

 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated  
Estates, Powers and Trusts Law (Refs & Annos)  
Chapter 17-B. Of the Consolidated Laws  
Article 5. Family Rights  
Part 4. Rights of Members of Family Resulting from Wrongful Act, Neglect or Default Causing Death  
of Decedent (Refs & Annos)

McKinney's EPTL § 5-4.3

§ 5-4.3 Amount of recovery

Currentness

(a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded.

(b) Where the death of the decedent occurs on or after September first, nineteen hundred eighty-two, in addition to damages and expenses recoverable under paragraph (a) above, punitive damages may be awarded if such damages would have been recoverable had the decedent survived.

(c)(i) In any action in which the wrongful conduct is medical malpractice or dental malpractice, evidence shall be admissible to establish the federal, state and local personal income taxes which the decedent would have been obligated by law to pay.

(ii) In any such action tried by a jury, the court shall instruct the jury to consider the amount of federal, state and local personal income taxes which the jury finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.

(iii) In any such action tried without a jury, the court shall consider the amount of federal, state and local personal income taxes which the court finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.

**Credits**

(L.1966, c. 952. Amended L.1982, c. 100, § 1; L.1986, c. 266, § 6.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

By Margaret Valentine Turano

2013

Even if the decedent's father is a distributee, if he abandoned the decedent, he cannot share in the wrongful death proceeds. *See Matter of Ramos*, N.Y.L.J., March 25, 2013, at 36 (Surrogate's Court, Kings County) (father left when decedent was a child, did not support him, and never received any support from him).

2012

When damages are calculated in a wrongful death action, the award is discounted to reflect its cash value on the date of the verdict. The Court of Appeals has, in *Toledo v. Iglesia N. Christo*, 18 N.Y.3d 363, 939 N.Y.S.2d 282, 962 N.E.2d 773 (2012), enunciated the rule on how to calculate the pre-verdict interest in a wrongful death action. The court must “discount the 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.”

The Court in *Toledo* clarified and added to its prior decision in *Milbrandt v. Green Refractories Co.*, 79 N.Y.2d 26, 580 N.Y.S.2d 147, 588 N.E.2d 45 (1992), where it had ruled “that no preverdict interest should be added to an award for post-verdict losses if the award has not been discounted to a time prior to the award.” It reasoned that “[w]hen ... an intended amount is not discounted to the date of death, but only to the date of the verdict, the award includes the return that would be earned on the principal from the date of death to the date of verdict .... If... the damages are discounted only to the date of verdict, then that award already includes interest on the principal sum from the date of death to the date of verdict, and additional interest is a windfall.” In the *Milbrandt* trial, the verdict had not been properly discounted, so the Court denied pre-verdict interest on future damages. Later, in *Rohring v. City of Niagara Falls*, 84 N.Y.2d 60, 614 N.Y.S.2d 714, 638 N.E.2d 62 (1994), the Court said that “future damages should be discounted to the date of liability, which by statute is the date of death, before interest is calculated on them.” Then the legislature enacted CPLR Articles 50-A and 50-B (structured settlements, structured judgments), under which the jury awards the full amount of future damages and the trial judge discounts it. L. 2003, ch. 86. *See* CPLR 4111(e). *Toledo* closes the circle and clarifies that the plaintiff is entitled to interest on the discounted verdict from the date of death to the date of verdict.

In theory, it would seem that when the court discounts the damages back to the date of decedent's death and then adds interest from the date of death to the date of verdict, it should be a wash, but the statutory interest rate under CPLR 5041 is 9%, much higher than the rate at which the verdict is discounted (4.3% in *Toledo*). The dissent in *Toledo* objected to this windfall for the plaintiff.

Although the defendant had not objected on this ground, both the majority and the dissent mentioned that the plaintiff had added the 9% interest to the date-of-verdict value of the damages, rather than to the date-of-death value, which did constitute a windfall, because the date-of-verdict value already included interest from date of death to date of verdict.

2011

Personal injury damages are part of the decedent's estate and, if he died without a will, they pass in intestacy. Wrongful death proceeds are paid to the decedent's distributees to compensate them for the pecuniary losses, including support, that the decedent's death caused them. That was why in *Matter of Dukes*, N.Y.L.J., April 29, 2011, at 29, col. 3 (Surrogate's Court, Bronx County), the decedent's widow and son fought over whether to allocate the bulk of the proceeds to personal injury or wrongful death. Because the son was over 21 when the decedent died and therefore not entitled to support, and because the decedent had suffered for seven weeks before dying, the son hoped that the court would weight the recovery more toward personal injury. The widow, on the other hand, pointed to the lost earnings and pension and urged the court to allocate most of the recovery to wrongful death. The court allocated 43% to personal injury and the rest to wrongful death.

