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# Comments: Personal Injury Damages under the Maryland Survival Statute: Advocating Damage Recovery for a Decedent's Future Lost Earnings

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# PERSONAL INJURY DAMAGES UNDER THE MARYLAND SURVIVAL STATUTE: ADVOCATING DAMAGE RECOVERY FOR A DECEDENT'S FUTURE LOST EARNINGS

## I. INTRODUCTION

Imagine the following scenario: Ms. Evelyn Manning, a fifty year old woman, drives her car down Route 202 in Prince George's County, Maryland, when it breaks down.<sup>1</sup> Moments later, another vehicle strikes her, pinning her against her disabled vehicle.<sup>2</sup> Assume she is not killed, but instead severely injured, and now seeks a remedy under Maryland law. Further assume that, due to these injuries, Ms. Manning's future lost earnings<sup>3</sup> equal \$500,000.

Under Maryland law, Ms. Manning could file an action for personal injury, where she could recover up to \$500,000 in damages for future lost earnings.<sup>4</sup> Further, if Ms. Manning dies soon after receiving this damage award, her estate may retain the entire damage award under Maryland's estate law.<sup>5</sup> In contrast, now assume that Ms. Manning dies prior to filing suit. Under current Maryland law, Ms. Manning's estate, acting as her agent, may bring the same personal injury action under the survival statute, but can *not* recover damages for the decedent's future lost earnings.<sup>6</sup>

Based on this scenario, an injured party who lives and appears for trial is entitled to fair and reasonable compensation for the de-

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1. See *Jones v. Flood*, 351 Md. 120, 122, 716 A.2d 285, 286 (1998).

2. *Id.*

3. Future lost earnings are defined as:

Wages, salary, or other income that a person could have earned if he or she had not lost a job, suffered a disabling injury, or died. Lost earnings are typically awarded as damages in personal-injury and wrongful-termination cases. There can be past lost earnings and future lost earnings.

BLACK'S LAW DICTIONARY 526 (7th ed. 1999).

4. See MD. CODE ANN., CTS. & JUD. PROC. § 11-109 (1998). In Maryland, the term "economic damages" means loss of earnings and medical expenses." *Id.*

5. See MD. CODE ANN., EST. & TRUSTS § 1-301 (1995) ("All property of a decedent shall be subject to the estates of decedents law, and upon the person's death shall pass directly to the personal representative, who shall hold the legal title . . .").

6. See *infra* note 44 and accompanying text.

gree of injury sustained.<sup>7</sup> However, if the injured party dies before trial, that party is not entitled to fair and reasonable compensation for the degree of injury suffered.<sup>8</sup> Stated another way, the injured party, whose earning potential is diminished by the negligence of a tortfeasor, can be fully compensated for that diminution. Yet, the victim who dies, having all earning potential eliminated upon death, is not entitled to compensation under current Maryland law. This inconsistency is illogical: by causing the death of another, the tortfeasor's liability is substantially minimized.

Surprisingly, this inconsistency is mandated under Maryland law.<sup>9</sup> Damages for future lost earnings are not recoverable by the estate of an injured party who died as a result of a tortfeasor's conduct.<sup>10</sup> Therefore, the decedent's estate is not compensated for the decedent's future lost earnings, even though the loss occurred as a result of the tortfeasor's conduct.<sup>11</sup>

The Court of Appeals of Maryland recently upheld this inequity position in *Jones v. Flood*.<sup>12</sup> In *Jones*, the court held that a personal representative in a survival action may not recover damages for the decedent's future lost earnings.<sup>13</sup> This glaring injustice requires a thorough examination of the adoption and interpretation of both the Maryland survival<sup>14</sup> and wrongful death statutes,<sup>15</sup> and the impact the courts' continued reliance on *Jones* has on injured parties' estates.

This Comment examines the survival and wrongful death statutes by exploring the types of damages recoverable in a survival action<sup>16</sup> for personal injuries, and proposes a change in the current

7. See *infra* notes 45-47 and accompanying text.

8. See *infra* note 44 and accompanying text.

9. See *infra* note 44.

10. See discussion *infra* Part II.B.

11. See *infra* note 83 and accompanying text.

12. 351 Md. 120, 716 A.2d 285 (1998).

13. See *id.* at 131, 716 A.2d at 290.

14. See MD. CODE ANN., CTS. & JUD. PROC. § 6-401 (1999) (providing that, "[e]xcept as provided in subsection (b) of this section, a cause of action at law, whether real, personal, or mixed, survives the death of either party").

15. See MD. CODE ANN., CTS. & JUD. PROC. § 3-902 (1999) (providing that "[a]n action may be maintained against a person whose wrongful act causes the death of another").

16. See David W. Leebron, *Final Moments: Damages For Pain and Suffering Prior To Death*, 64 N.Y.U. L. REV. 256, 261 (1989):

Survival acts . . . generally have provided that certain of a decedent's causes of action survive the death and become the claims of the es-

application of the law. Part II of this Comment addresses the survival statute, discussing its purposes and the damages currently recoverable under it.<sup>17</sup> Part III discusses the wrongful death statute, highlighting its purpose and the recoverable damages.<sup>18</sup> Part IV provides a comparison of the nature and purpose of the survival statute and the wrongful death statute.<sup>19</sup> Part V discusses the current state of the law regarding the recovery of future lost earnings in Maryland courts.<sup>20</sup> Part VI illustrates how the plain language and legislative intent of the survival statute is currently ignored.<sup>21</sup> Finally, Part VII discusses how the perceived problems of double recovery and stare decisis should not limit a court's granting of future lost earnings in survival actions.<sup>22</sup>

## II. THE SURVIVAL STATUTE

### A. *Survival Statutes Generally*

Historically at common law, both in Maryland<sup>23</sup> and nation-

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tate which the decedent's personal representative may pursue. The survival acts were enacted in large part to alleviate the situation in which a decedent had initiated and prosecuted a legal action that had not proceeded to judgment prior to the death. Upon the death of the plaintiff, the case would be dismissed. This practice was unfair to the decedent and her heirs and resulted in an undeserved windfall to the defendant . . . . Damages under these survival acts have included medical expenses resulting from the injury, lost income, pain and suffering prior to death, and, in some jurisdictions, loss of enjoyment of life.

*Id.* A survival action is also defined as "[a] lawsuit brought on behalf of a decedent's estate for injuries or damages incurred by the decedent immediately before dying." BLACK'S LAW DICTIONARY 1459 (7th ed. 1999).

17. See *infra* notes 22-47 and accompanying text.

18. See *infra* notes 48-71 and accompanying text.

19. See *infra* notes 72-84 and accompanying text.

20. See *infra* notes 85-137 and accompanying text.

21. See *infra* notes 138-201 and accompanying text.

22. See *infra* notes 202-68 and accompanying text.

23. See *Demczuk v. Jenifer*, 138 Md. 488, 490, 114 A. 471, 472 (1921) ("The general rule of common law was that, if an injury were done either to the person or to the property of another, for which unliquidated damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done." (citing HERBERT BROOM, LEGAL MAXIMS 702 (8th ed. 1911))); see also *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 333-34, 65 A. 49, 50 (1906) (holding that the survival statute and wrongful death statute are two separate and distinct causes of action which allow for separate and distinct recoveries).

wide,<sup>24</sup> all causes of action initiated by or on behalf of a party ended with the death of that party.<sup>25</sup> However, many jurisdictions abrogated the common law by enacting what are commonly referred to as "survival statutes."<sup>26</sup> Survival statutes provide that claims held by a person at death are not extinguished; they may be enforced by an action brought by a successor, usually the decedent's personal representative.<sup>27</sup>

While no general federal survival statute exists,<sup>28</sup> almost all fifty states have enacted some form of survival statute.<sup>29</sup> The approach of the states that have done so can generally be divided into two categories: (1) those that have entirely rejected the common-law approach by adopting new rules that presume the survival of claims, with some exceptions;<sup>30</sup> and (2) those that have acted more conservatively by "merely add[ing] categories of actions to those that already survived the death of the claimant at common law."<sup>31</sup>

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24. See 1 C.J.S. *Abatement and Revival* § 117 (1985). It was a principle of common law that if a person suffered an injury to either the person or property, for which only damages could be the remedy, the cause of action in correlation to that injury abates at death. In Latin, this common-law doctrine is *actio personalis moritur cum persona*. In English this translates to "a personal right of action dies with the person." See *Doggett v. Boiler Eng'g & Supply Co.*, 477 P.2d 511, 512 (Idaho 1970).
25. See *Doggett*, 977 P.2d at 512.
26. See *infra* notes 29-31 and accompanying text.
27. See RESTATEMENT (SECOND) OF JUDGMENTS § 45 (1982).
28. See Michael D. Moberly, *For Whom The Bell Tolls: A Decedent's Right to § 1983 Pain and Suffering Damages in the Ninth Circuit*, 40 SANTA CLARA L. REV. 409, 413 (2000). See also *Miller v. Apartments & Homes of N.J.*, 646 F.2d 101, 108 (3d Cir. 1981) (noting "the absence of general federal provisions concerning survival of actions"); *Strickland v. Deaconess Hosp.*, 735 P.2d 74, 77 (Wash. Ct. App. 1987) (commenting that "no federal survival provision exist[s]").
29. See *infra* note 49.
30. See ALA. CODE § 6-5-462 (2000) ("[A]ll personal claims upon which an action has been filed, except for injuries to the reputation, survive . . . ."); ALASKA STAT. § 09.55.570 (1999) ("All causes of action . . . survive . . . ."); ARIZ. REV. STAT. ANN. § 14-3110 (West 2000) ("Every cause of action, except [named exceptions], shall survive . . . ."); CAL. CIV. PROC. CODE § 377.20(a) (West 2000) ("Except as otherwise provided by statute, a cause of action . . . is not lost by reason of the person's death, but survives . . . ."); COLO. REV. STAT. ANN. § 13-20-101 (West 2000) ("All cause of action, except actions for slander or libel, shall survive . . . ."); CONN. GEN. STAT. ANN. § 52-599(a) (West 2000) ("A cause or right of action shall not be lost or destroyed by the death of any person . . . .").
31. Karen M. Doore, *Survival of the Fittest? Waiting Out the Death of the Plaintiff in ADA Claims: Allred v. Solaray, Inc.*, 1998 UTAH L. REV. 371, 377-78 (1998); see

B. *Maryland's Survival Statute*<sup>32</sup>

Maryland follows the trend of the more aggressive states by rejecting the common-law approach and adopting a new rule that presumes the survival of claims, with an exception for slander.

1. Development of Maryland's Survival Statute

The Maryland General Assembly abrogated the common-law rule when it enacted its first survival statute in 1785.<sup>33</sup> This precursor to the current section 6-401 of the Courts and Judicial Proceedings Article provided that, "[n]o action of ejectment, waste, partition, dower, replevin, or any personal action, . . . shall abate by the death of either or any of the parties to such action . . . this not to apply to actions for slander or for injuries to the person."<sup>34</sup> In a special session one year later, the Legislature narrowed the scope of "injuries," but broadened the class of "personal actions" that would not abate at plaintiff's death—an action deemed necessary by the injustices resulting from the Civil War. This class of personal actions was further enlarged in 1888 when the General Assembly stated, "[n]o action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiff and prosecute the suit to final

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*also* ARK. CODE ANN. § 16-62-101(a) (West 1999) ("For wrongs done to the person . . . an action may be maintained . . ."); DEL. CODE ANN. tit. 10, § 3704(a) (West 1999) ("No action brought to recover damages for injuries to the person . . . shall abate . . ."); IDAHO CODE § 5-327 (West 2000) ("Causes of action arising out of injury to the person . . . shall not abate . . .").

32. MD. CODE ANN., CTS. & JUD. PROC. § 6-401 (1999). Maryland's survival statute provides the following:

(a) Except as provided in subsection (b) of this section, a cause of action at law, whether real, personal, or mixed, survives the death of either party. (b) A cause of action for slander abates upon the death of either party unless an appeal has been taken from a judgment entered in favor of the plaintiff. (c) A right of action in equity survives the death of either party if the court can grant effective relief in spite of the death.

*Id.*

33. The first survival statute enacted by the Maryland Legislature was the Act of 1785, chapter 80, which abrogated the common-law rule for abatement of certain actions.
34. *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 335, 65 A.2d 49, 50 (1906) (quoting Acts 1785, ch. 80, codified as the Code of 1860, art. 2, § 1).

judgment and satisfaction.”<sup>35</sup> Inadvertently omitted from the comprehensive Maryland Code revision of 1957, the survival statute remained “lost” until a corrective bill was enacted in 1963.<sup>36</sup> Fortunately, the code restructure of 1973 placed the statutory provision within the Courts and Judicial Proceedings Article, continuing with the same force and effect despite the modification in language.<sup>37</sup> In 1988, the language was altered, becoming the current version, with no apparent desire to change the statutory intent.<sup>38</sup> However, the 1988 modification provided for abatement of “actions for injuries to the person where the defendant dies, and actions for slander.”<sup>39</sup>

## 2. Damages Recoverable Under Maryland’s Survival Statute

The purpose of Maryland’s survival statute is to provide for the recovery of damages sustained by the deceased during the decedent’s life that would have been recoverable had the deceased survived.<sup>40</sup> A loss to the decedent’s estate in a survival action concerns only damages sustained by the decedent, not for damages sustained by the decedent’s relatives.<sup>41</sup>

A survival action limits the personal representative to recovering damages that the decedent sustained during the decedent’s life.<sup>42</sup> Maryland courts, however, limit recovery to include only com-

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35. *Stewart*, 104 Md. at 335, 65 A.2d at 51 (quoting the Code of Public General Laws of 1888, art. 75, § 25).

