

July 1980

## Thoughts on the Survival Action in Montana and Related Matters

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### Recommended Citation

Russell E. Smith, *Thoughts on the Survival Action in Montana and Related Matters*, 41 Mont. L. Rev. (1980).

Available at: <https://scholarworks.umt.edu/mlr/vol41/iss2/1>

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## ARTICLES

### THOUGHTS ON THE SURVIVAL ACTION IN MONTANA AND RELATED MATTERS

Russell E. Smith\*

For reasons now largely obscure, at common law tort actions did not survive the death of victims. In 1846, the Fatal Accidents Act, popularly known as Lord Campbell's Act, was enacted by the British Parliament<sup>1</sup> to ameliorate the harshness of the common law rules. Variants of Lord Campbell's Act<sup>2</sup> were adopted in many of the American states, including Montana.<sup>3</sup> Montana's version permits the parents or guardian of an infant child to maintain an action for the child's death. For adult decedents, an action for wrongful death may be brought by the "heirs or personal representatives" of the decedent.<sup>4</sup> In Montana it is clear that wrongful death actions do not recover damages suffered by the decedent. Instead, they recover damages suffered by widows, orphans, or parents, because of some loss to them.

Damages suffered by the decedent are recoverable under a dif-

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1. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 920 (3d ed. 1964).

2. The present version of Lord Campbell's Act in Montana is found in MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 27-1-512, -513 (1979). See *Dillon v. Great N. Ry.*, 38 Mont. 485, 100 P. 960 (1909).

3. MCA § 27-1-512 (1979) provides:

Either parent may maintain an action for the injury or death of a minor child and a guardian for injury or death of a 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.

Initially only the father was permitted to bring the action, except that in cases of death or desertion the mother might do so. Probably the guardian referred to is the guardian appointed prior to the death of the ward and one who would maintain an action for injuries occurring prior to death. The thought that the reference might be to a guardian appointed after the death of the minor to prosecute some cause that survived to the minor for the benefit of the guardian or some other undesignated group of beneficiaries is fanciful indeed, but in this wonderful world of survival some fanciful flights seem to have been flown.

4. MCA § 27-1-513 (1979) provides:

When the death of one person, not being a minor, 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.

ferent type of action, commonly known as a survival action. Montana's survival statute<sup>5</sup> provides that heirs or personal representatives may maintain an action on behalf of a decedent. There is nothing in the statute relating to damage, but no particular difficulty is encountered in the assessment of damages in most survival actions. The measure of damages is found in the other branches of the law. Thus, in an action for the replevin of Black Beauty, for the conversion of a car of grain, for the foreclosure of a chattel mortgage, or for the failure to pay a debt, the relief granted by a judgment to the personal representative is identical with that which would have been granted to the decedent himself had he lived.

In addition, an action for the value of pain and suffering and the value of medical expenses between the time of injury and the time of death can obviously vest in the decedent prior to death. The Catch 22 appears the moment we think of the rights of a decedent to damages caused by the death itself. Although a man is injured by his death, the dead man himself cannot be paid for those injuries, and if there were some way to pay him, there is no way for him to take it with him. Viewed apart from the beneficiaries of it, an estate is simply a legal mechanism—a funnel—which distributes to the beneficiaries what belonged to the decedent. A funnel cannot be damaged by the fact that less is poured into it, although those who receive at the end of the funnel may be. Can an estate which does not come into being before death be damaged by the act which brings it into being?

The efforts made over the years to apply the concepts embraced in the survival statutes have resulted in a body of law which, if judged in light of the real problems—the individual needs, the social needs—is artificial, capricious in operation, fictional, and perhaps sometimes ignored.

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5. MCA § 27-1-501 (1979) provides:

An action, cause of action, or defense does not abate because of the death or disability of a party or the transfer of any interest therein, but whenever the cause of action or defense arose in favor of such party prior to his death or disability or transfer of interest therein, it survives and may be maintained by his representatives or successors in interest. If the action has not been begun or defense interposed in the name of his representatives or successors in interest. If the action has been begun or defense interposed, the action or proceeding may be continued as provided in Rule 25, M.R.Civ.P.

