

N.Y. Pattern Jury Instr.--Civil 2:320

New York Pattern Jury Instructions--Civil

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Committee on Pattern Jury Instructions Association of Supreme Court Justices

Division 2. Negligence Actions

J. Damages

6. Action for Wrongful Death and Conscious Pain

PJI 2:320 Damages—Actions for Wrongful Death and Conscious Pain and Suffering

As you have heard, the plaintiff, EF, is the representative of the estate of AB. EF makes two claims: the first claim seeks damages on behalf of *[list distributees]* resulting from the death of AB and the second claim seeks damages for the injuries suffered and losses sustained by AB before (he, she) died. You must separately consider each of these claims.

As to the first claim, damages are the amount that you find to be fair and just compensation for the monetary losses resulting from AB's death to each of the persons for whom this claim is brought. Those persons are: *[list the distributees by name and state their relationship to decedent]*.

EF claims that these individuals have sustained monetary loss as a result of AB's death in that *[state items of pecuniary loss claimed by plaintiff]*. Defendant CD claims *[state CD's claims in relation to distributees' alleged pecuniary loss]*.

The law limits damages resulting from AB's death to monetary injuries. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must decide the monetary losses to *[list the distributees by name]* caused by AB's death on *[give date of death]*. In deciding the amount of monetary losses, you should consider the character, habits and ability of AB; the circumstances and condition of *[list the distributees by name]*; the services that AB would have performed for (him, her, them); the portion of (his, her) earnings that AB would have spent in the future for the care and support of *[list the distributees by name]*; the age and life expectancy of AB; the ages and life expectancies of *[list the distributees by name]*; and *[where the distributees include children]* the value of the intellectual, moral, and physical training, guidance and assistance that AB would have given the children had (he, she) lived. You should also consider the amount, if any, by which AB, if (he, she) had lived, would have increased (his, her) estate from (his, her) earnings and thus added to the amount that would have been inherited from (him, her), provided that you find that at least one of *[list the distributees by name]* would have been alive to inherit from (him, her) had AB not died on *[state date of death]*.

AB was, at the time of (his, her) death *[state age]* and, according to the life expectancy tables, had a life expectancy of *[state number of years]*. (His, her) spouse was then *[state age]* and had a life expectancy of *[state number of years]*. The children were *[state ages]* and had life expectancies, respectively of *[state number of years]*. Life expectancy tables are simply statistical averages. A person might live longer or die sooner than the time indicated by those tables. The figures I just mentioned are not controlling but may be considered by you together with the evidence you heard concerning the health, habits, employment and activities of AB prior to (his, her) death and those of *[list the distributees by name]* in determining what their respective life expectancies were at the time AB died.

You must decide what portion of (his, her) earnings AB would have spent for the care and support of *[list the distributees by name]*. In making your decision, you must consider: the amount AB earned per (week, month, year) prior to (his, her) death; the part of those earnings that AB contributed to the care and support of each of the distributees and the pattern of those contributions; the position that AB had with (his, her) employer at the time that (he, she) died; (his, her) prospects for advancement and the probabilities with respect to (his, her) future earnings; the risks of (his, her) occupation; the condition of

(his, her) health and the length of time that (he, she) would reasonably be expected to continue working. As to this last factor, the work expectancy of AB was, according to work expectancy tables, *[state number of years]*. That figure, like the life expectancy figures I mentioned earlier, is only a statistical average and is furnished simply as a guide. In determining what portion of (his, her) available earnings AB would have applied in the future to the care and support of (his, her) children, you should consider that AB was not legally obligated to contribute to the support of any child who became 21 years old. However, AB could have stopped supporting a child under 21 who *[e.g., became self-supporting]* or could have decided to continue to support a child who was older than 21. If, on the evidence, you deem it reasonably probable that any of the children would have *[e.g., become self-supporting]* prior to age 21, or that AB would have contributed to the support of any of them beyond age 21, you may use as the date of termination of support of that child a date which is earlier or later than 21 as you deem proper.

As I stated before, it is the monetary value of AB to each of the distributees that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in deciding the amount of the monetary loss suffered by each of the distributees.

The amount you award for monetary losses sustained by each of the distributees must represent the full amount of such losses without reduction to present value. You must also decide the period of years for which that amount is intended to provide compensation.

You will make a separate award for those reasonable expenses for AB's funeral and burial lot and those that were (*[where appropriate]*) paid by the spouse, for which the spouse is responsible) for medical aid, nursing and other care required to treat AB's injuries.

As to the claim for damages sustained by AB before (he, she) died, which is the second claim I mentioned to you earlier, plaintiff is entitled to recover such sum as you find will fairly and justly compensate for AB's pain and suffering during such time as (he, she) was conscious from the moment of injury to the moment of death. Conscious pain and suffering means pain and suffering of which there is some level of awareness by AB. In addition, plaintiff is entitled to recover those reasonable expenses that were paid or incurred by (AB, AB's estate) for medical aid, nursing and other care required to treat AB's injuries, and such amount for loss of earnings as you find AB would have earned between the date of injury and the date of death had (he, she) not been injured.

*[The following should be charged when there is evidence that the decedent experienced pre-impact terror, see Caveat 3 below:]* Plaintiff is also entitled to recover the amount you find that will fairly and justly compensate for the emotional pain and suffering actually endured by AB between the moment AB realized that (he, she) was going to be gravely injured or die and the moment AB sustained a physical injury. In order to find that plaintiff is entitled to recover for these damages, you must find that (a) AB was aware of the danger that caused (his, her) grave injury or death, (b) AB was aware of the likelihood of grave injury or death, and (c) AB suffered emotional distress as a result of (his, her) awareness of (his, her) impending grave injury or death.

Your verdict will include answers to the following questions, which will be submitted to you in writing:

1. State the total amount of monetary loss, if any, to each of *[list the distributees by name]* resulting from AB's death. For the children of AB this monetary loss should include the deprivation of the intellectual, moral and physical training and education that AB would have given. *[In cases tried in the Second Department, state in place of the preceding sentence: State the total amount of monetary loss, if any, to (list the distributees by name) resulting from AB's death, without specifying the amount of monetary loss for each individual (see Caveat 2 below)].*
2. For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such monetary loss is intended to provide compensation *[In cases tried in the Second Department, omit this question, see Caveat 2 below].*

3. State the amount awarded, if any, for the following items of damage incurred or paid by AB's spouse:

- (a) Medical expenses;
- (b) Nursing and other expenses;
- (c) Funeral expenses, including any burial lot.

4. State the amount awarded for the following items of damage sustained before AB's death, if any, incurred by AB prior to (his, her) death or for which AB's estate is responsible [*Only include items that are supported by the evidence in the case before the court*]:

- (a) Medical expenses;
- (b) Nursing and other expenses;
- (c) Dental expenses;
- (d) Loss of earnings/Impairment of earning ability;
- (e) Custodial care;
- (f) Rehabilitation services;
- (g) Emotional pain and suffering AB endured between the moment AB realized that (he, she) was going to be gravely injured or die and the moment AB sustained a physical injury;
- (h) Pain and suffering of AB from the moment of physical injury to the moment of death;
- (i) Funeral expenses, including a burial lot.

If you decide not to make an award as to any item, you will insert the word “none” as to that item.

**Caveat 1:** Where the distributees are persons other than the surviving spouse and children, the charge must be modified accordingly.

**Caveat 2:** As a general rule, the jury should allocate the total amount of economic loss among the distributees. In *Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 765 NYS2d 111 (4th Dept 2003), the Fourth Department held that the jury must allocate the amount of economic loss among the distributees. However, in *Carter v New York City Health and Hospitals Corp.*, 47 AD3d 661, 851 NYS2d 588 (2d Dept 2008), the Second Department stated, in what appears to be dicta, that it was improper in a wrongful death case to ask the jury to itemize the amount of economic loss to be awarded to each distributee. The Carter court also stated that the jury's role is limited to determining the total wrongful death damages to be awarded to all distributees and that the apportionment of the award among the distributees is for the Supreme or Surrogate's Court after a hearing. In light of Carter, courts within the Second Department should consider modifying the charge and verdict sheet in wrongful death cases to require a single lump sum award to the distributees.

**Caveat 3:** With respect to the compensable injuries sustained by the decedent before he or she died—the plaintiff's second claim in the charge—the decedent's estate may recover damages for the decedent's “pre-impact terror” as an element of the decedent's conscious pain and suffering. Damages for pre-impact terror are designed to compensate the decedent's estate for the fear the

decedent experienced during the interval between the moment the decedent appreciated the danger resulting in the decedent's death and the moment the decedent sustained a physical injury as a result of the danger. Such damages are appropriate where there is evidence that the decedent was aware of the danger that caused the decedent's death, that the decedent was aware of the likelihood of grave injury or impending death, and that the decedent suffered emotional distress as a result of that awareness, *Lang v Bouju*, 245 AD2d 1000, 667 NYS2d 440 (3d Dept 1997); see *Phiri v Joseph*, 32 AD3d 922, 822 NYS2d 573 (2d Dept 2006); *Anderson v Rowe*, 73 AD2d 1030, 425 NYS2d 180 (4th Dept 1980); see also this Comment, *infra*. Care must be taken in preparing the charge to reflect the precise conscious pain and suffering damages that the evidence supports, as three possible scenarios exist: (1) the evidence supports an award only for pre-impact terror, (2) the evidence supports an award only for pain and suffering from the moment of physical injury to the moment of death, or (3) the evidence supports awards for both species of damages.

