

## **Green v. Bittner and Progeny: Projecting Dollar Values for Advice, Counsel and Companionship in New Jersey**

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*Green v. Bittner (1980) is a legal decision that is unique among the 50 states in that the New Jersey Supreme Court provided some level sanction for an economic expert to make speculative projections of lost advice and counsel and lost companionship in wrongful death actions. Economic experts, however, have differed about the degree of speculation that is allowed and about the meaning of “companionship” in the decision. Frank Tinari’s original paper (1998) on this subject interpreted Green v. Bittner in a fairly broad fashion. Tinari’s second paper (2004) provided discussion of five reported lower court decisions subsequent to Green v. Bittner, arguing for same broad interpretation of the decision. This paper argues for a narrower interpretation of Green v. Bittner based on the same set of six legal decisions discussed by Tinari.*

In 1998, Frank Tinari published a paper that provided arguments for a “more comprehensive measurement” of household services in New Jersey based on the New Jersey Supreme Court decision in *Green v. Bittner* (1980). Based on that decision, Tinari’s 1998 paper explained how he calculates dollar values for “loss of advice and counsel” and “loss of companionship” in New Jersey wrongful death actions. In a paper presented at the July, 2005 meetings of the Western Economic Association (Ireland 2005, available only as an internet download), I argued that Tinari’s interpretation of “loss of companionship” was inconsistent with the *Green v. Bittner* decision. Tinari responded to this author’s unpublished paper in a note (Tinari 2004, but published in 2005). In that note, Tinari argued that subsequent New Jersey legal decisions interpreting *Green v. Bittner* have supported his broader interpretation of the meaning of “loss of companionship.” This paper will make two arguments: First, that the five reported decisions cited in Tinari’s 2005 note all support this author’s interpretation of the meaning of “companionship” in the *Green v. Bittner* decision; and second, that the degree of speculation required for projecting values for loss of advice and counsel and for loss of companionship (regardless of how companionship is interpreted) is greater than would be allowed in most states.

The first section of this paper will provide analysis of the decision in *Green v. Bittner*. The second section will review the five subsequent reported decisions discussed in Tinari’s 2004/2005 note. The third section will discuss the degree of speculation required to make calculations under either interpretation of *Green v. Bittner* and explain why such calculations would not be permitted in any state other than New Jersey.

### **The *Green v. Bittner* Decision**

*Green v. Bittner* involved the death of a student in her senior year in high school. The decedent was an exemplary child, but the trial court jury had found that Donna Bittner’s parents and brothers and sisters had suffered no pecuniary loss. The trial court judge denied a motion for a new trial on damages on the basis that (as quoted by the Judge Wilentz in *Green v. Bittner*)

[I]t would be reasonable for this jury to come to [the] conclusion that the value of her services to babysit or to dry dishes was far exceeded by the cost to the family of feeding,

clothing and educating her. The jury in this case followed literally the language of the statute and came to the conclusion that they reached.

Judge Wilentz went on to explain that the trial court judge had noted "that it was unusual for a jury to come up with a verdict of no recovery, and he expressed sympathy with the parents and their shock when they learned of no reward for their daughter's death." Judge Wilentz also said:

In fairness to the trial court, its instructions to the jury were substantially in accord with present law. Furthermore, the charge was objected to in only one respect which the court remedied. Under those instructions, the trial court was clearly correct when, in ruling on the motion for a new trial, he noted that a jury could very well have concluded that the further cost to the family of maintaining Donna might equal or exceed the pecuniary value of those items of loss which the law, as understood by all concerned, allowed the jury to consider.

New Jersey Supreme Court reversed that decision, saying:

We reverse. Under the circumstances presented to us, such a verdict is a miscarriage of justice. . . We hold that when parents sue for the wrongful death of their child, damages should not be limited to the well-known elements of pecuniary loss such as the loss of the child's anticipated help with household chores, or the loss of anticipated direct financial contributions by the child after he or she becomes a wage earner. We hold that in addition, the jury should be allowed, under appropriate circumstances, to award damages for the parents' loss of their child's companionship as they grow older, when it may be most needed and valuable, as well as the advice and guidance that often accompanies it. As noted later, these other losses will be confined to their pecuniary value, excluding emotional loss.

In describing the new permissible scope of recovery in wrongful death actions, the *Green v. Bittner* decision went on to emphasize the distinction between emotional loss based on the loss of a loved one and services of the sort that adult children might provide to aging parents:

What services, what activities, could a daughter or son reasonably have been expected to engage in but for their death and to what extent could any of them have monetary value? Just as the law recognizes that a child might continue performing services after age 18, and that monetary contributions may also be received by the parents thereafter when the child becomes productive, it should similarly recognize that the child may, as many do, provide valuable companionship and care as the parents get older. . . [0]ur courts have not hesitated to recognize the need of children for physical help and care. Parents facing age or deteriorating health have the same need, and it is usually their children who satisfy that need. Indeed the loss of companionship and advice which a parent suffers when a child is killed will sometimes be as great as the loss of counsel and guidance which a child suffers when a parent is the victim.

