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**PROGRAM MATERIALS**  
**Program #30290**  
**December 4, 2020**

## **Handling Death Cases in New York**

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# Handling Death Cases In New York

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MORRIS DUFFY ALONSO & FALEY

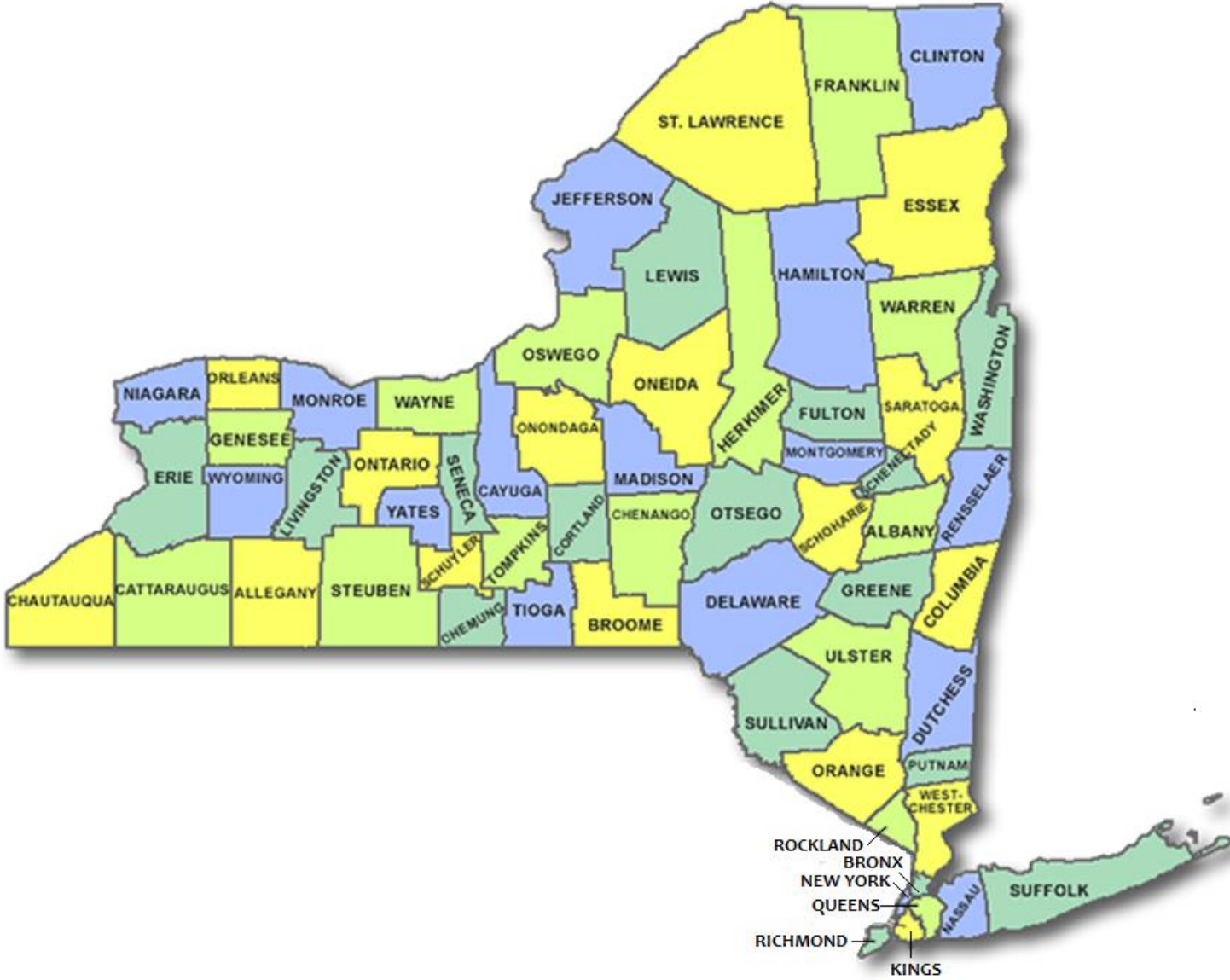
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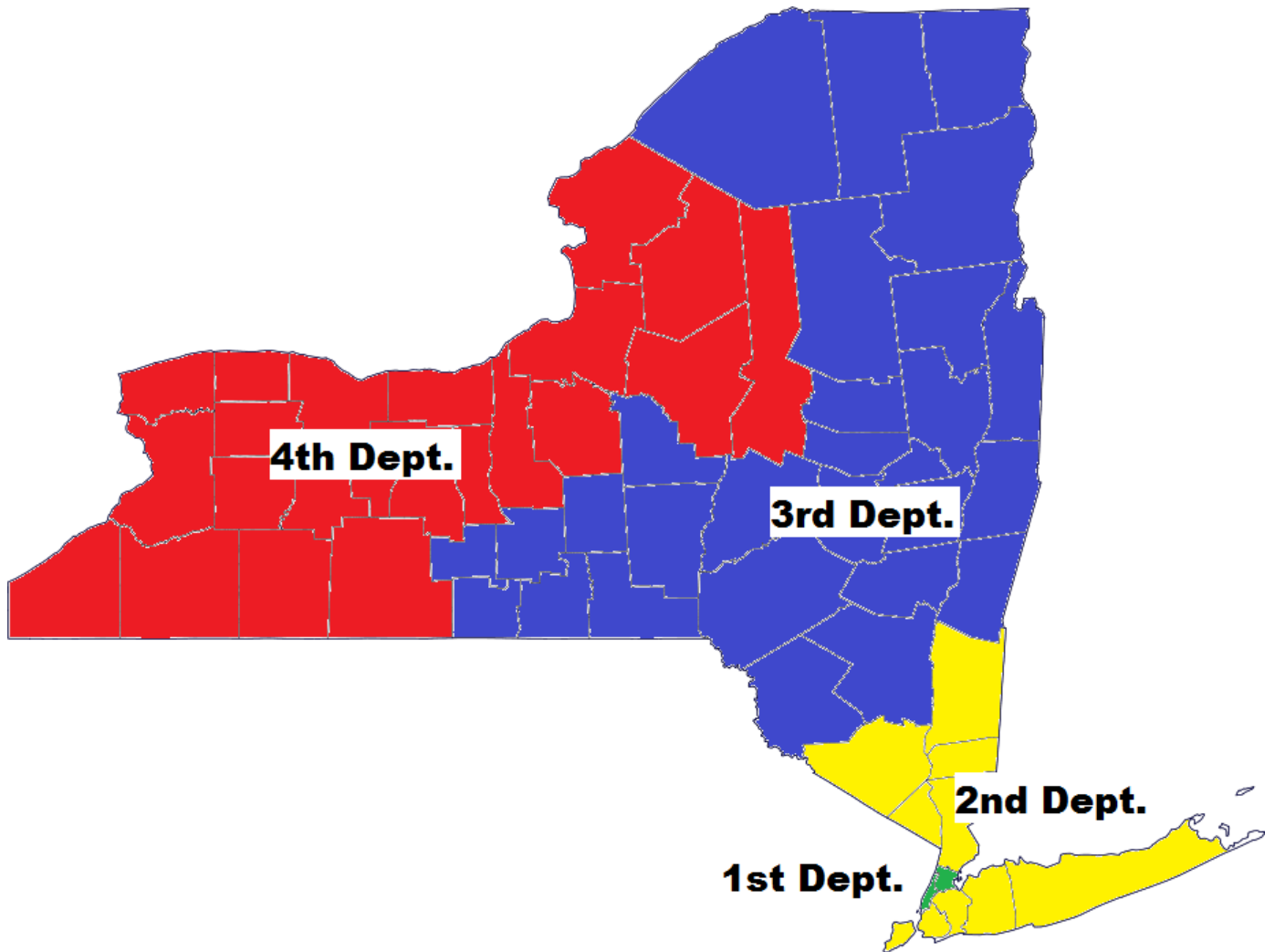
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# NEW YORK STATE COUNTIES

