Understanding the Limited Effect of *Molzof v. United States* On Wrongful Death Damages Under the Federal Tort Claims Act

**Cyrus B. Richardson, III**

**Introduction**

The Federal Tort Claims Act (FTCA or Act) is a limited waiver of the United States’s sovereign immunity to certain tort claims. In the FTCA, Congress authorized damage suits against the United States for harm caused by the negligence or misconduct of any federal employee acting within the scope of his or her employment, to the same extent that a private person would be liable under state law.¹ In dealing with such claims, the Act generally provides that the remedy available under state law is incorporated into the statute.² However, there are some important exceptions to the waiver. Most notably, Congress excluded punitive damages from the damages available under the FTCA.³

As a result of the exclusion of punitive damages from FTCA awards, damage calculations in wrongful death cases are often perceived to be

---

¹ *See* 28 U.S.C. § 1346(b) (1994). 28 U.S.C. § 1346(b) provides that:

> (The district courts . . . shall have exclusive jurisdiction of civil actions on claims . . . for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.


> The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or punitive damages.

> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought . . . .

³ *See* id.
confusing aspects of FTCA litigation. This confusion lies in the determination of which aspects of a state’s wrongful death damage award are permitted by the FTCA and which are barred by the Act’s punitive damage exclusion. Prior to 1992, most courts held that damage awards that exceeded a plaintiff’s loss were barred by the Act’s prohibition on punitive damages even if greater amounts were recoverable from a private defendant for the same tort. These courts limited FTCA wrongful death damage awards to actual or compensatory damages based on the plaintiff’s loss. These courts considered damage awards that exceeded a plaintiff’s loss to be punitive. Consequently, courts generally excluded money that would have been used for the decedent’s taxes and the decedent’s consumption from the FTCA wrongful death damage awards because the plaintiffs would never have benefitted from that money.

4. See, e.g., Flannery v. United States, 718 F.2d 108, 111 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984) (To the extent that an award gives more than the actual loss suffered by the claimant, it is ‘punitive’ . . . .”; Felder v. United States, 543 F.2d 657, 669 (9th Cir. 1976); (“[I]n deciding if a statute is punitive, we look not to its language nor the state court’s characterization of it . . . we look to its effect.”); Hartz v. United States, 415 F.2d 259, 264 (5th Cir. 1969) (“[T]o the extent . . . [that the Georgia wrongful death statute] permits recovery of more than the loss to the survivor it is punitive.”); contra Kalavity v. United States, 584 F.2d 809, 811 n.1 (6th Cir. 1978) (“Damages are ‘punitive’ only when awarded separately for the sole purpose of punishing a tortfeasor who inflicted injuries ‘maliciously or wantonly, and with circumstances of contumely or indignity.’”)(citing Milwaukee R.R. Co. v. Arms, 91 U.S. 489, 493 (1875)).

5. See, e.g., Flannery, 718 F.2d at 111 (“The FTCA’s proscription of awards of punitive damages authorizes only those awards that compensate or reimburse, or provide recompense or redress for injuries suffered by the claimant.”); Felder, 543 F.2d at 669 (“[T]he purpose of the FTCA is compensation . . . it is intended to repay the amount of loss or injury sustained by a plaintiff . . . .”); Hartz, 415 F.2d at 265 (“[T]he trial court, in a federal tort claims act, cannot award a judgment in excess of the injury suffered . . . .”); contra Kalavity, 584 F.2d at 811 (“Tort law may award as customary damages something more than simply out-of-pocket loss, something for deterrence without spilling over into ‘punitive’ damages awarded solely for the purpose of punishment.”).

6. See, e.g., Flannery v. United States, 718 F.2d 108, 111 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984) (“To the extent that an award gives more than the actual loss suffered by the claimant, it is ‘punitive’ . . . .”); Hartz v. United States, 415 F.2d 259, 264 (5th Cir. 1969) (“[T]o the extent . . . [that the Georgia wrongful death statute] permits recovery of more than the loss to the survivor it is punitive.”); contra Kalavity v. United States, 584 F.2d 809, 811 n.1 (6th Cir. 1978) (“[D]amages are ‘punitive’ only when awarded separately for the sole purpose of punishing a tortfeasor who inflicted injuries ‘maliciously or wantonly, and with circumstances of contumely or indignity.’”)(citing Milwaukee R.R. Co. v. Arms, 91 U.S. 489, 493 (1875)).

7. See, e.g., Flannery, 718 F.2d at 111 (“Federal income taxes must be deducted in computing lost future earnings. . . .”); Harden v. United States, 688 F.2d 1025, 1029 (5th Cir. 1982) (“The [FTCA’s] prohibition [against punitive damages] would also seem to imply that, like [the decedent’s] other personal expenses, income taxes must be deducted.”); Felder v. United States, 543 F.2d at 670 (“Since failure to deduct income taxes would result in plaintiffs receiving greater financial support than they [normally] would have . . . the effect of such an
However, in the 1992 FTCA personal injury case *Molzof v. United States*, the Supreme Court held that the FTCA's punitive damages exclusion bars only the recovery of what are legally considered to be punitive damages according to traditional common law principles. Punitive damages, according to traditional common law principles, are those damages that satisfy a two-part test; they require proof that (1) the defendant engaged in intentional or egregious conduct, and (2) the damages have a punitive purpose.

Few recent cases have interpreted *Molzof*. Consequently, judges and practitioners must carefully consider the effect of *Molzof* on FTCA wrongful death damage awards. This article examines *Molzof*’s limited effect on the calculation of wrongful death damages in order to curtail the misinterpretation and misapplication of the FTCA in light of the *Molzof* decision.

