whether the governmental entity, assuming it is an agency generally vested with eminent domain power, may invoke the power in this instance. At stake is whether the government's acts in taking the property interest are in furtherance of some object that is within the power of that particular governmental body. In the (increasingly rare) cases in which this question is answered in the negative, the attempted taking should of course be judicially enjoined. If the question is answered affirmatively, compensation will be due.

This framework of analysis may be deceptively simple. The steps may seem too mechanical. But behind each step is a theory that has its foundation in our historical conception of a people and their government. Most courts would do well to follow the framework if they never got beyond the mechanics of it. They would do better if they were led to look beyond the framework to its foundations.

MEASURING DAMAGES IN SURVIVAL ACTIONS FOR TORTIOUS DEATH

Michael M. Martin*

Survival statutes have been adopted to avoid the effect of common law rules preventing claims for the tortious death of a human being.[1] These statutes give the personal representative such causes of action on behalf of the decedent's estate as the decedent would have had were he still alive.[2] The question the statutes do not answer, however, is the effect of the death of a party on the measure of damages. The Washington Supreme Court's decision in *Warner v. McCaughan*[3] illustrates the problem.

Warner arose out of the death of a twenty-one year old college student. Alleging that the death was caused by improper diagnosis and care and by administration of unsafe drugs, her parents, individually, and her father, as administrator of her estate, brought suit for damages against the doctor, hospital, and pharmaceutical company on the grounds of negligence and breach of warranty. The parents' individual claims were dismissed because the parents were not dependents of the decedent,[4] but the estate's claim was entertained.[5] One of the items of

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* Associate Professor, Fordham University School of Law. B.A., 1964, J.D., 1966, University of Iowa; B. Litt., 1968, Oxford University.

1. *See, e.g.*, Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929).

2. *See, e.g.*, Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918, 923-24 (1957); Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 373, 369 P.2d 96, 99 (1961); Rose v. Ford, [1937] A.C. 826, 838, 843.

3. 77 Wn.2d 178, 460 P.2d 272 (1969).

4. The parents' claim was brought under the wrongful death statute, WASH. REV. CODE § 4.20.010-.020 (1959). This claim was dismissed because the parents were not dependents of the decedent. *Warner*, 77 Wn.2d at 185-86, 460 P.2d at 276-77. The right of action created by the wrongful death statute is available only to beneficiaries in designated relationships with the decedent. WASH. REV. CODE § 4.20.020 (1956). In order for parents to qualify for beneficiary status under the act, they must be dependent upon the decedent for support. *Id. See also* Mitchell v. Rice, 183 Wash. 402, 48 P.2d 949 (1935); Grant v. Libby, McNeill & Libby, 145 Wash. 31, 258 P. 842 (1927).

5. This action was based upon the general survival statute. WASH. REV. CODE § 4.20.046 (Supp. 1971).

No action was possible under the death-by-personal-injury survival statute. Such an action is brought by the personal representative on behalf of statutory beneficiaries. WASH. REV. CODE § 4.20.060 (1959). In order to qualify as beneficiaries, parents must be dependent upon the deceased. *Id. See, e.g.*, Cook v. Rafferty, 200 Wash. 234, 93 P.2d 376 (1939); Bortle v. Northern Pac. Ry. Co., 60 Wash. 552, 111 P. 788 (1910).

The fourth Washington tortious death statute, which creates a cause of action in par-

damage claimed by the estate was "disability in consequence of a medical condition" caused by the defendants' tortious acts and resulting in the decedent's death.[6] This claim presented the major issue of the case: whether the prohibition in the general survival statute against recovery for pain and suffering[7] prohibited recovery for the decedent's "disability." The court rejected the defendants' argument that the statutory prohibition meant that all claims personal to the decedent abated with her death[8] and held that the statute allows "the broad common-law claim for personal injury," except for pain and suffering.[9] The principal question remaining, which the *Warner* court did not fully answer, is how these damages for physical injury are to be measured in a tortious death case. The purpose of this article is to discuss the factors relevant to the damages issue and to suggest appropriate standards for measuring them.

I. INTRODUCTION—TORTIOUS DEATH ACTIONS

The focus of this article is on the "survival statute" action for re-

ents for injury to or death of a child, was not available because the decedent was over twenty-one years old when she died and her parents were not dependent upon her. WASH. REV. CODE 4.24.010 (Supp. 1971). Even if the decedent in *Warner* had been a minor, the case was tried before the law was changed to permit recovery for loss of love and companionship of the child and destruction of the parent-child relationship. Before the law was amended in 1967, recovery under R.C.W. § 4.24.010 was limited to the actual pecuniary loss to the parents, measured by the value of the child's services less the cost of his support, from the date of injury until he would have reached his majority. *Compare* Skeels v. Davidson, 18 Wn.2d 358, 139 P.2d 301 (1943), *with* Lockhart v. Besel, 71 Wn.2d 112, 426 P.2d 605 (1967). Under that measure of damages, recovery for the loss of a child attending college should in most cases be negligible. *See generally* 43 WASH. L. REV. 654 (1968); 3 GONZAGA L. REV. 220 (1968).

6. Motions to dismiss the estate's claims for medical and hospital expenses and burial and funeral expenses were denied. *Warner*, 77 Wn.2d at 181, 182, 460 P.2d at 274. While burial and funeral expenses are generally treated as expenses of the estate, recovery has also been permitted under the wrongful death statute. *See* Comment, *Damages in Washington Wrongful Death Actions*, 35 WASH. L. REV. 441, 446-47 (1960). The plaintiff did not contest dismissal of the estate's claim for pain and suffering, since the survival statute explicitly excludes recovery for pain and suffering. WASH. REV. CODE § 4.20.046(1) (Supp. 1971).

7. WASH. REV. CODE § 4.20.046(1) (Supp. 1971).

8. *Warner*, 77 Wn.2d at 184, 460 P.2d at 275. Under the defendants' suggested reading of the proviso to WASH. REV. CODE § 4.20.046(1) (Supp. 1971), damages for personal injuries, shortened life expectancy, and impaired earning capacity could not be recovered. In effect, the defendants were arguing that the statute revived (or retained) the distinction between claims which were personal and those involving property which was so important in the rules regarding survival of claims at common law. *See* Jones v. Matson, 4 Wn.2d 659, 667-72, 104 P.2d 591, 595-97 (1940); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV 1043, 1047-50 (1965).

