

# SURVIVAL ACTIONS AFTER THE 2021 AMENDMENT TO CODE OF CIVIL PROCEDURE SECTION 377.34:

LEVERAGING DIVERSE FORMS OF EVIDENCE TO PROVE CONSCIOUS PREDEATH PAIN AND SUFFERING

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When negligence or misconduct causes the death of a loved one, survivors may bring tort claims for damages under two distinct theories. First, a wrongful death action is an independent claim on behalf of the decedent's heirs for damages they personally suffered on account of the death. (Code Civ. Proc., § 377.60 et seq.) Second, a survival action is for injuries the decedent suffered before death; this cause of action, asserted by the decedent's personal representative or successor in interest, "survives" to the decedent's estate for the purpose of recovering damages that the decedent could have been awarded had he or she lived. (§§ 377.20, 377.30; *Adams v. Superior Court (Centinella Freeman Regional Med. Ctr.)* (2011) 196 Cal. App.4th 71, 78-79.) Our focus in this article is survival actions — specifically, actions for damages based on pain and suffering a decedent experienced before death.

Until recently, California was one of only five states that did not usually permit recovery for the decedent's general damages (pain, suffering, disfigurement) in survival actions. (Code Civ. Proc., § 377.34; see *Welf. & Inst. Code*, § 15657 [governing actions for elder and dependent adult abuse].) In 2021, however, Governor Newsom approved

Senate Bill 447 and amended California law to allow these damages. (Code Civ. Proc., § 377.34, subd. (b).) The newly amended statute raises several questions. When does a survival action serve clients' best interests under the new law? What must a plaintiff show to recover damages for a decedent's pain and suffering? And on what evidence or facts?

In answer to these questions, this article outlines the historical development of survival actions in California. Then it illustrates how various types of evidence — such as percipient and expert witness testimony, medical records, autopsy reports, and video footage — can substantiate the nature and extent of pre-death pain and suffering and maximize clients' compensation for survival claims, ensuring justice is served for decedents and those they leave behind.

## A SHORT HISTORY OF SURVIVAL ACTIONS IN CALIFORNIA

Historically, damages for survival actions included only economic losses, including a decedent's medical bills and lost wages, and punitive or exemplary damages. This limitation seemed in line with the primary

purpose of a civil tort action: to try to place the injured party in the position that he or she would have been in absent the wrong. As explained in *Garcia v. Superior Court* (1996) 42 Cal.App.4th 177, 186: “Code of Civil Procedure section 377.34 represents the Legislature’s reasonable judgment that, once deceased, the decedent cannot in any practical way be compensated for his injuries or pain and suffering, or be made whole.”

However, this limitation overlooked a somber reality: when severely injured plaintiffs died while awaiting trial, their ability to claim pain and suffering died with them. This led to a significant reduction in the value of their cases. This “death discount” rewarded wrongdoers with an unfair economic benefit. Disturbingly, it also provided an incentive for defendants to delay trials in the hope that the plaintiffs would die before their day in court. And this rational but chilling strategy placed an additional burden on courts. Defendants’ deliberate pursuit of the “death discount” became evident when, following the suspension of jury trials in March 2020 due to COVID-19, defendants refused to consent to bench trials and objected to virtual trials, creating a huge backlog in cases.

Recognizing the need for change, the California Legislature enacted the 2021 amendment. It permits the recovery of general damages, including pain and suffering, incurred prior to death if the cause of action or proceeding was granted a preferential trial date before 2022, or if it is filed between January 1, 2022 and January 1, 2026. The California Legislature will reconvene in 2026 and determine whether they want to make the amendment permanent. (Code Civ. Proc., § 377.34, subs. (b)-(d).)

## **SURVIVAL ACTIONS: WHEN TO FILE AND WHEN TO HOLD BACK**

Determining whether to pursue a survival action for damages based on predeath pain and suffering requires a careful evaluation of the strength of the case and the availability of evidence. At the threshold, two factors can weigh against bringing this action.

First, if the wrongful death occurred instantaneously (or nearly so), predeath pain and suffering may appear speculative or minimal. In these circumstances, pursuing a claim for pain and suffering might impact a party’s credibility or distract the jury, while adding little to the existing wrongful death recovery. It may be prudent to refrain from bringing a survival action.

