Wrongful Death Actions in California Some Needed Amendments*

STATUTES providing for the survival of personal injury actions are to be distinguished from "Death Acts" giving a right of action for wrongful death to close relatives. At common law, in accordance with the maxim *actio personalis moritur cum persona*,[1] the death of either the person injured or the wrongdoer terminated any cause of action for injuries to the person. This doctrine still prevents a survival of the right of action to the victim's personal representative and a survival of the liability against a deceased wrongdoer's estate.[2] Another common law rule,[3] settled by Lord Ellenborough's *dictum* in *Baker v. Bolton*[4] that "in a civil court the death of a human being could not be complained of as an injury," denied to the family of a person wrongfully killed any right of action for the loss and interference with their "relational interests" resulting from the death of their relative.

The injustice occasioned by the lack of a common law remedy led to the statutory right of action, created originally by Lord Campbell's Act in 1846, "An Act for compensating the Families of Persons killed by Accidents," for the benefit of the wife, husband, parent and child of the deceased.[5] The jury might give such damages as they thought proportional to the injury resulting from the death, to be divided as the jury might direct. Somewhat similar acts have been adopted in most American jurisdictions.

The California Wrongful Death Act is embodied in sections 376

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* The writer wishes to acknowledge the valuable assistance in the preparation of this article given by Professor Henry W. Ballantine, at whose suggestion the article was written. He also wishes to express his appreciation for the suggestions received from Warren H. Pillsbury, Esq.

[1] For a historical discussion of this maxim, see Finlay v. Chirney (1888) 20 Q. B. D. 494, 502; Winfield, *Death as Affecting Liability for Tort* (1929) 29 COL. L. REV. 239; Note (1929) 18 CALIF. L. REV. 44. See also, NEW YORK LAW REVISION COMMISSION, RECOMMENDATIONS AND STUDY MADE IN RELATION TO THE SURVIVAL OF CAUSES OF ACTION FOR PERSONAL INJURY, LEGISLATIVE DOCUMENT (1935) No. 60 (E) pp. 16-24; LAW REVISION COMMITTEE, INTERIM REPORT (England, 1934) cmd. 4540, 77 L. J. 246.

[2] See Legis. (1936) 24 CALIF. L. REV. 716.

[3] A few early American cases which permitted the maintenance of an action were subsequently overruled. See TIFFANY, DEATH BY WRONGFUL ACT (2d ed. 1913) §§ 7-11; Hay, *Death as a Civil Cause of Action* (1893) 7 HARV. L. REV. 170.

[4] (1808) 1 Camp. 493; see Holdsworth, *Origin of Rule in Baker v. Bolton* (1916) 32 L. Q. REV. 431.

[5] FATAL ACCIDENTS ACT, 9 & 10 VICT. (1846) c. 93.

and 377 of the Code of Civil Procedure.[6] These sections do not seem to be the result of considered draftsmanship. In order that they may conform to the policies of modern law, these provisions should be subjected to a careful and studious revision.

The drafting of curative legislation in this field presents a complex problem.[7] Such legislation should not only aim to provide adequate redress for the pecuniary loss suffered by the decedent's estate and by his surviving relatives, but it should also protect tortfeasors from extravagant judgments which may subject them to financial ruin. The task is more difficult because the damages ensuing from the termination of a human life are not capable of an exact evaluation in terms of money.

It is the purpose of the writer to discuss briefly the defects of the California wrongful death provisions and to suggest certain changes which seem to be sorely needed to correct them.

I

RIGHT OF ACTION FOR DEATH OF UNMARRIED MINOR

The special provisions of section 376 of the Code of Civil Procedure governing a right of action for the death of an unmarried minor should be repealed.[8] This section, which restricts the right to sue for the death

[6] Section 376 provides: "A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury, or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

Section 377 provides: "When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

[7] For an excellent general discussion of this problem, see McCORMICK, DAMAGES (1935) § 106.

[8] Section 376 as it originally appeared in the Code of Civil Procedure of 1872 was a reenactment of section 11 of the Practice Act of 1851 which was a verbatim copy of section 606 of the New York Draft Code of Civil Procedure (Loomis, Graham, Field, 1850). Section 606 provided: "A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward." This section was apparently a codification of the New York common law rule that a father, as the technical master of his child during its minority, could maintain an action for the loss of the child's services during minority caused by a tortious physical injury to the child (REEVE, DOMESTIC RELATIONS (2d ed. 1846) 290; Whitney v. Hitchcock (N.Y. 1847) 4 Denio 461; Cowden v. Wright (N.Y. 1840) 24 Wend. 429); or by the wrongful death of the child. Ford v. Monroe (N.Y. 1838) 20 Wend. 210;

of an unmarried minor child to the father unless he is dead or has deserted his family, is inconsistent with the present policy of California law which gives both parents an equal right to the custody, services and earnings of unmarried minor legitimate children.[9] In every case where a mother sues under this section, unless she is joined as a plaintiff with the

cf. Plummer v. Webb (1825) Fed. Cas. No. 11,234. The New York commissioners had reason to believe that the New York wrongful death statute (Laws of New York, 1849, c. 256) did not give parents a right of action for the death of their child. See Oldfield v. N. Y. & Harlem R. R. Co. (1856) 14 N. Y. 310, 317.

The peculiar language, "A father, or in case of his death or desertion of his family, the mother . . .," used in section 606 by the New York draftsmen can also be explained by the New York common law rule existing when the section was drafted in 1849. It has been pointed out above that a father, because he was deemed to be the technical master of his children during their minority, could maintain an action for the loss of their services during minority. But the question whether the mother, upon the death or desertion of the father, became the master of her children and was therefore entitled to their services during minority was not yet settled in 1849. Since section 606 was never enacted as law in New York, this question was not finally determined until the case of Kennedy v. New York, etc. R. Co. (N. Y. 1885) 35 Hun. 186, in which a widowed mother was allowed recovery for the loss of her minor son's services resulting from a personal injury to the child. It is therefore evident that the New York draftsmen intended to give a mother the same right of action for the loss of services of her minor child which the father would have had but for his death or desertion of his family.

Section 606 apparently has served as a prototype for statutes giving a right of action for the wrongful death of a child in twelve other jurisdictions: ALA. CODE (Michie, 1928) § 5694; ALASKA COMP. LAWS (1933) § 3384; ARIZ. CODE (Struckmeyer, 1928) § 945; FLA. GEN. LAWS (Skillman, 1927) § 7049; IDAHO CODE ANN. (1932) § 5-310; IND. ANN. STAT. (Burns, 1926) § 274; IOWA CODE (1931) § 10986; MONT. REV. CODES (Choate, 1921) § 9075; ORE. CODE ANN. (1930) § 1-307; PUERTO RICO CODE OF CIVIL PROC. (1933) § 60; UTAH REV. STATS. (1933) § 104-3-10; WASH. COMP. STAT. (Remington, Supp. 1927) § 184. The draftsmen of the Iowa statute, however, were the only ones to set out clearly its actual meaning. Section 10986 of the IOWA CODE (1931) provides: "A father, or, in case of his death or imprisonment or desertion of his family, the mother, may as plaintiff maintain an action for the expenses and actual loss of service resulting from the injury or death of a minor child." The Indiana and Washington statutes have been construed to limit the recovery in an action for the wrongful death of a child to the value of the child's services during minority. Thompson v. Town of Ft. Branch (1931) 204 Ind. 152, 178 N. E. 440, 82 A. L. R. 1413; Hedrick v. Ilwaco R. & N. Co. (1892) 4 Wash. 400, 30 Pac. 714; Skidmore v. Seattle (1926) 138 Wash. 340, 244 Pac. 545. This rule has also been adopted in Arkansas, District of Columbia, Maryland, Michigan, Missouri, North Dakota, Pennsylvania, and Rhode Island without the presence of a separate statute providing for the wrongful death of minors. For a criticism of this minority rule, see Bond v. United Railroads (1911) 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; MCCORMICK, *op. cit. supra* note 7, § 101; Note (1936) 2 U. OF PITT. L. REV. 167.

[9] Section 197 of the California Civil Code provides: "The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings." See also § 169: "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."

father, she must be in a position to allege and prove that the father either is dead or has deserted his "family."[10] Consequently, no provision is made for those cases in which the right to the child's services, the obligation to support the child, or both, are divided between parents who are divorced or who are living apart without divorce. Situations may therefore arise where the father, who is the only parent entitled to maintain the action, cannot prove pecuniary loss, while the mother who suffers the pecuniary loss has no right of action.[11]

Furthermore, section 376 does not give a right of action for the death of an unmarried minor in all cases. Apparently no action can be maintained under either section 376 or section 377 for the death of an unmarried minor who has no guardian and whose parents do not survive him, although he may have brothers or sisters or other relatives dependent upon him or who for other reasons would suffer substantial pecuniary loss by his death.[12]

Finally, the section gives a guardian the right to sue for the wrongful death of his ward even though the guardian, as such, has no interest which entitles him to maintain an action of this character,[13] and although no provision is made for the disposal of any damages which he might recover in the action.

The provisions of section 376 relating to actions for the wrongful death of an unmarried minor should be repealed and section 377 should be amended to provide that the personal representative of either an adult or a minor may maintain the action for the benefit of certain relatives. Such a revision might allow a deceased minor's father, mother,

[10] McLain v. Llewellyn Iron Works (1922) 56 Cal. App. 60, 204 Pac. 869; Delatour v. Mackay (1903) 139 Cal. 621, 73 Pac. 454 (what constitutes father's desertion); Frazzini v. Cable (1931) 114 Cal. App. 444, 300 Pac. 121 (Desertion must exist at time of child's death).

It is not definitely settled that a mother may sue for the death of an illegitimate minor child when the father is not proved to be dead. The case of Stoneburner v. Theodoratos (1934) 76 Cal. App. Dec. 886, 30 P. (2d) 1001, (1934) 22 CALIF. L. REV. 578, (1935) 8 So. CALIF. L. REV. 249, upholding the mother's right, was dismissed while a rehearing was pending.

[11] *Cf.* Espinosa v. Haslam (1935) 8 Cal. App. (2d) 213, 47 P. (2d) 479, (1936) 24 CALIF. L. REV. 231.

