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3-1-1980

## Personal Injuries and the Texas Survival Statute: The Case for Recovery of Damages for a Decedent's Lost Future Earnings.

Karl L. Rubinstein

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### Recommended Citation

Karl L. Rubinstein, *Personal Injuries and the Texas Survival Statute: The Case for Recovery of Damages for a Decedent's Lost Future Earnings.*, 12 ST. MARY'S L.J. (1980).

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**PERSONAL INJURIES AND THE TEXAS SURVIVAL STATUTE:  
THE CASE FOR RECOVERY OF DAMAGES FOR A  
DECEDENT'S LOST FUTURE EARNINGS**

**KARL L. RUBINSTEIN\***

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**I. INTRODUCTION**

Assume hypothetically, the following circumstances: *X*, an unmarried adult, is severely injured in an automobile collision resulting from the negligence of the other driver. *X* dies within an hour of the collision as a result of his injuries and is survived only by his parents. In a subsequent action by the parents individually and his father as administrator of the estate, the jury finds that if *X* had lived he would reasonably have had net earnings of \$500,000 during the remainder of his life.<sup>1</sup> The jury also finds that his parents could reasonably have expected contributions from *X* in the amount of \$50,000. Judgment is rendered for the parents on the basis of the \$50,000 finding. What happens to the remaining \$450,000? Does it really just disappear?

Assume the same set of circumstances, except that the victim lives for a period of days as a quadriplegic and the evidence shows

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1. Net earnings means gross earnings less reasonable cost of maintenance, including taxes, reduced to present value.

he would have remained a quadriplegic had he survived. In this situation there clearly could be a recovery for the earnings lost during the period he lived,<sup>2</sup> but what happens to the net future earnings lost due to his untimely death? This article examines the proposition that net lost future earnings are recoverable by the decedent's estate in each of these hypothetical examples.<sup>3</sup>

## II. THE PROPOSITION

The Texas survival statute<sup>4</sup> provides:

All causes of action upon which suit has been or may hereafter be brought for personal injuries, or for injuries resulting in death, whether such injuries be to the health or to the reputation, or to the person of the injured party, shall not abate by reason of death of the person against whom such cause of action shall have accrued, nor by reason of the death of such injured person, but, in the case of the death of either or both, all such causes of action shall survive to and in favor of the heirs and legal representatives and estate of such injured party and against the person, or persons liable for such injuries and his or their legal representatives, any may be instituted and prosecuted as if such person or persons against whom same accrued were alive.<sup>5</sup>

By the literal terms of the statute, damages recoverable by the estate of an individual dying as a result of personal injuries are identical to those recoverable in an action by a living victim of personal injuries. It therefore follows that the question of what damages are recoverable under the survival statute should be resolved by reference to the elements recoverable by a live victim. There is no question that loss of earnings, diminished capacity to work in the future, and loss of profits are all recoverable in Texas by a living victim of personal injuries.<sup>6</sup> Since the Texas survival statute is

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2. See, e.g., *McIver v. Gloria*, 140 Tex. 566, 568-69, 169 S.W.2d 710, 712 (1943); *Dallas Consol. Elec. St. Ry. v. Motwiller*, 101 Tex. 515, 521, 109 S.W. 918, 921 (1908); *Hodges v. Plasky*, 300 S.W.2d 955, 958 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.).

3. This concept will be referred to as "the proposition" throughout the article.

4. TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958).

5. *Id.*

6. See, e.g., *McIver v. Gloria*, 140 Tex. 566, 569, 169 S.W.2d 710, 717 (1943); *Dallas Consol. Elec. St. Ry. v. Motwiller*, 101 Tex. 515, 521, 109 S.W. 918, 921 (1908); *Hodges v. Plasky*, 300 S.W.2d 955, 958-59 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.). See generally *Horvitz & Krist, Measuring the Loss of Earning Capacity*, 36 TEX. B.J. 411 (1973).

clear and unambiguous, and plainly states that *all* causes of action for personal injury survive and since a live victim may recover lost wages and diminished earning capacity, it follows that lost wages and diminished earning capacity are recoverable by the estate of a deceased victim.<sup>7</sup> After all, death is the ultimate diminishment of earning capacity.

It is essential in considering this proposition to distinguish between the Texas survival statute<sup>8</sup> and the Texas wrongful death statutes.<sup>9</sup> The survival statute and the wrongful death statute give rise to two separate and distinct but co-existing causes of action: one on behalf of the estate, and one on behalf of the designated beneficiaries under the wrongful death statute.<sup>10</sup> This rule is clearly set out by the Texas Supreme Court in *Landers v. B. F. Goodrich Co.*,<sup>11</sup> where the court stated:

Two separate and distinct causes of action may arise where injuries wrongfully inflicted result in death. One is the common law action for damages sustained by the decedent *and his estate* as a result of the injuries. This is the cause of action which survives to the heirs or legal representatives under the provisions of Art. 5525. The other right of action is conferred by Articles 4671, et seq. upon the surviving husband, wife, child and parents of the decedent. Since these statutory beneficiaries are not always entitled to assert both causes of action, it seems clear to us that the judgment in a wrongful death action does not necessarily bar a subsequent suit *on behalf of the estate to recover for medical and funeral expenses, property damage, physical pain and suffering and other damage sustained by the decedent prior to his death . . .*<sup>12</sup>

Because the survival statute and the wrongful death statute per-

7. When a statute is clear and unambiguous on its face, its literal meaning is to be given effect. *See, e.g.,* Gateley v. Humphrey, 151 Tex. 588, 591, 254 S.W.2d 98, 100 (1952); Col-Tex Ref. Co. v. Railroad Comm'n, 150 Tex. 340, 346-47, 240 S.W.2d 747, 750 (1951); Gilmore v. Waples, 108 Tex. 167, 171, 188 S.W. 1037, 1038 (1916). Statutes providing for survival of causes of action are to be liberally construed. *See* Merrill v. Beckwith, 61 F.2d 912, 913 (5th Cir. 1932) (construing Texas law); Farmers' & Mechanics' Nat'l Bank v. Hanks, 104 Tex. 320, 325, 137 S.W. 1120, 1123 (1911).

8. TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958).

9. *Id.* arts. 4671-4678 (Vernon 1952 & Supp. 1980). These statutes will be collectively referred to herein as the wrongful death statute.

10. *See id.* art. 4675 (Vernon 1952) (conferring cause of action in wrongful death upon decedent's spouse, children, and parents).

11. 369 S.W.2d 33 (Tex. 1963).

12. *Id.* at 35 (emphasis added).

tain to entirely separate causes of action, the elements of damages recoverable in the two causes of action must be considered separately.

In a wrongful death action, the designated beneficiaries sue to recover a personal pecuniary loss, not to recover damages suffered by the decedent or his estate. Thus, those beneficiaries can recover for lost earnings of the decedent only if those lost earnings constitute damage to the beneficiary bringing the suit. Lost earnings of the decedent damage the beneficiary bringing the suit if, and only if, the decedent could reasonably have been expected to contribute a portion of those earnings to the beneficiary in question. Therefore, lost earnings of the decedent are presently recoverable under the Texas wrongful death statute by the named beneficiaries to the extent that the particular beneficiary could have expected pecuniary contributions from the decedent or to the extent they have suffered pecuniary loss by reason of the death.<sup>13</sup>

A survival action brought by the administrator or executor of the decedent's estate, however, is different from an action under the wrongful death statute. As can be seen from the opinion of the Texas Supreme Court in *Landers*, as well as the literal language of the statute, the survival action is nothing more and nothing less than a common law personal injury action which is made to survive the death of the victim and which may be prosecuted on behalf of the decedent's estate.<sup>14</sup>

Prior to *Landers*, there was confusion in the Texas cases concerning the construction of the wrongful death and survival statutes.<sup>15</sup> *Landers*, however, makes it clear that not only do these two statutes contemplate separate and distinct causes of action, but also they contemplate damages to different entities. The death

13. See, e.g., *Miller v. Alexandria Truck Lines, Inc.*, 273 F.2d 897, 900 (5th Cir. 1960) (applying Texas law); *Smith v. Farrington*, 117 Tex. 459, 462-63, 6 S.W.2d 736, 737 (1928); *Murray v. Templeton*, 576 S.W.2d 138, 141 (Tex. Civ. App.—Texarkana 1978, no writ).

