

Assessing and Proving Damages

Survival and Wrongful Death Damages in Section 1983 Cases Revisited

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INTRODUCTION

In representing the families of victims of police or governmental misconduct, when death is a result, one overriding emotional component sometimes overlooked is the representation of the rights of the deceased victim. When the case is presented, pre-trial and at trial, the rights of the deceased should be asserted with the same intensity as if the deceased were sitting the chair next to the family. Vigorous advocacy of the rights of the deceased will give meaning to the injustices they suffered thereby giving them "life" after death. This paper will briefly discuss how the survival action on behalf of the deceased can maximize the purposes and policies of § 1983.

Most conventional state law torts cases typically includes damages for pain and suffering, but exclude them in a number of circumstances, such as under the survival statute C.C.P. § 377.34, or under the wrongful death statute C.C.P. § 377.61. However, cases alleging damages under 42 U.S.C. § 1983² have been held to have distinct purposes that has expanded the recovery of damages for the pain and suffering of the deceased before his/her death and for recovery of damages for the deceased's "right to life" by the heirs or the authorized representative of the estate. The basic purposes of an award of damages under § 1983 is: (1) to compensate plaintiffs for injuries caused by deprivations of their federal constitutional or statutory rights; and, (2) the award often serves an important function "to prevent or deter 'official illegality'." *Robertson v. Wegmann*, 436 U.S. 584, 590-592 (1978).

The common law provided that tort claims for personal injuries abated upon the death of the injured party. As a result of obvious injustices caused by

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²§ 1983 is one of the Reconstruction-era statutes enacted in response to the lawlessness of the Ku Klux Klan and its sympathizers and the tacit acceptance of the KKK by southern local governments and law enforcement agencies. It is now unquestionably "the main [statutory] vehicle for constitutional tort litigation." *Archie v. City of Racine*, 847 F.2d 1211, 1226 (7th Cir. 1988) (Posner, J., concurring).

the common law rule, most states (except Idaho) have enacted statutes "survival statutes," allowing tort actions to survive the death of the plaintiff. § 1983 contains no language addressing this question and there is no codified federal survival statute, these state survival statutes provide the vehicle in recovering damages in survival claims under § 1983. *Robertson v. Wegmann*, 589-90.

A frequently litigated issue is whether, and to what extent, the survivors in such a case can recover damages for pain and suffering experienced by the decedent prior to death. In *Greene v. Vantage S.S. Corp.*, 466 F.2d 159, 166 n.9 (4th Cir. 1972) the court commented that "there is no federal policy against awarding damages for pain and suffering" under these circumstances. *In re Korean Air Lines Disaster*, 807 F. Supp. 1073, 1081 (S.D.N.Y. 1992) also opined that there was "no federal statutory or common law bar to the survival action brought by the decedent's estate . . . to recover damages for decedent's conscious pain and suffering". Most courts first look to state law for the, appropriate remedy for § 1983 violations. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1236 (7th Cir. 1984); *Berry v. City of Muskogee*, 900 F.2d 1489, 1505 (10th Cir. 1990).

However, many state survival statutes, including several in the Ninth Circuit, preclude any recovery for the decedent's pain and suffering. For example, in *Kirk v. Washington State Univ.*, 746 P.2d 285, 292 (Wash. 1987) it was noted that damages for pain and suffering were "expressly barred from recovery" under the Washington survival statute which was later modified. In *Garcia v. Whitehead*, 961 F. Supp. 230, 232 (C.D. Cal. 1997) the court pointed out that "California's survivorship statute ... specifically excludes damages for a decedent's pain and suffering." See also *Denton v. Superior Court*, 945 P.2d 1283, 1287 (Ariz. 1997). Thus, the defense will typically argue that the survival statutes should control the jury instructions on damages and plaintiffs' counsel will assert that the application of these state law limitations in § 1983 are inconsistent with 1983's deterrent and compensatory purposes. The trend of these cases are that restrictive state laws must give way to federal common law rules that permit recovery. In sum, in a § 1983 action, the trend of the law is that the estate may recover damages for loss of life, conscious pain and suffering experienced by the decedent prior to death, and punitive damages in a case in which the standard of *Smith v. Wade* (supra) has been satisfied.

