DEFENSE PLANNING FOR THE WRONGFUL DEATH CASE

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III. DEFENSE PLANNING FOR THE WRONGFUL DEATH CASE

The following discussion is not intended to be exhaustive, rather it is intentionally selective, to address many of the common issues confronted in the wrongful death case, while at the same time assuming a general understanding of these procedures by the reader. The best general reference is the MoBarCLE series, in the following three volumes: *Tort Law II,* ch. 27, Wrongful Death; *Damages,* ch. 17, Wrongful Death; *Litigation Settlements,* ch. 5, Wrongful Death.

A. What to Include in the Case Investigation

Often the defense of a wrongful death case will begin before the plaintiffs have found an attorney. Normally, there will be more than one plaintiff, being the members of the decedent's family, although all plaintiffs together will be pursuing the same wrongful death claim. Depending on the choice of law issues which may arise, and questions' as to which state's wrongful death statute applies, this group of plaintiffs can vary, so that often there is confusion in the early stages as to who the proper plaintiffs are, and as to who most properly will represent the group.

The-potential defendants usually know who they are, and they will either have insurance or be a large enough company, with assets worth pursuing, so that an initial investigation has already begun. In many cases, defense counsel may have already been consulted long before the plaintiffs have presented a claim.

In some cases, however, such as for component manufacturers of a product which is the alleged defective cause of the death, the first notice of the incident at all is the defendant's receipt of the summons and petition.

The primary source of information for the defense counsel is the client, and any related employees and documents. In a medical malpractice case, the defendant may be able to secure cooperation from hospital employees or other personnel. In a products liability case, the defendant may be able to consult component vendors or customers. Several personal visits with the client may be necessary at the very outset of the case, and counsel should not be shy in asking for the client's help.

In addition, sources to be gathered in the investigation of a death case will include all the following items:

1. The autopsy, an interview with the coroner, and if cause of death or time of death is in issue, perhaps the services of a pathologist.

2. Medical records of the decedent from the time of the incident up to death [including workers' compensation files].

3. When relevant, medical records of the decedent before the incident.

4. Governmental investigation reports, police reports, emergency response team reports [fire department, ambulance, HAZMAT, etc], and personal interviews with all official personnel involved, most of whom are usually willing

to talk off the record.

5. Interviews of all eyewitnesses, and when possible, video statements. An early video of an eyewitness at the scene, to point out when and how the accident happened, can be invaluable years later at trial. Take your camcorder with you on all interviews.

6. Collection of photo's, aerial photo's, charts and maps, weather records, and news reports.

7. Preservation of the accident vehicle or product, or instrument, or proper demand upon the custodian to prevent spoliation.

8. Review of insurance adjuster's report and interview with adjuster. [Note, this report is privileged under Missouri's insurer-insured doctrine, but the privilege is not recognized in Kansas or Illinois.]

9. Consultation with possible friendly co-defendants.

10. Collection of work records or time records of defendant's employees or others involved.

11. Obituaries.

12. The defendant's available insurance coverage.

13. The Internet.

14. Federal records, via Freedom of Information Act, applicable regulations, and industry standards such as ASME, ANSI, etc.

In many death cases, defense counsel may find much of this information already collected in the insurer's claim file. Nonetheless, the defense counsel should go beyond the file material as soon as possible, and do such things as establish personal contact with witnesses, make a personal visit to the scene, or conduct a personal examination of the "defective" product.

B. Defense and Other Pleadings

The form of the answer to the petition is rather routine and nontechnical, although defense counsel must be careful to address specifically each of plaintiffs allegations and not rely upon a general denial. Mo.R.Civ.P. 55.07 governs the form of denials, and states, among other things, that: "If the responding party is without knowledge or information sufficient to form a belief as to the truth of a specific averment, the party shall so state, and this has the effect of a denial."

Counsel should be aware that as to plaintiffs capacity to sue, which is often an issue in wrongful death cases among alleged co-plaintiffs, Mo.R.Civ.P. 55.13 requires a denial of capacity to be specific and supported by known facts. See Fox Plumbing v. Kootman, Mo.Law.Week 21076 (MoApp.E.D. Oct. 1997).

Certainly, all known affirmative defenses need to be pleaded, and these include contribution or indemnity as to other alleged tortfeasors. Mitigation of damages may be a valid issue, even in a wrongful death case, as to certain members of the plaintiffs' group. Also, mitigating circumstances can be pleaded

separately as recognized in the Wrongful Death Statute. See Mo.R.Civ.P. 55.08 generally as to affirmative defenses. If another state is involved, don't forget about statutes of repose and ceilings on nonpecuniary damages. Frivolous affirmative defenses should be left ¯out, but only if counsel is certain no evidence will likely be discovered later. For example, if defendant's car rear-ended the car of plaintiffs decedent while sitting at a red light, and the defendant in counsel's first interview offers no opinion that plaintiffs decedent did anything questionable, then an affirmative defense of comparative fault is frivolous.

