

ACTIONS BROUGHT ON BEHALF OF DECEDENTS

A Seminar Memorandum

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ACTIONS BROUGHT ON BEHALF OF DECEDENTS

A cause of action for conscious pain and suffering is separate and distinct from one for wrongful death and is distinguished by whether the damages have been sustained by the distributees or the decedent. A personal injury action is for conscious pain and suffering of the decedent prior to his death. This contrasts with a wrongful death action for pecuniary injuries resulting from decedent's death and certain expenses. The recovery for conscious pain and suffering accrues to the decedent's estate whereas the damages for wrongful death are for the benefit of the decedent's "distributees" who have suffered pecuniary injury. The claims are thus predicated on essentially different theories of loss which accrue to different parties. This memorandum will discuss the wrongful death cause of action as well as the action for pain and suffering brought on behalf of decedents.

WRONGFUL DEATH CAUSE OF ACTION

The New York wrongful death statute provides as follows:

The personal representative ... 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 (NY EPTL Section 5-4.1).

The wrongful death cause of action is authorized by EPTL 5-4.1 through 5-4.5. It did not exist at common law. It is a statutory cause of action. Damages are limited to those allowed by the statute. The essential elements in a wrongful death action are: (1) a death; (2) caused by the wrongful conduct or default of defendant; (3) giving rise to a

cause of action which could have been maintained, at the moment of death, by the decedent if death had not ensued; (4) survival by distributees who have suffered pecuniary loss by reason of the death; and (5) appointment of a personal representative of the decedent. A decedent has no cause of action to recover for his or her own death.

In a wrongful death cause of action, an award of damages is limited to fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought (EPTL5-4.3). Pecuniary injuries include loss of support, voluntary assistance and possible inheritance, as well as medical expenses incidental to death and funeral expenses. The decedent's gross income at the time of death is the standard means to measure the value of past and future lost earnings.

Pecuniary injuries do not include sorrow or mental anguish, or companionship of a deceased spouse. Recovery for pecuniary loss also does not include damages the decedent might have obtained in a personal injury action if the decedent had survived. As a result, a plaintiff in a wrongful death action cannot seek any recovery for decedent's loss of enjoyment of life. Pecuniary injuries do, however, include a loss of parental nurture and care as well as a loss of physical, moral and intellectual training by a parent.

Courts have held that proof that a decedent performed household duties for his spouse and provided love, guidance and advice to their children is sufficient proof of pecuniary loss to sustain at least some damages. Similarly, evidence that a deceased grandparent had provided services to her adult, financially independent grandchildren was sufficient to demonstrate pecuniary damages. Assistance by the decedent in the care of a disabled brother who lived with the plaintiff's mother was also sufficient to demonstrate pecuniary damages. Recovery for pecuniary loss was required in a case that

provided uncontroverted evidence that a decedent cooked, cleaned and ironed for her adult children and babysat for her grandchildren.

The standard by which to measure the value of past and future loss of household services is the cost of replacing the decedent's services. However, adult children have no cause of action for the loss of a deceased parent's companionship when the parent provided no services to them. Future tax liability of the estate is not considered when determining pecuniary loss and, therefore, the loss of an inchoate tax credit, the right to which is dependent upon the amount of the estate, the decedent's future taxes and the future tax itself, is not compensable.

New York courts have consistently held that injuries for wrongful death are limited to pecuniary injuries and do not include losses which result from the deprivation of the society and companionship of relatives. Pecuniary injuries include those that involve a plaintiff's reasonable expectancy of future assistance or support by the decedent. These include such elements as loss of support, voluntary assistance and possible inheritance as well as medical and funeral expenses incidental to death. To recover on their wrongful death claims, plaintiffs must present an evidentiary basis for a reasonable expectation of pecuniary loss from decedents' death. Damages for wrongful death are not recoverable when they are based on contingencies which are uncertain, dependent on future changeable events and, thus, inherently speculative. The damages recoverable are not capable of exact proof. The fixing of damages in a death action is peculiarly within the province of the jury. The jury is permitted to consider, in a reasonable way, those prospective and indefinite damages arising from death. Each case stands on its own particular facts.

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 the injury; the decedent’s work habits and present position; the decedent’s future earning capacity and potential for career advancement; and the number, age and life expectancy of the decedent’s distributees.

