

**January, 2004
No. 6**

Drug, Device & Biotech

In This Issue

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Discovery Rules Do Not Necessarily Rule in Wrongful Death Claims

By Douglas G. Schneebeck and Anna E. Tuttle

I. Introduction

Medical device and drug litigators are accustomed to a discovery rule defining “accrual” of a cause of action in most jurisdictions. We should be mindful that wrongful death claims may be governed by different rules. In some jurisdictions, the effect can be that the limitation period for wrongful death claims is *shorter* than that applicable to injury claims.

The potential for conflicting rules arises in jurisdictions that apply a discovery rule to injury claims, and where the applicable wrongful death legislation defines accrual of a cause of action as “date of death”. Where the dichotomy has been litigated, the parties’ arguments have been structured predictably. Plaintiffs argue that, without a discovery rule, defendants are better off if the product user dies from a product defect than if the defect merely injures the user. Defendants typically argue that, where the legislature has defined “accrual” in a wrongful death statute, the judiciary has no power to modify the legislative judgment.

The distinction between the injury and death statutes generally relates to the historical development of the wrongful death legislation. At common law, a right of action for personal injuries was extinguished by the death of the person injured, and no civil action could be maintained for a tort resulting in death.¹ Wrongful death acts preserve or revive the claim in favor of the estate. Whether by inattention or design, many legislatures have defined the accrual of causes of action under these statutes as the “date of death”,

even where the state's general limitations provisions merely define a period after an undefined date of accrual.

II. Application Of A Discovery Rule To Wrongful Death Actions Independent Of Whether The Wrongful Death Act Defines Accrual As "Date of Death"

Relying on policy arguments, courts in some jurisdictions have interpreted their statutes to allow application of a discovery rule.

a. Alaska

Even though the Alaska wrongful death act defines accrual as the date of death, the Alaska Supreme Court in *Hanebuth v. Bell Helicopter Int'l*,² ruled that the fundamental fairness of a discovery rule to wrongful death actions was consistent with the purposes of the act. The *Hanebuth* court opined that the Alaska legislature did not intend the wrongful death act to deprive a litigant of the right to bring a lawsuit before he has had a reasonable opportunity to do so.³ The court reasoned that refusing to apply a discovery rule to wrongful death cases would create the potential for an unreasonable result – a defendant whose conduct caused only injury might have liability in the same circumstances where a claim might be time-barred if the event resulted in death.⁴

b. Utah

Utah's statute provides that a wrongful death action may be brought within two years.⁵ The statute does not define accrual. The Tenth Circuit, applying Utah state law employed a balancing test when considering whether to apply a discovery rule to a wrongful death cause of action. The Utah test requires balancing the hardship imposed upon the plaintiff by the statute of limitations against the difficulties of proof caused by the passage of time.⁶ In applying a discovery rule to a case where decedents had allegedly died from exposure to

carcinogens, the court reasoned that plaintiffs could not reasonably be expected to file suit against all sources of suspected carcinogens simply to prevent the running of the statute of limitations.⁷

c. Oregon

An Oregon court of appeals case applying a discovery rule to a wrongful death action was apparently silently overruled by the state's supreme court, and later rendered obsolete by the legislature. In a 1981 decision, *Shaughnessy v. Spray*, relying on statutory language consistent with a discovery rule, an Oregon appellate court applied a discovery rule to a wrongful death action involving an overdose of medication, where the plaintiff initially sued the physician, but added the drug manufacturer after the three-year limit.⁸ In 1989, without mentioning *Shaughnessy*, the Oregon Supreme Court reached a different result in *Eldridge v. E. Moreland Gen. Hosp.*⁹ Moreover, in 1991, the statute was amended. While retaining the language that the *Shaughnessy* court relied on in applying a discovery rule, the statute now also provides in relevant part that no wrongful death claim can be filed later than "three years after the death of the decedent."¹⁰

