Notes

Paying the Penultimate Price: Compensating Predeath Pain and Suffering in California

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Senate Bill 447, California's recent lift of the ban on recovery of damages for a decedent's pain, suffering, and disfigurement in survival actions marks a necessary change in the state's tort law, avoiding the arbitrary and even shocking outcomes that occurred under the former statutory regime. When the California State Legislature revisits the survival statute prior to the recent amendment's sunset in 2026, it should choose to keep predeath noneconomic damages as part of the available recovery in a death case. However, the lack of in-state case law discussing predeath noneconomic damages will require California courts and lawmakers to look to other jurisdictions for guidance on the various doctrinal and evidentiary questions that inevitably flow from such an expansion of liability. These questions include the relationship between a tortious injury and the subsequent death, judicial review of noneconomic jury verdicts, the temporal scope of liability, and the evidentiary requirements for a claim of predeath pain and suffering. This Note outlines the circumstances leading the passage of Senate Bill 447, argues for the retention of predeath pain and suffering damages past the statutory sunset, and discusses how California courts might address the doctrinal questions that may arise in the context of cases implementing the new damages with reference to the many solutions found in jurisdictions around the United States.

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INTRODUCTION

The California State Legislature passed Senate Bill 447 ("S.B. 447") in September of 2021[1] amidst a legislative push to increase accessibility to justice for individuals who have been harmed or have lost loved ones as a result of others' misconduct.[2] This bill, an amendment to California's longstanding survival statute,[3] Code of Civil Procedure section 377.34, opened the door for the heirs of deceased tort victims to collect damages for their lost loved one's pain and suffering.[4] For many years, California, unlike most U.S. states, prohibited compensation for the noneconomic damages suffered by a decedent prior to death.[5] This limitation applied even where the death resulted from the same injury that caused the decedent's pain and suffering.[6] Culpable tortfeasors therefore avoided paying for a large portion of the harm they caused when an injury victim died sometime after suffering their injuries. S.B. 447 corrected this problem, but only for a limited time.[7] Starting January 1, 2022, and due to end on January 1, 2026, plaintiffs may now recover "damages for pain, suffering, or disfigurement" in survival actions.[8] Despite cries of "double recovery"[9] and "nuclear verdicts"[10] from the defense bar, the California State Legislature chose to join the majority of states in allowing compensation for predeath pain and suffering.

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1. S.B. 447, 2021-2022 Leg. (Cal. 2021).

2. *See*, *e.g.*, Samantha Solomon, *New California Law Expands Statute of Limitations for Sexual Assault Survivors*, ABC 10 (Dec. 20, 2018, 12:58 PM), https://www.abc10.com/article/news/local/california/new-california-law-expands-statute-of-limitations-for-sexual-assault-survivors/103-bb9e26a3-77b4-49f2-8960-3dce865da669; Ganesh Setty, *Calif. Raises Caps On Medical Malpractice Awards*, LAW360 (May 23, 2022, 9:47 PM), https://www.law360.com/articles/1496045/calif-raises-caps-on-medical-malpractice-awards; *Sen. Dodd: Governor Signs Auto Liability Insurance Reform Bill*, CAL. STATE SENATE (Sept. 29, 2022), https://sd03.senate.ca.gov/news/20220929-sen-dodd-governor-signs-auto-liability-insurance-reform-bill.

3. For a definition and distinction between survival actions and claims for wrongful death, *see infra* Part II.

4. S.B. 447, 2021-2022 Leg. (Cal. 2021); Bigad Shaban, Robert Campos & Mark Villarreal, *New California Law Allows Families to Sue for Millions More After Losing Loved Ones*, NBC BAY AREA (Oct. 8, 2021, 10:09 AM), https://www.nbcbayarea.com/investigations/new-california-law-allows-families-to-sue-for-millions-more-after-losing-loved-ones/2676606.

5. Jennifer K. Thai, *Pain and Suffering Damages Now Permitted in California Survival Actions*, 7 SCHNADER AVIATION GRP., no. 4, 2021. *See generally* ELLIOTT M. KROLL & JAMES M. WESTERLIND, ARENT FOX LLP SURVEY OF DAMAGE LAWS OF THE 50 STATES INCLUDING THE DISTRICT OF COLUMBIA AND PUERTO RICO (2012).

6. *See* Cnty. of L.A. v. Superior Ct., 981 P.2d 68, 70 (Cal. 1990).

7. Steven M. Sweat, *New California Law Allows Pain and Suffering Damages in Wrongful Death Claims*, CAL. ACCIDENT ATT'YS BLOG (Dec. 13, 2021), https://www.californiaaccidentattorneysblog.com/new-california-law-allows-pain-and-suffering-damages-in-wrongful-death-claims.

8. CAL. CIV. PROC. CODE § 377.34(b) (West 2023).

9. Justin Sarno & Jayme Long, *New California Law Threatens to Dramatically Increase Pain-and-Suffering Damages in Survival Actions*, DLA PIPER (Oct. 6, 2021), https://www.dlapiper.com/en/insights/publications/2021/10/new-california-law.

10. Spencer Kelly & Joelle Nelson, *California Amends CCP 377.34 Permitting Recovery of Damages for Pain, Suffering, or Disfigurement in Survival Actions*, LEWIS BRISBOIS (June 24, 2022), https://lewisbrisbois.com/newsroom/legal-alerts/california-amends-ccp-377.34-permitting-recovery-of-damages-for-pain-suffering.

As noted, S.B. 447 is subject to a sunset provision that will end the recovery of predeath pain and suffering in 2026 unless new legislation is enacted.[11] In addition, the amendment includes a mandatory reporting procedure for parties who recover damages under it, which may help lawmakers to evaluate whether the new changes have been effective during this active period.[12] The time between now and the amendment's sunset provides a window of opportunity to look to other jurisdictions for answers on how to address the various doctrinal matters that can arise with implementing and applying survival statutes that include pain and suffering as items of recovery. When the California State Legislature revisits the issue in 2025, it will need to decide whether survival damages for pain, suffering, and disfigurement should remain in the code and how to address any implementation issues raised during this initial active period of the provision.

This Note argues that the State Legislature should choose to retain these elements of damages for survival actions into the future, and addresses the issues legal practitioners will face when implementing them in survival actions in California courts. Part I outlines the circumstances that led to the passage of S.B. 447, and discusses the statutory text, including the sunset provision. Part II addresses criticisms of the legislation and argues for the state to keep survival damages for pain and suffering into the future. Finally, Part III lists some of the issues California courts are likely to face with the new damages provisions and presents examples of solutions from other jurisdictions. These will include the relationship between causation of injury and causation of death, the temporal scope of recoverable damages, and the standard of appellate review for excessiveness and sufficiency.

I. OVERVIEW OF THE PASSAGE OF SENATE BILL 447

Unlike a wrongful death action, which is brought by statutorily designated beneficiaries for the harms they have suffered in losing a loved one's companionship and financial support, a survival action is a claim made by the personal representative of the decedent for the damages the decedent accrued from the time of a civil wrong until their death.[13] Under California's statutory regime, decedents' personal representatives have long been able to collect the economic losses that decedents incurred before their death, such as past medical expenses and lost wages.[14] For many years, plaintiffs who have brought survival

11. CAL. CIV. PROC. CODE § 377.34(b) (West 2023).

12. *Id.* § 377.34(c).

13. *See* 22A Am. Jur. 2d *Death* §§ 12, 70, 190, 273 (2023); RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS §§ 71–72 (AM. L. INST., Tentative Draft No. 2, 2023) (outlining the law of liability in the event of death); RESTATEMENT (THIRD) OF TORTS: REMEDIES §§ 23–24 (AM. L. INST., Tentative Draft No. 2, 2023) (outlining the damages remedies generally available in survival actions, as well as wrongful death actions).

14. Judicial Council of California Civil Jury Instructions § 3919, *Survival Damages (Code Civ. Proc, § 377.34)* (2022).

actions in the state have also collected punitive damages in cases of malicious, oppressive, or fraudulent conduct.[15] Conspicuously absent from the survival damages collectable in California, however, were noneconomic damages:[16] the pain, suffering, and disfigurement that many tort victims experience before eventually succumbing to their injuries. This led to many cases in which recovery against a clearly negligent defendant was artificially limited, simply because the victim happened to be unlucky enough to lose their life prior to trial and entry of a judgment.[17] Some narrow exceptions through the years, such as where it was preempted by state statute[18] or inconsistent with federal law,[19] or where an exception was necessitated by procedural irregularities.[20] However, in the majority of cases, surviving heirs had no means by which to hold tortfeasors accountable for the physical pain and mental anguish the victims experienced before their death. This had an enormous effect on the value of a case to a surviving family. Because of the bar against predeath pain and suffering, where the victim of a terminal condition lacked evidence of a substantial *economic* damages claim, their case was, in effect, lost or won depending on whether the victim could survive to a final judgment at trial.[21] The COVID-19 pandemic,

15. CAL. CIV. PROC. CODE § 377.34(a) (West 2023) (allowing collection of punitive damages in survival cases). The inclusion of "any penalties or punitive or exemplary damages that the decedent would have been entitled to recover" in a survival claim was first added in 1961, when the State Legislature enacted California Probate Code section 573. 1961 Cal. Legis. Serv., ch. 657. There are many examples throughout the years of personal representatives collecting such damages. *See* Dunwoody v. Trapnell, 120 Cal. Rptr. 859, 860–61 (Cal. Ct. App. 1975); Stencel Aero Eng'g Corp. v. Superior Ct. of S.F., 128 Cal. Rptr. 691, 695 (Cal. Ct. App. 1976); Garcia v. Superior Ct., 49 Cal. Rptr. 2d 580, 585 (Cal. Ct. App. 1996); Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 522 (Cal. Ct. App. 2001); Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 807 (Cal. Ct. App. 2003).

16. For a history of the timeline of the ban on survival damages for pain and suffering in California law, *see* Cnty. of Los Angeles v. Superior Ct., 981 P.2d 68, 69–71 (Cal. 1990).

17. *See generally SB 447 (Laird) Restoring Victim's Rights: Stopping Wrongdoers Benefitting from Court Backlogs and Delaying Until Victims Die*, CONSUMER ATT'YS OF CAL. (2021).

