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Telling a Good Ghost Story: Winning and Maximizing Damages in the Wrongful Death and Survival Case

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TELLING A GOOD GHOST STORY: WINNING AND MAXIMIZING DAMAGES IN THE WRONGFUL DEATH AND SURVIVAL CASE

I. INTRODUCTION

In trial we tell a story. That is, if we do it right. John Quincy Adams, a great trial lawyer, is reputed (rightly or wrongly) to have said, “Whoever tells the best story wins.” Carl Bettinger, also a great trial lawyer, said in his wonderful book *Twelve Heroes, One Voice*, “Good stories are about universal truths.” In making this point, he quotes John Steinbeck: “If a story is not about the hearer, he will not listen.” The oft made point: to break through and resonate with our jury we must tell a story that transcends.

In the trial of a wrongful death or survival case, from the plaintiff’s perspective, we tell a ghost story. We do this whether we mean to or not, whether we like it or not. The story may include other stories too, but it is most certainly a ghost story. My advice in this paper is that we accept and own this inescapable fact. And, since we must tell a ghost story, it had better be about a good ghost, and it had better be well told.

II. WHY WE TELL A GHOST STORY

A. It’s A Story About We Humans

Carl Sagan, ever vigilant in debunking myths and pseudosciences, had this to say on the subject of ghosts:

Sometimes I dream that I’m talking to my parents, and suddenly – still immersed in the dreamwork – I’m seized by the overpowering

realization that they didn’t really die, that it’s all been some kind of horrible mistake. Why, here they are, alive and well, my father making wry jokes, my mother earnestly advising me to wear a muffler because the weather is chilly. When I wake up I go through an abbreviated process of mourning all over again. Plainly, there’s something within me that’s ready to believe in life after death. And it’s not the least bit interested in whether there’s any sober evidence for it.

So I don’t guffaw at the woman who visits her husband’s grave and chats him up every now and then, maybe on the anniversary of his death. It’s not hard to understand. And if I have difficulties with the ontological status of who she’s talking to, that’s all right. That’s not what this is about. This is about humans being human. More than a third of American adults believe that on some level they’ve made contact with the dead. The number seems to have jumped by 15 percent between 1977 and 1988.

Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark*, 1996, at 204.

Since Sagan published his book in 1996, twenty years ago, the number of American’s who believe in ghosts is apparently up further, according to a Harris

poll, to 42%.¹ This despite exponential advances in technology.

I wonder if Sagan would find this heartbreaking. I like to think he would instead agree it comes down to how we phrase the question “Do you believe in ghosts?” There is a fat gray line between the skeptics and the credulous, made fatter still by semantics, and most of us stumble in, out and across that zone depending on our recent experiences.

To be very clear, I would never suggest, and won’t here, use of the word ghost in the courtroom, or reference to the departed as a ghost, or even a suggestion in words that the departed is actually present in the courtroom, or elsewhere. But seldom will a juror wince to hear of a husband saying good night to his deceased wife or asking her for advice. Nor will a juror be shocked or find it campy to hear the husband heard and followed that advice. A juror would likely hear without critique that a mother who lost her little girl tells her other two children that their lost sister is now an angel who watches over them all and protects them. And should those children grow and continue to believe this tale, or at least profess to, long after they’ve given up on Santa Claus and the Tooth Fairy, no juror will wonder why or think them fools.

So there are ways in which we talk about the continued influence of the departed. We call upon the departed and they move us. They guide us. Sometimes we do things they ask of us or they would have wanted. We may do great things on their behalf.

These, are ghost stories.

The concept of ghosts, or spirits, transcend time and culture. Indigenous Americans have a thousand variations on the many intersections where the living meet the

spirit world, where their ancestors reside. The Gullah people in the American Deep South, descendants of slaves, are the cause of so many homes throughout the south having blue paint on the window frames, door frames and porch ceilings. The color is called Haint Blue, and it is a top seller for Sherwin-Williams. A “haint” is a restless spirit of the dead who, for some reason, has not moved on from the physical world. It is hoped that ghosts, who cannot cross water, are fooled by the color and do not enter the home.

