

TOWARD A SURVIVAL OF ACTIONS ACT

FOR ALBERTA

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## COMMON LAW RULES

A clear distinction must be drawn in the mind of the reader between two common law rules which came into play upon the death of a tort victim. The two rules raise separate considerations and must not be confused with each other.

The first rule at common law was that a cause of action for personal injuries died with either party, wrongdoer or victim. The oft-quoted maxim actio personalis moritur cum persona, (a personal action dies with the parties to the cause of action), embodied the rule. For instance, Blackstone used the maxim in the following manner:

. . . in actions merely personal, arising ex delictis, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that actio personalis moritur cum persona; and it shall not be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed in their own personal capacity, any manner of wrong or injury.<sup>1</sup>

In other words, the "actio personalis" rule dealt with the extinction of a cause of action, meaning that at common law a representative could not sue or be sued for a claim

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1. 3 Blackstone Commentaries at 302

for personal injuries. It is this rule which is a part of the background related to our present concern with survival of actions legislation.

The other common law rule, stood for the proposition that it was not a civil wrong to cause the death of a human being. Lord Ellenborough C.J. in Baker v. Bolton (1808) 1 Camp. 493 stated that, "In a civil court the death of a human being cannot be complained of as an injury." This rule had nothing to do with the survival or extinction of existing actions because of death, but rather dealt with the concept that the wrongful infliction of death was not a cause of action in the first place, and thus no action in tort could be brought by third parties who suffered loss through the killing of another. The much criticized Baker v. Bolton case <sup>2</sup> where a husband could not claim damages in the negligence action for the death of his wife, was upheld by the House of Lords in Admiralty Commissioners v. S.S. Amerika [1917] A.C. 38, and outside of statutory provisions to the contrary, the Baker v. Bolton doctrine is still the law today.

With the increasing numbers of people killed in railroad accidents, and the criticism of this situation of having no right of action for wrongful death, the English Parliament in 1846 passed Lord Campbell's Act (Fatal Accident's Act) 9 and 10 Vict. ch.93, which was entitled, "An act for compensating the families of persons killed by accidents." The act created a new right of action for

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2. See Holdsworth, "The origin of the Rule in Baker v. Bolton", 32 Law Quarterly Review 431, and; Smedley, "Wrongful Death: Basis of the Common Law Rule", (1960) 13 Vanderbilt L. Rev. 615, and; Malone, "Genesis of Wrongful Death", (1965) Stanford L. Rev. 1043.

certain named beneficiaries, as an exception to the existing Baker v. Bolton doctrine that the law of torts does not recognize the interest of one person in the life of another. The statute provided that whenever the death of any person was caused by the wrongful act, neglect or default of another, in such a manner as would have entitled the party injured to have sued had death not ensued, an action could be maintained if brought within twelve months after his death in the name of his executor or administrator for the benefit of wife, husband, parent and child.<sup>3</sup> The cause of action conferred upon the relatives of the deceased by the act was a new cause of action and not merely a continuance of that which was formerly vested in the deceased himself. (The Vera Cruz (1884) 10 App. Cas. 59).<sup>4</sup>

All common law jurisdictions have an act dealing with this matter, and in regard to this jurisdiction we refer the reader to The Fatal Accidents Act, R.S.A. 1970, c. 138 reproduced in Appendix "A", which gives a cause of action to certain specified dependents of the victim. Basically, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed. (Royal Trust Co. v. C.P.R. [1922] 3 WWR 24 (P.C.)). "Pecuniary loss", is a term employed judicially to discriminate between a material loss which is susceptible of valuation in monetary terms as compared to the inestimable loss of society and companionship of the deceased.

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3. See Speiser, Recovery for Wrongful Death, (1966) at 12.

4. See Corpus Juris Secundum at 592.

The right of recovery under the Fatal Accidents Act does not include damages allowed for injury to the feelings, commonly called a "solatium". The Act, although relevant in some degree to our present concern will not be examined in detail. It deals with recovery by dependents. We want to deal with recovery by the deceased's estate in relation to the first common law rule.

The common law rule of actio personalis moritur cum persona may well have arisen because of the early penal nature of the trespass action.<sup>5</sup> The argument was that if one wanted to punish the tortfeasor rather than compensate the victim, how could one do so if the tortfeasor was dead? But what about when the victim was dead and the tortfeasor was still alive? Thus, Pollock threw up his hands and characterized the rule as "one of the least rational parts of our law".<sup>6</sup> With the rise of traffic accidents, much injustice followed when a person could recover for injuries in a car crash if the tortfeasor survived, but could not do so if the tortfeasor happened to die in the accident.

## II

### LAW REFORM ACT, 1934

While exceptions to the rule of non-survival of actions were made for contract actions (Pinchon's Case (1611) 9 Rep. 86), and actions for the return of property

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5. Winfield "Death as Affecting Liability in Tort", (1929) 29 Columbia Law Review 239.

6. Pollock, Torts, 63 (13th ed., 1939)

which had been appropriated by a deceased person, (Sherrington's Case (1582)) it was not until 1934, that the Law Reform (Miscellaneous Provisions) Act, 1934 24 and 25 Geo. 5 c. 41, was passed by the English Legislature providing for survival of actions in tort.<sup>7</sup> The Act is reproduced in Appendix "B".

A survival action seeks to compensate for those losses which the injured party suffered between the time of his injury and his death, the action becoming the property of the estate of the deceased.<sup>8</sup> As emphasized by Munkman, "it is important to appreciate that the Act does not create any new cause of action for wrongfully causing death, it merely continues the existing cause of action for personal injuries".<sup>9</sup> Salmond explains the 1934 provisions in the following manner:

The Act in section 1(1) lays down the general rule that in future on the death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. But to the general rule there are certain exceptions. There is no survival of causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other, or of claims for damages on the ground of adultery. The Act does not, however, abolish the common law rule that it is no tort to cause the death

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7. While Ontario had a survival of actions provision as early as 1886, for instance.

8. Baker, "Survival Actions in Idaho", (1971) *Idaho Law Review*, 168.

9. John Munkman, Damages for Personal Injuries and Death (2nd ed. 1960), at 119.

of another. It does not make the infliction of death into a new tort; death is only the event which is required to enable an existing cause of action to descend to the personal representatives.<sup>10</sup>

Thus, even where death is instantaneous (Morgan v. Scoulding [1938] 1 K.B. 786) the action is brought not for the death but for the cause of action vested in the victim before his death, presuming if necessary, that there is a split second between cause of action and death .

Finally, under the 1934 Act the damages recoverable for the benefit of the estate may not include exemplary damages, and shall, where the death has been caused by the act or omission which gives rise to the cause of action, be calculated without any reference to any loss or gain to the deceased's estate consequent on his death, except that funeral expenses may be included.<sup>12</sup>

The distinction should now be clear in the mind of the reader that a "survival statute merely continues in existence the injured person's claim after death as an asset of his estate, while the wrongful death statute (Fatal Accidents Act) creates a new cause of action, usually for the benefit of decedent's heirs or next of kin, based upon the death itself".<sup>13</sup>

All of the Canadian Provinces have some statutory provisions for survival of actions in tort but no uniformity

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10. Salmond, On The Law of Torts (16th ed., 1973)) at 451.

11. See Winfield and Jolowicz, On Tort (9th ed. (1971) at 508.

12. Section 1(2)

13. Speiser, supra n.3 at 744

exists among them regarding the actions which do not survive, the restrictions on certain heads of damages, or the length of limitation periods. Appendices "C" to "K" include for comparative purpose all the provisions of the common law Provinces. In Alberta, until fairly recently survival of actions provisions were included in the Trustee Act, R.S.A. 1955, c. 346, sections 32 - 36, but now have been moved to the Administration of Estates Act R.S.A. 1970, c. 1.<sup>14</sup> Before examining the various provisions of our act and those of other jurisdictions, we must isolate certain issues that make the examination of these provisions necessary in the first place.

### III

#### LOSS OF EXPECTATION OF LIFE

We have noted that certain causes of action dealing with personal dignitary interests (defamation and seduction, etc.), and certain heads of damage, (exemplary damages, for instance) were specifically excluded by the 1934 Act and did not survive for the benefit of the deceased's estate. The Law Reform Committee responsible for the Act, "advised that the damages recoverable should be limited to the loss to the estate only, but for some reason the draftsman considered (and convinced those instructing him) that no suitable formula in positive terms could be devised to express this concept".<sup>15</sup> The lack of such a provision had a profound influence on the future of damage claims under

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14. See Appendix "C".

15. Noel Hutton, "Mechanics of Law Reform", (1961) 24 Modern Law Review 18.



the Act, as we shall see.

In 1935 the Court of Appeal in Flint v. Lovell [1935] 1 K.B. 354 decided that a seventy year old man who was hurt in a traffic accident caused by the negligence of the defendant could claim as an independent head of damages a sum for "loss of expectation of life". Medical evidence indicated that the man was not likely to live for more than a year. The anxiety resulting in a realization of a shortened expectation of life had in previous cases been compensated for by including it as part of the subjective "pain and suffering" head of damages category. Roche, L. J., the dissenting judge in Flint v. Lovell stated at 367 that the proper place for anxiety over shortening of life should remain in this "pain and suffering" head and an independent award for "loss of expectation of life" only "tended to and resulted in compensation being given for the same matter more than once". However, speaking for the majority, Slessor L.J. lamented at 361 that the plaintiff had lost the "prospect of an enjoyable, vigorous and happy old age" and this loss was a "further and independent head of damages".

While an independent head of damages unknown to the framers of the 1934 Act had been created, it was not clear in Flint v. Lovell, a case dealing with a living plaintiff, whether this damage was to be measured objectively (whether the person was aware of the loss or not) or subjectively, (as in pain and suffering - no recovery if the victim is drugged or unconscious and does not feel any). In Slater v. Spreag [1936] 1 K.B. 83 it was decided that the loss of expectation of life should be measured subjectively; but the landmark decision of the House of Lords in Rose v. Ford [1937] A.C. 826 settled the matter and henceforth it was clear that "loss of expectation" was to be considered objectively as a loss of an asset compensated for regardless

of whether there was knowledge of its' loss or not. Thus, the House of Lords held that the right of damages for loss of expectation of life survived to the personal representative under the Law Reform (Miscellaneous Provisions) Act of 1934. This would follow naturally, of course, if the 1934 Act was interpreted as providing not only for the survival of causes of actions but also for survival of heads of damage not specifically excluded; and that "a survival action is the identical action which the deceased could have brought had he lived".<sup>16</sup> The case involved a 23 year old woman who sustained a combined fracture of her right leg and thigh, in a motorcycle accident caused by the defendant's negligence. Gangrene set in and the woman died a few days later having been unconscious most of the time between the accident and death. Her father, as her administrator, brought an action claiming inter alia under the 1934 Act for the shortening of her expectation of life. Lord Atkin stated at page 834:

"I am of opinion therefore that a living person can claim damages for loss of expectation of life. If he can I think that right is vested in him in life, and on his death passes under the Act of 1934 to his personal representatives".