14. See *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 34 (Tex. 1963); *Mitchell v. Akers*, 401 S.W.2d 907, 909 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.), noted in Annot., 20 A.L.R.3d 1385 (1968); *Vassallo v. Nederl-Amerik Stoomy Maats Holland*, 337 S.W.2d 309, 313 (Tex. Civ. App.—Eastland, 1960), *aff'd in part, rev'd in part*, 344 S.W.2d 421 (Tex. 1961).

15. Compare *Fox v. Gulf, C. & S. F. Ry.*, 80 S.W.2d 1072, 1076-77 (Tex. Civ. App.—Galveston 1935, writ dism'd) with *Norman v. Valley Gin Co.*, 99 S.W.2d 1065, 1067 (Tex. Civ. App.—Beaumont 1936, writ ref'd) and *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645, 647 (Tex. Civ. App.—Waco 1962, no writ).

damages both the decedent's estate and the beneficiaries named in the wrongful death statute. Pursuant to this construction, the two statutes complement one another and cause the "survival" of a complete package of relief from which all those suffering injury by reason of the personal injury may be compensated. Texas decisions have allowed recovery under these statutes as follows.

*The Wrongful Death Statute.* The essence of recovery is the pecuniary loss to the particular beneficiary. Among the factors considered are:

- 1) expected contributions from earnings to the named beneficiary;<sup>16</sup>
- 2) loss to children of nurture, care, moral and mental training, and education by deceased parent;<sup>17</sup>
- 3) loss to parent of services of deceased minor child;<sup>18</sup>
- 4) loss to wife of value of deceased husband's attention, care, counsel, and services around house;<sup>19</sup>
- 5) loss to husband of deceased wife's services; and<sup>20</sup>
- 6) medical, funeral, and similar expenses, if paid by the beneficiary in question.<sup>21</sup>

*The Survival Statute.* In essence, the damage to the decedent or his property is recoverable by his estate for the following:

- 1) pain and suffering by decedent prior to death;<sup>22</sup>
- 2) mental anguish of decedent prior to death;<sup>23</sup>
- 3) property damage;<sup>24</sup>

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16. See *Smith v. Farrington*, 117 Tex. 459, 463, 6 S.W.2d 736, 737 (1928).

17. See *Page v. Scaramozi*, 288 S.W.2d 909, 912 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.).

18. See *Smith v. Farrington*, 117 Tex. 459, 463, 6 S.W.2d 736, 737 (1928); *Banker v. McLaughlin*, 200 S.W.2d 699, 702 (Tex. Civ. App.—Beaumont 1947), *aff'd*, 208 S.W.2d 843 (Tex. 1948).

19. See *Page v. Scaramozi*, 288 S.W.2d 909, 912 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.).

20. See *Dallas Ry. & Terminal Co. v. Bishop*, 203 S.W.2d 651, 656 (Tex. Civ. App.—Amarillo 1947, writ ref'd n.r.e.).

21. See *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 34-35 (Tex. 1963); *Smith v. Farrington*, 117 Tex. 459, 463, 6 S.W.2d 736, 737 (1928).

22. See *Mitchell v. Akers*, 401 S.W.2d 907, 910 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).

23. See *id.* at 910.

24. See *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 34 (Tex. 1963).

- 4) exemplary damages; and<sup>25</sup>
- 5) medical and funeral expenses when paid by estate.<sup>26</sup>

Thus, there are Texas cases specifically holding that all well-recognized elements of damage from personal injury are recoverable under the survival statute, except loss of future earnings.<sup>27</sup> Since a live victim of personal injuries may recover damages for diminished earning capacity and loss of future earnings, and since both the legislature and the supreme court have stated that under the survival statute all causes of action survive, it necessarily follows that the survival statute allows the estate to recover for diminished earning capacity and loss of future earnings.

There exists no obvious rationale for omitting lost future earnings from the damages recoverable under the survival statute since the estate has obviously suffered severe financial loss, just as it may suffer a financial loss by reason of other types of property damage or through payment of medical and funeral expenses. *Landers* specifically states that property damage is recoverable under the survival statute, and it should be noted that earning capacity has been held to be property.<sup>28</sup> Accordingly, whether damage to future earnings is viewed as a property damage or as a personal injury, it should be recoverable under the survival statute. This conclusion not only follows from the present statute, but is philosophically sound as well. To hold that the quadriplegic, but living, victim of personal injuries has incurred damages because of lost earning capacity, and simultaneously hold that the estate of

25. See *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645, 649 (Tex. Civ. App.—Waco 1962, no writ).

26. See *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 34-35 (Tex. 1963); *Humble Oil & Ref. Co. v. Ooley*, 46 S.W.2d 1038, 1040 (Tex. Civ. App.—Eastland 1932, writ dismissed).

27. There are no Texas cases specifically holding loss of future earnings recoverable under the survival statute, and as will be discussed in more detail later, there is at least one case seemingly holding there can be no recovery therefor. This case is *Norman v. Valley Gin Co.*, 99 S.W.2d 1065, 1067 (Tex. Civ. App.—Beaumont 1936, writ refused), and its holding can be distinguished from the proposition, not only because it appears erroneous in the face of the specific language of the survival statute, TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958) ("all causes of action . . . for personal injuries resulting in death . . . survive"), and the language of the Texas Supreme Court in *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 35 (Tex. 1963) (suit on behalf of estate to recover medical and funeral expenses, *property damage*, physical pain and suffering, and *other damage*), but also because it did not recognize the separate nature of the causes of action in question.

28. See *El Paso Elec. Ry. v. Murphy*, 109 S.W. 489, 490 (Tex. Civ. App. 1908, writ refused).

the victim who dies from his personal injuries has not incurred damages because of lost earning capacity, is patently inconsistent with the statutory language and the *Landers* opinion. Certainly both the living quadriplegic victim and the deceased victim have suffered total diminishment of earning capacity. The survival statute provides that *all* causes of action survive. If that language is to be given effect, the estate must be allowed to recover lost future earnings to the extent the wrongful death beneficiaries are not entitled to do so. Accordingly where, as in the initial hypothetical example, a deceased unmarried adult would have earned \$500,000 during the remainder of his life and his only relatives, his parents, could have expected only \$50,000 in contributions, the remaining \$450,000 of damage would not simply evaporate. That \$450,000 represents the amount the decedent's estate could reasonably have anticipated in future earnings and that loss should be recoverable by the estate pursuant to the survival statute.

The hypothetical can be modified somewhat by assuming the decedent had been rendered a quadriplegic by the accident and lived for a period of days, hours, or even minutes prior to his death and the evidence proves that even if he had survived, he would have suffered total diminishment of his earning capacity. Under these circumstances, a cause of action for lost earnings would have accrued to the victim during the period he lived. Since he had been rendered a quadriplegic, he suffered total diminishment of earning capacity while living. His subsequent death should not be grounds for ignoring the plain language of the survival statute and denying the estate a recovery for the cause of action. The victim would have died possessed of a cause of action involving total diminishment of earning capacity by reason of his injuries. The \$450,000 in net lost future earnings simply should not go with him to his grave; rather, that sum should be recoverable by the estate.

### III. THE PUTATIVELY CONTRARY TEXAS CASES

Three Texas civil appeals cases contain language seemingly contrary to the proposition in question: *Fox v. Gulf C. & S. F. Ry.*,<sup>29</sup> *Norman v. Valley Gin Co.*,<sup>30</sup> and *Houston-American Life Insur-*

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29. 80 S.W.2d 1072, 1076-77 (Tex. Civ. App.—Galveston 1935, writ dismissed).

30. 99 S.W.2d 1065, 1067 (Tex. Civ. App.—Beaumont 1936, writ refused).



