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Economic Damages Under New York Wrongful Death Statute

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JUNE 2006 - Under our system of laws, wrongful death is a civil wrong (tort), which is remedied by the courts with payment of compensation (damages). The intention of the guilty party's payment to the decedent's distributees is to right the wrong sustained.

Applicable Law

The New York State Constitution Article 1, S16, has made pecuniary recovery inviolate as follows: "The right of action now existing to recover damages for injuries resulting; and the amount recoverable shall not be subject to any statutory limitation" (Constitutional Convention, November 8, 1938; effective January 1, 1938).

The Estate Powers and Trust Law (EPTL), Article 5, Part 4, EPTL 213-217, is New York's wrongful death statute. The law provides that the personal representative of the estate has the right to sue for pecuniary loss on behalf of the distributees. Damages are determined by the court in an amount it deems to be fair and just compensation for pecuniary injuries resulting from the decedent's death. It calls attention to reasonable expenses for medical aid, nursing, and funeral expenses, "in addition to every other lawful element." Punitive damages, designed to punish the defendant in cases of recklessness or depravity, are allowed.

Consideration of personal income taxes that the decedent would have been required to pay must be considered by both the court and the jury. In *Norfolk & Western Co. v. Liepelt* [444 US 490 (1980)], the Supreme Court went a step further by holding that lost earnings in a wrongful death action can be estimated on an after-tax basis.

Commentaries by David D. Siegel in *McKinney's Consolidated Laws of New York* (Thomson-West) note that New York State courts have expanded the narrow statutory language of the EPTL to include:

- Benefits that the distributee had a reasonable right to expect if the decedent had lived, including loss of support, voluntary assistance, and possible inheritance (*Parrilis v. Feldman*, 1980).
- Factual situations that take into account "decedent's working habits, her job and her income at the time of death, the likelihood of further advancement and increased earnings capacity" (*Matter of Reynolds*, Surrogate Court of Erie County, 1952).
- The age and life expectancy of the decedent and the distributees she was supporting (*Brown v. Horn*, 1992; *Tenczar v. Milligan*, 1975).
- In the event that the distributees are minor children, damages include loss of a parent's "nurture, intellectual and physical training and such instruction as only can proceed from a parent" (*Tilley v. Hudson Railroad Co.*, 1862). Damages may include the loss of similar attributes provided by grandparents and may include the difficult question of lost inheritance (*Sternfels v. Metropolitan Street Railroad Co.*, 1903).

The Valuation Process

To value the tort claim, one must hypothesize what would have happened had the decedent lived; accordingly, pre-injury life expectancy must be determined. Collaterally, data is required as to the wage base at death and projected expected wage increases. As mandated by the statute, earnings projections are reduced by mandatory related federal and state tax liabilities. Consideration of fringe benefits is also necessary, as are reductions for the personal expenditures of the decedent.

Worklife expectancy estimates project lost earnings capacity. Worklife expectancy takes into account time during working years when the individual was not in the labor market. If the decedent was not gainfully employed, the court must consider the value of a student, a homemaker, or a child's future gainful employment.

Worklife Expectancy

Worklife expectancy is defined as the number of years of earnings an individual was expected to have before natural death or retirement. It is the starting point for the valuation process. Differences exist by education and occupation. Based on data compiled in 1979 (the Department of Labor last published tables in 1986), these "increment-decrement tables" include an allowance for interim periods of separation from the labor force. Updated data prepared by economists are commercially available and are accepted by the courts. As in the use of any statistical data, the case-specific data required must be extracted.

Lost Earnings

Lost earnings represent the decedent's earnings capacity (the option to work) for the period of worklife expectancy (i.e., what would have been the lifetime earnings "but for" the wrongful death). If the decedent had an employment history, projections could be based upon past earnings, past earnings growth, anticipated promotions, or industry-specific data.

The U.S. Bureau of Labor Statistics (BLS; www.bls.gov) publishes an annual compensation survey compiled by the Census Bureau. Data are available by occupation, geographic area, age, sex, and education level. For individuals who have not yet entered the labor force, projections can be made using information from college placement offices or other sources. Nominal wage increases are estimated on a historical basis. If a decedent was an infant or the survivor of deceased parents, the courts require projections in terms of probabilities. Direct correlations exist with the parents' educational levels.

Lost Fringe Benefits

Case-specific information must also be determined with regard to fringe benefits. The starting point is pay stubs and an employer's human resources department. Labor unions are particularly helpful, and a union contract always contains specifics. An attorney may subpoena needed information.

Absent case-specific information, current statistical data can be found at the BLS website. The U.S. Chamber of Commerce also collects and publishes data annually on the growth of employee fringe benefits. Value is determined in the year of death, and a growth rate is applied over the remaining worklife expectancy.

Because continuing care, medical, and funeral expenses represent past losses (i.e., incurred before the claim), they are easily documented and included in the claim. A wrongful death claim differs from a bodily injury case in that the latter requires careful projections as to future damages, and reports from vocational rehabilitation experts.

Lost Household Services

People inevitably contribute varied nonpaid services to family life. Specific services can be uncovered through a questionnaire and interviews with family members.

Household work should be assigned a value. There have been several surveys by economists and government agencies to determine time spent on household work. Among the most helpful was a study by Kurt V. Krueger and John O. Ward, "Dollar Value of a Day." The Department of Labor's blended rates were integrated into occupations to determine hourly rates in 1999. Consideration should be given to self-consumption of the household services rendered by the decedent, as well as task reductions at latter stages of the life cycle. Based on *McKee v. Colt Electronics Co. Inc.* (849 F.2d 46, 50, 2nd Circuit, 1988), case law does not preclude calculation of past services based on after-tax figures.