As the statute on wrongful death clearly states, damages recovered in a wrongful death action are not an award in compensation of the injuries sustained by the decedent but rather are recovered for the exclusive benefit “of the decedent’s distributees. “Wrongful death damages do not pass by intestacy, but rather are an award made directly by a court to the appropriate distributee. A distributee is defined as “a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution” (EPTL Section 4-1.1)(a)(4)). Since the statute awards distributees the proceeds in a wrongful death action, their health and life expectancy is an issue. In determining fair and just compensation, the finder of fact is traditionally asked to consider numerous factors pertaining to the health and life expectancy of the decedent as well as the number, age and health of the decedent’s distributees. It is therefore proper at an examination before trial to inquire into the health of the decedent’s distributee.

Generally, evidence of a decedent’s gross income at the time of death is the standard with which to measure the value of income already lost and to measure the loss of future earnings. The jury may take into account increased earnings that a decedent would have received provided that plaintiff establishes that such increases would probably have been forthcoming. Thus, where a decedent had a consistently high level of job performance, which resulted in yearly profit-sharing bonuses, the jury could properly consider such bonuses in decedent’s future earning capacity. However, where the

decedent's employment history was unimpressive, it would be error to permit a jury to project a dramatic increase in the decedent's earning based solely on the decedent's expression of a desire, for example, to obtain further schooling and to open a business.

In proving decedent's prospective earnings, evidence of what others actually earned and could earn is admissible if there is a fair basis for comparison. The court has discretion to refuse to allow an economist to testify as to the prospective loss of earnings of the deceased where the testimony is too speculative.

While a corporation that employed a decedent may suffer pecuniary injury due to his death, a corporation is not a beneficiary of the decedent and thus is not a "person for whose benefit" the wrongful death action is brought. Where there is no evidence that the profits of the corporation were chiefly personal to the plaintiff's decedent, there can be no recovery for alleged loss of profits as part of the gross income of the decedent.

New York does not recognize a common-law cause of action on behalf of the surviving spouse for permanent loss of consortium due to the wrongful death of his or her marital partner. There can be no recovery for grief or loss of society or companionship. There can be no recovery further for decedent's loss of enjoyment of life.

In a case involving divorced parties, or parties that are separated, the court may consider any hostility between the deceased and the surviving spouse. This is relevant on the question of the surviving spouse's pecuniary loss. It is proper to allow discovery of pleadings in a matrimonial action between the decedent and surviving spouse.

The beneficiaries of a wrongful death action are determined at the moment of decedent's death. The fact that a distributee was adopted by another after decedent's

death is irrelevant in a wrongful death action. An action for wrongful death is maintained for the benefit of decedent's distributees and the damages recovered are distributable to all distributees under EPTL4-1.1. An illegitimate child may not constitutionally be excluded from recovery from the wrongful death or for the conscious pain and suffering of his mother. If there is a dispute as to who the legal distributees are, that issue must be determined prior to trial.

Decedent's earnings are to be considered by the jury not only as a source of his or her contribution to current support but also as a means of augmenting his or her estate and thus increasing the distributees' inheritances.

INCOME TAXES ON LOST EARNINGS

Absent an express statute to the contrary, the earnings considered in a wrongful death action are ascertained by reference to decedent's gross earnings and no deduction is to be made, or consideration given, on account of income taxes.

Damages for personal injury and loss of earnings are not income taxable. The court must instruct a jury that the award is not subject to income taxes and that the jury should not add or subtract from the award on account of income taxes.

SPECIAL VERDICTS

CPLR Section 4545(c) mandates certain collateral source payment reductions in all personal injury, property damage and wrongful death actions commenced after June 28, 1986. To apply the statutory collateral source rule, itemized verdicts are essential. Itemized verdicts are required by CPLR 4111(f) in all personal injury, property damage and wrongful death actions. CPLR Section 4545(c) permits the introduction of evidence that the cost of past and future medical care, dental care, custodial care or rehabilitation

services, loss of earnings or other economic loss was, or will, with reasonable certainty, be replaced or indemnified, in whole or in part, by any collateral source such as insurance (except for life insurance) social security (except those benefits provided under Title XVIII of the Social Security Act), workers' compensation, or employment benefit programs. Evidence of collateral source payment is to be received by the court outside the presence of the jury only if the jury has returned its verdict and only if the verdict shows that the jury has made an award for the special damages covered by CPLR Section 4545(c). Since such evidence would be in mitigation of damages, it would appear that the burden of proof is on the defendant.

