St. John's Law Review

Volume 52
Number 4 *Volume 52, Summer 1978, Number 4*

Article 10

EPTL § 5-4.3: Recovery Permitted for Loss of Consortium in Wrongful Death Action

Elaine Robinson McHale

the Court of Appeals will review the "harmless constitutional error" doctrine at the earliest possible opportunity and establish clear and narrowly drawn guidelines for its use. In the absence of such guidelines, the potential for this doctrine's abuse will remain a serious threat to the carefully constructed rights of criminal defendants.[147]

Gregory Kehoe

ESTATES, POWERS, AND TRUSTS LAW

EPTL § 5-4.3: Recovery permitted for loss of consortium in wrongful death action

Section 5-4.3 of the EPTL[148] permits recovery in a wrongful death action[149] "for pecuniary injuries resulting from the decedent's

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disregarded if they did not contribute to the defendant's conviction. Thus, in *Chapman*, the Supreme Court stated that "some constitutional errors . . . are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S. at 22. Typically, the error consists of the erroneous admission of physical or testimonial evidence in violation of the defendant's fourth, sixth, or fourteenth amendment rights. *E.g.*, People v. Smith, 60 App. Div. 2d 566, 401 N.Y.S.2d 353 (4th Dep't 1978); People v. Trappier, 60 App. Div. 2d 896, 401 N.Y.S.2d 295 (2d Dep't 1978); People v. Cowan, 60 App. Div. 2d 634, 400 N.Y.S.2d 179 (2d Dep't 1977). In such cases, before the error can be held to have been harmless, the court must examine the admissible and inadmissible evidence presented by the prosecution and conclude that the erroneously admitted evidence did not, in any way, contribute to the conviction. *See* People v. Jones, 61 App. Div. 2d 264, 402 N.Y.S.2d 28 (2d Dep't 1978). In essence, the appellate court must decide whether the decision at the trial level would have been the same had the evidence been excluded from consideration. In a case such as *Felder*, however, the question does not call for a weighing of the relative impact of evidence. Rather, in order to hold the error harmless, the court would have to conclude that representation by the layman did not contribute to the defendant's conviction. It is submitted that the harmless error test was not meant to permit the court to make such a subjective determination, nor is it precise enough to properly evaluate the impact of a sixth amendment violation which is present at every stage of the trial.

[147] *See* note 146 *supra*.

[148] EPTL § 5-4.3 provides in part:

> Amount of recovery.
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> The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought.

EPTL § 5-4.3.

[149] The cause of action for wrongful death was unknown at common law. Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 579 (1974); Western Union Tel. Co. v. Cochran, 277 App. Div. 625, 630, *aff'd*, 302 N.Y. 545 (1951). Believing there was no valid justification for permitting recovery for personal injuries in a negligence suit and denying such recovery in the event that the personal injuries resulted in death, the English Parliament enacted The Fatal Accidents Act, 1846, St. 8 & 10 Vict., c. 93. *In re* Meng, 96 Misc. 126, 128, 159 N.Y.S. 535; 537 (Sur. Ct. N.Y. County 1916), *aff'd*, 188 App. Div. 69, 176 N.Y.S. 290 (1st Dep't 1919), *rev'd mem.*

death."[150] In construing this provision, New York courts have generally denied recovery for loss of consortium and society.[151] Recently,

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on other grounds, 227 N.Y. 669, 126 N.E. 914 (1920). That act, more commonly referred to as "Lord Campbell's Act," provided

> that whensoever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages . . ., then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages.

The Fatal Accidents Act, 1846, St. 8 & 10 Vict., c. 93, *reprinted in* 96 Misc. at 128, 159 N.Y.S. at 537.