**Caveat 4:** The above pattern charge applies generally to all wrongful death actions. However, for actions based on medical, dental or podiatric malpractice commenced on or after July 26, 2003, the charge may be modified to instruct the jury to reduce to present value the award for future damages and to eliminate the instruction to specify the period of years for which an award of future damages is intended to provide compensation, see Comment to this charge, *infra*.

### I. General Considerations

The wrongful death charge contains instructions for the jury relating to two substantive claims: (1) the wrongful death cause of action itself, and (2) the survival action. The wrongful death cause of action, which is a creature of statute, provides a means of compensation to the decedent's distributees for the pecuniary injuries they suffered as a result of the decedent's death. The common law survival cause of action is brought on behalf of the decedent's estate to recover for the decedent's pre-death losses, including conscious pain and suffering and past lost earnings. Both causes of action are brought by the decedent's personal representative for the benefit of the distributees on the wrongful death cause of action and the estate on the survival action.

EPTL 5-4.3 governs the amount of recovery for wrongful death; EPTL 5-4.4 and EPTL 1-2.5 define the persons for whose benefit the action is brought. EPTL 11-3.3 defines what may be recovered in a survival action, including conscious pain and suffering. Pre-death loss of earnings, as well as medical, nursing and funeral expenses paid by decedent or by the estate, or which are a charge against the estate, are recoverable in the survival action, EPTL 11-3.3, but damages for future loss of earnings or loss of services are not, *Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 765 NYS2d 111 (4th Dept 2003). Medical, nursing and funeral expenses paid by the spouse or next of kin, or for which such person is responsible are recoverable in the wrongful death action, EPTL 5-4.3, but funeral expenses paid by a spouse in his or her capacity as administrator of decedent's estate are recoverable as an item of damages in the survival action, *Montalvo v Chiamonte*, 74 AD3d 455, 902 NYS2d 520 (1st Dept 2010). To avoid a double recovery, the pattern charge must be modified to reflect who made or is responsible for these payments. Itemized verdicts are required in wrongful death actions, CPLR 4111(e); this issue is discussed further in this Comment.

Age 21 is used in the pattern charge because the age for support has not been reduced. While the legislature in 1974 lowered the age of majority to 18, see Domestic Relations Law § 2; CPLR 105; see also PJI 2:317, statutory authority continues to make parents chargeable for the support of their children to age 21, Family Court Act § 13, but not beyond, *Hirsch v Hirsch*, 142 AD2d 138, 534 NYS2d 681 (2d Dept 1988). As to emancipation, see PJI 2:317.1. As to "loss of earnings" and "future impairment of earning ability" sustained by decedent prior to death, except in the most unusual circumstances, there is little, if any, distinction between the two items and, therefore, it is erroneous to identify both as separate items of damages, *Taylor v Henderson*, 175 AD2d 590, 573 NYS2d 793 (4th Dept 1991).

### II. Effect of Legislation Applicable to Certain Actions Commenced on or After July 23, 2003

In 1985 the Legislature adopted CPLR article 50-A to require that certain money judgments in medical, dental and podiatric malpractice actions be paid over a period of time through "structured" plans. In 1986 the Legislature adopted CPLR article 50-

B, which applied essentially the same requirements to most other tort actions. A significant overhaul of the structured judgments provisions occurred in 2003, when the Legislature revised CPLR article 50-A. Included among the changes was a provision that all damages in wrongful death actions based on medical, dental and podiatric malpractice be paid in a lump sum (as opposed to payment in structured form), CPLR 5031(b); *Toledo v Iglesia Ni Cristo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012). The revisions to CPLR article 50-A were made applicable to medical, dental and podiatric malpractice actions commenced on or after July 26, 2003. No similar revisions were made to CPLR article 50-B.

The 2003 revisions to CPLR article 50-A resulted in some seeming anomalies. First, although the revisions made the structured judgment requirements inapplicable to post-July 26, 2003 wrongful death actions for medical, dental and podiatric malpractice, it did not alter the provision in CPLR 4111(e) (former CPLR 4111(f)) requiring that the jury be instructed that it must not only itemize the damages but also set forth the period of years over which the amounts for future damages are intended to provide compensation. An instruction requiring the jury to set forth the period of years for which its award of future damages is intended to compensate has no practical utility where future damages are awarded in a lump sum and may be particularly problematic in cases tried in the Second Department since *Carter v New York City Health and Hospitals Corp.*, 47 AD3d 661, 851 NYS2d 588 (2d Dept 2008), states that courts should not ask the jury to itemize the amount of economic loss to be awarded to each distributee.

Second, the 2003 revisions to CPLR article 50-A altered the structured judgment scheme applicable to actions involving medical, dental and podiatric malpractice by exempting awards for future damages in wrongful death cases from the structuring requirements, CPLR 5031(d); *Toledo v Iglesia Ni Cristo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012). Although CPLR 5031 as amended now requires future damages to be awarded in a lump sum, that statute is silent on the question whether the award should be reduced to its present value. If there were no other relevant statutory provisions, the common-law approach to that question would, presumably, be revived. Under the common law, the parties could submit expert evidence on the present-value question, including evidence of the effects of inflation, and the jury could return a verdict reflecting a reduction of its future-damages award to its present value. However, the final sentence of CPLR 4111(e) (former CPLR 4111(f)), which was not amended in 2003, still requires an instruction that the jury must “award the full amount of future damages, as calculated, without reduction to present value,” see *Toledo v Iglesia Ni Cristo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012). If, as the language suggests, that sentence is applicable to wrongful death actions based on medical, dental and podiatric malpractice, then any consideration of reduction to present value is precluded.

An alternative reading of CPLR 4111(e), which is suggested by CPLR 4111's respective subdivision headings as well as by the first sentence of subdivision (e), is that CPLR 4111(d) is the exclusive governing provision for medical, dental and podiatric malpractice actions. Since CPLR 4111(d) contains no language prohibiting consideration of present value, this alternative reading of the statute would permit consideration of—and reduction to—the present value of a future-damages award.

The pattern charge, which is applicable generally to all wrongful death actions, does not contain an instruction on reduction to present value, and therefore reflects the first view of the statute discussed above. In the absence of legislative clarification and in the absence of any appellate case law on the issue of reduction to present value in actions based on medical, dental or podiatric malpractice commenced on or after July 23, 2003, the question of which interpretative approach should be taken is one that trial courts will have to resolve as a matter of first impression or the parties will resolve by agreement. Where the parties have agreed or the court has determined that reduction to present value is appropriate and where relevant expert testimony has been offered the following charge may be utilized and inserted in place of the eighth paragraph of the pattern charge:

**PJI 2:320.1 [*This charge is only appropriate where relevant expert evidence has been adduced*]**

In determining the monetary loss sustained by [*list the distributees by name*], you must also consider the fact that a lump sum of money received today is worth more than the same amount paid in installments over a period of time, because the lump sum can be invested to earn interest. Your award is being made now, even though the earnings from which AB would have contributed to the support of [*list the distributees by name*] would have been received in the future. For that reason, you must reduce the

amount that you find that AB would have contributed each year from (his, her) earnings to the support of [*list the distributees by name*] to its present cash value in order to make allowance for the earning power of the money.

You have heard testimony that will assist you in deciding the present cash value of the money by determining a discount rate for each year and then using that discount rate to deduct from your award a reasonable allowance for the earning power of money. In determining what discount rate to use for each year, you must consider the rate of interest that is fairly to be expected from reasonably safe investments made by a person who does not have any special financial skill or experience. On the other hand, you must also consider that inflation may reduce the value of a dollar in the future. For example, if I invest \$1 today, I will earn interest on that dollar but I will not actually come out ahead unless the interest rate that I earn is greater than the inflation rate. Therefore the discount rate you use will be the interest rate you selected as affected by the inflation rate you find appropriate.

You must also decide the period of years for which that amount is intended to provide compensation.

