

Emerging Issues

Grief expert testimony is admissible when helpful

by Roger T. Creager

The Virginia Supreme Court has never specifically addressed the admissibility of expert testimony regarding grief. Some Virginia Circuits have ruled that such testimony is allowed, and some have excluded it. This article posits that under long-accepted principles of Virginia evidence law grief expert testimony should be allowed whenever it will be helpful to the jury. Furthermore, grief expert testimony should seldom if ever be excluded as a matter of law on a pretrial motion *in limine* since it is virtually impossible to determine before trial that the testimony would not be helpful in any way.

Under Virginia law, all relevant evidence is admissible.

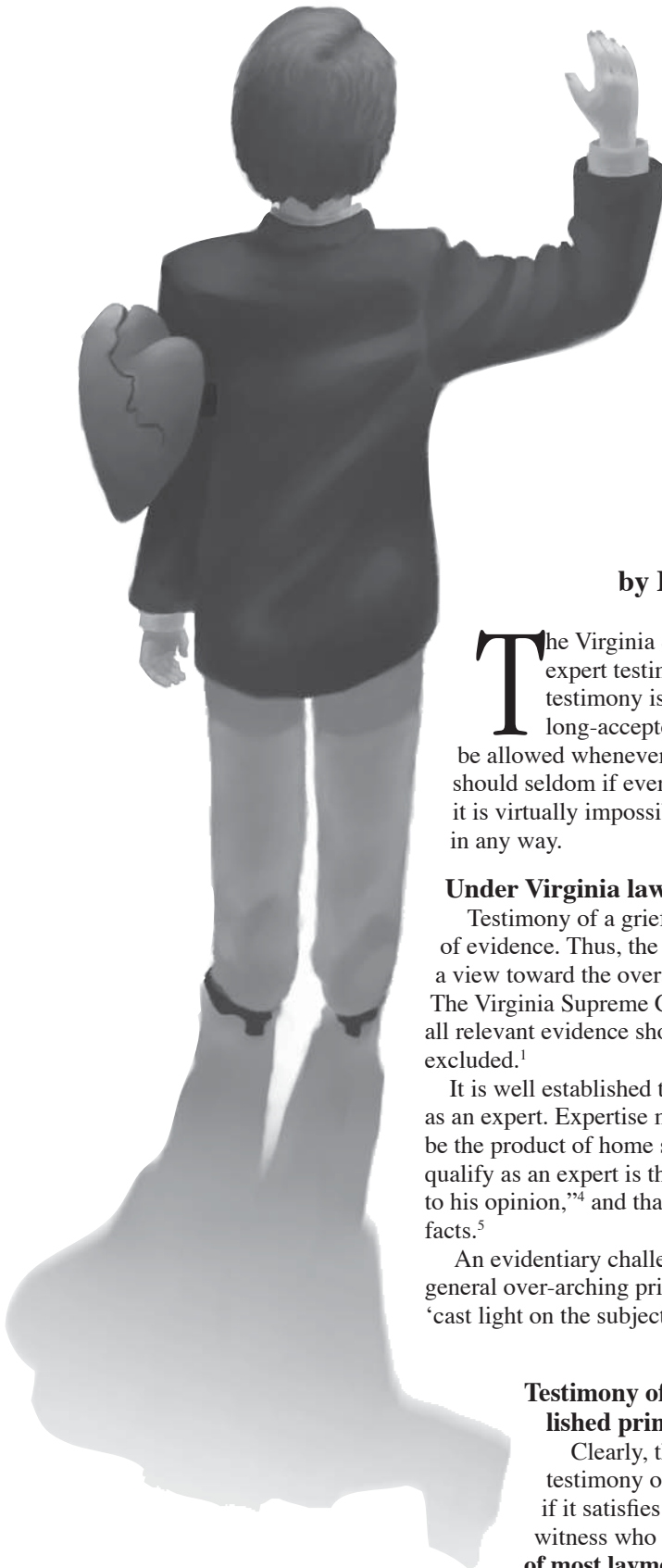
Testimony of a grief expert should not be treated any differently from any other type of evidence. Thus, the admissibility of grief expert testimony must be determined with a view toward the overarching principle of the admissibility of all relevant evidence. The Virginia Supreme Court has consistently adhered to the broad general principle that all relevant evidence should be admitted unless some rule of evidence requires that it be excluded.¹

