

Outline of Law & Rules Pertaining to Settlement of Death Actions

by Clifford A. Rieders, Esquire



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OUTLINE OF LAW & RULES PERTAINING TO SETTLEMENT OF DEATH ACTIONS

I. STATUTORY BASIS FOR DEATH ACTIONS

A. 42 Pa. C.S.A. 8301 – Wrongful Death Actions

1. Statutorily Created
2. Only beneficiaries are spouse, children or parents
3. Special damages provided in Subsection (c) include reasonable hospital, nursing, medical, funeral expense and expenses of administration necessitated by reason of injuries causing death.
4. Damages pass outside of decedent's estate.

Nature and Types of Damages Recoverable

5. For an explanation of nature and types of damages recoverable – look to Pennsylvania Suggested Standard Jury Charge Civil Jury Instructions 6.10 and Case Law Defining Wrongful Death Damages. Wrongful Death Damages are the following:
 - 5.1 Hospital, medical, funeral, burial, and estate administration expenses incurred;
 - 5.2 An award that will fairly and adequately compensate the family of decedent (wife, children, parents, etc.) for their loss of any contributions they would have received between the time of the death of decedent and today. Note: Should also continue into the future. This includes all amounts of money that the decedent would have spent for or given to his/her family for such items as shelter, food, clothing, medical care, education, entertainment, gifts, and recreation;
 - 5.3 All sums decedent would have contributed in support of his or her family between today and the end of his life expectancy;
 - 5.4 Addition to monetary contributions, this includes monetary value of services, society, and comfort that he/she would have given to his or her family had he/she lived, including such elements as work around the home, provision of physical comforts and services, provision of society and comfort; *Amato v. Bell and Gossett*, 116 A.3d 607 (Pa. Super. 2015). Included in a

wrongful death award may be recovery for loss of post-death services, including society and comfort. A loss of consortium claim is intended to compensate a survivor spouse for loss of her services, society and conjugal affection while her spouse was still living, yet suffering from the injury in question. Hence there is no duplication of damages as one award is for pre-death loss and the other post-death.

5.4.1 SEPTA is a Commonwealth agency. The Superior Court's observation that loss of compensable services is comparable to loss of consortium is irrelevant to the meaning of the Sovereign Immunity Act. The meaning of "loss of consortium" is quite clear, and it has been definitively construed by our Supreme Court to mean damages available only to a spouse, not a parent. Accordingly, the order of the trial court denying SEPTA's motion for partial summary judgment on the pleadings with respect to the recovery of non-pecuniary losses sought by the parents of Decedent is reversed. Under the Sovereign Immunity Act, the parents have no claim for non-pecuniary losses with respect to the death of their child. *Ebersole v. SEPTA*, 111 A.3d 286 (Pa. Cmwlth. 2015).

5.5 On behalf of surviving children, an amount that will fairly compensate the loss of service of decedent as a mother or father would have contributed to his or her children. This would include monetary value of guidance, tutelage, and moral upbringing that you believe children would have received up to the time you believe such services would have been provided had the death not occurred.

5.6 With respect to consortium, 5.4 above, such damages as noted are normally incorporated within the wrongful death claim unless the decedent survived for some period of time prior to death. According to WEST'S PENNSYLVANIA PRACTICE,

In *Linebaugh v. Lehr* [351 Pa.Super. 135, 505 A.2d 303 (1986)], the Superior Court held that for practical purposes wrongful death damages encompass the traditional elements of a common law claim for loss of consortium, so that permitting a separate consortium claim " would permit double recovery for the same death."

4 WEST'S PA PRACTICE, TORTS: LAW AND ADVOCACY §14.7 (footnotes omitted).

In other words, there is no separate claim for loss of consortium.

On the other hand, the treatise also notes that “in a case where the decedent survives for some period of time, a surviving spouse is permitted to recover damages for loss of consortium between the time of injury and the time of death. Thereafter, the damages recoverable would be governed by the Wrongful Death Act.” *Id.* See *Novelli v. Johns-Manville Corp.*, 395 Pa. Super. 144, 576 A. 2d 1085 (1990); *Schroeder v. Anchor Darling Valve Co.*, 16 Pa. D. & C. 5th 449 (Phila. C.P. 2010).

