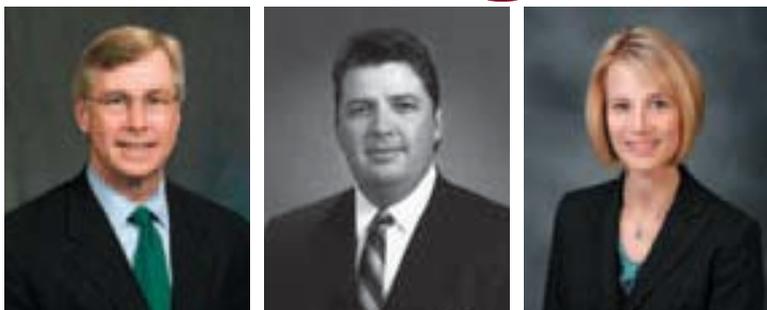


Georgia Wrongful Death Actions:

What's a Life Really Worth

An Update



BY JAMES E. BUTLER, JR., C. FREDERICK OVERBY, AND MARY K. WEEKS

In 1878, the Georgia Legislature pronounced that the measure of damages for a wrongful death should be “the full value of the life of the deceased, as shown by the evidence.”¹ Two elements comprise the “full value” of a decedent’s life under Georgia law: “The economic value of the deceased’s normal life expectancy and the intangible element incapable of exact proof.”² Although this measure has remained unchanged over the years,³ for a time, the recovery of “non-economic” damages in a wrongful death case was attacked by some as amounting to the recovery of “hedonic” damages.

Others took the more well-reasoned and progressive view that the very concept of “hedonic” damages actually undermined the sound judicial reasoning relating to the recovery of “non-economic” damages in wrongful death actions, which had long been employed by the Georgia Legislature and the courts. In response to the questions raised concerning the proper measure of damages in Georgia wrongful death actions, Fred Overby and Jim Butler wrote a 1991 law review article explaining the historical and philosophical bases for Georgia’s wrongful death statute and emphasized the importance of the non-economic component of wrongful death damages.⁴

This article is intended to update and supplement that law review article by addressing post-1991 Georgia cases pertaining to the damages recoverable under Georgia’s wrongful death statute as well as several post-1991 developments regarding the calculation of pre-death pain and suffering damages that may be awarded to the decedent’s estate.

1. Calculation of Wrongful Death Damages

Understanding and illustrating the value of each of the components of the measure of damages is key to maximizing recovery for the plaintiffs in a wrongful death action. The most obvious component of damage is the “economic component” of a decedent’s losses that “reflects the projected value of the decedent’s probable future earnings or services that have an economically determinable value.”⁵ Such losses can consist of “those items having a proven monetary value, such as lost potential lifetime earnings, income, or services, reduced to present cash value.”⁶ In addition to such proof of “actual earnings,” “the decedent’s income from a pension, retirement plan payments, social security benefits, and other receipts of like nature” may be considered by jurors in determining an award of economic damages.⁷ The Georgia Court of Appeals has also clarified that jurors may consider evidence that the decedent received disability benefits, despite a defense argument that such benefits are “unrelated to services rendered by the decedent.”⁸

When the decedent is a child, temporarily unemployed, or does not work outside the home, the economic damages calculation becomes more difficult.⁹ Case law on this issue is relatively scarce, but it appears the prevailing standard is that the valuation of *any* human life must be “established by the enlightened conscience of an impartial jury as applied to the evidence in the case.”¹⁰ For example, an adult decedent’s voluntary abstinence from work is just “one of many relevant factors a jury may consider in determining the economic value of a decedent.”¹¹ Other factors that a

jury could consider include the age and health of the decedent, his occupation and surroundings, his habits, “dullness in business,” and increased infirmity with age (and corresponding reduction in earning capacity).¹² Expert testimony can also be used to establish the future earnings potential or value of services of an unemployed adult, stay-at-home parent, or the like.¹³ When the decedent is a child, Georgia courts have approved the consideration of factors which include the child’s age, life expectancy, precocity, health, mental and physical development, and family circumstances.¹⁴ Evidence of the value of a child’s life can also be presented by an expert in economic valuation.¹⁵

The more important component of damages in a wrongful death case, however, is the “non-economic” value of the decedent’s life *to herself*, as though she had lived. Although there have been somewhat confusing appellate court decisions from time to time since Georgia first specified a measure for wrongful death damages in 1878,¹⁶ it cannot now be doubted that the measure of damages espoused in the referenced 1991 law review article is the correct one: A “jury is not restricted to ‘adding up the paychecks’ to calculate the *full* value of a decedent’s life. The jury can award damages in a wrongful death case to compensate for the intangible component of a decedent’s life, even though that component is not capable of exact proof.”¹⁷

Good reasons exist for Georgia’s approach to non-economic damages in wrongful death cases:

While Georgia’s courts have held that the major purpose of the wrongful death action is to compensate, for deterrence purposes, they have also sanctioned the public policy goal of extracting a civil penalty from a defendant who negligently causes a homicide. Because of this public policy, exact compensation for economic loss is not a goal of the wrongful death statute. If the measure of damages in a wrongful death case were limited to pecuniary loss, the cost to the tortfeasor might be too low to deter negligent homicides. This result would thwart the public policy of encouraging safety through deterrence.

