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# REPRESENTING CRIME VICTIMS CALLS FOR CREATIVITY

By Franklin W. Shoichet, Esq.

It is over now, a five-year battle fought on behalf of the families of two Washington state murder victims. In 1993, when Ted M. walked over to his next-door neighbors' house and shot them both to death, the families of the victims--Robert J., 31, and Jennifer F., 20--could not reasonably expect to recover much for their devastating losses. Although Ted, 58, owned his home, it was in poor shape and worth little. In addition, almost all insurance policies exclude coverage for "intentional acts." Ted's only income was a $1,200 per month pension he had earned as a municipal garbage truck driver. Not only that, he was unquestionably mentally ill--even the prosecution's expert witnesses agreed he was insane. (Ted had delusions that Robert and Jennifer were spying on him, and sending poison gas into his home.) Ted was adjudged not guilty by reason of insanity, and sent to Washington State's main mental hospital. Most likely, he will never be released.

One of the sad ironies of our civil justice system is that when victims of violent crime seek compensation for their injuries, the deck is often stacked against them. A lawyer representing victims of violent crime--especially the family c a murder victim--has to be creative and persistent when pursuing justice for his or her clients.

The attorney cannot accept at face value assurances from anyone who stands to gain or lose from the crime, or from those whose negligence may not be criminal, but which helped to make the crime possible. In short, the need for a victim's attorney to perform detective work really just begins when the criminal trial ends. The goals of a criminal trial

a review of the criminal file.

## Litigation Strategy

My five-year representation of Robert's and Jennifer's families involved many discrete steps along the way. **Step 1: Sue the killer's guardianship estate.** First, the victims' families sued Ted's estate. Because Ted was insane, a guardianship had been established, with his son, Mel, a local truck driver, the appointed guardian. Mel produced Ted's homeowner's insurance policy. As expected, it had an "intentional acts" exclusion. However, pursuant to Washington case law, the court could take Ted's insanity into consideration in deciding whether he lacked "intent" such that his insurer could avoid coverage.(1) **Step 2: Get the insurer to tender the policy limits.** While the limits were only $50,000, this amount, which the insurer soon paid, helped fund the rest of the litigation.

We turned our focus to Ted's remaining assets. Mel was being evasive on this topic. Contrary to a court order, he did not file an inventory for the guardianship. Following up on suspicions, we learned that Mel had put down $40,000 on a house after becoming guardian--which seemed odd for someone who had filed for bankruptcy two years earlier, listing his father as a creditor. **Step 3: Get Mel ousted as guardian, and have an honest one appointed.** The probate court readily came to our aid in accomplishing this step.

**Step 4: Work with the new guardian to find Ted's other assets, such as what we discovered was $100,000 in bank savings.** The new guardian settled with the plaintiffs, in part by agreeing to pay approximately $650 per month from Ted's pension check, in addition to the $50,000 insurance payment.(2) (Because of peculiarities in state and federal law, the protection afforded some types of retirement pensions was not available to protect Ted's pension payments from collection.(3)) More significantly, the new guardian agreed to assign to the victims' families any claims the guardianship estate had against Mel or anyone acting in concert with him.

There was an unforeseen problem in collecting these amounts. The state asserted a lien on Ted's estate for the cost of

caring for a criminally insane patient, a procedure established by statute.[4] Incredibly, the state insisted on its priority

drafted pursuant to a statute authorizing collection on the basis of the insane patient's "ability to pay." The statutory standards were not a model of clarity, and the regulations omitted from the "ability to pay" factors any mention of money owed by the criminally insane patient to his or her victims.[5] However, the law of statutory construction sometimes allows for retroactive application of a statutory amendment where it is enacted to *clarify* existing law or legislative intent.[6]

**Step 5: Ask the legislature to clarify its delegation of authority.** Two of the legislature's most notable crime victim advocates, Rep. Ida Ballasiotes and Rep. Jeralita Costa, prepared a bill to clarify the "ability to pay" legislation to recognize crime victims' interests. At the committee hearings, a spokesperson for the administrative agency that had insisted for two years on priority of payment testified in support of the bill. It passed unanimously. Governor Lowry signed the bill, with Robert's and Jennifer's families looking on.

We then turned our focus back to Mel. With the assistance of his mother (and Ted's ex-wife), a bookkeeper, Mel had prepared a financial report of sorts. Tens of thousands of dollars in unaccounted for cash withdrawals had taken place, and Mel and his mother both testified at deposition that they could not remember what these were for.