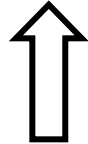


# NEW YORK APPELLATE DIVISIONS

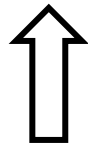


# STATE OF NEW YORK COURT SYSTEM

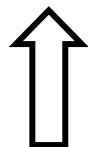
## COURT OF APPEALS



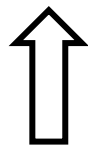
**APPELLATE DIVISION**  
**(1st, 2nd, 3rd and 4th)**



**SUPREME COURT (COUNTY OF...)**  
**(unlimited monetary limit)**



**CIVIL COURT (COUNTY OF...)**  
**(\$25,000 limit)**



**COUNTY COURT**  
**SMALL CLAIMS COURT – TOWN COURT**  
**(\$10,000 limit)**

# NEW YORK CITY

## BOROUGH NAME

## COUNTY NAME

Manhattan

New York

Brooklyn

Kings

Staten Island

Richmond

Bronx

Bronx

Queens

Queens

## DEPARTMENT/TRIAL TYPE

## COUNTIES

1<sup>st</sup> Dept. (Unified)

Bronx, New York

2<sup>nd</sup> Dept. (Bifurcated)

Suffolk, Nassau, Queens  
Kings, Richmond,  
Westchester, Dutchess,  
Orange, Rockland, Putnam

3<sup>rd</sup> Dept. (Bifurcated)

Albany (North)

4<sup>th</sup> Dept. (Bifurcated)

Buffalo (West)



## Handling Death Cases in New York

- Two separate and distinct causes of action in death cases: survivorship cause of action and wrongful death.
- Survivorship cause of action belongs to the estate for decedent's pain and suffering prior to death.
- Wrongful death cause of action belongs to distributees who have suffered pecuniary loss by reason of death.
- In any death case, there will be a **unified trial**.
- Burden of proof still the plaintiff's, but not as high a burden in death cases. See PJI 1:61.
- For wrongful death damages, decedent's estate is entitled to collect interest at the rate of 9% from date of death to date of judgment, governed by Section 5-4.2 of the Estates, Powers and Trusts Law (hereinafter the EPTL).

