

THE MALDISTRIBUTION OF DAMAGES IN WRONGFUL DEATH

DAMAGE INTERESTS IN WRONGFUL DEATH, JUDGMENTS AND RELEASES DURING LIFE

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Sometimes courts, like the tailor, must cut and fit, making shift with what is given them. Clothes tend to become disreputable with age. Laws tend to become more reputable—even though they were an ill-fit. The law of damages which result from wrongful death has acquired a number of wrinkles in the passage of time, and not a few holes. This article is confined to a critique, in broad outline, of the distribution or allocation of such damages. It deals primarily with the recognition and protection accorded the various classes of person affected by a wrongful death. Although other approaches to wrongful death are inserted for comparison purposes, the main discussion is on the effect of statutes creating a new cause of action in the decedent's dependents—popularly called "Lord Campbell" statutes.

In 1846, Lord Campbell introduced his well-intentioned and long overdue attempt to destroy the harsh common law rules which prevented recovery for wrongful death.¹ About the same time, and partially as a result of the English statute, reform movements exploded throughout America. As in most explosions, the result was quite a mess. After over a century, the debris has settled enough to give answer to most questions on a per state basis, although some issues are still obscured by the dust. Several different approaches to the problem have emerged. However, even in states which have similar statutes, agreement on details is absent to a conspicuous degree. The discussion here is only general and no attempt has been made to document the shadings of view.

GENERAL APPROACHES

Two types of statutes have direct bearing on recovery for wrongful death. A "survival" statute is one which, generally speaking, simply abrogates the common law rule that death terminates the cause of action for personal injury.² The cause of action which arose in the decedent during life is transferred or survives to his personal representative.³ Any recovery is administered as an asset of the decedent's estate.

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¹ Fatal Accidents Act of 1846, 9 & 10 VICT., c. 93, commonly referred to as "Lord Campbell's Act." Under the common law, the death of either party terminated the injured person's cause of action. No cause of action was recognized for the damage suffered by other persons as a result of the death of the injured person.

² *E.g.* OHIO REV. CODE §2305.21.

³ Technically, "survival" applies where no suit was brought before death and "revival" applies where death occurs while a suit is pending. See OHIO REV.

A "wrongful death" statute is one patterned on Lord Campbell's Act. It creates a new cause of action in the next of kin or others designated by the statute for the loss to them resulting from the death.⁴ Procedurally, the action is brought by the decedent's personal representative, but it is for the exclusive benefit of the statutory beneficiaries.⁵ Any recovery is generally administered under special statutory provisions and is not considered or administered as an asset of the decedent's estate.

At present, there are three major approaches to damages for wrongful death. These may be identified as those states which have:

1. Only a survival statute, and only one action is possible. These will be referred to as "survival" states.⁶

2. A survival statute and a wrongful death statute and two actions can be brought and two recoveries obtained, one under each statute.⁷ The actions usually can be brought at separate times or concurrently.⁸ These are "two-remedy" states.

3. A survival statute and a wrongful death statute but only one recovery is possible.⁹ The statutes are considered as mutually exclusive—when one applies the other does not.

DAMAGE INTERESTS

Wrongful death is frequently referred to as an invasion of the decedent's interest in his person and property.¹⁰ However useful that CODE §§2311.21-37. In the context of wrongful death, the distinction should be, but has not necessarily been, merely procedural. Cf. *Muldowney v. Illinois Central Ry. Co.*, 36 Iowa 462 (1873).

⁴ Technically, wrongful death statutes change the common law rule that refused recognition to a cause of action in other persons for death caused by injuries and do not affect the rule which terminated the injured person's caused by action.

⁵ See OHIO REV. CODE §§2125.01-.04; *May Coal Co. v. Robinette*, 120 Ohio St. 110, 165 N.E. 576 (1929). But cf. ORE. REV. STAT. §30.020, *infra* note 31.

⁶ One curious detail of this approach, at least in earlier years, was the problem of "instantaneous" death. If a man died "instantly" no cause of action ever arose in him and logically there was nothing to "survive" to the personal representative. Rigid adherence to this logic created an arbitrary gap in the coverage of wrongful death. In the light of modern medical knowledge, it would seem almost impossible instantly to kill a person, except in the narrow sense that his heart may be instantly stopped.

⁷ "Instantaneous" death may bar the survival action. Should the American courts ever recognize shortened or decreased life itself as a distinct item of non-pecuniary injury to a living plaintiff, it would seem probable that the recovery would also be allowed under the survival statute. That is the English law. See Smith, *Psychic Interest in One's Own Life*, 98 U. PA. L. REV. 781 (1950).

