1-1-1975

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In May, 1969, two Las Vegas hotel security guards observed California attorney William G. Emslie picking up a room key near the hotel swimming pool. Because a number of hotel rooms had been burglarized with stolen keys, the guards detained Emslie, searched him, and found eight more keys. They turned him over to the Las Vegas sheriff’s department. Acting on information from the manager of Emslie’s hotel, officers located his car, impounded it, and searched it without a warrant. The trunk contained fifty-two more room keys.

The next day, after being advised of his Miranda rights and waiving counsel, Emslie confessed to numerous burglaries. A search warrant prepared on the basis of this information and served on a Las Vegas jeweler turned up stolen property purchased from Emslie. Some of the items were identified by Emslie as having been taken from specific rooms he had burglarized. However, the charges filed in Las Vegas in June, 1969, were later dismissed.¹

In November, 1970, the California State Bar disciplinary committee began a series of hearings to determine whether disciplinary action should be taken. Emslie denied all charges and made a motion to exclude the evidence of stolen property as the product of an unlawful search and seizure. The motion was denied and a recommendation of disbarment made by the committee to the California Supreme Court.²

¹. Emslie was released on his own recognizance on condition that he seek psychiatric assistance; he complied. Five months later, on motion of the Las Vegas district attorney’s office, charges were dismissed because of insufficient evidence. Emslie v. State Bar, 11 Cal. 3d 210, 218, 520 P.2d 991, 994, 113 Cal. Rptr. 175, 178 (1974).

². The disciplinary committee of the State Bar, acting for the Board of Governors as an administrative arm of the California Supreme Court, is empowered to conduct disciplinary hearings. CAL. BUS. & PROF. CODE § 6044 (West 1970). Upon finding of misconduct, the committee may make recommendation of suspension or disbarment to the supreme court if such penalty is warranted. CAL. BUS. & PROF. CODE § 6078 (West 1970). Final determination is for the court, which
The court, after rejecting the unlawful search argument, proceeded to give careful consideration to the general applicability of exclusionary rules to State Bar disciplinary hearings. It concluded that these rules are not part of administrative due process

reviews the record of the disciplinary proceedings and reaches an independent judgment. Bernstein v. State Bar, 6 Cal. 3d 909, 101 Cal. Rptr. 369 (1972).

3. To uphold the warrantless vehicle search the court cited Chambers v. Maroney, 399 U.S. 42 (1970). (Chambers held that where there is probable cause to search a car stopped on the highway, and the opportunity to search is “fleeting,” officers may choose to impound the vehicle and search it later at the police station without obtaining a warrant.) The Emslie court declared that removing Emslie’s rented automobile from a hotel parking area to a police lot and subsequently searching it without a warrant was no infringement on the defendant’s rights “beyond that which would have resulted had a warrant authorizing the impoundment and search first been obtained.” 11 Cal. 3d at 223, 520 P.2d at 998, 113 Cal. Rptr. at 182. The only “exigent circumstance” the court noted was that a deputy sheriff said he thought the car might contain contraband which would easily be removed by an accomplice.

This interpretation of Chambers appears to reduce the exigent circumstances requirement in vehicle search cases (“fleeting opportunity to search”) to a nullity. Emslie was in custody when the sheriff learned of the car’s existence; he had cooperated to the extent of consenting to a search of his hotel room containing stolen goods, and nothing indicates that the deputy sheriff in fact had any reason to believe there was an accomplice. A year earlier the court had handed down a consistent ruling on similar facts in People v. Dumas, 9 Cal. 3d 871, 109 Cal. Rptr. 304 (1973) (warrantless search of an automobile parked near defendant’s apartment building after defendant had been arrested in the apartment).

Discounting the phantom accomplice in Emslie (who can be conjured up at need by any enterprising policeman), the holdings in Emslie and Dumas would appear to reduce the theoretical mobility of any automobile to an almost automatic equality with “exigent circumstances”—an extension not justified by the facts of the Chambers case and expressly rejected by the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971). Speaking for the majority in Chambers, Mr. Justice White stated, “[O]nly in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search,” 399 U.S. at 51, and emphasized that Chambers does not “require or suggest that in every conceivable circumstance the search of an automobile may be made without the extra protection for privacy which a warrant affords.” Id. at 50.

Since the Chambers decision, the California courts have recited the “exigent circumstances” formula in numerous vehicle search cases, but most of the cases in which the search has been approved clearly have involved some element of urgency other than the inherent mobility of an automobile. See, e.g., People v. Lauresen, 8 Cal. 3d 192, 501 P.2d 1145, 104 Cal. Rptr. 425 (1972) (suspects at large in vicinity of abandoned car); People v. McKinnon, 7 Cal. 3d 899, 100 Cal. Rptr. 897 (1972) (search of package consigned to carrier on Chambers “fleeting opportunity” rationale); People v. Lovejoy, 12 Cal. App. 3d 883, 91 Cal. Rptr. 94 (1970) (car stopped on the highway, accomplices known to be at large in another vehicle). See also People v. Medina, 7 Cal. 3d 30, 496 P.2d 433, 101 Cal. Rptr. 521 (1972), for a general statement of the primacy of the warrant requirement. Faced, however, with a situation in which the necessity of immediate search is virtually nonexistent, the courts seem willing to go far beyond both the language and the facts of Chambers in authorizing warrantless search. See People v. Dumas, supra; People v. Medina, 26 Cal. App. 3d 809, 103 Cal. Rptr. 337 (1972); People v. Gurley, 23 Cal. App. 3d 536, 100 Cal. Rptr. 407 (1972).
The court’s analysis turned on the nature and function of disciplinary proceedings. There is some precedent for prohibiting on constitutional grounds the use of evidence obtained by unlawful search and seizure in civil and administrative actions which share some of the key objectives of a criminal trial. The strongest and most consistent line of decisions is in the area of civil forfeiture proceedings. In *One 1958 Plymouth Sedan v. Pennsylvania*, a case involving an illegal search of a vehicle by state officers, the United States Supreme Court held that the government could not make use of illegally obtained evidence (liquor on which federal taxes had not been paid) by waiving the criminal penalty and proceeding to confiscate the automobile in a civil action. The Court held that despite the “civil” label, the object of a forfeiture action is to punish the commission of a criminal offense and impose a serious penalty. Given the “quasi-criminal” nature of the proceeding, the fourth amendment exclusionary privilege is available. One year earlier the California Supreme Court had applied the same rationale to forfeiture actions in state courts and, in *People v. One 1960 Cadillac Coupe*, had reached the same conclusion: forfeiture proceedings, though technically civil, are deterrent in nature and bear such close resemblance to the aims and objectives of the criminal law as to require application of criminal exclusionary rules barring evidence acquired by illegal search.

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4. The court noted that the issue is “directly raised” by the *Emslie* case, and is “of sufficient importance to require consideration here.” 11 Cal. 3d at 226, 520 P.2d at 1000, 113 Cal. Rptr. at 184. Since the illegality issue had been disposed of, making it unnecessary for the court to rule on the applicability of the exclusionary rules, its conclusion is dictum. *People v. Gregg*, 5 Cal. App. 3d 502, 85 Cal. Rptr. 273 (1970). However, since the court gave full and careful consideration to an issue argued by counsel, and announced a principle upon which it might have decided the case had it been necessary to reach the issue, its conclusion is authoritative. *People v. Barksdale*, 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972); *San Joaquin & Kings River C. & I. Co. v. Stanislaus County*, 155 Cal. 21, 99 P. 365 (1908).


6. Use of illegally seized evidence in federal court criminal proceedings had long been prohibited by the rule laid down in *Weeks v. United States*, 232 U.S. 383 (1914). In *Mapp v. Ohio*, 367 U.S. 643 (1961), the United States Supreme Court held that the privilege of excluding evidence obtained by illegal search and seizure was an essential part of the right of privacy guaranteed by the fourth amendment and therefore was binding on both federal and state courts.

7. 380 U.S. at 700. The Court noted that not infrequently the forfeiture of an automobile carrying contraband may constitute a greater penalty than the criminal law could impose, since the value of the car might exceed the maximum fine. *Id.* at 701.

8. 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964). State narcotics agents sought to introduce illegally seized evidence in civil proceedings to confiscate a car used to transport marijuana. *Id.* at 96, 396 P.2d at 709, 41 Cal. Rptr. at 293.
The California court has also declared products of unlawful search and seizure inadmissible on constitutional grounds in a few other types of civil cases, notably narcotics commitment hearings. In *People v. Moore*, the defendant's motion for exclusion of illegally seized evidence in a narcotics commitment proceeding was upheld on the ground that the action, though civil, involved an attempt by the state to deprive the defendant of his liberty. The fact that commitment proceedings can result in involuntary confinement for a substantial period was sufficient, in the court's judgment, to constitute such identity with the objectives of the criminal law as to make application of the exclusionary rule a necessary element of due process. In addition, the court found such application consistent with the basic function of the exclusionary rule: deterrence of police misconduct.

