

By Timothy J. Reuland and  
Shirley A. Murphy

A 2007 amendment to the Illinois Wrongful Death Act permits recovery for grief, sorrow, and mental suffering, and scientific evidence about these elements of damage is admissible. This article discusses the nature of that evidence and the legal standards governing its use.

## *Scientific Evidence About Grief in Illinois Wrongful Death Cases*

Survivors of a victim of a wrongful death that occurred before May 31, 2007, were limited under the Illinois Wrongful Death Act<sup>1</sup> to recovering only pecuniary loss.<sup>2</sup> While pecuniary loss included loss of the decedent's society<sup>3</sup> – that is, loss of the benefits of the decedent's love, affection, care, attention, companionship, comfort, guidance, and protection<sup>4</sup> – consideration of survivors' grief was barred.<sup>5</sup> An amendment of the Act now allows grief, sorrow and mental suffering of survivors of wrongful death to be considered as damages.<sup>6</sup>

What do survivors experience? Certainly, the loss of society as defined in the Illinois Pattern Jury Instruction<sup>7</sup> is a part of it. But what about the grief, sorrow, and mental suffering? Have these aspects of human experience been systematically studied in a way that might help lawyers better understand and present what survivors actually undergo?

This article addresses these questions and brief-

ly outlines some of what is known about survivor grief, sorrow, and mental suffering. It focuses on parents who have lost children to trauma by way

1. 740 ILCS 180/1 et seq.
2. IPI Civil 31.01-31.06
3. Id.
4. IPI Civil 31.11.
5. IPI Civil 31.07.
6. PA 95-0003, effective May 31, 2007.
7. IPI Civil 31.11.

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*Timothy J. Reuland of Speers, Reuland & Cibulskis, PC, Aurora, represents plaintiffs in wrongful death and personal injury litigation. Shirley A. Murphy, RN, PhD, is professor emeritus at the University of Washington, Seattle and has been studying family member reactions to violent death since the volcanic eruption of Mt. St. Helens in 1980.*

of illustration and suggests that “mental suffering” is a more useful term than “grief” for proponents of such evidence.

The article also briefly reviews the legal issues involved in admitting this scientific evidence.

### **Scientific evidence of grief and mental suffering**

Grief is a reaction to the disintegration of the structure of meaning that was dependent upon a relationship that is gone.<sup>8</sup> Following the death of a loved one, both the manifestations and intensity of grief vary from person to person.

Experts generally agree that grief has

Second, some thanatologists (experts in dying, death, and bereavement) believe that the phenomenon of grief has had inadequate theoretical development.<sup>11</sup> Some grief counselors believe that grief occurs in stages despite the lack of empirical evidence.

Third, instruments used to measure grief vary considerably in their scope and specificity. Some instruments have over 100 items, making them too lengthy for persons in distress to complete. Other instruments are composed of items that can be answered only “yes” or “no,” thereby limiting the value of the information obtained. The reliability and validity of these instruments can be called into question.

For these reasons, scientific evidence of “grief” may be difficult for trial lawyers to present.

**A better term: “mental suffering.”** We suggest that “mental suffering,” a term used in the recent amendment to the Illinois Wrongful Death Act,<sup>12</sup> is more easily measured and is otherwise a more useful concept

for lawyers who wish to present evidence to sustain money damages awards. The following examples of mental suffering caused by bereavement are drawn from the bereavement experiences of parents whose adolescent and young adult children have died suddenly and traumatically, most often in motor vehicle crashes.

When violent deaths of young people occur, the suddenness, irrevocability, and disbelief that one’s offspring has died before the parent causes intense personal suffering and affects reintegration into community life. The mental suffering experienced by bereaved parents includes post-traumatic stress disorder (PTSD).

The assessment of this trauma is often overlooked following violent death. Parents commonly report depression, anxiety, hostility, cognitive dysfunction, interpersonal sensitivity, changes in world view, anguish in their attempts to find both meaning in the death and ways to maintain emotional and spiritual bonds with the deceased child. All of these mental suffering concepts can be measured, most by both personal interview and paper-and-pencil tests.

For example, symptoms of PTSD can be measured based on criteria set forth in the DSM-IV, the Diagnostic and Statis-

tical Manual of Mental Disorders published by the American Psychiatric Association and commonly used by mental health professionals.