Lord Wright at page 847 emphasized that the loss of expectation of life should be viewed as an objective loss:

(A man has) "a legal interest entitling him to complain if

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16. Oppenheim, "The Survival of Tort Actions and the Actions for Wrongful Death" (1942) 16 Tulane Law Review 386.

the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering and disability, but in regard to the continuance of life for its normal expectancy. A man has a legal right that his life shall not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given."

Finally, it was recognized in Rose v. Ford that when claims are brought both in respect of the deceased's loss of expectation of life under the 1934 Act and claims by or on behalf of dependents for the primary loss which they have suffered under the Fatal Accidents Act, there must not be overlapping of damages. In other words, if the dependents are beneficiaries of the estate, the amount of the award from the Fatal Accidents Act will be deducted from their award under the 1934 Act, or vice versa which ever award is larger.

After Rose v. Ford the decisions in England regarding awards for the deceased's loss of expectation of life varied greatly in their amounts as the courts struggled to evaluate in monetary terms something so inestimable as the value of years lost. Some decisions conforming to the principle of tort law as compensating the victim rather than conferring a "windfall" on the

felt that it was "unwise to award large sums in respect of a loss not actually felt by the injured party."<sup>17</sup> Finally, the House of Lords in Benham v. Gambling [1941]

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17. Fridman, Modern Tort Cases (1968) at 415.

A.C. 157 while not overruling Rose v. Ford unanimously agreed "that the 'good' for the loss of which a victim or his estate could claim compensation was not the expectation of life at all, but the expectation of happiness."<sup>18</sup> While certainly no easier to calculate, the House of Lords made it very clear that very moderate figures should be chosen. The case involved a child of two and one-half years who was instantly rendered unconscious and died the same day from injuries in a traffic accident caused by the defendant's negligence. The House of Lords reduced the damages from £1,200 to £200. Viscount Simon L.C. stated at 166:

In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly on the basis of the length of life that is lost . . . The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness.

The fact that the assessment was still objective was emphasized, as well as an open admission that the House of Lords wished to establish a conventional and much lower figure under the loss of expectation head of damages. Viscount Simon said at 167:

" . . . the test is not subjective and the right sum depends on an objective estimate of what kind of future on earth the victim might have enjoyed . . . The truth, of

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18. Kahn-Freund, "Expectation of Happiness", (1941) *The Modern Law Review* 81.

course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived the jury or judge of fact is attempting to equate incommensurables .

. . . in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen. I trust that the views of this House . . . may help to set a lower standard of measurement.

Clearly, then, the House of Lords indicated that the non-pecuniary, intangible, loss of expectation of life, a loss personal to the victim not a loss to the estate, must be limited drastically. It has been suggested that only stare decises prevented the House from overruling Rose v. Ford completely.<sup>19</sup>

Inflation of course has dramatically reduced the value of the pound in England. Yet the House of Lords in Yorkshire Electricity Board v. Naylor [1968] A.C. 529, dealing with a case of awards to the estate of a twenty year old man killed instantaneously by an electric shock while employed as a jointer's mate, upheld the trial judges award of £500 for loss of expectation of life rather than the Court of Appeal's decision that it should be raised because of inflation to £1,000. Lord Devlin said, in conclusion at page 550:

The law has endeavored to avoid

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19. Id. at 94

two results, both of which it considered would be undesirable. The one is that a wrongdoer should have to pay large sums for disabling and nothing for killing; the other that the large sum appropriate to total disablement should come as a windfall to the beneficiaries of the victim's estate. . . . while the law remains as it is, I think it is less likely to fall into disrespect if judges treat Benham v. Gambling as an injunction to stick to a fixed standard than if they start revaluating happiness, each according to his own ideas.

## IV

## LOSS OF AMENITIES

The story in England of the evolution of damage awards conferred upon the estate of a tort victim does not stop at Benham v. Gambling and the principle of a nominal sum for loss of expectation of life. A new independent existence was soon accorded to a different head of damages, namely, "loss of amenities", objectively rather than subjectively assessed, and once again the problem of conferring windfalls on the estate of the deceased was raised. The loss of amenities of life represents a curtailment of the plaintiffs enjoyment of life, not by the positive unpleasantness of pain; but, in a more negative way, by his inability to pursue the activities he pursued beforehand.<sup>20</sup>

Loss of amenities or capacities for enjoying life

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20. Harvey McGregor "Compensation Versus punishment in Damage Awards", (1965) 28 The Modern Law Review at 650.

as explained by Street are " . . . damages for the narrowing of the free expression of one's personality either through its natural endowments or through acquired conditioning, that is diminution of the quality as distinct from the quantity of life".<sup>21</sup> This damage before the 1950's was a part of the subjective "pain and suffering" category just like "loss of expectation of life" was at one time. However in Wise v. Kaye [1962] 1 All E.R. 257 (C.A.), the Court of Appeal, dealing with a case of a twenty year old woman rendered permanently unconscious as a result of an injury caused by the defendant's negligence, held that an award for loss of amenities should be objectively assessed, awarded regardless of whether the person was aware of his or her loss. The award of £15,000 for such loss was upheld. Sellers L.J. stated that the Benham v. Gambling decision did not apply to this head of damages, and although Upjohn L.J., recognized that most of the money would go to the estate not the victim, he stated:

" . . . I am unable to see why the plaintiff while living should be prevented from so claiming merely because she is wholly ignorant of the grave loss she has suffered and her chances of recovery are negligible".

Diplock L.J., dissented and wished to treat loss of amenities in conformity with the compensatory principle of damages and he insisted that the capacity for enjoying life could not be measured objectively as a "valuable personal asset, akin to loss of ones horse, his shoes, and his china

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21. The Law of Torts (5th ed. (1972) at 62.

vase";<sup>22</sup> but should remain a subjective consideration. The question came before the House of Lords in West v. Shepard [1964] A.C. 326, dealing with a case of a 41 year old woman who had been rendered unconscious from injuries caused by the defendant's negligence. The House of Lords upheld the award of £17,500 for general damages. The loss of amenities category was, according to most Lords, both subjective and objective, but the majority placed great emphasis on the objective part. Lord Morris agreed with the Wise v. Kaye decision that the Benham v. Gambling principle did not apply to any class of case other than loss of expectation of life, and damages for loss of amenities should be awarded regardless of whether the victim subjectively felt her loss of enjoyment of life. Lord Devlin and Lord Reid dissented. Lord Reid stated at page 34 that; "It is no more possible to compensate an unconscious man than it is to compensate a dead man". His reasoning was based on an adherence to the principle of law that compensation not punishment was the proper scope of tort law. He said at page 342:

It is often said that it is scandalous that it should be cheaper to kill a man than to maim him, and that it would be monstrous if the defendant had to pay less because in addition to inflicting physical injuries he had made the plaintiff unconscious. I think that such criticism is misconceived. Damages are awarded not to punish the wrongdoer but to compensate the person

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22. To use the words of A.I. Ogus, "Damages for Tort Amenities: For a Foot, A Feeling, or a Function?" (1972) 35 Modern Law Review 1, at 2



injured, and a dead man cannot be compensated. Loss to his estate can be made good, and we can give some compensation to those whom he leaves behind. Perhaps we should do more for them--but not by inflating the claim of the dead man's executor, for then the money may go to undeserving distant relatives or residuary legatees or even to the Treasury if he dies intestate and without heirs.

Furthermore, Lord Devlin insisted that the loss of amenities category was an award for "diminution in the full pleasure of living," not a "loss of personal asset, something in the nature of property," and that "limbs and faculties cannot be turned into cash as property can". Again, in the same vein as Lord Reid, Lord Devlin concluded at page 362:

I think that deprivation should be measured mainly, if not wholly, by the sense of loss. I cannot help feeling that the contrary view is coloured by the thought that a wrongdoer should be made to pay damages commensurate with the gravity of the physical injury he has inflicted rather than the suffering he has caused.

Once loss of amenities was established as an objectively assessed independent head of damages, like loss of expectation of life, it followed naturally that a claim under the 1934 Act by the administrator of a deceased estate would be made. This is precisely what happened, for instance, in Andrews v. Freeborough (1966) 2 All E.R. 721 (C.A.) where an eight year old girl was rendered immediately unconscious as a result of an injury caused by the negligence of the defendant and died a year later without gaining consciousness. The court felt bound by Wise v. Kaye

and West v. Shephard although all three judges wished that they could rule otherwise on the basis that damages should be a compensation for the victim and that "the death of a human being should not be the source of profit or advantage to any other person".<sup>23</sup>

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### THE CONTROVERSY

Before examining the survival of actions legislation of the common law Provinces of Canada and specifically how Alberta and other jurisdictions have handled the loss of expectation and loss of amenities heads of damages in survival actions, it is appropriate to set forth the arguments for and against the survival of these heads of damage. The opinion of this writer is that there is a majority view and a minority view; the majority view being that these non-pecuniary, intangible heads of damages should not survive for the benefit of the estate; and the minority view stating that they should.

To begin with the majority view, a common theme expressed is that there is a problem of conferring a "windfall" on the estate of a deceased person. E. R. E. Carter states that compensations under a survival act for exemplary damages, pain and suffering, loss of expectation of life and so forth are objected to "because, being of a personal nature, they should not be permitted to swell the estate for the benefit of living persons, whether relatives or creditors of the deceased and that . . .

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<sup>23</sup>. See Winn L.J., dissenting at 733.

it is against the whole conception of the common law to compensate a person who has not suffered".<sup>24</sup> Furthermore, while not speaking of survival of heads of damages but rather of survival of certain causes of action, Winfield, nevertheless, made clear his position:

Where it is the injured party who has died there is something to be said for extinction of an action for a personal tort, for it seems consonant neither with justice, nor with the law of tort that a man's successor's should profit by a wrong which in<sup>25</sup> origin did them no harm . . .

Furthermore, Fleming, while perhaps not positively expressing his own views states at 646:

More debatable is whether to allow recovery for non-pecuniary losses, like pain and suffering, physical disfigurement or loss of expectation of life. All of these are in a sense personal to the victim and do not represent a loss to the estate, comparable to a wrecked car or his medical and funeral expenses. And although, as a general proposition, recovery in a survival action is measured by loss not to the estate but to the deceased, it is widely felt to be against sound policy to confer on the estate what would in effect be a windfall. This viewpoint derives additional support from the fact that,

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24. Carter, "Assessment of Damages" (1954) 32 Canadian Bar Review. 713.

