A:31-1 (1951); N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967); N.C. GEN. STAT. § 28-173 (1965); N.D. CENT. CODE § 32-21-01 (1960); OHIO REV. CODE ch. 2125.01 (Baldwin 1964); R.I. GEN. LAWS ANN. § 10-7-1 (1969); S.C. CODE ANN. § 10-1951 (1962); S.D. COMPILED LAWS ANN. § 21-5-1 (1967); VT. STAT. ANN. tit. 14 § 1492 (1959); VA. CODE ANN. § 8-633 (1950); WASH. REV. CODE ANN. § 4.20.010 (1962); W. VA. CODE ANN. § 55-7-5 (1966); WIS. STAT. ANN. § 331.03 (1958); WYO. STAT. ANN. § 1-1065 (1957).

11. It was suggested by some courts and commentators that the prohibition of nonstatutory wrongful death actions derived support from the ancient common-law rule that a personal cause of action in tort did not survive the death of its possessors . . . and the decision in Baker v. Bolton itself may have been influenced by this principle . . . . However, it is now universally recognized that

A majority of jurisdictions have incorporated language in their statutes requiring that all damages be defined in terms of a pecuniary loss to the decedent's survivor.[12] Initially this was intended to be a limitation on recovery. However, this statutory language has been construed broadly and extended beyond mere contribution of food, shelter, money or property, and damages have been awarded to survivors for loss of society, care and attention.[13] Regardless of the interpretation of the statute, the courts consider the following elements in assessing damages for the wrongful death of an employed individual: age of the decedent, his health, habits, qualities, income, and the number, age, sex, situation and condition of those dependent upon him or

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because this principle pertains only to the victim's own personal claims, such as for pain and suffering, it has no bearing on the question whether a dependent should be permitted to recover for the injury he suffers from the victim's death . . . .

Moragne v. States Marine Lines, 398 U.S. 375, 385 (1970).

For a discussion of New York law relating to this issue, see Chartener v. Kice, 270 F. Supp. 432, 437 (E.D.N.Y. 1967): "under both New York and California law, a cause of action for wrongful death is an original and distinct cause of action which accrues at the time of death and inures to the benefit of the statutory beneficiaries." *See also* Greco v. Kresge, 277 N.Y. 26, 12 N.E.2d 557 (1938), stating that actions to recover for personal injuries abate with the death of the injured person, but that the New York statute creates a new cause of action based not upon damage to the estate of the deceased, but rather for *pecuniary injury* to the surviving spouse and next of kin.

12. *See e.g.*, N.Y. EST., POWERS & TRUSTS LAW § 5-4.3 (McKinney 1967) which provides as follows:

The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be *fair and just compensation for the pecuniary injuries* resulting from the decedent's death to the persons for whose benefit the action is brought. . . . (emphasis added)

This standard is contrasted with those statutes under which damages for a wrongful death action are measured by the amount of loss to the estate. *See generally* S. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 3:1 & 3:2 (1966) for a comparison of these two standards.

13. *See* 22 AM. JUR. 2d *Death* § 123 (1965):

The word 'pecuniary,' as used in death statutes, has been said not to be in a sense of the immediate loss of money or property but to look to the prospective advantages of a pecuniary nature that have been cut off by the premature death of the person from whom they would have come.

See also Page, *Damages for Wrongful Death—Broadening View of Pecuniary Loss*, in DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH CASES 383 (Schreiber ed. 1965); Robins, *The Broadening Concept of "Pecuniary Loss" in Wrongful Death Statutes*, PERSONAL INJURY ANNUAL 563 (1961); H. TIFFANY, DEATH BY WRONGFUL ACT § 154 (2d ed. 1913), indicating that wrongful death statutes should be construed broadly in light of their objectives and should not be restricted to items estimated in terms of money. *See generally* Hare, *The Rationale of Damages for the Death of a Minor or Dependent Person*, 41 B.U.L. REV. 336 (1961).

her for support.[14] Survivors of an *employed* female (wife-mother) are not disadvantaged in the evaluation of injuries because of a wrongful death. This results from the fact that there is no distinction made in the procedure utilized in evaluating lost earnings for an employed male or female.[15]

III. Substitute Mother-Housewife Concept

Economic indicators and guidelines are readily available in assessing the worth of an employed female.[16] A distinct problem develops, however, in attempting to make a similar assessment for an *unemployed female.* Until recently, courts did not consider the substitute services of a mother-housewife as an element to be utilized in assessing the damages in an action for wrongful death instituted by the decedent's children or husband.[17] It has been noted that:

> In computing the damages of a husband for the death of his wife the recovery should not be limited to the recovery of a menial servant. Neither should the recovery be limited to what the wife would have earned working for another, nor to a combination thereof. Rather, would these be included along with the value of her services in counseling, advising, inspiring, confronting, and otherwise serving her husband as would have reasonably been expected from a wife who was the kind of person she is shown to have been.[18]

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14. *E.g.* St. George v. State, 203 Misc. 340, 118 N.Y.S.2d 596 (Ct. Cl. 1953); Sutherland v. State, 189 Misc. 953, 63 N.Y.S.2d 553 (Ct. Cl. 1947); *In re* Mangan, 162 Misc. 495, 294 N.Y.S. 974 (Sur. Ct. 1937); Weathers v. New York C. R.R., 120 Misc. 830, 199 N.Y.S. 875 (Sup. Ct. 1923). *See also* Moore-McCormack Lines v. Richardson, 295 F.2d 583 (2d Cir. 1961); indicating the importance of evidence as to parental qualities. For the principles to be taken into consideration in appraising basic and potential earnings, see S. Speiser, Recovery for Wrongful Death—Economic Handbook § 1:2 (1970), which utilizes general economic and statistical principles in appraising gross and net loss earnings.

15. S. Speiser, Recovery for Wrongful Death—Economic Handbook § 12:1 (1970).

16. *Id.* at §§ 5:1-10:1.

17. *See* Fraiser v. Public Service Interstate Transp., 244 F.2d 668 (2d Cir. 1957); Merrill v. United Air Lines, 177 F. Supp. 704 (S.D.N.Y. 1959); Williams v. McDowell, 32 Cal. App. 2d 49, 89 P.2d 155 (1939); Spangler v. Helm's New York-Pittsburg Motor Express, 396 Pa. 482, 153 A.2d 490 (1959).

18. S. Speiser, Recovery for Wrongful Death § 4:3 n.20 (1966), *citing* Continental Bus System v. Toombs, 325 S.W.2d 153 (Tex. Civ. App. 1959). *See also* Merrill v. United Air Lines, 177 F. Supp. 704 (S.D.N.Y. 1959).

There are several methods available to attorneys that may be used to prove the value of services of a housewife-mother: proof by presumption, actual substitute costs, testimony of friends and family, and expert testimony.[19] It is apparent that the ability to equate an economic indicator to the type of service performed will provide a more accurate appraisal of the damages involved. Thus, in order to achieve a realistic appraisal of these services, the method chosen by the attorney and allowed by the court becomes important. While proof of damages by presumption, actual substitute costs, or testimony of family and friends can be useful methods to evaluate the loss of services, they do not provide an accurate standard by which damages may be assessed.[20] However, expert testimony, *if admitted by the courts*, can be used to exhibit the current economic value of a substitute housewife-mother and would be the most accurate appraisal of the losses involved.

Most foreign jurisdictions that have considered the issue of allowing expert testimony have concluded that it is properly admissible.[21] Those jurisdictions which have not directly confronted the admissibility question have not held it error to admit such testimony.[22]

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19. For an excellent discussion and analysis of the various methods, see Comment, *Torts—Wrongful Death—"How Much is a Good Wife Worth?,"* 33 Mo. L. Rev. 463, 466-70 (1968).

20. *Id.* at 466-68.

21. Har-Pen Truck Lines v. Mills, 378 F.2d 705 (5th Cir. 1967); State v. Phillips, 470 P.2d 266 (Alaska Sup. Ct. 1970); Smith v. Whidden, 87 So. 2d 42 (Fla. Sup. Ct. 1956); Schmitt v. Jenkins Truck Lines, 170 N.W.2d 632 (Iowa Sup. Ct. 1969). *Compare* Thomas v. S.H. Pawley Lumber, 303 F.2d 604 (7th Cir. 1962); Dobsen v. Richter, 34 Ill. App. 2d 22, 180 N.E.2d 505 (1962), which represents the majority position that the value of damages resulting from the wrongful death of a housewife-mother are within the common knowledge of the jury. They do not, however, indicate that expert testimony will not be admissible as to the value of such services. For an appraisal of case law in this area and an extensive case history, see Comment, *supra* note 18, at 466. *See generally* Keirr, *Damages Arising from the Death of a Housewife*, in NACCA 14th Annual Convention Transcript 645 (1961); Lambert, *Comments on Recent Important Personal Injury (Tort Cases)*, 26-27 NACCA L.J. 45-55 (Nov. 1960 & May 1961); Lambert & Rheingold, *Comments on Recent Important Personal Injury (Tort Cases)*, 28 NACCA L.J. 63, 72-73 (Nov. 1961 & May 1962).

