

Date of Meeting: February 13-14, 1959
Date of Memo: February 6, 1959

MEMORANDUM No. 3

SUBJECT: Study #33 - Survival of Torts

Attached is a draft of proposed legislation to effectuate principles decided upon by the Commission at its January meeting.

COMMENTS:

1. We have prepared alternative methods of making the desired changes in Civil Code Section 956: (1) repealing the section and replacing it with new Sections 956 and 957, or (2) merely amending Section 956 in case the Commission feels a less radical change in language and organization is desirable. If the latter method is adopted, references to Section 957 in the suggested changes in other code sections would be eliminated.

2. Provisions with regard to pain and suffering and the like have been placed in brackets, since the commission has not as yet decided this question.

3. For reference purposes, we are preparing copies of the survival statutes of two or three other jurisdictions. They will be forwarded to you shortly.

4. In the proposed new Sections 956 and 957 and the revised Section 956, we have provided that all "tort" actions survive. It may be interesting to consider what causes of action, if any, would now not survive.

5. We note that the California statutes have generally eschewed the use of the word "tort." Would its use here present any difficult problems of interpretation to the courts?

Respectfully submitted;

Glen E. Stephens
Assistant Executive Secretary

PROPOSED LEGISLATION RE SURVIVAL OF TORT ACTIONS

1. Repeal Section 956 of the Civil Code and enact new Sections 956 and 957 of the Civil Code as follows:

956. If a person having a thing in action in tort dies, his executor or administrator may bring suit thereon but recovery shall be limited to such loss or damage as the decedent sustained or incurred prior to the date of death [and shall not include any recovery for pain, suffering, disfigurement, mental anguish and the like].

957. If a person against whom there exists a thing in action in tort dies, suit may be brought thereon against his executor or administrator. The executor or administrator is liable for all damages which might have been recovered against the decedent had he lived except punitive or exemplary damages. A thing in action exists against a person within the meaning of this section even though it arises simultaneously with or after his death if he would have been liable thereon had he survived until the loss or injury giving rise to the cause of action occurred.

2. Or, in the alternative, amend Section 956 of the Civil Code to read:

956. A thing in action arising out of a tort ~~wrong~~-which ~~results-in-physical-injury-to-the-person-or-out-of-a-statute imposing-liability-for-such-injury~~ shall not abate by reason of a death of the wrongdoer or any other person liable therefor, ~~for-damages-for-such-injury~~ nor by reason of the death of the person injured or of any other person who owns any such thing

in action. When the person liable for damages in any such action dies before judgment, punitive or exemplary damages shall not be awarded. When the person entitled to maintain such an action dies before judgment, the damages recoverable ~~for such injury~~ shall be limited to such loss or damage as the decedent sustained or incurred prior to the date of death of earnings and expenses sustained or incurred as a result of the injury prior to his death, [and shall not include damages for pain, suffering or disfigurement, mental anguish and the like.] ~~nor exemplary damages, nor prospective profits or earnings after the date of death.~~ The damages recovered shall form part of the estate of the deceased. Nothing in this article shall be construed as making such a thing in action assignable. A thing in action exists within the meaning of this statute even though it arises simultaneously with or after the death of the person who would have been liable thereon had he survived until the loss or injury giving rise to the thing in action occurred.

3. Amend Sections 376 and 377 of the Code of Civil Procedure as follows:

376. The parents of a legitimate unmarried minor child, acting jointly, may maintain an action for injury to such child caused by the wrongful act or neglect of another. If either parent shall fail on demand to join as plaintiff in such action or is dead or cannot be found, then the other parent may maintain such action and the parent, if living, who does not join as plaintiff must be joined as a defendant and, before trial or hearing of any question of fact, must be served with summons either personally or by sending a copy of the summons and complaint by registered mail with proper postage prepaid addressed to such parent's last known address with request for a return receipt. If service is made by registered mail the production of a return receipt purporting to be

signed by the addressee shall create a disputable presumption that such summons and complaint have been duly served. In the absence of personal service or service by registered mail, as above provided, service may be made as provided in Sections 412 and 413 of this code. The respective rights of the parents to any award shall be determined by the court.

A mother may maintain an action for such an injury to her illegitimate unmarried minor child. A guardian may maintain an action for such an injury to his ward.

Any such action may be maintained against the person causing the injury, ~~or if such person be dead, then against his personal representatives.~~ If any other person is responsible for any such wrongful act or neglect the action may also be maintained against such other person, ~~or his personal representatives in case of his death.~~ ~~The death of the child or ward shall not abate the parent's or guardian's cause of action for his injury as to damages accruing before his death.~~

In every action under this section, such damages may be given as under all of the circumstances of the case may be just, ~~provided, that in any action maintained after the death of the child or ward, damages recoverable hereunder shall not include damages for pain, suffering or disfigurement nor punitive or exemplary damages nor compensation for loss of prospective profits or earnings after the date of death.~~

If an action arising out of the same wrongful act or neglect may be maintained pursuant to Section 377 of this code for wrongful death of any such child, the action authorized by this section shall be consolidated therewith for trial on motion of any interested party.

377. When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, ~~or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person~~ injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, ~~or in case of his death, his personal representatives.~~ In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 956 of the Civil Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 956 of the Civil Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of

Section 956 of the Civil Code, such actions shall be consolidated for trial on the motion of any interested party.

