The Lost Years: A Problem in the Computation and Distribution of Damages

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SIGNIFICANT and continuing advances by contemporary medicine in diagnostic and clinical skills have made it increasingly more possible and common to venture a prognosis of diminished life expectancy for victims of disease and accident, sufficiently reliable to meet the conventional legal standard of proof on a balance of probabilities. This development raises to prominence important questions relating to the assessment of damages in personal injury actions and the distribution of compensation among the various interests, including those of dependants, who are liable to suffer prejudice presently and in the future as a result of an accident and may, therefore, legitimately voice their concern in the disposition of any claim against the tortfeasor.

Diminution of life expectancy has a harmful impact not only on the person thus disabled, both in respect of his interests of personality (anguish at the prospect of hastened death) and substance (deprivation of earning capacity during the lost years), but no less upon the expectancy of his survivors which is today protected to some extent in all of our jurisdictions either by survival or wrongful death statutes or both.1 Neither courts nor legislatures have remained strangers to some of the problems of adjusting these varying and often conflicting interests, particularly as between the estate and surviving dependants of the decedent. But in the past, rather less consideration than it deserves has been given to the proper relation between claims by the injured person in his own lifetime and those of his dependants after death.

With few exceptions, of which California is a notable example,2 this conflict has generally3 been resolved by subjecting the interests of the latter to the risk of extinction by a prior recovery of the deceased, in the assumed belief that any other solution would expose the tortfeasor to the dreaded prospect of double liability. This fear would be warranted, however, only if the award to the decedent included compensation for his loss of earnings during the period by which his life has been curtailed, for this segment alone corresponds with the expectancy of support to which his dependants

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1 See generally Prosser, Torts § 105 (2d ed. 1955); 2 Harper & James, Torts § 24.2 (1956); Note, 44 Harv. L. Rev. 980 (1931).

2 See note 50 infra.

3 See note 38 infra.
may lay claim in a wrongful death action. At the time when this pattern emerged, in the declining years of the last century, recovery by the decedent himself invariably proceeded on the basis of his normal life expectancy, not so much because it was deemed a matter of inexorable principle that loss of earnings should be measured by his pre-accident rather than his post-accident condition, but simply because there was no ground for any prognosis at the time of the trial or settlement that his life expectancy had in fact been decreased by the accident. Hence only an undiscriminating obeisance to precedent, foreign to the spirit of our forward-looking courts, would necessarily compel the same solution where, in the light of evidence of diminished life expectancy, judgment in the original personal injury action was limited to prospective loss of earnings in the plaintiff's remaining years. Accordingly, it might seem appropriate to reopen the question of compensation for the "lost years" upon which hinges the controversial corollary that his dependants should run the risk of being fortuitously defeated by a prior recovery in his own lifetime.

The problem is of no lesser importance in those states, like California, that have already committed themselves on grounds of supervening social policy against thus subordinating the interests of the survivors.⁴ For, in order to enforce this policy and safeguard the statutory beneficiaries against prejudice from any prior recovery, settlement, or release by the decedent, it becomes all the more critical to ensure a disposition that will spare the tortfeasor from double liability. For reasons which will appear hereafter in greater detail, this objective can be accomplished only at the point of controlling the measure of recovery by the decedent. Accordingly, in both types of jurisdictions, the problem of the "lost years" is central to any adjustment of the reciprocal interests of the several parties involved: the tortfeasor, the accident victim, and his survivors.

Perhaps rather surprisingly, this legal syndrome has attracted relatively scant attention by courts and writers over the years,⁵ but this, as already mentioned, is probably largely a reflection of the fact that until quite recently medical knowledge rarely permitted reliable prognoses of reduced

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⁴ See note 50 infra.

⁵ The only discussions in American legal literature, to the present writer's knowledge, are the rather brief treatment by Duffey, Life Expectancy and Loss of Earning Capacity, 19 Omro St. L.J. 314 (1958) and Comment, The Measure of Damages for a Shortened Life, 22 U. Chi. L. Rev. 505 (1955). Stimulated by its recent topicality in England, there has been more widespread discussion in British journals, the most ambitious being Boberg, Damages Occasioned by Shortened (or Lengthened) Expectation of Life: A New Case and Some Further Thoughts, 79 S.A.L.J. 43 (1962); Boberg, Shortened Expectation of Life as an Element in the Assessment of Damages for Loss of Earnings, 77 S.A.L.J. 438 (1960); Howroyd, Damages for Pecuniary Loss Occasioned by Shortened Expectation of Life, 77 S.A.L.J. 448 (1960). In addition, see the perceptive note by Jolowicz, [1960] Camb. L.J. 160.
life expectancy sufficiently accurate to furnish a basis for legal acceptance.\(^6\) Lately, however, interest in the subject has been rekindled; in part by being widely, if disappointingly, canvassed in England,\(^7\) and partly by the stimulus of a notable pronouncement by the Supreme Court of Hawaii\(^8\) which deserves widespread attention as a new starting point in this neglected area of the law of damages.

I

In legal discourse abstract speculation in quest of valid principle rarely proves a rewarding enterprise. Yet much of the debate over the question whether loss of earnings in personal injury actions should be measured by reference to the claimant’s life expectancy before or after the accident has been conducted by advocates on either side in doctrinaire, rather than pragmatic, terms. The futility of this approach may be gauged by a brief glance at the standard arguments.

By far the more formidable task of demonstrating its “inherent logic” devolves upon proponents of the contention that recovery be confined to the shorter period of the plaintiff’s remaining years. It is all the more astonishing, therefore, that the English courts, in recently adopting that solution\(^9\) after what appeared to be a longstanding course of practice to the contrary,\(^10\) were content to appeal primarily to just such a principle. The

\(^6\) Despite some scattered cases going back to the turn of the century. E.g., Cooper v. St. Paul City Ry., 54 Minn. 379, 56 N.W. 42 (1893); Magee v. City of Troy, 48 Hun 383, 1 N.Y. Supp. 24 (1888); and others cited in Comment, 22 U. Chi. L. Rev. 505 n.3 (1955).