The symptoms of depression, anxiety, hostility, cognitive dysfunction, and interpersonal sensitivity can be measured by the Brief Symptom Inventory (BSI),<sup>13</sup> which defines each symptom dimension. The BSI yields an overall measure of mental distress as well as scores on individual subscale items measured by interval-level scales (as opposed to nominal “yes/no” scales).

The BSI can be purchased by qualified researchers and clinicians, and is easily and quickly administered and scored. The BSI provides normative data for non-bereaved “typical” men and women, making comparison with bereaved mothers and fathers feasible. Instruments to measure world view are also available.<sup>14</sup> Having a comparison group is a huge advantage in proving how survivors’ mental suffering is different than the mental state of people who have not suffered loss through wrongful death.

**Mothers, fathers, and siblings.** Differences in the way mothers and fathers respond to and cope with a child’s death are noteworthy, and can lead to marital problems. Friends, relatives, and colleagues vary in their support of bereaved parents. Some fear the death of a child could happen to them, so they ignore bereaved parent-friends. Others blame the parents for various reasons, and others do not know what to do or say and consequently make inappropriate remarks such as, “It was God’s will,” words often devastating to parents.

Children in the families of deceased

8. Peter Marris, *Loss and Change* (London: Routledge & Kegan Paul 1974).

9. Thomas R. Faschingbauer, Richard A. DeVaul, and Sidney Zisook, *The Texas Revised Inventory of Grief*, in Sidney Zisook (Ed), *Biopsychosocial aspects of bereavement* 111-124 (Washington DC: American Psychiatric Press 1987).

10. S. A. Murphy, *Theoretical perspectives on bereavement*, in P.L. Chinn (Ed), *Advances in nursing theory development* 191-206 (Rockville, MD: Aspen Systems 1983).

11. George A. Bonanno & Stacey Kaltman, *Toward an integrative perspective on bereavement*, 125(6) *Psychological Bulletin* 760-776 (1999). Margaret S. Stroebe, *Bereavement research and theory: Retrospective and prospective*, 44 *American Behavioral Scientist*, No. 5, 854-865 (2001).

12. PA 95-0003, effective May 31, 2007.

13. L. R. Derogatis, *BSI-Administration, scoring, and procedures manual* (Baltimore: Clinical Psychometric Research 1992).

14. R. Janoff-Bulman, *Shattered Assumptions: Towards a new psychology of trauma* (New York: The Free Press 1992).

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## **Appropriately qualified professionals should be able to testify to the mental suffering caused by a relative’s death.**

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emotional, physiological, behavioral, and social components. Common manifestations are sadness, loneliness, disbelief, sleeplessness, nausea, time spent thinking about the deceased and wishing he/she were still present, and feeling isolated. One commonly used instrument to assess grief reactions is The Revised Texas Inventory of Grief.<sup>9</sup>

**The problems with “grief.”** Measuring grief per se can be a challenge for several reasons.

First, the concept of grief overlaps with those of mourning, sorrow, depression, and the like. That weakens the scientific identity of grief. The terms “grief” and “bereavement” are sometimes used interchangeably, though they are not the same thing.

Bereavement is the period following the death of a significant other and may be regulated by social, cultural, and religious norms.<sup>10</sup> *Being bereaved* is a state of experiencing a complex set of reactions, including major life changes, grief, and mental suffering. The terms “complicated mourning,” “pathological grief,” and “traumatic grief” found in the bereavement literature have contributed to the lack of conceptual clarity surrounding grief.



siblings suddenly find themselves in dilemmas with which they have no experience. Sometimes siblings of the decedent are inadvertently ignored by their parents because of the parents' grief and mental suffering. Some bereaved children feel smothered by parental overprotection, and some perceive that they are expected to take on roles of their deceased sibling.

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**Instruments used to measure grief per se vary considerably in their scope and specificity. The reliability and validity of these instruments can be called into question.**

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Standardized and recognized instruments are available to measure parents' coping,<sup>15</sup> social supports,<sup>16</sup> family functioning<sup>17</sup> and bereaved sibling responses.<sup>18</sup>

Additional personal and family consequences include short- and long-term health problems and even the untimely deaths of bereaved parents themselves, most commonly the mother. These phenomena are supported by empirical research.<sup>19</sup>

**Other differences in mental suffering.**

Survivors experience mental suffering as a result of the wrongful death, but that suffering will vary. What factors account for differences in the grief, sorrow, and mental suffering of bereaved individuals?