**Step 6: Obtain a judgment against Mel.** [7] On a motion for summary judgment, the judge entered a total award of over $250,000. The award was large for several reasons. For one, Washington law allows pre-judgment interest on amounts that are "liquidated," *i.e.*, capable of calculation with precision without reliance on opinion or discretion.[8] This policy is especially strong in cases involving looting of guardianship estates.[9] In addition, Mel was liable for attorney's fees which were awardable when recovering a guardianship estate's assets.[10]

**Step 7: Attempt to collect the judgment against Mel.** Mel was not willing to cooperate in the collection of the judgment. He promptly filed for Chapter 13 "wage earner" bankruptcy.[11] What Mel had done as guardian was the type of "defalcation of fiduciary duty" that is non-dischargeable under a Chapter 7 bankruptcy.[12] But the Chapter 13 list of non-dischargeable debts does not include all of the Chapter 7 non-dischargeable debts. Fiduciary defalcations, fraud, and embezzlement may all be discharged under Chapter 13.[13] Mel was allowed to pay approximately twenty-five cents on the summary judgment dollar pursuant to a so-called "best efforts" plan,[14] whereby he returned the equity in his house, returned the boat he had bought with guardianship funds, and paid approximately $200 a month for five years.

**Step 8: Look beyond Mel to recover Ted's assets.** Mel's Uncle Jerry (Ted's brother), knowing Mel was Ted's guardian, obtained from guardianship funds a high risk, $10,000 investment in a gold mine in which Jerry had an ownership interest. The last thing I expected to be doing on behalf of Robert's and Jennifer's families was a securities law case,[15] but you do what you have to do. Because the gold mine was not the kind of "prudent investment" that is required of a guardian, Jerry's insurer ultimately paid back the $10,000, with interest and attorney's fees of $ 6,500.

**Step 9: Recover from Mel's mother.** In examining bank records, we noticed a curious pattern. Soon after Mel made large withdrawals from his father's IRA, his mother would visit her safe deposit box. Mel's mother told her lawyer about the "records" she had kept of her safe deposit box visits, showing large amounts of cash from Mel placed in the box at the crucial times. Periodically, Mel would ask for withdrawals to purchase items such as his new boat and car license tabs for his girlfriend. Mel's mother, ever the bookkeeper, kept meticulous records of the safe deposit box transactions. An all-day mediation resulted in a $ 42,000 settlement with Mel's mother.

**Step 10: Settle with Mel's lawyer.** Rather than ensuring that Mel performed the tasks the court had assigned to him, Mel's guardianship lawyer sat back, believing he owed no duty to Ted, the ward for whom the guardianship had been established.[16] In the end, this approach to guardianship matters cost him a $130,000 settlement with the plaintiffs.

**Step 11: Settle with Mel's girlfriend.** Mel's girlfriend-who received thousands of dollars in "gifts" from her boyfriend

who had paid for them with guardianship money-was ordered by the court to return these fraudulent "gifts."[17] Before the court rendered its final judgment, she paid back $10,000 she owed.

**Mental Health System**

Prior to murdering Robert and Jennifer, Ted M. had a long history with the mental health system. Four months before the killings, a mental health professional in a neighboring county ordered that Ted be detained and evaluated for possible commitment. We later learned that she noted in her chart that Ted was the "most globally paranoid man I have seen in a very long time." During her deposition, she testified as follows: "He just, after thousands of contacts with psychotic people for me to have noted that he was the most globally paranoid person that I had seen in a long time, there was some significance to that. I mean, he was that paranoid."

A three-day period of "evaluation and treatment" at a local hospital was required before a court could determine whether Ted should be committed.[18] The hospital's intake chart for Ted was ominous:

He was grandiose in discussing his intelligence and how he had managed to avoid 'all those people out there earning $100,000 a year who are trying to put me away for life.' He denied suicidal ideation but stated he would kill the people who are after him if he could.

Despite his initial statements, Ted was warehoused in the hospital for three days. On the morning of Ted's commitment hearing, a hospital social worker spoke with a local community mental health agency where Ted had previously been a patient. An agency representative testified at deposition that he and his colleagues were "all aware that [Ted] had these weapons in his house," especially after a "frightening" home visit when Ted tried to get agency employees down to his basement to show them his gun collection. The agency worker--who recommended further hospitalization for Ted--later testified:

I think he should have been detained. I mean I believe people have the right to be crazy. But unfortunately, I thought he might act on it one day.