### **III. Wrongful Death Action**

#### **A. Elements**

The cause of action authorized by EPTL 5-4.1 through 5-4.5 did not exist at common law, *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991); *Liff v Schildkrout*, 49 NY2d 622, 427 NYS2d 746, 404 NE2d 1288 (1980); *Langan v St. Vincent's Hosp. of New York*, 25 AD3d 90, 802 NYS2d 476 (2d Dept 2005). The damages recoverable are limited to those allowed by statute, *Farrar v Brooklyn Union Gas Co.*, 73 NY2d 802, 537 NYS2d 26, 533 NE2d 1055 (1988); *Smith v Lehigh Valley R. Co.*, 177 NY 379, 69 NE 729 (1904); see *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980). The essential elements to be pleaded and proved in a wrongful death action are: (1) a death; (2) caused by the wrongful act, neglect or default of defendant; (3) giving rise to a cause of action that could have been maintained, at the moment of death, by 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 decedent, EPTL 5-4.1; see *Chong v New York City Transit Authority*, 83 AD2d 546, 441 NYS2d 24 (2d Dept 1981); see also *Goldberg v Plaza Nursing Home Comp., Inc.*, 222 AD2d 1082, 635 NYS2d 841 (4th Dept 1995) (ovrld on other grounds, *Doe v Westfall Health Care Center, Inc.*, 303 AD2d 102, 755 NYS2d 769 (4th Dept 2002)).

#### **B. Damages Recoverable**

##### **1. Pecuniary Injuries**

In a wrongful death 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, EPTL 5-4.3; see *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983); *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014); see also *Hernandez v New York City Health and Hospitals Corp.*, 78 NY2d 687, 578 NYS2d 510, 585 NE2d 822 (1991). Such damages include loss of support, voluntary assistance, and possible inheritance, as well as medical expenses incidental to death and funeral expenses, *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991); *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980); *Johnson v Richmond University Medical Center*, 101 AD3d 1087, 956 NYS2d 568 (2d Dept 2012); *Motelson v Ford Motor Company*, *supra*; *Sand v Chapin*, 238 AD2d 862, 656 NYS2d 700 (3d Dept 1997). To establish a right to a wrongful death recovery, the plaintiff need only show that one or more distributees had a reasonable expectation of support from the decedent and therefore a pecuniary loss, *Zelizo v Ullah*, 2 AD3d 273, 769 NYS2d 255 (1st Dept 2003). Once that showing is made, the determination of the amount of damages is a question for the jury, *id.*

Pecuniary injuries do not include sorrow or mental anguish, *Smith v Lehigh Valley R. Co.*, 177 NY 379, 69 NE 729 (1904), loss of companionship of a deceased child, *Devito v Opatich*, 215 AD2d 714, 627 NYS2d 441 (2d Dept 1995), or loss of companionship of a deceased spouse, *Liff v Schildkrout*, 49 NY2d 622, 427 NYS2d 746, 404 NE2d 1288 (1980); *Sand v Chapin*, 238 AD2d 862, 656 NYS2d 700 (3d Dept 1997); see *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014) (damages for loss of society, affection, conjugal fellowship and consortium are not recoverable). Nor does recovery include the damages that the decedent might have obtained in a personal injury action had the decedent survived, *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980). Therefore, the plaintiff in a wrongful death action cannot seek any recovery for decedent's loss of enjoyment of life, *Sand v Chapin*, *supra*.

However, pecuniary injuries do include loss of parental nurture and care and loss of physical, moral and intellectual training by a parent, *Kenavan v New York*, 120 AD2d 24, 507 NYS2d 193 (2d Dept 1986), *aff'd*, 70 NY2d 558, 523 NYS2d 60, 517 NE2d 872 (1987); *Zygmunt v Berkowitz*, 301 AD2d 593, 754 NYS2d 313 (2d Dept 2003). Accordingly, it is proper to instruct the jury: "You must also take into consideration the intellectual, moral and physical training, guidance and assistance [the decedent] would have given the children had he [or she] lived," *Kenavan v New York*, *supra*. Further, proof that the decedent performed household duties for his or her spouse and provided love, guidance and advice to their adult children is sufficient proof of pecuniary loss to sustain at least some damages, *Korman v Public Service Truck Renting Inc.*, 116 AD2d 631, 497 NYS2d 480 (2d Dept 1986). Likewise, evidence that a deceased grandparent provided services to her adult, financially independent grandchildren was sufficient to demonstrate pecuniary damages, *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991). Evidence that the deceased assisted in the care of a disabled brother who lived with the plaintiff mother is sufficient to demonstrate pecuniary damages, *Abruzzo v New York*, 233 AD2d 278, 649 NYS2d 172 (2d Dept 1996). Evidence that a decedent regularly gave her sister money, took care of the sister's house while she was on active military duty, and provided baby-sitting services for the children of another sibling, suggested that those siblings sustained pecuniary losses as a result of the decedent's death and precluded summary judgment in favor of the defendant dismissing the siblings' wrongful death cause of action, *Johnson v Richmond University Medical Center*, 101 AD3d 1087, 956 NYS2d 568 (2d Dept 2012). Recovery for pecuniary loss was required upon uncontroverted evidence that the decedent cooked, cleaned and ironed for her adult children and babysat for her grandchildren, *Pullman v Pullman*, 216 AD2d 886, 629 NYS2d 577 (4th Dept 1995). 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, *Klos v New York City Transit Authority*, 240 AD2d 635, 659 NYS2d 97 (2d Dept 1997); see *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983). 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 loss will continue beyond minority, *Tilley v Hudson River R. Co.*, 29 NY 252 (1864); *Zaninovich v American Airlines, Inc.*, 26 AD2d 155, 271 NYS2d 866 (1st Dept 1966). However, adult children have no claim for the loss of a deceased parent's companionship where the parent provided no services to them, *Bumpurs v New York City Housing Authority*, 139 AD2d 438, 527 NYS2d 217 (1st Dept 1988).

## 2. Jury Role in Calculating Damages

The damages recoverable are not capable of exact proof, *Countryman v Fonda, J. & G.R. Co.*, 166 NY 201, 59 NE 822 (1901). The fixing of damages in a death action is peculiarly within the province of the jury, *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980); *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980); see *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014). The jury is permitted to consider in a reasonable way those prospective and indefinite damages arising from death, *Countryman v Fonda, J. & G.R. Co.*, *supra*. Each case stands on its own particular facts, *Liubowsky v State*, 260 App Div 416, 23 NYS2d 633 (3d Dept 1940), *aff'd*, 285 NY 701, 34 NE2d 385 (1941); *Franchell v Sims*, *supra*.

## 3. Factors and Considerations in Determining Award

### a. Generally

In determining what is “fair and just compensation for the pecuniary injuries resulting from the decedent's death,” EPTL 5-4.3, 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, *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); see *Motelson v Ford Motor Co.*, 101 AD3d 957, 957 NYS2d 341 (2d Dept 2012), *aff'd*, 24 NY3d 1025, 997 NYS2d 678, 22 NE3d 186 (2014) (award may be based on the decedent's age, character, earning capacity, life expectancy, and the circumstances of the distributees); *Gilleo v Elizabeth A. Horton Memorial Hosp.*, 196 AD2d 569, 601 NYS2d 332 (2d Dept 1993) (evidence concerning plaintiff's and decedent's alleged desire to terminate decedent's life-sustaining dialysis treatment was properly admitted since health and life expectancy of decedent are relevant in determining pecuniary loss in wrongful death action). Thus, there was no pecuniary loss in the death of a 64 year old retiree who was living on disability benefits and who was survived by two emancipated and self supporting children, see *Hartman v Dermont*, 89 AD2d 807, 453 NYS2d 464 (4th Dept 1982).

#### **b. Decedent's Income**

Generally, evidence of a decedent's gross income at the time of death is the standard by which to measure the value of income already lost and to measure the loss of future earnings, *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988); *Klos v New York City Transit Authority*, 240 AD2d 635, 659 NYS2d 97 (2d Dept 1997); *Marigliano v New York*, 196 AD2d 533, 601 NYS2d 161 (2d Dept 1993) (abrogated on other grounds by, *Rodriguez v Triborough Bridge and Tunnel Authority*, 276 AD2d 769, 716 NYS2d 24 (2d Dept 2000)); see also *Konstantatos v Suffolk*, 174 AD2d 653, 571 NYS2d 514 (2d Dept 1991). The jury may take into account increased earnings that the decedent would have received, provided that the plaintiff establishes that such increases would probably have been forthcoming, *Wanamaker v Pietraszek*, 107 AD2d 1020, 486 NYS2d 523 (4th Dept 1985). Thus, where the decedent had a consistently high level of job performance that resulted in yearly profit-sharing bonuses, the jury could properly consider such bonuses in the decedent's future earning capacity, *Woodring v Board of Ed. of Manhasset Union Free School Dist.*, 79 AD2d 1022, 435 NYS2d 52 (2d Dept 1981). However, where the decedent's employment history was unimpressive, the trial court erred in permitting the jury to project a dramatic increase in the decedent's earnings based solely on the decedent's expression of a desire to obtain further schooling and to open a business, *Morales v New York*, 115 AD2d 439, 497 NYS2d 5 (1st Dept 1985). Likewise, it was error to receive evidence as to what profits were made by a car dealership operating in a location in which the decedent had planned to operate a dealership, *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 (2d Dept 1988).

