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Vernon X. Miller

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## Dead Men in Torts: Lord Campbell's Act Was Not Enough

VERNON X. MILLER\*

This article is an essay on death statutes and torts. It is not a text because there is little profit nowadays in laying down the law.<sup>1</sup> People everywhere in 1970 are reappraising the social structure, and lawmen cannot escape. Lawyers can be creative, or they can be stubborn. They can respond with imagination, or they can wait for pressures. But legislating and judging are constant processes, and the law does catch up with the community. There will be much reappraising in the personal injury business during the nineteen-seventies. Death cases are part of that business.

Death can be related to a tort, or it can happen after the accident from other causes while a claim for damages is pending. It can happen to an injured victim, and it can happen to a tortfeasor. All kinds of death-tort cases have been hard for lawyers to crack. For generations judges have been circumscribing them with common law absolutes and strict statutory construction. That story is background for the reappraisal.

### *The plaintiffs' world—a long time coming*

The civil suit for damages is the greatest resource of the common law. It is bigger than torts, but the personal injury business has captured most of its facilities. The theory and the actuality of the civil suit are law to the community. People are involved in every case as injured persons and tortfeasors. Employers and insurance carriers have become just as important as the individual tortfeasors, but there has to be a tortfeasor in every case,

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\* Professor of Law, Catholic University of America School of Law. A.B., University of Minnesota, 1923; LL.B., University of Minnesota, 1925; J.S.D., Yale, 1929; Member of District of Columbia, Minnesota and Wisconsin bars.

1. Even if the climate were good, I would not try to write a textbook on death cases. There are countless decisions which can be related only to experiences in certain states. I have tried to be positive. Anyone can find cases and statutes to support something different from most of my propositions. But I stick to my guns. In every state the story is just as good or just as bad as the one I have laid out in this paper.

and he is always a people. He can be hard to find in some nonfeasance cases, but we suppose that somewhere among a hierarchy of employees there is someone who forgot to close a door or to tighten a bolt. *Res ipsa loquitur* solves many hard cases. The basic standard for measuring conduct is the standard of the reasonably prudent man. The measures for price are compensation and punishment. Ambiguities, inadequacies and inconsistencies stick out all over the procedures, but the ambiguities get resolved, the inadequacies are patched up and the inconsistencies are rationalized.

The variety of people and events involved in torts defies classification by legislatures or judges. Lawsuit by lawsuit the system comes up with adjustments related to specifics of time and place and cast of characters. Text writers cannot describe it as it is,<sup>2</sup> but lawyers learn to absorb it and to understand it. Perhaps they are so close to the civil suit that they cannot see it as it is. They can never argue to a judge that a lawsuit is a forum where a man's obligations to his neighbors are measured by popular convention. Demurrers and proximate cause have lots of muscle. A plaintiff must state a cause of action. He cannot complain about a practical joke if embarrassment is his only hurt.<sup>3</sup> A defendant does not have to underwrite the cost of everything that happens as a result of his inadvertence. But the actuality is there; the civil suit for damages is wide open. Anyone who can get a lawyer can claim damages for what he thinks is an injury. The actuality of limitation is real also, although the circumscribing can seldom be reduced below the generalities of the reasonably prudent man, proximate cause or scope of employment.

The civil suit for damages has practical limitations. Jurors are not always bright, and judges are not always wise. Some kinds of controversies cannot be resolved adequately through the civil suit.<sup>4</sup> A judgment for damages is

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2. You can take your pick from *Corpus Juris*, *American Jurisprudence*, or any state digest. I hesitate to peg any authors by name.

3. This proposition defies citation except indirectly. *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920) looks as if it is on the nose. It is not easy to cut *Nickerson* down to size. Judge Dawkins did not cite another case in his opinion. The victim was an excitable person with a history of mental illness. Apparently she did not suffer any disability after the hoax, but she did allege in her petition that she had spent money and that she had lost business on account of the prank. In every reported practical joke case there is some other effect than mere embarrassment. See *Johnston v. Pittard*, 62 Ga. App. 550, 8 S.E.2d 717 (1940); *Newman v. Christensen*, 149 Neb. 471, 31 N.W.2d 417 (1948); *Lewis v. Woodland*, 101 Ohio App. 442, 140 N.E.2d 322 (1955).

4. It is not practicable to break down measures comparable to the standard of the reasonably prudent man into issues for the court and jury in police arrest cases. See *Wimberly v. City of Paterson*, 75 N.J. Super. 584, 183 A.2d 691 (Super. Ct. 1962); *Fields v. City of New York*, 4 N.Y.2d 334, 151 N.E.2d 188, 175 N.Y.S.2d 27 (1958).

Claims arising from mass torts like the Minnesota forest fires of 1918 and the Ringling Brothers fire in 1944 cannot be resolved through civil suits. See *Hollister v.*

worthless against a defendant without money. Lawyers cannot afford to represent clients who cannot pay. Nor can every injured person win. He may not have a case for fault, or he may be barred by his own misconduct. All this is primer stuff. Lawyers know all about contingent fees and insurance. They know they cannot litigate every case, and they learn how to tell the bad ones from the good—good that is for responsibility and price. The system is loose. It does not always square with certainty or logic. And that is good. Looseness has served justice well. Judges and jurors could not discover solutions related to the intricate combinations of specifics in multitudes of civil suits if the system were rigid.

Judges have tightened some of the ambiguities of the reasonably prudent man with statutory negligence.<sup>5</sup> They have opened many areas to plaintiffs that were closed two generations ago, but lawmen are not always creative and generous. In an adversary system defendants' lawyers are constantly arguing for restrictions on plaintiffs' claims. A hundred years ago judges listened willingly to scare stories from defendants' counsel. They came up with privity of contract in products liability,<sup>6</sup> the fellow servant rule,<sup>7</sup> and strict construction of Lord Campbell's Act.

No legal scholar has done enough grubbing to write a history of the civil suit in the United States. To get part of the job done someone will have to

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Ulvi, 199 Minn. 269, 271 N.W. 493 (1937) (on the forest fires); 60 YALE L.J. 1417 (1951) (on the circus fire); cf. Comment, *Procedural Devices for Simplifying Litigation Stemming from a Mass Tort*, 63 YALE L.J. 493 (1954). Because the United States was involved, the Texas City explosion cases looked practicable under the Federal Tort Claims Act. A trial court found for the plaintiffs in a test case, but the Supreme Court decided that the Act did not cover policy choice mistakes by top government officials. *Dalehite v. United States*, 346 U.S. 15 (1953).

5. Is violation of a statute negligence per se, or is it merely evidence of negligence? There is no majority or minority rule. It all depends on the case and the statute or the ordinance. Sometimes the statutory provision is vital and sometimes it is merely relevant. There can be commitments to both ideas in one state. Cf. *Whetzel v. Jess Fisher Mgmt. Co.*, 282 F.2d 943 (D.C. Cir. 1960), noted in 10 CATHOLIC U.L. REV. 44 (1961). *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943). Whether or not contributory negligence can be a defense in a statutory negligence case depends on what the court thinks a legislature was trying to protect. *Dart v. Pure Oil Co.*, 223 Minn. 526, 27 N.W.2d 555 (1947). When a statute is a codification of the common law, a violation creates a presumption of negligence. See *Satterlee v. School Dist.*, 29 Cal. 2d 581, 177 P.2d 279 (1947).

6. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842). On its facts this was not a products liability case. Nevertheless, the court's dictum was historic. Judges everywhere picked it up in true products liability cases. Economic facts looked big. A tradesman could not stay in business if he had to cover personal injuries sustained in the using of his products by anyone but a customer. Judge Sanborn tried to canonize the rule and the exceptions in *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865 (8th Cir. 1903).

7. *Priestley v. Fowler*, 150 Eng. Rep. 1030 (Ex. 1837). You can detect the scare stories in Lord Abinger's judgments both in *Winterbottom* and *Priestley*. Courts in the United States picked up the idea of fellow servant from this court just as they

cover what he thinks are key states, but he should cover everything in the states he chooses. After a little bit of grubbing in Minnesota, Louisiana, the District of Columbia and New York, it is easy to put a finger on a crucial decade. Before 1915 it was a defendants' world. Judges were strict about evidence sufficient to support a verdict, about proximate cause and scope of employment, and they sat tight on damages. Plaintiffs rarely got more than \$50,000 in personal injury suits.<sup>8</sup> Since 1925 it has been a plaintiffs' world. The big step-up in damages began in the nineteen-forties.<sup>9</sup> *Palsgraf* was obsolete when it was decided in 1928.<sup>10</sup>

The ramifications of the plaintiffs' world extend into products liability,<sup>11</sup> immunity of charitable corporations,<sup>12</sup> even governmental immunity,<sup>13</sup> and attractive nuisance,<sup>14</sup> just to name a few areas. These ramifications extend

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would do with privity of contract. See *Farwell v. Boston & W.R.R.*, 45 Mass. (4 Met.) 49 (1842); *Murray v. South Carolina R.R.*, 1 McMullan 251 (S.C. Ct. Err. 1841). Apparently South Carolina did it on its own before the judges could read *Priestley v. Fowler*. These were just the first. See also *Hubgh v. New Orleans & C.R.R.*, 6 La. Ann. 495 (1851) discussed in the text.

8. See Miller, *Assessment of Damages in Personal Injury Actions*, 14 MINN. L. REV. 216, 245-46 (1930).

9. According to my chronology the first one was *Avance v. Thompson*, 320 Ill. App. 406, 51 N.E.2d 334 (1943), *rev'd*, 387 Ill. 77, 55 N.E.2d 57, *cert. denied*, 323 U.S. 753 (1944).

