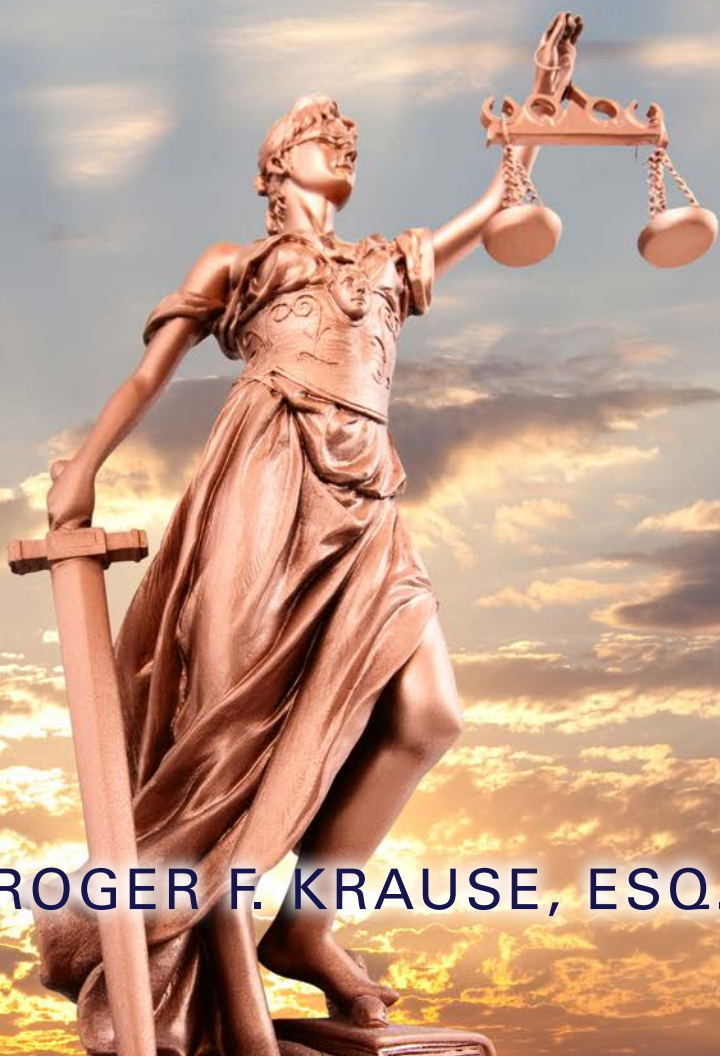


DEMANDING JUSTICE IN AN UNFAIR WORLD

FIGHTING BACK

A GUIDE TO
WRONGFUL
DEATH CLAIMS
IN GEORGIA



ROGER F. KRAUSE, ESQ.

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CHAPTER 1

WRONGFUL DEATH ACTIONS PUNISH WRONGDOERS AND COMPENSATE THE FAMILY

A. What is a Wrongful Death Action?

Wrongful Death actions are specialized civil lawsuits, brought by the family of the loved-one who died, due to the negligence or wrong doing of a third-party.

The right to file a claim for wrongful death was specifically created under the Georgia Wrongful Death Act, O.C.G.A. § 51-4-1. The law permits Georgia families to “...recover for the full value of the life of the decedent¹ as shown by the evidence.”

In 1932 the Georgia Supreme Court explained the purpose of the law was to:

Strike at the evil of the negligent destruction of human life, by imposing liability upon those who are responsible therefore. It is not beyond the power of the

¹ The person who died is often described as the “decedent.”

Legislature to attempt to preserve human life by making homicide committed by ordinary or simple negligence expensive...[the law] ...may enact a penalty in addition to such loss ... it may impose an extraordinary liability .. **not only upon** those at fault, but upon those who, although not directly culpable, are nevertheless able in the management of their affairs to guard substantially against the evil to be prevented.

Western & C. R. Co. v. Michael, 175 Ga. 1 (1932).

Georgia law does not limit wrongful death actions to any specific set of facts; rather, claims may arise in any situation that involves the sudden and wrongful loss of one's life due to the negligence of a third party. The most common scenarios include: (1) motor vehicle collisions, where a truck/car/motorcycle runs into either another vehicle, or with someone walking, jogging or riding a bicycle; (2) an accident while the loved one was at work; (3) medical malpractice, regardless if it occurs in a hospital, clinic, office or pharmacy; (4) as a result of criminal activity; and (5) during recreational sports including all water activities.

B. Are Wrongful Death Lawsuits Simply About the Money?

While this is a reasonable question, the answer is a resounding no. It's not *just* about the money.

i. Money = Justice.

A money judgment provides some justice, some dignity for the family, even if the justice obtained is limited and flawed.

What I mean by the term "justice is limited and flawed" is that money can never return the loved one and no amount of money

can ever truly compensate for the loss. Rather, obtaining money from the defendant simply makes the world seem a little bit more balanced. It gives the family recognition of the value of the life lost. Nothing is worse than seeing the defendant returning to their “normal life,” while the grieving family’s world is turned upside. As such, the Court’s order that the wrongdoer must pay helps restore balance to the universe—even if it’s just a little.

The Bible talks about justice being an eye for an eye, a tooth for a tooth. In our culture, money is the currency by which we measure ourselves. Therefore, in the modern civil justice system, taking money from the wrongdoer is the punishment that society inflicts.

ii. Money Eases Financial Strains.

While money could **never** make the family whole, it can ease the financial strain.

The most obvious when the person killed was a parent to young children.

If the decedent was working outside the home, then the family has suffered a major economic loss. Assuming the parent earned an average \$30,000 per year, and most likely would have worked for another twenty (20) more years, simple math shows that the family lost income over \$600,000.

If the decedent was a stay-at-home parent, then the family equally suffered a major economic loss. From a pure economic perspective, what does it cost to hire the “very best” caregiver, the “very best” teacher, the “very best” organizer, the “very best” psychologist, and the “very best” chef? I use the term ‘very best’ on purpose. After all, a child’s parent is the person that provides the very best for that child. You can see this if you have ever

taken care of of young children. I recall taking care of my niece and nephew, when they were young and they would always say “that’s not how Dad does it”, or “that’s not how Mom does it”. To my niece and nephew, just as to all children, their parent’s way of doing “it” was the absolute best way.

The same logic applies in all situations. It does not matter if the person was 8 months or 80 years old. The person that died provided the “very best” love for their family and friends. In each situation, the loved-one provided something extremely important – and the world has suffered an important loss due to the negligence of the wrongdoer.

In other words, money helps the survivors heal. It could pay for a caregiver, for family counseling, or a babysitter. It could pay for the family to take time off from work and school or even pay for a scholarship in the name of a loved-one.²

The recovery also helps the family to pay for those unexpected costs that they are forced to incur. This includes burial cost and end-of-life medical expenses. It is a sad truth, but many times, families are forced to use their savings to pay these expenses just at the point in time when it’s needed the most to help the living recover.

iii. A money judgment encourages safer behavior.

The goal, as explained by the Georgia Supreme Court in 1932, is to encourage safety through monetary penalties.

To understand why these statutes encourage safety, pause and consider the facts and circumstances that lead to the loved one’s

² It has been said that there are really two deaths. The first, when the body dies, and the second, when the loved-one’s name has been forgotten. One family that tragically lost a child set up a foundation to help children. In this way, the child’s name lives on.

unexpected death. In each and every situation the death was caused by someone acting carelessly, and many times, recklessly.

This is not to say that the wrongdoer intentionally killed the loved one. Rather, the wrongdoer—at a specific moment in time and space—was acting dangerously, carelessly, and recklessly.

Think about it. A driver kills someone while speeding or while drunk. A doctor misdiagnoses a patient because he fails to read the test that was ordered. A tire store fails to tighten the bolts on all four new tires. In all of these situations, the wrongdoer did not intend to hurt anyone. However, we all know that driving while drunk slows the reaction time, resulting in more collisions. Similarly, we know that all medical tests must be interpreted, and that if a tire is not properly secured, eventually, it can cause a collision.

Thus, a money judgment encourages individuals and companies to act in a safer manner to create safer products, to hire more responsible employees, and to closely supervise them. An individual who goes out drinking with friends will plan, in advance, of a safe way to get home. Employers hire drivers who have a safe driving record, and have strict rules about the use of mobile telephones while driving. Employers also are setting forth goals and objectives for employees so that the employees will not speed. Manufacturers of automobiles and tires are striving to put safety first. With respect to retailers and service stations, they are ensuring that the repairs made are done safely.

Hospitals and doctors are implementing safer policies and procedures. There are well published statistics that show 98,000 patients per year die due to simple medical errors. Many of these mistakes are easy to correct. For example, as a low tech method of avoiding operations on the wrong body-part, doctors are

literally drawing on the patient's body, i.e. "yes, "on this knee to be operated on, and "no" on the other. A high tech example includes the use of barcodes to avoid administering the wrong medication. Even implementation of a simple hand washing program has been found to decrease the spread of infection in hospitals. As such, good hospitals are no longer focusing on money; rather, they are focusing upon protecting patient's safety and dignity.

The only way to hold the person at fault for the death of a loved one is to take what is most precious to them – their money. The wrongdoer can be further affected for a judgment against them that can impact their ability to get a job. This is most strongly observed in the healthcare area, where nurses can lose employment, and sometimes, in the cases of doctors and nurses, they can lose their medical license.

C. What is the Difference between a Wrongful Death Suit and a Charge of Involuntary Manslaughter?

There are two different types of law, criminal law and civil law. The charge of involuntary manslaughter or murder is a criminal action. The claim for wrongful death is a civil action.

Criminal actions enforce public rights and duties. These suits are brought by the police and the district attorney, collectively called the State, against individuals for wrongdoing, e.g. murder, manslaughter, or rape. Criminal defendants, if found guilty, are sent to jail.

Civil actions enforce special rights and duties between the parties. Generally, these suits are between private parties. These include claims such as breach of contract cases and claims for personal injury. Civil defendants, if found liable, must pay money for the damages caused by them.

Perhaps the best example of how the two systems work, and the importance of the civil justice system can be seen in the case of OJ Simpson—back in 1994.³

OJ Simpson was a professional football Hall of Famer. Everyone, even non-football fans knew his name. Even after retiring from football, OJ was famous as a spokesperson, broadcaster and actor.

In 1994, OJ's former wife and Ronald Goldman were found dead near OJ's home. The police accused OJ of murder. While OJ was supposed to have surrendered, he led police (and the media) on a low speed chase in southern California while driving a white SUV.

The case was big news. Every day, thousands watched the State of California prosecute OJ Simpson for murder. One particular compelling piece of the State's evidence against OJ was a bloody glove with DNA from the victims found at the Simpson house. However, the glove was too small for OJ's hand. OJ's criminal defense team developed the powerful rhetoric "if it [the glove] doesn't fit, you must acquit." That was exactly what happened; OJ Simpson was found not guilty.

The families of the victims were outraged.⁴ Then, the families decided to fight back.

The families hired wrongful death attorneys to file suit. Now, the outcome was extremely different. OJ was held responsible

3 More recently the death of Michael Jackson also demonstrates the difference. Like the OJ trial, there was a criminal trial followed by a civil trial. In the criminal case, the State of California charged Dr. Conrad Murray for involuntary manslaughter, for wrongfully administering surgical anesthetic to Michael Jackson for the purposes of putting Michael to sleep each night. A guilty verdict was rendered and Dr. Murray received 4 years of jail time. In the civil case, the family of Michael Jackson sued AEG Live the concert promoter. The family argued the concert promoter actually hired Dr. Murray and told Dr. Murray to give the anesthetic, and thus, concert promoter should be held responsible for the wrongful conduct of Dr. Murray.

4 The country was also outraged and the case sparked discussions of race and prejudice in America.

for the deaths and a \$33.5 million judgment was entered against OJ.

What made the difference? Why OJ Simpson was found not guilty⁵ in the criminal matter, but responsible under the civil justice system? There are a number of reasons.

First, in the civil action, OJ was cross-examined. Cross examination is one of the most powerful weapons to expose the truth. In criminal matters, the Fifth Amendment to the US Constitution protects against self-incrimination. Yet, in private disputes, the civil defendant can be compelled to testify.

Second, there the burden of proof in civil cases is less harsh than criminal cases. In criminal actions, the required proof is “beyond a reasonable doubt”, meaning that a juror must feel extremely convinced of the defendant’s wrongdoing. In civil actions, the burden is less, the required proof is by “preponderance of the evidence,” meaning the standard of proof is merely “more likely than not” that the defendant is responsible.