[12] See Bond v. United Railroads, *supra* note 8, at 280. Section 377 was amended in 1935 to give the spouse and children of a deceased minor the right of action for his wrongful death. Cal. Stats. 1935, p. 460.

[13] See REPORT OF THE COMMISSIONERS FOR THE REVISION AND REFORM OF THE LAW; RECOMMENDATIONS RESPECTING THE CODE OF CIVIL PROCEDURE (Freeman, Van Fleet, Denis, 1900) p. 29. Section 376 was amended by Cal. Stats. 1901, p. 126, the amendment being a deletion of the phrase "and a guardian for the injury or death of his ward." This amendment, however, fell with the other amendments to the Code of Civil Procedure that were held unconstitutional in Lewis v. Dunne (1901) 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257, on the ground that they violated section 24 of article IV of the California Constitution.

spouse, children, brothers, sisters or dependent relatives, a wrongful death recovery.

II

THE AWARD OF DAMAGES

Relational Interests Protected. The evident purpose of the California Death Act is to give compensation for the loss of benefits to be expected from the life of certain close relatives, which benefits are taken away by their wrongful death. By the liberal terms of section 377 of the Code of Civil Procedure the jury are not confined to material, economic or pecuniary losses but are at liberty to consider any circumstances and elements of value. The courts, however, have undertaken to read limitations into the statute by construction and to define the interests and kinds of loss which may be recognized. By the statutes of many states juries are to fix damages with reference to the pecuniary injuries resulting from the death, but in California and some other states the measure of damages is directed by the legislature to be "such damages as under all the circumstances of the case, may be just,"[14] without specification of the items or elements of loss and without limitation to strictly pecuniary losses.[15]

Pecuniary Loss. The fundamental principle with respect to damages laid down by the cases is that the beneficiaries are entitled to recover only for the pecuniary value of the elements of loss or injury which they have suffered because of the death of their relative.[16] The loss to members of the immediate family of society, companionship, comfort, protection and other incidents of family association which are productive of benefit and well being may be considered.[17] It is only the more impalpable injuries of grief and bereavement which are excluded.[18] "Pecuniary loss" under such a statute as that of California is a somewhat fictional expression and does not necessarily mean actual economic loss. The term includes not only support and services to which the beneficiaries had a legal right or which they had reason to expect by the conduct of the deceased during his life, but it also includes the money

[14] This rule as to damages also applies to cases coming within the wrongful death provisions of section 376 of the Code of Civil Procedure and section 1970 of the Civil Code.

[15] Coliseum Motor Co. v. Hester (1931) 43 Wyo. 298, 3 P. (2d) 105.

[16] *In re* Riccomi's Estate (1921) 185 Cal. 458, 197 Pac. 97, 14 A.L.R. 509; Morgan v. Southern Pacific Co. (1892) 95 Cal. 510, 30 Pac. 603, 17 L.R.A. 71, 29 Am. St. Rep. 143; Bond v. United Railroads, *supra* note 8.

[17] Beeson v. Green Mountain Gold Mining Co. (1880) 57 Cal. 20; Munro v. Pacific Coast Dredging & Reclamation Co. (1890) 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; and cases cited *supra* note 16.

[18] Simoneau v. Pacific Electric Ry. Co. (1911) 159 Cal. 494, 115 Pac. 320; Fox v. Oakland Consol. Ry. (1897) 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

value of certain non-economic interests indicated by such terms as society, companionship, comfort and protection. The interest of the child in nurture, instruction and moral and physical training may be considered an actual pecuniary interest.

The pecuniary loss suffered by the beneficiaries is estimated as of the time of the death and the damages awarded should represent the present value of the prospective benefits that probably would have been received from the deceased for a period not to exceed his reasonable expectation of life as shown by either a standard mortality table or by other evidence.[19] The fact that an inheritance was received by the beneficiaries from the estate of the deceased or that life insurance money was paid to them can not be used by the wrongdoer to mitigate damages.[20]

In general, recovery is permitted for the loss of that to which a relative is entitled by law, such as the support which a wife and children may demand from a husband and father, or to something of pecuniary value which a relative would have been reasonably certain to receive from the deceased had he lived, even though the obligation to supply it may have been only a moral one.[21] It is, therefore, not necessary in order to recover damages that the relative be actually dependent upon the deceased for support.[22] It is settled that the beneficiaries may recover funeral expenses which have been paid by them or for which they are liable;[23] but expenditures for medical and hospital services rendered to the deceased are not proper elements of damage.[24]

[19] Valente v. Sierra Ry. Co. (1907) 151 Cal. 534, 91 Pac. 481; Fox v. Oakland Consol. Ry., *supra* note 18; Herron v. Smith Bros., Inc. (1931) 116 Cal. App. 518, 2 P. (2d) 1021 (Jury is not bound by exact estimates of mortality tables or past income.)

The most widely used mortality table, The American Experience Table of Mortality, was compiled in 1868 and has not been revised since. The accuracy of this table may be doubted in view of the fact that man's span of life has increased considerably since 1868. See GILBERT, MORT AND E. ALBERT, LIFE INSURANCE: A LEGALIZED RACKET (1936) iv, 43, 49, 50.

[20] McLaughlin v. United Railroads (1915) 169 Cal. 494, 147 Pac. 149, Ann. Cas. 1916D, 337, L. R. A. 1915E, 1205.

[21] Sneed v. Marysville Gas etc. Co. (1906) 149 Cal. 704, 87 Pac. 376; Parsons v. Easton (1921) 184 Cal. 764, 195 Pac. 419; Bond v. United Railroads, *supra* note 8.

[22] Taylor v. Albion Lumber Co. (1917) 176 Cal. 347, 168 Pac. 348, L. R. A. 1918B, 185; Shebley v. Peters (1921) 53 Cal. App. 288, 200 Pac. 364 (opinion of Supreme Court on denial of hearing).

[23] Adams v. Southern Pacific Co. (1935) 4 Cal. (2d) 731, 53 P. (2d) 121; Little v. Yanagisawa (1924) 70 Cal. App. 303, 233 Pac. 357; see Gay v. Winter (1867) 34 Cal. 153, 162; Koehl v. Carpenter (1920) 47 Cal. App. 642, 646, 191 Pac. 43, 45.

[24] Fitzgerald v. Quinn (1933) 131 Cal. App. 457, 21 P. (2d) 656; see Salmon v. Rathjens (1907) 152 Cal. 290, 301, 92 Pac. 733, 738. *Contra*: Cleary v. City R. R. Co. (1888) 76 Cal. 240, 18 Pac. 269; see Morgan v. Southern Pacific Co., *supra* note 16, at 521.

Damages for Death of Head of Family. The elements of damage differ according to the relationship between the beneficiaries and the victim. Thus, in an action for damages on behalf of a widow and children for the death of the husband and father, the elements of damage are the loss of support and contributions which they may reasonably have expected to receive from the deceased during the remainder of his lifetime had he not been killed. This entails a consideration of such factors as his ability to earn money,[25] his expenditures on himself,[26] his habits and health and the possible future fluctuations of his business or employment.[27] In addition, damages may be recovered for the loss of training, guidance, education and also the comfort, society and protection which the father would probably give to his wife and children.[28] The children, as heirs, are entitled to recover for the loss of any benefits of pecuniary value which they could with reasonable certainty have expected to receive from their deceased father after their arrival at majority as well as during minority, measured by what would have been the probable duration of the life of the deceased.[29]

Damages for Death of Wife and Mother. Where a wife and mother dies as a result of the wrongful act of another, the husband may recover damages for the value of her services, and also for the loss of her comfort, society and companionship.[30] The childrens' recovery, which is not limited to their minority, is based upon the pecuniary value of their mother's care, instruction, and intellectual and moral training, taking into account her ability to care for and assist them, and her efforts for their welfare.[31]

Damages for Death of Child. Perhaps there are no damages more difficult to estimate than those allowable to the parents for the wrongful death of a minor child. Although the nature of the subject does not admit of direct or precise proof,[32] as in all other cases involving wrongful death, the theoretical basis for the damages recovered is the loss of benefits of pecuniary value. In general, damages are given for the loss of the child's prospective services, comfort, protection and society, taking into consideration his age, character, disposition and health.[33]

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[25] Shebley v. Peters, *supra* note 22.

[26] Harrison v. Sutter St. Ry. Co. (1897) 116 Cal. 156, 47 Pac. 1019.

[27] *In re* California Nav. & Imp. Co. (1901) 110 Fed. 670.

[28] Simoneau v. Pacific Electric Ry. Co., *supra* note 18; Hale v. San Bernardino etc. Co. (1909) 156 Cal. 713, 106 Pac. 83; Gilmore v. Los Angeles Ry. Corp. (1930) 211 Cal. 192, 295 Pac. 41.

[29] Peters v. Southern Pacific Co. (1911) 160 Cal. 48, 116 Pac. 400.

[30] Valente v. Sierra Ry. Co. (1907) 151 Cal. 534, 91 Pac. 481.

[31] Redfield v. Oakland Consol. St. Ry. Co. (1895) 110 Cal. 277, 42 Pac. 822.

[32] For a helpful comment on the problems involved in this class of death cases, see Note (1932) 16 MINN. L. REV. 409.

[33] Bond v. United Railroads, *supra* note 8; Note (1931) 74 A.L.R. 11, 72, 88, 93.