\(^7\) See notes 9 & 10 infra.


attempt, admirable though it may have been for its boldness, was otherwise less than impressive. The following passage reveals the gist of the argument:

For what has been lost by the person assumed to be dead is the opportunity to enjoy what he would have earned, whether by spending it or saving it. Earnings themselves strike me as being of no significance without reference to the way in which they are used. To inquire what would have been the value to a person in the position of this plaintiff of any earnings which he might have made after the date when ex hypothesi he will be dead strikes me as a hopeless task.\(^{11}\)

The fallacy of this reasoning is that, in one sense, it confounds two entirely distinct legal interests: on the one hand, the plaintiff's economic interest in his future earnings and, on the other, what might conveniently be described as his psychological interest\(^{12}\) in the prospect of a complete life with all its normal vicissitudes of pain and pleasure. Both of these are impaired by reducing his life expectancy, and both qualify separately for compensation. The latter, as is well known, has received separate recognition in England\(^{13}\) even as a transmissible claim in survival actions,\(^{14}\) under the title of "loss of expectation of life," though the first blush of enthusiasm which heralded its appearance in the mid-thirties was quickly repressed when appellate courts, fearful of extravagant verdicts, placed upon it so low a ceiling as to reduce it in effect to a purely conventional or nominal sum.\(^{15}\) American courts, perhaps wisely declining a similar experiment lest it add but another stimulant for juries to indulge their generosity to plaintiffs, have been content with treating this claim as but another of the scrambled strands composing the conventional item of pain and suffering.\(^{16}\)

\(^{11}\) Willmer, L.J., in Oliver v. Ashman, [1961] 3 Weekly L.R. 669, 690 (C.A.). His was the only opinion attempting a theoretical justification aside from the typically English concern with inconclusive dicta in earlier cases. Much of this was strongly reminiscent of such necromantic rites as the viewing of chicken gizzards by the ancient Roman augurs and the still extant English practice of foretelling the future from random patterns of tea leaves.


\(^{14}\) Rose v. Ford, [1937] A.C. 826. This more ambitious venture, following hard upon the passage of the first survival statute for personal injury claims in 1934, was promptly repudiated by most Canadian provinces (see Wright, Cases on Torts 547–48 (1968)) and all but one of the Australian jurisdictions as well as New Zealand (see Fleming, Torts 702–03 (2d ed. 1961)). It has been trenchantly criticised by Kahn-Freund, Expectation of Happiness, 5 Modern L. Rev. 81 (1941).

\(^{15}\) Benham v. Gambling, [1941] A.C. 157 (1940). The award is fixed between £200 and £500, and has not been increased in step with the decline in the value of the currency during the postwar period. By contrast, Alberta and Manitoba have proudly declined to take so pessimistic a view of the prospect of happiness in these Canadian provinces, and awards of up to $7,500 are not unusual. See Wright, op. cit. supra note 14, at 548.

\(^{16}\) Farrington v. Stoddard, 115 F.2d 96, 100 (1st Cir. 1940); O'Leary v. United States Lines Co., 111 F. Supp. 745 (D. Mass. 1953); Lake Erie & W.R. R. v. Johnson, 191 Ind. 479,
important for present purposes, however, is that this claim, whatever its
guise, in no way trenches upon the distinct economic loss involved in being
deprived of earnings during the lost years. In other words, we are concerned
with loss of earnings, not with loss of the opportunity or prospect to enjoy
them.

Besides, the argument seems to imply that the assessment of damages
might be influenced by the opportunities available to the injured party for
disposing of the money received in compensation for his injuries. While
interesting for its originality, this proposition is correspondingly vulner-
able. Indeed, it was to all appearances implicitly disowned when the same
court declined the invitation to reduce the award for pain and suffering
because the plaintiff might unhappily never be able to spend it.17 Within
weeks, it was finally demolished by a differently constituted court of appeal
accepting the “objective” test to the extent of holding that it was not even
a ground for reducing general damages for physical impairment that the
injured person was unlikely ever to become conscious of his condition, let
alone live to enjoy them personally.18 Indeed, awards even for “loss of ex-
pectation of life” have become so conventionalized as to be no longer de-
pendent on the victim actually having suffered mental anguish at the pros-
pect of hastened death, as when he dies instantaneously or never regains
consciousness.19 Since it would presumably be too quixotic even for the
English courts to maintain at once an “objective” approach in the assess-
ment of general damages and a “subjective” standard for economic loss,
where it is obviously least justifiable, we must perforce dismiss this argu-
ment also as an untenable basis for restricting recovery to the plaintiff’s
remaining years.

Least persuasive of all is the final hint that any attempt to assess
“imaginary” earnings after death is pressed to extinction by the weight of its
own uncertainties. For, if it were taken seriously, it would militate against
recovery for the remaining no less than for the lost years, since all awards
for loss of earnings are necessarily based on speculation of imaginary
earnings in the sense that, ex hypothesi, the accident has prevented the
plaintiff from actually earning them.20 Such uncertainties as beset his fu-

483-84, 133 N.E. 732, 733 (1922); Krakowski v. Aurora, E. & C. Ry., 167 Ill. App. 469, 476
(1912); Ramsdell v. Grady, 97 Me. 319, 322, 54 Atl. 763, 764 (1903); Rhone v. Fisher, 224
Md. 223, 167 A.2d 773 (1961); Ham v. Maine-N.H. Interstate Bridge Authority, 92 N.H. 268,
275-76, 30 A.2d 1, 5-6 (1943); Annot’s, 97 A.L.R. 823 (1935); 131 A.L.R. 1351 (1941).
L.R. 251 (1956). The plaintiff’s unconsciousness would, however, preclude damages for pain
and suffering, strictly so-called.
20 Cf. RESTATEMENT, TORTS § 912, comment e (1939).
ture prospects are sufficiently discounted by making a suitable, if small, deduction without going to the length of precluding all redress whatever.

