



Quiet reflections on profound loss

HELPING THE JURY DO JUSTICE FOR THE WRONGFUL DEATH OF A CHILD

You sit down and look across your desk to meet two people. The look on their faces is reserved for those who are experiencing the unthinkable. Not long ago, they received a phone call telling them their child had been killed and asking them to please come and identify the body.

The body? This is their child, not just a body. This is a child whose life was inextricably intertwined with the lives of the two people who are now sitting in your office. This is a child who was guided, nurtured, and supported by the parents who sit before you and with whom the sharing of love is not easily measured.

As the parents sit before you, still waiting to awaken from this nightmare, you know that they wish they never had to meet you. If only the hands of the clock could be turned back to twenty seconds before the negligent party took the life of their beloved child. If only they could have sat with the party who was about to act negligently and had the chance to plead with that party not to be negligent – the chance to plead with that party to spare the life of their child. If only they could have warned their child, protected their child as they had done countless times in the past. If only....

It has been said that having a child is like having your heart walking around outside your body. Our children are our hopes and dreams for the future. We have spent our child's lifetime protecting, teaching, and loving them. We have basked in the joy of their love of us. We have comforted their pain, accepted their weaknesses, rejoiced in their successes, and helped them through adversity. And, now, at their moment of greatest need, we could do nothing for them.

Closing argument in a wrongful death case is built, of course, on the evidence. Nothing new about that. The whole trial is built on the evidence. But to plan to adequately convey to a jury the

enormity of the loss, one must sit quietly. One must consider. One must find the universal chords that resonate with everyone about this most profound of losses. One must become less a lawyer and more a human being. One must ponder those shared values and experiences that cut across society, that make us all the same no matter our station in life.

The one thing we all share

The one thing we all share – from the CEO to the carpenter, from the doctor to the parking attendant, from the movie star to the auto mechanic – is the love of our children. It is those universal realities about which one must stop, sit quietly, and consider in formulating the closing argument in a wrongful death case. The argument is rooted in the evidence, but it blossoms when the jury is reminded of these universal principles that we try to capture in the word “love.”

This article does not address economic damages in a wrongful death case. Loss of financial support is certainly a significant element of damage in many wrongful death cases, but that evidence typically comes from financial witnesses, documents, and/or expert testimony. This article, instead, deals with non-economic damages – the loss of love and all of its related but distinct losses as listed in the CACI jury instruction. And while that instruction contains a list that is useful to the jury in evaluating damages, the simple words themselves hardly reach to the core of what the non-economic damages are about. So, this article asks you to ask yourself, in the quiet moment, what such a loss truly means. If you ask yourself, if you look into yourself, if you understand what the loss means as a human being, you will know what to tell the jury in closing.

I am using the example of the death of a child to illustrate the point. But many of the same ideas are transferable to the death of a spouse or the death of a parent. There are no cookie-cutter approaches to developing a closing

argument in a wrongful death case. There is no checklist. And I do not claim that all the ideas in this article are mine. Some are ideas I picked up from other trial lawyers and some are my own. But, in the end, it is all about understanding deeply the particular loss in your case and communicating that to the jury.

Ask yourself: Is it true that the worst thing you can do to a human being is to cause them to walk in the funeral procession of their own child? And, if so, why? It has often been said that a parent would throw himself or herself in front of a bus to save the life of their child. A potential juror years ago was asked during voir dire how important his children were to him. This big, burly construction worker responded that his kids were the best thing that he had done in his whole life. Our children, after all, are our hopes and dreams going into the future. We want them to find joy and fulfillment, to grow and prosper. We cannot imagine walking in that funeral procession. The mind simply cannot go there.

Ask yourself: Can we actually place a monetary value on the loss of a child? We would all agree that accountability for wrongdoing that took the life of someone's child is required. But why do we put that loss into monetary terms in the civil justice system? For those who say that the money will not bring the child back, they miss the point. Accountability is just a word until the consequence of wrongdoing is translated into money damages – until the wrongdoer is made to pay. The negligent parties are not asked to give up their own child. But they are commanded by the law to pay money damages for the debt that is due and owing, a debt that they created by their conduct. Indeed, money is the only means we have of forcing the wrongdoer to be held accountable. And, without full accountability for the wrong, society would descend into chaos. A monetary

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award is the best way ever devised to resolve these disputes peacefully.

We do not hesitate to make meaningful monetary awards in other circumstances. If the negligent party were to drop and shatter a priceless vase, would we hesitate to award the owner of the vase the full value? Of course not. If a corporate truck were to careen into a building and destroy it, would we hesitate to award the building owner the full value of the building – the full value of the loss? Of course not. So, when it comes to a loss far worse than either of those, we should not flinch from making a full award for the loss of the child.

Ask yourself: How do you place a value on the loss? Nothing is more challenging for a juror than to assess the loss of a loved one in monetary terms. It is not easy, but if it were easy, we would not need a jury of human beings. We could just input the data into a computer and it would spit out an answer. But would it? Could it? How would a computer ever understand why we would give up our lives to save the life of our child?

