

# COMMENTS

## 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?

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One who is financially dependent upon another should not lose both life support and legal remedy in one tortious moment.<sup>1</sup>

### I. INTRODUCTION

For more than sixty years, Dean William Prosser has noted in his treatise on tort law that "it's cheaper to kill a man than to maim him."<sup>2</sup> This old adage has been repeated many times over the years in both law review articles and court decisions involving wrongful death actions.<sup>3</sup> The story behind this maxim begins almost 200 years ago, when an English court decided that a civil action could not be brought for the wrongful death of another.<sup>4</sup> In other words, while a person tortiously injured by

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1. *Tait v. Wahl*, 97 Wash. App. 765, 776, 987 P.2d 127, 132 (1999) (Ellington, J., concurring).

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 945 (5th ed. 1984). For an earlier version of this quote, see also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 955 (1941) ("The result was that it was more profitable for the defendant to kill the plaintiff than to scratch him.").

3. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395 (1970); *Greene v. Texeira*, 505 P.2d 1169, 1178 (Haw. 1973); *Miller v. Bath Elevator Co.*, 97 N.W.2d 792, 793 (Mich. 1959); Craig S. Bonnell, *Back and Forth with the I.R.S.: The Taxation of Wrongful Death Actions in Alabama*, 17 CUMB. L. REV. 53, 69 (1986); Melanie T. Hewell, Comment, *Extending the Application of the Discovery Rule to Wrongful Death Actions: Where Will Texas Draw the Line?*, 38 BAYLOR L. REV. 151 (1986).

4. *Baker v. Bolton*, 170 Eng. Rep. 1033 (Nisi Prius 1808).

another could bring a civil action against the tortfeasor, if that person was killed, his loved ones would have no recourse and the defendant would escape all civil liability, making it cheaper for the tortfeasor to kill the person than merely to injure him. Supreme Court Justice Harlan noted that such a rule has been described as “barbarous.”<sup>5</sup> Other courts have referred to it as “monstrous” and an “ancient obscenity.”<sup>6</sup> Unfortunately, Dean Prosser’s maxim is still true in the early years of the twenty-first century in Washington.<sup>7</sup> Currently, five separate Washington statutes deal with tortious death.<sup>8</sup> These statutes encompass causes of action for the decedent’s surviving family and also preserve the decedent’s own cause of action for personal injury and death. The latter situation is covered by the two survival statutes.<sup>9</sup>

Because wrongful death law in Washington is purely statutory,<sup>10</sup> the legislature is at liberty to determine who can and who cannot recover for the wrongful death of a loved one. Such legislative control in this area has been upheld by the Washington courts.<sup>11</sup>

In the earliest days, only a widow or her children were allowed to recover. Over the years, however, the legislature has recognized and

5. *Moragne*, 398 U.S. at 381–82 (“Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as ‘barbarous.’”).

6. *Miller v. Bath Elevator Co.*, 97 N.W.2d 792, 793 (Mich. 1959).

It was inevitable that a doctrine so monstrous, its origins so obscure and puzzling, should receive legislative amelioration and such has been the case. Even with relation to workmen’s compensation, which is in no respects a damage remedy, it is provided by statute that compensation for an industrial injury shall not be interred with the body. Yet, despite the express mandate of an enlightened public conscience, clearly stated in the compensation act itself, we are besought to read this provision out of the act by a process of judicial interpretation. We are invited to engraft this grotesque stalk of the common law, long discredited and unlamented, upon one of the great remedial acts of our times, thus infusing the ancient obscenity with new life and vigor. This we cannot do.

*Id.*

7. This assertion is contrary to the view of the Washington State Supreme Court as recently as June 2004. In a case challenging the state survival statutes, the decedent’s estate argued that recovery of damages for the decedent’s loss of enjoyment of life should be recoverable under those statutes. *Otani v. Broudy*, 151 Wash. 2d 750, 757, 92 P.3d 192, 198 (2004). The estate contended that under the current statutes, it was cheaper for a tortfeasor to kill a person than to harm him. *Id.* at 762, 92 P.3d at 198. In finding that loss of enjoyment of life was not recoverable under the survival statutes, the court stated “[t]hus, it is not cheaper for a defendant to kill, instead of injure, another person in Washington.” *Id.* at 763, 92 P.3d at 198.

8. WASH. REV. CODE §§ 4.20.010, .020, .046, .060 (2004); *Id.* § 4.24.010 (2004).

9. *Id.* §§ 4.20.046, .060 (2004).

10. *Tait v. Wahl*, 97 Wash. App. 765, 771, 987 P.2d 127, 130 (1999) (“But as the courts of this state have long and repeatedly held, causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law.”).

11. *Philippides v. Bernard*, 151 Wash. 2d 376, 390, 88 P.3d 939, 946 (2004).

added other beneficiaries to the wrongful death and survival statutes, including dependent parents and siblings.<sup>12</sup> These changes are consistent with the purpose of such statutes, which is to compensate members of the decedent's family who have been denied the support or assistance that they expected to receive from the decedent had he or she remained living.<sup>13</sup>

Legislative designations of who qualifies as a "beneficiary" for the purpose of wrongful death and survival statutes are typically based on the category of family member. For instance, statutes in other states have allowed recovery by dependent siblings, step-children, or illegitimate children.<sup>14</sup> In Washington, however, the legislature has taken a more restrictive view and determined that only a specific subset of dependent parents and siblings should be allowed to recover.<sup>15</sup> Thus, recovery under the Washington wrongful death and survival statutes is only available to qualifying dependent parents and siblings who *reside* within the United States at the time of the death of their loved one.<sup>16</sup> The only exception is the child-death statute, which allows dependent parents to bring a wrongful death claim irrespective of residency.<sup>17</sup>

Several hypothetical situations illustrate the issue. If a person residing in Washington is simply injured by a tortfeasor, the victim would not be statutorily prohibited from bringing a civil action for personal injury, irrespective of whether that person is a United States citizen. If, however, the person is killed by the tortfeasor, and the victim's dependent parents happened to live just across the border in Vancouver, they would *only* be able to recover under the child-death statute, again, irrespective of their citizenship. If those same parents happened to reside in Florida, they would be entitled to recovery under all of the Washington wrongful death and survival statutes, even if they were foreign citizens. Finally, dependent siblings who do not reside within the United States are precluded from recovery under all the statutes.

Inherent in wrongful death statutes is the idea that not all relatives of the decedent should be compensated for their loss.<sup>18</sup> However, decid-

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12. See 1909 Wash. Sess. Laws 425.

13. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 947 (5th ed. 1984).

14. See, e.g., DEL CODE ANN. tit. 10, § 3721 (2005) (definition of child for wrongful death actions includes illegitimate child); OR. REV. STAT. § 30.020 (2004) (allowing for recovery by step-child).

15. WASH. REV. CODE § 4.20.020 (2004).

16. *Id.*

17. *Id.* § 4.24.010 (2004).