III. Rejection Of A Discovery Rule In Wrongful Death Actions Where The Legislature Has Defined "Accrual"

Most courts have rejected policy arguments like those discussed above. For example, courts interpreting New Mexico and Texas law have refused to apply a discovery rule to wrongful death actions where the wrongful death statute defines "accrual".¹¹

a. New Mexico

Despite the applicability of a discovery rule in personal injury cases, New Mexico courts have not applied a discovery rule to wrongful

death actions. The New Mexico wrongful death statute explicitly provides that “the cause of action accrues as of the date of the death.”¹² It is a well-settled general rule in New Mexico that it is judicial function to determine when a cause of action accrues only “[i]n the absence of explicit instructions from the legislature.”¹³ The Tenth Circuit, interpreting New Mexico law, predicts that New Mexico state courts will agree that this rationale applies to the legislative definition of “accrual” found in the wrongful death act.¹⁴ As the Tenth Circuit pointed out, the fairness argument is trumped by the notion that courts must remain true to their constitutional role and respect the legislative judgment, which could have its own basis in sound policy.¹⁵ The Tenth Circuit reasoned that “the fact that hardship may result can furnish no warrant for the courts to supply what the Legislature has omitted or omit what it has inserted”.¹⁶ New Mexico’s first-level appellate court has the question under submission following a state district court’s dismissal of a drug claim filed more than three years after the death of the plaintiffs’ son.¹⁷

b. Texas

Texas courts have also prohibited the “judicial legislation” that plaintiffs advocate. In *Moreno v. Sterling Drug*, the court held that the legislature had “foreclosed judicial application of [a] discovery rule.”¹⁸

In reaching this conclusion, the *Moreno* court addressed the policy arguments that are often offered by plaintiffs regarding the fairness of applying a discovery rule to wrongful death actions. For example, *Moreno* discussed and rejected the rationale relied upon in Alaska’s *Hanebuth* case, discussed earlier in this article¹⁹ The Texas court identified a basis in policy for distinguishing between personal injury and death cases:

... in wrongful death actions ... survivors are put on immediate notice by the event of death that an investigation into the cause of

action must occur to preserve a claim. This definitive notice is what differentiates wrongful death and survival actions from personal injury actions.²⁰

The *Moreno* court also pointed out that recognizing the distinction between personal injury and wrongful death actions is sensible because it helps to effectuate the prompt settlement of a decedent’s affairs.²¹

IV. Conclusion

Despite the sympathetic appeal of some of plaintiffs’ arguments, sound constitutional separation of powers arguments support the defense position. Practitioners should be aware of the various and seemingly irreconcilable treatments of the issue among state courts.

Endnotes

1. See, e.g., *Romero v. Byers*, 117 N.M. 422, 427, 872 P.2d 840, 845 (N.M. 1994).
2. *Hanebuth v. Bell Helicopter Int’l*, 694 P.2d 143 (Alaska 1984).
3. *Hanebuth*, 694 P.2d at 145-147.
4. *Hanebuth*, 694 P.2d at 147.
5. UCA §78-12-28(2).
6. *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1384 (10th Cir.1985) (class action based on carcinogens, all decedents died within at least seven years prior to the suit being filed; Utah had two-year statute of limitations in its wrongful death act.)
7. *Maughan*, 758 F.2d at 1386.
8. *Shaughnessy v. Spray*, 637 P.2d 182, 187 (Or.App. 1989); 2001 ORS §30.020(1).
9. 769 P.2d 775 (Or. 1989).
10. 2001 ORS 30.020(1)
11. See also, *Trimper v. Porter-Hayden*, 501 A.2d 446, 449 (Md. Ct. App. 1985); *Corkill v. Knowles*, 955 P.2d 438, 443 (Wyo. 1998); *Pobieglo v. Monsanto Co.*, 521 N.E.2d 728, 731 (Mass. 1988); *Hubbard v. Libi*, 229 N.W.2d 82, 84 (N.D. 1975); *Leo v. Hillman*, 665 A.2d 572, 575 (Vt.1995); *Stiles v. Union Carbide Corp.*, 520 F. Supp. 865, 868 (S.D. Tex. 1981).
12. NMSA 1978 §41-2-2.
13. *Roberts v. Southwest Cmty. Health Servs.*, 114 N.M. 248, 252, 837 P.2d 442, 446 (1992).
14. *Lujan v. Regents of the Univ. of California*, 69

F.3d 1511 (10th Cir. 1995).

15. *Id.* at 1521.
16. *Id.* (quoting *Nasteway v. Jojola*, 56 N.M 793, 799, 251 P.2d 294, 277 (N.M. 1952))
17. *Clark v. Johnson & Johnson*, New Mexico Court of Appeals No. CV-2000-08718.
18. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (1990).
19. *Id.* at 355.
20. *Id.*
21. *Id.*