But we acknowledge the fact of that value all the time in society. When we send a test pilot up in a heretofore untested multimillion-dollar airplane, we instruct the pilot to bail out if anything goes wrong and not to try to save the plane. The life of one pilot is worth more than the ultra-high dollar value of the plane. Likewise, if someone were in a burning building and, down the hall, they see a \$20 million painting hanging on the wall and, below it, an unconscious human being on the floor, and if only one could be saved, which one would be saved? Of course, the human being would be saved. These examples are but two of many that show how much we value human life and how we put that value into monetary terms every day.

Award is for loss, not grief and sorrow

Ask yourself: What does it mean when the jury instruction says that the award shall be for the loss but not for grief and sorrow? After all, doesn't that sound inconsistent? In fact, it is not

inconsistent. Grief and sorrow are different and far less profound than the loss.

Example: If a man were to lose his leg in an industrial accident, he would go through a period of grief and sorrow. It is a period, usually of limited duration, often described as the grieving process. Initially, the man cannot believe this has really happened. He wakes up thinking, hoping, that it was just a nightmare and that he is fine. But then he reaches down to where his leg was and finds that it is missing. He goes through the day almost in a state of denial. He wakes up the next morning and goes through the same emotions until finally, one day, he comes to grips with the reality that the leg is gone and it is not going to change.

Some people say this process takes a few months. But, once it is over, the *loss* begins. He has come to realize the fact that every day for the rest of his life will be lived without the leg – that so much of his life the way it used to be has changed. The loss is so much greater than the process of grief and sorrow. The grief and sorrow period, while difficult, does not remotely match the lifetime of loss and all the changes in life that will be with him until the day he dies.

Such it is with the loss of a child. Initially, the grief and sorrow are overwhelming. The parents wake up every morning hoping, praying, that it was just a nightmare. They live in a state of near denial. They do not understand. But once they get through this grieving process, the loss of the love of the child sinks in. How is my child doing now? Where would she be sitting at the Thanksgiving table? What dreams were snuffed out by the negligent party? Where is the joy? Where is the love?

Gone. Lost. Loss.

Ask yourself: What will the jurors think the parents will do with the money? We cannot answer that question, but we can explain that the choice about what to do with the money is not ours, but theirs. After all, the loss is not ours, but theirs. If a juror during deliberations were to ask what the parents will do with the money, the rest of the jurors should turn to that juror and politely say that that

question is not part of the jury instructions, not part of the verdict form, and should not be part of deliberations or the verdict.

The same could be said if a juror were to say, "I would never sue for the death of my child." It is hard to say what one would do until they are placed in the situation themselves of seeing a negligent party take the life of their child. Here, it is the parents' situation, not ours. It is their loss, not ours. It is their choice to seek to hold the person who negligently took the life of their child accountable. The law permits it and the jurors must follow the law.

Likewise, if a juror were to say, "no amount of money will bring the child back," the other jurors should say that bringing the child back is not what this is all about. If we could bring the child back, we would. And the parents would gladly accept that as their verdict. But we cannot. All we can do is to provide compensation for the loss caused by the negligent party.

In fact, if you were to pile millions of dollars on the table in front of the parents and offer one of two things – that they could have the money *or* that their child would walk into the courtroom for just five minutes so that they could hug, say "I love you," say "good-bye," and say "I'll see you again" – we all know which one the parents would take.

Ask yourself: And what about the monetary sacrifices the parents have made in raising the child? The parents certainly make sacrifices in order to provide the best for their children. In my own case, my parents sacrificed buying things for themselves so that my sister and I could get the best possible education. In some cases, parents pass up opportunities to advance in their careers – advancements that would give them more income – because they want to spend more time with their children. Or parents choose not to move to a different city for a higher paying job because they know that it would be best for their children to stay where they are in the schools they love with the friends they've made. Parents make these monetary sacrifices

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all the time out of love. They put teeth into the phrase “family values” by putting money on the line for those values.

Ask yourself: How long? The court will give, if requested, an instruction on life expectancy. The life expectancy appropriate to the case is the shorter of the parents or the child. Typically, in a child death case, the parents’ life expectancy is the measure. So, the jury will not be making an award just for the day of the death, not just for the first holiday season without the child, not just for the first birthday without the child, not just for the first anniversary of the death.

No, the jury will be making an award for every minute of every hour of every day of every month of every year for the rest of the parents’ lives. Every holiday dinner with an empty seat at the table.

Every family event with the child missing. Graduation Day. Every Mother’s Day. Every Father’s Day. Grandchildren. All the moments and memories that were to be made but never occurred. All of it. Fully accounted for. Fully recognized by the verdict.

Recognizing the enormity of the loss

Someone once proposed a method of avoiding nuclear holocaust between the major superpowers: Have the leader of each superpower place one of their own children to live in the other superpower’s capital city. No leader would ever drop the bomb on a city knowing that he or she would be taking the life of his or her own child in the process. That is because the love between parent and child is as valuable a thing as a person could possess. And that value is what you

will help a jury, once you sit quietly and ponder, to understand. And then the jurors will proudly return a verdict that recognizes the enormity of the loss. And you will have helped them to do justice.

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