

# **Maximizing Your Client's Recovery in Challenging Times**

## **Proof of Damages in Wrongful Death and Survival Actions**

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### **Biography**

Robert T. Szostak, Esquire, is a member of Rubin, Glickman, Steinberg and Gifford ([www.rgsglaw.com](http://www.rgsglaw.com)). He concentrates his practice in the area of Complex Civil Litigation. For 25 years, he has represented victims of catastrophic injury and death. Mr. Szostak handles medical negligence, insurance bad faith, fraud, defamation, products liability and other major personal injury cases involving motor vehicles, amusement parks, construction accidents and premises liability. Mr. Szostak been trial or co-trial counsel in more than thirty-five jury trials, with many million dollar resolutions. He has also handled numerous appellate matters in Pennsylvania and New Jersey. Mr. Szostak received his B.A. from Brown University in 1976, and his law degree from the Widener University School of Law in 1982, where he wrote for the law review. He was law clerk to Pennsylvania Superior Court President Judge Emeritus Stephen J. McEwen, Jr. Mr. Szostak is admitted to practice in Pennsylvania and New Jersey, and in the District Courts for the Eastern District of Pennsylvania and the District of New Jersey, and he is also admitted to practice before the United States Supreme Court. He often serves as faculty for the Pennsylvania Bar Institute and trial attorney associations in his practice areas with emphasis on issues related to medical malpractice litigation. Mr. Szostak is an active member of the Montgomery County Bar Association and the Philadelphia Bar Association where he is an executive officer of the State Civil Litigation Section and was Chairman of the Rules and Procedure Committee and the Medical-Legal Committee for several years. Mr. Szostak is recognized as a Pennsylvania "Super Lawyer," ranking him in the top 5% of lawyers statewide in his fields of practice. He also has an AV<sup>TM</sup> rating from Martindale-Hubbell®, distinguishing his performance in the profession as very high to preeminent.

# PROOF OF DAMAGES IN WRONGFUL DEATH AND SURVIVAL ACTIONS

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## I. INTRODUCTORY OVERVIEW

Pennsylvania Wrongful Death and Survival Actions are codified under 42 Pa.C.S. §8301 and 42 Pa.C.S. §8302, respectively. A Wrongful Death Action is “separate and distinct” from a survival action. Tulewicz v. Southeastern Pennsylvania Transportation Authority, 606 A.2d 427, 431 (Pa. 1992). Wrongful Death and Survival Actions are cumulative and not alternative. Id.; Stafford v. Roadway Transit Co., 70 F. Supp. 555, 563 (W.D. Pa. 1947), *rev. other grounds*, 165 F.2d 920 (3d Cir. 1948). Given that the damages in the two actions are cumulative, they must not overlap or result in a duplication of damages. Tulewicz, supra, at 431; Kiser v. Schulte, 648 A.2d 1, 4 (Pa. 1994); Pezzulli v. D’Ambrosia, 226 A.2d 659, 660 (Pa. 1942). Although Wrongful Death and Survival Actions are generally brought at the same time or otherwise consolidated, *see Tulewicz, supra*, at 431; Pa.R.C.P. 213 (e), under the Wrongful Death Act the spouse, children or parents of the decedent seek damages, while the decedent’s estate may recover damages under the Survival Act. Commonwealth v. Opperman, 780 A.2d 714, 719 (Pa. Super. 2001). Because every death action involves its own particular factual predicate (i.e., husband and/or father, wife and/or mother, child and/or supporting son or daughter), the elements and measure of damages depend on the facts and circumstances of each case.

Damages recoverable by the plaintiff under the Pennsylvania Wrongful Death and Survival Acts are summarized as follows:

<u>Wrongful Death Damages</u>	<u>Survival Damages</u>
1. Hospital, medical, funeral, burial and estate administration expenses	1. Decedent’s total earnings between time of accident/event and his/her death
2. Decedent’s contributions to his/her family (spouse, children or parents) from date of death to date of trial, including all money decedent would have spent for or given to his/her family for items such as food, shelter, clothing, medical care, education, entertainment, gifts and recreation	2. Decedent’s lost past net earning capacity between the date of his/her death and the date of trial  (Decedent’s gross earnings, including fringe benefits, between the date of his/her death and the date of trial minus the amount of monetary contributions he/she would have made to his/her family, as calculated under wrongful death damages, and minus decedent’s personal maintenance (probable cost
3. Decedent’s contributions to the support of his/her family between the date of trial and the end of his/her life expectancy	

4. Monetary value of the services, society and comfort decedent would have given to his/her family had he/she lived including the provision of household services, society and comfort
  5. Compensation to surviving children for loss of decedent's services, including guidance, tutelage, and moral upbringing up to the time such services would have been provided had death not occurred
3. Decedent's total lost future net earning capacity between the date of trial and the end of his/her life expectancy – i.e., decedent's net earnings over his/her work life expectancy  
  
(Decedent's gross earnings between the date of trial and his/her life expectancy minus the amount of monetary contributions he/she would made to his/her family during this period as calculated under wrongful death damages, and minus decedent's personal maintenance (probable cost of his/her necessary and economical living expenses required to sustain life during this period))
  4. Decedent's mental and physical pain, suffering and inconvenience and loss of life's pleasures from the time of accident/event to the time of his/her death as a result of the accident/event

See Pa. SSJI (Civ) 6.19 (Revised, October 2005).

## II. DAMAGES IN WRONGFUL DEATH ACTIONS

At common law, no right of action existed to recover damages for wrongful death. In 1851, the Pennsylvania Legislature enacted Pennsylvania's first Wrongful Death Act. In 1978, after a series of statutory changes, the Act was repealed and reenacted as part of the Judicial Code, as amended in 1995, as follows:

### § 8301. Death action

- (a) **General rule.** -- An action may be brought, under procedures prescribed by general rules, to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime and any prior actions for the same injuries are consolidated with the wrongful death claim so as to avoid a duplicate recovery.
- (b) **Beneficiaries.** -- Except as provided in subsection (d), the right of action created by this section shall exist only for the benefit of the spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere. The damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy and without liability to creditors of the deceased person under the statutes of this Commonwealth.
- (c) **Special damages** -- In an action brought under subsection (a), the plaintiff shall be entitled to recover, in addition to other damages, damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.
- (d) **Action by personal representative** -- If no person is eligible to recover damages under subsection (b), the personal representative of the deceased may bring an action to recover damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death.

42 Pa.C.S. §8301.

The purpose of the Wrongful Death Act is to compensate statutorily designated relatives of the decedent for the pecuniary loss suffered by them as a result of the deprivation of the part of the decedent's earnings that they would have received from him/her if he/she had lived. Berry v. Titus, 499 A.2d 661, 664 (Pa. Super. 1985); Skoda v. West Penn Power Company, 191 A.2d 822,

828 (Pa. 1963); Manning v. Capelli, 411 A.2d 252, 254 (Pa. Super. 1979); Miller v. Philadelphia Geriatric Center, 463 F.3d 266, 272 (3d Cir. 2006); Saunders v. Consolidated Rail Corporation, 632 F. Supp. 551, 552 (E.D. Pa. 1986). “Damages, which are based on the pecuniary loss suffered by the statutory beneficiaries are determined from the standpoint of the beneficiaries, not from that of the deceased.” McClinton v. White, 427 A.2d 218, 221 (Pa. Super. 1981), *rev’d on other grounds*, 444 A.2d 85 (Pa. 1982). “Pecuniary loss” has been defined as

... a destruction of a reasonable expectation of pecuniary advantage from the deceased. It is not a matter of guess or conjecture, but must be grounded on reasonably continuous past acts or conduct of the deceased. The reasonable expectation of pecuniary advantage to one standing in the family relation may be shown in many ways, but more frequently through services, food, clothing, education, entertainment and gifts bestowed. To be reasonable, the services and gifts must have been rendered with a frequency that begets an anticipation of their continuance; occasional gifts and services are not sufficient on which to ground a pecuniary loss.

Frazier v. Frazier, 179 A.2d 202, 208 (Pa. 1962) *quoting* Gaydos v. Domabyl, 152 A. 549, 552 (Pa. 1930).

“An adult, if damaged, may recover as well as a minor” and ... while a minor child is presumed to suffer pecuniary loss, an adult child must provide evidence of a pecuniary loss.” In re Estate of Wolfe, 915 A.2d 1197, 1200 (Pa. Super. 2007) *quoting* Gaydos, *supra*, at 553. Damages for wrongful death are thus the value of the decedent’s life to the family, as well as expenses caused to the family by reason of the death. Slaseman v. Myers, 455 A.2d 1213, 1218 (Pa. Super. 1983). In short, before a person in the enumerated statutory class can recover damages, a pecuniary loss must be proven by demonstrating a destruction of the reasonable expectation of pecuniary advantage from the deceased, including services, maintenance or other gifts with such reasonable frequency as to lead to the expectation of future enjoyment of such services, maintenance or gifts. Gaydos, *supra*, at 554; Berry, *supra*, at 664. Because damages are measured by pecuniary loss or the loss of a reasonable expectation of pecuniary advantage suffered by the next of kin on whose behalf the action is brought, neither the right of recovery nor the measure of damages is conditioned on actual dependency, either total or partial. Eichmann v. Dennis, 347 F.2d 978, 982 (3d Cir. 1965).

The pecuniary damages recoverable in a wrongful death action specifically include special damages for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death. Kiser, *supra*, at 4; 42 Pa.C.S. §8301(c); Miller, *supra*, at 272. Although the cost of obtaining letters testamentary or of administration are compensable, costs associated with administration such as appraisers’ fees, costs of filing and advertising the executor’s account, counsel fees, commissions and payments for state transfer inheritance tax are not recoverable. Fidelity-Philadelphia Trust Co. v. Staats, 57 A.2d 830, 832-33 (Pa. 1948); Marinelli v. Montour Railroad Co., 420 A.2d 603, 611 (Pa. Super.

1980). “[T]he term expenses of administration is employed in conjunction with hospital, nursing, medical and funeral expenses, and it would seem clear that all of these items are intended to cover only such expenses as are immediately attendant upon, and related to the decedent’s injuries and death.” Fidelity-Philadelphia Transit Co., *supra*, at 832. “The cost of the tombstone and the cost of administration of the estate have also been held to be proper items of damage.” Altamuro v. Milner Hotel, Inc., 540 F. Supp. 870, 878-879 (E.D. Pa. 1982) *quoting* McClinton, *supra*, at 221 n.5. Although pecuniary loss does not include the loss of earning power of the deceased as such, “pecuniary loss is what the deceased would probably have earned by his labor, physical or intellectual, in his business or profession, if the injury that caused death had not befallen him, and which would have gone to the support of his family.” Magill v. Westinghouse Electric Corp., 464 F.2d 294, 300 (3d Cir. 1972). As a general rule, pecuniary loss encompasses contributions to the decedent’s family, excluding the probable cost of the decedent’s maintenance calculated from the date of death to the date of trial and from the date of trial through the end of the decedent’s life expectancy. McElroy v. Cessna Aircraft Company, 506 F. Supp. 1211, 1217-18 (W.D. Pa. 1981); Wetzel v. McDonnell Douglas Corporation, 491 F. Supp. 1288, 1290 (E.D. Pa. 1980); Mascuilli v. United States, 343 F. Supp. 439, 441 (E.D. Pa. 1972), *rev. other grounds*, 483 F.2d 81 (3d Cir. 1973); Blackburn v. Aetna Freight Lines, Inc., 250 F. Supp. 289, 291 (W.D. Pa. 1966).

In addition to the economic component of the pecuniary loss to the statutory beneficiaries permitted by law, wrongful death also recognizes non-pecuniary loss in the form of services beyond those of day-to-day activities. Otherwise put, recoverable damages include “companionship, comfort, society, guidance, solace and protection.” Spangler v. Helm’s New York-Pittsburgh Motor Express, 153 A.2d 490, 492 (Pa. 1959). See also Filer v. Filer, 152 A. 567, 568-569 (Pa. 1930); Bonavitacola v. Culver, 619 A.2d 1363, 1373 (Pa. Super. 1993); Mease v. Pennsylvania State Police, 8 Pa.D.&C. 4<sup>th</sup> 384, 385 (Bucks 1990); Schofield v. Piper Aircraft Corporation, 1988 WL 62181 (E.D. Pa. 1988). Thus, under the Wrongful Death Act, the plaintiff is entitled to be awarded a sum which will fairly and adequately compensate him/her for the pecuniary value of the services, society and comfort, including work around the home, that the decedent would have given from the time of injury to the end of the decedent’s life expectancy. Rittenhouse v. Hanks, 777 A.2d 1113, 1119 (Pa. Super. 2001).

