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Dead People in Torts: A Second Installment

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Actions for wrongful death and survival are a big piece of torts, but commentators have shied away from them. Perhaps potential authors have pulled a page from the judges' book because courts cut death cases from the common law. A cause of action died with the decedent. The implications were many: an administrator could not litigate a personal injury claim after an injured man died; nor could an injured victim sue a dead tortfeasor's estate. When an injured person died as a result of a tort, members of his family could not sue for their losses through the estate or in their own right.

History and Background

How legislators moved to fill the gaps in the common law and how judges responded to the remedial legislation is the heart of the story on death and survival. It has been told before, and this paper is not the place for a repetition except as an introduction to a discussion of some vital recent case law and some recent legislation. Legislators responded first to afford spe-

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* “Dead Men” in the title of the first installment was too cozy. Many of the victims in death cases are females.
2. This is one of the common law propositions everyone states. Even in Blackstone it is hard to pin down. See Benning, J., in Shields v. Yonge, 15 Ga. 349, 351 (1854) quoting Blackstone: “The public mischief is the thing . . . in these gross and atrocious injuries, the private wrong is swallowed up in the public.”
4. See Dead Men in Torts.
cial protection to members of decedents' families in their own right. That was Lord Campbell's Act on wrongful death, by which Parliament permitted actions by personal representatives for the benefit of some family dependents. The typical statute restricts beneficiaries to a surviving spouse and some or all of the next of kin, to be preferred in order as in a statute of descent. Even under Lord Campbell's Act, courts created another kind of abatement. If the preferred next of kin died while the litigation was pending, the cause of action abated. Neither the heirs of the first beneficiaries nor the next of kin on the next alternate level could proceed with the lawsuit.

For many years and in most jurisdictions Lord Campbell's Act was the only kind of remedial legislation in death cases. To supplement Lord Campbell's Act today, there is some kind of survival act in every state. More accurately, there is such a statute to cover claims against a dead tortfeasor's estate, and in all jurisdictions there is some kind of statute supplemented by judicial administration to allow litigation for the benefit of estates where a decedent has died as a result of a tort. In some states there is still a gap, where an injured plaintiff dies from causes other than the tort while litigation is pending. Frequently the separate statutes on wrongful death and survival are published in different chapters of compiled statutes. There has been little conscious codification, and there are still some unsolved problems about joinder of claims under the two kinds of statutes, as well as some serious problems on damages and statutes of limitation.

Remedial developments through case law have been hampered because judges have seldom brought common law flexibility into the interpretation of the statutes on wrongful death and survival. They have been blinded by the maxim that statutes in derogation of the common law must be strictly construed. But there are signs of change as indicated in some of the cases that will be discussed in this paper. History is special in each jurisdiction.

6. There is a discussion of this aberration in the first installment. See Dead Men in Torts 308-09. Much of this has been cured by decision and by statute. Gray v. Goodson, 61 Wash. 2d 319, 378 P.2d 413 (1963); La. Civ. Code Ann. art. 2315 (West 1971).
7. Idaho (see text below), Minnesota and New Mexico (see text and notes below).
9. In the District of Columbia there are two separate causes of action which can be joined. Sornborger v. District Dental Lab., Inc., 266 F.2d 694 (D.C. Cir. 1959). See Landers v. B.F. Goodrich Co., 369 S.W.2d 33 (Tex. 1963); Deep Rock Oil Corp. v. Sheridan, 173 F.2d 186 (10th Cir. 1949).
Since lawmaking and judicial administration do not proceed everywhere at the same pace, generalizations about trends must be tested against special instances; but some judges and some legislators are moving to bring death cases into the plaintiffs' world.

"Plaintiffs' world" deserves some words of explanation. It is an old theme expounded by this commentator that the decade between 1915 and 1925 was a crucial one for torts. Before 1915, we were living in a defendants' world. The community always gets the kind of tort law it can afford. Casualty insurance was not available for many individuals or small proprietors. There were not many personal injury cases until the time of the railroads\(^1\), the greatest acceleration in these cases came with the automobile. The development of casualty insurance, especially the omnibus clause for drivers of automobiles, was the greatest stimulus to litigation in the history of torts. Before 1915, judges were hypercritical about evidence, prima facie cases, proximate cause, and scope of employment. It was an era of dismissals and directed verdicts. Judges and jurors were stingy with damages. There were statutory limits in many states on damages for wrongful death.\(^2\) Fifty thousand dollars was an unacknowledged ceiling in all personal injury cases.\(^3\)

Since 1925, however, tort lawyers and personal injury victims have been living in a plaintiff's world. The compulsory omnibus clause statute in New York became effective in 1924.\(^4\) *Palsgraf v. Long Island R. Co.*\(^5\) with its tight definition of proximate cause, was already out of date when it was decided in 1928,\(^6\) and it has had little effect on the development of the case law. In a plaintiff's era, more plaintiffs get to more juries on the basic issues of proximate cause and negligence; and since the years immediately subsequent to the Depression, more plaintiffs have been getting bigger judgments, reaching six and even seven digits.

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1. It is significant that the first fellow servant cases and the first death cases in the United States were railroad cases. Farwell v. Boston and W. R.R., 45 Mass. (4 Metc.) 49 (1842); Murray v. South Carolina R.R., 1 McMullan 251 (S.C. 1841); Hubgh v. New Orleans & C.R.R., 6 La. Ann. 495 (1851); Whitford v. Panama R.R., 23 N.Y. 465 (1861).

2. Ten states still have a money limit on damages for wrongful death: Colorado, Kansas, Maine, Massachusetts, Minnesota, Missouri, Oregon, Virginia, West Virginia, and Wisconsin. For many years there was a ceiling of $10,000 in the District of Columbia. Ch. 45, D.C. Code, 31 Stat. 1394-95 (1901). The ceiling was erased in 1948. Ch. 507, § 1, 62 Stat. 487.


