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*MAXIMIZING WRONGFUL DEATH DAMAGES FROM INTERVIEW TO VERDICT*

Massachusetts Bar Institute Continuing Legal Education 1999

**I. INTRODUCTION**

Perhaps the most compelling personal injury lawsuits involve the death of a fellow human being. The effective preparation and presentation of these cases from the plaintiff's perspective can be a daunting, yet rewarding, challenge to the conscientious practitioner. A wrongful death case can provide a dramatic opportunity to paint a portrait and touch humanity.

This challenge must be met from the initial client interview through case resolution. There follows one practitioner's humble suggestions on the most effective means for handling these cases.

**II. INITIAL CLIENT INTERVIEW**

In attempting to portray the magnitude of another's untimely demise under the wrongful death statute, *G.L. c.229, §1 et seq.*, the attorney must first become the master of both the law and the facts. The written materials submitted by other panel members provide an excellent resource for understanding the statutory framework and case law on the subject. In addition, the attorney must obtain a detailed history of the deceased, his or her station in life, the circumstances surrounding his or her wrongful death, and the identity and location of his or her loved ones entitled to recovery by law.

At the outset, all probate forms should be executed by the necessary family members, and in cases where the deceased died intestate, the identity of that individual willing and able to serve as administrator identified. Thereafter, probate proceedings should be completed forthwith, since neither the medical releases nor the operative Contingent Fee Agreement can be executed without doing so.

At the initial client interview, the attorney must be a reassuring presence that will guide vulnerable, grief-stricken clients through what will probably be the most devastating time of their lives. It is essential that the attorney's approach to the case be competent, controlled and compassionate.

**III. INVESTIGATION**

As soon as is practicable, investigators should be retained and dispatched to obtain witness statements, photographs, diagrams and/or any other documentary evidence that will assist in the formulation of theories of recovery. In cases involving medical malpractice, a complete set of the pertinent medical records should be obtained and reviewed by a medical professional in order to assess theories of recovery. Thereafter, experts in the particular specialty should be thoroughly investigated and then retained to review said records and arrive at opinions on liability, causation and, if necessary, damages.

Likewise, in death cases involving defective products, experts such as engineers, chemists and the like should be retained to examine the product in question and arrangements should be made to secure said product and protect it from spoilation.

It should be noted that the fact that a death has occurred should not stampede counsel into a hasty decision with respect to representation. Wherever practicable, a Contingent Fee Agreement should not be executed until a thorough investigation of all issues with respect to both liability and causation has taken place. A rush to judgment on accepting a wrongful death case can often result in disgruntled clients and the conduct of costly and ultimately fruitless litigation.

#### **IV. DISCOVERY**

Formal discovery, such as detailed Interrogatories, Requests for Production of Documents and Notices of Taking Deposition of the defendant(s) individually and/or pursuant to M.R.C.P. 30(b)(6), should always be served upon the defendant(s) with the Complaint. Wherever practicable, the Complaint and discovery should not be served until all informal investigations and/or analyses have been completed. The ballistic missile of your case should always be assembled in the cellar before it is trained upon the defendant(s).

It is imperative that counsel for the plaintiff seize the momentum from the outset and hold it throughout the entire litigation. This is a pivotal step in maximizing damages. It demonstrates a competence and a determination that will be conveyed to the defendant(s), their counsel and the insurer. Remember, part of the insurer's analysis in evaluating a wrongful death claim will be the ability of plaintiff's counsel and his or her willingness to pursue the case to the outer limits of the defendant's exposure.

In conducting discovery, it is important that you recognize that defense counsel is your adversary but not your enemy. A scorched earth approach to extensions or continuances will prove harmful. Nevertheless, there are points where accommodations are sought that will compromise your duty to effectively represent

your clients and secure maximum compensation for them. Then, and only then, is it the time to communicate your resolve to defense counsel by advising them, in no uncertain terms, that you are preparing this case for a trial on the merits and you are unable to accommodate their unreasonable requests.

The question may arise as to the timing of direct communications with the insurer regarding settlement. In a wrongful death case, it is important to communicate the magnitude of the loss to the insurer at an early stage so that appropriate reserves can be adjusted. This can be accomplished in your representation letter. This is never, however, the time to make your settlement demand.

It is likewise important to establish a rapport with the claims representative whenever practicable. An experienced adjuster can usually discern a significant case requiring considerable reserves from one where liability is weak and damages are exaggerated. It is important to establish your reputation as a conscientious advocate who does his or her homework and who will try the case competently, if necessary. Remember, your reputation is the hallmark of your career. It will ultimately fashion the way to fair compensation for your clients. Be honest, be truthful and be determined to fight should you be required to do so.

