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Trying Damages in the Wrongful Death Case of an Adult Child

By Ben Rubinowitz and Evan Torgan

When a young worker, who is married, with three children and who is earning \$100,000 per year, dies after falling from a scaffold, the award, whether by verdict or settlement, should be substantial. The special damages in such a case, specifically the loss of earnings, loss of parental care and guidance and loss of services to the spouse can readily be communicated to a jury. The more difficult case, however, is when the decedent is a young adult child just starting out in life, unmarried with no children, little to no earnings history, and survived only by his parents. In such a scenario, the parents of the adult child would be the distributees entitled to compensation in the wrongful death action. This is the first part of a two part article discussing damages issues in such a case. This first part will deal with jury selection and opening statements. The second part will deal with the direct examination of the parent or parents and summation.

Under the common law of England, it was not possible to maintain an action for damages for wrongful death. For years this was the state of the law in New York and many other states depriving people who suffered the most grievous injury from seeking compensation for the loss of a loved one. In effect, it was cheaper for a defendant to kill, rather than injure, a plaintiff. In the 19th century, New York's legislature enacted a wrongful death statute authorizing the representative of a decedent survived by distributees to bring an action for wrongful death. The wrongful death statute, however,

does not allow a distributee to recover for the emotional distress and grief he or she suffers over the loss of a parent or child. Instead, the statute only allows recovery for pecuniary damages, or monetary, loss to the distributees. Where the wrongful death damages are economic in nature, the death of an unmarried adult child with no children who is survived only by his parents may seem to have little promise of a substantial recovery. However, a trial lawyer advocating for the surviving parents should refrain from seeing the case through the eyes of the ancient English King or through the strict interpretation offered by New York's legislature and instead frame the case through the eyes of the parents. By framing the case through the eyes of the parents and presenting facts and evidence accordingly, the jury can award a substantial verdict, even in the absence of formalized special damages.

When an adult child dies leaving only his parents as the distributees we must first identify the nature of the damages that can actually be obtained from a jury. The best approach, as always, when preparing the case for trial is to start at the end and to build your case guided by the jury instructions that will be given by the judge after summations. This approach will tell you how best to frame your case to the jury. To paraphrase the Pattern Jury Instructions regarding pecuniary loss:

The law limits damages relating to the death of an adult child to monetary injuries. A jury may not make an award for sorrow, mental anguish, injury to feelings, or loss of companionship. In deciding the amount of losses, the jury should consider the character, habits and ability of the decedent, the circumstances and condition of his parents, and the services that he would have performed. It is the monetary value to the parents that the jury must decide.

That value is incapable of exact proof. Taking into account these factors, the jury

must use its own common sense and sound judgment based upon the evidence in deciding the amount of monetary loss suffered by each parent.i

Clearly, the charge to the jury regarding monetary losses is not just limited to a cold accounting of the child's loss of earnings or the cost of the child's medical care. To the contrary, parents are entitled to recover the value of the services they would have received from their child, but for the child's death. To determine the value of those services, the jury is instructed to take into account the child's character, habits and abilities. Being acutely aware of the charge is critical to one's ability to effectively frame the issue of damages for the jury. The trap in cases involving the death of an adult child is to view the case as having little value based on the absence of formal special damages. Indeed, the non-earnings based pecuniary losses grounded in the adult child's character, habits and abilities and services that he would have provided can be quite substantial.

The challenging damages issues that arise in a case involving the death of an adult child must be addressed head-on in jury selection. Jurors must understand that it is the parents who suffered the loss and will be seeking compensation for the death of their child. Some jurors will be uncomfortable with the idea of awarding money to the parents of a deceased adult child for the death of their child so you must determine whether the juror is the right person for such a case. Does the juror have a problem awarding compensation for the death of a decedent where there is no child or spouse left behind? Can the juror appreciate the continued need a parent may have for their child, particularly as the parent begins to age? As the plaintiff's attorney, be the first to tell the jurors that they cannot award damages for the grief or sorrow suffered by the

parents, but also let them know they can make an award for the loss of services sustained by the parents that would have been provided by the adult child based on the child's character, habits and abilities. The questions should focus on the general issues of a parent bringing a case for vindication of the death of an adult child, as well as the specific elements of damages the jurors will be asked to award. Consider the following questions to prospective jurors:

Q: Do you agree with our system of civil justice which stands for the proposition that if a parent loses a child through the fault of another that parent should be compensated for that loss? Why do you feel that way? What if the child is an adult, does that change the way you feel? Why?

The first part of the question is leading, but it is critical that you follow up any leading question with open ended questions to explore the juror's feelings. The best question is often the simplest question: "Why?"

Q: On a scale of one through ten, ten being the strongest feeling regarding the parents' entitlement to compensation and one being the weakest, where would you rate your feelings regarding the parents' entitlement to compensation for the loss of their child in the event we prove it was caused by the negligence of another?