Finally, the families did not get to select their district attorneys. They were simply assigned by the state. While certain they wanted to win, those attorneys salary was still paid, win, lose or draw.

Yet, in wrongful death actions or personal injury actions, the families select their own attorneys. The civil attorneys put everything they have into an important wrongful death case. When I use the term “everything” that is exactly what I mean. Almost all wrongful death cases are contingency fee cases; this means that, in contrast to the hourly pay that the defense makes

⁵ It is noteworthy to observe that “not guilty” is not the same as innocent. Rather, the jury decision in the criminal matter simply means that the State of California failed to carry its burden to convict Mr. Simpson.

(usually \$200–\$500 per hour) the plaintiff's do not get paid unless there is a recovery. Likewise, the attorney must advance all expert fees and trial expenses, which can easily exceed \$100,000. If the case is complex, an attorney will often associate additional counsel. In other words, for the plaintiff's attorney, everything is riding on the case, just like for the family. Who do you think will fight harder?

D. Some Concluding Thoughts

The sad truth is that most of the time, the wrongdoer will never be criminally prosecuted. The criminal system is simply not set up to address these types of wrongdoing. If there is any prosecution, the punishment is usually small, whereby the defendant ends up serving short or no jail time. Similarly, the criminal system usually does not prosecute companies or organizations.

Wrongful death actions are serious lawsuits. They are expensive in every way; time, money, psychologically, emotionally, and spiritually. It's hard on the family and on the attorneys. For me, your author, it has been my greatest honor to devote my life representing families who have the courage to fight back and demand justice.



CHAPTER 2

WARNING! ***YOUR RIGHTS ARE EXPIRING***

We live in a deadline-driven society.

Rent is due the 1st of each month.

Taxes are due April 15th.

At work or at school the big report is due in 2 weeks.

The same applies to lawsuits. You must file the lawsuit within the deadline or lose your claim. Sometimes, you must provide advance notice of your lawsuit, or lose your claim.

One of the most important deadlines is the time to file the lawsuit. The time period is set forth by law, commonly called the statute of limitations. If the deadline is passed, the right to make a claim is lost. The statute of limitations is one of the strictest and harshest rules. Filing a lawsuit too late is an automatic win for the defendant.

Occasionally, even before filing suit, you must provide notice of the injury. Notice is always required when a defendant is a government entity, i.e., a city, county, state, national government, or an employee of a government entity. The requirement to provide notice falls under the so-called ante litem laws. Before you think that the ante litem notice does not apply to your case – beware– because unfortunately, there are more people covered by this protection than you may initially believe.

Many times, clients have said to me that surely the defendant knew that they acted wrongly. Why don't they simply make it right? Unfortunately, that is not the way it works. If the defendant wanted to make it right, they would have reached out to you instead of wanting to escape responsibility. Many times the defendants have insurance companies that will pay to defend any claim. The easiest way to deny paying a claim is on the grounds that it was filed too late. When I worked at one of the largest insurance defense firms, we always counted these late claims as wins for our clients.

A. The General Rule = the Georgia Statute of Limitations is Two Years

As a general rule to bring a claim for injury in Georgia, one must file the lawsuit and obtain service over the defendant (i.e., properly notify the person) before two (2) years from the date of injury or the act of the defendant which caused the death of the loved one. O.C.G.A. § 9-3-31.

This general rule is applied to many situations, including if the victim was killed in a motor vehicle collision, by medical malpractice or due to a defective product or machine. With reference to a car crash, the claim must be filed by the two-year anniversary of the collision; and in medical malpractice, two (2) years from the malpractice.

However, claims against the employer must be brought in just one year. At the same time, if the death occurred at work, and was due to the negligence of a third party, then those claims can be brought within the two-year rule.

This is the problem with the “general rule”. Sometimes the general rule applies, and sometimes the exception applies. Occasionally there are exclusions and exceptions to the exception. This is what makes the law complex, and why retaining lawyers in complex situations, such as wrongful death lawsuits is a good idea.

B. Why Ignoring the General Rule will Preserve Your Rights.

I know that it is odd to give you the general rule, and then tell you to ignore it. However, there is a variety of reasons that one needs to hire an attorney now, rather than at the time of the statute of limitations. Of course, these are fact dependent situations, but for example.⁶

If this is a medical malpractice case, the plaintiff must include a doctor’s affidavit specifying that one or more of the defendants committed malpractice. To obtain such an affidavit, requires that all the medical records are ordered. To get the medical records and to obtain an affidavit can take a significant amount of time. Merely getting the medical records can take 90 days. Selecting and vetting the right expert also takes an extremely long time.

Defendant Has Moved. The law requires that one not only file the lawsuit on time, but also a plaintiff is required to have the lawsuit hand delivered to the defendant – in legal term “service of process”. I have always been amazed how many people move in less than 2 years, regardless if the defendant is a doctor or new to the workforce. Finding the new address of the Defendant

⁶ Some related issues are also covered in Chapter 14 below.

is a challenge, and often requires retaining the services of a private investigator. If one files just at the time of the statute of limitations, it is possible that one cannot obtain service.

The remaining section of this chapter discusses other situations in which the statute of limitations is less than 24 months. The way to avoid these issues, and the possible loss of your claim, is to retain an attorney now.

C. If a Loved One is Killed on the Job, There is One Year for Claims under the Workers' Compensation System

If a loved one was killed on the job, it is possible that the family has two separate claims.

The family may bring a claim against the employer under the workers compensation system. This claim is valid, regardless of how the death occurred. In other words, if the loved one was injured due to an accident, or due to the negligence of a fellow employee, one still has a claim under the workers compensation system. This is because the workers compensation system is really an insurance benefit (See Chapter 9 for further explanation). To bring a claim under workers compensation, that claim must be made within one (1) year of the event of the death, or the claim is lost.

Sometimes, there is also a second claim in addition to the workers compensation claim. Sometimes, the family can also pursue a claim under the Wrongful Death Statute. In such a situation, the family can bring suit against third parties within two (2) years of the date of the death. This is so even if no claim was made against the employer.

D. Claims Against the Government Require Advance Notice – The Problem Is, How Do You Know?

Bringing suits against any government agency is more difficult than suits against a corporation. One problem is providing notice of the claim to the correct government entity. Unfortunately, it is sometimes unclear that such notice is even required.

i. The Notice Requirement.

As a general rule, there is no legal requirement that you notify a defendant of your intent to file suit; one simply files the lawsuit.

Yet, if the defendant is a city, county, state or federal government, then the plaintiff is required to provide notice of the claim prior to filing suit. Just as with the statute of limitations, this is a strict rule and a plaintiff will lose the entire case if this procedural requirement is not followed.

Different notice requirements apply depending on whether the government or government agency is at the federal or state level, i.e., the United States of America, the State of Georgia, a county in Georgia, or a city in Georgia. Yet, regardless of the government entity, the injured party must provide notice to the specific governmental agency of the claim before filing suit.

ii. Why Notice?

The reason for these technical barriers turns on the very special protections of state actors, under the concept of sovereign immunity. The sovereign, originally meaning and referring to the king, could never be held responsible for any wrongdoing. This concept of sovereign immunity remains and is important in the administration of law. At the same time, the state, along with the federal government, has waived some of its rights to immunity in certain situations. O.C.G.A. § 50-21-23(a)

provides: the state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state's sovereign immunity is waived subject to all exceptions and limitations set forth in this article. The state shall have no liability for losses resulting from conduct on the part of state officers or employees that were not within the scope of their official duties or employment.

The same explanation is provided under the Federal Tort Claims Act (FTCA). Under this act, the federal government can be held responsible for the harm "caused by the negligent, wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

iii. What Type of Notice is Required?

Usually, notice requires completing a specific form, identifying the parties, the plaintiff's injuries, and explaining why the government entity is responsible. The purpose of the provision is to "provide enough information to enable the city or the county to conduct an investigation into the alleged injuries and determine if the claim should be settled without litigation." *City of Columbus v. Barngrover*, 250 Ga.App. 589 (2001). The challenge is not what is in the notice, but rather, when and to whom the notice is provided. Of course, any lawsuit can be resolved at any point during litigation, so the true purpose of the notice is to provide a barrier to reduce the number of claims.

One of the biggest concerns is the difficulty in identifying if a defendant is a governmental actor. A good example of this is a doctor providing care at a private hospital. Sometimes, that doctor is actually an employee of a federally funded healthcare clinic. If that is the situation, one must provide advance notice of the claim to the appropriate agency, in this situation, the U.S. Department of Health and Human Services, prior to filing suit.

iv. When is Notice Due?

Three separate statutes cover Georgia governmental entities, depending on whether the actor is the city, the county, or the state of Georgia. A similar notice requirement is due when filing suit against the federal government.

Claims against Georgian cities require notice within six months of the event. O.C.G.A. § 36-33-5.

Claims against Georgia counties require notice within twelve months of the event. O.C.G.A. §36-11-1.

Similarly, claims against the State of Georgia must also be provided within twelve months after the event. However, there are some important distinctions between the requirements of notice to the county and to the state. In short, the notice requirements to the state are more restrictive, because the statute is more precise with how such notice is provided.

Claims against a federal employee, under the Federal Tort Claims Act, also require notice within two years of the loss. This creates some interesting questions in situations when the statute of limitations is two (2) years, and of course, the best approach is simply to provide notice at least six (6) months prior to such a suit.

So, let's apply this to an example. John is severely injured by a garbage truck operated by the City of Macon on May 1, 2014. One might reasonably find that since the statute of limitations in a motor vehicle wreck is two years, John could file suit on May 1, 2016, two years thereafter. Yet, because the defendant is a city employee, the plaintiff would need to provide notice to the City of Macon by November 1, 2014—within just six months after the injury.

Sometimes, you do not know that one of the defendants is a government entity. For example, one of our clients was injured at a private hospital. Unbeknown to everyone, the defendant doctor was an employee at a federally funded clinic. (Why a federal employee is working at a private hospital is still unclear). We were fortunate twice. First, that the client retained our office very shortly after the injury. Second, we provided notice of the claim, and in the response, we learned that the doctor was considered a federal employee. We thus were able to satisfy the ante litem notice, which in federal court requires a completion of federal Form 95, and after waiting the required 6 months, and then proceeded with filing suit.

E. Exceptions and Extensions to the Statute of Limitations: Tolling and the Statute of Repose.

The statute of limitations can be extended. Yet, even if the statute is extended, the right to file suit is eventually foreclosed by the statute of repose.

For example, the right to file a wrongful death action extends beyond the two-year time period of the bad act. Under the so-called statute of repose, a claim can be brought beyond the statute of limitations, provided: the death occurred within five (5) years of the bad act of the defendant, the plaintiff filed the

suit one (1) year after the death, and all the other requirements are satisfied.

For example, if there is a car collision that occurred in January 2015, and the death does not occur until February 2017, under the statute of limitations, the claim would normally be closed. But, under the statute of repose, so long as the lawsuit was filed by February 2018, the claim will be preserved. This extension in the time period to file suit does not last forever, and once the fifth anniversary of the wrongful act of the defendant passes, the right is lost.

The statute of limitation is also extended or ‘tolled’ if the matter arises from a crime. For example, if a person is killed in a motor vehicle collision, the defendant is often charged with the crime of involuntary manslaughter. This serves to extend the statute. In Georgia, the tolling can be up to six (6) years. O.C.G.A. § 9-3-99. The tolling can be for any criminal action, even if the crime is merely a traffic citation.

Please note that if the statute of limitations is extended, the ante litem notice may still need to be sent timely.

Please also note that there are other extensions of the statute of limitations not discussed here, given that this book focuses on wrongful death actions. For example, if a child is injured at birth due to medical malpractice, the statute of limitations does not begin until she has reached age 5, however, the parents’ claims are lost once the child reaches age 2.

Lawsuits must be filed timely. As shown above, this is a tricky issue. One must be aware of the exceptions and limitations to make sure the claim is preserved. Timely and prompt action allows the family to bring their claims in a court of law.



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 example⁷, 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?

⁷ 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 employer⁸ 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 failed⁹. 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

8 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.

9 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”¹⁰ that specify a bar can be held responsible

¹⁰ 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.



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

fiduciary duty to the children, and must ensure that funds are distributed according to law.

Recovery in such a situation is generally divided equally between the surviving spouse and the children. For example, if there were one surviving child and the surviving spouse, each would get one-half. However, if there were six children and the surviving spouse, then the surviving spouse receives no less than one-third of all recovery, with the remaining two-thirds to be distributed equally among the children.

