

**Losing a Loved One**  
**A Family's Guide**   
**to Illinois Wrongful Death Lawsuits**

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**Barry G. Doyle**  
Attorney at Law



Losing a Loved One

A **Survival Guide**

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to Wrongful Death Lawsuits



Losing a Loved One  
**A Survival Guide**

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WORD ASSOCIATION PUBLISHERS

[www.wordassociation.com](http://www.wordassociation.com)

1.800.827.7903

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Printed in the United States of America.

ISBN: 978-1-59571-611-8

*Designed and published by*

Word Association Publishers  
205 Fifth Avenue  
Tarentum, Pennsylvania 15084

[www.wordassociation.com](http://www.wordassociation.com)  
1.800.827.7903

## Table of Contents

Disclaimer . . . . .	7
Overview of Wrongful Death Cases. . . . .	9
Wrongful Death Lawsuits . . . . .	11
Types of Wrongful Death Cases. . . . .	13
Distinguishing Wrongful Death and Survival Cases. . . . .	35
Importance of Medical Proof . . . . .	37
Who Gets to File a Wrongful Death Case. . . . .	39
Who is a Beneficiary of a Wrongful Death Case . . . . .	43
Distribution of Settlement Proceeds in a Wrongful Death Case . . . . .	45
Fractured Families. . . . .	51
Defenses in Wrongful Death Case . . . . .	53
Importance of Insurance in Wrongful Death Cases . . . . .	55
What Does a Lawyer Do For You in a Wrongful Death Case. . . . .	59
A Look at Lawyer Advertising . . . . .	63
Hiring the Right Lawyer. . . . .	67
Cases That We Cannot Accept. . . . .	73

About Our Law Firm . . . . .	75
What Our Former Clients Say . . . . .	77
About Barry G. Doyle . . . . .	83



## Disclaimer

This really would not be a book by a lawyer without some disclaimers, so here they are:

- It will be pretty clear to you by the time that you get done reading this book that I strongly recommend that if you have a potential wrongful death case, you should hire an experienced lawyer to represent you in your case. In fact, one of the quirks in Illinois law is that a non-lawyer cannot represent the estate of a dead person, so since you have to hire a lawyer, you might as well hire one that knows what he is doing. However, until you have a signed Attorney-Client Retainer Agreement from me, you should not assume that I have agreed to represent you in any case you have, and should take the appropriate steps to find competent legal representation for your case. The only way that I am assuming any professional responsibility for your case is if either I or a lawyer from my law firm signs a retainer agreement with you.
- Every case is different, and the statements contained in this book are expressions of general legal principles that apply in most cases, but not necessarily yours. You should not look solely to the statements contained in this book for

legal advice, but should instead retain the services of an experienced personal injury lawyer who can give you advice based on a full review of the facts and circumstances of your case and the specific legal principles that apply to the facts of your case.

- I am a lawyer licensed to practice law in the State of Illinois. If you have obtained this book to get information regarding an accident that happened outside the State of Illinois, you should not use this book as valid information about your case. This area of law varies tremendously from state to state, and you should not consider any of the information contained in this book as applicable to your situation because of differences in the law in other states. You should instead consult a lawyer licensed to practice law in that state. We are willing to refer people to qualified counsel in other states.
- This book does not address the benefits that you may be entitled to recover in a worker's compensation claim for a work-related fatality, even in Illinois. We offer a book on Illinois worker's compensation claims that should provide you with further information concerning that kind of claim. I am also not providing any legal advice in this book concerning life insurance benefits or claims for benefits under any private or public pension or benefit plan or program.

## Overview of Wrongful Death Cases

There are a few questions that come up with every wrongful death case, and we are going to try to address those questions in this book. In this section, I want to try to give some short answers to some of those questions:

- What types of wrongful death cases are there?
- Who gets to file a wrongful death case?
- Who gets the money from the wrongful death case?
- How much money is a wrongful death case worth?

The basis of every wrongful death case is negligent or wrongful conduct that resulted in the death of another person. (This is why it is a “wrongful” death case). Most cases are based on negligence which is defined legally as the failure to exercise ordinary care for the safety of others—in short, carelessness. You can also have a medical malpractice wrongful death case, but “medical malpractice” is just another term for medical negligence. Before you are ever entitled to recover money in a wrongful death case, you have to first be able to show that someone was legally to blame for accident or incident which resulted in the death of your loved one.

A wrongful death suit cannot simply be filed by the estate of a deceased person. The law requires that a person be designated to handle the

legal affairs of the estate. When someone dies having left a will, the person designated by the deceased—the executor of the estate—must be the one to file the lawsuit. Where there was no will, then a court order must be obtained appointing someone as the administrator of the estate. The person who files the lawsuit then has the power to make decisions concerning the lawsuit, including whether a suit should be filed and whether a settlement offer should be accepted. However, the executor or administrator does not ultimately get to decide who benefits from the suit or how much money they receive.

In a wrongful death case, there are two main aspects to the case: the survival action and the wrongful death action. The survival action is for the injuries sustained by the deceased prior to his or her death. The wrongful death action benefits the surviving next of kin for the losses they sustained as a result of the death. The survival action is an asset of the estate, while the wrongful death claim is brought by the executor or administrator on behalf of the next of kin. The distinction between the wrongful death action and the survival action can be highly significant, and we will discuss this later.

The amount of money that can be recovered in a wrongful death case can be significant, but this is also shaped to a large extent on the particular facts of the case. Some important factors include: the facts of the underlying accident, the existence and amount of insurance coverage, the amount of the medical bills if any, the amount of time between the accident and the death, the number and relationship of the surviving next of kin to the deceased, and other factors.

## **Wrongful Death Lawsuits**

The legal basis for the vast majority of wrongful death suits in Illinois is negligence. Under some circumstances, the law imposes a legal obligation on a person or company to act with reasonable care for the safety of others. Negligence is the doing of something that a reasonable person would not do, or the failure to do something that a reasonable person would do, under the circumstances.

To recover damages in a wrongful death suit, the person bringing the suit (known as the plaintiff) must show that the person being sued (known as the defendant) was negligent AND that the negligence of the defendant caused injuries and the death of the deceased.

One defense to a lawsuit is known as contributory negligence. The basis of the defense is that the plaintiff's own conduct contributed to cause his own injuries. In essence, the defense is blaming the plaintiff for his own injuries. Children age 7 and under cannot be guilty of contributory negligence, and the conduct of children between the ages of 7 and 14 are judged on a sliding scale which accounts for their age and experience. Everyone else over the age of 14 must exercise ordinary care for their own safety.

In virtually all Illinois personal injury cases the jury, not the judge, gets to decide issues relating to negligence and contributory negligence. At

the trial of a personal injury case, the jury is asked to assess the degree of fault of both the plaintiff and the defendant. When the plaintiff is found guilty of contributory negligence up to 50%, the award of damages is reduced proportionately. For example if the jury assesses an injured person's damages as being \$100,000, but also finds that his contributory negligence was 20% of the cause of his injuries, then the damage award is reduced from \$100,000 to \$80,000. This is true all the way up to the 50-50 point. Once the plaintiff's contributory negligence exceeds 50%, this results in a not guilty verdict.

Not every case in Illinois is decided on a negligence standard. Some cases require a heightened degree of misconduct on the part of the defendant, known as willful and wanton conduct. Other cases result in a plaintiff's verdict when a statutory violation is proven. However, the vast majority of cases are decided on the basis of negligence.

## **Types of Wrongful Death Cases**

The first thing that must be proved in any wrongful death case is that the defendant was liable for the accident which caused the death. To help you understand what has to be proved to show that the other person is liable for the accident, I want to discuss some of the kinds of wrongful death accident cases we handle and what must be proven in each.

### **Auto Accidents**

Car crashes are a common type of wrongful death accident. The issue of fault for a car accident is determined largely by the Rules of the Road which are incorporated in the Illinois Motor Vehicle Code. Some of the bases of negligence in a car accident suit include:

- Following too closely, resulting in a rear-end accident;
- Failing to properly slow their vehicle, resulting in a rear-end accident;
- Speeding;
- Driving too fast for conditions;
- Failing to stop at a stop sign;
- Failing to stop for a stop light;
- Failing to yield the right-of-way at a posted “Yield” sign;

- Failing to yield the right of way to a pedestrian;
- Failing to yield the right of way when making a left turn;
- Failing to yield the right of way when emerging from a driveway;
- Failing to keep a safe and proper lookout;
- Failing to keep in a single lane;
- Changing lanes when it was not safe to do so;
- Changing lanes without signaling;
- Make unsafe turns;
- Failing to use a turn signal before turning;
- Driving while intoxicated;
- Failing to keep vehicle under control.

