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# NONECONOMIC DAMAGES, SUFFERING, AND THE ROLE OF THE PLAINTIFF'S LAWYER

*Ellen S. Pryor\**

Tort law has many terms for suffering, including general damages, noneconomic damages, pain and suffering, mental anguish, impairment, loss of the enjoyment of life, and loss of companionship and society. All these terms signify forms of human suffering: from pain; from injury and shock; from loss of ability, mobility, or livelihood; from the loss of a loved one; from the recognition that life will never be the same. Each year the vast tort engine processes tens of thousands of claims for suffering. The players in the tort system—the plaintiff's lawyer, the defense lawyer, and the insurance company and its adjusters—articulate, investigate, measure, probe, argue, gather evidence, strategize, monetize, and bargain over these claims for suffering.

How does this legal claiming process affect the suffering of the plaintiff?<sup>1</sup> That *some* effects occur is difficult to dispute. Whatever the nature of the injury and whoever the plaintiff is, suffering is an experience with permeable boundaries, shaped not just by the medical nature of the injury but also by psychological, spiritual, relational, and

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1. One might argue that this question—however fundamental it might seem—is far down in the queue of questions meriting empirical research or systematic study. First, we plausibly could sense that, even if the tort process alters or misshapes the suffering of the individual, this is an inevitable result of a compensation-claiming system of any kind. Thus, even if we were to find that although we regret what we intuitively sense as some suffering inflicted or aggravated by tort, we sense that, in the main, it cannot be avoided.

Second, we could suspect that this fundamental question cannot be studied in ways that would produce insights that could be useful to the system. For instance, we might undertake longitudinal research—at a time right after case resolution and again five years later—that would assess the qualitative experience of suffering and the factors that affected it. Even aside from the daunting task of designing such studies, it could yield few generalizable insights. These and other considerations do seem to be powerful reasons for a paucity of information about how the tort process affects the suffering of the plaintiff.

other factors. Whether the plaintiff files a claim that is settled quickly or one that takes years to litigate, the legal claim process will be an overlay onto and will affect how the plaintiff experiences and makes meaning of his or her suffering. The legal process does not just evaluate, measure, and eventually compensate (or not compensate) for "noneconomic damages" that stand independent of the legal process. No, the legal process itself inevitably will be an influence on the plaintiff's "noneconomic" losses.<sup>2</sup>

This Article addresses one topic within this larger subject: the link between the plaintiff's lawyer's representation of the plaintiff and the plaintiff's experience of suffering. Simply looking at the lawyer's role might suggest that there is little to say about the connection of the

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2. What does tort scholarship and medical-rehabilitative research tell us about the interaction between tort and the plaintiff's experience of suffering? Certainly the tort liability debates have produced extensive scholarship on noneconomic losses, including horizontal and vertical equity, effects of capping noneconomic damages, and the economic efficiency of noneconomic damage from an insurance perspective. See Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. REV. 908, 919-24 (1989) (discussing lack of horizontal equity); Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1787 (1995) (discussing debate over the inefficiency of noneconomic damages); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1556-57 (1987) (same); Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 99-100 (1993) (same); Michael J. Saks, *Comments on the Vidmar and Diamond Studies*, 48 DEPAUL L. REV. 423 (1998) (same). Much of this research, of course, has focused on different questions than tort law's effect on the noneconomic loss of the plaintiff.

Some lines of research have focused more directly on how the tort process affects the individual plaintiff. Procedural justice research asks about the factors that affect whether and when the tort process can leave a sense that justice has been served. See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990) (showing value to participants of processes that give them a sense of respect and dignity). Some tort-related research appears in the body of therapeutic jurisprudence, a significant body of work that examines legal doctrines and systems with an eye toward improving their power to improve the lives and mental health of individuals. See generally *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996); *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (Dennis P. Stolle et al. eds., 2000); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 KAN. L. REV. 39, 62-65 (1994) (analyzing procedural justice research in the setting of tort compensation).

Perhaps the most directly relevant body of work is the long-standing and extensive literature inquiring into whether the tort system prolongs the process of recovery from injury. This literature springs from both medical and legal sources. Medical rehabilitation literature has extensively debated: whether the pendency of a claim (for tort or workers' compensation) delays or reduces recovery; to what extent the amount or timing of compensation payments can create incentives not to energetically rehabilitate and return to work; and whether filing or litigating a claim creates some sort of disability mentality (conscious or subconscious) that impedes recovery. See generally EDWARD B. BLANCHARD & EDWARD J. HICKLING, *AFTER THE CRASH: ASSESSMENT AND TREATMENT OF MOTOR VEHICLE ACCIDENT SURVIVORS* (1997) (canvassing the studies on the relationship between compensation claiming and rehabilitation outcomes). The precise questions asked by various studies, and the methodology used, vary considerably.

lawyer's representation to the client's suffering. The lawyer's role is to represent the individual in his or her legal claim; the lawyer is not, and should not, function as a grief counselor or therapist. Thus, the lawyer's representation is concerned with the client's suffering (among other matters), but in fact probably has little effect, and should not affect, the client's suffering.

This Article contends that a linkage between the lawyer's role and the client's suffering does exist. From the start of the case—which can be as early as days after the injury event—to its end, the lawyer is professionally charged with the task of articulating the client's injury in all the ways that the case requires: investigating, engaging in discovery, measuring, strategizing, negotiating, and monetizing the injury. And this process cannot take place in a way that is entirely bracketed off from the experience of suffering itself. Whatever the nature of the injury or whoever the plaintiff is, suffering will be a process—an open system and not a closed one. The legal claiming process will clearly be an overlay on an already-in-motion psychological, spiritual, and meaning-making process. The strength and shape of the lawyer's influence, and the nature of the legal-psychological-spiritual lawyering, may be debatable, changing, and partly unknowable. But the lawyer will surely have some effect on a psychological, spiritual, and meaning-making process.

Given that the lawyer's representation is linked to the suffering process, the next question is if, and how, a lawyer's representation can have a positive role, or at least avoid negative impacts to the degree possible, as to the plaintiff's suffering process. This Article addresses that question. Part II starts outside the legal process, looking at insights and practices relating to how a helpful third person can be available to and engaged with a suffering individual. The point here is not to suggest that a lawyer must follow these insights and replicate these practices. Rather, the aim is to gain knowledge about how the presence and engagement of other people can ameliorate or intensify suffering.

With these insights in mind, Part III turns to the role of the lawyer. It first identifies the key ways in which the personal injury lawyer's representation will intersect with, and possibly influence, the client's suffering and loss process. Having identified these points of connection, the discussion, in subpart B, moves to the critical question of competence: is a lawyer competent to identify and to act in ways that are helpful, or at least not harmful, to the client's loss process? Because the answer to this question is affirmative in at least some re-

spects, subpart C sets out some thoughts and guidelines about the plaintiff's lawyer's actions and counsel.<sup>3</sup>

Throughout, the goal is not to argue that lawyers, when possible, must represent clients in ways that facilitate or at least not interfere with the client's healing. Rather, this Article is an effort to answer a question that I have heard students and practicing lawyers raise. These lawyers and students are attracted to personal injury practice in part because they want to help individuals in times of crisis and pain. Yet they wonder: Am I crossing boundaries? Can I be a good personal injury lawyer—a good advocate for my clients—and not interfere with their healing and recovery? Their question is not about what they must do under the rules of professional responsibility. Rather, they wonder if and how their role as advocate may also include facilitating the healing process for their clients.

## II. SUFFERING AND THE PRESENCE OF ANOTHER

### A. *Suffering*

Suffering, and the efforts to ameliorate or console, come in innumerable faces and forms. Job's friends, having heard of his afflictions, "made an appointment together to come to mourn with him, and to comfort him. . . . [When they saw him,] they lifted up their voice, and wept . . . [and] sat down with him upon the ground seven days and seven nights, and none spake a word unto him: for they saw that *his* grief was very great."<sup>4</sup> (Later, of course, the friends would be much less helpful, trying to find explanations for Job's sufferings.) In *King Lear*, Edgar encounters his father, the blind, despairing Earl of Gloucester, who asks Edgar (whom he does not recognize) to lead him to the cliffs of Dover so that he can jump. With a loving and clever deception, Edgar tricks Gloucester into thinking that he has jumped from the cliff but that the gods have preserved him: "Ten masts at each make not the altitude / Which thou hast perpendicularly fell: / Thy life's a miracle."<sup>5</sup> In our world, friends grieve with and comfort friends, and helping professionals of all sorts employ their training and skills to relieve suffering: doctors, nurses, hospice workers, pas-

3. Cf. Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133, 140–41 (2004) (suggesting that while lawyers should not become therapists, lawyers should "become familiar with the psychological dimensions of behavior in a manner similar to that of a generalist social worker").

4. *Job* 2:11–13 (King James).

5. WILLIAM SHAKESPEARE, *KING LEAR* act 4, sc. 6, verses 53–55.

toral counselors, psychologists, psychiatrists, ministers, doctors, suicide hotline workers, social workers, and grief counselors.

It would be impossible and brazen to try to identify, describe, and explore the many forms and faces of suffering, and the many styles of healing, comforting, and amelioration. A more limited inquiry, however, can take us far enough to allow meaningful discussion of the lawyer's role, to be discussed in Part III. For now, then, the aim is to build an understanding of suffering, and of the work of comfort and amelioration, rich enough to lead us to that point.

When approaching the definitions and shapes of suffering—including the medical, psychological, spiritual, and culture literature—this Article does not need to work from a particular definition or theory of suffering.<sup>6</sup> Rather, we will concentrate on the salient themes that appear in this literature, insofar as they relate to the types of losses included under the rubric of noneconomic damages.