\* \* \*

When the decedent had more than one child, the *Kaiser* formula, discussed in the main Practice Commentary, suggests that their proportions of the wrongful death recovery should reflect the number of years of dependence on the decedent they would have expected if he had lived. In some circumstances, particularly when the children are in their upper teens and the *Kaiser* formula would therefore skew their shares, the court will use another formula. In *Matter of Delvalle*, N.Y.L.J., April 29, 2011, at 29, col. 5 (Surrogate's Court, Bronx County), however, the court refused to veer from *Kaiser*, finding no reason to disadvantage the younger child by splitting the recovery among the children equally. *Accord*, *Matter of Passalacqua*, N.Y.L.J., November 9, 2010, at 37, col. 2 (Surrogate's Court, Kings County). In *Matter of Zavattieri*, N.Y.L.J., November 9, 2010 at 26, col. 4 (Surrogate's Court, New York County), the court stuck to *Kaiser* and refused to reduce the widow's share and increase the child's share despite the facts that the decedent's marriage to the widow had been short and the child's mother was impecunious, neither of which was relevant to their expectations of support.

#### 2008

A family member can request a deviation from the *Kaiser* formula (see the Practice Commentary in the main volume and the 2002 and 2000 Supplementary Practice Commentaries for discussions of *Kaiser*), but ultimately the division of the proceeds is in the court's discretion. In *Matter of Duncan*, N.Y.L.J., October 22, 2007, at 39, col. 2 (Surrogate's Court, Kings County), for example, the petitioner requested equal payments from the \$35,000 wrongful death proceeds to two children, ages 12 ½ and 7 ½, because their mother's loss affected both equally. The court disagreed because that allocation inadequately took into account their ages and pecuniary losses, but conceded that the raw *Kaiser* result (62% and 38%) also skewed their relative losses, so the court directed that the first \$5,000 be paid to the younger child and the rest be divided between the two children equally.

#### 2006

Only distributees can share in the proceeds of a wrongful death action, and a decedent's grandchildren are not his distributees if their mother, the decedent's daughter, is still alive. The dilemma in *Clark v. Weinstein*, 23 A.D.3d 1054, 804 N.Y.S.2d 183 (4<sup>th</sup> Dep't 2005), was that the decedent had supported his two grandchildren for most of their lives. Still, they were not his distributees and were not entitled to recover. His daughter, on the other hand, suffered pecuniary damage when her father died and stopped supporting her children, whom she had the obligation to support. The defendants objected that such an indirect recovery by the grandchildren, but to no avail.

#### 2005

The New York Court of Appeals has held that future tax consequences resulting from a decedent's death are not part of damages in a wrongful death suit. *Farrar v. Brooklyn Union Gas Company*, 73 N.Y.2d 802, 537 N.Y.S.2d 26,

533 N.E.2d 1055 (1988); *Johnson v. Manhattan and Bronx Surface Transit Operating Authority*, 71 N.Y.2d 198, 524 N.Y.S.2d 415, 519 N.E.2d 326 (1988). The court has distinguished those holdings in *Matter of DelBroccolo*, 4 Misc. 3d 510, 780 N.Y.S.2d 857 (Sup. Ct. Nassau County 2004), where the homeowner transferred her house into an irrevocable Qualified Personal Residence Trust (“QPRT”) to last for five years, after which it would pass to the named beneficiaries, from whom the settlor would rent it. Its purpose was to freeze the value of the house for gift-tax purposes, to reduce the transfer-tax cost by the actuarial value of the grantor's right to live there during the term, and to pass the appreciation during the five years to the beneficiaries free of gift and estate taxes. If she died before the term of the QPRT, the entire value of the house would be included in her estate under Internal Revenue Code 2036. In *DelBroccolo*, the decedent was killed by the defendant's tortious behavior eight months before the trust was to end. The court included in the wrongful death damages the tax savings the estate would have enjoyed if the decedent had survived the term. It distinguished *Farrar*, where the projected tax loss was “speculative” and “subject to change.” The *DelBroccolo* holding is sound; in *Johnson*, the tax losses potentially involved “[c]ountless numbers of unknown and unpredictable variables ...,” 71 N.Y.2d at 204, 524 N.Y.S.2d at 418, 519 N.E.2d at 329, unlike the easily calculable damages in *DelBroccolo*.