Illinois has a mandatory auto insurance law, but the required limits are very low. State law requires that drivers carry automobile liability insurance with policy limits of \$20,000 per person and \$40,000 per accident. These are too low to provide a fair measure of compensation to the accident victim in all but the most minor of non-fatal car accident cases, much less to the survivors of a wrongful death car accident. Many drivers carry liability insurance with higher liability limits than that, but most drivers still do not have enough liability insurance to meet the damages required in a wrongful death car accident.



With that in mind, our office examines the following issues in every wrongful death car accident:

- Was drinking and driving involved? If so, that could increase the pressure on his or her auto liability insurance carrier to make a reasonable settlement offer. As important, where the at-fault driver became intoxicated at a bar, restaurant, or other licensed liquor establishment, the seller may be liable under the Illinois Dram Shop Act. Further, if the drunk driver was a minor, there is liability on the part of the persons who provided liquor to the minor. Being able to identify a dram shop or person who provided liquor to a minor allows the injured parties to reach additional insurance policies which serve as sources of compensation for the death or injuries.
- Does respondeat superior apply? The legal doctrine of respondeat superior holds employers liable for the negligence of their employees, even when they are driving their personal vehicles. We handled a case where a machinist was making a service call for work in a personal vehicle when he was involved in an accident. For our client, the difference was that she was not limited to the \$50,000 of insurance held by the employee and could reach the \$1 million in coverage held by his employer. This greatly increased the settlement our client received. In serious car accident cases, as a condition of settlement, we require the at-fault driver to provide us with an affidavit establishing that they were

not doing anything employment-related when the accident happened.

- Is there a basis for an automotive product liability suit? Many serious injuries are caused by failures of the vehicle itself. Where there are truly catastrophic injuries or death and the remains of the vehicle still exist, it may be worth considering an automotive product liability suit based on defects in the design or manufacture of the vehicle.
- Did defective repair work cause the crash? If so, there may be liability for the mechanic or repair shop. We handled a case where the client suffered a brain injury in a car accident caused by the wheel coming off another vehicle. Had this avenue not been explored, our client's recovery would have been limited to the \$25,000 in liability coverage from the other driver, while the repair shop carried significant coverage. This made a significant difference in the settlement received by our injured client.
- What other insurance is there? Sometimes, other insurance policies which provide additional layers of coverage are purchased. Known as umbrella policies, their existence is not always voluntarily disclosed by insurers. Where there is umbrella coverage, this provides significant additional insurance coverage to benefit the injured party. We also require an affidavit from the defendant that there was

no additional insurance coverage before entering into a settlement agreement.

- Is there a possible underinsured motorist coverage claim? When you buy full coverage on your own vehicle, you get a coverage called underinsured motorist coverage. With underinsured motorist coverage, your own insurance company will step in and pay the damages between the amount of insurance coverage that the at-fault driver had and the amount of your underinsured motorist coverage.

## **Trucking Accidents**

Trucking accidents are not just another type of car accident. The major distinguishing factor is the enormous size and power of tractor trailers give them tremendous capacity for causing death and injury. They are driven by professional drivers who have special training in the operation of these deadly machines. The drivers are employed by trucking companies which have a special responsibility to the motoring public to ensure that the trucks are being driven in compliance with the applicable regulations and standards.

Federal regulations require that trucking companies carry a minimum of \$750,000 in liability insurance. Certain kinds of trucks, such as those hauling hazardous substances, are required to carry higher levels of insurance. Many of the larger trucking companies carry several layers of insurance which provide them with much higher levels of insurance coverage. I have seen trucks that had as much as \$20 million

in insurance coverage. With this much money at stake, trucking companies can and do hire skilled lawyers, investigators, accident reconstructionists, medical experts, and other people needed to mount an aggressive defense against any claim or lawsuit filed against them.

Another factor that distinguishes trucking accidents from ordinary car accident cases is the types of documentation involved. Trucking companies maintain extensive records of the activities of the drivers and the maintenance of the vehicles they drive. The records that trucking companies keep have proven enormously useful in showing the negligence of the truck drivers and violations of regulations and statutes by the trucking companies. While federal regulations do require trucking companies to keep records for a certain period of time, litigation-savvy trucking companies begin destroying records relating to the truck driver and truck involved in a serious crash as soon as they are legally permitted to. This period is as short as 90 days for some records.

For many trucking accidents, there are theories of liability beyond the obvious (e.g., the truck rear-ended me) which may apply in trucking accidents:

- **Unsafe tractor or trailer**—the equipment, including all of the components of the power unit and the trailer, must be inspected to insure that it is in safe condition to operate on the road. This is required to help assure the safety of other drivers.

**Unsafe driving practices**—truckers must follow not only the rules of the road like every motorist, but also must follow federal regulations. Additionally, their operation of their vehicle must take into account the special operating characteristics of their vehicle such as braking capacity and blind spots.

**Overweight truck**—Truckers must comply with maximum weight rules and regulations. Failing to do so limits the ability of the trucker to drive safely.

**Driver was over hours**—Many studies show that the effects of being over-tired while driving a truck has almost the same effect as being intoxicated on the ability of the trucker to operate their truck safely. Regulations limit the number of hours a trucker may be on the road, but these limits are often ignored in the effort to comply with the demands of their employers.

**Truck underrides**—Underride guards are intended to keep cars from going underneath the trailer. Trucking companies may be held liable where there is no underride guard or it is deficient.

Because the stakes are so high in trucking accidents, insurers for trucking companies and their lawyers have assembled “Go Teams” including investigators, photographers, and reconstructionists which are sent to the scene of trucking wrecks, sometimes arriving within minutes of the wreck. I have had cases where the investigator for the

insurance company was on the scene taking pictures of my client sitting in his car while the police officer was still writing tickets to the truck driver who rear-ended him. In the meantime, the trucking company is marking off the days until it can destroy the records which will help establish its liability for the trucking accident.

The playing field can be leveled by hiring a skilled truck accident lawyer who understands the trucking industry and the regulations it must follow. The advantage that trucking companies have by being first on the scene can be overcome by making sure that scene evidence is documented and preserved and that the trucking company is put on notice promptly not to destroy any of the crucial records which will help establish its liability. These are steps that anyone dealing with a recent death due to an accident is not likely to think to take.

## **Motorcycle Accidents**

There are so many things that distinguish motorcycle accidents from car accident that it would be foolish to consider them in the same way. While it is true that motorcycles are covered by many of the same provisions of the Illinois Motor Vehicle Code that cars are, and the same basic rules of the road apply to cars and motorcycles alike. Some of the key factors that distinguish motorcycle accidents from car accidents include:

- Many people who are not motorcycle riders unfairly regard riders as being daredevils, which puts motorcyclists at a disadvantage coming into court. Sadly, there are some

motorcyclists who perpetuate that image by weaving in and out of heavy traffic at speeds well in excess of the speed limit. Those are the guys that jurors see in their mind's eye when they hear that the case involves a motorcyclist injured in an accident. Experienced motorcycle accident lawyers know how to bring out those attitudes during jury selection to have those people eliminated from the jury, if possible, and to try to dispel those attitudes during the presentation of the case by showing what the deceased rider did to learn how to ride safely, followed safe riding practices, and did what he could to avoid the accident at issue in the lawsuit.

- Jurors who do not have experience riding a motorcycle do not know how to operate one, and need to be taught the basics of it. It is hard for them to put themselves in the place of a motorcyclist when they do not know how to ride one, but much easier for them to put themselves in the place of the defendant, following the familiar procedures for driving a car. Concepts like maintaining speed to help maintain stability of the bike and laying the bike down are foreign concepts to most jurors and run contrary to their normal way of thinking. Riders know that laying the bike down is a means of escaping a catastrophic crash, but most lay people that screams out excessive speed and loss of control over the bike. This is especially important when the deceased rider is not available in court to explain why he took the actions he did leading up to the crash.

The loss of the deceased rider is no doubt devastating to his family, but it also makes winning a case against the at-fault driver more difficult due to the preconceived notions that many jurors have regarding motorcycles and motorcycle riders. This challenge is made all the more difficult by hiring a lawyer that does not appreciate those challenges and who is not prepared to address those challenges in court.

### **Construction accidents**

When someone is at least partially to blame for the accident besides the injured worker's employer or co-employee, the family of the deceased worker can pursue both a liability lawsuit against the responsible parties as well as a worker's compensation case against his employer. Some of the theories of liability which we have presented on behalf of injured construction workers include:

- **Unsafe work practices**—When another contractor or its employees engage in unsafe work practices that put the employees of other contractors on the site in danger.
- **Unsafe equipment**—When contractors use unsafe equipment on the job site which put employees of other contractors at risk, or when there is equipment which is used by all the contractors on the site such as ladders, ramps, or scaffolding which is not maintained in safe condition by those responsible, including the general contractor and others in charge of safety on the job site.



