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PSYCHIC INTEREST IN CONTINUATION OF ONE'S OWN LIFE: LEGAL RECOGNITION AND PROTECTION

(Spectrum of Personality Interests Legally Protectible in Tort
Actions for Personal Injury)

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INTRODUCTION

May the victim of personal injuries wrongfully inflicted recover damages for consequent shortening of his life expectancy? The answer to this novel problem ought to turn on how far the law should go in protecting psychic aspects of the human personality against culpable invasions which are not simply disturbing but demonstrably destructive.¹ One should like to plunge straightway into logic and social policy as the proper determinants of this question, remembering that for sixty years legal protection of the psyche has been steadily expanding.²

But however much one might prefer to treat this matter as a problem *sui generis*, he is balked by an involved and clinging history which invests the subject and obscures it. He is freshly reminded that the chronology of concepts has unusual importance in the life of the law because of the peculiar risk that *stare decisis* may enshrine an error implicit in the initial step of doctrinal evolution and thus retard

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1. Transient disturbance of psychic tranquillity (fear, pain, mental anguish) lessens the pleasure of existence, but may be neutralized, or alleviated or shrugged off or eventually escaped; the shortening of life through injury involves an amputation of life substance and so an absolute and irremediable loss.

2. See Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 445 (1915); STONE, *THE PROVINCE AND FUNCTION OF LAW*, Ch. XXI: Individual Interests or Conditions of Individual Life in Society (1946); Smith, *Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944); Smith and Solomon, *Traumatic Neuroses in Court*, 30 VA. L. REV. 87 (1943).

or defeat correction of the mistake through continuing growth and mutation of ideas. The subject for discussion is encumbered by doctrines of dubious policy, of exceedingly doubtful lineage, which became sovereign principles of the common law through the familiar process of prolonged passive acceptance. Now the fact is that serious doubt exists as to whether these doctrines have any true bearing upon the recognition of a legally protectible interest in the continuation of one's own life despite a current tendency to assume their relevancy. So great has been the obscurity in this connection that a sociological approach to our subject must await rescue of the problem from the distorting impacts of history misapplied.

IRRELEVANCE OF THE COMMON-LAW RULES CONCERNING THE JURAL EFFECTS OF DEATH

Few of our American courts have passed upon the right of a person injured by the wrongful act of another to recover damages for resultant shortening of his life expectancy and nowhere in our jurisprudence can a decision be found which probes the problem in a penetrating or rounded manner. It is fashionable to say that no American court has allowed damages for shortening of life expectancy, but this is far from accurate. The truth is that a majority of the courts which have dealt at all with the problem have granted damages to the injured plaintiff for loss of earning capacity during the part of his life expectancy destroyed by the defendant's wrong.³ These decisions contain little or no philosophic discussion. Nowhere will one find the interest of personality in continuation of human life properly dissected into its essential components, namely: the *economic expectancy*, based upon the individual's prospect of earning money, and the *psychic expectancy* based upon his anticipation of a life worth living. The result is that the prevailing practice in American law is to compensate only the economic loss which a man sustains when his life is shortened by the defendant's tort, without explicit mention of the psychic interest concurrently affected.

Those American decisions which deny all damages for shortening of life expectancy rest principally on the specious assumption that since the death of a human being could not be complained of as a legal wrong in a civil action at common law, the shortening of life of a living

3. This is always true in theory, but in practice much depends upon whether there is a co-existing wrongful death act and next of kin eligible to claim under it. See note 52 *infra*.

Damages for decreased earning power are based upon plaintiff's life expectancy before the injury; damages for future suffering are based on his life expectancy at the time of the trial. *Webb v. Omaha & S.I.R. Co.*, 101 Neb. 596, 164 N.W. 564 (1917).

person is not an actionable injury. For example in *Richmond Gas Co. v. Baker*,⁴ an 85 year old woman recovered a verdict of \$4,500 for severe injuries which resulted from an explosion caused by defendant's negligent mending of a leaking pipe on the consumer's premises. The trial judge instructed the jury that in estimating damages they might consider whether or not plaintiff's life expectancy had been shortened by her injuries received in the explosion. This was held on appeal to be reversible error. The precedents cited by appellant were all cases resting upon the authority of *Baker v. Bolton*,⁵ the 1808 Nisi Prius decision in England in which Lord Ellenborough uttered his oft-quoted dictum that "In a civil court the death of a human being could not be complained of as an injury." The court accepted these precedents as controlling, declaring that:

. . . if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury, the consequent disability to make a living and the bodily and mental suffering which will result. This, however, falls far short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life.⁶

The fundamental fallacy here is in appellant's contention, accepted by the court, that "the common law does not admit of compensation in money for the taking of human life or the shortening of its duration. . . ." The first half of the proposition is a true statement of an anomaly of the common law far more ancient than Lord Ellenborough's decision of *Baker v. Bolton* in 1808; however, it should be stressed that no case at common law can be found foreclosing the right of a *living* person to recover damages for wrongful shortening of his life expectancy. None of the precedents cited and relied upon contains any such holding, all being actions based upon the *death* of one wrongfully injured. Death at common law, either of victim or of tort-feasor, snuffs out the cause of action for personal injuries for ancient reasons now somewhat obscure, but certainly not because of any rule of policy of the law of damages applicable to an action by a *living* plaintiff against a *living* defendant as was involved in *Richmond Gas Co. v. Baker*. Observe, also, the court's statement that "The value of human life cannot, as adjudged by the common law,

4. 146 Ind. 600, 45 N.E. 1049 (1897).

5. 1 Camp. 493 (1808).

6. *Richmond Gas Co. v. Baker*, 146 Ind. 600, 609, 45 N.E. 1049, 1052 (1897).

be measured in money." Now the fact is that no one seriously contends that this was the original foundation of the common law rules which prevented the maintenance of a civil action for wrongful death. The court in *Hyatt v. Adams*⁷ proposed this admittedly new justification for the common law rules, thinking it more cogent than the historical grounds traditionally assigned in their support, but it has not been accorded any real acceptance. We may fairly say that the opinion in *Richmond Gas Co. v. Baker* is erroneous in its historical premises, that its conclusions are not supported by legal precedent and that no convincing reasons are set forth for the court's solution of a problem whose novelty eluded judicial detection.⁸ Other American cases which refuse to permit a *living person* to recover damages for shortening of his life expectancy by personal injury assume that such a result is compelled by the common law rules preventing a civil action for wrongful death.⁹ The error of this cardinal assumption can be demonstrated both by history and by logic. To appreciate the legal effect which death has at common law upon tort claims for personal injury, one must understand that two separate fact situations may be involved.

Rule A. *A* wrongfully injures *B* but before a judgment for damages can be had, the victim *B*, or the tort-feasor *A*, dies. In either case, at common law the effect of death is to extinguish the cause of action. It does not survive in favor of or against the dead man's estate, but, as the saying goes, is buried with the decedent. A pending action for damages abates with the death and cannot be afterwards revived. This rule is customarily identified with the maxim "*Actio personalis moritur cum persona*," an ancient brocard first used judicially in the time of the Year Books.¹⁰

7. 16 Mich. 179 (1867).

8. It is important to note that the English courts had expressly distinguished *Baker v. Bolton* (the basis of the decision in *Richmond Gas Co. v. Baker*) and held it inapplicable to a complaint of shortening of life by wrongful injury asserted by the victim himself, as a *living plaintiff*, in an action against a *living defendant*. *Fair v. London & N.W. Ry. Co.*, 21 L.T. 326 (1869); *Phillips v. London & S.W. Ry. Co.*, 5 Q.B.D. 78 (1879). These decisions antedated the *Richmond case* and should have controlled its reasoning. Unfortunately, the American Court seems to have been unaware both of this further development in the English law, limiting the effect of *Baker v. Bolton*, and of the vital distinction which rendered that decision inapplicable to living litigants such as were involved in the *Richmond Gas Co.* case.

9. *Farrington v. Stoddard*, 115 F.2d 96 (1st Cir. 1940); *Krakowski v. Aurora E. & C.R. Co.*, 167 Ill. App. 469 (1912); *Lake Erie & W.R. Co. v. Johnson*, 191 Ind. 479, 133 N.E. 732 (1922); *Richmond Gas Co. v. Baker*, *supra* note 6; *Chocener v. Walters Amusement Agency*, 269 Mass. 341, 168 N.E. 918 (1929); *Ham v. Maine-N.H. Bridge Authority*, 92 N.H. 268, 30 A.2d 1 (1943).

10. POLLOCK, *THE LAW OF TORTS*, 62 *et seq.* (13th ed. 1929); Y.B. Mich. 18 Edw. IV, f. 15, pl. 17 (1417), cited by Winfield, *Death as Affecting Liability in Tort*, 29 COL. L. REV. 239, 244 (1929). And see Y.B. Hen. VI 66, pl. 10 (1440-41), dictum of Newton, C.J., that: "If one doth a trespass to me, and dieth, the action is dead also, because it should be inconvenient to recover against one who was not a party

Rule B. *A* wrongfully injures *W*, the wife of *H*, and after languishing in bed for a time, *W* dies of her injuries. *H* now sues *A* for damages for loss of his wife's services. Observe that both plaintiff and defendant are still alive and that the husband seeks to recover damages for an injury to his interests occasioned by the wife's death but not to succeed to the rights of action she had while still alive. In such a case it is plausible to argue that the maxim "*actio personalis moritur cum persona*" need not apply as it is concerned with intransmissibility of tort claims where victim or wrongdoer has died.

Situation B was the factual situation in *Baker v. Bolton*. Lord Ellenborough held that the husband could recover damages for medical expense and loss of the wife's services up to the time of her death but no more. Without hearing argument of counsel, without explanation of his reasons, and without reference to any precedent, Lord Ellenborough declared: "In a civil court the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence." He did not allude to the maxim *actio personalis moritur cum persona*. Partially because Lord Ellenborough was a learned man, his dictum concerning the jural effects of death upon claims for personal injury has received the lion's share of attention by courts and legal writers. If the reader seeks to discover the origin of either of these rules by tracing their genealogy, he will reach no certain answer, as none exists in the annals of our law. He must find his solace in the fact that every investigator has come to the same impasse. One can only reach certain speculative possibilities none of which has any degree of certainty;¹¹ and in the end one is prone to accept the intimation of the House of Lords that the rules express an historical anomaly rather than any product of scientific jurispru-

to the wrong." The maxim is the latinized expression of a doctrine which originated still earlier. Goudy, *Two Ancient Brocards*, in VINAGRADOFF, *ESSAYS IN LEGAL HISTORY* 215 (1913), and 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 576 (3d ed. 1923).

11. It has been suggested that the rules stem from Bracton's misunderstanding of the Roman Law; GOUDY, *op. cit. supra* note 10, at 219 *et seq.*; *contra*, WINFIELD, *op. cit. supra* note 10, at 244. They have also been interpreted as corollaries of the Common Law's inability to transfer causes of action from one person to another; Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 *MICH. L. REV.* 114 (1925); and of the merger of the private cause of action with the Crown's prosecution for homicide; 3 HOLDSWORTH, *op. cit. supra* note 10, at 331; see also TIFFANY, *DEATH BY WRONGFUL ACT* 16 (2d ed. 1913), and, for American applications, *Boardman v. Gore*, 15 *Mass.* 330 (1819), and *Cross v. Guthery*, 2 *Root* 90 (*Conn.* 1794). Paralleling the latter possibility, it has been pointed out that trespass would not lie for a felony (a procedural deficiency); *Admiralty Com'rs v. S.S. Amerika*, [1917] *A.C.* 38; but see criticism of the court's historical material in 3 HOLDSWORTH, *op. cit. supra*, at 576. There is no historical basis for supposing that the rules were founded on the Roman Law maxim that an injury to a freeman which caused his death gave no right of action for the reason that no money value could be put on the life of a freeman; GOUDY, *op. cit. supra*, at 219 *et seq.*; WINFIELD, *op. cit. supra*, at 244; 3 HOLDSWORTH, *op. cit. supra*, at 331-336, 576, 676.

dence.¹² But clear it is that the rules trace back to medieval times, to reasons now conjectural, to justifications long since vanished. They lead to the surprising result that it was cheaper to murder than to maim: one who wrongfully injured his victim could be made to pay damages but he could escape all civil liability by taking pains to inflict mortal injuries.¹³ Courts have denounced the rules as harsh and unjust;¹⁴ law writers have called them barbaric.¹⁵ As fatal accidents due to negligence began to mount with the advent of the railroad in the early nineteenth century, social pressure forced legislative alterations.¹⁶ In England and in most of our American states wrongful death acts and survival statutes have been passed to limit or abolish the rules.¹⁷ This one can say with assurance: the anomalous common law rules concerning the jural effects of death are not logically relevant to the question whether or not a person should be conceded to have a legally protectible interest in the continuation of his own life. The rules were never applied at common law to defeat an action or to curtail damages where the victim of a tort and the wrongdoer were both alive at the time of trial and they should not be given any such effect today. Furthermore, rules so thoroughly doubted and discredited

12. *Admiralty Com'rs. v. S.S. Amerika*, [1917] A.C. 38.

13. Thus Pollock observes (*op. cit. supra* note 10, at 64): "Railroad accidents, towards the middle of the nineteenth century, brought the hardship of the common law rule into prominence. A man who was maimed or reduced to imbecility by the negligence of a railway company's servants might recover heavy damages. If he died of his injuries, or was killed on the spot, his family might be ruined, but there was no remedy. This state of things brought about the passing of Lord Campbell's Act (9 and 10 Vict. c. 93, A.C. 1846), a statute extremely characteristic of English legislation. Instead of abolishing the barbarous rule which was the root of the mischief complained of, it created a new and anomalous kind of right and remedy by way of exception." And see the opinion of Lord Wright in *Rose v. Ford*, [1937] A.C. 826, 3 All E.R. 359. Even in early times, community sentiment was not opposed to redressing wrongful death by monetary amends, as will be seen from the ancient institution of wergild and the long tolerated use of the appeal of murder by the dead man's relatives to force monetary compensation from the accused.

14. *Hooper v. Gorham*, 45 Me. 209 (1858); *Harris v. Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1914).

15. See authorities cited note 10 *supra*.

16. Unfortunately, the greater readiness to protect property rights than to vindicate interests of personality led to a grudging piece-meal reform rather than to abolition of the rules concerning effects of death upon tort claims. Only a part of the victim's original cause of action was preserved to his dependents as "pecuniary loss" under the terms of Lord Campbell's Act (9 and 10 Vict., c. 93 (1846)). This much criticized and abortive legislation now known as the Fatal Accidents Act, 1846 and 1908, was widely copied by our American states.

17. In 1931, twenty-two states had separate survival statutes as well as wrongful death acts and to this number were added Georgia (1935), New York (1935) and Connecticut (1937). "Unfortunately, however, it appears at the outset that by judicial decision about one-third of these jurisdictions do not permit actions to be brought under both statutes for the same act or omission." 44 HARV. L. REV. 980 (1931).

