

# New York State Court of Claims



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**THURSTON v. THE STATE OF NEW YORK, # 2013-031-019, Claim No. 117361,  
Motion No. M-82942, Cross-Motion No. CM-83026**

## Synopsis

Despite Defendant's negligence, lack of pecuniary injury requires dismissal of wrongful death cause of action and absence of evidence of conscious pain and suffering requires dismissal of "survival action." Defendant's motion for dismissal of claim is granted. Claimant's cross motion for summary judgment against Defendant is denied as moot.

## Case information

<b>UID:</b>	2013-031-019
<b>Claimant(s):</b>	LAURIE A. THURSTON, Individually and as Administratrix of the Estate of CHERYL L. THURSTON, Deceased
<b>Claimant short name:</b>	THURSTON
<b>Footnote (claimant name) :</b>	
<b>Defendant(s):</b>	THE STATE OF NEW YORK
<b>Footnote (defendant name) :</b>	
<b>Third-party claimant(s):</b>	
<b>Third-party defendant(s):</b>	
<b>Claim number(s):</b>	117361
<b>Motion number(s):</b>	M-82942
<b>Cross-motion number(s):</b>	CM-83026
<b>Judge:</b>	RENÉE FORGENSI MINARIK
<b>Claimant's attorney:</b>	THE O'BRIEN FIRM BY: CHRISTOPHER J. O'BRIEN, ESQ.
<b>Defendant's attorney:</b>	HON. ERIC T. SCHNEIDERMAN New York State Attorney General BY: TAMARA B. CHRISTIE, ESQ. Assistant Attorney General
<b>Third-party defendant's attorney:</b>	
<b>Signature date:</b>	May 2, 2013

<b>City:</b>	Rochester
<b>Comments:</b>	
<b>Official citation:</b>	
<b>Appellate results:</b>	
<b>See also (multcaptioned case)</b>	

### Decision

The following papers, numbered 1 to 10, were read on motion by Defendant for summary judgment and on cross motion by Claimant for summary judgment:

- 1) Defendant's Notice of Motion (M-82942), filed February 4, 2013;
- 2) Affirmation of Tamara B. Christie, Esq., dated February 4, 2013, with exhibits;
- 3) Affirmation of Peter T. Ostrow, M.D., Ph.D., dated January 22, 2013;
- 4) Affidavit of Patricia Graham, sworn to January 9, 2013;
- 5) Defendant's Memorandum of Law, dated February 4, 2013;
- 6) Defendant's Revised Memorandum of Law, dated February 5, 2013;
- 7) Claimant's Notice of Cross Motion (CM-83026), filed February 22, 2013;
- 8) Affirmation of Christopher J. O'Brien, dated February 18, 2103, with exhibits;
- 9) Affirmation of Scott F. Lapoint, M.D., dated February 19, 2013, with exhibit;
- 10) Affidavit of Laurie A. **Thurston**, sworn to February 20, 2013.

Hard cases make bad law. The decision on this motion has been one of the easiest and one of the hardest I have ever made. The law is clear, and its application to the undisputed facts is obvious. And yet, the obvious and correct result feels so much like injustice.

In her underlying claim, filed on September 4, 2009, Claimant Laurie A. **Thurston** alleges a cause of action for the wrongful death of her sister Cheryl L. **Thurston** (Cheryl) on August 31, 2008. In addition to the wrongful death cause of action, Claimant also asserts a "survival action" for the pain and suffering Cheryl endured prior to her death.

The claim relates to a tragic incident that occurred at the Defendant's Office for People with Developmental Disabilities facility on Hilltop Drive in Pittsford, New York, on the evening of August 30, 2008. At that time, Cheryl was an inpatient in Defendant's facility. It is undisputed that Cheryl was mentally and physically handicapped and dependent upon Defendant for care and supervision. Cheryl also suffered from a seizure disorder which, at times, such as when she was bathing, required constant, one-on-one supervision. Despite this fact, Defendant concedes that on August 30, 2008, Cheryl was improperly left alone and unsupervised in her bath (Exhibit D, pp. 43-47). It appears that the person responsible for her supervision had gone to Cheryl's room to get a change of clothes for her while Cheryl was in the bath (Exhibit D, p. 43). Upon returning, she found Cheryl unconscious and unresponsive in the bathtub. An ambulance was called and Cheryl was transported to Strong Memorial Hospital. Cheryl never regained consciousness and passed away approximately 14 hours later, after she was

removed from life support. The expert affirmations received from both parties demonstrate that Cheryl suffered a seizure while unattended in the bathtub and drowned.