### Statute of Limitations

- The statute of limitations differs depending on the cause of action asserted.
- The statute of limitations for a survivorship cause of action is three years from the date of the accident or one year from the date of death, whichever is longer. See CPLR Section 210(a).
- The statute of limitations on a wrongful death claim is two years, measured from the date of death, under EPTL 5-4.1 but be mindful of other statutes providing differing limitations periods. See General Municipal Law, 50-I (one year statute of limitations if Metropolitan Transportation Authority or one of its subsidiaries, other than New York City Transit Authority, is defendant). See also Unconsolidated Laws, 7401(2) (as to New York City Health and Hospitals Corporation, two years from date of death, effective August 24, 1990).

### Extended Limitations Period and Tolling

- There is 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 an action has already expired or has less than a year remaining.
- 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.
- The Dram Shop Act, GOL 11-101, creates a cause of action in favor of any person who is injured in person, property, means of support or otherwise by any intoxicated person or by reason of the intoxication of any person, whether or not resulting in death. A cause of action under the Dram Shop Act, GOL 11-101 is separate and distinct from a wrongful death action and, therefore, is subject to the three year statute of limitations.

## Survival Actions

- Survival actions are brought by distributees to compensate for the decedent's pre-death pain and suffering.

### Evidence Required

- The landmark case outlining the requirements of proving a survival action is *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372 (N.Y. 1989). In *McDougald*, the Court of Appeals held that proving cognitive awareness was a prerequisite to a survival cause of action. The Court further refused to recognize a second cause of action for loss of enjoyment of life.
- No recovery for pain and suffering will be allowed without evidence that decedent was conscious after the occurrence. Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed. *See Cummins v. County of Onondaga*, 84 N.Y.2d 322, 325 (1994).
- Mere conjecture, surmise, or speculation is insufficient to sustain a claim to recover damages for conscious pain and suffering. *See Kevra v. Vladigan*, 96 A.D.3d 805, 949 N.Y.S.2d 64 (2d Dept. 2012).
- However, testimony that the decedent was conscious at the scene and responding to commands, crying, withdrawing from touch, or otherwise evincing pain, is sufficient to support a verdict for conscious pain and suffering. *See National Continental Insurance Company v. Abdymadiyeva*, 387 F.Supp.3d 245 (E.D.N.Y 2017).
- Further, an award for conscious pain and suffering may be made where a decedent remains conscious and in obvious pain, without the benefit of painkillers, until treatment attempts and/or death. *See In re 91st Street Crane Collapse Litigation*, 154 A.D.3d 139, 62 N.Y.S.3d 11 (1st Dept. 2017).
- Conscious pain and suffering may also be inferred where a medical expert testifies that the decedent did not sustain injuries that would have killed him instantly nor caused him to lose consciousness immediately, yet decedent likely experienced pain before death or loss of consciousness. *See Vargas v. Crown Container Co., Inc.*, 155 A.D.3d 989, 65 N.Y.S.3d 567 (2d Dept. 2016).
- Further, testimony that the decedent appeared unconscious immediately following an accident, coupled with corroborating paramedic reports and a coroner's conclusion that the decedent's death was instantaneous, is sufficient to dismiss a cause of action for conscious pain and suffering. *See McKenna v. Reale*, 137 A.D.3d 1533, 29 N.Y.S.3d 596 (3d Dept. 2016).

## **Pre-Impact Terror**

- The courts have recognized the injured person’s “pre-impact terror” as an element of conscious pain and suffering. However, such an award cannot be based on mere surmise or conjecture.
- In *Kenan v. Molloy*, 137 A.D.3d 868, 27 N.Y.S.3d 73 (2d Dept. 2016), where a bus owned by city transit authority struck decedent, the Court upheld the jury's award of zero damages for pre-impact terror. While the bus driver testified that he heard a scream a few seconds before he felt the bus hit something, there was no evidence to establish that the scream came from decedent.
- Likewise, in *Martin v. Reedy*, 194 A.D.2d 255, 606 N.Y.S.2d 455 (3d Dept. 1994), no award for pre-impact terror as there was no evidence that vehicle changed speed or direction prior to impact and therefore, no basis for inferring that the decedent was aware of his own impending death.
- Similarly, in *Kevra v. Vladigan*, 96 A.D.3d 805, 949 N.Y.S.2d 64 (2d Dept. 2012), where decedent died in a one-car accident and two other occupants of the vehicle survived the crash, the Second Department held that any finding that the decedent perceived grave injury or death, so as to justify making an award for “pre-impact terror,” would be based on impermissible speculation.
- By contrast, recovery for “pre-impact terror” was allowed in *Vargas v. Crown Container Co., Inc.*, 155 A.D.3d 989, 65 N.Y.S.3d 567 (2016) where a garbage collector sustained fatal injuries when a garbage truck lurched backward and pinned him against a dumpster, and the decedent was facing the truck when it started to move in reverse.
- Likewise, in *In re 91st Street Crane Collapse Litigation*, 154 A.D.3d 139, 62 N.Y.S.3d 11 (1st Dept. 2017), evidence supported the jury's finding that a crane operator endured inconceivable pre-impact terror when the crane collapsed off of a building, but did not fall straight to ground, striking other buildings first, and witnesses in the adjacent apartment buildings described the look of sheer panic and fear on the crane operator’s face and described him making a series of hand movements and putting his hands together as if praying.

