

New York State Court of Claims



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GARDNER v. STATE OF NEW YORK, # 2012-018-317, Claim No. 109520

Synopsis

This is an amended Decision to comply with CPLR 4111 (e) and 50-B. This Decision addresses the issue of damages for the conscious pain and suffering and wrongful death due to the negligence of the State in maintaining the northbound Route 81 Park Street Bridge on the morning of January 25, 2004. The total amount of damages awarded on this is \$3,569,985.

Case information

UID:	2012-018-317
Claimant(s):	BRANDON WILLIAM GARDNER, INDIVIDUALLY AND AS ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF WILLIAM G. GARDNER, CYNTHIA ANN GARDNER, AND RYAN J. GARDNER
Claimant short name:	GARDNER
Footnote (claimant name) :	
Defendant(s):	STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	109520
Motion number(s):	
Cross-motion number(s):	
Judge:	DIANE L. FITZPATRICK
Claimant's attorney:	ANTHONY F. ENDIEVERI, ESQUIRE
Defendant's attorney:	ERIC T. SCHNEIDERMAN Attorney General of the State of New York By: Patricia M. Bordonaro, Esquire Assistant Attorney General

**Third-party
defendant's
attorney:****Signature date:** November 19, 2012**City:** Syracuse**Comments:****Official citation:****Appellate results:****See also
(multcaptioned
case)****Decision**

This Decision addresses the issue of damages for the conscious pain and suffering and wrongful death of Colonel (Retired) William G. Gardner due to the negligence of the State in maintaining the northbound Route 81 Park Street Bridge on the morning of January 25, 2004. The State was previously found to be 100 percent liable.⁽¹⁾

THE ACCIDENT

On January 25, 2004, at approximately 8:54 a.m., Col. Gardner was traveling north on Route 81 through the City of Syracuse on his way to Hancock International Airport. The weather at the time of the accident was extremely cold (-15F.), although clear and sunny. Earlier that morning it had snowed, and there had been accumulating snow for several of the preceding days.⁽²⁾ Mr. Daniel Manns was called to testify for Claimants and recalled witnessing the tragic event. Mr. Manns estimated he first saw the colonel's car at about 8:50 a.m., traveling approximately 55 mph. Mr. Manns was several car-lengths behind Col. Gardner's vehicle and testified his own speed was just less than 50 mph. Route 81 becomes four lanes⁽³⁾ as it passes over Park Street and Mr. Manns was in the right-hand lane of the three travel lanes and Col. Gardner was in the far-left passing lane. Mr. Manns saw the colonel hit a slippery spot on the bridge and lose control of his vehicle. It appeared that the colonel was pumping the brakes, but the car went into the snowbank along the left-side median barrier. His vehicle then became almost perpendicular to the right-side jersey barrier, and it appeared he was trying to regain control of the vehicle. Mr. Manns saw the vehicle turn to the left and the right-side wheels left the pavement. The vehicle slid northerly, perpendicular to the right jersey barrier, hit the snowbank on the right side of the road, and rode up the bank. Mr. Manns testified that the vehicle teetered on the top of the barrier for three- to- six seconds before falling off the bridge to the road below. Mr. Manns said that he could see the colonel reach up to the car roof and lean back while the vehicle was teetering. He estimated the whole event took about 30 seconds. Mr. Manns testified he was two- to- three car-lengths behind the colonel and was pulling over to the side of the road as he watched the events unfold.

Mr. Manns' contemporaneous statement⁽⁴⁾ to the police that morning never mentioned Col. Gardner's vehicle teetering on the barrier. He explained at this trial that he recalled more details afterwards. Neither in his statements to the police nor in his prior testimony, did Mr. Manns indicate he saw Col. Gardner reach up or lean back. He testified in the liability trial that the colonel's vehicle was still going pretty fast when it hit the right-side snowbank, although in the damages trial, he estimated the speed at 25 mph. The police report⁽⁵⁾ estimated the speed at approximately 24 mph when it left the roadway.

Rural Metro Ambulance Service was called at 8:55 a.m., and arrived at the scene by 8:56 a.m. At that time, Col. Gardner had no pulse and was apneic.⁽⁶⁾ His pupils were fixed and dilated. The driver's side door was removed with the jaws of life. The colonel was declared dead at 9:00 a.m., due to multiple blunt force injuries as a result of the automobile accident.

The Rural Metro report⁽⁷⁾ described the scene. The colonel was found restrained in the crushed vehicle which was on its roof, and he was facing toward the driver's side window with the right side of his head against the roof in a large pool of blood. The left side of his head was flush against his left shoulder. He had blood coming from his nose and mouth. The vehicle was crushed around him, with the passenger's side of the vehicle completely flat.

The autopsy report⁽⁸⁾ summarized the colonel's injuries which included:

- A. Complex fracture of the skull, including basilar hinge fracture.
- B. Fracture contusions of the brain.
- C. Multiple bilateral rib fractures.
- D. Transverse laceration, aorta.
- E. Extensive posterior thoracic soft tissue hemorrhage.
- F. Pulmonary lacerations.

