

THE CALL FOR A WRONGFUL DEATH ACT IN BRITISH COLUMBIA

Revising BC's System for Compensation of Fatalities

Six Key Objectives

**Worthless in the
Eyes of the Law!**



**British Columbia Needs a
Wrongful Death Act**

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THE CALL FOR A WRONGFUL DEATH ACT IN BRITISH COLUMBIA Revising BC's System For Compensation of Fatalities

Six Key Objectives

The Trial Lawyers Association of British Columbia believes that meaningful and comprehensive reform of BC's statutory system for "wrongful death" compensation should strive to satisfy the following principles:

1. *Death should not eliminate the accountability of wrongdoers who have caused pain, suffering, loss of amenities of life, loss of life or other injuries to the person of the deceased. This should apply to damages claimed or claimable by a person whose death intervenes before judgment is finally rendered in an action on their behalf. Both that and the wrongful taking of every person's life shall be capable of attracting an award of civil damages.*
2. *The estate of a person is entitled to damages, including all forms of non-pecuniary damages, in the same measure as if the deceased had lived. The only exception to this should be actions for defamation, concerning which there should be further study before any change to the legal limitation on a deceased's personal representatives continuing or bringing action for losses alleged to have resulted therefrom.*
3. *The estate of a person is entitled to seek punitive and/or exemplary damages against a wrongdoer in cases where the wrongdoer's conduct justifies such an award at law.*
4. *The share of damages awarded to the estate for sums which compensate loss of financial support to dependent children, parents and spouses shall be held in trust for those beneficiaries by the estate, and will be immune from claims by the estate's creditors.*
5. *Damages shall be available to survivors in their own name(s) for the loss of relationship upon the wrongful death of a child, parent or spouse.*
6. *Whenever possible, actions brought on behalf of the decedent's estate and surviving dependents shall be consolidated into a single action.*

Wrongful death or death caused by a person without legal justification occurs in a variety of circumstances. It may be the result of negligence, such as when a driver unintentionally collides with another vehicle and kills someone; or it may be intentional, as when someone kills another person with a gun. Many states have legislation allowing for damages in the case of wrongful death. Though the statutes vary from state to state, in general they define who may commence an action for wrongful death and what, if any, limits may be applied to an award of damages. Below is an analysis of how wrongful death statutes have worked in practice in various jurisdictions throughout the United States, a discussion of the mechanics of suggested reforms in greater detail and a proposal for model legislation to be adopted here in British Columbia.

Comparing U.S. and Canadian Terminology

In most jurisdictions in the United States, discussion of compensation for fatal accidents/injuries involves consideration of two discreet statutory systems.

A *wrongful death* statute typically vests some portion of recovery for a decedent's demise in a class of statutorily defined beneficiaries, who bring the claim in their own name and thus obtain the proceeds outside of probate, and free from the claims of the decedent's creditors.

In contrast, a *survival* action permits the decedent's estate to pursue any claim which the decedent could have brought had he lived. This has important implications for cases where a person has suffered personal injuries for which a claim is brought or could be brought and death intervenes before such claims are rendered into judgments. Thus the common law concept encompassed in the Latin phrase "actio personalis moritur cum actor" is eliminated by a *survival* action, either in whole or in part. Statutory provisions such as are set out in our Estate Administration Act limiting the kinds of actions that a personal representative of a deceased person may continue or bring would have to be repealed and replaced by a *survival* action provision in order to make effective this concept.

Focusing upon wrongful death cases, the key question in evaluating the American schemes for fatality compensation centres on what, if anything, remains for collection on behalf of the estate via the survival action once the damages under the wrongful death system have been recovered.

Loosely speaking, one could consider the *Family Compensation Act* as an analogue for the "wrongful death" remedy, and the *Estate Administration Act* as including the provisions typically seen in a U.S. "survival" statute.

The essential distinction worth noting here is that when one speaks of comprehensive "wrongful death reform", one must consider the manner in which *both* statutory schemes combine/overlap to provide a complete remedy.

Merely addressing deficiencies in the "wrongful death"/FCA side of the equation could lead to inconsistent or incomplete remedies while leaving important policy objectives unresolved.

Essential Elements of Claims for Death

There are several discreet policy issues involving heads of damage in actions arising out of the tortious death of another which have been confronted and addressed in American jurisprudence. These include:

Pecuniary Damages – How to Calculate and Who Gets Them?

As §925 of the *Restatement (Second) of Torts* illustrates, there are three primary approaches used in the United States for calculation of pecuniary wrongful death damages.

1. The loss of benefit approach permits pecuniary losses based on the value of expected contributions the decedent would have made during his lifetime to a specific class of statutorily defined beneficiaries (often limited to spouse and children; occasionally broadened to include anyone “dependent” upon the decedent). There must be a nexus between the award and the recipient’s dependence upon the decedent – meaning that if the decedent dies without legal “dependents” (as in the case of the “adult child” or the “minor child” plaintiff), no pecuniary award may be given under this approach.
2. The loss of estate approach values pecuniary losses based on the decedent’s future earning capacity less consumption. The award is typically NOT contingent upon the decedent having “dependents” – though if “dependents” exist, they may take their share of the award in their own name through a wrongful death statute, which insulates that portion of the recovery from the estate’s creditors. The balance of any award (future capacity less decedent’s consumption AND the consumption share of any “dependents”) would pass through the estate, either by testamentary disposition or through intestacy statutes.
3. Some statutory schemes combine the wrongful death and survival actions into a single proceeding. Typically, statutes taking this approach allow the defined statutory beneficiaries to recover the full value of the decedent’s future earnings less consumption, without regard to dependency of the beneficiaries.

Put another way, there are three subheads of potential recovery for the pecuniary loss of the decedent, all representing a segment of the decedent’s future earning potential. One segment, the decedent’s own consumption over his life, is extinguished in all systems (as to do otherwise would unquestionably represent a “windfall” to any recipient). Another segment, the share of the decedent’s earnings contributed to “dependents” for their consumption, is typically awarded to statutorily-defined beneficiaries under a wrongful death statute. All systems allow some defined class of “dependents” to recover the expected financial contributions these “dependents” would have received from the decedent but for his death. Distribution of the final segment, the “prospective inheritance” left behind when one subtracts ALL consumption (personal and “dependent”) from the decedent’s expected future earnings, is where systems tend to diverge. Some systems (such as BC’s) allow no recovery for this “prospective inheritance” – a result which effectively extinguishes pecuniary damages for those decedents who die without statutory dependents. Other systems award this “prospective inheritance” share directly to the statutory beneficiaries through a wrongful death or unified statutory scheme. Still others award these residual sums to the estate itself, which makes them available to the decedent’s creditors and may result in an award to a different party than that identified as “beneficiaries” under the wrongful death scheme. In the United States, however, the “majority” position appears to favour awards based on the “loss of estate” approach, ensuring that the decedent’s earnings less consumption pass to *someone* or *some entity*, whether by wrongful death statute, testamentary disposition or through intestate succession.

In British Columbia, § 59(3)(c) of the Estate Administration Act forbids any award of damages to a decedent’s estate “in respect of expectancy of earnings after the death of the deceased that

might have been sustained if the deceased had not died”. Not only does such an approach stand in stark contrast with the experience of the majority of American jurisdictions, it has been questioned in Canadian provincial court decisions as well. In permitting a claim for lost future earning capacity to survive to the estate of a sixteen year old decedent under its Survival of Actions Act, the Alberta Court of Appeal in *Duncan Estate v. Baddeley*, 196 A.R. 161 (1997) offered compelling justification for the adoption of the “loss to estate” approach as the fairest measure of compensation in actions involving death:

Kerans, J.A.:

“I want no part of a definition of compensation that puts value on physical but not intellectual capital. Those who argue that I here go beyond compensation would insist I am sure that survivorship law undeniably permits the estate to claim loss to physical property of the deceased. Thus, they are driven to say that, if two people are killed by the same tortfeasor, the estate of the wealthy one who never worked in his life but who lost his Cartier watch as well as his life would recover the value of the watch (so the heirs could say that ill wind blew some good) because of course, the tortfeasor destroyed not just the life but also the property. But the estate of the victim, who is a “working man”, and who must rely on his ability to earn, would receive nothing on the ground that to treat the loss of his ability to earn as the loss of property separable from his death would be to go beyond compensation of him and create a “windfall”. In my view, to label the claim of the first estate as just compensation and of the second estate as a non-compensatory “windfall” is unwarranted, and reflects certain social attitudes that are not part of the law. In sum, I say that to recognize the capital of the propertied person but not that of the unpropertied person is to make an invidious class distinction, and I want no part of it.”

Cote, J.A. (concurring):

“I wish to close my remarks with what seems to me the most powerful argument for permitting this recovery of damages for the lost earning years. The issue is not limited to cases of instant death. It applies equally to persons who are seriously injured by tortfeasors, linger for some time, and then die of their injuries.....Why should the tortfeasor escape scot-free if the plaintiff dies the day before judgment is pronounced? Worse still, why should the tortfeasor who has made death imminent escape scot-free if he manages to drag out the litigation long enough that he produces the very death in question, before judgment? In my view, the issues here transcend questions of social utility of inheritance. They involve justice.”

Additionally, the court in *Duncan Estate* failed to consider another compelling rationale in favour of its move away from a “loss of benefit” approach to compensation for wrongful death – the effect such an approach may have on the decedent’s creditors. The current reliance on the “loss of benefit” approach utilized in British Columbia’s *Family Compensation Act* forbids collection by anyone of the “prospective inheritance” share of the decedent’s estate. Such an approach enhances the likelihood that a decedent’s estate will lack adequate assets to compensate the estate’s outstanding creditors, leading to the perverse result where secured and unsecured debtholders may be left uncompensated in circumstances arising from the wrongful death of a debtholder. Under the “loss to estate” method of accounting for pecuniary loss, such

a result is far less likely, as the estate's award for the decedent's future earnings (less consumption by self and beneficiaries) is generally attachable by estate creditors prior to distribution via testamentary disposition or intestate succession.

We believe that amendment of §59 of the *Estate Administration Act* to permit measurement of pecuniary damages based on the "loss of estate" approach is fundamental to ensuring that for every wrongful taking of a life there exists a fair and adequate remedy, whether on behalf of the dependents or beneficiaries established by will or through the intestacy statutes, or for the protection of the decedent's creditors.

Non-Pecuniary Damages to the Statutory Beneficiaries

Most U.S. compensation systems award some level of nonpecuniary damages to the wrongful death beneficiaries. These are typically defined as the beneficiary's *loss of consortium* with the decedent, based on the love, care, guidance, companionship, sexual services, and other intangible benefits of the relationship between decedent and beneficiary, as appropriate. The focus with these damages is typically on the intangible loss suffered by the beneficiary. Damages under this head generally do not extend to "stand alone" emotional distress/pain & suffering damages sustained by the beneficiary as a result of the decedent's loss – though admittedly the line between "relational" damages and emotional distress claims is a fine one, susceptible to blurring.

Non-Pecuniary Damages to the Estate under the "Survival" Action

If the estate is permitted through the survival statutes to bring any claim the decedent could have brought had he lived, the question arises as to whether the decedent's claims for pre-death pain and suffering, fear in anticipation of death, etc. may survive to the estate post mortem. There is a tendency in the U.S. schemes to extinguish such claims upon death, though a substantial minority of states allows them to proceed for the benefit of the estate. In those states which allow such claims, there is often a requirement that the suffering/anticipation of death be conscious – ruling out non-pecuniary claims for instantaneous death and leading to evidentiary battles over whether the circumstances of the decedent's demise suggested that he was aware of impending doom, even if only for an instant.

Punitive Damages

In those jurisdictions that allow them in other causes of action, punitive damages are typically allowed where the injured person has died. The majority view is that they inure to the estate through the survival action; a minority position suggests they should pass through the wrongful death acts directly to the beneficiaries who have proven some measure of direct loss. Consistent with some views of the objectives of punishment, punitive damage claims survive the death of the decedent, but are extinguished by the death of the tortfeasor, as no one remains worthy of censure. Whether that view is appropriate so that the tortfeasor's estate "benefits" from avoiding liability for punitive damages that otherwise would have been awarded against the tortfeasor had he lived is a question worthy of further consideration.

Special Non-Pecuniary Claims for the Loss of a Minor Child

A number of states have recognized that a parent's loss of a minor child raises unique issues of intangible loss which defy compensation by the typical statutory means. These statutes typically allow a claim for "loss of society" or "impairment of the parent-child relationship" which comes even closer than consortium damages in attempting to compensate the surviving parent for the grief surrounding the loss of a minor. The precise definition of these heads of damage vary from jurisdiction to jurisdiction, though few frankly acknowledge that such claims are truly meant to compensate for the parent's "stand alone" emotional distress, pain and suffering.

Other "Stand Alone" Claims for Beneficiaries

Obviously, claims for the beneficiary's own emotional distress would be included under this catch-all. As discussed above, many jurisdictions close the front door to such claims, but appear to let them in the back door through permissive interpretation of loss of consortium damages, special child death statutes allowing "loss of society" claims, or other mechanisms.

An unexplored area of the law, but one which merits further study, is whether *pecuniary losses* suffered by the beneficiaries arising from the distress occasioned by the decedent's death would be compensable. Damages such as counselling expenses, lost time from work owing to depression/coping with the loss, etc. would be included under such a head. Questions of remoteness would inevitably arise from such claims, but common sense suggests that some measure of these claims (especially those brought by a parent following the death of a minor) might sometimes be supported by independent evidence, and thus should be allowed. Such claims represent the "outer limit" of compensable damages, and further evolution in this area of American law is to be expected.

Specific State Examples

In this section we will examine the statutory schemes in place in Washington, Connecticut, Alaska, Hawaii and Oregon as examples that ought to be considered when framing legislative reform for British Columbia.

Washington

Washington's system is discussed in detail in the 2005 article by Greg Samuels and Wyatt Pickett published in *The Verdict* (copy attached). It represents one of the more expansive recovery regimes amongst the various American approaches. Relevant details include:

- the general wrongful death statute (RCW 4.20.010) vests a claim for "true" pecuniary losses and broad consortium rights in a decedent's spouse or children (including stepchildren). If no beneficiaries in this "first tier" of claimants exist, parents and siblings may bring the action, but only if they are both (a) resident in the United States and (b) financially dependent upon the decedent for support;

- the general (RCW 4.20.046) and special (RCW 4.20.060) survival statutes permit either the estate or the statutory beneficiaries enumerated in the wrongful death statutes to assert claims for (a) the balance of the decedent's future earning capacity not distributed via the wrongful death statute, (b) the decedent's pre-death pain and suffering, even if only momentary, and (c) for fear suffered by the decedent in anticipation of imminent death; and
- The "child" wrongful death statute (RCW 4.24.010) is a special alternative action which broadens the scope of remedies available to a parent for the loss of a minor child beyond those enumerated in the general wrongful death statute. The U.S. residency requirement is removed from such actions, and damages for "destruction of the parent-child relationship" are expressly authorized to compensate for the parent's grief, mental anguish and anxiety arising from the loss. A parent may assert claims under both wrongful death statutes, subject to an election of remedies requirement to avoid double recovery.

Rationale for Inclusion: Neighbouring jurisdiction; WA high court decisions highly respected by other jurisdictions in U.S. system (2nd most often quoted as persuasive authority, after California).

Advantages:

Full recovery for loss of estate damages.

Broad judicial application of "relationship" damages in wrongful death action.

Child wrongful death statute acknowledges grief claims for parents arising out of loss of a minor.

Ample mechanisms for recovery to pass directly to beneficiaries as non-probate assets, thus insulating awards from creditor claims against decedent's estate.

Disadvantages:

General wrongful death statute's limitation on benefits to parents/siblings of decedent based on U.S. residency raises constitutional issues, concerns about xenophobia.

Punitive damages are not recognized in Washington.

Connecticut

Connecticut is an example of the "unified" statutory scheme referenced in the *Restatement*, whereby a state collapses the wrongful death and survival actions into a single proceeding which provides the sole remedy for all claims. Conn. Gen Stat. §52-555 vests the wrongful death action in the executor or administrator of the decedent's estate. It would appear that such an approach would likely render the entire proceeds of the action amenable to attachment

by the decedent's creditors prior to distribution (although the act is silent on this issue). Recoverable damages include:

- the decedent's future earning capacity less personal consumption, based on the "loss to estate method";
- damages for the decedent's loss of enjoyment of life;
- sums for the decedent's conscious premortem pain and suffering; and
- punitive damages where applicable.

Proceeds from the action pass to beneficiaries by either testamentary disposition or intestate succession, as appropriate.

Since recovery is focused on the estate's loss rather than the harms done to specific beneficiaries, the Connecticut act is silent as to claims for loss of consortium with the decedent. A separate action may be brought under §52-555(a) and (b) for *spousal* consortium losses, but this act has been limited to spouses only. Filial consortium claims, whether parent-child or child-parent, have been consistently rejected by the Connecticut courts.

Rationale for Inclusion: Home jurisdiction of many large U.S. insurers, suggesting reform can coexist alongside business community objectives. Substantial body of case law interpreting statutes have developed.

Advantages: Simplicity of unitary statute.

Loss of estate remedy for pecuniary damages adopted.

Broad damages for *decedent's* premortem pain and suffering acknowledged.

Punitive damages allowed.

Disadvantages: Poor recovery mechanisms for collateral dependent claims; filial consortium denied.

Absence of special statute for "minor child" loss leaves parental grief undercompensated.

Entire award treated as a probate asset;
Places creditors ahead of "dependents"; may lead to collateral litigation where testamentary disposition overlooks "dependents".

Alaska

Alaska's fatal tort recovery system utilizes a wrongful death statute (AK Stat. §09.55.580), a survival statute (§09.55.570) and a child wrongful death statute (§09.15.010) to provide complete compensation. Relevant highlights of the Alaska system include:

- the wrongful death claim under §09.55.580 vests in the executor or administrator of the estate;
- punitive damages are allowed in all cases where applicable;
- *if the decedent dies with a spouse, children or "other dependents"*, the wrongful death claim vests in the executor in trust for those beneficiaries, and is *apparently* immune from creditor claims against the estate (by virtue of the "in trust" status);
- Recoverable damages include (a) future earnings of the decedent less consumption, using the "loss to estate" approach; (b) loss of enjoyment of life damages sustained by the decedent; loss of consortium claims on behalf of the beneficiaries; and (d) *possibly* claims for stand alone emotional damages for beneficiaries' distress [case law appears in conflict on this point];
- *if decedent leaves no dependents*, the wrongful death claim passes through the estate, and is presumably attachable by creditors. Damages are limited to pecuniary losses only, calculated using the "loss to estate" evaluation of future earning capacity;
- the "survival" action under §09.55.070 would appear to be rarely used, and would only apply in circumstances where the decedent suffered premortem pain and suffering which was more than "momentary"; in such circumstances, the estate would have an action for those non-pecuniary damages; and
- the "child" wrongful death statute mirrors the Washington statute in allowing parents to claim "loss of society" damages for impairment to the parent-child relationship, independent from any consortium losses allowed in the general wrongful death action. Case law suggests that these damages are limited to the time period prior to what would have been the minor's 18th birthday (i.e., no compensation for "filial piety" losses or ongoing grief over the "adult" child).

Rationale for Inclusion: Neighbouring jurisdiction; became state in 1959, so statutes are of relatively recent origin.

Advantages: Full recovery for loss of estate damages.

Broad judicial application of "consortium" damages in wrongful death action.

Child wrongful death statute acknowledges grief claims for parents arising out of loss of a minor.

Punitive damages allowed.

Possible judicial recognition of beneficiaries' "stand alone" emotional distress claims?

Disadvantages:

No non-pecuniary claims for decedent in cases of "sudden death", as pain/suffering must be something more than "momentary".

Virtually nothing passes through estate; may underprotect decedent's creditors.

Hawaii

The Hawaiian approach to fatal injury compensation rests upon both a wrongful death act (HRS §663-3) and a survival statute (HRS §663-7). Relevant details include:

- the wrongful death action vests solely in the beneficiaries, which include the decedent's "spouse, reciprocal beneficiary, children, father, mother, or any person partly or wholly dependent upon the decedent";
- the claim is immune from the estate's creditors;
- pecuniary claims allowed, suggesting that sums to support "dependents" pass by this act under the "loss of benefit approach", with the "prospective inheritance" residua distributed by the estate via the survival action;
- broad types of non-pecuniary claims, including consortium and filial piety claims, are expressly permitted by the statute;
- *dependency is the prerequisite to recovery* under the wrongful death act... meaning that if there are no "dependents" capable of bringing a claim, only the survival action may be maintained for the estate;
- decedent's loss of enjoyment of life damages are compensable under the wrongful death act; presumably extinguished if no "dependent" exists;
- The survival action scheme expressly authorizes the use of the "loss to estate" approach for calculating pecuniary losses for the decedent's future earnings (see HRS §663-8); and
- Punitive damages, if appropriate, pass through the estate.

Rationale for Inclusion:

Became state in 1960, so statutes of relatively recent origin; diverse multiethnic population similar to that of BC.

Advantages:

Expressly adopts "loss to estate" approach for decedent's future wage loss in statute.

Broad definition of "dependents" to which benefits may pass directly with immunity from creditor claims.

Punitive damages allowed.

Broad definition of consortium damages, including “filial piety” type claims.

Disadvantages:

Appears to authorize two separate actions to address different shares of the pecuniary loss “pie” (i.e., loss of benefits to “dependents” assessed under WD statute, while residual “prospective inheritance” determined in survival action).

No “child” wrongful death statute; parental grief for loss of minor may go undercompensated.

Antemortem claims of decedent for pain & suffering/fear of death unaddressed; presumably not compensable (case law silent).

Oregon

The Oregon approach to fatal injury claims is similar to that taken by Connecticut, in that a single action brought under the wrongful death statute, ORS § 30.020, is typically broad enough to encompass *all* claims arising out of death, thus obviating the need for the estate to bring a separate action under the “survival” provisions of ORS § 115.305. But unlike Connecticut, Oregon’s statute specifically enumerates the right of beneficiaries and dependents to seek “loss of relationship” damages in the same action assessing pecuniary losses under the “loss to estate” approach. Relevant features of the Oregon scheme include:

- the wrongful death action is brought by the personal representative of the decedent’s estate;
- the action is brought *either* “in trust” for the benefit of a defined class of beneficiaries/dependents, or for the benefit of the decedent’s estate where no such beneficiaries exist;
- “loss of estate” approach to valuing pecuniary damages to decedent’s estate expressly authorized;
- premortem pain and suffering claims of the decedent allowed;
- family dependents (spouse, parents, children and stepchildren) permitted to recover both pecuniary damages arising from decedent’s loss and “relational” damages for loss of society, companionship and services; and
- punitive damages expressly authorized, in appropriate cases.

Rationale for Inclusion:

Close geographical proximity and historical relationship with British Columbia; well developed body of case law interpreting statutory provisions (dating back to 1880).

Advantages:

Simplicity of unitary statute.

Loss of estate remedy for pecuniary damages adopted.

Damages for *decedent's* premortem pain and suffering acknowledged.

Damages for “loss of relationship” expressly authorized by statute for spouses, children and parents.

Punitive damages allowed.

Disadvantages:

Statute & subsequent caselaw unclear on treatment of decedent's creditors; may underprotect creditor interests.

Of all the aforementioned statutory schemes, we believe that the Oregon approach goes furthest in satisfying the primary objectives of meaningful, comprehensive reform enumerated elsewhere in this paper. While we feel all the systems discussed have points worthy of consideration, we urge strong consideration of the Oregon example as a model of what unified statutory reforms in this area of law would ideally accomplish.

Copies of the aforementioned statutes, including annotations of judicial decisions interpreting the statutes, have been included for the Ministry's review and consideration.

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Wrongful death and survival actions in Washington state: Comparing benefits from a Canadian perspective

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One of the most rewarding benefits flowing from a multi-jurisdictional practice is the opportunity to evaluate legal issues within the framework of two diverse judicial systems. Inevitably, comparing US and Canadian laws that govern a specific client problem leads to thinking about the differences between the two nations' legal systems in a more general way, and wondering how each might benefit from greater awareness of the approach taken by its neighbour.

One area in which British Columbia and Washington law differ substantially is in valuing the recoverable losses arising from the death of a loved one. Most practitioners on both sides of the border have a general awareness that awards for "wrongful death" are more generous in the United States, while the heads of damage are more limited in Canada. For the rare case which presents a multi-jurisdictional fact pattern, the principle seems clear – bring your action in the jurisdiction which enables

you to maximize your client's compensation. Keeping the case in that favorable jurisdiction, however, can be quite a challenge – and, even if you succeed, you cannot help but consider the policy choices which lead to radically disparate awards for the same losses north and south of the international border.

Does the Canadian approach err on the side of modesty, offering too little compensation for the devastating impact of losing a family member? Or do the Washington courts, which have gone so far as to recognize claims for the losses to the estate of a viable unborn fetus¹, permit excessive damages for intangible and speculative harms? We do not presume to offer a definitive answer to this question. Practitioners in British Columbia, however, can easily overlook Washington as an alternative forum for their client's cross-border dispute – an oversight which can both diminish the client's recovery in the short run and thwart the evolution of British Columbia damages law over the long term. In this article, we offer a brief overview of the Washington law analogous to our *Family Compensation Act* and *Estate Administration Act* claims, provide one example of how Canadian plaintiffs used the more favorable Washington law to their advantage, and illustrate the challenges Canadians face when seeking to avail themselves of US wrongful death statutes – even for accidents arising in the US.

WASHINGTON'S WRONGFUL DEATH AND SURVIVAL STATUTES – AN OVERVIEW

Both Washington and British Columbia have legal systems that evolved from the English common law tradition, which failed to recognize a cause of action for "wrongful death". As the pressures of industrialization and the social hardships created by increased accidents mounted in the mid-19th century, both the United States and Canada began considering statutory solutions to ameliorate the harsh effects of the common law regime. The British Parliament responded first in 1846 with *Lord Campbell's Act*, recognizing the right of close relatives

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to seek compensation for the death of a family member. Washington, in contrast, took its first steps towards recognition of a wrongful death cause of action in 1854, when the territorial authorities approved a limited cause of action for the benefit of widows and orphans of men killed while dueling.² Thankfully, the scope of actionable claims for injuries resulting in death has advanced significantly in the intervening 150 years, both through adoption of Washington's wrongful death and survival statutes, and through continued evolution of the rights afforded under these statutes as interpreted by the state's courts. Today, claims arising from death in Washington state fall into two general groups, governed by four distinct statutes.

THE WRONGFUL DEATH CLAIM

Wrongful death claims are actions which inure in statutorily defined beneficiaries of the decedent, and are conceptually equivalent to actions under British Columbia's *Family Compensation Act*. The action is brought by the personal representative of the decedent's estate, but this is merely for the sake of procedural convenience; the cause of action vests in the beneficiaries, not the estate, and sums awarded cannot be attached by the estate's creditors³.

The "general" wrongful death statute

The general wrongful death statute, RCW 4.20.010, was created to compensate a decedent's surviving family members for pecuniary losses they sustain as a result of the decedent's death. The decedent's spouse and children, including stepchildren, are treated as "first-tier" beneficiaries, and have priority standing to bring the action. If no "first-tier" beneficiaries survive the decedent, secondary beneficiaries such as the decedent's parents or siblings may bring the action – but only if they are residents of the United States and can demonstrate a threshold level of financial dependency on the decedent.

While the precise heads of damage to which the beneficiaries are entitled is not enumerated in the statute, subsequent court decisions have permitted claimants to recover the true pecuniary loss sustained by the surviving family member(s). In Washington, pecuniary loss includes not only the financial contributions the decedent would have made to the beneficiaries had he lived, but also an award for "loss of consortium" – the loss of the decedent's love, care, companionship and services⁴. Although prior cases have established that the general wrongful death statute does not recognize claims for the grief and mental anguish of the survivors, the flexible definition of "consortium" provided by the case law undoubtedly results in circumstances where jurors consider the claimant's emotional distress when computing an award for consortium damages.

The "child" wrongful death statute

Washington also offers a discrete statutory remedy for parents who suffer the loss of a child. Like general wrongful death claims, a cause of action brought under RCW 4.24.010 vests in the parents as beneficiaries. If the child is under the age of 18, there is no requirement that the parents show financial dependence on the child to make this claim. Parents may elect to bring an action under this statute for adult children if substantial financial dependence can be shown. Unlike the general wrongful death statute, RCW 4.24.010 does not require a parent to be a resident of the United States at the time of the decedent's death to make a claim.

The heads of damages recoverable under the child wrongful death statute include pecuniary and nonpecuniary claims, and are broader in scope than those permitted by RCW 4.20.010. As in a general wrongful death claim, the child-specific statute permits recovery for medical and funeral expenses, as well as for the loss of the child's "consortium". But the statute further allows a claim for destruction of the parent-child relationship, which the case law has defined as being distinct from the consortium claim. This claim for destruction of the parent-child relationship is intended to compensate the parent(s) for the grief, mental

anguish and anxiety suffered as a result of the child's loss – thus providing a head of non-economic damages specifically disallowed in the context of a general claim for wrongful death⁵.

Obviously, circumstances often arise where both statutes may be applicable to a parental claim for the loss of a child. Parents are entitled to bring claims under both statutes in the same action, but to the extent the statutes overlap, the claimant is required to elect his remedies under the two statutes and avoid a double recovery.

SURVIVAL ACTIONS

Survival actions preserve the decedent's own cause of action for injury or death, permitting the decedent's estate and/or statutory beneficiaries to bring those claims which the decedent would have been able to make had he lived. Roughly analogous to claims in British Columbia brought under the *Estate Administration Act*, survival actions in Washington are governed by two separate statutes.

The "general" survival statute

The general survival statute, RCW 4.20.046, simply preserves a decedent's cause of action for the benefit of his estate. Any award obtained under the statute is treated as an estate asset, and can be attached by the estate's creditors⁶. The statute is not tort-specific, and thus makes no distinction between cases where the decedent died as the result of negligence underlying the action, or whether the decedent died of causes unrelated to the claims asserted.

The "special" survival statute

In contrast, the special survival statute, RCW 4.20.060, was created specifically to address the continuation of claims which resulted in the death of the decedent. While actions brought under the special survival statute are brought for harms done to the decedent's estate, they vest not in the estate but in the "first-tier" or "second-tier" beneficiaries established in the wrongful death statutes⁷. As such, awards made under the special survival statute cannot be attached by the estate's creditors.

Relevant heads of damage in survival actions

The heads of damage permitted under the general and special survival statutes are identical. In addition to medical and funeral expenses incurred by the estate (and not recovered under the wrongful death statutes), the survival action permits a claimant to seek damages for the loss of net earnings that would have accumulated to the estate had the decedent lived. The loss of earnings claim is computed by establishing the decedent's future earnings through expert economic testimony, then offsetting probable deductions for family and personal expenses and other relevant adjustments. The future net earnings figure is then reduced to present value to arrive at the final award⁸.

Finally, the estate is permitted to seek compensation for two elements of non-economic damage. If any measurable length of time occurred between injury and death – even a matter of a few seconds – the estate is permitted to seek damages for the decedent's pre-death pain and suffering⁹. Testimony must establish that the decedent was conscious during this interval, or else these damages will not be permitted. Additionally, the Washington courts recognize a claim by the estate for the fear suffered by the decedent in anticipation of imminent death – again, if the fear is supported by more than mere conjecture and speculation¹⁰.

The overlapping nature of Washington's statutory framework for resolving actions resulting in death leads most personal representatives to file claims under both the wrongful death and the survival statutes. Expert economic testimony regarding the decedent's future earnings often plays a central role in any damages inquiry, as the decedent's probable lifetime income is relevant to both the pecuniary loss sustained by the beneficiaries of the wrongful death claim and the value of future net earnings recoverable in the survival action.

APPLYING WASHINGTON LAW TO CANADIAN PLAINTIFFS – BROOKS V. CYTODYNE TECHNOLOGIES

As the preceding paragraphs illustrated, the range of damages awarded for wrongful death and survival claims in Washington are significantly broader than those afforded under the *Family Compensation Act* and *Estate Administration Act* in two important respects. The value of a decedent’s “net future earnings” can be substantial, especially in cases involving the loss of a child or young adult with a strong educational background and future job prospects. Further, some cases present facts which clearly indicate that the decedent suffered some level of conscious pain and suffering prior to death, or likely experienced fear in anticipation of imminent injury. While these three heads of damage are excluded by the *Estate Administration Act*, all are permitted under the Washington survival statutes. When presented with those unique cases where Washington law might apply to your client’s claims, the significant disparities in the American and Canadian compensation schemes simply must be considered before an action is pursued under the familiar but more conservative British Columbia statutes.

Brooks v. Cytodyne Technologies arose out of a much-publicized fatality automobile collision which occurred at the Peace Arch border crossing in May of 1998. A vehicle driven by a Washington resident at speeds approaching 160 km/h crossed the international border and struck a line of vehicles waiting to clear Canada customs. Two young women, Kimberly Brooks and Monique Ishikawa, were killed when the Washington driver struck the rear of their Honda sedan, causing it to burst into flames. The Brooks/Ishikawa vehicle was in turn propelled forward into the next car in the customs line, causing it too to catch on fire and seriously injuring the four occupants inside. In all, eleven individuals waiting in the customs line were injured or killed in the collision, and five vehicles sustained varying degrees of damage.

As the collision occurred approximately 100 yards north of the international boundary, the RCMP assumed responsibility for investigating the cause of the collision. The Washington driver was charged with two counts of reckless driving resulting in death, and was prosecuted by the Crown. During the course of the criminal trial, the accused submitted evidence that she had suffered a psychotic episode as a result of her use of Xenadrine, an ephedra-based diet supplement she had been taking in the weeks leading up to the collision. Following extensive testimony from both fact witnesses and medical experts establishing the transitory nature of the driver’s psychosis and the role that Xenadrine played in causing the driver’s bizarre symptoms, the Supreme Court found the driver not criminally responsible for her actions, and an acquittal was entered.

By pursuing a broad civil lawsuit to include product liability claims against the manufacturer, distributor and retailer of the Xenadrine supplement, in addition to claims against the negligent driver, the injured parties would have an opportunity to bring this action in the United States, where all the defendants to the action resided or were incorporated. By pursuing all civil claims arising from this collision in Washington, there would be consistency in the plaintiffs’ collective strategy and the opportunity to have all family and estate claims evaluated under Washington’s more generous wrongful death and survival statutes. A Washington action involving representation of all plaintiffs sought damages from six individual and corporate defendants whose conduct contributed to the collision.

Shortly after commencing the lawsuit in August of 2000, it became evident that the defendants intended to vigorously contest the decision to have the action tried in Washington under Washington law. While the arguments of the defendants were often cloaked in high-minded references to Canada’s overwhelming interest in the outcome of the dispute and a desire to promote international comity, the truth of the matter was that the defendants would substantially reduce their financial liability if they could have the claims of the two decedents evaluated under the British Columbia statutory framework. The defendants, including counsel for the driver, cooperated in motions seeking removal of the lawsuit to British Columbia under the doctrine of *forum non conveniens*, or in the alternative a ruling that the case could remain in Washington but be tried according to British Columbia law.

The defendants had some powerful arguments in support of their request – not the least of which was the fact that the collision had occurred north of the border in Canada. It was also true that Canada had expressed some interest in the outcome of the dispute by prosecuting the driver under Canadian criminal law. The defendants further contended that the Brooks family’s initial decision to file an FCA claim in British Columbia – an action which was promptly dismissed once the possibility of a Washington action became evident – illustrated an intent by the parties to submit the dispute to the Canadian courts for adjudication, and arguably reduced the Washington action to an inappropriate instance of “forum shopping.”

The response to the defendants’ arguments centered around three main points. First, since all the defendants were United States domiciliaries (if not Washington residents), it could hardly be unjust to expect those defendants to have their conduct judged by American as opposed to Canadian legal standards. Second, all tortious conduct by the defendants was initiated within the borders of the United States. Even if the driver were wholly to blame for the collision, she had traveled some 100 miles from the Seattle area north to the border at extreme speeds; it was unquestionable that someone who crossed the border going 160 km/h and came to rest 100 yards north of the boundary must have been driving negligently in Washington state, and Washington’s interest in addressing that negligence was paramount. Finally, it was argued that Washington maintains an interest in protecting visitors to the state until

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such time as they are cleared by Canadian customs to proceed into British Columbia, and that the accident occurred in this “no man’s land” north of the boundary but south of customs, where precise notions of sovereign interest are harder to define.

In the end, a King County Superior Court judge accepted the arguments in November of 2001, ruling that the lawsuit should remain in the United States and be tried under Washington law. The trial court’s decision was subsequently upheld by the Washington Court of Appeals in the spring of 2002. Shortly thereafter, with Washington’s wrongful death and survival statutes established as the basis for evaluating quantum, the claims of all plaintiffs settled for a confidential amount.

While the defendants in *Brooks* were ultimately unsuccessful in their attempts to remove the action to British Columbia, it should be noted that other defendants have fared better with similar requests. Notably, plaintiffs involved in cross border civil litigation often discover that the Insurance Corporation of British Columbia has a standing policy of attempting to dismiss wrongful death and significant injury claims against its insureds arising in Washington, and moving the litigation to British Columbia under the doctrine of *forum non conveniens*. ICBC and out-of-province counsel have amassed an impressive track record of success, both at the trial and appellate level, in obtaining such dismissals in cases where both the plaintiff and defendant drivers are residents of British Columbia¹¹. Still, it is important to “fight each fight” on its particular facts, and evaluate the applicability of Washington law in cases where the scope of damages and the presence of potential claims against American defendants suggest even a modest chance of success. While we await the day when a broader spectrum of damages becomes available to plaintiffs in their actions before British Columbia courts, expanding the awareness of the Washington approach to wrongful death and survival claims can offer benefits for present-day clients as well as a source of inspiration for how Canadian damages law might evolve in the future.

- 1 *Moen v. Hanson*, 85 Wn.2d 597, 599, 537 P.2d 266 (1975). The Washington Supreme Court has subsequently held that a *nonviable* preterm fetus killed by the negligence of a third party does not possess an estate, and is not a “minor child” for the purposes of the child wrongful death statutes.
- 2 Gregory Casey, Comment, Washington Wrongful Death and Survival Actions, 6 *Gonz. L. Rev.* 314 (1971), citing *Civil Practice Act*, 496 Wash. Terr. Sess. Laws. 220 (1854).
- 3 *Wood v. Dunlop*, 83 Wn.2d 719, 724, 521 P.2d 1177 (1974)
- 4 *Chapple v. Ganger*, 851 F. Supp 1481, 1487 (E.D. Wash. 1994). *Chapple* provides an excellent example of how the wrongful death and survival scheme overlap, and the considerations a court must make in avoiding “double recovery” under the various heads of damage.
- 5 *Hinzman v. Palmanteer*, 81 Wn.2d 327,332, 501 P.2d 1228 (1972).
- 6 See *Walton v. Absher Construction, Inc.*, 101 Wn.2d 238, 676 P.2d 1002 (1984)(harmonizing the general and special survival statutes, and discussing distinctions between them).
- 7 See *Higbee v. Shorewood Osteopathic Hospital*, 105 Wn.2d 33, 711 P.2d 306 (1985).
- 8 *Wagner v. Flight Craft, Inc.*, 31 Wn. App 558, 568, 643 P.2d 906 (1982). See *Chapple*, supra note 4, for the practical application of this approach.
- 9 *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 837, 699 P.2d 1230 (1985).
- 10 *Id.* at 837, citing *Johnson v. Marshall Field & Co.*, 78 Wn.2d 609, 617-18, 478 P.2d 735 (1970).
- 11 See *Hill v. Jawanda*, 96 Wn. App 537, 983 P.2d 666 (1999).



About retirement...

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Projections of future earning capacity provided by economists usually extend to age 65, which is considered the normal retirement age in Canada. Projections may account for retirement earlier or later than age 65, in a few special cases. Examples of such special cases are persons who work in occupations where earlier retirement is mandatory (police officers and firefighters, for example), and persons who likely will not be able to afford retirement at a normal retirement age (such as recent immigrants who have not made significant Canada Pension Plan contributions).

Readers of economists’ expert opinion reports often infer that, because calculations are terminated at age 65, retirement as of that age is assumed. Presumably because of this inference, a popular point raised on cross-examination is that the median retirement age in Canada, between 1996 and 2000, was estimated at less than 65 years (61.8 years for men, and 60.1 years for women). This simple statement, which draws on information published in a Statistics Canada article entitled “Fact-sheet on retirement”¹, directly and indirectly touches on a number of issues which will be briefly discussed in this article. They are:

1. Results reported in the “Fact-sheet on retirement” are median rather than mean retirement ages. Does this matter?
2. Are estimates of median or mean average retirement ages in Canada good predictors of individual behaviour?
3. Why terminate the calculations at age 65?
4. How does a model of earning capacity of the kind usually produced in personal injury cases need to be modified to accommodate assumptions regarding a specific retirement age?

MEDIAN VERSUS MEAN

Both the median and the mean are considered so-called “measures of central tendency”. To determine which is the better or more appropriate measure, the median or the mean, it may be useful to recall how each is calculated.

The median is obtained simply by ordering responses from lowest to highest with the median being the response in the middle. No calculations are required, and all but one observation (two observations, in the case of even-numbered samples) essentially are discarded. The mean, on the other hand, is calculated by taking the sum of observed values, and then dividing by the number of responses. Not a single observation is discarded.

The single most important difference between these two approaches is that the calculation of a mean average is in fact a probability calculation, albeit a simple one in which every response is given an equal chance of occurring. In contrast, finding the median literally means just that – finding it, and ignoring the rest of the responses. We will illustrate the difference between these calculations by way of an example.

Some of you may recall participating in Associated Economic Consultants Ltd.’s “Totally Anonymous and Utterly Simplistic Retirement Survey”, which we conducted at the October 29, 2004 “*Winning at Trial II*” conference hosted by the Trial Lawyers Association of BC, 26 individuals responded to this survey, which asked only the respondent’s current age and his or her intended retirement age. The lowest intended retirement age given was 55, and the highest was “never” (this and two other responses were “top-coded” at age 85). A chart of the answers we received is shown in Figure 1.

THE CALL FOR A WRONGFUL DEATH ACT IN BRITISH COLUMBIA

Revising BC's System for Compensation of Fatalities

APPENDICES

Tab 1

WASHINGTON

(RCW 4.20 - Civil Procedure/Survival of Actions)

- Survival of actions (RCW 4.20.046)
- Action for personal injury survives to surviving spouse, state registered domestic partner, child, stepchildren, or heirs (RCW 4.20.060)
- Action for injury or death of child (RCW 4.20.010)

Tab 2

CONNECTICUT

(§52.555 - Civil Actions/Statutory Rights of Action and Defenses)

- Actions for injuries resulting in death (§52.555)
- Actions for loss of consortium re death of spouse independent for determination of damages (§52.555a)
- Actions for loss of consortium re death of spouse to be joined with all actions re death of spouse (§52.555b)

Tab 3

ALASKA

(§09.55 - Code of Civil Procedure/Special Actions and Proceedings/Survival and Wrongful Death Actions; and §09.15 - Code of Civil Procedure/Parties)

- Action for wrongful death (§09.55.580)
- All causes of action survive (§09.55.570)
- Parents or guardian may sue for injuries or death to child (§09.15.010)

Tab 4

HAWAII

(HRS §663 - Tort Actions)

- Death by wrongful act (§663-3)
- Survival of cause of action (§663-7)
- Damages, future earnings (§663-8)

Tab 5

OREGON

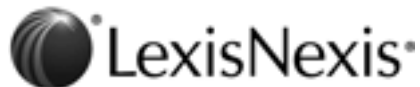
(ORS § 30 - Actions and Suits in Particular Cases/Actions for Injury or Death; and ORS § 115 - Claims; Actions and Suits)

- Action for wrongful death; when commenced; damages (ORS § 30.020)
- Survival of causes of action (ORS § 115.305)

Worthless in the
Eyes of the Law!



British Columbia Needs a
Wrongful Death Act



LEXSTAT REV. CODE WASH. (ARCW) § 4.20.046

ANNOTATED REVISED CODE OF WASHINGTON
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*** Statutes current through the entire 2009 Regular Session (2009 c 580) ***
*** Annotations current through June 11, 2009 ***

TITLE 4. CIVIL PROCEDURE
CHAPTER 4.20. SURVIVAL OF ACTIONS

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 4.20.046 (2009)

§ 4.20.046. Survival of actions

(1) All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: PROVIDED, HOWEVER, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of those beneficiaries enumerated in *RCW 4.20.020*, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action. The liability of property of spouses or domestic partners held by them as community property to execution in satisfaction of a claim enforceable against such property so held shall not be affected by the death of either or both spouses or either or both domestic partners; and a cause of action shall remain an asset as though both claiming spouses or both claiming domestic partners continued to live despite the death of either or both claiming spouses or both claiming domestic partners.

(2) Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his or her death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the personal representative of such person.

HISTORY: 2008 c 6 § 409; 1993 c 44 § 1; 1961 c 137 § 1.

NOTES: PART HEADINGS NOT LAW -- SEVERABILITY -- 2008 C 6: See *RCW 26.60.900* and *26.60.901*.

EFFECT OF AMENDMENTS.

2008 c 6 § 409, effective June 12, 2008, substituted "spouses or domestic partners" for "a husband and wife" and added references to "domestic partners" in the third sentence of (1), and made related changes.

JUDICIAL DECISIONS

ANALYSIS

Action held barred

--Ineligible relatives

--Outrageous conduct

--Violation of constitutional right

--Workers' compensation claim

Action held proper

--Estate of infant

--Estate of murdered spouse

--Estate of unborn child

Applicability

--In general

--Ineligible relatives

--Time of death

Apportionment of settlement

Assignability of damages

Common law

--In general

--Trespass

Community property

--Tort obligations

Construction

--"Any person."

Conversion actions

Damages

--Alleged psychological loss

--Award held not assignable

--Enjoyment of life

--Incorrect calculation

--Jury award upheld

--Lost earning capacity

--Method of calculation

--Not recoverable

--Shortened life expectancy

Derivation of law

Discovery rule applicable

Distribution of award

Exclusion from settlement

--Spousal separation

Future earnings

--Spouse's estate

Future economic loss

--Action under federal law

Instantaneous death by tort

Limitation on damages

--Death from unrelated causes

--Pain and suffering

Pain and suffering

--In general

Presumption of due care

--Not applicable

Proof

--Enrichment of estate

--Negligence standard

Property damage

--In general

--Assignability of claim

--Automobile

--Chattels

--Destruction

--Motor vehicles

Purpose

Separate cause of action

Special survival statute distinguished

Tort actions

ACTION HELD BARRED.

-- INELIGIBLE RELATIVES.

Plaintiffs could not assert any wrongful death, *RCW 4.20.010* and *RCW 4.20.020*, or survival causes of action, *RCW 4.20.046* and *RCW 4.20.060*, because neither the parents nor the sibling were financially dependant on the decedent at the time of his death in the county jail. *Rentz v. Spokane County*, 438 F. Supp. 2d 1252 (E.D. Wash. 2006).

Washington's statutory causes of action for wrongful death and survival set forth in *RCW 4.20.010*, *4.20.020*, *4.20.046*, and *4.20.060* required parents to be financially dependent on a deceased adult child in order for the parents to recover. However, given the fundamental policies behind 42 U.S.C.S. §§ 1983 and 1988, including the compensation of persons injured by the deprivation of federal rights and the prevention of abuses of power by those acting under color of law, the wrongful death and survival statutes did not bar parents' action against a police officer for excessive force that allegedly resulted in their son's death. *Loomis v. City of Puyallup Police Dep't*, -- F. Supp. 2d -- (May 3, 2005).

Decedent's niece, niece's children, and decedent's nondependent brother were not beneficiaries under the wrongful death and survival statutes. *Tait v. Wahl*, 97 Wn. App. 765, 987 P.2d 127 (1999).

-- OUTRAGEOUS CONDUCT.

This statute barred plaintiff, who died after bringing an action against a hospital for outrageous conduct in removing him from a respirator following a heart attack, from recovering damages for the outrage. *Strickland v. Deaconess Hosp.*, 47 Wn. App. 262, 735 P.2d 74 (1987).

-- VIOLATION OF CONSTITUTIONAL RIGHT.

Damages for a violation of the constitutional right of privacy were personal to the deceased and as such did not survive to the personal representative. *Strickland v. Deaconess Hosp.*, 47 Wn. App. 262, 735 P.2d 74 (1987).

-- WORKERS' COMPENSATION CLAIM.

A workers' compensation claim for time loss compensation benefits did not survive to the estate of an injured worker where no final order or judgment was issued prior to the claimant's death and where the claimant left no surviving spouse or dependent children. *Johnson v. Department of Labor & Indus.*, 114 Wn.2d 479, 788 P.2d 551 (1990).

ACTION HELD PROPER.

-- ESTATE OF INFANT.

The estate of a person who dies after birth can maintain a survival cause of action. *Cavazos v. Franklin*, 73 Wn. App.

116, 867 P.2d 674 (1994).

-- ESTATE OF MURDERED SPOUSE.

Wife's personal representative may maintain action for benefit of children against estate of husband who murdered wife and then committed suicide. *Johnson v. Ottomeier*, 45 Wn.2d 419, 275 P.2d 723 (1954).

-- ESTATE OF UNBORN CHILD.

The personal representative of a viable unborn child who was killed by a third party's negligence may maintain a survival cause of action. *Cavazos v. Franklin*, 73 Wn. App. 116, 867 P.2d 674 (1994).

APPLICABILITY.

-- IN GENERAL.

The only prerequisite to maintaining a survival action is that the decedent could have maintained the action had he or she lived. *Cavazos v. Franklin*, 73 Wn. App. 116, 867 P.2d 674 (1994).

The general survival statute is not limited to situations where decedent's injuries did not cause decedent's death. *Vail v. Tofness*, 51 Wn. App. 318, 753 P.2d 553 (1988).

This statute does not create a separate claim for the survivors, but merely preserves the causes of action that a person could have maintained had he not died, other than for pain and suffering, anxiety, emotional distress, or humiliation. *Woolridge v. Woolett*, 96 Wn.2d 659, 638 P.2d 566 (1981).

Under this section and RCW 4.20.060, all causes of action of a decedent survive to his personal representative, who may maintain an action for damages thereon, except those elements of damage specifically excluded by this section. *Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (1969).

-- INELIGIBLE RELATIVES.

Because decedent's niece, niece's children, and decedent's nondependent brother were not beneficiaries under the wrongful death and survival statutes, they could not recover damages under this section. *Tait v. Wahl*, 97 Wn. App. 765, 987 P.2d 127 (1999).

-- TIME OF DEATH.

This section applies where the person who brought an action before the effective date of this section died after the effective date, since the first time the question of survival arises is at the time of death. *Engen v. Arnold*, 61 Wn.2d 641, 379 P.2d 990 (1963).

APPORTIONMENT OF SETTLEMENT.

When a trial court must apportion funds from a single settlement fund resolving claims under the wrongful death statute and two survival statutes, the fund must first be apportioned between the three actions; the proceeds must then be apportioned according to the appropriate method for each cause of action. *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986).

ASSIGNABILITY OF DAMAGES.

The trial court properly dismissed claims of the decedent's niece brought on behalf of the decedent's estate for the decedent's pain and suffering, anxiety, emotional distress, loss of enjoyment of life, and loss of consortium. *Tait v. Wahl*, 97 Wn. App. 765, 987 P.2d 127 (1999).

In unequivocal language, by this section the legislature has established that all causes of action survive; provided, however, that there can be no recovery by a personal representative of damages for "pain and suffering, anxiety, emotional distress or humiliation personal to and suffered by a deceased." Any other element of damage, except those enumerated, would appear to survive and thus be assignable (survivability being the test of assignability). *Harvey v. Cleman*, 65 Wn.2d 853, 400 P.2d 87 (1965).

COMMON LAW.

-- IN GENERAL.

Prior to enactment of section, cause of action for wrongful death did not survive the death of the tortfeasor. *Rinker v. Hurd*, 69 Wash. 257, 124 P. 687 (1912); *Bortle v. Osborne*, 155 Wash. 585, 285 P. 425 (1930).

-- TRESPASS.

Interference with access of abutting owner is trespass for which cause of action survived under prior law. *Seward v. Spokane, P. & S. Ry.*, 64 Wash. 516, 117 P. 263 (1911).

COMMUNITY PROPERTY.

-- TORT OBLIGATIONS.

Subsection (1) of this provision does not remove the liability of a deceased spouse's former half interest in community property from separate tort obligations of the deceased. *Edmonds v. Ashe*, 13 Wn. App. 690, 537 P.2d 812, review denied, 86 Wn.2d 1001 (1975).

CONSTRUCTION.

-- 'ANY PERSON.'.

"Any person" includes municipal or public corporation. *Whatcom County v. Schuman*, 12 Wn.2d 290, 121 P.2d 378 (1942).

CONVERSION ACTIONS.

County may continue conversion action against estate of tortfeasor. *Whatcom County v. Schuman*, 12 Wn.2d 290, 121 P.2d 378 (1942).

Under prior law, administrator could maintain action against decedent's son for conversion of property. *McCoy v. Ayers*, 2 Wn. Terr. 307, 5 P. 843 (1884).

DAMAGES.

-- ALLEGED PSYCHOLOGICAL LOSS.

A claim for shortened life expectancy, insofar as it attempts a recovery for alleged psychological loss as opposed to a claim for loss of earnings due to an untimely death, is excluded by this section in survival actions. *Wooldridge v. Woolett*, 28 Wn. App. 869, 626 P.2d 1007, aff'd, 96 Wn.2d 659, 638 P.2d 566 (1981).

-- AWARD HELD NOT ASSIGNABLE.

Where a person stated his claim in a complaint against another as having more than twice as much damages in the form of personal injuries than all other forms combined, the gist of the claim was for damages to the person rather than to property; hence, an unsegregated verdict based on such claim, but in an amount much less than half of the total amount claimed, must be deemed to be for injury to the person, and not assignable since it would not survive to the personal representative under this section. *Harvey v. Cleman*, 65 Wn.2d 853, 400 P.2d 87 (1965).

-- ENJOYMENT OF LIFE.

The survival statutes govern only "predeath damages" and do not create claims on behalf of dead persons for the loss of life itself. *Shigaki v. Broudy*, 114 Wn. App. 545, 59 P.3d 126 (2002), aff'd, 151 Wn.2d 750, 92 P.3d 192 (2004).

Damage award rendered against the doctor was reversed and remanded because loss of enjoyment of life was not authorized under Washington's survival statutes, RCW 4.20.046 and 4.20.060, when the decedent died shortly after surgery without conscious pain or awareness that she had been fatally injured. *Shigaki v. Broudy*, 114 Wn. App. 545, 59 P.3d 126 (2002), aff'd, 151 Wn.2d 750, 92 P.3d 192 (2004).

-- INCORRECT CALCULATION.

It was error for the trial court in a survival action to allow the measure of damages to include amounts which the decedent would have spent on others and which therefore would not have accumulated in his estate. *Wagner v. Flightcraft, Inc.*, 31 Wn. App. 558, 643 P.2d 906, review denied, 97 Wn.2d 1037 (1982).

-- JURY AWARD UPHELD.

It was not abuse of discretion for trial court not to grant new trial in survival action where jury failed to award any general damages, since jury could reasonably have concluded from the evidence presented that if the deceased had lived his savings at the end of his life would have been zero. *Woolridge v. Woolett*, 96 Wn.2d 659, 638 P.2d 566 (1981).

-- LOST EARNING CAPACITY.

Damages for lost earning capacity of a decedent are measured by deducting personal expenses from gross earnings of the decedent to arrive at the probable net earnings of the decedent had he lived to his normal life expectancy. *Balmer v. Dilley*, 81 Wn.2d 367, 502 P.2d 456 (1972).

-- METHOD OF CALCULATION.

The correct method for measuring damages in survival actions is to subtract all probable expenditures of the decedent (including both personal and family expenditures) from the decedent's probable gross earnings and then reduce this probable net accumulation to present value. *Wagner v. Flightcraft, Inc.*, 31 Wn. App. 558, 643 P.2d 906, review denied, 97 Wn.2d 1037 (1982).

-- NOT RECOVERABLE.

In a wrongful death survival action, the decedent's estate may not recover damages for the decedent's loss of a probable future inheritance. *Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (2000).

-- SHORTENED LIFE EXPECTANCY.

This value of a person's shortened life expectancy is not a separately recoverable item of damages in a survival action brought pursuant to this section. *Woolridge v. Woolett*, 96 Wn.2d 659, 638 P.2d 566 (1981).

DERIVATION OF LAW.

This section derived from laws of 1961, Ch. 137, does not violate *Wa. Const.*, Art. II, § 19, for the provisions of Ch. 137 were sufficiently connected to the subject of the act as expressed in its title. *Engen v. Arnold*, 61 Wn.2d 641, 379 P.2d 990 (1963).

DISCOVERY RULE APPLICABLE.

The "discovery" rule set forth in *Ohler v. Tacoma Gen. Hosp.*, 92 Wn. 2d 507, 598 P.2d 1358 (1979), and *Sahlie v. Johns-Manville Corp.*, 99 Wn. 2d 550, 663 P.2d 473 (1983), applied to the Washington survival and wrongful death statutes so as to toll the applicable statutes of limitation until such time as plaintiff, as the surviving spouse and personal representative of the decedent, discovered or should reasonably have discovered the essential elements of her possible causes of action. *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687 (1985).

DISTRIBUTION OF AWARD.

Any award under this statute passes through the estate and is distributed as any other asset. *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986).

EXCLUSION FROM SETTLEMENT.

-- SPOUSAL SEPARATION.

If husband and his deceased wife had separated with no intention of ever resuming the marital relationship, he would

be excluded from receiving any part of settlement in wrongful death and survival action. *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986).

FUTURE EARNINGS.

-- SPOUSE'S ESTATE.

In survival statute action arising out of accident caused by husband which killed both the husband and wife, wife's estate was entitled to the full amount of future earnings which she would have earned during the marriage. *Vail v. Toftness*, 51 Wn. App. 318, 753 P.2d 553 (1988).

FUTURE ECONOMIC LOSS.

-- ACTION UNDER FEDERAL LAW.

The estate of Washington decedent is entitled to recover for future economic loss in a suit brought under the Death on the High Seas Act (former 46 U.S.C.S. § 761 et seq.). *Muirhead v. Pacific Inland Nav., Inc.*, 378 F. Supp. 361 (W.D. Wash. 1974).

INSTANTANEOUS DEATH BY TORT.

A cause of action for a tort causing the instantaneous death of the victim survives to the personal representative of the victim. *Criscuola v. Andrews*, 82 Wn.2d 68, 507 P.2d 149 (1973).

LIMITATION ON DAMAGES.

-- DEATH FROM UNRELATED CAUSES.

Where an injured person dies from causes unrelated to the injury litigated, the personal representative cannot recover damages for diminished earning capacity beyond the date of death; the cause of action survives, but damages become fixed and recovery may be had only for the period between the date of the accident and the date of the death from unrelated causes. *Zimny v. Lovric*, 59 Wn. App. 737, 801 P.2d 259 (1990), review denied, 116 Wn.2d 1013, 807 P.2d 884 (1991).

-- PAIN AND SUFFERING.

Recovery under the survival statute is limited to the prospective net accumulations of the deceased and does not include damages for injuries personal to the individual and essentially representing pain and suffering. *Strickland v. Deaconess Hosp.*, 47 Wn. App. 262, 735 P.2d 74 (1987).

PAIN AND SUFFERING.

-- IN GENERAL.

A decedent's pain and suffering are recoverable elements of damages under the death-by-personal-injury statute in spite of language in the later-enacted general survival statute expressly excluding recovery for pain and suffering. *Bingaman v. Grays Harbor Community Hosp.*, 37 Wn. App. 825, 685 P.2d 1090 (1984), rev'd on other grounds, 103 Wn.2d 831, 699 P.2d 1230 (1985).

PRESUMPTION OF DUE CARE.

-- NOT APPLICABLE.

The presumption of due care does not apply where the testimony of the injured party has nothing to do with the issue of the negligence of the decedent. *Frothinger v. Serier*, 57 Wn.2d 780, 360 P.2d 140 (1961).

PROOF.

-- ENRICHMENT OF ESTATE.

Enrichment of estate not necessary in action under prior law. *Barnum v. Jackson*, 165 Wash. 347, 5 P.2d 497 (1931); *Whatcom County v. Schuman*, 12 Wn.2d 290, 121 P.2d 378 (1942).

-- NEGLIGENCE STANDARD.

This section does not change the usual rule that the burden on the plaintiff is to prove negligence by a preponderance of the evidence, except that such proof must be established by competent evidence other than the testimony of injured parties. *Frothinger v. Serier*, 57 Wn.2d 780, 360 P.2d 140 (1961).

PROPERTY DAMAGE.

-- IN GENERAL.

Survival of actions for property damage is not limited to those instances resulting from direct physical injury. *Mickelson v. Williams*, 54 Wn.2d 293, 340 P.2d 770 (1959), rev'd on other grounds, 50 Wn.2d 402, 312 P.2d 656 (1957).

-- ASSIGNABILITY OF CLAIM.

Under prior law, tort claim for damages to property was assignable. *Cooper v. Runnels*, 48 Wn.2d 108, 291 P.2d 657 (1955).

-- AUTOMOBILE.

Under prior law, damage to automobile was recoverable by representative in tort action resulting from collision during decedent's life. *Boyd v. Sibold*, 7 Wn.2d 279, 109 P.2d 535 (1941).