## **V. SETTLEMENT DEMAND**

Only after discovery has been completed and a trial date has been scheduled should a demand for settlement be presented in a wrongful death cause of action. For it is only then that the plaintiff's attorney can make an accurate assessment of the magnitude of the loss, the liability and exposure of the defendant(s) and their insurer(s), as well as the likelihood of recovery, in light of the trial forum and trial judge.

Likewise, this is the time when most insurers really begin to examine the case seriously and require an effective presentation to convince them that they have no other choice but to pay fair compensation on the claim. This is where the artistry of the trial advocate comes to the fore.

A settlement demand should be a detailed presentation that comprehensively addresses all issues of liability and damages with supporting documentation. It should likewise contain a reasoned demand for settlement that has taken into consideration verdicts and settlements in similar cases. It should be formulated only after the advocate has gained a clear understanding of the magnitude of the loss by observing first hand what the deceased's loved ones are left with. This requires exposure to the circumstances of your client's situation by visiting the deceased's household and obtaining pain and suffering diaries whenever possible from those loved ones who are entitled to compensation under the law. *Harding v. DeAngelis*, 39 Mass. App. Ct. 455, 657 N.E.2d 758 (1995) rev. denied 422 Mass. 1102, 661 N.E.2d 100; *Guy v.*

*Johnson*, 15 Mass. App. Ct. 757, 448 N.E.2d 1142 (1983).

With respect to the evaluation of another's death pursuant to the statute, a rule of thumb that seems to place the case in context is to start with the figure of \$500,000 as the median amount of these settlements and adjust it upward or downward in accordance with the particular facts and circumstances of each case. There should also be significant wiggle room in your demand to allow for negotiation in mediation. Obviously, an elderly decedent in failing health survived by a spouse and grown children will not be valued as high as a deceased bread winner in his forties survived by a wife and three minor children.

The formulation of the settlement demand presents an opportunity for creative advocacy. Particularly effective demands include videotaped collages of photographs of the decedent in the company of his or her loved ones, interspersed with photographs pertaining to the accident and segments of expert testimony on liability, pain and suffering, and loss of net income.

## **VI. MEDIATION**

If plaintiff's attorney has prepared his or her case accordingly, and formulated a reasoned demand, the pre-trial mediation of the claim will most likely ensue. It is important that counsel advise his or her clients fully on the purposes and desirability of mediation and the history of the mediator. Not all mediators bring the same skills to the table. Some are experts at arriving at a consensus settlement in a collegial context, while others are suited to engineering a settlement where the litigation has been difficult for all parties and resentment continues to complicate an amicable resolution.

In addition, counsel should have a clear-cut game plan going into the mediation and a realistic bottom line for settlement. Obviously, the vagaries of litigation and the present-day prejudice of juries toward personal injury plaintiffs should be discussed with the client(s). It is here that counsel's efforts on behalf of the client(s) will be rewarded. If counsel has won the trust of his or her client(s) through diligent preparation and a compassionate understanding of their circumstances, a settlement that provides fair compensation in accordance with the provisions of *G.L. c.229 §1 et seq.* will result. Should mediation fail to bring an amicable resolution, a trial on the merits is the only vehicle for securing a just result on the case. This is the time for the advocate to muster the strength and the courage to maximize damages through a contest in the courtroom.

## **VII. TRIAL**

### **A. JUROR SELECTION**

The makeup of the jury is the single most important ingredient to maximizing damages in the trial of a wrongful death lawsuit. Nevertheless, lawyers in Massachusetts are often hamstrung in this selection process because of the lack of meaningful voir dire examination of individual venire members before their selection as jurors. Such an examination would allow counsel for both sides to explore biases, prejudices and predispositions that would impact jury deliberations and awards.

Considering this deficit in our system, the need for meaningful voir dire examination of prospective jurors should be strenuously argued at the outset of every case. Through the use of detailed juror questionnaires and a limited judge conducted voir dire examination of individual jurors at side bar, the Court can be assured that an unbiased jury can be impaneled. Without this type of meaningful voir dire, picking a jury in Massachusetts necessarily becomes a matter of educated guesswork that relies upon a mixture of life experiences, common sense, racial, sexual and ethnic stereotyping, as well as considerations of social and occupational status and the prospective identification or lack thereof between the plaintiff(s) and jurors.

In many cases, the use of scientific research, jury consultants and mock juries can be extraordinarily useful in determining the appropriate makeup of the jury in maximizing damages. Considering the inordinate time and expense that will go into the proper preparation and presentation of a wrongful death lawsuit at trial, these resources can be a valuable expenditure for the conscientious practitioner seeking to determine both the nature of the ideal juror and the ideal approach to juror receptivity.