If any cost or expense was or will, with reasonable certainty, be replaced or indemnified by any collateral source, the court must reduce the award by such amounts, less an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately proceeding the accrual of the action and less an amount equal to the projected future cost of the plaintiff maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source benefits pursuant to a contract or other enforceable agreement subject only to the continued payment of premiums or other financial obligations.

An itemized verdict with respect to the pecuniary losses sustained by the distributees is required in order to obtain the information necessary to structure a judgment in accordance with CPLR Article 50-B and to compute collateral source reductions. That statute requires the structuring of judgments in tort litigation, including wrongful death actions, commenced on or after July 30, 1986. Pursuant to CPLR 5041, judgment is to be entered in a lump sum for all past damages and for up to \$250,000 in

“future damages.” Future damages in excess of \$250,000 are subject to being structured. While the statute is not explicit as to this issue, it would appear that the \$250,000 cap should be determined by adding the amounts allocated to each distributee.

Though the statutory scheme of Article 50-B is technical and complicated, its basic operation is simply stated. Past damages are paid in a lump sum (CPLR 5041(b)). Future damages, which are awarded by the jury without reduction to present value (CPLR 4111(f)), are bifurcated for purposes of Article 50-B. The first \$250,000 is paid as a lump sum (CPLR 5041(b)). The remainder, after subtraction of attorneys’ fees and other adjustments, is to be paid in periodic installments (CPLR 5041(e)). To provide for these periodic payments, subdivision (e) further specifies that defendants are to purchase an annuity contract.

In the itemized verdict required by CPLR 4111(f), the jury must specify the amount assigned to each element of damages, including but not limited to, medical expenses, dental expenses, loss of earnings, impairment of earning ability and pain and suffering. Each element must be further itemized into amounts intended to compensate the plaintiff for damages incurred prior to verdict and amounts intended to compensate the plaintiff for damages to be incurred in the future. The jury must set forth the period of years over which the amounts awarded for future damages are intended to provide compensation. In making this computation, the jury must be instructed to award the full amount of future damages without reduction to present value.

The measure of damages for wrongful death is the pecuniary loss sustained by the distributees. The jury should be required to state the amount of pecuniary loss for each distributee and the period of years over which the amount is intended to provide compensation. The amount of pecuniary loss constitutes an “element” of damage and the

period of years is required in order for the court to enter an appropriate structured judgment under CPLR Article 50-B. In making the computation for purposes of Article 50-B, while the statute is not explicit, the court should make a pro rata allocation of the first \$250,000 in future damages which is paid in a lump sum based on the amounts allocated to each distributee.

OTHER CONSIDERATIONS AS TO PECUNIARY LOSS

The decedent's income from investments is not considered in arriving at pecuniary loss. What the distributee received as a pension may not be considered by the jury; nor is the distributee's pecuniary loss any less because the distributee has independent income.

The jury may not consider the criminal conduct of the decedent during his lifetime unless it bears on either his earning capacity or his disposition to support those dependent on him. In addition, evidence of decedent's future lost earnings may be admitted even if decedent was an undocumented alien working in the United States on an apparently illegal basis. It is for the jury to weigh the defendant's proof that decedent would have continued to earn those wages, if at all, as an undocumented alien.

A jury may not consider the remarriage of the surviving spouse; nor may the jury consider the remarriage of: (a) decedent's divorced parent with whom decedent lived; or (b) decedent's subsequently widowed mother. Where decedent's widow has remarried, the court may not require that she be sworn as a witness in her present name, but counsel may, in selecting jurors, inquire whether they know or are related to a person having the name of her present husband. The fact that decedent and his or her spouse were married after the accident that caused the death is, however, immaterial.

LOSS OF A PARENT/GRANDPARENT

The pecuniary loss of a child for the death of a parent is not limited to the minority of the child, if the jury is persuaded that the effects of the loss will continue beyond minority. The jury may consider, should the health of the child fail, that the parent might not care for the child indefinitely and also that although the child might be self-supporting, the mother may have been in the habit of sending articles of clothing or other items of support to him. Though under other wrongful death acts it has been held that there must be evidence that contributions after minority are reasonably to be anticipated, it appears that under the New York statute, the evidence need not be specific and the jury may allow such damages from the evidence in the probabilities they find will reasonably result.