In strikingly similar language, the New York State Legislature adopted a cause of action for wrongful death in 1847. 96 Misc. at 130, 159 N.Y.S. at 538. Although the amount of recovery was limited to $5,000 by an 1849 amendment, Ch. 256, [1849] N.Y. Laws 388-89, this limitation was abolished by article I, section 18, of the New York State Constitution of 1894. This later became article I, section 16, of the New York State Constitution of 1938. Amerman v. Lizza & Sons, Inc., 45 App. Div. 2d 996, 998, 358 N.Y.S.2d 220, 224 (2d Dep't 1974). Article I, section 16, of the New York State Constitution of 1938 provides that "[t]he right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." Although the present statute limits recovery to compensation for "pecuniary injuries," it has been held not to violate the New York Constitution. Amerman v. Lizza & Sons, Inc., 45 App. Div. 2d 996, 358 N.Y.S.2d 220 (2d Dep't 1974). The *Amerman* court noted that the purpose of Article I, section 16, was twofold. The constitutional provision was enacted to guarantee that the statutorily created wrongful death action would not be unilaterally abolished by the legislature. 45 App. Div. 2d at 998, 358 N.Y.S.2d at 224. In addition, § 16 was intended to abolish the $5,000 limitation on pecuniary damages which could be recovered. 45 App. Div. 2d at 998, 358 N.Y.S.2d at 224.

[150] EPTL § 5-4.3. The purpose of § 5-4.3 is to compensate surviving relatives for loss of future benefits which would have been received had the decedent lived. *See* Loetsch v. New York City Omnibus Corp., 291 N.Y. 308, 310, 52 N.E.2d 448, 449 (1943). Since the statute provides for "fair and just compensation," the amount awarded lies in the discretion of the jury. Oddo v. Paterson Bridge Co., 219 App. Div. 518, 521, 220 N.Y.S. 217, 220 (2d Dep't 1927); Liddie v. State, 190 Misc. 347, 351, 75 N.Y.S.2d 182, 186 (Ct. Cl. 1947). In arriving at a proper award, the trier of fact may consider such factors as the decedent's age, health, life expectancy, relationship with the persons seeking recovery, disposition to support such persons, working habits, present position and potential for advancement, and the likelihood of increased earning capacity. *See* Kraus v. Ford Motor Co., 55 App. Div. 2d 851, 852, 390 N.Y.S.2d 495, 496 (4th Dep't 1976); Tenczar v. Milligan, 47 App. Div. 2d 773, 775, 365 N.Y.S.2d 272, 273 (3d Dep't 1975); Horton v. State, 50 Misc. 2d 1017, 272 N.Y.S.2d 312 (Ct. Cl. 1966).

[151] *See* Osborn v. Kelly, 61 App. Div. 2d 637, 402 N.Y.S.2d 463 (3d Dep't 1978); Bell v. Cox, 54 App. Div. 2d 920, 388 N.Y.S.2d 118 (2d Dep't 1976); Ventura v. Consolidated Edison, N.Y.L.J., Oct. 7, 1977, at 13, col. 3 (Sup. Ct. N.Y. County 1977). The United States Supreme Court has noted that "[t]he term 'society' [now] embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 585 (1974). Consortium is the "[c]onjugal fellowship of husband and wife, and the right of each other to the company, co-operation, affection, and aid of the other in every conjugal relation." BLACK'S LAW DICTIONARY 382 (4th ed. 1968). Although at common law consortium was essentially synonymous with society and companionship, it has developed into the more specific and special relationship existing between spouses. *See* D. DOBBS, LAW OF REMEDIES § 8.11 (West 1973); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923).

however, in *Lehman v. Columbia Presbyterian Medical Center*,[152] the Supreme Court, New York County, held that a spouse may properly recover in a wrongful death action for loss of consortium suffered as a result of her mate's death.[153]

The decedent in *Lehman* died 5 days after open heart surgery.[154] The decedent's wife brought suit alleging that her spouse's death was caused by the defendant's negligence.[155] After a medical malpractice panel found the defendant liable, the plaintiff moved for an order permitting amendment of her complaint to include a claim for loss of consortium.[156] Stating that "simple justice mandates the ending of our present archaic strictures on recoveries in wrongful death actions," the supreme court granted the motion.[157]

In permitting amendment of the complaint, Justice Nusbaum noted that the meaning of "pecuniary injuries" under EPTL § 5-4.3 appears unsettled.[158] Framing the issue as whether "loss of services and society" are compensable as pecuniary injuries,[159] the court was influenced by the trend in other jurisdictions to broaden the scope

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[152] 93 Misc. 2d 539, 402 N.Y.S.2d 951 (Sup. Ct. N.Y. County 1978).