NOTE: Since Civil Code Sections 956 and 957 are so drafted as to apply to all tort causes of action there should be no need to provide specifically for survival of a particular cause of action sounding in tort in the statute creating it. Moreover, to do this in some cases might lead a court to hold that when the legislature fails to make such provision as to a particular existing or future statutory cause of action sounding in tort it does not survive. Hence, I would recommend no further amendment of Sections 376 and 377. If the Commission should decide otherwise, there could be added to each section, at an appropriate point, the following:

Sections 956 [and 957] are applicable to causes of action arising under this section.

4. Amend Probate Code Section 573 as follows:

573. Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to enforce a lien thereon, or to determine any adverse claim thereon, and all actions founded upon contracts, ~~or upon any liability for physical injury, death or injury to property,~~ may be maintained by and

against executors and administrators in all cases in which the cause of action whether arising before or after death is one which would not abate upon the death of their respective testators or intestates, and all actions by the State of California or any political subdivision thereof founded upon any statutory liability of any person for support, maintenance, aid, care or necessities furnished to him or to his spouse, relatives or kindred, may be maintained against executors and administrators in all cases in which the same might have been maintained against their respective testators or intestates.

Actions may also be maintained by and against executors and administrators as provided in Sections 956 [and 957] of the Civil Code.

5. Repeal Probate Code Section 574 which reads:

574. Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the property of their testator or intestate, in his lifetime, or committed any trespass on the real property of the decedent in his lifetime; and any person, or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried

away, or converted to his own use, the property of any such person or committed any trespass on the real property of such person. This section shall not apply to an action founded upon a wrong resulting in physical injury or death of any person.

6. Amend Section 707 of the Probate Code as follows:

707. All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses and all claims ~~for damages for physical injuries or death or injury to property or actions provided for in Section 574 of this code,~~ arising under Sections 956 [and 957] of the Civil Code must be filed or presented within the time limited in the notice or as extended by the provisions of Section 702 of this code; and any claim not so filed or presented is barred forever, unless it is made to appear by the affidavit of the claimant to the satisfaction of the court or a judge thereof that the claimant had not received notice, by reason of being out of the State, in which event it may be filed or presented at any time before a decree of distribution is rendered. The clerk must enter in the register every claim filed, giving the name of the claimant, the amount and character of the claim, the rate of interest, if any, and the date of filing.

7. Amend Section 402 of the Vehicle Code [owner liability statute] by eliminating subsection (g) which provides:

(g) No action provided for in this section shall abate by reason of the death of any injured person or of any person liable or responsible under the provisions of this section; provided, that in any action for physical injury contemplated by this section by the executor, administrator or personal representative of any deceased person, the damages recoverable shall be the same as those recoverable under Section 956 of the Civil Code.

For the reasons stated in the discussion of Code of Civil Procedure Sections 376 and 377, above, I would make no other amendment here. However, the same amendment set forth there could be made here if the Commission deems such an incorporation by reference desirable.

NOTE: No amendment of Section 11580 of the Insurance Code appears to be necessary. It provides:

11580. A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this State unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein.

(a) Unless it contains such provisions, the following policies of insurance shall not be thus issued or delivered:

(1) Against loss or damage resulting from liability for injury suffered by another person other than a policy of workmen's compensation insurance.

(2) Against loss of or damage to property caused by draught animals or any vehicle, and for which the insured is liable.

(b) Such policy shall not be thus issued or delivered to any person in this State unless it contains all the following provisions:

(1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy.

(2) A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.

STUDY #33
Survival of Tort Actions

Survival Statutes of other states--Examples

1. N. Y. Consol. Laws, Decedents Estate Law

SEC. 118 No cause of action for injury to person or property shall be lost because of the death of the person liable for the injury. For any injury, an action may be brought or continued against the executor or administrator of the deceased person, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury. This section shall extend to a cause of action for wrongfully causing death and an action therefor may be brought or continued against the executor or administrator of the person liable therefor.

Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the executor or administrator of such person.

SEC. 119 No cause of action for injury to person or property shall be lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the executor or administrator of the deceased person, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury. On the trial of any such action, which is joined with an action for causing death, the contributory negligence of the deceased person shall be a defense to be pleaded and proved by the defendant. No cause of action for damages caused by the death of a third person shall be lost because of the death of the third person.

SEC. 120 Where an injury causes the death of a person the damages recoverable for such injury shall be limited to those accruing before death, and shall not include damages for or by reason of death, except that the reasonable funeral expenses decedent paid by the estate, or for the payment of which the estate is responsible, shall be recoverable in such action.

Nothing herein contained shall affect the cause of action existing in favor of the next of kin under section 130 of this chapter. Such cause of action and the cause of action in favor of the estate

to recover damages pursuant to this section may be prosecuted to judgment in a single action; a separate verdict, report or decision shall be rendered as to each cause of action.

Where an action to recover damages for personal injury has been brought, and the injured person dies before verdict, report or decision, and his death is due to the injury, his executor or administrator may enlarge the complaint in such action to include the cause of action for wrongful death pursuant to section 130 of this chapter.

Where an action to recover damages pursuant to this section and a separate action for wrongful death pursuant to section 130 of this chapter are pending against the same defendant, they may be consolidated on motion of either party.

NOTE: The New York statute was enacted in 1935, following a study by the New York Law Revision Commission.

2. Conn. Gen. Stat., 1958

SEC. 52-599 No cause or right of action shall be lost or destroyed by the death of any person, but it shall survive in favor of or against the executor or administrator of such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but it may be continued by or against the executor or administrator of such decedent. In case of the death of any party plaintiff, his executor or administrator may enter within six months thereafter and prosecute the suit in the same manner as his testator or intestate might have done if he had lived; and, in case of the death of any party defendants the plaintiff, within one year thereafter, may apply to the court in which such suit is pending for an order to substitute such decedent's executor or administrator in the place of such decedent, and, upon due service and return of such order, the action may proceed. The provisions of this section shall not apply to any cause or right of action or to any civil action or proceeding the purpose or object of which is defeated or rendered useless by the death of any party thereto; nor to any civil action or proceeding whose prosecution or defense depends upon the continued existence of the persons who are plaintiffs or defendants; nor to any civil action upon a penal statute.