Q. If he had made such a [threatening] statement ?

A. Yeah, sure.

Unfortunately, none of this information had been mentioned at Ted's commitment hearing. Rather than detain Ted for another fourteen days for further evaluation, the mental health court released him under a "less restrictive order."[19] This order released him if, for the next ninety days, he complied with its conditions, which included: "Follow treatment recommendations of [the community mental health agency] and any case manager appointed for him by [it]." The hospital never disclosed to the court that Ted had a long history of non-cooperation with that very agency--a fact that the hospital social worker had learned in her call to Ted's case manager at the agency. The social worker's last note stated: "Hopefully, the [court order] will provide the structure the patient needs." Rather than reinforce that structure, the hospital's sole instruction to Ted on its discharge form was: "Stay away from junk food." **Step 12: Sue the hospital for its negligent investigation of Ted, its failure to provide the court with the information that it discovered from the agency, and its failure to arrange for proper care for Ted.**[20]

During the next ninety days, Ted did not cooperate with the local mental health agency. As a result, a county mental health worker could have brought Ted back before a judge, or Ted could have been summoned back to court through another court procedure.[21] However, not wanting to "jeopardize" its relationship with Ted, the agency never notified either the county mental health authorities or the court of Ted's non-cooperation. After ninety days, the "less restrictive

order" expired of its own terms. As far as the government mental health system knew, the order had been a success, and no further action was taken.

The mental health agency's silence was only part of the story. While reading the police murder investigation file, I discovered yet another serious mistake. A man named Kyle, a court employee who knew Ted, had become fearful about Ted's mental state. In addition to his usual paranoid ramblings, Ted had recently brandished a gun at a local fishing spot they both frequented. Ted told Kyle that he was thinking of coming to the courthouse to kill a judge who Ted believed had persecuted him.

Kyle called the county mental health agency, told the story once, received a call back, and told the story again. The county did not act, but referred Kyle to the community mental health agency that had been treating Ted. Kyle called them and told the story for the third time. He got a call back from Ted's case manager, the same one who knew about the guns. Kyle told the story for the fourth time, and the case manager promised to do something. Nothing was done. **Step 13: Sue the community mental health agency and the county for their failure to take steps to protect against the foreseeable danger that Ted presented** (22) The county and the agency denied any record of Kyle's calls. Fortunately for the plaintiffs, there were witnesses to Kyle's efforts.

The county's records contained an extraordinary memorandum of a meeting with state mental health authorities. Deinsitutionalization had become the new mental health order in Washington, as elsewhere. Unfortunately, funding fo community agencies never reached minimally adequate levels. Jails became the new mental health wards, as "deinstitutionalized" patients were left to "decompensate" to the point of criminality.(23) Less than a year before Robert's and Jennifer's murders, the state warned the county that it was sending too many people to the state hospital, creating the need to open up wards to house the new patients. According to the memorandum, a state official allegedly stated: "Money to pay for these wards would be taken from any additional community funding the legislature might appropriate." By the following month, new admissions to the state's mental hospital dropped by thirty percent.

**Step 14: Sue the state for its threat to reduce funding of local mental health agencies unless they sent less patients to the state mental hospital** In discovery, county officials denied the statement quoted above, but a state official conceded in deposition that the threat had been made.

We also learned the county had pursued its own interpretation of the state law which empowered county authorities to re-apprehend patients who did not comply with "less restrictive orders," or to summon them to court.(24) County officials refused to use the latter procedure, and insisted that re-apprehension could only be used if patients were know to be deteriorating. How such a deterioration could be diagnosed without bringing the patient in for re-evaluation was never explained.

All four defendants moved for summary judgment, claiming numerous forms of immunity,(25) lack of proximate cause,(26) and lack of a recognized duty to the victims.(27) Happily, Robert's and Jennifer's families were in court to hear the judge reject each plea for dismissal, asking one non-plussed defense attorney: "Do you get the feeling you are in a heap of trouble?"

The mental health case settled the following week during an all-day mediation for another $265,000, primarily from th hospital and the community mental health agency.

If Ted lives a normal life expectancy, we expect the total recovery for these efforts to be about $700,000. The only basis under Washington law for an award to Robert's and Jennifer's parents was for the net lost future accumulations to each decedent's estate.(28) Given the fact that Jennifer was an unemployed high-school drop-out, that Robert was part-owner of a struggling new telephone solicitation business, that they were unmarried and childless, and that Washington does not permit punitive damages awards, the dollar amounts recovered were much more than expected.