-- CHATTELS.

Chattels may be destroyed without being converted, and converted without being destroyed. *Barnum v. Jackson*, 165 Wash. 347, 5 P.2d 497 (1931).

-- DESTRUCTION.

"Destroyed" does not necessarily mean annihilated. *Barnum v. Jackson*, 165 Wash. 347, 5 P.2d 497 (1931).

-- MOTOR VEHICLES.

Prior law included action for injury to truck and trailer. *West Coast Transp. Co. v. Landin*, 187 Wash. 556, 60 P.2d 704 (1936).

PURPOSE.

This section, passed by the legislature in 1961, was fashioned to remedy confusion that had arisen under predecessor statutes: this section was made to state, unequivocally, that all causes of action survive the death of either party. *Cavazos v. Franklin*, 73 Wn. App. 116, 867 P.2d 674 (1994).

SEPARATE CAUSE OF ACTION.

A claim for damages to a decedent or the decedent's estate is dependent upon the survival statutes to continue the injured person's claim after the death as an asset of his estate; a claim arising out of the same wrongful act, for wrongful death for the benefit of the decedent's heirs or next of kin, is not one that belonged to the decedent, but is a new cause of action created by statute and based upon the death itself. *Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (1969).

SPECIAL SURVIVAL STATUTE DISTINGUISHED.

Argument was rejected that the general survival statute, *RCW 4.20.046(1)*, applied only where the decedent's injuries did not cause the decedent's death (unlike the special survival statute, *RCW 4.20.060*); defendant also unsuccessfully

argued that *RCW 4.20.046(1)* required that the decedent be survived by statutory beneficiaries in order for the estate to recover on his behalf. *Harms v. Lockheed Martin Corp.*, -- F. Supp. 2d -- (W.D. Wash. Sept. 27, 2007).

Under the general survival statute, the action which survives is for the benefit of the estate and there is no recovery for pain and suffering; under the special survival or death by personal injury statute, the personal representative brings the action for the benefit of certain beneficiaries and damages for pain and suffering are allowed. *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986).

TORT ACTIONS.

Prior law provided for survival of limited classes of tort actions in estate's favor. *Muir v. Kessinger*, 35 F. Supp. 116 (E.D. Wash. 1940).

RESEARCH REFERENCES

GONZAGA LAW REVIEW.

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Wrongful death and survival actions in Washington. 6 *Gonz. L. Rev.* 314.

UNIVERSITY OF PUGET SOUND LAW REVIEW.

Liability for prenatal harm in the workplace: the need for reform., 17 *U. Puget Sound L. Rev.* 283.

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Survivability of noneconomic damages for tortious death in Washington. 21 *Seattle U. L. Rev.* 625 (1998).

Prosecuting pregnant women: Should Washington take the next step? 21 *Seattle U. L. Rev.* 133 (1997).

WASHINGTON LAW REVIEW.

Measuring damages in survival actions for tortious death. 47 *Wash. L. Rev.* 609.

Determination of time of taking of navigation easement. 41 *Wash. L. Rev.* 574.

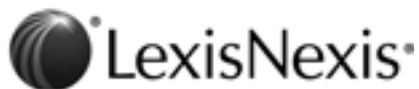
Admissibility of blood test in civil action, effect of tortfeasor's death. 40 *Wash. L. Rev.* 375.

Legislation allowing survival of actions. 36 *Wash. L. Rev.* 331.

Presumption of due care by decedent. 29 *Wash. L. Rev.* 79.

Survival of actions against deceased tortfeasor. 8 *Wash. L. Rev.* 201.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



LEXSTAT REV. CODE WASH. (ARCW) § 4.20.060

ANNOTATED REVISED CODE OF WASHINGTON
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*** Statutes current through the entire 2009 Regular Session (2009 c 580) ***
*** Annotations current through June 11, 2009 ***

TITLE 4. CIVIL PROCEDURE
CHAPTER 4.20. SURVIVAL OF ACTIONS

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 4.20.060 (2009)

§ 4.20.060. Action for personal injury survives to surviving spouse, state registered domestic partner, child, stepchildren, or heirs

No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse, state registered domestic partner, or child living, including stepchildren, or leaving no surviving spouse, state registered domestic partner, or such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters, or brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse or state registered domestic partner, or in favor of the surviving spouse or state registered domestic partner and such children, or if no surviving spouse or state registered domestic partner, in favor of such child or children, or if no surviving spouse, state registered domestic partner, or such child or children, then in favor of the decedent's parents, sisters, or brothers who may be dependent upon such person for support, and resident in the United States at the time of decedent's death.

HISTORY: 2007 c 156 § 30; 1985 c 139 § 2; 1973 1st ex.s. c 154 § 3; 1927 c 156 § 1; 1909 c 144 § 1; Code 1881 § 18; 1854 p 220 § 495; RRS § 194.

NOTES: SEVERABILITY -- 1973 1ST EX.S. C 154: See note following *RCW 2.12.030*.

EFFECT OF AMENDMENTS.

2007 c 156 § 30, effective July 22, 2007, added "state registered domestic partner" throughout the section.

JUDICIAL DECISIONS

ANALYSIS

Applicability

--In general

- Minor children
- Stepchildren
- Concurrent causes of action
- Damages
 - In general
- Apportionment
- Enjoyment of life
- Future earnings
- Measure of recovery
- Pain and suffering
- Defenses
 - Not "wrongful."
 - Suicide
- Dependency
 - In general
- Jury question
- Not shown
- Occasional contributions
- Partial
- Promise held insufficient
- Receipt of wages
- Showing by parents
- Discovery rule
- Evidence
 - Grounds for new trial
 - Not error
- Joinder of actions
- Judgment nunc pro tunc
- Liberal construction
- Limitations period
- Mootness of appeal
- Preemption by federal law
- Proper parties
 - Personal representative
- Purpose
- Recovery not warranted
 - In general
 - Negligence of party
- Release and satisfaction
- Separate causes of action
- Settlement
 - Apportionment
 - Spousal separation
 - Vacation held proper
- Survival statute
- When action accrues

APPLICABILITY.

-- IN GENERAL.

This section is not limited to injuries to male persons. *Thompson v. Seattle, R. & S. Ry.*, 71 Wash. 436, 128 P. 1070 (1912).

-- MINOR CHILDREN.

Widow's election to take under workers' compensation act for herself and minor sons under sixteen does not preclude action under this section by minor children over sixteen. *State v. Vinther*, 183 Wash. 350, 48 P.2d 915 (1935), aff'd, 186 Wn. 691, 58 P.2d 357 (1936); *State v. Vinther*, 186 Wash. 691, 58 P.2d 357 (1936).

-- STEPCHILDREN.

Stepchildren are not protected by the survival statute. *Klossner v. San Juan County*, 93 Wn.2d 42, 605 P.2d 330 (1980).

CONCURRENT CAUSES OF ACTION.

Actions under this section and RCW 4.20.010 may be prosecuted concurrently. *Machek v. City of Seattle*, 118 Wash. 42, 203 P. 25 (1921).

Actions under this section and RCW 4.20.010 may be brought concurrently with action under RCW 4.24.010, giving parent cause of action for death of minor child. *Hedrick v. Ilwaco Ry. & Nav. Co.*, 4 Wash. 400, 30 P. 714 (1892), overruled on other grounds, *Lockhart v. Besel*, 71 Wn.2d 118, 426 P.2d 605 (1967); *Oregon-Washington R. & Nav. Co. v. Roman*, 293 F. 666 (9th Cir. 1923).

DAMAGES.

-- IN GENERAL.

In addition to loss of net earnings, a survival action also authorizes an award to the estate for those damages recoverable in a garden variety tort action: (1) Medical and hospital expenses; (2) Funeral expenses; (3) Property damage; (4) Pain and suffering; and fear of injury or death. *Chapple v. Ganger*, 851 F. Supp. 1481 (E.D. Wash. 1994).

Under this section and RCW 4.20.046, all causes of action of a decedent survive to his personal representative, who may maintain an action for damages thereon, except those elements of damage specifically excluded in RCW 4.20.046 i.e., pain and suffering, anxiety, emotional distress, and humiliation personal to and suffered by the decedent. *Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (1969).

-- APPORTIONMENT.

Pain and suffering damages awarded under this statute are apportioned among the statutory beneficiaries according to the state law of descent and distribution. *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986).

-- ENJOYMENT OF LIFE.

Damage award rendered against the doctor was reversed and remanded because loss of enjoyment of life was not authorized under Washington's survival statutes, RCW 4.20.046 and 4.20.060, when the decedent died shortly after surgery without conscious pain or awareness that she had been fatally injured. *Shigaki v. Broudy*, 114 Wn. App. 545, 59 P.3d 126 (2002), aff'd, 151 Wn.2d 750, 92 P.3d 192 (2004).

The survival statutes govern only "predeath damages" and do not create claims on behalf of dead persons for the loss of life itself. *Shigaki v. Broudy*, 114 Wn. App. 545, 59 P.3d 126 (2002), aff'd, 151 Wn.2d 750, 92 P.3d 192 (2004).

-- FUTURE EARNINGS.

The likelihood that decedent would have received a promotion, and commensurate increase in salary, was allowed to be included in the calculation of loss of net earnings in a wrongful death suit. *Chapple v. Ganger*, 851 F. Supp. 1481 (E.D. Wash. 1994).

-- MEASURE OF RECOVERY.

The measure of recovery under this section is the amount which deceased would have recovered had he lived, to be

computed from the time of injury to the time of death. *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 P. 795 (1910); *Thompson v. Seattle, R. & S. Ry.*, 71 Wash. 436, 128 P. 1070 (1912); *Machek v. City of Seattle*, 118 Wash. 42, 203 P. 25 (1921).

-- PAIN AND SUFFERING.

Under the general survival statute, the action which survives is for the benefit of the estate and there is no recovery for pain and suffering; under the special survival or death by personal injury statute, the personal representative brings the action for the benefit of certain beneficiaries and damages for pain and suffering are allowed. *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986).

Where decedent left a surviving spouse and children, the personal representative suing under the tort survival statute was entitled to recover damages for the decedent's pain and suffering caused by the medical malpractice which resulted in decedent's death. *Bingaman v. Grays Harbor Community Hosp.*, 103 Wn.2d 831, 699 P.2d 1230 (1985).

Recovery for pain and suffering in survival action can only be for conscious pain and suffering. *Bingaman v. Grays Harbor Community Hosp.*, 37 Wn. App. 825, 685 P.2d 1090 (1984), rev'd on other grounds, 103 Wn.2d 831, 699 P.2d 1230 (1985).

A decedent's pain and suffering are recoverable elements of damages under the death-by-personal-injury statute in spite of language in the later-enacted general survival statute expressly excluding recovery for pain and suffering. *Bingaman v. Grays Harbor Community Hosp.*, 37 Wn. App. 825, 685 P.2d 1090 (1984), rev'd on other grounds, 103 Wn.2d 831, 699 P.2d 1230 (1985).

Decedent's pain and suffering are recoverable elements of damages under this statute if injury causes death and beneficiaries exist. *Walton v. Absher Constr. Co.*, 101 Wn.2d 238, 676 P.2d 1002 (1984).

Recovery for pain, suffering and medical expenses denied. *Boyd v. Sibold*, 7 Wn.2d 279, 109 P.2d 535 (1941).

No recovery under this section for mental suffering, pain and anguish sustained by parents as result of child's death. *Penoza v. Northern Pac. Ry.*, 215 F. 200 (W.D. Wash. 1914).

DEFENSES.

-- NOT "WRONGFUL."

Where pursuant to statute police officers responding to a domestic violence situation were required to arrest the decedent and were authorized to do so without a warrant, because they acted reasonably, they were immune from liability; the facts did not support the "wrongful" element of the wrongful death and survival actions as a matter of law. *Estate of Lee v. City of Spokane*, 101 Wn. App. 158, 2 P.3d 979 (2000).

-- SUICIDE.

Proof that deceased knew what he was doing is defense to action against perpetrator of injuries causing deceased's despondency. *Arsnow v. Red Top Cab Co.*, 159 Wash. 137, 292 P. 436 (1930).

DEPENDENCY.

-- IN GENERAL.

Under the special survival statute, surviving spouses and children do not need to establish their dependency on a decedent in order to bring an action or recover damages for the decedent's pain and suffering; the dependency qualification of the statute applies only to parents, sisters and brothers of a decedent. *Higbee v. Shorewood Osteopathic Hosp.*, 105 Wn.2d 33, 711 P.2d 306 (1985).

-- JURY QUESTION.

Dependency is a question for the jury where all father's income required to carry encumbrances and pay taxes, and deceased son had contributed small amounts to his support. *Mitchell v. Rice*, 183 Wash. 402, 48 P.2d 949 (1935).

-- NOT SHOWN.

Plaintiffs could not assert any wrongful death, *RCW 4.20.010* and *RCW 4.20.020*, or survival causes of action, *RCW 4.20.046* and *RCW 4.20.060*, because neither the parents nor the sibling were financially dependant on the decedent at the time of his death in the county jail. *Rentz v. Spokane County*, 438 F. Supp. 2d 1252 (E.D. Wash. 2006).

Washington's statutory causes of action for wrongful death and survival set forth in *RCW 4.20.010*, *4.20.020*, *4.20.046*, and *4.20.060* required parents to be financially dependent on a deceased adult child in order for the parents to recover; however, given the fundamental policies behind 42 U.S.C.S. §§ 1983 and 1988, including the compensation of persons injured by the deprivation of federal rights and the prevention of abuses of power by those acting under color of law, the wrongful death and survival statutes did not bar parents' action against a police officer for excessive force that allegedly resulted in their son's death. *Loomis v. City of Puyallup Police Dep't*, -- F. Supp. 2d -- (May 3, 2005).

Parents not dependent upon child whose earnings did not support herself. *Grant v. Libby, McNeill & Libby*, 145 Wash. 31, 258 P. 842 (1927).

-- OCCASIONAL CONTRIBUTIONS.

Occasional contributions in the nature of gifts to parents who support themselves does not meet the dependency requirement. *Bortle v. Northern Pac. Ry.*, 60 Wash. 552, 111 P. 788 (1910).

-- PARTIAL.

Partial dependency is sufficient if substantial. *Bortle v. Northern Pac. Ry.*, 60 Wash. 552, 111 P. 788 (1910); *Cook v. Rafferty*, 200 Wash. 234, 93 P.2d 376 (1934).

-- PROMISE HELD INSUFFICIENT.

Promise of deceased child to support parents does not alone show dependency. *Kanton v. Kelly*, 65 Wash. 614, 118 P. 890 (1911), aff'd, 71 Wn. 696, 127 P. 568 (1912).

-- RECEIPT OF WAGES.

Fact that parents received wages of deceased child is not sufficient proof of actual dependency. *Kanton v. Kelly*, 65 Wash. 614, 118 P. 890 (1911), aff'd, 71 Wn. 696, 127 P. 568 (1912).

-- SHOWING BY PARENTS.

Parents must show actual dependency to recover under this section. *Bortle v. Northern Pac. Ry.*, 60 Wash. 552, 111 P. 788 (1910); *Kanton v. Kelly*, 65 Wash. 614, 118 P. 890 (1911), aff'd, 71 Wn. 696, 127 P. 568 (1912); *Mitchell v. Rice*, 183 Wash. 402, 48 P.2d 949 (1935).

DISCOVERY RULE.

The "discovery" rule set forth in *Ohler v. Tacoma Gen. Hosp.*, 92 Wn. 2d 507, 598 P.2d 1358 (1979), and *Sahlie v. Johns-Manville Corp.*, 99 Wn. 2d 550, 663 P.2d 473 (1983), applied to the Washington survival and wrongful death statutes so as to toll the applicable statutes of limitation until such time as plaintiff, as surviving spouse and personal representative of the decedent, discovered or should reasonably have discovered the essential elements of her possible causes of action. *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687 (1985).

EVIDENCE.

-- GROUNDS FOR NEW TRIAL.

Admission of evidence as to physical condition of wife and child of deceased is ground for new trial. *Seattle Elec. Co. v. Hartless*, 144 F. 379 (9th Cir. 1906).

-- NOT ERROR.

Showing to jury of a year-old scar on arm injured in accident which caused death of deceased's son was not reversible error. *Heath v. Stephens*, 144 Wash. 440, 258 P. 321 (1927).

JOINDER OF ACTIONS.

Actions under this section and *RCW 4.20.010*, wrongful death statute, may be joined. *Whiting v. City of Seattle*, 144 Wash. 668, 258 P. 824 (1927).

JUDGMENT NUNC PRO TUNC.

If jury verdict entered prior to death of a party, and entry of judgment is delayed by court or opposing party, judgment will be entered nunc pro tunc. *Garrett v. Byerly*, 155 Wash. 351, 284 P. 343, overruled on other grounds, *Martin v. Hadenfeldt*, 157 Wn. 563, 289 P. 533 (1930); *Nenezich v. Elich*, 183 Wash. 657, 49 P.2d 33 (1935); *Carl v. Department of Labor & Indus.*, 38 Wn.2d 890, 234 P.2d 487 (1951).

LIBERAL CONSTRUCTION.

This section, being remedial in nature, is to be liberally construed although in derogation of common law. *Robinson v. Baltimore & Seattle Mining & Reduction Co.*, 26 Wash. 484, 67 P. 274 (1901); *Whittlesey v. City of Seattle*, 94 Wash. 645, 163 P. 193 (1917); *Cook v. Rafferty*, 200 Wash. 234, 93 P.2d 376 (1939).

LIMITATIONS PERIOD.

Three-year statute of limitations applies to actions under this section. *Robinson v. Baltimore & Seattle Mining & Reduction Co.*, 26 Wash. 484, 67 P. 274 (1901); *Horner v. Pierce County*, 111 Wash. 386, 191 P. 396 (1920); *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P.2d 943 (1932).

MOOTNESS OF APPEAL.

If the plaintiff in a personal injury action dies from causes not connected with the accident during the pendency of an appeal from the trial court, the appeal becomes moot. *Marvin v. McCall & McDonald, Inc.*, 57 Wn.2d 906, 357 P.2d 173 (1960).

PREEMPTION BY FEDERAL LAW.

By passage of the Jones Act (former 46 U.S.C. § 688, see now 46 U.S.C. 30104), Congress has pre-empted the field and provided the exclusive remedy available to the personal representative of a deceased seaman against his employer and the state wrongful death or survival statutes are therefore not operative to provide a remedy. *Harrison v. A Bar A Ranch, Inc.*, 63 Wn.2d 592, 388 P.2d 531 (1964).

PROPER PARTIES.

-- PERSONAL REPRESENTATIVE.

Personal representative is the proper party to action under this section, not widow in individual capacity. *Carl v. Department of Labor & Indus.*, 38 Wn.2d 890, 234 P.2d 487 (1951).

PURPOSE.

The purpose of damages under the survival statute is to reimburse the decedent's estate for the monetary losses it sustained as a result of the untimely death. *Chapple v. Ganger*, 851 F. Supp. 1481 (E.D. Wash. 1994).

RECOVERY NOT WARRANTED.

-- IN GENERAL.

Post-death damages for loss of enjoyment of life (LOEL) were not recoverable by a decedent's estate under Washington's survival statutes where no language in the 1993 amendment allowed the recovery of damages for any LOEL or shortened life expectancy that a decedent did not suffer during life. *Estate of Otani v. Broudy*, 151 Wn.2d 750, 92 P.3d 192 (2004).

-- NEGLIGENCE OF PARTY.

Where husband and wife were killed in an automobile accident caused by the husband, there could be no recovery under the wrongful death statute or the special survival statute because the wife had no surviving statutory beneficiaries and because the husband's children by a previous marriage could not recover due to the husband's negligence in causing the accident. *Vail v. Tofness*, 51 Wn. App. 318, 753 P.2d 553 (1988).

RELEASE AND SATISFACTION.

A release and satisfaction by the deceased, of right of action for injuries sustained, bars the right of the beneficiaries under either RCW 4.20.010 or this section. *Brodie v. Washington Water Power Co.*, 92 Wash. 574, 159 P. 791 (1916).

SEPARATE CAUSES OF ACTION.

Actions under RCW 4.20.010 and this section are distinct and separate. *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 P. 795 (1910); *Brodie v. Washington Water Power Co.*, 92 Wash. 574, 159 P. 791 (1916); *Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P.2d 193 (1935).

SETTLEMENT.

-- APPORTIONMENT.

When a trial court must apportion funds from a single settlement fund resolving claims under the wrongful death statute and two survival statutes, the fund must first be apportioned between the three actions; the proceeds must then be apportioned according to the appropriate method for each cause of action. *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986).

-- SPOUSAL SEPARATION.

If husband and his deceased wife had separated with no intention of ever resuming the marital relationship, he would be excluded from receiving any part of settlement in wrongful death and survival action. *Parrish v. Jones*, 44 Wn. App. 449, 722 P.2d 878 (1986).

-- VACATION HELD PROPER.

Order setting aside a stipulated settlement and judgment between the department of corrections (DOC) and the department of labor and industries as assignee of wife's wrongful death action against the DOC for the death of her husband was proper, since the excessively broad release provisions in the order improperly affected the claims of the children of the deceased and therefore constituted a "mistake" within the meaning of the court rule authorizing vacation of judgments. *Ebsary v. Pioneer Human Servs.*, 59 Wn. App. 218, 796 P.2d 769 (1990).

SURVIVAL STATUTE.

This section does not create a cause of action, but is survival statute, merely preserving existing right. *Whittlesey v. City of Seattle*, 94 Wash. 645, 163 P. 193 (1917).

WHEN ACTION ACCRUES.

Cause of action accrues at time of injury. *Horner v. Pierce County*, 111 Wash. 386, 191 P. 396 (1920); *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P.2d 943 (1932).

RESEARCH REFERENCES

GONZAGA LAW REVIEW.

Discovery rule is applied to wrongful death and survival causes of action. 21 *Gonz. L. Rev.* 261.
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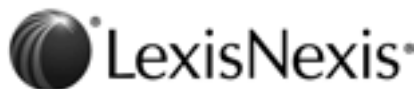
WASHINGTON LAW REVIEW.

Wrongful death of a minor child: the changing parental injury. *43 Wash. L. Rev.* 654.

Recovery for suicide. *37 Wash. L. Rev.* 256.

Damages in wrongful death actions. *35 Wash. L. Rev.* 441.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



LEXSTAT REV. CODE WASH. (ARCW) § 4.24.010

ANNOTATED REVISED CODE OF WASHINGTON
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*** Statutes current through the entire 2009 Regular Session (2009 c 580) ***
*** Annotations current through June 11, 2009 ***

TITLE 4. CIVIL PROCEDURE
CHAPTER 4.24. SPECIAL RIGHTS OF ACTION AND SPECIAL IMMUNITIES

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 4.24.010 (2009)

§ 4.24.010. Action for injury or death of child

A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable.

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent: PROVIDED, That notice shall be required only if parentage has been duly established.

Such notice shall be in compliance with the statutory requirements for a summons. Such notice shall state that the other parent must join as a party to the suit within twenty days or the right to recover damages under this section shall be barred. Failure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the suit.

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

HISTORY: 1998 c 237 § 2; 1973 1st ex.s. c 154 § 4; 1967 ex.s. c 81 § 1; 1927 c 191 § 1; Code 1881 § 9; 1877 p 5 § 9; 1873 p 5 § 10; 1869 p 4 § 9; RRS § 184.

NOTES: INTENT -- 1998 C 237: "It is the intent of this act to address the constitutional issue of equal protection addressed by the Washington state supreme court in *Guard v. Jackson*, 132 Wn.2d 660 (1997). The legislature intends to

provide a civil cause of action for wrongful injury or death of a minor child to a mother or father, or both, if the mother or father has had significant involvement in the child's life, including but not limited to, emotional, psychological, or financial support." [1998 c 237 § 1.]

SEVERABILITY -- 1973 1ST EX.S. C 154: See note following *RCW 2.12.030*.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality

--In general

--Regular contribution proviso

--Support proviso

Applicability

Cause of action

--Created

--Dismissed

--Nature

--Not precluded

--Scope

Damages

Desertion by parent

Evidence

Exclusivity of remedy

Fetus

Financial dependence

--Constitutionality

--Based on current circumstances

--Condition precedent

Grandparents

Illegitimate child

Imputed negligence

Joinder

Mental anguish and bereavement

Underinsured motorists

Validity of section

CONSTITUTIONALITY.

-- IN GENERAL.

RCW 4.24.010 does not violate the constitutional guarantee of equal protection as the lines drawn by the statute bear a rational relationship to its purpose, it treats all persons in each category of beneficiaries the same, and there is a reasonable basis for distinguishing the parents of minor children from the parents of adult children. *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004).

-- REGULAR CONTRIBUTION PROVISIO.

The phrase "regularly contributed," as used in this section, is not unconstitutionally vague. Defendant's record of child support payments in this case was not, by any understanding of the term, "regular." His uncertainty as to the exact point at which the statute would apply to a father's actions does not compel reversal on vagueness grounds. *Guard v. Jackson*, 83 Wn. App. 325, 921 P.2d 544 (1996), aff'd, 132 Wn.2d 660, 940 P.2d 642 (1997).

-- SUPPORT PROVISIO.

In requiring only the father, and not the mother, to have contributed regularly to the financial support of the child before the father can join in the action, this section violates the Washington Equal Rights Amendment, *Wa. Const., Art. XXXI, § 1. Guard v. Jackson, 132 Wn.2d 660, 940 P.2d 642 (1997).*

Court struck from the first paragraph of this section the words "and the father has regularly contributed to the child's support" as unconstitutional. But eliminating this support proviso does not render the statute useless, as it is incidental to the general purpose of permitting parents to recover damages for a child's wrongful death. *Guard v. Jackson, 83 Wn. App. 325, 921 P.2d 544 (1996), aff'd, 132 Wn.2d 660, 940 P.2d 642 (1997).*

In the context of statutes dealing with parent-child relations, "support" generally means providing for a child's needs for housing, food, clothing, education and health care. Court therefore construed this section as requiring the father to contribute regularly to the child's material well-being. A non-custodial father under a court order to make child support payments can meet the requirement by showing compliance with the order. *Guard v. Jackson, 83 Wn. App. 325, 921 P.2d 544 (1996), aff'd, 132 Wn.2d 660, 940 P.2d 642 (1997).*

APPLICABILITY.

This section not available to personal representative of deceased child. *Winfree v. Northern Pac. Ry., 173 F. 65 (9th Cir. 1909), aff'd, 227 U.S. 296, 33 S. Ct. 273, 57 L. Ed. 518 (1913).*

CAUSE OF ACTION.**-- CREATED.**

This section is one creating a right of action and is not one to be construed as prescribing any measure of recovery. *Northern Pac. Ry. v. Everett, 232 F.2d 488 (9th Cir. 1956).*

This section creates new right of action in persons enumerated. *Upchurch v. Hubbard, 29 Wn.2d 559, 188 P.2d 82 (1947), overruled on other grounds, Sargent v. Selvar, 46 Wn.2d 271, 280 P.2d 683 (1955).*

-- DISMISSED.

The failure to attend trial is both a failure to prosecute and a failure to comply with the order setting trial. Given that party had notice of both the requirements of this section and notice of the trial, and chose not to attend, case was dismissed. *Alexander v. Food Servs. of Am., Inc., 76 Wn. App. 425, 886 P.2d 231 (1994).*

-- NATURE.

Statement of intent to the 1998 amendment to this section defines the term "support" as including emotional or psychological support and overrules the case law definition of "support" in *Guard v. Jackson, 921 P.2d 544 (1996)*; therefore, a father who entered evidence of his close relationship with his son, but who missed child support payments, but was deprived of his right to recover for his son's death by a jury instruction under the *Guard* definition and was entitled to have a new trial or to have the trial court determine the issue as a matter of law. *Postema v. Postema Enters., Inc., 118 Wn. App. 185, 72 P.3d 1122 (2003), review denied, 151 Wn.2d 1011, 89 P.3d 712 (2004).*

This statute clearly indicates that the parents together, whether married or not, have only one cause of action. *Wrenn v. Spinnaker Bay Homeowners Ass'n, 60 Wn. App. 400, 804 P.2d 645 (1991).*

The 1967 amendment to this section intended that recovery could be granted for several integral elements of damage including loss of love, loss of companionship, and injury to or destruction of the parent-child relationship. *Wilson v. Lund, 80 Wn.2d 91, 491 P.2d 1287 (1971).*

-- NOT PRECLUDED.

Fact that deceased son was an adult and had a daughter did not preclude parents from maintaining an action for wrongful death if they were dependent on their son for support. *Masunaga v. Gapsin, 52 Wn. App. 61, 757 P.2d 550 (1988).*

Prior action by guardian for pain and suffering and disability no bar to action by parent for cost wages and expenses of

medical care and treatment. *Harris v. Puget Sound Elec. Ry.*, 52 Wash. 299, 100 P. 841 (1909).

Action for loss of services under this section not precluded by separate suit on behalf of deceased's estate for wrongful death. *Hedrick v. Ilwaco Ry. & Nav. Co.*, 4 Wash. 400, 30 P. 714 (1892), overruled on other grounds, *Lockhart v. Besel*, 71 Wn.2d 118, 426 P.2d 605 (1967); *Harris v. Puget Sound Elec. Ry.*, 52 Wash. 299, 100 P. 841 (1909); *Meshner v. Osborne*, 75 Wash. 439, 134 P. 1092 (1913); *Bruner v. Little*, 97 Wash. 319, 166 P. 1166 (1917).

-- SCOPE.

The torts of outrage and negligent infliction of emotional distress originate in the common law; they do not arise from the wrongful death or child death statutes or from any other legislative enactment. *Shoemaker v. St. Joseph Hosp. & Health Care Ctr.*, 56 Wn. App. 575, 784 P.2d 562, review denied, 114 Wn.2d 1025, 792 P.2d 500 (1990).

Under this section a divorced mother who had custody of a deceased child is entitled to maintain an action based on the statute even though the father was living and supplying all financial support for this child, since the legislature, in enacting the statute, created a substantive right of recovery running to both parents. *Wilson v. Lund*, 74 Wn.2d 945, 447 P.2d 718 (1968), (decided prior to 1998 amendment of section).

DAMAGES.

A parent may maintain an action as plaintiff for the medical, hospital, and medication expenses incurred, as well as the loss of services and support, love and companionship of the child and the injury to or destruction of the parent-child relationship. *Chapple v. Ganger*, 851 F. Supp. 1481 (E.D. Wash. 1994).

This section authorizes an award of damages for the loss of parent-child consortium resulting from the injury or death of a minor child; to maintain such an action, there must be evidence of an injury to the child with resulting damages. *Chapple v. Ganger*, 851 F. Supp. 1481 (E.D. Wash. 1994).

Nonpecuniary damage award to parents of injured child of \$150,000 for loss of the child's companionship and \$150,000 for damage to the parent-child relationship was not excessive where the child when mature is likely to read at a first-grade level and be unable to write, unable to walk, and unable to be free of assistance and supervision. *Colleen v. United States*, 843 F.2d 329 (9th Cir. 1987).

Damages to a parent for the bodily injury suffered by a child are indirect and arise as a consequence of the harm suffered by the child, not as an independent injury. *West Am. Ins. Co. v. Buchanan*, 11 Wn. App. 823, 525 P.2d 831 (1974).

Recoverable damages under this provision are not limited to the period of the child's minority. *Balmer v. Dilley*, 81 Wn.2d 367, 502 P.2d 456 (1972).

"Loss of love and companionship" and "injury to the parent-child relationship" under this provision are separate and distinct items of compensable damage and recovery may be had for each. *Hinzman v. Palmanteer*, 81 Wn.2d 327, 501 P.2d 1228 (1972).

The 1967 amendment to this section does not confine damage recovery in actions under this section to loss of companionship only. *Wilson v. Lund*, 80 Wn.2d 91, 491 P.2d 1287 (1971).

In adopting loss of companionship as a proper element of damages in an action for the wrongful death of a child, the Supreme Court did not eliminate loss of services as a proper element, but an award of damages based upon such latter element must find some support in the evidence; hence, a jury award of \$15,000 for loss of companionship of a 20 month old deceased child was upheld, while an award of \$15,000 for loss of services, with no evidence to sustain the plaintiffs' claim for such loss, was not upheld. *Clark v. Icicle Irrigation Dist.*, 72 Wn.2d 201, 432 P.2d 541 (1967).

The measure of damages allowable under this statute for the wrongful death of a minor child includes, in addition to the pecuniary value of the child's services, the loss of companionship of the child during his minority without giving any consideration for grief, mental anguish, or suffering of the parents by reason of the child's wrongful death. *Lockhart v. Besel*, 71 Wn.2d 112, 426 P.2d 605 (1967).

The use of the term "substantial damages" in an instruction as to the measure of damages allowable in an action for the wrongful death of a minor child is neither necessary nor proper. *Lockhart v. Besel*, 71 Wn.2d 112, 426 P.2d 605 (1967).

By the enactment of this statute permitting parents to bring an action for the wrongful death of their minor child, the legislature intended that recovery for more than nominal damages should be allowed. *Lockhart v. Besel*, 71 Wn.2d 112,

426 P.2d 605 (1967).

While parents have the right to maintain an action for the value of services which would have been performed by a child incapacitated by an injury, they are not entitled to recovery for such loss without proof that some services would have been performed during the minor's incapacity, notwithstanding that a judgment may be obtained for the wrongful death of a child without proof of special pecuniary damages. *Lofgren v. Western Wash. Corp. of Seventh Day Adventists*, 65 Wn.2d 144, 396 P.2d 139 (1964).

Medical and general expenses recoverable under this section. *Swenland v. Gregory*, 118 Wash. 640, 204 P. 597 (1922).

Factors of measure of damages under this section are age, health and capacity of child and situation of parents. *Atrops v. Costello*, 8 Wash. 149, 35 P. 620 (1894); *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 P. 492 (1916); *Blair v. Kilbourne*, 121 Wash. 93, 207 P. 953 (1922); *Skidmore v. Seattle*, 138 Wash. 340, 244 P. 545 (1926).

Punitive damages may not be awarded in action under this section. *Atrops v. Costello*, 8 Wash. 149, 35 P. 620 (1894); *Woodhouse v. Powles*, 43 Wash. 617, 86 P. 1063 (1906).

DESERTION BY PARENT.

At the time of the vehicle-bicycle accident, the child (who was severely injured) was living with her father (not a party) and the mother was living at a homeless shelter due to a history of drug addiction and had not had contact with her child for quite some time. Under RCW 4.24.010, a parent had to have "significant involvement" in the child's life "at the time of the accident," in order to recover, and the trial court did not err in determining that the mother lacked standing. *Blumenshein v. Voelker*, 124 Wn. App. 129, 100 P.3d 344 (2004).

Mother, in case of desertion of family by father, is proper party plaintiff in action under this section. *Clark v. Northern Pac. Ry.*, 29 Wash. 139, 69 P. 636 (1902); *Norton v. City of Seattle*, 113 Wash. 408, 194 P. 373 (1920).

EVIDENCE.

Showing of defendant's negligence is required for recovery under this section. *Deffland v. Spokane Portland Cement Co.*, 26 Wn.2d 891, 176 P.2d 311 (1947); *Skeels v. Davidson*, 18 Wn.2d 358, 139 P.2d 301 (1943), overruled on other grounds, *Lockhart v. Besel*, 71 Wn.2d 112, 426 P.2d 605 (1967).

Evidence of other accidents not admissible in action for death of youngster based on negligence of swimming pool attendant. *Corum v. Blomquist*, 116 Wash. 196, 198 P. 727 (1921).

Evidence of deceased son's intent to support parents is properly admitted. *Dean v. Oregon R.R. & Nav. Co.*, 38 Wash. 565, 80 P. 842 (1905).

Evidence relative to expense of maintenance and education admissible on question of damages. *Atrops v. Costello*, 8 Wash. 149, 35 P. 620 (1894).

EXCLUSIVITY OF REMEDY.

That workers' compensation act bars claim under child death statute does not offend due process or equal protection. *West v. Zeibell*, 87 Wn.2d 198, 550 P.2d 522 (1976).

Exclusive remedy provisions of industrial insurance act preclude a claim for damages under the child death statute. *Ledesma v. A.F. Murch Co.*, 87 Wn.2d 203, 550 P.2d 506 (1976); *West v. Zeibell*, 87 Wn.2d 198, 550 P.2d 522 (1976).

Minor employed without a work permit is subject to exclusive remedy provisions of industrial insurance act. *Ledesma v. A.F. Murch Co.*, 87 Wn.2d 203, 550 P.2d 506 (1976).

FETUS.

Legislature did not indicate its intent to expand the meaning of "minor child" in this section to include a cause of action for recovery by the patient for the wrongful death of nonviable fetus. *Baum v. Burrington*, 119 Wn. App. 36, 79 P.3d 456 (2003), review denied, 151 Wn.2d 1035, 95 P.3d 758 (2004).

For purposes of this provision, a viable unborn fetus is a minor child. *Moen v. Hanson*, 85 Wn.2d 597, 537 P.2d 266 (1975).

There is no requirement that an unborn viable fetus survive to a live birth before dying in order to create a cause of action for wrongful death in its parents. *Moen v. Hanson*, 85 Wn.2d 597, 537 P.2d 266 (1975).

A wrongful death action for the parental bereavement occasioned by the loss of a viable unborn fetus is separate and distinct from any wrongful death action ensuing from the loss of the fetus' mother. *Moen v. Hanson*, 85 Wn.2d 597, 537 P.2d 266 (1975).

FINANCIAL DEPENDENCE.

-- CONSTITUTIONALITY.

The provision in the child death statute disqualifying nondependent parents of an adult child from claiming loss of consortium does not violate equal protection. *Shoemaker v. St. Joseph Hosp. & Health Care Ctr.*, 56 Wn. App. 575, 784 P.2d 562, review denied, 114 Wn.2d 1025, 792 P.2d 500 (1990).

-- BASED ON CURRENT CIRCUMSTANCES.

The financial dependence necessary to support a wrongful death action by parents of an adult child must be based on a current condition, not on a promise of future services or anticipated future dependence. *Masunaga v. Gapasin*, 57 Wn. App. 624, 790 P.2d 171, review denied, 115 Wn.2d 1012, 798 P.2d 780 (1990).

-- CONDITION PRECEDENT.

Financial dependence is a condition precedent to maintenance of a wrongful death action by parents of an adult child. *Masunaga v. Gapasin*, 57 Wn. App. 624, 790 P.2d 171, review denied, 115 Wn.2d 1012, 798 P.2d 780 (1990).

Under the wrongful death statutes, parents have no cause of action for the wrongful death of a child over 21 years of age unless they are dependent on the child for support. *Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (1969).

GRANDPARENTS.

Grandparents could not maintain individual actions against doctor based upon his care and treatment of their grandson. *Benoy v. Simons*, 66 Wn. App. 56, 831 P.2d 167, review denied, 120 Wn.2d 1014, 844 P.2d 435 (1992).

ILLEGITIMATE CHILD.

Mother of illegitimate child is proper party plaintiff in action under this section. *Goldmyer v. Van Bibber*, 130 Wash. 8, 225 P. 821 (1924), (decided prior to 1998 amendment of section).

IMPUTED NEGLIGENCE.

The contributory negligence of an adult delegated by a parent to exercise physical dominion over his child, is imputed to the parent in an action by the parent for the death of the child. *McCandless v. Inland N.W. Film Serv., Inc.*, 64 Wn.2d 523, 392 P.2d 613 (1964).

JOINDER.

Order barring father from claiming damages in a wrongful death action brought in his son's behalf by the mother was proper, where father filed notice with the court of his intention to join the action 3 days after the 20-day deadline for joinder and did not serve notice on the defendant until 2 years after the action was filed. *Wrenn v. Spinnaker Bay Homeowners Ass'n*, 60 Wn. App. 400, 804 P.2d 645 (1991).

MENTAL ANGUISH AND BEREAVEMENT.

This section does not permit recovery for mental anguish by a child for the wrongful death of his parent. *Pike v. United States*, 652 F.2d 31 (9th Cir. 1981).

A parent's bereavement over the wrongful death of a minor child creates a cause of action under this provision. *Moen v. Hanson*, 85 Wn.2d 597, 537 P.2d 266 (1975).

Damage for "loss of love" and "injury to or destruction of the parent-child relationship" includes recovery for parental grief, mental anguish and suffering as an element of damages intended by the legislature to be recoverable under the appropriate circumstances in cases involving the wrongful death of or injury to a child. *Wilson v. Lund*, 80 Wn.2d 91, 491 P.2d 1287 (1971).

UNDERINSURED MOTORISTS.

Coverage under the underinsured motorist provisions of policy for the loss of consortium of father's 10-year-old uninsured son was denied. *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 865 P.2d 560, review denied, 124 Wn.2d 1010, 879 P.2d 292 (1994).

An insured person is not allowed to recover underinsured motorist benefits under a policy whenever the person can point to a statute granting him a legal entitlement to damages stemming from injury to a relative, including loss of consortium of children and wrongful death of siblings and parents. *Allstate Ins. Co. v. Hammonds*, 72 Wn. App. 664, 865 P.2d 560, review denied, 124 Wn.2d 1010, 879 P.2d 292 (1994).

Mother was covered under the underinsured motorist provision of her insurance policy for the death of her minor son who was killed while knowingly riding in a stolen vehicle. *Grange Ins. Ass'n v. Hubbard*, 35 Wn. App. 407, 667 P.2d 121, review denied, 100 Wn.2d 1023 (1983).

A parent's cause of action for injury to a child is not based upon a bodily injury to the parent and, when arising as a result of the acts of an uninsured motorist, does not constitute a separate direct injury for purposes of a policy limit for bodily injury to one person. *West Am. Ins. Co. v. Buchanan*, 11 Wn. App. 823, 525 P.2d 831 (1974).

An insured is entitled to recover from his insurer, under RCW 48.22.030, damages arising under this section for the wrongful death of his minor children, when such minor children have been killed by tortious acts of an uninsured motorist. This includes damages for loss of love and companionship of the children and destruction of the parent-child relationship. *Brummett v. Grange Ins. Ass'n*, 4 Wn. App. 979, 485 P.2d 88 (1971).

VALIDITY OF SECTION.

This section was not repealed by later enactment of RCW 4.20.010 and 4.20.060. *Mesher v. Osborne*, 75 Wash. 439, 134 P. 1092 (1913).

RESEARCH REFERENCES

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Wrongful death and survival actions in Washington. 6 *Gonz. L. Rev.* 314.

Damages -- Wrongful death of a minor child -- The measure of recovery. 3 *Gonz. L. Rev.* 220.

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Liability for prenatal harm in the workplace: the need for reform. 17 *U. Puget Sound L. Rev.* 283.

Public policy over metaphysics: wrongful birth and wrongful life in *Harbeson v. Parke-Davis, Inc.* 8 *U. of Puget Sound L. Rev.* 511.

Wrongful death of the fetus: viability is not a viable distinction. 8 *U. of Puget Sound L. Rev.* 103.

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Flawed Justice: Limitation of Parental Remedies for the Loss of Consortium of Adult Children., 27 *Seattle U. L. Rev.* 941 (2004).

Survivability of noneconomic damages for tortious death in Washington. 21 *Seattle U. L. Rev.* 625 (1998).

Prosecuting pregnant women: Should Washington take the next step? 21 *Seattle U. L. Rev.* 133 (1997).

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Measuring damages in survival actions for tortious death. 47 *Wash. L. Rev.* 609.

Wrongful death of a minor child: the changing parental injury. 43 *Wash. L. Rev.* 654.

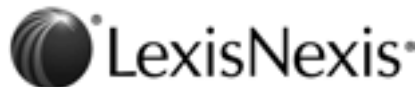
Damages in wrongful death actions. 35 *Wash. L. Rev.* 441.

Dependency of parent in action for death of child. 3 *Wash. L. Rev.* 54.

TEXTBOOKS AND TREATISES.

Washington Insurance Law; Thomas V. Harris (Michie).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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LEXISNEXIS (TM) CONNECTICUT ANNOTATED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE FEBRUARY 2008 REGULAR SESSION ***
*** AND THE JANUARY, JUNE 11, AUGUST AND NOVEMBER 24, 2008 SPECIAL SESSIONS ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 26, 2009 ***

TITLE 52 CIVIL ACTIONS
CHAPTER 925 STATUTORY RIGHTS OF ACTION AND DEFENSES

GO TO CONNECTICUT STATUTES ARCHIVE DIRECTORY

Conn. Gen. Stat. § 52-555 (2008)

Sec. 52-555. Actions for injuries resulting in death.

(a) In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of.

(b) Notwithstanding the provisions of subsection (a) of this section, an action may be brought under this section at any time after the date of the act or omission complained of if the party legally at fault for such injuries resulting in death has been convicted or found not guilty by reason of mental disease or defect of a violation of *section 53a-54a, 53a-54b, 53a-54c, 53a-54d, 53a-55 or 53a-55a* with respect to such death.

HISTORY: (1949 Rev., 8296; 1949, 1951, S. 3230d; 1957, P.A. 532; 1969, P.A. 401, S. 1; P.A. 91-238, S. 1, 2; P.A. 99-42; P.A. 00-200, S. 8.)

NOTES:

History Notes:

1969 act changed deadline for bringing action from one year from date injury is sustained or discovered or should have been discovered to two years from that date, effective October 1, 1969, and applicable only to injuries first sustained on or after that date; P.A. 91-238 required that action be brought within two years of death or within five years of act or omission complained of rather than within two years of date of injury or discovery of injury or within three years of act or omission complained of, effective October 1, 1991, and applicable only to injuries first sustained on or after that date; P.A. 99-42 designated existing provisions as Subsec. (a) and added Subsec. (b) eliminating time limitation in certain homicide cases; P.A. 00-200 amended Subsec. (b) by adding references to *Secs. 53a-55 and 53a-55a*.

Cross References

See *Sec. 45a-448* re distribution of damages recovered for injuries resulting in death.

See *Sec. 52-584* re limitation of action for injury to person or property.

See *Sec. 52-594* re time limit for executor or administrator to bring personal action which survives to deceased person's representatives.

CASENOTES:

No action lay at common law for causing death. *25 Conn. 272*. Right of recovery in general; *24 Conn. 577*; *69 Conn. 284*; *72 Conn. 617*; *73 Conn. 616*; *77 Conn. 111*; *87 Conn. 337*; action begun by injured person in lifetime survives, not restricted to death from negligence; *87 Conn. 301*; action lies for death in another state; *83 Conn. 278*; statute is not penal; *33 Conn. 246*; it prevents any suit for the benefit of deceased's estate generally. *34 Conn. 58*. Action lies for instantaneous death; *30 Conn. 187*; *69 Conn. 620*; *72 Conn. 616*; and substantial damages may be given. *73 Conn. 616*; *99 Conn. 6*. Administration proper to enforce right, though there is no estate. *36 Conn. 214*. The law presumes that there are heirs; effect. *64 Conn. 482*; *69 Conn. 272*; *71 Conn. 286*. Under former statute, sum named was limitation, not measure, of damages. *85 Conn. 117*. Purpose of statute is not to penalize, but to give just damages. *87 Conn. 472*. Elements and rule of damage. *29 Conn. 496*; *33 Conn. 56*; *61 Conn. 159*; *72 Conn. 617*; *73 Conn. 620*; *75 Conn. 548*; *Id., 571*; *79 Conn. 367*; *83 Conn. 278*; *90 Conn. 35*; *92 Conn. 678*; *95 Conn. 117*; *103 Conn. 530*; *106 Conn. 330*; *123 Conn. 302*; *132 Conn. 466*. Omission to charge as to limitation not error. *87 Conn. 149*. Necessary averments in action. *33 Conn. 247*. Effect of default by defendant. *33 Conn. 252*; *36 Conn. 155*. Delay in taking out administration does not extend time limit; *90 Conn. 527*; but the provisions of *section 52-592* apply. *91 Conn. 395*; *102 Conn. 69*. Negligence of statutory distributees is no defense. *78 Conn. 284*. Not necessary to count on statute in complaint; applies whether death is instantaneous or not. *99 Conn. 6*. Limit of damage covers all expenses prior to death as well as loss to estate. *103 Conn. 529*; *106 Conn. 338*. New York statute enforceable in our courts. *108 Conn. 445*. No bar to action that heirs at law are the defendants. *Id., 649*. Does not permit recovery of damages for death resulting from breach of implied warranty. *115 Conn. 253*. History of this statute. *Id., 255*; *122 Conn. 95*. Whether action for death due to highway defect falls within this section, *quaere*. *Id.* Employer obligated to pay compensation to deceased employee's dependents is entitled to apportionment under *section 31-293* of damages recovered by administratrix from third person. *116 Conn. 92*. Statute applies in action to recover damages for death against physician for malpractice. *127 Conn. 380*. Does not create new cause of action; administratrix of father may not sue unemancipated minor son. *129 Conn. 518*. Cited. *111 Conn. 336*; *127 Conn. 692*; *131 Conn. 130*; *142 Conn. 84*. This section is not limited or modified by *section 45-210* so as to postpone the beginning of the one-year period. *134 Conn. 382*. Cited. *143 Conn. 653*. Basic principles underlying act; assessment of damages. *144 Conn. 659*. Distinguished from *section 52-599*. *Id.* Computation of actuarial expectancy of child. *145 Conn. 622*. Extensive discussion of rule for measuring damages. *146 Conn. 114*. In such an action the administrator does not act in his true capacity as administrator for the benefit of the estate but as agent or trustee for those beneficially interested. *147 Conn. 233*. Proceeds do not become general assets of the estate. *Id.* Right of action for wrongful death and that for nonfatal personal injuries rest on substantially the same basis. *Id., 649*. Administrator of unemancipated minor may sue her unemancipated minor sister for wrongful death. *Id.* Damages for death and its direct consequences are recoverable only if, and to the extent that, they are made so by statute. *153 Conn. 360*. Cited. *Id., 633*. Plaintiff stands in shoes of decedent and can recover only if he, had his injuries not proved fatal, could himself have recovered. *154 Conn. 432*. As executor, plaintiff is empowered to sue for injuries resulting in decedent's death whether his appointment issued from a court in this state or in a foreign jurisdiction. *156 Conn. 115*. Admission in evidence of hearsay statements by defendant's driver, although made in presence of plaintiff's decedent on date of accident, was reversible error. *159 Conn. 307*. Injuries resulting in death held not to constitute medical malpractice. *170 Conn. 443*. Cited. *Id., 637*. Cited. *183 Conn. 448*. Cited. *187 Conn. 53*. Cited. *192 Conn. 280*; *Id., 327*. Cited. *196 Conn. 134*; *Id., 509*. Suit under this section not barred by workers' compensation act where minor killed while illegally employed. *203 Conn. 34*. Permits a recovery of death damages only by decedent's estate. Claim for loss of ante mortem consortium distinguished from claim for loss of post mortem consortium. *Id., 187*. Three-year limitation is a jurisdictional prerequisite which must be met to maintain action under the statute and cannot be waived. Statute

does not violate *Conn. Const. Art. I Sec. 10, 205 Conn. 219*. "Intent is not an essential element of the cause of action." *206 Conn. 229*. Cited. *208 Conn. 392*. Cited. *209 Conn. 59*. Cited. *210 Conn. 175*; *Id.*, 721. Cited. *212 Conn. 415*. Cited. *213 Conn. 282*. Cited. *221 Conn. 346*. Cited. *226 Conn. 282*. Elements of wrongful death cause of action under section discussed. *267 Conn. 539*.

Cited. *3 Conn. App. 598*. Cited. *43 Conn. App. 294*. Cited. *44 Conn. App. 172*.

Limitation held applicable to recovery under section allowing action for death or injury against highway commissioner. *1 Conn. Supp. 136*. History of section reviewed. *Id.*; *11 Conn. Supp. 117*. Action to be brought one year after "the neglect complained of" and not from date of death. *4 Conn. Supp. 32*. Applicable to action where death results from malpractice of a physician. *6 Conn. Supp. 450*. Cited. *7 Conn. Supp. 328*. Cited. *9 Conn. Supp. 184*. Statute does not limit the number of parties that can be sued. *10 Conn. Supp. 396*. Proviso is not a true statute of limitations but a condition precedent to the actual ripening of a complete right of action. *11 Conn. Supp. 239*. Parent has no cause of action to recover for loss of services of child wrongfully killed. *Id.*, 447. Fact that person injured died more than a year after injury immaterial where original complaint was brought within statutory period. *Id.*, 413; *Id.*, 468. Cited. *16 Conn. Supp. 430*. Cited. *17 Conn. Supp. 3*. Covers both antemortem elements of damage such as pain and suffering and also for injuries resulting in death. *19 Conn. Supp. 487*. Connecticut's wrongful death statute compared with that of North Carolina, which is based on *Lord Campbell's Act*. *21 Conn. Supp. 233*. Where prenatal injuries result in death, the personal representative of the child may prosecute an action. It makes no difference whether death took place just after birth or just prior to birth. *23 Conn. Supp. 256*. Stillborn infant, dead from injuries sustained as a viable fetus, has a cause of action. *26 Conn. Supp. 358*. Connecticut follows the "survival" rather than the "new cause of action" theory. *Id.*, 358. Damages for antemortem injuries, though required to be claimed in same action as damages for death, do not depend on this section but on *section 52-599*, which provides that decedent's cause of action survives to his personal representative. Where one year period of limitation with respect to those injuries had not expired when decedent died, his personal representative, under *section 52-594*, had year from date of death to initiate action. *28 Conn. Supp. 461*. Wrongful death action must be brought by executor or administrator to have standing. Standing acquired subsequent to statute of limitations does not cure original action. *29 Conn. Supp. 139*. Amendment to complaint not deemed instituting new cause of action so as to be barred by section but was amplification and expansion not change of facts originally claimed. *35 Conn. Supp. 38*. Wrongful death action is not a new and independent action created by the demise of the injured party, but rather a claim of the deceased party which survives his death. Therefore the decedent's spouse can attach to the wrongful death claim an independent claim for loss of consortium. Loss of consortium is now legally recoverable under "just damages". Consortium is an element of a marital relationship and cannot be extended to the children of the marriage. *Id.*, 292. Cited. *37 Conn. Supp. 1*. Cited. *38 Conn. Supp. 318*. Damages for loss of consortium are not recoverable under this statute, which compensates losses suffered only by decedent or his estate. *39 Conn. Supp. 8*. Cited. *40 Conn. Supp. 95*. Read together with Secs. 45-249c and 45-249d(a) "executor or administrator" is interpreted to include a temporary administrator to be allowed to commence wrongful death action when necessary to preserve estate. *Id.*, 451. Cited. *Id.*, 457. Cited. *44 Conn. Supp. 477*. Administratrix may maintain action for wrongful death on behalf of a viable unborn fetus for injuries and death. *48 Conn. Supp. 440*.

LexisNexis (R) Notes:

CASE NOTES

1. Wrongful death statute provided the exclusive remedy for the recovery of financial losses such as the ascertainable

loss of life, health and medical costs; thus, where plaintiff failed to allege any recoverable financial loss independent from those wrongful death damages, such as the cost of the residential services provided to plaintiff's decedent in a rest home, there was no basis for asserting a claim under the Connecticut Unfair Trade Practice Act (CUTPA), *Conn. Gen. Stat. § 42-110a* et seq., in addition to plaintiff's wrongful death claim. *Rivera v. Simonetti*, 2005 Conn. Super. LEXIS 1999 (Conn. Super. Ct. Aug. 5 2005).

2. Administratrix could maintain a cause of action in negligence on behalf of a viable unborn fetus under *Conn. Gen. Stat. § 52-555*. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

3. Where a fetus has reached that stage of prenatal development where it is capable of independent life apart from its mother, such a stage of development as to permit continued existence, under normal conditions, outside of the womb, if such child dies in the womb as the result of the negligence of some third person, then the personal representative of that child may, under the provisions of *Conn. Gen. Stat. §§ 52-555, 52-599*, maintain a cause of action in its behalf for such injuries and death. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

4. Absent a clear expression from the legislature to the contrary, the provisions of *Conn. Gen. Stat. § 52-555* should be broadly construed to permit an administratrix to maintain a cause of action in negligence on behalf of a viable fetus for injuries and death. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

5. A driver's motion to dismiss a negligence claim brought by the mother of unborn twins who died in an automobile accident based upon lack of standing was denied; although *Conn. Gen. Stat. § 52-555* provided that the action should have been prosecuted by the executor or administrator of the twins' estate, judicial economy required that the administrator be substituted into the action in place of the mother because there was no prejudice to the driver. *Walker v. Gellert*, 1999 Conn. Super. LEXIS 3431 (Conn. Super. Ct. Dec. 22 1999).

6. Defendant's failure to file a motion to dismiss in the order specified by Conn. Prac. Book § 112 (now § 10-6) did not waive his right to challenge the administratrix's standing to bring a wrongful death action under *Conn. Gen. Stat. § 52-555* because the court was required to address the possible absence of subject matter jurisdiction whenever the issue was raised. *Estate of Johnson v. Roth*, 1995 Conn. Super. LEXIS 1973 (Conn. Super. Ct. July 5 1995).

7. Administrator did not have standing to bring a wrongful death action on behalf of the pedestrian's estate because she was not the administratrix at the commencement of the action and the certificate showing her authority as administrator was dated more than two years after the date of death and, thus, beyond the specific limitation imposed by *Conn. Gen. Stat. § 52-555* for bringing the action. *Estate of Johnson v. Roth*, 1995 Conn. Super. LEXIS 1973 (Conn. Super. Ct. July 5 1995).

8. Foreign administrator had standing, and the court had subject matter jurisdiction in a wrongful death suit by the foreign administrator against a cafe and a server that alleged dram shop violations and recklessness on behalf of decedent even though the administrator had not filed for letters of ancillary administration because the administrator's authority came from the wrongful death statute, *Conn. Gen. Stat. § 52-555*, and case law and not the probate law. *Rhoads v. Newman Enters.*, 1993 Conn. Super. LEXIS 2615 (Conn. Super. Ct. Oct. 7 1993).

9. Son lacked standing under *Conn. Gen. Stat. § 52-555* to bring a wrongful death action for the death of his mother,

and the trial court lacked subject matter jurisdiction, as he was not the administrator or executor of his mother's estate. *Boykin v. Rutherford*, 2007 Conn. Super. LEXIS 3263 (Conn. Super. Ct. Dec. 6 2007).

10. Defendant's failure to file a motion to dismiss in the order specified by Conn. Prac. Book § 112 (now § 10-6) did not waive his right to challenge the administratrix's standing to bring a wrongful death action under Conn. Gen. Stat. § 52-555 because the court was required to address the possible absence of subject matter jurisdiction whenever the issue was raised. *Estate of Johnson v. Roth*, 1995 Conn. Super. LEXIS 1973 (Conn. Super. Ct. July 5 1995).

11. A wrongful death action brought by decedent's daughter pursuant to Conn. Gen. Stat. § 52-555 against hospitals and a physician was properly dismissed for lack of subject matter jurisdiction, because she had not actually been appointed an administratrix when she filed the action, as the statute required, and because the statute of limitations had already run at the time of her eventual appointment. *Isaac v. Mt. Sinai Hospital*, 3 Conn. App. 598, 490 A.2d 1024, 1985 Conn. App. LEXIS 914 (1985).

12. Connecticut law did not categorically apply the "lex loci" doctrine where great weight was given to the fact that all claimed deviations occurred in Connecticut; it applied the guidelines contained in the factors of *Restatement (Second) Conflict of Laws* §§ 6, 145(2) and the wrongful death principles of *Restatement (Second) Conflict of Laws* § 175. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

13. In patient's suit for wrongful death of her stillborn baby, patient claimed that five of six deviations from defendant physicians' standard of care took place in Connecticut where the patient was last examined in a Connecticut hospital; the claimed deviations were failure to properly diagnose fetal distress, failure to admit the patient to the hospital, for observation, monitoring, and testing, and the failure to properly test the patient. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

14. Under *Restatement (Second) Conflict of Laws* § 175, in an action for wrongful death, the local law of the state where the injury occurs determines the rights and responsibilities of the parties unless, with regard to the particular issue, some other state has a more significant relationship under the principles stated in *Restatement (Second) Conflict of Laws* § 6 to the occurrence and the parties, in which event the local law of the other state will be applied. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

15. Where a complaint seeks recovery for wrongful death of an unborn child, the requirements of *Restatement (Second) Conflicts of Laws* § 175 must be considered; § 175 establishes a presumption that the law of the state where the injury occurred governs, unless another state has a more significant relationship consistent with *Restatement (Second) Conflicts of Laws* § 6. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

16. Analysis of the criteria announced in the *Restatement (Second) Conflict of Laws* §§ 6, 145, 175 necessarily involves a case by case consideration of the various factors. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

17. With respect to the choice of law to apply to a wrongful death action, Connecticut's interests include ensuring that hospitals that are located and licensed in the state provide proper medical care and attention to all who utilize hospital services, both residents and non-residents, seeing that physicians licensed in Connecticut adhere to the standard of care

applicable to board certified physicians in the particular specialty, in according to a viable fetus, who is stillborn, certain rights along with the ability to enforce those rights, and preservation of potential human life, as advanced by *Conn. Gen. Stat. § 19a-602(b)*. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

18. With respect to the choice of law to apply to a wrongful death action, the determination of whether another state's or Connecticut's law applies should not be settled based upon where the mother is when the baby dies, but rather where the deviation from the standard of care occurs. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

19. Connecticut law does not require that a baby be born alive for a wrongful death action to be maintained. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

20. Connecticut's wrongful death statute applied to single-car accident in Vermont; lex loci approach was rejected because Connecticut had a more significant relationship to the incident as deceased passenger, driver, and owner all resided in Connecticut. *Gatti v. Forcier*, 2003 Conn. Super. LEXIS 2459 (Conn. Super. Ct. July 30 2003).