6. See *Dead Men in Torts* 286 n. 10.
The crucial decade from 1915 to 1925 had little effect on death cases. Even now legislatures have not completely erased the ceilings on wrongful death claims. However, where ceilings have been retained, they have been boosted. The old attitudes about strict construction of death and survival statutes were so well entrenched that judges were not affected by the trends in other tort cases. But the tide has been turning, and turning faster since 1969.

Common Law Flexibility in Idaho

The statutes on death and survival in Idaho are thin: there are two short sections which the courts have administered as an abbreviated Lord Campbell’s Act. Damages can include expenses of the illness and death, plus loss of companionship and support. There was no survival statute of any kind in Idaho until 1949, and then abatement was cured only when a tortfeasor died before suit. Plaintiffs were protected against tortfeasors’ deaths in ordinary personal injury cases, property damage, and wrongful death. Punitive damages were excluded. But the common law on abatement still controls when an injured person with a pending claim dies from causes other than the tort. The Idaho court confirmed that proposition in 1970, in *Doggett v. Boiler Engineering and Supply Company*, but saved the lawsuit in spite of the common law.

*Doggett* has some interesting ramifications. First of all, it was a work injury case. The decedent was permanently injured, in October 1966, in an explosion of a boiler that was being installed in the plant where he worked. He died of other causes, in August 1969, while his lawsuit was pending. Third party actions were begun against the manufacturer and installer of the boiler, and against the manufacturers of component parts. On the merits, *Doggett* was a products liability case. Questions of jurisdiction were argued and were resolved in favor of the plaintiff. The trial judge refused to permit the decedent’s wife to be substituted as a party plaintiff and granted defendants’ motion for summary judgment. Judgments were reversed and the case was remanded once again.

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17. See note 22 infra.
18. See ch. 801, § 1 (1971) Mass. Laws. The ceiling was boosted from $55,000 to $100,000. In all the other nine states the ceilings are higher than they were 20 years ago.
19. IDAHO CODE §§ 5-310, 5-311 (1948).
How did the court do it? Idaho has a community property law, and actions for personal injuries to married persons are assets of the community. If either husband or wife dies, the other may proceed to liquidate the claim. The impact of this case in Idaho may not be great since it is a special kind of case, but that is not what is important about Doggett. The technique of the court is important. Strictly in terms of common law propositions, this was not a common law decision; but it is common law in terms of the court's creativity. The court wanted to save the case. Fifty years ago most courts would have looked for reasons to support abatement. The case will not be big if you think of six figures. It is not likely that the widow will be the prime beneficiary of a judgment in the case because this one has the earmarks of a work injury third party action in which the employer's insurance carrier has a claim for subrogation. But Doggett is a bit of statesmanship.

Expansive Judicial Administration in New Mexico

In Stang v. Hertz Corporation, the decedent was a nun who died 15 days after an automobile accident. The defendants were a car rental agency and a tire manufacturer. Like Doggett, the case looks like products liability. The statutory beneficiaries were her natural brothers and sisters. It was stipulated by the parties that on the date of the decedent's death the statutory beneficiaries would not have had "any reasonable expectation of pecuniary benefit from her continued life." Nevertheless, an action was begun under the New Mexico statute. (The singular form of "statute" is intentional. Does it cover both survival and wrongful death? Stang and its predecessors give the answer which we shall try to diagnose.) The personal representative was not one of the statutory beneficiaries. She was a nun, a member of the decedent's religious community who was the duly appointed ancillary administrator with will annexed. There were two steps in this case, one in the intermediate appellate court and one in the supreme court.

First of all, there is the New Mexico statute. As it was drafted by the legislature and as it has been construed by the New Mexico courts, the statute is a hybrid. Literally, it covers every kind of wrongful death case with all of the survival aspects. Whether a victim dies instantaneously or whether he lingers, there is always the potential for two kinds of claims: economic loss to the estate, and special loss to members of the decedent's family. Legislatures responded first to recognize the family interests. Frequently,

economic loss to the estate is slight, just funeral expenses in cases of instantaneous death. By accident, by fiction, and sometimes by delayed legislative action to eliminate exceptions from a general statute, legislators and judges usually have permitted some kind of recognition for the interests of a victim's estate. The story would be too long for spelling out here, but the New Mexico experience is vital to an understanding of Stang v. Hertz Corporation. It is epitomized in the text of the statute and in the decisions in this case.

The statute is entitled "Death by wrongful act or neglect—Liability in damages," and it is published in the chapter on "Wrongful Death—Actions for Damages." It is a statute on plaintiffs' actions when a victim has died because of a tort. The first section is typically wrongful death—a boiler plate from Lord Campbell's Act. While section two is a statute of limitations, it was not until 1961 that the legislature made explicit that the time when a cause of action arises "shall be the date of death." Before 1961, the courts had construed "time" to be the date of the injury. Section three includes the specifics. Section four is an extra leg, and covers death actions against common carriers. Before 1955, damages in death cases against these defendants were punitive. A sum was fixed as the price of each death, and plaintiffs were the named beneficiaries. Now the text of section four has been accommodated to the specifics in section three, although the named beneficiaries must qualify as plaintiffs unless none of them survive the decedent. In that case the action is begun by a personal representative as in section three.

Section three with the specifics is the vital text. An action shall be litigated by a personal representative. Damages shall be fair and just (not very specific); they can be compensatory and exemplary; the jury shall take into consideration the pecuniary injuries resulting to the persons interested in the action, and the jury will have regard to the mitigating or aggravating circumstances of the tort. Proceeds will be distributed to certain preferred relatives on alternate levels of relationship. If none of these persons survive the decedent, the proceeds shall be disposed of "in the manner authorized by the law for the disposition of personal property of deceased persons." The proceeds of a judgment are protected against the decedent's creditors only when the money can be divided among the named relatives.