If judicial imagination, then, has proved less than adequate to carry the point, we would be unfairly selling it short by ignoring that it has still other, more vibrant, strings to its bow. One of the less defensible features, for example, of the common practice of crediting the plaintiff with his gross earnings based on his pre-accident life expectancy is that it tends to overcompensate him by making no allowance for the fact that he will be spared all expense of maintaining himself during the period when he will in fact be dead. True it is that at least one court has curtly dismissed this objection on the ground that it was none of the defendant's business how the plaintiff proposed to spend his damages. But this aspersion must be attributed more to emotional reaction than sound reasoning, since the law does not pretend to go beyond compensation for the net loss incurred by a plaintiff, which, in this context, seems to be at most the difference between what he would have earned and what would be left to him after meeting the cost of the basic necessities of life and the expenditures, if any, involved in earning his living. This may seem a somewhat pusillanimous response to the stark tragedy of his condition and unlikely to evoke enthusiasm with the plaintiffs' bar avid in pursuit of the ever "more adequate" award, but it is as well to recall occasionally that the figure of justice is conventionally portrayed as carrying a pair of scales, not a cornucopia.

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21 This factor is briefly adverted to by Willmer, L.J., in Oliver v. Ashman, [1961] 3 Weekly L.R. 669, 683 (C.A.), and is reflected in the less ambitious, but nonetheless unsuccessful, claim by the plaintiff in Richards v. Highway Ironfounders Ltd., [1955] 1 Weekly L.R. 1049 (C.A.), for loss of his prospect to make provision for his family rather than for his gross wages during the lost years. See also 2 HARPER & JAMES, TORTS § 25.8, at 1317 n.6 (1956); Comment, 22 U. Chi. L. Rev. 505, 511 (1955).

22 Olivier v. Houghton County St. Ry., 138 Mich. 242, 245, 101 N.W. 530, 531 (1904). See also Mickel v. New England Coal & Coke Co., 132 Conn. 671, 675, 47 A.2d 187, 189 (1946) ("The final inquiry as to earning capacity of a man is not what he is capable of saving but what he is capable of earning").


This, however, is but a peripheral objection to the widespread practice of awarding the plaintiff full compensation for his lost years, and one which a slight adjustment can readily cure. What, then, are its essential merits? The stock argument of its advocates is that it would be giving the tortfeasor the benefit of his own wrong, if he had to pay less for reducing his victim's life than leaving it unscathed.\[25\] Though striking a sympathetic chord, the trouble with this approach is that it pretends too much, for we have long been inured to the admittedly unattractive notion that it is less expensive to kill than to maim. True, the harsh doctrine of the common law, that "in a civil court the death of a human being could not be complained of as an injury,"\[26\] has had its sting progressively blunted by Lord Campbell's progeny of wrongful death acts conferring a limited measure of protection on dependants, as well as by the passage in many jurisdictions of survival legislation which has rescued from abatement certain causes of action vested in the decedent prior to his death, not infrequently including claims arising from the personal injury that resulted in his death.\[27\] But even discounting such vestigial idiosyncrasies as the arbitrary and often absurdly low monetary ceilings still retained here and there across the country,\[28\] redress is almost uniformly confined to purely economic loss\[29\] which

\[25\] It is of course common ground that, where the person injured dies from an unconnected cause, recovery is limited to his loss of earnings prior to his death. Atchison, Topeka & Santa Fe Ry. v. Chance, 57 Kan. 40, 45 Pac. 60 (1896); Payne v. Georgetown Lumber Co., 117 La. 983, 42 So. 475 (1906); Rogers v. Thompson, 364 Mo. 605, 265 S.W.2d 282 (1954). This conclusion is often reinforced by express wording of the relevant survival statute. E.g., CAL. PROB. CODE § 573.


\[27\] This has been the position in California since 1949 when the legislature eventually responded to the goad applied in Hunt v. Authier, 28 Cal. 2d 288, 169 P.2d 913 (1946), and provided for the survival of personal injury claims, Cal. Stat. 1949, ch. 1380, § 2, at 2400. On the recommendation of the Law Revision Commission, a general tort survival statute, CAL. PROB. CODE § 573, took its place in 1961. See note 32 infra.

\[28\] Although the number of such jurisdictions has steadily decreased over the years (Tiffany, Death by Wrongful Act (1893) listed no less than twenty-two), there are still rather more than a dozen (see Bell, The More Adequate Award 71 (1952) who enumerates thirteen states, apart from Connecticut, which must be deleted since 1951). See 2 Harper & James, Torts § 24.1, at 1285 (1956).

\[29\] This restrictive interpretation, pioneered in Blake v. Midland Ry., 18 Q.B. 93, 118 Eng. Rep. 35 (1852), is still followed by most jurisdictions under statutes of the Lord Campbell's Act type, although a few west coast states have relented to the extent of condoning awards for loss of society, etc., as distinct from personal grief. Such, e.g., is the position in California. See Munro v. Pacific Coast Dredging & Reclamation Co., 84 Cal. 515, 24 Pac. 303 (1890); Griott v. Gamblin, 194 Cal. App. 2d 577, 15 Cal. Rptr. 228 (1961). A very few others, like Florida and the Virginias, actually allow for mental pain and suffering, as do Massachusetts and Alabama which espouse a penal, not compensatory, theory of recovery. See generally 2 Harper & James, Torts §§ 25.13–18 (1956).

By the same token, the tortfeasor may escape altogether in the absence of any designated beneficiaries surviving the decedent (see Annot., 43 A.L.R.2d 1291 (1955)) or, in many jurisdic-
exempts the tortfeasor from the heavy bill for pain and suffering and, by avoiding the cost of rehabilitation or protracted nursing, reduces it to still smaller dimensions than if he had left "life smouldering beneath the ruins." In addition, whatever the position regarding loss of future earnings, awards for pain and suffering strictly so-called are invariably limited to the period of the victim's shortened life expectancy. All of this is the consequence, not so much of any insidious policy to spare defendants as of the hardy axiom that the function of tort damages is to compensate actual losses rather than to penalize transgressors. In short, the penal theory offers no support whatever, especially in this context, for any a priori demand to compensate the injured person beyond his remaining years.