With its motion, Defendant seeks summary judgment and dismissal of the claim, while Claimant, with its cross motion, seeks partial summary judgment on liability, due to what it asserts is Defendant's clear and obvious negligence.

In any application for summary judgment, the moving party bears a heavy burden in establishing that he or she is entitled to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To make out a prima facie cause of action for negligence, such as is alleged here, a Claimant must demonstrate the following: "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury" (*Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept 1996]).

In this instance, it is clear that Defendant had a duty to provide Cheryl Thurston with one-on-one observation while she bathed; that Defendant breached this duty; and that as a result, Claimant's sister Cheryl Thurston drowned. Clearly, Defendant was negligent and this negligence was the proximate cause of Cheryl Thurston's death.

Defendant offers no opposition to Claimant's argument that Defendant was negligent in its care for Cheryl, and that this negligence led to Cheryl's death. Although Defendant has not technically conceded that it was negligent, Defendant posits in defense of the claim for conscious pain and suffering, that Cheryl first suffered a seizure that rendered her unconscious, and then drowned. This defense implicitly acknowledges Defendant's negligence in leaving Cheryl unattended.

Defendant argues that the claim must nevertheless be dismissed because Claimant cannot prove compensable damages under either theory of liability set forth in the claim. Specifically, Claimant's cause of action for wrongful death must fail because there has been no pecuniary injury. And, further, the action for conscious pain and suffering must fail because Cheryl was unconscious from the time of her seizure until the time of her death.

Claimant's action for wrongful death is governed by statute. In accordance with Estates, Powers and Trusts Law (EPTL) § 5-4.3 (a), damages in a wrongful death action are to be "fair and just compensation for the pecuniary injuries" resulting from the decedent's death for the distributees for whom the action was brought (emphasis added). In this case, Claimant Laurie A. Thurston has submitted a candid and heartfelt affidavit that poignantly demonstrates how important Cheryl was to her. It detailed the pain of her loss, the dear memories she holds, the grief caused by the State's negligence, and the hole left in Claimant's life. Claimant's submissions also demonstrate that, although Cheryl's death caused great emotional injury, it caused no pecuniary injury, which is the only kind that can be compensated under New York Law (see *Gonzalez v New York City Hous. Auth.*, 77 NY2d 663 [1991]).

Similarly, although the claim includes a cause of action for the pain and suffering Cheryl endured, there simply can be no recovery without some evidence that Cheryl was, for some period of time, conscious and aware of what was happening (see *Cummins v County of Onondaga*, 84 NY2d 322 [1994]). Here, not only has Claimant failed to offer any evidence that Cheryl was conscious for any period of time following the incident, but Defendant's expert's uncontradicted testimony demonstrates that the seizure Cheryl apparently suffered before drowning would have rendered her unconscious. Cheryl suffered a seizure, lost consciousness and then drowned. She lived for 14 more hours, but never regained consciousness. For this reason Claimant's "survival action" for the conscious pain and suffering Cheryl suffered must

also be dismissed.

Yes, hard cases make bad law, and the corollary is that bad laws make hard cases. The application of New York law to the facts of this case lead to the inevitable and very unpleasant conclusion that, although Defendant was negligent, and this negligence led directly to Cheryl Thurston's death, there can be no recovery in this action. I find cold comfort in the fact that I am not the only judge to have struggled with the fact that the laws of this great State appear to place no intrinsic value on human life. In *Gary v Schwartz* (72 Misc 2d 332 [Sup Ct, Nassau County 1972]), the Hon. Daniel Albert eloquently lamented New York's "callous approach" to the valuation of a human life. He points out that our draconian wrongful death statute has changed little since 1846 (Lord Campbell's Act), when it grew out of exploitative child labor laws. "Since the appalling child-labor conditions have long since been eradicated, how can a formula based upon such a condition remain applicable?" (*Gary* at 338). The ultimate scandalous irony is that, had Cheryl been chattel rather than a human being, Claimant could recover the lost value of her property.

It is repugnant to the Court to have to enforce this law which places no intrinsic value on human life and is "no longer relevant and applicable to our contemporary social structure and mores" (*Gary* at 337). Although I add my voice to the chorus of those who would call upon our legislature to address this fundamental injustice in our wrongful death statute, I have no choice but to honor and faithfully apply the law as it now stands, and dismiss Claimant's action in its entirety.

Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment is granted and the claim is dismissed. Claimant's cross motion for summary judgment is denied as moot.

May 2, 2013  
Rochester, New York

RENÉE FORGENSI MINARIK  
Judge of the Court of Claims