In addition, there were abrasions on the right side of his face, on the anterior right knee, and the anterior left shin.

CLAIM FOR CONSCIOUS PAIN AND SUFFERING

Dr. Louis Roh, a Board Certified Pathologist, who has performed 10,400 autopsies over a 34-year span, testified on behalf of Claimants. He reviewed the autopsy report and photographs. A chart⁽⁹⁾ was produced diagraming the colonel's injuries and Dr. Roh described them as well.

The colonel suffered skull fractures, specifically, a fracture of the left orbital roof, a fracture through the sella turcica, and fractures of bilateral inferior temporal lobes and a subarachnoid hemorrhage on the inferior right temporal lobe. Bilaterally, his bronchial trees contained bloody material within the lumen.⁽¹⁰⁾ He had bilateral hilar⁽¹¹⁾ hemorrhaging, a laceration of the right pulmonary artery, and a laceration separating the superior and inferior right lobes of his lung. All of the ribs on his right side were fractured, as well as three on the left side. Dr. Roh opined that these injuries, although serious, were not immediately fatal and he stated several facts evident from the autopsy to support his position. First, it appears from the slides in evidence⁽¹²⁾ that the heart, when it was removed for organ donation, was still intact having suffered no laceration or damage. He also found no traumatic rupture of the pericardial sac.⁽¹³⁾ Secondly, Col. Gardner bled into his chest cavity which Dr. Roh opined was the result of his heart still pumping blood. Once death occurs, there is no heart action so bleeding is limited to a localized area. Thirdly, there were no lacerations or serious injuries to the brain stem.

Dr. Roh also testified that the bilateral hilar hemorrhages indicated that Col. Gardner was still breathing after impact. The bleeding from the right lung laceration was found up his airway and into his left lung which sustained no injury. The bleeding into his left lung came

through the airway, the main bronchus from the lacerated right lung. He referred to this as aspiration and it results in asphyxiation or choking on his own blood.

Later during his testimony, Dr. Roh referred to positional asphyxia, opining that because Col. Gardner was upside down with his head turned with the blood in his airway, he had tremendous difficulty breathing. He further opined this was a contributing cause of death.⁽¹⁴⁾ In Dr. Roh's opinion, Col. Gardner survived the impact for an estimated one- to- two minutes before loss of blood and asphyxiation ended his life.

On redirect examination, Claimants' counsel asked Dr. Roh what the amount of blood around Col. Gardner's nose and mouth area told him. Dr. Roh testified, for the first time, that after impact Col. Gardner was alive and *moved*. Dr. Roh pointed to two blood drops, one on Col. Gardner's forehead and one on his upper right cheek.⁽¹⁵⁾ He opined that his head would have had to move in order for the blood to have gotten on these areas of his face. The State objected on the ground that this was beyond the scope of cross-examination, and counsel for the State was unprepared and surprised by Dr. Roh's opinion. Later, the Assistant Attorney General renewed the objection arguing that Col. Gardner's movement based upon the "splatter" of blood droplets on his face was not disclosed in Claimants' Expert Witness Disclosure.⁽¹⁶⁾ Claimants did not dispute that this was not disclosed but, instead, argued it was not wilful or prejudicial. The Court allowed the testimony and reserved decision allowing the parties to brief the matter after trial.

The Court will allow the testimony to stand. Although arising only on redirect, Defendant's counsel never requested an adjournment to prepare for re-cross-examination, and she had an opportunity to discuss this issue with her expert witness who testified three days after the close of Dr. Roh's testimony and presented another explanation for the blood drops (*see Gilbert v Luvini*, 286 AD2d 600 [1st Dept 2001]; *Reed v City of New York*, 304 AD2d 1[1st Dept 2003], *lv denied* 100 NY2d 503 [2003]).

The State called Michael M. Baden, M.D. Dr. Baden has been a Medical Examiner for 50 years, 25 of which were in the New York City Medical Examiner's Office. He estimated that he has performed more than 20,000 autopsies. He, too, described Col. Gardner's injuries. He described the numerous skull fractures Col. Gardner sustained, and testified the injuries were not just to the skull. Rather, the blunt force which caused the fractures was transmitted through the entire brain, damaging not only the area at the fracture site, but also the other side of the brain. Trauma from the brain impacting the skull was evident in the bilateral fractures of the temporal floors and bruising or injury to both temporal lobes. This area of the brain controls all motor functions. Dr. Baden also indicated there were multiple intersecting fractures in the posterior skull which were not shown in the diagram⁽¹⁷⁾ of Col. Gardner's injuries. Dr. Baden noted from the autopsy that with these significant brain injuries there was no swelling. The first thing that occurs when the brain is injured is swelling, and swelling takes a little time. The absence of swelling indicates death occurred quickly, before swelling could occur.