Similarly, Chinese roofs are said to be curved because ghosts can only travel in straight lines. In Thailand spirit houses are constructed to appease and offer gifts to spirits. Throughout Asia, ghosts are explained to be spirits who have an attachment to the human realm that keeps them haunting and helping humans.²

Such concepts go all the way back to the beginnings in terms of civilization. Ancient Egypt’s most famous book (for lack of a better word for it) is the Book of the Dead. This “book” is actually a collection of stories begun on objects like pottery pieces and so forth from 1550 bce to 50 bce, its purpose to assist the dead on their journey through the *duat*, or underworld, so they may reach the afterlife.

Stories of the dead, their attachment to this world and their quest to reach the afterlife are so old and repeated across cultures that they must be deeply embedded in our psych. Some who study and catalogue the genre make a similar point:

. . . [M]ore than any other subgenre, ghost and haunted house tales lend themselves to the short story format. . . . Perhaps this is because the

¹ Alanna Greco, *How Many American’s Believe in God, Ghosts and UFO’s, Poll Reveals the Answers*, Lifestyle, Dec. 18, 2013.

² Tiffanie Wen, *Why do People Believe in Ghosts*, Atlantic Monthly, Sept. 5, 2014 (quoting Justin McDaniel, professor of religious studies, U.Penn.)

conventions of this genre are so ingrained in our consciousness that not much is needed to establish the details of a given tale.

Anthony J. Fonseca, June Michele Pulliam, *Hooked on Horror*, 2d Ed., at 24

So, to the extent we can tell it, telling a ghost story in trial has a high chance of being transcendent, or of at least helping to make our story more transcendent.

B. It is What Wrongful Death and Survival Actions are all About

According to Chapter 71 of the Civil Practice and Remedies Code, a death can be “wrongful.” Tex. Civ. Prac. & Rem Code 71.002. When charging the jury in a wrongful death or survival case, the court may speak of the “natural life” of the deceased, and how it was allegedly interrupted by a “wrongful” and “unnatural death.” See PJC 29.3, 29.4 (where defining “loss of inheritance”). As we discuss the charge, we lawyers will do the same. We will talk to the jury about what might have been and how the natural life of the departed was wrongfully and unnaturally cut short by the defendant.

Even more interesting, in Texas law the claim, or grievance, of a person does not die with that person. Instead, a grievance for injury to health, reputation or person can “survive” the life of that person and be carried on by that person’s heirs or legal representatives. Tex. Civ. Prac. & Rem. Code 71.002. Thus, a case involving a person who has died becomes called, confusingly to some, a “survival claim.” I find myself on occasion having to explain to clients and law clerks that it is the grievance, or cause of action, that has survived.

So: A death was wrongfully caused. The course of a life was altered unnaturally.

The last vestige of the departed is her grievance, which remains here with us to account for her suffering in this life, and perhaps her untimely death.

Is this not a ghost story?

III. ESTABLISH THE GHOST

There is good news and bad news that comes with that inescapable fact that we are telling a ghost story when we try a wrongful death and/or survival case. The good news is that, while it easier said than done, as soon as the jury believes there is a ghost, that it is a good and helpful ghost, and that it motivates our client, then the jury will likely set their mind to figuring out what the ghost wants and entering that verdict. In this way, the ghost story is a great story to tell because it leads to a successful outcome of the trial.

The bad news is that many ghost stories are about scary ghosts and the guilty people they haunt. So, we must be careful and deliberate in our telling, so the jury is not led to mistakenly impugn our ghost or our haunted client with all the wrong qualities.

A. Discover the Ghost

The typical ghost story includes at least two characters: the ghost (the departed) and the haunted (our client).

