

How to obtain punitive damages (and pre-death pain and suffering damages) in a California wrongful death lawsuit

By Kevin Boyle and Nicholas W. Yoka

On March 29, 2001, fifteen passengers boarded an airplane in Los Angeles bound for a birthday celebration in Colorado. They never returned. Instead, as the airplane approached its destination, it crashed into a hillside, killing all 15 passengers – “instantly,” according to the coroner’s reports. Investigation revealed evidence of reckless conduct in disregard of human safety by the pilot and charter company, arguably raising a colorable claim for punitive damages. But given California law that wrongful death claimants cannot recover punitive damages, and the fact that all the passengers were “instantly” killed in the crash according to the coroner, were those punitive damages even recoverable? This is the question we asked ourselves when our firm began representing several of the families involved in this catastrophic plane crash.

As explained in this article, the answer is “yes, it is possible.” There is no doubt that *wrongful death claimants* are prohibited from seeking punitive damages;

the clear statute and decades of authority close the door. *Survival actions* though are a different story. If a *survivor action* or a case made by an *estate representative* can prove that a decedent was injured but lived for a discernible period of time before dying, however briefly, or the decedent’s personal property was damaged prior to death, then punitive damages are available.

In this case, we obtained expert testimony from a biomechanic expert and a medical doctor with an expertise in death that our decedents suffered injury as the plane impacted the mountain and survived for .08 seconds before their ultimate death. With this evidence we no longer faced a legitimate threat of a summary adjudication motion to kick out the punitive claims. We presented this evidence at trial, and got a finding of malice, and a very large compensatory damages award. The case settled as the jury was deciding the punitive damages amount.

The inclusion of a valid punitive damages claim can greatly increase both the

settlement and trial value of a wrongful death case. In the plane crash case just described, the defendant admitted liability and was hoping for a whitewashed trial on damages only, without any of their conduct or the horrors of the plane crash itself being shown to the jury. Accordingly, in pleading and preparing a wrongful death action, it is critical to understand the legal framework and evidentiary showings necessary to preserve a claim for punitive damages. Understanding these claims—and what must be shown to make them—can make an enormous difference to your clients’ recovery.

THE CAUSES OF ACTION: WRONGFUL DEATH VERSUS SURVIVAL

While the differences between a wrongful death and survival action may seem technical and minute, they have wide-reaching implications. A “wrongful death” claim is “a statutory claim providing compensation for specified heirs of the decedent for the loss they suffered as a result of the decedent’s death.” (*Adams v. Superior Court* (2011) 196 Cal.App.4th 71, 76 [126 Cal. Rptr.3d 186].) In California, wrongful death claims are codified at Code of Civil Procedure section 377.60. The statutory wrongful death heirs, and not the decedent, hold the right to bring a wrongful death claim. Specifically, section 377.60 provides that wrongful death claims may be asserted by the heirs of the decedent or a personal representative on behalf of the estate.



Kevin R. Boyle is a founding partner of Panish | Shea | Boyle | Ravipudi LLP and specializes in resolving large, high-profile plaintiffs cases by trial or settlement.
www.psblaw.com



Nicholas W. Yoka is a trial attorney with Panish | Shea | Boyle | Ravipudi LLP and specializes in litigating catastrophic personal injury and civil rights cases.
www.psblaw.com



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In contrast, a “survival” claim involves causes of action belonging to the decedent that are brought by a decedent’s personal representative or successor in interest. Unlike a wrongful death claim, which arises only after the decedent’s passing, survival claims necessarily arise before the death because they are claims that the decedent could have brought had they not been killed. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1264 [45 Cal.Rptr.3d 222].) In other words, a survival action “[does] not create a cause of action but merely prevent[s] the abatement of decedent’s cause of action.” (*San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1553 [53 Cal.Rptr.3d 722].)

WHAT IS RECOVERABLE IN EACH ACTION?

The technical distinction between wrongful death and survival claims carries immense ramifications for damages, including punitive damages.

Wrongful death claims exist as a “creature of statute” that did not exist at common law, and the Legislature “both created and limited the remedy.” (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1439 [111 Cal.Rptr.2d 534].) An action for wrongful death “exists only so far and in favor of such person as the legislative power may declare.” (*Justus v. Atchinson* (1977) 19 Cal.3d 564, 575 [139 Cal.Rptr. 97].) In other words, wrongful death damages are limited to those specified in the statute, and nothing more.