- **Unsafe working conditions**—When there are unsafe conditions such as uncovered floor openings, deep ruts or mud, missing guard rails, or other tripping, slipping, or fall hazards. In this case, both the contractor responsible for creating the hazard and the entity responsible for overall job site conditions (usually the general contractor or owner) has liability for failing to prevent and/or correct unsafe job site conditions.
- **Failure to control the job site**—On most construction sites, the general contractor has the right to control the work being done by the subcontractor it hires. When the general contractor fails to do this to prevent injury to workers on the site, it may be responsible for injuries suffered by the worker. This responsibility may include stopping unsafe work practices adopted by the injured worker's employer and properly coordinating the work done by the various contractors on the job.
- **Product liability**—If there is a defect in the design, manufacture or maintenance of the equipment used by the injured worker, this may be the basis of a lawsuit against the manufacturer or maintenance company responsible for the injury-producing equipment.

Identification of facts which help develop a construction negligence claim against the responsible parties is one of the benefits of hiring our firm. Our background in handling these kinds of cases gives us

insight into the contractual obligations of the contractors on the site to ensure worker safety. Further, our understanding of OSHA regulations and construction industry safety customs and practices allows us to help juries understand why blame for the accident rests upon the proper parties and not upon the deceased worker.

The technical term for a lawsuit arising from a work-related construction accident is a third-party liability suit, and we have prepared a book covering some of the special technical issues involving these kinds of cases. Please call our office at (312) 263-1080 for a copy.

### **Slip and fall**

Slip-and-fall cases are referred to in the law as premises liability cases. Premises liability cases are also decided on a negligence basis. It is not enough that your loved one was killed on someone else's property.

You must prove (1) that there was a hazardous condition on the property, (2) that the property owner was negligent in allowing the hazardous condition to exist or failing to correct it, and (3) that the negligence of the property owner caused the accident. You also must either prove that the owner created the hazardous condition or that he knew about it or that the condition had existed for a sufficiently long time that he should have known about it.

One crucial question that has to be answered in every slip and fall case is what made the person fall. This is a key question even in slip

and fall cases where the victim was not killed. If we cannot show what caused the fall, we cannot prove that the property owner was negligent in either causing the hazardous condition or failing to correct it. If you trip over your own feet or suddenly feel faint and fall, the property owner is not responsible for your injuries just because you happened to fall on his property. If you have no idea why you fell, we cannot prove a case for you. There must be something about the property such as a defect in the property or a foreign object or substance that caused your fall.

This question is an especially difficult one in a wrongful death accident because the person who can best say what made him or her fall is now deceased. Therefore, we look to sources such as eyewitnesses, police reports, paramedics records, or emergency room records to help establish what caused the client's fall.

We strongly recommend that if you are considering filing a premises liability wrongful death suit that you retain well-qualified counsel as soon as possible. Identifying the property owner and determining who was responsible for the creation of the hazard can be a tricky business. Further, where there is a death, proof of the cause of the fall is that much more difficult. You want to make sure that there is ample time before the expiration of the statute of limitations to conduct a proper investigation into these issues. When there is not enough time to conduct a proper investigation, there is a risk that a defendant who should be named as a defendant will be missed.

## **Nursing home abuse and neglect**

Our firm handles many nursing home abuse and neglect cases, and well over half are wrongful death cases. This is due to the fact that so few of the victims of poor care in nursing homes survive.

Nursing home abuse and neglect cases are a specialized area of personal injury litigation. One reason for this is that unlike medical malpractice cases, there is a strong regulatory framework for nursing homes which provides a framework for the care that must be provided to nursing home residents. A lawyer handling a nursing home case must be familiar with these regulations in order to hold the nursing home accountable for poor care.

There are a number of different types of substandard care in nursing homes can result in a wrongful death suit, but some of the more common ones include:

- **Pressure ulcers**—The terms “bedsore”, “pressure ulcer” and “decubitus ulcer” mean the same thing and are used to describe any skin lesion or wound caused by unrelieved pressure that damages the underlying tissue. State and federal regulations provide that when a resident enters a nursing home without bedsores, they must not develop them unless they are clinically unavoidable. This means that the nursing home and its staff must take all necessary steps to prevent the development of bedsores. Left untreated, pressure ulcers can become infected and result in the amputation of a limb,

or even death. These wounds are graded on a scale from I to IV, with a grade I ulcer being a minor reddening of the skin and grade IV being an open wound with exposed muscle or bone. However, none of these terms really capture just how horrible these kinds of injuries are.

- **Falls**—Unlike falls involving normal, healthy adults, falls involving nursing home residents are, to a large extent, foreseeable, and special plans must be made for their prevention. Nursing home residents are often susceptible to falling because of declining physical condition, medications, and/or the need for assistive devices such as canes or walkers. Nursing homes are required to make ongoing assessments of the fall risk for each resident and to develop plans to prevent their occurrence. Hip fractures are often the result of a nursing home fall, and multiple studies have shown that complications from hip fractures are a surprisingly common cause of death.
- **Medication Errors**—Many nursing home residents take multiple medications on a long-term basis for a variety of conditions. Errors in administering medications can have devastating consequences for the health and well-being of a nursing home resident. Nursing home residents are also at risk of harm through medication interactions. When residents are taking several medications, including medications ordered by more than one doctor, there is a chance

that the drugs will interact in a way that can cause harm to the resident.

- **Choking and Suffocation**—Any time that a nursing home resident is deprived of oxygen, there is a potential for a wrongful death suit. This could be due to the resident choking on food, being asphyxiated due to a restraint, or due to poor care with respect to the equipment which delivers supplemental oxygen.
- **Resident-on-Resident Assaults**—Virtually all residents of nursing homes have been admitted because they have conditions which render them incapable of living independently in the community, or with the assistance of their families. For some nursing homes residents, the condition that prompted their admission is mental illness, and in most instances, the resident does not have accompanying physical disabilities. Nonetheless, they become part of a patient mix which frequently includes highly debilitated residents. When a mentally ill resident acts aggressively towards a highly debilitated one, serious injury frequently results. The staff of the nursing home has an obligation to protect all the residents and to anticipate and intervene in situations which have potential to escalate into violence.

One other way in which nursing home cases are different is that the nursing home resident victims often have complex, long-standing medical conditions which must be taken into account in prosecuting

the case. One well-known nursing home defense lawyer says that they do not try the case based on the care (it's often indefensible), but against the pre-existing medical conditions of the nursing home resident. In short, they defend the cases based on the fact that the victim was "old and sick." However, when they were admitted to the nursing home, they were already "old and sick"—that was the reason that they went into the nursing home to begin with. When the nursing home promised you that they could take care of Mom or Dad, they were already old and sick, and they knew it. It means that they had to try harder, not throw their hands up and give up. Lawyers prosecuting nursing home wrongful death cases must be ready to address the complex medical issues affecting nursing home residents.

Unlike virtually all personal injury cases, most nursing home cases do not involve something that happens in one particular moment in time. In a car accident, a moment of inattention can result in a rear-end accident. However, most serious nursing home injuries take place because of substandard care which takes place over a matter of days, if not weeks or months. Pressure ulcers do not happen overnight, it takes a long period of substandard care for them to reach Stage III or Stage IV. Even falls are often the result of poor care over a period of months—poor monitoring of the resident leading to a poor care plan which was not implemented. Skilled nursing home attorneys know how to review the chart to identify the missed opportunities to prevent the horrible outcome.

Medical malpractice

There are few areas of law more difficult and complex than medical malpractice cases. The factual, legal, and medical issues are always highly complex and the cases are defended aggressively by highly skilled defense lawyers. There are three things that must be established by expert testimony in every medical malpractice case:

- What a reasonably well-qualified health care professional would have done under the same or similar circumstances, also known as the standard of care;
- A breach of the standard of care by the health care professional;
- Injuries caused by the breach of the standard of care.

Each of these points must be established by an expert witness. An expert witness is someone who has the same type of license as the health care professional whose care is at issue and who has training and experience in the area of medicine at issue. For example, a doctor must be the expert witness in a case involving another doctor, and so forth. The expert's testimony must be supported by his review of the records pertaining to the care. Expert witnesses usually charge for their time by the hour, and the cost of reviewing of extensive medical records and pre-trial depositions may run several thousand dollars by the time the case reaches trial. Also, especially within certain fields of medical specialty, it is difficult to find a doctor who is willing to testify against a fellow physician.