Occasionally, there is a dispute about the identity of the children and the probate court can investigate those issues. Sometimes, the probate court will require a detailed investigation regarding who the heirs are. The investigation includes the obligation to pay for a legal advertisement in the local newspapers in an attempt to protect and notify all potential heirs.

Similar complications occur when there is no longer a surviving spouse, but multiple adult children. In that situation, there is often a “race to the courthouse” in which the adult children compete in being appointed as a temporary administrator of the estate, which also includes filing and obtaining service over the wrongdoers. In such a situation, the defendant may join the actions so that they only have to deal with one single action.

Unlike the statute of limitations, parties to the lawsuit can be changed and substituted, and the lawsuit does not automatically fail. At the same time, the case proceeds with fewer difficulties by being brought by the correct parties.



CHAPTER 5

DAMAGES—WHAT CAN BE RECOVERED?

We are fortunate to live in America; for in America, all life is valued. The sad truth is that in other countries, life is not valued. The Georgia wrongful death statutes recognize the importance of an American life.

When lawyers use the word damages, it is a broad description of the loss, both from an economic and non-economic perspective. At trial, the plaintiff must help the jury understand and appreciate the “how empty the world is” without the loved one. Ultimately, the jury must wrestle with the difficult question on how to reduce the loss to the legal remedy, a money judgment.¹¹

There are two basic categories of damage claims. The first claim is the full value of life of the loved one. This recovery belongs to the heirs or survivors. The second is for the pain and suffering experienced by the loved one just immediately prior to death,

¹¹ As discussed in chapter 1, the amount of the money judgment is an imperfect measure of justice. At the same time, a money judgment helps to make the world slightly more just. It is important to compensate the family and is critical to the overall civil justice system as well as to help the community promote safety for its citizens.

as well recovering medical expenses incurred by the defendant's negligence. This claim belongs to the estate.

A. Claims Belonging to the Survivors—the Full Value of Life

The Georgia Code statute, O.C.G.A. § 51-4-1 et seq., specifies that the measure of damages in a wrongful death lawsuit is “the full value of the life of the decedent as shown by the evidence.” Even as a practicing lawyer, I struggle with understanding this meaning. Fortunately, case law explains that there are two basic parts to a life, the economic value of the life, and the intangible or the enjoyment of life.

i. Economic Damages: Trying to Determine Lifetime Earnings

The economic damage when one is wrongfully killed can be significant. If a person earns or would have earned \$30,000 per year and works for thirty years, that person's life-time earnings would be \$900,000. If the person died 15 years prior to retirement, the family—just on the economic basis—lost \$450,000.

In bringing a claim for wrongful death, the plaintiff must introduce evidence to prove the economic loss. Most of the time, this requires the plaintiff to retain an economist to calculate the lost wages reduced to present value¹², as required by Georgia law.

If the decedent was self-employed, a consultant, a sales person, or had other variable income, it is often more difficult to determine the lifetime earnings. To accomplish the calculation, often an accounting must be conducted to determine the true economic

¹² Present value of money is the determination of the current worth of a future sum of money or stream of cash flow. In large part, present value discounts future streams of money, to take into account inflation and volatility. All adults experience the phenomenon of recalling what it costs to buy a Coke or see a movie when they were kids, compared to today. One of the reasons the price is higher is due to inflation. Since a jury award cannot be given as a stream of income (i.e., \$40,000 every year for ten years), rather, the entire sum must be paid at one time, fairness dictates that the payment is adjusted to reflect inflation.

benefit that a decedent enjoyed from their work. Once monthly figures are determined, then, an economist must extrapolate the economic loss.

If a person was not employed, either because they were a homemaker or retired, this does not mean their life had no economic value. A good attorney can show the economic value of a stay-at-home parent, who often combines the roles of the very best advocate, teacher, mentor, counselor, therapist, chef, buyer, and nanny. I use the term 'very best' because, for children, the very best care comes from their parents.

The economic evaluation is not only important to demonstrate the amount of the money loss, but also serves as a benchmark for the jury in evaluating the loss of the decedent's life, and in determining the decedent's enjoyment of that life. For some jurors, the economic damage is used as a figure upon which to calculate the loss of life, multiplying the economic damage by ten. For example, if the earnings lost were \$100,000, then the entire loss would be valued at 10 times more; or \$1,000,000. Also, the economic damage is helpful to those jurors who dislike the civil justice system, and who dislike the idea of awarding money for emotional pain. Yet, even the most conservative juror can understand how a family is economically damaged when a loved one is lost; thus, this calculation is critical.

ii. Loss of Enjoyment of Life.

Of course, our lives are worth more than mere economic output or wages. All life has special value and all life has dignity.

There is special joy of living and progressing through stages of life: of being a child, of being an adult, of being a husband or wife, of being a parent or grandparent. At trial, the plaintiff must show this enjoyment.

The family must assist their attorney by helping to develop the loved one as a person. This often requires the family to recover a lifetime of photographs, movies, letters, articles, awards, and the like. Interviews¹³ and testimony from friends and family are also important to show the jury who the decedent was, and to bring the loved one back to life, so that the jury can truly understand the family's loss.

B. Claims for the Estate—"Pain and Suffering and Bills"

An estate is a legal entity, similar to a company that collects the assets and liabilities of the decedent. The estate is similar to a bankruptcy estate and can even be thought of as a company. The estate is managed either by an executor or an administrator. An executor is identified in the will. If there is no will, then the probate court will appoint an administrator.¹⁴

i. Pain and Suffering Just Immediately Prior to Death

The estate recovers the loved one's claim for pain and suffering, between the event of wrongdoing and the decedent's death. This occasionally occurs in motor vehicle collision cases, where one will live for days, weeks, or even months, only to succumb to the long-term injuries. Lingered deaths also often occur due to malpractice. Regardless of the specific facts, the estate always has a claim, even if the loved one only survived for a few minutes prior to death.

ii. Medical and Funeral Bills

Medical bills, other expenses that occurred as a result of the injuries, and final arrangement expenses, such as funeral costs,

¹³ I like to spend time in the family home for a day or two, to learn firsthand about the family, the family routine, and how the loss has impacted family and friends.

¹⁴ If there is no will, the plaintiff will need to have the probate court appoint the administrator before the wrongful death lawsuit can proceed to trial.

are also recoverable. Sometimes, recovery for these expenses will go to the estate; however, there are collections in Georgia law that allow for the proceeds to go to the person who paid the expenses.

iii. Special Problems When There is a Settlement: The Estate's Responsibility to Pay for Healthcare

While the estate can recover money, as discussed above, the estate has the additional burden of paying off the outstanding medical bills and/or other debts owed by the decedent.

If the case goes to trial, the jury assigns money to the family and to the estate.

However, if there is a settlement, how the money is allocated between the family and the estate can be a difficult question.

For example, let's assume the medical bills are large, say \$500,000, and all of the money that one can recover is \$1 million. If all of the money is paid to the estate, then none of the family members can recover. Until 2013, lawyers representing the family and the estate allocated almost all the funds to the loved ones and almost nothing to the estate claim. This makes sense. The healthcare insurance company can only recover the amount of money from the estate. However, under a recent U.S. Supreme Court case, it was determined that the health insurance company had a very strong claim on the funds—and in fact—can seek to claw back the funds allocated to the family! Now, under a settlement, the allocation of the funds between the family and the estate has to be weighed carefully.

C. Punitive Damages

Punitive damages are additional damages charged against the defendant as a penalty for outrageously bad actions. The plaintiff must show the defendant was acting willfully or with wanton disregard for the safety of others.

For the claims that belong to the survivors, that is, the claims that permit compensation for the full value of the life, punitive damages are not permitted. It has been explained in case law that the Georgia wrongful death statute itself is punitive, and it is improper for punitive damages to be granted twice. As justification, the court specified that the economic loss calculation is based upon the total gross income without deductions for taxes or expenses.

However, the estate may bring claims for punitive damages. If the plaintiff was able to make the proper showing, as was done in a successful case against GM, punitive damages may be sought. See generally, *GM v. Moseley*, 213 Ga. App. 875 (1994).

Damages must be proven at trial, just like all elements of the case. While it may seem instinctual that the damages are significant in wrongful death cases, a plaintiff must present evidence of the damages at trial. Significant time must be spent at trial showing to the jury the loss that the world suffered due to the defendant's negligence.



CHAPTER 6

WHO TO SUE AND WHY

The amount of money recovered often depends more on certain facts about the defendant (the one who injured the loved one) than the loved one who was killed. In short, the wealthier the defendant, the more money a plaintiff can recover.

To understand why, we must first discuss the difference between a judgment and recovery. A judgment is the finding of a court that a defendant must pay the plaintiff a specific amount, say \$1 million. Yet, if the defendant does not or cannot pay it, what happens? The answer, unfortunately, is nothing. A plaintiff can only collect as much money from the defendant as the defendant has available. No longer can one be arrested and placed into a debtors' prison for the failure to pay. As such, obtaining a judgment of \$200,000 or \$2 million is essentially meaningless unless the defendant can ultimately pay the judgment.

Fair and full compensation demands that all parties that are responsible, be held responsible in a Court of Law. Below, we review the five general categories of defendants who could be held responsible.

A. The Bad or Careless Actor

This is the party that is the most obvious, i.e., the party driving the vehicle that crossed the double yellow line, the doctor who misdiagnosed the patient, the robber who shot the decedent. This person is almost always sued.

B. Employer or Supervisor

The defendant's employer, if there is one, can be sued under two different legal theories.

First, an employer is held responsible for the wrongful acts of their employees. This is called *Respondeat Superior*, Latin for "let the boss be responsible." The employer does not need to do anything wrong or negligent.

In one case, a plaintiff was severely injured and he required expensive around-the-clock care. There, the defendant driver appeared to have just \$25,000 in liability. However, it was uncovered that the driver was on the job for a large employer at the time of the collision and the injured was able to recover a huge amount of money directly from the employer.

Second, the employer can also be held responsible for its own negligence. For example, an employer has a responsibility to select, train, and supervise its employees. If the employer was hiring a driver, and the driver had 10 prior accidents, it could be argued that such a person was not qualified to be a driver. Likewise, the employer is responsible to make sure the company vehicles are in good working condition. If the vehicle is not well repaired, the company can be held responsible.

Of course, this issue is not limited to vehicle collisions, but is applied regularly to medical malpractice claims, whereby an

employer, such as a doctor's office or hospital, is held responsible for the actions of its employees, such as the nurses and doctors. Likewise, this can be applied to situations of not only private companies, but to county, state and federal employees.

C. Owner of the Property

Property owners have certain obligations to protect the public from known dangers.

The owner of a motor vehicle is often held responsible for injuries caused by his/her car. The owner may not permit their vehicle to be driven by someone who is known to be dangerous. Similarly, if the third-party driver is driving the car for the purposes of the family, then the owner can be held responsible under the so-called family purpose doctrine. Generally, this is applied when a teenager causes a wreck. To prove a claim under the family purpose doctrine, one must prove that the defendant driver was driving a vehicle that is controlled or owned by the parent, and that the defendant driver was driving to run family-related errands, say, to pick up a younger sibling.

In one very tragic and unique situation, a boating accident resulted in the death of a swimmer. There, claims were successfully made against both the company that rented the boat, and the homeowner's policy of the defendant.

The owner or occupier (i.e., renter) of a store or restaurant is responsible for keeping the walkways free of tripping hazards and from other hazards such as falling merchandise. Furthermore, the owner or occupier of real property has a duty to keep customers and patrons safe from known risks of assault or other criminal activities. At the same time, stores and restaurants cannot guarantee that no one will be injured, but they can protect against known or foreseeable risks.

D. Manufacturer or Repairer

These are generally claims against large corporations, such as car manufacturers, tire makers, drug makers, and tobacco companies. Claims may also be brought against automobile repair shops.

The general claim is that the manufacturer knew or should have known that their product was dangerous to the public. For example, in the Ford Pinto lawsuit in the 1970s, the gas tank of the automobile was placed virtually behind the bumper of the vehicle. As of the time of the writing of this book, GM has recently identified 1.2 million cars with faulty ignition switches that turned off the car while it was in operation. Reportedly 12 deaths have occurred due to the malfunction. Toyota, which also has its own recall problems, has agreed to pay \$1.2 billion to settle a criminal investigation to the Justice Department as Toyota covered up problems with automatic acceleration on several Toyota models.

With regards to medical products and drugs, there have been numerous cases in which the manufacturer knew that the product or drug was dangerous, only the manufacturer elected to ignore the warning signs.