21. Connecticut's reckless operation of motor vehicle statute did not apply to accident that occurred in Vermont where the deceased passenger, driver, and owner all resided in Connecticut; even though Connecticut's wrongful death statute could apply to the accident because Connecticut had a more significant relationship to the incident and to the parties, the motor vehicle laws of Vermont had to determine the issue of recklessness. *Gatti v. Forcier*, 2003 Conn. Super. LEXIS 2459 (Conn. Super. Ct. July 30 2003).

22. Because the co-administrators' amended medical malpractice complaint was timely filed under *Conn. Gen. Stat. § 52-555* as extended by *Conn. Gen. Stat. § 52-190a(b)*, and because the 90-day extension in *Conn. Gen. Stat. § 52-190a(b)* was not unconstitutional, a hospital's single-sentence conclusory special defense was legally insufficient. *Morgan v. Hartford Hosp.*, 2008 Conn. Super. LEXIS 1827 (Conn. Super. Ct. July 22 2008).

23. To promote efficiency, a physician's motion to strike parents' names from a count in a wrongful death action seeking hospital, medical, and burial expenses was treated as a request to revise pursuant to Conn. Gen. Prac. Book § 147; the parents' names were stricken because the administratrix had the sole right to recover such expenses pursuant to *Conn. Gen. Stat. § 52-555*. *Brodski v. Leicher*, 1996 Conn. Super. LEXIS 1048 (Conn. Super. Ct. Apr. 25 1996).

24. Nursing association's claim that a decedent's estate could not recover damages for the death itself under the wrongful death statute in one action and for ante-mortem damages, flowing from the same tort, in another action under the survival of action statute had to be determined by a motion to strike addressed to the sufficiency to the pleadings and to the question of whether the time limitations specified in *Conn. Gen. Stat. § 52-555* were applicable. *Wilson v. Visiting Nurses Servs. of Conn.*, 2007 Conn. Super. LEXIS 3208 (Conn. Super. Ct. Dec. 4 2007).

25. Physician's motion to strike a count in a complaint seeking damages for parents' loss of their deceased child's care, support, comfort, love, and companionship was granted; wrongful death damages were recoverable only insofar as they were made so by the Connecticut wrongful death statute and *Conn. Gen. Stat. § 52-555* did not create a cause of action for loss of filial consortium. *Brodski v. Leicher*, 1996 Conn. Super. LEXIS 1048 (Conn. Super. Ct. Apr. 25 1996).

26. Radiology group's motion to strike claims for loss of parental consortium was denied in plaintiffs' action alleging that the negligent reading of a mammogram caused a decedent's cancer death; although the wrongful death statute, *Conn. Gen. Stat. § 52-555 et seq.*, included no cognizable claim for postmortem loss of parental consortium, the complaint was read to assert antemortem claims. *McAuliffe v. Bridgeport Radiology Assocs., P.C.*, 1995 Conn. Super. LEXIS 1309 (Conn. Super. Ct. Apr. 28 1995).
27. Radiology group's motion to strike claims for loss of parental consortium was denied in plaintiffs' action alleging that their negligent reading of a mammogram caused a decedent's cancer death; although a split of authority existed as to whether such a cause of action existed in Connecticut, the court had previously recognized the cause of action in another case. *McAuliffe v. Bridgeport Radiology Assocs., P.C.*, 1995 Conn. Super. LEXIS 1309 (Conn. Super. Ct. Apr. 28 1995).
28. Administrator husband's claim of wrongful death of a fetus was stricken because he did not allege that the decedent's unborn child was viable at the time the doctor performed the abortion; as such, the administrator failed to allege facts that, if proven, would have supported a wrongful death cause of action for the death of decedent's unborn. *Bourquin v. Melsungen*, 1990 Conn. Super. LEXIS 1170 (Conn. Super. Ct. Sept. 4 1990).
29. Wrongful death action brought beyond the two-year statute of limitations in *Conn. Gen. Stat. § 52-555* was subject to a motion to strike, because the administrator failed to properly plead a claim of fraudulent concealment alleging a tolling of the statute of limitations for the wrongful death claim. *Tedford v. Buck*, 2008 Conn. Super. LEXIS 1456 (Conn. Super. Ct. June 4 2008).
30. Nursing association's claim that a decedent's estate could not recover damages for the death itself under the wrongful death statute in one action and for ante-mortem damages, flowing from the same tort, in another action under the survival of action statute had to be determined by a motion to strike addressed to the sufficiency to the pleadings and to the question of whether the time limitations specified in *Conn. Gen. Stat. § 52-555* were applicable. *Wilson v. Visiting Nurses Servs. of Conn.*, 2007 Conn. Super. LEXIS 3208 (Conn. Super. Ct. Dec. 4 2007).
31. Because the administratrix alleged that a doctor and a nurse knew of the decedent's dire condition and failed to treat or transfer the decedent in a timely manner, in violation of *Conn. Gen. Stat. § 52-555*, and because the administratrix alleged that the hospital failed to comply with *Conn. Agencies Regs. § 19-13-D5(d)(3)*, (e)(1) and *42 C.F.R. §§ 482.22, 482.23(b), 482.24(c)* relating to patient care, the motions to strike those counts in the administratrix's complaint were denied. *Lancaster v. Jackson*, 2005 Conn. Super. LEXIS 1881 (Conn. Super. Ct. July 11 2005).
32. Since the administratrix properly pled the wrongful death statute, *Conn. Gen. Stat. § 52-555*, where the decedent died after being assaulted at a nursing home, the motion to strike was denied on that ground. The claims of recklessness were not destroyed merely because the administratrix pleaded both negligence and recklessness based upon substantially the same allegations of fact as the administratrix explicitly set forth the facts which she alleged constituted reckless conduct. *Delconte v. Kindred Nursing Ctrs. E., LLC*, 2005 Conn. Super. LEXIS 1486 (Conn. Super. Ct. May 20 2005).
33. Since, under *Conn. Gen. Stat. § 52-555*, based on reckless conduct punitive damages could be awarded, and since such damages could include counsel fees, the motion to strike the claim for relief which sought attorneys fees was denied. *Delconte v. Kindred Nursing Ctrs. E., LLC*, 2005 Conn. Super. LEXIS 1486 (Conn. Super. Ct. May 20 2005).
34. Where the group home operator and contractor alleged that the co-administrators' wrongful death action failed to allege damages available under *Conn. Gen. Stat. § 52-555*, the motion to strike filed by the operator and contractor was granted, as the co-administrators failed to address the issue. *Langewisch v. New England Residential Servs.*, 2005 Conn.

Super. LEXIS 401 (Conn. Super. Ct. Jan. 25 2005).

35. Nursing facility's motion to strike the wrongful death claims for medical malpractice and recklessness was denied because the executor properly pled the wrongful death statute, *Conn. Gen. Stat. § 52-555*. Further, the argument that the executor's separate counts should have been brought as a single count should have been raised in a request to revise, not a motion to strike, and the right was waived because the facility did not ask for a specific correction when it filed the earlier request to revise. *Monterio v. Crescent Manor, LLC, 2004 Conn. Super. LEXIS 1337 (Conn. Super. Ct. May 21 2004).*

36. Facts alleged by the executor in the wrongful death claim, pursuant to *Conn. Gen. Stat. § 52-555*, did not support a cause of action under *Conn. Gen. Stat. § 19a-550(b)(5)*, the patients' bill of rights statute, and therefore the motion to strike the claim for negligence per se was granted. The executor neither alleged that the decedent made nor even contemplated making grievances or recommendations, nor alleged that any threats or reprisals were made by the facility, and there were no allegations that the facility's restraint, interference, coercion, discrimination, or reprisal caused the decedent's wheelchair to fall down the stairwell. *Monterio v. Crescent Manor, LLC, 2004 Conn. Super. LEXIS 1337 (Conn. Super. Ct. May 21 2004).*

37. "Just damages" under *Conn. Gen. Stat. § 52-555* include: (1) the value of the decedent's lost earning capacity less deductions necessary for her living expenses and taking into consideration that a present cash payment will be made, (2) compensation for destruction of capacity to carry on and enjoy life's activities in a way decedent would have done had she lived, and (3) compensation for conscious pain and suffering; loss of chance damages, therefore, may be pleaded by an executor along with a wrongful death claim because compensation for loss of chance for successful treatment is not provided under the statute. Doctors and a hospital were denied their motion to strike loss of chance counts in an executor's wrongful death action against them on behalf of the estate's decedent. *Estate of Treadwell v. Yale-New Haven Hosp., 2004 Conn. Super. LEXIS 51 (Conn. Super. Ct. Jan. 9 2004).*

38. Where the decedent's estate separately pleaded causes of action for loss of chance for successful treatment and wrongful death pursuant to *Conn. Gen. Stat. § 52-555*, the motion to strike pursuant to *Conn. Prac. Book § 10-39* filed by the cardiologist and medical practice was denied; contrary to the assertions of the cardiologist and medical practice, the estate was permitted to plead wrongful death and loss of chance causes of action separately. *Estate of Treadwell v. Yale-New Haven Hosp., 2003 Conn. Super. LEXIS 3560 (Conn. Super. Ct. Dec. 22 2003).*

39. Defendants' motion to strike, pursuant to *Conn. Prac. Book § 10-39*, was denied as to plaintiffs' claim for loss of parental consortium due to the death of the children's mother as a result of a car accident; although such a cause of action had not yet been acknowledged by the Connecticut Supreme Court, the facts were distinguishable from prior cases which denied recovery under that theory and the children had suffered the same losses and were entitled to the same damages as were awarded in a marital loss of consortium claim and accordingly, the claim might have viability and was, therefore, not subject to being stricken. *Estate of Chung v. Place Motors, Inc., 2003 Conn. Super. LEXIS 370 (Conn. Super. Ct. Feb. 11 2003)*, criticized by *Kaya v. City of New London, 458 F. Supp. 2d 1, 2006 U.S. Dist. LEXIS 58407 (D. Conn. 2006).*

40. Because the recklessness counts that an administratrix sought to add against a police officer simply recast and refined the negligence allegations pending against the officer, the amendments satisfied the time limitations of *Conn. Gen. Stat. § 52-555*, by virtue of the relation back principle; therefore, pursuant to *Conn. Prac. Book § 10-60(b)*, the complaint could be amended. *Florence v. Town of Plainfield, 2005 Conn. Super. LEXIS 1727 (Conn. Super. Ct. July 15 2005).*

41. Nursing facility's motion to strike the wrongful death claims for medical malpractice and recklessness was denied

because the executor properly pled the wrongful death statute, *Conn. Gen. Stat. § 52-555*. Further, the argument that the executor's separate counts should have been brought as a single count should have been raised in a request to revise, not a motion to strike, and the right was waived because the facility did not ask for a specific correction when it filed the earlier request to revise. *Monterio v. Crescent Manor, LLC, 2004 Conn. Super. LEXIS 1337 (Conn. Super. Ct. May 21 2004)*.

42. In an action seeking damages for the death of a decedent while he was in the custody of the city's police department, the administratrix of the decedent's estate was granted leave to amend the complaint to include additional counts; even though the request to amend was filed beyond the three-year statute of limitations period provided for in *Conn. Gen. Stat. §§ 52-577, 52-555*, the amended complaint related back to the date of the complaint because it alleged facts identical to the original complaint, and the evidence that supported the facts alleged in the amended complaint could have been introduced under the former complaint as well. *Anderson v. City of New London, 1999 Conn. Super. LEXIS 580 (Conn. Super. Ct. Mar. 4 1999)*.

43. To promote efficiency, a physician's motion to strike parents' names from a count in a wrongful death action seeking hospital, medical, and burial expenses was treated as a request to revise pursuant to *Conn. Gen. Prac. Book § 147*; the parents' names were stricken because the administratrix had the sole right to recover such expenses pursuant to *Conn. Gen. Stat. § 52-555*. *Brodski v. Leicher, 1996 Conn. Super. LEXIS 1048 (Conn. Super. Ct. Apr. 25 1996)*.

44. Retailer's motion for judgment on the pleadings in an action by an administratrix arising out of a death allegedly caused by a chemical sold by the retailer based on an amendment of the complaint filed more than two years after the death was denied because a change in a ground of negligence did not change the cause of action where the group of facts originally claimed to have brought about the injury was not changed, but rather the amendment was merely an amplification of the original complaint that set forth in greater detail the manner in which the retailer was negligent. *Cooper v. Ketover, 35 Conn. Supp. 38, 393 A.2d 64, 1978 Conn. Super. LEXIS 129 (Conn. Super. Ct. 1978)*.

45. *Conn. Gen. Stat. § 52-555(a)* claim failed for lack of subject matter jurisdiction as the order appointing a wife as the temporary administratrix of a decedent's estate attached to the original complaint restricted itself to granting the authority to obtain medical records; the amended complaint did not fall within exception to rule requiring a ruling on a motion to dismiss before addressing an amended complaint even though the wife filed her amended complaint within 30 days of the return date under *Conn. Gen. Stat. § 52-128* and *Conn. Gen. Prac. Book, R. Super. Ct. § 10-59*, as there was an issue as to whether the wife had authority to sue in the first instance. *Williams v. Vill. Med. Ass'n, 2008 Conn. Super. LEXIS 2994 (Conn. Super. Ct. Nov. 25 2008)*.

46. Allegations that defendants' conduct violated the Patient's Bill of Rights related back under *Conn. Gen. Stat. § 52-555* to the filing of the original complaint. Although there were no such allegations in the original complaint, the new allegations were based on the same set of facts that were the basis for the allegations in the initial complaint. *Pueshel v. McLean Found., Inc., 2007 Conn. Super. LEXIS 1022 (Conn. Super. Ct. Apr. 26 2007)*.

47. Because the recklessness counts that an administratrix sought to add against a police officer simply recast and refined the negligence allegations pending against the officer, the amendments satisfied the time limitations of *Conn. Gen. Stat. § 52-555*, by virtue of the relation back principle; therefore, pursuant to *Conn. Prac. Book § 10-60(b)*, the complaint could be amended. *Florence v. Town of Plainfield, 2005 Conn. Super. LEXIS 1727 (Conn. Super. Ct. July 15 2005)*.

48. Husband's loss of consortium claim in a medical malpractice action was time-barred because the husband did not assert a claim as a plaintiff until he was named in the amended summons and complaint, which were served after the expiration of limitations period of *Conn. Gen. Stat. § 52-555*; the husband's claim did not relate back to the original

complaint under *Conn. Gen. Stat. § 52-128* because he was not a plaintiff in the original action. *Brittain v. Hosp. of St. Raphael*, 2001 Conn. Super. LEXIS 1174 (Conn. Super. Ct. Apr. 25 2001).

49. Because an amended complaint that set forth a wrongful death claim and a claim for post-mortem loss of consortium shared the same factual predicate as the original medical malpractice claim, the claims in the amended complaint related back to the filing of the original complaint and were not barred by *Conn. Gen. Stat. § 52-555*. *Jane W. Glander v. Licht*, 2000 Conn. Super. LEXIS 1898 (Conn. Super. Ct. July 24 2000).

50. In an action seeking damages for the death of a decedent while he was in the custody of the city's police department, the administratrix of the decedent's estate was granted leave to amend the complaint to include additional counts; even though the request to amend was filed beyond the three-year statute of limitations period provided for in *Conn. Gen. Stat. §§ 52-577, 52-555*, the amended complaint related back to the date of the complaint because it alleged facts identical to the original complaint, and the evidence that supported the facts alleged in the amended complaint could have been introduced under the former complaint as well. *Anderson v. City of New London*, 1999 Conn. Super. LEXIS 580 (Conn. Super. Ct. Mar. 4 1999).

51. An amended complaint asserting a wrongful death cause of action pursuant to *Conn. Gen. Stat. § 52-555* was not a new cause of action because it related back to the original suit filed while decedent was still alive. *Reilly v. Porter*, 1997 Conn. Super. LEXIS 2148 (Conn. Super. Ct. Aug. 7 1997).

52. Where a patient died after bringing a medical malpractice claim against her doctor, the patient's administrator was permitted to amend the complaint to add a wrongful death claim; the claim related back to the filing of the original complaint. *Hand v. Clark*, 1992 Conn. Super. LEXIS 627 (Conn. Super. Ct. Feb. 28 1992).

53. Executor of a decedent's estate could alternatively plead a cause of action under *Conn. Gen. Stat. § 52-555* for wrongful death and a cause of action for loss of chance. *Richie v. Charlotte Hungerford Hosp.*, 2008 Conn. Super. LEXIS 1809 (Conn. Super. Ct. July 10 2008).

54. Action brought by the administratrix against a community-services corporation on account of the alleged wrongful death of her child was separate and distinct from any action brought on behalf of an individual; ergo, the administratrix was the plaintiff, and a counterclaim alleging negligence could not be filed against her in an individual capacity by the corporation. *Franklin v. Saint Luke's Community Servs.*, 1992 Conn. Super. LEXIS 790 (Conn. Super. Ct. Mar. 19 1992).

55. Where the decedent's estate, in a wrongful death action, failed to explicitly refer to *Conn. Gen. Stat. § 52-555*, the wrongful death statute, in violation of *Conn. Prac. Book § 10-3*, which required that the statute be specifically pleaded by number, the failure to specifically refer to *Conn. Gen. Stat. § 52-555* in a wrongful death action was not fatal to the complaint. *Estate of Treadwell v. Yale-New Haven Hosp.*, 2003 Conn. Super. LEXIS 3560 (Conn. Super. Ct. Dec. 22 2003).

56. Where the executor and the wife's wrongful death action was based on *Conn. Gen. Stat. § 52-555*, the fact that the statute was not specifically identified in their pleadings was not fatal; they also stated a recognized cause of action for loss of chance, and § 52-555 was not their exclusive remedy. *Estate of Peter Haskos v. Jung*, 2002 Conn. Super. LEXIS 857 (Conn. Super. Ct. Mar. 20 2002).

57. Because an administratrix's wrongful death claim arose from the negligent release of an individual by the police under *Conn. Gen. Stat. § 52-593*, her mistake in failing to name the ranking officer in the initial action was reasonable; accordingly, it was not barred by the applicable statute of limitations in *Conn. Gen. Stat. § 52-555*. *Finkle v. Carroll*, 2009 Conn. Super. LEXIS 1126 (Conn. Super. Ct. Apr. 28 2009).

58. In a medical malpractice action, a widow's automatic statute of limitations extension petition, pursuant to *Conn. Gen. Stat. § 52-190a(b)*, included an unnamed defendant because it applied to her full cause of action. *Lucid v. Arthritis Ctr. of State*, 2000 Conn. Super. LEXIS 2707 (Conn. Super. Ct. Oct. 10 2000).

59. *Conn. Gen. Stat. § 52-593a*, a remedial statute, applied to extend the statute of limitations contained in *Conn. Gen. Stat. § 52-555*, which was extended by the application of *Conn. Gen. Stat. § 52-190a(b)*, when the summons and complaint were served a day after the extended time limit expired as the summons and the complaint were delivered to the marshal for service before the expiration of the statutory period. Further, the fact that the original marshal's return did not state under oath the date of delivery of the summons and complaint to the marshal did not render *Conn. Gen. Stat. § 593a(b)* inapplicable because the endorsement of the date of delivery on the original return was directory and not mandatory. *Desimini v. Bristol Hosp., Inc.*, 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006).

60. Although, as a general rule, an executor in a foreign state did not have jurisdiction to bring an action on behalf of the decedent's estate without first obtaining ancillary jurisdiction to do so, an exception applied when the action was for the wrongful death of the decedent under *Conn. Gen. Stat. § 52-555*. *Estate of Tapia v. Burns*, 1993 Conn. Super. LEXIS 2493 (Conn. Super. Ct. Sept. 20 1993).

61. A wrongful death action brought by decedent's daughter pursuant to *Conn. Gen. Stat. § 52-555* against hospitals and a physician was properly dismissed for lack of subject matter jurisdiction, because she had not actually been appointed an administratrix when she filed the action, as the statute required, and because the statute of limitations had already run at the time of her eventual appointment. *Isaac v. Mt. Sinai Hospital*, 3 Conn. App. 598, 490 A.2d 1024, 1985 Conn. App. LEXIS 914 (1985).

62. A driver's motion to dismiss a negligence claim brought by the mother of unborn twins who died in an automobile accident based upon lack of standing was denied; although *Conn. Gen. Stat. § 52-555* provided that the action should have been prosecuted by the executor or administrator of the twins' estate, judicial economy required that the administrator be substituted into the action in place of the mother because there was no prejudice to the driver. *Walker v. Gellert*, 1999 Conn. Super. LEXIS 3431 (Conn. Super. Ct. Dec. 22 1999).

63. In a wrongful death suit brought pursuant to *Conn. Gen. Stat. § 52-555*, the provisions of *Conn. Gen. Stat. § 52-109* concerning the substitution of parties did not apply where the suit was initiated by an entity that was not recognized as a "person" for purposes of bringing a law suit. *Palmieri v. Relende*, 1997 Conn. Super. LEXIS 1675 (Conn. Super. Ct. June 26 1997).

64. Referral service was entitled to summary judgment in a wrongful death action as the administratrix failed to allege a

viable theory of legal fault that was the proximate cause of the decedent's injuries; the decedent was not in class of persons to whom the referral service owed duty of care. *Ward v. Greene*, 267 Conn. 539, 839 A.2d 1259, 2004 Conn. LEXIS 19 (2004).

65. As a wrongful death claim existed in both New York and Connecticut law pursuant to *N.Y. Est. Powers & Trusts Law* § 5-4.1 and *Conn. Gen. Stat. § 52-555*, a motion for summary judgment pursuant to *Conn. Gen. Prac. Book, R. Super. Ct. § 17-49* was not procedurally proper because the determination of which state's law was controlling would not necessarily determine the outcome of the matter; the parties agreed that New York law controlled with respect to the issue of liability, arising from a vehicle accident, but they disputed which state's law applied on the issue of damages. *Leahy v. New Eng. Motor Freight, Inc.*, 2008 Conn. Super. LEXIS 2538 (Conn. Super. Ct. Oct. 3 2008).

66. Partial summary judgment was denied to a medical center on its claim that a cause of action under the wrongful death statute, *Conn. Gen. Stat. § 52-555*, was not cognizable for a stillborn infant. The superior court followed the majority of jurisdictions and allowed the mother, as administratrix for the daughter, to bring a cause of action for the wrongful death of her viable, but unborn, child; the court held that, for purposes of the partial summary judgment motion, the child could have been born alive but for the center's breach of its standard of care during delivery, so the statute allowed the mother, as personal representative for the daughter, to bring the cause of action. *Warycha v. Midstate Med. Ctr.*, 2004 Conn. Super. LEXIS 873 (Conn. Super. Ct. Mar. 17 2004).

67. Where a decedent fell and appeared to have a seizure during a traffic stop, police officers who conducted the stop were entitled to summary judgment on a wrongful death claim filed pursuant to *Conn. Gen. Stat. § 52-555(a)* because there was no evidence contradicting a medical examiner's determination that the cause of death was a ruptured berry aneurysm, there was no physical altercation between the officers and the decedent, and there was no evidence indicating that the officers' conduct in stopping the decedent's vehicle for a traffic violation, having the decedent exit the car, and performing a brief pat-down search was a proximate cause of the bleeding that resulted in the decedent's death. *Pinnock v. City of New Haven*, 553 F. Supp. 2d 130, 2008 U.S. Dist. LEXIS 39008 (D. Conn. 2008).

68. Jury's award to the decedent's estate was supported where the decedent was an accomplished artist and sculptor; while the amount was a considerable sum, given that this was a death of a talented 64-year-old man, who left a widow who had little left for herself in her new country, the award did not shock the sense of justice of the court. *Santos v. Zarif*, 2003 Conn. Super. LEXIS 3403 (Conn. Super. Ct. Dec. 10 2003).

69. Jury's award to the decedent's estate was supported where the decedent was an accomplished artist and sculptor; while the amount was a considerable sum, given that this was a death of a talented 64-year-old man, who left a widow who had little left for herself in her new country, the award did not shock the sense of justice of the court. *Santos v. Zarif*, 2003 Conn. Super. LEXIS 3403 (Conn. Super. Ct. Dec. 10 2003).

70. Defendants' motion for a remittitur, pursuant to *Conn. Prac. Book § 16-35* (2003), of a widow's award on a loss of consortium claim pursuant to *Conn. Gen. Stat. § 52-555a* was granted, because the verdict for loss of consortium was so excessive as to shock the court's sense of justice, as the loss of consortium verdict was twice the amount of a verdict for the husband's wrongful death pursuant to *Conn. Gen. Stat. § 52-555*, and the court concluded that there was no rational

basis for sustaining the verdict for loss of consortium while awarding half the amount to the widow, in her representative capacity, for her husband's wrongful death; *Conn. Gen. Stat. § 52-216a* did not require the court to further reduce the loss of consortium claim based on settlements the widow had received from other parties. *Elaine Blake v. Neurological Specialists, P.C.*, 2003 Conn. Super. LEXIS 1471 (Conn. Super. Ct. May 9 2003).

71. Since, under *Conn. Gen. Stat. § 52-555*, based on reckless conduct punitive damages could be awarded, and since such damages could include counsel fees, the motion to strike the claim for relief which sought attorneys fees was denied. *Delconte v. Kindred Nursing Ctrs. E., LLC*, 2005 Conn. Super. LEXIS 1486 (Conn. Super. Ct. May 20 2005).

72. Mother's request for injunctive relief against the department of public health to require the rectification of internal problems that allegedly led to the death of her child was denied because she had a remedy under law under *Conn. Gen. Stat. § 52-555* for the death of her child. *Ward v. Greene*, 2001 Conn. Super. LEXIS 794 (Conn. Super. Ct. Mar. 21 2001).

73. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate *Conn. Const. art. I, § 10*, by abolishing common law and statutory rights that existed in 1818, when article I, § 10, was adopted, because an action for damages for wrongful death did not exist at common law or by statute in Connecticut in 1818. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

74. In determining a parties' property right to a limitations period for wrongful death actions, the time limitation provided for in *Conn. Gen. Stat. § 52-555* must be read in conjunction with *Conn. Gen. Stat. § 52-190a(b)* because the legislature intended the 2-year limitations period to be modified by *Conn. Gen. Stat. § 52-190a(b)* with an automatic 90-day extension in all actions involving personal injury or wrongful death caused by a health care provider, provided the claimant attaches a good faith certificate to the complaint in compliance with *Conn. Gen. Stat. § 52-190a(a)*; therefore, a health care provider defendant does not have property rights in a 2-year limitation period, but in a statute of limitations of 2 years and 90 days; since a defendant does not have a vested property right in a 2-year statute of limitations, the automatic extension in *Conn. Gen. Stat. § 52-190a(b)* does not give rise to a violation of the defendant's constitutional due process rights and § 52-190a(b) is constitutional. *Plourde v. Hartford Hosp.*, 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006).

75. Although the automatic 90-day extension provided by *Conn. Gen. Stat. § 52-190a(b)* to the 2-year limitations period under *Conn. Gen. Stat. § 52-555* is ex parte, the extension does not unconstitutionally deprive a defendant of a vested property right because the defendant's property right is to a limitations period of 2 years and 90 days. *Plourde v. Hartford Hosp.*, 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006).

76. Doctors did not meet their heavy burden of proving beyond a reasonable doubt that *Conn. Gen. Stat. § 52-190a(b)* was unconstitutional because they did not show that they were deprived of a vested property right and they did not show that the ex parte automatic extension procedure deprived them of any procedural due process; *Conn. Gen. Stat. § 52-190a(b)* properly extended the limitations period under *Conn. Gen. Stat. § 52-555* by 90 days since it applied only after compliance with the good faith certificate requirement of *Conn. Gen. Stat. § 52-190a(a)*, which was a procedural hurdle that ordinary personal injury and wrongful death claimants did not have, and which was a benefit to the doctors by forcing an adequate investigation of the claims. *Plourde v. Hartford Hosp.*, 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006).

77. Hospital's summary judgment motion in a wrongful death action by an executrix was denied because the hospital was not deprived of a vested property right in violation of the due process clause of the Fourteenth Amendment as the ex parte procedure in *Conn. Gen. Stat. § 52-190a(b)*, which extended the statute of limitations by 90 days, did not deprive the hospital of its vested property right to an exemption if suit was not brought within two years. The hospital had property rights, not in a two-year limitation period, but in a statute of limitations of two years and 90 days; because the hospital did not have a vested property right in a two-year statute of limitations, the automatic extension in § 52-190a(b) did not give rise to a violation of constitutional rights. *Desimini v. Bristol Hosp., Inc., 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006)*.

78. Elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to be heard, and an essential function of notice is to enable the recipient to choose for himself whether to appear or default, acquiesce or contest with regard to proceedings affecting the recipient's interests; thus, due process was satisfied in a decedent's wife's action against a doctor and a professional corporation alleging wrongful death and a derivative loss of consortium claim because, even though the doctor and the corporation did not receive notice within the time required by *Conn. Gen. Stat. § 52-555(a)* where the wife filed a petition to extend the limitations period, they received adequate notice from the filing of the civil action and did not suffer any harm, and, therefore, the doctor and professional corporation's motion to dismiss for lack of subject matter jurisdiction was denied. *Sneath v. Roche, 2004 Conn. Super. LEXIS 535 (Conn. Super. Ct. Mar. 2 2004)*.

79. Because the trial court lacked subject matter jurisdiction over a wrongful death, which requiring that the claim had to be dismissed, plaintiffs' contention that *Conn. Gen. Stat. § 52-555* was unconstitutional in that it deprives them of their right to a jury trial provided by *Conn. Const. art. I, § 19* was unavailing. *Gatto v. County Coach Corp., 1995 Conn. Super. LEXIS 588 (Conn. Super. Ct. Feb. 23 1995)*.

80. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate the equal protection clause of *Conn. Const. art. I, § 20*, by extending the discovery rule to personal injury actions but not to wrongful death actions, because the distinction was rationally related to a legitimate government interest in preventing the unexpected enforcement of stale and fraudulent claims and of promoting the prompt settlement of the economic and legal affairs of the deceased. *Ecker v. West Hartford, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987)*.

81. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate the equal protection clause of *Conn. Const. art. I, § 20*, by providing a shorter statute of limitations than provided for death actions because it could not be said that the inherent nature of instrumentalities such as agent orange, hazardous chemicals, and deficient architectural and engineering designs, was an irrational reason for having a different period applicable to each. *Ecker v. West Hartford, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987)*.

82. While an administrator had the right to assert alternative theories of recovery based on breach of contract and breach of implied contract while also asserting claims against a nursing facility under the wrongful death statute, the facility's motion to strike the contract counts was granted because the administrator failed to allege facts showing that the facility promised to provide a specific result and refused to provide that result. The administrator's allegations pertained to the facility's alleged failure to provide services and care with a certain level of diligence and competency, and those allegations did not support a claim either of a failure to provide a specific result or for breach of contract to provide

medical services. *Latino v. Pendleton Nursing*, 2004 Conn. Super. LEXIS 2582 (Conn. Super. Ct. Sept. 2 2004).

83. Doctor's motion to strike a widow's breach of contract claim and a loss of consortium claim based on the breach of contract was granted because her husband's death, which was the subject of a wrongful death action under *Conn. Gen. Stat. § 52-555*, resulted from the same conduct that was complained of in the contract action, and thus *Conn. Gen. Stat. § 52-555* provided the widow's sole right of action. *Healy v. Gordon*, 1998 Conn. Super. LEXIS 1210 (Conn. Super. Ct. Apr. 28 1998).

84. Wrongful death claims arising from toxic exposure in the workplace were time-barred under *Conn. Gen. Stat. § 52-555*, which was not preempted by 42 U.S.C.S. § 9658(a)(1) because toxic exposure solely within a workplace is excluded from the definition of "release" in 42 U.S.C.S. § 9601(22); although the complaint alleged that toxic particles clung to the decedents' clothing and were carried into their cars and houses, such enclosed areas are not part of the environment under 42 U.S.C.S. § 9658(a)(1). *Greco v. United Techs. Corp.*, 277 Conn. 337, 890 A.2d 1269, 2006 Conn. LEXIS 56 (2006).

85. Plaintiffs could not rely on the preemptive affect of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.S. § 9658, to avoid state statute of limitations in their suits against defendants, the decedents' employers; plaintiffs had filed workers' compensation claims against defendants and thus could not rely on 42 U.S.C.S. § 9658 insofar as they claimed wrongful death from the release of contaminants within the workplace, and the exposure to toxins from the decedents' clothing in plaintiffs' cars and homes did not constitute a "release" into the "environment" because the initial exposure occurred at the workplace. *Greco v. United Techs.*, 2003 Conn. Super. LEXIS 2431 (Conn. Super. Ct. Sept. 3 2003), affirmed by 277 Conn. 337, 890 A.2d 1269, 2006 Conn. LEXIS 56 (2006).

86. Trial court properly granted employers' motion to strike as time-barred, wrongful death claims arising from toxic exposure in the workplace; *Conn. Gen. Stat. § 52-577c(b)*, which applies to personal injury or property damage caused by toxic substances, does not preempt the statute of limitations for wrongful death, *Conn. Gen. Stat. § 52-555*. *Greco v. United Techs. Corp.*, 277 Conn. 337, 890 A.2d 1269, 2006 Conn. LEXIS 56 (2006).

87. Action brought by the administratrix against a community-services corporation on account of the alleged wrongful death of her child was separate and distinct from any action brought on behalf of an individual; ergo, the administratrix was the plaintiff, and a counterclaim alleging negligence could not be filed against her in an individual capacity by the corporation. *Franklin v. Saint Luke's Community Servs.*, 1992 Conn. Super. LEXIS 790 (Conn. Super. Ct. Mar. 19 1992).

88. Partial summary judgment was denied to a medical center on its claim that a cause of action under the wrongful death statute, *Conn. Gen. Stat. § 52-555*, was not cognizable for a stillborn infant. The superior court followed the majority of jurisdictions and allowed the mother, as administratrix for the daughter, to bring a cause of action for the wrongful death of her viable, but unborn, child; the court held that, for purposes of the partial summary judgment motion, the child could have been born alive but for the center's breach of its standard of care during delivery, so the statute allowed the mother, as personal representative for the daughter, to bring the cause of action. *Warycha v. Midstate Med. Ctr.*, 2004 Conn. Super. LEXIS 873 (Conn. Super. Ct. Mar. 17 2004).

89. Administratrix could maintain a cause of action in negligence on behalf of a viable unborn fetus under *Conn. Gen.*

Stat. § 52-555. Florence v. Town of Plainfield, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

90. Absent a clear expression from the legislature to the contrary, the provisions of *Conn. Gen. Stat. § 52-555* should be broadly construed to permit an administratrix to maintain a cause of action in negligence on behalf of a viable fetus for injuries and death. *Florence v. Town of Plainfield, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).*

91. Foreign administrator had standing, and the court had subject matter jurisdiction in a wrongful death suit by the foreign administrator against a cafe and a server that alleged dram shop violations and recklessness on behalf of decedent even though the administrator had not filed for letters of ancillary administration because the administrator's authority came from the wrongful death statute, *Conn. Gen. Stat. § 52-555*, and case law and not the probate law. *Rhoads v. Newman Enters., 1993 Conn. Super. LEXIS 2615 (Conn. Super. Ct. Oct. 7 1993).*

92. *Conn. Gen. Stat. § 52-599*, which permits substitution of a personal representative for a deceased plaintiff, is conditioned, just like the wrongful death statute, *Conn. Gen. Stat. § 52-555*, in the case of a foreign personal representative, on ancillary qualification in *Connecticut. Perrine v. Ackerly, 1990 Conn. Super. LEXIS 2038 (Conn. Super. Ct. Dec. 13 1990).*

93. Because *Conn. Gen. Stat. § 52-555* permits the bringing of a wrongful death action by an executor or administrator only, while former *Conn. Gen. Stat. § 45-249c* (now *Conn. Gen. Stat. § 45a-316*) permits a temporary administrator to preserve the estate until the appointment of an administrator, and former *Conn. Gen. Stat. § 45-249d(a)* (now *Conn. Gen. Stat. § 45a-317*) permits the temporary administrator to do any acts necessary for the preservation of the estate authorized by the court, reading these statutes together, the term "executor or administrator" in § 52-555 should be interpreted so as to allow a temporary administrator to commence a wrongful death action when necessary to preserve the estate. *Miller v. United Technologies Corp., 40 Conn. Supp. 451, 515 A.2d 386, 1986 Conn. Super. LEXIS 33 (Conn. Super. Ct. 1986).*

94. Where a private not-for-profit organization had terminated its day-care program and did not refer day care clients to a day care provider, but continued its foster care contract with the day care provider, the administrator had failed to show that the organization's conduct was the proximate cause of the child's death after he was killed during day care where the organization had no ownership interest in the day care operation, did not refer children, did not pay the operator, did not supervise her, and did not investigate whether she was qualified. *Ward v. Greene, 267 Conn. 539, 839 A.2d 1259, 2004 Conn. LEXIS 19 (2004).*

95. Where a fetus has reached that stage of prenatal development where it is capable of independent life apart from its mother, such a stage of development as to permit continued existence, under normal conditions, outside of the womb, if such child dies in the womb as the result of the negligence of some third person, then the personal representative of that child may, under the provisions of *Conn. Gen. Stat. §§ 52-555, 52-599*, maintain a cause of action in its behalf for such injuries and death. *Florence v. Town of Plainfield, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).*

96. Because the filing of a petition to extend the statute of limitations under *Conn. Gen. Stat. § 52-190a(b)* neither commenced a wrongful death action nor required that such an action be commenced, rather, it merely secured an additional 90 days so that a person contemplating the filing of a medical malpractice action had sufficient time to comply with the good faith requirements established by the statute, the motion to dismiss based on the executor not

being named the administrator at that time was denied. *Fiore v. Schwartz*, 2007 Conn. Super. LEXIS 1502 (Conn. Super. Ct. June 8 2007).

97. In light of the language and purpose of *Conn. Gen. Stat. § 52-190a*, the Legislature intended for the 90-day extension to apply in all actions involving personal injury or wrongful death caused by a healthcare provider, and the effect of the granting of such an extension is simply to extend by three months the time within which a potential plaintiff must commence his or her lawsuit; thus, a doctor and a professional corporation's motion to dismiss a wrongful death suit filed by the deceased's wife was denied where the wife filed a timely petition for a 90-day extension of the two-year time limitation, provided by *Conn. Gen. Stat. § 52-555(a)*, because the petition extended the two-year statute of limitation from twenty-four months to twenty-seven months. *Sneath v. Roche*, 2004 Conn. Super. LEXIS 535 (Conn. Super. Ct. Mar. 2 2004).

98. Wrongful death action was governed exclusively by *Conn. Gen. Stat. § 52-555*; the language of 52-555 did not specifically restrict its application to deaths resulting merely from the negligence of another; a wrongful death action alleging medical malpractice was brought within the applicable limitations period and defendant's motion for summary judgment was denied. *Dawson v. Kuehn*, 47 Conn. Supp. 241, 785 A.2d 1226, 2001 Conn. Super. LEXIS 2249 (Conn. Super. Ct. 2001).

99. In a wrongful death action, where defendants, on the first day of trial, filed a request to amend their answer to raise the statute of limitations under *Conn. Gen. Stat. § 52-555* as a special defense, the request should have been granted because the statute of limitations was contained within the statute that created the right of action, and was a substantive and jurisdictional prerequisite that could not be waived and could be raised at any time. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

100. Retailer's motion for judgment on the pleadings in an action by an administratrix arising out of a death allegedly caused by a chemical sold by the retailer based on an amendment of the complaint filed more than two years after the death was denied because a change in a ground of negligence did not change the cause of action where the group of facts originally claimed to have brought about the injury was not changed, but rather the amendment was merely an amplification of the original complaint that set forth in greater detail the manner in which the retailer was negligent. *Cooper v. Ketover*, 35 Conn. Supp. 38, 393 A.2d 64, 1978 Conn. Super. LEXIS 129 (Conn. Super. Ct. 1978).

101. Where a decedent was injured and died of his injuries six weeks later, an action for damages brought within a year of decedent's death, but not within a year of the incident that resulted in the injuries was not time barred; the former one-year limitation in *Conn. Gen. Stat. § 52-555* was not applicable to a claim for pre-death pain and suffering, and the limitation in *Conn. Gen. Stat. § 52-584* was extended by *Conn. Gen. Stat. § 52-594*. *Doucette v. Bouchard*, 28 Conn. Supp. 460, 265 A.2d 618, 1970 Conn. Super. LEXIS 111 (Conn. Super. Ct. 1970).

102. Because a doctor and other defendants did not provide any evidence to support their argument that because a patient was aware of the contents of an opinion letter before she filed for an extension under *Conn. Gen. Stat. § 52-190a(b)*, the patient was entitled to the automatic extension in regard to the wrongful death claim, the doctor's motion for summary judgment was denied. *Jervis v. Steckler*, 2007 Conn. Super. LEXIS 3359 (Conn. Super. Ct. Dec. 17 2007).

103. Where a patient filed for an extension of the statute of limitations under *Conn. Gen. Stat. § 52-190a(b)*, which was automatically granted on that day, the medical malpractice action was not prohibited under *Conn. Gen. Stat. §§ 52-584* and 52-555 as the extension was automatic. *Jervis v. Steckler*, 2007 Conn. Super. LEXIS 3394 (Conn. Super. Ct. Dec. 17

2007).

104. As an administrator's wrongful death suit against a hospital involved *Conn. Gen. Stat. § 52-190a(b)*, the limitations period for commencing suit was two years and 90 days; as the hospital was served within that time limit, the suit was "commenced" within the limitations period under *Conn. Gen. Stat. § 52-555*. *Plante v. Charlotte Hungerford Hosp.*, 2007 Conn. Super. LEXIS 2309 (Conn. Super. Ct. Aug. 22 2007).

105. In determining a parties' property right to a limitations period for wrongful death actions, the time limitation provided for in *Conn. Gen. Stat. § 52-555* must be read in conjunction with *Conn. Gen. Stat. § 52-190a(b)* because the legislature intended the 2-year limitations period to be modified by *Conn. Gen. Stat. § 52-190a(b)* with an automatic 90-day extension in all actions involving personal injury or wrongful death caused by a health care provider, provided the claimant attaches a good faith certificate to the complaint in compliance with *Conn. Gen. Stat. § 52-190a(a)*; therefore, a health care provider defendant does not have property rights in a 2-year limitation period, but in a statute of limitations of 2 years and 90 days; since a defendant does not have a vested property right in a 2-year statute of limitations, the automatic extension in *Conn. Gen. Stat. § 52-190a(b)* does not give rise to a violation of the defendant's constitutional due process rights and § 52-190a(b) is constitutional. *Plourde v. Hartford Hosp.*, 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006).

106. Although the automatic 90-day extension provided by *Conn. Gen. Stat. § 52-190a(b)* to the 2-year limitations period under *Conn. Gen. Stat. § 52-555* is ex parte, the extension does not unconstitutionally deprive a defendant of a vested property right because the defendant's property right is to a limitations period of 2 years and 90 days. *Plourde v. Hartford Hosp.*, 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006).

107. Doctors did not meet their heavy burden of proving beyond a reasonable doubt that *Conn. Gen. Stat. § 52-190a(b)* was unconstitutional because they did not show that they were deprived of a vested property right and they did not show that the ex parte automatic extension procedure deprived them of any procedural due process; *Conn. Gen. Stat. § 52-190a(b)* properly extended the limitations period under *Conn. Gen. Stat. § 52-555* by 90 days since it applied only after compliance with the good faith certificate requirement of *Conn. Gen. Stat. § 52-190a(a)*, which was a procedural hurdle that ordinary personal injury and wrongful death claimants did not have, and which was a benefit to the doctors by forcing an adequate investigation of the claims. *Plourde v. Hartford Hosp.*, 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006).

108. Where the executrix brought a wrongful death action against a hospital in both her capacity as an executrix and an individual, a loss of consortium claim by the executrix in her individual capacity was not untimely under *Conn. Gen. Stat. § 52-555* as the executrix's petition, as an executrix, for an extension of the statute of limitation under *Conn. Gen. Stat. § 52-190a* extended by 90 days the time in which the claim had to be brought. *Desimini v. Bristol Hosp., Inc.*, 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006).

109. Hospital's summary judgment motion in a wrongful death action by an executrix was denied because the hospital was not deprived of a vested property right in violation of the due process clause of the Fourteenth Amendment as the ex parte procedure in *Conn. Gen. Stat. § 52-190a(b)*, which extended the statute of limitations by 90 days, did not deprive the hospital of its vested property right to an exemption if suit was not brought within two years. The hospital had property rights, not in a two-year limitation period, but in a statute of limitations of two years and 90 days; because the hospital did not have a vested property right in a two-year statute of limitations, the automatic extension in § 52-190a(b) did not give rise to a violation of constitutional rights. *Desimini v. Bristol Hosp., Inc.*, 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006).

110. *Conn. Gen. Stat. § 52-593a*, a remedial statute, applied to extend the statute of limitations contained in *Conn. Gen. Stat. § 52-555*, which was extended by the application of *Conn. Gen. Stat. § 52-190a(b)*, when the summons and complaint were served a day after the extended time limit expired as the summons and the complaint were delivered to

the marshal for service before the expiration of the statutory period. Further, the fact that the original marshal's return did not state under oath the date of delivery of the summons and complaint to the marshal did not render Conn. Gen. Stat. § 593a(b) inapplicable because the endorsement of the date of delivery on the original return was directory and not mandatory. *Desimini v. Bristol Hosp., Inc.*, 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006).

111. In a medical malpractice action, a widow's automatic statute of limitations extension petition, pursuant to *Conn. Gen. Stat. § 52-190a(b)*, included an unnamed defendant because it applied to her full cause of action. *Lucid v. Arthritis Ctr. of State*, 2000 Conn. Super. LEXIS 2707 (Conn. Super. Ct. Oct. 10 2000).

112. Because the co-administrators' amended medical malpractice complaint was timely filed under *Conn. Gen. Stat. § 52-555* as extended by *Conn. Gen. Stat. § 52-190a(b)*, and because the 90-day extension in *Conn. Gen. Stat. § 52-190a(b)* was not unconstitutional, a hospital's single-sentence conclusory special defense was legally insufficient. *Morgan v. Hartford Hosp.*, 2008 Conn. Super. LEXIS 1827 (Conn. Super. Ct. July 22 2008).

113. Plaintiffs could not rely on the preemptive affect of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.S. § 9658, to avoid state statute of limitations in their suits against defendants, the decedents' employers; plaintiffs had filed workers' compensation claims against defendants and thus could not rely on 42 U.S.C.S. § 9658 insofar as they claimed wrongful death from the release of contaminants within the workplace, and the exposure to toxins from the decedents' clothing in plaintiffs' cars and homes did not constitute a "release" into the "environment" because the initial exposure occurred at the workplace. *Greco v. United Techs.*, 2003 Conn. Super. LEXIS 2431 (Conn. Super. Ct. Sept. 3 2003), affirmed by 277 Conn. 337, 890 A.2d 1269, 2006 Conn. LEXIS 56 (2006).

114. Wrongful death action filed in June of 2000 was filed beyond the limitations period where the acts or omissions that case was based on occurred on February 24, 1996 and *Conn. Gen. Stat. § 52-555* provided that such an action had to be brought within two years of the date of death except that no such action was to be brought more than five years from the date of the act or omission complained of. *Strickland v. St. Francis Hosp. & Med. Ctr.*, 2001 Conn. Super. LEXIS 1672 (Conn. Super. Ct. June 14 2001).

115. Because the trial court lacked subject matter jurisdiction over a wrongful death, which requiring that the claim had to be dismissed, plaintiffs' contention that *Conn. Gen. Stat. § 52-555* was unconstitutional in that it deprives them of their right to a jury trial provided by *Conn. Const. art. I, § 19* was unavailing. *Gatto v. County Coach Corp.*, 1995 Conn. Super. LEXIS 588 (Conn. Super. Ct. Feb. 23 1995).

116. If the second count in plaintiff's complaint was considered to be a claim for antemortem loss of consortium, it was derivative of the first count, which was a cause of action for wrongful death; therefore, because the cause of action for the wrongful death was barred by the statute of limitations set forth at *Conn. Gen. Stat. § 52-555*, the claim for antemortem loss of consortium was also barred. *Gatto v. County Coach Corp.*, 1995 Conn. Super. LEXIS 588 (Conn. Super. Ct. Feb. 23 1995).

117. In administratrix's negligence and *Conn. Gen. Stat. § 52-555* wrongful death suit against a smaller rural town and pre-warned police officers after a man shot and killed his former girlfriend and her nine-month old fetus, the identifiable person/imminent harm exception to *Conn. Gen. Stat. § 52-557n* governmental immunity applied; the trial court stated that (1) the mother was clearly in imminent harm; (2) the foreseeably dangerous condition was limited in duration and geographical scope; (3) it was hard to imagine what more a desperate woman could have done to reach out for police protection; and (4) it was equally hard to construct a situation of such delay and failure of police to appreciate the gravity of the situation and act accordingly. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004

Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

118. In administratrix's suit against town and pre-warned police officers when boyfriend killed mother, identifiable person/imminent harm exception to governmental immunity pursuant to *Conn. Gen. Stat. § 52-557n* applied and mother and viable fetus were protected by wrongful death statute, *Conn. Gen. Stat. § 52-555. Florence v. Town of Plainfield, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).*

119. A claim for wrongful death brought by the decedent's administrator against a city and police officers under *Conn. Gen. Stat. § 52-555* does not amount to a claim for loss of filial consortium. *Hawthorne v. Lowe, 1995 Conn. Super. LEXIS 949 (Conn. Super. Ct. Mar. 23 1995).*

120. As an administrator's wrongful death suit against a hospital involved *Conn. Gen. Stat. § 52-190a(b)*, the limitations period for commencing suit was two years and 90 days; as the hospital was served within that time limit, the suit was "commenced" within the limitations period under *Conn. Gen. Stat. § 52-555. Plante v. Charlotte Hungerford Hosp., 2007 Conn. Super. LEXIS 2309 (Conn. Super. Ct. Aug. 22 2007).*

121. Facts alleged by the executor in the wrongful death claim, pursuant to *Conn. Gen. Stat. § 52-555*, did not support a cause of action under *Conn. Gen. Stat. § 19a-550(b)(5)*, the patients' bill of rights statute, and therefore the motion to strike the claim for negligence per se was granted. The executor neither alleged that the decedent made nor even contemplated making grievances or recommendations, nor alleged that any threats or reprisals were made by the facility, and there were no allegations that the facility's restraint, interference, coercion, discrimination, or reprisal caused the decedent's wheelchair to fall down the stairwell. *Monterio v. Crescent Manor, LLC, 2004 Conn. Super. LEXIS 1337 (Conn. Super. Ct. May 21 2004).*

122. In an action by a 22 year-old decedent's administrator against the Commissioner of the Connecticut Department of Mental Retardation, the administrator met his burden of proving that the Commissioner failed in his duty under *Conn. Gen. Stat. § 17a-24* and former *Conn. Gen. Stat. §§ 19a-469* (now *Conn. Gen. Stat. § 17a-238*) and 17-206(c) to provide care and treatment for the decedent, where the decedent died in a facility operated by the Department for the care and treatment of retarded persons, the decedent died within one week of being admitted to the facility, the decedent died from pneumonia and dehydration after two days of refusing to get out of bed, and under *Conn. Gen. Stat. § 17a-238(e)*, pneumonia and dehydration could be treated by prompt, sufficient, and appropriate medical treatment. *Canning v. Lensink, 1993 Conn. Super. LEXIS 353 (Conn. Super. Ct. Feb. 4 1993).*

123. Estate administratrix's complaint sufficiently alleged a private nuisance claim against the owners of a swimming pool in which the administratrix's son drowned; the owners had notice and knowledge that their gate would not prevent a three-year-old child from climbing over it, that the pool did not have a sufficient distance between it and the gate, and that the deck area next to the pool was painted, creating a slippery and nonadhesive surface. *Simmons v. Papadopoulos, 2001 Conn. Super. LEXIS 1034 (Conn. Super. Ct. Apr. 11 2001).*

124. Estate administratrix's complaint sufficiently alleged a private nuisance claim against the owners of a swimming pool in which the administratrix's son drowned; the owners had notice and knowledge that their gate would not prevent

a three-year-old child from climbing over it, that the pool did not have a sufficient distance between it and the gate, and that the deck area next to the pool was painted, creating a slippery and nonadhesive surface. *Simmons v. Papadopoulos*, 2001 Conn. Super. LEXIS 1034 (Conn. Super. Ct. Apr. 11 2001).

125. In a negligence action against two officers and the city, the parents were awarded damages of \$ 403,164.30, with \$ 3,164.30 for funeral and burial expenses and the remaining \$ 400,000 for non-economic damages, after their son hung himself while in custody; the court accounted for the son's life expectancy, level of education, lack of work history, poor health, and the son's expressed desire to turn his life around. *Thomes v. Tuyen Duong*, 2008 Conn. Super. LEXIS 672 (Conn. Super. Ct. Mar. 12 2008).

126. In her wrongful death claim under Conn. Gen. Stat. § 52-555, decedent's wife was properly awarded, in addition to "just damages," economic damages in the amount of \$ 2,005.00, for her funeral expenses. *Osiecki v. Bridgeport Health Care Ctr., Inc.*, 2005 Conn. Super. LEXIS 1239 (Conn. Super. Ct. May 12 2005).

127. In a wrongful death claim brought by decedent's wife under Conn. Gen. Stat. § 52-555, decedent's estate was property awarded \$ 575,000 for the loss of life's enjoyment. The decedent was 67 years old and had an average life expectancy of 15 years, and there was sufficient evidence regarding his enjoyment of his life prior to the onset of Guillain-Barre syndrome, upon which the jury could base its award of wrongful death damages, and although the award was generous, it did not shock the conscience. *Osiecki v. Bridgeport Health Care Ctr., Inc.*, 2005 Conn. Super. LEXIS 1239 (Conn. Super. Ct. May 12 2005).

128. Connecticut's reckless operation of motor vehicle statute did not apply to accident that occurred in Vermont where the deceased passenger, driver, and owner all resided in Connecticut; even though Connecticut's wrongful death statute could apply to the accident because Connecticut had a more significant relationship to the incident and to the parties, the motor vehicle laws of Vermont had to determine the issue of recklessness. *Gatti v. Forcier*, 2003 Conn. Super. LEXIS 2459 (Conn. Super. Ct. July 30 2003).

129. An award of damages made pursuant to the wrongful death statute, Conn. Gen. Stat. § 52-555, was set aside as insufficient where the jury awarded only \$ 5,000 for the death of a 24-year-old man in good health who had a high school education, had been honorably discharged from the armed forces, and was employed. *Butler v. Steck*, 146 Conn. 114, 148 A.2d 246, 1959 Conn. LEXIS 135 (1959).

130. In an action by a 22 year-old decedent's administrator against the Commissioner of the Connecticut Department of Mental Retardation, the administrator met his burden of proving that the Commissioner failed in his duty under Conn. Gen. Stat. § 17a-24 and former Conn. Gen. Stat. §§ 19a-469 (now Conn. Gen. Stat. § 17a-238) and 17-206(c) to provide care and treatment for the decedent, where the decedent died in a facility operated by the Department for the care and treatment of retarded persons, the decedent died within one week of being admitted to the facility, the decedent died from pneumonia and dehydration after two days of refusing to get out of bed, and under Conn. Gen. Stat. § 17a-238(e), pneumonia and dehydration could be treated by prompt, sufficient, and appropriate medical treatment. *Canning v. Lensink*, 1993 Conn. Super. LEXIS 353 (Conn. Super. Ct. Feb. 4 1993).

131. In an action by wife and administratrix of a deceased police officer against owner of property where officer suffered fatal injuries, the wife was entitled to receive, as part of an award of damages, an evaluation of the value of the destruction of her decedent husband's earning capacity. *Kuczynski v. Weimann*, 1990 Conn. Super. LEXIS 1885 (Conn.

Super. Ct. Oct. 17 1990).

132. Where the executrix brought a wrongful death action against a hospital in both her capacity as an executrix and an individual, a loss of consortium claim by the executrix in her individual capacity was not untimely under *Conn. Gen. Stat. § 52-555* as the executrix's petition, as an executrix, for an extension of the statute of limitation under *Conn. Gen. Stat. § 52-190a* extended by 90 days the time in which the claim had to be brought. *Desimini v. Bristol Hosp., Inc.*, 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006).

133. Where a wife filed a petition for an extension of the statute of limitations in her action alleging wrongful death and loss of consortium but only requested an extension on behalf of her husband decedent's estate and did not request an extension on behalf of herself individually, the loss of consortium claim was timely because it was a derivative action that was understood to constitute a part of the wrongful death action, and the wife's petition for extension of the statute of limitation extended by 90 days the time in which she had to bring her loss of consortium claim. *Sneath v. Roche*, 2004 Conn. Super. LEXIS 535 (Conn. Super. Ct. Mar. 2 2004).

134. Defendants' motion for a remittitur, pursuant to *Conn. Prac. Book § 16-35* (2003), of a widow's award on a loss of consortium claim pursuant to *Conn. Gen. Stat. § 52-555a* was granted, because the verdict for loss of consortium was so excessive as to shock the court's sense of justice, as the loss of consortium verdict was twice the amount of a verdict for the husband's wrongful death pursuant to *Conn. Gen. Stat. § 52-555*, and the court concluded that there was no rational basis for sustaining the verdict for loss of consortium while awarding half the amount to the widow, in her representative capacity, for her husband's wrongful death; *Conn. Gen. Stat. § 52-216a* did not require the court to further reduce the loss of consortium claim based on settlements the widow had received from other parties. *Elaine Blake v. Neurological Specialists, P.C.*, 2003 Conn. Super. LEXIS 1471 (Conn. Super. Ct. May 9 2003).

135. Defendants' motion to strike, pursuant to *Conn. Prac. Book § 10-39*, was denied as to plaintiffs' claim for loss of parental consortium due to the death of the children's mother as a result of a car accident; although such a cause of action had not yet been acknowledged by the Connecticut Supreme Court, the facts were distinguishable from prior cases which denied recovery under that theory and the children had suffered the same losses and were entitled to the same damages as were awarded in a marital loss of consortium claim and accordingly, the claim might have viability and was, therefore, not subject to being stricken. *Estate of Chung v. Place Motors, Inc.*, 2003 Conn. Super. LEXIS 370 (Conn. Super. Ct. Feb. 11 2003), criticized by *Kaya v. City of New London*, 458 F. Supp. 2d 1, 2006 U.S. Dist. LEXIS 58407 (D. Conn. 2006).

136. Doctor's motion to strike a widow's claim for postmortem loss of consortium was denied because the claim was not on its face barred by the statute of repose under *Conn. Gen. Stat. § 52-555* where the suit was filed within five years after the husband discovered his cancer. *Healy v. Gordon*, 1998 Conn. Super. LEXIS 1210 (Conn. Super. Ct. Apr. 28 1998).

137. Doctor's motion to strike a widow's breach of contract claim and a loss of consortium claim based on the breach of contract was granted because her husband's death, which was the subject of a wrongful death action under *Conn. Gen. Stat. § 52-555*, resulted from the same conduct that was complained of in the contract action, and thus *Conn. Gen. Stat. § 52-555* provided the widow's sole right of action. *Healy v. Gordon*, 1998 Conn. Super. LEXIS 1210 (Conn. Super. Ct. Apr. 28 1998).

138. Connecticut's general wrongful death statute, *Conn. Gen. Stat. § 52-555*, does not address loss of consortium claims based on the death of a parent or a child; accordingly, there is no cause of action for postmortem loss of filial consortium under Connecticut law. *Belliveau v. Stevenson*, 123 F.3d 107, 1997 U.S. App. LEXIS 29858 (2d Cir. Conn. 1997).

139. The reasoning of *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 523 A.2d 1301 (1987), impliedly precludes a claim for postmortem loss of parental consortium in Conn. Gen. Stat. § 52-555 just as it expressly precludes a claim for postmortem loss of marital consortium in Conn. Gen. Stat. § 52-555. *Williams v. Reynolds*, 1996 Conn. Super. LEXIS 689 (Conn. Super. Ct. Mar. 14 1996).

140. Radiology group's motion to strike claims for loss of parental consortium was denied in plaintiffs' action alleging that the negligent reading of a mammogram caused a decedent's cancer death; although the wrongful death statute, Conn. Gen. Stat. § 52-555 et seq., included no cognizable claim for postmortem loss of parental consortium, the complaint was read to assert antemortem claims. *McAuliffe v. Bridgeport Radiology Assocs., P.C.*, 1995 Conn. Super. LEXIS 1309 (Conn. Super. Ct. Apr. 28 1995).

141. Radiology group's motion to strike claims for loss of parental consortium was denied in plaintiffs' action alleging that their negligent reading of a mammogram caused a decedent's cancer death; although a split of authority existed as to whether such a cause of action existed in Connecticut, the court had previously recognized the cause of action in another case. *McAuliffe v. Bridgeport Radiology Assocs., P.C.*, 1995 Conn. Super. LEXIS 1309 (Conn. Super. Ct. Apr. 28 1995).

