



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 54
Issue 3 *Dickinson Law Review - Volume 54,*
1949-1950

3-1-1950

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Recommended Citation

William L. Otten, *Damages in Death: Actions for Pain and Suffering While Unconscious or Where Death is Immediate*, 54 DICK. L. REV. 345 (1950).

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DAMAGES IN DEATH ACTIONS FOR PAIN AND SUFFERING WHILE UNCONSCIOUS OR WHERE DEATH IS IMMEDIATE

The attorney who must defend a wrongful death and survival action is faced with many difficult, if not distressing, problems. Not the least of these is the matter of preventing a jury, naturally sympathetic to the cause of the deceased, from rendering an excessive verdict. In reviewing the items of damages recoverable, it appears that the most dangerous single item is pain and suffering. Here is the intangible, upon which a value must be placed, but which has no value that can be calculated by any arithmetical processes. If the jury's sentiments obscure their reason and judgment, then this is the point where control must be achieved; otherwise a verdict of enlarged proportions may be suffered.

What then are the limits to recovery for pain and suffering when death results from a tortious act?

In answering this question let us go back to the year 1851. Prior to that time the rules that *personal tort actions die with the person of the plaintiff*,¹ and that *the death of a human being could not be complained of as an injury in a civil court*,² had been consistently applied. This deplorable state of the law was corrected by two series of statutes, known as the Wrongful Death Acts,³ and the Survival Acts,⁴ which created two entirely new forms of action, both unknown to the common law.⁵

The damages recoverable in a wrongful death action have been clearly set out in the case of *Gaydos v. Domabyl*,⁶ and generally amount to a compensation to the surviving husband, widow, children, or parents for the loss of *pecuniary benefit* which would reasonably have inured to the plaintiff had deceased lived. This sum is computed as the present worth of that part of deceased's probable earnings, or services, which in the ordinary course of events would have been received by the plaintiff. It has been consistently held in a very long line of cases that *there*

¹ *Rogers v. Simmons*, 13 S. & R. 183 (Pa. 1825); *Means v. Presbyterian Church*, 3 Pa. 93 (1846).

² *Fink v. Garman*, 40 Pa. 95 (1861).

³ Act of 1851, P. L. 669; Act of 1855, P. L. 309, as amended by Act of 1937, P. L. 196, 12 P. S. 1601, 1602; "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or if there be no widow, the personal representatives may maintain an action for, and recover damages for the death thus occasioned. . . ." "The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; . . ."

⁴ Act of 1937, P. L. 2755, 20 P. S. 772: "Executors or administrators shall have the power, either alone or jointly with other plaintiffs, to commence and prosecute. . . all personal actions which the decedent whom they represent might have commenced and prosecuted. . ."

⁵ *Voelkel v. Bennet*, 115 F.2d 102 (1940); *Minkin v. Minkin*, 336 Pa. 49, 7 A.2d 461 (1939).

⁶ *Gaydos v. Domabyl*, 301 Pa. 523, 152 A. 549 (1930).

can be no recovery in a wrongful death action for the pain and suffering of the deceased, nor for the mental anguish of the survivors.⁷

In a survival action the damages recoverable are for *the pain and suffering of deceased until his death, and the economic value of his life as measured by the present worth of his likely earnings during his life expectancy.*⁸

As a result of these acts the law in Pennsylvania today is that if a tort causes death, two interests have been invaded. The first interest is that of the deceased in the security of his person, an interest which has been invaded by compelling him to endure pain and suffering, and loss of earnings. The second interest is that of deceased's family, an interest in the nature of an expectancy, their anticipation of sharing in his prospective earnings.⁹

This points up the first limitation to recovery for pain and suffering which should be brought to the attention of the jury. There are two separate and distinct causes of action which must be enforced in one action, and while the causes of action are cumulative and not alternative, they should not overlap and result in a duplication of damages.¹⁰ Thus, *damages are recoverable for the pain and suffering of the deceased alone,*¹¹ *not for that of the survivors.*¹²

Now consider the not uncommon case of a traffic accident in which one of the parties has died immediately following the mishap, or sometime thereafter without regaining consciousness. The rule above states that damages are recoverable for pain and suffering *until death*. Consequently, if death were immediate there would be no time interval in which pain could be suffered, and this could not be an element of damage.