The value of services a decedent would have rendered to the statutory beneficiaries - his family - had he lived, also includes the guidance, tutelage and moral upbringing he would have given to his children. *Id.* See also Department of Public Welfare v. Schultz, 855 A.2d 753, 755 (Pa. 2004); Machado v. Kunkel, 804 A.2d 1238, 1246 (Pa. Super. 2002); Quinn v. Commonwealth of Pennsylvania, Department of Transportation, 719 A.2d 1105, 1110 (Pa. Cmwlth. 1998); Bonavitacola, *supra*, at 575; Blair v. Mehta, 67 Pa. D.&C. 4<sup>th</sup> 246, 257-258 (Lycoming 2004); Mascuilli, *supra*, at 442. The rationale for including compensation for the care, training, advice, guidance, education and tutelage to children is the fundamental understanding that child rearing entails far more than merely supplying the necessary food, clothing and shelter lost as a result of death of a parent. Thomas v. Conemaugh Black Lick Railroad, 133 F. Supp. 533, 543 (W.D. Pa. 1955). “All of these things ... which go into the vase

of family happiness are things for which a wrongdoer must pay when he shatters the vase.” Spangler, supra, at 485.

The burden of proof in a Wrongful Death Action rests with the plaintiff. The quantum of proof and measure of damages is based on the best available evidence. This evidence need not be precise, for the inherently speculative nature of evidence of pecuniary loss, including future lost earnings, is not ground for excluding such evidence. The damages need not be proven with mathematical certainty. Rather, the standard requires that a Wrongful Death Action be supported by a reasonable basis for calculation, not mere guess or speculation. Smail v. Flock, 180 A.2d 59, 62 (Pa. 1962); Tomlinson v. Northwestern Electric Service Co. of Pennsylvania, 151 A. 680, 683-684 (Pa. 1930); Greer v. Bryant, 621 A.2d 999, 1004-1005 (Pa. Super. 1993); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 474 A.2d 605, 616-617 (Pa. Super. 1984); Vrabel v. Commonwealth of Pennsylvania, Department of Transportation, 844 A.2d 595, 600 (Pa. Cmwlth. 2004); Pine v. Synkonis, 470 A.2d 1074, 1078-1079 (Pa. Cmwlth. 1984); Blackburn v. Aetna Freight Lines, Inc., 368 F.2d 345, 347-348 (3d Cir. 1966); Saunders, supra, at 553; Kowtko v. Delaware and Hudson Railroad Corporation, 131 F. Supp. 95, 104 (M.D. Pa. 1955).

“It is the law of Pennsylvania that in an action for wrongful death the measure of damages is the pecuniary loss suffered by the next of kin on whose behalf the action is brought.” Curnow v. West View Park Company, 337 F.2d 241, 242 (3d Cir. 1964). When available, juries should be given valid data for computing damages, with a sufficient foundation, in order to prevent jury speculation. Magill, supra, at 300-301. When seeking a share of the wrongful death proceeds, an enumerated beneficiary must prove both family relationship and pecuniary loss before being included in the distribution schedule. Manning, supra, at 256. Again, controlling Pennsylvania law only requires that a reasonable quantity of information must be supplied by plaintiffs so that the jury may fairly estimate the amount of damages from the evidence. Vizzini v. Ford Motor Company, 569 F.2d 754, 762 (3d Cir. 1977).

While the jury is given broad discretion in fashioning its verdict on damages, pecuniary loss is not an item of guess or conjecture, but must be based on reasonably continuous past acts or conduct of the decedent. Gaydos, supra, at 552; McElroy, supra, at 1217. The plaintiff must present sufficient evidence as to what amount the decedent expended for the benefit of his or her family prior to death. Failure to produce any evidence of pecuniary loss to the survivors in a Wrongful Death Action is fatal, even if proven post-verdict. Id.

Delay damages are recoverable in a Wrongful Death Action. Machado, supra, at 1250-1252; Pa. R.C.P. 238 (a)(1).



## II. DAMAGES IN SURVIVAL ACTIONS

At common law, an action for personal injury did not survive death. Salvadia v. Ashbrook, 923 A.2d 436, 439 (Pa. Super. 2007). The Legislature cured this injustice by enactment of a series of statutes known as the Survival Act, which presently provides:

### **§ 8302. Survival action**

All causes of action or proceedings, real or personal, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants.

42 Pa.C.S. §8302. See also 20 Pa.C.S. §§ 3371-3373. Unlike the Wrongful Death Act whose purpose is to compensate the decedent's survivors for the pecuniary losses they sustained as a result of the decedent's death including the value of services the decedent would have rendered to them, the purpose of a Survival Action, brought by a decedent's personal representative, is to recover damages the decedent could have recovered arising from the underlying tort had the decedent survived, with any recovery passing through to the decedent's estate. Otherwise stated, the survival action has its genesis in the decedent's injury, not his death, and the decedent's estate sues on behalf of the decedent, for claims the decedent could have pursued but for his or her death. Recovery of damages stems from the rights of action possessed by the decedent at the time of death. A survival action, unlike a wrongful death action, is not a new cause of action, but is one which merely continues in the decedent's personal representative, the right of action which accrued to the decedent at common law because of the tort. Kiser, supra, at 4; Tulewicz, supra, at 431; Salvadia, supra, at 440; Frey v. Pennsylvania Electric Company, 607 A.2d 796, 798 (Pa. Super. 1992). The two actions are thus designed to compensate two different categories of claimants: the spouse and/or members of the decedent's family for wrongful death of the decedent; and the decedent through the personal representative of his or her estate, for the Survival Action. Kiser, supra, at 4; Tulewicz, supra, at 431.

Because the Survival Act is silent on the amount of damages recoverable by the decedent's estate, the proper measure of damages has been determined by the Courts of Pennsylvania. Incollingo v. Ewing, 282 A.2d 206, 227 (Pa. 1971), *abrogated on other grounds*, Kaczkowski v. Bolubasz, 421 A.2d 1027 (Pa. 1980); McClinton, supra, at 222. The measure of damages in a survival action is the decedent's pain and suffering and loss of gross earning power from the date of injury until the date of death and the loss of earning power, less personal maintenance, from the time of death through the decedent's estimated working life-span. Incollingo, supra, at 229; Carroll v. Avallone, 869 A.2d 522, 528-529 (Pa. Super. 2005), *rev'd other grounds*, 939 A.2d 872 (Pa. 2007); Mecca v. Lukasik, 530 A.2d 1334, 1341 (Pa. Super. 1987); Slaseman, supra, at 1217-1218; Burkett v. George, 545 A.2d 985, 987 (Pa. Cmwlt. 1988); Murdock v. Commonwealth, 531 A.2d 1164, 1166 (Pa. Cmwlt. 1987); Altamuro, supra, at 878. See also Murray v. Philadelphia Transp. Co., 58 A.2d 323, 325 (Pa. 1948); Pezzulli v. D'Ambrosia, 26 A.2d 659, 661 (Pa. 1942); Buchecker v. The Reading Company, 412 A.2d 147,

158 (Pa. Super. 1979); Heffner v. Allstate Insurance Company, 401 A.2d 1160, 1164 (Pa. Super. 1979). Pennsylvania follows the “total offset method” in calculating damages for future earnings to the effect that there is a complete setoff between inflation and reduction of present value. As such, Pennsylvania does not discount damage awards for future lost earnings. Kaczkowski, supra, at 1037-1039; Slaseman, supra, at 1218.

In calculating loss of earnings until death, because the decedent continues to incur “costs of maintenance” until the actual time of his or her demise, the decedent’s estate is entitled to recover the gross amount of his or her prospective earnings between injury and death, without deduction for cost of maintenance. See Incollingo, supra, at 229. When determining the future lost earning power of an estate, a net earnings calculation is required – i.e., gross earnings (including fringe benefits) less cost of maintenance. Income derived from actual retirement pension, and Social Security, Veterans, and other similar benefits terminable by death, are part of the loss of net earnings equation. Murdoch, supra, at 1166; Slaseman, supra, at 1217; Thompson v. Philadelphia, 294 A.2d 826, 829 (Pa. Super. 1973). However, capital investment income is not compensable in a Survival Action. Murdoch, supra, at 1166 (noting that this income is excluded based on the rationale that it does not arise from any physical or intellectual labor of the decedent and is not lost upon death). And, upon proper foundation, the decedent’s lost future productivity is considered to be an integral component of income generation to be included in the projection of lost future earnings. Kaczkowski, supra, at 1038-1039.

As part of the lost future earnings equation, an appropriate deduction must be made for the probable cost of maintenance that the decedent would have been required to spend on himself or herself had he or she not been killed. Proof of the expense of the decedent’s maintenance is a basic and essential element of a plaintiff’s case in proving the earning power of the deceased person during the period of his or her life expectancy. The rationale for this deduction is the fact that when a person dies and an action is brought to trial by his or her personal representative, the decedent obviously does not maintain himself or herself during the period of his or her life expectancy. Therefore, his/her administrator may not receive anything for the decedent’s maintenance during that period. Instead, the estate may receive only the loss of earning power “diminished by [the decedent’s] living expenses during the period of expectancy.” Murray, supra, at 325. See also McClinton, supra, at 223; Haddigan v. Harkins, 441 F.2d 844, 852 (3d Cir. 1971); Polischeck v. United States, 535 F. Supp. 1261, 1267 (E.D. Pa. 1982). Although no Pennsylvania case has specifically itemized those expenses to be included under the maintenance deduction, “the cost of maintenance is ‘that necessary and economical sum which a decedent would be expected to spend, based upon his station in life, for food, clothing, shelter, medical attention and some recreation.’” McClinton, supra, at 88 *quoting Bernstein, Damages in Personal Injury and Death Cases in Pennsylvania (A Supplement)*, 26 Pa. Bar. Ass’n Q. 26 (1954). Thus, maintenance expenses appear to include only the modest and reasonable costs of living. Id. See also Borman v. Raymark Industries, Inc., 960 F.2d 327, 336 (3d Cir. 1992); Commonwealth of Pennsylvania, Department of Transportation v. Phillips, 488 A.2d 77, 88 (Pa. Cmwlth. 1985).

The determination of the actual cost of maintenance is a jury question. Income taxes are not a legitimate part of the equation to be considered by the jury, and should not be mentioned in either argument or jury instructions. Gradel v. Inouye, 421 A.2d 674, 680 (Pa. 1980); Girard Trust Corn Exchange Bank v. Philadelphia Transportation Company, 190 A.2d 293, 298 (Pa. 1963); Phillips, supra, at 89. Because damages under the Survival Act are not measured on an accumulations theory, expenditures such as monies given to friends, family or church, gambling expenses, investments or support of relatives other than wrongful death statutory beneficiaries are not within the ambit of a decedent's maintenance expense. See McClinton, supra, at 87; McSparran v. Pennsylvania Railroad Company, 258 F. Supp. 130, 138 n.22 (E.D. Pa. 1966). Simply stated, only the decedent's own living expenses are deductible costs of maintenance. Incollingo, supra; Murray v. Philadelphia Transp. Co., supra.

Recovery for a decedent's pain and suffering endured prior to his or her death is allowed under the Pennsylvania Survival Act from the date of injury until death. Nye v. Commonwealth of Pennsylvania, Department of Transportation, 480 A.2d 318, 321 (Pa. Super. 1984); Slaseman, supra, at 1217. This element of survival action damages may include fright and mental suffering attributed to the peril leading to the decedent's death. Phillips, supra, at 89; In re Consolidated Coal Co., 296 F. Supp. 837, 844-845 (W.D. Pa. 1969). See also Nye, supra, at 321 (noting that damages for pre-impact fright and shock could be recovered by a decedent's estate in a Survival Action, provided damages based on mental or emotional distress of the decedent as a result of fear of impending death prior to impact could be proven); Pa. SSJI (Civ) 6.19 Subcommittee Note (revised, October 2005). But see Stecyk v. Bell Helicopter Textron, Inc., 53 F. Supp. 2d 794, 797 n. 4 (E.D. Pa. 1999). Loss of life's pleasures is also compensable prior to death as a component of pain and suffering. Willinger v. Mercy Catholic Medical Center of Southeastern Pennsylvania, 393 A.2d 1188, 1191 (Pa. 1978); Wagner v. York Hospital, 608 A.2d 496, 501-502 (Pa. Super. 1992); Hall v. Jackson, 788 A.2d 390, 402 (Pa. Super. 2001). But see Gaines v. Krawczyk, 354 F. Supp. 2d 573, 588-589 (W.D. Pa. 2004) (striking "hedonic damages," including loss of life's enjoyment and pleasures, from complaint does not restrict customary measures of recovery in Survival Action for decedent's pain and suffering between injury and death). In any action for death claiming non-economic loss, the Court must instruct the jury that the plaintiff has made a claim for past non-economic loss including pain and suffering and the loss of the ability to enjoy the pleasures of life. Pa.R.C.P. 223.3.