⁸ Required or permissive joinder in one suit is a distinct problem of its own. See Wills, *Wrongful Death and Personal Injuries—Joinder of Causes of Action and Counterclaims*, 16 OHIO ST. L.J. 501 (1955).

⁹ Procedurally, it may be permissible to file on both causes of action but recovery is limited to one theory or the other. See *Carbary v. Detroit United Ry.*, 157 Mich. 683, 122 N.W. 367 (1909).

¹⁰ *E.g.* 44 HARV. L. REV. 980 (1931); REPORT OF THE LAW REVISION COMMISSION [OF NEW YORK] 204 (1935).

statement may be for other purposes, it is obviously only figurative and, from the viewpoint of compensatory damages, tends to cloud recognition of the damages resulting from death. One cannot compensate a dead body, nor an estate. A dead body is a thing, not a person. An estate is simply a legal concept employed for the purpose of adjusting the interests of living persons in assets formerly owned by the decedent. Analytically, there are two damage interests which arise from a wrongful death—the decedent's creditors, and the dependents and others who would have received economic benefit from the decedent or who suffer direct injuries arising from mental distress and loss of decedent's services.

It would seem apparent that creditors have a substantial economic interest in a debtor's life. Every creditor, whether legally secured or unsecured, relies principally upon the debtor's earning capacity in extending credit. Mortgages and other collateral are in fact merely a backstop against inability to pay out of income. The creditor expects payment from prospective earnings—especially in the case of personal loans to a wage earner. The wrongful destruction of earning capacity necessarily injures every creditor by impairing the most basic security—an expectation of repayment from income. Depending on the amount of other assets the decedent held, the result can be substantial monetary loss to the creditor.¹¹

Dependents, relatives and others may show a pecuniary interest arising from their expectation of economic benefit. The identification of those in this class, and the determination of the extent of their expectation, is obviously a problem of reasonable probabilities. Some of this class may also claim a direct non-pecuniary injury in the mental distress, loss of companionship, etc., that the death causes and a direct pecuniary injury in the loss of services rendered by the decedent to them.

SURVIVAL STATES

The pecuniary interests of both groups receive substantial protection in a "survival" jurisdiction.¹² In such states, recovery under the survival statute is, essentially, what the decedent would have recovered. Damages include expenses (medical and others), pain and suffering,¹³ and loss of earnings, all to date of death. Recovery also includes loss of future

¹¹ In recent years life insurance has become a common security device, and not infrequently, a loan requirement.

¹² Of course the failure to impose *liability* in the case of "instantaneous" death would be a major defect. See *supra* note 6.

¹³ The inclusion of the decedent's pain and suffering as an item of damages in an action brought after death is somewhat dubious. It appears to result from mechanical reasoning by both courts and legislatures—the decedent could have recovered this and therefore the item "survived." Perhaps the best ground for its allowance is that while creditors and dependents may have no particular claim to such damages, neither does the defendant have any particularly strong ground upon which to protest liability. The Iowa court excluded pain and suffering. See Jones, *Civil Liability for Wrongful Death in Iowa*, 11 IOWA L. REV. 28 (1925).

earning capacity, computed with reference to the decedent's life expectancy.¹⁴

Since the recovery is administered as an asset of the estate, creditors receive all the protection they could ask. On the other hand, the economic impact of death upon the decedent's family and dependents may be so drastic that it would seem highly desirable social policy to make some provision for their need.¹⁵ The most obvious method of dealing with the problem would be to make a portion of the survival action recovery payable to the dependents free from the claims of creditors. Creditors are generally accorded priority in the administration of a decedent's estate, although there are certain basic exemption provisions.¹⁶ These provisions are designed to deal with all types of estates. Any substantial increase in the general exemptions would affect the whole field of decedents' estates. Some specific provision on recoveries under the survival statute would appear necessary.

However, while the pecuniary interest derived from the decedent is covered by the survival statute approach, no recovery is usually accorded the dependents for any direct pecuniary loss suffered by them (such as the value of the decedent's services), nor for the non-pecuniary injuries arising from death, grief, etc.¹⁷

Survival statutes commonly contain no specific provision on the effect of judgments or releases by the injured person during life. However, since the personal representative is said to be suing on the decedent's cause of action, he is in "privity" with, and bound by, the action of the decedent. Commonly, therefore, the extinguishment of the cause of action by either judgment or valid release operates to bar any action under the survival statute.¹⁸

However valid that reasoning may be from the viewpoint of statu-

¹⁴ There has been extensive disagreement on the computation. The measures suggested vary from gross earnings at one extreme to accumulation (amount decedent would have saved) at the other. See *Chase v. Fitzgerald*, 132 Conn. 461, 45 A.2d 789 (1946). From the viewpoint of compensating creditors and dependents or others, gross earnings less living expenses (net earnings) would seem the proper measure.