3. Ariz. Rev. Stat., 1956

SEC. 14-477 Every cause of action, except a cause of action for damages for breach of promise to marry, seduction, libel, slander, separate maintenance, alimony, loss of consortium or invasion of the right of privacy, shall survive the death of the person entitled thereto or liable therefor, and may be asserted

by or against the personal representative of such person, provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed.

FOOTNOTES

1. Cal. Code of Civ. Proc. §§ 752, 763.
 2. Cal. Code of Civ. Proc. § 763.
 3. Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108 (1907).
 4. 1956 Rep. Calif. Law Rev. Comm'n 22; Cal. Stat. 1956, Res. c. 42, p. 263.
 5. Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108 (1907).
 6. Now Probate Code §§ 760, 761.
 7. Estate of Naftzger, 24 Cal.2d 545, 150 P.2d 873 (1944).
 8. Estate of Cole, 124 Cal. App.2d 615, 269 P.2d 73 (1954).
 9. Judge Condee of the Los Angeles Superior Court in his book on probate practice published shortly after the Cole decision assumed that the Cole rule applied to determining both whether an increased bid is sufficiently larger than the original bid and also which of two increased bids should be accepted. He criticized the Cole case, stating that such a holding would have a detrimental effect on the sale of real property of estates because it would discourage brokers from seeking out bidders and it would impose an additional burden on bidders to ascertain whether or not a commission is to be paid on the original bid and on other increased bids. He also stated: "Another consideration in favor of the policy of ignoring commissions at the sale is that the sale of real estate carries certain costs which are bound to be paid in one way or another, . . ." pointing out that the administrator or the attorney or both are able to ask for an extraordinary fee for such services.
- 1 Condee, California Probate Court Practice § 619 (1955)

10. The act which contained this amendment also contained the following statement:

The wording of the sections of the Probate Code amended by this act and a recent district court of appeal decision have resulted in great uncertainty in the minds of real estate agents and brokers as to their right to compensation, and the amount thereof, when producing bids for real property in the estate of a decedent. This uncertainty has resulted in a sharp decrease in the number and amount of bids made for such property. Often such property constitutes the bulk of an estate and a substantially increased bid for the property would mean comfortable rather than substandard living conditions for the widow or widower and children of the decedent. This act, by eliminating the uncertainty referred to, will tend to increase the number and amount of bids, to the benefit of such widows, widowers, children, and other devisees, legatees, or heirs of the decedent.

11. Continuing Educ. of the Bar, Review of Selected 1955 Code Legislation 158, 160, 161.

Min.

Revision of 2/2/59

A STUDY TO DETERMINE WHETHER THE LAW IN
RESPECT OF SURVIVABILITY OF TORT ACTIONS
SHOULD BE REVISED*

* This study was made at the direction of the California Law Revision Commission by Mr. Leo V. Killion, a member of the California Bar, San Rafael.

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A STUDY TO DETERMINE WHETHER THE LAW IN RESPECT OF
SURVIVABILITY OF TORT ACTIONS SHOULD BE REVISED

Introduction

At common law, in accordance with the maxim actio personalis moritur cum persona the death of either the person injured or the wrongdoer terminated any tort cause of action for injuries to the person.¹ In the absence of statute, this doctrine prevents both an active survival of an ex delicto action to the victim's personal representative and a passive survival of the liability against a deceased wrongdoer's estate.²

This rule of the common law was in effect in California until 1946 when in Hunt v. Authier³ the California Supreme Court by a 4-3 decision held in effect that Section 574 of the Probate Code was a statute providing for the survival of tort actions. Following the Hunt decision, the California Legislature enacted comprehensive survival of tort actions legislation in 1949.⁴ It is the purpose of this study to review the present survival of tort actions legislation and the rule of the Hunt case as it still persists, with a view to suggesting needed statutory changes.

The Rule of the Hunt Case.

In Hunt v. Authier the court held that the heirs of one decedent could maintain an action for wrongful death against the personal representative of another decedent in a case where the defendant's decedent had shot and killed the plaintiff's decedent and then committed suicide. The court's conclusion that the cause of action for wrongful death survived was reached

by some clever legal acrobatics⁵ and by what the court labeled a "liberal" interpretation of the language of Probate Code Section 574. That statute, as amended in 1931, allowed an action against a personal representative of a deceased who had "wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person." The court interpreted the word "property" in this section in its broadest sense, concluded that the statute modified the common law rule of actio personalis moritur cum persona and held that the loss to the plaintiffs (the widow and three minor children) of the right of future support of their decedent amounted to a "taking" of their "property" because their decedent's estate had been diminished by his wrongful death. In concluding its opinion, the court said:

It follows that wherever a plaintiff has sustained an injury to his "estate" whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to "property" within the meaning of that word in the present statute.