25. Winfield, "Recent Legislation on the English Law of Torts," (1936) 14 Canadian Bar Review 639.

even though it is rather generous to defendants, the more when the injury in question caused the death, yet to allow such a claim would in any event only inure to the benefit of estate creditors (for whom no one ever seems to have a kind word) and non-dependent legatees, since dependants claiming under Lord Campbell's Act would be obliged to give the tortfeasor credit for any gain coming to them by reason of the death.<sup>26</sup>

Kahn-Freund states as well that, "Succession to happiness is as unthinkable as succession to pain and suffering . . . The principle actio personalis should have remained in force with regard to all claims other than those of a strictly compensatory nature."<sup>27</sup> Dean Wright, noted, as early as 1938 that:

It is the writer's opinion not only that a claim for shortened expectation of life or death should be excluded as an item in an action by a personal representative of a deceased, but that many other actions in tort and all claims for pain and suffering should be excluded as well.<sup>28</sup>

Harry Street, points out, further, that in terms of what

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26. Fleming, The Law of Torts (4th ed. 1971).
27. Kahn-Freund, Supra n. 18 at 99.
28. Wright, "The Abolition of Claims for Shortened Expectation of Life by a Deceased's Estate," (1938) 16 Canadian Bar Review. 193 at 195.

should survive and what should not, the answer must be that causes of action cannot be the Criterion; at most one would hold that certain heads of damage, ie. non-pecuniary ones, are not recoverable after the death of the plaintiff, whatever the cause of action".<sup>29</sup> Finally, the author of McGregor, On Damages, notes that the courts show a distaste "for awarding to the estate damages in respect of the non-pecuniary loss of the deceased, and the ultimate answer would appear to be to amend the survival legislation so as to eliminate all possibility of such recovery by the estate".<sup>30</sup>

The majority viewpoint as we have seen insists on the compensatory nature of tort actions. In reply to the argument that it is anomalous that a tortfeasor is better off to kill than to simply injure a plaintiff, Harvey McGregor asserts:

It is clear that, as far as compensatory damages are concerned, it will always remain cheaper to kill than to maim, and this is as it should be. Any feeling that a defendant ought to pay as much, if not more, for inflicting death as for inflicting serious injury is based on a theory of punishment and not compensation"<sup>31</sup>

According to Bruce Dunlop, although the courts call shortened expectation of life and loss of amenities objective losses "they can only be viewed as subjective".<sup>32</sup> Dunlop, furthermore

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29. Streit, Supra n. 21 at 138.

30. McGregor, On Damages (13th ed. 1972) at 796.

31. Harvey McGregor, Supra n. 20 at 642.

32. Bruce Dunlop "The High Price of Sympathy: Damage for Personal Injuries," (1967) 17 U of T, Law Journal 51 at 53.

suggests that large sums are awarded because of an emotional reaction triggered by sympathy for the victim. We are admonished finally, to remember the tort principle that "you take your victim as you find him". Thus, in conformity to the principle of reasonable compensation for the victim, it has always been true that a small injury to the hand of a brain surgeon, for instance, may result in far higher damages than a severe injury to a child. The difference may have nothing to do with the culpibility of the tortfeasor. Thus the idea that "it is cheaper to kill than to maim" is not so anomalous. Finally, A.I. Ogus recently struck at the compensatory chord again when he stated:

The duty of the court is to award the plaintiff such money as will compensate him for the loss he has actually sustained, not to nominate a sum which it thinks that the defendant ought to pay.<sup>33</sup>

Another majority view is that reform of the Fatal Accidents Act rather than survival of non-pecuniary losses to the estate would be a more appropriate reaction to the problem. In an influential article,<sup>34</sup> Honorable Sir Owen Dixon suggested that the Fatal Accidents Act should be reformed so as to include proper non-pecuniary interests of dependents in the life of another, rather than the survival of such damages for the benefit of the deceased's

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33. Ogus, Supra n. 22 at 11.

34. Dixon, "The Survival of Causes of Action,"  
1 University of Queensland Law Journal 1.

estate under survival legislation:

The death of a human being cannot in reason be made a subject of compensation to his estate. But it produces a profound effect upon the circle of people with whom he lives and among whom he moves. The question by which the law is really faced is whether survivors interested in his life should be compensated for the loss and injury they sustain from the wrongful act causing his death, and, if so, in respect of what interests . . . Men and women connected by ties of relationship or close association with a man or woman upon whom they depend for moral support, comfort and companionship almost uniformly regard the death of the latter by a wrongful act as a thing for which justice demands that they should have some redress.

In a similar vein, John Munkman speaking generally of the 1934 Act states:

It will be seen that the Act of 1934, so far as concerns actions for personal injuries, has proved to be a singularly unsuccessful experiment in law reform. It is unrealistic that damages for personal injuries should be recovered by any person who has not sustained those injuries. It would have been better to enlarge the rights of the dependents under the Act of 1846 so as to include general damage for the personal loss they have sustained, as distinct from loss of a purely

financial character."<sup>35</sup>

This very same position, furthermore, is taken by the authors of Winfield and Jolowiz, On Torts.<sup>36</sup> Finally, Dean Bowker in 1964 concluded in an article entitled "The Uniform Survival of Actions Act" that:

By way of summary, the purpose of survival legislation is to cure defects in the common law. The present submission is that the real harshness of the common law rule disappears once the victim can recover against the wrongdoer's estate, and the victim's estate can recover for loss to the estate. The legislation should not cast its net so wide as to allow the estate of a victim to make a claim that represents no loss whatever to the estate. If the Fatal Accidents Act is too narrow it should be widened; and a Survival Act should not be the vehicle for doing this indirectly, erratically and inefficiently.<sup>37</sup>

Regarding the minority view, James Laycraft responding in 1964 to the proposed Uniform Survival of Actions Act wrote inter alia:

When the victim loses his

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35. Munkman, Supra n. 9 at 12.

36. at 524.

37. W. F. Bowker "The Uniform Survival of Actions Act," (1964) 3 Alberta Law Review, 197 at 201.



expectation of a happy life, he has suffered something which can be estimated in terms of money, no matter how difficult that process is. While we have a system of law which allows a man to bequeath property to his adult children or to other beneficiaries, there would seem to be no reason why those rights which are damage claims may not also be bequeathed.<sup>38</sup>

A proposed minority solution is set forth by Harry Street:

The solution . . . is to allow the estate to recover all the future losses which the victim could himself have recovered had he survived. The obvious criticism is that this leaves the dependents remediless should the victim have bequeathed his estate elsewhere. The answer, and it is submitted that it is a convincing one, is that the amount of recovery and the problem of distribution are separate questions. How the law regulates the disposal of a deceased's estate is no concern of the law of contracts and torts."<sup>39</sup>

This is the reverse of the majority view which seeks to reform the Fatal Accidents Act if greater awards beyond pecuniary loss to dependents are justified. Street's proposal might well do away with the Fatal Accidents Act altogether. Finally, Prosser states that "the modern trend is definitely toward the view that tort causes of action

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38. J.H. Laycraft, "Survival of Claims for Loss of Expectation of Life" (1964) 3 Alberta Law Review 202 at 203.

39. Street Principles of the Law of Damages (1962) at 141.

and liabilities are as fairly a part of the estate of either plaintiff or defendant as contract debts . . ."<sup>40</sup> It might be argued that justice demands some redress for the family of a child or adult who has been killed even if the family does not depend on that child or adult for financial support of any kind. It is easy to see that in many actions brought by the estate of an unmarried adult or a very young child, for instance, no recovery under the Fatal Accidents Act is possible and since the deceased will usually have not left a will, the award under the Administration of Estates Act for loss of expectation of life will go to the parents under the Intestate Succession Act R.S.A. 1970, c.190. Thus the existence of the loss of expectation of life head of damages affords the only recovery possible at the present time in some situations and some people will be reluctant to close the door on it.

## VI

### REACTION OUTSIDE ENGLAND

It might well be asked how other jurisdictions have reacted to the English developments in regard to loss of expectation of life and loss of amenities. As in Britain, the maxim actio personalis moritur cum persona has been modified in all the Canadian common law Provinces by statute. Unlike the English 1934 Act, however, all Australian legislation except for Queensland, excludes claims for the decedent's non-pecuniary losses,<sup>41</sup> and arising from the Rose

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<sup>40</sup>. Prosser, Law of Torts (4th ed. 1971) at 901

<sup>41</sup>. Fleming, Supra n. 26 at 647.

v. Ford decision; Australia, New Zealand, and every Province in Canada except for Alberta and Manitoba has excluded loss of expectation of life as an allowable head of recovery under survival provisions. In Ireland the decision in Rose v. Ford has been reversed by statute as well.<sup>42</sup>

As far as the Civil Law is concerned, "Article 1382 of the Code Napoleon allows the widow and children of a man killed by another's fault to bring civil action for his death. This right of action is independent of the victim's right of action, which cannot be asserted by the beneficiaries since such recovery would constitute an unjust enrichment to the beneficiaries."<sup>43</sup>

Perhaps legislation has not completely caught up with the "loss of amenities" issue and Bruce Dunlop, for instance, suggests that "the consistent thing to be done in those jurisdictions where legislation has abolished loss of expectation is to abolish loss of amenities as well"<sup>44</sup> As we shall see, however, this may not be necessary in the light of recent decisions.

The American scene in regard to survival of actions is very complex, as hybrid forms of Fatal Accidents Acts and Survival Acts exist together, and in some states no survival of causes of action where the injured party dies exist at all. In these states only Fatal Accidents Act, or more commonly called, "Wrongful Death Acts" exist for the benefit of

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42. Civil Liability Act 1961, s. 7(2).

43. Oppenheim, Supra n. 16 at 332.

44. Dunlop, Supra n. 32 at 64.

dependents.<sup>45</sup>

The High Court of Australia in Skelton v. Collins (65-66) 115 CLR 94, refused to follow the House of Lords decision in West v. Shephard. The case involved a seventeen year old who had been rendered totally unconscious in an accident caused by the defendant's negligence. Kitto J. refused to look at loss of amenities as primarily an objective loss and stated at page 103:

So far as this country is concerned, I think that Benham v. Gambling (2) ought to be accepted as prescribing the correct approach in all cases where the matter for which compensation is to be given is, whether by reason of death or not, the fact that the plaintiff has been excluded for a period from the whole of the experiences that make up life.

Taylor J. emphasized the subjective element of the assessment and the need to keep in mind the fact that the plaintiff was insensible of his deprivation and thus very moderate sums should be awarded. He stated at page 113:

. . . in assessing damages for a loss of the amenities of life resulting from the physical destruction or impairment of some part of the body, I find it impossible to ignore, or, to regard merely as a minimal factor, what has been referred to as the subjective element. The expression "loss of the amenities of life" is a loose expression but as a head of damages

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45. See Speiser Supra n. 3.

in personal injury cases it is intended to denote a loss of the capacity of the injured person consciously to enjoy life to the full as, apart from his injury, he might have done.

Furthermore, Windeyer J., in his usual well reasoned manner, set his visions outside the traditional subjective - objective controversy and neither accepted the view that one could simply award "so much for a foot," (objective) or "so much for a feeling," (subjective), but rather that one ought to recognize that we do award reasonable sums as a solace to the plaintiff whatever the courts say to the contrary.

To begin with Windeyer J. at page 128 made clear a fundamental starting point:

The one principle that is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory. They are not punitive. They are given to compensate the injured person for what he has suffered and will suffer in mind, body or estate. Only so far as they can do so is he entitled to have them.

Then Windeyer J. went on to justify the idea that loss of amenities could not be looked at as a loss of a "thing", but should "be based upon solace for a condition created not upon payment for something taken away".<sup>46</sup> Finally, indicative of the fact that the problem is not an easy one, both Owen J.J. and Menzies J. dissented and followed the

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46. At 130.