Finally, the negligence of a repairer could be as simple as a tire store failing to make sure that the bolts were tightened on all the tires repaired.

E. Other Third Parties

Sometimes, there are other third parties that can be included.

For example, in one case, claims were brought against a security monitoring company that failed to warn a victim adequately that a rapist had broken into the young woman's home. Similarly,

when a bar or restaurant continues to provide alcohol to a patron even though he or she is apparently drunk, and is likely to drive home, that business can be held responsible under the Dram Shop Acts. O.C.G.A. § 51-1-40. The duty is to the victim of the drunk driver, not to the drunk driver.

The law requires that all parties that contributed to the injury are held responsible. A careful investigation is required in these tragic situations to make sure that all wrongdoers are held accountable.



CHAPTER 7

WATCH OUT FOR THE BLAME GAME

Defendants rarely take responsibility for their wrongful conduct.

One of the most common tactics to escape responsibility is to blame other parties. These parties can be anyone. They almost always blame the victim or the decedent. Even worse, the defense will blame the family members who brought the lawsuit. Many times the defendant will blame someone who is not a party to the lawsuit. It is for these reasons that it takes tremendous courage on behalf of the family that stands up and fights back.¹⁵

A. Assigning All Parties Blame and Responsibility

Rather than accepting responsibility, the defense will often blame everyone else, including the victims and the plaintiffs.

Georgia law recognizes that there may be more than one person who contributed to, or is responsible for someone's death. At trial, the jury is allowed to consider all parties, including a person or party who is not even named in the lawsuit. The jury then

¹⁵ It is for this reason that this book is titled "Fighting Back."

determines what person is responsible for what percentage of fault. This is called apportionment under Georgia law. O.C.G.A. § 51-12-33.

A plaintiff may recover, so long as the defendant is 51% responsible. In other words, even if the plaintiff is partially responsible, so long as the plaintiff is less than 49% to blame, the plaintiff can still recover.

So, how does this work? Let's assume there was a car crash on the highway. Danny, who is driving a van, hits Peter, as Danny changes lanes. Peter then sues Danny. At trial, Danny claims that he changed lanes because Theresa was coming into his lane. Danny also claims that Peter was driving too fast.

As such, the jury must decide who is responsible. The jury form would look like the following:

JURY VERDICT FORM

1. We, the jury, find the total of Peter's damages to be:
_____ (U.S. dollars)

2. We, the jury, find the negligence of Plaintiff Peter, Defendant Danny, and Non-party Theresa was the proximate cause of the Plaintiff's injury. We hereby apportion the negligence as follows: (The total must equal 100%)

Defendant Danny _____ (of fault)

Non-party Theresa _____ (of fault)

Plaintiff Peter _____ (of fault)

Now, let's say the jury completes the form as follows:

JURY VERDICT FORM

1. We, the jury, find the total of Peter's damages to be: \$1 million dollars (U.S. dollars)

2. We, the jury, find the negligence of Plaintiff Peter, Defendant Danny, and Non-party Theresa was the proximate cause of the Plaintiff's injury. We hereby apportion the negligence as follows: (The total must equal 100%)

Defendant Danny 70 percent (of fault)

Non-party Theresa 20 percent (of fault)

Plaintiff Peter 10 percent (of fault)

So, how much in this scenario does the plaintiff recover? The answer is \$700,000. This is because the jury found Peter was responsible for 10%, or \$100,000, and Theresa for 20% or \$200,000. Thus, the amount of the recovery by the victim's family is \$700,000.

B. The Empty Chair

The defense's favorite option is to blame a party that is not present at trial. Why does the defense like this so much? This is because the third party is neither represented nor defended. This makes the jury's job easy, particularly if the defendant appears to be nice. This allows the jury to blame someone for the wrongdoing—but someone whom they do not like or know.

Sometimes, jury members believe that their judgment can actually result in a recovery for the plaintiff. Yet, that is simply not the case. As shown above, the decision against a third party only serves to reduce the judgment against the named defendants.

There are some protections for a Georgia plaintiff, but those protections are quite limited. The defendant must provide notice

of the intent to blame a third party and the defendant has an obligation to prove their case against a third party.

C. Blaming the Victim and the Family

The defense's second favorite approach is to blame the victim. This is a particularly powerful defense, since survivors will always feel some type of guilt associated with the loss.

The worst scenario is when a loved one dies and another lives, such as in a motor vehicle collision. The survivor will always feel some type of guilt, and the defendant will seek to amplify and exploit these feelings. This is, in fact, called survivor's guilt. After all, there are always things that one could have done differently. If it was a car wreck, either one could have left the house five minutes earlier or five minutes later. One could have swerved right rather than left, applied more brake or gas. Rather than taking responsibility, the defendant will focus upon the family.

In the context of a medical malpractice case, the defense may try to use a patient's unhealthy habits to show that the decedent's actions brought about their own death, e.g., if the decedent was a smoker or had he lost the weight as the doctor advised him to, he would not have gotten a heart attack.

In all cases, there are bad facts. One of the expected "bad facts" is the defendant's attempt to either "blame the victim" or "blame the empty chair." Either way, skilled counsel will respond appropriately, and will re-shift blame back where it belongs, at the feet of the wrongdoer. Many times, this is handled by accepting some of the responsibility.

Probably the most important fact is that the family members will know the defense's tricks, and will be prepared.



CHAPTER 8

SPECIAL ISSUES FOR WRONGFUL DEATH CLAIMS DUE TO CAR AND TRUCK COLLISIONS

The vast majority of injuries arise from collisions on the roads and highways. According to the U.S. Department of Transportation and the National Highway Traffic Safety Administration, approximately 33,000 people die each year due to traffic-related accidents.

The most obvious source of recovery is from the defendant himself/herself. The problem is that many people have very limited savings. For many working people, the most insurance that they can afford is the state minimum insurance of just \$25,000. While, on one hand, \$25,000 is a great deal of money, it's a certainty that \$25,000 is not going to compensate a family that has lost a father, mother, husband, sister, brother, daughter or son.

So, is a Georgia family limited to recovering just \$25,000 if a loved one dies in a car crash?

Sadly, sometimes the answer is yes. (However, see the sections in this book about recovery from the Georgia Crime Victims Compensation Program and Social Security.)

Sometimes other sources of recovery may be made available.

A. The Driver's Employer or Owner of the Vehicle

One of the best sources of recovery is the defendant driver's employer if the driver was acting in the scope of their employment at the time of the accident. The employer is held responsible under the doctrine of *Respondeat Superior* – roughly translated from Latin, “let the boss answer” [for the acts of the servant]. As discussed above, the possibility to hold a defendant's employer responsible may turn a \$25,000 possible compensation into a multi-million-dollar recovery. The challenge is that the employer-employee relationship is not always easy to prove. On many occasions, a company will argue that the defendant was not an employee, but an independent contractor, and that the company is not responsible. This often happens in cases with cabs, commercial trucks, etc.

B. Problems and Defect with the Vehicle and Road Designs

Sometimes, the cause of the crash is not the driver, but problems with either the plaintiff's or the defendant's vehicle. For example, the braking system may have failed, or there may have been problems with the tires. Plaintiffs in product liability actions can allege three theories of liability; (1) liability for defective design, (2) liability for a manufacturing defect, or (3) liability for failure to warn. Product liability lawsuits, like medical malpractice lawsuits, are extremely complex, for they rely significantly on expert witnesses to testify to certain scientific principles and facts. Also, like medical malpractice actions, the manufacturers

do not want to admit liability, and will often litigate the matter all the way up to the U.S. Supreme Court.

Sometimes, an accident is caused by a defect of the roadway. If the problem is due to poor design, an action can be brought against the Georgia Department of Transportation (DOT). If the problem is due to poor maintenance, as in the case of a bridge falling, claims can be brought against a city or a county. Either way, a governmental agency can be held responsible and the special notice requirements must be provided. (See the section on ante litem notices in Chapter 2).

C. Drunk Drivers

In the event that the defendant was drunk, there is always the possibility of holding the supplier of the alcohol responsible. Under Georgia's Dram Shop Act, O.C.G.A. § 51-1-40, the dram shop laws hold that someone selling alcohol, regardless of whether it's a bar, restaurant, or convenience store, can be held responsible if they were selling alcohol to persons underage, to a noticeably intoxicated adult, or an adult who will be driving. Importantly, the claim is only for innocent third parties. If a drunk driver or the purchaser of the alcohol is injured, they cannot make a claim against the bar.

Uninsured motorist or underinsured motorist coverage (known as "UM Coverage") is one of the best sources of recovery.¹⁶ UM coverage is part of the decedent's automobile insurance coverage. It is designed for a situation in which a traffic incident occurs and there is not enough coverage by the defendant driver to pay for the damages. The UM coverage is generally broadly written and it includes all family members of the household.

¹⁶ We always encourage folks to purchase as much uninsured and underinsured motorist coverage as possible.

Wrongful death cases that arise from traffic-related deaths are complex because of the issue of recovery from multiple parties. The issues discussed in Chapter 3, regarding the questions of the breach of duty and causation, can become complex. Many times, a lawsuit will need to be filed to determine the relationship between the defendant driver and other individuals and companies that should be held responsible.



CHAPTER 9

SPECIAL PROBLEMS OF WRONGFUL DEATH CLAIMS AT WORK

If a loved one is killed at work, the family may have two different, but related, actions. The first is against the employer under the workers compensation program. The second is a potential claim against a third party under a statutory wrongful death action.

A. Claims Against the Employer

Claims against the employer, and under the workers compensation system, are significantly different than the other claims described in this book. This is because the workers compensation system is really the administration of insurance benefits. In the event of a death, the recovery is limited to lost wages, medical expenses, and funeral expenses up to \$7,500.

Under the workers compensation system, the claimant does not need to prove the liability of the employer or the liability of a fellow employee. Likewise, it does not matter if the employer was just a little bit negligent or grossly negligent. The litigation issues

in workers compensation cases focus on the issue of eligibility, and the amount of lost wages that can be recovered.

An injured worker's family must first show that the loved one was eligible under workers compensation. Was his or her employer large enough to make a claim under workers compensation? Second, the family must show that the injury occurred at work, and not merely on the way to or leaving work. The death must be due to a work condition, and not due to some natural process. Finally, claims must be filed within one year of the event that caused the death or the claim is lost.

The amount of money that a family can recover for the loss of wages depends on how many years remaining the decedent would have or could have worked, his/her yearly earnings, the decedent's married status, and the number of minor children in the household. As a general rule, in Georgia, the surviving spouse can receive a benefit of up to \$125,000 if there are no other dependents, i.e., children or others. If the deceased employee has children under the age of eighteen, the children are able to receive weekly benefits until age twenty-two if enrolled in college or other secondary education.

If there is a dispute regarding the claim, the injured family files a petition with an administrative law judge, at the State Board of Workers' Compensation. There are no jurors; rather, the administrative law judge makes findings of both fact and law.

B. Claims against Third Parties

If another party beyond the employer is responsible, the family may pursue a wrongful death claim as described earlier in this book. This means that the family has the right to a trial by jury, to recover all damages, including non-economic damages such

as the simple enjoyment of life, and there are no caps on the amount of the recovery.

Third-party claims can range from claims against a third party for driving unsafely, or against a doctor for malpractice, to a manufacturer for an unreasonably dangerous piece of equipment. If the third party's wrongful acts caused or contributed to the wrongful death, then that party can be held responsible.

Unfortunately, there are two important limitations. First, the third party must be a truly different party than the employer. Stated differently, the decedent and the wrongful actor cannot be employed by the same employer. Second, the employer has a claim of subrogation against any recovery from a third party. In other words, if there is a recovery against a third party, money previously paid by the workers compensation system must be repaid. At the same time, a good lawyer can have this claim for compensation released.

Claims against third parties must be filed within the statute of limitations, which is generally two years. Yet, interestingly enough, to bring a third-party claim, one is not required to file a workers compensation claim. Therefore, even if the family of the decedent does not make a claim against the employer, there is still a possibility that the family has a claim against another third party.



CHAPTER 10

SPECIAL PROBLEMS IN WRONGFUL DEATH CLAIMS DUE TO MEDICAL MALPRACTICE

In the event the death is caused by medical malpractice, there are a number of special considerations that need to be addressed.