22. Legare v. United States, 195 F. Supp. 557 (S.D. Fla. 1961); Lithgrow v. Hamilton, 69 So. 2d 776 (Fla. Sup. Ct. 1954). For a New York case on this point, see Weiss v. Rubin, 11 App. Div. 2d 818, 205 N.Y.S.2d 274 (3d Dep't), *aff'd*, 9 N.Y.2d 230, 173 N.E.2d 791, 213 N.Y.S.2d 65 (1960). *See also* Lassiter, *Estimating the Monetary Value of Damages in Negligence Cases Involving Death*, in Damages in Personal Injury and Wrongful Death 457, 462 (Schreiber ed. 1965).

In admitting expert testimony on the value of substitute services, the court in *Merrill v. United Air Lines*[23] clearly stated its rationale for doing so.

> To provide orphan children with the best available substitute for a mother one intelligent course would be to obtain the services of a professional worker trained in the field of home economics. This is a recognized branch of applied economics and sociology . . . .
>
> . . . .
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> As knowledge becomes more professionalized, specialists will more frequently be called upon as expert witnesses. This is a judicial by-product of our age of pervasive technology and expanding social services.

By allowing expert testimony to be admitted, the court did not preclude the jury from assessing the weight that should be given to such testimony. Nor did the decision prevent the jury from using "[p]opular knowledge and common sense"[24] in their assessment of the value of the services.

New York case law on the admissibility of expert testimony in wrongful death actions with respect to the estimation of damages is at this time unsettled. It is apparent from an analysis of the cases in this area that an attorney seeking to establish the value of services performed by a housewife-mother is at a disadvantage because of the insufficiency of judicial guidelines.

A comparison of two New York cases, *Zaninovich v. American Airlines*[25] and *Horton v. State*,[26] indicates the conflict that exists. The *Zaninovich* case was a wrongful death action instituted by the executors of the estates of a 29 year old father and 28 year old mother on behalf of four surviving children. The supreme court, special term, permitting expert testimony on the valuation of damages, awarded $550,000 in damages for the wrongful death of the father and $200,000 for the wrongful death of the mother.[27] The appellate division held that such an award was grossly excessive because the jury was influenced by the "poignant sympathy inducing factors."[28] Further, the

23. 177 F. Supp. 704, 705 (S.D.N.Y. 1959), *aff'd*, 288 F.2d 218 (2d Cir. 1961).
24. *Id.* at 705.
25. 47 Misc. 2d 584, 262 N.Y.S.2d 854 (Sup. Ct.), *modified*, 26 App. Div. 2d 155, 271 N.Y.S.2d 866 (1st Dep't 1966).
26. 50 Misc. 2d 1017, 272 N.Y.S.2d 312 (Ct. Cl. 1966).
27. 47 Misc. 2d at 586, 262 N.Y.S.2d at 856.
28. 26 App. Div. at 159, 271 N.Y.S.2d at 871.

court pointed out that unless the plaintiff executors stipulated to a reduced award of $350,000 for the death of the father and $125,000 for the death of the mother, the court would reverse the lower court and remand for a new trial.[29] On the issue of admissibility of expert testimony, the court held that

> *it was error to allow proof as to costs in providing a substitute for the wife.* These are matters within the common ken, and subject to so many variables and choices that no objective standard can be supplied by an expert, if one there be . . . .[30]

Horton was based on a wrongful death action instituted by the dependents of a decedent housewife-mother. The Court of Claims of New York awarded $60,000 in damages. In assessing the amount of damages the court noted that:

> A comparatively recent trend in an action for wrongful death of a woman survived by children is the assessment of damages under the so-called *substitute wife-mother theory.* There are several cases which allow the expert testimony by one qualified in the field of domestic service agencies and hold it is competent evidence of damages for the wrongful death of a housewife. *Weiss v. Rubin,* 11 A.D. 2d 818; [205 N.Y.S.2d 274 (3d Dep't 1960)]; *Zaninovich v. American Airlines, Inc.,* 47 Misc. 2d 584, 262 N.Y.S.2d 854 . . . .[31]

In considering the expert testimony presented, the court concluded that "weight should be given to this testimony in the assessment of damages as to do otherwise would deprive a Claimant of his just damages . . . ."[32]

In analyzing the two cases, it is initially important to note that the court in *Horton* cited the lower court decision in *Zaninovich* as standing for the proposition that expert testimony should be allowed as to the value of substitute services.[33] Subsequent to the decision in *Horton,* the Appellate Division, First Department, *modified* the lower court decision in *Zaninovich* and held that it was error to admit such testimony.[34]

29. *Id.* at 162-63, 271 N.Y.S.2d at 872-74.