#### 2002

An adult child who was in fact dependent on a decedent for support is eligible to share in the action for his wrongful death. *See Conejero v. Lajam*, N.Y.L.J., February 15, 2002, at 23, col. 4 (Supreme Court, Queens County).

\* \* \*

For still another deviation from the strict *Kaiser* formula to make the elder children's shares more equitable and to take into account that the surviving spouse had raised nine children without help from the decedent, *see Matter of Stella*, N.Y.L.J., November 21, 2001, at 25, col. 3 (Surrogate's Court, Suffolk County).

#### 2000

For another equitable veering from the *Kaiser* formula because the decedent's four distributees were clustered in age between 10 and 22 years, *see Matter of Colon*, N.Y.L.J., September 13, 1999, at 30, col. 4 (Surrogate's Court, Bronx County)(one-half according to *Kaiser* formula, one-half in equal shares to the four sons).

#### 1999

When a decedent is the innocent victim of a crime, the New York State Crime Victims Board may grant money to a person who pays the decedent's funeral bill, and when it does so it takes back a lien on any wrongful-death proceeds to cover the funeral expenses. *See Matter of Fludd*, 178 Misc.2d 496, 681 N.Y.S.2d 740 (Surrogate's Court, Bronx County 1998).

### PRACTICE COMMENTARIES

By Margaret Valentine Turano

This section, which derives from Decedents Estates Law § 132, defines damages in a wrongful death action as the “fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought” (subparagraph (a)) (that is, distributees; see EPTL 5-4.1. For the inclusion of parents as distributees when the decedent was survived by a spouse, see EPTL 5-4.4 and the Practice Commentary thereto.).

Damages include “the reasonable expenses of medical aid, nursing [costs resulting from the injury that caused that death] and the reasonable funeral expenses of the decedent paid by the distributees ... ” (subparagraph (a)), as well as the pecuniary benefits that the distributees had a reasonable right to expect if the decedent had lived, including “loss of support, voluntary assistance and possible inheritance ... .” *Parilis v. Feinstein*, 49 N.Y.2d 984, 429 N.Y.S.2d 165, 406 N.E.2d 1059 (1980). The trier of the facts has to determine “the reasonable expectancy, or lack of it, of future assistance or support” from the decedent had she lived. *Loetsch v. New York City Omnibus Corp.*, 291 N.Y. 308, 52 N.E.2d 448 (1943).

Because damages in a wrongful death lawsuit are measured by the loss to distributees, this section governing the amount of damages overlaps a good deal with the next section (EPTL 5-4.4) governing their distribution. Determination of damages adequate to compensate distributees for their pecuniary losses is a “complex factual determination,” *Bellows v. Smith*, 50 A.D.2d 622, 375 N.Y.S.2d 43 (3d Dep't 1975), taking into account the decedent's working habits, her job and her income at the time of death, the likelihood of her advancement and increased earning capacity (though not all courts consider this a factor; see *Matter of Reynolds*, 115 N.Y.S.2d 534 (Surrogate's Court, Erie County 1952) (dictum)), and the age and life expectancy of the decedent and the distributees she was supporting, among other factors. *Brown v. Horn*, 179 A.D.2d 1073, 578 N.Y.S.2d 951 (4th Dep't 1992); *Tenczar v. Milligan*, 47 A.D.2d 773, 365 N.Y.S.2d 272 (3d Dep't 1975), *appeal denied*, 36 N.Y. 645, 371 N.Y.S.2d 1027, 332 N.E.2d 362 (1975).