Of course, if the child were very young at the time of his death, the benefits that might accrue to the parents after he reached his majority would seem too remote and conjectural to be of any actual economic value.[34]

It could seldom be proved that a deceased infant was a financial asset rather than a liability to his parents. While there is considerable conflict, the California law and that of a few other jurisdictions properly recognizes and protects certain non-economic interests of the parents in the life of the child, such as comfort, protection and family companionship. Similar non-economic interests are recognized as elements of damage on the part of the child in the life of the parent and of the husband or wife in the life of the spouse. Such losses, although not readily measurable in money, are substantial and material and may well be reasonably compensated as of pecuniary value, even though it is impossible to prove the loss of financial support, services or the expectation of pecuniary contributions. Such family relational interests are among the most valuable elements of human well-being and may be estimated in money even though the law cannot undertake to estimate or recompense mental anguish, bereavement and emotional distress.[35]

In the case of older children various facts can be considered such as the willingness of the child to help the parents as shown by the help actually rendered before his death and the probability of the continuance of the help if death had not intervened. The age, health and earning capacity of the child and the age of the parents are also considered.[36]

Who are the "heirs"? It has been recently held that a dependent mother of a deceased adult son who also leaves a surviving wife and adult children is not an "heir" within the meaning of Code of Civil Procedure section 377 and cannot maintain an action for his wrongful death even though the deceased son was separated from his wife at the time of his death and was not supporting either his wife or children.[37]

This unjust and surprising result demonstrates the need for amend-

[34] *Ibid. Cf.* Criss v. Angelus Hospital Ass'n of L. A. (1936) 13 Cal. App. (2d) 412, 56 P. (2d) 1247, (1936) 25 CALIF. L. REV. 103 (sustaining a $6000 verdict for the death of a twelve-day-old infant); Notes (1934) 12 N. Y. U. L. Q. REV. 388, 390; (1932) 16 MINN. L. REV. 409, 415, 416.

[35] Anderson v. Great No. Ry. Co. (1908) 15 Idaho 513, 99 Pac. 91; Coliseum Motor Co. v. Hester, *supra* note 15; Green, *Relational Interests* (1934) 29 ILL. L. REV. 460, 469.

[36] Parsons v. Easton, *supra* note 21; Rocca v. Tuolumne County Electric etc. Co. (1926) 76 Cal. App. 569, 245 Pac. 468; Herron v. Smith Bros., Inc., *supra* note 19.

[37] Evans v. Shanklin (1936) 86 Cal. App. Dec. 797, 60 P. (2d) 554; Sabine Towing Co. v. Brennan (1936) 85 F. (2d) 478, 484; Wilcox v. Bierd (1928) 330 Ill. 571, 162 N. E. 170; White v. A. T. & S. F. Ry. (1928) 125 Kan. 537, 265 Pac. 73, 59 A. L. R. 749, 760.

ing section 377 by adding a definite enumeration of beneficiaries. The section might provide that the spouse, children (legitimate, natural or adopted), parents (including stepparents and mothers of illegitimate children), brothers, stepbrothers, sisters, stepsisters and other relatives (not beyond the third degree of consanguinity and dependent in whole or in part upon the deceased) may recover damages for the wrongful death of any deceased person upon a showing that they had an interest in his life which was of pecuniary worth.

Excessive Damages. In an action for wrongful death it is the province of the jury under proper instruction from the court to determine the amount of the damages from the facts and circumstances of the case before it.[37a] The jury in fixing the damages must necessarily be given a wide range of discretion, for the data presented to it and upon which it must base its verdict are at best uncertain.[38] After being committed to the discretion of the jury, the amount of the damages is next submitted to the trial judge, who, in ruling upon a motion for a new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just,[39] or order the remission of a part of the recovery as a condition to refusing a new trial.[40]

Since the determination of the amount of damages is primarily the province of the jury and the trial judge, the courts are reluctant to interfere when a verdict is challenged on appeal as excessive. The attitude of the appellate courts is shown by general statements and formulae which vary in expression from those making the test such excessiveness as to indicate passion, prejudice or corruption on the part of the jury, to those which assert the court's right to interfere when the damages are clearly disproportionate to the injury sustained. The variations in this regard are perhaps partially due to the natural tendency of the court when it declines to interfere in a particular case to express the general rule against interference in stronger terms than it employs in cases in which it exercises its power to interfere.[41]

Thus, when the court decides not to set aside the verdict, the

[37a] Hale v. San Bernardino etc. Co., *supra* note 28; Bond v. United Railroads, *supra* note 8.

[38] Morgan v. Southern Pacific Co., *supra* note 16; Rocca v. Tuolumne County Electric etc. Co., *supra* note 36.

[39] Harrison v. Sutter St. Ry. Co., *supra* note 26; Griffey v. Pacific Electric Co. (1922) 58 Cal. App. 509, 209 Pac. 45; Gorman v. County of Sacramento (1928) 92 Cal. App. 656, 268 Pac. 1083.

[40] *Cf.* Gonsalves v. Petaluma etc. Ry. Co. (1916) 173 Cal. 264, 159 Pac. 724; Etchas v. Orena (1898) 121 Cal. 270, 53 Pac. 798; Muench v. Gerske (1934) 139 Cal. App. 438, 34 P. (2d) 198.

[41] For a general discussion of the power of appellate courts to declare verdicts excessive or inadequate in wrongful death and personal injury cases, see 1 PARMELE, DAMAGE VERDICTS (1927) 1-42; Note (1936) 102 A.L.R. 1125.

formula which has been most frequently used is to the effect that to warrant interference "the verdict must be so excessive as to appear, at first blush, to have been given under the influence of passion, prejudice or corruption",[42] or "so plainly or flagrantly or outrageously excessive as to suggest passion, prejudice or corruption on the part of the jury".[43] The courts have also said that they will not interfere although the award is large[44] or the court, had it been acting as a jury in the particular case, would have assessed the damages at a smaller amount than did the jury.[45] It has also been stated that the court will not interfere unless the facts are such that an excess appears as a matter of law or unless there has been a palpable abuse of discretion on the part of the jury.[46]

On the other hand, when the court has decided to set aside a verdict on the ground that it is excessive such statements as "the jury could not have arrived at the amount of the verdict by any rational method of computation"[47] or the verdict "is clearly greater than the evidence warrants"[48] have been used. The lack of a cool and dispassionate exercise of discretion on the part of the jury and the inference that the jury was prompted by improper motives have also been suggested as a justification for interference.[49] Usually the idea of disproportion of the damages allowed to the injury sustained is suggested as the criterion.[50] The courts rarely make excessiveness in and

[42] Bond v. United Railroads, *supra* note 8; Varcoe v. Lee (1919) 180 Cal. 338, 181 Pac. 223; Myers v. San Francisco (1871) 42 Cal. 215.

[43] Hale v. San Bernardino etc. Co., *supra* note 28; Brown v. Beck (1923) 63 Cal. App. 686, 220 Pac. 14; Weaver v. Shell Oil Co. (1935) 83 Cal. App. Dec. 109, 49 P. (2d) 857 (Reversed on rehearing on other grounds (1936) 13 Cal. App. (2d) 643, 57 P. (2d) 571).

These formulae are apparently based upon a formula first employed by Chancellor Kent in Coleman v. Southwick (N.Y. 1812) 9 Johns. 45, 6 Am. Dec. 253. See PARMELE, *op. cit. supra* note 41, at 2. In passing upon the objection that the damages awarded in a libel suit were excessive, Chancellor Kent stated: "The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess. These are the principles which have been laid down by the most eminent judges who have presided in the English courts since the year 1760; . . ." Coleman v. Southwick, *supra*, at 52.

[44] Switzer v. Mullally (1935) 7 Cal. App. (2d) 444, 46 P. (2d) 215.

[45] Bellandi v. Park Sanitarium Ass'n (1931) 214 Cal. 472, 6 P. (2d) 508.

[46] Bond v. United Railroads, *supra* note 8; Myers v. San Francisco, *supra* note 42.

[47] Wyseur v. Davis (1922) 58 Cal. App. 598, 209 Pac. 213.

[48] Parsons v. Easton, *supra* note 21.

[49] Morgan v. Southern Pacific Co., *supra* note 16.

[50] Morgan v. Southern Pacific Co., *supra* note 16; Fox v. Oakland Consol. St. Ry., *supra* note 18; Dickinson v. Southern Pacific Co. (1916) 172 Cal. 727, 158 Pac. 183; Wiezorek v. Ferris (1917) 176 Cal. 353, 167 Pac. 234.

of itself a substantive ground for relief, however, but nearly always imply that the jury was actuated by passion or prejudice. This formal insistence upon the necessity of an inference of passion or prejudice may be due to the fact that those terms are employed by section 657 (5) of the Code of Civil Procedure[51] in enumerating the grounds for a new trial.[52]

Power of Trial Judge Over Excessive Damages. Since an appellate court has a very limited power to set aside a verdict on the ground that it is excessive,[53] a solution to the problem of curbing extravagant and unreasonable judgments must be found in the discretion and power of the trial judge to grant a new trial or to order a remission of a portion of the recovery as a condition to refusing a new trial. This proposition was considered in *Bond v. United Railways*,[54] wherein Judge Shaw observed:

> "Juries should he insistently cautioned not to allow compensation for the sorrow and distress which always ensues from such a death, nor for the pecuniary loss which is remote or conjectural in the particular case. The trial judge should be vigilant to set aside verdicts where there is reason to believe this has heen done, or that passion, prejudice, or sympathy[55] has influenced the jury to give more than the facts reasonably warrant. We have cause to feel that the trial courts sometimes act on the theory that they can shift the responsibility in this matter to the appellate court, and that an excessive verdict can be corrected on appeal. This is a mistake. Our power over excessive damages exists only when the facts are such that the excess appears as a matter of law,[56] or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. Practically the trial court must bear the whole responsibility in every case." [57]

Since the average juror is inexperienced in the trial of wrongful death cases and is often influenced by pity and sympathy, the solution of the problem of controlling excessive damage awards rests entirely with strong trial judges who are willing to interpose their more mature

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[51] Section 657 provides: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

"(5) *Excessive damages.* Excessive damages, appearing to have been given under the influence of passion or prejudice; . . ."

[52] See PARMELE, *op. cit. supra* note 41, at 8.

[53] See Appendix, *infra*, for an analysis of the California cases in which wrongful death judgments have been challenged on appeal either as excessive or inadequate.

[54] *Supra* note 8, at 285.

[55] The fact that the jury, in reaching its verdict, was influenced by "sympathy" is not a ground for setting aside the verdict under section 657 (5) of the Code of Civil Procedure. See *supra* note 51.

[56] The sixth paragraph of Code of Civil Procedure section 657, *supra* note 51, provides that the court may set aside a verdict and grant a new trial if the evidence is insufficient "to justify the verdict or other decision or . . . is against the law."