¹⁵ Bankruptcy, wage-earner trusteeships, garnishment exemption and other "debtor" laws, plus the willingness of creditors to go along with a debtor demonstrating good faith by even token payments, enables one earning income to devote a substantial portion of it to his family. In the death action, those earnings become a lump sum, are reduced to present worth, and the recovery is immediately subject to the payment of all debts in full. Thus, realistically, the family may be left in a considerably worse position.

¹⁶ OHIO REV. CODE §2115.13 exempts from the administration an amount, in property or money, which in no event can exceed \$2500.00. OHIO REV. CODE §§2117.20-24 provide for a "Year's Allowance" for the support of a widow and children under eighteen.

¹⁷ Whether the non-pecuniary injury is in fact excluded by juries is another question. See discussion *infra*.

¹⁸ *Cogswell v. Boston & M.R. Co.*, 78 N.H. 379, 101 Atl. 145 (1917).

tory interpretation, it hardly explains why the action should be barred. Looking to the damage interests, the point to note is that "privity" should be found to prevent duplication of damages. The damages recoverable in an action by the injured person during life are, or should be, exactly the same as those recoverable in the survival action.¹⁹ To permit the survival action would thus result in double recovery.²⁰

There being no specific recognition given in these States to the needs of the family as a matter of social policy, nor to any direct injury (pecuniary or non-pecuniary) suffered by those benefiting from the survival action, the bar by judgment or release of the survival action does no great violence to the damage interests of the various persons. The same derivative expectation interests exist in any case of permanent non-fatal injury. The legislature not having seen fit to accord a greater degree of protection in cases involving death, the courts have simply followed the usual rules.

STATES WITH CONCURRENT REMEDIES

In states where two concurrent actions and recoveries are permitted, one under a survival and one under a wrongful death statute, the duality of remedies presents peculiar damage problems.

The measure of recovery in the wrongful death action is generally based on the pecuniary loss to the beneficiaries of the action. In a few states, it is the loss to the "estate." Under either view, this loss includes an amount measured by reference to the decedent's earning capacity over his life expectancy.²¹ As previously noted, survival jurisdictions grant recovery for the decedent's loss of earning capacity in the survival action. To follow that view in a concurrent remedy state would result in duplication of damages. The portion of future earning capacity recoverable in the wrongful death action would simply be a segment carved from the larger recovery obtained in the survival action.²²

¹⁹ On the right of a living plaintiff to recover loss of earning capacity where an injury decreases life expectancy, see Duffey, *Life Expectancy and Loss of Earning Capacity*, 19 OHIO ST. L.J. 314 (1958). If the recovery by a living plaintiff were limited to the date of probable actual death (*i.e.*, expectancy as shortened by the injury), there would be no duplication on that item, and the operation of a judgment or release as a total bar could not be justified on the ground of duplication of damages.

²⁰ A judgment for the injured person during life may not, of course, cover the damages in full because of an error or mistake. Releases may be given for inadequate consideration. A judgment may be against the plaintiff. In none of these instances is there double *payment* in fact. It would, however, be within the meaning of "double recovery." The point is discussed further *infra*.

²¹ As in survival states, the courts vary on the amount of the decedent's gross earning capacity which is recoverable. See *supra* note 14. For the purposes of this article it is only necessary to notice that under all views, the recovery includes some portion of future earning capacity. It should also be noted that in many cases, this item of damage is the only really substantial one.

