


# CROSSING



# BORDERS



Navigating cross-border wrongful death cases requires careful attention to a web of complex issues, from choice of law to the rights of minors.

By || **ANTHONY TARRICONE**

When you litigate a cross-border case—such as an international airplane crash case—be aware of issues concerning the availability and allocation of damages.<sup>1</sup> On one end of the spectrum is an injury case involving a single adult when the plaintiff is the sole recipient of funds and no special approvals for minors are necessary. But at the other end of the spectrum are wrongful death cases, which can raise questions of who is entitled to receive compensation and how the total recovery will be allocated.

In a wrongful death case, factors affecting rights of recovery include the country of domicile or residence of surviving blood relatives, whether the decedent resided in a country other than their domicile, whether domestic or life partners are legally married under applicable law; and whether there are minor survivors. How and to whom compensation is paid will be determined by choice of law; whether a partner is deemed a legal spouse; and, if applicable, allocation of compensation between wrongful death and survival claims. You may also face questions about special treatment for minor survivors.

Knowing how to navigate these issues is key to ensuring that every wrongful death beneficiary is treated fairly and avoiding the risk of a subsequent challenge to the distribution of settlement proceeds.

## Damages

Economic losses, such as lost future income, are generally recoverable in most jurisdictions. However, U.S. law typically provides for a significantly greater measure of noneconomic damages. This could apply to any case involving actionable injury or death abroad when the defendant can be sued in the United

States—for example, when a U.S.-made commercial aircraft crashes abroad.

Take a wrongful death case in which a professional employed in Europe is survived by a spouse and minor children. Noneconomic or “moral damages” are recoverable in varying amounts by country, but the total damages likely will consist mostly of economic damages based on lost future income for loss of support. In the United Kingdom, for example, the Fatal Accidents Act provides a noneconomic bereavement award of only £15,120.<sup>2</sup> By contrast, if the same wrongful death claim were litigated in most U.S. jurisdictions, noneconomic damages for the decedent’s surviving spouse and children would probably far exceed economic damages.<sup>3</sup>

### **U.S. noneconomic damages.**

There are variables depending on which wrongful death law applies,<sup>4</sup> but U.S.-based noneconomic damages may include each surviving family member’s loss of services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice due to the decedent’s untimely death.<sup>5</sup> Many states also provide compensation for grief and bereavement suffered by each survivor.<sup>6</sup>

Additionally, almost all U.S. jurisdictions generally recognize a separate “survival” claim for the harm experienced by the decedent before death.<sup>7</sup> In many states, the “surviving” pain and suffering claim can include emotional distress arising from the decedent’s fear and knowledge of imminent death.<sup>8</sup>

There are differences among the states, some major and some nuanced, and not every state provides a greater measure of damages than would be available under competing foreign

laws. Notably, some U.S. jurisdictions have enacted damages caps limiting noneconomic damages.<sup>9</sup> Tennessee, for example, limits noneconomic damages in both injury and death cases to \$750,000 or \$1 million in a death case if the decedent is survived by minor children.<sup>10</sup> This amount is fixed regardless of the number of takers or the number of defendants responsible for the plaintiff’s damages. Some states have more severe limits, depending on the type of case and damages. Idaho, for example, has a statutory cap of \$250,000 for noneconomic damages, subject to periodic adjustments for inflation.<sup>11</sup>

## Takers

In U.S. jurisdictions, entitlement to wrongful death damages usually is specified by a statute, which is rigidly applied.<sup>12</sup> A typical state wrongful death statute provides that if the decedent is survived by a spouse or children, they are the only survivors entitled to compensation; or if there is no spouse or child, the next-of-kin, usually defined by laws of intestacy, are entitled to compensation. But if a spouse or children exist, other survivors such as parents and siblings are not entitled to damages.

The practical effect of rigidly applying this statutory prescription of recovery takers is to exclude people who generally could assert claims for compensation under foreign law. So although U.S. laws generally offer the potential for greater damages, the categories of people entitled to share in the recovery are usually more limited, often with the complete exclusion of family members who would be entitled to claim damages under the law of many countries.



## If the case is settled before a choice-of-law ruling, there is flexibility in how settlement funds are allocated.

### Venue

In most foreign crash cases, the plaintiff likely will face a request to transfer the matter outside of the United States via a motion to dismiss based on forum non conveniens (FNC). These motions supposedly relate to the relative ability to access evidence and witnesses—but typically the real reason is the potential for the plaintiff receiving more compensation if the case is venued in the United States instead of abroad. This results in U.S. corporations claiming it is “inconvenient” to be sued in the very state where they are incorporated or have their principal place of business.

### Choice of Law

If your client’s case survives the FNC challenge, the next hurdle is choice of law. The defendant invariably will claim that foreign law applies to the measure and amount of damages recoverable.

