

Aviation Law - New York's Ancient and Harsh Wrongful Death Law

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Passengers are accustomed to the fact that airlines charge different amounts to their seat-mates on a flight, but few can comprehend why our legal system applies vastly different recovery standards to persons killed in the same plane crash. On damages issues, modern choice of law rules largely ended the methodical application of the law of the place of the accident in aviation cases, and placed greater emphasis on the law of the residence of the decedent and his or her beneficiaries.

While these rules have often avoided arbitrary results, they have highlighted the inequities of the laws in a small minority of jurisdictions, including New York, that still retain provisions dating back to the 1800s, which limit death damages to pecuniary losses. By contrast, at present the majority of states and several federal laws recognize the recovery of non-economic death damages, most notably the survivors' loss of the decedent's society, in addition to economic losses.

Wrongful death damages laws can be roughly broken down into four categories of recovery:

- 1. Strict pecuniary loss.** The laws in several states, including New York, continue to strictly limit damages to pecuniary loss, defined as the monetary value of the financial support and services that the decedent would have provided to the surviving family members. The services include the nurture, training, education and guidance that a child would have received had his or her parent not been killed, and the household services that the decedent performed at home for the family.
- 2. Pecuniary loss plus the loss of the decedent's society.** The large majority of states, including California, allow recovery for not only financial support and services but additional damages for loss of the decedent's society, which "embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection...."¹
- 3. Pecuniary loss plus society plus survivor's grief.** A minority of states permit not only damages for loss of the decedent's support, services and society but also for the suffering and grief endured by the decedent's survivors as a result of the death. These additional damages attempt to compensate for the emotional experience of losing a loved one.
- 4. "Value of the life."** A handful of states, including Connecticut, award damages to reimburse the decedent's estate for the decedent's lifetime loss of future income and the loss of the enjoyment of life.

If passengers from New York, California, Florida and Connecticut are killed in the same plane crash, under modern choice of law rules, the recovery of the New York surviving family members will be strictly limited to their economic loss of financial support and services; the California family will also recover for loss of companionship; the Florida family will also be entitled to additional damages for survivor's grief; and the Connecticut family will recover the decedent's lifetime earnings (plus loss of companionship for a spouse).

The different combinations of potential choice of law rules (depending on where the suit is filed) and damage laws can result in a mind-boggling array of outcomes. What is clear is that in almost every case, the New York family will receive a sharply limited recovery compared with those residing in other jurisdictions.

New York Law

The origins of New York's death statute reach back to ancient English common law, which allowed recovery for a personal injury or damage to property but did not recognize any remedy for wrongful death. This resulted in a rather

astounding legal anomaly: a tortfeasor was liable for injuring a victim but was not liable if the victim was killed. The common law prohibition against death recoveries was adopted in the United States. The Supreme Court has observed that "[t]he most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age."²

During the Industrial Revolution in England, a series of highly publicized deaths in railway accidents led to public outrage that the responsible companies were virtually immune from suit. A group of legislators led by Lord John Campbell worked to enact the 1846 Fatal Accident's Act (commonly known as "Lord Campbell's Act"), which gave personal representatives the right to bring a legal action for damages where the deceased person would have had such a right at the time of his or her death. Compensation was restricted to the husband, parent or child of the deceased and was for "such damages...proportioned to the injury resulting from such death."³

In 1847, one year after Lord Campbell's Act, New York became the first state to adopt a wrongful death statute. New York's statute was modeled on the English law and expressly limited the recovery to the "pecuniary injury resulting from death...." Although Lord Campbell's Act did not contain that language, an 1858 English case, *Franklin v. South Eastern Railway*, confirmed that the legislation permitted only economic loss damages.

The current New York Estates, Powers and Trusts Law retains the same pecuniary loss restriction from the 1847 New York statute. One modern concession made by the New York Legislature was a 1982 provision permitting the recovery of punitive damages in a wrongful death claim. This change was made to cure the "inconsistency" that had resulted "whereby a reckless defendant actually avoids some liability by killing his victim rather than merely injuring him."⁴

Similar inconsistencies in the law however, still exist today: in personal injury cases, the victim's spouse is allowed to recover for loss of consortium, which includes "grief, and loss of society, affection and conjugal fellowship."⁵ Those same damages, however, cannot be recovered by the surviving spouse if the same victim dies as a result of a tortfeasor's negligence.⁶ In this way, New York law continues to perpetuate the tortured anomaly of ancient English common law.

New York's wrongful death damages law retains the 19th century view that measures the legal value of a life as an economic asset. Proposals made over the past two decades to add non-economic damages have been defeated by arguments that an expanded recovery would increase damage awards, raise insurance rates and harm businesses. These arguments do not answer the basic unfairness in the current law that overwhelmingly discriminates in favor of cases with wage earning decedents; fails to properly acknowledge any measurable loss in a wide variety of cases; and provides the tortfeasor with a windfall when the victim is killed rather than merely injured. A series of court decisions have criticized the statute's economic limitation and urged the Legislature to change it.⁷

New York's death statute has an especially harsh impact in cases involving a child's death, where it is often difficult to establish that the surviving parents suffered an economic loss. The Court of Appeals has recognized that "since it is often impossible to furnish direct evidence of pecuniary injury, calculation of pecuniary loss is a matter resting squarely within the province of the jury" and that "in any wrongful death action, especially one involving a child of tender years, the absence of dollars and cents proof of pecuniary loss does not relegate the distributees to recovery of nominal damages only...."⁸ This does not answer the fact that the statute leaves many plaintiffs without substantive legal guidelines for more than a nominal recovery.