18. See *Tait v. Wahl*, 97 Wash. App. 765, 771-72, 987 P.2d 127, 130 (1999) (the purpose of wrongful death statutes is to compensate those who might naturally have expected assistance from the deceased).

ing that some dependent parents and siblings should be excluded from recovery solely based upon their foreign residency while allowing recovery for other dependent parents and siblings, who reside within the United States, is discriminatory on its face. Even though the wrongful death statutes make legitimate distinctions between beneficiaries based upon dependency or the category of relationship to the decedent (e.g. siblings, grandparents, nephews, etc.), "what difference can it make where they may reside? It is the fact of their relation to the life destroyed that is the circumstance to be considered . . ." <sup>19</sup>

Although courts have expressed repugnance for discrimination against nonresidents as far back as the early 1900s and recognized that it was out of date even in their time, it is the refusal of Washington courts to question the constitutionality of such legislative enactments which has allowed this injustice to continue unabated for almost 100 years. It is time that the courts in Washington finally realize that such discriminatory legislation must succumb to the protections provided by both the United States and Washington Constitutions and find these statutes unconstitutional. To do otherwise would allow a tortfeasor an "undeserved and morbid windfall"<sup>20</sup> should his tortious act result in death instead of injury.

Part II of this Comment will briefly discuss the historical roots of wrongful death and survival statutes from their origin in England, the resulting lack of a common law cause of action, and the current Washington statutes. Part II concludes with a discussion of treatment of non-resident beneficiaries under various wrongful death and survival statutes. Part III applies the rational basis constitutional review adopted by the Washington State Supreme Court. In Part IV, this Comment concludes that, under the rational basis test and pertinent Washington case law, the Washington statutes are unconstitutional.

## II. THE HISTORY OF WRONGFUL DEATH AND SURVIVAL STATUTES

### *A. The Origins of Wrongful Death and Survival Statutes*

Today, all fifty states have statutes that allow for wrongful death or survival actions.<sup>21</sup> In most cases, however, this statutory cause of action

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19. *Bridget & McGovern v. Philadelphia & Reading Ry. Co.*, 235 U.S. 389, 400 (1914).

20. Steve Andrews, Comment, *Survivability of Noneconomic Damages for Tortious Death in Washington*, 21 SEATTLE U. L. REV. 625, 651 (1998).

21. S. SPEISER, RECOVERY FOR WRONGFUL DEATH AND INJURY 35-36 (3d ed. 1992) ("At the present time there are statutes in all American states that create a right to recover for wrongful death.").

is not accompanied by a recognized common law cause of action.<sup>22</sup> The lack of a common law recovery for wrongful death has a long history, and has its origins in the 1808 English case of *Baker v. Bolton*.<sup>23</sup> In that case, Lord Ellenborough instructed the jury that “in civil court, the death of a human being could not be complained of as an injury.”<sup>24</sup> Almost forty years later, this common law rule was effectively overturned by the British Parliament with the passage in 1846 of Lord Campbell’s Act, the preamble of which created a civil cause of action for deaths which would otherwise be felonies under criminal law.<sup>25</sup>

In general, Lord Campbell’s Act created a class of statutorily defined beneficiaries who could recover for losses caused by the wrongful death of a relative.<sup>26</sup> The creation of a new statutory cause of action for wrongful death under Lord Campbell’s Act became the basic model for the various state statutes which were subsequently adopted in the United States,<sup>27</sup> including in the State of Washington.<sup>28</sup>

Although a statutory recovery for wrongful death has reached all corners of our country, the old rule of *Baker*, which rejected the notion of recovery for wrongful death under the common law, continues to persist.<sup>29</sup> In essence, various state courts in the United States, including Washington, adhere to a general common law rule, which holds that in the absence of a statute, no recovery for wrongful death is allowed.<sup>30</sup>

### *B. Washington State Wrongful Death and Survival Statutes*

The complexity of the Washington wrongful death and survival statutes has long attracted the attention of both lawyers and scholars in the state.<sup>31</sup> Part of the complexity stems from the fact that wrongful death cases are entirely statutory in nature, since Washington has followed the general practice of adopting the example of Lord Campbell’s Act.<sup>32</sup> In addition, Washington courts have repeatedly rejected the idea of a com-

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22. William S. Bailey, *Flawed Justice: Limitation of Parental Remedies for the Loss of Consortium of Adult Children*, 27 SEATTLE U. L. REV. 941, 952 (2004).

23. 170 Eng. Rep. 1033 (Nisi Prius 1808).

24. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 383 (1970) (citing *Baker*, 170 Eng. Rep. 1033).

25. Bailey, *supra* note 22, at 951.

26. SPEISER, *supra* note 21, § 1:8.

27. *Id.* § 1:9.

28. *Griffin v. Gehret*, 17 Wash. App. 546, 550, 564 P.2d 332, 334–35 (1977).

29. *Moragne*, 398 U.S. at 384.

30. See *Philippides v. Bernard*, 151 Wash. 2d 376, 390, 88 P.3d 939, 946 (2004); *LaFage v. Jani*, 766 A.2d 1066, 1076 (N.J. 2001).

31. Andrews, *supra* note 20, at 625.

32. 16 Wash. Practice, *Tort Law and Practice* § 6.1 (2005).

mon law claim for wrongful death and have affirmed that such actions are purely within the province of the legislature.<sup>33</sup>

In Washington, five separate statutes govern wrongful death and survival actions.<sup>34</sup> The wrongful death statutes, codified at title 4, chapter

33. *Philippides*, 151 Wash. 2d at 390, 88 P.3d at 946 (2004); *Anderson v. Seattle*, 78 Wash. 2d 201, 202, 471 P.2d 87, 88 (1970); *Windust v. Dep't. of Labor & Indus.*, 52 Wash. 2d 33, 36, 323 P.2d 241, 243 (1958); *Tait v. Wahl*, 97 Wash. App. 765, 771, 987 P.2d 127, 130 (1999).

34. WASH. REV. CODE § 4.20.010 (2004) provides:

When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

WASH. REV. CODE § 4.20.020 (2004) provides:

Every such action shall be for the benefit of the wife, husband, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife or husband or such child or children, such action may be maintained for the benefit of the parents, sisters or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

WASH. REV. CODE § 4.20.046 (2004) provides:

(1) All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: *Provided, however*, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action. The liability of property of a husband and wife held by them as community property to execution in satisfaction of a claim enforceable against such property so held shall not be affected by the death of either or both spouses; and a cause of action shall remain an asset as though both claiming spouses continued to live despite the death of either or both claiming spouses.

(2) Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefore if his death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the personal representative of such person.

WASH. REV. CODE § 4.20.060 (2004) provides:

No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse or child living, including stepchildren, or leaving no surviving spouse or such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters or brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse, or in favor of the surviving spouse and such children, or if no surviving spouse, in favor of such child or children, or if no surviving spouse or such child or children, then in favor of the decedent's parents, sisters or brothers who may be dependent upon such person for support, and resident in the United States at the time of decedent's death.