Importantly, the issue of which law applies is unsettled until a court rules on the issue. The plaintiff typically will assert that U.S. law applies, while the defendant will claim the law of domicile for a foreign national suing in the United States applies. If the case goes to trial, the court must rule on choice of law. Once the ruling is made, it governs who is excluded and the measure of damages recoverable.

But if the case is settled before a choice-of-law ruling, there is flexibility in how settlement funds are allocated. This can impel plaintiffs and defendants to avoid both trial and the necessity of a definitive ruling on choice of law. The timing of the settlement can be critically

important in influencing the size of the recovery and how the funds will be distributed.

For example, when the competing laws involve U.S. and French venues, if the court rules that French law applies, there will be an expanded group of family members entitled to compensation, but the potential noneconomic damages will be smaller. If the court rules that U.S. law applies, only the surviving spouse and children will share in the recovery in most states, but the total recovery will be significantly more than what would be recovered under French law.

In this type of scenario, family members can enter into an agreement, formal or informal, concerning the distribution of recovery among them. Such an agreement would specify the allocation of damages among the survivors regardless of a court resolution (or not) of choice of law. Later, if there is a subsequent choice-of-law ruling, the agreement will determine distribution, but the losses of those not legally entitled to recover will not influence the measure and amount of compensation.

### Survival Versus Death Claims

While foreign law conflates all elements of noneconomic damages as “moral damages,” in U.S. jurisdictions, there is a marked distinction between death damages for loss of society and survival damages for pain and suffering. In contrast to foreign law, the allocation of a settlement between death and survival claims may affect who is entitled to share in the recovery.

In the United States, wrongful death takers are specified by the wrongful death statute of the relevant jurisdiction. Survival actions for a decedent’s pain and suffering and emotional distress before death are treated differently. They typically are not part of the wrongful death claim and the recovery belongs to the estate and is distributed pursuant to the provisions of the decedent’s will or the laws of intestacy irrespective of the wrongful death statute. This means that the allocation of a settlement between the death and survival claims may affect who is entitled to share in the recovery.

As with choice of law, this creates potential conflicts but also provides an opportunity for more flexibility in the distribution of a settlement as compared to a recovery by verdict. But the flexibility to allocate compensation between the death and survival claims exists only when the case is settled before trial. If the case proceeds to trial, the jury will determine the damages for each claim.

Another important consideration is the tax difference between a wrongful death recovery, which passes directly to the decedent’s beneficiaries, and a survival claim recovery, which passes through the decedent’s estate. Under U.S. federal law, for example, wrongful death damages are not taxable,<sup>13</sup> but survival damages that pass through an estate can be subject to both state and federal taxes, depending on the circumstances of the estate. So if you obtain a verdict with an award for the survival claim, that award will become an asset of the estate subject to applicable taxation law.

### Family Agreements

In wrongful death cases, determinations concerning choice of law, spousal status,<sup>14</sup> and survival and death claims all affect entitlement to damages—potentially excluding some family members in favor of others. For this reason, you must fully explain all of the possible outcomes to





surviving family members at the outset of the case. Be sure family members understand that proceeding in the United States has a potential for greater damages, but that some family survivors who would recover a modest amount for moral damages under foreign laws will be entirely excluded under most U.S. death statutes.

A practical solution is to enter into a family agreement concerning the allocation of a recovery at the outset of the case. The agreement can specify, for example, who will share in a recovery and the amount or percentage. This approach can resolve issues of entitlement before court rulings and other case activity begin to bestow rights on some survivors based on how the variables discussed above play out.

If decisions have to be made while litigating the case, you cannot advocate for one family member over another—the conflict is obvious. You can only explain how the determination of a variable affects the rights of all involved. Likewise, if a family agreement is entered into when it's unclear how all the variables will play out, you cannot be involved in a “renegotiation” of the agreement.

In some states, a dispute concerning allocation of a wrongful death recovery gives the court the authority to allocate the proceeds after consideration of the law and circumstances involved.<sup>15</sup> In this instance, the court will follow the wrongful death statute concerning entitlement to share in the recovery. The percentage granted to each survivor is a separate issue, in which the court will have discretion to allocate based

on family circumstances. For this reason, even when there are no issues concerning who is entitled to recover, I advise having a family agreement concerning the percentage division among statutory wrongful death takers at the outset of the case.

## Minors


In any case when minors have legal rights, special approvals must be obtained for the protection of the minors and counsel must represent their interests, directly or indirectly. Lawyers representing the interests of a minor have a special fiduciary relationship and must consider how allocation of proceeds between claims and among survivors affects the minor's interest and well-being.

All U.S. jurisdictions accept that a court of competent jurisdiction must approve how funds recovered by a personal injury or wrongful death settlement or verdict are allocated, distributed, and managed for the benefit of a minor. The court where the case is pending or the probate or family court typically has authority to approve a settlement, allocation, and handling of funds.