18. CAL. WELF. & INST. CODE § 15657 (West 2020) (creating exception to the bar on pain and suffering damages in elder abuse cases where "defendant has been guilty of recklessness, oppression, fraud, or malice in the commission" of elder abuse). *But see* Quiroz v. Seventh Ave. Ctr., 45 Cal. Rptr. 3d 222, 239 (Cal. Ct. App. 2006) (a timely-pled cause of action for wrongful death did not allow a later-plead survival action under the Elder Abuse Act to relate back to date of the original complaint, striking the claims for the decedent's pain and suffering).

19. Chaudhry v. City of L.A., 751 F.3d 1096, 1105 (9th Cir. 2014) ("California's prohibition against pre-death pain and suffering damages limits recovery too severely to be consistent with [42 U.S.C] § 1983's deterrence policy. Section 377.34 therefore does not apply to § 1983 claims where the decedent's death was caused by the violation of federal law.").

20. Sullivan v. Delta Air Lines, Inc., 935 P.2d 781, 783 (Cal. 1997) (holding that damages for predeath pain and suffering were available where fatally ill plaintiff survived past the rendering of a final judgment pending appeal).

21. *See, e.g.*, *id.* (pain and suffering damages were available in a trial where a fatally ill plaintiff died after final judgment was rendered and appeal was pending); Williamson v. Plant Insulation Co., 28 Cal. Rptr. 2d 751, 753–54 (Cal. Ct. App. 1994) (no damages for pain and suffering were available in a bifurcated trial on liability and damages where a fatally ill plaintiff survived the first phase of trial but died before the second phase on damages was completed); Kellogg v. Asbestos Corp. Ltd., 49 Cal. Rptr. 2d 256, 262 (Cal. Ct. App. 1996) (no damages for pain and suffering were available in a trial where a fatally ill plaintiff survived to end of bench trial and after submission of the matter, but died before final judgment was rendered); Cadlo v. Metalclad Insulation

which closed many courts and pushed trial dates far off into the future, only increased the risk of a plaintiff dying before resolution of their lawsuit.[22]

Moreover, this bar against recovery for predeath noneconomic damages placed California among a small minority of states that did not allow such damages.[23] Only Colorado, Arizona, Florida, and Idaho shared similar bans prohibiting personal representatives in survival actions from recovering for a decedent's pain and suffering.[24]

In light of the crisis that COVID-19 presented for civil courts, and recognizing that California's ban against recovery for predeath suffering was a divergence from the tort law of most states, the State Legislature passed S.B. 447 and Governor Newsom signed it into law in late 2021.[25] As passed, however, S.B. 447 represented something of a half measure.[26] The amended statute's provision outlining the damages recoverable in a survival action still reads as follows:

> In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement. [27]

The baseline, default position of the survival statute therefore remains that recovery for pain and suffering is still unavailable, unless some exception applies. That relevant exception is the next subsection in the amended statute:

> Notwithstanding subdivision (a), in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.[28]

So, predeath pain and suffering damages are available only for cases filed within this four-year window.[29] The amendment also provides a carve out for

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Corp., 61 Cal. Rptr. 3d 104, 112 (Cal. Ct. App. 2007) (pain and suffering damages were available in a trial where a fatally ill plaintiff died after the jury's special verdict was filed, with no other issues pending).

22. Loren Schwartz, *Recovery of Non-Economic Damages in Survival Actions*, PLAINTIFF MAG. (Dec. 2021), https://plaintiffmagazine.com/recent-issues/item/recovery-of-non-economic-damages-in-survival-actions.

23. Shaban et. al, supra note 4.

24. *Id.*

25. *Id.*

26. Daniel S. Hurwitz, *California's SB 447 – Increasing the Danger in One of the Country's Most Favorable Venues for Personal Injury Plaintiffs*, NAT'L L. REV. (Jan. 10, 2022), https://www.natlawreview.com/article/california-s-sb-447-increasing-danger-one-country-s-most-favorable-venues-personal.

27. CAL. CIV. PROC. CODE § 377.34(a) (West 2023).

28. *Id.* § 377.34(b).

29. *Id.*

cases that were given a trial preference, where an older or chronically ill plaintiff asks for an earlier trial date, worrying that they may lose out on a substantial portion of recoverable damages if they do not survive.[30]

For the first three years of this amendment's limited trial run, California's Judicial Council will keep a record of every jury verdict, judgment, and settlement entitling a plaintiff to noneconomic damages.[31] Then, on or before the first day of 2025, the Judicial Council will send the State Legislature a report outlining the information gathered in the process.[32] This presumably will allow lawmakers to decide whether to keep pain and suffering under the statutory regime, to make additional changes to the statute, or to do away with noneconomic damages in survival actions entirely, returning California to its original regime.[33] The State Legislature might also conclude that more time and more case results are necessary to gauge the effectiveness of the new changes, and decide to kick back the amendment's sunset to a later date.

Still, it's important to note that cases involving predeath pain and suffering have obviously come before California courts before. There was just no mechanism, in most cases, to compensate for it. A good example of a case displaying the contours of California's pre-amendment damages regime is *Rufo v. Simpson*,[34] the 1997 civil trial of O.J. Simpson over his infamous alleged killing of his former wife, Nicole Brown Simpson, and Ronald Goldman.[35] The plaintiffs, including Nicole Brown Simpson's father and Ronald Goldman's parents, were precluded from recovering anything for the pain and suffering of the decedents under the pre-amendment version of 377.34.[36] Because no noneconomic awards for the decedents—which likely would have been substantial, given the grisly facts that came out at trial—were available, the plaintiffs shifted their focus to punitive damages.[37] At the time, wrongful, oppressive, and malicious conduct could justify a punitive award in a survival action, and even a nominal economic loss award could be the springboard for a much bigger punitive damages award.[38] The plaintiffs therefore claimed nominal economic losses (mostly the value of the victims' clothing)[39] to provide a route to substantial punitive damages ($25 million total).[40] The only other

30. *Id.* The California statute regarding trial preferences is California Code of Civil Procedure section 36.

31. CAL. CIV. PROC. CODE § 377.34(c) (West 2023); *see* Jud. Council of Cal., CCP 377.34 Reporting, https://www.courts.ca.gov/documents/CCP-377.34-Reporting-Webpage-Language.pdf.

32. CAL. CIV. PROC. CODE § 377.34(d) (West 2023).

33. Sara M. Peters, *California Finally Allows Pre-Death Pain and Suffering Damages, But That's Set to Expire*, DAILY JOURNAL, Mar. 31, 2023 at 1.

34. 103 Cal. Rptr. 2d 492 (Cal. Ct. App. 2001).

35. Michael Fleeman, *Jury Orders Simpson to Pay $25 Million in Punitive Damages*, ASSOCIATED PRESS (Feb. 10, 1997), https://apnews.com/article/a9afcf44252464c9309a4d569a74660d.

36. *Rufo*, 103 Cal. Rptr. 2d at 520.

37. *Id.* at 522.

38. *Id.*

39. *Id.*

40. Of course, this unique method of recovery is not available to a majority of plaintiffs in cases after a death. Liability insurers rarely insure for intentional harm, meaning that punitive damage awards are rarely

items of damage available to the plaintiffs were those given to beneficiaries under the California wrongful death statute, like loss of consortium and funeral expenses.[41] The reviewing court in *Rufo* seemed to recognize the immensity of the provable but uncompensable damages involved.[42] The Second District Court of Appeal, ruling on the propriety of all the damages in the verdict, acknowledged the severity of the uncompensable noneconomic harms suffered by the decedents in a footnote, suggesting that "the actual harm suffered by the decedent" was distinguishable from "the limited economic damages recoverable by the estate."[43]

If the same case were filed today under the newly amended statute, all of those same items of damage would remain compensable—the economic losses, punitive damages, and wrongful death damages—but with the addition of another item of damage that could be readily proved, the pain and suffering that Nicole Brown Simpson and Ronald Goldman likely experienced before they passed away.[44] In more typical cases, this statute also provides a means of vindicating a decedent's noneconomic harm when a terminal condition kills the decedent during the pendency of a lawsuit.[45] Before the amendment, if a plaintiff died unexpectedly or from a cause unrelated to the tort,[46] recovery of pain and suffering damages was completely barred, even to the point that a case could finish trial and any noneconomic damages awarded by the jury could be stricken.[47] These problems now present no bar to recovery under the new version of section 377.34, so long as the lawsuit was filed after January 1, 2022 and before January 1, 2026, or was granted a trial preference prior to trial.[48]

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pursued unless the defendant has individually deep pockets. Also, the majority of high-value injury cases do not involve conduct bad enough to justify punitive damages claim. The peculiar facts of the *Rufo* case make it a convenient window into how the law works in a situation where the typical incentives and disincentives for litigation do not exist.

41. *Rufo*, 103 Cal. Rptr. 2d at 520; CAL. CIV. PROC. CODE § 377.61 (West 2023).

42. *Rufo*, 103 Cal. Rptr. 2d at 527 n.15.

43. *Id.*

44. CAL. CIV. PROC. CODE § 377.34(b) (West 2023).

45. *See, e.g.*, Sullivan v. Delta Air Lines, Inc., 935 P.2d 781, 783 (Cal. 1997); Williamson v. Plant Insulation Co., 28 Cal. Rptr. 2d 751, 751 (Cal. Ct. App. 1994); Kellogg v. Asbestos Corp. Ltd., 49 Cal. Rptr. 2d 256, 261 (Cal. Ct. App. 1996); Cadlo v. Metalclad Insulation Corp., 61 Cal. Rptr. 3d 104, 113 (Cal. Ct. App. 2007).

46. *See* Moody v. Cal. Dep't of Corr. & Rehab., No. 18cv1110-WQH-AGS, 2022 U.S. Dist. LEXIS 20628, at *8–9 (S.D. Cal. Feb. 3, 2022) (striking pain and suffering claims in a prison excessive force case under the old version of section 377.34 where the decedent died for unrelated reasons).

47. *Kellogg*, 49 Cal. Rptr. 2d at 261.