## **Amount of Award**

- The elements to be considered in determining the conscious pain and suffering award when the interval between injury and death is short are the degree of consciousness, severity of pain, apprehension of impending death, and duration of suffering.

## **Cases:**

*Vatalaro v. County of Suffolk*, 163 A.D.3d 893, 81 N.Y.S.3d 441 (2d Dept. 2018): The evidence established that while the decedent was able to feel pain following the collision, she was able to do so for, at most, 11 to 20 minutes and that, during that time, she was minimally conscious. An

award of \$1,250,000 for conscious pain and suffering deviated materially from what was reasonable compensation, thus warranting a new trial on the issue of pain and suffering damages unless plaintiff agreed to a reduced award of \$400,000.

*Dowd v. New York City Transit Authority*, 78 A.D.3d 884, 911 N.Y.S.2d 460 (2d Dept. 2010): A jury award for conscious pain and suffering in the amount of \$1,750,000 for a decedent who was struck by a bus and died less than 2 hours later was excessive.

*Oates v. New York City Transit Authority*, 138 A.D.3d 470, 30 N.Y.S.3d 606 (1st Dept. 2016): The First Department found that a \$300,000 award was appropriate in light of plaintiffs' uncontroverted expert testimony that decedent was conscious and in pain for 2 - 5 seconds after being hit by a bus.

*Hyung Kee Lee v. New York Hosp. Queens*, 118 A.D.3d 750, 987 N.Y.S.2d 436 (2d Dept. 2014): The Second Department affirmed an award for conscious pain and suffering of \$3,750,000 for a decedent who remained conscious while hospitalized for three and a half days prior to death.

*Ramos v. Shah*, 293 A.D.2d 459, 740 N.Y.S.2d 376 (2d Dept. 2002): In a medical malpractice action against a care provider, a patient had complained of suffering pain, allegedly from extreme dehydration prior to his death. Although the patient lapsed into a coma, he had some level of consciousness for several days; however, the award of \$900,000 for pain and suffering was considered excessive and reduced to \$450,000.

*In re 91st Street Crane Collapse Litigation*, 154 A.D.3d 139, 62 N.Y.S.3d 11 (1st Dept. 2017): An award of \$8 million for a crane operator's conscious pain and suffering deviated materially from reasonable compensation and was reduced to \$5.5 million, where decedent sustained blunt impact head trauma with cranial fracturing, pulpification of the brain, and near-complete decapitation.

In that same case, an award of \$24 million for conscious pain and suffering for a worker who was crushed by the falling crane was excessive and would be reduced to \$7.5 million, where the worker was hit with over 25,000 pounds of crane components, causing multiple bone-shattering injuries and trapping him under the wreckage, during which period he was screaming and, having been doused in diesel fuel, choking on noxious fumes and smoke.

*Alston v. Sun Harbor Manor, LLC*, 48 A.D.3d 600, 854 N.Y.S.2d 402 (2d Dept. 2008): Plaintiff, a 62-year-old man, was left in sunlight for two hours in 95 degree heat, causing heatstroke and second-degree burns. An award for pain and suffering in the sum of \$3 million deviated materially from reasonable compensation, and would be reversed unless plaintiff's estate agreed to reduction to \$1 million. Plaintiff was not fully conscious at the time of injuries and was given morphine to dull the pain.

- When determining the value of a claim for conscious pain and suffering prior to death, examine the specific evidence regarding the interval between accident and death, degree of consciousness, and duration of suffering. Also, be aware that the Appellate Division tends to sustain much higher verdicts when a defendant's actions are grossly negligent, the injuries are particularly gruesome, or when the decedent is a child.

### **Comparative Negligence**

- As in any other personal injury action, the decedent's own culpable conduct must be considered when apportioning damages.

### **Wrongful Death Actions**

Wrongful death actions are available to compensate a decedent's survivors for economic losses incurred. Cause of action is purely statutory.

New York's Wrongful Death Statute is Article 5, Part 4.

5-4.1 Action by personal representative for wrongful act, neglect or default causing death of decedent

1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death; provided, however, that an action on behalf of a decedent whose death was caused by the terrorist attacks on September eleventh, two thousand one, other than a decedent identified by the attorney general of the United States as a participant or conspirator in such attacks, must be commenced within two years and six months after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a will appointing an executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit.

### **Elements of the Action**

The essential elements to be pleaded in a wrongful death action are:

- (1) a death;
- (2) caused by the wrongful conduct of defendant;

- (3) giving rise to a cause of action which 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.