*ance Co. v. Tate*.<sup>31</sup> In *Fox*, Marbelle Fox sued individually and as administratrix of the estate of her adult son for damages resulting from fatal injuries sustained by her son while employed as a brakeman for the defendant. Based upon jury findings contrary to plaintiff's assertions of negligence, a take-nothing judgment was entered. The appeal and the court of civil appeals decision were primarily based upon allegations of improper comment by the trial judge during trial, but one point of error dealt with the trial court's having sustained a special exception to allegations in plaintiff's petition that the instantaneous death of her son gave her "a surviving cause of action for the total destruction of her son's earning capacity, under R.S. articles 4675 and 5525, as amended by Acts 1927."<sup>32</sup> On this point, the court of civil appeals stated:

As concerns the averment of the mother of a right of action in her for the total, instantaneous destruction of her son's earning capacity under R. S. arts. 4675 and 5525, as amended (Vernon's Ann. Civ. St. arts. 4675, 5525) it is our conclusion that no such right exists; by our authorites it seems to have been established that the cause of action given to the beneficiaries of deceased persons by R. S. art. 4671 is for the pecuniary loss sustained by them and defined to be that sum of money which, if paid now, would reasonably and fairly compensate them for what they might reasonably have expected as contribution from the deceased had he continued to live, and nothing further; Vernon's Annotated Texas Civil Statutes, vol. 14, art. 4671 . . . .<sup>33</sup>

It is clear from the preceding quotation that the court's ruling was not really based upon a construction of article 5525, the survival statute, but was based on a construction of article 4671, the wrongful death statute. The court held that under article 4671, the named beneficiaries may recover only for the pecuniary loss sustained by them and that they are restricted to recovery under that statute. This holding is obviously correct with regard to the recovery available under article 4671, but the court did not base its opinion upon an analysis of the recovery available to the estate under article 5525. The court's ruling lumped the survival statute

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31. 358 S.W.2d 645, 647 (Tex. Civ. App.—Waco 1962, no writ).

32. *Fox v. Gulf C. & S. F. Ry.*, 80 S.W.2d 1072, 1075 (Tex. Civ. App.—Galveston 1935, writ *dism'd*).

33. *Id.* at 1076-77.

and wrongful death statute together without attempting to distinguish between them. As evidenced by *Fox* and *Norman*, the failure of courts to distinguish between the two statutes was not uncommon in the 1930's.<sup>34</sup> Their separate and distinct nature was not clarified until the Texas Supreme Court decided *Landers* in 1963. The court in *Fox* ruled only with regard to an alleged cause of action in the mother individually, and it did not directly rule on the possibility of a recovery upon a separate cause of action for lost earnings by the decedent's estate.<sup>35</sup> Thus, *Fox* is clearly distinguishable from the proposition in question.

*Norman* is more directly in point; and that court stated:

There is but one question in this case, and that is, where one is injured and later dies as a result of the injuries, may a recovery be had under article 5525, . . . for the present value of such earnings as the deceased would probably have earned during the period of his life expectancy had he not been killed.<sup>36</sup>

The court then states:

Under this statute [article 5525], the cause of action that survives is for damages for injuries received by the injured party, which, if he lives, may be recovered by him, but, if he dies from the injuries, *then his heirs and legal representatives have the right to recover the same damages that the injured party, had he lived, could have recovered.*<sup>37</sup>

Up to this point, the court's decision and the proposition advanced herein have no conflict, and the court expressly states that the decedent's representative may recover the *same* damages a live victim could have recovered. The court, however, continues:

That is, his right to recover damages because of the injuries which he has suffered up to the time of his death, survives to his heirs, legal representatives, and estate. The value of his life, measured by his earning power during the period of his life expectancy, is not the

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34. See *Norman v. Valley Gin Co.*, 99 S.W.2d 1065, 1067 (Tex. Civ. App.—Beaumont 1936, writ ref'd); *Fox v. Gulf, C. & S. F. Ry.*, 80 S.W.2d 1072, 1076 (Tex. Civ. App.—Galveston 1935, writ dism'd).

35. See *Fox v. Gulf, C. & S. F. Ry.*, 80 S.W.2d 1072, 1076 (Tex. Civ. App.—Galveston 1935, writ dism'd).

36. *Norman v. Valley Gin Co.*, 99 S.W.2d 1065, 1066 (Tex. Civ. App.—Beaumont 1936, writ ref'd).

37. *Id.* at 1067 (emphasis added).

estate, the right to recover which is provided by the statute [*sic*].

It is believed that, where one is negligently injured, and from which injury he dies, the cause of action which had accrued to him for damages suffered up to the time of his death survives to his heirs, but that, when death ensues, a new cause of action is created by article 4671 (death statute). His beneficiaries, under the death statute, may then institute suit and recover such damages as they have suffered by reason of his death.<sup>38</sup>

It cannot be denied that the language of this decision initially appears directly contrary to the proposition advanced herein. Upon close examination, however, *Norman* can be distinguished. For one thing, the plaintiffs in *Norman* were not suing as administrators on behalf of the estate, but were suing as the individual heirs of the decedent on behalf of themselves.<sup>39</sup> Because of this distinction, the court may have been correct in holding that the recovery in *Norman* was to be had under the death statute and that under the death statute the correct measure of damages was "the present value of the earnings of the child during its minority and the present value of such contributions as they might reasonably expect to have received from him after maturity."<sup>40</sup> One can only speculate whether the court's ruling would have been different had the suit been brought by the administrator on behalf of the estate, but this distinction is absolutely pivotal in light of the *Landers* decision. In *Landers* suit was brought by administrators on behalf of the estate, and the court clearly distinguished between the estate's cause of action and the cause of action of the heirs as beneficiaries under the wrongful death statute.<sup>41</sup>

It is also significant that the *Norman* opinion referred to the death statute as conferring a "new" cause of action, indicating that that this "new" cause of action in some way replaces the "old"

38. *Id.* at 1067.

39. *See id.* at 1067. The plaintiffs had previously sued under the wrongful death statute, and final judgment had been entered denying them recovery. *See id.* at 1066.

40. *Id.* at 1067. Note that the quoted language would allow recovery of the present value of all the lost future earnings of the child during its minority (almost 15 years worth) under the wrongful death statute and would also allow recovery of the present value of expected contributions to the parents from future earnings after majority. The failure to deal with the balance of the earnings after maturity leaves the decedent's estate without a remedy for the major element of damage it suffers from the death.

41. *See Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 35 (Tex. 1963).

cause of action.<sup>42</sup> This is incorrect in the sense that the "old" cause of action does not die with the victim—it survives. The death statute may be viewed as creating a "new" cause of action, but this cause of action co-exists with the cause of action that survives pursuant to the survival statute. Whatever limitations exist with regard to the cause of action created by the death statute cannot logically serve to limit the rights in the decedent's estate established by the survival statute. The court's failure to recognize the survival statute as conferring a cause of action upon the estate for damages sustained by it led the court to limit the heirs to recovery under the wrongful death statute.<sup>43</sup>

In stating "where one is negligently injured, and from which injury he dies, the cause of action which had accrued to him for damages suffered up to the time of his death survives to his heirs, but that, when death ensues, a new cause of action is created by article 4671 (Death Statute),"<sup>44</sup> the court apparently adopted the position that the exclusive remedy of the heirs was under the death statute. In view of *Landers*, that position is incorrect. Further, the fact that the plaintiffs in *Norman* were also wrongful death beneficiaries and had already lost a suit under the wrongful death statute certainly served to present a confusing issue to the court. The court obviously considered only the question of what recovery was available to the heirs as individuals and determined that they were limited to a wrongful death action. Having failed to consider the issue of what damages occurred to the decedent's estate and consequently what damages were recoverable by the estate, the court failed to analyze the separate and distinct nature of the survival and wrongful death statutes. While the court recognized that beneficiaries under the wrongful death statute may recover lost future earnings to the extent they could have expected contributions from such earnings, the court ignored the fact that to the extent these beneficiaries could not have expected portions of those future earnings, the decedent's estate could have. Accordingly, the estate has suffered a loss of these future earnings.

