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"Mr. Hall and Ms. Tecala have given advice that all lawyers should appreciate in dealing with loss (and, of course, serious injury). I expected nothing less than a jewel from Bob Hall. Forty-eight years of practice in this area of the law reveals that Mr. Hall and Ms. Tecala have shared with us a real diamond mine."

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past president of the International Academy of Trial Lawyers, listed in *The Best Lawyers in America* since 1983, fellow of the American College of Trial Lawyers

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"Finally, a book that will help two disciplines—attorneys and mental health professionals—understand one another in the work that they do for clients in grief. This is a book that I will read and reread as it becomes an important part of my library, as I hope it does yours."

—Bruce Buchanan, ACSW, LISW, BCD
past president of the Association of Social Work Boards

"This is one amazing book! Many professionals give lip service to interdisciplinary collaboration. Hall and Tecala present a perfect model of how attorneys and mental health professionals can work together to help meet the needs of the client involved in the judicial system … This is simply must-reading."

—Steven Walfish, Ph.D.
licensed psychologist, Atlanta, and co-author of
Financial Success in Mental Health Practice

Every trial lawyer who has a client involved in a legal action following the loss of a loved one will benefit from reading this book. The book is not only understandable, it is written with compassion and sensitivity. Over and over, the cases described make it clear how this psychological material directly applies to trial law, making it invaluable preparation for mental health professionals in situations that may go to court.

—Donna DeAngelis, LICSW, ACSW
NASW Diplomate in Clinical Social Work

Grief and Loss

Identifying and Proving Damages in Wrongful Death Cases

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Identifying and Proving Damages in Wrongful Death Cases

By Robert T. Hall
and
Mila Ruiz Tecala

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To the families who selected me
to share their life's darkest hours,
and to my wife, Sally.

—Robert T. Hall

To my sons, Raoul and Christopher,
the lights of my life.

—Mila Ruiz Tecala

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Acknowledgments

To the families who selected me to share their life's darkest hours, I dedicate this book. Within their losses were reflections of their love, affection, warmth, and care for the life now stilled, and concern for those who lived on. Their stories were a special, sad reminder that all lives are important. They spoke of regrets for words left unsaid, and in doing so made me, I hope, a better husband and father.

This book is also dedicated to my wife, Sally. She helped me carry the burdens of this profession by crying with me when their stories broke down the barricades we had erected as protection against other people's pain, and we cried often.

For their contributions to the downloadable content that accompanies this book I would like to acknowledge my good friends —fine trial lawyers all—for sharing their summations: Jeffrey Breit of Norfolk, Virginia; Tommy Malone of Atlanta, Georgia; Chris Searcy of West Palm Beach, Florida; Mary Lynn Tate of Abingdon, Virginia; and Tom Albro of Charlottesville, Virginia. For sharing his Memoran-dum of Law in Opposition to the Defendants Motion to Preclude a Grief Therapist as Expert Witness, my colleague and walking legal encyclopedia, Roger Creager, and for sharing his direct examination of surviving family members in a verdict just returned (November, 2009), Greg Webb, whose sensitivity to the needs of his clients connected them to jurors in a way which produced the largest non-economic damages verdict in the history of our Commonwealth.

—Robert T. Hall

I would like to thank all of my patients of the last forty years for sharing their pain and suffering in the darkest moments of their lives. They have taught me a lot about grief and mourning and I hope that in some small way I have helped them rebuild their lives. I also would like to thank Robert, my co-author, for being my mentor of this complex legal system. I hope that together we have educated lawyers, judges, and jurors about the complications of the grieving process.

—Mila Ruiz Tecala

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Preface

Arnold[1] was nineteen when he died, the victim of a hit-and-run driver.

He dropped out of school at age sixteen after months of skipped classes, failing grades, recreational drug use, a diagnosis of alcoholism, and jail time for shoplifting.

One night, walking home from a bar (where he was too young to drink legally), on foot because his driver's license had been suspended, he was struck by something. His body was found lying on the bank of a hill next to the road. Several days later, the driver of a delivery truck sporting a badly damaged right-side mirror—the commercial kind—was arrested and charged with leaving the scene of an accident with injury, a felony. At autopsy, Arnold's injuries were consistent with a mirror strike. A forensic analysis confirmed

1. All of the deceased and bereaved people mentioned in this book are real people in real cases. We changed their names and, as necessary, some circumstances to afford them their privacy. As you read about Arnold, you'll appreciate why.

that the mirror caused these injuries, based on analysis of the tissues and fibers found on it.

His mother and father sat across the conference room table from us. They were older than we had expected. Arnold, in the vernacular, had been a bonus baby. The parents had other, older children who had done well in life, but Arnold had been their problem child from his teens. His blood alcohol level on autopsy was merely consistent with expectations. He had been intoxicated when killed.

Did the delivery truck hit him in the travel lane, or on the shoulder? If the truck hit him on the shoulder, how far was he from the edge of the roadway? We explored this question with the parents, but they could contribute little. The police had told them that the prosecutor had decided only to charge the defendant with leaving the scene of an accident with injury rather than manslaughter because of his concern about that very issue. Addressing Virginia's doctrine of contributory negligence, we explained how easily we could lose the case, but assured them that risk would not prevent us from making a detailed assessment of the claim's strengths and weaknesses.

The mere mention of weaknesses provided a natural bridge for me to raise a question that troubled me: how the history of Arnold's misbehavior might have an impact on their recoverable damages.

In a clinical way, which I later learned had been insensitive, I explored with them what I then considered the realities of this claim. Hadn't the last six years of their life been a form of living hell, one loaded with frustration, failed hopes, and a sadness that washed over them in waves as he disappointed them time and time again? Didn't his death put those dark times behind them?

Each mention of his shortcomings, his broken promises, and his growing alienation seemed to drive them into deeper despair. At the time, I wrote off their burgeoning sorrow as an acute exacerbation of the trauma of his loss. I mistakenly believed it would quickly resolve as their lives returned to a normalcy that had evaded them during the tumultuous preceding years.

My words unintentionally echoed those of visitors at the funeral home, neighbors at the home after the services, other family

members, and even their pastor. While I had thought I had been gathering evidence and reality-testing a lawsuit, others had used similar themes to try to bring the parents comfort. Independently, we compounded their suffering. I was seduced by the myths of grief and out of touch with its realities.

In one particularly sad exchange, I asked them if they had saved the clothes Arnold was wearing that night. They were still in the bag of Arnold's belongings that the hospital personnel in the emergency department handed to Arnold's father. "Please bring them in," I said, hoping Arnold had worn light-colored clothes that night. He had not, but something on his shoes caught my attention. The sole of the right shoe exhibited rotational striations. An expert later concluded from the material imbedded in the sole striations that Arnold had been walking on the gravel shoulder, not the paved asphalt.

In those years my fascination, even fixation, with proving liability came at the expense of full assessment of the non-economic damages. I labored under the illusion, as I suspect many of my colleagues still do, that I could prove the non-economic losses merely by putting the survivors on the stand. I lacked the curiosity and intellectual rigor to pursue an obvious question: why were his parents in such distress losing this going-nowhere, troublesome kid? Why did their suffering seem proportional to the number of times we discussed his misbehavior? Arnold's death was stigmatized (for more information on stigmatized deaths, see Chapter 9), but the constellation of losses stigmatized deaths may trigger was outside my body of knowledge until I met my co-author.

Learning about Death and Grieving

My colleague Mila Tecala and I set out to write a "how to" book for trial attorneys who represent family members following a wrongful death. Somewhere in the process, I got caught up in some of the lessons of thanatology. This is the relatively new science that studies how people respond to death and dying, whether their own impending death or the impending or actual death of a loved one.

The resulting book is not a traditional "how to" book, yet I don't think it will disappoint. It describes new categories of non-economic death losses, new ways to identify and prove all elements of a survivor's death loss, as well as new ways of thinking about and discussing these losses with our clients and our juries. It also suggests that by becoming more sensitive to the nature, intensity, and duration of these losses, we can contribute to our clients' mental health. Bereavement and grief reactions can become chronic and disabling. Clinical depression and death may result. Immersed in their bereavement reactions, we are uniquely positioned to get our clients the help they need.

Having said that, a number of my wrongful death clients have resisted mental health referrals. In their words, they were concerned by the stigma of "seeing a shrink," troubled by the expense and whether it was covered by their insurance, or had persuaded themselves they were "doing just fine." Over the years, my clients who had the greatest resistance to seeking professional help were the ones at the greatest risk of long-term injury from unresolved issues of their bereavement.

I think you'll find that this book adds more body and context to words and phrases with which we think we are already familiar. By the end of this book, I hope you will no longer consider *grief* as a subdivision of mental anguish, but instead see it as a separate composite of losses of enormous complexity, linked to all facets of a survivor's daily life.

If more adequate verdicts follow the reading of this book because trial counsel now appreciates the warp and weave of non-economic death losses, and understands how to communicate these losses to a jury, then, I suppose, it will be deemed a successful "how to" book. But, I hope to make the point that we should consider verdicts that are more adequate a by-product, not an end point, of our efforts. The book is about the journey, not the destination. It is about individual and family migrations through the process of grief. It is about how individual family members and the family as a unit process the losses.

Although oriented towards a trial attorney readership, my co-author, a clinical social worker specializing in grief therapy,[2] and I aspire to a broader audience. We hope that in reading this book, our professional colleagues and staff will become more aware of our clients' unspoken needs, and will treat them with a new sensitivity and compassion. We hope that our adversary counsel and their staff, while vigorous in defending their claims, will resist the instinct to exploit our clients' vulnerabilities. We hope that our judges, burdened by a busy docket, will find a reservoir of patience to deal with death's unsettling course. We hope that mental health professionals who treat our clients will prepare them to speak of their pain and prepare them for the rigors and uncertainties of trial.

Who knows? Perhaps even future jurors may chance upon this book and learn to recognize and discard the common myths about grieving that otherwise cast a long shadow over the evidence.

An Evolving Approach

When a wrongful death claim arrives at your office, you might first inquire: is there provable fault that caused the death? As trial lawyers, this is a natural place to start. However, we historically have become so fixated on developing the evidence of liability we have left the damages, particularly the non-economic damages, off our radar screens until much later in the case. Until the mid-1980s, I generally worked to bring the proof of liability within my comfort zone, then developed the case for economic loss and worked it into shape for trial before turning my attention to the non-economic losses. Burdened, until that time, with an inadequate knowledge of the grieving process, my trial preparation then tended to be formulaic and short. "Tell me—how has your loved one's death affected you?" In the material that follows I will describe the myriad ways in

2. My co-author, Mila Tecala, is a Licensed Clinical Social Worker (LICSW). I refer to her as a grief therapist for the rest of the book. People of many different disciplines in mental health care can be experienced grief therapists.

which that approach is woefully inadequate, and probably beneath contemporary standards of care.

In the mid-1980s, I met my co-author, Mila Tecala, then the treating grief therapist for a family I was representing in a wrongful death claim. Their seventeen-year-old daughter and sister, Diane, had been thrown from a Jeep during a rollover accident. By the time the helicopter arrived at the hospital she was dead. She left a father, mother, and younger brother.

I had been in practice for twenty years and had yet to encounter a grief therapist either as a treating mental health professional or as an expert witness. I wasn't certain what to expect when I drove into Washington, D.C., to meet with her for the first time.

On the drive in from my Virginia office, I ruminated. Why had this family sought the aid of a grief therapist? What couldn't they address and resolve without a therapist's intervention? What did a grief therapist bring to the legal process that the survivors couldn't describe by themselves? Was their work with her one of convenience or necessity?

Her office was not unlike that of other mental health professionals I had interviewed. The comfortable couch and chairs reminded me that the mode of diagnosis and treatment was talk. The smattering of stuffed animals indicated that she had some children as patients.