When minors entitled to share in a U.S. wrongful death recovery reside abroad, a separate court approval in the country of their domicile or residence is often also required. For instance, in the recent U.S. settlement of a wrongful death case I handled for an Italian domiciliary who perished when Ethiopian Airlines Flight 302 crashed in Ethiopia, tutelary court approval was required before the surviving spouse, in her capacity as mother and natural guardian of a minor child, had legal authority to sign the settlement agreement and release of claims on the child's behalf. After obtaining approval by the Italian tutelary judge, a second motion for approval was filed in the U.S. district court, which

referenced the approval by the tutelary court and described its authority to oversee management of the minor's recovery.

Family agreements concerning entitlement and allocation of recovered funds also are subject to approval by the applicable foreign court and the U.S. trial court when the interests of minors are affected. In any allocation of damages to people not entitled to share in the recovery under the wrongful death statute, or any allocation in which the amount of each share is not prescribed and discretion is exercised, the minor's interests are potentially affected. Generally speaking, if the allocation plan is reasonable under the applicable foreign and U.S. laws, even if there are differences regarding who takes under each law, the court usually will approve distribution in accordance with the family agreement—so long as the allocation provides a reasonable share to the minor.

Given the number of considerations and variables that influence the amount of, entitlement to, and allocation of a wrongful death recovery, plan ahead and discuss potential outcomes with your clients early in the case. Don't wait until a settlement is reached or a verdict is handed down and then attempt to sort out these issues. 



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## NOTES

1. While international aviation disasters are perhaps most common, the same or similar issues can arise in other cross-border cases. Any case prosecuted in the U.S. for a foreign plaintiff can raise these issues (for example, a U.S.-based hotel chain is sued in the U.S. for a balcony collapse at a

European resort, with resulting deaths of non-U.S. citizens).

2. Fatal Accidents Act 1976, c. 30, §1A(3) (Eng.). This is roughly \$17,000 at current exchange rates.
3. Moral damages in death cases vary widely by country. In a country such as Italy, children, grandchildren, parents, grandparents, and siblings can all claim moral damages. In contrast, moral damages in a death case in

the Netherlands would likely be under \$25,000 in any family scenario.

4. The choice-of-law analysis differs in every case based on the countries or states involved and the choice-of-law rules applied. The substantive law and choice-of-law rules vary among the states and territories of the United States, and multiple states often are involved in the analysis. This is a topic for a separate paper

- but suffice to say that there are innumerable possibilities depending on which country's governing laws apply.
5. See, e.g., Mass. Gen. Laws ch. 229, §2 (1989) ("services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice").
6. See, e.g., Wrongful Death Act, 740 Ill. Comp. Stat. 180/2 (2017) ("grief, sorrow and mental suffering").
7. See, e.g., 755 Ill. Comp. Stat. 5/27-6 (1982); Mass. Gen. Laws ch. 229, §6 (1973); N.H. Rev. Stat. §556:9 (1887).
8. See Bernadette Panzella, *The Trauma of Terror*, Trial, July 2019, at 28.
9. As of April 2022, 11 states cap noneconomic damages in general injury/death claims, while 26 cap damages in medical negligence cases. See Dani Alexis Ryskamp, *The Current State of State Damage Caps*, Expert Inst., Apr. 27, 2022, <https://www.expertinstitute.com/resources/insights/state-state-damage-caps/>.
10. Tenn. Code Ann. §29-39-102 (2012).
11. Idaho Code §6-1603 (2003).
12. Wrongful death statutes are strictly construed because they are not based on English common law, which did not recognize a remedy for wrongful death. Hence, wrongful death statutes are commonly described as being in derogation of common law, constraining interpretation of rights and remedies under the doctrine of stare decisis. In 1864, the British Parliament enacted Lord Campbell's Act, which provided a remedy for wrongful death limited to recovery of pecuniary damages. As previously mentioned, the current Fatal Accidents Act continues to impose draconian limits on the recovery of noneconomic damages in the tradition of the original 1864 Act.
13. 26 C.F.R. §1.104-1.
14. In many states, a decades-long domestic partner, even if the parent of surviving children, is not considered a "spouse" within the meaning of the death statute. In most U.S. states, the term "spouse" is strictly construed as one married in a civil law-sanctioned marriage. In some countries, domestic partners are entitled to recover moral damages to the same extent as a civil marriage spouse. Under most U.S. death statutes, when there is a surviving spouse, the spouse will recover death damages to the exclusion of parents, siblings, or next-of-kin.
15. Some U.S. jurisdictions require court approval of wrongful death settlements in every instance, even if no minors are involved. This includes the death and survival claims, allocation between them, and allocation of the recovery among the survivors.

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