Most obviously, suffering can arise from and be connected to physical pain.<sup>7</sup> In this sense, to relieve the physical pain is to relieve the suffering. This very basic aspect of suffering is contained in tort's recognition of damages for "pain and suffering." But suffering, of course, does not simply arise from, and thus is not bounded by, the extent of physical pain. Suffering also appears in the form of grief. Most generally, grief refers to the "emotional pain that accompanies a sense of loss."<sup>8</sup> "Bereavement," in turn, generally refers to the responses and actions that a person undertakes in response to his or her grief.<sup>9</sup> Although much of the grief and bereavement literature focuses on situations involving the death of a loved one, the terms can be used with respect to any sense of loss. Grief captures a wide and long trajectory: it has "come to mean the complex, intense internal responses to all perceived and felt losses. . . . Along with deep emotion there will

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6. Needless to say, defining or setting conceptual boundaries on suffering has been challenging for all those who have seriously examined it. The Christian ethicist Stanley Hauerwas discussed the difficulty of finding the conceptual boundaries of suffering: "Our assumption that suffering is a universal phenomenon makes us forget that we can only talk intelligently about it through the use of paradigm instances. In other words, the meaning of suffering varies from one interpretive context to another." STANLEY HAUERWAS, *SUFFERING PRESENCE: THEOLOGICAL REFLECTIONS ON MEDICINE, THE MENTALLY HANDICAPPED, AND THE CHURCH* 29–30 (1986). Near the beginning of his book on suffering, Dr. Eric J. Cassell discussed the difficulty of finding medical literature that helped illuminate the meaning of suffering as distinct from pain. ERIC J. CASSELL, *THE NATURE OF SUFFERING: AND THE GOALS MEDICINE* 32 (1991).

7. CASSELL, *supra* note 6, at 31–33.

8. RICHARD A. DERSHIMER, *COUNSELING THE BEREAVED* 15 (1990) (internal citations omitted).

9. *Id.* at 16 (noting different variations, some of which limit the term to instances of death).

be spiritual, psychological, and physical turmoil as well.”<sup>10</sup> Again, noneconomic damages include these dimensions of grief, whether in the terms mental anguish, loss of enjoyment of life, or loss of companionship and society.

Even though the notion of grief captures a vast set of experiences, reactions, and dimensions, it tends to sound retrospective—as in grief for a loss that has already occurred. The experience of grief is ongoing, but the term seems to reference a loss that has occurred: the loved one died, the spinal cord was severed, the limb was amputated. In this sense, the term “grief” can fail to capture another dimension of suffering—the experience of an injury or threat that, day to day, can change in intensity, implications, and nature. So, for instance, when we say that we grieve for the loved one who has died or for the leg we have lost, we signify a process that is still occurring, but we refer to an injury or event that can be located at some prior period of time.

People also suffer, of course, from an injury or threat that is ongoing and chronic. For instance, someone is in a wheelchair because his lumbar spinal cord was damaged; another was exposed to a toxic chemical that caused cancer (and thus a course of treatment) and that continues to cause seizures, strange allergies, and infections. Here, the injury event seems less historical. So the term grief—to the extent it seems to represent the pain and adjustment that still goes on about an event in the past—might not capture the suffering associated with the experience of an ongoing injury or illness. Yet grief, in the sense of mental pain caused by the experience of loss, surely exists in cases of chronic and ongoing injury or disease.<sup>11</sup> And the ongoing injury or disease causes the suffering of physical pain and discomfort, along with additional suffering of assimilating the new level of injury and beginning another thread in the web of adjustment.

Suffering also includes what some have called the “secondary losses” associated with an initial injury or trauma. This is a “physical or psychosocial loss that coincides with or develops as a consequence of the initial loss.”<sup>12</sup> This might include financial difficulties, divorce, and the like. As one commentator noted: “In some cases, it is unclear when the end of the chain of associated losses is reached—in fact it

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10. *Id.*

11. The point here is not to draw some bright boundary between ongoing grief for a loss event that has occurred and an injury or disease process that is chronic or ongoing. Rather, the aim is just to highlight that suffering includes not just the mental pain of grieving for the loss, but also the mental pain of enduring and adjusting to losses chronic in nature. Tort law recognizes this aspect of suffering, too.

12. JOHN H. HARVEY, GIVE SORROW WORDS: PERSPECTIVES ON LOSS AND TRAUMA 4 (2000).

may not be reached until the survivor also dies.”<sup>13</sup> To some extent, tort law allows compensation for these losses.

In addition, although we can generally say that certain events will cause suffering—intense physical pain, the loss of a loved one, the loss of a livelihood—the nature and shape of suffering is always unique to a given individual. It is said: “Suffering is ultimately a personal matter—something whose presence and extent can be known only to the sufferer.”<sup>14</sup>

To say that suffering is eventually a personal matter unique to the sufferer has several other implications. First, because the person himself or herself—before the time of the injury event—has been formed by familial, cultural, economic, religious, and other factors, these factors themselves will influence the experience of suffering. Second, after the injury event, the person continues to live and experience the suffering within a particular set of cultural, economic, religious, and familial circumstances and influences. These circumstances might themselves be altered drastically by the injury (such as devastating economic effects or abandonment of a belief in God). Thus, the experience of suffering includes a kind of cycling process: the person’s suffering is influenced by cultural, familial, and other factors; these in turn can be affected by and thus altered by the injury; and these altered dynamics influence the suffering process. Dr. Eric Cassell has said that suffering can affect “[a]ll the aspects of personhood—the lived past, the family’s lived past, culture and society, roles, the instrumental dimension, associations and relationships, the body, the unconscious mind, the political being, the secret life, the perceived future, and the transcendent-being dimension . . . .”<sup>15</sup>

In sum, given the variety of lenses through which suffering can be examined, several themes seem consistent through the literature (although the language of these themes can differ by discipline). First, pain can be a source of suffering, but suffering extends beyond physical pain and beyond the demarcated boundaries of a given injury. Second, suffering includes grief, which is the mental and internal pain that accompanies the experience of serious loss. Suffering is also a part of the process of bereavement, the term often used to express the actions and responses that the person takes in response to grief. Third, suffering is connected not just to grief and bereavement over losses that have occurred in the past; suffering also includes the mental pain and evolving sense of loss that goes along with a loss that

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13. *Id.* (internal citations omitted).

14. See CASSELL, *supra* note 6, at 35.

15. *Id.* at 43.



is less defined historically and that is, instead, more chronic in nature. Fourth, suffering can also be the result of what we can call secondary losses—problems and losses that result from the “main” loss, such as financial dislocation, divorce, relocation. Fifth, although we can confidently generalize that certain types of losses produce suffering or even intense suffering, in the end suffering is unique to the individual, considering his or her history, psychological and physical makeup, economic and family circumstances, and spiritual compass.

These variables affect his or her suffering, and in turn his or her suffering affects these variables, and these individual movements once again cycle back into the experience of suffering—as in the case of a person whose loss is initially framed through the lens of faith, whose loss eventually shatters that faith, and whose eventual suffering includes the mental pain of feeling abandoned by the God in which he or she once believed.

### B. *Suffering and the Presence of the Other*

Ours is a society familiar with many terms and tools directed at the amelioration of suffering: rehabilitation, pain control clinics, biofeedback, grief work, recovery, healing, empowerment, spiritual direction, rebuilding, trauma and crisis intervention, and cognitive and other forms of therapy. Here, we need not explore all these models and tools. Instead, the more modest aim is to draw from this literature some of the most salient insights about how environments, institutions, and other people can facilitate or interrupt a process of healing and recovery. To reach these insights, we must gain some general understanding of the processes by which suffering ever diminishes, and recovery from loss ever occurs.

We should start by recognizing two related yet distinct bodies of knowledge relevant to loss. One is rehabilitation: the tools and methods by which the injured person obtains, to the extent possible, his or her full functional, educational, vocational, and psychological capacity after the injury.<sup>16</sup> This broad definition includes the medical measures that will correct and improve the underlying impairment such as the

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16. See ENABLING AMERICA: ASSESSING THE ROLE OF REHABILITATION SCIENCE AND ENGINEERING 24 (Edward N. Brandt, Jr. & Andrew M. Pope eds., 1997) (noting that rehabilitation refers to the “lifelong process of obtaining ‘optimal function despite residual disability’”) (quoting DeLisa et al., *infra*); Joel A. DeLisa et al., *Rehabilitation Medicine: Past, Present, and Future*, in REHABILITATION MEDICINE: PRINCIPLES AND PRACTICE 3 (Joel A. DeLisa et al. eds., 3d ed. 1998) (defining rehabilitation as the process of helping the person achieve the fullest functional, vocational, educational, and psychological potential that is consistent with the person’s disability and life plans). For discussion of how rehabilitation, as a goal, does and should connect with tort law, see Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L.J. 659 (2003).

Harrington rod surgery that will stabilize the spine, or the skin grafting after a burn. It also includes all the techniques and tools available for improving the person's functional capacity once the medical impairment has been addressed to the extent possible. Included, then, are vocational rehabilitation, speech therapy, physical therapy, recreational therapy, prosthetic devices, assistive technology, pain control techniques such as biofeedback, and environmental and workplace accommodations.

The other broad body of knowledge relates to recovery, grief, and bereavement. The languages and tools of recovery and grief are not an alternative to, or in contradiction with, the vast body of knowledge on rehabilitation. Rather, these broad categories focus on different dimensions of a loss. Both are aimed at reducing suffering and restoration of the person's functionality and well-being. Indeed, we could use the word "recovery" to describe both bodies of knowledge. The rehabilitation world, though, is focused on reducing the disabling consequences of an injury: improving mobility, work capacity, speech ability, cognitive functioning, pain control, and other consequences. The grief and recovery world is focused on how the person—as diminished by the loss during or after any rehabilitation that is possible—endures, and makes recovery steps in response to the sorrow, grief, and dislocation created by the loss.

Both of these worlds are relevant to this Article's theme, because each focuses on a dimension of the client's losses. For the rest of Part II, we will concentrate on the insights and tools of the recovery literature. Part III will then incorporate these points while considering the lawyer's role.

### 1. *The Postloss Experience*

Loss sets in motion a process of grief, coping, and meaning making. This notion appears in all models for understanding a postloss experience: psychological, philosophical, cultural, and spiritual.<sup>17</sup> For our purposes, we need not discuss the details of the grief and bereavement models that have been the subject of application and study, such as various "phases of grief" models.<sup>18</sup> Rather, several key insights common to most of the literature are important to mention here.

First, the reaction to and grief over a loss entails a process, or a series of movements, in which the individual copes with, adjusts to, and makes meaning of the loss. These movements can include the

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17. DERSHIMER, *supra* note 8, at 18.

