

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

*relating to*

Survival of Actions

October 1960

## LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN  
*Governor of California*  
*and to the Members of the Legislature*

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the law relating to survivability of tort actions should be revised. The Commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Mr. Leo V. Killion, a member of the California State Bar.

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RALPH N. KLEPS, *Legislative Counsel, ex officio*

JOHN H. DEMOULLY  
*Executive Secretary*

October 1960



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# RECOMMENDATION OF CALIFORNIA LAW REVISION COMMISSION

## RELATING TO SURVIVAL OF ACTIONS

### Background

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 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 *Hunt v. Authier*.<sup>1</sup> 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 Section 574 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 for injuries to 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 hold 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 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

<sup>1</sup> 28 Cal.2d 288, 169 P.2d 913 (1946).

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.

### What Tort Actions Should Survive

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, on physical injury to the person or on injury to intangible personal or property interests.

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 held at his death and, conversely, the various claims and obligations which 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 a 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 most important exception to this principle has been that some tort causes of action do not survive. The Commission believes that no substantial basis exists for distinguishing those relatively few tort actions which do not now survive from the majority which do. The failure of these actions to survive at common law appears to rest in large part on nothing more than the continued application of the ancient maxim that "personal actions die with the person."<sup>2</sup> 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.

The Commission is not persuaded by arguments which have been made against the survival of such actions as actions for libel, slander and invasion of the right of privacy based on the allegedly speculative and noncompensatory nature of the damages involved. Even if these arguments were sound, they appear to be more properly relevant to the question of 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 these actions do exist they should survive.

### Limitation on Damages

The Law Revision Commission has concluded 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 recovery. The Commission therefore makes the following recommendations:

The provisions in the 1949 survival legislation which limit damages recoverable by the personal representative of a decedent to those which he sustained or incurred prior to his death should be continued. When a person having a cause of action dies, all the damages he sustained

<sup>2</sup> *Actio personalis moritur cum persona.*

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 to award his estate in addition to such damages such prospective damages as a trier of fact, speculating as to his probable life span, presumably would have awarded had he survived until judgment. Moreover, such a recovery would in many instances largely duplicate damages recoverable under the wrongful death statute.

Although the 1949 legislation does not expressly so provide, the California courts have held that punitive or exemplary damages or penalties may not be recovered against the estate of a deceased wrongdoer. This limitation should be continued. Such damages are, in effect, a form of civil punishment of the wrongdoing defendant. When 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 provision in the 1949 legislation that the right to recover punitive or exemplary damages is extinguished by the death of the *injured party* should not be continued. There are no valid reasons for this 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.

The provision in the 1949 survival legislation that damages may not be allowed to the estate of the deceased plaintiff for "pain, suffering or disfigurement" should also be discontinued. One reason advanced in support of this limitation is that the victim's death and consequent inability to testify renders it difficult and speculative to award damages for such highly personal injuries. The Commission believes, however, that while it may be more difficult to establish the amount of damages in such a case the victim's death should not automatically preclude recovery. Other competent testimony relating to the decedent's pain, suffering or disfigurement will be available in many cases. The argument has also been made that the purpose of awarding such damages is to compensate the victim for pain and suffering which he himself has sustained and that when he is dead the object of such damages is lost and his heirs receive a windfall. This argument suggests that the primary reason for providing for survival of actions is to compensate the *survivors* for a loss to or diminution in the expectancy which they had in the decedent's estate. The Commission does not agree. 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.



Some have also 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 substantially undermine the effect of the proposed new survival statute 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.

### Proposed Legislation

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 as Probate Code Section 573.<sup>3</sup> (See the proposed legislative bill following this recommendation.) The following points should be noted with respect to this recommended legislation:

1. The proposed legislation provides for the survival of *all* causes of action. The Commission attempted originally to draft a statute limited to effectuating its view that all *tort* causes of action should survive, but encountered great difficulty in attempting to draft technically accurate and satisfactory language to accomplish this more limited objective. Legislation limited to "causes of action in tort," 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, whether or not "sounding in tort," were included. Similar questions would arise if a statute of limited scope were written in other terms. The Commission therefore recommends the enactment of a broad and inclusive provision for the following reasons:

(a) A comprehensive survival statute would have the advantage of simplicity and clarity by eliminating difficult questions of construction which would result from the use of more restrictive language.

