## Practice Pointer

# Preserving Survival Damages When Your Case Morphs Into a Wrongful Death Action

**By Brien A. Roche and Richard N. Shapiro**

If you've had the experience of a client who died during the course of your handling an injury claim for that client then you know that there can be some tricky issues ahead. If the injury that initially brought the client to you was not the cause of death, then you simply have a survival claim that is governed by Virginia Code §8.01-25.

If, on the other hand, there is an argument to be made that the injury did cause the death then you get into a circumstance that may be impacted by *Centra Health, Inc. v. Mullins*, 277 Va. 59, 670 S.E.2nd 708 (2009).

The facts in *Centra Health* were that the patient was admitted to the hospital for a broken hip. Negligence was alleged on the part of the hospital staff resulting in a urinary tract infection. The date of admission was November 3, 2004. The patient died on November 21, 2004. Suit was filed for wrongful death, along with an alternative survival claim. The administrators contended that no election between claims was required until *after* the jury returned a verdict. The administrators conceded that if the injuries caused the death then they could only recover on the wrongful death claim but that since the defendant contested the issue, the administrators should be entitled to proceed on both claims and have the issue decided by the jury. Plaintiff's doctor testified that it was a failure to recognize and treat an infection that contributed to plaintiff's death. The defendant presented evidence that the death was the result of preexisting conditions.

The Supreme Court held that the trial court properly concluded that there was conflicting evidence as to whether the injury caused the death and properly instructed the jury on *both claims* and told them they could award damages *only under one of the claims*.

The jury therefore is making the election, not counsel. The real question is what happens to the survival damages, in particular the pre-death pain and suffering and the pre-death loss of income if the jury concludes the injury caused the death? Do such damages vanish? The defense would maintain they do, under the final sentence of Virginia Code §8.01-56 which states: "If death resulted from the injury for which the action was originally brought, a motion for judgment and other pleadings shall be amended so as to conform to an action under §8.01-50, and the case proceeded with as if the action had been brought under such section. In such cases, however, there shall be but one recovery for the same injury."

**We say not so fast.** The case law on the issue is not exactly a model of clarity. In *Stevenson v. W.M. Ritter Lumber Co.*, 108 Va. 575 (1908), the Court stated that the Wrongful Death Statute does not affect the right of action for damages existing at common law in favor of a personal representative or a parent to recover for losses between the time of an injury and the resulting death of the person injured. In *Virginia Iron, Coal and Coke Co. v. Odle's Administrator*, 128 Va. 280 (1920) (Abrogated on other grounds by *McDonald v. Hampton Training School for Nurses*, 254 Va. 79, 84 (1997) no recovery was allowed in wrongful death action for pre-death pain and suffering. In *Monroe v. Whitaker*, 207 Va. 1032, (1967) the issue was whether punitive damages were recoverable under the Wrongful Death Act. The Court cites *Virginia Iron* as standing for the proposition that pain, suffering, medical expenses and funeral expenses are not recoverable under the Wrongful Death Act; In *Jappell v. Arlington Health Foundation*, 47 Va. Cir. 419 (Arlington Circuit 1998) in a ruling on a demurrer, the Trial Court ruled that the decedent's pre-death pain and suffering were not recoverable on the basis that when the General Assembly amended the Wrongful Death Act to allow recovery for medical expenses it

did not include pain and suffering and therefore that omission must have been intentional.

What these cases do not squarely address is the fact that no Virginia statute purports to extinguish pre-death survival damages that are not duplicative of the statutory elements of wrongful death damages. Contrary to defense arguments that the provision in §8.01-56 stating "a motion for judgment and other pleadings shall be amended so as to conform to an action under §8.01-50" wholly eradicates pre-death survival damages, "[s]tatutes, however, are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare. Therefore, in all general matters, the law presumes the act did not intend to make any alteration, for, if [the legislative body]... had that design, they would have expressed it in the act." *Millhiser Mfg. Co v. Gallego Mills Co*, 101 Va. 579 (1903); *see also Norfolk & W. Ry. Co v. Va. N Ry. Co*, 110 Va. 631 (1910). The goal of the quoted statutory provision in §8.01-56 was most likely to assure that plaintiffs retained their right of action for wrongful death, rather than any implication that the legislature intended to deny a Plaintiff the *option* to pursue a survival action, or to pursue pre-death survival damages not duplicative of statutory wrongful death damages.