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42. See *Norman v. Valley Gin Co.*, 99 S.W.2d 1065, 1067 (Tex. Civ. App.—Beaumont 1936, writ ref'd).

43. See *id.* at 1067. The effect of the holding, of course, was to deny recovery completely because of the earlier judgment. See *id.* at 1067.

44. *Id.* at 1067.

The short-sightedness of the *Norman* opinion becomes more obvious when one considers that exemplary damages, burial expenses, and property damage are recoverable under the survival statute as damages to the estate,<sup>45</sup> and that earning capacity may be considered a property right.<sup>46</sup> If these damages are recoverable, and earning capacity is to be considered a property right, it logically follows that all damages to the estate are recoverable, including lost future earnings. Further, whether lost future earnings are viewed as a property damage or as a personal injury, their loss constitutes damage to the decedent and his estate and should be recoverable by the estate. Accordingly, it can be seen that the court in *Norman* did not recognize, or at least did not address, the distinction between damage to the estate and damage to the beneficiaries under the wrongful death statute. In view of *Landers*, this distinction can no longer be ignored, and the Texas survival statute must be held to pass on to the decedent's estate all causes of action possessed by the decedent.<sup>47</sup>

A third case with language contrary to the proposition advanced herein is *Houston-American Life Insurance Co. v. Tate*.<sup>48</sup> The case is not directly in point since it dealt with the issue of whether a cause of action for exemplary damages in a suit for usury survived under the survival statute. The court held that exemplary damages do survive, and quoted the language from *Norman* previously stated.<sup>49</sup> The language is dicta and constitutes the only language in the case inconsistent with the instant proposition.<sup>50</sup> Since the only

45. See, e.g., *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 35 (Tex. 1963); *Mitchell v. Akers*, 401 S.W.2d 907, 910 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); *Humble Oil & Ref. Co. v. Ooley*, 46 S.W.2d 1038, 1040 (Tex. Civ. App.—Eastland 1932, writ dism'd).

46. See *El Paso Elec. Ry. v. Murphy*, 109 S.W. 489, 490 (Tex. Civ. App. 1908, writ ref'd).

47. It is interesting to note that in the case of *Heil Co. v. Grant*, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.), the court cites *Norman* for the proposition that the wrongful death act permits recovery by a decedent's surviving spouse, children, and parents for losses they sustained by reason of the death, but cites *Landers* for the proposition that the survival statute permits recovery for damages sustained by the decedent. See *id.* at 924. Thus, the Tyler court apparently interpreted *Norman* as definitive on the wrongful death issue only, and interpreted *Landers* as definitive on the survival statute.

48. 358 S.W.2d 645, 647 (Tex. Civ. App.—Waco 1962, no writ).

49. See *id.* at 647 (quoting *Norman v. Valley Gin Co.*, 99 S.W.2d 1065, 1067 (Tex. Civ. App.—Beaumont 1936, writ ref'd)). See text accompanying notes 37-38 *supra*.

50. See *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645, 647 (Tex. Civ. App.—Waco 1962, no writ).

contradictory language emanates from *Norman*, it may be distinguished in the identical manner.<sup>51</sup> It should be noted, however, that the *Houston-American Life Insurance Co.* case also contains the following language supportive of the subject proposition: “ ‘ordinarily where a cause of action ex delicto survives the death of the person injured, it survives in its entirety so as to entitle the personal representative to recover *exactly the same damages as his decedent might have recovered.*’ ”<sup>52</sup> There appear to be no other Texas cases addressing the instant proposition. In the three cases containing contrary language, all failed to approach the issue from the viewpoint of *Landers* and distinguish between the two separate causes of action created by the two statutes.

As previously discussed, both *Fox* and *Norman* viewed the wrongful death statute as providing the exclusive remedy for persons qualifying as statutory beneficiaries. They did not view the two statutes as providing separate and distinct causes of action. Thus, they did not fully analyze the nature of the cause of action available under the survival statute as *Landers* did almost thirty years later. In view of the relative newness of the statute at the time *Fox* and *Norman* were decided, this is not too surprising. Prior to 1895 the common law rule applied in Texas, and there was no survival of a cause of action for personal injuries.<sup>53</sup> In 1895 this was changed by statute,<sup>54</sup> but the statute did not provide for the survival of causes of action for personal injuries resulting in death.<sup>55</sup> It was not until the 1925 enactment of article 5525, together with its 1927 amendment, that the statute provided for non-abatement of causes of action for personal injuries resulting in death.<sup>56</sup> Thus, the courts which decided *Fox* and *Norman* were made up of lawyers who had “grown up” with the concept that

51. See text accompanying notes 39-47 *supra*.

52. *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645, 647 (Tex. Civ. App.—Waco 1962, no writ) (quoting 1 C.J.S. *Abatement and Revival* § 138, at 190 (1955)).

53. See *Gulf, C. & S. F. Ry. v. Sullivan*, 190 S.W. 739, 741 (Tex. Civ. App.—Fort Worth 1916, no writ).

54. Tex. Rev. Civ. Stat. art. 3353(a) (1895); see Tex. Rev. Civ. Stat. art. 5686 (1911).

55. See, e.g., *Gulf, C. & S. F. Ry. v. Sullivan*, 190 S.W. 739, 743 (Tex. Civ. App.—Fort Worth 1916, no writ); *Fitzgerald v. Western Union Tel. Co.*, 40 S.W. 421, 422 (Tex. Civ. App. 1897, writ ref'd); *Houston & T. C. R. Co. v. Rogers*, 39 S.W. 1112, 1113 (Tex. Civ. App. 1897, no writ).

56. See *Marcus v. Huguley*, 374 S.W.2d 1100, 1104 (Tex. Civ. App.—Dallas 1931, writ dism'd); 1927 Tex. Gen. Laws, ch. 239, § 1, at 356.

death terminated a cause of action for personal injuries resulting in death. The rule that the survival statute allows the estate to recover exactly the same damages as a living victim was, therefore, alien to the rule that had existed prior to 1927.

#### IV. OTHER JURISDICTIONS

In considering other jurisdictions, one must be conscious of the various types of statutes involved. In some states, the wrongful death statute is construed as a benefit-to-estate type.<sup>57</sup> In others, the statute is considered a benefit-to-survivors type.<sup>58</sup> In still other states, the wrongful death statute and survival statute are combined as a "hybrid" statute.<sup>59</sup>

As the name implies, benefit-to-estate statutes create a cause of action in the estate for damages resulting from the decedent's death. Under these wrongful death statutes, the estate is normally allowed to recover for the decedent's lost future earnings.<sup>60</sup> A benefit-to-survivor wrongful death statute creates a cause of action in the beneficiaries, and they are allowed to recover the decedent's lost future earnings only in the sense that they can recover for contributions they could reasonably have expected from the deceased. The Texas wrongful death statute falls into the latter category.<sup>61</sup>

The various states have a variety of survival statutes. In those numerous states that have a benefit-to-estate wrongful death statute, the survival statute, if any, is irrelevant as to the instant proposition because the right to recover lost future earnings exists under the wrongful death statute. Recognition by these states of the right to recover lost future earnings, however, supports the instant proposition because they recognize lost future earnings as a

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57. See 1 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3.2 (2d ed. 1975). See generally, e.g., DEL. CODE ANN. tit. 10, §§ 3704, 8107 (1974); GA. CODE ANN. §§ 105-1301 to -1308 (1968 & Supp. 1979); KY. REV. STAT. § 411.130 (Supp. 1978).

58. See 1 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3.1 (2d ed. 1975). See generally, e.g., CAL. CIV. PROC. CODE § 377 (Deering Supp. 1980); MO. ANN. STAT. § 537.080 (Vernon Supp. 1980); TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952).

59. See 1 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3.2 (2d ed. 1975). See generally, e.g., CONN. GEN. STAT. ANN. § 52-555 (West Supp. 1980); N.H. REV. STAT. ANN. § 556.12 (1974); TENN. CODE ANN. §§ 20-601 to -623 (1955 & Supp. 1979).