The specifics do not include everything. The text about named beneficiaries and pecuniary losses is typically Lord Campbell, but the section leaves open other possibilities for damages. Nothing is prescribed literally about expense, pain and suffering, or value of the life to the estate, all of which sound like measures for losses to the estate, and the New Mexico courts have exploited all of them, measuring value of life to the estate by what a decedent would have earned had he lived. Conceivably these are items within the description of what is fair and just. Stang is the capstone in the interpretation. Neither the legislature nor the courts have differentiated between the interests of named relatives as statutory beneficiaries and the interests of the same people or other next of kin as distributees of the proceeds from the litigation. The hybrid has not been identified precisely for what it is: the only statute on both wrongful death and survival for plaintiffs' claims. There is a separate statute under which injured victims can reach the estates of dead tortfeasors.

The action in Stang was begun by the two-hat representative to recover under the statute for the value of the decedent's life to the estate, damages for pain and suffering, for medical and hospital bills before death, and for the reasonable expenses of the decedent's funeral and burial. The trial judge dismissed the complaint. No action could lie because the statutory beneficiaries had not suffered any pecuniary injury. The statute was primarily wrongful death. Only when the statutory beneficiaries had suffered a special loss could the other factors be added into the verdict. That decision was reversed in the court of appeals and the judgment of the court of appeals was affirmed in the supreme court. Apparently the obligation for funeral expenses was conceded by the defendants because there is no discussion of the item in the appellate courts, but both courts opened the case at the trial for everything—expenses of the illness, pain and suffering, and value of the decedent's life to the estate—all that when the statutory beneficiaries had suffered no special pecuniary loss to themselves. Does the special status of this personal representative have any significance in the scope of this decision and its impact on future cases? The court of appeals suggested that it might have something to do with the claims for expenses.

33. This positive statement may need some second guessing. Certainly a tort claim abates in New Mexico when a victim dies from other causes before he can begin an action. There is no statute that saves that kind of claim but there is a survival statute which protects pending lawsuits. N.M. Stat. Ann. § 21-7-4 (Supp. 1971). The text is big enough to include personal injury claims. Perhaps that conclusion is so obvious that no one has raised any question about the statute's scope. There is no case law.
of illness and pain and suffering, but the supreme court found reason for supporting claims like these, which smack of survival and not wrongful death, in the comprehensive language of the boiler plate. The liability in every such action (wrongful death), the court said, is for "damages which the decedent could have recovered." Chief Judge Comstock of the New York Court of Appeals tried unsuccessfully to sell his brothers that same kind of interpretation in 1861.

The story in New Mexico does not begin with Stang v. Hertz Corporation. Lawyers have lived with the New Mexico statute for many years, and they have molded it to include survival as well as wrongful death. The only damage item added in Stang was compensation for pain and suffering. Many years ago the state supreme court recognized the value of the life to the estate as a measurable item which can be added to the proceeds for distribution to the statutory beneficiaries. Expenses of the illness have long been recognized. In Stang, the defendant's lawyers were arguing that expenses of the illness are not covered by wrongful death, and that, since 1961, the New Mexico statute is one on wrongful death and not a statute on survival. Both courts agreed that names are not important, that it is a matter of custom and interpretation.

The new factors in Stang are the courts' allowing compensation for pain and suffering, and their allowing litigation to proceed when statutory beneficiaries have not suffered pecuniary loss. Both factors sound like survival. The courts did not spell it out literally, but they did conclude that natural brothers and sisters, who have not suffered any special loss, can split a pot of damages compiled from estimates on expense to the estate, pain and suffering, and the value of the life. It follows also from these decisions that named beneficiaries, who have suffered substantial pecuniary losses, can split a double pot with contributions from both wings of the statute, wrongful death and survival. Perhaps lawyers in New Mexico will want to confirm those possibilities. Perhaps they may want to think about a complementary

35. 81 N.M. at 77, 463 P.2d at 53.
36. 81 N.M. at 351, 467 P.2d at 16-17.
39. The court had rejected it many years ago. 9 N.M. at 49, 49 P. at 807 (1897). Stang reversed the earlier decision.
40. Id. at 68, n.42, 49 P. at 807.
41. This is precisely what happened in Baca v. Baca, 81 N.M. 734, 472 P.2d 997 (1970). Baca was decided just a few months after Stang. The statutory beneficiaries were grown brothers and sisters of the decedent. If there was any evidence on pecuniary loss, there was no reference to it in the opinion. Judgment for $24,500 was affirmed.
integrated statutory scheme. There is a "Modest Proposal" in the conclusion of this paper.

In Washington State

Warner v. McCaughan from the State of Washington is another case where the supreme court effected a preliminary decision before trial. The decedent was a 21 year old college senior who died in a hospital after a short illness. Her parents sued in their own right as beneficiaries under the wrongful death statute, and the father sued also in the same action as the administrator of the daughter's estate. It was a malpractice suit against the doctor and the hospital, and a products liability case against a pharmaceutical company. Plaintiffs' counsel asked for everything: damages for conscious pain and suffering, disability, medical and hospital expenses, damages to the estate because of the loss of life, and damages to the plaintiffs because of the wrongful death. The trial judge struck everything from the complaint except the claim for expenses for the last illness and the burial. The supreme court second-guessed the trial judge on one item—the claim for damages to the decedent and the estate. The potential is tremendous where the decedent was a 21 year old college student preparing for a professional career.

The Washington statutes cover both facets of death cases, wrongful death and survival. All the sections are included in one chapter entitled "Survival of Actions." The editing and classifying do not represent planned codification. Most of the sections in the chapter are remnants of older statutes that were enacted or amended in 1854, 1881, 1917, and 1927. A section which is crucial in Warner was added in 1961. Until that year, tort actions did not survive to plaintiffs' estates. The wrongful death statute still is narrow. Beneficiaries are restricted to spouses, children, and dependent parents. In 1953, the legislature enacted a special statute to permit litigation against the estates of dead tortfeasors. In the 1961 statute, the legislature declared that all actions shall survive to plaintiffs' estates and against the estates of dead tortfeasors. The only restrictions on damages are in

42. 77 Wash. 2d 179, 460 P.2d 272 (1969).
43. The case was settled before trial for $25,000. Two insurance carriers contributed to the settlement. Letter from counsel, November 10, 1971.
44. WASH. REV. CODE ANN. §§ 4.20.005, 4.20.010, 4.20.020, 4.20.046, 4.20.050 and 4.20.060 (1962). See also § 4.24.010, a special statute covering actions by parents when minor children are injured or killed. Ch. 4.24 is entitled "Special Rights of Action." Loss of companionship is a vital factor under this special statute. Lockhart v. Besel, 71 Wash. 2d 112, 426 P.2d 605 (1967). Does the decision in Warner affect cases under the special statute?
pain and suffering, emotional distress, humiliation, and anxiety suffered by the decedent.