18. For discussion of models that include phases of grief, see *id.* at 18–24.

following:<sup>19</sup> recognizing, in a cognitive fashion, that the loss has occurred;<sup>20</sup> reacting to the loss in a way that allows full experience of the pain of the loss and expression of the range of emotions from the loss;<sup>21</sup> relinquishing assumptions about the world that no longer work in light of the loss;<sup>22</sup> readjusting or relearning the world in a way that tries to find meaning in a life without what was lost.<sup>23</sup>

Second, no model of the stages or process of grief can be predictive of any single individual. The ideas of stages of grieving “take root in empirical studies of large populations of grieving people. They are at best statistical generalizations describing what is probable across a particular population. But statements of probability say nothing specific about particular individuals.”<sup>24</sup>

Third, recognizing grief as a process with movements does not require or presuppose a particular psychological, spiritual, or cultural understanding of loss. Put another way, whoever the person is, and whatever institutional and helping context surrounds the person, the postloss experience will involve movement, steps, a process. How the person moves through this process will depend in many ways on the

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19. GERALDINE M. HUMPHREY & DAVID G. ZIMPFER, *COUNSELLING FOR GRIEF AND BE-REAVEMENT* 7–8 (1996) (discussing the evolution of different approaches to the “stages” of grief). Although many models of grief stages were developed specifically with respect to grief after death, the models have been applied to other kinds of losses. *Id.* at 8. This theme—the postloss experience involving these movements—appears in the literature as both a descriptive and prescriptive one. After a loss, every person makes some movements of the sorts described above. Prescriptively, most grief and recovery wisdom views this movement as necessary and desirable, while recognizing that not all persons go through these or go through them in the same way.

20. *Id.* at 7; see also THOMAS ATTIG, *HOW WE GRIEVE: RELEARNING THE WORLD* 45 (1996); DERSHIMER, *supra* note 8, at 20.

21. HUMPHREY & ZIMPFER, *supra* note 19, at 7; see also ATTIG, *supra* note 20, at 47–48 (discussing the need to acknowledge the loss, explaining that this requires a struggle to take in the reality and make sense of the loss, and acknowledging our feelings and express or otherwise process them); DERSHIMER, *supra* note 8, at 20–22 (describing these reactions and emotions as included in a phase he calls “acute grief”).

22. HUMPHREY & ZIMPFER, *supra* note 19, at 8; see also LAWRENCE G. CALHOUN & RICHARD G. TEDESCHI, *FACILITATING POSTTRAUMATIC GROWTH* 17–19 (1999).

23. HUMPHREY & ZIMPFER, *supra* note 19, at 8; see also ATTIG, *supra* note 20, at 49–50 (explaining that grief following death involves a process of relearning the world, including our physical world, the social world, our selves, and our spiritual beliefs); Robert A. Neimeyer, *The Language of Loss: Grief Therapy as a Process of Meaning Reconstruction*, in *MEANING RECONSTRUCTION & THE EXPERIENCE OF LOSS* 261, 289 (Robert A. Neimeyer ed., 2001) (emphasizing the need for a model of grief that seeks not to “normalize” grief but to recognize the need for and individuality of meaningmaking after the loss).

24. ATTIG, *supra* note 20, at 45. See also Camille B. Wortman & Roxane Cohen Silver, *The Myths of Coping With Loss*, 57 *J. CONSULTING & CLINICAL PSYCHOL.* 349 (1989) (discussing and questioning several general assumptions about stages of grief).

person's psychological and spiritual framework,<sup>25</sup> his or her familial system,<sup>26</sup> and other factors.<sup>27</sup> But the person's experience will be a process of movement, flux, and, sometimes, of reaching new stages. For instance, for a Christian who believes in an all-loving and all-powerful God, recognizing and fully expressing the loss may involve recognizing the sense of betrayal or abandonment by God, and adaptation may involve a reconfigured sense of who God is in his or her life and in the world.<sup>28</sup> Thus, the notion of movements is useful no matter what system of meaning the person had.

## 2. *People Engage in a Process of Meaning Making*

During various steps of the postloss process, people continuously engage (more or less consciously, with or without professional counseling, and with or without a religious framework) in what many call "meaning making"—an effort to understand and make sense of "the meaning of a loss and its significance for their changed lives."<sup>29</sup> This is not simply a cognitive task of learning new information (such as medical information); it is likewise not only a task of encountering new attitudes from others, or changed work habits and social relations, or financial situations.<sup>30</sup> Rather, it is these things and more: the process of relearning the world, making sense of the world, making meaning of the world after the loss.<sup>31</sup>

25. See ATTIG, *supra* note 20, at 120 (discussing changes in self and spiritual understandings); CALHOUN & TEDESCHI, *supra* note 22, at 10–17 (discussing how posttraumatic growth can involve changed sense of one's self, of relationships with others, and of God or ultimate meaning).

26. See ATTIG, *supra* note 20, at 152–56 (discussing the connections between grieving and the person's familial and social structure).

27. *Id.* at 155 (explaining that how one copes with loss can be affected by "differences in gender, age, economic class, ethnic origin, and culture"); CASSELL, *supra* note 6, at 37–43 (stating that illness, suffering, and loss can affect all the aspects of personhood: "the lived past, the family's lived past, culture and society, roles, the instrumental dimension, associations and relationships, the body, the unconscious mind, the political being, the secret life, the perceived future, and the transcendent-being dimension").

28. See ATTIG, *supra* note 20, at 119–21 (describing sense of abandonment or betrayal by God and movement toward a changed spiritual understanding).

29. Neimeyer, *supra* note 23, at 263.

30. *Cf.* ATTIG, *supra* note 20, at 14 (discussing this concept in the context of recovery from death of a loved one).

31. The literature contains different terms for this process. See *id.* at 12 (explaining and elaborating on the notion of "relearning" the world in the context of bereavement after death); CALHOUN & TEDESCHI, *supra* note 22, at 17 (explaining how traumatic events shake the person's worldview and initiate the process of ruminating about what happened and how the person will now fit this into his or her worldview); HARVEY, *supra* note 12, at 6, 26–31 (discussing the theme of "account-making" or storytelling as people construct meaning after loss); HUMPHREY & ZIMPFER, *supra* note 19, at 1 (explaining that the loss "includes ideas of reaction, adaptation, and process. . . . The bereaved person reacts emotionally as the pain of grief is experienced, and gradually reacts cognitively and behaviourally as a new identity is formed and a life is rebuilt").

This notion of “meaning making” is meant to be broad. This generality allows room for the considerable variation that can exist among individuals and loss experiences.<sup>32</sup> Losses are different, both objectively (as seen or measured by some external referent), individually, and culturally. The death of a loved one, the onset of mesothelioma, an injury that leads to paraplegia, a back injury resulting in chronic pain—all these and innumerable other major losses will trigger a meaning-making process, but the shape, difficulty, and pain of that process will vary according to the nature of the injury, and individual and cultural factors.<sup>33</sup> This meaning-making work includes struggling for answers to questions: What happened? Why did it happen? What will happen now? What is to become of my life now?<sup>34</sup>

The work of meaning making often takes the form of and employs narrative—the process by which the person interprets, self-communicates, and communicates with others about what happened, why it happened, what it means, and what will happen. The theme of narrative is huge in the literature of suffering because all suffering takes place within an interpretive context.<sup>35</sup> This is not to say that suffering is all “in the mind,” but that suffering inevitably includes some interpretation. At a minimum, the person perceives that he or she is suffering “from” something, and this requires at least an implicit notion of what this is.<sup>36</sup>

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32. The text includes, in the concept of loss and the theme of relearning, both the death of a loved one and other major losses. This general treatment requires some explanation. The literature on suffering and bereavement does not always address the subject of loss by death and other losses together. Rather, a considerable amount of writing and research focuses specifically on the suffering and grief that follows the death of a loved one. Nonetheless, in this and other parts of the paper, loss will be used to include death and major losses other than death. This is consistent with the literature. See HARVEY, *supra* note 12, at 18–19 (explaining the definition of a “major loss”); Neimeyer, *supra* note 23, at 263 (discussing the need to reconstruct one’s life narrative in the wake of significant loss).

33. This broad notion of meaning making is also meant to be descriptive, not normative. The point is not that individuals should engage in a process by which they reconsider their world and emerge with new meanings. Granted, we desire that this process occur in a way that is healing and restorative, and so the notion of meaning making is a normative goal. But for now, the point is not the desirability of this process or how to facilitate healing and recovery. Rather, the point is just descriptive: loss will provoke a process of relearning, of meaning making, to some degree and in some shape.

34. ARTHUR KLEINMAN, *THE ILLNESS NARRATIVES* 29 (1988) (referring to the second two questions and calling them, respectively, the question of bafflement and the question of order and control).

35. See HARVEY, *supra* note 12, at 7–8 (explaining that people often conceive their losses in terms of “accounts or stories that contextualize the major events of their lives”); HAUERWAS, *supra* note 6, at 28 (“Our ability to recognize our suffering means that suffering always takes place in an interpretive context.”).

36. See HAUERWAS, *supra* note 6, at 28.

Applying this notion to chronic illness, the doctor and medical anthropologist Arthur Kleinman has explained:

[P]atients order their experience of illness—what it means to them and to significant others—as personal narratives. The illness narrative is a story the patient tells, and significant others retell, to give coherence to the distinctive events and long-term course of suffering. The plot lines, core metaphors, and rhetorical devices that structure the illness narratives are drawn from cultural and personal models for arranging experiences in meaningful ways and for effectively communicating those meanings.<sup>37</sup>

Applying the idea of narrative to bereavement of loss, others have pointed to the “value of stories, storytelling, and story-listening in dealing with loss and as essential elements of effective grieving.”<sup>38</sup> Narrative fits into the process of meaning making in multiple ways. The narrative impulse is a means by which the person tries to order, manage, and find some meaning in the shattering, dislocating loss.<sup>39</sup>

### 3. *The Sense of Control and Predictability, Ruptured Assumptions, Attributions of Responsibility, and Justice*

According to the experiences of those who suffer loss and third persons who help the suffering individual, a number of issues affect the process by which people engage in meaning making and move through various points after a loss. One is the blow to, or shattering of, one’s assumptions about the world. A loss can rupture one’s world view—the “set of beliefs people have about how the universe functions and what place they, as individuals, occupy therein.”<sup>40</sup> This world view includes not just cognitive thoughts and assumptions, but “a web of perceptions, feelings, images, and values that each person spins from specific personal experiences.”<sup>41</sup> In the face of a major loss, many pieces of this world view collapse and no longer make sense. Sometimes, the loss shatters the most central pieces of the person’s world view: a sense that life has meaning and purpose; a sense that he or she is worth loving; a belief in God.<sup>42</sup>

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37. KLEINMAN, *supra* note 34, at 49.