The losses must be pecuniary. Besides lost wages and actual expenses, they may include loss of support and services such as cooking, cleaning, driving, etc., measured by the cost of hiring people to replace those services. See *Protzman v. State*, 91 A.D.2d 853, 458 N.Y.S.2d 408 (4th Dep't 1982). If the distributees are minor children, the damages include loss of parental support, including a parent's “nurture and ... intellectual, moral and physical training ... and ... such instruction as can only proceed from a [parent].” *Tilley v. Hudson Railroad Co.*, 24 N.Y. 471 (1862) (quotation updated to include fathers). No damages are awardable for the grief or suffering of the distributee or the lost companionship, comfort or assistance the decedent would have provided, *Bumpurs v. New York City Housing Authority*, 139 A.D.2d 438, 527 N.Y.S.2d 217 (1988), or for loss of consortium, *Liff v. Schildkrout*, 49 N.Y.2d 622, 427 N.Y.S.2d 746, 404 N.E.2d 1288 (1980), *reargument denied*, 49 N.Y.2d 1048, 429 N.Y.S.2d 1027, 407 N.E.2d 483 (1980), but they may be awarded for lost services provided by the decedent even to nondependent distributees. See *Gonzalez v. New York City Housing Authority*, 77 N.Y.2d 663, 569 N.Y.S.2d 915, 572 N.E.2d 598 (1991) (counseling, meals, occasional shelter, babysitting provided by decedent to her nondependent grandchildren). Damages may include lost inheritance, which is another difficult question of fact. See *Sternfels v. Metropolitan Street Railroad Co.*, 73 A.D. 494, 77 N.Y.S. 309 (1st Dep't 1902), *affirmed*, 174 N.Y. 512, 66 N.E.2d 1117 (1903).

When a parent is sole distributee, the courts consider the child's relationship with the parent, the money the child was giving the parent, if any, and the likelihood of support in the future had the child lived. *E.g.*, *Williams v. City of New York*, 169 A.D.2d 713, 564 N.Y.S.2d 964 (2d Dep't 1991). When the decedent was an infant, the damages are still a question of fact, and often difficult to measure. See *Parilis v. Feinstein*, 49 N.Y.2d 984, 429 N.Y.S.2d 165, 406 N.E.2d 1059 (1980) (evidence as to “age, character and condition of the decedent and the circumstances of his distributees”); *Fornaro v. Jill Brothers*, 42 Misc.2d 1031, 249 N.Y.S.2d 833 (Supreme Court, Kings County 1964)(subsequent history of the case relates to other issues)(case contains discussion of the complex case law).

Parents disqualified under EPTL 4-1.4 and spouses disqualified under EPTL 5-1.2 may not recover in wrongful death actions (EPTL 5-1.2 by specific reference to wrongful death, 4-1.4 because such malfeasors are no longer distributees).

Damages under this section also include interest “on the principal sum recovered” from the date of the decedent's death (subparagraph (a)). This language seems mandatory but it makes no distinction between pre-judgment and post-judgment losses and offers very little assistance in cases where there are both losses at the time of the decedent's death and anticipated losses of support and income after her death and after the verdict. The Court of Appeals clarified it in

*Milbrandt v. A.P. Green Refractories Co.*, and *Schmertz v. Presbyterian Hospital*, 79 N.Y.2d 26, 580 N.Y.S.2d 147, 588 N.E.2d 45 (1992), by reading the interest language together with the clause requiring “fair and just compensation for the pecuniary injuries resulting from the decedent's death.” Thus read, the “principal sum” means the amount, discounted to the date of judgment, that will yield a sum sufficient to compensate for pecuniary losses. To allow additional interest on that amount would in effect be a double recovery, which is neither fair nor just compensation under EPTL 5-4.3's terms. This holding comports with the federal decisions in *Woodling v. Garrett Corp.*, 813 F.2d 543 (2d Cir.1987), and *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir.1984). In *Milbrandt*, the jury awarded damages for past losses and for future losses, the lower court allowed interest on both, and the Appellate Division affirmed, 167 A.D.2d 845, 562 N.Y.S.2d 252 (4th Dep't 1990). In *Schmertz*, the jury awarded damages for loss of inheritance and for past and future losses to the decedent's children, the lower court permitted interest on the entire wrongful death proceeds, *Schmertz v. Matteo*, 148 Misc.2d 491, 560 N.Y.S.2d 591 (Supreme Court, New York County 1990), and the Appellate Division affirmed *sub nom. Schmertz v. Presbyterian Hospital*, 171 A.D.2d 602, 567 N.Y.S.2d 691 (1st Dep't 1991). In both *Milbrandt* and *Schmertz*, the Court of Appeals discounted the recovery to the date of the verdict and included the interest that would have been earned to the date of the verdict. In *Milbrandt* the Court held that pre-verdict interest would not be added to the award for future loss, and in *Schmertz* it eliminated pre-verdict interest on the loss of inheritance award, prorated the interest on the loss of parental guidance awards between pre-verdict and post-verdict portions, and eliminated interest on the post-verdict losses. Finally, the Court concluded that to calculate interest on the total pre-verdict awards from the date of decedent's death also represented an unwarranted windfall to the plaintiff and therefore violated the express intent of EPTL 5-4.3. The Court directed the interest to be computed under CPLR 5001(b), by calculating interest “upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date,” which was fair because losses occur not all at once but from time to time between the decedent's date of death and the verdict.