## **B. OPENING STATEMENT**

The opening statement is the most important phase of the trial of a wrongful death lawsuit, because it is the first and best opportunity to tell the jury the story of your case. We live in a visual age where people are spending more and more of their waking hours “clicking” across either a computer or television screen, processing information and formulating beliefs and decisions that impact their daily lives.

The courtroom of the approaching millennium will not be a bastion, removed from this “sound bite era” but rather an integral and hopefully exemplary component thereof. The challenge to the plaintiff’s attorney is to compose a concise opening statement that imbeds visual and vocal images in the minds of the jury and motivates them to return a verdict that fairly and fully compensates plaintiffs for the loss of their loved ones, despite an environment that minimizes or even trivializes such loss.

In meeting this challenge, plaintiff’s counsel must recognize that the pre-existing sentiment of most jurors in this “information age” is that personal injury lawyers are greedy and often unscrupulous and that most plaintiffs are seeking an unjustified

windfall for the inevitable vicissitudes of the human condition. Through the daily manipulation of a computer mouse or a television remote, we as a people seem to have become indifferent and desensitized to the injustice of suffering and death occasioned by careless and/or reckless acts.

It should be the desire and the duty of the conscientious plaintiff's attorney to alter these perceptions and to foster a compassionate and courageous spirit within juries; a spirit that will reach out to the bereaved and the disconsolate through an understanding and appreciation of the terrible contrast that now exists between their lives before and after the negligence visited tragedy upon them; a spirit that will seek to remedy this injustice by their verdict.

There are certain tried and true means of doing this, starting with the opening statement. A proper understanding of certain underlying principles of human psychology, communication and story telling will assist counsel in formulating an opening that not only passes legal muster but predisposes the jury to a maximum award of damages.

#### **PRINCIPLE I: GRAB THEM AND HOLD THEM IN THE FIRST FEW MINUTES**

Primacy is the advantage that the party with the burden of proof possesses at trial. Counsel who opens first must strike quickly and effectively by sequencing the opening to place the blame upon the defendant(s) first. Recent studies have confirmed what many personal injury trial lawyers have suspected -- jurors have become much less sympathetic to the pain and suffering of the victims of negligence in the last few years. The present day sentiment is that life is uncertain and often unfair and people must take responsibility for their own tragic circumstances. An effective means of supplanting these sentiments is to focus the jury's attention on the wrongdoing of the defendant(s) at the outset of the case and only after that wrongdoing has been established should the plaintiff's predicament in falling victim to that wrongdoing be shown.

#### **PRINCIPLE II: GIVE THEM A TUNE THEY CAN WHISTLE**

A theme that summarizes the case in a few words or sentences is an effective means of grabbing and holding the attention of the jury from opening statement through summation. In determining the theme of a wrongful death case, the first component must arise from those revelations in discovery that stand out the most in signifying the wrongdoing of the defendant(s). The next component should arise from the manner of the decedent's suffering and death. The last component should arise from the plight of the decedent's loved ones as the result of their loss.

A means of arriving at an effective theme is to begin the first sentence of the theme with the words: "This is a case where" and follow them with the three

aforementioned components. For example:

This is a case where:

a) corporate indifference has caused electrocution and the loss of a mother's love.

b) inattention and delay has caused asphyxiation and a profound tragedy.

c) reckless disregard for the law has caused unspeakable human suffering and the loss of a father's comfort and direction.

The theme should be enunciated within the first few minutes of the opening statement and anchored deliberately by a pregnant pause, or a distinctive gesture and an appropriate positioning within the courtroom. This will embed the theme in the minds and hopefully the hearts of the jury at the time when their attention is at its zenith and thereby give plaintiff's counsel, the witnesses presented on the plaintiff's behalf, and ultimately the jury, a tune they can whistle throughout the trial.

### **PRINCIPLE III: TELL A COMPELLING STORY**

In delivering an effective opening statement, it is necessary to draw the jury into the compelling story of the case and thereby lead them to visualize the facts and circumstances of liability, causation and damages within each of their mind's eyes. This can be done most effectively by both visual and vocal means of communication.

The story of the case should be told in word pictures using the present tense and other visual stimuli, including photographs or blow-ups. It is as if you are taking each of the members by the hand back in time just a split second before the defining event and reciting in moving word pictures first the wrongdoing of the defendant(s) then the impact of that wrongdoing upon the decedent and consequently his or her loved ones.

It should be noted that, as long as the obligatory words, "*the evidence will show,*" are used, counsel will remain within the bounds of a proper opening statement, yet enjoy considerable leeway in delivering the theme and the story of the case from the outset.