The first step in any medical malpractice case is to obtain all of the records pertaining to the care and/or condition that is at issue. Many times, cases that appear to be promising at first blush show themselves to reasonably good care after considering the records. After obtaining the records, the records must be submitted to a medical expert for review. Obtaining medical records after a death can be challenging, and you may have to go to court just to obtain the records. In order to file a medical malpractice lawsuit in Illinois, a certificate of merit written by a qualified health care professional must be attached to the lawsuit. This is a barrier to getting your case to court that does not exist in any other type of case.

The issue of proving that the death was caused by malpractice is often a difficult issue. In other kinds of cases this is a fairly straightforward issue. For example, if you a pedestrian who gets hit by a car and have a broken leg afterwards, proving that the car accident caused the broken leg is a pretty simple issue. With medical malpractice cases, this is often more complex. It is often difficult to show that a different outcome would have occurred if the malpractice had not happened.

Because there is so much work to be done before a lawsuit is ever filed, we always strongly recommend that you hire a well-qualified lawyer as soon as possible. This helps ensure that all of the proper defendants are identified and that properly credentialed experts can be located before the statute of limitations expires.

## Dangerous and Defective Products

Product manufacturers are under a legal obligation to manufacture their products so that they are reasonable safe for the intended users of the product. When the product contains hazards, they should be eliminated from the design where possible. If that is not possible, then the hazard should be guarded against. Finally, when it is neither possible to eliminate the danger or guard against it, warnings should be given. These are basic principles of product design.

There are three main theories that are used in defective products suits:

- **Manufacturing Defect:** This applies where there is a product that is manufactured in a way that does not comply with product specifications or where there a defect in the materials used in the product;
- **Design Defect:** This is where there is a defect in the design of the product that was not eliminated or guarded against and there was a feasible alternative design available;
- **Failure to Warn:** Where there are hazards inherent in the product, but the necessary warnings regarding the defect are not given.

Defective products suits can be filed against the manufacturers of a variety of products:

- Asbestos;

- Prescription drugs;
- Medical devices;
- Industrial products and tools;
- Motor vehicles;
- Tires;
- Exercise and recreational equipment; or
- Food products.

### **Other types of accident cases**

There are other types of accident cases which can also result in a wrongful death suit. Regardless of the accident way in which the accident occurred or what theory of liability will be pursued, when there is an accident which results in the death of another, there is potential for a wrongful death suit.



## **Distinguishing Wrongful Death and Survival Cases**

We said earlier that there were really two parts to a wrongful death suit: (1) the survival action, and (2) the wrongful death action. There are some important differences between the two which are important to understand.

The survival action covers the damages that were suffered before death. This would include conscious pain and suffering, disability, disfigurement, lost wages and medical expenses. Because these are damages which were incurred before death, the right to sue for the damages belongs to the estate of the deceased person. This means that the damages from the survival claim are an asset of the estate.

Because the damages from the survival portion of the case are an asset of the estate, that means that the damages will be distributed in accordance with the provisions of the deceased person's will. If there was no will, then a provision in the Probate Code known as the statute of intestate descent and distribution controls. This is the statute which controls what happens to a deceased person's assets when there is no will.

In contrast, the wrongful death portion of the claim is brought by the estate for the benefit of the surviving next of kin for their losses

resulting from the death of the decedent. The term “next of kin” has a technical definition which may surprise some, as we will discuss later. Under the provisions of the Illinois Wrongful Death Act, the surviving next of kin are entitled to recover damages for their “pecuniary losses” resulting from the death of the decedent. Under the Wrongful Death Act, pecuniary losses include:

- Loss of society, or the loss of the family relationship
- Loss of Economic Support
- Grief

Because the damages for the wrongful death portion of the case is for the losses that the next of kin suffered, the damages that are generated for that portion of the case are not part of the estate of the decedent. Instead, they are paid directly to the surviving next of kin.

The difference between the survival and wrongful death portions of the case can be significant with regard to the final distribution of any money from the settlement of the case. This is an issue which we will address later.

## **Importance of Medical Proof**

One key element in every wrongful death case is medical proof of the death and injuries. By that, I am not talking about showing that someone is actually dead—there is never any controversy about that.

However, in some cases, there is controversy about whether the death was caused by the accident. One of the things that a plaintiff in a wrongful death suit must prove is that the death was caused by the accident. If there is no proof that the death was caused by the accident, the defendants do not have to pay any damages for death, no matter how serious they are. This is a common issue in medical malpractice suits, nursing home abuse and neglect cases, and any other case where there is a lengthy delay between the time of the accident and the death.

To help establish the needed proof, we review medical records to find evidence that links the cause of death back to the initial accident. We identify the doctors who are needed come to court to testify about the cause of death and supply the needed link between the accident and the ultimate cause of death. Where there are no readily identifiable doctors, we retain the services of highly-qualified experts to review medical records and other materials to determine the cause of the death.

Issues of medical proof can be important in the survival portion of a wrongful death case also. Damages in a survival action can be recovered only for conscious pain and suffering prior to death. In some cases, the medical issue of whether death was instantaneous or whether the deceased could perceive pain may be crucial in determining whether or not there will be compensation under the survival aspect of the case. Where this is an issue, we not only review the medical records for forensic evidence of conscious pain and suffering, but also locate witnesses who can testify as to the appearance and actions of the deceased in their last moments before passing away.

Medical proof is an important part of every wrongful death case and cannot be left to chance.



## **Who Gets to File a Wrongful Death Case**

A wrongful death case can only be filed when there is someone who has legal authority to file suit on behalf of the estate of the deceased person. That “someone” is normally (but does not have to be) a relative, but does not have to even be an actual living “person”—it can be a bank or a trust company, for example.

Where there is a will, the will designates one or more persons as the executor of the estate. The executor would be the one(s) with the legal authority to act for the estate. When there is no will, then someone must be designated to assume the same role that the executor has where there is a will. That person is referred to as the Administrator of the Estate, and depending on how they receive the appointment, they are called the “Independent Administrator” or the “Special Administrator”. For the purposes of the wrongful death case, there is no real difference between an Independent Administrator and a Special Administrator; it is just a matter of a difference in how they are appointed.

In theory, more than one person can have serve as the executor or administrator. In practice, it doesn't work very well. In our practice we try to encourage the appointment of a single executor administrator because it promotes efficient decision-making.

The executor or administrator has the legal authority to make decisions for the estate, including:

- Whether to file a lawsuit or not;
- Who to file the lawsuit against; and
- Whether to settle the case or not.

Going hand-in-hand with the powers that they receive over the wrongful death suit, the executor or administrator also has some responsibilities:

- Responding to pre-trial discovery requests from the defense lawyers;
- Representing the interests of all of the beneficiaries of the suit fairly;
- Participating in settlement negotiations;
- Attending the trial and other necessary court hearings;
- Keeping beneficiaries advised of the progress of the case and settlement negotiations;
- Making decisions regarding prosecution and settlement of the case which are in the best interests of all of the beneficiaries of the estate;
- Presenting a proposed settlement agreement and distribution order to the judge for approval;

- Distributing the proceeds of the settlement in accordance with the court order;
- Filing proof with the court that the money was distributed to the beneficiaries of the suit in accordance with the court order.

You will notice a few things that the executor or administrator cannot do:

- Manipulate the lawsuit to benefit themselves or other beneficiaries of the lawsuit;
- Decide who receives what compensation from the lawsuit; and
- Subject to a few exceptions, arrange for themselves to be paid for serving as the executor or administrator.

The bottom line on who files that lawsuit is this: there needs to be one person in charge of the lawsuit who has the power to make decisions regarding the lawsuit, and that person cannot manipulate the process to his/her benefit or to the detriment of any of the beneficiaries of the suit.



## **Who is a Beneficiary of a Wrongful Death Case**

Those who are left behind after a wrongful death accident have a very natural concern about who will be receiving the money which will be paid as part of a settlement or judgment in a wrongful death suit. To some extent, that will depend on whether there is a will or not and whether we are talking about the wrongful death or survival portions of the case.

The money from the settlement which is allocated to the survival portion is an asset of the estate because it compensates the decedent for what he/she experienced prior to death. That means that where there is a will, the money must be distributed in accordance with the will. If there is no will, then the statute of intestate descent and distribution determines where the money will be distributed.

Under the Wrongful Death Act, the wrongful death portion of the case is brought by the estate for the benefit of the surviving next of kin. The term “next of kin” has a very specific meaning, and is narrower than many people would naturally believe. The term “next of kin” is determined by a provision in the Illinois Probate Act called the statute of intestate descent and distribution, and under that statute, the “next of kin” depends on who survives the death:

- If there is a spouse and/or child surviving, then the spouse and/or children are the next of kin;
- If there is no child or spouse, but there are parents and/or siblings, then the parents and/or siblings are the next of kin;
- Where there are no parents, children, siblings, or spouse, then other relatives may be deemed “next of kin,” as set forth in the statute.