Dr. Baden opined that the bilateral hilar hemorrhage in the lungs shows bleeding in the portion of the lungs near the heart due to broken blood vessels, not due to respiration. The autopsy was performed after Col. Gardner's heart was removed for organ donation. Dr. Baden stated, in opposition to Dr. Roh's testimony, that pictures of the heart at the time it was removed showed bruising from impact. During the process of removing the heart, blood vessels must be cut. These vessels still contain blood which leaks out and would have caused some of the hemorrhaging described in the autopsy report. There was also diffuse blood elsewhere in the chest cavity and lungs. Dr. Baden attributed this to internal bleeding in the lungs from the rib fractures and lacerations. He said the right lung laceration was caused by the rib fractures and impact from the accident. When the lungs were sectioned,

the lung tissue had patches of maroon coloring which indicates blood in the tissues as seen in Exhibit Q. According to Dr. Baden, this would be bleeding dispersing through the tissues, and not blood flowing through vessels.

The right pulmonary artery is the major artery going from the right side of the heart to the lungs. This artery was lacerated and also would have leaked blood. Dr. Baden could not tell if this was the result of the accident or the heart removal. The leakage of blood from this artery would flow into the pericardial sac and seep into the pericardial cavity.

The autopsy indicated that the bronchial trees contained bloody material within the lumen, bilaterally. Unlike Dr. Roh, who opined this was the result of Col. Gardner breathing, Dr. Baden said that this was the result of blood from the lacerations of the lung and blood vessels leaking into the alveolar sacs and air passages. Dr. Baden opined this was not evidence of breathing, it can occur after death from lacerations of the blood-filled blood vessels.

Dr. Baden opined that Col. Gardner was unconscious immediately upon impact due to his brain and lung injuries. In reaching this conclusion, he relied on the autopsy and the EMT report⁽¹⁸⁾ in which it was noted that vital signs were taken at 8:56 a.m., upon arrival, and Col. Gardner's pupils were fixed and dilated, evidence of severe brain damage. Also, the fact that there were no vital signs indicate Col. Gardner was deceased.

Dr. Baden disputed Dr. Roh's opinion that positional asphyxia was a contributing cause of death. The Medical Examiner would have included positional asphyxia in the autopsy results, under cause of death, if it was a contributing factor, and it was not included in the autopsy in this case. Dr. Baden described positional asphyxia as where the chest is compressed and the diaphragm cannot move causing death. Usually, with positional asphyxia, petechial hemorrhaging in the eyes or chest compression injury is evident. These conditions were not found during the autopsy. By definition, this cause of death must exclude any other. Dr. Baden agreed with the Medical Examiner that Col. Gardner died of blunt force trauma.

The autopsy report detailed the injuries caused by the blunt trauma and described a group of abrasions on the right side of Col. Gardner's face. Dr. Baden testified that these would have bled, and that some of the photographs showed where the blood had seeped out onto Col. Gardner's face. Dr. Baden noted that blood can be seen seeping under Col. Gardner's nose and the right side of his mouth.⁽¹⁹⁾ He attributed this to the facial fractures and tearing of blood vessels. The drops of blood on Col. Gardner's forehead and upper right cheek, which Dr. Roh attributed to movement, Dr. Baden testified were the result of abrasions and scrapes to his face, evident from the initial autopsy photos.⁽²⁰⁾ The blood came from the broken capillaries resulting from the impact and this could happen even after death. He attributed the blood in and below Col. Gardner's left nostril to fractures to the facial bones after impact. The photographs also showed that there was some snow inside the vehicle and some glass fragments under his left hand. There is no evidence to show he moved his fingers after impact.

The picture of the scene, taken after Col. Gardner was removed from the vehicle, shows what appears to be a large spread of blood.⁽²¹⁾ Dr. Baden estimated the removal process caused two- to- three ounces of blood to seep out due to postmortem leakage. This amount of blood indicates that the heart stopped pumping quickly or even more blood would have pooled out. On cross-examination, Dr. Baden conceded that he could not rule out the possibility that Col. Gardner lived for a short time after impact, but did not believe he was conscious. Although Col. Gardner's heart may have continued to beat after the impact, it would have been for less than two minutes. Since the standard for life, according to Dr.

Baden, is a beating heart for one minute, he could have, technically, been alive for a short time. The police received a call regarding the accident at 8:54 and the EMT report reflects that vital signs were taken at 8:56 a.m., upon arrival at the scene, and there were no signs of life. There is no evidence to support a finding he was conscious, since on cross-examination even Dr. Roh denied any evidence of movement or verbalization that would show Col. Gardner was conscious.⁽²²⁾

The Court finds that although Col. Gardner may have been technically alive up to two minutes after impact, based upon his injuries and the photos of the scene, there is no evidence he was conscious upon impact or had "some level of awareness" of his pain (see *McDougald v Garber*, 73 NY2d 246, 255 [1989]; *Boston v Dunham*, 274 AD2d 708 [3d Dept 2000]; *Cepeda v New York City Health & Hosps. Corp.*, 303 AD2d 173 [1st Dept 2003]). Evidence that shows "practically instantaneous death" will not support an award for conscious pain and suffering (*Estate of Ferguson v City of New York*, 73 AD3d 649, 650 [1st Dept 2010]).

