

Recovering Damages for Death: Two Separate Causes of Action

In an action brought in New York state to recover damages for a person's death, there are two separate and distinct causes of action: survivorship and wrongful death. The survivorship cause of action belongs to the estate for the decedent's pain and suffering prior to death. The wrongful death cause of action belongs to those distributees who have suffered pecuniary loss by reason of death. Distributees are determined strictly by statute.

Because of this dichotomy, there may be more than one plaintiff in a death case as well as separate statutes of limitations for each cause of action. In order to properly address a death case, an attorney must keep in mind that there are two separate and distinct causes of action—survivorship and wrongful death—and each action should be treated and evaluated independently of the other.

Statute of Limitations

The statute of limitations in a death case differs depending on the cause of action asserted. The statute of limitations for a survivorship cause of action (pre-death pain and suffering) is three years from the date of accident or one year from the date of death, whichever is longer. However, in accordance with Section 5-4.2 of the Estates, Powers and Trusts Law (EPTL), the statute of limitations on a wrongful death claim (pecuniary loss) is two years, measured from the date of death. There are, of course, exceptions to this rule.

When a criminal proceeding is brought against the wrongful death defendant, the decedent's personal representative shall have at least one year from the termination of the criminal proceeding to commence an action, even if the statute of limitations has expired.¹ This is intended to unburden the personal representative from participating



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in two separate legal proceedings. It also enables the personal representative to use the criminal judgment of conviction as collateral estoppel on certain issues in the civil case.

Where the decedent's only distributee is a minor, the limitations period is tolled until a guardian is appointed or the distributee has reached majority, whichever occurs first. Prior to instituting a wrongful death case,

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an administrator of the estate must be appointed through Probate Court.

Survivorship Action

A survivorship action is brought by the decedent's estate to compensate for pre-death pain and suffering. Unlike a wrongful death claim, where the settlement or award passes by statute, a survivorship claim is distributed pursuant to a will. (However, if the decedent dies intestate, then the survivorship claim is distributed by intestate statute).

In order for a plaintiff to sustain a survivorship claim for pre-death pain and suffering, there must be evidence that the decedent experienced "cognitive awareness."² Cognitive awareness means that decedent was conscious after the occurrence.³ Conscious pain and

suffering may be evinced by decedent "moaning and groaning like he was in pain."⁴

An award for conscious pain and suffering may be made where decedent screamed after the occurrence and was conscious during painful treatment attempts.⁵ However, mere movement of head, jaw and leg without any manifestation of pain is insufficient.⁶

The courts have also recognized the injured person's "pre-impact terror" as an element of conscious pain and suffering. There must be evidence that a decedent was aware of his/her own impending death in order for "pre-impact terror" to exist.⁷ For instance, in *Lang v. Bouju*, the driver of a motorcycle applied his brakes, indicating that he had seen defendant's truck and was aware of the likelihood of a serious collision.⁸ Likewise, in *Boston v. Dunham*, testimony that the deceased had a "surprised look" on his face immediately prior to impact was sufficient to support a recovery for pre-impact terror.⁹

The elements to be considered in determining the conscious pain award when the interval between injury and death is short are the degree of consciousness, severity of pain, apprehension of impending death and the duration of suffering.

The Appellate Division reduced a damages verdict from \$1 million for the pain and suffering prior to death to \$350,000 after a medical expert testified that decedent was conscious for only two to three minutes after impact.¹⁰

Conversely, in *Ramos v. La Montana Moving and Storage Inc.*, a pedestrian was killed as a result of being struck twice by a tractor trailer.¹¹ The pedestrian subsequently suffered extreme pain for 30 minutes as a result of "excruciating crushing injuries." The Appellate Court held that, considering the facts and the amount of suffering, a reduction of a jury verdict from \$3 million to \$250,000 was excessive.

Consideration is also given when the decedent did not experience extreme pain. In an instance when pain was dulled with

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morphine, an award for damages may be reduced.¹²

When determining the value of a survivorship claim for conscious pain and suffering prior to death, the defendant should examine the specific evidence regarding the interval between accident and death, the degree of consciousness and the duration of suffering. As in any other personal injury action, the decedent's own culpable conduct must be considered when apportioning damages.

Wrongful Death Action

The separate cause of action for wrongful death compensates a decedent's survivors for economic losses. The essential elements of a wrongful death action are: a death caused by the wrongful conduct of defendant; giving rise to a cause of action that could have been maintained at the moment of death by decedent; if death had not ensued; survival by distributees who have suffered pecuniary loss by reason of the death; and appointment of a personal representative of decedent.

In contrast to a survivorship claim, only distributees, as defined in EPTL 4-1.1, can share in the pro-

ceeds of a wrongful death action. Therefore, it is plausible that there will be two separate and distinct plaintiffs in one death case.

The damages awarded in wrongful death actions are solely for the benefit of the deceased person's distributees in order to compensate them for their pecuniary injuries resulting from the death of the decedent and, consequently, are not considered part of the deceased individual's estate to be distributed pursuant to either intestate distribution or the terms of a will.¹³

EPTL Section 5-4.3 dictates in a wrongful death action that an award of damages to the statutory distributees is limited to fair and just compensation for the pecuniary injuries resulting from decedent's death. Such damages include loss of support, voluntary assistance and possible inheritance, as well as medical expenses incidental to death and funeral expenses.