It is important to note that once a survivor is determined to be “next of kin,” other relatives who are at the next level do not get any right to recover, no matter how severe their losses are due to the death of decedent. For example, if a young man is killed in a car accident and leaves behind his mother and a child, the child is considered the next of kin under the Wrongful Death Act. His mother would not be considered “next of kin” under the Wrongful Death Act, and she would not be entitled to recover damages under the Wrongful Death Act for the death of her son.

The rule that limits the recovery to the “next of kin” often leaves survivors of wrongful death accidents confused and angry. This is especially true where there are parents who lose adult children and may be very dependent on them for assistance and companionship. Unfortunately, the application of the term “next of kin” in the Wrongful Death Act is very mechanical and sometimes yields results that many would consider unjust.

## **Distribution of Settlement Proceeds in a Wrongful Death Case**

Because no one plans to get into an accident which kills them, no one makes plans for distributing the proceeds of a survival claim from a wrongful death lawsuit. This can result in some unhappy results. For example:

- A parent of adult children has a will and makes numerous specific bequests to each of her children and then specifies that the residue of her estate (which she expected would be very small) will go the local animal shelter. Even if the survival damages are very large, the animal shelter would get the proceeds of the survival portion of the case;
- A woman lives with her long-term boyfriend, and does not have a will. She has an adult son from whom she is estranged and has not spoken to in years. Illinois does not recognize “common-law” marriages, and there is no provision in the statute of intestate descent and distribution to address long-term, non-marital relationships. This means that her estranged son would get the money from the survival, to the exclusion of the long-term boyfriend. The long-term boyfriend, because he is not next of kin under the statute, also does not get anything from the wrongful death portion of the case.

However, in most cases, it is very clear who the beneficiaries of the suit will be, and there are not any strange results like those described above. Cases are resolved either by way of settlement or by verdict, and the mechanism of how the case is resolved is important in determining how the money from the case will be allocated between the survivors.

### **Cases Resolved by Verdict**

In civil trials, the jury is considered the finder of fact, and they get to resolve any factual issues in the case, including whether damages were suffered, and if so, in what amount. Therefore, when a case goes to trial and reaches a verdict, the jury is asked to make monetary awards for the survival and wrongful death aspects of the case separately.

If the jury awards damages on the survival aspect of the case, then that money goes to the estate and is distributed as an asset of the estate. This means that where there is a will, the terms of the will must be followed. Where there is no will, then the money is distributed in the manner determined by the statute of intestate descent and distribution.

If the jury awards damages on the wrongful death action, they award a single sum of money for the wrongful death portion of the case. After the case is over, then the judge makes a determination of how the money from the wrongful death portion of the case will be allocated between the surviving next of kin. This is known as a dependency hearing. The key considerations in this aspect of the case is the nature



of the family relationship and the extent to which there was economic dependency by the survivor upon the deceased.

One important aspect to know about bringing cases to trial is that the jury will also be asked to assess any contributory negligence on the part of the surviving next of kin. For example, if a husband was driving a car when his wife was killed in a car accident, part of the defense may be to blame the husband for the accident. The jury will be asked to assess the degree of blame to the husband, and if the jury finds him over 50% at fault, then he will not be able to recover anything from the lawsuit, and the defendant will not have to pay the damages that would have otherwise been paid to the husband. However, if the jury finds that he has some amount of contributory negligence, but 50% or less, then his recoverable damages are reduced by that percentage, but the total amount payable by the defendant will not decrease.

That is a lot to swallow, so an example may be helpful:

The husband is driving, with his wife a front seat passenger when the defendant makes a left hand turn in front of him. The wife dies, leaving behind the husband and their children. The defendant files an affirmative defense claiming that the husband was contributorily negligent in causing the accident. The case goes to trial, and the jury assesses damages for the wrongful death portion of the case as being \$100,000. At the dependency hearing, the judge determines that the

husband's percentage of dependency was 40%. If there was no issue of contributory negligence, then his portion of the damages from the wrongful death claim would be \$40,000. If the jury found him 55% at fault, he would not recover anything and the defendant would only have to pay \$60,000 in damages on the wrongful death portion of the case. On the other hand, if the jury found him only 25% contributorily negligent, then he would only recover \$30,000 from the wrongful death portion of the case. However, the defendant would still have to pay \$100,000 in damages on the wrongful death portion of the case. The extra \$10,000 would go to his children.

Once there is a court order determining how much each beneficiary will receive, the court will require the executor or administrator of the estate to show proof that the money was distributed in the manner ordered by the court. Once this occurs, then the case is over.

### **Case resolved by settlement**

When a settlement is reached in a wrongful death case, the case is normally settled for a single gross amount without any allocation between the wrongful death and the survival action or between the survivors. From the perspective of the defendant, it does not matter to them what happens with the money: they want a release from liability and a dismissal from the lawsuit.

Any settlement of a wrongful death action requires court approval. The court looks to see whether the settlement is fair and reasonable and in the best interests of the beneficiaries. As a practical matter, virtually all settlements agreed to by the parties are approved by the court. Once the court approves the settlement, then defendant will be dismissed from the case.

Ideally, the beneficiaries to the case will be able to agree on how the proceeds of the settlement will be divided. Where that is the case, the court will enter an order for the proceeds to be distributed in accordance with the agreement.

If the beneficiaries are unable to agree on how the proceeds should be divided, then the court conducts a hearing to determine how the money should be allocated between wrongful death and survival portions of the case. At the same time, if there is money to be allocated to the wrongful death portion of the case, then the court will make a determination as to the degree of dependency which will determine how the surviving next of kin will share in the proceeds of the wrongful death portion of the case.

If a hearing is necessary, it is a contested evidentiary hearing. Because the beneficiaries to the suit have conflicting interests, each should hire their own lawyer to represent them. The lawyer who represented the estate cannot represent any members of the estate against one another.

Once the court enters an order as to how the money will be divided, whether as a result of an agreement or a contested hearing, then the executor or administrator is responsible for distributing the money in accordance with the court order. They then have to show proof to the court that the money was distributed as ordered. That concludes the case.

## Fractured Families

There are some families where everyone does not get along or in some cases, even trust one another. Unfortunately, both the accident which caused the wrongful death and the prospect of money coming from a lawsuit sometimes not only brings the underlying family tensions out in the open, or even cause the problems in the first place. This is not to cast aspersions on families where this is the case. It happens in many different situations: divorced parents who lose a child; siblings who never got along; kids who are estranged from their parents; a spouse and her step-children.

Where this happens, one of the beneficiaries may have a legitimate concern, based on their personal history with the executor or administrator, that they do not trust them to treat them fairly. There are a few points in response to this. First, the executor has a legal obligation to treat all of the beneficiaries fairly. Second, if there is not a consent among the beneficiaries as to an allocation of the funds between the wrongful death and survival portions of the case and as to the division of the wrongful death proceeds, then there must be a court hearing where all sides can present testimony and evidence concerning the proper distribution of the proceeds of the settlement.

However, if there is still reason for a beneficiary to believe that their interests will not be adequately protected during the lawsuit, they can

file a petition to intervene in the lawsuit. In the petition, they will need to spell out why they believe that the executor or administrator will not adequately protect their interests and ask for a right to intervene in the lawsuit which would give them the right to notice of all proceedings and to participate directly in the lawsuit. As a general rule, we do not encourage people to file intervening petitions because doing so lets the insurance company know that there is a damaged family relationship, and this may give them incentive to continue to fight the lawsuit, knowing that they may have a chance to present evidence of the difficult family relationship to the jury which can in turn drive the value of the case downwards.

## Defenses in Wrongful Death Case

Wrongful death cases have the potential to result in a judgment of thousands, if not millions, of dollars against the defendant. Because of this, you can be certain that the insurance company will select skilled counsel for the defendant who will thoroughly investigate the case and assert any defenses that may apply to the wrongful death suit. The defenses generally will address issues of liability and damages.

Some of the defenses you might expect to see on the liability portion of the case include:

- Contributory negligence of the decedent
- Contributory negligence of the beneficiary
- Settlement prior to death
- Exclusive remedy of Worker's Compensation Act
- Statute of limitations
- Any defense to the underlying case

Some of the defenses you might expect to see on the damages portion of the case include:

- No evidence of medical causation

- No evidence of conscious pain and suffering
- Lack of certainty as to economic damages
- Poor quality relationship between deceased and beneficiary



## **Importance of Insurance in Wrongful Death Cases**

As we discussed earlier, wrongful death cases are a particular type of personal injury case. They may have an emotional element that is not present in other personal injury cases where the injured party survived the accident, but in the end, the survivors of the wrongful death accident are seeking to obtain compensation for the loss of their loved one. There are often other goals: to change how things are done, to obtain recognition of the wrongfulness of the conduct, to hold others accountable, but in the end, the only thing that a wrongful death suit can do is provide compensation for the survivors.