48. Glass v. Whills, LLC, Nos. B304806, B305637, 2022 Cal. App. Unpub. LEXIS 4901, at *13 (Cal. Ct. App. Aug. 10, 2022) (granting retroactive availability of pain and suffering damages where the elderly personal representative, not the decedent, was granted a trial preference before the statutory cutoff in the new amendment); Bader v. Johnson & Johnson, 303 Cal. Rptr. 3d 162, 199 (Cal. Ct. App. 2022) (holding that the amendment to section 377.34 allowed the personal representative of a plaintiff who died before final judgment to collect for pre-death pain and suffering, avoiding the outcomes in previous mesothelioma cases under the previous statutory regime); Parrish v. Healthcare, No. 30-20210-1204202, 2022 Cal. Super. LEXIS 63235, at *6 (Cal. Super. Ct. Sep. 19, 2022) (denying terminating sanctions in an elder abuse case where the plaintiff filed a

II. AN ARGUMENT FOR FUTURE RETENTION OF PREDEATH PAIN AND SUFFERING DAMAGES IN CALIFORNIA

Given that pain and suffering damages have some of the biggest effects of any aspect of tort claims on case value,[49] vigorous arguments for and against the recent amendment have been raised by both sides of the bar.

On the side of the plaintiff's bar, advocates for S.B. 447 have argued that the previous prohibition of predeath suffering damages led to shady delay tactics by defense lawyers.[50] In its own advocacy in support of the bill, the Consumer Attorneys of California (a plaintiff-side professional organization) wrote that the prohibition "create[d] a perverse incentive for defendants to delay cases and harass ill plaintiffs in the hopes that the plaintiff will die before trial."[51] Plaintiff's lawyers also stressed that these tactics exacerbated the backlog of cases in the California court system (roughly 1.4 million cases) and unduly abused public resources.[52] Especially in light of the COVID-19 pandemic that increased risk of unexpected fatalities among people with preexisting conditions, advocates for the bill argued that without an expansion of liability to predeath noneconomic damages, tortfeasors would have no reason not to just "wait and see" if a toxic exposure plaintiff would die while their lawsuit was ongoing.[53] Therefore, the new law would "exert tort law's full deterrent effect," increasing settlement pressure and giving fatally ill plaintiffs the assurance that the emotional and temporal commitment of bringing a lawsuit would not be in vain.[54]

On the other side of the bar, defense lawyers have argued that predeath pain and suffering awards would unnecessarily increase businesses and insurers' exposure to "nuclear verdicts."[55] Defense lawyers have cautioned that the new bill would "increase discovery costs" since, under the new amendment, a decedent's pain and suffering would necessarily be the subject of additional

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second lawsuit against the same defendant after January 1, 2022, seeking to recover pre-death pain and suffering damages).

49. Cary Silverman & Christopher E. Appel, *Nuclear Verdicts Trends, Causes, and Solutions*, U.S. CHAMBER OF COM. (Sept. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf (defense bar perspective); Brian Panish & Patrick Gunning, *Arguing Non-Economic Damages in A Wrongful-Death Case*, ADVOCATE (Apr. 2021), https://www.advocatemagazine.com/article/2021-april/arguing-non-economic-damages-in-a-wrongful-death-case (plaintiff's bar perspective).

50. *See* Shaban et. al., *supra* note 4.

51. CONSUMER ATT'YS OF CAL., *supra* note 17.

52. Consumer Attorneys of California, *When Negligence Results in Human Suffering, Victims Could Finally Hold Bad Actors Accountable Under New Legislation*, YUBANET (Mar. 8, 2021), https://yubanet.com/california/when-negligence-results-in-human-suffering-victims-could-finally-hold-bad-actors-accountable-under-new-legislation.

53. Shaban et. al., s*upra* note 4.

54. Spencer Pahlke, Douglas Saeltzer & Kelsey Constantin, *Calif. Bill Would End Damages Injustice for Dead Plaintiffs*, LAW360 (June 22, 2021, 4:06 PM), https://www.law360.com/articles/1395840/calif-bill-would-end-damages-injustice-for-dead-plaintiffs.

55. Kelly et. al, s*upra* note 10. Defense lawyers usually use "nuclear verdict" to refer to a jury verdict of $10 million or more.

inquiry during pretrial litigation.[56] They also argued the amendment would complicate an already complex area of the law, given, for example, the potential susceptibility of survival claims for pain and suffering to medical liens.[57] One of the defense bar's most vigorous arguments has been that the state "already allows one form of noneconomic damages—punitive damages—to be recovered in survival actions" and that pain and suffering awards would be duplicative of any punitive awards.[58]

Detractors of the bill make this argument despite the fact that punitive damages are conceptually distinct from pain and suffering damages. Where pain and suffering damages seek to compensate a victim for harm, punitive damages have no compensatory function and seek to punish a wrongdoer.[59] Thus, they are not duplicative because they do not fulfill the same purpose. Further, punitive damages are limited to cases of especially egregious wrongdoing, requiring malicious, oppressive, or fraudulent conduct, and must be proven by clear and convincing evidence,[60] an exceedingly difficult standard to reach in most tort cases.

Despite the vigorous arguments on both sides, the arbitrary results that stem from the previous prohibition of recovery reveal the most convincing argument in favor of compensating decedents' noneconomic harm. The California Assembly Committee on the Judiciary indicated a similar logic in its own analysis of the bill prior to its passage:

> The supporters of this bill stress the "perverse incentive" created by the California rule, which they allege leads to the "despicable" and "nefarious" exploitation of that rule by "manipulative" defendants, insurers, and defense counsel. The Committee is not privy to, and need not judge, the motives of defense counsel and defendants. . . . Nonetheless, without questioning the motives of defense counsel, one could still oppose the California rule based upon its sheer arbitrariness.[61]

The outcomes in cases dutifully applying the original statute, many of which are mesothelioma cases, are indeed bizarre. In *Williamson v. Plant Insulation Co.*, for example, a mesothelioma patient survived to the end of one

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56. Anne Marie Ellis & David DeBerry, *What Calif. Personal Injury Law Change Means for Defendants*, LAW360 (Dec. 6, 2021, 4:20 PM), https://www.law360.com/articles/1444525/what-calif-personal-injury-law-change-means-for-defendants.

57. Kelly et. al., *supra* note 10.

58. Kyla Christoffersen Powell & Fred J. Hiestand, *Stop SB 447's Imposition of Unlimited "Pain and Suffering" Damages*, CIVIL JUSTICE ASSOC. OF CAL. (May 13, 2021), [https://web.archive.org/web/20230129190835/https://www.cjac.org/op-ed/stop-sb-447s-imposition-unlimited-pain-and-suffering-damages].

59. *See* Dunwoody v. Trapnell, 120 Cal. Rptr. 859, 860 (Cal. Ct. App. 1975); Stencel Aero Eng'g Corp. v. Superior Ct. of S.F., 128 Cal. Rptr. 691, 691 (Cal. Ct. App. 1976); Garcia v. Superior Ct., 49 Cal. Rptr. 2d 580, 585 (Cal. Ct. App. 1996); Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 522 (Cal. Ct. App. 2001); Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 807 (Cal. Ct. App. 2003).

60. CAL. CIV. CODE § 3294 (West 2023).

61. Cal. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 447 (2021-2022 Reg. Sess.), as amended April 22, 2021, at 4.

section of a bifurcated jury trial, which established the liability of the defendant, but died before commencement of the second phase of trial, completely barring recovery for the victim's pain and suffering.[62] In *Kellogg v. Asbestos Corp. Ltd.*, a case with a tort victim who survived to the end of a bench trial but died before the final judgment was entered, recovery for pain and suffering was also prohibited.[63] In contrast, in *Cadlo v. Metalclad Insulation Corp.*, a similarly situated victim survived to the end of a jury trial, and the special verdict form was filed on the docket, but the victim died before entry of judgment on that special verdict.[64] In this case, the court ruled that the surviving widow *was* entitled to damages for the decedent's predeath pain and suffering.[65] A fair and just civil system should not hang entitlement to damages on such capricious distinctions. At least to avoid those results, a new statute was necessary. And, since arbitrary outcomes like these were happening for decades under the previous survival damages regime,[66] not just during COVID-19, the ongoing implementation of survival damages for noneconomic harm should remain.

Under the amended version of section 377.34, results like the ones in *Williamson* and *Kellogg* are avoidable. In fact, one of the few applications of the new statutory amendment avoided a similar outcome under similar facts.[67] In a 2022 California Court of Appeal case, *Bader v. Johnson & Johnson*, the defense appealed a jury verdict for pain and suffering (among other issues) in a mesothelioma case where the victim died after the case was granted a trial preference, citing the general bar on pain and suffering damages still found in the statutory code at section 377.34(a). Because the case fell into one of the categories allowing for predeath pain and suffering damages, the court held that the defendant's argument was mooted.[68] While the opinion largely focused on the propriety of expert testimony, and the segment focusing on the predeath pain and suffering issue was only two paragraphs at the end of the opinion,[69] *Bader* was one of the first examples of a pain and suffering award upheld in the peculiar circumstance of a plaintiff dying in the course of a nearly completed lawsuit, one of the situations S.B. 447 was designed to address.

Not only were the outcomes anomalous from case to case, the prior statutory regime also made California tort cases anomalous as to the rest of the country. The fact that only four other states prohibited recovery of predeath pain and suffering damages meant that, for decades, Californians who were the victims of great tragedies were placed on uneven footing with the residents of other states. Even in a case with clear-cut fault, litigants suing in California

62. 28 Cal. Rptr. 2d 751, 753–54 (Cal. Ct. App. 1994).
63. 49 Cal. Rptr. 2d 256, 262 (Cal. Ct. App. 1996).
64. 61 Cal. Rptr. 3d 104, 112 (Cal. Ct. App. 2007).
65. *Id.* at 113.
66. *See Williamson*, 28 Cal. Rptr. 2d at 753–54.
67. Bader v. Johnson & Johnson, 303 Cal. Rptr. 3d 162, 199 (Cal. Ct. App. 2022).
68. *Id.*
69. *Id.*

courts had no means of vindicating a decedent's pain and suffering, no matter how substantial. This had the effect in some cases of preventing some California litigants from even presenting evidence of the details of a significant injury at all.[70] Though financial remediation is one significant incentive in bringing a lawsuit, so too is having the wrongdoing of a defendant publicly disclosed and evaluated by an impartial jury.[71] If a large component of the harm that a defendant causes is completely unrecoverable in a lawsuit, then any evidence relevant only to that component of harm will not come out in a trial.[72] If Californian survivors of a deceased loved one cannot find vindication for their loved one's predeath suffering in the courts, then the public benefit of educating the public about the harm caused by a negligent business becomes hamstrung by legal technicalities. Even if survivors could go to the news industry or to social media and have their stories heard, thouse outlets are not the same as the unambiguous statement of wrongdoing and responsibility that a jury verdict provides and which was unavailable under the old section 377.34 for a victim whose primary harm was pain and suffering.

