



Humanizing damages in

WRONGFUL DEATH

By DIRK VANDEVER & MARK EMISON

Stop treating wrongful death cases the same as personal injury cases. They are the most serious and important cases tried by a civil juror, and we must treat them accordingly. As trial attorneys, one of our greatest honors and responsibilities is to advocate for a family who has lost a loved one due to another's carelessness. These cases are emotional for all involved. It is a weighty responsibility to intimately understand this treasured person's life, the impact this person has made in their life, and the impact on those who are left behind.

Wrongful death cases present unique challenges we must recognize. Even jurors who understand the law's mandate to value non-economic damages in personal injury cases may struggle with awarding money to someone who has lost a family member. In this article, first, we explore the unique challenges that arise in most wrongful death cases. Second, we discuss strategies we have found successful in revealing and presenting damages to give full justice in wrongful death cases.

The Challenges

Every single person on a *voir dire* panel has lost someone they deeply care about. Many have lost someone due to tragic circumstances. Nearly everyone has shouldered the loss without receiving a dime. Potential jurors think, "why should we treat the plaintiffs better than my family?"

In personal injury cases, the discussion is often centered around the unnecessary, violent change brought about in an injured person's life. There is often hope that financial compensation can make a concrete difference in the person's life and provide a better future. Whereas in wrongful death cases, it is common to hear potential jurors say, "I just don't get it; money cannot bring the dead back to life," "What good will money do?" or "Give money to someone who died years before?" (thereby highlighting even more that this is about the surviving family rather than the decedent . . . it's about both).

This is particularly challenging for some jurors when the family relied on no financial support from the decedent. In a recent wrongful death trial, we represented adult children for the loss of an elderly parent who provided no financial support. Most of the jury panel had a negative reaction to our adult clients asking for money for the death of their mother. Some responses included, "I lost my mom; I cry every day," "Money doesn't make a difference," "Money will not bring her back," and "I'm not for the adult kids getting money."

While every case is unique, we've identified seven common issues that arise with jurors who are philosophically opposed to wrongful death cases:

Everyone dies. I never received any money when I lost someone dear to me.

Life is so precious that assigning a money value cheapens life.

Money cannot bring this person back or ease the family's grief (frequently an element that is not recoverable).

Often, there is no financial loss to the family.

This is "blood money:" A family should never profit from the death of their loved one.

This lawsuit is tantamount to accusing the defendant of murder when this tragedy was just an accident.

What a wonderful, full life she lived!

In jury selection, we must confront these challenges head on to identify jurors who believe wrongful death cases are inappropriate and cannot follow the law.

Mindset Shift: Value of the Life Taken

As a society, there are numerous examples of the high value placed on human life. When someone is stranded out to sea or in the wilderness in a life-or-death situation, we do not hesitate to devote substantial financial resources to deploy rescue operations, helicopters, highly trained personnel, or whatever else it takes to save one life. We will spend tens of millions to dig up those buried under rubble on the chance it saves one life.

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We do not ask as a prerequisite:

What would be the economic loss if this person died?

Does the person have any comorbidities?

Is the person employed?

What is that person's lifetime earnings capacity? or

What is the person's life expectancy?

In considering the value of life, a painting of a man or woman by Rembrandt, Van Gogh, or Leonardo da Vinci may be valued in the tens, if not hundreds of millions of dollars. Can we say that a painting is worth more than the human depicted the painting?

This high value placed on human life is a cornerstone of our nation. In the Declaration of Independence, our founders declared the foundation of basic human rights in America as "life, liberty, and the pursuit of happiness." Of these express inalienable human rights, life is above all.

This makes wrongful death cases the most important and serious cases in our civil justice system. In these cases, the death was unnatural – not from disease or aging. In most cases, the death was sudden, unexpected, and violent. The carelessness of the defendant took this person before his or her time to die without any chance to put affairs in order, obtain closure, or to mend relationships that need repair. Our form of justice makes America different than other countries. We live in a society that values allowing people

to do what they want as long as they do not harm others.

