



It's the Damages Stupid: Making Mental Health Professionals Your Best Witness

by Thomas Q. Keefe, III

Lawsuits are linear.

Duty, breach, causation, damages. Elements which read left to right, or top to bottom. Sequential.

The fourth does not matter without the first three. Therefore, we tend not to focus on the fourth until we have established the first three.

This is logical and efficient, because we cannot help a catastrophically injured client without a culpable defendant.

But the longer you wait to focus on damages, the greater the potential gap between what you wish the jury could hear, and what they actually will hear. Assertive, forward-thinking lawyers, working with mental health professionals, can strengthen damages evidence, while maintaining adaptability. We can bridge that gap.

Consider a commercial trucking wrongful death.

A married father of two drives straight from work to the school play, where both kids are performing. On the way, he blows his left, rear tire and pulls all the way over, working fast to fix it. With luck, he'll still make curtain.

Meanwhile, a semi is about a half-mile away. The driver is distracted, looking at his phone and radio. As his mind drifts, so does the truck. Discovery will show he's got a history of accidents, missed safety meetings, falsified log books and an expired CDL. Discovery will also show his employer knew, warned him, mandated additional training, and a few superiors even wanted him fired. The jury will be livid.

Reconstruction evidence will show the truck never braked, and that Dad turned into the impact. He saw

it coming. He knew. But it was too late. The grill of the semi lifts and drags him across the side panel. His body rips off the mirror before being thrown over the hood. It thuds onto the shoulder, gravel tearing away his flesh and clothing. Death wasn't instantaneous, but it was close enough. There's no survival case.

That won't matter to the jury. By the time the coroner testifies they'll be infuriated. For months you go to bed thinking of the liability case you'll put on, visions of an eight-figure verdict dancing in your head.

Problem is, your opponent sees the same thing. Wants to admit fault. To prevent it, you allege wilful and wanton conduct. But punitive damages aren't available in wrongful death cases.¹

Three weeks out, they file an amended answer. The steam is out of your lawsuit; they've sanitized it and left you with a trial on damages. You've gone from a case about a reckless and greedy corporation to one about a family in mourning. You wish the jury could hear some of that liability evidence.

If you've thought ahead, they can.

In 2007, our General Assembly amended the Wrongful Death Act to permit recovery of damages caused by "grief, sorrow and mental suffering."² These terms are not defined. The legislature left that to the lawyers. Each case is individual, and evidence varies by victim.³ Which means each case is a new opportunity to expand this category of damages.

So what is grief? What are we asking the jury to compensate? And how can a mental health professional help?

Historically, the law has defined it in the negative: grief is not loss of society, love, companionship, or affection.⁴

Comparing the two, the U.S. Supreme Court has said that, while loss of society entails the loss of positive benefits (i.e. what decedent would have contributed in support, assistance, comfort, consortium, etc.), "grief" represents an emotional response to the wrongful death.⁵ "When we speak of recovery for the beneficiaries' mental anguish, we are primarily concerned, not with the benefits they have lost, but with the issue of compensating them for their harrowing experience resulting from the death of a loved one ... what deleterious effect has the death, as such, had upon the claimants?"⁶

Stated otherwise, while loss of society seeks to capture what was taken away, grief is what remains - - anguish, bereavement, anxiety, distress, mental pain and suffering.

Proof of the former is the foundation for the latter. The greater the loss, the deeper the grief.

We prove loss of society with two overlapping categories of lay witnesses: people who can testify about the decedent, and people who can testify about how this loss hurts the family, the society. Ultimately, damages are driven by the broader community and societal impact, even though we are not arguing for it specifically. We need to prove a big loss to generate a big verdict.

For example, if the decedent supported American Legion baseball, we might call the coach; if he supported the Rotary Club, we might call the president of the Rotarians. These organizations benefit the community

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as a whole; in connecting them to the decedent, and thus to the grieving family members, we emphasize the breadth of loss -- a ripple effect turned inward.