The second factor is the potential impact of medical liens in cases in which the decedent received extensive medical treatment before death — resulting in sizable unpaid medical bills. Because a survival action arises from the decedent’s tort claim, recovery is subject to medical liens enforceable against damages awarded to the decedent’s personal representative. (Welf. & Inst. Code, §§ 14124.72-14124.79; see § 14124.72, subd. (c); see generally, Haning, Flahavan, Cheng & Wright, Cal. Practice Guide: Personal Injury (The Rutter Group) chs. 1 & 3; compare *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819-820.) In contrast, a medical lien may not be asserted against a wrongful death settlement or judgment. In a wrongful death action, the decedent’s medical expenses are not recoverable by survivors, so allowing enforcement of a medical lien against wrongful death damages “would reduce those damages below the amount needed to fully compensate the survivors for the harm done to them.” (*Fitch*, at p. 820.)

Therefore, depending on the expected recovery, if large medical liens will be asserted on your client’s award in a survival action, it may be better to refrain from bringing the claim, especially if the responsible party has limited financial means or inadequate insurance coverage.

## **ESTABLISHING PREDEATH PAIN AND SUFFERING**

Predeath pain and suffering damages rest on the physical and emotional distress a decedent experienced as a result of the defendant’s wrongful actions or negligence. Almost invariably, statutes governing survival actions (including California’s) are silent as to the requirements for a showing of “pain and suffering.” Case law can fill these in. Although California courts have not yet explicated this requirement, the Ninth Circuit and other jurisdictions with a history of granting predeath pain and suffering awards can offer guidance on establishing the decedent’s pain and suffering and on pitfalls to avoid.

Most courts require the plaintiff to prove conscious pain and suffering prior to death. Consciousness simply means awareness of oneself or one’s surroundings, possessed of mental faculties not dulled by sleep, faintness, or stupor, awake. (“Consciousness,” Merriam-Webster Dict. <[www.merriam-webster.com/dictionary/consciousness](http://www.merriam-webster.com/dictionary/consciousness)> [as of Nov. 6, 2023].) As such, if death was nearly instantaneous, or the plaintiff was unconscious or anesthetized for the entire period between injury and death, an award for pain and suffering may not be appropriate. (E.g., *Cook v. Ross Island Sand*

and Gravel Co. (9th Cir. 1980) 626 F.2d 746, 749-750 [holding the plaintiff must show by a preponderance of the evidence “that the decedent was conscious for at least some period of time after he suffered injuries which resulted in his death”]; McGrail v. Lee (La.Ct.App. 2d Cir. 2002) 814 So.2d 729 [damages properly awarded for predeath pain and suffering if there is a scintilla of evidence of any suffering or pain on the part of the deceased by his actions or otherwise]; cf. St. Clair v. Denny (1989) 245 Kan. 414 [claim failed when decedent motorist was seen unconscious just after accident, there was no evidence that she consciously experienced or was capable of experiencing pain and suffering after moment of impact, and she was not responsive to outside stimuli and did not utter any audible words or other sounds].)

On the other hand, there is no hard and fast rule that dictates the length of time the decedent must have survived and remained conscious to justify an award for pain and suffering. Nor is there some minimum level of consciousness. Even a newborn or very young child is not automatically precluded from such a recovery on the grounds that he or she could not have had the requisite cognitive awareness. It is therefore essential to present compelling evidence to substantiate these damages. This evidence comes in many forms.

## PERCIPIENT WITNESS TESTIMONY

Percipient witnesses — who were present at the scene of the incident, or were involved in post-incident treatment — can offer firsthand accounts of the decedent’s condition and suffering. Their testimony can include observations of physical distress, emotional distress, and verbal and nonverbal expressions of pain. Common percipient witnesses include:

- **Eyewitnesses:** These individuals were physically present during the incident and can provide details of the injured party’s condition. Bystander eyewitnesses may recall statements made by the decedent, their condition, or visible signs of distress.
- **First Responders:** Paramedics, firefighters, police officers, or other first responders are often among the first witnesses to the scene of an accident or emergency. In addition, they are accustomed to scenes of emergency and trained to assess individuals in distress, making their testimony highly credible. They can describe the decedent’s physical condition, behavior, and expressions of pain. And their

medical interventions and recorded observations can also serve as crucial evidence. To bolster their testimony, they should be designated as nonretained expert witnesses as appropriate.

- **Treating Physicians and Medical Providers:** Because treating physicians can provide expert testimony regarding the nature and severity of the pain, as well as any conscious suffering experienced by the patient, they should also be designated as nonretained experts. Their medical expertise lends credibility to the claims of predeath pain and suffering. In addition to their own expert observations, they can also testify about medical records that document injuries, treatment, and deterioration.
- **Family and Friends:** Family members and close friends of the deceased often have a profound understanding of the decedent’s emotional state and suffering leading up to their passing. They can provide insights into changes in behavior, mood, and quality of life caused by the injuries sustained. Their testimony humanizes the case and underscores the emotional toll on the decedent. Moreover, family and friends can describe the impact of the decedent’s suffering on their own lives, highlighting the broader ramifications of the injury. This emotional aspect can influence juries and judges in assessing damages. Finally, family and friends can assist with collecting and preserving any written or verbal expressions of pain and suffering, such as text messages, emails, or recorded conversations.

