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TRIAL ADVOCACY

Proving Damages in a Wrongful Death Case

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The trial of a wrongful death case presents interesting and challenging issues. The laws regarding damages for wrongful death are old-fashioned, out of date and archaic.

At common law, the personal injury case died with the decedent. Thus, it was always in the best financial interest of the defendant to injure someone enough to kill him so that he would not be cast in damages. New York State therefore created the statutory rule that allowed death cases to proceed, but exacted its toll by its limiting law of damages. Surviving family members are not permitted damages for their grief or loss; widows are not entitled to loss of the marital relationship. The sole amount of damages is pecuniary or financial loss and pain and suffering that the decedent felt prior to death.

Nonetheless, the skilled trial lawyer can try a case that results in significant damages for those limited elements of compensation. Due to the special nature of wrongful death cases, each stage of the proceeding must be planned with great care and consideration from jury selection through summation.

The Voir Dire

Areas of both liability and damages must be addressed in a nonargumentative, educational yet probative manner. Begin the voir dire something like this: 'I represent the family of Michael Jones. He was killed in an automobile accident on October 5th, 2003. We have a lawsuit against a driver who we claim went through a red light. We will be talking to you today in general terms about this case.'

Q. How do you feel about someone's children vindicating the loss of their father by bringing a lawsuit?

Q. Do you think there is anything wrong with a wife suing for the loss of her husband? Do you think there is anything right about it? What?

In a case involving adult children and no wife bringing the case, make sure the jury knows that your case is being brought by adults. Otherwise they may be surprised either in opening or when your adversary conducts his voir dire, that the true plaintiffs are not minor children in need of financial support or the immediate nurturing of a parent.

Q. I want you to know right now that my clients are the adult children of Michael

Jones. They have brought a lawsuit to vindicate the death of their father. How do you feel about that?

Q. Do you think that these children, although they are grown, have a right to bring a lawsuit saying that the defendant is responsible for their father's death? What do you think about that?

Q. It's their position that the person who was careless and responsible for the death should be held accountable. Do you think there is anything wrong with adult children getting justice for the loss of their father?

It is also important that you deal with the liability issues in the case as well, and the fact that your clients will not be able to add anything to your proof on liability.

Q. You know, obviously Mr. Jones is no longer with us, and can't tell us at trial how the accident happened. As a result, I have to prove my case through the defendant himself. What do you think? Is that OK?

You have to talk to the prospective panel about your specific elements of damages as well.

Q. Do you agree with our system of civil justice that stands for the proposition that if someone feels pain and suffers through the fault of another, that they are entitled to be compensated for that pain and suffering, even if they are no longer with us?

Q: Do you agree with the civil justice system that we have in New York that says if someone dies through the negligence of another, that the estate of the person who dies is entitled to be compensated for the pain and suffering he felt prior to his death? Why do you agree with that?

Q. How do you feel about our civil justice system that says when a child loses a parent through the negligence of another, that the child is entitled to be compensated for their 'loss of parental guidance'? Why do you feel that way?

Q. Do you agree that a person's children are entitled to pecuniary or financial loss from the loss of a parent, if it is caused by the negligence or carelessness of another party?

The last two questions are crucial when the survivors are adult children, particularly with regard to the claim for loss of parental care and guidance. This element of damages gives you the most latitude to offer proof regarding the type of person and parent that the decedent was, and thus represents an important part of your case. Jurors, however, may be surprised that adult children are entitled to such an award and are often resistant to the concept. Thus, identification of such juror attitudes is a crucial part of your jury selection.

Loss of Services and Parental Guidance

Obviously, when the decedent was a substantial wage-earner in the prime of his career, proving economic damages is a straightforward matter. Issues to keep in

mind in projecting these economic damages include the decedent's opportunity for promotions and advancement in his field, as well as the fringe benefits, such as health insurance and pension plan opportunities, that the decedent may have received from his employer. To that end, a witness with knowledge of the excellent work habits, talents and abilities possessed by the decedent may go a long way towards justifying a large pecuniary loss projection by your economist.

Of note, defendants are entitled to argue that the decedent would have, himself, consumed a portion of his lost earnings, and that the award must be diminished by that amount. With regard to income tax, our law contains a strange quirk: defendants in a personal injury action may seek such an offset in a post-trial hearing, but medical malpractice actions require that such proof be offered through expert testimony during the trial itself or such an argument is waived.

In the case of a spouse who works inside the home or a parent with a minimal earning history, the trial lawyer can still get a substantial award. First, lay the foundation for all the work the stay-at-home spouse did prior to her death: laundry, cleaning, landscaping, garbage removal, painting, window-washing and things of that nature. Then have an economist quantify what it would cost to project those services after providing him with the proper foundation through factual hypothetical questions:

Q. Professor Smith, how does an economist quantify the value of losing a wife who works within the home?

A. What we do is determine the replacement cost of finding other individuals to do the same type of work.

Q. Can you give us an example of what you mean by that?

A. Sure. We can take, for example, what it would cost to have a live-in housekeeper to replace what Mr. Jones' wife did for him around the house, add a growth rate to it, and project that for her life-expectancy.

