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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.



## CHAPTER 4

# ***WHO CAN BRING A WRONGFUL DEATH ACTION?***

In Georgia, there are two separate, but related claims for wrongful death. The first claim, often described as the survivors' action, is brought by the family, for the full value of the life lost. The second claim is brought by the estate of the decedent, for medical and funeral expenses as well as the pain and suffering of the loved one just prior to death.

### ***A. Who Was the Loved One? What was Their Family Role?***

Who should bring the claim is determined by the role of the loved one in their family, i.e., if they were unmarried, married, or had children.

If the loved one was a child, the parents of that child have the right to bring a suit for wrongful death. The definition of a child is broad and expansive, and includes unborn babies and extends to any adult who is unmarried or without any children.

The right to a claim for wrongful death of a child belongs to the parents equally, even if the parents are separated or were never married. Ideally, if the parents are not married, they can bring the lawsuit together, or one parent elects to bring the lawsuit. The proceeds are nonetheless split equally between the parents, unless one of the parents asks for a special hearing on the allocation of the proceeds. At one point in time, a wrongful death action for an unborn child was limited. Cases could only be brought if the unborn child was “in the quick,” meaning that the mother is able to feel the baby moving. However, since 2006, there has been a change in the statutory law issued by the Georgia General Assembly, in which all unborn children at any stage of development may have a wrongful death claim. Of course, in the event of an abortion, neither the mother nor the father has a claim against the hospital or the medical care provider.

If the loved one was married or had children, the parents no longer have a claim. Instead, the surviving spouse (a husband or a wife) has the right to bring a claim. Likewise, a claim belongs to the children. Usually, the spouse brings the claim on behalf of himself/herself as well as on behalf of the children. If the loved one was only survived by their children, then the children have the right to bring the claim.

If the children are minors, then there are special protections to protect and preserve the funds until the children reach adulthood. Many families believe that the funds should be used to take care of the children as they are growing up. While this is a permissible use, the probate court views the job of the surviving parent to provide most of the day-to-day care of the child.

If one of the parents survives, then the parent can bring the claim on behalf of the children, and the probate court will appoint

a guardian to ensure the money is used wisely. Otherwise, the lawsuit must be brought under the name of a conservator. The conservator is appointed by the probate court to protect the funds of the minor children until they reach adulthood, typically at age eighteen.

Strangely, a decedent's siblings are not authorized to bring suit. The brother and sisters must file the claim by way of the estate. The same applies if the family members are nieces, cousins, and the like. These are the unique situations whereby the estate may recover both the survivors' and estate claims.

If the person bringing the lawsuit either does not have authority, or does not file any claims on behalf of the estate, the defendant may bring a motion to join all necessary parties. In essence, the defendant can force all of the parties to join as plaintiffs.

### ***B. The Estate of the Decedent***

An estate is a legal entity, similar to a company that owns all of the assets and liabilities of the corporation. The estate of the decedent is run by an executor (if there is a will), or an administrator (if there is no will).

In wrongful death actions, the estate has an obligation to pay all of the outstanding medical bills of the decedent. At the same time, the estate has a claim for the pain and suffering experienced by the decedent prior to his death. If there is extra money remaining, after satisfaction of the debts, then the remainder goes to the heirs, as outlined above.

<u>Who</u>	<u>What Can Be Recovered</u>
The family members/ survivors	“The full value of the loved one’s life,” i.e., the economic value of life and non-economic value of enjoying life.
The estate	Medical expenses, funeral expenses, and pre-death pain and suffering.

***C. Some Additional Problems, Issues, and Complexities***

When there is a claim for the wrongful death of a child, the rights to the claim belong equally to both parents. Ideally, in this situation, the parents bring the lawsuit together, or one parent brings the lawsuit, and the proceeds are split equally between the parents once the lawsuit is concluded. If the parents cannot agree, each parent can bring a suit independently, and in such a situation, the defendant(s) can merge the two lawsuits into one. Sometimes, one parent will elect not to file suit, but that parent does not waive the right to recover. Worse, sometimes one parent will blame the other parent for the death of the child. The best approach, of course, is for the parents to work out these issues before filing any suit.

When there is a claim for the wrongful death of a parent, the surviving spouse has the right to file suit and to resolve that suit without the consent of the children. This is true regardless of whether the surviving spouse is the parent of the children or if the children are adults. This sometimes creates the “evil step-parent” problem. At the same time, the surviving spouse has a