The loss by a child also includes damages from the deprivation of the intellectual, moral and physical training education that the parents would have given. As in the case of other next of kin, the jury may take into consideration the probability that decedent's estate would have been augmented by earnings and the child's inheritance thus increased. Thus, it is not necessary that the child have been dependent on decedent. An illegitimate child, for example, may not constitutionally be excluded from recovery for the wrongful death or the conscious pain and suffering of his mother.

If the decedent was a homemaker, recovery may include the monetary value of the services provided. Expert testimony and other evidence on this issue is admissible.

It is important to remember that pecuniary injuries are not limited to those circumstances that deal with a decedent who is a wage earner. In the case of a wage earner, it is easy to calculate present and future earnings, earning potential, potential for advancement, and probability of means of support of heirs, as well as factors pertaining

to age, character, condition and the circumstances of the distributees. It is more difficult in the case of someone who is not a wage earner. The Court of Appeals dealt with the issue in the case of Gonzalez v. New York City Housing Authority, 77 NY.2d 663 (Ct. of App.).

In Gonzalez, the decedent was 76 years old at the time that she was murdered in her apartment. She was survived by her daughter-in-law, who was mentally ill, and by two grandchildren, Martha Gonzalez, 21 years of age, and her brother, Antonio Freire, then 19. After trial, a jury awarded the grandchildren \$1,250,000 for the wrongful death of their grandmother. The trial court reduced this figure to \$100,000, which was upheld by the Appellate Division and the Court of Appeals. In the case of a decedent who was not a wage earner, pecuniary injuries may be calculated, in part, by the increased expenditures required to continue the services provided by the decedent, in this case the plaintiffs' grandmother. In addition, the grandchildren should be compensated for losses of a personal nature, such as loss of guidance. The fact that the grandchildren were adults and financially independent does not, of itself, preclude their recovery. The courts in New York have rejected the argument that an adult distributee cannot state a claim for pecuniary injuries based on loss of a parent's guidance. The Court of Appeals pointed out that the record showed that the decedent contributed far more than occasional meals and that her grandchildren relied on her for contributions. Decedent provided shelter for her granddaughter during a marital crisis and helped both grandchildren cope with their mother's condition. Both grandchildren ate meals at their grandmother's house every other day and visited frequently. The court valued these losses at \$100,000 for the plaintiffs.

In Mono v. Peter Pan Bus Lines, Inc., 13 F.Supp. 2d 471 (S.D.N.Y.), the jury awarded Lawrence Mono \$240,000 in damages for the loss of parental services and

guidance. At the time of trial, Lawrence Mono was 29 years old and had been living in California for six years. He was employed as a videotape editor for NBC News in Los Angeles. However, he suffered from a learning disability and a compulsive personality disorder. He spoke with his mother, the decedent, at least twice a week and sometimes as often as four or five times “depending if (he) had a bad day.” The court reduced the award from \$240,000 to \$75,000 and pointed out that Mr. Mono had established a career while living across the country from his mother, who had been 57 years old at the time of her death, and ruled that it would be improper for Lawrence Mono’s recovery to equal that of an infant child deprived of decades of parental training and guidance.

LOSS OF A CHILD

Where the decedent is a child, the pecuniary loss of the parent is measured by the services of a child during minority less the cost of the child’s maintenance and education during that period, and in addition all the probable, or even possible, pecuniary benefits which might result to the parent from the child’s life, modified as the jury finds they should be by all the chances of failure and misfortune. When a child is of tender years, the absence of dollars and cents proof of pecuniary loss does not relegate the distributees to recovery of nominal damages only. Pecuniary value of services in a child may be considered though the child is an adult.

A parent’s loss also includes the probability that the parent would benefit from earnings that the child might have accumulated. However, there must be an adequate basis for assessing decedent’s future earnings so that the matter is not left to speculation. Aside from future earnings, damages may include the reasonable value of future services which decedent would have performed. Recovery of the value of services is not affected by whether or not the child was unemancipated, a minor, or living within the parent’s abode. The standard is the present value of reasonable expectation of future services;

therefore, evidence is admissible showing prior services, the parents' increasing or decreasing need for services, the decedent's ability to have rendered future services, character and habits of the deceased and the life expectancy of the parent. Recovery is precluded where an adult decedent had little contact with his surviving parent and there was no evidentiary basis for a reasonable expectation of pecuniary loss on the part of the parent. The loss from the death of a child does not include the Social Security benefits the child would have received because of the death of the parent subsequent to the death of the child. The pecuniary loss for the child does not include grief or loss of companionship.