38. HARVEY, *supra* note 12, at 27.

39. *Id.* at 28–29 (discussing the view that the work of constructing an account with a pattern and plot can help give the person a greater sense of control and bring a sense of manageability to the chaos of the loss).

40. DERSHIMER, *supra* note 8, at 38.

41. *Id.* at 39.

42. *See id.* at 47–62 (discussing the role of spirituality, including shaken faith views, in grieving); HARVEY, *supra* note 12, at 24 (explaining that major loss often shatters assumptions “that the world is a benign place, it is a meaningful place, and that we are worthy people”).

Another theme in the process of meaning making is dealing with the subject of responsibility. Arthur Kleinman has pointed out one of the fundamental questions that suffering presents, for both the sick person and the social group, is “why me?”—what he calls the “question of bafflement.”<sup>43</sup> The notion of responsibility, and how the person incorporates and grapples with it, is often a central feature of the postloss experience. Clinicians have reported and written on one common experience that relates to this subject of responsibility: the “counterfactual” thoughts and ruminations of the person’s mind. These are “what if” questions—what if I had not left that day, what if I had read the warning, what if John had come on time—and they can be deeply distressing and difficult to dislodge.<sup>44</sup> One commentator noted:

How one attempts to cope with such thoughts is a topic that has received virtually no attention in the literature. Do people attempt to convince themselves that the counterfactual possibilities are implausible, based on alternative actions that were unlikely or unforeseeable? . . . [T]he very ease with which one could have prevented the situation that one now faces is likely to haunt one for years.<sup>45</sup>

Relatedly, even those who understand intellectually that their actions could not possibly have prevented what happened can experience the sense of responsibility often termed survivor’s guilt: the guilt and shame that accompanies a sense of feeling that it is wrong and unfair that one should be unharmed while another died.<sup>46</sup>

### III. THE ROLE OF THE LAWYER

To consider the link between the lawyer’s representation and the client’s suffering would be unnecessary if, descriptively speaking, the lawyer’s representation had no influence on the client’s suffering. But, even lacking much empirical data, a no-influence hypothesis seems untenable. The claiming process itself usually overlaps to some extent, chronologically, with the suffering-rehabilitation-recovery process. In addition, the claiming process will involve cognitive, emotional, decisional, and interpersonal tasks that seem impossible to seal off from many of the core components of, and influences on, the person’s suffering and recovery. These include recollecting and rumi-

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43. KLEINMAN, *supra* note 34, at 29.

44. Christopher G. Davis, *The Tormented and the Transformed: Understanding Responses to Loss and Trauma*, in MEANING RECONSTRUCTION & THE EXPERIENCE OF LOSS, *supra* note 23, at 137, 140–42.

45. *Id.* at 142.

46. See HARVEY, *supra* note 12, at 59–60.

nating about the loss, the process of making meaning from the loss, attribution of responsibility, and handling blame and guilt.

Perhaps, though, the lawyer's representation itself is not a significant factor, as distinguished from whatever effects the claiming process as a whole has on the loss experience. Yet this, too, seems untenable. The lawyer is a key player in many of the ways in which the claiming process could fold into and influence the client's suffering and recovery process. And this does not just mean that the effect of the claiming process could be different with a lawyer than without one. Rather, the lawyer's own style, approach, philosophy, and language, among other factors, would seem to have some effects on the cognitive, decisional, and emotional work that the claim will entail for the client. Thus, we should consider how and when a lawyer's representation can play a positive role, or at least avoid negative impacts to the degree possible, as to the plaintiff's suffering process.

A brief note about lawyering approaches is appropriate here. A large and rich literature addresses the question of lawyering styles, including writings from professional responsibility scholars and clinical practitioners. Superb books and articles contain both theoretical and practical materials for training law students and lawyers in negotiating, counseling, listening, empathizing, fact gathering, and establishing the nature of the lawyer-client relationship.<sup>47</sup> Obviously, this Article addresses some lawyering scenarios and issues, but it does not assume a particular answer to which models or styles of lawyering are best in general or in given contexts.<sup>48</sup> For instance, suppose that a lawyer generally follows a client-centered approach to lawyering, using empathic and active listening. Another lawyer might use a more directive approach.<sup>49</sup> Either way, the choice of method does not answer the particular questions addressed in this Article.

Toward this end, this section of the paper: (a) identifies some main ways in which the lawyer's role can interact with the plaintiff's loss process; (b) addresses whether and to what extent a plaintiff's lawyer has competence to recognize when and how the lawsuit interacts with

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47. See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING* (1990); DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004). For a review of several leading texts, see Robert D. Dinerstein, *Book Reviews*, 39 *UCLA L. REV.* 697 (1992) (analyzing two clinical teaching texts).

48. For an excellent analysis of lawyering models, with a focus on the dominant client-centered model, see Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 39 *ARIZ. L. REV.* 501 (1990).

49. For discussion of directive approaches, see Robert F. Cochran, Jr. et al., *Symposium: Client Counseling and Moral Responsibility*, 30 *PEPP. L. REV.* 591, 592-93 (2003) (describing three general models of lawyering); Dinerstein, *supra* note 48, at 506.



the client's loss process and, if so, whether the lawyer has competence to take any action in light of this; and (c) outlines some steps towards a praxis for a plaintiff's lawyer—some suggestions about practice that are rooted in the theories of lawyering and theories of suffering, and, in turn, some thoughts about lawyering theory as informed by the practice of representing the individual who suffers.<sup>50</sup>

A. *How the Lawyer Plays a Role*

1. *Discussing the Basic Concepts of Liability: Defendant's Liability, Plaintiff's Contributory Negligence, and Liability of Other Parties and Nonparties*

The lawyer must explain the legal notion of fault under whatever standard is applicable (negligence, for example, "stricter" products liability, or fraud) and the factual essence of why this defendant or these defendants might be liable. At some point, too, the lawyer will need to discuss the notion of contributory negligence if this is relevant. In some cases, the lawyer also will need to explain why some actors may or may not be defendants to the claim. A more marginally faulty actor might be named as defendant; conversely, someone whose acts clearly warrant blame might not be named as defendant. As the claim proceeds, the lawyer must explain, to some extent, how these matters will be proved and the chances of liability findings on the defendants and fault findings on the client. In addition, the lawyer will need to explain the discovery that is possible or likely from the plaintiff or his or her loved ones; this includes what the plaintiff will be obligated to answer in writing or by deposition, and similarly with family members and loved ones whose testimony will be relevant to liability or damages (for instance, a plaintiff's son might have to testify about what he saw in the accident, or how this has affected his mother's abilities).

Discussions of fault hit a note that lies at the heart of the client's suffering and loss process. The notion of responsibility is a key part of the suffering person's working out an account, or narrative, that comes to terms with the question of bafflement in a way that is helpful

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50. The term here refers not just to practice or even theoretically informed practice, but also to "the critical relationship between theory and practice whereby each is dialectically influenced and transformed by the other." DAVID TRACY, *BLESSED RAGE FOR ORDER: THE NEW PLURALISM IN THEOLOGY* 243 (1975). Cf. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 874 (1997) (suggesting "an explicit race praxis characterized by reflective action: infusing antiracism practice with aspects of critical inquiry and pragmatism, and then recasting theory in light of practical experience") (internal citations omitted).

to the person. Working out such an account can take years; it involves sorting and re-sorting questions of cause and responsibility at many points in time. Thus, over time, the person could go through an early part of this working-out process, dealing with: rumination, obsessive reviewing of what happened, and attributions of responsibility tied to “what ifs” (for example, some victims have asked, “if my sister had not insisted on picking this resort for the family retreat, then my son would not have been injured” or “if I had not been in Chicago for the business trip, I could have picked David up instead of asking him to find a ride home”).<sup>51</sup> Later periods of working out could include attributions of responsibility that cohere with the client’s meaning making.

Thus, the work of understanding and building the case for legal fault is an overlay onto the client’s own processing of cause, responsibility, and bafflement.<sup>52</sup> The possible influences of this overlay could take many forms and be very potent. Some might be quite positive. The client’s participation in understanding and building the legal fault case might fold into and further his or her postloss recovery in various ways: by cohering well with the client’s own groping efforts to understand why this happened, by the sense that establishing legal fault will prevent other losses if not this one (“make the city fix the intersection where my brother died”), by addressing the person’s need for a formal attribution of responsibility and consequence as to the wrongdoer who has caused the loss.

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51. See David S. Boninger et al., *Counterfactual Thinking: From What Might Have Been to What May Be*, 67 J. PERSONALITY & SOC. PSYCHOL. 297 (1994) (explaining research findings that demonstrate amelioration of self-blame and regret when one’s perspective shifts from “counterfactual” thinking to “what may be”). Cf. ELAINE SCARRY, *THE BODY IN PAIN* 296–307 (1985) (discussing the structure of a products liability trial in which a child was burned, explaining that each repetitive telling of the story at trial raised in the jury’s mind the wish that “let her this time not have been so burned,” and stating that the plaintiff’s counsel’s job is to raise “that collective passive wish” into a particular decision about the product).

52. Granted, for some losses or for some people, a particular aspect of legal fault will not be important at a given point in time. One lawyer tells of two parents who contacted him in connection with their forty-year-old son, who died after a possibly misdiagnosed heart attack and who left two small children. The lawyer agreed to review the case and sent the medical records to a respected cardiologist for review. The doctor wrote a preliminary report concluding that the cardiologist on call in the emergency room that night had failed to follow the accepted diagnostic practice and that, had he done so, the death might have been prevented. When the lawyer told the parents of the consulting doctor’s conclusion, he said this meant the case would go forward, and that he (the lawyer) hoped that the parents would not feel fresh grief at the report that their son’s death was medically preventable. The parents then explained to the lawyer that they viewed the lawsuit as a method for obtaining funds that they would put into trust for their grandchildren if the law allowed recovery; that they had always believed their son’s death was medically preventable but they had already made their peace with this; and this report—and, for that matter, the lawsuit—was not a factor in their recovery.

