TRIAL OF THE WRONGFUL DEATH CASE

DEFENSE PERSPECTIVE

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Because the defense goes second, a great deal of trial presentation is a reaction or response to plaintiff's counsel. Plaintiff's burden includes the telling of the story for the first time, so that the jury will understand and remember, and much of plaintiff counsel's comments and evidence need not be repeated by the defense. Only in the unusual case, such as when plaintiff's theory of liability is based on res ipsa loquitur, will the defense evidence be more extensive than that of the plaintiff.

A. Jury or Nonjury -- Defense Considerations

Plaintiff's counsel will almost always want a jury as fact finder for a wrongful death case, to maximize the damage award, or to maximize the pressure on defendant's counsel to settle. The defense should prefer a jury as well, because the trial judge, after all, is just one person, and his or her reaction to the evidence, as a fact finder, is not at all predictable. This is true even if the judge is known or reputed to have a defense bias.

Although juries admittedly tend to be all over the map in terms of verdicts returned, there is some reason to believe that nine out of twelve jurors [or six out

of six in federal court], will respond in a rational way most of the time. Further, defendant's counsel has a much better chance to preserve reversible error in a jury trial, if things go badly.

If, however, the trial is to be a bench trial, either by choice or statute or administrative rule, there are some practical differences. Defense counsel should specifically, in advance and on the record, request that the courts make full written findings of facts and conclusions of law, or else there will be little chance of appealing an adverse decision.

Trial to a jury is certainly going to be more expensive, because of the need for elaborate visual aids and other exhibits, many of which could be presented in an 8 1/2" X 11" format for a judge in a bench trial. Further, in a bench trial, the judge can be "educated" in advance on the factual background by a trial brief and other pretrial hearings, which can streamline the presentation of evidence at the actual trial, and perhaps eliminate some of the less critical witnesses.

Moreover, many of the legal foundations for testimony or documents can be more easily stipulated or streamlined for a bench trial, saving time for everyone. The judge will be much more relaxed in the admission of evidence, confident that he or she can separate the "wheat from the chaff." Clearly, in addition, the time for jury selection, evidentiary objections or witness voir dire examinations outside the jury's hearing, jury instruction, and the inevitable delays waiting for straggling

jurors to come back from lunch, all can be avoided.

Otherwise, however, the actual trial before a judge or jury should be about the same. Defense counsel should never waive opening statement, as this is an important opportunity for persuasive focusing on the strong points in the defense. Witness examinations should proceed the same, perhaps skipping over many of the preliminary matters that might be necessary if a jury were listening, instead of a judge who has the trial brief for reference.

Although defense counsel might expect a judge to be less likely than a jury to be swayed by an emotional widow or surviving child, there is no evidence that is true. Cross-examinations are still vitally important. Obviously, for a bench trial, the cross-examination should be brisk and to the point, but that is no different for a jury. The jury is just as impatient with unnecessary repetition and collateral questioning as is the judge.

Equally as obvious, in a bench trial, the defense counsel will not want to talk with the judge about settlement offers. Federal courts offer the services of magistrates to avoid this problem. Finally, in a bench trial, the judge may permit post-trial briefing, which gives the defense one last opportunity to respond to plaintiff's arguments, and legal authorities.

B. Presentation of Evidence

Cross-examination of plaintiff's witnesses was discussed in section III above. Courtesy and respect for the surviving family members is expected, and only in the rarest cases can counsel safely "take on" a family member as a hostile witness. The facts alone will not justify such a confrontation, but the demeanor of an argumentative or grossly exaggerating witness may give defense counsel an opportunity to defuse the emotional element naturally favoring plaintiffs.

In addition, if defense counsel has obtained some favorable admissions from plaintiffs in discovery, by interrogatory answer or deposition, these admissions should be brought out with the live witnesses during plaintiff's case, and not reserved for reading in the defense case. If the admission is strong enough to have an impact, that impact is maximized in the confrontation with the live witness. The jury will not react negatively to defense counsel as long as counsel is fair with the witness.

The plaintiff's economist, however, is fair game, as he or she will have very little emotional appeal to the jury. If there is a false or unsupported assumption, and if the economist is not willing to concede any weakness, a vigorous cross-examination will not offend the jury, even though a death is involved. If plaintiff's economist will admit some weaknesses in the analysis, defense counsel should get

those admissions from the witness first, before going on the attack. Otherwise, once war is declared, an experienced economic witness can be difficult to control.

Further, because the economic damages will be used by plaintiff's counsel in closing argument as the starting point for the jury, and in fact plaintiff's counsel will probably use economic damages as a multiplier for the "softer" nonpecuniary damage elements, cross-examination of the economist is the most likely source of good ammunition against damages in the defense closing.

Plaintiff's counsel will close the case in chief on a strong witness, probably emphasizing the horror of decedent's death, or the anguish of a family member. Defense counsel should anticipate this in picking the first defense witness. When liability is very much in issue, the strongest fact witness available should lead off. When there is not much of a defense to liability, and defusing damages is the heart of the defense, then a calm, soft spoken "educational" witness can provide a good opening to the defense case.