142. A claim for wrongful death brought by the decedent's administrator against a city and police officers under Conn. Gen. Stat. § 52-555 does not amount to a claim for loss of filial consortium. *Hawthorne v. Lowe*, 1995 Conn. Super. LEXIS 949 (Conn. Super. Ct. Mar. 23 1995).

143. If the second count in plaintiff's complaint was considered to be a claim for antemortem loss of consortium, it was derivative of the first count, which was a cause of action for wrongful death; therefore, because the cause of action for the wrongful death was barred by the statute of limitations set forth at Conn. Gen. Stat. § 52-555, the claim for antemortem loss of consortium was also barred. *Gatto v. County Coach Corp.*, 1995 Conn. Super. LEXIS 588 (Conn. Super. Ct. Feb. 23 1995).

144. Court determined that there was no cause of action under Conn. Gen. Stat. § 52-555 for children who suffer a loss through death of parental consortium, but there was a cause of action for loss of consortium as a result of an injury to a living parent. *Shabazz v. Price*, 1994 Conn. Super. LEXIS 1039 (Conn. Super. Ct. Apr. 21 1994).

145. Plaintiff's cause of action for postmortem loss of consortium arose at the time of her husband's death, and Conn. Gen. Stat. § 52-555 applied; although the statute was not in effect at the time the husband was injured, it was in effect at the time of his death from the injuries and plaintiff properly stated a cause of action thereunder. *Andersen v. Smart*, 1993 Conn. Super. LEXIS 292 (Conn. Super. Ct. Feb. 2 1993).

146. Just as the claim of a decedent for injuries not involving death survives death by virtue of the survival-of-actions statute, Conn. Gen. Stat. § 52-599, the claim of a spouse for antemortem loss of consortium because of such nonfatal injuries also is viable; the circumstance that injuries to an accident victim have culminated in death does not extinguish the decedent's claim for antemortem damages for those injuries, as indicated by reference in the wrongful death statute, Conn. Gen. Stat. § 52-555, to the recoverability of damages for injuries resulting in death, whether instantaneous or otherwise. *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 523 A.2d 1301, 1987 Conn. LEXIS 828 (1987).

147. Surviving spouse may recover for antemortem loss of consortium in an individual capacity where the common law consortium claim has been joined with the wrongful death action brought by the decedent's estate pursuant to Conn. Gen. Stat. § 52-555. *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 523 A.2d 1301, 1987 Conn. LEXIS 828 (1987).

148. Surviving spouse could not recover postmortem consortium damages in a wrongful death action under Conn. Gen. Stat. § 52-555; damages under § 52-555 are not based upon any loss caused to the family or relatives of the deceased.

Ladd v. Douglas Trucking Co., 203 Conn. 187, 523 A.2d 1301, 1987 Conn. LEXIS 828 (1987).

149. Parents could not recover for loss of consortium resulting from their son's stillbirth because the wrongful death statute did not permit claims for postmortem loss of consortium and because consortium was an element of marriage that did not extend to the relationship between parents and children. *Shattuck (Estate of Stillborn Child) v. Gulliver*, 40 Conn. Supp. 95, 481 A.2d 1110, 1984 Conn. Super. LEXIS 163 (Conn. Super. Ct. 1984).

150. Claim for loss of consortium is not recognized within a wrongful death action in Connecticut. *Leland v. Chawla*, 39 Conn. Supp. 8, 467 A.2d 439, 1983 Conn. Super. LEXIS 298 (Conn. Super. Ct. 1983).

151. Because Conn. Gen. Stat. § 52-555 expressly provides for the bringing of a wrongful death action by either an executor or an administrator, a widow, who was the administratrix of her deceased husband's estate was precluded from filing a loss of consortium claim, as an individual, in her wrongful death action. *Leland v. Chawla*, 39 Conn. Supp. 8, 467 A.2d 439, 1983 Conn. Super. LEXIS 298 (Conn. Super. Ct. 1983).

152. In an administratrix's suit under Conn. Gen. Stat. § 52-555 for the wrongful death of her husband, the administratrix was permitted to intervene personally to assert her own derivative but independent claim for loss of consortium. *Hinde v. Butler*, 35 Conn. Supp. 292, 408 A.2d 668, 1979 Conn. Super. LEXIS 168 (Conn. Super. Ct. 1979).

153. Conn. Gen. Stat. § 52-555 does not in and of itself preclude awards of punitive damages. *Engram v. Zapert*, 1996 Conn. Super. LEXIS 2955 (Conn. Super. Ct. Nov. 6 1996).

154. Plaintiffs' Conn. Gen. Stat. § 14-295 claim in a wrongful death action arising out of a traffic accident, which sought to hold defendant employers vicariously liable for the recklessness of defendant driver, their employee, was dismissed because Conn. Gen. Stat. § 14-295 did not abrogate the common-law doctrine prohibiting vicarious liability for punitive damages. *Hronis v. EBO Logistics, LLC*, 2009 U.S. Dist. LEXIS 70422 (D. Conn. Aug. 11 2009).

155. Executor of a decedent's estate could alternatively plead a cause of action under Conn. Gen. Stat. § 52-555 for wrongful death and a cause of action for loss of chance. *Ritchie v. Charlotte Hungerford Hosp.*, 2008 Conn. Super. LEXIS 1809 (Conn. Super. Ct. July 10 2008).

156. Hospital's claim that a loss of chance count was legally insufficient because Connecticut did not recognize a common-law cause of action for "loss of chance" when an action was brought on behalf of a decedent's estate was rejected as the loss of chance count incorporated the allegations in a wrongful death count, which expressly stated that the action was filed pursuant to Conn. Gen. Stat. § 52-555; it followed that the loss of chance count was based on § 52-555. *Ritchie v. Charlotte Hungerford Hosp.*, 2008 Conn. Super. LEXIS 1165 (Conn. Super. Ct. May 12 2008).

157. Where a patient filed for an extension of the statute of limitations under Conn. Gen. Stat. § 52-190a(b), which was automatically granted on that day, the medical malpractice action was not prohibited under Conn. Gen. Stat. §§ 52-584 and 52-555 as the extension was automatic. *Jervis v. Steckler*, 2007 Conn. Super. LEXIS 3394 (Conn. Super. Ct. Dec. 17 2007).

158. In determining a parties' property right to a limitations period for wrongful death actions, the time limitation provided for in Conn. Gen. Stat. § 52-555 must be read in conjunction with Conn. Gen. Stat. § 52-190a(b) because the

legislature intended the 2-year limitations period to be modified by *Conn. Gen. Stat. § 52-190a(b)* with an automatic 90-day extension in all actions involving personal injury or wrongful death caused by a health care provider, provided the claimant attaches a good faith certificate to the complaint in compliance with *Conn. Gen. Stat. § 52-190a(a)*; therefore, a health care provider defendant does not have property rights in a 2-year limitation period, but in a statute of limitations of 2 years and 90 days; since a defendant does not have a vested property right in a 2-year statute of limitations, the automatic extension in *Conn. Gen. Stat. § 52-190a(b)* does not give rise to a violation of the defendant's constitutional due process rights and § 52-190a(b) is constitutional. *Plourde v. Hartford Hosp., 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006)*.

159. Although the automatic 90-day extension provided by *Conn. Gen. Stat. § 52-190a(b)* to the 2-year limitations period under *Conn. Gen. Stat. § 52-555* is ex parte, the extension does not unconstitutionally deprive a defendant of a vested property right because the defendant's property right is to a limitations period of 2 years and 90 days. *Plourde v. Hartford Hosp., 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006)*.

160. Doctors did not meet their heavy burden of proving beyond a reasonable doubt that *Conn. Gen. Stat. § 52-190a(b)* was unconstitutional because they did not show that they were deprived of a vested property right and they did not show that the ex parte automatic extension procedure deprived them of any procedural due process; *Conn. Gen. Stat. § 52-190a(b)* properly extended the limitations period under *Conn. Gen. Stat. § 52-555* by 90 days since it applied only after compliance with the good faith certificate requirement of *Conn. Gen. Stat. § 52-190a(a)*, which was a procedural hurdle that ordinary personal injury and wrongful death claimants did not have, and which was a benefit to the doctors by forcing an adequate investigation of the claims. *Plourde v. Hartford Hosp., 2006 Conn. Super. LEXIS 608 (Conn. Super. Ct. Feb. 28 2006)*.

161. Defendants' motion to strike medical postmortem medical malpractice claims was granted, as those claims were not filed within the two-year period provided by *Conn. Gen. Stat. § 52-555*, but summary judgment was denied as to antemortem claims, as a three-year limitations period applied pursuant to *Conn. Gen. Stat. §§ 52-584* and *52-594*, and *Conn. Prac. Book § 10-50* did not require plaintiffs to specifically plead those statutes, and *Conn. Prac. Book § 10-3*, requiring a statute to be identified in the complaint when a claim was grounded on the statute, was directory rather than mandatory. *Mickelson v. Katz, 2005 Conn. Super. LEXIS 1793 (Conn. Super. Ct. July 25 2005)*.

162. "Just damages" under *Conn. Gen. Stat. § 52-555* include: (1) the value of the decedent's lost earning capacity less deductions necessary for her living expenses and taking into consideration that a present cash payment will be made, (2) compensation for destruction of capacity to carry on and enjoy life's activities in a way decedent would have done had she lived, and (3) compensation for conscious pain and suffering; loss of chance damages, therefore, may be pleaded by an executor along with a wrongful death claim because compensation for loss of chance for successful treatment is not provided under the statute. Doctors and a hospital were denied their motion to strike loss of chance counts in an executor's wrongful death action against them on behalf of the estate's decedent. *Estate of Treadwell v. Yale-New Haven Hosp., 2004 Conn. Super. LEXIS 51 (Conn. Super. Ct. Jan. 9 2004)*.

163. Where the decedent's estate separately pleaded causes of action for loss of chance for successful treatment and wrongful death pursuant to *Conn. Gen. Stat. § 52-555*, the motion to strike pursuant to *Conn. Prac. Book § 10-39* filed by the cardiologist and medical practice was denied; contrary to the assertions of the cardiologist and medical practice, the estate was permitted to plead wrongful death and loss of chance causes of action separately. *Estate of Treadwell v. Yale-New Haven Hosp., 2003 Conn. Super. LEXIS 3560 (Conn. Super. Ct. Dec. 22 2003)*.

164. Husband's loss of consortium claim in a medical malpractice action was time-barred because the husband did not assert a claim as a plaintiff until he was named in the amended summons and complaint, which were served after the expiration of limitations period of *Conn. Gen. Stat. § 52-555*; the husband's claim did not relate back to the original complaint under *Conn. Gen. Stat. § 52-128* because he was not a plaintiff in the original action. *Brittain v. Hosp. of St. Raphael, 2001 Conn. Super. LEXIS 1174 (Conn. Super. Ct. Apr. 25 2001)*.

165. In a medical malpractice action, a widow's automatic statute of limitations extension petition, pursuant to *Conn. Gen. Stat. § 52-190a(b)*, included an unnamed defendant because it applied to her full cause of action. *Lucid v. Arthritis Ctr. of State*, 2000 Conn. Super. LEXIS 2707 (Conn. Super. Ct. Oct. 10 2000).

166. Continuous treatment doctrine did not apply in a medical malpractice action against a radiologist whose only activity was a single reading of x-rays two years before a decedent's cancer was discovered; the reading of x-rays is a one-time event, and nothing that could have been called treatment occurred between that event and the decedent's diagnosis. *Holzmaier v. Associated Internists, P.C.*, 1998 Conn. Super. LEXIS 1241 (Conn. Super. Ct. May 4 1998).

167. Action by an executrix to recover damages from a physician would have been time-barred by *Conn. Gen. Stat. § 52-555* even if the court had not determined that *Conn. Gen. Stat. § 52-584* was the applicable statute of limitations; a petition to extend the statute of limitations pursuant to *Conn. Gen. Stat. § 52-190a(b)* was not filed until after the expiration of the period of repose, and the filing of such a petition cannot be utilized to revive an already expired statute of limitations. *Holzmaier v. Associated Internists, P.C.*, 1998 Conn. Super. LEXIS 1241 (Conn. Super. Ct. May 4 1998).

168. Right to recover for injuries resulting in death is a right solely given by statute and must be pursued in a statutory wrongful death action; a patient's widow could not also seek damages from a physician for breach of contract and loss of consortium arising from the breach of contract. *Healy v. Gordon*, 1998 Conn. Super. LEXIS 1210 (Conn. Super. Ct. Apr. 28 1998).

169. Administratrix 's complaint, which alleged that a nursing home negligently deprived her decedent of a right or benefit created or established for the well-being of the patient by the provisions of *Conn. Gen. Stat. § 19a-550(c)*, thereby causing his death, was struck because the wrongful death statute, *Conn. Gen. Stat. § 52-555*, is the exclusive remedy for an action that includes as an element of damages a person's death or its consequences. *Morgan v. Tolland County Health Care*, 1996 Conn. Super. LEXIS 638 (Conn. Super. Ct. Feb. 9 1996).

170. Administratrix 's complaint, which alleged that a nursing home's negligent or reckless failure to provide her decedent with skilled nursing and hospice care, as required by the agreement entered into when the decedent was admitted into the home and led to the decedent's death, was struck because the wrongful death statute, *Conn. Gen. Stat. § 52-555*, is the exclusive remedy for an action that includes as an element of damages a person's death or its consequences. *Morgan v. Tolland County Health Care*, 1996 Conn. Super. LEXIS 638 (Conn. Super. Ct. Feb. 9 1996).

171. In mother's medical malpractice action against a hospital and doctors, based upon her emotional distress over the death of her stillborn infant, the court denied the hospital's motion to strike the malpractice claims because they were maintainable alongside a wrongful death action under statute. *Patel v. Norwalk Hosp.*, 2000 Conn. Super. LEXIS 354 (Conn. Super. Ct. Feb. 9 2000).

172. Allegations that a rehabilitation center and corporation knew of a decedent's tendency to have problems remaining safely seated in her wheelchair were sufficient to allege recklessness in a wrongful death action filed by her executor after she strangled on the wheelchair's seatbelt; if proven, the claims would demonstrate that they were aware of and consciously disregarded a substantial risk. *Stromberg v. Hamilton Rehab. & Healthcare Ctr.*, 2006 Conn. Super. LEXIS 784 (Conn. Super. Ct. Mar. 13 2006).

173. Because the recklessness counts that an administratrix sought to add against a police officer simply recast and refined the negligence allegations pending against the officer, the amendments satisfied the time limitations of *Conn.*

Gen. Stat. § 52-555, by virtue of the relation back principle; therefore, pursuant to *Conn. Prac. Book § 10-60(b)*, the complaint could be amended. *Florence v. Town of Plainfield*, 2005 Conn. Super. LEXIS 1727 (Conn. Super. Ct. July 15 2005).

174. Because the administratrix alleged that a doctor and a nurse knew of the decedent's dire condition and failed to treat or transfer the decedent in a timely manner, in violation of *Conn. Gen. Stat. § 52-555*, and because the administratrix alleged that the hospital failed to comply with *Conn. Agencies Regs. § 19-13-D5(d)(3)*, (e)(1) and *42 C.F.R. §§ 482.22, 482.23(b), 482.24(c)* relating to patient care, the motions to strike those counts in the administratrix's complaint were denied. *Lancaster v. Jackson*, 2005 Conn. Super. LEXIS 1881 (Conn. Super. Ct. July 11 2005).

175. Since the administratrix properly pled the wrongful death statute, *Conn. Gen. Stat. § 52-555*, where the decedent died after being assaulted at a nursing home, the motion to strike was denied on that ground. The claims of recklessness were not destroyed merely because the administratrix pleaded both negligence and recklessness based upon substantially the same allegations of fact as the administratrix explicitly set forth the facts which she alleged constituted reckless conduct. *Delconte v. Kindred Nursing Ctrs. E., LLC*, 2005 Conn. Super. LEXIS 1486 (Conn. Super. Ct. May 20 2005).

176. Where a fetus has reached the stage of prenatal development where it is capable of independent life apart from its mother, such a stage of development as to permit continued existence, under normal conditions, outside of the womb, if such child dies in the womb as the result of the negligence of some third person, then the general representative of that child may, under the provisions of *Conn. Gen. Stat. §§ 52-555 and 52-599* maintain a cause of action in its behalf for such injuries and death. *Gorke v. Le Clerc*, 23 Conn. Supp. 256, 181 A.2d 448, 1962 Conn. Super. LEXIS 109 (Conn. Super. Ct. 1962).

177. Where a private not-for-profit organization had terminated its day-care program and did not refer day care clients to a day care provider, but continued its foster care contract with the day care provider, the administrator had failed to show that the organization's conduct was the proximate cause of the child's death after he was killed during day care where the organization had no ownership interest in the day care operation, did not refer children, did not pay the operator, did not supervise her, and did not investigate whether she was qualified. *Ward v. Greene*, 267 Conn. 539, 839 A.2d 1259, 2004 Conn. LEXIS 19 (2004).

178. Administrator of the estate of an unborn fetus had a cause of action against a motorist for the negligent operation of an automobile that resulted in the death of the fetus under *Conn. Gen. Stat. § 52-555* because Connecticut followed the "survival theory" as opposed to the new cause of "action theory"; and because the complaint specifically alleged that the fetus was seven to eight months old and was viable. *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406, 1966 Conn. Super. LEXIS 136 (Conn. Super. Ct. 1966).

179. In a wrongful death action pursuant to *Conn. Gen. Stat. § 52-555*, the trial court granted property owners' motion to strike portions of a count which alleged that they served alcohol to minors, because there was no evidence that the owners actually supplied the alcohol that their son served to a decedent at a party at the home while the owners were away. *Silk Adm'r of the Estate of Silk v. Gill*, 2005 Conn. Super. LEXIS 2489 (Conn. Super. Ct. Sept. 15 2005).

180. As a wrongful death claim existed in both New York and Connecticut law pursuant to *N.Y. Est. Powers & Trusts*

Law § 5-4.1 and Conn. Gen. Stat. § 52-555, a motion for summary judgment pursuant to *Conn. Gen. Prac. Book, R. Super. Ct. § 17-49* was not procedurally proper because the determination of which state's law was controlling would not necessarily determine the outcome of the matter; the parties agreed that New York law controlled with respect to the issue of liability, arising from a vehicle accident, but they disputed which state's law applied on the issue of damages. *Leahy v. New Eng. Motor Freight, Inc.*, 2008 Conn. Super. LEXIS 2538 (Conn. Super. Ct. Oct. 3 2008).

181. In an outcome-determinative choice of law determination, recovery of damages under *Conn. Gen. Stat. § 52-555(a)* pursuant to Connecticut law was applicable to a wrongful death action although New York law applied to liability under the significant relationships analysis, as Connecticut had a dominant interest; the principle of depeceage was applicable in Connecticut, damages were a stand-alone issue, and the broader scope of recovery under § 52-555(a) that included the decedent's pain and suffering was available to the decedent's estate compared to that of New York, where recovery provided in *N.Y. Est. Powers & Trusts Law §§ 5-4.3(a) and 11-3.3(a)* had a more limited scope. *Leahy v. New Eng. Motor Freight, Inc.*, 2008 Conn. Super. LEXIS 2538 (Conn. Super. Ct. Oct. 3 2008).

182. Administrator could bring a wrongful death action against a New York driver under the laws of the State of Connecticut when the accident occurred in Connecticut, the employer was registered to do business in Connecticut, Connecticut had an interest in maintaining public safety on its highways and the other state, New York, had very little interest in precluding recovery by the administrator for the alleged negligent actions of her co-worker driver. *Angerome v. Reid*, 2006 Conn. Super. LEXIS 3634 (Conn. Super. Ct. Dec. 5 2006).

183. Trial court properly granted employers' motion to strike as time-barred, wrongful death claims arising from toxic exposure in the workplace; *Conn. Gen. Stat. § 52-577c(b)*, which applies to personal injury or property damage caused by toxic substances, does not preempt the statute of limitations for wrongful death, *Conn. Gen. Stat. § 52-555*. *Greco v. United Techs. Corp.*, 277 Conn. 337, 890 A.2d 1269, 2006 Conn. LEXIS 56 (2006).

184. Wrongful death claims arising from toxic exposure in the workplace were time-barred under *Conn. Gen. Stat. § 52-555*, which was not preempted by 42 U.S.C.S. § 9658(a)(1) because toxic exposure solely within a workplace is excluded from the definition of "release" in 42 U.S.C.S. § 9601(22); although the complaint alleged that toxic particles clung to the decedents' clothing and were carried into their cars and houses, such enclosed areas are not part of the environment under 42 U.S.C.S. § 9658(a)(1). *Greco v. United Techs. Corp.*, 277 Conn. 337, 890 A.2d 1269, 2006 Conn. LEXIS 56 (2006).

185. Since the wrongful death action was brought more than two years from the date of death by the estate administrator and the deceased's widow, and *Conn. Gen. Stat. § 52-594* does not extend the statute of limitations as to *Conn. Gen. Stat. § 52-555*, the action was barred. *Miller v. Hartford Hosp.*, 2005 Conn. Super. LEXIS 3604 (Conn. Super. Ct. Dec. 22 2005).

186. State's motion for summary judgment was granted as to a wife's wrongful death and consortium claim, as she failed to bring the claim within the *Conn. Gen. Stat. § 52-555(a)* statute of limitations, and the tolling provision of *Conn. Gen. Stat. § 4-160(d)*, interpreted pursuant to *Conn. Gen. Stat. § 1-2z*, merely provided an extension of time for a state board to review the claim, not a renewal of the statute of limitations. *Lagassey v. State*, 50 Conn. Supp. 130, 913 A.2d 1153, 2005 Conn. Super. LEXIS 2810 (Conn. Super. Ct. 2005), affirmed by 281 Conn. 1, 914 A.2d 509, 2007 Conn. LEXIS 8 (2007).

187. Defendants' motion to strike medical postmortem medical malpractice claims was granted, as those claims were not filed within the two-year period provided by *Conn. Gen. Stat. § 52-555*, but summary judgment was denied as to

antemortem claims, as a three-year limitations period applied pursuant to *Conn. Gen. Stat. §§ 52-584 and 52-594*, and *Conn. Prac. Book § 10-50* did not require plaintiffs to specifically plead those statutes, and *Conn. Prac. Book § 10-3*, requiring a statute to be identified in the complaint when a claim was grounded on the statute, was directory rather than mandatory. *Mickelson v. Katz*, 2005 Conn. Super. LEXIS 1793 (Conn. Super. Ct. July 25 2005).

188. Where an administratrix filed a wrongful death and medical malpractice action more than three years after the child's death, the action was barred by the wrongful death statute, *Conn. Gen. Stat. § 52-555*, rather than the medical malpractice statute, *Conn. Gen. Stat. § 52-584*; as a result, the doctor was entitled to summary judgment pursuant to *Conn. Prac. Book § 17-49*. *Spruill v. Ahmed*, 2003 Conn. Super. LEXIS 649 (Conn. Super. Ct. Mar. 10 2003).

189. Doctor and his company's special defense under *Conn. Gen. Stat. § 52-584* was legally insufficient since law of the case had previously set *Conn. Gen. Stat. § 52-555* as the applicable statute of limitations for injuries resulting in death; executor brought suit well within statute of limitations period. *Dawson v. Kuehn*, 2002 Conn. Super. LEXIS 665 (Conn. Super. Ct. Feb. 25 2002).

190. Wrongful death action filed in June of 2000 was filed beyond the limitations period where the acts or omissions that case was based on occurred on February 24, 1996 and *Conn. Gen. Stat. § 52-555* provided that such an action had to be brought within two years of the date of death except that no such action was to be brought more than five years from the date of the act or omission complained of. *Strickland v. St. Francis Hosp. & Med. Ctr.*, 2001 Conn. Super. LEXIS 1672 (Conn. Super. Ct. June 14 2001).

191. Husband's loss of consortium claim in a medical malpractice action was time-barred because the husband did not assert a claim as a plaintiff until he was named in the amended summons and complaint, which were served after the expiration of limitations period of *Conn. Gen. Stat. § 52-555*; the husband's claim did not relate back to the original complaint under *Conn. Gen. Stat. § 52-128* because he was not a plaintiff in the original action. *Brittain v. Hosp. of St. Raphael*, 2001 Conn. Super. LEXIS 1174 (Conn. Super. Ct. Apr. 25 2001).

192. In an action seeking damages for the death of a decedent while he was in the custody of the city's police department, the administratrix of the decedent's estate was granted leave to amend the complaint to include additional counts; even though the request to amend was filed beyond the three-year statute of limitations period provided for in *Conn. Gen. Stat. §§ 52-577, 52-555*, the amended complaint related back to the date of the complaint because it alleged facts identical to the original complaint, and the evidence that supported the facts alleged in the amended complaint could have been introduced under the former complaint as well. *Anderson v. City of New London*, 1999 Conn. Super. LEXIS 580 (Conn. Super. Ct. Mar. 4 1999).

193. Continuous treatment doctrine did not apply in a medical malpractice action against a radiologist whose only activity was a single reading of x-rays two years before a decedent's cancer was discovered; the reading of x-rays is a one-time event, and nothing that could have been called treatment occurred between that event and the decedent's diagnosis. *Holzmaier v. Associated Internists, P.C.*, 1998 Conn. Super. LEXIS 1241 (Conn. Super. Ct. May 4 1998).

194. Action by an executrix to recover damages from a physician would have been time-barred by *Conn. Gen. Stat. § 52-555* even if the court had not determined that *Conn. Gen. Stat. § 52-584* was the applicable statute of limitations; a petition to extend the statute of limitations pursuant to *Conn. Gen. Stat. § 52-190a(b)* was not filed until after the expiration of the period of repose, and the filing of such a petition cannot be utilized to revive an already expired statute of limitations. *Holzmaier v. Associated Internists, P.C.*, 1998 Conn. Super. LEXIS 1241 (Conn. Super. Ct. May 4 1998).

195. Statute of limitations for medical malpractice, *Conn. Gen. Stat. § 52-584*, rather than the statute of limitations for wrongful death cases, *Conn. Gen. Stat. § 52-555*, applied in an executrix's action against a doctor because *Conn. Gen. Stat. § 52-555* did not create a new cause of action but was a continuation of that which the decedent could have asserted had he lived. *Holzmaier v. Associated Internists, P.C.*, 1998 Conn. Super. LEXIS 694 (Conn. Super. Ct. Mar.

19 1998).

196. 1991 Conn. Acts 238, effective October 1, 1991, provides that the amendment to *Conn. Gen. Stat. § 52-555* shall apply to injuries first sustained on or after said date; prior to the amendment, the time limit had been three years from the date of the act or omission complained of. *Price v. Castro*, 1997 Conn. Super. LEXIS 2521 (Conn. Super. Ct. Sept. 16 1997).

197. Statute of limitations is a statute of repose, serving the social purpose of precluding the uncertainty of persons having to labor under perpetual apprehension of litigation to address the consequences of their claimed ancient wrongdoing, and the statutes exist to prevent the assertion of stale claims. *Price v. Castro*, 1997 Conn. Super. LEXIS 2521 (Conn. Super. Ct. Sept. 16 1997).

198. Doctor's motion for summary judgment based on the passing of the statute of limitations was denied where the injured party alleged in the complaint filed inter vivos that he would die as a result of the doctor's malpractice, and the injured party's administrator brought a wrongful death action after the injured party's death and his substitution as the party plaintiff; there could be no element of surprise or staleness as concerned the wrongful death claim. *Price v. Castro*, 1997 Conn. Super. LEXIS 2521 (Conn. Super. Ct. Sept. 16 1997).

199. Physician's motion for summary judgment alleging that a wrongful death claim by a stillborn infant was barred by *Conn. Gen. Stat. § 52-555* was denied because the action on behalf of the estate of the deceased child was commenced well within the period of three years from the act or omission complained of, and within two years from the date of death, if one year was excluded from a calculation of two years from the date of death, as provided by *Conn. Gen. Stat. § 52-594*. *Slater v. Mount Sinai Hosp.*, 1997 Conn. Super. LEXIS 1614 (Conn. Super. Ct. June 11 1997), criticized by *Fenton v. United Techs. Corp.*, 204 F. Supp. 2d 367, 2002 U.S. Dist. LEXIS 10365 (D. Conn. 2002).

200. Administrator did not have standing to bring a wrongful death action on behalf of the pedestrian's estate because she was not the administratrix at the commencement of the action and the certificate showing her authority as administrator was dated more than two years after the date of death and, thus, beyond the specific limitation imposed by *Conn. Gen. Stat. § 52-555* for bringing the action. *Estate of Johnson v. Roth*, 1995 Conn. Super. LEXIS 1973 (Conn. Super. Ct. July 5 1995).

201. In a products liability action, the manufacturer was not entitled to summary judgment when it failed to specifically plead the statute of limitations as a defense under *Conn. Gen. Stat. § 52-555*, with respect to the administratrix's wrongful death action. *Manson v. Mr. Coffee, Inc.*, 1995 Conn. Super. LEXIS 1609 (Conn. Super. Ct. May 26 1995).

202. Limitation in *Conn. Gen. Stat. § 52-555* is a non-waivable, jurisdictional prerequisite which must be met in order to maintain an action under the statute; the limitation period under § 52-555 must be strictly construed and a court is not at liberty to extend, modify or enlarge its scope through the mechanics of construction. *Waller v. State*, 1993 Conn. Super. LEXIS 940 (Conn. Super. Ct. Apr. 15 1993).

203. Time limitations under *Conn. Gen. Stat. § 52-555* were tolled until the executors received authorization from the Claims Commissioner to sue the State; therefore their actions were filed within the time allowed. *Toomey v. State*, 1992 Conn. Super. LEXIS 2882 (Conn. Super. Ct. Sept. 15 1992).

204. In an action by plaintiff, an administratrix of her decedent daughter's estate, against defendants, a city and two police officers, alleging wrongful death and negligent infliction of emotional distress, defendants were not entitled to summary judgment under *Conn. Prac. Book § 17-49* because there was a genuine issue of fact regarding when the actionable harm was discovered and when the two-year limitations period commenced under *Conn. Gen. Stat. § 52-555*, and because defendants failed to prove that they had governmental immunity as the court could not find that the decedent was not an identifiable victim. *Garcia v. Davis*, 1991 Conn. Super. LEXIS 1808 (Conn. Super. Ct. July 25

1991).

205. In a wrongful death action, where defendants, on the first day of trial, filed a request to amend their answer to raise the statute of limitations under *Conn. Gen. Stat. § 52-555* as a special defense, the request should have been granted because the statute of limitations was contained within the statute that created the right of action, and was a substantive and jurisdictional prerequisite that could not be waived and could be raised at any time. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

206. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate *Conn. Const. art. I, § 10*, by abolishing common law and statutory rights that existed in 1818, when article I, § 10, was adopted, because an action for damages for wrongful death did not exist at common law or by statute in Connecticut in 1818. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

207. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate the equal protection clause of *Conn. Const. art. I, § 20*, by extending the discovery rule to personal injury actions but not to wrongful death actions, because the distinction was rationally related to a legitimate government interest in preventing the unexpected enforcement of stale and fraudulent claims and of promoting the prompt settlement of the economic and legal affairs of the deceased. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

208. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate the equal protection clause of *Conn. Const. art. I, § 20*, by providing a shorter statute of limitations than provided for death actions because it could not be said that the inherent nature of instrumentalities such as agent orange, hazardous chemicals, and deficient architectural and engineering designs, was an irrational reason for having a different period applicable to each. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

209. Wrongful death suit was not timely where the complaint was served a year and a day after the decedent's death; also, where plaintiff was not the decedent's administrator when the complaint was filed, the complaint did not state a cause of action. *Cofrancesco v. Smith*, 29 Conn. Supp. 139, 275 A.2d 608, 1971 Conn. Super. LEXIS 112 (Conn. Super. Ct. 1971).

210. Where a decedent was injured and died of his injuries six weeks later, an action for damages brought within a year of decedent's death, but not within a year of the incident that resulted in the injuries was not time barred; the former one-year limitation in *Conn. Gen. Stat. § 52-555* was not applicable to a claim for pre-death pain and suffering, and the limitation in *Conn. Gen. Stat. § 52-584* was extended by *Conn. Gen. Stat. § 52-594*. *Doucette v. Bouchard*, 28 Conn. Supp. 460, 265 A.2d 618, 1970 Conn. Super. LEXIS 111 (Conn. Super. Ct. 1970).

211. Although a decedent's estate administratrix filed her wrongful death action against a surgical practice and affiliated individuals after the two-year limitations period of *Conn. Gen. Stat. § 52-555(b)*, she had obtained an extension under *Conn. Gen. Stat. § 52-190a(b)* which was applicable to extend the time frame; although she had obtained the extension in a judicial district other than where the complaint was actually filed, strict statutory interpretation was not warranted because subject matter jurisdiction was not involved, the statutes were procedural, and rigid application gave way to equitable considerations. *Johnson v. Wazaz*, 2007 Conn. Super. LEXIS 928 (Conn. Super. Ct. Apr. 3 2007).

212. Doctor's motion to strike a widow's claim for postmortem loss of consortium was denied because the claim was not on its face barred by the statute of repose under *Conn. Gen. Stat. § 52-555* where the suit was filed within five years after the husband discovered his cancer. *Healy v. Gordon*, 1998 Conn. Super. LEXIS 1210 (Conn. Super. Ct. Apr. 28

1998).

213. Statute of limitations is a statute of repose, serving the social purpose of precluding the uncertainty of persons having to labor under perpetual apprehension of litigation to address the consequences of their claimed ancient wrongdoing, and the statutes exist to prevent the assertion of stale claims. *Price v. Castro*, 1997 Conn. Super. LEXIS 2521 (Conn. Super. Ct. Sept. 16 1997).

214. In administratrix's negligence and Conn. Gen. Stat. § 52-555 wrongful death suit against a smaller rural town and pre-warned police officers after a man shot and killed his former girlfriend and her nine-month old fetus, the identifiable person/imminent harm exception to Conn. Gen. Stat. § 52-557n governmental immunity applied; the trial court stated that (1) the mother was clearly in imminent harm; (2) the foreseeably dangerous condition was limited in duration and geographical scope; (3) it was hard to imagine what more a desperate woman could have done to reach out for police protection; and (4) it was equally hard to construct a situation of such delay and failure of police to appreciate the gravity of the situation and act accordingly. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

215. In administratrix's suit against town and pre-warned police officers when boyfriend killed mother, identifiable person/imminent harm exception to governmental immunity pursuant to Conn. Gen. Stat. § 52-557n applied and mother and viable fetus were protected by wrongful death statute, Conn. Gen. Stat. § 52-555. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

216. In a wrongful death action, evidence relating to matters that were not apparent to officers when they investigated a suicide call was excluded because it was not relevant to the claim of governmental immunity. *Brown v. Dooling*, 1997 Conn. Super. LEXIS 2712 (Conn. Super. Ct. Sept. 30 1997).

217. Where recreational land was not required to be available to all people, for all purposes, at all times, and because the administratrix failed to challenge the reasonableness of restrictions placed on the recreational land, the city and superintendent were immune from the administratrix's action for damages that was brought, pursuant to Conn. Gen. Stat. § 52-555, for the drowning death of her son. *Roman v. Handy*, 1994 Conn. Super. LEXIS 769 (Conn. Super. Ct. Mar. 24 1994).

218. In administratrix's negligence and Conn. Gen. Stat. § 52-555 wrongful death suit against a smaller rural town and pre-warned police officers after a man shot and killed his former girlfriend and her nine-month old fetus, the identifiable person/imminent harm exception to Conn. Gen. Stat. § 52-557n governmental immunity applied; the trial court stated that (1) the mother was clearly in imminent harm; (2) the foreseeably dangerous condition was limited in duration and geographical scope; (3) it was hard to imagine what more a desperate woman could have done to reach out for police protection; and (4) it was equally hard to construct a situation of such delay and failure of police to appreciate the gravity of the situation and act accordingly. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

219. Plaintiffs' reckless entrustment claim in a wrongful death action arising out of a traffic accident, which sought to hold defendant employers vicariously liable for the recklessness of defendant driver, their employee, was dismissed because Connecticut did not recognize a claim for reckless entrustment. *Hronis v. EBO Logistics, LLC*, 2009 U.S. Dist. LEXIS 70422 (D. Conn. Aug. 11 2009).

220. *Conn. Gen. Stat. § 52-555(a)* claim failed for lack of subject matter jurisdiction as the order appointing a wife as the temporary administratrix of a decedent's estate attached to the original complaint restricted itself to granting the authority to obtain medical records; the amended complaint did not fall within exception to rule requiring a ruling on a motion to dismiss before addressing an amended complaint even though the wife filed her amended complaint within 30 days of the return date under *Conn. Gen. Stat. § 52-128* and *Conn. Gen. Prac. Book, R. Super. Ct. § 10-59*, as there was an issue as to whether the wife had authority to sue in the first instance. *Williams v. Vill. Med. Ass'n, 2008 Conn. Super. LEXIS 2994 (Conn. Super. Ct. Nov. 25 2008)*.

221. Hospital's claim that a loss of chance count was legally insufficient because Connecticut did not recognize a common-law cause of action for "loss of chance" when an action was brought on behalf of a decedent's estate was rejected as the loss of chance count incorporated the allegations in a wrongful death count, which expressly stated that the action was filed pursuant to *Conn. Gen. Stat. § 52-555*; it followed that the loss of chance count was based on § 52-555. *Ritchie v. Charlotte Hungerford Hosp., 2008 Conn. Super. LEXIS 1165 (Conn. Super. Ct. May 12 2008)*.

222. Because a doctor and other defendants did not provide any evidence to support their argument that because a patient was aware of the contents of an opinion letter before she filed for an extension under *Conn. Gen. Stat. §/AA52-190a(b)*, the patient was entitled to the automatic extension in regard to the wrongful death claim, the doctor's motion for summary judgment was denied. *Jervis v. Steckler, 2007 Conn. Super. LEXIS 3359 (Conn. Super. Ct. Dec. 17 2007)*.

223. Because the filing of a petition to extend the statute of limitations under *Conn. Gen. Stat. § 52-190a(b)* neither commenced a wrongful death action nor required that such an action be commenced, rather, it merely secured an additional 90 days so that a person contemplating the filing of a medical malpractice action had sufficient time to comply with the good faith requirements established by the statute, the motion to dismiss based on the executor not being named the administrator at that time was denied. *Fiore v. Schwartz, 2007 Conn. Super. LEXIS 1502 (Conn. Super. Ct. June 8 2007)*.

224. Administrator could bring a wrongful death action against a New York driver under the laws of the State of Connecticut when the accident occurred in Connecticut, the employer was registered to do business in Connecticut, Connecticut had an interest in maintaining public safety on its highways and the other state, New York, had very little interest in precluding recovery by the administrator for the alleged negligent actions of her co-worker driver. *Angerome v. Reid, 2006 Conn. Super. LEXIS 3634 (Conn. Super. Ct. Dec. 5 2006)*.

225. Allegations that a rehabilitation center and corporation knew of a decedent's tendency to have problems remaining safely seated in her wheelchair were sufficient to allege recklessness in a wrongful death action filed by her executor after she strangled on the wheelchair's seatbelt; if proven, the claims would demonstrate that they were aware of and consciously disregarded a substantial risk. *Stromberg v. Hamilton Rehab. & Healthcare Ctr., 2006 Conn. Super. LEXIS 784 (Conn. Super. Ct. Mar. 13 2006)*.

226. Trial court properly granted employers' motion to strike as time-barred, wrongful death claims arising from toxic exposure in the workplace; *Conn. Gen. Stat. § 52-577c(b)*, which applies to personal injury or property damage caused by toxic substances, does not preempt the statute of limitations for wrongful death, *Conn. Gen. Stat. § 52-555*. *Greco v. United Techs. Corp., 277 Conn. 337, 890 A.2d 1269, 2006 Conn. LEXIS 56 (2006)*.

227. Wrongful death claims arising from toxic exposure in the workplace were time-barred under *Conn. Gen. Stat. § 52-555*, which was not preempted by 42 U.S.C.S. § 9658(a)(1) because toxic exposure solely within a workplace is excluded from the definition of "release" in 42 U.S.C.S. § 9601(22); although the complaint alleged that toxic particles

clung to the decedents' clothing and were carried into their cars and houses, such enclosed areas are not part of the environment under 42 U.S.C.S. § 9658(a)(1). *Greco v. United Techs. Corp.*, 277 Conn. 337, 890 A.2d 1269, 2006 Conn. LEXIS 56 (2006).

228. The State's summary judgment motion was denied in a wrongful death action pursuant to *Conn. Gen. Stat. § 52-555*, because when the legislature gave plaintiff, the mother of a child murdered by an inmate who had escaped from a Connecticut prison, permission to sue the State under *Conn. Gen. Stat. § 4-159*, the legislature waived the State's potential defense under the public duty doctrine pursuant to *Conn. Gen. Stat. § 4-160*. *Torres v. State*, 50 Conn. Supp. 72, 912 A.2d 1132, 2006 Conn. Super. LEXIS 568 (Conn. Super. Ct. 2006).

229. Where the executrix brought a wrongful death action against a hospital in both her capacity as an executrix and an individual, a loss of consortium claim by the executrix in her individual capacity was not untimely under *Conn. Gen. Stat. § 52-555* as the executrix's petition, as an executrix, for an extension of the statute of limitation under *Conn. Gen. Stat. § 52-190a* extended by 90 days the time in which the claim had to be brought. *Desimini v. Bristol Hosp., Inc.*, 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006).

230. Hospital's summary judgment motion in a wrongful death action by an executrix was denied because the hospital was not deprived of a vested property right in violation of the due process clause of the Fourteenth Amendment as the ex parte procedure in *Conn. Gen. Stat. § 52-190a(b)*, which extended the statute of limitations by 90 days, did not deprive the hospital of its vested property right to an exemption if suit was not brought within two years. The hospital had property rights, not in a two-year limitation period, but in a statute of limitations of two years and 90 days; because the hospital did not have a vested property right in a two-year statute of limitations, the automatic extension in § 52-190a(b) did not give rise to a violation of constitutional rights. *Desimini v. Bristol Hosp., Inc.*, 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006).

231. *Conn. Gen. Stat. § 52-593a*, a remedial statute, applied to extend the statute of limitations contained in *Conn. Gen. Stat. § 52-555*, which was extended by the application of *Conn. Gen. Stat. § 52-190a(b)*, when the summons and complaint were served a day after the extended time limit expired as the summons and the complaint were delivered to the marshal for service before the expiration of the statutory period. Further, the fact that the original marshal's return did not state under oath the date of delivery of the summons and complaint to the marshal did not render *Conn. Gen. Stat. § 593a(b)* inapplicable because the endorsement of the date of delivery on the original return was directory and not mandatory. *Desimini v. Bristol Hosp., Inc.*, 2006 Conn. Super. LEXIS 120 (Conn. Super. Ct. Jan. 12 2006).

232. Since the wrongful death action was brought more than two years from the date of death by the estate administrator and the deceased's widow, and *Conn. Gen. Stat. § 52-594* does not extend the statute of limitations as to *Conn. Gen. Stat. § 52-555*, the action was barred. *Miller v. Hartford Hosp.*, 2005 Conn. Super. LEXIS 3604 (Conn. Super. Ct. Dec. 22 2005).

233. Defendants' motion to dismiss wrongful death claims was denied; a mother properly moved for a 90-day extension to file the action under *Conn. Gen. Stat. § 52-190a*, and the complaint was filed well within the 90-day extension, so the action was timely under the *Conn. Gen. Stat. § 52-555* statute of limitations. *Williams v. St. Francis Hosp.*, 2005 Conn. Super. LEXIS 3264 (Conn. Super. Ct. Nov. 22 2005).

234. State's motion for summary judgment was granted as to a wife's wrongful death and consortium claim, as she failed to bring the claim within the *Conn. Gen. Stat. § 52-555(a)* statute of limitations, and the tolling provision of *Conn. Gen. Stat. § 4-160(d)*, interpreted pursuant to *Conn. Gen. Stat. § 1-2z*, merely provided an extension of time for a state board to review the claim, not a renewal of the statute of limitations. *Lagassey v. State*, 50 Conn. Supp. 130, 913 A.2d 1153, 2005 Conn. Super. LEXIS 2810 (Conn. Super. Ct. 2005), affirmed by 281 Conn. 1, 914 A.2d 509, 2007 Conn. LEXIS 8 (2007).

235. In a wrongful death action pursuant to *Conn. Gen. Stat. § 52-555*, the trial court granted property owners' motion to strike portions of a count which alleged that they served alcohol to minors, because there was no evidence that the owners actually supplied the alcohol that their son served to a decedent at a party at the home while the owners were away. *Silk Adm'r of the Estate of Silk v. Gill*, 2005 Conn. Super. LEXIS 2489 (Conn. Super. Ct. Sept. 15 2005).

236. Wrongful death statute provided the exclusive remedy for the recovery of financial losses such as the ascertainable loss of life, health and medical costs; thus, where plaintiff failed to allege any recoverable financial loss independent from those wrongful death damages, such as the cost of the residential services provided to plaintiff's decedent in a rest home, there was no basis for asserting a claim under the Connecticut Unfair Trade Practice Act (CUTPA), *Conn. Gen. Stat. § 42-110a* et seq., in addition to plaintiff's wrongful death claim. *Rivera v. Simonetti*, 2005 Conn. Super. LEXIS 1999 (Conn. Super. Ct. Aug. 5 2005).

237. Since the administratrix properly pled the wrongful death statute, *Conn. Gen. Stat. § 52-555*, where the decedent died after being assaulted at a nursing home, the motion to strike was denied on that ground. The claims of recklessness were not destroyed merely because the administratrix pleaded both negligence and recklessness based upon substantially the same allegations of fact as the administratrix explicitly set forth the facts which she alleged constituted reckless conduct. *Delconte v. Kindred Nursing Ctrs. E., LLC*, 2005 Conn. Super. LEXIS 1486 (Conn. Super. Ct. May 20 2005).

238. Since, under *Conn. Gen. Stat. § 52-555*, based on reckless conduct punitive damages could be awarded, and since such damages could include counsel fees, the motion to strike the claim for relief which sought attorneys fees was denied. *Delconte v. Kindred Nursing Ctrs. E., LLC*, 2005 Conn. Super. LEXIS 1486 (Conn. Super. Ct. May 20 2005).

239. In her wrongful death claim under *Conn. Gen. Stat. § 52-555*, decedent's wife was properly awarded, in addition to "just damages," economic damages in the amount of \$ 2,005.00, for her funeral expenses. *Osiecki v. Bridgeport Health Care Ctr., Inc.*, 2005 Conn. Super. LEXIS 1239 (Conn. Super. Ct. May 12 2005).

240. In a wrongful death claim brought by decedent's wife under *Conn. Gen. Stat. § 52-555*, decedent's estate was property awarded \$ 575,000 for the loss of life's enjoyment. The decedent was 67 years old and had an average life expectancy of 15 years, and there was sufficient evidence regarding his enjoyment of his life prior to the onset of Guillain-Barre syndrome, upon which the jury could base its award of wrongful death damages, and although the award was generous, it did not shock the conscience. *Osiecki v. Bridgeport Health Care Ctr., Inc.*, 2005 Conn. Super. LEXIS 1239 (Conn. Super. Ct. May 12 2005).

241. Where the group home operator and contractor alleged that the co-administrators' wrongful death action failed to allege damages available under *Conn. Gen. Stat. § 52-555*, the motion to strike filed by the operator and contractor was granted, as the co-administrators failed to address the issue. *Langewisch v. New England Residential Servs.*, 2005 Conn. Super. LEXIS 401 (Conn. Super. Ct. Jan. 25 2005).

242. While an administrator had the right to assert alternative theories of recovery based on breach of contract and breach of implied contract while also asserting claims against a nursing facility under the wrongful death statute, the facility's motion to strike the contract counts was granted because the administrator failed to allege facts showing that the facility promised to provide a specific result and refused to provide that result. The administrator's allegations pertained to the facility's alleged failure to provide services and care with a certain level of diligence and competency, and those allegations did not support a claim either of a failure to provide a specific result or for breach of contract to provide medical services. *Latino v. Pendleton Nursing*, 2004 Conn. Super. LEXIS 2582 (Conn. Super. Ct. Sept. 2 2004).

243. In an action arising out of the death of an arrestee who died as a result of a gunshot wound by officers who were arresting him after a traffic stop, the court denied a summary judgment motion by the city and its police department and officers as to the wrongful death claim under *Conn. Gen. Stat. § 52-555*; the "wrongful act" hinged on whether the force

used against the arrestee was "reasonable." *Holeman v. City of New London*, 330 F. Supp. 2d 99, 2004 U.S. Dist. LEXIS 16100 (D. Conn. 2004), reversed in part by, appeal dismissed in part by 425 F.3d 184, 2005 U.S. App. LEXIS 21213 (2d Cir. Conn. 2005).

244. Nursing facility's motion to strike the wrongful death claims for medical malpractice and recklessness was denied because the executor properly pled the wrongful death statute, *Conn. Gen. Stat. § 52-555*. Further, the argument that the executor's separate counts should have been brought as a single count should have been raised in a request to revise, not a motion to strike, and the right was waived because the facility did not ask for a specific correction when it filed the earlier request to revise. *Monterio v. Crescent Manor, LLC*, 2004 Conn. Super. LEXIS 1337 (Conn. Super. Ct. May 21 2004).

245. Facts alleged by the executor in the wrongful death claim, pursuant to *Conn. Gen. Stat. § 52-555*, did not support a cause of action under *Conn. Gen. Stat. § 19a-550(b)(5)*, the patients' bill of rights statute, and therefore the motion to strike the claim for negligence per se was granted. The executor neither alleged that the decedent made nor even contemplated making grievances or recommendations, nor alleged that any threats or reprisals were made by the facility, and there were no allegations that the facility's restraint, interference, coercion, discrimination, or reprisal caused the decedent's wheelchair to fall down the stairwell. *Monterio v. Crescent Manor, LLC*, 2004 Conn. Super. LEXIS 1337 (Conn. Super. Ct. May 21 2004).

246. Partial summary judgment was denied to a medical center on its claim that a cause of action under the wrongful death statute, *Conn. Gen. Stat. § 52-555*, was not cognizable for a stillborn infant. The superior court followed the majority of jurisdictions and allowed the mother, as administratrix for the daughter, to bring a cause of action for the wrongful death of her viable, but unborn, child; the court held that, for purposes of the partial summary judgment motion, the child could have been born alive but for the center's breach of its standard of care during delivery, so the statute allowed the mother, as personal representative for the daughter, to bring the cause of action. *Warycha v. Midstate Med. Ctr.*, 2004 Conn. Super. LEXIS 873 (Conn. Super. Ct. Mar. 17 2004).

247. Referral service was entitled to summary judgment in a wrongful death action as the administratrix failed to allege a viable theory of legal fault that was the proximate cause of the decedent's injuries; the decedent was not in class of persons to whom the referral service owed duty of care. *Ward v. Greene*, 267 Conn. 539, 839 A.2d 1259, 2004 Conn. LEXIS 19 (2004).

248. Where a private not-for-profit organization had terminated its day-care program and did not refer day care clients to a day care provider, but continued its foster care contract with the day care provider, the administrator had failed to show that the organization's conduct was the proximate cause of the child's death after he was killed during day care where the organization had no ownership interest in the day care operation, did not refer children, did not pay the operator, did not supervise her, and did not investigate whether she was qualified. *Ward v. Greene*, 267 Conn. 539, 839 A.2d 1259, 2004 Conn. LEXIS 19 (2004).

249. Wrongful death statute, *Conn. Gen. Stat. § 52-555*, is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought. Although § 52-555 precludes a plaintiff from pleading any alternative, common-law cause of action, § 52-555 does not bar the plaintiff from advancing alternative theories of recovery, or causes of action, pursuant to § 52-555. *Hebert v. Frontier of Northeast Conn., Inc.*, 2004 Conn. Super. LEXIS 229 (Conn. Super. Ct. Jan. 29 2004).

250. Under Connecticut's wrongful death statute, *Conn. Gen. Stat. § 52-555*, the statutory right of action belongs, in effect, to the decedent, and to the decedent alone, and damages are recoverable for the death as for one of the consequences of the wrong inflicted upon the decedent. The cause of action authorized by the wrongful death statute is a continuance of that which the decedent could have asserted had she lived and to which death may be added as an element of damage. *Hebert v. Frontier of Northeast Conn., Inc.*, 2004 Conn. Super. LEXIS 229 (Conn. Super. Ct. Jan.

29 2004).

251. As the exclusive remedy, the wrongful death statute, *Conn. Gen. Stat. § 52-555*, precludes a plaintiff's cause of action premised on the Patients Bill of Rights, *Conn. Gen. Stat. § 19a-550*. *Hebert v. Frontier of Northeast Conn., Inc.*, 2004 Conn. Super. LEXIS 229 (Conn. Super. Ct. Jan. 29 2004).

252. An attempt to recover ante-mortem damages, arising out of the same tort, in another action pursuant to the survival of actions statute, *Conn. Gen. Stat. § 52-599*, is a course of action inapposite to the rule of exclusivity. There cannot be a recovery of damages for death itself in one action, under *Conn. Gen. Stat. § 52-555*, and a recovery of ante-mortem damages, flowing from the same tort, in another action brought under the survival of action statute, *Conn. Gen. Stat. § 52-599*. *Hebert v. Frontier of Northeast Conn., Inc.*, 2004 Conn. Super. LEXIS 229 (Conn. Super. Ct. Jan. 29 2004).

253. *Conn. Gen. Stat. § 52-555* wrongful death statute provided the exclusive form of relief, but it could be supported by separate allegations that defendants violated distinct duties. Therefore, the trial court did not strike counts 2 through 7 because they pleaded violations of distinct nursing home minimum duties of care, arising under 42 C.F.R. §§ 483.20(k), 483.25(j), 483.25 (i), 483.30, 483.35, 483.40, as alternative negligence claims--breaches of a statute intended to prevent the type of injuries the decedent allegedly suffered. *Hebert v. Frontier of Northeast Conn., Inc.*, 2004 Conn. Super. LEXIS 229 (Conn. Super. Ct. Jan. 29 2004).

254. Administratrix could maintain a cause of action in negligence on behalf of a viable unborn fetus under *Conn. Gen. Stat. § 52-555*. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

255. In administratrix's suit against town and pre-warned police officers when boyfriend killed mother, identifiable person/imminent harm exception to governmental immunity pursuant to *Conn. Gen. Stat. § 52-557n* applied and mother and viable fetus were protected by wrongful death statute, *Conn. Gen. Stat. § 52-555*. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

256. Where a fetus has reached that stage of prenatal development where it is capable of independent life apart from its mother, such a stage of development as to permit continued existence, under normal conditions, outside of the womb, if such child dies in the womb as the result of the negligence of some third person, then the personal representative of that child may, under the provisions of *Conn. Gen. Stat. §§ 52-555, 52-599*, maintain a cause of action in its behalf for such injuries and death. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

257. Absent a clear expression from the legislature to the contrary, the provisions of *Conn. Gen. Stat. § 52-555* should be broadly construed to permit an administratrix to maintain a cause of action in negligence on behalf of a viable fetus for injuries and death. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7, 2004 Conn. Super. LEXIS 102 (Conn. Super. Ct. 2004).

258. "Just damages" under *Conn. Gen. Stat. § 52-555* include: (1) the value of the decedent's lost earning capacity less deductions necessary for her living expenses and taking into consideration that a present cash payment will be made, (2) compensation for destruction of capacity to carry on and enjoy life's activities in a way decedent would have done had she lived, and (3) compensation for conscious pain and suffering; loss of chance damages, therefore, may be pleaded by an executor along with a wrongful death claim because compensation for loss of chance for successful treatment is not provided under the statute. Doctors and a hospital were denied their motion to strike loss of chance counts in an executor's wrongful death action against them on behalf of the estate's decedent. *Estate of Treadwell v. Yale-New Haven Hosp.*, 2004 Conn. Super. LEXIS 51 (Conn. Super. Ct. Jan. 9 2004).

259. Where the decedent's estate, in a wrongful death action, failed to explicitly refer to *Conn. Gen. Stat. § 52-555*, the

wrongful death statute, in violation of *Conn. Prac. Book § 10-3*, which required that the statute be specifically pleaded by number, the failure to specifically refer to *Conn. Gen. Stat. § 52-555* in a wrongful death action was not fatal to the complaint. *Estate of Treadwell v. Yale-New Haven Hosp.*, 2003 Conn. Super. LEXIS 3560 (Conn. Super. Ct. Dec. 22 2003).

260. Where the decedent's estate separately pleaded causes of action for loss of chance for successful treatment and wrongful death pursuant to *Conn. Gen. Stat. § 52-555*, the motion to strike pursuant to *Conn. Prac. Book § 10-39* filed by the cardiologist and medical practice was denied; contrary to the assertions of the cardiologist and medical practice, the estate was permitted to plead wrongful death and loss of chance causes of action separately. *Estate of Treadwell v. Yale-New Haven Hosp.*, 2003 Conn. Super. LEXIS 3560 (Conn. Super. Ct. Dec. 22 2003).

261. Jury's award to the decedent's estate was supported where the decedent was an accomplished artist and sculptor; while the amount was a considerable sum, given that this was a death of a talented 64-year-old man, who left a widow who had little left for herself in her new country, the award did not shock the sense of justice of the court. *Santos v. Zarif*, 2003 Conn. Super. LEXIS 3403 (Conn. Super. Ct. Dec. 10 2003).

262. Connecticut law did not categorically apply the "lex loci" doctrine where great weight was given to the fact that all claimed deviations occurred in Connecticut; it applied the guidelines contained in the factors of *Restatement (Second) Conflict of Laws § 6*, 145(2) and the wrongful death principles of *Restatement (Second) Conflict of Laws § 175*. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

263. In patient's suit for wrongful death of her stillborn baby, patient claimed that five of six deviations from defendant physicians' standard of care took place in Connecticut where the patient was last examined in a Connecticut hospital; the claimed deviations were failure to properly diagnose fetal distress, failure to admit the patient to the hospital, for observation, monitoring, and testing, and the failure to properly test the patient. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

264. Under *Restatement (Second) Conflict of Laws § 175*, in an action for wrongful death, the local law of the state where the injury occurs determines the rights and responsibilities of the parties unless, with regard to the particular issue, some other state has a more significant relationship under the principles stated in *Restatement (Second) Conflict of Laws § 6* to the occurrence and the parties, in which event the local law of the other state will be applied. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

265. Where a complaint seeks recovery for wrongful death of an unborn child, the requirements of *Restatement (Second) Conflicts of Laws § 175* must be considered; § 175 establishes a presumption that the law of the state where the injury occurred governs, unless another state has a more significant relationship consistent with *Restatement (Second) Conflicts of Laws § 6*. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

266. Analysis of the criteria announced in the *Restatement (Second) Conflict of Laws §§ 6, 145, 175* necessarily involves a case by case consideration of the various factors. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

267. With respect to the choice of law to apply to a wrongful death action, Connecticut's interests include ensuring that hospitals that are located and licensed in the state provide proper medical care and attention to all who utilize hospital services, both residents and non-residents, seeing that physicians licensed in Connecticut adhere to the standard of care applicable to board certified physicians in the particular specialty, in according to a viable fetus, who is stillborn, certain rights along with the ability to enforce those rights, and preservation of potential human life, as advanced by *Conn. Gen. Stat. § 19a-602(b)*. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

268. With respect to the choice of law to apply to a wrongful death action, the determination of whether another state's or Connecticut's law applies should not be settled based upon where the mother is when the baby dies, but rather where the deviation from the standard of care occurs. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

269. Connecticut law does not require that a baby be born alive for a wrongful death action to be maintained. *Vecchio v. Rye Brook Obstetrics-Gynecology, P.C.*, 2003 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 24 2003).

270. Connecticut's wrongful death statute applied to single-car accident in Vermont; lex loci approach was rejected because Connecticut had a more significant relationship to the incident as deceased passenger, driver, and owner all resided in Connecticut. *Gatti v. Forcier*, 2003 Conn. Super. LEXIS 2459 (Conn. Super. Ct. July 30 2003).

271. Defendants' motion for a remittitur, pursuant to *Conn. Prac. Book § 16-35* (2003), of a widow's award on a loss of consortium claim pursuant to *Conn. Gen. Stat. § 52-555a* was granted, because the verdict for loss of consortium was so excessive as to shock the court's sense of justice, as the loss of consortium verdict was twice the amount of a verdict for the husband's wrongful death pursuant to *Conn. Gen. Stat. § 52-555*, and the court concluded that there was no rational basis for sustaining the verdict for loss of consortium while awarding half the amount to the widow, in her representative capacity, for her husband's wrongful death; *Conn. Gen. Stat. § 52-216a* did not require the court to further reduce the loss of consortium claim based on settlements the widow had received from other parties. *Elaine Blake v. Neurological Specialists, P.C.*, 2003 Conn. Super. LEXIS 1471 (Conn. Super. Ct. May 9 2003).

272. School board's motion to strike, pursuant to *Conn. Prac. Book § 10-39*, claims by parents arising from the suicide of a child which alleged common law wrongful death, reckless disregard, and loss of filial consortium, were granted, as the Connecticut wrongful death statute, *Conn. Gen. Stat. § 52-555*, was the sole basis upon which an action that included as an element of damages a person's death or its consequences could be brought, the parents failed to refer to the Connecticut wrongful death statute in the claim, and because Connecticut law did not recognize causes of action for reckless disregard and loss of filial consortium. *Savinelli v. E. Haven Bd. of Educ.*, 2003 Conn. Super. LEXIS 1165 (Conn. Super. Ct. Apr. 28 2003).