It is well established that no formal training or education is necessary to qualify a person as an expert. Expertise may be acquired through an avocation or a hobby.² Knowledge may be the product of home study or experience, or both.³ All that is necessary for a witness to qualify as an expert is that he must have “sufficient knowledge of his subject to give value to his opinion,”⁴ and that he be better qualified than the jury to form an inference from the facts.⁵

An evidentiary challenge to the testimony of a grief expert must be tested against this general over-arching principle of admissibility. The testimony of a grief expert usually will ‘cast light on the subject of inquiry,’ and thus should be ruled admissible.

Testimony of experts, including a grief expert, is governed by well-established principles.

Clearly, there is no rule of law that supports the automatic exclusion of the testimony of a grief expert. Rather, this type of expert testimony is admissible if it satisfies the ordinary principles governing expert testimony. “In general, a witness who by education, training or experience has **knowledge beyond that of most laymen**, may be qualified before the court as an expert witness and allowed to state an opinion to the fact-finder on matters not within their common



knowledge or experience.”⁶ Thereafter, any argument that an expert witness lacks experience goes to the weight, not the admissibility, of the expert’s testimony.⁷ An expert’s opinion is admissible if it will “**probably aid the trier in the search for the truth.**”⁸

Helpful testimony from a qualified grief expert should be admitted.

Courts should be careful to make certain that a grief expert does indeed have qualifications by training, education, and/or experience that would render his or her testimony helpful to the jury. A licensed clinical social worker who has done extensive study and work in the area of grief and mourning should, for example, be recognized as qualified to offer expert testimony.⁹

A grief expert typically spends hours interviewing, testing, and evaluating (and perhaps also counseling) the family members regarding their grief and mourning. Clearly, such an expert has knowledge regarding grief and grief processes that is beyond that of most laypeople, and thus his or her testimony will be helpful and should be admitted into evidence.

Virginia law provides by statute that in a wrongful death action “[t]he verdict or judgment of the court trying the case without a jury shall include, but may not be limited to, damages for the following: 1. Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent.”¹⁰ Mental anguish is a person’s mental reaction to a loss or injury.¹¹ Mental anguish may be inferred from the nature of the injury or loss.¹² “When the case is a proper one for the recovery of damages for mental anguish . . . any competent evidence which tends to establish or dispute the fact that the plaintiff suffered mental anguish as a result of the defendant’s act is admissible.”¹³

“For purposes of proving grief, mental anguish, or suffering of a surviving parent (or statutory beneficiary), the Courts look with favor upon expert psychiatric testimony to provide a reasonably reliable basis for award of such damages, and to prevent the jury from falling into speculation, conjecture, and sympathy.”¹⁴ Extensive training, education, background, and experience as a licensed social worker or other professional specializing in grief and mourning amply qualify one to give expert testimony regarding grief and mourning.

Clearly, in a personal injury action, expert testimony is admissible to assist the jury in evaluating and determining the nature and extent of the physical injury and the associated mental anguish. There is no sound reason to apply a different rule of evidence to expert testimony regarding grief and mourning in a wrongful death action. To the contrary, the applicable principles of evidence are the same, and they favor the admission of grief

expert testimony. In both personal injury actions and wrongful death cases, the jurors may not have personally experienced the type of loss in question, and expert testimony is helpful. Moreover, even if the jurors have experienced the sudden death of a loved one, expert testimony will still be helpful in providing a broader perspective and understanding.