60. See 1 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3.64 (2d ed. 1975).

61. *Id.* § 3.1; see *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 35 (Tex. 1963); *Smith v. Farrington*, 117 Tex. 459, 462-63, 6 S.W.2d 736, 737 (1928); *Murray v. Templeton*, 576 S.W.2d 138, 140-41 (Tex. Civ. App.—Texarkana 1978, no writ).

loss to the estate. Since *Landers* requires that the loss to the estate be recognized under the Texas survival statute, the fact that other jurisdictions allow recovery of lost future earnings under benefit-to-estate wrongful death statutes is certainly pertinent to an analysis of what damages are recoverable on behalf of the estate under the Texas survival statute and is supportive of the instant proposition.

The various state survival statutes and wrongful death statutes are exhaustively examined in existing material,<sup>62</sup> and are not reexamined in this article. It should be noted, however, that Pennsylvania, Washington, and the District of Columbia all have survival statutes providing that "all" or "any" causes of action "survive," just as does the Texas statute.<sup>63</sup> Each of these states recognizes the validity of the instant proposition.<sup>64</sup>

Although some earlier Pennsylvania cases held to the contrary, the leading Pennsylvania case is *Pezzulli v. D'Ambrosia*,<sup>65</sup> in which the Supreme Court of Pennsylvania considered the proposition.<sup>66</sup> The *Pezzulli* court held that a decedent's executor or the administrator of his estate may recover the same damages the deceased would have been entitled to recover if he had survived.<sup>67</sup> This holding is essentially identical to that of the Texas Supreme Court in *Landers*.<sup>68</sup> The Pennsylvania court also held specifically that:

The elements of permissible recovery in such a case are well established—pain and suffering until the time of death, and the economic value of the life, as measured by the present worth of likely earnings during the period of life expectancy, the diminution in earning

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62. See generally 1 & 2 S. SPEISER, RECOVERY FOR WRONGFUL DEATH (2d ed. 1975).

63. Compare D.C. CODE ENCYCL. § 12-101 (West 1966) and PA. STAT. ANN. tit. 20, § 320.601 (Purdon 1950) and WASH. REV. CODE ANN. § 4.20.046 (1962) with TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958).

64. It should be noted that several states limit recovery under the survival statute to those earnings lost between injury and death. See 2 S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 14.7 (2d ed. 1975). Other states do not allow recovery of lost future earnings under the survival statute at all. See Annot., 76 A.L.R.3d 125 (1977). As discussed in the text of that article, the major reason for these holdings is the spectre of double recovery and that spectre does not exist in Texas. See *id.* § 3(b). Various distinctions between the law in those states and Texas law can be demonstrated. See generally 1 & 2 S. SPEISER, RECOVERY FOR WRONGFUL DEATH (2d ed. 1975); Annot., 76 A.L.R.3d 125 (1977).

65. 26 A.2d 659 (Pa. 1942).

66. See *id.* at 659-62.

67. See *id.* at 660-61.

68. See *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 35 (Tex. 1963).



power being total because of the death.<sup>69</sup>

The Washington survival statute is basically the same as the Texas statute except it specifically excludes recovery for pain and suffering, anxiety, emotional distress and humiliation, personal to and suffered by a deceased.<sup>70</sup> The Washington Supreme Court considered whether a decedent's personal representative could recover for impaired earning capacity in *Warner v. McCaughan*.<sup>71</sup> In that case, the Washington court cited one of its earlier opinions in which it held that pursuant to the unequivocal language of the statute, *all* causes of action survived except those specifically excluded by statutory provision.<sup>72</sup> It should be remembered that the Texas statute contains equally unequivocal language that *all* causes of action survive.<sup>73</sup> In recognizing that the decedent's estate could recover for impaired earning capacity, the court stated: "We believe it apparent that the Legislature sought to wipe out the approach to the law that prompted Dean Prosser to write:

"The result was that it was more profitable for the defendant to kill that plaintiff than to scratch him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy.'"<sup>74</sup>

The District of Columbia survival statute is similar to the Washington statute in that it excludes certain types of recoveries:

On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action survives in favor of or against the legal representative of the deceased. In tort actions for personal injuries, the right of action is limited to damages for physical injury, excluding pain and suffering resulting therefrom.<sup>75</sup>

69. Pezzulli v. D'Ambrosia, 26 A.2d 659, 661 (Pa. 1942).

70. See WASH. REV. CODE ANN. § 4.20.046 (1962).

71. 460 P.2d 272 (Wash. 1969).

72. *Id.* at 275; *accord*, Hinzman v. Palmanteer, 501 P.2d 1228, 1230-31 (Wash. 1972) (en banc).

73. See TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958).

74. *Warner v. McCaughan*, 460 P.2d 272, 275 (Wash. 1969) (citing PROSSER ON TORTS § 121, at 924 (3d ed. 1964)). The *McCaughan* opinion cites a number of other Washington decisions supporting the instant proposition. See *id.* at 274, 276; *Harvey v. Clemon*, 400 P.2d 87, 90 (Wash. 1965); *Engen v. Arnold*, 379 P.2d 990, 993 (Wash. 1963); *Cooper v. Runnels*, 291 P.2d 657, 659 (Wash. 1955).

75. D.C. CODE ENCYCL. § 12-101 (West 1966).

The Court of Appeals for the District of Columbia considered whether lost future earnings were recoverable under this statute in *Runyon v. District of Columbia*.<sup>76</sup> The court made substantially the same observation that the Texas Supreme Court made in *Landers*:<sup>77</sup>

[I]f a tort causes death, two interests have been invaded. *The first is the interest of the deceased in the security of his person and property.* The personal representative of the estate of the deceased may bring an action on behalf of the estate to recover for the invasion of that interest. 12 D.C. Code § 101 (1967). The second is the impairment of the interest of the deceased's spouse and next of kin. They may recover pecuniary loss resulting from the death provided the personal representative of the deceased's estate prevails in their behalf in the wrongful death action established by statute. 16 D.C. Code §§ 2701, 2702 (1967).<sup>78</sup>

The District of Columbia Circuit went on to hold that "pursuant to the Survival Statute, we think it is proper for the estate of the deceased to recover an amount based on probable net future earnings, discounted to present worth . . . ."<sup>79</sup> As noted in an analysis of positions taken by various other states,<sup>80</sup> the primary objection to allowing recovery of lost future earnings is the spectre of double recovery, but:

Where an action is not maintainable under the wrongful death statute, the danger of a double recovery is removed and, accordingly, in this situation, the courts have allowed the decedent's personal representative to recover in a survival action for the decedent's lost future earnings. Examples of when a wrongful death action is not maintainable so that future earnings may be recovered in a survival action include the following: where there were no beneficiaries capable of maintaining a wrongful death action; where the statute of limitations for bringing a wrongful death action had run; and where the wrongful death and survival statutes have been interpreted as conferring separate and distinct causes of action.<sup>81</sup>

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76. 463 F.2d 1319 (D.C. Cir. 1972).

77. See *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 35 (Tex. 1963).

78. *Runyon v. District of Columbia*, 463 F.2d 1319, 1321 (D.C. Cir. 1972) (emphasis added).

79. *Id.* at 1321-22.

80. Annot., 76 A.L.R.3d 125 (1977).

81. *Id.* at 130 (footnotes omitted) (emphasis added).

## V. THE SPECTRE OF DOUBLE RECOVERY

Since the Texas survival and wrongful death statutes have been held to provide separate and distinct causes of action, allowing the decedent's estate to recover lost future earnings to the extent they are not recoverable by wrongful death beneficiaries will not create a double recovery to any greater extent than any Texas personal injury case. In this regard it is necessary to understand what a double recovery is. A double recovery necessarily involves the double assessment of damages against a defendant so that the defendant pays twice for the same wrong.<sup>82</sup> Typically, a double recovery results from an error in the trial court's charge to the jury, which could occur in any personal injury case.