[57] Bond v. United Railroads, *supra* note 8, at 285.

judgments to reduce the amount of the award or to grant a new trial whenever a jury's award is unjustly large. It is evident that trial judges have practically an absolute discretion[58] to grant new trials on the ground of excessive damages, for no case appears in the California reports in which such an order granting a new trial has been reversed on appeal. The terms of section 657(5) of the Code of Civil Procedure can easily be complied with since there may be an inference of "passion or prejudice" on the part of the jury whenever a verdict is unreasonably large in view of the evidence of pecuniary loss sustained by the beneficiaries.[59]

Maximum Limitation on Amount of Damages. Seventeen jurisdictions have attempted a solution of the problem of preventing excessive verdicts by enacting in their wrongful death statutes the maximum amount which may be awarded, the usual limitation being $10,000,[60] although one state has a $15,000,[61] and another state a $5,000[62] maximum. But it is doubtful if this method presents a fair and satisfactory solution of the problem.[63] Although $10,000 may appear to be sufficient

[58] "That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse has become axiomatic, and requires no citation of authority in its support. It is true that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But so long as a case made presents an instance showing a reasonable or even a fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn from the evidence. The opportunities of the trial court, in such instances, for reaching just conclusions are, as a general thing, so superior to our own, that we will not presume to set our judgment against that of the former, where there appears any reasonable room for difference." Van Fleet, J., in Harrison v. Sutter St. Ry. Co., *supra* note 26, at 161, 47 Pac. at 1020.

[59] ". . . to say that a verdict bas been influenced by passion or prejudice is but another way of saying that it exceeds any amount justified by the evidence." Griffey v. Pacific Electric Ry. Co., *supra* note 39, at 513, 209 Pac. at 46.

[60] ALASKA COMP. LAWS (1933) § 3845; CONN. GEN. STAT. (1930) § 5987; D. C. CODE (1929) tit. 21, c. 1, § 1; ILL. STATE BAR STAT. (1935) c. 70, § 2; IND. ANN. STAT. (Burns, 1933) § 2-404; KAN. REV. STAT. ANN. (1923) c. 60, § 3203; ME. LAWS (1933) c. 113, p. 247; MASS. ANN. LAWS (Michie, 1933) c. 229, § 5; MINN. STAT. (Mason, Supp. 1936) § 9657; MO. REV. STAT. (1929) § 3262; N. H. PUB. LAWS (1926) c. 302, § 13 (if surviving spouse, dependent father or mother, or minor children, otherwise $7000); ORE. CODE ANN. (1930) § 5-703; S. D. COMP. LAWS (1929) § 2931; VA. CODE (Michie, 1924) § 5787; W. VA. CODE (Michie, 1932) § 5475.

[61] Wis. Stats. 1935, c. 213, p. 326 (if surviving spouse or parent, otherwise $12,500).

[62] COLO. ANN. STATS. (Michie, 1935) c. 50, § 3.

[63] Several states have provisions in their constitutions which forbid the legislatures to set any limit upon the recovery of damages in wrongful death cases, *e.g.*, KY. CONST. § 54; N. Y. CONST. art. I, § 18; OKLA. CONST. art. XXIII, § 7; PA. CONST. art. III, § 21; WYO. CONST. art. X, § 4.

compensation for the great majority of wrongful death claims, the actual recovery will normally be much smaller after the expenses of the litigation have been deducted from the recovery. Furthermore, the presence of a fixed limit of recovery tends to affect the court's willingness to allow the jury a greater range of discretion in considering non-pecuniary elements of loss,[64] and the tendency of the jury would no doubt be to give the maximum amonnt recoverable in many cases where such an award would bear small relation to the pecuniary loss sustained. Since the basic principle underlying the measure of damages in wrongful death actions is that the wrongdoer shall render compensation for all the pecuniary loss he has inflicted npon the surviving relatives of the victim, and since this pecuniary loss will vary with the earning capacity of the deceased, an arbitrary limitation on the wrongdoer's liability would result in an inadequate compensation for the pecuniary loss sustained in many cases.

If our present system for measuring damages and awarding compensation in wrongful death cases is found too unsatisfactory, perhaps a step forward would be to establish a system of damages according to a fixed scale, based upon the earning power and life expectancy of the deceased.[65] Such a system now applies to death cases falling under the terms of the Workmen's Compensation Act and the suggestion has been made that death claims arising from automobile accidents, the largest class of death cases now before our courts, be withdrawn from litigation over questions of negligence and damages, and be made compensable through administrative awards, based upon an insurance liability as in the workmen's compensation system.[66] Much may be said in favor of such a proposal.

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[64] See McCormick, *op. cit. supra* note 7, at 361.

[65] *Ibid.*, § 106 (7).

[66] *Ibid.* See French, The Automobile Compensation Plan (1930), Book Review (1932) 45 Harv. L. Rev. 1428. Such a plan is now being studied by the Commission on the Administration of Justice in New York State. See Report of the Commission, Legis. Doc. (1934) No. 50, pp. 951-956. At page 952 of the report the general principles of the plan are set out as follows:

"The plan involves three elements:

1. The removal of all automobile personal injury [and wrongful death] cases from the courts to Administrative Commissions with relatively swift and simple procedure, similar to that which now operates in connection with workmen's compensation.

2. The abandonment of the present rules of damages, negligence and contributory negligence. Owners of motor vehicles would be held absolutely liable for all injuries in which their vehicles should be involved. Damages would be measured as accurately as possible according to medical expenses and actual economic loss suffered.

3. The inauguration of a system of compulsory financial responsibility among automobile owners by requiring them to carry insurance covering all awards which may be made against them."

Apportionment of Damages. A majority of the jurisdictions provide in their wrongful death statutes that the damages recovered shall be distributed to the beneficiaries under the statute in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate.[67] The statutes of other jurisdictions provide that the damages shall go to designated beneficiaries in specified proportions.[68] Still other jurisdictions provide that the trial court,[69] the probate court,[70] or the jury,[71] shall apportion the damages recovered according to the pecuniary loss suffered by each beneficiary.

In California and a few other jurisdictions, the statutes contain no provision for the apportionment of damages awarded in wrongful death actions. The California courts have, therefore, laid down the rule that the recovery shall be in a single "lump sum" for the total of the pecuniary loss suffered.[72] But it has also been held not to be reversible error for a jury, upon instructions from the court, to return a verdict for separate damages to each heir.[73] Where the personal representative brings the action and recovers damages, he holds this fund as a statutory trustee and must distribute it among the heirs upon the basis of the pecuniary loss to each.[74] If there is a dispute among the heirs with respect to the share each shall receive, an action may be brought by the parties to the dispute in the Superior court for an accounting and for the distribution of the trust fund in which the heirs of the deceased have a beneficial interest.[75]

The inadequacy of the California statute in regard to apportionment of damages should be corrected. It does not seem advisable that

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[67] *E. g.*, ALA. CODE (Michie, 1928) § 5696; MICH. COMP. LAWS (1929) § 11198; NEB. COMP. STATS. (1929) § 30-810. This was the rule for distribution of damages in Califoruia under the wrongful death act of 1862 (Cal. Stats. 1862, p. 447), but when the codes were enacted in 1872 this provision was omitted.

[68] *E. g.*, COLO. ANN. STATS. (1935) c. 50, § 1; NEV. COMP. LAWS (Hillyer, 1929) § 9195; N. Y. ANN. CONS. LAWS (McKinney, Supp. 1935) DECEDENTS ESTATE LAW § 133.

[69] HAWAII REV. LAWS (1935) § 4052; FEDERAL DEATH ACT (DEATH ON HIGH SEAS ACT) 46 U. S. C. § 762.

[70] OHIO ANN. CODE (Throckmorton, 1934) § 10509-168 (unless beneficiaries can adjust their respective shares among themselves); S. D. COMP. LAWS (1929) § 2931 (unless beneficiaries can adjust their respective shares among themselves).

[71] MD. ANN. CODE (Bagby, 1924) art. 67, § 2; VA. CODE ANN. (Michie, 1924) § 5787; TEXAS REV. CIV. STAT. (Vernon, 1928) tit. 77, art. 4677; LORD CAMPBELL'S ACT, 9 & 10 VICT. (1846) c. 93, § 2.

[72] Robinson v. Western States etc. Co. (1920) 184 Cal. 401, 194 Pac. 39; Rose v San Diego Electric Ry. Co. (1933) 133 Cal. App. 646, 24 P. (2d) 838.

[73] Robinson v. Western States etc. Co., *supra* note 72; Cate v. Fresno Traction Co. (1931) 213 Cal. 190, 2 P. (2d) 364.

[74] *In re* Riccomi's Estate (1921) 185 Cal. 458, 197 Pac. 97, 14 A. L. R. 509.

[75] *Ibid.*

the damages should be distributed to the heirs according to the statute of distribution, although this is the method used in the majority of jurisdictions, or that they should be distributed to designated beneficiaries in specified portions. Such methods of distribution are unfair inasmuch as surviving relatives who have suffered no pecuniary injury on account of the death share in the damages to the detriment of the relatives who have suffered pecuniary loss. Nor does it seem desirable to add to the jury's burden the task of apportioning the damages.

A more practical type of provision appears to be that used in Ohio[76] which requires the probate judge to apportion the damages in cases where the beneficiaries cannot agree upon their respective shares. But since the trial judge has heard the evidence of the pecuniary loss to each heir, he is in a much better position to apportion the damages than is a probate judge. It seems desirable, therefore, that the California wrongful death statute should be amended so as to provide that the trial judge shall apportion the damages recovered in such manner as shall be fair and equitable, having regard to the pecuniary loss sustained by each beneficiary, unless the beneficiaries can agree upon their respective shares.

III

SURVIVAL OF ACTION AGAINST WRONGDOER'S ESTATE

Another glaring defect in California wrongful death law results from the language of section 377 of the Code of Civil Procedure when read in connection with section 573 of the Probate Code. By the terms of section 377,[77] a wrongful death action can only be maintained "*against the person* causing the death, or if such person be employed by another person who is responsible for his conduct, then also against *such other person.*" Section 573 of the Probate Code does not allow an action for wrongful death against the personal representative of a deceased wrongdoer.[78] Consequently, the supreme court in the leading case of *Clark v.*

[76] Section 10509-168 of the Ohio Code, *supra* note 70, provides: "The amount received by such personal representative, whether by settlement or otherwise, shall be distributed to the beneficiaries or any one or more of them, and unless the share of each shall be adjusted among themselves, by the court making the appointment [of the personal representative] in such manner as may be fair and equitable, having due regard to the pecuniary injury to each beneficiary resulting from such death and to the age and condition of such beneficiaries. In making such distribution, the court may consider funeral expenses and other items of expense incurred by reason of the death."