There can be no recovery for pain and suffering in a survival action where the decedent is killed instantaneously. Fisher v. Dye, 125 A.2d 472, 475 n.2 (Pa. 1956); Nye, supra, at 321; Slavin v. Gardner, 418 A.2d 361, 364 n.4 (1979); Stecyk v. Bell Helicopter Textron, Inc., 1998 WL 744087(E.D. Pa. 1998). "This rule is obviously based on the proposition that where death is instantaneous the decedent experiences neither pain nor suffering and therefore an award of damages to compensate for pain and suffering would be unwarranted." Nye, supra, at 321. Nor can there be a recovery for familial mental anguish, for damages are limited to the decedent's pain and suffering. Vincent v. Philadelphia, 35 A. 2d 65, 66 (Pa. 1944); Hall v. Babcock & Wilcox Co., 69 F. Supp. 716, 733 (W.D. Pa. 1999).

The test for awarding Survival Act compensation for pain and suffering is not whether the decedent was conscious before death; rather, the question is whether the decedent was conscious of pain, even though the decedent's condition rendered him or her incapable of communicating suffering to others before death. Williams v. Southeastern Pennsylvania Transportation Authority, 741 A.2d 848, 859 (Pa. Cmwlth. 1999). Whether a decedent suffered "conscious" pre-death pain is a jury issue to be determined from evidence presented in support of a finding that the decedent was alive and conscious of pain even if only for a few seconds. Mecca, supra, at 1344-45 (allowing pain and suffering Survival Action damages where vehicle struck a guardrail and went airborne for 2.1 seconds before impacting with the ground 211 feet below); Slaseman, supra, at 1219-1220. See also Nye, supra, at 322. Because an award for pain and suffering is intended to compensate the victim for actual pain suffered as a result of injuries sustained, it has been suggested in one court opinion that "the shorter the duration of pain and suffering, the smaller the award." Teamann v. Zafris, 811 A.2d 52, 65 (Pa. Cmwlth. 2002). In order to prove pain and suffering damages on behalf of a person in a persistent vegetative state, the plaintiff must present competent expert opinion testimony that the person could in fact experience such pain. Cominsky v. Donovan, 846 A.2d 1256, 1260 (Pa. Super. 2004). Pain and suffering may be shown by testimony elicited from witnesses detailing the observed misery before the demise. Krock v. Chroust, 478 A.2d 1376, 1380 (Pa. Super. 1984).

Conscious pain and suffering, as an element of Survival Act damages, may also include the decedent's articulated concern about the future of the decedent's family. For example, where a husband suffered a preventable infectious process that eventually caused brain damage, brain hemorrhage and death five and one-half months after the precipitating event, the evidence that the decedent was aware of his grave condition and was very concerned about the future of his young children, should he die, was deemed sufficient to support a significant jury award for pain and suffering. Bonavitacola, supra, at 1373.

Punitive damages are recoverable in a Survival Action to the extent that they could have been recovered by the decedent if he or she had lived. Walsh v. Strenz, 63 F. Supp. 2d 548, 550 (M.D. Pa. 1999) *citing* Harvey v. Hassinger, 461 A.2d 814, 815-816 (Pa. Super. 1983). Punitive damages are not available in an action for wrongful death. Id. at 558. But see Burke v. Maassen, 904 F.2d 178 (3d Cir. 1990).

Damages in medical professional liability actions are regulated by statute, the common law and rule of court. Briefly stated, whenever a Wrongful Death and Survival Action is instituted sounding in medical negligence and/or hospital liability, the damages provisions of the Medical Care Availability Reduction of Error (Mcare) Act, 40 P.S. §1303.101 *et sec.*, must be carefully studied and incorporated into the plaintiff's proofs and argument.

The Mcare Act has changed the collateral source rule. Under Section 508, a plaintiff is prohibited from recovering damages for past medical expenses or past earnings incurred to the time of trial to the extent that they are covered by a private or public benefit or gratuity that the plaintiff has received prior to trial. Collateral source deductions do not include life insurance,

pension or profit sharing plans, or other deferred compensation plans, social security benefits, cash or medical assistance benefits subject to repayment to the Department of Public Welfare, and benefits paid or payable under a program which under Federal Statute provides for right of reimbursement which supersedes State law for the amount of benefits paid from a verdict or settlement. Otherwise stated, a defendant found liable in a malpractice trial is entitled to a credit for medical expenses and disability payments paid by private insurance, and medical expenses and wage loss paid by Worker's Compensation. In return, there is no right of subrogation or reimbursement from the plaintiff's recovery for such payments under Section 508(c). Pursuant to Section 508(b), the plaintiff has the option of introducing into evidence the amount of medical expenses actually incurred as a gauge of the severity of injuries suffered, but the plaintiff is not permitted to recover for such expenses as part of any verdict except to the extent that the plaintiff remains legally responsible for payment. Thus, under Mcare, pain and suffering can be proved through evidence of medical expenses actually incurred to the time of trial. The Mcare Act does not entitle a defendant to a credit for future payments of medical expenses or lost earnings. Accordingly, when calculating and proving damages recoverable under the Pennsylvania Wrongful Death and Survival Acts for past medical expenses, these provisions regulating such expenses must be considered in measuring damages up to the time of death.

Additionally, under Section 509 of the Mcare Act, a jury must issue separate findings specifying the amount of past damages, except as provided for under Section 508, for medical and other related expenses in a lump sum, loss of earnings in a lump sum and non-economic loss in a lump sum. Future damages for loss of earnings or earning capacity and non-economic losses must also be separately determined with separate findings in a lump sum.

Section 510 of the Mcare Act mandates that future damages for loss of earnings or earning capacity be reduced to present value based upon the return that the plaintiff can earn on a reasonably secure fixed income investment. These damages must be presented to the jury based on competent evidence of the effect of productivity and inflation over the period of time. The trier of fact is required to determine the applicable discount rate based upon competent evidence. This requires the plaintiff to present expert economic testimony on the appropriate discount rate, future inflation and future productivity. Pragmatically speaking, if economists retained by the plaintiff and the defendant reach similar conclusions, an appropriate discount rate can be stipulated to and submitted to the jury along with figures on loss of future earnings.

Section 505 of the Mcare Act governs punitive damages in medical negligence actions. This section recognizes the common law threshold for awarding punitive damages based on wilful or wonton conduct or reckless indifference to the rights of others. Unless intentional misconduct is proven, this section caps punitive damages against an individual physician at two hundred percent of any compensatory damages awarded. Additionally, if awarded, punitive damages may not be less than \$100,000.00, unless a lower verdict amount is returned by the jury. When a verdict including punitive damages is entered, the punitive damages must be apportioned such that seventy-five percent are paid to the prevailing party and twenty-five percent are paid to the Mcare Fund.

As a final point on proof of death damages in general, it cannot be gainsaid that a double recovery is not permitted. To prevent duplication of damages, where both a Wrongful Death and Survival Action are brought, any recovery awarded to the estate for the loss of the decedent's net earning power must be reduced by the amount of monetary contributions the decedent would have made to his or her family as found by the jury in the Wrongful Death Action. Simply stated, "in order to avoid duplication of damages for loss of future earning power, Survival Action damages must be diminished by any amounts recoverable under the Wrongful Death Act." McClinton, *supra*, at 222. See also Skoda, *supra*, at 829; Pa. SSJI (Civ) 6.19 and Subcommittee Note ("to avoid double recovery, that portion of the earnings that would have been contributed to the family and thus recoverable under the Wrongful Death Act, must also be deducted from the gross earnings in arriving at 'net earnings' [under the Survival Act]").

#### **IV. PARTICULAR DEATHS UNDER THE PENNSYLVANIA WRONGFUL DEATH AND SURVIVAL ACTS**

##### **1. SPOUSE/PARENT DECEDENT**

##### **A. HUSBAND DECEDENT**

(1) Smail v. Flock, 188 A.2d 59 (Pa. 1962):

Wrongful Death verdict in favor of wife of sixty-one year old dairy farmer held not excessive where oral testimony established the earning capacity of the decedent from various buyers of milk and from other farmers on the fair and reasonable value of the decedent's services in running and operating his dairy farm. The Supreme Court emphasized that the measure of a decedent's loss is what he would have properly earned by his intellectual or bodily labor in his business or profession during the residue of his life, and determined that the evidence showed a reasonably fair basis for calculating the plaintiff's loss.

(2) Rittenhouse v. Hanks, 777 A.2d 1113 (Pa. Super. 2001):

Superior Court held that the wife of the decedent was entitled to the monetary value of his services, society and comfort had he lived from the time that injury was suffered through the end of his life expectancy. These elements included work around the home, the provision of physical comforts and services and the provision of society and comfort to his wife. This element of damages was deemed essentially the same as damages awarded for a loss of consortium claim.

- (3) Linebaugh v. Lehr, 505 A.2d 303 (Pa. Super. 1986):

Widow precluded from maintaining an independent loss of consortium claim on her own behalf in a Wrongful Death and Survival Action. The Superior Court held that she was limited to recovering damages for loss of her husband's society in the Wrongful Death Action arising from her husband's death when struck by a car while riding a bicycle.

- (4) Heffner v. Allstate Insurance Company, 401 A.2d 1160 (Pa. Super. 1979):

Widow was entitled to recover work loss benefits as the survivor of a deceased victim under the No-Fault Motor Vehicle Insurance Act in addition to survivor's loss benefits under the policy. The case sets forth the damages recoverable in survival actions and wrongful death actions.

- (5) Baird v. Wheatland Tube Company, 11 Pa. D.&C. 4<sup>th</sup> 209 (Mercer 1991):

Evidence of prospective earnings on the basis of life expectancy of an injured plaintiff who dies prior to trial is not admissible at trial unless there is a legally cognizable causal connection between the decedent's injury and subsequent death. In this unusual construction/workplace injury case, after the husband had fallen through a deteriorated portion of a roof injuring his left foot, he and his wife divorced and she subsequently shot and killed him and then herself. The Court precluded any evidence that plaintiffs' deaths resulted in any way from the roofing accident and any evidence of prospective earnings on the basis of life expectancy.

- (6) Vizzini v. Ford Motor Company, 569 F.2d 754 (3d Cir. 1977):

Testimony of plaintiff's actuary on the value of employer provided sick pay and insurance fringe benefits determined to be a proper part of the damages portion of the plaintiff's Wrongful Death and Survival Action. The Court further held that in fixing damages for the determination of decedent's earning capacity, income tax consequences should not be considered.

- (7) Blackburn v. Aetna Freight Lines, Inc., 368 F.2d 345 (3d Cir. 1966):

Third Circuit Court of Appeals observed that under both the Pennsylvania Wrongful Death Act and Survival Act, it was necessary for the plaintiff to prove two things: (i) the probable future earnings of the deceased over the probable term of his life; and, (ii) the part of his earnings that would have gone for his own maintenance and expenses. The evidence showed that the decedent was in good health, strong and active and for the greater part of his life had been the operator of a tractor-trailer either as owner or as an employee driver. At the time of his death, he was an employee driver. However, over objection, his wife testified that he intended to go back into business as a broker of tractor-trailer transportation services for which he could have earned as much as double the income of an employee driver. The Court held that evidence on this intention was admissible as bearing on the decedent's earning power in general and probable future earnings in particular.

- (8) McElroy v. Cessna Aircraft Company, 506 F. Supp. 1211 (W.D. Pa. 1981):

The Court held that evidence of remarriage was inadmissible in a Wrongful Death Action. The Court reasoned that the rights of survivors are fixed at the moment of death; therefore, a widow's grief and remarriage are irrelevant to the assessment. The Court ruled that because there was no evidence of any past financial contributions, cohabitation or support from the decedent to his widow, the jury's verdict in favor of the widow was unsustainable. The Court held: "In the evidentiary vacuum that existed in this case, the jury could not possess sufficient factual information to rationally estimate the pecuniary loss to [the widow]. The hypothesis that the decedent would have contributed 64 percent of his future earnings to his wife may be totally accurate or completely inaccurate. Without some evidence to substantiate the estimate, we have no basis for determining whether the verdict of \$400,000.00 under the Wrongful Death Act is reasonable or grossly excessive. A new trial limited to damages was, therefore, granted." The Court emphasized that the mere fact of marriage does not permit a jury to presume that a spouse suffered pecuniary loss. There must be sufficient evidence on the elements of cohabitation and support, namely, pecuniary loss less the decedent's probable cost of maintenance during his life expectancy.



**B. WIFE DECEDENT**

- (1) Carroll v. Avallone, 939 A.2d 872 (Pa. 2007):

Where plaintiff presented an actuarial economic consultant on the issue of the amount of net economic loss resulting from decedent's death, and defendants provided no countervailing evidence but contested plaintiff's damage estimates during cross-examination of plaintiff's expert, the expert's testimony was not "uncontroverted." Accordingly, the Court held that the jury was free to consider all of the evidence on the issue of net economic loss, and accept or reject it in the proper exercise of its authority in determining damages.

- (2) Tulewicz v. Southeastern Pennsylvania Transportation Authority, 606 A.2d 427 (Pa. 1992):

Because a Wrongful Death and a Survival Action are two distinct actions designed to compensate two different categories of claimants, one the spouse and/or members of the decedent's family for the loss and the other the decedent through the legal person of her estate, the Court ruled that separate damages caps under the Sovereign Immunity Act should apply to each cause of action against SEPTA.

