

Effective and Empathetic Mediation of Wrongful Death Cases

By

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Introduction

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

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

It is our view that counsel, adjusters, risk managers, and mediators must all be informed not only about the facts of a wrongful death case but also about the special issues survivors deal with in their bereavement. The professionals must learn or must obtain information about where the survivors are in their grieving

process. For example, have the survivors dealt with their fear and anxiety, anger and guilt, separation pain, disorganization, depression, and despair, identification issues, and their other psychological and sociological issues?² The degree to which these issues and the related issue of revenge have been addressed will impact the mediation and will affect the survivor's feelings about restitution and resolution.

The focus of this article is on wrongful death cases that result in a sudden death and the unique psychological factors that impact these cases. Such cases present unique challenges to the survivors, their counsel, defense counsel, in-house counsel, adjusters and mediators.

In addition to the abrupt and incomprehensible tearing asunder of a family, there may be complicating factors that need to be addressed in particular cases. In some instances, "survivor's guilt" is enhanced, if the survivor lived through the incident.³ In one horrific case our office mediated, a daughter survived a crash with her Mother's decapitated head in her lap.

On occasion, facts indicate that a manufacturer has known of the danger posed by its product and ignored an inexpensive cure in return for greater profits.

Many survivors, heartbroken by their loss, feel re-victimized by a legal system that appears to make little sense.⁴ Knowledgeable and effective defense counsel

find a respectful and sincere way to acknowledge the survivor and her special issues.

Grieving in the Context of a Sudden Wrongful Death

In an unanticipated grief, you are unable to grasp the full implications of the loss. Your adaptive capabilities are seriously assaulted...and the death may continue to seem inexplicable.⁵

Where a claimant has lost a loved one to a sudden and dramatic death, all professional participants must have some basic empathy and compassion and at least a modest understanding of the grieving process. Primary responsibility rests with the Plaintiff's counsel to determine whether his client and the case itself is ready for mediation. It is our view that Plaintiff's counsel must give wrongful death claimants special attention and do their best to prepare their case, and their client for the mediation process. Plaintiff's counsel can add to their client's pain, when they bring them to a mediation with unrealistic expectations about the value of the case and with unrealistic expectations about the defendant's willingness, in the context of litigation, to accept responsibility or to offer an apology or to fully acknowledge the loss. Plaintiff's counsel should know whether the survivors had pastoral and/or professional grief counseling, what sort of support system they have put into place, and where are the survivors in their

grieving process. This information will allow the plaintiff's counsel in determining if the plaintiff is ready for mediation, who should be at the mediation, and how the mediation should be conducted. Lord speaks of the stages of grief.⁶ Lord references Elizabeth Kubler- Ross' famous formula of grief stages as (1) denial, (2) anger, (3) bargaining, (4) depression and (5) acceptance.⁷ More specifically directed to crime victimization is the grief process referenced by Marton Bard and Dawn Sangrey. They refer to (1) initial disorganization/shock, (2) struggle/recoil, and (3) readjustment.⁸ Dr. Therese A. Rando, acknowledged as America's finest grief researcher, is noted to speak of three stages of grief: (1) avoidance, (2) confrontation, and (3) accommodation.⁹

Rando points out that the difference between a sudden death and an anticipated death "is not in the amount of pain that the survivor suffers, but in its impact it has upon that person's ability to cope and to go about the rest of her life."¹⁰ In a sudden death, preparation and comprehension are missing.¹¹ Rando emphasizes that with a sudden death there is a destruction of the world as you know it, that is no gradual a transition. There is no time to make changes in yourself, and there is no ability to change your expectations about your life or your world.¹² With a sudden death, survivors are called upon to face a world as it abruptly is, versus a world as it should be. Professionals dealing with wrongful death cases need to be appreciative of this dynamic as survivors try to both turn the clock back, ask what if, look for answers, and seek a target for their anger.

*After a sudden death, the loss doesn't make sense. The critically important understanding of what happens is missing... We cannot comprehend what has transpired.*¹³

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

Numbness/Denial/Disorganization

"Your loved one has died.

You are unprepared.

The death has struck like

A tidal wave.

You are cut loose from your moorings.

You are all but drowning in the

Sea of your private sorrow.

The person who has been part

Of your life is gone forever.

It is final, irrevocable.

*Part of you has died."*¹⁴

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

Fear and Vulnerability

"In an effort to gain some control and understanding over what often appears to be a meaningless, unmanageable event (the survivors) may repeatedly review the death trying to make sense of it..."¹⁵

Suddenly without warning mortality slaps survivors in the face. They may feel "anxious, fearful and powerless."¹⁶ Fear and vulnerability may occur when there is a massive accident with deaths of loved ones and survivors with both physical injuries and emotional scars. An example of this would be a case that our office mediated involving a tractor trailer that jackknifed across an icy windblown highway wiping out two SUV's and some family members, decapitating a mom, and severely injuring other family members.

