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*Restatement of the Law, Second, Torts, § 926*

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§ 926 Survival of Tort Actions

**Under statutes providing for the survival or revival of tort actions, the damages for a tort not involving death for which the tortfeasor is responsible are not affected by the death of either party before or during trial, except that**

**(a) the death of the injured person limits recovery for damages for loss or impairment of earning capacity, emotional distress and all other harms, to harms suffered before the death, and**

**(b) the death of the tortfeasor terminates liability for punitive damages.**

**COMMENTS & ILLUSTRATIONS: Comment on Clause (a):**

a. As stated in § 900, at common law the death before trial either of the tortfeasor or of the injured person extinguished the right of action and, if it occurred between trial and judgment, prevented judgment from being given. The statutes of many states now provide that the representative of a deceased person can institute an action for tort after the plaintiff's death and can continue an action brought by him. They commonly provide also that the death of the defendant does not prevent or abate actions for torts committed by him. Under these statutes, if the tort does not involve harm to the person, the same elements of damage are recoverable after the death of either party as if the death had not occurred. Even when there is harm to the person and the injured person dies, if the defendant's act did not cause the death or if suit is not brought for the death, the same elements of damage are considered but the amount of damage is crystallized by death at any time before trial. Damages for loss or impairment of earning capacity, pain, emotional disturbances and other harms are limited to those occurring before death.

If the defendant's act has caused the death, in most states the survival and revival statutes are interpreted as giving to the representative of the estate no more than the damages accruing before the death. In these states it is to be noted that when death immediately results from the tort without an appreciable period of suffering intervening, there can be no recovery except under a death statute. In other states, as stated in paragraph three of Comment b on § 925, a survival or revival statute may, in all or some of the situations in which the defendant has caused death, combine the functions of a death statute and a survival statute, and in these states the representatives of the deceased can recover in a single action both for the damages preceding death and for those caused by the death. Even in these states, however, a judgment obtained by the deceased or a release of the cause of

action by him terminates the right of action.

Because of the overlapping of the damages recoverable under a separate death statute, damages for shortening the life of the deceased are not recoverable under a survival statute, although these damages are given under a combined death and survival statute.

b. Survival statutes usually provide for the limitation of actions to a specific period after death. This differs in effect from the statute of limitations applying to the original cause of action. The former is regarded as limiting the right; the latter as merely affecting the remedy. Consequently, the time-limit in the survival statute of the state where the tort was committed will be applied though a longer time is given by the statute of the state where the action is brought. (See Restatement, Second, Conflict of Laws, §§ 142, 143).

**REPORTERS NOTES:** In support of Clause (a): [Fitzgerald v. Hale, 247 Iowa 1194, 78 N.W.2d 509 \(1956\)](#); [Payne v. Georgetown Lbr. Co., 117 La. 983, 42 So. 475 \(1906\)](#); [Rouse v. Michigan United R. Co., 164 Mich. 475, 129 N.W. 719 \(1911\)](#); [Hindmarsh v. Sulpho Saline Bath Co., 108 Neb. 168, 187 N.W. 806 \(1922\)](#); [Memphis St. Ry. Co. v. Prince, 2 Tenn.Civ.App. 688 \(1912\)](#).

In support of Clause (b): [Holm Timber Industries v. Plywood Corp. of America, 242 Cal. App.2d 492, 51 Cal.Rptr. 597 \(1966\)](#); [Rowen v. Le Mars Mut. Ins. Co., 282 N.W.2d 639 \(Iowa 1979\)](#); [J. H. Leavenworth & Son, Inc. v. Hunter, 150 Miss. 245, 116 So. 593 \(1928\)](#); [Hayes v. Gill, 216 Tenn. 39, 390 S.W.2d 213 \(1965\)](#); [Dalton v. Johnson, 204 Va. 102, 129 S.E.2d 647 \(1963\)](#).

Death of the injured party does not affect liability for punitive damages. [National Bank of Bloomington v. Norfolk & Western Ry. Co., 73 Ill.2d 160, 23 Ill. Dec. 48, 383 N.E.2d 919 \(1978\)](#).

**CROSS REFERENCES:** ALR Annotations:

Validity of exception for specific kind of tort action in survival statute. [77 A.L.R.3d 1349](#). For whose benefit a survival action under the Federal Employers' Liability Act, or the Jones Act, may be prosecuted. [94 A.L.R.2d 910](#).

Assignability and survivability of cause of action created by civil rights statute. [88 A.L.R.2d 1153](#).

Action or claim for punitive damages as surviving death of person wronged. [63 A.L.R.2d 1327](#).

Right of parent or representatives to maintain tort action against minor child. [60 A.L.R.2d 1284](#).

Statutory liability for physical injuries inflicted by animal as surviving defendant's death. [40 A.L.R.2d 543](#).

Action against spouse or estate for causing death of other spouse. [28 A.L.R.2d 662](#).

Contributory negligence of beneficiary as affecting action under death or survival statute. [2 A.L.R.2d 785](#).

Digest System Key Numbers:

C.J.S. Abatement and Revival §§ 117, 132-148, 159; Forcible Entry and Detainer § 30.  
West's Key No. Digests, Abatement and Revival 52 et seq.

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