In proving the decedent's prospective earnings, evidence of what others actually earned and could earn is admissible if there is a fair basis for comparison, *Wanamaker v Pietraszek*, 107 AD2d 1020, 486 NYS2d 523 (4th Dept 1985). 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, *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980); *Bartkowiak v St. Adalbert's Roman Catholic Church Soc.*, 40 AD2d 306, 340 NYS2d 137 (4th Dept 1973); see also PJI 1:90.

The 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, *Keenan v Brooklyn City R. Co.*, 145 NY 348, 40 NE 15 (1895); *Johnson v Long Island R. Co.*, 30 NYS 318 (Gen Term 1894), *aff'd*, 144 NY 719, 39 NE 857 (1895); *Zaninovich v American Airlines, Inc.*, 26 AD2d 155, 271 NYS2d 866 (1st Dept 1966); Annot: 76 ALR3d 125.

Because the decedent's income from investments is not considered in arriving at pecuniary loss, the rule stated in PJI 2:295 applies to death actions as well as personal injury actions, see *Spreen v Erie R. Co.*, 219 NY 533, 114 NE 1049 (1916); *Read v Brooklyn Heights R. Co.*, 32 App Div 503, 53 NYS 209 (2d Dept 1898); see also *Fell v Presbyterian Hosp. in City of New York at Columbia-Presbyterian Medical Center*, 98 AD2d 624, 469 NYS2d 375 (1st Dept 1983). What the distributee received as a pension, *Cady v New York*, 14 NY2d 660, 249 NYS2d 868, 198 NE2d 901 (1964); *Lehr v New York*, 16 AD2d 702, 227 NYS2d 705 (2d Dept 1962), or under the decedent's will, *Closson v Griffith*, 219 App Div 163, 218 NYS 517 (1st Dept 1926), *aff'd*, 245 NY 552, 157 NE 854 (1927), may not be considered by the jury; nor is the distributee's pecuniary loss any less



because the distributee has independent income, *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980); *Application of Frank*, 286 App Div 986, 144 NYS2d 435 (4th Dept 1955). However, it has been held that evidence that the surviving spouse and children have no property of their own is admissible, *Lockwood v New York, L.E. & W.R. Co.*, 98 NY 523 (1885); *Van Leet v Kilmer*, 225 App Div 184, 232 NYS 330 (3d Dept 1929), rev'd on other grounds, 252 NY 454, 169 NE 644 (1930).

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 tax status, and the future tax law itself, is not compensable, *Farrar v Brooklyn Union Gas Co.*, 73 NY2d 802, 537 NYS2d 26, 533 NE2d 1055 (1988).

#### **c. Pecuniary Loss of Distributees for Loss of Homemaker**

If the decedent was a homemaker, recovery may include the monetary value of the services provided, *De Long v Erie*, 60 NY2d 296, 469 NYS2d 611, 457 NE2d 717 (1983). Expert testimony and other evidence on this issue is admissible, *De Long v Erie*, supra; see *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991); see also *Speiser, Recovery for Wrongful Death*, § 4.5; *Speiser, Recovery for Wrongful Death, Economic Handbook*, § 12:1–12:3; *Comment: The Unemployed Housewife-Mother: Fair Appraisal of Economic Loss in a Wrongful Death Action*, 21 Buffalo L Rev 205; *Annot: 77 ALR3d 1175*. When the question of this item of recovery is presented by expert testimony or otherwise, the following instruction should be given in place of, or in addition to, the sixth paragraph of the pattern charge:

#### **PJI 2:320.2 Damages—Action for Wrongful Death and Conscious Pain and Suffering; Value of Homemaker Services [Supplemental Instruction]**

In fixing the value of AB's services you must take into consideration the circumstances and condition of (his, her) spouse and children; the services (he, she) would have performed for (his, her) spouse and children in the care and management of the family home, finances and health; and the intellectual, moral and physical guidance and assistance (he, she) would have given the children had (he, she) lived. In fixing the monetary value of AB to (the survivor) and children you must consider what it would cost to pay for a substitute for (his, her) services, considering both AB's age and life expectancy and the age and life expectancy of (the survivor) and of each of the children.

#### **d. Pecuniary Loss for Death of Spouse**

Hostility between the deceased and the surviving spouse is relevant on the question of the latter's pecuniary loss, *Loetsch v New York City Omnibus Corporation*, 291 NY 308, 52 NE2d 448 (1943); *Freeman v Corbin Ave. Bus Co.*, 60 AD2d 824, 401 NYS2d 224 (1st Dept 1978); see also *Janecka v Casey*, 121 AD2d 28, 508 NYS2d 451 (1st Dept 1986) (allowing discovery of pleadings in matrimonial action between decedent and surviving spouse). However, the jury may not consider the remarriage of the surviving spouse, *Luddy v State*, 30 AD2d 993, 294 NYS2d 87 (3d Dept 1968), aff'd, 25 NY2d 773, 303 NYS2d 522, 250 NE2d 581 (1969); *Lees v New York Consol. R. Co.*, 109 Misc 608, 180 NYS 546 (Sup 1919), aff'd without opinion, 193 App Div 882, 182 NYS 933 (2d Dept 1920); *Duffy v New York*, 16 Misc2d 1015, 184 NYS2d 1006 (Sup 1958), mod on other grounds, 7 AD2d 988, 183 NYS2d 863 (1st Dept 1959); *Restatement, Second, Torts* § 925, *Comment H*, and, on request, the jury should be so charged. Nor may the jury consider the remarriage of: (a) the decedent's divorced parent with whom decedent lived, *Lawler v Newcastle Motors Leasing Inc.*, 35 AD2d 450, 317 NYS2d 99 (2d Dept 1970); *Annot: 69 ALR3d 1038*, or (b) the decedent's subsequently widowed mother, *Woodard v Pancio*, 65 AD2d 923, 410 NYS2d 454 (4th Dept 1978). Where the 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, *Rodak v Fury*, 31 AD2d 816, 298 NYS2d 50 (2d Dept 1969). The fact that the decedent and his or her spouse were married after the accident which caused his death does not preclude the surviving spouse from recovering in the wrongful death action as a distributee, *Radley v Le Ray Paper Co.*, 214 NY 32, 108 NE 86 (1915); *Du Bois v Community Hosp. of Schoharie County, Inc.*, 150 AD2d 893, 540 NYS2d 917 (3d Dept 1989); *Annot: 69 ALR3d 1046*.

#### e. Pecuniary Loss of Child for Death of Parent

The jury may consider, should the health of the child fail, that the parent might care for the child indefinitely, *Countryman v Fonda, J. & G.R. Co.*, 166 NY 201, 59 NE 822 (1901), and also the fact that though the child was self supporting, the mother had been in the habit of sending articles of clothing to him, *McIntyre v New York Cent. R. Co.*, 37 NY 287, 35 How Pr 36 (1867). Though under other wrongful death acts, it has been held that there must be evidence that contributions after minority are reasonably to be anticipated, *Boller v Pennsylvania R. Co.*, 185 F Supp 505 (NDInd 1960); *First Nat Bank in Greenwich v National Airlines, Inc.*, 171 F Supp 528 (SDNY 1958), *aff'd*, 288 F2d 621 (2d Cir 1961), it appears that under the New York statute the evidence need not be specific, that the jury may allow such damages as from the evidence and the intrinsic probabilities they find will reasonably result, *Tilley v Hudson River R. Co.*, 24 NY 471, 23 How Pr 363 (1862); *Countryman v Fonda, J. & G.R. Co.*, *supra*; see *Kraus v Ford Motor Co.*, 43 AD2d 896, 351 NYS2d 229 (4th Dept 1974) (room and some meals); *Phalen v Rochester Ry. Co.*, 31 App Div 448, 52 NYS 836 (4th Dept 1898).

The loss by a child also includes damages from the deprivation of the intellectual, moral and physical training and education that the parent would have given, *Tilley v Hudson River R. Co.*, 24 NY 471, 23 How Pr 363 (1862); *Sternfels v Metropolitan St. Ry. Co.*, 73 App Div 494, 77 NYS 309 (1st Dept 1902), *aff'd*, 174 NY 512, 66 NE 1117 (1903); see *Juiditta v Bethlehem Steel Corp.*, 75 AD2d 126, 428 NYS2d 535 (4th Dept 1980) (citing PJI); *Richardson v Lutheran Hospital of Brooklyn*, 70 AD2d 933, 417 NYS2d 526 (2d Dept 1979); *Didocha v State*, 54 AD2d 786, 387 NYS2d 752 (3d Dept 1976). 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, *Tilley v Hudson River R. Co.*, *supra*; *Sternfels v Metropolitan St. Ry. Co.*, *supra*. Thus, it is not necessary that the child have been dependent on the decedent, see *De Clara v Barber S. S. Lines*, 309 NY 620, 132 NE2d 871 (1956); *Gross v Abraham*, 306 NY 525, 119 NE2d 370 (1954).

