

Surviving Wrongful Death Part II:

Shall it Be Survival or Death?

One can survive everything, nowadays, except death, and live down everything except a good reputation.

Oscar Wilde

By Mark McGrath

From the perspective of a trial attorney, few things spawn greater desperation than a clear liability case that is saddled with questionable medical causation. This disheartening combination of facts can be especially devastating when the negligence of a defendant causes an innocent person to suffer terribly for a period of time, only to perish later of conditions that are, arguably, unrelated to the original injury. Doctors refer to such conditions as comorbidities, which are medically defined as concomitant but unrelated pathological diseases or processes. Whatever its medical definition might be, from the perspective of a defense attorney comorbidity has but one meaning: convenient defense to cases involving clear negligence.

All kidding aside, the North Carolina court of appeals recently provided some much needed clarity for attorneys who confront this scenario in their practice. The case is *Alston v. Britthaven, Inc.*, ____ N.C. App. ____, 628 S.E.2d 824 (2006), and it is required reading for anyone who dabbles in personal injury cases.

In *Alston*, an elderly nursing home resident died after contracting stage IV decubitus ulcers. Plaintiff alleged that the stage IV ulcers (those marked by extensive necrosis and penetration to the underlying bone) were caused by the negligence of the nursing home in failing to take appropriate measures to prevent the development of such wounds, and that over time, the ulcers caused an infection which ultimately claimed the resident's life. Defendant contended that the resident's death was actually the result of his advanced Alzheimer's disease (read, comorbidity), the stage IV ulcers being nothing more than a very painful and very foul smelling coincidence.

At trial, the plaintiff proposed four issues for submission to the jury: (1) was the decedent injured by the negligence of the defendant? (2) if so, what amount is the estate of the decedent entitled to recover from the defendant for those injuries? (3) was the death of the decedent caused by the negligence of the defendant? (4) if so, what amount of damages is the estate of the decedent entitled to recover for the death of the decedent?

Over the objections of the plaintiff, the trial judge refused to submit the first two issues to the jury, and instead submitted only the latter two. Upon these two issues the jury determined that the negligence of the defendant did not cause the death of the nursing home resident. The result? Game over. Months of unspeakable agony out the window.

On appeal, plaintiff argued that there was abundant evidence in the record from which a juror could have concluded that the defendant's negligence caused pre-death personal injuries for which damages could be recovered, even if the negligence of the defendant did not cause the death of the resident. As authority, plaintiff cited the survivorship statute, N.C. Gen. Stat. section 28A-18-1(a). That statute provides in pertinent part that upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person shall survive to and against the personal representative or collector of the estate.

The court of appeals agreed with the plaintiff, and ordered a new trial on his survivorship claim. So what does Alston teach us about complaints that include claims for both wrongful death and pre-death injuries? Simply put, where the pleadings and evidence support a distinct survival claim for pre-death personal injuries, that issue should be submitted to the jury separate and apart from the wrongful death issue.

Several important lessons emerge from the Alston case.

1. Pleading survivorship and wrongful death claims in the same complaint can be tricky business. At a minimum, the two claims should be pled in the alternative and as separate counts. The survival claim should be set out with such glaring clarity that there is no room for a crafty defense attorney to argue that it is really a wrongful death claim in disguise. Something like this should do the trick:

II. SECOND CLAIM FOR RELIEF

(Survival Claim/N.C. Gen. Stat. section 28A-18-1)

2. Be extremely careful in articulating the damages you are seeking in the survivorship claim. Make it exquisitely clear that you are seeking damages for pre-death injuries only (e.g., pain and suffering, pre-death medical expenses), and not wrongful death damages. State explicitly and to the point of monotony that the plaintiff is seeking damages only for those injuries that arose and existed prior to death. Remember, there is no place for society, comfort or kindly offices in a survival claim.

3. As you build your case, be sure to develop evidence that the decedent did, in fact, incur damages prior to death. For example, defendants are fond of arguing that nursing home residents are so sick or demented that they are incapable of experiencing pain and suffering, even when bed sores eat into their tailbones. Be prepared to counter such allegations. At trial, call family members to testify that they witnessed their loved ones suffering. Ask them to describe how their parent, brother or sister exhibited signs of being in great pain before death claimed them. In your expert designation identify wound experts or other medical experts who can testify that even patients with advanced dementia or other comorbidities are able to experience pain and suffering.

4. While it is primarily the responsibility of the estate's legal representative to distribute settlement proceeds, be mindful of the manner in which the proceeds of a survivorship action are distributed. In wrongful death actions, funds obtained by way of judgment or settlement are distributed to the decedent's heirs according to the laws of intestate succession. The proceeds of a survival action,

on the other hand, become general assets of the decedent's estate. Accordingly, where the decedent dies testate, those proceeds must be distributed in accordance with the terms of the decedent's will.

5. Given the disparate manner in which proceeds from survival and wrongful death actions are distributed, be wary of ethical tangles. The beneficiaries under the decedent's will, who stand to gain from a survivorship recovery, may not be the heirs who would stand to gain if the proceeds are from a wrongful death claim. Remain ever cognizant of the fact that the estate is the client for both survival and wrongful death actions, not the potential beneficiaries.

The ruling of the trial court in Alston illustrates in dramatic fashion how meticulous and even paranoid trial attorneys need to be in today's legal climate. In cases where there is an interval of time between the negligently inflicted injury and death, always plead two distinct causes of action, both in the alternative: one for survival, and one for wrongful death. And please be careful. It's dangerous out there.