The *Emslie* court, therefore, was faced with the problem of determining whether the policy outlined in *One Cadillac Coupe* and broadened in *Moore*, which requires exclusion of illegally seized evidence in civil actions bearing a close resemblance to

10. 69 Cal. 2d 674, 466 P.2d 800, 72 Cal. Rptr. 800 (1968). *But cf.* *People v. Bourdon*, 10 Cal. App. 3d 878, 89 Cal. Rptr. 415 (1970) (holding that a motion to exclude on grounds that evidence was illegally seized must be made at the hearing before the judge on statutory compliance, not at the jury trial). *See also Redner v. Workmen's Compensation Appeals Bd.*, 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971) (alternative holding: evidence obtained by gross invasion of defendant's privacy contaminates and subverts Board function); *Elder v. Board of Medical Examiners*, 241 Cal. App. 2d 246, 50 Cal. Rptr. 304 (1966), *cert. denied*, 385 U.S. 1001 (1967) (fourth amendment exclusionary rule assumed to apply in proceedings by Board of Medical Examiners to deprive a physician of his license).

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criminal trials, should be further extended to State Bar disciplinary hearings which contemplate suspension or disbarment.

Though the court made no mention of conflicting decisions at the appellate level, the same type of issue (application of the fourth amendment exclusionary rule in proceedings to revoke a professional license) had previously been presented to the California Court of Appeal. In Elder v. Board of Medical Examiners, which involved proceedings to revoke a physician's license to practice, the Court of Appeal for the First District made a direct analogy to the civil forfeiture cases. The court interpreted One Cadillac Coupe as requiring exclusion of unlawfully seized evidence in any civil or administrative proceeding which shares the deterrent and punitive objectives of a criminal action and threatens deprivation of liberty or property. Consequently, the court stated that "it will be assumed herein that the exclusionary rule will apply to an administrative hearing when the proceeding contemplates the deprivation of a license which is recognized as a property right, as is the right to practice medicine."

The Court of Appeal for the Second District, however, refused to recognize the forfeiture decisions as controlling precedent in a case involving a nearly identical fact situation, Board of Governors of the Mountain View School District v. Metcalf. Upholding the school board's dismissal of a probationary teacher following his conviction of a criminal offense, the appellate court ruled that evidence of Metcalf's conduct "that was inadmissible in his criminal prosecution [because the product of an illegal search by police] was properly admitted in this dismissal proceeding." Conceding the punitive effect of revoking a teaching

11. The Emslie court cites and discusses Elder v. Board of Medical Examiners, 241 Cal. App. 2d 246, 50 Cal. Rptr. 304 (1966) (see note 12 infra and accompanying text). However, there is no reference to Board of Governors of the Mountain View School Dist. v. Metcalf, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974) (see text accompanying note 15 infra). The Metcalf decision, which was handed down three months before the Emslie ruling, is in direct conflict with Elder on the issue of application of the fourth amendment exclusionary rule to license revocation proceedings.

12. 241 Cal. App. 2d 246, 50 Cal. Rptr. 304 (1966), cert. denied, 385 U.S. 1001 (1967). Agents of the State Board of Medical Examiners, accompanied by two policemen, raided defendant's office without a warrant and seized files on patients for whom Elder had prescribed methadrine. Defendant challenged use of the illegally procured records in the disciplinary proceedings instituted to consider revoking his license. Though the court accepted defendant's argument that the fourth amendment exclusionary rule should apply to the proceeding, it subsequently ruled the search and seizure legal.


16. Id. at 552, 111 Cal. Rptr. at 728.
credential, the court stressed that the primary purpose of dismissing a teacher for misconduct is not to punish the teacher but to protect his pupils. The regulatory character of the disciplinary proceedings, in the court's estimation, overrode any "quasi-criminal" elements. In addition, the Metcalf court found that the policy of deterring official misconduct, which is the backbone of the criminal law exclusionary rules, has little relevance in the context of school board disciplinary hearings.

The Emslie court, resolving the same issue with regard to State Bar disciplinary hearings, expressly rejected the Elder court's assumption that disciplinary proceedings are directly analogous to civil forfeiture actions and thus require application of the fourth amendment exclusionary rule as a necessary element of procedural due process. Instead it adopted the Metcalf court's approach and undertook a careful analysis of the nature and function of disbarment proceedings.

An early line of California State Bar disciplinary cases stressed the punitive nature of disbarment proceedings, characterizing them as "quasi-criminal" or "in the nature of a criminal prosecution." However, these cases pre-date both People v. Cahan, which required exclusion of illegally seized evidence from California criminal trials, and Mapp v. Ohio, which applied the fourth amendment exclusionary rule to state courts.

The practice in the older cases of comparing Bar disciplinary hearings to criminal trials did not raise the issue of exclusion, because before Cahan unlawfully seized evidence was not excludable even in criminal trials in California courts, except where there was flagrant police misconduct. The criminal analogy was drawn primarily to establish and support the necessity for such elementary procedural safeguards as notice, right to counsel, and ex-

17. 11 Cal. 3d at 229, 520 P.2d at 1001, 113 Cal. Rptr. at 185.
18. State Bar disciplinary proceedings are statutory, governed by the State Bar Act, Cal. Bus. & Prof. Code § 6001 et seq. (West 1970). The Rules of Procedure of the State Bar, id. foll. § 6087, establish minimum standards for procedural due process in disciplinary hearings. Rules governing procedure in civil and criminal cases are therefore not applicable unless specifically made so by legislative action. Id. § 6001. However, the supreme court retains inherent supervisory power over such matters, Id. § 6087, and has the power to supplement the statutory provisions with additional procedural requirements "if it is not satisfied that the legislative qualifications are sufficient." Emslie v. State Bar, 11 Cal. 3d 210, 225, 520 P.2d 991, 999, 113 Cal. Rptr. 175, 183 (1974).
19. E.g., Herrscher v. State Bar, 4 Cal. 2d 399, 49 P.2d 832 (1935); In re Morton, 179 Cal. 510, 177 P. 453 (1918); In re Luce, 83 Cal. 303, 23 P. 350 (1890).
20. E.g., In re Haymond, 121 Cal. 385, 53 P. 899 (1898).
clusion of hearsay testimony. In a 1935 disbarment review in which an attorney did seek to have illegally procured evidence suppressed, basing his argument on the procedure obtaining in federal courts under the rule of *Weeks v. United States*, the California Supreme Court acknowledged the punitive effect of the disciplinary hearing and accepted the "quasi-criminal" label. But it disposed of the motion to suppress by simply reciting the common law rule, then in force in state courts, that a court presented with competent evidence will not stop to investigate its source.

The *Emslie* opinion rejects the criminal/quasi-criminal label and takes the position asserted by the more recent California Bar cases: the essential purpose of disbarment is not to impose a penalty on the offender but to preserve the integrity of the judicial system and protect the public from unethical and incompetent practitioners.

This rejection of the criminal analogy, and consequently of any constitutional requirement that criminal exclusionary rules be applied in all cases, is clearly in accord with current case law in California and other jurisdictions. However, a 1968 United States Supreme Court decision, *In re Ruffalo*, contains an express statement that disbarment is a "penalty" and proceedings which contemplate disbarment are "quasi-criminal in nature." Consequently, the Court held that an attorney must be given advance

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24. Herrscher v. State Bar, 4 Cal. 2d 399, 49 P.2d 832 (1935). Private detective hired by an irate client broke into Herrscher's office and photostated his personal and business files. The stolen records were later studied by the Examiner in Bar disciplinary proceedings. Ruling on the motion to suppress, the court held that the illegal act and the use of the stolen papers by the disciplinary committee were "distinct transactions" with "no necessary connection."


27. 390 U.S. 544, 551 (1968). The *Ruffalo* opinion concerns a federal disbarment, but the federal court proceedings consisted merely of a review of the record of the state court action, and a finding that one of the three charges constituting grounds for expulsion from the Ohio State Bar was sufficient for federal disbarment. The error on which defendant challenged the federal disbarment (failure to give timely notice of charge) occurred in the original State Bar disciplinary hearing. Thus the Supreme Court's characterization of disciplinary actions as quasi-criminal is clearly intended to apply to both state and federal proceedings.
notice of all charges brought against him in disbarment proceedings. The Emslie opinion made reference to Ruffalo, but dismissed it with the terse observation that it "hardly stands for the equation of criminal and disciplinary proceedings." However, it is not clear that Ruffalo should have been dismissed as irrelevant to the issue. It must be conceded that any argument that the Ruffalo opinion does "equate" disciplinary hearings with criminal trials rests solely on the Court's use of the label "quasi-criminal." If by using that phrase the Supreme Court intended to place disbarment proceedings in the same category as civil forfeiture actions, also labeled "quasi-criminal," then Ruffalo suggests that the fourth amendment exclusionary rule may be part of minimal due process requirements, as it is in forfeiture actions. Ruffalo contains no discussion of the implications of "quasi-criminal," and there is no clear indication that the words were meant as a term of art or that the Court's intention was to broaden the category of non-criminal proceedings subject to the exclusionary rule of the criminal law. Moreover, those state courts which have considered the ramifications of Ruffalo have, like the California Supreme Court, uniformly treated the language as dictum and summarily rejected the suggestion that Ruffalo requires the application of criminal procedural rules in Bar disciplinary hearings. But if disbarment proceedings share the aims and objectives of the criminal law ("quasi-criminal"), it is not clear why an accused attorney should not have the benefit not only of timely notice of charges, which Ruffalo requires, but of other procedural protections afforded criminal defendants who may face penalties considerably less severe than the loss of livelihood that disbarment entails.

