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## *Let's Win This!*

A Monthly Newsletter - What You Need to Know  
About Personal Injury Law

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November 2018 - Issue 9



It's already November - 2018 is rapidly coming to a close.

As Thanksgiving approaches, here at Stephens Anderson & Cummings we hope that all of you have much to be grateful for.

Sometimes, though, bad things happen to good people. Helping folks deal with difficult times is our calling.

Knowing your options under the law is one of the first steps in coping if tragedy strikes.

When a loved one is killed due to the negligence of others, special rules apply. While it's our wish that you never experience such a loss, there is value in having a basic familiarity with the law as it applies to injuries that result in death.

Damages, in general, is a complicated subject. Wrongful death and survival damages are no exception, so we'll probably spend 3 issues covering them. In this issue, we start with a bit of background.

Remember - anytime you have questions about, well, pretty much anything involving personal injury law, give us a call, shoot us an email, or chat through the website. That's what we're here for.

Thanks for reading -

*John*

## **Damages - Part 3 - Wrongful Death - Part 1**

### **The History of Wrongful Death in Personal Injury Law**

Continuing our series on Damages in Personal Injury Law, we turn to the subject of wrongful death.

When someone dies as a result of another person's wrongful act - as opposed to being injured and surviving - different rules apply. To understand the law of damages as it applies to situations involving death, we need to look back at how the law developed.



### **Common Law and Statutory Causes of Action**

Laws in Texas (and most states) generally have two sources – either the courts, or the legislature. You could add a third one – the Constitution – but the Constitution and its numerous amendments originate in the legislature. They differ from ordinary statutes (laws passed by the legislature) because they require approval by a majority of the people in general elections.

A "cause of action" is the right to bring suit on account of a particular circumstance. The laws creating causes of action in Texas have their origins in both court decisions and statutes passed by the legislature.

If a judge decides that you can sue on account of a given set of facts, when that right has not been allowed before, and an appellate court upholds the judge's decision, then the courts have created what is called a "common law cause of action."

If the legislature passes a statute that gives people the right to sue because of a given set of facts, then we say that the legislature has created a "statutory cause of action."

The term "common law" is also used to refer to the whole history of laws created by court decisions, going back even to before our country was born and up to the present.

### **Which One Wins - the Courts or the Legislature?**

You might wonder: if there is a conflict between the courts and the legislature, who wins?

That is by no means a simple question. For our purposes, though, the last one to speak usually calls the shots.

If the courts say that there is no cause of action for something and then the legislature comes along and passes a law saying that there is, then the right to sue exists and the courts will usually defer.

If a court looks at an existing statute creating a cause of action and says there is something wrong with it (usually that it's unconstitutional), then the cause of action disappears until and unless the legislature speaks again. Since, at least in theory, courts are not supposed to be in the business of passing laws, the legislature often gets the last word.

## So What?

What does all of this have to do with the damages recoverable when a loved one is killed due to the negligence of another?

Back in the 1800s, before there were statutes on the subject, *when a person died, their right to bring a suit died with them.*

In other words, if your negligence killed someone, rather than just injuring them, there was no civil penalty and no remedy for the family of the person killed. (Remember the issue of *Let's Win This!* that answered the question, what is a tort? If you missed it, you can find that issue [here](#).)

That doesn't seem fair, does it?

The legislature agreed. So, it passed some statutes to remedy that injustice.

Fast-forward to today.

There are two different statutory schemes that deal with the situation when someone is killed due to another's negligence:

## ***Wrongful Death & Survival Causes of Action***



Although people generally use the term "wrongful death" to refer to all claims involving death, these are two separate and distinct causes of action: *wrongful death* and *survival*.

Chapter 71 of the Texas Civil Practice & Remedies Code is devoted to wrongful death and survival claims. Before we discuss the damages recoverable in each of them, it's important to get an

understanding of what they are, how they differ, and – importantly – who can bring each cause of action.

***Wrongful Death*** refers to the right to sue because of “an injury that causes an individual’s death” if the injury is due to a “wrongful act, neglect, carelessness, unskillfulness, or default.”

*The wrongful death cause of action is “for the exclusive benefit of the surviving spouse, children, and parents of” the person killed.*

The legislature drew the lines narrowly. Brothers, sisters, aunts, uncles, grandparents, fiancées, or very best friends – none of them have the right to sue for wrongful death.

And what do the surviving spouse, children, and parents of the deceased get to sue for?

*Not* the injuries, pain, suffering, and other harm that *the deceased suffered* before death.

Rather, wrongful death claimants sue for the damages that *they suffered because the person died.*

In other words, wrongful death beneficiaries can recover damages for the *harm done to them by the death* of their loved one – not the injuries to that person.

This distinction will become clearer when we take a look at the specific elements of damages the jury will be asked to evaluate. (Remember our first discussion of elements of damages? You can find it [here](#).)

We’ll pick up there and move on to the **Survival** cause of action after the first of the year, when *Let’s Win This!* continues our Damages Series.

In the meantime, since the next issue won’t come out until December, all of us here at Stephens Anderson & Cummings wish you and yours a

**Very Happy Thanksgiving!**

***Let’s Win This!***

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**Stephens Anderson & Cummings**

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