

Date of Meeting: October 8-9-10, 1958
Date of Memo: October 6, 1958

Memorandum No. 4

Subject: Study #33 - Survival of Torts

The Commission discussed an earlier draft of the research consultant's report on this topic at its March 1958 meeting. A number of questions were raised and suggestions made concerning the study. I subsequently communicated these questions and suggestions to Mr. Killion, our research consultant, in a letter of April 1, 1958, a copy of which is enclosed.

We have recently received a revised version of the study, a copy of which is enclosed. In the enclosed copy pages 3, 5, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17 and 18 are new.

Mr. Killion has asked that we schedule this study for consideration at the October meeting. I have told him that I would put it on the Agenda and that we would try to reach it.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

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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.

Study #33

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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 persona¹ the death of either the person injured or the wrongdoer terminated any tort cause of action for injuries to the person. In the absence of statute, this doctrine prevents an active survival of an ex delicto action to the victim's personal representative and a passive survival of the liability² against a deceased wrongdoer's estate.

This rule of the common law was in effect in California until the year 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, in 1949, enacted comprehensive survival of tort actions⁴ legislation.

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, as amended in 1931, which allows 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, and as modifying the common law rule of actio personalis moritur cum persona and reasoned 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 away 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 interpreted to be a statute providing for the active and passive survivability of all tort actions involving injury to property; it was held to be a general survival statute with the restriction that the elements of the cause of action relating to injury to the person did not survive. So in the Hunt case no recovery was allowed for such elements of "wrongful death" damages as loss of consortium, comfort or society of the deceased. Likewise 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 material 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 reversed its

stand at the 1949 session and passed a comprehensive statute that had been drafted over the years by a group of professors and lawyers and was sponsored by the Committee on the Administration of Justice of the State Bar.

The 1949 Legislation⁹ added to the Civil Code Section 956, which provides that a tort involving physical injury will survive the death of either the victim or the tortfeasor.

If the injured party dies, the damages recoverable are limited to "loss of earnings and expenses sustained or incurred as a result of the injury by the deceased prior to his death." Neither punitive nor exemplary damages, nor damages for pain, suffering, or disfigurement may be recovered.

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 wrongful arrest, malicious prosecution, abuse or malicious use of process, false imprisonment, invasion of the right of privacy and defamation in its various phases (libel, slander, slander of title, trade libel) are not covered by its language.

But where a physical injury is involved, 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 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 (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 (the husband of an injured wife or the parent of an injured minor), will abate the action.

The 1949 legislation also revised Section 376 of the Code of Civil Procedure to provide for survival of actions by parents and guardians for injuries to minors.

Section 377 of the Code of Civil Procedure was amended to allow survival of wrongful death actions against the estate of a deceased wrongdoer.

In 1949 the Legislature also amended Sections 573 and 574 of the Probate Code which enumerates the types of actions which may be maintained by and against executors and administrators. The amendment to Section 573 included within the enumeration actions founded "upon any liability for physical injury, death or injury to property."

The amendment to Section 574 consisted of adding a final sentence which provides:

This section shall not apply to an action founded upon a wrong resulting in physical injury or death of any person. (Emphasis added.)

The 1949 legislation also amended Probate Code Section 707 to require the filing of claims on actions which survive: Vehicle Code Section 402 to provide for survivability of actions against the owner of a motor vehicle based on vicarious liability:

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and Insurance Code Section 11580 relating to mandatory provisions of liability insurance policies.

The Defects in the 1949 Legislation and Suggested Amendments

The original designers of this survival legislation thought that it would "repeal" the doctrine enunciated in the Hunt case without specifically saying so in Probate Code Section 574. But the courts have held that the legislation did not accomplish this obvious purpose of its framers.