We must start listening for the ghost story at intake. We can ask the prospective client when we first meet or talk with her something like – what do you hope to accomplish with a lawsuit? In cases involving death there is more often than not an answer like – I don’t want to see this happen to somebody else, or, I just can’t sleep knowing he died that way. Details will emerge as we get to know the client better, and she us. And we may later hear more frank descriptions of her motivations,

often attributed to the continued influence of or concern for the departed. We may be told, “This is something I swore I would do for my daughter,” and “We are doing the right thing. She will tell me when we are done.” It is important for many reasons and can be potentially useful that our clients are motivated in this way and willing to share it with us frankly. But it can only be explored when the client is encouraged, beginning early in the relationship and throughout the litigation, to describe the influence in whatever way feels honest for her. The best tool for this kind of encouragement is non-judgmental listening. Active listening exercises, chair back exercises and mirroring exercises can assist any lawyer wishing to hone such skills. Many versions abound and practice is critical.

1. Helpful Ghosts, Lost Ghosts = Good Ghosts

Naturally, what we are listening for are good ghost stories; a story about a good and helpful spirit guiding our client, or a story about an understandably troubled spirit who our client desperately wants to help rest in peace. Popular examples of such stories include:

- Dickens’ *A Christmas Carol* – three ghosts help an old scrooge to learn the meaning of Christmas
- Chau Van Truong’s *Secrets Kept* – a young woman’s ghost kills a would be rapist, then enlists a family’s help in finding her murderer
- *The Sixth Sense* – helpful child ghosts help a boy understand his power of communing with the dead, and he in turn helps the dead settle matters so they can rest in peace
- *What Lies Beneath* – A ghost helps a woman learn the truth about her husband

- *Ghost*—the ghost of Patrick Swayze returns to keep his wife, Demi Moore, from hooking up with the tool who murdered him

You get the point.

2. Scary Ghost 1, Unfinished Business with our Client

But, we must also be listening for bad ghost stories coming from our clients. We must be on the lookout for signs that our client may be motivated by his ghost for all the wrong reasons.

James Van Praagh is a best selling author and co-creator and co-executive producer of CBS’ *The Ghost Whisperer*, starring Jennifer Love Hewitt. He is a true believer who claims to regularly commune with ghosts, like the boy in *the Sixth Sense* but all grown up. He explains, “Granted, ghosts want to communicate with us, but mostly they want to help us, not scare us.” He continues, “Earthbound ghosts are usually fearful, angry, or lonely, and they communicate with these kinds of emotions.” James Van Praagh, *Ghosts Among Us*, 2008, at 37-38.. He expounds that there are a variety of reasons a ghost will “stay close to earth.” He lists four:

1. Has unfinished business with someone on earth
2. Unaware of her condition
3. Wishes to make sure final wishes are followed
4. Afraid of what lies ahead (like damnation)

Id.

Obviously, some of these can be helpful, while others are not. For example, if the ghost has unfinished business with someone here on earth, the battleground question is: who is that person? In a nursing

home case, defense counsel will always conduct a cross of our client in deposition to explore our client's guilt, with questions probing why our client put the departed in a nursing home, and whether he could have visited more frequently. The aim is to develop a story for trial showing our lawsuit is really all about our clients being wracked with guilt. If she sells that story to the jury, then we lose. If not carefully elicited, a client who suggests that the departed still calls to him from the grave may only feed this dangerous story.

Ambrose Bierce defines the word "ghost" in *The Devil's Dictionary* as "the outward manifestation of an inward fear." While this is an extremely limited definition, it belies what many believe, that a ghost is merely a figment in the mind of the haunted, and must therefore be nothing other than a manifestation of fear and other negative emotions trapped in a psyche unwilling to face them head on. A repressed guilt is very commonly suspected. Many ghost stories follow this pattern. A couple of examples:

- Stephen King's *The Shining* – Jack Torrance represses the problem his drinking has become and knowledge that he could go seriously over the edge
- *The Others* -- a mother and her children encounter ghosts who threaten to reveal to her who she and her children really are.