For an excellent earlier article, see Evans, *A Comparative Study of the Statutory Revival of Tort Claims For and Against Executors and Administrators*, 29 MICH. L. REV. 969 (1931). One of the leading articles of recent years is Oppenheim, *The Survival of Tort Actions and The Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386 (1942).

should be narrowly confined to their historical applications rather than extended. They should certainly not be treated as policy considerations in the weighing of new interests when they express no acceptable policy in their own right and province.

Survival statutes abolish Rule A. Nor is the legal situation altered by the fact that the victim's life is snuffed out by an injury which causes loss of life within minutes or seconds, or even instantly. Furthermore the compensation allowed is for the injury, not for death.

The notion which some hold¹⁸ that a claim for shortening of life expectancy is actually one for wrongful death is false, as a little reflection will show. It is settled in our law of damages that a victim's cause of action in tort is for the full injury, including both immediate consequences and those reasonably certain to occur in the future.¹⁹ The victim does not gain a new cause of action as each fresh consequence develops, for that would entail no end of litigation; he has a single cause of action which vests in him at the moment the wrong is committed.²⁰ Whatever happens thereafter is mere evidence which measures the extent of the original wrong. If the victim is alive at the time of trial, the extent, if any, to which his life has been shortened by the injury involves a statement of probability based upon medical opinion: if the victim dies before trial the probability is converted into a conclusive certainty. The victim's cause of action cannot be in respect of his wrongful death, for the law of nature would prevent its accrual during his lifetime; his cause of action is for personal injury and such prospective consequences as are reasonably certain to occur in the future. Furthermore, virtually all courts hold that the cause of action of one injured by wrongful conduct includes his prospective loss of earning capacity for the full period of his life expectancy as it existed before the accident.²¹ In case of one fatally injured, these damages are awarded to his administrator in respect to the cause of action which the victim acquired in his own right as a living person at the instant of the wrong, and do not depend on the theory of a wrongful death action.²² In brief, all of a man's interests of person-ality may be injured instantly by the wrongful act of another; furthermore, a right of action for full consequential damages always vests in the living victim during the time interval, however short, which

18. As, for instance, the courts which decided the cases cited in note 9 *supra*.

19. *Barron v. Duke*, 120 Or. 181, 250 Pac. 628 (1926). 25 C.J.S. Damages 497, § 31.

20. *Fitter v. Veal*, 12 Mod. 542 (K.B. 1701); *Brunsdon v. Humphreys*, 14 Q.B.D. 141 (1884).

21. *Pieczonka v. Pullman Co.*, 89 F.2d 353 (2d Cir. 1937); 25 C.J.S. Damages 512, § 40.

22. *E. g.*, *Measure of Damages for Death in Action for Benefit of Decedent's Estate*, 7 A.L.R. 1314 (1920); 26 A.L.R. 593 (1923); 163 A.L.R. 247 (1946).

separates the wrongful impact and its physiological consequences. This means that the common-law rules as to the jural effects of death are foreign to the problem of whether a living person suffers any legal injury when his life expectancy is shortened, or even instantly terminated by the defendant's wrongful conduct.²³ That question may now be discussed without false historical impediments.

LEGAL RECOGNITION OF THE RIGHT TO NORMAL LIFE EXPECTANCY

Philosophic Basis of the Interest.—One's rights in respect to the preservation and exercise of his physical and psychic faculties are referable to interests of personality. The legal protection granted to such interests does not depend upon any assumed violation of a property right in one's own body. As Lord Atkin said for the House of Lords in the English case of *Rose v. Ford*:²⁴

It does not seem to me necessary to say that a man has a personal right, of the nature of property, in his life, so that, when it is diminished, he loses something in the nature of valuable property. I do not say that this is not so, but I am satisfied that the injured person is damnified by having cut short the period during which he had a normal expectation of enjoying life, and that the loss, *damnum*, is capable of being estimated in terms of money, and that the calculation should be made.

Injuria in tort results from any wrongful invasion of a legally protected interest of personality.²⁵ It would be unworthy of law or logic to hold that an individual may have redress in damages for interferences which obstruct or preclude the legal expression of personality but shall be without remedy for injuries which impair or cut it short. That every man has a redressible interest in the *integrity* of his personality is attested daily by judgments of our courts allowing damages for personal injuries culpably caused. That the *shortening* of a man's life by so injuring him involves a distinct and separate head of damage should be as readily perceptible if one will pause to

23. As Lord Roche said in *Rose v. Ford*, [1937] A.C. 826, 3 All. E.R. 359: ". . . it is theoretically wrong, in such a case, to start from death as shortening life, but right to start with the initial bodily injuries carrying with them from the outset a diminished expectation of life, which sooner or later will end with death. On this analysis of the cause of action of the deceased, and of the plaintiff, I am impelled to the conclusion that this cause of action is not within, and is not touched by, the rule of law laid down in *Baker v. Bolton* and the *Amerika case*. . . . The cause of action is the cause of action, not of a stranger to the deceased, but of the deceased herself, when alive. . . . the deceased's death added nothing to the cause of action, but was merely evidence of the gravity of the injuries, and of the extent to which her expectation of life was diminished owing to such injuries."

24. [1937] A.C. 826, 3 All E.R. 359.

25. One must not forget that interests of personality are not created by the law; they come into being and exist independently but an important incident in their social acceptance is recognition by the law and protection against wrongful invasion. See Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 445 (1915).

analyze the matter. All one can hope for, or have, in respect to interests of personality, is the right to possess and use his physical and mental faculties as best he can and with what enjoyment he may derive therefrom, during the span of his own life expectancy. Viewed in this light, one's interests of personality are both qualitative and quantitative: it is the continuation of life in its temporal aspect which gives meaning and consequence to personality since every act or experience requires its allotted time. An injury which cuts life short involves an amputation of all interests of personality. Surely the victim suffers as real a loss in such a case as another sustains from a crippling injury which narrows, without shortening, the free expression of his personality. To assess the dimensions of interests of personality we are bound by common sense to multiply the breadth of life by its length.

The ends of legal evolution seem to require protection of the human personality both in its economic and psychic phases and as to prospective as well as to present results of tortious injuries. This may be attained by conceding to every individual a legal interest in living his life without having it shortened by the wrongful act of another. The law of damages in respect to personal injuries cannot attain rational maturity if impairment of the victim's enjoyment of life by wrongful act is not compensated independently of any pecuniary loss suffered. Social considerations, also, argue for legal protection of life expectancy against wrongful curtailment. Virtually every individual has obligations or reasonably founded expectations which depend for their fulfillment on his continued life. Damages should be granted for shortening of life expectancy as one means of minimizing the frustration of such expectations and the social dislocations caused by the hastening of death.²⁶ Finally, since a person's interests of personality have a temporal dimension in nature, they should have as broad a connotation and protection in law.

26. Awards to dependents under Wrongful Death Statutes are usually exempt from the claims of creditors. Damages awarded for non-economic injuries to decedent would not be a part of "the pecuniary loss" recoverable by dependents but would pass to decedent's administrator under a general Survival statute and so be available for payment of debts. As Pollock says: "But when once the notion of vengeance has been put aside, and that of compensation substituted, the rule *actio personalis moritur cum persona* seems to be without plausible ground. First, as to the liability, it is impossible to see why a wrongdoer's estate should ever be exempted from making satisfaction for his wrongs. It is better that the residuary legatee should be to some extent cut short than that the person wronged should be deprived of redress. The legatee can in any case take only what prior claims leave him, and there will be no hardship in his taking subject to all obligations, *ex delicto* as well as *ex contractu*, to which his testator was liable. Still less could reversal of the rule be a just cause of complaint in the case of intestate succession. Then as to the right: it is supposed that personal injuries cause no damage to a man's estate, and therefore after his death the wrongdoer has nothing to account for. But this is oftentimes not so in fact. And, in any case, why should the law, contrary to its own principles and maxims in other departments, presume it, in favour of the wrongdoer, so to be?" POLLOCK, *THE LAW OF TORTS* 63 *et seq.* (13th ed. 1929).

Historical antecedents. That hastening a person's death is an injury to his rights of personality is sometimes described as a novel doctrine originating with the English case of *Flint v. Lovell*²⁷ in 1935. The Court of Appeal there approved an award of damages to a 70 year old man for serious injuries negligently caused by defendant. These resulted in continued pain and suffering and reduced plaintiff's expectation of life from eight or nine years as a hale and hearty, happy person to less than a year's existence as a helpless invalid. The award expressly included compensation for this loss of life expectancy. But influential as *Flint v. Lovell* has been, it had legal precursors. One of the most interesting is an early American case, *Murphy v. New York and New Haven R. R. Co.*²⁸ decided by the Supreme Court of Connecticut in 1861. There the plaintiff, as administrator under a general survival statute, brought an action on the case alleging that defendant's locomotive was negligently run "upon and against" the deceased and that thereby deceased (a six year old child) was killed. From a judgment in plaintiff's favor, the defendant appealed, contending that no cause of action was set forth in the plaintiff's declaration, as case lies only for consequential injury and decedent was killed presumably instantly. The court, in affirming the judgment, held that it is an injury to a person to hasten his death, saying:

. . . it is alleged in the declaration that the blow was so violent as to produce the death of the intestate. And is this no injury? If to take one's liberty or one's property without justification is an injury, how much more is the taking of human life: The elementary books, in speaking of absolute rights, classify them thus:—1st. The right of personal security; 2d. The right of personal liberty; and 3d. The right to acquire and enjoy property. If these rights are valued in this order of preference, then every man of common understanding would at once pronounce it absurd to hold that it is no injury to a person to take his life, while it is to strike him a light blow. Such a distinction is not worth talking about, and has no foundation or existence in the law, as it has none in common sense.²⁹

In *Phillips v. London & S. W. R. Co.*,³⁰ a physician in the prime of life, accustomed to earning from £6,000 to £7,000 per year from his practice, was totally and permanently disabled by injuries received when the train on which he was travelling negligently collided with a light engine on the same track. In an action for damages, the trial

27. [1935] 1 K.B. 354 (C.A.).

28. 30 Conn. 184 (1861).

29. This is one of the clearest judicial affirmations we have found concerning the interest of personality in living out one's life expectancy without wrongful shortening.

30. 5 Q.B.D. 78 (C.A. 1879).

judge told the jury that: "An active, energetic healthy man is not to be struck down almost in the prime of life and reduced to a powerless helplessness with every enjoyment of life destroyed and with the prospect of a speedy death, without the jury being entitled to take that into account, not excessively, not immoderately, not vindictively, but with the view of giving him a fair compensation for the pain, inconvenience and loss of enjoyment which he has sustained." The jury brought in a verdict for plaintiff for £7,000. The Queen's Bench Division granted plaintiff's motion for a new trial on the ground that the amount of damages given by the jury was so small as to show that they must have left out of consideration some of the circumstances which ought to have been taken into account. The defendants appealed. In upholding the order for a new trial, the Court of Appeal expressed the opinion, in effect, that the trial court's charge relative to loss of earnings should have been based on plaintiff's life expectancy prior to the accident,³¹ but no criticism was made of the direction authorizing the jury, in assessing plaintiff's damages, to consider "the prospect of a speedy death," and the "loss of enjoyment which he has sustained."

In 1885³² and in 1913³³ the Scottish courts intimated, without so holding, that shortening of life expectancy is a distinct head of damages. In 1934 the Court of Session came squarely to grips with the problem in *Reid v. Lanarkshire*.³⁴ The Lord Ordinary, in assessing damages for negligent injuries resulting in death, had expressed the view that the victim's mental anguish from anticipation of earlier death is the basis on which compensation is allowed for shortening of life expectancy.³⁵ The pursuer reclaimed, and the case came before the Court of Session, which thought the damages awarded were adequate but the theory on which the Lord Ordinary granted them incorrect. The Court held that wrongful shortening of a person's life expectancy is compensable as an *absolute* injury without proof of any mental anguish or conscious suffering; that while no precise standard exists for measuring such damages "the weight to be given to this element must be moderate."

As long ago as 1909, the Supreme Court of Alberta recognized that a person has a legal interest in the normal continuation of his life

31. The court further held that the jury should not compensate the loss of future income by giving the value of an annuity for the same amount as the plaintiff's life for his economic prospects would need to be discounted by multiple contingencies which might have occurred such as onset of independent disabling disease, premature death, failure in practice, etc. It held, too, that an exceptional fee of a professional man (5,000 guineas), such as he might receive only once in a lifetime, should not be included in calculating plaintiff's average earnings.

32. *M'Master v. Caledonian Ry. Co.*, 13 Sess. Cas. Sc. 252 (1885).

33. *M'Enaney v. Caledonian Ry. Co.*, 2 Scots L. T. 293 (1913).

34. 1 Scots L. T. 54 (1934).

35. *Id.* at 80.

and so a right to damages for its wrongful shortening. In the case of one whose life expectancy has already been shortened by sickness or affliction, the interest is still to have the full measure of life which nature will allow, free of further curtailment by another's wrong. The vital question is whether the defendant's wrongful conduct has further reduced a life expectancy already impaired. Thus in *M'Garry v. Canada West Coal Co., Ltd.*,³⁶ it appeared that a man destined to die of cancer in the not distant future, had sustained a fracture of his leg as a result of the defendant's negligence. This injury, according to medical evidence, so aggravated his pre-existing disease that the victim's death was hastened by a year or a year and a half. The court held it was not unreasonable to allow damages of \$600 for this shortening of life expectancy.³⁷

Practical implications: admissibility of evidence of death hastened by injury. Even after *Flint v. Lovell*³⁸ explicitly recognized wrongful shortening of life expectancy to be a distinct head of damages in personal injury cases, some misapprehension persisted in England that the basis of such an award was mental anguish arising from the victim's awareness of impending death. In *Slater v. Spreag*,³⁹ where decedent sustained a fractured skull when struck by defendant's negligently operated car and was unconscious from the moment of impact until he died two days later, the court held that nothing could be allowed for shortening of life expectancy as the injured man could have experienced no conscious mental anguish, pain or suffering. This same view was expressed by the trial judge in *Rose v. Ford*⁴⁰ where a young woman 23 years of age remained in a state of coma from the moment of her injury in a motor car collision until her death four days later. She had sustained a compound fracture of her right leg and thigh in an accident on August 4, 1934; two days later, gangrene set in and the leg was amputated, but the infection had already spread above the point of severance and on August 8 she died. Her father, as administrator, brought a statutory action⁴¹ against the defendant to recover

36. 2 Alberta 299 (1909).