9. *Warner*, 77 Wn.2d at 183, 460 P.2d at 275, *quoting* Hudson v. Lazarus, 217 F.2d 344, 348 (D.C. Cir. 1954).

covery of damages in a tortious death.[10] At common law there were two rules barring personal injury claims connected with the death of the decedent: first, any action commenced by the decedent abated at his death by virtue of the maxim *actio personalis moritur cum persona*, and, second, his personal representative was not permitted to enforce any claims personal to the decedent after his death.[11] Therefore, the decedent's estate was poorer by the amount of any uncompensated personal injury claims outstanding at his death. The survival statutes authorize the decedent's personal representative to continue or bring an action to recover for injuries incurred before the decedent's death.[12] The primary purpose behind the adoption of such statutes seems to have been to permit the estate to recover for such items as medical and hospital expenses.[13] However, the survival statutes have also been used in some jurisdictions to allow the dependents to recover for their loss of support.[14]

"Wrongful death" statutes provide another basis for recovering compensation in tortious death situations. Also adopted to overturn restrictive common law rules,[15] these statutes give a cause of action to

10. For a recent discussion which focuses on the damages available under the Washington wrongful death statutes see Comment, *Washington Wrongful Death and Survival Actions*, 6 GONZAGA L. REV. 314 (1971).

11. *See* Malone, *supra* note 8, at 1044-52. *See also* 1 Am. Jur. 2d *Abatement, Survival and Revival*, § 1 (1962).

12. *See, e.g.*, ALASKA STAT. § 13.20.330 (1962); ARIZ. REV. STAT. ANN. § 14-447 (1956); WASH. REV. CODE § 4.20.046 (Supp. 1971).

13. *See, e.g.*, Ake v. Birnbaum, 156 Fla. 735, 25 So. 2d 213, 221-22 (1946); Hindmarsh v. Sulpho Saline Bath Co., 108 Neb. 168, 187 N.W. 806, 809 (1922). Until recently such a limited purpose seems to be the only one ascribed to the Washington survival statute by bench and bar. Although the latter had been construed in an assignability case to permit the survival of only claims surviving at common law, there was never any reported case challenging that interpretation in a tortious death action. *See* Slauson v. Schwabacher Bros., 4 Wash. 783, 31 P. 329 (1892). Even after the statute was amended in 1961 to make clear that personal injury causes of action survive, the first case in which damages for tortious death were sought under the statute was decided in 1969. *See Warner*, 77 Wn.2d 178, 460 P.2d 272 (1969). Apparently the survival action has just not been considered a weapon in the practitioner's arsenal of tortious death remedies. The most recent major treatise on tortious death omits the Washington survival statute from its catalogue of available remedies, except to mention that the state has a survival statute. *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH 893-94, 995-96 (1966) [hereinafter cited as SPEISER].

14. *See, e.g.*, Mallinger v. Brussow, 252 Iowa 54, 105 N.W.2d 626 (1960); Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436, 441-44, *appeal dismissed*, 371 U.S. 21 (1962).

15. The classic statement of the common law position was made by Lord Ellenborough in Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (K.B. 1808): "In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence."

designated beneficiaries for the injuries they have suffered by the tortious death of the decedent.[16] The principal differences between survival and wrongful death statutes are in the causes of action given and the beneficiaries. In a survival action the estate (the creditors and the heirs or devisees) succeeds to the claims which the decedent would have possessed had he lived; in a wrongful death action the designated beneficiaries, who are usually persons in certain familial relationships with the decedent,[17] have a "new" cause of action for the damage done them by the death.[18]

Analytically, the most difficult problem of tortious death recoveries is that the most substantial injuries have no readily ascertainable monetary values.[19] It is virtually impossible to affix a rational price tag on the decedent's life and the loss to his family and friends of his love, companionship, nurture, and all of the other qualities which make the presence of an individual valuable to those around him. Thus, there is continuous tension in tortious death cases between the desire to compensate for non-pecuniary injuries and the difficulty of doing so by monetary awards.[20] This tension is most likely to be manifested in wrongful death actions, where the designated beneficiaries are usually

16. *See, e.g.*, ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1972); NEB. REV. STAT. § 30-810 (1964); WASH. REV. CODE §§ 4.20.010.-.020 (1959).

17. *See, e.g.*, ARK. STAT. ANN. § 27-908 (1962); OKLA. STAT. ANN. tit. 12, § 1053 (1961); WASH. REV. CODE § 4.20.020 (1959). *But see* Hawaii Rev. Stat. § 663-3 (1968) (spouse, children, parents, any person dependent upon the deceased).

18. Damages under wrongful death statutes are usually measured by either loss of support or loss to the estate. *See* C. MCCORMICK, DAMAGES §§ 95-102 (1935); SPEISER, *supra* note 13, at §§ 3:1-3:2.

19. The seminal article is Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 221-28 (1953).

20. Recent developments regarding the Washington child death statute, WASH. REV. CODE § 4.24.010 (1959), illustrate this problem. The statute had originally been construed in the same manner as the other wrongful death statutes to allow recovery for the loss of support which the beneficiaries (parents) would have received from the decedent (the child during his minority). *See* Upchurch v. Hubbard, 29 Wn.2d 559, 563, 188 P.2d 82, 85 (1947); Skeels v. Davidson, 18 Wn.2d 358, 366-67, 139 P.2d 301, 305 (1943); Skidmore v. City of Seattle, 138 Wash. 340, 344, 244 P. 545, 547 (1926). The facts of modern life have meant that only rarely will a child make a positive financial contribution to his parents; rather, he will virtually always be a net economic loss. Therefore, there could usually be no recovery under the old statute when a child died by tortious means, unless the court were hypocritically to relax the burdens of proving the anticipated support from the child. *See* Northern Pac. Ry. v. Everett, 232 F.2d 488, 494-95 (9th Cir. 1956) (Washington law); Kranzusch v. Trustee Co., 93 Wash. 629, 633-34, 161 P. 492, 494-95 (1916). Recognizing that the old measure was not suited to modern conditions, and that the injury suffered by the parents in such cases is not limited to the pecuniary loss, the Washington Supreme Court and the Washington Legislature came to the same conclusion, that the parents should be entitled to recovery for the "loss of companionship" of the child. Lockhart v. Besel, 71 Wn.2d 112, 117, 426 P.2d 605, 609 (1967); WASH. REV. CODE § 4.24.010 (Supp. 1971). *See* 43 WASH. L. REV. 654 (1968); 3 GONZAGA L. REV. 220 (1968). Interestingly enough, while the Washington court has gone on to interpret the amended child death statute as giving a cause of action for the parents' mental anguish, *see* Wilson v. Lund, 80 Wn.2d 91, 491 P.2d 1287 (1971), the Michigan Supreme Court has retreated from its position in the landmark case of Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960) (allowing recovery for loss of human companionship). Breckon v. Franklin Fuel Co., 383 Mich. 251, 174 N.W.2d 836, 839-46 (1970). *See* MICH. STAT. ANN. § 27A.2922(2) (Supp. 1971).

the natural objects of both affection and intangible benefits from the decedent, and presumptively are the persons who suffer the greatest intangible losses by his death.[21] The survival action recovery, on the other hand, goes to the decedent's creditors and heirs or devisees. The relationship between these beneficiaries and the decedent is, by definition, only one based on their succession to his property interests. For this reason, the present discussion of damages under survival statutes is largely freed from consideration of the complications involved in compensating non-pecuniary injuries.

