

Memo

Date of Meeting: June 19-20, 1959  
Date of Memo: June 12, 1959

Memorandum No. 2

Subject: Study No. 33 - Survival of Tort Actions

We are attaching a proposed Recommendation relating  
to the above study.

Respectfully submitted,

Glen E. Stephens  
Assistant Executive Secretary

June 12, 1959

RECOMMENDATION OF CALIFORNIA LAW REVISION COMMISSION

Relating to Survival of Actions

Under the common law and the earlier survival statutes in most jurisdictions causes of action based on physical injury to the person or on damage to more intangible personal or property interests, such as reputation, privacy and the like, did not survive the death of either party. This appeared to be the law in California until 1946, when the California supreme court decided the case of Hunt v. Authier. This and several succeeding decisions of the California courts involved the construction of Probate Code Section 574, which deals in terms only with the survival of actions for loss or damage to "property." These cases interpreted that Section, however, as providing for the survival of causes of action not only for injuries to tangible property but also for physical injury to the person and injuries to the more intangible personal or property interests, at least to the extent that the injured party sustained an out-of-pocket pecuniary loss as a result thereof, which they held to be an injury to his "estate."

In 1949 the Legislature enacted Civil Code Section 956 which specifically provides for the survival of causes of action arising out of wrongs resulting in physical injury to the person but limits to some extent the damages which may be recovered. At the same time

Probate Code Section 574 was amended to provide that it does not apply to "an action founded upon a wrong resulting in physical injury or death of any person." It appears to have been the intention of those sponsoring this legislation to limit the effect of Hunt v. Authier and succeeding cases by confining the survival of actions for injuries to the person to those based on physical injuries, as provided in Civil Code Section 956. The opinion in a recent district court of appeal decision indicates, however, that the courts may take the position that while Probate Code Section 574 as construed in Hunt v. Authier is no longer applicable to cases involving physical injuries to the person, it continues to have the effect of providing for the survival of all other causes of action for wrongs to the person or to property if and to the extent that they result in pecuniary loss to the plaintiff. Since it is not clear whether Section 574 will be so construed, the California law with regard to the survival of causes of action is in an uncertain and unsatisfactory state, particularly with regard to such actions as 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. These actions clearly do not survive under Civil Code Section 956 but they may survive under Probate Code Section 574 to the extent that the plaintiff has incurred a pecuniary loss.

Because of these uncertainties the California Law Revision Commission was authorized and directed to undertake a study to determine whether the law in respect of survivability of tort actions

should be revised. As the basis of this study the Commission has concluded that all tort causes of action should survive the death of either party, whether the cause of action is based on injury to tangible property, or physical injury to the person or to the more intangible personal or property interests. The Commission has reached this conclusion for the following reasons:

1. When a person dies, society, and thus the law, is faced with the problem of what disposition should be made of the various valuable economic rights which he may have held at his death and, conversely, the various claims and obligations which may have existed against him. Any of various solutions to this problem might have been adopted. The general answer which has in fact evolved has been that most valuable rights held by decedent at the time of his death whether they be rights in specific tangible property or claims against others pass to his estate or heirs and may be exercised or enforced in much the same manner as if he were yet living. Conversely, his estate is held answerable for most valid claims which existed against him. In effect, the estate and thus the heirs and devisees stand in the shoes of the decedent. Historically, the principal exception to this principle has been that many but not all tort causes of action do not survive. The Commission believes that no substantial basis exists for distinguishing those relatively few actions which do not now survive from the majority which do.

2. The failure of some actions to survive at common law appears to rest in large part on nothing more than the continued application of the ancient maxim actio personalis moritur cum persona. This

maxim merely states a largely meaningless conclusion, has no compelling wisdom on its face, is of obscure origin, and appears to be of questionable application to modern conditions.

3. The Commission is not persuaded by arguments which have been made against the survival of such actions as actions for libel, slander, invasion of the right of privacy, etc., based on the allegedly speculative and noncompensatory nature of the damages involved. Even if these are sound, they would appear to be more properly relevant to the question whether such causes of action should exist at all than to the question of whether they should survive. The Commission believes that so long as they do exist they should survive.