- (3) Fisher v. Dye, 125 A.2d 472 (1956):

Where wife was killed instantaneously in a motor vehicle accident, there could be no recovery for pain and suffering. Recovery was limited to the loss of her earning power less cost of her maintenance during the period of her life expectancy.

- (4) Polischeck v. United States, 535 F. Supp. 1261 (E.D. Pa. 1982):

In this Federal Tort Claims Act case, the Court determined that as a result of the decedent's death, the plaintiff was entitled to compensation under a wrongful death action for his deceased wife's anticipated future services as his bookkeeper and assistant in the operation of their retail furniture store.

C. **HUSBAND/FATHER DECEDENT**

- (1) Bonavitacola v. Culver, 619 A.2d 1363 (Pa. Super. 1993):

Wrongful Death award of \$1,246,147.00 found well-supported based on evidence of expert economist and testimony of decedent's wife that she and her husband dated exclusively before they were married, he provided her with emotional support, managed the family's finances, helped his wife with daily chores around the house and provided the couple's young sons with guidance, tutelage and friendship. Additionally, the Survival Act award for conscious pain and suffering of \$750,000.00 was sufficiently supported by evidence of adverse suffering, hospitalization, awareness of grave cardiac problems and decedent's expressed concern about the future of his young children, should he die.

- (2) In re Estate of Wolfe, 915 A.2d 1197 (Pa. Super. 2007):

Superior Court held that decedent's adult daughter suffered a pecuniary loss as a result of her father's death, entitling her to an intestate share of the damages. The Court observed that an adult may recover as well as a minor and that while the minor is presumed to suffer pecuniary loss, an adult child must provide evidence of pecuniary loss. The Court found that the adult daughter met her burden of proof by showing that she was the beneficiary of her father's pension and another retirement account, that she enjoyed an extremely close relationship with her father and that he continually visited her and constantly gave her gifts, that she had attended the same college as her father who assisted her with tuition, meals and housing, that he paid for her automobile and her car insurance following her legal emancipation, and that after graduation from college, he continued to maintain a loving and cordial relationship with her, speaking to her every few days and visiting her at least once a month. Accordingly, the Court entered an order awarding the daughter her intestate share in the Wrongful Death proceeds finding that the record admitted of no other conclusion but that the father would have continued to make his daughter the object of his bounty with sustained and generous gifts as well as other payments including vacations, a wedding trip, furniture, cameras, a television and other significant pecuniary advantages such as items decedent's daughter needed for his grandchild and decedent's plan to pay for college expenses of his grandchild. An adult child can thus establish pecuniary loss through

gifts provided they are given with sufficient consistency such that they would be expected to continue.

(3) Machado v. Kunkle, 804 A.2d 1238 (Pa. Super. 2002):

Superior Court upheld a \$1.5 Million award to daughter of decedent for loss of his services such as guidance, tutelage, moral upbringing, food, shelter, clothing, etc. The Court also ruled that delay damages under Pa.R.C.P. 238 are recoverable in a Wrongful Death Action.

(4) Slaseman v. Myers, 455 A.2d 1213 (Pa. Super. 1983):

Plaintiff's decedent was riding his motorcycle when another car turned left into him. Within an hour he was pronounced dead due to severe skull fractures in combination with multiple other injuries including a severe compound fracture of his right arm that was the equivalent of being torn off. To establish damages for pain and suffering, plaintiff produced a registered nurse who rendered assistance at the scene to explain that the decedent was conscious and restless based on extremely heavy and labored breathing indicative of excitement. The Superior Court found sufficient evidence to believe that the decedent was conscious, despite his very severe injuries, at least until his emergency transport. The plaintiff also presented evidence on the loss of services and guidance, tutelage and moral upbringing that the decedent provided to his children, including recreational activities, household services, trips and basic support for shelter, food, clothing, medical care and education. In addition, through the testimony of an actuary, the plaintiff demonstrated damages arising from lost earnings, lost pension, lost social security benefits, lost fringe benefits and loss of value of services to his family. The Superior Court also found the plaintiff's evidence presented on the loss of society and comfort to decedent's widow to be significant. Finally, the Court vacated the verdict rendered as inadequate, and ordered a new trial, further directing that damages for lost future earnings were not to be reduced to present value as dictated by Kaczkowski v. Bolubasz, 421 A.2d 1027 (Pa. 1980).

(5) Daniels v. State Farm Mutual Automobile Insurance Company, 423 A.2d 1284 (Pa. Super. 1980):

Decedent husband/father never supported his wife or child from whom he separated within four months of marriage and less than

one month after their son was born. At the time of the fatal motor vehicle accident, the decedent was in the final stages of obtaining a divorce. The Superior Court concluded that for purposes of determining eligibility for survivor's loss benefits under the Pennsylvania No-Fault Act, a minor child is, as a matter of law, dependent upon a deceased parent. The Court noted that a father's duty to support his child is not ended by divorce from the child's mother and that the deceased had a legal duty to support his son that in a normal course of events would have continued for at least seventeen years. Accordingly, the Court held that the minor child was entitled to survivor's loss benefits from the Assigned Claims Bureau (decedent was an uninsured passenger in an uninsured truck).

(6) Commonwealth vs. Phillips, 488 A.2d 77 (Pa. Cmwlth. 1985):

Decedent motorist's widow and children brought a Wrongful Death and Survival Action against PennDOT arising from a collision caused by an ice patch on a highway. The Commonwealth Court affirmed a Trial Court award of damages, finding it adequate based on the evidence presented. As part of the Trial Court's awarded damages under the Survival Act, an amount was awarded to 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 the accident, including fright and mental suffering attributed to the peril leading to the decedent's death. The Commonwealth Court also upheld the Trial Court's decision to deduct as part of the decedent's maintenance, leisure activities not limited to expenditures essential to barest survival. The widow was also found entitled to compensation for the pecuniary value of the services, society and comfort that the decedent would have given to her based on testimony and evidence offered to demonstrate the tremendous qualities of the decedent as father and husband. The Court also concluded that the Trial Court correctly ruled that income taxes were not a legitimate item of personal maintenance.

(7) Altamuro v. Milner Hotel, Inc., 540 F. Supp. 870 (E.D. Pa. 1982):

The decedent husband/father died during acts of heroism when he went into a burning hotel in a failed attempt to rescue its residents. He succumbed to the inhalation of fumes and carbon monoxide. Economic losses were proven through the testimony of an actuarial-

economic consultant. Pain and suffering were proven based on the medical examiner's testimony relating to suffocation and the presence of burn blisters on the decedent's face. The Court also observed that the cost of the decedent's tombstone and administration of his estate were proper items of damages. Although the record was barren to show what portion of his earnings the decedent regularly contributed to his family, and what services he customarily rendered to them, given the economic conditions of the time, and the observation that a father of four with an annual income of \$19,219.00 would spend his entire earnings minus his personal maintenance expenses on his family, the Court found that as a result of the husband's death, there was a significant pecuniary loss to the wife and children, as well as intangible or non-monetary losses such as loss of society, comfort and the normal services and guidance a husband/father provides to his wife and children.

(8) Mascuilli v. United States, 343 F. Supp. 439 (E.D. Pa. 1972):

The Court determined that pecuniary loss sustained by the decedent's family as a result of his death encompassed loss of financial support the decedent would have contributed to his family members, loss of services to his widow, including the value of services in and around the home based on his wife's testimony, funeral expenses and loss of nurture and guidance to his children under the Wrongful Death Act. However, under the Survival Act, the Court would not allow recovery for loss of investment income without proof showing that the decedent's intellectual and physical labor was the predominating factor in producing that income. Because there was no evidence to show that the decedent performed anything more than minor maintenance on various real estate properties, no award was made for any claimed loss of real estate investment income.

(9) Blackburn v. Aetna Freight Lines, Inc., 250 F. Supp. 289 (W.D. Pa. 1966):

In computing the maintenance factor under the Pennsylvania Survival Statute, the Court observed that "the record bespeaks an unusual degree of frugality and dedication to business interests on the part of the decedent, who confined his life to the elementary amenities of living, devoid of entertainment or any type of expense that could be considered a luxury." However, in determining the

pecuniary compensation to which the decedent's wife and minor son were entitled, the Court emphasized that "the frugality, industry, usefulness and attention which the attentive husband renders to a wife and son are greater than those of an ordinary servant and, therefore, worth more." The Court further observed that declarations and discussions which the deceased husband had with his wife as to his intentions in business enterprises were also correctly admitted to sustain the verdict of the jury. See also Blackburn v. Aetna Freight Lines, Inc., supra.

**D. WIFE/MOTHER DECEDENT**

- (1) Spangler v. Helm's New York-Pittsburgh Motor Express, 153 A.2d 490 (Pa. 1959):

In this seminal Pennsylvania Supreme Court opinion authored by Justice Michael A. Musmanno, the Court eloquently reversed a decision of a trial Judge who erroneously declared a verdict in favor of a thirty-six year old wife and mother of three children (ages fourteen, thirteen, and five) to be excessive. The evidence revealed that the decedent "was unstintingly devoted to her family [and] that her loyalty was expressed in an incessant activity, tireless energy, and never-flagging concern." The decedent mother "took the children to church regularly, she added to their religious instruction, she prayed with them, she accompanied them to baseball games and on fishing trips." The Supreme Court ruled: "All these things - such as companionship, comfort, society, guidance, solace and protection which go into the vase of family happiness - are the things for which a wrongdoer must pay when he shatters the vase." In arriving at their verdict, an important item which the jury considered was the fact that the decedent "was obviously one of those wife-mothers who give heart, body and soul to the family [and] not only performed the household duties already described, but, in addition, in order to augment the family income, took up part-time employment." In analyzing the pecuniary values arising from the decedent's displacement, the Court emphasized "[t]here are services performed by a wife-mother which no housekeeper can supply."

- (2) Haddigan v. Harkins, 441 F.2d 844 (3<sup>d</sup> Cir. 1971):

Plaintiff's decedent was a passenger in a car driven by her husband in a three car accident in which she suffered severe injuries leading

to her death within two hours. In the ensuing Wrongful Death and Survival Action, the defense claimed evidentiary error in the exclusion of evidence of the plaintiff husband's remarriage. The Court ruled that the Trial Court properly excluded this evidence. The Court also found no error in the admission of expert testimony on the economic value of the services rendered by the decedent wife and mother. Particularly, the Court deemed admissible expert testimony concerning the value of various services performed by the wife such as dishwashing, cooking, dietician, seamstress, housekeeper, etc. The Court noted that an instruction on the loss of companionship, comfort, society, solace and protection is objectionable unless it is clearly limited to the Wrongful Death Action, and the language used does not convey to the jury the misapprehension that in a Wrongful Death Action, the survivors can recover for their mental suffering, grief or loss of companionship. Finally, to avoid reversible error, as found in this case, the decedent's life expectancy must be correctly conveyed to the jury with sufficient actuarial evidence or guidance from which the jury could make the calculation of present worth required by the then applicable law governing death actions.

(3) Curnow v. West View Park Company, 337 F.2d 241 (3<sup>d</sup> Cir. 1964):

The decedent wife/mother survived only minutes after she sustained injuries. At trial, damages were sought under the Wrongful Death Act for the pecuniary loss suffered by her family, including the services the decedent would have rendered to them had she lived, less the probable cost of her maintenance during the period of her life expectancy. The burden was upon the plaintiff to prove the probable cost of the decedent's maintenance. Because the record was without such evidence from which the jurors could have determined the decedent's maintenance during her life expectancy, a new trial was awarded. While there is no requirement that the evidence as to maintenance be direct and precise, the Court explained that the evidence must be sufficient to enable the jurors to make a fair determination. The Court also ruled that it was error for the Trial Court to instruct the jury by quoting the emotionally phrased language of Justice Musmanno in Spangler, *supra*.

**E. FATHER DECEDENT**

- (1) Girard Trust Corn Exchange Bank v. Philadelphia Transportation Company, 190 A.2d 293 (Pa. 1963):

Decedent, age sixty-seven, was killed as a passenger in an automobile struck by a bus. His daughters instituted a Wrongful Death Action and Survival Action resulting in a verdict in their favor. Trial Court instructed the jury that in fixing damages, income taxes should be deducted from the gross earnings of the decedent. The Trial Court granted a new trial and the Supreme Court affirmed holding, in part, that income tax consequences should not be taken into consideration when computing a decedent's gross earnings.

- (2) Manning v. Capelli, 411 A.2d 252 (Pa. Super. 1979):

Decedent had separated from the mother of his thirty-six year old emancipated daughter by a prior marriage when his daughter was eight months old, after which he divorced her mother when she was two years old. From the time of the separation through the remainder of the daughter's minority, and up to her father's death, the daughter had lived apart from the decedent's home and had received no support, financial or otherwise, from the decedent. A Schedule of Distribution was submitted to the Trial Court to approve a Wrongful Death Action distributing one-third of the proceeds to the decedent's surviving spouse and the remaining two-thirds equally among the decedent's two minor children and one adult dependent child. The thirty-six year old emancipated adult daughter filed exceptions to the Schedule, arguing that she had been improperly excluded and was entitled to one-fourth of the proceeds distributed to the decedent's other children. The Superior Court disagreed and held that it is incumbent for one seeking to procure a share of Wrongful Death proceeds to prove the family relationship and pecuniary loss before he or she may be included in the Schedule of Distribution. Because the emancipated daughter was an adult at the time of her father's death, who had not resided with him since she was eight months old and never received financial support, she was not entitled to a share in the distribution of Wrongful Death settlement proceeds.