Companionship and advice in this context must be limited strictly to their pecuniary element. The command of the statute is too clear to allow compensation, directly or indirectly, for emotional loss. . .

Companionship, lost by death, to be compensable must be that which would have provided services substantially equivalent to those provided by "companions" often hired today by the aged or the infirm, or substantially equivalent to services provided by nurses or practical nurses. And its value must be confined to what the marketplace would pay a stranger with similar qualifications for performing such services. No pecuniary value may be attributed to the emotional pleasure that a parent gets when it is his or her child doing the caretaking rather than a stranger, although such pleasure will often be the primary value of the child's service, indeed, in reality, it's most beneficial aspect. The loss of added emotional satisfaction that would have been derived from the child's companionship is fundamentally similar to the emotional suffering occasioned by the death. Both are emo-

tional rather than “pecuniary injuries,” one expressed in terms of actual emotional loss, the other in terms of prospective emotional satisfaction.

The critical element in this discussion, which was repeated in cases citing *Green v. Bittner* was that the services involved must be replaceable by a stranger hired in the commercial marketplace. This precludes the kind of special companionship that John Smith and Frank Smith can provide to each other as father and son. *The mere fact that people who care about each other are spending time together mutually enjoying activities is not sufficient for a pecuniary value to be assigned to time spent in that type of companionship under Green v. Bittner.* It must also be shown that the companionship involved could be replaced by a stranger from the commercial marketplace.

### Interpretations of “Loss of Companionship”

Tinari’s 1998 paper interprets “loss of companionship” broadly as time a decedent would have spent in the company of survivors bringing a claim for damages in a wrongful death action. Ireland (2005) argued that “loss of companionship” was more narrowly focused on the type of companionship a person might need if ill, injured or elderly and the services of an attendant care provider would be needed in lieu of such services that might have been provided by a decedent. To provide a simple example of the difference, suppose that John Smith regularly went fishing with his son Frank Smith for both the enjoyment of fishing as a recreational activity and for enjoyment of companionship with each other. Tinari’s 1998 paper would treat this type of companionship as compensable damages under the standards of *Green v. Bittner*. Ireland’s 2005 paper argued that this type of companionship would not be compensable under the standards of *Green v. Bittner* unless there was evidence that either John or Frank Smith would have been unable to go fishing with someone else without attendant care. Ireland argued that if John and Frank Smith are both able bodied, they do not depend upon each other for companionship services. If John Smith did not go fishing with his son, he would not consider hiring an attendant care provider from the commercial labor market. He would go fishing with one of his friends or another relative. It is the same with Frank Smith unless, of course, there really is a dependant relationship such that Frank Smith would need a paid companion to go fishing if not for the companionship services of his father. People who want to spend time together are enjoying each other’s company in consortium, not providing needed services that could be replaced by strangers.

### Subsequent Legal Decisions Cited by Tinari

Tinari’s “Note” cited five legal decisions subsequent to *Green v. Bittner* (1980) as allegedly defining companionship in a broader fashion. The oldest was *Hudgins v. Serrano* (1982). Citing *Green v. Bittner*, the *Hudgins* Court said:

The intent of the [wrongful death] statute is to provide those entitled with that which they could have reasonably expected had the decedent survived. Where those expectations anticipated something to be provided by the person of the decedent other than that which could be furnished with the coin of the realm, the entitlement is to money sufficient to provide a substitute to the extent it can be provided. Its value must be confined to what the market place would pay a stranger with qualifications as similar to those of decedent as possible under the circumstances for performing such services. Significantly, no pecuniary value may be attributed to emotional pleasures or satisfaction now lost.

The next oldest was *Cary v. Lovett* (1992). Citing *Green v. Bittner*, the *Cary* Court said:

Damages for the wrongful death of an infant, like wrongful-death damages generally, are limited to economic matters. When parents sue for the wrongful death of a child, their damages may include the pecuniary value of the child’s help with household services, the pecuniary value of the child’s anticipated financial contributions, and the pecuniary value

of the child's companionship, including his or her advice and guidance, *as the parents grow older* (italics added for emphasis).

Next oldest was *Goss v. American Cyanamid, Co.* (1994). That Court said:

Loss of companionship, guidance and counsel must be confined to their pecuniary element and their value "must be confined to what the marketplace would pay a stranger with similar qualifications performing such services." *Green, supra*, 85 N.J. at 12; *Hudgins, supra*, 186 N. J. Super. at 476.