20, sections 010 and 020 of the Revised Code of Washington, create a cause of action for the statutorily defined classes of beneficiaries of the decedent, whose death was caused by the wrongful or negligent act of another.<sup>35</sup> Similarly, title 4, chapter 24, section 010, the so-called “child-death statute,”<sup>36</sup> gives parents a cause of action for the death of a minor child or a child upon whom the parents are financially dependent for support.<sup>37</sup> In contrast, the two survival statutes, title 4, chapter 20, sections 046 and 060 of the Revised Code, preserve any cause of action that the decedent may have had against the wrongdoer for pre-death injuries, and therefore do not create new causes of action for the beneficiaries.<sup>38</sup>

### 1. General Wrongful Death Statutes

Title 4, chapter 20, sections 010 and 020 of the Revised Code is the general wrongful death statute in Washington. Under this statute, the personal representative of the deceased, plaintiff in name only, can bring an action for the benefit of the statutorily defined beneficiaries as specified in the statute, which states that

[e]very such action shall be for the benefit of the wife, husband, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife or husband or such child or children, such action may be maintained for the

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WASH. REV. CODE § 4.24.010 (2004) provides:

A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable.

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent: PROVIDED, That notice shall be required only if parentage has been duly established.

Such notice shall be in compliance with the statutory requirements for a summons. Such notice shall state that the other parent must join as a party to the suit within twenty days or the right to recover damages under this section shall be barred. Failure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the suit.

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

35. WASH. REV. CODE §§ 4.20.010, .020 (2004).

36. *Masunaga v. Gapsin*, 57 Wash. App. 624, 625–26, 790 P.2d 171, 173 (1990).

37. WASH. REV. CODE § 4.24.010 (2004).

38. *Otani ex rel. Shigaki v. Broudy*, 151 Wash. 2d 750, 755, 92 P.3d 192, 194–95 (2004).

benefit of the parents, sisters or brothers, who may be dependent upon the deceased person for support, *and who are resident within the United States at the time of his death.*<sup>39</sup>

While the wrongful death statute has undergone a few changes since it was first enacted in 1854,<sup>40</sup> the most significant change, at least from the point of view of this author, was the amendment by the legislature in 1909. During this session, the legislature expanded the class of beneficiaries under the wrongful death statute to include recovery by dependent parents and siblings (at the time, “siblings” only included sisters and *minor* brothers). It also added language limiting recovery in this new category of beneficiaries to those who were residents in the United States at the time of the decedent’s death.<sup>41</sup> As noted, this particular language persists to this day.

In its current form, section 020 is considered to have created two classes of beneficiaries.<sup>42</sup> The beneficiaries in the first class, who are entitled to recover without a showing of financial dependency, consist of spouses or children of the decedent.<sup>43</sup> Beneficiaries in the second class, who may recover in the absence of a beneficiary from the first class, are made up of parents or siblings who were dependent upon the decedent for support.<sup>44</sup> However, the legislature further divided the second class by restricting recovery to only those financially dependent siblings or parents who are “resident within the United States at the time of [the decedent’s] death.”<sup>45</sup> It is clear that the residency requirement only applies to the second class of beneficiaries—dependent siblings and parents—and not to spouses or children.<sup>46</sup> Because no significant legislative history is available for the 1909 legislative session, we are left to speculate about the reasons for the inclusion of such language. Part III of this article will explore possible explanations for the legislature’s actions.

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39. WASH. REV. CODE § 4.20.020 (2004) (emphasis added).

40. Andrews, *supra* note 20, at 628.

41. See 1909 Wash. Laws, ch. 129, p. 425.

42. See *Philippides v. Bernard*, 151 Wash. 2d 376, 386, 88 P.3d 939, 944–45 (2004); Andrews, *supra* note 20, at 629.

43. WASH. REV. CODE § 4.20.020 (2004).

44. *Id.*

45. *Id.*

46. Although no cases have challenged the language of the statute on these grounds, it seems clear from a plain language reading of the statute that the residency restriction only applies to non-dependent parents and siblings and has no bearing on the recovery of children or spouses. The sentence designating spouses and children as beneficiaries ends with a period. The next sentence, which designates parents and siblings, included the residency restriction which is contained within the same sentence, separated only by a comma. See full text of WASH. REV. CODE § 4.20.020, *supra* note 34.



## 2. Child-Death Statute

In addition to the general wrongful death statutes, Washington also has what is known as the child-death statute.<sup>47</sup> Title 4, chapter 24, section 010 of the Revised Code exclusively gives parents a statutory cause of action for the death of a minor child or child upon whom the parents were dependent.<sup>48</sup> This statute is distinguished from chapter 20, section 010, in that it gives the parents a cause of action even if there are beneficiaries from the first class of beneficiaries, spouses or children, under chapter 20, section 020.<sup>49</sup>

The wrongful death and child-death statutes differ in at least two ways. First, unlike the wrongful death statute, which requires that dependent parents and siblings be United States residents at the time of death, the child-death statute does not impose a residency requirement on the parents.<sup>50</sup> Second, qualifying parents may bring actions under both the general wrongful death statute and the child's wrongful death statute, although they may be required to elect available damages under the statutes to avoid duplication.<sup>51</sup> The result is that while dependent parents who reside in the United States can recover under both the child-death statute and the general wrongful death statute, dependent parents residing outside the United States may only recover under the child-death statute. Discussion of this distinction will be addressed in further detail in Part III.

## 3. Survival Statutes

Washington has a general survival statute as well as a special survival statute. Unlike the wrongful death statutes, which generally cover post-death damages, the survival statutes preserve the decedent's causes of action for pre-death injuries; they do not create a new cause of action for the statutory beneficiaries.<sup>52</sup> Under title 4, chapter 20, section 046 of the Revised Code, the general survival statute, all causes of action that the decedent could have brought are preserved for the benefit of the estate.<sup>53</sup> In general, this allows for the personal representative to recover

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47. *Masunaga v. Gapasin*, 57 Wash. App. 624, 790 P.2d 171 (1990).

48. WASH. REV. CODE § 4.24.010 (2004).

49. Under WASH. REV. CODE § 4.20.020, the second class of beneficiaries (which includes parents) is not entitled to recovery unless there are no beneficiaries from the first class (spouses or children). In addition, like WASH. REV. CODE § 4.20.020, there is a requirement under chapter 24, section 010 that the parents be dependent on the child for support. *See supra* note 34.

50. *Id.* § 4.24.010 (2004).

51. *Andrews, supra* note 20, at 630.

52. *Otani ex rel. Shigaki v. Broudy* 151 Wash. 2d 750, 755, 92 P.3d 192, 195 (2004); *see also Andrews, supra* note 20 at 632.

