Anatomy of a Wrongful Death Action in New York

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Claims involving an allegation that a defendant's acts or omissions resulted in the wrongful death of another individual are given special treatment by New York law. Despite a wrongful death claim's similarity to a negligence cause of action, the elements of the claim, statute of limitations, evidentiary rules and recoverable damages all differ from the rules governing negligence claims.

This article will examine the peculiarities of wrongful death causes of action as compared with other personal injury actions, and will examine recent developments in wrongful death cases in light of contemporary issues facing New Yorkers.

Evidentiary Considerations

The statutory cause of action for wrongful death under the New York Estates Powers and Trusts Law (EPTL) requires proof of five elements: (1) death; (2) caused by the wrongful conduct of a defendant; (3) giving rise to a cause of action which could have been maintained, at the moment of death, by the 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 the decedent. In a wrongful death action, damages recoverable by the estate of the decedent under EPTL 5-4.3 are separate from those recoverable by survivors under EPTL 11-3.3. Additionally, CPLR Article 16, providing a limitation on joint and several liability in certain circumstances, is not applicable to a wrongful death claim. Ryan v. Beavers, 566 N.Y.S.2d 112.

According to EPTL 5-4.1, the proper plaintiff in a wrongful death action is the "personal representative" of a decedent. No other party must be named as a plaintiff in the action. However, the named plaintiff is the holder of any proceeds of the suit as a statutory trustee for distribution of the funds to those entitled to them by law. In re Estate of Mullins, 225 N.Y.S.2d 790.

EPTL 5-4.1 provides that a wrongful death cause of action must be commenced within two years of the date of death. Even in cases where the decedent's personal representative is an infant, courts have held that the statute of limitations is not tolled by CPLR 208. Instead, New York courts reason that the natural guardian of the infant has sufficient time to commence the action on the infant's behalf, thereby eliminating the need for the statute of limitations to be tolled. Baez v. New York City Health & Hospitals Corporation, 80 N.Y.2d 571.

In an ordinary wrongful death action arising out of the allegedly negligent acts of a tortfeasor, the plaintiff is in a decidedly disadvantageous position. Typically, the burden of proof in a civil action requires a plaintiff to establish the elements of a claim by a preponderance of the evidence. However, this burden is often difficult to reach for a wrongful death plaintiff, as the plaintiff's decedent, possessing actual knowledge of the accident, is unable to testify.

New York courts have recognized this disparity between the ability of a typical plaintiff and a wrongful death plaintiff to prove a case against a potentially liable tortfeasor, and have fashioned
a rule permitting relaxed standards of proof in a wrongful death case. *Noseworthy v. City of New York*, 298 N.Y. 76. The *Noseworthy* decision alters the burden of proof that a plaintiff must meet in a wrongful death case. Specifically, *Noseworthy* allows a plaintiff to benefit from more liberal inferences that can be drawn from the evidence on the record in an effort to even the playing field with the defendant who, presumably, has actual knowledge of the facts. The jury charge associated with this relaxed burden of proof (PJI 1:61) instructs jurors to consider facts that the decedent might have testifed to had the decedent survived. As a result, the jury is able to consider a broad range of evidence that is speculative in nature in reaching its verdict.

The *Noseworthy* holding has had the effect of permitting more wrongful death cases to reach a jury, by allowing a plaintiff to successfully defeat a dispositive motion on more questionable evidence, and has been expanded to apply to situations where the plaintiff suffers from amnesia. *Schechter v. Klanfer*, 28 N.Y.2d 228.

Claims Not Recognized

While not wrongful death claims per se, it is important for a practitioner to note that several similar catastrophic claims are not permitted under New York law. Counsel should take note of these claims and proceed accordingly when consulting with potential clients or determining strategy in the defense of such claims.


Recoverable Damages

In addition to unique liability rules, wrongful death cases also give rise to significantly different rules governing the type and amount of damages that a plaintiff can expect to recover if successful.

The decedent's estate is entitled to recover the reasonable value of any earnings that were lost between the moment of injury to the moment of death. Additionally, the costs of reasonable medical aid, nursing and other care required to treat the decedent's injuries prior to death are recoverable, as are funeral expenses and the cost of a burial lot.

Survivors may recover for pecuniary injuries suffered as a result of the wrongful death. New York law permits recovery of the value of support and services provided by the decedent to the survivor. With respect to children of the decedent, the law also permits recovery of the value of parental nurture, care and physical, moral and intellectual guidance. Recovery may also be obtained in the amount by which the decedent would have increased his or her estate from earnings and thus added to the amount of the survivor's inheritance. In addition, the remarriage of a spouse is not the basis for a reduction of the recoverable damages in a wrongful death action. *Rodash v. Fury*, 298 N.Y.S.2d 50.

New York law also permits a plaintiff in a wrongful death action to recover damages for the conscious pain and suffering of the decedent prior to death. In order to permit a jury to consider an award for conscious pain and suffering prior to death, some evidence of a decedent's moan, groan or other expression of pain is generally sufficient. However, depending on the duration of the pre-death pain and suffering, a jury award for such pain and suffering is subject to a reduction by the court following the verdict on motion by the defendant.
Additionally, EPTL §5-4.1 and 5-4.3 specifically provide that the plaintiff in a wrongful death action is permitted to recover pre-judgment interest at 9 percent from the date of death forward on any principal amount obtained by verdict and judgment.

Non-Recoverable Damages

On the other hand, New York law does not permit survivors to recover for such non-economic losses as pain and suffering resulting from the wrongful death, mental anguish, loss of companionship or consortium. This is true even in cases involving the death of a minor child. In cases where the wrongful death is not concurrent with an accident or occurrence, the law also permits a spouse to recover for loss of consortium only up to the time of death.

When the plaintiff's decedent is a child, additional considerations must be made with respect to the amount of recoverable damages. New York law allows a parent to recover for the services of the child during minority less the costs and expenses that would have been incurred for maintenance and education of the child. Keenan v. Brooklyn C. RR. Co., 145 N.Y. 348. There is also support for a claim that a parent may recover for prospective earnings of a deceased son or daughter, but there must be sufficient evidence of such future earnings so as to remove this item of damages from the speculation of the jury.

Additionally, the Appellate Division, Second Department has held that same sex couples cannot recover wrongful death damages under New York law. Langan v. St. Vincent's Hospital. In the Langan case, the Second Department was not persuaded that the action could be maintained despite the fact that the plaintiff and the decedent had entered into a legally recognized civil union under Vermont law. Instead, the court held that the relationship did not fit within the scope of the EPTL for the purposes of wrongful death actions. The Langan court noted that any change in the scope of persons that may maintain a wrongful death action is for the legislature to consider, and concluded that the plaintiff's wrongful death action could not proceed.

Settlement of Claims

When settling a wrongful death case, the parties should be sure to review the Letters of Administration of the plaintiff to be certain that the plaintiff has full authority to settle the case. In certain situations, the Surrogate's Court has reserved for itself the exclusive right to approve the settlement of any wrongful death claim arising out of the decedent's death. As such, plaintiff's counsel must be certain that his client has full authority to settle a case before engaging in settlement discussions, and defense counsel would be well advised to determine whether a plaintiff or the Surrogate's Court has the final word on the approval of any settlement prior to engaging in any negotiations.

Conclusion

The practice of wrongful death litigation involves a unique set of rules, some of which reflect the state's attitudes toward social relationships and policies regarding the obligations of certain persons to care for others. Practitioners must be mindful of these nuances in order to fully protect the interests of their clients.