37. It is reversible error to exclude evidence offered by defendant to prove that prior to the accident plaintiff was in poor health and had really suffered shortening of his life expectancy through operation of these independent, pre-existing causes. *Adams v. Kaiser* 285 Pac. 751 (Cal. 1930). The defendant should always take a full inventory of plaintiff's state of health immediately before the accident, with the hope of minimizing the effects attributable to it.

38. Note 27 *supra*.

39. 153 L.T. 297 (K.B. 1935).

40. [1937] A.C. 826, 3 All. E.R. 359.

41. Under Lord Campbell's Act, 1846 (9 & 10 Vict., c. 93) as amended by the Fatal Accidents Act of 1908; and the Act 24 & 25 Geo. 5, c. 41, providing that, with certain exceptions, ". . . on the death of any person after the commencement of this Act [i.e., July 25, 1934] all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate."

damages in respect of (a) pain and suffering, (b) the loss of the leg, and (c) the shortening of reasonable expectation of life of the deceased. The Court of Appeal held that the trial judge was mistaken in assuming that damages for wrongful shortening of life expectancy are allowed as compensation for mental anguish resulting from the victim's anticipation of premature death, but that such an injury involves an absolute loss not dependent upon the injured man's state of mind. This view was accepted in full by the House of Lords on further appeal of the case.⁴²

Several consequences flow from this doctrine that it is an *absolute* injury to a person's rights of personality to amputate part of his prospective life by a wrongful act. Damages may be recovered even though the victim was almost instantly killed,⁴³ or survived for a time without regaining consciousness after the impact,⁴⁴ or developed traumatic dementia from a serious head injury,⁴⁵ or was an infant too young to experience mental anguish from awareness of approaching death,⁴⁶ or was an adult unaware that the injuries would probably shorten his future life.

42. The Court of Appeal had held that the cause of action would not survive death of the victim, [1936] 1 K.B. 90, and this was the ground upon which their decision was reversed by the House of Lords. That wrongful shortening of another's life involves an *absolute loss* for which the victim may have damages, independently of mental anguish, was firmly settled in Scotland by the case of Reid v. Lanarkshire Traction Co. Ltd., *supra*, note 34.

43. Murphy v. New York & New Haven R.R. Co., 30 Conn. 184 (1861); Rose v. Ford, [1937] A.C. 826, 3 All. E.R. 359; Shepherd v. Hunter, [1938] 2 All. E.R. 587, (C.A.) (3 year old child died 10 minutes after accident); Morgan v. Scoulding [1938] 1 K.B. 786 (*D*, driver of motor car, negligently collided with motor cyclist; latter struck his head on curb and died almost instantly); Chant v. Read [1939] 2 K.B. 346, 2 All E.R. 286 (Wife killed when husband's motor car collided with motor cycle; when *H* sued *X* for damages for wrongful shortening of his wife's life expectancy, *X* sought contribution from *H* as a joint tortfeasor. *Held*: denied, for reason that the right to contribution was dependent upon whether the wife had a right to sue her husband for loss of expectation of life; held: no, because the Married Women's Property Act, 1882, S. 12 (as amended) authorizes a wife to sue her husband only for injuries to her property and her expectation of life is not "property" within the meaning of that legislation).

44. Rose v. Ford, *supra* note 43 (in continuous coma for four days from time of accident until death), *overruling* Slater v. Spreag, 153 L.T. 297 (K.B. 1935); Benham v. Gambling, 57 T.L.R. 177 (H.L. 1940) (2½ year old child so seriously injured in overturn of car caused by D's negligence that it died the same day without regaining consciousness); Stebbe v. Laird, 45 Manitoba 541, 1 D.L.R. 240 (K.B. 1938) (11 year old girl, struck by D's car, sustained a head injury from which she was continuously unconscious until her death 9 days later).

45. Roach v. Yates, [1938] 1 K.B. 256 (C.A. 1938).

46. Turbyfield v. Great Western Ry. Co., 54 T.L.R. 221, 158 L.T. 135 (K.B. 1938) (An 8 year old girl seriously injured when she was run down by defendant's horse and dray on a footpath, died 9 days later); Bailey v. Howard, [1938] 1 K.B. 453 (C.A.), 4 All. E.R. 827 (Defendant, while learning to drive a car, negligently collided with a perambulator standing in front of a house, so injuring a 3 year old girl that she died next day); Ellis v. Raine, [1939] 2 K.B. 180 (C.A.) 1 All. E.R. 104 (8 year old boy killed by negligent operation of defendant's motor-car); Benham v. Gambling, *supra* note 44; Cullen v. Jackson, 85 Sol. J. 10 (K.B. 1941) (Two girls, one 8 and one 11, fatally injured when knocked down by defendant's car).

It is indispensable to clear analysis of the elements of damage in a personal injury case that the distinction between absolute loss and mental anguish be sharply maintained. The truth is that both factors may be compensated in a single case without any overlapping of damages: the shortening of life expectancy as an absolute loss or amputation of life substance; and mental anguish resultant upon fear of early death (or of dire complications) as an actionable disturbance of mental tranquillity. Virtually all courts now allow damages for mental anguish reasonably produced by particular personal injuries and their potential consequences, or reasonably certain to occur in the future.⁴⁷ It seems therefore clear that a plaintiff is entitled to prove that his injuries are calculated to shorten his life expectancy as a step in showing that mental anguish was reasonably engendered in him by learning such fact.⁴⁸ This is true even though the law of the jurisdiction denies direct compensation for the psychic loss which plaintiff sustains in having his future life cut short by the defendant's wrong.⁴⁹

47. *Bellman v. San Francisco High School Dist.*, 11 Cal.2d 576, 81 P.2d 894 (1938); *City of Richmond v. Hill*, 195 Ky. 566, 242 S.W. 867 (1922); *Brickley v. St. Louis Merchant's Bridge Terminal Ry. Co.*, 259 S.W. 476 (Mo. 1924); *Ft. Worth & D.C. Ry. Co. v. Kidwell*, 249 S.W. 303 (Tex. 1922), *certified questions answered*, 112 Tex. 89, 245 S.W. 667 (1922).

The weight of authority is that damages may be recovered for mental pain suffered in contemplation of a permanent mutilation or disfigurement of the person though a few isolated cases hold that future mental anguish from such cause is too remote to be considered an element of damage. 25 C.J.S. Damages §66, p. 554, n.73-75.

Damages have been allowed for mental anguish occasioned by apprehension of a variety of reasonably feared future consequences of a physical injury: *Elliott v. Arrowsmith*, 149 Wash. 631, 272 Pac. 32 (1928) (Dread of future illness or death); *Macke v. Sutterer*, 224 Ala. 681, 141 So. 651 (1932); *Fehely v. Senders*, 170 Ore. 457, 135 P.2d 283 (1943) (Fear of miscarriage); *Halloran v. New England Tel. & Tel. Co.*, 95 Vt. 273, 115 Atl. 143 (1921) (Injury to heart precluding life-saving surgery needed to cure pre-existing malignant condition); *Davis v. Murray*, 29 Ga. App. 120, 113 S.E. 827 (1922) (Fear of pregnant woman that injuries will cause child to be born deformed); *Atlantic Coast Line R. Co. v. Russell*, 215 Ala. 600, 111 So. 753 (1927); *May v. Farrell*, 94 Cal. App. 703, 271 Pac. 789 (1928); *Rome Ry. & Light Co. v. Duke*, 26 Ga. App. 52, 105 S.E. 386 (1920) (Apprehension as to effects of injury upon future ability to earn a living); *Walker v. Boston & Maine R. Co.*, 71 N.H. 271, 51 Atl. 918 (1902) (Fear of future insanity).

48. *Roche, L.J. in Flint v. Lovell*, [1935] 1 K.B. 354, 366. *Ramsdell v. Grady*, 97 Me. 319 (1903); *Farrington v. Stoddard*, 115 F.2d 96 (1st Cir. 1940); *Choicener v. Walters Amusement Agency*, 269 Mass. 341, 168 N.E. 918 (1929); *Fournier v. Zinn*, 257 Mass. 575, 154 N.E. 268 (1926); *Alberti v. N.Y., N.H. & H.R.Co.*, 118 N.Y. 77, 23 N.E. 35, (1889). *But see*, *Lake Erie & Western R.R. Co. v. Johnson*, 191 Ind. 479, 133 N.E. 732 (1922) (Held: no damages recoverable for mental anguish caused by peril to one's life when he did not realize danger he was in until long after a railway locomotive had collided with his car at a crossing; nor due to fear of a fatal termination, during the period of his convalescence, after regaining consciousness at the hospital 8 weeks after the accident, this being a remote consequence of past negligence). This holding seems questionable unless one can say the apprehensions were unreasonable under the special facts of the case.

49. *Roche, L.J. in Flint v. Lovell*, [1935] 1 K.B. 354, 366; *Richmond Gas Co. v. Baker*, 146 Ind. 600, 45 N.E. 1049 (1897) (Even in this case which we have criticized so roundly for its erroneous refusal of damages for wrongful shortening of life expectancy, Howard, J. expressly admitted that ". . . if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury, the consequent ability to make a

It seems equally clear that all jurisdictions will, or should, admit testimony that defendant's wrongful conduct probably shortened plaintiff's life for the further reason that it is relevant evidence tending to prove the severity of the injuries sustained, their permanence and their likely effect upon his future earning capacity.⁵⁰ The very fact that an injury is likely to shorten the plaintiff's future life implies that it will have a permanent and continuing effect upon his health during the interim. Now it is true that even though shortening of life expectancy is admissible for the limited purpose of proving mental anguish, or the gravity and effects of the injuries sustained, the defendant is entitled to an instruction restricting the jury to such use of the evidence and telling them that no damages may be allowed for the shortening of life itself. Whether such a direction is psychologically effective is very doubtful, to say the least. In practice, the fact that the plaintiff's injuries have shortened his life expectancy can always be gotten into evidence and one is entitled to think that such information will ordinarily influence the jury's verdict, whatever the restrictive instructions laid down by the court. Would it not be more satisfactory to recognize shortening of life expectancy as an injury to be compensated and require the jury to assess damages separately for that item, thus enabling their true action to be seen, reviewed, and, if need be revised?⁵¹

RESOLUTION OF DAMAGES GENERALLY INTO ECONOMIC LOSS AND PSYCHIC CONSEQUENCES

We have seen that English courts have recognized the dual nature of the interest in respect to one's life expectancy, as including both economic and psychic factors. Compared with this development of English law, American precedents dealing with the subject are meagre both in number and in breadth of reasoning. Few of our courts have given articulate consideration to the problem. Of those that have, the majority have compensated the victim for shortening of life expectancy in respect to impairment of earning capacity of the victim, where personal injuries wrongfully inflicted upon him have caused his total and permanent disability or death. Along with this has grown up the more

living and the bodily and mental suffering which will result."); *Chocener v. Walters Amusement*, 269 Mass. 341, 168 N.E. 918 (1929); *Farrington v. Stoddard*, 115 F.2d 96 (1st Cir. 1940); *Ham v. Maine-New Hampshire Interstate Bridge Authority and N.H. Gas & Electric Co.*, 92 N.H. 268, 30 A.2d 1 (1943).

50. *Richmond Gas Co. v. Baker*, *Chocener v. Walters Amusement*, *Farrington v. Stoddard*, *supra* note 49. *Toledo W. & W.R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71 (1870); *Houston Electric Co., v. McDade*, 34 Tex. Civ. App. 497, 79 S.W. 100 (1904); 20 AM. JUR.: Evidence, § 872, "Life Expectancy."

51. The scientific approach to damages would seem to require breaking the compensation down into the ultimate categories of injury legally redressible.

articulate minority view which refuses damages for loss of earnings beyond the time of the decedent's death.⁵²

Aside from this minority view, the real question is whether the measure of damages is to be restricted to this economic loss or shall include, also, injury to the victim's psychic expectancies—his prospects of a good and happy life. It may be argued, on the one hand, that the law of damages should grant compensation only for injuries reasonably susceptible of mathematical measurement.⁵³ But the fact is that personal injuries can hardly ever be compensated on a purely mathematical basis, and the courts know it.⁵⁴ A little reflection will show that multiple and complex factors enter into the evaluation of any substantial injury to the human body. It is evident that no mathematical standard can be applied in compensating pain or mental suffering. Nevertheless, the courts, seeing the reality of the injury caused by the defendant's wrong, have thought it better to accept the risks of some speculation in the jury's deliberations than to absolve the wrongdoer from liability. Limitation of damages to economic ex-

52. This apparent conflict of authority is explicable by the fact that while virtually *all* courts are agreed that the pecuniary injury due to destruction of the victim's economic life expectancy should be paid for by the wrongdoer, many states have both survival statutes and wrongful death acts. To prevent double damages, and to secure to dependents certain recovery of their pecuniary loss, many of our state courts hold that under the survival statute the administrator can recover loss of earnings only until the time of decedent's death. *Allen v. Burdette*, 66 Ohio App. 236, 32 N.E.2d 852 (1940). Lost earnings beyond that time are reserved to make good the pecuniary loss suffered by dependents and recoverable by them from the wrongdoer under the Wrongful Death Act. But this rule of administrative convenience and expediency co-exists with the majority rule that the measure of damages to decedent's estate for his wrongful death includes the income which the victim stood to earn or accumulate throughout his economic life expectancy as it existed prior to his injury. *Measure of Damages in Action for Personal Injuries Commenced by Deceased in His Lifetime and Revived by Personal Representative*, 7 A.L.R. 1355, (1920), 26 A.L.R. 593 (1923).

If no dependents are left by deceased, and hence no eligible claimants under the wrongful death act, the risk of double damages is eliminated, and under the better view, decedent's personal representative suing under a survival statute can recover the full loss of prospective income; *West v. Boston & Me. R.R.*, 81 N.H. 522, 129 Atl. 768 (1925).

53. To press the doctrine of certainty in *measurement* of damages beyond the point of requiring use of the best evidence and techniques currently available would result in a shifting of the risk of loss from wrongdoer to innocent victim. It would tend to put the more delicate interests of personality beyond the pale of legal protection. But the law has already gone too far in redressing these to turn back (as, for instance, in compensating pain and mental anguish) and in moving forward the challenge will be to find better methods for preventing abuse of the license to compensate substantial psychic injuries, non-economic in their connotation. Thus, in the Law-Science Program, we are interested in the perfection of methods for determining objectively whether the plaintiff is obtuse to pain, has average sensitivity or feels it acutely because of hypersensitivity. See NATIONAL SYMPOSIUM ON "SCIENTIFIC PROOF AND RELATIONS OF LAW AND MEDICINE" (1st ser. 1943); Wolff, Hardy and Goodell, *The Pain Threshold in Man*, 99 AM. J. PSYCHIAT. 744 (1943).