The problems presented by the statute have been compounded by the inconsistent manner in which pecuniary loss has been defined by the courts. For example, under the pattern jury charge, a surviving child is allowed to recover the economic value of the "intellectual, moral, and physical training, guidance and assistance" of the deceased parent.⁹ But the charge provides no similar recovery for a surviving spouse or parent. One court observed that while a child may recover for the "deceased parent's love, care, nurture and guidance...[t]hese elements are not considered in the surviving spouse's award."¹⁰ But the statute provides no basis for such a distinction. Rather, this "rule" appears to have gained some acceptance merely through its repetition. Why shouldn't a surviving spouse be entitled to recover the economic value of the decedent's nurture, care and guidance?

The pattern charge also instructs juries to "not consider or make any award for...loss of companionship." Yet the losses already allowed to a child for the death of a parent include activities (care, guidance, training and assistance) that fall within the meaning of "companionship." Indeed, the Court of Appeals has never squarely faced the question whether the economic value of loss of companionship is recoverable.

While New Jersey's wrongful death statute also provides only for pecuniary loss, the New Jersey Supreme Court overturned a no-damages verdict for the death of a 17-year-old high school student survived by her parents and declared that the statute allowed recovery for "the parents' loss of their child's companionship as they grow older, when it may be most needed and valuable, as well as the advice and guidance that often accompanies it."¹¹ The court declared that to uphold the verdict "would result in a return to the outmoded doctrine that a child is a liability—not an asset." The court held, however, that the companionship losses must "be confined to their pecuniary value, excluding emotional loss."

Template for Change

It is apparent that New York's wrongful death statute does a disservice to New Yorkers and should be modernized to look beyond strict pecuniary loss in order to compensate for the actual value of the decedent to his or her family.

A simple template for change is an amendment passed by Congress to the Death on the High Seas Act (DOHSA). DOHSA was originally enacted in 1920 to provide a uniform federal death action for accidents on the high seas outside state territorial waters. The act included a pecuniary loss limitation similar to New York's statute. In the 1990s growing pressure was placed on Congress to change DOHSA following a series of major airline disasters at sea and a Supreme Court ruling that imposed the DOHSA limit on the recoveries to families in the Korean Airlines flight 007 litigation.

In 2000, Congress amended DOHSA to provide that "additional compensation is recoverable for nonpecuniary damages" in a "commercial aviation accident."¹² The amendment defines "nonpecuniary damages" as "damages for loss of care, comfort, and companionship."¹³ Courts have held that a "commercial aviation accident" includes all flights for compensation or hire from a small air taxi to a jumbo jet.¹⁴

Congressman Don Sherwood, who represented the Pennsylvania district that was home to a group of high school students killed in the crash of TWA flight 800, forcefully explained why the damage recovery should not be limited to economic loss based simply on the fortuitous location of an airplane crash:

Today, however, when state tort law has progressed to a point where value is placed on human life, the application of this skewed statute is viewed as inequitable, unfair and inhumane. This is particularly true in the death of children since children are generally not economic providers for their families. Thus, family members would receive minimal compensation for the loss of a loved one who was not a wage earner or "bread winner." Because of this arbitrary line, legislatively drawn in the ocean, the surviving family members in this case are being dealt a cruel blow. No parent should be told by our nation's legal system that longitude and latitude will determine the value of their child or determine their rights in a court of law. Many family members of TWA 800 victims feel that the application of the Death on the High Seas Act makes the life of their child or loved one appear worthless in the eyes of the law.¹⁵

Unfortunately, Congress did not end the DOHSA limitation completely, and pecuniary loss remains the damage standard for a death occurring on the high seas aboard a ship or noncommercial aircraft. But if the same accident occurs in territorial waters, nonpecuniary damages can be claimed under general maritime law.

These types of unfair and arbitrary results will persist until the final vestiges of the antiquated English common law rules are eliminated from the statute books. It is well past time for New York to adopt realistic death damage rules that recognize the true value of the loss of a family member.

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Endnotes:

1. *Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 585 (1974).
2. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970).
3. *Grant v. Guidotti*, 66 A.D.2d 545, 551, 414 N.Y.S.2d 171 (2d Dept. 1979).
4. 1982 Recommendations of the Law Revision Commission, set forth in the notes to NY CLS EPTL §5-4.3.
5. *Liff v. Schildkrout*, 49 N.Y.2d 622, 633 (1980).
6. *Id.*
7. *Fornaro v. Jill Bros.*, 42 N.Y.Misc.2d 1031, 249 N.Y.S.2d 833 (Sup.Ct. 1964), rev'd on other grounds, 22 A.D.2d 695, 253 N.Y.S.2d 771 (2d Dept.1964); *Gary v. Schwartz*, 72 Misc.2d 332, 339 N.Y.S.2d 39 (N.Y.Sup.Ct. 1972).
8. *Parilis v. Feinstein*, 49 N.Y.2d 984 (1980).
9. New York Pattern Jury Instructions 2:320 (Thomson 2009).
10. *In re Estate of Feld*, 153 Misc.2d 615 (N.Y. Surr. Ct. 1992).
11. *Green v. Bittner*, 85 N.J. 1, 4, 424 A.2d 210 (1980).
12. 46 USC §30307(b).
13. 46 USC §30307(a).
14. *Gund v. Pilatus Aircraft, Ltd.*, 2010 U.S. Dist. LEXIS 22434 (N.D. Ca. 2010); *Brown v. Eurocopter S.A.*, 111 F.Supp.2d 859 (S.D. Tex. 2000).

15. 106th Cong. 1st Sess., 145 Cong. Rec. 137 (Feb. 4, 1999).

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