...

Most citizens expect to be measured in life and in death, not by who they are or how much they have, but by what they are and what they do during their lifetimes. By awarding damages for the loss of the ability to live and enjoy life’s activities, Georgia law permits recovery for the true *full* value of human life.¹⁸

Georgia’s measure of non-economic damages thus “comports with the Judeo-Christian philosophy prevalent in western civilization that each individual life is valuable, if only to the person living it.”¹⁹

While it is certainly true that the “non-economic” value of a person’s life is something “whose value cannot be precisely quantified,” it nonetheless must be based upon “the enlightened conscience of the jury.”²⁰ Because such damages are, by their very nature, incapable of exact proof, it becomes the task of the plaintiff’s counsel to educate the jury about the full value of the decedent’s life.²¹ The scope of evidence admissible to demonstrate the value of something so intangible is as broad as the basis

for such damages. It is important for the plaintiff’s counsel to remember, however, that while “[t]wo-dimensional evidence, such as photographs and mementos, are essential . . . spoken words remain the true currency of the courtroom.”²² Thus, “[t]he testimony of those who knew the decedent is the highest and best evidence of what life meant to the decedent.”²³

It is equally important for the plaintiff’s counsel to remember that damages in a wrongful death case “are measured from the decedent’s point of view.”²⁴ The importance of measuring non-economic damages from the perspective of the decedent is readily apparent from the 2002 decision of the Georgia Court of Appeals in *Brock v. Wedincamp*. The defendant in that case sought to admit evidence that the decedent had experienced five pregnancies out of wedlock, some of which ended in abortion or adoption.²⁵ After a detailed analysis of the development of wrongful death damages law in Georgia, the court reaffirmed that under Georgia’s wrongful death framework, “the measure of damages is not a son’s loss from his mother’s absence, but the mother’s loss from not being able to raise her son.”²⁶

Thus, when viewed from the proper perspective, “evidence that the decedent had one abortion before the birth of her son and one abortion and two full-term pregnancies after his birth is not relevant to show the decedent’s loss to herself of her opportunity to be a parent to the son who survived her.”²⁷ The court concluded that “[t]he defendants want to unfairly devalue the decedent’s life to the jury by focusing on her sex life and sex partners, evidence that is irrelevant to the value of her life to herself. This course of action cannot be condoned.”²⁸ The court also noted that the wrongful death statute “is penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause is vested,” and it deemed that fact important to its rejection of defendants’ attempt to introduce evidence in a wholesale attack upon the decedent’s character.²⁹

Based on the foregoing principles, Georgia courts since 1991 have found the following categories of evidence irrelevant to establishing the value of the decedent’s life *to the decedent*, or otherwise more prejudicial than probative: (1) anecdotal evidence of drug or alcohol use;³⁰ (2) evidence of the criminal history of the decedent’s family;³¹ (3) evidence of the decedent’s marital or family difficulties;³² and (4) evidence of other potentially inflammatory aspects of a decedent’s life, such as the decedent’s sex life, infidelity, and pregnancy history.³³

It almost goes without saying that “[l]ife has more meaning and value to the individual living it than the mere ability to work and earn pay.”³⁴ Accordingly, “just compensation” for the *full* value of the decedent’s life necessarily includes recovery for economic losses as well as “the more important elements of non-economic and intangible loss caused by premature death.”³⁵

2. Calculation of Pre-Death Pain and Suffering Damages

Full representation of the survivors also requires close analysis of claims which may be available to the estate of the decedent, such as those for pain and suffering. Under Georgia

law, damages for pain and suffering by the decedent while still in life are wholly separate and apart from damages recoverable under Georgia's wrongful death statute.³⁶ But such damages are important, and they can even enhance the damages presentation of the separate category of damages related solely to the wrongful death aspect of the case. Accordingly, such pre-death pain and suffering damages should be sought in appropriate cases where a sufficient factual basis exists to claim them. Otherwise a lack of full compensation may result.