53. *Otani*, 151 Wash. 2d at 755–56, 92 P.3d at 195.

pain and suffering as well as other damages on behalf of the same beneficiaries that are listed in the wrongful death statute. Under the special survival statute, codified at chapter 20, section 060, only the personal injury claims of the decedent are permitted and they are only for the benefit of the statutory beneficiaries.<sup>54</sup> In theory, this differential treatment is explained by the fact that an action under the special survival statute is brought by the administrator of the decedent's estate while an action under the general survival statute is brought by the decedent's personal representative. However, in practice, the executor of the estate and the personal representative is often the same person acting in both roles.<sup>55</sup> Nevertheless, the beneficiaries under either survival action are still limited by the categories established by the wrongful death statute.<sup>56</sup> Therefore, as applied to dependent parents and siblings, only those who reside in the United States at the time of the decedent's death are entitled to recover under the survival statutes.

Despite the complexity and broad scope of Washington's five statutes, they still allow a tortfeasor to escape liability if the victim dies and only has beneficiaries who live outside the United States. Such differential treatment is not acceptable in this day and age and the courts should strike down these statutes as unconstitutional.

### *C. Wrongful Death and Survival Statutes as Applied to Nonresidents*

A basic premise of Lord Campbell's Act and its progeny in the United States was that a wrongful death claim is for the exclusive benefit of the statutorily defined beneficiaries.<sup>57</sup> As noted above, the Washington legislature has established two classes of beneficiaries under the wrongful death and survival statutes.<sup>58</sup> Unlike other states, Washington has specifically excluded nonresident parents and siblings from recovery under the wrongful death and survival statutes.<sup>59</sup> However, this was not always the case. As of 1903, no state statutes either allowed or forbade recovery by nonresident beneficiaries.<sup>60</sup> Indeed, as of 1909, both the Washington Supreme Court and the Ninth Circuit Court of Appeals held that nonresident aliens had a right of recovery under the Washington

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54. *Id.* at 756, P.3d at 195.

55. Andrews, *supra* note 20, at 632 n.55.

56. See WASH. REV. CODE §§ 4.20.046, .060 (2004) (although the language of WASH. REV. CODE § 4.20.060 does not specifically refer to WASH. REV. CODE § 4.20.020, the language regarding the residency requirement is almost identical).

57. SPEISER, *supra* note 21, at § 10:1.

58. *Philippides v. Bernard*, 151 Wash. 2d 376, 385, 88 P.3d 939, 943–44 (2004).

59. See *supra* note 34 and accompanying text. Also note that this does not apply to the child-death statute, WASH. REV. CODE § 4.24.010, which has no residency requirement.

60. *Bonthron v. Phoenix Light & Fuel Co.*, 71 P. 941, 942 (Ariz. 1903).

statutes.<sup>61</sup> However, in that same year, the Washington legislature extended recovery under the wrongful death and survival statutes to dependent parents and siblings and added the language “who are resident within the United States at the time of his death.”<sup>62</sup>

Although the Washington statutes appear to apply equally to nonresident *citizens* as well as nonresident *aliens*, some states have determined that in the absence of express language such as that in the Washington statutes, nonresident *aliens* may not recover at all for the wrongful death of a relative.<sup>63</sup> However, the case law in most states follows the lead of *Davidsson v. Hill*,<sup>64</sup> a 1901 English case which gave the nonresident alien mother of the decedent a cause of action for wrongful death.<sup>65</sup> The court in *Davidsson* noted that:

it would seem to be rather a strange thing that the foreign nationality of the sufferer by another’s negligence, which in no way prejudices his right of action here if he is only hurt and not killed, should form, the circumstances being otherwise identical, an absolute bar to any relief of the sufferer’s family under these Acts. The Acts are Acts the express object of which is to create a liability to an action for damages at the suit of relatives who suffer from the death of the deceased person . . . .<sup>66</sup>

Similar language has also been used by courts in the United States.<sup>67</sup>

Given that the original wrongful death statute in Washington did not expressly create a residency requirement for dependent beneficiaries, it is reasonable to conclude that the Washington legislature deliberately added this language when they amended the statute in 1909. The absence of case law from that time suggests that the legislature’s actions were not simply to affirm a prior version of a statute or to codify previous court

61. *Anastasakas v. Int’l Contract Co.*, 51 Wash. 119, 123, 98 P. 93, 94 (1908); *Saveljich v. Lytle Logging & Mercantile Co.*, 173 F. 277 (9th Cir. 1909).

62. *Meshner v. Osborne*, 75 Wash. 439, 443, 134 P. 1092, 1094 (1913). This change was subsequently acknowledged in *Dobrin v. Mallory S.S. Co.*, 298 F. 349, 350 (D.C.N.Y. 1924) (although this ruling is not binding in Washington State, this is the first case which recognized the addition of the residency requirement to the wrongful death statute).

63. See, e.g., *Maiorano v. Baltimore & O. R. Co.*, 213 U.S. 268 (1909); *Fulco v. Schuylkill Stone Co.*, 163 F. 124 (C.C.E.D. Pa. 1908), *aff’d*, 169 F. 98 (C.C.A. 3d Cir. 1909).

64. 2 K.B. 606 (1901).

65. SPEISER, *supra* note 21, at § 10:22.

66. *Davidsson*, 2 K.B. at 610.

67. See, e.g., *Bonthron v. Phoenix Light & Fuel Co.*, 71 P. 941, 944 (Ariz. 1903).

The object of the [wrongful death] act is to extend beyond the limits of the common law the right to recover reparation for a wrong, and we fail to see why, the wrong having been committed, the same reparation should not be made, whether those entitled to it are citizens of a state of our Union, or citizens of that country whose law were have inherited, and whose legislation in this instance we have adopted.

rulings. No matter its legislative purpose, this restriction on recovery by nonresident dependents has survived unchanged by the legislature for nearly 100 years. The time has come for the courts in Washington State to recognize that the statutory limitation on recovery by nonresident dependents is unconstitutional and should be overturned.

### III. THE CONSTITUTIONALITY OF WASHINGTON STATE WRONGFUL DEATH AND SURVIVAL STATUTES

The Washington State wrongful death and survival statutes have been attacked on many different fronts since their inception, including on constitutional grounds.<sup>68</sup> However, the courts have consistently found that the legislature's identification of classes of beneficiaries is not subject to judicial review.<sup>69</sup> In 1999, the Washington Court of Appeals rejected an equal protection challenge brought by a decedent's niece on the grounds that she was not a statutory beneficiary under any of the State wrongful death or survival statutes even though she was dependent on the decedent for support and they shared a "parent-child like" relationship.<sup>70</sup>

As recently as 2004, the Washington Supreme Court reaffirmed its reluctance to infringe on legislative decisions by rejecting an equal protection challenge to the dependency requirement of the child-death statute.<sup>71</sup> The court held that "the legislature has created a comprehensive set of statutes governing who may recover for wrongful death and survival, and there is no room for this court to act in that area."<sup>72</sup> The court further emphasized that "the change the plaintiffs seek must come from the legislature rather than this court."<sup>73</sup> However, the legislature appears unaware of the existence of such a discriminatory provision in the wrongful death and survival statutes. Even though all of the statutes have been amended many times since their creation in the mid-1800s, the amendments have mostly concerned gender discrimination (at one point they allowed recovery to widows and dependent sisters but not widowers and dependent brothers)<sup>74</sup> or the dependency factor.<sup>75</sup> It seems that the subse-

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68. See, e.g., *Philippides, v. Bernard*, 151 Wash. 2d 376, 88 P.3d 939 (2004); *Masunaga v. Gapasin*, 57 Wash. App. 624, 790 P.2d 171 (1990).

