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Damages Pt. 11 – Wrongful Death

In this week's installment of the ongoing series on damages the attorneys here at Pavlack Law discuss both the ability to recover damages and to whom damages may be awarded under Indiana's Wrongful Death Statute.

In order to understand how Indiana's Wrongful Death Statute works it is necessary to understand how the law functioned prior to the adoption of wrongful death statutes. The Indiana Court of Appeals recently discussed how the law functioned prior to the Wrongful Death Statute.

At common law, there was no liability in tort for killing another person because actions for personal injury did not survive the death of the injured party. Thus, wrongful death actions are purely creatures of statute.

What this means is that prior to the adoption of the statute the law was unbelievably strict. The law held that if the injured person died, the person causing the harm was obviated of any liability. As such, the law was so absurd as to find that a person whose negligence claimed the life of another was not on the hook for so much as a dime. Thus, the law had created a perverse incentive for a tortfeasor to make sure that the injuries inflicted upon another were life threatening. Fortunately the law has since changed.

Currently, under Indiana's Wrongful Death Statute, a person can recover for

the injuries that killed him. Or, more accurately, that person's estate can recover for those injuries. The problem at common law that led to the absurd reality discussed above is that the right to bring a legal action against someone is unique to an individual – meaning that only the person directly harmed can bring a claim. If you think about it on a fundamental level this makes sense. If someone rear-ends your car, your neighbor down the street should not be able to sue the negligent driver for your injuries. This premise was what caused the problem at common law, because the person who was injured was dead and thus was no longer in a position to sue anybody.

The way the law works now is that the right to sue survives the death of the individual and becomes part of that person's "estate." You may be more familiar with the term estate being used in the context of a will. In the case of a will that is what is called a Probate Estate. In a Probate Estate someone files a deceased person's will with a court and then the executor or executrix of the estate – typically a person named in the will, often a son or daughter – will see that the debts of the deceased person are paid and that the will is followed for inheritance. In the wrongful death context what is opened is a Wrongful Death Estate. The sole purpose of the Wrongful Death Estate is to act as a legal fiction – like a corporation – which exists to pursue a wrongful death claim on behalf of the deceased person.

Under Indiana law a wrongful death claim can be brought "[w]hen the death of one is caused by the wrongful act or omission of another . . . if the [deceased] might have maintained an action had he or she . . . lived[.]" The claim must be brought within two years after the injury-causing event. The law allows a person's estate to seek damages for things such as "reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission." To the extent that damages are recovered for hospitalization and burial expenses, those fees are to be used by the estate to pay those expenses. The remaining damages are to be paid to the person's spouse, dependent children, or dependent next of kin.

Where the deceased person is an adult – 20 years of age or 23 if enrolled in postsecondary education – who is unmarried and has no dependents the law is a little different. The most notable difference is that the recovery is capped at only \$300,000 for damages that are not funeral or medical expenses.

Where the deceased person is a child – someone younger than 20 or younger than 23 if enrolled in postsecondary education – the only recovery that can be made is for the loss of the child's services, love and companionship, and expenses. Moreover, the calculation of those damages only runs until either the child would have turned 20 or 23 if in postsecondary education or the date of death for the last

surviving parent of the child. One thing you may note that is very much lacking is the ability to recover punitive damages in a wrongful death action.

While it is relatively easy to identify to whom damages may be awarded, it is quite another thing to calculate those damages. Judge Posner of the Seventh Circuit Federal Court of Appeals discussed this issue in a recent decision. In *Arpin v. United States*, the highly regarded and oft maligned Judge Posner wrote:

Loss of life is a real loss even when it has no financial dimension (the decedent might have had no income). So is the loss of the companionship (“consortium”) of a loved one. The problem is the lack of a formula for calculating appropriate damages for loss of consortium.