273. A loss of chance claim cannot be asserted as a separate common law action but must be presented as an alternative theory of recovery pursuant to *Conn. Gen. Stat. § 52-555*. *Estate of Alfano v. Montowese Health & Rehab.*, 2003 Conn. Super. LEXIS 975 (Conn. Super. Ct. Apr. 2 2003).

274. A loss of chance claim in a wrongful death action under *Conn. Gen. Stat. § 52-555* does not seek damages for death but rather for the decreased chance of successful treatment. *Estate of Alfano v. Montowese Health & Rehab.*, 2003 Conn. Super. LEXIS 975 (Conn. Super. Ct. Apr. 2 2003).

275. Examination of a complaint revealed the alleged tortfeasors were mistaken that the injured party's counts were legally insufficient because they failed to set forth a cause of action for wrongful death based on *Conn. Gen. Stat. § 52-555*, as count one specifically alleged the injured party brought the action pursuant to § 52-555 for the injuries and death of the decedent, and furthermore, count one was incorporated by reference into each of the subsequent counts. *Campion v. Harborside Conn. L.P.*, 2003 Conn. Super. LEXIS 782 (Conn. Super. Ct. Mar. 18 2003).

276. Where the executor and the wife's wrongful death action was based on *Conn. Gen. Stat. § 52-555*, the fact that the statute was not specifically identified in their pleadings was not fatal; they also stated a recognized cause of action for loss of chance, and § 52-555 was not their exclusive remedy. *Estate of Peter Haskos v. Jung*, 2002 Conn. Super. LEXIS 857 (Conn. Super. Ct. Mar. 20 2002).

277. Doctor and his company's special defense under *Conn. Gen. Stat. § 52-584* was legally insufficient since law of the

case had previously set *Conn. Gen. Stat. § 52-555* as the applicable statute of limitations for injuries resulting in death; executor brought suit well within statute of limitations period. *Dawson v. Kuehn*, 2002 Conn. Super. LEXIS 665 (Conn. Super. Ct. Feb. 25 2002).

278. In a suit brought by an executrix against a city and an emergency medical rescue company seeking damages on multiple grounds arising from decedent's death following an asthma attack, a motion to strike portions of the executrix's complaint filed by the city on the ground that the wrongful death statute, *Conn. Gen. Stat. § 52-555*, was the sole basis of recovery in an action that included as an element of damages a person's death or its consequences was denied because the wrongful death statute was only intended to bar a plaintiff from seeking recovery for death as damages under the wrongful death statute in one count and under an alternative theory of liability in a separate count that relied on the same conduct. *Torres v. Am. Med. Response of Conn.*, 2001 Conn. Super. LEXIS 2580 (Conn. Super. Ct. Sept. 6 2001).

279. Wrongful death action was governed exclusively by *Conn. Gen. Stat. § 52-555*; the language of 52-555 did not specifically restrict its application to deaths resulting merely from the negligence of another; a wrongful death action alleging medical malpractice was brought within the applicable limitations period and defendant's motion for summary judgment was denied. *Dawson v. Kuehn*, 47 Conn. Supp. 241, 785 A.2d 1226, 2001 Conn. Super. LEXIS 2249 (Conn. Super. Ct. 2001).

280. Wrongful death action filed in June of 2000 was filed beyond the limitations period where the acts or omissions that case was based on occurred on February 24, 1996 and *Conn. Gen. Stat. § 52-555* provided that such an action had to be brought within two years of the date of death except that no such action was to be brought more than five years from the date of the act or omission complained of. *Strickland v. St. Francis Hosp. & Med. Ctr.*, 2001 Conn. Super. LEXIS 1672 (Conn. Super. Ct. June 14 2001).

281. Mother's request for injunctive relief against the department of public health to require the rectification of internal problems that allegedly led to the death of her child was denied because she had a remedy under law under *Conn. Gen. Stat. § 52-555* for the death of her child. *Ward v. Greene*, 2001 Conn. Super. LEXIS 794 (Conn. Super. Ct. Mar. 21 2001).

282. *Conn. Gen. Stat. § 52-555* is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought. *Ward v. Greene*, 2001 Conn. Super. LEXIS 714 (Conn. Super. Ct. Mar. 8 2001).

283. Decedent's parents had no independent legal claim against a motorcycle manufacturer, distributor, and retailer for the decedent's medical, funeral, and incidental expenses arising from his death in a motorcycle accident. *Administrator of the Estate of Sin Sit v. Dighello Bros. Auto Sales*, 2000 Conn. Super. LEXIS 564 (Conn. Super. Ct. Mar. 13 2000).

284. In mother's medical malpractice action against a hospital and doctors, based upon her emotional distress over the death of her stillborn infant, the court denied the hospital's motion to strike the malpractice claims because they were maintainable alongside a wrongful death action under statute. *Patel v. Norwalk Hosp.*, 2000 Conn. Super. LEXIS 354 (Conn. Super. Ct. Feb. 9 2000).

285. Wrongful death action under *Conn. Gen. Stat. § 52-555* was not dismissed because it was clear that the suit was brought by executors of an estate and not the estate itself. *Estate of Ferrara v. St. Joseph's Living Ctr.*, 1998 Conn. Super. LEXIS 3618 (Conn. Super. Ct. Dec. 10 1998).

286. The wrongful death statute, *Conn. Gen. Stat. § 52-555*, is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought. *Fritz v. Veteran's Mem. Med. Ctr.*, 1998 Conn. Super. LEXIS 3238 (Conn. Super. Ct. Nov. 10 1998).

287. In an action by the estate of a victim pursuant to *Conn. Gen. Stat. § 52-555*, the damages suffered before the victim's death are one of the elements of the just damages to be awarded and must be sought in that action rather than in a separate suit under the survival-of-actions statute. *Fritz v. Veteran's Mem. Med. Ctr.*, 1998 Conn. Super. LEXIS 3238 (Conn. Super. Ct. Nov. 10 1998).

288. Action by an executrix to recover damages from a physician would have been time-barred by *Conn. Gen. Stat. § 52-555* even if the court had not determined that *Conn. Gen. Stat. § 52-584* was the applicable statute of limitations; a petition to extend the statute of limitations pursuant to *Conn. Gen. Stat. § 52-190a(b)* was not filed until after the expiration of the period of repose, and the filing of such a petition cannot be utilized to revive an already expired statute of limitations. *Holzmaier v. Associated Internists, P.C.*, 1998 Conn. Super. LEXIS 1241 (Conn. Super. Ct. May 4 1998).

289. Doctor's motion to strike a widow's claim for postmortem loss of consortium was denied because the claim was not on its face barred by the statute of repose under *Conn. Gen. Stat. § 52-555* where the suit was filed within five years after the husband discovered his cancer. *Healy v. Gordon*, 1998 Conn. Super. LEXIS 1210 (Conn. Super. Ct. Apr. 28 1998).

290. Doctor's motion to strike a widow's breach of contract claim and a loss of consortium claim based on the breach of contract was granted because her husband's death, which was the subject of a wrongful death action under *Conn. Gen. Stat. § 52-555*, resulted from the same conduct that was complained of in the contract action, and thus *Conn. Gen. Stat. § 52-555* provided the widow's sole right of action. *Healy v. Gordon*, 1998 Conn. Super. LEXIS 1210 (Conn. Super. Ct. Apr. 28 1998).

291. Right to recover for injuries resulting in death is a right solely given by statute and must be pursued in a statutory wrongful death action; a patient's widow could not also seek damages from a physician for breach of contract and loss of consortium arising from the breach of contract. *Healy v. Gordon*, 1998 Conn. Super. LEXIS 1210 (Conn. Super. Ct. Apr. 28 1998).

292. Statute of limitations for medical malpractice, *Conn. Gen. Stat. § 52-584*, rather than the statute of limitations for wrongful death cases, *Conn. Gen. Stat. § 52-555*, applied in an executrix's action against a doctor because *Conn. Gen. Stat. § 52-555* did not create a new cause of action but was a continuation of that which the decedent could have asserted had he lived. *Holzmaier v. Associated Internists, P.C.*, 1998 Conn. Super. LEXIS 694 (Conn. Super. Ct. Mar. 19 1998).

293. In a wrongful death action filed in accordance with *Conn. Gen. Stat. § 52-555*, the administrator of the decedent's estate was not entitled to a new trial or entitled to set aside the verdict when the jury could have reasonably and justly reached its decision that no damages were proven with respect to the failure of the police to call the decedent's parents or attempt to prevent the decedent's suicide. *Brown v. Dooling*, 1998 Conn. Super. LEXIS 172 (Conn. Super. Ct. Jan. 23 1998).

294. Claims that the deceased children had against the landlord survived their deaths and the executor or administrator of the estate was allowed to bring their claims. *St. Amand v. Kromish*, 1997 Conn. Super. LEXIS 2963 (Conn. Super. Ct. Nov. 6 1997).

295. In a wrongful death action, evidence relating to matters that were not apparent to officers when they investigated a suicide call was excluded because it was not relevant to the claim of governmental immunity. *Brown v. Dooling*, 1997 Conn. Super. LEXIS 2712 (Conn. Super. Ct. Sept. 30 1997).

296. 1991 Conn. Acts 238, effective October 1, 1991, provides that the amendment to *Conn. Gen. Stat. § 52-555* shall apply to injuries first sustained on or after said date; prior to the amendment, the time limit had been three years from the date of the act or omission complained of. *Price v. Castro*, 1997 Conn. Super. LEXIS 2521 (Conn. Super. Ct. Sept.

16 1997).

297. Statute of limitations is a statute of repose, serving the social purpose of precluding the uncertainty of persons having to labor under perpetual apprehension of litigation to address the consequences of their claimed ancient wrongdoing, and the statutes exist to prevent the assertion of stale claims. *Price v. Castro*, 1997 Conn. Super. LEXIS 2521 (Conn. Super. Ct. Sept. 16 1997).

298. Doctor's motion for summary judgment based on the passing of the statute of limitations was denied where the injured party alleged in the complaint filed inter vivos that he would die as a result of the doctor's malpractice, and the injured party's administrator brought a wrongful death action after the injured party's death and his substitution as the party plaintiff; there could be no element of surprise or staleness as concerned the wrongful death claim. *Price v. Castro*, 1997 Conn. Super. LEXIS 2521 (Conn. Super. Ct. Sept. 16 1997).

299. Connecticut's general wrongful death statute, *Conn. Gen. Stat. § 52-555*, does not address loss of consortium claims based on the death of a parent or a child; accordingly, there is no cause of action for postmortem loss of filial consortium under *Connecticut law*. *Belliveau v. Stevenson*, 123 F.3d 107, 1997 U.S. App. LEXIS 29858 (2d Cir. Conn. 1997).

300. An amended complaint asserting a wrongful death cause of action pursuant to *Conn. Gen. Stat. § 52-555* was not a new cause of action because it related back to the original suit filed while decedent was still alive. *Reilly v. Porter*, 1997 Conn. Super. LEXIS 2148 (Conn. Super. Ct. Aug. 7 1997).

301. Minor child, who was not born at the time his father was killed was not entitled to recover damages for the loss of parental consortium arising from his father's death; *Conn. Gen. Stat. § 52-555* was the exclusive means by which damages resulting from death could be recovered and the statute did not provide for recovery for loss of postmortem parental consortium. *Cronin v. McArdle*, 1997 Conn. Super. LEXIS 1894 (Conn. Super. Ct. July 9 1997).

302. In a wrongful death suit brought pursuant to *Conn. Gen. Stat. § 52-555*, the provisions of *Conn. Gen. Stat. § 52-109* concerning the substitution of parties did not apply where the suit was initiated by an entity that was not recognized as a "person" for purposes of bringing a law suit. *Palmieri v. Relende*, 1997 Conn. Super. LEXIS 1675 (Conn. Super. Ct. June 26 1997).

303. Physician's motion for summary judgment alleging that a wrongful death claim by a stillborn infant was barred by *Conn. Gen. Stat. § 52-555* was denied because the action on behalf of the estate of the deceased child was commenced well within the period of three years from the act or omission complained of, and within two years from the date of death, if one year was excluded from a calculation of two years from the date of death, as provided by *Conn. Gen. Stat. § 52-594*. *Slater v. Mount Sinai Hosp.*, 1997 Conn. Super. LEXIS 1614 (Conn. Super. Ct. June 11 1997), criticized by *Fenton v. United Techs. Corp.*, 204 F. Supp. 2d 367, 2002 U.S. Dist. LEXIS 10365 (D. Conn. 2002).

304. *Conn. Gen. Stat. § 52-555* does not in and of itself preclude awards of punitive damages. *Engram v. Zapert*, 1996 Conn. Super. LEXIS 2955 (Conn. Super. Ct. Nov. 6 1996).

305. Widow, whose husband was intentionally shot on his birthday in his swimming pool, was able to recover damages for his wrongful death from the party legally at fault for the husband's death; the widow was entitled to just damages for the loss of life and earning capacity as well as funeral expenses. *Peters v. Wilson*, 1996 Conn. Super. LEXIS 2218 (Conn. Super. Ct. Aug. 23 1996).

306. Where an administrator brought a wrongful death action against the voluntary members of an organization, the action was dismissed; mere passive membership in a voluntary association was insufficient to confer jurisdiction on all the members unless they were personally served within two years; while a voluntary association may sue or be sued in

its own name under *Conn. Gen. Stat. § 52-76*, individual member liability requires personal service on the member and participation in the suit by the member under *Conn. Gen. Stat. § 52-292*. *Karp v. American Legion Dep't*, 1996 Conn. Super. LEXIS 1865 (Conn. Super. Ct. June 18 1996).

307. Physician's motion to strike a count in a complaint seeking damages for parents' loss of their deceased child's care, support, comfort, love, and companionship was granted; wrongful death damages were recoverable only insofar as they were made so by the Connecticut wrongful death statute and *Conn. Gen. Stat. § 52-555* did not create a cause of action for loss of filial consortium. *Brodski v. Leicher*, 1996 Conn. Super. LEXIS 1048 (Conn. Super. Ct. Apr. 25 1996).

308. To promote efficiency, a physician's motion to strike parents' names from a count in a wrongful death action seeking hospital, medical, and burial expenses was treated as a request to revise pursuant to Conn. Gen. Prac. Book § 147; the parents' names were stricken because the administratrix had the sole right to recover such expenses pursuant to *Conn. Gen. Stat. § 52-555*. *Brodski v. Leicher*, 1996 Conn. Super. LEXIS 1048 (Conn. Super. Ct. Apr. 25 1996).

309. The reasoning of *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 523 A.2d 1301 (1987), impliedly precludes a claim for postmortem loss of parental consortium in *Conn. Gen. Stat. § 52-555* just as it expressly precludes a claim for postmortem loss of marital consortium in *Conn. Gen. Stat. § 52-555*. *Williams v. Reynolds*, 1996 Conn. Super. LEXIS 689 (Conn. Super. Ct. Mar. 14 1996).

310. Administratrix 's complaint, which alleged that a nursing home negligently deprived her decedent of a right or benefit created or established for the well-being of the patient by the provisions of *Conn. Gen. Stat. § 19a-550(c)*, thereby causing his death, was struck because the wrongful death statute, *Conn. Gen. Stat. § 52-555*, is the exclusive remedy for an action that includes as an element of damages a person's death or its consequences. *Morgan v. Tolland County Health Care*, 1996 Conn. Super. LEXIS 638 (Conn. Super. Ct. Feb. 9 1996).

311. Administratrix 's complaint, which alleged that a nursing home's negligent or reckless failure to provide her decedent with skilled nursing and hospice care, as required by the agreement entered into when the decedent was admitted into the home and led to the decedent's death, was struck because the wrongful death statute, *Conn. Gen. Stat. § 52-555*, is the exclusive remedy for an action that includes as an element of damages a person's death or its consequences. *Morgan v. Tolland County Health Care*, 1996 Conn. Super. LEXIS 638 (Conn. Super. Ct. Feb. 9 1996).

312. Defendant's failure to file a motion to dismiss in the order specified by Conn. Prac. Book § 112 (now § 10-6) did not waive his right to challenge the administratrix's standing to bring a wrongful death action under *Conn. Gen. Stat. § 52-555* because the court was required to address the possible absence of subject matter jurisdiction whenever the issue was raised. *Estate of Johnson v. Roth*, 1995 Conn. Super. LEXIS 1973 (Conn. Super. Ct. July 5 1995).

313. Administrator did not have standing to bring a wrongful death action on behalf of the pedestrian's estate because she was not the administratrix at the commencement of the action and the certificate showing her authority as administrator was dated more than two years after the date of death and, thus, beyond the specific limitation imposed by *Conn. Gen. Stat. § 52-555* for bringing the action. *Estate of Johnson v. Roth*, 1995 Conn. Super. LEXIS 1973 (Conn. Super. Ct. July 5 1995).

314. Because the trial court lacked subject matter jurisdiction over a wrongful death, which requiring that the claim had to be dismissed, plaintiffs' contention that *Conn. Gen. Stat. § 52-555* was unconstitutional in that it deprives them of their right to a jury trial provided by *Conn. Const. art. I, § 19* was unavailing. *Gatto v. County Coach Corp.*, 1995 Conn. Super. LEXIS 588 (Conn. Super. Ct. Feb. 23 1995).

315. If the second count in plaintiff's complaint was considered to be a claim for antemortem loss of consortium, it was derivative of the first count, which was a cause of action for wrongful death; therefore, because the cause of action for the wrongful death was barred by the statute of limitations set forth at *Conn. Gen. Stat. § 52-555*, the claim for

antemortem loss of consortium was also barred. *Gatto v. County Coach Corp.*, 1995 Conn. Super. LEXIS 588 (Conn. Super. Ct. Feb. 23 1995).

316. A parent was not entitled to recover medical expenses in a wrongful death action because she brought the action in her individual capacity and only the administrator of decedent's estate could bring a cause of action for a wrongful death pursuant to Conn. Gen. Stat. § 52-555. *Molina v. St. Mary's Hosp.*, 1993 Conn. Super. LEXIS 3038 (Conn. Super. Ct. Nov. 29 1993).

317. Because there was no statutory provision for recovery for loss of parental or filial consortium, a decedent's minor children had no cause of action for the loss of parental consortium in their wrongful death suit and the medical care provider's motion to strike such claims was granted. *Wright v. Anesthesia Assocs.*, 1993 Conn. Super. LEXIS 3036 (Conn. Super. Ct. Nov. 19 1993).

318. Foreign administrator had standing, and the court had subject matter jurisdiction in a wrongful death suit by the foreign administrator against a cafe and a server that alleged dram shop violations and recklessness on behalf of decedent even though the administrator had not filed for letters of ancillary administration because the administrator's authority came from the wrongful death statute, Conn. Gen. Stat. § 52-555, and case law and not the probate law. *Rhoads v. Newman Enters.*, 1993 Conn. Super. LEXIS 2615 (Conn. Super. Ct. Oct. 7 1993).

319. Plaintiff's cause of action for postmortem loss of consortium arose at the time of her husband's death, and Conn. Gen. Stat. § 52-555 applied; although the statute was not in effect at the time the husband was injured, it was in effect at the time of his death from the injuries and plaintiff properly stated a cause of action thereunder. *Andersen v. Smart*, 1993 Conn. Super. LEXIS 292 (Conn. Super. Ct. Feb. 2 1993).

320. Action brought by the administratrix against a community-services corporation on account of the alleged wrongful death of her child was separate and distinct from any action brought on behalf of an individual; ergo, the administratrix was the plaintiff, and a counterclaim alleging negligence could not be filed against her in an individual capacity by the corporation. *Franklin v. Saint Luke's Community Servs.*, 1992 Conn. Super. LEXIS 790 (Conn. Super. Ct. Mar. 19 1992).

321. Where a patient died after bringing a medical malpractice claim against her doctor, the patient's administrator was permitted to amend the complaint to add a wrongful death claim; the claim related back to the filing of the original complaint. *Hand v. Clark*, 1992 Conn. Super. LEXIS 627 (Conn. Super. Ct. Feb. 28 1992).

322. Conn. Gen. Stat. § 52-599, which permits substitution of a personal representative for a deceased plaintiff, is conditioned, just like the wrongful death statute, Conn. Gen. Stat. § 52-555, in the case of a foreign personal representative, on ancillary qualification in Connecticut. *Perrine v. Ackerly*, 1990 Conn. Super. LEXIS 2038 (Conn. Super. Ct. Dec. 13 1990).

323. In an action by wife and administratrix of a deceased police officer against owner of property where officer suffered fatal injuries, the wife was entitled to receive, as part of an award of damages, an evaluation of the value of the destruction of her decedent husband's earning capacity. *Kuczynski v. Weimann*, 1990 Conn. Super. LEXIS 1885 (Conn. Super. Ct. Oct. 17 1990).

324. In a wrongful death action, where defendants, on the first day of trial, filed a request to amend their answer to raise the statute of limitations under Conn. Gen. Stat. § 52-555 as a special defense, the request should have been granted because the statute of limitations was contained within the statute that created the right of action, and was a substantive and jurisdictional prerequisite that could not be waived and could be raised at any time. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

325. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate *Conn. Const. art. I, § 10*, by abolishing common law and statutory rights that existed in 1818, when article I, § 10, was adopted, because an action for damages for wrongful death did not exist at common law or by statute in Connecticut in 1818. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

326. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate the equal protection clause of *Conn. Const. art. I, § 20*, by extending the discovery rule to personal injury actions but not to wrongful death actions, because the distinction was rationally related to a legitimate government interest in preventing the unexpected enforcement of stale and fraudulent claims and of promoting the prompt settlement of the economic and legal affairs of the deceased. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

327. Statute of limitations for wrongful death actions in *Conn. Gen. Stat. § 52-555* did not violate the equal protection clause of *Conn. Const. art. I, § 20*, by providing a shorter statute of limitations than provided for death actions because it could not be said that the inherent nature of instrumentalities such as agent orange, hazardous chemicals, and deficient architectural and engineering designs, was an irrational reason for having a different period applicable to each. *Ecker v. West Hartford*, 205 Conn. 219, 530 A.2d 1056, 1987 Conn. LEXIS 1001 (1987).

328. Just as the claim of a decedent for injuries not involving death survives death by virtue of the survival-of-actions statute, *Conn. Gen. Stat. § 52-599*, the claim of a spouse for antemortem loss of consortium because of such nonfatal injuries also is viable; the circumstance that injuries to an accident victim have culminated in death does not extinguish the decedent's claim for antemortem damages for those injuries, as indicated by reference in the wrongful death statute, *Conn. Gen. Stat. § 52-555*, to the recoverability of damages for injuries resulting in death, whether instantaneous or otherwise. *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 523 A.2d 1301, 1987 Conn. LEXIS 828 (1987).

329. Surviving spouse may recover for antemortem loss of consortium in an individual capacity where the common law consortium claim has been joined with the wrongful death action brought by the decedent's estate pursuant to *Conn. Gen. Stat. § 52-555*. *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 523 A.2d 1301, 1987 Conn. LEXIS 828 (1987).

330. Surviving spouse could not recover postmortem consortium damages in a wrongful death action under *Conn. Gen. Stat. § 52-555*; damages under § 52-555 are not based upon any loss caused to the family or relatives of the deceased. *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 523 A.2d 1301, 1987 Conn. LEXIS 828 (1987).

331. Because *Conn. Gen. Stat. § 52-555* permits the bringing of a wrongful death action by an executor or administrator only, while former *Conn. Gen. Stat. § 45-249c* (now *Conn. Gen. Stat. § 45a-316*) permits a temporary administrator to preserve the estate until the appointment of an administrator, and former *Conn. Gen. Stat. § 45-249d(a)* (now *Conn. Gen. Stat. § 45a-317*) permits the temporary administrator to do any acts necessary for the preservation of the estate authorized by the court, reading these statutes together, the term "executor or administrator" in § 52-555 should be interpreted so as to allow a temporary administrator to commence a wrongful death action when necessary to preserve the estate. *Miller v. United Technologies Corp.*, 40 Conn. Supp. 451, 515 A.2d 386, 1986 Conn. Super. LEXIS 33 (Conn. Super. Ct. 1986).

332. A wrongful death action brought by decedent's daughter pursuant to *Conn. Gen. Stat. § 52-555* against hospitals and a physician was properly dismissed for lack of subject matter jurisdiction, because she had not actually been appointed an administratrix when she filed the action, as the statute required, and because the statute of limitations had already run at the time of her eventual appointment. *Isaac v. Mt. Sinai Hospital*, 3 Conn. App. 598, 490 A.2d 1024, 1985 Conn. App. LEXIS 914 (1985).

333. Parents could not recover for loss of consortium resulting from their son's stillbirth because the wrongful death statute did not permit claims for postmortem loss of consortium and because consortium was an element of marriage that did not extend to the relationship between parents and children. *Shattuck (Estate of Stillborn Child) v. Gulliver*, 40

Conn. Supp. 95, 481 A.2d 1110, 1984 Conn. Super. LEXIS 163 (Conn. Super. Ct. 1984).

334. Claim for loss of consortium is not recognized within a wrongful death action in *Connecticut*. *Leland v. Chawla, 39 Conn. Supp. 8, 467 A.2d 439, 1983 Conn. Super. LEXIS 298 (Conn. Super. Ct. 1983).*

335. Because *Conn. Gen. Stat. § 52-555* expressly provides for the bringing of a wrongful death action by either an executor or an administrator, a widow, who was the administratrix of her deceased husband's estate was precluded from filing a loss of consortium claim, as an individual, in her wrongful death action. *Leland v. Chawla, 39 Conn. Supp. 8, 467 A.2d 439, 1983 Conn. Super. LEXIS 298 (Conn. Super. Ct. 1983).*

336. In an administratrix's suit under *Conn. Gen. Stat. § 52-555* for the wrongful death of her husband, the administratrix was permitted to intervene personally to assert her own derivative but independent claim for loss of consortium. *Hinde v. Butler, 35 Conn. Supp. 292, 408 A.2d 668, 1979 Conn. Super. LEXIS 168 (Conn. Super. Ct. 1979).*

337. Retailer's motion for judgment on the pleadings in an action by an administratrix arising out of a death allegedly caused by a chemical sold by the retailer based on an amendment of the complaint filed more than two years after the death was denied because a change in a ground of negligence did not change the cause of action where the group of facts originally claimed to have brought about the injury was not changed, but rather the amendment was merely an amplification of the original complaint that set forth in greater detail the manner in which the retailer was negligent. *Cooper v. Ketover, 35 Conn. Supp. 38, 393 A.2d 64, 1978 Conn. Super. LEXIS 129 (Conn. Super. Ct. 1978).*

338. In an action alleging medical malpractice resulting in death, evidence that an earlier diagnosis and treatment of the cancer would have prolonged the patient's life was only speculation and, therefore, did not prove the necessary causal link to impute liability on the part of the doctors who attributed the patient's complaints of pain to emotional rather than physical problems; testimony by the operating neurologist that the life expectancy of a person suffering from glioblastoma multiforme was 12 months, and that no diagnosis could have been made until the patient became paralyzed, did not support the requested finding that an earlier operation would have prolonged the patient's life. *Grody v. Tulin, 170 Conn. 443, 365 A.2d 1076, 1976 Conn. LEXIS 1038 (1976).*

339. Elements of a cause of action for malpractice causing wrongful death are clear from the explicit language of *Conn. Gen. Stat. § 52-555*: the plaintiff must prove not only a violation of a standard of care as a wrongful act, but also, a causal relationship between the injury and the resulting death; a causal relation between the defendant's wrongful conduct and the plaintiff's injuries is a fundamental element, without which a plaintiff has no cause of action. *Grody v. Tulin, 170 Conn. 443, 365 A.2d 1076, 1976 Conn. LEXIS 1038 (1976).*

340. Wrongful death suit was not timely where the complaint was served a year and a day after the decedent's death; also, where plaintiff was not the decedent's administrator when the complaint was filed, the complaint did not state a cause of action. *Cofrancesco v. Smith, 29 Conn. Supp. 139, 275 A.2d 608, 1971 Conn. Super. LEXIS 112 (Conn. Super. Ct. 1971).*

341. Where a decedent was injured and died of his injuries six weeks later, an action for damages brought within a year of decedent's death, but not within a year of the incident that resulted in the injuries was not time barred; the former one-year limitation in *Conn. Gen. Stat. § 52-555* was not applicable to a claim for pre-death pain and suffering, and the limitation in *Conn. Gen. Stat. § 52-584* was extended by *Conn. Gen. Stat. § 52-594*. *Doucette v. Bouchard, 28 Conn. Supp. 460, 265 A.2d 618, 1970 Conn. Super. LEXIS 111 (Conn. Super. Ct. 1970).*

342. As executor, plaintiff was empowered to sue for the injuries resulting in a decedent's death, pursuant to *Conn. Gen. Stat. § 52-555*. *McCoy v. Raucci, 156 Conn. 115, 239 A.2d 689, 1968 Conn. LEXIS 586 (1968).*

343. Administrator of the estate of an unborn fetus had a cause of action against a motorist for the negligent operation of

an automobile that resulted in the death of the fetus under *Conn. Gen. Stat. § 52-555* because Connecticut followed the "survival theory" as opposed to the new cause of "action theory"; and because the complaint specifically alleged that the fetus was seven to eight months old and was viable. *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406, 1966 Conn. Super. LEXIS 136 (Conn. Super. Ct. 1966).

344. Where children of a deceased mother filed a suit against a physician who allegedly failed to perform a hysterectomy, thereby permitting the pregnancy that resulted in the mother's death, and the children sought recovery for postmortem damages sustained by them flowing from the loss of the mother's care and affection, the wrongful death statute was wholly inapplicable to their claim. *Foran v. Carangelo*, 153 Conn. 356, 216 A.2d 638, 1966 Conn. LEXIS 533 (1966).

345. Where a fetus has reached the stage of prenatal development where it is capable of independent life apart from its mother, such a stage of development as to permit continued existence, under normal conditions, outside of the womb, if such child dies in the womb as the result of the negligence of some third person, then the general representative of that child may, under the provisions of *Conn. Gen. Stat. §§ 52-555* and *52-599* maintain a cause of action in its behalf for such injuries and death. *Gorke v. Le Clerc*, 23 Conn. Supp. 256, 181 A.2d 448, 1962 Conn. Super. LEXIS 109 (Conn. Super. Ct. 1962).

346. Determining whether negligent actions causing the death of a fetus constitutes a cause of action on behalf of the unborn child, Connecticut follows the principle known as the "survival theory," which is the principle that the state has followed since the first "death statute" was adopted in the state, now *Conn. Gen. Stat. § 52-555*; the right of action, which the executor or administrator is permitted to pursue, is not one that springs from the death but one that comes to the representative by survival where the right of recover for the death is one of the consequences of the wrong inflicted upon the decedent. *Gorke v. Le Clerc*, 23 Conn. Supp. 256, 181 A.2d 448, 1962 Conn. Super. LEXIS 109 (Conn. Super. Ct. 1962).

347. Administrator, as representative of a child born dead following an automobile collision, had a cause of action against the driver of the other automobile even where the death had occurred prior the child's birth where the court recognized liability for prenatal injuries to a viable fetus; there was no difference in liability whether the wrongfully inflicted injuries to the viable fetus resulted in death just prior to birth or in death just after birth. *Gorke v. Le Clerc*, 23 Conn. Supp. 256, 181 A.2d 448, 1962 Conn. Super. LEXIS 109 (Conn. Super. Ct. 1962).

348. An award of damages made pursuant to the wrongful death statute, *Conn. Gen. Stat. § 52-555*, was set aside as insufficient where the jury awarded only \$ 5,000 for the death of a 24-year-old man in good health who had a high school education, had been honorably discharged from the armed forces, and was employed. *Butler v. Steck*, 146 Conn. 114, 148 A.2d 246, 1959 Conn. LEXIS 135 (1959).

349. Where a decedent fell and appeared to have a seizure during a traffic stop, police officers who conducted the stop were entitled to summary judgment on a wrongful death claim filed pursuant to *Conn. Gen. Stat. § 52-555(a)* because there was no evidence contradicting a medical examiner's determination that the cause of death was a ruptured berry aneurysm, there was no physical altercation between the officers and the decedent, and there was no evidence indicating that the officers' conduct in stopping the decedent's vehicle for a traffic violation, having the decedent exit the car, and performing a brief pat-down search was a proximate cause of the bleeding that resulted in the decedent's death. *Pinnock v. City of New Haven*, 553 F. Supp. 2d 130, 2008 U.S. Dist. LEXIS 39008 (D. Conn. 2008).

350. Because an administratrix's wrongful death claim arose from the negligent release of an individual by the police

under *Conn. Gen. Stat. § 52-593*, her mistake in failing to name the ranking officer in the initial action was reasonable; accordingly, it was not barred by the applicable statute of limitations in *Conn. Gen. Stat. § 52-555*. *Finkle v. Carroll*, 2009 Conn. Super. LEXIS 1126 (Conn. Super. Ct. Apr. 28 2009).

351. Wrongful death action brought beyond the two-year statute of limitations in *Conn. Gen. Stat. § 52-555* was subject to a motion to strike, because the administrator failed to properly plead a claim of fraudulent concealment alleging a tolling of the statute of limitations for the wrongful death claim. *Tedford v. Buck*, 2008 Conn. Super. LEXIS 1456 (Conn. Super. Ct. June 4 2008).

352. No basis existed for an estate's claims that the statute of limitations in a wrongful death action ran from the date of injury as opposed to the date of death, or from the discovery of a negligent act as opposed to the act itself, or that it ran five years from the date of injury; the language of *Conn. Gen. Stat. § 52-555* was clear that the statute of limitations for a wrongful death action expired two years after the date of death, and therefore, the wrongful death action filed by the estate almost three years after its decedent passed away, was untimely. *Estate of Maroni v. Bobcat of Conn., Inc.*, 2007 Conn. Super. LEXIS 2132 (Conn. Super. Ct. Aug. 7 2007).

353. As a decedent's death occurred when *Conn. Gen. Stat. §§ 52-555(b)* and *52-190a(b)* were both in effect, application of the time period together with the extension to a claim by the decedent's estate administratrix in a wrongful death action asserted against surgical entities did not violate their due process rights under *Conn. Const. art. I, § 10*, as the entities had legal notice and knowledge of the status of the law and their legitimate "expectancy" interests were premised on the existing statutory scheme, which permitted the extension period for bringing the action. *Johnson v. Wazaz*, 2007 Conn. Super. LEXIS 928 (Conn. Super. Ct. Apr. 3 2007).

354. Son lacked standing under *Conn. Gen. Stat. § 52-555* to bring a wrongful death action for the death of his mother, and the trial court lacked subject matter jurisdiction, as he was not the administrator or executor of his mother's estate. *Boykin v. Rutherford*, 2007 Conn. Super. LEXIS 3263 (Conn. Super. Ct. Dec. 6 2007).

355. In an outcome-determinative choice of law determination, recovery of damages under *Conn. Gen. Stat. § 52-555(a)* pursuant to Connecticut law was applicable to a wrongful death action although New York law applied to liability under the significant relationships analysis, as Connecticut had a dominant interest; the principle of depepage was applicable in Connecticut, damages were a stand-alone issue, and the broader scope of recovery under § 52-555(a) that included the decedent's pain and suffering was available to the decedent's estate compared to that of New York, where recovery provided in *N.Y. Est. Powers & Trusts Law §§ 5-4.3(a)* and *11-3.3(a)* had a more limited scope. *Leahy v. New Eng. Motor Freight, Inc.*, 2008 Conn. Super. LEXIS 2538 (Conn. Super. Ct. Oct. 3 2008).

356. In a negligence action against two officers and the city, the parents were awarded damages of \$ 403,164.30, with \$ 3,164.30 for funeral and burial expenses and the remaining \$ 400,000 for non-economic damages, after their son hung himself while in custody; the court accounted for the son's life expectancy, level of education, lack of work history, poor health, and the son's expressed desire to turn his life around. *Thomes v. Tuyen Duong*, 2008 Conn. Super. LEXIS 672 (Conn. Super. Ct. Mar. 12 2008).

357. Wrongful death action survived death and it was maintainable by the administratrix or executrix of an deceased's estate, and not by his dependents under *Conn. Gen. Stat. § 52-555* et seq.; any recovery for wrongful death was distributed as part of the personal estate of the deceased. *Keogh v. Bridgeport*, 187 Conn. 53, 444 A.2d 225, 1982 Conn.

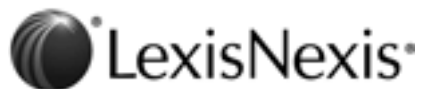
LEXIS 501 (1982).

TREATISES AND ANALYTICAL MATERIALS

1. *Tort Remedies in Connecticut § 8-2*, PART III. CLAIMS AND DAMAGES AVAILABLE, CHAPTER 8. WRONGFUL DEATH/SURVIVAL OF ACTIONS, § 8-2. Current Statutory Scheme.
2. *Tort Remedies in Connecticut § 8-3*, PART III. CLAIMS AND DAMAGES AVAILABLE, CHAPTER 8. WRONGFUL DEATH/SURVIVAL OF ACTIONS, § 8-3. Availability of Remedy.
3. *Tort Remedies in Connecticut § 8-4*, PART III. CLAIMS AND DAMAGES AVAILABLE, CHAPTER 8. WRONGFUL DEATH/SURVIVAL OF ACTIONS, § 8-4. Elements of Recovery.
4. *Tort Remedies in Connecticut § 8-5*, PART III. CLAIMS AND DAMAGES AVAILABLE, CHAPTER 8. WRONGFUL DEATH/SURVIVAL OF ACTIONS, § 8-5. Measurement and Calculation of Damages.
5. *Tort Remedies in Connecticut § 16-3*, PART III. CLAIMS AND DAMAGES AVAILABLE, CHAPTER 16. PROFESSIONAL MALPRACTICE, § 16-3. Medical Malpractice.
6. *Tort Remedies in Connecticut § 24-5*, PART IV. LIMITATIONS ON REMEDIES, CHAPTER 24. STATUTE OF LIMITATIONS, § 24-5. Tolling Statutes of Limitations.

LAW REVIEWS

1. 9 *Conn. Ins. L.J.* 51, SYMPOSIUM ARTICLE: The September 11TH Attack on America: Ground Zero in Tort and Insurance Law *
2. 5 *Yale J. Health Pol'y L. & Ethics* 507, Article: Wrongful Abortion: A Wrong in Search of a Remedy.
3. 14 *Quinnipiac L. Rev.* 437, Note: Children's Rights: The Parental Consortium Dilemma And Connecticut Law.
4. 15 *Quinnipiac L. Rev.* 235, NOTE: HEDONIC DAMAGES AND THE ADMISSIBILITY OF EXPERT TESTIMONY IN CONNECTICUT AFTER DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.



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LEXISNEXIS (TM) CONNECTICUT ANNOTATED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE FEBRUARY 2008 REGULAR SESSION ***
*** AND THE JANUARY, JUNE 11, AUGUST AND NOVEMBER 24, 2008 SPECIAL SESSIONS ***
*** ANNOTATIONS CURRENT THROUGH AUGUST 26, 2009 ***

TITLE 52 CIVIL ACTIONS
CHAPTER 925 STATUTORY RIGHTS OF ACTION AND DEFENSES

GO TO CONNECTICUT STATUTES ARCHIVE DIRECTORY

Conn. Gen. Stat. § 52-555a (2008)

Sec. 52-555a. Actions for loss of consortium re death of spouse independent for determination of damages.

Any claim or cause of action for loss of consortium by one spouse with respect to the death of the other spouse shall be separate from and independent of all claims or causes of action for the determination of damages with respect to such death.

HISTORY: (P.A. 89-148, S. 1, 5.)

NOTES:

History Notes:

P.A. 89-148 effective October 1, 1989, and applicable to all causes of action arising on or after that date.

CASENOTES:

Cited. 226 *Conn.* 282.

Cited. 44 *Conn. App.* 172.

LexisNexis (R) Notes:

CASE NOTES

1. Where a physician, without obtaining the consent of a patient's wife, who had been appointed health care agent under his living will, removed the patient's ventilator tube, causing his death, a superior court denied the defendant hospital's motion to strike the counts of the complaint alleging wrongful death based on the Removal of Life Support Systems Act, *Conn. Gen. Stat. § 19a-570 et seq.*, loss of consortium, and negligent infliction of emotional distress. *O'Connell v. Bridgeport Hosp.*, 2000 Conn. Super. LEXIS 1276 (Conn. Super. Ct. May 17 2000).

2. Defendants' motion for a remittitur, pursuant to *Conn. Prac. Book § 16-35* (2003), of a widow's award on a loss of consortium claim pursuant to *Conn. Gen. Stat. § 52-555a* was granted, because the verdict for loss of consortium was so excessive as to shock the court's sense of justice, as the loss of consortium verdict was twice the amount of a verdict for the husband's wrongful death pursuant to *Conn. Gen. Stat. § 52-555*, and the court concluded that there was no rational basis for sustaining the verdict for loss of consortium while awarding half the amount to the widow, in her representative capacity, for her husband's wrongful death; *Conn. Gen. Stat. § 52-216a* did not require the court to further reduce the loss of consortium claim based on settlements the widow had received from other parties. *Elaine Blake v. Neurological Specialists, P.C.*, 2003 Conn. Super. LEXIS 1471 (Conn. Super. Ct. May 9 2003).

3. Where a physician, without obtaining the consent of a patient's wife, who had been appointed health care agent under his living will, removed the patient's ventilator tube, causing his death, a superior court denied the defendant hospital's motion to strike the counts of the complaint alleging wrongful death based on the Removal of Life Support Systems Act, *Conn. Gen. Stat. § 19a-570 et seq.*, loss of consortium, and negligent infliction of emotional distress. *O'Connell v. Bridgeport Hosp.*, 2000 Conn. Super. LEXIS 1276 (Conn. Super. Ct. May 17 2000).

4. Where a physician, without obtaining the consent of a patient's wife, who had been appointed health care agent under his living will, removed the patient's ventilator tube, causing his death, a superior court denied the defendant hospital's motion to strike the counts of the complaint alleging wrongful death based on the Removal of Life Support Systems Act, *Conn. Gen. Stat. § 19a-570 et seq.*, loss of consortium, and negligent infliction of emotional distress. *O'Connell v. Bridgeport Hosp.*, 2000 Conn. Super. LEXIS 1276 (Conn. Super. Ct. May 17 2000).

5. Wife's claim for postmortem loss of consortium following her husband's death was derivative of the claim arising out of injury to her deceased husband pursuant to *Conn. Gen. Stat. § 52-555a*; her claim therefore did not affect the limit of liability for damages sustained by any one person in any one accident under the insurance policy at issue. *DeMarinis v. United Servs. Auto. Ass'n Cas. Ins. Co.*, 44 Conn. App. 172, 687 A.2d 1305, 1997 Conn. App. LEXIS 32 (1997).

6. Wife's claim for postmortem loss of consortium following her husband's death was derivative of the claim arising out of injury to her deceased husband pursuant to *Conn. Gen. Stat. § 52-555a*; her claim therefore did not affect the limit of liability for damages sustained by any one person in any one accident under the insurance policy at issue. *DeMarinis v. United Servs. Auto. Ass'n Cas. Ins. Co.*, 44 Conn. App. 172, 687 A.2d 1305, 1997 Conn. App. LEXIS 32 (1997).

7. Children of parent who slipped and fell at city's apartments had no cause of action for loss of parental consortium since Connecticut did not recognize such a claim. *Majette v. New London Hous. Auth.*, 2005 Conn. Super. LEXIS 1914

(*Conn. Super. Ct. July 12 2005*).

8. Children of parent who slipped and fell at city's apartments had no cause of action for loss of parental consortium since Connecticut did not recognize such a claim. *Majette v. New London Hous. Auth.*, 2005 *Conn. Super. LEXIS 1914* (*Conn. Super. Ct. July 12 2005*).

9. Defendants' motion for a remittitur, pursuant to *Conn. Prac. Book § 16-35* (2003), of a widow's award on a loss of consortium claim pursuant to *Conn. Gen. Stat. § 52-555a* was granted, because the verdict for loss of consortium was so excessive as to shock the court's sense of justice, as the loss of consortium verdict was twice the amount of a verdict for the husband's wrongful death pursuant to *Conn. Gen. Stat. § 52-555*, and the court concluded that there was no rational basis for sustaining the verdict for loss of consortium while awarding half the amount to the widow, in her representative capacity, for her husband's wrongful death; *Conn. Gen. Stat. § 52-216a* did not require the court to further reduce the loss of consortium claim based on settlements the widow had received from other parties. *Elaine Blake v. Neurological Specialists, P.C.*, 2003 *Conn. Super. LEXIS 1471* (*Conn. Super. Ct. May 9 2003*).

10. Parent's claim for loss of filial consortium was struck from the parent's amended complaint because *Conn. Gen. Stat. §§ 52-555a* and *52-555b* provide only for loss of spousal consortium under the wrongful death statute. *Deglin v. Norwich Free Academy*, 1999 *Conn. Super. LEXIS 901* (*Conn. Super. Ct. Apr. 5 1999*).

11. Parents had no claim for loss of filial consortium in their medical malpractice action arising out of the stillbirth of their child; although *Conn. Gen. Stat. § 52-555a* recognized a cause of action for postmortem loss of consortium by a spouse, the legislature had not enacted similar legislation recognizing a parent's claim for loss of consortium upon the death of a child. *Rios v. Kozlowski*, 1998 *Conn. Super. LEXIS 2465* (*Conn. Super. Ct. Aug. 24 1998*).

12. *Conn. Gen. Stat. § 52-555a* speaks exclusively in terms of loss of spousal consortium and as it is in derogation of the common law rule prohibiting actions based on death and its direct consequences, it must receive a strict construction and cannot be construed to include loss of filial consortium claims as well. *Belliveau v. Stevenson*, 123 *F.3d 107*, 1997 *U.S. App. LEXIS 29858* (2d *Cir. Conn. 1997*).

13. Wife's claim for postmortem loss of consortium following her husband's death was derivative of the claim arising out of injury to her deceased husband pursuant to *Conn. Gen. Stat. § 52-555a*; her claim therefore did not affect the limit of liability for damages sustained by any one person in any one accident under the insurance policy at issue. *DeMarinis v. United Servs. Auto. Ass'n Cas. Ins. Co.*, 44 *Conn. App. 172*, 687 *A.2d 1305*, 1997 *Conn. App. LEXIS 32* (1997).

14. *Conn. Gen. Stat. § 52-555a* et seq. recognizes a statutory cause of action for postmortem loss of consortium by a spouse; the legislature had yet to enact similar statutory provisions recognizing a parent's claim for loss of consortium upon the death of a child. *Mills v. Ansonia Community Action*, 1996 *Conn. Super. LEXIS 2162* (*Conn. Super. Ct. Aug. 19 1996*).

15. A widow who was earlier denied recovery for loss of consortium arising out of the killing of her husband by defendant was entitled to recovery, because the court in its earlier judgment had failed to note that the amended wrongful death statute, *Conn. Gen. Stat. § 52-555a* et seq., allowed such a claim. *Williams v. Reynolds*, 1996 *Conn. Super. LEXIS 927* (*Conn. Super. Ct. Apr. 4 1996*).

16. Loss of consortium recovery was dependent upon, and derivative of, a bodily injury to an injured spouse and was recoverable during the lifetime of the injured spouse, and after the death of the spouse, if caused by that same injury. *Demarinis v. USAA Cas. Ins. Co.*, 1996 *Conn. Super. LEXIS 414* (*Conn. Super. Ct. Feb. 13 1996*), affirmed by 44 *Conn.*

App. 172, 687 A.2d 1305, 1997 Conn. App. LEXIS 32 (1997).

17. Parents had no claim for loss of filial consortium in their medical malpractice action arising out of the stillbirth of their child; although *Conn. Gen. Stat. § 52-555a* recognized a cause of action for postmortem loss of consortium by a spouse, the legislature had not enacted similar legislation recognizing a parent's claim for loss of consortium upon the death of a child. *Rios v. Kozlowski, 1998 Conn. Super. LEXIS 2465 (Conn. Super. Ct. Aug. 24 1998).*

18. Parent's claim for loss of filial consortium was struck from the parent's amended complaint because *Conn. Gen. Stat. §§ 52-555a* and *52-555b* provide only for loss of spousal consortium under the wrongful death statute. *Deglin v. Norwich Free Academy, 1999 Conn. Super. LEXIS 901 (Conn. Super. Ct. Apr. 5 1999).*

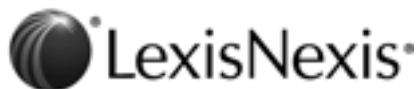
19. *Conn. Gen. Stat. § 52-555a* speaks exclusively in terms of loss of spousal consortium and as it is in derogation of the common law rule prohibiting actions based on death and its direct consequences, it must receive a strict construction and cannot be construed to include loss of filial consortium claims as well. *Belliveau v. Stevenson, 123 F.3d 107, 1997 U.S. App. LEXIS 29858 (2d Cir. Conn. 1997).*

20. Sons' claim for post-mortem loss of parental consortium was not recognized under the wrongful death statute, *Conn. Gen. Stat. § 52-555a*. *Reed v. Norwalk Hosp., 1996 Conn. Super. LEXIS 2245 (Conn. Super. Ct. Aug. 21 1996).*

21. A widow who was earlier denied recovery for loss of consortium arising out of the killing of her husband by defendant was entitled to recovery, because the court in its earlier judgment had failed to note that the amended wrongful death statute, *Conn. Gen. Stat. § 52-555a* et seq., allowed such a claim. *Williams v. Reynolds, 1996 Conn. Super. LEXIS 927 (Conn. Super. Ct. Apr. 4 1996).*

TREATISES AND ANALYTICAL MATERIALS

1. *Tort Remedies in Connecticut § 11-7, PART III. CLAIMS AND DAMAGES AVAILABLE, CHAPTER 11. UNINSURED MOTORIST COVERAGE, § 11-7. Application of Statute.*



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LEXISNEXIS (TM) CONNECTICUT ANNOTATED STATUTES

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*** ANNOTATIONS CURRENT THROUGH AUGUST 26, 2009 ***

TITLE 52 CIVIL ACTIONS
CHAPTER 925 STATUTORY RIGHTS OF ACTION AND DEFENSES

GO TO CONNECTICUT STATUTES ARCHIVE DIRECTORY

Conn. Gen. Stat. § 52-555b (2008)

Sec. 52-555b. Actions for loss of consortium re death of spouse to be joined with all actions re death of spouse.

Any claim or cause of action for loss of consortium by one spouse with respect to the death of the other spouse, which claim or cause of action may include, without limitation, claims for damages with respect to loss of the society of, affection of, moral support provided by, services provided by, sexual relations with or companionship of the other spouse, suffered because of the death of the other spouse, shall be brought with or joined with the claims and causes of action with respect to the death of the other spouse.

HISTORY: (P.A. 89-148, S. 2, 5.)

NOTES:

History Notes:

P.A. 89-148 effective October 1, 1989, and applicable to all causes of action arising on or after that date.

CASENOTES:

Cited. *44 Conn. App. 172*. Assets the trustee in bankruptcy transferred to bank, which were encumbered by a valid lien, were not "assets" within meaning of the Fraudulent Transfer Act and, therefore, transfer not subject to said act. *54 Conn. App. 481*.

LexisNexis (R) Notes:

CASE NOTES

1. Where a physician, without obtaining the consent of a patient's wife, who had been appointed health care agent under his living will, removed the patient's ventilator tube, causing his death, a superior court denied the defendant hospital's motion to strike the counts of the complaint alleging wrongful death based on the Removal of Life Support Systems Act, *Conn. Gen. Stat. § 19a-570 et seq.*, loss of consortium, and negligent infliction of emotional distress. *O'Connell v. Bridgeport Hosp.*, 2000 Conn. Super. LEXIS 1276 (Conn. Super. Ct. May 17 2000).

2. Where a physician, without obtaining the consent of a patient's wife, who had been appointed health care agent under his living will, removed the patient's ventilator tube, causing his death, a superior court denied the defendant hospital's motion to strike the counts of the complaint alleging wrongful death based on the Removal of Life Support Systems Act, *Conn. Gen. Stat. § 19a-570 et seq.*, loss of consortium, and negligent infliction of emotional distress. *O'Connell v. Bridgeport Hosp.*, 2000 Conn. Super. LEXIS 1276 (Conn. Super. Ct. May 17 2000).

3. Where a physician, without obtaining the consent of a patient's wife, who had been appointed health care agent under his living will, removed the patient's ventilator tube, causing his death, a superior court denied the defendant hospital's motion to strike the counts of the complaint alleging wrongful death based on the Removal of Life Support Systems Act, *Conn. Gen. Stat. § 19a-570 et seq.*, loss of consortium, and negligent infliction of emotional distress. *O'Connell v. Bridgeport Hosp.*, 2000 Conn. Super. LEXIS 1276 (Conn. Super. Ct. May 17 2000).

4. Under *Conn. Gen. Stat. § 52-555b*, a widow cannot maintain a claim for loss of consortium independent from a wrongful death action, because the consortium claim is a derivative action. *Monk v. Lime Rock Assocs.*, 2000 Conn. Super. LEXIS 3029 (Conn. Super. Ct. Nov. 16 2000).

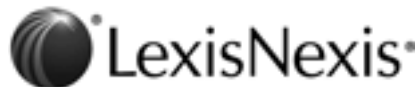
5. Parent's claim for loss of filial consortium was struck from the parent's amended complaint because *Conn. Gen. Stat. §§ 52-555a* and *52-555b* provide only for loss of spousal consortium under the wrongful death statute. *Deglin v. Norwich Free Academy*, 1999 Conn. Super. LEXIS 901 (Conn. Super. Ct. Apr. 5 1999).

6. Loss of consortium recovery was dependent upon, and derivative of, a bodily injury to an injured spouse and was recoverable during the lifetime of the injured spouse, and after the death of the spouse, if caused by that same injury. *Demarinis v. USAA Cas. Ins. Co.*, 1996 Conn. Super. LEXIS 414 (Conn. Super. Ct. Feb. 13 1996), affirmed by 44 Conn. App. 172, 687 A.2d 1305, 1997 Conn. App. LEXIS 32 (1997).

7. Under *Conn. Gen. Stat. § 52-555b*, a widow cannot maintain a claim for loss of consortium independent from a wrongful death action, because the consortium claim is a derivative action. *Monk v. Lime Rock Assocs.*, 2000 Conn. Super. LEXIS 3029 (Conn. Super. Ct. Nov. 16 2000).

8. Parent's claim for loss of filial consortium was struck from the parent's amended complaint because *Conn. Gen. Stat. §§ 52-555a* and *52-555b* provide only for loss of spousal consortium under the wrongful death statute. *Deglin v. Norwich Free Academy*, 1999 Conn. Super. LEXIS 901 (Conn. Super. Ct. Apr. 5 1999).

1. *14 Quinnipiac L. Rev. 437, Note: Children's Rights: The Parental Consortium Dilemma And Connecticut Law.*



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*** Annotations current through opinions posted on Lexis.com as of September 4, 2009 ***

TITLE 9. CODE OF CIVIL PROCEDURE
CHAPTER 55. SPECIAL ACTIONS AND PROCEEDINGS
ARTICLE 7. SURVIVAL AND WRONGFUL DEATH ACTIONS

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Alaska Stat. § 09.55.580 (2009)

Sec. 09.55.580. Action for wrongful death

(a) Except as provided under (f) of this section and *AS 09.65.145*, when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had the person lived, against the latter for an injury done by the same act or omission. The action shall be commenced within two years after the death, and the damages therein shall be the damages the court or jury may consider fair and just. The amount recovered, if any, shall be exclusively for the benefit of the decedent's spouse and children when the decedent is survived by a spouse or children, or other dependents. When the decedent is survived by no spouse or children or other dependents, the amount recovered shall be administered as other personal property of the decedent but shall be limited to pecuniary loss. When the plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

(b) The damages recoverable under this section shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

(c) In fixing the amount of damages to be awarded under this section, the court or jury shall consider all the facts and circumstances and from them fix the award at a sum which will fairly compensate for the injury resulting from the death. In determining the amount of the award, the court or jury shall consider but is not limited to the following:

(1) deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during the lifetime of the deceased;

- (2) loss of contributions for support;
- (3) loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries;
- (4) loss of consortium;
- (5) loss of prospective training and education;
- (6) medical and funeral expenses.

(d) The death of a beneficiary or beneficiaries before judgment does not affect the amount of damages recoverable under this section.

(e) The right of action granted by this section is not abated by the death of a person named or to be named the defendant.

(f) A person whose act or omission constitutes the felonious killing of another person may not recover damages for the death of that person either directly or as a personal representative of that person's estate. In this subsection, a "felonious killing" means a crime defined by AS 11.41.100 -- 11.41.140.

HISTORY: (§ 4 ch 78 SLA 1972; am §§ 1, 2 ch 164 SLA 1988; am § 2 ch 122 SLA 2003)

NOTES: REVISOR'S NOTES. --In 1992, "or" was substituted for "of" after "accumulations" in paragraph (c)(1) of this section to correct a typographical error in the 1962 codification of § 61-7-3, ACLA 1949, as amended.

EFFECT OF AMENDMENTS. --The 2003 amendment, effective September 16, 2003, added a section reference in the first sentence in subsection (a).

EDITOR'S NOTES. --This section was taken from former AS 13.20.340 which, in turn, was taken from § 61-7-3, ACLA 1949, as amended.

NOTES TO DECISIONS

- I. General Consideration.
- II. Nature of Right Conferred by Section.
- III. Parties.
- IV. Negligence.
- V. Damages.
- VI. Beneficiaries.

I. GENERAL CONSIDERATION.

HISTORY OF SECTION. --See *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977).

MODEL FOR STATUTE. --The Alaska wrongful death statute is closely modeled after the precursor of most wrongful death statutes, Lord Campbell's Act, 9 & 10 Vict. Ch. 93 (1846). *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840 (D. Alaska 1977).

ORIGIN. --Section 61-7-3, ACLA 1949, was taken from the *Oregon Code*. *Kreidler v. Ketchikan Spruce Mills*, 10 Alaska 365 (D. Alaska 1943).

The Alaska Wrongful Death Statute was adopted substantially from the Oregon statute. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

AUTHORITY OF OREGON DECISIONS. --Where there is no surviving husband, wife or children, then this section may be and has been construed to the same effect as the Oregon law. But the authority of the Oregon decisions ends there. *Dralle v. Steele*, 13 Alaska 680 (1952).

Any decision based upon the Oregon law, as it existed on June 6, 1900, can be of little use in construing this section in any case where there is a surviving husband, wife or children, and is likely to be completely misleading. *Dralle v. Steele*, 13 Alaska 680 (1952).

PURPOSE OF WRONGFUL DEATH ACTION. --Examination of this section and its statutory predecessors suggests that the purpose of creating the action was primarily to compensate those who had suffered direct losses as a result of decedent's death. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977).

The primary purpose of the wrongful death statute is to compensate those who suffer a direct loss. *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979).

STRICT CONSTRUCTION. --Actions, like wrongful death, which arise by legislative fiat are to be strictly construed. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977).

NO CAUSE OF ACTION EXISTS FOR DEATH OF A NONVIABLE UNBORN CHILD as a result of an automobile collision. *Mace v. Jung*, 210 F. Supp. 706 (D. Alaska 1962).

LIMITATION PERIOD IN WRONGFUL DEATH STATUTE CONSTRUED IN PARI MATERIA WITH GENERAL LIMITATIONS PROVISIONS. --See *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979).

AS 09.10.070 AND THIS SECTION COMPARED. --See *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979).

DISCOVERY RULE TOLLS RUNNING OF LIMITATIONS PERIOD. --The discovery rule applies to toll the two-year statute of limitations for wrongful death actions contained in this section. *Hanebuth v. Bell Helicopter Int'l*, 694 P.2d 143 (Alaska 1984).

Reasonable failure of a plaintiff to discover an element essential to the cause of action tolls the running of the two-year period provided by this section within which to commence an action for wrongful death. *Hanebuth v. Bell Helicopter Int'l*, 694 P.2d 143 (Alaska 1984).

The "discovery rule," which holds that a statute of limitations does not begin to run until a plaintiff discovers, or reasonably should discover, the existence of all the elements of his cause of action, applies to actions for wrongful death. *State, Dep't of Cor. v. Welch*, 805 P.2d 979 (Alaska 1991).

THE DISABILITY OF A MINOR STATUTORY BENEFICIARY TOLLS THE RUNNING of the two-year time limit for commencing a wrongful death action until the disability is concluded. *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979).

BAR TO ACTION FOUND IN WORKERS' COMPENSATION ACT. --An action for wrongful death, filed pursuant to this section, is barred by AS 23.30.055, the exclusive remedy provision of the Alaska Workers' Compensation Act; the fact that the estates of deceased workers leaving dependents are entitled to favored treatment over the estates of workers leaving no dependents reflects a legislative determination that the former require greater compensation, is entirely reasonable and does not deprive the estate of a worker leaving no dependents of equal protection of the law. *Taylor v. Southeast-Harrison W. Corp.*, 694 P.2d 1160 (Alaska 1985).

CROSS-CLAIM RELATING BACK TO ORIGINAL ANSWER NOT BARRED. --Cross-claim filed more than two years after the cause of action arose but less than two years after the original answer was filed related back to when the original answer was filed and was not barred by this section. *Estate of Thompson v. Mercedes-Benz, Inc.*, 514 P.2d 1269

(Alaska 1973).