10. *Palsgraf v. Long Is. R.R.*, 248 N.Y. 339, 162 N.E. 99. *Palsgraf* was one of the greatest put-ons in American case law. It was not a hoax or a fraud because the judges were good men. Both Cardozo and Andrews molded the record to fit their theories. Cardozo picked Bohlen as his prophet. He preached the doctrine of the foreseeable plaintiff. That kind of measure is too obvious to be good. A judge can never use it in instructions to a jury. It is usable only when he articulates a decision for a defendant on a motion for a directed verdict.

The Long Island Railroad could have believed that Mrs. *Palsgraf* was faking. Her symptoms were subjective. She testified that a penny weighing scale "blew" after the explosion and struck her. She had no broken bones, but she did show some bruises. She was treated for shock and sent by ambulance to a hospital from which she was soon released. The explosion was a big one. Part of the railroad platform was blown away. You can read all about it on the front page of the *New York Times* for Monday, August 25, 1924. Twelve other people were injured and taken to hospitals. What happened to the other claims? The Long Island Railroad does not tell. I have tried to find out.

11. So much has been written in this area that citations are superfluous. See, e.g., *Mull v. Ford Motor Co.*, 368 F.2d 713 (2d Cir. 1966) where a bystander outside the line of distribution was struck by a defective automobile. See also *Products Liability—A Symposium*, 19 Sw. L.J. 1 (1965).

12. See, e.g., Miller, *Personal Injury Litigation in School Cases*, 20 LAW & CONTEMP. PROB. 60 (1955).

13. Historically, policing and school-keeping were the sacred cows among governmental functions. Immunity for cities and counties in these areas was absolute. It has been cracked. *Elgin v. District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964) (the District was charged in a schoolground maintenance case); *Harbin v. District of Columbia*, 336 F.2d 950 (D.C. Cir. 1964) (the District was charged when a police dog attacked a bystander); *Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (the town had to cover the costs of the tort when jailers failed to protect the security of a prisoner).

14. See *McGettigan v. National Bank*, 320 F.2d 703 (D.C. Cir. 1963).

also into loss of consortium, especially when a married woman claims damages because of her husband's injuries,<sup>15</sup> but loss of consortium is an anachronism;<sup>16</sup> extending the plaintiffs' world into this area proves that logic can be sentimental. In the plaintiffs' world judges are no longer tight about scope of employment, proximate cause and what it takes to build a case for negligence. More cases are resolved by jurors on issues of fact evaluation. The manifestations of the plaintiffs' world are many,<sup>17</sup> but they have been slow to reach death cases. The common law absolutes were too well entrenched, and judges were too cautious about remedial statutes.

There can be all kinds of explanations for the shift from a defendants' to a plaintiffs' world. It could be that lawmen have been reappraising the community's needs constantly and matching the law to necessity. The real explanation is more down to earth. We get the kind of tort law the community can afford to support in dollars and cents. Employers, most automobile owners and many householders nowadays can pay for their torts. In every state there is some kind of pressure on automobile owners to carry liability insurance.<sup>18</sup> Commercial firms cannot remain in business without public liability protection. Most of the insurance story is good. One part of it is not so good. Inflation is rampant. Judgments are big, and so are premiums. It is possible that the system can price itself out of business.

The superficial grubbing in four states suggests another proposition. Personal injury cases were few and far between until the last two decades of the nineteenth century.<sup>19</sup> Even then most of the defendants were railroad com-

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15. It all began with *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950) a workmen's compensation case. *Hitaffer* was overruled four years later on the exclusive remedy in compensation issue, but the decision on loss of consortium remains. *Smither & Co. v. Coles*, 242 F.2d 220 (D.C. Cir.), *cert. denied*, 354 U.S. 914 (1957). The idea in *Hitaffer* caught on. New York succumbed in 1968. *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305. Maryland recognizes a kind of community interest in loss of consortium. *See Deems v. Western Md. Ry.*, 247 Md. 95, 231 A.2d 514 (1967), *noted in* 17 CATHOLIC U.L. REV. 382 (1968). In *Thill v. Modern Erecting Co.*, — Minn. —, 170 N.W.2d 865 (1969), the Minnesota Supreme Court returned a case to a trial judge with instructions to hear a wife's claim for loss of consortium. The husband won at the trial and accepted \$375,000 in damages. The size of the husband's verdict is the tip-off. A wife has a claim for loss of consortium only when her husband has been hopelessly crippled. The husband has already been compensated for loss of time and impairment of earning capacity. The wife cannot get a divorce, and she cannot acquire another mate legally.

16. *See Jaffe, Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 228-29 (1953). That many courts have climbed on the bandwagon since 1953 does not make Jaffe look bad. It was just that he and a dozen other tort teachers turned out to be poor prophets.

17. *See Miller, Tort Law in Evolution*, 5 TRIAL, April-May 1969, at 32-33.

18. I am thinking of extended tort liability statutes against automobile owners, standard automobile liability policies, financial responsibility, compulsory insurance and unsatisfied judgment laws.

19. The first five volumes of the Minnesota reports are thin. There is a slander

panies or street railways.<sup>20</sup> Casualty insurance was not practicable until people had to buy it for automobile using; the supporting base had to be widespread. There were assault and battery cases in the older reports, even more than there are today. Many of them occurred in small towns or country places among farmers.<sup>21</sup> Their neighbors in the jury box were almost as cautious about price as the judges. Damages for broken bones ran from five hundred to a thousand dollars. There were more nonpolitical defamation cases a century ago. James Fenimore Cooper was especially litigious.<sup>22</sup>

The historic English cases were landmarks because they were so few: *Baker v. Bolton*,<sup>23</sup> *Priestley v. Fowler*,<sup>24</sup> *Winterbottom v. Wright*<sup>25</sup> and *Davies v. Mann*.<sup>26</sup> Common law lawyers were adept at spinning much legal theory from thin materials. You wonder how there could be enough money involved in these cases to support all the lawyers. There were barristers and solicitors on each side. Barristers had to be paid when the briefs were delivered. Losing parties had to cover all attorneys fees. In the United States conditions were not the same. Judicial proceedings were less formal and less expensive<sup>27</sup> and American lawyers must have known about contin-

case in Volume 1, *St. Martin v. Desnoyer*, 1 Minn. 156 (1854). There is not a personal injury case or one on defamation in all of Volume 2. Volume 3 has one personal injury case, a claim against the City of St. Paul for street injuries. *St. Paul v. Seitz*, 3 Minn. 297 (1859). There is a trover case in Volume 3 that explains much. The defendant borrowed the plaintiff's horse and rig. The defendant was thrown when the horse ran away. The carriage was smashed and the horse was killed. The horse owner was the successful plaintiff, and he recovered the value of the horse and rig because of the defendant's bad driving. *Bennett v. Gillette*, 3 Minn. 423 (1859). Volume 4 has one libel case, *Hemphill v. Holley*, 4 Minn. 233 (1860). Volume 5 has one on assault and battery, *Ward v. Haws*, 5 Minn. 440 (1861).

20. You can add to railroads and street railways a lot of factory owners who were sued for work injuries on the safe place exception. It is significant that the defendants were railroads in the first fellow servant cases and the first wrongful death cases. See the cases cited in note 7 *supra*. See also *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475 (1848); *Whitford v. Panama R.R.*, 23 N.Y. 465, 5 N.Y.S. 215 (1861).

21. You think of the cases you have been using in class for many years. *Seigel v. Long*, 169 Ala. 79, 53 So. 753 (1910); *Frew v. Teagarden*, 111 Kan. 107, 205 P. 1023 (1922); *Germolus v. Sausser*, 83 Minn. 141, 85 N.W. 946 (1901).

22. In volume 24 *Wendell* for 1840, Cooper was a plaintiff twice, *Cooper v. Barber*, 24 Wend. 105 (against a newspaper editor); *Cooper v. Stone*, 24 Wend. 434 (against a book reviewer). In that same volume there is one other defamation case, *Bissell v. Cornell*, 24 Wend. 354 and an assault and battery case, *Cowden v. Wright*, 24 Wend. 429.

23. 170 Eng. Rep. 1033 (K.B. 1808). Of course there were more tort cases in England than the four mentioned in the text. Nor is it so that the four in the text are more leading than the others. It is just that tort cases were few.

24. 150 Eng. Rep. 1030 (Ex. 1837).

25. 152 Eng. Rep. 402 (Ex. 1842).

26. 152 Eng. Rep. 588 (Ex. 1842).

27. See 2 A. BEVERIDGE, LIFE OF LINCOLN 215-54 (1928).

gent fees before the Civil War. Nevertheless, the over-all appraisal stands in the United States as in England. Tort cases were few and far between.

*Death and tort—in combination, an enigma for lawmen*

It was in this kind of constrictive climate that common law lawyers proclaimed the absolutes about death. A cause of action died with the decedent. That proposition covered the waterfront; death of the victim or the tortfeasor killed all possibilities for litigation. Neither his estate nor his relatives could collect for economic loss after the injured man died, and a plaintiff before judgment had no recourse against a tortfeasor's estate. Blackstone's explanation was cryptic and irrelevant: the civil suit is absorbed in the offense against the state.<sup>28</sup> So was Lord Ellenborough's explanation in *Baker v. Bolton*.<sup>29</sup> He said that the death of a human being could not be complained of as an injury. Nevertheless, Lord Ellenborough recognized that a husband has an interest in his wife's injuries so long as she lived. Baker did have a cause of action for loss of consortium. Mr. and Mrs. Baker had been passengers in the defendant's coach. They were injured in an upset. Mrs. Baker died thirty days later. The husband was successful as a plaintiff in his own right for injuries to himself and for loss of consortium until his wife's death. The damages altogether amounted to one hundred pounds. Costs added to the judgment could have been substantial. One hundred pounds in 1808 was a large sum. Perhaps the damages and costs were big enough to justify the work of all the barristers and the attorneys on both sides of the case. The action stopped at the trial.

