

A COMMENTARY ON THE KANSAS WRONGFUL DEATH ACT

*Robert C. Casad**

The Kansas legislature had an excellent opportunity to create a new, coherent, consistent wrongful death and survival law as part of the enactment of the new Code of Civil Procedure in 1963. The Kansas Supreme Court had then only recently decided the *Prowant*¹ case, which put the law in a new (and, for the first time, proper) perspective. The situation was ideal for a thoroughgoing reform. It is unfortunate that it was not done. Some changes were made, of course, but it must have been felt that they were minor, since they apparently were adopted without any preliminary study. Some of the changes, however, in fact were quite important, and the result is a difficult and confusing law of doubtful constitutionality.

I

In the first section of the Kansas wrongful death statute one encounters an absurdity. That section reads as follows:

§ 60-1901. Cause of Action

If the death of a person is caused by the wrongful act or omission of another, *an* action may be maintained for the damages resulting therefrom if the former might have maintained *the* action had he lived, in accordance with the provisions of this article, against the wrongdoer, or his personal representative if he is deceased.²

“The action” in this section can only refer to the “action” previously referred to in that same sentence, namely the “action” for damages resulting from the death. This section, then, says that an action can be brought for the damages resulting from a wrongful death if the person killed could have maintained an action for his own death if he had lived! It is, of course, impossible for a living person to bring an action for his own wrongful death, but this is the plain meaning of the language in that section. The section is not ambiguous; it is simply absurd. And yet, we cannot explain it as a mere oversight on the part of the draftsmen, since the present language indicates a purposive change from that contained in the first section of the prior act. The former law read, in relevant part, as follows:

§ 60-3203.

When the death of one is caused by the wrongful act or omission of another, the personal

* Professor of Law, The University of Kansas. A.B. 1950, M.A. 1952, The University of Kansas; J.D. 1957, The University of Michigan.

¹ *Prowant v. Kings-X, Inc.*, 184 Kan. 413, 337 P.2d 1021, *rev'd*, 185 Kan. 602, 347 P.2d 254 (1959). (1959).

² Kan. Sess. Laws 1963, ch. 303, § 60-1901. (Emphasis supplied.)

representatives of the former may maintain *an action* therefor against the latter or his personal representative if the former might have maintained *an action had he lived against the latter for an injury for the same act or omission*.³

This language is clear enough: why was it changed?

The change can be ignored, perhaps, on the ground that the legislature obviously could not have meant what they have said. But this is not too satisfying. The law ought to be amended at the earliest opportunity to reflect what the legislature really intended.

II

The next difficulty arises in the next section of the new act.

§ 60-1902. Plaintiff

The action may be commenced by any one of the heirs at law of the deceased who has sustained a loss by reason of the death. Any heir who does not join as a party plaintiff in the original action but who claims to have been damaged by reason of the death shall be permitted to intervene therein. The action shall be for the exclusive benefit of all of the heirs who have sustained a loss regardless of whether they all join or intervene therein, but the amounts of their respective recoveries shall be in accordance with the subsequent provisions of this article.⁴

This contains two important changes from the prior law. Under the old law the party designated as the one to bring the action was the personal representative of the decedent who sued for "the exclusive benefit of the surviving spouse and children, if any, or next of kin"⁵ Under that provision, after the decisions in the *Prowant* case⁶ and *Concannon, Adm'r v. Taylor*,⁷ the personal representative could join in one lawsuit claims under the survival act and under the wrongful death act. Now, however, the personal representative is still the party designated to bring survival actions but he has no capacity to bring a wrongful death action unless he is also an "heir at law" who has sustained loss. This means that separate trials are far more likely under the new code provision than under the old. It is difficult to see any good that can come from separate trials in wrongful death and survival cases. Of course, under the new rules dealing with joinder of claims and parties⁸ and with consolidation of cases for trial,⁹ much of the difficulty may be obviated if the right procedural steps are taken.

One other change was made in 60-1902 that must be mentioned. The parties

³ KAN. G.S. 1961 Supp., 60-3203. (Emphasis supplied.)

⁴ Kan. Sess. Laws 1963, ch. 303, § 60-1902.

⁵ KAN. G.S. 1949, 60-3203. This section was repealed by the legislature in 1963.

⁶ *Prowant v. Kings-X, Inc.*, 184 Kan. 413, 337 P.2d 1021, *rev'd*, 185 Kan. 602, 347 P.2d 254 (1959).

⁷ 188 Kan. 143, 360 P.2d 1085 (1961).