It is arguable that the court in *Warner* disregarded the limitations in the wrongful death statute, that all sections in the chapter should be interpreted as a unit, and that the act of 1961 was a supplement to the existing death statutes. That is how the trial judge interpreted them. The supreme court refused to interpret the statutes strictly. Instead, the court read into the legislative history of the statute an intent to preserve causes of action. All resources of the estate can be exploited in the lawsuit except those which the legislature has specifically prohibited. The most important resource is the value of the life which has been lost. In this case, that means something analogous to impairment of earning capacity. That is how the court did it in *Hudson v. Lazarus* from the District of Columbia, which the Washington court used to support its position. (*Hudson*, however, was a special case where the statute of limitations had run on the wrongful death claim but not on the original tort.)

In the immediate instance, *Warner* looks like a remedial decision. The beneficiaries are the parents who are excluded under the wrongful death statute. Wrongful death in Washington is unusually tight, since parents must be dependent on the decedent. Perhaps the Washington legislature may want to set the sights higher, but there are other effects from the *Warner* case that Washington lawyers may not like. The beneficiaries under survival are the heirs of the estate, or under one like the Washington statute, they could be legatees in a will. The heirs could be beneficiaries who have not seen the decedent for many years. The legatees could be strangers to the family. Damages would depend on who the decedent was, his age, and prospects, and not on any special relationship between the decedent and the heirs or the legatee. The statutory scheme in Washington is unusually cryptic. It is difficult to read much remedial intent into the text of the 1961 statute. *Warner*, too, like *Stang* in New Mexico, could be the stimulus for rethinking on death and survival and a redrafting of the statutes.

**In Iowa**

Iowa has never adopted a statute like Lord Campbell's Act. Instead, there is a simple comprehensive section on survival which has been on the books

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47. The case references are thin. For background see Harvey v. Cleman, 65 Wash. 2d 853, 400 P.2d 87 (1965) and Lockhart v. Besel, 71 Wash. 2d 112, 426 P.2d 605 (1967). Before 1961, only actions which could be assigned at common law survived in Washington to decedents' estates. Cooper v. Runnels, 48 Wash. 2d 108, 291 P.2d 657 (1955). Apparently that case was one of the stimuli to revision.

since 1851. Nevertheless, the legislature has added in another chapter something from a typical wrongful death statute. If a decedent leaves a spouse, children, or parents, the proceeds from the survival action are protected against the decedent's creditors. The principal item of damages under the Iowa scheme is the loss to the estate. Impairment of earning capacity is not an adequate description of the loss. Estimated income, estimated expense, life expectancy, and now estimated taxes, state and federal, are all important for determining the amount of the estate a decedent would have accumulated by the time of his death.

Although loss to the estate was the vital measure for many years, there are now two other measures just as important: loss of services to the beneficiaries of the estate and loss of support. Obviously these measures can be most important when the distributees are members of the household, and the legislature has restricted them to instances where the distributees are children or surviving spouses. By one standard, the statute under which these items are justified is old. It was first enacted in 1911 to cover cases where decedents were married women.

A non-Iowa lawyer can miss some tricks in studying the Iowa history and case law, but the origin of the 1911 statute seems to be cases like Nolte v. Rock Island Railway. The decedent in that case was a young married woman who was killed on a railroad train in 1910. The court's opinion was handed down in 1914. The special statute was enacted in 1911, covering damages in death claims where the decedents were married women. The opinion and the result in Nolte explain the reason for the statute. Because Mrs. Nolte was trained as a nurse and practiced her profession until her marriage ten months before her death, and because she had preserved her interest in her profession after her marriage, there was evidence which a jury could evaluate for measuring the decedent's worth to her estate. The court admitted that the case was special and that, in a case involving the death of an ordinary housewife, a jury could not assume that she would accumulate any substantial estate before she died.

49. IOWA CODE ANN. § 611.20 (1950). This is the first section. There are two others just as simple and direct. The right of civil remedy is not merged with the public offense. § 611.21. Actions under the first two sections may be continued if a defendant dies. § 611.22. See IOWA CODE § 2502 (1851).
52. IOWA CODE ANN. § 613.15 (Supp. 1971).
53. Ch. 163, § 1 (1911) IOWA LAWS 183; IOWA CODE ANN. § 613.15 (Supp. 1971).
54. 165 Iowa 721, 147 N.W. 192 (1914).
In the 1911 statute, the legislature provided that the administrator could recover for the value of the married woman's services as a wife or mother, expenses before death, and punitive damages "where warranted." A ceiling was fixed at $6,000. In 1941, the statute was redrafted.\footnote{55 \textit{IOWA CODE ANN.} \S 613.15 (Supp. 1971).} Disabilities and restrictions were erased in any lawsuit where a married woman is a plaintiff or where an administrator of a married woman's estate is suing for wrongful death. The legislature was specific. Damages should include costs of the injury and the value of the decedent's services as a wife or mother. The ceiling on damages was removed. Damages under the statute in death cases could be substantial. In \textit{Hamdorf v. Corrie},\footnote{56 251 Iowa 896, 101 N.W.2d 836 (1960).} a verdict and judgment for $20,000 was affirmed. That was in 1960, and according to one commentator,\footnote{57 Druker, \textit{The Question of Damages}, 15 \textit{DRAKE L. REV.} 107, 109 (1965).} it was the largest judgment under the statute up to that time.