For example, in *International & Great Northern Railroad v. Butcher*,<sup>83</sup> the trial court submitted four groups of damage elements:

1. Physical and mental suffering;
2. The future effect of the injuries upon Butcher's mental and physical health;
3. Any impairment of his ability or capacity to pursue, after he arrives at his majority, the course of life he might have otherwise followed; and
4. Decreased physical and mental ability to labor and earn money.<sup>84</sup>

On appeal, this charge was attacked for allowing double recovery as follows: "It was error to instruct the jury as shown, because the same was calculated to confuse and mislead the jury into assessing double damages, and more damages than the law allows, and assessing damages more than once for the same thing."<sup>85</sup> This objection contains a proper definition of double recovery. The supreme court agreed with the objection and reversed and remanded the case after holding:

The elements of the last three propositions are so blended in their

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82. *E.g.*, *Missouri, K. & T. Ry. v. Beasley*, 106 Tex. 160, 179, 155 S.W. 183, 187-88 (1913); *International & G. N. R.R. v. Butcher*, 98 Tex. 462, 464, 84 S.W. 1052, 1053 (1905); *Missouri, K. & T. Ry. v. Nesbit*, 88 S.W. 891, 892-93 (Tex. Civ. App. 1905, no writ).

83. 98 Tex. 462, 84 S.W. 1052 (1905).

84. *See id.* at 463, 84 S.W. at 1053.

85. *Id.* at 464, 84 S.W. at 1053.

effects upon the sufferer that they are not capable of separation so as to admit of distinct compensation. The decreased capacity to labor and earn money would necessarily be a result of the impairment of physical and mental health and would be embraced in the incapacity to follow the calling he might otherwise have chosen. Incapacity to earn money could result from nothing except physical or mental injury, and would be embraced in incapacity to pursue any desirable vocation.<sup>86</sup>

The correctness of the supreme court's position is relatively clear. Special issues two, three, and four essentially amount to three different ways of saying, "lost future earnings."<sup>87</sup> Thus, the double recovery problem arose not because the plaintiff was allowed to recover lost future earnings, but because he was allowed to recover them three times.

This article does not advocate such a result, and a plaintiff should not be allowed to recover, or a defendant required to pay, more than once for the same element of damage. It is also true, however, that a tortfeasor should be required to pay once for each element of damage. Because both the wrongful death beneficiaries and the decedent's estate have been deprived of the benefits of the decedent's future earnings, both are entitled to recover for that loss to the extent each can prove expectation of contributions from future earnings. To allow the wrongful death beneficiaries such a recovery yet deny it to the estate allows the tortfeasor a windfall. Unless the estate is allowed to recover for the net lost future earnings that would have been contributed to it, then Texas law would be allowing only a "fractional recovery." A fractional recovery should be as abhorrent as a double or triple recovery.

It was not recognition of a cause of action for lost future earnings that resulted in the double recovery in *Butcher*, it was the manner in which the jury was charged. An erroneous charge can occur in any case. If one employs syllogistic reasoning to this issue, the following results:

Premise 1: A double recovery exists when a defendant is required to pay twice for the *same* cause of action or loss.

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86. *Id.* at 464, 84 S.W. at 1053.

87. One might argue with respect to special issue two that it contains a mental anguish concept. See *French v. Grigsby*, 567 S.W.2d 604, 607 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.). Resolution of that question, however, is outside the scope of this article.

Premise 2: The survival statute and the wrongful death statute establish *two separate and distinct* causes of action based upon *two separate and distinct losses*.

Conclusion: Therefore, allowing recovery for (a) the full measure of loss sustained by the wrongful death statute beneficiaries, and (b) the full measure of loss sustained by the decedent's estate, does not constitute a double recovery.

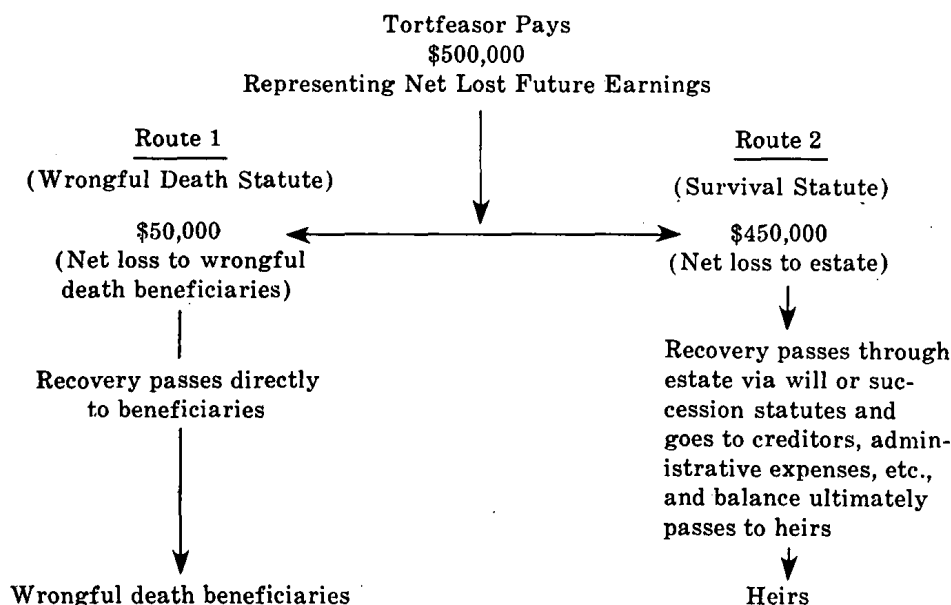
The absence of double recovery can also be illustrated by an analysis of the measure of damages under the two causes of action and the manner in which recovery is obtained from the defendant.

In the examples given in the first paragraphs of this article, it is assumed the jury found that the actions of the tortfeasor deprived the decedent of \$500,000 in net future earnings. The next issue becomes—who is entitled to recover that loss? In this regard, it is extremely important to realize that, absent procedural error, the tortfeasor pays the same \$500,000 regardless of who ultimately receives the proceeds. Thus, under the instant proposition there is no double recovery against the tortfeasor because he has paid only once, and only the tortfeasor has the right to complain of a double recovery.

To take one extreme example, if evidence at trial proved that the decedent was a financially successful singing monk who had taken a vow of poverty and would have contributed all future earnings to his father, then no one would argue with the proposition that the father would be entitled to recover the entire \$500,000. In such event the tortfeasor would pay \$500,000 in damages. Conversely, if the decedent were a medical doctor and the proof showed that the father would have received only \$50,000 of the \$500,000, and the decedent had willed the entire proceeds of his estate to his aunt, what possible reason could there be to allow the tortfeasor to escape payment of the remaining \$450,000? In view of *Landers*, there is no such reason. If the \$50,000 would have been contributed to the father, then that \$50,000 would not be a part of the estate. To the extent that the father, or any other wrongful death beneficiary, would not have received contributions from the remaining \$450,000 of the decedent's future earnings, then the estate would have.

To carry this example further, assume again that the evidence at trial proved the decedent's net future earnings were \$500,000 and that \$50,000 would have been contributed to the wrongful death

beneficiaries. The recoveries would then flow substantially as follows:



As can be seen from this chart, the tortfeasor pays the same \$500,000 regardless of who receives it; thus, there is no double recovery as to him.<sup>88</sup> The ultimate recipients of the proceeds receive their recovery through Route 1, Route 2, or both. If a particular individual happens to receive funds from both routes, then that is as it should be, and he has not realized two recoveries upon the same cause of action or for the same loss. To the contrary, he has received the proceeds of two different causes of action and such a result is not a double recovery.

In connection with the issue of double recovery, one must have an understanding of basic Texas trial procedure. In jury cases, judgments are based on jury verdicts, and jury verdicts are based upon the court's charge to the jury which includes special issues.

88. Unless the decedent's estate is allowed to recover lost future earnings, the tortfeasor reaps a windfall if he manages to kill the beneficiaries under the wrongful death statute while he is in the process of killing the principal decedent. Further, the tortfeasor who seriously injures another would be financially rewarded if he were to let the victim die rather than using first aid to keep him alive until medical assistance could arrive.