The road to civil accountability for a terrible criminal act can be long and full of obstacles. But the courage and persistence of victims, coupled with creative advocacy on their behalf, can force accountability, even in the face of

conspiracies of greed, official and professional cover-ups, and an unwillingness to face up to the consequences of a mental health system that seemed to take leave of all sanity.

*Franklin W. Shoichet, Esq. is a charter member of the National Crime Victim Bar Association and has practiced law in Seattle for twenty-four years. The names of the parties have been changed to comply with a confidentiality agreement with one of the defendants.*

**End Notes:**

1. *See Pemco v. Fitzgerald,* 828 P.2d 63 (Wash. 1992).

2. At the time, the lack of intent did not mean Ted could file for bankruptcy, since he knew he was pulling the trigger on a loaded gun, and thus had committed a "willful and malicious" tort that was not dischargeable. 11 U.S.C. § 523(a)(6). A recent U.S. Supreme Court decision changed that rule, holding that it applies only to intentional torts. *Kawaauhau v. Geiger,* 523 U.S. 57 (1998). What is not yet clear is how insurance law "intentional acts" concepts interplay with this new bankruptcy law holding.

3. WASH. REV. CODE § 6.15.020 (3), only exempts "the right to a pension" from collection on a judgment, but does not exempts a pension payment, once received. WASH. REV. CODE

§ 6.15.020 (2), however, exempts a federal pension payment after it is received, even after it has been deposited or loaned.

4. WASH. REV. CODE §§ 43.20B.320, 43.20B.335.

5. WASH. ADMIN. CODE § 275-16-085.

6. *See* 2 **Singer, Sutherland Statutory Construction** §§ 22.31, 41.11 (5th ed., 1993); *Tomlinson v. Clarke,* 825 P.2d 706(Wash. 1992); *Johnson v. Continental West,* 663 P.2d 482 (Wash. 1993).

7. A guardian's basic duties include loyalty, *i.e.*, the duty to act "solely in the interest of the [ward] . . . .' **Restatement (Second) of Trusts** § 170, and to account for the estate faithfully, § 172; and not to commingle estate assets with personal assets, § 179.

8. *See Prier v. Refrigeration Eng'g. Co.*, 442 P.2d 621 (Wash. 1968); *Bailie Communication v. Trend,* 810 P.2d (1991) (applying liquidated damages rule to unjust enrichment claim).

9. *See* **Restatement (Second) of Trusts** § 207.

10. WASH REV. CODE § 11.76.070 and former WASH REV. CODE § 11.96.140.

11. 11 U.S.C. §§ 1301, *et seq.*

12. 11 U.S.C.§ 523(a)(4).

13. 11 U.S.C. § 1328 (a). However, the "good faith" standard, 11 U.S.C. §1325 (a)(3) may preclude a Chapter 13 discharge if the true purpose of a Chapter 13 Plan is to evade Chapter 7 limitations without reasonable and substantial payments to creditors. *In re Bloom,* 3 B.R. 467 (Bankr. C.D. Cal. 1980).

14. *See* 11 U.S.C. §§ 1325(a)(3), (b)(2); *In re Warren,* 89 B.R. 87 (Bankr. 9th Cir. 1988); *In re Pickering,* 195 B.R. 759 (Bankr. D. Mont. 1996).

15. *See* WASH REV. CODE §§ 21.20.010, et seq.

16. *See Fickett v. Superior Court,* 558 P.2d 988 (Ariz. 1976); *In re Fraser,* 523 P. 2d 921 (Wash. 1974); *In re Clagett,* 544 N.W.2d 878 (S.D. 1996).

17. *See generally,* **Restatement of Restitution** § 4 (1937): "A transferee who would be under a duty of restitution if he had knowledge of pertinent facts, is under such duty, if, at the time of transfer, he suspected their existence." If the transferee is, in reality, a donee, and the transferor acquired the property or money by fraud, the transferee, even though otherwise totally innocent, has the same duties of restitution as the transferor. **Restatement**, *supra* at § 17. A transferee takes with notice if he/she knows the facts in question, or should know them, i.e, "...when he/she knows facts that would lead a reasonably intelligent and diligent person to inquire whether there are circumstances that would give rise to [a restitutionary remedy], and if such inquiry when pursued with reasonable intelligence and diligence would give him[/her] reason to know of such circumstances." **Restatement**, *supra* at §§ 174, 175.