[77] See *supra* note 6.

[78] Section 573 provides: "Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

Goodwin[79] felt compelled to reaffirm the common law doctrine of *actio personalis* in relation to the survival of personal injury actions, and denied a recovery in a wrongful death action brought by the widow of a murdered man against the estate of the deceased murderer.

The exemption of the wrongdoer's estate from this tort liability has no basis in reason or justice. In the formative period of wrongful death legislation the law was primarily concerned with giving redress in death cases where the wrongdoers were corporations[80] and the need for the survival of wrongful death actions against the estate of the wrongdoer was not urgent. Today, however, the law is confronted with a different situation which demands correction. Modern automobile traffic has made for an ever increasing number of casualties due to the negligent operation of motor vehicles by individuals. Often the negligent driver is killed along with the victim of his negligence and the members of the victim's family are deprived of compensation although the wrongdoer leaves a large estate or is fully insured against liability.

Obviously, the wrongdoer's death should affect neither the *right* of the victim's surviving relatives to compensatory relief nor the *liability* incurred by the tortfeasor as a consequence of his wrongful act. The social purpose of money damages for wrongful death is to compensate the members of the victim's family for their pecuniary loss suffered by reason of his death and their need for compensation is in no way changed by the wrongdoer's death. On the other hand, the wrongdoer's estate should not escape the liability of rendering compensation for his wrong. Since the claim of the victim's family is based solely upon a right to compensation for the pecuniary loss caused by the death, the cause of action should be viewed by the law as no more "personal" than contract obligations which are allowed to survive against the deceased wrongdoer's estate.[81] If the cause of action for wrongful death were allowed to survive against the wrongdoer's estate, his heirs would have no just complaint since any judgment permitted against the estate would affect only those assets which would have been subject to levy had the judgment been recovered against the wrongdoer personally,[82] and it seems much more just to deprive the wrongdoer's heirs of benefits from the estate than to deny redress to the persons wronged.[83]

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[79] (1915) 170 Cal. 527, 150 Pac. 357, L.R.A. 1916A, 1142.

[80] Sir Frederick Pollock believes that the numerous railway accidents towards the middle of the nineteenth century led to the passage of Lord Campbell's Act. POLLOCK, LAW OF TORTS (13th ed. 1929) 68.

[81] *Ibid.* at 63.

[82] See New York Report, *supra* note 1, at 4.

[83] See POLLOCK, *op. cit. supra* note 80, at 64.

One-third of the states[84] and England[85] provide by statute that death actions may be originally brought against the estate of a deceased wrongdoer. The California legislature should follow the example of these more progressive[86] jurisdictions in this field of the law and abolish the unfair rule of *Clark v. Goodwin*.[87]

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[84] GA. LAWS (1935) p. 94; MD. ANN. CODE (Bagby, Supp. 1929) art. 67, § 1; ILL. STATE BAR STAT. (1935) c. 3, § 125; Devine v. Healy (1909) 241 Ill. 34, 89 N. E. 251; KY. STAT. (Carrol, 1930) § 10; Hunt's Exec'x v. Mutter (1931) 238 Ky. 396, 38 S. W. (2d) 215; MISS. CODE ANN. (1930) § 510; MONT. REV. CODE (Choate, 1921) § 9086; Anderson v. Wirkman (1923) 67 Mont. 176, 215 Pac. 224; N. J. COMP. STAT. (1910) tit. Executors and Administrators, § 5; Hackensack Trust Co. v. Vanden Berg (1916) 88 N. J. L. 518, 97 Atl. 148; N. Y. CONSOL. LAWS ANN. (McKinney, Supp. 1935) DECEDENTS ESTATE LAW, § 118; OHIO ANN. CODE (Throckmorton, 1934) § 10509-166; R. I. ACTS (1932) p. 186; S. D. COMP. LAWS (1929) § 2929; TENN. PUB. ACTS (1935) p. 208; TEX. STAT. (Vernon, 1928) § 4676; VA. CODE (Michie, 1930) § 5786; W. VA. CODE (Michie, 1932) § 5474; WIS. STAT. 1933, p. 225. See Evans, *Survival of the Action for Death by Wrongful Act* (1933) 1 CHI. L. REV. 102; Winfield, *loc. cit. supra* note 1; Legis. (1935) 48 HARV. L. REV. 1008, 1012.

[85] THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT (1934) 24 & 25 GEO. V, c. 41, § 1 (1).

[86] "Is it not surprising that with all the progressive legislation on our statute books, the legislature has not yet seen fit to place California in the same position with regard to survival of actions as many of our sister states who do not boast of their progressiveness?" *Review of Recent Cases*, O. K. M. (Orrin K. McMurray) (1918) 6 CALIF. L. REV. 455, 466.

[87] A statute allowing survival of wrongful death actions should make provision for cases in which the wrongdoer dies before the victim. Since, in these cases, no cause of action for wrongful death was in existence during the lifetime of the wrongdoer, it has been held that there was no cause of action to survive against the wrongdoer's estate. Beavers v. Putnam (1910) 110 Va. 713, 67 S. E. 353. This unjust result has been corrected in Virginia by statute. VA. CODE (Michie, 1930) § 5786. There is no valid reason why the action should not be maintainable in such cases the same as if the wrongdoer had died after his victim. The cause of action for wrongful death should relate back to the time of the accident. See LAW REFORM (MISCELLANEOUS PROVISIONS) ACT (1934) *supra* note 85, § 1 (4); Evans, *op. cit. supra* note 84.

Perhaps provision should also be made that suits against the wrongdoer's estate must be brought within six months after the personal representative takes out letters of administration. See LAW REFORM (MISCELLANEOUS PROVISIONS) ACT (1934) *supra* note 85. This requirement would speed up the administration of the wrongdoer's estate and should not work hardship on the victim's surviving kin. Provision might also be made that if there is no personal representative of the deceased, or if no action is brought by the personal representative within six months after death, the action may be brought by the beneficiaries in their own names. See THE FATAL ACCIDENTS ACT, 27 & 28 VICT. (1864) c. 95, § 1.

If wrongful death actions against the tortfeasor's estate were permitted, the problem would also arise as to how the damages recovered should be paid. Should they be made payable as a simple contract debt incurred by the deceased (see LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, *supra* note 85, § 1(6)) or should an exemption of a certain amount be made for the support of the family and dependents of the wrongdoer?

A revision of the law which would allow the action to be maintained against the wrongdoer's estate would apparently necessitate the amending of sections 11580 (b) 1 and 11580 (b) 2 of the Insurance Code and sections 402 (a-e) and 415 of the Vehicle Code.

IV

RECOVERY FOR DECEASED'S LOSS OF EARNINGS BEFORE DEATH AND FOR HIS MEDICAL AND HOSPITAL EXPENSES

The cause of action given to the heirs by section 377 of the Code of Civil Procedure is entirely independent of the cause of action for personal injuries which was vested in the decedent at the time of his death,[88] and the damages recovered inure to the exclusive benefit of the dependent heirs or those who can show pecuniary loss and are not subject to the claims of creditors of the deceased.[89] The deceased's cause of action for his personal injuries does not survive to his personal representative, and thus no recovery can be had for the loss resulting to the estate from the impairment of the deceased's earning power between the time of the injury and that of death and from the payment of his medical and hospital expenses. The result is that the creditors of the victim who have suffered injury by being deprived of valuable security, namely, the earning power and personal credit of the victim-debtor, are given no protection. Consequently, although a physical injury causing death results in financial loss to the creditors, the estate and the surviving relatives of the decedent, the wrongdoer is compelled to render compensation only for the loss of prospective benefits to the heirs, and if the decedent leaves no surviving heirs who can prove pecuniary loss, the wrongdoer is given complete freedom from liability.[90]

This situation should be corrected so that the wrongdoer would be compelled to render compensation for the pecuniary loss caused by the wrong to the victim's estate as well as to his surviving relatives who have sustained pecuniary losses by reason of the death. The present law should be revised by either of the following two methods:[91]

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[88] Morgan v. Southern Pacific Co., *supra* note 16; Dickinson v. Southern Pacific Co., *supra* note 50; Tann v. Western Pac. Railway Co. (1919) 39 Cal. App 377, 178 Pac. 971.

[89] *In re* Riccomi's Estate, *supra* note 74; see Keena v. United Railroads (1922) 57 Cal. App. 124, 130, 207 Pac. 35, 38.

[90] Webster v. Norwegian Mining Co. (1902) 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; Kerrigan v. Market St. Ry. Co. (1903) 138 Cal. 506, 71 Pac. 621.

[91] A third method of revision which would correct many of the deficiencies of the present law could be accomplished by repealing the existing wrongful death statute and enacting a survival statute which would provide for the recovery of all damages arising both from the injury and the resulting death. This method has been adopted in five states. See Jones, *Civil Liability for Wrongful Death in Iowa* (1925) 11 IOWA L. BULL. 28, 29-49. In this group of states, the damages in actions under the survival statute are not restricted to the injuries which accrued before death but also include the economic loss resulting from the death itself. This is accomplished under the theory that one element of the cause of action which survives is a claim for the estate's loss resulting from the impairment of the deceased's earning power during the period of his life expectancy. See MCCORMICK, *op. cit. supra* note 7, § 94. This method of revision would necessitate a radical departure from many of our settled rules relating to wrongful death actions and is not deemed advisable.