The plaintiff's bar and the defense bar have taken predictable stances on recovery of predeath pain and suffering damages given the issue's likely effect on case value. But the previous system led to tragic outcomes, barring recovery even when tort victims themselves had brought a lawsuit and gone through years of litigation, only for an untimely death to completely abate an otherwise valid claim. Because such results were out of step with the vast majority of states, keeping Californians unable to publicly disclose the effects of a defendant's wrongdoing in many cases, the statutory change and allowance of recovery is a necessary step in the right direction. To avoid arbitrary and tragic outcomes for California tort-victims in the future, the Calfornia Legislature should choose a path that retains predeath pain and suffering damages in the statutory scheme even after the current sunset in 2026. Additionally, the Legislature should keep these damages even after COVID-19's impact subsides, since these problems existed before the pandemic and will continue to affect fatally ill plaintiffs well into the future.

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70. *See* Moody v. Cal. Dep't of Corr. & Rehab., No. 18cv1110-WQH-AGS, 2022 U.S. Dist. LEXIS 20628, at *9 (S.D. Cal. Feb. 3, 2022) (striking pain and suffering claims in a prison excessive force case under the old version of section 377.34 where the decedent died for unrelated reasons); Carr v. Progressive Cas. Ins. Co., 199 Cal. Rptr. 835, 841 (Cal. Ct. App. 1984) ("By statute, no rights for damages for pain, suffering, emotional distress or disfigurement survived Carr's death and consequently his administrator could not recover them from either Royce or Progressive.").

71. For a recent example of the essentiality of the civil justice system for public disclosure of wrongdoing, *see* Shanin Specter, *Dominion's Riches Come at Our Expense*, SMERCONISH (Apr. 21, 2023), https://www.smerconish.com/exclusive-content/dominions-riches-come-at-our-expense; *see also* Timothy D. Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809 (2007).

72. *See* Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 520 (Cal. Ct. App. 2001) (holding the decedent's pain and suffering was not recoverable and therefore was not a primary focus of the trial, even though it was likely a huge component of the harm done by Simpson). *See also* Judicial Council of California Civil Jury Instructions § 3921, *Wrongful Death (Death of an Adult)* (2020), which expressly instruct a jury not to consider a decedent's predeath suffering.

III. ISSUES AND SOLUTIONS

Cases are trickling into the California courts applying the new survival statute,[73] but the expansion of liability for a decedent's pain and suffering damages will undoubtedly bring up a set of issues that courts and lawmakers outside the state have already faced. This Part will outline some of the issues and questions that will likely come up when personal representatives seek to vindicate the pain and suffering of a decedent in a survival action in California courts under the amended section 377.34. Part III.A will discuss the relationship between a decedent's injury and their cause of death, Part III.B will explore the applicable review standards for excessiveness and adequacy, and Part III.C will survey the temporal scope of and evidentiary requirements for liability, each of which are issues (and have solutions) found in jurisdictions all around the country.

A. CAUSATION OF DEATH

Despite the universal implementation of survival statutes around the nation, states are split on the matter of how to treat causation of death as it pertains to recovery in a survival action. Wrongful acts can result in many different types of injuries, and those injuries' relationship with the eventual death of a person can vary. In some cases involving injuries like burns, asphyxiation, certain cancers, internal bleeding, and brain diseases, the wrongful act can both be a cause of death *and* the cause of much predeath pain and suffering. In other cases, a tort victim might be left permanently injured, and therefore experience permanent pain, suffering, and disfigurement, but later die due to a completely unrelated cause. When faced with a survival action for pain and suffering, the question becomes how, and whether, to differentiate the relationships between injury and death.

The key functions of tort—compensation and deterrence[74]—are a source of the problem. The compensation function of the tort system exists to restore

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73. *See* Lewis v. Red's Iron Specialties, No. 19STCV32637, 2023 Cal. Super. LEXIS 3448, at *6 (Cal. Super. Ct. Mar. 13, 2023) (striking a pre-death pain and suffering damages claim where original lawsuit was filed before 2022 and plaintiff was not given a preference); Glass v. Whills, LLC, Nos. B304806, B305637, 2022 Cal. App. Unpub. LEXIS 4901, at *13 (Cal. Ct. App. Aug. 10, 2022) (granting retroactive availability of pain and suffering damages where the elderly personal representative, not the decedent, was granted a trial preference before the statutory cutoff in the new amendment); Bader v. Johnson & Johnson, 303 Cal. Rptr. 3d 162, 199 (Cal. Ct. App. 2022) (holding that the amendment to section 377.34 allowed the personal representative of a plaintiff who died before final judgment to collect for pre-death pain and suffering, avoiding the outcomes in previous mesothelioma cases under the previous statutory regime); Parrish v. Healthcare, No. 30-2021-01204202-CU-MC-CJC, 2022 Cal. Super. LEXIS 63235, at *6 (Cal. Super. Ct. Sept. 19, 2021) (denying terminating sanctions in an elder abuse case where the plaintiff filed a second lawsuit against the same defendant after January 1, 2022, seeking to recover pre-death pain and suffering damages).

74. *See*, *e.g.*, Warriner v. Stanton, 475 F.3d 497, 500 (3d Cir. 2007); Wiley v. Cnty. of San Diego, 966 P.2d 983, 990 (Cal. 1998); S. Cal. Gas Leak Cases, 441 P.3d 881, 896 (Cal. 2019); Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 33 (Or. 2014); Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1173 (Conn. 2006); Fu v. Fu, 733 A.2d 1133, 1141 (N.J. 1999); Dickhoff v. Green, 836 N.W.2d 321, 333 (Minn. 2013); Morris v. Giant Four Corners, Inc., 498 P.3d 238, 250 (N.M. 2021). For discussion and criticism of the compensation-deterrence

the injured to as near a position as they might have been in had the wrongful act not occurred.[75] Because the courts are powerless to nurse a grievously injured person back to health, they choose financial redress as the next-best substitute.[76] But a lawsuit can't bring a person who has suffered and died back to life. On the other hand, the deterrence function of the tort system exists to make sure that similar wrongful acts are avoided in the future, and to deter victims and loved ones from resorting to retaliatory self-help.[77] In death cases, limiting recovery only to injuries suffered by the now-living, such as loss of consortium and loss of support, would fail to accomplish these deterrent goals. This interplay of compensatory policy and the need for systems of deterrence therefore forces jurisdictions to choose which values should win in a wrongful death/survival action case. There are multiple ways that the tort system of a state can go about these issues, some of which follow here.

A couple of states only allow recovery for predeath pain and suffering where the tort *does not* cause the person's death.[78] Indiana allows the personal representative of a decedent's estate to sue for predeath pain and suffering only if the decedent was injured and then "subsequently died from causes other than those personal injuries."[79] If the cause of injury is different than the cause of death, a survival action is the proper means of recovery. If the injury is related to the cause of death, then only the damages available under the state's wrongful death statute can be recovered.[80] As noted in a federal appellate case that applied the Indiana statute:

> The distinction is important because each statute allows for different recoveries. In a case governed by the survival statute, [the estate] could receive full damages including pain and suffering. Under the wrongful death statute, the estate could recover only [the decedent's] medical and funeral expenses plus any other pecuniary or other loss suffered by her survivors.[81]

Minnesota meanwhile limits predeath noneconomic damage recovery to cases where the decedent first brought the injury lawsuit before death.[82] These are uncommon approaches, but since wrongful death and survival statute typically define for themselves the entirety of the scope of liability in these cases, in contravention of the common law rule that causes of action abate with the

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theory of torts, *see* John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO L.J. 513, 521–37 (2003); *see also* RESTATEMENT (SECOND) OF TORTS § 901 (1979).

75. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

76. *See* Clarence Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 478 (1959).

77. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

78. MINN. STAT. ANN. § 573.02 (West 2023); Beaudry v. State Farm Mut. Auto. Ins. Co., 518 N.W.2d 11, 12 (Minn. 1994); IND. CODE ANN. § 34-9-3-4 (West 2017); Atterholt v. Robinson, 872 N.E.2d 633, 641 (Ind. Ct. App. 2007).

79. IND. CODE ANN. § 34-9-3-4(a)(2) (West 2017).

80. Best Homes, Inc. v. Rainwater, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999).

81. Am. Int'l Adjustment Co. v. Galvin, 86 F.3d 1455, 1457–58 (7th Cir. 1996).

82. MINN. STAT. ANN. § 573.02, subdiv. (1) (West 2023).

death of the aggrieved party,[83] state legislatures are free to limit recovery to particularized situations, just as these states have done.

If double or overrecovery is a genuine concern, statutes can be narrowly drawn to assure that plaintiffs may only recover for one of the following: (1) the predeath pain and suffering experienced by the decedent; or (2) the noneconomic damages recoverable by the victim's family under a wrongful death claim, depending on the relationship of the tortious act to the eventual death. There would be no potential for crossover and confusion between the family's perceived losses (loss of love and companionship, loss of training or guidance, etc.)[84] and the suffering of their loved one. However, it should be noted that a statute like this can lead to significant litigation over whether the cause of death was "unrelated" to the tortious injury, which itself presents a number of difficulties.[85]

Another approach, though an especially uncommon one, is to require that a tortious act actually cause the decedent's death in order to allow recovery for the related predeath pain and suffering in a survival action. In such a statutory regime, a person's pain and suffering experienced before death from an injury unrelated to the cause of death is not compensable. In Washington, a former version of the state's wrongful death/survival statutory regime limited personal representative's recovery for the decedent's pain and suffering to cases where the claimed bodily injuries "occasioned death."[86] Therefore, if a personal representative brought a claim for a decedent's predeath injuries that were unrelated to the cause of death, they could not recover.[87] However, Washington has since disavowed this approach,[88] with one of the policy rationales being that the loved ones of elderly tort victims had been denied their day in court to vindicate their loved ones' rights in cases involving injuries unrelated to their death.[89] This reflects one of California's own justifications for the implementation of S.B. 447, namely that COVID-19 had created a situation where many tort victims might die before trial, severely limiting the recovery

83. Larry D,. Scheafer, *Effect of Death of Beneficiary Upon Right of Action Under Death Statute*, 13 A.L.R.4th 1060, 2a.