Experts are allowed to testify regarding the nature and course of an injury involving a broken bone even though most jurors have known someone who has suffered a broken bone. The same logic holds true with respect to grief expert testimony. Grief experts should be permitted to provide expert testimony regarding the sorrow and mental anguish and the grief suffered by the statutory beneficiaries. Furthermore, based on education, training, and experience, a grief expert will have helpful testimony to give regarding the nature of the grieving process, which experts have studied for decades.

Numerous courts have upheld the admissibility of expert testimony regarding grief and mourning. In 1971, the Washington Supreme Court held: [F]or purposes of proving grief, mental anguish or suffering, expert psychiatric testimony will often be useful and proper . . .”¹⁵ To the same effect is a 1995 decision of the Ohio Supreme Court which held that the trial court properly admitted the testimony of a grief expert in a wrongful death action.¹⁶

Likewise, in 1991, a Florida appellate court evaluated the testimony of a grief expert under standards which were very similar to those applicable under Virginia law:

In the present case, the witness’s testimony clearly assisted the jury, and appellants’ argument that his testimony should have been excluded because the subject matter of the testimony was within the normal, everyday comprehension of jurors is without merit. **The expert witness’s research over a period of fifteen years and the research of others in the field indicate that there are patterns of responses to grief, stages of grief, and factors that exacerbate one’s responses to grief.** More specifically, he explained that people can now be categorized as falling into either normalized patterns of grief or complicated grief, and he explained those processes. Certain factors affect a person’s grief, and the ability to recover from that grief.

The expert interviewed Mr. and Mrs. Rice before trial. Thus, he was able to explain to the jury the Rices’ ordeal in working their way through the grief process, where they were in that grief process at the time of trial, what factors had adversely affected their response to their son’s death and had affected their ability or inability to recover from their grief, and

the pattern their grief was likely to take in the future. **Clearly, the subject of grief and bereavement is not an area within the normal everyday comprehension of jurors, and the expert testimony was properly admitted to aid the jury in its consideration of the effect of David's death on his parents.**

Additionally, the witness was undoubtedly qualified as an expert in the field of grief and bereavement. Having already obtained a Bachelor's Degree, a Master's Degree and a Ph.D. in sociology, he was working on his post-doctorate at Harvard University in the field of grief and bereavement. The witness has been researching and studying grief for fifteen years, and has received research grants from the federal and state governments and foundations in order to do so. As the author of several books and publications on death and dying, and grief and bereavement, he has taught at seminars and has provided training as a consultant to different groups including hospital staffs, nurses, physicians, social workers and people who work in facilities for the terminally ill on this subject. Further, he teaches psychologists and counselors so that they can understand grief and bereavement and provide more help to their patients. This is only a partial listing of the witness's qualifications. Thus, it cannot be said that the court erred in designating him an expert in the field of grief and bereavement.¹⁷

The now well recognized field of grief therapy became firmly established with the 1969 publication of Elizabeth Kubler-Ross's work titled, *On Death and Dying* (London, Collier-Macmillan Ltd. 1969). In the intervening 35 years, a great deal of work has been done in this important field.¹⁸ Indeed, there are even journals, such as *Thanatos*, which are exclusively devoted to publication of research and articles regarding death, grief and the grief process.

The field of grief therapy, and testimony from an expert in that field, can assist the jury in recognizing and understanding the variants in the grief reaction, the role that the patient's pre-existing psychological condition may have on that response, the role that the family as a unit and the individual members of the family have in shaping that response and recovery from its acute and sometimes disabling stages, and the identification of the various stages of grieving that a patient may experience and that patient's prognosis for transition of those stages towards the completion of the active grieving process.

Death of a loved one sets in motion a mourning

process involving some of the deepest human feelings, feelings that are not always obvious or readily understandable to the layperson. Even though many of us have experienced the death of a loved one, it is far less common for laypeople to have knowledge regarding **the sudden, violent death of a loved one.**¹⁹ Moreover, those of us who have experienced the death of a loved one may nonetheless have a limited and incomplete understanding of grief and the grieving process, since we are often simply emotionally overwhelmed by what has occurred.