⁸ Kan. Sess. Laws 1963, ch. 303, § 60-218 to -220.

⁹ Kan. Sess. Laws 1963, ch. 303, § 60-242.

beneficially interested in the recovery under the present law are the "heirs at law who sustain loss." The old statute looked to the losses of the "surviving spouse and children, if any, or next of kin."¹⁰ The question that immediately arises is, what did the legislature intend by changing to the term "heirs at law"?

The term "heirs at law" does not appear elsewhere in the Kansas statutes.¹¹ "Next of kin," the term used by the old law, is not defined in the statutes either, but the court did give that term a judicial definition. "Next of kin" in the wrongful death act, the court said, meant "those kin to whom the personal estate of the decedent descends" in event of intestacy.¹² The Kansas Court has occasionally discussed the meaning of "heirs" in other contexts, and has said that the term means "one who succeeds to the estate of a deceased person."¹³ Presumably, since the new code abandoned the term "next of kin," which had been judicially construed, in favor of "heirs at law," a change in meaning was intended. Perhaps the new code meant to extend the protection of the wrongful death act to those persons who share the decedent's estate, whether by virtue of a testamentary provision or by the statute of descent and distribution. But if this were the intended meaning, we would expect the law to give a clue to the policy that underlies the change. It contains no such clue.

Mr. Richard Barber, commenting on the vagueness of this provision at the Institute on the New Kansas Code of Civil Procedure, held at Lawrence, October 26, 1963, said "I think we must assume the words 'heirs at law' mean those who are heirs at law under the probate code of the State of Kansas."¹⁴ But the probate code does not refer to "heirs at law." Moreover, if the intended meaning is "those who would share an intestate estate under the Kansas probate code," why did the new code abandon the old term "next of kin," which had already been construed to mean just that?

If the statute is construed as giving a cause of action to those who would share the estate in the event of intestacy, we may question whether this provision is consistent with the objectives of the law. The old law gave a cause of action to the personal representative for the benefit of the next of kin, and the next of kin shared the award in the same proportions as they shared in the decedent's estate. The new code, however, focuses on the *losses* sustained by individual "heirs at law," and the total recovery is apportioned among them, not

¹⁰ KAN. G.S. 1961 Supp., 60-3203.

¹¹ "Heirs" are referred to in § 59-508 of the probate code in describing the persons entitled to share in the estate of an intestate who dies without issue, spouse, or parents surviving. The "heirs" of decedent's parents share the same as if the parents had owned decedent's property in equal shares and had died intestate at decedent's death (except that spouses of parents are not allowed a share). This indicates that "heirs" are those who would share an intestate estate, except perhaps spouses. Whether "heirs at law" means anything different from "heirs" is conjectural.

¹² See *Ellis v. Sill*, 190 Kan. 300, 374 P.2d 213 (1962); *Atchison T. & S.F. Ry. v. Ryan*, 62 Kan. 682, 685, 64 Pac. 603, 605 (1901).

¹³ *Delashmutt v. Parrent*, 40 Kan. 641, 20 Pac. 504 (1889); *McKinney v. Stewart*, 5 Kan. 230, 234 (1870).

¹⁴ TRANSCRIPT OF THE INSTITUTE ON THE NEW KANSAS CODE OF CIVIL PROCEDURE 149 (1963).

according to their intestate share, as under the old code, but according to their respective losses.¹⁵ If the new code aims at permitting the recovery of losses, it would seem that the persons given a right to recover should be those sustaining loss, not those who would share in intestacy. It is, of course, entirely appropriate to limit the class of persons entitled to sue for their losses to those bearing some close relationship to the decedent, either by marriage, blood, or affinity. But the proper way to so delimit a class is to identify the relationship, not to borrow a class term from a statute that had a definite connection with the old act (by prescribing the method of apportionment) but has none with the present law.

If "heirs at law" under the new code means those who share in intestacy, situations can arise in which persons who bear a close blood relationship to the decedent and who are entirely dependent upon him for support may be denied recovery altogether. For instance, assume decedent left no spouse, but did leave two grown children and a mother. The children are entirely self-supporting, but the mother is entirely dependent on decedent for support. The mother will have sustained a great loss—pecuniary and non-pecuniary—but she cannot recover because she would not be an "heir at law." The children, on the other hand, are heirs at law but they have suffered no pecuniary loss. They could perhaps recover a small amount for mental anguish or bereavement, along with funeral expenses, but that would be all under the new code, if "heirs at law" means those who share in intestacy.