We agree that if a corporation or person is careless and causes harm to others, they must be accountable for the harms and losses caused. Our country has developed the best system in the world. It is not an eye for an eye justice or a life for a life, where if someone negligent takes someone's wife's life, we take their wife's life. In our system, the remedy is money damages for a life taken. So how do we determine that value?

Framework for Damages

Assigning a monetary value for the loss of a life is a foreign and difficult concept for jurors. To test this, try a one-person focus group with a friend or loved one. Ask them to imagine being forced to come up with a fair, objective monetary value for your life. Most would have a confused reaction and not know where to start. Others may try to develop some sort of formula or multiplier based on economic damages. Finally, some would flat out refuse because it is too hard. Without a framework, jurors will likely have a similar reaction – yet none of the above strategies reflect what the law mandates in determining wrongful death damages.

Luckily, the law provides specific guidance on how damages must be determined. To provide this context and framework, you must educate the jury in *voir dire*, opening, and closing of their job in determining damages,

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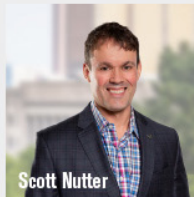
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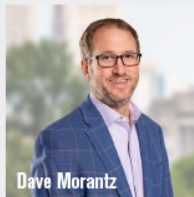
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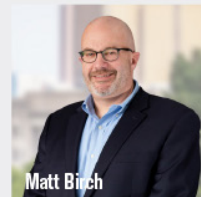
Lynn Johnson



Scott Nutter



Dave Morantz



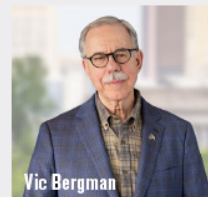
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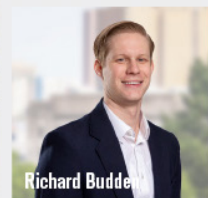
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recoverable wrongful damages, the varying elements, and what evidence must be considered. Below we explore some core concepts to consider when discussing damages with jurors.

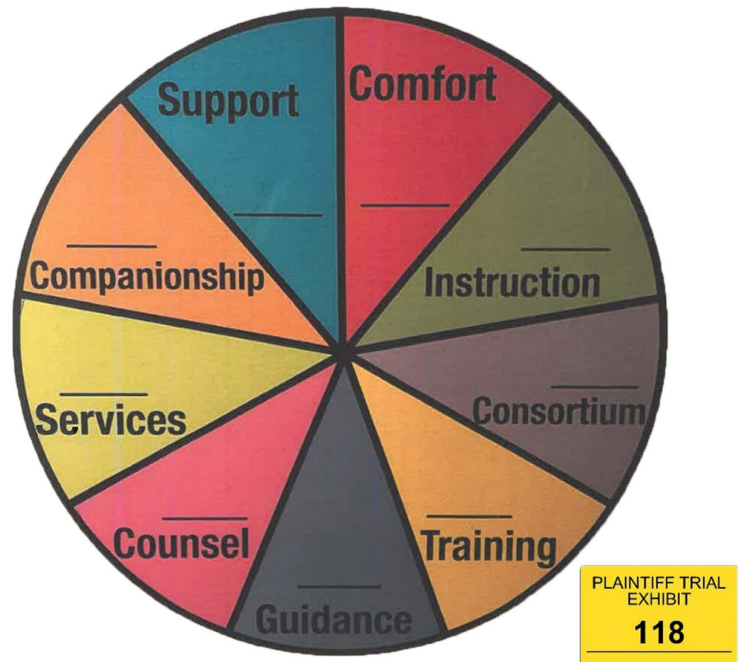
In Missouri, wrongful death damages include nine different values:

Services
Consortium
Companionship
Comfort
Instruction
Guidance
Counsel
Training
Support

See § 537.090, RSMo. Each of these categories are unique and have a different meaning. Since each wrongful death beneficiary has a right to bring a claim for damages, each of these elements must be weighed and valued separately for each individual wrongful death beneficiary. Ultimately, the jury adds all these values up to come to one single dollar amount in the verdict form.

Visuals, metaphors, and analogies are helpful to ensure jurors understand this concept. Below, we've included a wrongful death damages "pie" visual, above, that outlines the nine recoverable elements in Missouri wrongful death cases that may be used as a framework to talk about the separate elements that must be considered.