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. In Clark v. Weinstein, 23 A.D.3d 1054, 804 N.Y.S.2d 183 (4<sup>th</sup> Dept. 2005), the decedent had supported his two grandchildren for most of their lives. Still, they were not his distributees and were not entitled to recover.

### **Who is a distributee**

An individual who qualifies as a distributee as defined by EPTL 4-1.1

#### 4-1.1 Descent and distribution of a decedent's estate

The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves a distributee from contributing to all such taxes the amounts apportioned against him or her under 2-1.8.

Distribution shall then be as follows:

- (a) If a decedent is survived by:
  - (1) A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.
  - (2) A spouse and no issue, the whole to the spouse.
  - (3) Issue and no spouse, the whole to the issue, by representation.
  - (4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents.
  - (5) Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation.
  - (6) One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving paternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving maternal grandparent or grandparents, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the

issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.

- (7) Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the paternal grandparents, per capita, and the other one-half to the great-grandchildren of the maternal grandparents, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.
- (b) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.
- (c) Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime.
- (d) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.
- (e) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

The damages awarded in wrongful death actions are solely for the benefit of deceased person's distributees to compensate them for their pecuniary injuries resulting from death, and consequently, are not considered part of deceased individual's estate to be distributed pursuant to either intestate distribution or the terms of a will. *See Heslin v. County of Green*, 14 N.Y.3d 67, 896 N.Y.S.2d 723.

See PJI 2:320 Action for Wrongful Death and Conscious Pain.

### **What Damages are Recoverable**

#### 5-4.3 Amount of recovery

- (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.
- 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. Such damages include loss of support, voluntary assistance, and possible inheritance, as well as medical expenses incidental to death and funeral expenses.
  - In order to establish a right to a wrongful death recovery, the plaintiff need only show that he had a reasonable expectation of support from the decedent. Once that showing is made, the calculation of the precise amount of damages is a question for the jury. The plaintiff does not need to prove that he/she was receiving support at the time of death.
  - In determining what is "fair and just" compensation for the pecuniary injuries resulting from the decedent's death, 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.



- 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.
- Loss of consortium claims are not recoverable in wrongful death actions except for the time period between injury and death. 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. Damages may be computed for pecuniary loss to an infant until he or she reaches the age of 21 years old. *See Odom v. Byrne*, 104 A.D.2d 863, 480 N.Y.S.2d 247.
- No damages are awardable for the grief or suffering of the distributee or the lost companionship, comfort or assistance the decedent would have provided.
- 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. The fact that a child was too young to work does not prevent a parent from recovering a pecuniary award.
- 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.

## Cases

In *Estevez v. Tam*, 148 A.D.3d 779, 49 N.Y.S.3d 167 (2d Dept. 2017), the Second Department found that a jury verdict awarding zero damages for the loss of parental guidance was not against the weight of the evidence where decedent was 65, divorced, retired, living by himself, and provided no financial support to his three adult sons.

By contrast, in *Vargas v. Crown Container Co., Inc.*, 155 A.D.3d 989, 65 N.Y.S.3d 567 (2016), awards of \$650,000 for past pecuniary loss and \$350,000 for future pecuniary loss were reasonable compensation for the son of garbage collector, where the garbage collector was 22 years old at time of his death, he worked two jobs to support his family, and his son was one year old at the time of his death.

In *Gardner v. State*, 134 A.D.3d 1563, 24 N.Y.S.3d 805 (4th Dept. 2015), the Fourth Department declined to disturb an award that totaled \$875,000 for both of the decedent's children for both past and future loss of parental guidance, despite the fact that the children were teenagers.

However, for past loss of financial support (for the 8 ½ years between the date of the accident and the date of the court's decision), awards of \$275,100 for decedent's older son, who was 19 years old at the time of decedent's death, and \$473,400 for decedent's younger son, who was 15 years old, were not supported by the evidence, and that the evidence supported only up to \$175,000 for the older son and \$250,000 for the younger son.

In *Hyung Kee Lee v. New York Hosp. Queens*, 118 A.D.3d 750, 987 N.Y.S.2d 436 (2d Dept. 2014), an award of \$336,000 deviated materially from what would be reasonable compensation for the loss of parental guidance for the period between the decedent's death and the date of the verdict. However, for future economic losses, an award of \$2,243,560 did not deviate materially from what was reasonable, as evidence supported a determination that a licensed practical nurse, billing at a rate of \$35 per hour, would be required to replace the decedent's services in caring for his daughter at home.

In *Vasquez v. County of Nassau*, 91 A.D.3d 855, 938 N.Y.S.2d 109 (2d Dept. 2012), the Court upheld awards of \$40,000 for past financial support, \$200,000 for future loss of financial support, \$140,000 for past loss of household services, and \$1.8 million for future loss of household services in an action where the distributee was a disabled, minor child and the plaintiff presented expert testimony that established the decedent's financial support and her child's special lifetime needs.