If the statute is going to change the basis of allocating recovery from the intestate portion to "losses," the provision designating the class of persons entitled to sue should be phrased in terms appropriate to the change. Of course, the courts can solve part of the problem by construing the undefined term "heirs at law" to mean, not those who would share an intestate estate, but a broader class of persons that are still close enough in their relation to the decedent to be properly regarded as entitled to the protection of the law. The term could, perhaps, be construed to mean persons in any relationship specifically mentioned in the Kansas statute of descent and distribution, since all of these under some circumstances could share the estate. This would include spouse,¹⁶ children (including adoptive children),¹⁷ issue of a previously deceased child,¹⁸ and parents (including adoptive parents).¹⁹ Such a construction would be somewhat artificial, but since "heir at law" really should be construed to mean *something different* from "next of kin," and since the intestate succession classifications are inappropriate for a law designed to allow recovery of *losses*, such a construction could be justified.

¹⁵ Kan. Sess. Laws 1963, ch. 303, § 60-1905.

¹⁶ Kan. Sess. Laws 1963, ch. 303, § 59-504.

¹⁷ Kan. Sess. Laws 1963, ch. 303, § 59-506.

¹⁸ *Ibid.*

¹⁹ Kan. Sess. Laws 1963, ch. 303, § 59-407.

III

The new code retains a monetary maximum on the total amount recoverable in a wrongful death action.²⁰ This continues Kansas as a member of that dwindling minority of states that specify a maximum amount of recovery. Kansas should have taken the adoption of the new code as a convenient occasion for abolishing this anachronistic provision. Although the original prototype wrongful death act (the English Lord Campbell's Act) had no maximum limitation on recovery, at one time in America slightly more than half the states had such a limit.²¹ Since 1893, however, more than half of the states that had such monetary maxima have abolished them, and no state that did not have such a maximum in 1893 has adopted one since then. This trend must indicate something, and the Kansas legislature should have considered it.

The maximum limitation in the old law, while it made no more sense than the limitation in the present law, did not seem so out of place. The old law made no pretense of providing a rationally conceived compensatory remedy for survivors injured by the killing. It provided for distribution of the award according to the intestate share of the survivors; what they got was not supposed to bear any relation to their loss. Instead of providing a remedy for losses, the former Kansas wrongful death act provided the "next of kin" what might be called a substitutionary sum of money. The act was not really a wrongful death act in the Lord Campbell's Act tradition at all, although it purported to be and this no doubt explains the confusion the courts fell into in the early *McCarthy*²² case, which was only recently rectified in *Prowant*.²³ Rather the old law was an unconscious throwback to the Anglo-Saxon *wergild* system—that preceded the common law in England—under which payment of a fixed sum of money was prescribed for various specified wrongs, including the killing of a human being.²⁴ The payment was not designed to afford compensation to the injured party, but to placate the injured (and punish the offender) so as to prevent the exaction of private vengeance or retribution which could lead to blood feuds and threaten the king's peace. Since the former Kansas law was basically a *wergild* statute, the monetary maximum on recovery made about as much sense as the rest of the statute. The legislature, like the Anglo-Saxon lawmakers, could prescribe how much a man's life was to be worth. It is true that the former Kansas law did refer to "damages" and mentioned certain factors that in other circumstances are treated as compensatory elements, but this seemed out of place, and in any event had little effect in the old law.

²⁰ Kan. Sess. Laws 1963, ch. 303, § 60-1903.

²¹ See McKenney, *Maximum Limitation on Damages—Virginia's Death by Wrongful Act Statute*, 4 WM. & MARY L. REV. 19, 26 (1963).

²² *McCarthy v. Chicago R.I. & P.R.R.*, 18 Kan. 46 (1877).

²³ *Prowant v. Kings-X, Inc.*, 184 Kan. 413, 337 P.2d 1021, *rev'd*, 185 Kan. 602, 347 P.2d 254 (1959).

²⁴ See McCORMICK, DAMAGES § 105 (1935).

The new law, however, seems to have been clearly designed to provide a compensatory remedy to close relatives of the decedent who suffer loss by reason of his death. If this be the purpose, the monetary maximum seems simply out of place. If the party has proved compensable losses, why should recovery be limited? Damages for non-fatal injuries are not limited by statute. Is it sound policy to specify by law that, so far as civil liability is concerned, it is cheaper to kill than to maim?²⁵

Arguments have sometimes been advanced to justify the monetary maximum in wrongful death acts. The two arguments urged most frequently are (1) that damages for death are by nature uncertain, so a limit must be imposed to prevent excessive awards; and (2) that damage awards in death cases are likely to be influenced by feelings of sympathy and an improper and excessive verdict rendered. Another argument sometimes urged is that insurance rates will soar if the limit is removed. None of these arguments can stand even casual scrutiny.