The plaintiffs have therefore stated a cause of action for recovery from the defendants of the material losses sustained, including the present value of future support from their decedent considering their respective normal life expectancies, but exclusive of any damages for such items as loss of consortium, comfort or society of the decedent. (Emphasis added.)⁶

Thus Probate Code Section 574 was in effect held to be a general survival statute as applied to tort actions with the restriction that the elements of damages arising out of injury to the plaintiff's person -- i.e., such "wrongful death" damages as loss of consortium, comfort or society of the deceased -- did not survive. Similarly, in Moffat v. Smith, a case involving the survivability of a personal injury action against a

deceased tortfeasor's estate, no recovery was allowed for plaintiff's pain and suffering or disfigurement. In other cases applying the Hunt doctrine the damages were also limited to the monetary damages caused by the tort.⁸

The 1949 Survival of Tort Actions Legislation

Prior to the Hunt case, bills providing for survival of tort actions had been introduced at every session of the Legislature for many, many years but had always failed of passage. With the Hunt case on the books, however, the Legislature in 1949 enacted Section 956 of the Civil Code, a statute which had been drafted by a group of attorneys and law professors over the years and which was sponsored by the State Bar. Section 956 provides:

A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury, nor by reason of the death of the person injured or of any other person who owns any such thing in action. When the person entitled to maintain such an action dies before judgment, the damages recoverable for such injury shall be limited to loss of earnings and expenses sustained or incurred as a result of the injury by the deceased prior to his death, and shall not include damages for pain, suffering or disfigurement, nor punitive or exemplary damages, nor prospective profits or earnings after the date of death. The damages recovered shall form part of the estate of the deceased. Nothing in this article shall be construed as making such a thing in action assignable.

It is to be noted that Section 956 only provides for survival of causes of action for "physical injuries." Causes of action for such torts as malicious prosecution, abuse or malicious use of process, false imprisonment, invasion of the right of privacy, defamation in its various phases (libel, slander, slander of title, trade libel) and intentional infliction of emotional distress are not covered by its language. Where a physical

injury is involved, however, the provision for survival is all-inclusive with the above noted limitation on damages recoverable. Actions founded upon a liability imposed by statute survive as well as as actions based upon common law torts. Neither the death of the wrongdoer, nor the death of any other person who may be liable in damages for the injury (e.g., an employer, the owner of a motor vehicle or the parent of a minor motorist), nor the death of the injured person or of any other person who may own a cause of action arising out of the injury (e.g., the husband of an injured wife or the parent of an injured minor), will abate the action.

The 1949 legislation also made the following related changes in existing statutes:

1. Section 376 of the Code of Civil Procedure was amended to provide for the survival of actions brought by parents and guardians for injuries to minors.
2. Section 377 of the Code of Civil Procedure was amended to provide for the survival of wrongful death actions against the estate of a deceased wrongdoer.
3. Section 573 of the Probate Code, which specifies actions which may be brought by and against executors and administrators was amended to include actions founded "upon any liability for physical injury, death or injury to property."
4. Probate Code Section 574, which had been made the basis of the Supreme Court's decision in Hunt v. Authier was amended by adding the following sentence thereto:

This section shall not apply to an action founded upon a wrong resulting in physical

injury or death of any person. (Emphasis added.)

5. Probate Code Section 707 which requires that certain claims against decedents' estates be filed within a specified time was amended to include "all claims for damages for physical injuries or death."
6. Section 402 of the Vehicle Code was amended to provide for the survival of the liability it imposes on owners of vehicles when driven by other persons.
7. Section 11580 of the Insurance Code which relates to liability insurance policies was amended.

The Defects in the 1949 Legislation and Suggested Amendments

The original designers of the 1949 survival legislation thought that it would "repeal" the broad construction of Probate Code Section 574 enunciated in the Hunt case. However, a recent decision suggests that the legislation did not accomplish this purpose. This was Vallindras v. Massachusetts etc. Ins. Co.¹¹ which involved an action for false imprisonment which occurred in 1950. The district court of appeal held that even though the 1949 legislation only provided for survival of those tort actions involving physical injury or death, the action survived under Probate Code Section 574 as interpreted by the Hunt case. The court stated:

We think the conclusion is inevitable that, if we start with the premise that Hunt v. Authier properly interpreted section 574 of the Probate Code (and this court is bound by that decision), then all that the 1949 legislation accomplished was to provide expressly for the survivability of causes of action for physical injuries and wrongful death,

but that as to other torts, such as false imprisonment that involve damage to property as that term was interpreted in Hunt v. Authier, they survive under Section 574. This may not have been the intent of the lawyer committee that proposed the legislation, but it is what the legislation that was adopted actually accomplished.

The only logical explanation of Hunt v. Authier is that it interpreted Section 574 of the Probate Code to be a general tort survival statute as to those torts involving injury to the estate or property of the plaintiff. If Section 574 so provided before 1949, obviously the identical language in the section which the Supreme Court found sustained that interpretation, and which remained unchanged by the 1949 amendments, means the same thing after 1949, except that it does not apply to causes of action resulting in personal injury or death which are now covered by other sections of the law.

* * *

Under these cases and the 1949 amendments it must be held that Section 956 of the Civil Code provides for the survivability of actions for physical injuries. But that section is not all inclusive. Section 574 of the Probate Code is a general statute providing for the surviving of all torts, except those provided for in Section 956 of the Civil Code, which result in injury to property as defined in Hunt v. Authier.

Now how do these rules apply to the instant case? The complaint alleges loss of \$550 in costs and counsel fees, a loss of \$50 a week wages while in jail, and a loss of earnings of \$1,100 after plaintiff was released. Those certainly constitute injury to property within the meaning of Section 574 of the Probate Code as interpreted in Hunt v. Authier. The cause of action for such damage survives. The plaintiff also alleges various items of damage amounting to physical injuries -- loss of health, mental suffering, etc. The cause of action for such damage survives under the express terms of Section 956 of the Civil Code. The cause of action for

exemplary damages, of course, does not survive under any theory.¹²

Under the rationale of the Vallindras case the 1949 legislation did not lay to rest the rule of the Hunt case. Rather, we now have two survival statutes instead of one: Torts causing injuries other than physical injury or death which result in monetary loss to the plaintiff or his estate survive under provisions of the Probate Code; those causing physical injury or death survive under provisions of the Civil Code and the Code of Civil Procedure.