54. Baron Parke declared as long ago as 1847 in *Arnsworth v. South Eastern Ry.* Part I, 11 Jur. 758, 759 (1847) that ". . . it is impossible to form an estimate of the value of human life either to a man himself or to others connected with him." Yet this did not stop the courts from putting the burden upon the community conscience (the jury) of finding the best possible answer in particular cases.

pectancy alone would in some cases entirely eliminate damages for shortening of life expectancy. The elderly pensioner or the life termmer in a penitentiary may have no calculable prospects of gainful employment, but who will say that if either of these has his health or happiness shattered by personal injuries wrongfully inflicted, this psychic loss is to go uncompensated? Psychic as well as pecuniary effects of personal injury must be recognized if the law of damages is to attain a philosophy as broad as the values which men everywhere impute to personality and life. To restrict compensation to pecuniary loss would be to retreat to a materialistic, mathematical conception of life too narrow for justice and too far behind our present stage of legal evolution. It would lead in many cases to fragmentary redress of grave injuries to interests of personality.

Furthermore, when the victim's life expectancy is impaired (narrowed) rather than shortened it seems clear that he should recover damages. This problem was considered as long ago as 1869 by Chief Justice Cockburn in the English case of *Fair v. The London and North-Western Railway Co.*⁵⁵ In that case a 27 year old unmarried minister, possessed of excellent health and earning £250 a year, was seriously injured in a train wreck. In an action seeking compensatory damages from defendant, he showed that the accident had made him permanently deaf, had injured his spine causing permanent paralysis of the lower extremities and some impairment of sensation, converting him into a helpless invalid for the remainder of his life. The jury returned a verdict allowing plaintiff general damages of £5,000 and £250 for medical and other expenses. In denying a motion for a new trial on the ground of excessive damages, the court said:

"Now the rule is that where a railway company undertakes to carry a passenger and he receives an injury in consequence of their negligence, he is entitled to receive compensation for them, and in assessing that compensation the jury should take into account two things; first, the pecuniary loss he sustains by the accident; secondly, the injury he sustains to his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss, they have to take into account not only his personal loss but his incapacity to earn a future improved income. . . . Then as to the second ground, undoubtedly health is the greatest of all physical blessings; and to say that when it is utterly shattered, no compensation is to be made for it is really perfectly extravagant."

Fair v. Railway is the type of case where permanent injuries cause material impairment of the victim's enjoyment of life. This results usually from deprivation of pleasurable pursuits and is a separate and

55. 21 L.T. 326 (1869).

distinct item of damage from mental anguish, as the latter is properly classifiable as a species of pain. In *Phillips v. London and South-Western Railway Co.*,⁵⁶ it appeared that plaintiff, a physician, had been totally and permanently disabled by injuries negligently inflicted which served to reduce him to "a powerless helplessness". The trial judge in that case instructed the jury to take into account as one item of damage the victim's loss of enjoyment of life.⁵⁷ A striking application of the principle is to be found in the more recent case of *Heaps v. Perrite, Ltd.*,⁵⁸ where the Court of Appeal in England upheld as not excessive an award of £10,000 damages made to a plaintiff who lost both hands as a result of the defendant's negligence. It was recognized that no such damages could be justified for mere loss of earning power, and in upholding the award, Greer, L. J., relied principally upon the great psychic injury plaintiff had sustained in being rendered incapable of performing simple acts important to his wellbeing and happiness.⁵⁹

The right of one permanently injured by wrongful conduct to recover damages for resultant impairment (but not shortening) of his capacity to enjoy life has been before American courts with increasing frequency since 1890. Virtually all of the better reasoned decisions have held such psychic injury to be a distinct and proper head of damages. They reason that, the injury being real, want of certainty in the measure of damages should defeat redress here no more than in similar situations.⁶⁰ The prevalent opinion among our courts seems to be that in such cases it is better to let the common sense and judgment of the jury prescribe what would be reasonable compensation, while counting upon judicial surveillance to minimize risks of excessive verdicts.

Legal redress for substantial impairment of the capacity to enjoy life involves rejection of the now intolerable conception that personality

56. 5 Q.B.D. 78 (1879).

57. This surely means the savour and salt rather than mere ecstasy, and, we venture to believe, the ability to express personality through natural endowments and acquired conditioning rather than merely impairment of acquisitive talents and interests of substance.

58. [1937] 2 All E.R. 60 (C.A.).

59. As, for instance, feeding oneself, dressing and performing habitual acts. The defendant should investigate fully all the possibilities which modern rehabilitation medicine has to offer in the way of reasonable surgical correction, retraining techniques, and prosthetic aids. The plaintiff has a duty to minimize his own damages which may well embrace acceptance of such corrective procedures particularly if offered to him without expense.

60. It would seem that evidence of loss of enjoyment is being admitted as having probative value upon the seriousness of injury and the extent of incapacity, and tends, where special damages are denied, to attain compensation under the head of general damages, or by swelling the allowance for pain and suffering and mental anguish. For collected cases, see *Loss of Enjoyment as an Element of, or Factor in Determining, Damages for Bodily Injury*, 120 A.L.R. 535 (1939). The case of *Hogan v. Santa Fe Trail Transp. Co.*, 148 Kan. 720, 85 P.2d 28 (1938) would seem to be wrong in denying damages for loss of pleasure in playing the violin which was directly due to an injury to plaintiff's hand negligently caused by defendant.

has meaning and value only in the economic sphere. There is no reason why investigation should not readily reveal what the previous habits and pursuits of the plaintiff were before his injury and the extent to which these have been rendered impossible of continued performance by his incapacity.

We must remember that an award of money damages is the only real remedy which our law affords to redress injurious invasions of interests of personality.⁶¹ The course of Anglo-American social evolution has been toward increasing valuation of the dignity and importance of the common man, and, despite the apparent contradiction offered by recent wars, toward a growing reverence for life. Only in so far as the measure of damages covers the distinguishable elements in the personality spectrum can we be said to have afforded legal protection for these non-economic interests in human existence.

It is therefore, of considerable advisory importance to consider what basis may exist for projecting a scheme for dividing injuries to interests of personality into economic and non-economic factors. In undertaking such an analysis, one is impressed by the variety of situations in which our law is prepared to uphold substantial damages where the injury to personality is perceptible or great, but resultant loss of money is small or undemonstrable. Such damages are awarded despite the lack of any mathematical basis for their measurement. Science and logic (and defendant's lawyers) long for particularization and certainty in estimation of damages, while community conscience and humanitarian instincts (and plaintiff's lawyers) seem satisfied to resort to the judgment of common men when no such standards of monetary admeasurement can be found.

Consider, for instance, the large verdicts for damages which our courts are prone to sustain for extreme or permanently disabling injuries suffered by children so young that no one can justly prophesy what they might have earned otherwise upon reaching maturity, nor what alleviation Rehabilitation Medicine may have to offer a number of years hence.⁶² It is the fact that such severe injuries cause gross and

61. Pound's quotation from Kipling (in *Interests of Personality*, 28 HARV. L. REV. 445, 446 (1915)) is apropos, concerning the Oriental's view of the Englishman: "Is a man sad? Give him money, say the Sahibs. Is he dishonored? Give him money say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." KIPLING, *Dray Wara Tow Dee*, IN BLACK AND WHITE 4 (Outward Bound ed.). The remedy of honorable amends and the like might be valuable in dealing with certain transient disturbances of mental tranquillity engendered by defamatory utterances, invasions of privacy or other socially reprehensible behavior, but it is not an apt mode of redress for absolute losses resulting from invasions of personality.

62. *E.g.*, *Ells v. Scandrett*, 28 F. Supp. 16 (D.C. Idaho 1938), *appeal dismissed*, 106 F.2d 1016 (9th Cir. 1939) (4 year old boy: \$40,000); *Junge v. Midland Counties Public Service Corp.*, 38 Cal. App. 2d 154, 100 P.2d 1073 (1940) (13 year old boy: \$35,000); *Magaraci v. Santa Marie*, 130 Conn. 323, 33 A.2d 424 (1943) (12 year old boy: \$12,500); *Bowman v. Healey's Inc.*, 16 N.J. Misc. 113, 197 Atl. 655, *appeal dis-*

permanent impairment of various modalities of personality expression rather than the calculable economic loss which determines reasonableness of the damages in such cases.

In other cases, the physical injury is such that the effect does not express itself in reduction of earning power, and the compensation granted is based upon absolute loss or impairment of a useful or enjoyable anatomic member or physiological function.⁶³ This willingness of courts to compensate *pro tanto* extinguishment of the personality, where narrowing rather than shortening of the spectrum is involved, is a persuasive argument for extending like protection to the longitudinal dimensions of personality (i.e. against its wrongful shortening).

So-called physical and mental pain induced by any *physical agency* which the defendant brings into contact with plaintiff's body is compensable whether or not any real tissue damage is caused and irrespective of resultant pecuniary loss.⁶⁴ *A fortiori*, such pain as is induced by traumatic disruption or injury of bodily tissues is compensable, with the added consequence that secondary mental anguish may now qualify for inclusion in the measure of damages.⁶⁵ It is true that gross disfigurement may render unemployable, because of prejudice of em-

missed, 121 N.J.L. 198, 1 A.2d 848 (1938) (17 year old boy: \$15,000); Carballal v. Pilgrim Laundry, 254 App. Div. 773, 5 N.Y.S.2d 38 (1938) (5½ year old girl: \$15,000); Shell Petroleum Corp. v. Perrin, 179 Okla., 142, 64 P.2d 309 (1936) (4 year old girl: \$25,000).

Observe that these verdicts were upheld prior to the current inflation and that much larger awards are now held reasonable as courts take judicial notice of the diminished purchasing power of the dollar. Kircher v. A.T. & S.F. Ry. Co., 32 Cal.2d 176, 195 P.2d 427 (1948). See also, 18 A.L.R. 564 (1922). For more recent cases, see Armentrout v. Virginia Ry. Co., 166 F.2d 400 (4th Cir. 1948) (13 month old boy): \$160,000 for partial loss of both arms; reversed as excessive, settled for \$75,000; Huggans v. Southern Pac. Co., 92 Cal. App. 2d 715, 207 P.2d 864 (1949) (12 year old boy: \$91,000); Lindroth v. Walgreen Co., 87 N.E. 2d 307 (Ill. 1949) (7 year old boy; terribly disfiguring burns; \$65,000).

63. Hercules Powder Co. v. Morris County Court of Common Pleas, 93 N.J. Law 93, 107 Atl. 433 (1919) (Certiorari by employer to remove an award made under Workmen's Compensation Act in favor of an injured servant; held: award affirmed). Minturn, J. said: "The lower court found that as a result of the injury (*loss of a testicle*) the defendant's morale, courage and marital efficiency were lessened. Whatever view medical experts may entertain upon that phase of the case, the indisputable fact remains that the injured defendant has suffered the loss of a portion of his anatomy which nature implanted in the human organism as a dual reservoir of complete efficiency, and that to deprive him of its attributes is to take from him a component part of the perfect genus homo. This impairment may not prove to be so conspicuous in the ability to produce wages, but there are other spheres for the employment of human energy, talents and the possession of physical attributes beside the industrial world."

Kierkowsky v. Connell, 43 Pa. Co. 250, 11 Schuylkill Leg. Rec. 163, (1913) *aff'd.*, 253 Pa. 566, 98 Atl. 766 (1916) (Damages recoverable for loss of teeth though earning capacity not affected). And observe that if injuries result in impotency, sterility or loss of childbearing power, compensation is allowed for this impairment of non-economic physiological functions affecting ability of the individual to live a normal, full life. 18 ORE. L. REV. 259, 260 (1939).

64. Gerber v. Pines, 79 Sol. J. 13 (K.B. 1934); Ernen v. Crofwell, 272 Mass. 172, 172 N.E. 73 (1930).

65. 25 C.J.S. 548, Damages § 62, 63 (1941).

ployers, a person able and willing to work⁶⁶ and that modest injuries to a vulnerable person may cause initial mental anguish induced in him to reach the proportions of a disabling traumatic neurosis⁶⁷ and so we should not lose sight of the fact that psychic injury may express itself secondarily in the form of economic injury.

Another interesting example of psychic injury is presented where a major consequence of the defendant's tort is to destroy the special joy or happiness which plaintiff derived from his accustomed participation in a creative art or pleasureable activity, now no longer open to him because of the physical disability he has sustained. Courts differ as to whether compensation should be allowed for such an item⁶⁸ but it would seem plausible to permit proof of all interferences with habitual activities of a personal and socially useful character, lumping these under a generic heading of "deprivation of social amenities through personal injury."

The dissection of non-economic or psychic losses from interwoven economic damage produced by personal injury may be accomplished by considering the proper measure of damages where, for one reason or another, no loss of earnings can be proven. In the case of very young children who are permanently disabled by injury the economic interest is seriously invaded, though the measurement is difficult and conjectural. But where the victim is an aged person who has retired from gainful pursuits, or a person who prior to the defendant's dereliction had been reduced to a state of complete dependency by operation of law, or by injury or disease, or by constitutional defect, the basis of compensation necessarily shifts from economic to psychic interests.⁶⁹

66. *Sweeting v. American Knife Co.*, 226 N.Y. 199 (1919). And see *Olsen v. Union Pacific R.R. Co.*, 62 Idaho 423, 112 P.2d 1005 (1941).

67. *Smith and Solomon, Traumatic Neuroses in Court*, 30 VA. L. REV. 87 (1943).

68. Damages denied: *Hogan v. Santa Fe Trail Transp. Co.*, 148 Kan. 720, 85 P.2d 28 (1938) (Loss of ability to play violin for personal pleasure; court regarded this loss of enjoyment as "too speculative and conjectural to form a sound basis for the assessment of damages"). This view seems erroneous as courts which subscribe to it are ready to grant damages for pain and mental anguish which are psychic injuries equally subjective, and difficult of measurement. Damages allowed: *Kramer v. Chicago, M., St. P. & P.R.R. Co.*, 226 Wis. 118, 276 N.W. 113 (1937); 38 MICH. L. REV. 97 (1939). See note 63 *supra*.

It would seem that the main controversy is not whether such a psychic loss can be proved, as bearing upon the extent of the injury and disability, or even allowed expressly or covertly, to influence general damages in an unspecified way, but whether it may be compensated as a specific item of loss. Courts now are generally receptive to introduction of evidence calculated to show any and all types of impairments of plaintiff's pre-existing *integrated* personality attributable to personal injuries.