This special statute was amended in 1965.\footnote{58 Ch. 427, \S\S 1, 2 (1965) \textit{IOWA LAWS} 808, 809; \textit{IOWA CODE ANN.} \S 613.15 (Supp. 1971).} The potent addition to the text follows an "and": "And in the case of both women and men, such person, or the appropriate administrator, may recover for the value of services and support as spouse and parent, or both as the case may be, in such sum as the jury deems necessary." \textit{Schmitt v. Jenkins Truck Lines} was waiting in the wings. The supreme court let the statute apply retroactively.\footnote{59 260 Iowa 556, 149 N.W.2d 789 (1967).} The judgment in \textit{Schmitt}, which was affirmed in 1969, was the biggest in Iowa history.\footnote{60 170 N.W.2d 632 (Iowa 1969).} \textit{Schmitt} was the prelude to \textit{Adams v. Duer}.\footnote{61 173 N.W.2d 100 (Iowa 1969).} Both have sparked the new dispensation for expert witnesses, sociologists, economists, tax experts, and family welfare advisers. These people are permitted to prospect the future about economic development, inflation, capital savings, and appraisals in dollars and cents of housekeeping and counseling services. Information about taxes has been restricted to past experiences, but the seed is there to permit tax experts to project estimates about future tax burdens from past experience and anticipated economic growth.

In the \textit{Schmitt} case, a husband and wife were killed instantly in a collision with a transport truck. They left six minor children from three to 19 years old. The judgment in the action for the death of the father was $302,500, and for the death of the mother, $264,000. As a dissenting judge acknowledged,\footnote{62 170 N.W.2d 632, 666 (Iowa 1969).} that sum invested for the children would bring as an annual in-
come more than the decedent parents would earn, and at the end of the last child's life, if the investment were continued that long, the principal sum would be intact. The judge might have allowed for the lawyer's contingent fee and still come up with an estimate to make the price look good. Neither Iowa nor any other state has had enough experiences with big judgments to know how such sums can be absorbed by the community. Moreover, death cases differ from personal injury cases. When a person's injuries are permanently disabling, he may have to pay doctor bills the rest of his life, and his earning capacity can be impaired completely. He still has to pay for his living. In a death case, doctor bills do not continue beyond death. Minor children grow up and support themselves. Widows may remarry. Most decedents do not leave estates measured in six figures.

The Adams case also involved a highway death. It was a work injury case, and the probabilities are that it was an action against third parties in which the employer's insurance company was entitled to subrogation. The decedent was working for a utility company on a highway where signs were posted to direct automobilists into a single lane. A truck and a private car, approaching the spot where the decedent was working, did not slow down in time to move into the proper lane. The truck piled into the car and knocked it across the road into the decedent. The survivors were his widow and minor children. The verdict and judgment were just over $100,000, considerably less than the sums in Schmitt. Nevertheless, judgment was reversed because the trial judge had decided that income tax payments by the decedent over the last five years were inadmissible. The supreme court disagreed and set the stage for tax experts among the cast of expert witnesses. An economist was permitted to offer his opinion of the value of the father's services in educating and training the children, the value of his services in performing work around the house, and his value as a counselor. The witness pinned his estimates to precise figures at present values of $11,414.42, $35,981.34, and $7,753.30. And in addition, there were estimates as to loss of support and value to the estate. This is another case where it seems like quibbling to complain about mechanics for figuring price. The description of the event is so awful, this price was not unusually high for 1970, and the survivors were a widow and minor children. Nevertheless, there is something unreal about dollars and cents estimates down to the last digit where the predictions are subject to so many contingencies.

This is a new trend in death cases. Perhaps the Iowa statute is made to order for this kind of experimentation because the Iowa legislature has encouraged speculation on value of services and support from parents and spouses. Benefits are restricted to spouses and children. Maybe there is
more room for speculation in death cases than in personal injury actions, but the day of the economist and tax expert is coming for computing impairment of earning capacity in all kinds of cases, now that there are no acknowledged limits beyond which verdicts cannot go.

**A Judicial Brake in Michigan**

In Michigan the story is different. Recent judicial action has been restrictive, and that action has sparked legislation. In 1939, the legislature codified death and survival and tied the scheme through cross references to the statutes on the distribution of decedents' estates. The kind of survival covered in the statute is related to wrongful death. For estates of injured victims who die from other causes than the tort, there is still a separate statute. Instantaneous death created a special problem in Michigan before 1939. Whether the proper action was for death or survival depended on the time of death. If a decedent lingered after the tort, the lawsuit had to be a claim for survival. The idea of instantaneous death as some kind of prerequisite or limitation in death or survival is a bogey which lawmen have to slay. If a wrongful death is instantaneous the economic loss is less. Instantaneous death can have something to do with damages, but the potential for a lawsuit is the same whether a victim lingers or dies immediately. It is the same, that is, unless a court has manufactured a legal problem as Michigan did before 1939.

The statutes on death and survival had to be cleaned up to cover all kinds of wrongful death whether or not there is substantial economic loss to the estate. Under the Michigan statute, actions are begun by a personal representative. If a decedent has lingered, the plaintiff can recover expenses and damages for pain and suffering. In any event the plaintiff is concerned primarily with the interests of the statutory beneficiaries. The statute in-

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67. Mich. Comp. Laws § 600.2921 (1968). The statute is sweeping and simple. It covers both of the other kinds of problems, where claimants die from other causes, and tort claims which survive the death of a tortfeasor. Where death is the result of an injury, claims are litigated under the wrongful death statute.
68. See In re Olney's Estate, 309 Mich. 65, 14 N.W.2d 574 (1944); Micks v. Norton, 256 Mich. 308, 239 N.W. 512 (1931); Detroit United Ry. v. Weintrobe, 259 F. 68 (6th Cir. 1919).
69. Michigan was not the only state where lawyers had blind spots about instantaneous death. The list could be long, but see Fretz v. Anderson, 5 Utah 2d 290, 300 P.2d 642 (1956).
cludes a plan for the distribution of the proceeds as in a statute of descent. The trial judge in the tort action confirms the distribution. Also as a part of the scheme, and by cross reference to the statute on distribution of a decedent's estate, the personal representative can petition a probate judge to approve a settlement of the lawsuit. The probate judge is advised to distribute the proceeds to those persons who are dependents of the decedent according to the damages sustained by each. The words of art in the first section of the statute from 1939 until March, 1972, were "pecuniary injury."