The answer offered by the Emslie court is that the ultimate test of whether a particular procedural rule should be applied is a practical one. Thus, as the final step in its determination, the court weighed the regulatory function of disciplinary actions against the primary policy consideration behind the fourth amendment exclusionary rule: deterrence of police misconduct. In support of its decision the court relied extensively on In re Martinez, a case in which the court "applied this balancing test . . .

28. 11 Cal. 3d at 229, 520 P.2d at 1002, 113 Cal. Rptr. at 186.
31. See In re Gault, 387 U.S. 1, 49 (1967).
in considering the nature of an administrative proceeding—a parole revocation by the Adult Authority."\textsuperscript{34}

Martinez, a parolee, was convicted of a narcotics offense, and his parole revoked. The conviction was later reversed on determination that the evidence admitted at the trial was the product of an unlawful search, and that the defendant's confession had been obtained in violation of the \textit{Dorado-Miranda} rules.\textsuperscript{35}

On appeal, the supreme court held that the Adult Authority was entitled to consider the illegally seized evidence and the confession during parole revocation proceedings. The rationale was that both the fourth amendment and the \textit{Dorado-Miranda} exclusionary rules sought to deter unlawful police practices. In the judgment of the court, that policy would not be implemented by requiring application of those rules in Adult Authority hearings. The court reasoned that since a police officer is unlikely to predetermine his unlawful act on the victim's status as parolee, the increase in deterrence achieved by excluding illegally obtained evidence from Adult Authority hearings would be minimal, while the hampering effect on an administrative body charged with the "delicate duty" of deciding whether a convicted criminal can be released without danger to the public would be substantial. Despite a vigorous dissent from Justice Peters,\textsuperscript{36} the court concluded that the exclusionary rules do not apply to Adult Authority proceedings, except where serious violation of the parolee's rights absolutely requires exclusion to assure a fair hearing.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{34} Emslie v. State Bar, 11 Cal. 3d 210, 227, 520 P.2d 991, 1000, 113 Cal. Rptr. 175, 184 (1974).
\item \textsuperscript{36} Justice Peters argued persuasively that if exclusionary rules are to function successfully as deterrents, courts must enforce them so broadly as to make any use of illegally obtained evidence impossible. Permitting the state to profit in any way from unconstitutional methods weakens the overall deterrent effect and creates incentive for illegal activity. Peters also pointed out that the majority opinion, focusing on the deterrent function of exclusionary rules, gives short shrift to an equally important consideration: preservation of judicial integrity. Noting that the purpose of parole proceedings is to facilitate rehabilitation, he suggested that toleration of government lawlessness is peculiarly inappropriate in such a setting. The civil forfeiture cases, in Peters' opinion, indicate that exclusionary rules ought properly to be applied in analogous non-criminal proceedings. \textit{In re Martinez}, 1 Cal. 3d 641, 652, 463 P.2d 734, 741, 83 Cal. Rptr. 382, 389 (1970) (dissenting opinion).
\item \textsuperscript{37} The court actually resolved the issue of the \textit{Dorado-Miranda} violation by refusing to apply \textit{Dorado} retroactively. The narcotics arrest which later resulted in parole revocation took place in 1963. The \textit{Dorado} decision was handed down in 1965, \textit{Miranda} in 1966. \textit{Dorado}'s companion case, \textit{In re Lopez}, 62 Cal. 2d 368, 398 P.2d 380, 42 Cal. Rptr. 188 (1965), held that \textit{Dorado} contemplated deterring future police misconduct and declined to make the rule retroactive. The United States Supreme Court made the same ruling with respect to \textit{Miranda} viola-
\end{itemize}
Applying the same test to the issue raised in *Emslie*, the court reached an identical conclusion: for the State Bar disciplinary committee to perform its protective and regulatory duties with maximum efficiency, it should be permitted to assess all competent evidence available, unrestricted by procedural rules not consonant with its function. The court expressly cautioned that *Emslie* was not to be construed as holding that "circumstances could not be presented under which the constitutional demands of due process could not countenance use of evidence obtained by unlawful means in a proceeding conducted by [a] governmental agency or administrative arm of this court." But the opinion continued: "The application of such rules must be worked out on a case-by-case basis in this and other license revocation proceedings."\(^{38}\)

The *Emslie* ruling is limited to State Bar disciplinary proceedings, and serves primarily as a directive to the disciplinary committee of the Bar, which exercises administrative and advisory duties in matters of suspension and disbarment.\(^{39}\) However, the court's adoption of the policy-weighing procedure used in *Martinez* clearly delineates the approach the California Supreme Court will favor in cases involving an attempt to apply criminal procedural rules to administrative proceedings. The court appears to have balked at any absolute extension of the fourth amendment exclusionary rule beyond the limits of *Moore* and *One 1960 Cadillac Coupe*. It has chosen instead a cautious case-by-case approach, at least where the administrative body has as its primary function protection of the public, and the threatened penalty, though severe, is neither deprivation of physical liberty nor confiscation of tangible property. Such an approach may facilitate the regulatory work of disciplinary boards. But the price of this concession to practical necessity is that the integrity of the state is undermined when it permits its administrative agencies to wield the disciplinary rod with unclean hands.

*Christine de Shazer*

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\(^{38}\) *11 Cal. 3d at 229-30, 520 P.2d at 1002, 113 Cal. Rptr. at 186.*

\(^{39}\) *See discussion at note 2 supra.*

While at work in 1969, Richard Rodriguez, age 22, was struck on the head by a falling pipe which weighed over 600 pounds. As result, his spinal cord was severely damaged and he suffered apparently permanent paralysis in his legs, lower body and part of one arm. After the accident, Mary Anne Rodriguez, age 20, quit her job to provide her bedridden husband with the continual care his injuries required. She had to assist him in virtually every aspect of daily living, including washing, dressing, and getting into and out of his bed or wheelchair. In addition, she had to wake him several times each night and turn him over in an effort to prevent bedsores. Since Richard no longer had control over his bowels or bladder, Mary Anne had to provide artificial inducement to help him perform the basic bodily function of waste disposal. The performance of all these duties constituted an enormous physical strain on Mary Anne.

Just as serious, however, was the psychological suffering she was compelled to endure. She had to witness her husband’s own physical and mental suffering each day. Furthermore, due to Richard’s inability to participate in sexual relations after the accident, Mary Anne could not have the children she desired. In effect, a normal marriage relationship had been destroyed and replaced by a nurse-patient relationship. Her own physical and emotional stress which resulted from her husband’s accident, and the knowledge that Richard would require her constant attention for the rest of his life, caused Mary Anne to become “‘nervous, tense [and] depressed.’” As she stated in her complaint, “Richard’s life has been ruined by this accident. As his partner, my life has been ruined too.”

2. Id. at 386, 525 P.2d at 670, 115 Cal. Rptr. at 766.
3. Id.
4. Id.
5. Id. at 386, 525 P.2d at 670-71, 115 Cal. Rptr. at 766-67.
6. Id. at 386, 525 P.2d at 671, 115 Cal. Rptr. at 767.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
Richard and Mary Anne jointly filed an amended complaint alleging two causes of action.\textsuperscript{12} The first was predicated on Richard's own injuries.\textsuperscript{13} The second cause of action alleged separate consequential damages to Mary Anne.\textsuperscript{14} She sought general damages in her own right, recovery for the value of her nursing services, and compensation for her lost earnings and future earning capacity.\textsuperscript{15} The defendants demurred to the second cause of action on the basis of the supreme court's holding in \textit{Deshotel v. Atchison, Topeka & Santa Fe Railway Co.},\textsuperscript{16} which had denied a wife the right to recover damages for loss of consortium.\textsuperscript{17} The trial court reluctantly followed this rule,\textsuperscript{18} but in order to allow Mary Anne an immediate appeal, it severed the two causes of action and sustained the demurrer to her action without leave to amend.\textsuperscript{19} The court of appeal unanimously affirmed, stating that it was the task of the California Supreme Court to qualify or overrule its own earlier decisions.\textsuperscript{20}