First, there are important procedural requirements in Georgia in order to file suit for medical malpractice. One of the most challenging is the requirement under O.C.G.A. Section 9-11-9.1 that calls for the affidavit of a health care professional. The affidavit must specify at least one act of the medical defendant that falls below the standard of care and secondly, show that the failure to comply with the standard of care caused the death of the loved one. The affidavit must be made by a health care provider within the same field. For example, in the case of medical malpractice against a cardiologist, a cardiologist must make the affidavit. A medical doctor may make an affidavit against a nurse; however, a nurse may **not** make a medical malpractice affidavit against a doctor.

The requirement of a medical malpractice affidavit slows down the litigation process and vastly increases the cost of litigation. This is because the affidavit is based upon the medical records of the decedent. Often, it takes ninety days simply to obtain all the medical records (notwithstanding that Georgia law requires medical records be provided within thirty days). Then, it can take another sixty to ninety days to find a medical provider who will review the medical records and prepare an affidavit. Of course, the doctor doing the affidavit wishes to be paid premium hourly rates as well as a significant retainer.

The requirement for the affidavit is a strict one. If there is no affidavit, the case is dismissed automatically. This is the reason most good attorneys will not take a case without at least ninety-plus (90+) days before the statute of limitations.

Second, doctors and hospitals do not want to accept responsibility because such an admission can impact both the doctor and the hospital. Bad publicity inhibits the ability of both parties to earn money in the future. A doctor with multiple malpractice settlements could lose hospital privileges. The hospital administrators might lose their jobs and be replaced. As such, the health care providers vigorously defend cases.

The defendants will seek to take advantage of the jury's inexperience in the field of medicine. In medical malpractice cases, the plaintiff has the burden to show the doctor fell below the "standard of care." The *standard of care* refers to what is expected of a knowledgeable medical provider under similar circumstances. Unfortunately, the *standard of care* is not uniformly agreed upon,¹⁷ rather identification of the standard of care is required to be explained by experts. Given that each side has

¹⁷ With the advent of the Internet and incredibly smart computers, there may be a day when the standard of care is well defined.

an expert; it can be difficult for the jury to determine if there was a breach of the *standard of care*. This complexity helps the defendant-doctor to hide behind medical terms that the jury cannot understand or follow.

Likewise, the doctor will attack the issue of causation. The medical provider will argue that even if they fell slightly below the standard of care, the patient would not have made it anyway. Many times the defendants will argue, either explicitly or implicitly, that even if they committed an error, the error did not harm a patient who was so seriously ill or injured.

Third, further complicating medical malpractice is the evolving nature of health care. At one point in time, it was only doctors or nurses who could commit malpractice. However, as health care costs have increased, so-called mid-level providers now play an important role in the health care system. These are generally known as physician assistants (PA); nurse practitioners (NP or APRN), nurses (RN or LPN), physical therapists (PT), and respiratory therapists (RT). It is confusing who is the person(s) providing care; is it just the mid-level provider who is responsible or is the doctor supervising the mid-level provider also responsible?

Fourth, under the Tort Reform Act of 2005, the Georgia legislature sought to reduce lawsuit liability. The new law now creates two different legal standards for medical malpractice actions. These two standards make it more difficult for the plaintiff to win the lawsuit, and differ depending on whether the patient was in a true emergency (meaning the patient was truly facing a life-or-death emergency), or if the patient was stable and able to receive non-urgent care in the emergency room. Under both standards, a plaintiff must work even harder to prove malpractice. The good news is that recent success has

demonstrated and proven that plaintiffs can still be successful, even in emergency room cases.

Fifth, more and more doctors are now government employees. All government employees enjoy a certain degree of immunity, because they are government actors. As such, a plaintiff is required to provide to all government actors notice of a claim before filing the lawsuit. The failure to provide notice results in the case being dismissed and forever lost. The problem is the difficulty in determining which doctors are government employees and which ones are private doctors or doctors employed by the hospital.

The general rule is that medical malpractice actions must be filed within two (2) years of the date of the malpractice. However, if the death occurred three (3) years after the malpractice, under the so-called statute of repose, the lawsuit could still be filed up to twelve (12) months after the death.

Finally, and perhaps, surprisingly, is the challenge of collecting on a judgment. In Georgia, doctors are not required to have insurance when practicing medicine. Those doctors who do not have insurance either have very few assets because they spend more than they make, or they may engage in a practice known as asset protection. Asset protection is the allocation of assets, before a claim is known, among the physician's spouse and family members. This is all done to shield one's assets from any and all liability. This is perfectly legal. Also, nothing prevents a physician from merely filing bankruptcy and getting the debt discharged. (Only special debts are considered to be non-dischargeable and, unfortunately, medical damages can be discharged by a bankruptcy court).



CHAPTER 11

SPECIAL PROBLEMS IN WRONGFUL DEATH DUE TO CRIMINAL ACTIVITY

If a loved one is hurt or killed due to criminal activity, just as in all wrongful death situations, the family can bring a wrongful death suit. Unfortunately, most criminals have limited financial resources, if any.

Good wrongful death attorneys search for third parties that may have some responsibility to keep the victim safe. As per the examples at the beginning of the book, if the crime occurred at a hotel, apartment complex, retailer, gas station, restaurant or bar, these businesses have an obligation to protect their customers and potential customers from harm.

Just what are a business's obligations to protect their customers, and just how many steps or actions must a business owner take? These are questions currently being explored in the Georgia Court of Appeal and the Georgia Supreme Court. What is very clear is that businesses must actively protect their customers,

particularly if the business knew or should have known about prior criminal activity.

For example, if an apartment complex or hotel has been around for ten years, and there has not been any criminal activity, the apartment complex or hotel may not be obligated to take any additional action to protect their customers or guests who stay at the hotel. However, if residents or guests of residents at a certain apartment complex or hotel have been robbed at gunpoint every month for three months, then the apartment complex or hotel may have to take additional steps to protect the residents, travelers and customers in the complex, or at the hotel. (In the event that the wrongdoer and the victim knew each other, in almost all such circumstances, there will not be any recovery from any business.)

A recent case was decided in favor of the victim, after he was beaten up at Six Flags, by Six Flags' employees. There, the plaintiff showed that the company had been hiring employees who were also active gang members, and that the reason for the assault was because of the gang's culture.

An example of quasi-criminal contact can be when landlords are held responsible when something is wrong with the property. For example, if there is faulty wiring that causes a fire, and if the landlord knew about it or should have known about the problem, then the family can recover against the landlord, and sometimes even the landlord's agents.

While the police are generally reluctant to get involved in some wrongful death matters, they take an active role with respect to traffic-related fatalities. If a defendant killed another while driving, the defendant is often charged with a misdemeanor, driving recklessly, or even involuntary manslaughter.

In all circumstances where there is a crime that leads to death of a loved one, there is the Georgia Crime Victims Compensation Fund. Contact information can be found later in this book.



CHAPTER 12

MEDIATION: THE GOOD, THE BAD AND THE UGLY

In almost all wrongful death actions, as in many injury cases, the plaintiff will be forced to consider settlement at mediation or go to trial.

A. Why Do Parties Consider Mediation and Settlement?

Trial is risky for both the plaintiff and the defendant. This is because neither side can truly know what the jury's decision will be. A jury could award a plaintiff nothing, or, just as easily, award the plaintiff a very large sum of money. All trial attorneys will tell you that they have won cases that they should have lost, and lost cases that they should have won. Plaintiffs and defendants settle for the purposes of controlling the risks of both low and high verdicts.

By way of example, let's assume that a jury can only find for the plaintiff in an amount between \$1 and \$100. Of course, the plaintiff would want to recover an amount as close to \$100 as possible, and the defendant would want to pay an amount as

close to \$1 as possible. However, the settlement would never result in either \$1 or \$100; rather, a settlement would result in an amount between the high and the low. Theoretically if the plaintiff has a weak case (either because liability is questionable, or the damages are unclear), then that case would settle between \$2 and \$20 out of the total \$100 available. If the case is good, then settlement may be between \$40 and \$60. Finally, if the case is very strong, then the settlement may be between \$70 and \$80 of the \$100 available. Notice that the defendant will rarely give up all of the available funds.

B. What is Mediation?

Mediation is a process to reach a settlement agreement. Most of the time, the mediator is an attorney, and sometimes, a retired judge. The mediator seeks to persuade each side to come to a middle point in resolving the case. However, the mediator cannot “force” a settlement.

The mediator accomplishes resolution by telling the plaintiff all the problems with his/her case, trying to convince the plaintiff(s) to decrease their settlement demand. At the same time, the mediator tells the defendant(s) all the problems with their case, for the purpose of increasing the amount of money they are willing to pay.

Mediation can be either voluntary or court-ordered. Voluntary mediation seems to have the better results, because the parties have elected to mediate the case. Court-ordered mediations are less effective because the parties are forced to spend some time mediating. If the parties are too far apart, and refuse to budge, then the mediation is a waste of time.

C. The Process of Mediation

Mediation begins with all the parties meeting in one large conference room. The initial meeting usually takes sixty to ninety minutes. Typically, the individuals who are present at the mediation include the plaintiff, the plaintiff's attorney, the defendant's attorney, the defendant's insurance adjuster, and of course, the mediator. It is important to observe that rarely is the defendant present; this is because the defendant's insurance company makes the decision on how much money to pay. The exception to this rule is in cases involving medical malpractice when the doctor will often be present as well.

The process begins with the mediator making general statements about the benefits of mediation, and then concludes with positive statements about each of the attorneys. This makes sense because the mediator wants to do a good job; and saying nice things about the lawyers always gets people in a better state of mind, and of course, it's the attorneys who select the mediators.

After the mediator's opening remarks, each party has an opportunity to make a presentation. The plaintiff's attorney would argue the merits of the plaintiff's case and the defendant's attorney would argue the merits of the defendant's case. There is usually at least some validity in each of the party's arguments, because those cases that are "slam dunks" do not require mediation.

Next, each party is moved to a separate room. The mediator will then meet with the plaintiff's side to discuss the case, the purpose being to obtain an initial settlement offer. This usually takes another thirty to sixty minutes. After obtaining an initial concession from the plaintiff, the mediator will go to meet with the defendant's side. Once again, the mediator will work with

them for another thirty to sixty minutes for the purpose of returning with a counteroffer from the defendant.

The mediator then starts the process of going back and forth between the plaintiff's conference room and the defendant's conference room, exchanging various offers and counteroffers. Many times, the true negotiations do not really start until four to five hours into the mediation. Ultimately, the parties either strike a compromise or no resolution is reached.

D. The Good and the Bad of Settlement and Mediation

Ironically, the good and the bad of mediation are one and the same thing. As many mediators will say, a good result is where both parties are unhappy, but can live with the results. Accordingly, the plaintiff is better off recovering some money and avoiding the risk of getting nothing or receiving a low jury verdict. This decision also avoids the additional time and expense of a jury trial. For the defendant, it is better paying off the plaintiff than risking a possible high jury verdict. In essence, a settlement is a compromise of a claim – and it is the safest approach for both sides. Unfortunately, for a plaintiff to get true justice, often he/she must be willing to go to trial.

E: The Ugly

From a wrongful death or catastrophic injury plaintiff's perspective, there are ugly parts of mediation. For families and individuals having claims for wrongful death, medical malpractice, and catastrophic injuries, mediation is the most stressful and difficult part of the litigation process.

Why is mediation so stressful? This is because everything about mediation is designed to prey upon the participants' fears and anxieties about trial.

Yet, the pressure is greater on the plaintiffs than the defendants. This is because the actual defendants are only occasionally present. Most of the time, the defendant is represented by defense counsel and the defendant's insurance company. These folks, of course, are professionals and immune to the pressures of mediation. Yet, in contrast, the family has never gone to mediation before, and they are the ones who feel the pressure. Moreover, the defense will do everything possible to increase that pressure and stress for the goal and objective of settling a case for less than it is worth.

i. The Defense Will Drag Out the Mediation for an Entire Day

With the intent to increase the stress on the plaintiff, defendants often engage in various delays, sometimes up to three or four hours into the mediation, before they start making serious settlement offers.

Why drag it out? The defense views settlement like a fisherman; once a fish is hooked, it is only a matter of time before the fish will be exhausted and, eventually, be caught – or in this analogy, give up and settle.

The defense will use one of two processes in mediation, both designed to wear out a plaintiff. The most common approach is to start with a very low offer. No significant offers to increase the settlement will be made until the mediator has moved back and forth between the plaintiff's and the defendant's conference rooms and the process has appeared to stall out. Then, a reasonable offer will be made, and the defense will make the plaintiff fight for each and every dollar, all designed to wear out the plaintiff. In addition to wearing one out, a low initial offer has a few other effects. The defense is using a psychological technique called priming. The defense team is attempting to convince you that the true value of the case is less than you think, hoping that such

priming will have an impact on you when it becomes close to the settlement date. It may also have the effect of undermining your confidence in your attorney.

