

Money Justice for Love, Comfort, and Society in a Wrongful Death Case

J. JUDE BASILE TLC '94

Wrongful death cases present the challenge of how we value the invaluable. The intangible loss of a loved one is immeasurable. With the war in Iraq taking so many loved ones away, the value of personal relationships is at the forefront of our minds. This article presents an approach for developing evidence, themes and argument and applying them to a wrongful death trial.

THE EVIDENCE

We must demonstrate to a jury the magnitude of the loss of a loved one.

In California the law specifically prohibits any recovery for grief, sorrow or sympathy. The defense will use this theme throughout the case constantly emphasizing no money should be awarded for these elements. Any evidence that presents a theme of sympathy or sorrow may be objected to and the jury admonished that they are not to consider the evidence. This may damage our credibility. I personally feel that a wrongful death case presented on a theme of grief and sorrow may turn the jury against us. Jurors are suspicious of lawyers and lawyer tricks. Numerous focus groups and studies have proven that many jurors feel lawyers manipulate emotions to obtain big dollar verdicts. I also do not want to hurt jurors by intentionally making them feel sad.

I once had a lawyer ask me what he had done wrong when he received a low verdict for the wrongful death of a child. He told me he had the whole jury crying during his opening statement that began with the scene of the mother sitting at the child's grave. I did not see the trial but thought perhaps the trial evidence was much too heavy on grief and sorrow. I could imagine that the jurors having been placed in such a depressed mood when the lawyer spoke, did not want to listen or could not listen to anything he said. So what evidence do we present?

JOY AND HAPPINESS

We must take the time to discover the real truth of the relationship between the

plaintiff and the decedent. First get rid of those words, "plaintiff and decedent". Similarly, the word "accident" should never be used in a courtroom. Instead of plaintiff use Mom, Mother, Wife, Husband, Son, Daughter and first names.

Next, we must get out of our office and spend time with our client. Get into their life. Go to their home. See the child's room. Read all the notes, cards and letters written between the two. Read e-mails. Go to the places where they went. Talk to friends. Reenact moments and conversations the lost loved one had with the Mom or about the Mom. Read books they read. Read books they read to each other or talked about. Learn about their favorite times together. Learn of their painful times together. Talk to friends and teachers and co-workers. Look through all the photos and videos you can get that show the person who was lost and their relationship with your client. Listen to any audio-tapes. Reverse roles with the person who was wrongfully killed after you have learned all you can about them. Spend some time being the plaintiff after you have learned all you can about the (ugh) decedent (I hate using that word). Remember this: **there is no such thing as knowing too much about who they are.** All of this takes time.

Now you are ready to find the joy and happiness, or more precisely, the truth of the relationship.

I recently tried the wrongful death case of a 16 year old girl, who was living away from home at the time of her death. The girl had gone to school out of state for a couple years of elementary school and had graduated from a private high school at the age of 15 that was seventy five

miles away from home and her mother. She was living with another family at the time of her death. The defense—the child did not love Mom and did not even want to live with Mom.

Having spent time with Mom and the teachers at the school I discovered the child had very unique artistic and mechanical talents. The family she was living with hired her to work at their specialized tool manufacturing company where she was excelling.

The theme became "giving our children roots and wings." We try hard to give our children roots and ground them in solid values, but we must also be able to give them wings to fly and discover their own path, which is often the most difficult task of parenting. This Mom worked hard to give her child "roots and wings".

Pick out a chronology of pictures to tell the life of the decedent. Intersperse this with art work, letters, awards or anything that demonstrates the unique individual and the relationship. Each piece should be a different aspect of the individual or relationship. This will keep the jury interested and the evidence will withstand any cumulative objection.

Present a wonderful story of joy, happiness and hope. Present any difficulties up front and make them part of the whole story. Jurors are real people. They have all had failings. They know we all were teenagers and many of us had rebellious years with our parents. Most of us have had hard times occasionally in our marriages. Use these discoveries as showing our clients as real people. It also shows us as real and understanding.

Witnesses should be called to offer a sep-

arate and distinct story of the life and the relationship. A teacher can tell of a particular project the child did in school. A community leader may tell a story of how the decedent organized a new playground. Look for stories to be told, not just a parade of folks saying the decedent was a nice person who loved the client. Find examples that demonstrate the qualities of the individual through their life's activities.

