

What is the value of a poor man's life?

Focusing solely on noneconomic damages can maximize the wrongful-death verdict

"If money is all that a man makes, then he will be poor. Poor in happiness and poor in all that makes life worth living."

— Herbert Casson

By Deborah Chang and Brian J. Panish

On January 28, 2009, 48-year-old Cameron Cuthbertson, a legally blind man, attempted to board a three-car train at Del Amo Station on the Blue Line in Compton. Mistaking the gap between the second and third cars as the doorway of a train car, he stepped off the platform and into the gap, falling onto the tracks below. While attempting to climb back onto the platform, his body was crushed and severed when the train began to move. At the time of his death, Cameron lived with his 73-year-old mother, Mary Cuthbertson.

In the wrongful death case brought by Mary Cuthbertson against the Los Angeles Metropolitan Transportation Authority ("MTA"), we decided to pursue only noneconomic damages at trial. Economic damages were, not surprisingly, minimal because Cameron's blindness limited his job opportunities and household services. Up to the time of his death, and despite his declining vision, Cameron washed cars in his Compton neighborhood for pocket money. The MTA undoubtedly placed much emphasis on the fact that his economic damages were minimal: no settlement offer was ever made.

The jury returned a verdict in favor of plaintiff, awarding $17 million in noneconomic damages ($5 million past and $12 million future).

One month earlier, in Kern County, a jury awarded our client a very high



wrongful-death award against the City of Bakersfield, also based on noneconomic damages. Our strategy in both cases was based on the premise that jurors can better understand and appreciate noneconomic damages in wrongful-death cases when such damages are not combined with and diluted by minimal economic damages.

Economic damages in wrongful-death cases

Whenever death occurs unexpectedly due to another's negligence, the emotional loss of the decedent to his or her loved ones is unquantifiable. The tragic loss of a son, daughter, a parent, or a spouse leaves a void that can never be filled. Abraham Lincoln expressed this sentiment best in his letter to Mrs. Bixby in 1864 following the loss of her sons during the Civil War:

> *I feel how weak and fruitless must be any words of mine which should attempt to beguile you from the grief of a loss so overwhelming.*

Despite these facts, we nevertheless ask jurors to do the unimaginable: to quantify the loss of a decedent to another. To perform this daunting task, we arm them with evidence and broad jury instructions relating to economic and noneconomic damages. Too often, however, trial lawyers focus too much time and effort in gathering and presenting evidence of those aspects of the decedent's loss that are quantifiable: the *economic* damages. We retain economists to calculate how much the decedent would have made in his lifetime and to determine the reasonable value of household services that the decedent would have provided. We gather receipts for funeral and burial expenses, and work diligently on trying to plump up those economic damages as much as possible.

There is a harsh reality, however, related to these economic damages. Unless the decedent is someone like Steve Jobs, those economic damages will never be enough to drive the wrongful-death damages award to where they should be. The true value of a man's life to his loved ones cannot be measured by how much he earned. In fact, those economic damages will often drag the non-economic damages down. If the economic portion of a man's life is valued at a mere $350,000 or even $1 million, then why should a jury award much more than that for noneconomic damages?

There is a trend growing among trial lawyers who regularly try wrongful death cases: Dump the economic damages at trial. Sometimes that decision is easy. In our Bakersfield trial, for example, our decedent

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had a legal alien registration card, but it had expired and he did not have a current one in his possession at the time of his death. Defendants tried to claim that our decedent was an illegal alien. By eliminating economic damages and claims for loss of future earnings, the decedent's resident status was rendered irrelevant and inadmissible. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460.)

In those cases in which there are no such problematic issues, however, trial lawyers are more reluctant to waive economic damages. Although that is understandable, such economic damages too often unfairly define and limit the value of the decedent's life and loss. They also unintentionally place unnecessary boundaries and limitations on the jury.