This loss of society evidence sets up the therapist to drive home the family's grief. The law already gives us broad parameters. "The impact of grief depends upon various factors, including predictableness of loss, preventability of the loss, and the intentionality of the loss."⁷ Grief and mental anguish can cast a wide net, and include "how family members learned of decedent's death or their reaction to this news; funerals and funeral arrangements; how the families mourned ... bad dreams, sleeplessness."⁸

Push those parameters further. For example, the therapist might explain to the jury that the manifestations and evolution of grief -- the response to the death of a loved one -- are variable and unique to each loss.⁹ Some clinicians may describe, or even diagnose, severe and prolonged grief. Testimony that the

grief resulting from a sudden or violent death may be more intense, last longer, and cause significant impairment in daily functioning provides the framework for admitting evidence of the circumstances surrounding the death -- despite admitted liability.

In our hypothetical above, the fact that the decedent likely saw the truck barreling down on him; that his body ripped the mirror off his own car before it was shredded on the gravel; the callous malfeasance of the actors causing the death; the fact that the truck driver's employer should have pulled him from the road for unsafe driving are all things that directly bear on grief damages. If you can prove that these aggravating factors further complicate and intensify the family's grief, anguish, and mental suffering, the liability evidence becomes centrally relevant to your damages argument.

Expect a fight. The loyal opposition will cry foul, and accuse us of trying to "back door" evidence and making an "end run" around their admitted-fault defense. And if we

haven't thought ahead, they'll be right. Putting up a therapist to testify about something she never documented is transparent, opportunistic, and phony.

That's why we spend time with our clients. Get to know them and their pain until we can feel it ourselves. If it is genuine, encourage them to talk about it. If Mom is having nightmares about her husband's last moments, suggest she share that with her therapist. The professional will document it. Written records are snapshots in time, presumed reliable, and can be attached as exhibits opposing motions in limine.

Mental health treatment is no longer stigmatized; it is no longer evidence that the recipient lacks toughness.

In 2014, 43.6 million American adults had some form of mental illness¹⁰ -- ranging from depression and anxiety to schizophrenia, bipolar disorder, and a host of other serious maladies. Addiction alone cripples millions of families every year.

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is reflected in the jury instructions. Pain, suffering, emotional distress, and loss of a normal life -- including the ability to enjoy the pleasurable aspects of life -- are all tied to a person's mental well-being. Every non-economic element of wrongful death damages has some foundation in mental and emotional health.

Jurors know. But they aren't allowed to assume. They are sworn to decide solely on the evidence. So give them that evidence. And before you present it, master it.

Plaintiff's lawyers have the *Petrillo Doctrine*.¹¹ We can talk to our client's doctors whenever we want. Use it for something more than a five-minute chat before a discovery deposition. Have regular conversations. Ask about the records, and what isn't in the records. Get to know the counselor, and get a feel for your client's treatment.

Mental health professionals treat what the jury can't see, and no lawyer can effectively present evidence without first understanding it. With a proper

grasp of the evidence, and comfort with the witness, your presentation to the jury is much stronger.

The testimony *connects*.

Consider a medication error, with unknown permanency.

Your client sees his primary care physician because he's got a raised, red bump on the back of his neck -- a lesion of some sort. His doctor prescribes Clindomycin, a powerful antibiotic for serious infections. But your client doesn't have a serious infection; he has a bump on his head.

Then he has a serious allergic reaction. He is hospitalized for five-days; heavy steroids resolve the immediate problem. But they don't know his prognosis. He may be fine. He may end up with drug-induced lupus. It'll take a couple years to know for sure.

You file the lawsuit and babysit the case, waiting to see what develops. Your client bounces from specialist to specialist. He's worried about his physical condition. You're worried

about his physical condition. His doctors are worried about his physical condition. So is your client's family.

What's all this worrying doing to his mental condition?

Every defendant sends an interrogatory asking if we're claiming mental or emotional injury, and further requesting us to identify who is treating our client for those injuries. The jury instructions allow for the recovery of such damages, and your client can always testify to the mental and emotional impact of his ordeal.

But isn't that evidence stronger if it comes from a disinterested third-party? Especially if the mental health professional is documenting the impact of your client's ordeal in real time, as it happens?