84. *See* Judicial Council of California Civil Jury Instructions § 3921, *Wrongful Death (Death of an Adult)* (2020).

85. *See Best Homes, Inc.*, 714 N.E.2d at 707 (discussing whether a jury could reasonably find the decedent's suicide was related to his pre-death injuries); Beaudry v. State Farm Mut. Auto. Ins. Co., 518 N.W.2d 11, 12 (Minn. 1994) (discussing whether, in context of abatement of survival tort causes related to the cause of death, an underinsured motorist claim was a contract or tort case). *See also* Taylor v. Hennepin Cnty., No. C1-93-2369, 1994 Minn. App. LEXIS 428, at *3 (Minn. Ct. App. May 10, 1994) (discussing survivability of state civil rights claim in light of the bar on pain and suffering damages for injury claims related to the cause of death).

86. Walton v. Absher Constr. Co., 676 P.2d 1002, 1006 (Wash. 1984). *See also* Warner v. McCaughan, 460 P.2d 272, 275 (Wash. 1969).

87. *Walton*, 676 P.2d at 1006.

88. WASH. REV. CODE ANN. § 4.20.046 (West 2019); S.B. 5077, 53rd Leg., Reg. Sess. (Wash. 1993); Tait v. Wahl, 987 P.2d 127, 131 (Wash. Ct. App. 1999).

89. Otani v. Broudy, 59 P.3d 126, 127 (Wash. Ct. App. 2002).

their families could expect to receive from their lawsuits.[90] So, at least as it pertains to the COVID-19 situation, this specific method of limiting the scope of liability will probably not find much support in the California State Legislature as the crisis abates. Still, even as the crisis of COVID-19 subsides over time, lawmakers will be called to look at the ongoing viability of predeath damages for pain and suffering. If the State Legislature is unreceptive to maintaining these damages in full form, other states' case law and legislation at least provide examples by which California could limit the scope of liability while still preserving the rights of a large group of potential plaintiffs.

Of course, there is a third option, which is to treat torts that cause death and those that don't as one and the same in terms of recovery. Many of the states that compensate for predeath pain and suffering do not distinguish between the two categories.[91] There may be valid reasons for the differentiation between torts that kill and torts unrelated to the death, but those reasons can fail when put into practice. For example, requiring that a tort cause both the injury and the subsequent death to allow recovery for the predeath pain and suffering could absolve clearly responsible defendants from any accountability if the victim dies for other reasons.[92] Meanwhile, allowing noneconomic recovery only where the tort is *not* the cause of death creates perverse incentives to engage in conduct that is more likely to kill someone than grievously injure them.[93] If a decedent does not have substantial assets or close relationships with their statutorily-designated wrongful death beneficiaries, then defendants would be held to pay next to nothing, even if their conduct caused great suffering and caused the person's death. This is the same problem that California plaintiffs already faced when they sued over chronic, degenerative conditions under the previous statutory regime.

As the California statute is currently composed, torts that cause the death of the decedent and those that are unrelated to the cause of death are treated as one and the same.[94] Therefore, absent case law to the contrary, personal representatives should expect to be able to collect for predeath pain, suffering, and disfigurement whether or not the tortious injury ultimately killed the decedent.[95] For example, if the statute is read on its face, a long battle with chemical burns followed by the victim's death would be treated no differently regardless of whether the longtime condition or a later freak accident actually causes that person's death. While courts may find their own carve outs for the

90. *See* Shaban et. al., *supra* note 4.

91. TEX. CIV. PRAC. & REM. CODE § 71.021 (West 1985); N.Y. EST. POWERS & TRUSTS LAW § 11-3.2 (McKinney 1982).

92. Pahlke et al., *supra* note 54.

93. *See, e.g.*, Jeff Watters, *Better to Kill than to Maim: The Current State of Medical Malpractice Wrongful Death Cases in Texas*, 60 BAYLOR L. REV. 749 (2008); Jonathan James, *Denial of Recovery to Nonresident Beneficiaries under Washington's Wrongful Death and Survival Statutes: Is It Really Cheaper to Kill a Man than to Maim Him*, 29 SEATTLE U. L. REV. 663 (2006).

94. CAL. CIV. PROC. CODE § 377.34 (West 2023).

95. *Id.*

extent of recoverable damages as they start to apply the new law in new cases, under the plain language of the statutory text, there should be no difference.[96]

However, if the State Legislature is unsatisfied with its findings at the end of the reporting period, it need not do away with the new regime entirely. Instead, it could look for ways to limit the outcomes. Compensation for pain and suffering could be treated differently based on whether or not the tort caused the death. If the desired policy purpose behind allowing for predeath pain and suffering is primarily compensation for extraordinarily traumatic losses, where a decedent suffered grave injuries for an extended time before death, then requiring that the tort actually be the cause of death would make some sense.[97] If legislators want to differentiate scrupulously between the emotional distress experienced by the surviving loved ones and the distress a decedent experienced from their injuries, then following the Indiana and Minnesota approach requiring that the cause of death be unrelated to the predeath pain and suffering is an option.[98] Whatever the basis for the State's previous apprehension with predeath damages, tying compensation to the relationship between the tort and the death is a better option than failing to compensate real, provable losses at all.

B. JUDICIAL REVIEW OF PREDEATH PAIN AND SUFFERING VERDICTS

The amount of damages is one of the primary issues decided in any trial for tortious personal injury, and in most cases, that issue is decided by the jury. Non-monetary losses like pain and suffering are not easily reduced to dollar amounts the same way lost wages and medical expenses are. Therefore, the standard of review of a jury's verdict must be handled delicately. Under the U.S Constitution and many state constitutions, the amount of damages is an issue of fact squarely within the jury's purview.[99] For that reason, a jury's damages determination is usually handled with quite a bit of deference, in the absence of strict caps placed by statute. Now that California has passed S.B. 447, California courts will have to address the level of deference given to a predeath pain and suffering verdict. While issues of both excessiveness and sufficiency of damages awards have come up in pain and suffering claims for living plaintiffs in the state already, lifting the bar on predeath damages will likely lead to some new questions.

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96. *Id.*

97. Walton v. Absher Constr. Co., 676 P.2d 1002, 1006 (Wash. 1984); Seymour v. Richardson, 75 S.E.2d 77, 80 (Va. 1953).

98. IND. CODE ANN. § 34-9-3-4 (West 2017); MINN. STAT. ANN. § 573.02 (West 2023).

99. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998); Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019); *see also* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 5 (AM. L. INST., Tentative Draft No. 2, 2023) ("'Noneconomic' damages that cannot be measured by any value in a market, such as pain and suffering, emotional distress, dignitary harms, and the like, are so inherently imprecise that the reasonable-certainty standard cannot meaningfully be applied. Courts may review the amount of such damages only after the factfinder has awarded them and only under the standards for judicial review of allegedly excessive or inadequate damages in § 17.").

Before launching into the applicable review standards set out in this state and others, a primer on the jury's factfinding function in California civil tort claims is necessary. The jury's function is key in determining damages in civil cases in California, but subject to some limits.[100] While the California Constitution Declaration of Rights section 16 does provide that the right to a "[t]rial by jury is an inviolate right and shall be secured to all,"[101] the California Supreme Court has held that "a plaintiff has no vested property right in a particular measure of damages, and . . . the Legislature possesses broad authority to modify the scope and nature of such damages."[102] In *Fein v. Permanente Medical Group*, the California Supreme Court set out just how vast the State Legislature's authority over plaintiffs' entitlement to damages is:

> As our language in *American Bank* itself suggests, our past cases make clear that the Legislature retains broad control over *the measure*, as well as *the timing*, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest.[103]

However, while the State Legislature has ample authority to cap damages in tort claims, the precise amount of noneconomic damages "are ascertainable only at trial" and are therefore left to the trier of fact.[104]

After a jury puts a number to the noneconomic damage award, a court may, in its discretion, evaluate whether the amount was improper or unsubstantiated.[105] California's Code of Civil Procedure sets forth a mechanism by which trial and appellate courts can review and either modify or vacate a jury verdict.[106] Under section 657, a trial court may modify part of a verdict on the grounds of excessive or inadequate damages, or if there is insufficient supportive evidence to justify the verdict.[107] The court may also grant a new trial on these bases, but only if "after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."[108] The trial court may also conditionally grant a new trial, depending on a party's acceptance of a reduced or increased damage award.[109]

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100. CAL. CONST. art I, § 16.

101. *Id.*

102. Am. Bank & Tr. Co. v. Cmty. Hosp., 683 P.2d 670, 676 (Cal. 1984).

103. Fein v. Permanente Med. Grp., 695 P.2d 665, 680 (Cal. 1985) (emphasis in original).

104. Rashidi v. Moser, 339 P.3d 344, 349 (Cal. 2014).

105. Seffert v. L.A. Transit Lines, 364 P.2d 337, 342 (Cal. 1961).

106. CAL. CIV. PROC. CODE § 657 (West 1967).

107. *Id.*

108. *Id.*

109. *Id.* § 662.5(c); *see also* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 17 (AM. L. INST., Tentative Draft No. 2, 2023). Such reduced or increased damages awards are called remittitur and additur, respectively. *See* Jehl v. S. Pac. Co., 427 P.2d 988, 995 (Cal. 1967).

