

Wrongful Death Claims and Survival Actions: Pursuing or Defending Claims

Assessing Claims, Proving or Defending Liability, Navigating Complex Valuation and Settlement Issues

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Today's faculty features:

Donald Patrick Eckler, Partner, **Pretzel & Stouffer**, Chicago

Daniel M. Gilleon, Partner, **The Gilleon Law Firm**, San Diego

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Wrongful Death Claims and Survival Actions: Pursuing or Defending Claim

Dan Gilleon

Gilleon Law Firm

1320 Columbia Street

San Diego, CA 92101

619-702-8623

dan@gilleon.com

Donald Patrick Eckler

Pretzel & Stouffer, Chartered

One South Wacker Dr., Ste. 2500

Chicago, IL 60606

312-578-7653

deckler@pretzel-stouffer.com

- I. Case Assessment
- II. Proving or Defending Against Liability
- III. Evidentiary Issues
- IV. Assessing Damages
- V. Negotiating Settlements

Case Assessment

(Liability, Damages and Collectability)

- Wrongful death and survival claims are derogation of common law
- Identification of applicable statutes
- Any applicable caps need to be assessed
- IC 34-23-2-1 caps love and companionship damages for unmarried adults with no dependents at \$300,000

Types of damages that are allowed will vary from state to state:

- Funeral expenses
- Lost wages
- Hospital expenses

Types of damages:

- Loss of society means benefits of a pecuniary value (that which can be valued in money), including goods, services, society and companionship which one would have received from the decedent had they not died. *Bullard v. Barnes*, 102 Ill. 2d 505 (1984)
- Love and companionship
- Loss of services

Types of damages:

- Grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person. 740 ILCS 180/2(a)
- Conscious pain and suffering

The Parties - Plaintiff

Who can recover those damages:

- Spouse
- Children
- Dependents
- More distant relatives

The Parties - Plaintiff

- Identifying the takers is essential so they can be notified and represented
- Who are the proper plaintiffs (i.e., standing)?
- Are the plaintiffs likeable, and do they all want the same attorney?

The Parties - Defendant

- Is the defendant likeable?
- Is the defendant an individual or corporation?
- Collectability issues
 - Insurance of potentially culpable parties
 - Policy limits
 - Other deep pockets or assets

Initial Investigation

- Was there an autopsy (or is there time to get one)?
- Meet with key witnesses
- Review of accident and/or police reports
- Scene visit (if possible)
- Collect government information via FOIA or other request, e.g. death certificate

Initial Investigation

- Securing scene or witnesses is critical
- For plaintiffs: considering filing a petition to secure instrumentalities involved
- For defendants: protect materials, communications, and involve counsel to take statements and conduct investigation

Initial Investigation

- Early identification and retention of experts, particularly liability experts
- Initial case assessment is critical for budgeting, reserve setting, and discovery planning
- As discovery and alternative dispute resolution become the process, accurate early case assessment is vital
- Statutes of limitation

Proving or defending against liability

- Distinction for wrongful death claims: Often times, the plaintiff's best witness is dead
- Depending on the case, reviewing co-morbidities
- A plaintiff's best friend: co-defendants pointing fingers

Proving or defending against liability

- Threat of bifurcation and ways to mitigate risk
- Don't overplay (or rely on) sympathy factor to prove liability

Evidentiary issues

- Social media is a great tool to determine familial relationships
 - for plaintiffs – preserve it
 - for defendants – search for it
- Proving (or disproving) contact with deceased – visitor logs
- Obtain the guest book from the funeral

Evidentiary issues

- Dead Man's Act (varies by state) – a statute designed to prevent perjury in a civil case by prohibiting a witness who is an interested party from testifying about communications or transactions with a deceased person against the decedent unless there is a waiver.
- Use of grief and sorrow to prove loss of love.
- Danger of “dirt” introduced to prove other issues, like relationship and life expectancy

Assessing damages

- Comprehensive wrongful death and survival interrogatories and requests for production inquiring into support and medical condition
- Mental health records related to proving of grief
- Seek divorce or marital counseling records for married deceased
- Proving (or disproving) conscious pain and suffering require a thorough review of medical records

Assessing damages

- Lost wages and benefits
 - Obtain tax returns using IRS Form 4506
 - Obtain pension and/or union records
 - Obtain employment records

Assessing damages

- Plaintiff needs economist to provide the whole economic picture
- Advantages and disadvantages of using an economist for defendants

Assessing damages

- Punitive Damages – important to remember that these are generally uninsurable
- Statutory attorney's fees and penalties
- Statutory caps and insurance coverage

Negotiating settlements

- Approval of settlement may involve probate court
- Consideration of structured settlement
- Issues related to liens
- Allocation of settlement between wrongful death and survival
- Medicare secondary payer reimbursement issues

Negotiating settlements

- Conflicts of interest for attorney representing multiple plaintiffs
- Malpractice liability for an attorney omitting an heir (and similar considerations for carriers)
- Difficulty in value assessment is a double-edged sword