(b) Such a statute is sound in theory since there does not appear to be any rational basis upon which to determine that some actions should survive while others do not.

(c) A comprehensive survival statute would make little or no substantive change in the present law with respect to survival of non-tort causes of action. The Commission's study of the present law has shown that actions based on contract, quasi-contract, trusts, actions to recover

<sup>3</sup> Although it involves another departure from the 1949 legislation, putting the new comprehensive survival statute in the Probate Code would appear to be logical. The original survival legislation was placed there. CAL. PROB. CODE §§ 573, 574. Survival legislation is located in analogous parts of the statutory law of other states. ARIZ. REV. STAT. ANN. § 14-477 (1956); ILL. ANN. STAT. ch. 3, § 494 (Supp. 1959); N.Y. DECEDENT ESTATE LAW §§ 118-120.

possession of property or to establish an interest therein, and most statutory actions already survive.<sup>4</sup>

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

3. The proposed legislation includes amendments to Code of Civil Procedure Sections 376 and 377 and Probate Code Section 707 necessary to conform them to the proposed new survival statute. Thus in Code of Civil Procedure Section 377, cross references to Civil Code Section 956 are eliminated and replaced by references to the new statute; and in Probate Code Section 707 the cross reference to Probate Code Section 574 is eliminated and replaced by language describing the claims now covered by Probate Code Section 574. In addition, the specific survival provisions contained in Code of Civil Procedure Section 376 are eliminated and Vehicle Code Section 17157, a specific survival provision, is repealed. These specific survival 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.

<sup>4</sup> Causes of action based on contract, quasi-contract or judgments have long survived at common law. *Janin v. Browne*, 59 Cal. 37 (1881) (contract); *Vraghizian v. Savings Union etc. Co.*, 31 Cal. App. 709, 161 Pac. 507 (1916) (quasi-contract); *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 151, 86 Pac. 178 (1906) (judgment); *PROSSER, TORTS* § 105, p. 705 (2d ed. 1955); 1 CAL. JUR.2d *Abatement and Revival* §§ 59-61, 78 (1952). Actions for breach of trust, although technically based on neither "tort" nor "contract," have been held to survive under Probate Code Section 574. *Fields v. Michael*, 31 Cal. App.2d 443, 205 P.2d 402 (1949). In addition, there appears to be some authority that equity did not recognize the maxim that personal actions die with the person. *Evans, A Comparative Study of the Statutory Survival of Tort Claims For and Against Executors and Administrators*, 29 MICH. L. REV. 969, 974 (1931). Moreover, actions for breach of trust would survive even in the absence of statute. *Robinson v. Tower*, 95 Neb. 198, 145 N.W. 348 (1914); 1 C.J.S. *Abatement and Revival* § 134 (1936).

It should also be pointed out that Section 954 of the Civil Code provides:

A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office.

Under the above quoted section it has been held that the right to contest a will survives. *Estate of Field*, 38 Cal.2d 151, 238 P.2d 578 (1951); *Estate of Baker*, 170 Cal. 578, 150 Pac. 989 (1915). As to actions to recover property or to establish an interest therein, see *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700 (1890) (eminent domain); *Barrett v. Birge*, 50 Cal. 655 (1875) (ejectment); *Sanders v. Allen*, 83 Cal. App.2d 362, 188 P.2d 760 (1948) (unlawful eviction); *Swartfager v. Wells*, 53 Cal. App.2d 522, 128 P.2d 128 (1942) (quiet title); *Stockton Morris Plan Co. v. Carpenter*, 18 Cal. App.2d 205, 63 P.2d 859 (1936) (unlawful detainer). And see *Bank of America v. O'Shields*, 128 Cal. App.2d 212, 275 P.2d 153 (1954) (quiet title action by administrator); *Chase v. Leiter*, 96 Cal. App.2d 439, 215 P.2d 756 (1950) (action for declaratory relief by executor). As to statutory actions, note that Civil Code Section 956 expressly applies to actions arising out of a statute. Compare *Rideaux v. Torgimson*, 12 Cal.2d 633, 86 P.2d 826 (1939) (workmen's compensation).

4. A provision is included in the proposed legislation to provide that a cause of action survives where the cause of action arises before, but the death occurs after, the effective date of the proposed legislation.

