

Negligence Law Section

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“Justice for the Dead: Lost Earning Capacity Damages in Wrongful Death Cases”

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“Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.”

– Dr. Martin Luther King, Jr., Letter from a Birmingham Jail, April 16, 1963.

The Negligence Law Section has as its prime purpose the advocacy of access to justice. Central to this mission is the paramount importance of jury trials. The section seek to unwaveringly promote the fair, equitable, and speedy administration of negligence litigation in the Michigan trial and appellate courts. As negligence law attorneys, we often speak for our clients or ask probing questions to direct our clients to tell their story and their truth. Perhaps one of the unique challenges is speaking for—and seeking justice on behalf of—those whose lives have been taken from this world. Death can leave a jagged hole in the heart of a family. The loss of a spouse, parent, or child is a human loss in the truest sense of the term. Holidays, birthdays, and otherwise joyous gatherings become bittersweet.

A negligent (*i.e.*, wrongful) death can also inflict economic devastation on a family. This often comes in the form of loss of a primary wage earner and loss of valuable household services among others. Seeking full justice for those taken by negligence sometimes means seeking full economic justice. This may be especially true where the recoverable damages for human losses

are limited by arbitrary damage caps, such as in medical malpractice and products liability cases. MCL 600.1483. When the case merits it, seeking full economic justice in a wrongful death case may mean pursuing the full value of the loss of earning capacity of decedent, holding the wrongdoer fully accountable for the wrongful death. Michigan law has long recognized this bedrock principle and it is codified into the Wrongful Death Act. These principles were spotlighted with the binding precedent of *Denney v Kent County Road Commission*, 317 Mich App 727 (2016), *lv denied* 500 Mich 997 (2017). *Denney*, and its long standing foundational cases, affords for an estate to stand in the shoes of the decedent and collect the full measure of economic damages that the decedent would have been entitled to, but for his or her death. *Id* at 736. A

Notably, *Denney* has close connections to this section. The case was expertly litigated by the current Negligence Law Section Chair (Thomas Behm) and his law partner Scott Melton. The Negligence Law Section's amicus brief in *Denney* was submitted pursuant to a bipartisan consensus and vote of the section's leadership council. This article aims to promote the section's scholarship in this area of law by analyzing the issue of loss of earning capacity claims in as clarified by *Denney*.

Lost Earning Capacity Claims, In General

In tort cases generally, an injured party is entitled to recover for loss of earning capacity. *Rohm v Stroud*, 386 Mich 693, 696, 194 NW2d 307 (1972). Loss of earning capacity and lost wages are two separate categories of harm recoverable as damages in tort claims. When an injured party is reasonably likely to have lost the ability to work or his/her ability to earn is impaired, the law recognizes a claim to be compensated for the loss of earning capacity, despite the inherent difficulty in precise calculation of actual lost wages. Loss of earning capacity is a category of harm separate from loss of wages. Michigan's Courts have declared that the plaintiff may recover damages for loss of earning *capacity* even though actual earnings increased. *Lorenz*

v Sowle, 360 Mich 550, 554; 104 NW2d 347, 348-349 (1960), *Gonzalez v Hoffman*, 9 Mich App 522, 527; 157 NW2d 475, 478 (1968).

A claim for future damages due to impaired earning capacity calls for projection in the same sense that any claim for future damages calls for projection from known data points. *Foote v Huelster*, 272 Mich 194, 261 NW 296 (1935). See also, *Michigan Law of Damages and Other Remedies*, 3d Ed, ICLE, Patek, McLain, Granzotto, and Stockmeyer, § 2.11, 2-14. Michigan follows the prevailing American view that the calculation of lost earning capacity is based upon what the life expectancy of the injured party was undiminished by negligence. Life expectancy is thus calculated based on the individual's life expectancy immediately before the injury. The prevailing American rule holds that "a tort victim suing for damages for permanent injuries is permitted to base his recovery 'on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury.'" *Sea-Land Services, Inc. v Gaudet*, 414 US 573, 595; 94 S Ct 806, 819; 39 L Ed. 2d 9 (1974) (citations omitted, emphasis in original).

Lost earning capacity can include losses from sources other than wages or salary, such as partnership draws, or fringe benefits, opportunities for promotion or advancements, and diminished effectiveness at work. All are recoverable in the category of lost earning capacity. *Miller v Pillow*, 337 Mich 262, 272–273, 59 NW2d 283 (1953), *Canning v Hannaford*, 373 Mich 41, 44, 127 NW2d 851 (1964) *Bourdon v Read*, 30 Mich App 681, 684, 186 NW2d 737 (1971).

While practitioners recognize that lost earning capacity is a category of recoverable damages, litigation frequently ensues over the award of such damages in wrongful death cases—especially where the decedent was not providing financial support to a spouse or child. It is within this framework that *Denney* challenges are frequently seen.

Michigan Law Affords A Decedent's Estate The Right To Present To The Trier Of Fact The Income Which Plaintiff's Decedent Could Have Earned But For Their Wrongful Death. This Is The Essence Of Lost Earning Capacity.

To reiterate, *Denney* affirms the long-standing legal principle that an estate may stand in the shoes of its decedent when presenting damages. *Id* at 736. *Denney* is by no means novel doctrine; it is predicated on older, well-established statutory and case law. Michigan’s Wrongful Death Act (WDA), codified in MCL 600.2922, provides for expansive damages, including, **“damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.”** MCL 600.2922(6), with emphasis added.