The supreme court granted a hearing, and in its decision, per Justice Mosk, stated that the lower courts had correctly deferred the resolution of the issue,\textsuperscript{21} but held unequivocally that either spouse may recover for the loss of consortium caused by the negligent or intentional injury of the other spouse by a third party.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 387, 525 P.2d at 671, 115 Cal. Rptr. at 767.
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} At the end of the opinion, the court discussed the plaintiff's prayer for damages alleged in the complaint. The court found the prayer for general damages acceptable and permitted the plaintiff, upon retrial, to offer proof of her loss of consortium. However, the court held that the plaintiff could not recover for the value of the nursing services she furnished her husband, because, if her husband succeeded in his action against the defendants, he would be entitled to recover the cost of those services. To allow both the wife and the husband to recover for the nursing services she provided would amount to double recovery. Nor could the wife recover for the loss of her earnings and earning capacity incurred when she quit work to take care of her husband. Such recovery would allow her to accomplish indirectly that which we have just held she cannot do directly." \textit{Id.} at 409, 525 P.2d at 687, 115 Cal. Rptr. at 783.
\item \textsuperscript{16} 50 Cal. 2d 664, 328 P.2d 449 (1958).
\item \textsuperscript{17} 12 Cal. 3d at 387, 525 P.2d at 671, 115 Cal. Rptr. at 767.
\item \textsuperscript{18} The trial court had stated:
\begin{quote}
I have never been able to justify the law which permitted a widow to be compensated for the detriment suffered as a result of loss of companionship and so forth, but at the same time won't compensate her for the loss, together with the burden, of somebody made a vegetable as a result of something happening to her husband. I can't see it, but I feel kind of hide bound by the Appellate Court. That is my problem.
\end{quote}
\textit{Id.}
\item \textsuperscript{19} \textit{Id.} at 387-88, 525 P.2d at 672, 115 Cal. Rptr. at 768.
\item \textsuperscript{20} \textit{Id.} at 388, 525 P.2d at 672, 115 Cal. Rptr. at 768.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782. The decision was 6-1. Justice McComb dissented, stating that this cause of action should not be allowed without legislative approval. \textit{Id.} at 409, 525 P.2d at 687, 115 Cal. Rptr. at 783.
\end{itemize}
In addition to overruling Deshotel, the Rodriguez court also overruled West v. City of San Diego, which had denied a husband the right to recover for the loss of his wife's consortium. These cases involved fact patterns similar to the one in Rodriguez. In each case a spouse had been so seriously injured that the ability to continue a normal marital relationship was no longer possible. In addition to the suit for damages brought by the victim, the other spouse sought recovery for loss of consortium, a term which encompasses not only loss of support and services, but also "love, companionship, affection, society, sexual relations, solace and more.

A series of conflicting court decisions provided the basis for holding in Rodriguez. In an early case, Meek v. Pacific Electric Railway Co., the court allowed a husband to recover for the loss of his wife's services, but stated that damages for loss of consortium were not allowed in California. The subsequent decision in Gist v. French, however, rejected this view as "inadvertent dictum." Since there was no law forbidding such recovery, the lower appellate court had stated that "it would be unreasonable to conclude that the loss of enjoyment of the sex relation by either party to a marriage is not recoverable from him who caused such loss."

In Deshotel, the supreme court denied recovery, holding that the quoted language from Gist also was dictum, insofar as it referred to the wife's right of recovery for loss of consortium. Justice Carter wrote a vigorous dissent stating, inter alia, that the decision was a denial of equal protection of the laws, since the Gist court had allowed a similar right of recovery to a husband. Two years later, in West, the supreme court completely overruled Gist and refused to permit a husband to recover for the loss of consortium of his injured wife. The West court reasoned that the common law right of recovery accorded to the husband was based on the subservient legal position of the wife; since that theory was no longer viable the husband should be denied recovery.
Again there was a strong dissent, this time by Justice Peters, who found the majority's reasoning unsound. At common law, the wife had no separate legal existence apart from her husband; consequently she had no right to recover for the loss of his consortium. Justice Peters argued that if the court sought to treat husband and wife equally, it should have extended the right to recover for loss of consortium to a wife rather than have rescinded the common law action accorded to a husband. Since the original reason for denying the wife recovery no longer existed, the rule should have ceased. Instead, as noted by the Rodriguez majority, "the court devised new reasons of 'policy and procedure' to justify the survival of the rule in California.

In order to provide a definitive answer to whether a right of recovery should exist for loss of consortium, the Rodriguez court investigated, evaluated, and destroyed the bases of the Deshotel and West decisions. The court drew from the dissents in those cases of Justices Carter and Peters, as well as from opinions from other jurisdictions which had rejected the position taken by the majorities in Deshotel and West.

First, the court examined the role of stare decisis in the prior holdings. When Deshotel was decided, the weight of authority—both judicial and legislative—supported the common law rule which denied the wife a right of recovery for loss of consortium. By 1974, however, the position taken in Deshotel had become the minority view in the United States. Furthermore, legal schol-
ars and writers had been recommending for many years that the common law rule be changed, and in 1969 the Restatement of Torts was revised to include a right of recovery for loss of consortium to a wife.

The Rodriguez court found the destruction of the precedential foundation of Deshotel to be complete, saying:

In these circumstances we may fairly conclude that the precedential foundation of Deshotel has been not only undermined but destroyed. In its place a new common law has arisen, granting either spouse the right to recover for loss of consortium caused by negligent injury to the other spouse. Accordingly, to adopt that rule in California at this time would not constitute, as the court feared in Deshotel [citation omitted] an "extension" of common law liability, but rather a recognition of that liability as it is currently understood by the large preponderance of our sister states and a consensus of distinguished legal scholars.

A second point emphasized by the earlier decisions was that the common law should be changed only by the legislature. Yet the West court had "modified" the common law on its own initiative by denying a husband a right of recovery for loss of consort-

(1973). For a complete list of these cases, see Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 390 n.5, 525 P.2d n.5, 669, 673 n.5, 115 Cal. Rptr. 765, 769 n.5 (1974). Five states have made the change by statute (Colorado, Mississippi, New Hampshire, Oregon and Tennessee). Id. at n.6, 525 P.2d at 673-74 n.6, 115 Cal. Rptr. at 769-70 n.6. Hawaii, Louisiana, North Dakota and Rhode Island apparently have no definitive opinion on the issue. Id. at n.7, 525 P.2d at 674 n.7, 115 Cal. Rptr. at 770 n.7. Virginia and Utah have statutes which deny the wife's right by implication. Id. at n.8, 525 P.2d at 674 n.8, 115 Cal. Rptr. at 770 n.8. And in thirteen states judicial decisions impliedly denied the right. Id. at 391 n.9, 525 P.2d at 674 n.9, 115 Cal. Rptr. at 770 n.9. Some courts, however, have stated that the legislature must make the change, while other decisions denying recovery are based on cases from other jurisdictions which, in many instances, have been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled. Deshotel is a good example. Of the twenty cases which were cited by the court to support its decision, seventeen have now been overruled.


45. 12 Cal. 3d at 392-93, 525 P.2d at 675, 115 Cal. Rptr. at 771.

ium. To demonstrate that the argument for legislative mandate lacked merit, the *Rodriguez* court cited numerous instances in which the California Supreme Court had first specifically held that legislative action was required to change the law and then subsequently reversed its position. In each instance, the court eventually determined that it need not wait for the legislature to act, especially when the doctrine involved was judicially created. As Justice Traynor pointed out in *People v. Pierce*, for the court not to act would be an abdication of the court’s “responsibility for the upkeep of the common law.”

The *Rodriguez* court also rejected the argument raised in *Deshotel* that the wife (or husband) sustained only indirect harm as a consequence of the defendant’s wrong to the other spouse. The court stated that argument had already been negated in *Dillon v. Legg*. In that case a driver who negligently ran over a small child was found liable to the child’s mother, who had witnessed the accident, for the emotional shock and subsequent physical illness she suffered. In rejecting the argument that the mother’s injury was too indirect, the *Dillon* court declared that the defendant owed a duty of care to all persons who foreseeably could be endangered by his conduct. It found that the driver should reasonably have foreseen that the mother of the deceased child would be nearby and would suffer emotional trauma from witnessing the accident.