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

*An act to repeal Section 956 of the Civil Code, and to repeal Section 574 and to amend Sections 573 and 707 of the Probate Code, and to amend Sections 376 and 377 of the Code of Civil Procedure, and to repeal Section 17157 of the Vehicle Code, 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.

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.

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.

*Except as provided in this section no cause of action shall be lost by reason of the death of any person but may be maintained by or against his executor or administrator.*

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\* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted from the present law.

*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 damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.*

*When a person having a cause 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, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived.*

*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.*

*Nothing in this section shall be construed as making assignable things in action which are of such a nature as not to have been assignable prior to the enactment of the 1961 amendment to this section.*

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

~~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.~~

SEC. 4. Section 376 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 Code* ~~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 to or death of a person or injury to property or actions provided for in Section 574 of this code and all claims 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 another person or committed any~~

*trespass on the real property of another person*, 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.

SEC. 7. Section 17157 of the Vehicle Code is repealed.

~~17157. No action based on imputed negligence under this chapter shall abate by reason of the death of any injured person or of any person liable or responsible under the provisions of this chapter. In any action for physical injury based on imputed negligence under this chapter by the executor, administrator, or personal representative of any deceased person, the damages recoverable shall be the same as those recoverable under Section 956 of the Civil Code.~~

SEC. 8. This act applies to all causes of action heretofore or hereafter arising but nothing in this act shall be deemed to revive any cause of action that has been lost by reason of the death of any person prior to the effective date of this act.



# A STUDY RELATING TO SURVIVAL OF TORT ACTIONS \*

## INTRODUCTION

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

This rule of the common law was in effect in California until 1946 when in *Hunt v. Authier*<sup>3</sup> the California Supreme Court by a 4-3 decision held in effect that Section 574 of the Probate Code is a statute providing for the survival of tort actions. Following the *Hunt* decision, the California Legislature enacted comprehensive survival of tort actions legislation in 1949.<sup>4</sup> 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 acrobatics<sup>5</sup> and by what the court labeled a "liberal" interpretation of the language of Probate Code Section 574. That statute, as amended in 1931, allowed an action against a personal representative of a deceased who had "wasted, destroyed, taken, or carried away, or converted to his own use, the property of any such person." The court interpreted the word "property" in this section in its broadest sense, concluded that the statute modified the common law rule of *actio personalis moritur cum persona* and held that the loss to the plaintiffs (the widow and three minor children) of

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

<sup>1</sup> For a historical discussion of this maxim, see *Finlay v. Chirney*, 20 Q.B.D. 494, 502 (1888); Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929); Comment, 18 CALIF. L. REV. 44 (1929). See also *Recommendations and Study made in relation to the Survival of Causes of Action for Personal Injury*, 1935 NEW YORK LAW REVISION COMM'N REP., REC. & STUDIES 157, 172-179; Law Revision Committee, Interim Report, 77 L.J. 246 (England 1934); POLLOCK, TORTS 60, 64 (12th ed. 1923); PROSSER, TORTS 706 (2d ed. 1955); 2 HARPER & JAMES, TORTS 1284 (1956).

<sup>2</sup> 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 REP., REC. & STUDIES, *supra* note 1.

<sup>3</sup> 28 Cal. 2d 288, 169 P. 2d 913 (1946).

<sup>4</sup> Cal. Stat. 1949, ch. 1380, p. 2400.

<sup>5</sup> 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 SO. CAL. L. REV. 239 (1947). Dean Prosser labels the decision "judicial ingenuity." PROSSER, TORTS 709, n. 99 (2d ed. 1955).



the right of future support of their decedent amounted to a "taking" of their "property" because their decedent's estate had been diminished by his wrongful death. In concluding its opinion, the court said:

It follows that wherever a plaintiff has sustained an injury to his "estate," whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to "property" within the meaning of that word in the present statute. The plaintiffs have therefore stated a cause of action for recovery from the defendants of the material losses sustained, including the present value of future support from their decedent considering their respective normal life expectancies, *but exclusive of any damages for such items as loss of consortium, comfort or society of the decedent.* (Emphasis added.)<sup>6</sup>