Yet explaining and building the legal fault case could also intensify the client's suffering and interfere with the client's recovery. One problem is timing: the legal claim is focused on one story of responsibility; months and years are devoted to this story. Time goes on, the legal story is essentially static, but the loss process is not static. Another problem is possible dissonance, or at least gaps, between the cause and responsibility attribution that the client works toward, and the substance or timing of the legal fault case. The client might be working towards forgiving himself or herself for not more closely monitoring how close his or her child was to the participants in the games at the state fair; yet the lawyer now has to prepare the client for his or her deposition, where the defense lawyer is expected to question him or her closely about this topic and make it a central argument in settlement or trial presentations. Or the lawyer needs to explain why the lawsuit will not name as defendant the man who sexually assaulted the plaintiff, and instead will name only the property manager of the downtown garage where the assault took place. Or the lawsuit will uncover facts (and thus make the client aware of facts) that are unnecessary and may be harmful to the client's recovery (that her husband did not die instantly; that the daughter who had been hit by a car on the side of the road while walking some distance from her own car had parked and left her car because she was meeting someone to buy drugs).

Another problem is that the work the client must do to build and participate in the legal fault case might be at odds with where the client is, emotionally and physically, in the suffering and loss process. Recollecting the loss event, describing the loss and its consequences, and "giving sorrow words"<sup>53</sup> can be essential steps for the suffering person.<sup>54</sup> But the timing and adversarial context of the telling, in a lawsuit and discovery, could make the telling unhelpful, confusing, and grief- or guilt-intensifying.

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53. The phrase comes from the title of a book, *Give Sorrow Words*. See HARVEY, *supra* note 12.

54. Indeed, a considerable body of respected literature now supports the therapeutic value of translating, into spoken or written words, emotional upheavals and loss. See generally EMOTION, DISCLOSURE, & HEALTH (James W. Pennebaker ed., 1995) (compiling research addressing the link between disclosure and health).

2. *Introducing the Categories of Damages, Discussing Which Are Compensable and Noncompensable, and Assessing the Likely Range of Damage Findings*

In discussing damages with the client, the lawyer will first have to introduce the client to a way of understanding or framing the injury that the client otherwise often would not employ.<sup>55</sup> That is, even leaving aside other issues such as whom to sue or the likelihood of liability, the lawyer must explain the rules dictating which dimensions of the client's loss get translated into particular damage items, and the rules dictating the compensability of those items. In addition to this general introduction, the lawyer at various points will need to advise the client about the possible range of damages, as assessed by the trier of fact, by the defendant and defendant's counsel and insurer in settlement contexts, and by any mediator or neutral.

These discussions seem likely to intersect with several dimensions of the client's suffering and loss process. Although these intersections could take multiple forms depending on the client and the loss, some seem especially likely. Discussion of noneconomic damages will explain that these particular losses are compensable (disfigurement of the body through scars, inability to engage in the same activities as before, diminished quality of the client's intimate relationship with his or her spouse), and the client's suffering in regard to those losses is compensable. Then, at some point, the conversation must explain that the damages for these items will fall within particular a range, and why.

It seems unlikely that many clients could bracket off these conversations from the process of remembering and recollecting what has been lost, and from meaning making in connection with the loss. Consider some of the ways the legal conversation connects to the client's personal loss journey, such as timing. At various points, the client will have moved to different steps in his or her recollection and understanding of the loss. Perhaps the client has settled in his or her mind a

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55. Granted, with some aspects of loss, the use of compensatory language would be part of the client's understanding of the loss anyway. For instance, if a person has a hand injury that diminishes earning capacity, her own understanding and meaning making with regard to the injury would include its monetary impact on her life—whether or not a lawsuit occurred or a lawyer introduced that language into the mix. But, absent the claiming process, a person would not otherwise need to understand the following, among other items: that the diminished quality of her marital life (sexual and otherwise) can be compensated; that the diminished quality of her relationship with her children is not compensated; that her conscious awareness, even horror, of the impending accident is part of compensable losses; that mental anguish, in addition to physical pain, is compensable; that her dreams about what she might do in the future and can no longer do are part of what is compensable.

picture of what happened, what was lost, what was not lost; the client now is grappling with what this means and what to do now. The legal conversation, however, continues to replay the loss—both the loss event and each step of the painful and difficult work of grasping the loss and understanding it.<sup>56</sup> Perhaps, for some, this replaying is congruent with, or not disruptive to, their journey through this loss. For others, however, the opposite might be the case.

Another point of intersection is the need to think about nonmonetary losses in monetary terms. Again, it seems unlikely that clients can bracket this off from the process of meaning making. Indeed, the possibility of monetary recovery—and its range—end up having to be considered as the client tries to understand the implications of the loss for his or her life and the nature of the world after the loss. Some clients will be able to integrate the legal monetizing into their recovery process. For instance, a parent who loses a hand in a defectively designed metal-shearing machine might find meaning and value in the notion that his or her physical pain and postaccident depression will yield money that can help fund a better education for his or her children. Or the notion of monetary recovery will coincide with the client's sense that justice requires the defendant to make restoration with money to the extent possible. For others, the legal monetizing might be more difficult to integrate if, for instance, the clients perceive themselves as commodifying the loss of something priceless or beyond the range of monetary discussions.

### 3. *Decisions Relating to the Lawsuit and Decisions About Settlement*

Thus far, the discussion has focused on the lawyer's explaining and assessing liability and damages. Still to consider are those many times in which a client must make decisions. These include choices about the framing of the case (for instance, whether to bring a child's consortium claim), the types of damages asserted, whether and for what amount to settle, how to handle the subject of apology or memorial action, whether to settle the case in a lump-sum or in some sort of payout form. Consider the following examples:

- A married couple consults a lawyer after an accident that caused the husband to suffer a serious head injury and reduced cognitive functioning. The lawyer eventually explains that, in this jurisdiction, a minor child can recover damages for consortium for a seri-

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56. Cf. SCARRY, *supra* note 51, at 298–99 (describing how the plaintiff's lawyer in a products liability case tells and retells the story, in part to build in the jury a desire that the story, this time, have a different ending).

ous injury to the parent. A child also might have a “bystander” claim. The parents have two children, ages eight and eleven. One of the children witnessed the accident. The lawyer explains that if the children’s consortium claim is added, both children will probably need to give discovery with respect to their relationship with their father before the accident. Further, the lawyer explains, the bystander claim would require the child to give additional discovery such as what he witnessed in the accident or how he felt.

- In this jurisdiction, an emerging line of cases takes a new slant on the discoverability of psychiatric or counseling records. Previously, any assertion of damages for emotional distress allowed discovery of the psychiatric records of the plaintiff. The newer line of cases suggests that discovery of these records will not be triggered solely if the claimant asserts mental anguish in the manner of a general damage—pleads and proves the damages as those that would follow naturally in the wake of a loss of the sort the plaintiff suffered. Thus, the lawyer advises the client that she has a choice about how to present the claim for mental anguish. One route might yield lower damages, but would probably prevent discovery of therapy records. The other route might lead to more recovery but open the client’s psychiatric records.
- The lawyer is retained to bring a wrongful death and survival case when the spouse falls from a crumbling sidewalk at a “scenic overlook” on a mountain drive. The surviving spouse believes that his wife died instantly when her head hit the rocks below. In looking into the case, the lawyer obtains the autopsy report (which the husband has not seen); the report concludes that she died from internal bleeding caused by rocks that hit or rolled onto her when she fell.
- A settlement is offered in the form of a structured, annuity-funded payout, with lump-sum payments at the outset and at various intervals. The defendant would also be willing to settle for a lump sum entirely at the outset, but the “present value” of the structured settlement is higher than the lump-sum payment.

These examples illustrate two categories of decisions that can affect the loss: strategic decisions about the lawsuit (which claims to include and which damages to emphasize) that will directly affect how the plaintiff and his or her loved ones recreate and re-encounter the loss, and decisions about whether and how to settle. These decisions could affect the client’s suffering and meaning making in myriad ways. One way is the need to decide whether to take an action that might bring more “success” in the lawsuit but that might also expose the client or a loved one to evidence, questioning, or revelations that could interrupt the recovery or increase the suffering of the client or loved one.

Second, the client now will have to make decisions about monetizing the loss and appraising the likelihood of liability. Earlier, the cli-

ent will have been introduced to the legal language of damages and liability, but now the client will have to engage in decisions for which he or she must use the legal framing. If the client previously negotiated this legal language with a useful attitude of detachment from it, he or she must now employ it to make a decision with significant consequences. And the decision is imbued with meaning about the loss itself and about responsibility.

Third, the client will be engaged in a decision about how and when to end the lawsuit, which can be significant. The “results” of liability and damages are now final, and the client must incorporate these results into his or her understanding of the loss. In addition, both the amount of the settlement and its structure will have tangible and often critical effects on the plaintiff’s life.<sup>57</sup>

### B. Competence?

How can or should the lawyer act, given the complex and potent interplay between these aspects of the lawsuit and the client’s suffering and loss process? Should the lawyer try to counsel the client in a way that is least intrusive, or most helpful, as to the plaintiff’s own loss recovery process? As practitioners and scholars are aware, current professional responsibility rules permit the lawyer to counsel the client about not only legal factors, but also nonlegal factors that bear on matters within the scope of representation.<sup>58</sup> Yet, even if the lawyer “may” counsel the client with respect to nonlegal matters under the professional rules, a foundational question arises: the question of competence. As the *Restatement* phrases it, a lawyer must “act with reasonable competence” as to “matters within the scope of the representation.”<sup>59</sup> This means that “[i]n pursuing a client’s objectives, a lawyer must use reasonable care,” and must “be competent to han-

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57. See Ellen S. Pryor, *After the Judgment*, 88 VA. L. REV. 1757 (2002) (explaining the many ways in which decisions about settlement affect the plaintiff’s future).

58. See MODEL RULES OF PROF’L CONDUCT R. 2.1 (2002) (addressing lawyer as advisor and stating that “[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation”). For a thorough discussion of the history and reach of this provision and its permission and encouragement of nonlegal counseling, see Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365 (2005). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(3) (2000) (stating that “[i]n counseling a client, a lawyer may address nonlegal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects”).

59. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000).

dle the matter, having the appropriate knowledge, skills, time, and professional qualifications.”<sup>60</sup>

Thus, even if the lawyer aspires to discuss these issues in a way that minimizes the client’s suffering and loss, is the lawyer competent to carry this out?<sup>61</sup> One could plausibly argue that a personal injury lawyer should be aware of some of the most basic features of the suffering and recovery process. These would include: that the process occurs over a period of time not predictable or bounded by the “typical” timeframes or the timeframe of the lawsuit; that explanations of what happened and why it happened are not just legal issues but have intense significance for the client’s own suffering and meaning making; that spiritual understandings or framing of the loss will be very important for many clients; that the suffering process is not bracketed off and linear, but instead is shaped by the client’s understandings and meaning. Probably most importantly, the lawyer should be expected to understand that the legal claiming process will be an overlay onto a suffering and meaning making process that cannot be bracketed off entirely from the legal process.