Only by listening to our clients and picking up on repressed guilt can we unveil and deal with problematic testimony before it is fairly or unfairly exploited by a talented defense lawyer. If such feelings are suspected, talking therapy with a professional should be encouraged and communications lines should remain open. If the feelings are extreme or at risk of remaining repressed, we must consider all

options to avoid putting our client on the witness stand at trial. Jurors can appreciate and forgive guilt that is honestly dealt with, but if they pick up on such feelings despite our client's efforts to hide them, a healthy verdict becomes unlikely.

3. Scary Ghost 2, Angry Ghost

Other problematic ghost stories include those about extremely angry or wrathful spirits. These typically represent a person who, though perhaps justified in their outrage, was likely not a nice person in life anyway. That is obviously not a conclusion that would help our case. Examples of such stories include the extremely dark and compelling Japanese horror books and films that have become popular and have crossed over into the American film market, such as *The Ring* series, *The Grudge* series, and *Dark Water*. These fit the generally held notion that a ghost is an unrestful spirit wronged in life, but the ghosts in these stories exhibit extreme and inescapable wrath. Other ghost stories in this subgenre, albeit less terrifying, include:

- Nathaniel Hawthorne's *The Legend of Sleepy Hollow*
- Toni Morrison's *Beloved* – Sethe takes her daughter's life rather than let her live in slavery, but the child returns and exacts revenge on the family
- Stephen King's *Bag of Bones* – Ghosts exact revenge upon a village for what the village ancestors did to them.
- *Poltergeist*—Angry ghosts take a family's young daughter and reveal that a subdivision has been built on the cemetery in which they still lie buried.

There is no chance that any one of us would even accidentally introduce elements of these scary ghost stories into our trial story. But they are so popular that it is worth considering these stories a moment and paying heed. The takeaway is this: *our ghost cannot be angry*. That emotion, anger, in the hands of a ghost, is simply too potentially terrifying to some, especially jurors primed by repeated exposure to these kinds of ghost stories. The reaction is invariably to run, speed away in your car or book a flight to the other side of the planet. So to those of us who choose to express outrage or even anger on behalf of our clients and their cause, or to elicit such emotions from our clients, I caution that we must diligently keep such emotion well separated from any discussion or depictions of the departed.

B. Who's There?³

The best kind of ghost story is one the hearer does not even recognize as a ghost story, or one the hearer will forget is a ghost story when done hearing. Hamlet is a very good ghost story. It is also very instructive on the manner in which one must establish a good ghost.

1. Establish the Ghost Early, but Keep it Short.

For much of the first act of Hamlet Shakespeare is involved in establishing the existence of the ghost (Hamlet's murdered father), introducing him to Hamlet, and learning what he wants. This involves a lot of cries of disbelief and exclamation points. Naturally, we want to avoid all that in trial, as advised above, by not allowing our ghost to be overly scary. Any such reactions risk being accompanied by the wrong attributions of what our ghost is after and

how our ghost will go about getting it. So, unlike King Hamlet's ghost, we do not want our ghost parading in and out of fog at night at the castle wall, wearing battle armour. To put it finely, if in opening statement we have a choice between showing a harrowing photo of the departed in the throws of death or discussing a sweet last conversation our client had with the departed, choose the sweet conversation.

Apart from this fairly chilly introduction of the ghost, there is much to be learned from Shakespeare's Hamlet. After Act I the ghost leaves the play, save for one small appearance later (to chastise Hamlet for not taking it easy on his mother, as he was instructed by the ghost in Act I). The rest of the play is devoted to Hamlet scheming to unveil the murder of his father and bring down the murderer.

This is what we want. We want our jury convinced early that our client is compelled by the memory of the departed, or by the wishes of the departed. Then, as in Hamlet, the rest is about uncovering the full nature of the wrong and determining what must be done to set it right.