[153] *Id.* at 544, 402 N.Y.S.2d at 954.

[154] *Id.* at 540, 402 N.Y.S.2d at 952.

[155] *Id.* The decedent underwent open heart surgery at Columbia Presbyterian Medical Center in December 1972. The plaintiff alleged that following surgery her husband was left unattended in a private room for approximately 10 hours, causing him fear and apprehension which affected the functioning of his heart and resulted in his death 5 days later. *Id.*

[156] *Id.*

[157] *Id.* at 543, 402 N.Y.S.2d at 954. The court noted that, although the application to amend was made more than 3 years after issue was joined, the defendants were not prejudiced since they had notice of the facts. *Id.* at 544, 402 N.Y.S.2d at 954. Accordingly, Justice Nusbaum granted the leave to amend pursuant to CPLR 3025(b) which states:

> A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

It would appear that the order was consistent with the policy underlying CPLR 3025(b). Except in the three instances where a party may amend his pleading as of right, *see* CPLR 3025(a), the power to permit a pleading to be amended rests squarely within the court's discretion. Harriss v. Tams, 258 N.Y. 229, 179 N.E. 476 (1932). In an attempt to avoid overemphasis on technical form and to permit all substantive rights of the parties to be litigated, the courts have been liberal in considering motions to amend. *See* Bendan Holding Corp. v. Rodner, 245 App. Div. 723, 280 N.Y.S. 252 (2d Dep't 1935) (per curiam); Weitz v. Consolidated Edison Co., 21 Misc. 2d 932, 198 N.Y.S.2d 351 (Sup. Ct. Kings County 1960). Generally the court will not determine the merits of the proposed amendment unless the lack of merit or sufficiency is clear. Town Bd. v. National Sur. Corp., 53 Misc. 2d 23, 24, 277 N.Y.S.2d 872, 874 (Sup. Ct. Sullivan County 1967), *aff'd mem.*, 29 App. Div. 2d 726, 286 N.Y.S.2d 122 (3d Dep't 1968); Brodman v. Merchants Fire Assur. Corp., 217 N.Y.S.2d 794 (1st Dep't 1961) (per curiam).

[158] 93 Misc. 2d at 541, 402 N.Y.S.2d at 953.

[159] *Id.*

of recovery in wrongful death actions.[160] In addition, the *Lehman* court emphasized that more than a century earlier, in *Tilley v. Hudson River Railroad Co.*,[161] the Court of Appeals rejected a nar-

[160] *Id.* at 543, 402 N.Y.S.2d at 954. Justice Nusbaum stated that a majority of the states have allowed recovery for loss of consortium in wrongful death actions. *Id.* It is submitted that this is somewhat misleading. While a national trend has developed recognizing loss of consortium as a proper element of damages in wrongful death actions, it appears that few states with statutes compensating only for "pecuniary *injury*" have followed this movement. Approximately one-fifth of the states have statutes similar to EPTL § 5-4.3, and these jurisdictions generally do not permit recovery for loss of consortium. *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 3:49 (2d ed. 1975). Even with such a statutory scheme, however, Michigan and Minnesota have allowed loss of consortium damages. *See* Smith v. Detroit, 388 Mich. 637, 202 N.W.2d 300 (1972); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961). After the *Smith* decision, the Michigan Legislature amended its statute to expressly allow such recovery. *See* MICH. STAT. ANN. § 27A.2922 (Callaghan 1962). Moreover, in a few jurisdictions, where statutes have been interpreted as limiting recovery to "pecuniary *losses*," judicial decisions have allowed loss of consortium as a proper element of recovery. *See* Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 587 n.21 (1974); SPEISER, *supra*, § 3:49.

The majority of the remaining jurisdictions have allowed recovery for loss of consortium in wrongful death actions. *See* SPEISER, *supra*, § 3:49. Most of these states, however, have statutes that either expressly enumerate this loss as a proper element of damage, *see* Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 587 n.21 (1974); SPEISER, *supra*, § 3:49, or are susceptible to such an interpretation since damages are not expressly limited to pecuniary injuries. *See* Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 587 n.21 (1974); SPEISER, *supra*, § 3:49.

