

Pain and Suffering under Article 50 of the New York Statutes

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There seems to be considerable confusion about the treatment of Pain and Suffering under Articles 50A and 50B of the New York Statutes. This position paper contains our opinions based on a reading of the statutes and the cited cases.

The questions seem to fall into three categories

- The nature of Pain and Suffering

Pain and Suffering is characterized as a non-economic loss and not as a non-pecuniary loss.

- The application of time limitations placed on Pain and Suffering

The limitations placed on Pain and Suffering (8 years in Amended 50A and 10 years in original 50A and 50B) applies to future Pain and Suffering, and does not reduce or affect past Pain and Suffering.

- Whether Pain and Suffering related to wrongful death bears interest from the date of death.

Past Pain and Suffering in wrongful death cases is a pecuniary loss and, as with future damages, bears interest from the date of death, and without any further discounting for the period prior to the Award.

Nature of Pain and Suffering

Pain and Suffering are characterized as non-economic losses and not as non-pecuniary losses.

The question arises from a provision in Estates, Powers and Trusts - Article 5, related to the amount of recovery as compensation for 'pecuniary' injuries resulting from the decedent's death, and the application of interest on that recovery from the date of death.

§ 5-4.3 Amount of recovery (a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded.

First, The Court of Appeals in Bryant v. New York Health and Hospitals Corporation (92 N.Y.2d 592-1999) included a note as follows;

1. Under certain circumstances — for example, a plaintiff's death — plaintiff will not recover portions of future damages, such as installments for future health care, future pain and suffering and other non-economic losses not due at the time of plaintiff's death.

The Court therefore defines Pain and Suffering as non-economic, and the argument in support of any contention that Pain and Suffering is non-pecuniary would seem to rise or fall, in part, on the plain meaning of the language used.

The American Heritage Dictionary defines

Pecuniary - consisting of or measured in money 2 : of or relating to money

Economic 1 *archaic* : of or relating to a household or its management
2: economical a: of or relating to economics <*economic* theories>
b: of, relating to, or based on the production, distribution, and consumption of goods and services <*economic* growth>
c: of or relating to an economy <a group of *economic* advisers>
4: having practical or industrial significance or uses : affecting material resources
5: profitable

If that were not enough, The Court of Appeals in *Gonzalez v. New York City Housing Authority* (77 N.Y.2d 663 - 1991) said in part,

The measure of damages obtainable in a wrongful death action "may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought." (EPTL 5-4.3[a].) In 1862, fifteen years after enactment of the statute, we held that the statutory word "pecuniary was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value." (*Tilley v The Hudson River Railroad Co.*, 24 NY 471, 476).

1. While other states now permit recovery for loss of society (*Sea-Land Services, Inc. v Gaudet*, [414 US 573](#), 587 n.21 [listing jurisdictions]), New York since its first wrongful death statute has steadfastly restricted recovery to "pecuniary injuries," or injuries measurable by money, and denied recovery for grief, loss of society, affection, conjugal fellowship and consortium (*Liff v Schildkrout*, 49 NY2d at 633-634, *supra*). Thus, the essence of the cause of action for wrongful death in this State is that the plaintiff's reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death (*Loetsch v New York City Omnibus Corp.*, 291 NY 308, 310-311). Loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death, are injuries for which damages may be recovered (*Parilis v Feinstein*, [49 NY2d 984](#), 985).

The Court has adopted the plain meaning of 'pecuniary', and provides examples of damages that may not be recompensed. Both 50A and 50B provide that Pain and Suffering can be recompensed, therefore they are pecuniary.

Time Limitations Placed on Pain and Suffering

The limitations placed on Pain and Suffering (8 years in Amended 50A and 10 years in original 50A and 50B) apply to future Pain and Suffering, and do not reduce or affect past Pain and Suffering.

The plain language of the statutes clearly provide that the time limitations of 8 years in Amended 50A and 10 years in the original 50A and 50B relate only to future Pain and Suffering.

They provisions of the statutes are as follows;

Article 50A as amended § 5031

(c) As to any award of damages for future pain and suffering in excess of five hundred thousand dollars, the court shall determine the greater

of thirty-five percent of such damages or five hundred thousand dollars and such amount shall be paid in a lump sum. The remaining amount of the award for damages for future pain and suffering shall be paid in a stream of payments over the period of time determined by the trier of fact or eight years, whichever is less. The stream of payments for future pain and suffering shall be calculated by dividing the remaining amount of damages for future pain and suffering by the number of years over which such payments shall be made to determine the first year's payment and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. The court shall determine the present value of the stream of payments by applying a discount rate to the stream of payments.