Any kind of codification suggests good intentions. That the Michigan legislature in 1939 killed the legalisms of instantaneous death was good, but the act of 1939 was not all good. The text includes conventional boiler plate. That the job was done in 1939 is significant. Not many lawmen then were ready for much remedial legislation on death. Lawyers still associated statutory schemes on death and survival as some kind of action in derogation of the common law. The vocabulary in this kind of statute had to be stereotyped in 1939. Perhaps "pecuniary injury" is no worse than "loss of services" and "loss of support," but it sounds constrictive, and so it was construed until 1960.

In Wycko v. Gnadtke, the Michigan court opened pecuniary loss to include something more than estimates based on monetary income. The decedent was a 14 year old boy who was killed instantly when he was hit by an automobile as he was riding his bicycle. His parents were the statutory beneficiaries, and his father sued as the personal representative. On damages, the trial judge gave the standard definition of pecuniary loss where the decedent is a minor. The jury should take into consideration what the minor would have earned before he reached 21 and how much the parents would have had to spend to maintain him. The jury found a verdict of $14,000. The trial judge cut it to $7,500 which the personal representative refused to accept. He appealed to the supreme court. That court reversed the judgment and the order for the new trial, directing the trial judge to enter judgment in favor of the plaintiff on the original verdict. Judge Talbott Smith wrote the opinion of the court. He did not go to bat on loss of companionship, nor did he wrestle specifically with a definition of pecuniary loss. He said that the worth of a member of the family can be estimated in dollars and cents. Michigan lawyers were not slow to read into that de-

74. 361 Mich. 331, 105 N.W.2d 118 (1960).
cision something about loss of society and to introduce loss of companion-
ship into some death cases that otherwise might not be worth litigating.75

Some Michigan judges have been waiting for the chance to spike the new
trend. Witness the prevailing opinion in Breckon v. Franklin Fuel Com-
pany,76 a 1970 case. The decedents, a man and wife, were killed in an
automobile accident. The woman was killed instantly, and the man lingered for three days. The survivors were two married daughters. The de-
fendant admitted liability for the expenses of the burials and illness, but the case was litigated because the daughters claimed substantial damages for loss of companionship. The jury brought in verdicts for the personal repre-
sentative in each case: $15,000 for the mother's death and $20,000 for the father's. Expenses for the mother's estate were $1,120 and for the father's $2,550. The supreme court reversed judgments on both claims.

The court was split. Five judges signed the opinion of the court, two judges dissented, and one concurred in the result. The opinion of the court is unfortunate, not because the five judges did not have a case, but because they were so anxious to sweep this one out of the scheme that they failed to identify an area which Wycko created as an extended application of pecu-
niary loss. In Wycko, the decedent was a member of the family who lived within the family circle. Whether he was a minor or not could be important on monetary estimate,77 but whether he was young or old should not cut the possibility for estimating value as long as he was living within the family unit. The court in Breckon could have been explicit and could have argued for that kind of understanding of pecuniary loss. But the court did not do it that way. Reaction was not swift, but it has happened. The statute has been amended.78 Loss of society and loss of companion-
ship have been canonized; pecuniary loss has been erased. You can hear them now—the witnesses in future cases—telling about the family visits and the endearing correspondence, with all the hypocrisy, false sentiment,

77. See Currie v. Fiting, supra note 75. The decedent was a 21 year old daughter living at home. Loss of society was an important factor for estimating damages, but the case was remanded because the estimated figure was not reduced to its present value.
and showmanship interested witnesses can muster. Breckon was not a stimulus to codification; it sparked a questionable patchwork job.

**Codification in North Carolina**

In 1969, the North Carolina legislature enacted a simply worded and comprehensive statute on "damages recoverable for death by wrongful act."\(^79\) Perhaps the statute is too comprehensive, but it is specific, and like Michigan's and New Mexico's, it brings what could be litigated under two different statutes into one scheme. This statute covers damages in death and survival where death follows the tort. In North Carolina, as in Michigan, survival in the other cases where the injured person dies from other causes is covered in a separate section.\(^80\) According to the new statute, damages... include: (1) hospital and medical expenses, (2) pain and suffering, (3) funeral expenses, (4) present monetary value of the decedent to the person entitled to receive damages (spouse and next of kin) including (a) net income, (b) services, protection and care, (c) society, companionship and comfort, (5) punitive damages if the deceased could have recovered them, and (6) nominal damages in any case. The statute is specific and complete. There is not much room for interpretation.

The North Carolina Supreme Court has not yet had a chance to interpret the statute, but it has refused to apply it retroactively.\(^81\) It could be an unfair observation, because the legislators might have worked long and cautiously, but the statute looks like a quick job without much analysis behind it. It is loaded for plaintiffs. A generation ago lawyers might have needed an omnibus scheme like this just to get enough into a death case to generate adequate funds for a surviving spouse and children and enough to cover the lawyer's fee. But not so today. This kind of statute can be the prelude to a Schmitt case in North Carolina. The prospects look good for big verdicts supported by all the new expertise from economists, sociologists, and tax experts.