This paper will briefly address three issues which may arise in the context of which damages will be compensable at trial in a survival action.

(1) The federal common law developed by U.S. Supreme Court and federal cases are generally controlling on the issues of damages in § 1983 actions;

- (2) The estate in a § 1983 action can recover damages for "loss of life" as a result of the deceased's death in a survival action; and,
- (3) The estate in a § 1983 action can recover damages for "pain and suffering of the deceased suffered prior to his/her death in a survival action.

1. FEDERAL COMMON LAW APPLIES FIRST IN DETERMINING WHAT DAMAGES ARE RECOVERABLE IN A § 1983 ACTION

42 U. S. C. § 1983 creates "'a species of tortliability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Carey v. Phipus*, 435 U.S. 247, 253 (1978). See also *Smith v. Wade*, 461 U.S. 30, 34 (1983). Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts. See *Smith v. Wade*, supra, at 34; *Carey v. Phipus*, supra, at 257-258. To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as "impairment of reputation . . . , personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). See also *Carey v. Phipus*, 264 (mental and emotional distress constitute compensable injury in § 1983 cases). Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory* -- damages grounded in determinations of plaintiffs' actual losses. Congress adopted this common-law system of recovery when it established liability for "constitutional torts." Consequently, "the basic purpose" of § 1983 damages is "to *compensate persons for injuries* that are caused by the deprivation of constitutional rights." *Carey v. Phipus*, 254 (emphasis added). See also *Id.*, at 257 ("damages awards under § 1983 should be governed by the principle of compensation").

As the United States Supreme Court explained in *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978) "[I]n certain areas 'federal law is unsuited or insufficient 'to furnish suitable remedies'; federal law simply does not 'cover every issue that may arise in the context of a federal civil rights action. "'When in a section 1983 case brought in federal court the federal law is deemed to be deficient, a related statute, 42 U.S.C. § 1988, instructs courts to turn to "'the common law, as modified and changed by the constitution and statutes of the [forum] State,' as long as these are 'notinconsistent *with the Constitution and laws of the United States.*' " (*Id.*, 588.) *Robertson v. Wegmann* alleged a §1983 deprivation based on a state district attorney's bad faith criminal prosecution. The plaintiff died, (the death was unrelated

to the alleged constitutional violation) while the action was pending and he left no close surviving relatives. *Id.*, 585. The decedent's estate then sought to be substituted as a plaintiff, but the state survival statute was limited to survival claims of the spouse, children, parents, or siblings of a decedent, none of which had standing under the statute. However, Court of Appeal upheld the trial court's decision that not allowing the estate to proceed would be inconsistent with the purposes of § 1983, and held the estate could proceed. *Id.*, 587-88, 590. In reversing, the Supreme Court the survival statute barred the decedent's § 1983 claim. Holding that because federal law is silent on the survival of § 1983 claims, they are generally determined by state law, the court clarified that the exception to this general rule occurs where application of the pertinent state law such as a survival statute - would be inconsistent with federal law. *Id.*, 589-590, citing 42 U.S.C. 1988 (1996), which permits resort to state law where federal remedial provisions are "deficient," In determining if a state statute is inconsistent with federal law, courts must look not only to the language of the pertinent federal statute, but also to the policies underlying that statute, citing the principal policies behind § 1983 are (1) compensating for injuries to persons who have been deprived of their federal rights, and (2) deterring abuses of authority by individuals acting under color of state law. *Id.*, 590-591.

Robertson also held the abatement of that specific action was not contrary to the deterrent policy of § 1983 in that the constitutional deprivation did not cause the victim's death, because the statute permitted most actions to survive the victim's death. Thus, even state officials contemplating illegal activity who were familiar with the statute would be cognizant of their potential liability under § 1983 and the deterrent value would generally be preserved. *Id.* 591-952. Although in *Robertson* the court concluded that plaintiffs § 1983 claim abated upon his death, the Court reaffirmed the general proposition that state survival statutes apply in 1983 actions unless they have an independent adverse effect on, and are generally inhospitable to, the policies underlying § 1983. *Id.* 594.