One of two possible ways in which the proposition made herein could result in a double recovery would occur in the event the trial court errs in submitting the special issues. An example of this is seen in *Butcher*, as previously discussed. The significant point, however, is that erroneous instructions can and do result in double recovery in any kind of case, especially personal injury cases. The double recovery does not result from the recognition of a cause of action for personal injuries, though, and surely no one would advocate abolishing a cause of action for personal injuries simply because, if improperly charged by the trial court, a double recovery could result. Accordingly, adoption of the proposition herein would not create a double recovery any more than the recognition of a cause of action for personal injuries does. It would simply recognize the true nature of the survival action. If a double recovery were to occur by reason of erroneous submission of special issues, then the proper remedial action would be a remittitur or reversal and remand.<sup>89</sup> This remedial action is quite sufficient to cure any double recovery resulting from error in the trial procedure. Avoiding potential double recovery by simply refusing to recognize a theory of recovery clearly authorized by the literal language of the survival statute and by the reasoning of the Texas Supreme Court in *Landers*, is a classic example of throwing out the baby with the bath water.

The other way a double recovery would occur also results from erroneous trial procedure and is also a result that could occur in any personal injury case. It does not result from recognition of the proposition under discussion, but could occur when multiple suits are filed. For instance, if some wrongful death beneficiaries file one suit on their own behalf, other beneficiaries file a second suit on their own behalf, and the decedent's personal representative files a third suit on behalf of the estate, then there is a potential for error by the lawyers and the trial judge that could result in a double recovery. If the lawyers and trial judge act correctly, however, then there would be no double recovery. One might envision any number of variations in this example. Remaining with the hypothetical case, what if the personal representative sues first and recovers the

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89. See TEX. R. CIV. P. 315, 339-41; cf. *Ft. Worth & R. G. Ry. v. Morris*, 101 S.W. 1038, 1040 (Tex. Civ. App. 1907, writ ref'd) (personal injury case involving diminished earning capacity; double recovery problem cured by remittitur).

entire \$500,000 on behalf of the estate, and then the wrongful death beneficiaries recover \$25,000 each in two subsequent suits? Clearly this would result in a recovery of \$550,000 and could be characterized as a double recovery. In truth, it should be characterized as an example of improper handling of the cases, because the Texas Rules of Civil Procedure allow the tortfeasor to join all these parties in one action.<sup>90</sup> Further, a defendant may prove the existence of other wrongful death beneficiaries who are entitled to pecuniary benefits as bearing on the extent of the recovery in a given case.<sup>91</sup> Therefore, the double recovery can be avoided by properly prepared defense counsel, and, if it occurs, it occurs not because of the existence of the cause of action but because of misapplication of trial procedure.

It is interesting to note in this regard that article 4677 provides for apportionment of damages among wrongful death beneficiaries.<sup>92</sup> The proposition advanced herein calls for an appointment of the damages among the statutory beneficiaries under the wrongful death act and the decedent's estate under the survival statute on the grounds that failure to include the estate in the apportionment results in the various inequities described herein. This broader apportionment between the two statutes is no more subject to double recovery than is article 4677.

With respect to this issue, one should also note that Texas law unquestionably recognizes that funeral expenses may be recovered either by the statutory beneficiaries who paid them or by the estate.<sup>93</sup> This circumstance is really no different than the proposition advanced herein that: lost future earnings may be recovered either by the statutory beneficiaries who would have received them or by the estate to the extent the beneficiaries would not have received them. The instant proposition is no more subject to a double recovery than is the rule that would apply if part of the funeral expenses were paid by the estate and part by a wrongful death beneficiary. *Landers* held that funeral expenses could be recovered by either the statutory beneficiaries or the estate, "provided the de-

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90. See TEX. R. CIV. P. 38-40.

91. See *Galveston, H. & S. A. Ry. v. Contreras*, 72 S.W. 1051, 1051 (Tex. Civ. App. 1903, no writ).

92. See TEX. REV. CIV. STAT. ANN. art. 4677 (Vernon 1952).

93. See *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33, 35 (Tex. 1963).



feudant will not be subjected thereby to a double recovery."<sup>94</sup> Thus, that court recognized the existence of the two causes of action while simultaneously admonishing lawyers and trial judges to avoid the procedural pitfalls precipitating double recovery. As stated previously, these pitfalls exist in every personal injury case.

In summary, recognition of the principal that lost future earnings are recoverable by a decedent's estate to the extent they are not recoverable by the statutory beneficiaries does not create a double recovery situation. A double recovery could result only from procedural error, and such error could occur in any case. Thus, the spectre of double recovery does not justify denying recovery to the estate. A denial of the recovery in question could create a windfall for the tortfeasor as well as various other inequities.<sup>95</sup> As an example of these inequities, assume the decedent has a high income but also has an expensive life style. Assume he borrows thousands of dollars from various people who certainly need repayment of the loans in order to avoid serious financial loss. If the decedent's estate is otherwise devoid of assets, then these creditors will receive nothing unless the estate is allowed to recover the same future earnings that would have otherwise been applied to repayment of the loans. Meanwhile, the tortfeasor pays nothing. This hardly seems appropriate.

As further example, let us suppose the decedent had been reared by his aunt and uncle, or for that matter, simply two nice people who are not related to the decedent, who expended all labor and funds necessary to send him to medical school. Suppose they are more or less destitute but are the decedent's only heirs under his will. They do not qualify as beneficiaries under the wrongful death statute,<sup>96</sup> and, therefore, if the estate is not allowed to recover the

94. *Id.* at 35.

95. See *Criscuola v. Andrews*, 507 P.2d 149, 150 (Wash. 1973) (en banc). The court states:

The problem of prospective double compensation where actions are brought under both survival and wrongful death action is avoided if recovery under the survival action is limited to the prospective net accumulations of the deceased. Payment for support theoretically going to the statutory beneficiaries under the wrongful death action is then included in the decedent's expenses and the problem of a prospective double recovery is obviated. This is a better way to face the issue rather than to arbitrarily indicate damages under a survival action cease [*sic*] at death.

*Id.* at 150.

96. See TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952) (conferring cause of action

decendent's lost future earnings, these people are left destitute as well as griefstricken while the tortfeasor is free to laugh up his sleeve. Is this equitable?<sup>97</sup>

## VI. MEASURE OF DAMAGES TO THE ESTATE

Although the proposition herein has been discussed in terms of "lost future earnings" this terminology is intended to encompass the broader concept of "impairment of earning capacity," and, albeit somewhat simplistic, these terms are used interchangeably for the purpose of this discussion.<sup>98</sup> The various states have taken several positions with respect to the manner in which damages for lost future earnings or impairment of earning capacity should be calculated. In Texas the general rule is that the injured person is entitled to recover the present value of the difference between what he would have been able to earn in the future, but for the injury, and the amount he will be able to earn in his present condition.<sup>99</sup> A discussion of what discount factors are to be used to arrive at present value or whether inflation factors should be included in the

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only to deceased's spouse, children, and parents).

97. *Cf. Criscuola v. Andrews*, 507 P.2d 149, 150 (Wash. 1973) (en banc) (citing *Martin, Measuring Damages in Survival Actions for Tortious Death*, 47 WASH. L. REV. 609, 624-25 (1972)) ("injury to creditors and heirs or devisees in the loss of expected future earnings does not abate at decedent's death because their injury is included in decedent's cause of action which arose, even if only momentarily, before death").

98. *See Missouri, K. & T. Ry. v. Beasley*, 106 Tex. 160, 179, 155 S.W. 183, 187-88 (1913) (holding "lost future earnings" and "impairment of earning capacity" synonymous). Reference should also be made, however, to *Jones v. Martin*, 481 S.W.2d 467, 470 (Tex. Civ. App.—Texarkana 1972, no writ) and *Texas Elec. Ry. v. Worthy*, 250 S.W. 710, 712 (Tex. Civ. App.—Dallas 1923, writ dism'd), for the proposition that a loss of future earnings is but one element to be considered in determining loss of earning capacity. These opinions consider loss of earning capacity to be a broader concept than loss of future earnings and hold the damage calculation should not only consider the victim's salary or earnings before injury, but should also consider how his capacity to expand upon these earnings has been affected. Further, reference should be made to *French v. Grigsby*, 567 S.W.2d 604, 607 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.), in which the court held that "physical impairment" and "diminished capacity to work and earn money," or "loss of earning capacity" are not always equivalent because physical impairment can involve elements of disability beyond impairment of earning capacity. When the victim is dead, however, this additional element does not exist.