Unlike the draftsmen of the 1949 survival legislation and its research consultant, the Law Revision Commission believes that if a cause of action survives, it necessarily follows that the same damages should be recoverable by or against the personal representative as could have been recovered had the decedent lived, except where some special and substantial reason exists for limiting such recovery. The Commission therefore makes the following recommendations with respect to limitations on damages:

(a) The Commission recommends that damages recoverable by the personal representative of a decedent be limited to those which he sustained or incurred prior to his death. When a person having a cause of action dies all the damages he suffered as the result of the injury from which his cause of action arose have in fact occurred and can be ascertained. It would be anomalous, therefore, to award his estate, in addition to such damages, prospective damages which a

trier of fact, speculating as to his probable life span, might have awarded had he survived until judgment. Such a recovery would, moreover, in many instances largely duplicate damages recoverable under the wrongful death statute.

(b) The Commission recommends that no recovery of punitive or exemplary damages or penalties be permitted against the estate of a deceased wrongdoer. Such damages are, in effect, a form of civil punishment of the wrongdoing defendant. If such a defendant is deceased awarding exemplary damages against his estate cannot serve this purpose and merely results in a windfall for the plaintiff or the plaintiff's estate. The Commission believes that no such limitation should apply, however, to damages recoverable by the plaintiff's personal representative against the wrongdoing defendant himself. The Commission's research consultant takes a different view, contending that the right to recover punitive or exemplary damages should be extinguished by the death of either party. The Commission does not believe that valid reasons exist for this wider limitation. True, such damages are in a sense a windfall to the plaintiff's heirs or devisees, but since these damages are not compensatory in nature, they would have constituted a windfall to the decedent as well. The object of awarding such damages being to punish the wrongdoer, it would be particularly inappropriate to permit him to escape such punishment in a case in which he killed rather than only injured his victim.

(c) The Commission recommends that there be no other restriction on damages recoverable in actions brought by or against a decedent's estate. In this, the Commission differs with its research consultant who believes that damages should not be allowed to the estate of a

deceased plaintiff for pain, suffering, mental anguish and the like because, unlike special damages and earnings lost by the decedent during his lifetime, these do not involve a diminution of the decedent's estate. This suggests that the primary reason for causing actions to survive is to prevent or ameliorate loss to the expectancy which the decedent's survivors had in his estate. The Commission takes the view, however, that causes of action should survive because they exist and could have been enforced by or against the decedent and because if they do not survive the death of a victim produces a windfall for the wrongdoer. Under this view it is inconsistent to disallow elements of damages intended to compensate the decedent for his injury merely because of the fortuitous intervention of the death of either party. The Commission's research consultant has adverted to the speculative and uncertain nature of damages for pain, suffering, mental anguish and the like as an argument against permitting them to survive. But these considerations would appear to be more relevant to the question of permitting such damages to be recovered at all rather than to their survival. Moreover, not to permit survival of such elements of damage would render the proposed new survival statute almost nugatory insofar as it purports to provide for the survival of such causes of action as those for false imprisonment, malicious prosecution, invasion of the right of privacy, and the intentional infliction of emotional distress. Very often little pecuniary loss can be shown in such cases, the only really important element of damage involved being the embarrassment, humiliation and other mental anguish resulting to the plaintiff.

To effectuate the foregoing recommendations the Commission recommends that both Civil Code Section 956 and Probate Code Section 574 be repealed and that a comprehensive new survival statute be enacted. (See proposed legislative bill following this recommendation) The following points should be noted with respect to this recommended legislation:

1. It provides, with minor qualifications, for the survival of all causes of action. In attempting to draft a statute to effectuate its view that all tort causes of action should survive, the Commission encountered considerable difficulty in devising technically accurate and satisfactory language. Legislation limited to "causes of action in tort," for example, would create problems because there simply is not a satisfactory definition of the meaning and scope of the term "tort." Moreover, such language would raise questions as to whether actions arising from breaches of trust and purely statutory actions were included. Similar questions would arise if a restrictive statute were written in other terms. The Commission therefore recommends the enactment of a broad and inclusive provision with specified exceptions (discussed below), even though this recommendation may be thought to exceed somewhat the scope of the study which it was authorized to make, for the following reasons:

(a) It would have the advantage of simplicity and clarity, in that it would eliminate difficult questions of construction which would result from the use of more restrictive language.