At that time, civil injury litigators generally reserved the use of mental health professionals for cases of brain injury or physical injuries so severe that psychic injury followed. While this mother, father, and brother had suffered a loss, they hadn't been physically injured, hadn't witnessed the death, and hadn't been in the zone of danger.

While not unheard of in the mid-1980s, grief therapists were relatively rare. I could find no case in which one had testified as a witness, either at deposition or trial. Death, after all, comes to all families, and the process of grieving was rather well known, or so I thought. Couldn't the survivors adequately describe how this death was affecting them? Did we need a grief therapist to prove damages for loss of solace and companionship, mental anguish, and the

myriad other terms by which the components of non-economic loss were described? Would the court even allow her to testify as an expert?

My meetings with Ms. Tecala caused an epiphany over time, one that many of my colleagues now share. My colleagues and numerous judges first approached the prospect of expert grief therapy testimony as I had—with reservations. My relationship with Ms. Tecala took time to evolve. She was as suspicious of our role in death cases as I was ambivalent about hers.

The book that follows is a collaborative effort—between the two of us and our professions. Eventually, admiration supplanted wariness, and Ms. Tecala's exposure to the legal system allayed her concerns. Our eventual trust was not instantaneous.

Until I immersed myself more deeply in the science of grief and loss, I had no idea that grieving involved a process that was transparent neither to the observer nor the bereaved. I did not know how that process might change over time, or how the legal system might interconnect with that process in a harmful way and exacerbate grief. Ms. Tecala, in turn, was concerned that the legal system might be an impediment to her patients' progress towards acceptance of their loss, and its focus on monetary compensation would be a potentially dangerous diversion. What might be the message and consequences to family members if we lost the case or the verdict was low?

Until our meeting and work together, I was also insensitive to an important issue—that a death *in* the family is a death *of* that family as it was then constituted. The death of the existing family unit can generate anger, misunderstandings, tension, and confusion as its members try to construct a new family unit out of the ashes of the old. When mixed with sorrow, the emotional load may drive the family apart rather than bring it together.

In addition, I was not attuned to the fact that family members grieve in different ways and on different timetables. The lack of synchronicity in a family's grieving can produce a potent, potentially toxic mix of emotions that can derail the legal process and complicate the grief therapist's treatment. Ms. Tecala's perspective

might be quite different than mine. What appeared to me as a potentially irreconcilable conflict between the various survivors, all of whom I had represented up to that point, might appear to the grief therapist as a familiar family crisis that she can help work out during treatment. The grief therapist became an important ally, helping me sort out when a conflict was real and irreconcilable, and when it was transitory and solvable. It is one of many roles she has played in the cases that followed.

What began as a relationship of mutual wariness has become one of mutual respect. I extend my thanks to Mila Tecala, for teaching me, training me, and allowing me to pass off what limited knowledge I have on the subject of grief and loss as my own. In reality, I am only a legal filter for her abundant wisdom on human suffering, and for how we can help ameliorate that suffering.

The Grieving Client

Before we get started, let me mention three matters that concern me about what we do and how we do it. Can we ameliorate our clients' suffering? I contend that yes, we can in three ways:

- Therapeutic jurisprudence
- Being aware of your clients' emotional needs
- Learning to use the language of grieving

Therapeutic Jurisprudence

The first matter that concerns me about what we do as trial lawyers is contained in an interesting article in a 2006 edition of the *John Marshall Law Review*.[3] This article dealt with *therapeutic jurisprudence,* a concept so new that at first reading it seemed novel and so contrary to existing practices that it would be easy to dismiss. The author used Dostoyevsky's *Crime and Punishment* as her vehicle.

3. Amy D. Ronner, *Dostoyevsky and the Therapeutic Jurisprudence Confession,* 40 No. 1, J. Marshall L. Rev., 41, 41–113 (Fall 2006) (discussing the concept of therapeutic jurisprudence).

What is therapeutic jurisprudence? Imagine a criminal practitioner considering whether to recommend that his client confess to the crime charged. He would recommend this because it would be better for the client in the long run—that it would aid his development as a person and bring him peace.

We must never lose sight of the curative power of forgiveness. Some bereaved may undertake a wrongful death case hoping to have closure at the end, but the results may disappoint. A defense verdict or an award that the client views as inadequate may reawaken earlier angers and sorrows. Even a fully "victorious" trial outcome may leave the bereaved feeling empty. I commend to you some of the more recent articles on the power of forgiveness—not as a biblical or religious concept—but as a vehicle for recognizing that human beings can elevate themselves above anger and vengeance. Through forgiveness, we acknowledge the human frailty, failings, weaknesses, and vulnerabilities of others—and in the process see some of ourselves in others.

In his book *Ripples from Peace Lake,* Eric Galton relates a mediation he conducted of a wrongful death claim.[4] An obstetrician/gynecologist, who had delivered three of a family's children, committed malpractice while delivering the fourth. The child died thirty minutes later. The hospital risk manager counseled the doctor not to talk to the family. The family's attorney counseled the family not to talk to the doctor. The family filed suit, discovery proceeded, and the matter ended up in mediation before trial.

After both sides agreed to a settlement, the doctor said to the mediator, Mr. Galton, "You know this doesn't really end it for me. I had hoped for more out of this today. I really need to talk with the family." In the other room, the bereaved mother was telling her lawyer, "I want to meet with *my* doctor." The mother and the doctor met without the attorneys present. The doctor broke down in tears and told the family how sorry he was. The mother embraced

4. Eric R. Galton, Ripples from Peace Lake 85 (Trafford Publishing Company 2004).

him and said, "I forgive you." Each found unexpected peace in this exchange.

Retributive justice can fail to bring peace even in the face of wildly violent behavior. Many who lost loved ones in the Murrah Building bombing in Oklahoma City waited anxiously for an end of the legal proceedings and the day Timothy McVeigh would be executed for the horrors he wrought on their families. Now, years after his execution, some seemed unsettled that "an eye for an eye" has brought them little comfort. Was it because the lethal injection seemed so sterile and painless compared to the way their loved ones died? Or, was it that with McVeigh, the answer to why he did such a thing also died? No advances in psychiatry or psychotropic medications will ever unlock that mystery now. For a few families, McVeigh's death produced a strong ambivalence. For the "system" to work, McVeigh's parents had to watch their child put to death.

Clients' Emotional Needs

The second matter that concerns me about what we do as trial lawyers is one I will reiterate with some frequency in this book. While we trial lawyers are not mental health diagnosticians or therapists, we can still be alert to our clients' emotional needs. While I strongly recommend early referrals to a qualified grief therapist, some clients don't want such a referral, misunderstand the purpose of a referral, or are just plainly not ready—perhaps because it's too painful to deal with the loss head-on. When we turn to the role of the grief therapist in Chapter 12, I hope you will appreciate how such a referral, whether made at the outset of the attorney-client relationship or later in your representation, may be a key ingredient to ameliorating your client's suffering. The referral may also be an enormous aid to your understanding of and resonance for their loss.

Doctors frequently recite how important it is for them to not get too close to their patients so they can maintain diagnostic objectivity. I'm not sure we have the luxury of distance. Nothing eases the pain of one bereaved more than our empathetic acceptance of their expressions of their sorrow.

Can we be empathetic and zealously pursue our client's interests? Is there a contradiction? I think not. We are communicators in wrongful death cases. We address jurors who come to the task reluctant to deal with someone else's grief and take it on as their own. Additionally, some of them come to the jury box convinced that our job is to manipulate them through emotional appeals for sympathy, and the judge will instruct them not to be guided by sympathy. An empathetic trial lawyer can build bridges of understanding and acceptance.

Don't get me wrong. As David Ball and Don Keenan so ably point out in *Reptile,*[5] we must first persuade the jury that the defendant violated a rule that had been adopted for the safety of all of us. That violation of the rule bore risks with it. One of those risks was death. The death of plaintiff's decedent was one of the harms that adherence to the rule would have avoided.

But once you establish violation of the rule and the risks that attend it, David and Don remind us to speak to the jury of the "harms and losses" that flowed to this family from the rule breaker's behavior. This book is all about the harms and losses that flow from an avoidable and unnecessary death. Who will be better able to communicate the variety, complexity, magnitude, and anticipated duration of these harms and losses than an attorney immersed as a participant in the family's suffering? Is that attorney better aided by the wise counsel of a qualified grief therapist, or by reading questions from a checklist in *Proof of Facts*? I don't need to offer an answer.

The Customary Language of Grieving

This brings me to my third matter of concern about what we do as trial lawyers. This point is important to our client relationship and the amelioration of our clients' suffering. Please, accept this proposition as a powerful truth for now. We cannot bring our client

5. David Ball and Don C. Keenan, Reptile: The 2009 Manual of the Plaintiff's Revolution (Balloon Press 2009).

comfort offering the customary bromides. We have no idea of the kind or level of suffering they are experiencing. Avoid saying, "I know what you must be going through!" You don't. Don't say it. Skip the religious intimations that she "has gone to a better place," or, "at last, he is at peace in the comfort of a loving God." Resist, "at last he has been released from his suffering."

We tend to speak these slogans because we don't know what else to say. They don't bring comfort. They are more likely to bring pain and anger, and interfere with your relationship. Your job is to listen, simply listen, with an attentive ear, an open mind, and a concerned manner. Later, we'll consider how these idioms of usage are reflected in the myths of grief and loss, and how our judges and jurors may have bought into them and repeat them during deliberations.

Above all else, please don't talk to the bereaved like a self-important lawyer, proud of your record of substantial awards. Most of the time when bereaved clients come to you, they are there because they are angry that their loved one has been taken from them. They want you to right a wrong. Money will only be of genuine concern at the early meetings if a wage earner has died and the survivors fear losing their home or not putting food on the table. Otherwise, money is only symbolic of their loss. For the future of the relationship, don't make promises you might not be able to keep. Avoid discussions about money—about verdicts, judgments, or settlements—unless asked. If the client asks prematurely, consider saying, "It's much too early. I need to know a great deal more about your loved one, to get to know him through your eyes."

I still cringe as I recall my co-counsel in a recent case telling the mother of a deceased baby, "We're going to get you a lot of money for this case." She felt dirtied by the comment. She wasn't there for money. She was there to make certain the hazard that took her baby's life was corrected, and corrected right away, so that such a loss didn't happen again to someone else. Later she took me aside and asked angrily, "How can he talk to me about blood money?"

Parents of deceased children have particular needs. They want to come out of their legal experience with a sense that they, by their

efforts, have made a difference in someone else's life. They want to know that they have made the community, the country, or the world a safer place by having a defective product recalled, new safety legislation adopted, streets and highways better signed or constructed, or the risks of drunk driving brought home to high school students. What better memorial can they erect to their son's or daughter's memory than the belief that another family has been spared their pain because of their efforts?

In the Chinese language, the word for *crisis* is spelled in two Chinese characters. One represents danger; the other opportunity. Start your representation with this goal: set out to right a wrong, and seize the opportunity to make the community a safer place.

Introduction

On Thursday, December 12, 1985, a chartered DC-8 plane was carrying 248 members of the 101st Airborne Division out of Fort Campbell, Kentucky, along with eight crew members.

The soldiers were returning home for Christmas from peacekeeping duties in the Middle East. It crashed during takeoff from Gander, Newfoundland, where it had stopped to refuel. All on board were killed.

Fourteen years later, in December 1999, Clarence Williams, a reporter for the *Washington Times,* tracked down some of the families. In Sydney Jennings's, home in Yonkers, New York, a Christmas tree, now denuded of its needles, stood bare over presents wrapped in faded holiday paper. "He told me to put up the Christmas tree because he was coming home," Mrs. Jennings told Williams. "I still have gifts that have never been opened." In addition, Mrs. Jennings had not cut her fingernails in those intervening fourteen years. They were longer than her hands and grotesque. She didn't care. Her nails and the unopened presents were her memorial to her son Todd and the others on the flight.

