

6.10**6.10 (Civ) DAMAGES IN DEATH CASES**

The plaintiff, as the administrator (-trix) of the estate of the decedent, claims damages under the Wrongful Death Act and the Survival Act. He (She) is entitled to make claim under both Acts, but the damages must not overlap or duplicate themselves.

- A. Under the Wrongful Death Act, the damages recoverable by the plaintiff are as follows:
- (1) The plaintiff is entitled to be awarded an amount which will cover all hospital, medical, funeral, burial and estate administration expenses incurred. (It has been stipulated that these expenses amount to \$_____).
 - (2) The plaintiff is entitled to be awarded an amount that will fairly and adequately compensate the family of the decedent (wife, children, parents, etc.) for their loss of such contributions as they would have received between the time of the death of the decedent and today. This includes all monies 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.
 - (3) The plaintiff is entitled to be awarded the value of all sums that the decedent would have contributed to the support of his (her) (family) between today and the end of his (her) life expectancy.
 - (4) In addition to the monetary contributions that the decedent would have contributed to his (her) (family's) support, the plaintiff is entitled to be awarded a sum which will fairly and adequately compensate his (her) family for the pecuniary value of the services, society and comfort that he (she) would have given to his (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.
 - (5) The plaintiff, on behalf of the surviving children, is entitled to be awarded an amount which will fairly compensate for the loss of the services that the decedent as a father (mother) would have contributed to his (her) children. It will be your duty to consider the monetary value of such services as guidance, tutelage and moral upbringing which you believe the children would have received, up to such time as you believe such services would have been provided, had the death not occurred.
- B. Under the Survival Act, the damages recoverable by the plaintiff are as follows:
- (1) [If a period intervenes between accident and death:]
The plaintiff is entitled to be awarded the total amount the decedent would have earned between the time of the accident and his death.

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- (2) **The plaintiff is entitled to be awarded the total net amount that the decedent would have earned between the date of his death and today. Net earnings are determined as follows: You must first calculate the total amount of the decedent's gross earnings, including the fringe benefits, between the date of death and today; from this amount, you deduct the amount of monetary contributions he would have made to his (family) during this period (which you have already awarded to the plaintiff under the Wrongful Death Act) and the amount of money that the decedent would have spent on himself for his personal maintenance during this period. The probable cost of personal maintenance includes only the necessary and economical living expenses, such as food, shelter and clothing, that the decedent would have been required to spend in order to maintain life during this period.**
- (3) **The plaintiff is entitled to be awarded the value of the net amount that the decedent would have earned between today and the end of his life expectancy. Again, net earnings for this period are determined as follows: You must first calculate the total amount of the decedent's gross earnings between today and the end of his life expectancy; from this amount you must deduct the probable cost of his necessary and economical living expenses required to sustain life during this period [together with the amount of monetary contributions he would have made to his (family) during this period (which you have already awarded under the Wrongful Death Act)]. Your award to the estate for total lost future net earnings thus represents the total net earnings over the decedent's work life expectancy.**
- (4) **The plaintiff is entitled to be awarded such an amount as you believe will fairly and adequately compensate for the mental and physical pain, suffering and inconvenience that the decedent endured from the moment of his injury to the moment of his death as a result of this accident.**

C. You are to add each of these items of damages together in its proper category and return your verdict in two lump sum amounts, one under the Wrongful Death Act and the second under the Survival Act.

SUBCOMMITTEE NOTE

The measure of damages to be awarded in death cases has been subject to much inadvertent confusion over the years, in part because the statutes providing for the survival of causes of action after death do not speak directly to the damage issue. For this reason, the courts have been called upon to determine the elements of recovery, with sometimes inconsistent results. Only recently the Supreme Court authored an opinion that did much to eliminate the major inconsistency, that between actions brought before death actually occurs and those brought after death. *Incollingo v. Ewing*, 444 Pa. 263, 299, 282 A.2d 206 (1971). But because each death action involves a particular situation (i.e., married husband, child, supporting son, wife and/or mother), the appropriate elements of damages must depend on each case. Indeed, it is safe to say that the only element of damage common to all death cases is the amount of the funeral bill.