The argument that insurance rates will go up if the limit is removed is a curious one. In the first place, no evidence has ever been adduced to show that insurance rates are necessarily higher in states that have no monetary maximum on wrongful death recoveries. But even if it were accepted as true that rates would increase, this provides no substantial reason for the monetary maximum on wrongful death recovery in a statute that aims at providing compensation to the survivors for their losses rather than *wergild*.

As for the argument that damages for death are by nature uncertain, thus necessitating the monetary maximum on recovery, it need only be pointed out that this same argument could apply equally well to damages for non-fatal injuries, or even to damages for anticipatory breach of contract.²⁶ In fact, it would seem apparent that damages for death are *less* uncertain than damages for non-fatal personal injuries. In either case, the most important factor in determining damages normally will be the impairment of earning capacity. In the death actions, of course, it is the survivor's loss of support that is the factor that actually must be determined, but this is dependent upon how much the deceased could have earned. The only determination that must be made to establish loss of support in a death action, that is not necessary in a non-fatal personal injury case, is how much support would the survivors probably have obtained from the decedent's future earnings. In the case of non-fatal injuries, on the other hand,

²⁵ "Familiar to most lawyers is the bit of law-lore to the effect that the reason the earliest Pullman cars were so constructed that passengers slept with their heads toward the front of the train was so that they would be killed rather than merely injured if an accident occurred. Although the reason assigned for the Pullman Company's practice is purely fictitious the logic of the fiction is sound, for the common law gave no civil action for a wrongfully inflicted injury if death occurred before a judgment was recovered, and it thus was cheaper to kill a person than to inflict a nonfatal injury." Gamble, *Actions for Wrongful Death in Tennessee*, 4 VAND. L. REV. 289 (1951).

²⁶ See generally DUBLIN & LOTKA, *THE MONEY VALUE OF A MAN* (1946); Lassiter, *Estimating the Monetary Value of Damages in Negligence Cases Involving Death*, 1964 INS. L.J. 282. These sources suggest methods of evaluating human life for damage purposes.

several uncertainties must be resolved that are not present in the death action. The degree of impairment of earning capacity is a question that is not posed in death actions. If the injured party dies, it is clear that the impairment is total. The duration of the impairment is uncertain in the case of non-fatal injuries: the possibility of rehabilitation in the future must be evaluated. This uncertainty, of course, is not present in a wrongful death case. Future medical expenses, future pain and suffering, etc. are elements of considerable uncertainty in non-fatal injury cases, which, of course, do not apply in death actions. So long as the "one-sum" recovery principle is applied to non-fatal injuries, it seems clear that there are more elements of uncertainty in non-fatal injury cases than in death actions.²⁷ If uncertainty is a justification for imposing a monetary limitation on the amount of recovery in death cases, it would seem equally or more justifiable to limit recovery in non-fatal cases.

But even if uncertainty were a justification for a limit, why does it justify a maximum limitation any more than a minimum? If the theory of recovery is compensation for losses, recovery should be based on the losses proved. It is true that because of the uncertainties inherent in these (and all personal injury) cases the trier of fact may sometimes find damages to be greater than the actual loss, and a maximum on recovery would minimize the effect of the error in such cases. But it is also true that the trier of fact could find the damages to be less than the actual loss. Would this justify a minimum limitation on the amount recoverable? No one would seriously urge that it would. And yet it would seem as justifiable as a maximum limitation. If the uncertainty argument does not justify a minimum recovery, neither does it justify a maximum. Both are equally out of place in a statute that aims at compensation.²⁸

The argument that the maximum limitation is necessary because juries are likely to be unduly influenced by sympathy and hence to give excessive awards likewise seems to have little force in the context of our Kansas statute. Most states solve this problem by limiting recovery to the "pecuniary" losses of the survivors—losses that are susceptible of a tangible or quantitative form of proof.²⁹ This restricts the latitude of the jury in awarding sympathy damages. The Kansas Code, on the other hand, does not restrict recovery to "pecuniary" losses, but specifically permits recovery for such intangible elements as "mental anguish, suffering or bereavement; loss of society, companionship, comfort or protection; loss of marital care, attention, advice or counsel; loss of filial care or attention; . . ."³⁰ Our statute, in contrast to those

²⁷ See McKenney, *supra* note 21, at 21-22.