In order to establish a right to a wrongful death recovery, the plaintiff need only show that he had a reasonable expectation of support from the decedent. Once that showing is made, the calculation of the precise amount of damages is a question for the jury. The plaintiff does not need to prove that he was receiving support at the time of death. In determining what is "fair and just" compensation for the pecuniary injuries resulting from

the decedent's death, a number of factors have been identified as appropriate for consideration by the jury. These include: the age, health and life expectancy of the decedent at the time of injury; the decedent's work habits and present position; decedent's future earning capacity and potential for career advancement; and the number, age and life expectancy of decedent's distributees.

The losses must all be pecuniary. Besides lost wages and actual damages is a question for the jury.

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expenses, they may include loss of support and services such as cooking, cleaning, driving, measured by the cost of hiring people to provide these "lost" services.

Loss of consortium claims are not recoverable in wrongful death actions except for the time period between injury and death. Further, no damages are awardable for the grief or suffering of the distributee or the lost companionship, comfort or assistance the decedent would have provided.

If the distributees are minor children, the damages include loss of parental support, including a parent's nurture, intellectual, moral and physical training and such instruction as can only proceed from a parent. These are subjective rules and each individual scenario will be subject to scrutiny. Damages may be computed for pecuniary loss to an infant until he or she reaches the age of 21 years old.¹⁴

In *Carlson v. Porter*, three children all under 10 years old received

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child's relationship with the parent, the money the child was giving the parent, if any, and the likelihood of support in the future had the child lived.¹⁷ The fact that a child was too young to work does not prevent a parent from recovering a pecuniary award. However, a decedent teenager who did not contribute to her household is unlikely to be the source of a significant award for decedent's parents because there is no loss of expected monetary contribution to the household.¹⁸

To receive a pecuniary award, a distributee must provide a value of the lost services. In *Merola v. Catholic Medical Center of Brooklyn and Queens*, the Appellate Division, Second Department, reduced a pecuniary award for the surviving husband for the value of household chores performed by decedent wife from \$250,000 to \$50,000.¹⁹ The Second Department cited the plaintiff's failure to provide expert testimony as to the value of the lost services as a reason for reduction.

Conclusion

Death cases in New York are frequently not evaluated properly by claims representatives and attorneys alike. To properly evaluate a death case, one must be familiar with the two separate and distinct causes of action that potentially arise and what is and is

not recoverable under each cause of action. Defendants must obtain documentary and/or testimonial evidence of each and every claim for loss of earnings/support/service that plaintiff is alleging in order to aggressively defend a potentially high-exposure case.

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1. *Jordan v. Britton*, 128 A.D.2d 315, 515 N.Y.S.2d 678.

2. See *McDougal v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372 (N.Y. 1989).

3. See *Cunimuns v. County of Onondaga*, 84 N.Y.2d 322, 325 (1994).

4. See *Pfirtz v. Joseph*, 32 A.D.3d 922, 822 N.Y.S.2d 572 (2d Dept. 2006).

5. See *Ragon v. Long Island R.R. Co.*, 128 A.D.2d 511, 512 N.Y.S.2d 443 (2d Dept. 1987).

6. See *Parke v. McConnell Mfg. Co.*, 40 A.D.2d 587, 334 N.Y.S.2d 586.

7. See *Martin v. Reed*, 194 A.D.2d 255, 606 N.Y.S.2d 455 (3d Dept. 1994).

8. *Lang v. Boutin*, 245 A.D.2d 1000, 667 N.Y.S.2d 440 (3d Dept. 1997).

9. *Boston v. Dunham*, 274 A.D.2d 708, 711 N.Y.S.2d 54 (2d Dept. 2000).

10. See *Gazer v. City of Orange*, 54 A.D.3d 997, 894 N.Y.S.2d 557 (2d Dept. 2006).

11. *Ramos v. la Montana Mining and Storage Inc.*, 247 S.D.2d 333, 669 N.Y.S.2d 529 (1st Dept. 1998).

12. See *Alston v. Sun Harbor Manor, LLC*, 48 A.D.3d 600, 854 N.Y.S.2d 402 (2d Dept. 2006).

13. See *In Re Estate of Rodriguez*, 3 Misc.2d 1049, 776 N.Y.S.2d 751.

14. See *Odom v. Byrne*, 104 A.D.2d 883, 480 N.Y.S.2d 247.

15. *Carlson v. Porter*, 52 A.D.3d 1129, 861 N.Y.S.2d 907 (4th Dept. 2008).

16. *Altamirer v. Morley*, 274 A.D.2d 364, 710 N.Y.S.2d 616 (2d Dept. 2000).

17. See *Lang*, 245 A.D.2d.

18. See *Ragon*, 128 A.D.2d.

19. *Merola v. Catholic Medical Center of Brooklyn and Queens*, 24 A.D.3d 629, 808 N.Y.S.2d 395 (2d Dept. 2005).