30. *Id.* at 159, 271 N.Y.S.2d at 871 (emphasis added). *See* the case comparison, *supra* note 21. It would appear, therefore, that *Zaninovich* is in definite conflict with those jurisdictions similarly holding that it is within the common knowledge of the jury to appraise the value of the loss of services of a housewife-mother. Contrary to other jurisdictions, *Zaninovich* specifically excludes expert testimony on this issue.

31. 50 Misc. 2d at 1022, 272 N.Y.S.2d at 319 (emphasis added).

32. *Id.*

33. *Id.*

34. 26 App. Div. 2d at 155, 271 N.Y.S.2d at 866.

Further, the court in *Horton* cited *Weiss v. Rubin*[35] which antedated *Zaninovich* by five years. In *Weiss,* at the trial stage, the plaintiff introduced testimony through an expert of the New York Family Service Society as to the value of the main services performed by a housewife during the normal course of her daily activities. The cost of hiring a substitute mother was fully set forth in the record. Neither the Appellate Division, Second Department,[36] nor the Court of Appeals[37] commented upon the evidence adduced at the time of the trial. More importantly, however, the court in *Zaninovich* completely ignored the *Weiss* decision. There is no rational basis for the court in *Zaninovich* not to comment on or distinguish the implications that can be drawn from *Weiss.*

The primary reasoning of the court in *Zaninovich* for excluding proof as to the cost of providing a substitute housewife-mother is that these matters are within the "common ken" of the jury, and are subject to so many variables and choices that no objective standard can be supplied by an expert.[38] While it is required under our pecuniary loss standard to demonstrate the monetary equivalent of the decedent's character, her propensities to help her children and family, her ability and capability, and all aspects of her conduct,[39] it would appear that the *Zaninovich* court would not allow expert proof as to these services.

In order to reach this conclusion, the court, citing *Clark v. Iceland S.S. Co.,*[40] relied on the proposition that *only* where the subject of inquiry is of such technical nature that a proper conclusion from the facts depends upon professional or scientific skill, may qualified experts express their opinion as to the proper inference to be drawn from a given set of facts.[41]

The cases cited in *Clark* as not permitting expert testimony concern factual situations where such testimony would be unnecessary to convey the facts to the jury or to enable them to

35. 11 App. Div. 2d 818, 205 N.Y.S.2d 274 (3d Dep't), *aff'd,* 9 N.Y.2d 230, 173 N.E.2d 791, 213 N.Y.S.2d 65 (1960).

36. *Id.*

37. 9 N.Y.2d 230, 173 N.E.2d 791, 213 N.Y.S.2d 65 (1960).

38. 26 App. Div. 2d at 159, 271 N.Y.S.2d at 871.

39. *See supra* note 13 and accompanying text.

40. 6 App. Div. 2d 544, 179 N.Y.S.2d 708 (1st Dep't 1958).

41. 26 App. Div. 2d at 159, 271 N.Y.S.2d at 871; *see* J. PRINCE, RICHARDSON ON EVIDENCE § 387 (9th ed. 1964).

arrive at a determination.[42] Whereas, those cases holding that expert testimony is admissible consider factors which are peculiarly within the knowledge of men whose experience and study enable them to speak with authority on the subject.[43] It has been suggested that admitting expert testimony as to the value of the substitute services of a housewife-mother invades the functions of the jury and is within their "common ken."[44] It has been concluded, however, that "[s]uch modern scientific testimony is more reliable than the jury's unbound musings of yesteryears."[45]

Not only does the court in *Zaninovich* contend that allowing expert testimony would invade the "common ken," but also that there are too many variables and choices involved to devise an objective standard.[46] A complete discussion of this problem is presented by Stuart Speiser in his book *Recovery for Wrongful Death—Economic Handbook.* The author lists nine roles performed by the housewife-mother and their corresponding occupational equivalent and suggests that these should be utilized in appraising damages in a wrongful death action.[47] While it is suggested that there is overlapping among these categories and that their individual worth is very difficult to determine,[48] the author concludes that this approach is better than relying on the jury's common knowledge. Recognizing the problems with this piecemeal approach, Speiser also presents a more practical

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42. 6 App. Div. 2d at 547-48, 179 N.Y.S.2d at 712-13.