In *Grevelding v. State*, 132 A.D.3d 1332, 17 N.Y.S.3d 813 (4th Dept. 2015), awards of \$900,000 to each of the decedent's two children for past loss of parental guidance were reduced to \$500,000. Further, the Court reduced awards of \$1,100,000 to decedent's son and \$1,300,000 to decedent's daughter for future loss of parental guidance to \$900,000 for decedent's son and \$1,000,000 for the decedent's daughter.

### **Discovery In Wrongful Death Cases**

Documentary discovery and depositions are crucial in defending a wrongful death case. Records that should be obtained include but are not limited to the following:

- bank records, cancelled checks, money orders evidencing payments in support to various parties. This would also include bank records and receipts of parties claiming monetary support.
- credit card bills, credit listings, monthly expenditure information for determining consumption rate for decedent.
- any records that indicate a payment trail to a party; for a child, that could include school tuition, clothing allowances, extracurricular activities, etc. If the individual was divorced, copies of the child care arrangement ordered by the Court.

- tax records, employment authorizations, family doctor history, all information about general health that might affect life expectancy for both the deceased and any individual making a claim.
- the needs of the individuals making the claim; for a spouse, mortgage info; for a child, health care needs etc.
- each individual making a claim for pecuniary damages should be deposed extensively and they should provide records in their possession relative to their claim.
- benefit information, pensions, 401k, social security records, workers comp records, life insurance policies, union records, etc.
- in addition to the individuals making claims on the estate, depositions of any outside parties that might shed light on the claims should be conducted.
- funeral expense records, will, medical expenses for deceased relative of the accident, autopsy reports, police reports, OSHA reports, surrogate court file should also be obtained where applicable.

In addition, experts should be retained early if feasible. Some experts that are helpful in certain situations include:

- medical examiner, if there is indication that the conscious pain and suffering of the deceased is not as plaintiff has made it out to be. For instance, if the autopsy report indicates that plaintiff was unconscious immediately after the accident until his death, and plaintiff is making a claim for conscious pain and suffering. In that vein, a toxicologist if there is indication of possible drugs or alcohol in decedent's system.
- if decedent's life expectancy or life expectancy of distributee is less than indicated because of illness, you should consider retaining an expert to testify to the same.
- accident reconstruction experts should be considered.
- economists-often we may not want to call one, but we may want to retain an economist to point out the discrepancies in plaintiff's report for cross-examination purposes.
- witnesses that rebut plaintiff's experts. For example, for loss of household services, if plaintiff comes up with a ridiculous number, we may want to put someone on stand to refute that testimony.

### **Conclusion**

Death cases in New York are frequently not evaluated properly by claims representatives and attorneys alike. To properly evaluate a death case, one must be familiar with the two separate and distinct causes of action that potentially arise and what is and isn't recoverable under each cause of action. Defense counsel and claims should agree upon an aggressive discovery strategy at the earliest possible time so that the value of the claim can be promptly determined and appropriate measures taken to bring the claim to an expeditious and just conclusion.

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**DAMAGES FOR WRONGFUL DEATH AND SURVIVORSHIP:  
TWO DISTINCT CAUSES OF ACTION**

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**Andrea M. Alonso and Kevin G. Faley**

To recover damages for a person's death in New York State, there are two distinct causes of action: survivorship and wrongful death. While the survivorship cause of action belongs to the estate for the decedent's pain and suffering prior to death, the wrongful death cause of action compensates those statutory distributees who have suffered pecuniary loss as a result of the decedent's death. Consequently, there may be more than one plaintiff in a death case as well as separate statutes of limitations for each cause of action. Due to these distinctions, an attorney must assess each action independently of the other.

### Survivorship

A survivorship action is brought by the decedent's estate for pre-death pain and suffering. Unlike a wrongful death claim, where the settlement or award passes by statute, a survivorship claim is distributed pursuant to a will (or, if the decedent dies intestate, pursuant to the intestate statute). The statute of limitations for a survivorship claim is three years from the date of the accident or one year from the date of death, whichever is longer.

A survivorship claim for pre-death pain and suffering requires evidence that the decedent experienced "cognitive awareness," which is defined as consciousness after the occurrence. *McDougald v. Garber*, 73 N.Y.2d 246 (N.Y. 1989). Consciousness may be evinced where decedent screams, moans in pain, or otherwise visibly suffers.

Evidence of conscious pain and suffering may also be inferred where a medical expert testifies that the decedent sustained injuries that did not cause instantaneous death or loss of consciousness, but did likely cause pain. *Vargas v. Crown Container Co., Inc.*, 65 N.Y.S.3d 567 (2d Dept. 2016). By contrast, testimony that the decedent appeared unconscious immediately following an accident, coupled with corroborating paramedic reports and a coroner's conclusion that death was instantaneous, is sufficient to dismiss a survivorship claim. *McKenna v. Reale*, 29 N.Y.S.3d 596 (3d Dept. 2016).