An out-of-wedlock child may not constitutionally be excluded from recovery for the wrongful death or for the conscious pain and suffering of his or her parent, *Levy v Louisiana*, 391 US 68, 88 SCt 1509 (1968); *Matter of Niles' Estate*, 53 AD2d 983, 385 NYS2d 876 (3d Dept 1976); see *Lalli v Lalli*, 439 US 259, 99 SCt 518 (1978). Under EPTL 5-4.5, the out-of-wedlock child is the distributee of the father, and vice versa, see *Eckel v Hassan*, 61 AD2d 13, 401 NYS2d 820 (2d Dept 1978).

#### f. Pecuniary Loss of Parent for Death of Child

Where the decedent is a child, the pecuniary loss of the parent is measured by the services of the child during minority less the cost of the child's maintenance and education during that period, *Keenan v Brooklyn City R. Co.*, 145 NY 348, 40 NE 15 (1895); see Comment to PJI 2:317, and in addition all the probable, or even possible, pecuniary benefits that 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, *Birkett v Knickerbocker Ice Co.*, 110 NY 504, 18 NE 108 (1888); *Hanson v Erie*, 120 AD2d 135, 507 NYS2d 778 (4th Dept 1986); *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980); see *Parilis v Feinstein*, 49 NY2d 984, 429 NYS2d 165, 406 NE2d 1059 (1980); *Lopez v Gomez*, 305 AD2d 292, 761 NYS2d 601 (1st Dept 2003). The Court of Appeals has stated that, in cases involving a decedent of "tender years," the absence of dollars and cents proof of pecuniary loss does not relegate the distributees to recovery of nominal damages, *Parilis v Feinstein*, *supra*. Thus, even in the absence of direct evidence of pecuniary loss, the Court upheld a wrongful death award of \$50,000 to the parents-distributees of their 12-year-old child, since there was proof as to the age, character and condition of the decedent-child and the circumstances of his parents, *id*; see *Meredith v New York*, 220 AD2d 563, 632 NYS2d 812 (2d Dept 1995). Under *Parilis*, in cases in which the decedent was too young to have demonstrated any disposition or ability to support his or her surviving parents, an award for the wrongful death of the decedent may nevertheless be appropriate where the parents and decedent were part of an intact family unit, which furnishes a basis for the expectation that the parents would have become the objects of the decedent's bounty had he or she lived, *Public Adm'r, Kings County v U.S. Fleet Leasing of New York, Inc.*, 159 AD2d 331, 552 NYS2d 608 (1st Dept 1990). The pecuniary value of services of a child may be considered though the child is an adult, *Rowan v Nassau*, 91 AD2d 608, 456 NYS2d 418 (2d Dept

1982); *Brooks v Siegel*, 52 AD2d 1003, 383 NYS2d 439 (3d Dept 1976); *Cook v Erwin*, 30 AD2d 579, 289 NYS2d 730 (3d Dept 1968); *Palmer v New York Cent. & H.R.R. Co.*, 153 App Div 296, 138 NYS 10 (2d Dept 1912); see *Prosser & Keeton, Torts* (5th ed), § 127, pp 952–954.

A parent's loss also includes the probability that the parent would benefit from earnings that the child might have accumulated, *Connaughton v Sun Printing & Publishing Ass'n*, 73 App Div 316, 76 NYS 755 (1st Dept 1902). However, there must be an adequate basis for assessing the decedent's future earnings so that the matter is not left to speculation, *Wanamaker v Pietraszek*, 107 AD2d 1020, 486 NYS2d 523 (4th Dept 1985); see *Franchell v Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept 1980). Aside from future earnings, damages may include the reasonable value of future services that the 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 value of reasonable expectations of future services; therefore, evidence is admissible showing prior services, the parent's 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, *Quinn v Sullivan*, 48 AD2d 965, 369 NYS2d 551 (3d Dept 1975); *Palmer v New York Cent. & H.R.R. Co.*, 153 App Div 296, 138 NYS 10 (2d Dept 1912); see *Hanson v Erie*, 120 AD2d 135, 507 NYS2d 778 (4th Dept 1986). But 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, *Public Adm'r, Kings County v U.S. Fleet Leasing of New York, Inc.*, 159 AD2d 331, 552 NYS2d 608 (1st Dept 1990). 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, *Woodard v Pancio*, 65 AD2d 923, 410 NYS2d 454 (4th Dept 1978). The pecuniary loss by the parents does not include grief or loss of companionship, see *Gilbert v Stanton Brewery*, 295 NY 270, 67 NE2d 155 (1946); *Devito v Opatich*, 215 AD2d 714, 627 NYS2d 441 (2d Dept 1995); *Bell v Cox*, 54 AD2d 920, 388 NYS2d 118 (2d Dept 1976); *Amerman v Lizza & Sons, Inc.*, 45 AD2d 996, 358 NYS2d 220 (2d Dept 1974).

The mother of an out-of-wedlock child may not constitutionally be barred from a recovery for the child's wrongful death, *Glonn v American Guarantee & Liability Ins. Co.*, 391 US 73, 88 SCt 1515 (1968). Under EPTL 5-4.5, the father of an out-of-wedlock child is a distributee of the child, see *Eckel v Hassan*, 61 AD2d 13, 401 NYS2d 820 (2d Dept 1978).

The fact that the parents were divorced, and custody of the deceased child was awarded to one parent, does not preclude the non-custodial parent from sharing in a recovery for wrongful death. However, there is no presumption that the parents are entitled to equal shares of the recovery, *Hanson v Erie*, 120 AD2d 135, 507 NYS2d 778 (4th Dept 1986).

No cause of action to recover damages for wrongful death or personal injury exists on behalf of a stillborn child, *Broadnax v Gonzalez*, 2 NY3d 148, 777 NYS2d 416, 809 NE2d 645 (2004); *Endresz v Friedberg*, 24 NY2d 478, 301 NYS2d 65, 248 NE2d 901 (1969); *Matter of Broadnax*, 240 AD2d 663, 659 NYS2d 502 (2d Dept 1997); see *Becker v Schwartz*, 46 NY2d 401, 413 NYS2d 895, 386 NE2d 807 (1978); *Maher v Yoon*, 297 AD2d 361, 746 NYS2d 493 (2d Dept 2002); see also PJI 2:284; 2:318. However, the funeral expenses are recoverable as an incident of injuries sustained by the mother, see PJI 2:316.

#### **g. Criminal Conduct/Institutionalization of the Decedent**

The criminal conduct of the decedent during his or her lifetime may not be considered by the jury unless it bears on either (1) his or her earning capacity, or (2) his or her disposition to support those dependent on him or her, *Dobro v Sloan*, 48 AD2d 243, 368 NYS2d 621 (4th Dept 1975); see *Freeman v Corbin Ave. Bus Co.*, 60 AD2d 824, 401 NYS2d 224 (1st Dept 1978); see *Sanchez v New York*, 97 AD3d 501, 949 NYS2d 368 (1st Dept 2012) (citing PJI 2:320.2) (criminal history admissible on issue of loss of moral guidance of child). In addition, evidence of the decedent's future lost wages may be admitted even if the decedent was an undocumented alien working in the United States on an apparently illegal basis, see *Balbuena v IDR Realty LLC*, 6 NY3d 338, 356, 812 NYS2d 416, 845 NE2d 1246 (2006); *Public Adm'r of Bronx County v Equitable Life Assur. Soc. of U.S.*, 192 AD2d 325, 595 NYS2d 478 (1st Dept 1993). However, the fact that an injured worker was undocumented is a factor that may be considered in determining the amount of the award for lost future wages, *Balbuena v IDR Realty LLC*, *supra*; *Public Adm'r of Bronx County v Equitable Life Assur. Soc. of U.S.*, *supra*.

Where the decedent was confined in an institution, damages depend upon the chance he or she had at the time of the accident of being returned to normal society, *Hassler v State*, 29 AD2d 1026, 289 NYS2d 483 (3d Dept 1968); *Herold v State*, 15 AD2d 835, 224 NYS2d 369 (3d Dept 1962); see *Cohen v State*, 51 AD2d 494, 382 NYS2d 128 (3d Dept 1976), *aff'd*, 41 NY2d 1086, 396 NYS2d 363, 364 NE2d 1134 (1977).

