Substantial Awards for Brief Periods of Pre-Death Pain and Suffering in Two New Appeals Court Decisions

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A **significant element of damages in New York wrongful death personal injury lawsuits is pre-death pain and suffering.** This can be very difficult to prove (as opposed to other elements such as the decedent's future lost earnings).

Here's **Pattern Jury Instruction 2:320** which is what New York judges tell juries about pain and suffering in death cases:

- "As to the claim for damages sustained by [the decedent] before he died, plaintiff is entitled to recover such sum as you find will fairly and justly **compensate for the pain and suffering actually endured by the decedent during such time as he was conscious from the moment of injury to the moment of death."**

In the case of someone who clearly suffers a great deal over a long period of time before he dies (for example a burn victim who undergoes many painful procedures over many months before dying, or a malpractice victim who has medical complications, pain and extensive suffering for years before death), the pre-death conscious pain and suffering claim is apparent and may be quite substantial (in the millions of dollars).

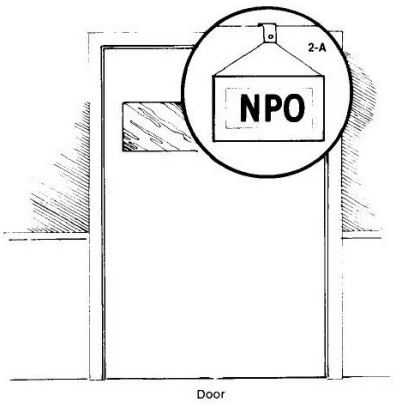
The difficult cases are those like the two that were ruled on recently. One involved a hospital patient who choked to death on his lunch; the other a woman walking down the street who was struck by a falling tree.

In each case, death resulted in a very brief time after the negligence. In one, it was only seconds later; in the other, it was a half-hour or so. In both, substantial jury awards were made for pain and suffering - **in one case the appellate court affirmed $350,000 for a few seconds of pain and suffering; in the other it approved $800,000 for a half hour of pain and suffering.**

Perez v. St. Vincent's Hospital dealt with the death of a man who presented to the emergency room with urinary difficulties. Anastacio Perez was diagnosed with alcohol withdrawal and consequent dehydration and admitted for treatment. Since he had previously suffered throat cancer and could not eat sold food, his doctors issued orders that he was to receive no food or drink by mouth.

Several days later, though, on the day of his scheduled discharge home, when his condition had improved, Mr. Perez was given solid foods for lunch (chicken and cucumber) which he started to eat. He choked on the food as one of his sons came to visit him.

A sign like this on his hospital door (NPO means nothing by mouth) may have saved Mr. Perez:



What followed was a **frantic scene** in which Mr. Perez clutched his throat, flailed his arms and had a look of terror in his eyes. Attempts to save him failed and he was pronounced dead an hour or so later. **The jury returned a verdict for pre-death pain and suffering in the sum of $1,500,000 and on appeal the court reduced that to $800,000.**

The defense argued that certain hospital records indicated the choking incident began 35 minutes before death was pronounced while plaintiff argued that the period was as much as an hour and a half (based on when a family member said the incident began). Medical experts testified trying to calculate the period of suffering based on known facts, the autopsy report and certain assumptions.

In any event, **it was clear that whether Mr. Perez choked to death over a 15 minute period, 35 minutes or 90 minutes, it was a gruesome scene and a horrific way to die**. And the appellate judges agreed in determining that **$800,000** was reasonable for pre-death pain and suffering.

In **Segal v. City of New York**, 52 year old Hinda Segal's skull was crushed and she was **killed by falling tree limbs**. Walking with her daughter on a Brooklyn street one fine summer morning in July 2003, a storm broke out and overhead tree branches broke off and hit Mrs. Segal in the head knocking her to the ground. Her daughter, Shifra Berger, had been walking with her hand in hand. They saw the tree falling and Shifra saw her mother try to get the branches out of her face, heard her mother call out, saw her mother get hit and felt her mother squeeze her hand as she lay dying on the sidewalk.

Mrs. Segal never had a chance; a warning like this might have saved her life:

An ambulance came quickly but Mrs. Berger was pronounced dead 45 minutes later. **Cause of death: skull fracture with avulsion to her head and massive blood loss.**

At trial, negligence against the city was proven (and affirmed on appeal) because it failed to discover that the tree was rotted and could fall and it failed to take any steps to prevent this type of foreseeable incident.

Shifra Berger (decedent's daughter) suffered a huge emotional loss, succumbed to severe **post-traumatic stress disorder** and the jury returned a verdict of $1,750,000 for her emotional distress (modified downward by the appeals court to **$1,250,000**)

In an attempt to establish pre-death pain and suffering, plaintiff called upon Lone Thanning, M.D. , a forensic pathologist, who testified that Mrs. Berger survived for a mere 8-10 seconds (half being pre-impact terror and half being post-impact consciousness). The city's expert, Adhi Sharma, M.D., an emergency medicine specialist, testified that there was no evidence of any pre-impact terror or any conscious pain and suffering at all after Mrs. Berger was struck. He concluded that Mrs. Berger's squeezing of her daughter's hand was not willful but merely reflexive.

The jury rejected the city's expert and found that Mrs. Berger had indeed suffered great pain and suffering and pre-impact terror, if only for a few seconds. For conscious pre-death pain and suffering the jury awarded **$350,000** and that sum was upheld as reasonable by the appellate judges. They ruled that the evidence was sufficient for the jury to award damages and that the jurors were free to accept one expert's opinion and reject the other's.

The **$350,000 verdict for pain and suffering in Segal v. City of New York, for less than 10 seconds of pre-death consciousness, appears to break new legal ground**.

Here are the **other important appellate court New York injury cases ruling on brief periods of pre-death pain and suffering** (none of which dealt with less than a couple of minutes of pain and suffering):

- **Glaser v. County of Orange** (2008) - **$350,000** for 2-3 minutes after a truck's axle struck decedent in a car accident
- **Givens v. Rochester City School District** (2002) - **$300,000** for five minutes of pain after decedent was stabbed and he then lost consciousness and was pronounced dead within the hour
- **Gersten v. Boos** (2008) - **$350,000** for 5-10 minutes of pain after a car accident and some indications of responsiveness while in a coma over the next 11 days before death
- **Ramos v. Shah** (2002) - **$450,000** for a day of pain from dehydration and some level of consciousness in a coma for several days before death
- **Bennett v. Henry** (2007) - **$400,000** for about 20 minutes of pain from a pedestrian knockdown car accident before death was pronounced 10 hours later

No prior reported appellate decision has sustained an award for mere seconds of pre-death pain and suffering. Our review of the record and conversations with attorneys in the Segal case indicates that it was superlative trial and appellate advocacy that's responsible for this stunning result. Trial counsel **Alan M. Greenberg** and appellate counsel **Jay Breakstone** presented this case to the jury and the judges in such a fashion as to convince them that Mrs. Berger had in fact been aware of what was happening to her and felt pain as she died.

The key was to present sufficient factual evidence to give the jury a legal basis to award the damages and that's just what the appeals court stated was done. Once there was a legal basis for the jury to award damages, then, the lawyers urged and the jurors judges agreed, **$350,000 was not an unreasonable sum** and the amount should not be (and was not) disturbed.