*Baker v. Bolton* was decided in 1808. Lord Campbell's Act was passed in 1846.<sup>30</sup> Legislatures could afford to wait long in the defendants' world. Nor did Lord Campbell's Act meet all the implications from the common law propositions.<sup>31</sup> All Parliament did in 1846 was to set up a routine for a personal representative to sue a tortfeasor for the benefit of a decedent's wife, husband, parent and child. It would give Mr. Baker more than the little

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28. It is hard to pin this down in *Blackstone*. See Judge Benning in *Shields v. Yonge*, 15 Ga. 349 (1854) quoting Blackstone, "The public mischief is the thing . . . . In these gross and atrocious injuries, the private wrong is swallowed up in the public." *Id.* at 351. "[W]ith regard to injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our Commentaries." 2 COOLEY'S BLACKSTONE 419 (4th ed. 1899).

29. 170 Eng. Rep. 1033 (K.B. 1808).

30. Fatal Accidents Act of 1846, 9 & 10 Vict., c. 93.

31. The case law under Lord Campbell's Act is just as thin as the tort cases in the early American reports. Statutory interpretation was even tighter in England than it was in the United States. See *Berry v. Humm & Co.*, [1915] 1 K.B. 627; *Osborn v. Gillette*, L.R. 8 Ex. 88 (1873).

bit he could get for loss of consortium. Lord Campbell's Act did not protect the estate of an injured man who died from causes other than the injury before he could litigate his claim.<sup>32</sup> Nor did it help an injured man or a personal representative who could not sue a dead tortfeasor.<sup>33</sup>

The climate since 1925 is so different from what it was a century ago that lawyers cannot analyze with understanding the explanations for the absolutes in death cases. Nevertheless, the common law absolutes and strict construction were consistent with the climate of the nineteenth century.<sup>34</sup> They are not consistent with the trend in the twentieth, but judges hewed to the tight line about death and torts down to the nineteen-sixties. If it is a mystery, perhaps it can be explained. The law about death was dug so deep that judges were trapped. Most of them did not try to escape. Judging is easier when magistrates can rely on legalisms and precedents.<sup>35</sup>

The first tranquilizer was the legalism about the new cause of action. In death cases, so the judges said, there was no common law to help them. Actions for death by wrongful act had to be created by the legislature, and judges were not free to develop a statutory scheme by decision. Not all legislatures in the United States enacted copies of Lord Campbell's Act. Most of them did, but some in the beginning provided that all tort actions shall survive.<sup>36</sup> Courts in Louisiana and Iowa agreed that these statutes covered death as well as injuries.<sup>37</sup> Lawmen have been sweating through problems of draftsmanship and strict construction for more than four generations. In every state by this time legislatures have supplemented Lord

32. Abatement was cured in 1934 when Parliament codified all the statutes on wrongful death and survivorship. Law Reform (Miscellaneous Provisions) Act of 1934, 24 & 25 Geo. 5, c. 41. See *Rose v. Ford*, [1937] A.C. 826; Fatal Accidents Act of 1959, 7 & 8 Eliz. 2, c. 65. Abatement in the United States is discussed in the text.

33. Perhaps there is some court somewhere that has decided otherwise, but the case law is top heavy. Even under Lord Campbell's Act the cause of action died with the tortfeasor. Some cases are discussed in the text. See also *Ryan v. Ortger*, 201 Mo. App. 1, 208 S.W. 856 (1919); *Estes v. Riggins*, 68 Nev. 336, 232 P.2d 843 (1951); *Burford v. Evans*, 191 Okla. 555, 132 P.2d 653 (1942); *Tuttle v. Short*, 42 Wyo. 1, 288 P. 524 (1930).

34. Not all judges were sold on the absolutes. See *Shields v. Yonge*, 15 Ga. 349 (1854). Judge Benning criticized Blackstone and *Baker v. Bolton*. The court in the Kingdom of Hawaii did not follow *Baker v. Bolton*. A widow recovered \$1,100 in 1860 for the wrongful killing of her husband by manslaughter. *Kake v. Horton*, 2 Hawaii 209. Nevertheless causes of action died with an injured person who died from causes other than the tort. See the legislative history and the common law background discussed in *Rohlfing v. Moses Akiona, Ltd.*, 45 Hawaii 373, 369 P.2d 96 (1962).

35. A legalism is a doctrinal development or statutory interpretation on the level of judge-made law. It is a policy choice with a restrictive effect. Literally it is consistent with the taught law, but it could have been different.

36. IOWA CODE § 2502 (1851), IOWA CODE § 611.20 (1966); No. 223, [1855] La. Laws 270, LA. CIVIL CODE ANN. art. 2315 (West Supp. 1970).

37. See generally *Jones, Civil Liability for Wrongful Death in Iowa*, 10 IOWA L. BULL. 169 (1925), 11 IOWA L. REV. 28 (1925).

Campbell's Act with some kind of scheme for survival. The pace has been slow, but perhaps it was just as well for everybody. Legislation in the nineteenth century was deadly stuff. Survival and death by wrongful act were not recognized as complementary.

Even a hundred years ago some things about death cases could have been different. In 1861 Chief Judge Comstock of the New York Court of Appeals tried to persuade his colleagues that Lord Campbell's Act was remedial. The case was *Whitford v. Panama R.R.*<sup>38</sup> It was an action against the Railroad by a personal representative for the benefit of the next of kin of a decedent who was killed when he was on the defendant's train in the Isthmus of Panama. The defendant was a New York corporation authorized to build and operate a railroad in New Granada. The decedent was a resident of New York. So was the personal representative, and so were the beneficiaries. But the court agreed with the Railroad's lawyers. The case could not be processed under the New York statute because the accident did not happen in the state. Nor was the case covered by the common law. The plaintiff had failed to prove the law of New Granada, although the courts of New York would be open to him if the policy of the statute in New Granada was not inconsistent with the law of New York.<sup>39</sup> The trial judge had sustained a demurrer to the complaint and judgment was affirmed through the General Term and the Court of Appeals.

Chief Judge Comstock dissented. The court permitted him to publish an opinion which he had prepared for another case in which the judges had agreed to the disposition although not all of them had concurred in the opinion. In the other case an injured man had accepted a settlement before he died. After his death a personal representative began an action for the

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38. 23 N.Y. 465, 484.

39. This opens a wide area for discussion on conflicts problems which are not directly related to the theme of this paper. Perhaps the most notorious cases are on damages. Does the court of the forum have to recognize the statutory limitations on price from the law of the place of the accident, or can the court let price be fixed under local law? The choice is not quite that simple, but it has been resolved in favor of the forum and on constitutional grounds. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962).

Some other problems are easier, and there is diversity of opinion. Before there was a survival statute in the District of Columbia, the court of appeals would not permit a case to be litigated against a dead tortfeasor's estate even though action was permitted under the law of the place where the accident occurred. *Woollen v. Lorenz*, 98 F.2d 261 (D.C. Cir. 1938). In Minnesota, when there was no survival statute, the court did permit this kind of case to be tried. *Chubbuck v. Holloway*, 182 Minn. 225, 234 N.W. 314 (1931). On the conflicts problems New York has come a long way from *Whitford*. See *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967). Courts can be generous about periods of limitation and recognize the longer period of the place of the accident instead of the shorter period of the forum. *Wilson v. Massengill*, 124 F.2d 666 (6th Cir.), *cert. denied*, 316 U.S. 686 (1942).

benefit of the decedent's next of kin. Apparently all the judges agreed that the claim had been discharged, but there is no published opinion for *Dibble v. New York & Erie R.R.* in the reports of the Court of Appeals. An opinion of the General Term is published in Volume 25 of Barbour on page 183. Judge Comstock's opinion for *Dibble* was published as a dissent in *Whitford*.

The Chief Judge agreed with his colleagues that "purely personal wrongs died with the person who received them."<sup>40</sup> He did not try to explain or justify the common law. He did say that it was "manifestly unjust." He believed that legislatures were trying to cure that kind of injustice with statutes like Lord Campbell's Act. There were limits to the statutory scheme which the judge recognized; the statute covered only those cases where death followed from an injury. Judge Comstock proposed a hypothetical about the injured man who lingered for days or weeks or months before he died. In such a case, the Judge argued, a personal representative should recover for the expenses of the illness, loss of time and pain and suffering as well as damages to cover the pecuniary losses to the special beneficiaries. Immediately in *Whitford* he would have let the plaintiff litigate the case in New York because the legislature had removed the limitation on the common law.

Judge Comstock's colleagues were not persuaded. Lord Campbell's Act was in derogation of the common law. The legislature had created a new cause of action. Literally the statute was effective only for cases which arose in New York. His colleagues did not buy Judge Comstock's solution for *Whitford*, nor did they buy his theory. But the Judge identified a problem which has plagued lawyers and judges for a hundred years. What do you do for the estate to allow it to recover economic losses when a man lingers for weeks or months before he dies as a result of his injuries? This question suggests another which Judge Comstock did not touch. What do you do for the estate of an injured man who dies from causes other than the injury? The United States Court of Appeals for the District of Columbia grappled with Judge Comstock's hypothetical in 1954. By that time Congress had adopted two statutes for the District of Columbia, one for wrongful death<sup>41</sup> and one for survival of tort claims.<sup>42</sup> In *Hudson v. Lazarus*<sup>43</sup> the court stretched one of the statutes to afford a remedy for a case falling primarily under the other. It was a landmark case, and it deserves extended discussion later in this paper.