Fear and vulnerability may occur in the context of the bewildering loss of a child when a physician unaccountably delays coming to the hospital, despite the pleas

of nurses and parents. Fear and vulnerability may capture and ensnare a survivor. It may freeze the survivor like a deer caught in the headlight of a car unable to decide what to do. Counsel and mediators must be prepared to assist in getting the survivor to make reasoned decisions that enable them to get to a safe place.

Anger

“You [the survivor]” may be surprised at the intensity of the anger you feel for the person who killed your loved one. The more senseless (sic) the act, the more angry (sic) you may feel. Some survivors do not feel angry, but most do, even to the point of rage.”¹⁷

Survivors wish desperately for an explanation. As Sandra W. Gilbert describes in *Wrongful Death*, the explanation is often withheld in medical malpractice cases.¹⁸ An expression of remorse, acknowledgement or apology is often not forthcoming. The failure fuels the disquieting flames of anger and despair. Mrs. Gilbert lost her husband to routine prostate surgery. Lack of answers followed by inconsistent information led her to file her lawsuit. Her book reflects that a sense of re-victimization was fueled by California’s medical malpractice cap on a wrongful death recovery to \$250,000.¹⁹

Anger seems most intense when a survivor experiences a sudden loss without explanation.²⁰ We find that anger can boil over when a parent second guesses him or herself about allowing a child to engage in a questionable activity.

Frequently, this anger needs to be expressed at mediation because it just has not been allowed to complete its course. Plaintiff's anger has to be respected by all parties. Advocates and mediators must determine whether it is properly directed and what its expression may be on the survivors, the recipients of the anger, and the overall mediation process

When the loss is perceived as preventable and the survivors assume responsibility for the failure to prevent some activity, their anger is greater and more difficult to manage.²¹ Their anger may be both inner and outer directed with varying degrees of logical analysis. The sudden loss of a relationship and the loss of joint aspiration may cause a torrent of anger. Of all the stages of the grieving process, anger probably impacts litigation and mediation the most.

Often, if someone asks a survivor whose anger is still unmanageable to make an evaluative decision about a settlement proposal, the survivor will react angrily. They will be upset with the offer no matter how "legally reasonable" it may be. Invariably, some of that anger will be directed at their own counsel, the mediator, the defense attorney and/ or the defendant. Given the survivor's anger, stress, and emotional turmoil Lord,²² suggests that survivors not make important decisions for at least one year following the death of a loved one. These factors mean that in some instances an early mediation simply will not work.

Legislative Complications

There are basically two models of wrongful death statutes. One model, like Colorado's²³, limits recovery of survivors in a number of ways. Such statutes may limit who has a claim, who may bring a claim, what damages may be sought, what can be recovered, and how the proceeds may be divided.

The other statutory model, like Wyoming's Wrongful Death Statute,²⁴ allows a broader class of plaintiffs and/or a broader range of recovery, and does not set a statutory cap on recovery. While there is variation within this model, New Mexico, Arizona, California and Missouri are just some of the states that we have worked in that utilize this broader model of compensation for a wrongful death.

It is not our purpose in this article to advocate the wisdom of one model over another. Nor is it our purpose to address medical malpractice caps. However, we would simply note that survivors in states where there is a special limitation on a wrongful death allegedly caused by a physician, often express the view that the legislature has senselessly devalued their loved one and unjustly protected the wrongdoer. These feelings often enhance the anger expressed at mediation and

make such cases more difficult to resolve. Survivors in states such as California often express feeling re-victimized by wrongful death legislation that limits the recovery for non-economic loss. Speaking in the context of special barriers that limit a family's right of recovery when a wrongful death is caused by a physician; Gilbert states that this legislative limitation on recovery is terribly hard for families to accept.²⁵

Gilbert points out that accountability for a wrongful death is what survivors want most of all. But, how can there be accountability, she laments, when there is neither duty to disclose negligent events nor a duty to pay for them.²⁶ She argues as a survivor that the limitations for recovery in wrongful death cases denigrate the concepts of responsibility and accountability.²⁷ How are Plaintiff's attorneys, health care providers, defense attorneys, risk managers, adjusters, and neutrals to deal with such feelings and perceptions? It is our view that plaintiff's counsel must start addressing the legislative reality when he takes the case, along the way, and certainly before the mediation.

Mediators can acknowledge the pain of a survivor's loss and note the basis for the legislative caps. Thereafter, mediators can help survivors evaluate their case acknowledging that a full and fair recovery must be viewed in light of the statutory framework. At least survivors can have a mediation with honesty, dignity and respect.

Loss of a Child

*“...keep in mind that with the death of a child you not only have lost that particular child but also the specific hopes, dreams, experiences, fantasies, and wishes you had for that child. You have lost parts of yourself, parts of your partner, parts of your family, and parts of your future...”*²⁸

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

Colorado, which follows the more restrictive model of wrongful death recovery, limits non-economic recovery in such circumstances. A grieving parent often sees this as a rebuke and as reinforcement of their often unjustified sense of

guilt. We often hear such feelings expressed during caucuses, if not during the general sessions of mediation.