West v. Shephard principles.

## VII

### ALBERTA: THE CASES

The path of the law in Alberta, as we shall see has a few curious twists along the way. The Administration of Estates Act, R.S.A. 1970, C. 1 sets forth the action that can be taken by a legal representative for a tort committed against the deceased:

51. (1) The legal representative of the estate of a deceased person may maintain an action for any tort or injury to the person or to the real or personal estate of the deceased except in cases of defamation, in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do.

(2) The damages when recovered form part of the personal estate of the deceased.

We notice that all heads of damage survive (the same rights and remedies). Action in tort against a legal representative is set forth in s. 53:

53. Where any deceased person committed a wrong to another in respect of his person or of his real or personal property, except in cases of defamation, the person so wronged may maintain an action against the legal representative of the estate of the deceased person who committed the wrong.

Thus, awards for loss of expectation of life are made with regularity in this Province.

In Batog v. Mundy [1939] 2 WWR 1 (Alta S.C.) Ewig J. examined Rose v. Ford and concluded that Alberta survival legislation was similar to the British 1934 Law Reform Act and awarded \$3,000 for loss of expectation of life to the estate of a twelve year old girl who died in a car accident. In Brebner v. Anderson [1947] 1 WWR 1009 (Alta S.C.) Boyd McBride J. awarded \$2,000 for loss of expectation of life to the estate of a thirty-nine year old man. The twist was introduced by the important Manitoba case which affected later Alberta decisions. In the Manitoba Court of Appeal decision of Anderson v. Chasney [1949] 4 DLR 1971, McPherson L.J.M. refused to follow the strict interpretation of the House of Lord's reasoning in Benham v. Gambling. McPherson L.J.M. stated at page 90 that "the standard of measurement in England has no bearing on what should be the standard in Canada," and Adamson J.A. reiterated at page 96 that "happiness should not be the determinant of the value of life," drawing an analogy to Christ who was a man "of sorrows and acquainted with grief." Thus in Maltais v. C.P.R. [1950] 2 WWR 145 (Alta S.C.) Egbert J. followed Anderson v. Chasney instead of Benham v. Gambling and awarded \$5,000 for loss of expectation of life. He said at page 161, "I am unable to endorse the doctrine that 'it is cheaper to kill than to main' to the extent of giving only nominal damage for killing."

In Drewry v. Towns (1951) 2 WWR 217 (Man. K.B.) Kelly J. awarded \$7,500 for the loss of expectation of life to the estate of a deceased fifty year old farmer. In Shybunka v. Kapolka (1951) 4 WWR 673, the Alberta Supreme Court followed Anderson v. Chasney and made a \$5,000 award for loss of expectation of life. Furthermore \$6,000 was awarded under this head in Daman v. Kenick (1953) 9 WWR 429 (Man. Q.B.), \$3,500 in Rivard v. Toronto Central Trust (1953) 9 WWR 370 (Man. Q.B.); and in Thompson v. Stahler and Parcels (1952-1953)

7 WWR 510, the Alberta Supreme Court awarded \$7,500 for "loss of expectation" to the estate of a sixteen year old boy who died instantly in a traffic accident. Finally, the Supreme Court of Canada in Bechthold v. Osbaldeston [1953] 4 DLR 783 stepped in and made it clear that in awarding damages for shortened expectation of life, the ratio of the House of Lords in Benham v. Gambling should be followed, not Anderson v. Chasney. The case was an appeal from the Alberta Supreme Court in an automobile negligence action, where Egbert J. awarded \$10,000 for loss of expectation of life according to Anderson v. Chasney principles. In Bechthold, the Alberta Supreme Court Appellate Division lowered the \$10,000 by \$2,500 and allowed \$7,500 for loss of expectation of life. Kerwin J. of the Supreme Court of Canada, while indicating that the awards should be moderate according to Benham v. Gambling principles, stated at 786:

Under these circumstances and bearing in mind the depreciation in the value of money, this court should not interfere with the amount fixed by the highest provincial court  
 . . .

The reaction of the court that decided Anderson v. Chasney in the first place became apparent in Bryce v. Northland Greyhound (1955) 14 WWR 258 (Man. C.A.) where an award of \$2,500 by the trial judge based upon Benham V. Gambling and Bechthold was increased to \$5,000 for loss of expectation of life by the Court of Appeal. Adamson J.A. stated that since \$7,500 was not overruled in Osbaldeston, on the basis of equity, not less than \$5,000 should be given in the present case. Once again, the case went to the Supreme Court of Canada [1956] CLR 409, and once again the Manitoba Court of Appeal was overruled and the \$2,500 trial judge's award was restored. In the meantime, Adamson C.J.M. said



in Lysack v. Anderson (1955) 15 WWR 635 (Man. C.A.) at 640:

Courts frequently allow large sums for permanent disability. To be killed is the ultimate permanent disability. The happiness of the individual cannot be the yardstick of the value of a life. Were that so, the value of the life of the "man of sorrows" would be worth little or nothing. The life of every person who wishes to live is of the utmost value to him or her. "Skin for skin, yea, all that a man hath will he give for his life." Job 11 4. Is the life of a person of high estate to be judged of greater value than that of a person of humble degree? Such a judgment it seems to me would be invidious. Who is to judge the value of a life? In my opinion there should be a standard uniform value set for loss of the life of a normal healthy person. Exception to such a standard would be the life of a baby-in-arms or a seriously disabled or sub-normal person. For the permanent disability or loss of life of a normal person \$5,000 cannot be said to be excessive and such a sum is not "exemplary."

At any rate, after the Supreme Court of Canada had spoken, \$3,000 was awarded for loss of expectation of life in Carl v. Steinhauer (1956-1957) 20 WWR 520 (Alta. S.C. A.D.); and in Flynn v. C.P.R. (1957) 22 WWR 131 (Alta. S.C.) Primrose J. indicated for purpose of guidance that had the plaintiffs been successful he would have awarded \$2,500 to each under the survival provisions. Furthermore, in Ure v. Fagmon (1957) 22 WWR 289 (Alta. S.C. A.D.) \$5,000 was awarded; the same figure that was awarded in Delorne et al v. Sinclair (1957) 22 WWR 374 by the Manitoba Queen's Bench, and by the Alberta Supreme Court in Ruff v. Hetesy (1957) 21 WWR 595. The cases after this point indicate a rising award under

the Fatal Accidents Act provisions but a conventional \$3,000 to \$5,000 sum under survival of actions provisions. Finally in Ciniewicz v. Braiden (1965) 52 WWR 111 (Alta. S.C. A.D.) Smith C. J. A. awarded \$7,500 for loss of expectation of life. Yet in Constable v. Ulan (1969) 70 WWR 171, McDermid J. A. of the Alberta Supreme Court appellate Division reduced the \$6,000 awarded at trial for loss of expectation of life to the estate of a sixty-seven year old wife who was killed instantly in an accident. He stated at 172:

Taking the awards that have been made into account and applying the principles enunciated in Benham v. Gambling, I think the award of \$6,000 made by the trial judge cannot stand . . . I think the maximum amount that should be awarded pursuant to The Trustee Act is \$4,000.

The question of loss of amenities and the controversy between the West v. Shephard approach and the Australian Skelton v. Collins approach, came clearly in front of the Supreme Court of Canada in The Queen v. Jennings (1966) 57 D. L. R. (2d.) 644. The court went the House of Lords way, as Cartwright J., stated at 652:

I regard the allowance of \$2,000 for loss of amenities of life as very much too low. I am in full agreement . . . that these cases rightly decide that damages for loss of the amenities of life are not to be reduced by reason of the fact that the injured person is unconscious and unaware of his condition.

Thus, just as in England, it was obvious that claims for loss of amenities would be made under survival legislation.

For instance in Child et al v. Stevenson et al [1972] 6 WWR 140, Gould J. of the B.C. Supreme Court, dealing with a case of three boys, aged respectively, fifteen, sixteen and seventeen years, who were killed instantly by the negligence of the driver of the car in which they were riding, said of the B.C. survival of actions provisions at 142:

It is clear from the above legislation that the estate of each of the dead boys may claim and recover for loss of amenities, because that particular claim is not specifically excluded.

Gould J. awarded \$20,000 to each of the plaintiffs. He felt reluctantly bound by inter alia, The Queen v. Jennings.

If loss of amenities is to be awarded to estates under survival legislation without the moderating influence of Benham v. Gambling vis-a-vis loss of expectation of life it is obvious that substantial "windfalls" to beneficiaries will result. However on appeal to the B.C. Court of Appeal (Child et al v. Stevenson et al [1973] 4 WWR 322), Branca J.A. overruled Gould J. and stated that loss of amenities was not used as a separate head of general damages when the survival provisions were passed but that the specific exclusion of damages for disfigurement, for pain and suffering, and the 1942 amendment specifically excluding loss of expectation of life meant by implication that loss of amenities could not be recovered in B.C. survival actions either.

As we have already noted, however, the Alberta legislation is different from B.C. provisions. Yet, we have the same result in regard to loss of amenities, although we still allow loss of expectation of life. A recent Alberta case involved the death in a motor accident of a twenty one year old graduate student at the California Institute of

Technology who had a great academic record. At trial Manning J. with a jury awarded \$90,000 under S. 51 of The Administration of Estates Act for loss of expectation of life. The case was appealed to the Alberta Supreme Court (Crosby v. O'Reilly [1973] 6 WWR 632) on the issue of the amount of damages and the instructions to the jury by Manning J. The defendants appealed the award as excessive on the grounds that the trial judge erred in law when he instructed the jury that they could not be given information regarding other awards in similar circumstances and that he failed to suggest a minimum and a maximum amount for the assistance of the jury in arriving at the damages awarded. The plaintiffs cross-appealed because Manning J. had instructed the jury that only loss of expectation of life could be considered, not loss of amenities. Clement J.A., on appeal, reviewed the English cases as far as loss of expectation of life was concerned and concluded that under the Benham v. Gambling and Berhtold v. Osbaldiston principle the courts of Alberta were bound to an upper limit in claims of this nature of \$7,500, subject only to adjustment in the light of any decline in the value of the dollar and a jury should be told this as a matter of law. As far as loss of amenities was concerned, Clement J.A., looked at the English authorities and distinguished between the action brought in regard to a living but unconscious victim and those brought in regard to a dead victim. In the latter situation, Clement J.A. was of the opinion that, following Rose v. Ford which denied double damages, and in consideration that in any event such damages should be subject to the same considerations as those discussed in relation to Benham v. Gambling, only damages for loss of expectation should be awarded under the Administration of Estates Act because "the loss of expectation of life has as its very core the loss of those amenities by which the damage is measured. To paraphrase Lord Roche, when damages for loss of expectation of life have been awarded, they

necessarily include loss of the amenities by which the expectancy is made compensable. Having regard to the present comparative value of the dollar I am of opinion that the present upper limit of damage for loss of expectation of life in this jurisdiction should be \$10,000".