In *Carlson v. Green*, 446 U.S. 14 (1980) the court distinguished and limited *Robertson*. *Carlson* alleged a "Bivens action"³ alleging an Eighth Amendment violation for failure of prison officials to provide adequate medical

³*Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). *Bivens* actions are claims asserted against federal officials for violation of a U.S. Constitution rather than one arising under § 1983. Many cases follow *Carlson* in addressing the survival of claims for pain and suffering in § 1983 cases. See, e.g., *Weeks v. Benton*, 649 F. Supp. 1297, 1308-09 (S.D. Ala. 1986); *Sager v. City of Woodland Park*, 543 F. Supp. 282, 287 n.3, 295-96 (D. Colo. 1982); *Davis v. City of Ellensburg*, 651 F. Supp. 1248, 1254-55 (E.D. Wash. 1987); *Guyton v. Phillips*, 532 F. Supp. 1154, 1166 (N.D. Cal. 1981).

attention causing the death of the plaintiffs son from a decedent's chronic asthmatic condition which occurred while he was incarcerated in federal prison. *Id.*, 16, fn. 1. The Indiana state law provided that no recovery was available where the acts complained of caused the victim's death. *Id.*, 17, Fn. 4. *Carlson* rejected the defense argument that *Robertson* compelled that state law must be followed in assessing the survival of the decedent's *Bivens* claim. It held that only a uniform federal survivorship rule would suffice to redress the constitutional deprivation being alleged, and that whenever a state survival statute would result in the abatement of *Bivens* claims against defendants whose conduct caused the victim's death, federal common law applies to permit survival of the action. *Id.*, 23-24.

Notwithstanding the authority provided by *Robertson* and *Carlson*, they addressed the applicability of state survival statutes that result in the complete abatement of an action and neither case directly held that in § 1983 actions, state survival provisions that merely preclude the recovery of damages for pain and suffering should not be followed in instructing the jury.⁴ However, these Supreme Court cases have become the foundation for a number of circuit and lower court decisions which have limited the application of state law provisions that preclude damages awarded to the estate or representative of a decedent for "loss of life" or for the decedent's "pain and suffering" caused by the constitutional violation before death.

2. DAMAGES FOR VIOLATION OF A CONSTITUTIONAL RIGHT MAY ALLOW FOR RECOVERY BY AN ESTATE FOR LOSS OF LIFE

In the seminal case of *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) the defendant officers appealed from the jury verdict and judgment of the district court, which found that the defendant officer deprived decedent Daniel Bell and his family of their constitutional rights by an unlawfully shooting and the finding that the officer, the Chief of Police, and the investigating detective unlawfully conspired to conceal the true facts of Daniel Bell's death. Defendants appealed various components of the judgment of \$1,590,670 in favor of family members and the estate of Daniel Bell for "loss of life." There, the court held that the state law wrongful death-survival statute, similar to California's, along with state case law decisions construing those provisions ". . . which would preclude

⁴In *Carlson*, in a concurring opinion written by J. Powell, joined by J. Stewart opined the same result if the action was under § 1983, *Id.* at 29-30. See also *Bell v. City of Milwaukee*, 746 F.2d 1205, 1237-1238 (7th Cir. 1984), (applicability of *Carlson* to § 1983).

recovery to Daniel Bell's estate for loss of life, are inconsistent with the deterrent policy of Section 1983 and the Fourteenth Amendment's protection of life." *Id.*, 1240. "The Wisconsin law therefore cannot be applied to preclude the \$100,000 damages recovered by Daniel Bell's estate for loss of life." *Id.*

Deterrence of wrongful or negligent conduct is also a policy objective of tort law, but as in Wisconsin, survival and wrongful death statutes generally do not seek to deter wrongful deaths through the imposition of damages for loss of life itself. The rationale is typically the extraordinary difficulty in measuring the value of the loss; and in the context of a survival action, there is the additional inability to restore a deceased to the state he would have enjoyed but for his death. [cite omitted] Yet given the stated tort policy of deterrence and the conceivable reduction of the incidence of tortious conduct created by the threat of substantial damages, these dilemmas amount to less than a compelling argument against awarding any damages at all for loss of life. *Id.*, fn. 41.