- (3) Quinn v. Commonwealth of Pennsylvania, Department of Transportation, 719 A.2d 1105 (Pa. Cmwlth. 1998):

Plaintiff's decedent was fatally injured in a single vehicle accident. Decedent's son was not born until after decedent's death. The Trial Court's jury verdict form instructed the jury that it could award an amount "for loss of services that the decedent, as his father, would have contributed to his child ... for such services as guidance, tutelage, and moral upbringing." The Commonwealth Court held that under the Wrongful Death Act, the child could recover for the loss of such services not under a general theory of loss of parental consortium, but as part of the damages that have been held to be recoverable under the Wrongful Death Act for lost guidance, tutelage, and moral upbringing even though the child was not born at the time of the accident.

- (4) Saunders v. Consolidated Rail Corporation, 632 F. Supp. 551 (E.D. Pa. 1986):

Only children who have suffered a demonstrable pecuniary loss due to their father's death take pursuant to the Wrongful Death Act, the purpose of which is to compensate them for their pecuniary loss suffered as a result of the deprivation of that part of the deceased's earnings which they would have received had the deceased lived. Statutorily enumerated relatives who have not suffered a pecuniary loss do not share in the proceeds. Pecuniary loss is not a matter of guess or conjecture but must be grounded on reasonably continuous past acts or conduct of the deceased. Elements of an individual's pecuniary loss are services, gifts, education, training and advice of the deceased. However, such elements must have been rendered with a frequency that begets an anticipation of their continuance, for occasional gifts and services are not sufficient evidentiary proof on which to ground a pecuniary loss. The law creates a rebuttable presumption that minor children suffer a pecuniary loss when one of their parents dies. Emancipated children, however, must affirmatively show direct pecuniary loss because damages are never presumed for them. Here, the decedent father showed virtually no interest in certain of his children and failed to meet his legal support obligations. His occasional gifts and services a few months before his death were deemed insufficient to establish a pecuniary loss because they were not rendered with a frequency that begot an anticipation of their continuance.

- (5) Thomas v. Conemaugh Black Lick Railroad, 133 F. Supp. 533 (W.D. Pa. 1955):

Decedent's seven children were ages two through sixteen at the time of his death. The testimony established that the children received unusual religious, moral and intellectual training, as well as physical training from their father. Accordingly, they were entitled to damages for their loss of nurture through the age of their majority, for "the rearing of a child entails far more than merely supplying the necessary food, clothing and shelter. Its mental, moral and physical training are the keystone to the arch of future living and citizenship."

**F. MOTHER DECEDENT**

- (1) Gaydos v. Donaby, 152 A. 549 (Pa. 1930):

Decedent mother, a widow, was negligently killed and survived by seven children, ages fourteen through thirty-two. The oldest son was confined in a mental institution. A verdict was recovered for all the children. The Supreme Court reversed due to errors in the Trial Court's charge. However, the Supreme Court set forth the defining concepts in the death action in favor of statutory beneficiaries. In order for children of the deceased to recover damages, their family relation, as understood by the Act, must be proven by showing parental services or maintenance or gifts to a child with such reasonable frequency as to lead to an expectation of future enjoyment of these services, maintenance or gifts. Those children affected by such death need not reside in the same home or under the same roof as the deceased, but may reside elsewhere and still be within the family relation. However, before there can be any recovery of damages by one in that relation for the negligent death of their parent, there must be a pecuniary loss. This loss is defined to be a destruction of a reasonable expectation of pecuniary advantage from the deceased that is not a matter of guess or conjecture, but is grounded on reasonably continuous past acts or conduct of the deceased. The reasonable expectation of pecuniary advantage to one standing in the family relation may be shown in many ways, but more frequently through services, food, clothing, education, entertainment and gifts bestowed. To be reasonable, the services and gifts must have been rendered with a frequency that begets an anticipation of their continuance; occasional gifts and

services are not sufficient on which to ground a pecuniary loss. As a general rule, pecuniary loss embraces the deceased's probable earnings during the probable duration of the deceased's life which have gone for the benefit of the children, parent, husband or wife, as the case may be, and is broad enough to include the value or probable services which would, in the ordinary course of events, be of benefit to one within the class. A child may be compensated for the value of the parent's services in his or her supervision, attention, care and education, of which the child may have been deprived due to the death. The loss is thus what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, taking into consideration his age, ability and disposition to labor and habits of living and expenditure. The measure is not what the deceased would have earned, but only so much as the jury finds would have gone for the benefit of his family. Where all the children sue and less than that number have been damaged, the verdict must be confined to the loss by those damaged. An adult, if damaged, may recover as well as a minor. Maintenance must be deducted from the pecuniary loss to the children consisting of that amount which surviving relatives would have expected to expend for the maintenance (food and clothing) of the deceased for the probable remainder of her life deducted from the gross value of her services. The burden of proof is on the beneficiary to adduce facts which would bring the beneficiary into the class entitling him or her to recover. The law presumes the family relationship and pecuniary loss to a minor whose damage would be the difference between the value of his/her mother's services, maintenance and spending money furnished to minor and the amount the parent probably would have received from the earnings of the child until twenty-one and after twenty-one, in view of the relationship established and the child's probable contributions to his/her mother during her lifetime or as long as the family relation was not severed. Because family relation is the threshold for recovery of damages which may continue beyond the age of twenty-one, damages are measured by the pecuniary loss, based on past conduct and acts of the deceased in that relation. Ordinarily it is a question for the jury to determine.

**G. PARENT DECEDENTS**

- (1) Tomlinson v. Northwestern Electric Service Co. of Pennsylvania, 151 A. 680 (Pa. 1930):

Guardian of children, ages nineteen and seventeen, sought to recover damages arising from the death of their parents who were killed when their car was struck by a trolley. The Court held that the children were entitled to substantial damages measured by the pecuniary advantage they would have received had their parents survived based on what they could reasonably expect would have been given to them for their support in the future. The two sons were thus found entitled to compensation which they could fairly anticipate would be furnished. The burden of proof was on them to show sufficient facts from which the extent of damages could be determined. The Court held that the Trial Judge properly charged the jury on the earning capacity of the decedent father, the manner of living of the decedent parents and the sums actually expended or required until their sons reached majority. The Trial Court also correctly stated that damages did not necessarily cease when the sons reached maturity and became self-supporting. At that point, the amount of loss was based on testimony from which the jury could fairly gauge the financial assistance to the children in the future. Because the record was silent on the extent of further pecuniary aid reasonably to be expected, and the Trial Court failed to instruct the jury that its verdict must be limited to the actual financial assistance which, under the circumstances, the sons had reason to anticipate, a new trial was ordered to enable the jury to determine sums justifiably recoverable under the testimony presented.

**2. CHILD DECEDENT**

**A. EMANCIPATED CHILD DECEDENT**

- (1) Kiser v. Schulte, 648 A.2d 1(Pa. 1994):

Parents of eighteen year old daughter who was killed in a drunk driving accident brought a Wrongful Death and Survival Action against the drunk driver. In support of their claims, the parents and siblings of the deceased testified as to the character and personality traits of the deceased and offered expert testimony of an economist

on the value of the loss of services to the family resulting from the tragic death. The expert provided economic loss opinion evidence by assuming a high school education, adding income, fringe benefits and household services together, and then subtracting personal maintenance expenses. The same was done to prove substantially greater economic losses by assuming that the decedent would have completed a college education. The expert opined that the net economic loss to decedent's family ranged between \$571,659.00 and \$756,081.43. Despite this "uncontroverted" evidence, the jury awarded a shocking \$25,000. Both the Supreme and the Superior Courts could find no basis for this inadequate award in any of the evidence presented at trial. Accordingly, the jury verdict was vacated and the case remanded for a new trial on the issue of damages alone.

(2) Springer v. George, 170 A.2d 367 (Pa. 1961):

Administrator of an eighteen year old's estate brought a Wrongful Death and Survival Action arising from a motor vehicle accident in which the decedent was rendered unconscious from injuries received. He died two hours later. The evidence showed that the decedent was a high school graduate with ambitions to be a school teacher for which he was in his first year at a teachers college. Decedent and his parents were shown to have excellent health, and his grandparents on both sides were still alive and well. The decedent's habits and traits were found admirable; he worked during summer months. There was also evidence presented on the minimum salary of a school teacher with productivity increases factored into the equation. Mortality tables were used to demonstrate the decedent's life expectancy. The Court found that the evidence as to teachers' earnings was sufficient as the best evidence reasonably available to guide the jury in determining the pecuniary value of the human life involved. The Court also ruled that the maintenance costs were sufficient and that the jury could reasonably infer that they would increase had the decedent lived and married, leading to greater maintenance expenses.

(3) Vescio v. Philadelphia Electric Co., 9 A.2d 546 (Pa. 1939):

Mother of deceased twenty-one year old unmarried son brought action against utility arising from his electrocution while helping another person who had been injured by a live wire. The testimony showed that prior to his death, the decedent, supported his mother

with weekly contributions which included payments for his room and board when he was at home and the same contributions to her when he worked away from her home. He also bought her considerable household equipment and provided her with fuel. He paid interest on a mortgage on his mother's property and sometimes paid on its principal, and he also paid the real estate taxes. The mother received no support from her husband who deserted them ten years earlier. The evidence showed a range of decedent's earnings. He was the only person contributing to his mother's support and he had promised her that he would never get married as long as he lived so that he could take care of her. At the time of her son's death, the mother was fifty-eight years of age. In upholding a jury verdict in favor of the mother, the Court ruled that it was the duty of the jury to consider the age of the mother, how long she would be likely to live and whether or not her son would continue to support her during her life's duration. The jury also had to consider the probability that the son might marry and thereby diminish his ability to support his mother.

(4) Davis v. Steigerwalt, 822 A.2d 22 (Pa. Super. 2003):

Parents of daughter who died in a motor vehicle accident brought a Wrongful Death and Survival Action. The Trial Court awarded a new trial with respect to damages returned by the jury in the Survival Action, finding its verdict to be shockingly inadequate. The Superior Court affirmed, and held that the measure of damages in a Survival Action includes the decedent's pain and suffering, loss of gross earning power from the date of injury until the date of death, and loss of her earning power, less maintenance expenses, from the time of death through her estimated life span. Significantly, the plaintiff/parents presented testimony from a vocational rehabilitation counselor regarding the decedent's vocational path, including evidence on her graduation from high school, attendance at Penn State University in the Nursing Bachelor of Science program and completion of a nurse's aide program with certification. Evidence was also presented as to decedent's part-time work history as a nurse's aide. The decedent had completed her first year at Penn State and then successfully applied to a Nursing School for its two-year RN program. She was scheduled to begin that program before the accident. Plaintiffs also presented testimony from an economist on the lifetime earning capacity less personal expenses if she had worked over the course of the next thirty-three to forty-three years. They also provided higher figures

for starting salaries based on the state average salary for RNs and based on a sliding salary scale.

- (5) Vrabel v. Commonwealth of Pennsylvania, Department of Transportation, 844 A.2d 595 (Pa. Cmwlth. 2004):

Parents were precluded from recovering non-economic loss of consortium damages against the Commonwealth associated with the death of their adult son under the Wrongful Death Act in the context of sovereign immunity. Moreover, although pecuniary loss generally embraces the amount of the deceased's probable earnings that would have gone for the benefit of the children, parent, husband or wife, the plaintiffs did not present sufficiently specific testimony to permit the jury to assign a dollar amount to the loss of those services without speculation. Plaintiff's case also lacked any testimony about the amount of their son's earnings, the plaintiff/parents' loss for not having their son's help around the home, or the cost to hire someone to help with household services.

- (6) Blair v. Mehta, 67 Pa. D.& C.4<sup>th</sup> 246 (Lycoming 2004):

The deceased was thirty-six years old and survived by her parents who sought damages under the Wrongful Death Act for loss of services, companionship, society, comfort, guidance, solace, protection, friendship, love, tutelage and affection. The Trial Court held that the damages recoverable under the Wrongful Death Act are not limited solely to the loss of the decedent's monetary contributions which the survivors have been denied; the Wrongful Death Act also permits recovery for the pecuniary value of the loss of services, and included among those services is the provision of society and comfort. The Court explained that the services the child may have provided to a parent go beyond that a housekeeper could supply, and may involve taking the parents to church, the store, on vacation and various activities which, were it not for the child's attention and care, the parents would never enjoy. As part of its rationale the Court observed that because it is common experience for many adult children to render valuable services to aging parents, the wrongful death of such a child would certainly occasion a loss to the affected parents. Moreover, the Wrongful Death Act does not exclude a parent from recovering damages due to the death of a child, nor does it limit such a recovery by a parent to those damages arising from the death of a minor child. Rather, it permits the named individuals, including the parents, to recover damages

arising out of the person's death without distinction. Although there can be no loss of filial consortium, parents may recover for the loss of society and comfort that would have been provided by their deceased child as part of the damage recoverable under the Wrongful Death Act.