Much of what has been learned from research and in-depth experience regarding grieving is not intuitively obvious to the layperson. For example, acceptance of a death often requires the grieving person to deal with feelings of betrayal, i.e., that by accepting the death the survivor has betrayed the deceased loved one. The latter stages of mourning involve the acceptance that the loved one is lost forever. This acceptance, which is required if the survivor is to carry on successfully, feels in some respects like forgetting the loved one's importance and meaning. Laypersons with little, and sometimes no, experience with the grieving process can be assisted by expert testimony in understanding the testimony and evaluating the survivor's sorrow, mental anguish, and grief.²⁰

Former Fairfax County Circuit Court Chief Judge F. Bruce Bach stated the following from the bench when addressing this very issue:

I heard a fellow testify. I think he was from Hood College over in Frederick, Maryland, who was one of the world's leading experts on the grieving process. He was marvelous. I allowed him to testify. I will allow her to testify assuming she is qualified.

I don't think a jury knows any more or a judge knows any more about the grieving process than they know about the process of a rotating cuff injury, say. There is a grieving process that differs between the loss of a parent and the loss of a child. They can say what is going to happen to the same degree that a medical doctor is going to say what is going to happen to a broken bone.

So to that extent, I will allow her to testify, assuming she is qualified, because I don't think the trier of fact understands this process, even if they have been through it themselves.²¹

In *Sperry v. Schuyler Enterprises, Inc.*, Warren County Circuit Court Judge John E. Wetsel, Jr., ruled admissible testimony of a licensed clinical social worker who counseled wrongful death beneficiaries concerning the death of a child. Judge Wetsel specifically held that the grief expert could testify concerning the statutory beneficiary's mental anguish arising from the death of a loved one. Judge

Wetsel ruled:

[T]he testimony of psychologist, psychiatrists, or other duly qualified professionals is regularly received by courts in the Commonwealth on the issue of the emotional distress or mental anguish sustained by a party entitled to compensation such as the statutory beneficiaries in this case.

* * *

Upon consideration of the argument of counsel, it is adjudged and ordered that Plaintiffs' expert, Mila Tecala, who is a licensed clinical social worker in the Commonwealth of Virginia, may testify as to matters within the field of expertise of a licensed clinical social worker in which she is permitted to treat patients in the Commonwealth of Virginia pursuant to her license. The extent to which the expert is permitted to testify will be subject to determination upon her voir dire at trial.²²

Courts of sister states have taken the same approach.²³

At a recent hearing, Orange Circuit Court Chief Judge Daniel R. Bouton likewise denied a defense motion in limine to exclude the testimony of a grief expert. Judge Bouton ruled that the admissibility of particular testimony would be determined at trial, and he indicated that one of the issues at trial "might be whether the trial court is persuaded that in this case the victims, for example, have problems expressing grief or are not in a position to be able to state it clearly, such as the children in some of the other cases where the evidence has been found admissible."²⁴

Briefs opposing grief expert testimony usually rely on *El Meswari v. Wash. Gas & Light Co.*, 785 F.2d 483 (4th Cir 1986). The case is not persuasive. In *El-Meswari*, the Fourth Circuit held the trial court had not abused its discretion in refusing to allow a witness to testify as to a beneficiary's grief. The Fourth Circuit's opinion provides virtually no information at all, however, regarding the nature of the witness' qualifications or of the proposed testimony. The opinion merely identifies the witness as Dr. Ayub K. Ommaya, and provides no information regarding his education, training, or experience. Information available on the internet indicates that Dr. Ayub K. Ommaya is a neurosurgeon.²⁵ Nothing is contained in the Fourth Circuit's opinion to suggest that Dr. Ommaya had any particular expertise in grief, and there is no suggestion that he was a professional specializing in the treatment of those suffering grief following the death of a loved one. In a case where the expert involved clearly does have expertise in grief, the *El Meswari* case is not applicable and the grief expert testimony should be allowed.

