

ISSUES RELATED TO COMMENCING PLAINTIFFS' WRONGFUL DEATH CASES IN CALIFORNIA

When considering representation and suit as to a client's losses arising from wrongful death in California, there are several initial issues to explore: (1) is your client's relationship to the decedent such that your client has a claim at all; (2) who else has a claim; (3) what damages can be sought by whom; and (4) what are the causes of action to be pleaded in the Complaint?

Wrongful death actions are strictly statutory. Code Civ. Proc. § 377.60. In a wrongful death action, economic and non-economic damages are recoverable. But there is no recovery under this statute for punitive damages, and no recovery for damages that the decedent sustained or incurred before death. Code Civ. Proc. § 377.61.

The decedent's surviving spouse, children, dependent stepchildren (and dependent minors residing in the household for at least six months), and dependent parents can always state a claim for wrongful death. Code Civ. Proc. § 377.60 permits recovery for these categories of relationship in all circumstances, notwithstanding any intestacy laws. If there are none of these heirs, the law of intestate succession governs. Code Civ. Proc. § 377.60(a); and Probate Code § 6402.

Where there are numerous persons with statutory entitlement to a potential recovery for wrongful death, not all of whom you can represent without conflict, consider the alternative of setting up an estate and filing an action in the name of the personal representative as plaintiff. A wrongful death action may be brought by either a statutory claimant or by the personal representative of the decedent. Code Civ. Proc. § 377.60. When proceeds are ultimately obtained, they may be distributed to persons not necessarily sharing in the estate according to the laws of succession. See Estate of Waits (1944) 23 Cal.2d 676, 680. The appropriate distribution of any verdict or settlement among various heirs can be determined either by settlement or by the Court's allocation. Code Civ. Proc. § 377.61.

Having a personal representative as plaintiff can avoid problems – for example, one need not then name, as a defendant, any heirs who do not desire your representation. *Cf.*, Code Civ. Proc. § 382. Bringing the action in the name of the personal representative also eliminates the possible need to consolidate various actions which, in the absence of such a filing, might be separately brought by separately represented relatives.

It is important to consider claims for damages beyond potential statutory recovery for decedent's wrongful death. If there are claims for punitive damages, medical bills, lost earnings, property damage, or other losses incurred by the decedent before death, then decedent's personal representative (or successor in interest) should plead a separate cause of action seeking compensation for such losses. Code Civ. Proc. § 377.30; and Quiroz v. Seventh Ave. Center (2006) 140 Cal.App.4th 1256, 1264.

Prior to 1992 legislation, pursuing such an action required establishing a probate estate in order to have a personal representative appointed. Code Civ. Proc. § 377.32 now permits (where the estate is not the named plaintiff) the filing of a declaration by one or more successors in

interest, setting forth their entitlement to proceed on the decedent's behalf. This declaration should be filed with the Complaint, with a copy of the death certificate attached.

Damages for the decedent's pain and suffering are ordinarily not recoverable at all. See Code Civ. Proc. § 377.34. But such damages are expressly recoverable in a survivor action under the Elder Abuse Act. Quiroz, 140 Cal.App.4th at p. 1265.

A separate distinction determines whether punitive damages can be recoverable in the surviving cause of action. Under Probate Code § 573 and [Code Civ. Proc., § 377.34](#), punitive damage claims can survive the death of the injured party: but, in most situations, that is true only if the decedent survived the accident, however briefly, or if property of the decedent was damaged or lost before death. Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 829. So it is a good idea to allege, affirmatively, that the decedent survived for an interval of time, and/or that he sustained a loss of property before his death. Otherwise, the Complaint may be subject to demurrer for failure to plead a necessary element of the cause of action.

Considering these issues as you decide whether to accept representation will maximize the possibility of success, and help achieve a successful relationship with your clients.