The plaintiffs appealed to the Supreme Court of Canada (unreported, June 28th, 1974) and on behalf of the Court, Chief Justice Laskin dismissed the appeal and upheld the \$10,000 figure. The plaintiff sought a restoration of the jury's verdict and submitted that the jury should have been directed to consider both loss of expectation of life and loss of amenities of life. First of all, Chief Justice Laskin made it clear that he was aware of the controversy surrounding the survival of loss of expectation of life as a head of damage in Manitoba and Alberta. He stated:

On the basis that the damages are awarded only for shortened expectation of life, the question at issue is the extent of the compensable interest of the deceased's personal representative in a loss that is personal to the deceased. The anomaly of an award in any amount is obvious if it be the case that it is compensation to the injured party and not penalty or punishment of the wrongdoer that is the governing principle. We are not concerned with a case where it is the tortfeasor who has died. That would present an entirely different situation from the standpoint of compensating the injured party.

Chief Justice Laskin did not interfere with the \$10,000 award as the amount "has become a local provincial question in Canada". He was also in agreement with the Court of Appeal that "loss of amenities" as a head of damage in survival actions should not be awarded. He

stated, "Where however, the claim is asserted in a survival action as here, I can see nothing but duplication of the recognized claim for shortened expectation of life, even if it be the case that in a living person situation, loss of the amenities of life may call for a larger award than would be given for loss of expectation of life alone." However, Chief Justice Laskin did not agree that as a matter of law \$10,000 could be made the present upper limit of the award. He concluded:

Rather than fix the firection as one of law governing the upper limit of an award, the trial judge should direct the jury, in the light of the evidence respecting the deceased in all of his or her qualities, mode of life and prospects, in the light of age and physical condition, that a figure beyond a particular sum, which may be less than \$10,000 may be regarded as excessive.

## VIII

### THE PROVINCIAL SURVIVAL LEGISLATION

An examination of the existing survival of actions legislation of other Provinces reveals, as has been mentioned before, a variety of causes of action that are allowed to survive for and against estates, a variety of heads of damage that are allowed to survive, and finally, a variety of limitation periods. Of importance to this report is an examination of the causes of action and heads of damages which are not allowed to survive. As far as limitation periods are concerned, in Alberta any limitation provision in regard to survival legislation should be included in the Limitations Act.

In regard to causes of action, it should first of all be noted that the New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island statutes deal within the larger context of all causes of action, while the other Provinces confine their provisions to tort actions.

Furthermore, provisions dealing with distraint for rent are included in the Alberta, British Columbia, Saskatchewan and Newfoundland Acts, and the Alberta and Saskatchewan provisions include sections dealing with the survival of joint obligations despite the death of one obligor. More importantly, the reader will notice the lack of uniformity between the Provinces in the causes of action that are not allowed to survive for the benefit of an estate. Alberta singles out only defamation, British Columbia and Ontario only libel and slander; while Manitoba goes somewhat farther and excludes defamation, malicious prosecution, false imprisonment, and false arrest. New Brunswick singles out adultery, seduction, and inducing one spouse to leave or remain apart from another, while Newfoundland excludes defamation, malicious prosecution, false imprisonment, false arrest, seduction, and inducing one spouse to leave or remain apart from another. Nova Scotia, on the other hand, adheres simply to the "inducing one spouse", and adultery exclusions, while Prince Edward Island singles out defamation, adultery and seduction. Finally, Saskatchewan excludes libel and slander and all torts resulting in death.

Of greatest importance, perhaps, the reader should note upon examining the other provincial provisions that most of the acts do not make distinctions between exclusion of survival of actions for the benefit of the estate and survival of actions against estates. Defamation in Alberta is excluded both against and for the benefit of an estate. Likewise all the rest of the Provinces, save that of New Brunswick which brought forth a brand new Survival of Actions Act in 1969 which provided that all causes of action, with

no exceptions should survive against the estate of a tortfeasor as opposed to exceptions of adultery, seduction and "inducing one spouse", in regard to actions surviving for the benefit of the estate.

As far as restricting the heads of damage recoverable for the benefit of an estate, we have already noted that Manitoba and Alberta do not exclude exemplary damages. British Columbia excludes damages for physical disfigurement, pain and suffering, loss of expectation of life, damages for death and compensation for expected earnings subsequent to death. The latter two heads are not surviving rights anyway, and are merely superfluous. Ontario also excludes damages for loss of expectation of life and the unnecessary damages for death exclusion. Of particular note, however is that the other Provinces have a provision which gets around the whole problem, rightly or wrongly according to the readers viewpoint, that we have raised in this report.

All the provisions in effect do away with the chance that the estate can recover for non-pecuniary damages, or that any "windfall" on the estate, or punitiveness of survival actions can occur. Section 6 of the New Brunswick Act, for instance, states:

6. Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable and, without restricting the generality of the foregoing, the damages recoverable shall not include punitive or exemplary damages or damages for loss of expectation of life, pain and suffering or physical disfigurement.



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## A PROPOSED SOLUTION

In 1963 the Uniformity Conference prepared a Uniform Survival of Actions Act which is reproduced in Appendix L. The reader will notice first that the proposed Act provides for the survival of all causes of action rather than survival of tort actions only. Notice, further, that while the especially personal actions of adultery, seduction, and inducing one spouse to leave or remain apart from the other, are excluded as causes of action surviving for the benefit of an estate; no exceptions are made in respect to cause of action surviving against estates. It is submitted that this makes a great deal of sense, for usually in these actions the victim is alive, his damages unmitigated by the wrongdoer's death, and it seems anomalous to say the least that he should be deprived of his remedy. Winfield states, "that where it is the tortfeasor who has died, then whether the tort was a personal one or not, his estate ought to be liable."<sup>47</sup> Finally, in a footnote on page 646 of Fleming, On Torts, we find a comment favouring the Uniform Survival Act where Fleming states: ". . . it would have been more sensible to distinguish, as the Canadian Uniform Act does, between the wrongdoer's death and the victims. The first does not mitigate the plaintiff's damages at all and should accordingly be ignored."<sup>48</sup>

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The most important provision in terms of what has

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47. Supra n. 25 at 649

48. Fleming, Supra n. 26

been said about loss of expectation of life is section 6 which is currently the exact section used in the new 1969 New Brunswick Act, which, as we have mentioned earlier would meet all the points of criticism by the majority view of the current law related to damages in survival actions. Nearly every jurisdiction has abolished claims for loss of expectation of life, and the Uniformity Conference agreed that such abolition was sound in principle.

In 1964 at the Annual Meeting of the Law Society and of the Alberta section of the CBA, Dean Bowker presented what I have called "the majority view," and spoke in favour of section 6. Mr. James H. Laycroft presented the opposite viewpoint.<sup>50</sup> When the Bencher's Law Reform Committee studied the Uniform Act, they were evenly split on the desirability of section 6 of the Act and did not advise the legislature to adopt it.

It is respectfully submitted that the Uniform Act and particularly section 6 should be once again examined and in the writer's opinion should be adopted consonant to the majority views expressed earlier.

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50. See (1964) 3 Alberta Law Review 197-203

## APPENDIX A

The Fatal Accidents Act R.S.A. 1970  
c. 138

## THE FATAL ACCIDENTS ACT

## CHAPTER 138

- |                              |  |
|------------------------------|--|
| Short title                  | 1. This Act may be cited as <i>The Fatal Accidents Act.</i><br>[R.S.A. 1955, c. 111, s. 1]   |
| Definitions                  | <p>2. In this Act,</p> <p>(a) "child" includes son, daughter, grandson, grand-daughter, stepson, stepdaughter, and illegitimate child;</p> <p>(b) "parent" includes father, mother, grandfather, grandmother, stepfather and stepmother.<br/>[R.S.A. 1955, c. 111, s. 2]</p>   |
| Action for damages           | <p>3. When the death of a person has been caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the injured party to maintain an action and recover damages in respect thereof, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.<br/>[R.S.A. 1955, c. 111, s. 3]</p>   |
| Persons entitled to benefits | <p>4. (1) Every such action</p> <p>(a) shall be for the benefit of the wife, husband, parent, child, brother or sister of the person whose death has been so caused, and</p> <p>(b) shall be brought by and in the name of the executor or administrator of the person deceased,</p> <p>and in every such action the court may give to the parties respectively for whom and for whose benefit the action has been brought such damages as the Court thinks proportioned to the injury resulting from the death.</p> <p>(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then the action may be brought by and in the name or names of all or any of the persons, if more than one, for whose benefit the action would have been, if it had been brought by or in the name of the executor or administrator.</p> <p>(3) Every action so brought shall be for the benefit of the same person or persons and is as nearly as possible</p> |

## FATAL ACCIDENTS

subject to the same regulations and procedure as if it were brought by and in the name of the executor or administrator.  
[R.S.A. 1955, c. 111, s. 4; 1966, c. 49, s. 4(4)]

### Limitation of actions

**5.** Not more than one action lies for and in respect of the same subject matter of complaint.  
[R.S.A. 1955, c. 111, s. 5; 1966, c. 49, s. 4(4)]

### Death of person liable for damages

**6.** (1) Where a person dies who would have been liable in an action for damages under this Act had he continued to live, then, whether he died before or after or at the same time as the person whose death was caused by wrongful act, neglect or default, an action may be brought and maintained or, if pending, may be continued against the executor or administrator of the deceased person.

(2) Where neither probate of the will of the deceased person mentioned in subsection (1) nor letters of administration of his estate have been granted in Alberta, a judge of the Supreme Court or a judge of the district court, as the case may require, may, on the application of any party intending to bring or to continue an action under this section and on such terms and on such notice as the judge may direct, appoint an administrator *ad litem* of the estate of the deceased person, whereupon

(a) the administrator *ad litem* is an administrator against whom and by whom an action may be brought under subsection (1), and

(b) a judgment in favour of or against the administrator *ad litem* in any such action has the same effect as a judgment in favour of or against, as the case may be, the deceased person, but it has no effect whatsoever for or against the administrator *ad litem* in his personal capacity.

[1960, s. 31, s. 1]

### Insurance moneys

**7.** In assessing damages in an action brought under this Act, there shall not be taken into account a sum paid or payable on the death of the deceased under a contract of assurance or insurance.  
[R.S.A. 1955, c. 111, s. 6]

### Funeral expenses

**8.** Where an action has been brought under this Act there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased (not exceeding \$500 in all) if those expenses were incurred by any of the persons by whom or for whose benefit the action is brought.

[1967, c. 22, s. 1]

## APPENDIX B

## CHITTY'S STATUTES

Vol. 29

1933-35

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LAW REFORM (MISCELLANEOUS PROVISIONS)  
ACT, 1934

24 & 25 Geo. 5, c. 41—An Act to amend the law as to the effect of death in relation to causes of action and as to the awarding of interest in civil proceedings.

Be it Enacted, etc.:

1. (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section one hundred and eighty-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, for damages on the ground of adultery.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:

- (a) shall not include any exemplary damages;
- (b) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry;
- (c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either

- (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
- (b) proceedings are taken in respect thereof not later than

six months after his personal representative took out representation.\*

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908, or the Carriage by Air Act, 1932, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section.