The principal difficulty in measuring survival action damages lies in giving full compensation for compensable injuries without permitting excessive recoveries.[22] Full compensation requires both that the extent of injuries giving rise to causes of action be measured accurately and that all parties suffering such injuries be identified. Excessive recoveries violate the principle that an ordinary tort recovery not be punitive.[23] A penalty is imposed on the tortfeasor to the extent that overlapping remedies are permitted for the same injury or that damages are awarded for injuries not actually suffered. The discussion which follows is intended to show how such precise compensation may be accomplished under a survival statute.

II. DAMAGES UNDER THE SURVIVAL STATUTE

Since a survival statute gives the personal representative such causes of action on behalf of the estate as the decedent would have had were he still alive,[24] attention must first be given to what claims the decedent could have asserted as a living plaintiff. For present purposes, these claims may be divided into two general categories: those for

21. *See* note 17, *supra*.

22. *See, e.g.*, Jaffe, *supra* note 19, at 222-23.

23. *See, e.g.*, Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 373, 369 P.2d 96, 102 (1962); Pezzulli v. D'Ambrosia, 344 Pa. 643, 26 A.2d 659, 661 (1942).

24. *See* notes 11-14, *supra*.

damages already sustained at the time of trial and those for damages which may reasonably be expected from the time of trial to the termination of the disability or the plaintiff's life expectancy.[25] The primary claims in each class are usually for medical and hospital expenses, pain and suffering, and earnings lost because of the injury.

The difficulty with saying that a survival action gives the estate the same claims that the decedent would have had if alive is that there is an air of unreality in speaking of "prospective" losses of a decedent. This difficulty should be apparent in the following discussion of the major damage items available under survival statutes.

A. *Medical and Hospital Expenses*

It is quite clear that the survival statute preserves to the estate any claims of the decedent for medical and hospital expenses already incurred.[26] When the survival action is brought, the decedent is no longer living, so he has no prospective medical or hospital expenses to recover.

B. *Pain and Suffering*

The Washington general survival statute provides: "[N]o personal representative shall be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased."[27] The proviso makes good sense regarding prospective pain and suffering. As with prospective medical expenses, the decedent will never suffer the pain, so there is no actual damage to the plaintiff. However, it may be argued that denying damages for pain and suffering allows the tortfeasor to profit by his own wrong: if he had not killed the decedent he would have been liable for prospective pain and suffering, so he should not escape liability by inflicting the

25. On the problem of the proper life expectancy to use when it has been shortened by the injury see Boberg, *Damages Occasioned by Shortened (or Lengthened) Expectation of Life: A New Case and Some Further Thoughts*, 79 S. Afr. L.J. 43 (1962); Duffey, *Life Expectancy and Loss of Earnings Capacity*, 19 Ohio St. L.J. 314 (1958); Fleming, *The Lost Years: A Problem in the Computation and Distribution of Damages*, 50 Calif. L. Rev. 598 (1962); Comment, *The Measure of Damages for a Shortened Life*, 22 U. Chi. L. Rev. 505 (1955).

26. *Cf.* Orcutt v. Spokane County, 58 Wn.2d 846, 364 P.2d 1102 (1961).

27. Wash. Rev. Code § 4.20.046 (Supp. 1971).

more grievous injury. The best answer to that argument is that the policy of tort law is not to give retribution, but only to compensate for actual losses incurred.[28]

The case against recovery for pain and suffering sustained between injury and death is not so clear. The decedent actually suffered and felt the pain. Had the decedent recovered this item while he lived, as he was entitled to do, his estate would have increased to the benefit of his dependents, creditors, and heirs or devisees. The practical explanation for the limitation in the Washington survival statute is that it was the price exacted by the insurance interests in the legislature for the enactment of any survival statute.[29] They apparently feared that allowance of pain and suffering damages would lead to excessive recoveries.[30] In any event, there is an element of economic cannibalism in allowing a decedent's dependents, creditors, and heirs or devisees to recover for the pain he suffered.[31]

It is important to compare the treatment of pain and suffering damages under the Washington death-by-personal-injury statute,[32] with that in the general survival statute just discussed. Both authorize the survival of tort claims, but the death-by-personal-injury statute does not exclude recovery for pain and suffering. The explanation for

28. *See, e.g.*, Murray v. Philadelphia Transp. Co., 359 Pa. 69, 58 A.2d 323, 324 (1948).

Regarding the more general problem of death requiring less rather than greater compensation from the tortfeasor, we should be inured to the idea that it is still "more profitable for the defendant to kill the plaintiff than to scratch him." W. Prosser, Law of Torts 902 (4th ed. 1971); Fleming, *supra* note 25, at 604-05. The continuing vitality of that principle is illustrated by the limitation of tortious death damages to pecuniary losses. Penoza v. Northern Pac. Ry., 215 F. 200 (W. D. Wash. 1914); Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 391, 261 P.2d 692, 695 (1953); Woodbury v. Hoquiam Water Co., 138 Wash. 254, 244 P. 565 (1926). Also illustrative is the restriction of wrongful death action recoveries to designated beneficiaries. *See, e.g.*, Wash. Rev. Code § 4.20.020 (1956), and the monetary limits on wrongful death recoveries in some jurisdictions. *See also*, Mass. Ann. Laws ch. 229, §2 (Supp. 1971); Minn. Stat. Ann. § 573.02 (Supp. 1971); Mo. Ann. Stat. § 537.090 (Supp. 1972). *Cf.* Ore. Rev. Stat. § 30.075 (1971).