Personal adjustment to the death of a significant other depends upon several sets of risk factors that can be examined at the individual case level. These are a) characteristics of the deceased, i.e., age, gender, mode of death; b) characteristics of the bereaved, i.e., age, gender, kinship, time since loss, personal and financial resources, beliefs regarding blame and preventability, and coping skills; c) the nature of the attachment between the bereaved and deceased; d) the mode of death and the circumstances surrounding the death; and e) other factors, such as family constellation and the availability of support.

For example, Bugen<sup>20</sup> found that the more central the relationship between the bereaved and deceased at the time of death and the more the death was

perceived as preventable, the more intense and long lasting the grief, when compared to grief experienced when the attachment to the decedent was less important and the death was viewed as not preventable.

Murphy, the second author of this article, found that the trauma response (PTSD) among bereaved parents five years after the sudden, violent deaths of their 12- to 28-year-old children was predicted by the parents' gender, self-esteem and coping strategies, the child's cause of death, PTSD symptoms, mental distress, perceived social support, and early intervention.<sup>21</sup>

Having reviewed some of the scientific evidence, we will turn to the legal standards for admitting such evidence.

**Admissibility of scientific data on mental suffering: *Turner v Williams***

Even before the passage of PA 95-0003, Illinois reviewing courts had shown some openness to testimony about survivor mental suffering. These courts found such testimony relevant to loss of society.

*Turner v Williams*<sup>22</sup> is an example. In *Turner*, two minor children survived a motor vehicle collision in which their father was killed.<sup>23</sup> At trial, the minor plaintiffs were permitted to introduce evidence concerning their emotional distress resulting from the death of their father.<sup>24</sup>

Specifically, the opinion states that "treating healthcare providers" testified that the two children experienced grief and related emotional difficulties due to the loss of their father, and a "treating psychology clinician" related one child's behavioral problems to his feelings of grief over the loss of his father.<sup>25</sup> The therapist gave details about a therapy program designed to help cope with grief reactions.<sup>26</sup> Additionally, both minors told the jury about their feelings of loss regarding their father.<sup>27</sup>

On appeal, the second district upheld a jury verdict of more than \$5 million. The court wrote that as a result of the death of their father, the children were entitled to recover their pecuniary losses, including money, benefits, goods, services, and society.<sup>28</sup>

The court also stated that although those recoverable damages did not, under law applicable at the time, include grief or mental anguish resulting from the death of their father, damages from loss of society were recoverable.<sup>29</sup> Under then-applicable law, the court held that although bereavement itself is not a directly recoverable element of damage, "testimony concerning bereavement is relevant to a claim for loss of society."<sup>30</sup>

*Turner* suggests that no special standards or rules apply to expert testimony concerning survivors' grief, sorrow, and mental suffering, and that the proponent of expert testimony on these subjects need only be prepared to address the standards usually involved in expert testimony in Illinois. Those standards pertain to witness qualifications and to the

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15. C. S. Carver, M. F. Scheier & J. K. Weintraub, *Assessing coping strategies: A theoretically based approach*, 56 *Journal of Personality and Social Psychology* 267-283 (1989). S. Folkman, R. S. Lazarus, C. Dunkel-Schetter, A. DeLongis & R. Gruen, *Dynamics of a stressful encounter: Cognitive appraisal, coping, and encounter outcomes*, 50(5) *Journal of Personality and Social Psychology* 992-1003 (1986).

16. M. Barrera, *Distinctions between social support concepts, measurements, and models*, 14 *American Journal of Community Psychology* 413-445 (1986).

17. D. H. Olson, J. Portner & Y. Lavee, *FACES III, Family adaptability and cohesion evaluation scales* (St. Paul, MN: Family Social Science, Univ of Minnesota 1985).

18. N. S. Hogan & D. E. Balk, *Adolescent reactions to sibling death: perceptions of mothers, fathers, and teenagers*, 39 *Nursing Research* 103-106.

19. M. Biondi & A. Picardo, *Clinical and biological aspects of bereavement and loss-induced depression: a reappraisal*, 65 *Psychotherapy and Psychosomatics* 229-245 (1996). J. Li, P. Mortensen, J. Olsen, *Mortality in parents after death of a child in Denmark: A nationwide follow-up study*, 361 *Lancet* 363-367 (2003). J. Li, D. Precht, J. Olsen & P. Martensen, *Hospitalization for mental illness among parents after the death of a child*, 352 *New England Journal of Medicine* 1190-1196 (2005). S. A. Murphy, J. Lohan, T. Braun, L. C. Johnson, K. C. Cain, R. Baugher, R. D. Beaton & M. Dimond, *Parents' health, health care utilization and health behaviors following the violent deaths of their 12 to 28-year-old children: A prospective, longitudinal analysis*, 23 *Death Studies* 1-29 (1999).