We could simply explain there is a ghost in opening, assuming we will make good on the promise – *Ladies and Gentleman Mr. Martin will tell you very simply from this witness stand that he did not want this fight, but he also could not just go crawl under a rock. The memory of his wife calling to him from that torn away sleeper cab simply will not let him rest.*

We may also choose to put our client, or one of our clients, on the witness stand very early for this purpose, despite the more frequent convention of putting on clients later in the order of proof. If we have a good, credible, sympathetic client (i.e. one who's case we might try) and we believe the jury will be motivated by what motivates our client, and thereafter embark upon a full investigation into the departed's wrongful

³ Shakespeare's *Hamlet*, first line, said by Bernardo.

death, then it may be worth opening the case with our client on the witness stand.

Another enjoyable option is to start with the defendant. This is an especially good choice if we have a “ghost at the feast” situation, explained in more detail below.

2. Establish and Protect our Client’s Credibility

There are several ways to *show* that our client is sincerely and credibly moved to action by the ghost of the departed. One is to show in patient, painstaking detail, as Shakespeare did in Act I with the back and forth among Horatio and the guards at the wall, and between Horatio and Hamlet, how the client came to believe that something is rotten, and how it dawned upon him the defendant wrongfully caused the departed’s death. This is where it cannot be stressed enough that the successful telling of a ghost story, like a joke, depends so much upon the way in which it is told. A calm building pace for these events is required, and in busy courtrooms with impatient judges we must employ our skill to borrow the court’s patience and indulgence from elsewhere so that we may spend it comfortably here.

Medical negligence cases often provide an example. Perhaps our client was bedside and experienced, as the departed’s health declined, the health care provider relationship slowly turn from a helpful, trusting relationship, to an increasingly cool one. Nurses and doctors may have become cagey and incommunicative, may have refused to answer direct questions, may have passed our client off to social workers, then risk managers. They may have later refused to provide medical records when requested. Showing our client’s journey into grief complicated by such feelings of betrayal and abandonment can provide depth and credibility when it comes to her motivations

for bringing suit and her need for a just outcome in the name of the departed.

Another way to show our client’s sincerity and credibility is to show humility. Hamlet says to his wise and educated friend:

There are more things in
heaven and earth, Horatio,
Than are dreamt of in your
philosophy.

Our client does not need to profess to understand where he is, emotionally. If it must be done it is the job of the expert psychologist. It is okay if the client feels lost and appears to be hobbling along the best he can, pushed in his search by poorly understood forces of nature. What is most important is that he testify honestly and earnestly about his motivations.

Yet another is to show that our client, the hero, accepts the mantle the ghost thrust upon her, but perhaps begrudgingly. Hamlet exclaims:

The time is out of joint: O
cursed spite
That ever I was born to set it
right!

This helpful sentiment will be aided if our client can honestly describe a time period or phase in which she did not respond to the call to action. Hamlet, after Act I, does not immediately begin carrying out the mission he accepts from the ghost. He first goes into a fit of melancholy, meets with Ophelia and tells her to join a nunnery. A client who admits having suffered a similar phase of being lost and out of touch with the call to action might be similarly humanized and actually gain credibility. This is the very natural “refusal of the call” element in the classic hero’s journey, and the element may be all the more important in a ghost

story, where the call to action comes from such a potentially incredible source.

3. Establish that the Ghost is a Good Ghost

Though the ghost certainly looks like Hamlet's father and wears the battle armour in which he was buried, Hamlet does not immediately accept that the ghost is truly his father. Hamlet is aware that evil spirits may lie and mislead the living, so after his initial bout of melancholy he next stages a scene, played by a group of traveling actors, that closely resembles the murder as told to him by the ghost, to watch his uncle Claudius' reaction. He does this to test what the ghost has clearly told him. It works, and Claudius bolts up when the scene concludes, proving that the ghost told Hamlet the truth; Claudius is his father's murderer.