In the absence of extraordinary circumstances, many (but not all) courts apportion damages among distributees mathematically under the formula set forth in *Matter of Kaiser*, 198 Misc.2d. 582, 100 N.Y.S.2d 218 (Surrogate's Court, Kings County 1950), which counts the number of years the distributee would likely have been dependent on the decedent and prorates the proceeds among all the distributees accordingly. (See the Practice Commentary to EPTL 5-4.4). When infants are distributees, the fiduciary typically get approval from the Surrogate before settling a wrongful death case and making distributions. With the increasing frequency of structured settlements, under which the defendant or his insurer pay some “up front” money and agree to pay out certain amounts in the future, fiduciaries are asking the Surrogates to approve arrangements that do not strictly adhere to the *Kaiser* formula. The Surrogates are not likely to approve them unless the child's percentage of the whole settlement is at least what she would have received under a *Kaiser* allocation, and more if her share is solely out of the future payments. For example, in *Matter of Cotrel*, N.Y.L.J., Oct. 12, 1989, at 25, col. 3 (Surrogate's Court, Bronx County), the child's share under *Kaiser* would have been 29.7%. The settlement was structured so that his mother would get some front money and he would begin receiving payments at eighteen, with large payments coming due at his ages thirty, forty and fifty. His share, though deferred, equaled 46.6% of the total money paid. The court allowed it.

The defendant can introduce evidence that some of the distributees' pecuniary losses may be replaced by such benefits as Workers Compensation, Social Security or employee benefit programs. See CPLR 4545(c), applicable to actions commenced after its enactment on June 27, 1986. L.1986, ch. 220, § 36.

The distributees may recover punitive damages if the decedent could have recovered them if she had survived (subparagraph (b)). Punitive damages are awarded in cases of utter recklessness or depravity, in order to deter wrongdoers in the future. See *James v. Powell*, 19 N.Y.2d 249, 279 N.Y.S.2d 10, 225 N.E.2d 741 (1967). This provision was added by L.1982, ch. 100, effective for decedents dying after September 1, 1982. The prior rule had caused claims for punitive damages to abate when the victim died, theoretically allowing a wrongdoer to reduce his damages by killing rather than merely injuring his victim. In addition to correcting that gruesome anomaly, the

legislature hoped to reduce the recklessness of corporations in committing torts. See Report of the Law Revision Commission, 1982 Sess. L. at 2420-21 (McKinney).

Subparagraph (c) was added by L.1986, ch. 266, § 6, as part of the Medical and Dental Malpractice and Professional Act, which was enacted in response to the escalating costs of obtaining malpractice insurance. [1986] New York State Leg. Ann. 158. It applies to actions commenced after July 7, 1986 for medical or dental malpractice; when the jury considers the decedent's lost earnings, it also considers evidence of the income taxes the decedent would, with reasonable certainty, have had to pay and sets the damages accordingly (subparagraph (c)(ii)). If there is no jury, the court considers the taxes in setting damages (subparagraph (c)(iii)). This differs from actions against non-medical and non-dental defendants, where the court instructs the jury not to consider taxes and, after receiving the jury's verdict, makes an appropriate downward adjustment for income taxes. CPLR 4546(2).

The court also instructs the jury that the wrongful death proceeds are not subject to income taxation. See *Lanzano v. City of New York*, 71 N.Y.2d 208, 524 N.Y.S.2d 420, 519 N.E.2d 331 (1988), *rehearing denied*, 71 N.Y.2d 890, 527 N.Y.S.2d 772, 522 N.E.2d 1070 (1988).

The predecessor to this statute, Decedents Estates Law § 132, for many years unaccountably included a provision that the death of the decedent's father before the verdict would not affect the amount of the damages, a curiosity eliminated when this statute was enacted by L.1966, § 952.

Notes of Decisions (648)

McKinney's E. P. T. L. § 5-4.3, NY EST POW & TRST § 5-4.3

Current through L.2015, chapters 1 to 361.

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