Another six years went by. Twenty years after the crash, in 2005, Zona Phillips, mother of another one of the soldiers on the Gander flight, was still searching for answers to what went wrong on that fateful day. She had rejected the official conclusion that the plane suffered icing problems that distorted the airfoil and the lifting capacity of its wings. She accused the United States and Canadian governments of a cover-up. Sabotage by Middle Eastern terrorists seemed a more likely explanation to her.

Forty years before the Newfoundland crash, on April 8, 1945, William Edwin Wells lost his life at age twenty-eight. He was a navigator in a bomber shot down over Germany, and his death was not confirmed until six weeks after his plane failed to return from its mission. He was my uncle, whom I barely knew. He went off to war when I was eight years old. When his remains were brought home, the family did not invite the young children to the services. The family did not talk much about his passing. By all reports, he was given "a hero's service and burial." While his mother and sisters (including his twin) mourned, life on the surface appeared normal. Grief was private. Many families at that time had lost a loved one. Others understood this kind of loss. Besides, Uncle Bill's death was a noble one. He had given his life for his country. The United States was on the winning side and Uncle Bill's family was very proud of his sacrifice. His was what the playwright Horton Foote called a soldier's "expected death," an ordinary risk of going off to war to fight for one's country.[1]

In 1985, two soldiers on the Gander flight had given their lives in service to their country, but their family members were still grieving years later. My uncle's family, on the surface, seemed at peace with his passing. Only recently, I learned of their inner turmoil, including a suicide which back then was thought unrelated to my uncle's death. These different faces of grief are at the core of this book: differences the law has, over time, come to recognize.

1. Horton Foote, 1988 interview with *Fresh Air* host Terry Gross.

Wrongful Death and the Evolution of Law

In 1846, the British Parliament enacted "Lord Campbell's Act." This act followed what was described as "an epidemic" of railroad deaths, including nine deaths and fifteen serious injuries in an accident at Sonning Cutting in 1841. The act allowed bereaved survivors to sue for damages for the wrongful death of a loved one.[2] Previously, recovery was limited to the physical damage to the deceased or his property.[3] In Scotland, it was possible to recover for loss of solatium, but in England, the law was construed to limit recovery to economic damages. People may now assert claims for bereavement in England, but those claims are limited in amount.[4]

The wrongful death laws of the fifty states have evolved, perhaps matured, to reflect a greater concern for death's intangible, but deeply personal losses. At this writing, more than forty states allow for the recovery of one or more elements of non-economic loss, such as grief, anguish, sorrow, pain and suffering, loss of solace and companionship, comfort, guidance, love, affection, society, kindly offices, advice, counsel, protection, security, and consortium.[5]

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2. LORD CAMPBELL'S ACT, 9 and 10 Vict. C. 93 (1846) (Eng.) "An Act for Compensating the Families of Persons Killed by Accidents" "Whereas, no action at law is now maintainable against a person who, by his wrongful act, neglect, or default may have caused the death of another person and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted… that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.
3. *Baker v. Bolton* (1808), 1 Camp 493, 170 ER 1033.
4. Administration of Justice Act, 1982, s.3 (Eng.).
5. See www.trialguides.com/resources/downloads/grief-and-loss for a discussion of the laws of all fifty states.

Of those forty states, the vast majority provide that the statutory survivors are the real parties in interest. Those people have suffered the loss, not the estate. This distinction is important. It shifts the emphasis from the value of the life lost to the magnitude of the losses each survivor sustains. It acknowledges the survivor's right to have been heavily invested in and deeply attached to a less-than-perfect human.[6]

Example: A Case from Moe Levine

Professor Charles Becton of Duke University uses this example. Arizona lawyer Dick Grand had this case in the 1960s and consulted Moe Levine about his proposed summation. Professor Becton recalls the story this way:

> Plaintiff's wife, a black woman in her sixties, was walking in the crosswalk when she was run down and killed by a City of Tucson Transit Authority Bus. There were several problems in the case. She was an alcoholic. The plaintiff, her surviving spouse, was in his sixties and he was an alcoholic. They had an estimated life expectancy, according to actuarial data, of eight years. They didn't just live on the wrong side of the tracks. They lived, literally, in a tar paper shack that they built next to the slaughter house by the rail tracks in Tucson. The area was an ugly, nasty, smelly, horrible place. Neither of them worked. Both were on Social Security Disability because of their acute alcoholism. They lived for the checks that came the first of each month. When they got their checks, they bought Mad Dog and Thunderbird—and they drank and

6. The Georgia "Wrongful Death" statute [GA St. 51-4-2] awards damages for the value of the life lost, not the loss sustained by the survivors *per se*, but the damages for the value of the life lost are payable to the spouse or spouse and children or parent.

> drank and drank. They would survive on beans and wine until the money ran out. Then they would survive on whatever they could scrounge from garbage cans. The Tucson Transit Authority offered the husband $10,000.

Moe Levine said, "Damages are not for what they take away from you. It's what they leave you with." He suggested the following argument:

> Members of the jury, the Transit Authority lawyer, a fine lawyer, says to you "Yes, we killed her. We don't deny it. But, she wasn't worth much. She was old." They don't say it—but it was true—she was black—she was an alcoholic. She was on Social Security Disability. She got nothing except her check at the first of the month.
>
> My client is old. He's an alcoholic. They don't say it, but it's true. He's black. He's on Social Security. He lives for the check. She was worth $10,000. Give the plaintiff $10,000.
>
> But, members of the jury, you have heard the testimony. She would come when he was sick—sick from the rotgut wine. And she would cradle his head. She would come, and when he threw up, she would clean it. When he wet his pants, she would clean them, and she would clean him. When the check came they celebrated. She cooked the beans that they ate, and they ate them together.
>
> And now, she's gone. Who will marry him now? Who will marry the man who sits before you today? Eight years of life. They say that's all she had, and that's all he would have shared with her. But those would be the last eight years of his life, members of the jury. What will they be like now?

> He will be alone. He will lie in his waste and his vomit. He will die without solace, without care, without love. The Transit Authority didn't take much from him. They just took everything he had, everything that mattered."[7]

Some statutes don't expressly provide for recovery of "grief." However, the term describes its constituent parts: anguish, sorrow, pain and suffering, loss of solace and companionship, the loss of the decedent's comfort, guidance, love, affection, society, kindly offices, advice, counsel, protection, security, and consortium. Of course, you must reference the statutes and case decisions in the jurisdiction whose substantive law applies to the claim. Each jurisdiction has numerous variations, including which survivors qualify to assert a claim and whether recoverable damages are capped.

Granted the right to seek recovery of non-economic damages, how well have we served our clients?

In the past twenty years, we have seen a remarkable growth in our understanding of how people handle their grief. However, a corresponding paradigm shift has not happened in the way we have prepared and tried wrongful death cases. In the 1960s, Elizabeth Kubler-Ross published her landmark book, *On Death and Dying*.[8] Since then, we have seen the development of academic curricula dealing with that subject,[9] and the development of grief counseling and grief therapy as recognized mental health specialties. We have become more aware of the complexities of grief and loss and its collateral consequences. For example, survivors, "at a higher rate than those who have not lost someone to death, die or kill themselves, or contract diseases, or have accidents, or

7. Retold with permission from Professor Charles Becton. A version of this story also appears in Moe Levine, Moe Levine on Advocacy 28–29 (Trial Guides 2009).

8. Elizabeth Kubler-Ross, On Death and Dying (Collier-Macmillan, Ltd. 1969).

9. A discipline called thanatology.

overindulge in smoking, drinking, drugs, or suffer from depression and various other psychological disturbances."[10]

Have we not kept pace in the legal profession because we have only understood these losses through the filter of our own experiences, and applied our personal templates and understanding? Have we limited our inquiry to the death's impact on individual survivors, but not the family as a unit? Have we not appreciated how a sudden, unexpected, traumatic death changes the equations of grief? Did we take the simple view? A family member died in an accident. His or her surviving family members grieved the loss, some more intensely than others. Some handled it better than others. After a few years, they all had seemed to move beyond the loss.

My family passed down these myths to me. While reassuring in their simplicity, these myths were not consonant with the death cases I was handling. I was not attuned to these myths until I met Mila Tecala.

Wrongful Death Is Different

The kinds of deaths that brought clients to my office bore no resemblance to those ended by old age, illness, or even war, which seemed to have a sort of naturalness to them. Even a war death was one the family could foresee.

Shortly after that DC-8 went down in Gander, Newfoundland, seventeen-year-old Diane died in the Jeep rollover. As Diane's family's case progressed, Mila showed me some of the distinguishing features of a death that was not natural or expected, and how the death's unnaturalness influenced the survivors' reactions and behavior. Particularly, she showed me how the death changed the relationships between all surviving family members. After a long gestation, I, with Mila's wise counsel and assistance, have birthed this book.

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10. Judith Viorst, Necessary Losses 281 (Fawcett Gold Medal–Ballantine Books 1989).

If you have lost a spouse, grandparents, parents, or perhaps a sibling in the natural course of life, your loss and your reactions to it will undoubtedly occupy a special place in your memories. However, you should not use these memories to measure your clients' losses. The sudden, unexpected, preventable death stands apart in the spectrum of the grief reactions it generates.

My first encounter with a grief therapist also awakened me to the fact that I had been missing broad constellations of losses. Focused on the direct loss ("and how did John's death affect you?"), I had been missing the question I should have asked: "What has been the impact of John's death on your relationship with other family members?" With Ms. Tecala's appearance came my awareness that a death *in* a family is a death *of* that family as it was then constituted. Many of the crushing, occasionally overwhelming features of grief relate to the difficulty of constructing a new family from what is left of the old.

The Dynamics of Grief

She also awakened me to how the dynamics of grief can be complex, contextual, and historical. Many factors surrounding a death can generate a matrix of interconnected losses. These losses may change over time but may not necessarily progress toward a resolution.

These factors can include:

- Cultural or religious variants of grieving.
- Unique connections between the deceased and individual survivors.
- Significant or symbolic events in the minutes, hours, or days before death.
- The manner of death (especially when survivors perceive it as preventable).
- Stigmatized deaths (AIDS, suicide, homicide).
- The degree of the defendant's culpability.
- The culpability that one or more survivors may experience.

- The concurrence of other losses.
- The importance of older unresolved losses.
- The interactions between the grief of one survivor and that of other survivors.
- The differing timetables and tasks of grieving for each survivor.
- How dependent is the survivor on the deceased for her own well-being (mental, physical, financial, psychological, and so on).

In addition, I learned that a survivor's grief, if it progressed, was not likely to progress in a linear fashion towards some resolution. And, *resolution* was an inappropriate term. Grief is not a disease with a cure. For the survivor, it reflects a loss for all time, which the survivor must learn to accommodate in order to function. *Acceptance,* too, is a difficult and perhaps misunderstood term because it implies the bereaved is comfortable with the death, and suggests that the survivors can and will forget the deceased. Necessary to acceptance, as grief therapists use the term, is the bereaved learning to relocate the deceased to another place in his or her life.

Grief is seldom rational and orderly. The survivor may see the deceased at the mall, only to disappear in the crowd. He may appear in dreams as though alive, provide guidance, or send signs from the beyond. The survivor may talk to him, leave the porch light on, or have his clothes ready for his return. A survivor may express anger at the deceased for dying, saying things like, "How could you do this to me?" and still be considered grieving normally. Part of your job as counsel will be to make the unnatural and irrational seem understandable, should it show up at deposition or trial. To do that, we'll consider the multiple roles a treating grief therapist may play as adviser to the court, the jury, and counsel as the therapist steers us through grief's maze.