The second approach is to make one reasonable offer, but never come any further off that initial offer. Both approaches serve the same goal, stressing out and tiring the plaintiff, for the goal of obtaining concessions. The defense correctly believes that the more a plaintiff worries about what will or will not happen at trial, the more a plaintiff is willing to settle for less.

ii. The Defense Will “Push All of the Buttons” of the Plaintiff

The defense counsel will use any and all psychological tricks to further push for settlement. These tricks fall into three different categories. They often use all three.

Apologize. Many times the defense counsel, and sometimes the defendant, will apologize for the incident. You must be able to see through this falsity. The apology is merely self-serving, untrue, and an act. After all, talk is cheap. If the defense were really sorry, they would never make you file a lawsuit, take your deposition, or go through mediation. Rather, they would just cut to the chase and make a real settlement offer from the start.

Blame you. The alternative is that the defendant will blame you for the injury. This is seen most frequently in cases in which the injured are children. Typically, the defendants will blame the parents and make sure the parents really “feel” that blame. After all, any parent whose child is injured feels some psychological guilt. The defense tries to use this guilt to push for a settlement. Blaming you has the additional advantage of lessening the responsibility of the defendant.

Undermine your confidence in your attorney. While the plaintiff's attorney will argue the strengths and benefits of the plaintiff's case, the person receiving the information, the claims adjuster, is a professional. There are no arguments in which the plaintiff's counsel can "trick" the claims adjuster who has sat through a thousand mediations. Do you think that one used-car salesman can trick another used-car salesman? The answer, of course, is no. However, this is usually the first time the plaintiff has been in mediation. The defense counsel will take advantage of this fact and will seek to undermine your confidence in your attorney by making presentations and arguments that often are not permissible at trial. Please note that the defense counsel will do this in a very "nice way." Once again, this is merely an act. Good defense attorneys always seem nice. Many times they must speak for individuals or companies that are undoubtedly at fault, and by appearing nice and approachable, they seek to diffuse their client's malfeasance.

iii. Nothing is Secret

The mediator will, of course, tell you that everything you say in the mediation is confidential. Although, from a technical legal perspective, this may be true, yet, from a practical perspective, it is untrue. The safest approach is to say as little as possible to the mediator.

The confidentiality clause protects the parties in certain limited ways. For example, after mediation, the defense may not say at trial, that you were willing to take \$100,000 at mediation, and thus, limit your damages at trial. Likewise, the defense may not say that in mediation you admitted to some wrongdoing, or admitted that someone else caused the injury.

However, nothing prevents the defense from adjusting their trial strategy in response to how the mediation proceeds. If there

was an admission one made at mediation, the defense may cross examine you and ask about that admission. Likewise, the Defense may emphasize or deemphasize how they present evidence based upon mediation. Stated differently, I always believe that the facts learned at mediation come out – in one form or another, at trial.

It is for this reason that I always suggest to clients that they never tell the mediator anything that they would not tell the defense. The concepts under the Miranda warning¹⁸ apply here: anything you say can and will be used against you.

iv. Practice Pointer: You Must be Willing to Walk Away and Proceed to Trial

Many times, the defense will simply not offer enough money to settle the case. After spending an entire day worried, stressed, and bored, you must be willing to walk away. The defense counsel expects to wear you out. You must resist the temptation to settle the case for less fair value. Finally, you must understand and appreciate that sometimes the true cost of justice involves going to trial.

¹⁸ The Miranda warning is a criminal law concept, not a civil law concept. When one is facing criminal charges they have a Fifth Amendment privilege against self-incrimination. See *Miranda v. Arizona*, 384 US 436 (1966). That right does not exist in criminal lawsuits.



CHAPTER 13

EMOTIONAL RESPONSES TO UNEXPECTED LOSS.

A sudden and unexpected death is the most stressful experience that anyone must endure.

Common feelings include: guilt, depression, anger, bitterness, and anxiety. Some even feel some sense of relief. Others feel suicidal. Almost every aspect of one's life is impacted.

For many of our clients, the feelings of guilt are particularly strong. "If only ..." is a strong theme in these wrongful death cases. If only I had gone to a different doctor, if only I was driving more cautiously, if only Many times, our clients also suffer from post-traumatic stress disorder, in which they personally experience significant fear and anxiety.

Worse, in many of these actions, the defendants focus upon identifying all the possible things that the decedent or the loved ones might have done wrong. The defendants will seize on just about anything that they can to diminish their responsibility and they will stoop to any level. In cases of children killed or injured,

the defense spends significant time trying to spear the character of the parents. In cases of medical malpractice, the defendants will always argue that it was the decedent's fault for failure to disclose a fact or condition. Needless to say, this causes the family further pain and anguish.

So, how should one deal with this pain, anger, guilt, etc.?

There is no "one way." Rather, there are many different ways.

A. There is no Magic. Grief Takes Time. Be Prepared to Respond Unexpectedly.

How one will respond to the situation is unknown. We know that grief takes time. At one point in time, the DSM, the diagnostic manual for mental health practitioners, determined that one could not be diagnosed as being clinically depressed if grieving for less than one year. Many religions also consider the mourning time period to be at least one year.

The response to grief comes out at unexpected times. One can feel just fine the whole day and then – wham – one feels terrible just one second later, or feels angry, etc.

There are a few things that I can share from my observations. First, my clients and my clients' families do get better over time. I am always amazed at the transformation of my clients. Needless to say, when I meet them, they are facing the worst crisis of their lives. They are utterly lost, confused, angry, and sad all at once. Yet, at the conclusion, they have returned to some enjoyment of life. They often find an inner strength to return to a life worth living, taking care of their families, and thriving.

Second, there is no secret or magic that allows one to feel better faster. While there are strategies and approaches that can be

helpful, there is no quick or easy fix. It typically takes at least one full year for most individuals to return to normalcy after a significant loss.

B. Some Suggestions to Take Care of Yourself

You need to take care of yourself.

At the beginning, just eating is difficult.

Likewise, normal sleep patterns are abnormal. Either one sleeps too much or too little.

You will need to determine how to take care of yourself now that your life is changed. This will be difficult. Yet, even more difficult is to find some time to take care of yourself.

One of the best things that you can do is go for long walks, thirty to forty-five minutes at a time, four to six times per week. Make sure that you can find a place where you can be left alone. Studies repeatedly show that walking helps to restore the body's natural daily balance, releases brain endorphins, helps improve circulation, and helps the healing process. In fact, simply walking has been shown to be more effective than taking antidepressant medication.

Also, keep and maintain a journal. This is not a diary; one does not need to write in it every day. Rather, it's a journal that keeps track of your thoughts, concerns, and ideas.

Of course, journaling and walking can also be painful, constant reminders of the loss of the loved one. However, I always suggest that clients keep journaling and walking. Eventually, it helps.

C. Know the Five Stages of Grief Model

At one point in time, it was believed that everyone grieving must follow the five stages of grief: denial, anger, bargaining, depression, and eventually acceptance. While we now know that not everyone must go through the states, the model is still helpful in understanding the grieving process.

The five stages¹⁹ are:

Denial. While one understands, intellectually, that the loved one has passed, it is often difficult to believe emotionally. To a lesser degree, this is the phenomenon of turning to the loved one to tell them something that happened that day, momentarily forgetting that they have passed.

Anger. Being angry is one of the most common feelings. Family members are angry. Their feelings are raw. The anger can be directed in various directions. The anger is often directed towards the loved one who died. Many times, the family members ask “how could you have left me with so many responsibilities?” Sometimes the anger is directed towards oneself. Sometimes, people are angry at God, asking how a God could allow this to happen.

Bargaining. This is a type of wish fulfillment, when one attempts to make a type of grand bargain, agreeing to forgo something in exchange for bringing back the loved one, such as, take my life in place of my loved one. This is the constant replaying of the event in one’s mind, trying to correct the wrong.

Depression. It’s normal to feel extreme sadness when a loved one dies. Often, part of the mourning process is the complete

¹⁹ The original author of the five states was Elisabeth Kübler-Ross, MD. in her 1969 book, *On Death and Dying*.

lack of energy to take on the daily tasks of living. It can feel like life is not worth living. One can feel like not taking care of their children, and sometimes, not even feel love for their surviving children or other family members. Sometimes, the depression can last a very long time, and go really deep. Suicidal thoughts are not uncommon, but repeat focus on suicidal thoughts does require intervention. More on this topic below.

Acceptance. This is the stage when there is an emotional understanding of what has occurred, and the beginning of the willingness to pick up the pieces and continue to live.

One of the great values of this model is the understanding and appreciation that one can move between different stages, or experience multiple stages at one time. Acceptance can merge into depression then into anger, into bargaining, and back to acceptance.

D. Watch Out for Harm: Suicidal Thoughts, Obsession and Planning

It's ok and normal to be extremely sad, to have fits of crying, anger, and rage. It's ok and normal to feel overwhelmed and lost. It's also ok and normal to think or have thoughts about suicide.

However, you must pay attention if you are continually thinking about suicide, or if you start making up very specific plans to commit suicide. The more specific the plans, the more troublesome this is. Likewise, you must pay attention if you are feeling like injuring third parties, particularly, if the third parties are children. **If you are feeling any of these ways, you must get help immediately.**

- Call 911 or report to the nearest hospital emergency room;

- Call the National Suicide Prevention Lifeline at 1-800-273-8255 (TTY: 1-800-799-4TTY);
- Call your clergy, priest, or therapist;
- Call a friend or family members.

These folks care and can help if there is an emergency.

E. Trust Your Lawyer and Appointment Setting

Litigation is stressful. There are many strategies that can be helpful in managing the stress. Below, are two approaches that have worked for many of our clients.

First, let your lawyer do the worrying about your case. If you have done a good job selecting your attorney, and your attorney has earned your trust, then letting your attorney worry about the case eases your burdens. Know that litigation takes a long time. There are various fits of starting and stopping, and other periods of time where the pace of the case seems incredibly fast. By letting your attorney worry about the case, you can then focus on more important things like your family and friends. To understand the time parameters, please see the different phases of litigation in Appendix 2.

Second, we often encourage clients to make appointments with themselves to think about what happened and how they are going to deal with the case. I often suggest starting to make appointments every other day, at a specific time, say between 1:00pm and 2:00pm. Then, when the time comes, spend time thinking about all the scary stuff for the entire hour. Sit with the feelings, write them down. Then, at the end of the hour, stop.

When the worry feelings return, remind yourself that you have a special time for the worry and try to stop worrying. Hold

off until the next appointment. This is difficult, but eventually, you can gain control over your thought process — in which your worry and concern are managed. Combining this approach along with walking, and even better, vigorously exercising, can be particularly helpful in dealing with your new circumstances.

F. Get Support

As a preliminary note, “support” does not mean “psychotherapy”. Nor does getting support mean that you are mentally ill.

The simple truth is that you have gone through one of the worst possible tragedies any human is forced to endure and you or members of your family may need special human contact to help.

Children, particularly, need assistance to work through these issues. There are wonderful organizations and individuals who are willing to help. There are many good resources at religious institutions. For many clients, they actually find they become closer to God and more spiritual, as they wrestle with feeling angry and betrayed

Likewise, a lot of people benefit from religious- or non-religious-based grief work. If, for example, the loss was due to a sudden catastrophic event, such as a motor vehicle collision, many folks will benefit from cognitive-behavioral therapy, which helps to get symptoms of anxiety and stress (i.e., PTSD) under control.

For others, group-based grief experiences – sitting with others who has suffered similarly – can be helpful. There are many great resources on the Web. Some of our favorites include: www.griefshare.org and www.goodtherapy.com.

The good news is that our clients, after a long time and personal struggle, return to a normal and happy life. Some who have even lost children have given birth to new children. Some, who have lost a husband or a wife, have gotten remarried.

Perhaps, the resilience of our clients has more to do with our clients than anything else. I would speculate that folks who are willing to pursue a wrongful death action already have greater resilience than those who do not. It must be that these strong and brave people simply refuse to be victims. Similarly, bringing the wrongdoer to justice is an important step in the healing process. Regardless, we are continually blessed by, and amazed at how strong our clients are and how far they are able to travel on the road to recovery.



CHAPTER 14

WHEN TO HIRE AN ATTORNEY AND HOW TO FIND THE RIGHT ONE

A. Hire Counsel as Soon as Possible

Its cliché, but you will want to retain an attorney as soon as possible! Why?