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60. In lawyer malpractice litigation, the duty of competence is translated into a standard of care. Formulations vary somewhat but follow the approach described in the leading treatise on legal malpractice: “The ultimate test of competence is *reasonable conduct*, which is determined by the standard of care that requires the exercise of skill and knowledge *ordinarily* possessed by attorneys under similar circumstances.” 2 ROBERT E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 18.3, at 558 (4th ed. 1996). As applied to the situations set out in the text, the “standard of care” meaning of competence is not very helpful. This is because lawyer practices in these respects are probably not very developed, and any developed practices are probably not conveyed by the formal and informal means of learning the profession. Somewhat analogous is the problem faced some years ago by courts addressing the law of informed consent in medical malpractice. If the doctor’s disclosure was measured by the usual professional liability standard—the accepted customary practice—the doctor’s actions usually would measure up because disclosure practices had not developed very much. Thus, to whatever degree the doctor disclosed risk, the doctor probably was doing as much as the “ordinary, custom” practitioner. *Cf. Canterbury v. Spence*, 464 F.2d 772, 791–92 (D.C. Cir. 1972) (holding that the “custom” approach is not the preferable standard for informed consent, as distinct from negligent treatment claims).

61. A recent article addressing counseling on nonlegal considerations addresses the question of competence. *See Gantt, supra* note 58, at 388–97. Professor Gantt concludes:

Attorneys therefore should consider whether traditionally “nonlegal” issues have become so intertwined with the legal ones in their field that they should acquire knowledge of those issues or at least associate with an expert to whom they can refer clients. Furthermore, attorneys should be mindful that clients may incorrectly assume that certain nonlegal advice they provide is part of the representation and clients may rely on that advice to their detriment. Attorneys thus should provide some disclaimers if they sense the consultation moving to nonlegal matters. Although a full disclosure pursuant to Rule 5.7 may be impracticable and may frustrate the benefit of the nonlegal counseling, attorneys should at least let the clients know that they are not offering the advice “as their attorney.”

*Id.* at 396.



Given the premise that a lawyer should have some basic knowledge of the loss process, the lawyer does not have therapeutic competence to understand how all or most of the language and actions relating to the case will affect—positively or negatively—the client's suffering and loss. This would require therapeutic competence well beyond what could be expected of lawyers, even if we could assume best practices with respect to lawyer education. The interactions and effects are too individual, psychological, and nuanced; psychological competence seems required.

This is not to say, however, that we can expect nothing more of the lawyer than a correctly articulated statement of the rules of liability and how they play out given the evidence in a case. First, at various points along the way, the lawyer could offer explanatory or preparatory discussion aimed at allowing the client to distinguish between the legal framing of a case and the client's own experience of loss. Here, the goal would not be to force or even encourage the client to detach from the language and meaning of the lawsuit. Rather, the goal would be to permit the client to uncouple, or to integrate, the legal framework and his or her own understanding in whatever ways might be most helpful for the client.

Second, although the lawyer does not have general therapeutic competence about the interplay between the legal fault case and the client's own account-making as to responsibility, a lawyer at times *will* recognize that some aspect of the case is intersecting with the client's loss process in a way that could warrant discussion with, or counsel by, the lawyer, perhaps followed by a decision relating to the matter in question. This can happen in myriad ways. Consider these examples:

- The lawyer notices, from the client's language or actions, that the client's anxiety, grief, or other mental distress has heightened significantly because of some development, issue, or upcoming matter in the case. For instance, the client's deposition is coming up, or the client is markedly more anxious and depressed when the lawyer notifies the client that the expert who has reviewed the possible medical malpractice claim has concluded that the treating doctor did not follow the standard of care and that this caused the client's injury.
- A fifty-eight-year-old woman, living alone in an apartment, wakes up one night and hears an intruder. She hesitates for a moment, paralyzed with fear, and then picks up the phone to call 911. The intruder comes into her bedroom, grabs a heavy statue on the woman's dresser, and smashes it into her face. She remembers nothing else. When she regains consciousness, she is in a hospital room. She has undergone surgery, though she does not suffer from any cognitive impairment. She does, however, have a skull that is somewhat "caved in" near the forehead, and this is very

noticeable. At the urging of her family, the woman sees a lawyer. Investigation reveals that the apartment complex had ignored numerous complaints from tenants about two men who were staying in the laundry room of the complex, and who, residents believed, were breaking and entering apartments. In addition, the woman had a broken latch on her window, and she had notified the apartment manager of this, but then had not followed up to make sure that the latch was fixed. Eventually, the two men are arrested and convicted of various burglary crimes. The police believe that one of the men probably was the one who injured the woman, but they lack evidence sufficient to bring charges against him.

While preparing the lawsuit against the apartment complex and its management company, the lawyer often hears his client express ambivalence and doubt, some of which relate to the lawsuit and most of which seem to come from her religious beliefs. She tells the lawyer, for instance, that she tries hard to forgive the man who did this but is having trouble doing so; she wonders if it is right to sue the property manager when the criminal seems at least as responsible; she tries to stay upbeat but she feels shame from her disfigurement and sometimes wonders why she feels God is more distant in her mind; she has consulted her pastor, but she still wonders if perhaps the lawsuit is creating her distance from God because perhaps it shows she is unwilling to forgive.

- After coming to know the client over a course of months, the lawyer has a sense that some upcoming feature of the case—such as an expert report—will be very disturbing for the client. (The difference between this and the first example is that, here, the client is not displaying agitated behaviors; rather, the lawyer just has a sense, given what he knows of the client, that an upcoming event will be dislocating.)

In these and other such situations, the lawyer might have some ideas or instincts about possible options, or about how to interact with the client. For instance, the lawyer in the first situation might think (a) he or she should suggest that the client discuss the expert report with her therapist; (b) it might be helpful if the lawyer asked the client about what is distressing him or her about the expert report or the upcoming deposition, and then discuss these concerns with the client; or (c) it might be wise to postpone the deposition until the client seems to be in a more stable posture. In the second situation, the lawyer might be inclined to engage the client in a discussion of the nonlegal theme, such as by discussing with the client his or her fears that seeking blame in a lawsuit conflicts with the client's reading of the Bible. In the third situation, the lawyer might decide to engage the client in a preparatory discussion about what the lawyer senses is going to be a dislocating moment in the claim.

The list of situations, and what the lawyer might consider doing, could go on and on. These situations pose two questions. One is whether the lawyer—even if sincere and meaning well—is competent to recognize that the lawsuit is interacting with the recovery process at this point. Second, even if the lawyer is competent to recognize the situation, what may the lawyer permissibly do within the range of his or her competence and within the scope of the representation?

As to the first question, the answer seems to be yes, at least some of the time. Recognizing a dissonance or tension between some aspect of the suit and the client's emotional situation does not necessarily take therapeutic competence. The lawyer is not a therapist or a mental health professional and surely should not try to act as one. But, in the course of months and sometimes years working with a client, the lawyer may know the client well enough to sense that the client is having a problem with something that is connected to the lawsuit but not directly part of "the case." The lawyer is not qualified to diagnose someone with generalized anxiety disorder, posttraumatic stress syndrome, or depression. But he or she can be qualified to conclude that, at this point in time, the client is having a particular personal, emotional, or religious concern or anxiety as a result of the lawsuit.

If the lawyer can be competent in perceiving these situations, what is the range of permissible actions? Lacking therapeutic competence, the lawyer should not have, as his or her aim, to help the client work out the mental, emotional, or spiritual problem. For instance, the lawyer should not try to engage the client in a discussion focused on resolving the client's anger towards God or his or her guilt over the accident. Yet the scope of the lawyer's representation does include helping the client understand the nonlegal considerations that bear on the client's objectives in the lawsuit. And, it seems, the lawyer can have competence in this respect. Specifically, the lawyer can be competent to explore these nonlegal matters to the extent necessary to understand the client's objectives in the lawsuit, or to the extent necessary to explain to the client how the lawsuit does or does not affect the emotional, mental, or religious concern as the client has expressed that concern and as the lawyer understands it. More detail about how to carry this out appears in the next section.

### *C. Praxis*

Having developed a richer sense of how and why the lawyer's role can interact with the client's loss, and having addressed the bounda-

ries of the lawyer's competence, we can now posit some features of a practice informed by, and open to, the client's suffering and loss.

1. *Understanding That One's Professional Role Will Create a Relationship With, and a Relationship That Can Affect, a Suffering Person Who Is in a Process of Loss and Recovery, and Understanding the Boundaries of That Relationship*

A personal injury lawyer is often the first professional "helper" a client sees; sometimes the lawyer is the only such helper; sometimes the lawyer is one of several (i.e., therapist, pastoral counselor, rehabilitation specialist). Whether the only professional helper or one of several, the lawyer is in a relationship that cannot bracket off the reality of, or the relationship's possible effects on, the loss experience of the client. When one understands this, the question then becomes how I, as this person's lawyer, can and should represent my client in a way that remains within the boundaries of my role and yet—to the extent possible—does not increase and possibly diminishes his suffering and loss.

It would be helpful to keep in mind some general guidelines about "nonprofessional" counselors—people without therapeutic training who nonetheless function as counselors in some respect. Therapists Eugene Kennedy and Sara C. Charles have suggested a basic guideline: nonprofessional counselors should be "*supportive* rather than *uncovering* in their psychological interventions."<sup>62</sup> Supportive assistance focuses on the "*current conscious life situation* of the persons seeking help."<sup>63</sup> It does not seek to be uncovering—the nonprofessional counselor should "deliberately and carefully avoid any psychological archeological expeditions to excavate levels beneath [the client's] everyday awareness of problems."<sup>64</sup> This means avoiding techniques such as free association, dream analysis, or "remaining achingly neutral," techniques that "may rupture the defenses that the person has erected against dealing with the unconscious conflicts" with which the person struggles.<sup>65</sup> On the other hand, useful techniques include the counseling skills emphasized in clinical and lawyering classes: allowing the client to ventilate; remaining conscious of the client's story and avoid-

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62. EUGENE KENNEDY & SARA C. CHARLES, ON BECOMING A COUNSELOR: A BASIC GUIDE FOR NONPROFESSIONAL COUNSELORS AND OTHER HELPERS 6 (3d ed. 2001).

