



## Proving Noneconomic Damages in Non-Wage Earner Wrongful Death Cases

Providing the Tools to Enhance the Verdict

By Teresa Ridley and Richard McNally

When the family breadwinner is the victim of a wrongful death, the economic loss borne by the survivors can usually be substantial and easily demonstrated. On the other hand, attorneys representing wrongful death victims are often faced with the issue of proving noneconomic damages when the decedent's economic contribution to the survivors is minimal or nonexistent. These issues commonly arise when the decedent is a child, retired parent or grandparent, or other unemployed relative.

### Governing law

Michigan wrongful death cases are governed by MCLA 600.2922, which provides for recovery of damages by “[t]he deceased’s spouse, children, descendants, parents, grandparents, brothers and sisters....” Damages are addressed by M Civ JI 45.02. Section 3 of the instruction—particularly elements 3b (loss of service), 3d (loss of parental training and guidance), and 3e (loss of society and companionship)—

## Fast Facts

Cases based on the death of a non-wage earner are often undervalued by counsel, insurance companies, and the judiciary.

The Wrongful Death Act and the Michigan Model Civil Jury Instructions provide the framework for the skilled advocate to effectively present wrongful death claims.

The sudden death of a family member complicates the grieving process of the surviving family members.

provides opportunities to demonstrate damages to survivors.<sup>1</sup> The fact that the instruction contains unspecified “other” components of damage in elements 3f and 3g implies an opening for consideration and instruction regarding elements of damage supported by the particular facts of a case and effective advocacy.<sup>2</sup>

### A case study

Facts: mid-twenties male

A vehicle accident killed a young man in his mid-twenties, leaving behind a young son (of whom he did not have custody), his mother, grandparents, and three siblings. The young man lived 100 miles from the family for employment reasons, and his only monetary contribution to the child was as stated in the divorce decree.

His survivors

Videotapes of the mother, grandfather, and siblings depicted him as having many roles. To his siblings, he was a surrogate father, mentor, and leader. They were emotionally dependent on him as the man of the house and the “glue of the family.” The siblings looked to him for approval in all areas of their lives. As one sister said, his sudden death had unmoored her bearings. Her idol had died, and she felt lost without him.

The young man’s single mother said he was her “best friend, advisor” and someone she could lean on. She often dreamed of saving him from the deadly accident and frequently awoke in the night to find one or all of her three children awake, unable to sleep. She indicated she felt as if

she were “screaming on the inside,” and 18 months after his death, still had not returned to work because of depression.

The deceased’s grandfather, a recent widower, lost his “little buddy.” Some of the best years he and his late wife had were times they had spent with the young man. His grandson had also provided much needed help and care to his grandparents, especially during his grandmother’s decline. The death of his grandson reinforced his grief over the loss of his wife.

Although the young son of the decedent lived with his mother, he had regular visitations with his father. After his father’s death, the child was confused as the visits ceased; his understanding of his father’s death was limited to what his mother had told him. The son did not understand what death meant—only that his father would no longer be coming to see him.

## General considerations

### Prolonged death

When someone loses a family member due to a long illness, there is adequate time to prepare. Grieving starts from the moment of terminal diagnosis and lasts long after death, though the grieving is less intense because the death was anticipated.

### Grief process—Byock

Dr. Ira Byock, a noted palliative care physician and end-of-life expert, says there are five things one should say to a dying loved one: “I love you, forgive me, I forgive you, thank you, and goodbye.”<sup>3</sup> When death is foreseen, there is time to prepare and say what needs to be said, make amends, rectify the wrongs, ask for forgiveness, and forgive. Gratitude is given in words and deeds, and, most importantly, one is able to say goodbye. It gives the bereaved a sense of closure and peace.

### Kübler-Ross

Elisabeth Kübler-Ross’s groundbreaking theory of grief movement<sup>4</sup> states that a person moves through grief in stages: denial, anger, bargaining, depression, and acceptance. Grief experts now agree these stages are not sequential with each task necessarily completed before one can move to the next stage; rather, grief moves randomly. The bereaved feel they are moving toward acceptance of the death but often return to denial, anger, bargaining, or depression during the entire process.

### LoCicero

Initially, Kübler-Ross believed the grief process model took a year to move through the stages, but this is no longer the

school of thought. Grieving can last forever but becomes less intense, and the bereaved grow more accepting of the death. However, “triggers” such as holidays, birthdays, and anniversaries are bound to occur periodically through life. Or they can arise by seemingly inconsequential events; for example, hearing the decedent’s favorite music may cause the bereaved to grieve as if the death had just happened.

Dr. Jack LoCicero states that to move forward in grief, the bereaved must accomplish five tasks:

- (1) Acknowledge the death.
- (2) Experience the pain.
- (3) Readjust to the death.
- (4) Reinvest emotional energy.
- (5) Reconcile the death.<sup>5</sup>

### Sudden death

In a sudden death, there’s no chance for the bereaved to say I love you, forgive me, I forgive you, thank you, and goodbye, as recommended by Dr. Byock. The decedent, alive and healthy on a journey of life at one moment, is suddenly gone with so much left unsaid. The bereaved feel cheated because they weren’t able to say goodbye. They have no closure and, therefore, no peace.

Many experts writing about sudden death recognize shock as the most prevalent and overwhelming feeling, which may lead to complicated grief. This type of grief can manifest itself through long-term depression, suicidal ideation, inability to move on with life, preoccupation with death, difficulties in dealing with day-to-day activities, and guilt from being unable to save a loved one. Therapy is necessary to help the survivor move toward coping with the sudden death.