²⁸ *Id.* at 22.

²⁹ "Strictly non-pecuniary losses are not, generally, sought to be redressed by this kind of statute. Most courts do not allow damages for the grief and emotional distress of the survivors, nor for their loss of the companionship, society, and affection for decedent." 2 HARPER & JAMES, TORTS § 25.14 (1956). See also McCORMICK, DAMAGES § 98 (1935).

³⁰ Kan. Sess. Laws 1963, ch. 303, § 60-1904.

of most other states, seems to *invite* the award of sympathy damages. It would seem to be very inconsistent, then, to argue that the monetary maximum in our statute is justifiable as a means of avoiding sympathy damages. Under our statute, a survivor who had only \$100 worth of pecuniary losses could conceivably get as much as \$24,900 because of the jurors' sympathy. A widow with \$100,000 worth of pecuniary damages, however, would be prevented from recovering even her tangible losses. While an award of damages based on sympathy is always possible in these cases, the way to avoid that is *not* to impose a monetary maximum, but to specify that only "pecuniary" losses are recoverable, or to specify rigorous requirements of proof for all non-pecuniary losses.

Again, as in the case of the "heirs at law" provision, the courts could probably ameliorate the effects of the maximum limitation on recovery under the wrongful death act by a construction of the *survival act*³¹ that would permit recovery for the benefit of the decedent's estate of so much of decedent's loss of future earning capacity as was not reflected in the award to survivors under the wrongful death act.

Since the survival act keeps alive the decedent's own cause of action, it would seem entirely appropriate to allow recovery under the survival act for the permanent total loss of earning capacity suffered by the decedent. If decedent had lived long enough to sue in his own right for his injuries, he could have recovered for his loss of earning capacity. A cause of action to recover for that loss arises at the time of the injury and could be said to survive without any stretching of the terms of our Kansas survival statute. Of course, destruction of decedent's earning capacity is also the basis for the claim of loss of support by survivors under the wrongful death act. Since both actions will now lie for a single wrongful death, it is clear that some double recovery might be involved if both types of recovery were permitted. For this reason, many states that have both wrongful death acts and survival acts provide, by statute or decision, that recovery under the survival act is not permitted for loss of decedent's earnings after death.³² The loss of decedent's future earnings is recoverable in those states only if that loss caused loss to his survivors, and they must recover under the wrongful death act.³³ The great majority of these

³¹ Kan. Sess. Laws 1963, ch. 303, § 60-1801.

³² See McCORMICK, DAMAGES § 94 (1935).

³³ Though theoretically recovery under the wrongful death acts is to compensate survivors for their losses, there are two different approaches to measuring damages. Some of the statutes seem to focus upon the loss of support or inter vivos contributions from the decedent. Others focus upon the diminution in the anticipated inheritance from decedent's estate. These two views lie behind the two different approaches to calculating damages in wrongful death cases: the "loss to survivors" approach and the "loss to the estate" approach. Under the "loss to survivors" approach, recovery is based upon that part of decedent's probable future earnings that would probably have been contributed to the particular survivor. Under the "loss to the estate" approach, recovery is usually based on the amount of "net earnings" (*i.e.*, after deducting his own probable expenses) the decedent would have made, on the theory that that net sum would either be contributed in some way inter vivos to the survivors or pass to them through the estate. Of course, since the statutes do not normally spell out the method of measuring damages, there are many variations of these basic approaches, and some states follow neither view. See generally 2 HARPER & JAMES, TORTS § 25.14 (1956); McCORMICK, DAMAGES §§ 95-101 (1935).

states, however, have no maximum limitation on recovery of pecuniary losses by the decedent's survivors. The survivors are fully protected without the right to sue under the survival act for decedent's future earnings.

In states that have no wrongful death act but do have a survival act, on the other hand, recovery by the decedent's personal representative is allowed for the decedent's loss of earning capacity for the balance of his life expectancy.³⁴ These states, in other words, accommodate to the absence of a wrongful death act by permitting recovery under the survival act for what in other states is normally the main item of recovery under the wrongful death act.