Recovery for the lost years must, therefore, eventually seek its justification in the bald proposition that the earnings that he would have made but for his untimely death represent an actual loss for which the tortfeasor should be accountable. But to whom? The victim himself may fairly claim to have been deprived of the opportunity to dispose of his prospective earnings or, at least, of so much as he would have had left after meeting the basic cost of maintaining himself. This much must be conceded as consonant with the contemporary notion of "economic man" in a free-enterprise society, despite the aversion to such materialistic values evident in the prevailing English judicial doctrine. His claim would certainly include loss of ability to provide for his dependants, at its lowest in the amount he would have spent on their support, at its highest extending also to his accumulated savings which might have passed to them upon his death. At this very point, however, his dependants may legitimately advance an independent bid in their own right, to the extent that their expectation of continued support has been raised to a legally protected interest by wrongful death legislation. This would be incontestable if the person fatally injured were already dead because their interest would then have vested beyond recall. It is significant that the contest between the competing claims of the decedent's estate and the protected class of surviv-
ing dependants is, in that event, uniformly resolved by giving priority to the latter. The standard solution is to allow the dependants the value of their expectancy and to allot to the estate, as representing the decedent, his probable earnings limited to the span between injury and death. 32 This


In California, this solution has statutory authority inasmuch as CAL. PROB. CODE § 573, as amended in 1961, expressly provides that “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 . . . .” (Emphasis added.) Significantly, the report in 1960 of the Law Revision Commission on survival of actions, 3 CALIFORNIA LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES F–6–7 (1961), explained:

When a person having a cause of action dies, all the damages he sustained 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.

See also id. at F–23. Although the intent of this provision seems fairly clear, its wording is not without ambiguity, for it might well be argued that an injury that permanently destroys a plaintiff's earning capacity causes him a present loss which, in the words of the statute, has therefore been “sustained . . . prior to his death” (and note that this element of damage is conventionally described as “loss of earning capacity” rather than “loss of future earnings,” and for this among other reasons is, e.g., treated as exempt from income tax). This interpretation was excluded under the original statutory version, CAL. CIV. CODE § 956 (Stat. 1949, ch. 1380, § 2, at 2400), now repealed, which directed that “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.” “Earnings . . . prior to his death” obviously contrast with earnings thereafter, whereas “loss . . . sustained . . . prior to his death” may well be given meaning by excluding only such losses as the termination of annuities, life interests, etc. This change was, however, inadvertent, not intended: The Law Revision Commission's draft, as submitted to the legislature, had changed “earnings” to “loss” in order to include survival of claims for pain and suffering. When this recommendation failed to gain legislative approval, slipshod repair work left the original draft intact and merely added “and shall not include damages for pain, suffering and disfigurement" instead of reverting to the original wording of CAL. CIV. CODE § 956.

In a jurisdiction like Connecticut which has no wrongful death actions, properly so-called, and where the survival action provides the sole avenue for any recovery on behalf of dependent survivors, the action is of course strictly derivative and based, not on the death, but on the original injury. Accordingly, damages are assessed by reference to the loss, not of the survivors, but of the decedent, though they are eventually distributed like personality on intestacy. Conn. Gen. Stat. Ann. §§ 45–280, 52–555 (1958). The measure is therefore based on pre-accident life expectancy. Chase v. Fitzgerald, 132 Conn. 461, 45 A.2d 789 (1946). A similar approach once prevalent in Michigan, Olivier v. Houghton County St. Ry., 134 Mich. 307, 96 N.W. 434 (1903), and 138 Mich. 242, 101 N.W. 530 (1904), was superseded in 1939 when the survival statute was repealed in so far as it was inconsistent with the death act. See note 36 infra.
disposition offers the tortfeasor adequate protection against double liability (even when the actions are not consolidated), but incidentally confers on him a disguised windfall by not mulcting him for the difference between the present worth of the decedent's likely earnings during his lost years, reduced by the probable cost of his maintenance, and the amount awarded to the dependants. In recognizing the estate's legitimate claim to such "excess earnings," Pennsylvania and Hawaii are thus far alone in offering a commendable departure from the customary formula.

II

If this pattern of giving the victim's dependants a pre-emptive right to his prospective earnings during the lost years is generally accepted as the most equitable post-mortem adjustment of the various interests concerned, it becomes pertinent to inquire why it has not commanded an equal appeal for the disposition of claims during the injured person's lifetime. The distinguishing feature between the two situations is, of course, that the dependants' right does not, according to the received doctrine, vest until his death. This might well mean nothing more than that their claim to compensation is postponed until that event, but it could also carry the more far-reaching implication that it is wholly contingent thereon and that no interest of theirs is legally recognized prior to it. The critical question is, accordingly, whether or not the death act discloses a legislative policy to protect their expectancy as soon as their prospect of continuing support is jeopardized by an accident that has the effect of reducing their breadwinner's life and therewith his earning capacity. Viewed from a slightly different angle, is the statute content to let them remain dependent upon his unfettered discretion regarding their future welfare or does it purport to intervene after his injury and abridge his management for the sake of safeguarding their interests against the risk of his wasting their patrimony?

It is highly doubtful whether this problem was ever within the contemplation of the framers of the statute who more probably envisaged a standard type of accident proving fatal, if not instantaneously, at least within a brief interval thereafter. In truth, we are here confronted with

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83 Very occasionally, a court has had the courage and good sense to depart from this formula and make an award to the estate based on the decedent's normal life expectancy where this did not involve duplication of damages because, e.g., there were no statutory beneficiaries surviving the decedent. See Kriesak v. Crowe, 36 F. Supp. 127 (D. Pa. 1941); Kriesak v. Crowe, 44 F. Supp. 636 (D. Pa. 1942), aff'd, 131 F.2d 1023 (3d Cir. 1942).


