

APPENDIX

## Proposed Legislation re Survival of Torts

Alternative No. 1

1. Repeal Section 956 of the Civil Code, which now reads:

956. 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.

2. Amend Probate Code Section 573 to read:

573. No cause or right of action shall be lost by reason of the death of any person. ~~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 same cause of action whether arising

before-or-after-death-is-one-which-would-not-abate-upon  
the-death-of might have been maintained by or against their  
respective testators or intestates; provided, that this  
section does not apply to any cause or right of action or civil  
action or proceeding the purpose of which is defeated or rendered  
useless by the death of any person. 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-necessaries-furnished  
to-him-or-to-his-spouse,-relatives-or-kindred,-may-be-main-  
tained-against-executors-and-administrators-in-all-cases-in  
which-the-same-might-have-been-maintained-against-their  
respective-testators-or-intestates.

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 the 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 [and do not include damages for pain, suffering,  
disfigurement, mental anguish and the like.]

Where a loss or damage resulting from a wrongful  
act, neglect or default, occurs simultaneously with or

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portion not  
yet decided  
upon by the  
Commission]

after the death of a person who would have been liable  
therefor if his death had not occurred simultaneously with  
such loss or damage or if his death had not intervened  
between the wrongful act, neglect or default and the result-  
ing loss or damage, an action to recover for such loss or  
damage may be maintained against the executor or administrator  
of such person.\*

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\* This paragraph is shown in the form tentatively approved by the Commission. If desired, it might be shortened slightly to read:

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 occurred simultaneously therewith or if his death had not intervened between an act, neglect or default and the loss or damage resulting therefrom, an action to recover for such loss or damage may be maintained against the executor or administrator of such person.

Or it might be condensed further to read:

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.

3. Repeal Section 574 of the Probate Code 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.

4. 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 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.

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 Code, such actions shall be consolidated for trial

on the motion of any interested party.\*

5. 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 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

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\* Since Probate Code Section 573 is so drafted as to apply to all causes of action there should be no need to provide specifically for survival of a particular cause of action 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 it does not survive. Hence, no further amendment of Sections 376 and 377 is recommended. If the Commission should decide otherwise, there could be added to each section, at an appropriate point, the following:

Section 573 of the Probate Code is applicable to causes of action arising under this section.

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.

Comment on Alternative No. 1

This is the language which the Staff feels would be most desirable. It provides, of course, for the survival of all causes or rights of action. As mentioned in the accompanying memorandum, this would result in little if any change in the present law beyond that already contemplated by the Commission. It has the advantage of simplicity and should largely eliminate problems of construction.

Since the chapter in which the present Civil Code Section 956 appears deals only with "things in action," it is felt that a survival statute dealing with all "causes or rights of action" should be placed elsewhere. Probate Code Section 573 seems to be the most desirable spot, since provisions both for the survival of actions and authorizing actions by or against executors or administrators could now appear in one appropriate place.

Probate Code Section 574 should be repealed since its provisions, particularly as construed by Hunt v. Authier and succeeding cases, would now be redundant.



ALTERNATIVE NO. 2

1. Amend Section 956 of the Civil Code to Read:

956. A No 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 is lost abate by reason of the death of the wrongdoer or of 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, but survives in favor of or against the executor or administrator of such deceased person.

Where a loss or damage 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 loss or damage or if his death had not intervened between the wrongful act, neglect or default and the resulting loss or damage, an action to recover for such loss or damage may be maintained against the executor or administrator of such person.\*

In an action brought under this section against an executor or administrator, all damages may be awarded

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\* Or alternative language shown in the footnote on page 3 could be used in this paragraph.

which might have been recovered against the decedent had he lived, except penalties or punitive or exemplary damages.

When the person entitled-to-maintain-such-an having a thing in action dies before judgment, the damages recoverable ~~for-such-injury-shall-be~~ are 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-by-the-deceased-prior-to-his-death,

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[and shall not include damages for pain, suffering or disfigurement, mental anguish and the like.] ~~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~~ makes such a thing in action assignable.

2. Amend Probate Code Section 573 to read:

~~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.

3. Repeal Section 574 of the Probate Code.
4. Amend Sections 376 and 377 of the Code of Civil Procedure as shown above under Alternative No. 1, but leave references in Section 377 to Section 956 of the Civil Code unchanged.
5. Amend Section 707 of the Probate Code as shown under Alternative No. 1, but make reference to Civil Code Section 956 rather than Probate Code Section 573.
6. Amend Section 402 of Vehicle Code as shown under Alternative No. 1.

Comment on Alternative No. 2.

The amended Civil Code Section 956 shown above constitutes a survival statute of slightly less scope than Alternative No. 1 in that causes of action which are not "to recover money or other personal property," and thus not technically "things in action," would not be expressly covered. Such actions are listed in the present Probate Code Section 573 (i.e. suits to recover real property or to quiet title)

but that section by its terms merely authorizes suit by or against executors or administrators if the cause of action survives. Thus Alternative No. 2 leaves a gap with respect to such actions; reference must be made to common law principles or other statutes to determine their survival. As pointed out in the foregoing memorandum, however, it appears that such causes of action survive under existing law. Thus although the changes shown under Alternative No. 2 are less comprehensive and perhaps somewhat clumsier, the effect accomplished is apparently no different than that under Alternative No. 1.

