

Daily Journal

www.dailyjournal.com

FRIDAY, MARCH 31, 2023

PERSPECTIVE

GUEST COLUMN

California finally allows pre-death pain and suffering damages, but that's set to expire

By Sara M. Peters

With the passage of Senate Bill 447 on Jan. 1, 2022, California joined the majority of states that allow plaintiffs to recover damages for decedents' pre-death pain and suffering. At last, our judicial system will be forced to account for an element of harm overlooked for decades. As it stands, however, this provision will sunset in 2029. The legislature should make the change permanent, because doing so is both just and feasible. And, for attorneys worried about how to prove and evaluate such damages, there is no need to reinvent the wheel. We have the benefit of existing precedent from courts around the country.

The Right Thing to Do Pre-amendment, California's survivor statute violated basic principles of interactive justice by canceling defendants' debts the moment their victims died. In the book *Philosophical Foundations of Tort Law*, Tony Honoré describes justice as requiring "those who have without justification harmed others by their conduct to put the matter right." In other words, the wrongdoer owes his victim compensation, including for pain and fear. There is nothing about the victim's death that should intuitively cancel this debt. Especially where the victim's death is a result of the defendant's misconduct. Why should a defendant gain a windfall by its own wrongdoing? Yet that is how California's prior survivor statute operated.

In addition, by denying recovery of pre-death pain and suffering damages in survivor actions, the pre-2022 statute artificially limited the potential deterrent impact of such lawsuits. See *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014) ("California's prohibition against pre-death pain and suffering damages limits recovery too severely to be consistent with § 1983's deterrence policy). The availability, or lack thereof, of pre-death pain and suffering damages has a real impact on the deterrent function of the tort system. Oakland civil rights lawyer Michael Haddad speaks knowledgeably to the weightiness of such damages, given that they have long been recoverable in Section 1983 actions. He says "Anyone who's handled civil rights wrongful death cases over the past decade, on either side, would know that pre-death conscious pain and suffering damages have a significant impact on case value, even where there were only minutes of conscious suffering."

Beyond simply lessening deterrence, the prior statute also rewarded dilatory litigation conduct by some defendants. When plaintiffs died during litigation, defendants sometimes escaped accountability for the full measure of noneconomic damages attributable to their misconduct.

Now, having corrected some of these issues, California finds itself in good company. By 2011, most U.S. states allowed a decedent's estate to recover for pre-death pain and suffering damages. In *Arent Fox*,

LLP's 2011 Survey of Damage Laws of the 50 States, it listed only Arizona, Nevada, Wyoming, and California as still prohibiting the recovery of predeath pain and suffering damages in a survival action. Given its liberal reputation, it is surprising that California spent so long as a hold out, trailing behind states like Alabama and Mississippi in affording compensation for decedents' pain and suffering.

Feasibility and Implementation As amended, Code of Civil Procedure Section 377.34(b) allows recovery of pre-death "pain, suffering, or disfigurement" in cases filed on or after Jan. 1, 2022, and before Jan. 1, 2026, as well as in cases granted preference before Jan. 1, 2022. Unless and until the legislature extends this provision, it will become inoperative Jan. 1, 2029.

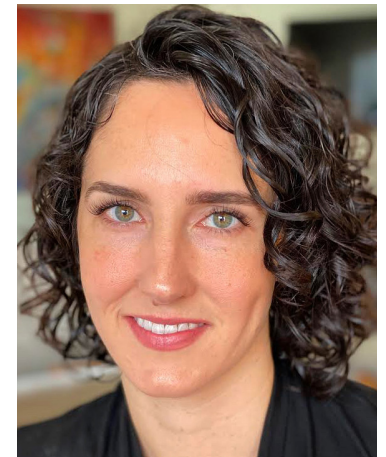
The amended Section 377.34 goes on to require plaintiffs who recover such damages by "judgment, consent judgment, or court-approved settlement agreement" to report to the Judicial Council the amount and type of damages awarded. The Judicial Council will, in turn, transmit this data to the legislature, presumably to assist the legislature in deciding whether to make the provision permanent. (It does not appear that these reporting requirements apply to the majority of survival actions, most of which resolve via private settlements.)

For lawyers and judges worried about evidentiary issues regarding pre-death pain and suffering damages, there is already a roadmap. Jurisprudence from other states,

and from California cases involving Section 1983 violations, elder neglect and abuse, and maritime torts, describe common approaches to evidentiary issues that may arise. See 1 Stein on Personal Injury Damages Treatise § 3:59 (3d ed). For example, in cases where death occurs instantaneously with physical impact, damages may still be recoverable for pre-impact terror. *Id.*

Likewise, jury trials and verdicts from around the country provide some guidance for settlement evaluations and trial strategies. Seattle trial attorney Jackson Pahlke of Connelly Law Offices points out that (just as with pain and suffering damages for a living plaintiff) the measure of damages is highly fact-specific, dependent on "duration, consciousness, and the scene in general," whether "the person is confused and in pain" and whether

Sara M. Peters is a shareholder at Walkup, Melodia, Kelly & Schoenberger.



they are alone at the time of death. In Connelly's experience, the biggest driver of damages is simply the fact "that they experienced their death." In settlement discussions and at trial, Connelly has also found that "the terror and fear, and pain, from dying from someone [else's] wrongdoing is an awful thought that jurors and decision

makers understand and place value on."

Even where plaintiffs do not live to tell about their pain and suffering, in courtrooms around the country plaintiffs' attorneys have found ways to equip the jury with enough evidence to make a reasoned inference. In one trial, an expert neuropathologist took the stand to

explain that, after a bullet penetrated a plaintiff's internal organs, his brain continued functioning for minutes – long enough for nerve pathways to transmit pain signals, for the brain to interpret the pain, and for the plaintiff to consciously experience terror and mental anguish. In another trial, counsel played a video of a fatal workplace

accident. After a crane collapse, a countdown timer appeared on the screen, logging the seconds during which the crushed plaintiff likely remained conscious, processing both pain and fear. In another case, a terminally ill plaintiff records videotaped testimony regarding her present pain and anxiety, to be used at a trial she will not live to see.