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Compensable Damages for Loss of Companionship

By: Dan Jeck



There really is no debate. There is no greater loss than the loss of a child. In preparation for this summary, I re-read several articles about the senseless tragedy that unfolded only a few months ago at Sandy Hook Elementary School in Newtown, Conn. It was truly numbing. Some of the parents of the 20 children killed who dropped them off at school that morning hold onto the hope that their kids are going to come home. Nicole Hockley still reaches for her son Dylan's hand in parking lots, according to *The New York Times*. Another parent expects her son to crawl into her bed for hugs before "goodnight."

These parents will never be the same. These families will never be the same. As time passes, that community will return to ordinary life, but the lives of the families affected by the Sandy Hook shootings will never again be ordinary. They are now in the process of redefining themselves and are at a loss as to how to move forward. Somehow, they will move forward. The seasons will change, anniversaries and birthdays will come and go and they will go on. But, there will always, always, be the grief they have suffered that may dull over time but which will always be present every minute of every day.

I have seen and heard from such grieving parents who have suffered the tragic loss of a child because of the misconduct of others in many cases in Pennsylvania courtrooms. Zealous defense counsel routinely file motions in limine to prevent family members from describing their losses as part of compensable damages in Pennsylvania tort cases. The argument to keep such testimony out is that it is too speculative to attach a number to such a loss. I've actually seen counsel argue that it is too prejudicial. Fortunately, Pennsylvania law, both statutory and at common law, is clear: Such damages for the loss of a close family member are undeniably compensable.

The Pennsylvania Wrongful Death Act, 42 Pa. C.S.A. Section 8301, allows a spouse, children or parents of a deceased to sue another for a wrongful or neglectful act that resulted in the death of the deceased. Section 8301(c) lists the special damages that may be sought: "In addition to other damages, damages for the reasonable hospital, nursing, medical, funeral expenses and expenses of administration." Case law interpreting the "other damages" has included damages for the value of the decedent's life to the family, as well as expenses caused to the family by reason of the death. It is widely understood that a wrongful-death action is not to compensate the decedent, but rather the survivors for damages they have sustained as a result of the decedent's death.

The Pennsylvania Superior Court has previously set forth that the purpose of the Wrongful Death Act is to compensate the decedent's survivors for the pecuniary losses they have suffered as a result of the decedent's death. This includes the value of services the victim would have rendered to family if he or she had lived. (See *Machado v. Kunkel*, 2002 Pa. Super. 232, 804 A.2d 1238 (Pa. Super. 2002); *Slaseman v. Myers*, 309 Pa. Super. 537, 545, 455 A.2d 1213 (1983).)

As will be discussed below, "services" include the loss of the comfort and society of the deceased; otherwise stated, the emotional and psychological loss suffered by the remaining parents or child. (See *Rettger v. UPMC Shadyside*, 2010 Pa. Super. 41, 991 A.2d 915 (Pa. Super. 2010).) The recurring argument that there is inherent uncertainty involved in determining fair and adequate compensation for the loss of the companionship, society and comfort of another has been squarely addressed, as far back as 1959 by the Supreme Court of Pennsylvania in *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 484-485, 153 A.2d 490, 492 (1959), which found:

"The fact that there is no mathematical formula whereby compassionately bestowed benefits can be converted to a precise number of banknotes does not mean that the tortfeasor will be excused from making suitable reimbursement for their loss ... all these things — such as companionship, comfort, society, guidance, solace and protection which go into the vase of family happiness — are things for which a wrongdoer must pay when he shatters the vase."

More recently, the Pennsylvania Superior Court, in *Rettger*, rather unequivocally stated: "The purpose of the Wrongful Death Statute, 42 Pa. C.S. Section 8301, is to compensate 'the decedent's survivors for the pecuniary losses they have sustained as a result of decedent's death. ... This includes the value of services the victim would have rendered to his family if he had lived.' ... A wrongful-death action does not compensate the decedent; it compensates the survivors for the damages which they have sustained as a result of the decedent's death."