(b) It is sound in theory since, with the exception of certain specific causes of action, discussed below, there does not appear to



be any rational basis upon which to determine that some actions should survive while others do not.

(c) An all-inclusive survival statute would make little or no change in the present law with respect to survival of causes of action other than those "sounding in tort." The Commission's studies of the present law have shown that actions based on contract, quasi-contract, trusts, actions to recover possession of property or to establish an interest therein, and most statutory actions already survive.

2. The recommended legislation does except certain actions from the broad rule of survival which it would establish. The principle exception is of actions "the purpose of which is defeated or rendered useless by the death of either party." Such actions would include, for example, an action exclusively for the purpose of compelling a remainderman to restore possession of property to a life tenant now deceased, or an action to compel performance of specific acts by a deceased defendant where only he could have performed such acts. It would also include actions for divorce and alimony which do not now survive, since alimony may be awarded only in conjunction with a divorce action which is an action to dissolve a marriage and by specific statutory provision in California marriage is automatically terminated by death. Nor would an action for separate maintenance survive under the proposed statute; being in effect an action for the specific enforcement of the obligation for support arising out of the marriage relationship, this action would be "defeated or rendered useless" by the husband's (or wife's) death.

It is, the Commission believes, less clear whether statutory obligations for the support of a minor child, father, mother, or adult child would be "defeated or rendered useless" by the death of the person on whom the obligation rests. Nor is the present law clear as to whether such obligations now survive against the estate of a decedent so as to create an obligation for support to be furnished after decedent's death. There are California decisions holding that, at least where provision for child support is made in a separate maintenance or divorce decree, the obligation survives against the estate of the deceased parent for the period following his death. There is also language in some other cases indicating that such a duty may exist even in the absence of such a decree. The Commission believes that it would be unwise in connection with this proposed legislation either to impose new liabilities for such support on decedents' estates or to relieve such estates from liabilities which may presently exist. It has, therefore, drafted the proposed new survival statute in such a way as to preserve the status quo in this regard by providing that it does not create any right of action against an estate not otherwise existing for the support, maintenance, education, aid or care of any person furnished or to be furnished after the decedent's death.

3. The report of the research consultant points out that in cases where the victim's injury occurs either after or simultaneously with wrongdoer's death the technical argument has been successfully made in at least one jurisdiction that no cause of action came into existence upon which a survival statute could operate because a cause

of action for personal injury cannot arise against a person who is dead and thus nonexistent. A simultaneous death provision has therefore been incorporated in the legislation recommended by the Commission to preclude the possibility of such a construction of the proposed new survival statute.

4. The adoption of the proposed new survival statute requires certain minor conforming amendments to be made to Code of Civil Procedure Sections 376 and 377 and Probate Code Section 707. Thus, cross references to Civil Code Section 956 and Probate Code Section 574 are eliminated and replaced by references to the new statute. The Commission also recommends that the specific survival provisions contained in Code of Civil Procedure Sections 376 and 377 be eliminated. Such provisions are rendered unnecessary by the all-inclusive language of the new survival statute. Moreover, the presence of such specific provisions for survival in these statutes might conceivably lead a court to hold that some other existing or future statutory cause of action does not survive because the Legislature has failed to include such specific provisions therein.

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The Commission's recommendation would be effectuated by enactment of the following measure:

An act to repeal Sections 956 of the Civil Code and 574 of the Probate Code and to amend Sections 573 and 707 of the Probate Code and Sections 376 and 377 of the Code of Civil Procedure, all relating to the survival of causes of action after death.

The people of the State of California do enact as follows:

SECTION 1. Section 956 of the Civil Code is repealed.

SEC. 2. Section 573 of the Probate Code is amended to

read:

~~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.~~

573. No cause or right of action shall be lost by reason of the death of any person. An action may be maintained by or against

an executor or administrator in any case in which the same might have been maintained by or against his decedent; provided, that this section does not apply to any cause or right of action to the extent that the purpose thereof is defeated or rendered useless by the death of any person, nor does this section create any right or cause of action, not otherwise existing, against an executor or administrator for the support, maintenance, education, aid or care of any person furnished or to be furnished after the decedent's death.