Thus Probate Code Section 574 was in effect held to be a general survival statute as applied to tort actions with the restriction that the elements of damages arising out of injury to the plaintiff's person—i.e., such "wrongful death" damages as loss of consortium, comfort or society of the deceased—do not survive. The courts applying the *Hunt* doctrine have limited recovery to monetary damages caused by the tort without extending damages to include recovery for pain, suffering or disfigurement.<sup>7</sup>

#### 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 years but had always failed of passage. With the *Hunt* case on the books, however, the Legislature in 1949 enacted Section 956 of the Civil Code, a statute which had been drafted by a group of attorneys and law professors over the years and which was sponsored by the State Bar.<sup>8</sup> Section 956 provides:

A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury, nor by reason of the death of the person injured or of any other person who owns any such thing in action. When the person entitled to maintain such an action dies before judgment, the damages recoverable for such injury shall be limited to loss of earnings and expenses

<sup>6</sup> *Hunt v. Authier*, 28 Cal. 2d 288, 296, 169 P. 2d 913, 918 (1946).

<sup>7</sup> *Vallindras v. Massachusetts etc. Ins. Co.*, 255 P. 2d 457 (1953), *superseded*, 42 Cal. 2d 149, 265 P. 2d 907 (1954) (cause of action for false imprisonment); *Cort v. Steen*, 36 Cal. 2d 437, 224 P. 2d 723 (1950) (cause of action for property damage arising out of personal injuries against the estate of deceased tortfeasor); *Hume v. Lacey*, 112 Cal. App. 2d 147, 245 P. 2d 672 (1952) (same); *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); *Nash v. Wright*, 82 Cal. App. 2d 475, 186 P. 2d 691 (1947) (cause of action against employer for wrongful death); *City of 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); *Smith v. Stuthman*, 79 Cal. App. 2d 708, 181 P. 2d 123 (1947) (cause of action for slander of title to real property).

<sup>8</sup> *Livingston, Survival of Tort Actions—A Proposal for California Legislation*, 37 CALIF. L. REV. 63 (1949); *Legislation—Survival of Personal Injury Actions: A Legislative Proposal*, 24 CALIF. L. REV. 716 (1936).

sustained or incurred as a result of the injury by the deceased prior to his death, and shall not include damages for pain, suffering or disfigurement, nor punitive or exemplary damages, nor prospective profits or earnings after the date of death. The damages recovered shall form part of the estate of the deceased. Nothing in this article shall be construed as making such a thing in action assignable.

It is to be noted that Section 956 only provides for survival of causes of action for "physical injuries." Causes of action for such torts as malicious prosecution, abuse or malicious use of process, false imprisonment, invasion of the right of privacy, defamation in its various phases (libel, slander, slander of title, trade libel) and intentional infliction of emotional distress are not covered by its language. Where a physical injury is involved, however, the provision for survival is all-inclusive with the above noted limitation on damages recoverable. Actions founded upon a liability imposed by statute survive as well as actions based upon common law torts. Neither the death of the wrongdoer, nor the death of any other person who may be liable in damages for the injury (e.g., an employer, the owner of a motor vehicle or the parent of a minor motorist),<sup>9</sup> nor the death of the injured person or of any other person who may own a cause of action arising out of the injury (e.g., the husband of an injured wife or the parent of an injured minor), will abate the action.<sup>10</sup>

The 1949 legislation also made the following related changes in existing statutes:<sup>11</sup>

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

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

5. Probate Code Section 707 which requires that certain claims against decedents' estates be filed within a specified time was amended to include "all claims for damages for physical injuries or death."

<sup>9</sup> *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); *Nash v. Wright*, 82 Cal. App. 2d 475, 186 P. 2d 691 (1947).

<sup>10</sup> *Smith v. Minnesota Mut. Life Ins. Co.*, 86 Cal. App. 2d 581, 195 P. 2d 457 (1948).

<sup>11</sup> Cal. Stat. 1949, ch. 1380, p. 2400. For an analysis of this legislation, see Stanton, *Survival of Tort Actions*, 24 CAL. B.J. 424 (1949).

6. Section 17157 (then Section 402(g)) of the Vehicle Code was amended to provide for the survival of the liability it imposes on owners of vehicles when driven by other persons.
7. Section 11580 of the Insurance Code which relates to liability insurance policies was amended.