The *Lehman* court also noted that the United States Supreme Court in Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573 (1974), recently held loss of consortium properly recoverable by a spouse under the general maritime law. In *Gaudet*, the plaintiff's husband sustained serious injuries while aboard the defendant's ship. In a personal injury action based upon the unseaworthiness of the vessel under federal maritime law, the husband was awarded damages for loss of earnings, pain and suffering, and medical expenses. *Id.* at 591. After termination of the personal injury action, the husband died from his injuries. *Id.* at 574. The plaintiff thereupon commenced a wrongful death action for damages representing loss of consortium and funeral expenses. *Id.* at 591. The wrongful death action was dismissed by the District Court for the Eastern District of Louisiana for failure to state a claim and on the grounds of res judicata. *Id.* at 574. The fifth circuit reversed, finding that the plaintiff had an independent cause of action for damages that was not affected by her husband's prior recovery for his personal injuries. 463 F.2d 1331 (5th Cir. 1972). The Supreme Court affirmed and permitted recovery for loss of society. 414 U.S. at 591. The Court noted, however, that such losses are distinguishable from the mental anguish or grief that a surviving relative may sustain. *Id.* at 585-86 n.17. In determining that the latter would not be recoverable in a wrongful death action, the Court stated that mental anguish or grief is merely an emotional response, whereas loss of society is loss of a positive benefit for which compensation should be given. *Id.*

Although the *Lehman* court, in citing *Gaudet*, intimated that the Supreme Court found loss of consortium properly recoverable under the pecuniary loss standard of the Death on the High Seas Act, 46 U.S.C. § 762 (1970), this was not the case. The Court, in fact, was creating an element of wrongful death damage under the nonstatutory federal maritime law. Although the court mentioned the Death on the High Seas Act, it avoided any explicit recognition that such a recovery would be permitted under the statute. As one commentator has noted, the *Gaudet* decision is especially valuable where the state statute is termed in equivocal language, rather than where an express limitation of pecuniary losses exists. *See* SPEISER, *supra*, § 3:49 n.5.

[161] 24 N.Y. 471 (1862).

row interpretation of pecuniary injuries by allowing children to recover for loss of parental services, including parental training and guidance in a wrongful death action.[162] Interpreting this decision to permit recovery by children for the loss of society of their parents, the court concluded that to allow recovery by a spouse for loss of consortium was merely the logical development of the law.[163]

It is submitted that the *Lehman* court has erred in its interpretation of EPTL § 5-4.3 and has reached a result contrary to prevailing New York law. New York courts have generally distinguished between loss of services and loss of society or consortium when interpreting EPTL § 5-4.3.[164] Since the *Lehman* court incorrectly equated

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[162] 93 Misc. 2d at 541, 402 N.Y.S.2d at 953. In *Tilley*, the plaintiff commenced an action against the defendant to recover damages for his wife's death which resulted from a train collision. 24 N.Y. at 471. The Court of Appeals set aside an award of damages on the ground that the lower court incorrectly charged that the jury could consider the children's interest in the earnings from the decedent's business. *Id.* at 473. The Court stated that such earnings would become the property of the plaintiff upon the decedent's death and that the children's interest would remain only in respect to any expected inheritance from their father. *Id.* This interest the Court found too remote to be within the meaning of the statute. *Id.* It was noted, however, that the allowance for loss of parental guidance was proper. *Id.* at 476. On appeal following retrial, the Court held that the jury could properly consider the loss of the children of the decedent's nurture and moral and physical training in estimating pecuniary damages. Tilley v. Hudson River R.R., 29 N.Y. 252, 287 (1864). Noting that parental guidance may "improve and perfect the man . . . for worldly success as well as social consideration," the Court stated that the loss of this possible pecuniary advantage should be compensable. *Id.* In so interpreting pecuniary injuries, the Court concluded:

> A liberal scope was designedly left for the action of the jury. . . . They are not tied down to any precise rule; within the limit of the statute, as to amount, and the species of injuries sustained, the matter is to be submitted to their sound judgment and sense of justice.

Id. at 286.