86 Some courts, indeed, have actually limited the application of wrongful death acts to cases of instantaneous death. Farrington v. Stoddard, 115 F.2d 96, 101 (1st Cir. 1940) (applying
a choice between two analogies, each representing a clearly divergent legal approach to much the same situation. One is the common kind of accident which impairs the victim's earning capacity either wholly or in part, but without reducing his life expectancy. In this situation, it is axiomatic that those dependent on him for support have no independent claim against the tortfeasor in respect of such loss, their exiguous interest being completely identified with the person disabled who remains in sole control of the compensation received. In noticeable contrast thereto is the solution favored for fatal accidents, where the surviving dependants' interest is recognized in its own right, and the estate, as representing the decedent and his creditors,

is excluded from all control over the disposition of the damages awarded. The type of case with which we are concerned bears some, but not all, of the features found in the preceding paradigms: in common with the first, the person injured is still alive; in common with the second, the injuries are fatal in the sense of having curtailed his life and hastened death.

As might be expected, no uniform pattern in making the appropriate policy choice for this hybrid situation has emerged. Indeed, few courts have ever squarely faced the issue, at any rate precisely in these terms. A not insignificant straw in the wind, however, is the prevailing attitude toward the closely related question whether a prior recovery, release, or settlement by the injured person in his own lifetime bars any further claim by his dependants after death. For though that issue has usually been canvassed in the context of a prior recovery not based on any assumption that the injury would prove fatal, its resolution one way or the other furnishes some indication of the tolerance allowed to an individual in disposing of the expectancy of his survivors.

III

With some notable exceptions, the great weight of precedent has undoubtedly been prepared to sacrifice the interest of dependants to the vagaries of a unilateral adjustment between the decedent and the tortfeasor. This conclusion has found support in a variety of reasons. Of


37 Cf. Duffey, The Maldistribution of Damages in Wrongful Death, 19 Ohio St. L.J. 264 (1958), who questions the legislative choice of crudely either excluding creditors altogether, as under standard wrongful death legislation, or giving no co-ordinate rights whatever to the family, as in “survival” states. A small minority of wrongful death statutes (Florida, Mississippi, Nevada, New Mexico, Virginia) expressly allows creditors to reach the proceeds in the absence of any statutory beneficiaries.

38 At least twenty-three jurisdictions, following Read v. Great E. Ry., L.R. 3 Q.B. 555
these the most inveterate is the cabalistic argument that the defendants' claim, if not exactly derivative, is at least conditional on the decedent having had a cause of action immediately prior to his death, in view of the express statutory qualification, originating in Lord Campbell's Act and almost uniformly transplanted into the standard American legislation, that the death be caused by a "wrongful act, neglect or default such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." Although this condition seems to be concerned with the tortious nature of the defendant's conduct rather than the date for testing the success of a hypothetical action by the decedent, this forced interpretation is nonetheless of one piece with the originally hostile judicial reception of wrongful death legislation which contributed so much to defeating its purpose by giving the wrongdoer all defenses available against the victim. By focusing on the date of the decedent's death rather than his injury, another avenue of escape was opened to defendants by allowing them to take advantage of the cause of action having become barred by lapse of time or a prior recovery, settlement, or release. Now that a century's familiarity with wrongful death actions and concomitant changes in social outlook have radically modified the dominant judicial attitude, we might well pause before perpetuating an interpretation engendered by such obsolete considerations.

But this principle of identification has also been defended on more substantial grounds. These are primarily administrative, ranging from em-

(1868), have so held in the clearest terms and some half a dozen more have so indicated in dicta. They are Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Vermont, and Washington. The cases are collected in Annot's, 39 A.L.R. 579 (1925); 99 A.L.R. 1091 (1935). An earlier conflict with respect to FELA was resolved in the same sense in Mellon v. Goodyear, 277 U.S. 335 (1927). See also PROSSER, TORTS 717 (2d ed. 1955); 2 HARPER & JAMES, TORTS § 24.6 (1956).

In jurisdictions with a survival statute alone, in which, therefore, the claim by the estate is inevitably derivative, it follows inexorably that a prior recovery, release, or settlement bars further claims by the estate. See Kling v. Torello, 87 Conn. 301, 87 Atl. 987 (1913); Perry v. Philadelphia, B. & W. Ry., 1 Boyce 399, 77 Atl. 725 (Del. 1910); Cogswell v. Boston & M. Ry., 78 N.H. 379, 101 Atl. 145 (1917).

Conversely, jurisdictions with "penal" statutes, like Alabama and Massachusetts, might well decline to recognize a prior recovery as a bar, because the award is based not on loss, but on the gravity of the defendant's fault. Wall v. Massachusetts N.E. St. Ry., 229 Mass. 506, 118 N.E. 864 (1918). But see Montelier v. United States, 202 F. Supp. 384, 393–94 (1962), which implies that the position in Massachusetts may now have been changed since the penal basis was abandoned by a legislative amendment in 1958 (Mass. Ann. Laws ch. 229, § 2 (1958)).

PROSSER, TORTS 717 (2d ed. 1955); FLEMMING, TORTS 632 (2d ed. 1961).


phasis on the delay of final settlements until death has supervened to the notorious fear of duplication of damages. The last, being the most formidable, calls for closer scrutiny. That it is often merely a pretense or figment due to inadequate analysis is demonstrated by the many cases in which it was invoked although the prior recovery or settlement clearly purported to compensate the decedent for nothing more than medical expenses, pain, and suffering or, at most, loss of earnings for the period between injury and the receipt of compensation. The argument has force, however, whenever allowance was made for prospective loss of earnings, since this would have drawn on, or depleted, the fund contingently available to satisfy the dependants for loss of their expectancy of support. As this result can be readily avoided by the simple expedient of confining the decedent's award to compensation for his remaining years on proof that the injury has resulted in a curtailment of his life, the issue is squarely presented whether the particular court is resolved to adhere to the one-cause-of-action theory as a categorical imperative or, alternatively, is committed to it only to the extent that it may be needed in order to protect the tortfeasor from double liability. The fact that a good number of these jurisdictions have already evinced a willingness to divide compensation for loss of earnings in post-mortem allocations as between the decedent's estate and his dependants shows at the very least that the scruples against "splitting" the cause of action are no longer as sanguine as in the less sophisticated past. This change in attitude manifest in the more recent handling of survival or revival claims offers, therefore, some prospect of the possibility that earlier precedents, based on a widely divergent theory, may not be altogether beyond recall.