Pain and Suffering

Rather than award lump-sum damages, the Civil Practice Law Rules (CPLR) require juries that award for pain and suffering to itemize awards. Pain and suffering can exist with regard to the deceased prior to death; some academics indicate a direct correlation of cognitive awareness until death with the amount awarded. Plaintiff distributees are not allowed to recover compensation for their own grief or sorrow.

A 1989 New York Court of Appeals case, *McDougal v. Gerber*, concluded that the award of money damages for loss of enjoyment of life to a totally comatose patient "has no meaning or utility to the injured person." It further proscribed a hedonic award as evaluated by some vague deferential standard. Accordingly, courts preclude expert testimony as to enjoyment of life.

Other noneconomic damages. Compensation can also include loss of love, companionship, comfort, affection, society, solace, moral support, protection, advice, and training. Accordingly, substantial awards are common for children who have lost one or both parents. Juries must itemize awards, analogous to awards for pain and suffering. The valuation of noneconomic damages generally falls outside the scope of a CPA's litigation support.

Deductions

Personal consumption. Because the purpose of the pecuniary award is to make the survivors whole, one must subtract from the amount what the decedent would have personally consumed. Conversely, what was the decrease in the family support factor resulting from the wrongful death?

Cost-accounting principles refer to fixed and variable expenses. The BLS tables refer to individual expense items and consumption factors. Line-item information is available for specific expenditures. Further refinements in the report of "Consumer Expenditures in 2002" provide income, family size, education, occupation, and demographic refinements. Note that fixed expenses, such as mortgage payments, rents, utilities, and home insurance, do not decrease with the loss of one family member.

Income tax. Both the New York State Consolidated Laws and the courts require the deduction of income taxes that the decedents would have paid during their lifetime. The Court of Claims, in *Pellegrino v. State of New York*, citing Liepelt, expressly stated that tax liabilities were deducted in its decision. Pellegrino had faithfully and constantly understated both income and related tax liabilities.

While after-tax earnings must be considered to determine the amount of a damage award, the income tax consequences of an actual award fall under IRC section 104 (a)(2), which specifies that "gross income does not include the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." Punitive damages, as discussed above, will be fully taxable to the decedent's estate or devisees.

Erick Lee Erickson, professor of economics, wrote that, "depending upon the applicable law," there can be no reduction for taxes, or a reduction for all taxes, including Social Security and Medicare. Erickson pointed out that "if earnings have been reduced for taxes, the discount rate (required for present value computations) should also be reduced for taxes."

Tort reform. In a New York State Court of Appeals decision, *Desiderio v. Ochs* (April 8, 2003), the court invited the legislature to "revisit existing law to determine whether, in actual operation, it is achieving its intended purposes, or is overcompensating plaintiffs." Under existing law, the future value was paid annually over the plaintiff's life expectancy, a 4% annual addition to the remaining liability. In *Desiderio*, the jury determined damages for $42 million. By double-counting inflation, the court upheld an ultimate verdict compounded to almost $140 million. On June 24, 2003, apparently in deference to the invitation, the New York State Senate and Assembly passed a law that would require juries to award future economic damages in current dollars rather than gross future damages. Present values are to be determined by reference to U.S. Treasury Bonds on the date of the verdict. While the original legislation was applicable to CPLR Article 50-A (Medical Malpractice), the statute was quickly extended to Article 50-B, which includes wrongful death actions.

Article 50-B distinguishes between past and future damages (i.e., those occurring prior and subsequent to the trial date). The law requires that past damages be paid in a lump sum to the plaintiff after a payment of one-third for attorney fees. The future lost stream awarded by the jury is divided into two parts. The court is directed to enter judgment in a lump sum for future damages not in excess of $250,000. This lump sum is subtracted from the nominal future loss in proportion to each category of loss (e.g., household services; pain and suffering; loss of earnings). The balance is then divided by the number of years as specified by the jury, annual payments are averaged, and each installment is increased by 4% for the entire loss period. Awards for pain and suffering, however, must be paid over eight years (10 years under prior law). The judge, not the jury, reduces future damages to present value (an expert witness testifies only to the nominal value of the future loss stream). Attorney fees and lien holders "related to nominal values of the future periodically paid damages shall be paid in lump sum based on present value of the annuity contract purchased to provide payment of such periodically paid damages." The effective discount rate to present value is the market rate at the time of the award. The 4% annual addition still applies, as under the old law. Security is provided by an annuity contract executed by a qualified insurer and approved by the superintendent of insurance. The court determines the period of time for these installments, such amounts to be paid in accordance with generally accepted actuarial practices.

The New York Collateral-Source Rule

Black's Law Dictionary defines the collateral-source rule as "The doctrine [that] if an injured party receives compensation from his injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay." To achieve the underlying purpose of "tort reform," CPLR 4545(c) is applicable to wrongful death actions after June 28, 1986. "If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding."

A New York State Court of Appeals case, *Oden v. Chemung County*, opined that "[T]he reduction is authorized only when the collateral source payment represents reimbursement for a particular category of loss for which damages were awarded." The court continued: "We now adopt the narrower construction of the statute."

Preparing a checklist. Given a basic knowledge of applicable statutes, engagements by litigation attorneys require individuals to determine what was lost and to place a value on it. Thomas R. Ireland, an economics professor, suggests preparing a list of questions when working for either a personal injury or a wrongful death action. Most of Ireland's questions are applicable to New York statutes and judiciary law. The checklist covers taxes applicable to a wrongful death, deduction for personal consumption, personal consumption applicable to a spouse's income, child support, discount rates, collateral source subtractions, periodic payment provisions, Daubert expert-witness requirements, and more. For more information, visit Ireland's website at www.umsl.edu/~ireland/.

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