

Pursuing Claims for Grief Under the Wrongful Death Act

Thanks to a 2007 statutory change, juries are permitted to consider grief, sorrow, and mental suffering in wrongful death cases. Here's advice for trial lawyers about how to approach this relatively untested element of wrongful-death damages.

By Elizabeth Felt Wakeman and Gregory J. Barry

Until several years ago, wrongful death claims for grief, sorrow, or mental suffering incurred by next of kin were not recognized in Illinois. Next of kin were limited to pursuing pecuniary claims based on their relationship with the deceased such as loss of society or support.

That all changed in 2007 when the Wrongful Death Act¹ ("Act") was amended by the Illinois legislature. The revision specifically allows next of kin to seek damages for the "grief, sorrow and mental suffering" that they have incurred as a result of the wrongful death.

But though the Act was amended more than five years ago, there is still no body of precedent to guide practitioners and judges. As this article explains, trial lawyers should prepare for an aggressive response by defense counsel. Among other things, lawyers for claimants should familiarize themselves with the amended jury instructions and be prepared to use legisla-

tive history and cases from other jurisdictions to argue for the optimal verdict form and against inevitable motions in limine.

Grief, sorrow, and mental suffering and the Wrongful Death Act

Background. Section 2 of the Act prior to the 2007 revision did not explicitly permit damages for grief, sorrow, and mental suffering. Rather, it permitted damages that would be "a just and fair compensation with reference to the pecuniary injuries suffered resulting from [the] death."² Longstanding case law, however, held

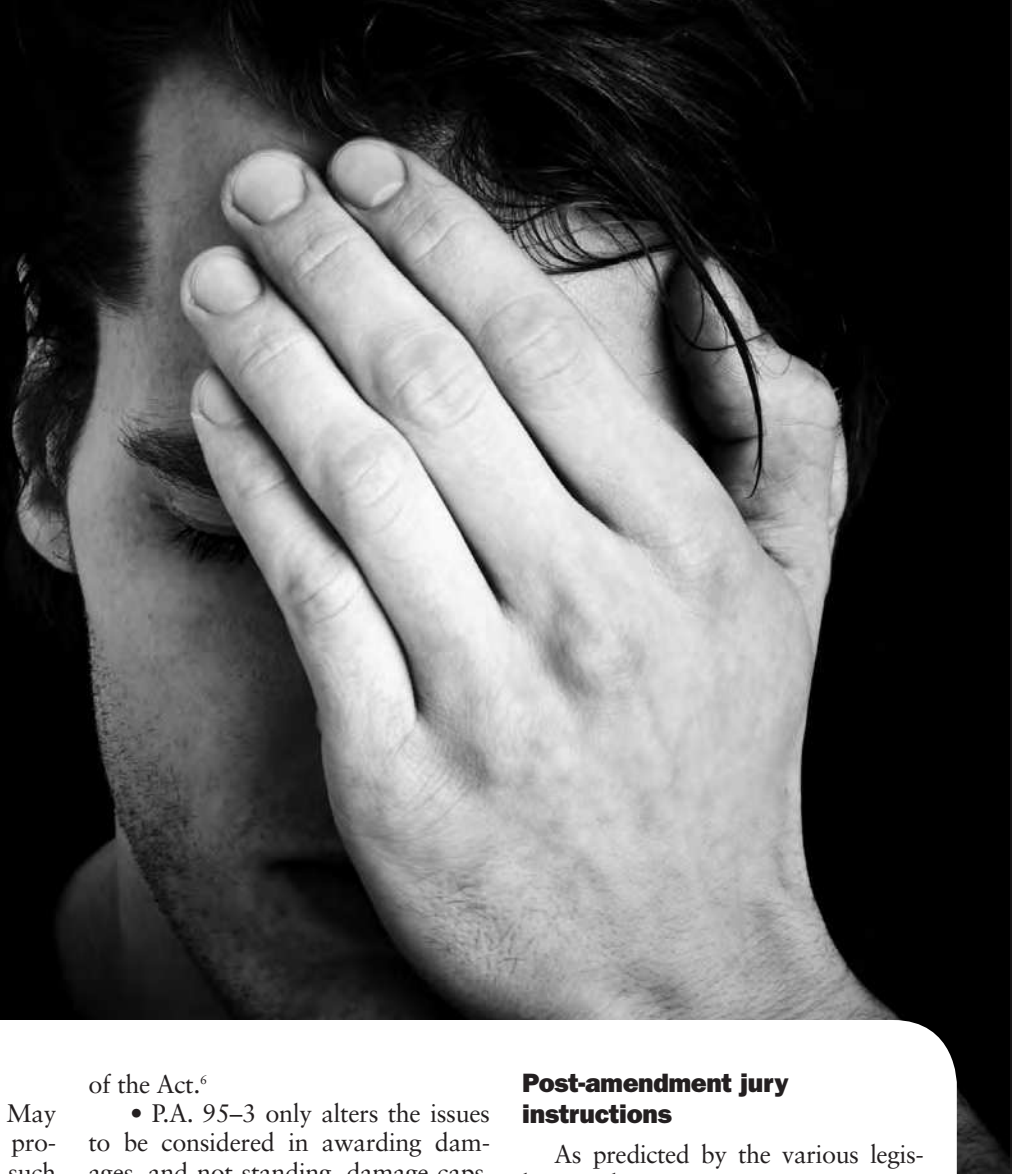
that grief, sorrow, and mental suffering were *not* to be considered in determining "just and fair compensation."³ This was reflected in the Pattern Jury

