



APRIL 2021

Getting to the heart of non-economic damages in wrongful-death cases

To tell the story from the heart, you must first know the family

By **KIMBERLY WONG**

In wrongful death cases, the greatest losses loved ones suffer are often the personal damages, the non-economic damages. Although grief and sorrow are not compensable under California law, a surviving heir is entitled to compensation for their loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, moral support, advice, guidance, and training. (CACI 3921; *Krouse v. Graham* (1977) 19 Cal.3d 59, 72; *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 720.) Unlike economic damages, there are no guideposts such as pay stubs or medical bills to value these personal damages. Jurors 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.)

Jurors thus face an important yet difficult task of valuing the intangible and priceless losses that the plaintiff has suffered. To maximize recovery for non-economic damages, jurors and insurance adjusters need to see persuasive evidence of the nature and the magnitude of the plaintiff's loss. It is the trial attorney's job to present a compelling story of the relationship between the plaintiff and the decedent and what made their particular relationship special. As this article discusses, significant time, effort, patience, and empathy are required to uncover and develop the elements of a plaintiff's story.

Appreciating the permanence and magnitude of the loss

Empathy is a key component of good storytelling. To effectively tell the plaintiff's story, trial lawyers must endeavor to understand a life that they have not experienced firsthand.

We can learn quite a bit about empathy and loss from the global COVID-19 pandemic. The pandemic has underscored the universal importance and value of having the love, support, companionship, and comfort of one's family. These are the things we truly treasure in life. Family members living in separate households have now gone over a year without in-person visits, kisses, and hugs from their family. Phone calls, video conferencing, and socially distanced visits outside have been the only options for connecting.

Everyone in this world has felt a great sense of loss of their familial relationships as people long to be reunited with their



loved ones. Fortunately, with vaccines on the horizon, it should not be too much longer before we can resume some semblance of our prior normalcy. However, imagine what it would be like to go through this pandemic without ever being able to text, email, talk, video chat, or do a socially distanced visit with your loved one. And then picture what it would feel like to never be able to see, touch, or hold your loved one again regardless of the availability of vaccines. This is the everyday reality of someone who has lost their loved one, not just life during the pandemic. The loss is total and perpetual.

The pandemic has also created unprecedented new challenges and stresses at home. Home has no longer been the place of rest and comfort with family. For many, home has also become the place for school and work. Even with two parents at home, it has been immensely challenging to juggle everything during these unprecedented times. Now, imagine what it would be like



APRIL 2021

to manage it all at home by yourself without your spouse – the person who should have and would have been there to comfort you during the stressful moments, make you laugh, be your companion, provide you with love and affection, share chores, help take care of the kids, and keep you sane, especially during these crazy times, by just simply being there.

Life during lockdown has highlighted the importance of your nuclear family in particular. As the old saying goes, “home is where the heart is.” Your daily lives are intertwined with your nuclear family like no one else. They tend to be the people you can count on the most no matter what and no matter when to be there for you, which is why suffering the loss of your spouse or child is so profound. The thing that widows and widowers have missed the most is having their spouse at home during the lockdown and during all of those years that they should have shared together. Of course, they are just as tired of being cooped up at home and are eager to go out, socialize, and travel like everyone else, but the greatest loss felt are those so-called ordinary aspects of everyday life with their partner that made their relationship special.

For some people, imagining the loss of a loved one is not just an exercise, but a reality that they have lived through during the pandemic and will endure beyond. The pandemic has only served to magnify and intensify the losses of all of those intangible priceless things that we value most in life and are compensable as general damages. While no two stories of loss are the same, the permanence and magnitude of the loss are universal.

Developing the story through the plaintiff

A series of conversations with the plaintiff is necessary to learn about the relationship between the plaintiff and the decedent. No one else will know the story and feelings of loss more than the plaintiff who has experienced it firsthand.

Whether it has been one month or one year or more since the death, the plaintiff may find it difficult to share details about their relationship with the decedent. Some people may have no issue opening up to their lawyer regardless of whether or not it triggers tears. For plaintiffs who do have a harder time, understand that it can be due to ongoing grief or for a variety of other reasons.

It is not easy for everyone to show their vulnerable side and share personal details about their relationship with the person they lost. Some might feel embarrassed to cry in front of a lawyer. Others may feel like the subject is too painful or uncomfortable to talk about at that particular time or in general. Grief affects each person differently and it can be complicated.

Losing a loved one is already hard enough. The fact that you have been hired means that the decedent’s death was unexpected, premature, and probably sudden. This can add another dimension to the plaintiff’s grief journey. If the plaintiff witnessed the incident or emergency treatment, there is the potential that they may also be suffering from depression or PTSD. Recognize that how the plaintiff appears on the outside to you is not necessarily a reflection of what they are experiencing on the inside.

There is no singular approach to engaging with the plaintiff in these very personal conversations. However, being patient and creating a safe space to talk by showing empathy and compassion can help tremendously.

Starting the conversation with the plaintiff

To tell the plaintiff’s story most effectively, your goal is to elicit information that provides vivid detail and specific examples about their relationship with the decedent. Ask a variety of open-ended questions until you feel like you have a good sense of all the things that made their relationship unique and the loss so profound. You want to encourage the plaintiff to “show, don’t

tell” by asking follow-up questions until you get the level of detail you need. For example, if you get a conclusory statement like “My dad was my rock,” follow up until you get a more illustrative response, such as: “My dad was my rock. He was the person I could call for comfort any time, even at two a.m. when he was sleeping. He would always pick up and talk with me for as long as I needed until I felt better.”