#### DEFECTS IN THE 1949 LEGISLATION

The original designers of the 1949 survival legislation thought that it would "repeal" the broad construction of Probate Code Section 574 enunciated in the *Hunt* case. However, a recent decision suggests that the legislation did not accomplish this purpose. This was *Vallindras v. Massachusetts etc. Ins. Co.*<sup>12</sup> which involved an action for false imprisonment which occurred in 1950. The District Court of Appeal held that even though the 1949 legislation only provided for survival of those tort actions involving physical injury or death, the action survived under Probate Code Section 574 as interpreted by the *Hunt* case. The court stated:

We think the conclusion is inevitable that, if we start with the premise that *Hunt v. Authier* properly interpreted section 574 of the Probate Code (and this court is bound by that decision), then all that the 1949 legislation accomplished was to provide expressly for the survivability of causes of action for physical injuries and wrongful death, but that as to other torts, such as false imprisonment that involve damage to property as that term was interpreted in *Hunt v. Authier*, they survive under section 574. This may not have been the intent of the lawyer committee that proposed the legislation, but it is what the legislation that was adopted actually accomplished.

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

\* \* \*

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

Now how do these rules apply to the instant case? The complaint alleges loss of \$550 in costs and counsel fees, a loss of \$50 a week wages while in jail, and a loss of earnings of \$1,100 after plaintiff was released. Those certainly constitute injury to property within

<sup>12</sup> 255 P. 2d 457 (1953), *superseded*, 42 Cal. 2d 149, 265 P. 2d 907 (1954).

the meaning of section 574 of the Probate Code as interpreted in *Hunt v. Authier*. The cause of action for such damage survives. The plaintiff also alleges various items of damage amounting to physical injuries—loss of health, mental suffering, etc. The cause of action for such damage survives under the express terms of section 956 of the Civil Code. The cause of action for exemplary damages, of course, does not survive under any theory.<sup>13</sup>

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

The law is in a state of uncertainty respecting the survivability of torts which do not cause physical injury or death. In the first place, the *Vallindras* decision has no authoritative status inasmuch as it was vacated when the Supreme Court granted a hearing in the case.<sup>14</sup> Moreover, the *Hunt* case could be overruled upon a change of personnel of the Supreme Court. Furthermore, it is not clear precisely what torts survive under the *Hunt* doctrine.<sup>15</sup> There is need, therefore, for further legislative action on the subject of survival of tort actions in this State.

## PROPOSALS FOR LEGISLATIVE ACTION

### What Tort Actions Should Survive

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

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

<sup>13</sup> *Vallindras v. Massachusetts etc. Ins. Co.*, *supra* note 12, 255 P. 2d at 462-463. Section 956 of the Civil Code by its "express terms" bars damages for "suffering" as well as for punitive or exemplary damages.

<sup>14</sup> 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. *Vallindras v. Massachusetts etc. Ins. Co.*, 42 Cal. 2d 149, 265 P. 2d 907 (1954). This case is, of course, not authority for the opinion expressed but is discussed here 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 is 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, 976 (1931).

<sup>15</sup> Query: Wouldn't the action in *Smith v. Stuthman*, 79 Cal. App. 2d 708, 181 P. 2d 123 (1947), survive independently of the *Hunt* case as a tort to real property? Wouldn't the action in *Smith v. Minnesota Mut. Life Ins. Co.*, 86 Cal. App. 2d 581, 195 P. 2d 457 (1948), have survived independently as an action in contract or quasi-contract? See 2 WITKIN, SUMMARY OF CALIFORNIA LAW § 7, at 1177 (7th ed. 1960).

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

There is no social justification for requiring such causes of action to survive. Persons injured by torts which do not cause physical injury are seldom, if 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 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.<sup>16</sup>

This argument is easily answered. It is relevant to the *existence* of the causes of action in question, not to their survivability. Our courts

<sup>16</sup> Livingston, *Survival of Tort Actions—A Proposal for California Legislation*, 37 CALIF. L. REV. 63, 72-73 (1949).

and Legislature have long since decided that these causes of action should exist. If they have the dignity of being causes of actions they should have the dignity of surviving the same as other tort causes of action. Or as one writer put it:

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

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

Dean Prosser answers the argument as follows:

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

#### Limitation on Damages

Any reappraisal of our statute raises the further question of whether there should be any restriction on the elements of damages recoverable. California is one of the very few jurisdictions which has a survival statute which refuses to allow damages for deceased's pain, suffering or disfigurement.<sup>19</sup> In the great majority of the states and in Great

<sup>17</sup> 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.