*Artificial*Example No. 1:<sup>6</sup>

John Brown, age 40, with an invalid wife and five children, was hit by a drunken driver going eighty miles per hour. The impact was so violent that death was instantaneous. The estate could have proved \$300,000 in damages, but because there was no survival for an appreciable period of time, there was no cause of action.

## Example No. 2:

John Smith, age 40, a bachelor with no children, no living relatives, and no will, was hit by a drunken driver going forty miles per hour. The impact was insufficient to kill him instantaneously, but arteries were severed and Smith lived three or four minutes before he bled to death. A public administrator was appointed personal representative; he sued and recovered \$200,000 which, after costs and attorneys' fees, escheated to the state.

These results, bearing no relationship to the real damages to real people, come about because the Montana Supreme Court in *Dillon v. Great Northern Railway*,<sup>7</sup> decided that a decedent had to survive an "appreciable period of time" before a cause of action could vest in his estate.<sup>8</sup> The court was not thinking in terms of who was damaged by the death and in what amount; rather it was concerned with an interpretation of the words "the right of action shall survive" as they appeared in a law relating to the death of railroad employees.<sup>9</sup> It solved the problem in this language:

It goes without saying that a thing which never existed cannot survive . . . .

Is it possible for one who is instantly killed to have a cause of action for the wrong which caused his death? The very statement of the question would seem to suggest its own answer. Since there is not any appreciable length of time between the wrong and the death, or, in other words, the wrong and the death being coincident in point of time, the instant the wrong is committed the victim of the wrong has ceased to exist, and it seems impossible that

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6. These examples, except as noted, are hypothetical but do illustrate what can and sometimes does happen.

7. 38 Mont. 485, 100 P. 960 (1909).

8. *Dillon* was cited in *Stephens v. Brown*, 160 Mont. 453, 503 P.2d 667 (1972), and still states the Montana law.

9. REVISED CODES OF MONTANA 1907, § 5252 (enacted 1905 Mont. Laws, ch. 1, § 1). The court equated this statute with the general survival statute, REVISED CODES OF MONTANA 1907, § 6494, the predecessor of MCA § 27-1-501 (1979).

there is any cause of action in favor of such victim. This conclusion seems inevitable when the elements which are to be considered in determining the measure of damages are taken into account. Those elements are physical and mental pain and suffering, expense of medical attendance, loss of time, and decreased earning capacity. In the case of instant death every one of these elements is absent. To presume the existence of any one of them is to presume that life did not become extinct until some appreciable time had elapsed after the wrong was committed, a fact which is negatived by the agreed statement of facts in this case.<sup>10</sup>

This learned logic suggests that there lingered in the judges' minds the notion that, while a dead man could not take a cause of action with him, it was his if he could teeter on the brink of eternity long enough to grab it. Given the time to grab it, he would be invested with a sort of common law seisin which he could pass on to his creditors or heirs. Whether or not the introduction of the idea of a sort of semi-survival adds to the logic of the argument, it certainly read into the law a totally artificial requirement.

By the same language, the court spawned other problems. What does the word "death" mean as the court used it? Once consciousness is totally and forever gone, does a briefly continuing heartbeat constitute life for the purposes of a survival action? Is it sufficient that life be found in some muscle tissue if all of the cells governing the operation of the brain are wholly dead?

There is probably always some time between the original impact and the death which follows, but how long is "appreciable"? Is it five minutes or one-tenth of a second? What constitutes an "appreciable" time is probably a question of fact for a jury to answer. If one-tenth of a second is "appreciable" to the timer at a track meet, and it certainly is because medals are awarded on performances measured in tenths of a second, then one-hundredth of a second is "appreciable" to a person timing an air race, and perhaps one-millionth of a second is "appreciable" to an astronomer timing the movement of stars.<sup>11</sup> When a jury finally decides how long an appreciable period of time is, it will have solved the survival problem and may have redistributed some wealth, but unfortunately the whole survival problem was never relevant to the

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10. 38 Mont. at 495-96, 100 P. at 963.

