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## This Week's Feature

### **Keeping Pain and Suffering Out of Wrongful Death Damages**

by Brett A. Tarver

Despite numerous state statutes limiting a plaintiff's ability to present evidence on the pain and suffering of a decedent in a wrongful death action, many plaintiffs' attorneys still look for opportunities to inundate a jury with this powerful, sympathy-inducing evidence. This article reviews just two scenarios in which plaintiffs' attorneys may attempt to avoid the prohibition of such evidence and how to neutralize these tactics.

Under the statutes governing wrongful death actions in many states, survivors are not allowed to recover damages for the pain and suffering of a decedent. See, e.g., Fla. Stat. Ann. § 768.21; Ga. Stat. Ann. § 51-4-2; see also, e.g., *Martin v. United Sec. Servcs., Inc.*, 314 So. 2d 765, 769 (Fla. 1975) (upholding constitutionality of the Wrongful Death Act and recognizing that under the Act "[t]he claim for pain and suffering of the decedent from the date of injury to the decedent was eliminated"); *Bodiford v. Crowley*, No. 3:14CV335/MCR/CJK, 2015 WL 12777212, at \*3 (N.D. Fla. July 23, 2015) ("Under Georgia law, the surviving spouse may recover 'the full value of the life of the decedent,' which is measured by 'the economic value and the value of other noneconomic intangible items that the decedent would have attained to the end of his life had he lived.'") (internal citations omitted); *Adelman v. Adelman*, 191 Misc. 2d 281, 287, 741 N.Y.S.2d 841, 847 (N.Y. Sup. Ct. 2002) ("[W]rongful death actions are not brought 'to compensate the decedent or his [or her] estate for the pain and suffering attendant to the injury, but rather to recover, on behalf of decedent's distributees, the pecuniary value of the decedent's life.'"); *Martin v. United Sec. Servcs., Inc.*, 314 So. 2d 765, 769 (Fla. 1975) (upholding constitutionality of the Wrongful Death Act and recognizing that, under the Act, "[t]he claim for pain and suffering of the decedent from the date of injury to the decedent was eliminated").

Wrongful death statutes in some states allow recovery, however, for pain and suffering claims to specific survivors of a decedent, as defined by the statute, who may recover only for their own personal pain and suffering caused by the decedent's injury and death. See, e.g., § 768.21, Fla. Stat.; see *Martin*, 314 So. 2d at 769 (holding that the survivor's claim is limited to "his or her own mental pain and suffering from the date of the injury") (emphasis in original). This is often the result when a state does not allow a plaintiff to bring a wrongful death action and a survival action currently. For example, in Georgia, because plaintiffs can assert both a wrongful death action and a survival claim, they are not entitled to damages for their own mental pain and suffering because they can still seek a claim for the pain and suffering of the decedent. See, e.g., *Carroll Fulmer Logistics Corp. v. Hines*, 309 Ga. App. 695, 697, 710 S.E.2d 888, 890 (2011) ("Since these damages are measured from the decedent's point of view, there is no recovery for damages, including mental or emotional suffering, experienced by the decedent's survivors as a result of the wrongful death.").

Despite the clear language of these wrongful death statutes limiting plaintiffs' abilities to present evidence regarding their decedents' pain and suffering, defense counsel must be vigilant of plaintiffs' attorneys' attempts to do this very thing. Their motivation is two-fold: (1) they seek to engender sympathy and compassion from a jury, and (2) they seek to drive up the value of a compensatory verdict by deploying their most emotional evidence. Defense counsel should have their antennae up during plaintiffs' attorneys' presentation of evidence in at least two areas to ensure that the wrongful death acts' prohibitions against pain and suffering damages are not skirted.

The first and most likely situation will arise when a plaintiff's counsel is eliciting testimony from a plaintiff about the plaintiff's own mental pain and suffering that occurred during his or her decedent's illness or injuries and before and after the decedent's death. Despite the prohibition against consideration of a decedent's pain and suffering in calculating damages, under many wrongful death acts, plaintiffs are still entitled to damages for the mental pain and suffering that they experienced while watching their loved one suffer and after their loved one's demise. See, e.g., § 768.21, Fla. Stat.; see *Martin*, 314 So. 2d at 769 (holding that the survivor's claim is limited to "his or her own mental pain and suffering from the date of the injury") (emphasis in original). Plaintiffs' counsel routinely argue that evidence of what a plaintiff observed, including the decedent's own suffering, is relevant and admissible to the question of the plaintiff's own anguish. This argument, which many trial judges accept, gives plaintiffs a door through which evidence regarding the pain and suffering of a decedent may make its way to a jury.

The second and more novel tactic used by plaintiffs' counsel can arise during closing arguments on the issue of punitive damages. Using the United States Supreme Court's discussion in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580, 116 S. Ct. 1589, 1601 (1996), as justification, plaintiffs' counsel have begun to assert that a jury may determine the amount of punitive damages in comparison to "the actual harm inflicted on the plaintiff." In spelling out this "actual harm," plaintiffs' counsel have used a decedent's medical records as a way to draw a jury's attention to the decedent's pain and suffering.

There are many steps that defense counsel can take to ensure that this door is not swung wide open. First, defense counsel can put a court on notice of such tactics before a trial by filing of a motion in limine to exclude all evidence of the pain and suffering of the decedent. Such a motion will alert the judge of a plaintiff's possible attempt to use this type of evidence impermissibly and will often result in a ruling requiring the plaintiff's counsel to stay within the lines. Counsel may also consider filing a motion in limine governing the use of the decedent's medical records during argument to the jury to eliminate any argument stressing the pain and suffering of the decedent during treatment for his or her injuries or illness.

During a trial, defense counsel must pay close attention to the testimony, including descriptions of the decedent's pain and suffering, and ensure that it is directly linked to the effect upon the plaintiff's own mental pain and suffering, if the state statute allows this type of claim for damages. A well-timed objection with reference to the court's ruling on the defense motion in limine can aid in cutting this testimony short.

Finally, defense counsel should argue for a jury instruction on the issue so that it will be clear to the jurors that they may not consider the decedent's pain and suffering in their deliberations during the compensatory and punitive damages phases of the case. For punitive damages in particular, defense counsel should highlight to the court that punitive damages are derivative of the underlying suit, and therefore, the plaintiff cannot use punitive damages as a separate cause to expand the underlying action or to introduce impermissible evidence.



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