99. *See Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 237 (5th Cir.), *cert. denied*, 423 U.S. 839 (1975); *Brown & Root, Inc. v. DeSautell*, 554 S.W.2d 764, 770 (Tex. Civ. App.—Houston [1st Dist] 1977, writ ref'd n.r.e.); *Chicago, R. I. & G. Ry. v. Hammond*, 286 S.W. 483, 485 (Tex. Civ. App.—Amarillo 1926, no writ); *Galveston, H. & S. A. Ry. v. Paschall*, 92 S.W. 446, 448 (Tex. Civ. App. 1906, writ ref'd).

calculation exceeds the scope of this discussion.<sup>100</sup>

The proper measure of damages in a case seeking recovery of the lost future earnings of a decedent in the context of the instant proposition is somewhat more complicated than the general rule stated above. The trial judge's instruction to the jury must be explicit in order to avoid double recoveries, excessive verdicts, or other improper verdicts.<sup>101</sup> Since the precise issue of how to calculate the respective recoveries under the Texas statutes has never been decided in Texas, procedures used in other jurisdictions provide assistance.

The case of *Runyon v. District of Columbia*<sup>102</sup> contains a good discussion of how to measure recoveries under the subject proposition. Pursuant to *Runyon* the calculation would proceed as follows:

- a. Determine gross probable future earnings by approximating the decedent's projected average annual income multiplied by his probable work life, defined as the number of years in which he could have been expected to have earned income; then
- b. Subtract from gross future earnings the following:
  1. probable income taxes, both state and federal, for the term of the deceased's probable work life, and<sup>103</sup>
  2. the amount the deceased would have required to maintain himself, and
  3. the amount the deceased would have contributed to the wrongful death statute beneficiaries; then
- c. Adjust the amount determined by the above process to reflect the reasonable accumulations of the deceased, usually determined by multiplying the said amount by a reasonable per-

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100. For analysis of discount factors used in these calculations see *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541, 551 (5th Cir. 1978) (applying Texas law); *Johnston Testers v. Rangel*, 435 S.W.2d 927, 932-33 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.); *Dallas Ry. & Terminal Co. v. Guthrie*, 206 S.W.2d 638, 644 (Tex. Civ. App.—Fort Worth 1947), *rev'd on other grounds*, 210 S.W.2d 550 (Tex. 1948); *Henwood v. Moore*, 203 S.W.2d 973, 974 (Tex. Civ. App.—Texarkana 1947, no writ); Comment, *Inflation and Future Loss of Earnings*, 27 BAYLOR L. REV. 281 (1975).

101. See *Missouri, K. & T. Ry. v. Beasley*, 106 Tex. 160, 179, 155 S.W. 183, 188 (1913).

102. 463 F.2d 1319 (D.C. Cir. 1972).

103. Whether taxes should be deducted is open to some question. See *Greene v. Teixeira*, 505 P.2d 1169, 1177 (Hawaii 1973) (Levinson, J. dissenting). The Supreme Court, however, has recently held that the effect of income taxes is to be considered in a case under FELA. See *Norfolk & Western Ry. v. Liepelt* \_\_\_ U.S. \_\_\_, \_\_\_, 100 S. Ct. 755, 757, 62 L. Ed. 2d 689, 694 (1980).

centage to reflect the rate of return had it been invested.<sup>104</sup>

The foregoing computations will result in a figure representing the probable net future earnings of the deceased. This sum should then be discounted to present value, and the resulting figure is the figure recoverable under the survival statute as the decedent's net lost future earnings.<sup>105</sup> This method of calculation also results in a determination of the amounts recoverable by the wrongful death beneficiaries; thus, it is impossible to have a double recovery since the wrongful death beneficiaries' recovery has been deducted from the estate's recovery.

As described in *Runyon*, the loss to the wrongful death beneficiaries is to be calculated by ascertaining the annual share of each in the deceased's earnings, multiplied by the number of years in which the beneficiary could reasonably have been expected to have received such share and then reducing this figure to present value.<sup>106</sup> The number of years involved would be determined by the life expectancy of the deceased or the life expectancy of the beneficiary, whichever is shorter.<sup>107</sup>

This method of calculating damages is appropriate for use in Texas, and an analysis of this calculation demonstrates that the instant proposition must be accepted if an entire remedy for the injury is to be afforded to compensate for the two distinct losses. Further, this calculation demonstrates that a double recovery cannot occur if the statutes are interpreted in accordance with the proposition.

## VII. CONCLUSION

In view of the express language of the Texas survival statute and the ruling of the Texas Supreme Court in *Landers*, it seems that net lost future earnings of a decedent should be recoverable by his personal representative under the Texas survival statute to the extent they are not recoverable by someone else under the Texas wrongful death statute. To the extent those who qualify as benefi-

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104. See *Runyon v. District of Columbia*, 463 F.2d 1319, 1321-22 (D.C. Cir. 1972).

105. Compare *Runyon v. District of Columbia*, 463 F.2d 1319, 1322 (D.C. Cir. 1972) with *Rohlfing v. Moses Akiona, Ltd.*, 369 P.2d 96, 104-08 (Hawaii 1961) and *Pezzulli v. D'Ambrosia*, 26 A.2d 659, 661 (Pa. 1942).

106. See *Runyon v. District of Columbia*, 463 F.2d 1319, 1322 (D.C. Cir. 1972).

107. See *id.* at 1322.

ciaries under the wrongful death statute can show what the decedent's contribution of future earnings would have been to them, they can recover those sums under the wrongful death statute. The balance of the lost future earnings, however, should be recoverable under the survival statute by the decedent's personal representative on behalf of his estate. In this regard, one may wish to consider the two hypothetical examples in the first paragraph of this article separately. The first example involves an injury causing more or less instantaneous death, and the second involves an injury causing quadriplegia or some other premanently disabling injury, which precedes death for a period of days, weeks, or months. In either situation, net lost future earnings should be recoverable. In the latter example, the right to recovery is, perhaps, more demonstrable because, it can be said that while the victim lived his earning capacity was permanently diminished, and the cause of action for that diminishment can be said to have survived his death by virtue of the survival statute.<sup>108</sup> The fact remains, however, that instantaneous death itself results in a total diminishment of earning capacity, and there is no logical reason to allow recovery of funeral expenses and other property damage, for example, under the survival statute in such a case, yet not allow recovery of lost future earnings. Both constitute losses to the estate. Regardless of how "instantaneous," a death is suffered, there is some fraction of time between the injury and the resultant death. It is during that fraction of time that the decedent has suffered an invasion of the security of his person so severe that it causes his death and the decedent must be considered to possess a cause of action for that invasion during that instant of time, no matter how brief. The cause of action for this invasion survives to his estate.

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108. In *Merrill v. Beckwith*, 61 F.2d 912 (5th Cir. 1932), the court in applying the Texas survival statute, held "statutes providing for the survival of causes of action are to be liberally construed with a view to effect their objects." *Id.* at 913 (citing *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 137 S.W. 1720 (1911)). *Merrill* presented the issue of whether a cause of action survived the instantaneous death of the *tortfeasor*. The court stated, "We are of the opinion that the statute does not recognize a distinction where a wrongdoer lives a measurable length of time and one where death resulting from an injury is commonly spoken of as having been instantaneous." *Id.* at 913. Thus, the plaintiff was able to prosecute the cause of action against the *tortfeasor's* estate even though the *tortfeasor* had died instantly in the accident causing the plaintiff's injuries. *See id.* at 913. One has only to turn this coin over to see that all of the injured party's causes of action survive his instantaneous death as well.