(a) Retain the present wrongful death statute and in addition enact a complementary survival statute which would allow the cause of action for personal injuries vested in the deceased at the time of his death to survive to his personal representative.[92] The damages awarded in an action brought under the wrongful death statute, which would inure to the exclusive benefit of the surviving relatives, would be for the loss of the pecuniary benefits they might reasonably have expected to receive during the probable life of the victim, including the loss of contributions from his prospective earnings. The damages recoverable in an action brought under the survival statute, which would be an asset of the deceased's estate and would be subject to creditors' claims, would be for the deceased's loss of earnings in the interim between the injury and death, for his medical and hospital expenses[93] and perhaps for his pain and suffering. The two actions could be joined upon the motion of either party.[94]

(b) Revise the present wrongful death statute so that it will give the decedent's personal representative a single cause of action for the damages suffered both by the deceased's family and by his estate in all cases where a tortious physical injury causes death. The first count in this action would be for the injury to the surviving relatives and damages would be awarded for their pecuniary loss resulting from the death. The second count would be for the estate's loss due to the deceased's personal injury and would include damages for his loss of earnings between the time of the injury and that of death and for the losses due to medical and hospital expenses. The personal representative rather than the surviving relatives should also be allowed to recover damages for the victim's funeral expenses since such expenses are a charge on the estate and do not constitute a loss of a pecuniary benefit which could be expected from the continuance of the decedent's life.

In cases where (1) the victim leaves no surviving relatives who can prove pecuniary loss and (2) where the victim dies from causes unrelated to the tortious injury, the personal representative of the deceased would nevertheless be allowed to maintain an action on behalf of the estate for

[92] This could be accomplished by adding a new section to the Civil Code which would provide for the survival of things in action. See Legis., *op. cit. supra* note 2, at 721 for a draft of such a section.

[93] Since the deceased's burial expenses are a charge on his estate, it also seems desirable to allow his personal representative to recover damages for the reasonable expenses of the funeral.

[94] This method, with some variations, is employed by the Federal Employers' Liability Act, in England and in eleven states. See Legis. (1931) 44 HARV. L. REV. 980, 982. The two most recent converts to this method are England, LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, *supra* note 85, and New York, N. Y. ANN. CONS. LAWS (McKinney, 1935 Supp.) DECEDENTS ESTATE LAW, §§ 118 and 119.

its loss resulting from the tort. In order to protect defendants from a double recovery, provision should be made that a recovery or settlement by the decedent in his lifetime for his personal injuries will bar an action for the benefit of his estate.[95]

The method set out in (a) above proceeds on the theory that where a physical injury causes death, the tort invades two distinct interests and two causes of action spring from the injury and resulting death,—one accruing to the victim in his lifetime and the other accruing to the victim's family after his death.[96] The first interest invaded is the interest of the deceased in the security of his person and earning power.[97] This interest is violated by the bodily injury which compels him to endure pain and suffering, to submit to the loss of earnings and to incur medical and hospital expenses. Compensation for the invasion of this interest is given by abrogating the doctrine of *actio personalis* and allowing the deceased's cause of action for personal injuries to survive to his personal representative. The second interest invaded is the relational interest of the members of the victim's family in his life.[98] This interest is invaded by depriving them of the pecuniary benefits they could reasonably expect from the deceased had his life not been tortiously terminated, and the interest is legally protected by allowing them to recover under the wrongful death statute for their probable pecuniary losses occasioned by the death. Under this method full redress would be given for all the damage flowing from the wrongdoer's double tort and the creditors of the deceased would be given protection as the damages recovered for the victim's personal injury would be an asset of his estate.[99] Since the survival statute would permit a recovery for damages accruing before death and the present death act allows a judgment for damages occurring after death, the damages awarded in the two actions would be separable and there would be no serious danger of a double recovery.[100]

The theory upon which the statute suggested in (b) above is based is that a physical injury causing death results in financial injury both to

[95] This method is not employed in any state. However, it is similar to the provisions of the Mississippi statute, MISS. CODE ANN. (1930) § 510, in that it allows a recovery to be had by the personal representative, in a single action, for both the injury to the estate and the injury to the heirs. For a discussion favoring this type of death statute, see MCCORMICK, *loc. cit. supra* note 7.

[96] See Schumacher, *Rights of Action Under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114, 124; Legis. (1931) 44 HARV. L. REV. 980; Note (1932) 80 U. OF PA. L. REV. 993.

[97] Legis. (1931) 44 HARV. L. REV. 980.

[98] See Green, *loc. cit. supra* note 35.

[99] See Blackwell v. American Film Co. (1922) 189 Cal. 689, 702, 209 Pac. 999, 1004.

[100] Schumacher, *op. cit. supra* note 96, at 126; Legis. (1931) 44 HARV. L. REV. 980, at 982; Note (1932) 80 U. OF PA. L. REV. 993, at 1000.

the decedent's estate and to the members of his family. The injury to the estate results from its financial loss due to the impairment of the deceased's earning power in the interim between the injury and death and from his medical, hospital and funeral expenses. The deceased's pain and suffering and bodily disfigurement do not constitute an injury to his estate. The surviving relatives are injured by being deprived of the pecuniary benefits which they would in all probability have received from the deceased had he not been killed. Under this theory, the law would be viewing the injuries as they exist after the death and the wrongdoer would be mulcted in damages for only the actual pecuniary loss occasioned by his wrong. Full redress would be given in a single action for the damage to the estate and to the surviving relatives, and creditors would be given some protection since the damages inuring to the benefit of the estate would be subject to their claims. Procedure would not be complicated by two separate actions.

Under either type of statute, damages should not be awarded for the deceased's pain and suffering, bodily disfigurement or loss of a member of his body.[101] Such injuries are strictly to the person of the deceased and, in and of themselves, do not lessen the value of his estate and are not of such a transmissible nature that they should be made the basis of legal liability or an award of compensatory damages after the victim's death. If the deceased were still alive, a recovery of money damages would tend to compensate him for the pain and suffering endured because of the wrongdoer's tort; but after his death his personal injury is beyond redress by compensatory damages. To exact damages in the latter situation would be to impose a penalty upon the wrongdoer for his tortious conduct.

It has been suggested that a recovery for pain and suffering should be allowed because the damages recovered would become an asset of the victim's estate and would to some extent compensate his creditors for their loss from his death.[102] An answer to this argument lies in the fact that the creditors' losses are occasioned not by the pain and suffering of the victim-debtor but by the destruction of his earning capacity. If a recovery for deceased's loss of earnings before his death and for his medical, hospital and funeral expenses would not give creditors adequate pro-

[101] If recovery for deceased's loss of earnings in the interim between injury and death and for his medical, hospital and funeral expenses be allowed through the medium of a survival statute, provision also should be made that the recovery in such an action shall not include damages to the person of the deceased. See Legis., *op. cit. supra* note 2 at 724, for a draft of a proposed Civil Code section which would forbid damages for the pain and suffering of the deceased.

[102] See Notes (1902) 15 HARV. L. REV. 854; (1932) 80 U. OF PA. L. REV. 993; Legis. (1931) 44 HARV. L. REV. 980.

tection, the logical method of giving them additional redress would be to make them beneficiaries of the damages recovered for the victim's death. Perhaps a certain amount, for example 10%, of the money damages now inuring to the exclusive benefit of the heirs might be made subject to creditors' claims.

In many cases, the beneficiaries under a wrongful death statute are the sole heirs to an estate which has no debts other than those accruing from the expenses caused by the personal injury. This situation arises in the great majority of cases in which the deceased is a minor child. If the heirs, usually the father and mother, were allowed to recover damages for the minor's pain, suffering and other intangible personal injuries, they would be receiving damages clearly out of proportion to the pecuniary loss sustained by reason of the death.

In view of the liberal damages exacted from defendants by California juries in wrongful death cases, it seems inadvisable to make a change in the law which will place on wrongdoers the additional burden of being mulcted in damages for injuries to the person of the deceased. The jury should not be given further leeway for conjecture and speculation on the amount of damages in wrongful death cases.[103]

V

ACTION FOR DEATH OF EMPLOYEE AGAINST EMPLOYER

In 1907, section 1970 of the Civil Code, which pertains to actions for injuries received by employees in the course of their employment, was

[103] The recent English case of Rose v. Ford [1936] 1 K. B. 90, illustrates the confusion that can result from allowing a recovery of damages for all the injuries suffered by the deceased in his lifetime. In this case, through the negligence of the defendant, a young woman was injured in an automobile accident, sustaining a fractured leg. Two days after the accident the leg had to be amputated, and the day after the operation she died as a result of her injuries, having been unconscious during the greater part of the four-day period. The girl's father, in addition to an action for wrongful death in which he recovered 300 pounds damages, brought an action for her personal injuries under the recent English survival statute, LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, *supra* note 85. The court, after allowing 20 pounds damages for the girl's pain and suffering for four days, was faced with the odd problem of awarding damages to the father, as administrator, for the loss of her leg for two days. The court awarded nominal damages for the loss of the leg, saying: "We think that the deceased would have been entitled to something in respect of the loss of her leg for two days in addition to her pain and suffering, but this cannot be more than a nominal amount, and we fix it at forty shillings." Rose v. Ford [1936] 1 K. B. 90, at 100. The case has been appealed to the House of Lords.

It is difficult to understand why pain and suffering for four days should be made the basis of a 20-pound award whereas the loss of a leg for two days should bring only the nominal sum of 40 shillings. Why should the law allow the administrator a recovery of any damages for an injury so personal to the deceased that it cannot be made the subject of monetary compensation after the injured party's death?

amended so as to modify the fellow servant and assumption of risk doctrines.[104] Later, both of these harsh common law rules were abolished by a section of the Employers' Liability Act of 1911 (the "Roseberry Act")[105] which, except for this provision, was superseded by the Boynton Act of 1913.[106] The later act has been superseded by the Workmen's Compensation, Insurance and Safety Act of 1917.[107]

At the time that the above changes in section 1970 were made, a new provision was added which gives a right of action for the wrongful death of an employee occurring under the circumstances set forth in the section.[108] But since the passage of the Workmen's Compensation Act,[109] the Federal Employers' Liability Act,[110] the Merchant Marine Act of 1920 (the "Jones Act"),[111] and the Longshoremen's and Harbor Workers' Compensation Act[112] these wrongful death provisions have become relatively unimportant and section 1970 now applies only to those causes of action for wrongful death which were created by the 1907 amendment to the section and which do not come within the provisions of the above mentioned state and federal acts.[113]

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[104] Pritchard v. The Whitney Estate Co. (1913) 164 Cal. 564, 129 Pac. 989.