As to Col. Gardner's pre-impact terror as his vehicle slid across the icy roadway that morning and rode up the snowbank in front of the right jersey barrier, Mr. Manns testified about the vehicle teetering for a few seconds before falling and Col. Gardner reaching up and leaning back. The police report⁽²³⁾ calculated that Col. Gardner's vehicle was traveling 24 mph when it went over the jersey barrier causing it to land 62 feet out from the barrier. These factual findings and the pictures in evidence⁽²⁴⁾ are not consistent with the vehicle resting or teetering on the barrier for any length of time before falling off the bridge. Nor was there any indication from the police investigation and measurements that the vehicle teetered on the barrier before falling.

The Court notes that Mr. Manns failed to mention the car teetering to the police immediately after the accident. Although he did testify to the car teetering at the liability trial, he never mentioned seeing Col. Gardner reaching or leaning at that time. In light of the police findings, the Court cannot credit Mr. Manns' recollection on this point.

Col. Gardner was a brilliant, well-educated engineer. During those seconds between loss of control after hitting the left median barrier, skidding perpendicular to the 55-mph direction of traffic, riding up the right barrier, and his vehicle landing on Park Street, it can reasonably be inferred that Col. Gardner was aware of the danger he was in and was aware of the likelihood of grave injury or death. Given his efforts, as described consistently by Mr. Manns, to regain control of his skidding vehicle, Col. Gardner was aware of the unfolding events. Prior to contacting the left median barrier, there was no reason for the colonel to believe grave injury or death was imminent. Although, as the State points out, no one will ever know exactly what Col. Gardner was thinking during that time, that, alone, is not a reason to deny a recovery for pre-impact terror. Eyewitness testimony of a decedent's suffering before the accident is not necessary; what is necessary is some evidence from which it can reasonably be inferred that the decedent underwent some suffering before impact (*Shatkin v McDonnell Douglas Corp.*, 727 F. 2d 202 [C.A.N.Y. 1984]; see also *Lang v Bouju*, 245 AD2d 1000 [3d Dept 1997]).

In the case of *Lang v Bouju*, *supra*, the estate of a motorcyclist who died instantly upon impact with a truck was awarded damages for his pre-impact terror. The Court found that the fact decedent applied his brakes as he did, allowed an inference that he saw the truck and was aware of the likelihood of a collision.

At some point between hitting the left median barrier and leaving the Park Street Bridge, Col. Gardner, with his engineering expertise, perceived the inevitable. Certainly, after his vehicle left the bridge railing, Col. Gardner knew what his fate would be. For these several

seconds, the Court awards Claimant, as administrator of the estate \$250,000. In the cases cited by the Claimants, *Lubecki v City of New York*, 304 AD2d 224 [1st Dept 2003] *appeal denied* 2 NY3d 701 [2004], the decedent had been held hostage by a bank robber, used as a human shield and was shot at least three times before she died. Her ordeal lasted significantly longer and she suffered from gunshot wounds for an unspecified period of time before passing, making the \$3 million award incomparable to the facts here.

Ms. Gardner, the colonel's ex-wife, testified that she paid for the funeral expenses. Col. Gardner was buried in Arlington National Cemetery in March 2004. The bill and copies of the checks totaling \$6,985 were received into evidence.⁽²⁵⁾ Although Ms. Gardner is not a distributee, she paid these expenses on behalf of the estate. Pursuant to EPTL § 11-3.3, the Court awards this amount to Claimant as administrator of the estate as part of the personal injury cause of action (*In re Estate of Jackson*, 71 Misc 2d 133 [Kings Co. Sur. Ct. 1972]).

WRONGFUL DEATH CAUSE OF ACTION

Claimants also seek damages for Col. Gardner's wrongful death. 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. In this case, the sole distributees are Col. Gardner's two sons, Brandon William Gardner, born October 8, 1984, who was 19 years old at the time of his father's death, and Ryan Jerome Gardner, born June 27, 1988, who was 15 years old at that time.⁽²⁶⁾ Col. Gardner and Cynthia Gardner were divorced in 2000,⁽²⁷⁾ and she is no longer a distributee or entitled to damages under the statute.

Despite the tragedy of Col. Gardner's death, the Court is constrained to make an award solely for pecuniary loss, that is the loss measured by money. The tremendous loss to these young men of their father and their resulting grief, sadness, loss of affection, and loss of companionship cannot be compensated by money damages, practically or under the statute (*see Gonzalez v New York City Hous. Auth.*, 77 NY2d 663 [1991]). Loss of support, voluntary assistance, possible inheritance, and medical and funeral expenses are recoverable damages. Where the distributees are the decedent's children, loss of parental guidance or nurture, care and physical, moral and intellectual training may also be recovered (*Id.* at 668). In assessing the amount of damages, the Court or fact-finder can consider decedent's earning potential, which would include past and future earnings and potential for advancement, as well as decedent's age, health, life expectancy, and character, and the circumstances of the distributees, including their number, age, and health (*Johnson v Manhattan & Bronx Surface Tr. Operating Auth.*, 71 NY2d 198, 203 [1988]). Given the unique factors relevant to any wrongful death action, each case must be examined on its own merits (*DeLong v County of Erie*, 89 AD2d 376, 386 [4th Dept 1982], *affd* 60 NY2d 296 [1983]).