Under Pennsylvania law, recoverable damages are measured under two distinct provisions, the Wrongful Death Act and the Survival Act. Generally, the Wrongful Death Act, 42 Pa. C.S.A. §8301 provides for recovery of the administrator's expenses and the losses to the immediate family. The Survival Act, 42 Pa. C.S.A. §8302, provides for the other losses occasioned by the death of the decedent.

Under the Wrongful Death Act, the following elements, depending upon the factual situation, are recoverable:

(1) *Administrator's expenses*: The Wrongful Death Act, as amended in 1937, specifically provides that the "personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death." 12 P.S. §1602. These items would be recoverable even if the decedent left no surviving spouse, children or parents.

(2) *Support*: If the decedent had dependent "husband, widow, children, or parents" (no other relatives being included in the Wrongful Death Act), they are entitled to receive compensation for the monetary support that the decedent would have provided during his lifetime. In the case of the death of a minor, ordinarily the minor's net earnings until majority would be considered as "support" recoverable by the parents. E.g., *Alleva v. Porter*, 184 Pa. Super. 335, 134 A.2d 501 (1957). In certain circumstances, however, the child may continue to support the parents after majority (or be expected to support the parents after their retirement) just as the child may continue to receive support from the parents after he reaches majority. E.g., *Gaydos v. Domabyl*, 301 Pa. 523, 152 A. 549 (1930). Whether such is the case must depend on the evidence, and thus the period of support is properly a jury issue.

(3) *Services*: Services performed for the family have pecuniary value, for which the survivors may seek recovery, regardless of the status of the deceased. As a general rule pecuniary loss embraces the amount of deceased's probable earnings which would have gone for the benefit of the children, parent, husband or wife and is broad enough to include the value of probable services which would, in the ordinary course of events, be of benefit to one within this class. *Gaydos v. Domabyl*, *supra*, 301 Pa. at 530; accord, e.g., *Haddigan v. Harkins*, 441 F.2d 844 (3rd Cir. 1970); *McKee v. Jamestown Baking Co.*, 101 F. Supp. 794, 796 (W.D. Pa.), *aff'd*, 198 F.2d 551 (3rd Cir. 1952).

The services not only include day-to-day activity, but also "companionship, comfort, society, guidance, solace, and protection." *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 485, 153 A.2d 490 (1959); accord, *Filer v. Filer*, 301 Pa. 461, 465-66, 152 A. 567 (1930) ("frugality, industry, usefulness, attention, and tender solicitude of a wife, and the mother of children, surely makes her services greater than those of an ordinary servant").

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(4) *Guidance and tutelage to children*: A child is entitled to compensation "for the value of the parent's services in the superintendence, attention to, and care of his family, and the education of his children of which they have been deprived by his death." *Gaydos v. Domabyl, supra*, 301 Pa. at 530. The death of either parent deprives the child of guidance and tutelage. *Thomas v. Conemaugh Black Lick R.R.*, 133 F. Supp. 533, 543 (W.D. Pa. 1955), *aff'd*, 234 F.2d 429 (3rd Cir. 1956) (loss to children from death of father "must include compensation for the care, training, advice, guidance, education").

Under the Survival Act, the following elements, depending upon the factual situation, are recoverable by the decedent's estate:

(1) *Loss of earnings until death*: Because the decedent continues to incur "cost of maintenance" until the actual time of his demise, his estate is entitled to recover the *gross* amount of his lost prospective earnings between injury and death, without deduction for cost of maintenance. E.g., *Incollingo v. Ewing*, 444 Pa. 26, 299, 282 A.2d 206, 229 (1971).

(2) *Loss of net earnings*: The concept of "net earnings" has often been confused with loss of "savings" or loss of "accumulations". Net earnings, quite simply, are gross earnings (including fringe benefits) less cost of maintenance. Savings, on the other hand, represent what is left of an individual's pecuniary worth at the time of his death. The two are not the same, since many expenditures made during lifetime are not for the purpose of personal maintenance (e.g., taxes, gifts, contributions, extravagant expenditures such as gambling, expensive cars or extensive travel).

The test of the loss to the estate is "net earnings" lost. *Murray v. Philadelphia Trans. Co.*, 359 Pa. 69, 58 A.2d 323 (1948). The test of "future accumulations" was, in *Murray*, specifically rejected: 359 Pa. at 72. In holding that the *Murray* ruled applied to all survival actions, the Supreme Court has only recently stated in *Incollingo, supra* at p. 229 that: "...as applied to survival actions the economic loss to a decedent's estate should be measured by decedent's total estimated future earning power less his estimated cost of personal maintenance...".