Complicated Grieving

We'll also consider *complicated grieving,* a term that denotes that the grief has become abnormal. Disabling features usually

accompany this. These features often require further psychiatric assessment, perhaps medication and occasional hospitalization. In the process, we'll consider what factors may predispose survivors to complicated grief, what may be done to prevent them from progressing to that condition, and how to manage them if they do. This includes when to refer them to mental health professionals equipped to address their needs. You'll be of little help to clients who have developed clinical depression or symptoms of post-traumatic stress disorder if you haven't learned to recognize their need for assistance outside your specialty.

The Lawyer's Role in Grieving

We'll address a little-discussed feature of our legal work for the bereaved. When you agree to represent a grieving family, you become part of their grieving process. Where are they individually and collectively in the grieving process when you come on the scene? What are their expectations from the legal process? What might your introduction into their grieving process mean to the attorney-client relationship over time? You must learn to adopt the physician's maxim—first, do no harm. How might you harm your clients if you misunderstand their needs? We'll talk about it.

Myths of Grieving

We'll also talk briefly about the common myths about grief and grieving. These myths appear both in the context of what our jurors may be thinking, and how those myths, if our clients believe them, may impair the client's mental health and progress towards accommodating the loss.

Professional Problems in Death Cases

This book will also address some of the professional problems you may encounter in the preparation and trial of wrongful death cases, specifically as they relate to the recovery of non-economic damages. We'll try to identify the dangerous juror, the judge with an earlier

mind-set, and help you do some self-diagnosis of baggage you may bring to the process.

We'll consider what today's jurors may bring to the courtroom, and what may have influenced how receptive they are of the evidence you're about to offer. You'll learn that you first need to get their permission to talk with them about this loss. Will your jurors come to the task of hearing, analyzing, and determining the facts of your client's loss much as I did in the mid-1980s? I endeavored to fit the testimony about grief within the template of my own experience. Might they apply, *sub rosa,* a "reasonable and prudent griever" test, asking "how would I have handled this loss?" despite instructions on the law to the contrary?

Will the trial judge allow you to call a qualified grief therapist as an expert witness and counselor on the losses in the case? Will that therapist be able to help walk the jury through the uniqueness of sudden, unexpected, humanly caused deaths? A judge may hear a motion to preclude, and be predisposed to rule that the jurors will be just as conversant with grief and loss as an expert grief therapist. The judge may believe he has that same conversance. This book should help put that notion to rest, as both antiquated and scientifically unsupported.

In one of Virginia's busiest trial courts, Fairfax County Circuit Court Chief Judge F. Bruce Bach addressed this issue. From the bench, he overruled a motion to preclude the testimony of Ms. Tecala:

> I believe that [for] most trial judges and most other supreme courts, the[ir] first reaction is not [to] have somebody testify as to this. I heard a fellow testify. I think he was from Hood College over in Frederick, Maryland, who was one of the world's leading experts on the grieving process. He was marvelous. I allowed him to testify.
>
> I will allow her to testify. I don't think a jury knows any more or a judge knows any more about the

> grieving process than they know about the process of a rotator cuff injury.
>
> There is a grieving process that differs between the loss of a parent and the loss of a child. They can say what is going to happen to the same degree that a medical doctor is going to say what is going to happen to a broken bone.
>
> So to that extent, I will allow her to testify, assuming she is qualified, because I don't think the trier of fact understands this process, even if they have been through it themselves.[11]

Another court has opined that:

> (F)or purposes of proving grief, mental anguish or suffering, expert psychiatric testimony will often be useful and proper, if not absolutely necessary—(1) to provide a reasonably reliable basis for considering an award of such damages; (2) to prevent the trier of fact from falling into the realm of mere speculation and conjecture; and (3) to prevent the trier of fact from resorting out-of-hand to legal assumptions and conclusions which have little or no supporting medical or other reasonably reliable data.[12]

Developing a new understanding of grief and learning new trial techniques for developing non-economic damages in wrongful death cases is at the heart of this book. However, all our learning will be for naught if we can't identify jurors with open and receptive minds and attitudes.

Older notions that powerful damage evidence may put the necessary meat on thin liability bones are no longer valid. Today's juror

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11. *Falletti v. AAA Disposal Service, Inc.,* Law No. 100966 (Circuit Court for Fairfax County, VA., 1990).

12. *Wilson v. Lund,* 491 P2d 1287, 80 Wash 2d 91 (1971) (emphasis supplied).

may demand that the plaintiff first show him why he should even consider awarding damages. One case stands seared in my memory.

Example: Ambulance Crash Case

Neal Sherman was a big, gentle bear of a man. His second job, made necessary by the baby on the way, was as a cardiac tech with a private ambulance service. During a non-emergency transport of a cardiac patient from Loudoun County Hospital in suburban Virginia to Alexandria Hospital for some tests, the driver feel asleep, the ambulance left the road, went up an embankment, and rolled. Neal died when his head struck the unpadded, unprotected sharp corner of an equipment cabinet. The ambulance was not crashworthy.

The manufacturer of the patient compartment was long out of business and there was no insurance coverage. The only available defendant was the company that had remanufactured the cab months earlier. The contract for the "re-man" was to restore it to its original condition and place it on a new Ford F-150 chassis. The remanufacturer had only done what Neal's employer had requested. Our theory was that once the remanufacturer undertook to perform services on the patient compartment it owed a duty to bring it up to standards, but that duty, if it existed, was common law, not statutory or regulatory.

Neal's wife, Cynthia, survived him. She was five months pregnant with their first child. A pregnant woman about Cynthia's age was seated on our jury. However, as luck would have it, at the end of the trial two jurors were to be excused as alternates, and the alternates were determined by lot. She was picked and excused. By hand signal, I sent my legal assistant to follow her out of the courtroom and debrief her.

The report at the next recess was disheartening. This juror was against us. We had not earned her permission to put on evidence of Cynthia's grief, of how she struggled to keep her husband's image alive for the little daughter who would never know him except through pictures and stories. According to the juror I thought would be most sympathetic to Cynthia's suffering, all of the

testimony about grief and loss was "a waste of my time." She had not heard sufficient evidence that the remanufacturer should pay anything. She didn't even couch her attitude in "I felt so sorry for her, but…" She sat on that jury with a "show me" attitude and was angry that we made her sit and listen to testimony about someone else's pain. So much for the insightfulness of our voir dire. As for the theory that powerful damage testimony will support and buttress weak liability evidence, forget about it. The defendant's bad conduct is now "driving the bus." We must get our jurors' permission to put on damage evidence by demonstrating that the defendant deserves to have a verdict taken against him.

Jurors in Wrongful Death Cases

Are jurors tougher on us in wrongful death cases than they are in injury cases? Yes, and it's not too difficult to understand why. As plaintiff's attorneys, our familiar physical injury trial model doesn't fit the facts in a wrongful death case. The survivors, the ones requesting an award of damages, suffered no broken bones, spent no time in the hospital, weren't disabled, lost little time from work, received no pain medications, and weren't disfigured. A juror might think, "They may have grieved for a while, but so did I when my grandmother died."

When they enter the jury box, they have no connections to the deceased or the survivors. They won't see X-rays that might make them wince, no doctor will testify about the need for high dosage morphine to address the pain. There will be no before-and-after photographs, no economists to put large numbers on the blackboard, and no life-care planner to document future needs.

Our implements of proof are words, mere words, and we must use them to build bridges to connect our clients with our jurors. Our job is to create an environment of connection, create a causeway of familiarity, a commonality, a sense of kinship with that survivor. When the evidence is in, the death in question must no longer be the death of a stranger, but the death of a man, a woman, a child, a real person with whom the jury feels connected. Through

that connection, the jury must also feel connected to the survivors who loved the deceased.

Unless you read and take the lessons of this book to heart, the problems of communication may start as frictions between you and your clients. Yes, I know, the personal representative *is* the client and all the others are just statutory beneficiaries. Technically, you may not have to deal with them. If that is your attitude, you will build a bridge to nowhere. All the survivors are your clients, and you must present the evidence of their loss with an almost intimate familiarity. In that regard, I view it as essential that you visit the bereaved's home, and, if different, the deceased's home to be able to absorb a sense of familiarity with them. See how the photos are displayed, or if the family scrapbook sits on the coffee table. Perhaps the bed is still unmade from the day she left and never came back.

The Value of a Home Visit

On Mila's advice, I went to Diane's home, the teenager killed when she was ejected from the Jeep during a rollover. I interviewed her family and her friends in the living room. I saw her room. Her parents and her brother could not start the day without walking past that room. I met Annie, her cat, who still roamed the house looking for her. I saw the bird feeder out the kitchen window that Diane filled so her mother could enjoy the beauty of the wild birds that wintered there.

The home visit will serve you well. It is an important step to get to know your client and the family. It will help persuade the family that you care—and they can trust you. The visit is likely to provide a fertile source of anecdotes about the life of the decedent, and why her family loved her. It will give you information that you will never get in your office.

Roles of a Grief Therapist

Later in the book, we'll discuss the numerous, important roles a grief therapist can play as you prepare your case. Without the assistance of a grief therapist, you may not be able to establish

connections and rapport with one or more survivors. This difficulty is based on the dynamics of their grief and your involvement in their grieving process. We'll discuss how you may be involved and in ways that are opaque to you.

To understand how a death *in* the family is a death *of* that family we will explore the interconnections that make a family a unit, stable or otherwise. We'll see how the grief of one survivor may unexpectedly have an impact on another survivor's grief. A death in the family may drive that family apart, not bring it together.

Death and the Family

Death losses do not stand alone. Instead, they are associated with or may generate other losses. Death may resurrect old fears and longings, challenge one's independence, and renew old threats to identity. With the disordering of family relationships and the efforts to construct a new family out of the old, may come new tensions and turmoil as the family struggles to find a new stasis.

A death in the family may constitute multiple types of deaths. The wife may have lost her husband, but his children lost their daddy. While the wife grieves the loss of her chosen life-mate, the children grieve the loss of a loving parent, or perhaps an authoritarian or a dictatorial, even abusive parent. Depending on the age of the children, the grief of a son may be markedly different than the grief of a daughter, and the pressures of rebuilding a family may exacerbate the distinctions. One survivor may be discomforted or angered by another survivor's grief. Grieving family members may feel like they are standing on the deck of a small ship in heavy weather being tossed from one side to another as they sort out the consequences of this death.

Chapters in This Book

In Chapter 1, we consider grief reactions that are common to all deaths. In Chapter 2, we will learn about the phases and tasks of grief work over time. Complicated grieving is in Chapter 3 and

network losses are in Chapter 4. Then, we'll turn to specific deaths and the frequently appearing characteristics of each: death of a spouse is Chapter 5; death of a parent is Chapter 6; death of a sib-ling is Chapter 7; and, death of a child is Chapter 8.

In the course of those chapters, we'll address those deaths which seem to give attorneys pause: death of the very young, born or unborn, death of the elderly parent or grandparent, death of the troubled or troublesome child, death of the foreign-born, perhaps illegal alien, and death of someone from another culture.

We have devoted a separate chapter to stigmatized deaths, Chapter 9. This chapter describes those deaths in which the decedent's behavior leading up to the death might, to some, implicate immoral or illegal behavior. This could include AIDS from a homosexual relationship, hepatitis from illegal drug use, or suicide.

Not all deaths we deal with are sudden. We'll look at anticipatory grief in Chapter 10, discuss some of the myths of bereavement and how we can address them in Chapter 11, and take a closer look at the use of grief therapists as fact and expert witnesses in Chapter 12.