In *Graham v. Sauk Prairie Police Commission*, 915 F.2d 1085 (7th Cir. 1990) plaintiff's § 1983 Fourteenth Amendment arise from the shooting death of her husband. The officer defendant died from causes unrelated to the case shortly after it was filed. The district court granted plaintiffs' summary judgment on the decedent's fourth amendment excessive force claim and fourteenth amendment loss of life claim and in favor of the spouses' fourteenth amendment claim for lost society and companionship. After a jury award to the spouse of \$ 300,000 for lost society and companionship, \$ 130,200 in compensatory damages and \$ 550,000 for loss of life to the Estate, defendants challenged the loss of life damages on the grounds that because the officer had died, no deterrent policy would be advanced by the award. *Id.*, 1088.

Graham followed *Bell* where "[W]e stated that where the unconstitutional act is the taking of a life, there would result more than a marginal loss of influence on potentially unconstitutional actors and, therefore, on the ability of § 1983 to deter official lawlessness, if the victim's estate could not recover loss of life damages." *Id.*, 1104. First the court rejected the argument that because both the deceased and the officer were Caucasian that the award would not address an inference of racial animus present in *Bell* and therefore had no effective deterrence on racial injustice, a historical consideration of § 1983 explaining:

While the loss of life damages in *Bell* may have been directed partially towards deterring deprivations of life that are motivated by racial animus, we emphasized that the legislative history underlying § 1983 expresses an

unequivocal concern for *protecting life*. (Cite omitted, emphasis in the original.) Thus, while § 1983 damages may in some cases be aimed at deterring a specific motivation (for instance, racial animus) for an unconstitutional killing, the overriding concern of § 1983 is deterring unjustified takings of life. *Id.*, 1104-1105.

Graham also rejected the argument that because the individual officer acting insane at the time of the shooting and was now dead, that the award would have no deterrent effect on him as an individual and therefore did not advance the purposes of § 1983. The court found the fact that the officer could no longer be deterred "quite irrelevant." It explained:

The deterrence objective of § 1983 damages is directed at a broader category of persons than the individual perpetrator alone. In *Bell*, this court stated that loss of life damages are intended to have a deterrent effect on "potentially unconstitutional actors." 746 F.2d at 1239(emphasis added). No specific deterrence could have been accomplished in *Bell* because in that case, the offending officer had resigned from the force. *Id.*, 1105.

Thus, it was held that the loss of life award to the estate was broadly directed towards "deterring any police officer who would contemplate taking the life of a person who poses no threat of harm to the officer or the public." *Id.*

Consistent with the reasoning of the "loss of life" cases, a number of § 1983 cases have also allowed claims of punitive damages in wrongful death cases over restrictive state wrongful death statutes. For example, in *Bass v. Wallenstein*, 769 F.2d 1173, 1190 (7th Cir, 1985) the court stated "Nor can restrictive state law preclude the estate's recovery of punitive damages in a case in which the showing of "recklessness or callous indifference" required by *Smith v. Wade*, 461 U.S. 30, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983), has been made." In *Bell*, the court held that "To disallow punitive damages in Section 1983 actions solely on the basis of restrictive state tort law would seriously hamper the deterrence effect of Section 1983." (*Id.*, 746 F.2d, at 1241.) See also *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983).