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40. 23 N.Y. at 484.

41. See D.C. CODE ANN. §§ 16-2701 to -2703 (1967).

42. *Id.* § 12-101.

43. 217 F.2d 344 (D.C. Cir. 1954).

*Cautious action by legislatures and judges on  
wrongful death and survival*

Nineteen-twenty-one is a long time ago for tort lawyers. There is a Massachusetts case from that year which has all the earmarks of old-fashioned case law. Several boys were fishing on a pond in the Connecticut River below the Turner Falls dam. A power company, the defendant in the case, owned the land around the pond and controlled the water level behind the dam. The boys were trespassers. They had disregarded signs, but people from the neighborhood fished frequently in the pond. There was reason to believe that employees of the company should have known that the boys were on the pond. These employees gave no warning when they opened the dam and let the water flow down the river. Two of the boys were drowned when they tried to escape from the flood. Action was begun by a personal representative of one of the boys against the power company in *Prondecka v. Turners Falls Power & Electric Co.*<sup>44</sup>

The text of the Massachusetts statute reveals its history.<sup>45</sup> It is different from most other statutes like Lord Campbell's Act. Damages are penal and they are assessed against tortfeasors according to culpability. The statute was built floor by floor, against towns for defective highways, against carriers, then railroads and at a later time against street railways. At the time of *Prondecka* it was effective against all other tortfeasors for negligence.<sup>46</sup> Massachusetts is strict about trespassers even when they are minors.<sup>47</sup> The case against a landowner must depend on gross misconduct. In *Prondecka* the jury found a verdict for the plaintiff, but the defendant's exceptions were sustained in the Supreme Judicial Court. The only evidence of fault related to gross misconduct, and that was not covered by the statute. "A statute cannot be extended by construction," Justice Jenney said, "[n]or [can] a statute [be] enlarged because it does not give a remedy for something of more flagrant character than that to which it applies."<sup>48</sup> The court would not escape from the common law rut in 1921, and the court stayed there in another case like *Prondecka* as late as 1956.<sup>49</sup> Perhaps that was the one that did the trick because the legislature cleaned up the statute in 1957 to cover every kind of wrongful death.<sup>50</sup>

The Massachusetts statute is long and dull and obsolete in style even in 1970. Damages have always been limited by a ceiling, but now the limit is

44. 238 Mass. 239, 130 N.E. 386 (1921).

45. MASS. GEN. LAWS ANN. ch. 229, §§ 1-6F (Supp. 1970). See, e.g., § 2, *id.*

46. Ch. 375, [1907] Mass. Acts 324 (repealed 1946), cited in *Prondecka*.

47. See *Chronopoulos v. Gil Wyner Co.*, 334 Mass. 593, 137 N.E.2d 667 (1956).

48. 238 Mass. at 243-44, 130 N.E. at 388.

49. *Corrado v. New York, N.H. & H.R.R.*, 333 Mass. 417, 131 N.E.2d 201.

50. Ch. 238, § 1, [1958] Mass. Acts 122.

\$55,000 instead of \$10,000. Perhaps the Massachusetts court has learned something about statutory construction from the Supreme Court of the United States. Under the Federal Tort Claims Act responsibility depends on local law. Damages are compensatory, but by special reference the statute is extended to those states where price fixing is punitive under the local law. In *Massachusetts Bonding & Insurance Co. v. United States*<sup>51</sup> the Court agreed with the plaintiff and held that even in a Massachusetts case litigated under the Federal Torts Claims Act, damages are compensatory, and they are not affected by the Massachusetts ceiling.

By many standards Minnesota is a progressive state. In death cases it has been stubborn. There is still a ceiling of \$35,000 on damages.<sup>52</sup> Even now on a plaintiff's side, a cause of action abates with the death of the injured man.<sup>53</sup> It can be saved only when a claim has been liquidated by verdict.<sup>54</sup> This Minnesota story is a shifting to another level about death, but survival and wrongful death are so closely related that even under Lord Campbell's Act, most courts agree, the death of a tortfeasor abates the action.<sup>55</sup> Not until well along in the automobile era did the legislature in Minnesota allow for litigating claims against the estates of dead tortfeasors.<sup>56</sup> And this special statute was necessary in cases involving wrongful death.<sup>57</sup> In 1941 the legislature amended the survival statute: claims for bodily injuries or death caused by the negligence of a decedent could be litigated against his estate. In *Lavalle v. Kaupp*<sup>58</sup> the plaintiff was a minor who was attacked by the defendant's dog. Also in Minnesota there was a dog statute.<sup>59</sup> The owner of a dog was liable in damages to a person who was attacked by the dog without provocation. The dog owner in *Lavalle* died after the summons and complaint were served on him. The plaintiff did not have a chance at the trial or on appeal. The survival statute did not cover statutory torts. You wonder how the court would have reacted if the plaintiff had relied on scienter. Literally that was not covered by the survival statute.

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51. 352 U.S. 128 (1956).

52. Only eleven states have retained the money limit on damages. After returns are in for 1969, the number could be smaller. According to my computation the eleven states are Colorado, Idaho, Kansas, Maine, Massachusetts, Minnesota, Missouri, Oregon, Virginia, West Virginia and Wisconsin. Idaho is practical about the limitation. The limit is \$10,000 unless the tortfeasor is insured. IDAHO CODE ANN. § 5-327 (Supp. 1967).

53. MINN. STAT. ANN. § 573.01 (Supp. 1970).

54. MINN. STAT. § 540.12 (1967); cf. *Cooper v. St. Paul City Ry.*, 55 Minn. 134, 56 N.W. 588 (1893).

55. See cases cited note 33 *supra*. See also *Ickes v. Brimhall*, 42 N.M. 412, 79 P.2d 942 (1938); *McFadden v. Rankin*, 46 R.I. 475, 129 A. 267 (1925).

56. Ch. 440, [1941] Minn. Laws 809.

57. *Green v. Thompson*, 26 Minn. 500, 5 N.W. 376 (1880).

58. 240 Minn. 360, 61 N.W.2d 228 (1953).

59. MINN. STAT. § 347.22 (1967).

The Minnesota legislature waited long to cure the statute, not as long as Massachusetts, but they waited fourteen years.<sup>60</sup> And as in Massachusetts there was another case that finally turned the trick. In *Dahl v. Northwestern National Bank*<sup>61</sup> a tavern keeper sold liquor to an intoxicated man who left the tavern to drive his automobile. Thereafter the intoxicated customer, who was not carrying automobile liability insurance, collided with another automobile causing property damage and personal injuries. There was a liquor selling statute in Minnesota which controlled this kind of case,<sup>62</sup> but the tavern keeper died before the case could be finished. As in *Lavalle* the court agreed with defendant's counsel; the cause of action was not covered literally by the survival statute. Both *Dahl* and *Lavalle* have been erased by the new statute.

In 1953 the Utah legislature tried hard to cure the local wrongful death scheme and to cover survival of tort actions with a blanket amendment: "Causes of action arising out of physical injury to the person or death . . . shall not abate on the death of the wrongdoer."<sup>63</sup> Nevertheless in *Fretz v. Anderson*<sup>64</sup> the Utah Supreme Court decided that even under that statute a "cause of action cannot arise at a time beyond the life of the tortfeasor."<sup>65</sup> The facts of *Fretz* were fantastic. At two o'clock in the morning on a high-speed country highway the plaintiff rammed her car into an automobile that was stalled in her lane. The stalled car was headed in the wrong direction. The decedent's body was hauled from the wreck. There was physical evidence to indicate that the decedent had been driving fast, that his car had swerved across the highway, hit an obstruction and had rolled back onto the highway to the place where it was when the plaintiff hit it. Also there was an eye witness who had seen the decedent driving fast several miles away from the wreck. Contributory negligence was an issue in the case, but there was evidence that the plaintiff had been blinded by lights from a truck whose driver had stopped on the shoulder of the highway across from the stalled car seconds before the plaintiff rammed it. In the action against the decedent's estate the jury found a verdict for the plaintiff. On appeal to the supreme court the judges discovered a reason to reverse. Everything in the opinion seems to lean plaintiff's way until the court picked up the argument about the scope of the statute. The court said the cause of action

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60. Ch. 158, § 1, [1967] Minn. Laws 282.

61. 265 Minn. 216, 121 N.W.2d 321 (1963).

62. MINN. STAT. § 340.95 (1967).

63. Ch. 30, § 1, [1953] Utah Laws 67, UTAH CODE ANN. § 78-11-12 (Supp. 1967). This section was amended in 1967 to allow for survival to a plaintiff's estate when the injured man dies from causes other than the tort. Ch. 217, § 1, [1967] Utah Laws 580.

64. 5 Utah 2d 290, 300 P.2d 642 (1956).

65. *Id.* at 300, 300 P.2d at 649.

could not survive unless the decedent was alive at the time of the accident. This was the first case under the amended statute. Although the court was ready to help the plaintiff with presumptions, the judges insisted that time of death had to be submitted to the jury.

A majority of the Utah court has had some second thoughts. It is difficult to determine whether or not the court overruled *Fretz* in *Meads v. Dibblee*<sup>66</sup> because the second case was one for wrongful death. Two young people were driving on a country highway, the driver of the car and his fiancée. The driver pulled his car to the right of the highway to make a left turn in front of a truck that was rolling along behind him. The truck hit the car broadside. The driver of the car was killed instantly. The girl lived a few days longer. In the action by the girl's father against the young man's estate, the trial judge granted the defendant's motion for summary judgment. The cause of action was not in existence at the time of the tortfeasor driver's death. On appeal judgment was reversed by a three to two vote. "A liberal construction of this statute to effect its objects and promote justice as well as the direct wording of its last part requires that the statute be not so limited. We reach this conclusion notwithstanding what we said about this statute in *Fretz v. Anderson*."<sup>67</sup> It was the same court with one change in personnel after *Fretz*. The new judge was one of the dissenters.