The law is in a state of uncertainty respecting the survivability of torts which do not cause physical injury or death. In the first place, the Vallindras decision was vacated when the Supreme Court granted a hearing in the case and has no authoritative status.¹³ Moreover, the Hunt case could be overruled upon a change of personnel of the supreme court. Furthermore, it is not clear precisely what torts survive under the Hunt doctrine.¹⁴ There is need, therefore, for further legislative action on the subject of survival of tort actions in this State.

Proposals for Legislative Action

In considering any change in our law relating to survival of tort actions we are immediately confronted with the question whether our statute should provide only for survival of actions involving wrongs to the physical person or wrongful death or whether it should provide for survival of all tort actions.¹⁵

It is difficult for this writer to see any justification for the limitation which the 1949 legislation placed on the types of actions made to survive. It was the definite position of the draftsmen of that legislation

that actions for injury to the more intangible interests in personality such as actions for malicious prosecution, abuse or malicious use of process, false imprisonment, invasion of the right of privacy, libel, slander, slander of title or trade libel and the intentional infliction of emotional distress should abate upon either the death of the person wronged or the tortfeasor. Their case is set forth as follows:

There is no social justification for requiring such causes of action to survive. Persons injured by torts which do not cause physical injury are seldom, if every, deprived of the ability to maintain themselves. Certainly there is no risk that such injured persons may become public charges. Those who are physically injured frequently have earning power permanently cut off, or at least seriously impaired.

Furthermore, a study of the judgments rendered in tort cases which do not involve physical injury leads inevitably to the conclusion that although the damages are denominated partially pecuniary and partially punitive, the pecuniary damages are minimal and these judgments are, in fact, largely punitive. Judgments for thousands of dollars have been awarded for a few days' imprisonment which has caused considerable discomfort but little or no money damage. The Supreme Court of California has upheld a judgment of \$10,000 for seduction although there was actually no financial loss whatsoever. Enormous verdicts for libel have been upheld, but the out-of-pocket loss in such cases usually is negligible. It was recently reported in the public press that a woman in St. Louis was awarded \$290,000 because a motion picture invaded her right of privacy and cheapened her character!

There is no reason why the estate of a dead man should be enriched because of humiliation, embarrassment or even anguish suffered by the deceased in his lifetime. There is little reason why the estate of a dead man should be required to respond in damages because of humiliation, embarrassment, or anguish caused by the deceased in his lifetime.

Finally, and perhaps most important, a judgment flowing from physical injury need not cause any loss to the estate of the deceased tortfeasor. Practically all torts involving physical injury, excepting deliberate injury or killing, can be covered by liability insurance, and the mythical "ordinary prudent man" carries such insurance. The Motor Vehicle Code

practically requires such insurance, at least to a limited extent. Automobile finance companies frequently demand liability insurance. Such insurance on real property is generally recommended by banks and other lending agencies.

Thus, there is a real difference between torts causing physical injuries and other torts. This difference may properly be recognized in a survival statute. It is conceivable that the legislature will disagree with this view; if so, the proposed legislation will be amended accordingly.¹⁶

This argument is easily answered. It is relevant to the existence of the causes of action in question; not to their survivability. Our courts and Legislature have long since decided that these causes of action should exist. If they have the dignity of being causes of actions they should have the dignity of surviving the same as other tort causes of action. Or as one writer put it:

The wisdom of excepting from survival such causes as defamation . . . seems questionable. As civil actions, they are not primarily punitive; moreover, while the interest invaded may not be a pecuniary one, compensation necessarily takes the form of money damages. Other objections go more to the very existence of the causes themselves, and would be better met by legislative abrogation of the right of action than by denial of survival.¹⁷

The argument that some of these actions carry punitive as well as compensatory damages is no argument against their survivability; damages can be restricted to compensatory damages for purposes of survival as is now done by Civil Code Section 956 in cases where the person wronged dies. The same answer applies to the argument that the estate of a dead man should not be enriched or penalized by damages for humiliation or embarrassment.

Dean Prosser answers the argument as follows:

There has been some dispute as to the desirability of broad survival statutes. Opposition to them is based upon the argument that justice does not require a windfall to the

plaintiff's heirs by way of compensation for an injury to him when they have suffered none of their own, together with the contention that since one party is dead and the other necessarily not disinterested the truth will be difficult to ascertain in court. The answer to the latter objection is that no serious difficulties have arisen as to contract actions and those torts which now survive. As to the first, the modern trend is definitely toward the view that tort causes of action and liabilities are as fairly a part of the estate of either plaintiff or defendant as contract debts, and that the question is rather one of why a fortuitous event such as death should extinguish a valid action. Accordingly, survival statutes gradually are being extended; and it may be expected that ultimately all tort actions will survive to the same extent as those founded on contract.¹⁸

Any reappraisal of our statute raises the further question of whether there should be any restriction on the elements of damages recoverable. California is one of the very few jurisdictions which has a survival statute which refuses to allow damages for deceased's pain, suffering or disfigurement.¹⁹ In the great majority of the states and in Great Britain there is no such limitation on damages.²⁰ The legislatures in those jurisdictions evidently felt that the only problem involved was whether or not tort actions should survive, without regard to limitation on damages. When it was determined that such actions should survive, total survival was allowed without consideration of the problem of the elements of damages recoverable. The present California statute, however, was the result of a more studied consideration of the question of damages and it is submitted that the present limitation on damages is sound.

