



# Michigan Defense Trial Counsel

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### Wrongful-Death Damages

#### **“Wrongful-Death Damages in the *Denney* Era”**

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Damages in wrongful-death cases experienced a tectonic event in 2016--the Court of Appeals held that estates can recover the decedent’s lost earning capacity. *Denney v Kent Co Rd Comm*, 317 Mich App 727; 896 NW2d 808 (2016). That was new. And with new rules come new questions.

This article assumes that *Denney* is controlling (though there’s an argument that it isn’t) and explores the next battlefield: personal consumption and tax reductions. Had they lived, decedents would have necessarily incurred expenses (personal consumption and taxes on their income). Can estates standing in their shoes recover the entirety of the decedents’ future earning capacity? Or, do we account for the expenses that the decedents won’t incur?

#### **Michigan’s wrongful-death act**

Statutes are always a good starting point. Michigan has a survival statute. MCL 600.2921. It says that all “actions and claims” survive death, but it says nothing about damages. And when it comes to wrongful-death claims, the survival statute points to “the next section”—Michigan’s wrongful-death act, MCL 600.2922.

The wrongful-death act says that if the decedent could have “recover[ed] damages,” the person who caused their death remains “liable to an action for damages.” MCL 600.2922(1). It doesn’t say the “same” damages or even “those” damages. It just says, “damages.”

Scrolling down, the wrongful-death act has a damages provision. MCL 600.2922(6). That provision allows damages that are “fair and equitable, under all the circumstances including” a couple specific categories of damages. It doesn’t mention the decedent’s personal consumption or use terms like gross or net earning capacity. So it doesn’t directly answer our entirety-versus-reduction query.

We're left to glean and infer. The phrase "under all the circumstances" favors considering personal consumption; it certainly doesn't prohibit it. But is awarding the entirety of the decedent's earning capacity "fair and equitable"?

### **The rationale for the entirety**

Some say that the estate should recover everything the decedent could have recovered if he had lived. Awarding less, the argument goes, would be inequitable because the wrongdoer would pay less if he killed someone than if he didn't.

This argument essentially compares a deceased plaintiff to a permanently incapacitated plaintiff. Because the incapacitated plaintiff could recover the entirety of his earning capacity (not to mention substantial medical expenses and noneconomic damages), the estate shouldn't recover anything less. If the estate recovered less than the incapacitated plaintiff, the defendant would be rewarded for killing instead of disabling.

### **Michigan law on awarding the entirety**

There's some support in Michigan for the entirety argument. In 1904, the Supreme Court held that earning-capacity damages in wrongful-death cases brought under the former survival act aren't reduced for personal consumption. *Olivier v Houghton Cty St R Co*, 138 Mich 242, 243; 101 NW 530 (1904). That requires some explanation, particularly the survival act part. In the late 19<sup>th</sup> and early 20<sup>th</sup> century, Michigan had a survival act and a death act. Under the survival act, if someone had a claim when they died, their estate could pursue the claim—it survived the death. Under the death act, a decedent's survivors could recover damages caused by the wrongful death. Back then, wrongful-death claims could fall under either act. Whether a claim was under one or the other depended on whether the death was instantaneous. If it was instantaneous, the death act applied. If not, the survival act applied.

Let's return to *Olivier*. The decedent lived for 14 hours after the defendant injured him. So it was a survival act case. The Court held that the estate could recover the same damages that the decedent could have if he lived. It said that reducing the damages for consumption would make the survival statute "in part inoperative" because the action would survive "in a limited degree." *Id.* at 244. It also said that it would be "inequitable" to reduce earning-capacity damages because "it is none of the defendant's business how the injured party disposes of the money received in compensation for the injury." *Id.* at 245.

### **The rationale for reduction**

The upshot of the argument for reduction is that awarding the decedent's entire earning capacity isn't compensatory. Awarding earning capacity without reduction for personal-consumption and taxes puts the estate in a better position than if the decedent lived. Stated differently, without reduction, the decedent is more valuable dead than alive.