63. *Id.*

64. *Id.*

65. *Id.* at 7 (emphasis omitted).

ing imposing the lawyer's story on the client;<sup>66</sup> exploring the concern by asking for description and prompting of details that the person can easily remember; clarification of the concern; suggestion; reassurance; education; and empathy.<sup>67</sup>

## 2. *Communicating Some Basics: Timeline, Information, Decisionmaking, Objectives*

Near the outset of the representation, personal injury practitioners take various steps worth noting; these steps relate to timeline, desire for information, decisionmaking, and objectives. As to timeline, the lawsuit follows one timeline; the person's suffering and loss follow another. Because the lawsuit can be a source of confusion, stress, misplaced expectations, and pain, clarification about the legal timeline is both professionally necessary and can be enormously helpful in reducing confusion, stress, and misplaced expectations. This is especially so when the lawyer conveys the sense that, during many time blocks, the client really does not need to do much with respect to the lawsuit and yet what seems like "down time" in the lawsuit will be time when the lawyer is working. One lawyer, in a lovely phrase, tells his client to "let me carry that burden"—the burden of working up the lawsuit, getting information, knowing what to do and when. The lawyer continues:

For the next six months, it looks as though we will be finishing consulting with some experts and filing the case. Probably there won't be any discovery requests—things you have to provide the other side—for six months. Most of the work we will be doing will relate to research and investigation. Feel free to call us at any time, but you don't need to feel that you will have to be really occupied with the case for the next six months. Let us carry that burden for you; we will be working all these things.<sup>68</sup>

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66. A substantial literature explores the danger of lawyering styles that replaces the client's own narratives with the lawyer's legal voice or legal categories. As Professor Anthony Alfieri has put it (in the context of poverty lawyers): "Lawyer storytelling falsifies client story when lawyer narratives silence and displace client narratives." Anthony V. Alfieri, *Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2111 (1991). For other discussion of this general concern, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

67. See generally BASTRESS & HARBAUGH, *supra* note 47; BINDER ET AL., *supra* note 47.

68. This quote and the following quotes are drawn from plaintiff's personal injury lawyers with whom I discussed this Article. Because these quotes reflect the lawyers' personal choices and styles of communication, my preference is not to identify the lawyers. These lawyers do not reflect a wide or random sample of personal injury lawyers. Rather, they come from several lawyers—each with different styles and approaches—who represent some of the finest and most dedicated professionals I know.

Lawyers also see that personal injury clients can differ greatly in their desire for information and detail about the case. Mindful of this, they address the client's level of interest in keeping informed of each development—options include being copied on all correspondence, or just receiving updates.

As to decisionmaking and objectives, lawyers early on can use language that validates the client's interest in pursuing a claim, expresses the lawyer's commitment to and empathy for the client, and lets the client know that the lawyer understands and recognizes the difference between the legal claim and the client's loss. According to one lawyer, her introductory comments include:

I know that this lawsuit cannot bring back what you have lost, and I know that I cannot feel what you are feeling. But it is an honor and a privilege to represent you, and I will treat this case as if it were a loss that I had suffered.

According to another lawyer:

My job is to provide you with the best educated decisions I can give you about the liability and damages in this case from a legal perspective, and give you my best legal recommendations. But I know that, for you, it is not a legal decision; you have many factors to consider besides just the ones that are my expertise.

3. *Preparatory and Introductory Language That Permits the Client to Find His or Her Own Degree of Overlap or Nonoverlap Between Legal Language, Standards, Proof; and the Client's Understanding of and Meaning About the Loss*

As discussed earlier, the lawyer cannot know whether and to what extent various aspects of the case will integrate into the client's recovery, will interrupt the process or intensify suffering, or will have no particular effect. Yet the lawyer can offer preparatory and explanatory language that makes clear to the client that he or she need not force his or her meanings of loss or responsibility into the legal framework. The goal should not be to encourage a distancing between the client's understanding and the legal framing; the lawyer cannot understand and should not prejudge the connections or disconnections that might exist for the client. But, by explaining that the legal language and standards have their own rationales and limitations, the lawyer can permit the client to detach the legal standard from the client's meaning, without conveying a lack of integrity about the claim pro-

cess.<sup>69</sup> For example, a lawyer might provide something like the following explanation the first time the lawyer introduces the categories of compensable damages:

Now and at other times in this process, you will hear about certain categories of damages. By the word “damages,” we mean the types of losses—both financial and emotional—that can be compensated in a lawsuit of this sort. You will hear a lot more about these categories of damages as time goes on, but I wanted to make a few overall points at the start. First, these are legal terms, which the law has developed over time for many reasons. The law of torts tries to capture, in these words, a lot of the dimensions of injury and grief, but you should not feel as though you have to use these words yourself in your own understanding and experience of the loss. Second, a lawsuit seeks compensation for all these damages at one point in time—for instance, at the time we settle or go to trial. But of course you will experience some of these losses at earlier and later points in time. For instance, maybe your physical pain has lessened, but your emotional turmoil is greater. You should not feel that you are supposed to be experiencing all these losses at the same point in time, or that it is somehow bad for your lawsuit if some parts of your loss seem to have improved. In the lawsuit, we can present the past, present, and future of your damages. Third, you will learn that some losses—maybe even some of the losses that you consider important—are not compensated by tort law as damages. And you will hear that some damages—the ones that the law calls noneconomic—are not compensated above a certain ceiling, which in this jurisdiction is [\$500,000]. Later, I will explain what this means for your lawsuit. For now, though, you should understand that these are decisions that the law has made; they do not mean that these losses are less real, less painful than other losses.<sup>70</sup>

#### 4. *Preparatory Language About Noticing and Conveying Nonlegal Concerns*

As explained earlier, the lawyer lacks general therapeutic competence, but can notice and respond to the points of tension or distress between the claim and the client’s suffering and loss. (More detail about the lawyer’s response will appear below.) A client, however, might think that he or she should not mention questions or concerns that are not directly “about” the lawsuit. The lawyer can explain early on that the client can ask questions or express concerns about timing,

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69. Depending on the case, timing, and client, the lawyer might even want to discuss with the client the notion that a legal finding of fault, or a settlement or judgment, reflects only the imperfect justice that the legal system can provide.

70. This language, unlike the quotes in the text accompanying notes 68–69 *supra*, is not taken from conversations with plaintiffs’ lawyers. Rather, the passage is my effort to illustrate the kind of explanatory language that might be helpful in this context.

participation by the client, distress, or the level of information that the client might want if more detail about the accident becomes available.

##### *5. Major Themes Including Justice, God, Guilt, and Monetizing Loss*

Many dimensions of the lawsuit will intersect with central themes in a client's loss process. Many examples have already been illustrated, these include seeking justice, guilt, anger at or confusion about God or the tenets of the person's religion, and confusion and ambivalence about monetizing the loss. In keeping with the general guidelines already noted, the lawyer should not try to assess the client or try to elicit these themes from the client. Yet clients may nonetheless express them. As argued earlier, the scope of the representation, and the lawyer's competence, may allow the lawyer to discuss these concerns with the client as they interact with the lawsuit. Yet in what ways, and to what extent, can a lawyer engage the client in these matters without stepping past the boundaries of the lawyer's competence?

First, some themes about the lawsuit can be both descriptively accurate and often helpful to a client who is working through a concern or distress over the lawsuit and an emotional or spiritual issue. One example of such a theme is that the legal claim at most reflects one of this society's tools, and an imperfect tool at that, for attributing responsibility and giving compensation. The theme can validate the value that the client finds in the legal claim, and yet give the client permission to uncouple his or her own meanings from a particular legal term or decision. Another theme is the purpose of, and limitations of, monetizing the intensely personal. Again, this can validate the meanings or value that the client finds in the claim, and yet allows the client to uncouple the legal construct from his or her own meanings.

Second, although these will be very contextual encounters, the lawyer should engage the client in these serious nonlegal issues in a way that is supportive, not uncovering. To illustrate, return to the case of the fifty-eight-year-old woman with a disfiguring injury, who is uncertain whether it is right to sue the property owner, and who wonders whether the lawsuit is related to why she feels that God is so distant. These are expressed questions and concerns, and they relate to the lawsuit. The lawyer should not aim to uncover or work with her on the origins or unconscious levels of these worries. But the lawyer can acknowledge the concerns that she expresses, understand what the concern is, and then explain and give information about the suit in light of these concerns. He or she might say:



I know that you feel uncertain about the fact that, right now, the lawsuit does not include a claim against the man who did this. Maybe it would help to explain the legal reasons behind this; you can then tell me what you think and we can alter the lawsuit if that is what you wish to do. The law of this state allows us the choice of whom to sue. There is no rule that we must sue everyone who is responsible. If we sue one defendant, and if that defendant feels that someone else's actions were part of the problem, then our defendant can always sue that person in a separate action for what we call "contribution"—partial payment back of what the defendant had to pay. Also, in this suit even as it stands now, the property manager can tell the jury everything about the events of that night—indeed, we will tell the jury about the criminal who broke in. So, to decide not to sue the criminal is not keeping a secret from the jury. Why, then, are we not suing the criminal? The reason is that we are suing a defendant if two things are true about the defendant: we think they are legally responsible, and there is some ability to collect compensation. The criminal is in prison and cannot pay anything. We think the criminal was responsible, but we also think the property owner was responsible because he knew about this problem before and did not correct it. So our lawsuit sues the property owner.<sup>71</sup>

On the issues of guilt or the client's sense of distance from God, the lawyer should not move in an "uncovering" way—for instance, asking the client to go back in memory and think of any other events that left her with this same feeling, and then probing for connections and differences. Rather, the lawyer can acknowledge, clarify, focus, and explain and give information that addresses the concerns as the client has expressed them. Because the focus is on the issue as the client expresses it, the nature and detail of the discussion might change as the lawyer comes to know the client better or the client feels more comfortable in expressing these themes. The lawyer's advice might sound like this:

You have mentioned a number of times lately that God seems really distant, and that you wonder if this lawsuit is causing this. I cannot explain why God seems distant to you, but I would like to mention a few things that you might think about. One is that bringing a lawsuit, legally, does not mean that you have, in your heart, not forgiven the person. Our tort law allows someone to sue another person for compensation when that person has been the cause of an injury and when the act was negligent. One main reason for this law is recognizing that people who are hurt need and deserve compensation—they have medical bills, lost wages, mental anguish, and other things. So, even if the injured person forgives the one who injured them, the law allows the injured person to bring a claim