²² 44 HARV. L. REV. 980 (1931). For two excellent analyses of this duplication

Duplication is avoided by the simple device of limiting recovery in the survival action to the date of death.²³ The wrongful death action then picks up loss of earning capacity from death to date of life expectancy prior to injury. While the reasoning employed in many of the cases is fallacious,²⁴ there can be no doubt that the basis for limiting the pecuniary losses in a survival action to the date of death is the avoidance of duplication of damages and that the limitation is a judge-made rule, created in an attempt to reconcile the operation of the two statutes.²⁵

The result of such tailoring is that: 1. In the survival action, the principal damages recoverable are expenses, pain and suffering, and loss of earnings, all to date of death; 2. In the wrongful death action, the principal damages are all or a portion of the loss of earning capacity from death to date of life expectancy prior to injury, and the pecuniary value of the decedent's services.²⁶

The impact that this judicial cutting and fitting has upon the distribution of damages is peculiar. The arbitrary, even if necessary, division of damages between the two actions has a direct effect upon the creditors' interest. Their interest certainly extends to loss of earnings and the expenses incurred by the decedent before death which deplete the estate. That recovery is available to creditors since it passes through the estate under the survival statute. But the creditors' main concern lies in the lost future earnings. It is this loss which inflicts the greatest injury on creditors and which constitutes the primary damage item in those cases in which creditors are likely to have the greatest interest—the death of a wage or salary earner. Yet participation in the recovery of prospective damages is completely denied to the creditors. All of that recovery is allocated to the wrongful death action and does not pass through the estate.²⁷ Certainly the interests of the dependents justify exempting a

of damages, see Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924); REPORT OF THE LAW REVISION COMMISSION [OF NEW YORK] 199 (1935).

²³ See *Hindmarsh v. Sulpho Saline Bath Co.* 108 Neb. 168, 187 N.W. 806 (1922); *Allen v. Burdette*, 139 Ohio St. 208, 39 N.E.2d 153 (1942).

²⁴ In *Allen v. Burdette*, *supra* note 23, the court stated that death "established" the decedent's life expectancy and therefore recovery could not extend past death. Where death occurs from *other* causes, the person's life span is obviously established as a fact. But it would seem rather patent that death caused by the injury itself cannot possibly have any bearing on what the life span would have been without the injury. The court was either simply begging the question or stating a conclusion without recognizing the issue.

²⁵ See articles cited note 22 *supra*. Thus, in these states, damages in a survival action do not strictly follow the survival theory or concept. A living person can, or should be able to, recover over his life expectancy as it existed prior to injury and not merely to the date of his probable actual death due to the injury. See *supra* note 19.

²⁶ Non-pecuniary injuries are generally not recoverable, at least in theory. See discussion *infra*.

²⁷ Exemption of the wrongful death recovery from claims of creditors results

substantial portion of the future earnings recovery from the claims of creditors. However, it is questionable whether the complete exemption which results from this judicial balancing is justifiable.

The peculiarities go deeper. Occasionally, but not rarely, the designated beneficiaries do not survive the decedent, or perhaps die before judgment. A fair number of states hold that in such circumstances, no action lies under the wrongful death statute.²⁸ Under these holdings, the wrongdoer escapes all liability for the loss of future earning capacity despite the fact that creditors may suffer substantial injury. Correction of this result would require the creation of an exception to the rule limiting damages in the survival action. Even though the rule seems clearly based on policy grounds rather than statutory interpretation, few courts would be willing to so boldly tailor the statutes. *Kriesak v. Crowe*²⁹ is an unusual, and commendably frank handling of the problem. The action was under the survival statute, and it appeared that no wrongful death action could be brought. Recognizing that the limitation of damages in survival actions was based on the avoidance of duplication, the court held that loss of earning capacity in the survival action should be computed on the decedent's normal life expectancy.³⁰

Wrongful death statutes also have a marked effect on the distribution of damages among the dependents and others who had an expectation of economic benefit from the decedent. The statutes vary greatly on exactly to whom, and in what proportion, the recovery is distributed. Beyond the immediate family, it is difficult to generalize. Commonly, recovery is limited to next of kin, and non-relative dependents are excluded. While this is also true of intestacy statutes, it would seem that such persons might be accorded protection in this area. Certainly, in a fair number of cases the probability of loss to them greatly exceeds that which could be shown by relatives. The existence of non-relative dependents is recognized in our tax laws. It seems somewhat unrealistic to refuse recognition in this area of wrongful death. Similarly, such statutes operate to prevent inheritance under the decedent's will.³¹

from both express provision and the application of the "new cause of action" theory. Many of the statutes are noted in 44 HARV. L. REV. 980 (1931). As might be expected, the States are not uniform on this point and in some the decedent's creditors may be able to reach the recovery under some circumstances. Cf. *infra* note 31.

²⁸ Many cases are collected in 43 A.L.R.2d 1291 (1955).

²⁹ 36 F. Supp. 127 (D.C. Pa. 1941), followed in *Kriesak v. Crowe*, 44 F. Supp. 636 (D.C. Pa. 1942), *affirmed*, 131 F.2d 1023 (C.C.A. 3d 1942).