11. GUINNESS BOOK OF WORLD RECORDS 628 (15th ed. 1977) reports: The closest victory in the Olympic Games was in the Munich 400-meter individual medley final on August 30, 1972, when Gunnar Larsson (Sweden) won by 2/1,000ths of a second in 4 minutes 31.98 seconds over Tim McKee (U.S.)—a margin of less than 1/8 inch, or the length grown by a finger nail in 3 weeks.

questions of who was damaged or how much.

### *Capricious*

#### Example No. 3:

Gaspard Loiseau, a railroad employee, was knocked off a railroad bridge and into a river. He was seen swimming but was found dead some distance downstream. Loiseau died without a will but was survived by two cousins who lived in France. He had never known them. His estate, represented by a lawyer tenacious enough to trace the French cousins, recovered a verdict of \$150,000. Less attorneys' fees, this amount went to the cousins in dollars, which they sold to buy gold.<sup>12</sup>

#### Example No. 4:

Alexander Jenkins, a brilliant young scientist, was killed by a fire in his employer's plant. He survived for a few days, but died of the burns. He left no will, and his only heir was his father, an extremely wealthy widower with no dependents. Jenkins's estate recovered \$1,000,000 in a survival action. The sum of \$700,000 (after deducting costs and attorneys' fees) went to the father, who died between the date of the judgment and the time it was paid. The estate was in the top estate tax bracket, and the federal government alone took \$490,000 of the \$700,000.

#### Example No. 5:

Remember that the estate of John Smith, who died without an heir or a will in Example No. 2, escheated to the state. The survival action plays the role of a capricious fairy princess touching with the wand of wealth those gold-buying Frenchmen because of a cousinage which would have been too remote if Loiseau had been biologically more aggressive, then touching a father who had no need, and then the State of Montana with much need but a right which is fanciful at best. It is probable that most estates pass to the dependents, or at least to close relatives of the decedent, but so long as the estate, which is really a fiction, is regarded as the beneficiary of the survival action, the proceeds will be distributed without regard to the existence of real damage. Sometimes the damages awarded will result in pure windfalls to the recipients.

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12. The buying of gold is irrelevant except that it makes the example slightly more horrible.

*Fictional*

## Example No. 6:

Bill Howard, the victim of a tortious wrong, survived his injuries fifteen minutes. At the trial it was shown that he was earning \$20,000 per year and that his work expectancy was thirty years. He died leaving a wife as his sole heir and beneficiary. In the estate action it was shown that Howard's wife was chronically ill and that his contribution for her support amounted to an average of \$6,000 per year, that he spent on his own account \$3,600 per year, and that his federal and state taxes amounted to about \$2,000 per year. Without violating the instructions, the jury returned a verdict for \$188,538. This is the present value, using a ten percent interest rate, of \$20,000 per year paid yearly over a period of thirty years.

## Example No. 7:

The facts here are the same as the facts in Example No. 6 except that, prior to the survival action, the widow in a wrongful death case recovered on her own behalf \$56,561, the present value of all of the \$6,000 per year contributions that would have been made to her had her husband survived. In the survival action the verdict again was \$188,538.

The results given in Examples No. 6 and 7 are in accord with the pronouncement in *Hurly v. Star Transfer Co.*,<sup>13</sup> where the jury was instructed that it should award such a sum "as would purchase an annuity equal to the amount he [decedent] could have earned annually were it not for his injuries, keeping in mind, however, any diminution in his earning capacity that would have ensued on account of his advancing years, his habits of life, and the possibility of his continuous employment or from other causes, if the injury had not occurred." This instruction was given over objections and in the face of requested instructions that damages should be computed on the basis of net rather than gross earnings.<sup>14</sup>

As has been said, there is a hocus-pocus quality about the concept that an estate which does not exist until death is somehow damaged by the death which brings it into being. Usually damages are measured in terms of the harm done to the victim, but where the wrong to the victim is a fiction, then of necessity the rule of damages, no matter how formulated, has a fictitious quality about

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13. 141 Mont. 176, 376 P.2d 504 (1962).