The changes shown in Section 573 of the Probate Code do not appear to affect the substantive meaning of the section, since, as mentioned above, this section, by its terms, does not provide for the survival of the actions listed.\*

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\* If the Commission does not agree with this conclusion, the following language could be used in this section:

573. Actions may be maintained by and against executors and administrators as provided in Section 956 of the Civil Code and actions for the recovery of any property, real or person, 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.

ALTERNATIVE NO. 3

1. Amend Section 956 of the Civil Code to read:

956. A thing in action arising out of a wrongful act, neglect or default ~~wrong-which-results-in-physical injury-to-the-person-or-out-of-a-statute-imposing-liability for-such-injury-shall~~ is not lost abate by reason of the death of ~~the-wrongdoer-or-of~~ 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~~ but survives in favor of or against the executor or administrator of such deceased person.

Where a loss or damage 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 loss or damage or if his death had not intervened between the wrongful act, neglect or default and the resulting loss or damage, an action to recover for such loss or damage may be maintained against the <sup>\*</sup> executor or administrator of such person.

In an action brought under this section against an executor or administrator, all damages may be awarded

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\* Or alternative language shown in the footnote on page 3 could be used in this paragraph.

which might have been recovered against the decedent had he lived, except punitive or exemplary damages.

When the person ~~entitled to maintain such an~~ having a thing in action dies before judgment, the damages recoverable ~~for such injury shall be~~ are 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 by the deceased prior to his death [and ~~shall~~ do not include damages for pain, suffering or disfigurement, mental anguish and the like.] ~~nor punitive or exemplary damages, nor prospective profits or earnings after the date of death.~~ The damages recovered shall ~~shall~~ form part of the estate of the deceased. Nothing in this article shall be construed as making such a thing in action assignable.

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2. Repeal Section 574 of the Probate Code and amend Sections 376 and 377 of the Code of Civil Procedure and 573 and 707 of the Probate Code, as shown under Alternative No. 2.

Comment on Alternative No. 3.

The above survival statute would, of course, apply only to things in action "arising out of a wrongful act, neglect or default." Since it applies only to "things in action," it is of narrower scope than Alternative No. 1. To the extent that there are "things in action" which do not arise from a "wrongful act, neglect or default," it is also narrower than Alternative No. 2.

Whether or not the language of this statute would be construed to cover all contract, quasi-contract, or other non-tort causes of action, its effect would be little, if any, different than Alternatives 1 or 2, since it appears that such actions already survive under existing law.

As pointed out in the foregoing memorandum, however, questions would arise as to the proper construction of the language used. For one thing, read literally it does not apply to causes of action based on liability without fault arising by statute or otherwise.

ALTERNATIVE NO. 4

1. Amend Section 956 of the Civil Code to read:

956. A thing in action arising out of a tort is  
~~wrong-which-results-in-physical-injury-to-the-person-or~~  
~~out-of-a-statute-imposing-liability-for-such-injury-shall~~  
not lost ~~abate~~ by reason of the death ~~of-the-wrongdoer-or~~  
of any other person liable-for-damages-for-such-injury  
~~ner-by-reason-of-the-death-of-the-person-injured-or-of~~  
~~any-other-person-who-owns-any-such-thing-in-action~~ but  
survives in favor of or against the executor or adminis-  
trator of such deceased person.

Where a loss or damage 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  
loss or damage or if his death had not intervened between

the wrongful act, neglect or default and the resulting loss or damage, an action to recover for such loss or damage may be maintained against the executor or administrator of such person.\*

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 punitive or exemplary damages.

When the person entitled to maintain such an having a thing in action dies before judgment, the damages recoverable for such injury are ~~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 by the deceased prior to his death, [and shall do not include damages for pain, suffering or disfigurement, mental anguish and the like.] ~~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~~ makes such a thing in action assignable.

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2. Make changes in other code sections as shown under Alternative No. 3, other than the repeal of Probate Code Section 574.

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\* Or alternative language shown in the footnote on page 3 could be used in this paragraph.



Comment on Alternative No. 4

The foregoing amendment to Section 956 of the Civil Code results in a survival statute which is the narrowest in scope of the four alternatives shown. Despite this and despite problems of construction to which it might give rise, its total effect would be little different from that of the broader alternatives. This is true since, as already pointed out, it appears that most non-tort actions survive under existing law.

Besides questions as to the meaning of the term "tort" and whether and to what extent statutory actions would be included, there is another problem which might follow from the use of this language. The present basis for the survival of non-tort actions, such as actions based on breaches of trust, appears to be Section 574 of the Probate Code. It would therefore be difficult to repeal that section without making somewhat uncertain the survival of such actions. If Section 574 is not repealed, however, its provisions will overlap with those of Section 956, with accompanying problems of construction.