**An Anachronism from Massachusetts**

Abatement in the common law sense is still alive in Massachusetts. The Massachusetts court has always been conservative in torts. It waited 30

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79. N.C. Gen. Stat. § 28-174 (Supp. 1969). The basic death by wrongful act statute was not repealed. See N.C. Gen. Stat. § 28-173 (1966). Under that section actions are begun by a personal representative. Assets are not liable to a decedent's creditors, nor can they be distributed to legatees. Everything about damages has been superceded by the new section.


years to catch up with *MacPherson v. Buick Automobile Company.*

Fifty years ago, the court construed "negligence" in the death statute to be so tight that the court could not stretch it to cover gross misconduct. In 1970, the court was still tight on death statutes and products liability. The case was *Necktas v. General Motors Corporation.* Perhaps the products liability part of the case is the most important to the profession, but to the parties in the lawsuit the part on common law abatement was the killing punch. The mother of the decedent had purchased a new automobile. The decedent was driving it in the early evening, when the power steering failed and he lost control of the car. It crossed the median strip and collided with an oncoming automobile. Lawsuits were begun by the decedent's mother in her own right and as the personal representative of the decedent's estate. She was successful on her claim for property damage against the dealer for breach of warranty, but she lost after verdicts in the Supreme Judicial Court on all of her claims as the personal representative of the decedent's estate. How did it happen? As personal representative she sued for negligence against the dealer and the manufacturer and for breach of warranty against the dealer. In Massachusetts her lawyer knew better than to argue strict liability. To corroborate the inference from the happening of the event about a defect in the steering mechanism, there was evidence after the event that a reservoir in the steering unit was empty. Still the court decided that the evidence was too speculative to support the verdicts on negligence against the dealer and the manufacturer. The case for breach of warranty under the Uniform Commercial Code could be processed against the dealer. He was a merchant engaged in the business of selling automobiles, the circumstantial evidence was sufficient to support a finding about a defect, and the decedent was within the scope of option A in Section 2-318 of the Code. But—and this is a big but—the action for breach of warranty does not survive under the death statute.

85. There was a dissent. Two of the judges would have sustained the verdicts on the negligence claims, and they would have sustained the car owner's claim for property damage against the manufacturer on a breach of warranty because of the special structure of the automobile business. They did not touch the abatement problem. *Id.* at 239.
86. The Uniform Commercial Code. *Mass. Gen. Laws Ann.* ch. 106 (1950). Massachusetts has adopted Option A. See 106 § 4-318. The court did not spell it out as I have done in the text. I have deduced my explanation from the scheme of the Code. The opinion is cryptic. What was not enough evidence to support findings of
Not much criticism can be added, beyond a simple statement of the case. Even if the court had bought an argument on strict liability against the manufacturer in a suit for a third party like the decedent, the court would have killed the case. It was not within the language of the death statute. It is not likely that this decision will be a stimulus to much legislative action. At best, the legislature may add in the death statute some more words to "negligence" and "wilful, wanton and reckless acts."

_A Modest Proposal_

Most of the action in recent years on death and survival has related to damages. Price and resources are the most important factors in the whole tort picture. Even today, not all tortfeasors have the resources to pay for their torts. It could be that the picture is worse than it was ten years ago. Certainly the risks of chance are more graphic now than they were a generation ago. Judgments today are big, but there are still a lot of tortfeasors who cannot pay for their torts. Big verdicts and judgments are creating a law of diminishing returns. In some areas, insurance carriers cannot afford to underwrite risks except at rates which prospective insureds cannot afford to pay. A million dollars is not an adequate award for a person who has lost both eyes or two limbs or who is hopelessly paralyzed as the result of a tort, but adequacy is not the only factor tort lawyers have to consider. The costs of every tort are shared by the injured person, the members of his family, his neighbors, and the tortfeasor's insurance carrier. An adjustment at best is a compromise, and some of it has to depend on practical economics.

Practically, high prices and tortfeasors without enough resources are driving the community toward no-fault. Death cases will be absorbed into the new dispensation, but that new dispensation may be long in coming. In the meantime lawyers can do some rethinking about death and survival. What they do for conventional torts can be adapted eventually to no-fault. Codification is not the key word. Redrafting is in order. Legislators can find out what is happening in other states, but the time for patching holes with boilerplate is gone.

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negligence in the claims by the personal representative was sufficient to support an inference of a defect in the power steering unit for the plaintiff in her own right against the dealer. Any cause of action for the estate on a breach of warranty against the dealer abated.

87 This can be hunch, and it is personal observation. See "Medical Malpractice: The Patient Versus the Physician," a study submitted by the Subcommittee on Executive Reorganization to the Committee on Governmental Operations, United States Senate, November, 1969. "Introductory Statement" by Senator Ribicoff, 1, 2, 8-10; Response to the Subcommittee from Aetna Life and Casualty, 1009, 1012.
There is not any one blueprint for a statute that will be adequate in every state. Local history cannot be ignored. But a model statute can look like New Mexico's or Michigan's, not like their text or their plan, but like their purpose. Survival is part of wrongful death when a decedent dies from the injury. When death happens to a victim from other causes, the problem deserves a separate statute. The saving of actions against dead tortfeasors' estates also creates another kind of problem and deserves a special statute. Death because of the tort, whether it is instantaneous or not, is the crucial area that deserves rethinking. Legislators have to be wary to avoid possibilities for double recovery, to plug the loopholes which can excuse abatement, and they have to devise a scheme under which it can be practicable economically to litigate a claim that a defendant resists.

Two areas of interest deserve protection: the estate and the statutory beneficiaries. Frequently the same people will be interested in both, but it will not always be so. A personal representative has to wear two hats. For the estate he will try to recoup economic loss. For the statutory beneficiaries he will demand compensation for loss of services and loss of support. The statutory beneficiaries are the surviving spouse and the next of kin who are members of the decedent's family circle, or who were dependent on him for support. They can include relatives from several levels in the hierarchy of the next of kin. Compensation for these relatives is special for each class, and a piece of the verdict will be allocated to each group. A relative in the family circle or one dependent on the decedent may be the only next of kin in his class and he may die before the lawsuit is ended. Until the verdict is confirmed after judgment and review, there can be an abatement of that part of the total claim.