A common argument in opposition to grief expert testimony is the assertion that grief and mourning are matters of common knowledge, as to which the jurors are competent to form an intelligent and accurate opinion. To say as much is to establish, however, the fallacy of the motion to exclude. It cannot possibly be that jurors know as much about the grief and mourning process as an educated, trained, and experienced expert who has studied and dealt with this process for decades with hundreds of survivors of the loss of loved ones. Such testimony clearly will be **helpful** to the jury in understanding this process, and that is all the law requires to render it admissible.

Moreover, the assertion that the average juror fully understands the grieving process has been explicitly rejected in the professional literature regarding grief. A leading journal in this field of expertise states:

Despite the prevalence of death as a feature in our society, **we have distanced ourselves from the realities of death and the experience of grief.** For all the changes in our modern, post-industrial culture, we have yet to address effectively much of the acute suffering that the bereaved must confront as they experience the pain of grief.

Many of the beliefs regarding death that are shared in this society have been formed within a context of limited contact with the death experience. If we have isolated ourselves from the realities of death, it is not surprising that we come to the experience of loss unprepared to deal with it.

We encourage the discussion of almost any aspect of human experience with relative openness and candor from growing up to growing old. However, when it comes to grief, such open conversation ceases. **Consequently, many Americans maintain a number of beliefs about grieving behavior that are distortions of the true nature of human responses to loss.**

These misconceptions held by the public at large stand in sharp contrast to the harsh realities of the mourning experience shared by those who have suffered the loss of a loved one. This continuing gap between the cultural distortions concerning grief and the private realities shared by the bereaved, has allowed the true face of grief to remain hidden from view. ...²⁶

The opponent of grief expert testimony usually contends that most if not all of the jurors will know about grief since they will have had some experience with the death of a loved one. Even if that is true, the standard of admissibility is not whether laypeople will have some familiarity with the topic,

but rather is whether the expert has knowledge that would be helpful and aid the jurors' understanding of the topic. As previously noted, even though most people have some direct or indirect experience with bone fractures, testimony of orthopedic surgeons is routinely allowed in personal injury actions. The same is true of the testimony of grief experts. Even though many people may have some limited experience with the death of a loved one, the testimony of a grief expert will be helpful in assisting them to more fully understand grief and the mourning process.

Moreover, experts in the field of grief counseling say that the average person does not fully understand the grief and mourning process. A grief expert was recently quoted in an article published in a leading Virginia newspaper as stating that when it comes to understanding grief and mourning, "[n]inety percent of the population is clueless."²⁷ The same article quoted a woman who lost her son in 1994 as follows: "Unless they've lost a child, they truly cannot identify with us, and they may say [things like] 'You should be better by now.'"²⁸

Standard principles of Virginia evidence law establish that the testimony of qualified grief experts will be helpful to and will assist the jurors understanding of grief and mourning in a wrongful death action, and this testimony therefore should ordinarily be allowed. Moreover, it would be virtually impossible for a trial court to determine as a matter of law at a pretrial hearing that the testimony of a grief expert would not be helpful to the jurors at trial in any way. A sound determination regarding that issue will depend upon the particular nature and characteristics of the statutory beneficiaries, their ability to fully articulate their grief and mourning process, a full exploration of the qualifications of the grief expert, the particular testimony to be offered, and various other factors which should be considered on the full record at trial.

Endnotes

1. The Virginia Supreme Court has summarized the general principle that all relevant evidence is admissible as follows:

"All facts having rational probative value are admissible unless some specific rule forbids. * * *" 1 Wigmore, *Evidence* (3d ed.), sec. 10, p. 293.

"Evidence which tends 'in an appreciable degree to sustain a material issue of facts' is admissible. (*Lyons v. Fairmont Real Estate Co.*, 71 W. Va. 754, 77 S.E. 525), and 'the safer and more satisfactory rule is for the Court to admit whatever is relevant, and leave the question of weight for the jury.'" *Wilson v. Fleming*, 89 W. Va. 553, 562, 109 S.E. 810.