69. *Flint v. Lovell*, [1935] 1 K.B. 354; *Feay v. Barnwell*, [1938] 1 All E.R. 31; *Fulton v. Chouteau Cy. Farmer's Co.*, 98 Mont. 48, 37 P.2d 1025 (1934) (61 year old man; earnings \$16,000 to \$18,000 per year, however; legs rendered virtually useless; awarded \$76,112); *Brannock v. Spokane, Portland & Seattle Ry. Co.*, D.C.N.D. Wash. E.D., File No. 801 (60 year old carman suffered loss of two legs and one arm; jury verdict for \$102,985; settled June, 1949), *Verdicts or Awards Exceeding \$50,000.*, 4 NACCA LAW J. 280, 287 (Nov. 1949); *Jennings v. McCowan*, 55 S.E.2d 552 (S.C. 1949) (Death case; deceased was 56 years of age, had a life

Substantial damages have been allowed to criminal offenders for personal injuries wrongfully inflicted even though their sentences involved such long terms of confinement that they had no determinable prospects of future gainful employment.⁷⁰ Even more interesting is the judicial inclination to uphold substantial damages for serious personal injuries suffered by mental patients who have no past work record and no arguable prospect of gainful employment in future. In the case of *Scolavino v. State*,⁷¹ the staff of a New York mental hospital negligently left patients on a violent ward without adequate supervision by attendants. Benturira, a patient suffering from psychosis and epileptic clouded states, and well known to be assaultive and dangerous, was left in restraint sheets, unattended, in a bed near Scolavino who likewise was so restrained. At 2 o'clock in the morning, Benturira broke out of the restraint sheets, which experience had shown were not uniformly effectual, and brutally attacked Scolavino, fracturing his nose and putting out both his eyes. Scolavino had been in the hospital for several years under a diagnosis of psychosis with mental deficiency. There was no prospect that he could later have been returned to society as a useful or even merely as a harmless member, irrespective of the assault. All physicians were agreed that his mental age was less than half that of a normal person, that he was of a disagreeable and assaultive nature, and that his condition was incurable. In assessing damages the Court of Claims, after adverting to these facts, frankly said:

"Experiments in allowing him to return home had proved unfortunate. It may be safely concluded that he was in any event doomed to a lifetime spent in mental institutions. This being the case, his living at State expense is assured, and loss of potential earnings is not an element in assessing damages."⁷²

The psychic injuries taken into account were pain, mental anguish, permanent loss of vision and consequent deprivation of such amenities as ability to read simple books. The Court of Claims awarded plaintiff \$9,000 but on further appeal this was held to be inadequate by

expectancy of 16.2 years; earned \$2,475 per year; was survived by wife and two children, 14 and 20 years of age; award for \$85,000). Consider, too, the case of the housewife, *Catherine Jeffers v. City and County of San Francisco*, Superior Ct., No. 34965 (Sept. 1946), 3 NACCA LAW J. 300 (P. a housewife, sustained injuries resulting in loss of one leg; no loss of earnings, no medical or special damages because she was treated by Navy; judgment of \$100,000; allowed to stand as not excessive).

70. *Bhullar v. State*, 248 App. Div. 802, 289 N.Y.S. 41 (1936); *Kusah v. McCorkle*, 100 Wash. 318, 170 Pac. 1023 (1918). There is less litigation of this sort than one would expect, doubtless because most states have enacted statutes which either declare a convicted felon to be civilly dead or incompetent to maintain a suit.

71. 62 N.Y.S.2d 17 (1946).

72. *Id.* at 25.

the Appellate Division⁷³ which increased damages to \$20,000 and this sum was upheld as reasonable by the New York Court of Appeals.⁷⁴

We have sought by our reconnoitering, to test the hypothesis that interests of personality require the law, in personal injury litigation, to construct a theory of redress broad enough to authorize substantial damages for psychic as well as for economic injury. This brings us to the important question as to how damages may reasonably be measured in respect to psychic injuries of a non-economic sort, including shortening of the victim's life expectancy. On the possibility of achieving sensible criteria for judicial guidance, fair to the plaintiff, yet calculated to prevent exploitation of psychic injuries as run-away factors in swelling damages, is apt to depend the attitude of many courts toward admitting or excluding psychic injury from shortening of life expectancy as a discrete item of recoverable damage in personal injury cases.

MEASURE OF DAMAGES AND PROBLEMS OF PROOF IN RESPECT TO ALLEGED SHORTENING OF LIFE EXPECTANCY

Three distinct items of damage may result from the wrongful shortening of a person's life expectancy: mental anguish resulting from awareness that his death has been accelerated, *pro tanto* reduction of prospective earning capacity, and fractional loss of a future life which promised to be predominantly happy or at least to have perceptible value to its possessor. The last two consequences are *absolute* losses compensable despite the victim's ignorance that his death has been hastened.⁷⁵ It is well for the law to consider these absolute economic and psychic losses separately for two reasons: first, they are measurable by different principles and second, damages allowed for them tend to pass into different hands. Wrongful death acts give named bene-

73. *Scolavino v. State*, 271 App. Div. 618, 67 N.Y.S.2d 202 (1946).

74. *Id.*, 297 N.Y. 460, 74 N.E.2d 174 (1947). And see *Koch v. City of Chicago*, 297 Ill. App. 103, 17 N.E.2d 411 (1938) (12 year old subnormal boy: \$10,000).

Note that the *Scolavino* case holds that mental suffering is a presumed consequence of physical injury in the case of an insane person as well as of a sane person, unless it is proved that his condition is such that he does not experience pain.

Attention is drawn to *Murphy v. Friel*, 328 Ill. App. 586, 66 N.E.2d 450 (1946), holding that where a person of low intelligence is victim of an intentional wrong, he can recover damages due to aggravated condition of the injury resulting from his low intelligence.

In *Anderson v. Lavelle*, 285 Mich. 194, 280 N.W. 729 (1938), an action under a Survival Act, it appeared that the decedent, a 6 year old child, was so injured by an automobile negligently driven by defendant that she was rendered unconscious thereby and remained so until she died 20 minutes later. She therefore suffered no pain or mental anguish and as she had never been able to work, no pecuniary loss resulted to next of kin from her death. Judgment on a jury verdict in defendant's favor was affirmed on appeal. Query, whether it is justifiable to hold that the life of an insane or mentally deficient person is wholly without value because the affliction has destroyed the individual's economic productivity. Contrast *Scolavino v. State*.

75. Note 42 *supra*.

ficiaries a prior claim, usually free of the claims of creditors, for "pecuniary loss" they sustain from destruction of decedent's earning capacity; damages for destruction of psychic expectancy go to the victim, if alive, or if he be dead, to his estate, subject to the claims of creditors. Our concern now is to discover what considerations are relevant in assessing damages for the *psychic* injury caused by shortening of life expectancy.

The Court of Appeal in *Flint v. Lovell* was preoccupied principally with showing that the right of living person to have damages for wrongful shortening of his life expectancy was not foreclosed by *Baker v. Bolton*. Little was said concerning the nature of the interest impaired, but no criticism was made of the ground upon which the trial judge justified his action in awarding plaintiff damages of £4400, namely: "There is no doubt that he has lost the prospect of an enjoyable, vigorous and happy old age which I am satisfied on the medical testimony might have gone on for a number of years if this unhappy accident had not occurred." This conception that the psychic injury involved in shortening of one's life consists of lost prospects for future happiness is accepted by all the later British decisions. We have seen that the courts soon classified the injury as an *absolute loss* which the law must redress as best it can, despite the want of any definite measuring rod. In *Flint v. Lovell*, Lord Roach had ventured misgivings about the dangers of excessive verdicts and speculative awards in compensating shortening of life expectancy as a separate head of damage. But conceding always the difficulty of assessing damages, and of equating incommensurables,⁷⁶ the high Courts of Britain held fast to the view that a real injury deserves redress, whatever the administrative difficulties may be. In extending a remedy, they hoped to avoid excessive damages by:

(1) Reliance upon the prudence of the jury or trial judge in assessing damages, it being recognized that the good sense of the trier of fact must always be trusted where an imponderable is to be valued, such as happiness, pain or mental anguish;⁷⁷

76. This problem has always been readily conceded by the Judiciary in Great Britain and while it has been seized upon as a weapon of attack by those who would destroy the right to have damages for wrongful shortening of life expectancy (as, for instance, O. Kahn-Freund in *Expectation of Happiness*, 3 Mod. L. Rev. 81 (1941)) it has done no more in fact than to lead the House of Lords to sharpen its analysis of the measure of damages and to place a conservative ceiling on awards as a preventive for excessively variable or generous compensation of the injury. See Benham v. Gambling, [1941] A.C. 57, 57 T.L.R. 177.

77. See Slessor, L.J. in *Flint v. Lovell* and Lord Shane in *Reid v. Lanarkshire Traction Co.*, [1934] S.C. 79, 83 (upon the whole the jury were entitled in a great measure to take this matter into their own hands, and so long as they did not do anything very extravagant that their verdict should stand). In *Bailey v. Howard*, [1939] 1 K.B. 453, 458 (C.A.) 4 All. E.R. 827, Lord Justice Scott said: "In the peculiar circumstances of this cause of action created by the Act of 1934 I see no

(2) Reliance upon the trial court's charge on the measure of damages to moor the jury by defining and illustrating those factors which are to be considered and those which are to be ignored;⁷⁸

(3) Reliance upon prior precedents to furnish a criterion for determining what would be a reasonable award in the case at bar;⁷⁹

(4) Reliance upon judicial surveillance to detect and prune excessive awards.⁸⁰

Rose v. Ford was the next landmark in the British law, settling as it did the proposition that the injured person acquired *eo instanti* a cause of action for the wrongful shortening of his life which survives to his administrator under the British survival statute of 1934,⁸¹ this

means of arriving at any sort of quantitative scale for the guidance of Judges or juries except the gradual working out, chiefly through the common sense of juries, of the sort of figures that in English civilization of today are to be regarded as reasonable for damages under that particular head. Whether ultimately any sort of scale will be worked out, or whether the assessment will remain permanently quite empirical, one cannot say, but today my own view is that the right attitude of the Courts to take is that it is essentially a matter for the appreciation of the jury under a direction of the Judge that the measure of damages is that which the deceased person possessed, and that the amount to be given should always be strictly reasonable, and, if it errs at all, should err on the low side."

78. In *Rose v. Ford* Lord Wright said, at 848: "It is true that it has been considered that it is impossible to form an estimate of the value of human life whether to the man himself or to others connected with him, to quote again the words of Baron Parke in *Armsworth's case* (11 Jur. 758, 1847). But, in that very case Parke B. was directing the jury to award damages under Lord Campbell's Act. It was the first case under that Act and Parke B. did not, it seems, appreciate the precise limits which were subsequently to be fixed for assessing the damages claimable by dependents. He seems to have directed the jury as if they were to award general damages for loss of the deceased's man's life. He warned them that they could not give an exact compensation, which, he said, was impossible just as much as in the case of loss of limb or a wound; they were not to consider the value of existence as if bargaining with an annuity office, but were to calculate all accidents and give a fair compensation. This direction might, it seems to me, in principle be applied to a case where a man's life has been wrongfully shortened and damages are claimed under the Act of 1934. It answers the objection that it is impossible to put a value on human life."

79. In *Flint v. Lovell*, £4400 was awarded to a 70 year old man in respect to serious personal injuries expected to shorten his life expectancy from 9 years to 1 year; it appears that this precedent resulted in overgenerous allowances for wrongful shortening of life expectancy, with considerable variations evident from one case to another. Next, in *Ford v. Rose*, it appeared that a 23 year old woman injured through defendant's negligence, died four days later, and the House of Lords considered £1,000 to be a reasonable award for shortening of her life expectancy. But this sum had been stipulated in advance by counsel. Cases subsequent to *Rose v. Ford* nevertheless used its award for comparative purposes. Finally, the House of Lords in *Benham v. Gambling*, [1941] A.C. 157, 57 T.L.R. 177, had to deal with the almost instant death of a 2½ year old male child, caused by defendant's negligent driving of an automobile. The trial court had allowed £1200 damages for the shortening of life expectancy; this was reduced by the Court of Appeal to £250 and by the House of Lords £200, the point being emphasized that a more conservative measure of damages was henceforth to be allowed for the item. There has been a striking readiness among trial courts in England to make advisory use of these "ceilings" set by higher courts, in controlling damages.

80. Both the Court of Appeals and the House of Lords in England have maintained a circumspect censorship to the end of preventing excessive variation or inflation of awards.

81. 24 and 25 Geo. 5, c. 41 (1934).

being in no wise an action based upon death of the victim such as the dictum of *Baker v. Bolton* forbade. In the *Ford* case, a motor car collision caused by the defendant's negligence injured a 23 year old girl so gravely that she remained in a state of coma for nearly all of four days and then died. The Court of Appeal had found that £1,000 would be reasonable compensation for shortening of decedent's life if the claim survived to her administrator.⁸² The House of Lords adopted this finding saying: "How the damages are to be calculated is a question which this House has not to decide, for there has been no quarrel with the amount fixed by the Court of Appeal. . . ." Nevertheless, some of the Judges went on, by way of dictum, to point out certain of the factors they thought relevant to such an inquiry. Thus, Lord Wright said:

I think that, both on principle and on authority, this element of damage—that is, for the shortening of life or for the loss of the normal expectancy of life—was properly taken into calculation in *Flint v. Lovell*, and should be considered here, as Greer, L. J., thought. The jury should be directed that they are entitled to take it into consideration along with other relevant elements of damage, using their common sense to give what is fair and moderate, in view of all the uncertainties and contingencies of human life. Special cases may occur, such as that of an infant, or an imbecile, or an incurable invalid, or a person involved in hopeless difficulties. The judge or jury must do the best they can, in the circumstances, in this as in other cases.⁸³

Lord Roche was clear that wrongful shortening of a person's life involves an objective loss;

I regard impaired health and vitality, not merely as a cause of pain and suffering, but as a loss of a good thing in itself. Loss of expectation of life is a form in which impaired health and vitality may express themselves as a result. In such a loss, there is a loss of a temporal good, capable of evaluation in money, though the evaluation is difficult. . . . Damages frequently have to be estimated in a case such as the following: A person suffers physical injuries of a nature to prevent him or her from living as full and complete a life as before, not in the matter of earning power, but in the matter of performing the functions and reaping the enjoyments of a normal life. An analogous problem is now presented. In the case I have outlined, partial loss of the good of life over the normal period of life has to be measured. Here a total loss of the good of life over part of the normal period of life

82. [1936] 1 K.B. 90 (C.A.).

83. *Rose v. Ford*, [1937] A.C. 826, 849.

has to be measured. I do not doubt that the measurement can be made . . .

[The amount of the award for shortening of life] was obviously and rightly arrived at without regard to the question of the amount of future earnings, and solely on the basis of what life was going to be worth to a healthy young woman, earning her own living, with dependent parents, and with some prospects of marriage. This method seems to me to be correct. It eliminates, and rightly so, the question of rich and poor, and pays regard to the normal and the average. A rich miser living in squalor, or a very poor man deeply sunk in misery, might require special treatment, but, ordinarily, a person may be assumed to have, or be able to earn, enough to live his or her life, and to enjoy it. Earning or income are otherwise, and to an extent beyond this, irrelevant.⁸⁴

Rose v. Ford provided a convenient measuring rod for many harassed judges: the assumption that £1,000 was a reasonable award for wrongfully shortening the life expectancy of a healthy, happy 23 year old girl to four days provided a criterion for estimating damages in other cases and courts were glad to make use of it.⁸⁵ Still, it is to their credit that they generally used the standard as a balance wheel for their reckoning, not as a substitute for independent analysis; as a ceiling rather than as a floor.