29. *See* Richards, *Washington Legislation—1961, Survival of Actions*, 36 Wash. L. Rev. 331, 332 (1961).

30. This argument by the insurance interests assumes that they are treasuries, solely responsible for the money to pay claims, rather than conduits for spreading losses among their policy holders. *See generally* R. Keeton, Venturing To Do Justice 42-43 (1969); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 Yale L. J. 554, 579-81 (1961); Peck, *The Role of Courts and Legislatures in the Reform of Tort Law*, 48 Minn. L. Rev. 265, 300-01 (1963).

31. *Cf.* W. Prosser, Law of Torts 901 (4th ed. 1971); Richards, *supra* note 29, at 332. *But cf.* Oliver v. Ashman, [1962] 2 Q.B. 210, 224 (C.A. 1961).

32. Wash. Rev. Code § 4.20.060 (1959).

the anomaly is probably twofold. First, although the general survival statute appears to cover all cases to which the death-by-personal-injury statute applies, the historical background of the former section must be considered.[33] That statute was passed specifically to overcome the very restrictive interpretation given to its predecessor. The predecessor statute had no exclusion for pain and suffering damages,[34] but attachment of the proviso to the replacement was a political necessity if an effective general survival statute was to be adopted. The question now is why the death-by-personal-injury statute should be retained in view of the fact that the broader general survival statute has been held effective.[35]

The probable answer to that question is also a second explanation of the anomaly: the death-by-personal-injury statute, although in the form of a survival statute, gives a cause of action only for beneficiaries in designated relationships with the decedent, as does a wrongful death statute.[36] This means that the statutory beneficiaries are allowed to recover for such items as medical and hospital expenses and earnings lost until the date of death, free from the claims of the estate's creditors and heirs or devisees.[37] If the general survival statute were the only remedy available, a statutory beneficiary dependent for support on the decedent's earnings might receive nothing if the estate were insufficient to satisfy the claims of the creditors.[38] While this reasoning might explain the retention of the death-by-personal-injury statute, it does not justify the allowance of pain and suffering damages.

Possibly, such damages are allowed as a little extra "compensation" to the statutory beneficiaries because of a presumed insufficiency in

33. The original survival statute had provided that "[a]ll . . . causes of action by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former against the personal representatives of the latter." Law of Dec. 2, 1869, Section 659, [1869] Wash. Terr. Laws 165. This apparently clear language was construed in an 1892 assignability case to mean only that when actions survived at common law the personal representative was the proper party to bring the action. Slauson v. Schwabacher Bros., 4 Wash. 783, 31 P. 329 (1892).

34. *See* WASH. CODE § 718 (1881).

35. *See* Warner v. McCaughan, 77 Wn.2d 178, 184, 460 P.2d 272, 276 (1969).

36. *See* notes 15-18, *supra.*

37. *See* Comment, *Damages in Washington Wrongful Death Actions,* 35 WASH. L. REV. 441 (1960).

38. The beneficiary would receive reimbursement for amounts advanced on behalf of the decedent for medical and hospital expenses, since these expenses have first priority (after funeral expenses) as claims against the estate. *See* WASH. REV. CODE § 11.76.110 (1965).

the wrongful death recovery. The designated beneficiaries are the same under both that statute and the wrongful death statute.[39] Thus, permitting damages for the decedent's pain and suffering under the former may allow the beneficiaries to receive more than the damages for loss of support they would receive under the latter alone. There are two objections to using the death-by-personal-injury statute to correct inadequate awards under the wrongful death statute.

First, calculating damages for pain and suffering is a highly speculative venture.[40] To add that enterprise to the calculation of pecuniary measures for such intangibles as "loss of nurture,"[41] "loss of companionship,"[42] and "loss of comforts and conveniences"[43] already permitted under the wrongful death act would seem to threaten the rational basis for tortious death damages. Second, the character of pain and suffering is distinguishable from the other elements recoverable under the death-by-personal-injury statute. Items such as medical expenses and lost earnings are by nature pecuniary. Under that statute, those who directly suffer the pecuniary losses, either by reason of having themselves paid the claims or having been deprived of the support, are compensated for the injury to *them.* In contrast, pain and suffering is an injury whose direct incidence is only on the deceased. Thus, a pecuniary award to the beneficiaries is not compensation for the injury originally suffered.[44] At most, it may compensate the beneficiaries for the loss of money expected to be in the estate if the decedent had lived and had recovered for the pain and suffering *he* incurred. Once the nature of the injury is seen in this light, it is apparent that no compelling reason exists why the statutory beneficiaries are more deserving of compensation for this indirect injury than are the creditors and heirs or devisees, who suffer the identical injury but are prohibited from recovering for it under the general survival statute. In summary, while the death-by-personal-injury statute might not have been rendered superfluous by the adoption of the general survival statute, the reasons

39. *Compare* WASH. REV. CODE § 4.20.060 (1959), *with* WASH. REV. CODE § 4.20.020 (1959).

40. *See* C. MCCORMICK, DAMAGES 318-19 (1935).

41. *See, e.g.,* Walker v. McNeill, 17 Wash. 582, 593, 50 P. 518, 522 (1897).

42. *See, e.g.,* Davis v. North Coast Transp. Co., 160 Wash. 576, 583-84, 295 P. 921, 924 (1931).

43. *See, e.g.,* Pearson v. Picht, 184 Wash. 607, 613, 52 P.2d 314, 316 (1935). *See generally* Comment, *Damages in Washington Wrongful Death Actions,* 35 WASH. L. REV. 441, 443-46 (1960).

44. *See* text accompanying note 30, *supra.*

for excluding recovery for pain and suffering are equally valid in the former as in the latter. On the other hand, until the former statute is amended, it is to the advantage of the decedent's relatives to qualify as statutory beneficiaries so that they may recover pain and suffering damages.

C. *Lost Earnings*

Earnings lost by the decedent between injury and death present no particular problem in a survival action. Had he lived he would have been entitled to compensation for the reasonable value of the earnings he lost because of the injury inflicted by the tortfeasor. Under the general survival statute that cause of action survives to his personal representative.

The claim for loss of prospective earnings presents the most significant issue in a cause of action under the survival statute. Since recovery for pain and suffering is excluded, loss of prospective earnings is likely to be the major item of damage claimed. As the *Warner* court noted: " 'Permanent loss of earning power is usually the chief economic harm caused by a permanent injury.' "[45]

Because the case arose on a motion to dismiss, the *Warner* court did not discuss how this harm is to be measured. The only indication of the measure of damages was in the quotation from *Hudson v. Lazarus*:[46]

> If Hudson in his lifetime had recovered judgment in this action, his damages would have included an allowance for prospective loss of earnings during his normal life expectancy, discounted to present worth, and with such other adjustments as the facts may require.