### **C. Distributees**

The beneficiaries of the action are determined at the moment of the decedent's death, *Alberino v Long Island Jewish-Hillside Medical Center*, 87 AD2d 217, 450 NYS2d 857 (2d Dept 1982) (fact that distributee was adopted by another after decedent's death irrelevant in wrongful death action); *Woodard v Pancio*, 65 AD2d 923, 410 NYS2d 454 (4th Dept 1978) (citing PJI). Under EPTL 5-4.1 and 5-4.4, an action for wrongful death is maintained for the benefit of the decedent's distributees and the damages recovered are distributable to all distributees under EPTL 4-1.1, except those disqualified under EPTL 4-1.4 (parent who abandons child during infancy or fails or refuses to provide for a child) or 5-1.2 (with certain exceptions, a spouse separated or divorced, or whose marriage was void, or who abandoned decedent, or who failed to support decedent). Under the EPTL, "grandchildren or parents, if distributees under 4-1.1, will be entitled to recover in wrongful death if they can show pecuniary injury," *Revisers' Notes to 5-4.4*. Surviving spouses, who are included in the class of distributees set forth in EPTL 4-1.1, do not include surviving same sex life partners, *Langan v St. Vincent's Hosp. of New York*, 25 AD3d 90, 802 NYS2d 476 (2d Dept 2005); but see *Marriage Equality Act*, L 2011, ch 95; *U.S. v Windsor*, 133 SCt 2675 (2013) (holding § 3 of the federal Defense of Marriage Act unconstitutional; that section had defined, for the purposes of federal law, a "marriage" as a "legal union between one man and one woman," and a "spouse" as "a person of the opposite sex who is a husband or a wife"). A corporation is not a "person" under the EPTL for whom a death action can be brought, *Konstantatos v Suffolk*, 174 AD2d 653, 571 NYS2d 514 (2d Dept 1991). If there is a dispute as to who are the legal distributees, that issue must be determined prior to trial, *Reed v Schoharie*, 51 AD2d 499, 382 NYS2d 371 (3d Dept 1976); see *Kingsley v Bast-Hatfield, Inc.*, 188 AD2d 957, 592 NYS2d 103 (3d Dept 1992).

It is error to charge the decedent's life expectancy without also charging the life expectancy of the distributees, *Bishin v New York Cent. R. Co.*, 20 AD2d 921, 249 NYS2d 778 (2d Dept 1964). With respect to life expectancy tables, see PJI 2:281 and Appendix A. With respect to work expectancy tables, see PJI 2:290 and Appendix B. Where, however, the distributee has died prior to trial, life expectancy tables should not be charged since damages are confined to the pecuniary loss sustained between the time of the decedent's death and the time of the distributee's death, *Dibble v Whipple*, 281 NY 247, 22 NE2d 358 (1939); *Woodard v Pancio*, 65 AD2d 923, 410 NYS2d 454 (4th Dept 1978).

### **D. 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 the decedent's gross earnings and no deduction is to be made, or consideration given, on account of income taxes, *Johnson v Manhattan & Bronx Surface Transit Operating Authority*, 71 NY2d 198, 524 NYS2d 415, 519 NE2d 326 (1988). Evidence as to after-tax income is inadmissible, *id.* However, in wrongful death actions which are predicated upon medical or dental malpractice, evidence is admissible to establish the federal, state and local income taxes that the decedent would have been required by law to pay, EPTL 5-4.3(c)(i). The jury must be instructed to find, "with reasonable certainty," the amount of taxes that the decedent would have been required by law to pay and to consider that amount in determining the sum that would otherwise be available for the support of the decedent's distributees, EPTL 5-4.3(c)(ii). A similar requirement is imposed upon the court in a non-jury trial, EPTL 5-4.3(c)(iii). Although the statute does not expressly mandate a reduction in the award, it does invite the factfinder to exclude the amount that otherwise would have been paid in taxes by the decedent from the sums available for the support of the distributees. For further elaboration on the intricate problems posed by differing rules applying to different aspects of the case, see PJI 2:151B.2, *supra*.

Where EPTL 5-4.3(c) applies, the instruction that follows should be given after the sixth paragraph of the pattern charge above. The instruction should not be given unless evidence has been adduced on the question of the decedent's income taxes.

**PJI 2:320.3 Damages—Action for Wrongful Death and Conscious Pain and Suffering; Income Taxes on Decedent's Earnings [Supplemental Instruction in medical and dental malpractice actions]**

In determining what portion of AB's earnings would have been available to the support of (*list the distributees by name*), the law requires you to consider the effect of income taxation on AB's earnings. This is why during the trial evidence was received as to the amount of federal, state (and local) income taxes AB would have been legally required to pay on the income AB would have received had (he, she) not died. If you find that it is reasonably certain that AB would have been required to pay a given amount of income taxes on the income that (he, she) would have earned if (he, she) had survived, then you must consider that amount of income taxes in determining how much money would have been available to AB for the support of (his, her) family. If you conclude that you cannot make any finding with reasonable certainty as to the amount of decedent's tax liability, then do not consider the issue of income taxation any further.

The provisions of EPTL 5-4.3 and CPLR 4546 apply where the conduct complained of is medical or dental malpractice. CPLR 4546 also applies to podiatric malpractice, but EPTL 5-4.3 has not been made expressly applicable to podiatric malpractice. Neither EPTL 5-4.3 nor CPLR 4546 applies where the wrongful conduct constitutes negligence other than malpractice. As to the distinction between malpractice and negligence, see Comment to PJI 2:150. The jury should be charged as to income tax principles applicable to different claims.

A complication is presented by cases in which the decedent, as the result of an act of medical or dental malpractice, incurred a loss of earnings as a result of incapacitation prior to death. In such situations, the decedent's personal representative may pursue, in a single litigation, causes of action for wrongful death and for medical or dental malpractice to recover earnings lost by the decedent prior to death. Where both survival and wrongful death claims are asserted, the jury should be carefully instructed as to which claims on which the jury must and must not consider taxes. In such cases, the following charge should be inserted after the tenth paragraph of the main charge:

**PJI 2:320.4 Damages—Action for Wrongful Death and Conscious Pain and Suffering; Income Taxes on Decedent's Earnings [Supplemental Instruction in medical and dental malpractice actions]**

The plaintiff also seeks recovery for the loss of earnings that AB incurred prior to (his, her) death. In deciding the amount, if any, the plaintiff may recover for earnings that AB lost before (his, her) death, you must not deduct from the award any sums on account of federal, state (and local) income taxes. The law requires me to decide whether any such reduction is warranted.

**E. Income Taxes on Award**

Damages for personal injury and loss of earnings are not income taxable, 26 USC § 104(a)(2); see *Lanzano v New York*, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988). The court must instruct the jury that the award is not subject to income taxes and that the jury should not add to or subtract from the award on account of income taxes, *Lanzano v New York*, supra; *Cramer v Kuhns*, 213 AD2d 131, 630 NYS2d 128 (3d Dept 1995).

Based upon *Lanzano v New York*, 71 NY2d 208, 524 NYS2d 420, 519 NE2d 331 (1988), the court should add the following instruction to the charge in actions not subject to express statute on the issue of income taxes:

**PJI 2:320.5 Damages—Action for Wrongful Death and Conscious Pain  
and Suffering; Income Taxes on Award [Supplemental Instruction]**

If your verdict is in favor of plaintiff, plaintiff will not be required to pay income taxes on the award and you must not add to the award, nor subtract from the award, on account of income taxes.

**F. Special Verdicts and Collateral Source Reductions**

CPLR 4545 was added to mandate certain collateral source payment reductions in all personal injury, property damage and wrongful death actions. To apply the statutory collateral source rule, itemized verdicts are essential. For a detailed discussion regarding collateral source reductions under CPLR 4545, including the collateral sources to which the statute applies and the procedure for determining a defendant's entitlement to collateral source reductions, see Comment to PJI 2:301.

The jury must specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, 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, CPLR 4111(e). In a non-jury trial, CPLR 4213(b) imposes a similar requirement upon the court. As to the issue of reduction to present value in actions based on medical, dental or podiatric malpractice commenced on or after July 23, 2003, see this Comment, *supra*.

The pattern charge covers the items of past damages listed in CPLR 4111(e) and others as well. Care should be taken to omit those items not supported by evidence. It is apparent that the Legislature used the term “pain and suffering” to encompass all items of general damages. Although custodial care and rehabilitation services are not mentioned specifically in CPLR 4111(e), they constitute special damages and should be listed in the special verdict form. CPLR 4545(c) specifically requires reduction for collateral source payments for “custodial care and rehabilitation services.” Within the context of a wrongful death action, payments for funeral expenses constitute special damages and should be itemized.

The jury should be required to state the period of years over which the award of pecuniary loss is intended to provide compensation. Moreover, except in the Second Department, the jury should be required to state the amount of pecuniary loss of each distributee, see Caveat 2 of the pattern charge. 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 appropriately structured judgment under CPLR article 50-B. Prior to CPLR article 50-B, the award made by the jury in a wrongful death action was regarded as being for the benefit of all distributees, with the allocation of that award as between the distributees being a matter for subsequent judicial determination, see EPTL 5-4.4; *Hanson v Erie*, 120 AD2d 135, 507 NYS2d 778 (4th Dept 1986). It now appears that itemization in the verdict as to each distributee is required to meet the mandates of CPLR article 50-B, see *Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 765 NYS2d 111 (4th Dept 2003); but see *Carter v New York City Health and Hospitals Corp.*, 47 AD3d 661, 851 NYS2d 588 (2d Dept 2008); Caveat 2 of the pattern charge. In making the computation for purposes of article 50-B, while the statute is not explicit, the trial 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, see *Huthmacher v Dunlop Tire Corp.*, *supra*; see also CPLR 5041(b). Where the jury has allocated different percentages of pecuniary loss to each distributee, a structured judgment cannot be calculated based on the testimony of an economist who simply divided the future loss of earnings equally among the survivors, *Huthmacher v Dunlop Tire Corp.*, *supra*.