36. *See Owens-Corning Fiberglass Corp. v. Garrett*, 343 Md. 500, 535, 682 A.2d 1143, 1160 (1996) (noting the re-codification in MD. ANN. CODE, art. 75, § 15B (Supp. 1963), with only minor editorial changes including the deletion of the word “hereafter” and two extraneous commas)).

37. *See id.* at 535-36, 682 A.2d at 1160 (noting the revision author’s intent).

38. *See id.* at 536 n.21, 682 A.2d at 1160 n.21 (noting the change was signed into law by the Acts of 1988, ch. 359).

39. *Stewart*, 104 Md. at 336, 65 A. at 51 (quoting the Code of Public General Laws of 1888, art. 75, § 24, recodified in the Code of 1904).

40. *See id.*

41. *See id.* at 339-40, 65 A. at 52 (stating that damages under each statute “go into different channels and are recovered upon different grounds . . .”).

42. *See id.* (stating that the damages include those the decedent sustained, but exclude damages sustained by other persons due to the death); *see also* MD. CODE ANN., EST. & TRUSTS § 7-401(y) (Supp. 1999) (providing that the representative may recover funeral expenses if the action is brought against the tortfeasor whose wrong resulted in the decedent’s death); *see also* ACandS, Inc. v. Asner, 104 Md. App. 608, 645, 657 A.2d 379, 397 (1995) (“Damages in a survival action are limited to the damages that would have been recoverable by the decedent had he survived, i.e., appropriate compensation for the time between injury and death, which includes loss of consortium damages.”), *rev’d*

pensation for injury and loss between the time of injury and the time of death.<sup>43</sup> Such damages include pain and suffering, medical expenses, funeral expenses, and lost earnings.<sup>44</sup> The courts also al-

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*on other grounds*, 344 Md. 155, 686 A.2d 250 (1996); *Rhone v. Fisher*, 224 Md. 223, 230, 167 A.2d 773, 777 (1961) (noting that damages are limited to those that might have been recovered by the deceased); *Stewart*, 104 Md. at 342-43, 65 A. at 53 (same).

43. *See Jones v. Flood*, 351 Md. 120, 126, 716 A.2d 285, 288 (1998) (noting that Maryland courts have consistently applied the rule that, under the survival statute, damages are based on those suffered by the decedent from the date of injury until his or her death (citing *Monias v. Endal*, 330 Md. 274, 279 n.2, 623 A.2d 656, 658 n.2 (1993) (holding that in a Maryland survival action, future earnings are not recoverable)); *United States v. Streidel*, 329 Md. 533, 544 n.9, 620 A.2d 905, 909 n.9 (1993) (noting that Maryland's survival statute allows for compensation only between the time of injury and time of death); *Fennell v. Southern Md. Hosp. Ctr., Inc.*, 320 Md. 776, 792, 580 A.2d 206, 214 (1990) (commenting that survival action damages include conscious pain and suffering, but exclude future loss of earnings); *Tri-State Poultry Coop. v. Carey*, 190 Md. 116, 125, 57 A.2d 812, 817 (1948) (stating that the victim must have lived after the accident to recover future earnings); *White v. Safe Deposit & Trust Co.*, 140 Md. 593, 598, 118 A. 77, 79 (1922) (noting that a suit for future damages could not be maintained if the person causing the injury was dead); *ACandS*, 104 Md. App. at 645, 657 A.2d at 397-98 (1995) (noting that damages in a survival action are limited to those that the decedent could have recovered had he survived and therefore compensation is only awarded for the time between the injury and death); *Globe Am. Cas. Co. v. Chung*, 76 Md. App. 524, 539, 547 A.2d 654, 661 (1988), *vacated on other grounds*, 322 Md. 713, 589 A.2d 956 (1991) (holding that under the survival statute, "the damages are limited to compensation for the pain and suffering by the deceased, his loss of time and his expenses between the time of the injury and his death . . ." (quoting *Stewart*, 104 Md. at 342-43, 65 A. at 49)); *Biro v. Schombert*, 41 Md. App. 658, 665, 398 A.2d 519, 523, *vacated on other grounds*, 285 Md. 290, 402 A.2d 71 (1979) (noting that damages in a survival action are "limited to compensation for pain and suffering sustained, expenses incurred, and loss of earnings, by the deceased from the time of the infliction of the injury to the time of death"). In *Jones*, the court noted that the Maryland Civil Pattern Jury Instructions also embody this rule. *See Jones*, 351 Md. at 126, 716 A.2d at 288 (quoting that economic loss is to be considered "[f]rom the time of injury to the time of death" (citations omitted)).
44. *See Streidel*, 329 Md. at 544 n.9, 620 A.2d at 911 n.9 (noting that the survival statute allows for loss of earnings and medical expenses); *Fennell*, 320 Md. at 792, 580 A.2d at 214 (observing that damages in a survival action include "conscious pain and suffering as well as medical expenses, but exclude future loss of earnings, solatium damages, and damages which result to other persons from the death"); *Rhone*, 224 Md. at 230, 167 A.2d at 777 (explaining that damages in a survival action do not include those for the shortening of the decedent's life); *Biro*, 41 Md. App. at 665, 398 A.2d at 523 ("Damages in Survival Statute actions are limited to compensation for pain and suffering



low the recovery of punitive damages in survival actions.<sup>45</sup> Therefore, under Maryland's survival statute the issue is making the decedent's estate whole, not whether the decedent's relatives are entitled to any benefit.

### III. THE WRONGFUL DEATH STATUTE

#### A. *Wrongful Death Statutes Generally*

The purpose underlying wrongful death statutes is to provide the decedent's relatives with recovery for lost support or benefits that would have been provided to them had the decedent not died as a result of another's negligence.<sup>46</sup> Wrongful death statutes can be traced to England's enactment of Lord Campbell's Act in 1846 in recognition of the injustice created by the absence of a remedy for wrongful death.<sup>47</sup> The United States soon followed, with New York enacting the first wrongful death statute in 1847.<sup>48</sup> Currently, all fifty states have enacted statutes providing a cause of action to remedy wrongful death.<sup>49</sup> Further, while most jurisdictions have a general

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sustained, expenses incurred, and loss of earnings . . ."). The Court of Special Appeals of Maryland recently included loss of consortium damages as appropriate compensation for an injury recoverable in a survival action. See *ACandS*, 104 Md. App. at 645, 657 A.2d at 397-98 (explaining that loss of consortium damages are recoverable in a survival action and holding that the decedent's death does not terminate the entitlement to damages).

45. See *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 160, 297 A.2d 721, 727 (1972) ("[I]f a wrongdoer may be punished if his victim lives, then surely he should not escape retribution if his wrongful act causes a death." (quoting *Leahy v. Morgan*, 275 F. Supp. 424, 425 (E.D. Iowa 1967), *overruled on other grounds*, *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992))). The court in *Zenobia* moved from a presumed malice to an actual malice standard when punitive damages are at issue. See *Zenobia*, 325 Md. at 459, 601 A.2d at 652.
46. See *ACandS*, 104 Md. App. at 644-45, 657 A.2d at 397-98; *Stewart*, 104 Md. at 338-40, 65 A. at 52.
47. See STUART M. SPEISER ET AL., *RECOVERY FOR WRONGFUL DEATH AND INJURY* § 1:8 (3d ed. 1992). "Thus, Lord Campbell's Act created a new cause of action based upon the defendant's wrongful act, neglect or default, limited recovery to certain beneficiaries, and measured damages with respect to the loss suffered by these beneficiaries." *Id.*
48. See *id.* § 1:9.
49. See *id.*; see also ALA. CODE §§ 6-2-38(a),(o), 6-5-410, -411, -462 (1993) (maintaining that actions by personal representatives to recover damages for a wrongful act, omission, or negligence causing the decedent's death, or for damage to decedent's death is permissible so long as commenced within two years from death); ALASKA STAT. §§ 09.55.570, .580 (Michie 1998) (providing causes of action, other than defamation, to survive to the personal representative of the

decedent and permitting initiation of a wrongful death action by the estate); ARIZ. REV. STAT. §§ 12-542 (two-year limitation), 12-551 (product liability), 12-611 (liability), 12-612 (named parties), 12-613 (measure of damages), 14-3110 (causes of action survive) (1994); ARK. CODE ANN. §§ 16-62-101, -102 (Michie 1987 & Supp.) (allowing survival of actions except libel and slander to survive the death of decedent and providing for wrongful death actions to be brought by the estate); CAL. CIV. PRO. CODE §§ 340, 377.20-21, .30-31, .34-35, .40-43, .60-62 (West 1982) (stating that wrongful death actions must be brought within one year, actions may survive after a person's death, and may be brought by the decedent's successor in interest); COL. REV. STAT. §§ 13-20-101, 13-21-202, 13-80-102 (1997) (allowing all causes of action, other than libel or slander, to be brought or continued despite death of a party within two years after the cause of action accrues); CONN. GEN. STAT. §§ 52-555, -599 (1991) (permitting a cause of action to survive the decedent's death); DEL. CONST. art. 4, § 23 (allowing actions to survive death of party), DEL. CODE ANN. tit. 10, §§ 3701, 3707, 3722, 3724-35, 8107 (1999) (stating actions survive and may be initiated after death of a party unless for defamation, malicious prosecution, or upon penal statutes, and may be maintained against a person whose wrongful act causes the death of another); D.C. CODE ANN. §§ 12-101, 16-2701, 16-2702, 20-741 (1997) (allowing the right to bring a cause of action to survive the decedent); FLA. STAT. ANN. §§ 46.021, 95.11(4)(d), 768.19-27 (West 1997) (permitting actions to survive the death of a party and for wrongful death actions to be brought within two years); GA. CODE ANN. §§ 9-2-41, 9-3-33, 51-4-1, 51-4-2, 51-4-5 (1982) (stating actions for wrongful death may be brought by the surviving spouse, child, or personal representative of the decedent for wrongful death within two years); HAW. REV. STAT. §§ 663-3 to -8 (1993 & Supp. 1999) (providing the personal representative to bring an action for wrongful death and actions survive death of either party); IDAHO CODE §§ 5-311, 5-319, 5-327 (Michie 1998) (stating that actions for wrongful death by or against the estate is permitted and actions survive notwithstanding death of a party); 740 ILL. COMP. STAT. 180/2, 5/27-6 (1993) (permitting actions to survive the death of a party); IND. CODE §§ 34-1-2-7, 34-9-3-1 to -5, 34-11-7-1, 34-23-1-1 (1998) (allowing actions to survive the death of the decedent and be brought within 18 months of the date of death and wrongful death actions to be brought); IOWA CODE §§ 611.20-22, 613.15, 633.336 (1999) (permitting all causes of action to survive the death of a party and initiation of wrongful death actions); KAN. STAT. ANN. §§ 60-513, 60-1801-02, 60-1802, 60-1901 to -1903 (1994 & Supp. 1999) (stating causes of action survive the death of a party and actions may be brought for wrongful death); KY. CONST. §§ 54, 241 (limiting the legislature from restricting recoveries for death or injury and allowing recovery for wrongful death); KY. REV. STAT. ANN. §§ 395.270, 411.130, 411.140, 413.140 (Banks-Baldwin 1995) (providing for the recovery of damages for wrongful death and allowing actions to survive the death of the injured party); LA. CIV. CODE ANN. arts. 2315.1-.2 (West 1997) (permitting actions to survive the death of the injured party for one year as well as wrongful death actions); ME. REV. STAT. ANN. tit. 18-A, §§ 2-804, 3-817(a) (West 1998) (allowing wrongful death and survival of actions); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-901 to -904, 6-401 (1998) (providing actions to survive despite