What weight is to be assigned to the *quantum* of expected life destroyed by the defendant's wrong? In *The Aiskarai Mendi*⁸⁶ several seamen of varying ages had lost their lives in a disaster at sea caused by the defendant's negligence. The registrar in awarding damages to surviving widows, refused to take ages or life expectancies of the victims into account, being of opinion that all had suffered the same loss in respect to deprivation of their prospects of future happiness. He reasoned thus: "They are all still in active life, and the joy they get out of it is much the same whether they find it in what they have done or in the hope of what they may do." Langton, J., in the Probate, Divorce and Admiralty Division, held this view to be erroneous believing that, while the length of life lost may not be of chief importance in a particular case, it is always relevant. He substituted larger awards in respect to the younger men whose death involved a greater loss of

84. *Id.* at 859.

85. Virtually every English trial judge, in dealing with such cases, after *Rose v. Ford* and before *Benham v. Gambling*, gave substantial or controlling weight to the sum of £1,000 as a reasonable starting point in determining proper damages for wrongful shortening of life expectancy.

86. [1938] P. 263, 3 All. E.R. 483.

prospective life. Logic seems to require that damages be proportioned to the length of life lost where the expectancy destroyed held promise of a predominantly happy life. This follows from the fact that reduction of the temporal dimension of life is an indispensable factor in the injury we are considering and it would hardly do in measuring damages to ignore the extent of the temporal loss. Conversely, the damages to be allowed should be discounted by an amount proper to give effect to any risks so peculiar to the victim that his life expectancy might have been shortened by accident or illness unrelated to the defendant's wrong. This consideration led the courts in *The Aizkarai Mendi* and in *The Oropesa*⁸⁷ to discount the damages somewhat because the victims were sailors and therefore engaged in an extra-hazardous occupation.

Similar problems arise where an infant has been fatally injured. It may be argued that such a child has a longer life span before him than an adult, but one must not forget the risks of disease or injury which lie between the ages of one and twenty-one. Nor can one very well prophesy what an infant's lot in life will be, and estimate his prospects until he has approached maturity and the path ahead of him becomes discernible. It can be understood how these conflicting considerations naturally led different courts to adopt opposite views as to the proper measure of damages where the life of an infant had been shortened by fatal injuries. Some thought that wrongful shortening of the life expectancy of a healthy child should warrant greater compensation than that allowed for such injury of a twenty-three year old adult (*Rose v. Ford*) in as much as the temporal loss is greater and proverbially the days of childhood are the happiest of one's life.⁸⁸ Other courts stressed the vicissitudes of early life, the independent risks of premature death from accident or disease in childhood, and the lack

87. [1942] P. 140, 58 T.L.R. 328.

88. *Turbyfield v. Great Western Ry. Co.*, [1938] 54 T.L.R. 221 (K.B.), 158 L.T. 135. (8 year old girl died nine days after D negligently injured her; the court felt that a happy child, with good future prospects, had lost 15 more years of life than the 23 year old young woman whose administrator in *Rose v. Ford* was allowed £1000; using that case as a measure, £1500 was awarded for wrongful shortening of decedent's life expectancy in the case at bar). See also, *Bailey v. Howard*, [1939] 1 K.B. 453 (C.A.), 4 All. E.R. 827 (1938) (*Rose v. Ford* figure taken as a reasonable standard, £1000 awarded for wrongful shortening of life expectancy of 3 year old girl who died day following injury). On appeal, £90 for loss of life expectancy of a healthy, happy 3 year old child was held to be grossly inadequate and a new trial was granted in *Shepherd v. Hunter*, [1938] 2 All. E.R. 587 (C.A.). A new trial was granted for failure of jury to compensate loss of life expectancy of 8 year old boy killed by negligent operation of D's motor car in *Ellis v. Raine*, [1939] 2 K.B. 180, 1 All. E.R. 104.

Stebbe v. Laird, 45 Manitoba 541 (K.B. 1937) 1 D.L.R. 240 (1938) (Happy, 11 year old daughter of village blacksmith, in being killed, lost more years than Miss Rose and should receive no less for the wrongful shortening of her life expectancy: \$5,000. awarded for this item of damage).

of established prospects until an infant nears majority. They concluded that forecasting an infant's prospects of future happiness involves added speculations which should lead to more modest damages than would be proper where defendant's wrongful act destroyed the life expectancy of an adult. This latter view won acceptance of the House of Lords in *Benham v. Gambling*,⁸⁹ a case as important as *Flint v. Lovell* and *Rose v. Ford* in the development of the doctrine we are considering.

British courts prior to 1940 had not attained consistency in the size of awards they made for wrongful shortening of life expectancy. Compiled records of trial and appeal courts, exhibited to the House of Lords in *Benham v. Gambling* by consent of counsel, provoked judicial comment as to the manifest variation in the awards made in such cases.⁹⁰ It was clear that a need existed for that tribunal to speak authoritatively concerning the proper measure of damages. In the *Benham* case, the facts revealed that young Gambling, an infant two and one-half years of age, was riding in his parents' car when defendant Benham negligently drove by in such manner that he caused the Gambling vehicle to overturn. The child sustained serious injuries from which he died on the same day without regaining consciousness. The administrator of the infant's estate brought an action under the survival statute seeking damages solely for wrongful shortening of the child's life expectancy. Defendant admitted his negligence and Mr. Justice Asquith, at the Winchester Assizes, entered damages for £1200. This award was approved by the Court of Appeal, though it thought the amount should be reduced to £250.⁹¹ The case was carried by further appeal to the House of Lords which unanimously reduced the damages awarded to £200. The Lord Chancellor took it as settled by *Rose v. Ford* that the infant had a cause of action for the wrongful shortening of his life and that it survived to his administrator. He said: "The present appeal raises the problem of the assessment of damages for 'loss of expectation of life' before this house for the first time and it is indeed the only issue with which we are now concerned."⁹² It is important to the understanding of the court's action to set out the main points which Lord Chancellor Simon made in respect to the measure of damages. (Commentary of our own that seems in order has been appended.)

89. [1941] A.C. 157, 57 T.L.R. 177.

90. *Id.* Lord Chancellor Simon at p. 161, T.L.R. at 179, mentions list of cases (some in the reports, others only in shorthand notes), comments on these variations, and adverts to the fact that several judges had drawn attention to the need for authoritative guidance on the subject of how to arrive at a proper measure of damages.

91. *Id.* at 164, T.L.R. at 180.

92. *Id.* at 162, T.L.R. at 179.

(1) *While the quantum of life expectancy of the victim is relevant, and the extent to which his life span was shortened by the defendant's wrongful act, the right conclusion cannot be reached by statistical or actuarial tests alone because . . . "in any case the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life."*

The Lord Chancellor declared:

It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation to be paid to the deceased's estate on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up "Life's fitful fever"—have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely or even mainly on the basis of the length of life that is lost.⁹³

(2) *The problem is to fix a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness and this is to be determined from the circumstances of the victim's life rather than by any presumption "that human life is, on the whole, good."*

Lord Simon was not inclined to accept the presumption acted upon in some of the earlier decisions "that human life is, on the whole, good." He thought that the trial court should be satisfied ". . . that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence." In this connection one would be entitled to consider whether the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, or to an opposite state of existence, taking into account every species of relevant evidence. Thus it would be pertinent to know that prior to the accident an independent injury or disease had already put a mortgage on the victim's life expectancy by shortening his expectable existence and producing a continuing state of pain and suffering or impaired happiness.⁹⁴

93. *Id.* at 166, T.L.R. at 180.

94. *Ibid.* Defendant's counsel is entitled to show that pre-existing disease or injury had already shortened plaintiff's life expectancy. *Adams v. Kaiser*, 285 Pac. 751 (Cal. 1930) (Sustaining P's objection to questions asked by defendant of its medical witness to determine whether prior ailment, or the automobile accident in litigation shortened P's life, held reversible error). Defendant is also entitled to show that such expectancy should be discounted because decedent was in a hazardous occupation. *The Oropesa*, [1942] P. 140, 58 T.L.R. 328. Or was on the verge of being called into military service in times of war, with all the attendant perils of premature death. *Hall v. Wilson*, 56 T.L.R. 15 (K.B. 1939), 4 All. E.R. 85. Mortality tables are only prima facie evidence of the expectation of life of a particular person, and evidence of conditions tending to decrease the expectation of life of such person is admissible. *Townsend v. Briggs*, 99 Cal. 481, 34 Pac. 116 (1893).

(3) *In appraising the victim's prospects of future Happiness, an objective estimate is to be made by the trier of fact; the test is not subjective, as the victim may have miscalculated what lay ahead of him.*⁹⁵

This view goes hand in hand with the conception that shortening of life expectancy involves an absolute loss not dependent upon production of mental anguish in the victim. One must stand off, as it were, and look at the victim's prospective life as an impartial appraiser of assets and liabilities, doing so with a detachment and insight which the victim himself may not have possessed at the time of the accident. The victim may have mistaken a temporary illness or loss of happiness for a permanent state, and an objective appraisal by an informed observer is needed to detect such errors or distortions in the psychic prognosis.

(4) *The appraisal is to be confined to the loss of expectation of life without including loss of pecuniary prospects resulting from the same injury.*⁹⁶

The objective here is to distinguish psychic and economic injuries which may result from the shortening of a person's life expectancy. This is desirable analytically.

(5) *Smaller damages should be awarded in the case of a very young child for the reason that "there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made."*

The position here is that while the fact of injury legitimately may be assumed, the degree of it is more speculative than where the victim is an adult whose prospects in life are more clearly established. The plaintiff will naturally try to reduce these uncertainties by such evidence as that brought forward in the *Benham* case showing that the child was a normal healthy infant, living in a country village off the main road where the risks of accident and of contagious disease were less than in crowded centers, and that he was living in a modest but happy home presided over by a father who had been continuously employed for fifteen years.

(6) *The proper sum to be awarded should not be influenced by the social or economic position of the victim.*

The view here is that the poor man's psyche is as precious as the rich man's and that happiness is not a product of wordly wealth. Lord

95. *Benham v. Gambling, op. cit. supra*, note 89 at 167, T.L.R. at 180.

96. *Ibid.*

Simon puts it this way: "Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status."⁹⁷ Such a philosophy is thoroughly democratic and few will dissent from the major premise. It does appear, however, that evidence of economic status should be admissible for the limited purpose of showing whether the victim had enough to provide himself with simple creature comforts, as this inquiry seems relevant to the issue of probable future happiness. But this inquiry must not be pursued too far, because materialists tend to confuse wealth and happiness. It should be enough for the plaintiff to show that the victim had means of reasonable subsistence, while the defendant should be restricted to counter-evidence that the victim was living in a state of miserable penury.

(7) *Shortening of life expectancy should be modestly compensated because of the difficulties of proof and the lack of a definite standard for measuring the loss.*

Lord Simon makes it clear that he intends his opinion to counteract any tendency to allow inflationary damages for shortening of life expectancy.⁹⁸ We saw in *Rose v. Ford* that £1,000 was considered to be a reasonable award for shortening the life expectancy of a twenty-three year old girl by a fatal injury. But there no real dispute existed as to the proper measure of damages, and one can only conjecture whether the House of Lords, after its decision in the *Benham* case, would now consider such a figure reasonable or excessive.

Special Problems. Consider the comment of Lord Wright, in *Rose v. Ford* that "Special cases may occur, such as that of an infant,

97. *Ibid.*

98. *Id.* at 168, T.L.R. at 181. Lord Chancellor Simon said: "The truth, of course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. *Damages which would be proper for a disabling injury may well be greater than for deprivation of life.* These considerations lead me to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen. My noble and learned friend Lord Roche was well advised when he pointed out in *Ford v. Rose* the danger that this head of claim might become unduly prominent and lead to inflation of damages in cases which do not really justify a large award." (Emphasis added).

The italicized passage seems to us to be demonstrably true. Members of the Court in the Scottish case of *M'Master v. Caledonian Ry. Co.*, 13 Sess. Cas. 252 (1885), were inclined, in testing the reasonableness of damages, to assume that the estate of a man who dies of injuries wrongfully inflicted should get no less than would the man himself had he lived. But this overlooks the fact that death cuts short many items of continuing damage such as medical and nursing expense, pain and suffering, mental anguish and prospective complications which might be of an abhorrent or distressing character. Injuries to the brain or spinal cord may leave an individual so disabled that constant nursing attendance will be required and this head of damage, alone, can reach into large sums.

or an imbecile, or an incurable invalid, or a person involved in hopeless difficulties." Unusual cases of this sort must be solved by determining whether the wrongful shortening of the victim's life expectancy entails a lesser injury, or none at all. It appears that the psychic interest in continuation of one's life clearly depends, in the last analysis, upon the subjective attitude of the victim, even though this is to be appraised objectively. It seems, furthermore, that one must consider whether the continuation of his life had any meaning and value to the victim prior to his injury. Consider, for instance, the fact that most people afflicted with incurable cancer, or crippled by gross disabilities, nevertheless have a will to live life out in full despite any attendant pain or inconvenience. So long as such a desire to live is present, the pains or disadvantages of existence cannot defeat the right to damages for further wrongful shortening of the victim's life, although the pre-existing impairment of his psychic expectancy would normally require a lower measure of damages. American courts have recognized the right of the mentally subnormal person to recover damages for personal injuries.⁹⁹ Such individuals have interests of personality not dependent upon their economic productivity and any deficiency in their powers to experience the raptures and joys of life could do no more than diminish the damages recoverable for wrongful shortening of their life expectancy. Interesting cases might arise where immediately before receipt of an injury which shortened his life, the victim had evinced an unmistakable purpose of committing suicide. Suppose, for instance, a hypothetical case such as the following. X takes an overdose of Nembutal with suicidal intent. Actually the amount of the drug he ingests is not sufficient to kill or seriously injure him. He does become stuporous, however, and while sitting on a curb, is struck by defendant's negligently operated car and gravely injured. Let us indulge two separate assumptions. Assume, first, that the injuries result in X's death a few hours later. Shall his suicidal effort be held to show such a complete renunciation of the will to live that no damages properly can be allowed for destruction of his psychic expectancy? Secondly, assume that the injuries sustained are not fatal but reduce the victim's life expectancy from thirty to five years; furthermore, that when X becomes conscious he relents his suicidal attempt and now desires to live. The scientific approach here would be to determine whether the victim's extinguished will to live and suicidal attempt proceeded from a temporary depression or psychosis from which he might be expected to recover shortly, or whether it was an expression

99. See notes 71-74 *supra*.

of a permanent pathological condition likely to blot out the prospects of future happiness. Such unusual cases are not apt to arise in large numbers, and are mentioned only to emphasize the need for objective evaluation of the victim's long-range prospects of happiness and for focussing primarily on the psychological rather than the physical features of his case. An incurable invalid, an individual who is blind, or otherwise handicapped, or a person carrying a load of heavy burdens, may be so psychologically adjusted or compensated that he derives more happiness from life than his normal brethren. A good example here is the interesting fact situation in the English case of *Feay v. Barnwell*,¹⁰⁰ in which a seventy-three year old blind man was injured and his seventy-one year old wife killed in a street accident. The evidence showed that she lived for three weeks after the accident, being conscious until the last day and suffering great pain. Her husband had been completely blind for fifteen or seventeen years. She had enjoyed good health, had done all the work about the house, including the washing, and had looked after her husband with the greatest care and devotion. A callous person might assume that so heavy a burden would be incompatible with any real happiness on the part of the victim. Singleton, J. correctly perceived the psychological gratification involved in such a service of love, saying: "Any one who has to deal with a matter of this sort must feel that part of the wife's joy in life was in looking after her husband." He assessed £600 as proper damages to compensate the pain and suffering experienced by the seventy-one year old wife prior to her death, and the shortening of her life expectancy by a period of five years.¹⁰¹

The fact that one wrongfully injured dies before the date of the trial does not convert the action by his administrator under a survival act into a wrongful death action, as we have stressed repeatedly. The death is relevant only as an evidentiary fact in determining the extent of the loss, for it obviates the necessity of offering medical testimony that the injury shortened the victim's life by an *estimated* amount of time.