Such a questioning not only further attests to the credibility of the haunted, but it also shows that the ghost is a helpful ghost, not just a malicious haunting spirit. I've elicited testimony of this nature in trial, with positive results: *At first I ignored these feelings, and I drank a lot. I thought I should just put it all behind me best I could But my sister and friends convinced me that that wasn't going to help me. Since then I just want to see this process through, and I feel better. I sleep better, and that is making me think that we are on the right path. It hurts, but I need to hear these things, and finish what we started.*

IV. CONFRONT THE DEFENDANT WITH THE GHOST, SPARINGLY, POIGNANTLY

A. Backstory on Wrongful Death and Survival Law

In England, through much of the 19th century, there remained no wrongful death

and survival remedies at law. The closest thing was the distant common law cousin of *deodands*, with roots tracing clear back to the 11th century. A person or group of people, most often a coroner's jury, would conduct an inquest and declare the property or chattel causing serious injury or death a "deodand," and then forfeit that property or chattel to the crown. The crown might then provide the property or some amount based on its value to the aggrieved or put it to some other pious purpose.

The major turning point, it seems, began with a series of railway deaths that caused ever increasing public outrage, culminating in the Sonning Cutting railway accident. The terrible crash occurred on Christmas Eve, 1841, took nine lives, and seriously injured another sixteen. At the conclusion of the first inquest the coroner's jury of twelve men assigned to the train a deodand value of £1000. A second inquest involving the ninth passenger killed added another £100. But soon after, the findings were appealed and quashed on technicalities and nothing was ever paid to the victims or their families.

These injustices resulted in cries for an overthrow of the deodand system. The Fatal Accidents Act 1846, otherwise known as Lord Campbell's Act, was enacted specifically to compensate victims of railway accidents. The Act allowed personal representatives to bring legal actions when the deceased person could have done so but for the person's death. Those entitled to bring the action included husband or wife, parent or child of the deceased. *Prosser & Keeton on Torts* 946-7 (5th Ed. 1984). Lord Campbell's Act served as a model for wrongful death and survival remedies in the United States, including Texas. *Id.*

It is this history that causes so many courts to say that there is no common law cause of action for wrongful death; that

wrongful death causes of action owe their existence to statutes. See e.g. *Moreno v. Sterling Drug, Inc.* 787 S.W.2d 348, 356. Those who try wrongful death and survival cases on behalf of the aggrieved will do well to remember the hard fought origins of these claims. These causes of action come not from the earwig-capped minds of would be platonic philosopher kings, but rather from the rabble. Once upon a time there were captains of industry who ran railways and made fortunes, who preferred to forget the dead and readily had even the most modest payment of duodens quashed. But others, compelled perhaps by voices they alone could still hear of their lost loved ones crushed between the cars of steaming locomotives, demanded the creation of another remedy.

B. Ghost at the Feast

“Ghost at the feast” is a phrase in the English lexicon that refers to a person or presence that brings gloom to an otherwise enjoyable occasion. More accurately used it is one who mars an occasion by bringing guilt or reviving unwelcome memories.

The phrase originates from Shakespeare’s *Macbeth* (1606). In Act III, Scene IV, the Ghost of Lord Banquo, who was just murdered, appears to the guilty Macbeth. Macbeth alone can see him. Some critiques argue over whether the ghost is meant to be real or merely a representation of Macbeth’s stirring conscience, but no director or actor is ever bothered with such a question.

The ghost merely enters, sits a bit in Macbeth’s seat, then vanishes. According to the guilty Macbeth the ghost glares at him, but the ghost does little else. His brief appearances, however, in their context, are sufficient to begin Macbeth’s unraveling.

It is accepted that Shakespeare’s choice, to have the ghost appear at the feast

(not, say in Macbeth’s bedchamber or at the site of Banquo’s murder . . .) was no accident. The survival of the phrase “a ghost at the feast” in the English language, and its meaning, prove this. The profits of a misdeed shall not be enjoyed without due consideration and homage paid to any ghosts created in making such profits.