[163] 93 Misc. 2d at 542, 402 N.Y.S.2d at 953. To support his decision Justice Nusbaum pointed to the recognition by the Court of Appeals in Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968), that a marital relationship may be seriously impaired as a result of an injured spouse. Thus, Justice Nusbaum reasoned it is illogical to allow recovery for impediment to the marital relationship in a negligence suit, and deny the same recovery if the defendant's act results in death. Accordingly, the *Lehman* court stated that recovery for loss of consortium in wrongful death is merely the "natural progression" from *Tilley* to *Millington*. 93 Misc. 2d at 543, 402 N.Y.S.2d at 954. Justice Nusbaum then concluded that the permanent deprivation of a spouse's consortium and society should be compensated. *Id.* It is submitted, however, that neither *Millington* nor *Tilley* encourage, as the court intimates, a departure from the traditional rule. *Millington* was a negligence action wherein the Court for the first time allowed a wife to recover for loss of consortium. Indeed, although the *Millington* Court found damage to the wife, it cannot be argued that this authorizes a similar recovery in a wrongful death suit brought under a statute which limits recovery to "pecuniary injuries." Similarly, *Tilley* allowed recovery for loss of parental guidance and training while specifically reaffirming the principle that damages must be limited to pecuniary injury under the statute.

[164] *Compare* Bell v. Cox, 54 App. Div. 2d 920, 388 N.Y.S.2d 118 (2d Dep't 1976), Amerman v. Lizza & Sons, Inc., 45 App. Div. 2d 996, 358 N.Y.S.2d 220 (2d Dep't 1974), *and* Horton v. State, 50 Misc. 2d 1017, 272 N.Y.S.2d 312 (Ct. Cl. 1966), *with* Gilbert v. Stanton Brewery,

loss of society with loss of services,[165] it assumed that under *Tilley* children can recover for loss of society and therefore could find no sound reason for denying recovery to married persons for loss of consortium.[166] In *Tilley*, however, although the Court of Appeals sanctioned damage awards for loss of parental training and guidance in wrongful death actions, it expressly stated that loss of society and companionship would not be compensable.[167] Thus, *Tilley* provides no support for the position that the Court of Appeals would sanction an award of damages for loss of consortium in a wrongful death action.

Although one second department panel has held that a claim for loss of consortium may be asserted in a wrongful death action,[168] the sounder rule would appear to be the one taken by the majority of New York courts in denying recovery.[169] This result appears to be

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Inc., 295 N.Y. 270, 67 N.E.2d 155 (1946), *and* O'Neil v. State, 66 Misc. 2d 936, 323 N.Y.S.2d 56 (Ct. Cl. 1971). *But see* Martins v. Ford, 53 App. Div. 2d 887, 385 N.Y.S.2d 620 (2d Dep't 1976); Leavy v. Yates, 142 N.Y.S.2d 874 (Sup. Ct. N.Y. County 1955).

[165] 93 Misc. 2d at 540, 402 N.Y.S.2d at 952.

[166] *Id.* at 542, 402 N.Y.S.2d at 953. The *Lehman* court reasoned that "[t]o recognize that children suffer from the loss of society of their parents and allow recovery to them in wrongful death actions, but to reject this concept as between married persons draws a distinction without a difference." *Id.*, 402 N.Y.S.2d at 953.

[167] 24 N.Y. 471, 476 (1862). The *Tilley* Court analogized the parental training lost by the children to the benefit a student would lose upon the violation of a teacher's duty and thus found such a loss to be pecuniary in nature. *Id.*

[168] Martins v. Ford, 53 App. Div. 2d 887, 385 N.Y.S.2d 620 (2d Dep't 1976). In *Martins*, the plaintiff-widow, suing individually and in her capacity as administratrix of her husband's estate, commenced a negligence action seeking to recover damages for loss of consortium. The court, relying on Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968), held that the plaintiff had a valid claim for loss of consortium. 53 App. Div. 2d at 887, 385 N.Y.S.2d at 621. Justice Cohalan, concurring in part and dissenting in part, contended that *Millington* was no precedent in a wrongful death action. *Id.* at 888, 358 N.Y.S.2d at 621. He noted that "despite the lapse of five years from the time of the *Millington* decision in 1968 to the instant tragedy in 1972, our State Legislature has taken no steps to include the *Millington* rationale in the wrongful death statutes; nor is there any present indication that it is considering such a step." *Id.* (Cohalan, J., concurring in part and dissenting in part).