³⁰ For another very interesting "tailoring job" on this problem, see Pezzuli v. D'Ambrosia, 344 Pa. 643, 26 A.2d 659 (1942). A comment on the Pennsylvania law, including both the *Kriesak* and *Pezzuli* cases, may be found in 91 U. PA. L. REV. 68 (1942).

³¹ Cf. ORE. REV. STAT. §30.020 where the action is "for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent."

Under this "Lord Campbell" or "new cause of action" approach, the determination of who should participate, and the extent of participation, is obviously a vexing problem. Considering all those persons and institutions who might reasonably have expected to receive an economic benefit from the decedent, it is impossible to arrive at a perfect solution. The problem is inherently one of reasonable probability plus social policy. Certainly the fact that the decedent's will at the time of his premature death provided for a certain distribution is no assurance of what he would have done had he lived. It might be commented, however, that the law of testate and intestate succession contains a pattern of distribution which is firmly planted and, in its general outline, well known. It would seem desirable to use that pattern as at least a backstop rather than simply release the wrongdoer from liability.

Regardless of the beneficiary problem, the present division of damages seems utterly arbitrary. Creditors have as great an interest as do the dependents and others in the loss of the decedent's earning capacity. On the other hand, the latter have as great a claim as do creditors upon the recovery for expenses, pain and suffering and loss of earnings to date of death.³² Yet as a result of the judicial balancing of the two statutes, distribution is by item of damage rather than upon any considered policy decision of the extent of damage interest.³³ An approach based on weighing the various interests on a percentage or minimum amount of the total recovery of damages would seem a far more appropriate method of handling the distribution.

Under most wrongful death statutes, recovery is limited by statute or judicial decision to pecuniary damages.³⁴ Where recovery is based on loss to the beneficiaries, this includes the pecuniary value to the beneficiaries of the decedent's services—an item not recoverable under a simple survival approach. The item is not of great importance in cases where the decedent had any substantial future earning capacity. But where the decedent was a non-wage earner—and particularly, an infant—it assumes an importance as the only apparent foundation for the wrong-

³² Assuming that the beneficiaries of the wrongful death action are substantially the same as those sharing in the estate (and that assets exceed liabilities), the beneficiaries will, of course, benefit from the survival action.

³³ The "new cause of action" concept is so deeply ingrained that it is easy to lose sight of the very substantial identity of damage interest in the survival and wrongful death recoveries. Not infrequently reference is made to damages to the estate as "distinct" from the loss to the beneficiaries under the wrongful death statute. Much of this confusion may arise from an underlying assumption that a living plaintiff cannot recover loss of earning capacity for a period of decreased life expectancy and that therefore no such recovery is possible in a survival action. As previously pointed out, the assumption appears to be erroneous both as to the right of a living plaintiff and as to the basis of the limitation in survival actions. See *supra* notes 19, 22 and 23.

³⁴ OHIO REV. CODE §2125.02; Michigan Central R. Co. v. Vreeland, 227 U.S. 59 (1913).

ful death action.³⁵ In this connection, it should be noted that the pecuniary damage limitation excludes, at least in theory, recovery for grief, loss of companionship, etc., incurred as a result of the death. But the size of verdicts returned by juries and upheld by the courts in non-wage earner cases would indicate that the value of services is merely a vehicle for the recovery of the non-pecuniary injury in fact.³⁶

The extreme difficulty of measuring such an intangible injury, and the consequent inability to establish standards for controlling both the jury and judge, probably accounts for the refusal openly to recognize mental distress and related injury. The whole pecuniary damage concept might best be viewed, at least today, as simply a device for controlling excessive awards without any real intent or desire actually to exclude the item from the jury's verdict. If that be true, there is much reason seriously to consider the forthright position of Wisconsin. In that state, recovery for mental distress is specifically allowed, but simply restricted to \$2500.00.³⁷

In the light of these considerations, it may be doubted if there is any real distinction between survival states and concurrent remedy states on the damages which are recoverable in fact.

The concurrent remedy approach has also given rise to confusion on the effect of a judgment or valid release obtained during the life of the injured person.³⁸ The survival action generally is held to be barred by a judgment in these states just as in "survival" states. The reasons are also the same: (1) the cause of action is "the decedent's cause of action," and (2) a complete duplication of damages exists.³⁹ Valid releases also operate as a bar for similar reasons. There is, of course, an existing body of law dealing with the validity of releases. Again as pointed out previously, the very real interest of the dependents and of the community itself in any settlement by the decedent suggests that attention may well be given to whether the existing law adequately copes with the problems of releases for an "inadequate" but legally "sufficient" amount.