First, the *Molzof* holding should be confined to FTCA personal injury cases. The *Molzof* holding should not be applied to FTCA wrongful death cases. Wrongful death damages are different from personal injury damages. Damage awards in wrongful death cases compensate for the losses of people other than the decedent. Most wrongful death statutes are designed to compensate a decedent’s family members for their economic loss.

award . . . [is] ‘punitive.’’); contra Kalavity, 584 F.2d at 813 (“[N]o reduction need be calculated for the absence of income taxes . . . for ordinary cases involving loss of future earnings.”). See also Fred S. McChesney, *Problems in Calculating and Awarding Compensatory Damages for Wrongful Death Under the Federal Tort Claims Act*, 36 EMORY L.J. 149, 149-158 (1987) (discussing court decisions that excluded taxes and personal expenditures from FTCA wrongful death damage awards because they violated the Act’s prohibition on punitive damages).

9. Id. at 312. 
10. See id.; see also Brewer v. United States, 864 F. Supp. 741, 745 (N.D. Ill. 1994) (discussing the *Molzof* definition of “punitive damages”).
11. See Kirchgessner v. United States, 958 F.2d 158, 163 (6th Cir. 1992) (stating that *Molzof* held that “the punitive damages proscription of the FTCA . . . bars only those awards that under traditional state law analysis operate to punish the defendant for the degree of wrongfulness of his conduct.”); Childs v. United States, 923 F. Supp. 1570, 1584 (S.D. Ga. 1996) (citing *Molzof* for the proposition that “‘[p]unitive damages’ is a term of art which has particular meaning under state law, and any damages that are not technically considered ‘punitive damages’ under the relevant state law are available to a plaintiff proceeding under the FTCA.”); Brewer, 864 F. Supp. at 745 (explaining that “the damages sought in *Molzof* were not ‘punitive damages’ because they did not satisfy a two part test: the recoverability of damages must depend on proof that the defendant has engaged in intentional or egregious misconduct, and the purpose of the damages must be to punish.”).
12. See Thomas R. Ireland and James D. Rodgers, *Hedonic Damages in Wrongful Death/Survival Actions: Equitable Compensation or Optimal Life Protection?*, J. LEGALECON. DEC. 1993, at 43, 45-46 (“In most states, it is quite clear in their wrongful death acts that survivors may only recover their own losses, not the losses suffered by the decedent.”).
13. See W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen,
decedent’s family members recover the economic benefits that they would have received from the decedent during the rest of the decedent’s lifetime if the decedent had not been killed. The decedent is dead; no amount of money can make the decedent whole. Personal injury damage awards on the other hand, compensate the victim for the victim’s injuries. In personal injury cases, courts consider the amount of money that would allow “the wrongfully injured person to purchase goods and services that are as enjoyable as those precluded by the injury, thus making the injured party in some sense whole.” Thus, given the different natures of wrongful death and personal injury damages, it is inappropriate to apply the holding of Molzof, a personal injury case, to wrongful death cases.

In addition, Congress recognized a distinction between wrongful death and other torts. In the 1947 amendment to the FTCA, Congress stated:

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought . . . .

While punitive damages are not permitted in FTCA personal injury or wrongful death claims, Congress placed further limitations on the damages available for wrongful death claims. By distinguishing wrongful death from other torts in the 1947 amendment to the FTCA, Congress confined the Government’s liability in wrongful death actions to actual or compensatory damages based on the plaintiff’s pecuniary loss. Second, even if Molzof were extended to wrongful death cases, the portions of a state’s wrongful death statute that are punitive would still be excluded from a wrongful death damage award.


14. Id.
16. Id. at 46.
Moreover, this article analyzes a 1996 Southern District of Georgia decision, Childs v. United States\textsuperscript{18}, that arguably misapplied Molzof. The Childs court should not have extended Molzof, a personal injury decision, to the Childs case, a wrongful death action. Nonetheless, even if Molzof were applicable to FTCA wrongful death claims, the Childs court misapplied it. Molzof supports the proposition that the punitive portions of a state's wrongful death statute should be excluded when figuring FTCA wrongful death damage awards. The Molzof court acknowledged that the FTCA made the United States liable for state law damages that were designed to compensate for injuries resulting from the tort, but not liable for damage awards intended to punish for egregious conduct.\textsuperscript{19} In light of Molzof, courts should exclude the punitive portions of a state's wrongful death act when calculating damages in FTCA wrongful death actions. However, the Childs court failed to exclude the punitive portions of Georgia's wrongful death statute. By failing to exclude the punitive damages portions of Georgia's wrongful death statute, the Government paid more in damages than Congress intended. The Childs court's misinterpretation of Molzof's effect on FTCA wrongful death damages led to a damage award that does not comport with the FTCA or Molzof.

