find a
better lawyer,
faster℠

leadinglawyers.com

Grief and Sorrow: Powerful, Uncharted Element of Damages in Nursing Home Cases

By Steven M. Levin and Cari F. Silverman

In 2007 the Illinois legislature amended the Wrongful Death Act, 740 ILCS 180/2, expanding the scope of recoverable damages to expressly include the grief, sorrow and mental anguish suffered by surviving family members.1 In the area of nursing home litigation, grief, sorrow and mental anguish as a consequence of a defendant's misconduct is a powerful and compensable element of harm.

Proof of grief, sorrow, and mental anguish offers the plaintiff an opportunity to introduce emotionally commanding evidence of the impact of a death caused by negligence on the subjective feelings of the decedent's family. No longer can defense attorneys suggest or argue during voir dire or trial, as they could under the old Wrongful Death Act, that the case is not about feelings and sadness. Allowing juries to award damages to the next of kin for their grief, sorrow, and mental anguish will impact the admissibility of evidence, alter the valuation of damages, and provide a powerful weapon for the plaintiff in nursing home cases. Under the 2007 amendment, grief and sorrow is a legitimate element of harm even if at the time of the death the nursing home resident was physically and mentally compromised. The plaintiff's attorney can legitimately introduce evidence that the nursing home urged the family to trust that its staff would appropriately care for their loved one in the last years of life. It is this breach of trust that is emotionally devastating and now an appropriate element of harm.

Prior to the 2007 amendment, surviving family members were limited to pursuing "pecuniary injuries" based on the loss of benefits the family would have reasonably received from the decedent's continued existence including, love, affection, companionship and financial support.2 These narrow limitations precluded juries from considering the impact a negligently caused death on the nursing home resident's survivors. Under the old law in computing damages, jurors were instructed to consider evidence concerning future money, benefits, goods and services lost, as well as the decedent's age, sex, health, and physical and mental characteristics.3 The health of the decedent was one of the primary considerations for damages for a wrongful death claim, as it was used by the jury to estimate how much longer the decedent would have lived absent the wrongful death. The emphasis on financial support as the primary measure of damages, coupled with considerations of the decedent's life expectancy and medical conditions, ensured little to no recoverable damages for the wrongful death of nursing home patients. Ironically, the same factors that necessitated the decedent's placement in long-term care—age, debility and preexisting medical conditions—were used by defense counsel as ammunition to depreciate the value of the decedent's life and the loss endured by the family.

The 2007 amendment to the Act altered the course of nursing home litigation.4 The addition of grief and sorrow as recoverable damages enabled plaintiffs to shift focus away from loss of society to grief and sorrow. The Supreme Court, in describing grief and sorrow as recoverable damages, said the following:

"When we speak of recovery for the beneficiaries' mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one."5

This change rendered the defense arguments of life expectancy and ailing health essentially irrelevant for purposes of wrongful death damages in nursing home cases. However, to do this effectively, plaintiff's attorneys need to be strategic in their presentation of evidence and arguments to the jury. Successful plaintiff's attorneys will keep the jury's attention focused on the impact of the death—the grief, sorrow and mental anguish of the family—rather than on what the family lost because of the death. This case is not about that the resident died, but rather how the resident died.

Routinely, defense attorneys in nursing home cases try to reduce damages by presenting evidence belaboring the resident's cognitive decline, cognitive deficits and quality of life. Without saying the words, defense attorneys suggested to the jury the decedent's death was a blessing to both the decedent and the decedent's family. This argument was designed to appeal to jurors who quarreled with the concept of loss of society for an elderly patient with Alzheimer's, dementia or some other debilitating illness. The addition of grief, sorrow and mental anguish damages eliminates this defense. Again, it is the impact of the negligent death, and not what the decedent contributed or how the long decedent would have lived. The decedent's ailing health or medical condition is thus irrelevant.

When a death is traumatic, preventable, and caused by negligence, there is undeniable proof that family members experience significant grief and sorrow. Overwhelming research confirms that grief encompasses a survivor's guilt felt as a result of the wrongful death. Therefore, the guilt the next of kin feel as a result of a loved one's wrongful death is compensable. In the nursing home context, family members are often riddled with guilt over the initial decision to place their loved one in the nursing home. This guilt is intensified when that nursing home's subsequent negligence causes their loved one's death. Survivors are wracked with guilt because they entrusted the nursing staff with their loved one's life, to only have that trust betrayed. They feel they have failed and disappointed their loved ones. All of these feelings and emotions are recoverable.