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47. 54 Cal. 2d at 482-83, 353 P.2d at 937-38, 6 Cal. Rptr. at 297-98 (Peters, J., concurring and dissenting).
50. Id.
51. 50 Cal. 2d at 667, 328 P.2d at 451.
53. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
54. Id. at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.
55. Id. at 739-40, 441 P.2d at 920, 69 Cal. Rptr. at 80.
56. Id. at 740-41, 441 P.2d at 921, 69 Cal. Rptr. at 81.
the facts in *Rodriguez*, the court concluded that since most adults
are married, an injury sustained by an adult could reasonably be
expected to have an adverse effect on his or her spouse.\textsuperscript{57} The
use of the reasonable man-foreseeability standard, therefore, rec-
ognizes that each spouse suffers an immediate, personal loss and
that each is entitled to recover from the responsible tortfeasor.\textsuperscript{58}

The court briefly dealt with two additional arguments raised
in the prior cases: (1) that the damages were too speculative,\textsuperscript{59}
and (2) that allowing the uninjured spouse to recover for loss of
consortium would encourage parents and children to try to enforce
similar claims.\textsuperscript{60}

In disposing of the concern over the uncertainty of damages,
the court noted that while loss of consortium may have physical
consequences, it is primarily a form of mental suffering or emo-
tional distress.\textsuperscript{61} Obviously, it is not possible to determine objectively the extent of such suffering, nor is a monetary award likely
to compensate totally for the destruction of the marriage relation-
ship. Nevertheless, such an award is the only means available
to compensate for the loss. In California it is well established
that a plaintiff may recover for many subjective injuries related
to pain and suffering\textsuperscript{62} even though it is not possible to measure objectively the amount of damages sufficient to redress the emo-
tional harm caused. If a jury can, and must, determine a proper
award in such circumstances, there is no reason to believe that
it cannot do so in an action for loss of consortium.\textsuperscript{63}

While the court acknowledged that permitting an action for
loss of consortium might lead other family members to assert sim-
ilar causes of action, it emphasized that it would be improper to

\textsuperscript{57} 12 Cal. 3d at 399-400, 525 P.2d at 680, 115 Cal. Rptr. at 776.
\textsuperscript{58} Id. at 401, 525 P.2d at 681, 115 Cal. Rptr. at 777.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 402, 525 P.2d at 682, 115 Cal. Rptr. at 778.
\textsuperscript{61} Id. at 401, 525 P.2d at 681, 115 Cal. Rptr. at 777.
\textsuperscript{62} PROSSER, supra note 43, at 327-28 states: "Mental suffering is no more
difficult to estimate in financial terms, and no less a real injury than 'physical
difficulty.' (Citations omitted.)
\textsuperscript{63} Justice Tobriner of the California Supreme Court has written:

[A] plaintiff may recover not only for physical pain but for fright,
nervousness, grief, anxiety, worry, mortification, shock, humiliation, in-
dignity, embarrassment, apprehension, terror or ordeal. (Citations omi-
ted.) Admittedly these terms refer to subjective states, representing a
detriment which can be translated into monetary loss only with great dif-
culty. (Citations omitted.) But the detriment, nevertheless, is a gen-
uine one that requires compensation (citations omitted), and the issue
generally must be resolved by the "impartial conscience and judgment of
jurors who may be expected to act reasonably, intelligently and in
harmony with the evidence." (Citations omitted.)

Capelouto v. Kaiser Foundation Hosp., 7 Cal. 3d 889, 892-93, 500 P.2d 880, 883,
103 Cal. Rptr. 856, 859 (1972).

\textsuperscript{63} 12 Cal. 3d at 401, 525 P.2d at 681, 115 Cal. Rptr. at 777.
deny an existing right of action simply because of potential future difficulty in delineating the scope of liability. The Rodríguez court also implied that the husband-wife relationship is legally quite different from the parent-child relationship and that the need to extend an analogous right of recovery was not necessarily required.

The fear of double recovery and the concern about the retroactive effect of a judicial decision to allow a right of recovery for loss of consortium were raised as additional reasons to deny the action. The Rodríguez court did not find these problems serious and concluded that they could satisfactorily be resolved by procedural means.

While a wife is entitled to her husband's financial support, the rule against double recovery prohibits her from recovering for such a loss when her husband has already been compensated for his loss of earnings and earning power. The loss of this power is personal to the husband, and he is entitled to recover for it. But as has been indicated, financial support is only one element of consortium. The possibility of double recovery is not a problem when one considers the other elements of consortium, such as sexual relations and companionship, in which both husband and wife have personal interests which are entitled to protection. When either or both parties are deprived of these elements by reasons of a negligent or intentional injury to one, it is obvious that each has suffered a personal injury. Therefore, a recovery obtained by a husband for the loss of his ability to participate in a normal married life does not compensate his wife for the similar loss she has incurred. Both should be able to recover for the loss of an opportunity to enjoy a normal sexual relationship and if both do, the result is not double recovery. As one court has said, "[t]here is no duplication, instead, this is an example of a single tortious act which harms two people by virtue of their relationship to each other."}

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64. Id. at 403, 525 P.2d at 682, 115 Cal. Rptr. at 778 citing Dillon v. Legg, 68 Cal. 2d 728, 743-44, 441 P.2d 912, 922, 69 Cal. Rptr. 72, 82 (1968).
65. In other words, liability will be limited to "persons and injuries within the scope of the reasonably foreseeable risk." 12 Cal. 3d at 403, 525 P.2d at 682, 115 Cal. Rptr. at 778.
66. Id. at 403-04, 525 P.2d at 683, 115 Cal. Rptr. at 779. See text accompanying notes 81-91 infra for further discussion of this problem.
67. Id. at 404, 525 P.2d at 683, 115 Cal. Rptr. at 779.
68. Id.
69. Id.
70. Id. at 404-05, 525 P.2d at 684, 115 Cal. Rptr. at 780.
71. Id. at 405, 525 P.2d at 684, 115 Cal. Rptr. at 780.
72. Id. at 404, 525 P.2d at 683, 115 Cal. Rptr. at 779.
Loss of Consortium

To insure that there would be no double recovery in Rodriguez, Justice Mosk followed the procedural suggestion of an earlier decision and advised that, upon remand, each element of the damages be kept separate and distinct from the others. Further, the court suggested that pursuant to section 378 of the California Code of Civil Procedure, the claim for loss of consortium be joined to the other spouse's cause of action for negligent or intentional injury. The court noted the approach suggested in Diaz v. Eli Lilly and Co., that if the actions were not originally joined, either party would normally be entitled to have them consolidated for trial. Since the Rodriguez court did suggest joinder, it would appear probable that as a practical matter most, if not all, such suits will be joined in the future.

Finally, the court summarily dismissed the concern that a judicial decision to allow a right of recovery for loss of consortium might have retroactive effect. The court reasoned that an action for loss of consortium based on any claim for personal injuries to a married person, which had already been settled, would be barred by the statute of limitations. However, "for reasons of fairness and sound administration," the Rodriguez court held that even if the filing of such an action were not barred by the statute of limitations, it would be prohibited if the personal injury claim of the injured spouse had been concluded by settlement or judgment prior to the effective date of the Rodriguez decision.

Since the California Supreme Court so often leads the way in changing outmoded laws, it is rather surprising that thirty-one states recognized a wife's right to recover for loss of consortium before California. Now that the right has been granted to both

75. CAL. CIV. PRO. CODE § 378 (West 1973) states:
(a) All persons may join in one action as plaintiffs if:
   (1) They assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or
   (2) They have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action.
(b) It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective right to relief.
76. 12 Cal. 3d at 407-08 n.29, 525 P.2d at 686 n.29, 115 Cal. Rptr. at 782 n.29.
78. 12 Cal. 3d at 407, 525 P.2d at 686, 115 Cal. Rptr. at 782.
79. Id. at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782.
80. The Rodriguez decision was handed down on August 21, 1974. Id. at 382, 525 P.2d at 669, 115 Cal. Rptr. at 765. Presumably this is the effective date referred to by Justice Mosk. Id. at 408, 525 P.2d at 686, 115 Cal. Rptr. at 782.
81. See note 35 supra.
husband and wife in California, it seems likely that the supreme court will be asked soon to decide whether the reasoning employed in Rodriguez is equally applicable to a child's claim for the deprivation—analagous to loss of consortium—resulting from an incapacitating injury to one or both of its parents.

The Rodriguez court clearly foresaw the possibility that its decision allowing a right of action for loss of consortium to either spouse could be used later as a basis for urging the court to recognize a similar right for other family members. Although the court did not appear to encourage such an extension of the doctrine, it pointed out in Rodriguez, as it had in Dillon v. Legg, that it preferred to proceed on a case-by-case basis rather than to create "artificial islands of exceptions" which automatically deny recovery to certain types of plaintiffs.

Even the imaginative lawyer will not find it easy to persuade the supreme court that a child's loss of the care, companionship, education, and affection normally provided by a parent should be the basis of an action for money damages. For one thing, the precedential foundation which had been so completely destroyed in the loss of consortium area is still intact on the question of whether a child should have an analogous right of recovery. Thus far, in no jurisdiction has a lower court decision recognizing such a right been upheld, although a number of legal writers, including Dean Prosser, have failed to understand the appellate courts' reluctance to grant such recovery.

The notion espoused in Dillon that recovery should be available to all who are foreseeably harmed by a tortfeasor's actions

82. 12 Cal. 3d at 402-03, 525 P.2d at 682, 115 Cal. Rptr. at 778.
83. The court quoted decisions from other jurisdictions which raise serious questions as to the availability of recovery for other family members. Id. at 403-04, 525 P.2d at 683, 115 Cal. Rptr. at 779.
84. Id. at 403, 525 P.2d at 682, 115 Cal. Rptr. at 778, citing Dillon v. Legg, 68 Cal. 2d 728, 747, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968).
86. See PROSSER, supra note 43, at 896. See id. n.26 for other sources.
87. Id. at 896. The objections to extending the right to a child are similar to those which were raised and overcome in the loss of consortium area—for example, the possibility of double recovery (id. at 897), or a claim that the child's injury is too indirect and that his recovery would lead to unlimited liability for defendants. While the child would benefit to some degree from any recovery the injured parent received, Prosser argues that the parent's recovery would not be adequate to recompense the child for all that he personally has lost. Id.
has always been well received by other courts. Although the dissent in *Dillon* saw that decision as the first step into the "fantastic realm of infinite liability," subsequent decisions have limited its application.  