Do not over do it. Three or four witnesses in addition to the client, at the most, to establish damages for the loss of love comfort and society. Have others show up at court and since they are not witnesses they can sit in court and watch the others testify. Witnesses can refer to them in the testimony. You can explain how many wanted to testify and the trial could go on for many weeks but you trust the jury to understand.

THE TRIAL

Jury selection is the most important part of any trial. You begin a relationship with a group of people who are going to provide justice for the greatest loss known. My specific objectives in a wrongful death case are to first recognize that this is the greatest loss anyone can suffer. Next, lead a discussion of "how can we determine an amount for justice." I start this way: "folks, we've got to do something in this case that has never been done before...we've got to put into dollars what the value of a child's love, little Mary's love, is to her mother, Vicki...what do you think of that?" If none respond I go to a juror with whom I have previously felt a connection (how this is done is perhaps a good subject for another article) and ask them directly. At this point it usually comes out that it is priceless, we can't do it. This provides a great opportunity to ask them what we should do when a loved one is wrongfully killed. Leave; go home not ask for any justice? They will realize that money is all we can ask.

I engage in a similar discussion with the jury about comfort. I establish that each element lost, all the love, comfort and society needs to have a price. We talk about comfort. The comfort we receive from simply knowing a loved one is alive. How often we say to loved ones "call us

when you get there" so we are comforted they are safe. Society should be defined. Society is the vast array of mutual benefits we receive by living in society with a loved one. These are benefits such as going to church with them on Sunday, sharing a Thanksgiving dinner, a phone call, an awards ceremony, graduation, birth of a grandchild etc., etc. etc.

If the court permits, I get into specific numbers. I am usually stopped by the judge at this point who says something about having the jury prejudice the evidence, but the above discussion clearly puts in the jurors' minds that this is a very big damage case. I tell them, even if I can't say a specific number, that I have to ask for lot of money to get all the justice my client (I use their name) deserves. I always assure them that I will show them how to calculate the justice. I ask them to work with me in doing that and I will show them how to do that in closing.

ARGUMENT: REDWOOD TREES AND THE MILLION DOLLAR MINUTE

Begin by acknowledging and reminding, that the death of a loved one is the greatest loss anyone can ever suffer. Many people suffer when a person is wrongfully killed. Imagine where the world would be if we would have lost some of our greatest leaders and thinkers before their time. Imagine if Lincoln had been killed before he became president or if Martin Luther King had been killed at age 12. The whole nation would have suffered a tremendous loss. Yet the whole nation cannot bring an action in court for justice. All the relatives and friends have suffered a loss because of the death.

Our society may be compared to a group of redwood trees. Those giant redwood tree's roots are all interconnected under the ground. All the trees to some extent depend on the others. When one dies they all feel it. Just like this case when Mary was killed, many, many friends and relatives feel that loss but only those person(s) who have suffered the greatest does the law allow to bring the case. That is so there can be full justice.

I speak for a while about love, comfort and society and tell the jury that we must come to a number through the eyes of the Mother (plaintiff). I remind them they

can not give true justice, which would be making the court room doors swing open and the child come walking in and rushing into to the mother's out stretched arms. They can only put this greatest loss in money justice terms.

I ask the jury to think of what this mother would do to have her child back?...She would sell everything, work every hour at any job for the rest of her life. She would do this to get just one minute more with her child. And, if she could have one precious moment back, what moment would she chose?

Then, through the touch of a computer or ELMO, I go through a few scenes of the child's life. I preface each with "would the mother chose...the first minute she held the child" and show a picture of the Mom holding her as a baby. Would she pick that soccer game when Mary scored her first goal? I watch the jury carefully so as not to over do this. I show as many scenes as I feel are appropriate "in the moment" as I feel it with the jury. I then pause and say "or would the Mom choose a moment in the future when Mary calls and says " Mom I'm Getting married" or a few years later "Mom I am having a baby"...or perhaps it will be when the Mom is old and facing the end of her own life when Mary comes for the final goodbye.

Each of these moments is a million dollar moment and years of these moments have been taken by the defendant's wrongful killing. Thirty years of these million dollar moments could be hundreds of millions of dollars. No amount is too much. The question is how much is enough?

I tell the jurors we must each decide individually what is the **least** amount that will represent this loss. Once you have each decided the least amount, then collectively together you can decide a full, fair and just amount, not the least but an amount representing full justice. I then give them the least amount and a just amount. Each is a multi-million dollar number.

I truly believe wrongful death damages for the loss of love, comfort and society are the greatest loss one can suffer. Hopefully this article has provided some ideas for obtaining justice. ☺