The measure of pain and suffering damages is simply "the enlightened conscience of impartial jurors."³⁷ It is clear that under Georgia law, there must be *some* evidence of pre-death pain and suffering in order for the jury to award such damages to the decedent's estate.³⁸ Such evidence can be narrowly tailored to the particular circumstances of the decedent, however.³⁹ Recovery of pain and suffering damages is not limited to circumstances in which the decedent survived and consciously experienced pain and suffering after a physical injury.⁴⁰ In *Monk v. Dial*, for example, the evidence suggested that while the decedent was killed instantaneously when his vehicle was struck by a tractor-trailer, the decedent had swerved to avoid the wreck.⁴¹ From this evidence, the court held that the jury could have inferred that the "decedent was aware of the impending crash, and from these circumstances could extrapolate the probable mental state of [the] decedent in that last moment of consciousness."⁴²

The distinction between the wrongful death and estate claims must be made clear in any jury verdict based, at least in part, on pre-death pain and suffering. In *Georgia Osteopathic Hospital, Inc. v. O'Neal*, for example, the Georgia Court of Appeals granted the hospital's motion for a new trial where the jury returned a \$550,000 lump-sum verdict for the plaintiffs, decedent's children.⁴³ Plaintiffs had originally brought a claim for the decedent's pre-death pain and suffering; however, plaintiffs failed to have an administrator or executor appointed to represent the decedent's estate.⁴⁴ Although plaintiffs ultimately acknowledged that they could not recover for the decedent's pain and suffering as part of the wrongful death claim itself, the court of appeals found it impossible to tell from the lump-sum verdict whether the jury had erroneously included pre-death pain and suffering damages in the recovery.⁴⁵ The court held that this ambiguity required a new trial.⁴⁶

3. Challenges to Damages Awards

Generally, an award of damages in a wrongful death case cannot be successfully attacked on appeal unless it is so flagrantly excessive or inadequate, in the light of the evidence, as to create a clear implication of bias, prejudice or gross mistake on the part of the jurors. Even though the evidence is such as to authorize a greater or lesser award than that actually made, the appellate court will not disturb it unless it is so flagrant as to "shock the conscience."⁴⁷

In addition, "the trial court's approval of the verdict creates a presumption of correctness that will not be disturbed absent compelling evidence," and all evidence is construed in the light

most favorable to the prevailing party following a verdict.⁴⁸ Accordingly, the appellate courts have generally upheld verdicts so long as there was *some* evidence upon which a jury could base an award for a loss of the intangible aspects of a decedent's life.⁴⁹

Of course, this deference to the jury's verdict cuts both ways. The standard for setting aside a verdict believed to be inadequate has been described as "*extremely high*."⁵⁰ Despite this standard, however, at least one post-1991 court of appeals decision set aside a wrongful death verdict as inadequate.⁵¹ Where a verdict is apparently inconsistent or contradictory, the trial court should typically "use its traditional powers to grant a motion for new trial on liability and damages" rather than modify such a verdict via its power of additur.⁵²

4. Final Thoughts

It is by now clear that under Georgia law, the "full value" of a person's life is not calculated by merely adding up the missing future paychecks, and this value must be measured from the perspective of the decedent. To adequately present wrongful death cases, plaintiffs' advocates must not only fully understand and explore each component of the claims available to the survivors, but they must also always remain mindful of the philosophical underpinnings of Georgia's wrongful death framework. ●

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References

- ¹ See *Thompson v. Watson*, 186 Ga. 396, 398, 197 S.E. 774, 775 (1938), *disapproved of on other grounds* by *Walden v. Coleman*, 217 Ga. 599, 124 S.E.2d 265 (1962); see also O.C.G.A. § 51-4-1(1) ("Full value of the life of the decedent, as shown by the evidence" means the full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived.").
- ² *Miller v. Jenkins*, 201 Ga. App. 825, 826, 412 S.E.2d 555, 556 (1991).
- ³ See, e.g., *Brock v. Wedincamp*, 253 Ga. App. 275, 277, 558 S.E.2d 836, 839 (2002).
- ⁴ See C. Frederick Overby & James E. Butler, Jr., *What's a Human Life Really Worth? Recovering Damages for Decedents' Non-Economic Losses in Georgia Wrongful Death Actions*, 7 Ga. St. U. L. Rev. 439 (1991).
- ⁵ Overby & Butler, *supra*, at 440.
- ⁶ *Consol. Freightways Corp. of Del. v. Futrell*, 201 Ga. App. 233, 233, 410 S.E.2d 751, 752 (1991).
- ⁷ *Id.* (internal quotation marks omitted).
- ⁸ *Id.* at 233-34, 410 S.E.2d at 753 (finding that veteran's benefits paid to decedent "constitute readily provable income of the decedent which ceased because of his death").
- ⁹ See, e.g., *Williams v. Worsley*, 235 Ga. App. 806, 808, 510 S.E.2d 46, 49 (1998) (noting that the difficulty inherent in calculating the value of a human life is "necessarily compounded when a jury must place a value on the life of a