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CHAPTER 5

DAMAGES—WHAT CAN BE RECOVERED?

We are fortunate to live in America; for in America, all life is valued. The sad truth is that in other countries, life is not valued. The Georgia wrongful death statutes recognize the importance of an American life.

When lawyers use the word damages, it is a broad description of the loss, both from an economic and non-economic perspective. At trial, the plaintiff must help the jury understand and appreciate the "how empty the world is" without the loved one. Ultimately, the jury must wrestle with the difficult question on how to reduce the loss to the legal remedy, a money judgment. [11]

There are two basic categories of damage claims. The first claim is the full value of life of the loved one. This recovery belongs to the heirs or survivors. The second is for the pain and suffering experienced by the loved one just immediately prior to death,

11 As discussed in chapter 1, the amount of the money judgment is an imperfect measure of justice. At the same time, a money judgment helps to make the world slightly more just. It is important to compensate the family and is critical to the overall civil justice system as well as to help the community promote safety for its citizens.

as well recovering medical expenses incurred by the defendant's negligence. This claim belongs to the estate.

A. Claims Belonging to the Survivors —the Full Value of Life

The Georgia Code statute, O.C.G.A. § 51-4-1 et seq., specifies that the measure of damages in a wrongful death lawsuit is "the full value of the life of the decedent as shown by the evidence." Even as a practicing lawyer, I struggle with understanding this meaning. Fortunately, case law explains that there are two basic parts to a life, the economic value of the life, and the intangible or the enjoyment of life.

i. Economic Damages: Trying to Determine Lifetime Earnings

The economic damage when one is wrongfully killed can be significant. If a person earns or would have earned $30,000 per year and works for thirty years, that person's life-time earnings would be $900,000. If the person died 15 years prior to retirement, the family—just on the economic basis—lost $450,000.

In bringing a claim for wrongful death, the plaintiff must introduce evidence to prove the economic loss. Most of the time, this requires the plaintiff to retain an economist to calculate the lost wages reduced to present value[12], as required by Georgia law.

If the decedent was self-employed, a consultant, a sales person, or had other variable income, it is often more difficult to determine the lifetime earnings. To accomplish the calculation, often an accounting must be conducted to determine the true economic

12 Present value of money is the determination of the current worth of a future sum of money or stream of cash flow. In large part, present value discounts future streams of money, to take into account inflation and volatility. All adults experience the phenomenon of recalling what it costs to buy a Coke or see a movie when they were kids, compared to today. One of the reasons the price is higher is due to inflation. Since a jury award cannot be given as a stream of income (i.e., $40,000 every year for ten years), rather, the entire sum must be paid at one time, fairness dictates that the payment is adjusted to reflect inflation.

benefit that a decedent enjoyed from their work. Once monthly figures are determined, then, an economist must extrapolate the economic loss.

If a person was not employed, either because they were a homemaker or retired, this does not mean their life had no economic value. A good attorney can show the economic value of a stay-at-home parent, who often combines the roles of the very best advocate, teacher, mentor, counselor, therapist, chef, buyer, and nanny. I use the term 'very best' because, for children, the very best care comes from their parents.

The economic evaluation is not only important to demonstrate the amount of the money loss, but also serves as a benchmark for the jury in evaluating the loss of the decedent's life, and in determining the decedent's enjoyment of that life. For some jurors, the economic damage is used as a figure upon which to calculate the loss of life, multiplying the economic damage by ten. For example, if the earnings lost were $100,000, then the entire loss would be valued at 10 times more; or $1,000,000. Also, the economic damage is helpful to those jurors who dislike the civil justice system, and who dislike the idea of awarding money for emotional pain. Yet, even the most conservative juror can understand how a family is economically damaged when a loved one is lost; thus, this calculation is critical.

ii. Loss of Enjoyment of Life.

Of course, our lives are worth more than mere economic output or wages. All life has special value and all life has dignity.

There is special joy of living and progressing through stages of life: of being a child, of being an adult, of being a husband or wife, of being a parent or grandparent. At trial, the plaintiff must show this enjoyment.

The family must assist their attorney by helping to develop the loved one as a person. This often requires the family to recover a lifetime of photographs, movies, letters, articles, awards, and the like. Interviews[13] and testimony from friends and family are also important to show the jury who the decedent was, and to bring the loved one back to life, so that the jury can truly understand the family's loss.

B. Claims for the Estate—"Pain and Suffering and Bills"

An estate is a legal entity, similar to a company that collects the assets and liabilities of the decedent. The estate is similar to a bankruptcy estate and can even be thought of as a company. The estate is managed either by an executor or an administrator. An executor is identified in the will. If there is no will, then the probate court will appoint an administrator. [14]

i. Pain and Suffering Just Immediately Prior to Death

The estate recovers the loved one's claim for pain and suffering, between the event of wrongdoing and the decedent's death. This occasionally occurs in motor vehicle collision cases, where one will live for days, weeks, or even months, only to succumb to the long-term injuries. Lingering deaths also often occur due to malpractice. Regardless of the specific facts, the estate always has a claim, even if the loved one only survived for a few minutes prior to death.

ii. Medical and Funeral Bills

Medical bills, other expenses that occurred as a result of the injuries, and final arrangement expenses, such as funeral costs,

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13 I like to spend time in the family home for a day or two, to learn firsthand about the family, the family routine, and how the loss has impacted family and friends.

14 If there is no will, the plaintiff will need to have the probate court appoint the administrator before the wrongful death lawsuit can proceed to trial.

are also recoverable. Sometimes, recovery for these expenses will go to the estate; however, there are collections in Georgia law that allow for the proceeds to go to the person who paid the expenses.

iii. Special Problems When There is a Settlement: The Estate's Responsibility to Pay for Healthcare

While the estate can recover money, as discussed above, the estate has the additional burden of paying off the outstanding medical bills and/or other debts owed by the decedent.

If the case goes to trial, the jury assigns money to the family and to the estate.

However, if there is a settlement, how the money is allocated between the family and the estate can be a difficult question.

For example, let's assume the medical bills are large, say $500,000, and all of the money that one can recover is $1 million. If all of the money is paid to the estate, then none of the family members can recover. Until 2013, lawyers representing the family and the estate allocated almost all the funds to the loved ones and almost nothing to the estate claim. This makes sense. The healthcare insurance company can only recover the amount of money from the estate. However, under a recent U.S. Supreme Court case, it was determined that the health insurance company had a very strong claim on the funds—and in fact—can seek to claw back the funds allocated to the family! Now, under a settlement, the allocation of the funds between the family and the estate has to be weighed carefully.