Inconsistent pleadings stated in the alternative are, of course, appropriate, under Mo.R.Civ.P. 55.10, although at trial only consistent theories may be submitted in the jury instructions. Defense counsel should also be alert as to Mo.R.Civ.P. 55.09, which requires plaintiff to file a reply pleading, if plaintiff seeks to avoid an affirmative defense. *Angoff v. Mersman, 917 S. W.2d 207(Mo.App.WD. 1996).*

Clearly, in the first 30 days of a case, counsel only knows a little of the evidence compared to months later when discovery is in full swing, and leave to file an amendment to add later-discovered affirmative defenses will be freely granted unless discovery has closed or trial is imminent.

A cross claim against a codefendant for contribution and indemnity is not essential to support submission of the jury instruction on allocation of fault, but it

may prove necessary post-judgment if plaintiff executes disproportionately against one defendant, who wants to recover the excess from another.

C. Discovery Techniques

In federal court, discovery will begin with Rule 26 compliance. In state court, local rules may restrict interrogatories. Interrogatories are of very limited value. They are helpful to identify potential plaintiffs, witnesses and documents, to list special damages, and to secure authorizations for the decedent's medical, and employment and tax records. Beyond that, however, interrogatory answers are usually crafted by plaintiff’s counsel to be useless. This is not to suggest that defense counsel skip them, but simply realize the limitations.

Also, contention interrogatories, which might seem useful to ferret out plaintiffs theories, usually don't help much. Often the trial court will, upon objection, permit plaintiff’s counsel to delay a response to contention interrogatories until discovery is complete, by which time the experts will be deposed anyway. Also, the availability of contention interrogatories in state court is much more restricted than in federal court, which follows notice pleading rather than fact pleading.

One interrogatory should refer to the request for production of documents, and invoke counsel's duty to supplement the interrogatory answer in the future, as to responsive documents.

When defense counsel is confronted with document production requests, there should be a definite bias in favor of production. The spirit of the specific request is equally important with the letter of the request. If plaintiff's counsel later wants to claim noncompliance with discovery in defendant's failure to produce some document, or seek sanctions accordingly, the trial court will have little sympathy for the argument that a particular request was-not sufficiently specific to encompass the hidden document. Further, since defense counsel cannot predict at the outset which course discovery will take, a trial court can easily find prejudice when some documents surface after a number of depositions have already been taken.

Perhaps the most difficult part of this compliance is dealing with the client's frustration. A defendant in a wrongful death case certainly fears the runaway verdict, and focuses frustration on the "mad dog" plaintiff's counsel, looking at the same time to defense counsel for protection and retaliation. Whereas an insurance claims person, experienced in litigation, may well understand the broad disclosure requirements of discovery, the defendant rarely does. Counsel has no good alternative but to insist, diplomatically and firmly, that defendant comply.

In the wrongful death case against a corporation, plaintiff's counsel will certainly schedule a deposition under F.R.Civ.P. 30(b)(6) or Mo.R.Civ.P. 57.03(b)(4), on specific items, to which plaintiff's counsel hopes to bind defendant

corporation at trial. Defense counsel, of course, must be aware of the trap, and ensure that the witness or witnesses appointed to represent the corporate defendant have all available knowledge to respond to the specific items.

It is a huge mistake for defense counsel to offer some "custodian of documents" who knows nothing about the merits of the items, because that witness' lack of knowledge will foreclose defendant from offering contrary or supplemental evidence at trial. Likewise, if the notice of corporate deposition seeks inappropriately to uncover expert opinion, defense counsel may need to seek a protective order in advance, to preclude plaintiffs attempt later to strike expert witnesses.

D. Pretrial Motions

Dispositive motions, such as a motion to dismiss certain counts of plaintiffs petition, and motions for summary judgment, are effective to limit issues at trial. Motions in limine can be effective to limit evidence and counsel's statements. Sanctions motions may be filed over discovery disputes, or they may be cloaked in motions in limine to preclude the opposing party from offering evidence beyond the scope of the discovery.

In considering motions to dismiss or notions for summary judgment, defense counsel should consider any allegation of aggravating circumstances. Until recently, it was common for plaintiffs petition to seek damages for aggravating

circumstances. Now, those damages are in the nature of punitive damages, and require the same foundation. Absent some prima facie evidence, such a claim should fail. Call v. Heard, 925 S.W.2d 840 (Mo. 1996). These motions should be filed well in advance of the trial date, and in federal court, a scheduling order will control.

Motions in limine are often considered, in state court, on the morning of trial. If there are a number of these, counsel should ask for a pretrial conference in advance. The effect of an order in limine is often misunderstood. Such an order precludes evidence, or statements by counsel relative to such evidence, and prohibits the offer or mention of the evidence in front of the jury, absent a further ruling.