Compare non-death cases to death cases. In non-death cases, the plaintiffs still have the necessary expenses of life. After paying those expenses, the plaintiffs end up with their net earnings. In death cases, the estates don't have the necessary expenses that a living plaintiff would. They also don't pay taxes on personal injury settlements and judgments. See 28 USC 104(a)(2); MCL 206.30. So, without a reduction, estates end up with more than the decedents

would have if they survived—far more than if they had not been injured. Subtracting personal consumption and taxes from earning capacity in a death case, on the other hand, produces the same result as the non-death case. The estate, standing in the decedent’s shoes, ends up with the difference between the decedent’s earnings and expenses.

## **Michigan law on reduction**

*Olivier* isn’t binding precedent. The Legislature repudiated that opinion when it enacted the wrongful-death act. See *Baker v Slack*, 319 Mich 703, 713; 30 NW2d 403 (1948). So lower courts aren’t required to follow it. The question is whether *Olivier* is the phoenix rising from the ashes. There are reasons to think that it isn’t.

With few exceptions, Michigan only permits compensatory damages. The wrongful-death act isn’t one of the exceptions. See *Tobin v Providence Hosp*, 244 Mich App 626, 638; 624 NW2d 548 (2001). So wrongful-death damages must be compensatory, not punitive—you probably see where this is going.

Compensatory damages aren’t concerned with the defendant. Their only concern is making the injured party whole for the loss actually suffered. Since the goal is to put the estate in the same position the plaintiff would have been if he lived, personal consumption should be subtracted from earning capacity in wrongful-death cases.

Concern that subtracting consumption rewards the defendant is a punitive damages concept. It views the reduction as a reward for the wrongdoer and seeks to take it away. So it’s a punishment, which isn’t permitted in Michigan.

Death stops both income and expenses. Compensatory damages recognized both effects. A parent or spouse, for example, can only recover the value of a decedent’s personal services if it exceeds the cost of the decedent’s care and maintenance. *Thompson v Ogemaw Co Bd of Rd Comm’rs*, 357 Mich 482, 497; 98 NW2d 620 (1959). A company that was tortiously put out of business can recover its lost profits, not its lost revenue. *Couyoumjian v Brimage*, 322 Mich 191, 193; 33 NW2d 755 (1948). So, in other areas, expenses that aren’t incurred due to the tort are deducted to ensure a compensatory award. The same principle should apply to earning-capacity damages in wrongful-death cases.

## **What’s everyone else doing?**

35 states permit lost-financial-support damages instead of earning-capacity damages in wrongful-death cases. In other words, the estate only recovers the financial support that the decedent was providing to others. One state (Alabama) is on an island, permitting only punitive damages. That leaves Michigan and 13 other states.

Ten of the 13 other states subtract personal consumption from earning capacity in wrongful-death cases. Three—Georgia, Kentucky, and West Virginia—don’t. Each of those states permit punitive damages. Georgia and West Virginia have specific, statutory bases for their rules and Kentucky’s courts have observed that it’s “in the minority, and possibly a minority of one ....” *Charlton v Jacobs*, 619 SW2d 498, 500 (Ky App, 1981).

## **Conclusion**

Again, based on the wrongful-death act's damages provision, the question is whether awarding the entirety of the decedent's earning capacity is "fair and equitable." It would put estates in a better position than decedents would have occupied if they had not been injured—all the income without the expense. Of course, the counter point is that subtracting personal consumption puts the defendant who kills in a better position than the defendant who disables.

These are uncharted waters in Michigan. There's no definitive answer (yet). But separating the compensatory rationale from the punitive rationale may cut the Gordian knot. With few irrelevant exceptions, Michigan doesn't do punitive damages. So what damages are necessary to put the estate in the same position the decedent would have been if he lived? The overwhelming majority view is that personal consumption reduction is necessary to ensure that a plaintiff is made whole and that a defendant is not punished. It seems obvious that courts applying *Denney* should follow the same course.

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