Additionally, trial attorney Christy Crowe Childers¹ crafted a helpful metaphor for non-economic damages that may be helpful in your cases. She asks the jurors to imagine

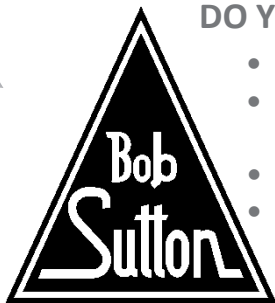


a house. Each damages element to consider represents a different room of the house. In an actual house, an appraiser considers the value of each room. Some rooms may be bigger or more valuable than others, but it is important that all rooms be considered in determining the total value.

Likewise, a jury must appraise and value each individual element separately to come to a total value in damages. The jury will consider evidence and testimony to value each individual element. Using this metaphor for Missouri wrongful death damages, see the demonstrative below along with basic, common-sense examples of each element.

Explain in opening how different witnesses will provide evidence of each "room" for the jury to consider in assessing the value of each loss. We do this with stories

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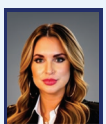
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from a multitude of perspectives of the person lost.

Stories, Stories, Stories

In building your case, collect stories from your clients and independent sources that reflect and personalize the different elements of damages. These stories should apply separately to each family member with a right of recovery. Each witness should provide a perspective and a “slice” of the loved one’s life. Stories vary from the major milestones in the person’s life (education, marriage, children, retirement, etc.) to, more importantly, the daily and weekly routines.

The stories should be specific, and real examples of what the witness saw, observed, or has knowledge. Witnesses often retreat to generalities and platitudes, such as she was “kind,” “supportive,” or “loved her family.” These are nice things to say, but the generalities only show a two-dimensional version of the person. Specific stories that demonstrate her support, her instruction, companionship, etc. are both more natural for witnesses to tell, and so much more powerful than generalities. When several people each tell a handful of stories about the person no longer with us that highlight these elements, all these stories allow jurors to understand a living, breathing, three-dimensional person. The loss to those left behind becomes evident.

In the work collecting stories, look for visuals and evidence. Real evidence makes the best visuals. Do not overlook surveillance and dash cam videos to provide jurors a powerful sense that they are at the scene. In addition, videos that show the person lost move, talk, and interact with others are especially powerful. Ask for notes, emails, and photographs of the loved one. For example, a note or a voicemail from a mother checking on their adult son during a hard time in his life or to congratulate him on a good day speaks volumes about their relationship.

Timelines may be very helpful. As with all visuals, ask why you are presenting it. For example, in the death of a 30-year-old, a timeline of the person’s 30 years of life may be extended 60 years into the future to show experiences that will never occur, stories never told, and bonds never formed.

Focus on Joy, not Grief

In “Witness Preparation: How to Tell the Winning Story,” author Jesse Wilson discusses the power of joy in the courtroom.² Wilson writes:

Joy, the emotional state of joy, is the cord that binds you to your listener, and vice versa. Fear pushes the listener away. Joy unites. Why? Because joy is what we treasure the most. Joy is something we never want to be robbed of. Joy is priceless.

...

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People get it because they understand the loss and what has been taken from [the] family even more.

After all, how can the jury know what was truly taken if you don't show them the full value of what was taken?