In *Pezzuli v. D'Ambrosia*¹³ a two year old boy died within ten minutes after the injury was inflicted and the elements of pain and suffering were held to be negligible. In *Gannon v. Lawlor*¹⁴ it was held that the personal representative could recover for the pain and suffering of deceased *for the fixed period between injury and death*. A federal district court sitting in Pennsylvania adopted the view of Judge Heiligman in *Gannon v. Lawlor*, and regarding the elements of pain and suffering

⁷ Pennsylvania R. R. Co. v. Kelly, 31 Pa. 372 (1858); Pennsylvania R. R. Co. v. Zebe, 33 Pa. 318 (1858); Gaydos v. Domabyl, supra; Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663 (1936); Vincent v. Philadelphia, 348 Pa. 290, 35 A.2d 65 (1944); Stegner v. Fenton, 351 Pa. 292, 40 A.2d 473 (1945); Siidekum v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 45 A.2d 59 (1946).

⁸ Pezzuli v. D'Ambrosia, 344 Pa. 642, 26 A.2d 659 (1942).

⁹ Murray v. Philadelphia Transportation Co., 359 Pa. 69, 58 A.2d 323 (1948).

¹⁰ Rules of Civil Procedure 213 (e); Pezzuli v. D'Ambrosia, supra.

¹¹ Stegner v. Fenton, supra; Siidekum v. Animal Rescue League, supra; Pezzuli v. D'Ambrosia, supra; Liguori v. Philadelphia, 351 Pa. 494, 41 A.2d 563 (1945).

¹² See note 7, supra; Maher v. Philadelphia Traction Co., 181 Pa. 391, 37 A. 571 (1897); McCafferty v. Pennsylvania R. R. Co., 193 Pa. 339, 44 A. 435, (1899); Murray v. P. T. C., supra.

¹³ See note 8, supra.

¹⁴ 34 D. & C. 591 (1939).

said further, "In this case these elements are not involved, for the period between injury and death was very short, and he was unconscious the entire time."¹⁵

In view of the above authorities there seems to be little doubt that where death is immediate there can be no recovery for pain and suffering in an action by the personal representative under the Survival Acts. Although it might be argued that some quantum of compensable pain and suffering is experienced in that split second between impact and death, this argument is apparently negated by *Pezzuli v. D'Ambrosia, supra*, in which the pain and suffering experienced in ten minutes was considered negligible.

The rule makes it equally clear that damages are not recoverable for any future pain and suffering. When the loss of a limb is involved there will necessarily be some suffering in the future which is compensable, but when life is gone there is no future, and damages can be recovered only for that pain suffered in life.

The writer has been unable to find any well defined rule in Pennsylvania applicable to the situation where death did not occur immediately, but the victim failed to regain consciousness before death. In fact, the only local authority found on this point is the dictum in *Voelkel v. Bennet*,¹⁶ in which the court mentioned as another reason for holding pain and suffering to be negligible, the fact that deceased was unconscious from impact until death. There are cases from other jurisdictions which flatly hold that damages for pain and suffering are not recoverable during the time in which the injured person is in an unconscious state,¹⁷ and there is no reason to believe that the Pennsylvania courts would not follow the trend of thought adopted in these cases. In other words, though pain is an element of damages for personal injuries, it should be considered with a view to making a practical compensation to the party for his loss.¹⁸ He is not to be compensated for that which he did not actually suffer, and the damages should not be the result of speculation and sentiment, but merely, in this situation, the value which the jury places upon a certain, definite quantum of pain and distress actually suffered. Resort to the dictionary¹⁹ reveals pain to be defined as a sensation, and sensation as a conscious experience. Consequently, it seems to follow that one must be conscious to suffer pain; that where unconsciousness prevails there is an absence of pain and suffering.

It is submitted that the preceding material gives rise to the following rules:

- (1) In a wrongful death action, there can be no recovery for the pain and suffering of the deceased, nor for the mental distress of his surviving family.

¹⁵ See note 5, *supra*.

¹⁶ See note 5, *supra*.

¹⁷ *Stone v. Sinclair Refining Co.*, 229 Mich. 103, 200 N. W. 948 (1924); *Fries v. Chicago, R. I. & P. R. R. Co.*, 159 Minn. 328, 198 N. W. 998 (1924); *Vanderlippe v. Midwest Studios*, 137 Neb. 284, 289 N. W. 341 (1939).

¹⁸ *Musick v. Latrobe*, 184 Pa. 375, 39 A. 226 (1898).

¹⁹ Webster's New International Dictionary.

- (2) In a survival action,
- (a) there can be no recovery for the pain and suffering of the deceased where death immediately followed the impact;
 - (b) there can be no recovery for the pain and suffering of the deceased, where although death was not immediate, consciousness was never regained between the time of impact and death;
 - (c) where death was not immediate, and consciousness was regained between the time of impact and death, there may be a recovery for the pain and suffering of the deceased during that time, subject however to the power of remittitur in the court, in event the verdict is so grossly excessive as to shock one's sense of justice.

William L. Otten