(3) *Loss of retirement and social security income*: (This item is also to be considered in wrongful death damages.) Income from social security should be considered in the same manner as actual earnings for the purpose of providing some measure of a loss under either wrongful death or survival. Since retirement benefits represent past earnings put aside for the future and from which past cost of maintenance has already been deducted, it would be improper to allow a "double" deduction by again deducting costs of maintenance during the retirement period. This would also include other forms of retirement benefits, i.e., health insurance, death benefits and other items known as fringe benefits. *Thompson v. City of Philadelphia*, 222 Pa. Super. 417, 294 A.2d 826 (1972) allocatur refused.

Under the rationale of *Murray* and *Incollingo, supra* an appropriate deduction must be made for the "probable cost of maintenance" that the decedent would have been required to spend on himself had he not been killed. The *Murray* court speaks of maintenance costs in terms of "living expenses", 359 Pa. at 74, and cites with approval an out-of-state case defining maintenance as "the necessary and economical living expenses of the deceased had he not been killed." *Id.* at 75. While no Pennsylvania death case gives precise delimitation of the expenses includable within this definition, it would seem clear that the expenses include only the modest and reasonable costs of living. See *Winthrop Co. v. Clinton*, 196 Pa. 472, 476-77, 46 A. 435 (1900) ("maintenance" means "supply of the necessaries of life; sustenance; subsistence; livelihood; support", the "things which are essential to his personal and physical subsistence"); cf. *Reardon v. California Tanker Co.*, 260 F.2d 369, 371 (2d Cir. 1958) ("maintenance means keep, that is food and lodging"); *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 191 F.2d 82, 85 (7th Cir.

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1951) ("subsistence"); *Morris v. American Liab. & Sur. Co.*, 322 Pa. 91, 94, 185 A. 201 (1936) ("to preserve or keep in an existing state or condition").

While the actual cost of maintenance is necessarily a jury question depending on the evidence and their collective common sense, certain costs a decedent would have borne are clearly not deductible from net earnings. "Income consequences should not be considered by the jury" and "should be mentioned neither in argument nor in jury instructions." *Gradel v. Inouye M.D.*, 491 Pa. 534, 421 A.2d 674, 680 (1980); affirming *Girard Trust Corn Exchange Bank v. Philadelphia Trans. Co.*, 410 Pa. 530, 190 A.2d 293, 298 (1963). Monies given to others, such as friends, family or church are not within a decedent's cost of maintenance, since it is only his "own living expenses" that are deductible. E.g., *Incollingo v. Ewing, supra*; *Murray v. Philadelphia Trans. Co., supra* at 73, 74. Retirement and Social Security income is admissible to establish loss in a wrongful death or survival action. *Thompson v. Philadelphia*, 222 Pa. Super. 417, 294 A.2d 826 (1972).

To avoid double recovery, that portion of the earnings which would have been contributed to the family, and thus are recoverable under the Wrongful Death Act, must also be deducted from gross earnings in arriving at "net earnings". However, if the decedent was a minor or an adult without dependent spouse, children or parents, there would be no recovery for loss of contributions (beyond those given by a minor to his parents and family) and, therefore, no deduction from net earnings should be made. Although it may well be that an unmarried decedent may have married had he lived, absent any dependent survivors, his estate is entitled to full amount of his prospective net earnings.

(4) *Pain and suffering*: If the decedent was not killed instantly and remained conscious, recovery for his pain, suffering and inconvenience endured prior to his death is allowed.

The court in *Nye v. Commonwealth of Pennsylvania, Department of Transportation*, 331 Pa. Super. 209, 480 A.2d 318 (1984) has indicated that pain and suffering does not include pre-impact fright. The *Nye* court stated:

Appellant argues, however, that the jury could properly award damages for pain and suffering if it believed Karen Nye was aware of her impending death as she struggled to bring her car under control. Thus, appellant contends that he may recover for Karen's "pre-impact fright". There is no precedent in Pennsylvania for such an award. "The rule in Pennsylvania is that in survival actions the measure of damages is the decedent's pain and suffering and loss of gross earning power from the date of injury until death..." *Slaseman v. Myers, supra*, 309 Pa. Super. at 544-45, 455 A.2d at 1217 (emphasis added). Thus, we have always limited recovery to damages for pain and suffering and emotional distress occurring *after* the time of injury.