I. Molzof v. United States

In October of 1986, Robert Molzof underwent lung surgery at a Veteran's Administration (VA) hospital in Wisconsin.\textsuperscript{20} As a result of negligence on the part of federal employees acting within their scope of employment, Mr. Molzof's ventilator tube became disconnected.\textsuperscript{21} Mr. Molzof was deprived of oxygen and consequently suffered irreversible brain damage, leaving him permanently comatose.\textsuperscript{22}

Mr. Molzof's guardian ad litem brought suit seeking supplemental medical care, future medical expenses, past and future loss of consortium, and damages for loss of enjoyment of life.\textsuperscript{23} The United States District Court for the Western District of Wisconsin determined that the free care that the Government had provided Mr. Molzof via the VA was reasonable and adequate.\textsuperscript{24} Shirley Molzof, Mr. Molzof's wife, was satisfied with the care

\begin{itemize}
\item \textsuperscript{18} 923 F. Supp. 1570 (S.D. Ga. 1996).
\item \textsuperscript{19} Molzof, 502 U.S. at 306.
\item \textsuperscript{20} See Molzof v. United States, 911 F.2d 18, 19 (7th Cir. 1990), rev'd, 502 U.S. 301 (1992).
\item \textsuperscript{21} See id.
\item \textsuperscript{22} See id.
\item \textsuperscript{23} See id. at 19-20.
\item \textsuperscript{24} See id. at 19.
\end{itemize}
and had no intention of transferring her husband to a private facility.25 There was no indication that a neighboring hospital could provide similar treatment.26 The court ordered the VA to continue to treat and care for the plaintiff.27

The District Court awarded $75,750.00 for future medical expenses and $150,000.00 for past and future loss of consortium.28 However, the court declined to award loss of enjoyment of life damages.29 The court reasoned that Mr. Molzof should not receive loss of enjoyment of life damages because his comatose condition kept him from even being aware of any damage award.30 Mr. Molzof died after the court entered the final judgment.31 Mrs. Molzof, the personal representative for Mr. Molzof's estate, appealed the decision.32

The Seventh Circuit Court of Appeals affirmed the District Court's decision and rejected the petitioner's request for $1.3 million for future medical expenses.33 The Seventh Circuit stated that an award for future medical care would duplicate the free medical services already provided to Mr. Molzof by the VA hospital.34 Because such an award would overcompensate the plaintiff for his actual losses, it was barred by the Act's prohibition on punitive damages.35

The loss of enjoyment of life claim was barred because such an award did not redress the incognizable loss of the comatose patient.36 The Court stated that the Act proscribed damages "in excess of those necessary to compensate for injuries suffered by the plaintiff" and that an award for loss of enjoyment of life could not compensate a comatose patient who was not cognizant of a loss.37 Thus, the FTCA's prohibition against punitive damages precluded a damage award for loss of enjoyment.38

25. See id.
26. See id.
27. See id. at 20
28. See id. at 20 n.3.
29. See id. at 20.
30. See id.
32. See id.
33. See Molzof, 911 F.2d at 21-22.
34. See id. at 20.
35. See id. at 20-21.
36. See id. at 22.
37. Id.
38. See id.
The Supreme Court granted certiorari to consider the meaning of the term "punitive damages" as used in the Act. Justice Thomas, writing for the unanimous Court, stated that the Act's prohibition against punitive damages is a matter of federal law and that "punitive damages" is a legal term of art with a widely accepted meaning. The Supreme Court ruled that the punitive damage exclusion only barred the recovery "of what are legally considered to be 'punitive damages' under traditional common-law principles." The Court reasoned that, absent any contrary indication, Congress must be presumed to have had the traditional common law meaning in mind when it drafted the FTCA. The Court determined that a damage award is punitive under the traditional common law meaning if its recoverability depends on proof that (1) the defendant engaged in intentional or egregious misconduct, and (2) the purpose of the damages is to punish.

The Supreme Court rejected the Government's view that any award that exceeds what is necessary to fairly compensate the plaintiff is barred by the Act. The Government contended that "punitive damages" referred to all damages that exceeded or duplicated the loss, or bore no relation to compensation.

The Supreme Court noted that the Government must have interpreted § 2674 to provide that the United States "shall be liable only for compensatory damages." However, the first clause of § 2674 clearly states that the United States "shall not be liable for punitive damages.

The difference [between "shall be liable only for compensatory damages" and "shall not be liable for punitive damages"] is important. The statutory language suggests that to the extent a plaintiff may be entitled to damages that

41. Id. at 312.
42. See id. at 307-308.
43. Molzof, 502 U.S. at 305-306 (agreeing with petitioner's argument that "[s]ection 2674 must be interpreted to permit awards against the United States of those state law damages which are intended by state law to act as compensation for injuries sustained as a result of the tort, and to preclude awards of damages which are intended to act as punishment for egregious conduct"), id. at 312 (stating that the future medical expenses and loss of enjoyment of life damages were "not punitive damages under the common law or the FTCA because their recoverability . . . [did] not depend upon any proof that the defendant . . . engaged in intentional or egregious misconduct and their purpose . . . [was] not to punish").
44. Id. at 306.
45. Id.
46. Id. at 308.
47. Id.
are not legally considered "punitive damages," but which are for some reason above and beyond ordinary notions of compensation, the United States is liable "in the same manner and to the same extent as a private individual." These damages in the "gray" zone are not by definition "punitive damages" barred under the Act.48

The Supreme Court also rejected the Government's argument that the second clause of § 2674 confirmed the compensatory purpose of the Act and showed Congress' intent to define "punitive damages" by contrasting them with actual or compensatory damages.49 The Court rejected this argument because "punitive damages" is a well-established legal term of art and that the second clause applies only in wrongful death cases.50

The Court further noted that it would be "difficult and impractical" to apply the Government's interpretation of "punitive damages."51 The Court opined that under the Government's interpretation of "punitive damages," Mr. Molzof's future medical expenses would be reduced by the amount that he would save on rent, meals, clothing, and other daily living expenses while he was hospitalized.52 According to the Court, "The difficulties inherent in attempting to prove such offsets would be enormous."53

Consequently, even though an award for the petitioner's claim for future medical expenses and loss of enjoyment of life exceeded what was ordinarily required to compensate the petitioner, such an award was not necessarily prohibited by the Act.54 Because the petitioner's claims for future medical expenses and loss of enjoyment of life were grounded solely in a simple negligence theory and were not intended to punish the tortfeasor, the Supreme Court found that the lower court erred in determining that the FTCA barred