20. L. Bugen, *Human grief: A model for prediction and intervention*, 47 *American Journal of Orthopsychiatry* 197-206 (1977).

21. S. A. Murphy, L. C. Johnson, I. J. Chung, R. D. Beaton, *The incidence of PTSD following the violent death of a child and predictors of change over time*, 16 *Journal of Traumatic Stress* 17-26 (2003-a).

22. 326 Ill App 3d 541, 762 NE2d 70 (2d D 2001), appeal denied 198 Ill 2d 631, 770 NE2d 224 (2002).

23. Id at 544, 762 NE2d at 74.

24. Id at 547-48, 762 NE2d at 76-77.

25. Id at 547-48, 762 NE2d at 77.

26. Id at 548, 762 NE2d at 77.

27. Id.

28. Id.

29. Id.

30. Id, citing *Uhr v Lutheran General Hosp*, 226 Ill App 3d 236, 589 NE2d 723 (1st D 1992) (allowed testimony of decedent's parents regarding family members' mental anguish and bereavement as relevant to claims of lost society in a case where jury was specifically instructed not to consider grief or sorrow).

content of the proposed testimony, and will now be briefly reviewed.

### Qualifying the expert: the applicable legal standards

The Illinois Supreme Court addressed the standards applicable to the qualifications of experts in *Thompson v Gordon*.<sup>31</sup> If a person's experience and qualifications afford her knowledge not common to lay persons, and if her testimony will aid the trier of fact in reaching its conclusions, she is allowed to testify as an expert.<sup>32</sup>

The requisite knowledge, not common to lay persons, can be gained not only through specialized education, but also through practical experience, scientific study, training or research.<sup>33</sup> "An expert need only have knowledge and experience beyond that of an average citizen."<sup>34</sup> Whether a person has an Illinois license in the particular discipline involved is "not a mandatory prerequisite to rendering an expert opinion."<sup>35</sup>

The authors in some of the research studies cited above have acquired their knowledge through their work in various fields, such as psychology (Bonanno, Hogan, Lazarus), medicine (Li), family studies (Olson), and nursing and human development (Hogan, Murphy). Trial lawyers may thus look to persons in multiple disciplines for aid in presenting evidence of survivors' grief, sorrow, and mental suffering.

### Donaldson v CIPS and the legal standard for content of expert testimony

The Illinois Supreme Court has set out the requirements to qualify the content of proffered scientific evidence in a number of cases, a leading one of which is *Donaldson v Central Illinois Public Service Company*.<sup>36</sup>

*Donaldson* was a toxic tort case. The plaintiffs were parents of four children who developed a rare form of cancer allegedly caused by negligent cleanup of a coal tar site at a former gas plant.<sup>37</sup> The defendant challenged the causation opinions of plaintiffs' experts, alleging that the trial court did not function as a "gatekeeper" because it refused to bar the causation testimony<sup>38</sup> and, specifically, failed to apply the "Frye-plus-reliability" standard to exclude that testimony.<sup>39</sup>

In addressing these contentions, the Illinois Supreme Court held that in Il-

linois the "exclusive test" for the admission of expert testimony is the *Frye* standard,<sup>40</sup> not the "Frye-plus-reliability" standard.<sup>41</sup> In addition, the Illinois Supreme Court held that *Frye* does not make the trial judge a gatekeeper of all expert testimony, but only that involving a novel scientific principle, technique, or test.<sup>42</sup> Scientific evidence is "novel" under *Frye* when it is "original or striking" and does "not resemble something formerly known or used."<sup>43</sup>

*Donaldson's* holding that *Frye* is the exclusive test for the admissibility of expert testimony distinguishes Illinois' approach from the "Frye-plus-reliability" standard in the federal courts. As the *Donaldson* opinion points out, the "Frye-plus-reliability" test requires a trial judge to use a multi-question inquiry<sup>44</sup> to determine not only whether the expert's technique or methodology is generally accepted, but also whether the opinion is reliable and based on valid underlying data.<sup>45</sup>

In contrast, the *Frye* standard is commonly called the "general acceptance" test. It holds that scientific evidence is admissible "if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'"<sup>46</sup> No multi-question inquiry is necessary.