Kansas has a wrongful death act, but it is only effective up to the specified monetary maximum. In so far as damages in excess of \$25,000 are concerned, it is as though Kansas had no statute. For that excess, it would seem not inappropriate to borrow the view of the states that have no wrongful death act and allow recovery for loss of future earnings. Since Kansas' wrongful death statute seems clearly to be designed to provide some sort of recovery by survivors bearing the prescribed relationship to the decedent, which recovery is to be payable directly to the survivors and not into the decedent's estate (where it would be subject to claims of decedent's creditors), if the approach suggested were taken it would seem proper that the wrongful death act claim for loss of support should be heard and ruled upon first, before any claim by the personal representative for decedent's loss of future earnings. But the excess of decedent's lost future earnings over that which can be recovered by the survivors under "loss of support," could be held to be recoverable by the personal representative following the precedents of those states that have no wrongful death act. The language of the survival act is broad enough to permit this construction.

Of course, there are problems in this approach. For one thing, unless the wrongful death and survival actions were joined or consolidated, it would seem to require a special verdict itemizing the amounts allowed for loss of support in the wrongful death action. This is not an insurmountable obstacle, however. A more serious problem would be whether the policy of the state *should* allow recovery of a decedent's loss of earning capacity except to the extent necessary to protect his dependent survivors. There are perhaps some good

³⁴ "In states where the survival act, when available, is the only remedy, the recovery, in addition to [compensating for injuries suffered by the decedent before his death and costs of care and treatment], embraces also the loss to the estate of the earning power of the deceased during the period of his life expectancy." (Blackletter rule) MCCORMICK, DAMAGES § 94 (1935).

"In some states the only basis of recovery for wrongful death is the survival or revival statute. In these states this statute is generally construed to permit recovery [of] damages resulting from the death itself—even where instantaneous—as well as those for the loss sustained by deceased during his lifetime. Such statutes therefore afford a remedy very much like that afforded by a combination of wrongful death and a survival statute" 2 HARPER & JAMES, TORTS § 25.17 (1956).

See CONN. GEN. STAT. ANN. §§ 52-555, 45-280 (1960); IOWA CODE §§ 611.20, 2359 (1962). Cf. N.H. REV. STAT. ANN. §§ 556.9-14 (1955); TENN. CODE ANN. § 20-607 (1955).

reasons why it should not. But when the remedy provided under the wrongful death act is subject to a monetary maximum that may deny the survivors recovery even for their pecuniary losses, a construction of the survival statute such as that described here may be justified as a means of providing additional relief in the ordinary case where the dependent survivors also share in the estate.

The best solution to the monetary maximum problem, however, would be for the legislature to abolish it—at least in so far as it applies to provable pecuniary losses.³⁵

IV

The last section of the wrongful death act prescribes a method of apportioning the recovery which is quite different from that of the former statute. Previously the “next of kin,” shared the award according to their statutory portions of intestate property. The new law provides for apportionment according to the losses sustained by each of the heirs. The new provision reads as follows:

§ 60-1905. Apportionment of Recovery

The net amount recovered in any such action, after the allowance by the judge of costs and reasonable attorney fees to the attorneys for the plaintiffs, in accordance with the services performed by each if there be more than one, shall be apportioned by the judge upon a hearing, with reasonable notice to all of the known heirs having an interest therein, such notice to be given in such manner as the judge shall direct. The apportionment shall be in proportion to the loss sustained by each of the heirs, and all heirs known to have sustained a loss shall share in such apportionment regardless of whether they joined or intervened in the action; but in the absence of fraud, no person who failed to join or intervene in the action may claim any error in such apportionment after the order shall have been entered and the funds distributed pursuant thereto.³⁶

The important thing to note is that this apportionment requires a separate hearing. Separate notice of the hearing must be given “to all known heirs having an interest therein.” There are two indefinite features in the quoted phrase. To whose knowledge does “known” refer? The judge? Plaintiff’s attorney? Plaintiffs? Anyone? This is important for it is to plaintiff’s advantage to keep the number of “heirs” who are required to be notified of the hearing as low as possible. Next, what does “having an interest therein” refer to? An interest in “the net amount recovered”? Or an interest in receiving notice? And what kind of “interest”? Curiosity? Or some colorable claim to a share? Does the prescription require notice to all “known heirs” or only those known to have an interest?

³⁵ Amendments to remove or raise the limit were proposed to the 1965 legislature, but did not pass.

³⁶ Kan. Sess. Laws 1963, ch. 303, § 60-1905.