First and foremost, an attorney retained right away can obtain and secure evidence. The insurance company has a whole team of investigators, adjusters, and such who are usually on the scene immediately. In serious cases, they are interviewing all of the witnesses, obtaining recorded statements, and making sure that they have good contact information for all. The simple truth is that evidence gets lost; people forget and may move away. Retaining an attorney as soon as possible will make sure that you preserve crucial evidence in and for your case.

Second, an attorney will make sure that you make your way through all of the procedural barriers, making sure that the statute of limitations, the time limit when one must file suit, is not missed.

Third, an attorney can make sure that all of the defendants or potential defendants are put on notice of the claim. This is important from two perspectives, as discussed in Chapter 2. If a defendant or potential defendant is a government entity, they will require some type of advance notice of the claim. The failure to provide such notice commonly results in the plaintiff's case being dismissed. And if the defendant is a private person or entity, then the defendant's insurance company must receive notice of the claim. This is because most policies are notice claims policies. Stated differently, if one waits until the statute is about to run out, the defendant may not have any insurance, and any recovery or judgment may be nothing more than a paper win.

Fourth, retaining counsel quickly can make sure that all the proper parties are included in the lawsuit. For example, if a loved one is killed while at work, but not due to the employer's fault, a family may have two separate lawsuits, a workers' compensation claim as well as an action against a third party.

Finally, retaining counsel quickly forgoes the stress and worry of those attorneys who will target you immediately after the loss, in violation of Georgia's professional code of conduct. Furthermore, your family and friends will be relieved that you have an attorney to protect your interests.

B. How to Find Good Counsel Requires Due Diligence.

It is difficult to find the right attorney to bring a wrongful death action in Georgia and in any other state. Regardless of the source, it is our suggestion that you conduct your own due diligence.

- Friends and family are often good sources for referrals, but you must do your own due diligence to make sure that the attorney is a good one in a wrongful death action. I have seen too many occasions, in which a friend or family recommends

an attorney and that attorney had no experience in wrongful death actions. Attorneys specialize the same way that doctors specialize. If you have cancer, you want a cancer specialist, not a cardiologist. Here, you want an attorney who has significant experience in wrongful death actions.

- The internet can provide leads. At the same time, you should be careful, for the internet has allowed many people to create false impressions about their experience with these types of suits. Most of the largest websites are, in fact, created by marketing firms, which makes it easy for grieving families to be misdirected.
- TV Advertisements. This is likely the worst way to find a lawyer. TV lawyers are great advertisers, and great business people, but usually sub-par attorneys. I have never seen a TV lawyer in court, nor at any CLE seminars. Their business model is different. I would avoid going with any law firm that devotes so much of its time and money to advertising—as opposed to actually practicing law.

C. What to Look For and What to Ask

Always meet with your attorney. It is important for you to know who is working on your case. While paralegals often do important work, ultimately, it is your lawyer who will direct the case. If you never meet the lawyer, even if you speak by phone, this indicates a problem.

Always ask your lawyer how many wrongful death actions they are currently working on. Furthermore, ask how many cases are similar to yours. You want a lawyer who has lots of experience in wrongful death actions, and depending on your case, one with lots of experience, for example, in car collision cases or in medical malpractice actions.

Ask about the ratio between the number of attorneys and other personnel in the office. Specifically ask, how many attorneys are there compared to the number of non-attorneys. Why? The answer will let you know if your case will be treated individually or as just one of many. The more paralegals, the less attention the lawyer will devote to your case. While many areas of law are administrative in nature and can be done quite successfully by paralegals, with minimum attorney supervision, wrongful death claims are not ordinary matters. Thus, you want the case to be directed by an attorney. Paralegals, closely supervised, are very effective. However, how can one attorney supervise ten paralegals? The answer is – they simply cannot.

Understand the scope of representation. The scope of representation means the issues the attorney will assist you on. The death of a loved one gives rise to many different types of legal claims and issues, including the issue of probate, and the distribution of other assets such as a home, car, stocks, and bonds. There are also issues related to taxes and life insurance benefits. If you retain an attorney, make sure you know which type of attorney you have selected. If there are questions about distribution of assets, we regularly refer or recommend folks to estate attorneys. These attorneys are skilled in resolving disputes among heirs. Likewise, there are tax attorneys who specialize in estate problems. Our firm specializes in bringing wrongful death claims against third parties arising out of an automobile collision, medical malpractice, or due to a defective product.

As an important note, there may be times when you wonder about your choice of attorneys. Are they doing a good job? This could be caused by the defendant refusing to put any real money on the table, or the attacks against your counsel. Similarly, there will be long periods when you may not feel as though your case is being advanced. I think that good attorneys forewarn you

about the process and are available to discuss your concerns. If they are unavailable or do not prepare you for the upcoming process, then either the attorney is too busy or does not care about your case.

D. Is It Ok if My Lawyer Wants to Associate Other Attorneys?

The general answer is yes. So long as there are no additional fees.

The real question is: Why would an attorney bring another attorney into a matter? Sometimes, an attorney will associate with other attorneys to assist with some aspects of the case, such as conducting depositions, conducting a specific part of a jury trial, or writing an appeal. (I personally don't like writing appeals). At the end of the day, it means that somewhere along the line, your attorney must have determined that they needed help. This is a much better situation than if an attorney tries to go at it alone when they need help.

At the same time, some attorneys do not really practice law; rather, they are in the "referral business." This means that they will not work on the case, they simply want to earn a percentage of the fee. While the various bar associations have attempted to stop this practice, it seems to continue. You should ask the attorney if they anticipate associating an attorney, and ask them why. Listen to the answer closely. It will tell you some important information.

E. What About Fees? How Can I Hire a Great Lawyer Without Paying a \$100,000 Retainer?

Concerns about how to pay an attorney are real. The general model of attorney fees is based upon an hourly rate, where time devoted to the case is calculated at 1/10th of an hour, or every

six minutes. In Georgia, hourly rates vary greatly, from \$150 for new attorneys to \$1,000 or more for the most experienced attorneys. A wrongful death case usually requires a significant amount of time. Let's assume that it takes 1,000 attorney hours to complete a case and that a reasonable hourly rate for an attorney is \$350 per hour. If you were paying the attorney by the hour, the attorney fees alone could cost \$350,000. Few people can afford this fee.

In addition to attorney fees, the litigation costs also are extremely high. Almost all wrongful death cases will require at least one expert, and many times, multiple experts. Medical experts wish to receive a premium to testify, and demand anywhere between \$100 and \$1,000 per hour. These must be paid up front. Likewise, court reporters, depositions, and trial exhibits, are all extremely expensive. In wrongful death cases, litigation costs regularly range between \$20,000 and \$200,000. In product liability cases, the amount of the costs could be as much as \$1 million. Once again, few families have this type of money to spend.

A contingency fee means that the attorney only receives payment for their legal services if there is a recovery of actual money. The contingency fee model is in response to the way that most attorneys' bill based upon the hour. Given the huge costs, both in terms of attorney fees and the costs of litigation, families are able to hire top-notch attorneys in exchange for the promise of payment based upon the results. For this reason, contingency fees became a reasonable way of earning fees.

So what is a fair contingency fee? This is a difficult question because a fee must be considered in a variety of ways, including the difficulty of the case (i.e., the risk of the case), the ultimate results, and the time and resources poured into that case. The fees vary depending upon the complexity of the claims, where

the case is resolved, and special particulars about the facts and circumstances of the loss. For example, if the death was due to medical malpractice, fees will be greater, because those cases require many experts. Likewise, if a case is resolved before a lawsuit is filed, the fee is often less. If the case goes to trial, the fee is often greater. There are often additional fees if there are any appeals.

Can the attorney voluntarily reduce their fee? The answer is yes. When the recovery is low and there are not many sources of recovery, many attorneys will reduce their fees, but they are not required to do so. It is appropriate to discuss these issues with your attorney, both at the beginning of the case and the end. As a general rule, we are skeptical of attorneys whose fees are either too high or too low. Attorneys who agree to reduce their standard rate may not have sufficient experience to evaluate the complexities of a case. We often see cases that initially seem simple, but turn out to have major problems. Experienced attorneys need to consider these issues and will not usually agree to reduce their fees at the first meeting.

It has been said that the common fee in any injury case is 33% of the reward yet, we have seen fees as low as 25% and as great as 60%. The amount of the fees vary depending on the type of the case, and at what stage in the litigation the case is resolved. Many firms will increase percentages as the case proceeds to trial, and many firms charge more for cases that are complex. The increase in fee is appropriate as the attorney or firm devotes more and more resources to the case, which also increases the risk of the case and the expenses for the firm.

Selecting an attorney comes down to hiring an attorney you like. I am a big believer in the “gut.” At the end of the day, after you have done your research on the attorneys, determined what

type of practice they have, how long they have practiced, and determined that they have the appropriate skills, you will have to decide if you feel comfortable with that particular attorney. If you feel nervous or concerned about the attorney, then the simple answer is to keep looking. If you like and trust your attorney, stick with your gut.



CHAPTER 15

ADDITIONAL SOURCES OF RECOVERY

You want to discuss with your attorney these additional matters:

The decision of who will have the responsibility in securing other resources such as benefits from social security, life insurance or workers comp should be addressed and discussed with your attorney. The advantage of having the attorney work on recovery for one or more of the sources is that he will know how to do it properly. The disadvantage is that you will be charged for these services. There is no clear 'best' approach; the key is to discuss these issues with your attorney (and stay away from attorneys who fail to address these issues).

A. Social Security

Family members who were financially dependent upon the deceased loved one can also recover funds from Social Security. This is due to a special provision in Social Security that is similar to a life insurance policy. Usually, all minor children are provided benefits, as well as a widow or widower. Likewise, dependent parents can also recover.

Make a claim as soon as possible. According to the Social Security website, benefits begin at the time of application, rather than the time of the death. To apply, one must contact Social Security directly, either by walking into any Social Security office or by telephone at 1-800-772-1213. The Social Security Administration has an easy-to-use website, where common questions are answered, www.ssa.gov.

You will need to gather certain information for Social Security. The following are some, but not all, of the documents that you will need:

- proof of death—either from a funeral home or death certificate;
- your Social Security Number, as well as the deceased's;
- your birth certificate;
- your marriage certificate, if you are a widow or widower;
- dependent children's Social Security numbers, if available, and birth certificates;
- deceased worker's W-2 forms or federal self-employment tax return for the most recent year;
- the name of your bank and your account number so your benefits can be deposited directly into your account.

B. Georgia Crime Victims Compensation Program

In Georgia, families of loved ones who are killed due to a crime have the right to recover up to \$25,000. Generally, this includes up to \$10,000 for economic expense, \$3,000 for funeral expenses, as well as up to \$15,000 for medical expenses. Family members generally have only one year from the death to apply. There are some exceptions, but the sooner, the better.

To make a claim, family members should call the Criminal Justice Coordinating Council at (404) 657-2222 or (800) 547-0060. An application is available online at <http://cjcc.georgia.gov/victims-compensation>. Once completed, it should be sent to: Georgia Crime Victims Compensation Program, 104 Marietta Street NW, Suite 440 Atlanta, GA 30303.

C. Private Life Insurance

There are a variety of different sources of private life insurance. It is important to explore all the suggested areas to recover all monies you are entitled to receive.

Most large employers offer life insurance. Usually, a timely claim must be made upon a large employer group. To make a claim, normally, you must call the employer or the insurance group, and then complete the paperwork.

The decedent may have a private life insurance policy. Also note that if the death occurred while traveling, many times there is additional travel insurance available, sometimes through a credit card or a program like the AAA.



APPENDIX 1

BASIC DEFINITIONS

Answer. The formal written response by the Defendant to the allegations in the Plaintiff's Complaint.

Arbitration. Arbitration is a private trial, whereby the arbitrator serves both as judge and jury.

Civil lawsuit. These are lawsuits filed in the court system. The cases are brought by individuals, families, and companies against another party for some wrong doing and the recovery of money damages.

Complaint. This is the formal start of the lawsuit, whereby the plaintiff outlines basic allegations against the defendant. The complaint along with the summons must be hand delivered to the defendant.

Court. The physical location in which the lawsuit is filed as well as another word for the judge.

Contingency fee. A method of paying attorneys for their legal services based upon a percentage of recovery. This is different than the usual approach of paying attorneys on an hourly basis.

Criminal lawsuit. These are lawsuits filed in the court system brought by the police and the district attorney. The general penalty for the criminal defendant is jail time.

Decedent. The loved one who has died.