Many cases illustrate the power of percipient witness testimony in establishing decedents’ conscious pain and suffering. In *Velez v. Roy* (2021) 138 N.Y.S.3d 860, a decedent was struck and killed by a car while he was riding his motorcycle. Testimony of a passerby proved that he was trying to move and gasping for air for roughly one minute before succumbing to the injuries. This was enough to support a finding of \$350,000 in predeath pain and suffering damages.

Similarly, in *Davila v. State of New York* (2016) 34 N.Y.S.3d 508, a decedent was trapped in a house fire. The testimony elicited from fire personnel established that when the decedent was found, she was moaning as if in pain, steam was coming from her body, she had third degree burns over 90 percent of her body, and she was turning her head from side-to-side with her eyes wide open. This testimony demonstrated that she was

conscious, and it was sufficient evidence to support a \$4 million award.

## EXPERT WITNESS TESTIMONY

Percipient witness testimony has extraordinary value in establishing the decedent's conscious pain and suffering, but it is not absolutely necessary. (See *F/V Carolyn Jean, Inc. v. Schmitt* (9th Cir. 1995) 73 F.3d 884, 885 ["if no eyewitnesses are available to testify, consciousness must be shown through alternative means"].) In its absence, retained expert witnesses, such as medical professionals, biomechanical engineers, and accident reconstruction experts, can testify regarding the extent of predeath pain and suffering and help litigators overcome the difficulty in establishing such damages. Their specialized knowledge can help the jury or judge understand the medical aspects of the case, including the pain management techniques employed and the likely extent and duration of suffering.

For example, in *Zicherman v. Korean Air Lines Co., Ltd.* (1994) 43 F.3d 18, the Second Circuit affirmed a jury's award for the predeath pain and suffering of a passenger killed when a Korean Air Lines (KAL) jet was shot down over Soviet airspace. At trial, the plaintiff presented testimony from two experts to support the claim of predeath pain and suffering. The first expert, an aeronautical engineer, testified that the Soviet aircraft fired two missiles, which struck the KAL plane at an altitude of 35,000 feet; that the missiles probably caused a five-foot hole in the rear fuselage; and that the plane remained airborne for 12 minutes thereafter. (Id. at p. 20.) The second expert, an aviation physiologist, testified that such a hole would cause rapid decompression of the plane; that passengers would experience intense pain in their ears, sinuses, lungs, stomach, and intestines due to decompression; and that passengers had sufficient time to don oxygen masks which would allow them to remain conscious during the plane's descent. (Id. at pp. 20–21.)

KAL argued this evidence was insufficient to prove pain and suffering. The court disagreed: "Eyewitness testimony as to the decedent's pain and suffering is not essential to recovery in fatal aircraft accidents, because such evidence 'is difficult if not impossible to obtain.' Obviously, it was impossible to produce such evidence in this case. Plaintiffs satisfied their burden by providing circumstantial evidence from which 'it can be reasonably inferred that the passenger underwent some suffering before impact.' A jury which accepted [the experts'] testimony could reasonably infer that

[the decedent] remained conscious for a period of up to twelve minutes after the missile strike, during which time she experienced intense, compression-induced pain." (*Zicherman*, supra, 43 F.3d at p. 18, citations omitted.)

Expert and percipient witness testimony also work well in combination. In *Vargas v. Advanced Fleet Maintenance, Inc.* (2015) 16 N.Y.S.3d 795, a pedestrian sustained fatal injuries after he was pinned and crushed between the rear of a garbage truck and a dumpster in an alleyway. Plaintiffs presented testimony from a New York City Medical Examiner that prior to the arrival of the ambulance and its paramedics, decedent was conscious and able to experience pain. This testimony was based on the medical examiner's opinion that decedent's injuries would not have killed him instantly and his immediate injuries would not have rendered him unconscious. The driver of the truck also testified that before paramedics arrived at the accident scene, he held decedent in his arms, spoke to him, and observed his eyes looking at him and his arms moving. The expert testimony combined with the lay witness testimony provided sufficient evidence to support the jury award for predeath pain and suffering of \$1 million.

