



Ready for the Defense

\$25 million verdict for loss of society reveals need for better jury instructions

THIS MONTH'S COLUMN discusses a recent Appellate Court decision in a products liability case involving the death of the husband and a claim for loss of society by the wife. The jury awarded \$2 million for the loss of money, goods and services and \$25 million for the loss of society and sexual relations. The Appellate Court reversed the \$25 million judgment, holding it was excessive, and remanded the case to the trial court to determine a remittitur on the award. (*Mikolajczyk v. Ford Motor Co.*, 859 N.E.2d 201, 307 Ill.Dec. 201 (1st Dist. 2006)).

The *Mikolajczyk* case is being called to your attention because it reveals a need for some specific guidelines for instructing a jury on how to evaluate and place a dollar amount on "loss of society."

Jurors are asked to place a dollar amount on the "loss of society" experienced by the loss of a family member, but most jurors have little, if any, experience in determining how to go about this task. For the most part, jurors are left to guess and speculate what a fair and reasonable dollar figure would be.

For all practical purposes, a jury relies upon two forms of guidance to evaluate what the evidence of loss of society shows the economic, dollar value to be worth:

- (1) A general cautionary or preliminary instruction given the jury as guidance on how to go about deciding the case. The instruction states, in pertinent part, as follows: "You may use common sense gained from your experience in life in evaluating what you see and hear during trial." (Illinois Pattern Jury Instruction in Civil cases, I.P.I. 1.01).
- (2) The figure or figures suggested by the plaintiff's attorney and defendant's attorney to be fair and reasonable figures based upon the evidence presented during the trial.

The court also instructs the jury on how to evaluate what the attorneys say. In the same general cautionary or preliminary instruction, the court instructs, in pertinent part, as follows: "A closing argument is given at the conclusion of the case and is a summary of what

an attorney contends the evidence has shown. If any statement or argument of an attorney is not supported by the law or evidence, you should disregard that statement." (I.P.I. 1.01).

A Little Discussion of the Accident Facts and Issues

Plaintiff Connie Mikolajczyk, as administrator of her husband, James Mikolajczyk's estate, sued Ford Motor Co. and Mazda Motor Corporation on a negligence and products theory for a defective seat in a Ford Escort and she sued William Timberlake, an intoxicated driver who rear ended the Ford Escort at 60 mph while it was stopped at a stoplight. The issue was whether the driver's seat, which was a so-called "yielding seat", was defective because it flattened backwards upon impact, causing James' head to strike the back seat, resulting in his death. It was contended that a different kind of driver's seat, a so-called "rigid seat," would not have flattened backwards. The jury found Timberlake 60% at fault and Ford and Mazda 40% at fault. Because there is joint and several liabilities in Illinois, and because Ford and Mazda were not less than 25% at fault, they became liable to pay the full judgment, in particular the \$25 million for loss of society.

James Mikolajczyk was 46 years old, a physician's assistant earning \$63,450 a year and so employed for 22 years. His wife, Connie, was a secretary at a Catholic grade school. They had two children at the time of James' death: Adam, age 14; and Elizabeth, age 10.

The Arguments of the Attorneys on the Loss of Society

The Appellate Court opinion briefly summarizes the arguments on loss of society as follows:

In plaintiff's closing statement, plaintiff's attorney reiterated the testimony concerning the family's close relationship. Plaintiff's attorney then stated:

When it comes down to it, I'm almost without the ability to give you a dollar value that makes sense for the loss of society. It's something that I have strug-

gled with because I know it's your chore and it's uniquely your chore and it's one that the lawyers are free on both side[s] to make suggestions and I will.

I can't believe that a fair appraisal of the loss of society that these people have suffered would be less than \$25 million. I can't believe it.

Though defendants' attorney did not suggest a damages amount, he reminded the jury:

Under the law, under the law, you're required to find just and fair compensation and you have to be reasonable and fair.

Standing up here as [plaintiff's attorney] has done, he can ask for anything. It doesn't mean it's fair. It doesn't mean it's just. It doesn't mean it's reasonable. But that's for you to decide.