During trial, counsel can approach the bench and make an offer of proof of the disputed items, to have it then admitted before the jury. If defense counsel's motion in limine is granted before trial, but plaintiff's counsel offers the evidence later, the order in limine does not preserve an objection later, and the objection must be renewed or it is waived.

Typical items in a wrongful death case which are subject to a motion in limine include decedent's life insurance and other collateral sources such as health insurance or prepaid funeral plans; decedent's wealth; a surviving spouse's remarriage; pre-death medical problems of the decedent which did not clearly affect

life expectancy or decedent's relationship with the plaintiffs; decedent's prior marriages; "day in the life" or similar family videos of the decedent; photo's of decedent's body or grave; pre-death statements by the decedent about the incident [dying declarations only apply in criminal cases].

E. Offers of Judgment and Settlements

Section 408.040 RSMo gives plaintiffs a chance to tag defendants for prejudgment interest. Mo.R.Civ.P.'77.04 gives defendants a chance to tag plaintiffs for costs.' These offers of judgment seem to be overused and overrated, but defendant clients love them as a way to apply pressure. Only in a very weak liability case [or a high offer or an offer of policy limits] are they likely to influence a plaintiff to accept a settlement. Otherwise, they seem only to generate ill will, and actually operate as a disincentive to further settlement talks.

The value of a wrongful death case varies tremendously, depending upon the jurisdiction and the facts. In Jackson County in June, 1995, a single wrongful death of a helicopter pilot resulted in a verdict of $175 million in compensatory damages, and another $175 million in damages for aggravated circumstances. In St. Louis County, wrongful death verdicts under $1 million are not uncommon. In most cases involving the death of a wage-earner, an economist will be testifying as to the economic loss to the family, and that economic opinion will serve as the starting point for settlement discussions.

Any settlement of a Missouri wrongful death case requires court approval. While the trial judge can usually be expected to accept an agreement by the parties, with or without an offer of judgment, the judge is not a rubber stamp or a potted plant. Death cases are always serious, and if a defendant's insurer is paying less than policy limits to settle, the judge will want to know why.

Also, the plaintiff's family will be at the hearing, supposedly to testify that they believe the settlement to be fair and reasonable and to ask for its approval. Family members have been known, however, to argue while testifying in the hearing, about the total amount as well as their share, jeopardizing or even upsetting a settlement already drafted and signed. Further, when the decedent is survived by small children, the judge will understandably take a greater interest in the fairness of the settlement.

Assuming, however, that the hearing proceeds smoothly, the judge must make two sets of rulings. First, there must be a finding that the settlement by the plaintiff group with this defendant is fair and reasonable. Second, the court must find that the proposed apportionment of the settlement fund among the family members, as well as payment of their attorneys fees, is fair and reasonable. Normally this all happens at one hearing. However, it is possible for the first portion to be decided, with the defendant released and dismissed, before the funds are apportioned among the family members.

A more interesting issue may arise as to other defendants. If the settling defendant is only one of several, then Section 537.060 RSMo comes into play, whereby the contribution and indemnity claims of the remaining defendants against the settling defendant will be discharged upon the settlement by plaintiff. The remaining defendants can challenge the settlement under this statute, if there are grounds to find that the settlement is not in good faith in the discharge of these contribution claims.

Sufficiency of the amount paid, and unused insurance proceeds, will be important factors in such a hearing.

F. Tips for Presenting a Strong Defense to Damage Claims

Plaintiffs recoverable damages are listed in the statute. They fall essentially into three categories: economic damages, noneconomic damages, and pre-death pain and suffering "survival" damages.

Economic damages are easily measurable, usually by plaintiffs economist. That economist's assumptions must be carefully examined, of course, and hopefully exposed on cross-examination. The economist may have ignored, or not even be aware of, a history of decedent's work problems, depression, or family matters affecting decedent's past work life. Missouri does not allow recovery for loss of the decedent's enjoyment of life, known as "hedonic" damages, in part because the

decedent's estate is not a proper party plaintiff. A longer discussion of damages evidence follows in Section VI below.

Defense counsel may be concerned that an aggressive defense of damages will dilute an equally aggressive defense of liability. However, that is a matter for closing argument. The jury expects disputes and objections and aggressive attorneys, and if they don't get it, they are likely to draw unwarranted conclusions.

The job for defense counsel is to be clear from the outset as to the primary issues, and pursue those directly and clearly throughout the trial. It is important to be polite and fair with the witnesses. It is equally important to be predictable to the jury, to give them what they expect, what you promised in opening, with each witness along the way, and in closing. If you are not stretching the truth yourself, and if your points are clear and simple, then your closing argument will be predetermined, and the jury in deliberations will say "of course!"