The evidence established that Col. Gardner was 50 years old when he died, having been born on December 19, 1953. He and his sons and former wife lived in California. He held a Bachelor's Degree in Electrical Engineering and Master's Degrees in Electrical Engineering and National Security Strategy. He retired in August 2001 as a full colonel in the United States Air Force after 25 years of service. He had top-secret security clearance. At the time of his death, he was working as the Program Project Manager III for the Director of Space Technology at the Jet Propulsion Laboratory (JPL) at California Institute of Technology in Pasadena, California.

Five of Col. Gardner's friends and family came in to attest to what a superlative individual he was. They consistently described him as a quiet, hard working gentleman with a good sense of humor. He was calm and collected and committed to his family. He was very frugal and lived in a small apartment, with simple belongings. He owned only three vehicles

over his lifetime. He was very healthy and stayed fit. He had an extraordinary ability to problem-solve, and could take complex issues and break them down into simple terms when explaining or assisting others.

Even after Colonel and Ms. Gardner divorced, they maintained a close relationship and regularly got together for cookouts and activities with the boys. They also continued to vacation together as a family. She described him as "an exceptional man."

Both boys testified how involved and supportive Col. Gardner was in their lives. Brandon, who was in college at the time of his father's death, indicated that his father helped him out financially by paying for his school tuition and room and board, and also sent him money. He also helped him with problems that arose. His father would assist him to break things down and problem-solve. He spoke to his father at least weekly while he was away at college. Since his father's death, Brandon has gone on to obtain his law degree and is now practicing law in Michigan. He attributes his success to his father teaching him how to problem-solve and helping him to develop a strong work ethic. He indicated that his father was there whenever he or the family needed him.

Ryan was younger when his father died, and they spent a lot of time together enjoying each other's company. They were involved in sports including surfing and other activities. They were planning a camping trip before his death. Ryan described his father as his best friend.

The life expectancy for both boys exceeds the life expectancy of Col. Gardner. Based upon the Life Expectancy Table in the PJI, Brandon had a life expectancy of 56.6 years and Ryan had a life expectancy of 59.4 years at the time of Col. Gardner's death.⁽²⁸⁾

LOSS OF GUIDANCE

Col. Gardner was a role model for his sons, and they looked up to him and sought out his advice and guidance. The record is replete with evidence of the time, attention, guidance, support and love he gave his children. There is no indication that this would have ended before his sons were done with college and established in their first jobs. It is clear from the evidence that both of his sons would have sought out and received the wisdom and guidance of their father as they began their careers.

Based upon the foregoing, the Court finds that both Gardner children have suffered the loss of their father's emotional and intellectual care and guidance. The bond between Col. Gardner and his children was evident, as was his assistance in helping them to develop and make decisions about their lives. The Court awards Claimant, Brandon William Gardner, as Administrator, the sum of \$300,000 for his loss of Decedent's past parental care and guidance (see *Gonzalez*, 77 NY2d at 669), and \$425,000 for Ryan (*Phelan v State of New York*, 11 Misc 3d 151 [Ct Cl, 2005]). As to his future loss of parental care and guidance, the Court awards Claimant, Brandon William Gardner, as Administrator the sum of \$50,000 (*Kiker v Nassau Co.*, 175 AD2d 99 [2d Dept 1991]), and for Ryan \$50,000 (see *Carlson v Porter*, 53 AD3d 1129 [4th Dept 2008]; *Phelan v State of New York*, 11 Misc 3d at 169 [Ct Cl 2005]).

LOSS OF SUPPORT AND LOSS OF INHERITANCE

In addition to the loss of guidance, the children suffered a loss of financial support and loss of inheritance. The determination that must be made is what is the reasonable expectancy of future assistance of support from the decedent that was prematurely terminated by his wrongful death (*Gonzalez*, 77 NY2d at 668). Even adult, financially independent distributees are not precluded from recovery (*Id.*).

Relevant to the determination of pecuniary damages related to loss of support and inheritance are the decedent's present and future earnings, expectations for advancement, and probability of means to support heirs (*Id.*). At the time of his death, Col. Gardner had a 29-year life expectancy.⁽²⁹⁾ He had a pension income from the Air Force of \$44,302,⁽³⁰⁾ and an annual salary of \$145,830 from JPL.⁽³¹⁾ By all accounts he loved his job, which he had begun on October 21, 2002.