*Some laborious catching up in Louisiana  
and the District of Columbia*

The Louisiana story is special and not because of the civil law tradition. In one sense it is typically conventional and typically Anglo-American. In 1851 the Louisiana Supreme Court followed *Baker v. Bolton*. In *Hubgh v. New Orleans & Carrollton R.R.*<sup>68</sup> the court held that a surviving spouse does not have a cause of action because of her husband's death. As in *Baker v. Bolton*, so in *Hubgh*, the defendant was a common carrier. In *Hubgh* the decedent was an employee. He was a locomotive engineer who was killed when a steam boiler exploded. The Louisiana court gave the local jurisprudence two injections from the common law. The judges followed *Priestley v. Fowler* as well as *Bolton* and committed Louisiana to the fellow servant doctrine. The possibilities for case law development on death by wrongful act were just as barren in the civil law as in the common law tradition. Counsel for the plaintiff filed a long brief when the case was reheard.<sup>69</sup>

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66. 10 Utah 2d 229, 350 P.2d 853 (1960).

67. *Id.* at 236, 350 P.2d at 858.

68. 6 La. Ann. 495 (1851).

69. *Id.* at 498.

There was something in the French cases that did not square with Blackstone. Apparently in France there were possibilities that members of a murdered victim's family could be paid something from the penalty assessed against a criminal. Nevertheless that was not enough to persuade the Louisiana judges that the civil law tradition was different from the common law.

The Louisiana legislature responded in 1855 by adding a provision to Article 2294 of the Civil Code of 1825.<sup>70</sup> That Article was a summary of tort law in France and in England as it was at the end of the eighteenth century. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."<sup>71</sup> That is still the first sentence in Article 2315, the present survival provision in the Civil Code. After 1855 "the right of this action shall survive in cases of death, in favor of the minor children and widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother of either of them for the space of one year from the death."<sup>72</sup>

Ten years later the Louisiana Supreme Court tagged the Act of 1855 as one affecting survival of actions and not a local copy of Lord Campbell's Act.<sup>73</sup> From the time of Edward Livingston there was an article in the Code of Practice about survival. A cause of action did not abate after an answer was filed.<sup>74</sup> That covered civil suits for damages including torts.<sup>75</sup> After 1855 torts were covered by Article 2294(2315) of the Civil Code. Subsequent attempts to enlarge the provision in the Code of Practice did not affect the specific prescription in the Civil Code about survival in tort.<sup>76</sup> Other clauses and paragraphs have been added to Article 2315, especially to allow for other relatives as alternate beneficiaries.<sup>77</sup> In 1884 the legislature added an important paragraph to allow legal survivors to recover also

70. No. 223, [1855] La. Laws 270.

71. LA. CIV. CODE ANN. art. 2315 (West Supp. 1970).

72. No. 223, [1855] La. Laws 270-71.

73. *Earhart v. New Orleans & C.R.R.*, 17 La. Ann. 243 (1865). See Comment, *Wrongful Death and Survival of Tort Actions in Louisiana*, 1 LOYOLA L. REV. 84 (1941).

74. Article 21. The Code of Practice has been redrafted and renamed. It is now the Louisiana Code of Civil Procedure (1960). In the new Code Article 21 is Article 428. The text has been amended: "An action does not abate on the death of a party." LA. CODE CIV. PRO. ANN. art. 428 (West 1960).

75. *Vincent v. Sharp*, 9 La. Ann. 463 (1854). That one was just under the wire before the Act of 1855.

76. See No. 239, [1946] La. Laws 738. Cf. Comment, *Survivorship and Wrongful Death Actions as Affected by Louisiana Act 239 of 1946*, 4 LOYOLA L. REV. 75 (1947). Nevertheless, the changes in the Code of Practice did not affect personal injury cases. *Maher v. Schlosser*, 144 So. 2d 706 (La. App. 1962).

77. This is a shortcut footnote. The several acts are paraphrased or quoted in the annotations to Article 2315 in West's Annotated Civil Code of 1952. The present text of the Article is in the 1970 Supplement.

damages for the pecuniary loss they suffered through the wrongful death.<sup>78</sup>

Experiences in Louisiana with Article 2315 look like those in the other states. Judges have been just as tight about statutory construction. In the other states many of the hard cases are about abatement from the death of tortfeasor. Louisiana has not done anything about that specifically because that part of the problem has been reduced by the Article in the Code of a Practice, and it has been reduced drastically since 1930 by the direct action statute against insurance carriers.<sup>79</sup> The strict construction in Louisiana has related to abatement on the plaintiffs' side through the death of legal survivors.

There is more in the Louisiana cases than strict construction about abatement. Much of it is good. The original Act of 1855 plus all the changes since that time cover survival when an injured man dies from causes other than the tort.<sup>80</sup> Pain and suffering, loss of time and expenses of the illness are all part of the assessment. In all death cases under Article 2315 pain and suffering can be vital in affecting price. Before 1884 pain and suffering had to be the biggest factor to support a big claim for damages in wrongful death.

This is not the kind of paper for an extended discussion on damages, even in death cases, but pain and suffering does suggest a digression which is related to every kind of tort case. There is much double talk in the law. Most of it is intellectually honest because lawmen can become tedious when they try to spell out step by step their explanations for every proposition in a case. There is a place for summaries and for figurative classifications. Lawyers understand what judges mean when they distinguish between compensatory and punitive damages. Literally a trial judge sometimes tells a jury that they can add to the price an extra sum as a warning to everyone not to do it again.<sup>81</sup> It is not easy to understand judges who announce that no punitive damages can be assessed against any defendants in their juris-

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78. No. 71, [1884] La. Laws 94.

79. No. 55, [1930] La. Laws 122, LA. REV. STAT. § 22.655 (Supp. 1970).

80. *Dumas v. United States Fidelity & Guar. Co.*, 241 La. 1096, 134 So. 2d 45 (1961); *Payne v. Georgetown Lumber Co.*, 117 La. 983, 42 So. 475 (1906). Louisiana has not done well in death cases where relationships between decedents and survivors are not legitimate. See *Board of Comm'rs v. New Orleans*, 223 La. 199, 65 So. 2d 313 (1953). But a constitutional issue is involved. A state cannot discriminate against survivors because their relationship to a decedent is not legitimate. *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968). There is another hole in the statute which does not suggest a constitutional issue. If there is no survivor, an estate cannot recover any economic loss from the tortfeasor, not even expenses of the death. *Young v. McCullium*, 74 So. 2d 339 (La. App. 1954).

81. This is hornbook stuff. Everybody knows it, but see an old case: *Beach v. Hancock*, 27 N.H. 223, 224 (1853).

dictions, but that is what the Louisiana judges say.<sup>82</sup> And so do the judges in Massachusetts.<sup>83</sup> You could believe them if they declared that trial judges cannot give instructions on punitive damages, but damages in assault and battery and defamation have to be punitive in the great majority of cases. In every tort there are two intertwining ideas behind the price a jury fixes; damages are related to the conduct of the defendant and/or to the condition of the plaintiff and what he needs to cover his economic loss. In an assault and battery case when doctor bills are modest and damages reach five hundred to a thousand dollars,<sup>84</sup> price is assessed according to the defendant's conduct no matter how the judges classify it. Anything reaching four digits in defamation is punitive.<sup>85</sup>

Without pain and suffering in tort cases, many claims would not be worth litigating. That needs a word of explanation. From the point of view of any claimant economic loss is vital. Under the adversary system plaintiffs have to pay lawyers for their services. Most tort victims cannot afford to pay retainers. They need the possibilities of the contingent fee. Without pain and suffering where injuries are not permanent and where they do not result in death, few cases would be good enough to justify the expense of a lawyer's fee. Before 1884 pain and suffering had to be large in Louisiana to make a death case worthwhile. Even in 1970 it can be vital, especially when the survivors are adult brothers and sisters who were not dependent on the decedent for support. Nor is Louisiana the only state where pain and suffering means much in death cases. Massachusetts is another. Pain and suffering in that state are now important only in determining whether or not an extra count can be added to a death case,<sup>86</sup> but in times past the right to recover anything at all depended on whether or not a decedent had groaned while he was unconscious after the accident.<sup>87</sup>

This discussion on damages has been a digression in the middle of the Louisiana story. The rest of that story relates to abatement through the death of survivors. It is a story of strict construction, common law tech-

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82. See O'Neill, J., in *McVay v. Ellis*, 148 La. 247, 252, 86 So. 783, 785 (1921).

83. See Holmes, J., in *Burt v. Advertiser News. Co.*, 154 Mass. 238, 245, 28 N.E. 1, 4 (1891).

84. *McVay v. Ellis*, 148 La. 247, 254, 86 So. 783, 785 (1921), O'Neill's case is on the nose. The injuries were minor, so were the doctor bills, and there was a one day loss of time. Even after O'Neill's sermon, damages were fixed by the court at \$1,000.

85. Compare another Louisiana case, *Jackson v. Briede*, 156 La. 573, 100 So. 722 (1924) where publication was restricted, no special damages could be shown, and the price was \$2,500.

86. See *Putnam v. Savage*, 244 Mass. 83, 138 N.E. 808 (1923). There may be two causes of action, one under survival and one for wrongful death, and they should be joined. Conscious suffering is a damage factor under survival. Cf. *De Marco v. Pease*, 253 Mass. 499, 149 N.E. 208 (1925).

