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## CHAPTER 3

# ***WHAT MUST BE PROVEN?***

In a Wrongful Death action, the family must establish two key elements: first, the defendant breached a duty by acting badly or wrongly; second, that the bad act of the defendant directly caused the injury. If these two key elements are proven, then the defendant can be held legally responsible for the injury.

### ***A. The Breach of Duty aka Bad Act or Carelessness***

The term “breach of the duty” describes the wrongful act of the defendant. It is the duty, obligation, or rule that the defendant must follow to avoid causing injury. Defining the specific wrongful act depends on the facts and circumstances of the injury, but ultimately, the defendant must have been careless and thus responsible for the injuries they caused.

When a death occurs in a motor vehicle collision, such as a car or truck collision, then the traffic laws are useful to describe the careless act. For example, the law sets the speed limit and specifies that one may not cross a double yellow line, or drive while drunk. Thus, it is wrongful and dangerous to drive faster than the speed limit, to cross a double yellow line, or to drive

while intoxicated. If the death occurred because of one or more of these wrongful acts, then the defendant breached the duty to drive carefully and safely.

What if the death occurs at the hospital? Has a breach of duty occurred? This is a more difficult scenario, particularly given that many Americans ultimately die at a hospital. As such, we need to work harder to demonstrate a legal breach of duty.

By way of example<sup>7</sup>, what if I walk into the ER with chest pain and shortness of breath? Let's further assume the doctor's diagnosis is acid reflux, and I am really having a heart attack. What's the bad act? The answer is: the failure to diagnose the true problem, and the failure to medically treat the problem.

Now, what if I was admitted due to the chest pain, and required open heart surgery. Let's assume that I was required to have antibiotics, but did not receive them? Who is responsible? We still do not know. We need more facts.

What if the surgeon failed to prescribe the antibiotics or failed to monitor my condition? If so, then the surgeon could be held responsible for their carelessness. Is there anyone else who should be held responsible? What about the nurses? If the antibiotics were prescribed and the nurses failed to give them per the doctor's orders, can the nurse be held responsible? The answer is likely yes. Moreover, the hospital, as the nurse's employer would also be held responsible.

Now, what if I was hit by a truck? What if the truck driver had been driving for eighteen hours because he receives an extra bonus for getting his trailer to the drop off location quickly? What are the wrongful acts and who should be sued?

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<sup>7</sup> To explore legal issues, lawyers and law students often explore the issue by applying various fact scenarios.

Here, the analysis begins with the truck driver. Certainly, the driver would be held responsible; after all, he caused the collision.

What about the truck driver's employer? Why? What did the employer do wrong? Here, the employer<sup>8</sup> created incentives or bonuses that can only be achieved by a driver who had too little sleep. Moreover, federal law limits the amount of hours that a truck driver can work, and with this additional fact, we know that the company also violated federal law.

### ***B. Causation: the Careless Act Must Cause the Injury***

Causation is the legal term that describes the relationship between the wrongful act and the harm. It is the bridge or the relationship between (i) the bad act, and (ii) the harm.

The causation is the “but for” in the statement that explains why the defendant is responsible. “But for the wrongful act of the defendant, my loved one would have lived.” By way of example, “But for the defendant truck driver crossing the double yellow line, I would not have been injured.” The causation relationship can also be explained with the converse: “If only the trucker stayed on his side of the road, then the collision would not have happened.”

By way of another example, assume Dan rear-ended Patrick. Dan was driving Sam's car and the reason for the rear-end collision was that the brakes failed<sup>9</sup>. Let's also assume Dan just took Sam's car without asking his permission. Let's further assume Sam put his car in the garage because he knew the brakes on the car were

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<sup>8</sup> Of course the truck company would also be named merely because it employed the truck driver, under the theory of Respondeat Superior, meaning, let the employer be responsible for the employee. This is discussed later.

<sup>9</sup> Law professors also use the names of the parties to suggest the role that the parties might play in a lawsuit. I have followed this pattern here, i.e., Dan the “Defendant”; Patrick, the “Plaintiff”; Sam the “Second defendant”.

not working and was waiting to have enough money to fix the car.

Who should be held responsible?

Should Dan be held responsible? The answer is, of course, yes. Applying our “but for” analysis: “But for Dan driving, the collision would not have occurred.” Is that true? Yes.

What about Sam. Is Sam responsible? After all, it was Sam’s car. Let’s apply the rule. “But for Sam’s failing to get the brakes fixed, the collision would not have occurred.” Is that true? No. There was a step missing: Dan taking the car without permission. However, if Sam loaned his car to Dan, knowing the brakes were defective, then Sam could be held responsible.

What if the collision was caused because Dan was drinking at a local bar and was drunk? Who should be held responsible? There is little doubt that Dan should be held responsible.

The harder question: should the bar be held responsible? To answer this question, we need to focus on the acts of the bar. What exactly did the bar do wrong? After all, the bar was licensed to sell alcohol and the defendant was of legal age to purchase alcohol—so what did the bar do wrong?

Historically, the bar was not held responsible. However, through advocacy of organizations such as Mothers Against Drunk Driving (MADD), and American Association of Justice (AAJ), we have all learned that there is a direct link between drinking and car crashes. For these reasons, Georgia adopted the so called “dram shop laws”<sup>10</sup> that specify a bar can be held responsible

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<sup>10</sup> Georgia’s dram shop act, O.C.G.A. § 51-1-40, specifies a bar is responsible for selling alcohol to persons underage, or to a noticeably intoxicated adult or an adult who will be driving. Noteworthy: if the purchaser of the alcohol was also injured, they cannot make a claim against the bar.

if they are serving intoxicated drivers. To answer the question above, what did the bar do wrong? The answer is: The bar allowed Dan to continue to drink, when Dan was obviously intoxicated.

The question of causation, the relationship between the bad act and the injury, is hotly litigated in medical malpractice cases. Given the injured party is typically ill, doctors will usually argue that even if there was a mistake, the mistake did not injure the patient as nothing could have prevented the ultimate injury. Many jurors have found this argument compelling.

To prove that the defendant is legally responsible, the plaintiff must show that the breach of a duty was the cause of the injury. As demonstrated by the examples above, while these elements seem simple in theory, they are complex in application.