As always, you must follow up such a question with "Why do you feel that way?"

Q: One of our concerns is that someone might think that since the child has died without leaving a spouse or child, there is no point in the parents bringing a lawsuit for their loss. How do you feel about that? Why or why not?

Q: There are some people who feel that a parent shouldn't bring a lawsuit for the death of their child even when a party negligently causes that child's death. Other people feel they should bring that case for vindication for the loss of their child. Which opinion is closer to yours? How strongly do you feel about that opinion? Why?

Q: If we prove negligence and that the negligence caused the injuries and ultimate death, we will be asking you to award money for the child's pain and suffering. That award will go to his estate. One of our concerns is that you might think: "What's the point in awarding money to the estate since the child is dead. The child is not going to get the money."

Nonetheless the law provides that the parents are entitled to compensation if their child's death is caused by the fault of another. What do you think about that? On a scale of one to ten, one being the weakest feeling in support of the entitlement to compensation for pain and suffering, and ten being the strongest, what number on the scale would you allow for those feelings? Why?

Q: How do you feel about having to quantify the loss of a child? As difficult as it may be, under our civil justice system judges don't quantify the loss, you, the jurors, do. Do you feel comfortable attempting to do that? Why or why not?

Q: The other element of compensation is pecuniary loss or monetary loss to the parents as a result of the death of their child. Do you believe that a

parent can suffer a monetary loss as a result of the death of their child?

Why?

Q: By monetary loss, we are not just talking about the child's loss of earnings that she would have given to her parents. We are talking about an award for services the child would have provided to her parents into the future based upon that child's character, habits and abilities. Do you feel comfortable making that evaluation?

Q: If we prove a monetary loss to Teddy's parents for their loss of services based upon Teddy's character, habits and abilities, can you assure me you will make an award for that loss if the evidence warrants it and the law supports it?

Q: Let's say you are selected as a juror and you are convinced that the defendants are responsible for the injuries and death. Let's assume you add up the elements of damages -- the pain and suffering, the monetary losses and loss of services to the parents -- and those damages come to a substantial sum of money. Would you have any hesitation at all in awarding the parents a substantial sum of money if the evidence shows it and the law supports it? Why do you feel that way?

Needless to say, you must, at all times, maintain your credibility. To the extent the damages do not come to a substantial sum of money, make it clear to the jury that such an award would, in that instance, be appropriate. Awarding parents money for the loss of their child's services can be a daunting task for some jurors. Meet the issue of

damages head on in jury selection to ensure that you select the appropriate jurors for this case.

Although persuasion begins with jury selection, the opening statement is the first real opportunity a lawyer has to persuade a jury, lay out the facts of the case, and make a strong, lasting impression. It is important for the attorney to work with operative terms, the words contained in the charge the Court will give at the conclusion of the case. Mirroring the very language of the jury charge in your opening will make the jurors familiar with those concepts and the elements of compensation from the very inception of the trial. In a case involving the death of an adult child with surviving parents, focus on the “character, habits and ability” of the decedent, work those terms right into your opening and show how those qualities were embodied by the decedent.

In addition, confront the weaknesses in the opening. If the adult child was not contributing money to his or her parents acknowledge that. If there is no proof of pain and suffering tell the jurors as much because you can be sure the defendant will pound that point home. Establish your credibility by acknowledging the weaknesses, but move on and focus the jury’s attention on the strengths of the case, that which you can prove.

Consider the following opening:

Teddy was an honest and hard-working young man dedicated to his family. Although he didn’t have much money, he always helped his parents around the house and supported them in whatever ways he could. He possessed character, habits and abilities that made his parents proud and that contributed to the growth of those in his community. In his free time he volunteered as a tutor at his local elementary school where he helped younger children with their math. You will hear about his interests in technology and how he was proficient at fixing and programming computers often spending countless hours

helping older people who were not computer savvy. Even after he became paralyzed, Teddy continued to exhibit those same qualities and traits that garnered him so much respect. Indeed, his abilities to overcome his physical limitations demonstrated how special he truly was. Seated in his wheelchair, he continued to tutor young children and help around the house. He took on additional commitments by working with younger kids who suffered from physical disabilities. He even worked a part-time job at a local hardware store. His life was a glowing illustration of courage in the face of adversity. Even though he couldn't move his legs he learned how to drive a car with hand controls that his dad installed himself. Even though he couldn't climb stairs, he continued to live in his basement apartment with the elevator his dad built with his own bare hands. And even though he couldn't walk he took great pride in earning money working a part time job. We will show you that Teddy was a person of great character, habits and ability who was of great value to his parents. He performed important and beautiful services for them during his life and had he lived there is no doubt he would have continued to be there for his parents well into their old age.

The second part of this two part article will focus on the direct examination of the parent and summation.

ⁱ Pattern Jury Instruction 2:320

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