³⁵ For an exhaustive annotation on recovery for the death of an infant, see 14 A.L.R. 2d 485 (1950).

³⁶ See PROSSER, TORTS, §105, p. 715 (2d ed. 1955).

³⁷ *Mueller v. Silver Fleet Trucking Co.*, 245 Wis. 458, 37 N.W.2d 66 (1949).

³⁸ A somewhat analogous problem arises with respect to the running of limitations against the decedent during his life. However, the limitations applicable to any type of death action are so complex a matter and include so many side issues that they are not considered here. See 132 A.L.R. 292 (1941); 167 A.L.R. 894 (1947).

³⁹ A judgment may not, in fact, cover all the damages, or may cover them for an insufficient period. Such a circumstance is simply an error of fact occurring in the personal injury action. On principles of finality of decision, the judgment should be considered conclusive as to all damages that could or should have been recoverable. A judgment against the injured person should operate as a bar on principles of mutuality. To hold otherwise would be to sanction "double jeopardy" in civil liability. It should be remembered in both of these instances that error is no respecter of sides and works as much against defendants as against plaintiffs.

However, the courts split when it comes to the question of whether the wrongful death action is barred.⁴⁰ The majority of courts hold that the wrongful death action is dependent upon the existence of a cause of action in the decedent at the time of his *death*. Thus if the decedent's cause of action is merged in a judgment or validly released, the requirements of the statute are not met. The minority say that the cause of action depends on conditions at the time of *injury*, and the decedent cannot by his subsequent conduct affect a cause of action in favor of others, and which doesn't even accrue until death.⁴¹

With due respect to all the judges who have so often repeated these arguments, neither statement is persuasive, and, on the wording of the statutes, both come perilously close to mere conclusions. On the literal wording of the statutes, neither interpretation can be said to be unreasonable. If the statutory language is clear, a court must follow it. But where two or more interpretations are available, general policy considerations should control. Nor is the minority view appreciably strengthened by resort to the "new cause of action" theory. To strenuously argue that the personal representative acts in two capacities and therefore that no "privity" (and no *res judicata*) exists between the parties would certainly seem to be a mere conclusion.⁴² The question would really be better stated as one of whether "privity," or "estoppel," *should* be found. As the length of Freeman's treatise⁴³ attests, it is not unusual to extend such concepts in a new situation, here a statutorily created remedy, if basic policy reasons appear to require the extension.⁴⁴

In an action by a living plaintiff, recovery extends to the loss of earning capacity over the life expectancy as it existed prior to injury.⁴⁵ The recovery in the wrongful death action based on the decedent's future earning capacity is thus simply a portion or segment of the larger recovery obtained by the injured person himself in the personal injury action. The result of the minority view is thus to impose double liability upon the defendant and require double payment for the same loss.⁴⁶

⁴⁰ 39 A.L.R. 579 (1925), supplemented in 99 A.L.R. 1091 (1935). In a number of states, e.g. Ohio, no clearly authoritative decision exists.

⁴¹ The case of *Rowe v. Richards*, 35 S.D. 201, 151 N.W. 1001 (1915), is probably the leading authority for the minority view.

⁴² Taking the two-capacity approach, the discussion should probably be directed at estoppel by bar rather than *res judicata*. For arguments of this type see *Ohio's Wrongful Death Statute*, 4 CLEV.-MAR. L. REV. 38 (1955); 18 U. CIN. L. REV. 548 (1949).

⁴³ FREEMAN ON JUDGMENTS (5th ed. 1925).

⁴⁴ In the almost converse situation of successive or concurrent joint tortfeasors, the courts had no great difficulty creating a bar despite lack of "privity."

⁴⁵ *Hallada v. Great Northern Railway*, 244 Minn. 81, 69 N.W.2d 673 (1953); *Prairie Creek Coal Min. Co. v. Kittrell*, 106 Ark. 237, 153 S.W. 89 (1912). See cases collected in Duffey, *Life Expectancy and Loss of Earning Capacity*, 19 OHIO ST. L.J. 314 (1958).