[105] Cal. Stats. 1911, p. 796.

[106] Cal. Stats. 1913, p. 279; Cal. Stats. 1915, pp. 913, 1079, 1302.

[107] CAL. GEN. LAWS (Deering, 1931) Act 4749.

[108] The following provisions of Civil Code section 1970 relate to actions for wrongful death:

"When death, whether instantaneous or otherwise, results from an injury to an employee . . . the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery."

[109] *Supra* note 107.

[110] 35 STAT. (1908) 65, 45 U.S.C.A. (1928) §§ 51-59; 36 STAT. (1910) 291, 28 U.S.C.A. (1928) § 71, 45 U.S.C.A. (1928) §§ 56, 59.

[111] 41 STAT. (1920) 988, 46 U.S.C.A. (1928) § 688.

[112] 44 STAT. (1927) 1424, 33 U.S.C.A. (1935 Supp.) § 901. See Pillsbury, *Jurisdiction over Injuries to Maritime Workers* (1932) 18 VA. L. REV. 740.

[113] The following wrongful death cases can be maintained under the provisions of section 1970:

Cases where the employee was killed through the negligence of a fellow employee or was killed in employment for which he assumed the risk of injury, and where the employment is not covered by the terms of the Workmen's Compensation Act.

(a) Where the parties have not elected to come within the provisions of the act and the employment is *both* casual and not in the course of the trade, business, profession or occupation of the employer. WORKMEN'S COMPENSATION ACT, §§ 8 (a) and 8 (c). *Cf.* Ingram v. Dept. of Ind. Relations (1930) 208 Cal. 633, 284 Pac. 212.

(b) Where the parties had not elected to come within the provisions of the act and where the deceased employee was engaged in household domestic service. WORKMEN'S COMPENSATION ACT, § 8 (a). *Cf.* Lacoe v. Ind. Acc. Comm. (1930) 211 Cal. 82, 293 Pac. 669.

(c) Where the deceased was engaged in selling newspapers or magazines, and

Section 1970 provides that the action given by it for the wrongful death of an employee must be brought by his personal representative for the benefit of the "wife, children, dependent parents and dependent brothers and sisters in order of the precedence herein stated."[114] Therefore, in order to maintain the action, one, at least, of the limited class of beneficiaries must be in existence. The class is limited to persons who are either presumed as a matter of law to have been dependent upon the deceased, whether they actually were or not, or to persons who were actually dependent upon him. Thus, the widow and children, because they are legally entitled to support from the deceased, can recover without proof of dependence, whereas the parents or brothers and sisters of the deceased cannot recover without proof of their dependence. But in cases where the heirs of a deceased employee can maintain a wrongful death action against the employer under Code of Civil Procedure section 377 they do not have to prove their dependence upon the deceased in order to recover damages.[115]

There is no apparent reason for this discrimination between the beneficiaries under section 377 and those under section 1970. The latter section should be amended so that its wrongful death provisions in this regard will conform to those of section 377. This amendment should provide that the personal representative may maintain an action under the section for the benefit of the deceased's spouse,[116] children (legitimate, natural or adopted), parents (including stepparents and mothers of illegitimate children), brothers, stepbrothers, sisters, stepsisters and other relatives (not beyond the third degree of consanguinity and de-

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where title to the same has passed to him. WORKMEN'S COMPENSATION ACT § 8 (a). *Cf.* Pacific Employers' Ins. Co. v. Ind. Acc. Comm. (1935) 3 Cal. (2d) 759, 47 P. (2d) 270.

(d) Where the deceased was a private watchman for a non-industrial establishment and was paid by the subscriptions of several persons. WORKMEN'S COMPENSATION ACT, § 8 (d).

(e) Where the deceased's employer had failed to secure the payment of compensation. WORKMEN'S COMPENSATION ACT, § 29 (b). *Cf.* Marshall v. Foote (1927) 81 Cal. App. 98, 252 Pac. 1075; Soria v. Cowell Portland Cement Co. (1929) 99 Cal. App. 108, 277 Pac. 1061.

(f) Where the deceased was employed in farm, dairy, agricultural, viticultural, or horticultural labor or in stock or poultry raising and his employer had refused to come under the terms of the Workmen's Compensation Act. CAL. GEN. LAWS (Deering, 1931) Act 4749a. *Cf.* Earl Ranch, Ltd. v. Ind. Acc. Comm. (1935) 4 Cal. (2d) 767, 53 P. (2d) 154.

[114] *Supra* note 108.

[115] For example, where the employee's death is caused by the negligence of the employer himself. Gonsalves v. Petaluma etc. Ry. Co. (1916) 173 Cal. 264, 159 Pac. 724; Taylor v. Albion Lumber Co., *supra* note 22.

[116] Apparently a husband can not recover for the wrongful death of his wife under the provisions of Civil Code section 1970.

pendent in whole or in part upon the deceased for support) upon a showing that they had an interest in his life which was of pecuniary worth. The other changes which have been suggested in section 377 should also be made in section 1970 so that there will be complete uniformity in the wrongful death provisions of these two sections.

CONCLUSION

A summary of the changes advocated in the present California wrongful death legislation may be set out as follows:

(1) The wrongful death provisions of section 376 of the Code of Civil Procedure should be repealed.

(2) Section 377 of the Code of Civil Procedure should be revised to provide:

(a) That the spouse, children (legitimate, natural or adopted), parents (including stepparents and mothers of illegitimate children), brothers, stepbrothers, sisters, stepsisters and other relatives (not beyond the third degree of consanguinity and dependent in whole or in part upon the deceased) may all[117] recover damages for the wrongful death of any person upon a showing that they had an interest in his life which was of pecuniary worth.

(b) That but one action shall be brought in all cases by the personal representative of the deceased.

(c) That the trial court shall apportion the damages among the beneficiaries on the basis of the pecuniary loss suffered by each, unless the beneficiaries can agree upon their respective shares.

(d) That the action may be maintained against the estate of a deceased wrongdoer whether he died before or after the victim of his wrongful act.

(e) That the personal representative may recover for the deceased's loss of earnings in the interim between injury and death and for his medical, hospital and funeral expenses,[118] and that such damages shall

[117] The amendment should clearly state that all the beneficiaries have a right to recover damages and that the action can be maintained for the collective benefit of all, regardless of whether or not they are technical heirs or next of kin. The division of beneficiaries into preferred and deferred classes has produced some unfortunate results. See cases cited *supra* note 37.

[118] Provision also should be made that no recovery shall be allowed for the deceased's loss of earnings before death or for his hospital and medical expenses if he had settled or recovered for his damages. This provision would not, of course, alter the present California rule which allows the heirs a wrongful death recovery even though the decedent, in his lifetime, executed to the wrongdoer a full release from all claims and causes of action for his injuries, Earley v. Pacific Electric Ry. Co. (1917) 176 Cal. 79, 167 Pac. 513, L. R. A. 1918A, 997, or had recovered damages for his injuries. Blackwell v. American Film Co., *supra* note 99.

inure to the benefit of the deceased's estate and be subject to the claims of his creditors.[119]

(3) The wrongful death provisions of section 1970 of the Civil Code should be amended to conform with the above amendments to section 377 of the Code of Civil Procedure.

Leo V. Killion.

SAN FRANCISCO, CALIFORNIA.

APPENDIX

This appendix presents a classification of all the California wrongful death cases in which verdicts or court awards have been challenged on appeal as either excessive or inadequate. It is practically impossible to determine what percentage of large wrongful death awards have been paid in full or have been settled by plaintiffs for a lesser amount in order to avoid an appeal. Thus little more can be done than to look to the decided cases in which the awards have been attacked on the ground of excessiveness or inadequacy in order to ascertain the amounts that are being awarded in wrongful death cases.

The cases are classified with reference to the amount of the verdict or court award, the relationship of the deceased to the beneficiaries, the age and earnings of the deceased (when this information is given in the report), and the county in which the trial court was sitting. An asterisk (*) appearing before the amount of the award indicates that the defendant in that particular case was a corporation; a dagger (†) appearing after the amount of the award indicates that the death was due to the negligent operation of the defendant's motor vehicle.

[119] This change could be made either by amending section 377 or by enacting a separate survival statute. See *supra* note 92.

Date	Citation	Amount	Court or Jury	Description	Age	Earnings	Decision	County
1871	42 Cal. 215	*$ 5,000	Jury	Minor daughter	7		Not excessive	San Francisco
1873	46 Cal. 27	$ 200	Jury	Father	56 or 57	$4 to $7 per day	*Inadequate*	San Francisco
1882	60 Cal. 604	*$ 8,000	Jury	Husband and father	59		Not excessive	San Francisco
1882	62 Cal. 320	*$10,800	Jury	5 minor children	5 to 16		Not excessive	Alameda
1883	63 Cal. 483	*$1	Jury	Husband	25	$100 per month	*Inadequate*	El Dorado
1890	84 Cal. 489	$ 3,000	Jury	Son and brother	23	Gave $40 or $50 per mo. to family	Not excessive	San Francisco
1892	95 Cal. 510	*$20,000	Jury	Infant girl	2		*Excessive*	Kern
1895	110 Cal. 277	*$14,000	Jury	Wife and mother			Not excessive	Alameda
1896	73 Fed. 239	*$ 7,000	Court	Husband and father	35	$100 per month	Not excessive	
1896	73 Fed. 239	*$ 5,000	Court	Husband and father	39	$50 per month	Not excessive	
1897	116 Cal. 156	*$ 8,000	Jury	Husband and father	69	$110 per month	*Excessive*	San Francisco
1897	118 Cal. 55	*$ 6,000	Jury	Minor son	4½		*Excessive*	Alameda
1903	140 Cal. 507	*$18,000	Jury	Husband and father			Not excessive	Humboldt
1906	3 Cal. App. 312	*$ 5,000	Jury	Father	27	$40 per month	Not excessive	Tehama
1906	3 Cal. App. 712	*$12,000	Jury	Husband and father	44		Not excessive	Santa Barbara
1909	156 Cal. 713	*$12,000	Jury	Husband and father	26		Not excessive	San Bernardino
1910	158 Cal. 412	*$14,000	Jury	Wife and mother			Not excessive	Tuolumne
1910	14 Cal. App. 414	*$ 5,000	Jury	Minor son	16½	$40 per month	Not excessive	Kings