49. Id. at 309.
50. Id.
51. Id. (stating that the Government's argument that "the second clause of 2674 confirms the compensatory purpose of the statute and demonstrates that Congress intended to define 'punitive damages' by contrasting them with 'actual or compensatory damages' . . . is undermined . . . not only by the fact that 'punitive damages' is a legal term of art with a well-established common-law meaning, but also by the Government's own statement, although the second clause defines 'actual or compensatory damages' as "the 'pecuniary injuries resulting from such death,' the 'pecuniary' injuries standard does not apply in determining compensatory damages in any other kind of tort suit against the United States").
53. Id. at 310.
54. See id. at 308-12.
the damages and remanded the case for a determination of whether the damages that the petitioner sought were recoverable under Wisconsin law.\textsuperscript{55}

A. \textbf{MOLZOF IS LIMITED TO FTCA PERSONAL INJURY CASES}

\textit{Molzof} should be limited to personal injury cases. \textit{Molzof} is an FTCA personal injury case, not a wrongful death case.\textsuperscript{56} FTCA personal injury damages should be distinguished from FTCA wrongful death damages.\textsuperscript{57} First, the statutory language and legislative history of the FTCA show that Congress distinguished wrongful death from other torts. Unlike the general FTCA tort remedy, the wrongful death remedy is narrowly defined as the plaintiff's actual or compensatory damages based on pecuniary loss.\textsuperscript{58} Second, the language of the \textit{Molzof} decision demonstrates that the Supreme Court did not intend \textit{Molzof} to apply to FTCA wrongful death cases. Consequently, courts should not overextend the \textit{Molzof} decision. If the \textit{Molzof} decision is overextended, then FTCA wrongful death plaintiffs will receive damage awards that exceed those intended by Congress.

1. \textbf{The Statutory Language and Legislative History of The FTCA Demonstrate that Congress Intended to Distinguish Between Wrongful Death and Other Tort Suits}

Congress distinguished wrongful death from other torts. The statutory language and the legislative history of the FTCA demonstrate Congress’ intent to provide a uniform method of determining damages in wrongful death cases. Although tort damages under the FTCA are generally determined by applying

\begin{itemize}
\item \textsuperscript{55} Id. at 312.
\item \textsuperscript{56} \textit{Molzof}, 502 U.S. 301.
\item \textsuperscript{57} In Brereton v. United States, 973 F. Supp. 752, n.7 (E.D. Mich. 1997) the court recognized the distinction between FTCA wrongful death cases and personal injury cases. The court rejected the plaintiffs' claim that \textit{Molzof} permitted recovery of hedonic damages in FTCA wrongful death cases when federal courts apply the Michigan Wrongful Death Act. \textit{Id.} ("That such damages [hedonic damages] might be available under the FTCA in a personal injury case brought on behalf of the victim is irrelevant to whether hedonic damages are available under the ... [Michigan Wrongful Death Act].") (emphasis added).
\item \textsuperscript{58} See 28 U.S.C. § 2674 (1994). 28 U.S.C. § 2674 states: If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought. ... (emphasis added).
\end{itemize}
state law damage rules, the Act explicitly addresses wrongful death damages.\textsuperscript{59}

The second paragraph of 28 U.S.C. § 2674 demonstrates Congress’ intent to measure FTCA wrongful death damages based on the plaintiff’s loss:

\begin{quote}
If . . . in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought . . . .
\end{quote}

This language was added by a 1947 amendment because the Department of Justice had moved for the dismissal of wrongful death claims brought in Alabama and Massachusetts.\textsuperscript{60} The Alabama and Massachusetts statutes conflicted with the FTCA’s prohibition on punitive damages because they only permitted the recovery of punitive damages awards in wrongful death cases.\textsuperscript{61} Consequently, Congress created the second paragraph of 28 U.S.C. § 2674 to provide plaintiffs in Alabama and Massachusetts with a remedy in FTCA wrongful death cases.\textsuperscript{62} Congress defined the remedy for FTCA wrongful death plaintiffs as “actual or compensatory damages, measured by the pecuniary injuries resulting from such death.”\textsuperscript{63}

Congress’ addition of the second paragraph did more than merely provide an FTCA wrongful death remedy in Alabama and Massachusetts; it served as a means for Congress to effectuate the policy goal of setting a uniform method of calculating recoverable damages in FTCA cases. Congress viewed the amendment as a means to make the settlement of wrongful death damage claims consistent among the states.\textsuperscript{64} In explaining the bill to amend the FTCA to provide a remedy for plaintiffs in states whose wrongful death statutes only award punitive damages, the Committee Reports and a

\begin{flushleft}
\begin{itemize}
  \item \textsuperscript{59} 28 U.S.C. § 2674 (1994).
  \item \textsuperscript{60}  H.R. Rep. No. 80-748, at 1548 (1947).
  \item \textsuperscript{61}  H.R. Rep. No. 80-748, at 1548 (1947).
  \item \textsuperscript{62}  \textit{Id}.
  \item \textsuperscript{63}  \textit{See} 28 U.S.C. § 2674 (1994).
  \item \textsuperscript{64}  \textit{See} Unpublished hearings, \textit{quoted in Massachusetts Bonding \& Ins. Co. v. United States}, 352 U.S. 128, 131 (1956). \textit{See also} H.R. Rep. No. 80-748, at 1548 (1947) (“The result of conflict of laws has been that the Department of Justice has moved for the dismissal of death claims brought in both these States [Alabama and Massachusetts] under the Federal Tort Claims Act on the theory that the purpose of the Act was to compensate for the loss actually suffered rather than for the culpability involved in the tort committed. . . . This bill simply amends the Federal Tort Claims Act so that it shall grant to the people of the two States the right of action already granted to the people in the other 46.”).
\end{itemize}
\end{flushleft}
spokesman for the Comptroller General implied that, when Congress originally passed the Act, Congress had intended to make the Government only liable for compensatory damages:

Since in those two states [Alabama and Massachusetts] compensatory damages are not allowed [in wrongful death cases], all that is required is to amend the Federal Tort Claims Act to say that in such states compensatory damages shall be allowed . . . It is believed that suggestion would eliminate the discrepancy and would make the settlement of claims in those two states to be exactly in accord with the general rules followed in the other 46 states . . . .