death, as well as wrongful death actions); MASS. GEN. LAWS ANN. ch. 228, §§ 1, 4, ch. 229, §§ 1-2, 6, ch. 230, §§ 1-2, 4 (1998) (allowing wrongful death and survival of actions); MICH. COMP. LAWS §§ 600.2921-2922, 600.5805 (1987) (permitting survival of actions after the death of a party and wrongful death actions to be initiated); MINN. STAT. § 573.02 (1998 & Supp. 1999) (permitting actions arising from death by a wrongful act to be maintained); MISS. CODE ANN. §§ 11-7-13, 91-7-233, 91-7-235, 91-7-237 (1999) (permitting the personal representative to bring a wrongful death action and for continuance of actions despite death of a party); MO. REV. STAT. §§ 537.020, 537.080 (1988) (continuing actions for personal injuries or death despite death of a party and allowing wrongful death actions); MONT. CODE ANN. §§ 27-1-323, -501, -502, -513 (1999) (allowing for both survival of actions upon death of a party and wrongful death claims); NEB. REV. STAT. §§ 25-1402, 25-1405, 25-1410, 25-1411, 25-1413, 25-1414, 30-809, 30-810 (1995) (permitting continuation of claims and initiation of wrongful death actions); NEV. REV. STAT. §§ 12.100, 41.085, 41.100, 41.130 (1998 & Supp. 1999) (allowing survival of actions despite death of a party and wrongful death action); N.H. REV. STAT. ANN. §§ 556:7, 556:9 to :15 (1997) (allowing survival of actions despite death of a party and wrongful death action); N.J. STAT. ANN. §§ 2A:15-3 to -4, 2A:31-1 to -6 (West 1998) (permitting actions to survive despite a parties death, as well as recovery for wrongful death); N.M. STAT. ANN. §§ 37-2-1, 41-2-1 to -4 (Michie 1996 & Supp. 1999) (providing recovery for wrongful death and survival of claims notwithstanding the death of a party); N.Y. CONST. art. I, § 16 (permitting continuation of actions despite death), N.Y. C.P.L.R. 210, 214 (McKinney 1990) (permitting actions to survive the death of a party so long as it is within the three-year statute of limitations), N.Y. EST. POWERS & TRUSTS LAW §§ 5-4.1, 11-3.2 (1999) (permitting wrongful death action and survival of action despite death); N.C. GEN. STAT. §§ 1-53, 28A-18-1, 28A-18-2 (1999) (recovering for wrongful death permitted within two years of the date of death and most actions survive the death of a party); N.D. CENT. CODE §§ 28-01-26.1, 32-21-01 to -06 (1996 & Supp. 1999) (permitting survival of claims within the statute of limitations despite death of a party and recovery for wrongful death); OHIO REV. CODE ANN. §§ 2125.01-.02, 2305.21, 2317.421 (Anderson 1994) (allowing claims for wrongful death and survival of actions); OKLA. STAT. tit. 12 §§ 1051-55 (1998) (providing for continuation of causes of actions regardless of death of a party and permitting actions for wrongful death); OR. REV. STAT. §§ 30.020, 30.075, 30.080 (1999) (permitting actions to survive death of a party and recovery for wrongful death); PA. STAT. ANN. tit. 20, § 3373, tit. 42 §§ 2202, 8301-02 (West 1998) (allowing for actions to survive the death of a party and for wrongful death claims); R.I. GEN. LAWS §§ 9-1-6 to -8, 10-7-1 to -13 (1997 & Supp. 1999) (permitting actions that survive the death of a party and compensate for wrongful death); S.C. CODE ANN. §§ 15-51-10, 15-51-20, 15-51-40 to -42, 15-51-60 (Law. Co-op. 1977) (allowing recovery for wrongful death and continuation of action despite death of party); S.D. CODIFIED LAWS §§ 15-4-1, 15-4-2, 15-6-25(a), 21-5-2 to -9 (Michie 1987) (continuing actions regardless of death of a party and affording compensation for wrongful death); TENN. CODE ANN. §§ 20-5-101 to -113 (1994) (permitting wrongful death actions and survival of actions despite death of a party); TEX. CIV. PRAC. & REM. CODE ANN.

wrongful death statute, some jurisdictions also provide statutory remedies for specific situations.<sup>50</sup>

Because of the statutes' diversity, it is nearly impossible to group them into clearly defined categories. Even statutes originally enacted in the United States with similar wording have undergone quite different judicial constructions.<sup>51</sup> However, two broad categories of state wrongful death statutes have emerged.<sup>52</sup> The first category includes those tracking Lord Campbell's Act, creating a new cause of action for designated persons or for the decedent's personal representative.<sup>53</sup> This type of wrongful death statute attempts to compensate designated beneficiaries for their loss resulting from the victim's death.<sup>54</sup>

The second category is "'survival-type' wrongful death statutes [that] simply continue the cause of action for tortious injury that the decedent would have possessed, but for death."<sup>55</sup> Again, this survival-type statute varies regarding who may initiate the action,<sup>56</sup> but the intent is to compensate the loss to the decedent's estate.<sup>57</sup>

§§ 71.001-.0011, 71.021 (Vernon 1997) (allowing actions to survive death of a party and recovery for wrongful death); UTAH CONST. art. XVI, § 5 (prohibiting abrogation of an action because of death of a party), UTAH CODE ANN. §§ 78-11-7, -12 (1996) (allowing for recovery of wrongful death of an adult and survival of action); VT. STAT. ANN. tit. 14, §§ 1452-53, 1491-92 (1989) (permitting recovery for wrongful death and continuation of action regardless of death of party); VA. CODE ANN. §§ 8.01-25, 8.01-50 to -64 (Michie 1998) (providing for continuation of an action regardless of death of a party and for wrongful death recovery); WASH. REV. CODE §§ 4.20.005, .010, .020, .046, .050, .060 (1988) (recovering for wrongful death and survival of action despite death of a party permitted); W. VA. CODE §§ 55-2-18, 55-7-5 to -8a, 56-8-1 to -2 (1997 & Supp. 1999) (providing survival of action and assertion of wrongful death claims); WIS. STAT. ANN. §§ 777.01, 893.22, 893.54, 895.01 (West 1997) (permitting recovery for wrongful death and continuation of actions despite death of a party).

50. See SPEISER ET AL., *supra* note 47, §§ 1:14-1:17 (discussing specific state idiosyncracies in addition to more common specialized statutes for worker's compensation, dram shop recovery, and uninsured motorist protection).

51. See *id.* § 15:8.

52. See C. Frederick Overby & Jason Crawford, *The Case for Allowing Punitive Damages in Georgia Wrongful Death Actions: The Need to Remove an Unjust Anomaly in Georgia Law*, 45 MERCER L. REV. 1, 9 (1993).

53. See *id.*

54. See SPEISER ET AL., *supra* note 47, § 1:9.

55. Overby & Crawford, *supra* note 52, at 9.

56. See *id.* at 9 (allowing an action in the name of the estate or an action by designated persons such as the surviving spouse or children).

57. See SPEISER ET AL., *supra* note 47, § 1:9.

### B. *Maryland's Wrongful Death Statute*

Maryland's wrongful death statute allows particular relatives<sup>58</sup> of a victim who died as a result of a tortfeasor's conduct to bring a cause of action for injuries to them as a result of the death.<sup>59</sup> As such, it follows the first broad category of wrongful death statutes.<sup>60</sup> The damages recoverable under a wrongful death claim include pecuniary losses to the claimant as a result of the decedent's death, such as medical and funeral expenses, emotional pain and suffering, and loss of support, as well as non-pecuniary damages.<sup>61</sup>

### C. *Future Lost Earnings*

#### 1. Generally

Under both wrongful death and survival action statutes, a person should be able to recover future lost earnings. Future lost earn-

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58. Maryland's wrongful death statute provides which relatives may bring a wrongful death action and separates this into primary and secondary beneficiaries. See MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (1998) ("Action for wrongful death"). First, primary beneficiaries, defined as a wife, husband, parent, or a child of the deceased person, may bring a wrongful death action. See *id.* If no one qualifies as a primary beneficiary, then a secondary beneficiary may bring the action. A secondary beneficiary is defined as "any person related to the deceased person by blood or marriage who was substantially dependent upon the deceased." *Id.* § 3-904(b).

59. See MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (1998) (delineating which relatives may bring a wrongful death action and laying out the damages that may be recovered). Maryland's wrongful death statute is essentially an adoption of a statute from England historically known as the Lord Campbell's Act. See *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 334, 65 A.49, 50 (1906) (tracing the history of the adoption of Maryland's wrongful death statute). Maryland adopted Lord Campbell's Act under the Act of 1852, chapter 299. See *id.*

60. See *supra* notes 53-54 and accompanying text.

61. See MD. CODE ANN., CTS. & JUD. PROC. § 3-903 (1998). The statute expressly states that the damages recoverable "may include damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, paternal care, filial care, attention, advice, counsel, training, guidance, or education . . . ." *Id.* § 3-904(d). See, e.g., *Carolina Freight Carriers Corp. v. Keane*, 311 Md. 335, 336-37, 534 A.2d 1337, 1338 (1988) (awarding solatium damages, damages allowed for the injury to the feelings, to parents for the loss of their child); *Ory v. Libersky*, 40 Md. App. 151, 156, 166-67, 389 A.2d 922, 926, 931 (1978) (affirming a trial judge's instruction that allowed the jury to consider whether children would be entitled to damages, such as, the cost of higher education, mental anguish, emotional pain and suffering, loss of society, companionship, and guidance due to the loss of their father).

ings are defined as "[t]he amount of money the decedent would have earned had he lived out his normal life expectancy."<sup>62</sup> Calculation of future lost earnings is not exact; it requires some speculation about the decedent's life expectancy and potential work experience.<sup>63</sup> Although somewhat predictable when the individual works,<sup>64</sup> the subjectivity is enhanced when the individual has never worked or is currently unemployed.<sup>65</sup>

## 2. Maryland

Damages for future lost earnings are recoverable in a personal injury action as provided for under section 11-109 of the Courts and Judicial Proceedings Article.<sup>66</sup> A future lost earnings award is allowed for those amounts reasonably certain to result from the injury.<sup>67</sup> For judicial simplicity, the award is usually allocated in a lump sum.<sup>68</sup> The amount awarded must be based upon present value and not upon speculation about inflation or other unknown factors impacting earning potential.<sup>69</sup>

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62. SPEISER ET AL., *supra* note 47, § 3:50.

63. *See id.*

64. *See generally* Michael T. Brody, *Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings*, 49 U. CHI. L. REV. 1003 (1982) (referring to consideration of factors such as "age, occupation, education, and actuarial probability of survival" for predicting future wages).

65. Maryland allows recovery for lost future wages for a minor child. *See* Johns Hopkins Hosp. v. Pepper, 346 Md. 679, 689, 697 A.2d 1358, 1363 (1997) (deciding upon the extent of damages sustained by an infant who underwent open heart surgery at the age of four months). The exhaustive exploration of various factors to consider in calculating lost future earnings is beyond the scope of this Comment.

66. *See* MD. CODE ANN., CTS. & JUD. PROC. § 11-109 (1998). The statute addressing the damages allowed includes the following:

- a. (1) In this section, "economic damages" means loss of earnings and medical expenses. (2) "Economic damages" does not include punitive damages.
- b. As part of the verdict in any action for damages for personal injury in which the cause of action arises on or after July 1, 1986 or for wrongful death in which the cause of action arises on or after October 1, 1994, the trier of fact shall itemize the award to reflect the monetary amount intended for: (1) Past medical expenses; (2) Future medical expenses; (3) Past loss of earnings; (4) *Future loss of earnings*; (5) Noneconomic damages; and (6) Other damages.

*Id.* (emphasis added).

67. *See* Brooks v. Fairman, 253 Md. 471, 252 A.2d 865 (1969).

68. *See* Scott v. James Gibbons Co., 192 Md. 319, 331 A.2d 117 (1949).

69. *See* Baublitz v. Henz, 73 Md. App. 538, 550-51, 535 A.2d 497, 501 (1988) (rea-

#### IV. COMPARISON OF MARYLAND'S SURVIVAL AND WRONGFUL DEATH STATUTES

While both Maryland's survival statute and wrongful death statute provide damages to individuals as a result of a single tortious act, each have separate purposes, separate causes of action, and separate treatments of damages. These differences are crucial to understanding how Maryland's case law has gone so far afield of what the statutes were designed to compensate for.

##### A. *Separate Purposes*

The wrongful death statute and the survival statute were enacted for distinct purposes. The actions are by different persons, "the damages go into different channels and are recovered upon different grounds, and the causes of action, though growing out of the same wrongful act or neglect, are entirely distinct."<sup>70</sup> The purpose of the wrongful death statute is to provide the decedent's relatives with an award for the lost support that they would have received had the decedent not died as a result of a tortfeasor's negligence.<sup>71</sup> Whereas, the purpose of the survival statute is to provide for the recovery of damages, sustained by the decedent in life, which the decedent could have recovered had he survived.<sup>72</sup>

##### B. *Separate Causes of Action Under Each Claim*

A wrongful death action and a survival action, though growing out of the same wrongful or negligent act, are two distinct causes of action.<sup>73</sup> An action for wrongful death is a cause of action, created by statute, that can be brought by relatives of the decedent,<sup>74</sup> while a survival action is an existing cause of action that survives the decedent and can be pursued by the personal representative on the decedent's behalf.<sup>75</sup>

##### C. *Separate Treatment of Damages Under Each Statute*

In Maryland, courts maintain a clear distinction between a survival action and a wrongful death action to ensure there exists no

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soning that the court of appeals would agree with this conclusion).

70. *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 339, 65 A. 49, 52 (1906).

71. *See id.* at 338-40, 65 A. at 52.

72. *See supra* note 40.

73. *See Stewart*, 104 Md. at 340, 65 A. at 52.

74. *See supra* notes 53-57 and accompanying text.

75. *See supra* note 27 and accompanying text.

overlap of damages.<sup>76</sup> Therefore, the damages awarded under each action shall be considered separately, and any discussion of damages under the survival statute may not include those damages recoverable under the wrongful death statute.<sup>77</sup>

When an individual injured by the negligence of another dies prior to bringing a personal injury action, all claims brought under the survival statute, including claims for personal injuries, survive that individual's death.<sup>78</sup> A survival action may also be initiated by the decedent's personal representative on behalf of the estate after the decedent's death as if the decedent survived.<sup>79</sup> However, if the injured victim survived and lived throughout the pendency of the suit, the victim could receive future lost earnings as part of a damage award.<sup>80</sup> According to the current practice of Maryland courts,

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76. See *Globe Am. Cas. Co. v. Chung*, 76 Md. App. 524, 538, 547 A.2d 654, 660 (1988). The *Globe* court noted that Maryland has been pointed to "as a jurisdiction that meticulously distinguishes the damages in a survival action from the damages in a wrongful death action, thereby avoiding the problem of duplication in the element of damages." *Id.* (citing Bowen E. Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114, 126 (1924)); *Stewart*, 104 Md. at 339-40, 65 A.2d at 52 ("Under the [wrongful death statute] the damages recoverable are such as the equitable plaintiffs have sustained by the death of the party injured. Under [the survival statute] the damages recoverable are only such as the deceased sustained in his lifetime, and consequently exclude those which result to other persons from his death. Under the [wrongful death statute] the damages are apportioned by the jury among the equitable plaintiffs, and belong exclusively to them, and form no part of the assets of the decedent's estate. Under the [survival statute] the damages recovered go in to the hands of the executor or administrator and constitute assets of the estate. The cause of action is created by [the death], and is a new cause of action, and consequently one which the deceased never had. Under the [survival statute] there is a survival of a cause of action which the decedent had in his lifetime.").