A. Pain, suffering, mental anguish, etc.

Recent writers have stated that a functional view of damages precludes any award for such impalpable injuries after the death of the victim as pain

and suffering and shortening of life expectancy.²¹ The present writer advanced the same argument some years ago, as follows:

[D]amages should not be awarded for the deceased's pain and suffering, bodily disfigurement or loss of a member of his body. Such injuries are strictly to the person of the deceased and, in and of themselves, do not lessen the value of his estate and are not of such a transmissible nature that they should be made the basis of legal liability or an award of compensatory damages after the victim's death. If the deceased were still alive, a recovery of money damages would tend to compensate him for the pain and suffering endured because of the wrongdoer's tort; but after his death his death his personal injury is beyond redress by compensatory damages. To exact damages in the latter situation would be to impose a penalty upon the wrongdoer for his tortious conduct.²²

A case exemplifying the complete absurdity of allowing damages for all elements of a personal injury action to survive is Rose v. Ford,²³ an English case decided shortly after the passage of the English survival statute of 1935. There a young woman sustained a fractured leg in an automobile accident. Two days after the accident her leg had to be amputated, and the day after the operation she died, having been unconscious the greater part of the four day period. Her father as administrator (in addition to an action for wrongful death in which he recovered 300 pounds damages) brought an action under the English survival statute for her personal injuries. The court of appeal, after allowing 20 pounds damages for the girl's pain and suffering, was faced with the ridiculous problem of awarding damages for the loss of her leg for two days. Said the court:

We think that the deceased would have been entitled to something in respect of the loss of her leg for two days in addition to her pain and suffering, but this cannot be more than a nominal amount, and we fix it at forty shillings.²⁴

It is a well known fact that juries may become over sympathetic in the award of damages in cases where the victim has died and may award damages

for pain and suffering that are completely irrational. A classic illustration is the case of St. Louis & Iron Mtn. Etc. Ry. v. Craft²⁵ where a jury (in the year 1913) awarded \$1,000 to a father for the pecuniary loss to him by reason of the wrongful death of his son and \$11,000 for the pain and suffering of the deceased son, although he had lived for only a half-hour after the accident and the evidence was in conflict as to whether he was conscious and capable of suffering pain.

It is submitted that damages should not be allowed in any personal injury action brought after the victim's death for such peculiarly personal elements of damage as pain, suffering, mental anguish, mental disturbances, fright, shock, disfigurement, loss of a member, humiliation, worry, embarrassment, nervous upset, inconvenience, discomfort, shame, public ridicule or shortening of life expectancy.

B. Loss of Earnings.

The fact that the California survival statute is complemented by the California wrongful death statute justifies the provision in the present survival statute which limits damages for loss of earnings to the interim between the victim's injury and his death and allows no recovery for prospective profits or earnings after the date of the death of the victim. Damages for such loss of future earnings and profits during the period of his natural life expectancy had not his life been ended by the wrongdoer's conduct as would have inured to the benefit of his survivors are recoverable under the wrongful death statute; to allow such damages to be recovered under the survival statute would permit a double recovery. In those cases where the victim's death is not caused by the wrongdoer's conduct but results

from independent causes, the restriction simply reflects the rule that in a personal injury action, damages for loss of future earnings and profits are always confined to the probable period of normal life expectancy. When the plaintiff survives until the date of judgment we cannot know what this period will be so as to utilize mortality tables to make an "educated guess." When death occurs prior to judgment, however, the period of life expectancy becomes fixed and determinable.

C. Punitive Damages.

Section 956, Civil Code prohibits the award of punitive or exemplary damages in favor of the victim's estate. It is submitted that this restriction is sound law and should be continued. It is, in effect, a codification of the California rule that such damages can only be awarded to the person immediately harmed by the defendant's wrongful act.²⁶ It also codifies the rule, recognized in California and most other jurisdictions, that punitive damages can not be recovered against the estate of a wrongdoer.²⁷

Simultaneous Death Problem

In any redraft of the California survival statute it is advisable to consider a problem which has arisen under the survival statutes of several states in cases where the tort-feasor was instantly killed in the same accident in which the victim suffered personal injuries. Section 956 Civil Code provides that a cause of action for physical injuries "shall not abate by reason of the death of the wrongdoer." From this language it could be

argued that the section requires proof that a cause of action existed against the wrongdoer during his lifetime and that in cases where the victim's injury occurred either after or simultaneously with the wrongdoer's death no cause of action came into existence upon which the statute could operate because a cause of action for personal injuries can not arise against a person who is dead and who does not exist.

It may be thought doubtful that a California appellate court would apply such a narrow and legalistic construction to this statute.²⁸

However, exactly such a narrow interpretation was given to the New York survival statute by the Supreme Judicial Court of Massachusetts in Silva v. Keegan.²⁹ In that case an action for wrongful death of and personal injuries to plaintiff intestate was brought against the wrongdoer's personal representative. At the time of the fatal accident the victim was riding as a guest passenger in the wrongdoer's automobile in New York. Both were killed. The trial judge directed a verdict for the defendant on the ground that there was no evidence that the alleged wrongdoer was alive at the moment of the injury to the victim and therefore no evidence that any cause of action for either wrongful death or personal injuries arose against the wrongdoer in his lifetime which could survive his death. It was conceded that the wrongdoer died at the scene of the accident and that the victim died several hours later. The only evidence bearing upon the time of the personal injuries to the victim was that shortly after the crash the wrongdoer was lying in the road dead, and that the victim got out of the automobile and was bleeding and gave indications of pain. As to this evidence the court said:

This evidence does not disclose the nature or the

relative times of the applications of violence to the persons of Keegan and Silva. The mere facts that Keegan's body was out of the automobile while Silva was still in it furnish no solid basis for an inference that Silva was injured before sudden death overtook Keegan.³⁰

The court then went on to uphold the trial judge's directed verdict on the ground that no cause of action came into existence during the lifetime of the wrongdoer and therefore there was no cause of action which could "survive" his death.