Since the court clearly authorized the recovery of some prospective earnings,[47] the pertinent question is: what are the "adjustments as the facts may require" from the present value of lost prospective earnings?[48]

45. 77 Wn.2d at 183, 460 P.2d at 275, *quoting* Hudson v. Lazarus, 217 F.2d 344, 348 (D.C. Cir. 1954).
46. *Id.*
47. 77 Wn.2d at 183-84, 460 P.2d at 275-76.
48. Since the net accumulations measure gives a present recovery of what would otherwise be a single payment in the future, present value should be computed by the straight, rather than the annuity, method. The annuity method is appropriate when the recovery represents periodic future payments. *See* Note, *Wrongful Death Actions in Iowa*, 48 IOWA L. REV. 666, 672 (1963).

A proper analysis of that question requires consideration of the interests of a number of different persons. The interest of the tortfeasor is in not paying damages in excess of actual losses, since the policy of tort law is compensatory and not punitive. The decedent, of course, no longer has any interest which must be served in the survival action.[49] There are three other interested groups, however: the decedent's dependents, his creditors, and his heirs or devisees.[50] The dependents expected to be supported by the decedent. Because of his death alternative arrangements must be made for their support. Similarly, creditors may have extended credit to the decedent on the basis of his expected earnings.[51] His death deprives them of that security. Finally, the heirs or devisees have an obvious interest in the savings and accumulations in the decedent's estate.

The interests of the heirs or devisees are perhaps less worthy of consideration than those of the others with claims to the decedent's property, since the injury which they incur because of the tortfeasor's act is somewhat speculative.[52] First, the value of the estate may be subject to more fluctuation in the future than even the decendent's prospective earnings, because of changes in such factors as the number of dependents, the return on investments, and the decedent's spending patterns. Second, the identity of the heirs or devisees may well change, and it is only fortuitous that particular persons hold that status at the time of the decedent's death. Nevertheless, a consideration of their interests is necessary since the heirs and devisees suffer injury if they are unable to recover what they would have received if the decedent had died naturally.

With the interests of these parties in mind, the following discussion considers some alternative measures of damages for lost prospective earnings. These measures generally fall into three categories. First, some courts base the award on the full amount of the decedent's lost prospective earnings with no adjustments other than a reduction to

49. *See* Duffey, *The Maldistribution of Damages in Wrongful Death*, 19 OHIO ST. L.J. 264, 266 (1958). *But see* Fleming, *supra* note 25, at 605.
50. *See* Murray v. Omaha Transfer Co., 98 Neb. 482, 153 N.W. 488, 489 (1915). *Cf.* Duffey, *supra* note 49, at 266; Jaffe, *supra* note 19, at 227. *But see* J. MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH 141-42 (3d ed. 1966).
51. *See* Duffey, *supra* note 49, at 266; Comment, *Damages in Washington Wrongful Death Actions*, 35 WASH. L. REV. 441 n.7 (1960). *But cf.* 44 HARV. L. REV. 980 (1931), which appears to consider the creditors' interest only in relation to earnings lost before death.
52. *Cf.* Duffey, *supra* note 49, at 266.

present value.[53] This will be termed the "gross earnings" measure. Second, many courts make the award according to the value of the decedent's prospective earnings reduced by his expected expenditures for his own maintenance.[54] This is the "net earnings" measure. Finally, there are courts which measure the survival action recovery by the amount of the lost prospective earnings which the decedent would have been expected to save and accumulate; that is, the amount which could be expected to be in his estate when he died at the end of his normal life expectancy.[55] This "net accumulations" measure of damages differs from the "net earnings" measure in that *all* of the decedent's expenditures are taken into account, not just those for his own maintenance.

1. *"Gross Earnings" Measure*

The "gross earnings" measure of damages was that allowed in *Hudson v. Lazarus* when the court made no adjustments to the present value of the prospective earnings during the decedent's normal life expectancy.[56] Thus, the recovery for prospective earnings was exactly the same as if the decedent had brought the action during his lifetime. The difficulty with this measure is that it overcompensates the estate. When the plaintiff recovers prospective earnings during his lifetime, it is expected that part of that recovery will go to his maintenance during his life expectancy. When the injured party is dead, he has no further expenses of maintenance, so that part of the prospective earnings recovery will be a windfall to those who share in the estate.[57] The only argument in favor of this measure, that the tortfeasor should not profit by his own wrong,[58] is not persuasive in light of the non-

53. *See* Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705, 709 (5th Cir. 1967); Hudson v. Cole, 102 Ga. App. 300, 115 S.E.2d 825, 828 (1960).

54. *See, e.g.*, Floyd v. Fruit Indus., Inc. 144 Conn. 659, 136 A.2d 918, 926 (1957); Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 373, 369 P.2d 96, 103-04 (1961); Ferne v. Chadderton, 363 Pa. 191, 69 A.2d 104, 108 (1949).

55. *See, e.g.*, Burch v. Gilbert, 148 So. 2d 289, 291 (Fla. App. 1963); Mallinger v. Brussow, 252 Iowa 54, 105 N.W.2d 626 (1960). *Cf.* Cann v. Mann Const. Co., 47 Del. 504, 93 A.2d 741, 743 (1952).

56. Hudson v. Lazarus, 217 F.2d 344, 348-49 (D.C. Cir. 1954).

57. *See* Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918, 926-27 (1957); Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 373, 369 P.2d 96, 103-04 (1961); Murray v. Philadelphia Transp. Co., 359 Pa. 69, 58 A.2d 323, 325 (1948); Comment, *The Measure of Damages for a Shortened Life*, 22 U. Chi. L. Rev. 505, 511 (1955).

58. *See* Murray v. Philadelphia Transp. Co. 359 Pa. 69, 58 A.2d 323, 329-30 (1948) (dissenting opinion).

punitive policy of tort law to compensate only for losses actually incurred.

2. *"Net Earnings" versus "Net Accumulations"*

The question of the proper measure as between the net earnings and net accumulations theories must be considered in the context of the tortious death statutes applicable. A multiplicity of applicable statutes may have the undesirable effect of allowing double recovery and penalizing the tortfeasor. Therefore, this section considers the question when the jurisdiction has only a survival statute, when there are both survival and wrongful death statutes, and when there are both types of statutes but only the survival statute applies.