Thus, by amending the FTCA, Congress defined the damages available in FTCA wrongful death actions as compensatory damages based on pecuniary loss.

Interpreting the second paragraph of § 2674 to authorize only compensatory damages in FTCA wrongful death damages is consistent with the interpretations of other federal statutes that address awards in death cases. Prior to the creation of the FTCA, Congress enacted the Federal Employers' Liability Act\(^66\) (FELA) and the Death on the High Seas Act\(^67\) (DOHSA).

\(65\) Unpublished hearings, quoted in Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128, 131 (1956) (emphasis added). However, the issue remains: why is Congress concerned about consistency in the general calculation of wrongful death damages, yet allows other inconsistencies to remain? For example, Congress permitted FTCA personal injury damages to be calculated according to state law. This certainly permits a variety of FTCA personal injury award calculations among the states. Congress appears to have been most concerned about achieving consistency in calculating wrongful death damages. Arguably, this is because the calculations of wrongful death damages awards had been very disparate as evidenced by the fact that Alabama and Massachusetts had permitted only punitive damages in wrongful death cases. See supra note 64.


Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving [dependent relatives] . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.


Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas . . . the personal representative of the decedent may maintain a suit for damages . . . for the exclusive benefit of the decedent’s wife, husband, parent, child, or dependent relative against
Damages available under these statutes are limited to compensatory damages based on pecuniary loss.68 This standard is similar to the one articulated in the 1947 amendment to the FTCA.69

The pecuniary injury standard is based on the actual injuries suffered by the plaintiff.70 These damages should compensate a plaintiff for the reasonably expected benefits that the plaintiff would have received had the decedent lived.71 Consequently, money that dependent relatives would not have received if the decedent had lived must be excluded from the pecuniary standard damage awards.72

The 1947 Amendment to the FTCA demonstrated that Congress intended to create a uniform policy regarding the calculation of FTCA wrongful death damages. Congress applied the pecuniary injury standard to FTCA wrongful death damage awards. Thus, legislative intent, as well as guidance from


70. See Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 489 (1916) (FELA) ("The damages should be equivalent to compensation for the derivative of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.").

71. Id. Many factors have been held proper for consideration of the pecuniary injuries suffered by a plaintiff. These include: the income the decedent was earning at the time of the decedent's death, the decedent's health and habits, the length of time the decedent had worked for the decedent's employer, the likelihood that the decedent would have retained the decedent's job, the prospects for promotion or demotion, the decedent's and the decedent's dependent family members' life expectancies, and the likelihood that the decedent would have supported family members. O'Connor v. United States, 269 F.2d 578, 582 (2d Cir. 1959); see also Montellier v. United States, 202 F.Supp. 384, 422 (E.D.N.Y. 1962) (discussing factors considered in determining pecuniary loss).

72. See, e.g., Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 493-94 (1980) ("It follows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.") (a FELA case).
previously enacted wrongful death statutes, indicate that the pecuniary injury standard should be applied to FTCA wrongful death damage awards.

2. The Language of Molzof Demonstrates that FTCA Wrongful Death Cases Are Distinguished from Other Tort Cases

In Molzof, the Supreme Court recognized the distinction between wrongful death and other types of torts. The Government argued that the FTCA's prohibition on punitive damages precluded the Court from awarding future medical expenses and loss of enjoyment of life damages when such damages would overcompensate a plaintiff. In addition, the Government claimed that the second clause of § 2674 confirmed the compensatory purpose of the Act and demonstrated that Congress intended to define "punitive damages" by contrasting them with "actual compensatory damages." The Supreme Court rejected these arguments, stating that they were:

undermined . . . not only by the fact that "punitive damages" is a legal term of art with a well-established common law meaning, but also by the Government's own statement that although the second clause defines "actual or compensatory damages" as "the pecuniary injuries resulting from such death," the "pecuniary injuries" standard does not apply in determining compensatory damages in any other kind of tort suit against the United States.

The Supreme Court noted the Government's concession that the second paragraph applies only to wrongful death suits. Consequently, the Supreme Court did not apply the articulated wrongful death standard to the personal injury claim in Molzof.

The Supreme Court's acknowledgment that the pecuniary injury standard does not apply when determining compensatory damages to suits other than wrongful death suits demonstrates the Supreme Court's recognition of a distinction between the remedies available for wrongful death and other torts. Thus, by inference, the Supreme Court's interpretation of "punitive damages" in Molzof is necessarily limited to tortious conduct other than wrongful death.