87. See *Battany v. Wall*, 232 Mass. 138, 122 N.E. 168 (1919).

niques, and family a curative amendment. In *Chivers v. Roger*<sup>88</sup> a father sued to recover damages for the death of a son. It was in 1898. The plaintiff died while the action was pending, and his heirs were cited as parties to the lawsuit which the trial judge then dismissed. The supreme court affirmed; the cause of action was personal to the survivor.

It did not appear in *Chivers* that there were any alternate survivors, but there were such survivors in *Kerner v. Trans-Mississippi Terminal R.R.*<sup>89</sup> The decedent's mother was the legal survivor who died before the action was tried. The adult brothers and sisters began another lawsuit. This one was not so easy. Although the trial judge dismissed the suit, a court of appeals reversed,<sup>90</sup> holding that the claim arising out of the decedent's death was transmitted to the collaterals through the mother. The supreme court reversed the court of appeals and clinched the case for abatement. The cause of action abated with the death of the first survivor even if there were statutory beneficiaries on another level.

The court gave up a little bit in *Castelluccio v. Cloverland Dairy Products Co.*<sup>91</sup> If there was a liquidation of a survivor's claim, even before judgment was final, the award was an asset of the survivor's estate. So matters stood until 1960 when the Louisiana legislature amended Article 2315 to provide that the right to recover damages under the Article is a property right which on the death of a survivor is inherited by the "legal, instituted or irregular heirs."<sup>92</sup> We shall have a comment on that kind of remedy later in this article.

In Louisiana the legislature first attacked death problems with a survival statute which was interpreted to include all kinds of death cases. In most states, legislatures began with Lord Campbell's Act. A man had to die from his injuries before anyone could sue under the statute. Even then causes of action might abate through the death of the tortfeasor or the death of a beneficiary. In most states survival statutes were added later. Not until lawmen realized that insurance carriers were profiting by the common law rule on abatement did legislatures move fast to let all kinds of plaintiffs reach the resources of dead tortfeasors.<sup>93</sup> It is doubtful that some legislatures

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88. 50 La. Ann. 57, 23 So. 100.

89. 158 La. 853, 104 So. 740 (1925).

90. *Kerner v. Trans-Mississippi T.R.R.*, 1 La. App. 129, 131 (1924).

91. 165 La. 606, 115 So. 796 (1927).

92. No. 30, § 1, [1960] La. Laws 99, 102.

93. I do not pretend to have a complete tabulation. My reading of every statute leads me to believe that there is some kind of survival on this level in every state. In Louisiana it is effected primarily through the direct action statute. But legislative action was long delayed in some states. I mention just a few. California: ch. 1380, [1949] Cal. Laws 2400; District of Columbia: 62 Stat. 487 (1948); Florida: ch. 26541, § 1, [1951] Fla. Laws 114; Minnesota: ch. 440, [1941] Minn. Laws 839;

would have moved at all if they had to create remedies just for plaintiffs who died from other causes while claims were pending. The total of the economic losses in those cases would not be big enough to suggest a gross injustice. But when legislatures did respond, they did it most often with general statutes affecting survival on both sides in death as well as personal injury cases.<sup>94</sup>

In a wrongful death case where an injured man lingers long before he dies, and when the cause of action for personal injury survives, two causes of action are intertwined. At first glance it is arguable that survival covers only one kind of case,<sup>95</sup> death from other causes, and that wrongful death covers what it says literally, damages to a beneficiary who has suffered a pecuniary loss. But if a man has lingered long, the economic loss can be substantial. Expenses of the illness and death should be assessed against the tortfeasor, but they are not covered in Lord Campbell's Act unless a legislature adds it specially. Judge Comstock saw all that in 1860 and argued to his colleagues that the remedy of the death statutes should be construed to cover all the manifest injustices. *Hudson v. Lazarus*<sup>96</sup> in the District of Columbia is that kind of case.

In *Hudson* a pedestrian was hit by an automobile driven by a person without the owner's consent. The owner's insurance company did not have to underwrite the claim. Also, the driver of the car was an employee of a service station operator whose public liability insurance had lapsed. At least it was the contention of the insurer that the policy had lapsed. The pedestrian's injuries were serious. He was confined in the United States Naval Hospital in Bethesda from the date of the accident, May 3, 1949 until April 7, 1951, the date of his death. There is nothing in the opinion to suggest that Hudson was not represented right after the accident. Nevertheless, action was not begun until November 2, 1950. The long delay is understandable. Neither insurance company would settle the claim, and the operator's company would not defend him. The statutory period of limitation

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Wyoming: ch. 124, § 1, [1947] Wyo. Laws 151. See also New York: ch. 795, [1935] N.Y. Laws 1532. Literally the New York statute did not cover wrongful death. See *Gibson v. Meehan*, 7 N.Y.2d 93, 163 N.E.2d 874, 195 N.Y.S.2d 649 (1959) where the tortfeasor died before the victim. The court relied on legislative history, not strict construction, and the action did not abate.

94. I could be wrong, but as I read the statutes survivorship on the plaintiff's side still is not covered in Minnesota and New Mexico.

95. There are some older cases in which the courts support this distinction. See *Graham v. Central of Ga. Ry.*, 217 Ala. 658, 117 So. 286 (1928); *Holton v. Daly*, 106 Ill. 131 (1882); *McCafferty v. Pennsylvania R.R.*, 193 Pa. 339, 44 A. 435 (1899). Although there are problems about joinder, it is true generally that survival covers both death and personal injuries.

96. 217 F.2d 344 (D.C. Cir. 1954).

for tort is three years in the District.<sup>97</sup> After the plaintiff died, his lawyers petitioned the court to appoint the decedent's surviving wife as a personal representative with permission to continue the lawsuit.

By 1951 Lord Campbell's Act had been on the books for many years.<sup>98</sup> Hudson died from his injuries on April 7, 1951. Had the year been 1941 instead of 1951, the lawyers would have moved immediately to process the case under the death statute. The case pending for personal injuries would have abated. In 1941 the personal representative under Lord Campbell's Act could have recovered specially for the costs of the illness and funeral, and she could have recovered for herself as beneficiary the pecuniary loss she had suffered through the decedent's death. She would not have recovered anything for the loss of time while the decedent was in the hospital. The trial judge would have told a jury that they should measure the widow's pecuniary loss by what she would have received as gifts and support from her husband during the remainder of their joint lives.<sup>99</sup> In 1951 when Hudson died they could have moved immediately with the same kind of lawsuit under the death statute, and they could have continued the pending lawsuit through a personal representative.

In 1951 the survival statute in the District of Columbia was three years old. The lawyers for Mrs. Hudson thought of survival first. With the serious injuries, the long stay in the hospital and the pending lawsuit, survival seemed imminent and real. Counsel did not add a claim for wrongful death in the action pending until October 31, 1952, and then it was too late. The three year period for tort is long, but if the tort leads to death, the claim under Lord Campbell's Act must be filed within a year after the death.

At the trial in *Hudson* the judge treated the case as if the man had died from causes other than the tort. Loss of time amounted to \$6,000 exactly. Expenses of the illness had been covered by the United States in the Bethesda Naval Hospital. Pain and suffering in a survival action had been eliminated by statute. Six thousand dollars was all the plaintiff got in the trial court, but things were different in the court of appeals. The doctor's bills and the expenses of the illness, the court said, must be considered by the jury in fixing the price of a tort. The court referred to the doctrine of collateral resources. A defendant cannot profit because a plaintiff has other resources to cover the expenses. Although the legislature scratched pain and suffering, it did literally include the physical injury. A jury may consider it, and here

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97. D.C. CODE ANN. § 12-301(8) (1967).

98. 23 Stat. 307 (1885).

99. See, e.g., *United States Elec. Lighting Co. v. Sullivan*, 22 App. D.C. 115 (1903); *Baltimore & P.R.R. v. Golway*, 6 App. D.C. 143 (1895).

there was evidence that the decedent had suffered a loss of hearing as a result of the accident. But the biggest factor which the court said the jury could consider was impairment of earning capacity.<sup>100</sup> After a new trial the jury found a verdict for \$30,000, and the plaintiff had to claim through the insured in a separate action against the defendant's insurance company to recover on the \$30,000 judgment.<sup>101</sup>

*Hudson* is a vital case. It can be significant to lawyers everywhere as an illustration of good judging, but it has to be inspected with a microscope. The case had a sequel.<sup>102</sup> Four years later in another death case where the decedent had not lingered long, the plaintiff's lawyers asked for damages to the estate and for damages to the statutory beneficiary. Defendant's counsel objected to the joining of the two causes of action and argued that the plaintiff must make a choice. In a short per curiam opinion the court agreed with the plaintiff. There are two causes of action and they can be joined.<sup>103</sup> How much a plaintiff can collect on each can be determined only after trial. In *Hudson v. Lazarus* the court was positive. Impairment of earning capacity and pecuniary loss to beneficiaries cannot both be used to measure the same claim.

The measure for pecuniary loss to beneficiaries has been well established in the District for a long time. It is easy to predict which measure the court will prescribe for wrongful death when a case like the sequel gets to the court of appeals after trial. It can be a case where an injured plaintiff has lingered for days or weeks, but not necessarily as long as *Hudson*. There are

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100. Judge Edgerton had some case law to support his disposition. Under the Iowa survival statute which includes wrongful death by interpretation, impairment of earning capacity is the standard measure. *Scott v. Hinman*, 216 Iowa 1126, 249 N.W. 249 (1933); *Benton v. Chicago, R.I. & P.R.R.*, 55 Iowa 496, 8 N.W. 330 (1881). Other courts have had to adjust to special circumstances in a death case and to use a measure like *Hudson's*. See *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922); *West v. Boston & Me. R.R.*, 81 N.H. 522, 129 A. 768 (1925) and especially *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 26 A.2d 659 (1942) the first case after survival of tort was enacted in 1937.

