

Mediating Wrongful Death Cases

By Joe Epstein, Esq., with Steve Berkowitz, Esq.

Introduction

The injustice of your loved one's death, the deep hurt you feel and the loss of your future dreams may all add up to rage, a wordless drive to do something.¹

Wrongful death cases require parties to deal with raw emotions. There is the pain of remorse and regret. There is the anger involving retribution and revenge. There is the cry for respect and restitution. There is the hope for release and resolution. It is our position that participants in the mediation of wrongful death cases have to alert to the opportunity to assist the aggrieved deal with their emotional and spiritual loss.

It is our view that counsel, adjusters, risk managers and mediators must all be informed not only about the facts of a wrongful death case but also about the special issues survivors deal with in their bereavement. The professionals must learn or must obtain information about where the survivors are in their grieving process. For example, have the survivors dealt with their fear and anxiety, anger and guilt, separation pain, disorganization, depression and despair, identification issues and their other psychological and sociological issues?² The degree to which these issues and the related issue of revenge have been addressed will impact the mediation and will affect the survivor's feelings about restitution and resolution.

Not very long ago we had the occasion to mediate a case involving a defenseless developmentally disabled child who been molested by a person in

a position of power and trust. The parents, who had lost their child shortly after this horrific revelation, felt heartache, remorse, betrayal (by a fiduciary) and anger. They were prepared to bring suit. The institution involved, armed with legitimate legal defenses and a worthy mission, was fearful that a lawsuit would force its closure. In this pre-litigation we conducted a transformative mediation. Meeting in advance of the mediation we encouraged the parents to discuss their feelings about 1) rage, 2) revenge, 3) retribution, 4) remorse, 5) regret, 6) restitution, 7) relief, 8) respect, 9) risk assessment and 10) resolution. During the mediation the executive director of the facility offered a sincere apology, described newly implemented protections, offered to implement ideas flowing from the mediation and offered fair compensation. In working on this case we used both the grief work noted above and the work of Gary Furlong.³ Like Furlong we believe that grief accompanies many of the situations involving loss that we see as mediators. Wrongful death cases and catastrophic injuries may be the most dramatic examples but grief accompanies the dissolution of professional practices and family firms. Grief can come into play in employment cases and business cases where the parties have had long standing relationships. Like Furlong we believe that these grief issues must be raised rather than pushed under the carpet.⁴ After the close of this mediation the mother of the deceased child pulled me aside to thank us for helping her and her husband address issues that they had previously left unresolved. Similarly, the executive director

expressed gratitude for our appreciation for his position. He was particularly appreciative of the opportunity to have direct contact with the family, and he was delighted to have saved his facility.

The focus of this article will, however, be on the grief associated with wrongful death cases resulting from sudden death. Such cases present unique challenges to the survivors, their counsel, defense counsel, in-house counsel, adjusters and mediators.

Many survivors, heartbroken by their loss, feel re-victimized by a legal system that appears to make little sense.⁵ Knowledgeable and effective defense counsel find a respectful and sincere way to acknowledge the survivor and their special issues.

Grieving in the Context of a Sudden Wrongful Death

In an unanticipated grief, you are unable to grasp the full implications of the loss. Your adaptive capabilities are seriously assaulted...and the death may continue to seem inexplicable.⁶

Where a claimant has lost a loved one to a sudden and dramatic death, all professional participants must have some basic empathy and compassion and at least a modest understanding of the grieving process. Primary responsibility rests with the plaintiff's counsel to determine whether his client and the case itself are ready for mediation. It is our view that the plaintiff's counsel must give wrongful death claimants special attention and do their best to prepare their case and their client for the