⁴⁶ Of course, if a court were to deny an injured person the right to recover full compensation for his own injuries by limiting his recovery to the date of

In this connection it is important to distinguish a judgment during the injured person's life from a judgment under the survival statute. The limitation of survival damages to date of death excludes loss of earning capacity from a survival recovery. Therefore, it is apparent that because of that rule, the damages recoverable in survival and wrongful death are distinct and do not overlap.⁴⁷ Accordingly, there is no reason why judgment in a survival action should bar the wrongful death action, or vice versa.⁴⁸ Considering that the basis of the damage limitation in survival actions was the prevention of double recovery, it is difficult to explain why the courts following the minority view have failed to recognize the same point in the situation of judgments during life.⁴⁹

The opinion of the Nebraska court in *Hindmarsh v. Sulpho-Saline Bath Co.*,⁵⁰ contains a very thorough discussion of the overlap of damages between personal injury, survival and wrongful death actions. The court pointed out that the injured person can recover for his total loss of earning capacity and that a judgment during life should bar both the survival and wrongful death actions. The opinion then discusses the similar double payment that would arise from the two death actions unless the survival recovery is limited. The court emphatically stated that any such double liability—a recovery which exceeds the total loss sustained—constitutes *punitive* or *exemplary* damages.⁵¹

In the absence of a specific statutory or constitutional provision, the great weight of authority holds that no punitive or exemplary

probable actual death, there would be no double liability. See McCORMICK, DAMAGES, §86, p. 303-304 (1935 ed.).

⁴⁷ The distinction between "revival" and "survival" should be, but has not necessarily been, merely procedural. Where death occurs during a pending action and before judgment, and the action is revived and judgment obtained, double recovery will result unless the damages are limited to loss of earnings to date of death in accordance with the survival rule.

⁴⁸ No reason, that is, based on over-lapping damages. This article is not concerned with the justification for inconsistent judgments based on the same facts and other aspects of the concurrent remedy approach.

⁴⁹ The confusion may stem from a misconception of the common law death rules. Thus in Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924), the author makes an excellent analysis of the double recovery problem presented by the inter-play of survival and wrongful death actions in a concurrent remedy state. However, the article assumes, and in one place states, that a recovery by the injured person does not present such a problem. A similar assumption appears in *De Hart v. Ohio Fuel Gas Co.*, 84 Ohio App. 62, 85 N.E.2d 586 (1948), where the court held that a judgment for the defendant in an action by the injured person did not bar a wrongful death action. The Supreme Court of Ohio has never directly passed on a case involving a judgment by a living plaintiff.

⁵⁰ 108 Neb. 168, 187 N.W. 806 (1922).

⁵¹ A careful discussion of double recovery may also be found in *Fontheim v. Third Ave. Ry. Co.*, 257 App. Div. 147, 12 N.Y.S. 2d 90 (1939). See also REPORT OF THE LAW REVISION COMMISSION [OF NEW YORK], 48 (1935).

damages may be awarded in wrongful death.⁵² In those states permitting punitive damages, the recovery is based on the conventional tort distinction of gross or wilful negligence, etc., as the case may be in that state.⁵³ The punitive damages resulting from the failure to bar a wrongful death action would not be based on the degree of culpability of the defendant's conduct. The basis would simply be that death had resulted. It would seem that basic policy dictates the confinement of damages to compensation and that a court should refuse to impose punishment in the absence of explicit statutory provision.

It is, of course, true that the pecuniary value of the decedent's services is recoverable in wrongful death but not in the personal injury action—at least as to services that would have been rendered after the date of probable actual death. The same point was previously mentioned with respect to survival actions. In many states, a husband can recover for the loss of his wife's services, but others generally cannot sue for such a loss. This deficiency, if it be one, would seem a problem of general tort law. It would perhaps be possible to treat a judgment as only a partial bar by simply limiting the wrongful death action to loss of services. However, such an approach would probably accentuate the problem of jury verdicts based on grief and mental distress. Before engaging in such a course of action, a legislative re-appraisal of the whole non-pecuniary injury problem would seem desirable.⁵⁴

Releases present a similar situation. It is true that releases are sometimes given for trifling sums and the injured person subsequently dies from his injuries. Such things are, of course, unfortunate. But they arise from the inherent inability to determine exactly the extent of a person's injuries—just as it is difficult to determine with certainty the defendant's liability. Here, as in judgments during life, the speculative elements are on both sides of the fence. Assuming a release is given as an accord and satisfaction,⁵⁵ it is supported by the same policy considerations that apply to judgments.

The legislature might well consider requiring the dependents' interests to be specifically taken into account in settlements of personal injury claims. As to the courts, Judge Smith's strong dissent in *Rowe v. Richards*⁵⁶ puts the matter very well:

It would be idle to discuss the wisdom or justice of legislation

⁵² See cases cited in 14 A.L.R.2d at 538.