Even heirs who were not joined in the main action are entitled to come in at the separate hearing and to share in the award according to their loss. Thus, if there are heirs who sustained loss who were not joined, they are permitted to share in the award, which presumably was based on the losses proved by the heirs who did join. The heirs who did join receive less than their proved losses in such case. Of course, since total recovery is subject to a monetary maximum of \$25,000, the heirs who do join frequently receive less than their proved losses anyway—and usually do if they were largely dependent on the decedent for support. But the procedure that allows unjoined heirs to share in the total further reduces the fraction of their proved losses that the heirs who joined are able to receive.

The reason why the statute provides for a second hearing to apportion the damages rather than having apportionment determined in the main action apparently is to isolate this struggle between the heirs for shares of the recovery. The new statute creates a cause of action in favor of each heir at law who suffers loss. There are, accordingly, several potential plaintiffs under the new code, unlike the old, where the cause of action was conferred upon the personal representative. But if an overall maximum of \$25,000 for each wrongful death was to be effective, the statute had to insure that all claims were asserted in one lawsuit. Otherwise very troublesome questions would be raised and the defendant would be unnecessarily exposed to the possibility of several lawsuits. So the law had to provide for the complete resolution of the matter in one lawsuit.

Owing to the existence of the \$25,000 maximum recovery, it normally would not be advantageous to the heir who starts the lawsuit to encourage other heirs to take part in the action unless the law required it—at least where the plaintiff himself claims losses nearly equal to the statutory maximum. But if other heirs who have sustained losses which they could not sue for in a separate action are not joined, valuable rights of those other heirs would be cut off by the proceeding. So the statute prescribes that the heir who brings the action sues for the benefit of all heirs who suffered loss.³⁷ The heirs who join as plaintiffs get a judgment which they must hold to share with any other heirs who suffered loss. But if the other heirs were not joined, there has been no determination of the extent of their loss. There must be a hearing, and they must be given reasonable notice and an opportunity to assert their rights: this would seem to be a requirement of due process and equal protection. If they were not given such notice and opportunity, and did not join or intervene voluntarily, the whole proceeding might well be held void as to them. But if the defendant has already made his defense and has been found liable for the

³⁷ "The action shall be for the exclusive benefit of all the heirs who have sustained a loss regardless of whether they all join or intervene therein . . ." Kan. Sess. Laws 1963, ch. 303, § 60-1902.

full statutory maximum, nothing would be gained by reopening the whole case because one heir was not a party. That heir's real controversy is with the other heirs anyway, not with the defendant. And so it apparently is to afford the omitted heir a chance to assert his claim without involving the defendant again in litigation that the statute provides a separate proceeding—one in which defendant is not involved—to apportion the recovery.

If the defendant has been held liable for the full \$25,000, there was no necessity for any other heirs to be joined in the principal action. So long as they are given notice of the apportionment hearing, they can assert their claim to a share of the recovery. If there is any jurisdictional flaw, only the apportionment hearing need be upset.

This seems a sensible solution that protects the defendant from unnecessary litigation and gives a hearing to the omitted heir. It removes the incentive that might otherwise exist for the heir who sues to omit to join other heirs with legitimate claims. The only difficulty with this is that it presupposes the judgment in the main action will be for the full \$25,000. If it is for less than that, however—or worse still, if the defendant avoids liability altogether—the unjoined heirs who suffered loss may have been prejudiced by not being permitted to prove their damages in the main action. It would seem that unless the statute required some sort of notice of the main action to be given other heirs, to give them an opportunity to join or intervene to prove their own losses, proceedings under it could be challenged as unconstitutional. The fact that the statute requires notice be given to all heirs before the *apportionment* hearing would not protect the main action from attack, since the unjoined heirs would already have suffered prejudice by not being able to prove their losses in the main action. Of course, if the judgment is for the full \$25,000, the absence of the other heirs from the main proceeding did not prejudice them, but the constitutionality of the main action cannot be dependent upon whether or not the jury later awards the maximum amount of damages allowable.

Under modern conceptions of procedural due process, as exemplified by such cases as *Mullane v. Central Hanover Bank and Trust Co.*³⁸ and *Walker v. City of Hutchinson*,³⁹ the procedure by which a person's rights may be conclusively determined must be one reasonably calculated to give him actual notice and an opportunity to protect his rights. The requirements of due process are not satisfied even if the person has actual notice of the proceeding unless that notice comes to him by a means officially prescribed and required.⁴⁰ The Kansas wrongful death act permits the voluntary joinder of several

³⁸ 339 U.S. 306 (1950).

³⁹ 352 U.S. 112 (1956).