The downloadable content that comes with this book contains some of the tools for "lawyering" wrongful death claims, including intake information forms; checklists; some items relevant to motions practice, qualifying the grief therapist as an expert, and preparing for defense attempts to exploit the myths about death and dying; and sample summations. This downloadable content is available at the following link:

www.trialguides.com/resources/downloads/grief-and-loss

The book proper ends with a bibliography about death and dying. Within the poetry and prose of death and dying are powerful themes which may connect the court and the jury to our client when woven from opening to summation.

Let's get started.

1

Dimensions of Grief

Grief, bereavement, and *mourning* are not synonyms, nor are they interchangeable.

The Institute of Medicine's Committee for the Study of Health Consequences of the Stress of Bereavement offers the following definitions:

- BEREAVEMENT—the fact of loss through death.
- BEREAVEMENT REACTIONS—any psychological, physiological, or behavioral response to bereavement.
- BEREAVEMENT PROCESS—the emergence of bereavement reactions over time.
- GRIEF—the feeling [affect] and certain associated behaviors such as crying.
- GRIEVING PROCESS—the changing affective state over time.[1]

1. "Affect" here means observable behaviors that reflect a person's feelings, such as euphoria, anger, and sadness.

- Mourning—the social and cultural expressions of grief, including mourning rituals and associated behaviors.[2]

In this book, we will be dealing with both the impact on the survivor's affect and behavior (which the survivor is aware of) and underlying psychological bereavement reactions (which the survivor may be unaware of or unable to recognize as a bereavement reaction). For example, you might mistakenly view frictions between a mother and father following the death of a child as marital problems rather than stress reactions caused by the death. As a result, you might avoid this stress in the proof of damage. With the help of this book, we hope you will develop a basic appreciation of the many faces of bereavement reactions, and have nothing surprise you. Before studying this subject, I had no understanding how a survivor could be angry at the deceased for dying—and less of an idea how to handle it at trial if it surfaced. Now such anger seems just a natural part of the landscape of bereavement.

The Institute of Medicine describes bereavement as follows:

> Reactions to bereavement cover a wide, often confusing range. The bereavement experience may include not only sadness, an expected response, but also numerous other unanticipated emotions, experiences, and behaviors that can puzzle the bereft, their friends and relatives, and even the health professionals called upon to assist them. Increased knowledge about the various processes and outcomes associated with bereavement is likely to help avert some of the misunderstanding that can make the experience more difficult.[3]

One of the leading contemporary writers on grief and loss, J. William Worden, writes that grief encompasses a broad range of

2. Bereavement—Reactions, Consequences and Care 9–10 (Marian Osterweis, Frederick Solomon & Morris Green eds., National Academy Press 1984) [hereinafter Bereavement].

3. *Id.,* 47.

feelings and behaviors that are common after a loss.[4] These feelings and behaviors tend to change over time as the survivor finds his or her way through identifiable tasks of grieving. Elizabeth Kubler-Ross wrote of the stages of grief to be passed through on the way to resolution of the grief in a somewhat orderly or predictable progression. With the accumulation of greater knowledge from clinical experience, grief counselors and therapists now speak in terms of the *tasks* of grieving that the survivor must accomplish rather than discrete stages of grief through which they will naturally pass over time.[5] Resolution of grief is neither linear nor likely to be orderly. If the survivor gets stalled in one of the phases of grief, or if processing of that grief interferes with functioning and relationships, it has become complicated grief.

Normal Reactions of Grief

We can trace the professional study of bereavement and grief reactions back to 1944. Erich Lindemann was Chief of Psychiatry at the Massachusetts General Hospital, and in that year he attempted to take a systematic look at grief reactions. His goal was to sort out the "normal" from the "complicated."[6]

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4. J. William Worden, Grief Counseling and Grief Therapy 17 (4th ed., Springer Publishing Company 2009)[hereinafter Worden]. J. William Worden is a Fellow of the American Psychological Association, and he holds academic appointments at the Harvard Medical School and at the Rosemead Graduate School of Psychology in California. He is Co-Principal Investigator of the Harvard Child Bereavement Study and is the recipient of five major National Institutes of Health (NIH) grants. His research and clinical work over forty years has centered on issues of life-threatening illness and life-threatening behavior.

5. *Id.*

6. The word *normal* has a different meaning in mental health than in general use. In this context it means familiar, predictable, or foreseeable reactions to a death. To the survivor, there is nothing normal about what they are feeling and experiencing. As counsel, you should make this distinction clear during your direct examination of the grief expert. Defense counsel is likely to cross-examine the grief expert, to suggest that the client is undergoing "normal" grief for which no "treatment" is necessary.

One night in 1942, students from Holy Cross and Boston College met at the Coconut Grove Nightclub in Boston, either to celebrate or drown their sorrows over Boston College's loss to Holy Cross in football earlier that day. The nightclub became engulfed in fire when a busboy, using a match for light, ignited a fake palm tree while attempting to replace a lightbulb. Almost 500 people lost their lives when the club became a raging inferno.

Physiologic Features

Of the 101 families Lindemann and his colleagues surveyed, almost all reported similar physical sensations when they learned of the death of their loved one. Dr. Worden also reports common physical sensations and symptoms in the people he sees for grief counseling:

- Hollowness in the stomach.
- Tightness in the chest.
- Tightness in the throat.
- Oversensitivity to noise.
- A sense of depersonalization in which neither the surroundings nor the person seems real.
- Breathlessness or shortness of breath.
- Weakness in the muscles.
- Lack of energy.
- Dry mouth.[7]

Medical science does not completely understand the physiologic responses to bereavement. While few documented studies are available, researchers have collected bereaved people's self-reported physical symptoms and perceived deterioration in health status. From an epidemiologic perspective, there is, following bereavement, "a statistically significant increase in mortality for men under

7. Worden, *supra* on page 21, note 4., at 23-24. In states requiring physical injury to support claims for emotional injury, these features may provide a bridge.

the age of seventy-five."[8] This mortality is especially pronounced in the first year, but the mortality rate continues to be elevated for as much as six years for men who don't remarry. The suicide rate increases in the first year of bereavement, particularly by older widowers and single men who lose their mothers.[9] There is even an increased risk of death from accidents, cardiovascular disease, and some infectious diseases. The relative risk of death from cirrhosis rises among widows.

Michael Hirsch, author of *Coping with Grief and Loss,* states:

> Over 20 years ago, two landmark studies, reported in *Lancet* and the *Journal of the American Medical Association,* noted that the white cells in bereaved spouses were less able to fight off diseases than they were before the death, or compared with individuals who weren't grieving. More recent research reported finding fewer natural killer cells, which help quash infections and tumors, in bereaved elderly men and women who were depressed.[10]

Behavioral Features

As well as physiologic features, grief produces a number of behavioral features. There is a well-documented increase in alcohol consumption, smoking, and use of tranquilizers and hypnotics, particularly among those who used these substances before, but there is a significant incidence of new users and relapses by those who had given up such substances before the death. Ten to 20 percent of those who lose a spouse suffer depressive symptoms a year later. Sleep and appetite disturbances are quite common, as may be absentmindedness and social withdrawal.

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8. Bereavement, *supra* on page 20, note 2., at 39.
9. *Id.*
10. Michael Hirsch, M.D. Coping With Grief and Loss 5 (Harvard Health Publications 2007).

Cognitive Features

Cognitive functions can become impaired. The bereaved may engage in disbelief, and disbelief can take various forms.

A widow may think, "This is a mistake! They have misidentified him. My husband is still alive and will call me shortly. He should be on his way home now." Or she may believe, "This is a dream, a nightmare, and I'll awaken in a minute," or "I'm hallucinating!"

A bereaved person may enter denial and avoidance, which may naturally couple with disbelief, or may reflect a subconscious desire to avoid the message or the messenger of death.[11] The bereaved may seem confused, unable to order his thoughts, have difficulty concentrating or performing multiple-step tasks, or become forgetful.

Obsessions or preoccupations are common. The bereaved may worry or seem obsessed with thoughts about the deceased, or how to recover the lost person—how to wind the clock backwards. Or, they may seem overwhelmed by intrusive thoughts of the deceased and how they suffered and died.

The bereaved may develop a sense that the deceased is present or nearby. The sense of presence is a cognitive counterpart to yearning for the deceased, and may include thoughts that the deceased is still in the current area of time and space. Children are especially susceptible to this sense of presence.

A grieving person may hallucinate. Psychologists consider this to be a normal behavior because hallucinations appear frequently to the newly bereaved. The hallucinations can be both visual and auditory, and are usually transient, illusory experiences occurring a few weeks after the loss. They don't portend complicated grief if they resolve. However, if they persist beyond six months after the death, they represent complicated bereavement because the person is

11. The United States Marine Corps personally notifies the next of kin of marines killed in battle. When a car with two marines pulls up in front of the quarters of a family with a member on duty in a war zone, families have been known to lock their doors, pull the drapes, and deny the visitors admission. Jim Sheeler, Final Salute: A Story of Unfinished Lives (Penguin Press 2008).

keeping the dead loved one "alive"—which means the bereaved is stuck in the first phase of grieving—"to accept the reality of the loss."

Lifestyle Changes

Lifestyle changes frequently accompany bereavement and include sleep disturbances, such as difficulty getting to sleep, awakening several times during the night, early awakening, inability to fall asleep, or sleeping most of the time. During the wakeful hours the bereaved may experience intense sadness and a review of what might have been done differently to prevent the death, including how they might have prevented the death. Sleep disturbances may resolve over time, but if they don't it may be a symptom of a depressive disorder or an anxiety disorder.

Children are particularly susceptible to sleep disturbances in the early months following the death of a parent, and if a child was told that the parent "just went to sleep," the sleep disturbance may persist because the child fears sleep as synonymous with death.

Appetite disturbances are common, both overeating and undereating. The latter is the more common of the two initially. But later in the grieving process, weight gain may become a problem. Comfort food tends to fill other types of "hunger." Behaviors may seem absentminded or disconnected. The bereaved may drive and forget where she was going, or go to the second floor only to forget what she intended to do there. She may be looking for something she cannot find, but all along it has been in plain view.

Social withdrawal is common. In the early stages, normal socialization may seem dissonant with the way the survivor is feeling. It may not feel appropriate to behave in a normal social way. At the same time, those with whom the survivor socializes may try too hard to be comforting, or try too often, or inappropriately. Discussion of the death may be too painful or too awkward, particularly if the death was stigmatized. For more information on stigmatized deaths, see Chapter 9. If the withdrawal continues it may represent a depressive symptom that a mental health professional should follow.

Dreams of the deceased are also common and natural, and may give a clue where the survivor is in the grieving process. Dreams

may also reflect some unresolved issues with the deceased if the survivor has recurrent dreams.

While the survivor cannot directly avoid confronting or dealing with the death, the survivor may avoid reminders or retain reminders of the deceased. They may avoid places or things that trigger painful feelings, such as the place where the loved one died or, alternatively, have a nearly obsessive need to be where the loved one died.

One widow avoided a major thoroughfare where her husband died out of fear that there might be some reminder such as blood on the roadway or debris on the shoulder. A widower, on the other hand, visited daily the spot on a road where his wife died. He would pull off on the shoulder and look at the marks that the police crash team placed on the roadway. Initially, he said it helped him understand what had happened. Later, he said it comforted him to be where his wife's soul had departed this life. He felt nearer to her there.

Grief therapists may find some characteristics helpful in understanding how the bereaved is processing the loss. If the survivor has disposed of the decedent's belongings shortly after the death and taken down his pictures, it may assist in the diagnosis of complicated grief, or if the survivor has difficulty or refuses to give away the decedent's clothes and belongings after many months, it may also assist in such a diagnosis.