In an action brought under this section against an executor or administrator, all damages may be awarded which might have been recovered against the decedent had he lived except penalties or punitive or exemplary damages.

When a person having a cause or right of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death.

This section is applicable where a loss or damage occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not preceded or occurred simultaneously with the loss or damage.

SEC. 3. Section 574 of the Probate Code is repealed.

SEC. 4. Section <sup>376</sup> of the Code of Civil Procedure is amended to read.

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 parents' 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.

SEC 5. Section 377 of the Code of Civil Procedure is amended to read:

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 573 of the Probate 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-573 of the Probate 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 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

SEC 6. Section 707 of the Probate Code is amended to read:

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,~~ Section 573 of the Probate 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.

DISTRICT ATTORNEY  
Alameda County  
Court House  
Oakland 7, California

May 25, 1959

California Law Revision  
Commission  
School of Law  
Stanford, California

Attention: Mr. Glen E. Stephens  
Assistant Executive Secretary

Dear Mr. Stephens:

This is in reply to your letter, dated May 12, 1959, relative to our construction and use of Probate Code Section 573.

We have filed numerous actions for the County against estates of deceased responsible relatives for aid granted before the decedent's death. This type of suit has been upheld by the courts in San Bernardino County v. Simmonds, 46 C. 2d 398, and Department of Mental Hygiene v. Shane, 142 C.A. 2d Supp. 801. However, we have never been authorized by the Board of Supervisors to bring an action to collect for aid granted after the decedent's death. We do not know of any California appellate decisions on this subject involving welfare matters.

At common law, the liability of a father to provide support for his child terminated with the father's death. However, by statutory construction, the courts have held the support of a child may survive the death of its father and continue as a charge against his estate (DeSylva v. Ballentine, 96 C.A. 2d 503, 513). A fortiori, it is said, "the duty to the public precedes the mere enjoyment of a bounty by devisees or heirs" (Myers v. Harrington, 70 C. A. 680, 686).

Section 205 of the Civil Code specifically permits a county board of supervisors to move against a parent's estate for support of a child who has been left chargeable to the county. While it is impossible to prejudge what a court would do with other welfare benefits, we believe the courts could construe Probate Code Section 573 with the pertinent Welfare and Institutions Code Sections *pari materia* to have the effect of creating an obligation on the part of the estate of a deceased responsible relative for aid rendered after the decedent's death.

As noted above, this question has not arisen in this County. Hence, we are in no position to give you any actual results concerning any such litigation.

Very truly yours,  
J. F. Coakley, District Attorney  
By

William S. Coit  
Deputy District Attorney

WSC:em

DION R. HOLM  
City Attorney  
City Hall  
San Francisco 2, California

May 29, 1959

California Law Revision Commission  
School of Law  
Stanford, California

Attention: Mr. Glen E. Stephens  
Assistant Executive Secretary.

Dear Sir:

Your letter of May 12, 1959, addressed to Mr. Thomas C. Lynch, District Attorney, has been referred to this office for reply.

We have never received a request from our Board of Supervisors to proceed against the estate of a decedent to recover for aid furnished a relative either prior to or after the decedent's death.

As a matter of practice such requests would be initiated by our Department of Public Welfare since they administer the various assistance programs and would be aware of the liability for reimbursement, if any, of the decedent. I have discussed your question with them and they advise that the question has never arisen. In explanation, they point out that prior to any such request the following events would necessarily have to occur:

1. A determination would have to be made that the relative was pecuniarily able to contribute;
2. The refusal or failure to contribute on the part of the relative;
3. Death of the relative; and
4. Notice to the Department of the death of the relative.

In their experience, this sequence of events has never occurred.

I regret that I am unable to provide you with a more conclusive answer to your question, but perhaps the very fact that this question has never arisen in the City and County of San Francisco will be of some help to you.

Very sincerely yours,

/s/ Dion R. Holm

DION R. HOLM  
City Attorney.

