

Legislative Update

Potential Expansion of Right to Sue to Recover Certain Personal Injury Damages

By Hon. Allan Goodman (Ret.)

Synopsis

Legislation now pending (SB 29) would extend the time in which certain survivorship damages—for pain, suffering and/or disfigurement—in addition to other survivorship damages may be recovered beyond the current December 31, 2025 cut off to the same date in 2030.

Discussion

“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” (Frankfurter, J. dissenting in *Henslee v. Union Planters National Bank & Trust Co.* (1949) 335 U.S. 600)

In California, “wisdom” in the realm of damages allowable in civil litigation did not first come until 1949 when our Legislature enacted a statute allowing post-death actions for physical injuries to persons. Even then, this “wisdom” was only partial; that statute limited damages recoverable to those for loss of earnings and expenses sustained or incurred as a result of the injury to the deceased prior to death; damages for pain, suffering, disfigurement and punitive damages were excluded. In a 1960 Report, the California Law Revision Commission recommended removing the bar on recovery of these categories of damages. (The Commission Report) While legislation enacted in 1961 allowed recovery of punitive damages and of other damages not involving physical injury, the ban on recovery of damages for pain, suffering or disfigurement remained.

Why? The view that prevailed was that “such peculiarly personal elements of damages as pain [and] suffering” did not warrant being redressed by recovery of such damages by the decedent’s estate. (Commission Report at p. F-23.) This bar on recovery of damages for pain, suffering and disfigurement was continued when Code of Civil Procedure section 377.34 was enacted in 1992. And so, things continued. (See discussion in *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 295-296 [*County of L.A.*]).

These incremental enactments brought California closer to the damages remedies that had been available in the vast majority of states for many years. The bar on recovery of damages for “pain, suffering or disfigurement” remained notwithstanding the Commission’s 1961 recommendation or the recovery allowed in other states.

And so, the state of the law in California remained until recently, when the “wisdom” of the Commission’s 1960 recommendation became “clearer.” (Also, by 2020, only five states barred recovery of non-economic damages in

survival actions: Arizona, California, Colorado, Florida and Idaho.) In 2021, the Legislature amended Code of Civil Procedure Section 377.34 to allow recovery in a survival action of damages for pain, suffering and disfigurement (claims which otherwise would expire on death of the injured person), thus implementing the Commission's 1960 recommendation that "Causes of action should survive because they exist and could have been enforced by or against the decedent and because, if they do not survive, the death of a victim produces a windfall for the wrongdoer." Thus, as stated in the Commission Report, the recovery of these types of damages should not be barred "merely because of the fortuitous intervention of death...." (Commission Report at F-7.)

Even with the wisdom of this legislative change, a temporal limitation was included: Although as introduced, the 2021 bill had entirely removed the limiting language from the statute, the text eventually enacted placed limits on claims for these types of damages by allowing suits for their recovery only if "the action or proceeding was granted a preference pursuant to [Code of Civil Procedure] Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026."

The statute also requires the successful plaintiff to make a specified report to the Judicial Council, which is required to file a report to the Legislature.

And, the statute does not alter Civil Code section 333.21 which limits non-economic damages in medical negligence cases; nor does it affect claims brought under the Elder Abuse and Dependent Adult Civil Protection Act.

The four-year window for potential recovery of such damages was placed out of concern by opponents of the original version of the bill that enactment as originally proposed would place the power in the hands of juries to return "nuclear verdicts."

What happens to claims that do not meet the deadline, i.e., those brought after December 31, 2025? SB 29 is pending in the California Legislature to extend the "sunsetting" of the once-expanded recovery period to January 1, 2030, four additional years. As with the 2021 legislation, the original text of SB 29 had merely removed the end date on the authorization for claims for these damages. Before the bill passed the Senate in this legislative session, however, it was amended to insert language to place the new four-year limitation on the bringing of such claims. At the writing of this article, SB 29 is pending in the Assembly, with the 2030 cap. Given the history of this legislation, wisdom suggests that the 2025 Legislature may enact SB 29 with this extension, so that damages for pain, suffering or disfigurement may continue to be sought for an additional four years. Whether the time limit on the availability of such damages will even be removed remains to be determined.

Comparison with Wrongful Death Damages

Litigation occasionally confuses damages available in survival actions from damages available in wrongful death actions. Illustrative of the distinctions in damages which may be sought on these somewhat different claims, the table below lists several of the

types of damages available in survival actions and the types of damages available in wrongful death actions. Appreciating the differences begins with the recognition that the damages in survival actions are those claims that “belonged” to the decedent while those in

wrongful death actions are claims that “belong” to the surviving family members. A helpful place to start investigating these distinctions is by comparing CACI 3919 with CACI 3921. Exceptions and qualifications abound.

	SURVIVAL ACTION CCP 377.20 et seq.	WRONGFUL DEATH ACTION CCP 377.60 et seq.
Plaintiff	Personal representative of estate of decedent or decedent’s successor in interest	Surviving members of the family of the decedent
Compensatory Damages	Income lost prior to death; pre-death health expenses; property damage; pain, suffering and/or disfigurement [no damages for shortened life span	Lost financial support, gifts or benefits; lost companionship; lost household services; funeral and burial expenses; lost non-economic damages (Certain items must be reduced to present value)
Punitive damages	Available to the same extent they would have been recoverable by the decedent	Not available in many cases (see <i>Boeken v. Phillip Morris USA, Inc.</i> (2010) 48 Cal.4 th 788,

In over four decades as a lawyer, judge, arbitrator, mediator and discovery referee, Judge Allan Goodman (Ret.) has provided legal advice to development stage businesses, represented businesses or investors in venture capital financings, argued, tried and heard hundreds of cases in state and federal courts, including three in the United States Supreme Court. As a Superior Court Judge, he tried hundreds of jury and court trials, and taught judges at the Witkin Judicial College. While assigned to the Second District Court of Appeal, he heard hundreds of appeals and authored

200 appellate court opinions. Among his many cases as an arbitrator, he was the chair of a panel which heard twelve days of evidence and arguments in a legal malpractice case in which the availability of damages recoverable in the underlying “case within a case” was a principal issue.

This article is intended to provide general information about developments in the law. It is not intended to provide specific legal advice.