The bereaved may call out the deceased's name either vocally or subvocally. This behavior is most often associated with the searching behavior early in grief, during periods of disbelief. Sometimes they seek the comfort of the deceased's name.

You may hear or see the bereaved sighing, which correlates to the physical sense of breathlessness and may reflect a symptom of depression or anxiety. In addition, the bereaved may exhibit restless overactivity, and perhaps flee the home where they lived with the deceased to avoid the loneliness of the empty house, or flee the emptiness of a life without him or her. The survivor may become hyperactive, working long hours so as not to be home.

One father I represented worked abnormally long hours. His wife's grief was inconsolable. He could only tolerate so much

exposure to her pain because it mirrored the pain he was trying to avoid. The wife interpreted this behavior as "uncaring." She felt he probably did not love "our child as much as I did." Neither feeling was based in fact. Her reaction and his absence caused a lot of tension in their marriage.

While crying is the most common response we witness, it has a purpose. It is known to relieve emotional distress, but how it does so is still unknown. It may also serve a biological purpose by ridding the body of toxic substances that accumulate during grief. Studies are under way to determine what mood-altering chemicals are excreted in the tears of grief.

Breaking Connections

Death is a breaking of connections. The bereaved may visit places they went to together or may carry objects of remembrance to overcome the fear of losing memories of the deceased, or to feel close to the deceased. Treasuring objects that belonged to the deceased, such as mementos, is quite normal. However there is a phenomenon called *linking objects,* which Vamik Volkan, a psychiatrist from the University of Virginia, originally described. A linking object is one that the deceased owned or wore, perhaps at the time of death, and now the bereaved owns or uses that object all the time. Volkan believes that bereaved people use these linking objects to handle separation anxiety and that they provide a "token of triumph" over the loss. Linking objects mark a blurring of psychic boundaries between the bereaved and the one who died, as if representations of the two or parts of them merge externally through using the objects.

If separation from such an object causes extreme anxiety, or the bereaved has a panic attack, this signals complicated mourning. Oftentimes the bereaved knows that there is something wrong about his difficulty in leaving the object behind, so he may keep possession of the object a secret.

Of these common emotional, physical, and behavioral changes that may accompany grief or are emblematic of it, not all will be experienced by any one bereaved, but knowledge that they are "normal" should reassure our client that they are not engaged in

unexpected behavior or exhibiting signs of mental illness or a weakness. A grief therapist as an expert witness can describe why these are normal reactions in grief, ones the client has been subjected to because of the defendant's conduct.

Intensity and Duration of Grieving

As counsel, we consider not just the elements or manifestations of grief, but their intensity and duration, and how much they are affecting relationships and functioning. J. William Worden has listed common manifestations of normal grief in survivors who have lost a loved one to a sudden, unexpected death—the kinds of deaths that bring clients to our offices. None of these manifestations are pathological on their own, but if they last for abnormally long periods of time or at such excessive levels of intensity that it interferes with the bereaved person's functioning, they may portend complicated grief reactions.[12]

Shock, Numbness, and Disbelief

Shock, numbness, and disbelief—which while they may be present early following any death—are exacerbated, more intense, and longer lasting in sudden, unexpected deaths. Shock may "disconnect" or "short-circuit" normal emotional functioning. Numbness and disbelief act as buffers to prevent the bereaved's consciousness from being overwhelmed by a flood of unexpected feelings.

Sadness, represented by crying behavior, which evokes sympathetic and protective reactions in others, may make other survivors uncomfortable. It may make them cry also, a behavior they have resisted, or it may remind them of pain and suffering they have tried to deny or avoid.

Anger

Anger is an extremely common by-product of the death. It may confuse the survivor who is unsure at whom to be angry or why

12. Worden, *supra* on page 21, note 4., at 40, 125–29.

they feel angry. The survivor's anger may spill over to other survivors in unexpected ways. One survivor may be angry at the deceased for abandoning her by dying. Other survivors may not understand why or how the deceased can be the object of the first survivor's anger, and get upset by it. Survivors may be angry at the deceased for dying because they feel anxious about their future or panicked that they feel ill equipped to manage the household, the investments, or the family business. Anger at the decedent may be based on the deceased's contribution to his own death. The doctor may have misdiagnosed the lung cancer, but the deceased wouldn't quit smoking. Or, he shouldn't have gotten in the car with someone who had been drinking, and so on.

Anger may appear to have a selfish side to it when the survivor expresses the plans that have been interrupted by the death. These plans might include that once-in-a-lifetime vacation, or the promotion that at last would permit them to live within their means, or retire, or travel, or many other possibilities.

The bereaved may direct the anger at himself—for failing to have prevented the death. A bereaved parent might say, "If I had been a better father she never would have gone to that party. She would have known better!" That argument may be coupled with a deep sense that she did know better, but went anyway. Now the survivor is mad at himself and the deceased for her death. The anger engendered by death is replete with ambivalences and contradictions.

One of the ways to resolve these conflicts is for the bereaved person to find someone else who was at fault—blame shifting. If successful, this lifts the burden of responsibility off the deceased and the survivors and onto a previously anonymous wrongdoer. That blame shifting may bring the bereaved to our door, where we will be called on to determine if the blame shifting is appropriate and fact based, or if the bereaved is pursuing it as part of their grieving process.

One of the more complicated reactions is guilt and self-reproach. In the death of a child, this reaction may even have genetic origins—we have a biological imperative to protect our

children. A lawsuit may provide a vehicle to lift the blame for the death from the deceased, or from the survivor who feels he or she may share some complicity for the death. A survivor's assumed responsibility for the death will complicate that survivor's resolution of grief and bereavement reactions. Assumed responsibility may present serious problems in resolving grief, and in successful assertion of a legal claim.

Anxiety

Sudden, unexpected deaths cause anxiety, which may arise from a host of sources. A newly bereaved person may ask: "What are my new roles?" "Am I equipped to handle them?" "How can I make decisions for which I'm ill equipped?" Anxiety-producing questions arise instantaneously. "What should I tell the children?" "Should they attend the services?" "What kind of service should I have?" "Do I have a burial?" "Where?" "Do I have a cremation?"

After those come the intermediate-term worries. These include: "How will I ever be able to take care of myself and the children financially?" "How will I manage this house?" "Should I sell it? Should I keep it for the children?" "Should I let them complete school first?"

And then come the longer-term concerns: "What if something happens to me? Who will take care of the children? Who should I ask to be their guardian?"

Some anxieties can become "me" focused. These include thoughts and questions like these: "He died way too early. Will I?" "How will I handle the investments and his retirement account?" "How do I do the taxes?" Some thoughts express the anxiety of loneliness. "How will I live without his advice and counsel?" "What if the children become seriously ill or need surgery. With whom will I share ideas?"

The bereaved person's mind may wander to uncertainty. "Will I need to remarry? I don't want to, but maybe I'll have to." Helplessness, as a corollary to anxiety, may produce a sense of being overwhelmed or unable to see a way to bring order out of the new chaos.

Loneliness is multifaceted. Loneliness can include several types, such as emotional, social, and sexual. The bereaved might express emotional loneliness as "I don't have anyone to talk to." Social loneliness might appear in statements like, "I guess our friends were really his friends. I don't get invited out anymore." Sexual loneliness may appear also, "I still have wants and needs."

The bereaved may exhibit yearning, sometimes called *pining,* for the deceased. This yearning acts as a barometer of sorts. If it diminishes over time, it may reflect that grief and the bereavement reactions are coming to a healthy conclusion. If it persists or intensifies as time passes, it may suggest complicated grieving. Some survivors may describe the death as an amputation.[13] Does the bereaved try to find new ways of adapting to that amputation, or succumb to its disability?

Searching

One common behavior is called *searching,* in which the bereaved sees the dead person alive at the mall or on the street, only to disappear into the crowd as the bereaved approaches. The bereaved may hallucinate that the deceased is still alive or see him alive in his dreams. They may leave the porch light on at night. The bereaved may believe that the loved one is not dead, just traveling and will return later. His clothes are left where they lay on the day of his death. If others live in the house, a survivor might hear a key in the lock—it is not the other survivors returning for the evening, but the sound of the bereaved returning.

As time passes and the deceased doesn't return, the searching behavior should diminish. However, it may turn to despair, where the bereaved becomes depressed, has difficulty concentrating, is angry, irritable, anxious, restless, and suffers sleep disturbances.

The survivor may have mood swings and feelings that oscillate wildly from warm, fond memories of the deceased to avoidance of all memories and reminders.

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13. C. S. Lewis, A Grief Observed 70–71 (HarperCollins Paperback 1994).

Grief and Relationships with Others

All of these feelings and behaviors constitute the *vertical* loss—they originate out of the bereaved survivor's now-interrupted relationship with the deceased. It may seem irrelevant to the survivor that others are also grieving. Two or more survivors grieving the vertical losses and insulating themselves from each other's loss may generate additional conflicts.

As we have noted, a survivor's progression through the various tasks of grief and its accompanying thoughts, feelings, and behaviors is unique to that survivor. The psychological set of the survivor, the grief reactions of other survivors, and the course of the others' grief all have an influence on a survivor's grieving process. No one can forecast a timetable for resolution. That brings us to consider the various myths about grief and how the grief therapist should address those myths, for the benefit of both patient and jury.

One myth states that grief progresses through its various stages according to a rough timetable. For example, "You'll be back to normal in two years." Friends and family may encourage the bereaved to "get over it" or "get on with the business of living" or "start dating," or treat a bereaved who hasn't met that timetable as behaving abnormally and deserving of redirection. And, if friends or family persuade the bereaved that he is grieving abnormally, he may find it difficult to complete the tasks of mourning, and become the survivor who enters complicated bereavement.

An Ending to Grief?

How long will grief last? When should it be over? These aren't the questions to ask. Grief never ends. It only changes its forms, its presentation, and its degree of control over the bereaved—unless the bereaved gets stuck in complicated grief. For more information about complicated grief, see Chapter 3.

Elizabeth Edwards, the wife of former vice-presidential and presidential candidate John Edwards, wrote a book called *Resilience.* She has much about which to be distressed, but she writes with reserve and a certain calmness. Dying of recurrent breast cancer,

now metastatic to bone, and wrestling with the changes the revelation of her husband's infidelity brought to her private and public life, she has suffered through many life-altering events not of her own making. Once facing the prospect of high national office, if not for herself for her husband, she has now almost disappeared from public life under the cloud of his betrayal. Her book doesn't dwell in agonizing reappraisals of what might have been, or focus on the bleakness of her personal health. But there is a recurrent subject, the death of her sixteen-year-old son, Wade, nearly thirteen years before.

Chapter upon chapter cycles back, connects, and weaves a fabric of her life around that day in 1996 when Wade died. She doesn't do so in a maudlin way or wallow in self-pity. She wrings lasting meaning out of Wade's short life and his sudden death. I mention this not to praise her or critique the book, but to point out that this woman, who might, under other circumstances, have been first lady, has her life anchored around the death of her sixteen-year-old-son over thirteen years ago. She is not mired in complicated grief—quite the contrary. She has found new connections with Wade and his memory—healthy connections. But thirteen years later, she is still grieving. However, her grief has transitioned to accommodation through reconnection to Wade at a different place in her life. Her grief for him will never end, but it long ago stopped being disabling.[14]

Children and Grief

Myths abound as they relate to children and grief. Well-intended family and friends may confuse grief, or the thoughts and feelings that the child who has lost a loved one experiences, with that child's external or public face of grief. A child may not be able to express his inner turmoil in a public way. This lack of public expression leads to the second myth of childhood grief: that it is short in duration. If a child does not express or display his grief outwardly, the

14. Elizabeth Edwards, Resilience (Broadway Books 2009).

parents may mistakenly believe the child is over his grief. Or, a child may focus on his schooling to avoid dealing with the pain at home, and his good grades may lead teachers and parents to conclude he has adjusted. Unlike adults, children grieve in spurts and they are not able to complete their tasks of mourning until they reach physical maturity along with the corresponding cognitive and emotional maturity, perhaps in their mid-twenties.