77. See *Stewart*, 104 Md. at 340-41, 65 A. at 53. The court in *Stewart* further points out that even though the causes of action flow from the same cause, the same act may injure different individuals in different ways and each of those individuals should have separate remedies for the recovery of damages sustained by them. See *id.* at 340, 65 A. at 52.

78. See MD. CODE ANN., CTS. & JUD. PROC. § 6-401 (1998) (enumerating when actions survive at law and in equity).

79. See MD. CODE ANN., EST. & TRUSTS § 7-401(y) (Supp. 1999) ("He may prosecute, defend, or submit to arbitration actions, claims, or proceedings in any appropriate jurisdiction for the protection or benefit of the estate, including the commencement of a personal action which the decedent might have commenced or prosecuted . . .").

80. See *Monias v. Endal*, 330 Md. 274, 280-81, 623 A.2d 656, 659 (1993) (stating that, in a personal injury action, a plaintiff may recover damages "for loss of



however, the decedent's estate may not recover future lost earnings in a survival action.<sup>81</sup>

## V. MARYLAND COURTS' VIEW OF FUTURE LOST EARNINGS

Various court decisions in Maryland led to the recent holding by the court of appeals in *Jones v. Flood*.<sup>82</sup> In *Jones*, the court held that future lost earnings are not recoverable by a decedent's estate in a survival action for personal injuries.<sup>83</sup> One such case leading to the conclusion in *Jones* is *Stewart v. United Electric Light & Power Co.*<sup>84</sup> In *Stewart*, the court of appeals laid the foundation upon which all other cases rely with regard to recovery under the survival statute.<sup>85</sup>

### A. *The State of the Law Beginning With Stewart v. United Electric Light & Power Company*

The court in *Stewart* decided whether both a wrongful death action and a survival action may be pursued concurrently when each flows from the same wrongful act.<sup>86</sup> *Stewart* involved an action by an estate administrator to recover damages due to the defendant's negligence.<sup>87</sup> The decedent, a professional tinner and roofer, received an electric shock when he came into contact with charged wires while working for the defendants.<sup>88</sup> He was thrown to the ground, seriously injured, and suffered for a number of hours before eventually dying.<sup>89</sup> The single question before the Maryland Court of Appeals was whether the cause of action, which accrued in the decedent's lifetime from the alleged negligence of the defendants, abated when he died or survived enabling his administrator to

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future earnings which will reasonably and probably result from the tort"); see also *Adams v. Benson*, 208 Md. 261, 270-71, 117 A.2d 881, 885 (1955) (holding that plaintiff may recover for any damages which certainly or reasonably resulted as a proximate consequence from the tort).

81. See *supra* notes 41-45 and accompanying text; see also *Monias*, 330 Md. at 279 & n.2, 623 A.2d at 658 & n.2 (stating that lost future earnings are not recoverable in a survival action in Maryland).

82. 351 Md. 120, 716 A.2d 285 (1998).

83. See *id.* at 131, 716 A.2d at 290.

84. 104 Md. 332, 65 A. 49 (1906).

85. See *id.* at 339, 65 A. at 52 (holding that, under the abatement and wrongful death statutes, there are two separate and distinct causes of action arising out of the same wrongful act).

86. See *id.* at 340, 65 A. at 52.

87. See *id.* at 333, 65 A. at 49.

88. See *id.* at 333, 65 A. at 49-50.

89. See *id.* at 333, 65 A. at 50.

maintain a suit.<sup>90</sup>

The court thoroughly discussed both the wrongful death statute and the survival statute,<sup>91</sup> clarifying the scope of the survival statute and the damages recoverable under it.<sup>92</sup> It explained that the estate may recover only those damages that the decedent could have recovered had he survived and instituted the action himself,<sup>93</sup> and limited the recovery in a survival action to losses sustained between the decedent's time of injury and the time of death.<sup>94</sup> The court created this limitation in order to prevent an overlap of damages with those recoverable under the wrongful death statute.<sup>95</sup> With this decision, the *Stewart* court created a common-law rule that contradicted the legislative intent of the survival statute and the personal representative statute.<sup>96</sup> Unfortunately, this remains the rule of law in Maryland and has been relied upon in subsequent decisions prohibiting the recovery of future lost earnings.

#### B. *Stewart's Progeny*

Since *Stewart*, Maryland courts apply its rule to determine the recoverability of certain damages in a survival action for personal injuries.<sup>97</sup> In fact, the court of special appeals, in *Biro v. Schombert*,<sup>98</sup> looked to *Stewart* when asked to decide whether future lost earnings were recoverable in a survival action.

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90. *See id.*

91. *See id.* at 333-43, 65 A. at 50-53 (discussing the law in Maryland as it was settled in 1852 and its roots in English common law).

92. *See id.* at 342-43, 65 A. at 53 (stating that determination of damages requires close observance of the nature of the statute under which the action is brought).

93. *See id.*

94. *See id.* (identifying as compensable the deceased's pain and suffering, loss of time, and expenses between the time of injury and death).

95. *See id.* at 344, 65 A. at 54 (stating that to prevent defendants from being exposed to a danger of injustice, meaning double recovery, the damages under the survival statute must be limited to those sustained between the time of injury and the time of death).

96. *See supra* Part VI.A for a discussion of how *Stewart* contradicts the plain and clear language of the two statutes.

97. *See, e.g., Jones v. Flood*, 351 Md. 120, 126, 716 A.2d 285, 288 (1998) (acknowledging that under the survival statute, damages are limited to compensation for pain and suffering, loss of time, and expenses between the time of injury and death (quoting *Stewart*, 104 Md. at 343, 65 A. at 53)); *ACandS, Inc. v. Asner*, 104 Md. App. 608, 645, 657 A.2d 379, 397 (1995).

98. 41 Md. App. 658, 398 A.2d 519 (1979), *vacated on other grounds*, 285 Md. 290, 402 A.2d 71 (1979).

1. *Biro v. Schombert*

In *Biro*, the parents and personal representatives of a twenty year old boy killed in a head-on collision brought suit against the driver of the other automobile for both wrongful death and survival actions.<sup>99</sup> The trial court granted partial summary judgment as to the future damages claim, limiting recovery to \$2000 for funeral expenses.<sup>100</sup>

The single issue raised on appeal was whether the personal representative of the decedent's estate could recover for future lost earnings in a survival action brought by the personal representative.<sup>101</sup> The court made it clear that the limitation imposed by *Stewart* was proper and dispositive of the issue.<sup>102</sup> Thus, the court held future lost earnings are not recoverable in a survival action because they do not accrue before the time of death.<sup>103</sup>

In addition, the *Biro* court, in dicta, addressed the argument raised by the appellant that it is unjust to disallow recovery by a decedent's estate for future lost earnings when the person is killed by another's negligent conduct.<sup>104</sup> The appellants unsuccessfully argued that, under current Maryland law, a tortfeasor who kills another person is liable for a smaller amount of damages than if the tortfeasor were only to injure that person.<sup>105</sup>

The court gave two reasons why the appellant's claim was invalid.<sup>106</sup> First, the appellants, parents of the deceased, and others in their position, are not without a remedy.<sup>107</sup> The court illustrated that the Maryland legislature, in passing the wrongful death statute,

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99. *See id.* at 659, 398 A.2d at 520.

100. *See id.* at 660, 398 A.2d at 520.

101. *See id.* at 660, 398 A.2d at 521.

102. *See id.* at 665-66, 398 A.2d at 524 (stating that there is no valid claim for loss of future earnings because the clear message of *Stewart* is that an estate may only recover losses sustained between time of injury and death).

103. *See id.* at 666, 398 A.2d at 524 (reasoning that there can be no valid claim by the estate for the loss of future earnings if the claim ceases to accrue as of the time of death).

104. *See id.* (noting that the parents of the deceased are not without remedy and that the Legislature has had numerous opportunities to change the law if the *Stewart* decision was inconsistent with legislative intent).

105. This is because someone who is only injured may bring an action for personal injury themselves and recover loss of future earnings. *See id.* (noting the appellant's suggestion that under existing law, "it is cheaper to kill than to injure").

106. *See id.*

107. *See id.*

gave certain persons the right to maintain a suit for the loss suffered as a result of the wrongful death of another.<sup>108</sup>

Second, the *Biro* court stated that, since the Maryland Legislature had not overturned the *Stewart* decision by statutory enactment, the Legislature must have intended exactly what the *Stewart* court held.<sup>109</sup> However, it was not until the court's decision in *Biro* that the effects of this limitation on recovery surfaced and led to unjust results. Before *Biro*, there was no reason for the Legislature to modify the holding in *Stewart* with a statutory enactment. Interestingly, the *Biro* holding was short-lived; the court of appeals vacated it because the court of special appeals had no authority to hear the appeal on its merits.<sup>110</sup>

## 2. *Jones v. Flood*

It was not until 1997 in *Jones v. Flood*,<sup>111</sup> that an appellate court in Maryland again addressed whether a personal representative may recover future lost earnings in a survival action brought on behalf of the deceased for personal injuries caused by the wrongful act of another.<sup>112</sup> For many of the same reasons given by the court in *Biro*, the *Jones* court rejected the personal representative's claims.<sup>113</sup>

In *Jones*, the personal representative of a motorist killed in a collision with a county vehicle brought a survival action.<sup>114</sup> The circuit court granted summary judgment for the defendant on the ground that the plaintiff could not recover damages for future lost earnings and awarded funeral and medical expenses only.<sup>115</sup>

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108. *See id.* (explaining that the common-law concept of no recovery by anyone except the injured party was wisely remedied by the Legislature which provided in the statute that the wife, husband, parent, or child can maintain a wrongful death suit).

109. *See Biro*, 41 Md. App. at 666-67, 398 A.2d at 524 (stating that because the Legislature has not changed the *Stewart* decision through further statutory enactments, one can only conclude that the Legislature meant what the *Stewart* court said it meant).

110. *See Biro v. Schombert*, 285 Md. 290, 297, 402 A.2d 71, 75 (1979) (holding that the circuit court had no authority to make its decision final and appealable). Where the appellate court had no authority to hear the appeal on its merits, it is improper to rely upon the opinion therein and assert the opinion as support for the issue raised therein. *See Eastgate Assocs. v. Apper*, 276 Md. 698, 704, 350 A.2d 661, 665 (1976).

111. 118 Md. App. 217, 702 A.2d 440 (1997).

112. *See id.* at 220, 702 A.2d at 441.

113. *See supra* notes 101-09 and accompanying text.

114. *See Jones v. Flood*, 351 Md. 120, 122, 716 A.2d 285, 286 (1998).

115. *See Jones*, 118 Md. App. at 219, 702 A.2d at 441.

The decision by the court of special appeals, upholding summary judgment, was erroneous for two reasons. First, the court relied on its holding in *Biro* that future lost earnings are not recoverable by a personal representative in a survival action.<sup>116</sup> It was improper for the court of special appeals to do so because the decision was vacated by the court of appeals.<sup>117</sup> Second, the court also relied upon *Stewart's* interpretation of the scope of recovery under the survival statute,<sup>118</sup> erroneously concluding that because future lost earnings are recoverable under the wrongful death statute, those damages are not recoverable in a survival action.<sup>119</sup>

One year later, the Court of Appeals of Maryland heard this case as one of first impression.<sup>120</sup> The court, relying heavily on the legal conclusions in *Stewart*,<sup>121</sup> held that future lost earnings are not recoverable in a survival action.<sup>122</sup>

The court of appeals repeated the doctrine created by the *Stewart* court, that the survival statute limits the recovery of damages to only those sustained between the time of injury and the time of death.<sup>123</sup> The court used this judicially-created doctrine to exclude recovery of any future lost earnings.<sup>124</sup>

Additionally, the *Jones* court adopted the notion that the estate of a person tortiously killed is not, and never has been, a beneficiary of damages for wrongful death.<sup>125</sup> Therefore, the court reasoned that a personal representative's claim for future lost earnings is an

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116. *See id.* at 221, 702 A.2d at 442.

117. *See supra* note 110.

118. *See Jones*, 118 Md. App. at 221, 702 A.2d at 442 (limiting damages under the statute to pain and suffering, loss of time, and expenses between the time of injury and death).

119. *See id.* at 224, 702 A.2d at 443 ("Because damages for future loss of earnings . . . may be recovered in a wrongful death action as the pecuniary value of the life of the decedent, those damages are not recoverable in a survival action.").

120. *See Jones v. Flood*, 351 Md. 120, 716 A.2d 285 (1998).

121. *See id.* at 126, 716 A.2d at 288 (noting that Maryland courts have consistently applied the survival statute in accordance with the *Stewart* construction, that is, that it applies to pre-death harms only).