*Schiavo v. Owens-Corning Fiberglas* (1995) came next. That court said: "The jury determined that \$150,000 would reasonably compensate [Dona Schiavo, defendant's widow] for her pecuniary losses, including those permitted by *Green v. Bittner*." This decision provided no discussion of how the \$150,000 figure was arrived at.

The final decision cited in Tinari's note was *Gangemi v. National Health* (1996). In this decision a sister brought the action for her own losses. The decision places significant emphasis on the advice and counsel provided by the decedent sister to the younger surviving sister who had brought the wrongful death action. The decedent sister's advice was deemed "invaluable" by the surviving sister. The *Gangemi* decision held that a sister was permitted under the wrongful death act to recover for loss of advice and guidance. The court then cited *Green v. Bittner*, saying:

The damages encompass "the loss of guidance, advice and counsel," and companionship . . . The Court warned, however, that the evaluation of such benefits "in this context must be limited strictly to their pecuniary element." . . . The estimation may not include any consideration of emotional loss relating to either decedent's death or plaintiff's pleasure in having her next of kin, rather than a stranger, perform the services.

The type of advice and companionship compensable under the [Wrongful Death] Act is the kind which may be purchased . . . In the context of the parent/child relationship, the Court gave the example of hired companions who may provide assistance to aged parents with shopping, nursing care and household management . . . The recovered "value must be confined to what the marketplace would pay a stranger with similar qualifications for performing such services."

### **Speculation Required by *Green v. Bittner* Not Matched in Other States**

Regardless of how "companionship" is interpreted, *Green v. Bittner* requires a degree of speculation not matched in other states. Judge Wilentz acknowledged in the *Green v. Bittner* decision that the jury's decision in that case was consistent with New Jersey law as it had existed up to that point in time. As fully described, it was also consistent with the law in the majority of other states that maintain standard wrongful death acts under which survivors of a decedent may recover their own losses, but not losses to the decedent resulting from his or her own death. (A few states allow recovery by the estate of a decedent for losses of the decedent, making the issues posed by *Green v. Bittner* irrelevant.) In other states with survivor-based wrongful death acts, a claim can be made for the future pecuniary value of loss of advice and counsel and loss of companionship, but the required degree of speculation is typically too extreme to allow an economic expert to project such losses.

One of the easiest ways to explain this point is to provide an example in which such a claim could easily be made. Assume that Mary Smith, the mother of George Smith, had been providing the types of services a paid companion would ordinarily provide and was also handling George Smith's financial affairs. After Mary's wrongful death, George Smith (or perhaps his siblings on his behalf) has hired a paid companion to provide replacement services at a cost of \$15 per hour for 20 hours of each week (\$15,600 per year). George Smith has also hired a case manager at \$10,000 per year to handle his finances. With those facts in evidence, most economic experts would not hesitate to project that George Smith has pecuniary losses of

\$15,600 per year for paid companionship and \$10,000 per year for a type of advice and counsel. The latter calculation would probably be presented as costs of a case manager rather than lost advice and counsel, but the function of a case manager is very similar to some forms of advice and counsel. An economic expert would have to project how long Mary Smith would have continued to provide these services to George Smith, a growth rate for future increases in cost, and a discount rate at which the future value of services should be reduced to present value, but it would be very difficult to argue that such calculations were in any way speculative or that they were pecuniary costs caused by the death of Mary Smith.

For an opposite example, consider the case of Donna Green, who was one of six children of Harry and Anne Green of *Green v. Bittner*. It is possible that at some future date either Harry or Anne Green might have needed attendant care of the type provided by paid attendant care providers. Unlike George Smith, however, Harry and Anne Green had no need for such services at the time of their daughter's death, not did either of them have a condition that would result in a foreseeable need for such services in the future. There is some chance that one or both parents might have needed such services at some point in the future. There is some chance that one of the six children of Harry and Anne Green might have provided such services so that a paid companion did not need to be hired. Donna Green was an exemplary daughter. Perhaps it could be shown that it was more likely that in the event that such services were to be needed by Harry or Anne Green, it was more likely that Donna would have provided those services as compared with her five siblings. However, while this loss would be pecuniary if the need developed and Donna would have filled that need, it is highly speculative to assume that such a need would have existed or that Donna would have filled that need in lieu of hiring a paid attendant care provider. To develop a specific dollar value for the loss, an economic expert would have had to further base a loss calculation on *when* that need would have developed. The chance that such a calculation would be admitted as meeting ordinary standards for admission of economic testimony are remote.