89. See, e.g., *Powers v. Sissoev*, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (1974). *Powers* was an action brought by a mother and daughter against the truck driver who ran over the child. The child sued for her personal damages and the mother requested separate damages for the physical and emotional pain and distress which she suffered as a result of her daughter's accident. The mother did not witness the accident and first saw her child's injuries some thirty to sixty minutes later. The mother argued that *Capelouto v. Kaiser Foundation Hosp.*, 7 Cal. 3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972), stood for the existence of a right of recovery for physical harm flowing from *knowledge of an unobserved tort*. *Powers v. Sissoev*, 39 Cal. App. 3d 865, 873-74, 114 Cal. Rptr. 868, 873-74 (1974). In *Capelouto*, the actual issue on appeal was whether an infant could recover for pain and suffering as a result of medical malpractice. 7 Cal. 3d at 891, 500 P.2d at 881, 103 Cal. Rptr. at 857. While resolving this issue for the plaintiff, the *Capelouto* court discussed, in a footnote, the parents' separate cause of action for their own mental and physical distress arising from the defendant's negligence. The court approved of an instruction, based on *Dillon* and given at the trial, which permitted the parents to recover "reasonable compensation for any pain, discomfort, fears, anxiety, and emotional distress suffered by the parents of which the injury to their child was a proximate cause." *Id.* at 892 n.1, 500 P.2d at 882 n.1, 103 Cal. Rptr. at 858 n.1. Justice Tobriner noted that this instruction allowed parents to recover "for physical or mental injury sustained in the course of caring for the child and responding to her needs...." *Id.* (emphasis added). However, the *Capelouto* court also said that *Dillon* made it clear that a parent cannot recover for witnessing a child's distress unless the parent suffers actual physical injury. *Id.*, citing *Dillon v. Legg*, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80. Given this somewhat ambiguous standard and the strong dissent in *Dillon* which expressed the fear of unlimited liability for defendants, the *Powers* court stated that it did not think it should extend the rule to a case such as this where the shock, as claimed, resulted from seeing the daughter 30 to 60 minutes after the accident and thereafter under circumstances not materially different from those undergone by every parent whose child has been injured in a nonobserved and antecedent accident.

*See also* *Jansen v. Children's Hosp. Medical Center of East Bay*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973). *Jansen* was an action by a mother for her infant's wrongful death due to an improper diagnosis of the child's condition. The mother was not allowed to recover for her emotional trauma and subsequent physical injury caused by witnessing the progressive decline and ultimate death of her child because, the court said, *Dillon* contemplated a sudden and brief event causing the child's injury, which was subject to sensory perception. *Id.* at 24, 106 Cal. Rptr. at 884. *But cf.* *Employers Casualty Ins. Co. v. Foust*, 29 Cal. App. 3d 382, 105 Cal. Rptr. 505 (1972). In that case the court held that damages for physical injury which resulted from the emotional distress caused by a child's accident were recoverable by the parents under an insurance policy which covered all bodily injury resulting from an accident. The mother witnessed the accident and the father learned of it within ten minutes. Both suffered severe fright, shock, emotional distress and resulting physical injury. *Id.* at 387, 105 Cal. Rptr. at 508; *accord*, *Archibald v. Braverman*, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969). The *Archibald* court held that a mother was entitled to recover damages for the mental and emotional illness requiring institutionalization, which she sustained as a result of witnessing her child's injuries within moments of the event. *Id.* at 255-56, 79 Cal. Rptr. at 724-25.
The California Supreme Court will undoubtedly consider the closeness of the family relationship in deciding whether, in a given factual context, to extend Rodriguez. It seems obvious that severe emotional harm to a child is likely to result when the parent-child relationship is damaged by incapacitation of the parent. In many instances a brother or sister of a seriously injured person could also be expected to suffer considerable emotional distress. While there is no denying the fact that other relatives and close friends may be greatly affected by an incapacitating injury to someone they care for deeply, reason and pure economics dictate that lines must be drawn. One approach the court could take in drawing such a line, should it decide later to extend Rodriguez, is that followed by California’s wrongful death statute: it could limit the class of permissible plaintiffs seeking recovery analogous to loss of consortium to the heirs at law or dependent parents of the injured victim.

The Rodriguez decision, in permitting the spouse of a negligently or intentionally injured person to bring an action for loss of consortium, recognizes, albeit belatedly, an important legal right. It is to be expected that the supreme court will soon be called upon to decide whether the principles espoused in Rodriguez are sufficiently broad to dictate that a similar right of action be extended at least to a dependent child who has been deprived of the comfort and companionship of its parent as a result of the tortious act of a third party.

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90. The closeness of the family relationship was one of the factors which the Dillon court considered in reaching its conclusion that the harm suffered by the mother was reasonably foreseeable. 68 Cal. 2d at 741, 441 P.2d at 920, 69 Cal. Rptr. at 80.

91. The California Wrongful Death statute allows the heirs and dependent parents who are not heirs to bring an action against the person causing the death. It provides that “such damages may be given as under all the circumstances of the case, may be just . . . “ CAL. CIV. PRO. CODE § 377 (West 1973).

92. Such an extension of Rodriguez is suggested by a recent decision of the court of appeal (February 25, 1975). Based on the reasoning in Rodriguez, the court held in Hair v. County of Monterey, 45 Cal. App. 3d 538, 545, 119 Cal. Rptr. 639, 644 (1975), that no reasonable distinction can be drawn between the right of parents, in appropriate circumstances, to seek recovery for lost comfort, society and companionship of an injured and totally helpless child and the right of a spouse, in similar circumstances, to seek recovery for loss of consortium as authorized by Rodriguez. Since the court found that the law favored the parent-child relationship sufficiently to allow the parent to recover for lost comfort, society and companionship (id. at 545-46, 119 Cal. Rptr. at 644), it may be inferred that, at least in this court, reciprocal rights would be accorded to a child whose parent had been severely injured or incapacitated.

In the early afternoon of June 25, 1968, a light Beechcraft airplane took off on a routine equipment test flight from Fullerton airport. The small private plane climbed to approximately 350 feet, made a shallow right turn and climbed again to about 650 feet. At this point the pilot began another right turn when, suddenly, the engine failed and the plane crashed to the ground killing all four occupants.1

The heirs of the crash victims and the owner of the airplane joined in an action against the airplane manufacturer for damages resulting from the deaths of the occupants and destruction of the aircraft.2 The evidence indicated that the crash resulted from a defectively designed fuel system in the airplane,3 and the jury awarded $4,497,0004 in compensatory damages to the plaintiffs based on strict liability in tort.5 Finding the defendants’ issuance of a certificate of airworthiness on the defective airplane prior to the crash to constitute misrepresentation and fraudulent concealment of a defect,6 the jury awarded a total of $17,250,000 in punitive damages to the heirs and to the owner of the airplane.7

Because of a deficient instruction to the jury on the elements of fraud, the trial judge ordered a new trial as to punitive damages, but denied a new trial as to compensatory damages after the plaintiffs agreed to remittiturs.8 All parties appealed.9 The California Court of Appeal for the Fourth District held that the evidence of defectively designed fuel cells was sufficient to establish the cause of the crash.10 In addition, the court ruled that regardless of whether there was error in the lower court's decision to grant a new trial as to punitive damages in favor of the heirs, a new trial could not be granted because of California's rule barring punitive

2. Id. at 453, 113 Cal. Rptr. at 419.
3. Id. at 459, 113 Cal. Rptr. at 422.
4. Id. at 454, 113 Cal. Rptr. at 419.
5. Id. at 467, 113 Cal. Rptr. at 427.
6. Id. at 462, 113 Cal. Rptr. at 424.
7. Id. at 454, 113 Cal. Rptr. at 419.
8. Id.
9. Id.
10. Id. at 459, 113 Cal. Rptr. at 428.
damages in a wrongful death action. The court of appeal affirmed the judgment of the lower court granting a new trial as to punitive damages in favor of the owner of the airplane. The court found that the trial judge's failure to instruct the jury properly on elements of fraud did not invalidate the compensatory damage award, and the appeal of the order denying a new trial as to compensatory damages was dismissed.