mediation process. The plaintiff's counsel can add to their client's pain, when they bring them to a mediation with unrealistic expectations about the value of the case and with unrealistic expectations about the defendant's willingness, in the context of litigation, to accept responsibility or to offer an apology or to fully acknowledge the loss. The plaintiff's counsel should know whether the survivors had pastoral and/or professional grief counseling, what sort of support system they have put into place and where the survivors are in their grieving process. This information will allow the plaintiff's counsel in determining if the plaintiff is ready for mediation, who should be at the mediation and how the mediation should be conducted. Jamie Harris Lord speaks of the stages of grief.⁷ Lord refers to Elizabeth Kubler-Ross' famous formula of grief stages as (1) denial, (2) anger, (3) bargaining, (4) depression and (5) acceptance.⁸ More specifically directed to crime victimization is the grief process referenced by Marton Bard and Dawn Sangrey. They refer to (1) initial disorganization/shock, (2) struggle/recoil and (3) readjustment.⁹ Dr. Therese A. Rando, acknowledged as America's finest grief researcher, is noted to speak of three stages of grief: (1) avoidance, (2) confrontation and (3) accommodation.¹⁰

Rando points out that the difference between a sudden death and an anticipated death "is not in the amount of pain that the survivor suffers, but in its impact it has upon that person's ability to cope and to go about the rest of her life."¹¹ In a sudden death, preparation and comprehension are missing.¹² Rando emphasizes that with a sudden death there is a destruction of the world as you know it, that is no gradual a transition. There is no time to make changes in yourself, and there is no ability to change your expectations about your life or your world.¹³ With a sudden death, survivors are called upon to face a world as it abruptly is, versus a

world as it should be. Professionals dealing with wrongful death cases need to be appreciative of this dynamic as survivors try to turn the clock back, ask "what if," look for answers and seek a target for their anger.

After a sudden death, the loss doesn't make sense. The critically important understanding of what happens is missing... We cannot comprehend what has transpired.¹⁴

The sudden arbitrary inexplicable loss of a loved one leaves the survivor like a small boat caught in a sudden tsunami of emotions. A safe shore is hard to find and the professional mediating these wrongful death cases must be prepared to deal with and acknowledge these emotions.

Numbness/Denial/Disorganization

*Your loved one has died.
You are unprepared.*

*The death has struck like
A tidal wave.
You are cut loose from your moorings.
You are all but drowning in the
Sea of your private sorrow.
The person who has been part
Of your life is gone forever.*

*It is final, irrevocable.
Part of you has died.*¹⁵

How did this happen? Why did it happen? Did it have to happen? How could it have been avoided? Can we replay that split second that has caused my loved one's death and my searing and incomprehensible pain? These are questions that the survivor, with the counseling of her attorney and her support network, must deal with before the mediation to enhance the likelihood of resolution at mediation.

Fear and Vulnerability

In an effort to gain some control and understanding over what often appears to be a meaningless, unmanageable event (the survivors) may repeatedly review the death trying to make sense of it.¹⁶

Suddenly without warning mortality slaps survivors in the face. They may feel "anxious, fearful and powerless."¹⁷ Fear and vulnerability may occur when there is a massive accident with deaths of loved ones and survivors with both physical injuries and emotional scars. An example of this would be a case that our office mediated involving a tractor trailer that jackknifed across an icy windblown highway wiping out two SUV's and some family members, decapitating a mom and severely injuring other family members.

Fear and vulnerability may occur in the context of the bewildering loss of a child when a physician unaccountably delays coming to the hospital, despite the pleas of nurses and parents. Fear and vulnerability may capture and ensnare a survivor. It may freeze the survivor like a deer caught in the headlights of a car unable to decide what to do. Counsel and mediators must be prepared to assist in getting the survivor to make reasoned decisions that enable them to get to a safe place.