*Donaldson* points out three other important facts about the application of the *Frye* "general acceptance standard." First, general acceptance "does not concern the ultimate conclusion," but rather "the underlying methodology used to generate the conclusion."<sup>47</sup> If an expert's underlying methodology is reasonably relied upon by experts in his or her field, the fact-finder may consider the expert's opinion, even if the conclusion reached is novel.<sup>48</sup>

Secondly, "general acceptance of methodologies does not mean 'universal' acceptance of methodologies."<sup>49</sup> The supreme court points out, for example, that the medical community may reach diverse opinions regarding causation, but diverse opinions do not render causation testimony inadmissible if the doctor offering the opinion used generally accepted methodology to reach his or her conclusion.<sup>50</sup>

Finally, "[q]uestions concerning underlying data, and an expert's application of generally accepted techniques, go to the weight of the evidence rather than its admissibility."<sup>51</sup> The supreme court's

approach relies on cross-examiners and their experts to attack underlying data and techniques. It does not permit the exclusion of evidence because questions may be posed about underlying data or techniques.<sup>52</sup>

Whether a methodology is generally accepted rather than novel can be established in two ways: by a *Frye* hearing or by judicial notice of "unequivocal and undisputed prior judicial decisions or technical writings on the subject."<sup>53</sup> If different jurisdictions have reached varied determinations on a given methodology or test, or if the scientific literature on the methodology reveals "a dichotomy in the scientific community, rather than [an] unequivocal or undisputed viewpoint," then general acceptance cannot be determined by judicial notice. A *Frye* hearing must be held.<sup>54</sup>

### Conclusion

While we know of no Illinois case that has specifically addressed the issue, *Turner* suggests that testimony about grief, sorrow, and mental suffering does

31. 221 Ill 2d 414, 851 NE2d 1231 (2006).

32. Id at 428, 851 NE2d at 1240.

33. Id at 428-429, 851 NE2d at 1240.

34. Id at 429, 851 NE2d at 1240.

35. Id.

36. 199 Ill 2d 63, 767 NE2d 314 (2002); abrogated on other grounds (standards of review) in *In re Commitment of Simmons*, 213 Ill 2d 523, 821 NE2d 1184 (2004).

37. *Donaldson* at 65-66, 767 NE2d at 317.

38. Id at 76, 767 NE2d at 323.

39. Id at 80, 767 NE2d at 325.

40. Citing *Frye v United States*, 293 F 1013 (DC Cir 1923).

41. *Donaldson* at 76-77, 767 NE2d at 323.

42. Id at 78-79, 767 NE2d at 323.

43. Id at 79, 767 NE2d at 324.

44. Id at 80, 767 NE2d at 325 (quoting):

Under the "Frye-plus-reliability" standard, a court considers the following questions: (1) Can the scientific technique or method employed be empirically tested, and if so, has it been? (2) Has the technique or method been subjected to peer review and publication? (3) What is the technique or method's known or potential error rate? (4) Are its underlying data reliable? (5) Is the witness proposing to testify about matters growing naturally and directly out of research she has conducted independently of the litigation, or has the witness developed her opinion solely for the purpose of testifying? and (6) Did the witness form her opinion and then look for reasons to support it, rather than doing research that led her to her conclusion?

45. Id at 80-81, 767 NE2d at 326.

46. Id at 77, 767 NE2d at 324, quoting *Frye*, 293 F at 1014.

47. Id at 77, 767 NE2d at 324.

48. Id.

49. Id.

50. Id at 77-78, 767 NE2d at 324.

51. Id at 81, 767 NE2d at 326 (citations omitted; emphasis in original).

52. Id at 88, 767 NE2d at 330.

53. *People v McKown*, 226 Ill 2d 245, 254, 875 NE2d 1029, 1034 (2007).

54. Id at 275, 875 NE2d at 1046.

not involve novel methodology. Instead, that testimony is based on the usual methods of observation typically used by physicians, psychologists and even lay persons.

Appropriately qualified professionals

are able to assess the effects of a relative's death on a survivor. These experts should be permitted to testify about how the survivor is in fact experiencing any of the manifestations of grief, sorrow, and mental suffering identified in the scien-

tific literature on bereavement, including those discussed above (which are themselves drawn from peer-reviewed journals). What science has long known, the law now permits to be spoken. ■

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