- (7) Ehrman v. Mid-American Waste Systems of Pa., Inc., 39 Pa. D. & C. 4<sup>th</sup> 235 (Allegheny 1998):

In this Wrongful Death and Survival Action arising out of the death of a nineteen year old unmarried daughter without children or siblings, her parents sought damages under a Wrongful Death count, including claims for loss of aid, companionship and services the deceased would have furnished them. The Trial Court held that the parent/plaintiffs were entitled to recover these damages based on proffered testimony that the decedent was an only child and very involved in her parents lives, had a helping and caring personality, and her relationship with her parents had been one of closeness, love and assistance. Accordingly, the testimony would show that as her parents aged, she would have begun to perform household chores for her parents, and in times of illness, she would have transported her parents to the doctor and provided nursing care and living assistance. She would have also provided financial assistance if her parents experienced any financial difficulties, and under powers of attorney, she would have managed her parents' lives and affairs if they were no longer able to do so. The Trial Court also followed the opinion in Kiser, supra, in deciding that the damages recoverable in a Wrongful Death Action include the present value of the services the deceased would have rendered to the family, had she lived, as well as funeral and medical expenses. The Court also observed that the Pennsylvania Suggested Standard Jury Instructions permit the damages described in Kiser.

But see Estate of Matthews v. Township of Millcreek, 45 Pa. D. & C.4<sup>th</sup> 376 (Erie 2000) (declining to follow Ehrman, and holding that a mother could not maintain a loss of parental or filial consortium claim arising from the death of her son under the Wrongful Death Act).



- (8) Schofield v. Piper Aircraft Corporation, 1998 WL 62181 (E.D. Pa. 1988):

Plaintiff's decedent, age twenty-four, was killed while working as a commercial pilot. His parents presented expert and lay witness testimony on the decedent's qualifications to become a pilot with a major airline, including his past efforts and future intention to obtain such a position. As a result, a reasonable evidentiary basis existed for concluding that the decedent would have obtained such a position. Witnesses graphically portrayed plaintiff's decedent as the oldest child with emphasis on his relationship with his parents and the filial services and comfort that he provided to them.

Significantly, it was noted that the decedent's father was a corporate commercial pilot, and he and others who knew the decedent well, were excellent witnesses on his character and future plans. The Court cited Mecca v. Lukasik, *infra*, where the Superior Court held that the testimony of the parents as to a decedent's future plans, their own stations in life and that of siblings was a sufficient foundation for an expert's projections on a decedent's potential earning horizon. Accordingly, the Federal District Court held that the jury's \$4,000,000.00 Survival Action verdict and \$503,000.00 Wrongful Death verdict were not excessive.

- (9) Kowtko v. The Delaware and Hudson Railroad Corporation, 131 F. Supp. 95 (M.D. Pa. 1955):

The jury verdict was upheld in favor of the plaintiff's mother arising from the death of her twenty-nine year old son whose car was struck by a freight train traveling fifty miles per hour, causing injuries rendering her son unconscious, followed by death within ten minutes of the collision. The evidence showed that the mother was sixty-two years of age, and in good health. The Court explained the damages recoverable under the Wrongful Death and Survival Acts based on the best evidence available. Although the plaintiff's case could have been stronger by presentation of specific evidence as to the cost of the decedent's maintenance, the Court ruled that the jury could determine what would have been reasonable living expenses under the circumstances. The Court allowed the inclusion of Veterans Subsistence Benefits as part of the regular income of the decedent. It was additionally observed that the problems inherent in determining the question of life expectancy, future loss of earning power and probable cost of future maintenance are concerns particularly left to the good sense and sound, deliberate judgement

and discretion of the jury upon all of the facts and circumstances of each particular case.

**B. UNEMANCIPATED CHILD DECEDENT**

(1) Sinn v. Burd, 404 A.2d 672 (Pa. 1979):

The parents of minor daughter brought action against driver of automobile which struck and killed their minor daughter to recover under the Wrongful Death and Survival Acts, and to recover for negligently caused mental trauma of the mother when she saw her minor daughter struck and killed. Although she was outside the “zone of danger” and had no reason to fear for her own safety, the Supreme Court allowed the maternal claim to go forward for her own physical and mental injuries. In dictum, the Court noted that the Wrongful Death Act compensates the decedent’s survivors for the pecuniary losses they sustained as a result of the decedent’s death and that the measure of damages for the death of a minor in such action consists of funeral and medical expenses, plus total earnings which would have been earned by the child up to the age of twenty-one, minus the cost of maintaining the child during this period. The mother-plaintiff sought damages for the emotional injuries she sustained as a result of witnessing the accident, not damages for Solatium or solace – a type of monetary damages awarded the decedent’s survivors to recompense them for their feelings of anguish, bereavement, and grief caused by the fact of the decedent’s death – a concept that has been steadfastly rejected by the common law. The Supreme Court noted that the mother-plaintiff was not seeking damages to soothe her grief resulting from the loss of her child, but instead sought damages for the mental distress caused her by the shock of actually witnessing her child being struck and killed independent of her grief and bereavement. Otherwise stated, both Solatium and Wrongful Death Actions are intended to compensate the decedent’s survivors for the loss, namely, any affectional and pecuniary harm respectively suffered by reason of the death.

(2) Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971):

The Supreme Court explained that damages are to be compensatory to the full extent of the injuries sustained, but that the award should be limited to compensation and compensation alone. The Court

concluded that as applied to Survival Actions, the economic loss to a decedent's estate should be measured by the decedent's total estimated future earning power less his/her estimated cost of personal maintenance. The Court further held that in all Survival Actions, damages are properly measured by the decedent's pain and suffering and loss of gross earning power from the date of injury until the date of death, and loss of earning power less personal maintenance expenses from the time of death through the decedent's estimated working lifespan.

(3) Fries v. Ritter, 112 A.2d 189 (Pa. 1955):

Plaintiff's decedent was four and one-half years old when he was killed in a bicycle accident. A jury awarded damages in his parents' Survival Action which the defense claimed were excessive. In rejecting this assertion, the Pennsylvania Supreme Court observed that loss of earning power is a subject which is often difficult to ascertain. The correct test for formulating Survival Action damages is the loss of the minor's earning power after the age of majority (in this case age twenty-one), less maintenance.

(4) Vincent v. Philadelphia, 35 A.2d 65 (Pa. 1944):

In death of six year old girl who was struck and almost instantly killed by a City truck, the Court confirmed that the law is concerned only with the economic and not human value of the life that has been taken; it does not attempt to measure in money the parental anguish caused by the child's death. See also Hall v. Babcock & Wilcox Company, 69 F. Supp. 2d 716 (W.D. Pa. 1999) (noting that damages recoverable under the Pennsylvania Wrongful Death Act are limited to the parents' pecuniary loss sustained as a result of their child's death; the measure of damages that can be awarded in a Survival Action includes, among other elements, the decedent's pain and suffering; however, damages may not be awarded for the parents' anguish).

(5) Ginocchi v. Pittsburgh & L.E.R. Co., 129 A. 323 (Pa. 1925):

In this case brought by parents to recover for the death of their thirteen year old son who was struck by a train, the Supreme Court noted that at the time of injury, the boy was in sound, healthy condition, and that the parents were entitled to the earnings of their son until he became of lawful age. The evidence also showed that

their son attended public school and was a bright, industrious, intelligent lad in the fourth grade whose father had been employed as a laborer for over twelve years. The Court emphasized that in calculating damages, much reliance is placed on the knowledge and common sense of juries acquired through the experiences of life. Simply because the decedent happened to be a child did not place him without the protection of the law, so that compensation for damage resulting from negligent conduct is properly awarded where the evidence cannot be reduced to a certainty. Although there was no evidence of the probable cost of board, clothing, or personal expenses, such evidence was deemed largely a matter of approximate cost. And, because very few families keep a record of what it costs to raise children, the Court concluded that the Trial Court properly submitted the matter to the jury in a charge free from error resulting in a verdict that was not unreasonable.

(6) In re Estate of Coleman, 772 A.2d 1026 (Pa. Super. 2001):

Following the death of their deceased six year old son in a single vehicle accident caused by his mother who was admittedly negligent at the wheel, his father filed a petition for apportionment of proceeds from automobile insurance settlements. The Superior Court upheld the Trial Court Order awarding the father eighty percent of the settlement for the Wrongful Death Action and the estate twenty percent of the settlement for the Survival Action. At the time of death, decedent's parents were unmarried and his father was the custodial parent. The Superior Court instructed that the damages recoverable in a Wrongful Death Action include the services the deceased would have rendered to his family had he lived, as well as funeral and medical expenses. The Survival Action, on the other hand, was brought by the administrator of the decedent's estate to recover the loss to the estate of the decedent resulting from the tort. The measure of damages in a survival action includes the decedent's pain and suffering, the loss of gross earning power from the date of injury until death, and the loss of his earning power less personal maintenance expenses, from the time of death through his estimated life span. The Superior Court thus rejected the mother's arguments that more of the settlement proceeds should have been allocated to cover lost future wages recoverable in the Survival Action and less should have been allocated to cover for the loss of the decedent's services to his family. The Superior Court concluded that the mother should not profit from her wrongdoing and upheld the allocation of the Orphans' Court. Notably, on impact

with a stone wall, air bags deployed on the boy's head and chest causing cardiac arrest and immediate loss of consciousness. Death was pronounced within the ensuing 24 hours. Of the compensable claims in the Survival Action, no pain and suffering was involved.

(7) Greer v. Bryant, 621 A.2d 599 (Pa. Super. 1993):

In this newborn infant death case, a mother sued on her deceased baby's behalf. At trial, the plaintiff introduced expert testimony which used a 1.1% "productivity" factor to calculate the deceased child's potential earning capacity. The hospital defendant claimed that since the child was not old enough at her death to exhibit tangible objective factors that would demonstrate her earning potential, the expert had no foundation on which to base his 1.1% figure. The Superior Court disagreed and held that the use of a productivity factor is proper to estimate a plaintiff's potential productivity increase. Referencing Kaczowski v. Bolubasz, 421 A.2d 1027 (Pa. 1980), the Superior Court reasoned that a productivity factor takes into account an individual's ability to influence his rate of income earning power over time by considering objective criteria such as age, maturity, education and skill. Thus, the basis for permitting the use of a productivity factor is the progressive notion that while damages are never capable of precise mathematical computation, the inherently speculative nature of damages should not justify the exclusion of reliable economic theory from the jury's consideration. Reliance on economic data is helpful in aiding the fact finder and reducing the amount of guesswork that naturally exists when determining damages. Thus, the proper foundation for the admission of a productivity factor can only be determined on a case by case basis, taking into account the plaintiff's decedent's personal circumstances. Because the plaintiff's economic expert calculated the deceased newborn child's 1.1% productivity factor based on objective criteria, including the deceased child's mother's testimony on the mother's experiences, the productivity calculation was ruled admissible. Projecting that child's productivity potential on a plane equal to that of her parent was deemed certainly more proper than ignoring that potential all together.

(8) Mecca v. Lukasik, 530 A.2d 1334 (Pa. Super. 1987):

Parent-administrators secured jury verdicts in an average amount of \$3,500,000.00 arising from the deaths of their teenage children who were killed when the car in which they were passengers plummeted from a roadway and landed some two hundred feet below. Plaintiffs presented the testimony of an economist who projected certain dollar amount lost earnings based on the planned careers of the minors to which the respective parents testified, including in his computations the children's life expectancies minus a maintenance figure, plus fringe benefit figures. The Superior Court found that the testimony of the economist constituted proper evidence for the jury's consideration. In all Survival Actions, damages are to be properly measured for loss of earning power less personal maintenance expenses from the time of death through a decedent's estimated working lifespan. While expert testimony is not required to show loss of earning capacity, either party in a negligence action is entitled to introduce expert or other evidence to establish or refute actual expected future earning capacity of a particular plaintiff. With reference to McClinton v. White, 444 A.2d 85 (Pa. 1982), a case pertinent to personal maintenance, the Superior Court related the procedure to be employed by the plaintiffs in presenting their proof on future loss of earnings capacity damages to the jury, as follows:

The expert, who was a professor of economics, calculated the earning potential of the two decedents, who were ages 16 and 18 at the time of their death in an automobile accident, both as college graduates and as high school graduates. He based these calculations on testimony of the decedent's interests, talents and ambitions. Thus, as in this case, experts are commonly used by plaintiffs to present their case regarding the future lost earnings.