In order to obtain compensation for the surviving next of kin, there has to be a means of paying that compensation. In almost all cases, the source of that compensation will be insurance held by the responsible parties. Sometimes, the responsible party is a large, solvent entity with the resources to pay compensation, but in virtually all cases the primary source of compensation is insurance, and there are times when the amount of compensation that can be obtained is the limit of the insurance coverage. Unfortunately, there are cases where the amount of the insurance coverage is very low. For example, the state minimum for automobile liability insurance is \$20,000. If there is a car accident with a driver who carries the state minimum of insurance,

that may be all of the compensation that is available, no matter how great the losses are.

The reason that the insurance policy limits may cap the amount of compensation that can be recovered is that most people or businesses simply do not have the assets to help fund a settlement or pay a judgment after the case goes to trial. Before a judgment is entered after the end of a trial, a person cannot be forced to help fund a settlement. After a judgment is obtained following a trial, if the amount of the judgment exceeds their insurance coverage, then you can attempt to force them to hand over assets in a collection proceeding. When this happens, the likely response from the defendant is to declare bankruptcy. Declaring bankruptcy automatically stops any collection efforts, and any further payment on the judgment will have to be approved by the bankruptcy court. The odds of recovering any significant portion of the judgment after a bankruptcy are slim indeed.

One thing that we do as experienced wrongful death lawyers is to conduct a thorough investigation to identify any potentially liable persons or entities and any potentially available insurance coverage to make sure that the families of the deceased are able to obtain the full measure of compensation due to them.

It is also important to understand that insurance does not cover all wrongful death cases. Insurance is intended to cover people for accidental injuries. This means that insurance does not cover intentional acts by the person holding the insurance policy. The reasoning behind

this is that having insurance coverage for intentional acts would allow people to settle any dispute they wanted with their fists without any financial consequences. This means that when someone dies as a result of an intentional or criminal act, there may be no insurance coverage available. As experienced personal injury lawyers, one thing that we do when faced with the possibility of there being no insurance coverage is analyze the coverage issue very closely before deciding whether to proceed with the case or not.

You should also understand that the intentional acts exclusion in insurance policies only applies to the person committing the intentional act and that there may be another person or theory available which results in insurance coverage. For example, we represented a boy who was injured when he was hit with a stone that another boy shot at him with a wrist rocket slingshot. There was no coverage for the boy who shot the stone, but we were able to recover through his parent's homeowner's insurance coverage based on their negligence in providing him with the slingshot and failing to supervise him. Experienced personal injury lawyers bring that kind of expertise to the table when faced with a difficult issue that may result in a loss of insurance coverage.



## **What Does a Lawyer Do For You in a Wrongful Death Case**

As a starting point, you must hire a lawyer to file a valid wrongful death suit. Illinois court rules do not permit a person who is not a licensed attorney to file a lawsuit on behalf of the estate of a deceased person. Any lawsuit filed on behalf of the estate of a deceased person by a person who is not a licensed attorney is considered a nullity. In fact, there was a recent decision issued by the Illinois Appellate Court where a wrongful death lawsuit was filed by a lawyer on behalf of the estate of his mother. The lawyer had let his registration lapse, and the trial court dismissed the lawsuit as a nullity. The Appellate Court ruled that the trial court properly dismissed the lawsuit as a nullity because even though the person who filed the lawsuit was an attorney, he was not licensed at the time the suit was filed.

Besides just filing the lawsuit, experienced wrongful death lawyers do the following things:

- Investigate the accident, including:
  - Obtain police reports
  - Obtain witness statements
  - Obtain photographs of the places, persons, or objects involved

- ▶ Obtain documentation to support survival and wrongful death claim damages
- ▶ Identify witnesses to support survival and wrongful death claim damages
- File suit and serve the defendants with suit papers
- Files responses to motions to transfer venue
- Analyzes and responds to affirmative defenses
- Attends multiple status and case management conferences
- Prepares and answers written discovery
- Files motions to compel the defendant to answer written discovery
- Presents the plaintiff for deposition
- Takes multiple depositions
- Meets with witnesses
- Analyzes insurance coverage issues
- Responds to pre-trial motions to dismiss and for summary judgment
- Obtains and analyzes medical records
- Doctor depositions
- Analyzes case for settlement potential
- Engages in settlement negotiations and/or mediation

- Selects and hires well-qualified liability, medical, and/or damages experts
- Identifies and discloses trial witnesses for all aspects of trial
- Presents experts for deposition
- Reviews defendant trial witness disclosures
- Takes depositions of defendant expert witnesses
- Selects and prepares compelling trial exhibits
- Conducts pretrial focus groups
- Prepares all cooperative witnesses for testifying
- Prepares for questioning all other witnesses
- Prepares pretrial evidentiary motions and researches anticipated defense motions
- Issues notices to appear and subpoenas for trial witnesses
- Prepares jury instructions
- Prepares questions for jury selection
- Prepares opening statements and closing and rebuttal arguments
- Argues pretrial evidentiary motions
- Conducts jury selection
- Gives opening statement

- Puts on case in chief
- Responds to defense case in chief
- Offers rebuttal evidence
- Participates in a jury instruction conference
- Gives closing argument and rebuttal argument
- Prepares judgment order based on jury verdict
- Prepares and/or responds to post-trial motions
- Handles appeals to Appellate Court and/or Illinois Supreme Court, if needed
- Enforces judgment
- Disputes questionable claimed liens
- Verifies the correct amount of liens
- Disburses money to client, beneficiaries, and lien holders as required
- Provides full accounting of all money from verdict or settlement to the client



## A Look at Lawyer Advertising

As someone who practices exclusively in the field of plaintiff's personal injury law, there is little that bothers me more than lawyer advertising on TV. It is not just that these lawyers are advertising, but how they are doing it. And how they are doing it has enormous adverse effects on the profession that I love and on the people that they supposedly want to help—the victims of someone else's wrongful conduct.

Most TV lawyer advertising looks and sounds pretty much the same: there is a lawyer standing in front of a bookcase filled with law books or sitting at his desk telling them who he is, that he is aggressive, that he fights for injured people against insurance companies, that if you have been hurt in any kind of accident, call him right away and he will get you a settlement. The subtext of the ad is that there is quick and easy money to be had if you call him.

Here are some things that you should know about lawyer advertising on TV:

- Except for in the fields of patent law and admiralty law, Illinois does not recognize any field of legal specialty, so anyone can claim to specialize in personal injury accident cases. The fact that a lawyer says that is what he does on TV does not mean that he really knows how to work a case

up properly to present it to a jury if need be and to truly maximize the client's recovery at the end of the case.

- The lawyers who are advertising on TV are often not the ones who actually handle your case. One of the little known facts of the legal profession is that cases are sometimes referred onto another lawyer to handle, and the referring lawyer will receive a percentage of the fee from the lawyer who actually handles the case. Sometimes the referral fee will be as high as 50%! It is a great way for a lawyer to make a lot of money with very little work. However, it means that the lawyer you selected—the one making the promises on TV—will almost certainly not be doing any of the work on your case. There are many law firms outside of Illinois that advertise for cases inside Illinois. The chances that those law firms will have actual day-to-day involvement in your case are slim indeed.
- Many of the lawyers who advertise on TV have what is known in the legal business as a “volume practice”—one where there firm is handling hundreds of smaller cases all at once, with much of the work being done by paralegals or inexperienced lawyers. A volume practice is one which is not built to handle complex, serious cases properly. Rather, it is one where the emphasis is on moving cases in and out the door as quickly as possible, regardless of results. Because there is little or no emphasis on quality, clients suffer.

- Be wary of lawyers who make promises about how quickly your case will be resolved. A lawyer who promises that your case will be settled in 30 days is one who is not willing to do the work that is needed to get a proper result. A promise like that screams out “I will not work hard! I will not do things right! I will not go to court if needed! Settle! Settle! Settle!” That is not a formula for a good result, especially in a wrongful death case.
- Everyone knows who the lawyers are who are shouting on TV—insurance companies and jurors. Insurance companies know that few TV advertisers are likely to actually work the case up properly and go to trial if need be, and will feel more confident giving that lawyer’s clients a lowball offer, knowing that the lawyer is likely to push the client to take a sub-par settlement offer. Jurors know who these people are also—after all, they watch TV, too—and the “fast cash” message from those lawyers angers people. If you show up to court with one of those lawyers, you are behind from right at the starting gate—the jury does not trust your lawyer and thinks that you are probably in cahoots with him, trying to scam some insurance company. That is a tough deficit to make up.