The courts also recognize "pre-impact terror" as a sub-category of conscious pain and suffering. Pre-impact terror requires evidence that a decedent was aware of his own impending death. For example, in *In re 91st Street Crane Collapse Litigation*, 62 N.Y.S.3d 11 (1st Dept. 2017) where a crane collapsed off of a high-rise, evidence strongly supported a finding of pre-impact terror for the crane operator who was trapped inside the crane when it fell. Witnesses in adjacent apartment buildings described the look of "sheer panic and fear" on the crane operator's face as the crane struck other buildings on its way to the ground. In that same case, there was also sufficient evidence of pre-impact terror for the worker upon whom the crane fell, as he sustained defensive injuries to his forearm and had warned coworkers to run as the crane was falling down.

Conscious pain awards vary widely according to the circumstances of each case. For example, the Second Department reduced an award of \$1,250,000 to \$400,000 where evidence established that, while the decedent was able to feel pain following a collision, she was able to do so for at most 11 to 20 minutes and that she was minimally conscious during that time. *Vatalaro v. County of Suffolk*, 81 N.Y.S.3d 441 (2d Dept. 2018). Conversely, for a decedent who remained conscious while hospitalized for three and a half days prior to death, the Second Department affirmed an award of \$3,750,000. *Hyung Kee Lee v. New York Hosp. Queens*, 987 N.Y.S.2d 436 (2d Dept. 2014). Note that the Appellate Division tends to sustain much higher verdicts for pre-impact terror and conscious pain and suffering when a defendant's actions are grossly negligent, the injuries are particularly gruesome, or when the decedent is a child.

When determining the value of a survivorship claim for conscious pain and suffering prior to death, the attorney should examine the specific evidence regarding the interval between accident and death, the degree of consciousness, and the duration of suffering. As in any other personal injury action, the decedent's own culpable conduct must also be considered when apportioning damages.

### Wrongful Death

The separate cause of action for wrongful death is designed to compensate a decedent's survivors for economic losses. The essential elements of a wrongful death action are a death caused by the wrongful conduct of defendant; survival by distributees who have suffered pecuniary loss by reason of the death; and appointment of a personal representative of decedent. The statute of limitations for a wrongful death action is two years, measured from the date of death, subject to certain exceptions. See Estates, Powers, and Trusts Law (EPTL) § 5-4.1. The burden of proving the defendant's wrongful conduct is not as high as in cases where an injured plaintiff can himself describe the event. See *Noseworthy v. City of New York*, 298 N.Y. 76, 80, 80 N.E.2d 744.

In contrast to a survivorship claim, only distributees as defined by EPTL 4-1.1 can share in the proceeds of a wrongful death action. Wrongful death damages are designed to compensate distributees solely for their pecuniary injuries resulting from the death of the decedent and, consequently, are not considered part of the deceased individual's estate.

Under the current statute, wrongful death damages are limited to "fair and just" compensation for the pecuniary injuries resulting from decedent's death. See EPTL § 5-4.3. Such damages may include loss of support, voluntary assistance, and possible inheritance, as well as medical expenses incidental to death and funeral expenses. See *Gonzalez v. New York City Housing Authority*, 77 N.Y.2d 663. Besides lost wages and actual expenses, pecuniary losses may also include services such as cooking, cleaning, and driving. Loss of consortium claims are not recoverable under the statute. A surviving spouse can recover for loss of consortium for the period prior to the decedent's death, but this is a derivative action of the decedent's claim for conscious pain and suffering. See *Liff v. Schildkrout*, 427 N.Y.S.2d 746, (1980). No damages are awardable for the grief or suffering of the distributee or the lost companionship, comfort or assistance the decedent would have provided. See *Bumpurs v. New York City Housing Authority*,

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Courts have long recognized the pecuniary value of parental guidance and support. See *Tilley v. Hudson Railroad Co.*, 24 N.Y. 471 (1862). These losses are highly fact-specific, and each individual scenario will be subject to scrutiny. For example, in *Gardner v. State*, 24 N.Y.S.3d 805 (4th Dept. 2015), the Court declined to disturb an award of \$875,000 for the decedent's children for past and future loss of parental guidance, despite the fact that both children were teenagers at the time of death. By contrast, in *Estevez v. Tam*, 49 N.Y.S.3d 167 (2d Dept. 2017), the Second Department found that a jury verdict awarding zero damages for the loss of parental guidance was not against the weight of the evidence where decedent was 65, divorced, retired, living by himself, and provided no financial support to his three adult sons.

In order to establish a right to a wrongful death recovery, the plaintiff need only show that he had a reasonable expectation of support from the decedent. Then, the calculation of the precise amount of damages is a question for the jury.

In determining what is "fair and just" compensation for the pecuniary injuries resulting from wrongful death, the jury may consider a number of factors: the age, health and life expectancy of decedent at the time of injury; decedent's work habits and present position; decedent's future earning capacity and potential for career advancement; and the number, age and life expectancy of decedent's distributees. In *Vargas v. Crown Container Co., Inc.*, awards of \$650,000 for past pecuniary loss and \$350,000 for future pecuniary loss were considered reasonable compensation for the one-year-old son of a 22-year-old garbage collector who worked two jobs at the time of his death.