Similarly, in *Snyder v. Whittaker Corp.* (5th Cir. 1988) 839 F.2d 1085, the two decedents were on a boat that struck an oil platform and sank. At trial, an eyewitness testified that he saw a figure clinging to the hull. Expert testimony established that, under the weather conditions existing at the time of the accident, it was possible to survive in the water for eight to 20 hours. (Id. at p. 1092.) Although no bodies were found, the Fifth Circuit concluded that a jury could infer the decedents struggled in the water for several hours before dying. (Id. at pp. 1092–1093.)

Finally, in *Schneider v. Hanasab* (2022) 176 N.Y.S.3d 280, 282, the decedent was struck by a vehicle at an intersection while operating a motorized scooter. The decedent spent four days in the hospital before passing away. A medical expert testified that the decedent was alert and conscious at times during his hospitalization, and despite being administered morphine, was experiencing difficulty breathing and other symptoms that could not be completely alleviated.

## MEDICAL RECORDS (INCLUDING AUTOPSY / CORONER REPORTS)

Medical records set forth detailed information about injuries, treatment, and the decedents' condition over time. They also often contain decedents' own statements,

or others' statements about decedents' verbal or nonverbal expressions of pain and distress. Key elements to consider include: diagnoses, treatments, or surgeries; medication history; and nurse and physician notes.

Autopsy and medical examiner reports can also be pivotal, providing insights into the cause of death, the condition of internal organs, or indications of trauma or distress.

For example, in *Cook v. Ross Island Sand & Gravel Co.* (9th Cir. 1980) 626 F.2d 746, 749–750, an eyewitness testified that the decedent fell into the Columbia River but did not state whether the decedent had been conscious. (Id. at p. 747.) An autopsy established that the decedent's death was caused by drowning. (Ibid.) Plaintiff's expert forensic pathologist testified he found no evidence that the decedent had suffered a skull fracture. The pathologist therefore concluded the decedent had probably been conscious for up to two and a half minutes while submerged in the water. (Id. at p. 748.) The court upheld the jury's finding that this testimony provided enough evidence to find the decedent was conscious during his asphyxiation.

Similarly, in *Caldecott v. Long Island Lighting Co.* (S.D.N.Y. 1969) 298 F.Supp. 540, the decedent died as a result of a gas explosion and fire. The medical examiner's report indicated the presence of soot in the decedent's lungs; the cause of death was asphyxiation due to carbon monoxide poisoning. That evidence supported a reasonable inference that the decedent was conscious for a period of time prior to this death, and that he must have suffered excruciating pain from second and third degree burns prior to his death by suffocation. (Id. at p. 541.)

In another case that occurred in Michigan, a five-year-old pedestrian was struck by a passing vehicle. There was contrasting witness testimony as to whether the child exhibited conscious signs of life after the accident, with some witnesses arguing that death was instantaneous while others claimed that they saw the child gurgle, gasp, and show signs of life for a period of 20 to 30 minutes after the accident. The autopsy report showed the presence of blood in the 'trachea and stomach, which coupled with the testimony of one of the physicians, allowed a jury to properly infer the decedent survived the traumatic event long enough to swallow blood and therefore experienced conscious suffering. (*Bos v. Gaudio* (1934) 267 Mich. 517.)

## VIDEO FOOTAGE (SURVEILLANCE / BODY WORN / DASH CAMERAS)

Video recordings from dash cameras, business surveillance systems, body-worn cameras, and other sources can offer an apparently objective and unimpeachable account of circumstances surrounding a wrongful death. They can therefore play a pivotal role in establishing predeath pain and suffering.

Commonly available forms of video evidence include dashboard-mounted cameras; business and public surveillance systems; body-worn cameras; and witness cell phone videos. Videos from these sources might show the sequence of events, the actions and conditions of the individuals involved, causation, and any other relevant circumstances. They can also support or undermine percipient witness testimony. (See, e.g., *Velez*, supra, 138 N.Y.S.3d 860 [plaintiffs used surveillance video from a business to demonstrate that the decedent survived an accident and was moving and showing clear signs of distress establishing liability, causation, and the extent of the decedent's suffering].)

Video cameras serve as unblinking witnesses to the events that shape our lives and our legal system. As technology continues to advance, video footage will play an increasingly important role in uncovering the truth in cases involving decedents' predeath pain and suffering.

## CONCLUSION

With California just joining the majority of states in allowing survival claims for predeath pain and suffering, California courts will be grappling with these claims' legal and factual nuances in the coming years. This article has explained when to bring such claims and when not to. It has also explained the forms of evidence that can support these claims. With these points in mind, tort litigators can maximize clients' recovery, ensure justice for those killed by others' negligence or malfeasance, and promote the sensible development of the law,

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