Claimants called Dr. Conrad Berenson as an economic consultant to testify regarding the loss of the colonel's earnings. Based upon Col. Gardner's date of birth, date of death, occupation, work history, W-2's, tax returns, work-life expectancy, his Air Force pension, the divorce decree, and his anticipated pension from JPL, he developed four projections for future lost earnings. These four projections assumed different retirement dates for Col. Gardner at age 67, 68, 69, and 70. In addition, he calculated retirement income for the balance of his life expectancy. Dr. Berenson determined that, excluding step increases, Col. Gardner's income would have been \$181,000 per year as of February 2011⁽³²⁾ based upon the U. S. Department of Labor, Management, Business and Finance Tables before the inclusion of any growth rate. He reduced these sums by 5.7 percent for his pension contribution, \$2,001 for the cost of providing Ryan with health insurance as a minor, and based upon Col. Gardner's frugality he deducted a 25.8 percent consumption rate based upon a household of one. This was an average for personal consumption using United States Department of Labor Statistics and factoring in his frugal nature. The consumption rate is used to deduct from gross income an amount that Col. Gardner would have used for the cost of living expenses, personal items, and sundries, such as food, clothing, recreation, transportation, etc. In determining this personal consumption percentage, he did not look at Col. Gardner's savings or expenditures during the years prior to his death.

Dr. Berenson made four projections of lost income. To those projections he made two alternate calculations using a 2.5 percent and then a 3.5 percent growth rate. He used a .5 percent and 1.3 percent increase for Col. Gardner's retirement income.

Although the Pattern Jury Instructions (1B PJI, Appendix B) sets forth a work-life expectancy of 62.3 years, the Court agrees with Dr. Berenson and finds that given Col. Gardner's healthy lifestyle, advanced degrees, work ethic, and having just started a second career he would have likely worked until the age of 69 to have reached 20 years at JPL.⁽³³⁾ By all accounts, Col. Gardner enjoyed his new job, as he had a strong interest in outer space work, and this job provided him with an opportunity to continue working on projects involving outer space.

The State called Anthony Riccardi, a Forensic Economist and Enrolled Actuary, with degrees in Mathematics and Economics. Mr. Riccardi calculated the loss of support to Brandon and Ryan based solely upon Col. Gardner's obligations under the divorce. He also opined that a loss of inheritance could not be determined because it was too speculative to anticipate what would have remained in Col. Gardner's estate some 29 years into the future. He looked at Col. Gardner's income and accumulated assets at the time of death, which included a condominium valued at \$500,000, which he had purchased a year before his death and made a \$100,000 downpayment, obtaining a mortgage for the balance. He also had other personal property totaling \$150,000, including a bank account. He owned a 1986 Toyota Four Runner and a 1978 Harley Davidson motorcycle. Based upon Col. Gardner's income and assets at the time of death, Mr. Riccardi opined that his personal consumption was closer to 95 percent of his income.

The Court rejects Mr. Riccardi's position and the State's arguments that an award for loss of support should be limited to the amount Col. Gardner was obligated to pay under the

terms of the divorce agreement. Col. Gardner, under that agreement, had to pay \$500 per month child support for Ryan, which was to continue until he reached the age of 18 or the death of Col. Gardner, Ryan, or Ms. Gardner. Although in California, the duty of support ceases for a child who is 18 years old and no longer a full-time high school student,⁽³⁴⁾ Col. Gardner did not limit his financial support to the contractual amount he owed, he paid for other things for the boys and helped Ms. Gardner if she needed assistance. Col. Gardner supported both his children well-beyond his contractual obligations, and there is no indication that this would have ceased. Col. Gardner continued to support his son, Brandon, by paying for his college expenses, room and board, and providing him with additional support. Although Ryan lived with his mother after the divorce, he regularly spent time with his father, often staying at his apartment. Given that Col. Gardner expected his sons to obtain college degrees, there is sufficient evidence that he would have supported them as they pursued their education. The Court finds this would have included Brandon's law school education.

Although Col. Gardner had not accumulated significant savings at the time of his death, he had only begun his career at JPL and his dual income. The Court does not find it speculative to conclude that given his financial status at the time of his death projected into the future, he would have continued to help the boys get established in their careers and provided some assistance throughout his life; although, the amount of support would have significantly decreased as the boys became self-supporting.

The Court does not accept Dr. Berenson's calculations for lost income because of clarified increases to Col. Gardner's JPL income based upon U. S. Department of Labor data not clearly analogous or related to Col. Gardner's job and industry. He also appears to have used only half of the pension Col. Gardner received based upon his 2003 W-2 in his calculations.⁽³⁵⁾

The Court calculated past lost earnings for 8.5 years based upon Col. Gardner's earnings on his 2003 W-2, with a 3 percent annual increase. The Court also finds Col. Gardner's 25.8 percent personal consumption rate too low, based upon the limited assets in his estate; yet, Defendant's 95 percent rate is too high. The Court will use a personal consumption rate of 45 percent. As Ryan was a minor at the time of his father's demise, he would have received greater financial support for those years until he completed high school with support continuing through college. Support for Brandon would have continued through college and law school and as they began their careers. The assistance Col. Gardner would give his sons after his retirement would decrease to a nominal amount. Although not subject to precise quantifications, the Court has relied on the financial information, evidence of Col. Gardner's character, and support for his family to arrive at an award for future loss of support. The Court finds that Col. Gardner's total past net income for assisting his family \$993,400,⁽³⁶⁾ and his future net income until the end of his life expectancy would be \$1,631,350.