Not every lawyer who advertises on TV is awful, but the quality of lawyer advertising on TV is pretty low and does not provide people who are hurt in work accidents with a very reliable guide as to who to hire. If you are considering hiring a lawyer who advertises on TV, you should ask a lot of questions about how your case is going to be handled before agreeing to let that lawyer represent you.

## Hiring the Right Lawyer

Most often, the decision of hiring a personal injury lawyer is made during the stressful aftermath of an accident. In large part because of this stress, people often rush into this decision so that they have two big items off their plates: 1) they have a lawyer; and 2) their lawyer will deal with the insurance company.

Unfortunately, this haste can lead to a bad decision that might have negative consequences. For starters, you need to collect your thoughts and choose your lawyer after carefully considering whether you will pursue a case or not. One of the biggest mistakes people make in choosing a personal injury lawyer is choosing one that does not have the suitable background for handling a serious personal injury case or one who does not have the necessary commitment to handling a serious case correctly.

Not all lawyers are the same. Many lawyers focus in certain areas of law. Be sure that the lawyer you choose focuses in the area of law in which your case fits. If you were injured in an automobile accident, you would need to find an experienced personal injury attorney, for example.

I am not saying that only lawyers who focus on plaintiff's personal injury work can pursue your claim correctly, but I am saying that the

odds of getting a good result are better with an attorney who specializes in plaintiff's personal injury work. For example, I do not handle divorces, bankruptcies, DUI cases, real estate closings, or write wills. That doesn't mean that I couldn't competently handle one or all of the above. However, it does mean that if you are getting a divorce, hiring a lawyer who specializes in divorce cases and has experience in doing so will probably net you a better result in a more efficient manner, as he or she will be more familiar with that area of law.

Simply put, lawyers who focus on other matters and rarely handle a personal injury case just are not going to be on top of the current legal and medical issues that will be important to your case. The law that governs personal injury cases changes all the time, and if your lawyer is not on top of the latest developments, this puts him at a disadvantage compared to the insurance company's lawyers, who are likely to be on top of these developments. Also, many lawyers who handle solely personal injury cases will frequently come into a case with a fairly sophisticated understanding of the common medical issues in the case. This does not mean they are medical experts or doctors by any stretch. But, just as a lawyer who handles mostly real estate closing will likely have a good understanding of real estate law, the real estate market and its intricacies, so too will personal injury lawyer have a good understanding of the relevant legal and medical issues involved.

Another no-no in the hiring process is choosing the lawyer who does not have the commitment to handling his or her cases the right way. This is a tough one, as there are not a lot of good ways to spot this

type of lawyer at first glance. However, the biggest give-away will be an emphasis on speed and volume rather than quality and on settling matters out of court rather than handling your case individually and correctly right from the get-go so as to maximize your recovery. These high-speed, high-volume lawyers are those who tend to give my profession a bad name. It is the quick-and-easy buck approach, and honestly, the only ones who are well-served by this approach are the insurance companies who end up getting away with paying short money, and the lawyer who makes a buck for selling his client short.

Yet, despite these warnings and although lawyers have a poor public image, you should know that not all lawyers are the same. There are good attorneys out there who have your best interests at heart. In making your selection, do not base your decision off the assumption that all lawyers are the same. If you do, you might cheat yourself out of getting the representation you truly deserve.

My law office handles personal injury cases; that's it. We are selective in the cases we take on so that we can provide each of our clients the necessary work to obtain the maximum recovery. I could learn other areas of the law and dabble in them as well, but I don't. I am 100% committed to be on top of the current personal injury law only.

If hiring a lawyer seems like an overwhelming decision, here are a few questions that you may want to ask potential lawyers to get you started in your process.

## **Which professional organizations do you belong to?**

There are two bar associations that most (but not all) reputable personal injury lawyers in Illinois belong to: the Illinois Trial Lawyers Association (ITLA) and the American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA). These are organizations which are devoted to protecting the rights of injured people and their families and to raising the quality of practice for lawyers who represent them. Not belonging to at least one, and preferably both, suggests to me that the lawyer is not serious about handling those kinds of cases. I belong to both, and belong to specialty groups within both organizations.

## **How did you satisfy your continuing legal education requirement?**

Illinois now has a mandatory continuing legal education requirement. Every 2 years, every lawyer in Illinois must complete 20 hours of continuing legal education, including 4 hours of professional responsibility credits. When the 20 hours must be completed depends on the first letter of the lawyer's last name. If the lawyer completed the requirement by taking classes on topics other than personal injury work and/or civil trial practice, the odds are good that he or she is not spending much of his or her practice handling the kind of matter on which you need help. In the last few years, I attended a 2 day seminar on trucking accidents, a two day seminar on representing people with brain injuries, a two day seminar on presenting cases to juries, a one day and a two day seminar on nursing home abuse and neglect



cases, and a four day college on effective presentation of damages to juries. The trunk of my car is filled with CD's from continuing legal education speeches and seminars on personal injury law. I am always learning about this area of the law so that I can serve my clients better.

### **What else do you do besides personal injury work?**

I know that there are a good number of very good lawyers who are true general practitioners who do a little of everything. I also think that the odds of finding a general practice lawyer who will capably handle your personal injury case are slim, and the more things that a lawyer does that are unrelated to personal injury work, the slimmer those odds become.

### **What percentage of your work is billable work?**

“Billable work” refers to work that a lawyer does where they submit a bill for a flat fee or an hourly rate to the client with the expectation of prompt payment. Virtually all personal injury work is done on a contingency basis. The more work that is billable, the less work is in the area of personal injury law. Not only is this concept an eye-opener in terms of evaluating the lawyer’s practice, but also it gives you an idea of where your case may sit on a lawyer’s list of priorities. A personal injury case may not result in payment for years, where work done on a billable case may result in payment in a few weeks. Lawyers are like everyone else and need to pay bills and put food on the table, and there will be times when a lawyer has a choice of what to do in a given day, and will choose the billable work because of the faster payment on it.

The more work that a lawyer does that is billable, the more that the business model for his practice will be built around the regular cash flow that billable work generates. This makes it hard for the lawyer to make your case a priority. I have never filled out a billable hour sheet in my career. My clients will never have to compete with billable work for my time and attention.

I recognize in some more rural areas of the state, nearly all of the lawyers nearby would fit the mold of a general practitioner. Where that is the case, there are some who have a better background for handling personal injury and wrongful death cases. The other option is to go outside the geographical area to hire a lawyer who does focus on personal injury and wrongful death cases. It does not matter where you are or where your case must be filed. If you have a serious personal injury case, lawyers will get in their car and drive where they have to go. For example, while my office is in Cook County, I have filed cases and/or attended court hearings in many Illinois counties, including: Lake, DuPage, Kane, Kankakee, Iroquois, Ford, Grundy, LaSalle, Champaign, Macon, Peoria, McLean, Winnebago, Ogle, Putnam, Jo Daviess, Carroll, Jackson, Madison, Williamson, Rock Island, DeKalb, Jasper, Schuyler, Macoupin, and Sangamon Counties. You do not have to limit your hiring field to your geographical area.

## Cases That We Cannot Accept

As I said earlier, our firm makes a serious commitment of time, energy, and resources to each client we decide to represent. Because of the extent of our commitment to our clients, we accept the cases of only about 5% of the people who contact us each month about representing them. Since we take on so few clients each month, we have a set of criteria which we use to help us determine which cases we are NOT going to take:

- **If you did not have a solid relationship with the person who died.** One potential asked me to represent him in a wrongful death suit when he only learned of his mother's death a year after it occurred. Cases like that indicate that the person is not seeking compensation for a real loss, but trying to capitalize on a tragedy which didn't really affect them.
- **If you have already hired a lawyer**—very rarely will we consider taking on a case which another lawyer has worked on, and almost never after a lawsuit has been filed. Put simply, we prefer to handle cases start to finish. The strategic decisions made by your lawyer may not have been the ones which we would have made, and we want to control the prosecution of the case as much as possible.

- **If you have a short statute of limitations date**—in general, you have 2 years from the date of an accident in which to file a lawsuit, but that can be as short as one year for cases involving a municipality or other unit of local government. In order for us to be sure to name the proper persons or entities as defendants in your case, we need time to properly investigate your case. If you have less than 60 days before the statute of limitations expires, we will probably decide to not take your case, even though there is still time remaining.

Because the emphasis of my practice is on handling a lower number of cases and handling things the right way, we simply cannot take on cases that have these kinds of issues. I have found that cases like these simply demand too much of my time and attention, at the expense of other clients whose cases deserve my time and attention as well. While we will sometimes consider cases that have one or more of these problems, the chances are better that you will be told that we cannot help you and that you should find another lawyer to help you.