Michael Koskoff, the current president of the Inner Circle of Advocates and the senior partner at Koskoff, Koskoff & Bieder in Connecticut, has considerable experience in trying wrongful-death cases. In one such case, the decedent was a 53-year-old truck driver with economic damages totaling approximately $350,000. A decision was made to waive those damages and to proceed with only noneconomic damages. The jury awarded $11.5 million, and the defendants appealed. After the case was reversed and retried, the second jury awarded $22.5 million for noneconomic damages. As a result of that experience, Koskoff now believes that "concentration on relatively insignificant economic loss is a cheapening factor for a jury. Jurors must be lifted above the mundane to achieve real justice."

Less than two weeks after the *Cuthbertson v. MTA* verdict, a Los Angeles jury awarded $12.8 million in the wrongful-death case of *Dylan Boeken v. Philip Morris, USA, Inc.* In that case, Michael Piuze pursued only noneconomic damages at trial. That verdict was also recently upheld by the trial court.

Noneconomic damages in wrongful-death cases

When a loved one dies, it is the noneconomic damages that resonate with a jury. Jurors are asked to quantify the loss to the plaintiff of the decedent's love, companionship, comfort, care, assistance, protection, affection, society and moral support. In performing this task, they are instructed:

> No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. (CACI 3921).

In order to maximize recovery for these noneconomic damages, trial lawyers must spend time and effort in creatively gathering and presenting evidence of the plaintiff's loss in a way that the jury can appreciate. Finding ways that the relationship between the plaintiff and the decedent was unique and special are essential. Defendants, and especially insurance companies, are too inclined on appeal to present a summary or average of wrongful death verdicts in other, nonsimilar cases as a basis for a "reasonable" wrongful-death award. Courts, however, have found that a case alleging noneconomic damages for the loss of a family member must be determined on its own facts. (See *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1241.)

Developing the family relationship

Every relationship is based on something that is unique and special; our most important task as trial attorneys is to find ways to make the jury see and appreciate that relationship between the decedent and the plaintiff.

In *Cuthbertson v. MTA*, the jury heard evidence of an extraordinarily unique relationship between a mother and her son. The evidence established that Cameron Cuthbertson was a "Mama's boy" who never left home and lived with his mother from the day that he was born until the day he died. After Mary's husband died and her other children left home, Cameron stayed at his mother's side. For 48 years, Cameron was Mary's companion and gave her life special purpose and meaning.

The two forged an even closer and more meaningful bond when they both discovered they were suffering from progressive impairments. He began to lose his sight as she started losing her hearing, and as a result, she served as his eyes and he was her second set of ears. Together they made "a great team" and they depended on each other. Due to the nature of her hearing loss, Mary could adjust to the tone and pitch of Cameron's unique voice, and as a result, she could hear and understand him better than her other children.

As Cameron's vision deteriorated, Mary's bond with Cameron became even closer because he needed her. Cameron's brother, Colen Cuthbertson, testified that during this time period, Mary "notched up her concern and her care even more" and became more protective as "their bond got closer and closer because his limitations had increased or deteriorated."

The jury heard the testimony of a board-certified psychiatrist, who explained the uniqueness of Mary and Cameron's relationship:

> If you have a dependent child, in a sense they don't grow up. This was a family of five and one, Cameron, had special needs because of his visual losses, and as a consequence, a mutually dependent relationship occurred. As a result, Mary Cuthbertson developed a special role, in a sense, she anticipated this ongoing relationship to sustain her. She was, in a sense, still able to get her needs in terms of being a mother and taking care of someone realized in her relationship with her son Cameron different than having, you know, adult children who move out of the home and you see periodically. . . .
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> He became progressively more visually impaired over the course of years. During that time, in some ways he became more dependent on his mother, but yet maintained a level of independence that's still really quite

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striking . . . . He assisted his mother, who became progressively hard of hearing. So it's the situation where often she would be his eyes and he would be her ears. They would go shopping together. She would take him to his doctor appointments. They were very, very close. They lived together since, you know, his birth. He had always been there with her and because of this, she had – he was a companion. He was a confidant. He was there for her in a way that the other children weren't. It was a very special relationship. As both she and the children I interviewed pointed out, it was a different relationship. It gave her a sense of meaning in her life. She was there to continue taking care of him and it established a sense of value for herself in terms of that role. . . .