122. *See id.* at 131, 716 A.2d at 290 (concluding that "[i]f . . . the injured person is killed instantly, there are no future lost earnings damages in the survival action").

123. *See id.* (citing *Stewart* as support for proposition that damages are limited to pain and suffering, and loss of time and expenses between the time of injury and death).

124. *See id.*

125. *See id.* at 128, 716 A.2d at 289.

"end run around"<sup>126</sup> the limitation imposed by the wrongful death act, whereby only a certain class of individuals may benefit from an award of wrongful death damages—an element of which is future lost earnings.<sup>127</sup> The court emphasized that if a claim for future lost earnings was to survive, no limitation on the class of potential beneficiaries would exist.<sup>128</sup>

Further, the court held that allowing an estate to recover future lost earnings in a survival action would yield a double recovery.<sup>129</sup> This was based on the premise that the award would not be an accurate assessment of the amount the estate would have been enriched by the future earnings.<sup>130</sup> The court reasoned that an award to the estate for future lost earnings would not take into account the amount of money the decedent would have spent on the decedent's own personal expenses and for the support of others.<sup>131</sup>

Finally, the *Jones* court erroneously concluded that since future lost earnings are recoverable under the wrongful death statute, those damages are not recoverable in a survival action.<sup>132</sup> Unfortunately, the *Jones* court fell into the very trap warned of earlier, that the wrongful death statute and the survival statute provide for two separate causes of action.<sup>133</sup> Because the losses recovered under each are distinct, damages recovered under one statute cannot preclude recovery under the other.<sup>134</sup>

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126. *See id.*

127. *See id.* at 128-29, 716 A.2d at 289.

128. *See id.* at 129, 716 A.2d at 289 (stating that the class of persons who may sue for post-death earnings would extend far beyond the relationships specified in the wrongful death statute).

129. *See id.* (stating that allowing recovery for future lost earnings would duplicate the damages awarded in a wrongful death action).

130. *See id.* at 129-30, 716 A.2d at 289-90.

131. *See id.*

132. *See Jones*, 118 Md. App. at 224, 702 A.2d at 443 ("Because damages for future loss of earnings . . . may be recovered in a wrongful death action measured as the pecuniary value of the life of the decedent, those damages are not recoverable in a survival action.").

133. *See Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 342, 65 A. 49, 50 (1906).

134. *See supra* Part VI for a discussion of the distinction between wrongful death damages and survival damages; recovery under one does not preclude recovery under the other.

## VI. MARYLAND SHOULD PERMIT DAMAGES FOR FUTURE LOST EARNINGS IN A SURVIVAL ACTION

Several reasons exist why Maryland should permit recovery of future lost earnings in survival actions. Primarily, given the plain and clear language of the statute, Maryland courts cannot disregard the cardinal rule of statutory construction which provides that if the language of a statute is unambiguous, it must be followed. In addition, the legislative intent is clear that future lost earnings are to be included in damages recoverable under Maryland's survival statute. As support for these propositions, other jurisdictions adhere to these principles with similarly worded survival statutes. Finally, public policy demands that to avoid unjust results, survival action awards must include future lost earnings.

### A. *The Plain and Clear Language of the Statutes Should be Followed*

Regarding the courts' limitation on recoverable damages and on actions surviving the decedent's death, it must be noted that it is beyond the courts' judicial power to "disregard the natural import of words with a view toward making the statute express an intention which is different from its plain meaning."<sup>135</sup> However, beginning with *Stewart v. United Electric Light & Power Co.*,<sup>136</sup> and ending with the recent decision in *Jones v. Flood*,<sup>137</sup> Maryland courts have not adhered to this cardinal rule of statutory construction.<sup>138</sup> Instead, they have limited the types of damages recoverable in a survival action and effectively limited the causes of action that survive the death of the injured party.<sup>139</sup> This refusal to adhere to canons of statutory construction results from the courts' effort to prevent duplicating damages.<sup>140</sup> However, neither the *Stewart* court, nor any subsequent

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135. *Purifoy v. Mercantile-Safe Deposit & Trust*, 273 Md. 58, 66, 327 A.2d 483, 487 (1974).

136. 104 Md. 332, 65 A. 49 (1906).

137. 351 Md. 120, 716 A.2d 285 (1998).

138. *See supra* Part V.A-C.

139. *See generally Jones*, 351 Md. at 125, 716 A.2d at 287 (holding that an estate may not recover damages for future lost earnings in a survival action); *Stewart*, 104 Md. at 343, 65 A. at 53 (holding that the damages recoverable in a survival action are limited to only those losses sustained between the time of injury and the time of death).

140. *See Jones*, 351 Md. at 129, 716 A.2d at 289 (reasoning that if loss of future earnings were recoverable in a survival action, and were also recoverable in a wrongful death action, then a person may recover the same damages under two separate causes of action leading to a duplication of damages).

Maryland court, provide any rationale to support that such a policy was the intent of the Legislature. In the absence of such support, the plain and clear language of the statutes should not be ignored.<sup>141</sup>

Looking to the plain and clear language, the statute expressly provides that the estate may recover "funeral expenses . . . in addition to other damages recoverable in the action . . ." <sup>142</sup> Thus it is clear that the Legislature intended for *all* damages to be recoverable in a survival action commenced by the personal representative. From this reading, it follows that damages for future lost earnings were intended to be included in a survival action brought for personal injury.<sup>143</sup>

The current interpretation given to the survival statute by the Court of Appeals of Maryland contradicts the plain and clear language of the wrongful death and survival statutes, resulting in unjust results.<sup>144</sup> The survival statute expressly grants personal representatives the right to recover all damages "recoverable in the action."<sup>145</sup> There are no words of limitation in the statute.<sup>146</sup>

Because the plain and clear language of both statutes allows for survival of all actions and recovery of all damages, a limitation on the damages recoverable is contrary to what the Legislature intended.<sup>147</sup> Therefore, just as the *Stewart* court was incorrect fifty-five years ago in creating this limitation, it is equally wrong for the *Jones* court to uphold it.

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141. See *supra* note 66 and accompanying text.

142. MD. CODE ANN., EST. & TRUSTS § 7-401(y) (Supp. 1999).

143. See, e.g., *Monias v. Endal*, 330 Md. 274, 281, 623 A.2d 656, 659 (1993) (stating that loss of future earnings are recoverable in an action for personal injuries). See generally *Burke v. United States*, 605 F. Supp. 981, 998 (D. Md. 1985) (discussing the computation of lost earnings in a personal injury case); *Anderson v. Litzenberg*, 115 Md. App. 549, 572, 694 A.2d 150, 161 (1997) ("Essentially, an accident victim is entitled to be compensated to the extent his or her power to work . . . has been reduced by the injury.").

144. See *supra* note 124 and accompanying text (holding by the Court of Appeals of Maryland that lost earnings are not recoverable in a survival action in *Jones*); Part II.B (discussing Maryland's survival statute) and Part III.B (discussing Maryland's wrongful death statute).

145. MD. CODE ANN., EST. & TRUSTS § 7-401(y) (Supp. 1999).

146. See *id.*

147. See MD. CODE ANN., CTS. & JUD. PROC. § 6-401 (1998); MD. CODE ANN., EST. & TRUSTS § 7-401(y) (Supp. 1999); see also *Purifoy v. Mercantile-Safe Deposit & Trust Co.*, 273 Md. 58, 65-66, 327 A.2d 483, 487 (1974) (stating that legislative intent is ascertained by looking at the plain and clear language of the statute).



### B. *Legislative Intent*

"The cardinal rule of construction of a statute is to ascertain and carry out the legislative intent."<sup>148</sup> The primary source for determining legislative intent is the statute's language.<sup>149</sup> Furthermore, where the language is clear and free from ambiguity, there is generally no need to look beyond the statute to determine the Legislature's intent.<sup>150</sup>

The language used in the personal representative statute is clear and unambiguous,<sup>151</sup> and should therefore be used to determine the Legislature's intent regarding any limitation on this statute.<sup>152</sup> The language of the statute provides that, with the exception of slander, "a cause of action at law . . . survives the death of either party."<sup>153</sup> The Legislature clearly intended for all causes of action to survive. It logically follows that a personal injury action, brought to recover damages for future lost earnings, is included in the causes of action that survive.

Although the first survival statute appeared in 1795, at the time of the wrongful death statute's adoption in 1852, the ability to commence a survival action when death resulted from a tortious injury did not exist. By enacting the wrongful death statute, Maryland legislators sought to afford designated persons relief for injuries they

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148. *Purifoy*, 273 Md. at 65, 327 A.2d at 487 (citing *Scoville Serv., Inc. v. Comptroller*, 269 Md. 390, 306 A.2d 534 (1973)); accord *Board of Trustees v. Kielczewski*, 77 Md. App. 581, 587, 551 A.2d 485, 488 (1989) ("In determining that intent, the Court considers the language of an enactment in its natural and ordinary signification."). See generally *State v. Fabritz*, 276 Md. 416, 421, 423-24, 348 A.2d 275, 278, 280 (1975) (determining that the Legislature clearly intended the term "cause" in child abuse cases to include injuries resulting from cruel and inhumane treatment); *Scoville Serv.*, 269 Md. at 393, 396, 306 A.2d at 537-38 (holding that the Legislature did not intend for the common-place meaning of the word "admissions" to include parking fees).

149. See, e.g., *Kielczewski*, 77 Md. App. at 587, 551 A.2d at 488.

150. See *id.* at 587, 551 A.2d at 488 ("[I]f there is no ambiguity or obscurity in the language of the statute, there is usually no need to look elsewhere to ascertain the intent of the General Assembly."). See generally *Maryland Med. Serv., Inc. v. Carter*, 238 Md. 466, 478, 209 A.2d 582, 588-89 (1965) (finding that a statute regarding reimbursement of subscribers for medical services was unambiguous on its face, there was no need to look elsewhere).

151. See *infra* note 153; see also *supra* Part II.B.

152. See *Board of License Comm. v. Toye*, 354 Md. 116, 124, 729 A.2d 407, 411 (1999) ("[W]hen 'there is a lack of relevant legislative history, we must rely substantially on the language of the statutes in the context of the goals and objectives they seek to achieve.'").

153. See MD. CODE ANN., CTS. & JUD. PROC. § 6-401(a) (1999).

suffered due to a tortfeasor's actions. Thirty-six years later, these legislators again sought to expand the relief afforded to a tortfeasor's victims by deleting the restriction abating tort actions upon death.<sup>154</sup>

Since this expansion occurred after the enactment of the wrongful death statute, had the Legislature intended to eliminate the possibility of double recovery, they could have expressly distinguished the damages allowed under a survival action from those allowed in a wrongful death action.<sup>155</sup> The fact that no limiting language exists is significant, especially because the statutory language explaining non-economic damages in personal injury actions specifically references the wrongful death statute and expressly differentiates wrongful death action damages.<sup>156</sup>

In addition to the legislative intent expressed in the plain and clear language of Maryland's survival statute, the only explicit limitation provided is that actions for slander do not survive.<sup>157</sup> If the Legislature intended to further restrict the actions that survive, to exclude those for future lost earnings, it would have done this when the statute was adopted or last revised.<sup>158</sup> The Legislature has not

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154. See *supra* Part II.B.1; see also *Smith v. Gross*, 319 Md. 138, 151, 571 A.2d 1219, 1225 (1990) (Eldridge, J., dissenting) (noting that "[b]y the late nineteenth century, the exclusion for tortious injuries had been eliminated, giving executors and administrators full power to commence suits for the recovery of damages for injuries suffered by the testator or intestate in his lifetime").

155. See *supra* Part II.B.1.

156. See MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (a) providing:

In this section . . . (2)(i) "Noneconomic damages" means: 1. In an action for personal injury, pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury; and 2. In an action for wrongful death, mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education, or other noneconomic damages authorized under Title 3, Subtitle 9 of this article. (ii) "Noneconomic damages" does not include punitive damages. (3) "Primary claimant" means a claimant in an action for the death of person described under § 3-904(d) of this article.

*Id.*

157. See MD. CODE ANN., CTS. & JUD. PROC. § 6-401(b) (1998).

158. This is also a classic statutory construction argument known as *expressio unius est exclusio alterius*. See *Long v. State*, 343 Md. 662, 666 & n.1, 684 A.2d 445, 447 & n.1 (1996) ("[T]he expression of one thing is the exclusion of another." (quoting BLACK'S LAW DICTIONARY 581 (6th ed. 1990))). By expressly listing slander as a cause of action not covered by the statute, many courts would conclude that the Maryland General Assembly intended the statute to include all other causes of action. See *id.*; see also *BFP v. Resolution Trust*

done so.<sup>159</sup>

As noted earlier, neither the survival statute nor the personal representative statute limit the types of damages recoverable in a personal injury action brought under the survival statute.<sup>160</sup> The *Stewart* court correctly held that the estate may recover those damages that the decedent could have recovered, had the decedent survived.<sup>161</sup> This holding comports with the intent of the Legislature, given the clear and plain language of both statutes.<sup>162</sup> The *Stewart* court was not correct, however, in limiting those damages because the statute did not expressly provide for such a limitation.<sup>163</sup> The ability to create such a limitation rests solely with the Legislature and should be left alone by the courts.<sup>164</sup> It is incorrect for the court to do so to further a policy which prevents the overlap of damages, when such a policy is not the intent of the Legislature.<sup>165</sup> The court of appeals has stated that “where the language of the

Corp., 511 U.S. 531, 537 (1994); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir. 1989), *cert. denied*, 492 U.S. 924 (1989).