(859 N.E.2d at 227, 307 Ill.Dec. at 227).

The Appellate Court Determines the Damages for Loss of Society Were Excessive

The Appellate Court determined that the damages were excessive, reasoning as follows:

Unfortunately, however, our system of justice does not have a formula to determine the fair amount of loss of society. Often the finder of fact relies more on the heart than the mind.

While we understand the jury's sympathy, we must disagree with the verdict and the trial court's assessment of that verdict and find that the \$25 million loss of society award exceeds all fair and reasonable compensation and is so large as to shock the judicial conscience. (859 N.E.2d at 227, 307 Ill.Dec. at 227).

The Difficulty in Determining a Dollar Value of Loss of Society

When a jury verdict is excessive, the usual remedy is to reverse the judgment amount and remand it back to the trial court where the court enters a remittitur (reduces the damages to a fair and reasonable amount based on the evidence). The plaintiff's attorney then can accept the reduced amount or reject it and elect to go forward with a new trial on the damages amount.

The Appellate Court did reverse the \$25 million judgment and remand the case back to the trial court to determine a remittitur. However, the three Justices deciding the case did not agree on the guidelines for determining the value of loss of society.

Justice Greiman, writing the opinion, wrote:

We, therefore, remand this case to the trial

court for a hearing to determine the appropriate amount of remittitur. By way of guidance to the trial court, we would find it difficult to deem reasonable a loss of society award of more than seven figures in this case and would certainly find unreasonable an award of any more than one-half of the loss of society award settled upon by the jury. After the remittitur amount is set by the trial court, if plaintiff does not consent to the reduced award within a reasonable time period as set by the trial court, then the trial court shall order a new trial between the parties on the issue of the amount of loss of society damages. (859 N.E.2d at 229, 307 Ill.Dec. at 229).

Thus, he suggested that a reasonable loss of society award would not exceed seven figures and a figure of more than half of the \$25 million figure would likely be found unreasonable.

Justice Campbell, in a specially concurring opinion, took a little different view and stated:

In this case, even taking into account the evidence noted by the trial court in upholding the verdict, I conclude that the verdict falls outside the permissible range. The award does not shock my judicial conscience, but Illinois law does not require such to join the majority opinion. (859 N.E.2d at 231, 307 Ill.Dec. at 231).

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I agree that the award in this case is excessive and that a hearing to set a remittitur amount better serves the interests of justice than a new trial or our setting an award. While I respect the guidance given by the majority, I would defer to the sound judgment of the trial court after the hearing rather than establishing an acceptable range. Great deference should be given to the findings and decision of the trial court in determining a proper award. (859 N.E.2d at 231-32, 307 Ill.Dec. at 231-32).

Better Guidelines, Tests or Jury Instructions are Needed

The Appellate Court observed: “Unfortunately, however, our system of justice does not have a formula to determine the fair amount of loss of society.”

The three Appellate Court Justices deciding the case are very experienced, knowledgeable and well-respected, and the determination of the dollar value of the loss of society claim was troublesome, not clear, for them. How could a jury, without the background, experience or specific jury instruction or guidelines make a proper and reasonable determination of the value of loss of society?

We would not ask a doctor to do his first heart

surgery without the proper education, training and experience. We would not hand the keys to a car to a 16-year-old to drive without driver’s education and driver’s training.

The Christophers have a motto which seems appropriate here: “It is better to light one candle than to curse the darkness.”

Conclusion

This issue of how to help a jury place a dollar value on a loss of society claim is not easily resolved, but if the thoughts and ideas of all of us, every citizen affected by the jury system, are pooled and discussed, some guidelines can be developed. Without pretending to have an answer and with the idea that some starting point is needed to trigger discussions, we have heard it suggested that: (1) some formula based upon a percentage or multiple of compensatory damages might be a starting point; or (2) loss of society bears a relationship to loss of income or wages and some comparison might be a starting point.

There is a problem. The solution is not readily apparent. We invite your suggestions for further discussion herein toward a solution.



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