

UNDERSTANDING, ANALYZING & EVALUATING WRONGFUL DEATH CLAIMS

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Wrongful death actions are one of the more complicated and nuanced claims defense attorneys and claims adjusters will encounter. In many personal injury cases damages can be evaluated simply by looking at concrete figures and numbers. Medical bills, lost wages for time away from work and anticipated costs for future care and treatment can typically be determined with relative precision and certainty. Asking someone to put a value on a person's life, however, is no simple or precise task.

In order to properly evaluate wrongful death claims it is important to understand what a wrongful death claim *is* as well as what it *is not*. Once we are able to define what a wrongful death claim is we can examine the measure of damages. This provides a framework for evaluating specific types of wrongful death claims and what is recoverable. From there, we will also examine settlement strategies and how to negotiate common issues that arise when attempting to resolve these cases. Finally, we will discuss considerations for trial as well as special cases and issues that arise specifically within the context of wrongful death claims. Examining each of these topics will provide a useful framework for understanding, analyzing and evaluating wrongful death claims.

What Is a Claim for Wrongful Death?

When a family member dies as a result of the alleged negligence of another, a surviving spouse and the next of kin may bring a claim for civil damages. Next

of kin includes the spouse of the decedent, and any first-line blood relatives including children, parents, siblings and grandparents. Claims are generally initiated by a trustee or special administrator appointed on behalf of the next of kin who is named as the plaintiff on behalf of the claimants seeking recovery.

The purpose of a wrongful death action is to compensate the decedent's family for *their* losses. Wrongful death actions are thus distinguishable from survival actions under which the decedent's estate can assert claims for the decedent's injuries before death as well as any economic losses sustained by the decedent. In a survival action the estate is thus essentially stepping into the shoes of the decedent and making claims that would have belonged to the decedent had they survived. Wrongful death actions, conversely, are claims for the losses sustained by those the decedent left behind. The damages recoverable in each type of action are thus separate and distinct. Some jurisdictions allow for both types of actions to be pursued while other jurisdictions only allow recovery under a single theory.

What is Recoverable?

Although the damages recoverable in a wrongful death action vary from state to state they typically involve pecuniary or hedonic damages. These damages include the financial losses sustained by claimants as well as "loss of enjoyment of life" damages. Specifically, if the decedent provided (or could be expected to provide) financial support to the claimants during their lifetime, they can seek damages for that lost support. In order to recover the next of kin must establish that the decedent provided financial support. This is commonly seen in

claims by children that were dependent upon a parent for financial support and could be expected to remain dependent until the age of 18. It is also common for children to allege that a deceased parent would have paid for their education, including college, had they survived. Spouses will likewise claim damages for support they would have received up until the time of retirement. It is also possible in some instances for a significant other to recover damages if they can establish past financial contributions from the decedent.

In other states, such as Minnesota, the spouse and next of kin can also seek damages for less tangible items such as loss of counsel, guidance, aid, advice, comfort, assistance, companionship and protection. These pecuniary losses can be established through testimony from the next of kin about their relationship with the decedent. The Minnesota civil jury instruction for Wrongful Death claims states:

CIVJIG 91.75 Measure of Damages--Wrongful Death

Money value of damages

When you consider damages for (claimant)(s), determine an amount of money that will fairly and adequately compensate (claimant)(s) for the losses (he) (she) (they) suffered as the result of this death.

You should consider what (name of deceased) would have provided to the (claimant)(s) if (he) (she) (they) had lived.

Factors to consider

You should consider:

1. (His) (Her) contributions in the past
2. (His) (Her) life expectancy at the time of (his) (her) death
3. (His) (Her) health, age, habits, talents, and success
4. (His) (Her) occupation
5. (His) (Her) past earnings
6. (His) (Her) likely future earning capacity and prospects of bettering (himself) (herself) had (he) (she) lived
7. (His) (Her) personal living expenses (cost of supporting the child)
8. (His) (Her) legal obligation to support the (surviving spouse) (next of kin) and the likelihood that (he) (she) would have fulfilled that obligation
9. All reasonable expenses incurred for a funeral and burial (etc.), and all reasonable expenses for support due to (his) (her) last sickness, including necessary medical and hospital expenses incurred after and as a result of the injuries causing death
10. [The probability of (name of decedent)'s paying the debt owed by _____ to _____]
11. The counsel, guidance, and aid (he) (she) would have given (claimant)(s)
12. [The advice, comfort, assistance, companionship, and protection that (name of decedent) would have given if (he) (she) had lived]. [Give CIVJIG 91.85, where appropriate.]

Lost time together

Decide the length of time those related might be expected to survive together. You should compare the life expectancy of (name of decedent) with the life expectancy of each claimant.

Take into account only the amount of time the two being compared would be expected to survive together.

Base your money damages for each claimant on the shorter life expectancy of the two being compared.

Items to exclude

Do not include amounts for:

1. [Punishing the defendant]
2. [Grief or emotional distress of the surviving spouse and the next of kin], or
3. [For the pain and suffering of _____ before (his) (her) death].

Factors to exclude

Do not be influenced by the fact that:

1. [The (surviving spouse) (next of kin) (may have received) (may get) money or other property from (name)'s estate], or
2. [The (surviving spouse) (next of kin) (may collect) (has collected) insurance or workers' compensation benefits because of (name)'s death],
or

3. [The surviving spouse has remarried], or
4. [The minor children have been emancipated], or
5. [There is no legal obligation to support the next of kin].

You must determine the total amount of money that will fairly and adequately compensate the (claimant)(s) for the damages suffered as the result of this death. [I will divide the damages among the (claimants).]