159. Compare MD. CODE ANN., CTS. & JUD. PROC. § 6-401(b) (1998), with MD. CODE ANN., CTS. & JUD. PROC. § 6-401(b) (Supp. 2000), wherein no changes have been made to the statute’s language.
160. See discussion *supra* Part IV.A.
161. See *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 342-43, 65 A. 49, 53 (1906) (noting that the damages recoverable under each statute are “entirely different”).
162. See MD. CODE ANN., CTS. & JUD. PROC. § 6-401(a) (Supp. 1998) (stating that a cause of action survives the death of either party whether real, personal, or mixed); MD. CODE ANN., EST. & TRUSTS § 7-401(y) (Supp. 1999) (stating that a personal representative may commence a claim for personal injuries under the survival statute and may recover all damages recoverable in the action); see also discussion *supra* Part IV.A.
163. See *Employment Sec. Admin. v. Browning-Ferris, Inc.*, 292 Md. 515, 526, 438 A.2d 1356, 1363 (1982) (stating that “courts will not, under the guise of statutory construction, supply omissions or remedy possible defects in a statute, or insert exceptions not made by the legislature”); *Collier v. Connolly*, 285 Md. 123, 128, 400 A.2d 1107, 1109 (1979) (stating that it is not proper for the courts in construing statutes to supply omissions or remedy defects in statutes, or to insert provisions not made by the legislature).
164. See *Consolidated Eng’g Co. v. Cooper*, 246 Md. 610, 615, 228 A.2d 823, 825 (1967) (declaring that the courts may interpret and construe laws, but only the legislature has the power to amend them).
165. See *Purifoy v. Mercantile-Safe Deposit & Trust Co.*, 273 Md. 58, 66, 327 A.2d 483, 487 (1974) (stating that it is beyond the courts’ liberty to disregard the natural import of the clear and unambiguous words of a statute with a view towards making the statute express an intention different from its plain meaning).

statute is clear and explicit, . . . the court cannot disregard the mandate of the Legislature and insert an exception, where none has been made by the Legislature, for the sake of relieving against hardship or injustice."<sup>166</sup>

Furthermore, the losses sought under each statute are completely different.<sup>167</sup> Recovery of future lost earnings under the survival statute compensates the estate for a separate loss than for lost earnings under the wrongful death statute.<sup>168</sup> Therefore, it is not true, as the *Jones* court stated, that allowing such recovery would eliminate the line drawn by the Legislature under the wrongful death statute.<sup>169</sup> The line would still remain for limiting those who could recover damages under the wrongful death statute for the loss suffered due to the tort victim's death.<sup>170</sup> The Legislature never intended to limit the recovery of damages under the survival statute for the loss suffered by the tort victim, so limiting an estate from recovery would undermine the Legislature's intent. By limiting the survival statute, Maryland courts violated this doctrine of statutory construction.

*C. Other Jurisdictions Have Followed Similar Interpretations of the Survival Statutes*

The interpretation of the survival statute, as including damages for future lost earnings, has been adopted by courts in the District of Columbia<sup>171</sup> and in the State of Washington.<sup>172</sup> Interpreting a survival statute<sup>173</sup> similar in language to Maryland's, District of Colum-

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166. *Schmeizl v. Schmeizl*, 186 Md. 371, 375, 46 A.2d 619, 621 (1946) (noting that where there is ambiguity in the statute or the intention of the Legislature is doubtful, the court may look to the consequences but a judge does not have the power to mold the statute in accordance with his notions of justice).

167. *See Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 343-44, 65 A. 49, 54 (1906).

168. *See id.* at 343, 65 A. at 53 (stating that recovery under the survival statute is limited to compensation for pain and suffering and loss of time and expenses whereas recovery under the wrongful death statute is measured by the value of life of the party entitled to damages).

169. *See Jones v. Flood*, 351 Md. 120, 129, 716 A.2d 285, 289 (1998) (stating that if loss of future earnings damages were permitted, the class of persons who may sue for post-death earnings would extend far beyond the relationships specified in the wrongful death statute).

170. *See MD. CODE ANN., CTS. & JUD. PROC. § 3-904* (1998).

171. *See Runyon v. District of Columbia*, 463 F.2d 1319 (D.C. Cir. 1972).

172. *See Criscuola v. Andrews*, 507 P.2d 149 (Wash. 1973).

173. *See D.C. CODE ANN. § 12-101* (Supp. 1999). The statute provides, "[o]n the death of a person in whose favor or against whom a right of action has ac-

bia courts hold that the purpose of the survival statute is to place the decedent's estate in the same position it would have enjoyed had the decedent's life not been prematurely terminated.<sup>174</sup> The District of Columbia Circuit also holds that a proper recovery under the statute includes future lost earnings.<sup>175</sup>

In further support of including future lost earnings under the Maryland survival statute, the Supreme Court of Washington, interpreting a survival statute similar to Maryland's, held that allowing prospective earnings is consistent with the rule that "all" personal injury causes of action survive.<sup>176</sup> The court recognized that some jurisdictions have limited recovery in survival statutes to losses incurred before death, in an effort to avoid double recovery where an action for wrongful death is also brought.<sup>177</sup> The court found that, while limiting such damages is one way to provide for damages under the survival statute to prevent double recovery, it is "an inappropriate procedure."<sup>178</sup> The court reasoned that limiting recovery in a survival action to the net accumulations of the deceased obviates the problem of double recovery where a wrongful death action is also brought.<sup>179</sup>

#### D. *Unjust Results Exist Under Current Maryland Law*

When a tortfeasor is liable for causing injuries or losses to another, the tortfeasor must be responsible for compensating the victim for such injuries or losses.<sup>180</sup> Thus, if a tortfeasor causes another to lose all future earnings, that tortfeasor is liable for compensating

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crued for any cause prior to his death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased." *Id.*

174. *See, e.g.*, *Graves v. United States*, 517 F. Supp. 95, 99 (D.D.C. 1981) ("Recovery under the Survival Statute is comprised of that which the deceased would have been able to recover had he lived." (citing *Semler v. Psychiatric Inst. of Washington, D.C., Inc.*, 575 F.2d 922, 925 (D.C. Cir. 1978))).

175. *See Runyon*, 463 F.2d at 1321-22 ("Pursuant to the Survival Statute, we think it is proper for the estate of the deceased to recover an amount based on probable net future earnings, discounted to present worth . . .").

176. *See Criscuola*, 507 P.2d at 150-51 (holding that all personal injury causes of action survive including damages for loss of prospective earnings).

177. *See id.* at 150.

178. *Id.*

179. *See id.*

180. *See Krawill Mach. Corp. v. Rubert C. Herd & Co.*, 145 F. Supp. 554, 559 (D. Md. 1956) ("The general rule is that a person is liable for all pecuniary damages proximately caused by any negligence with which he is chargeable.").

that person for those future lost earnings.<sup>181</sup> Consequently, when a person dies due to another's negligence, it is only equitable that the estate be allowed to recover future lost earnings in a survival action.<sup>182</sup> Allowing a tortfeasor to escape liability creates a windfall for the tortfeasor.<sup>183</sup>

The *Jones* court's holding was improper and evidenced the court's confusion regarding recovery under the wrongful death statute and the survival statute, despite the lengthy discussion of the issue in *Stewart*.<sup>184</sup> The court mistakenly assumed that a remedy for the parents would somehow compensate for all of the damage from the victim's death, resulting in a windfall for the tortfeasor.<sup>185</sup> The court incorrectly equated the right to recover certain damages under the wrongful death statute as being sufficient compensation for the loss sustained by the estate under the survival statute.<sup>186</sup> The

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181. *See id.*

182. *See* Karl L. Rubinstein, *Personal Injuries and the Texas Survival Statute: The Case for Recovery of Damages for Decedent's Lost Future Earnings*, 12 ST. MARY'S L.J. 49, 54 (1980) (stating that the estate suffers economic harm and financial loss due to loss of future earnings). Since the primary reason for recovering damages is to compensate for a loss caused by someone else, it is only fair that the estate be allowed to recover those losses it has suffered. *See* 8 M.L.E. *Damages* § 4 (1985). Maryland Law Encyclopedia states:

The primary object of an award of damages in a civil action, and the theory upon which it is based, is just compensation or indemnity for the loss or injury sustained, so that the injured party may be made whole, and restored, as nearly as possible, to the position or condition he was in prior to the injury.

*Id.* (citing *Weishaar v. Canestrone*, 241 Md. 676, 217 A.2d 525 (1966); *Kahn v. Carl Schoen Silk Corp.*, 147 Md. 516, 128 A. 359 (1925); 25 C.J.S. *Damages* § 3 (1966)).

183. *See* Rubinstein, *supra* note 182, at 67 ("Unless the estate is allowed to recover for the net lost future earnings that would have been contributed to it, then [the] law would be allowing only a 'fractional recovery.' A fractional recovery should be as abhorrent as a double recovery or triple recovery."); *see also* *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 159, 297 A.2d 721, 727 (1972) ("[I]f a wrongdoer may be punished if his victim lives, then surely he should not escape the retribution if his wrongful act causes a death.") (quoting *Leahy v. Morgan*, 275 F. Supp. 424, 425 (E.D. Iowa 1967))).

184. *See* *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 339, 65 A. 49, 52 (1906) (stating that the survival statute and wrongful death statute are two separate and distinct actions and allow for separate and distinct recoveries).

185. *See* *Jones v. Flood*, 351 Md. 120, 131, 716 A.2d 285, 290 (1998).

186. *See* *Biro v. Schombert*, 41 Md. App. 658, 666, 398 A.2d 519, 524 (1979) (inferring that the fact that parents are not without a remedy means that they will be adequately compensated).

*Stewart* court made clear that actions created by the two statutes are distinct.<sup>187</sup> Recovery under one statute does not preclude recovery under the other. Therefore, not only is there a windfall to the wrongdoer, but there exists insufficient compensation to the decedent's estate.

Also, when a tortfeasor causes the death of another, and therefore causes a total loss of all future earnings, not only has the decedent suffered a loss, but the estate of the decedent has also suffered a loss.<sup>188</sup> If the victim lives, then that person will be able to recover future lost earnings in a personal injury action to the ultimate benefit of the estate.<sup>189</sup> However, if the person dies before bringing that cause of action, then the estate will not be entitled to recover for that loss.<sup>190</sup> The subsequent death of the individual should not be grounds for denying the estate recovery.<sup>191</sup>

Finally, the *Stewart* court concluded that the Legislature adopted the survival statute to provide recovery for losses not allowed under the wrongful death statute.<sup>192</sup> Under the latter statute, the only losses recoverable for a wrongful or negligent death are those suffered by others as a result of the death.<sup>193</sup> These losses do not include future lost earnings sustained by the deceased.<sup>194</sup> How-

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187. See *Stewart*, 104 Md. at 339, 65 A. at 52 ("The suits are by different persons, the damages go into different channels and are recovered upon different grounds, and the causes of action, though growing out of the same wrongful act or neglect, are entirely distinct.").

188. See Rubinstein, *supra* note 182, at 54 (stating that future lost earnings are a loss to the estate causing economic harm and financial loss).

189. See *Monias v. Endal*, 330 Md. 274, 280, 623 A.2d 656, 659 (1993).

190. See *Jones v. Flood*, 351 Md. 120, 131, 716 A.2d 285, 290 (1998).

191. See *Stewart*, 104 Md. at 344, 65 A. at 54 ("[I]f a person be wrongfully injured, the pain and suffering and expense to him in consequence thereof shall not be lost to his estate by the circumstance of his death from the injury before receiving satisfaction for his damages . . . ." (quoting *Brown v. Chicago N.W. Ry. Co.*, 78 N.W. 771, 777 (Wis. 1899))); see also Rubinstein, *supra* note 182, at 55.

192. See *Stewart*, 104 Md. at 339, 65 A. at 52 (stating that it is presumed that the legislature intended, by the enactment of the survival statute, to give a remedy for injuries which the wrongful death statute did not provide).

193. See MD. CODE ANN., CTS. & JUD. PROC. § 3-904 (1998); *ACandS, Inc. v. Asner*, 104 Md. App. 608, 645, 657 A.2d 379, 397 (1995) (noting that in a wrongful death action, damages are measured in terms of harm to others from the loss of the decedent); see also discussion *supra* Part III.A (discussing losses recoverable under the wrongful death statute).

194. See *ACandS*, 104 Md. App. at 643-45, 657 A.2d at 396-97. Section 3-904 of the Courts and Judicial Proceedings Article does provide that future lost earnings

ever, the survival statute does provide recovery for these losses.<sup>195</sup> Therefore, if the courts do not allow the estate to recover future lost earnings in a survival action, a loss would exist that is neither recoverable under the wrongful death statute nor the survival statute. It would be a grave disservice for Maryland courts to continue to allow such a loss to go unrecovered because "[t]he fundamental goal of tort recovery is compensation of the victim, i.e., to put the victim, insofar as money damages may do so, in the position he would have been absent the tort."<sup>196</sup>

#### VII. PROBLEMS NOTED BY MARYLAND COURTS ARE NOT AN ISSUE WITH THIS SUGGESTED APPROACH

The *Jones* decision appears well-supported and reasoned, given the decisions leading up to it.<sup>197</sup> Unfortunately, just as earlier Maryland courts had done, the *Jones* court adopted a judicially created doctrine contrary to legislative intent, confused and misapplied the related, but separate and distinct, wrongful death and survival statutes, and adhered to judicial precedents resulting in inequitable and unjust consequences. In fact, the *Jones* court used a hypothetical similar to the one at the beginning of this Comment,<sup>198</sup> yet did not recognize the inequitable and unjust results it demonstrated.<sup>199</sup> Therefore, the justification for changing the law becomes even clearer after addressing the problems which surfaced as a result of the *Jones* decision.