Significantly, few courts have gone on record that, as a matter of overriding principle, the injured person should be free to dispose of his rights in his own lifetime, unburdened by any competing claims on the part of his family and that, in the interest of sound social policy, his authority should not be subverted by conceding to his dependants a larger voice in the management of the family purse after the accident than they had before it. Such stress on their subordinate role as is occasionally encountered

43 Prosser, Torts 717 (2d ed. 1955), dismisses the fear of double recovery as:

groundless in point of law, since no element of damages which the living plaintiff might recover is available to the beneficiaries after his death. As a practical matter, however, it is undoubtedly true that either a judgment in favor of the decedent or a settlement made with him will take into account not only his diminished earning capacity while he does live, but also the decrease in his life expectancy and the earnings he would have made if he had lived his normal term, out of which any benefits receivable by the beneficiaries would be expected to come. (Emphasis added.)

The contrast here drawn between "law" and "practical matter" requires qualification because of the widely prevalent "rule of law" entitling an injured plaintiff to an award based on his pre-accident life expectancy.
in some of the earlier judicial opinions, if nostalgically reminiscent of bygone Victorian morality, carries the ring less of an attempt to justify a conclusion than of explaining its ineluctable consequence.

This cavalier treatment of survivors has, however, proved too bitter a pill for some courts to swallow. As early as 1898, a commentator questioned the reasoning underlying the majority rule which enabled an injured party to release a cause of action that had not accrued and could not accrue until his death and then only in favor of someone other than himself. To support so drastic a conclusion, would one not have to admit that an individual has a right of action for his own death which the common law has so persistently denied? In California, moreover, legislative history offers an additional reason against thus exposing his heirs to the tender mercy of their decedent. As originally enacted in 1862, the wrongful death statute followed the familiar formula of Lord Campbell's Act which, it will be recalled, makes the dependants' claim conditional on whether the deceased would have had a cause of action had he lived. But when re-enacted ten years later in substantially its present version, it emerged with the significant deletion of this qualifying clause, the legislature thereby discarding in quite unequivocal manner all vestige of the derivative theory. While the courts have declined to interpret this change as a mandate for going so far as to jettison even the defense of contributory negligence, they rightly discerned in it a clear expression of legislative policy to safeguard the heirs' expectancy from prejudice at the hands of their decedent. Accordingly, the view has prevailed from an early stage in California that any release or recovery by him does not bar their entrenched rights accruing to them after his death. At least three other states have followed this lead, without the specific aid of so helpful a nod from the legislature.

44 See, e.g., Southern Bell Tel. & Tel. Co. v. Cassin, 111 Ga. 575, 76 S.E. 881 (1900).
46 This approach found a receptive ear in Wall v. Massachusetts N.E. St. Ry., 229 Mass. 506, 118 N.E. 864 (1918); Phillips v. Community Traction Co., 46 Ohio App. 483, 189 N.E. 444 (1933).
48 CAL. CODE CIV. PROC. § 377.
IV

Faced with the problem of how to assess damages for loss of earnings in cases of shortened life expectancy—and mindful at once of the competing claims by the injured person and his dependants, on the one hand, as well as the legitimate demand by the tortfeasor to be spared from double liability, on the other—several alternatives are clearly vying for acceptance.

In the first place, jurisdictions that prefer continued adherence to the one-cause-of-action theory and would, therefore, bar the survivors’ claim after any prior adjustment between the accident victim and the wrongdoer are fairly committed to allowing the plaintiff full recovery based on his normal life expectancy prior to the injury. Such an award partly represents, in a sense, compensation for his future inability to provide for his dependants by putting at his disposal a fund for taking care of his family after death. If their expectation of future benefit is liable to disappointment by improvidence on his part in either settling for too little or subsequently dissipating the proceeds, this contingency is arguably no different from the normal vicissitudes of succession. By the same token, confining recovery to loss of earnings for his shortened life alone would confer a wholly undeserved windfall upon the tortfeasor and deprive the survivors of even the hope of eventually sharing in any compensation for loss of their expectancy of support. Only the English courts have not shrunk from enforcing so manifestly unfair a result, in a renewed demonstration of their intrepidity for sacrificing common sense to the inexorable demands of a spurious logic which has contributed so much to forfeiture of their erstwhile leadership of the common law.


Compare the proposal advocated in Comment, The Measure of Damages for a Shortened Life, 22 U. Chi. L. Rev. 505, 512 (1955), and unsuccessfully urged on the English court of appeal in Richards v. Highway Ironfounders Ltd., [1955] 1 Weekly L.R. 1049 (C.A.), to split plaintiff’s award into two separate sums, one representing compensation for his dependants’ loss of support (compensated by subtracting personal living expenses from his gross wages), the other representing full compensation for the period of his shortened life expectancy. This would not change the present position greatly in practical effect, besides offering a pious admonition to the plaintiff to salt away part of the proceeds for his family’s future welfare.