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

(7) Subsections (1), (2), (5) and (6) of section twenty-six of the Administration of Estates Act, 1925, shall cease to have effect.

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\*Amended by Law Reform (Limitation of Actions etc.) Act, 1954, c. 36, s. 4, by striking out the words "the cause of action arose not earlier than six months before his death and".

Administration of Estates Act, R.S.A. 1970 c.1  
(s. 51-57)

**ADMINISTRATION (PART 3).**

**PART 3**

**GENERAL**

**Rights and Liabilities of Executors and Administrators**

Action by  
legal repre-  
sentative  
for tort

**51.** (1) The legal representative of the estate of a deceased person may maintain an action for any tort or injury to the person or to the real or personal estate of the deceased except in cases of defamation, in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do.

(2) The damages when recovered form part of the personal estate of the deceased. [1969, c. 2, s. 51]

Funeral  
expenses

**52.** Where the death of the deceased person was caused by the act or omission that gave rise to the cause of action maintainable under section 51 there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased (not exceeding \$500 in all) if those expenses were or liability therefor was incurred by the estate. [1969, c. 2, s. 52]

Action  
in tort  
against  
legal  
repre-  
sentative

**53.** Where any deceased person committed a wrong to another in respect of his person or of his real or personal property, except in cases of defamation, the person so wronged may maintain an action against the legal representative of the estate of the deceased person who committed the wrong. [1969, c. 2, s. 53]

Adminis-  
trator  
ad litem

**54.** Where a person wronged is unable to maintain an action under section 53 because there is no legal representative of the estate of the deceased wrong-doer then holding office in Alberta, the court may, on the application of the person wronged and on such terms and on such notice as it considers proper, appoint an administrator *ad litem* of the estate of the deceased person, whereupon

(a) the administrator *ad litem* is an administrator against whom and by whom an action may be brought under section 53, and

(b) a judgment in favour of or against the administrator *ad litem* in any such action has the same effect as a judgment in favour of or against, as the case may be, the deceased person, but it has no effect for or against the administrator *ad litem* in his personal capacity. [1969, c. 2, s. 54]

Damages in  
actions

**55.** (1) In estimating the damages in any action under section 51 or 53 any benefit, gain, profit or advantage that in consequence of or resulting from the wrong committed

**ADMINISTRATION (PART 3)**

has accrued to the estate of the person who committed the wrong shall be taken into consideration and forms part of, or constitutes the whole of, the damages to be recovered.

(2) Subsection (1) applies whether or not any property or the proceeds or value of any property belonging to the person bringing the action or to his estate has or have been appropriated by the person who committed the wrong or added to his estate or moneys. [1969, c. 2, s. 55]

Distress  
for rent

**56.** (1) The legal representative of a deceased lessor or landlord may distrain for the arrears of rent due to the lessor or landlord in his lifetime in like manner as the lessor or landlord might have done if living.

(2) The arrears may be distrained for at any time within six months after the determination of the term or lease and during the continuance of the possession of the tenant from whom the arrears became due, and the law relating to distress for rent is applicable to the distress so made.

[1969, c. 2, s. 56]

Action  
against  
legal repre-  
sentative  
of joint  
contractors,  
etc.

**57.** (1) Where any one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise entered into by such joint contractors, obligors or partners may by action proceed against the legal representatives of the deceased contractor, obligor or partner in the same manner as if the contract, obligation or promise had been joint and several, notwithstanding that there may be another person liable under the contract, obligation or promise still living, and that an action is pending against that person.

(2) The property and effects of shareholders of chartered banks and of the shareholders or members of other corporations are not liable to a greater extent than they would have been if this section had not been passed.

[1969, c. 2, s. 57]



## APPENDIX D

The Administration Act, R.S. B.C. 1960 as amended 1966 c.1, 1968 c.3, and 1969 c.35. Chapter 3 Sections 70-75

70. An executor and administrator has the like powers to prosecute and defend an action in the nature of the common-law action or writ of account as his testator or the deceased intestate would have if living. [13 Edw. 1, st. 1, c.23 (Westr.2nd, A.D. 1285)]; R.S. 1948, C.6, s.70.

71.(1) This section does not apply in respect of an action of libel or slander, nor does it apply in respect of loss or damage occurring before the twenty ninth day of March, 1934.

(2) The executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to (including an action in the circumstances referred to in subsection (4)) except that recovery in the action shall not extend

(a) to damages in respect of physical disfigurement or pain or suffering caused to the deceased; or,

(b) if death results from such injuries, to damages for the death, or for the loss of expectation of life (unless the death occurred before the twelfth day of February, (1942); or

(c) to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died; and the damages recovered in the action form part of the personal estate of the deceased; but nothing herein contained shall be in derogation of any rights conferred by the Families' Compensation Act."

## Appendix D (2)

(3) Where an action is maintained under subsection (2), in addition to the remedies that the deceased would, if living, be entitled to, the executor or administrator may be awarded damages in respect of reasonable expenses of the funeral and the disposal of the remains of the deceased person.

(4) Where a person alleges that he has suffered loss or damage by the fault of another and the person alleged to be at fault dies,

(a) the person wronged may continue against the executor or administrator of the deceased any action on that account pending against the deceased at the time of his death; or

(b) the person wronged may, if the period of limitation appropriate to the action had not expired at the time of the death and the action is brought not later than twelve months after the date of the death, bring an action for the loss or damage, naming as defendant therein

(i) the executor or administrator of the estate of the deceased; or

(ii) the deceased, in which event the action is valid notwithstanding that the defendant is dead at the time the action is brought;

and damages or costs, or both, recovered in the action are payable out of the estate of the deceased person at fault";

(5) Where an action has been commenced under paragraph (ii) of clause (b) subsection (4),

(a) if probate or letters of administration of the estate of the person alleged to be at fault have been granted, the writ or plaint may be validly served upon the executor or administrator; and upon proof of service being filed with the Registrar of the Court in the registry office in which the action was commenced, the Registrar shall amend the style of cause in the action to substitute

## Appendix D (3)

the executor or administrator so served as the defendant therein in the place and stead of the named defendant, and the action shall continue against the executor or administrator;

(b) upon the production of a certificate that no notice has been received that probate or letters of administration have been issued in the Province in respect of the estate of the deceased person alleged to be at fault within ninety days after his death, a Court of competent jurisdiction or any Judge thereof may, on the application of the plaintiff or his executor or administrator, appoint a representative ad litem to represent the estate of the deceased for all purposes of the action and to act as defendant therein, and in that event the writ or plaint shall be served upon the representative ad litem; and in clause (b) a 'certificate' means a certificate issued by an officer designated in the regulations under the Probate Fees Act to exercise powers and functions of the Minister thereunder and dated not more than thirty days prior to the date upon which the Court or Judge hears the application to appoint a representative ad litem.

(5a) (a) A representative ad litem appointed under this section, upon being served with the order appointing him and the writ or plaint, shall file a notice with the officer who issued the certificate that he has been appointed as representative ad litem; and in the event that an executor or administrator is appointed in the Province in respect of the estate of the deceased person alleged to be at fault, that officer or his successor shall forthwith notify the representative ad litem of the appointment of the executor or administrator.

(b) Upon receipt of notice under clause (a), the representative ad litem shall file it with the Registrar of the Court in which the action was commenced, and the Registrar shall amend the style of cause in the action to

## Appendix D (4)

substitute the executor or administrator as the defendant therein in the place and stead of the representative ad litem and shall notify the plaintiff and the executor or administrator so appointed, and the appointment of the representative ad litem is thereupon terminated, and the executor or administrator appointed shall thereafter have sole conduct of the defence of the action.

(5b) All proceedings had or taken against the representative ad litem appointed under this section shall bind the estate of the deceased notwithstanding that prior or subsequent appointment of any executor or administrator of the estate of the deceased person, and all proceedings had or taken in accordance with this section shall bind the estate of the deceased person."

(6) Where at the time of the loss or damage in respect of which an action is continued or brought by virtue of subsection (4) the person who committed the wrong was insured against liability for loss or damage in respect thereof by a motor-vehicle liability policy within the meaning of the Insurance Act, and where the person wronged or his executor or administrator recovers a judgment in the action, then, notwithstanding the terms of the policy or the provisions of any law or Statute to the contrary, the liability of the insurer under the policy extends thereto, and the person or the executor or administrator by whom the judgment is recovered has the same rights and remedies as against the insurer and in respect of the insurance-moneys payable under the policy as the person wronged would have if both he and the insured person who committed the wrong were alive and the action had been brought or continued against the insured; but the estate of the insured is liable to pay or reimburse the insurer, upon demand, any amount paid by the insurer by reason of the provisions of this subsection which the insurer would not otherwise

## Appendix D (5)

be liable to pay."

(7) This section is subject to the provisions of section 12 of the Workmen's Compensation Act, and nothing in this section shall prejudice or affect any right of action under the provisions of section 83 of that Act or the provisions of the Families' Compensation Act."

72. An executor or administrator of any lessor or landlord may distrain upon the lands demised for any term, or at will, for arrears of rent due to such lessor or landlord when living. [3 & 4 Will. 4, c.42, s.37]; R.S. 1948, c.6, s.72.

73. The arrears may be distrained for after the determination of the term or lease at will, in the same manner as if the term or lease had not been determined; but the distress shall be made within six calendar months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears are due; and all the provisions in the several Statutes relating to distress for rent are applicable to the distress so made. [3 & 4 Will. 4, c.42, s.38]; R.S. 1948, c.6, s.73.

74. An executor and every administrator with the will annexed of a testator, as the case may be, is entitled to bring and maintain an action and recover damages and costs for a trespass done to the estate, goods, credits, or effects of the testator during his lifetime, in like manner as the testator could, if living, have brought and maintained the action. [4 Edw. 3, c.7; 25 Edw. 3, st.5, c.5]; R.S. 1948, c.6, s.74.

75. An executor of an executor has all the powers, rights, rights of action, and liabilities of his immediate testator in regard to the estates and effects of the first testator. [25 Edw. 3, st.5, c.5]; R.S. 1948, c.6, s.75.

## APPENDIX E

The Trustee Act R.S.M. 1970 T. 160  
(s. 55-59)

## ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES

**Actions by and against legal representatives.**

**55(1)** All actions and causes of action in tort, whether to person or property, other than for defamation, malicious prosecution, false imprisonment, or false arrest, in or against any person dying continue in or against his personal representative as if the representative were the deceased in life; but in any action brought or continued under authority of this section by the personal representative of a deceased person for a tort causing the death of the person, the damages recoverable for the benefit of his estate do not include any exemplary damages and shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

Am.

**Limitation.**

**55(2)** No action shall be commenced under authority of this section after the expiration of two years from the death of the deceased.

Am. S.M., 1966-67, c. 32, s. 13.

**Charge on estate.**

**55(3)** All causes of action under this section, and every judgment or order thereon or relating to the costs thereof, are and form assets or liabilities as the case may be of the estate of the deceased.