69. See *Philippides*, 151 Wash. 2d at 390, 88 P.3d at 946; *Tait v. Wahl*, 97 Wash. App. 765, 769, 987 P.2d 127, 129 (1999).

70. *Tait*, 97 Wash. App. at 769–70, 987 P.2d at 129–30.

71. Codified at WASH. REV. CODE § 4.24.010. *Philippides*, 151 Wash. 2d at 391–92, 88 P.3d at 946–47.

72. *Philippides*, 151 Wash. 2d at 390, 88 P.3d at 946.

73. *Id.*

74. See *Whittlesey v. City of Seattle*, 94 Wash. 645, 651, 163 P. 193, 195 (1917).

75. See *Masunaga v. Gapasin*, 57 Wash. App. 624, 628, 790 P.2d 171, 173 (1990).

quent legislatures have been indifferent to the residency requirement added in 1909 and have just accepted it as such without any further consideration. Although a constitutional challenge may be difficult, the legislature's inability to remedy such discrimination necessitates a judicial determination that these statutes violate the constitutional rights of the excluded beneficiaries or even of the decedent.

### A. Applying the Rational Basis Test

The strongest challenge to the Washington wrongful death and survival statutes is that they violate both the Equal Protection Clause of the United States Constitution,<sup>76</sup> which provides that no state shall deprive any person of the equal protection of its laws, and the privileges and immunities clause of the Washington Constitution.<sup>77</sup> The Washington privileges and immunities clause provides that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”<sup>78</sup> This clause has been interpreted by Washington courts as being “substantially identical” to the Equal Protection Clause of the United States Constitution.<sup>79</sup> Although a prospective plaintiff might argue that article 1, section 12 of the Washington State Constitution affords additional protections above and beyond those in the Fourteenth Amendment of the United States Constitution,<sup>80</sup> this Comment will focus on and engage in the same analysis used in recent years by the Washington courts when addressing constitutional challenges to the wrongful death and survival statutes.<sup>81</sup>

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76. U.S. CONST. amend. XIV, § 1.

77. WASH. CONST. art. 1, § 12.

78. *Id.*

79. *State v. Shawn P.*, 122 Wash. 553, 559–60, 859 P.2d 1220, 1223 (1993).

We have held that the right to equal protection under the law guaranteed by the U.S. Const. amend. 14, § 1 and by the privileges and immunities clause of the Washington Const. art. 1, § 12 are substantially identical. Both require that persons similarly situated with respect to the legitimate purpose of the law be similarly treated.

*Id.*

80. The Washington Supreme Court has, in some cases, analyzed article 1, section 12 independently from the Fourteenth Amendment using the so-called *Gunwall* factors. See *Grant County Fire Prot. Dist. No. 5*, 150 Wash. 2d 791, 805–06, 83 P.3d 419, 425 (2004). In addition, a prospective plaintiff might also bring a case in federal court. However, the scope of this Comment is limited to reviewing the test applied by the Washington courts, and as such, will not address a possible rational basis review by the federal courts.

81. The Washington courts have found the equal protection clause and the privileges and immunities clause as being substantially similar when analyzing constitutional challenges. See *supra*, note 79. This approach has been followed by the Washington courts in recent years when analyzing challenges to the wrongful death and survival statutes. See *Philippides, v. Bernard*, 151 Wash. 2d 376, 391, 88 P.3d 939, 946 (2004); *Masunaga v. Gapasin*, 57 Wash. App. 624, 632, 790 P.2d 171, 175–76 (1990).

Furthermore, any constitutional challenges to these statutes by non-resident dependent beneficiaries will be analyzed by a Washington court using a rational basis framework. When a statute is challenged as a violation of equal protection, the courts will use one of three different legal standards for determining whether the violation alleged by the plaintiff exists: "strict scrutiny," "intermediate" or "heightened scrutiny," or "rational basis."<sup>82</sup> The higher degrees of scrutiny, "strict" and "intermediate," are typically applied when a government classification affects a fundamental or important right or a suspect or semi-suspect class.<sup>83</sup> However, the sub-classification of second tier beneficiaries in the wrongful death and survival statutes is based upon residency, not upon alienage, citizenship, or some other intrinsic classification that the courts have found to be a suspect class.<sup>84</sup> Therefore, a court addressing a challenge on these grounds will likely apply a rational basis analysis.

In Washington, the courts have adopted a three-part test for determining whether a statute challenged on equal protection grounds survives the rational basis test.<sup>85</sup> The court asks the following: (1) does the classification apply alike to all members within the designated class; (2) do reasonable grounds exist to support a distinction between those within and without each class; and (3) does the class have a "rational relationship" to the purpose of the legislation?<sup>86</sup> In sum, a person challenging these statutes in a Washington State court on equal protection grounds<sup>87</sup> must first show that persons similarly situated with respect to the legitimate purpose of the law do not receive like treatment.<sup>88</sup> The burden is then on the party challenging the statute(s) to show that the law is irrelevant to maintaining a state objective or that an arbitrary classification has been created.<sup>89</sup>

### 1. Not All Class Members are Treated Alike

With respect to the first prong of the rational basis test, courts have consistently held that the wrongful death and survival statutes are limited

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82. *Fusato v. Wash. Interscholastic Activities Ass'n.*, 93 Wash. App. 762, 767, 970 P.2d 774, 777 (1999).

83. *Id.*

84. *See Parham v. Hughes*, 441 U.S. 347, 351–52 (1979).

85. *Fusato*, 93 Wash. App. at 767, 970 P.2d at 777.

86. *Harris v. Dept. of Labor and Indus.*, 120 Wash. 2d 461, 477–78, 843 P.2d 1056, 1065 (1993).

87. For purposes of this Comment, "equal protection" refers to a challenge brought under both the 14th Amendment of the United States Constitution and under the privileges and immunities clause of the Washington State Constitution.

88. *State v. Simmons*, 152 Wash. 2d 450, 458, 98 P.3d 789, 793 (2004).