Case law has confirmed that the Wrongful Death Act neither limits nor precludes the type of damages recoverable in wrongful death cases:

“A wrongdoer who brought his victim to the very brink of human dissolution would have to respond in damages to the full extent of the injury. But if he took the final step and plunged his victim into the abyss, he obtained absolution from the injuries.” . . . Such a position is inconsistent with the stated purpose of the WDA, MCL 600.2921, to assure that “[a]ll actions and claims survive death,” and contrary to the language of MCL 600.2922(1). The statutory language leads to the inescapable conclusion that the intervention of death neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury
Thorn v Mercy Mem’l Hosp Corp, 281 Mich App 644, 660; 761 NW2d 414 (2008).

In 2016, the Court of Appeals issued the published *Denney* opinion, which involved the death of Matthew Denney, a man killed in a motorcycle accident. Mr. Denney’s Estate brought suit for his wrongful death, and sought to obtain damages for lost wages and lost earning capacity. In analyzing the arguments, the Court affirmed that Mr. Denney’s estate could present the full scope of his financial losses to the jury as if it were standing in his shoes, finding as follows:

The word "including" in MCL 600.2922(6) "indicates an intent by the Legislature to

permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case." Under the wrongful-death statute "the intervention of death neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury." Relevant to this case, our Supreme Court has stated that economic damages include "damages incurred due to the loss of the ability to work and earn money" However, "[b]ecause an underlying claim 'survives by law' and must be prosecuted under the wrongful-death act, any statutory or common-law limitations on the underlying claim apply to a wrongful-death action."

As previously stated, the damages available under the wrongful-death statute, MCL 600.2922(6), include "any type of damages, economic and noneconomic, deemed justified by the facts of the particular case." **And economic damages include "damages incurred due to the loss of the ability to work and earn money" Therefore, damages for lost earnings are allowed under the wrongful-death statute.** *Denney* at 731-732, with emphasis added and internal citations omitted.

The *Denney* Court further noted, citing Supreme Court precedent, that:

"As a condition to a successful action under the wrongful death act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries." "[T]he cause of action of a proper plaintiff under the wrongful death act is a derivative one in that the personal representative of the deceased stands in his shoes and is required to show that the deceased could have maintained the action if death had not ensued"

Id. at 734, with internal citations omitted and emphasis added.

The defendants appealed to the Michigan Supreme Court, which denied leave without a single dissent. *Id.* Presumably that is because—as noted in *Denney*—in enacting the WDA, the Legislature made the policy decision to, “permit a decedent’s estate to recover *everything* that the decedent would have been able to recover had she lived.” *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540, 565 (2004) (emphasis added).

The *Denney* holding is consistent with precedent that the WDA is a “continuation of the decedent’s underlying claim.” The WDA does not “change the character of [the underlying action] except to *expand* the elements of damages available.” *Wesche v Mecosta County Rd Comm.*, 480 Mich 75,89; 746 NW2d 847 (2008), quoting *Jenkins v Patel*, 471 Mich 158, 165 (2004). Further, it follows Michigan’s longstanding legal doctrine, “effecting a continuance of

the right of action that had *vested in the decedent*, with such damages as *he* could have recovered, *including the present worth of his probable future earnings had he lived.*” *Jorgenson v Grand Rapids & I R Co*, 189 Mich 537, 541; 155 NW 535 (1915). This is consistent with MCL 600.2921, which unambiguously provides that all actions and claims survive death.

The response to *Denney* has been predictably lauded or panned depending on whose interests are being advocated for. Attorneys for decedents, and the civil justice system, see it as a step towards obtaining justice for those who are not here fight for themselves; insurance companies and their bean counters may see such damage claims as speculative or undeserved. Regardless of one’s opinion, practitioners should understand that wrongful death damages are not unconstrained in the aftermath of *Denney*. Plaintiffs still bear the burden of proving, by a preponderance of evidence, that those damages should be awarded.

When these wrongful death loss of future earning damages are at issue, practitioners often battle over life expectancy. Case law provides that published mortality tables “may be considered with all the other evidence in determining life expectancy”. *Rickwalt v Richfield Lakes Corporation*, 246 Mich App 450 (2001). As well, trial courts often take judicial notice of the National Vital Statistics Reports U.S. Life Tables, published by the Center for Disease Control’s Division of Vital Statistics. The tables are self-authenticating pursuant to MRE 902(5) and are admissible under MRE 803(8) and 803(9). These tables reflect the average life span for individuals, taking into account gender and race. These are an average of all comers in the demographic, regardless of health history and includes all the conditions of aging and the modern lifestyle. Such averages are simply another tool to provide the jury to evaluate damages. What about an injury that shortens life had the decedent survived? It is longstanding law that tortfeasors should not benefit from an injured party’s shortened life expectancy and/or death arising from tortious conduct. *See May v William Beaumont Hospital*, 180 Mich App 728, 755; 448 NW2d 497 (1989).

CONCLUSION

Reflecting sound public policy, *Denney* affirms that the Survival Act and Wrongful Death Act, the case law and the Legislature's "policy decision in § 2922(1), (2), and (6) by permitting a decedent's estate to recover *everything* that the decedent would have been able to recover had she lived." *Shinholster, supra*, 471 Mich 565 (Italics in original). *Denney* is binding case law which affords Plaintiff to claim the full value of the income and lost earning potential which Plaintiff's Decedent would have earned but for the wrongful death due to a Defendants' negligence.

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