The New York court in Maloney v. Victor³¹ refused to follow this case. In 1942, the New York Legislature, upon the recommendation of the New York Law Revision Commission,³² enacted the following amendment to the New York survival statute:

Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the executor or administrator of such person.³³

It would seem to be desirable for California to enact a similar provision.

AUTHOR'S RECOMMENDATIONS

It is respectfully recommended that the following changes should be made in California law:

1. Section 574 Probate Code should be amended to preclude application of the section to the survival of tort actions.

2. Section 956 Civil Code and Section 573 Probate Code should be amended to allow for survival of all³⁵ tort actions with the following limitations on damages continued:

(a) No punitive or exemplary damages either for victim's successors or against tort-feasor's estate;

(b) No damages for victim's prospective profits or earnings after the date of death;

(c) No damages for victim's pain, suffering or disfigurement; also no damages for the shortening of his normal life expectancy or for his humiliation, embarrassment, nervous upset, mental disturbance, fright, shock, worry, inconvenience, discomfort, shame or ridicule.

3. Section 956 Civil Code, Section 573 Probate Code and Section 376 Code of Civil Procedure should be amended to provide for the survival of the cause of action against a wrongdoer's personal representative in cases where the injury occurred simultaneously with or after the death of the wrongdoer.³⁶

FOOTNOTES

1. For a historical discussion of this maxim, see *Finlay v. Chirney*, 20 Q.B.D. 494, 502 (1888; Winfield, Death as Affecting Liability for Tort, 29 Colum. L. Rev. 239 (1929); Note, 18 Calif. L. Rev. 44 (1929). See also Recommendations and Study Made in Relation to the Survival of Causes of Action for Personal Injury, New York Law Revision Comm'n, Legislative Document No. 60(E) pp. 16-24 (1935 Law Revision Committee, Interim Report cmd. 4540, 77 L.J. 246 (England 1934); Pollock, *Torts* 64, 68 (10th ed. 1916); Prosser, *Torts* 706 (2d ed. 1955); Harper and James, *Torts* 1284 (1956).

2. The term "active" survival means survival in favor of the victim's estate; "passive" survival is survival against the wrongdoer's estate. See New York Law Revision Comm'n Report, supra note 1.

3. 28 Cal2d 288, 169 P.2d 913, 171 A.L.R. 1379 (1946).

4. Cal. Stat. 1949, c. 1380, p. 2400.

5. The decision was criticized by the minority as judicial legislation. In the same tenor were: Notes in 34 Calif. L. Rev. 613 (1946); 26 Neb. L. Rev. 128 (1946); 21 St. John's L. Rev. 111 (1946); 20 S. Calif. L. Rev. 239 (1947). Dean Prosser labels the decision "judicial ingenuity." Prosser, *Torts* 709, n. 99 (2d ed. 1955).

6. See note 3 supra at 296, 169 P.2d at 918.

7. 33 Cal.2d 905, 206 P. 2d 353 (1949).

8. *Smith v. Stuthman*, 79 Cal. App.2d 708, 181 P. 2d 123

(1947) (cause of action for slander of title to real property); Los Angeles v. Howard, 80 Cal. App.2d 728, 182 P.2d 278 (1947) (employer's right of action against third party tortfeasor, for reimbursement for money expended on behalf of injured employee); Nash v. Wright, 82 Cal. App.2d 475, 186 P.2d 691 (1947) (cause of action for wrongful death); Mecum v. Ott, 92 Cal. App.2d 735, 207 P.2d 831 (1949) (cause of action for personal injuries); Smith v. Minnesota Mut. Life Ins. Co., 86 Cal. App.2d 581, 195 P.2d 457 (1948) (action based on defendant's negligence in unreasonably delaying action upon an application for a life insurance policy by plaintiff's decedent); Cort v. Steen, 36 Cal.2d 437, 224 P. 2d 723 (1950) (cause of action for personal injuries against estate of deceased tortfeasor); Hume v. Lacey, 112 Cal. App.2d 147, 245 P.2d 672 (1952) (same); Vallindras v. Massachusetts etc. Ins. Co., 255 P.2d 457 (1953), rev'd on other grounds, 42 Cal.2d 149, 265 P.2d 907 (1954) (cause of action for false imprisonment).

9. For an analysis of this legislation, see Stanton, Survival of Tort Actions, Calif. State B.J. 424 (1949).

10. Cort v. Steen, 36 Cal.2d 437, 224 P.2d 723 (1950); Hume v. Lacey, 112 Cal. App.2d 147, 245 P.2d 672 (1952).

11. 255 P.2d 457 (1953), rev'd on other grounds, 42 Cal.2d 149, 265 P.2d 907 (1954).

12. Vallindras v. Massachusetts etc. Ins. Co., 255 P.2d at 462. Section 956 of the Civil Code by its "express terms" bars damages for "suffering," as well as for punitive or exemplary damages.