14. The quoted instruction is now contained in Montana Jury Instruction Guides and is routinely given in survival actions. An inspection of the transcript in *Putman v. Pollei*, 153 Mont. 406, 457 P.2d 776 (1969), reveals that it was given in that case.

it. Under the quoted instructions, the jury is told to fix damages on the basis of the gross amount that decedent might have earned reduced to present value. The rule does not permit deductions for the amount which decedent would have spent on himself and his family or to pay income taxes. While the damage is calculated on the basis of the impairment of earning capacity, the earning capacity has value only as it is exercised in time and converted into money. This conversion cannot take place unless life is sustained during the time period, and the costs of sustaining the life diminish the value of the earning capacity. Likewise, since an earning capacity is of value only as it is converted into money, and since the income taxes are a cost of conversion, the value of an earning capacity is diminished by the impact of income taxes. So, in this world of fiction, we indulge in another fiction: that an earning capacity has a value independent of time and the cost of converting it into money.

The result in Example No. 7 seems compelled by the decision in *Hurly*, but that logical<sup>15</sup> end result has not yet been reached.<sup>16</sup> When in the future a wrongful death action is combined with the survival action and a court instructs the jury that it should award the estate the present value of all that decedent would have earned without deduction and that it should award the widow all that the decedent would have contributed, and the jury obeys and the total verdicts are for more than the total of what decedent could have earned if he had lived, the whimsical character of the whole rule will be vividly illustrated.

### *Perhaps Ignored*

#### Example No. 8:

(This is *Hurly v. Star Transfer Co.*)

The plaintiff was a man 39 years of age, in good health, with an earning capacity of \$6,600 per year. He had a life expectancy of 30.08 years. The present value of an annuity providing \$6,600 per year would have been \$145,662. Decedent had suffered a great

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15. The logic, of course, starts post-*Hurly* and not before.

16. An inspection of the file in *O'Leary v. James & Wunderlich*, 192 F. Supp. 462 (D. Mont. 1960), a case decided before *Hurly*, where the wrongful death action and the survival action were tried together, reveals that the United States District Court gave the following instruction:

In your consideration of the earnings of the deceased, there can be only one recovery for loss of earnings, and in making any awards in the two causes, you may not consider or allow in the second cause any amount already allowed in the first cause.

amount of pain prior to his death. The jury awarded \$25,000 damages.

Example No. 9:

(This is *Putman v. Pollei*.<sup>17</sup>)

A college sophomore, female, age 19, who had won local, state, and national honors in athletic events, who had a good academic record and exceptional leadership ability, was the victim of a tort. She had a life expectancy of 57.4 years. The jury was given the gross earnings instruction and returned a verdict of \$485, the value of the personal property destroyed in the accident.

It may be questioned whether the juries in these example cases followed the instructions. In the *Putman* case the supreme court sustained the trial court's order granting a new trial, saying that the result was preposterous. The supreme court did not explain the results in the *Hurly* case where the verdict reflected the amount which decedent, who was in good health and had an expectancy of over thirty years, would have earned in about four years. When it is considered that the verdict should have contained some amount for pain and suffering, it is difficult to justify the verdict in light of the instructions. Certainly two isolated examples do not warrant a generalization, but they do not give us any confidence in the proposition that the juries involved read the instructions and made a faithful attempt to apply them.

