



Topic for the Month:

### Wrongful Death

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**History:** Under the "common law," or judge-made law, there was no recognized claim for wrongful death. If a person was killed, due to the negligence of another, any cause of action terminated with the death of the individual. In other words, no survivors of the deceased had a cause of action for damages related to the person's death. If a wife lost a husband, who produced an income, there was no claim for that lost income, let alone the loss of society and companionship associated with the loss of a loved one. Most state legislatures, including Wisconsin, recognized the unfairness of the common law and enacted wrongful death statutes.

**Wisconsin's Wrongful Death Statute:** Wisconsin enacted a wrongful death statute to protect survivors of a person who is killed as a result of the negligent conduct of another. Our wrongful death statute is at § 895.04 of the Wisconsin Statutes. This statute creates a cause of action for wrongful death damages on behalf of the decedent's survivors (i.e. spouse; children; heirs). The right to pursue a wrongful death claim rests only with those class of individuals set forth in the wrongful death statute. If the deceased leaves a surviving spouse and minor children under the age of 18, those persons have the right to pursue wrongful death damages. If there is no surviving spouse and no minor children, any damages recoverable go to the decedent's lineal heirs. If no lineal heirs survive, then the decedent's brother's and sisters have the right of recovery.

Any wrongful death claim, involving minor children (under age of 18), must be approved by a circuit court judge. The wrongful death statute imposes upon the court, the duty of insuring that a specific portion of any settlement be set aside for the protection of any minor children.

**Damages Available:** Typically the largest element of damages are those of "pecuniary injury." This includes loss of earnings of the deceased as well as benefits the beneficiary would have received from the decedent, had he/she lived. For example, social security benefits, loss of 401(k) benefits, and loss of household services. If conscious pain and suffering can be proven prior to death, a separate cause of action rests with the estate of the deceased. Another element of damages is that of loss of society and companionship. This element of damage has been "capped," or limited by the legislature. If the deceased was an adult, the loss of society claim is capped at

\$350,000. If the deceased was a minor, these damages are capped at \$500,000. These damages must still be established via evidence regarding the nature and extent of any loss of society and companionship. There is no requirement that a jury award the maximum amount for these damages. However, if a jury were to award \$700,000 for loss of society and companionship on the claim of a deceased adult, the recoverable damages would be reduced to the cap amount of \$350,000.

**Wrongful Death from Work Injury:** If death occurs during the course of employment, a separate statute covers the rights of any dependents. This claim is governed by Wisconsin's worker's compensation statutes, §§ 102.46 - 102.50. The worker's compensation system is a "cap" system. This means that ALL damages available to survivors are capped, or limited to a certain amount. The worker's compensation statutes are more restrictive than the third-party counterpart, previously outlined. The damages available for pecuniary loss (i.e. loss of decedent's income) are capped at 4 times the decedent's average annual wage with a maximum of \$213,300 (2005 figure). For example, if a decedent was earning \$35,000 annually, the maximum death benefit would be \$140,000. The maximum death benefit is adjusted annually. By comparison, in 1997, the maximum death benefit was \$152,700.

A surviving dependent is also entitled to payment of funeral expenses up to \$6,500. This is basically the extent of the damages available for the death of a loved one who dies within the course of his/her employment. There are no separate causes of action for conscious pain and suffering (prior to death); loss of society and companionship; loss of 401(k) contributions etc.



**Our Personal Injury Team** (front; left to right): Robert Janssen; Steve Hitzeman and Sandy Hupfer; (rear; left to right): Tim Hawley; Mike Kirschling and Patricia Sandoz. If you have any questions on a wrongful death claim, just call any member of our personal injury team. **We take a Personal Approach to Personal Injury Cases.**