Adults and children share a common myth about grief—that it goes through discrete, finite stages towards conclusion. Grief is far from linear and progressive towards resolution. Many people attribute a further myth to children but not adults—that some children are too young to grieve and mourn. While we do not know much about the impact of parental or sibling death on an infant or toddler, sleep disturbances, emotional liability, regression to a behavior of the past (such as bed-wetting), and withdrawn mood may appear and should be of concern.

When a child's parents don't seem to mourn, perhaps believing "we must be strong for the children," the children lack a model for their grief. Parents should be encouraged to express their grief so that the child may express his.

There are abundant myths about what and how a child should be told about the death of a loved one. Messages that the loved one went "to live with God" or are "asleep" create confusion over the role of faith and sleep. If "daddy was such a good person that God wanted your daddy to come live with him," the child may view bad behavior as a way to avoid death. Importantly, the myths may well influence one or more of our jurors who may want to impose such a template on the evidence.

Practical Problems in Grief

Grief has recurrent, practical problems that the bereaved must solve. Many a survivor has said that they never knew who their real friends were until after the death of a loved one. Some drifted away, as though the decedent was the only bond between them. Widows frequently remark that while their husband was alive the two of them

would be invited to join others for travel, shows, or dinner, and after the husband's death, the invitations dried up. The message: She has no worth as a single person. She had only been important as her husband's wife. She was an adjective for a noun that had died.

She needed someone to talk to about his passing. She had so many things she wanted to share and so many questions that needed answering, but no one was interested in her anymore. The people she ran into at their church or country club were not very helpful. She was little comforted by their efforts at comfort. If they spoke, it would be of the myths, or if not the myths, the well-worn phrases people say to the bereaved: "At least he did not suffer." "He led a good, full life." "You have lots of good memories." "You just have to keep your chin up and move on."

Nor did the clergy seem to understand. They said things like, "It was God's will," "He has gone to a better place," "God needed him more," or the frequently expressed, "God doesn't give you more than you can handle."

Lack of Emotional Support from Professionals

The professionals whose services the bereaved needs may not be reassuring. Let us follow the recently bereaved through some of the post-death requirements, starting with the funeral director who intones, "You may want to move up to a somewhat more expensive casket made from materials that last longer," at a time when the bereaved has no feel for his or her economic condition. An estate accountant or attorney may ask, "Do you know how much you are going to have to pay in taxes?" or "How are you going to get by on this little?"

The wrongful death attorney may handle an initial visit poorly. The wrongful death attorney and staff may say, "This may be a tough and expensive case. The defendant does not have very much insurance. Let me suggest a range of monetary awards for this case."

The judge in the traffic court may not be reassuring. "I find the defendant not guilty," or find the defendant guilty of a lesser

offense. The judge might say, "I find the defendant guilty and impose a $100 fine and suspend all jail time."

During the discovery deposition in the wrongful death case, the defense attorney may ask damaging questions as he explores the nooks and crannies of the decedent's life. She may ask, "Did you and your husband ever separate or talk of divorce?" or "Did your son use drugs?" or "Have you dated since the death?"

The judge in the wrongful death action may seem adverse when he rules against the survivor on evidentiary questions, or gives defense requested instructions on contributory negligence. The jury may seem disinterested at times and sleep through the economist's testimony. All these events can cause much distress to a grieving person.

Lack of Support from Family

The dynamics between one survivor and other survivors may provide fuel for tumult. Each survivor had a different relationship with the deceased, and with the death the relationship died. Each survivor had a different relationship with the other survivors, and upon the death those relationships were changed.

Who died—was it a spouse and a parent, a child and a sibling, or an aged grandparent? What are the ages of the survivors and how does their age impact their manner of grieving? What was the pre-death relationship with the deceased and the pre-death relationship among the survivors? What were the psychological connections between the survivor and the deceased and between each survivor? Were the survivors psychologically stable in all relationships, or only in some? For example, did any of the survivors have any underlying psychological diseases or disorders, or suffer from any underlying stressors in their life before the death? Were there any stressors that the death exacerbated, such as economic fragility?

How were the relationships between the survivors changed? For example, the surviving sibling used to hide in his sister's shadow, now he's an only child. Was this a marriage where the parents stayed together "for the children," but now a child has died?

Another factor to consider is the "when" factor—what was going on in the lives of the survivors when this death occurred? What plans, dreams, or expectations have been extinguished with this death? "He had just retired and we were going to—" "He was just about to graduate, and we were so excited for him." "He had so much wanted to have a son." "He was about to make partner."

Frequently the "when" factor may implicate wounds not yet healed or wrongs not righted. The survivor might be thinking, "I'd had a fight with him just before his death." "He promised me he'd reform." "He said it would be the last time he went out with them."

What happens in the relationships between the survivors when their anger, anxiety, guilt, or withdrawal collide? For example, one survivor might be angry at the decedent for not being more careful, or for not following advice on how to avoid dangerous situations, while another survivor is angry at other survivors for failing to prevent the death. A third survivor might feel guilty and responsible for the death.

Some survivors' relationships are reinforced by common religious attitudes, while other relationships may be exacerbated by religious issues. Some survivors may see the death in personal religious terms. "Why is God punishing me? Why has God forsaken me?" or as a result of personal failings, "What did I do to deserve this? Did I anger God?"

Other survivors may see this as God's failure. "Why didn't God protect him?" Others may view the death as the fulfillment of some greater design. "It must have been his time."

The post-death handling of the services or the wrapping up of the decedent's affairs may generate frictions. For example, adolescent or young adult survivors may want to be excluded from planning the services for the deceased, or they may deeply want to be involved. Sometimes usurpation of the role of service planner sits comfortably with other survivors. Sometimes it does not.

Some of the differences may be cultural, some may be historical. If the family comes from blended cultures, one survivor may have a quite distinct view of how the rituals following the death should be observed, and quite vocal in expressing that view. Reli-

gion may be an influence. In some faiths and in some cultures only a specific ritual will ensure transition to the afterlife.

You can't make an assessment of the possible tensions between the survivors without evaluating who caused the death and how they were connected to the family or other survivors, if at all. The family dynamic will be quite different depending if the death was caused by a stranger, an acquaintance or friend of the decedent, a friend of a family member, or a family member himself. The degree of the causative actor's culpability will also be a factor. Were they drunk or merely inattentive?

The pre-death relationship between the deceased and the causative actor will also be an important factor for the survivors to assimilate. "Did she die when he got drunk and got behind the wheel on their first date?" suggests a different course for grief than when she died as his fiancée at his side.

In that sense, managed care has changed the landscape for grief reactions following a medical malpractice death. The longtime family doctor whose error produced a death will engender intra-family survivors' tensions quite different in character and degree than a death caused by the "stranger doctor" assigned to the case by the managed care provider.

Each survivor's awareness of the manner of death will bear on their intra-family grief reactions. Family members who were present will likely grieve differently than those absent. One family member's intimacy with the events of the death may make him or her intolerant of the grief reactions of another survivor whose grief seems more remote or less personalized.

Was the death sudden and violent or slow and anguishing, and, if so, was the grieving family member a caretaker? Was there any grotesque distortion of the body? Did he suffer before the death? What did each grieving family member know of such matters?

One of the most common intra-family grief reactions involves what I call the "me" factor. One grieving family member may be so focused on his or her own loss as to be seemingly unaware of the grieving needs of other family members, and insensitive to them and their differences. Children may sense that they lost one parent

to death and the other to indifference. The widow who feels abandoned by her husband in death and says, "How could he do this to me?" may be incapable of seeing that "How could he do this to me and the children?" would be the better question.

The surviving spouse's self-absorption may seem justly earned. "I didn't just lose a spouse; I lost a lover, a friend, a confidant, a protector, my soul mate. I lost my identity. I was his spouse. I am no more. Mail still comes addressed to him. He left me with this house to manage. I don't know how. I lost my economic security. How can I pay the mortgage? I lost our future. As a single woman, I'm a pariah. They didn't care for me, I was just tagging along. I'm afraid at night. The house creaks." Thinking that her children don't share in these losses, she may conclude their grief is minor and inconsequential.

Within these parameters, cases requiring special advocacy skills arise. We will consider them in subsequent chapters: miscarriages or death in utero, death of a troubled child, death of an elderly person, death of an adult child, death of a sibling, death of a retarded child or one in poor health, and the traumatic death of a patient terminally ill from other causes.

While we are neither diagnosticians nor treating mental health professionals, we should remain attuned to our client's need for mental health assessment and potential treatment, and make appropriate suggestions or referrals. I have no hesitance to make a referral of a client to a mental health professional. That professional's subsequent cross-examination on how the patient became a patient yields rather easily to re-direct examination. You can easily answer: "I have trained myself to recognize when my client might need professional assistance, as this client did."

Why Wrongful Death Is Different

Before turning to a discussion of the tasks of grieving, and why we refer to them as *tasks* and not *stages,* we must be acutely aware that we represent a distinct subset of bereaved people.

When a death is sudden, unexpected, traumatic, preventable, and caused by a human wrongdoer, the intensity, duration, and processing of the grief is unique.

Each of us has lost a loved one, perhaps an aged grandparent or parent. In these cases, death is the natural end point of life. However, a death that occurs suddenly, unexpectedly, because a human actor failed to take adequate precautions for the safety of the decedent, and the death was preventable and avoidable, is an *unnatural* end point of a life. Life was not permitted to live its natural course. Studies have shown that such deaths precipitate grief reactions that are qualitatively and quantitatively different than natural deaths.

Wrongful Death Does Not Allow Time to Prepare

In a sudden death, there is no time to prepare. When a parent or grandparent dies "from natural causes," there is both a naturalness and normalcy that allows families and friends to prepare themselves emotionally. When people learn of an elderly relative's impending death, they are saddened at the prospect that this life is coming to an end. They might pray that their grandmother's life might be spared for a few more years together. The family might seek out further medical attention and medical opinions. Friends might remain hopeful in this time of darkness. The family's optimism, no matter how forced, their work, their prayers are part of their preparation for the possibility of death.

Time may permit the family the luxury of optimism and hope that some medical intervention might postpone or deflect their grandfather's probable end. It permitted them to tell their loved one they were loved and would be remembered. Importantly it allowed the family to seek reconciliation with loved ones from whom they might have been physically or emotionally distant. They could patch over old differences, or recognize they no longer mattered, rendered irrelevant by the magnitude of the new reality.

What can time buy us when someone we love is dying? Ask the wife and children of Randy Pausch, a now-deceased computer science professor at Carnegie Mellon University. His book, *The Last Lecture,* became an international best seller, written and published

after he was diagnosed with terminal pancreatic cancer. A father of three young children and married to the woman of his dreams, he asked himself what he could do with the time that remained. He answered it eloquently. In a last lecture to his college class, "I was trying to put myself in a bottle that one day would wash up on the beach for my children. If I were a painter, I would have painted for them. If I were a musician, I would have composed music. But, I am a lecturer."[15] So, he lectured, and in doing so left a legacy of insights about life and demonstrated his courage while facing certain death. In doing so he fashioned an indelible trail of love in which his family could find comfort after his passing.[16]

In a sudden, unexpected death, there is no preparation time and, importantly, no opportunity for families to intercede—to get that second opinion or seek out the recognized medical specialist who might reverse this course of history. In a sudden death, people are rendered helpless, powerless, out of control. Sudden death deprives families of the chance of rescue. In short, families and friends become irrelevant to their loved one's death and that gives them a powerful sense of loss.