In the case of divorced parents where the custody of the deceased child was awarded to one parent, the non-custodial parent is not precluded from sharing in a recovery for wrongful death. However, there is no presumption that the parents are entitled to equal shares of the recovery.

A wrongful death action does not lie for the death of an unborn child. However, the funeral expenses are recoverable as an incident of injuries sustained by the mother.

Where parents are the plaintiff's beneficiaries, the pecuniary injuries include loss of their child's services, not limited to the decedent's minority. Their compensation may properly include probable, or even possible, benefits which might inure to the parents from the child's entire life, taking into consideration the possibility of failure or misfortune. Among the factors to be considered is the decedent's physical status, including facts such as age, sex, life expectancy, state of health, and commitment, with any reasonable degree of certainty, to support a parent or parents. The following cases are examples of awards in New York to parents for the loss of a child.

In James v. Eber Bros. Wine and Liquor Corp., 550 N.Y.S.2d 972 (4th Dept.), the court affirmed a \$250,000 award to the parents of a 29-year-old airplane mechanic who, at the time of his death, lived with his parents, had no steady girlfriend, earned \$27,000 per year and paid his parents \$150 monthly rent. The decedent also contributed an average of 7 to 8 hours per week working on and around the house. The plaintiff's expert economist valued the projected monetary loss of his household services at \$92,641 and the loss of rental payments at \$55,526 based on the assumptions that the decedent would have remained single and continued to live in his parent's house until the end of his mother's life expectancy of more than 29 years.

In Williams v. City of New York, 564 N.Y.S.2d 464 (2d Dept.), the court reduced a \$600,000 award to the decedent's mother to \$325,000. The 20-year-old decedent was a high school graduate employed at a McDonald's Restaurant. However, he lived with his mother and contributed about \$50 and \$10 worth of groceries per week to the household. He daily helped his mother, who suffered from arthritis, with household tasks and the care of four nieces and nephews who shared their home. He also had planned to attend college in the near future, which could have increased his earnings potential.

In Rowan v. County of Nassau, 456 N.Y.S.2d 418 (2d Dept.), the court reduced a \$500,000 award to \$150,000 where the evidence showed that when the plaintiffs' son died at age 23, he was single, employed, lived with his parents, contributed \$50 per week to the household and had been contributing various sums since an early age. Noting that in the normal course of events the decedent would have moved away from his family, the court stated that while he might still have assisted them financially, the amount of such assistance could not have reasonably been expected to reach the amount awarded.

In Meredith v. City of New York, 632 N.Y.S.2d 812 (2nd Dept.), the jury entered judgment for the estate of a four-year-old in the amount of \$250,000 for pecuniary loss. In a brief opinion, the court noted that where, like here, the case involves a “child of tender years, the absence of dollars and cents proof of pecuniary loss” does not require that recovery be limited to nominal damages. However, in this case, where the decedent was only four years old, an award of \$250,000 deviates materially from what would be a reasonable compensation. The court reduced the award to \$125,000.

In the case of Brown v. Horn, 578 N.Y.S.2d 951 (4th Dept.), the court reversed a decision by a jury that awarded \$6,000 for wrongful death of a 19 year old who was killed in an automobile accident. The court found here again that this verdict deviated materially from what would be reasonable compensation. The plaintiff attended high school through the 11th grade. Her parents were 41 and 42 years of age at the time of trial. She enrolled in a nurse’s aide training course and successfully completed the course. She remained steadily employed as a nurse’s aide. She had a close and loving relationship with her parents and performed household chores for them. The court ordered a new trial on damages since the amount awarded by the jury was unreasonably low.

In the case of Krueger v. Wilde, 614 N.Y.S. 2d 88 (4th Dept.), the trial court set aside a jury’s determination that the parents of a 14-year-old daughter had suffered no pecuniary loss. The Appellate Division found that there was proof submitted that demonstrated that the plaintiff’s daughter completed the 8th grade with an 85 average, had an I.Q. of 125, was a good student who aspired to a professional career, played cello and guitar, was involved in girl scouts and other activities, was in good health with a normal life expectancy, held part time jobs, helped her parents with work-related tasks and enjoyed a close, loving relationship with both her parents. That evidence supports an

award for pecuniary loss. The court held that if the parties did not stipulate to an amount of \$100,000, there would be a new trial on damages.