<sup>18</sup> PROSSER, TORTS 709 (2d ed. 1955). See also Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386, 421 (1942).

<sup>19</sup> Prior to the case of *Fitzgerald v. Hale*, 247 Iowa 1194, 78 N.W. 2d 509 (1956) there was no recovery under the Iowa survival statute for the pain and suffering of a deceased victim. See reference to other statutes in Livingston, *supra* note 16, at 65-67.

Britain there is no such limitation on damages.<sup>20</sup> 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.

*Pain, Suffering, Mental Anguish and the Like*

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.<sup>21</sup> 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.<sup>22</sup>

A case exemplifying the complete absurdity of allowing damages for all elements of a personal injury action to survive is *Rose v. Ford*,<sup>23</sup> an English case decided shortly after the passage of the English survival statutes in 1934. There a young woman sustained a fractured leg in an automobile accident. Two days after the accident her leg had to be amputated, and two days after the operation she died, *having been unconscious the greater part of the four day period*. Her father as administrator (in addition to an action for wrongful death in which he recovered 300 pounds damages) brought an action under the English survival statute for her personal injuries. The Court of Appeal, after allowing 20 pounds damages for the girl's pain and suffering, was faced with the ridiculous problem of awarding damages for the loss of her leg for two days. Said the court:

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

<sup>20</sup> For a recent list of other statutes see Note, 39 IOWA L. REV. 494, 495 (1954).

<sup>21</sup> See 2 HARPER & JAMES, TORTS 1335 (1956); Livingston, *supra* note 16, at 74.

<sup>22</sup> Killion, *Wrongful Death Actions in California—Some Needed Amendments*, 25 CALIF. L. REV. 170, 190 (1937).

<sup>23</sup> [1936] 1 K.B. 90.

<sup>24</sup> *Id.* at 100. This case was appealed to the House of Lords. *Rose v. Ford* [1937] A.C. 826. The court allowed damages for all elements of the personal injury action, including damages for the shortening of decedent's normal expectancy of life! The case is discussed at length in Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 225 (1953).

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, I. M. & S. Ry. v. Craft*,<sup>25</sup> 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 thirty minutes 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.

### *Loss of Earnings*

The fact that the California survival statute is complemented by the California wrongful death statute justifies the provision in the present survival statute which limits damages for loss of earnings to the interim between the victim's injury and his death and allows no recovery for prospective profits or earnings after the date of the death of the victim. Damages for such loss of future earnings and profits during the period of his natural life expectancy had not his life been ended by the wrongdoer's conduct as would have inured to the benefit of his survivors are recoverable under the wrongful death statute; to allow such damages to be recovered under the survival statute would permit a double recovery. In those cases where the victim's death is not caused by the wrongdoer's conduct but results from independent causes, the restriction simply reflects the rule that in a personal injury action, damages for loss of future earnings and profits are always confined to the probable period of normal life expectancy. When the plaintiff survives until the date of judgment we cannot know what this period will be so as to utilize mortality tables to make an "educated guess." When death occurs prior to judgment, however, the period of life expectancy becomes fixed and determinable.

### *Punitive Damages*

Section 956 of the Civil Code prohibits the award of punitive or exemplary damages in favor of the victim's estate. It is submitted that this restriction is sound law and should be continued. It is, in effect, a codification of the California rule that such damages can only be awarded to the *person immediately harmed* by the defendant's wrongful act.<sup>26</sup> Although Section 956 does not expressly so state, the rule is

<sup>25</sup> 115 Ark. 483, 171 S.W. 1185 (1914), *aff'd*, 237 U.S. 648 (1915) (reducing amount of recovery to \$5,000).

<sup>26</sup> *French v. Orange County Inv. Corp.*, 125 Cal. App. 587, 13 P. 2d 1046 (1932); 14 CAL. JUR. 2d *Damages* § 174 (1954). For a criticism of the doctrine of exemplary damages see *McCORMICK, DAMAGES* 275 (1935); 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. *Id.* at 276.



also recognized in California and most other jurisdictions that punitive damages cannot be recovered against the estate of a wrongdoer.<sup>27</sup>

### SIMULTANEOUS DEATH PROBLEM

In any redraft of the California survival statute it is advisable to consider a problem which has arisen under the survival statutes of several states in cases where the tortfeasor was instantly killed in the same accident in which the victim suffered personal injuries. Section 956 of the Civil Code provides that a cause of action for physical injuries "shall not abate by reason of the death of the wrongdoer." From this language it could be argued that the section requires proof that a cause of action existed against the wrongdoer during his lifetime and that in cases where the victim's injury occurred either after or simultaneously with the wrongdoer's death no cause of action came into existence upon which the statute could operate because a cause of action for personal injuries cannot arise against a person who is dead and who does not exist.