Accordingly, the Court awards for Claimant, Brandon William Gardner, as Administrator for loss of support for:

Brandon - Past: \$275,100

Future: \$187,000

Ryan - Past: \$473,400

Future: \$187,000

LOSS OF INHERITANCE

In addition to loss of support, the evidence supports a finding that if Col. Gardner had lived out his life expectancy, after 20 years in his new position at JPL, coupled with his pension from the Air Force, his estate would have been significantly greater than it was at the time of his death and, particularly, since Col. Gardner retired from the Air Force in July 2001 and only began his new position at JPL increasing his income five-fold, 15 months before his death. The Court finds that Col. Gardner would have been assisting his sons, specifically, Brandon with law school through most of 2010, so it seems unlikely he would have had significant savings until after these school expenses ceased. Although projecting the amount Col. Gardner's children would have inherited if he had lived to his full life expectancy is wrought with contingencies and variables, no one can predict with clear accuracy; yet, where there is an evidentiary basis upon which to predict probable future accumulated wealth, an award for loss of inheritance can be made (*see Daniel v City of New York*, 8 AD3d 6 [1st Dept 2004]; *Austin v Metropolitan St. Ry. Co.*, 108 App Div 249 [1st Dept 1905]; *Sternfels v Metropolitan St. Ry. Co.*, 73 App Div 494 [1st Dept 1902], *affd* 174 NY 512 [1903]; *Machine v National Helicopter Corp. of America*, 1997 WL 786937 [S.D.N.Y.]). Factors such as decedents' ages, amounts earned or lost in the past, life expectancy, prospective income, expenses and activities are relevant considerations.

Here, as described above, Col. Gardner had just begun a lucrative new career, providing a significant second income more than three times his Air Force pension and he was frugal. Based upon his tax return, he had some savings accounts and stock, and even after deducting a 45 percent consumption rate and amounts for support to his children, he still had a significant balance of income. Both distributees are young and healthy with longer life expectancies and would, in all probability, have survived their father.

Given the significant financial assistance, the Court has found that Col. Gardner would have given to Brandon and Ryan while they completed their education through most of 2010, the Court does not find his investments and savings would have increased during that time.

Beginning in 2011, the Court finds Col. Gardner would have had a total of \$2,731,000 until retirement saved and/or invested after deducting for expenses and the financial assistance to his sons.

Claimants called upon Archie Spencer, a Financial Portfolio Manager for Atwood Investors Diversified Services, an investment management firm to establish a rate of return on investments. Mr. Spencer used a hypothetical portfolio which he created to determine a reasonable rate of return. He placed 40 percent of the hypothetical portfolio in the S & P 500, a broad-based equity index, 10 percent in a five-star rated mutual fund, 25 percent in a Fidelity Bond Fund, and 25 percent in a Global Bond Fund. The annual compounded growth rate for this hypothetical portfolio from January 2004 through August 2011 was 9.13 percent.

Mr. Riccardi felt that given Col. Gardner's conservative nature and frugality, he would have been more averse to risk than acknowledged by Mr. Spencer. The hypothetical portfolio created by Mr. Spencer carries more risk than Col. Gardner's personality would seem to authorize. This is consistent with what appears to be Col. Gardner's investments before his death which included Certificates of Deposits and bank accounts with some stocks.⁽³⁷⁾ Mr. Riccardi felt the 3 percent return for less risky U. S. Treasury Securities would be the appropriate rate.

The Court finds it is unlikely that Col. Gardner, at age 50, would make significant investments in risky sectors of the financial market. As a result, the rate of return on his investments would not reach Mr. Spencer's 9.13 percent. The Court finds a more appropriate rate which would include some investments that carry greater risk than U. S. Treasury Bonds

would be 4.5 percent. The Court calculated Col. Gardner's earnings on his investments and savings, based upon the net income the Court found he would have available, for investment until he retires. The Court did not include any additional investments after his retirement, although the investments made would still generate returns. The Court finds that given the possibility that Col. Gardner would have used some of his investments, remarried, or had other changes in circumstances, the Court awards Brandon and Ryan only 50 percent of the accumulated savings and investments that would have increased Col. Gardner's estate at his normal life expectancy.

Accordingly, the Court awards Claimant, Brandon William Gardner, as Administrator, \$682,750 each for Brandon's and Ryan's loss of inheritance damages.