Date	Citation	Amount	or Jury Court	Description	Age	Earnings	Decision	County
1911	159 Cal. 270	*$ 405	Court	Minor son		Good wages	*Inadequate*	San Francisco
1911	160 Cal. 48	*$30,000	Jury	Husband and father			Not excessive	Solano
1912	162 Cal. 531	*$20,000	Jury	Husband and father	57	$6,000 annually	Not excessive	Glenn
1913	22 Cal. App. 671	*$20,000	Jury	Husband and father	25	$20 per week	Not excessive	Los Angeles
1913	22 Cal. App. 737	*$ 8,000	Jury	Husband and father			Not excessive	San Joaquin
1914	168 Cal. 500	*$20,000	Jury	Husband and father	33	$3.50 per day	Not excessive	Butte
1915	169 Cal. 494	*$ 7,500	Jury	Mother		$335 per month	Not excessive	San Francisco
1915	171 Cal. 401	*$18,000	Jury	Wife and mother			Not excessive	San Joaquin
1915	26 Cal. App. 318	*$10,000	Jury	Adult son	23	Gave $10 to $16 per week to mother	Not excessive	Alameda
1916	172 Cal. 727	*$10,000	Jury	Husband and father	78	Would have earned $3,500 during remainder of life	*Excessive*	Kern
1916	173 Cal. 709	*$12,500	Jury	Husband and father		$50 per mo. plus	Not excessive	Tulare
1916	31 Cal. App. 597	*$17,000	Jury	Husband and father	44	$2.75 per day	Not excessive[1]	Los Angeles
1917	176 Cal. 353	$10,000†	Jury	Minor son	6½		*Excessive*	Los Angeles
1917	33 Cal. App. 730	$ 2,000	Jury	Husband and father			Not excessive	Monterey
1918	178 Cal. 634	*$ 1,000	Jury	Minor son	15		*Adequate*	Los Angeles
1918	38 Cal. App. 654	*$ 7,500	Jury	Husband and father		$900 per year	Not excessive	Stanislaus

[1] Judgment reversed on other grounds.

Date	Citation	Amount	Court or Jury	Description	Age	Earnings	Decision	County
1919	180 Cal. 338	$ 5,000†	Jury	Minor daughter			Not excessive	San Francisco
1919	41 Cal. App. 297	$ 3,500†	Jury	Minor son	15	$45 or $50 per month	Not excessive	Sacramento
1920	47 Cal. App. 642	$ 1,000†	Court	Adult daughter	21		Not excessive	Los Angeles
1920	50 Cal. App. 277	*$ 5,000†	Jury	Wife and adult daughter	23		Not excessive	Riverside
1920	50 Cal. App. 339	$ 5,400†	Court	Husband and father	37	$45 per mo. plus	Not excessive	Alameda
1921	184 Cal. 764	$ 6,000	Jury	Mentally deficient adult son	27	$30 per month	*Excessive*	Alameda
1921	53 Cal. App. 452	$11,875†	Jury	Wife and mother	51		Not excessive	Stanislaus
1921	273 Fed. 385	$13,000	Jury	Husband and father			Not excessive	
1922	189 Cal. 689	*$10,000†	Jury	Husband and father	36	$300 per month	Not excessive	Los Angeles
1922	58 Cal. App. 509	*$10,000	Jury	Wife and daughter	24		*Excessive*	Los Angeles
1922	59 Cal. App. 102	*$ 5,000	Jury	Infant son	2		Not excessive	Los Angeles
1922	59 Cal. App. 662	$ 5,250	Jury	Minor son	16		Not excessive	Sutter
1923	190 Cal. 487	*$ 3,600†	Court	Husband	48		Not excessive	Los Angeles
1923	63 Cal. App. 686	$ 7,500†	Jury	Husband	57	$18.75 per week	Not excessive	San Francisco
1923	64 Cal. App. 658	*$20,000	Jury	Husband and father	30	Gave $125 to $150 per mo. to family	Not excessive	San Mateo
1924	66 Cal. App. 767	*$10,000	Jury	Husband and father	74		Not excessive	Colusa

Date	Citation	Amount	Court or Jury	Description	Age	Earnings	Decision	County
1924	70 Cal. App. 303	$ 5,000†	Jury	Adult daughter	21		Not excessive	Alameda
1926	76 Cal. App. 569	*$12,000	Jury	Adult son	29	Manager of mother's ranch	Not excessive	Tuolumne
1927	82 Cal. App. 141	*$10,000	Jury	Husband		$120 per month	Not excessive	San Diego
1927	82 Cal. App. 226	*$15,000†	Court	Husband			Not excessive	Los Angeles
1927	87 Cal. App. 626	$ 4,000†	Jury	Husband and father	63		Not excessive	San Francisco
1928	204 Cal. 354	$10,250†	Jury	Minor son	7		Not excessive	Alameda
1928	89 Cal. App. 511	$15,000†	Jury	Husband and father	56	$240 per month	Not excessive	San Francisco
1928	92 Cal. App. 656	*$ 7,500	Jury	Minor son	10		Not excessive	Sacramento
1930	210 Cal. 644	*$35,000†	Jury	Husband and father	42	$4,000 to $5,000 annually	Not excessive	Fresno
1930	211 Cal. 192	*$ 7,500	Jury	Husband and father	79		Not excessive	Los Angeles
1930	105 Cal. App. 72	$30,000†	Jury	Wife and mother	40		Not excessive	Sacramento
1930	110 Cal. App. 345	$ 5,000†	Jury	Husband	59	$85 to $100 per month	Not excessive	Tulare
1931	214 Cal. 472	*$15,000	Jury	Adult son	33	$150 per month	Not excessive	San Francisco
1931	114 Cal. App. 444	$10,500	Court	Minor son	14	$15 per week plus	Not excessive	Los Angeles
1931	115 Cal. App. 50	*$ 9,275†	Jury	Minor son	8	$6 per month	Not excessive	San Diego
1931	116 Cal. App. 518	*$ 7,500	Jury	Adult son	23	Gave $25 per mo. to mother	Not excessive	Contra Costa

Date	Citation	Amount	Court or Jury	Description	Age	Earnings	Decision	County
1932	123 Cal. App. 742	$40,000†	Jury	Husband and father	59	$36 per week	*Excessive*[2]	San Benito
1932	125 Cal. App. 410	$ 1,000†	Jury	Husband and father	30	$33.50 per week	*Inadequate*	San Francisco
1932	127 Cal. App. 509	$ 3,000†	Jury	Minor son	17		Not excessive	Los Angeles
1933	128 Cal. App. 680	$10,000†	Jury	Wife and mother			Not excessive	San Mateo
1933	129 Cal. App. 670	$ 7,500†	Jury	Husband		$3,500 annually	Not excessive	Stanislaus
1933	131 Cal. App. 457	$ 5,000†	Jury	Adult son		Gave $20 per wk. to mother	Not excessive	San Francisco
1933	131 Cal. App. 602	$12,500†	Jury	Father	60		Not excessive	Los Angeles
1933	132 Cal. App. 57	$ 5,000†	Court	Adult son	29	Gave $20 per mo. and groceries to mother	Not excessive	Sonoma
1933	134 Cal. App. 147	*$14,000	Jury	Husband	40		Not excessive	San Francisco
1933	135 Cal. App. 49	$ 5,000†	Jury	Husband	83	$50 per month	Not excessive	Merced
1933	135 Cal App. 607	$ 5,000†	Jury	Mother	68	$744 to $852 annually	Not excessive	San Francisco
1934	136 Cal. App. 132	$15,000†	Jury	Wife and mother	40		Not excessive	Contra Costa
1934	136 Cal. App. 144	$ 7,833†	Jury	Minor daughter	10		Not excessive	Contra Costa
1934	138 Cal. App. 736	$20,320†	Jury	Wife and mother	30		Not excessive	Fresno
1934	3 Cal. App.(2d) 127	$ 4,000†	Jury	Minor son	18		Not excessive	Los Angeles

[2] Judgment reduced to $25,000.

Date	Citation	Amount	Court or Jury	Description	Age	Earnings	Decision	County
1934	3 Cal. App. (2d) 329	*$25,000	Jury	Parents			*Excessive*	San Francisco
1935	4 Cal. (2d) 1	*$20,000	Jury	Husband	28	$250 per mo. plus bonus	Not excessive	San Diego
1935	4 Cal. (2d) 731	*$ 1,500	Court	Adult son			*Inadequate*	San Bernardino
1935	7 Cal. App. (2d) 444	$10,895†	Court	Husband and father			Not excessive	Los Angeles
1935	8 Cal. App. (2d) 213	$ 1,500	Jury	Minor son	20	$3.50 to $4.50 per day on occasion	*Excessive*	Santa Barbara
1935	10 Cal. App. (2d) 107	$ 5,000	Jury	Mother	77		Not excessive	Los Angeles
1935	10 Cal. App. (2d) 132	$15,000†	Jury	Husband and father			Not excessive	Alameda
1935	49 P. (2d) 857	*$50,000	Jury	Husband and father	37	$150 to $160 per month	Not excessive[3]	San Francisco
1936	11 Cal. App.(2d) 222	$ 5,000†	Jury	Husband and father	65		Not excessive	Los Angeles
1936	12 Cal. App.(2d) 249	*$ 3,500	Jury	Adult son	35	None	*Excessive*	San Mateo
1936	12 Cal. App.(2d) 678	$ 7,500†	Jury	Husband and father	66	$3,400 to $3,600 per year	Not excessive	Fresno
1936	13 Cal. App. (2d) 265	*$ 6,000	Jury	12-day old infant			Not excessive	Los Angeles
1936	61 P. (2d) 461	*$25,000†[4]	Court	Husband and father	Had 21 yr. life expect'cy	$60 per month	Not excessive	Sacramento

[3] This case was later reversed on rehearing on other grounds. Weaver v. Shell Oil Co. (May 4, 1936) 13 Cal. App. (2d) 643, 57 P. (2d) 571.

[4] Reduced from $40,000 by trial court.