But a real problem of proof is presented when the victim is alive at the time of trial but claims that injuries have cut short his life expectancy. Part of the difficulty here arises from undertaking to make a medical prophecy that acceleration of death is reasonably cer-

100. [1938] 1 All. E.R. 31 (K.B.).

101. Sometimes British courts isolate the factor of shortening of life expectancy in assessing damages and sometimes they bracket it with other psychic injuries like pain and suffering, as the Court did here. On the whole, segregation of all distinguishable items of damages is desirable scientifically.

tain to occur after an intervening period of time. The longer the time interval between cause and predicted effect, the more speculative is the medical prognostication likely to be. The degree to which particular injuries or their complications are calculated to shorten life expectancy are problems which need continuing, systematic medical study.¹⁰²

Expert opinion that injury or disease has shortened a person's life expectancy is of course admissible in evidence, and a few principles may be suggested for evaluating such testimony. First, the clinical course of a person seriously injured should reveal in days, weeks or months whether the outcome is to be early death or prolonged life with health restored or impaired.¹⁰³ The risks of immediate death or of early complications will therefore normally be tested by passage of time before an action for damages can be brought to trial.

During this time interval many cases will reach a clinical end result so that the final deficit in health or activity can be assessed. A great deal of damage may be sustained by a person in the way of anatomic loss without any predictable shortening of his previous life span. A good example is the loss of an arm or a leg. Any traumatic injury of this sort may involve risks of death from shock, blood loss or infection, but if the end result is a limited anatomic or functional loss without impairment of general health, one must view with skepticism any prediction that the injury is reasonably certain to reduce the victim's life expectancy.¹⁰⁴

102. The average risk varies from .01% in cases of simple concussion of the brain to as high as 20-40% following depressed fractures of the skull with laceration of the meninges and underlying brain. The cause seems to be the formation of scar tissue which contracts with age and by exerting traction on the brain, sets up a focus of irritation. But one cannot procure statistics on how much traumatic epilepsy, once it has materialized, tends to shorten life expectancy on the average; indeed, this cannot be discovered either from the largest insurance companies or the leading Neurological Institutes. The matter has not yet been adverted to as a subject of study, in this regard being like countless other important medicolegal problems.

103. This is called by physicians, attainment of the "end result" or period of *consolidation*. Death or cure have occurred or full convalescence with a stationary deficit or impairment. "This is the time when complete physiological adjustment has taken place, when the maximum repair is completed and the resulting conditions are truly fixed or permanent." Kessler, *General Principles of Evaluating Disability*, 19 TENN. L. REV. 282, (1946).

104. Account must always be taken, also, of the remarkable, continuing advances in Rehabilitation Medicine. See KESSLER, *PRINCIPLES AND PRACTICES OF REHABILITATION*, (1950).

Rehabilitation Medicine spans both physical and psychic disabilities, surgical and non-surgical techniques, the use of physiotherapy and other forms of Physical Medicine. While our Courts are slow to hold that the injured person has a *duty* to submit to major corrective surgery as a means of minimizing his injuries and disabilities, Ludlam, *Plaintiff's Duty to Minimize Defendant's Liability by Surgery*, 17 TENN. L. REV. 821, (1943); we may hope that in future the test of reasonableness will become whether the procedure is usual treatment customarily prescribed by surgeons and generally accepted by patients who have no medicolegal claim pending.

The foundation is better for a medical opinion that the victim's injuries are reasonably certain to shorten life expectancy when those injuries permanently impair general health. These include injuries which disrupt normal functioning of one or more vital organ systems, and those which reduce the victim to a state of continuing invalidism. Coronary occlusion caused by an actionable psychic or physical trauma, may not be fatal, yet leave the surviving victim with a much impaired cardiac reserve and a warrantable prognosis of shortened life.¹⁰⁵ Severe multiple injuries may produce similar effects, reducing the victim's resistance to disease while simultaneously opening up risks of late complications or sequellae. Injuries to the central nervous system involving, for instance, partial or complete severance of the spinal cord, or gross damage to the brain, may result in varying degrees of paralysis, loss of control of the bladder, and other effects naturally calculated to shorten the victim's life expectancy.¹⁰⁶ *Roach v. Yates*¹⁰⁷ was a case of this sort. The evidence there showed that a thirty-three year old bricklayer was riding a bicycle to work when a car negligently operated by the defendant struck him. He sustained head injuries which produced traumatic dementia with gross alteration of mental functions, traumatic epilepsy with seizures occurring once a week, incontinence of urine and feces and other consequences which made him a helpless invalid, incapable of looking after himself and dependent day and night upon the care of a nurse. Attending physicians testified that the injuries had shortened plaintiff's life from thirty to sixteen years, an estimate so fair that one might well point to it as an admirable model of conservative medical prognosis in appraising such a case.

An injury may be such that the victim is able to attain to normal life and good health once more but with some permanent depletion of a vital function which statistics show will entail some shortening of life expectancy. Here we are thinking of the man who sustains the loss of one kidney, or one lung or the like, as the result of an injury. One is impressed by the way in which nature has provided considerable reserve capacity in respect to carrying out vital functions, particularly striking where two anatomical units such as the kidneys or

105. *Estabrook v. Butte, A. & P. Ry. Co.*, 163 F.2d 781 (9th Cir. 1947) (Evidence showed that coronary occlusion traumatically induced had decreased victim's life expectancy from 27.45 years to 10 years and that any physical strain would cause pain).

106. The state of helplessness, impaired functioning and inactivity tend to cause muscle atrophy, bed sores, secondary infections and complications and the lowered physical and psychic resistance of the patient increase these hazards.

107. [1938] 1 K.B. 256 (A.C.).

lungs serve the same purpose. So bountiful is this reserve that an individual may carry out vital functions and live to a ripe age after losing one of these paired organs.¹⁰⁸ Any such loss, however, does increase the statistical risk of earlier death for the members of such a class, and it would seem proper, therefore, to allow some damages for shortening of life expectancy to a plaintiff who has been so injured.

Courts may gain some help from the foregoing considerations in determining the credibility of a medical opinion that a particular injury has shortened the life expectancy of the victim. Any final doubts concerning the accuracy of the medical prognostication may serve as a proper ground for holding damages to modest levels.

Avoidance of Double Damages. The main possibility of double damages for the same loss arises from the fact that fatal injuries may result in two actions: one a suit under a survival statute wherein decedent's administrator enforces the victim's cause of action; the other an action under a wrongful death act to recover the "pecuniary loss" suffered by named beneficiaries.¹⁰⁹ In Britain, the two actions are

108. "A person can get along if he retains good function in one-half of one lung, one-third of a kidney, one-fourth of the liver, one-tenth of the pancreas, or one-third of the thyroid gland. Life is possible with only one-half of the total blood volume and with twenty percent hemoglobin. Among these safety factors are to be included the large number of digestive ferments and the ability to substitute one foodstuff for another. The potential of muscular effort is far greater than the usual work performed. One structure may substitute for another, as does the skin for the kidney in the elimination of wastes. [Continuation of the blood vessels adjacent to the injured ones.] Through these and similar vicarious functions, biologic adaptation achieved. The body is like an iceberg, revealing only about one-fifth of its great strength, while submerged, ready for any emergency, lies four-fifths of its great powers." Kessler, *General Principles of Evaluating Disability*, 19 TENN. L. REV. 282, 289 (1946).

109. It is this fact that has produced such a contrariety of approaches and complex confusion in our American States having both types of statute. Some jurisdictions hold that the two remedies are concurrent, and complementary measures of damages are worked out to avoid duplications. Under this view, as in Britain, there are two separate and maintainable causes of action, which may be tried separately, or if the administrator is the same, consolidated. *Farrington v. Stoddard*, 115 F.2d 96 (1st Cir. 1940); *McCarthy v. Wood Lumber Co.*, 219 Mass. 566, 107 N.E. 439 (1914); *Hindmarsh v. Sulpho-Saline Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922). Other jurisdictions, unfortunately, hold that the remedy provided by the wrongful death statute is exclusive. This has the undesirable effect of forgiving a part of the wrongdoer's proper liability. Some courts distinguish cases where the victim has begun suit during his lifetime, holding that his administrator can revive it under a survival statute, though he might not be able to institute an original action in behalf of the estate after the victim's demise, if, in that state, the wrongful death act is held to be exclusive. (7 ALR 1355; 26 A.L.R. 593) But this distinction hardly seems tenable.

Still other Courts hold that where death is *instantaneous*, recovery can be had only under a wrongful death statute. *Kyes v. Valley Telephone Co.* 132 Mich. 281, 93 N.W. 623 (1903). This whole line of authority is mistaken, for it assumes that there was not time for a cause of action to accrue to the victim. But this is a specious assumption for in science there is no possibility of the traumatic impact and resultant death occurring simultaneously: there is always a necessary time interval between cause and effect and this permits the right of action to vest in the person injured.

usually joined, thus eliminating supposed risks of overlapping damages. If they are brought separately, the matter is taken care of by proper charge to the jury.¹¹⁰ Actually, the current British practice of offsetting the recovery under the wrongful death act against damages for shortening of life expectancy, and *vice versa*, where the plaintiff is the same in the two actions, seems to involve a mistaken notion. The vice of double damages exists only where the defendant is made to pay compensation twice for the same injury. "Pecuniary loss" under the wrongful death statute does not include the loss of psychic expectancy, nor does the latter embrace any factor of lost earnings, as the British courts now clearly recognize. They are separate and distinct injuries flowing from the wrongful shortening of the victim's life. The risk of double damages arises only where the administrator under the survival statute can recover damages for impairment of decedent's earning capacity as well as for the psychic injury resulting from wrongful shortening of his life expectancy. In that case, proper safeguards must be taken to see that the beneficiaries under a wrongful death act will have their claim for "pecuniary loss" satisfied without subjecting the defendant to risks of double damages. American courts have reacted to this vexatious problem in a variety of ways; the perfect solution seems to call for model legislation. A general survival statute could be enacted providing for preservation of the decedent's full cause of action while yet setting aside a specified portion of the recovery for the benefit of decedent's dependents, free of the claim of creditors. We have seen that the cause of action which vests in an

110. Where damages for loss of life expectancy were assessed at £300, but on intestacy, the widow was entitled to the whole of it, this would merge in the sum of £1500 awarded to her under the Fatal Accidents Act, and not be recoverable in addition. *Feay v. Barnwell*, [1938] 1 All. E.R. 31 (K.B.). This principle of offset has been applied consistently in recent British cases: *The Aizkarai Mendi*, [1938] P. 263, 3 All. E.R. 483; *Hall v. Wilson*, 56 T.L.R. 15 (K.B. 1939), 4 All. E.R. 85; *May v. McAlpine & Sons, Ltd.*, 54 T.L.R. 850 (K.B. 1938), 3 All. E.R. 85.

It has been held, further, that pensions received by the widow and children of a policeman, both from statutory and voluntary funds, would need be deducted in assessing damages for shortening of his life under the Law Reform Act of 1934 (by being killed at age 35 while in perfect health), and under the Fatal Accidents Act. The Court took the position that these funds were not in the nature of insurance moneys (which of course are not deductible from defendant's damages.) *Lory v. Great Western Ry. Co.*, [1942] 1 All. E.R. (K.B.) 230.

In *The Oropesa*, [1942] P. 140, 58 T.L.R. 328, deceased was drowned in a rescue operation at sea. The same parties at interest sued both for loss of deceased's expectation of life under the Law Reform Act (Survival Statute) of 1934 and for pecuniary loss suffered as part dependents under the Fatal Accidents Act. The appeal court affirmed awards of £200 for the shortening of life and £50 under the Fatal Accidents Act.