Nye at 280 A.2d p. 321. (Emphasis in original).

This assertion runs counter to the "bystander" cases handed down by our Supreme Court. Prior to 1970, Pennsylvania followed the "impact" rule, which precluded a plaintiff's recovery for emotional distress unless some physical impact, however trivial, had resulted from the defendant's negligence. If there were even the slightest impact, the plaintiff could recover both for the mental distress caused by the impact and for his fright:

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[W]here, as here, a plaintiff sustains bodily injuries, even though trivial or minor in character, which are accompanied by *fright* or mental suffering directly traceable to *the peril in which defendant's negligence placed the plaintiff*, then mental suffering is a legitimate element of damages.

Potere v. City of Philadelphia, 380 Pa. 581, 589, 112 A.2d 100, 104 (1955). (Emphasis supplied) The "fright" stemming from "the peril in which the defendant's negligence placed the plaintiff" obviously refers to the pre-impact fear of bodily harm. Certainly, the Court did not limit recovery for mental suffering to the post-impact period.

When, in 1970, the Court abandoned the "impact" rule, it expressly recognized a plaintiff's right to recover for pre-impact fright:

We today choose to abandon the requirement of a physical impact as a precondition to recovery for damages proximately caused by the tort in only those cases like the one before us where the plaintiff was in personal danger of physical impact because of *the direction of a negligent force against him* and where *plaintiff actually did fear the physical impact*.

Niederman v. Brodsky, 436 Pa. 401, 413, 261 A.2d 84, 90 (1970). (Emphasis supplied).

E.g., *Incollingo v. Ewing, supra*. These damages include not only physical pain, but also the fright and mental suffering attributable to the peril leading to the decedent's death. *In re Consolidated Coal Co.*, 296 F. Supp. 837 (W.D. Pa. 1969).

It continues to be the law in Pennsylvania that "loss of life's pleasures" is not compensable in a survival action. Citing the Pennsylvania Suggested Standard Jury Instructions, the court in *Willinger v. Mercy Catholic Medical Center*, 241 Pa. Super 456, 467-469, 362 A.2d 280 (1976) reversed the trial court due to an erroneous charge permitting recovery as the result of the loss of amenities of life in a death case.

THE EFFECT OF THE MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW, AS AMENDED, ON DAMAGES IN DEATH CASES.

Under the MVFRL, the personal representative of a deceased, eligible claimant is entitled to receive first party benefits. These include medical expenses up to at least \$10,000, income loss following the accident and prior to death up to at least \$5,000 (unless waived) and funeral expenses up to at least \$1,500. Where additional insurance coverage has been secured, the personal representative is entitled to receive available first party benefits, which may include medical expenses up to at least \$100,000, income lost following the accident and prior to death up to at least \$50,000, funeral expenses up to at least \$2,500 and accidental death benefits up to at least \$25,000.

For claims arising under policies issued on or after July 1, 1990, the personal representative of a deceased, eligible claimant is entitled to medical expenses up to at least \$5,000. Where additional coverage has been secured, the personal representative is entitled to receive available first party benefits, which may include medical expenses up to at least \$1,100,000, lost income up to at least \$2,500 per month and a maximum of at least \$50,000, a funeral benefit of at least \$2,500 and accidental death benefits up to at least \$25,000.

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Income losses after the death of a claimant are not insurable. *Persik v. Nationwide Mutual Insurance Co.*, 382 Pa. Super. 29, 32, 554 A.2d 930, 932 (1989). Section 1712(2) of the MVFLR states:

Income loss does not include loss of expected income for any period following the death of an individual or expenses incurred for services performed following the death of an individual.