That concept, and its link to accountability being enforced by the spirits themselves, goes even further back. Chapter 5 of the Book of Daniel of the Old Testament, tells of Belshazzar’s feast. Belshazzar is a Babylonian king and son of Nebuchadnezzar. Belshazzar holds a giant feast for a thousand of his lords and orders that the vessels that adorn the temple in Jerusalem be brought so that they may drink from them. This, we learn, is a boldly blasphemous act which offends the Jewish God.

While the drink and feast, a hand mysteriously appears and writes something on the wall. It is in Aramaic, and cannot be interpreted by Belshazzar, his lords or anyone else in his party. So, they send for Daniel, who is thought very wise and learned, and he at length translates the message to read that god has numbered Belshazzar’s days; he has been weighed, found wanting, and his kingdom will go to others. Belshazzar is killed that night, and Darius the Mede receives his kingdom.

This story from the Book of Daniel is the origin of the phrase “the writing is on the wall.” Many scholars say that the Book of Daniel is a collection of folktales originating from Jewish people then living in Babylon. Is it a ghost story? Well, it is a floating hand story, which is close enough.

It is certainly conceivable, and widely assumed, that Shakespeare had this particular story in mind when he wrote *Macbeth*. One of the most renowned depictions of this tale was painted by Rembrandt in 1635, just 29 years after

Shakespeare penned Macbeth. The story of the writing on the wall was apparently alive and well in the Renaissance.

Concepts, images and phrases that have been part of our culture for as long as these and have made their way into our language—surviving translation through ancient languages and dialects, over millennia, across continents, and through the dark ages—should not be ignored. Such phrases likely represent core concepts of fairness and justice that resides deep within our conscience.

What we must do then, at some point in the trial, is allow for a confrontation between the defendant and the departed. This can be as deftly executed as the brief, cold stare of Banguo's ghost. Perhaps we ask a CEO a question on a bean counting decision—the cutting of staff, the sparing of a safety measure—with the departed's photo left up on the easel, and we waive a hand to it as we mention the risk involved. We might add: *So, you saved your company about \$42,000 with that decision? How many decisions like that do you think you made over your 10 years as CEO?*

The ways to execute such a confrontation are infinite. But when we study the quiet haunting manner in which such confrontations occur in good ghost stories, we see that less is often more. The selection of opportunities should be carefully curated.

C. Setting it Right

Damages we may seek in a wrongful death case are as follows:

Surviving spouse, surviving child damages:

1. Pecuniary loss, past and future
2. Loss of companionship and society, past and future
3. Mental anguish, past and future
4. Loss of inheritance

PJC 29.3, 29.4

Surviving parent damages:

1. Pecuniary loss, past and future
2. Loss of companionship and society, past and future
3. Mental anguish, past and future

PJC 29.5, 29.6

Survival damages are as follows:

Survival damages:

1. Pain and mental anguish
2. Medical expenses
3. Funeral and burial expenses

PJC 30-3

It is crucial that we review each instruction and definition in the PJC as we prepare for litigation, again before conducting voir-dire and opening, and of course before closing. Take for example, the following instruction in the wrongful death charge:

In determining damages for elements 3, 4, 5, and 6, [loss of companionship and society and mental anguish] you may consider the relationship between Mary Payne and Paul Payne, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

PJC 29.3

Nearly every instruction and definition provides a roadmap and a host of opportunities to not only develop our ghost story, but to link the verdict sought to what will likely soothe the restless spirit of the departed. They will also provide a roadmap to the areas that must be diligently defended

to impede the defendant's effort to tell a better opposing ghost story.

In both causes of action, assuming the evidence supports it, we may also seek "Exemplary damages" which "means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages." PJC 29-7C.

Factors to consider in awarding exemplary damages, if any, are—

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of Don Davis.