The net earnings measure (gross earnings less personal maintenance expenses) can be used to compensate all the interested parties in a survival action. The dependents, assuming that they share in the estate, can recover for the support they would have received during the decedent's normal life expectancy.[59] The creditors are protected by the availability of proceeds from the future earning capacity on which they relied when extending credit to the decedent.[60] Finally, the heirs or devisees receive the surplus of the estate which they could have expected had the decedent lived to his normal life expectancy.

However, since the net earnings measure is based on the decedent's expected gross earnings less only the expected expense of his maintenance, there is a possibility that the tortfeasor will be charged with losses other than those actually incurred. This will arise because there is no reduction under this measure for amounts that the decedent might have spent on himself other than for his own maintenance; that

59. Dependents may share in the decedent's estate by virtue of testamentary provisions, intestate succession, or dower or community property rights. However, not every dependent qualifies under one of these ways to participate in the distribution. Furthermore, there is no necessary relationship between the respective shares of qualified recipients and their dependency. The temptation must be firmly resisted to tinker with the survival action measure of damages in order that the legislative judgment about succession to the decedent's property might conform more closely with the actual pattern of expected support.

60. Creditors may be prejudiced if the amount protected from garnishment is less than the actual cost of maintaining the decedent during his lifetime. For example, if 75 percent of the decedent's earnings were protected from garnishment, but he ordinarily spent 80 percent of his earnings on his own maintenance, the creditors would have 25 percent of the earnings available for their security during his lifetime, but they will receive only 20 percent as a result of the tortfeasor's act.

is, there is no reduction for amounts the decedent would have spent for his own enjoyment.[61] Probably no adjustment is made for this second category of personal expenses on the reasoning that the law does not concern itself with how the plaintiff spends his money.[62] Such an argument, which may be appropriate when making a lump-sum payment to a living plaintiff,[63] loses its force when applied in a survival action. When the estate is seeking the recovery, it is clear that the injured party (the decedent) will not make expenditures for his own enjoyment, so the proper concern of the law should be to insure that the tortfeasor is charged only for the losses which are incurred by those who recover: the dependents, creditors, and heirs or devisees.[64] Thus, in states in which there is only a survival statute, "net earnings" is the proper measure of damages only if it is redefined to equal gross expected earnings less expected expenses for *both* personal maintenance and personal enjoyment. This measure is equivalent to net accumulations plus expenses that would have been made for the support of dependents.

Although the properly computed net earnings measure will compensate all the interested persons without charging the tortfeasor for improper items, a significant problem arises if this measure is used where a wrongful death statute is also applicable. Under the Washington wrongful death statute,[65] as in many jurisdictions,[66] the recovery to the statutory beneficiaries is measured by the loss which they incurred by the decedent's death.[67] This generally means that the tortfeasor is liable to them for that portion of the decedent's prospective earnings which would have been contributed to the beneficiaries' support. Therefore, where the survival statute damages are measured by net earnings and the beneficiaries are entitled to recovery for their loss under the wrongful death act, there will be double recovery of prospective earnings to the extent that the beneficiaries are the same under the two statutes.[68] For example, if the parents of the decedent in *Warner* had been dependent upon her, they would have been entitled to recover under the wrongful death act the amount of expected support and under the survival act the amount of all prospective earnings available to them from the estate through the laws of descent and distribution.

61. *See* Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918, 927 (1957).
62. *Cf.* Olivier v. Houghton County St. Ry. Co., 138 Mich. 242, 101 N.W. 530, 531 (1904); Oliver v. Ashman, [1962] 2 Q.B. 210, 224 (C.A. 1961).
63. *See* Wise v. Kaye, [1962] 1 Q.B. 638, 658 (C.A. 1961).
64. *See* Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 373, 369 P.2d 96, 106 (1961).
65. WASH. REV. CODE §§ 4.40.010-.020 (1959).
66. *See* C. MCCORMICK, DAMAGES § 98 (1935).
67. *See* Comment, *Damages in Washington Wrongful Death Actions*, 35 WASH. L. REV. 441, 443-47 (1960).
68. *See* Duffey, *supra* note 49, at 268.

The conclusion to be drawn when both the wrongful death and survival statutes apply is that the maximum recovery for lost prospective earnings in a survival action should be measured by the net accumulations theory. This measure compensates all those with actual losses: the statutory dependents receive their expected support under the wrongful death statute,[69] and the creditors and heirs or devisees participate in the prospective earnings to the extent such earnings would have been accumulated in the decedent's estate in a normal lifetime.[70] In addition, the tortfeasor does not have to pay twice or for any losses not actually incurred.

England and several United States jurisdictions with both wrongful death and survival statutes have adopted another means of dealing with the allocation of damages in actions for tortious death. They limit the recovery under the survival statute to losses incurred before death: medical expenses, actual pain and suffering, and earnings lost between injury and death.[71] The wrongful death action compensates only the statutory beneficiaries for the injuries they incur by the death. Under this allocation there can be no recovery for prospective earnings, except to the extent they would go to the support of the statutory beneficiaries.[72]

The usual justification for the division between pre-death and post-death actions is based on an inference of legislative intention.

69. Of course, dependents who qualify as beneficiaries under neither type of statute do in fact incur injury without compensation. However, that is primarily a result of the legislative judgment that the class of beneficiaries under the wrongful death act should be restricted, instead of including all dependents in it. As for dependents who are heirs or devisees but not wrongful-death beneficiaries, it is difficult to adjust the survival statute mechanism in order to assure that they are fully compensated. Even if the recovery were increased to include their anticipated support, distribution of the estate is governed by probate law which takes no account of dependency.
70. *See* Voelkel v. Bennett, 115 F.2d 102, 104-05 (3d Cir. 1940); Rohlfing v. Moses Akiona, Ltd., 45 Hawaii 373, 369 P.2d 96, 103-04 (1961); Ferne v. Chadderton, 363 Pa. 191, 69 A.2d 104, 108 (1949). *See also* Note, *Damages for Wrongful Death in Pennsylvania*, 91 U. PA. L. REV. 68, 73-74 (1942). *Cf.* Comment, *The Measure of Damages for a Shortened Life*, 22 U. CHI. L. REV. 505, 512-13 (1955).
71. *See, e.g.*, Ellis v. Brown, 77 So. 2d 845 (Fla. 1955); Hindmarsh v. Sulpho Saline Bath Co., 108 Neb. 168, 187 N.W. 806 (1922); Allen v. Burdette, 139 Ohio St. 208, 39 N.E.2d 153 (1942). *See also* J. MAYNE & H. MCGREGOR, DAMAGES 321-22, 682 (12th ed. 1961).
72. *See* W. PROSSER, LAW OF TORTS 906-07 (4th ed. 1971).