JOINER OF PARENTS AS THIRD PARTY DEFENDANTS. --In an action for the wrongful death of a minor without dependents brought by the parents of the minor in their representative capacity, the parents could be joined in the individual capacity as third party defendants and were liable for their negligent supervision of the child. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

PLANNING FUNCTIONS AS DISCRETIONARY FUNCTIONS. --Discretionary function immunity applied to bar a family's wrongful death action against the State of Alaska and the State Department of Public Safety for the failure to conduct a speedy search of relatives who froze to death after their car broke down because the decision of when to begin the search was a planning function, not an operational function, involving policy considerations such as the allocation of limited resources and a risk analyses of the mission. *Kiokun v. State*, 74 P.3d 209 (Alaska 2003).

APPLIED IN Hazel v. Alaska Plywood Corp., 16 Alaska 642 (D. Alaska 1957); *Aronson v. McDonald*, 17 Alaska 395, 248 F.2d 507 (9th Cir. 1957); *City of Fairbanks v. Schaible*, 375 P.2d 201 (Alaska 1962); *Lieb v. Interior Enters., Inc.*, 395 P.2d 32 (Alaska 1964); *Kanayurak v. North Slope Borough*, 677 P.2d 893 (Alaska 1984); *Goodlataw v. State, Dep't of Health & Social Servs.*, 698 P.2d 1190 (Alaska 1985); *Ned v. State*, 119 P.3d 438 (Alaska Ct. App. 2005).

QUOTED IN Reiten v. Hendricks, 370 P.2d 166 (Alaska 1962).

STATED IN Beck v. State, DOT & Pub. Facilities, 837 P.2d 105 (Alaska 1992).

CITED IN Larman v. Kodiak Elec. Ass'n, 514 P.2d 1275 (Alaska 1973); *Wainscott v. Ossenkop*, 633 P.2d 237 (Alaska 1981); *Truesdell v. Halliburton Co.*, 754 P.2d 236 (Alaska 1988); *Palmer v. Borg-Warner Corp.*, 838 P.2d 1243 (Alaska 1992).

II. NATURE OF RIGHT CONFERRED BY SECTION.

COMMON LAW. --At common law there was no civil action for death by wrongful act; such action is purely a creature of statute. *Koski v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334 (D. Alaska 1921).

SECTION CREATES NEW CAUSE OF ACTION. --This section, a version of Lord Campbell's Act, is not a survival statute, but creates a new cause of action. *Ishmael v. City Elec. of Anchorage, Inc.*, 12 Alaska 721, 91 F. Supp. 688 (D. Alaska 1950).

III. PARTIES.

ONLY THE PERSONAL REPRESENTATIVE MAY INSTITUTE A WRONGFUL DEATH ACTION on behalf of the deceased person. While under some circumstances the action might benefit only the estate's creditors, this result is not necessarily inconsistent with the legislative scheme. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977).

WHEN ESTATE MAY BRING SUIT. --Only where no statutory beneficiary survives the decedent may the estate bring suit under the *Wrongful Death Act*. *Kulawik v. Era Jet Alaska*, 820 P.2d 627 (Alaska 1991).

PERSONAL REPRESENTATIVE SUSTAINS RELATIONSHIP OF TRUSTEE. --The personal representative, though designated as the person to bring the action, does not derive any right, title, or authority from his intestate, but he sustains rather the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or

administrator, and though in his capacity as personal representative, he may perhaps be liable on his bond for its proper administration. *Koski v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334 (D. Alaska 1921).

If the decedent leaves a husband, wife, or children, then the administrator is a mere trustee for the husband, wife, or children, as the case may be -- a person upon whom the law has cast the duty of bringing the action; for when the money is recovered it must go exclusively to the husband, wife, or children, and no other person has any interest in it. *Koski v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334 (D. Alaska 1921).

While the personal representative is the party who brings suit for wrongful death in Alaska, he or she is a nominal party only and holds any recovery as trustee for the statutory beneficiaries. *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979).

ADMINISTRATOR AS NOMINAL PARTY. --If the decedent leaves a husband, wife, or children, the real party in interest is the husband, wife, or children, as the case may be, and the administrator is only a nominal party. *Koski v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334 (D. Alaska 1921).

Under this section where widow and children survive, although the suit must be brought by the executor or administrator, such personal representative is a mere nominal party, who sues for the benefit of the real party in interest. *Dralle v. Steele*, 13 Alaska 680 (1952).

If the decedent is survived by a spouse, child or dependent, the action is brought on behalf of the statutory beneficiary and damages are measured by the loss to the survivors. The personal representative is then a nominal party only and holds the recovery in trust. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977); *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840 (D. Alaska 1977).

ADMINISTRATOR AS REAL PARTY. --If there is no husband, wife, or child left by decedent, the administrator is the real party and would be suing for the loss to the general estate represented by him. *Koski v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334 (D. Alaska 1921).

If the deceased is not survived by the beneficiaries named in the statute, the personal representative is the real party in interest in the wrongful death action. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977); *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840 (D. Alaska 1977).

PRIOR ACTION BY ADMINISTRATOR IN DIFFERENT CAPACITY NO BAR. --An action brought by an administrator in a trustee capacity under this section is not barred by an action brought by him earlier in a totally different capacity. *Koski v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334 (D. Alaska 1921).

METLAKATLA INDIAN COMMUNITY. --Congress, by virtue of its enactment of 28 U.S.C. § 1360(a), did not waive the sovereign immunity of the Indian tribes and consequently, the Metlakatla Indian Community has sovereign immunity with respect to wrongful death action on the reservation. *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977).

IV. NEGLIGENCE.

CONDUCT DEEMED PROXIMATE CAUSE OF DEATH. --Failure on the part of the pilot to direct the passengers as to the door by which they should leave the plane, was the proximate cause of death of the deceased, who drowned while leaving the plane. *Haldane v. Alaska Airlines*, 15 Alaska 298, 126 F. Supp. 224 (D. Alaska 1954).

ATTRACTIVE NUISANCE DOCTRINE APPLIED IN ACTION FOR CHILD'S DEATH. --See *Taylor v. Alaska Rivers Navigation Co.*, 391 P.2d 15 (Alaska 1964).

JOINDER OF PARENTS AS THIRD PARTY DEFENDANTS. --See note under this catchline under analysis line I, "General Consideration."

JURISDICTION FOR ADMINISTRATOR'S NEGLIGENCE ACTION. --Where any recovery by the estate would not

be paid directly to specified individuals, the beneficiaries to the estate should not be considered the plaintiffs; therefore, there is no jurisdictional bar to an administrator's negligence action against parties who might otherwise stand to benefit from their wrongdoing. *Myers v. Robertson*, 891 P.2d 199 (Alaska 1995).

V. DAMAGES.

BENEFICIARIES NOT LIMITED TO "ACTUAL LOSSES". --Statutory beneficiaries are entitled to recover all of the deceased's probable accumulations, and are not limited to only their "actual losses." *Kulawik v. Era Jet Alaska*, 820 P.2d 627 (Alaska 1991).

PROSPECTIVE INHERITANCE. --A designated beneficiary in a wrongful death suit can recover "prospective inheritance," the inheritance he or she would have received if the deceased had not died prematurely. *Kulawik v. Era Jet Alaska*, 820 P.2d 627 (Alaska 1991).

NO FIXED OR ARBITRARY RULE CAN BE MADE FOR FIXING THE AMOUNT OF DAMAGES in cases of this character. *Kreidler v. Ketchikan Spruce Mills*, 10 Alaska 365 (D. Alaska 1943).

No rule can be laid down by which the damages can be ascertained with even approximate mathematical certainty. The amount must depend very much on the good sense and sound judgment of the jury and upon the facts in each particular case. *Linge's Adm'r v. Alaska Treadwell Co.*, 3 Alaska 9 (1906); *Kreidler v. Ketchikan Spruce Mills*, 10 Alaska 365 (D. Alaska 1943).

THE CORRECT MEASURE OF DAMAGES applicable under the Alaska wrongful death statute where the decedent is survived by a spouse and children is the pecuniary loss to the survivors. *Wien Alaska Airlines v. Simmonds*, 16 Alaska 670, 241 F.2d 57 (9th Cir. 1957).

In actions brought under this section, the true measure of damages is the pecuniary loss suffered by the estate, without any solatium for the grief and anguish of surviving relatives or pain or suffering of the deceased; and that loss would be what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his life, and which, as representing his net savings, would have gone for the benefit of his estate, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditures. *Kreidler v. Ketchikan Spruce Mills*, 10 Alaska 365 (D. Alaska 1943).

Recovery must be limited to pecuniary damages suffered by the wife and children, and no allowance can be made for mental anguish or loss of the love of the husband and father. *Dralle v. Steele*, 13 Alaska 680 (1952).

Under Alaska's wrongful death statute damages are required to be assessed according to the loss suffered by each statutory beneficiary. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

Because minors who died in an alcohol-related accident had no dependents, subsection (a) limited recovery in a wrongful death suit filed by their respective families to pecuniary loss, which did not include intangible loss of enjoyment of life. *Sowinski v. Walker*, 198 P.3d 1134 (Alaska 2008).

CALCULATION OF FUTURE EARNINGS. --Future earnings in a wrongful death case are calculated by (1) determining the decedent's future gross earnings and (2) subtracting the decedent's personal consumption. *Kulawik v. Era Jet Alaska*, 820 P.2d 627 (Alaska 1991).

Future tax liability should not be considered in calculating either future gross earnings or future personal consumption. *Kulawik v. Era Jet Alaska*, 820 P.2d 627 (Alaska 1991).

THE WEIGHT TO BE GIVEN TO EXPERT TESTIMONY is within the province of the trier of fact. *State v. Phillips*, 470 P.2d 266 (Alaska 1970).

DISCRETION. --Under Alaska's wrongful death statute, broad discretion is vested in the court or jury regarding damage awards. *State v. Phillips*, 470 P.2d 266 (Alaska 1970).

CIRCUMSTANCES OF DEATH PROPERLY EXCLUDED FROM TRIAL ON DAMAGES. --Where a bar's liability for the decedent's death was established at the original trial, evidence pertaining to the patron's role in the decedent's death was not relevant to the issue of damages unless the bar was seeking to apportion damages to the patron who murdered the decedent. The bar did not take the required steps to ensure that damages could be apportioned to the patron, and accordingly evidence of the patron's role in the decedent's death was not admitted at the trial on damages. *L.D.G., Inc. v. Brown*, 211 P.3d 1110 (Alaska 2009).

WHERE THE DECEASED LEAVES NO WIFE OR CHILDREN, the amount received should be for the benefit of the estate, and the damage to the estate would therefore be the value of the life to the estate, measured by the earning capacity, thriftiness, and probable length of the life of the deceased. *Jennings v. Alaska Treadwell Gold Mining Co.*, 170 F. 146 (9th Cir. 1909).

Where the deceased is not survived by the beneficiaries named in the statute, damages are limited to the loss to the estate and are distributed as other personal property of the deceased. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977).

An action for wrongful death of a child below the age of majority may be commenced by the parents of the child or the personal representative of the child. When the child leaves no husband, children or other dependents the measure of damages is limited to pecuniary loss and must be administered as other personal property of the deceased. *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840 (D. Alaska 1977).

Where the deceased is not survived by the statutory beneficiaries, damages are limited to the loss to the estate. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

THEORIES FOR DETERMINING LOSS TO ESTATE. --The net earnings theory and the net accumulations theory are alternative measures of the same amount when determining loss to the estate under this section -- the probable value of the deceased's estate had he not prematurely expired less the actual value of the estate at death. *Osborne v. Russell*, 669 P.2d 550 (Alaska 1983).

MENTAL ANGUISH. --Alaska does not expressly allow a widow and children to recover for their own mental anguish. *Ehredt v. DeHavilland Aircraft Co.*, 705 P.2d 446 (Alaska 1985).

DAMAGES TO COMPENSATE, NOT PUNISH. --The damages which the law contemplates, in providing a right of action under this section, are by way of compensation to those injured, not as a punishment of the party responsible for the injury. *Linge's Adm'r v. Alaska Treadwell Co.*, 3 Alaska 9 (1906).

WHEN CLAIM FOR PUNITIVE DAMAGES ALLOWED. --The language of this section providing that the court or jury should award the damages it "may consider fair and just" allows a claim for punitive damages when there is clear evidence that the wrongdoer acted maliciously, fraudulently, or with a wanton disregard for the plaintiff's safety. *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986).

RIGHT OF DECEDENT'S ESTATE TO SEEK PUNITIVE DAMAGES. --The estate of a decedent who dies without statutory beneficiaries is entitled to seek punitive damages. *Portwood v. Copper Valley Elec. Ass'n*, 785 P.2d 541 (Alaska 1990).

CONSTRUCTION OF SUBSECTION (C). --Subsection (c) is not to be construed as open invitation to the jury to award damages for any or all injuries or losses resulting from the death. *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986).

SUBSECTION (C) DOES NOT APPLY TO ACTIONS BY MINORS WITHOUT DEPENDENTS. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

If subsection (c) of this section applied to persons without statutory dependents the court would be required by the

term "shall" to consider noncompensable items. The only sensible manner to avoid this result is to conclude that subsection (c) of this section does not apply to those without dependents. This reading of the statute is supported by the use of the term "benefit" in subsection (a) of this section when referring to the distribution to dependents and the use of similar terms in subsection (c)(1) of this section. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

NET ACCUMULATIONS THEORY MAY BE USED. --Under Alaska law, damages in a wrongful death action brought on behalf of the estate of a minor with no dependents are determined under a net accumulations theory. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

WAGE TABLES FOR THE YEAR IN WHICH A TRIAL OCCURS MAY BE UTILIZED to calculate probable net accumulations in an action for wrongful death on behalf of a minor with no dependents. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

REDUCTION OF DAMAGES TO PRESENT VALUE. --Under Alaska law, damages in a wrongful death action on behalf of a decedent with no beneficiaries are not reduced to present value when assessed against a private party; such damages are reduced to present value as against the United States in an action based upon the Federal Tort Claims Act, 28 U.S.C. § 1346. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

In calculating damages in an action for wrongful death on behalf of a decedent with no dependents, the award will not be reduced to present value and general inflationary trends will not be considered. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

SUPERIOR COURT MAY ORDER DISTRIBUTION of the proceeds of a wrongful death recovery. *Engebret v. Moore*, 567 P.2d 305 (Alaska 1977).

NO ERROR IN REFUSING TO DISTRIBUTE ACCORDING TO INTESTATE SUCCESSION LAWS. --The superior court did not err in refusing to distribute the proceeds of the wrongful death settlement in accordance with Alaska's laws of intestate succession. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

The legislature intended that damages in a wrongful death case are to be assessed according to the actual losses of each qualified surviving beneficiary. It is illogical to infer that the legislature further intended that distribution of such damages was to be based on the fortuitous application of Alaska's laws controlling inheritance of intestate estates. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

WHEN RECOVERY DEEMED ASSETS OF ESTATE. --If there is no husband, wife, or children left by decedent, the amount recovered is assets of the estate to be administered as other personal property of the deceased person. *Koski v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334 (D. Alaska 1921).

If the decedent leaves a husband, wife, or children, then the estate has no interest whatsoever in any sum that may be recovered. It is only when no husband, wife, or children are left surviving decedent that the estate has any claim on the amount recovered. *Koski v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334 (D. Alaska 1921).

Alaska's Wrongful Death Act explicitly provides for only one instance, namely, when there are no statutory beneficiaries, where the damages recovered are to be administered as part of the decedent's estate. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

AWARDS TO SURVIVING BENEFICIARIES TO BE SEPARATE. --In determining awards under the Wrongful Death Act, the trier of fact should make a separate award for each surviving beneficiary. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

Alaska's wrongful death statute is silent as to whether or not the trier of fact should determine the loss suffered by each surviving beneficiary and then make a separate award for each, or calculate the loss suffered by each beneficiary, total such losses, and then enter a lump sum verdict. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

COURT TO MAKE ALLOCATIONS. --When confronted with allocation problems arising in the context of a

settlement of a wrongful death claim the court should make the necessary allocation. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

THE TRIAL COURT SHOULD HAVE RESERVED DISTRIBUTION of some or all of the settlement monies paid by some defendants in a wrongful death action until it could determine the full extent of "costs and expenses of suit" under this section, including costs and fees which foreseeably could have been one of the defendants which did not settle the claims against it, in the event that defendant prevailed in the plaintiffs' remaining action. *Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld*, 835 P.2d 1215 (Alaska 1992).

RIGHT OF PREVAILING DEFENDANT TO TRACE DISTRIBUTED FUNDS. --A defendant which prevailed in a wrongful death action has the right to trace the distributed funds paid by other defendants in the same action who settled the claims against them through the personal representative to each statutory beneficiary. The judgment on costs and attorney's fees should be entered against the personal representatives in their official capacity and also should specify that the judgment is chargeable only upon the actual beneficiaries of the settlement, as it was distributed. *Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld*, 835 P.2d 1215 (Alaska 1992).

RECOVERY BY REPRESENTATIVES HELD FOR DECEDENTS' ESTATE. --Any recovery which personal representatives obtained as a result of wrongful death actions brought by them, they held as trustees for the beneficiaries of the decedents set forth in this section. The flow of this recovery to the beneficiaries thus did not pass through the decedents' estates; the estates had no involvement in the case at all, consequently, the trial court had no basis on which to determine that the estates, through the personal representatives, were nonprevailing parties for the purpose of assigning costs and attorney's fees liability under Civil Rules 79 and 82. *Southcentral Air, Inc. v. Estate of Breitenfeld ex rel. Breitenfeld*, 835 P.2d 1215 (Alaska 1992).

EFFECT OF AGES OF BENEFICIARIES. --Paragraph (c)(1) provides for consideration of deprivation of pecuniary benefits to the beneficiaries without regard to their ages. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

FORMULA. --In making allocations of wrongful death settlements under certain circumstances, the supreme court has approved the use of a formula whereby appropriate proportions can be arrived at by totaling the number of years of reasonably expectable dependency or loss suffered by all beneficiaries. This figure is to be used as the denominator and the proportionate share of each beneficiary is that fraction of the proceeds which is arrived at by using each beneficiary's individual years of reasonably significant loss or dependency as the numerator. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

FORMULA DOES NOT CONFLICT WITH PARAGRAPH (C)(1). --Application of the allocation formula totaling number of years of reasonably expectable dependency or loss suffered by all beneficiaries was not in irreconcilable conflict with the "without regard to age" phraseology of paragraph (c)(1), since there is an adequate rationale for, as well as flexibility embodied in, the formula to reconcile it with the provisions of paragraph (c)(1). *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

Since the legal obligation to support children ordinarily terminates at approximately the age of majority and because the reasonable expectations of a child for pecuniary contributions from his parents terminates under ordinary circumstances at about the same time, the formula's employment as the years of significant damages for a child only those years between the age of the child at the time of his parent's death and the age of majority has a rational basis. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

If there is evidence of circumstances indicating a longer period of dependency or evidence furnishing a basis for finding a continued expectation of pecuniary contributions beyond the age of majority, then the formula can be adjusted or, if necessary, abandoned. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

SECTION 43-3-10, ACLA 1949, DID NOT DEPRIVE ADMINISTRATRIX OF HER RIGHT TO SUE FOR DAMAGES, except as between her and decedent husband's employer. *Andersen v. Pacific S.S. Co.*, 8 Alaska 291

(1931).

PREJUDGMENT INTEREST. --Interest should be awarded on damages recovered from the date of decedent's death until the date of judgment. *State v. Phillips*, 470 P.2d 266 (Alaska 1970).

RECOVERY OF MEDICAL AND FUNERAL EXPENSES. --See *Dralle v. Steele*, 13 Alaska 680 (1952).

ANGUISH, GRIEF, AND SUFFERING. --Under this section, spouses, children, and other dependents of the decedent may recover for their anguish, grief, and suffering resulting from the wrongful death. *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986).

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS. --Recognition of bystander's right to recover damages for negligent infliction of emotional distress caused by injury to another. See *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986).

COURT'S ABUSE OF DISCRETION IN GIVING INSTRUCTION ON INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. --See *Tommy's Elbow Room, Inc. v. Kavorkian*, 727 P.2d 1038 (Alaska 1986).

EVIDENCE OF LIABILITY INSURANCE. --The presence or absence of liability insurance should be divulged to the jury in cases of intra-family lawsuits so the jury can fully and fairly evaluate the case and the testimony before it. *Myers v. Robertson*, 891 P.2d 199 (Alaska 1995).

COST AND ATTORNEY FEES. --The trial court erred in allowing AS 09.60.040 to allow recovery of costs and attorney's fees against decedent's husband and the three children in a medical malpractice suit, as the statutory beneficiaries in this case, because they did not appear and did not make claims in their personal capacities. *Zaverl v. Hanley*, 64 P.3d 809 (Alaska 2003).

VI. BENEFICIARIES.

NO PROVISION FOR DIRECT RECOVERY BY THOSE WHO WOULD TAKE BY INTESTATE SUCCESSION. --Although the wrongful death statutes of some states specifically provide for direct recovery of the proceeds of the action by those who would take by intestate succession, Alaska's does not. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977).

RELATIONSHIP TO EXCEPTION IN AS 09.15.010. --This section broadly governs recovery that may be had by the victim of a wrongful death and by his close relatives and unambiguously bars nondependent siblings from recovering nonpecuniary damages; AS 09.15.010, which allows nondependent parents of a wrongful death victim to recover nonpecuniary damages, is an exception to this section but it does not apply to siblings of a wrongful death victim, and thus the Alaska statutes do not allow the nondependent sibling of a wrongful death victim to assert a wrongful death claim for nonpecuniary harm. *Sowinski v. Walker*, 198 P.3d 1134 (Alaska 2008).

PURPOSE OF 1960 AMENDMENT OF FORMER § 61-7-3, ACLA 1949. --In 1960 the statute (then former § 61-7-3, ACLA 1949) was amended to its present form. At that time, the legislature added "other dependents" to the class of statutory beneficiaries. Considering the history and purposes of the statute, this amendment appears designed to protect the interest of those who, like children and spouses, will suffer financial loss. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977); *Greer Tank & Welding, Inc. v. Boettger*, 609 P.2d 548 (Alaska 1980).

AN ACTION MAY BE BROUGHT DIRECTLY ON BEHALF OF THE SURVIVING PARENT. *In re Estate of Pushruk*, 562 P.2d 329 (Alaska 1977).

BUT ONLY IF SHE SHOWS THAT SHE IS ALSO A DEPENDENT. In re Estate of Pushruk, 562 P.2d 329 (Alaska 1977).

DEPENDENCY IS QUESTION OF FACT. --The term "dependent" provides for all persons who will suffer financial loss without creating either an excessively narrow or an overbroad classification. Thus, dependency is a question of fact. *In re Estate of Pushruk, 562 P.2d 329 (Alaska 1977); Greer Tank & Welding, Inc. v. Boettger, 609 P.2d 548 (Alaska 1980).*

"DEPENDENT" DOES NOT INCLUDE those who can show they would have been dependent on the deceased had he survived. *In re Estate of Pushruk, 562 P.2d 329 (Alaska 1977).*

NECESSARY SHOWING. --The legislature, by adding "other dependents" to the categories of spouse and children, intended to embrace those who occupy a position similar to those in the specified classes and who were actually dependent upon the decedent for support at the time of his death. A showing must be made of actual dependency for significant contributions of support over a sufficient period of time to justify the assumption that such contributions would have continued. *Greer Tank & Welding, Inc. v. Boettger, 609 P.2d 548 (Alaska 1980).*

WHERE THE MOTHER OF THE DECEASED WAS THE SOLE SURVIVING HEIR AND WAS NOT DEPENDENT on the deceased at the time of death, the proceeds of a statutory wrongful death action pass into the estate and are subject to the control and distribution of the court and to the claims of general creditors. *In re Estate of Pushruk, 562 P.2d 329 (Alaska 1977).*

Mother of decedent did not have the right to receive directly the proceeds of the wrongful death action as a statutory beneficiary by virtue of AS 25.20.030, which requires each child to maintain his parents when they are poor and unable to work and maintain themselves. *In re Estate of Pushruk, 562 P.2d 329 (Alaska 1977).*

Although AS 25.20.030 establishes a duty running between parent and child under specific factual circumstances, it does not create a right of action in the parent against a third-party tort-feasor. Nor does it establish dependency as a matter of law. *In re Estate of Pushruk, 562 P.2d 329 (Alaska 1977).*

LOSS OF PARENTAL CONSORTIUM. --Minor children have an independent cause of action for loss of parental consortium resulting from injuries tortiously inflicted on their parent by a third person, and this separate consortium claim must be joined with the injured parent's claim whenever feasible. *Hibshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987).*

ADULT DAUGHTER of deceased employee, who was not a beneficiary within the meaning of the Workman's Compensation Act, was not entitled to maintain an action under this section for the wrongful death of the employee. *McKenna v. Evans-Jones Coal Co., 12 Alaska 692 (1950).*

STEPCHILDREN. --Because of the lack of precision in the language of this section, the status of stepchildren as potential beneficiaries is not clear. *Brown v. Estate of Jonz, 591 P.2d 532 (Alaska 1979).*

Superior court's ruling excluding the nonadopted stepchildren from recovery was not plainly erroneous, and therefore supreme court did not review the court's instruction, unobjected to at trial, that the word "heir" included deceased's widow and daughter, with no mention of the stepchildren. *Brown v. Estate of Jonz, 591 P.2d 532 (Alaska 1979).*

DECEDENT'S DIVORCED WIFE AND NONADOPTED STEPSON were "dependents" under this section where the factual findings of the trial court which were supported by the evidence not only indicated the close familial relationship of the wife and stepson to the deceased, but also their actual dependency upon him for support. *Greer Tank & Welding, Inc. v. Boettger, 609 P.2d 548 (Alaska 1980).*

CHILD FROM FORMER MARRIAGE. --Wrongful death action by personal representative as administratrix of

decedent's estate encompassed claim of decedent's child from former marriage as well as claims of his wife and stepchildren, since this section contemplates that a wrongful death action include claims of all statutory beneficiaries. *Mitchell v. Mitchell*, 655 P.2d 748 (Alaska 1982).

TRIBAL CUSTOM ADOPTED CHILD. --A tribal custom adoption, recognized by Alaska state authorities, precludes the adopted child from recovery under Alaska's wrongful death statutes for the loss of a biological parent, as the adoption terminated the child's legal relationship with the deceased birth parent. *Buchea v. United States*, 154 F.3d 1114 (9th Cir. 1998).

JURY INSTRUCTION ON LEGAL CAUSE IN DAMAGES HEARING. --There was no need for the jury to receive a full instruction on legal cause where the issue of a bar's liability for the decedent's death at the hands of a bar patron was not before the jury in the damages trial. The only questions for the jury were whether the decedent's children had suffered harm and whether the decedent's death was the legal cause of that harm; because the instruction on legal cause was sufficient to allow the jury to make that determination, no more extensive instruction on legal cause was required. *L.D.G., Inc. v. Brown*, 211 P.3d 1110 (Alaska 2009).

COLLATERAL REFERENCES. --22 *Am. Jur. 2d, Death*, § 1 et seq.

25A C.J.S., *Death*, § 17 et seq.

Instruction mentioning or suggesting specific sum as damages, 2 *ALR2d* 454.

Beneficiary's negligence as affecting right of action for wrongful death, 2 *ALR2d* 785.

Common-law recovery of funeral expenses from tortfeasor by husband, wife, or other relative of deceased, 3 *ALR2d* 932.

Receivership in actions for wrongful death, 4 *ALR2d* 1278.

Claim for wrongful death as subject of counterclaim or cross action in negligence action against decedent's estate, and vice versa, 6 *ALR2d* 256.

Marriage of child or probability of marriage as affecting right or measure of recovery by parent in death action, 7 *ALR2d* 1380.

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Retroactive effect of statute changing manner and method of distribution of recovery or settlement for wrongful death, 66 *ALR2d* 1444.

Recovery of nominal damages, in wrongful death action, 69 *ALR2d* 628.

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Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss, 79 *ALR2d* 259.

Pension, retirement income, social security payments, and the like, of deceased, as affecting recovery in wrongful death action, 81 *ALR2d* 949.

Damages for wrongful death of husband or father as affected by receipt of social security benefits, 84 *ALR2d* 764.

Action ex contractu for damages caused by death, 86 *ALR2d* 316.

Fact that tortfeasor is member of class of beneficiaries as affecting right to maintain action for wrongful death, 95

ALR2d 585.

Recovery of prejudgment interest on wrongful death damages, *96 ALR2d 1104.*

Time from which statute of limitations begins to run against cause of action for wrongful death, *97 ALR2d 1151.*

Admissibility, in wrongful death action for pecuniary loss suffered by next of kin, etc., of evidence as to decedent's personal qualities with respect to sobriety or morality, *99 ALR2d 972.*

Res ipsa loquitur with respect to personal injuries or death on or about ship, *1 ALR3d 642.*

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, *3 ALR3d 1234.*

Official death certificate as evidence of cause of death in civil or criminal action, *21 ALR3d 418.*

Uninsured motorist clause; coverage of claim for wrongful death of insured, *26 ALR3d 935.*

Brothers and sisters of deceased as beneficiaries within state wrongful death statute, *31 ALR3d 379.*

Death of putative father as precluding action for determination of paternity or for child support, *58 ALR3d 188.*

Modern status of rule denying a common-law recovery for wrongful death, *61 ALR3d 906.*

Permitting child to walk to school unattended as contributory negligence of parents in actions for injury or death of child, *62 ALR3d 541.*

Remarriage of surviving parent as affecting action for wrongful death of child, *69 ALR3d 1038.*

Right of spouse to maintain action for wrongful death as affected by fact that injury resulting in death occurred before marriage, *69 ALR3d 1046.*

Admissibility and sufficiency of proof of value of housewife's services, in wrongful death action, *77 ALR3d 1175.*

Right to maintain action or to recover damages for death of unborn child, *84 ALR3d 411.*

Minority of surviving children as tolling limitation period in state wrongful death action, *85 ALR3d 162.*

Modern status of interspousal tort immunity in personal injury and wrongful death actions, *92 ALR3d 901.*

Validity of release of prospective right to wrongful death action, *92 ALR3d 1232.*

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa, *94 ALR3d 676.*

Employer's right of action for loss of services or the like against third person tortiously killing or injuring employee, *4 ALR4th 504.*

Effect of death of beneficiary upon right of action under death statute, *13 ALR4th 1060.*

Propriety of taking income tax into consideration in fixing damages in personal injury or death action, *16 ALR4th 589.*

Effect of anticipated inflation on damages for future losses -- modern cases, *21 ALR4th 21.*

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to other beneficiaries or decedent's personal representative, *21 ALR4th 275.*

Insurer's tort liability for wrongful or negligent issuance of life policy, *37 ALR4th 972.*

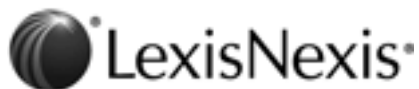
Tort Liability for window washer's injury or death, *69 ALR4th 187.*

Effect of death of beneficiary, following wrongful death, upon damages, *73 ALR4th 441.*

Wrongful death damages for loss of expectancy of inheritance from decedent, *42 ALR5th 465.*

Who, other than parent, may recover for loss of consortium on death of minor child, *84 ALR5th 687.*

USER NOTE: For more generally applicable notes, see notes under the first section of this article, chapter or title.



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*** Annotations current through opinions posted on Lexis.com as of September 4, 2009 ***

TITLE 9. CODE OF CIVIL PROCEDURE
CHAPTER 55. SPECIAL ACTIONS AND PROCEEDINGS
ARTICLE 7. SURVIVAL AND WRONGFUL DEATH ACTIONS

Go to the Alaska Code Archive Directory

Alaska Stat. § 09.55.570 (2009)

Sec. 09.55.570. All causes of action survive

All causes of action by one person against another, whether arising on contract or otherwise, except those involving defamation of character, survive to the personal representatives of the former and against the personal representatives of the latter, but this may not be construed so as to abate an action for a wrong where any party has died after the verdict or to defeat or prejudice the right of action given by *AS 09.15.010*. The personal representatives may maintain an action thereon against the party against whom the cause of action accrued, or, after the party's death, against the personal representatives of the party.

HISTORY: (§ 4 ch 78 SLA 1972; am § 34 ch 56 SLA 1973)

NOTES: EDITOR'S NOTES. --This section was taken from former AS 13.20.330 which, in turn, was taken from § 61-7-1, ACLA 1949, as amended.

NOTES TO DECISIONS

LEGISLATIVE INTENT. --The intent of the legislature inferred from the 1949 amendment to predecessor statute, is that actions no longer abate when the wrongdoer dies, but do abate when the injured party succumbs from noncausally connected matters. *O'Dey v. Matson, 17 Alaska 763 (1958)*.

SECTION 43-3-10, ACLA 1949, DID NOT REPEAL BY IMPLICATION THIS SECTION AND FORMER AS 13.20.340. *Andersen v. Pacific S.S. Co., 8 Alaska 291 (1931)*.

JOINDER OF PARENTS AS THIRD PARTY DEFENDANTS. --In an action for the wrongful death of a minor

without dependents brought by the parents of the minor in their representative capacity, the parents could be joined in the individual capacity as third party defendants and were liable for their negligent supervision of the child. *Macey v. United States*, 454 F. Supp. 684 (D. Alaska 1978).

NO PORTION OF SETTLEMENT ATTRIBUTABLE TO SURVIVORSHIP CLAIM. --The superior court correctly determined that no portion of the total settlement should be attributed to the survivorship claim for relief where there was nothing in the record which indicated that any pain and suffering which decedent may have suffered was other than momentary. *Horsford v. Estate of Horsford*, 561 P.2d 722 (Alaska 1977).

INJURED PARTY MAY NOT RECOVER PUNITIVE DAMAGES FROM ESTATE OF DECEASED TORTFEASOR under this section. *Doe ex rel. Doe v. Colligan*, 753 P.2d 144 (Alaska 1988).

APPLIED IN *Andersen v. Edwards*, 625 P.2d 282 (Alaska 1981).

CITED IN *Larman v. Kodiak Elec. Ass'n*, 514 P.2d 1275 (Alaska 1973); *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840 (D. Alaska 1977); *Goodlatav v. State, Dep't of Health & Social Servs.*, 698 P.2d 1190 (Alaska 1985).

COLLATERAL REFERENCES. --1 *Am. Jur. 2d, Abatement, Survival, and Revival*, § 1 et seq.

1 C.J.S., Abatement and Revival, § 1 et seq.

Liability for additions to deficiencies for fraud, imposed by income tax laws, as surviving taxpayer's death, 15 ALR2d 1036.

Conflict of laws as to survival or revival of wrongful death actions against estate of personal representative of wrongdoer, 17 ALR2d 690.

Constitutionality and construction of statute authorizing continuation of pending action against foreign representative of deceased nonresident driver of motor vehicle, arising out of accident occurring in state, 18 ALR2d 544.

Survival of action based on delay in passing upon application for insurance, 32 ALR2d 537.

Claim for negligently damaging or destroying personal property as surviving tortfeasor's death, 40 ALR2d 533.

Statutory liability for physical injuries inflicted by animal as surviving defendant's death, 40 ALR2d 543.

Survival of obligation of guaranty, 41 ALR2d 1243.

Conflict of laws as regards survival of cause of action and revival of pending action upon death of party, 42 ALR2d 1170.

Medical malpractice action as abating upon death of either party, 50 ALR2d 1445.

Death as terminating coexecutor's, coadministrator's, or testamentary cotrustee's liability for defaults or wrongful acts of fiduciary in handling, 65 ALR2d 1126.

Abatement or survival of action for attorney's malpractice or negligence upon death of either party, 65 ALR2d 1211.

Survivability of cause of action created by civil rights statute, 88 ALR2d 1153.

Survival of cause of action under liquor dealer's bond, 94 ALR2d 1145.

Validity of exception for specific kind of tort action in survival statute, 77 ALR3d 1349.

Effect of death of beneficiary upon right of action under death statute, 13 ALR4th 1060.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged, 30 ALR4th 707.

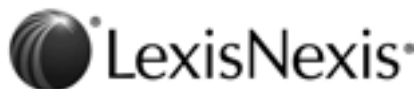
Effect of death of beneficiary, following wrongful death, upon damages, 73 ALR4th 441.

NOTES APPLICABLE TO ENTIRE TITLE

REVISOR'S NOTES. --The provisions of this title were redrafted in 1983 to remove personal pronouns pursuant to § 4, ch. 58, SLA 1982 and in 1983, 1994, and 2006 to make other, minor word changes under AS 01.05.031.

EDITOR'S NOTES. --For a review of the sources of some of Alaska law, see Brown, *The Sources of the Alaska and Oregon Codes* (pts. 1 and 2), 2 *UCLA-Alaska L. Rev.* 15, 87 (1972-1973).

CITED IN Flores v. Flores, 598 P.2d 893 (Alaska 1979).



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TITLE 9. CODE OF CIVIL PROCEDURE
CHAPTER 15. PARTIES

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Alaska Stat. § 09.15.010 (2009)

Sec. 09.15.010. Parents or guardian may sue for injuries or death to child

A parent may maintain an action as plaintiff for the injury or death of a child below the age of majority. A guardian may maintain an action as plaintiff for the injury or death of a ward.

HISTORY: (§ 30.01 ch 101 SLA 1962; am § 62 ch 127 SLA 1974)

NOTES TO DECISIONS

THIS SECTION IS A MERE PROCEDURAL DEVICE allowing the parent to bring an action on behalf of the estate of the child and creates no independent right of recovery in the parent. *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840 (D. Alaska 1977).

EXCEPTION TO AS 09.55.580. --AS 09.55.580 broadly governs the recovery that may be had by the victim of a wrongful death and by his close relatives and unambiguously bars nondependent siblings from recovering nonpecuniary damages; this section, which allows nondependent parents of a wrongful death victim to recover nonpecuniary damages, is an exception to AS 09.55.580, but it does not apply to siblings of a wrongful death victim. *Sowinski v. Walker*, 198 P.3d 1134 (Alaska 2008).

DAMAGES FOR LOSS OF SOCIETY. --A parent's right of action under this section includes the right to recover loss of society damages. Without question, the death of one's own child is the greatest loss a parent may suffer. It is far more than pecuniary; whatever monetary disadvantage a child's death may present to its parents pales in comparison to the immense mental anguish, grief and sense of loss that this event would inevitably cause. *Gillispie v. Beta Constr. Co.*, 842 P.2d 1272 (Alaska 1992).

This section does not clearly limit the time periods for which the parents of minor children may recover loss of

consortium damages, and while the supreme court has not addressed whether these damages may include loss of consortium for periods of time after the child has reached the age of majority, the policy behind this section suggests that parents may not recover such damages. *Sowinski v. Walker*, 198 P.3d 1134 (Alaska 2008).

APPLIED IN Macey v. United States, 454 F. Supp. 684 (D. Alaska 1978).

QUOTED IN Hanson v. Kake Tribal Corp., 939 P.2d 1320 (Alaska 1997).

CITED IN Wainscott v. Ossenkop, 633 P.2d 237 (Alaska 1981); *Crosby v. Hummell*, 63 P.3d 1022 (Alaska 2003).

NOTES APPLICABLE TO ENTIRE TITLE

REVISOR'S NOTES. --The provisions of this title were redrafted in 1983 to remove personal pronouns pursuant to § 4, ch. 58, SLA 1982 and in 1983, 1994, and 2006 to make other, minor word changes under AS 01.05.031.

EDITOR'S NOTES. --For a review of the sources of some of Alaska law, see Brown, *The Sources of the Alaska and Oregon Codes* (pts. 1 and 2), 2 *UCLA-Alaska L. Rev.* 15, 87 (1972-1973).

CITED IN Flores v. Flores, 598 P.2d 893 (Alaska 1979).

NOTES APPLICABLE TO ENTIRE CHAPTER

CROSS REFERENCES. --For rules of court on parties, see Civ. R. 17-25.

COLLATERAL REFERENCES. --59 *Am. Jur. 2d, Parties*, § 1 et seq.

67A C.J.S., Parties, §§ 1-8.

Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence, or incompetency, 7 *ALR2d* 1317.

Contract made in consideration of naming child as enforceable by child, 21 *ALR2d* 1067.

Maintainability of bastardy proceedings by infant prosecutrix in her own name and right, 50 *ALR2d* 1029.

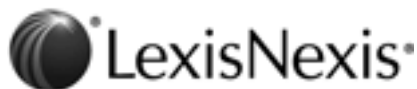
Capacity of local or foreign personal representative to maintain action for death under foreign statute providing for action by personal representative, 52 *ALR2d* 1016.

Capacity of foreign domiciliary, or of ancillary, personal representative to maintain action for death, under statute of forum providing for action by personal representative, 52 *ALR2d* 1048.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 *ALR2d* 1247.

Capacity of guardian to sue or to be sued outside state where appointed, 94 *ALR2d* 162.

Right of illegitimate child to maintain action to determine paternity, 19 *ALR4th* 1082.



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DIVISION 4. COURTS AND JUDICIAL PROCEEDINGS
TITLE 36 Civil Remedies And Defenses And Special Proceedings
CHAPTER 663 Tort Actions
PART I. Liability; Survival of Actions

Go to the Hawaii Code Archive Directory

HRS § 663-3 (2009)

§ 663-3. Death by wrongful act.

(a) When the death of a person is caused by the wrongful act, neglect, or default of any person, the deceased's legal representative, or any of the persons enumerated in subsection (b), may maintain an action against the person causing the death or against the person responsible for the death. The action shall be maintained on behalf of the persons enumerated in subsection (b), except that the legal representative may recover on behalf of the estate the reasonable expenses of the deceased's last illness and burial.

(b) In any action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including:

- (1) Loss of society, companionship, comfort, consortium, or protection;
- (2) Loss of marital care, attention, advice, or counsel;
- (3) Loss of care, attention, advice, or counsel of a reciprocal beneficiary as defined in chapter 572C;
- (4) Loss of filial care or attention; or

(5) Loss of parental care, training, guidance, or education, suffered as a result of the death of the person; by the surviving spouse, reciprocal beneficiary, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damages recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. Any action brought under this section shall be commenced within two years from the date of death of the injured person, except as otherwise provided.

HISTORY: L 1923, c 245, § 1; RL 1925, § 2681; am L 1931, c 16, § 1; am L 1933, c 139, § 1; RL 1935, § 4052; RL 1945, § 10486; am L 1955, c 205, § 1; RL 1955, § 246-2; *HRS § 663-3*; am L 1972, c 144, § 2(c); am L 1997, c 383, §

20

NOTES: Cross references.

As to the rules of the court, see HRCP, Rule 17.

NOTES TO DECISIONS

I. General Consideration II. Limitations Period III. Damages

I. General Consideration**Editor's note.**

Some of the cases below were decided under prior law.

Common-law right of widow to maintain action.

Where husband had come to his death by wrongful act of defendant, his widow could maintain an action on the case to recover consequential damages resulting from his death. *Kake v. Horton*, 2 Haw. 209, 1860 Haw. LEXIS 19 (1860); *Kamanu ex rel. Kamanu v. E.E. Black, Ltd.*, 41 Haw. 442, 1956 Haw. LEXIS 1 (1956).

A spouse's wrongful death action is derivative of the decedent's injury and dependent for its viability upon the nature of the harm suffered by the decedent; if the harm suffered by the decedent was not actionable because the tortfeasor was immune from suit or because the tortfeasor owed no duty to the decedent, then the wrongful death action for damages derived from that harm must necessarily fail. *Iida v. Allied Signal, Inc.*, 854 F. Supp. 702, 1994 U.S. Dist. LEXIS 7589 (D. Haw. 1994).

A spouse's wrongful death action is a separate and independent action from the decedent's action in the sense that it seeks different, if derivative, damages, it accrues at the time of death rather than the time of injury, and it is subject to a different statute of limitations. If the underlying injury or harm were actionable at the time it was sustained by the decedent, the derivative wrongful death action is entitled to go forward subject to the separate procedures and defenses specifically denominated in the wrongful death statute. *Iida v. Allied Signal, Inc.*, 854 F. Supp. 702, 1994 U.S. Dist. LEXIS 7589 (D. Haw. 1994).

Cause of action for death of fetus.

Parents may bring suit under this section for death of fetus which never sustained life outside its mother's womb, as long as fetus is viable, where a determination of viability considers not only length of gestation but also development of particular fetus in issue. *Wade v. United States*, 745 F. Supp. 1573, 1990 U.S. Dist. LEXIS 11828 (D. Haw. 1990).

Effect of section on common-law cause of action.

This section, as it read prior to amendment in 1955, did not abrogate the cause of action for death by a wrongful act adopted and made a part of the common law of *Kake v. Horton*, 2 Haw. 209, 1860 Haw. LEXIS 19 (1860), with respect to the relation of husband and wife, and parent and child. *Gabriel v. Margah*, 37 Haw. 571, 1947 Haw. LEXIS 7 (1947).

No right to recover for death of adult daughter prior to section.

Prior to the enactment of this section, no action could be maintained in this jurisdiction by parents for the death of their adult daughter caused by the negligence of another. *Hall v. Kennedy*, 27 Haw. 626, 1923 Haw. LEXIS 19 (1923).

Effect of No-Fault Law.

The legislature did not intend, in enacting Hawaii's No-Fault Law, to supersede claims brought under *Hawaii's Wrongful Death Statute*. *Crawford v. Crawford*, 69 Haw. 410, 745 P.2d 285, 1987 Haw. LEXIS 101 (1987).

Section 663-7 distinguished.

Under § 663-7 the cause of action arises out of the injury. The injury may manifest itself in the loss of life instantly or subsequently, but the loss of life is not what gives rise to the cause of action. In contrast, an action under this section arises out of the death. *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 373, 369 P.2d 96, 1961 Haw. LEXIS 80 (1961).

When an injured person has died as a result of his injury and an action is brought by his legal representative under § 663-7, the award under the survival statute is not to include compensation for loss of enjoyment of life. Compensation for sentimental losses is recoverable in the action under this section. *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 373, 369 P.2d 96, 1961 Haw. LEXIS 80 (1961).

Wrongful death statute creates a single cause of action for which those "persons entitled thereto" may claim damages against the tortfeasor. *Hun v. Center Properties*, 63 Haw. 273, 626 P.2d 182, 1981 Haw. LEXIS 106, reconsideration denied, 63 Haw. 676 (1981).

Breach of express warranty action.

A breach of express warranty action could be the basis for a derivative wrongful death action brought under this section. *Torres v. Northwest Eng'g Co.*, 86 Haw. 383, 949 P.2d 1004, 1997 Haw. App. LEXIS 300 (Ct. App. 1997).

Recovery dependent on decedent's right to recover.

A plaintiff in a wrongful death action can only recover if the tortious harm which decedent suffered would have entitled decedent to maintain an action against the defendant. *Bertelmann v. Taas Assocs.*, 69 Haw. 95, 735 P.2d 930, 1987 Haw. LEXIS 69 (1987).

Claims by dependents for pecuniary injuries as well as for the loss of love and affection are cognizable under this section. *Lealaimatafao v. Woodward-Clyde Consultants*, 75 Haw. 544, 867 P.2d 220, 1994 Haw. LEXIS 5 (1994).

Child's loss of consortium.

Hawaii recognizes a cause of action for a child's loss of consortium due to a non-fatal injury to a parent. *Marquardt v. United Airlines, Inc.*, 781 F. Supp. 1487, 1992 U.S. Dist. LEXIS 181 (D. Haw. 1992).

Dependency as prerequisite to recovery.

The right of action created by this section is not one accorded generally for damages resulting from death by a wrongful act. It is a cause of action for the benefit of dependents and to sustain a recovery it must affirmatively appear that those invoking the statute are wholly or partially dependent upon the deceased for their support. *Young v. Honolulu Constr. & Draying Co.*, 34 Haw. 426, 1938 Haw. LEXIS 36 (1938).

Definition of dependents.

Dependents are those who wholly or partly derive physical, moral and/or social necessities from the decedent. *Lealaimatafao v. Woodward-Clyde Consultants*, 75 Haw. 544, 867 P.2d 220, 1994 Haw. LEXIS 5 (1994).

Dependents are not required to join in action.

Under this section, persons who were dependent on a deceased person whose death was caused by the wrongful act or neglect of another were not required to join as parties plaintiff in an action for damages resulting from such death. *Choy Look Lum Too v. Kaiwiki Sugar Co.*, 32 Haw. 611, 1933 Haw. LEXIS 29 (1933).

This section does not define classes of relatives in a specific order of priority, nor does it limit the damages recoverable by a "dependent" to those arising from pecuniary injuries only. *Lealaimatafao v. Woodward-Clyde Consultants*, 75 Haw. 544, 867 P.2d 220, 1994 Haw. LEXIS 5 (1994).

By using the term "including," the legislature intended the enumerated claims to be exemplary of the type of claims which may be brought for the loss of love and affection. The term in no way implies exclusivity. *Lealaimatafao v. Woodward-Clyde Consultants*, 75 Haw. 544, 867 P.2d 220, 1994 Haw. LEXIS 5 (1994).

Complaint in two counts.

In an action under this section, a complaint which contains two counts, one of which charges the defendant with negligence and the other with maintaining a nuisance, both relating to the same tort, states but one cause of action in which the two counts may properly be joined. *Choy Look Lum Too v. Kaiwiki Sugar Co.*, 32 Haw. 611, 1933 Haw. LEXIS 29 (1933).

This section gives no cause of action to a child for injuries to a parent not resulting in death. *Halberg v. Young*, 41 Haw. 634, 59 A.L.R.2d 445, 1957 Haw. LEXIS 32 (1957). See also *Meredith v. Scruggs*, 244 F.2d 604, 1957 U.S. App. LEXIS 3123 (9th Cir. 1957).

As to inapplicability of this section to death on the high seas, see *Higa v. Transocean Airlines*, 230 F.2d 780, 1955 U.S. App. LEXIS 4792 (9th Cir. 1955), cert. dismissed, 352 U.S. 802, 1 L. Ed. 2d 37, 77 S. Ct. 20, 1956 U.S. LEXIS 672 (1956).

Sale of liquor to minor.

The estate and survivors of a minor, who became drunk and sustained injury, were precluded from suing commercial liquor supplier. *Winters v. Silver Fox Bar*, 71 Haw. 524, 797 P.2d 51, 1990 Haw. LEXIS 53 (1990).

As to limitation of claims against an employer to the remedy which the defendants of deceased employee have under the Workmen's Compensation Act, see *Kamanu ex rel. Kamanu v. E.E. Black, Ltd.*, 41 Haw. 442, 1956 Haw. LEXIS 1 (1956).

The 1955 legislature by Act 205, amending this section, did not intend to repeal, by implication, former § 386-7 (see now § 386-5), providing that the rights of the employee to any compensation " shall exclude all other rights and remedies of the employee, his personal representatives, dependents, or next of kin, at common law or otherwise, on account of the injury," even though the legislature did not include within this section as rewritten a proviso that had formerly appeared, namely, " provided, however, that nothing in this section shall be construed as authorizing any action to be maintained hereunder against the employer of such decedent in any case where any dependent of the decedent has a remedy for compensation under the provisions of chapter 77 (now chapter 386)." *Costa ex rel. Hanvey v. Flintkote Co.*, 42 Haw. 518, 1958 Haw. LEXIS 29 (1958).

The subrogation clause of the Workmen's Compensation Law, R.L. 1925, Sec. 3608 (see now § 386-8), had no application when the person for whose compensation the carrier was liable was the widow of the decedent whose death was caused by the wrongful act or neglect of a third person. (decided prior to amendments).

Prior to the 1931 act amending this section, dependent mother who had a remedy for compensation under the provisions of the workmen's compensation chapter against the employer of her adult son for the son's wrongful death caused by the negligence of a person other than the employer could not maintain an action for damages therefor against

the person causing such death. In such circumstances, the employer, who had paid said compensation or who had become liable therefor, did not have a subrogated right of action in the premises against the person who caused the death. *Haran v. Woolley*, 32 Haw. 61, 1931 Haw. LEXIS 26 (1931).

Where government performed duty to reasonably clear range of unexploded shells and gave ample notice to warn of the possible hidden dangers of unexploded shells in the area, there was no evidence to support the claim that death was caused by any negligent or wrongful act or omission of a government employee or agent, and judgment had to be rendered in favor of the government. *Iokepa v. United States*, 158 F. Supp. 394, 1958 U.S. Dist. LEXIS 2743 (D. Haw. 1958).

Negligent misrepresentaion.

Time-share company and related entity that provided flight vouchers, defendants, were entitled to summary judgment on the plaintiffs' wrongful death claims, which were brought under HRS § 663-3, where (1) there was no evidence that the defendants negligently misrepresented the safety record of the flight operator, and, in fact, the evidence showed that the operator had a good safety record; (2) the defendants owed no duty to the passengers, as the defendants did not dictate if and when the passengers would fly or where they would go; and (3) the waiver of liability language in the defendants' air ticket vouchers was enforceable. *Bailey v. United States*, 289 F. Supp. 2d 1197, 2003 U.S. Dist. LEXIS 19404 (D. Haw. 2003).

Cited in

Hisakichi Wada v. Associated Oil Co., 27 Haw. 671, 1924 Haw. LEXIS 37 (1924); *Gabriel v. Margah*, 37 Haw. 571, 1947 Haw. LEXIS 7 (1947); *Ginoza v. Kosuke Takai*, 40 Haw. 691, 1955 Haw. LEXIS 27; *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 373, 369 P.2d 96, 1961 Haw. LEXIS 80 (1961); *Greene v. Texeira*, 54 Haw. 231, 505 P.2d 1169, 1973 Haw. LEXIS 183, 76 A.L.R.3d 111 (1973); *Stryker v. Queen's Medical Ctr.*, 60 Haw. 214, 587 P.2d 1229, 1978 Haw. LEXIS 138 (1978); *Hudson v. Uwekoolani*, 65 Haw. 468, 653 P.2d 783, 1982 Haw. LEXIS 240 (1982); *Locke v. United States*, 351 F. Supp. 185, 1972 U.S. Dist. LEXIS 11096 (D. Haw. 1972); *Jenkins v. Whittaker Corp.*, 551 F. Supp. 110 (D. Haw. 1982); *Kiesel v. Peter Kiewit & Sons' Co.*, 638 F. Supp. 1251, 1986 U.S. Dist. LEXIS 22676 (D. Haw. 1986); *United States v. Furumizo*, 381 F.2d 965, 1967 U.S. App. LEXIS 5374 (9th Cir. 1967); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 1980 U.S. App. LEXIS 14987 (9th Cir. 1980); *Zator v. State Farm Mut. Auto. Ins. Co.*, 69 Haw. 594, 752 P.2d 1073, 1988 Haw. LEXIS 16 (1988); *Hara v. Island Ins. Co.*, 70 Haw. 42, 759 P.2d 1374, 1988 Haw. LEXIS 28 (1988); *Masaki v. GMC*, 71 Haw. 1, 780 P.2d 566, 1989 Haw. LEXIS 58 (1989); *Touchette v. Ganal*, 82 Haw. 293, 922 P.2d 347, 1996 Haw. LEXIS 68 (1996); *Guth v. Freeland*, 96 Haw. 147, 28 P.3d 982, 2001 Haw. LEXIS 281 (2001); *Silva v. City & County of Honolulu*, 115 Haw. 1, 165 P.3d 247, 2007 Haw. LEXIS 224 (Aug. 10, 2007).

II. Limitations Period

"Except as otherwise provided".

The supreme court attributes the same meaning of "except as otherwise provided" as used in § 663-6 to this section. *Hun v. Center Properties*, 63 Haw. 273, 626 P.2d 182, 1981 Haw. LEXIS 106, reconsideration denied, 63 Haw. 676 (1981).

What limitations period applies.

Where plaintiffs allege deprivation of parental care, training, guidance, education and support as a result of the death of their father, the controlling limitations period is found in this section. *Crawford v. Crawford*, 69 Haw. 410, 745 P.2d 285, 1987 Haw. LEXIS 101 (1987).

Running of statute against some persons would not necessarily affect others.

By its terms, this section speaks of damages being awarded to the "persons entitled thereto." Thus, the decedent's surviving spouse, children, parents and dependents each are granted by the statute, the right, independent of one another, to recover under the wrongful death statute. Under this view, even if one or more of the persons entitled to recover are barred by the statute of limitations, it does not affect the rights of other persons entitled to recovery. Adult persons entitled to damages under this section but barred by the statute of limitations would not necessarily affect the rights of surviving children. *Hun v. Center Properties*, 63 Haw. 273, 626 P.2d 182, 1981 Haw. LEXIS 106, reconsideration denied, 63 Haw. 676 (1981).

Limitations claim applicable where defendant added as to adult but not minor child's claims.

Where the limitations period of HRS § 663-3 had run as to adult plaintiff's wrongful death claim, a security company that was a newly added defendant was entitled to summary judgment on that basis but not as to minor child's claim, which was tolled due to her minority. *Gast v. Sung Ki Kwak*, 396 F. Supp. 2d 1150, 2005 U.S. Dist. LEXIS 24946 (2005).

Section 657-13 is not negated.

The legislature did not intend the two-year limitations period in this section to negate the tolling provisions of § 657-13, relating to the disabilities of infancy, insanity and imprisonment. Otherwise, the policy considerations of § 657-13 could not be effectuated. *Hun v. Center Properties*, 63 Haw. 273, 626 P.2d 182, 1981 Haw. LEXIS 106, reconsideration denied, 63 Haw. 676 (1981).

And thus the running of the statute is suspended during the minority of decedent's surviving children by reason of the general tolling statute, § 657-13. *Hun v. Center Properties*, 63 Haw. 273, 626 P.2d 182, 1981 Haw. LEXIS 106, reconsideration denied, 63 Haw. 676 (1981).

The running of the statute of limitations for a wrongful death action brought by a decedent's surviving children is suspended, under § 657-13, during the infancy of the decedent's surviving children. *Crawford v. Crawford*, 69 Haw. 410, 745 P.2d 285, 1987 Haw. LEXIS 101 (1987).

Statute was not tolled by pursuit of worker's compensation.

The running of the statute of limitations for wrongful death was not tolled during the pendency of worker's compensation proceedings, where some seven years passed before the wrongful death suit was initiated. The purposes underlying the statute of limitations would clearly be frustrated by tolling the statute while the worker's compensation claim was being pursued, since after seven years, evidence may have been lost, memories faded and witnesses disappeared. *Hun v. Center Properties*, 63 Haw. 273, 626 P.2d 182, 1981 Haw. LEXIS 106, reconsideration denied, 63 Haw. 676 (1981).

Relation back doctrine inapplicable.

Time-share company and related entity that provided flight vouchers, defendants, were entitled to summary judgment on the plaintiffs' wrongful death claims, which were barred by statute of limitations contained in HRS § 663-3. The plaintiffs' amended petition did not relate back under either *Fed. R. Civ. P. 15(c)* or *HRCP 15(c)(3)*, as the plaintiffs had not raised a question of fact as to whether the defendants (1) received notice of the institution of the action such that they would not be prejudiced in maintaining a defense on the merits, or (2) knew or should have known that, but for a mistake concerning their identity, the action would have been brought against them. *Bailey v. United States*, 289 F. Supp. 2d 1197, 2003 U.S. Dist. LEXIS 19404 (D. Haw. 2003).

III. Damages

Total award is determinative.

When the damages awarded consisted of pain and suffering, loss of love and affection, and loss of support, while the trial judge might not have been entirely accurate in computing retirement benefits, in failing fully to account for inflation and job promotion, and in discounting the award to the date of death instead of the death of judgment, it is the total award, not its particulars, which is significant under this section, and as the fairness objective of the statute would indicate, the total need only be reasonably certain. *Mills v. Tucker*, 499 F.2d 866, 1974 U.S. App. LEXIS 8209 (9th Cir. 1974).

Factors in computing damages.

In Hawaii, both by the common law and statute, loss of support, maintenance, education, nurture, care, training, attention, acts of kindness, comfort and solace are recognized factors in computing damage to the injured right incident to the family relationship. *Scruggs v. Meredith*, 134 F. Supp. 868, 1955 U.S. Dist. LEXIS 2823 (D. Haw. 1955), rev'd on other grounds, sub nom. *Meredith v. Scruggs*, 244 F.2d 604, 1957 U.S. App. LEXIS 3123 (9th Cir. 1957).

Jury instructions.

The emotional distress and mental suffering of survivors are considered by jurors under the direction given them to compensate a survivor for the loss of a decedent's love and affection and requires no further elaboration in the instructions. *Ozaki v. Association of Apt. Owners*, 87 Haw. 273, 954 P.2d 652, 1998 Haw. App. LEXIS 3 (Ct. App. 1998), aff'd in part and rev'd in part on other grounds, 87 Haw. 265, 954 P.2d 644, 1998 Haw. LEXIS 123 (1998).

Damages are viewed and measured in terms of loss suffered by the decedent. This rule permits recovery for impairment or destruction of earning capacity not only when caused by the loss of a limb or the like but also when caused by the loss of years in which to earn. *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 373, 369 P.2d 96, 1961 Haw. LEXIS 80 (1961).

As to computation of damages to decedent's wife and child, see *Furumizo v. United States*, 245 F. Supp. 981, 1965 U.S. Dist. LEXIS 7812 (D. Haw. 1965), aff'd, 381 F.2d 965, 1967 U.S. App. LEXIS 5374 (9th Cir. 1967).

Damages for death of adult child.

In an action by a father for the death of his son, evidence is admissible, on the question of damages, tending to show the capability of the son to earn certain wages in the class of work in which his father is engaged, the kind and value of the services actually performed by the son for his father before his death, and the size and character of the father's family. *Ferreira v. Honolulu Rapid Transit & Land Co.*, 16 Haw. 615, 1905 Haw. LEXIS 70 (1905).