Judge Posner is absolutely right that the most difficult part in a loss of life setting is calculating damages. As courts are nothing more than the power of man vested in an institution, they lack the ability to return the loved one lost. The only method of redress within the court’s arsenal is to grant monetary damages. But putting a price tag on a life is not only not a small feat but is virtually impossible. Judge Posner, in the *Arpin* decision, gives a bit of insight into how he envisions such a calculation. He hypothesized that if you assume that a person would require \$7 to perform a task that had a 1 in 1 million chance of causing that person death, then has the value of that person’s life not been assessed to be \$7 million, as that is the value assigned to it by the person himself? Though, as Judge Posner wisely adds, “Not that [the person] would sell his life for that (or for any) amount of money[.]”

This position is similar to one held by the author of this post. The author has long contended that if the purpose of tort law is to make a person whole – that is to put the person in the same place that he would have been but for the injury – then should not the amount of award reflect the amount at which you could pay a reasonable person to sustain the same injury? That is, if a reasonable person were offered \$1 million in exchange for someone breaking his arm, it is likely that the person would accept the money and allow his arm to be broken. So the value of a broken arm is equal to or less than \$1 million. In fact, the reasonable person might be willing to allow this to happen for a lot less – perhaps \$25,000. Essentially, the value is equal to whatever someone would accept in exchange for the act voluntarily being done to him. This is basically the position taken by Judge Posner, albeit through a more circuitous route. The difficult task in this approach is trying to determine what a reasonable person would consider the proper value for the exchange.

Fortunately, there are approaches that are much more easily quantified that are the typical approach for calculating such damages. For example, when dealing

with the death of a person, it is important to make some determination as to how long that person would have lived but for the injury that killed him. This is typically done using a life expectancy table, such as this table provided by the Social Security Administration. In dealing with lost wages, a typical approach is to use a worklife expectancy table such as this.

However, the calculations are not as simple as just plugging data for how long the deceased person would have lived and going from there. There are other concerns. For example, if the damage recovery is for loss of love and companionship then the amount applied for each year will only extend until such time as either the deceased person would have likely died or the date on which the person recovering the damages would have died, whichever is sooner. A good way to understand this scenario is to consider a scenario in which a husband and wife are driving in the same vehicle and are both killed in a horrible car crash caused by the negligence of another. In that case the difficulty arrives in assessing damages because the wife – who would have been entitled to recover damages for the loss of her husband – has passed away herself, and vice versa. In that case both the wife's and husband's estates would be able to bring claims for the loss of each other. However, the measure of time for the loss of each other's company would have to be the exact same. It would be the date on which either the husband or wife is projected to have deceased, whichever is earlier. To make this clear, let us assume that the husband and wife were, coincidentally, born on the exact same day, March 30, 1987 – the day the Hoosiers topped Syracuse for their fifth NCAA men's basketball title. Moreover, the accident that claimed their lives was on their 25th birthday. Under this life expectancy table by the Social Security Administration the wife would have been expected to live another 56.35 years while the husband was expected to have lived for only 51.78 more years. Thus, both estates could only recover for 51.78 years.

Needless to say, the calculations for wrongful death cases, and frankly any injury case, can be quite complex. It all comes down to the most basic problem, how do you take a life filled with millions of moments of joy and sorrow that impacts untold numbers of other lives and reduce it to a single number with a dollar sign in front of it.

Join us again next week for the next installment in our series on damages.

- Pt. 1 – Introduction to Damages and Loss of Consortium
- Pt. 2 – Duty to Mitigate Damages
- Pt. 3 – Diminished Value of Vehicle Due to Traffic Accident
- Pt. 4 – Damages for Negligently Inflicted Emotional Distress
- Pt. 5 – Assessing Damages When Injured Person is Partially at Fault
- Pt. 6 – Availability of Prejudgment Interest

- Pt. 7 – Indiana Crime Victim’s Relief Act
- Pt. 8 – Ability to Recover by Piercing the Corporate Veil
- Pt. 9 – Damages for the Loss of Chance of Survival from Medical Malpractice
- Pt. 10 – Punitive Damages Under Indiana Law
- Pt. 12 – Contract Damages

Sources

- Indiana’s Wrongful Death Statute: Ind. Code § 34-23.
- *Forte v. Connerwood Healthcare, Inc.*, 702 N.E.2d 1108, 1110-11 (Ind. Ct. App. 1998).
- *Arpin v. United States*, 521 F.3d 769, 775-76 (7th Cir. 2008).

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