89. *Id.*

to two tiers of beneficiaries.<sup>90</sup> The first tier consists of spouses and children while the second consists of parents and siblings who are dependent on the decedent for support. However, the second designated class, dependent parents and siblings, does not treat all members alike, because those who are not resident in the United States at the time of death are expressly excluded from recovery. Because these statutes create a subclassification based upon the residency of the dependent beneficiary, both nonresident United States citizens and nonresident aliens are affected. Additionally, unlike resident aliens, nonresident aliens are faced with the problem that they are not protected by the United States Constitution<sup>91</sup> and are not entitled to any recovery unless expressly provided for by statute.

As such, nonresident alien beneficiaries must argue that the constitutional rights affected are those of the decedent, and not those of the nonresident beneficiary him or herself. Under this theory, nonresident alien beneficiaries can challenge the survival statutes by arguing that denying recovery to the nonresident alien dependent beneficiaries actually infringes on the constitutional rights of the decedent because these causes of action are derivative of the decedent's cause of action. This argument will be explored in further detail in Part III.B.

## 2. There is No Reasonable Basis for Distinguishing Between Residents and Nonresidents

The second prong of the rational basis test asks whether reasonable grounds exist to support a distinction between those inside and outside each class. Under this prong of the test, there must be a reasonable basis for distinguishing between resident dependent beneficiaries and nonresident dependent beneficiaries. Unlike a strict scrutiny analysis, the rational basis test places a heavy burden on the challenger to show the unreasonableness of the classification.<sup>92</sup> Thus, a statute will be presumed to be constitutional "if at all possible."<sup>93</sup>

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90. See *Philippides v. Bernard*, 151 Wash. 2d 376, 383–86, 88 P.3d 939, 943–44 (2004); *Tait v. Wahl*, 97 Wash. App. 765, 769, 987 P.2d 127, 129 (1999); *Masunaga v. Gapasin*, 57 Wash. App. 624, 629, 790 P.2d 171, 174 (1990).

91. See *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) (the majority opinion pointed out that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.").

92. See *Philippides*, 151 Wash. 2d at 391, 88 P.3d at 946–47.

93. *Id.* at 391, 88 P.3d at 946.

*a. Historical Rationales*

There is no legislative history that explains the rationale for denying recovery to nonresident dependent beneficiaries. In the absence of legislative history, we must look instead at some general reasons which have been cited historically.<sup>94</sup> One reason was noted 100 years ago by a New York court that was considering whether to allow recovery by nonresident aliens for wrongful death.<sup>95</sup> In that case, the defendant argued that the dependency requirement in the wrongful death statute was intended to prevent "pauperism" in the state, and that in the case of nonresident alien dependents this would not be a legislative concern, since they would become paupers elsewhere.<sup>96</sup> The New York court dispensed of this argument by holding that, since a parent may recover for the death of an infant child, dependence could not be the main purpose of the statute.<sup>97</sup>

As noted above, dependence is an important purpose in classifying beneficiaries under the Washington wrongful death and survival statutes. However, the prevention of "pauperism" in Washington does not require distinction between residents of other states and those who reside outside of the United States. Since Washington State would only be responsible for providing welfare benefits for those within its territory, it should not matter whether the nonresident beneficiary resides in Vancouver, Canada, or 3000 miles away in Florida. The "prevention of pauperism" is not a valid justification for allowing recovery for U.S. citizens in other states, but not U.S. citizens in other countries.

An additional argument supporting the current statutes is that a country's laws are without any force and effect beyond its territorial jurisdiction and limits.<sup>98</sup> This argument is premised on the idea that a country, or in this case a state, cannot reach outside its boundaries to confer rights and/or impose liabilities upon aliens. This argument was convincingly dealt with by the Supreme Court of Ohio in the case of *Pittsburgh, Cincinnati, Chicago & St. Louis Railway. Co. v. Naylor*.<sup>99</sup> Here, the court noted that such actions are brought on behalf of the beneficiaries by appointed administrators who were just as likely to be residents and citi-

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94. 22A AM. JUR. 2D DEATH §107 (1988).

95. *Tanas v. Mun. Gas Co. of City of Albany*, 88 A.D. 251, 258 (N.Y. Sup. Ct. 1903).

96. *Id.*

97. *Id.*

98. 22A AM. JUR. 2D DEATH §107 (1988). An additional argument put forth is that if the legislature had intended for nonresident aliens and citizens to recover, it would have put this in the statute. *Id.* This argument was intended to address statutes which did not provide one way or the other for nonresident dependents. In the case of Washington State, the legislature has specifically precluded nonresident parents and siblings from recovery.

99. 76 N.E. 505 (Ohio 1905).



zens of Ohio as citizens of another country.<sup>100</sup> In addition, the claims of the beneficiaries were brought into the courts of Ohio to be determined by Ohio law.<sup>101</sup> As the court put it, “it is not a question of territorial jurisdiction . . . it is merely a question of construction of the statute to determine whether [the alleged beneficiary] is excluded from its benefits.”<sup>102</sup> Moreover, given that the Washington statute has already reached across borders specifically to exclude nonresident aliens from protection under its law, this argument is without merit and does not provide a rational basis for discriminating between residents and nonresident dependants.

Applying these arguments to the Washington statutes is problematic because the statutes did not expressly prohibit recovery by nonresident aliens. Instead, these courts were asked to decide whether wrongful death statutes should be interpreted to include nonresident aliens where the statutes were silent on this issue. However, given the lack of legislative history for the inclusion of the residency requirement in the Washington statutes, these contemporary cases—all written around the same time period, 1909, in which the language was added to the Washington statute—offer the best insight available into the justifications for excluding nonresident dependants from recovery under the Washington statutes.<sup>103</sup>

#### *b. Possible Race-Based Motivations*

The lack of legislative history and case law on this issue leads this author to speculate on the legislature’s rationale for excluding nonresident dependants from recovery. There is some evidence, albeit inconclusive, that there may have been racial overtones to the creation of the exclusionary provision in the statutes.

In 1911, the Washington State Legislature passed a joint memorial which stated, among other things, that more than one million aliens came to the United States between July 1909 and June 1910, of which over 600,000 came from “southern and eastern Europe and western Asia, the most undesirable immigrants known . . . . [T]he effect of this alien deluge is to depress the wages and destroy the employment of thousands of American workingmen . . . .”<sup>104</sup> This resolution requested that the United States Congress pass legislation restricting the “influx of the most unde-

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100. *Id.* at 506.

101. *Id.*

102. *Id.*

103. Similar justifications exist for denying workers’ compensation death benefits to nonresident alien beneficiaries. See Adam S. Hersh, Comment, *Go Home, Stranger: An Analysis of Unequal Workers’ Compensation Death Benefits to Nonresident Alien Beneficiaries*, 22 FLA. ST. U. L. REV. 217, 219–20 (1994).