The loss of this child, this adult child, it has had repercussions for her. . . . It's left a huge void and it's an emptiness that's not fulfilled by her other children. Her other son moved in to be there with her, but he's a truck driver and not physically there much of the time. She's alone. He was her companion. He was someone who she counted on, both to help her with her chores, but also it made her feel needed. She is missing the person who was her constant companion.

The jury also heard and saw how the loss of Cameron has affected Mary. On the day that she testified, the extent of her hearing impairment became readily apparent when she could not hear the questions posed to her even after counsel used a microphone that was set up only a few feet away from her. Without Cameron and the unique tone and pitch of his voice that she could hear, Mary is alone and isolated from people and even her other loving children because she cannot hear them. She looked lost and forlorn, and eventually collapsed on the stand crying while testifying: "I lost the one I needed the most. He was – I lost my companion. I lost my second ears. I lost the one who gave me security, a sense of security. I can hear him calling me, and I can see him on the ground."

Based on such uncontroverted evidence, the jury awarded $5 million for Mary's past loss (when such loss was most acute), and $1 million for every year she had remaining (12 years).

Relevant cases

Even though no fixed standard exists for determining noneconomic damages, defendants often challenge the amounts awarded for these damages in wrongful death cases on the basis that they were "excessive." An appellate court, however, "will interfere with the jury's determination only when the award is so disproportionate to the injuries suffered that it shocks the conscience and virtually compels the conclusion the award is attributable to passion or prejudice."(*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 615; *Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, 355-356 [upholding wrongful death verdict to parents of an adult child finding that "we are unable to say, as a matter of law, the award of a similar amount to [decedent's] parents is so disproportionate to their loss as to shock the conscience and warrant interference with the jury's verdict"].)

The mere fact that a judgment is large, however, does not mean that the verdict is the result of passion or prejudice. (*DiRosario*, 196 Cal.App.3d at 1241.) "Each case must be determined on its own facts." (*Ibid.*; see also *Rodriguez v. McDonnell Douglas Corp*. (1978) 87 Cal.App.3d 626, 655 ["The fact that an award may set a precedent by its size does not in and of itself render it suspect. The determination of the jury can only be assessed by examination of the particular circumstances involved.].)

In *Rufo v. Simpson,* O.J. Simpson contended that the $8.5 million awarded in noneconomic damages to the parents of decedent Ronald Goldman was excessive and that the evidence concerning the parents' loss of their adult son, who lived away from home, was insufficient to justify the jury's verdict in such a large amount. In that case, the evidence was that the decedent lived away from home, and had not seen his mother in 12 years. The appellate court upheld a damages award finding that "[a]lthough the verdict is very large, this alone does not compel the conclusion the award was attributable to passion or prejudice." (*Id.* at 615.) The court found that Simpson's argument primarily focused on the fact that the largest award in a published case that his counsel could find for the loss of comfort and society in the wrongful death of an adult child was $2 million. The court rejected that as the basis for a finding that the verdict was excessive. (*Id*. at 615-616; see also, *Zibbell v. Southern Pac. Co*. (1911) 160 Cal. 237 [finding that the mere fact that a personal-injury verdict was more than twice as large as the largest verdict previously rendered in a similar case does not show the passion or prejudice necessary for granting a new trial].)

In trying to establish the "excessiveness" of the verdicts, defendants often present other jury verdicts in what they deem as "comparable" wrongful-death cases as a basis for comparison. Defendants fail to realize, however, that a human being is not a fungible object whose loss to another can be calculated by computing the average of other verdicts in dissimilar wrongful-death cases. This method of attacking a verdict was specifically rejected by the California Supreme Court in *Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65, footnote 12, where it found:

> The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. *For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding.*

Thus, we adhere to the previously

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> announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice on the part of the jurors.

(*Id.,* emphasis added) (See also *Rufo*, 86 Cal.App.4th 573, 615 (rejecting the defendants' citation of a wrongful-death verdict in another case); *Wright*, 219 Cal.App.3d at 356 (same).)

Conclusion

A wrongful-death case with limited or no economic damages is not a curse; rather, it can be a blessing. By focusing on noneconomic damages, you can lift the jurors above the mundane to achieve true justice.



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