Where the observance of moral obligations which an adult son assumes toward dependent parents and dependent minor sisters includes acts and conduct which have a pecuniary value to such dependents, such acts and conduct are circumstances which the court may take into consideration in assessing damages in an action brought by such dependents. *Enos v. Honolulu Motor Coach Co.*, 34 Haw. 5, 1936 Haw. LEXIS 10 (1936).

Present value.

Awards to compensate a widow or child for the loss of care, attention, acts of kindness, and comfort and solace of husband's or parent's society need not be reduced to present value. Awards made to the widow or child to compensate for pecuniary damage, however, must be so discounted. *United States v. Hayashi*, 282 F.2d 599, 1960 U.S. App. LEXIS 3841 (9th Cir. 1960).

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Effect of death of beneficiary, following wrongful death, upon damages. *73 A.L.R.4th 441.*

When is death "instantaneous" for purposes of wrongful death or survival action. *75 A.L.R.4th 151.*

Recovery of damages for loss of consortium resulting from death of child--modern status. *77 A.L.R.4th 411.*

Fraudulent concealment of cause of action for wrongful death as affecting period of limitations. *88 A.L.R.4th 851.*

Wrongful death damages for loss of expectancy of inheritance from decedent. *42 A.L.R.5th 465.*

Liability of electric company to one other than employee for injury or death arising from commencement or resumption of service. *46 A.L.R.5th 423.*

Venue of wrongful death action. *58 A.L.R.5th 535.*

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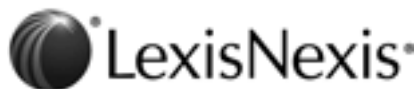
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HIERARCHY NOTES:

Div. 4, Tit. 36 Note

Div. 4, Tit. 36, Ch. 663 Note



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MICHIE'S HAWAII REVISED STATUTES ANNOTATED
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DIVISION 4. COURTS AND JUDICIAL PROCEEDINGS
TITLE 36 Civil Remedies And Defenses And Special Proceedings
CHAPTER 663 Tort Actions
PART I. Liability; Survival of Actions

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HRS § 663-7 (2009)

§ 663-7. Survival of cause of action.

A cause of action arising out of a wrongful act, neglect, or default, except a cause of action for defamation or malicious prosecution, shall not be extinguished by reason of the death of the injured person. The cause of action shall survive in favor of the legal representative of the person and any damages recovered shall form part of the estate of the deceased.

HISTORY: L 1955, c 205, § 2; RL 1955, § 246-6; *HRS § 663-7*; am L 1972, c 144, § 2(f)

NOTES: Cross references.

As to abatement and revival, see Chapter 634, Part V.

As to probate of claims, see Chapter 560.

As to substitution of parties, see HRCP, Rule 25, HRSC, Rule 6(g).

NOTES TO DECISIONS

As to recovery of probable future earnings prior to enactment of § 663-8, see *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 373, 369 P.2d 96, 1961 Haw. LEXIS 80 (1961). See now § 663-8.

Damages for pain and suffering of the decedent can be recovered under this section. *Tancredi v. Dive Makai Charters*, 823 F. Supp. 778, 1993 U.S. Dist. LEXIS 12326 (D. Haw. 1993).

The only limitation on damages recoverable under this section relates to "defamation or malicious prosecutions",

and the court erred in precluding plaintiffs' evidence of loss of enjoyment of life. *Ozaki v. Association of Apt. Owners*, 87 Haw. 273, 954 P.2d 652, 1998 Haw. App. LEXIS 3 (Ct. App. 1998), aff'd in part and rev'd in part on other grounds, 87 Haw. 265, 954 P.2d 644, 1998 Haw. LEXIS 123 (1998).

Where the decedent would have had an action for punitive damages had he survived, his estate representative would be entitled to recover for punitive damages under this section, but the action could not be maintained against a corporate defendant where there was no evidence that would indicate that the defendant, acting as a corporation, expressly or impliedly authorized the allegedly tortious act. *Jenkins v. Whittaker Corp.*, 551 F. Supp. 110, 1982 U.S. Dist. LEXIS 15885, 1982 U.S. Dist. LEXIS 15886 (D. Haw. 1982), aff'd in part, rev'd in part on other grounds, 785 F.2d 720, 1986 U.S. App. LEXIS 23305 (9th Cir. 1986), cert. denied, sub nom. *Whittaker Corp. v. Jenkins*, 479 U.S. 918, 93 L. Ed. 2d 296, 107 S. Ct. 324, 1986 U.S. LEXIS 4423 (1986).

Substitution pending appeal.

When the plaintiff recovers judgment below and the case is pending on appeal when plaintiff dies, upon the suggestion of his death by his personal representative, the personal representative will be substituted for the deceased plaintiff. (decided under prior law).

Trial court abused its discretion in not permitting substitution of plaintiff's administratrix as plaintiff, in the absence of a showing of undue prejudice to defendants in the two years and eight months which elapsed between plaintiff's death and motion for substitution, and in light of the fact that plaintiff's counsel did not abandon the case but continued with pretrial proceedings while attempting to locate "heirs" in the *Phillippines*. *Bagalay v. Lahaina Restoration Found.*, 60 Haw. 125, 588 P.2d 416, 1978 Haw. LEXIS 130 (1978).

Cited in

Lum v. Fullaway, 42 Haw. 500, 1958 Haw. LEXIS 30 (1958); *Furumizo v. United States*, 245 F. Supp. 981, 1965 U.S. Dist. LEXIS 7812 (D. Haw. 1965); *Stryker v. Queen's Medical Ctr.*, 60 Haw. 214, 587 P.2d 1229, 1978 Haw. LEXIS 138 (1978); *Mitsuba Publishing Co. v. State*, 1 Haw. App. 517, 620 P.2d 771, 1980 Haw. App. LEXIS 175 (1980); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 1980 U.S. App. LEXIS 14987 (9th Cir. 1980).

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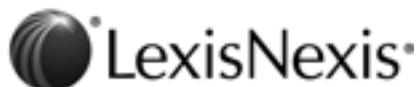
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Comment, Holding Hawai'i Nursing Facilities Accountable for the Inadequate Pain Management of Elderly Residents, 27 *U. Haw. L. Rev.* 233 (2004).

HIERARCHY NOTES:

Div. 4, Tit. 36 Note

Div. 4, Tit. 36, Ch. 663 Note



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DIVISION 4. COURTS AND JUDICIAL PROCEEDINGS
TITLE 36 Civil Remedies And Defenses And Special Proceedings
CHAPTER 663 Tort Actions
PART I. Liability; Survival of Actions

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HRS § 663-8 (2009)

§ 663-8. Damages, future earnings.

Together with other damages which may be recovered by law, the legal representative of the deceased person may recover where applicable under section 663-7 the future earnings of the decedent in excess of the probable cost of the decedent's own maintenance and the provision decedent would have made for his or her actual or probable family and dependents during the period of time decedent would have likely lived but for the accident.

HISTORY: L 1973, c 213, § 3

NOTES:

LexisNexis 50 State Surveys, Legislation & Regulations

Compensatory Damages & Costs

NOTES TO DECISIONS

Cited in

Sams v. Beech Aircraft Corp., 625 F.2d 273, 1980 U.S. App. LEXIS 14987 (9th Cir. 1980); *Hudson v. Uwekoolani*, 65 Haw. 468, 653 P.2d 783, 1982 Haw. LEXIS 240 (1982); *Tancredi v. Dive Makai Charters*, 823 F. Supp. 778, 1993 U.S. Dist. LEXIS 12326 (D. Haw. 1993).

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Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system. *51 A.L.R.5th 467*.

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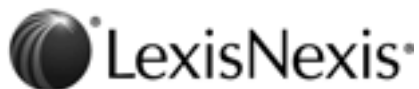
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HIERARCHY NOTES:

Div. 4, Tit. 36 Note

Div. 4, Tit. 36, Ch. 663 Note



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OREGON REVISED STATUTES

*** This document is current through the 2007 Regular Session ***
*** of the 73rd Legislative Assembly ***
*** Annotations are current through August 21, 2009 ***

TITLE 12. PROBATE LAW
CHAPTER 115. CLAIMS; ACTIONS AND SUITS
ACTIONS AND SUITS

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ORS § 115.305 (2007)

115.305. Survival of causes of action.

All causes of action or suit, by one person against another, survive to the personal representative of the former and against the personal representative of the latter.

HISTORY: Formerly 121.020

PERMANENT EDITION ANNOTATIONS:

CASENOTES:

1. In General
2. Construction of Statute
3. Particular Causes of Action
4. Actions by and Against Representatives
5. Under Former Similar Statute

1. IN GENERAL

The survival of actions in the United States courts depends upon the state laws. *Barker v. Ladd*, (1874) 3 Sawy 44, Fed Cas No. 990.

The fundamental law of the state is not violated by this section. *Nadstanek v. Trask*, (1929) 130 Or 669, 281 P 840, 67 ALR 599.

Remedies administered in equity do not die with the person. *Brown v. Hilleary*, (1930) 133 Or 26, 286 P 593.

2. CONSTRUCTION OF STATUTE

The torts that survive under this section are those which clearly involve property rights as distinguished from personal rights. *Nadstanek v. Trask*, (1929) 130 Or 669, 281 P 840, 67 ALR 599.

3. PARTICULAR CAUSES OF ACTION

A cause of action for fraud or deceit survives. *Brown v. Hilleary*, (1930) 133 Or 26, 286 P 593; *Barker v. Ladd*,

(1874) 3 *Sawy* 44, Fed Cas No. 990.

An action to determine an adverse claim to mining property survived. *Mackay v. Fox*, (1903) 121 Fed 487, 57 CCA 439 (Alaska).

The liability of a joint maker of a promissory note survived. *Nadstanek v. Trask*, (1929) 130 Or 669, 281 P 840, 67 ALR 599.

A cause of action for the conversion of chattels survives the death of the owner, and can be sued upon by his assignee or successor. *Nichols v. Jackson County Bank*, (1931) 136 Or 302, 298 P 908.

A cause of action for diversion of a water course survived defendant. *Adams v. Perry*, (1941) 168 Or 132, 111 P2d 838, 119 P2d 581.

A cause of action against deceased by a trustee in bankruptcy of a corporation, survived. *Hughes v. Honeyman*, (1949) 186 Or 616, 208 P2d 355.

4. ACTIONS BY AND AGAINST REPRESENTATIVES

An executor may sue either individually or in his representative capacity, at his option, on causes of action accruing after the death of the testator, whether in contract or in tort. *Burrell v. Kern*, (1899) 34 Or 501, 56 P 809; *Sears v. Daly*, (1903) 43 Or 346, 73 P 5.

5. UNDER FORMER SIMILAR STATUTE

In general, only the executor or administrator could have sued to recover property belonging to the estate, but the heirs could sue if he did not or would not. *Hillman v. Young*, (1913) 64 Or 73, 89, 127 P 793, 129 P 124; *Hadley v. Hadley*, (1914) 73 Or 179, 183, 144 P 80, 82; *In re Marks' Estate*, (1916) 81 Or 632, 638, 160 P 540.

Suit to enforce a lien upon a fund received from the United States for supplies furnished was not defeated by failure to present the demand to the administrator. *Dowell v. Cardwell*, (1877) 4 *Sawy* 217, Fed Cas No. 4,039.

Heirs should have been made parties to a suit against the executors to foreclose a mortgage on realty, otherwise the decree would not bind them. *Renshaw v. Taylor*, (1879) 7 Or 315.

It was not the intention of the provision to do more than provide that the executor should represent the estate of decedent, so far as the same vested in him as trustee for creditors and heirs. *Id.*

Suits for specific performance could be brought by the personal representative under the statute. *Zeuske v. Zeuske*, (1912) 62 Or 46, 51, 124 P 203.

On a note and mortgage, it was the practice first to present a claim based on the note and mortgage, and upon the rejection thereof to proceed in equity for foreclosure and judgment for the full amount of the note, if deceased was personally liable. *Schaefer v. Sellar*, (1937) 156 Or 16, 64 P2d 1334.

FURTHER-CITATIONS:

Ore. Auto-Dispatch v. Cadwell, (1913) 67 Or 301, 135 P 880; *Foulkes v. Sengstacken*, (1917) 83 Or 118, 158 P 952, 163 P 311; *In re Potter's Estate*, (1936) 154 Or 167, 59 P2d 253; *Tudor v. Jaca*, (1946) 178 Or 126, 164 P2d 680, 165 P2d 770; *The St. Nicholas*, (1891) 49 Fed 671; *Amoth v. United States*, (1925) 3 F2d 848; *Apitz v. Dames*, (1955) 205 Or 242, 287 P2d 585.

ATTORNEY GENERAL OPINIONS:

Whether cause of action to recover old-age assistance may be enforced against estate of deceased recipient, 1940-42, p 412.

LAW REVIEW CITATIONS:

9 OLR 76; 12 OLR 201, 208, 209.

CURRENT ANNOTATIONS:

NOTES OF DECISIONS

The death of a party after a decree of dissolution does not terminate the right of that party's personal representative from making a timely appeal of the property division. *Libby and Libby*, 23 Or App 223, 541 P2d 1077 (1975)

This section, not ORS 115.195, governed action commenced before decedent died and plaintiffs were not required to and did not present claims to personal representative. *Hitchman v. Burkey*, 95 Or App 508, 769 P2d 799 (1989)

LexisNexis (R) Notes:

CASE NOTES

1. A cause of action brought by a former associate professor at Oregon State University based on a right to a pretermination hearing did not survive his death where no protectable liberty or property interest was implicated by his termination. *Davis v. Or. State Univ.*, 591 F.2d 493, 1978 U.S. App. LEXIS 7827 (9th Cir. Or. 1978).

2. *Or. Rev. Stat. § 115.305* did not apply to a case where the personal representative of an estate sought a refund of the money that the decedent had paid to a retirement home pursuant to a contract, since there was no cause of action or suit in existence at the time of the decedent's death. *Rice v. Terwilliger Plaza, Inc.*, 65 Or. App. 74, 670 P.2d 188, 1983 Ore. App. LEXIS 3675 (1983).

3. In common law, an action for bodily injury abated on the death of either the injured party or the tortfeasor. Thus, such causes of action are continued only to the extent the common law has been modified by statute, as in *Or. Rev. Stat. § 115.305*, *115.315*, and former *Or. Rev. Stat. § 13.080*. *Mendez v. Walker*, 272 Or. 602, 538 P.2d 939, 1975 Ore. LEXIS 461 (1975).

4. Where a testator set up a trust for his property in his will, specifying that the entire net income was to be paid to his wife to support her, the trustee did not follow this directive, but instead paid varying amounts as needed by the wife, who never asked for all the income, the trustee accumulated a large amount of income in the trust, and at the wife's death, her personal representative contended that the unpaid trust income belonged to her estate, not the trust. Beneficiaries under the trust sued to have the income distributed to them along with the trust principal, on appeal, the Supreme Court held that the trust income passed to the wife's estate free of claims by the trust beneficiaries. Moreover, the wife's personal representative acquired the right, under *Or. Rev. Stat. § 121.020*, to force the trustee to pay the income into the wife's estate. *Crow v. Strome*, 214 Or. 158, 327 P.2d 414, 1958 Ore. LEXIS 223 (1958).

5. Prior to the determination of the amount of income due a beneficiary under a trust created by will, her rights, although vested, are in a sense inchoate in character, but when determined and declared, they assume the nature of a liquidated account, and are subject to payment on demand by the beneficiary during her lifetime, on or after the time that the same are made payable under the trust instrument. In the absence of a testamentary direction to the contrary, the same rights repose in the beneficiary's personal representative under former *Or. Rev. Stat. § 121.020* (now 115.305) as to any amounts of net income that accrued prior to the beneficiary's death and that were not received by her. *Crow v.*

ORS § 115.305

Strome, 214 Or. 158, 327 P.2d 414, 1958 Ore. LEXIS 223 (1958).

6. Or. Rev. Stat. § 115.305 did not apply to a case where the personal representative of an estate sought a refund of the money that the decedent had paid to a retirement home pursuant to a contract, since there was no cause of action or suit in existence at the time of the decedent's death. *Rice v. Terwilliger Plaza, Inc.*, 65 Or. App. 74, 670 P.2d 188, 1983 Ore. App. LEXIS 3675 (1983).

7. Action based on the wrongful conduct or negligence of a deceased person is not maintained against the decedent, but rather against the personal representative of the decedent's estate. *Wheeler v. Williams (In re Estate of Williams)*, 136 Or. App. 1, 900 P.2d 1076, 1995 Ore. App. LEXIS 1100 (1995), review denied by 322 Ore. 362, 907 P.2d 249 (1995).

8. Where a testator set up a trust for his property in his will, specifying that the entire net income was to be paid to his wife to support her, the trustee did not follow this directive, but instead paid varying amounts as needed by the wife, who never asked for all the income, the trustee accumulated a large amount of income in the trust, and at the wife's death, her personal representative contended that the unpaid trust income belonged to her estate, not the trust. Beneficiaries under the trust sued to have the income distributed to them along with the trust principal, on appeal, the Supreme Court held that the trust income passed to the wife's estate free of claims by the trust beneficiaries. Moreover, the wife's personal representative acquired the right, under Or. Rev. Stat. § 121.020, to force the trustee to pay the income into the wife's estate. *Crow v. Strome*, 214 Or. 158, 327 P.2d 414, 1958 Ore. LEXIS 223 (1958).

9. Prior to the determination of the amount of income due a beneficiary under a trust created by will, her rights, although vested, are in a sense inchoate in character, but when determined and declared, they assume the nature of a liquidated account, and are subject to payment on demand by the beneficiary during her lifetime, on or after the time that the same are made payable under the trust instrument. In the absence of a testamentary direction to the contrary, the same rights repose in the beneficiary's personal representative under former Or. Rev. Stat. § 121.020 (now 115.305) as to any amounts of net income that accrued prior to the beneficiary's death and that were not received by her. *Crow v. Strome*, 214 Or. 158, 327 P.2d 414, 1958 Ore. LEXIS 223 (1958).

10. A cause of action brought by a former associate professor at Oregon State University based on a right to a pretermination hearing did not survive his death where no protectable liberty or property interest was implicated by his termination. *Davis v. Or. State Univ.*, 591 F.2d 493, 1978 U.S. App. LEXIS 7827 (9th Cir. Or. 1978).

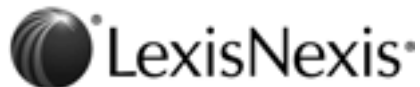
11. Under Or. Rev. Stat. § 115.305, the executor of an estate had the right, within the appropriate time limit, to appeal from an award of property made in a marital dissolution case, even though the decedent husband died prior to the executor's filing of the notice of appeal. *In re Marriage of Libby*, 23 Or. App. 223, 541 P.2d 1077, 1975 Ore. App. LEXIS 966 (1975).

12. Action based on the wrongful conduct or negligence of a deceased person is not maintained against the decedent, but rather against the personal representative of the decedent's estate. *Wheeler v. Williams (In re Estate of Williams)*, 136 Or. App. 1, 900 P.2d 1076, 1995 Ore. App. LEXIS 1100 (1995), review denied by 322 Ore. 362, 907 P.2d 249 (1995).

13. The administrator of a deceased wife's estate was entitled to maintain an action for the benefit of the wife's estate under the wrongful death statute, *Or. Rev. Stat. § 30.020* against the husband's estate where the husband murdered his wife and then committed suicide. The husband's act meant that he was not a preferred beneficiary, and under the statute there was no widower and no one qualified as a beneficiary. *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585, 1955 Ore. LEXIS 173 (1955), criticized by *Heino v. Harper*, 306 Ore. 347, 759 P.2d 253, 1988 Ore. LEXIS 446 (1988).

14. A person who kills his or her spouse may not maintain an action under the Wrongful Death Act of *Or. Rev. Stat. § 30.020* because public policy is against allowing a wrongdoer to reap the benefits of his crime. Nor may an action be maintained by an administrator of the estate of the deceased spouse for the benefit of the survivor, where the survivor was the person who killed the spouse. *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585, 1955 Ore. LEXIS 173 (1955), criticized by *Heino v. Harper*, 306 Ore. 347, 759 P.2d 253, 1988 Ore. LEXIS 446 (1988).

15. *Or. Rev. Stat. § 30.020*, which governs wrongful death cases, creates a new right and a new liability and is not a survival statute. A condition precedent to the right to bring the action is a determination that the deceased party, had he or she lived, might have maintained an action against the surviving party for personal injuries done by the same act or omission. *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585, 1955 Ore. LEXIS 173 (1955), criticized by *Heino v. Harper*, 306 Ore. 347, 759 P.2d 253, 1988 Ore. LEXIS 446 (1988).



1 of 1 DOCUMENT

OREGON REVISED STATUTES

*** This document is current through the 2007 Regular Session ***
*** of the 73rd Legislative Assembly ***
*** Annotations are current through August 21, 2009 ***

TITLE 3. REMEDIES AND SPECIAL ACTIONS AND PROCEEDINGS
CHAPTER 30. ACTIONS AND SUITS IN PARTICULAR CASES
ACTIONS FOR INJURY OR DEATH

GO TO OREGON REVISED STATUTES ARCHIVE DIRECTORY

ORS § 30.020 (2007)

30.020. Action for wrongful death; when commenced; damages.

(1) When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the decedent's surviving spouse, surviving children, surviving parents and other individuals, if any, who under the law of intestate succession of the state of the decedent's domicile would be entitled to inherit the personal property of the decedent, and for the benefit of any stepchild or stepparent whether that stepchild or stepparent would be entitled to inherit the personal property of the decedent or not, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission. The action shall be commenced within three years after the injury causing the death of the decedent is discovered or reasonably should have been discovered by the decedent, by the personal representative or by a person for whose benefit the action may be brought under this section if that person is not the wrongdoer. In no case may an action be commenced later than the earliest of:

(a) Three years after the death of the decedent; or

(b) The longest of any other period for commencing an action under a statute of ultimate repose that applies to the act or omission causing the injury, including but not limited to the statutes of ultimate repose provided for in *ORS 12.110 (4), 12.115, 12.135, 12.137 and 30.905*.

(2) In an action under this section damages may be awarded in an amount which:

(a) Includes reasonable charges necessarily incurred for doctors' services, hospital services, nursing services, other medical services, burial services and memorial services rendered for the decedent;

(b) Would justly, fairly and reasonably have compensated the decedent for disability, pain, suffering and loss of income during the period between injury to the decedent and the decedent's death;

(c) Justly, fairly and reasonably compensates for pecuniary loss to the decedent's estate;

(d) Justly, fairly and reasonably compensates the decedent's spouse, children, stepchildren, stepparents and parents for pecuniary loss and for loss of the society, companionship and services of the decedent; and

(e) Separately stated in finding or verdict, the punitive damages, if any, which the decedent would have been entitled to recover from the wrongdoer if the decedent had lived.

(3) For the purposes of this section:

(a) Two persons shall be considered to have a stepchild-stepparent relationship if one of the biological parents of the stepchild, while the stepchild is a minor and in the custody of this first biological parent, marries the stepparent who is not the second biological parent or the adoptive parent of the stepchild;

(b) The stepchild-stepparent relationship shall remain in effect even though the stepchild is older than the age of majority or has been emancipated;

(c) The stepchild-stepparent relationship shall remain in effect even though one or both of the biological parents of the stepchild die; and

(d) The stepchild-stepparent relationship shall end upon the divorce of the biological parent and the stepparent.

HISTORY: Amended by 1953 c.600 § 3; 1961 c.437 § 1; 1967 c.544 § 1; 1973 c.718 § 2; 1991 c.471 § 1; 1991 c.608 § 1; 1995 c.618 § 19

PERMANENT EDITION ANNOTATIONS:

CASENOTES:

1. In General

- (1) Action by Personal Representative
- (2) Action Commenced Within Three Years
- (3) Particular Cases

- 2. Action for Death of Employee
- 3. Action for Death of Child
- 4. Action for Death of Spouse
- 5. Rights of Heirs
- 6. Damages

1. IN GENERAL

A new legal right and liability was created by this section. *Perham v. Portland Gen. Elec. Co.*, (1898) 33 Or 451, 53 P 14, 72 Am St Rep 730, 40 LRA 799; *Hansen v. Hayes*, (1944) 175 Or 358, 154 P2d 202.

This statute does not provide that a right accruing to decedent is carried over to his personal representative; this is not a survival statute. *Perham v. Portland Gen. Elec. Co.*, (1898) 33 Or 451, 53 P 14, 72 Am St Rep 730, 40 LRA 799; *The Kain Maru*, (1924) 2 Fed2d 121.

Although the decedent may have been killed instantly, a right of action exists. *Perham v. Portland Gen. Elec. Co.*, (1898) 33 Or 451, 458, 53 P 14, 24, 72 Am St Rep 730, 40 LRA 799.

The amount recovered is the property of the decedent's estate. *Olston v. Ore. Water, Power & Ry.*, (1908) 52 Or 343, 96 P 1095, 97 P 538, 20 LRA(NS) 915.

Statutes creating a liability for causing death, while not to be strictly construed, are not to be extended by implication, as they are in derogation of the common law. *McClagherty v. Rogue R. Elec. Co.*, (1914) 73 Or 135, 154, 140 P 64, 144 P 569.

No action lies under this section against him who caused an injury if decedent died as a result of an entirely different cause. *Amoth v. United States*, (1925) 3 Fed2d 848.

The right of action under this section is granted to the personal representative for the benefit of those specified in the statute and in that order. *Ross v. Robinson*, (1942) 169 Or 293, 128 P2d 956.

If any of the statutory beneficiaries are in existence there is no statutory right of action for death by wrongful act for the benefit of the estate, the only recovery being for the named beneficiaries; consequently, if the estate were required to reimburse the widow for medical and funeral expenses, the estate would have no statutory right of recovery against the tortfeasor, nor, in the absence of statute, would the estate have any right of action for death by wrongful act at common law. *Hansen v. Hayes*, (1944) 175 Or 358, 154 P2d 202.

A husband who murders his wife is not a widower qualified as a beneficiary, and there being no dependents, the personal representatives may maintain an action for the benefit of the estate. *Apitz v. Dames*, (1955) 205 Or 242, 287 P2d 585.

The purpose of this Act is to afford redress in wrongful death cases where no redress was obtainable at common law. *Ferguson v. Belmont Convalescent Hosp.*, (1959) 217 Or 453, 343 P2d 243.

For a case under this section to succeed, it is essential that the evidence show that the defendant owed a duty to the deceased which the latter could enforce. *Id.*

Recovery under this section is barred if the sole designated beneficiary under the statute was himself guilty of negligence which proximately contributed to the death of the decedent. *Ditty v. Farley*, (1959) 219 Or 208, 347 P2d 47.

The Oregon, rather than California, statute applied to an action between Oregon domiciliaries in an Oregon court, although the death occurred in California. *DeFoor v. Lematta*, (1968) 249 Or 116, 437 P2d 107.

This section does not limit recovery for wrongful death where the Oregon Employer's Liability Act applies and subjects the United States to liability for deaths. *Binney v. United States*, (1971) 329 F Supp 351.

(1) ACTION BY PERSONAL REPRESENTATIVE.

The personal representative represents collectively all who are interested in the continuance of the life, whether as creditors, heirs or distributees. *Carlson v. Ore. Short Line Ry.*, (1892) 21 Or 450, 459, 28 P 497.

A foreign administrator may bring an action without qualifying under the probate law. *Elliott v. Day*, (1962) 218 F Supp 90. *DISTINGUISHED IN* *Gidinski v. McWilliams*, (1970) 308 F Supp 772.

That a personal representative bring the action is a condition to the right. *Richard v. Slate*, (1964) 239 Or 164, 396 P2d 900. *DISTINGUISHED IN* *Nichols v. Wilbur*, (1970) 256 Or 418, 473 P2d 1022.

A foreign administrator has no capacity to maintain an action for wrongful death in Oregon if the proceeds of any recovery go to decedent's estate. *Gidinski v. McWilliams*, (1970) 308 F Supp 772.

(2) ACTION COMMENCED WITHIN THREE YEARS.

The time for commencement of the action is of the essence of the right and the right is lost if the time is disregarded. *Laidlaw v. Ore. Ry. & Nav. Co.*, (1897) 81 Fed 876, 26 CCA 665.

The limitation for bringing an action under this section is not affected by ORS 12.150. *Bengston v. Nesheim*, (1958) 259 F2d 566.

The time for commencement of the action is not procedural but part of the substantive law. *Richard v. Slate*, (1964) 239 Or 164, 396 P2d 900.

The 1967 amendment enlarging the period of limitation applies to causes of action existing and not barred by the previous limitation. *Nichols v. Wilbur*, (1970) 256 Or 418, 473 P2d 1022.

(3) PARTICULAR CASES.

Where a death is caused by a maritime tort upon vessel in navigable waters, an action may be maintained under this section in admiralty. *IN PERSONAM*, *Holmes v. Ore. & Calif. Ry.*, (1880) 6 Sawy 262, 5 Fed 75; *IN REM*, *The Clatsop Chief*, (1881) 7 Sawy 274, 8 Fed 163; *The S.S. Oregon*, (1890) 42 Fed 78; *The Oregon*, (1891) 45 Fed 62; *The Oregon*, (1896) 73 Fed 846; *Laidlaw v. Ore. Ry. & Nav. Co.*, (1897) 81 Fed 876, 26 CCA 665; *The Aurora*, (1908) 163 Fed 633; *The General Foy*, (1910) 175 Fed 590; *Aurora Shipping Co. v. Boyce*, (1911) 191 Fed 960, 112 CCA 372.

An action against a county for death caused by a defective highway or bridge is within this statute. *Coates v. Marion County*, (1920) 96 Or 334, 189 P 903.

An admiralty court has jurisdiction of a libel against a vessel for the death of a longshoreman in consequence of injuries received on board the vessel, although the death occurred after he had been taken ashore. *Vancouver S.S. Co. v. Rice*, (1933) 288 US 445, 53 S Ct 420, 77 L Ed 885, aff'g 60 Fed 2d 793.

The administration by one person to another of alcoholic liquor for beverage purposes in such quantity as to cause death may constitute the basis of an action for wrongful death. *Ibach v. Jackson*, (1934) 148 Or 92, 35 P2d 672.

The doctrine of unseaworthiness can be a ground for recovery under this section. *Tallmon v. Toko Kaium K.K. Kobe*,

(1967) 278 F Supp 452.

In an action by the personal representative for damages for his decedent's death caused by a collision with defendant's automobile, a demurrer to defendant's counterclaim for damage to his car was properly sustained, since any recovery by the representative would inure to the benefit of the widow who was the real party in interest. *Natwick v. Moyer*, (1945) 177 Or 486, 163 P2d 936.

Where there was no evidence that defendant's truck struck decedent's bicycle, that defendant stole up on decedent and frightened him so he lost control or that defendant failed to provide sufficient clearance, charge of negligently causing deceased's death was unsupported. *Copenhaver v. Tripp*, (1950) 187 Or 662, 213 P2d 450.

2. ACTION FOR DEATH OF EMPLOYEE

The Employers' Liability Act does not repeal this section, but must be construed herewith. *Statts v. Twohy Bros. Co.*, (1912) 61 Or 602, 123 P 909; *McFarland v. Ore. Elec. Ry.*, (1914) 70 Or 27, 138 P 458, Ann Cas 1916B, 527; *Blair v. W. Cedar Co.*, (1915) 75 Or 276, 146 P 480; *Niemi v. Stanley Smith Lbr. Co.*, (1915) 77 Or 221, 227, 147 P 532, 149 P 1033; *Hawkins v. Anderson & Crowe*, (1917) 84 Or 94, 164 P 556.

The Employers' Liability Act is exclusive of this section while the persons named survive. *Evansen v. Grande Ronde Lbr. Co.*, (1915) 77 Or 1, 14, 149 P 1035; *Niemi v. Stanley Smith Lbr. Co.*, (1915) 77 Or 221, 227, 147 P 532, 149 P 1033; *Hawkins v. Anderson & Crowe*, (1917) 84 Or 94, 100, 164 P 556.

Where none of the relatives named in the Employers' Liability Act are in existence, a personal representative may maintain an action under this section for the death of an employee. *Niemi v. Stanley Smith Lbr. Co.*, (1915) 77 Or 221, 227, 147 P 532, 149 P 1033; *Hawkins v. Anderson & Crowe*, (1917) 84 Or 94, 100, 164 P 556.

Recovery under the Employers' Liability Act precludes a recovery under this section. *Hawkins v. Anderson & Crowe*, (1917) 84 Or 94, 164 P 556; *Wilcox v. Warren Constr. Co.*, (1920) 95 Or 125, 186 P 13, 13 ALR 211.

The personal representative of a deceased employee covered by the Employers' Liability Act may bring an action in that capacity under this section, or in his capacity as a relative, if such is the case, named in that Act. *Thompson v. Union Fishermen's Coop. Packing Co.*, (1926) 118 Or 436, 235 P 694, 246 P 273; *Thompson v. Union Fishermen's Coop. Packing Co.*, (1929) 128 Or 172, 273 P 953.

An administrator may not sue for a claim under the Employers' Liability Law for the death of his intestate or settle a claim. *Franciscovich v. Walton*, (1915) 77 Or 36, 42, 150 P 261.

Recovery may not be had under this statute for the death of a railroad employee where the proof shows a cause of action under the *Federal Employers' Liability Act*. *Kamboris v. Ore.-Wash. R.R. & Nav. Co.*, (1915) 75 Or 358, 146 P 1097.

Where any beneficiary named in the Employers' Liability Act is living and able to bring the action, no action lies by the personal representative of decedent. *Fox v. Ungar*, (1940) 164 Or 226, 98 P2d 717.

Amendment of complaint under death by wrongful act statute to base the claim on a violation of the Employers' Liability Act was a "new cause of action" and did not relate back to the date of the original complaint. *Id.*

3. ACTION FOR DEATH OF CHILD

Negligence of infant's parents will not affect the rights of the plaintiff in an action under this section. *MacDonald v. O'Reilly*, (1904) 45 Or 589, 78 P 753; *Bloomquist v. LaGrande*, (1926) 120 Or 19, 251 P 252; *Oviatt v. Camarra*, (1957) 210 Or 445, 311 P2d 746.

The right of action conferred by ORS 30.010 upon the parents of a deceased child is unaffected by the right conferred upon the personal representative by this section. *Schleiger v. No. Terminal Co.*, (1903) 43 Or 4, 72 P 324.

With reference to the statute giving a right of action to the father, mother or guardian for pecuniary loss of a minor child and that for such loss as the estate has sustained by his death, the one ends where the other begins; the estate could not be injured while the child would be supposed to continue in the service of the parent and, on the other hand, the parent could not be injured when the child is relieved of the duty of rendering service to him or has attained the age of majority. *Id.*

The personal representative of an unemancipated minor child may maintain an action for damages under this section against its parent when the death resulted from a wilful or malicious personal tort. *Cowgill v. Boock*, (1950) 189 Or 282, 218 P2d 445, 19 ALR 2d 405.

Award for death of three year old child did not render section unconstitutional for vagueness. *Cox v. Remillard*, (1956) 237 F2d 909.

4. ACTION FOR DEATH OF SPOUSE

At common law the husband could maintain an action for injury to or death of his wife whereby he lost her services or consortium, but the wife could not maintain a corresponding action. *Kosciolek v. Portland Ry. Light & Power Co.*, (1916) 81 Or 517, 160 P 132.

Where a husband brought an action for personal injuries and compromised, his widow had no right of action after his death for the consequential injury to her. *Id.*

Pecuniary loss consists not only of the loss of financial assistance which might reasonably be expected to have been received from the deceased had she lived, but also the loss of other things which have a pecuniary worth, such as the loss of a mother's care and attention to the physical, moral and educational welfare of her children, and a husband's loss of her services in the household. *Prauss v. Adamski*, (1952) 195 Or 1, 244 P2d 598.

The pecuniary loss sustained by the widower and children is fixed as of the date of death and what may have transpired subsequently is wholly immaterial. *Id.*

A husband who murders his wife is not a widower qualified as a beneficiary under this section. *Apitz v. Dames*, (1955) 205 Or 242, 287 P2d 585.

Where personal representative brought an action for the benefit of the estate while the spouse still survived, amendment of the complaint after the period for bringing the action had run so as to benefit the surviving spouse was permitted. *Ross v. Robinson*, (1944) 174 Or 25, 147 P2d 204.

5. RIGHTS OF HEIRS

Decedent's heirs acquire no remedy for decedent's wrongful death under this section. *Carlson v. Ore. Short Line Ry.*, (1892) 21 Or 450, 28 P 497; *Olston v. Ore. Water, Power & Ry. Co.*, (1908) 52 Or 343, 96 P 1095, 97 P 538, 20 LRA(NS) 915.

Only in the event of the nonexistence of preferred beneficiaries is there a right of action in favor of other beneficiaries. *Ross v. Robinson*, (1942) 169 Or 293, 128 P2d 956.

If there is a surviving spouse or surviving dependants the cause of action belongs to them rather than to the estate. *Anderson v. Clough*, (1951) 191 Or 292, 230 P2d 204.

6. DAMAGES

The pecuniary loss suffered by the estate of the decedent is the probable amount of what he would save from his earnings during the residue of his life in his business or profession, taking into consideration his age, ability, disposition to labor, habits of living and expenditures. *Carlson v. Ore. Short Line Ry.*, (1892) 21 Or 450, 456, 28 P 497, 499; *Gabrielson v. Dixon*, (1930) 133 Or 567, 291 P 494; *Scott v. Brogan*, (1937) 157 Or 549, 73 P2d 688; *Holmes v. Ore. & Calif. Ry.*, (1880) 5 Fed 523, 6 Sawy 262, 276; *Ladd v. Foster*, (1887) 31 Fed 827, 832, 12 Sawy 547; *Holland v. Brown*, (1888) 35 Fed 43, 48, 13 Sawy 284; *Meier v. Bray*, (1970) 256 Or 613, 475 P2d 587; *Arrow Trans. Co., v. NW Grocery Co.*, (1971) 258 Or 363, 482 P2d 519.

Exemplary damages are not recoverable. *Holmes v. Ore. & Calif. R. Co.*, (1880) 5 Fed 75, 542, 6 Sawy 262, 276.

The amount specified in the section is the utmost that can be in controversy. *Holmes v. Ore. & Calif. R. Co.*, (1881) 9 Fed 229, 246, 7 Sawy 380.

Insurance recovered cannot be set off against a claim for damages. *Ladd v. Foster*, (1887) 31 Fed 827, 833, 12 Sawy 547.

The personal representative is entitled to recover the amount of the present value of the decedent's estate, taking into account his expectancy of life, and his probable accumulations during that period. *Oregon Round Lbr. Co. v. Portland & Asiatic S.S. Co.*, (1908) 162 Fed 912.

An amount which if invested at the rate of four per cent per annum would produce an annuity in the amount of the decedent's net earnings during his expectancy of life was considered as fair and equitable damages. *Id.*

Increased costs of living to the widow, comfort, love, consolation and affection to the bereft, the financial responsibility of the one causing the death, equal distribution of justice, or dictates of humanity do not warrant a finding

of pecuniary loss where none is shown. (Alaska) *The Princess Sophia*, (1929) 35 Fed2d 736.

Health, earning capacity, employment, contributions to charity, "living well," and being a "good fellow," without some evidence of accumulation and saving habit, do not create a presumption to support a finding that a deceased would leave an estate. Id.

The amount of compensation is a question for the jury and is not a question of law for the court. *Gabrielson v. Dixon*, (1930) 133 Or 567, 291 P 494.

Damages are awarded in all cases, except where there is no widow, widower or dependents, upon the principle of compensation to repair the pecuniary loss sustained by the person or persons in the class of beneficiaries for which the action is to be brought under the statute; and the damages are the aggregate of the pecuniary losses of each of the beneficiaries of the action within the class and are measured by, and limited to the loss of the pecuniary benefits which those beneficiaries might reasonably be expected to have derived from the deceased had his life not been terminated. *Hansen v. Hayes*, (1944) 175 Or 358, 154 P2d 202.

If there is no widow, widower or dependents, the action is brought for the benefit of the estate and the damages would be measured by the "benefit of the estate rule" as established in the cases which arose under the death by wrongful act statute prior to its amendment in 1939. Id.

Pecuniary loss is dependent not only upon actual earnings or contributions to support but also other things, such as services, which have a pecuniary worth. *Durkoop v. Mishler*, (1963) 233 Or 243, 377 P2d 267.

The loss to beneficiaries of the estate should be reduced to present value. *Meier v. Bray*, (1970) 256 Or 613, 475 P2d 587.

In reducing a future pecuniary loss to present value, the most satisfactory method to determine the rate of return to be used is to allow the trier of facts to make a finding of a reasonable rate based on evidence introduced or judicially noticed. Id.

In an action brought for the benefit of a deceased wife's estate it was properly shown that the husband's property was acquired through the joint efforts of both the husband and wife, and also the nature of her duties in the conduct of their 18 acre home place. *Ross v. Robinson*, (1942) 169 Or 293, 124 P2d 918.

Evidence that the life expectancy of a 48 year old woman was 23.36 years and that she performed the ordinary work of a housewife warranted submission to the jury of the question of pecuniary loss to her estate in an action for the benefit thereof. Id.

Where a widow as beneficiary recovered damages under this section, but the trial court disallowed funeral expenses, recovery by her of such expenses in a subsequent action under the family expense statute was denied on the grounds that she should have appealed in the wrongful death action. *Cowgill v. Boock*, (1950) 189 Or 282, 218 P2d 445.

FURTHER-CITATIONS:

Miller v. So. Pac. Co., (1891) 20 Or 285, 26 P 70; *Putnam v. So. Pac. Co.*, (1891) 21 Or 230, 27 P 1033; *Nordlund v. Lewis & Clark R. Co.*, (1932) 141 Or 83, 15 P2d 980; *The Oregon*, (1898) 89 Fed 520; *Wallin v. Rankin*, (1949) 173 Fed 2d 488; *Whang v. Hong*, (1955) 206 Or 125, 290 P2d 185, 291 P2d 720; *Barnes v. Union Pac. R.R.*, (1956) 139 F Supp 198; *Clement v. Cummings*, (1957) 212 Or 161, 317 P2d 579; *Hess v. United States*, (1958) 259 F2d 285; *Hess v. United States*, (1959) 361 US 314, 80 S Ct 341, 4 L Ed 2d 305; *Harp v. Montgomery Ward & Co.*, (1963) 223 F Supp 781; *Escobedo v. Ward*, (1970) 255 Or 85, 464 P2d 698.

ATTORNEY GENERAL OPINIONS:

Relation of Workmen's Compensation Act to this section, 1928-30, p 107; taxability of money recovered under the wrongful death statute, 1948-50, p 271.

LAW REVIEW CITATIONS:

2 OLR 128; 6 OLR 278; 8 OLR 81; 9 OLR 199; 17 OLR 218; 21 OLR 207; 33 OLR 89; 47 OLR 383-387; 1 WLJ 35, 128-133, 616-626.

CURRENT ANNOTATIONS:

NOTES OF DECISIONS

In general

Under former provisions of this section providing for action for benefit of "dependents," status of parenthood would not by itself establish dependency, and thus mother was not dependent of deceased son. *Hines v. Hines*, 32 Or App 209, 573 P2d 1260 (1978), Sup Ct review denied

Action against public body for wrongful death must be commenced pursuant to ORS 30.275 rather than this section. *Housen v. Morse Brothers*, 32 Or App 491, 574 P2d 361 (1978), Sup Ct review denied

Wrongful death products liability action is governed by two-year limitations period of Oregon Products Liability Act not three-year limitations period of wrongful death statute. *Thompson v. Communications Technology, Inc. (CTI)*, 877 F2d 27 (9th Cir. 1989)

Where cause of action is within scope of wrongful death action, common law claim by beneficiary of decedent is not available. *Horwell v. Oregon Episcopal School*, 100 Or App 571, 787 P2d 502 (1990)

Where differential treatment is inherent in any statutory scheme which continues partial sovereign immunity and Oregon Constitution permits sovereign immunity, challenged statutory scheme which extends three-year statute of limitations to most wrongful death actions but only provides two-year statute of limitations when wrongful death was government-inflicted does not violate Article I, Section 20 of the Oregon Constitution. *Van Wormer v. City of Salem*, 309 Or 404, 788 P2d 443 (1990)

For death caused by product defect, time limitation for commencement of action under ORS 30.905 supersedes time limitation provided by this section. *Kambury v. DaimlerChrysler Corp.*, 334 Or 367, 50 P3d 1163 (2002)

Except in limited range of cases, substantial factor standard of causation does not relieve plaintiff of burden to show death would not have occurred but for wrongful act or omission. *Joshi v. Providence Health System of Oregon Corp.*, 198 Or App 535, 108 P3d 1195 (2005), aff'd 342 Or 152, 149 P3d 1164 (2006)

Action by personal representative

In wrongful death action allegedly resulting from medical malpractice, three year wrongful death limitation under this section applied rather than two year medical malpractice limitation under ORS 12.110. *Baxter v. Zeller*, 42 Or App 873, 601 P2d 902 (1979), Sup Ct review denied

Effect of this section is not to allow single claim for benefit of decedent's estate but rather to allow action to be brought in name of personal representative to enforce individual claims of spouse and each child for pecuniary losses and losses of society, companionship, and services resulting from decedent's death. *Christensen v. Epley*, 287 Or 539, 601 P2d 1216 (1979); *Graves v. Tulleners*, 205 Or App 267, 134 P3d 990 (2006)

Contributory negligence of sole beneficiaries to action can be asserted as defense. *Robinson v. Children's Services Division*, 140 Or App 429, 914 P2d 1123 (1996)

Ability of estate to bring action is dependent on decedent having cause of action at time of death. *Union Bank of California v. Copeland Lumber Yards*, 213 Or App 308, 160 P3d 1032 (2007)

Action commenced within three years

Where dermatologist misdiagnosed mole on decedent's scalp, injury occurred no earlier than time when mole began to grow, because that event was earliest time when decedent could have been aware of any harm traceable to physician. *Repp v. Hahn*, 45 Or App 671, 609 P2d 398 (1980), Sup Ct review denied

Action for death of child

Plaintiff was entitled to submit to jury issue whether defendant's nurse was negligent in failing to properly monitor child's heartbeat while its mother was in labor prior to delivery. *Libbee v. Permanente Clinic*, 268 Or 258, 518 P2d 636 (1974)

Action for wrongful death of viable unborn child can be maintained in Oregon. *Libbee v. Permanente Clinic*, 268 Or 258, 518 P2d 636 (1974)

Where there are surviving children of decedent, parent of decedent has cause of a ction for wrongful death independent of laws of intestate succession. *Rake v. Boise Cascade*, 43 Or App 767, 604 P2d 421 (1979), Sup Ct review denied

Nonviable fetus is not "person" for purposes of wrongful death action. *LaDu v. Oregon Clinic, P.C.*, 165 Or App 687, 998 P2d 733 (2000), Sup Ct review denied

Action for death of spouse

Person with whom decedent maintained domestic relationship without marriage for five years was not "surviving spouse" within meaning of this section. *Ore-Ida Foods v. Gonzalez*, 43 Or App 393, 602 P2d 1132 (1979), Sup Ct review denied

Damages

Where decedent had agreed to perform valuable services for sole beneficiary of decedent's estate without monetary compensation, measure of damages is pecuniary value of lost services. *Goheen v. Gen. Motors Corp.*, 263 Or 145, 502 P2d 223 (1972)

In wrongful death action, plaintiff need not show heirs that would have survived decedent if he had lived normal life span in order to recover damages for pecuniary loss to decedent's estate, so long as there are living heirs at time action is brought. *Goddard v. Munson*, 108 Or App 342, 816 P2d 619 (1991), Sup Ct review denied

Economic damages awarded for pecuniary loss in wrongful death actions are not limited to objectively verifiable monetary losses. *Ingram v. Acands, Inc.*, 977 F2d 1332 (1992)

Child's loss of "services" of deceased parent is item of economic damages. *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 20 P3d 837 (2001), Sup Ct review denied

LAW REVIEW CITATIONS:

10 WLJ 217, 221-228, 296-306 (1974); 74 OLR 379 (1995)

LexisNexis (R) Notes:

CASE NOTES

1. Writ of mandamus, ordering a Multnomah County (Oregon) trial court to vacate its order changing venue to Marion County, was dismissed in a wrongful death action because the claim arose in Marion County, where the alleged harm was done, not in Multnomah County, where the decedent died. *Howell v. Willamette Urology, P.C.*, 344 Ore. 124, 178 P.3d 220, 2008 Ore. LEXIS 55 (2008).

2. *Or. Rev. Stat. § 30.020* applied to an action for wrongful death brought by a representative of a decedent Oregon resident for a plane crash which occurred in British Columbia, where the decedent and his family resided in Oregon, the flight originated in Oregon, and the aircraft was owned and chartered in Oregon. The fact that the aircraft had been modified for a short take-off and landing by a company having its principal place of business in Washington was irrelevant, where the Washington statute was the same as the Oregon statute. *Myers v. Cessna Aircraft Corp.*, 275 Or. 501, 553 P.2d 355, 1976 Ore. LEXIS 816 (1976).

3. Under any choice of law theory except that which would apply the law of the place of injury without regard of any other considerations, the Oregon Wrongful Death Act, *Or. Rev. Stat. § 30.020*, should apply to an action between Oregon domiciliaries in an Oregon court. Thus, the statute applied in an accident involving a helicopter crash in California in which the decedent, the decedent's representative, and the defendant helicopter pilot were all residents of Oregon. *DeFoor v. Lematta*, 249 Or. 116, 437 P.2d 107, 1968 Ore. LEXIS 622 (1968).

4. Facts alleged in a personal representative's original complaint against a hospital for a decedent's wrongful death could not supply notice of subsequent intentional infliction of emotional distress claims against the hospital and a doctor by the decedent's survivors; the new claims could not relate back to the original claim under *Or. R. Civ. P. 23(c)* and was barred by the limitations period in *Or. Rev. Stat. § 30.020*. *Evans v. Salem Hospital*, 83 Or. App. 23, 730 P.2d 562, 1986 Ore. App. LEXIS 4277 (1986), review denied by 303 Ore. 331, 736 P.2d 565, 1987 Ore. LEXIS 1405 (1987).

5. Surviving spouse as defined in *Or. Rev. Stat. § 30.020(1)* does not include the survivor of a domestic relationship not sanctioned by the marriage laws of the state. Thus, a personal representative suing for the wrongful death of a deceased person could not include the deceased's live-in companion as a beneficiary party in the action. *Ore-Ida Foods, Inc. v. Gonzalez*, 43 Or. App. 393, 602 P.2d 1132, 1979 Ore. App. LEXIS 3388 (1979).

6. If an action is commenced by one who has no cause of action, the bringing in of the proper party as plaintiff to maintain the action is regarded as the commencement of a new action, where the statute of limitations has intervened under the time limits set forth in *Or. Rev. Stat. § 30.020*, in an action for wrongful death. Thus, appointment of a personal representative of an out-of-state decedent for purposes of maintaining an action for wrongful death in Oregon was void where the appointment occurred in the wrong county. *Richard v. Slate*, 239 Or. 164, 396 P.2d 900, 1964 Ore. LEXIS 501 (1964), overruled by *Rennie v. Pozzi*, 294 Ore. 334, 656 P.2d 934, 1982 Ore. LEXIS 1345 (1982), questioned by *Nichols v. Wilbur*, 256 Ore. 418, 473 P.2d 1022, 1970 Ore. LEXIS 335 (1970), questioned by *Parker v. May*, 70 Ore. App. 715, 690 P.2d 1125, 1984 Ore. App. LEXIS 4348 (1984).

7. Appellate jurisdiction was lacking in a medical malpractice and wrongful death case in which the apportionment of settlement proceeds among a spouse and children was challenged because there was no order of distribution, no final order was entered, and none of the substitutes for appeal had been established. *Roe v. Pierce*, 313 Or. 228, 832 P.2d 1226, 1992 Ore. LEXIS 83 (1992).

8. *Or. Rev. Stat. § 12.110(4)* and *Or. Rev. Stat. § 30.020(1)* did not violate the personal representative's rights to substantive due process because the statutes were rationally related to the legitimate legislative goals of avoiding stale claims and limiting the costs of litigation and malpractice claims. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 2005 U.S. App. LEXIS 11952 (9th Cir. Or. 2005).

9. Classifications made in *Or. Rev. Stat. § 12.110(4)* and *Or. Rev. Stat. § 30.020(1)* are rationally related to the legitimate legislative ends of avoiding stale claims and limiting the costs of litigation and medical care. The statutes withstand equal protection scrutiny under the *United States Constitution*. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 2005 U.S. App. LEXIS 11952 (9th Cir. Or. 2005).

10. Application of *Or. Rev. Stat. § 656.018* to a wrongful death action based on a theory of negligence brought under *Or. Rev. Stat. § 30.020* does not violate *Or. Const. art. I § 10*. *Kilminster v. Day Mgmt. Corp.*, 323 Or. 618, 919 P.2d 474, 1996 Ore. LEXIS 70, RICO Bus. Disp. Guide P9135 (1996).

11. Time of appointment of a personal representative in a wrongful death action is not relevant to the determination of when the limitation period established by *Or. Rev. Stat. § 30.020* has expired. *Eldridge v. Eastmoreland Gen. Hosp.*, 307 Or. 500, 769 P.2d 775, 1989 Ore. LEXIS 19 (1989).

12. Amendments to the Oregon Wrongful Death Act, *Or. Rev. Stat. § 30.020*, have made the Oregon act one under which the right of action in a case is not primarily for the benefit of an estate, but for the benefit of the spouse and children of the decedent as the "real parties in interest," with the personal representative as a mere nominal party who sues for their benefit for the recovery of the value of the life lost to them. *Christensen v. Epley*, 287 Or. 539, 601 P.2d 1216, 1979 Ore. LEXIS 1197 (1979).

13. Decedent's personal representative's compensation was required to be based on the proceeds from the settlement of a wrongful death action brought by that personal representative. The decedent's "whole estate" under *Or. Rev. Stat. § 116.173(1)* included the settlement, which was property subject to the probate court's jurisdiction under *Or. Rev. Stat. § 30.040*, and only the personal representative could pursue a wrongful death action under *Or. Rev. Stat. § 30.020*. *Brown v. Hackney (In re Estate of Brown)*, 228 Ore. App. 441, 2009 Ore. App. LEXIS 712 (2009).

14. Decedent's personal representative's compensation was required to be based on the proceeds from the settlement of a wrongful death action brought by that personal representative. The decedent's "whole estate" under *Or. Rev. Stat. § 116.173(1)* included the settlement, which was property subject to the probate court's jurisdiction under *Or. Rev. Stat. § 30.040*, and only the personal representative could pursue a wrongful death action under *Or. Rev. Stat. § 30.020*. *Brown*

v. Hackney (In re Estate of Brown), 228 Ore. App. 441, 2009 Ore. App. LEXIS 712 (2009).

15. When decedent's wife's expert testified, during a wrongful death suit, that there were three treatments that might have possibly saved decedent's life, the trial court properly directed the verdict in favor of the physicians, the hospital, and the clinic. The mere possibility that defendants' negligence could have caused decedent's death was not enough; the wife was required to show that there was a reasonable medical probability that decedent's death would not have occurred absent defendants' negligence. *Joshi v. Providence Health Sys. of Or. Corp.*, 198 Ore. App. 535, 108 P.3d 1195, 2005 Ore. App. LEXIS 342 (2005), affirmed by 342 Ore. 152, 149 P.3d 1164, 2006 Ore. LEXIS 1344 (2006).

16. Once plaintiff representative in a wrongful death action under *Or. Rev. Stat. § 30.020* produced a witness to testify to decedent's good moral characteristics, either by evidence of specific acts or by testimony in the form of opinion evidence, then it is proper to cross-examine the witness as to his knowledge of specific acts relating to the decedent's character, subject to the examining party's being able to offer proof of the specific acts that relate to the cross-examination. Thus, after plaintiff representative introduced testimony by two witnesses about the decedent's good moral character, including his activity in athletics, his ability to get along with fellow students, his willingness and ability to work, and his good health, a trial court properly allowed defendant to cross-examine the witnesses on the decedent's conviction for petty larceny resulting from the theft of a gallon of gasoline. *Stuart v. Kelsay*, 261 Or. 326, 494 P.2d 249, 1972 Ore. LEXIS 306 (1972).

17. Evidence of a decedent's good physical, mental, and moral characteristics and his ability to earn money is relevant to the issue of damages to the estate of the deceased in a wrongful death action under *Or. Rev. Stat. § 30.020*. Likewise, evidence concerning criminal offenses is admissible in a wrongful death action after the character of the decedent has been placed in issue. *Stuart v. Kelsay*, 261 Or. 326, 494 P.2d 249, 1972 Ore. LEXIS 306 (1972).

18. A mother was not a dependent of her deceased son under the meaning of that word in *Or. Rev. Stat. § 30.020* where the decedent contributed almost nothing to her support in the 10 months preceding his death, and his payments in the two and a half years prior to that when he resided with his family were less than the cost of his room and board. Also, there was no evidence that the mother's standard of living declined as a result of the death of her son. *In re Estate of Hines*, 32 Or. App. 209, 573 P.2d 1260, 1978 Ore. App. LEXIS 3085 (1978).

19. The enactment of the wrongful death statute under *Or. Rev. Stat. § 30.020* created a new and separate cause of action that could arise if death was caused by any wrongful act, and its three-year statutory limitations period was a part of that right. *Baxter v. Zeller*, 42 Or. App. 873, 601 P.2d 902, 1979 Ore. App. LEXIS 3342 (1979).

20. Full vindication of the rights under the wrongful death statute dictated that the limitation found in *Or. Rev. Stat. § 30.020(1)* be applied where a personal representative sought to recover damages suffered by a decedent's estate and her beneficiaries as a result of alleged negligence of doctors and a hospital in treatment of an ulcer. The two-year statute of limitations for medical malpractice under *Or. Rev. Stat. § 12.110(4)* was not applicable, nor was the case to be compared with cases where *Or. Rev. Stat. § 12.115(1)* was held to govern and to bar a wrongful death action even though that action was otherwise timely. *Baxter v. Zeller*, 42 Or. App. 873, 601 P.2d 902, 1979 Ore. App. LEXIS 3342 (1979).

21. Before an action is barred by a statute, the legislature has absolute power to amend the statute and alter the

prescribed period of limitation, subject only to the requirement that a reasonable time limit must be allowed for the prosecution of an action or proceeding after the passage of an amendment shortening the period. An amendment to a statute of limitations enlarging the period of time within which an action can be brought under *Or. Rev. Stat. § 30.020* is not retroactive legislation and does not impair any vested right. *Nichols v. Wilbur*, 256 Or. 418, 473 P.2d 1022, 1970 Ore. LEXIS 335 (1970).

22. Notwithstanding the general three-year wrongful death statute of limitations under *Or. Rev. Stat. § 30.020(1)*, the two-year statute of limitations contained in *Or. Rev. Stat. § 30.275(8)* for claims against public bodies and their agents does not violate the state constitutional provision requiring equal privileges and immunities for all citizens. *Van Wormer v. City of Salem*, 309 Or. 404, 788 P.2d 443, 1990 Ore. LEXIS 25 (1990).

23. Facts alleged in a personal representative's original complaint against a hospital for a decedent's wrongful death could not supply notice of subsequent intentional infliction of emotional distress claims against the hospital and a doctor by the decedent's survivors; the new claims could not relate back to the original claim under *Or. R. Civ. P. 23(c)* and was barred by the limitations period in *Or. Rev. Stat. § 30.020*. *Evans v. Salem Hospital*, 83 Or. App. 23, 730 P.2d 562, 1986 Ore. App. LEXIS 4277 (1986), review denied by 303 Ore. 331, 736 P.2d 565, 1987 Ore. LEXIS 1405 (1987).

24. Despite the fact that a representative of a decedent brought a wrongful death action under *Or. Rev. Stat. § 30.020* within the three-year time limit of that statute, the action could not be maintained under *Or. Rev. Stat. § 12.115(1)*, where the basis of liability was either the negligent manufacture of a defective product or the sale of it by the manufacturer to the employer, and both incidents occurred more than ten years prior to the time the representative commenced his action. The cause of action accrued at the time of manufacture or sale and not at the time of the alleged wrongful death. *Johnson v. Star Machinery Co.*, 270 Or. 694, 530 P.2d 53, 1974 Ore. LEXIS 516 (1974), questioned by *Barke v. Maeyens*, 176 Ore. App. 471, 31 P.3d 1133, 2001 Ore. App. LEXIS 1404 (2001), questioned by *Young v. State*, 161 Ore. App. 32, 983 P.2d 1044, 1999 Ore. App. LEXIS 1020 (1999), criticized by *Clackamas County v. Gay*, 146 Ore. App. 706, 934 P.2d 551, 1997 Ore. App. LEXIS 220 (1997).

25. Where a representative brought an action for the wrongful death of a decedent on May 6, 1969, the death having occurred on January 11, 1967 and the legislature had amended the the wrongful death statute, *Or. Rev. Stat. § 30.020*, in September, 1967, to extend the limitation period from two to three years, the representative's action was timely. A reviewing court held that statutes enlarging the period of limitations applied to existing causes of actions that had not been barred by the previous limitation and such statutes were not retrospective in application but are merely an extension of the right to bring the action. *Nichols v. Wilbur*, 256 Or. 418, 473 P.2d 1022, 1970 Ore. LEXIS 335 (1970).