INTEREST

Interest on the principal sum recovered from the date of decedent's death to the date of judgment in wrongful death actions is to be added to and be part of the total sum awarded. However, where the award for post verdict damages is only discounted to the date of verdict (rather than the date of death) pre-verdict interest may not be added; nor is it permissible to calculate interest on the total amount of pre-verdict damages from the date of decedent's death, since that would assume that all losses occurred simultaneously at the time of death. The proper approach is to either calculate interest on each separate damages item from the date it was incurred or to calculate interest on all pre-verdict damages from a single, reasonable intermediate date. Interest is computed at the rate of 9% per annum. The rate of interest in an action for wrongful death against a municipality shall not exceed 6%.

It is important to distinguish between wrongful death and survival actions on the issue of interest. New York Law provides explicitly for pre-judgment interest on wrongful death damages. The statute concerning survival action damages, by contrast, makes no mention of pre-judgment interest. The distinction between wrongful death and survival actions for purposes of pre-judgment interest makes sense only if one uses wrongful death damages as essentially pecuniary and survival damages as essentially non-pecuniary, but the statutes do not so characterize the distinction.

Damages for past loss of income suffered by a decedent prior to death must be considered survival action damages and, therefore, are not susceptible to an award of pre-judgment interest. By statutory definition, wrongful death damages include only

pecuniary injuries resulting from decedent's death. Pre-death loss of income cannot be said to result from the decedent's death, and thus is properly viewed as survival action damages.

A survival action (pain and suffering) is essentially a decedent's personal injury lawsuit. Pre-judgment interest is not allowed in such actions.

New York, as a matter of public policy, will not enforce any limitations on the amounts recoverable under the Wrongful Death Acts of other states in cases where the accident takes place outside of New York. However, where the foreign statute does not provide for interest, interest will not be added, notwithstanding the direction in the New York statute that the clerk add to the judgment interest from the date of the decedent's death.

CONDITIONS PRECEDENT AND STATUTE OF LIMITATIONS

A wrongful death action may be maintained only when, at the moment of death, decedent could have maintained an action (if death did not ensue). A wrongful death action is precluded if, during the lifetime of the decedent, decedent obtained a judgment against his/her tortfeasor or settled the claim against the tortfeasor. Similarly, if the statute of limitations barred decedent's personal injury claim before decedent died, the wrongful death action is also barred. If the personal injury claim was itself subject of a timely, pending lawsuit, then decedent's personal representative must be substituted as plaintiff and the complaint supplemented to add the wrongful death claim.

The statute of limitations in a wrongful death claim is two years, measured from the date of death. But care should be taken to check other applicable statutes in a

wrongful death action where the defendant is a municipality or other governmental authority or public corporation.

Where the decedent's only distributee is a minor, the statute of limitations is tolled until a guardian is appointed or the distributee reaches majority, whichever occurs first. However, the statute of limitations for a wrongful death action on behalf of decedent's infant beneficiaries will not be tolled where the decedent's will named a parent as executor/executrix of the estate and as guardian of the infant children, or where there is a competent adult who can commence the action such as an executor or guardian.

The Dram Shop Act, General Obligations Law Section 11-101, creates a cause of action in favor of any person who was injured in person, property, means of support or otherwise by any intoxicated person or by reason of the intoxication of any person, whether or not resulting in death. A cause of action under the Dram Shop Act is separate and distinct from a wrongful death action and is subject to the three year statute of limitations rather than a two-year period imposed by EPTL5-4.1 in wrongful death actions.

SURVIVAL ACTION

The key issue in determining damages in a survival action is the amount of time the decedent was conscious prior to death. Plaintiffs have the threshold burden of proving consciousness for at least some period of time following an accident in order to justify an award for damages for pain and suffering. The burden can be satisfied by direct or circumstantial evidence. However, mere conjecture, surmise or speculation is not enough to sustain a claim for pain and suffering damages. Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed.

No recovery for pain and suffering will be allowed where there is no evidence that decedent was conscious at any time after the occurrence. But testimony that decedent was “moaning and groaning like he was in pain” or otherwise evidencing pain is sufficient to support a verdict. Conscious pain and suffering may be inferred from the fact that decedent manifested the ability to talk coherently or from the fact that decedent consciously struggled for his life, or from the fact that a decedent, a murder victim, was elaborately bound and gagged. An award for conscious pain and suffering may also be made where decedent screamed after the occurrence and was conscious during painful treatment attempts. However, mere movement of the head, jaw and leg without any manifestation of pain is insufficient, as is evidence that the decedent was dehydrated or thirsty. Recovery for pain and suffering from inmates in a mental institution is allowed. Recovery for “pre-impact terror” may be allowed such as in one case where 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.