Plaintiff's counsel will often call all the best non-expert defense witnesses in plaintiff's case in chief, and defense counsel should avoid re-calling any witness in the defense case. The jury does not like seeing a witness return to the stand, because of the impression that time is being wasted, and defense counsel should be prepared in plaintiff's case to elicit the necessary testimony.

If the judge is restricting the scope of cross-examination, precluding certain lines of questioning on cross, it is appropriate to ask special leave for certain witness to expand cross-examination, so as to avoid re-calling the witness. The situation should be anticipated before trial, and brought up in the pretrial conference.

At the close of plaintiff's case, and at the close of all the evidence, unless you have admitted defendant's liability, make a motion for directed verdict. Otherwise, you will have waived any complaint later that plaintiff's claims were not submissible. If you strongly dispute the admissibility of some expert testimony, move to have it stricken, to preserve your record.

C. Effectively Defending the Impact of the Wrongful Death

The death of a close family member is a common experience, and should be explored at length in the jury selection. Defense counsel may want to strike or disqualify younger jurors, who reputedly tend to award larger damages anyway, who are less likely to have experienced a death in the family, and who may be more easily persuaded by plaintiff's counsel to make a large award at trial.

Prospective jurors who have lost loved ones can be asked to discuss this in voir dire, to help show that plaintiffs' loss is not quite so unique as plaintiffs'

counsel will argue. The effect of death cannot be minimized, and any attempt to do so will ruin defense counsel's credibility. However, the emotion displayed by the surviving family members at trial, while usually genuine, is much more acute due to the pressurized environment of a courtroom and the retelling of the events leading up to decedent's death.

The challenge for defense counsel is to keep an open perspective for the jury, to remind them that families do survive and thrive after these types of occurrences. The jury selection process is the least formal opportunity to begin to do this, before the issues of liability and damages have focused on the fatal incident at trial.

It is very difficult to make a successful attack on the decedent's character, who will be judged in part by the facts, but equally by whether the jury likes the surviving family. A defense of comparative fault must be relatively clear, and the defendant likable, or counsel will have a tough sell with the jury.

Economic damages normally include lost future income or earnings capacity. An employment contract or collective bargaining agreement may be involved. The decedent's life expectancy and work life expectancy are normally stipulated, as they appear in the statutory mortality tables or in Labor Department statistics. If decedent was self-employed or derived an income from an owned

business, the economist should not only rely on the last full year of earnings, but examine the trend of recent years leading up to the date of death.

The economist should, but may not, deduct from that future income stream the amount of decedent's own consumption and income taxes, and then discount the future anticipated earnings back to present value by some interest rate which may be open to dispute. Sometimes, the economist will offset the discount factor by a projected future inflation rate, which may be questionable.

Another large item of future damages is lost household services. Now that decedent can no longer cut the grass, cook dinner, dust and vacuum, or repair the car, plaintiff's economist may calculate the cost to the survivors to pay for all these services from now on. Defense counsel can uncover exaggeration by deposition questions to family members on the types of household services actually contributed by decedent. If the number of hours devoted to decedent's job and household services exceeds 16 hours per day, the exaggeration becomes apparent. Common areas of dispute include potential future raises and promotions, and the decedent's plans for additional education and training. Other economic damages such as funeral and burial costs, are usually beyond dispute, relatively minor, and should be stipulated.

Whether defense counsel wants to use an opposing defense economist is

never an easy decision. Even in a case where plaintiff's economist is clearly exaggerating, defense counsel is probably better off making this point in cross-examination, rather than using a defense expert. The defense economist will establish a floor for damages, and may give away useful points upon cross-examination by plaintiff's counsel.

A useful strategy to defuse the economic damages involves the testifying family members. Not much can be done with a surviving minor child, nor with a surviving spouse of a happy marriage. However, with emancipated adult children of the decedent, or surviving parents, or brothers and sisters, the expectancy of support from the decedent will be difficult for the jury to accept. A low-key cross-examination, amply supported by prior deposition admissions from the witness, or family letters, can expose this weakness in a plaintiff's case very effectively.

Noneconomic damages are "softer," and not so easily measured. Loss of comfort, guidance and counsel cannot be put in monetary terms except by plaintiff's counsel in the closing argument. These damages will be presented through testimony of family and friends, and sometimes there is very little the defense counsel can do except to keep taking notes and hope that the crying ends soon.

If there were marital problems, or other serious family difficulties

attributable to the decedent, such as abuse, alcoholism, or gambling, the defense attorney should not be afraid to bring them out. These types of matters must be clear, simple and striking, and defense counsel must be confident in advance that the evidence will not be explained away. Forget about minor family squabbles. Obviously, this has to be done delicately, but if the cross-examining attorney treats the witnesses fairly and courteously, the jury should accept these mitigating factors.

Often, a sign of a troubled family appears in the children who grow up and get in trouble with drugs or school or employers. However, this type of evidence can backfire against the defense, if the problems never surfaced until after decedent's death.