Am.

**Rights.**

**55(4)** The rights conferred by this Act are in addition to, and not in derogation of, any rights conferred on the dependants of deceased persons by The Fatal Accidents Act.

R.S.M., c. 273, s. 49; am.

**Action of account.**

**56** A personal representative has such an action of account as the testator or intestate might have had if he had lived.

R.S.M., c. 273, s. 50; am. 13 Ed. I (St. 1 West'm.), c. 23.

**Executors of executors.**

**57** Executors of executors have the same actions for the debts and property of the first testator as he would have had if in life; and are answerable for such of the debts and property of the first testator as they recover, as the first executors would be if they had recovered them.

R.S.M., c. 273, s. 51; am. 25 Ed. III, Stat. 5, c. 5.

Cap. T160

TRUSTEES

**Waste.**

**58** The personal representative of any person who, as executor or as executor in his own right or as administrator, wastes or converts to his own use any part of the estate of any deceased person, is liable and chargeable in the same manner as his testator or intestate would have been if he had been living.

R.S.M., c. 273, s. 52; am. 30 Car. II, c. 7, s. 1. 4 W. & M., c. 24, s. 12.

**Duties acting under powers.**

**59** Every personal representative, as respects the additional powers vested in him by this Act, and any money or assets by him received in consequence of the exercise of those powers, is subject to all the liabilities, and compellable to discharge all the duties that, as respects the acts to be done by him under the powers, would have been imposed upon a person appointed by the testator, or would have been imposed by law upon any person appointed by law, or by any court of competent jurisdiction to execute the powers.

R.S.M., c. 273, s. 53; am.

## APPENDIX F

New Brunswick

108

C. 19

Survival of Actions

1969

## CHAPTER 19

## SURVIVAL OF ACTIONS ACT

Assented to April 2, 1969.

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1. This Act may be cited as the Survival of Actions Act.
2. In this Act, "cause of action" means the right to institute a civil proceeding and includes a civil proceeding instituted before death, but does not include a prosecution for contravening a statute, regulation or by-law.
3. (1) All causes of action vested in a person who dies after the commencement of this Act, other than causes of action in respect of
  - (a) adultery;
  - (b) seduction; or
  - (c) inducing one spouse to leave or remain apart from the other;
 survive for the benefit of his estate.
 

(2) The rights conferred by subsection (1) are in addition to and not in derogation of any rights conferred by the *Fatal Accidents Act*.
4. All causes of action subsisting against a person who dies after the commencement of this Act survive against his estate.
5. Where damage has been suffered by reason of an act or omission as a result of which a cause of action would have subsisted against a person if that person had not died before or at the same time as the damage was suffered, there is deemed to have been subsisting against him before his death whatever cause of action as a result of the act or omission would have subsisted if he had not died before or at the same time as the damage was suffered.
6. Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable and, without restricting the generality of the foregoing, the damages recoverable shall not include punitive or exemplary damages or damages for loss of expectation of life, pain and suffering or physical disfigurement.



7. Where the death of a person was caused by the act or omission that gives rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent on his death, except that there may be included in the expenses of the funeral and the disposal of the body of the deceased if those expenses were, or liability therefor was, incurred by the estate.

8. Every cause of action that survives under this Act and every judgment or order thereon or relating to the costs thereof is an asset or liability, as the case may be, of the estate for the benefit of which or against which the action was taken or the judgment or order made.

9. (1) Where a cause of action survives against the estate of a deceased person, and there is no personal representative of the deceased person against whom such an action may be brought or continued in this Province, a court of competent jurisdiction, or any judge thereof, may,

(a) on the application of a person entitled to bring or continue such an action; and

(b) on such notice as the court or judge may consider proper;

appoint an administrator *ad litem* of the estate of the deceased person.

(2) The administrator *ad litem* is an administrator against whom such an action may be brought or continued and by whom such an action may be defended.

(3) The administrator *ad litem* as defendant in any such action may take any steps that a defendant may ordinarily take in an action, including third party proceedings and the bringing, by way of counterclaim, of any action that survives for the benefit of the estate of the deceased person.

(4) Any judgment obtained by or against the administrator *ad litem* has the same effect as a judgment in favour of or against the deceased person, or his personal representative, as the case may be, but it has no effect for or against the administrator *ad litem* in his personal capacity.

10. (1) Notwithstanding the *Limitation of Actions Act* or any other Act limiting the time within which an action may be brought, a cause of action that survives under this Act is not barred until the expiry of the period provided by this section.

(2) Proceedings on a cause of action that survives under section 3 or 4 may be brought

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C. 19

## Survival of Actions

1969

(a) within the time otherwise limited for the bringing of the action; or

(b) within one year from the date of death;

whichever is the longer period.

(3) Proceedings on a cause of action that survives under section 5 may be brought

(a) within the time otherwise limited for the bringing of the action, which shall be calculated from the date the damage was suffered; or

(b) within one year from the date the damage was suffered;

whichever is the longer period.

(4) Subject to subsection (5), this Act does not operate to revive any cause of action in or against a person that was barred at the date of his death.

(5) Any enactment that permits action to be instituted by way of counterclaim or third party proceedings after the expiry of the time otherwise limited for the bringing of the action applies with respect to proceedings under this Act.

11. The Crown is bound by this Act.

12. The Survival of Actions Act, Chapter 223 of the Revised Statutes, 1952, is repealed.

## APPENDIX G

1962

*Survival of Actions Act*

No. 30

135

**AN ACT TO PROVIDE FOR THE SURVIVAL OF CERTAIN  
CAUSES OF ACTION.**

(March 20, 1962)

*Be it enacted by the Lieutenant-Governor and House of  
Assembly in Legislative Session convened, as follows:*

1. This Act may be cited as The Survival of Actions Act, 1962. Short title.

2. Subject to this Act, all actions and causes of action Causes of  
action to  
survive for  
and against  
estates.

(a) vested in a person who died before or after the coming into force of this Act, or

(b) subsisting against a person who died after the coming into force of this Act

shall survive for the benefit of or, as the case may be, against his estate.

3. Where damage has been suffered by reason of an act or omission in respect of which a cause of action would have subsisted against a person if that person had not died before or at the same time as the damage was suffered, there is deemed for the purposes of this Act to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered. Survival  
of action  
against  
deceased  
person.

4. Where a cause of action survives in accordance with this Act for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the estate are recoverable and the damages recoverable Damages  
that may  
be recovered.

(a) shall be calculated in the same manner as if that person were living and had brought the action;

(b) shall not include punitive or exemplary damages;

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1962

*Survival of Actions Act*

No. 30

(c) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry;

(d) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

Limitation  
of action.

5. An action shall not be brought under this Act unless proceedings are commenced within six months after letters of probate or administration of the estate of the deceased have been granted and, in any event, proceedings shall not be commenced in an action under this Act after the expiration of one year after the date of death of the deceased.

No extension  
of time of  
actions under  
Highway  
Traffic Act.

6. Nothing contained in this Act shall be deemed to extend the time within which an action shall be brought under Section 217 of The Highway Traffic Act, 1962.

Appointment of  
representative  
of estate for  
purposes of  
action.

7. Where there is no executor or administrator or none within the province of an estate against which or for the benefit of which a cause of action survives under this Act, the Supreme Court or a judge thereof may, on an application made after the expiration of twenty days after the date of death of the deceased person and on such terms as to costs or security therefor as the Court or judge thereof deems fit, and upon such notice, if any, to interested persons as the Court or judge deems fit appoint a person to represent the estate for all purposes of any action, cause or proceeding on behalf of or against the estate.

Charge on  
estate.

8.—(1) All causes of action under this Act and every judgment or order thereon or relating to the costs thereof are assets or liabilities, as the case may be, of the estate for the benefit of which or against which the action was taken or the judgment or order was made.

Damages in  
actions under  
this Act.

(2) In estimating the damages in an action under this Act the benefit, gain, profit or advantage which in consequence of or resulting from the wrong committed may have accrued to

the estate of the person who committed the wrong shall be taken into consideration and shall form part or may constitute the whole of the damages to be recovered, whether or not property or the proceeds or value of property belonging to the person bringing the action or to his estate has or have been appropriated by or added to the estate or moneys of the person who committed the wrong.

9. The rights conferred by this Act for the benefit of the estate of a deceased person are in addition to and not in derogation of any rights conferred by The Fatal Accidents Act and so much of this Act as relates to causes of action against the estate of a deceased person applies in relation to causes of action under that Act as it applies in relation to other causes of action not expressly excepted from the operation of this Act.

Rights  
under  
Fatal  
Accidents  
Act.

10. This Act is subject to Section 13 of The Workmen's Compensation Act but nothing contained in this section shall prejudice or affect any right of action under Section 93 of that Act.

Workmen's  
Compensation  
Act.

11. This Act does not apply to an action for

- (a) defamation;
- (b) malicious prosecution;
- (c) false imprisonment;
- (d) false arrest;
- (e) seduction;
- (f) inducing one spouse to leave or remain apart from the other; or
- (g) damages for physical disfigurement, pain or suffering caused to a deceased person.

Actions to  
which Act  
does not  
apply.

## APPENDIX H

## SURVIVAL OF ACTIONS

Chap. 298

4343

## CHAPTER 298

## Survival of Actions Act

**1** (1) Except as provided in subsection (2), where a person dies after this Act comes into force, all causes of action subsisting against or vested in him survive against or, as the case may be, for the benefit of his estate.

Survival of actions by and against estates.

(2) A cause of action does not survive death when the action is for:

Exceptions.

(a) adultery;

(b) inducing a spouse to leave or remain apart from his or her spouse. R. S., c. 282, s. 1.

**2** Where damage has been suffered by reason of an act or omission as a result of which a cause of action would have subsisted against a person if that person had not died before or at the same time as the damage was suffered, there is deemed to have been subsisting against him before his death whatever cause of action as a result of that act or omission would have subsisted if he had not died before the damage was suffered. R. S., c. 282, s. 2.

Survival of action against deceased person.

**3** Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the estate are recoverable; and in no case are damages recoverable for:

Damages that may be recovered.

(a) punitive and exemplary matters;

(b) loss of expectation of life;

(c) pain and suffering. R. S., c. 282, s. 3.

**4** No action shall be brought under this Act unless proceedings are begun within six months after the personal representative takes out representation and, in any event, not later than two years after death. Such a cause of action is not extinguished under the provisions of The

Limitations of actions.

4344

Chap. 298

## SURVIVAL OF ACTIONS

Statute of Limitations, until at least six months after representation is taken out. R. S., c. 282, s. 4.

Limitation  
of actions  
hereafter  
arising.

**5** Where a cause of action that survives by reason of this Act arises on or after the day on which this Section comes into force, the cause of action is subject to the provisions of The Statute of Limitations and Section 4 does not apply to the cause of action. 1962, c. 48, s. 1.

Rights under  
Fatal Injuries  
Act preserved.

**6** The rights conferred by this Act are in addition to and not in derogation of any rights conferred by the Fatal Injuries Act. R. S., c. 282, s. 5.