Such damage determinations may also be weighed on appeal,[110] though they are matters of the trial court's discretion, so they are reviewed for abuse of discretion.[111] An appellate court reviewing the jury's verdict may hold that a "judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury."[112]

As recently as 2021, in *Phipps v. Copeland Corp. LLC*, an appellate court upheld a $25 million noneconomic damages verdict in a mesothelioma case.[113] While the defense argued that the size of awards in similar cases was frequently much smaller, the Second District Court of Appeal turned to a number of previous appellate cases—including *Rufo v. Simpson*—that showed that this method of comparing a challenged verdict to previous jury verdicts was disfavored.[114] The court found that the noneconomic damage number was supported by substantial evidence, including expert testimony that "'a very dreadful disease,' is 'one of the worst cancers to have,' and results in 'patients . . . dying in horrible pain' as the disease, in essence, suffocates them."[115] A year before, in *Burchell v. Faculty Physicians & Surgeons etc.*, an appellate court reviewing a $9.25 million noneconomic award for the loss of the male genitalia disavowed any notion that "there must be some 'reasonable relationship' between economic and noneconomic damages" awarded in a given case.[116]

That said, courts do occasionally reduce a noneconomic verdict as excessive as a matter of law. For example, in 2017, in *Bigler-Engler v. Breg Inc.*, the Fourth District Court of Appeal reversed and remitted a $5 million noneconomic jury verdict in a medical devices case against a doctor, medical network, and device manufacturer.[117] The case involved a plaintiff who was injured by a device that was used while she received a knee surgery.[118] Her condition was described by the reviewing court as follows: "In the nearly nine years between [her] last medical procedure and the time of trial, [the plaintiff's] condition improved steadily and dramatically. By the time of trial, her pain was at a low level, intermittent, and confined to the area around her scar."[119] Concluding that the record did not support the severity of the noneconomic verdict, the reviewing court reversed the verdict and remitted the number to

110. *See* CAL. CIV. PROC. CODE § 657 (West 1967).

111. Barnett v. Keilig, 338 P.2d 477, 478 (Cal. Ct. App. 1959); Westphal v. Wal-Mart Stores, Inc., 81 Cal. Rptr. 2d 46, 50 (Cal. Ct. App. 1998).

112. Seffert v. L.A. Transit Lines, 364 P.2d 337, 342 (Cal. 1961).

113. Phipps v. Copeland Corp. LLC, 278 Cal. Rptr. 3d 688, 688 (Cal. Ct. App. 2021). The noneconomic award was reduced based on 60% apportionment of fault. *Id.* at 709. This case, unlike the other mesothelioma cases cited herein, involved a living plaintiff, thus not implication the bar on survival damages for pain and suffering. *Id.* at 693.

114. *Id.* at 708.

115. *Id.*

116. Burchell v. Fac. Physicians & Surgeons etc., 269 Cal. Rptr. 3d 44, 58 (Cal. Ct. App. 2020).

117. 213 Cal. Rptr. 3d 82, 102 (Cal. Ct. App. 2017).

118. *Id.* at 105.

119. *Id.*

$1.3 million.[120] It should be noted that the reviewing court also observed that plaintiff's counsel's arguments in closing argument, including comparing the doctor's testimony to "that of a rapist who says the victim enjoyed the rape" and comparing the device-related injury to branding livestock, was designed to "inflame the jury" to the point that the verdict was motivated by passion or prejudice.[121] So, it is clear that if a reviewing court is going to reduce a noneconomic award, it will do so sparingly, and only on narrow bases where there is a strong reason to think that a jury got it wrong.

As for when a plaintiff claims a verdict is inadequate, the "shock the conscience" standard remains applicable.[122] A result which shocks the conscience might be reached, for example if a jury finds no (or nominal) damages for pain and suffering, even though it is "patently obvious" that "substantial pain, suffering, shock and inconvenience" must have "necessarily and inevitably accompan[ied]" the injuries proven at trial, with liability for "surgery and medical and hospital care" having been established.[123] Cases have also held verdicts to be inadequate as a matter of law in situations where the jury awarded nothing for pain and suffering but "'where the right to recover was established and . . . there was also proof that the medical expenses were incurred because of defendant's negligent act.'"[124]

Even though California courts have reviewed damages verdicts for pain and suffering under the same standard for decades, it remains to be seen how appellate review of *predeath* pain and suffering under the new section 377.34 will play out.[125] A look to cases around the country, which have applyied similar standards for excessive and inadequate verdicts, suggests that California should largely stay the course on its established analysis of noneconomic damages when courts review in a survival action context. For example, in a 1985 medical malpractice case involving a mother's death after childbirth, the Supreme Court of Washington reinstated a million dollar jury verdict for the decedent's pain and suffering.[126] The court wrote that "[a]lthough the decedent was unconscious during some part of her last 35 hours of life" deference was due to the jury's damages determination because "substantial evidence was presented . . . that during much of that period of time she not only suffered extreme conscious pain, fear and despair at not being helped, but also had the conscious realization her life . . . was prematurely ending."[127] Even despite some disagreement and lack

120. *Id.* at 108.

121. *Id.* at 107.

122. Buniger v. Buniger, 57 Cal. Rptr. 1, 4 (Cal. Ct. App. 1967).

123. Haskins v. Holmes, 60 Cal. Rptr. 659, 663 (Cal. Ct. App. 1967).

124. Dodson v. J. Pac., Inc., 64 Cal. Rptr. 3d 920, 923 (Cal. Ct. App. 2007).

125. There is also a question of what situations allow for a finding that a decedent did indeed suffer and what level of evidentiary support is required. See discussion *infra* Part II.C.

126. Bingaman v. Grays Harbor Cmty. Hosp., 699 P.2d 1230, 1234 (Wash. 1985).

127. *Id.*

of certainty about for how long she suffered, the Washington Supreme Court held that the lower court erred in remitting the award.[128]

In *Casas v. Paradez*, a Texas appellate court reviewed a jury verdict in a case where a nursing home resident, the decedent, was violently attacked by a roommate.[129] The noneconomic portion of the verdict was $3 million in physical pain and mental anguish, $50,000 in disfigurement, and $7 million in physical impairment.[130] The court affirmed each of the damages determinations as amply supported and entitled to due deference, as "it was undisputed at trial that his immediate, soft-tissue injuries looked 'horrible' and were 'terrible,' and that this was 'a terrible beating.'"[131] While there was an argument that the jury's findings were not supported by direct evidence, the court held that the abundance of circumstantial evidence of harm through the trial testimony of the decedent's daughter and of an expert were enough to justify the jury's numbers.[132] As the court wrote, "juries must be afforded discretion in arriving at the determination of a figure for which there is no exact evaluation . . . ."[133]

However, where there is little or no evidence supporting a claim of predeath pain and suffering, a court may be well-justified in setting aside or remitting a verdict for noneconomic harm. Consider, for example, *Maldonado v. Kiewit Louisiana Co.*, a falling death case where a Louisiana appellate court remitted a $250,000 physical pain and $750,000 mental anguish award.[134] Holding that there was "no evidence in the record that Martinez was conscious at the scene," the court wrote that the physical pain award from the jury was "abusively high," and even though "pre-impact fear [was] compensable," the total mental anguish award was "so excessive as to constitute an abuse of the jury's discretion."[135]

There is little to suggest that California's own application of judicial review of predeath noneconomic damages will come to wildly different results. Still, the implementation of the new damages after S.B. 447 is going to inevitably lead to situations that California courts have not yet faced as to the availability and reliability of evidence supporting jury findings of the severity of a decedent's pain and suffering. While California courts do have plenty of applicable precedent in terms of their own standards of review, other states have compensated predeath noneconomic damages for much longer and will provide instructive examples of how to evaluate jury verdicts under the new statute. Courts here should freely look to these states for guidance, as the many factual scenarios that will invoke section 377.34's new damages are already reflected in other states' case law.

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128. *Id.*
129. Casas v. Paradez, 267 S.W.3d 170, 175 (Tex. App. 2008).
130. *Id.* at 178.
131. *Id.* at 185.
132. *Id.* at 185–90.
133. *Id.* at 185.
134. 152 So. 3d 909, 936–37 (La. Ct. App. 2014), *cert. denied*, 157 So. 3d 1129 (La. 2015).
135. *Id.*

C. TEMPORAL SCOPE OF LIABILITY AND EVIDENTIARY REQUIREMENTS

Allowing predeath damages for pain and suffering also raises the question of how long a time interval will be sufficient to form the basis of a compensable survival claim. So-called "instantaneous" deaths fall into this category.[136] Another matter that must be addressed is what level of certainty, and what forms of evidentiary support will be needed to support a predeath pain and suffering claim to go forward.

One approach is to deny recovery where there is only "mere conjecture, surmise or speculation" of conscious suffering and "simply no evidentiary basis from which a rational jury could have found that the decedent was conscious."[137] Pain suffered as "as a mere incident of death or substantially contemporaneous with it" will likely not form a compensable element of damages.[138] Another approach is to require that a plaintiff prove by a preponderance of the evidence both (1) that a decedent did not die instantaneously from the cause of death and (2) that there was "some appreciable interval of conscious pain and suffering after the injury."[139] Federal courts have endorsed this view, allowing recovery with a showing that the decedent experienced mental pain and anguish for an "appreciable period of time," but have noted that the time sufficient to support a jury award is going to depend on the nature of the injury.[140]

Therefore, the availability of damages in deaths that have followed very quickly after an injury has varied from case to case. In the federal district courts, mental pain and anguish recovery has been denied for deaths caused by an engine room explosion,[141] a seaman's falling off a vessel,[142] a drilling rig collapse,[143] and in multi-fatality incidents where there is only conjectural evidence of the actual cause of death.[144] On the other hand, despite an early pronouncement by the United States Supreme Court that drownings would not support pain and suffering awards in death cases because any suffering was "substantially contemporaneous" with death,[145] state and federal courts now generally award pain and suffering damages in drowning cases, recognizing that

136. *See* Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 200 (1958).

137. Cummins v. Cnty. of Onondaga, 642 N.E.2d 1071, 1072 (N.Y. 1994); *see* Est. of Ferguson v. N.Y.C., 901 N.Y.S.2d 609, 611 (N.Y. App. Div. 2010); Keenan v. Molloy, 27 N.Y.S.3d 73, 76 (N.Y. App. Div. 2016).

138. N. Lights Motel v. Sweaney, 561 P.2d 1176, 1190 (Alaska 1977).

139. Magee v. Rose, 405 A.2d 143, 146 (Del. Super. Ct. 1979); *see also* Sears, Roebuck & Co. v. Midcap, 893 A.2d 542, 552 (Del. 2006) (endorsing *Magee* as the standard of review for conscious pain and suffering in Delaware).

140. Cook v. Ross Island Sand & Gravel Co., 626 F.2d 746, 751 (9th Cir. 1980) (applying federal maritime law).

141. *In re* Complaint of Conn. Nat'l Bank, 733 F. Supp. 14, 16 (S.D.N.Y. 1990) (applying federal maritime law).