As a comparison, a survival action jury instruction, like this one from Virginia, contains an entirely separate measure of recovery:

Under VMJI 9.0000, the jury is instructed to consider all of the following in formulating its compensatory damages (i.e., both economic and non-economic) award in a personal injury case:

(1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;

(2) any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future];

(3) any disfigurement or deformity and any associated humiliation or embarrassment;

(4) any inconvenience caused in the past [and any that probably will be caused in the future];

(5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future];

(6) any earnings he lost because he was unable to work at his calling;

(7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;

(8) any property damage he sustained.

In wrongful death claims the claimants will typically testify to their relationship with the decedent and what the loss of that relationship as well as their lost time together means to them. These damages can complicate the analysis of wrongful death claims and are typically a sticking point in settlement negotiations.

When evaluating alleged pecuniary losses the attorney or adjuster should look at the financial contributions made by the decedent to the next of kin in the past in order to determine the veracity of the alleged future losses. As for the claims for lost time together, in addition to deposition testimony, evaluators can look to phone records, written communication, vacation and holiday habits and other more concrete items to verify and quantify the alleged losses.

Any expenses and/or debts of the decedent should also be considered when measuring damages.

Evaluating the Claim

In any wrongful death claim the attorney and adjuster will have to endeavor to determine what the loss of a particular life is worth. Not all cases involve the death of parent and spouse who acted as the sole earner. Often times the contributions of the decedent came in the form of housework, emotional support and other less tangible items. Does that make them less valuable? Certainly not to the claimants. Attorney and adjusters may attempt to evaluate these claims by looking at replacements costs, like hiring a house cleaner or a handyman. But

even these evaluations can't equate for the loss of a loved one. Even more troublesome are cases involving young children. Such cases rarely involve any financial loss. To the contrary, children are generally always financially dependent on the surviving parents. But you will never hear a defense attorney argue that the death of a child resulted in a cost savings to the parents.

That is why when evaluating wrongful death claims it is also important to consider what a jury is *not* allowed to compensate for. In jurisdictions like Minnesota, the jury cannot award damages that punish the defendant or that provide compensation for the emotional distress of the surviving spouse or next of kin or for the pain and suffering of the decedent before they died. Thus, while pecuniary damages sound like an amorphous subject, the reality is that the recoverable damages in many jurisdictions still boil down to what losses can be specifically measured and quantified. Since items like grief, pain and anger are specifically excluded from consideration the sky is not necessarily the limit.

When evaluating, the attorney or adjuster should get an idea of the financial situation of the descendant and their family. The greater financial impact the decedent had on the surviving family the greater the value of the claim. From there the attorney and adjuster should evaluate the strength of the familial bond between the decedent and the surviving family. The loss of brother who had moved away and whose only remaining connection to the family was an annual holiday card will not warrant the same level of damages as a loving wife and mother living with her family. Determining who the decedent was and what they meant to their family is critical in evaluating the claim.

Settling Claims

Settling Wrongful Death claims can present unique difficulties, particularly when there are numerous next of kin or multiple decedents. Disagreements over settlement distributions or the value of a claim can arise between the parents of a decedent and a surviving spouse. Other times adjusters encounter claims with multiple deaths but a limited policy. Communicating with the next of kin and managing conflicts and expectations among family members and multiple claimants is essential when attempting to resolve claims through settlement. In some scenarios adjusters and attorneys can even use conflicts among various claimants to their advantage when attempting to resolve difficult cases. For instance, in claims involving multiple deaths and a single negligent party with limited policy limits, an adjuster that can convince at least some claimants to settle early can then in turn use those settlements and the diminishing policy funds to incentivize the remaining claimants to settle as well before the policy is exhausted. Co-defendants should also be looked to for settlement contribution based on their anticipated portion of fault. In auto cases, any uninsured or underinsured motorist benefits will also factor into any practical consideration of the settlement value. The same is true with respect to any life insurance policies or employment benefits that the claimants are entitled to.

Attorneys and claims adjusters should also consider the benefit of the meditation process in resolving difficult cases. Allowing the next of kin the opportunity to speak with a mediator and express their loss can be a cathartic experience that helps them move toward resolution. All scenarios should be

examined in any settlement discussion but it is important to remain mindful of the additional complications presented in wrongful death settlements where multiple interests and expectations are at play.

Trial Strategies

As in any case, it is important to consider the attorneys on the other side. Research into prior wrongful death experience and verdicts by the opposing counsel should not be discounted. The jurisdiction is also an important consideration not only when assessing what the measure of damages are but also when examining verdict range. Perhaps more important than any other factor, however, will be the opposing party. While nothing may be more moving to a jury than a loving and likable family that has suffered a significant loss, nothing may be more off-putting than a family attempting to benefit from the death of a loved one. Putting the work in at the discovery stage to evaluate the claimants will help give the attorney and adjuster an idea of what best and worse-case scenarios will look like. Using the jury instructions for the subject state in depositions and taking the claimants through the damage items one by one is one of the most effective ways to prepare for trial.

Special Considerations

Whenever settling or evaluating a wrongful death claim it is important to also consider any possible outside interests. Employment benefit plans, retirement plans, medical providers and other potential subrogees or assignees may be lurking in the weeds. It's important to verify that all interested parties have been

considered and notified before entering into a settlement. You do not want to settle a claim only to find out that there are additional claimants with actionable rights.

Conclusion

Wrongful Death Claims present unique challenges. Understanding what a claim for wrongful death is and what can be recovered is critical to any evaluation of these claims. Each of the issues discussed above should be considered and analyzed when addressing a wrongful death claim.