3. DAMAGES FOR VIOLATION OF A CONSTITUTIONAL RIGHT MAY ALLOW FOR RECOVERY BY AN ESTATE FOR PAIN AND SUFFERING OF THE DECEASED BEFORE HIS/HER DEATH CAUSED BY THE VIOLATION

A number of federal precedent supports the position that an estate may

recover "loss of life and pain and suffering of the deceased in an § 1983 action. In *Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981) the action was brought by the estate of the deceased minor by his mother. Guyton was an age 14 years, small, slight, black male whose death was caused by gunshot wounds inflicted by two officers following a car chase. *Id.*, 1156. Under state survival law the estate could not recover for pain and suffering sustained prior to death nor for the loss of life. Citing *Carey v. Piphus*, 435 U.S. 247, 253 (1978) for the proposition that state common-law tort rules of damages may be inconsistent with the policy underlying § 1983, the court held that the estate was entitled to recover for loss of life and pain and suffering. Plaintiff could therefore recover under § 1983.

However, taking heed of the guidance offered by the majority in *Robertson*, this court follows what appears to be the present interpretation of § 1988. (Fn and cite omitted.) Therefore, we look to the state statute, and if an inconsistency with federal law is found, we look to federal common law. This court is persuaded by the intent of the Act, the narrow ruling and discussion by the Supreme Court in *Robertson*, and the holdings in *Basista v. Weir, supra*, and its progeny, that California's survival statute, insofar as it excludes recovery for pain and suffering, is inconsistent with § 1983. Its restrictions on recovery are significantly inhospitable to the policies fostered by the Act. (Cites omitted.) To deny recovery for pain and suffering would strike at the very heart of a § 1983 action. *Id.*, 1166.⁵

In *Williams v. City of Oakland*, 915 F. Supp. 1074, (N.D. Cal. 1996) plaintiff filed her § 1983 alleging that officers unlawfully seized, searched and used excessive force. Plaintiff died before the action was tried from causes unrelated to the incident. Her husband substituted into the action as the administrator of her estate representing himself and her heirs and survivors. The court concluded that California survival law's disallowance of recovery for a deceased plaintiffs pain and suffering, as expressed in C.C.P § 377.34, is "inconsistent with section 1983 [even in cases] when the victim's death was not a result of the constitutional violation." (*Id.*, 1077.) *Guyton* distinguished *Robertson* and found that the implications of adopting the limitation contained in the

⁵The *Guyton* court at fn. 6 found it important to note that pain and suffering sustained prior to death is recoverable in a majority of jurisdictions as having survival statutes or hybrid survival-wrongful death statutes that allow recovery for a decedent's conscious pain and suffering prior to death: Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York North Carolina, Ohio, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Wisconsin, in addition to specific federal statutes and decisions under the general maritime law.

California statute were far broader than the very limited ones in *Robertson* where the pain and suffering damages abated only because that plaintiff had no next of kin survivors.

Here, the deceased plaintiffs husband is in a position to vindicate his wife's rights and receive an award of compensatory damages. He is within the familial range of those affected by defendants' conduct. To deprive him or other survivors of the only element of damages that the deceased might have been able to recover would have a serious adverse effect on the policies underlying section 1983. This holding comports with the conclusions in comparable cases decided by federal appellate and district courts. *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990) involved an action where the death was caused by the section 1983 violation. The Tenth Circuit discussed the need for compensation for victims of section 1983 violations and found that a state survival statute which cut off nearly all damages available to the decedent failed to satisfy the purposes of the federal law. *Id.* at 1504-06. In *Bell v. City of Milwaukee*, 746 F.2d 1205, 1234-42, 1250-53 (7th Cir. 1984), the Seventh Circuit adopted the state survival statute but found the monetary limitations in the state's wrongful death statute at odds with the purposes of section 1983. The court upheld an award of damages above the state limit in order to vindicate the deprivation of constitutional rights. Similarly, in *Larson v. Wind*, 542 F. Supp. 25, 27 (N.D. Ill. 1982), a district court found that a state survivorship statute which precluded recovery for punitive damages was inconsistent with section 1983. *Larson* also involved a plaintiff who died from causes unrelated to the conduct complained of in the action. The court went on to say that "section 1983's purpose of deterrence would be subverted by slavish application of a state survivorship rule denying punitive damages." *Id.* (*Id.*, 1078-1079.)