142. Gardner v. Nat'l Bulk Carriers, Inc., 221 F. Supp. 243, 246 (E.D. Va. 1963) (applying federal maritime law and noting that only "rank speculation" supported a finding of conscious suffering).

143. Thompson v. Offshore Co., 440 F. Supp. 752, 762 (S.D. Tex. 1977) (applying federal maritime law).

144. *In re* Sincere Navigation Corp., 329 F. Supp. 652, 659 (E.D. La. 1971).

145. The Corsair, 145 U.S. 335, 348 (1892) (baring independent recovery for pain and suffering because sufferings were "substantially contemporaneous" with death).

asphyxiation involves a great deal of predeath suffering, even in the absence of direct proof.[146] State courts have denied recovery for predeath anguish in cases involving gunshots[147] and traffic collisions that killed on impact,[148] but have allowed it in cases involving carbon monoxide inhalation[149] and burns from fires.[150] Most of these results sprout not from any hard-and-fast rule allowing or barring recovery for particular kinds of predeath injuries. Instead, they tie recovery to the availability of reliable testimony and evidence that a tort victim did indeed consciously experience pain and suffering for some appreciable period of time.

Still, some courts have noted that the "instantaneous" nature of *any* death is questionable.[151] As well observed in an older New Hampshire case, there is "no such thing in any case as death happening simultaneously with the injury causing it."[152] "[T]here always is a fraction of a moment, however immeasurable, before death results," from a wrongful injury.[153] Even fast-occurring decapitations, deaths which were previously thought to be among the quickest and most painless, are now thought to be accompanied by at least two to seven seconds of conscious experience[154]—though the presence of conscious experience generally depends on the exact nature of an injury and what body parts are affected.[155] If a personal representative comes forward with credible evidence that a decedent likely experienced some conscious pain before death, even if death were near-instant, how could a court evaluating a predeath pain and suffering claim prevent recovery for that "fraction of a moment" as a matter of law? Such a result would turn on an arbitrary time limit, and not on the evidence presented at trial. Many courts, seeming to share this conceptual

146. Deal v. A.P. Bell Fish Co., 728 F.2d 717, 718 (5th Cir. 1984) (applying the Jones Act); Howell v. Mun. of Anchorage, 646 F. Supp. 3d 1047, 1082 (D. Alaska 2022) (applying Alaska survival statute); DRD Pool Serv. v. Freed, 5 A.3d 45, 53 (Md. 2010); Austin v. Selter, 415 S.W.2d 489, 501 (Tex. Civ. App. 1967); Cook v. Ross Island Sand & Gravel Co., 626 F.2d at 752 (applying the Jones Act). *But see In re* Crosby Marine Transp., L.L.C., No. 17-14023, 2021 U.S. Dist. LEXIS 91349, at *23 (E.D. La. May 13, 2021) (applying the Louisiana survival statute, and in doing so, granting summary judgment and dismissing the drowning pain and suffering claims for lack of evidence). The Seventh Circuit also has argued, in dicta, in Jutzi-Johnson v. United States, 263 F.3d 753, 760 (7th Cir. 2001), that a pre-death pain and suffering award should be subject to comparison to other asphyxiation verdicts, including drownings, on appellate review.

147. Est. of Ferguson v. N.Y.C., 901 N.Y.S.2d 609, 611 (N.Y. App. Div. 2010).

148. Sanchez v. Robert Heath Trucking, 505 P.3d 823 (Kan. Ct. App. 2022).

149. N. Lights Motel v. Sweaney, 561 P.2d 1176, 1190–91 (Alaska 1977).

150. Harsh v. Petroll, 840 A.2d 404, 437–38 (Pa. Commw. Ct. 2003).

151. Rohlfing v. Moses Akiona, Ltd., 369 P.2d 96, 108 (Haw. 1961); RESTATEMENT (THIRD) OF TORTS: REMEDIES § 24 cmt. e (AM. L. INST., Tentative Draft No. 2, 2023).

152. Clark v. Manchester, 13 A. 867, 869 (N.H. 1887).

153. *Rohlfing*, 369 P.2d at 108.

154. *See* Frances Larson, *What a Beheading Feels Like: The Science, the Gruesome Spectacle—and Why We Can't Look Away*, SALON (Feb. 3, 2015, 12:00 PM), https://www.salon.com/2015/02/03/what_a_beheading_feels_like_the_science_the_gruesome_spectacle_and_why_we_cant_look_away.

155. George Dvorsky, *Why You Probably Won't Experience Your Own Traumatic Death*, GIZMODO (June 7, 2012), https://gizmodo.com/why-you-probably-won-t-experience-your-own-traumatic-de-5916677.

understanding, have recognized that real harm can occur in those fleeting moments before death, and is therefore compensable.[156]

Pre-impact terror—the emotional distress experienced before an impending death—has also been a form of recovery that has taken hold around the country.[157] Aviation cases have been the most common example of these types of claims,[158] since they tend to involve rapid traumatic injuries that immediately result in death. As they tend to arise in mass tort claims or in multi-district litigation, courts and counsel have come up with some creative ways to compensate this predeath suffering in a way that is equitable to an entire class of claimants.[159] The availability of damages under this theory, though recognized in some states,[160] has not taken hold in California, which has not yet had occasion to consider the question since the prior version of section 377.34 barred such recovery at all.[161]

A question that arises in this context: What types of evidence are sufficient to allow for a pain and suffering award in a death case? Where a person is not alive to testify to the pain they experienced, the reliability of evidence and testimony about the decedent's experience before death becomes harder to parse. If no depositions have been taken of the victim prior to death, if there were no percipient witnesses to the predeath injury, and if there is a dispute over the actual nature of a predeath injury, lay testimony might not be the best indicator of the strength of a pain and suffering claim. For example, in a Pennsylvania survival action claim, the reviewing court held that it was error to admit lay testimony on any pain and suffering experienced by a decedent who remained in a vegetative state for the entire claimed period of noneconomic damages.[162]

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156. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 262 (1989); *see also* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 24 cmt. e (AM. L. INST., Tentative Draft No. 2, 2023); RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 71 cmt. o (AM. L. INST., Tentative Draft No. 2, 2023).

157. *See generally* Thomas D. Sydnor II, *Damages for a Decedent's Pre-Impact Fear: An Element of Damages Under Alaska's Survivorship Statute*, 7 ALASKA L. REV. 351 (1990); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 47 cmt. e (AM. L. INST. 2012) (mentioning that it is also known as pre-impact fear or pre-impact fright).

158. Louisa Ann Collins, *Pre- and Post-Impact Pain and Suffering and Mental Anguish in Aviation Accidents*, 59 J. AIR L. & COM. 403, 420–25 (1993).

159. *See* KENNETH FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 76 (Public Affairs, 2005). Kenneth Feinberg, the special master selected to administer the compensation fund for the congressional act compensating the victims of 9/11, chose a round number for pre-death pain and suffering for all victims who died: "$250,000 for the pain and suffering of all 9/11 dead." *Id.*

160. Beynon v. Montgomery Cablevision Ltd. P'ship, 718 A.2d 1161, 1163 (Md. 1998) (applying Maryland law); Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 53 (2d Cir. 1984) (applying New York law); Haley v. Pan Am. World Airways, Inc., 746 F.2d 311, 317 (5th Cir. 1984) (applying Louisiana law). *But see In re* Air Crash Disaster Near Chi., Ill. on May 25, 1979 v. McDonnell Douglas Corp., 507 F. Supp. 21, 23–24 (N.D. Ill. 1980) (allowing no recovery of pre-impact terror damages under Illinois law). The issue has recently been litigated in the Ethiopian Airlines Flight 302 cases. Ryan Grenoble, *Did Victims In 737 Max Crash Suffer Before They Died? Boeing Lawyers Say No.*, HUFFINGTON POST (Mar. 17, 2023, 4:47 PM), https://www.huffpost.com/entry/boeing-737-crash-pain-suffering-damages_n_641373e2e4b00c3e6072bda5.

161. *See* S.B. 1496, 1991-1992 Leg. (Cal. 1992).

162. Cominsky v. Donovan, 846 A.2d 1256, 1260 (Pa. Super. Ct. 2004).

That court held that while a "lay witness was permitted to testify about the pain of a *conscious* person, or one who is *not* in a persistent vegetative state," the experience of someone in a persistent vegetative state had to be supported by "competent opinion testimony that the person could in fact experience such pain."[163] On the other hand, in a Maryland drowning case, the defendant challenged the admissibility of expert testimony that the decedent suffered while they drowned, because there was no case-specific direct evidence of such suffering.[164] Given the availability of an autopsy report, and the expert's testimony that a person who was drowning would feel pain and fear before their death, the court held that such expert testimony was not speculative and was therefore admissible.[165]

The current rule in California "is that the testimony of a single person," even a nonexpert, "may be sufficient to support an award of" noneconomic damages, so long as the subject matter discussed in not sufficiently beyond the common experience as to require the assistance of a qualified expert.[166] This is a functional, workable rule, and courts may well find no need to revisit it with respect to predeath pain and suffering damages. Still, the unique factual circumstances of post-death lawsuits can easily present situations where the decedent provided none of their own testimony and where witnesses can only guess after the fact as to what the decedent experienced before their death. In these cases, it is worth looking at the expert requirements in cases applying similar standards around the country. Of course, experts can be a source of a significant portion of litigation costs when they are required for a certain type of case, and establishing a blanket requirement for expert testimony where lay testimony can do just as well can be a source of unnecessary expense and waste. Therefore, any expert requirements should probably remain specific to the type of case a court faces.

Because of the recency of S.B. 447, California courts have not had occasion to review the standards for awarding pain and suffering damages in close cases of near-instant death or in cases lacking direct evidence of conscious pain and suffering.[167] While the previous iteration of section 377.34 did provide some opportunity for assessment of the availability of punitive damages in cases involving near-instant death,[168] the development of standards of recovery for

163. *Id.*

164. DRD Pool Serv. v. Freed, 5 A.3d 45, 48–49 (Md. 2010). There was, however, an autopsy report. *Id.* at 49.

165. *Id.* at 53.