## About Our Law Firm

We strongly believe that the law should protect people when they are vulnerable and to hold irresponsible people and corporations accountable for the harm they cause. People are rarely more vulnerable than when they are the victim of accidental injury—or worse, have lost a family member in a preventable accident. Accidental injuries and death cause enormous personal and economic turmoil from lost time from work and unplanned medical expenses. In this time of vulnerability, many insurers take advantage of the natural instinct that people have to try to reasonably resolve their disputes. Insurers will attempt to gather information that will undermine the case or will move as quickly as possible to resolve the case with a low-ball offer. Hiring well-qualified attorneys can remove a source of stress from your life during this difficult time and allow you to focus on making a physical and economic recovery.

We cannot help every client with a potential case. The focus of our practice is on complex, serious personal injury and wrongful death litigation. This is all that we do—we do not do divorces, bankruptcies, DUI cases, or anything except serious plaintiff's personal injury litigation. While a significant portion of our practice involves motor vehicle accidents, we also handle slip-and-fall cases, nursing home abuse and neglect cases, medical malpractice cases, construction accident cases, dog bite cases, defective product cases, and other serious

personal injury litigation. We do not accept as clients everyone who has been injured in an accident. If we do not believe that you would come out further ahead for having hired us, we will not take your case. Each case we take requires a significant investment of time and money, and the commitment that we make to the clients take on limits the number of cases we accept. Each month, we accept only approximately 5% of the potential clients who contact us about representation.

We believe in a team approach—that the lawyer and client should work together to achieve the best possible result for the client. It is your case, your life, your decision what to do with a case. You must make decisions about whether to accept a settlement offer based on your goals from the litigation. Some clients want top dollar on their case; others want the matter put behind them as quickly as possible. Those decisions are yours; we cannot dictate them for you. All we can do is provide you with the information you need to make good decisions. To do this, you need to receive regular information and feedback about what is happening with your case and its significance. This means delivering both the good news and the bad news. You will receive our honest advice about what you should do, but in the end, you have to make a decision you can live with. Our job is to give you the information need to make your decision, and if the case is not settled, to put it into the best position to present the case to a judge and jury.

## What Our Former Clients Say...

Here is what some of our clients have had to say about working with us:

*When we first contacted him, we really weren't sure on how to proceed with the case. I was on the internet, and Barry's information popped up. I called, and Barry listened to what I had to say.*

*Our son was injured, he was our first priority, and Barry also made him his first priority, too. That was just awesome for us.*

*Barry is easy to deal with, easy-going, and down to earth, just like a next-door neighbor. He is very easy to talk to, not intimidating at all, and definitely does his research. Barry kept us informed all the time. He'd explain things to us in just plain talk, not attorney talk. We entirely understood what was going on with our case.*

*Barry gives lawyers a good name. We've dealt with lawyers who see you as a number and then with Barry who sees you as a person. He's the kind of lawyer you want to deal with.*

- LINDA GRIMES

*Barry explained the strengths and weaknesses of my case in a manner that was easy to understand. Barry is patient, empathetic, and considerate. Barry took the time to make me feel that my case and my feelings were important to him. He's not your typical attorney. I was pleased with the result, and I'd absolutely recommend Barry.*

- PAM T.



*Barry had quite an understanding of what was going on, what the next steps would be. He was very clear in explaining the strengths and weaknesses of my case and helped me to understand the legal aspects. I felt that my case was as important as the most important case around. When I wanted to talk to Barry, get some feedback from him or anything, he was available. I didn't feel like just another number. Also, his staff was professional and pleasant. I felt that my case moved along as best it could, and I was pleased with the result.*

- LINDA T.



*After my accident, I had been in and out of the hospital. My bills were piling up. I looked for an attorney, and Barry was the first attorney to return my call. He came to my house as I was recovering and went through everything with me. While everyone else I was dealing with seemed to be shuffling paper, Barry actually sat down and was interested in my end of it. He cared about what was going on with me, my life, the troubles I was having. And his staff was pleasant, professional, and organized.*

*He kept me up to date with what was going on with the case, making the process quite a bit easier to deal with than what I expected. I told him what was going on and he took care of everything from the legal end of it. Barry laid it out, don't expect this, don't expect that, but we may be able to do this or that. And, he put it in layman's terms for me that I could understand.*

*I was just hoping to avoid ending up under a ton of bills, but Barry managed to clear a lot of things up, take advantage of a lot of avenues for me that I just didn't know were there. I was very happy with the result and very surprised with how well it turned out.*

- JEROME KELLY

*Working with Barry was easy. I asked a question on the internet, and I got a response from him. It was so easy, it was unreal.*

*Barry explained what was going on with my case. Several times he advised me on the pluses and the minuses of the case, what could and couldn't happen. He knew what was going on, so I was really impressed. He made sure that we were on the same page. The case went quicker than I thought it would. It was like 'wow, it's over, it's settled.' And, I was very pleased with the result.*

*I have already recommended Barry as an attorney and I would again.*

- BRIAN A.



*Barry went over everything thoroughly and explained things to me in layman's language as against attorney's language. I was very happy and comfortable with the way Barry handled everything. Barry was very accommodating. As the case progressed, he always kept me informed on everything that was going on. It all gets started with a loss for someone, and everything worked out very well. I'd naturally recommend Barry to others.*

- DONALD TUFANO

*I very much felt that I could rely on Barry. He answered all my questions and explained the strengths & weaknesses of my case. I understood everything he explained to me. I knew what was going on each step of the way and knew what to expect. I was not in the dark. I would recommend Barry to anyone who needs a lawyer because he made me feel very comfortable.*

- GERRI COX



*Barry is very good at communication. He knows what he is talking about and explains everything extremely well. He laid everything out, and I understood the strengths and weaknesses of my case. Whether I e-mailed or left a voicemail, Barry was always good about getting back to me. I was very comfortable having him take care of my case.*

*His staff was very professional and pleasant. I was very pleased with the result based on what I've learned and what we did.*

- T. KUTZ

*Two or three other lawyers turned down my case but Barry knew it was a strong case and saw potential. Barry gave me a good idea of what to expect and did an excellent job of explaining things. He knew what he was talking about, and I was very comfortable with him handling my case. The case moved along according to how Barry said it would.*

*In the end, I was pleased with the result and would recommend Barry to anyone else in need of an attorney.*

- BILL SHARP

## About Barry G. Doyle



Barry grew up in Evanston, Illinois. He is a 1987 graduate of Evanston Township High School and a 1991 graduate of the University of Michigan in Ann Arbor. He returned to the Chicago area to attend law school at Loyola University of Chicago.

While attending law school, he clerked at some of the most prestigious plaintiff's personal injury law firms in Chicago. While in law school, he was a dean's list student every semester and received academic awards in several classes. He graduated with honors in 1994, after finishing in the top 10% of his law school class. He has been admitted to practice law in Illinois state courts and in federal court for the Northern District of Illinois and the Southern District of Illinois.

Drawing upon his law school experiences and his desire to help injured people and their families in time of need, Barry chose to enter the field of plaintiff's personal injury work. To date, he has tried over 50 cases to verdict in jury trials, bench trials, and binding arbitration hearings and successfully reached settlements in hundreds of other cases. He has not and will not represent insurance companies.

He has spoken and written for several organizations on topics related to motor vehicle accident litigation, including accident reconstruction evidence, wrongful death cases, and insurance bad faith.

Barry is a member of the Chicago Bar Association, the Illinois State Bar Association, the Illinois Trial Lawyers Association, and American Association for Justice. He is a past co-chair of the Tort (Personal Injury) Litigation Committee of the Young Lawyers Section of the Chicago Bar Association and is a former Adjunct Professor at Loyola University of Chicago of Law. Because of his deep interest in the subjects, he is a member of the Nursing Home Litigation Group, the Interstate Trucking Litigation Group and the Traumatic Brain Injury Litigation Group for the American Association for Justice.

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# Losing a Loved One A Family's Guide



## to Illinois Wrongful Death Lawsuits

The sudden loss of a family member in an accident leaves the survivors asking questions that they never considered before. In this important guide for survivors, Chicago personal injury lawyer Barry G. Doyle answers several questions for those who have been left behind:

- What kinds of accident can result in a wrongful death case?
- What sort of damages can be recovered, and by whom, in a wrongful death case?
- Who is in charge of the wrongful death lawsuit, and what responsibilities do they have to the other survivors of the wrongful death accident?
- Why is it important that there is insurance available to compensate the survivors in a wrongful death case?
- Do we have to hire a lawyer? Should we? What kind of qualifications should we be looking for in a lawyer we are thinking about hiring?

Mr. Doyle answers these questions and many others you may not have considered (but should) in clear, simple terms. Families who are dealing with the anger, sorrow, stress and the difficulty of an unexpected death of a loved one owe it to themselves to get this valuable resource to answer their questions about their rights in this difficult time.

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