The argument made is that no wrongful death statute would have been adopted if the same damages were already available under the prior survival statute.[73] Thus, the only purpose of the survival statute is to change the common law rule abating personal injury causes of action at death. The measure of damages for the revived cause of action is the same as the personal representative could recover if the decedent had died at the same time but of natural causes: expenses and losses to the date of death.[74] The major difficulty with this approach is that granting a wrongful death remedy does not necessarily mean that damages for all prospective losses will be exhausted by it. To the extent that prospective losses exceed contributions to the statutory dependents, there is an opportunity for concurrent remedies without any punitive duplication of damages.[75] Therefore, the adoption of a wrongful death statute does not necessarily imply an intention to cut off all prospective losses in the survival action. Furthermore, such an idea is inconsistent with the notion that "all" personal injury causes of action survive, that the statute preserves the decedent's causes of action as if he were alive, since one of his inter vivos causes of action was for loss of prospective earnings during his pre-injury life expectancy.

A second justification of the time-of-death theory rests on the rule that the survival statute preserves only the causes of action possessed by the decedent. During his lifetime he had a cause of action for his loss of earnings to the date of his death; since that death has now occurred, his loss of earnings has been completely measured.[76] It is true that the estate can recover for lost earnings only to the date of death if the injured party dies from causes unrelated to the injury during the pendency of the action.[77] However, it does not necessarily follow that death should terminate the period of recoverable lost earnings when it is caused by the injury. In fact, the contrary is suggested by the American rule that when the plaintiff's life expectancy is shortened as a result of the injury he is entitled to recover for prospective earnings for the entire period of his pre-injury life expectancy.[78]

A third argument in favor of limiting survival actions to pre-death damages is that the legislature has not seen fit to allow recovery for injuries caused by the death except as incurred by the statutory beneficiaries. Since creditors and heirs or devisees are not statutory beneficiaries, it is argued that they are not entitled to compensation for the injuries to their interests caused by the death.[79] The response to this argument should be that their injury, the loss of expected future earnings, occurred at the moment the decedent was permanently disabled. That moment may be said always to precede the moment of death.[80] Therefore, the injury to them was included in the decedent's cause of action while he lived, so under the survival statute the claims based on it should not abate at his death.

A final justification for the date of death rule is that it is easy to administer. This virtue does not overcome the fact that the rule operates to the prejudice of the estate's creditors and heirs or devisees. Since there are other means by which these persons can be compensated without double recovery, a jurisdiction with both types of statutes should adopt the net accumulations measure of damages in survival actions rather than limit survival damages to pre-death losses.[81] The situation typically arises in cases in which there are no statutory beneficiaries, where the test of dependency is not met by the beneficiaries, or where the dependents are not within the proper relationship.[82] The choice then faced by the court is between the net earnings measure (as redefined), appropriate when there is a survival statute alone, and the net accumulations measure, appropriate when the wrongful death and survival statutes together provide the remedies for tortious death.

73. *See, e.g.*, Farrington v. Stoddard, 115 F.2d 96, 100 (1st Cir. 1940) (Maine law); Ellis v. Brown, 77 So. 2d 845, 848 (Fla. 1955); Hindmarsh v. Sulpho Saline Bath Co., 108 Neb. 168, 187 N.W. 806, 808-09 (1922).

74. *See* Ellis v. Brown, 77 So. 2d 845, 847-48 (Fla. 1955).

75. *See* text accompanying notes 59-60, *supra*.

76. Allen v. Burdette, 139 Ohio St. 208, 39 N.E.2d 153 (1942). *See* Hindmarsh v. Sulpho Saline Bath Co., 108 Neb. 168, 187 N.W. 806, 808 (1922).

77. *See* Dark v. Brinkman, 136 So. 2d 463, 469-70 (La. App. 1962) (award not to be reduced unless death before trial); Adelsberger v. Sheehy, 336 Mo. 497, 79 S.W.2d 109, 114 (1934); Chappell v. Pittsburgh & W. Va. Ry. Co., 402 Pa. 646, 168 A.2d 330, 332 (1961).

78. *See, e.g.*, Hallada v. Great Northern Ry., 244 Minn. 81, 69 N.W.2d 673, 685, *cert. denied*, 350 U.S. 874 (1955); Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N.W.2d 627, 632 (1944). *See also* Comment, *The Measure of Damages for a Shortened Life*, 22 U. CHI. L. REV. 505, 509-10 (1955). *But see* Borough v. Minneapolis & St. L. Ry. Co., 191 Iowa 1216, 184 N.W. 320, 323-24 (1921).

79. *Cf.* Comment, *The Measure of Damages for a Shortened Life*, 22 U. CHI. L. REV. 505, 513 n.34 (1955).

80. *See* Clark v. Manchester, 64 N.H. 471, 13 A. 867, 869 (1888).

81. Duffey, *supra* note 49, at 268-70.

82. *See, e.g.*, Warner v. McCaughan, 77 Wn.2d 178, 186, 460 P.2d 272, 276-77 (1969) (parents not dependent). *Cf.* Weyerhauser Timber Co., v. Marshall, 102 F.2d 78, 79 (9th Cir. 1939). *See generally* Annot., 72 A.L.R.2d 1235 (1960).

Hudson v. Lazarus,[83] relied upon in *Warner*, illustrates one treatment of this issue. There the injured party instituted an action during his lifetime against the tortfeasor. When he died as a result of his injuries approximately twenty-three months after the accident, his wife, as administratrix, was substituted as plaintiff in his personal injury action. Nineteen months thereafter she also brought an action for wrongful death in her own behalf. The wrongful death action was dismissed because it was not brought within the one-year statute of limitations.[84] Thus, the issue presented was the measure of damages in the survival action alone. The court held there was no possibility of double recovery since the wrongful death statute did not apply, so there was no need to reduce the allowance for prospective loss of earnings during the decedent's normal life expectancy by the amount the wife could have recovered as lost support under the wrongful death statute.[85]

Under the *Hudson* decision, the dependents can recover prospective earnings even though the legislature has said through the statute of limitations on wrongful death actions that the dependents can recover for the death only if they bring the action within one year. Although the court denied it, they used the survival statute to create a cause of action for the dependents, since the opinion is clear that this item could not be recovered in a survival action if a wrongful death action were possible.[86] The important question for present purposes is whether such an end-run around the legislative intent would be equally appropriate in situations like *Warner*. The better view would seem to be that the *Warner* and *Hudson* situations are distinguishable and that only the net accumulations measure of prospective earnings should be applied in survival actions such as *Warner*.