The Court awards Brandon William Gardner, as Administrator, wrongful death damages recapitulated as follows:

PAST DAMAGES:

PERSONAL INJURY DAMAGES

PAST PAIN AND SUFFERING \$250,000

FUNERAL EXPENSES \$ 6,985

TOTAL PERSONAL INJURY DAMAGES \$ 256,985

LOSS OF GUIDANCE

BRANDON \$300,000

RYAN \$425,000

LOSS OF SUPPORT

BRANDON \$275,100

RYAN \$473,400

TOTAL PAST WRONGFUL DEATH DAMAGES: \$1,473,500

FUTURE DAMAGES:

LOSS OF GUIDANCE

BRANDON \$ 50,000 Payable over 3 years

RYAN \$ 50,000 Payable over 3 years

LOSS OF SUPPORT

BRANDON \$ 187,000 Payable over 3 years

RYAN \$ 187,000 Payable over 3 years

LOSS OF INHERITANCE

BRANDON \$ 682,750 Payable over 11 years⁽³⁸⁾

RYAN \$ 682,750 Payable over 11 years

TOTAL FUTURE DAMAGES: \$1,839,500

TOTAL WRONGFUL DEATH DAMAGES: \$3,569,985

Since the amount of future damages exceeds \$250,000.00, a structured judgment is required pursuant to CPLR 5041 (e). The Chief Clerk is directed to stay entry of judgment in accordance with this Decision until a hearing is held pursuant to CPLR Article 50-B,⁽³⁹⁾ which will be scheduled as soon as practicable. The Court encourages the parties to agree upon the discount rate to be applied and to formulate a structured settlement of their own (CPLR 5041 [f]). In the event the parties fails to reach agreement, each party shall submit a proposed order directing judgment in writing conforming to the requirements of the CPLR Article 50-B within 90 days of the service of this Decision upon them by the Clerk of the Court.

Any filing fee paid by Claimants shall be recovered pursuant to § 11-a (2) of the Court of Claims Act.

All trial motions not heretofore decided are now deemed denied.

November 19, 2012
Syracuse, New York

DIANE L. FITZPATRICK
Judge of the Court of Claims

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1. After trial, this Court dismissed the claim which was reversed by the Appellate Division, 79 AD3d 1635 [4th Dept 2010].
 2. Trial Decision, *Gardner v State of New York*, UID No. 2009-018-047 [Ct Cl, Fitzpatrick, J., Oct. 2, 2009].
 3. The furthest right-hand lane is part of an on-ramp.
 4. Exhibit C.
 5. Exhibit 34.
 6. Exhibit 51.
 7. Exhibit 51.
 8. Exhibit 47.
 9. Exhibit 30.
 10. Cavity of a tubular organ (*Merriam-Webster Medical Dictionary* [1996] p. 452).
 11. Relating to, affecting or near the depression in the medial surface of a lung that forms the opening through which the bronchus, blood vessels and nerves pass (*Merriam-Webster Medical Dictionary* [1996] p. 339).
 12. Exhibit 48, slide 44, and Exhibit 68.

13. Sac in which the heart is encased in the body (*Merriam-Webster Medical Dictionary* [1996] p. 23).
14. Defendant objected to this testimony as beyond the scope of disclosure. The Court allowed the testimony to stand because the disclosure reviewed by the Court at trial indicated Dr. Roh would opine that Col. Gardner had difficulty breathing.
15. Exhibit 48, slide 141, also Exhibit V.
16. Claimants did not file their Expert Witness Disclosure in accordance with the Uniform Rules for the Court of Claims § 206.5 (c), so the disclosure is not part of the Court file.
17. Exhibit 30.
18. Exhibit 51.
19. Exhibits U and V.
20. See Exhibits R, 37 and 48. See also Exhibit 30.
21. Exhibits 24 and Y.
22. Trial Transcript, November 1, 2011, p. 64.
23. Exhibit 34.
24. See Exhibit 25.
25. Exhibit 18.
26. EPTL § 4-1.1.
27. Exhibit 14.
28. 1B PJI Appendix A, Table 1.
29. Dr. Berenson's testimony and US Life Expectancy Tables.
30. Ms. Gardner received half of his military pension under the divorce agreement. Exhibit 14.
31. Exhibit 60.
32. Dr. Berenson prepared his report in February 2011. Dr. Berenson included increases based upon U. S. Department of Labor data for Business and Financial Management not persuasively analogous or related to Col. Gardner's industry.
33. He would have actually reached 20 years in October 2022, two months before his 69th birthday.
34. California Family Code § 3901 (West 2012).
35. Exhibits 60 and 63. [Lost pension sum of \$175,992 for past of 7.05 years equals \$24,963.40, not \$44,302. Lost pension sum for future of \$267,920 for 9.85 years equals \$27,200, annually].

36. A 3 percent COLA was used.

37. Exhibits 8 and 11.

38. Although compensation for loss of inheritance may be more appropriately paid in a lump sum, a time frame needs to be specified in accordance with CPLR 4111 (e) and Article 50-B. Analogizing to the periodic accumulation of future income, the Court finds Decedent's estate accumulation would have occurred over his remaining work life expectancy as of this Decision.

39. All interest calculations shall be determined at such hearing.