The plaintiffs in *Pease* sought to recover punitive damages under both California's wrongful death statute and California's survival statute. Although these two statutes are frequently confused with each other, they constitute entirely separate causes of action. Wrongful death actions are intended to compensate heirs of a decedent for losses they have sustained as a result of

11. Id. at 462, 113 Cal. Rptr. at 424, see infra notes 19, 22.
12. Id. at 474, 113 Cal. Rptr. at 432.
13. Id. at 468, 113 Cal. Rptr. at 428.
14. CAL. CIV. PRO. CODE § 377 (West 1973) provides:
   When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father and mother, is caused by the wrongful act or neglect of another, his heirs, and his dependent parents, if any, who are not heirs, or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in the case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs and dependent parents in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.
15. CAL. PROB. CODE § 573 (West Supp. 1974) provides:
   Except as provided in this section no cause of action shall be lost by reason of the death of any person but may be maintained by or against his executor or administrator.
   In an action brought under this section against an executor or administrator all damages may be awarded which might have been recovered against the decedent had he lived except damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.
   When a person having a cause of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived, and shall not include damages for pain, suffering or disfigurement.
the decedent's death. Survival statutes, on the other hand, are designed to allow recovery by the personal representative of the deceased for damages the decedent himself might have recovered had he survived.

The Pease court made clear its approval of the long-standing policy of California courts denying the existence of a right to punitive damages in favor of the heirs of a deceased in actions brought under California's wrongful death statute. The court also decided that the facts in Pease did not warrant an award of punitive damages to the heirs under the survival statute. Finally, the Pease court concluded that there is no right to punitive damages in California independent of statute.

The court began its analysis by tracing the history of California's rule against the recoverability of punitive damages in wrongful death actions. In 1874, the California Legislature amended the wrongful death statute by striking the words "pecuniary and exemplary" from its text. The court then cited the early case of Lange v. Schoettler, which established the proposition that the purpose of the 1874 amendment was to deny the right to punitive damages in wrongful death actions. In Lange, the California Supreme Court held erroneous a jury instruction which permitted an award of punitive damages "if the act causing the

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17. Id.
18. Id.
20. Id. at 459-60, 113 Cal. Rptr. at 422.
21. Id. at 462, 113 Cal. Rptr. at 424.
22. Compare original CAL. CIV. PRO. CODE § 377 (Springer 1872), which provides:
   When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just, . . .
   With the first amended CAL. CIV. PRO. CODE § 377 (Sumner, Whitney & Co. 1883) (emphasis added), which stated:
   When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just. [In effect July 1st, 1874].

For the present version see CAL. CIV. PRO. CODE § 377 (West 1973).
23. 115 Cal. 388, 47 P. 139 (1896).
death was wanton, cruel, and malicious."\(^{25}\)

As further support for its denial of punitive damages to the heirs in *Pease*, the court cited *Doak v. Superior Court*.\(^{26}\) *Doak* involved a proceeding for a writ of prohibition to restrain the Los Angeles Superior Court from enforcing an order requiring petitioners to answer certain interrogatories in plaintiffs' wrongful death action. The plaintiffs in *Doak* were attempting to justify pretrial discovery of the defendant's financial status for the purpose of recovering punitive damages.\(^{27}\)

Although the question of recoverability of punitive damages in wrongful death actions was a secondary issue in *Doak*, the court held therein that since punitive damages were not recoverable in a wrongful death action, the plaintiffs' attempt to ascertain the defendant's financial status for the purpose of recovering punitive damages was improper.\(^{28}\)

The *Pease* court also cited with approval *Fox v. Oakland Consolidated Street Railway*.\(^{29}\) In *Fox*, the California Supreme Court reversed a $6000 judgment awarded to the plaintiff for the death of his infant son.\(^{30}\) Because the plaintiff's award was so out of proportion to the injury sustained, the court concluded that the verdict was "prompted by improper motives on the part of the jury" and set it aside.\(^{31}\)

In denying punitive damages to the heirs of the four occupants of the ill-fated Beechcraft airplane, the *Pease* court also relied on *Estate of Riccomi*\(^{32}\) and *Carr v. Pacific Telephone Co.*\(^{33}\) *Riccomi* involved a suit instituted by the mother of a deceased son against the son's wife to obtain one-half of a $3000 settlement paid to the latter for claims arising out of the son's death. The court held that money recovered under California's wrongful death statute is intended solely for the benefit of the heirs to compensate them for the pecuniary loss they have sustained as a result of a relative's death.\(^{34}\) Since Riccomi's mother had suffered minimal pecuniary loss from her son's death, the California Supreme Court

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\(^{25}\) *Lange v. Schoettler*, 115 Cal. 388, 390, 47 P. 139 (1896). The *Lange* court noted that California's wrongful death statute of 1862 (Stat. 1862, at 447) specifically authorized the awarding of exemplary damages, but that the purpose of the 1874 amendment of section 377 of the Code of Civil Procedure, "must have been to take away the right to exemplary damages." *Id.* at 391, 47 P. at 139.


\(^{27}\) *Id.* at 827, 65 Cal. Rptr. at 194.

\(^{28}\) *Id.* at 838, 65 Cal. Rptr. at 201.

\(^{29}\) 118 Cal. 55, 50 P. 25 (1897).

\(^{30}\) *Id.* at 68, 50 P. at 29.

\(^{31}\) *Id.*

\(^{32}\) 185 Cal. 458, 197 P. 97 (1921).

\(^{33}\) 26 Cal. App. 3d 537, 103 Cal. Rptr. 120 (1972).

\(^{34}\) *Estate of Riccomi*, 185 Cal. 458, 460, 197 P. 97, 98 (1921).
held she was not entitled to the one-half share of the recovery she claimed and affirmed the trial court judgment against her.

Although there was no mention of punitive damages in Riccomi, the Pease court cited the case as support for its contention that California's wrongful death statute was enacted solely to compensate heirs for losses resulting from the death of a decedent, not to punish the tortfeasor for his wrong.

Carr v. Pacific Telephone Co. was a wrongful death action brought by the widow of a tree trimmer who had been killed by a tree trunk which had accidentally bounced off an unusually taut telephone line. Carr's widow, appealing a lower court judgment for the defendant, argued that it was reversible error for the judge to instruct the jury on the defense of assumption of the risk, which she maintained did not apply in this case. The Court of Appeal for the Fourth District reversed the lower court and ordered a new trial because of error in the jury instruction.

The Pease court considered the Carr decision important because it set out the three basic elements of damages recoverable in actions brought pursuant to California's wrongful death statute:

1. the present value of future contributions from the decedent to his surviving heirs;
2. the value of any personal service, advice or training that probably would have been given; and
3. the value of the decedent's society and companionship.

By limiting recovery to direct pecuniary loss sustained by a decedent's heirs, Carr clearly affirmed California's longstanding rule barring punitive damages in wrongful death actions.

In light of these cases, the Pease court refused to "exercise legislative power" by creating a right to punitive damages. The decision of the Pease court follows the majority position in the United States.

Federal courts are among those that allow recovery of punitive damages in federal wrongful death actions, even if the federal cause of action is brought in

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35. Id. at 462, 197 P. at 98.
36. Id. at 459, 197 P. at 97.
37. The only issue in the case was whether the $3000 settlement was properly distributed among the decedent's heirs. Id. at 459, 197 P. at 97.
40. Id. at 546, 103 Cal. Rptr. at 127.
44. Comment, Punitive Damages in Wrongful Death, 20 CLEV. ST. L. REV. 301, 302-03 (1971) [hereinafter cited as Comment].
ful death actions generally do so because their respective legislatures have enacted statutes expressly permitting such recovery. In addition, some courts have allowed recovery of punitive damages because their wrongful death statutes have been judicially construed so as to permit recovery of such damages. The present trend in jurisdictions which allow punitive damages in wrongful death actions is to permit such recovery where the decedent is killed as a result of willful or wanton misconduct on the part of the wrongdoer.

Many of the jurisdictions which allow recovery of punitive damages in wrongful death actions do so because courts and legislatures tend to confuse the purpose of a wrongful death statute—to create a new cause of action in the heirs of a deceased based on the fact of death—with the purpose of a survival statute—to permit the representative of a deceased to recover damages the deceased himself might have recovered had he lived.

Because of the differences between the wrongful death and survival statutes, the damages normally recoverable in each differ as well. The plaintiff in a survival action usually recovers the same damages he or she would recover in a personal injury suit, that is compensatory relief for the injury itself, and for accompany-


To resolve the dilemma of how to apply the acts uniformly in view of the variance that exists among the states on the issue, federal courts have held that when the punitive damages issue arises in an F.E.L.A. or Jones Act action brought in a state court, the Acts themselves and common law principles applied in federal courts govern. Dice v. Akron C. & Y.R. Co., 342 U.S. 359 (1952); Ellis v. Union P. Ry. Co., 329 U.S. 649 (1947); Bailey v. Central V.R., Inc., 319 U.S. 350 (1943). Thus, if punitive damages would properly be awarded in an F.E.L.A. or Jones Act action under federal law, but the case is brought in a state court, the state court would be obliged to permit the award, even if the particular state's law prohibited such an award. Gee v. Lehigh Valley R. Co., 163 App. Div. 274, 148 N.Y.S. 882 (1914).