Wrongful Death Gives No Time to Resolve Issues

Sudden death does not give families time to say "I'm sorry" for some slight or offense, real or imagined. Given time to prepare for the death, we can address old issues left unresolved. Simone de Beauvoir wrote of the death of her mother:

> I had grown very fond of this dying woman. As we talked in the half darkness I assuaged an old unhappiness; I was renewing the dialogue that had been broken off during my adolescence and that our differences and our likenesses had never allowed us to

15. Randy Pausch, The Last Lecture, *Introduction, x* (Hyperion Press 2008).
16. The entire lecture is available on YouTube at: https://youtu.be/ji5_MqicxSo

> take up again. And the early tenderness that I had thought lost for ever came to life again …[17]

In short, time allows the survivors to say goodbye. It allows them to forgive and be forgiven for wrongs, real and imagined. Most important, time gives the dying person the opportunity to grant the bereaved permission to go on living after the death.

Sudden, unexpected deaths always foreclose resolution of the unfinished business of living in a family. Before the death, there was always the possibility of a better tomorrow, but now that tomorrow will never come. Talked-about hopes, aspirations, and promises go unfulfilled. The photo safari to Africa, the vacation on the lake, the trip to Disney World, golf in Scotland, whatever the demands of family or job had postponed are now extinguished.

The damage is aggravated further because there was a wrongdoer, an individual, corporation, product, or system, which caused a *preventable* death. A survivor might say, "Someone else rendered me irrelevant. They took my father. They didn't give him a chance. They didn't give me a chance. They didn't get my permission. They were judge, jury, and executioner."

The death was preventable. If history could be rewound and one variable changed, the loved one would still be alive. If the wrongdoer had exercised even the slightest care, the loved one would be alive today. If law enforcement deems the matter "only civil" and there will be no criminal charges for what the survivor may see as "the murder of my daughter," the survivor's sense of hopelessness may deepen and the survivor may feel further "wronged." A lack of criminal charges compounds this wrong.

Wrongful Death Is Often Traumatic

That the death was traumatic lingers with the survivor. They may dwell on it and perhaps become obsessed with it, or bury it in their subconscious because conscious memories of it are too powerful to confront. A bereaved widow once broke down in my office, saying,

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17. Simone de Beauvoir, quoted in Viorst, *supra* on page 7, note 10., at 294.

"He was trapped in the wreckage of that car. They had to cut him out with the jaws of life. His body was all broken and they can't even tell me if he was alive and conscious before they got there. I pray he didn't suffer."

How a loved one died may be a powerful factor in the survivor's grief. I will never be able to erase from my memories the mother in another accident. She and her friend were trapped in the front seat by the violence of a collision as their children burned to death in the backseat by the fire from the exploding gas tank. How their loved one died can be a powerful factor in their grief.

Wrongful Death Is not Valued

Along with these other factors, a wrongful death is not a "noble" or "valued" death. When a soldier falls in the field of battle, it is a sudden (but not completely unforeseeable) death, and it happened in the furtherance of national goals. Unlike the deaths we handle in court, the soldier's death has a purposeful quality to it. The deaths with which we deal are usually devoid of any ascribable purpose.

Grief therapists categorize deaths under the acronym NASH—Natural, Accidental, Suicide, and Homicide—and recognize the distinctly different grieving patterns each may produce. While our cases fall predominantly under the category of accidental, our clients are often uncomfortable with that nomenclature.

In natural deaths there is no wrongdoer. In accidental deaths there may be a negligent wrongdoer. In homicides there is an intentional wrongdoer. And in the incredibly complex grief issues surrounding suicide, the cause of the loved one's death is often unknown and the survivors haunted by an unanswerable question—why did she choose to take her own life? The suicide may have been the product of failed medical care or drug-induced suicidal thoughts, but ultimately the decision to die was the decedent's. When we turn to stigmatized deaths we will deal with suicide in more detail.

Wrongful Death Has a Specific Cause

Within the grieving patterns of sudden, unexpected deaths are exacerbating factors. What did the defendant do to cause the death? How callous, indifferent, or reckless was he? The barometer for egregiousness may be how angry the wrongdoer's conduct makes the survivor. Bad behavior has a sliding scale. The wrongdoer may be an elderly driver, confused by a new traffic pattern or afflicted by recent onset dementia who nonetheless caused an avoidable death. By contrast, how might a survivor feel if a drunken driver with prior DUIs claimed another victim? In that light, the elderly driver's conduct almost seems excusable. While the drunk driver may have been under the control of a disease as insidious as dementia, the survivors have little capacity to understand the linkage and express tolerance.

As we will discuss at some length in this book, the victim's level of innocence is also important. A small child dead in a car seat as the result of the conduct of a negligent driver may tend to diminish or obscure the fact that age or impaired mental acuity encumbered the elderly driver of the oncoming car.

Not all cases result in sudden death. The victim of an auto accident may linger for days, months, or years. Medical malpractice may slowly play out as a cancer patient with a delayed diagnosis goes through the various stages of the end of life. Some states require the victim's personal representative to elect whether to pursue the claim as a survival action for the victim's pre-death pain and suffering and enhanced medical expenses, or a wrongful death claim. In other states, the survivors may include in their damages awareness of the victim's pre-death suffering as a factor that shapes the survivors' grief. Not all courts follow this rule, and it may require the testimony of a qualified grief counselor to make this a jury question.

Needless to say, the opportunity to adjust to the impending death is an important feature of a natural death.

Practice Considerations

How might our jurors react to a bereaved who:

- Is angry at her child for dying?
- Claims to see him at the mall months and years after his death?
- Has hallucinations about his anticipated return?
- Leaves his room light on and his clothes out?
- Hears his key in the door late at night?
- In her few moments of acceptance of the reality of his death, feels guilty for his death even though she was miles away?

Might these normal grief reactions impress her jurors in a negative way?

Did the defense counsel learn about these slices of seemingly abnormal behavior from the grief therapist's treatment notes? Did the survivor, when asked about these strange feelings at her deposition, deny she had them? Did she on reflection think them odd, indefensible, and out of character, and deny she experienced them? If so, her denial may not be conscious; she may be subconsciously adjusting her reality to a place that is more comfortable and more familiar.

We all know the consequences of lies, misstatements, altered testimony, and efforts that appear to be intended to deceive. The sudden, unexpected, traumatic death of a loved one can be so disordering that the bereaved may wonder if she has gone insane. Struggling to reassure herself that she is not, the rush of feelings, the sense of helplessness, and the unreality of the new psychic territory she is traveling in may not only cause her to question her own sanity, she may wonder if *others* feel that she has gone mad. As time passes and she moves through the tasks of grieving (which we discuss later), she may feel embarrassed about her earlier loss of rational control. If the defense questions her at trial from therapist's notes that suggested her thinking had been disturbed and disordered, we prepare her. But how?

One of the keys to trial preparation is retaining a grief therapist early. This therapist serves as a treating mental health professional and ultimately as an expert witness. I encourage retaining a qualified grief therapist shortly after your client retains you as counsel, both for your client's and the case's benefit. For reasons we'll describe more fully in Chapter 12, the grief therapist has multiple roles to play. As a treating mental health professional, he or she can bring comfort to the client, help the client understand and adjust to the demands of the legal system, and prepare the client for deposition and trial.

Because the survivor did not have the opportunity to prepare for this loss, of a magnitude the survivor has never experienced or anticipated, she is unsettled in what is true and what she imagines. A typical human response to a psychic injury as severe as a death is to deny that it has occurred. Most people are incapable of handling a sudden death all at once. Denial and hallucinations allow our clients to ease into the horrors of this loss over time as their rational side once again asserts control over their feelings.

Of course as trial counsel, you should not wait for troubled waters to rise before you address and prepare for them. When Mila and I work together on a case, I see reviewing the treating therapist's notes as an essential part of our preparation for the survivor's deposition. Is there anything in them that might prove troublesome? If so, we need to prepare the survivor to respond to them.

Mila and I don't routinely discuss the therapist's notes with our client. Most therapists counsel us against providing the patient with a copy of the treatment notes. Therapists fear that the patient would not be able to appreciate the significance of the notes. In addition, the client might either misinterpret them or wonder why the therapist thought some items noteworthy when they "had so much material of greater importance that they talked about."

Most mental health professionals with whom I've dealt express concerns that if patients review the notes, that experience could interfere with the therapist-patient relationship. The solution that Mila and I developed is to engage the grief therapist in the process of preparing the deposition. That way, I can alert Mila to the mat-

ters that concern me, and ask her to interact with the client on those subjects before the rest of the deposition preparation starts. Then, I try to have Mila present for the deposition preparation.

Mila can explain to the survivor that my method for preparing for deposition will be to wear the hat of defense counsel. I will ask questions that I anticipate the defense counsel will ask. By doing this, the client will have few surprises at the deposition. The client will be ready to respond to almost every question meaningfully because he or she will have heard it before.

When working a case such as the one arising out of Arnold's death (the teenager killed on a gravel road shoulder, mentioned in the Preface), I also ask the therapist to prepare the survivor to cushion the pain of the examination. After all, we want our jurors to hear the potentially negative evidence from us. To build trust and confidence with the jury, I cannot appear to be hiding anything. Using a grief therapist as an expert witness is an excellent way to present and explain the "eccentricities" of the grieving process to a lay jury.

There is a corollary to using a grief therapist. I prefer not to have the bereaved serve as the principal witnesses to their own grief and loss. In physical injury cases, I use doctors and nurses to express the pathways and mechanisms of pain and treating it with analgesics. In the same way, the grief therapist and lay third party witnesses such as neighbors, close friends, co-workers, teachers, clergy, and family members who can appear to be impartial observers serve a similar role in grief and loss cases. Juries tend to be more receptive to descriptions of pain by those who didn't suffer it.

I limit using the bereaved as a witness to telling anecdotes of the deceased's life that the jury can relate to and connect with. I may also use one beneficiary to describe the grief reactions of other survivors. Grief involves destroying the connections that the survivor had with the deceased. What were those connections? The survivor is usually well positioned to recite the connections using examples, but cannot recognize and appreciate how ending those attachments has affected them in the many facets of their remain-

ing life. For these, the testimony of the grief therapist is important and the testimony of other survivors is helpful.

I also feel that using the survivors to talk about the connections they have lost rather than to describe their own pain reduces the defense counsel's opportunity to accuse us of making appeals to the jurors' sympathies. "Connections" may be as simple as the activities the deceased and the survivor did together—they played bridge, or golf, or went hiking, had long talks, read the same books, discussed politics, or any of the myriad of daily activities that brought them together—or may be intimacies, shared secrets and confidences. One widow described a connection as simple as, "We'd been married forty-two years, but he still took my hand when we crossed the street." Another described how for twenty-eight years he always bought her roses on their anniversary.

Connections need not be limited to "he and I," but include "we." For example, "We vacationed as a family. He loved watching the children make sand castles at the beach. He would lather them up with sunblock and send them off with pail and shovel to make him a sand fort."

Connections now lost tend to appear to be more objective in that they are familiar, while intimate expressions of the survivor's pain seems more subjective to the observer. Importantly, the connections are lost for all time. They represent a permanent loss. They permit the jury to sense, relate to, and infer the pain of the broken connection without requiring the survivor to use words of pain and loss. Some jurors might not be moved by testimony like, "Oh God, how it hurts to have him gone" because it can seem self-serving. However, they can use their own sense of connections to speak the loss for them. How the survivor might feel about the lost connections over time is clearly more subjective. Weaving the complete fabric of the past, present, and future losses that each survivor sustained and has not yet sustained is an appropriate role for the grief therapist. The therapist will naturally address each of these in the course of treatment.