Defendant. The person(s), or company(s) identified in the lawsuit, and who are responsible for injuring the loved one.

Depositions. The process whereby an attorney asks questions of witnesses taken prior to trial. The depositions are taken under oath and recorded.

Discovery. The formal process whereby the parties seek to establish facts of the case, i.e. the who, what, when and why. There are three basic ways to obtain discovery, file written questions on the other party, request documents to be produced by a party or a non-party, and by taking the depositions of the witnesses.

Estate. The entity that collects the assets and liabilities of the decedent, and disburses funds per the order of the probate court.

Expert Witness. This is a witness that has no personal knowledge of the facts, but through the experts, training and experience, they have an opinion that is important in the case. Many times, the expert will have an opinion as to causation, to explain the scientific relationship between the event and the bad outcome. Expert witnesses are paid for their opinion by the

party. Expert fees are quite expensive, ranging from \$150 per hour to \$1,500 per hour.

Judgment. The formal entry of the decision of the judge upon a motion to dismiss, or a motion for summary judgment, or the recording of the decision of the jury after trial.

Mediation. Mediation is a formalized process of settlement negotiations. The mediation is conducted by a mediator – a go between the parties – that encourage, cajole and scare the parties into reaching a settlement. However, the mediator has no power to ‘force’ the parties to settle, and has no power to make a decision in the case.

Non-parties. This describes individuals or companies, who are not a party to the lawsuit, but who have either an interest in the case, or have some type of evidence for the case. A non-party might be a witness to a motor vehicle collision or a health insurance company that paid for healthcare for the decedent.

Parties. This describes both the plaintiff(s) and the defendant(s).

Plaintiff. The party that brings the lawsuit. For wrongful death actions, this is usually the husband, wife, children or parents of the decedent. The estate of the decedent often joins as a plaintiff. The plaintiff has the burden to show the jury that the defendant acted wrongly and is thus responsible for the injuries to the loved one.

Service, or Service of Process. This is the hand delivery of the complaint and summons by the police or a private process server to the defendant(s).

Summary Judgment. A motion filed by a party to dismiss one or more claims/defenses of the other party.

Tort. A type of civil action. A wrongful death actions, is a type of specialized tort, that claims the defendant had a duty to the plaintiff, that the defendant breached that duty, and that the breach of the duty caused specific damages, and that the defendant is responsible to pay the plaintiff for those damages.



APPENDIX 2

PHASES OF LITIGATION

I. Pre-Litigation Phase

This is the time period an attorney investigates the facts of the claim and before the lawsuit is filed. This is the “who”, “what”, “when”, and “how” of the case. For example, who are the proper parties? Who are the proper plaintiff(s)? Who are the proper defendant(s)? Who are the witnesses or potential witnesses and what will those witnesses say. What happened? How can the attorney establish what occurred. Many times, it is also established how and why it occurred. Was the defendant merely sleepily, or was there a training and organizational defect?

In many regards, it's the most important step, because certain facts overlooked may result in the case going south.

This is why attorneys like to order as many documents as possible to investigate the claims. These documents can include police reports, autopsies, medical records and the like. Of course, once these documents collected, they must be carefully reviewed and analyzed.

During the pre-suit phase, an attorney must address technical and procedural barriers. Must advance notice of the claim be given? Must there be an expert report? Likewise, the attorney must wrestle with the question if there are any tactical advantages of providing advance notice?

Similarly, can the dispute be resolved without litigation? Sometimes, the answer is yes, and sometimes, the answer is no.

Finally, the attorney must be prepared and ready to respond to the defendants, including to the defendant's discovery.

The sooner a lawyer is retained, the more time the attorney can devote to exploring these issues. If the case is rush, or poorly planned, the case can quickly get sideways and problems arise.

II. The Law-Suit Phase.

Filing and Service of the Lawsuit

The complaint outlines the basic allegations against the defendants. The filing of the complaint along with the summons is the official start of the lawsuit. The lawsuit must be personally delivered upon the defendant by a sheriff or private process server. This is called service of process.

After service, the defendant generally has 20 or 30 days to respond to the allegations contained in the complaint, by filing their answer.

The filing of the answer generally starts the time period of formal discovery. (See below).

Motions to Dismiss

Sometimes, even before an answer is filed, the defendant moves to dismiss the lawsuit, identifying a legal defect in the plaintiff's case, and asking the judge to dismiss the plaintiff's lawsuit, forever preventing the plaintiff from recovering anything. A motion to dismiss, along with a motion for summary judgment are sometimes called dispositive motions, because these motions are filed to limit or foreclose one or more of the plaintiff's claims.

For example, the defendant may argue that the statute of limitations has expired, or that the plaintiff failed to attach an appropriate expert affidavit, or that there was duty or relationship between the parties.

Needless to say, for the plaintiff, a motion to dismiss is quite serious. Most attorneys can anticipate a motion to dismiss, and even before the lawsuit is filed, has already briefed out the issues

Under any scenario, the filing of a motion to dismiss by a defendant will slow down the process, because each side has the opportunity to brief the issues, and the judge ultimately required to rule on the issues.

Discovery

This is the formal process of establishing the "who", "what", "when" and "why" of the case. This is often the longest period of litigation. Depending on the type of case (medical malpractice, product liability, simple negligence), the number of parties, the number of expert witnesses, and whether the case is in the state court system or the federal court system, discovery could be as short as four months, and as long as 3 years. In special situations, it can even take longer.

There are three basic types of discovery.

i. Interrogatories (“Rogs”).

These are written questions served by one party on the other party in litigation. For example, parties usually ask the other to identify all fact witness to the event. In a car collision case, this might be any eye witnesses to the collision, as well as the identification of all medical doctors that provided care to the loved one. Likewise, the parties will ask to identify all documents that support either the claims or the defenses. Many times, this includes the production of all insurance policies, medical records, and bills. This might also include pictures of the collision or pictures of the decedent.

In responding to interrogatories, a party must provide written responses, made under oath. The defendants will cross examine a plaintiff on these responses, and the plaintiff should be prepared to respond.

ii. Request for production of documents (“RPDs”).

These are written requests to find and turn over specific documents. These RPDs can be served on any party, as well as non-parties. The term ‘document’ is a very broad term, and it includes both electronic and paper materials. It includes medical records, autopsy reports, police reports, cell phone records, tax returns, 1099s, W-2s, as well other related documents, such as e-mails, contracts, bills, etc.

iii. Depositions.

This is where a party’s attorney will ask questions of various witnesses before coming to trial. The depositions are generally taken in the attorney’s offices, and the depositions are taken under oath. These are often depicted in the law related TV shows.

One of the reasons that discovery is often so long, is because the parties need to take the depositions of the expert witnesses retained by both sides. The expert witnesses are witnesses that have no personal facts of the underlying event, but who have opinions about what occurred based upon their education and training. Many times the experts are doctors or engineers that explain to the jury what occurred from a scientific perspective.

Motions for Summary Judgment

At the end of discovery, each party may file a motion for summary judgment to eliminate one or more of the claims or defenses. These motions are decided by the judge, and not by the jury.

These motions are really mini trials, whereby each side seeks to introduce evidence showing or demonstrating their side of the case. These motions can be quite extensive, and the attorneys spend significant time in preparing for and presenting evidence in their motions. Usually, all the depositions in the case are submitted for the judge's review, as well as the critical documents.

These motions, just like motions to dismiss, are critical and quite serious for the plaintiff, because they can end the claim even before trial. Fortunately, these can be appealed, but under any scenario, the process will slow down the case significantly. Given that most judges are overwhelmed, these motions often are not ruled upon for quite some time period.

Daubert Motions

These motions are similar to motions for summary judgment, whereby the issue or question is the admissibility of a party's expert's opinion. The motion is based upon the the U.S. Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579

(1993), in which standards for admitting expert testimony were outlined in an attempt to avoid “junk science” from being admitted to the jury.

Once again, these are mini-trials, and if an expert’s opinion is eliminated, the party’s case will likely be significantly damaged.

III. Trial Phase.

This is the time whereby the parties put up their evidence, and ultimately, the jury makes a determination as to which side will win. TV has done a good job of showing how a trial basically works. Witnesses are called to testify, and each of the party’s attorneys may question or cross examine the witness. The jury is the ultimate “finder of fact”, and determines the outcome of the trial. In wrongful death actions, and in all injury actions, the jury will resolve two basic questions, liability and damages. Liability answers the question if the defendant responsible for the injury to the love one. Damages answer the question as to the amount of money that the defendant has to pay if the defendant is found responsible.

Motions in Limine

These motions are pre-trial motions, used to exclude specific facts or evidence. For example, a defendant driver in a motor vehicle collision might wish to exclude their prior driving record. The defendant arguing that if the jury knew the defendant had three prior speeding tickets, that the jury might naturally conclude that the defendant was also speeding here. Likewise, in a medical malpractice action, the doctor might wish to exclude a prior claim of medical malpractice. The parties can also challenge the sufficiency of the evidence or even if the evidence is admitted into trial.

IV. Post Trial Activity

While one might think that after a jury has made a decision that the case is over, there are many more additional parts of litigation.

Appeals

Many of the decisions of the trial judge can be appealed and reviewed by an appellate court. Appeals are not limited to just the time period after trial, but after a motion to dismiss or a motion for summary judgment. In short, the moving party is requesting that the appellate court overturn the trial judge's ruling.

It is difficult to win on appeal. Most of the time, the appellate court's will side with the trial judge. Of course, sometimes an appeal is successful.

Appeals, like motions for summary judgment, are briefed extensively, and there can be oral argument before the judges.

Retrial.

Depending on the outcome of the jury trial or appeal, sometimes, cases will need to be re-tried.

Settlement

Settlement can occur at any point in time, from before the lawsuit is filed, after a case is tried, and after a case is appealed all the way to the US Supreme Court. Settlement concludes the litigation.

APPENDIX 3

DOCUMENTS TO BRING TO YOUR ATTORNEY

Use this checklist of documents to bring to your attorney^{20, 21}

1. ___ Death Certificate.
2. ___ Autopsy report
3. ___ Police reports
4. ___ EMS Reports
5. ___ Any pictures of the incident or pictures immediately after the incident.
6. ___ List of all medical providers that provided care immediate before and after the bad event
7. ___ In medical malpractice cases, all relevant medical records, including records from the likely defendant and all subsequent medical care.
8. ___ All medical bills for medical treatment of decedent after the bad event (all cases).
9. ___ Funeral costs and bills.
10. ___ Pictures of loved one, surrounded by friends and family.
11. ___ At least two, but ideally four, years of tax returns, as well as the supporting documentation of 1099s and W-2s.
12. ___ Also, current resume of decedent.
13. ___ Marriage licenses, birth certificates and where appropriate, divorce decrees.
14. ___ Will

²⁰ Some documents only apply to specific cases.

²¹ You should not delay in meeting with an attorney even if you do not have all of these documents. If a suit is filed, you will eventually need to bring in all of these documents or specify that such documents are not available.

Disclaimer

This book is written for informational purposes only. It is not legal advice. All cases are fact specific and can only be evaluated on a case-by-case basis. If you are in need of legal advice, contact a qualified attorney.

WA

DEMANDING JUSTICE IN AN UNFAIR WORLD

FIGHTING BACK

**A GUIDE TO
WRONGFUL
DEATH CLAIMS
IN GEORGIA**

Losing a loved one due to carelessness or negligence is more than sad, it's tragic.

IN THIS BOOK, YOU WILL LEARN:

- Who to Hold Responsible and Why
- How Wrongful Death Actions Make The Community Safer
- What Is the True Value of a Life
- What Is Mediation, and How to Be Prepared for the Defense's Tricks
- What You Can Do to Help Your Attorney

ABOUT THE AUTHOR

Representing families in wrongful death cases is Roger Krause's true calling. He combines all of his education and experience for one single purpose: to seek justice for the family forced to endure the sudden, unexpected and avoidable loss of a loved one.

Roger Krause, originally from New York City, earned his undergraduate degree at Emory University in Atlanta, a master's degree in psychology from Columbia University in New York, and his law degree from Georgia State University. Mr. Krause has been an extern at the Georgia Court of Appeals, worked for a large insurance defense firm, then a midsize firm, before joining with veteran lawyer Bob Witcher to form Krause & Witcher.

Roger combines his study of law and psychology with his intellect and street smarts to fight for what is right. Roger Krause was selected in 2014 and 2015 to Georgia's SuperLawyers list, identifying the top 5% of all lawyers. Mr. Krause occasionally lectures to lawyers and law students.

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