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71. See *supra* note 70.

for compensation. So, if you are worried that the lawsuit symbolizes a lack of forgiveness, I would suggest that, legally, it does not signify this. I also want to mention something about punishment. You might think that the lawsuit is seeking a kind of punishment, and that this is inconsistent with trying to forgive someone. Legally, though, this case is not about punishment; it is not seeking punishment damages. Actually, the law of torts does allow someone to seek a type of damage that is specifically directed to punishment. These are called “punitive damages,” and they are specifically given to punish and deter the person. But, in this suit, we are seeking only compensatory damages—the amount of money that will compensate you for the losses you have suffered.<sup>72</sup>

#### 6. *Remaining Within the Scope of Representation*

Having said the lawyer can engage in preparatory discussions, and notice and be responsive to possible nonlegal concerns, one boundary deserves attention: the lawyer should refrain from counseling that is outside the scope of the representation. For instance, suppose that a client continues to express concern about the lawsuit in a way that makes clear that he or she is conflicted about the connection between the lawsuit and what the client sees as his or her religious obligation to forgive. Perhaps the lawyer engages in a conversation airing this concern with the client. Here, the lawyer’s act is within the scope of the representation. The client’s own comments and questions have made clear that, in the client’s mind, his or her ability to engage in and understand the legal claim is connected to the negotiation of the legal language within his or her faith framework. By contrast, suppose a client whose spouse has died asks for the lawyer’s opinion about whether selling his or her house and moving to a new location would help him or her “move on” from the loss. Were the lawyer to answer this question, the lawyer’s action would fall outside scope of the representation. The client’s question is connected to the loss for which the lawyer is representing him or her, but the client’s question is not about anything relating to her understanding of, or to the value or status of, the client’s legal claim.

Notice that this point does not necessarily flow from a decision about the lawyer’s *competence*. Perhaps a particular lawyer would be competent to engage in counseling about the best forms of investment for a client, as the lawyer happens to have a degree as a certified financial advisor. But the client has retained this lawyer for representation in a divorce, not for financial advice. Thus, notwithstanding this

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72. See *supra* note 70.

lawyer's competence to provide this sort of counsel, it lies outside the scope of the representation.

7. *Be Mindful That Recollecting and Ruminating Over the Loss Have Significance in the Client's Recovery Process*

By its nature, the lawsuit will call on the client to tell the story of the loss event again and again. A growing literature has looked into the relationship between a person's recollections and expressions about the loss event and the level of suffering and grief the person continues to experience.<sup>73</sup> For instance, a number of studies show that writing about traumatic experiences produces improvement along certain outcome measures.<sup>74</sup> Other studies have examined "social sharing" rather than private rumination or writing. Some of these studies suggest that disclosure and sharing are linked to positive health outcomes; other literature suggests that communicating a major negative experience can "reactivate the emotional disruption" rather than improve it.<sup>75</sup> Still another study found no significant relationship between social sharing soon after the event and emotional recovery as measured by several outcomes.<sup>76</sup> This same study, however, found that poorer recoveries from an emotional episode result when the "rehearsals about an emotional experience extend over a long period of time."<sup>77</sup> For our purposes, the research does not yield clear guidelines for the lawyer. In part, this is because the literature is itself inconclusive. In addition, the settings of the research are very different from the lawsuit context. That is, one cannot say that, in general, retelling the story in litigation contexts is unhelpful or whether it furthers a meaning-making process.

One can conclude, however, that recollecting, remembering, ruminating over, and re-articulating the loss experience *can* affect the client's level of suffering and his or her recovery. The lawyer can be

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73. See James W. Pennebaker & Sandra Klihr Beall, *Confronting a Traumatic Event: Toward an Understanding of Inhibition and Disease*, 95 J. ABNORMAL PSYCHOL. 274, 274-75 (1986) (discussing evidence relating to how the disclosure of traumatic events can be related to the disease process).

74. See James W. Pennebaker, *Emotion, Disclosure & Health: An Overview*, in EMOTION, DISCLOSURE, & HEALTH, *supra* note 54, at 3, 4 (citing studies).

75. See Bernard Rimé, *Mental Rumination, Social Sharing, and the Recovery from Emotional Exposure*, in EMOTION, DISCLOSURE, & HEALTH, *supra* note 54, at 271, 280 (summarizing studies on the subject).

76. *Id.*

77. *Id.* at 282-83. See also Richard Mayou et al., *Prediction of Psychological Outcomes One Year After a Motor Vehicle Accident*, 158 AM. J. PSYCHIATRY 1231 (2001) (showing that ruminations about an accident and negative interpretations of intrusive recollections were associated with more negative post traumatic recoveries one year after the accident).

alert to the times when preparatory and explanatory language along the way could reduce distress and confusion. For instance, the lawyer can explain that in the weeks and months to come, the client will be asked to tell parts or all of the loss event and its aftermath; that these requests are for information relating to the lawsuit; and that the client should let the lawyer know if the time or manner of the retelling is especially bothersome.

At times, the lawyer might have reason to think a particular telling—such as a client’s deposition—will be extremely traumatic. One lawyer tells of a case in which the parents retained him to represent their fourteen-year-old child in a claim against a grocery store in whose parking lot the girl had been sexually assaulted. The lawyer told the parents he would represent the girl, but he wanted the parents to know, at the outset, the lawyer would not allow the girl’s deposition to be taken unless her emotional state improved and a therapist agreed that the deposition would not cause further trauma. And, of course, lawyers can try to work with opposing counsel about the conditions or timing of a deposition.

8. *Do Not Advise the Client to Keep a Pain or Grief Diary; Advise of the Legal Consequences of Certain Actions but Do Not Advise for or Against the Actions*

A standard personal injury practitioner’s guide once noted that the plaintiff’s lawyer should suggest that the client keep a pain diary. For some individuals, keeping a pain diary or a journal would be helpful to their processing of the loss. Indeed, some research has supported the therapeutic value of writing about traumatic loss. But, even if writing can sometimes be helpful for a person, the lawyer should not advise it as something to do in connection with the lawsuit. The lawyer simply cannot know whether this would be beneficial for the client or if instead it will shape or interrupt what otherwise would be the trajectory of the client’s loss process.

The client’s life will be changing, especially when the representation takes place over a period of time. The client might consider moving, dating someone new (after a spouse has died), home-schooling his or her children, allowing his or her parents to raise the children for awhile, and so on. Many actions will have no effect on the claim; other actions, such as dating or remarrying, might be evidence that the defendant could use to diminish damages. When the lawyer is aware of the proposed action, the lawyer should give advice about the legal consequences, if any. But the lawyer should not advise the client which choice to make, or which choice the lawyer “recommends.”

## IV. CONCLUSION

Although the lawyer is not doctor or therapist, his or her representation will intersect with and sometimes influence the client's suffering and loss process. The lawyer is a key player in many of the ways in which the claiming process could fold into and influence the client's suffering and recovery process. And the lawyer's own style, approach, philosophy, and language, among other factors, would seem to have some effects on the cognitive, decisional, and emotional work that the claim will entail for the client. This seems plausible even if we make minimal assumptions about how involved or empathic that lawyer is, and no matter what style of lawyering is employed.

To explore the implications of this point, an initial step was to understand some salient themes about suffering and its amelioration. Thus, Part II turned to the grief and recovery literature that focuses on how the person—as diminished by the loss during or after any rehabilitation that is possible—endures, and makes recovery steps in response to the sorrow, grief, and dislocation created by the loss. For instance, a key insight of this literature is that the notion of responsibility is a key part of how a person works out an account, or narrative, that comes to terms with the question of bafflement.

Part III then turned to the role of the lawyer. It first inquired about the main ways in which the lawyer's role can interact with the plaintiff's loss process. These include the lawyer's explanation, development, strategy, and counsel about the fault component of the case—including the defendant's fault, the plaintiff's possible contributory fault, and the fault of other actors who might or might not be added to the case. Building the case for legal fault is an overlay onto the client's own processing of cause, responsibility, and bafflement. The possible influences of this overlay could take many forms, some positive and some negative. Another point of intersection is the need to think about nonmonetary losses in monetary terms. In these and other areas, how a lawyer uses language, gives advice, and suggests strategies, can intersect with and possibly influence the client's loss process.

The next question, then, is whether and how the lawyer can represent the client in a way that is least intrusive, or most helpful, as to the plaintiff's own loss recovery process. We know that, under professional responsibility rules, the lawyer may counsel the client with respect to nonlegal matters. But this does not get us far, because a foundational question arises: the question of competence. That is, even if the lawyer aspires to represent the client in a way that minimizes suffering, is the lawyer competent to carry out this desire?

In one sense, the answer is no. The lawyer does not have therapeutic competence to understand how all or most of the language and actions relating to the case will affect the client—positively or negatively. The interactions and effects are too individual, psychological, and nuanced; psychological competence seems required. This is not to say, however, that we can expect nothing more of the lawyer than to correctly articulate and advise about liability and damages. There are ways in which the lawyer, while remaining within the scope of his or her competence, can be mindful of and helpful towards the client's loss process.

The final section of the Article, then, outlines some thoughts and suggestions towards this end. These include: remembering that the representation can overlap onto the client's own meaning-making process, respecting the difference between supportive counseling and counseling that steps into the therapeutic method, providing suggestions about preparatory and explanatory language that allow the client to uncouple the legal terms and standards from his or her own understandings of loss and fault, and engaging with the client over concerns that he or she presents relating to the connection between the lawsuit and his or her own perceptions of fault or loss.

In these and other ways detailed in the Article, the personal injury lawyer's role allows what medical anthropologist Arthur Kleinman has called "empathic witnessing"—the "existential commitment to be with the sick person and to facilitate his or her building of an illness narrative that will make sense of and give value to the experience."<sup>78</sup> Kleinman is referring to physicians, but the phrase can apply to lawyers notwithstanding the obvious differences in the physician's and the lawyer's roles. Lawyers, too, can be empathic witnesses: they can and often do maintain a commitment to be with the injured person, and to facilitate the client's building of a loss narrative that will make sense of and give value to the injury.

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78. KLEINMAN, *supra* note 34, at 54.