101. *Lazarus v. Manufacturers Cas. Ins. Co.*, 267 F.2d 634 (D.C. Cir. 1959).

102. *Sornborger v. District Dental Lab., Inc.*, 266 F.2d 694 (D.C. Cir. 1959).

103. You could write a special comment on joinder, res judicata and splitting causes of action. That is beyond the scope of this paper. In Iowa and Louisiana where there are no separate statutes like Lord Campbell's Act, the claims must be joined. See *Fitzgerald v. Hale*, 247 Iowa 1194, 78 N.W.2d 509 (1956). It is common practice in some states to join the two counts. *Quaere*: must they be joined to avoid splitting causes of action? See *Sornborger v. District Dental Lab., Inc.*, 266 F.2d 694 (D.C. Cir. 1959); *Coulson v. Shirks Motor Express Corp.*, 48 Del. 561, 107 A.2d 922 (1954); *Finnegan v. Checker Taxi Co.*, 300 Mass. 62, 14 N.E.2d 127 (1938); *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 26 A.2d 659 (1942). That they do not have to be joined see *Allen v. Burdette*, 139 Ohio St. 208, 39 N.E.2d 153 (1942); *Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33 (Tex. 1963). Do you have to go to bat twice on the merits? See *Deep Rock Oil Corp. v. Sheridan*, 173 F.2d 186 (10th Cir. 1949).

two causes of action. They can be litigated in one proceeding. It is not important to classify expenses of the illness and death as items to be allowed under one claim or the other. In either event they are allocated to cover the claims of special creditors or to reimburse people who have paid those claims. Loss of time can be measured and this is an asset of the general estate. So too is the evaluation for the physical injury which in our hypothetical can be more than nominal. But on the big item there will be no choice. The claim will be processed like one for wrongful death.<sup>104</sup> The measure of damage for the beneficiary will be the one that has been standard in the District for many years, and that part of the proceeds will be protected against the decedent's creditors.

There is still another implication from *Hudson* that will have to be resolved. Suppose the next of kin who survive the decedent are grown brothers and sisters who have not been receiving gifts or contributions from him during his life. The decedent has lingered long and has suffered some disability, but no action was pending at his death. Nor is any action begun immediately thereafter. With the advice of a lawyer the brothers and sisters wait until more than a year after the death to have one of them appointed a personal representative. But they do begin an action under the survival statute within three years after the accident. *Hudson v. Lazarus* could be a windfall. The plaintiff argues that his case is controlled by *Hudson*. Impairment of earning capacity is a vital factor, he argues, in computing damages for the estate. It was a bit of wisdom to help Mrs. Hudson who needed a substantial sum to compensate her for her loss. The brothers and sisters do not need that kind of help. At the time of *Hudson* there were few guidelines for District lawyers about survival, and a case was pending. There was good faith in *Hudson*. The delay was an honest mistake; it was not planned. In the hypothetical the personal representative would get expenses for the estate, something for loss of time, maybe something for the disability and that is it.

#### *Trends and possibilities*

The nineteen-sixties were typical in the plaintiffs' era—bigger verdicts, wider areas of responsibility, more ground rules in statutes and ordinances—but there was nothing basically different like workmen's compensation 55 years

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104. Cf. *Emmett v. Eastern Dispensary & Cas. Hosp.*, 396 F.2d 931 (D.C. Cir. 1967). This was a death case and one for survival against the hospital for negligence in caring for the deceased. Time had expired on the death claim, but the court granted an extension of the statutory year because the defendant had refused to permit the plaintiff to inspect hospital records.

ago.<sup>105</sup> There was no trend toward compulsory automobile liability insurance or statutory programs on unsatisfied judgments. The really big news during the nineteen-sixties in the personal injury business was the Keeton-O'Connell no-fault plan for automobile users.<sup>106</sup> That sparked much discussion, some opposition,<sup>107</sup> some counter proposals,<sup>108</sup> and some thinking that no-fault plans may be good in other areas.<sup>109</sup>

No-fault liability is not one of the principal topics in this paper. Nevertheless, it deserves some comment because lawyers cannot dodge it during the reappraisal. Although automobile using creates most of the litigation in torts, there are other vital areas. Products liability is moving up to strict liability, and many customers are injured on proprietors' premises. Even on a lesser level plaintiffs still sue for assault and battery and false imprisonment. A no-fault program can be big enough to cover everything. There are serious problems about damages. Will they be fixed in schedules, or will they be determined by administrators under general statutory standards on economic loss? Old-fashioned trespass cases where litigants sue for vindication only may be relegated to the criminal law. Keeton and O'Connell have suggested a dividing of claims, compulsory insurance, no-fault and economic loss up to \$15,000 to be covered by the claimant's insurance carrier, fault and damages at common law for everything over \$15,000 to be underwritten by the tortfeasor's liability insurer, if he has one. If most lawyers and plaintiffs shoot for both levels, it could defeat the purpose of the program. Adequate fees for lawyers are vital. The scheme for measuring fees must be generous because the community cannot afford to sacrifice the adversary system.

If lawmakers were starting from scratch, they would codify Lord Campbell's Act with legislation on survival.<sup>110</sup> Too many people in too many

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105. You can second guess yourself just a little bit. Iowa's statute on tort liability for governmental subdivisions is not revolutionary, but it is more than a codification of the Iowa case law. Ch. 405, [1967] Iowa Laws 793; IOWA CODE §§ 613 A.1 - A.11 (Supp. 1970).

106. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); Keeton & O'Connell, *The Basic Protection Plan for Traffic Accident Losses*, 43 NOTRE DAME LAW. 184 (1967); cf. L. GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958); Blum & Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964).

107. Blum & Kalven, *A Stopgap Plan for Compensating Auto Accident Victims*, 1968 INS. L.J. 661-70.

108. Address by Paul S. Wise, American Mutual Insurance Alliance, White Sulphur Springs, West Virginia, July 11, 1968; AMERICAN INSURANCE ALLIANCE, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE REPARATIONS (1968). See DEFENSE RESEARCH INSTITUTE, SPECIAL REPORT: AN ANALYSIS AND CRITIQUE (1969).

109. Szakats, *Compensation for Personal Injury: Individual Liability or Collective Responsibility?* 3 U. TASM. L. REV. 204 (1969).

110. There has been some codification and some correlating of statutes. Parlia-

states have had to wait too long for survival against the estates of dead tortfeasors. After wrongful death, that would have priority in a composite statute. It does not help now to speculate about the long delay. Master-servant with respondeat superior reduced some of the sting. Employers had to cover the costs of employees' torts that were related to the business, whether or not the tortfeasor survived the events. Before 1915-25 most individual tortfeasors were judgment proof, dead or alive. Liability insurance carrying by automobile owners revealed the absurdities of the common law. All states have some kind of provision for survival against dead tortfeasors. Louisiana does not have it literally, but with the direct action statute against insurance carriers, survival against tortfeasors' estates is not crucial.

The pressures for survival on the plaintiff's side when an injured man dies from causes other than the tort are not so obvious. Economic loss before death may not be enough to justify litigation. Although pain and suffering can be severe, they are a kind of subterfuge to justify big verdicts. They sound unreal as a measure of price for anyone but a sufferer himself. For the District of Columbia, Congress has excluded pain and suffering expressly from all survival cases.<sup>111</sup> It was done so inexpertly that pain and suffering are excluded literally even in those cases where an injured living plaintiff proceeds against the estate of a dead tortfeasor. If pain and suffering are excluded from the computation in survival cases on the plaintiff's side, and whether or not death follows an injury, a plaintiff's attorneys fees must be covered by the tortfeasor. That is not as bad as it sounds. It is so provided now by statute in Oregon.<sup>112</sup> Contingent fees make it possible to cover overhead in the cases lawyers have to litigate and those they lose. Fees can be fixed by the court, and they can be big enough to make the system work.<sup>113</sup>

In spite of foot-dragging by courts and legislatures in death cases for four generations, the signs in the sixties have been good. There is new legislation, and there are decisions. When Judge Talbott Smith was on the Supreme Court of Michigan, he wrote a classic on death and damages in

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ment did it in the Fatal Accidents Law of 1934, *see* note 32, *supra*. In 1966 the New York legislature redrafted the survival act to cover all injury and death cases. N.Y. EST., POWERS & TRUSTS LAWS § 11-3.2 (McKinney 1967). At the same time the legislature redrafted the wrongful death act, Section 5-4.1 of the same law. The South Dakota statutes were simplified by an editorial commission and republished in 1967. S.D. COMPILED LAWS ANN. §§ 15-4-1, 15-4-2, 21-5-1, 21-5-2. Although the Minnesota legislature has not tried to redraft a comprehensive scheme, the sections on survival and wrongful death follow consecutively in the same chapter of the statutes. MINN. STAT. §§ 573.01-.02 (Supp. 1969).

111. D.C. CODE ANN. § 12-101 (1967).

112. ORE. REV. STAT. § 30.075 (1967).

113. Fees can be set by the court in New York, and both kinds of cases can be joined. *In re Peterson's Estate*, 257 App. Div. 449, 13 N.Y.S.2d 965 (1939); *In re Applebaum's Estate*, 41 N.Y.S.2d 227 (Sur. Ct. 1943).