A special verdict form for use in conjunction with the pattern charge follows. When the special verdict form is prepared for use, signature lines should be included after each question, see Comment to PJI 1:95, 1:97. The completed special verdict form should be marked as a court exhibit.

### Special Verdict Form PJI 2:320 SV Wrongful Death Verdict Sheet

If your verdict is in favor of plaintiff, answer the following:

1. Set forth the amount to which the estate of the decedent is entitled for the following items of damage, if any:

- |                                                                                                                                                                       |          |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| (a) Medical expenses;                                                                                                                                                 | \$ _____ |
| (b) Dental expenses;                                                                                                                                                  | \$ _____ |
| (c) Custodial care;                                                                                                                                                   | \$ _____ |
| (d) Rehabilitation services;                                                                                                                                          | \$ _____ |
| (e) Nursing care;                                                                                                                                                     | \$ _____ |
| (f) Loss of earnings.                                                                                                                                                 | \$ _____ |
| (g) Pain and suffering AB endured between the moment AB realized that (he, she) was going to be gravely injured or die and the moment AB sustained a physical injury; | \$ _____ |
| (h) Pain and suffering of AB from the moment of physical injury to the moment of death.                                                                               | \$ _____ |

At least five jurors must agree on the answer to this question.

2. Set forth the amount of monetary loss from the time of death to the date of your verdict sustained by the following persons as a result of the death of the decedent.

Name	Total Amount
_____	\$ _____
_____	\$ _____

At least five jurors must agree on the answer to this question.

3. Set forth the amount of future monetary loss sustained by the following persons as a result of the death of the decedent.

Name	Total Amount
_____	\$ _____
_____	\$ _____

At least five jurors must agree on the answer to this question.

4. Set forth the number of years each of the above named persons will sustain that future monetary loss.

Name	Number of Years
_____	_____
_____	_____

At least five jurors must agree on the answer to this question.

5. Set forth the funeral expenses incurred in connection with the decedent's burial.

\$ \_\_\_\_\_

At least five jurors must agree on the answer to this question.

### G. Interest on Award

Interest on the principal sum recovered from the date of the decedent's death is to be added to and be part of the total sum awarded, EPTL 5-4.3; *Toledo v Iglesia Ni Cristo*, 18 NY3d 363, 939 NYS2d 282, 962 NE2d 773 (2012). The proper method for calculating preverdict interest on future damages in a wrongful death action is to discount that verdict to the date of liability, i.e. the date of death, and award interest on that amount from the date of death to the date of judgment, *Toledo v Ni Cristo*, supra. If, however, the award for future damages has not been discounted to the date of death, but rather to the date of the verdict, preverdict interest may not be added, *Milbrandt v A.P. Green Refractories Co.*, 79 NY2d 26, 580 NYS2d 147, 588 NE2d 45 (1992); *Shue v Red Creek Cent. School Dist.*, 266 AD2d 899, 697 NYS2d 437 (4th Dept 1999); *Perez v Columbia Operating Co., Inc.*, 203 AD2d 347, 609 NYS2d 924 (2d Dept 1994). Nor is it permissible to calculate interest on the total amount of preverdict damages from the date of the decedent's death, since that would assume that all losses occurred simultaneously at the time of death, *Milbrandt v A.P. Green Refractories Co.*, supra. The proper approach is to either calculate interest on each separate damage item from the date it was incurred or to calculate interest on all preverdict damages from a single, reasonable

intermediate date, *Milbrandt v A.P. Green Refractories Co.*, supra; see CPLR 5001(b). As to interest generally, see Comment to PJ1 2:277.

### **H. Conditions Precedent and Statute of Limitations**

A wrongful death action may be maintained only when, at the moment of death, the decedent could have maintained an action “if death had not ensued,” EPTL 5-4.1. A wrongful death action is precluded if, during the lifetime of the decedent, the decedent obtained a judgment against the tortfeasor or settled the claim against the tortfeasor, *Kwiatkowski v John Lowry, Inc.*, 276 NY 126, 11 NE2d 563 (1937); *Doe v State*, 189 AD2d 199, 595 NYS2d 592 (4th Dept 1993); *Fontheim v Third Ave. Ry. Co.*, 257 App Div 147, 12 NYS2d 90 (1st Dept 1939). Similarly, if the statute of limitations barred the decedent's personal injury claim before the decedent died, the wrongful death action is also barred, *Kelliher v New York Cent. & H.R.R. Co.*, 212 NY 207, 105 NE 824 (1914); see *Lanni v Sekar*, 249 AD2d 515, 672 NYS2d 113 (2d Dept 1998). Where a personal injury claim is pending and plaintiff dies, a personal representative must be substituted as plaintiff, CPLR 1015, and the complaint may be amended to add the wrongful death claim, CPLR 3025(b); see *Caffaro v Trayna*, 35 NY2d 245, 360 NYS2d 847, 319 NE2d 174 (1974).

The statute of limitations on a wrongful death claim is two years, measured from the date of death, EPTL 5-4.1, 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, see General Municipal Law § 50-i; *Baez v New York City Health and Hospitals Corp.*, 80 NY2d 571, 592 NYS2d 640, 607 NE2d 787 (1992); *Andersen v Long Island R.R.*, 59 NY2d 657, 463 NYS2d 407, 450 NE2d 213 (1983) (one year if Metropolitan Transportation Authority or one of its subsidiaries, other than the New York City Transit Authority, is defendant); *Collins v New York*, 55 NY2d 646, 446 NYS2d 258, 430 NE2d 1311 (1981) (two years under GML); Public Authorities Law § 1276; *D'Andrea v Long Island R. Co.*, 117 AD2d 10, 501 NYS2d 891 (2d Dept 1986), aff'd, 70 NY2d 683, 518 NYS2d 964, 512 NE2d 547 (1987) (the one year period runs from date of decedent's death); Public Authorities Law §§ 1212(2), 2981; Town Law § 67 (in action against town, claim shall be commenced pursuant to GML 50-i); Unconsolidated Laws § 7401(2) (as to New York City Health and Hospitals Corporation, two years from date of death); see also *Hernandez v New York City Health and Hospitals Corp.*, 78 NY2d 687, 578 NYS2d 510, 585 NE2d 822 (1991). The time within which an action must be commenced under Public Authorities Law § 1276(2), governing suits against the MTA and its subsidiaries, constitutes a period of limitation that may be tolled or extended pursuant to CPLR 210(a) when the claimant dies before the expiration of the statute, *Trepel v Metropolitan Suburban Bus Authority*, 262 AD2d 552, 693 NYS2d 159 (2d Dept 1999).

Where the decedent's only distributee is a minor, the limitations period is tolled until a guardian is appointed or the distributee reaches majority, whichever first occurs, *Hernandez v New York City Health and Hospitals Corp.*, 78 NY2d 687, 578 NYS2d 510, 585 NE2d 822 (1991); *Nguyen v 230 Park Investors, LLC*, 19 AD3d 295, 797 NYS2d 488 (1st Dept 2005); *Boles v Sheehan Memorial Hosp.*, 265 AD2d 910, 695 NYS2d 818 (4th Dept 1999). However, this toll is not available with respect to the estate's claim for the decedent's personal injury, since the personal injury claim accrues on behalf of decedent, as opposed to the distributees, *Heslin v Greene*, 14 NY3d 67, 896 NYS2d 723, 923 NE2d 1111 (2010). It is the court's appointment of a legal guardian that is dispositive, not blood ties or natural guardianship, *Boles v Sheehan Memorial Hosp.*, supra. However, the statute of limitations for a wrongful death action commenced on behalf of the decedent's infant beneficiaries will not be tolled where the decedent's will named her mother as executrix of the estate and as guardian for her infant children, *Baez v New York City Health and Hospitals Corp.*, 80 NY2d 571, 592 NYS2d 640, 607 NE2d 787 (1992), or where there is a competent adult who can commence the action such as an executor or guardian, see *Ratka v St. Francis Hospital*, 44 NY2d 604, 407 NYS2d 458, 378 NE2d 1027 (1978); *Merced v Wyckoff Heights Medical Center*, 225 AD2d 532, 639 NYS2d 81 (2d Dept 1996).