A distributee must provide evidence of the value of the lost services. In *Merola v. Catholic Medical Center of Brooklyn and Queens*, 808 N.Y.S.2d 395 (2d Dept. 2005) the Court reduced an award for the value of household chores performed by a decedent wife from \$250,000 to \$50,000 because the plaintiff husband failed to provide expert testimony as to the value of the lost services. By contrast, in *Vasquez v. County of Nassau*, 938 N.Y.S.2d 109 (2d Dept. 2012), the Second Department upheld an award of \$1.8 million for future loss of household services in an action where the distributee was a disabled, minor child and the plaintiff presented expert testimony that established the decedent's financial support and her child's special, lifetime needs.

## Conclusion

To properly evaluate a death case, an attorney must be familiar with the two distinct causes of action and what is and is not recoverable under each. To defend a potentially high-exposure case, defendants must obtain documentary and/or testimonial evidence of each and every claim for loss of earnings/support/service that a plaintiff is alleging.

Andrea M. Alonso and Kevin G. Faley are partners at Morris Duffy Alonso & Faley. Annalise Leonelli, a paralegal, assisted in the preparation of this article.

### **PJI 1:61 General Instruction—Burden of Proof—In Death Cases**

The burden of proving that the defendant was negligent and that (his, her) negligence was a substantial factor in causing the injury and death is upon the plaintiff who is (executor, administrator) of the estate of AB. The burden of proving that AB was negligent and that (his, her) negligence was a substantial factor in causing the injury and death of AB is upon the defendant.

The party having the burden of proof on a particular issue must establish his or her contention on that issue by a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find worthy of belief. A preponderance means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase fair preponderance of the credible evidence refers to the quality of the evidence, the weight and effect that it has on your minds. The law requires that in order for a party to prevail on an issue on which he or she has the burden of proof, the evidence that supports the claim on that issue must appeal to you as more nearly representing what happened than that opposed to his or her claim on that issue. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, you must resolve the question against the party who has the burden of proof and in favor of the opposing party.

In a death action such as this, however, the plaintiff (executor, administrator) of AB's estate is not held to as high a degree of proof as is required of an injured plaintiff who can describe what happened. Thus, you are permitted greater latitude in evaluating such factual issues as the decedent might have testified to had (he, she) lived. If, from all the credible evidence in this case, you conclude that it is more probable than not that defendant was negligent and that (his, her) negligence was a substantial factor causing the injury or death, you will find for the plaintiff on this issue. However, if that is not your decision, or if you find that the evidence is so evenly balanced that you cannot say that the greater weight of the evidence is on either side of these issues, you will find defendant was not at fault.

On the issue of AB's fault, the burden is on the defendant to prove that AB was negligent and that (his, her) negligence was a substantial factor causing the (collision or other description of the occurrence). If, on considering all the evidence, you decide that it is more probable than not that AB was negligent and that (his, her) negligence was a substantial factor causing the injury and death, you will find for the defendant on this issue. If, however, you do not so decide or if you find that the evidence is so evenly balanced that you cannot say that the greater weight of the evidence is on either side of this issue of AB's negligence, you will find that AB was not at fault.



## **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.

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.

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## Damages for Wrongful Death and Survivorship: Two Distinct Causes of Action

To recover damages for a person's death in New York State, there are two distinct causes of action: survivorship and wrongful death. Attorneys must be familiar with what is and is not recoverable under each.

By **Kevin G. Faley and Andrea M. Alonso** | September 15, 2020



To recover damages for a person's death in New York State, there are two distinct causes of action: survivorship and wrongful death. While the survivorship cause of action belongs to the estate for the decedent's pain and suffering prior to death, the wrongful death cause of action compensates those statutory distributees who have suffered pecuniary loss as a result of the decedent's death. Consequently, there may be more than one plaintiff in a death case as well as separate statutes of limitations for each cause of action. Due to these distinctions, an attorney must assess each action independently of the other.

### Survivorship

A survivorship action is brought by the decedent's estate for pre-death pain and suffering. Unlike a wrongful death claim, where the settlement or award passes by statute, a survivorship claim is distributed pursuant to a will (or, if the decedent dies intestate, pursuant to the intestate statute). The statute of limitations for a survivorship claim is three years from the date of the accident or one year from the date of death, whichever is longer.

A survivorship claim for pre-death pain and suffering requires evidence that the decedent experienced “cognitive awareness,” which is defined as consciousness after the occurrence. *McDougald v. Garber*, 73 N.Y.2d 246 (N.Y. 1989). Consciousness may be evinced where decedent screams, moans in pain, or otherwise visibly suffers.

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Note that the Appellate Division tends to sustain much higher verdicts for pre-impact terror and conscious pain and suffering when a defendant’s actions are grossly negligent, the injuries are particularly gruesome, or when the decedent is a child.

When determining the value of a survivorship claim for conscious pain and suffering prior to death, the attorney should examine the specific evidence regarding the interval between accident and death, the degree of consciousness, and the duration of suffering. As in any other personal injury action, the decedent’s own culpable conduct must also be considered when apportioning damages.

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