It is not certain whether the court itself has any confidence in these rules. By affirming an order denying a new trial in *Hurly*, the supreme court apparently approved the amount awarded. It then justified its decision by quoting the following: "We must bear in mind that, in this class of cases, 'there is no fixed measuring stick by which to determine the amount of damages, other than the intelligence of the jury' . . . ."<sup>18</sup> In an earlier case, *Autio v. Miller*,<sup>19</sup> in response to an argument that the verdict was too high, the court said:

The fact is that verdicts in cases like this are necessarily speculative and hypothetical. But, as was said in *Houghkirk v. Delaware & Hudson Canal Co.*, 28 Hun. (N.Y.), 407, the difficulty is, "By what test are we to review them? If it is a matter of guesswork, the jury can guess as well as we. If we are to review them by the

17. 153 Mont. 406, 457 P.2d 776 (1969).

18. 141 Mont. at 183-84, 376 P.2d at 508, quoting *Fulton v. Chouteau County Farmers' Co.*, 98 Mont. 48, 37 P.2d 1025 (1934).

19. 92 Mont. 150, 169-70, 11 P.2d 1039, 1045 (1932).

test of the evidence, then the difficulty is, that there is no direct evidence proving the amount of loss.”

Again, however, is not much of this guesswork and speculation introduced because we deal with the fictional damage to an estate and do not measure real damage to real people? In the world of real earnings, real taxes, real widows, real orphans, are the yardsticks necessarily “speculative and hypothetical”?

What has been said has been said rather extravagantly and perhaps too facetiously in an effort to draw attention to the fact that in at least one area the law of damages makes absolutely no sense, was not planned to serve any real need, and produces justifiable results only by accident. While the survival action is an example of the law of damages at its worst, most of the law governing damages in tort actions has its origins in a distant past and is based upon concepts which may not now have any validity. Hence, what follows deals in a measure with the aspects of the law of damages applicable in cases other than wrongful death.

### *Some Thoughts on Related Matters*

It is probable that there was a time when the victim of a tort recovered his damage from the tortfeasor himself. In that day the problems were easier. A defendant did damage and obviously should pay for the amount of the damage done, but in that day the defendant paid the judgment out of his pocket. Not so now. Most judgments are paid by insurance companies.<sup>20</sup> Most people, except those who could not pay a judgment anyway, contribute to the payment of damage judgments through insurance premiums. Even in the case of insured or uninsured corporate defendants or municipalities, the losses fall on the consumer or taxpayer because the losses are ultimately reflected in the increased cost of goods or services.

Mr. Justice Holmes once said: “Probably in the end the public pays the damages in most cases of compensated torts.”<sup>21</sup> So compelling is the need for liability insurance that insurance premiums are not unlike taxes—any person who would be hurt by a judgment must pay premiums. The consumer, John Doe, has a dual position. He is a potential victim of negligence on whose account damages will be paid, and at the same time he is a contributor to the fund

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20. Those who think that damages are paid out of pockets so deep that they never need replenishing may disagree, but if it can be shown that insurance costs bear no relationship to the risks insured, then society should cause the whole industry to be restructured.

21. *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918).

out of which payments will be made. He is concerned with benefits since he may receive them, and he is concerned with costs since he must pay them. The law which fixes damages is equivalent to the benefit section of the liability policy. Should not a legislature in considering the law of damages put itself in the position of John Doe and write a law of damages that John Doe would write if he considered both his benefits and his costs?

A legislature probing the mind of John Doe might find that John Doe is mainly concerned with the support of his dependents, that he wants his family housed and fed and his children educated as they would have been had he survived. A dependentless John Doe might quickly scratch the idea of buying insurance to protect unknown cousins or the State of Montana. Were he aware of the benefits which, in their present form, the wrongful death actions provide for his dependents, he might rebel against paying to have those benefits duplicated by the survival action, and in any event he might look with a jaundiced eye at any kind of insurance policy which paid only if he survived an appreciable period of time.

John Doe, considering the cost, might not want to pay the premium which would be required in order to compensate his dependents for his antemortem pain and suffering. He might feel that, if he had provided adequately for the support of his dependents, he should not pay more for the additional cost of pain and suffering insurance.