26. Despite the fact that a defendant's move to another state would have acted to toll many statutes of limitation, it did not act to extend the period during which a wrongful death action could be brought. *Bengston v. Nesheim*, 259 F.2d 566, 1958 U.S. App. LEXIS 4764 (9th Cir. Wash. 1958).

27. *Or. Rev. Stat. § 656.156(2)* allowed a deceased worker's personal representative sue the worker's employer for intentionally causing the worker's wrongful death when the worker's only beneficiaries were the worker's nondependent parents because the parents were among those persons on whose behalf the personal representative could sue for the worker's deliberate wrongful death pursuant to *Or. Rev. Stat. § 30.020*. *Behurst v. Crown Cork & Seal USA, Inc.*, 346 Ore. 29, 203 P.3d 207, 2009 Ore. LEXIS 9 (2009).

28. Appellate jurisdiction was lacking in a medical malpractice and wrongful death case in which the apportionment of settlement proceeds among a spouse and children was challenged because there was no order of distribution, no final order was entered, and none of the substitutes for appeal had been established. *Roe v. Pierce*, 313 Or. 228, 832 P.2d 1226, 1992 Ore. LEXIS 83 (1992).

29. In a wrongful death action involving one decedent, the single statutory limit on noneconomic damages in former Or. Rev. Stat. § 18.560(1) (now *Or. Rev. Stat. § 31.710(1)*) applied even though there were two beneficiaries. *Greist v. Phillips*, 322 Or. 281, 906 P.2d 789, 1995 Ore. LEXIS 125 (1995).

30. The remarriage of a decedent's spouse does not affect the measure of damages in a wrongful death action under *Or. Rev. Stat. § 30.020*. The loss sustained by the spouse, as a beneficiary, is fixed as of the date of death, and what transpires afterwards is wholly immaterial. *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322, 1978 Ore. LEXIS 833, 97 A.L.R.3d 606 (1978).

31. An action for wrongful death of a stillborn child can be maintained under *Or. Rev. Stat. § 30.020*; this is in line with state law holding that a viable unborn child is a person for the purposes of the *Or. Const. art. I, § 10*, which guarantees every man a remedy by due course of law for injury done to him and his person, and it is immaterial whether the injury results before or after the child is born as far as recovery under the Wrongful Death Act is concerned. *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, 1974 Ore. LEXIS 455 (1974), limited by *LaDu v. Oregon Clinic, P.C.*, 165 Ore. App. 687, 998 P.2d 733, 2000 Ore. App. LEXIS 317 (2000).

32. *Or. Rev. Stat. § 30.020*, the Wrongful Death Act, was amended effective January 1, 1974, so as to no longer limit damages in actions under the statute to pecuniary loss; damages now include loss of society and companionship to the parents of a child as an item of damages, and even under the previous provisions of the act, the ultimate issue in an action for wrongful death was the value of the life lost, and the speculative nature of proof of pecuniary damage in wrongful death actions was no reason to deny the right of a plaintiff to have such an action submitted to the jury, much less to deny the existence of the substantive right to bring such an action. *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, 1974 Ore. LEXIS 455 (1974), limited by *LaDu v. Oregon Clinic, P.C.*, 165 Ore. App. 687, 998 P.2d 733, 2000 Ore. App. LEXIS 317 (2000).

33. Evidence of a decedent's good physical, mental, and moral characteristics and his ability to earn money is relevant to the issue of damages to the estate of the deceased in a wrongful death action under *Or. Rev. Stat. § 30.020*. Likewise, evidence concerning criminal offenses is admissible in a wrongful death action after the character of the decedent has been placed in issue. *Stuart v. Kelsay*, 261 Or. 326, 494 P.2d 249, 1972 Ore. LEXIS 306 (1972).

34. In a wrongful death action, plaintiff's representative sought to introduce evidence disclosing that the deceased in his lifetime rendered personal services which were of benefit to his wife, and thus the value of those services should be included along with economic loss sustained by the widow in measuring the damages. Court ruled that damages could include the value of services which the beneficiary had a reasonable right to expect from the deceased besides the loss of financial assistance. *Durkoop v. Mishler*, 233 Or. 243, 378 P.2d 267, 1963 Ore. LEXIS 265 (1963).

35. Under *Or. Rev. Stat. § 30.020*, the measure of damages is the pecuniary benefit that could reasonably have been anticipated by the beneficiary of the act through the continuance of the life destroyed. *Durkoop v. Mishler*, 233 Or. 243, 378 P.2d 267, 1963 Ore. LEXIS 265 (1963).

36. Pecuniary loss described in *Or. Rev. Stat. §§ 30.020(2)(c), (d)* is interpreted broadly to include more than actual monetary loss in a wrongful death case. *Ingram v. ACandS, Inc.*, 977 F.2d 1332, 1992 U.S. App. LEXIS 26688, 92 Cal. Daily Op. Service 8635, 92 D.A.R. 14338, CCH Prod. Liab. Rep. P13342, 24 Fed. R. Serv. 3d (Callaghan) 304 (9th Cir. Or. 1992).

37. Although *Or. Rev. Stat. § 30.020* provides that damages available to a representative in a wrongful death action are limited to actual pecuniary loss to the eligible parties resulting from the death of the decedent, pecuniary loss has been held to include more than the amount of monetary benefit which would accrue through the earning capacity and thriftiness of the deceased and may include loss of other things which have a pecuniary worth, such as a mother's care and attention to the physical, moral, and educational welfare of her children, and a husband's loss of her services in the household. Thus, a trial court properly instructed a jury that in determining pecuniary loss, it could consider "what instructions, moral training or superintendence of education the decedent might reasonably have been expected to give his children had he lived." *Arrow Transp. Co. v. N.W. Grocery Co.*, 258 Or. 363, 482 P.2d 519, 1971 Ore. LEXIS 455 (1971).

38. Damages for wrongful death under *Or. Rev. Stat. § 30.020* must be reduced to their present value. A trial court must instruct the jury to limit the amount of recovery in respect of the loss of future pecuniary benefit to its present worth or cash value, otherwise, a verdict based on the deprivation of future benefits would afford more than compensation if it were made up by aggregating the benefits without taking into account the earning power of the money that is presently to be awarded. *Meier v. Bray*, 256 Or. 613, 475 P.2d 587, 1970 Ore. LEXIS 360 (1970).

39. The measure of damages in an action for wrongful death under *Or. Rev. Stat. § 30.020* brought on behalf of a decedent who left no surviving spouse or dependents is what the decedent would have retained as savings during the remainder of his life. *Meier v. Bray*, 256 Or. 613, 475 P.2d 587, 1970 Ore. LEXIS 360 (1970).

40. In a wrongful death action under *Or. Rev. Stat. § 30.020*, damages for the "psychological effects" of the death of the plaintiff's wife on the plaintiff and his children were not recoverable. However, the trial court did not abuse its discretion in admitting evidence concerning such "psychological effects" since such evidence was relevant to the existence and extent of a claimed loss of society and companionship, for which such evidence could be considered, especially where the defendant could have but did not request a jury instruction limiting the purpose for which the evidence could be considered. *Green v. Denney*, 87 Or. App. 298, 742 P.2d 639, 1987 Ore. App. LEXIS 4472, CCH Prod. Liab. Rep. P11593 (1987), review denied by 305 Ore. 21, 749 P.2d 136, 1988 Ore. LEXIS 147 (1988).

41. The extent of a parent's loss on the death of a child is not necessarily measured by the quality of parenting in an apportionment of wrongful death proceeds by the probate court. *Williams v. Cover*, 74 Or. App. 711, 704 P.2d 548, 1985 Ore. App. LEXIS 3462 (1985).

42. In a wrongful death action under *Or. Rev. Stat. § 30.020*, damages for the "psychological effects" of the death of the plaintiff's wife on the plaintiff and his children were not recoverable. However, the trial court did not abuse its discretion in admitting evidence concerning such "psychological effects" since such evidence was relevant to the existence and extent of a claimed loss of society and companionship, for which such evidence could be considered, especially where the defendant could have but did not request a jury instruction limiting the purpose for which the evidence could be considered. *Green v. Denney*, 87 Or. App. 298, 742 P.2d 639, 1987 Ore. App. LEXIS 4472, CCH Prod. Liab. Rep. P11593 (1987), review denied by 305 Ore. 21, 749 P.2d 136, 1988 Ore. LEXIS 147 (1988).

43. When decedent's wife's expert testified, during a wrongful death suit, that there were three treatments that might have possibly saved decedent's life, the trial court properly directed the verdict in favor of the physicians, the hospital, and the clinic. The mere possibility that defendants' negligence could have caused decedent's death was not enough; the wife was required to show that there was a reasonable medical probability that decedent's death would not have occurred absent defendants' negligence. *Joshi v. Providence Health Sys. of Or. Corp.*, 198 Ore. App. 535, 108 P.3d 1195, 2005 Ore. App. LEXIS 342 (2005), affirmed by 342 Ore. 152, 149 P.3d 1164, 2006 Ore. LEXIS 1344 (2006).

44. The rule established by the great weight of modern authority is that under statutes like *Or. Rev. Stat. § 30.020*, which create a new right of action for a person's death itself in favor of the personal representative for the benefit of named beneficiaries not founded on survivorship, recovery is barred if the sole designated beneficiary under the statute is himself guilty of negligence which proximately contributed to the death of the decedent. *Ditty v. Farley*, 219 Or. 208, 347 P.2d 47, 1959 Ore. LEXIS 460 (1959).

45. *Or. Rev. Stat. § 30.950* does not create a new claim in favor of a person who, as a result of his own intoxication, has been harmed away from the premises of a drinking establishment, against the liquor licensee who served the person while he was intoxicated. Thus, a wrongful death claim filed by the personal representative of an individual who died while intoxicated but off the premises of a drinking establishment, was dismissed as against the establishments that served the deceased even though he was visibly intoxicated. *Sager v. McClenden*, 296 Or. 33, 672 P.2d 697, 1983 Ore. LEXIS 1675 (1983).

46. So-called "discovery rule," which holds that a cause of action does not accrue until plaintiff knows or should know that a tort has been committed and that defendant has committed it, does not apply to wrongful death actions. *Eldridge v. Eastmoreland Gen. Hosp.*, 307 Or. 500, 769 P.2d 775, 1989 Ore. LEXIS 19 (1989).

47. Comparative fault statute changed Oregon law on contributory negligence by modifying the bar that previously applied when a claimant's fault exceeds the fault of those against whom recovery is sought. *Robinson v. Children's Servs. Div.*, 140 Or. App. 429, 914 P.2d 1123, 1996 Ore. App. LEXIS 511 (1996).

48. Where the plaintiff and her husband were beneficiaries entitled to recover damages for the decedent's wrongful death, the jury properly considered the alleged fault of the plaintiff and her husband in causing decedent's death. *Robinson v. Children's Servs. Div.*, 140 Or. App. 429, 914 P.2d 1123, 1996 Ore. App. LEXIS 511 (1996).

49. Classifications made in *Or. Rev. Stat. § 12.110(4)* and *Or. Rev. Stat. § 30.020(1)* are rationally related to the legitimate legislative ends of avoiding stale claims and limiting the costs of litigation and medical care. The statutes withstand equal protection scrutiny under the *United States Constitution*. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 2005 U.S. App. LEXIS 11952 (9th Cir. Or. 2005).

50. *Or. Rev. Stat. § 12.110(4)* and *Or. Rev. Stat. § 30.020(1)* did not violate the personal representative's rights to substantive due process because the statutes were rationally related to the legitimate legislative goals of avoiding stale claims and limiting the costs of litigation and malpractice claims. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 2005

U.S. App. LEXIS 11952 (9th Cir. Or. 2005).

51. All wrongful death claims, even those based on theories of product liability and negligence, are governed by the three-year limitation of *Or. Rev. Stat. § 30.020*. *W. Helicopters, Inc. v. Rogerson Aircraft Corp.*, 715 F. Supp. 1486, 1989 U.S. Dist. LEXIS 6958, CCH Prod. Liab. Rep. P12295 (D. Or. 1989).

52. Wrongful death product liability action is governed by the two-year limitations period of Oregon's Product Liability Act, *Or. Rev. Stat. § 30.905(2)*, rather than the three-year period of limitations of Oregon's wrongful death statute, *Or. Rev. Stat. § 30.020(1)*. *Thompson v. Communs. Tech., Inc. (CTI)*, 877 F.2d 27, 1989 U.S. App. LEXIS 8100, CCH Prod. Liab. Rep. P12161 (9th Cir. Or. 1989).

53. Time of appointment of a personal representative in a wrongful death action is not relevant to the determination of when the limitation period established by *Or. Rev. Stat. § 30.020* has expired. *Eldridge v. Eastmoreland Gen. Hosp.*, 307 Or. 500, 769 P.2d 775, 1989 Ore. LEXIS 19 (1989).

54. In an action for wrongful death brought against a doctor for failure to diagnose a decedent's condition as malignant melanoma, a form of cancer, the injury did not occur until a mole on the decedent's scalp began to grow; that event was the earliest time when the decedent could have been aware of any harm traceable to her doctor, and an action against the doctor brought within three years of that occurrence was timely under *Or. Rev. Stat. § 30.020*. *Repp v. Hahn*, 45 Or. App. 671, 609 P.2d 398, 1980 Ore. App. LEXIS 2401 (1980), review denied by 289 Ore. 373, 1980 Ore. LEXIS 1109 (1980).

55. The three-year limit for bringing a wrongful death action under *Or. Rev. Stat. § 30.020* begins to run from the time that the decedent was or should have been aware that the harm was caused by the defendant. *Repp v. Hahn*, 45 Or. App. 671, 609 P.2d 398, 1980 Ore. App. LEXIS 2401 (1980), review denied by 289 Ore. 373, 1980 Ore. LEXIS 1109 (1980).

56. Despite the fact that a defendant's move to another state would have acted to toll many statutes of limitation, it did not act to extend the period during which a wrongful death action could be brought. *Bengston v. Nesheim*, 259 F.2d 566, 1958 U.S. App. LEXIS 4764 (9th Cir. Wash. 1958).

57. Classifications made in *Or. Rev. Stat. § 12.110(4)* and *Or. Rev. Stat. § 30.020(1)* are rationally related to the legitimate legislative ends of avoiding stale claims and limiting the costs of litigation and medical care. The statutes withstand equal protection scrutiny under the *United States Constitution*. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 2005 U.S. App. LEXIS 11952 (9th Cir. Or. 2005).

58. *Or. Rev. Stat. § 12.110(4)* and *Or. Rev. Stat. § 30.020(1)* did not violate the personal representative's rights to substantive due process because the statutes were rationally related to the legitimate legislative goals of avoiding stale claims and limiting the costs of litigation and malpractice claims. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 2005 U.S. App. LEXIS 11952 (9th Cir. Or. 2005).

59. Wrongful death product liability action is governed by the two-year limitations period of Oregon's Product Liability Act, *Or. Rev. Stat. § 30.905(2)*, rather than the three-year period of limitations of Oregon's wrongful death statute, *Or. Rev. Stat. § 30.020(1)*. *Thompson v. Communs. Tech., Inc. (CTI)*, 877 F.2d 27, 1989 U.S. App. LEXIS 8100, CCH Prod. Liab. Rep. P12161 (9th Cir. Or. 1989).

60. Despite the fact that a representative of a decedent brought a wrongful death action under *Or. Rev. Stat. § 30.020*

within the three-year time limit of that statute, the action could not be maintained under *Or. Rev. Stat. § 12.115(1)*, where the basis of liability was either the negligent manufacture of a defective product or the sale of it by the manufacturer to the employer, and both incidents occurred more than ten years prior to the time the representative commenced his action. The cause of action accrued at the time of manufacture or sale and not at the time of the alleged wrongful death. *Johnson v. Star Machinery Co.*, 270 Or. 694, 530 P.2d 53, 1974 Ore. LEXIS 516 (1974), questioned by *Barke v. Maeyens*, 176 Ore. App. 471, 31 P.3d 1133, 2001 Ore. App. LEXIS 1404 (2001), questioned by *Young v. State*, 161 Ore. App. 32, 983 P.2d 1044, 1999 Ore. App. LEXIS 1020 (1999), criticized by *Clackamas County v. Gay*, 146 Ore. App. 706, 934 P.2d 551, 1997 Ore. App. LEXIS 220 (1997).

61. Motion for judgment on the pleading under *Or. R. Civ. P. 21(B)* was erroneously granted to a municipal corporation and its employee in a wrongful death action brought by the personal representative of a deceased minor's estate, who was a surviving parent, pursuant to *Or. Rev. Stat. § 30.010* et seq., which was granted on the grounds of immunity because the claim was covered under the Workers' Compensation Law under *Or. Rev. Stat. § 30.265(3)(a)* of the Oregon Tort Claims Act, because § 30.265(3)(a) violated *Or. Const. art. 1, sec. 10* by denying any substantial remedy to the surviving parent, leaving him without a remedy; the right to receive a burial payment under *Or. Rev. Stat. § Or. Stat. § 656.204(1)* of the Workers' Compensation Law deprived the surviving parent from being awarded a just, fair, and reasonable compensation for his pecuniary loss and for the loss of the society, companionship, and services of his minor child as provided by *Or. Rev. Stat. § 30.010(2)* and *Or. Rev. Stat. § 30.020(1)*. *Neher v. Chartier*, 319 Or. 417, 879 P.2d 156, 1994 Ore. LEXIS 72 (1994), overruled in part by *Storm v. McClung*, 334 Or. 210, 47 P.3d 476, 2002 Ore. LEXIS 383 (2002).

62. Writ of mandamus, ordering a Multnomah County (Oregon) trial court to vacate its order changing venue to Marion County, was dismissed in a wrongful death action because the claim arose in Marion County, where the alleged harm was done, not in Multnomah County, where the decedent died. *Howell v. Willamette Urology, P.C.*, 344 Or. 124, 178 P.3d 220, 2008 Ore. LEXIS 55 (2008).

63. Application of *Or. Rev. Stat. § 656.018* to a wrongful death action based on a theory of negligence brought under *Or. Rev. Stat. § 30.020* does not violate *Or. Const. art. 1 § 10*. *Kilminster v. Day Mgmt. Corp.*, 323 Or. 618, 919 P.2d 474, 1996 Ore. LEXIS 70, *RICO Bus. Disp. Guide P9135* (1996).

64. Comparative fault statute changed Oregon law on contributory negligence by modifying the bar that previously applied when a claimant's fault exceeds the fault of those against whom recovery is sought. *Robinson v. Children's Servs. Div.*, 140 Or. App. 429, 914 P.2d 1123, 1996 Ore. App. LEXIS 511 (1996).

65. Where the plaintiff and her husband were beneficiaries entitled to recover damages for the decedent's wrongful death, the jury properly considered the alleged fault of the plaintiff and her husband in causing decedent's death. *Robinson v. Children's Servs. Div.*, 140 Or. App. 429, 914 P.2d 1123, 1996 Ore. App. LEXIS 511 (1996).

66. In a wrongful death action involving one decedent, the single statutory limit on noneconomic damages in former *Or. Rev. Stat. § 18.560(1)* (now *Or. Rev. Stat. § 31.710(1)*) applied even though there were two beneficiaries. *Greist v. Phillips*, 322 Or. 281, 906 P.2d 789, 1995 Ore. LEXIS 125 (1995).

67. Although it was more likely than not that the decedent and his wife would have eventually dissolved their marriage, their lives were still intertwined and the wife suffered a measurable loss of society and companionship when the husband died, so that she was entitled to \$50,000 for her loss. *Burk v. Burk*, 137 Or. App. 197, 903 P.2d 914, 1995 Ore. App. LEXIS 1440 (1995).

68. Motion for judgment on the pleading under *Or. R. Civ. P. 21(B)* was erroneously granted to a municipal corporation and its employee in a wrongful death action brought by the personal representative of a deceased minor's estate, who was a surviving parent, pursuant to *Or. Rev. Stat. § 30.010* et seq., which was granted on the grounds of immunity because the claim was covered under the Workers' Compensation Law under *Or. Rev. Stat. § 30.265(3)(a)* of the Oregon Tort Claims Act, because § 30.265(3)(a) violated *Or. Const. art. 1, sec. 10* by denying any substantial remedy to the surviving parent, leaving him without a remedy; the right to receive a burial payment under *Or. Rev. Stat. § Or. Stat. § 656.204(1)* of the Workers' Compensation Law deprived the surviving parent from being awarded a just, fair, and reasonable compensation for his pecuniary loss and for the loss of the society, companionship, and services of his minor child as provided by *Or. Rev. Stat. § 30.010(2)* and *Or. Rev. Stat. § 30.020(1)*. *Neher v. Chartier*, 319 Or. 417, 879 P.2d 156, 1994 Ore. LEXIS 72 (1994), overruled in part by *Storm v. McClung*, 334 Ore. 210, 47 P.3d 476, 2002 Ore. LEXIS 383 (2002).

69. Pecuniary loss described in *Or. Rev. Stat. §§ 30.020(2)(c), (d)* is interpreted broadly to include more than actual monetary loss in a wrongful death case. *Ingram v. ACandS, Inc.*, 977 F.2d 1332, 1992 U.S. App. LEXIS 26688, 92 Cal. Daily Op. Service 8635, 92 D.A.R. 14338, CCH Prod. Liab. Rep. P13342, 24 Fed. R. Serv. 3d (Callaghan) 304 (9th Cir. Or. 1992).

70. Where driver of vehicle killed in one-car accident could not have maintained wrongful death action against alcohol surveyors, the wife and children of driver could not maintain the action. *Hunt v. Evenoff*, 112 Or. App. 630, 829 P.2d 1051, 1992 Ore. App. LEXIS 765 (1992), review denied by 314 Ore. 175, 836 P.2d 1344 (1992).

71. A wrongful death action may be maintained only under circumstances in which the decedent might have maintained an action had he lived. *Hunt v. Evenoff*, 112 Or. App. 630, 829 P.2d 1051, 1992 Ore. App. LEXIS 765 (1992), review denied by 314 Ore. 175, 836 P.2d 1344 (1992).

72. Plaintiff seeking damages in wrongful death action for loss of services, society, and companionship was not required to prove loss by offering evidence of his or her own age or life expectancy. There was evidence from which a jury could make the necessary inferences regarding the years that plaintiff and the decedent attended school, and conflicting evidence about plaintiff's health. *Goddard v. Munson*, 108 Or. App. 342, 816 P.2d 619, 1991 Ore. App. LEXIS 1222 (1991), review denied by 312 Ore. 525, 822 P.2d 1194 (1991).

73. Plaintiff seeking damages in wrongful death action need only show that there were beneficiaries at time of action. There was no requirement of proof that beneficiaries would have survived decedent if not for defendant's acts. *Goddard v. Munson*, 108 Or. App. 342, 816 P.2d 619, 1991 Ore. App. LEXIS 1222 (1991), review denied by 312 Ore. 525, 822 P.2d 1194 (1991).

74. Notwithstanding the general three-year wrongful death statute of limitations under *Or. Rev. Stat. § 30.020(1)*, the two-year statute of limitations contained in *Or. Rev. Stat. § 30.275(8)* for claims against public bodies and their agents does not violate the state constitutional provision requiring equal privileges and immunities for all citizens. *Van Wormer v. City of Salem*, 309 Or. 404, 788 P.2d 443, 1990 Ore. LEXIS 25 (1990).

75. Where a minor child of a woman who died, allegedly as a result of defendants' negligence in connection with a mountain climbing expedition, brought an action for negligent infliction of emotional distress and loss of parental consortium, the action was substantially one of wrongful death and therefore had to meet the requirements of *Or. Rev. Stat. § 30.020*. *Horwell v. Or. Episcopal Sch.*, 100 Or. App. 571, 787 P.2d 502, 1990 Ore. App. LEXIS 165 (1990).

76. All wrongful death claims, even those based on theories of product liability and negligence, are governed by the three-year limitation of *Or. Rev. Stat. § 30.020*. *W. Helicopters, Inc. v. Rogerson Aircraft Corp.*, 715 F. Supp. 1486, 1989 U.S. Dist. LEXIS 6958, CCH Prod. Liab. Rep. P12295 (D. Or. 1989).

77. Wrongful death product liability action is governed by the two-year limitations period of Oregon's Product Liability Act, *Or. Rev. Stat. § 30.905(2)*, rather than the three-year period of limitations of Oregon's wrongful death statute, *Or. Rev. Stat. § 30.020(1)*. *Thompson v. Communs. Tech., Inc. (CTI)*, 877 F.2d 27, 1989 U.S. App. LEXIS 8100, CCH Prod. Liab. Rep. P12161 (9th Cir. Or. 1989).

78. So-called "discovery rule," which holds that a cause of action does not accrue until plaintiff knows or should know that a tort has been committed and that defendant has committed it, does not apply to wrongful death actions. *Eldridge v. Eastmoreland Gen. Hosp.*, 307 Or. 500, 769 P.2d 775, 1989 Ore. LEXIS 19 (1989).

79. Time of appointment of a personal representative in a wrongful death action is not relevant to the determination of when the limitation period established by *Or. Rev. Stat. § 30.020* has expired. *Eldridge v. Eastmoreland Gen. Hosp.*, 307 Or. 500, 769 P.2d 775, 1989 Ore. LEXIS 19 (1989).

80. In a wrongful death action under *Or. Rev. Stat. § 30.020*, damages for the "psychological effects" of the death of the plaintiff's wife on the plaintiff and his children were not recoverable. However, the trial court did not abuse its discretion in admitting evidence concerning such "psychological effects" since such evidence was relevant to the existence and extent of a claimed loss of society and companionship, for which such evidence could be considered, especially where the defendant could have but did not request a jury instruction limiting the purpose for which the evidence could be considered. *Green v. Denney*, 87 Or. App. 298, 742 P.2d 639, 1987 Ore. App. LEXIS 4472, CCH Prod. Liab. Rep. P11593 (1987), review denied by 305 Ore. 21, 749 P.2d 136, 1988 Ore. LEXIS 147 (1988).

81. Facts alleged in a personal representative's original complaint against a hospital for a decedent's wrongful death could not supply notice of subsequent intentional infliction of emotional distress claims against the hospital and a doctor by the decedent's survivors; the new claims could not relate back to the original claim under *Or. R. Civ. P. 23(c)* and was barred by the limitations period in *Or. Rev. Stat. § 30.020*. *Evans v. Salem Hospital*, 83 Or. App. 23, 730 P.2d 562, 1986 Ore. App. LEXIS 4277 (1986), review denied by 303 Ore. 331, 736 P.2d 565, 1987 Ore. LEXIS 1405 (1987).

82. *Or. Rev. Stat. § 30.020(2)(d)* provides that only the decedent's spouse, children, and parents may recover for the loss of society and companionship that are due to a wrongful death. *Saechao v. Matsakoun*, 78 Or. App. 340, 717 P.2d 165, 1986 Ore. App. LEXIS 2623 (1986), review dismissed en banc by 302 Ore. 155, 727 P.2d 126, 1986 Ore. LEXIS 1774 (1986).

83. The extent of a parent's loss on the death of a child is not necessarily measured by the quality of parenting in an apportionment of wrongful death proceeds by the probate court. *Williams v. Cover*, 74 Or. App. 711, 704 P.2d 548, 1985 Ore. App. LEXIS 3462 (1985).

84. Where the decedent's parents, who were the sole beneficiaries under *Or. Rev. Stat. § 30.020(1)*, settled a wrongful death action before the appointment of a personal representative, the subsequently appointed personal representative could not maintain a wrongful death action under *Or. Rev. Stat. § 30.020(1)*. *Haugh v. Kilmer*, 71 Or. App. 345, 692 P.2d 631, 1984 Ore. App. LEXIS 4603 (1984).

85. A personal representative for a decedent's estate cannot become an independent claimant solely by virtue of suing on behalf of the decedent's heirs. If a decedent leaves no heirs, the personal representative has no authority to maintain an action for wrongful death against the tortfeasor. *Mendez v. State*, 64 Or. App. 581, 669 P.2d 364, 1983 Ore. App. LEXIS 3452 (1983).

86. In a wrongful death action, a personal representative was not an independent claimant when damages for pain and suffering to the decedent were claimed under *Or. Rev. Stat. § 30.020*. The personal representative was not an independent claimant under § 30.270(1)(c) and was not entitled to a recovery in a wrongful death action. *Mendez v.*

State, 64 Or. App. 581, 669 P.2d 364, 1983 Ore. App. LEXIS 3452 (1983).

87. A husband and wife failed to state ultimate facts sufficient to constitute a claim under the Wrongful Death Act of Or. Rev. Stat. §§ 30.010 to 30.100 against a hospital for delivering their child stillborn. Their allegation that as a proximate result of the death of their child, they suffered severe emotional distress and pain and suffering was not a proper claim under the *Wrongful Death Act*. *Demars v. Erde*, 55 Or. App. 863, 640 P.2d 635, 1982 Ore. App. LEXIS 2296 (1982).

88. In a wrongful death claim, the terms "loss of the society, companionship and services" of a decedent stillborn child under Or. Rev. Stat. § 30.020(2)(d) did not contemplate a claim for a survivor's pain and suffering. Those terms referred instead to the prospective advantages to the surviving beneficiaries which were lost as a result of the decedent's death and although it was difficult to prove the prospective loss to parents of a relationship which never began, as in the case of a stillborn child, the right to recovery was nevertheless limited by the terms of the *Wrongful Death Act*. *Demars v. Erde*, 55 Or. App. 863, 640 P.2d 635, 1982 Ore. App. LEXIS 2296 (1982).

89. It was not necessary for the Court of Appeals to decide whether the rule that the statute of limitations began to run only from the time of discovery of the injury should extend generally to products liability and simple negligence actions, where it could be concluded that the limitation period under the wrongful death statute, Or. Rev. Stat. § 30.020, independently of the statute of limitations, was subject to the time of discovery commencement rule. *Shaughnessy v. Spray*, 55 Or. App. 42, 637 P.2d 182, 1981 Ore. App. LEXIS 3779, CCH Prod. Liab. Rep. P9206 (1981).

90. The three-year limitations period under Or. Rev. Stat. § 30.020(1) for bringing a wrongful death action runs not only from the time the decedent knew or should have known of a defendant's cause or involvement but also from the time the personal representative discovered the facts; the provision that the personal representative may maintain an action if the decedent might have had he lived has no bearing on when the statute of limitations begins to run. *Shaughnessy v. Spray*, 55 Or. App. 42, 637 P.2d 182, 1981 Ore. App. LEXIS 3779, CCH Prod. Liab. Rep. P9206 (1981).

91. An action by a personal representative to recover for the wrongful death of her son who died from an overdose of medication prescribed by a doctor, which was brought against the manufacturer and alleged negligence and the unreasonably dangerous nature of the product, was timely under Or. Rev. Stat. § 30.020, where the personal representative discovered the cause of death less than three years before she filed the complaint. *Shaughnessy v. Spray*, 55 Or. App. 42, 637 P.2d 182, 1981 Ore. App. LEXIS 3779, CCH Prod. Liab. Rep. P9206 (1981).

92. The limitation period under the wrongful death statute, independently of the statute of limitations which would apply to an action for the underlying injury, is subject to the time of discovery commencement rule; the three-year limitation period of Or. Rev. Stat. § 30.020(1) rather than the two-year period of Or. Rev. Stat. § 12.110(4) was applicable to a wrongful death action in which the injury causing the death was the result of medical malpractice. *Shaughnessy v. Spray*, 55 Or. App. 42, 637 P.2d 182, 1981 Ore. App. LEXIS 3779, CCH Prod. Liab. Rep. P9206 (1981).

93. The legislature's action in giving children a cause of action for wrongful death of a parent under Or. Rev. Stat. § 30.020 does not mean that the legislature intended to extend the rights of a child to recover damages from a third party whose negligence interferes with the parent-child relationship. It is not actually the child under Or. Rev. Stat. § 30.020 that has an action for wrongful death, but rather, the only plaintiff in a wrongful death action is the personal representative, who brings the action for the benefit of the surviving spouse, surviving children, parents, and other individuals who under the law of intestate succession would be entitled to inherit the personal property of the decedent. *Norwest v. Presbyterian Intercommunity Hospital*, 52 Or. App. 853, 631 P.2d 1377, 1981 Ore. App. LEXIS 2858 (1981), affirmed by 293 Ore. 543, 652 P.2d 318, 1982 Ore. LEXIS 1030 (1982), criticized by *Humphers v. First Interstate Bank*, 298 Ore. 706, 696 P.2d 527, 1985 Ore. LEXIS 1002, 48 A.L.R.4th 651 (1985).

94. Personal representative, when bringing an action for the wrongful death of a decedent under *Or. Rev. Stat. § 30.020*, acts solely for the benefit of the persons entitled to share in the proceeds of the action. It is clear that the personal representative, when managing a wrongful death claim, acts as a fiduciary exactly as if managing the decedent's estate itself. *In re Estate of White*, 289 Or. 13, 609 P.2d 365, 1980 Ore. LEXIS 795 (1980).

95. In an action for wrongful death brought against a doctor for failure to diagnose a decedent's condition as malignant melanoma, a form of cancer, the injury did not occur until a mole on the decedent's scalp began to grow; that event was the earliest time when the decedent could have been aware of any harm traceable to her doctor, and an action against the doctor brought within three years of that occurrence was timely under *Or. Rev. Stat. § 30.020*. *Repp v. Hahn*, 45 Or. App. 671, 609 P.2d 398, 1980 Ore. App. LEXIS 2401 (1980), review denied by 289 Ore. 373, 1980 Ore. LEXIS 1109 (1980).

96. The three-year limit for bringing a wrongful death action under *Or. Rev. Stat. § 30.020* begins to run from the time that the decedent was or should have been aware that the harm was caused by the defendant. *Repp v. Hahn*, 45 Or. App. 671, 609 P.2d 398, 1980 Ore. App. LEXIS 2401 (1980), review denied by 289 Ore. 373, 1980 Ore. LEXIS 1109 (1980).

97. Claim for wrongful death under *Or. Rev. Stat. § 30.020* is filed not on behalf of an estate but by the personal representative as a nominal party on behalf of the real parties in interest, who are the surviving spouse, the children, and the parents of a decedent. Parents have a cause of action independent of the other listed beneficiaries and not dependent on their right to share in the intestate distribution of the decedent's estate, thus, personal representative of a decedent could bring a wrongful death action on behalf of the decedent's parents despite the fact that there were surviving children of the decedent. *Rake v. Boise Cascade Corp.*, 43 Or. App. 767, 604 P.2d 421, 1979 Ore. App. LEXIS 3452 (1979).

98. The clause "under the law of intestate succession" in *Or. Rev. Stat. § 30.020(1)* applies only to the individuals other than the surviving spouse, children, and parents. These individuals only have a wrongful death claim if they are entitled to inherit the personal property of the decedent under the laws of intestate succession, and the clause does not limit the right of the surviving spouse, children, or parents to bring a wrongful death claim. *Rake v. Boise Cascade Corp.*, 43 Or. App. 767, 604 P.2d 421, 1979 Ore. App. LEXIS 3452 (1979).

99. Surviving spouse as defined in *Or. Rev. Stat. § 30.020(1)* does not include the survivor of a domestic relationship not sanctioned by the marriage laws of the state. Thus, a personal representative suing for the wrongful death of a deceased person could not include the deceased's live-in companion as a beneficiary party in the action. *Ore-Ida Foods, Inc. v. Gonzalez*, 43 Or. App. 393, 602 P.2d 1132, 1979 Ore. App. LEXIS 3388 (1979).

100. The enactment of the wrongful death statute under *Or. Rev. Stat. § 30.020* created a new and separate cause of action that could arise if death was caused by any wrongful act, and its three-year statutory limitations period was a part of that right. *Baxter v. Zeller*, 42 Or. App. 873, 601 P.2d 902, 1979 Ore. App. LEXIS 3342 (1979).

101. Full vindication of the rights under the wrongful death statute dictated that the limitation found in *Or. Rev. Stat. § 30.020(1)* be applied where a personal representative sought to recover damages suffered by a decedent's estate and her beneficiaries as a result of alleged negligence of doctors and a hospital in treatment of an ulcer. The two-year statute of limitations for medical malpractice under *Or. Rev. Stat. § 12.110(4)* was not applicable, nor was the case to be compared with cases where *Or. Rev. Stat. § 12.115(1)* was held to govern and to bar a wrongful death action even though that action was otherwise timely. *Baxter v. Zeller*, 42 Or. App. 873, 601 P.2d 902, 1979 Ore. App. LEXIS 3342 (1979).

102. Court of appeals erred in limiting plaintiffs' prayer for relief to \$ 100,000 under the Oregon Wrongful Death Act, *Or. Rev. Stat. § 30.020*, which was to grant a right of action for the benefit of the spouse and children of the decedent as the real parties in interest, and not primarily for the benefit of the estate. Since there was more than one claim and more

than one claimant, the proper limitation within the meaning of *Or. Rev. Stat. § 30.270(1)(c)* was \$ 300,000. *Christensen v. Epley*, 287 Or. 539, 601 P.2d 1216, 1979 Ore. LEXIS 1197 (1979).

103. Amendments to the Oregon Wrongful Death Act, *Or. Rev. Stat. § 30.020*, have made the Oregon act one under which the right of action in a case is not primarily for the benefit of an estate, but for the benefit of the spouse and children of the decedent as the "real parties in interest," with the personal representative as a mere nominal party who sues for their benefit for the recovery of the value of the life lost to them. *Christensen v. Epley*, 287 Or. 539, 601 P.2d 1216, 1979 Ore. LEXIS 1197 (1979).

104. Claim may be brought under *Or. Rev. Stat. § 30.020* only if the deceased might have maintained an action "had he survived." Thus, an action based on the alleged malpractice could not be brought against the Veterans Administration under that statute where the medical malpractice statutory limitations had expired even before the decedent's death. *Winn v. United States*, 593 F.2d 855, 1979 U.S. App. LEXIS 17210 (9th Cir. Or. 1979).

105. The remarriage of a decedent's spouse does not affect the measure of damages in a wrongful death action under *Or. Rev. Stat. § 30.020*. The loss sustained by the spouse, as a beneficiary, is fixed as of the date of death, and what transpires afterwards is wholly immaterial. *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322, 1978 Ore. LEXIS 833, 97 A.L.R.3d 606 (1978).

106. A mother was not a dependent of her deceased son under the meaning of that word in *Or. Rev. Stat. § 30.020* where the decedent contributed almost nothing to her support in the 10 months preceding his death, and his payments in the two and a half years prior to that when he resided with his family were less than the cost of his room and board. Also, there was no evidence that the mother's standard of living declined as a result of the death of her son. *In re Estate of Hines*, 32 Or. App. 209, 573 P.2d 1260, 1978 Ore. App. LEXIS 3085 (1978).

107. The phrase "surviving spouse and dependents" under *Or. Rev. Stat. § 30.020* does not have the same meaning as the phrase "surviving spouse, surviving children, surviving parents" that appears in the statute as a result of the 1973 amendments. The status of being a parent to a decedent does not by itself establish dependency under the statute. *In re Estate of Hines*, 32 Or. App. 209, 573 P.2d 1260, 1978 Ore. App. LEXIS 3085 (1978).

108. *Or. Rev. Stat. § 30.020* applied to an action for wrongful death brought by a representative of a decedent Oregon resident for a plane crash which occurred in British Columbia, where the decedent and his family resided in Oregon, the flight originated in Oregon, and the aircraft was owned and chartered in Oregon. The fact that the aircraft had been modified for a short take-off and landing by a company having its principal place of business in Washington was irrelevant, where the Washington statute was the same as the Oregon statute. *Myers v. Cessna Aircraft Corp.*, 275 Or. 501, 553 P.2d 355, 1976 Ore. LEXIS 816 (1976).

109. Representative of a decedent could not sue under the Wrongful Death Act on behalf of stepchildren never adopted by the decedent. They were not his dependents under the language of *Or. Rev. Stat. § 30.020* and were not entitled to any recovery. *Jones v. Jones*, 270 Or. 869, 530 P.2d 34, 1974 Ore. LEXIS 520 (1974).

110. Use of the term "widow or widower and dependents" in the Wrongful Death Act of *Or. Rev. Stat. § 30.020*, was not intended to expand the class entitled to recover as direct beneficiaries under that Act beyond the spouse and children of the decedent or that it intended to include as dependents any person to whom the decedent had no legal obligation to support. Also, there is nothing in the legislative history of the 1973 amendments to suggest that the legislature, by the use of the term "surviving widow, surviving children, surviving parents and other individuals entitled to inherit" had any intent other than to more specifically define the class of persons previously entitled to recover or that it intended to make any change in the law to deny benefits under the act to any persons previously entitled to benefits. *Jones v. Jones*, 270 Or. 869, 530 P.2d 34, 1974 Ore. LEXIS 520 (1974).

111. Despite the fact that a representative of a decedent brought a wrongful death action under *Or. Rev. Stat. § 30.020* within the three-year time limit of that statute, the action could not be maintained under *Or. Rev. Stat. § 12.115(1)*, where the basis of liability was either the negligent manufacture of a defective product or the sale of it by the manufacturer to the employer, and both incidents occurred more than ten years prior to the time the representative commenced his action. The cause of action accrued at the time of manufacture or sale and not at the time of the alleged wrongful death. *Johnson v. Star Machinery Co.*, 270 Or. 694, 530 P.2d 53, 1974 Ore. LEXIS 516 (1974), questioned by *Barke v. Maeyens*, 176 Ore. App. 471, 31 P.3d 1133, 2001 Ore. App. LEXIS 1404 (2001), questioned by *Young v. State*, 161 Ore. App. 32, 983 P.2d 1044, 1999 Ore. App. LEXIS 1020 (1999), criticized by *Clackamas County v. Gay*, 146 Ore. App. 706, 934 P.2d 551, 1997 Ore. App. LEXIS 220 (1997).

112. An action for wrongful death of a stillborn child can be maintained under *Or. Rev. Stat. § 30.020*; this is in line with state law holding that a viable unborn child is a person for the purposes of the *Or. Const. art. I, § 10*, which guarantees every man a remedy by due course of law for injury done to him and his person, and it is immaterial whether the injury results before or after the child is born as far as recovery under the Wrongful Death Act is concerned. *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, 1974 Ore. LEXIS 455 (1974), limited by *LaDu v. Oregon Clinic, P.C.*, 165 Ore. App. 687, 998 P.2d 733, 2000 Ore. App. LEXIS 317 (2000).

113. *Or. Rev. Stat. § 30.020*, the Wrongful Death Act, was amended effective January 1, 1974, so as to no longer limit damages in actions under the statute to pecuniary loss; damages now include loss of society and companionship to the parents of a child as an item of damages, and even under the previous provisions of the act, the ultimate issue in an action for wrongful death was the value of the life lost, and the speculative nature of proof of pecuniary damage in wrongful death actions was no reason to deny the right of a plaintiff to have such an action submitted to the jury, much less to deny the existence of the substantive right to bring such an action. *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, 1974 Ore. LEXIS 455 (1974), limited by *LaDu v. Oregon Clinic, P.C.*, 165 Ore. App. 687, 998 P.2d 733, 2000 Ore. App. LEXIS 317 (2000).

114. An action for wrongful death could not be brought by a representative of two deceased nuns on behalf of a religious order of which the nuns were members on the basis that the religious order was a dependent of the nuns, where dependents under *Or. Rev. Stat. § 30.020* were limited to a decedent's surviving spouse, surviving children, surviving parents, and other individuals entitled to the decedent's estate. However, the representative was allowed to bring an action for the benefit of the decedent's estate even though the nuns had taken vows of poverty, neither earned nor retained any earnings of money or property, and left wills under which the religious organization of which they were members was the sole beneficiary. *Goheen v. GMC*, 263 Or. 145, 502 P.2d 223, 1972 Ore. LEXIS 391 (1972).

115. *Or. Rev. Stat. § 30.020* permitted an award of damages by a jury for the death of a person who had a substantial earning capacity and left no spouse or dependents, but who performed useful services by agreement and without compensation for a person or organization who was a sole beneficiary of her estate, and who suffered a substantial pecuniary loss from the death because the services ended. The general rule in a wrongful death action, that there must be proof of the probable accumulation of net savings, did not apply to the facts of a case in which the decedents were not employed for money but demonstrated a capacity to earn money and to perform useful services of a pecuniary value. *Goheen v. GMC*, 263 Or. 145, 502 P.2d 223, 1972 Ore. LEXIS 391 (1972).

116. Once plaintiff representative in a wrongful death action under *Or. Rev. Stat. § 30.020* produced a witness to testify to decedent's good moral characteristics, either by evidence of specific acts or by testimony in the form of opinion evidence, then it is proper to cross-examine the witness as to his knowledge of specific acts relating to the decedent's character, subject to the examining party's being able to offer proof of the specific acts that relate to the cross-examination. Thus, after plaintiff representative introduced testimony by two witnesses about the decedent's good moral character, including his activity in athletics, his ability to get along with fellow students, his willingness and ability to work, and his good health, a trial court properly allowed defendant to cross-examine the witnesses on the decedent's conviction for petty larceny resulting from the theft of a gallon of gasoline. *Stuart v. Kelsay*, 261 Or. 326,

494 P.2d 249, 1972 Ore. LEXIS 306 (1972).

117. Evidence of a decedent's good physical, mental, and moral characteristics and his ability to earn money is relevant to the issue of damages to the estate of the deceased in a wrongful death action under *Or. Rev. Stat. § 30.020*. Likewise, evidence concerning criminal offenses is admissible in a wrongful death action after the character of the decedent has been placed in issue. *Stuart v. Kelsay*, 261 Or. 326, 494 P.2d 249, 1972 Ore. LEXIS 306 (1972).

118. Although *Or. Rev. Stat. § 30.020* provides that damages available to a representative in a wrongful death action are limited to actual pecuniary loss to the eligible parties resulting from the death of the decedent, pecuniary loss has been held to include more than the amount of monetary benefit which would accrue through the earning capacity and thriftiness of the deceased and may include loss of other things which have a pecuniary worth, such as a mother's care and attention to the physical, moral, and educational welfare of her children, and a husband's loss of her services in the household. Thus, a trial court properly instructed a jury that in determining pecuniary loss, it could consider "what instructions, moral training or superintendence of education the decedent might reasonably have been expected to give his children had he lived." *Arrow Transp. Co. v. N.W. Grocery Co.*, 258 Or. 363, 482 P.2d 519, 1971 Ore. LEXIS 455 (1971).

119. Damages for wrongful death under *Or. Rev. Stat. § 30.020* must be reduced to their present value. A trial court must instruct the jury to limit the amount of recovery in respect of the loss of future pecuniary benefit to its present worth or cash value, otherwise, a verdict based on the deprivation of future benefits would afford more than compensation if it were made up by aggregating the benefits without taking into account the earning power of the money that is presently to be awarded. *Meier v. Bray*, 256 Or. 613, 475 P.2d 587, 1970 Ore. LEXIS 360 (1970).

120. The measure of damages in an action for wrongful death under *Or. Rev. Stat. § 30.020* brought on behalf of a decedent who left no surviving spouse or dependents is what the decedent would have retained as savings during the remainder of his life. *Meier v. Bray*, 256 Or. 613, 475 P.2d 587, 1970 Ore. LEXIS 360 (1970).

121. Before an action is barred by a statute, the legislature has absolute power to amend the statute and alter the prescribed period of limitation, subject only to the requirement that a reasonable time limit must be allowed for the prosecution of an action or proceeding after the passage of an amendment shortening the period. An amendment to a statute of limitations enlarging the period of time within which an action can be brought under *Or. Rev. Stat. § 30.020* is not retroactive legislation and does not impair any vested right. *Nichols v. Wilbur*, 256 Or. 418, 473 P.2d 1022, 1970 Ore. LEXIS 335 (1970).

122. Where a representative brought an action for the wrongful death of a decedent on May 6, 1969, the death having occurred on January 11, 1967 and the legislature had amended the the wrongful death statute, *Or. Rev. Stat. § 30.020*, in September, 1967, to extend the limitation period from two to three years, the representative's action was timely. A reviewing court held that statutes enlarging the period of limitations applied to existing causes of actions that had not been barred by the previous limitation and such statutes were not retrospective in application but are merely an extension of the right to bring the action. *Nichols v. Wilbur*, 256 Or. 418, 473 P.2d 1022, 1970 Ore. LEXIS 335 (1970).

123. Recent Oregon cases indicate that the Oregon courts construe *Or. Rev. Stat. § 115.410* very strictly and would deny a foreign personal representative the right to bring a wrongful death claim on behalf of the deceased. Accordingly, a foreign personal representative could not bring such an action in federal district court. *Gidinski v. McWilliams*, 308 F. Supp. 772, 1970 U.S. Dist. LEXIS 13278 (D. Or. 1970).

124. Under any choice of law theory except that which would apply the law of the place of injury without regard of any other considerations, the Oregon Wrongful Death Act, *Or. Rev. Stat. § 30.020*, should apply to an action between Oregon domiciliaries in an Oregon court. Thus, the statute applied in an accident involving a helicopter crash in California in which the decedent, the decedent's representative, and the defendant helicopter pilot were all residents of

Oregon. DeFoor v. Lematta, 249 Or. 116, 437 P.2d 107, 1968 Ore. LEXIS 622 (1968).

125. Under *Or. Rev. Stat. § 30.020*, a cause of action is granted to the personal representative of the deceased for the benefit of those named in the statute. No cause of action is granted to the surviving spouse or dependents because the right of action for wrongful death is statutory. *Richard v. Slate, 239 Or. 164, 396 P.2d 900, 1964 Ore. LEXIS 501 (1964)*, overruled by *Rennie v. Pozzi, 294 Ore. 334, 656 P.2d 934, 1982 Ore. LEXIS 1345 (1982)*, questioned by *Nichols v. Wilbur, 256 Ore. 418, 473 P.2d 1022, 1970 Ore. LEXIS 335 (1970)*, questioned by *Parker v. May, 70 Ore. App. 715, 690 P.2d 1125, 1984 Ore. App. LEXIS 4348 (1984)*.

126. If an action is commenced by one who has no cause of action, the bringing in of the proper party as plaintiff to maintain the action is regarded as the commencement of a new action, where the statute of limitations has intervened under the time limits set forth in *Or. Rev. Stat. § 30.020*, in an action for wrongful death. Thus, appointment of a personal representative of an out-of-state decedent for purposes of maintaining an action for wrongful death in Oregon was void where the appointment occurred in the wrong county. *Richard v. Slate, 239 Or. 164, 396 P.2d 900, 1964 Ore. LEXIS 501 (1964)*, overruled by *Rennie v. Pozzi, 294 Ore. 334, 656 P.2d 934, 1982 Ore. LEXIS 1345 (1982)*, questioned by *Nichols v. Wilbur, 256 Ore. 418, 473 P.2d 1022, 1970 Ore. LEXIS 335 (1970)*, questioned by *Parker v. May, 70 Ore. App. 715, 690 P.2d 1125, 1984 Ore. App. LEXIS 4348 (1984)*.

127. In a wrongful death claim, *Or. Rev. Stat. § 30.020*, which creates a new right and a new liability, is not a survival statute. While granting a new cause of action, the statute also limits the cause of action to a specified time period, and thus, the right of action is a qualified right. *Richard v. Slate, 239 Or. 164, 396 P.2d 900, 1964 Ore. LEXIS 501 (1964)*, overruled by *Rennie v. Pozzi, 294 Ore. 334, 656 P.2d 934, 1982 Ore. LEXIS 1345 (1982)*, questioned by *Nichols v. Wilbur, 256 Ore. 418, 473 P.2d 1022, 1970 Ore. LEXIS 335 (1970)*, questioned by *Parker v. May, 70 Ore. App. 715, 690 P.2d 1125, 1984 Ore. App. LEXIS 4348 (1984)*.

128. In a wrongful death action, plaintiff's representative sought to introduce evidence disclosing that the deceased in his lifetime rendered personal services which were of benefit to his wife, and thus the value of those services should be included along with economic loss sustained by the widow in measuring the damages. Court ruled that damages could include the value of services which the beneficiary had a reasonable right to expect from the deceased besides the loss of financial assistance. *Durkoop v. Mishler, 233 Or. 243, 378 P.2d 267, 1963 Ore. LEXIS 265 (1963)*.

129. Under *Or. Rev. Stat. § 30.020*, the measure of damages is the pecuniary benefit that could reasonably have been anticipated by the beneficiary of the act through the continuance of the life destroyed. *Durkoop v. Mishler, 233 Or. 243, 378 P.2d 267, 1963 Ore. LEXIS 265 (1963)*.

130. The rule established by the great weight of modern authority is that under statutes like *Or. Rev. Stat. § 30.020*, which create a new right of action for a person's death itself in favor of the personal representative for the benefit of named beneficiaries not founded on survivorship, recovery is barred if the sole designated beneficiary under the statute is himself guilty of negligence which proximately contributed to the death of the decedent. *Ditty v. Farley, 219 Or. 208, 347 P.2d 47, 1959 Ore. LEXIS 460 (1959)*.

131. In a wrongful death case, *Or. Rev. Stat. § 30.020* is not a survival statute in the sense that it preserves a cause of action which the deceased possessed. For a wrongful death case to succeed it is essential that the evidence show that the defendant owed a duty to the decedent which the decedent could have enforced and the wrongful death plaintiff must show that defendant breached the purported duty which thereby caused the decedent's death. *Ferguson v. Belmont Convalescent Hosp., Inc., 217 Or. 453, 343 P.2d 243, 1959 Ore. LEXIS 387 (1959)*.

132. To recover under *Or. Rev. Stat. § 30.020*, governing wrongful death cases, plaintiff must show that the decedent on whose behalf he or she is suing could have recovered if the decedent had lived. Thus, a rest home was not liable for the wrongful death of one of its patients as a result of injuries which occurred when the decedent fell, where the decedent

was in full possession of her faculties, voluntarily got out of bed to go to the bathroom, and suffered a stroke which caused her to fall and injure herself severely. *Ferguson v. Belmont Convalescent Hosp., Inc.*, 217 Or. 453, 343 P.2d 243, 1959 Ore. LEXIS 387 (1959).

133. Despite the fact that a defendant's move to another state would have acted to toll many statutes of limitation, it did not act to extend the period during which a wrongful death action could be brought. *Bengston v. Nesheim*, 259 F.2d 566, 1958 U.S. App. LEXIS 4764 (9th Cir. Wash. 1958).

134. A trial judge in a wrongful death action brought under *Or. Rev. Stat. § 30.020* on behalf of a deceased woman's widower and minor children did not commit reversible error or invade the province of the jury by failing to instruct them that they must first determine whether the children were "dependents" of the decedent before they could consider whether the children had sustained a pecuniary loss compensable under the Wrongful Death Act. The jury's finding that the children suffered a pecuniary loss as a result of their mother's death was in actuality a finding that the children were dependents of the decedent. *Clement v. Cummings*, 212 Or. 161, 317 P.2d 579, 1957 Ore. LEXIS 181 (1957).

135. The administrator of the estate of a deceased wife was entitled to maintain an action for the benefit of the wife's estate under the wrongful death statute, *Or. Rev. Stat. § 30.020* against the estate of the husband, where the husband murdered his wife and then committed suicide. The act of the husband meant that he was not a preferred beneficiary, and under the statute there was no widower or none qualified as a beneficiary, thus the wife's personal representative could maintain the action where there were also no dependents. *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585, 1955 Ore. LEXIS 173 (1955), criticized by *Heino v. Harper*, 306 Ore. 347, 759 P.2d 253, 1988 Ore. LEXIS 446 (1988).

136. A person who kills his or her spouse may not maintain an action under the Wrongful Death Act of *Or. Rev. Stat. § 30.020* for reasons of public policy grounded in preventing a wrongdoer from reaping the benefits of his crime. Nor may an action be maintained by an administrator of the estate of the deceased spouse for the benefit of the survivor, where the survivor was the person who killed the spouse. *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585, 1955 Ore. LEXIS 173 (1955), criticized by *Heino v. Harper*, 306 Ore. 347, 759 P.2d 253, 1988 Ore. LEXIS 446 (1988).

137. *Or. Rev. Stat. § 30.020*, governing wrongful death cases, creates a new right and a new liability and is not a survival statute. A condition precedent to the right to bring the action is whether the deceased party, had he or she lived, might have maintained an action against the surviving party for an injury done by the same act or omission. *Apitz v. Dames*, 205 Or. 242, 287 P.2d 585, 1955 Ore. LEXIS 173 (1955), criticized by *Heino v. Harper*, 306 Ore. 347, 759 P.2d 253, 1988 Ore. LEXIS 446 (1988).

138. A surviving spouse of an employee killed while at work can sue in her individual capacity as a plaintiff under the employer's liability law of *Or. Rev. Stat. § 654.305 to 654.335* to recover damages for the death, but if the statute cannot be applied in a particular case, then an action for wrongful death must be brought under *Or. Rev. Stat. § 30.020* by a person in the capacity of a representative of the deceased party, and the action will be predicated on the common-law negligence of the responsible party. *Myers v. Staub*, 201 Or. 663, 272 P.2d 203, 1954 Ore. LEXIS 310 (1954).

139. Personal representative failed to prove the elements of the wrongful death action. Although deprivation of a 30 percent chance of survival could constitute an injury, the injury that was compensable under *Or. Rev. Stat. 30.020* was death; the court declined to adopt the lost chance theory for wrongful death actions. *Joshi v. Providence Health Sys. of Or. Corp.*, 342 Ore. 152, 149 P.3d 1164, 2006 Ore. LEXIS 1344 (2006).

140. *Or. Rev. Stat. § 656.156(2)* allowed a deceased worker's personal representative sue the worker's employer for

intentionally causing the worker's wrongful death when the worker's only beneficiaries were the worker's nondependent parents because the parents were among those persons on whose behalf the personal representative could sue for the worker's deliberate wrongful death pursuant to *Or. Rev. Stat. § 30.020*. *Behurst v. Crown Cork & Seal USA, Inc.*, 346 *Ore. 29*, 203 *P.3d 207*, 2009 *Ore. LEXIS 9* (2009).

141. National Childhood Vaccine Injury Act of 1986 did not preclude a wrongful death action arising out of a decedent's vaccine-related death; because the decedent might have maintained an action against defendants had she lived, plaintiff, the decedent's personal representative, could maintain a derivative action, on behalf of the decedent's children, under *Or. Rev. Stat. § 30.020(1)*. *Hobart v. Holt*, 222 *Ore. App. 550*, 194 *P.3d 820*, 2008 *Ore. App. LEXIS 1451* (2008).

142. Legislature's use of the terms special damages and general damages in *Or. Rev. Stat. § 137.103(2)* directs the court to civil law, but neither the text of the wrongful death statute, *Or. Rev. Stat. § 30.020*, nor the text of the restitution statutes, *Or. Rev. Stat. §§ 137.103 to 137.109*, aids in discerning what the legislature meant by the terms special damages or general damages, and as such, the court applies the familiar statutory construct to discern the legislature's intent in using those terms; the court finds that the terms are legal terms of art and the court has recognized the continuing use of the term special damages to refer to those damages that are naturally, but not necessarily resulting from the injury and the term general damages to refer to damages that are the natural and necessary result of the injury, and the legislative history of the restitution scheme confirms that the legislature understood the terms general and special damages to have the meanings ascribed to those terms in Oregon case law. *State v. Ferrara*, 218 *Ore. App. 57*, 178 *P.3d 250*, 2008 *Ore. App. LEXIS 165* (2008), review denied by 344 *Ore. 539*, 186 *P.3d 285*, 2008 *Ore. LEXIS 370* (2008).

143. Motion for judgment on the pleading under *Or. R. Civ. P. 21(B)* was erroneously granted to a municipal corporation and its employee in a wrongful death action brought by the personal representative of a deceased minor's estate, who was a surviving parent, pursuant to *Or. Rev. Stat. § 30.010* et seq., which was granted on the grounds of immunity because the claim was covered under the Workers' Compensation Law under *Or. Rev. Stat. § 30.265(3)(a)* of the Oregon Tort Claims Act, because § 30.265(3)(a) violated *Or. Const. art. 1, sec. 10* by denying any substantial remedy to the surviving parent, leaving him without a remedy; the right to receive a burial payment under *Or. Rev. Stat. § Or. Stat. § 656.204(1)* of the Workers' Compensation Law deprived the surviving parent from being awarded a just, fair, and reasonable compensation for his pecuniary loss and for the loss of the society, companionship, and services of his minor child as provided by *Or. Rev. Stat. § 30.010(2)* and *Or. Rev. Stat. § 30.020(1)*. *Neher v. Chartier*, 319 *Or. 417*, 879 *P.2d 156*, 1994 *Ore. LEXIS 72* (1994), overruled in part by *Storm v. McClung*, 334 *Ore. 210*, 47 *P.3d 476*, 2002 *Ore. LEXIS 383* (2002).

LAW REVIEWS

1. 8 *Animal L. 199*, ARTICLE: THE ECONOMIC VALUE OF COMPANION ANIMALS: A LEGAL AND ANTHROPOLOGICAL ARGUMENT FOR SPECIAL VALUATION.

2. 74 *Or. L. Rev. 379*, NOTE: The Remedy Clause Analysis of *Neher v. Chartier*.

3. 77 *Or. L. Rev. 497*, ARTICLE: Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?.

4. *31 Willamette L. Rev. 121*, COMMENT: ZEHR V. HAUGEN AND THE OREGON APPROACH TO WRONGFUL CONCEPTION: AN OCCASION FOR CELEBRATION OR LITIGATION?.

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