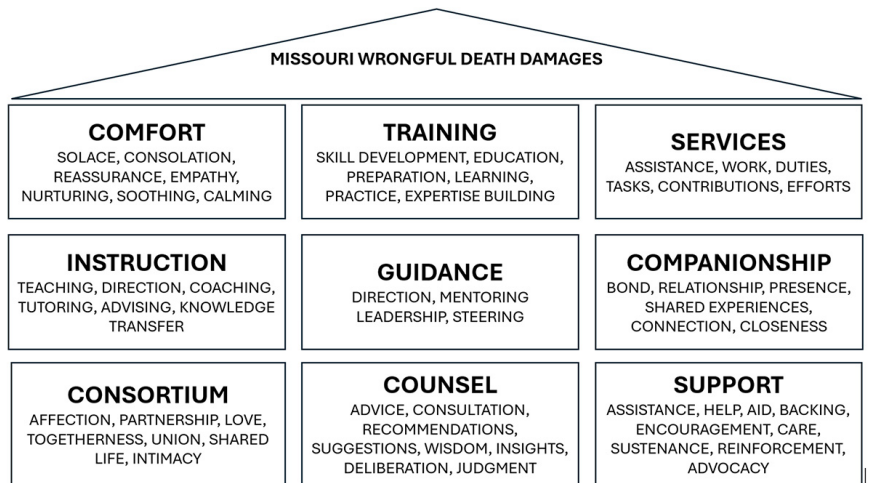
Joy.³

In virtually all wrongful death cases, our clients are in different stages of grief. Understandably, there is a tendency for witnesses to go to dark places and focus on their grief and pain. We are not asking for a penny for grief – a universal negative feeling all experience when we speak of grief – we speak of the mourning surrounding a funeral, but it's the positives we carry for the rest of our lives which matter. Our law celebrates this life which was taken. It celebrates those nine positive parts which made him who he was - whose lessons and inspiration we carry with us. When your clients shift toward darkness and pain, bring them back to joy. Ask them to take you back to their happiest moments together. Ask, what brought you joy together?

We have found that clients experience joy by telling stories of joy. "Your client will feel the honor of bringing the people they love to life because that's how they would have wanted to be remembered... We honor the people who are no longer here through stories of joy."⁴ It takes time and empathy to build trust with our clients to open up and get to a place of joy, but it can lead to incredible moments in the courtroom. For jurors to understand the magnitude of the loss, they must understand the joy brought by the person no longer with us.

To illustrate, consider a recent wrongful death trial involving a man who suddenly lost his wife of fifty years in a violent car crash. He was absolutely crushed. He had lived his entire adult life with his companion and could not fathom a world without her. Naturally, in preparation for his testimony, he tended to go to a dark place – to talk about how horrible and grief stricken he was by the loss, and the loneliness and helplessness he felt. These are, of course, all valid, understandable feelings.

This broken man transformed when he turned to joy. Once he started telling joyful stories about his wife, he could not stop. It was as if his stories brought his wife back to life. Stories about how the two grew up together as children, fell in love as teenagers, and went to parties and danced. How as they became adults, they got married and built a family together. The story of his wife's influence on getting him active in the community and church. The struggle they shouldered together when they raised children, started a business together, endured the business's struggle, and started another new business together. The joy of



grandchildren and enjoying retirement together. The good parts of life; the hard parts of life. The common thread through all of this was that they lived this life together. Throughout his testimony, the man spoke with a smile and pride in telling everyone in the courtroom about his wife who would listen. His smile was contagious. The heaviness felt in the courtroom lightened. The jurors were relieved.

The print on the pages cannot do this man justice, but hopefully you understand the takeaway. His testimony never touched on grief, sadness, or loneliness. After hearing these stories of joy, there was no way anyone could doubt the loss this man suffered.

Conclusion

We must rise to the occasion in these important cases. Our clients trust us to enshrine forever the memory of their loved ones wrongfully taken from their lives. Your important work in collecting stories and providing a framework for damages will serve you well in closing. Empower the jurors to act in what is the most important type of case brought to a civil jury. Consider this in a case with a surviving spouse and three adult children where the jurors may worry about allocation:

We represent four people – all entitled to have their story heard. Your job is to add the values of each to total one sum. The judge has heard the same evidence as you. He will divide the total in a fair and just fashion among the four. It is for you to confirm to the family – to the community - how truly remarkable this woman's life was – and more – as your verdict will live as long as Jackson County exists and all of his grandchildren and their grandchildren can point to your work today as proof our system works.

Endnotes

¹ Christy Rowe Childers, partner at Childers & McCain, L.L.C. Injury Attorneys in Macon, Georgia.

² Wilson, Jesse. *Witness Preparation: How to Tell the Winning Story*. Trial Guides, LLC (2022).

³ *Id.* at p. 88.

⁴ *Id.* at p. 92.