Those damages are more restricted than those available at common law. Section 377.60 provides that the measure of damages in a wrongful death action is the “value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived.” (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270].) Wrongful death claimants are entitled to recover damages for their own pecuniary loss. This may include: “(1) the loss of the decedent’s financial support, services, training and advice, and (2) the pecuniary value of the decedent’s society

and companionship.” (*Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 789 [6 Cal.Rptr.3d 650].) But the wrongful death claimant “may not recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss.” (*Ibid.*) In order to receive damages for grief, sorrow, or mental suffering, the claimant may bring a viable claim for negligent infliction of emotional distress. Wrongful death claims also do not permit damages from medical expenses incurred prior to death (unless paid for by the

Last year, CAOC’s historic change to allow pre-death pain and suffering damages to survive the victim’s death went into effect. Senate Bill 447 (Laird) allows damages for a decedent’s pain, suffering, or disfigurement to be recovered in an action brought by the decedent’s personal representative or successor in interest, if the action or proceeding was granted a specified preference before January 1, 2022, or if the action was filed on or after January 1, 2022, and before January 1, 2026.

SB 447’s reporting requirement for plaintiffs:

The bill also requires a plaintiff who recovers damages for pain, suffering, or disfigurement between January 1, 2022, and January 1, 2025, to submit to the Judicial Council a copy of the judgment, consent judgment, or court-approved settlement agreement entitling the plaintiff

to the damages and a cover sheet containing certain information. [Click here for a form created by CAOC](#) to make this self-reporting requirement easier for practitioners.

Why this self-reporting data matters:

Because the bill’s provisions sunset in 2026, we will need to pass legislation in 2025 to either extend or (ideally) eliminate the sunset altogether. We will need data of how the bill has been working in the real world to help us make the case for eliminating the sunset before the law expires. Finally, the Judicial Council will create a report to the Legislature detailing this self-reporting information, so please make sure to submit your forms in a timely fashion.

Contact CAOC’s Legislative department with any questions.

claimant) or wage losses, except to the extent such losses bear on claimant's loss of financial benefits from decedent. (*County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 304 [87 Cal.Rptr.2d 441].)

Punitive damages are likewise expressly prohibited for wrongful death claimants. Code of Civil Procedure section 377.61 specifically prohibits such damages, stating that wrongful death claimants may not be awarded "damages recoverable under section 377.34." An exception to this rule exists when an action is "based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time." (Civ. Code, § 3294, subd. (d).)

Section 377.74 applies to survival actions, and provides that proper survival claimants may receive damages "the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived..." Commenting on the divergence in damages between the two causes of action, one court reasoned that "to grant the heirs an additional, separate and independent right to recover punitive damages in a wrongful death action would permit double punishment for the same tortious conduct and could also lead to double recovery of punitive damages by the heirs." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 835 [174 Cal.Rptr. 348].)

The California Legislature's motivation notwithstanding, the statutory scheme is clear: Punitive damages are always unavailable to wrongful death claimants under section 377.60, and are only available to survival claimants under section 377.74 if there was a basis for the decedent to claim them.

"SPRINGBOARDS" FOR PUNITIVE DAMAGES

Considering the divergence between wrongful death and survival action damages, you must consider whether the facts support a survival action and punitive damages. Part and parcel to this consideration is a morbid evaluation of the facts, including the precise circumstances of the decedent's passing.

The *sine qua non* of a survival action is either the decedent's survival for an appreciable period of time following the causative event or damage to or loss of the decedent's personal property before death. (Code Civ. Pro., §§ 377.30, 377.31; *Stencel Aero Engineering Corp. v. Superior Court* (1976) 56 Cal.App.3d 978 [128 Cal.Rptr. 691]; *Grimshaw v. Ford Motor Co.*, *supra*, 119 Cal.App.3d at p. 829.) In both cases, establishing the decedent's survival is key.

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For instance, in *Stencel*, heirs of a pilot whose parachute malfunctioned were able to recover punitive damages in a survival action because \$200 of the pilot's personal property impacted the ground and was damaged mere seconds before he was killed on impact. By contrast, in *Pease v. Beech Aircraft Corp.* (1974) 38 Cal.App.3d 450 [113 Cal.Rptr. 416], heirs of several individuals "killed instantly" in an airplane crash were prohibited from claiming punitive damages because no survival claims arose.

Establishing either pre-death survival or pre-death property damage may provide a "springboard" for punitive damages. As the appellate court noted in the infamous O.J. Simpson civil wrongful death case, "[r]elatively minor compensatory damages, such as here the decedents' clothing and personal property damages during the homicides, can be a springboard for substantial punitive damages." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492].)

PRACTICE TIPS

Obtaining punitive damages requires proper pleading of the survival action and a meticulous investigation of the pertinent facts. You should also consider retaining proper experts to opine on the sequence of events and injuries leading to the death.

Proper Pleading

Because a poorly drafted complaint can eliminate punitive damages on the pleadings, you should take care to avoid

pleading those damages away. The decedent's death should not be described as "instantaneous" or "simultaneous" with the incident. Instead, both the injuries and any loss of personal property should be pled as arising "prior to the decedent's death." To eliminate any doubt, the complaint should expressly allege that the decedent was physically injured for a discernible period of time prior to death, that the decedent's property was damaged for a discernible period of time prior to death, and that the loss "survived the decedent."