18. *See* WASH. REV. CODE § 71.05.150.

19. *See* WASH. REV. CODE §§ 71.05.230, *et seq.*

20. *See Petersen v. State,* 671 P. 2d 230 (Wash. 1983).

21. *See* WASH. REV. CODE 71.05.340.

22. *See Bader v. State,* 716 P.2d 925 (Wash. 1986).

23. *See* **E. Fuller Torrey, Out of the Shadows: Confronting America's Mental Illness Crisis** (1997). Dr. Torrey, a leading expert in schizophrenia, also is a leading critic of the excesses of deinstitutionalization. He estimates that approximately one thousand deaths a year occur as a result of these misguided efforts. Dr. Torrey is also a founder of the Treatment Advocacy Center (TAC), which describes itself as "dedicated to eliminating legal and clinical barriers

to timely and humane treatment for Americans with severe brain disorders who are not receiving appropriate medical care. Focusing on schizophrenia and manic-depressive illness (bipolar disorder), TAC works to prevent the devastating consequences of non-treatment: homelessness, suicide, victimization, worsening of symptoms, violence, and incarceration."

24. *See* WASH. REV. CODE § 71.05.340. *See also* **National Center for State Courts**, **Guidelines for Involuntary Commitment** § H4 (1986): "Without provisions and resources for supervising, monitoring, and reviewing a respondent's compliance with the conditions of outpatient commitment or conditional release and without provisions and resources to revoke outpatient status and pull the respondent back in to more restrictive care, conditional release and outpatient commitment are nothing but a hope."

25. *See generally* WASH. REV. CODE § 71.05.120(1); *Petersen v. State, supra*; *Taggart v. State,* 822 P.2d 243 (Wash. 1992); Freedman, *The Psychiatrist's Dilemma: Protect the Public or Safeguard Individual Liberty,* 11 **U. Puget Sound L. Rev.** 255 (1988)*Evangelical United Brethren Church v. State,* 407 P.2d 440 (Wash. 1965) (discussing discretionary immunity standards);*Ruff v. King County,* 72 Wash. App. 289, 294-95, __ P. 2d __ (1993)(stating that immunity protects policy-level decisions, not discretion exercised at the operational level);*Babcock v. State,* 809 P.2d 143 (Wash. 1991)(foster care placement investigation prior to issuance of court order not shielded by judicial immunity);*Bender v. City of Seattle,* 664 P.2d 492 (Wash. 1983)(detective who controlled flow of information to court for issuance of warrant not shielded by quasi-judicial immunity).

26. *See generally Petersen v. State, supra*; *Bader v. State, supra*; *Taggart v. State, supra*; *Estates of Morgan v. Fairfield Family Counseling Center,* 673 N.E.2d 1311 (Ohio 1997).

27. *Cf. Petersen v. State, supra; Lipari v. Sears, Roebuck & Co.*, 497 F. Supp 185 (D. Neb. 1980)*; Naidu v. Laird,* 539 A.2d 1064 (Del. 1988); *Perreira v. State,* 768 P.2d 1198 (Colo. 1989); *Schuster v. Altenberg,* 424 N.W.2d 159

(Wis. 1988); *Mahomes-Vinson v. U.S.*, 751 F. Supp. 913 (D. Kan. 1990), *with Tarasoff v. Regents of Univ. of Calif*, 551 P.2d 334 (Calf. 1976); *Thompson v. County of Alameda*, 614 P.2d 728 (Calf. 1980). The latter line of cases, which appears to be the majority rule, limits the duty in similar circumstances to reasonably identifiable victims. *Cf. also Estates of Morgan v. Fairfield Family Counseling Center, supra*; **Restatement (Second) of Torts** §§ 315, 319; *Hasenei v. U.S.*, 541 F. Supp. 999 (D. Md. 1982).

28. WASH. REV. CODE Ch. 4.20. Note, however, that if official liability can be established under 42 U.S.C. §1983, federal damages remedies may supplement state wrongful death law. However, liability under a federal civil rights theory for injuries to a third person caused by the failure to supervise a felon, jail inmate mental patient, or other similarly situated person, is exceedingly problematic, given *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). Nonetheless, if the victim has been placed in the custody of the state, or where the state has placed the victim in a helpless or dependent position, liability may still exist, assuming the government was "deliberately indifferent." *See*, **Nahmod**, **Civil Rights and Civil Liberties Litigation** §§ 3.59, 3.60, 4.69 (4th ed. 1997).