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## Judge awards \$9.6M in wrongful death suit

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Picture this scenario: A man bludgeoned to death with a hammer, lying in a pool of blood, apartment tossed so it looks like a burglary, Porsche stolen.

The evidence leads to a man with a criminal past who works for the victim's father-in-law. Police bring the father-in-law, Gene Kirkpatrick, in for questioning and lie to him, telling him that the hit man has confessed and given him up. Kirkpatrick then makes arguably incriminating statements.

Kirkpatrick is grieving the loss of his daughter from medical negligence seven months earlier and is admittedly furious with his son-in-law.

At his trial, it comes out that Kirkpatrick hated the way his son-in-law was caring for his granddaughter. He wanted custody of his granddaughter and may have hired a hit man to kill his son-in-law for that reason. He is convicted and sentenced to life without parole. His appeal, based on an ineffective-assistance-of-counsel claim, is pending.

That's not a trite TV movie plot.

It's a drama that has played out in North Dakota twice, once in a criminal trial and once in a wrongful death case, where the court awarded \$9.6 million in damages to the estate of Dr. Phillip Gattuso.

That was the sum that the plaintiffs' attorneys — Kathleen Flynn Peterson and Brandon Thompson of Robins, Kaplan, Miller & Ciresi — requested "to



AP PHOTO: DAVID SAMSON, THE FORUM

Gene Kirkpatrick listens to opening arguments during his murder conspiracy trial, July 21, 2011, at the Cass County Courthouse in Fargo, N.D.

even come close to counterbalancing [the plaintiffs'] loss." The judge also awarded \$250,000 in exemplary damages.

### The value of a life

While the case is sensational, what's important to Flynn Peterson is that the judge recognized the economic value of a human life.

Other plaintiffs may find the verdict encouraging, Flynn Peterson said. "Many times people who are victims of crime

don't understand that there may be civil recourse for them."

The award was in three parts: economic loss, noneconomic loss and the exemplary damages.

Because the criminal trial had a res judicata effect, the plaintiffs were granted summary judgment on liability and won their motion for exemplary damages, leaving damages as the only issue.

Kirkpatrick agreed to waive a jury trial.

# Kirkpatrick ‘In every case, the economic loss is not really the challenge’

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## Beyond economic loss

The plaintiffs requested the usual economic losses: loss of earnings and earning capacity; loss of income and support; burial costs; domestic services; and so forth. They included lost savings, lost domestic services, burial expenses and psychologist’s bills for the decedent’s son, Philip Jr., and the expenses for security to protect the girl once Kirkpatrick bailed out.

Their request totaled \$4,406,139.50.

“In every case, the economic loss is not really the challenge,” said Flynn Peterson, noting that the decedent was a 49-year-old orthodontist and that he had the potential to generate a large income. “The noneconomic loss is the heart and soul of the case. The reason people come to you isn’t really so much because of the economic loss but because of the injustice that has been done in losing somebody they love. That is such a challenge for us in trying these cases.”

The plaintiffs’ submission to the court on damages is a lesson in proving noneconomic loss.

Flynn Peterson told the court that Gattuso had three children and that he was also survived by his parents, a sister and a brother. She told the court that Gattuso was close to his mother and siblings, meeting or talking with them frequently. “Dr. Gattuso’s mother misses these calls dearly and is taking the loss of her son very hard,” she wrote.

Flynn Peterson told the court that the children will feel the loss of their father every day for the rest of their lives. The girl, who at age 3 lost both her parents within six months, is likely to experience ongoing trauma. She had to move to New Orleans from Fargo and uproot her life.

Flynn Peterson explained to the court that survivors of early loss must contend with the “absent memory” of a parent who died early in the child’s life.



Kathleen Flynn Peterson

“The future damages K.M.G. will also suffer cannot be overstated. ... [She] will never be free from the horrors that have arisen from Kirkpatrick’s actions,” the memorandum continues.

## Custody

The custody battle continued after Gattuso’s death. Shortly after the murder, Gene Kirkpatrick and his wife, Sharon,

arrived from Oklahoma, took the girl back with them and obtained an ex parte order.

Eventually, the Kirkpatrick family stopped fighting.

“While Gene Kirkpatrick was out on his million-dollar bail awaiting trial, they

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— Plaintiffs’ attorney  
Kathleen Flynn Peterson

got a notice of deposition served upon him,” said Flynn Peterson. “So now think about it. They’re going to ask questions and he’s going to take the Fifth. To prove he’s not a fit custodian for the granddaughter they are going to ask him if he

had any role in the murder. So I’m certain that’s why at that point, no matter how much the family fought the case, they suddenly dismissed their case and the court awarded custody of the girl, who is doing very well, to her aunt and uncle on her father’s side.

“I think she’ll have a good life because she has good loving people taking care of her.”

## What’s next

“I’ll have to learn how to execute judgments,” said Flynn Peterson. She is working with lawyers in Oklahoma to see what can be collected.

Kirkpatrick had several pieces of property and was able to post \$1 million cash bail, Flynn Peterson noted. He reportedly paid the hit man \$3,000, with the promise of \$10,000 more later.

Now Kirkpatrick claims to have spent all his money on lawyers. The Fargo Forum reported that Sharon Kirkpatrick said, “If it was \$10,000 or \$10 million, I can’t pay it.”

But the case is a victory regardless of how much of the judgment is paid, said Flynn Peterson. “What is remarkable about the case is that a judge, not a jury, looked at the value of a human life and awarded the plaintiffs all their damages,” she said.

Even if the family is unlikely to get much out of it, the court said it was well aware of the loss for anyone growing up without a parent and realized that \$5 million was fair for noneconomic loss, said Flynn Peterson.

“North Dakota is a very conservative jurisdiction, not unlike Minnesota,” she said. “I’ve handled lots of cases over the years in North Dakota. In some respects their law is easier because they recognize grief, sorrow and emotional distress. We don’t recognize that in Minnesota.

“It’s very hard to get a plaintiff’s verdict there. But I’ve learned that demographics are all out the window. You have to focus group your cases and learn from focus grouping your cases. Every case is different.”