An operator or occupant of a recreational vehicle not intended for highway use, motorcycle, motor-driven cycle, motorized pedacycle or like type vehicle is not an eligible claimant. Any owner of a currently registered motor vehicle who does not have financial responsibility is also ineligible. This includes a claimant who is a named insured on a policy covering another vehicle and whose own uninsured vehicle was not involved in the accident. *DiMichele v. Erie Insurance Exchange*, 385 Pa. Super. 634, 561 A.2d 1271 (1989). A claimant whose uninsured vehicle was inoperable is also ineligible. *Kreage v. Keystone Insurance Co.*, 389 Pa. Super. 548, 567 A.2d 739 (1989).

Both the limited and full options provided by Act 1990-6 allow tort recovery where there is a death. For personal representatives claiming under policies issued between October 1, 1984, and June 30, 1990, and losses in excess of the minimum required coverage are recoverable in a tort action. Recoverable losses include those compensated by additional insurance or workers' compensation. Where the personal representative is claiming under a policy issues on or after July 1, 1990, tort recovery is abolished to the extent the claimant was covered by any policy of insurance or workers' compensation.

6.20**6.20 (Civ) DAMAGES — PRESENT WORTH — REDUCTION NO LONGER PERMITTED**

In *Kaczkowski v. Bolubasz*, Pa. , 421 A.2d 1027 (1980), the Pennsylvania Supreme Court overruled the Superior Court case of *Havens v. Tonner*, 243 Pa. Super. 371, 365 A.2d 1271 (1976) which had held that a productivity factor or inflationary factor could not be included when projecting future loss of wages. It reasoned that the productivity factor “was based upon nothing but the economists’ assertion that experience demonstrated that industrial productivity increased annually by at least that much due to improved technology and that this improvement was normally passed along in the form of increased wages” and that interest rates reflect the fact of inflation.

The Supreme Court held that the Havens Court misunderstood that inflation and productivity were separate and distinct phenomena and that Court failed to distinguish between the two in its blanket rejection of the productivity factor that was offered in evidence. The Supreme Court held that inflation and productivity factors are not speculative and are capable of definition and prediction by economic experts. It reviewed two formulae suggested by other jurisdictions which are referred to as variations of the evidentiary approach which allows the fact finder to consider productivity and inflation in awarding damages. An example of the first variant was the case of *Feldman v. Allegheny Airlines*, 385 F. Supp. 1271 (D. Conn. 1974), Affirmed, 524 F.2d 384 (First Cir. 1975). In *Feldman* the Court in analyzing the victim’s lost earning capacity, considered what course the deceased’s life probably would have taken and detailed her college grades, her employment history, the opinion of her held by her fellow workers, the expressed employment goals of the deceased and the potential jobs for which the deceased was qualified. It also examined the employment history of another individual who had remarkably similar credentials as the deceased. Based upon the above factors, the Court predicted the incremental salary (productivity) increases of the decedent over her work life expectancy. When the Court considered the inflation component and the task of discounting the award to present value, it developed a formula known as the “offset present value method” in which it subtracted the estimated inflation rate from the discount rate to calculate the inflation adjusted or “real” rate of interest. It came up with a figure of 1.5%. Apparently, the Court found that the inflation rate was less than the discount rate in reaching the 1.5% figure since it used this as the “real” discount rate in reducing the total work loss figure.

The Court then considered the second variant as adopted by the Alaska Supreme Court in *Beaulieu v. Elliot*, 434 P.2d 665 (Alaska Sup. Ct. 1967), and refined in *State v. Guinn*, 555 P.2d 530 (1976). With this formula the Court calculated lost future earning capacity of the victim over his work life expectancy. It took into account automatic step increases keyed

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to the length of service as being predictable at the time of trial. However, it excluded as speculative evidence the "non-scheduled salary increases and bonuses that are granted as one progresses in his chosen occupation in terms of skill, experience and value to the employer." In order to account for the inflationary component's impact on loss future earnings, the Court applied the "total offset method" which does not discount the award to its present value but "assumes that the effect of the future inflation rate will completely offset the interest rate, *thereby eliminating any need to discount the award to its present value.*" (Emphasis supplied)

Justice Nix in the *Kaczkowski* opinion adopted the *Feldman* Court's approach to calculating loss productivity and the Alaska Court's offset approach to inflation and discounting the present value. It was held as a matter of law that *there shall be no discount to present worth* and that "upon proper foundation, the Court shall consider the victim's lost future productivity." The courts of this Commonwealth "are instructed to abandon the practice of discounting lost future earnings."