### Application of principles to case study

There is no timetable for grief, but 18 months after the death of the young man in our case study, the family was still in shock, disbelief, and pain and displaying complicated grief symptoms. They were a family immobilized and had become nonfunctioning adults. The mother was unable to work, his sisters had dropped out of college, and his brother was struggling in high school. It was recommended that the family seek individual and family grief therapy twice a week. The victim’s son would require ongoing psychological monitoring and therapy.

### Role of the grief specialist

Grief specialists can assist lawyers in evaluating the effects of the loss on survivors and provide reports for negotiations or testimony for trials.

Counseling is often a long-term process used to treat the event. When a grief specialist is referred to a family for purposes of a wrongful death claim, the lawyer must be clear it is for evaluation only. After evaluation, the grief specialist will recommend the type of counseling survivors need.

Treating the trauma of sudden death is not an easy fix. As suggested earlier, long-term therapeutic counseling with a licensed trauma practitioner may be necessary and cannot typically be found through a support group meeting monthly in a church basement.

Young children experiencing the loss of a parent have a difficult time conceptualizing death. Depending on the explanation they receive from the adults in their lives, it can be a confusing time. Therapists who deal with children’s grief often use art and play therapy to help children understand death and determine the emotional and psychological trauma caused by the loss.

### Grief specialists can assist lawyers in evaluating the effects of the loss on survivors and provide reports for negotiations or testimony for trials.

Litigating a wrongful death often takes an extraordinary amount of time. In the case of expected deaths when the decedent has been ill for months, the survivors have time to process the loss. Some grieving is done before death (anticipatory grief), and often, because of the nature of a long-term illness, survivors often feel “grief relief” when their loved one dies: “He is no longer suffering” or “His quality of life was poor.”

For sudden death, there is no opportunity to say goodbye, nor is there a feeling of relief that the decedent is no longer suffering. The shock of sudden death lasts longer than natural death, and the grief is loaded with questions, including the unanswerable, “What if?”

Because litigation moves slowly, just as the survivors are beginning to move forward in their grief, they are often brought back to the beginning stages of their loss by questions asked in the defense of the case.

Videotaping the family talking about the decedent can be useful to a grief specialist, and the survivors don’t feel they are being psychologically evaluated. It is best not to edit the video unless it is irrelevant to the case; a moment that appears insignificant to the editor could be a moment of insight for a grief specialist. The video sessions can be conducted by the grief specialist, the attorney, or a videographer. If someone other than the grief specialist is videotaping the family using questions formulated from the specialist, he or she can





be most valuable by appearing unbiased and nonjudgmental. An extremely sensitive and knowledgeable director is necessary to film the family. If conducted in this manner, the video serves as a prelude to the grief specialist's interview, allowing him or her to ask questions not addressed in the video.

In grief counseling, the bereaved need to tell their stories. By retelling, they can begin to process the loss. When videotaping, the interviewer must have prepared questions and the ability to listen to survivors' statements and have them expound when necessary; often, this leads to issues they have avoided or never considered. Regardless of the interviewer, the art of active listening is necessary to hear what is really being said.

### Special considerations regarding particular decedents or survivors

When the decedent is retired or no longer otherwise contributes economically to the family, the jury instruction allows for consideration of "loss of parental training and guidance" and "loss of society and companionship." The facts of our case study provide concrete examples of these damages.

With respect to children, although jurors can in the abstract empathize with the family's loss of a child, the child's lack of financial contribution to the family unit may, at first blush, limit damage considerations to noneconomic components. It should, however, be kept in mind that the note on use to M Civ JI 45.02 provides for past economic loss sustained by the parents:

In child death cases, when there is a basis for finding the amount expended by the parent on the child's support, maintenance and education, add the following language after element 3b: "*which shall be at least as great as the amount spent by the parent on the child's support, maintenance and education.*" (Emphasis added.)

An economic-loss argument can also be built on the reasonable expectation that a child will eventually provide for his or her parents.

MCLA 600.2922(3) provides for damages to be recovered by survivors who would not immediately come to mind, such as the children of the deceased's spouse, devisees under the deceased's will and beneficiaries of a trust under the will, and even persons designated in the will to be entitled to damages based on the decedent's death.

### Conclusion

Preparing a wrongful death case based on the demise of a relative whose economic contribution to the family is modest poses challenges and is often undervalued by counsel, insurance carriers, and the judiciary. Jurors, however, relying on their own collective life experiences, will consider as much as any other evidence the reality of intangible loss, which is still a real loss. When able to learn and explain the open wound left by the sudden loss of a loved one, an effective grief specialist can provide to skilled legal counsel the basis to deliver full justice to the survivors. ■



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### ENDNOTES

1. See, e.g., *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644; 761 NW 2d 414 (2008).
2. *Johnson v Henry Ford Hosp*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2005 (Docket Nos. 250874, 25142), p 8.
3. Byock, *Dying Well: Peace and Possibilities at the End of Life* (New York: Riverhead Books, 1997).
4. Kübler-Ross, *On Death and Dying: What the Dying Have to Teach Doctors, Nurses, Clergy & Their Own Families* (New York, Scribner, 1969).
5. LoCicero, *The Experience of Grief* (2004) <<http://www.virginia.edu/studenthealth/caps/The%20Experience%20of%20Grief.pdf>> (accessed May 1, 2016).