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When Dicta Runs Amok: Untangling PJI 2:320

Imagine a common scenario: A wrongful death case where the decedent leaves behind a spouse, two children, and a third adult child from a prior marriage...

By **Timothy R. Capowski and Sofya Uvaydov** | September 21, 2020



Imagine a common scenario: A wrongful death case where the decedent leaves behind a spouse, two children, and a third adult child from a prior marriage (a blended family dynamic that is hardly unusual in the 21st century). How will the losses of these four people be compensated? The Pattern Jury Instruction (PJI) for wrongful death damages, PJI 2:320, provides two sets of instructions; one to itemize the damages for the four distributees, and a second separate modification if your case happens to fall within the jurisdiction of the Second Department. The PJI Commentary suggests that *dicta* in a Second Department decision, *Carter v. New York City Health & Hosps. Corp.*, 47 A.D.3d 661 (2d Dept. 2008), created this split by requiring one lump sum award for four different people instead of compensating our hypothetical family individually.

A more nuanced look beyond the PJI, however, reveals that there exists no true split. Beyond the single instance of *dicta* from *Carter*, the Second Department has never taken up the lump sum approach, and the Court of Appeals in its own *dicta* subsequently criticized lump sum awards as contrary to the CPLR and

frustrating meaningful appellate review. Furthermore, this approach does nothing more than create additional cost and work and disputes for plaintiffs and defendants alike.

The “Split” On Pecuniary Awards

In a wrongful death case, under EPTL 5-3.2, an administrator of the estate may bring an action for pecuniary damages caused by the decedent’s death to the distributees. These pecuniary damages may include loss of financial support, loss of services, possible inheritance, loss of parental guidance and medical and funeral expenses incidental to death. *Gonzalez v. N.Y.C. Hous. Auth.*, 77 N.Y.2d 663, 668 (1991); *Milczarski v. Walaszek*, 108 A.D.3d 1190, 1190 (4th Dept. 2013).

The Fourth Department over 17 years ago overturned a wrongful death jury verdict for lack of proper itemization of the distributees’ various claimed losses on the verdict sheet. The court held, “[t]he plaintiff in a wrongful death action is entitled to recover damages for only pecuniary loss, i.e., the economic value of the decedent to *each distributee* at the time decedent died.” *Huthmacher v. Dunlop Tire Corp.*, 309 A.D.2d 1175, 1176 (4th Dept. 2003) (emphasis added). The apportionment of pecuniary losses amongst distributees was a question of fact for the jury, as the Huthmacher court explained (id. at 1177):

[W]e [do not] see any other basis for allocating, ourselves, the loss of past and future earnings without impinging on the duties of the finder of fact (see generally EPTL 5-4.3 [a]).... On retrial, the verdict sheet must direct the jury to make a separate award for past and future loss of earnings, past and future loss of services, past and future loss of parental guidance, and loss of inheritance to each survivor to whom such an award is applicable.

The approach is logical and contemplates the wide variety of familial circumstances presented in such cases: a person likely supports a spouse, a minor child and an adult child in varying respects. Thus, the Court of Appeals has noted that “circumstance of the distributees” must be one of the factors considered by a jury. *Gonzalez v. N.Y.C. Hous. Auth.*, 77 N.Y.2d 663, 668 (1991).

The contrary *dicta* arose in *Carter*, a medical malpractice action, where the court vacated a pecuniary award to seven of decedent’s grandchildren since they were not distributees while the decedent’s children survived. In *dicta*, the Second Department provided (id. at 664):

[W]e note that it was improper for the Supreme Court in this case to use a special verdict sheet requiring the jury to determine the amount of economic loss damages to be awarded to each individual distributee. The jury’s role should have been limited to determining, based on the evidence presented at trial, the total amount of wrongful death damages to be awarded to all distributees (see EPTL 5-4.3). The apportionment of any award of economic loss damages made upon retrial should be determined by the Supreme Court, Kings County, or by the Surrogate’s Court, Bronx County, after a hearing in accordance with applicable law...