74. Id. at 309.
75. Id.
76. See id.
77. Id.
II. Even If Molzof Were Extended to FTCA Wrongful Death Cases, FTCA Wrongful Death Damage Awards Would Still Exclude Portions of the Damage Award That Are Not Punitive

Even if the Molzof decision were extended to FTCA wrongful death cases, courts should exclude the portions of damage awards that are punitive. If a state’s wrongful death statute is partially punitive, Molzof suggests that a court should ascertain which part of the award is punitive and exclude it from the damage award; only the compensatory award portion would remain.78

In Molzof, the Supreme Court recognized two factors for courts to consider when determining whether a damage award is barred by the FTCA’s punitive damages prohibition. First, damages are prohibited if their recoverability depends upon “proof that the defendant has engaged in intentional or egregious misconduct.”79 Second, damages are prohibited if “their purpose is . . . to punish.”80 Courts need to consider these factors when evaluating a state’s wrongful death damages under the FTCA.

In Molzof, the Supreme Court found this two-part test applicable in evaluating which damages were available under Wisconsin law.81 The Supreme Court found that Mr. Molzof’s future medical expenses and loss of enjoyment of life claims were grounded solely on a simple negligence theory because the recoverability of these claims did not depend upon any proof that the defendant engaged in intentional or egregious conduct.82 The Supreme Court remanded the case for a determination of whether such damages were recoverable as compensatory damages under Wisconsin law.83 By remanding the case for determination on whether future medical expenses and loss of enjoyment of life claims were recoverable as compensatory damages under Wisconsin law, the Supreme Court indicated that courts must determine whether the damages sought are recoverable as compensatory under state law.84 Thus, when determining which damages are recoverable in wrongful death cases, courts must look to the state’s wrongful death statute. If a state’s wrongful death statute has a punitive purpose, then those damages must be excluded from the award; if the purpose is not punitive, then the damages are included.85

78. See Molzof, 502 U.S. at 306.
79. Id. at 312 (emphasis added).
80. Id. (emphasis added).
81. Id.
82. Id.
83. Id. (“It may be that under Wisconsin law the damages sought in this case are not recoverable as compensatory damages.”).
84. See id.
85. See id.
Initially, *Molzof* may appear to reject an inquiry into the nature of damages under state law. The Supreme Court noted that the government's interpretation of "punitive damages" as any award exceeding compensation would be impractical to apply, stating that it would be difficult for the court to prove offsets, such as the money a comatose victim would save on rent, meals, clothing and other daily living expenses.\(^8^6\)

Determining the content of wrongful death awards, however, is different than determining the content of personal injury awards. In figuring personal injury awards, it is appropriate to consider the plaintiff's lost ability to perform certain activities that the individual enjoyed.\(^8^7\) On the other hand, most states limit survivor's recovery in wrongful death actions to the survivor's own loss, not to the losses of the decedent.\(^8^8\) Unlike personal injury damages, wrongful death damages can be determined with reasonable accuracy. There is less difficulty and impracticability in determining the content of damage awards in wrongful death cases because, unlike personal injury cases, the damages are fixed at the time of the tort because the victim is dead. There are no lingering living expenses to consider as there are in personal injury cases.\(^8^9\) Furthermore, mortality tables provide guidance as to the life expectancy of the decedent.

### III. Childs v. United States: Misapplication of the Molzof Decision

The District Court for the Southern District of Georgia's decision, *Childs v. United States*, misapplied the *Molzof* decision. In *Childs*, a United States Postal Service truck wrongfully entered an intersection and struck Debra Childs's vehicle, killing Ms. Childs, her eight-month-old fetus, and her six-year-old passenger.\(^9^1\) The plaintiffs brought suit against the United States under the FTCA seeking damages for the decedents' wrongful deaths, pain and suffering, and funeral expenses. They contended that the FTCA and Georgia's wrongful death statute mandated that their recovery should not be reduced by the taxes or personal expenses that the decedents would have incurred.\(^9^2\)

---

86. *Id.* at 309-310.
88. *Id.* at 45-46.
89. Personal injury awards must take into account the continued injuries suffered by the victim of a tort. *See* Brereton v. United States, 973 F. Supp. 752, n.7 (E.D. Mich. 1997) ("... [T]he plaintiff in *Molzof* was not dead and, thus, was suffering an actual, physical loss of enjoyment of life caused by his injury.").
91. *Id.* at 1572.
92. *Id.* at 1581.
The Georgia wrongful death statute permits the recovery of the "full value of the life of a decedent."93 The Georgia Code defines "full value of the life of the decedent" as the "full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived."94

The district court had to determine whether the Georgia wrongful death statute's mandate that courts ignore a decedent's personal expenses and taxes when determining the full value of life resulted in punitive damage awards under the FTCA.95 The plaintiffs argued that, under the Supreme Court's interpretation of the FTCA in Moizof, the FTCA's prohibition against punitive damages does not require the deduction of personal expenses.96 The government, on the other hand, argued that the FTCA's prohibition against punitive damages required a reduction for personal expenses and taxes to prevent awarding damages that were not solely compensatory.97

Prior to rejecting the Government's position, the Childs court discussed Harden v. United States,98 the Fifth Circuit case that had previously controlled FTCA wrongful death cases involving the Georgia wrongful death statute.99 In Harden, the parents of a fifteen-year-old boy brought an FTCA wrongful death action after their son was accidentally shot by a federal ranger who was investigating raucous activities at a campsite.100 The Harden court held that the FTCA's prohibition against punitive damages required a court to deduct personal expenses and taxes from damage awards in FTCA cases when applying the Georgia wrongful death statute.101 The Harden court reasoned that, because a decedent's living expenses and taxes would reduce the income available to the decedent's family had the decedent lived, the failure to deduct these items would result in an award that exceeded necessary compensation.102 Such damages were, therefore, punitive in effect and barred by 28 U.S.C. § 2674.103

The Childs court rejected the Harden holding in light of the Moizof decision, stating, "'Punitive damages' is a term of art which has particular meaning under state law, and any damages that are not technically considered