Loss of support and loss of services are abstractions that must be reduced to dollars and cents. One sounds like money, the other does not. Adding loss of companionship and family affection is the road to double recovery. When a decedent is a housewife, a minor child, or a spinster who was a member of the family, there has to be some other damage item than loss of support. Loss of services is closer to reality than family affection. You cannot have both.

Economic loss to the estate is the expense of the last illness and the funeral, plus any loss of wages or comparable income between the time of in-

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88. "Next of kin" needs definition. There can be a cross reference to the definition in the statute of descent. There can be a special definition in the model statute. "Next of kin" may be defined to include in-laws, adopted children, and related parents, persons who are illegitimate, foster parents, and foster children. There is reason to include everyone who lives within the family circle and specified relatives who are in fact dependent on the decedent. The practical probabilities are not as great as they sound.
jury and the time of death. It is a policy choice for the legislature whether or not these assets of the estate, plus anything else by way of penalty, shall be protected against the decedent's creditors and his testamentary disposition. 89 Certainly a part of the proceeds can be allocated to the special creditors or to the persons who have paid the bills for hospitals, doctors, and funeral. Compensation for pain and suffering and for disability are not assets of the estate. Even in personal injury cases these are factors which allow for expansive verdicts to support the costs of litigation. There is some justification for adding them into a verdict when a person who has suffered may enjoy some of the benefits, but to relatives who succeed to the estate, proceeds like this would be a gift.

Value of the life to the estate is another shortcut to double recovery. In a state like Iowa, where lawyers never dealt with anything like Lord Campbell's Act, value of the life to the estate was a necessity to justify substantial returns to relatives and to cover the costs of litigation. But in Iowa the measure for determining value of a life was unreal. It was an estimate of what a decedent would have accumulated by the time of his death. 90 Many persons of modest means earn substantial wages, save little from their salaries, and leave little property for distribution after death. If a statutory scheme is geared primarily to the interests of the estate and not to the interests of named beneficiaries, something like an estimate derived from factors for measuring impairment of earning capacity can be a fair approximation of the loss.

There will be instances when there are no relatives or next of kin who can qualify as statutory beneficiaries. In such a case, and Warner from the State of Washington is typical, lawmen can be tempted to search for items which seem to be fair under the circumstances, but which can lead to double recovery when statutory beneficiaries have suffered a loss of support and loss of services. That poses a dilemma, but it can be solved. Fees in all death cases can be fixed by the courts, and a personal representative can recover in every case a statutory penalty for the estate.

Lawyers will complain about court-fixed fees, and they will rush to test constitutionality. The solution is not that drastic, nor is it unusual. 91 These

89. "Estate" and "assets" mean "estate" and "assets" literally. These proceeds will be distributed as assets of any decedent's estate and are distributed among next of kin or legatees unless the assets are protected especially in the statute against certain distributions. Under the North Carolina statute all the proceeds from a death action are protected against testamentary dispositions. N.C. Gen. Stat. § 28-173 (1966).

90. Donaldson v. Mississippi & Missouri R.R., 18 Iowa 280 (1865) and cases cited in note 54 supra.

are cases affecting decedents' estates. Lawyers are used to court-approved fees in the administration of dead persons' estates. The fees will include a standard percentage fixed by the legislature, 15 percent for example, plus an allowance based on quantum meruit for services performed through the appeal. Plaintiffs in personal injury actions now have little choice about fees, but they can choose their lawyers, something defendants cannot do. Under the model death statute plaintiffs will select counsel. Fees will be standard and flexible. They will be assessed against defendants. But that is not so different from what happens now, i.e., defendants' insurance carriers underwrite the fees of plaintiffs' lawyers when the plaintiffs win.

Penalties in death cases are not new. Before 1955, the New Mexico statute prescribed penalties in death cases against common carriers for the benefit of statutory beneficiaries. Under the Massachusetts statute, damages still are geared to culpability. The amount of the standard penalty will be fixed by the legislature. It could be $5,000, and it will be assessed in every case litigated under the statute.

The model statute can be simple in text. Some of the propositions are controversial. Conventional torts can dominate certain areas in the personal injury business for many years, but the future is going to be different, and lawyers will have to re-appraise many of the ground rules. It could be that the biggest bug in the model scheme is a conventional one, resorting to loss of services and loss of support in the interest of statutory beneficiaries. That can put us onto the Iowa merry-go-round. We should know how to get off because the profession has been building around those factors for many years.

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92. The old text is published in the current edition of the New Mexico Statutes without the pocket supplement. N.M. STAT. § 22-20-4 (1953).

93. MASS. GEN. LAWS ANN. ch. 229, § 2, lines 8-10 (Supp. 1972).

94. See the instructions of the trial judge in Baltimore & Potomac R.R. v. Mackey, 157 U.S. 72, 92 (1895): "Now, manifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all. That is not possible. But you may and you should take into consideration the age of the man, his health and strength, his capacity to earn money as you discover it from the evidence, his family—who they are and what they consist of—and then, gentlemen, from all the
lation, but it can be reduced by judges. Unless judges will limit witnesses to testimony about family status, size, age, and income, with mortality tables, relying on the jurors' general experiences to help them evaluate the evidence, absolute liability and standard schedules will be here in all kinds of tort cases. Lawyers may not have time to learn how to capitalize on the expertise of the new kind of astrologers.***

facts and all the circumstances, make up your mind how much this family, if anything, probably lose by his death, and that would be how much had this family a reasonable expectation of receiving; how much had they a reasonable expectation of receiving while he lived, if he had not been killed." The instruction was ambiguous enough to suggest tradition and purpose, and it was specific enough to suggest some facts which the jurors could relate to their own experiences. That is the best you can expect in our judge and jury system.

*** There is nothing in this paper on pre-natal injuries and stillborn bodies. That topic is big enough for a short article. To anticipate my conclusions: these instances would be excluded specifically in the model plan. Neither plaintiffs' lawyers nor parents deserve two recoveries from one injury out of one event.