Based on *Carter*, the PJI commentary to 2:320 cautions that courts in the Second Department should deviate from the established rule and standard instruction to award lump sum verdicts. The PJI even provides suggested alternative language for trial courts in the Second Department.

COA Casts Shadow On Lump Sum Approach

In 2016, about eight years after *Carter*, the Court of Appeals weighed in with its own *dicta* on the lump sum versus itemized damages debate in *Mazella v. Beals*, 27 N.Y.3d 694, 712 (2016). In that medical malpractice case where the jury awarded one sum for the plaintiff administrator and another lump sum for the three

distributees, the Court of Appeals advised that on retrial, the parties should “consider a special verdict sheet itemizing the subcategories of damages [to] assist a court’s review of the jury’s monetary award” pursuant to CPLR 4111(d). *Id.*

But even before *Mazella* cast shadow on *Carter’s* approach, the purported lump sum requirement has not been followed by the Second Department itself, which repeatedly affirmed itemized pecuniary awards with nary a comment. See e.g., *Motelson v. Ford Motor Co.*, 101 A.D.3d 957, 962 (2d Dept. 2012) (affirming a jury award for decedent’s wife but not his adult children). Not even a year after *Carter*, the Second Department in *Perez v. St. Vincent’s Hosp. & Med. Ctr. of N.Y.*, 66 A.D.3d 663, 664 (2d Dept. 2009), another medical malpractice wrongful case, considered an itemized pecuniary award between decedent’s three children and vacated the award as against two of the adult children. Notably, had the verdict been awarded in a lump sum rather than an apportioned amount, the court would not have been able to strike the awards for the two distributees, necessitating a new trial.

New York Supports Itemization By a Jury

The lump sum approach also runs contrary to several statutes and rules and appears to be a too narrow reading into the term “hearing.” As the *Mazella* court notes, CPLR 4111(d) and (e) direct itemization of wrongful death damages. An itemized verdict aids a court in its review as to sufficiency of the evidence for each distributee or excessiveness of an award under CPLR 5101(c).

More practically, the status of each distributee (i.e. their age) would affect the structuring of the judgment under CPLR Article 50 and the proper ascertainment of CPLR 4545 collateral source offsets. For instance, minor children distributees would have a longer future award and might be eligible for Social Security Survivor benefits that act as a collateral source offset, which needs to be determined before a judgment is entered.

Nor does the EPTL necessitate a different approach. EPTL 5-4.4(a)(1) provides that proportion of distribution amongst distributees are “to be determined after a hearing,” with a jury trial sufficiently satisfying the requirements of a hearing. Indeed, various Surrogate Court decisions have indicated that a Surrogate Court’s hearing is only necessary when there has been no jury verdict. *In re Estate of Feld*, 153 Misc. 2d 615, 618 (Sur. Ct. N.Y. County. 1992); *Chicosky v. Cormier*, No. 1995 NYLJ LEXIS 974, *5 (Sur. Ct. Suffolk Cnty. Aug. 1, 1995).

Lump Sum Approach Is Inefficient

Finally, a lump sum approach is simply inefficient and wastes court and party resources. An administrator plaintiff would need to conduct two separate hearings with substantially similar evidence. At a trial, plaintiff must present evidence of each individual distributee’s loss since damages are “the pecuniary loss suffered by the individual distributees as a result of decedent’s death.” See *Hernandez v. N.Y.C. Health & Hosps. Corp.*, 78 N.Y.2d 687, 693 (1991) (emphasis added).

At a subsequent hearing, plaintiff administrator must present the same evidence to obtain an apportionment. As for a wrongful death defendant, as discussed above, a lump sum award would cripple and deter a successful post-trial and appellate review, making it difficult to vacate or remit an award without the expense of a new trial.

As such, although the PJI commentary notes that the Second Department suggested a differing lump sum approach in the twelve-year-old *dicta* of *Carter*, there is no legal support in the subsequent years for adhering to this burdensome and inefficient approach once trials resume in the Second Department.

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