*Wycko v. Gnodtke*.<sup>114</sup> The decedent was a boy of fourteen. Under Lord Campbell's Act in Michigan the boy's parents were the beneficiaries, and the father sued as the personal representative. The boy was riding on a bicycle when he was struck by the defendant's car. He died immediately after the accident, and under the Michigan law there was no claim for pain and suffering. The trial judge instructed the jury that the measure of the parents' pecuniary loss was the boy's earning power, the difference between what the boy would have earned before maturity and cost of his rearing. The jury returned a verdict for the plaintiff, \$14,000 for the pecuniary loss to the beneficiaries and \$1,000 to the estate for expenses. The trial judge granted the defendant's motion for a new trial unless the plaintiff would accept \$7,500. He said the verdict was out of line with the measure. The plaintiff appealed. The supreme court reversed the trial judge and remanded the case for judgment on the verdict. The court decided that the verdict was consistent with what the measure ought to be. Pecuniary loss is not as tight as the courts pegged it in the old law. An individual has value to the family as a functioning social group. Death creates an economic loss which is related to human companionship, and it can be translated into figures. Three judges dissented. They could have been writing in 1921.

*Gray v. Goodson*<sup>115</sup> from Washington state was a narrow issue death case. Does a cause of action abate with the death of the first beneficiary? The question is not unique. The courts and legislature in Louisiana worked on it for 60 years. But the solution is not easy. *Gray* points up some difficulties. There were no Washington death statute cases precisely on point when the case was decided in 1963 and in 1956, when the automobile accident in *Gray* occurred, claims in simple tort did not survive an injured man's death from other causes.<sup>116</sup> The decedent left only his wife as a possible beneficiary. She died while an action was pending and after the state supreme court had reversed a judgment in favor of one of the defendants.<sup>117</sup> The action was continued on behalf of the wife's daughter who was not related to the decedent except through her mother's marriage. The defendants' lawyers argued that the claim abated with the mother's death. To permit survival to her heirs, they contended, would defeat the purpose of the death

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114. 361 Mich. 331, 105 N.W.2d 118 (1960).

115. 61 Wash. 2d 319, 378 P.2d 413 (1963). The decedent was killed in the accident. How long he lingered is not indicated. The personal representative was appointed within a week of the accident.

116. See *Marvin v. McCall & McDonald Inc.*, 57 Wash. 2d 906, 357 P.2d 173 (1960); *Boyd v. Sibold*, 7 Wash. 2d 279, 109 P.2d 535 (1941). This has been cured by statute. Ch. 137, § 1, [1961] Wash. Laws 1681, WASH. REV. CODE § 4.20.046 (1962).

117. *Woods v. Goodson*, 55 Wash. 2d 687, 349 P.2d 731 (1960).

statute. But the court upheld the claim of the daughter as the heir of the first beneficiary. There were no alternate beneficiaries. Unless it survived the beneficiary's heir, the wrongful death action would fail completely.

The solution in *Gray* and the solution under the Louisiana statute are too pat. You wonder in *Gray* how much was in the case to justify litigation through the state supreme court. Even if the original decedent had lingered long after the accident, a claim for loss of time and pain and suffering did not survive in 1956. The pecuniary loss to the wife could have been substantial. She survived her husband by three years and four months. The case had been long in litigation; costs and disbursements could have been piling up. Under Washington decisions expenses of the death and the funeral can be recovered under wrongful death.<sup>118</sup> Perhaps the sum of these figures would be big enough to justify litigation to the bitter end, but the sum would have to be big enough to cover the lawyer's fees.

Any kind of abatement in personal injury or death cases, because of the death of injured persons or tortfeasors, or because of the death of a beneficiary under wrongful death, is unjust. Judge Comstock characterized the common law as "manifestly unjust" more than a century ago, but he was thinking only of cases where death followed personal injuries. Presently, little is left of common law abatement. It is true almost everywhere that tort actions do not abate with the death of the parties. In only two states have the legislatures failed to cure abatement in the little cases on a plaintiff's side where he dies from other causes. Minnesota is one of them. Washington cured it in 1961. The score may look even better on the issue of the *Gray* case, but the score is only one side of the coin. The hard question is how do you cure that kind of abatement when the first beneficiary dies.<sup>119</sup>

It is not easy to think through the consequences of any kind of remedy and to prescribe a cure that is consistent with the scheme of Lord Campbell's Act. There are only two possibilities, but these can be supplemented with collateral provisions. After the first beneficiary dies, the original claim can

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118. See *McMullen v. Warren Motor Co.*, 174 Wash. 454, 25 P.2d 99 (1933); *Castner v. Tacoma Gas & Fuel Co.*, 126 Wash. 657, 219 P. 12 (1923).

119. The decisions in Louisiana and *Gray* are not isolated cases. The problem arises often, and the decisions cut both ways. That the action under Lord Campbell's Act does not abate even without an express statutory provision, see *Meekin v. Brooklyn Heights R.R.*, 164 N.Y. 145, 58 N.E. 50 (1900) (claim can be processed by the alternate beneficiary). That the cause of action abates without a special statute, see *Campbell v. Western & A.R.R.*, 57 Ga. App. 209, 194 S.E. 927 (1938); *Dillier v. Cleveland C., C. & St. L. Ry.*, 34 Ind. App. 52, 72 N.E. 271 (1904); *Danis v. New York Cent. R.R.*, 160 Ohio St. 474, 117 N.E.2d 39 (1954). But the picture is changing fast. In Illinois the Supreme Court overruled an earlier decision and preserved a claim against abatement for the beneficiary's heirs. *McDaniel v. Bullard*, 34 Ill. 2d 487, 216 N.E.2d 140 (1966). And a Florida court has just decided to protect the beneficiary's heirs. *Bohannon v. McGowan*, 222 So. 2d 60 (Fla. App. 1969).

survive to the alternate beneficiaries, or the claim of the first beneficiary can survive to his heirs or next of kin.<sup>120</sup> By statute in Louisiana the claim in all cases survives to the beneficiary's heirs. By decision in *Gray* it survives also the beneficiary's heirs—at least in that kind of case! Sometimes the practical differences between one scheme or the other will be minimal. Grown children may be the alternate beneficiaries of their father, the original decedent, and the heirs of their mother, the first beneficiary. But there can be other cases like *Gray*. The list of alternate beneficiaries under a death statute does not usually extend through all the levels of the original decedent's next of kin. There can be cases when there are no alternate beneficiaries, and where an action can fail.

Perhaps legislators cannot anticipate every contingency. When they do prescribe for wrongful death, they are thinking of relatives who have been accustomed to rely on the decedent for some kind of help. But injuries preceding death can produce other effects, pain and suffering, loss of time, and expense. Even when injured persons die immediately there are death and funeral expenses. All these factors can be covered in a comprehensive scheme. Survival to the alternate beneficiaries rather than survival for the first beneficiary's heirs is consistent with Lord Campbell's Act. All tort actions should survive to permit recovery by the estate for economic loss. Pain and suffering can be scrapped, and lawyers fees can be charged against tortfeasors. In a case like *Gray*, the item for pecuniary loss to the wife would be lost. It is even possible that there were no heirs of the original decedent who could be interested in an administration of the estate. Although the remedy in *Gray* could be a windfall to a stranger, someone supported the wife for three and a half years after her husband's death. A claim for reimbursement against the tortfeasor can be litigated through the survival action.

This paper has been long. A final summing-up can be short. The common law absolutes were so well entrenched that lawyers had no choice. Death and survival had to be covered by statute. Caution was part of the game in the nineteenth century, and that meant strict construction and literal precedents. Judge Comstock was out of step in 1860. A century later the world is different, and the law is different. Millions of people, even tens of

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120. Tennessee tried to solve the problem by statute a long time ago. The statute looks two ways, to the alternate beneficiary if the first one dies before he can sue, to the next of kin of the first beneficiary if he dies while action is pending. The Tennessee court has construed the statute to afford the same remedy to the alternate beneficiary whether the first beneficiary dies before or after action is begun. *Ridge v. Bright*, 172 Tenn. 87, 110 S.W.2d 312 (1937). TENN. CODE ANN. §§ 20-612 to -613 (1955). The text of the statute has not been changed since *Ridge*, and the case has not been overruled.

millions live in the plaintiffs' world. More people are hurt not only actually but in bigger percentages. Everyone is involved constantly with more of his neighbors, and more of his neighbors can pay for their torts today than 100 years ago. Whether it is good or whether it is bad, there are more torts in the plaintiffs' world, bigger judgments and longer court calendars.

The nineteen-seventies can be a time of preparation for an era of no-fault. There are pressures which may shorten the time. The personal injury business costs the community much in money and time, courts struggle to keep up with it, and many injured people still lack remedies through the civil suit. Even so, it can happen that lawyers will have to live with fault for a long time to come. Alternatives are difficult to plan, and fault can be as flexible as the community can afford to make it. Lawyers did not have to wait for defective gadgets to develop the idea of strict liability. They had to learn the hard way how to escape from *Winterbottom v. Wright*. Escaping from Blackstone, Lord Ellenborough and *Baker v. Bolton* was even more difficult. But 1970 is a good year for taking stock. We have come a long way with death and survival since 1921, or 1941, or 1953!<sup>121</sup>

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121. The Minnesota Supreme Court almost muffed one in *City of St. Paul v. Sorenson*, — Minn. —, 167 N.W.2d 17 (1969). It was a third party action by an employer under compensation for reimbursement against the tortfeasor. The injured employee had died from causes other than the tort. In a stated case the trial judge bit on abatement and Section 573.01. Judgment for the defendant was reversed on appeal, and the case was remanded, but the court sweat through nine columns of text to apologize for catching up with 1969.