95. Childs, 923 F. Supp. at 1583.
96. Id. at 1581.
97. Id. at 1581.
98. 688 F.2d 1025 (5th Cir. 1982).
100. Harden, 688 F.2d at 1026-27.
101. Id. at 1029.
102. Id.
103. Id.
'punitive damages' under the relevant state law are available to a plaintiff proceeding under the FTCA.\textsuperscript{104} The court determined that punitive damages are not available under Georgia's wrongful death statute.\textsuperscript{105} Thus, the damages available under the Georgia wrongful death statute are either compensatory or fall into the Molzof-termed "gray zone."\textsuperscript{106}

Consequently, the \textit{Childs} court ruled that the Georgia wrongful death statute's mandate that the "full value of life" be figured without deducting the decedent's personal expenses and taxes does not amount to a punitive damage award under the FTCA.\textsuperscript{107} The court refused to consider the decedents' personal expenses and taxes when it determined the value of their lives.\textsuperscript{108} The court awarded the plaintiffs wrongful death damages in the following amounts: $1.35 million for Ms. Childs; $1.08 million for her fetus; and, $1.34 million for the six-year-old passenger.\textsuperscript{109}

A. \textit{MOLZOF DOES NOT CONTROL CHILDS BECAUSE CHILDS IS A WRONGFUL DEATH CASE}

\textit{Molzof} does not control \textit{Childs} because \textit{Childs} is a wrongful death case; whereas \textit{Molzof} is a personal injury case. In amending 28 U.S.C. § 2674, Congress explicitly recognized a distinction between wrongful death and other torts under the FTCA. The Act limits the government's liability in wrongful death cases to compensatory damages based on a plaintiff's pecuniary loss.\textsuperscript{110} In addition, the \textit{Molzof} court acknowledged the distinction between personal injury claims and wrongful death claims by pointing out that the second paragraph of § 2674 applies only to wrongful death claims.\textsuperscript{111} Consequently, the \textit{Childs} court should not have applied the \textit{Molzof} decision to the \textit{Childs} case. The \textit{Childs} court should not have awarded the \textit{Childs} wrongful death plaintiffs damages that exceeded their actual losses. Specifically, taxes and living expenses should have been deducted from the award.

\textsuperscript{104} \textit{Childs}, 923 F. Supp. at 1584.
\textsuperscript{106} \textit{Childs}, 923 F. Supp. at 1584.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.} at 1586.
\textsuperscript{111} \textit{Molzof}, 502 U.S. at 309.
B. EVEN IF MOLZOFS CONTROLLED FTCA WRONGFUL DEATH CASES, THE CHILD246
COURT SHOULD HAVE EXCLUDED THE PORTIONS OF GEORGIA WRONGFUL
DEATH DAMAGE AWARDS THAT ARE PUNITIVE

Even if Molzof controlled FTCA wrongful death cases, the Childs court
should have excluded the portions of the Georgia wrongful death damage
award that are punitive. By adopting the view that damages "intended to act
as punishment" should be excluded from damage awards, Molzof implies
that the courts exclude punitive portions of a state's wrongful death statute.112

The Childs court failed to recognize the punitive aspects of the Georgia
wrongful death statute. It stated that Georgia courts have held that "punitive
damages" were not available under Georgia's wrongful death statute.113 The
Childs court's statement, however, is inaccurate. Georgia courts have
interpreted portions of the Georgia wrongful death statute to be punitive.114
The cases that the Childs court cites merely stand for the proposition that
"punitive damages" are not available in addition to wrongful death damages.

Georgia courts have determined and repeatedly confirmed that the
Georgia wrongful death statute is partially punitive and partially
compensatory.115 They have determined that the Georgia wrongful death
statute is punitive to the extent that it permits the recovery of more than the
plaintiff's actual loss.116

112. See id. at 306.
114. See, e.g., Engle, 139 S.E. at 869 (holding that the Georgia wrongful death statute is punitive to the extent that it permits recovery of more than the plaintiff's actual loss); Atlantic, V. & W. R. Co. v. McDilda, 54 S.E. 140 (Ga. 1906) (noting that the Georgia wrongful death statute is penal in that the recovery is for the full value of the life of the decedent, regardless of its real value to the person in whom the cause of action is vested).
115. See Savannah Elec. Co. v. Bell, 53 S.E. 109 (Ga. 1906) ("The [wrongful death] damages recovered by the plaintiff in this case are intended incidentally to compensate her for the loss she has sustained, but primarily to punish the defendant for its negligence in bringing about the death of a human being."); Id. at 112; Gielow v. Strickland, 363 S.E.2d 278, 279 (Ga. Ct. App. 1987) ("[T]he decision to punish [for wrongful death] was the legislature's... it chose to do so by prescribing a particular measure of damages."); Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 480 (Ga. Ct. App. 1984) ("[P]unitive damages are not available in a wrongful death claim since the Georgia statute to the extent it permits recovery of more than the actual loss to the survivor, is itself punitive.") (citations omitted). But see C. Frederick Overby and Jason Crawford, The Case for Allowing Punitive Damages in Georgia Wrongful Death Actions: The Need to Remove an Unjust Anomaly in Georgia Law, 45 MERCER L. REV. 1 (1993) (arguing that the Georgia Wrongful Death Act is not punitive and that it has been misconstrued by Georgia courts).
116. Engle, 139 S.E. at 869; Ford Motor Co., 319 S.E.2d at 480.
The Georgia wrongful death statute is partially punitive according to the *Molzof* definition of "punitive" because a portion of the damage award is designed to punish the tortfeasor. In *Savannah Electric Company v. Bell*, the Georgia Supreme Court addressed the statute's penal nature:

The [Georgia wrongful death] statute is . . . one that it intended to inflict a punishment upon wrongdoers who bring about the death of a human being by negligence . . . . The General Assembly could have inflicted this punishment either by indictment or by qui tam action where the recovery would go to the public, but for reasons satisfactory to the lawmaking power the punishment is inflicted through the means of a civil action, and the penalty resulting is bestowed by the public upon those who have suffered directly by the act of the wrongdoer.117

In *Harden*, the Fifth Circuit Court of Appeals analyzed the composition of the Georgia wrongful death statute in the context of an FTCA wrongful death case.118 Citing Georgia case law precedents, the Fifth Circuit recognized the partly punitive nature of the Georgia wrongful death statute.119 Consequently, the *Harden* court refused to apply the punitive portions of the Georgia wrongful death statute.120

Prior to *Harden*, the Fifth Circuit addressed the application of Georgia law to FTCA wrongful death cases. In *Hartz v. United States*, the Fifth Circuit was confronted with the issue of whether to reduce the decedent's "full value of life" figure by estimating personal expenses and federal and state taxes.121 The court determined that the Georgia wrongful death statute was punitive to the extent that it permitted recovery of more than the loss to the survivor.122 Consequently, the Fifth Circuit held that it was appropriate to take personal expenses and taxes into account when calculating an FTCA wrongful death damage award.123

The exclusion of personal expenses and taxes from FTCA wrongful death actions applying Georgia law is not only mandated by precedent, it is logical. In an FTCA wrongful death action, the survivors are only entitled to

118. *Harden*, 688 F.2d at 1029.
119. *Id.*
120. *Id.*
121. 415 F.2d at 264.
122. *Id.*
123. *Id.*
the same benefit that they would have received if the decedent had lived.\textsuperscript{124} Survivors cannot not logically and reasonably expect to receive that part of a decedent's lost income that would have been paid in taxes or personal expenses because neither the survivor nor the decedent would have had use of the money if the decedent had lived.\textsuperscript{125} For example, decedents that were salaried employees never actually receive the amount withheld from their earnings for federal income tax purposes; therefore, their survivors would never have received a direct benefit from that part of their earnings.\textsuperscript{126} To provide survivors with a financial windfall in an FTCA wrongful death case ignores Congress' intent to limit the damage awards in wrongful death cases to compensatory damages.\textsuperscript{127}

\textit{Molzof} supports judicial inquiry into the nature of wrongful death statutes.\textsuperscript{128} Thus, instead of rejecting \textit{Harden} and \textit{Hartz}, the \textit{Childs} court should have been guided by their examinations of Georgia's wrongful death statute. The \textit{Harden} and \textit{Hartz} decisions chronicled the well-established notion that the portion of the Georgia wrongful death statute that permits plaintiffs to recover more than their actual losses is punitive.\textsuperscript{129} Just as the \textit{Hartz} and \textit{Harden} courts refused to apply the punitive portion of the Georgia wrongful death statute, the \textit{Childs} court should have refused to apply it. Consequently, the \textit{Childs} court should have excluded the decedents' personal expenses and taxes from the wrongful death damages award because these portions are deemed punitive under Georgia law.

\textbf{CONCLUSION}

Wrongful death damages under the FTCA are limited to actual or compensatory damages, even after \textit{Molzof}. In order to avoid misapplying \textit{Molzof}, courts and practitioners should recognize the limitations of the \textit{Molzof} decision. First, \textit{Molzof} is strictly an FTCA personal injury case. It does not apply to FTCA wrongful death cases. The statutory language and legislative

\begin{itemize}
\item \textsuperscript{124} Plannery v. United States, 718 F.2d 108, 112 (4th Cir. 1983) (citing Hartz v. United States, 415 F.2d 259 (5th Cir. 1969)).
\item \textsuperscript{125} See Felder v. United States, 543 F.2d 657, 669 (9th Cir. 1976).
\item \textsuperscript{126} O'Connor v. United States, 269 F.2d 578, 584 (2d Cir. 1959).
\item \textsuperscript{127} See Schuler v. United States, 675 F. Supp. 1088, 1094 (W.D. Mich. 1987) ("... [F]ailure to adjust damage awards to reflect tax liability is in conflict with the purposes of the FTCA to compensate for losses sustained and not to provide a windfall which plaintiffs would not have received had the tortious conduct not occurred.") (citation omitted).
\item \textsuperscript{128} See \textit{Molzof}, 502 U.S. at 309.
\end{itemize}
history of the Act indicate that Congress intended to distinguish wrongful death from other FTCA tort claims. In FTCA wrongful death cases, the government’s liability is limited to actual or compensatory damages based on plaintiff’s pecuniary injuries. Molzof recognized that this standard applies to wrongful death torts. Second, even if Molzof were applied to wrongful death claims, only the compensatory portions of a state’s wrongful death statute would be applied; the punitive portions would be ignored. Molzof suggests that the court should determine the intent of the state legislatures in creating wrongful death statutes prior to applying a state’s wrongful death damage award in an FTCA wrongful death action. After determining that portions of the state’s wrongful death statute are punitive, the court must exclude the portion intended to serve as punishment.

The Childs court misapplied the Molzof decision. By awarding damages that exceeded the actual or compensatory loss of the plaintiff in Childs, the court misinterpreted the effect of Molzof on FTCA wrongful death damage awards. The Childs court’s errors in applying the FTCA and Molzof decision should alert courts and practitioners to the pitfalls that may be encountered in FTCA wrongful death cases.