"It is said that all facts having rational probative value are admissible unless some specific rule forbids. How-

ever, the weight or probative value is not the criterion or test. **If it tends even slightly to prove a fact relevant to any issue in the case and material or forceful in the determination thereof, it is admissible.** The criterion of relevancy is whether or not the evidence tends to cast any light upon the subject of the inquiry. There are instances where the circumstances are such that the act in question, while perhaps somewhat remote, is not sufficiently irrelevant to render it inadmissible as a matter of law, and it may have such probative value and legal relevancy that the inferences which may be drawn therefrom are clearly proper for the jury."

McNeir v. Greer-Hale Chinchilla Ranch, 194 Va. 623, 628-629, 74 S.E.2d 165 (1953) (emphasis added) (cited with approval in *Breeden v. Roberts*, 258 Va. 411, 416, 518 S.E.2d 834 (1999)).

2. Charles E. Friend, *The Law of Evidence in Virginia*, §215 at 461 (2d Ed. 1983).
3. *Noll v. Rahal*, 219 Va. 795, 801, 250 S.E.2d 741, 745 (1979).
4. *Norfolk & Western Railway Co. v. Anderson*, 207 Va. 567, 571, 151 S.E.2d 628, 631 (1966).
5. Friend, *supra*.
6. *Callahan v. Commonwealth*, 8 Va. App. 135, 138, 379 S.E.2d 476 (1989) (emphasis added). This has long been the standard established by Virginia law:

The knowledge necessary to qualify one to speak as an expert may be derived from study or experience, or both. **The witness need not have all the knowledge possible for one in his class to entitle him to speak, but he may testify as an expert if it is shown that he has sufficient knowledge of his subject to give value to his opinion.** 7 Mich. Jur., *Evidence*, §167, p. 530; 20 Am. Jur., *Evidence*, §814, p. 684; *Swersky v. Higgins*, 194 Va. 983, 76 S.E.2d 200; *Ames Webb, Inc. v. Commercial Laundry Co.*, 204 Va. 616, 133 S.E.2d 547; *Rollins v. Commonwealth*, 207 Va. 575, 151 S.E.2d 622, decided today.

N & W Railway v. Anderson, 207 Va. 567, 571, 151 S.E.2d 628 (1966) (emphasis added).

7. *Kern v. Commonwealth*, 2 Va. App. 84, 341 S.E.2d 397 (1986).
8. *Neblett, Administrator v. Hunter*, 207 335, 340, 105 S.E.2d 115, 118 (1966) (emphasis added).
9. Numerous courts, for example have recognized the qualifications of Mila Ruiz Tecala, MSW, DCSW, ACSW, LICSW, as an expert regarding grief. She holds a Masters Degree in Social Work. She is a Licensed Clinical Social Worker, a member of the Academy of Certified Social Workers, and a Diplomate in Clinical Social Work. Grief, grief evaluation, and grief counseling are her areas of specialization. She has lectured and taught extensively in this field. Ms. Tecala has previously repeatedly been qualified and allowed to testify as a grief expert by state and federal courts in Virginia. For example, she has been qualified and permitted to testify in three cases in Fairfax County Circuit Court in *Edgerton v. Kerrigan*, Law No. 82957, *Falletti v. AAA Disposal Service, Inc.*, Law No. 100966, and *May v. Alvie*, Law No. 187839 (Feb. 19, 2001), in four cases in Prince William County Circuit Court (including in *Marler v. Porter*, Law No. 23724), in two cases in