In *Rettger*, the estate commenced a medical malpractice action following the death of Michael Rettger, age 24, who received a differential diagnosis that contained a brain tumor and brain abscess. A day prior to his surgery, he displayed neurological changes for which his nurse testified that she contacted his neurosurgeon. While the nurse asserted that she told the neurosurgeon that Rettger's pupils were fixed and dilated, the neurosurgeon contended that she only told him that the pupils were uneven, essentially indicating that his condition was unchanged, according to the opinion. The doctor did not report to the hospital or order emergency treatment and the nurse did not invoke the hospital policy to obtain immediate critical care for a patient whose condition appeared emergent.

Prior to surgery, Rettger lost consciousness and was placed on life support. Although the doctor conducted two emergency surgical procedures that day to relieve pressure in his brain, he never recovered and died. Following the trial, the jury deliberated and awarded \$2.5 million on Rettger's wrongful-death claim. UPMC appealed many issues, including the denial of a request for remittitur. The hospital argued that the jury's award of \$2.5 million was excessive, Rettger was unmarried and had no children (or dependents) and provided only limited services in his parents' home, to which he returned only on weekends. The trial court noted that the hospital failed to cite a single source of authority to support its analysis or even set forth a standard of review and, therefore, found that the claim was waived. However, the Superior Court went further to clarify that, even if it were to have considered the hospital's claims on its merits, it would not have found sufficient grounds to grant the requested relief. A discussion on damages for wrongful death ensued.

The *Rettger* court found that services for which the parents can be compensated should not be so limited or diminished to imply that they are only worth a little more than the value of household chores. The court held that wrongful-death damages include the value of a decedent's services, which includes loss of society and comfort. The court further held that "services" extends to the "profound emotional and psychological loss suffered upon the death of a parent or child where the evidence establishes negligence of another as its cause."

In the *Rettger* opinion, the court next went on to cite testimony from the trial given by the decedent's mother, Judy Rettger, that supported this claim. After describing the horror that she witnessed after her son came back from surgery, heavily sedated and non-responsive, she recalled the kind of person he was — everybody's friend, who was there for everyone. In a final rejection of the defense argument that such damages are speculative, the court found that "even viewed within the confines of a cold record, Mrs. Rettger's loss far exceeded the value of her son's yard work."

Hatwood v. Hospital of the University of Pennsylvania, 2012 Pa. Super. 217, 55 A.3d 1229 (Pa.Super. 2012), involved a medical malpractice action concerning the delivery and subsequent death of Hyseem Jacobs at age 17 months. After a two-week trial, the jury awarded the plaintiffs more than \$2 million against the remaining trial defendants. Among other issues raised on appeal, the defense claimed that the trial court erred in failing to strike the jury's award for "loss of society and companionship" under the Wrongful Death Act. As in *Spangler* and *Retzger*, the defense argued that such measure of damages was too uncertain to allow for recovery.

Jacobs' father and other family members testified at trial. They explained that they were a close-knit family and, for the relatively short time he lived, they played and helped care for him. The Superior Court upheld the trial court's finding that such evidence was sufficient to allow the jury to utilize its "common inheritance" to assign a value to the baby's life and found no error in the court's instruction to the jury — specifically, that the plaintiffs are entitled to be awarded a sum that will "fairly and adequately compensate the family for the monetary value of the companionship, society and comfort that Hyseem Jacobs would have given the family had he lived."

Damages for the loss of the companionship, society and comfort of a family member are not limited to the loss of a child. They are damages regarding the value of the decedent's life to the family. Under the holding of *Retzger*, the value of the decedent's services extend from the death of a child or parent where there is enough evidence to support the claim.

Damages for loss of the companionship, society and comfort of a parent or of a child should neither be overlooked nor undervalued. The arguments that they are too speculative or are not specifically delineated within the Wrongful Death Act, itself, have been wholly rejected going back now over 50 years. Such measure of damages, which appear to only require the support of testimony of a close family member, are clearly allowable under the Pennsylvania Wrongful Death Act. •

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