Article 50A original § 5031 and Article 50B § 5041

After making any adjustment prescribed by subdivisions (b), (c) and (d) of this section, the court shall enter a judgment for the amount of the present value of an annuity contract that will provide for the payment of the remaining amounts of future damages in periodic installments. The present value of such contract shall be determined in accordance with generally accepted actuarial practices by applying the discount rate in effect at the time of the award to the full amount of the remaining future damages, as calculated pursuant to this subdivision. The period of time over which such periodic payments shall be made and the period of time used to calculate the present value of the annuity contract shall be the period of years determined by the trier of fact in arriving at the itemized verdict; provided, however, that the period of time over which such periodic payments shall be made and the period of time used to calculate the present value for damages attributable to pain and suffering shall be ten years or the period of time determined by the trier of fact, whichever is less. The court, as part of its judgment, shall direct that the defendants and their insurance carriers shall be required to offer and to guarantee the purchase and payment of such an annuity contract. Such annuity contract shall provide for the payment of the annual payments of such remaining future damages over the period of time determined pursuant to this subdivision. The annual payment for the first year shall be calculated by dividing the remaining amount of future damages by the number of years over which such payments shall be made and the payment due in each succeeding year shall be computed by adding four percent to the previous year's payment. Where payment of a portion of the future damages terminates in accordance with the provisions of this article, the four percent added payment shall be based only upon that portion of the damages that remains subject to continued payment. Unless otherwise agreed, the annual sum so arrived at shall be paid in equal monthly installments and in advance.

Since the statutes separately refer to past damages, and the Court of Appeals has referred to the existence of past and future Pain and Suffering without taking exception to the existence of both, it can be inferred from those references that past pain and suffering is not in any way governed by the time limitations, and those time limitations refer solely to future Pain and Suffering as determined by the trier of fact at the time of the verdict.

Application of Interest on Past Pain and Suffering

Past Pain and Suffering in wrongful death cases are pecuniary losses and, as with future damages, bear interest from the date of death and, without any further discounting for the period prior to the Award.

§ 5001. Interest to verdict, report or decision.

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

(c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

The application of interest from the date of death is set out in part in Estates, Powers and Trusts - Article 5 and it provides, in part

§ 5-4.3 Amount of recovery (a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded.

To begin with, the statute (EPTL 5-4.3) calling for the application of interest from the date of death does not make any distinction in application between 50A and 50B.

Next, The Court has consistently applied the statute to both future and past damages, but has required the application discounting to both future and past damages to arrive at amounts on which interest is to be applied.

- Future damages are to be discounted back to the date of death, as the Award element would contain some amount of interest to the date of the Award. Pre-verdict interest is then applied to future damages from the time of death to the date of the verdict.
- Past damages are discounted back to the date on which the individual loss or obligation was incurred, or some reasonable overall average date, and interest is then applied from that individual or average date to the date of the verdict.

In *Milbrandt v. City of Niagara Falls* (79N.Y.2d 26 - 1992), The Court of Appeals set the principle as follows;

When losses are ongoing and spread over the period from the date of decedent's death to the date of the verdict, the damages may be viewed as resulting from a series of discrete losses occurring after decedent's death. If interest is computed as though the losses all occurred simultaneously at the time of decedent's death -- interest is necessarily included for

damages which have not yet been sustained. These amounts obviously do not represent interest earned on compensation for losses actually incurred and, if added, are a pure windfall. Their inclusion, just as with the inclusion of pre-verdict interest on nondiscounted future damages, subverts the underlying rationale for damages in EPTL § 5-4.3 (see, *Parilis v Feinstein*, supra, at 985).

As with an award for future losses, EPTL § 5.4-3 should be construed, if possible, so as to avoid the unfair imposition of a windfall, contrary to the legislative intent (see, *Matter of Long Island Pine Barrens*, supra; *Zappone*, supra; and discussion, Part II, supra, at 10). To avoid such a construction, we conclude that, with respect, to a past loss "interest upon the principal sum recovered" means interest computed from the time that the particular loss is sustained upon which the interest becomes due.

We agree with the Second Circuit Court of Appeals in *Woodling* (supra, at 561) that the procedure to be followed in computing pre-verdict interest on past losses incurred at discrete times from the date of death until the date of the verdict should be that in CPLR 5001(b) -- i.e., by calculating the interest "upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date" (id.).^[n 5] Thus, the interest on the pre-verdict losses in *Milbrandt* and on the award for pre-verdict portions of the parental guidance awards in *Schmertz* should be recalculated in accordance with CPLR 5001(b).

In wrongful death actions, the Pain and Suffering occurs during the period from the event of injury or harm to the time of death. The conclusion of the Court of Appeals as to past damages that, "...interest is necessarily included for damages which have not yet been sustained" would not apply to past Pain and Suffering in wrongful death actions.

Therefore, in wrongful death actions, interest should be applied to undiscounted past Pain and Suffering.

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