Loss of a Spouse

Depending upon your relationship you had in your marriage, the loss of your spouse is a major loss in your life. This is because the person with whom you have built and are living your life frequently plays a number of roles for you. This person may have been your friend, partner, confidant, lover, roommate, sounding-board, the person with whom you made decisions, with whom you set family policy and with whom you divide family labor and worked toward goals.”²⁹

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

Loss of a Sibling

“Sudden deaths rob us of the chance to offer comfort to our siblings in their final moments of life, to tell our siblings all of those things that lie deep within our souls, whether untold childhood secrets or disappointments over unfulfilled grownup dreams. They deprive us of the chance to ask for or to offer forgiveness for whatever childhood (or adult) transgressions may have passed between us. They take from us the final goodbye that can be so helpful in healthy grieving, leaving us with words forever left unsaid.”³⁰

This author and others point out that the loss of a sibling forever alters the family structure. A lifelong friend and companion is forever lost. The person many of us go to in a crisis or moments of despair is lost. The person who many of us go to share moments of joy or triumph is gone. Survivors never get over the loss of a sibling, yet society often disenfranchises their loss by not acknowledging it socially or by denying recovery under many wrongful death statutes.³¹ Regardless of whether a state recognizes such a loss, this often is an issue at mediation as siblings of the deceased will often accompany their parents to a mediation. Accordingly, their feelings cannot be ignored. Indeed, they may be the behind the scene decision-maker. Thus, their feelings must be addressed.

Conclusion

What is-

What cannot be changed-

Must be accepted.

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

The denial of tragedy is not mental health.

Mental health is the recognition of pain and the attempt to live with it.³²

Speaking of the accomplishments of a child, remembering shared times with a husband or a wife, reflecting on childhood escapades with a sibling – these are important parts of both the grieving process and the mediation process.

Plaintiff's attorneys must have their clients ready for mediation. They must address both the emotional and financial expectations of their clients beforehand.

The defense side may consider setting a tone and a process that fosters and encourages closure. First, would an empathetic approach warrant both an advance payment on the settlement and an early acknowledgement of loss?

Second, can both pain and transactional costs be saved with a pre-litigation mediation and/or use of neutral damage experts? Third, can the defense team be respectful in advocating its analysis of the facts and the law? In any event, in

such cases mediators must strive to build an intellectual, emotional, and, even, a spiritual connection to the grieving party.³³ Mediators need to increase their capacity for spiritual intervention, including intuition, empathy, and subtle awareness.³⁴ This does not mean imposing any spiritual practice.³⁵ It simply means being mindful of the grieving process, encouraging acknowledgement and respect, allowing the survivors to reach and/or express their feelings and emotions, and allow for direct communication between the parties.³⁶ Often survivors want some outsider to have a glimpse of their grieving soul and to feel some of their pain. The outsider can be either the defendant or the mediator.

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

Life is not fair.

You must find a way

To live with an unfair life –

To live without the one you loved.

How to begin?³⁷

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

¹ Jamie Harris Lord, *No Time for Goodbyes*, (Pathfinder Publishing 2002), p44. (Herei-in-after "Lord").

² See generally, Therese A. Rando, PhD, *How to go on Living when Someone you Love Dies*, (Bantam Books 1988), p25 ("Rando").

³ Lord.

⁴ See generally, Sandra A. Gilbert, *Wrongful Death*, (W. W. Norton & Company 1995), (site as "Gilbert").

⁵ Theresa A. Rando, PhD, *How to go on Living when Someone you Love Dies*, (Bantam Books 1988), ("Rando"), sited by Sandra M. Gilbert, *Wrongful Death*, (W. W. Norton & Company 1995), p43, ("Gilbert").

⁶ Lord at 34.

⁷ *Id.*

⁸ *Id.*

⁹ Rando a t p19.

¹⁰ *Id* at 89.

¹¹ *Id* at 90.

¹² *Id* at 90-91.

¹³ *Id.*

¹⁴ Earl A. Grollman, *Living when a Loved One has Died*, (Beacon Press 1987), p2, ("Grollman").

¹⁵ Rando cited by Gilbert at 80.

¹⁶ Lord at p38.

¹⁷ Lord at p41.

¹⁸ Gilbert at 18.

¹⁹ *Id* at 25.

²⁰ See Lord at p58.

²¹ See, Gilbert at p46.

²² Lord at p51.

²³ See, C.R.S. 13-21-201.

²⁴ See, WYO State. S 1-38-101.

²⁵ See Gilbert.

²⁶ Gilbert at p24-25.

²⁷ *Id.*

²⁸ Rando at p162.

²⁹ Rando at p27.

³⁰ T. J. Wray, *Surviving the Death of a Sibling*, (Three Rivers Press 2003), p25.

³¹ *Id* at p7.
³² Grollman at p48.
³³ See generally, Cloke at p117.
³⁴ *Id*.
³⁵ *Id* at p118.
³⁶ See generally, Cloke at p117-118.
³⁷ Grollman at p63.

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