Absent a legislative clarification on pre-death survival damages, there are two scenarios to consider:

1. Instances where there is no dispute that the injury caused the death.
2. Instances where there is a dispute as to whether the injury caused the death.

In either scenario your case may be converted to a wrongful death action, in particular if the underlying action was pending on the date of death since Virginia Code §8.01-56 indicates such an amendment or conversion is mandatory where there is a pending action. If there is no pending action then amendment is not possible. In *El Meswari v. Washington Gas Light Co.*, 785 F.2d 483, 491 (4th Cir. 1986) the federal court stated it could see no reason why the Virginia Supreme Court would not treat a pre-suit claim in this context any differently than a claim with a lawsuit actually pending.

## SCENARIO #1

Whether the action is converted to a wrongful death action or not, the simple fact is there is no reason why you should lose your survival damages consisting of pre-death pain and suffering and pre-death loss of income which in some instances could be substantial. For example, take the case of a significant burn injury where a person survives for a long period of time after the injury and then dies from the injury. There could well be substantial pain and suffering and substantial loss of income over that period of time. In addition, it is conceivable that a plaintiff could have a lifelong loss of income claim based upon being permanently totally disabled. Assuming that claim was fixed and undisputed and then the plaintiff dies, what happens to that claim? The defense takes the position that those pre-death damage claims die with the plaintiff.

There are several arguments to be made to the contrary:

1. In *McKinney v. Virginia Surgical Associates*, 284 Va. 455 (2012) the Court dealt with a statute of limitations issue wherein the underlying cause of action was for medical malpractice. The Court considered the distinction between "cause of action" and "right of action" and noted that the cause of action was medical malpractice resulting in injury to the decedent. From that cause of action the Court said there were two rights of action that arose, one of which was the action for the personal injury during the lifetime of the decedent which survived and then the wrongful death action. If in fact those rights of action are subparts of the overall cause of action and if the cause of action does not terminate pursuant to Virginia Code §8.01-229B, then it would seem that all of the underlying damages from either right of action are preserved. That is, the survival damages are preserved and the wrongful death damages are preserved.
2. The concern in the case law is to assure that the plaintiff does not recover duplicate damages. The potential for such duplication of damages seems to be minimal in these cases and certainly any possibility of duplication can be clearly eliminated in the crafting of proper jury instructions. To the extent there is any potential for duplication of damages, it seems to exist only in the realm of the lost income claim where there may be potential under the survival claim for a permanent total loss of income claim that would then be potentially duplicative of the income claim asserted in favor of a beneficiary in the wrongful death action. Even in that circumstance, however there is a compelling argument to be made that there really is no duplication because the beneficiaries are different (the heirs-at-law who typically are the heirs taking through intestacy or the heirs per the will under the survival claim versus the statutory beneficiaries under the wrongful death claim). There are different measurements of loss (in the survival claim gross income is to be considered whereas in the wrongful death action the income to be

considered may have personal consumption deducted) and there are different considerations as far as dependency (in the survival claim dependency is not an issue, whereas in the wrongful death action dependency may be an issue).

3. Even if Virginia Code §8.01-56 controls in terms of the mandatory amendment to a wrongful death action, there is nothing within that Code section that says that the plaintiff thereby loses or forfeits their survival damages. Forfeiture is disfavored in the law. *Rafalko v. Georgiadis*, 290 Va. 384, 395 (2015).
4. The survival damages (pre-death pain and suffering and loss of income) are property rights that the Trial Court cannot take away from the plaintiff without due process or perhaps just compensation per either the Fifth Amendment or the Fourteen Amendment to the U.S. Constitution.
5. The purpose of wrongful death recovery is to compensate the beneficiaries identified in the Act, not to benefit the estate. *Conrad v. Thompson*, 195 Va. 714, 80 S.E.2d 561 (1954). That stated purpose however is undermined by the fact that within the Wrongful Death Act, recovery is expressly allowed for medical expenses. The statute dictates those medical expenses are to be allotted to the "creditors". If there is a significant claim for medical expenses and insurance has covered those expenses and there is no right of subrogation then who recovers that award? It does not go to the statutory beneficiaries, rather it goes to the estate to be distributed pursuant to the will or if no will, then per the law of intestacy. If such recovery is allowed as to pre-death medical expenses, then why wouldn't recovery be allowed as to pre- death pain and suffering and loss of income?
6. Virginia Code §8.01-52 expressly states that the damages recoverable under the Wrongful Death Act *are not intended to be exhaustive*. If that list of damages is not exhaustive or exclusive then what else is to be included other than pre-death pain and suffering and loss of income? In *McKinney, supra*, the Court, citing *Centra Health*, noted that when a survival action is converted to a wrongful death action, the wrongful death action is the sole remedy. That dicta should not necessarily be read to mean the implied extinguishment of pre-death survival damages.