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- Loudon County Circuit Court, in Alexandria Circuit Court, and in the Immigration Court in Arlington, Virginia. She was likewise qualified and permitted to testify as a grief expert in federal court in Virginia in *Kennedy v. Burris Foods, Inc.*, Civil Action No. 98-CV-4 (W.D. Va. March 16, 1999).
10. Virginia Code §8.01-52.
 11. 22 Am. Jur. 2d, *Damages*, §251; *accord, Russo v. White*, 241 Va. 23, 27, 400 S.E.2d 160 (1991).
 12. *See, e.g., Bell v. Kirby*, 226 Va. 641, 645-646, 311 S.E.2d 799 (1984) (personal injury); *Gamble v. Hill*, 208 Va. 171, 180, 156 S.E.2d 888 (1967) (wrongful death of young girl without direct proof of mental anguish).
 13. 22 Am. Jur. 2d, *Damages*, § 932.
 14. *Fox v. Rich Products Corp.*, 34 Va. Cir. 403, 408, 1994 Va. Cir. Lexis 73 at *21 (Winchester Circuit Court (1994) (quoting Annotation, *Recovery of Damages for Grief or Mental Anguish Resulting from Death of Child - Modern Cases*, 45 A.L.R. 4th 234, 245 (1986).
 15. *Wilson v. Lund*, 491 P.2d 1287, 80 Wash. 2d 91, 102 (1971).
 16. *Sharp v. Norfolk & Western Ry. Co.*, 72 Ohio St. 3d 307, 649 N.E.2d 1219 (1995).
 17. *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322, 336 (Fla. 4th District Court of Appeals) (emphasis added), appeal dismissed, 589 So.2d 291 (Fla. 1991).
 18. *See, e.g.,* Judith Viorst, *Necessary Losses* (Ballentine Books 1986).
 19. *See, e.g.,* Plant, Larry D., "Without Warning: The Impact of Sudden Death," Vol. 10, No. 4 *Thanatos* 18 (Winter 1985).
 20. *See Wilson v. Lund, supra; Sharp v. Norfolk & Western Ry. Co., supra; Holiday Inns, Inc. v. Shelburne, supra.*
 21. *Falletti v. AAA Disposal Service, Inc., supra*, (emphasis added) (transcript of hearing).
 22. *Sperry v. Schuyler Enterprises, Inc.*, 31 Va. Cir. 200, 201-05, 1993 Va. Cir. Lexis 133 at * 2-11 (Warren County Circuit Court 1993).
 23. *Angrand v. Key*, 657 So.2d 1146, 1148-1149 (Fla. 1995); *St. Mary's Hospital, Inc. v. Brinson*, 1996 WL 267927 (Fla. App. 4th DCA 1996); *Horton v. Chaning*, 698 So.2d 865, 868 (Fla. 1995); *Wilson v. Lund*, 80 Wn.2d 91, 491 P. 2d 1287; *Gaither v. Tulsa*, 664 P.2d 1026, 1031 (1983); *Sharp v. Norfolk & Western Ry. Co.*, Ohio St.. 3rd 307, 649 N.E. 2d 1219 (1995). *See also* 45 ALR 4th 234, 245 (1986).
 24. *Johnson v. Bass*, Case No. CL05-000020 (transcript of January 6, 2006, hearing on motion to exclude grief expert at 14-15).
 25. *See, e.g.,* information provided regarding Dr. Ayub K. Ommaya at http://www.healthgrades.com/directory_search/Physician/Profiles/profile.cfm?hgid=HGPy4E0D3ABD859131981&tv_eng=yahootf_physician
 26. Platt, Larry A., "The Hidden Face of Grief: Private Realities and Public Beliefs," *Thanatos* 30 (Spring 1991).
 27. Farmer, Robin, "Gestures Help Comfort Grieving Families," Metro Section at page B-1, *Richmond Times-Dispatch* (March 8, 2006). This article is available on the Richmond Times-Dispatch website at the following location:

<http://www.timesdispatch.com/servlet/Satellite?pagename=Common%2FMGArticle%2FPrintVersion&c=MGArticle&cid=1137834573786&image=timesdispatch80x60.gif&oasDN=timesdispatch.com>

This website location also has links to other *Richmond Times-Dispatch* articles of interest on the topic of grief and mourning.

28. *Id.*