Instantly, the economist relied partly on figures from the United States Bureau of the Census calculations for earnings data and discussed each of the decedent's possible earning capacities as revealed in the testimony of record regarding each decedent. The expert testified as to the future wage loss of all high school and college graduates, noting that the decedent girls had expected to

attend college according to their mothers, and one had planned to become a doctor. The economist also presented future wage loss figures of high school, college and medical school graduates. One of the male decedents was described by his mother as wanting to join the Air Force or learn air conditioning repair work. Accordingly, the economist also offered figures on future wage loss of high school graduates and for all white males. For another of the deceased boys, the father testified that his son wanted to be a mechanic like the father. This prompted appropriate future wage loss testimony for a mechanic in the economist's analysis. In upholding the admission of this testimony, the Superior Court explained that the testimony on which the economist "based his projections was more than the dreams of each teenager as supported by his or her parents." Notably, testimony was also given by the parents concerning their own stations in life and that of the respective siblings. As for the deceased daughter whose projections included medical school as a possibility, one of her sisters was already in medical school and one was in pharmacy. Although the academic performance of one of the other decedents as a high school freshman was not good, because her sister had attended college, the mother's testimony that the decedent wanted the same for herself was significant. Nor could the foundations in support of the economist's projections on the potential earning capacities of the boys who wanted to enter air conditioning repair work or the Air Force be said to be unreasonable given that siblings of one of the boys had attended college, and the father of the other boy was a mechanic. Again, the measure of damages in Survival Actions is the decedent's pain and suffering and loss of gross earning power from the date of injury until the date of death and loss of net earning power from the time of death through his/her estimated working lifespan.

(9) Berry v. Titus, 499 A.2d 661 (Pa. Super. 1985):

Mother of fifteen year old decedent, who was killed when the motorcycle he was driving collided with a car, had been divorced for sixteen months following eighteen years of marriage with the decedent's father. She had left the marital home. The decedent and his sister remained there with their father. The Orphans' Court determined as a matter of law that the mother had abandoned her parental connection with the decedent and suffered no pecuniary loss as a result of his untimely death, concluding therefore that she was not entitled to a share in the wrongful death action proceeds.

The Superior Court reversed. The purpose of the Wrongful Death Act is to compensate certain numerated relatives of the deceased for the pecuniary loss occasioned to them through deprivation of the part of the earnings of the deceased which they would have received from him had he lived. Only those persons who stand in a family relation to the deceased are statutorily authorized to recover damages. A family relation is defined to require a showing of pecuniary loss by the relatives seeking damages as a result of the wrongful death of the decedent. A family relation exists between a parent and a child when the child receives from a parent services or maintenance or gifts with such reasonable frequency as to lead to an expectation of future enjoyment of these services, maintenance or gifts. The term family relation, as thus used, does not embrace its comprehensive definition, but is confined to certain phases of family relation between the persons named in the Act. Before there can be any recovery in damages by one in that relation for the negligent death of another in the family relation, there must be a pecuniary loss. Contrary to the Orphans' Court's finding, the Superior Court found that the mother provided significant financial support to her deceased son by reason of her relinquishment of the majority of her share of the value of the marital home. Moreover, the decedent's mother joined the family on a camping trip one week before the fatal accident. Significantly, the mother continued to visit her son following the separation. The record demonstrated that the mother played an active role in raising the decedent through fourteen of his fifteen years and that she continued to maintain her parental bond with him following her separation from decedent's father. Accordingly, it was erroneous to find abandonment of the parental family connection with the decedent. The Court, most importantly, ruled that the mother established a pecuniary loss as a result of her son's death by contributing directly to his care and maintenance for his first fourteen years of life and to his maintenance by relinquishing her pecuniary interest in the marital abode for his benefit. From this, the Court concluded that the mother had an expectation of future enjoyment of her son's efforts had he lived to adulthood. The Court held that she stood in a family relation to the decedent.

(10) Slavin v. Gardner, 418 A.2d 361 (Pa. Super 1979):

Parents brought Wrongful Death and Survival Action upon the death of their two and one-half year old daughter who was killed in an automobile collision. She was by all appearances a normal,



healthy child, her father was a sales engineer earning significant monthly income, her mother intended to return to work once her youngest child reached school age, both parents expected the decedent to attend college and, in light of their background and station of life, that hope was deemed reasonable. Accordingly, the Superior Court found that the evidence was sufficient for the jury to assess damages in the Survival Action. The Superior Court observed that Courts have considered a variety of factors when evaluating damages in child-death cases. Included among them are the decedent's age, health, intelligence, probability of education and the parents' background, occupation and station in life. The evidence thus provided the jury with a reasonably fair basis for assessing the loss to the decedent's estate.

- (11) Rivera v. The Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 474 A.2d 605 (Pa. Super. 1984):

Decedent, age twelve, drowned while swimming in an indoor pool owned by St. Charles Seminary. His mother commenced wrongful death and survival actions which were tried before a jury. In reversing on other grounds and remanding for a new trial, the Superior Court offered several observations about evidentiary rulings in jury instructions pertaining to plaintiff's proof of damages, as follows:

A claim for damages must be supported by a reasonable basis for calculations; mere guess or speculation is not enough. However, the law does not require that proof in support of claims for damages or in support of compensation must conform to the standard of mathematical exactness. Testimony concerning lost fringe benefits, it has been held, is properly received; lost fringe benefits can be considered in making an award in a death case, at least to the extent that they are not wholly speculative and can be translated into income reasonably to be anticipated if the decedent had lived. Income taxes are not to be considered by the jury. Income tax as it relates to damages should not be mentioned neither in argument nor in jury instructions. Finally, the projected loss of future earnings is not to be discounted or reduced to present value.

- (12) Aleva v. Porter, 134 A.2d 501 (Pa. Super. 1957):

The parents of a four and a half year old boy who was struck by an automobile and killed, filed a Wrongful Death and Survival Action. The Superior Court upheld a jury award in their favor. Under the Wrongful Death Act, damages were paid for funeral expenses and a sum of money that the parents would have received from their son's earnings until he reached majority over and above the cost of maintaining the boy. Under the Survival Act, the Court ruled that it was for the jury to determine the life expectancy of the child and what his total earnings would be during the period, less the probable cost of his maintenance. In the Court's view, the discretion to be exercised in estimating how long this boy would have lived, save for the fatal accident, and the amount of his life long probable net earnings, was for the jury in this case and not for the Trial Court. The Court made clear that there is no fixed rule by which future damages resulting from the death of a minor can be measured with any degree of certainty.

- (13) Teamann v. Zafris, 811 A.2d 52 (Pa. Cmwlth. 2002):

In this tragic case, a minor son was a passenger in a vehicle involved in a chain reaction collision causing the vehicle to burst into flames leading to the death of plaintiff's son from third degree burns over one hundred percent of his body. A jury awarded the son's estate \$3,200,000.00 for his death. Of this award, \$900,000.00 was for pain and suffering, which the Trial Court reduced by \$700,000.00 on defendant's motion for remitter. On appeal, the parents contended that the Trial Court should not have remitted the verdict because there was sufficient evidence to support the full award. Specifically, the parents contended that Cyril Wecht, M.D., a Forensic Pathologist in the Coroner's office who performed the autopsy on their son and who was the only individual who testified regarding pain and suffering that their son endured, stated that their son died from third degree burns over one hundred percent of his body and that he was conscious for several seconds prior to his death. Plaintiff adduced from Dr. Wecht that consciousness was evident because there was evidence of reddening internally and a minimal degree of blacking which meant that some breathing took place following the impact and during the fire. Dr. Wecht also testified that the decedent's brain was swollen, a finding that exists only when a person was alive. In affirming the Trial Court, the Commonwealth Court restated that the measure of damages in a

Survival Action is the decedent's pain and suffering and loss of gross earning power from the time of injury until death. The decedent's pain and suffering prior to his death as a result of third degree burns over his entire body required an award that took that fact into account, even though it lasted only for a few seconds. Although the Commonwealth Court acknowledged that the determination of pain and suffering damages is a jury question, the Court agreed with the Trial Court and substituted its judgment for that of the jury. Viewed through the prism that an award for pain and suffering is intended to compensate the victim for actual pain felt and suffered as a result of injuries sustained, the Court espoused a view that the shorter the duration of pain and suffering, the smaller the award should be. Because Dr. Wecht's opinion was that the decedent was alive and conscious for only several seconds after the car in which he was riding was impacted, the Court disregarded the jury's findings and verdict and declared the verdict excessive.

(14) Emerick v. Fox Raceway, 68 Pa. D. & C. 4<sup>th</sup> 299 (Armstrong 2004):

Although this is not a death action, the mother of an injured minor son brought suit including a claim for loss of the child's consortium. The Trial Court struck this claim on a motion for summary judgment advanced by the defense, holding that it is well established in Pennsylvania that claims for loss of consortium are limited to spouses and do not extend to the loss of a child's consortium. Notably, the Court observed that plaintiff parents may proceed with a loss of "comfort and society" claim for the death of a minor son, having previously held in Winkoop v. Luke, *infra*, that under the Wrongful Death Statute, such loss could be compensable if, and only if, it resulted in a pecuniary loss.

(15) Winkoop v. Luke, 43 Pa. D. & C. 4<sup>th</sup> 16 (Armstrong 1999):

Plaintiff's decedent was thirteen years of age when he was struck by a tree which fell on a vehicle in which he was a passenger resulting in his death. His parents sought damages for the loss of filial consortium under the Wrongful Death Act due to the loss of their son's comfort and society. The Court observed that the issue of whether damages for a parent's loss of a deceased child's "comfort and society" in a wrongful death action are recoverable had become a topic of some debate. The Court focused on the concept of pecuniary loss defined to be a destruction of reasonable expectation of pecuniary advantage from the deceased. Accordingly, the Court

held that the plaintiff-parents may recover for the loss of their deceased son's "comfort and society," if they could prove that such loss resulted in the destruction of a reasonable expectation of a pecuniary advantage for them. The Court cautioned that if the parents could not so demonstrate at trial, then the loss of comfort and society must necessarily be an affectional loss, which is outside the purview of a Wrongful Death Action. The Court clarified that it was merely holding that the pecuniary losses arising from the kinds of deprivation commonly suffered by those making valid claims for loss of consortium in negligence actions, are compensable in a Wrongful Death Action. Accordingly, the loss of society or companionship would be compensable only if it resulted in a pecuniary loss.

(16) Cullison v. Hartman, 9 Pa. D. & C.2d 359 (Adams 1956):

Plaintiff's decedent, age sixteen years and a high school student, was killed in an automobile accident. The Court held that before there could be any recovery at all in damages for the negligent death of plaintiff's son, there must be a pecuniary loss defined to be a destruction of a reasonable expectation of pecuniary advantage from the deceased. Because the deceased minor son was survived by a mother to whom he contributed some of his summer earnings and a father to whom he contributed nothing, and father made payment under a support order for his wife and son and was in arrears at the time of his son's death, the right to maintain an action for Wrongful Death based upon pecuniary loss was in the mother, with the balance of the distribution to be distributed equally to the father and mother as persons entitled to share under the Intestate Act.

(17) Pearsall v. Emhart Industries, Inc., 599 F. Supp. 207 (E.D. Pa. 1984):

In yet another tragedy, a husband and two children were killed as a result of a fire in their home involving heat and smoke detectors which a jury found defective and negligently manufactured, and a substantial factor in causing the deaths of plaintiff wife/mother's family. In post-trial motions, the defendants argued that the Trial Court instruction as to damages for the wrongful death of the plaintiff's two children was erroneous because the Court charged the jury that it could award monetary damages for the expected pecuniary value of the childrens' services and emotional support beyond the age of their majority. The defense also argued that the

surviving mother could not be awarded damages for her loss of the emotional support of her children. The Court disagreed. Under Pennsylvania law, absent a strong factual presentation to indicate continued support beyond the age of majority, parents may recover compensation in an action for wrongful death of a minor child for services and support only up to the age of majority. Because the Court's charge stated that only support before the age of majority was compensable in a Wrongful Death Action, and its instruction on damages for services and emotional support immediately followed its instruction that the plaintiff could be awarded sums of money that the two children would have contributed to her support up to the time of their majority, the Court found the charge to be appropriate. The Court concluded that decedents' mother was entitled to be awarded all sums that her two children would have contributed to her support, and an amount that would fairly and adequately compensate her for the value of the services and emotional support that the decedents would have given her had they lived, including the provision of physical services, such as work around the house and the provision of emotional support. Their mother was thus entitled to be compensated for the loss of contributions that the decedents would have made for her shelter, food, clothing, etc., as well as the monetary value of emotional support that she lost.

(18) Blisard v. Vargo, 185 F. Supp. 73 (E.D. Pa. 1960):

In a Survival Action arising from the death of an eight and a half year old boy, the verdict was not excessive where the evidence demonstrated that he had before him the prospect of almost certain employment in a prosperous and growing business which was owned by his family and in which his father had an influential position, especially since the minor decedent had a work life expectancy of approximately forty-seven years after college. Specifically, the Court found that jury verdicts in the Wrongful Death and Survival Action were not excessive, grounded in the reasoning that the boy was sheltered to a large degree from the risks that the average person might encounter in seeking and retaining lucrative employment. The Court found that the boy had before him a "ready-made career in the family business with demonstrable earnings he might reasonably expect to receive from that business as evidenced by his father's average earnings from the business." The father, because of his intimate knowledge of and active participation in the business, made an excellent witness as to the future prospects

of the business. Life tables were utilized to determine life expectancy.