#### **PRINCIPLE IV: STEAL THEIR THUNDER BEFORE THEY RAIN ON YOUR PARADE**

In virtually every civil case that culminates in a trial by jury, there are issues and/or defenses which complicate the presentation of the plaintiff's case. Since primacy, or presenting the case first, can be a decided advantage for the plaintiff, plaintiff's counsel should not bestow primacy on opposing counsel by failing to touch upon these issues and/or defenses first in his or her opening. Thus, with respect to issues or defenses that may serve to diminish the maximization of wrongful death damages, counsel for the plaintiff should strategize on the best means of acknowledging these matters and defusing them first. By stealing their thunder in this way, you will prevent them from raining on your parade.

#### **PRINCIPLE V: BE STRAIGHTFORWARD WITH RESPECT TO DAMAGES**

The decision as to how much emphasis should be placed upon the measure and the amount of damages in the opening statement of a wrongful death lawsuit depends upon the strength of the plaintiff's case on liability. The weaker the liability case, the less should be said about damages. Likewise the stronger the case on liability, the greater the focus on damages. In every case, the nature of the decedent's injury, the extent of his or her conscious pain and suffering, if any, and the economic and emotional impact of the decedent's death upon family members, should be touched upon.

The question really arises as to whether specific dollar amounts should be mentioned in the opening. Considering the common perception that personal injury lawyers are in it solely for the money and detached from the anguish of those who have suffered the loss, a discussion of dollar amounts at this sensitive stage in the proceedings may only serve to confirm this juror prejudice and detract from winning the trust and respect of the jury. It is imperative that the jury perceive plaintiff's counsel as someone who is competent and straightforward in his or her approach to the case.

Under no circumstances should damages be exaggerated or unreasonably embellished upon. Remember that you are making a promise to the jurors that the evidence will show certain facts and circumstances pertaining to liability, causation and damages. If the jury gets the impression during the trial that plaintiff's counsel has overstated the case, particularly with respect to the damages, they may very well find no liability on the part of the defendant(s) as the result. The rule of thumb should always be to keep the case as simple and as straightforward as possible and understate damages rather than exaggerate.

### C. DIRECT EXAMINATION

Developing a concise and effective direct examination for both lay and expert witnesses is the cornerstone of a successful wrongful death lawsuit. A direct examination that flows sequentially while meeting burdens of proof in a persuasive concise manner is a work of art requiring extensive preparation and rehearsal. Like an operatic duet, the advocate and the witness testifying on direct examination must become comfortable with each other and the lyrics they will share. It is essential that lay witnesses be prepared with respect to their dress and demeanor in court. They must also understand their role in the effective presentation of the case.

There is no substitute for preparation in this phase of the proceeding. It is recommended that a detailed outline of the subject matter of the direct examination be made, or the actual questions on direct examination be written out, and rehearsed prior to trial.

It is also imperative that the direct witness be prepared fully with respect to cross examination by opposing counsel. It is only through preparation and the witness's consequent faith in the competence of plaintiff's counsel that he or she will become a persuasive and effective asset in the presentation of the case.

A particularly significant component of a successful wrongful death lawsuit is the effective use of demonstrative aids such as blowups, models, photographs, charts, overhead projections, video animations and demonstrations. The old adage of a picture being worth a thousand words holds true here. Considering the absolute need to present your case clearly and concisely in light of the limited attention span of information-age juries, the use of these demonstrative aids is not only advisable but necessary for success. In addition, they often make the trial more rewarding from a creative perspective.

An important consideration in this regard is the proper sequencing of witnesses in the presentation of plaintiff's case. This requires a very real sense of the drama of trial. In each direct examination as well as in the overall presentation of the plaintiff's case, there should occur a building of momentum toward a climax. This will keep the attention of the jury riveted on your case and subconsciously prepare them for the gratifying applause of a plaintiff's verdict.

An important tool in effectively presenting direct expert testimony is the use of the hypothetical question. Any attorney seeking to become proficient in the presentation of wrongful death cases must be familiar with the requirements and the strategic advantages of the hypothetical question. See, *Foundation and Sufficiency of Expert Testimony, Massachusetts Law Review*; Vol 77, pp. 113-138 (1992). Through hypothetical questions, the expert and plaintiff's counsel can engage in an abbreviated

summation of the plaintiff's evidence and put forth a persuasive argument for its acceptance. The use of hypothetical questions can be an invaluable asset in repeating and reinforcing the theme of the plaintiff's case of wrongful death and thus assist in maximizing damages therein.