53 Oliver v. Ashman, [1961] 3 Weekly L.R. 669, 679 (C.A.). Holroyd Pearce, L.J., alone among the three members of the court of appeal, indicated an awareness of this unfortunate result by suggesting, in an aside, that “there would be much to be said” for allowing recovery for the lost years to a living plaintiff, but denying it to the executors representing the decedent’s estate. As it was, the whole court found no escape from the questionable premise that the rule must be the same for both types of action, and perhaps for that reason concluded that it was the lesser of two evils to adopt the shorter period so as to spare the tortfeasor from double liability. Their chosen premise strikes an outside observer as the more surprising in view of the
The second acceptable solution, open to California and those other jurisdictions that would insist on the inviolability of the expectancy interest secured to the protected class of survivors, is to deny the decedent recovery for the earnings he would have made during his lost years. For, to allow him full recovery based on his pre-accident life expectancy would unjustifiably subject the tortfeasor to a large measure of double liability in view of his exposure to a future, additional claim by the surviving dependants after the plaintiff's death. Although it seems to be generally believed that this result can be avoided only by excluding the injured person from all share in the earnings he would have made but for his accelerated death, this assumption is in fact not wholly accurate. Saving the simplicity of that formula and discounting the a priori argument that a living person can have no legal claim whatever for any loss occasioned by his death, a more sophisticated disposition has recently been suggested which would actually offer him some measure of participation in the fund notionally represented by his lost years. According to this recommendation by the Hawaii court, it would be wholly proper to allow him the difference between his probable earnings during that period and the amount to which his dependants could lay a subsequent claim for loss of their expected support. Recognition of the decedent's title to such "excess earnings" has the undoubted advantage of forestalling the tortfeasor from any disguised windfall, insignificant though it may be in most cases, besides emphasizing that recovery based on normal life expectancy should be qualified only to the extent irreducibly necessary for sparing the tortfeasor from double liability.

specific provision in the English survival act, excluding recovery for "any loss or gain to his estate consequent on his death," Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41, § 1(2)(c), but the view seems to have become fashionable owing to a thoughtless dictum by McKinnon, J., in Slater v. Spreag, [1936] 1 K.B. 83, 87-88, that this proviso referred only to annuities, life interests, etc. In other words, loss of earnings during the period after death is not, on this view, treated as a loss to the estate, but involves a claim for a present loss which would, if recognized, survive without qualification. The same problem of interpretation arises under the current California survival statute, discussed in note 32 supra.


64 Though that much seems to be implied in Ramsdell v. Grady, 97 Me. 319, 54 Atl. 763 (1903); Krakowski v. Aurora E. & C. Ry., 167 Ill. App. 469 (1912).

Authority, though scant, is generally conformable to the preceding postulates. As already mentioned, remarkably few courts have in fact passed on the question here being canvassed, but a recognizable pattern is nonetheless emerging. The somewhat more favored disposition of allowing the injured person recovery for the lost years is invariably encountered in jurisdictions that would bar further proceedings by the heirs, or actually lack statutory provision for wrongful death actions altogether. Conversely, the states of Illinois, Iowa, Louisiana, Maine, Ohio, South Dakota, and (with the reservation already noted) Hawaii, which...
have so far endorsed the lesser measure of award, are either committed or have foreshadowed their adherence to the policy of not condoning a prior recovery or settlement to prejudice the protected class of survivors. The lesson for California, which belongs to the second group, is therefore obvious, though our courts have not yet to all appearances had occasion to pass on the present issue.\(^6\)

In this connection, one further aspect calls for more detailed consideration. For, a striking feature of many decisions dismissing the relevance of a prior recovery or settlement is that the sums so recovered did not compensate the accident victim for loss of future earnings at all, but merely took care of his medical expenses, pain and suffering, and, at most, loss of earnings accrued up to the date of payment.\(^6\) These holdings did not, therefore, squarely face the problem of double liability and offer no unequivocal guide to the likely reaction in the face of a truly inescapable choice between either subordinating the interests of the survivors or the tortfeasor. But existing authority dealing with this inexorable dilemma suggests that the scales would probably tip in favor of the latter.

Some courts, it is true, have not displayed a marked solicitude for the wrongdoer, being content with the bland assertion that no duplication of damages can arise because the release or recovery by the decedent could not have covered the period beyond his death.\(^6\) That this is more often than not a protestation of faith rather than a conclusion drawn from proven facts is attested by their all too evident indifference toward the actual terms of the release or the amount awarded in the prior proceedings. On the other side, however, is a square holding from Louisiana, discounting the award to the statutory beneficiaries by the amount previously paid to the decedent for the permanent destruction of his earning capacity.\(^6\)

Though somewhat more muted, this conclusion also seems to reflect the prevailing standpoint in California. The leading opinion of *Earley v. Pacific Elec. Ry.*\(^7\) is admittedly less than a paragon of clarity. In categorically rejecting the materiality of a prior release given "in consideration of the

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\(^6\) Nor, for that matter, does *Baji, California Jury Instructions—Civil* (1956), venture into virgin territory: see Instruction 174–N.


\(^6\) Dougherty v. New Orleans Ry. & Light Co., 133 La. 994, 63 So. 493 (1913). Thus if, contrary to earlier indications, the practice in Louisiana were to award damages on the basis of pre-accident life expectancy (see note 61 *supra*), it would not expose the tortfeasor to double liability despite the "no bar" rule.

\(^7\) 176 Cal. 79, 167 Pac. 513 (1917).
payment to [the decedent] of his hospital expenses and of $5,200 in money," the supreme court emphasized the wholly independent nature of the right of action vested in the heirs and drew an analogy to a master's action for loss of his employee's services with the comment that a release by the latter would also in no manner prejudice the former's claim for his own loss. But these seemingly unqualified remarks should be read in the light of the fact that the $5,200 were, to all appearances, paid on account of pain and suffering, as suggested both by the amount involved and the judicial observation that the decedent's "right to recover for physical suffering [was] ... not from its nature an element of damages which the heir might claim. Moreover, on a subsequent occasion, the supreme court, while refusing to interfere with a substantial award to the widow and infant children for loss of the decedent's "comfort, society, protection, nurture and education," did not cavil at the trial instruction that the prior compensation received by the deceased for impairment of his future earning capacity was relevant only if the jury believed that "the plaintiffs in this case have been fully paid on that issue." If far from finely attuned to the nicer nuances of this complex legal situation, the latter dictum bears out the impression that the claim of the statutory beneficiaries is not wholly immune, even in California, to the effect of a prior adjustment by the decedent. The vital significance of this for our purposes is that, if true, it removes a powerful incentive for defendants to raise the issue of diminished life expectancy, and since it would rarely appear to the plaintiff's advantage to do so, it follows that the interest of his dependents remains virtually unrepresented. As well it is to recognize, therefore, that, while this factor is not a sufficient reason for rejecting the principle of post-accident life expectancy, it presents a serious procedural obstacle to its consistent enforcement, unless the courts themselves choose to fill the gap by assuming the role of guardian on behalf of the absent heirs.