PJC 29-7C, 30-4

Often we do not have an issue on exemplary damages. In that case, it is heartening to remember that there was never any finding beyond mere negligence from the inquests into the Sonning Cutting railway accident. The jurors nonetheless saw the accountability required by justice when negligence in a profitable undertaking takes a life or worse. And when that justice was denied the reaction from the people was outrage. So even without a jury issue on exemplary damages, we may expect jurors to choose the appropriate compensation for our clients with elements such as the nature of the wrong and the degree of culpability in mind.

V. THE TELLING

Glynn Washington, the host of the NPR radio show *Snap Judgment* provides a list of rules for telling a ghost story, which I

found (among many other lists) to be somewhat helpful. Here it is summarized and paraphrased:

1. Don't rush, keep it grounded in reality
2. Best told by someone who does not believe in ghosts
3. Tell it as if it just happened, in the present
4. Make the ghost as familiar as possible
5. Make sure the ghost wants something, and that something involves you
6. No gore, let the audience imagine the details for themselves
7. Let the story be told as an earnest warning
8. Make it about "who are we and why are we here?"
9. The story should build and take place over time
10. The story stops when the ghost interaction stops
11. Try telling your ghost story in the day

What is a great relief about this list is nearly every one of these rules, with only slight modification, describe not only what we should do to tell the story, but conduct we can actually get away with in the courtroom.

To these suggestions and the others I have peppered throughout this paper I will add:

A. Make it about the Future

A ghost story should not be about the past. The story naturally begins in the past. And ghost stories, more than most other story genres, improve and carry more weight with a significant passage of time. But a

ghost story is about putting the past to rest so that the living can go on with their lives.

This is not only true for our client, but also for the defendant and employees of the defendant. We must remember this during our cross-examinations and share this sentiment in the questions we ask and the way in which we ask them.

B. Use one great photo

We all want to show fifty photographs of the departed and catalogue for the jury the great pageant that was the departed's life. That may be irresistible, especially if we want to carry our burden and show the full extent of our clients' loss of companionship and society. So there is a time for that.

But let us remember this is also a ghost story. We really want to look through our photos and find that ONE PHOTO, perhaps washed out, perhaps somehow catching a halo or aura behind our departed, maybe even in black and white or sepia, that sums up the departed's most angelic character, and will STICK in the jury's minds. It helps if it is one of your client's favorites. Let's blow that photo up, and use that during the trial as often as possible.

C. We do not mind that our ghost is denied and repressed by the defendant

A great thing defense counsel is always willing to do to help us with our ghost story is try to sweep our departed under the rug. We want this help and we should look for these opportunities. Agree to share an easel, and leave that photo of our departed up so opposing counsel can take it down and place it, always face against the bar, behind our counsel table before asking her questions. Patiently wait as she makes her hearsay objection to the last words the

departed said to our clients and others, and perhaps provide a moment of brief silence to allow the jury to digest that the defense is attempting again to deny the presence of our departed.

D. Use Silence

Silence is the most underused weapon in the advocates arsenal, and in a wrongful death and survival case, it is an even more powerful a tool. The greatest testament to silence I ever encountered was not even real silence, per se, but the use of breaks employed by Elie Wiesel, in his 100 page masterpiece, *Night*. In *Night* Wiesel writes of his experience as a holocaust survivor. He provides sparse factual accounts of horrific experiences, and follows each episode with a simple blank space. He does not spoonfeed the reader his analysis of how the described experience made him feel or how it has affected him throughout his life. Nor does he tack directly onto the last event the next event. The intended effect, and invariable response, is that the reader, rather shocked by what she just read, will set the book down a moment and reflect for a moment on the effect such an experience might have had on her.

This is transcendence in real time, and it is the gold of human interaction. It can occur in the courtroom when we let it. We must create and allow strategic silences at the most choice moments. We can often plan them, or anticipate them. But we must also develop the muscles that tell us when one is suddenly needed and, more accurately, when to shut up.

When we manage to give the jurors a moment with our departed, or reflecting upon our client's interactions with the departed, then we must tune in and step aside long enough for the connection to make its impact.