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are included in the evaluation of damages. However, they are limited to the amount of loss of support that the claimant has suffered as a result of the person's death. See *Metzger v. Steamship Kristen Torm*, 245 F. Supp. 227, 234 (D. Md. 1965) (explaining that damages may be awarded under the wrongful death statute to a widow for both present and future pecuniary losses suffered by her as a result of the death of her husband). Therefore, the loss of support suffered by those other than the deceased is different and distinct from the loss of future earnings suffered by the deceased, and recovery for that loss does not equate with compensation for any loss suffered by the deceased. See *Stewart*, 104 Md. at 339, 65 A. at 52.

195. See discussion *supra* notes 42-45 and accompanying text.

196. *Tucker v. Calmar Steamship Corp.*, 356 F. Supp. 709, 711 (D. Md. 1973) (citing 25 C.J.S. *Damages* § 71, at 836 (1966); 2 FOWLER V. HARPER & FLEMING JAMES JR., *THE LAW OF TORTS* § 25.1, at 1299 (1956)).

197. See discussion *supra* Part V.

198. See *supra* Part I.

199. See *Jones v. Flood*, 351 Md. 120, 131-32, 716 A.2d 285, 290 (1998) (stating that if a person lives to the date of judgment in a personal injury action, the person may recover future lost earnings; but if a person dies before judgment, there are no future lost earnings damages).



### A. *Double Recovery*

The court in *Jones* concluded that if losses for future earnings were recoverable in survival actions, double recovery would be possible.<sup>200</sup> The *Stewart* court first embraced the decision to limit damages recoverable in a survival action to those between the time of injury and the time of death to prevent duplicating damages.<sup>201</sup> Unfortunately, the *Stewart* court misapplied the notion of double recovery with regard to the survival and wrongful death actions, as did the court in *Jones*.

In general, double recovery occurs when the plaintiff recovers twice for the same wrong or for the same element of damage.<sup>202</sup> For example, in a personal injury action, if a plaintiff is awarded damages for both impairment of her ability to earn money and for impairment of her physical ability to perform certain tasks, no double recovery would occur, as both essentially amount to "lost future earnings."<sup>203</sup>

However, recovery of future lost earnings in a survival action is different. *Both* the wrongful death beneficiaries and the decedent's estate are entitled to recover for that loss, because *both* have been deprived of the benefits of the decedent's future earnings.<sup>204</sup> To allow the wrongful death beneficiaries to recover, but not the decedent's estate, results in a windfall to the tortfeasor, while the estate receives only a fractional recovery.<sup>205</sup> Therefore, the limitation placed on recovery of damages in a survival action has no effect on preventing double recovery; rather it causes the decedent's estate to recover only a fraction of its actual loss. A fractional recovery is just as intolerable as a double recovery, or worse, since the primary pur-

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200. *See id.* at 125, 716 A.2d at 287 (stating that if loss of future earnings was recoverable, there would be a "high risk of duplicating the damages in a companion wrongful death case").

201. *See Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 344, 65 A. 49, 54 (1906) (stating that in order to prevent defendants from being exposed to a danger of injustice, meaning double recovery, the damages under the survival statute must be limited to those sustained between time of injury and time of death).

202. *See Shapiro v. Chapman*, 70 Md. App. 307, 315, 520 A.2d 1330, 1334 (1987) (stating that a plaintiff may not recover twice for the same tort).

203. Rubinstein, *supra* note 182, at 66-67 (providing a similar example of a plaintiff unable to recover for the same tort).

204. *See id.* at 67 (noting that while a defendant should not be required to pay *more than once* for the same element of damage, a tortfeasor, nevertheless, should be required to pay *once* for each element of damage).

205. *See id.*

pose of recovery of damages is to be compensated justly and fairly for the losses sustained as a result of another's acts.<sup>206</sup>

Furthermore, the limitation applied by the court in *Stewart* is unsound given the court's own conclusion that both the wrongful death statute and the survival statute create two distinct causes of action that provide for two separate recoveries.<sup>207</sup> By their very nature, damages recovered under one would not overlap with damages recovered under the other.<sup>208</sup>

By holding that damages for future lost earnings are not recoverable in a survival action, Maryland courts have not followed the letter of the personal representative statute.<sup>209</sup> That statute expressly grants personal representatives the right to recover all damages "recoverable in the action;"<sup>210</sup> there is no limitation in the statute.

The *Jones* court specifically misapplied Maryland's survivor statute,<sup>211</sup> limiting the type of damages recoverable, by precluding a personal representative's recovery of future lost earnings.<sup>212</sup> The court's rationale for limiting survival action damages to only those incurred between the time of injury and death was that if an award of damages were extended beyond death, the type of damages awarded would overlap with those damages recoverable under the wrongful death statute.<sup>213</sup>

The court of appeals contended that the estate's attempt to recover future lost earnings suffered by the deceased was actually the

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206. See *Tucker v. Calmar Steamship Corp.*, 356 F. Supp 709, 711 (D. Md. 1973) (noting that the fundamental goal of tort recovery is compensation of the victim); 25 C.J.S. *Damages* § 3, at 626 (1966) (stating that the primary object of civil damages awards is just compensation).

207. See *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 339, 65 A. 49, 52 (1906).

208. See *id.* at 342-44, 65 A. at 53-54 (clarifying that the two actions accomplish different results and are for the benefit of wholly different persons, thereby the satisfaction of one can in no way affect the other); see also discussion *supra* Part VI.C.

209. See MD. CODE ANN., EST. & TRUSTS § 7-401(y) (Supp. 1999).

210. *Id.*

211. See MD. CODE ANN., CTS. & JUD. PROC. § 6-401 (1998).

212. See *Jones v. Flood*, 351 Md. 120, 131-32, 716 A.2d 285, 290 (1998) (refusing to expand the damages recoverable in a survival action beyond death).

213. See *id.* at 125, 716 A.2d at 287 (stating that the court declines to include post-death lost earnings in a survival action because the change would involve a high risk of duplication of the damages in a companion wrongful death action); *Stewart*, 104 Md. at 344, 65 A. at 54 (stating that the defendant will not be exposed to any injustice, meaning double recovery, because the recovery is limited to the loss actually sustained by the deceased prior to death).

estate's attempt to recover damages only intended for designated beneficiaries.<sup>214</sup> The court made it clear that the legislature created a class of individuals who were permitted to recover a decedent's future lost earnings under the wrongful death statute, and an attempt to recover those future lost earnings in a survival action undermined that limitation.<sup>215</sup> Here, the court misapplied and confused the two statutes.

Because a wrongful death action and a survival action are separate and distinct causes of action,<sup>216</sup> it follows that no where does recovery under one overlap with recovery under the other.<sup>217</sup> Put another way, an attempt to recover certain damages under the survival statute is separate and distinct from an attempt to recover certain damages under the wrongful death statute.<sup>218</sup> Therefore, the court incorrectly stated that the estate's attempt to recover future lost earnings in a survival action is actually an attempt to recover damages only permitted under the wrongful death statute.<sup>219</sup>

The rationale for allowing recovery of future lost wages and further dispelling the fear of double recovery is found in *Monias v. Endal*,<sup>220</sup> a case decided by the Maryland Court of Appeals in 1993. In *Monias*, the court decided whether an award for future lost earnings due to premature death was recoverable.<sup>221</sup> The court distinguished a "personal injury" action from a wrongful death action.<sup>222</sup> That distinction is critical because, in contrast to a wrongful death

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214. See *Jones*, 351 Md. at 128-29, 716 A.2d at 289 (stating that because the legislature has limited who may and may not recover post-death earnings by way of the wrongful death statute, a survival action for loss of future earnings is an "end-run around" that limitation in an effort to collect post-death earnings).

215. See *id.* (stating that the Jones's action is an attempt to undermine the legislatively imposed limitation).

216. See *supra* Part IV.

217. See *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 343-44, 65 A. 49, 54 (1906) (stating that since a wrongful death action and survival action are separate and distinct causes of action which allow for the recovery of damages for two separate and different types of losses that are sustained by two separate and distinct classes of persons, then recovery under one can in no way affect the other).

218. See *id.* (stating that "neither of those actions is the alternative of, or substitute for, the other").

219. See *id.* at 344, 65 A. at 54 (stating that the estate will not lose any recovery on a survival action if the estate subsequently pursues a wrongful death action).

220. 330 Md. 274, 623 A.2d 656 (1993).

221. See *id.* at 279, 623 A.2d at 658.

222. See *id.*

action, among the possible types of survival actions is a personal injury action initiated or continued by the estate administrator.

In *Monias*, the personal injury action was initiated while the tort victim was alive.<sup>223</sup> The court recognized the potential for double recovery if the victim's husband was awarded damages for "loss of support" in a wrongful death action.<sup>224</sup> Rather than shy away from providing a just recovery for this victim, the court merely espoused that the "plaintiff's recovery in this action will obviously preclude a subsequent claim for loss of support in a wrongful death action for at least the same years included in the lost earnings award."<sup>225</sup> The court of appeals felt no need to establish a rigid formula to ensure that double recovery did not occur.

In addition, the court considered whether the plaintiff could recover "loss of income" for the "lost years," i.e., the years between the plaintiff's premature death and the normal expected retirement age.<sup>226</sup> Despite an earlier ruling that a plaintiff was not generally entitled to "lost years" recovery, the court determined the proper measure of damages to be the "loss of earnings based on the plaintiff's life expectancy had the tortious conduct not occurred, rather than loss of earnings based on the plaintiff's post-tort shortened life expectancy."<sup>227</sup> The court further reasoned that it could not "permit the tortfeasor to reduce liability . . . by reducing the victim's life expectancy."<sup>228</sup>

In sum, a double recovery exists when a defendant pays twice for the *same* loss. The survival statute and the wrongful death statute provide for recovery of *two different* losses.<sup>229</sup> Therefore, allowing wrongful death beneficiaries to recover the loss of the decedent's future earnings, and allowing the decedent's estate to recover the loss of the decedent's future lost earnings, will not lead to a double recovery.<sup>230</sup>

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223. *See id.* at 276, 623 A.2d at 657.

224. *See id.* at 279-80, 623 A.2d at 658.

225. *Id.*

226. *See id.* at 280-81, 623 A.2d at 659.

227. *Id.* at 281, 623 A.2d at 659 (noting that in the previous holding, the specific issue of "lost earnings" was not before the court).

228. *Id.* at 282, 623 A.2d at 660.

229. *See Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 343, 65 A. 49, 53 (1906).

230. *See Rubinstein*, *supra* note 182, at 67-68.

*B. Courts Accept and Encourage Deviation From Well-Established Law If Adherence Is Unsound or No Longer Suitable*

The principle of stare decisis is a policy whereby courts adhere to precedent rather than departing from settled points of law.<sup>231</sup> This principle affords certainty and stability in the law.<sup>232</sup> However, where the rule has become unsound and no longer suitable, the court may, and should, ignore the doctrine and depart from settled law.<sup>233</sup>

Currently, future lost earnings are not recoverable in a survival action.<sup>234</sup> However, because further adherence to this law leads to fractional recovery for the decedent's estate and allows the tortfeasor a windfall, a change in the law is necessary, despite the importance of stare decisis.<sup>235</sup>

Maryland courts have used varying rationales for changing common-law principles. For instance, Maryland courts have relied upon legislative public policy pronouncements in statutes to uphold deci-

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231. See 7 M.L.E. *Courts* § 52 (1985); BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). The doctrine of stare decisis reflects a "policy which entails the reaffirmation of a decisional doctrine of an appellate court, even though if considered for the first time, the Court [sic] might reach a different conclusion." See *Harrison v. Montgomery Co. Bd. of Educ.*, 295 Md. 442, 458, 456 A.2d 894, 902 (1983).

232. See *Post v. Bregman*, 112 Md. App. 738, 761, 686 A.2d 665, 676 (1996) (stating that the doctrine of stare decisis allows society to take comfort in knowing what the law is, and what it will be in the future); *Harrison*, 295 Md. at 458-59, 456 A.2d at 902 (stating that stare decisis exists for certainty and stability); *Deems v. Western Md. Ry. Co.*, 247 Md. 95, 102, 231 A.2d 514, 518 (1966) (stating that, for certainty and stability, the doctrine of stare decisis is invoked, usually leaving changes to the Legislature).

233. See *Post*, 112 Md. App. at 761, 686 A.2d at 675 (stating that stare decisis directs courts to avoid disturbing precedent unless the rule of law has become unsound and no longer suitable); *Harrison*, 295 Md. at 459, 456 A.2d at 903 (stating that stare decisis does not prevent the court from changing a common-law rule where in light of changed circumstances or knowledge, the rule has become unsound or no longer suitable); *Pride Mark Realty v. Mullins*, 30 Md. App. 497, 506, 352 A.2d 866, 871 (1976) (stating that the doctrine of stare decisis is not to be followed if the court is shown that the rule has become unsound in the circumstances of modern life); see also *White v. King*, 244 Md. 348, 355, 223 A.2d 763, 767 (1965) (stating that in determining whether a law should be changed, the courts should consider the law's application on a case-by-case basis, look at whether different factual situations present new difficulties to be resolved, and whether there exist new factors to be weighed).