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 the pain.

Since the recovery under EPTL11-3.3 is for damages incurred prior to death, including expenses and loss of earnings, recovery for the latter items, as well as funeral expenses paid by or charged against the estate, may be recovered even where it is not shown that decedent even regained consciousness. But there can be no recovery for loss of future earnings, although such damages are compensable in a wrongful death action.

Interest on the conscious pain and suffering award runs from the date of the verdict.

In Cummins v. County of Onondaga, 84 N.Y.2d 322 (Ct. of App.), the Court of Appeals was confronted with a wrongful death and conscious pain and suffering case. The decedent was killed in a single-car accident when she lost control of her car, causing it to leave a county road, flip over and come to rest upside down in a pond of water adjacent to the roadway. The medical examiner determined that drowning and hypothermia were the causes of death. The autopsy revealed a bruise on her scalp, which was consistent with a large dent found on the roof of the car. Although there was an eyewitness to the accident, no testimony emerged that the decedent cried out or made any noise in pain or sought aid following the accident. Police officers on the scene observed no scratch marks or other manifestations inside the car that would indicate any attempt by decedent to extricate herself from the vehicle. When decedent's body was recovered from the car and water, approximately 10 minutes after the accident, she had no vital signs. The court found that the record did not provide any evidentiary basis from which a rational jury could have found that the decedent was conscious following the accident. The court also rejected the doctrine of "presumption of continuance" as a substitute for the proof of decedent's consciousness after the accident. This argument would turn on record evidence that the decedent was conscious and driving just before the onset of the accident. This rule provides that proof of the existence of a condition at a given time raises a presumption that it continues for as long as is usual with things of that nature. This argument was rejected by the court. The Court of Appeals upheld the Appellate Division, which dismissed a \$400,000 verdict for pain and suffering.

In Greene v. City of New York, 566 N.Y.S.2d 40 (1st Dept.), the court reduced an award from \$1,000,000 to \$300,000 because there was considerable doubt as to whether and to what extent the decedent had experienced conscious pain and suffering between his injury and his death, during which time he remained in varying degrees of coma. The court stated "even relatively brief periods of consciousness would not warrant the kind of

award plaintiff received here, especially where the injured party lapsed into coma almost immediately after injury.”

Similarly, in Gricic v. City of New York, 527 N.Y.S. 2d 263 (2d Dept.), the court held that although the evidence supported the conclusion that the decedent had experienced conscious pain and suffering prior to death, given that the interval of consciousness was short and the degree of consciousness slight, the jury’s award of \$670,000 for conscious pain and suffering was excessive to the extent that it exceed \$150,000.

In Ramos v. La Montana Moving and Storage, 669 N.Y.S.2d 529, the trial court reduced from \$3,000,000 to \$250,000 the pain and suffering award to a pedestrian who was killed in a motor vehicle accident. The Appellate Court felt that this was too severe a reduction and increased the award to \$900,000. The decedent was struck and killed by a driver who had consumed excessive amounts of alcohol. In this case, the pedestrian was initially struck by the back end of defendant’s trailer truck and was then twice run over by the trailer truck’s two rear wheels. He suffered excruciating crushing injuries and lived for approximately 15 to 20 minutes, during which time he suffered extreme pain.

DERIVATIVE ACTION

The surviving spouse’s individual claim for loss of services may be joined with the wrongful death and survival actions. The surviving spouse individually may properly seek damages only for the loss suffered between the date of deceased’s injury and death. The statute of limitations applicable to the derivative action is the same as applies to the underlying cause of action in favor of decedent. However, the continuous treatment toll is personal to the patient and does not apply to a spousal claim for loss of services in a medical malpractice action.

FUNERAL EXPENSES

Funeral expenses paid by the decedent or by the estate, or which are charges against the estate, are recoverable in a survival action. Funeral expenses paid by the husband, wife or next of kin, for whom such person is responsible, are recoverable in the death action. The cost of a burial lot is included in “funeral expenses.” Funeral expenses may also include monument and perpetual care charges.

