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Double Trouble: The Dilemma of Duplicative Damages

Plaintiffs shouldn't collect for both 'death' and 'loss of life's enjoyment'

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One of the more difficult and somber tasks that judges and juries face is determining non-economic damages in a wrongful death case. Measuring the value of a person's life, and the appropriate damages for the loss of that life, raises many ethical and philosophical dilemmas. As if this responsibility were not challenging enough, recent wrongful death verdicts have compounded the task by asking jurors to assess damages not only for "loss of the enjoyment of life's activities," but also for "death itself." (See *Morrin v. Koplin*, 2014 WL 4817934, Conn. Super. Court, 2014). Allowing independent damage awards for flip sides of the same coin (loss of life's enjoyment and death) inevitably leads to duplicate recoveries, and unnecessarily complicates the fact finder's already difficult mission of assessing damages.

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How did we get here? At common law, there was no cause of action for wrongful death. Although a "death statute" has been in existence in Connecticut since 1848, the first statute that recognized the recovery of damages for death as a result of negligence passed in 1877. Under the current wrongful death statute, General Statutes Section 52-555, an estate may recover for a wrongful death, and may recover "just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses." The statute does not further define "just damages," but Connecticut courts, over time, have elaborated on the concept.

For example, in *Chase v. Fitzgerald,* 132 Conn. 461, 470 (1946), the court affirmed a verdict for the wrongful death of a married, unemployed housewife, clarifying that wrongful death damages are not limited to economic loss, but include compensation for the loss of a decedent's "capacity to carry

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on life's activities as she would have done had she not been killed."

In *Floyd v. Fruit Industries,* 144 Conn. 659, 670 (1957), the court again held that "just damages" are not limited to economic loss: "[W]e have consistently pointed out that damages for wrongful death are not restricted to those arising from the mere destruction of earning capacity. Some damages are recoverable for death itself, even though instantaneous, without regard to earnings or earning capacity."

While *Floyd* referenced damages for "death itself," there is nothing in the decision to suggest that the court intended to create a new category of damages, separate and apart from the loss of "capacity to carry on life's activities" described in *Chase.* In fact, citing *Chase, Floyd* concluded that "damages for wrongful death, as such, are allowed as compensation for the destruction of the decedent's capacity to carry on life's activities including his capacity to earn money, as he would have if he had not been killed."

'Death Itself'

Following *Floyd,* the state Supreme Court has continued to describe the loss of the enjoyment of life's activities as an element of "just damages" for wrongful death. For example, in *Kiniry v. Danbury Hospital,* 183 Conn. 448, 414 (1981), the court held that, in addition to economic damages for medical and funeral expenses as well as lost earnings, there are two distinct categories of non-economic "just damages": (1) pain and suffering; and (2) destruction of life's enjoyment. Other than *Floyd*, there are no appellate cases describing damages for "death itself."

Nonetheless, the civil jury instructions on the Judicial Branch website have adopted the *Floyd* language and added a third category of non-economic damages: compensation for the death itself (in addition to pain and suffering and the loss of life's enjoyment). The instructions explain that "the plaintiff may be awarded fair, just and reasonable compensation for the loss of life." According to the instructions, "damages are also allowed for the destruction of [the decedent's] capacity to enjoy life's activities." As authority for these damage categories, the instructions cite four cases, and only *Floyd* mentions compensation for the "death itself."

Compensation for "death itself" and "loss of life's enjoyment" is double-counting and far from "just." This is perhaps best illustrated with an example. In *Morrin,* the verdict form asked the jury to award damages for both "loss of life" (i.e., death) and "loss of life's enjoyment." The jury awarded the exact same amount—$4 million—on each blank line. This result highlights the duplicative nature of asking jurors to value both "loss of life" and "loss of life's enjoyment" as separate categories of damage. Requiring fact finders to complete a difficult and uncertain task twice inevitably leads to double recovery. On post-verdict motions in *Morrin*, the trial court rejected the defendant's argument that the damage award for "death itself" was inappropriate, referring to the standard jury instructions and stating that its hands were tied "[u]ntil such time as our appellate courts either clarify *Floyd,* or otherwise define for the jury what it should consider when determining damages for 'death itself.'"

Neither the wrongful death statute nor case law, including *Floyd*, supports a separate damage award for "death itself" in addition to an award for the loss of the ability to enjoy life's activities. By including a category for "death itself," the civil jury instructions are inconsistent with existing case law. Omitting "death itself" as a category of recovery in the instructions would accurately reflect decades of judicial opinions and prevent duplicative recovery. ▪

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