43. *Id.*

44. 26 App. Div. 2d at 159, 271 N.Y.S.2d at 871. *See also* Har-Pen Truck Lines v. Mills, 378 F.2d 705 (5th Cir. 1967).

45. Har-Pen Truck Lines v. Mills, 378 F.2d 705, 711-12 (5th Cir. 1967). *See generally* the discussion of this case in 10 PERSONAL INJURY NEWSLETTER 85-87 (1967).

46. 26 App. Div. 2d at 159, 271 N.Y.S.2d at 871.

47. ROLES OF WIFE AND MOTHER AND THEIR OCCUPATIONAL EQUIVALENTS

Roles assumed by a wife and mother	*Similar occupations*
House keeper	Household Worker, Domestic
Nurse	Registered Nurse, Practical Nurse
Counsellor	Teacher, Psychotherapist
Money manager	Bookkeeper, Accountant, Home economist
Family chauffeur	Chauffeur, Taxi Driver
Mrs. "Fixit"	Carpenter, Plumber, Electrician
Cook	Cook, Chef, Dietician
Dishwasher	Dishwasher
Clothes-washer	Laundress, Laundry Worker

S. SPEISER, RECOVERY FOR WRONGFUL DEATH—ECONOMIC HANDBOOK § 12:3 (1970).

48. *Id.* at § 12:4.

method based on the roles of a housewife-mother as an "Experienced Female Private Household Worker" and an "Elementary School Teacher."[49] The role or roles applied in the evaluation of lost services are readily adapted to individual situations. It is a "relatively simple and direct approach to the measurement of the lost wife, or wife and mother" and "[t]he trier of fact can understand, follow and apply it."[50] These occupational equivalents provide a base from which an attorney can develop expert testimony[51] and guideposts that can be utilized to *assist* the jury in formulating fair and just compensation for injuries received by those individuals dependent on a housewife-mother. Further, courts that have held that expert testimony is admissible generally have allowed testimony on the above occupations.[52]

IV. Conclusion

We must not delude ourselves into believing that the values of yesteryear can in every instance satisfy contemporary needs. While at one time the services of women were valued indifferently, in contemporary times our society has abandoned the attitude of second class status for women. Thus, both because of the reality of our times, and the pecuniary loss standard involved, it can no longer be countenanced that the life of a woman should be valued under the guidelines set forth in *Zaninovich*. Valued accordingly, mathematical calculations would yield the peculiar result that a woman's life could possibly be worth one-third that of her husband, simply because she did not have a weekly paycheck.[53] The anomalous result which has been obtained in *Zaninovich* finds no basis either in morality or law.

Viewed in this light, the reasoning of the court in *Zaninovich* cannot withstand a comparison with the piecemeal or practical approach promulgated by Speiser. The rationale in *Horton* corresponds more closely to these approaches and the mandate of the New York Estates, Powers, and Trusts Law sec-

49. *Id. See also* Comment, *supra* note 18.

50. *Id.*

51. For the type of testimony that has been entered in such actions, see S. Speiser, Recovery for Wrongful Death—Economic Handbook § 14:5 (1970).

52. *See* cases cited *supra* note 20.

53. See the damage figures awarded by the court in *Zaninovich* where the father's life was valued at $350,000 and the mother's at $125,000.

tion 5-4.3 which requires the awarding of "fair and just compensation for pecuniary losses."

Of course, it is within the "common ken" to know and understand the nature of services performed by a housewife-mother, but it is not within the "common ken" to know what it would cost to seek replacement services. Do twelve people chosen from a cross-section of the community necessarily know the cost of a nurse-governess, a housekeeper, a babysitter, counselling and psychological guidances and related items? This determination is peculiarly within the knowledge of an employment specialist who can more accurately appraise occupational equivalents. If it is proven that the mother performed these services and if an action for wrongful death is based on the awarding of "fair and just compensation for the pecuniary injuries," then why should a jury not be informed of the cost of replacing these services which were denied the survivors by the wrongful act of another?

The confusion and unsettled nature of the law will continue to exist until the Court of Appeals speaks on this issue. If the Court of Appeals follows the current trend and rules according to the decisions in *Weiss, Horton* and *Merrill,* this discussion will be academic.

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