**SCENARIO #2**

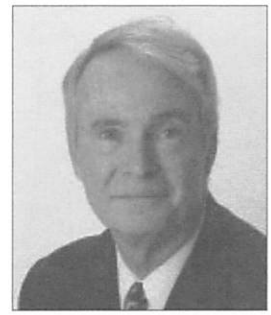
The second scenario is one where there is a dispute as to whether the injury in fact caused the death. This is the circumstance that existed in *Centra Health* and the Court there said that issue was going to be left up to the jury to decide, but that damages would only be awarded under one such right of action. This had the effect of producing this situation: if the jury had concluded that the claim was a wrongful death action, then there would be no survival damages awarded. For all the reasons mentioned above, counsel should never accede to such implied extinguishment of the pre-death survival damages which are not duplicative of wrongful death damages. If the jury decides the injury was not the cause of death, then all that remains is a survival action.

In those circumstances where there is a bona fide dispute as to whether the injury was the cause of death, aside from the five points made above, there are several other practice pointers to consider:

1. What is the proper way to create such a conflict as to the issue of causation? That is, does the conflict have to be created during the plaintiff's case in chief or can the conflict be deemed to have arisen simply because the plaintiff says that the injury was the cause of death and the defendant maintains and presents evidence that the injury was not the cause of death? In *Lucas v. HCMF Corporation*, 238 Va. 446, (1989) the Supreme Court ruled the Trial Court prematurely barred the plaintiff from presenting conflicting evidence as to causation. In *Centra Health*, the plaintiff essentially presented conflicting evidence on the issue of causation, thereby creating a jury issue which was then further buttressed by the fact that the defendant took the position that the injury was not the cause of death.
2. *Centra Health* suggested that one way to streamline cases like this (involving a dispute as to whether the injury was the cause of death) is to bifurcate the issue of causation from the damage issues. In our view, bifurcation typically works to the disadvantage of the plaintiff and is an inefficient use of resources for all parties involved. With properly worded jury instructions confusion can be avoided, thereby eliminating the need for bifurcation.
3. It's important that counsel not concede that election automatically means a limitation on damages. In *Centra Health*, plaintiff's counsel *conceded* that if there was a dispute

as to whether or not the injury was the cause of death then there would have to be an election made between the survival claim and the wrongful death claim. The Court accepted this concession. It's our position that the plaintiff should not concede that an election expressly limits those proper survival damages but rather if the jury concludes the injury was the cause of death then all proper survival damages (pre-death pain and suffering, non-duplicative loss of income) and wrongful death damages are recoverable, with the assurance to the Court that there is going to be no duplication of damages. In *Hendrix v. Daughtery*, 249 Va. 540 (1995) the Court dealt with a legal malpractice action where the underlying claim was medical malpractice. In the context of the legal malpractice action, the Supreme Court stated that at some appropriate time after discovery has been completed the plaintiff should be required to elect whether they will proceed on a theory that the defendant's attorneys breached the duty that was owed in the prosecution of the wrongful death action or breached the duty owed to the plaintiff in the prosecution of the survival action. But yet again, that language was only dicta because the issue before the Court was only whether or not the Demurrer to an Amended Motion for Judgment should have been sustained. The Court reversed the Trial Court on that issue.

4. In those instances where you're representing a client with a significant injury claim and it appears that the person may pass away within the short term, there may be some logic in holding off on filing suit so as to avoid the requirement of the mandatory amendment called for under Virginia Code §8.01-56. If there is no action pending then there is no underlying survival action that needs to be converted or amended to a wrongful death action. Both actions can then be filed and all claims should be preserved, but be forewarned and note the *El Meswari* decision, above.



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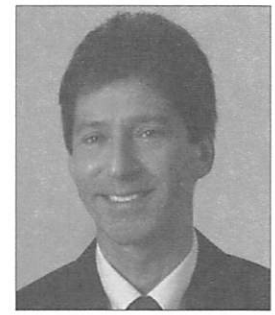

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