166. Knutson v. Foster, 236 Cal. Rptr. 3d 473, 487–88 (Cal. Ct. App. 2018).

167. *See* Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 527–28 (Cal. Ct. App. 2001) (noting that the "actual harm suffered by the decedent[s]" likely exceeded the "limited economic damages recoverable by the estate"); Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 807 (Cal. Ct. App. 2003) (discussing availability of punitive damages to deceased and surviving victims of rollover crash, whilst excluding "pain and suffering of [any] decedent").

168. *See* Ford Motor Co. v. Super. Ct., 175 Cal. Rptr. 39, 42 (Cal. Ct. App. 1981); Est. of Reno Nickalaus Carothers v. Yellow Cab of Greater Orange Cnty., No. 30-2018-00994748-CU-PO-CJC, 2018 LEXIS 55489, at *2–*3 (Cal. Super. Ct. Sept. 24, 2018).

conscious suffering in the fleeting last moments of life has taken place entirely outside of California courts. The same is true of pre-impact terror in death cases,[169] though there is an example of an anomalous federal court aviation case that allowed recovery for predeath pain and suffering under the "plain language" of the California wrongful death statute,[170] in tension with the state court cases precluding similar recovery in a wrongful death context.[171] At any rate, any analysis of these issues has only taken place in the space of a recognized exception,[172] or in anomalous and unrepresentative cases decided by courts with little precedential power.[173]

Now, S.B. 447 has opened the doors for California, one of the most influential states in the development of common law tort doctrine in the past century, to look at issues like these with fresh eyes.[174] California courts shaped the law of products liability in *Escola v. Coca-Cola Bottling Co.*,[175] *Greenman v. Yuba Power Products, Inc.*,[176] and *Sindell v. Abbott Laboratories*,[177] and the law of duty in *Rowland v. Christian*,[178] and *Tarasoff v. Regents of the University of California*.[179] Over the years, however, the passage of statutes that denied or capped recovery for plaintiffs in a variety of contexts has curtailed the role of California courts in innovating tort law.[180] Legislative enactments narrowed the issues evaluated by the California Supreme Court and Courts of Appeal to mostly procedural wrinkles and statutes of limitations, rather than the substantial rights of plaintiffs.[181] But, with recent advancements in the space of public nuisance law, California courts have shown that its innovating days in tort doctrine are far from over.[182] With the expansion of liability comes an

169. Collins, *supra* note 158, at 420–25.

170. *In re* Air Crash Disaster at Sioux City Iowa on July 19, 1989, 760 F. Supp. 1283, 1286–87 (N.D. Ill. 1991).

171. *See* Allen v. Toledo, 167 Cal. Rptr. 270, 276 (Cal. Ct. App. 1980); *accord* Canavin v. Pac. Sw. Airlines, 196 Cal. Rptr. 82, 86 (Cal. Ct. App. 1983). The California jury instructions for wrongful death seemingly disagree with the outcome in *In re Air Crash Disaster at Sioux City Iowa on July 19, 1989* as well: "In determining [name of plaintiff]'s loss, do not consider . . . 2. [Name of decedent]'s pain and suffering . . . ." Judicial Council of California Civil Jury Instructions § 3921, *Wrongful Death (Death of an Adult)* (2020).

172. Smith v. City of L.A., No. 2:19-CV-05370-CAS-JCx, 2020 U.S. Dist. LEXIS 208449, at *36–37 (C.D. Cal. Nov. 6, 2020) (In a federal section 1983 action, applying Chaudry, the court denied summary judgment due to a factual dispute over whether decedent's "death was indeed instantaneous" in which the plaintiff produced evidence that decedent suffered for "seconds to minutes" after being shot.).

173. *See In re Air Crash Disaster at Sioux City Iowa on July 19, 1989*, 760 F. Supp. at 1287.

174. *See, e.g.*, Kyle Graham, *The Diffusion of Doctrinal Innovations in Tort Law*, 99 MARQ. L. REV. 75 (2015) (explanatory parenthetical).

175. 150 P.2d 436 (Cal. 1944).

176. 377 P.2d 897 (Cal. 1963).

177. 607 P.2d 924 (Cal. 1980).

178. 443 P.2d 561 (Cal. 1968).

179. 551 P.2d 334 (Cal. 1976).

180. Graham, *supra* note 174, at 139–40; *accord* Neil M. Levy & Edmund Ursin, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497, 497 (1979).

181. Graham, *supra* note 174, at 140.

182. *See* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 529 (Ct. App. 2017); *see generally* Steven Czak, *Public Nuisance Claims After* ConAgra, 88 FORDHAM L. REV. 1061 (2019) (analyzing the

opportunity to revisit and to develop doctrine on issues that are in need of a clear judicial voice. The time may soon come for California courts to announce their own standards on recovery for pain and suffering in the fleeting last moments of life. As to pre-impact terror in death cases, California can set itself apart as a leading voice, since the development of liability for emotional distress largely took place on this state's watch.[183] Courts should answer the call that this new version of section 377.34 has presented to evaluate significant substantive and doctrinal questions, which will stay relevant if the State Legislature chooses to keep the amendment's provisions in place in some form.

On the other hand, the State Legislature might itself anticipate that these issues are bound to be litigated in the near future and decide to make advancements of their own. With the sunset provision in section 377.34, there is a chance for legislators to set out clearer standards for the availability of certain aspects of recovery for predeath damages. One option may be to set out, by statute, elements that a plaintiff must show to make a valid claim for damages, such as an "appreciable interval" of conscious experience and attendant conscious pain and suffering. Strict, or broad, temporal limits for pain and suffering could also be implemented. Supportive expert testimony could be required by statute, and the State Legislature could explicitly provide for or disallow recovery for pre-impact terror.[184] Changes like these are hard to make without invading the factfinding purpose of the jury, [185] but it is plain to see that these are going to be issues that litigators will face with some frequency.[186] With new enactments, the State Legislature can try its hand at answering the questions

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influence of *ConAgra*). Individuals and public entities have continued to make strides in public nuisance law since that case was passed down by the California Supreme Court. *See* Bob Egelko, *San Mateo County, Other Bay Area Governments can Sue Oil Companies Over Climate Change, Supreme Court Says*, S.F. CHRON. (Apr. 24, 2023, 1:40 PM), https://www.sfchronicle.com/politics/article/supreme-court-oil-companies-climate-17915300.php.

183. *See* Sydnor, *supra* note 157, at 367; Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 525 (Cal. 1963); Dillon v. Legg, 441 P.2d 912, 924 (Cal. 1968); Thing v. La Chusa, 771 P.2d 814, 829 (Cal. 1989). *See generally* John L. Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984) (elaborating on the decision in *Dillon v. Legg*).

184. While my survey of applicable state statutes has not located any examples of statutes expressly prohibiting or allowing pre-impact terror damages, note this language from the New York Pattern Jury Instructions as an example of how a jurisdiction might specify the availability of such damages:

> Plaintiff is also entitled to recover the amount you find that will fairly and justly compensate for the emotional pain and suffering actually endured by AB between the moment AB realized that (he, she) was going to be gravely injured or die and the moment AB sustained a physical injury. In order to find that plaintiff is entitled to recover for these damages, you must find that (a) AB was aware of the danger that caused (his, her) grave injury or death, (b) AB was aware of the likelihood of grave injury or death, and (c) AB suffered emotional distress as a result of (his, her) awareness of (his, her) impending grave injury or death.

New York Pattern Jury Instructions – Civil § 2:320, *Wrongful Death* (2023).

185. *But see* Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 261 (5th Cir. 2013) (upholding state restrictions on pain and suffering liability despite claims that the restriction invaded the jury's factfinding purpose).

186. *See, e.g.*, Peters, *supra* note 33, at 1; Ellis & DeBerry, *supra* note 56.

that are bound to pop up in the survival claims brought under the new compensation scheme. While the courts will surely be able to meet the challenges presented in the predeath survival actions filed before the amendment's sunset in 2026, lawmakers may find it worthwhile to introduce carve outs to preserve Californians' right to be compensated for a decedent's predeath suffering while still balancing other values.

CONCLUSION

The passage of S.B. 447 and its long-awaited inclusion of predeath pain, suffering, and disfigurement marks a needed change in California's tort system. And though, as with any new item of compensation added to a state tort system, S.B. 447 has drawn a significant amount of apprehension and criticism,[187] the California State Legislature should find a way to keep the new additions in effect past the date of the sunset provision that is currently in place. It is the best way to avoid the anomalous and arbitrary results that occurred under the previous ban on predeath pain and suffering damages.

With new additions to the state tort regime come new implementation issues, many of which have been raised in this Note. By no means are the issues discussed here exhaustive as to the problems California courts and legislators will be called upon to address in the coming years. Questions of duty, standard of care, and proximate cause in predeath pain and suffering claims are bound to find their way to the courts. The appropriateness of noneconomic damage recovery for intentional homicide[188] or for claims where the decedent has committed suicide[189] will have to be addressed under the current compensation structure as well. Section 377.34's interaction with other parts of the state and federal codes will also need to be reconciled.[190] This Note simply aims to show that the different ways states have addressed causation of death, standards of review, and temporal scope of conscious pain can be a model going forward as new factual scenarios find their way to the courts in California.

It was an unfortunate misstep that California fell so far away and for so many years from most of the rest of the country on the issue of predeath damages. Now that the Golden State is back on the right path on this issue, it has the good fortune of being able to look to those states that had already allowed for predeath noneconomic damages for guidance. One thing is certain: California litigants should no longer need to worry that a wrongdoer will never

187. Powell & Hiestand, *supra* note 58; Sarno & Long, *supra* note 9; Kelly, *supra* note 10.

188. *See* Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 520 (Cal. Ct. App. 2001).

189. *See* Chu v. Naik, No. A142837, 2015 Cal. App. Unpub. LEXIS 3621, at *1–2 (Cal. Ct. App. May 26, 2015).

190. *See* Williams v. The Pep Boys Manny Moe & Jack of Cal., 238 Cal. Rptr. 3d 809, 821 (Cal. Ct. App. 2018) (denying survival damages under the prior section 377.34 for future damages arising from "detriment . . . certain to result in the future," which were otherwise recoverable by statute); Valenzuela v. City of Anaheim, 29 F.4th 1093, 1096 (9th Cir. 2022) (evaluating the prior section 337.34's susceptibility to a "hedonic" damages claim in a federal section 1983 claim).

have to answer for causing a person terrible suffering just because the victim died.

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