Minutes

County of San Diego  
Office of  
COUNTY COUNSEL  
302 Civic Center  
San Diego 1, California

June 17, 1959

Glen E. Stephens  
Assistant Executive Secretary  
California Law Revision Commission,  
School of Law,  
Stanford, California

Dear Mr. Stephens:

The District Attorney has referred to this office your letter dated May 12, 1959. You have requested an expression as to any experience this office may have had in attempting to recover from estates of deceased persons aid furnished to relatives after the decedent's death, as well as that received prior to the decedent's death. One of our cases involved a father who died leaving a considerable estate and leaving an incompetent son who had been supported for a number of years at a County institution. By stipulated settlement the obligation for back support was paid, a County officer was appointed guardian of the estate of the incompetent son, and distribution of considerable property was made to the guardianship.

The section which we contemplated invoking, which is not cited by you, is 205 of the Civil Code. Some of the cases considering this section, particularly Myers v. Harrington, 70 Cal. App. 680 and Federal Mutual Liability Ins. Co. v. Industrial Acc. Com., 187 Cal. 469, suggest but do not decide the problem whether the section can be used to enforce support of an adult child or whether it extends only to a minor child.

In another case not involving a decedent a recipient of aid came into a substantial sum. In a suit we demanded not only aid to date but anticipated support of his divorced wife and their children, invoking the common law writ of brevia anticipantia. (9 C.J. 400, Coke Litt. 100a, Peters v. Linenschmidt, 58 Mo. 464, see also Archbishop of San Francisco v. Shipman, 69 Cal. 586 at 589.)

So far as we know we have not attempted in any other case to assert a demand for support or aid furnished the relatives after the decedent's death, nor have we given an opinion to the Department of Public Welfare, the Hospital, or any other County office as to whether such a right of reimbursement exists.

Very truly yours,

HENRY A. DIETZ, County Counsel

By Duane J. Carnes, Deputy

DJC:ES  
cc District Attorney

State of California  
Department of Justice  
OFFICE OF THE ATTORNEY GENERAL  
State Building, San Francisco

June 11, 1959

California Law Revision Commission  
Stanford School of Law  
Stanford, California

Attention: Mr. Glen E. Stephens  
Assistant Executive Secretary

Gentlemen:

The Department of Mental Hygiene has referred to this office your letter of May 13, 1959 requesting advice as to whether the Department has interpreted the provisions of section 6650 of the California Welfare and Institutions Code as creating an obligation for support upon certain relatives and their estates for any period after the deceased responsible relative's death. It has not been the practice of the Department of Mental Hygiene to file a claim in the estate of a deceased responsible relative for support for any period subsequent to the decedent's death. We have considered the provision relative to liability of estates as merely for the purpose of spelling out the survivorship of the Department's claim despite the like provision of section 573 of the Probate Code.

Actions against the estate's representative, regardless of whether a claim has been filed, have not included support for any period after the decedent's death. Attempts to secure reimbursement from estates of relatives of patients at the state hospitals are made frequently and successfully (See Department of Mental Hygiene v. McGilvery, 50 Cal. 2d 742).

Section 205 of the Civil Code as amended in 1957 (Stats. 1957, Chap. 1557) gives the Department a right to proceed against the estate of a parent and the heirs, devisees, and next of kin of the parent for future support of a child confined in a state institution if the child is wholly or partially cared for at state expense. "Child" in our opinion includes incompetent adult as well as minor children. This section on a few occasions has been utilized on behalf of the Department of Mental Hygiene.

Another provision to obtain support for an incompetent adult child from a parent's estate for a limited period after the decedent's death is the right to family allowance as provided by sections 680 and 682 of the Probate Code (Stats. 1953, Chap. 1215). At least one Superior Court has ruled that if the incompetent has a guardian, the guardian must apply for the family allowance and not the Department of Mental Hygiene. If the

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June 11, 1959

guardian refuses to apply, we file a petition for order instructing the guardian to so apply in the court where the guardianship is pending.

Yours very truly,

STANLEY MOSK  
Attorney General

/s/ Elizabeth Palmer  
By  
Mrs. Elizabeth Palmer  
Deputy Attorney General

EP/gb