1. 740 ILCS 180/2. The authors' firsthand experience with the law stems from a January 2011 trial where their firm represented a young boy in the wrongful death of his father in a motorcycle collision that occurred within months of the amendment to the Wrongful Death Act. The jury returned a verdict in the boy's favor, notably including \$100,000 as a separate line item of damages for the boy's grief, sorrow and mental suffering. This verdict is the first reported jury award for grief, sorrow, and mental suffering under the revised Wrongful Death Act.

2. 740 ILCS 180/2 (2006).

3. See, for example, *Ubr v. Lutheran General Hosp.*, 226 Ill.App.3d 236, 589 N.E.2d 723 (1st Dist. 1992), appeal allowed 145 Ill.2d 645, 596 N.E.2d 638 (1992), vacated, ordered not precedential 244 Ill.App.3d 289, 614 N.E.2d 319 (1st Dist. 1993); *Seef v. Sutkus*, 205 Ill.App.3d 312, 562 N.E.2d 606 (1st Dist. 1990), *aff'd*, 145 Ill. 2d 336, 583 N.E.2d 510 (1991); *Zostautas v. St. Anthony de Padua Hospital*, 23 Ill.2d 326, 177 N.E.2d 303 (1961); *Webb v. Henke*, 10 Ill.App.2d 152, 134 N.E.2d 540 (4th Dist. 1956); see also *Brackett v. Builders Lumber Co. of Decatur, Ill.*, 253 Ill.App. 107, 1929 WL 3244 (3d Dist. 1929); *Conant v. Griffin*, 48 Ill. 410, 1868 WL 5132 (1868); and *City of Chicago v. Major*, 18 Ill. 349, 1857 WL 5582 (1857).

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Instructions as well.⁴

Public Act 95-3, effective on May 31, 2007, clarified Section 2 to provide that “the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, *including damages for grief, sorrow, and mental suffering*, to the surviving spouse and next of kin of such deceased person.”⁵ This was the sole substantive change in the law effected by the public act — only section 2 of the Wrongful Death Act was changed, and the other changes were merely to clarify the statute and to specify the prospective application of P.A. 95-3.

Legislative history. While no case has ruled on the “grief, sorrow, and mental suffering” amendment, there was substantial debate in the legislative chambers prior to the passage of P.A. 95-3. Without repeating the floor debates verbatim, the following principles can be gleaned as to the understanding of the legislators — both those who supported and those who opposed the bill — of the construction, application, and practical effect

of the Act.⁶

- P.A. 95-3 only alters the issues to be considered in awarding damages, and not standing, damage caps, or other issues.

- The jury will be able to consider grief, sorrow, and mental suffering.

- Attorneys will be able to present evidence and argument on those issues.

- Jury instructions will be revised to either provide one line item for the new elements or separate, new lines for each element.

- Verdict forms will have either one new line item or separate new line items as contemplated for the jury instructions.

- “Grief, sorrow, and mental suffering” are separate and distinct from other pecuniary damages under the Wrongful Death Act (and are capped, non-economic damages under the Medical Malpractice Act).

- “Grief, sorrow, and mental suffering” are also different from loss of society.

- The new terms will remain undefined and their meaning will be determined by advocates at trial.

Post-amendment jury instructions

As predicted by the various legislators, the pattern jury instructions have been revised to reflect the statutory amendment. Instruction 31.01 lists “[t]he grief, sorrow, and mental suffering of [next of kin]” as distinct consideration in determining pecuniary loss.⁷ The comment to Instruction 31.01 reads as follows: “Item 9 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow, and mental suffering of the next of kin...”⁸ Similar revisions to the instructions and notes in the commentary are found in Instruc-

4. See IPI Civ. 3d No. 31.07 (2011).

5. 740 ILCS 180/2 (emphasis on language added by P.A. 95-3).