EPTL 5-4.1(2) provides an alternative statute of limitations in cases where criminal proceedings are brought against the wrongful death defendant. Under the statute, where a criminal action is brought against the same defendant with respect to the event from which the wrongful death claim arises, the decedent's personal representative “shall have at least one year from the termination of the criminal action” to commence a death action, even if “the time in which to commence such action has already expired or has less than a year remaining.” EPTL 5-4.1(2) is an alternative period to the general two year period imposed by EPTL 5-4.1(1), and a wrongful death action is timely if brought within either period. Thus, an action was held timely where it was



brought within one year of the defendant's plea of guilty to the criminal charges, even though the criminal proceedings were not commenced until nearly three years after the decedent's death, *Jordan v Britton*, 128 AD2d 315, 515 NYS2d 678 (4th Dept 1987). However, the alternative period allowed by EPTL 5-4.1(2) is available only as against the criminal defendant and does not apply to persons sought to be held vicariously liable, such as the criminal defendant's employer, *Villanueva v Comparetto*, 180 AD2d 627, 580 NYS2d 30 (2d Dept 1992); *Jordan v Britton*, supra (4th Dept); but see *Alford v St. Nicholas Holding Corp.*, 218 AD2d 622, 631 NYS2d 30 (1st Dept 1995). It should be noted that, where the criminal proceedings terminate in a conviction, the criminal defendant may not relitigate the issue of guilt unless he or she proves that a full and fair opportunity to contest the charges was not provided in the criminal court, *Jordan v Britton*, supra; see *Gilberg v Barbieri*, 53 NY2d 285, 441 NYS2d 49, 423 NE2d 807 (1981); *S. T. Grand, Inc. v New York*, 32 NY2d 300, 344 NYS2d 938, 298 NE2d 105 (1973); as to the effect of a plea of guilty, see *Merchants Mut. Ins. Co. v Arzillo*, 98 AD2d 495, 472 NYS2d 97 (2d Dept 1984); see also PJI 1:55.

### **I. Survival Action**

No recovery for post-accident pain and suffering will be allowed where there is no evidence that the decedent was conscious at any time after the occurrence, *Blunt v Zinni*, 32 AD2d 882, 302 NYS2d 504 (4th Dept 1969), *aff'd*, 27 NY2d 521, 312 NYS2d 996, 261 NE2d 107 (1970); *Alfieri v Cabot Corp.*, 17 AD2d 455, 235 NYS2d 753 (1st Dept 1962), *aff'd*, 13 NY2d 1027, 245 NYS2d 600, 195 NE2d 310 (1963); *Phiri v Joseph*, 32 AD3d 922, 822 NYS2d 573 (2d Dept 2006); see *Cummins v Onondaga*, 84 NY2d 322, 618 NYS2d 615, 642 NE2d 1071 (1994); *Cleary v LJR Associates*, 198 AD2d 394, 604 NYS2d 140 (2d Dept 1993). But testimony that tends to prove pain is usually sufficient to support a verdict, *Roche v Brooklyn City & N.R. Co.*, 105 NY 294, 11 NE 630 (1887) (red and swollen appearance of arm); *Coffey v Callichio*, 136 AD2d 673, 523 NYS2d 1011 (2d Dept 1988) (decedent conscious for 15 to 20 minutes with crushed skull); *Jones v Simeone*, 112 AD2d 772, 492 NYS2d 270 (4th Dept 1985) (decedent had eyes open and thrashed about); *Juiditta v Bethlehem Steel Corp.*, 75 AD2d 126, 428 NYS2d 535 (4th Dept 1980) (decedent screamed, made noises and breathing sounds); *Cook v Erwin*, 30 AD2d 579, 289 NYS2d 730 (3d Dept 1968) (decedent aware of treatment and groaning); *Kinner v Kuroczka*, 12 AD2d 383, 212 NYS2d 479 (3d Dept 1961) (decedent "moaning and groaning like he was in pain"). Conscious pain and suffering may be inferred from the fact that the decedent manifested the ability to talk coherently, *Kallenberg v Beth Israel Hospital*, 45 AD2d 177, 357 NYS2d 508 (1st Dept 1974), *aff'd*, 37 NY2d 719, 374 NYS2d 615, 337 NE2d 128 (1975); see *Teller v Fairchild*, 67 AD2d 1105, 415 NYS2d 138 (4th Dept 1979), from the fact that the decedent consciously struggled for his life, *Cassar v Central Hudson Gas & Elec. Corp.*, 134 AD2d 672, 521 NYS2d 337 (3d Dept 1987), or from the fact that the decedent, a murder victim, had been elaborately bound and gagged, *Gonzalez v New York City Housing Authority*, 77 NY2d 663, 569 NYS2d 915, 572 NE2d 598 (1991). An award for conscious pain and suffering may be made where the decedent screamed after the occurrence and was conscious during painful treatment attempts, *Regan v Long Island R.R. Co.*, 128 AD2d 511, 512 NYS2d 443 (2d Dept 1987). However, evidence that the decedent was dehydrated or thirsty, by itself, has been held insufficient, *Richardson v Lutheran Hospital of Brooklyn*, 70 AD2d 933, 417 NYS2d 526 (2d Dept 1979). 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, *Jones v Simeone*, 112 AD2d 772, 492 NYS2d 270 (4th Dept 1985); *Anderson v Rowe*, 73 AD2d 1030, 425 NYS2d 180 (4th Dept 1980); see *Regan v Long Island R.R. Co.*, 128 AD2d 511, 512 NYS2d 443 (2d Dept 1987).

Interest on the conscious pain and suffering award runs from the date of the verdict to the entry of final judgment, *Tucker v New York*, 45 AD2d 1051, 358 NYS2d 23 (2d Dept 1974).

#### **1. Pre-impact terror**

The courts have recognized the injured person's "pre-impact terror" as an element of conscious pain and suffering, *Lubecki v New York*, 304 AD2d 224, 758 NYS2d 610 (1st Dept 2003); *Smiley-Walsh v New York City Housing Authority*, 243 AD2d 261, 664 NYS2d 511 (1st Dept 1997). There must be some evidence from which one might imply an awareness of the danger and therefore infer pre-impact terror, *Anderson v Rowe*, 73 AD2d 1030, 425 NYS2d 180 (4th Dept 1980). Thus, no award for pre-impact terror was warranted where, in light of his pre-accident statement and the relatively low rate of speed of the

decedent's vehicle, there was no basis for inferring that the decedent was aware of his own impending death, *Martin v Reedy*, 194 AD2d 255, 606 NYS2d 455 (3d Dept 1994). Similarly, evidence that the bus driver whose vehicle struck the decedent's car sounded his horn continuously when he realized the car was entering the intersection was insufficient to support recovery for pre-impact terror, *Phiri v Joseph*, 32 AD3d 922, 822 NYS2d 573 (2d Dept 2006). In contrast, recovery for pre-impact terror was allowed 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, *Lang v Bouju*, 245 AD2d 1000, 667 NYS2d 440 (3d Dept 1997). Likewise, evidence that the deceased had a "surprised look" on his face was sufficient to support recovery for pre-impact terror, *Boston v Dunham*, 274 AD2d 708, 711 NYS2d 54 (3d Dept 2000). Plaintiffs asserting pre-impact terror claims on behalf of deceased accident victims may not take advantage of the lesser burden of proof permitted by *Noseworthy v New York*, 298 NY 76, 80 NE2d 744 (1948), *LaMendola v New York State Thruway Authority*, 35 AD3d 1249, 828 NYS2d 734 (4th Dept 2006).

## **2. Funeral expenses**

The damages recoverable for injury that causes death are limited to those accruing before death, but may include the reasonable funeral expenses paid by the estate or for which the estate may be liable, EPTL 11-3.3; *Montalvo v Chiaramonte*, 74 AD3d 455, 902 NYS2d 520 (1st Dept 2010). The cost of a burial lot is included in "funeral expenses," *Malvaso v State*, 15 Misc2d 585, 182 NYS2d 62 (Ct Cl 1959), *aff'd*, 10 AD2d 663, 197 NYS2d 452 (4th Dept 1960).

## **IV. Derivative Action**

The surviving spouse's individual claim for loss of services may be joined with the wrongful death and survival actions, CPLR 1002(a); see *Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 765 NYS2d 111 (4th Dept 2003). The surviving spouse individually may properly seek damages only for the loss suffered between the dates of the deceased's injury and death, and not for future losses, *Liff v Schildkrout*, 49 NY2d 622, 427 NYS2d 746, 404 NE2d 1288 (1980); *Sand v Chapin*, 238 AD2d 862, 656 NYS2d 700 (3d Dept 1997); *Yuet Ngor Chang v New York City Health and Hospitals Corp.*, 82 AD2d 764, 440 NYS2d 211 (1st Dept 1981).

The statute of limitations applicable to the derivative action is the same as applies to the underlying cause of action in favor of the decedent, *Rothfarb v Brookdale Hosp.*, 139 AD2d 720, 527 NYS2d 473 (2d Dept 1988). However, statutory tolls are personal to the decedent and do not apply to derivative actions, *Myrick v Suffolk*, 139 AD2d 633, 527 NYS2d 273 (2d Dept 1988) (infancy toll not applicable to mother's derivative claim).

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