Finally, as a third element of damages, if the decedent did not die immediately at the time of the incident, or if the decedent knew in advance that death was imminent, there will be damages for pre-death pain and suffering. If the suffering was horrible, as in a burn victim, then the damages will be horrible and the defense counsel is foolish to argue otherwise. An ineffective cross-examination of the observing witness will do more damage than no cross-examination at all. A useful tactic in cross- examination may be to gently deflect the jury's attention back to stronger defense issues, such as liability [but probably not, at that moment, comparative fault].

If the evidence is ambiguous whether decedent was conscious or aware at the time, then a defense pathologist may be helpful. This battle, however, will primarily be won or lost with the judge, in determining whether any of the evidence is sufficient to go to the jury.

A corporate defendant particularly needs to be personalized, so that the jury understands the defendant actually to be the human people [the employees] who were directly involved with the decedent, and not an impersonal board of directors in some distant city. Defense counsel should speak of the decedent by name, just as he or she refers to defendant's employees by name.

Closing argument will be in part a summation of evidence, and in part a response to plaintiff's argument. Plaintiff's counsel will have just finished a necessarily emotional and exaggerated description of the impact to the family from the loss of decedent. The jury will have just received a request to award millions of dollars. In the first several sentences of closing argument, defense counsel must be absolutely clear in contrasting defendant's position with plaintiffs.

Counsel should not waste time thanking the jury for their time and attention. Plaintiff's counsel already did that, and the jury wasn't impressed then, either. The jury has long ago decided whether they like you or not. Get to the point. Take an argument from plaintiff's closing, turn it around, and punch a hole in the damages balloon. Plaintiffs want a jackpot, and that's what their lawyer is asking for. The

astronomical damage figure [as to the "soft" damages] is based on some unstated multiplier totally unsupported by any evidence.

Plaintiff's counsel will have made a disguised "per diem" argument as to all the elements of nonpecuniary damages to justify the large verdict request, and defense counsel must show that the final number is completely out of sync with the life decedent's family lived before.

Argue liability questions last, if they are strong points, or put them somewhere in the middle if they are weak. Close with you strongest argument, and ask for a defense verdict.

D. Post-Trial

If you are concerned about post-trial matters, then the verdict wasn't too good. You will have already interviewed the jurors, if the judge permitted you to do so, to determine if there were any irregularities meriting reversal. Within a day, the trial judge will enter judgment on the verdict, and then post-trial motions for new trial or otherwise under Mo.R.Civ.P. 72 are appropriate.

Some defense counsel use the time while the jury is in deliberations to draft their motion for new trial, when all the judge's erroneous rulings are fresh in their minds. If you have the mental discipline to do this, you are destined for greatness. If another attorney or a paralegal has assisted you throughout trial, then you should

have the points of error listed in a notebook along the way. Be sure you have copies of all of opposing counsel's trial exhibits.

You must request a post-trial relief from the trial judge to preserve your points on appeal, and that must be done within 30 days of entry by the trial judge of the judgment on the verdict.

E. Motions and Appeals

Post-trial motions include either a motion for judgment notwithstanding the verdict, or motion for new trial, or both in the alternative. Mo.R.Civ.P. 72.01(b), 78. Defendant may also ask for remittitur, the scope of which is under review in the Court of Appeals now. Mo.R.Civ.P. 78.10.

In bench trials, the post-trial motion may include a request for amendment of the judgment or opinion in accordance with Mo.R.Civ.P. 73.01(a)(5), although no post-trial motion is necessary for appellate review.

The trial court's judgment becomes final within 30 days if no post-trial motion is filed, Mo.R.Civ.P. 81.05, or if the trial court has not granted a new trial on its own motion, Mo.R.Civ.P. 75. If a post-trial motion is filed and denied, or 90 days have passed since filing without a ruling on the motion, the judgment is final. Within 10 days thereafter, the notice of appeal must be filed

pursuant to Rule 81 and following, with a $50 fee.

Defendant must post a bond and obtain the trial court's approval of the bond, in order to avoid execution proceedings on defendant's assets or insurance. Within 30 days following the notice of appeal, counsel must request the trial court clerk to assemble record on appeal, which consists of the relevant pleadings, certified, for submission to the court of appeals. Within the same period, counsel must request a transcript of the trial proceedings from the court reporter.

If counsel is at all confused about the appellate rules, the appellate clerk's office is always very helpful.

In federal court, post-trial motions are governed by Fed.R.Civ.P. 59, and must be filed within 10 days of entry of the judgment. Counsel must carefully check with the trial court's clerk to verify the date of entry of judgment on the court's docket per Rules 58 and 79. The trial court is not limited in the amount of time it may consider the post-trial motion, but once that motion is decided, counsel has thirty days to file a notice of appeal in the Eighth Circuit. FRAP 4(a)(4). From that point on, the appellate procedure in the Eighth Circuit is complex and easily confused, governed by FRAP, The Eighth Circuit Rules of Appellate Procedure, and the Clerk's office.