Also, as discussed below, given the new availability of pre-death pain and suffering of the decedent, it should also be pled that the decedent suffered emotional trauma prior to death due to the circumstances leading up to the death.

Discover the Facts

The coroner's report

A death action will almost always involve a coroner or medical examiner's report. This report may be detailed, or it may be fairly cursory. In either case, understanding the report and its conclusions can greatly inform investigation for the remainder of the survival cause of action. But the report should not be treated as dispositive, regardless whether it supports or undermines the viability of a survival action. Quite frankly, coroners routinely describe deaths as "instantaneous" to make the family of the decedent feel better. The reality is, as many experts will opine, that there is no such thing as "instantaneous" death, and that even something that seems as sudden as a jet airplane crashing into a mountain takes time. Also, look at the coroner's reports carefully for errors. In the case described at the outset of the article, the coroner described all of the plane's 15 occupants as having died "instantaneously," yet he listed different times of death for everyone. We were able to use that with the jury to discredit the concept of "instantaneous" death and to show that the term is often used to comfort the surviving family members.

The coroner's report should be regarded as a guidepost for future investigation – and sometimes it will help make your arguments that there was a discernible period of time between the onset of the injury and the death. In one example, a coroner's report demonstrating that an airplane crash victim

died from smoke inhalation (as opposed to blunt force trauma) led to our retention of a pathologist to independently identify the cause and timing of death and support the survival action; it takes time for someone to die from smoke inhalation. Thus, as discussed further below, a proper expert or experts should be retained if a question arises about the time of decedent's death in relation to the incident.

Fact witnesses

Review statements in the incident reports and take the depositions of fact witness. There is often evidence in the surrounding aftermath of collision to provide support for a survival cause of action. For instance, in one matter, witnesses reported seeing a decedent move after the incident, a critical fact that helped establish that the decedent briefly survived the incident rather than simultaneously dying.

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Other evidence

Each case may present unique evidence that establishes a decedent's survival, however brief, from the incident causing death, even in the absence of pathological or eyewitness evidence. You should consider the facts of the incident and determine whether any such evidence may exist. For instance, the position of a seatbelt may indicate that a decedent was alive following a vehicle collision. This unique evidence is often partially destroyed or obscured by the event causing the decedent's death, therefore, a specially-trained expert will likely be necessary to assess and comment on the evidence.

The Right Experts

As noted, merely discovering and assessing the facts can be insufficient to establish a survival claim and experts are needed to unpack the information. Our office often retains a combination of experts, including an accident reconstructionist, a bio-mechanics expert, a forensic pathologist,

and physicians, to show the discernable time that transpired between a decedent's injury and death. Not only are such experts crucial in opposing defendants' inevitable motion for summary adjudication, they allow us to present the last moments of our client's loved one's life and the traumatic nature of their death to the jury. This testimony is critical to a successful survival claim.

Retaining the proper experts was precisely what kept punitive damages as a viable claim in the settlement described at the outset of this article. Even though the coroner's reports showed the victims instantly succumbed to “blunt force trauma” at the time of the crash and corresponding “instantaneous death,” defendants could not have justifiably moved for summary adjudication. The reason for this is because plaintiffs' experts showed that not only were the coroner's reports unreliable for the precise timing the defendants wished to draw from them, the decedents horrifically suffered another set of injuries before the blunt force trauma that ultimately claimed their lives. Without the right experts, the defendants would have undoubtedly used the coroner's reports finding an instantaneous death in an airplane crash to eliminate the survival claim, and, consequently, punitive damages. The right experts and the right investigation kept that from happening.

Pre-Death Pain and Suffering

It is extremely important to mention that on October 1, 2021, Governor Gavin Newsome signed into law SB 447, which will allow for pain and suffering damages in a survival action for any case filed after January 1, 2022, and before January 1, 2026, or if the action was granted a preference pursuant to section 36 before January 1, 2022. Specifically, the amended section 337.34(b) provides as follows: “Notwithstanding subdivision (a), in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.” So critical that facts supporting pre-death pain and

suffering under 337.34(b) are pled, and that damages under that section can be sought as a remedy. Inclusion of this claim will also permit the facts and circumstances of the death to go to the jury, even if the defendant admits liability to attempt to whitewash the trial. It should be noted that no published cases have interpreted section 337.34(b) yet, so it is unclear if there must be physical injury or damage to property prior to death. But it would seem to be prudent to plead facts and allegations that would support physical injury, emotional suffering, and damage to property prior to death.

Conclusion

Proper investigation, pleading, and expert retention is essential to maintaining a claim for punitive damages (and now pre-death pain and suffering) in an action arising from the wrongful death of a client's loved one. Failing to properly recognize and prepare for the pitfalls may eliminate punitive damages from consideration and greatly diminish the value of the case. ■