- 5.7 Wrongful Death Claims under Sovereign Immunity Act. *Ewing, et al. v. Potkul, et al.*, No. 1471 CD 2016 (Pa. Cmwlth. September 27, 2017) Leavitt, P.J. The Pennsylvania Department of Transportation (PennDOT) appeals an order of the Court of Common Pleas of Fayette County (trial court) that sustained in part, and overruled in part, PennDOT's preliminary objections to a six-count complaint filed on behalf of the Estate of Trudy J. Zooner (Estate). At issue here is the trial court's ruling upon PennDOT's demurrer to Count VI of the complaint, which asserted a claim under the statute commonly known as the Wrongful Death Act on behalf of the husband, mother, and three adult daughters of Trudy J. Zooner (Decedent). The trial court held that Decedent's mother and daughters could not seek “non-pecuniary” damages but could seek “pecuniary damages” under the Wrongful Death Act for the loss of Decedent's future services and financial contributions. PennDOT argues that these so-called pecuniary damages are barred by the provisions of the Judicial Code commonly known as the Sovereign Immunity Act. We agree and reverse the trial court's order holding otherwise.

In short, when considering a wrongful death claim brought against a Commonwealth agency, we examine the claim through the lens of the Sovereign Immunity Act. To recover against a Commonwealth agency, the damages sought must be authorized by the Wrongful Death Act and by Section 8528(c) of the Sovereign Immunity Act.

The same is true for a survival action brought against the Commonwealth or its agencies. Section 8302 of the Judicial Code, commonly known as the Survival Act, authorizes a decedent's estate to assert claims that the decedent could have asserted had he lived. Specifically, the Survival Act states that “all causes of actions, real or personal, shall survive the death of the plaintiff.” 42 Pa. C.S. § 8302.

As with a wrongful death claim, damages sought in a survival action against the Commonwealth must be authorized by both the Survival Act and the Sovereign Immunity Act.

The services and financial support a decedent would provide a child or parent do not constitute the “earnings” or the “earning capacity” of the recipient. This loss is more accurately characterized as the “loss of support.” The Legislature could have listed “loss of support” as one of the “types of damages recoverable” from a Commonwealth agency, as it did in the Tort Claims Act. But it did not do so. The only inference to be drawn is that the omission was intentional. We hold that damages for loss of the value of a decedent's services and financial contributions are not damages authorized in Section 8528(c)(1) of the Sovereign Immunity Act as “loss of earnings and earning capacity.” 42 Pa. C.S. § 8528(c)(1).

For the above reasons, we hold that the Sovereign Immunity Act bars a parent or child of a decedent from recovering damages in a wrongful death action for the loss of the decedent's future services and financial support. Accordingly, we reverse the trial court's order insofar as it overruled PennDOT's preliminary objection to the claims of Decedent's mother and daughters for such damages. The trial court's order is affirmed in all other respects.

B. 42 Pa. C.S.A. 8302 – Survival Action

1. Not a new cause of action, but rather just a codification of the notion that a cause of action survives death and can be brought by the personal representative of the deceased.
2. Note that any recovery goes to the estate of decedent.
3. Distribution of proceeds depends upon whether decedent died testate or intestate.
4. Proceeds are taxable in the estate at rates depending upon the relationship of beneficiaries of the estate.
5. See Pennsylvania Suggested Standard Civil Jury Charge Jury Instructions 6.10 and Case Law for fuller explanation of type of damages recoverable.
 - 5.1 Total amount decedent would have earned between the time of the accident and death;

- 5.2 Plaintiff is entitled to the total net amount decedent would have earned between the time of death and today. The net earnings are determined by calculating the total amount of decedent's gross earnings, including fringe benefits between the date of death and today. From this amount you deduct the amount of monetary contributions that would have been made to his family during this period (which you have already awarded to plaintiff under the Wrongful Death Act) and the amount of money decedent would have spent on himself for personal maintenance during this period. The probable costs of personal maintenance includes only the necessary and economical living expenses such as food, shelter and clothing decedent would have been required to spend in order to maintain life during this period;
- 5.3 Plaintiff is entitled to the value of the net amount the decedent would have earned between today and the end of his life expectancy. Again, the earnings for this period are determined as follows: you must first calculate the total amount of decedent's gross earnings between today and the end of his life expectancy. From this amount you deduct probable costs of necessary and economical living expenses to sustain life during this period (together with amount of monetary contributions he would have made to his family during this period, which you have already awarded under wrongful death). The award to the estate for total lost future net earnings thus represents a total net earnings of the decedent's work life expectancy;
- 5.4 Plaintiff is entitled to be awarded an amount to compensate for mental and physical pain, suffering, and inconvenience the decedent endured from the moment of his injury to the time of his death as a result of the accident.
- C. Overlap or Duplication. Please note that Wrongful Death and Survival Act Damages do not overlap or duplicate each other – rather part of the losses goes to one cause of action and the balance to the other.
- D. Emotional Distress of Other Family Members. Remember that this is a totally separate cause of action and does not pass through anyone's estate unless of course the person so asserting has died.