It may be thought doubtful that a California appellate court would apply such a narrow and legalistic construction to this statute.<sup>28</sup> However, exactly such a narrow interpretation was given to the New York survival statute by the Supreme Judicial Court of Massachusetts in *Silva v. Keegan*.<sup>29</sup> In that case an action for wrongful death of and personal injuries to plaintiff intestate was brought against the wrongdoer's personal representative. At the time of the fatal accident the victim was riding as a guest passenger in the wrongdoer's automobile in New York. Both were killed. The trial judge directed a verdict for the defendant on the ground that there was no evidence that the alleged wrongdoer was alive at the moment of the injury to the victim and therefore no evidence that any cause of action for either wrongful death or personal injuries arose against the wrongdoer in his lifetime which could survive his death. It was conceded that the wrongdoer died at the scene of the accident and that the victim died several hours later. The only evidence bearing upon the time of the personal injuries to the victim was that shortly after the crash the wrongdoer was lying in the road dead, and that the victim got out of the automobile and was bleeding and gave indications of pain. As to this evidence the court said:

This evidence does not disclose the nature or the relative times of the applications of violence to the persons of Keegan and Silva. The mere facts that Keegan's body was out of the automobile while Silva was still in it furnish no solid basis for an inference that Silva was injured before sudden death overtook Keegan.<sup>30</sup>

<sup>27</sup> *Evans v. Gibson*, 220 Cal. 476, 31 P. 2d 389 (1934); Note, 24 CALIF. L. REV. 479 (1936); 15 AM. JUR. DAMAGES § 235 (1938); 8 ENG. RUL. CAS. 379 (1896); Annot., *Punitive Damages—Executor or Receiver*, 65 A.L.R. 1049 (1930).

<sup>28</sup> Such a construction may be prevented by the 1947 amendment (Cal. Stat. 1947, ch. 451, 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 California Legislature*, 21 SO. CAL. L. REV. 1, 17 (1947).

<sup>29</sup> 304 Mass. 358, 23 N.E.2d 867 (1939). Other cases on this point are collected in Annot., *Survival of Cause of Action—Against Tortfeasor Killed in Same Accident*, 70 A.L.R. 1319 (1931).

<sup>30</sup> *Silva v. Keegan*, 304 Mass. 358, 359, 23 N.E.2d 867, 868 (1939).

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. Victor*<sup>31</sup> refused to follow this case. In 1942, the New York Legislature, upon the recommendation of the New York Law Revision Commission,<sup>32</sup> 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.<sup>33</sup>

It would seem to be desirable for California to enact a similar provision.<sup>34</sup>

#### AUTHOR'S RECOMMENDATIONS

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

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

2. Section 956 of the Civil Code and Section 573 of the Probate Code should be amended to allow for survival of *all* tort actions<sup>35</sup> with the following limitations on damages continued:

(a) No punitive or exemplary damages either for victim's successors or against tortfeasor'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.

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

<sup>32</sup> *Act and Recommendation relating to Maintenance of Action for Death or Injuries Occurring After the Death of the Person Responsible*, 1942 NEW YORK LAW REVISION COMM'N REP., REC. & STUDIES 19-25, 777.

<sup>33</sup> N.Y. Laws 1942, ch. 314, p. 890.

<sup>34</sup> No such amendment would be required with respect to wrongful death actions since Code of Civil Procedure Section 377 already 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, *supra* note 22, at 186, n. 87.

<sup>35</sup> Such an amendment will also necessitate amendments to Probate Code Section 707, Vehicle Code Section 17157 (formerly Section 402(g)) and perhaps Section 11580 of the Insurance Code.

3. Section 956 of the Civil Code, Section 573 of the Probate Code and Section 376 of the 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.<sup>36</sup>

<sup>36</sup> 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.

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