[169] In Osborn v. Kelly, 61 App. Div. 2d 367, 402 N.Y.S.2d 463 (3d Dep't 1978), the plaintiff-executrix sought to recover for loss of consortium in a wrongful death action. The court, finding recovery for loss of consortium proper only from the date of decedent's injury to date of death, implicitly rejected loss of consortium as an element of recovery under the "pecuniary injury" standard of EPTL § 5-4.3. *Id.* at 370, 402 N.Y.S.2d at 464. Similarly, the traditional rule denying loss of consortium was retained in Ventura v. Consolidated Edison, N.Y.L.J., Oct. 7, 1977, at 13, col. 3 (Sup. Ct. N.Y. County), wherein the court stated that "[*Martins*] is not controlling in this department and the court is not presuaded to adopt its rationale." *Id.* at col. 4. Ironically, after the decision in *Martins, see* note 168 *supra*, a different second department panel denied recovery for loss of society in a wrongful death action. Bell v. Cox, 54 App. Div. 2d 920, 388 N.Y.S.2d 118 (2d Dep't 1978). In *Bell*, the court, without referring to *Martins*, concluded: "If the law in this regard is to be changed it must be by an amendment of the statute, or by its reinterpretation by the Court of Appeals." *Id.*, 388

in accord with the intended reading of EPTL § 5-4.3. When the legislature first enacted the wrongful death statute[170] it was free to place restrictions on the right to recover.[171] Moreover, judicial interpretation of "pecuniary injuries" to exclude loss of society and consortium has not prompted legislative response, suggesting a reluctance to broaden the elements of recovery in wrongful death actions. It is submitted that if change in the traditional New York rule is to occur, it should come from the legislature.

Elaine Robinson McHale

UNIFORM COMMERCIAL CODE

N.Y.U.C.C. § 3-206,-405: Drawer has cause of action against depositary bank for failure to act in accordance with a restrictive indorsement

The Uniform Commercial Code (UCC) contains various provisions which seek both to foster the negotiability of commercial paper[172] and to place the risk of loss of the party who should most appropriately bear it.[173] Thus, under the "imposter rule" of section

N.Y.S.2d at 119. Another second department panel has extensively reviewed the history of the wrongful death action in New York and has noted that the constitutional provision that protects the statutorily created wrongful death action, *see* note 149 *supra*, "left undisturbed the other then existing limitation in the statute allowing recovery only of pecuniary damages which the courts of this State had interpreted as barring damages for grief, loss of society and suffering of survivors." Amerman v. Lizza & Sons, Inc., 45 App. Div. 2d 996, 998, 358 N.Y.S.2d 220, 224 (2d Dep't 1974).

[170] The constitutional limitations on the legislature's right to limit recoverable damages under the wrongful death statute were not adopted until 1894. *See* note 149 *supra*.

[171] Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573, 579 (1974); 2 F. HARPER & F. JAMES, LAW OF TORTS § 24.1, at 1285 (1956).

[172] Section 3-104(1) lists the prerequisites of negotiability. The instrument must be signed by the maker or drawer, promise unconditionally the payment in money of a sum certain on demand or at a definite time, and be payable to order or to bearer. These prerequisites are discussed in detail elsewhere in the Code. *See* N.Y.U.C.C. §§ 3-105 to -107, -109, -112 to -114 (McKinney 1964).

[173] Section 3-406, for example, provides that the party whose negligence "substantially" contributes to the alteration of an instrument or to the unauthorized affixing of a signature thereon shall, if the drawee pays in good faith, bear the burden of the resulting loss. Section 3-418 codifies the rule of Price v. Neal, 97 Eng. Rep. 871 (1762), which held that money paid out by an innocent drawee on an instrument bearing a forged signature may not be recovered from a holder in due course or an innocent purchaser who is able to show detrimental reliance. Section 3-419 delineates the circumstances whereby an instrument is deemed converted and allocates liability therefor. Subsection 3 limits the conversion liability of depositary and other collecting banks to the infrequent instances when the bank holds the proceeds of an instrument, fails to act in good faith or in accordance with reasonable commercial standards, or