To start the conversation, here is a list of sample questions that you could ask the plaintiff to begin to learn what was special about their relationship with the decedent. Of course, asking tailored follow-up questions is key to discovering the pieces that will make the plaintiff’s story most powerful.

- How would you describe your relationship with [the decedent]?
- What was [the decedent]’s personality like? What were [the decedent]’s best qualities?
- What made [the decedent] special?
- What are some of your favorite memories you shared with [the decedent]? Why are they your favorite?
- Which possessions of [the decedent] do you treasure most? Why?
- What did you love most about [the decedent]?
- What do you miss most about [the decedent]? Why?
- What have been the hardest parts for you about [the decedent]’s death?
- Which are your favorite photos/videos of [the decedent]? Why?
- In what ways did [the decedent] show you love? Note that there are many ways a person can show love, such as providing words of affirmation (e.g., saying things like, “I love you” or “You mean the world to me,” spending quality time together, showing through physical touch, offering gifts, and acts of service (e.g., taking care of you when you are sick).
- How would [the decedent] show you affection?
- How did [the decedent] make you feel when you were together? When you talked?
- In what ways did [the decedent] support you? (e.g., emotionally, morally,



APRIL 2021

physically, practically, professionally, etc.) What kinds of things did [the decedent] do that helped make your life easier?

- In what ways did [the decedent] provide you guidance? What kinds of advice would you seek from [the decedent]? (E.g., spiritual, emotional, professional.)
- What were some of the best or your favorite lessons [the decedent] taught you? What things did you depend on [the decedent] for?
- How did [the decedent] inspire you? Encourage you?
- What did you do for fun together? What activities did you enjoy together? What are things you used to do together that you now do alone? How does that feel now compared to before?
- What would [the decedent] do for you when you needed comfort?
- What things would [the decedent] do to take care of you? To show that he/she cared?

If the plaintiff has a hard time opening up or retrieving specific memories, invite them to show you some photos or videos of the decedent and tell you the story behind them. Try providing examples of the kind of anecdotes you are looking for to trigger inspiration. Assure them that their stories of things the decedent did for them do not have to be grand gestures. It is about what was most meaningful to them; what makes the loss most palpable for them. There are so many seemingly ordinary moments that exist in our everyday lives and relationships with our loved ones that are actually quite extraordinary. We just have to see them and appreciate them for what they truly are.

Uncovering pieces of the story inside the plaintiff's home

Whenever possible, visit the plaintiff's home, as it can provide further insight into the nature of their relationship with the decedent and a window into the kind of life they shared.

A home visit provides you access to photos and objects that can inspire follow-up questions or trigger additional stories. It may also be easier for the plaintiff to recall memories by referring to photos or decedent's possessions.

For example, at one home visit, a little girl showed her dad's unwashed sweatshirt that she slept with every night since his death years earlier just to feel close to him. In another case, a home visit revealed a table in the living room that the plaintiff had turned into a shrine for the adult son she had lost. This is where she kept the urn containing his ashes, framed photos of him, prayer candles, and a few of his keepsake possessions. The shrine was a place that she visited her son, prayed, and sought comfort every day since he died. The prominent location of the shrine in her home spoke volumes as to how much her son had meant to her. As you can see, you will never know what kind of gems you could uncover unless you visit the plaintiff's home.

Building on the story from other sources

It is essential to speak to family, friends, co-workers, and other people who would be able to testify about the quality of the relationship between the plaintiff and the decedent as well as how the plaintiff was affected by the death. Just like working with the plaintiff, this may require spending significant time speaking with family and friends to elicit emotionally rich memories. Testimony from other witness can be invaluable in strengthening, supporting, supplementing, and filling in missing pieces of the plaintiff's story. They may also have beautiful memories and anecdotes that the plaintiff has forgotten or was not privy to, such as the story of how the decedent told his family how he knew the plaintiff was "the one."

Besides personal testimonial accounts, tangible items such as videos,

photos, cards, letters, journals, scrapbooks, and memory boxes are good sources of material to help paint a vivid and compelling picture of the relationship. Request these items from the plaintiff and other family members and friends. Also be sure to ask if items from the funeral or celebration of life are available, such as a slide show, speeches, and commemorative items.

Conclusion

The death of a loved one is an unimaginable loss. It is a loss that can never be replaced. As trial attorneys, it is our job to do whatever we can to give the story of the plaintiff's loss the justice it deserves.

Kimberly Wong is a trial attorney and trial team leader at The Veen Firm, P.C., in San Francisco. She litigates complex catastrophic personal injury cases involving negligence, premises liability, wrongful death, products liability, industrial injuries, and exceptions to the workers' compensation exclusive remedy doctrine. Ms.



Wong

Wong is a frequent lecturer and author of published articles on various topics related to personal injury litigation, including third-party liability claims arising from workplace injuries. She has had several settlements featured in The Recorder's annual report of "California's Million-Dollar Settlements." Ms. Wong has also been selected by her peers to the Northern California Super Lawyers Rising Star list each year from 2012 to 2017 and the Super Lawyers list from 2018 to the present. She is an active member of the Consumer Attorneys of California, the San Francisco Trial Lawyers Association, the Asian American Bar Association, and Queen's Bench.