#### **D. CROSS EXAMINATION**

Effective cross examination is the single most important vehicle for securing truth and exposing deception. This is why cross examination is the most entrancing melody within the repertoire of the trial advocate. In the effective presentation of a wrongful death lawsuit, the concise and competent cross examination of the defendant(s) and his or her witnesses, both lay and expert, is a means of painting a picture on issues of liability, causation, and damages that will prove indelible when it comes to summation of the plaintiff's case.

A cross examiner should never cross examine without an objective. The cross examination should begin with a bang and end with a bang. It should never be shrill, yet it should always be forceful and controlling, even if it may appear sweet and kind. It is the opportunity to keep the witnesses against the plaintiff's case on a tether and hold them there while evidence is elicited through leading questions that evoke responses damaging to the defendant's case.

It can prove particularly dramatic and persuasive for plaintiff's counsel to evoke the following evidence from the lips of a hostile witness:

- 1.evidence that is consistent with the plaintiff's recitation of the case;
- 2.evidence that contain admissions of fact that damage the defendant's case;
- 3.evidence that reveals a bias or hostility in testifying that impacts the witness' credibility; and
- 4.evidence that impeaches, contradicts, and/or undermines the witness and/or the defendant's case.

Effective cross examination provides the opportunity for plaintiff's counsel to stand before the jury, prior to summation, repeating and reinforcing the theme of the plaintiff's case with a hostile defendant or witness simmering on the stand. It should never be misused or overdone in a bullying or arrogant manner; for in doing so, the witness will become sympathetic and plaintiff's counsel will lose the precious asset of

goodwill with the jury.

It should not be used where the witness is steadfast and unshakable or has testified so ineffectively or sympathetically that cross examination would be superfluous or counterproductive. Cross examination should be competent, concise and controlling with a clear objective. It is often the best means of arriving at punitive damages and maximizing damages in a wrongful death lawsuit.

#### **E. SUMMATION**

The summation or final argument is that portion of the trial where the advocate's powers of persuasion are paramount. It is the time for reinforcing the theme of the case with favorable jurors and providing them with the evidence which will enable them to persuade unfavorable jurors that returning a verdict for the plaintiff, including an award that provides full and fair compensation under the law, is the equitable thing to do.

Through the use of word pictures, the advocate should first paint a compelling portrait that encompasses all the salient evidence in support of liability and then insert within that portrait the decedent, using before and after contrasts to evoke empathy and motivate the jury, as the conscience of the community, to render a verdict on behalf of the plaintiff(s).

The advocate should stimulate the jurors' senses and their imaginations with a repertoire of visual, vocal, verbal and non-verbal devices and cues. These may include items of demonstrative evidence, changes in patterns and volume of speech, as well as the use of embedded commands, analogies, quotations, rhetorical questions, understatements, anecdotes and good old-fashioned eloquence. The summation should be rehearsed and refined until it flows smoothly from the advocate's lips. It should not be phoney or contrived, but rather it should be an intuitive and compelling formulation of ideas and ideals that reaches into the very hearts and souls of the jury and persuades them to do justice.

The summation should have clearly defined transition phrases between discussions of liability, causation and damages. It should express gratitude to the jurors for their service and make reference to words and phrases which the judge will use in instructing the jury. It should not ordinarily trace the case from a purely chronological perspective.

When dollar amounts have been placed on the blackboard or admitted into evidence, they should be given proper attention, all the while reiterating that the calculations of conscious pain and suffering damages on the part of the decedent and the loss of that decedent's society and companionship are calculations that the

Commonwealth leaves to the conscience of the jury.

In constructing and commenting on the jury verdict slip and the special questions which the jury will be required to answer during deliberations, it is advisable to include an award of damages as they relate to each of the decedent's next of kin. It is also advisable to review the questions with the jury and argue that justice requires them to answer these questions in favor of the plaintiff(s). Where reckless disregard has been proven, punitive damages should be demanded in order to send the defendant(s) a message that rings loud and clear and prevents the reoccurrence of a similar tragedy.

As a finale to the summation, you may want to include a conclusion that lasts for no more than five minutes. This is the point where the advocate should become very deliberate with his or her speech and very softspoken. It is a time for motivating the jury based on their empathy for the human tragedy that they have been called upon to witness. It is the last encore for justice. Here is one way to finish up a father's wrongful death case:

*What do these children need now? Someone who would try to understand their needs and problems? Someone who would do everything within his power to ensure that the fair thing would be done by them? Someone who would not compromise any aspect of these children's lives and future? Someone committed to justice? You might think that I am describing a father. But in reality, I am describing the twelve people who must now determine the value of this father.*

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