What is said here as to damages for pain and suffering might be considered in connection with all kinds of tort liability. In some circles there are certain rules of damages, such as the pain and suffering rule<sup>22</sup> and the collateral source rule,<sup>23</sup> which are regarded as sacred cows and which should not be touched. But the ordinary John Doe is not a lawyer and does not have a contingent interest in a sacred cow. The real question is what does John Doe, who pays the bill, want.

A legislature might well probe John Doe's thinking about the collateral source rule. Certainly the general public pays, in the form of energy rates, the Montana Power Company costs of workers' compensation. It likewise pays, in the form of transportation rates, the liability costs of the Burlington Northern Railroad. If

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22. A successful plaintiff in a personal injury action is entitled to damages for pain and suffering.

23. The "collateral source rule" prevents a defendant from diminishing plaintiff's recovery by reason of the fact that plaintiff has already recovered for the same damage from another source, such as private insurance, medicare, or workers' compensation. See *McClanathan v. Smith*, — Mont. —, — P.2d —, 37 St. Rptr. 113 (1980), an interesting case dealing with overlapping of benefits under the workers' compensation and social security laws.

Mike Walsh, a Montana Power Company employee, while working on a power company pole in the railroad yard, is killed, his wife is entitled to workers' compensation payments. But if Walsh's death was brought about by the negligence of the Burlington Northern, that same wife has a cause of action against Burlington Northern. The damages recoverable from Burlington Northern would not be reduced by reason of the benefits paid under the workers' compensation law. The historic reason for this, the collateral source rule, was that if *A* commits a tort against *B* and *B* has some kind of insurance protection against that injury, there is no reason why *A*, the tortfeasor, should benefit by the fact that *B* has purchased such insurance. The rule is fair enough if the matter is wholly one between *A* and *B*, and if the aggregate amount paid does not exceed the amount of compensation which John Doe would expect from a policy which he purchased himself. But if, in the end, the consumer pays, should he be required to pay twice for the same accident? A John Doe trying to balance insurance benefits and costs might consider this problem.

The same cost-conscious legislature might want to look at the damages payable on the death of a child. If the child survives, its estate has the survival action. In addition the mother and father may sue for the injury done to them. No doubt there was a time when the child could be regarded by a parent as being of economic benefit—at one time children supported their aged parents—but in modern times, with pensions and social security, does anyone regard the minor child as an economic asset? Do any substantial number of people feel any necessity to insure themselves against the loss of a minor child?

If John Doe were thinking of the law of damages as insurance which would permit his family to maintain their standard of living after his death, and if he were thinking that he, as a consumer, contributes to each damage verdict, he might take a dim view of a system which would first determine the amount necessary to maintain that standard of living and, even before the award reached the family, reduce it by some unknown percentage. That is exactly what the system does now because normally the heirs or representatives pay contingency fees, which could vary from ten to fifty percent of the award. Since he pays into the fund as a consumer and not as a plaintiff or defendant, John Doe might think that the fund should treat him as a consumer whether he causes the fund to be sued or defended. He may wonder whether it makes much sense to pay his lawyer from the fund when he himself appears in the role of a defendant but not when he appears in the role of a plaintiff.

Of course, the cost of the insurance would be increased, but John Doe might not object.

While this article starts with a criticism of the survival action as it exists in Montana, its main thrust is that our laws relating to damages in tort have not grown out of and are not based on a study of the basics: Who is damaged? What is the extent of the damage? What are the costs? Who pays them? A legislature looking at the whole problem of damages today, in light of real human and social needs, might conclude that more real desperation is caused by inadequate insurance than by inadequate verdicts.<sup>24</sup> By reducing costs, policy limits could be increased—if in no other way than through the financial responsibility laws. In any event, the problems are important enough to warrant some thought based on today's realities of need and cost.

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24. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, chs. 85 & 86 (3d ed. 1964). While the figures are out-of-date they indicate the problem as to uninsured defendants, the adequacy of recoveries made, and the difficulties in obtaining satisfaction of uninsured judgments.