

NOTHING HEREIN SHOULD BE CONSTRUED AS LEGAL ADVICE

Wrongful Death Damages – Strategy, Evidence and Calculations

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Calculating Life Expectancy Using Formulas and Tables

- Remember, the plaintiff has the burden of proof and persuasion
- It is worth creating an issue over life expectancy if the discrepancy is small
- Can be a significant issue in claims involving the elderly, e.g., nursing home cases
- Is it an economic issue or a medical issue
- PLAN for how you will address in discovery, especially depositions of treating doctors
- ANTICIPATE the defense, often the “kitchen sink” approach

Putting a Monetary Value on a Human Life

- Is this really the right question?
- How to deal with this misconception especially during *voir dire*
- How to effectively reframe the issue to be viewed in terms of the loss and harm suffered by the plaintiff(s)
- Needs to be emphasized during opening statement, during evidence, and closing

Exploring the Relationships to Reveal the Damages

- This is the lawyer's most important and challenging job
- PLAN and ROADMAP the elements of damage in every case – the circumstances are always unique
- Be informed of the damage statute, RSMo. 537.090 and be creative in developing your proof
- Be diligent in investigation with all members of the class – everyone has a unique view
- Be attentive to economic vs. non-economic damage items – see economic research on value of a mother

Pain/Suffering/ Mental Anguish - Damages for Surviving Family Members

- Is it recoverable? Missouri vs. Kansas
- In Kansas, is this non-economic v. economic
- STRATEGY – Do you want to make this claim? Considerations of settlement vs. mediation vs. trial
- Discussion point with clients – how are we going to address the issue?

Loss of Future Income, Benefits, Inheritance

- Lawyer needs to investigate/evaluate exhaustively
- What are the sources of data: tax returns, W-2s, investment accounts, estate plan documents, benefits materials, home tax assessment materials, partnership agreements/LLC documents, employment files and job reviews, educational files, collective bargaining agreements, social security history, real and personal property records, financial records for small business
- Who are your witnesses, both lay witnesses and retained and non-retained expert witnesses
- Think about what type(s) of experts you need – general labor economist, specific profession/industry expert (farming, union representative, estate planning, legal, etc.)
- Unique issues/concerns about loss of future inheritance, especially for high earners and business owners

Apportionment of Damage Among Family Members

- In Missouri, follow the statute (RSMo. Sec. 537.095) and instructive cases
- Who do you represent? Who can/should you represent?
- Potential ethical issues to consider
- Specific concerns about children and future needs
- Practical solutions – agreements among class members regarding apportionment, waiver of apportionment interest, conflict waivers?

Using Medical Evidence to Prove Conscious Pain and Suffering

- Another key strategy point – is this an important part of case or not? Challenges of persuasion – how do jurors really react to this evidence?
- Be attentive to this issue in *voir dire* – explain that “the law requires these damages to be awarded.”
- Economic vs. non-economic in med mal cases
- Also remember the economic value of bills/services
- SCOUR records of the event and medical treatment for evidence of pain. FIND the best lay witness on this issue.
- Consider an expert, e.g., a critical care nurse

Examination of Decedent's Will

- Discuss how/when the decedent's will is relevant
- Is there any purpose other than assisting in valuation of future estate/inheritance?

Punitive Damages

- Generally in Missouri, punitive damages may be awarded for a negligent act or omission if jury finds that defendant's conduct "showed complete indifference to or conscious disregard for the safety of others."
- See MAI 10.02, 10.07, and 6.02
- Aggravating circumstances in wrongful death cases
- Clear and convincing evidence required
- Heightened standard in med mal cases
- Coverage considerations
- Do you want aggravating circumstances claims?

537.080 Action for Wrongful Death – Who May Sue - Limitation

1. Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for:

(1) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;

(2) If there be no persons in class (1) entitled to bring the action, then by the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set out in section 537.090 because of the death;

(3) If there be no persons in class (1) or (2) entitled to bring the action, then by a plaintiff ad litem. Such plaintiff ad litem shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff ad litem shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff ad litem give bond for the faithful performance of his duties.

2. Only one action may be brought under this section against any one defendant for the death of any one person.

537.090 Damages to be Determined by Jury – Factors to be Considered

In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable. If the deceased was not employed full time and was at least fifty percent responsible for the care of one or more minors or disabled persons, or persons over sixty-five years of age, there shall be a rebuttable presumption that the value of the care provided, regardless of the number of persons cared for, is equal to one hundred and ten percent of the state average weekly wage, as computed under section 287.250. If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

537.095 Joinder of Parties Not Required, When, Effect on Recovery – Plaintiff Ad Litem, Recovery, Distribution

1. Except as provided in subsection 2 of this section, if two or more persons are entitled to sue for and recover damages as herein allowed, then any one or more of them may compromise or settle the claim for damages with approval of any circuit court, or may maintain such suit and recover such damages without joinder therein by any other person, provided that the claimant or petitioner shall satisfy the court that he has diligently attempted to notify all parties having a cause of action under section 537.080. Any settlement or recovery by suit shall be for the use and benefit of those who sue or join, or who are entitled to sue or join, and of whom the court has actual written notice.
2. When any settlement is made, or recovery had, by any plaintiff ad litem, the persons entitled to share in the proceeds thereof shall be determined according to the laws of descent, and any settlement or recovery by such plaintiff ad litem shall likewise be distributed according to the laws of descent unless special circumstances indicate that such a distribution would be inequitable, in which case the court shall apportion the settlement or recovery in proportion to the losses suffered by each person or party entitled to share in the proceeds and, provided, that any person entitled to share in the proceeds shall have the right to intervene at any time before any judgment is entered or settlement approved under this section.
3. In any action for damages under section 537.080, the trier of the facts shall state the total damages found, or upon the approval of any settlement for which a petition or application for such approval has been filed, the court shall state the total settlement approved. The court shall then enter a judgment as to such damages, apportioning them among those persons entitled thereto in proportion to the losses suffered by each as determined by the court.
4. The court shall order the claimant:
 - (1) To collect and receipt for the payment of the judgment;
 - (2) To deduct and pay the expenses of recovery and collection of the judgment and the attorneys' fees as contracted, or if there is no contract, or if the party sharing in the proceeds has no attorney representing him before the rendition of any judgment or settlement, then the court may award the attorney who represents the original plaintiff such fee for his services, from such persons sharing in the proceeds, as the court deems fair and equitable under the circumstances;
 - (3) To acknowledge satisfaction in whole or in part for the judgment and costs;
 - (4) To distribute the net proceeds as ordered by the court; and
 - (5) To report and account therefor to the court. In its discretion the court may require the claimant to give bond for the collection and distribution.