The principal distinguishing factor between *Hudson* and *Warner* is the reason the plaintiffs were disqualified from bringing the wrongful death action. In *Hudson* the wrongful death action was barred because her claim was not instituted promptly. The usual reason for not permitting the prosecution of stale claims is to prevent unfairness to opponents which may arise if they are required to defend after memories have faded and witnesses have disappeared.[87] However, the plaintiff had joined her wrongful death claim with a personal injury action which had been commenced promptly.[88] There was no possibility of unfairness to the defendants because both actions rested on the same facts and required the same evidence.[89] Any unfairness in the situation would arise only if the widow were deprived of her support because of an essentially procedural matter.

On the other hand, in *Warner*, the rule disqualifying the parents from bringing the wrongful death action goes to the essence of the remedy. The legislative judgment expressed by the statute is that only parents who are dependent on their adult child may recover for his tortious death, no matter how deserving they might otherwise be. For the court to adjust the survival action measure of recovery so that the parents could recover more than they would ordinarily expect as heirs or devisees would subvert this legislative pronouncement. In general, if plaintiffs do not come within the wrongful death statute categories, their recovery should be limited to that part of the prospective earnings they would receive as heirs or devisees in the event that qualifying beneficiaries did bring a wrongful death action: their share in the estate the decedent could reasonably be expected to accumulate during his normal life expectancy.

This conclusion assumes that the only purpose of the survival statute (except insofar as it prevents the abatement of claims actually accruing before death) is to protect the creditors and heirs or devisees from being prejudiced by the acceleration of the decedent's death. The dependents, as designated by the legislature, are protected by the wrongful death statute. However, even if the survival action is seen as another way of protecting dependents, it is subject to a severe practical limitation. In order for dependents who are not qualified as beneficiaries under the wrongful death act (or the widow in *Hudson*) to be protected by the survival statute, they must be heirs or devisees of the estate. Furthermore, if the will or the law of intestate succession does not divide the estate in such a manner that the dependent receives the support he would have expected from the decedent, the survival

83. 217 F.2d 344 (D.C. Cir. 1954).
84. *Id.* at 345.
85. *Id.* at 348-49.
86. *Id.*
87. *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 559 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).
88. *Hudson*, 217 F.2d at 345.
89. The only difference would be in the proof of damages, since the wrongful death recovery is based on the injury to the dependents and the survival recovery on the injury to the estate. This is unlikely to be of much importance: the proof of the decedent's earnings, maintenance, and contributions is likely to be made by the same witnesses, even though various elements thereof are relevant only to one recovery or the other.

statute has not served this other purpose. Thus, applying a net earnings measure of prospective earnings (which takes into account contributions made to others) is only a very imprecise, and frequently useless, tool for protecting dependents not covered by the wrongful death act.

CONCLUSION

Warner v. McCaughan made it clear, at last, that the legislative mandate in the general survival statute means exactly what it says. All tort causes of action, except claims for pain and suffering, survive the death of the injured party. The primary purpose of this article has been to examine the major element of damages recoverable under that statute, prospective earnings. Alternative measures of lost prospective earnings have been suggested, with the conclusion that, considering the interests of the dependents, creditors, heirs or devisees, and the tortfeasor, and taking into account the legislative judgments expressed in the statutory schemes for tortious death actions, recovery of prospective earnings in a survival action should be on the basis of the net accumulations measure in states such as Washington which have both survival statutes and wrongful death statutes, regardless of whether the latter applies. In jurisdictions having only survival statutes, the net earnings measure, redefined to exclude expenditures by the decedent for both his own maintenance and enjoyment, is appropriate.

COMMENTS

FEDERAL COMMON LAW REMEDIES UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Violations of a statutory norm often have legal consequences beyond those expressly provided by the statute. At Anglo-American common law a statutory violation may be considered either evidence of negligence or negligence per se, subjecting the violator to possible tort liability.[1] The source of the right to recover in these cases is not the statute but the common law. In other cases, state statutes are held to give rise to "implied" causes of action in which the right to recover is considered to be created by the statute itself and not by the courts.[2] Similarly, Acts of Congress have long been held to create implied federal causes of action.[3] The federal courts, however, have not yet utilized their power to create federal common law remedies for violations of a federal statute. The two rationales—statutory implication and federal common law—differ in their effect on federal jurisdiction and on the substantive right which is created. These differences are

1. *See:* Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 MODERN L. REV. 233 (1960); RESTATEMENT (SECOND) OF TORTS § 286 (1965).

2. In Washington, *see* Shermer v. Baker, 2 Wn. App. 845, 472 P.2d 589 (1970) (holding that WASH. REV. CODE § 21.20.010 (1959) impliedly creates a cause of action on behalf of a seller of stock against one who induced the sale through fraudulent or misleading statements or acts); Krystad v. Lau, 65 Wn.2d 803, 400 P.2d 72 (1965) (holding that the policy provisions in Washington's little Norris-LaGuardia Act, WASH. REV. CODE §§ 49.32.010-.910 (1959), impliedly create a cause of action on behalf of employees discharged because of their union membership).

3. *See* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Note, 48 COLUM. L. REV. 1090 (1948); note 38, *infra*. A separate set of problems, not discussed in this Comment, is presented when suit is brought in state court to redress injuries caused by the violation of a federal statute. Three types of state court suits may be distinguished. First, the defendant's conduct may have been independently actionable under local law prior to the federal enactment. Concerning the survival of local remedies in such cases see O'Neil, *Public Regulation and Private Rights of Action*, 52 CALIF. L. REV. 231 (1964). Second, the federal norm may be incorporated into local standards of conduct. *See, e.g.*, Moore v. Chesapeake & Ohio Ry., 291 U.S. 205 (1934). *See generally* Note, 66 HARV L.REV. 1498 (1953). Third, federal law may create the cause of action. For a discussion of the power of a state to enforce federal rights see Note, *State Remedies for Federally-Created Rights*, 47 MINN. L. REV. 815 (1963); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 241 (1969) (Harlan, J., dissenting).