⁴⁰ See *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

heirs as plaintiffs, and it permits those not joined as plaintiffs to intervene.⁴¹ It does not, however, *require* that those who do not join as plaintiffs be notified so as to be able to intervene if they wish, nor does it, in terms, require or even permit those not joined as plaintiffs to be joined as defendants.⁴²

As a result, it appears that the wrongful death act is vulnerable to attack as unconstitutional because of the absence of a requirement that other heirs be notified of the main proceedings. The fact they must be notified of the apportionment hearing is not enough to cure the defect, since their rights may already have been prejudiced in being denied a chance to prove their damages in the main action.

It could be argued, perhaps, that the unjoined heirs have no cause to complain about the notice they get. The statute that created the right in the first place can limit the recovery—*viz.*, the monetary maximum. The answer to this is that while the state may limit recovery generally, it cannot do so arbitrarily. It cannot provide that the first heir to get to the courthouse is the only one entitled to a hearing as a matter of right. Equal protection requires that all heirs sustaining a loss be given the same right to establish their loss.

The former wrongful death act made no serious pretense of being a remedy for losses. All heirs were treated alike: they share according to the statute of descent and distribution, not according to their loss. The present law, however, gears recovery to losses, so all must have a right to prove their losses in the main action.

It is no answer to say the main action can be treated as a "class action."⁴³ That concept is inappropriate where the total liability is subject to a maximum limit, and accordingly where the party bringing the action may have interests antagonistic to those of all members of the class.⁴⁴

If the act were interpreted as making all heirs indispensable parties, then its constitutionality would seem to be secure. However, the act seems to be carefully worded to exclude the interpretation that all heirs are indispensable parties. It is clear the framers of the act intended it to be constitutional, how-

⁴¹ "Any heir who does not join as a party plaintiff in the original action but who claims to have been damaged by reason of the death shall be permitted to intervene." Kan. Sess. Laws 1963, ch. 303, § 60-1902.

⁴² The rule pertaining to joinder of parties, Kan. Sess. Laws 1963, ch. 303, § 60-219, requires the joinder of all persons having a "joint interest," and permits one who should be a plaintiff, but refuses, to be joined as a defendant. The term "joint interest" does not appropriately apply to the interest of claimants under the wrongful death act, since the interests of parties under the new law are determined by the extent of their several losses. Accordingly, the claimants probably do not fall within the terms of the necessary joinder rule. The legislature clearly did not intend to make all wrongful death claimants indispensable parties in the main action, for if they had so intended there would have been no necessity for the separate apportionment hearing or separate and special notice. Moreover, the text of § 60-1902, by specifically mentioning joinder as plaintiff and intervention, could be said to exclude involuntary joinder of other claimants as defendants under § 60-219.

⁴³ Cf. Kan. Sess. Laws 1963, ch. 303, § 60-223.

⁴⁴ Besides, claimants in a wrongful death action are seldom "so numerous as to make it impracticable to bring them all before the court . . .," and this is a basic condition of a class action under our law. Kan. Sess. Laws 1963, ch. 303, § 60-223.

ever, and they probably intended that all heirs be involved somewhere in the course of the proceeding. Although it would require a great stretching of the statutory language to do so, it might not be inappropriate for a court to rule that all heirs are indispensable parties in the main proceeding.

But a better approach would be to provide for the giving of notice to all heirs at the commencement of the main action. It could be provided that those who do not wish to become parties must expressly waive their rights. This would eliminate the necessity of the separate apportionment hearing. The statute could immunize the defendant from involvement in the apportionment in cases where the judgment was for the maximum allowable, so that if an heir were omitted the whole action would not have to be retried. But if notice is not given to an heir who sustained loss, in a case where judgment was rendered either for the defendant or against the defendant for less than the statutory maximum, that heir should be given his day in court against the defendant on the liability issue, if that has not been established, and on the damage issue. The whole action would have to be tried again. The defendant could protect against the possibility of second suit by raising the issue of insufficiency of process,⁴⁵ at the first trial if he knows of an omitted heir, so this poses no unwarranted hardship on defendant.

In view of the several inconsistencies noted in the Kansas wrongful death act, it would seem appropriate for the legislature to reconsider the entire act and try to come up with a coherent, consistent statement of policy that can afford the desired protection to the interests sought to be served, and that can be readily understood and applied by the courts and the practicing bar.

⁴⁵ See Kan. Sess. Laws 1963, ch. 303, § 60-212(b)(4). Or, if the statute were construed as making the other heirs "indispensable parties," the nonjoinder of any such heir could be raised by defendant under Kan. Sess. Laws 1963, ch. 303, § 60-212(b)(7).