234. See *Jones*, 351 Md. at 131, 716 A.2d at 290.

235. See *supra* notes 183, 231-34 and accompanying text.

sions modifying the common law.<sup>236</sup> At other times, the courts have looked solely to the persuasive authority of secondary sources and other jurisdictions to alter previously held common-law principles.<sup>237</sup>

At times, judges refuse to change a common-law principle under *stare decisis* or because they recognize that it is the legislature's role to declare public policy, and that decisions to alter such legal principles should be left to the Maryland General Assembly.<sup>238</sup> Maryland courts rely on the presumption that legislators are aware of judicial statutory interpretations, and thereby acquiesce when they do not overturn such judicial interpretations.<sup>239</sup> This presumption is strengthened when a statute is re-enacted, following judicial interpretation, without substantive change.<sup>240</sup> At times, the Maryland courts have *assumed*, and not merely presumed, that General Assembly inaction indicates an intent to maintain the status quo, because the legislators were "certainly aware" of the judicial arguments advanced for changing the common law, but chose not to act despite "repeated reminders of [their] role in the matter."<sup>241</sup>

This presumption is not a universal view, and even the United States Supreme Court has cautioned against reading too much into legislative inaction, especially when legislators do not provide an ex-

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236. See *McGarvey v. McGarvey*, 286 Md. 19, 27-28, 405 A.2d 250, 254-55 (1979) (relying upon the statutory acceptance that a prior criminal conviction does not necessarily equate to lack of witness veracity to remove the common-law bar for persons with a prior criminal conviction from performing a will attestation).
237. See *Harris v. Jones*, 281 Md. 560, 564, 380 A.2d 611, 613 (1977) (upholding the decision, based on the lower court's rationale, to allow a tort action solely for intentional infliction of emotional distress). The court of special appeals based its conclusion upon the policy reasons in the Restatement (Second) of Torts, and the court of appeals dually noted that this change would be consistent with 37 other jurisdictions. See *id.* at 564, 380 A.2d at 613.
238. See *Harrison*, 295 Md. at 460, 456 A.2d at 903 (listing various cases supporting this proposition and the particular common-law rule left unchanged).
239. See *Sandford v. Maryland Police Training and Correctional Comm'n*, 346 Md. 374, 383, 697 A.2d 424, 428 (quoting "had the legislature intended to include . . . [it] within the terms of the statute, it would have done so, and since it did not, the implication is that . . . [it was] purposefully excluded" (citations omitted)).
240. See *Workers' Compensation Comm. v. Driver*, 336 Md. 105, 121, 647 A.2d 96, 104 (1994).
241. *Austin v. City of Baltimore*, 286 Md. 51, 55-56, 405 A.2d 255, 257 (1979) (supporting this assertion of the legislators' awareness by noting numerous cases abrogating the common-law sovereign immunity doctrine).

planation for this inaction.<sup>242</sup> The Supreme Court reasoned that lack of repudiation by Congress of the Court's decision did not "serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions" remain sound.<sup>243</sup>

The court in *Jones* rejected the plaintiff's attempt to change the law in Maryland so that future lost earnings would be recoverable, because the change would "effect a substantial upheaval in well-established Maryland law, contrary to the stare decisis principle . . . ."<sup>244</sup> Although such change would cause a substantial deviation from well-established law, it is nonetheless necessary and compelling in light of the inequitable and unjust results that adherence to the law continues to create.

Certainly, if stare decisis was a simple concept to apply, the conclusion would suggest placing pressure on the legislators to provide statutory relief that values the victim's interest over the tortfeasor's. But stare decisis is not a simple, "one-size fits all" doctrine.<sup>245</sup>

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242. See *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940) (categorizing this as a "venture into speculative unrealities").

243. *Id.* at 119 (stating that "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines").

244. See *Jones*, 351 Md. at 125, 716 A.2d at 287.

245. See, e.g., *Howard v. Bishop Byrne Council Home, Inc.*, 249 Md. 233, 238 A.2d 863 (1968) (refusing to abrogate the common-law charitable immunity rule noting that the 1947 General Assembly refused to adopt House Bill 99, preventing a charitable institution from using the immunity defense, and noting that, where "present statutes are tangible evidence" that after careful investigation the legislature "arrived at a solution [they] deemed satisfactory," the court is not at liberty to change this public policy pronouncement); *Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951) (emphasizing the General Assembly's resistance to change the contributory negligence doctrine by rejecting 21 legislative bills over the course of 17 years as indicating a clearly announced public policy decision). But see *Boblitz v. Boblitz*, 296 Md. 242, 273-74, 462 A.2d 506, 521-22 (1983) (where the court of appeals willingly accepted the challenge to look to changed circumstances and decided that the common law was unsound in light of modern life); *Harrison*, 295 Md. at 461 n.12, 456 A.2d at 904 n.12 (listing cases where the common law was changed or supplemented despite legislative inaction); *Adler v. American Standard Corp.*, 291 Md. 31, 45, 432 A.2d 464, 472 (1981) (determining that they were not restricted to find public policy pronouncements in "legislative enactments, prior judicial decisions or administrative regulations," the *Adler* court did recommend caution when adopting previously "undeclared public policy"); *Lewis v. State*, 285 Md. 705, 709, 404 A.2d 1073, 1075 (1975) (finding no reason to be

Refuting the stare decisis argument becomes easier when the trend among other jurisdictions is to abrogate the common law.<sup>246</sup> In *Lusby v. Lusby*,<sup>247</sup> the court held the common-law spousal immunity doctrine inapplicable to an intentional tort case because many jurisdictions had abrogated the doctrine, since the issue was first decided in that state ten years earlier.<sup>248</sup> Notably, the court, relying on trends among other jurisdictions, specifically addressed the public policy concerns against reducing tortfeasor liability.

This result is consistent with the general principle that if tortious injury exists, there should be recovery, and only strong public policy arguments should justify judicially created immunity for tortfeasors, and a bar to recovery for injured victims.<sup>249</sup>

When dealing with a judicially created legal principle, where public policy strongly demands a change to avoid an illogical result, legislative inaction cannot be allowed to immobilize the judicial system. To accomplish the task before them, judges should analyze "the public policy concerns raised by the parties and by the other courts which have grappled with th[e] issue."<sup>250</sup>

The distinguishing feature in this instance is that the wrongful death and survival statutes at issue were enacted many years ago and have continued without substantive changes for over a century. These are not statutes under constant review; legislation attempting to alter their provisions is not frequently introduced. Courts continue to deny lost wages in a survival action by hiding behind the stare decisis "legislative inaction" cloak, repeatedly relying upon dicta made by a court at the turn of the twentieth century.<sup>251</sup> Princi-

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bound by stare decisis when the changed conditions and illogical result of the common-law principle mandated such action, and noting that Maryland was the only jurisdiction holding onto the common-law procedural rule under the accessoryship doctrine, precluding accessory adjudication before sentencing a principal).

246. See *Lusby v. Lusby*, 283 Md. 334, 346-47, 390 A.2d 77, 82-83 (1978). Due to the division among judicial decisions, the *Lusby* court also relied upon the "nearly unanimous" opinions of professional commentators criticizing the spousal immunity doctrine. *Id.* at 350, 390 A.2d at 84.

247. 283 Md. 334, 390 A.2d 77 (1978).

248. See *id.*

249. See *id.* at 347, 390 A.2d at 83 (quoting *Lewis v. Lewis*, 351 N.E.2d 526, 532 (Mass. 1976)).

250. *Gaver v. Harrant*, 316 Md. 17, 30, 557 A.2d 210, 217 (1989) (continuing to develop the judiciary's role of discerning social policy).

251. See *State v. Wilson*, 106 Md. App. 24, 39, 664 A.2d 1, 8 (1995) (suggesting that dicta "should be given the weight [such words] would be given if the judge



ples of public policy should guide the courts, rather than placing continued emphasis upon the doctrine of stare decisis, a principle which, in this instance, ignores the changed circumstances of modern life.

C. *The Court of Appeals Previously Adopted Similar Reasoning*

The Court of Appeals of Maryland, in *Smith v. Gray Concrete Pipe Co.*,<sup>252</sup> determined that punitive damages are recoverable by a personal representative in a survival action, utilizing the same reasoning proposed here.<sup>253</sup> *Smith* involved a personal injury action brought by the personal representative of the deceased's estate under the survival statute.<sup>254</sup> The personal representative, the parent of a minor child killed in an automobile accident, brought suit against a corporate defendant and its employee.<sup>255</sup> The suit was based on the negligent entrustment of the employee with a company truck, and the personal representative sought damages from the company through respondeat superior.<sup>256</sup> The personal representative also sought the recovery of punitive damages.<sup>257</sup>

The court observed that neither the survival statute, nor the personal representative statute, mentioned the type of damages recoverable by the personal representative in a survival action for personal injuries.<sup>258</sup> However, the court applied the legal principles set

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had said them in a law review article or in a newspaper column or in a talk to the Kiwanis Club"). In *Wilson* the court stated, "stare decisis is ill-served if readers hang slavishly on every casual or hurried word as if it had bubbled from the earth at Delphi. Obiter dicta, if noticed at all, should be taken with a large grain of salt." *Id.*

252. 267 Md. 149, 297 A.2d 721 (1972).

253. *See id.* at 160, 297 A.2d at 727 ("[W]e hold that a personal representative may recover exemplary damages in those cases where they might have been awarded to the decedent, whose estate he administers, had the former survived.").

254. *See id.* at 152-53, 297 A.2d at 724.

255. *See id.* at 152-53, 297 A.2d at 723-24.

256. *See id.* *See generally* BLACK'S LAW DICTIONARY 1313 (7th ed. 1999) (defining "respondeat superior" as the common-law doctrine "holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency").

257. *See Smith*, 267 Md. at 152-53, 297 A.2d at 723-24. The court allowed the plaintiff's claim for punitive damages for negligently entrusting the employee, an 18 year old, with a truck that was in a well-documented state of disrepair. *See id.* at 168, 297 A.2d at 732-33.

258. *See id.* at 158, 297 A.2d at 727.

forth by the court earlier in *Stewart*,<sup>259</sup> holding that, because punitive damages were recoverable by a tort victim in a personal injury action if the victim survived and brought the action herself, then punitive damages were likewise recoverable by a personal representative bringing a personal injury action under the survival statute.<sup>260</sup> This is precisely the same legal analysis advocated with future lost earnings.<sup>261</sup> Because damages for future lost earnings are recoverable by a tort victim in the victim's own personal injury action, then these damages should similarly be recoverable by the victim's estate in a personal injury action brought under the survival statute.<sup>262</sup>

### VIII. CONCLUSION

Maryland courts created an injustice in the area of damages with the decisions of *Stewart* and *Jones*.<sup>263</sup> The court refused to extend the recovery of future lost earnings to a decedent's estate under a survival statute.<sup>264</sup> The current law allows a tortfeasor who fatally injures someone to reap a windfall that would otherwise not occur had the victim been injured and survived.<sup>265</sup>

In view of the clear and unambiguous language of the survival and personal representative statutes<sup>266</sup> and of the unjust and inequitable results that are possible under the current state of Maryland law,<sup>267</sup> future lost earnings should be recoverable by the personal representative in a personal injury action under the survival statute.<sup>268</sup> The clear language of the statutes does not limit the types of actions that survive, nor limits the types of damages recoverable in a survival action, and it is improper for Maryland courts to continue to create a limitation contrary to the clear statutory language.<sup>269</sup> In addition, death results in the total diminishment of earnings. There is no logical reason to allow recovery for funeral expenses, yet not

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259. See *supra* notes 93-95 and accompanying text.

260. See *Smith*, 267 Md. at 160, 297 A.2d at 727.

261. See *supra* Part V.

262. See *Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 342-43, 65 A. 49, 53 (1906) (holding that damages recoverable under a survival statute are those which the deceased might have recovered had he lived and brought the action himself).

263. See *supra* Part V.

264. See *supra* Part V.B.

265. See *supra* Part V.B.

266. See *supra* Part IV.A-B.

267. See *supra* Part IV.D.

268. See *supra* Part IV.B.

269. See *supra* Part VI.

allow for recovery of future lost earnings—both are losses to the estate.<sup>270</sup>

Simple syllogistic reasoning leads to the conclusion that future lost earnings damages should be recoverable in a survival action. The Maryland General Assembly decided that actions should survive a person's death and granted the decedent's personal representatives the right to commence an action to recover those damages which could have been recovered had the deceased survived.<sup>271</sup> For example, in an action for personal injury, if the deceased survived, the deceased would have been able to recover damages for future lost earnings.<sup>272</sup> Therefore, it follows that the personal representative should be permitted to recover those future lost earnings in the survival action.

If one were to analyse the statute today, without the judicial gloss, there would be only one interpretation. The conclusion that "lost earnings" are available in a survival action is evident, looking at the express language of section 6-401, allowing survival of a personal injury cause of action; section 7-401(y), granting the estate administrator the power to commence a personal injury action on behalf of the decedent; and section 11-109, providing not only for lost wages in a personal injury award, but also for payment to the decedent's estate in the event of death. Giving an executor the power to commence a "personal injury" action and providing the victim's estate with a mechanism to recover unpaid damages, necessitates *all* remedies to be included in a survival action that would be available to a living victim, including future lost earnings.

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270. See *supra* Part III.

271. See *supra* Part II.B.

272. See *supra* notes 66-69, 80 and accompanying text.