Appointment of  
representative of  
estate for  
purposes of  
action.

**7** Where there is no executor or administrator or trustee within the Province of an estate against which or for the benefit of which a cause of action survives under this Act, a judge of the Supreme Court or a judge of a County Court, on an application made after the expiration of twenty days from the date of death, may, on such terms as to costs or security therefor as the judge thinks fit, appoint a person to represent the estate for all purposes of any action, cause or proceeding on behalf of or against the estate. 1957, c. 49, s. 1.

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## APPENDIX I

The Trustee Act, R.S.O. 70, as amended 1971 c.32, and 1973 c.15 Sections 38,39

RIGHTS AND LIABILITIES OF PERSONAL  
REPRESENTATIVES

38. (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; provided that if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by The Fatal Accidents Act. R.S.O. 1960, c.408, s.38(1).

(2) Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his person or property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong. R.S.O. 1960, c.408, s.38(2); 1964. c.119,s.1.

(2a) Where a writ is issued naming as a defendant a person who was deceased at the time of the issue of the writ, a judge of the court out of which the writ was issued may, on such notice as he considers proper and on being satisfied that the writ was issued in good faith against the deceased person without knowledge of his death, make an order validating the writ as if that person had been alive at the time the writ was issued and died immediately thereafter.



Appendix I (2)

(2b) Upon making an order under subsection 2a, the judge may impose,

(a) a term that an executor or administrator shall not be personally liable in respect of any part of the estate of the deceased person that he has distributed or otherwise dealt with in good faith while not aware that a writ naming the deceased had been issued; and

(b) such other terms and conditions as in the circumstances of the action seem just.

(3) Where a person wronged is unable to maintain an action under subsection 2 because neither letters probate of the will of the deceased person nor letters of administration of the deceased person's estate have been granted within six months after the death, a judge of the Supreme Court may, on the application of the person wronged and on such notice as he considers proper, appoint an administrator ad litem of the estate of the deceased person, whereupon,

(a) the administrator ad litem shall be deemed to be an administrator against whom an action may be brought under subsection 2; and

(b) any judgment in favour of or against the administrator ad litem in any such action has the same effect as a judgment in favour of or against, as the case may be, the deceased person, but it has no effect whatsoever for or against the administrator ad litem in his personal capacity. R.S.O. 1960, c.408, s.38(3).

(4) A judge of the court having jurisdiction to entertain an action under subsection 2 may make an appointment under subsection 3 before the period of six months referred to therein has expired if he is of the opinion that the right of action of the person wronged might otherwise be prejudiced.

## CHAPTER 17

An Act To Enable The Survival Of  
Actions And To Amend The Judicature Act

(Assented to March 18, 1955)

**B**E IT ENACTED by the Lieutenant-Governor and  
Legislative Assembly of the Province of Prince  
Edward Island as follows:—

- Death not bar  
to action
1. Subject to the provisions of this Act, on the death of a person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate; Provided that this section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other, or to claims for damages on the ground of adultery.
- Proviso
2. Except as in this Act otherwise provided where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall be calculated in the same manner as if the deceased person were living and the action had been brought by him.
- Measure of  
damages
3. Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person
- Damages,  
what  
recoverable
- (a) shall not include any exemplary damages; or
- (b) shall not include any damages for loss of expectation of life; or
- (c) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry.
- Limitation of  
action
4. No proceedings are maintainable in the courts of the Province in respect of a cause of action which by virtue of this Act has survived against the estate of a deceased person, unless either,

(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

(b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

5. No proceedings are maintainable in the courts of the Province in respect of a cause of action which by virtue of this Act has survived for the benefit of the estate of a deceased person unless proceedings in respect of that cause of action are taken within six months after his personal representative takes out representation and in any event within two years after the death of the deceased person.

Idem

6. Where damage has been suffered by reason of an act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purpose of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

Where cause of action arises after or at same time as death

7. (1) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any right of action for the benefit of the relatives of deceased persons conferred by the Fatal Accidents Act.

Application of Fatal Accidents Act

(2) This Act shall not affect any right or cause of action in contact or otherwise subsisting against or vested in the estate of a deceased person which would have survived apart from this Act.

Effect on Contractual rights

8. Section 38 of The Judicature Act, R.S.P.E.I. 1951 chapter 79 is repealed, saving always all such rights of action as may have accrued thereunder before the passing of this Act.

Repeal

## APPENDIX K

The Trustee Act R.S.S. 1965  
Chapter 130 (s. 58-63)

## RIGHTS AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS.

Actions by  
executors  
and admin-  
istrators  
for torts

**58.**—(1) The executors or administrators of a deceased person may maintain an action for all torts or injuries to the person not resulting in death, except libel and slander, or to the real and personal estate of the deceased, in the same manner as the deceased might have done if living.

(2) In every such action the judge or jury may give such damages as he or it thinks proportioned to the loss sustained by the estate of the deceased in consequence of wrong committed.

(3) Every such action shall be brought within one year after the death of the deceased R.S.S. 1953, c. 123, s. 52.

Actions  
against  
executors  
and admin-  
istrators  
for torts

**59.** If a deceased person committed a wrong to another in respect of his person or of his real or personal property, except in cases of libel and slander, the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong, but such action shall be brought within one year after the decease. R.S.S. 1953, c. 123, s. 53.

Damages  
in actions  
under  
section  
58 or 59

**60.** In estimating the damages in an action under section 58 or 59 the benefit, gain, profit or advantage that in consequence of or resulting from the wrong committed may have accrued to the estate of the person who committed the wrong shall be taken into consideration and shall form part or may constitute the whole of the damages to be recovered, whether or not property or the proceeds or value of property belonging to the person bringing the action or to his estate has or have been appropriated by or added to the estate or moneys of the person who committed the wrong. R.S.S. 1953, c. 123, s. 54.

## TRUSTEES AND EXECUTORS

## Cap. 130

Power of  
executors or  
administrators  
of  
lessor to  
distrain for  
arrears

61. The executors or administrators of a lessor may distrain upon the lands demised for any term or at will for the arrears of rent due to the lessor in his lifetime in like manner as the lessor might have done if living. R.S.S. 1953, c. 123, s. 55.

Distrain  
limited to  
six months  
after lease  
terminates

62. Such arrears may be distrained for at any time within six months after the determination of the term or lease and during the continuance of the possession of the tenant from whom the arrears became due, and the law relating to distress for rent shall be applicable to the distress so made. R.S.S. 1953, c. 123, s. 56.

Representa-  
tives of  
deceased  
joint  
contractors  
liable  
although  
other joint  
contractors  
living

63. If one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise entered into by the joint contractors, obligors or partners may proceed by action against the representatives of the deceased contractor, obligor or partner in the same manner as if the contract, obligation or promise had been joint and several, notwithstanding that there may be another person liable under the contract, obligation or promise still living and an action pending against that person, but the property and effects of stockholders in chartered banks or the members of other incorporated companies shall not be liable to a greater extent than they would have been if this section had not been passed. R.S.S. 1953, c. 123, s. 57.

APPENDIX L

REVISED DRAFT OF  
THE SURVIVAL OF ACTIONS ACT

AN ACT TO PROVIDE FOR THE SURVIVAL OF CERTAIN  
CAUSES OF ACTION

1. This Act may be cited as "The Survival of Actions Act".
2. In this Act "cause of action" means the right to institute a civil proceeding and includes a civil proceeding instituted before death, but does not include a prosecution for contravening a statute, regulation or by-law.
3. (1) All causes of action vested in a person who dies after the commencement of this Act, other than causes of action in respect of
  - (a) adultery,
  - (b) seduction, or
  - (c) inducing one spouse to leave or remain apart from the other,survive for the benefit of his estate.
- (2) The rights conferred by subsection (1) are in addition to and not in derogation of any rights conferred by The Fatal Accidents Act.
4. All causes of action subsisting against a person who dies after the commencement of this Act survive against his estate.
5. Where damage has been suffered by reason of an Act or omission as a result of which a cause of action would have subsisted against a person if that person had not died before or at the same time as the damage was suffered, there is deemed to have been subsisting against him before his death whatever cause of action as a result of the act or omission would have subsisted if he had not died before or at the same time as the damage was suffered.
6. Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable and, without restricting the generality of the foregoing,

the damages recoverable shall not include punitive or exemplary damages or damages for loss of expectation of life, pain and suffering or physical disfigurement.

7. Where the death of a person was caused by the act or omission that gives rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent on his death, except that there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased [not exceeding . . . . . dollars in all,] if those expenses were, or liability therefor was, incurred by the estate.

NOTE:—The words in parenthesis are optional.

8. Every cause of action that survives under this Act and every judgment or order thereon or relating to the costs thereof is an asset or liability, as the case may be, of the estate for the benefit of which or against which the action was taken or the judgment or order made.

9. (1) Where a cause of action survives against the estate of a deceased person, and there is no personal representative of the deceased person against whom such an action may be brought or continued in this Province, a court of competent jurisdiction, or any judge thereof, may,

(a) on the application of a person entitled to bring or continue such an action, and

(b) on such notice as the court or judge may consider proper, appoint an administrator ad litem of the estate of the deceased person.

(2) The administrator ad litem is an administrator against whom such an action may be brought or continued and by whom such an action may be defended.

(3) The administrator ad litem as defendant in any such action may take any steps that a defendant may ordinarily take in an action, including third party proceedings and the bringing, by way of counterclaim, of any action that survives for the benefit of the estate of the deceased person.

(4) Any judgment obtained by or against the administrator ad litem has the same effect as a judgment in favour of or against the deceased person, or his personal representative, as the case may be, but it has no effect for or against the administrator ad litem in his personal capacity.

**10. (1)** Notwithstanding The Limitation of Actions Act or any other Act limiting the time within which an action may be brought, a cause of action that survives under this Act is not barred until the expiry of the period provided by this section.

**(2)** Proceedings on a cause of action that survives under section 3 or 4 may be brought

**(a)** within the time otherwise limited for the bringing of the action, or

**(b)** within one year from the date of death, whichever is the longer period.

**(3)** Proceedings on a cause of action that survives under section 5 may be brought

**(a)** within the time otherwise limited for the bringing of the action, which shall be calculated from the date the damage was suffered, or

**(b)** within one year from the date the damage was suffered, whichever is the longer period.

**(4)** [Subject to subsection (5)] this Act does not operate to revive any cause of action in or against a person that was barred at the date of his death.

**[(5)** Any enactment that permits action to be instituted by way of counterclaim or third party proceedings after the expiry of the time otherwise limited for the bringing of the action applies with respect to proceedings under this Act.]

**NOTE:**—The words in parenthesis may be adopted by those provinces that have provisions similar to section 131, subsection (2) of The Vehicles and Highway Traffic Act (Alberta) which permits counterclaims and third party proceedings after the expiry of the one year limitation period for motor vehicle negligence cases.

**11.** The Crown is bound by this Act.

**12.** Sections . . . . . of [The Trustee Act] and section . . . . . of [The Limitation of Actions Act] are repealed.

**NOTE:**—To be varied to meet the requirements of each adopting province.