

The Effects of Grief and Sorrow

DAMAGES IN ILLINOIS WRONGFUL DEATH CASES

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For over 100 years, families that have lost loved ones due to negligence were unable to recover for the grief and sorrow associated with their loss. Unfortunately, they were limited to recovering only “pecuniary loss,” which means a loss relating to money. While that pecuniary loss included loss of society — loss of the benefits of love, affection, care, companionship, comfort, guidance, and protection — evidence of the survivors’ grief was inadmissible. In fact, IPI 31.07 specifically stated that in wrongful death actions, jurors were not to consider the “grief or sorrow for the widow and next of kin” in determining any pecuniary loss.

Since 1853, when the Wrongful Death Act was enacted, this was the law. Defense attorneys consistently reminded the jury of this rule. Defense attorneys would begin the process in *voir dire* by asking the jury, “Can you be impartial and not consider the plaintiff’s sadness over this loss?” And then in closing arguments, defense attorneys would reiterate to them, “Remember, this case is not about the family’s sadness over this loss.” Fortunately, this all changed in May 2007.

Illinois is now in alignment with 22 other states. The 2007 amendment to the Act allows a jury to award damages as a result of a negligent death, including “damages for grief, sorrow and mental suffering, to the surviving spouse and next of kin of such deceased person.”

When the changes were first made, many defense attorneys argued that the new categories of damages would have little effect on jury verdicts. They argued that juries had essentially been awarding these damages under the eight categories of “loss of society” that were allowable at the time. Given this, some felt the change would have little impact on verdicts. Plaintiff’s attorneys perceived the amendment as a victory for families who had lost loved ones due to negligence and whose grief and sorrow, which was often substantial, had been unrecognized for over a century.

The actual effect of this new category of damages on jury verdicts is still to be determined. Although the change came about four years ago, these cases are just now coming to trial.

One change is certain. Verdict forms will now contain a separate line item for “grief, sorrow and mental anguish.” This opens the door for plaintiff’s attorneys to demonstrate not only the loss of society as a result of the loved one’s death, but also to explain the harm suffered as a result of the actual grief, sorrow and mental anguish experienced. The change not only affects what plaintiff’s attorneys can argue, but perhaps even more importantly, it affects what defense attorney cannot argue. Defense attorneys can no longer constantly remind the jury that they must not take into account the plaintiff’s sadness and sorrow over their negligently caused loss.

So what exactly are jurors able to consider under the new law?

Grief has been defined as the reaction to a loss, which can and usually does have cognitive, behavioral, physical and mental health symptoms. Emotional reactions to grief can include guilt, anger, anxiety, sadness and despair. Physical manifestations of grief can include sleeping problems, changes in appetite, physical ailments or illness. Moreover, although everyone grieves differently, research indicates and experts generally agree that the way a person dies plays a role in the grieving process. The impact of grief depends on various factors including the predictability of the loss, the preventability of the loss and the degree of personal suffering. For example, if a loved one dies of old age or from a “natural” progression of a disease, the death is expected in some ways. In those circumstances, people have a chance to come to terms with the loved one’s impending death, which often helps the grieving process. Those who suffered the loss feel as though they had time to prepare. If, however, a loved one dies from a sudden, unexpected or preventable death, the grieving process can be much more intense and prolonged. All of this information is now relevant to a jury’s assessment of damages.

By definition, in a claim brought under the wrongful death action, the loss was at least preventable and most times unpredictable, which may have a substantial impact on the grieving



process. Furthermore, while grief, sorrow and mental anguish can be explained to a jury through family members' own testimony, this "new" category of damages also opens an entirely new category of potential expert testimony.

Expert testimony from psychiatrists, psychologists, counselors and even thanatologists (experts in death, dying and bereavement) may now play an important role in helping explain to a jury what impact the defendant's conduct played in the grieving process and mental anguish suffered by those left behind. Tools such as the Brief Symptom Inventory (BSI), which measures various symptoms including depression, anxiety, hostility and cognitive dysfunction, may now play an important role in helping to explain how surviving family members' grief and mental suffering is different from those who have not suffered a loss as a result of negligence.

In some cases, particularly those involving non-wage earners, damages as a result of grief, sorrow and mental anguish are the primary damages. When a parent loses a child — although a non-wage earner — in addition to the substantial grief and sorrow suffered, the loss of society suffered can be considerable. Loss of society is measured in part by the life expectancy of both the survivor and the decedent. The parent has lost the society, companionship, love and affection for potentially many years, possibly decades, depending upon the

ages of the parent and the child. However, in cases involving the elderly, also non-wage earners, life expectancy of the parent is generally shorter due to the parent's age or medical conditions so loss of society may be less. In such a case, grief, sorrow and mental anguish may be the primary category of damages.

In nursing home cases, for example, family members usually struggle with the initial decision to place their loved one in a nursing home. The decision often riddles family members with guilt despite that medical necessity dictated that the loved one needed 24-hour care, which the family members simply could not provide. When negligence on the part of nursing home and/or staff then leads to the death of the loved one, the family members' grieving process is intensified by this pre-existing guilt. In these cases, there is simply no way to fully and fairly compensate the family for the loss, aside from considering the grief and sorrow experienced as a result of the defendant's negligence.

In order for plaintiffs to finally receive full and fair compensation in light of the legislature's long-awaited recognition of this category of damages, plaintiff's attorneys will need to rethink how they approach wrongful death cases. This process will need to begin long before trial. Plaintiff's attorneys will need to evaluate the circumstances of each wrongful death case to determine whether the case may warrant retaining an expert on grief and sorrow. Whether

to retain psychologists or psychiatrists to evaluate the next of kin's grieving process who can then testify at trial as to the impact the loss had on those left behind is a consideration that should take place in the early stages of litigation. In addition, just as defense attorneys repeatedly reminded the jury of what the case was not about before this change, at trial plaintiff's attorneys will need to consistently remind the jury that in addition to the other considerations and categories of damages, this case is about the sadness, the loss, the grieving and the mental suffering of the next of kin.

It is too early to quantify the effect, if any, that grief and sorrow will have on jury verdicts. Whatever the impact, the recognition of grief, sorrow and mental anguish as compensable areas of damages in wrongful death claims allows the jury to more fully and fairly compensate family members for the death of a loved one due to negligence. ■