If you're thinking ahead, and line your client up with a psychologist or psychiatrist, even if the lupus doesn't develop you may still have sufficiently documented emotional damages to pursue the case anyway. You can turn a case you were prepared to dismiss into

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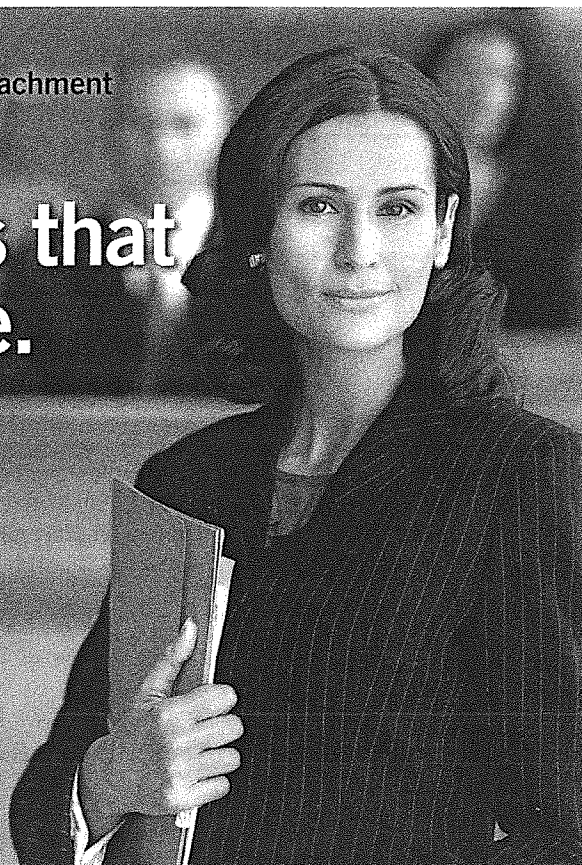
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a meaningful recovery for your client.

The field is fertile, with endless permutations.

The client who is afraid of public speaking, and who struggles to communicate effectively to the jury. His therapist can. Or a counselor can effectively testify about loss of consortium and sexual relations, which most clients and spouses have trouble with. Or they can explain the impact of their patient's disfigurement - scars from surgeries to repair internal injuries which are otherwise hidden to the public.

Or consider misconduct by opposing counsel, and abusive questioning during depositions. Your client probably won't be permitted to testify about such things, and even if she did it could backfire. But if the psychotherapist has documented the misconduct over the course of her treatment, and opines that it has contributed to the mental anguish of a grieving widow, the judge may let it in.

Same with a defendant who drags out discovery, only to admit fault at the last minute. If your client is upset about this, suggest she say something to her counselor, who will make a note.

No matter the injury, a good mental health professional can be your best witness. She can help reframe liability evidence for a trial on damages, fashion a recovery out of nothing, be your client's voice to the jury, and harness the power of grief to help synthesize disconnected damages elements into a much larger verdict. And the more time you spend getting to know her and what she's doing for your client, the better equipped you'll be once she takes the stand.¹²

But you've got to think ahead.

Endnotes

¹ *Mattyasovsky v. West Towns Bus Co.*, 61 Ill.3d 31, 330 N.E.2d 509 (1975).

² 740 ILCS 180/2.

³ State of Ill. 95th Gen. Assembly House of Representatives, Transcription Debate, 44th Legislative

Day, p. 60, April 27, 2007.

⁴ *Turner v. Williams*, 326 Ill.App.3d 541, 548 (2d Dist. 2001).

⁵ *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585 n. 17 (1974).

⁶ *Id.*

⁷ *Kimberly Dorsey v. State of Illinois*, 63 Ill.Ct.Cl. 177, 210 (Ill.Ct.Cl.2011).

⁸ *Schaaf v. Midwest Transfer & Logistics, LLC*, No. 07-6555, 2010 WL 3075657 (N.D. Ill. August 5, 2010).

⁹ See, M. Katherine Shear, M.D., Complicated Grief, *N.Engl.J.Med* 2015; 372: 153-160.

¹⁰ <https://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-ami-among-us-adults.shtml> (last visited January 12, 2017).

¹¹ *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581 (1st Dist. 1986).

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