(19) Palmer v. Moren, 44 F. Supp. 704 (M.D. Pa. 1942):

Plaintiff's decedent, an eighteen year old minor at the time of the accident, was a passenger in an automobile struck by a semi-trailer. Immediately before impact, plaintiff's decedent jumped from the car in which he was riding. He died a few minutes later. His parents instituted a Wrongful Death Action and were successful in obtaining a jury verdict. Based on the actual earnings of the plaintiff's decedent, the Trial Court concluded that the verdict was excessive and, therefore, reduced the verdict subject to acceptance of remittitur by the plaintiff. In so doing, the Court observed that the measure of damages in an action for wrongful death by the parents of a deceased minor under the law at that time was the probable value of the son's services until he reached the age of twenty-one, less what the parents would have been required to pay for his maintenance. To this, medical expenses arising from the injury and funeral could be added. The age, health and mental condition of the minor and the minor's probable earnings reflected by the occupation, circumstances and life of the minor's parents, were factors to be considered. The value of services and gifts rendered by the decedent could also be taken into consideration in arriving at the pecuniary loss suffered by his death, provided they had been bestowed with such frequency and regularity as would leave one to expect their continuance. Proof on the question of damages involved the decedent's past earnings, his contributions to his parents who kept him, the cost of his maintenance, and evidence that he was an industrious and ambitious boy without bad habits who intended to obtain a more remunerative position. Further, it was established that he habitually made regular gifts of clothing and similar items to his mother and sister and that he helped around the house and garden when he was home every weekend.

C. VIABLE STILLBORN CHILDREN

- (1) Amadio v. Levin, 501 A.2d 1085 (Pa. 1985):

The parents of a stillborn viable child who died as a result of alleged injuries received en ventre sa mere brought a Wrongful Death and Survival Action against the mother's obstetricians. The Pennsylvania Supreme Court recognized that a child's wrongful death is a separate injury from that of the mother. The child's wrongful death is, as a consequence, compensable in damages. The child's estate is the proper party to seek recovery for the decedent child's funeral and medical expenses. Pecuniary losses are recoverable under the Wrongful Death Act, as is loss of earning power less the costs of maintenance. Additionally, damages for any pain and suffering of the decedent are payable, if proven, under the Survival Act. Accordingly, the Supreme Court reasoned that the recovery afforded the estate of a viable stillborn is no different than the recovery afforded the estate of a child that dies within seconds of its release from its mother's womb. The Court thus recognized that Wrongful Death and Survival Actions lie by the estates of stillborn children for fatal injuries received while viable children in utero. The Court cautioned, however, that parental pain and suffering are not available through a Wrongful Death and Survival Action.

- (2) Caraballo v. Lehigh Valley Hospital, 2008 WL 4948209 (Pa. Com. Pl. Lehigh 2008):

Parents of a deceased stillborn commenced Wrongful Death and Survival medical malpractice action on behalf of their stillborn son. A jury found that the medical defendants were not negligent. In post-trial motions, the plaintiffs asserted that the Trial Court erred in refusing to provide the jury an instruction regarding the stillborn's claim for non-economic damages. Notwithstanding the fact that this claim was moot because the jury determined that the defendants were not negligent, the Trial Court noted that the plaintiffs' expert testified that the infant had died forty-eight to seventy-two hours before his birth leading the Court to wonder how there could be pain and suffering. Upon review, the Court opted not to instruct the jury as to the stillborn's pain and suffering due to a lack of evidence regarding the same. In this regard, the plaintiffs asserted that their expert testified that the infant developed hypoxia which led to the child's death. However, nothing in the experts'

testimony indicated that the baby suffered any actual pain. Because there was no proper basis to instruct the jury with reference to the stillborn's claim for non-economic damages, the Court concluded that it properly declined to do so. In analyzing its decision, the Court noted that the Pennsylvania Supreme Court in Amadio, supra, did not determine whether actions on behalf of a stillborn would lie where the plaintiff sues on behalf of a fetus which never achieved viability. Instantly, the undisputed evidence revealed that the fetus was non-viable forty-eight to seventy-two hours before the delivery and there was no evidence that the stillborn was a viable fetus capable of an independent existence at the time of the infant's demise.

(3) Hartman v. Oh, 65 Pa. D. & C 4<sup>th</sup> 1 (Lebanon 2004):

In this Wrongful Death and Survival Action arising from claimed obstetrical malpractice leading to the birth of a stillborn child, the Trial Court denied a motion for summary judgment where parental plaintiffs' expert described the fetus as viable. As to the standard of proof needed to establish pain and suffering, the Trial Judge permitted the claim to go forward, and observed:

To any adult, pain is experiential. No human being has escaped pain, illness or distress. This is the precise reason that juries are asked to quantify and award monetary damages as compensation for pain and suffering. After all, each juror knows by experience how pain can affect the lives of those suffering from it.

In stark contrast, pain suffered by a stillborn child is not experiential. If such pain exists, there is no way for the fetus to communicate or describe its pain. Unless or until medical science can establish what a fetus feels while in the womb, there is simply no yardstick by which intrauterine pain and suffering can be measured.

The above leaves us in a dilemma. On the one hand, we are instructed by our Supreme Court to permit a claim on behalf of a viable fetus 'despite' problems of proof that such claims



engender. On the other hand, we are also instructed that the damages should not be calculated based upon ‘speculation.’ Quite frankly, we see no way to reconcile these two legal principles. As we see it, the only conceivable measure of a fetus’ pain and suffering would be via the tool of ‘speculation.’

At this point, we will resolve our dilemma by following Amadio. We will allow the pain and suffering claim of [plaintiff’s decedent] to proceed beyond the summary judgment stage of these proceedings. We are cognizant that we are merely delaying resolution of our dilemma until another day in hopes that medical science and/or the Supreme Court will come forward with an answer that will help us. Absent new developments as set forth above, we will revisit this issue after the conclusion of the plaintiffs’ case.

In addition, the plaintiffs asserted a claim for “loss of contributions, support, consortium, comfort, counsel, aid, association, care and services of the decedent,” which the Trial Court referred to as a “loss of filial consortium” claim. The Court aptly observed and discussed a split among the courts on the issue of whether parents may be permitted to recover filial loss of consortium. The Court ruled that parents may not recover filial consortium. However, the Court permitted the parents to present any proof they might have as to economic or pecuniary loss they have or would suffer as a result of their stillborn daughter’s death under their Wrongful Death count.

### **3. CHALLENGED PERSONS**

#### **A. SIBLING DECEDENT**

- (1) Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3<sup>d</sup> Cir. 2006):

Sister of mentally challenged man filed a Wrongful Death and Survival claim under the Federal Tort Claims Act against her brother’s physicians and the medical/geriatric facility that provided

her brother's care, asserting that her brother died because the doctors administered a combination of psychiatric drugs to the point of toxicity which went undiagnosed, became irreversible and eventually terminal. In deciding a Statute of Limitations issue in favor of the plaintiff, the Court of Appeals for the Third Circuit observed that a Wrongful Death Action under Pennsylvania law, while technically an independent cause of action, is in some sense derivative. While not derivative of the decedent's personal injury action, such causes of action are deemed derivative of the original tort which resulted in the injury and eventual death. Accordingly, if on the date of the decedent's death, the Statute of Limitations had run on the underlying tort, his survivors would be barred from bringing a Wrongful Death claim. However, if the survivors could bring a Wrongful Death claim, the Statute of Limitations would begin to run on the date they sustained the pecuniary loss, i.e., the date of the decedent's death. Given that the decedent was mentally impaired with an approximate mental age of four years old, the Court found that his profound mental retardation prevented him from any awareness of his injury or its cause. Ultimately, the Third Circuit reversed the District Court rulings which had granted summary judgment on Statute of Limitations grounds.

**B. CHILD DECEDENT**

- (1) Department of Public Welfare v. Schultz, 855 A.2d 753 (Pa. 2004):

Plaintiff's adult son, a committed patient of a State hospital, wandered off its grounds and froze to death about one-half mile from the hospital. His mother instituted a Wrongful Death and Survival Action seeking recovery of non-pecuniary losses of comfort, society, love, affection, companionship, support and friendship. The Survival Action was settled. The Trial Court refused to dismiss the non-pecuniary Wrongful Death claim. The Commonwealth Court reversed, concluding that a parent may not recover non-pecuniary losses under the Wrongful Death Act. In affirming the Commonwealth Court, the Supreme Court held that because a parent cannot bring an action for loss of consortium resulting from the death of a child, the plaintiff was barred under the Sovereign Immunity Act from bringing an action against the Commonwealth for such non-pecuniary losses. The Court expressly limited its decision to the facts before it, and did not resolve the issue of whether the Wrongful Death Act outside the context of sovereign

immunity, permits recovery of such damages in a suit against a private party.

- (2) Schorr v. Borough of Lemoyne, 265 F. Supp. 2d 488 (M.D. Pa. 2003):

The parents of a bipolar son who was shot and killed by a police officer brought a civil rights action and a Wrongful Death and Survival Action. In their complaint, they sought damages for loss of filial consortium. The Trial Court dismissed this claim holding that the parents could not recover loss of consortium under the Pennsylvania Wrongful Death Act. However, the Court held that the plaintiffs could recover for the economic value of their son's life as well as the special expenses provided by statute in their Wrongful Death claim. The Court determined that the measure of damages for the death of a minor child is limited to funeral and medical expenses, plus total earnings which would have been earned by the child up to the age of twenty-one, minus the cost of maintaining the child during this period.

## V. CONCLUSION

The Wrongful Death Act is designed to compensate the statutorily enumerated relatives of the decedent for the pecuniary loss they suffered as a result of the death, including the deprivation of the part of the decedent's earnings that they would have received but for the death. In presenting the pecuniary loss, the proof must demonstrate a destruction of the reasonable expectation of pecuniary advantage from the decedent to his or her family which includes services and contributions. This in turn requires an assessment of the amount the decedent would have contributed for the benefit of his or her statutory beneficiaries, after deducting that part of the decedent's probable maintenance which cannot go to the benefit of the beneficiaries and cannot, for this reason, be part of any damages suffered by the beneficiaries as a result of death. However, it is not necessary for a beneficiary to have been dependent on the decedent to be entitled to recover in a Wrongful Death Action. The decedent's services, society and companionship are also a major loss. And, when a parent dies, the elements of care, training, advice, guidance, education and tutelage are fully recoverable and can never be overstated. Of course, funeral and burial expenses, estate administration expenses and medical expenses are recoverable as special damages.

Because the statute regulating Survival Actions makes no reference to the types and amounts of damages recoverable, the measure of damages must be determined through an understanding of Pennsylvania decisional law. The Survival Action is merely a continuation in the personal representative of the right of action that accrued to the decedent under common law

arising from the original injury and not out of the death. Accordingly, the estate is substituted for the decedent, enabling the personal representative to recover the same damages as would the decedent if he or she had survived until the conclusion of any litigation. The pain and suffering of the decedent prior to death is, generally speaking, the core of damages in a Survival Action. Evidence of fright and mental suffering attributed to the peril causing the death may be adduced as a proper component of this damage. Pain and suffering may be proven through eyewitness testimony, or inferred from the circumstances or through expert testimony. Although the economic losses stemming from lost earnings and earning power overlap to some extent in a Wrongful Death Action and Survival Action, where damages are awarded to a decedent's family members under the Wrongful Death Act, to avoid a duplication of damages, the recovery for the decedent's probable net earnings during the period of his or her life expectancy in the Survival Action must be reduced by the amount of the pecuniary loss awarded to the decedent's relatives in the Wrongful Death Action. If the decedent is a minor or an adult without a dependent spouse, children or parents, there can be no recovery for loss of contributions beyond those given by a minor to his or her parents and family and, therefore, no deduction from net earnings. Absent any survivors who can prove pecuniary loss, the decedent's estate would then be entitled to the full amount of the decedent's future net earnings.

Every death case should be carefully analyzed under the governing legal precepts applicable to Death Actions. To succeed in maximizing damages, there must be a full understanding of all of the components of recoverable damages as well as the relationship between the damages allowed under both the Wrongful Death Act and the Survival Act. The burden is on the plaintiff to produce sufficient evidence for a jury to determine the losses sustained, including the decedent's maintenance, life expectancy, past and future earning power, and essential non-economic damages in the form of loss of society, comfort, guidance, tutelage and nurturing. Proof of pain and suffering from the date of injury until death is paramount to securing a full award, especially where the economic component is lacking or diminished. Exquisite attention to detail must be exercised to fully and fairly present all evidence of loss from which to advocate and achieve a maximum successful recovery grounded upon the best available evidence.