104. See 1911 Wash. Sess. Laws, House Joint Memorial No. 2, p. 666.

sirable foreigners whose presence tends to destroy American standards of living.”<sup>105</sup> Whether this racial animus was behind the change in the wrongful death and survival statutes at issue here will likely remain unknown. However, it does not stretch the imagination too far to envision a legislature motivated by such ideas. Indeed, although they affect both nonresident *citizen* dependents and nonresident *alien* dependents, statutes which restrict a class of beneficiaries based upon residency would appear to fall disproportionately upon those dependents whose loved ones left their homes abroad to come and work in Washington.<sup>106</sup>

*c. Lack of Distinction Between Nonresident and Resident Parents*

Leaving aside the issue of nonresident dependent siblings, there is no valid reason for distinguishing between resident parents and nonresident parents. The Washington child-death statute allows for recovery by parents for the death of a child without any regard to the residency of the parent. As noted above, this statute somewhat mirrors the wrongful death statute, although the types of damages permitted by the two statutes may sometimes differ. However, the types of recovery available have nothing to do with the residency of the parents. Therefore, no valid justification exists that would allow nonresident parents to recover under the child death statute but not the wrongful death statute. If the damages are similar, or identical in some cases, and resident parents can elect under which statute to bring a claim, there is little practical difference between the wrongful death and child-death statutes when it comes to the residency of the parents. Given that concerns about residency are not sufficient to deny recovery to parents under the child-death statute, any justifications for distinguishing between nonresident parents and resident parents in the ordinary wrongful death and survival statutes is unconvincing.

*d. Similar Legislative Changes to Workers' Compensation Statutes*

Lastly, in 1997, the Washington legislature amended the workers' compensation statutes that deal with beneficiaries to end discrimination against nonresident alien beneficiaries with regard to death benefits.<sup>107</sup> Prior to the amendments, nonresident aliens were only entitled to fifty

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105. *Id.*

106. See, e.g., Sarah H. Cleveland, Beth Lyon, & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 819 (2003) (in a discussion of state workers' compensation laws which deny death benefits to nonresident alien beneficiaries. "Although these laws do not explicitly discriminate on the basis of alienage alone, they disproportionately deny equal benefits to non-nationals, who are most likely to have beneficiaries who are non-resident aliens.").

107. WASH. REV. CODE § 51.08.050 (2004); *Id.* § 51.32.140 (2004).

percent of the compensation awarded to resident beneficiaries.<sup>108</sup> The law now reads:

[e]xcept as otherwise provided by treaty or this title, whenever compensation is payable to a beneficiary who is an alien not residing in the United States, the department or self-insurer, as the case may be, shall pay the compensation to which a resident beneficiary is entitled under this title.<sup>109</sup>

Even though the legislature saw fit to correct this injustice in the workers compensation statutes, there has been no indication from the legislature that it plans to correct the same injustice in the wrongful death and survival statutes. Thus, although there might be a valid justification for permitting wrongful death recovery by parents and not siblings, the application of the residency requirement should apply to all nonresidents, whether they are siblings or parents.

### 3. The Designated Class does not Bear a Rational Relationship to the Purpose of the Statutes

The third and final question in the rational basis analysis is whether the class at issue bears a rational relationship to the legislation's purpose. Here, the plaintiff must "show conclusively that the classification is contrary to the legislation's purposes."<sup>110</sup> Washington courts have determined that "the object and purpose of these statutes is to provide a remedy whereby the family or relatives of the deceased, who might naturally have expected maintenance or assistance from the deceased had he lived, may recover compensation from the wrongdoer commensurate with the loss sustained."<sup>111</sup> This purpose cannot be achieved if a distinction is drawn between residents and nonresidents.

The wrongful death and survival statutes were intended to remedy the injustice of the common law by allowing certain family members a right of action for the loss of a loved one. Even justifications used in other jurisdictions, such as preventing pauperism or lack of jurisdictional power over nonresidents, bear no relation to this stated purpose. If the statutes had restricted recovery to dependent parents but not to siblings, it would still be rationally related to the state's interest in compensating those who would suffer most from the decedent's death and would typi-

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108. WASH. REV. CODE ANN. § 51.32.140 (2005).

109. WASH. REV. CODE § 51.32.140 (2004).

110. *Philippides v. Bernard*, 151 Wash. 2d 376, 392, 88 P.3d 939, 947 (2004) (citing *Yakima County Deputy Sheriff's Ass'n v. Bd. of Comm'rs*, 92 Wash. 2d 831, 836, 601 P.2d 936 (1979)).

111. *Tait v. Wahl*, 97 Wash. App. 765, 771-72, 987 P.2d 127, 130 (1999) (citing *Hedrick v. Ilwaco Ry. & Nav. Co.*, 4 Wash. 400, 402-03, 30 P. 714 (1892), *rev'd on other grounds*, *Lockhart v. Besel*, 71 Wash. 2d 112, 426 P.2d 605 (1967)).

cally have the closest relationship to him or her. The legislature is not required to allow recovery by every possible group who might feel the loss of a loved one. The purpose of these statutes is defeated, however, by not permitting recovery to a select group of those who otherwise were similarly dependent on the decedent but who happen to reside outside of the borders of the United States. This is especially true when other similarly situated parents and siblings are allowed to recover. Again, a tortfeasor should not benefit simply because he killed a person whose dependent mother happened to live 150 miles away in British Columbia instead of across the country in Florida.

*B. The Claim of Nonresident Alien Beneficiaries  
is Derivative from the Decedent's Claim*

Finally, the justification for allowing nonresident alien beneficiaries to bring suit for a violation of equal protection starts with the premise that all residents, whether aliens or not, would be entitled to bring personal injury claims if they were injured, but not killed, inside Washington borders. By extension, a claim for wrongful death which includes the pre-death injuries of the decedent is actually the claim that the decedent would have had if he had survived. The Washington Supreme Court states that "equal protection requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."<sup>112</sup> Therefore, by denying recovery in some wrongful death cases based on the residency of the beneficiary, the underlying claim of the decedent is not treated similarly to those of other decedents under the statute, that is, those with resident beneficiaries.

In such a case it is not the nonresident alien who is being treated unfairly but the decedent. Despite a longstanding common law principle of *actio personalis moritur cum persona* (a personal action dies with the person),<sup>113</sup> the purpose of the survival statutes is to remedy the common law problem of barring claims if the tort victim dies but allowing them if he survives.<sup>114</sup> Therefore, barring claims by nonresident dependents is contrary to the intent and purpose of survival statutes and once again makes it cheaper to kill a man than to injure him.

The primary question is whether the beneficiaries' claims are derivative of the decedent's claim. As noted above, the survival statutes, whether general or special, limit recovery to the two tiers of beneficiaries

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112. *State v. Simmons*, 152 Wash. 2d 450, 458, 98 P.3d 789, 793 (2004).

113. *Gray v. Goodson*, 61 Wash. 2d 319, 324, 378 P.2d 413, 416 (1963).