In *Garcia v. Whitehead*, 961 F. Supp. 230 (C.D. Cal., 1997) then District Judge Pragerson denied defendant's motion in limine to not allow pain and suffering of the deceased as damages in a § 1983 action against the County of San Bernardino and a deputy alleging excessive force was used against the Decedent. There the Court stated:

Thus, the deterrent purpose of section 1983 "is hardly served when the police officer who acts without substantial justification suffers a harsher penalty for injuring or maiming a victim than for killing him." [cite omitted] The Guyton court concluded that "to deny pain and suffering damages would strike at very heart of a section 1983 action Absent such a remedy, the section 1983 claim amounts to little more than a tort claim." *Id.*

In *Davis v. City of Ellensburg*, 651 F. Supp. 1248, 1256 (E.D. Wash. 1987), the 1983 claim arose out of the decedents' death during his arrest. The defendants based their position that the § 1983 claims were subject to Washington's survival statute precluding recovery for "pain and suffering ... personal to and suffered by a deceased." *Id.*, 1255-56, quoting Wash. Code 4.20.046(1) (1988). Plaintiffs argued that *Guyton v. Phillips*, was more applicable in that the statutes' limitation on recovery of pain and suffering prior to death was inconsistent with § 1983's deterrent objective. *Id.*, 1250.

The court agreed that the holding in *Robertson v. Wegmann*, should not be extended to cases where a constitutional violation results in the victim's death. The *Davis* court agreed that applying Washington's survival statute that excluded damages for pain and suffering would be inconsistent with § 1983 because defendants would not be sufficiently deterred from killing their victims, where the constitutional deprivation results in death would create a rule in terms of liability and deterrence where, from the point of the defendant, "it was better to kill them than leave them alive." The *Davis* court phrased the contrary situation as a "substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills the victim. *Id.*, 1256.

Similarly, in *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D. Fla. 1983), in a 1983 action brought by the estate of a youth who was shot and killed by a police officer, the court held that a Florida law which would preclude survival of the action was inconsistent with § 1983 policy, and that federal common law which allows the action to survive governed the estate's recovery. (See also *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981), (state law held to be inconsistent with the § 1983 policy of deterring unconstitutional deprivations of life by state officials, allowing the estate's § 1983 claim.)

In *Sanchez v. Marquez*, 457 F. Supp. 359 (D. Colo. 1978) the personal representative of the estate (and other plaintiffs) brought a § 1983 action against officers who wrongfully shot and killed the representative's brother. State law permitted survival of the action, but limited recovery to the victim's loss of earnings sustained prior to death. The court, noting that "it is inconsequential that the actions under color of state law which violate a federally protected right may also constitute a tort," held that § 1983 was not intended to incorporate such restrictive damage limits. (*Id.*, 362.) Other cases rejecting restrictive state laws on damages in § 1983 cases, see *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982) and *Jackson v. Marsh*, 551 F. Supp. 1091 (D. Colo. 1982).

In *Banks v. Yokamick*, 177 F. Supp. 2d 239 (SDNY 2001) Decedent Banks

was riding a bicycle in Manhattan on October 29, 1998 when Officer Yokemick, who was chasing Banks, threw his police radio at him, striking the side or rear of Banks's head with sufficient force to knock him off the bicycle and cause him to fall to the street. The jury also heard evidence indicating that Yokemick did not immediately disclose to other officers who arrived at the scene and drove Banks away to the police station, or to personnel at the precinct, or to ambulance attendants who later transported Banks to the hospital, that Banks had been struck on the head by Yokemick's radio. Banks's life could not be saved by the time he was finally taken to the hospital and properly diagnosed later that day as having suffered head injuries. Hours after his arrival at the hospital he went into a coma, was pronounced brain dead two days later. An autopsy determined the cause of Banks's death as having resulted from a blunt impact to the head that fractured his skull and produced brain contusions. (Id., 243244.)