Q. Professor, I'm going to ask you now to assume the following set of facts as true that were testified to in this court. I want you to assume that Mrs. Jones did all the housework for Mr. Jones. She cleaned the entire four bedroom house on a daily basis. She vacuumed, washed the floors, did the laundry, cooked two meals per day and did all the grocery shopping. Do you have an opinion to a reasonable degree of economic certainty as to what the replacement cost of Mrs. Jones' household services would be?

The same can be done for the loss of parental services claim as well. For example, if the parent tutored the child each night, drove her to school each day, counseled her with respect to her relationships, coached her golf lessons, and taught her bible studies at night, the trial lawyer can have the economist quantify that as well. Once you incorporate those sworn facts into a hypothetical question for your economist, you can have him project the costs of a daily tutor, a separate chauffeur, a social worker and golf instructor. Obviously, this could come to a substantial sum of money over the course of a child's minority.

However, with respect to loss of parental guidance claims, it is far better to have

emotional testimony about the type of parent the decedent was, leaving it to the jury to do the quantifying on the verdict sheet. And certainly do not limit the parental guidance to just 21 years of age, because, after all, when does someone stop needing their mother?

Conscious Pain and Suffering

You must prove conscious pain and suffering -- an actual awareness of pain. It is not enough to merely show that the person lived for a period of time from accident until death. Those witnesses who may have seen the physical injuries prior to death, or heard screams or moans must be called to the stand. Emergency service workers may have seen or heard something that could be interpreted as proof of conscious pain and suffering. Importantly, proof of fear of imminent death is permitted, and can be inferred by the actions undertaken by the decedent, such as skid marks left by the vehicle he was driving, proving that he was aware of the impending disaster and tried to avoid it.

Even in seemingly comatose patients, a careful review of the hospital record may reveal conscious pain. The nurses' notes are the best place to look because they are with the patient much more than the physicians and will record such things as whether the patient obeys commands or responds on any level to noxious stimuli. Once you have some favorable signs of consciousness, have your expert give an opinion as to their meaning.

In a case where a person is dead on arrival or dead at the scene with no eyewitnesses whatsoever, an autopsy report can form the basis of a determination of pain and suffering. However, you still need expert testimony on the issue.

Summation

The summation presents some interesting issues, paramount of which is explaining to the jury why your clients are entitled to a substantial verdict for pain and suffering of short duration. The first thing to discuss is why the jury should bother awarding money for pain and suffering to the estate, if the decedent is no longer alive to collect it. This can be addressed with the following argument:

You may ask yourselves, why should we give Michael's estate money for his pain and suffering when he won't be around to reap its benefits. That's a good question. But let's look at it this way. Let's say that someone owed Mike a million dollars based upon a prior debt. The fact that he died would not expunge that debt. His beneficiaries or his estate would still be entitled to that million dollars. At a minimum, the estate would demand payment of that million dollars owed to Mike, and if that debtor didn't pay, the estate would certainly hire an attorney to enforce that claim. Well, when the defendant made a left turn in front of Mike's car, killing him, and causing his tragic death and horrible suffering, they created a debt. A debt that is due and owing today. A debt that must be repaid. Certainly, if Mike were alive and brought a case for his pain and suffering you would make an award for it. But Mike's not alive. He died through the defendant's negligence, a defendant who shouldn't be rewarded for injuring him so severely that it caused his death. That would actually reward the defendant for killing him, rather than merely injuring him. Well, the debt was created on the day of the accident and it is due and payable today.

Another issue the trial lawyer must deal with on summation is compelling the jury to give a large award for a short duration of pain and suffering. Just deal with the issue logically and expand on your original argument. And do not forget about distinguishing the pain from the suffering:

Now, if the defendant made a left turn in front of Michael and permanently injured him, he would be entitled to compensation for pain and suffering for the rest of his life, the next 20 years. Should they get a benefit from injuring someone so badly that he dies? So he lived in pain for two minutes rather than 30 years. But let's look at that 2 minutes. The seared flesh from the fire enveloping his car; the bloody mouth from his 10 broken teeth. The bone coming through the muscle and skin of his leg after shattering into pieces. In the instant of that accident caused by the defendant's negligence, his life expectancy dropped from 20 more years to two more minutes. And for each and every instant of the remainder of his life expectancy, he felt agonizing, excruciating pain. Imagine pain for each remaining second of someone's life.

So there is no question that Mike was in severe pain. But now I am going to talk to you about his suffering as distinguished from the pain of gasping for his last breath. You know from the medical experts that he actually knew he was going to die. Imagine the fear he felt because of his impending death. And there he was, surrounded by strangers, knowing he would die, knowing he would never see his children again, knowing that he would never feel the warmth of his wife. There he lay, not knowing if his little ones would be able to afford college. Not knowing if they would be able to continue living in the family home. Not knowing if there would ever be another positive male influence in their lives. His last two minutes on earth were spent worrying how his children would ever survive the loss of their father.

Common Themes

All wrongful death trials have common themes: The unavailability of the plaintiff to add to the case; the dearth of witnesses to the plaintiff's last moments; and the finite amount of time the plaintiff survived for which you can prove conscious pain and suffering. However, with the proper jury selection techniques, the appropriate medical experts, and a thoughtful, common sense approach to summation, a trial lawyer can successfully obtain monetary compensation for the loss suffered by the decedent's family.

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