6. See transcript at pp. 76-77, Ill. 95th Gen. Assembly, H. R., 41st Legislative Day, April 24, 2007; transcript at pp. 40-45, 53-54, 57, 60-61, Ill. 95th Gen. Assembly, H. R., 44th Legislative Day, April 27, 2007; transcript at pp. 36-38, Ill. 95th Gen. Assembly, Reg. Sess., Sen., 41st Legislative Day, May 17, 2007.

7. IPI Civ. 3d No. 31.01 (2011).

8. *Id.*, Notes on Use.

tions 31.01(a), 31.02, 31.02(a), 31.03, 31.03(a), 31.04, 31.05, and 31.06.

Even when P.A. 95-3 has not resulted in an alteration of the Illinois Pattern Jury Instructions, its presence is still significant. Paragraph 2 of the current version of Instruction 31.07 (“Measure of Damages—Wrongful Death—Factors Excluded”) continues to direct the jury not to consider “[t]he grief or sorrow of the next of kin.”

However, the notes on use state as follows: “For causes of action that accrue after May 31, 2007, paragraph 2 should be deleted from this Instruction. Under P.A. 95-3, effective May 31, 2007, next of kin may recover damages for their grief, sorrow and mental suffering.” Thus, Instruction 31.07 will only direct the jury not to consider the decedent’s pain and suffering and the next of kin’s poverty or wealth.

Finally, the Notes on Use in the above Instructions require Instruction 31.11, “Damages—Loss of Society—Definition” to be used whenever loss of society is claimed. Instruction 31.11 defines “loss of society” as “the mutual benefits that each family member receives from the other’s continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection.” This is the current definition under the 2011 edition of the Illinois Pattern Jury Instructions, and, as such, the editors consciously omitted “grief, sorrow, and mental suffering” from the definition of loss of society. This presents a strong argument that “loss of society” and “grief, sorrow, and mental suffering” are to be separate areas of recovery in jury awards and not subsumed into loss of society.

Because the pattern jury instructions have already been changed to reflect the amendment to the Wrongful Death Act, plaintiffs’ lawyers should be comfortable submitting the instructions for consideration. Counsel for defendants will have a hard time blocking use of the Instructions, especially since grief, sorrow, and mental suffering are enshrined in the Act as matters for the jury to consider in awarding damages.

Pattern verdict forms – a stickier wicket

While the Illinois Pattern Jury Instructions contain specific directions on jury instructions, including with regard to grief, sorrow and mental suffering in

Wrongful Death Act cases, the verdict forms are far more general. This holds true for the verdict forms that may be used in wrongful death cases. For example, see Instruction B45.01 (“Verdict Form A—Single Plaintiff and Defendant—No Contributory Negligence Pleaded”). The entire form reads:

VERDICT FORM A

We, the jury, find for plaintiff’s name and against defendant’s name. We assess the damages in the sum of, [itemized as follows:]
[Signature Lines]

At trial, plaintiff’s lawyers should expect a challenge on how the categories of damages should be “itemized as follows” on the submitted verdict form.

Expect defense counsel to argue that because the pattern jury instructions verdict forms do not include a separate line item for grief, sorrow, and mental suffering – and the jury instructions *do* take those items into account – the verdict form should be left as is.

Plaintiffs’ counsel, in response, can refer the court to Instruction 31.06 and its related instructions, which specifically refer to grief, sorrow, and mental suffering as a measure of damages elaborated upon in the notes and comments. Plaintiffs’ counsel may also point out that the next of kin’s grief, sorrow and mental suffering is clearly separate in nature from loss of society, reasoning that Instruction 31.11 defines “society” as “the mutual benefits that each family member receives from the other’s continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection.” That definition makes no reference to personal grief, sorrow, and mental suffering of the next of kin and remains unchanged after the amendment to the wrongful death statute in 2007, which allowed for damages for grief, sorrow, and mental suffering. If such claims were really a part of loss of society, there should have been a change in the IPI definition of “society” to reflect that.

Arguing the legislative history. Finally, counsel for plaintiffs should be prepared to argue the legislative history of Public Act 95-3 to show that the verdict forms should contain a separate line item for grief, sorrow, and mental suffering. As the floor debates show, the proponents

said the purpose of the bill was to allow the jury to consider grief, sorrow and mental suffering in formulating its award and that those categories are now “a new area where a plaintiff can recover.”⁹ The bill’s opponents acknowledged that grief, sorrow, and mental suffering would be

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a separate item in the jury instructions – indeed, that was one of their primary objections.¹⁰ Further debate that same day suggests that grief, sorrow, and mental suffering would be combined into a single new line item rather than separate line items in the instructions.¹¹

The bill’s opponents also recognized that those new elements would be a separate line item in verdict forms. For them that was a drawback, as the following statement by Representative Winters reveals:

The Sponsor has mentioned in debate that this is adding a new area of recovery in this state. It’s a new area of recovery in jury cases. There’s going to be a new line on the jury form that will – after you’ve looked at the other recovery that you can get for deprivation of love, care, comfort, protection, guidance, advice, and affection of the deceased, there will be a new line for grief and sorrow...And believe me, if there’s an empty line with a figure to be filled in, the juries will be filling it in.¹²

These comments about the jury verdict form were not contradicted or opposed by Representative Brosnahan, the bill’s sponsor, whom Representative Winters was addressing in part of his statement above. If the bill’s intent was not to

9. Transcript at p. 40, Ill. 95th Gen. Assembly, H. R., 44th Legislative Day, April 27, 2007 (statement of Rep. Brosnahan); see also transcript at pp. 76-77, Ill. 95th Gen. Assembly, 41st Legislative Day, April 2, 2007 (statements of Reps. Brosnahan and Black).

10. Transcript at p. 41, Ill. 95th Gen. Assembly, H. R., 44th Legislative Day, April 27, 2007 (statement of Rep. Meyer); see also transcript at p. 57 (statements of Reps. Lang and Brosnahan).

11. *Id.* at 60-61.

12. Transcript at pp. 53-54, Ill. 95th Gen. Assembly, H. R., 44th Legislative Day, April 27, 2007 (statement of Rep. Winters).

create a new line item, one would think that the bill's sponsor would clarify that rather than remain silent.

The Senate debate followed the same pattern: an opponent of the bill stated that the verdict form would have a separate line item, followed by proponents who demur on the verdict-form issue.¹³ Both sides in both legislative chambers therefore understood that the bill, if passed, would change verdict forms to include a separate line item for grief, sor-

row, and mental suffering. Counsel will likely attempt to limit those damages through motions in limine designed to bar testimony related to that claim except from next-of-kin.

Plaintiff's counsel should respond by showing how P.A. 95-3 clearly puts grief, sorrow, and mental suffering at issue in the case. There is nothing in the statute, legislative history, or pattern jury instructions that remotely suggests that only the next-of-kin are competent to testify. While lay witnesses might be prohibited from testifying with certitude that the claimant actually suffered grief, sorrow, and mental suffering as specific conditions, nothing in the law prevents them from testifying as to facts from which the jury could infer those things. Experts such as psychiatrists should be allowed to testify on the issue without limitation.

As noted, a judge may decide a motion in limine

on grief, sorrow, and mental suffering by preventing lay witnesses (other than the next-of-kin) from using the specific words "grief," "sorrow," and "mental suffering" but allowing them to testify about facts related to those elements, while allowing the claimant and any qualified expert to testify with no such limit.

If so, the plaintiff's counsel might want to begin with testimony from key friends, family, and acquaintances of the claimant to provide several views of the plaintiff's mental suffering. This can be followed by putting on an expert psychiatrist to give context — the specific mental condition of grief, sorrow, and mental suffering — to the lay witnesses' observations. With that background, testimony from the next-of-kin about his

or her personal grief and sorrow can be particularly effective.

How much settlement value?

An important question is whether grief claims raise the value of a wrongful death case and how much energy you should devote to them. Until cases have established otherwise, expect insurance companies to place little value on the "grief, sorrow, and mental suffering" elements. For the time being, if you make grief claims a significant element of your wrongful death case, be prepared to prove up that element of damages.

Our experience suggests that this strategy is well worth pursuing. We received a jury verdict of over \$600,000 in a wrongful death case, which included \$100,000 for grief, sorrow, and mental suffering. This was significantly higher than defendant's last settlement offer (\$450,000). It was the second highest recorded jury verdict ever for a wrongful death case in McHenry County, and suggests that future jury awards for grief in less conservative counties (for example Cook) could indeed be significant.

Conclusion

While the Wrongful Death Act was amended more than four years ago to permit grief, sorrow, and mental suffering to be considered, there is little law on those elements. Practitioners should familiarize themselves with the amended jury instructions and be prepared to use legislative history and cases from other jurisdictions to argue for the optimal verdict form and for or against inevitable motions in limine, as appropriate. ■

13. Transcript at pp. 36-38, Ill. 95th General Assembly, Reg. Sess., Sen., 41st Legislative Day, May 17, 2007 (statements of Sens. Murphy, Noland, and Raoul).

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row, and mental suffering.

There is some legislative history suggesting that grief, sorrow, and mental suffering might have their own, separate line items, although the current pattern jury instructions suggest that those three elements should be considered together. Plaintiff's counsel will have to decide whether to ask for one line item to cover all three elements – i.e., to play it safe – or to ask for separate line items for each. The latter approach may require counsel to explain how grief, sorrow, and mental suffering are distinguishable.

Challenging motions in limine to bar lay testimony

In addition to fighting the claim for grief, sorrow and mental suffering as a separate line item of damages, defense

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