The jury awarded plaintiff a total of \$ 605,001 consisting of (1) \$ 25,000 for Banks's conscious pain and suffering and \$ 500,000 for his loss of life, both connected with the claim of use of excessive force; (2) \$ 75,000 for Banks's pain and suffering associated with a state law claim for negligent delay in obtaining medical assistance; and (3) \$ 5,000 on Banks's state law wrongful death cause of action, and (4) nominal damages of \$ 1.00 on Banks's claim of unlawful arrest.

In upholding the verdict, the Court stated:

Uniformly, the courts have ruled that when a violation of federal rights protected by § 1983 does cause the decedent's death, state laws that either extinguish the survival action or bar recovery for loss of life, effectively abate a § 1983 claim of deprivation of life, are inconsistent with § 1983, and warrant application of a federal rule of decision pursuant to § 1988. See *Berry*, 900 F.2d at 1501 ("We are satisfied that Congress intended significant recompense when a constitutional [**23] violation caused the death of a victim. The general legislative history of the 1871 act makes clear that death was among the civil rights violations that Congress intended to remedy."); *Bass v. Wallenstein*, 769 F.2d 1173, 1189-90 (7th Cir. 1985) (holding that where the constitutional violation has caused death, "state law that precludes recovery on behalf of the victim's estate for loss of life is inconsistent with the deterrent policy of section 1983.") (citing *Bell v. City of Milwaukee*, 746 F.2d 1205, 1234 (7th Cir. 1984)); *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984); *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983). (Id., 250.)

The *Banks* court concluded that based on the reasoning and precedent of the authorities cited the court found that insofar as New York's survivorship of claims

statute would bar recovery of the damages that the jury awarded for Banks's loss of enjoyment of life, the state law fails to take into account policies analogous to the goals expressed in § 1983 and sustained the jury's verdict awarding damages for loss of enjoyment of life and pain and suffering of the decedent. (*Id.*, 252-253.)

Not all jurisdictions have adopted the *Guyton* analysis and adopt the position that limitations on decedent's pain and suffering are not inconsistent with 1983's policy of deterrence. For example, in *Garcia v. Superior Court*, 42 Cal. App. 4th 177 (1996), a § 1983 action brought by the estate alleged excessive force claim which caused the death of plaintiff's brother, the trial court struck the claim for decedent's pre-death pain and suffering damages. The plaintiff appealed asserting the state statute was inconsistent with federal law, and the policies underlying § 1983. Court of Appeal declined to follow the reasoning of *Guyton* and concluded that the deterrent purpose of § 1983 is satisfied by the fact that the state survival statute (Cal. Code Civ. Pro. § 377.34) expressly allows punitive damages which the decedent would have been entitled to recover had he survived. The *Garcia* court also reasoned that the statutory scheme for survivors, taken as a whole, provides adequately for compensatory damages, because the designated heirs can bring a wrongful death action. *Id.*, 581-582.

Garcia specifically rejected the reasoning of *Guyton* and *Bell* that denial of pain and suffering damages would effectively create an incentive for wrongdoers to "kill the victim rather than merely injure or maim the victim." *Id.*, 585-585. The reasoning of *Garcia v. Superior Court* was rejected in *Garcia v. Whitehead*, 961 F. Supp. 230 (C.D. Cal. 1997) a § 1983 action alleging a shooting death by a deputy, specifically the conclusion that punitive damages provides an adequate deterrent in cases where the victim of a constitutional deprivation is deceased. *Id.*, 233.

The Court does not find persuasive the notion that punitive damages provide an adequate deterrent effect. Even where a constitutional violation is found, punitive damages are never available against the agency itself in a section 1983 action, and are not always warranted against the individual defendant. Furthermore, as Judge Patel noted in *Williams*, "the amount of those [punitive] damages will be governed by the financial condition of the individual officer without regard to the pain and suffering he may have inflicted on the decedent." 915 F. Supp. at 1078. The amount of punitive damages awarded against the typical civil servant is therefore likely to be relatively small. *Id.*