For another example, assume that Martha Jones has been wrongfully killed and her daughter Judy Jones is making a claim for loss of advice and counsel that her mother had been providing. Judy Jones claims that she spent an three hours per week taking with her mother on the telephone and had visits with her mother about twice per month lasting about three hours per visit. Using Tinari's definition of companionship, Judy Jones could claim 3 hours x 52 weeks = 156 hours per year in telephone companionship and 2 per month x 3 hours x 12 months = 72 hours of visit companionship. If we assign a value of \$10 per hour to those hours, the annual loss value is  $156 + 72 = 228$  hours x \$10 = \$2,280 per year. Using Ireland's definition of companionship, the value is \$0 since Judy Jones can find other persons with whom to communicate. It is possible that during the 228 hours of assumed interactions, Martha Jones offered valuable advice to Judy Jones, but how would one determine how much of the 228 hours consisted of offering useful advice. It also must be determined what kind of advice it was. If it was financial advice, it would have one market value. If it was psychological advice, it would have another value and so forth. Any specific dollar value must rest on a number of speculative assumptions that an economic expert would have great difficulty defending in a court of law, anywhere but possibly in New Jersey.

It is not that such losses are not pecuniary losses. If the losses exist, they could be replaced by strangers in the commercial marketplace in the manner described in the *Green v. Bittner* decision. If reliable estimates of quantities of the services provided could be produced, reasonably reliable values could be placed on the losses of those services. However, the level of speculation required is far greater than for any other allowable projection by economic experts in states other than possibly New Jersey. Tinari's approach, explained in his 1998 paper, was to assume what he considered to be reasonable time amounts for both advice and counsel and companionship. However, for any specific family, the foundation for his quantities is very weak. He does not attempt to answer questions about the quality of the advice and counsel that is assumed to be provided. Since *Green v. Bittner* specifies that such losses exist and should be considered by juries in wrongful death actions, it is not likely that his testimony regarding advice and counsel based on what appear to be reasonable ipse dixit assumptions will

be excluded. But it is not likely that similar testimony in other states with survivor-based recovery standards in wrongful death actions would be permitted. Even in New Jersey, however, it is hard to imagine that a calculation of the present value of a future possible need for paid companionship that has no foreseeable basis in any currently existing health condition by any survivor would be permitted to stand in the face of a carefully developed motion to exclude.

## Conclusions

The argument in this paper is not that valuations of advice and counsel and companionship (properly interpreted as care equivalent to care provided by attendant care providers) should not be projected in New Jersey or elsewhere, but that an economic expert does not have sufficient expertise to provide non-speculative valuations without having a solid foundation provided by experts in some other field. The *Green v. Bittner* Court did not authorize unfounded speculations with respect to either the time amounts a decedent might have spent providing such services nor did it allow an economic expert to simply assume quality levels in the provision of such services without any attempt to justify those assumed quality levels. Given a solid foundation in the form of supporting evidence, valuations by economic experts could be provided not only in New Jersey, but in most states with Wrongful Death Acts that award damages only to survivors of a decedent (which includes the majority of states). Losses of advice and counsel and of companionship of the sort provided by attendant care providers can be purchased in the commercial marketplace from persons unrelated to survivors of a decedent. As such, those losses are pecuniary losses in the sense carefully described in *Green v. Bittner*, and cases following *Green v. Bittner*. However, not all pecuniary losses can be measured by economic experts in a reliable way that is not speculative in nature.

A child who was a minor at the time of her death may have provided important advice and counsel to her parents at some point in her adult life, but whether this would have happened depends on the nature of the family situation. Economists are not experts on the unique circumstances that exist within families. The quantity and quality of such advice cannot be determined in the present, especially by an economic expert. Economists have no training or background that would allow them to predict either the quantity or the quality of advice and counsel that a minor child today might have provided in the future. If an adult child was already providing attendant care to a parent at the time of the adult child's death, there is no question that the commercial cost of alternative attendant care to replace the care that was being provided by the adult child would be an appropriate damage to claim. However, if there was no need for attendant care by either parent at the time of death, any calculation for the lost future value of such care must be based on guesses as to the likelihood of the need and the amount of the need that would have occurred years in the future.

The issue is not whether loss of advice and counsel and loss of attendant care companionship are compensable losses. It is whether any foundation exists from which an economic expert could prepare reliable and non-speculative projections of the values of the advice and counsel and future attendant care companionship based solely upon economic expertise. When reliable evidence exists, there is no controversy. Such losses are compensable as long as there is a reliable foundation for preparing calculations subject to the criterion of reasonable economic certainty. When reliable evidence does not exist, there is nothing about the training of economic experts that gives economic experts the expertise to create such a foundation.

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