The obvious intent of consolidating actions and offsetting awards is to prevent duplication of damages under the Act of 1934 and the Fatal Accidents Act as directed by Lord Wright in *Rose v. Ford*.

injured man, however quickly he may die, actually includes every item of damage for which the defendant can be made to pay compensation. If one shares our view that the whole cause of action should be preserved, it is clear that Lord Campbell's Act, enacted by Parliament in 1846 and widely copied in this country, is an inadequate, piecemeal reform of the common law rule that death of tortfeasor or victim extinguishes a tort claim. That Act did no more than confer upon dependents of one wrongfully killed a right of action for their resultant "pecuniary loss." This does not even preserve in all cases the right to recover the absolute loss of earnings which results from destruction of the victim's earning capacity. A single survival statute designed to preserve the whole cause of action, or to limit the amount of recovery in respect to any or all items of damage, could provide directions for distribution of proceeds between dependents, creditors and other claimants and eliminate altogether the need for any separate wrongful death act. Inviting such innovation is the rule already followed in many American jurisdictions that an administrator suing under a general survival statute can enforce the victim's full cause of action. This is held to include the right to damages for destruction of the victim's future earning capacity by the wrongful shortening of his life.¹¹¹ The complexities created by interplay of survival statutes and wrongful death acts are, of course, quite collateral to the policy problems involved in determining whether damages should be granted or denied for the psychic injury involved in wrongful shortening of the plaintiff's life expectancy.¹¹²

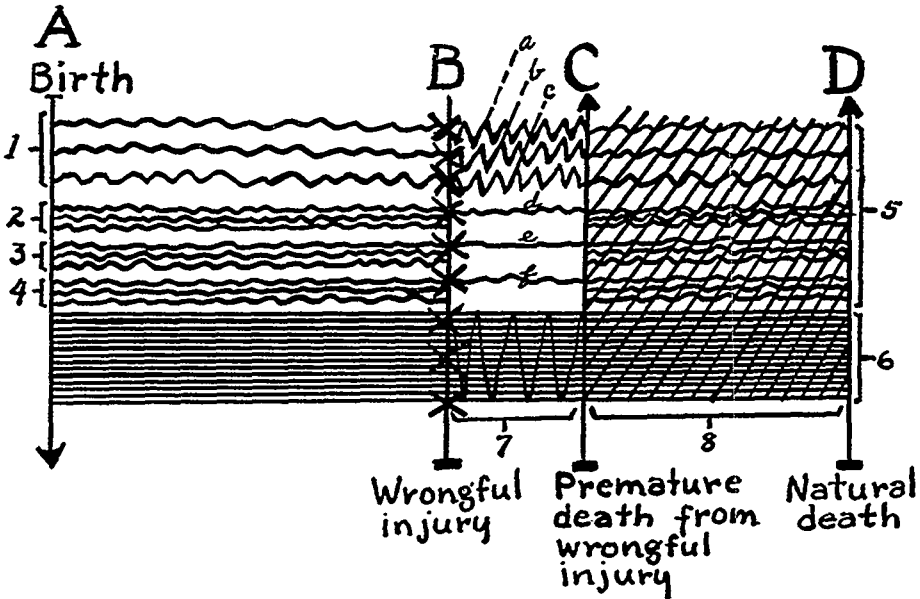
PENULTIMATE REFLECTIONS AND PROPOSALS

For purposes of assessing damages for personal injuries, interests of personality should be thought of as a spectrum, both broad and long, coextensive with life, divisible into two main bundles or bands: economic interests and psychic values. These contain assets prin-

111. *Kling v. Torello*, 87 Conn. 301, 87 A. 987 (1913); *Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N.W. 623 (1903); *Imbriana v. Anderson*, 76 N.H. 491, 84 A. 974 (1912). See also, *Maher v. Philadelphia Traction Co.*, 181 Pa. 391 (1897); *Vicksburg & M.R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537 (1887); *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922); *Murray v. Omaha Transfer Co.*, 95 Neb. 175 (1914), *aff'd on rehearing*, 98 Neb. 482 (1915); *West v. Boston & Maine R.R. Co.*, 81 N.H. 522, 129 A. 768 (1925); *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 26 A.2d 659 (1942); *Parker v. Bamberger*, 100 Utah 361, 116 P.2d 425 (1941); *Rogers v. Lurye Furn. Co.*, 193 Wis. 496, 211 N.W. 782 (1927).

112. These run to administration of the remedy and prevention of double damages rather than to negation of the right to sue for injurious invasions of the interest which one should be legally recognized as having in the continuation of his own life.

cipally, but oftentimes the asset is a net balance after deducting inter-related liabilities. We may chart these relations thus:



= Amputation of All Interests of Personality by Premature Death

1. Psychic tranquillity
2. Enjoyable amenities
3. Intact anatomy
4. Normal physiological and psychic functioning
5. Psychic values
6. Economic interests; power to earn money by personal functioning
7. Economic productivity impaired or destroyed by injury
8. Psychic values and economic interests cut off prematurely: absolute loss of assets
- a. Pain and suffering from traumatic injury or stimulus
- b. Mental anguish caused by injury or stimulus
- c. Fears, anxieties, neurosis, psychosis
- d. Impairment or loss of social amenities due to injury
- e. Impairment or loss of anatomical structures or body tissue due to injury
- f. Impairment or loss of physiologic or psychic function due to injury

The reader is invited to consider the effects of a serious personal injury on these interests: Pain and suffering; mental anguish; fears, anxieties, neuroses and psychoses may lessen or destroy mental tranquillity. Enjoyable amenities ranging from ability to perform countless habitual acts in taking care of oneself, to pleasurable pursuits, and aesthetic expression through gratifying creative arts or accomplishments may now be diminished or destroyed. A personality deficit may be sustained through impairment or destruction of anatomical organs or

body tissues, or of physiological or psychic functions; this may, and usually does, result in variable shrinkage of accustomed health, vigor and personal expression. Obviously life is much damped down between *B* and *C* by these psychic effects. Assuming the fact and causation of the injuries to be clear, the defendant, if otherwise at fault, cannot escape liability on the theory that the damages are too uncertain. The law prefers accepting the conscience of the community (the jury) as a measure of damages to forfeiting the remedy of the innocent victim.¹¹³

Economic interests of the victim suffer, too, as a result of any partial or total disability to work, and from depletion of his resources in obtaining care and treatment. The method of assessing damages to compensate these losses is more certain; yet even this is somewhat illusory since the final liability of the tortfeasor is notoriously speculative, depending as it does upon the accidental circumstance of the victim's capacity to earn money. On the other hand, juries tend in compensating psychic injuries to treat rich man, poor man, beggar and thief more nearly alike.

Probably it is wholesome, in a democracy, to employ these opposite bases of compensation in tort cases: an individualistic measurement of economic loss to encourage and protect enterprise and initiative, and a social measurement of psychic injury to assure a minimum compensation of seriously injured human beings whatever may be their social or financial status.

Bearing in mind that the law traditionally grants damages for *transient* disturbances of psychic security consequent upon physical injury, and the ever-widening protection given to the psyche as our law evolves,¹¹⁴ it is difficult to see why wrongful shortening of the

113. "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate. The wrongdoer is not entitled to complain that the damages cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1930).

This philosophy is applied frequently in supporting jury discretion in determining appropriate damages for non-mathematical consequences of personal injuries. See *Avance v. Thompson*, 320 Ill. App. 406, 51 N.E.2d 334 (1943) (Plaintiff sustained loss of two legs below knees; much pain and suffering; 13 weeks in hospital where a further amputation was required; \$125,000. verdict reduced to \$100,000 by *remititur*). The Appellate Court said: "It is difficult to appraise scientifically human pain and suffering and a mutilated body. In this character of case, the damages are for the determination of the jury, and unless we are able to say that the jury was moved by prejudice and passion, we would not be warranted in reversing the judgment on the ground that the verdict is excessive."

114. Witness the rapid evolution of the legal protection against injuries from psychic stimuli, Smith, *Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944). Note the expanding recognition of the right of privacy, nine additional

personality spectrum should not be compensated as involving a permanent impairment of psychic interests. The premature death of the victim at point C of our diagram entails an *absolute* loss of personality assets or resources, psychic and economic.

It seems reasonable that the prospective loss of all modalities of personality expression, reasonably certain to occur through premature death of the victim, is of more serious import than the mere temporary invasion of psychic tranquillity such as are involved in pain and suffering, mental anguish and the like. And as a practical matter, the need for scientific development of the law of damages argues as strongly for recognition of wrongful shortening of life expectancy as an independent head of damage. We have seen that this predicted consequence is admissible in evidence to prove mental anguish or the seriousness of the injury. Once in, such evidence becomes one of those indeterminate factors which operate *sub rosa*, to inflate awards unpredictably. By recognizing wrongful shortening of life expectancy as a separate element of damages, a covertly compensated factor may be catalogued and subjected to judicial control in respect to the inadequacy or excessiveness of damages actually being allowed for it.

It has been assumed in most quarters that the wrongful shortening of life expectancy was first recognized as a legal wrong by the English courts in 1935 in the celebrated case of *Flint v. Lovell*. Yet, as seen, the principle was enunciated in earlier English, Scottish and Empire cases. Apparently it has not previously been noticed that this species of legal injury was first recognized in America in the case of *Murphy v. New York and New Haven R. R. Co.*¹¹⁵ It is difficult to say how frequently lawyers are utilizing wrongful shortening of plaintiff's life expectancy to enhance damages. We have seen that unwarranted resort to common law rules concerning the jural effects of death has led some of our courts into erroneously excluding this proper item of damages from compensation. Some of our appeal courts allude freely to evidence that plaintiff's injuries will shorten his life as a means of underlining their serious import and the consequent reasonableness of damages assessed by the jury.¹¹⁶

states having embraced the doctrine between 1936 and 1948. Feinberg, *Recent Developments in the Law of Privacy*, 48 COL. L. REV. 713, 1948. For a perceptible start toward renunciation of the anachronistic tort doctrine that the unborn, but viable child, has no interests of personality, see *Williams v. Marion Rapid Transit, Inc.*, 87 N.E.2d 334 (Ohio 1949): "An unborn, viable child is a 'person' within the meaning of the constitutional guarantee of redress to every person for injury done him." *Verkennes v. Cornia*, 38 N.W.2d 838 (Minn. 1949) (The estate of a viable child who is born dead, may sue the wrongdoer whose conduct caused the fatal injury, for damages under a Wrongful Death Statute).

115. 30 Conn. 184 (1861).

116. Cases cited in notes 48-50 *supra*. See also: *Estabrook v. Butte, H. & P. Ry. Co.*, 163 F.2d 781 (9th Cir. 1947) *Fournier v. Zinn*, 257 Mass. 575, 154 N.E. 268 (1926); *Cooper v. St. Paul City R. Co.*, 54 Minn. 379; 56 N.W. 42 (1893); *Magee*

If *Flint v. Lovell* was not the first case to proclaim the right of man to have legal redress for wrongful shortening of his life expectancy, it quickly became one of the celebrated causes of modern times among the common people of England.¹¹⁷ The case was taken up with alacrity by counsel for injured plaintiffs and speedily became a traditional ground of damage. It was but natural that the Court should have held in *Ford v. Rose* that the cause of action is saved by a survival act for the benefit of victim's estate when he dies before suit.¹¹⁸ In what respects, then, should leave be taken of English practice in administering the remedy?

The right to recover damages for wrongful shortening of life expectancy should reflect simultaneously the presumed instinct of self-preservation, or will to live, and the equal value this has in a democratic society for poor and rich, without reference to class, creed, or color. An arbitrary ceiling should be put upon the interest, ranging, say, from \$5,000 in case of a person over 45 years of age up to as much as \$10,000 in case of victims who were children at the time of injury. The number of years by which normal life expectancy has been reduced should be reflected in the amount of the award, not ignored as the English courts direct.¹¹⁹ This follows from the fact that we are dealing with an *absolute* loss of an asset—life substance. Children, therefore, should be held entitled to larger damages for their greater deprivation of life substance. This would help equalize the hardship resulting from hesitation of some courts to compensate loss of future earnings liberally because of doubts as to what economic future the child would have had in absence of his disabling injuries.¹²⁰

The justice in varying compensation according to the years of life lost is buttressed by another consideration. The wrongdoer is liable in damages for future pain and suffering and mental anguish reasonably certain to result from the injuries. As the date of the victim's death is accelerated, the award for these factors diminishes, for the reason that life expectancy of the victim *following* the injury is used

v. City of Troy, 48 Hun. 383, 1 N.Y.S. 24 (1888); *Crecelius v. Gamble-Skogmo Inc.*, 144 Neb. 394 13 N.W.2d 627 (1944) (4 year old boy struck by truck; so injured that doctors declared his life expectancy had been reduced 25 years; verdict and judgment for \$20,000. affirmed).

117. It is said to have become almost household knowledge; a new right of the common man which only legislation could now nullify.

118. Because it can vest in the victim, death never being instantaneous, and because a survival act is enacted expressly to perpetuate the right of redress. *Clark v. Manchester*, 62 N.H. 577 (1883) Allen, J.: "Practically and in substance, though the intervening time may be very brief, an injury causing death or resulting in death must precede death in point of time."

119. *Benham v. Gambling*, [1941] A.C. 157, 57 T.L.R. 177.

120. Minors who have been permanently disabled or impaired by personal injuries are entitled to have their economic future estimated but this process usually induces an ultra-conservative judicial approach in fixing limits of reasonable compensation for serious personal injuries sustained by immature children.

to measure the period during which he will continue to suffer permanent pain.¹²¹ But as this type of injury to the victim is progressively reduced by increased acceleration of death, the absolute loss of life substance is correspondingly increased thereby.

Some may object to the development of arbitrary limits of compensation by the judiciary. But this seems not only plausible, but permissible and desirable. The chief risk in compensating psychic injury arises from the possibility that jurors will make irreconcilable awards in similar cases or seize upon the item as a run-away factor in returning excessive verdicts. Only trial judges and appeal courts can discharge the important function of maintaining comparable awards in similar cases and regularizing damages through exercise of their discretionary power to require remittiturs or to order new trials. There is nothing novel or radical in suggesting that such judges may properly fix limits of compensation for real injuries not scientifically measurable in a dollar figure. This would open the door to compensation of serious psychic injuries objectively demonstrable while closing it against the risks of speculative and fantastic awards prompted by purely subjective or visceral reactions.

It is reasonable to start with a presumption that the instinct for self-preservation is operative so that plaintiff's life is a good thing to him, worth living to the full of nature's gift, and compensable on the theory that his psychic interest in this regard is as valuable as any other man's. Thus a *prima facie* norm of compensation exists which varies only with the amount of time cut off by the injury from the victim's pre-existing life expectancy.¹²² The burden of going forward with evidence indicating that plaintiff's interest in life was previously impaired or gone, or that his life expectancy had already been curtailed by pre-existing injury or disease should rest upon defendant.

Lastly, it should be clear that as the economic and psychic resultants of physical injuries are separate and distinct heads of compensation, the English courts are in error in assuming that the award for one must be set off against the other as a means of preventing double damages.

CONCLUSION

We have endeavored to show that the shortening of a person's life expectancy by wrongful conduct involves an actionable invasion of a right of personality which modern law should recognize and redress.

121. Whereas life expectancy immediately prior to the injury is used to estimate loss of future earnings. *Webb v. Omaha & S.I. Ry. Co.*, 101 Neb. 596, 164 N.W. 564 (1917).

122. The item to be compensated thus becomes more objective, and less meta-physical. It might even be valued by stipulation of counsel in non-controversial cases.

The right of action accrues at the moment of the wrongful impact and survives to the victim's administrator where the common law bar to transmissibility of tort claims has been lifted by a survival statute. Whether such an interest of personality should be recognized and vindicated involves a fresh problem to be solved in the light of current legal and social policy and is not controlled by the anomalous common law rules dealing with the juridical effects attached to death of the victim or wrongdoer. Present day conceptions of the meaning and value of human personality call for this additional protection of the psychic interest one has in continuation of a life which to him is worth living. The difficulties of administering the remedy should be no ground for withholding recognition of the right and refusing redress for its wrongful impairment. Better, it would be, to recognize the right to damages for wrongful shortening of life expectancy and to forestall risks of inflationary awards by restricting the measure of damages. In that direction lies the proper course of legal evolution.