46. Comment, supra note 44, at 308.
47. SPEISER, supra note 16, at 744.
48. Id.
49. Id.
50. Id.
ing mental anguish or pain and suffering.\textsuperscript{51} In wrongful death actions, on the other hand, recovery is limited to the loss of pecuniary benefits to the heirs resulting from the death of the relative.\textsuperscript{52}

Apparently realizing the difficulty they would encounter in attempting to recover punitive damages under California’s wrongful death statute, the plaintiffs in \textit{Pease} also contended that they should recover punitive damages under the survival statute.\textsuperscript{53} It has long been the position in many jurisdictions that punitive damages are recoverable if properly brought under a state’s survival statute.\textsuperscript{54} Courts in these jurisdictions have relied upon the premise that there is no reason why a wrongdoer should be punished for fraudulent or malicious conduct when a party is injured, but not when a party is killed.\textsuperscript{55} Moreover, these courts have argued that since the purpose of survival statutes is to preserve those causes of action which existed at the time of the decedent’s death, the personal representative of the victim, who could have brought the action before death, should be allowed to do so after the death.\textsuperscript{56}

Although the \textit{Pease} court construed California’s survival statute as allowing possible recovery of punitive damages by the personal representatives of the deceased for those causes of action “sustained or incurred prior to death,”\textsuperscript{57} the court summarily rejected the plaintiffs’ contention that causes of action which might sustain punitive damages did in fact arise prior to the deaths of the airplane’s occupants.\textsuperscript{58} In order to have allowed recovery of punitive damages in the \textit{Pease} case, the court would have had to accept the plaintiffs’ argument that a cause of action warranting

\begin{footnotes}
\item[51.] \textit{Id.} at 750-52.
\item[52.] \textsc{Prosser, Law of Torts} 906 (4th ed. 1971), [hereinafter cited as \textsc{Prosser}].
\item[53.] 38 Cal. App. 3d 450, 460, 113 Cal. Rptr. 416, 422-23 (1974).
\item[54.] \textit{See also} Annot., 63 A.L.R.2d 1327 (1959). The following cases are examples of decisions in which the recovery of punitive damages under a survival statute was allowed: Hennigan v. Atlantic Refining Co., 282 F. Supp. 667 (E.D. Pa.), aff’d, 400 F.2d 851 (3d Cir. 1967), \textit{cert. denied}, 395 U.S. 904 (1968); Leahy v. Morgan, 275 F. Supp. 424 (N.D. Iowa 1967); State \textit{ex rel.} Smith v. Greene, 494 S.W.2d 55 (Mo. 1973); Smith v. Gray Concrete Pipe Co. Inc., 267 Md. 147, 297 A.2d 721 (1972); Atlas Properties Inc. v. Didich, 226 So. 2d 684 (Fla. 1969).
\item[57.] \textit{Pease} v. \textit{Beech Aircraft Corp.}, 38 Cal. App. 3d 450, 459-60, 113 Cal. Rptr. 416, 422.
\item[58.] As the court said: “It must be said no cause of action arose during the lifetimes of any of the four for damages to personal property. Therefore no such cause of action survived.” \textit{Id.}
\end{footnotes}
punitive damages arose on the behalf of each occupant prior to the crash.

The final argument advanced by the plaintiffs in their attempt to recover punitive damages was that there exists in California, independent of statute, a right to punitive damages. Plaintiffs cited a recent United States Supreme Court decision, Moragne v. States Marine Lines Inc., as support for their contention. In Moragne, the widow of a deceased longshoreman sued a shipping company for the wrongful death of her husband. The case had been dismissed in federal district court, where it was determined that the widow had no cause of action in light of earlier United States Supreme Court opinions which had denied the existence of a cause of action for wrongful death in the absence of a statute. The court rejected the common law rule denying a right to a civil cause of action for the wrongful death of a decedent and permitted the widow to pursue her case against States Marine Lines.

The Pease court reasoned that while Moragne may have created a right to a wrongful death cause of action in the heirs of a decedent under federal maritime law, it did not follow that the plaintiffs in Pease had a right to punitive damages independent of California law, which bars punitive damages in wrongful death actions.

Along with the problem of whether to allow punitive damages in wrongful death-survival actions, the Pease case poses the

60. Id. at 379.
61. The basic thrust of the Moragne decision was to overrule The Harrisburg, 119 U.S. 199 (1886), a case in which the Supreme Court reversed an award of damages against the defendants for a negligent condition on their ship which had caused the death of the decedent. The Harrisburg decision was based on Mobile Life Ins. Co. v. Brame, 95 U.S. 754 (1878), a case which held that American common law was in accord with the English common law principle that "no civil action lies for an injury which results in death." Id. at 756.

The Court in The Harrisburg acknowledged that its decision to support the ancient English principle "had little justification except in primitive English legal history, a history far removed from the American law of remedies for maritime deaths." Moragne v. States Marine Lines Inc., 398 U.S. 375, 379 (1970). Justice Harlan, writing for the majority in Moragne, pointed out that all American jurisdictions have enacted wrongful death statutes in one form or another, primarily to remedy the injustice of denying recovery for the pecuniary loss sustained by heirs of a decedent for his or her wrongful death, Id. at 388, 390.

California's first wrongful death statute was enacted in 1862 (Stat. 1862 at 447). It was based on Lord Campbell's Act (Vict., c. 93 at 531-32 (1846)), an English law adopted in 1846 to abrogate the harsh common law rule. Id. at 389. Lord Campbell's Act has been deemed the progenitor of California's wrongful death law. Buckley v. Chadwick, 45 Cal. 2d 183, 194, 288 P.2d 12, 18 (1955), reh. denied, 289 P.2d 242 (1955).

important question of whether punitive damages should be allowed in airplane products liability cases as a means of demonstrating to manufacturers the need to exercise greater care in the design and production of their aircraft. California courts recently have allowed the recovery of punitive damages against corporations in products liability cases. In a leading case, Toole v. Richardson-Merrell Inc., a California court accepted plaintiffs' contention that, in view of the defendant drug company's knowledge of the toxic effects of a certain drug, the defendant had acted "recklessly and in wanton disregard of possible harm to others in marketing, promoting, and maintaining" a drug on the market which had caused serious health problems to unsuspecting users. The Toole court held that because defendant had withheld information regarding the toxic side effects of the drug from the public, malice-in-fact existed and sufficient foundation had been established to permit the recovery of punitive damages. The Toole court allowed an award of $250,000 in punitive damages to the plaintiff.

Since California is a state which allows punitive damages in products liability cases, the Pease court was in a position to have permitted the award of punitive damages to stand against Beech Aircraft Corporation. California is a strict products liability jurisdiction and to have allowed punitive damages in Pease would have been consistent with the public policy considerations that underlie the state's imposition of a strict liability standard in products liability cases. These considerations include (1) the notion that the law should provide the maximum legal protection possible to protect the public from injury which results from defectively manufactured products, and (2) the idea that the law should also serve to deter manufacturers from producing defective products in the future.

Allowing punitive damages in Pease also would have been consistent with the modern trend in aviation products liability law
towards imposing stringent standards of care on airplane manufac-
turers in the production of aircraft.\textsuperscript{69} This insistence on great care
in airplane design and manufacture is founded on a realization by
courts of the lethal hazard that even a slight mechanical malfunc-
tion in an airplane can pose to its occupants.\textsuperscript{70}

Because the purpose of a wrongful death action is limited
to compensating the heirs of a decedent for loss of pecuniary ben-
efits, the better reasoned cases bar punitive damages in wrongful
death actions.\textsuperscript{71} However, since the purpose of survival statutes
is to permit recovery by a decedent's personal representative for
damages the deceased might have recovered had he lived, the
\textit{Pease} court could have relied upon California's survival statute to
sustain an award of punitive damages on the ground that a valid
cause of action (that is, misrepresentation or fraudulent conceal-
ment of a defect) did in fact arise prior to the deaths of the air-
plane's occupants.

Because of the need for change in California's wrongful
death-survival law, it is unfortunate that the \textit{Pease} case was denied
a hearing by the California Supreme Court. Perhaps, the court
declined review because of the huge $17,250,000 punitive dam-
age award it would have had to allow had it decided to recognize
plaintiff's right to punitive damages.

Whatever the reason for the supreme court's decision not
to hear the case, the court of appeal decision was unfortunate
for two reasons. First, because the opinion bars an award of punit-
tive damages against an airplane manufacturer for the deaths
which resulted from the use of their defective product, the deci-
sion was a major setback to the interests of the public in using
the law as a means of requiring airplane manufacturers to exercise
the greatest possible care in the design and production of aircraft.
Secondly, because the \textit{Pease} court failed to allow punitive dam-
ages to be awarded in a survival action, the court, in effect, sus-
tained an anomaly in California law which sanctions punitive dam-
ages against a wrongdoer only if the victim of the misconduct lives,
and prohibits the same damages when a victim dies.

\begin{flushright}Zachary E. Zwerdling\end{flushright}

\textsuperscript{69} Maloney, \textit{Current Trends in Aviation Products Liability Law}, 36 J. Air
\textsuperscript{70} 1 L. Kreindler, \textit{Aviation Accident Law} § 15.02 at 15.2-15.3 (Mathew
Bender 1974).
\textsuperscript{71} Speiser, \textit{supra} note 16, at 743-57.