In two cases¹⁰ in which the tortfeasor's death occurred prior to the effective date of the 1949 act, the courts held that the 1949 legislation did not repeal the property damage survival feature of Probate Code Section 574 as it was held to relate to tort actions in the Hunt case. And in Vallindras v. Massachusetts etc. Ins. Co.¹¹ the question of the effect of the 1949 legislation on deaths occurring after the effective date of the statute was squarely before the court. The case involved an action for false imprisonment which occurred in 1950. The district court of appeal held that in spite of the fact that the 1949 legislation only provided for survival of those tort actions involving physical injury or death, the action still 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

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exemplary damages, of course, does not survive under any theory. (Emphasis added.)¹²

Thus the Vallindras¹³ case pointed out the clear fact that the 1949 legislation did not accomplish the purpose of its proponents of laying to rest the rule of the Hunt case, and its subsequent repetitions, and that we now have two survival statutes instead of one. Torts causing injuries which result in loss to the estate survive in the Probate Code; those causing physical injury or death survive in the Civil Code and the Code of Civil Procedure.

This situation needs correcting. The law is in a state of uncertainty respecting torts which do not cause physical injury or death as the Hunt case could be overruled upon a change of personnel of the supreme court. Furthermore, it is not known precisely what torts survive under the Hunt doctrine.¹⁴

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

It is difficult for this writer to see any justification for the limitation on the type of action granted survival by the draftsmen of the 1949 legislation. It was their definite position that actions 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 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 ever, 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

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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. There is a legal and social justification for the survival of these actions. They are based upon wrongs for which the law has given redress the same as wrongs causing physical injury or death. 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 material losses 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.

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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 the advisability of retaining a 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 law and that any further revision should continue similar damage limitations. 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 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

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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.

It is submitted that this restriction on damages is further justified by the fact that in a very high percentage of cases, the death

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of the victim is proximately caused by the same tort which gives rise to the personal injury cause of action and that in nearly all of such cases the same persons (the heirs) who indirectly collect damages under the survived personal injury action can collect damages under the Wrongful Death Statute. Consequently, the heirs, instead of being allowed to capitalize on the personal sufferings of the deceased, are fully compensated under the death statute for the pecuniary loss occasioned them by reason of the tortious termination of the life of their relative.

The fact that the California survival statute is complemented by the California wrongful death statute also justifies the damage restriction contained in the 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 his 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 are recoverable under the wrongful death statute; and to also allow such damages to be recovered under the survival statute would permit a double recovery. In cases where the death is not the result of the wrongdoer's conduct but results from independent causes, the restriction becomes a codification of the rule that in a personal injury action, damages for loss of future earnings and profits must be confined to the probable period of normal life expectancy. Thus when death occurs from natural causes, the period of life expectancy becomes fixed and determinable.

Section 956, Civil Code prohibits the award of punitive or

exemplary damages in favor of the victim's estate and it is submitted that this restriction is sound law and should be continued; it is 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 is also submitted that the California rule that punitive damages can not be recovered against the estate of a wrongdoer²⁷ should be codified into this section.

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 contemplates proof of the existence of a cause of action against the wrongdoer during his lifetime and that in cases where the victim's injury occurred 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.

Although it is extremely doubtful that a California appellate court would apply such a narrow and legalistic construction to this statute,²⁸ it could be given such a construction by less liberal courts of other states. 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

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injuries to plaintiff intestate was brought against the wrongdoer's personal representative. The victim at the time of the fatal accident was riding as a guest passenger in the wrongdoer's automobile in New York. Both were killed and both were residents of Massachusetts. 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

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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 is respectfully suggested that the California survival statute also be amended to specifically 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.³⁴

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RECOMMENDATION

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. Stutman*, 79 Cal. App.2d 708, 181 P. 2d 123

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(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 a review 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."

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, survive independently as a contract or quasi-contract action? See Witkin, Summary of California Law 193 (Supp. 1950).

15. Most states which have survival statutes allow survival

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of most tort actions. See Harper and James, Torts 1285-86 (1956) and statutes there cited; but, 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.