Anger

You [the survivor] may be surprised at the intensity of the anger you feel for the person who killed your loved one. The more senseless (sic) the act, the more angry (sic) you may feel. Some survivors do not feel angry, but most do, even to the point of rage.¹⁸

Survivors wish desperately for an explanation. As Sandra W. Gilbert describes in *Wrongful Death*, the explanation is often withheld in medical malpractice cases.¹⁹ An expression of remorse, acknowledgement or apology is often not forthcoming. The failure fuels the disquieting flames of anger and despair. Mrs. Gilbert lost her husband to routine prostrate surgery. Lack of answers followed by inconsistent information led her to file her lawsuit. Her book reflects that a sense of re-victimization was fueled by California's medical malpractice cap on a wrongful

death recovery to \$250,000.²⁰

Anger seems most intense when a survivor experiences a sudden loss without explanation.²¹ We find that anger can boil over when a parent second guesses him or herself about allowing a child to engage in a questionable activity. Frequently, this anger needs to be expressed at mediation because it just has not been allowed to complete its course. The plaintiff's anger has to be respected by all parties. Advocates and mediators must determine whether it is properly directed and what its expression may be on the survivors, the recipients of the anger and the overall mediation process.

When the loss is perceived as preventable and the survivors assume responsibility for the failure to prevent some activity, their anger is greater and more difficult to manage.²² Their anger may be both inner and outer directed with varying degrees of logical analysis. The sudden loss of a relationship and the loss of joint aspiration may cause a torrent of anger. Of all the stages of the grieving process, anger probably impacts litigation and mediation the most. Often, if someone asks a survivor whose anger is still unmanageable to make an evaluative decision about a settlement proposal, the survivor will react angrily. They will be upset with the offer no matter how "legally reasonable" it may be. Invariably, some of that anger will be directed at their own counsel, the mediator, the defense attorney and/ or the defendant. Given the survivor's anger, stress and emotional turmoil Lord,²³ suggests that survivors not make important decisions for at least one year following the death of a loved one. These factors mean that in some instances an early mediation simply will not work.

Loss of a Child

"...keep in mind that with the death of a child you not only have lost that particular child but also the specific hopes, dreams, experiences, fantasies and wishes you had for that child.

You have lost parts of yourself, parts of your partner, parts of your family and parts of your future. . ."²⁴

It does not seem to be the natural order of things for a child to die before his/her parents. No matter his or her age, a child always represents the future. Parents have a unique emotional attachment to their children. They are often the coach, the confidant, the companion, the comforter, the moral compass, the educator and the guidance counselor for his or her child. When a child is lost suddenly as the result of a wrongful death, a parent abruptly stops playing these roles. The music stops. Parents already feel guilty about failing to protect their child. Under such circumstances many jurisdictions, where we have practiced, such as Arizona, Wyoming, Utah, Nevada, New Mexico, California and Missouri allow juries to measure that loss without legislative limitation (except as medical malpractice caps on recovery apply).

Colorado, which follows the more restrictive model of wrongful death recovery, limits non-economic recovery in such circumstances. A grieving parent often sees this as a rebuke and as reinforcement of their often unjustified sense of guilt. We often hear such feelings expressed during caucuses, if not during the general sessions of mediation.

Loss of a Spouse

Depending upon your relationship you had in your marriage, the loss of your spouse is a major loss in your life. This is because the person with whom you have built and are living your life frequently plays a number of roles for you. This person may have been your friend, partner, confidant, lover, roommate, sounding-board, the person with whom you made decisions, with whom you set family policy and with whom you divided family labor and worked toward goals.²⁵

Your spouse helps you define the world and helps provide you with a sense of history. Your spouse helps set a

pattern of friendships and helps define your status in the community. Loneliness and loss of companionship typically accompany the loss of a spouse. In Colorado, the legislators measure this loss while in surrounding states juries do so. Regardless, of the particular statutory scheme, professionals must familiarize themselves with the psychological and sociological aspects of the loss of a spouse. In many instances knowledge of such factors will assist all parties in their case evaluation.

Conclusion

*What is-
What cannot be changed-
Must be accepted.*

Even though it may be the most difficult thing you have ever done, you must now face the reality!

The denial of tragedy is not mental health.