⁵³ See 61 HARV. L. REV. 169 (1947).

⁵⁴ Wisconsin's specific recognition of the non-pecuniary injury previously discussed, presents a somewhat different question. Partial bar, leaving recovery on that item open, would seem possible under the Wisconsin statute. Failure to recover in fact in the personal injury action, as well as judgments for the defendant, should operate as a bar. See *supra* note 39.

⁵⁵ On the failure of American law adequately to distinguish releases from releases in satisfaction in the almost converse situation of "joint" tortfeasors, see PROSSER, TORTS, §46, p. 243 (2nd ed. 1955).

⁵⁶ *Supra* note 41.

which might require the wife's right to future support to be taken into account when settlements are made in his lifetime for personal injuries to the husband. We need only observe that at the present time the law does not require it, no matter what may be the extent of the injury.

It has also been suggested that, since the defendant must consider future liability, the minority view allowing suit despite a judgment or release may affect the procurement of settlements, and compound the problem of adequate payment.⁵⁷ In this respect, it is interesting to note the dilemma of Ohio attorneys arising from the unsettled law in that state. A release by the beneficiaries would operate to bar the wrongful death action. However, while the family of the injured person may be willing to join in a release, the parent may not be able to bind a minor child.⁵⁸ Resort to the Probate Court may also be ineffective.⁵⁹

"ONE REMEDY" STATES

To round off the picture of the judicial tailors at work, several comments on one-remedy states are appropriate. These states are those in which the survival action and wrongful death action are considered as being mutually exclusive.⁶⁰ This interpretation of the statutes is also probably based on a desire to avoid duplication of damages between the survival and wrongful death actions.⁶¹ It does not, of course, avoid the similar problem which arises between a personal injury judgment or a release during life and the wrongful death action.⁶²

The one-remedy view has a very drastic effect on the interests of creditors. In any case where the wrongful death statute applies, creditors are completely cut off. However, in "compensation" for this result, survival actions allow creditors to come out ahead of their brethren in a concurrent remedy state since loss of earning capacity is recoverable.

⁵⁷ *Dibble v. New York & Erie R.R. Co.*, 25 Barb. 183 (Sup. Ct. N.Y. 1857); *Littlewood v. City of New York*, 89 N.Y. 24 (1882).

⁵⁸ *Phillips v. Community Traction Co.*, 46 Ohio App. 483, 189 N.E. 444 (1933), *motion to certify overruled*, 1933.

⁵⁹ In *Traci, Ohio's Wrongful Death Statute*, 4 CLEV.-MAR. L. REV. 38 (1955), the author states that one Ohio Probate Court refused approval on the ground of lack of authority. The article also points out that the Negligence Committee of the Ohio State Bar Association twice proposed a statute making judgments and releases during life operate as a bar to wrongful death actions.

⁶⁰ *E.g. Susemihl v. Red River Lumber Co.*, 305 Ill. App. 473, 27 N.E.2d 285 (1940).

⁶¹ See articles cited in note 21 *supra*.

⁶² In Illinois, a lower court has held that a living plaintiff cannot recover the loss of earning capacity beyond his life expectancy in his injured condition. *Krakowski v. Aurora E. & C. Ry. Co.*, 167 Ill. App. 469 (1912). This appears to be the only such holding reported in America. The case is discussed in *Duffey, Life Expectancy and Loss of Earning Capacity*, 18 OHIO ST. L.J. 314 (1958).

CONCLUSION

The development of principles and doctrines to cope with all the aspects of tort damages has taken many years of evolution and the work of many minds. Much still remains to be done. In the field of death, development was arrested by the arbitrary common law rules. Certainly it is expecting too much of the late Lord Campbell to assume that in one swoop he was capable of drafting a statute that would adequately fill the hole left in our law. But with over 112 years of experience to draw upon, it does not seem to be asking too much of the legal profession and the legislatures to expect an effort to improve and refine Lord Campbell's work. The present day statutes, of whatever type, are inadequate. No mention has even been made of the complexities that have arisen in the area of conflicts of law.

Perhaps this article is more destructive than constructive in its criticism. However, its purpose is simply to suggest a basic conceptual approach to wrongful death—one based on damage interests and not on labels such as "survival" or "new cause of action." And comfort can be taken in the thought that knowledge of the inadequacies of the present day law is essential to adequate new legislation.