This guilt is evident even prior to the decedent's death. For example, in a nursing home pressure sore case that caused the decedent's wrongful death, the survivors have to live with the unbearable guilt that they chose the nursing home placement that resulted in a painful death. The families of nursing home residents frequently express the feeling that "if I had just taken her home or if I chose a different facility, my mom would never have developed this pressure sore." While they did nothing wrong, they are wracked with guilt and blame themselves. This guilt starts from the moment the family learns of the bed sore. That guilt only intensifies when the wound deteriorates, becomes infected, and they have to see their loved one every day in pain as a result of the sore. Family members are there for painful wound care treatments, and they see the wound VACs and/or surgical debridements. They feel guilt that their loved one is in pain and has a large bed sore that has debilitated the person. The family of nursing home residents, despite having done the best they could, wind up regretting their decision because of the terrible manner their loved one died as a result of the defendant's negligence.

Alternatively, the plaintiff's attorneys can argue that the decedent's ailing health and limited life expectancy only serve to heighten the family's grief, sorrow and consternation. Confront the defense right away. Yes, the decedent was elderly, his/her health was failing and he/she only had a short time left. The defendant knew that. And the defendant knows today that its negligence stole that precious time away from the family. The family was robbed of those invaluable moments and the chance to say goodbye. Because of that, their grief and sorrow is so much more.

The family's rights to have a loved one die with dignity and respect can also be argued to combat the defense. Though the Act was amended almost seven years ago, until recently there was little, if any, precedent discussing damages under the amended version of the Act. Prior to April 2013, the only reported Illinois case discussing damages under the new version of the Act was a brief mention by the Illinois appellate court in Dougherty v. Cole.6 In Dougherty, the court affirmed a $200,000 wrongful death award because it was fair and reasonable compensation based on the close relationship and "the manner in which she died."7 Rather than providing clarity, this holding left litigators perplexed.

However, in an April 2013 ruling in Hammond v. Sys. Transport, Inc., the court clarified the meaning of the damages allowed by the May 2007 amendment.8 The federal district court ruled that evidence concerning the circumstances and manner of the decedent's death is relevant and admissible.9 In support, the court reasoned that "just as a peaceful death may bring comfort to grieving loved ones, knowing that a loved one died a violent death could understandably increase the resulting grief, sorrow and mental suffering."10 This holding sanctions the admissibility of evidence by the plaintiff of the manner in which the decedent died and the impact of the family's grief, suffering, and mental anguish.

It is clear that the 2007 amendment to the Act finally recognizes a substantial amount of harm caused by the wrongful death of a nursing home resident. In many cases it is a more realistic measure of the harm a family suffers as opposed to the more traditional element of loss of society. While there is still not a lot of case law in this area, as more cases are tried arguing grief and sorrow, the courts will have the opportunity to decide what is and is not admissible under this element of damages. Recent verdicts that include appropriate compensation for grief and sorrow illustrate the public's value on life and willingness to compensate family members for their damages resulting from a wrongful death.

1. 740 ILCS 180/2
2. IPI 31.07 (prior to 2007 amendment)
3. Id.
4. 740 ILCS 180/2
5. Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 585 n.17, 94 S. Ct. 806, 39 L. Ed. 2d 9 (1974)
6. Dougherty v. Cole, 401 Ill. App. 3d 341, 934 N.E.2d 16, 17-18, 343 Ill. Dec. 16 (Ill. App. Ct. 2010)
7. Id.
8. Hammond v. Sys. Transp., 942 F. Supp. 2d 867, 2013 U.S. Dist. LEXIS 59810 (C.D. Ill. 2013)
9. Id.
10. Id.

Steven M. Levin, co-founder and senior partner of Levin & Perconti, is a nationally known trial lawyer with more than 30 years of personal injury litigation experience and success. In 1992, he and John Perconti founded Levin & Perconti, a firm that has achieved over $520 million for its clients, including over $140 million in nursing home abuse and neglect cases. He can be reached at **sml@levinperconti.com**.

Cari F. Silverman is an associate at Levin & Perconti. She can be reached at **csilverman@levinperconti.com**.