Mental health is the recognition of pain and the attempt to live with it.²⁶

Speaking of the accomplishments of a child, remembering shared times with a husband or a wife, reflecting on childhood escapades with a sibling – these are important parts of both the grieving process and the mediation process. The plaintiff's attorneys must have their clients ready for mediation. They must address both the emotional and financial expectations of their clients beforehand. The defense side may consider setting a tone and a process that fosters and encourages closure. First, would an empathetic approach warrant both an advance payment on the settlement and an early acknowledgement of loss? Second, can both pain and transactional costs be saved with a pre-litigation mediation and/or use of neutral damage experts? Third, can the defense team be respectful in advocating its analysis of the facts and the law? In any event, in such cases mediators must strive to build an intellectual, emotional, and, even, a spiritual connection to the grieving party.²⁷ Mediators need to increase their capacity for spiritual intervention, including intuition, empathy and subtle

awareness.²⁸ This does not mean imposing any spiritual practice.²⁹ It simply means being mindful of the grieving process, encouraging acknowledgement and respect, allowing the survivors to reach and/or express their feelings and emotions and allow for direct communication between the parties.³⁰ Often survivors want some outsider to have a glimpse of their grieving soul and to feel some of their pain. The outsider can be either the defendant or the mediator.

We understand that parents will never be the same after the loss of a child, that a spouse will not fit in the same way with old friends, that children would have a void with the loss of a parent, and that siblings will have lost a unique companion. We, as mediators cannot undo these losses. We can merely assist some people in talking about their loss, having it honored and acknowledged in an honest and objective forum.

Life is not fair.

You must find a way

To live with an unfair life –

To live without the one you loved.

*How to begin?*³¹

Mediation can provide an important forum not only for resolving the litigation; but also, for allowing the aggrieved to proceed with her emotional and spiritual healing. Although the loss is unfair it does help to have it acknowledged. As painful as the loss may be it to feel that a fair process has resulted in some measure of justice. Advocates and mediators alike have special roles to play in these tragic cases.

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Endnotes

- 1 JAMIE HARRIS LORD, NO TIME FOR GOODBYES, 44 (2002).
- 2 See generally, THERESE A. RANDO, PH.D., HOW TO GO ON LIVING WHEN SOMEONE YOU LOVE DIES, 25 (1988).
- 3 GARY FURLONG, THE CONFLICT RESOLUTION TOOLBOX: MODELS & MAPS FOR ANALYZING DIAGNOSING AND RESOLVING CONFLICT (2005).
- 4 See, *id.* at 217-248.
- 5 See generally, SANDRA A. GILBERT, WRONGFUL DEATH (1995).
- 6 *Id.* citing RANDO at 43.
- 7 LORD, *supra* note 1 at 34.
- 8 *Id.*
- 9 *Id.*
- 10 RANDO, *supra* note 2 at p19.
- 11 *Id.* at 89.
- 12 *Id.* at 90.
- 13 *Id.* at 90-91.
- 14 *Id.*
- 15 EARL A. GROLLMAN, LIVING WHEN A LOVED ONE HAS DIED, 2 (1987).
- 16 RANDO cited by GILBERT, *supra* note 5 at 80.
- 17 LORD, *supra* note 1 at 38.
- 18 *Id.* at 41.
- 19 GILBERT, *supra* note 5 at 18-25.
- 20 *Id.* at 25.
- 21 See LORD, *supra* note 1 at 58.
- 22 See, GILBERT *supra* note 5 at 46.
- 23 LORD *supra* note 1 at p51.
- 24 RANDO *supra* note 2 at p162.
- 25 *Id.* at p27.
- 26 GROLLMAN *supra* note 15 at 48.
- 27 See generally, KENNETH CLOKE, MEDIATING DANGEROUSLY, 117 (2002).
- 28 *Id.*
- 29 *Id.* at 118.
- 30 See generally, CLOKE *supra* note 27 at 117-118.
- 31 GROLLMAN *supra* note 15 at 63.

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