

Proving Noneconomic Damages in Wrongful Death Cases

by John F. Denove

When a loved one dies, there is an irreplaceable hole in the family left behind. When a loved one dies as a result of someone's negligence, the loss is even greater.

The job of the plaintiffs attorney is to put the jurors in the shoes of the family; to enable them to feel the pain that the family feels.

The job of the defense attorney is to minimize the loss. The defense may argue that: no amount of money will bring the decedent back; they cannot allow passion, prejudice or sympathy to influence their verdict; they must not consider the plaintiffs grief, sorrow or mental anguish.

In today's tort reform society, it is not easy to obtain adequate compensation for noneconomic damages. The following points should be considered when trying a wrongful death case:

Informal Discovery

When you first take the case, give the clients a copy of CACI number 3921, the wrongful death instruction for the death of an adult; or CACI number 3922, the wrongful death instruction for the parents' recovery for the death of a minor child. These instructions are your road map for establishing noneconomic damages. Advise your clients that you need to have the names of friends, schoolmates, teachers, co-workers and other persons who can give examples of what it was like to know the decedent and how his or her untimely and needless death has affected the plaintiffs.

Contact these witnesses early on and explain to them upon what a jury bases its verdict when considering noneconomic damages. Ask them if they have any photographs or video of the decedent; or any letters, notes or cards written by the decedent. Of course you want the plaintiffs and other family members to do the same.

Depositions of the Plaintiffs

Review the CACI instructions with your clients before they are deposed. Ask them to come up with specific examples of how the decedent's death has impacted them. Go through each element of noneconomic damage and have them describe what their life was like when the decedent was alive; and how their life has been affected since the decedent was taken from them. If they are unable to verbalize their loss at deposition, their credibility will be called into question if they testify in great detail at trial. Many plaintiffs feel uncomfortable with either showing emotion, or even thinking about the loss. Your clients must understand that without their persuasive testimony, the defense will undervalue the case for settlement, and the jury will not fully compensate them for their loss.

Settlement Video

A well edited video of the plaintiffs, family and friends speaking about who the decedent really was and how this loss has affected the plaintiffs, can make the most jaded insurance adjuster take note. Even if the adjuster isn't emotionally moved by the presentation, he or she will be concerned that the jury will see and hear these witnesses at trial and the jurors will have more empathy than the adjuster. The video, if done properly, will include photographs that corroborate what the witnesses are saying. Unlike a trial, the settlement video can include music which will make the presentation even more moving.

Voir Dire

There is no hard and fast rule as to who will make a good plaintiff's juror for noneconomic damage in a wrongful death case, and who will make a bad juror. It would be unwise to base your opinion on gender, race, education, profession or socio-economic factors. The job of the attorney conducting voir dire is to get the prospective jurors talking about their feelings. After a prospective juror discusses his or her feelings concerning awarding economic damages, see if the demeanor, voice or body language changes when discussing awarding damages for such things as loss of love, comfort and moral support. This is especially important if the prospective juror has suffered a recent loss of a loved one or close friend.

In discussing awarding damages for specific noneconomic items, introduce the concept that all that is required of the juror is to determine if it is more likely than not that there was such a loss, and more likely than not what the damages are. Ask a prospective juror what his feelings are about judging a case where all the plaintiff has to do is prove that the damages are more likely than not a certain sum. If the prospective juror says he or she has no problem with that concept, ask the prospective juror if the plaintiff requested one or two million dollars in noneconomic damages, would he or she still have no difficulty with the required proof being just "more likely than not." The more hesitant or unsure a person is with a "more likely than not" standard when the damages asked for are great, the less likely that person will award substantial damages.

Opening Statement

Jurors tend to award more damages if the defendant has refused to accept responsibility for his actions. Jurors also award more money if the act that killed the decedent was a conscious choice as opposed to a mere failure to do something. Structure your opening statement to first tell the jury what the defendant chose to do. He didn't fail to stop at a red light, he chose to run the red light. If the defendant has not admitted responsibility, explain to the jury that by denying fault, he is rubbing salt into the wounds of the family.

After you have explained how the defendant's choices led to the decedent's death, you might describe what each of the plaintiffs were doing when they learned of the accident or death. Advise the jury not only how they first became aware, but what their immediate reaction was. You can describe the range of emotions each of them felt over the next 24 to 48 hours. This will demonstrate how the defendant's bad choices effected not only the decedent, but his innocent loved ones.

If you haven't introduced the elements of noneconomic damages to the jury during voir dire, you need to get them thinking about them in opening statement. You may want to write the words on the board. These losses include the loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, training and guidance. Give the jury examples of a few items of loss that the plaintiffs have suffered.

Direct Examination

You will have gone a long way in proving noneconomic damages if you have a number of witnesses who can give examples about how the decedent was a loving person; a true companion; comforting in times of distress; caring; readily providing assistance to those in need; protecting people who could not protect themselves; affectionate; someone who provided moral support and guidance. Try not to have any witness give an example illustrating more than one or two traits. This way the testimony will not become cumulative.

If there are any photographs or writings that corroborate the testimony of the witness as to a particular trait, put it on the screen using Power Point or Elmo or have the photograph or writing enlarged on a board for all the jurors to see. During closing argument and jury deliberations, photographs and writings that have been admitted into evidence can help the jury remember the story the witness told.

By the time the non party witnesses complete their testimony concerning the decedent's traits, the jury should have no difficult appreciating the loss when the plaintiffs testify.

Closing Argument

You should write the elements of noneconomic damages on the board or have that portion of the jury instruction enlarged for closing argument. Rather than repeat what each of the witnesses have said concerning the plaintiffs' losses, remind the jury of a few examples. To ensure that the jurors understand what these elements of damage mean, you may want to define the terms. Before you do so, remind the jury that you are not doing this for sympathy. The plaintiffs have had all the sympathy they could ever want. They are not here seeking sympathy. They are here to collect a debt long owed by the defendant. You may want to define these terms as follows:

"**Love**" means a deep, tender feeling; an intense emotional attachment. A "**companion**" is a pair; a couple; a friend.

"**Comfort**" means to soothe in time of affliction or distress; to give solace; to give hope or help in time of grief, pain or fear

"**Care**" means to physically or emotionally provide for another person. "Assist" means to give help or support; come to the aid of another person.

"**Protect**" means to keep someone from being injured, attacked or damaged; to guard.

"**Affection**" means a tender feeling toward another; a fondness.

"**Society**" means company.

"**Moral support**" means to give religious, emotional or psychological support, rather than physical assistance.

"**Train**" means to teach; to instruct.

"**Guide**" means to show the way; to lead by example; to serve as a model for others.

It is because the plaintiff has suffered a loss in each of these areas and will suffer these losses for his entire life that the damages caused by the defendant's poor choices are in the amount of "x" dollars. If there are two plaintiffs, then the damages are twice "x". If there are five plaintiffs, the damages are five times "x".

Conclusion

Jurors are human. Even tort reform jurors can be persuaded to accept noneconomic loss as a loss that should be fairly compensated. Your job is to give them the evidence in a way that will motivate them to do justice. Give them the evidence so they can feel good when awarding the damages you request.



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DENOVE
ROWELL
&
BENNETT

John F. Denove is a partner in the firm Cheong, Denove, Rowell & Bennett. He has tried more than 100 civil cases in the areas of personal injury, products liability, insurance bad faith and professional negligence. He is a recipient of CAALA's Trial lawyer of the Year Award and Ted Horn Memorial Award. He is past president of both CAALA and Cowboy Lawyers Association a Diplomat of ABOTA and currently serves on the board of CAOC.

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