It remains to advert to a final suggestion which would cleanly dispose of the last-mentioned difficulty, but at the cost of what might well be considered prohibitive drawbacks of another kind. According to this pro-

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71 CAL. CIV. CODE § 49(c); see Darmour Prod. Corp. v. Herbert Baruch Corp., 135 Cal. App. 2d 351, 27 P.2d 664 (1933).
72 Which might well have included compensation for loss of future earnings.
73 176 Cal. at 82; 167 Pac. at 514. (Emphasis added.)
74 Note, however, that the supreme court was not directly called upon to pass upon its correctness, since the plaintiffs (respondents) did not contest it.
75 Blackwell v. American Film Co., 189 Cal. 689, 209 Pac. 999 (1922).
76 Taken literally, the heirs had obviously not been paid at all. Does "plaintiffs" signify the whole family group, consisting of both the heirs and the decedent, or does the statement presuppose that the heirs might have received their due via succession?
77 As they apparently have done in Iowa and Ohio.
the statutory beneficiaries should be allowed, perhaps compelled, to join as parties in the personal injury action and recover for loss of their future support, instead of awaiting their decedent's death. This solution offers several attractions. It would permit the tortfeasor to acquit himself of all outstanding claims once and for all, rather than having the final adjustment pending over his head until after his victim's demise. It would reduce administration expenses by requiring one set of proceedings instead of two, and eliminate the frustrations arising from having to prepare or meet a case perhaps many years after the accident. Finally, it would ensure continuity of compensation, to the advantage no less of the tortfeasor than the victim and his family. For, to take the specific case of an injured husband, if he dies later than was envisaged at the time of trial, there is a lacuna under existing law in that the wife's claim is postponed until he actually dies and both are, in the interval, dependent on their own private resources or charity, with no prospect of eventual reimbursement. If he should, on the other hand, die earlier than anticipated, it is the tortfeasor who is disadvantaged, because the error of the first guess cannot in all probability be compensated by subjecting her award to a corresponding deduction. In contrast, one comprehensive settlement with the victim and his family at the same time would avoid these shortcomings, at least to the extent that the excessive award to one or the other would be available to bridge the gap.

The disadvantages of this solution are that, in the first place, the class of statutory beneficiaries is not closed under the conventional pattern until the decedent's death. Accordingly, it could not be ascertained with exactitude at the time of trial who of them would be entitled to an award and for how much. Perhaps this objection could be met by placing the award into a trust fund under judicial administration, subject to adjustment in the light of future eventualities. Secondly, there looms the problem of the injured person dying, not of the accident, but of some other illness or dis-


80 These difficulties are, in fact, largely mitigated by treating a prior judgment in an action by the decedent as raising an issue estoppel with respect to the existence of conditions which would charge the defendant with responsibility for the death. See Secrest v. Pacific Elec. Ry., 60 Cal. App. 2d 746, 141 P.2d 747 (1943).

81 See, however, text accompanying note 75 supra.

82 This would not present a problem in those few states which base the award in wrongful death actions on loss to the estate rather than to the designated beneficiaries. See note 23 supra; 2 HARPER & JAMES, Torts §§ 24.2 n.9, 25.15 (1956).
ease. Of course, if the accident were a contributory factor, as for example, by lowering his vitality or resistance to infection, responsibility for the ensuing death could not be disclaimed by the tortfeasor under well-recognized principles of proximate cause. But if death supervened from a wholly independent cause, existing law would excuse him altogether. Besides the fact that this would be the result of luck rather than dessert, so remote a contingency could in any event be adequately discounted by reducing the award much in the same way as is now proper in the face of the possibility that the widow may subsequently remarry or die prematurely. Last of all is the fact that this proposal involves such a drastic departure from the conventional system of loss administration, aside from being actually incompatible with the textual formula of most death legislation, which postpones the accrual of the claim until death has occurred, that its adoption would fall more properly within the province of the legislature than the courts.

What emerges fairly from the preceding discussion is that this complex situation, like so many others involving multiple party interests, is singularly taxing to a system of law which is primarily geared to the adversary process and the demands for simplicity in loss administration imposed by the limitations inherent in jury trial. Each of the various solutions to the present problem that have been canvassed as conceivable alternatives falls in some respect short of the ideal due to the irritating intrusion of administrative or procedural restraints, but, in the absence of a much more drastic overhaul of our whole system for adjusting accident losses, nothing more ambitious can probably be realized with the relatively crude tools presently at our disposal.

83 See, e.g., Blackwell v. American Film Co., 189 Cal. 689, 209 Pac. 999 (1922); Wallace v. Ludwig, 292 Mass. 251, 198 N.E. 159 (1935); Prosser, Torts 273 (2d ed. 1955); Restatement, Torts § 458 (1934).


85 For example, by substituting periodical payments for the present lump sum awards. That is the standard disposition of personal injury claims in Germany, Bürgerliches Gesetzbuch § 843, and avoids the difficulties here discussed. Under German law, a court order or settlement in favor of the injured person does not bar his surviving dependants, the possibility of any overlap being excluded by the fact that the payments due to the former will cease upon his death. In other respects, the German scheme is very similar to our own typical wrongful death legislation. Thus, while the rights of the next of kin are not derivative and accordingly cannot be impaired or defeated by any release or other bargain between the decedent and the tortfeasor after the injury, it is essential that the decedent would have had a cause of action himself had he not died, with the result that his contributory negligence, e.g., will prejudice his dependants' claim. See 2 Bürgerliches Gesetzbuch (Reichsgerichtsrate (Kommentar) pt. 2, 1542–51 (11th ed. 1960); 2 Soergel, Bürgerliches Gesetzbuch 817–23 (8th ed. 1952); Esser, Schuldrecht § 209 (2d ed. 1960); 2 Larenz, Lehrbuch des Schuldrechts § 69 (4th ed. 1960).