114. *Otani v. Broudy*, 151 Wash. 2d 750, 755, 92 P.3d 192, 194 (2004).

listed in the statutes.<sup>115</sup> Both the courts and the legislature in Washington have made it clear that the survival statutes are to compensate for injuries personal to the decedent, since the injuries suffered by beneficiaries are otherwise covered by the wrongful death statutes.<sup>116</sup> In 1993, the general survival statute was amended by the legislature to allow the decedent's estate to recover for pain and suffering "personal to and suffered by a deceased" on behalf of the statutory beneficiaries.<sup>117</sup> Although this shows the legislature's intent to limit such recovery to the beneficiaries, it is evidence that the claim for injuries is personal to the decedent.

In addition, the courts have noted that Washington's survival statute does not create a new claim for the survivors, but preserves all causes of action that a decedent could have brought if he or she had survived.<sup>118</sup> Such causes of action are also subject to defenses such as the decedent's own negligence.<sup>119</sup> It follows that if the decedent has no cause of action, neither do his beneficiaries. Again, this shows that a claim under the survival statute is brought on behalf of the decedent, not his beneficiaries.

In the context of workers compensation claims, other state courts have held that restricting the class of beneficiaries is a violation of equal protection. In Kansas and Florida, the courts have determined that the beneficiaries' claims are derivative of the decedent's claim; thus, any discrimination against certain beneficiaries is tantamount to discrimination against the decedent himself.<sup>120</sup> In *Jurado v. Popejoy Construction*, the Kansas Supreme Court stated that "[a]ll considerations focus upon the employee and the rights and laws preexisting the employee's death, and we therefore conclude that it is entirely appropriate to approach a determination of constitutionality upon our consideration of the constitutional rights of the employee, now deceased."<sup>121</sup> The statute in *Jurado* differs from the present one in that it was limited to excluding only nonresident alien beneficiaries and did not exclude nonresident United States citizens, whom the Washington statutes do exclude. Thus, the court found that such a classification was based upon the alienage of a resident's dependents and should therefore be subject to a strict scrutiny

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115. See *supra* text accompanying note 49; *Tait*, 97 Wash. App. at 769, 987 P.2d at 129 ("Like Washington's wrongful death statute . . . RCW 4.20.060 is expressly limited to the two tiers of beneficiaries listed in RCW 4.20.020.")

116. See WASH. REV. CODE § 4.20.046 (2004); *Otani*, 151 Wash. 2d at 761-63, 92 P.3d at 197-98; *Tait*, 97 Wash. App. at 774, 987 P.2d at 132 (1999).

117. WASH. REV. CODE ANN. § 4.20.046 (2004).

118. *Otani*, 151 Wash. 2d at 755-56, 92 P.3d at 195; see also *Cavazos v. Franklin*, 73 Wash. App. 116, 118, 867 P.2d 674, 676 (1994).

119. See *Ginocchio v. Hesston Corp.*, 46 Wash. App. 843, 845, 733 P.2d 551, 552 (1987).

120. *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204 (Fla. La. Weekly, 1989); *Jurado v. Popejoy Constr. Co.*, 853 P.2d 669 (Kan. 1993).

121. 853 P.2d at 675.

analysis, since such an impermissible classification affected the equal protection rights of the employee and not the beneficiaries.<sup>122</sup> However, such an approach is still applicable to Washington survival statutes. As noted above, the survival statutes in Washington focus on the pre-death rights of the decedent; therefore, it is reasonable to rule on the constitutionality of these statutes based upon the decedent's rights.

In a Florida case, *De Ayala v. Florida Farm Bureau*, the court used similar logic for finding such classifications impermissible.<sup>123</sup> The *De Ayala* court noted the following:

The law did not afford petitioner's deceased husband different treatment while he was alive and working . . . [c]ommon sense dictates that he should be entitled to the same "benefits," regardless of the residence or status of his dependents.<sup>124</sup>

Again, in the workers' compensation context, the "benefits" referred to by the *De Ayala* court are the "satisfaction and well-being of providing for his or her family."<sup>125</sup> Although the wrongful death or survival statutes were not necessarily intended to reward the decedent for his hard work and contribution to his employer, they were intended, in the words of the Washington Supreme Court, to provide a remedy "whereby the family or relatives of the deceased, who might naturally have expected maintenance or assistance from the deceased, had he lived, may recover compensation from the wrongdoer commensurate with the loss sustained."<sup>126</sup> While no state courts have come to the conclusion that a claim under a survival statute is derivative, Washington courts should follow the approach used in Kansas and Florida and find that, at the very least, non-resident aliens, as distinguished from nonresident citizens, should be allowed to bring an equal protection challenge to the survival statutes.

#### IV. CONCLUSION

It is true that courts must be very careful about treading too far into the legislature's waters. However, an important element of our governing system of checks and balances is for the courts to ensure that the legislature does not overstep its bounds and violate either federal or state constitutional principles. Our courts must never forget that "[t]he ultimate

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122. *Id.* at 676. This Comment addresses the constitutionality question using a rational basis analysis, not a strict scrutiny analysis.

123. 543 So. 2d 204.

124. *Id.* at 207.

125. *Id.*

126. *Whittlesey v. City of Seattle*, 49 Wash. 645, 648, 163 P. 193, 194 (1917).

power to interpret, construe, and enforce the constitution of this State belongs to the judiciary.”<sup>127</sup>

After almost a century of denying recovery to dependent parents and siblings solely because they happen to live either next door in Canada or in another foreign country, it is time to recognize that such a distinction is outdated. Indeed, the courts in our state recognized this injustice before the legislature even amended the statutes. In 1908, the Washington Supreme Court took what was then a nonspecific wrongful death statute, at least as applied to nonresidents, and interpreted it to provide nonresident aliens with a cause of action.<sup>128</sup> As the court noted, “the rule which permits nonresident aliens to maintain actions of this kind [wrongful death] . . . is more in harmony with the liberal cosmopolitan spirit of the age than the narrow provincial rule which would close our courts to widows and orphans solely because they happen to be nonresident aliens.”<sup>129</sup> Less than a year later, the legislature decided to close our courts to nonresidents whose loved ones were killed in our state by a wrongful, tortious act.

In the end, the wrongful death cause of action stems from the tortious act of the defendant, not the entitlement to recovery by a certain class of persons. Therefore, a wrongful act should not go unremedied merely because of the residency of the decedent’s beneficiary. It is time that Washington courts remember the words of Justice Rudkin in *Anustasakas v. International Contract Co.*,<sup>130</sup> and move to bring Washington into harmony with the liberal cosmopolitan spirit of the age by striking down these statutes as unconstitutional.

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127. *Wash. State Labor Council v. Reed*, 149 Wash. 2d 48, 62, 65 P.3d 1203, 1211 (2003).

128. *Anustasakas v. Int’l Contract Co.*, 51 Wash. 119, 120–22, 98 P. 93, 94–95 (1908).

129. *Id.* at 123, 98 P. at 94.

130. *Id.*