CASES

The following are examples of decisions by Appellate Courts in wrongful death and survival actions.

Lang v. Bouju, 667 N.Y.S.2d 440 (3rd Dept.) - Plaintiff brought wrongful death action against pickup truck driver arising out of accident in which plaintiff's son, riding a motorcycle, collided with driver's truck. The Appellate Court held that evidence supported the finding that son experienced “pre-impact terror” that justified award of damages for pain and suffering; award of \$239,125 for pain and suffering was excessive, justifying new trial or *remittitur* to \$100,000, and award of \$250,000 for wrongful death was not excessive. Decedent was 22 years old, lived at his parents' home and worked full time as a carpenter. He provided economic assistance to his family. He shared the out-of-pocket expenses in pursuing their modest agricultural activities and provided a significant amount of labor.

Dantes v. City of New York, 584 N.Y.S.2d 134 (2nd Dept.) - action was brought to recover damages for wrongful death of drowning victim who was a 16 year old high school student. The trial court entered a jury verdict judgment awarding \$4,000,000 wrongful death damages and \$2,000,000 for conscious pain and suffering. The Supreme

Court, Appellate Division held that evidence supported award of some damages for pain and suffering of drowning victim, but \$2,000,000 was excessive and would be reduced to \$50,000. The \$4,000,000 wrongful death damage was also excessive to the extent it exceeded \$300,000. The court held that it did not agree with the jury's finding that the decedent sustained conscious pain and suffering. The school's swimming instructor testified that he attempted to apply artificial respiration immediately after Dantes was retrieved from the pool, but that Dantes' jaw and teeth were clenched so tight, that artificial respiration had to be administered through his nose. With respect thereto, the plaintiff's expert testified that a drowning victim will clench his jaw in order to prevent water from entering his mouth and that this is motivated by fear. The jury could therefore reasonably conclude that the plaintiff's decedent was conscious for a short period of time. It could not have been more than a few minutes and this is what led to the \$50,000 award for pain and suffering.

Abruzzo v. City of New York, 649 N.Y.S.2d 172 (2nd Dept.) - defendant in wrongful death action appealed from a judgment of the Supreme Court, Queens County that entailed a jury verdict in favor of decedent's state. The plaintiff is the mother and distributee of the decedent of Frances Abruzzo who died in a car accident at 27 years of age. At the time of trial, the decedent's father was also deceased. The decedent was a bus driver at the time of his death and earned \$27,000 per year, but he did not reside with his mother, the plaintiff, nor did he contribute financially to family members. He did, however, assist in the care of a disabled brother, a non-distributee, who lived with the plaintiff's mother. The jury returned an award of \$1,205,051 on the wrongful death cause of action. This was excessive. Although the decedent helped his mother by assisting in keeping company with his disabled brother, he did not provide extensive services to his family, nor did he contribute financially to the household. In light of the limited nature of the decedent's other assistance to his plaintiff mother, the award for the

pecuniary injuries resulting from the decedent's death deviated materially from what would be reasonable compensation and was therefore found excessive to the extent that it exceeds \$150,000.

In Klos v. New York City Transit Authority, 659 N.Y.S.2d 97 (2nd Dept.) - the administrator of estate of a worker who was injured when he fell through delivery opening in sidewalk, which gave access to an electrical substation vault to which he was delivering materials, brought an action against the City. Following trial on the issue of damages, the jury awarded the plaintiff \$3,964,164 for economic loss, loss of parental guidance for the decedent's two infant children, loss of household services and pre-impact terror. The Appellate Court found that these awards were excessive.

The Court stated that the damage award insofar as it was for future loss of earnings, past and future loss of parental guidance, past and future loss of household services and pre-impact terror, deviated materially from what was reasonable. The income growth projections presented by the plaintiff were inappropriate under the relevant circumstances given the vagaries associated with employment in the construction industry and various other costs and expenses fairly attributable to the decedent had he lived. The court further noted that the decedent's death was almost instantaneous.

The Appellate Court therefore made the following reductions: \$1,800,000 for future loss of earnings was reduced to \$1,354,000; award of \$1,000,000 for loss of parental guidance to each of two children was reduced to \$250,000 for each child (the decedent was 38 years of age at the time of his death); award of \$380,000 for past and future loss of household services was reduced to \$100,000; award of \$150,000 for pre-impact terror was reduced to \$50,000 since death was almost instantaneous.