13. A hearing by the supreme court was granted in the Vallindras case and that court reversed on other grounds. The question of the survivability of the cause of action was expressly left open. 42 Cal.2d 149, 265 P.2d 907 (1954). This case is, of course, not authority for the opinion expressed but is here discussed as an example of what the courts may do with the question under our statutes at some future date. In the district court of appeal opinion, Presiding Justice Peters held that damages in a false imprisonment action for "loss of health, mental suffering, etc." are damages for "physical injuries" and would, therefore, survive under Section 956 of the Civil Code. If this be so, then why wasn't the entire action for false imprisonment covered by Section 956 of the Civil Code without calling into play the provisions of Section 574 of the Probate Code? Under Wisconsin's survival statute an action for false imprisonment has been held to be an action for "physical injury." See Evans, A Comparative Study of the Statutory Survival of Tort Claims For and Against Executors and Administrators, 29 Mich. L. Rev. 969, 977 (1931).

14. Query: Wouldn't the action in Smith v. Stuthman, supra note 8, survive independently of the Hunt case as a tort to real property; wouldn't the action in Smith v. Minnesota Mut. Life Ins. Co., supra note 8, have survived independently as an action in contract or quasi-contract? See Witkin, Summary of California Law 193 (Supp. 1950).

15. Most states which have survival statutes allow survival

of most tort actions. See Harper and James, Torts 1285-86 (1956) and statutes there cited. However, in only six or seven states is the statute construed to cover defamation. See Prosser, Torts 709 (2d ed. 1955). In California an action for breach of warranty survives. *Gosling v. Nichols*, 59 Cal. App.2d 442, 139 P.2d 86 (1943).

16. Livingston, Survival of Tort Actions--A Proposal for California Legislation, 37 Calif. L. Rev. 63, 72-73 (1949).

17. Note, 48 Harv. L. Rev. 1008, 1013 (1935). In California "legislative abrogation" was applied in 1939 to causes of action for alienation of affection, criminal conversation, seduction of a person over the age of legal consent and for breach of promise of marriage. Cal. Civ. Code § 43.5.

18. Prosser, Torts 709 (2d ed. 1955). See also Oppenheim, The Survival of Tort Claims and the Action for Wrongful Death--A Survey and a Proposal, 16 Tul. L. Rev. 386, 421 (1942).

19. Prior to the case of Fitzgerald v. Hale, 78 N.W.2d 509 (Iowa 1956) there was no recovery under the Iowa survival statute for the pain and suffering of a deceased victim. See reference to statutes in Livingston, op. cit. supra note 16, at 67.

20. For a recent collection of statutes see Note, 39 Iowa L. Rev. 494 (1954).

21. See Harper and James, Torts 1335 (1956).

22. Killion, Wrongful Death Actions in California -- Some Needed Amendments, 25 Calif. L. Rev. 170, 190 (1937).

23. [1936] 1 K.B. 90.

24. This case was appealed to the House of Lords. *Rose v. Ford* [1937] A.C. 826. The case is discussed at length in Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 *Law & Contemp. Prob.* 219, 225 (1953). The court allowed damages for all elements of the personal injury action, including damages for the shortening of decedent's normal expectancy of life!

25. 237 U.S. 648 (1915).

26. *French v. Orange County Inv. Corp.*, 125 Cal. App. 587, 13 P2d 1046 (1932). 14 Cal. Jur.2d, Damages, § 174. For a criticism of the doctrine of exemplary damages see McCormick, *Damages* 276 (1935) where the author says in part:

"It is probable that, in the framing of a model code of damages to-day for use in a country unhampered by legal tradition, the doctrine of exemplary damages would find no place."

27. *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389 (1934); Note, 24 *Calif. L. Rev.* 479 (1936); 15 *Am. Jur.*, Damages, § 285; 8 *Eng. Rul. Cas.* 379; Annot., Punitive Damages -- Executor or Receiver 65 *A.L.R.* 1049 (1930).

28. Such a construction may be prevented by the 1947 amendment (Stat. 1947, c. 451, § 1, p. 1350. to Probate Code Section 573 which provided that actions may be maintained by or against executors and administrators in all cases in which the "cause of action whether arising before or after death is one which may not abate upon the death of their respective testators or intestates." This amendment was evidently made to cover actions to foreclose the lien of a special assessment or a bond where the assessment was levied after the death of the decedent. See

The Work of the 1947 Legislature, 21 So. Cal. L. Rev. 1, 17 (1947).

29. 304 Mass. 358, 23 N.E.2d 867 (1939). Other cases on this point are collected in Annot., Survival of Cause of Action -- Against Tort-feasor Killed in Same Accident 70 A.L.R. 1319 (1931).

30. Id. at 368, 23 N.E.2d at 868.

31. 175 Misc. 528, 25 N.Y. S.2d 257 (1940).

32. Act and Recommendation relating to Maintenance of Action for Death or Injuries Occurring After the Death of the Person Responsible, New York Law Revision Comm'n Rep., Rec. & Studies 19-25, 777 (1942).

33. N. Y. Laws 1942, c. 314, p. 890.

34. No amendment in this respect is necessary to insure the survival of an action for wrongful death as Code of Civil Procedure Section 377 provides that the action may be maintained against the personal representative of the wrongdoer "whether the wrongdoer dies before or after the death of the person injured." This provision was suggested by this writer in Killion, op. cit. supra note 22, at 186, n. 87.

35. Such an amendment will also necessitate amendments to Probate Code Section 707, Vehicle Code Section 402(g) and perhaps Section 11580 of the Insurance Code.

36. The survival provisions of Section 376 Code of Civil Procedure are not limited to actions for "physical injury" but include actions for any injury to an unmarried minor child or ward.