Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions

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Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child," "brother," "sister," "father," and "mother" include a child, brother, sister, father, and mother, by adoption, respectively. Louisiana Civil Code article 2315.

Hypothetical:1 Plaintiff and W are married in 1971 but W is already married at the time. Two weeks later, W is killed. Assuming the good faith of plaintiff in contracting the marriage, does he have an action under Article 2315 for her death?

† With apologies to the late Dame Agatha Christie.

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1. These facts were presented to the Louisiana Supreme Court in *King v. Cancienne*, 316 So. 2d 366 (La. 1975).
Hypothetical: H and W, a young married couple, are killed instantly in a one-car accident caused by H's negligence. Suit is brought on behalf of their infant daughter, not with them at the time, against H's liability insurer for damages she suffered as a result of his negligence, causing his own death. Is her suit barred by H's contributory negligence?

Grist for a student examination in relational interests, these questions would have been unhesitatingly answered by students and bar alike two years ago. New answers were given, and in one instance withdrawn, by the Louisiana Supreme Court in the last two terms. The answers, however, suggest more questions; and the entire debate focuses attention again on Article 2315 of the Civil Code and its much-amended provisions on the subject of survival of actions and remedies for wrongful death.

The story of wrongful death and survival actions in Louisiana begins in 1851 with the celebrated case of Hubgh v. New Orleans and Carrollton Railroad Company, a case which would in all likelihood not present a wrongful death claim if it arose today. Plaintiff's husband was employed by defendants to run a locomotive steam engine, and was killed when its boiler exploded. It appears that such a case arising today would be a matter to be settled by workmen's compensation principles rather than by the tenets of Article 2315.

Be that as it may, the court in Hubgh had to consider the claim made by the wife that Article 2315 permitted a cause of action for damages incurred by the "homicide of a free human being." Despite the fact that plaintiff ably argued that the wording of Article 2315 was identical to the wording of Code Napoléon Art. 1382, and that the Cour de Cassation had recognized such a right under that article, the supreme court rejected plaintiff's claim and thus set the stage for a fateful journey by the Louisiana judiciary and lawmakers along the path of specific statutory authorization of such actions. Since that decision, Article 2315 has been amended seven times.

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2. These facts were presented to the Louisiana Supreme Court in Callais v. Allstate Ins. Co., 334 So. 2d 692 (La. 1976).
3. 6 La. Ann. 495 (1851).
4. LA. CIV. CODE art. 2315 (1825), at that time provided: "Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it."
5. 6 La. Ann. at 513. For further discussion, see Voss, The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana, 6 TUL. L. REV. 201 (1931).
6. Not counting its inclusion in the Digest of 1808 and the Codes of 1825 and 1870, seven different acts of the legislature have amended Article 2315 or its precursors. La. Act 223 of 1855 added to the first and then only sentence in the
from the jurisprudence and commentaries on the article,\(^7\) one must conclude that these amendments have not been a complete success.

The two recent decisions prompt a re-examination of the article. In the second hypothetical outlined above, *Callais v. Allstate Insurance Company*,\(^8\) the supreme court first concluded that the negligence of the child’s father in causing his own death was not a bar to recovery on her behalf against the liability insurer. The opinion on original hearing would have created many more problems than it would have solved.\(^9\) On rehearing, the court reversed itself and affirmed the appellate court’s opinion barring recovery on the child’s behalf because of her father’s negligence, thus leaving intact the past jurisprudence.\(^10\)

In the other case, *King v. Cancienne*,\(^11\) it was held that a putative spouse may seek damages under the terms of the article. A 1907 decision holding the contrary was expressly overruled.\(^12\) This in itself might have been noteworthy, but in addition the supreme court was at pains to be extremely critical of the *Hubgh* decision, saying at one point that “*Hubgh*
was in error" and had forced the legislature to create an action for wrongful death and designate certain beneficiaries. Then the court pointedly left open the question of whether the beneficiaries so named are "merely illustrative rather than exclusive" and also left unanswered the question of whether the wrongful death provisions are sui generis and should be strictly construed. The questions left open by King, and the issues raised by Callais, are very important ones, and one does not need extraordinary vision to see that they might not remain open for very long.

The purpose of this effort is to examine the present state of the law under Article 2315, with particular emphasis on the more troublesome areas, and to offer some suggestions for improvement. No effort will be made to chronicle the history of the article, except where necessary to make the present state of the law intelligible; the history has been ably expounded in a number of articles which have already appeared.

THEORY OF THE REMEDY

Two maxims were well established at common law, with their roots deep in the early history of English law. The first was the rule that personal tort actions die with the person of either the victim or the wrongdoer. The second was the rule that the death of a human being did not create a cause of action on behalf of a living person who was injured by reason of the death. It will be noticed that the two rules, while bearing some resemblance to each other, are in fact concerned with two entirely different matters. The first concerns the extent to which a remedy available to the actual victim of the tort "survives" to others. The second concerns the existence of a remedy in certain persons still alive for the death of the victim of the tort.

13. 316 So. 2d at 369.
14. Id.
15. Id. at 369 n.7.
16. The subject of damages has not proved to be particularly troublesome, and for that reason, the subject is not discussed in this article. A subsequent article may deal with the subject.
17. See authorities collected in note 7, supra.
18. See the excellent article by Malone, The Genesis of Wrongful Death, 17 STAN. L. REV. 1043 (1965). The anomaly presented by a rule that permitted substantial recovery for serious injury but no recovery for death produced the grisly legends noted by Dean Prosser: "Most lawyers are familiar with the legend, quite unfounded, that this was the original reason that passengers in Pullman car berths rode with their heads to the front. Also that the fire axes in railroad coaches were provided to enable the conductor to deal efficiently with those who were merely injured." W. PROSSER, LAW OF TORTS, 902 n.43 (4th ed. 1971) [hereinafter cited as PROSSER].
The first rule was eventually changed by statute to permit "survival" of the victim's action for damages, despite the death of either the victim or the wrongdoer.\(^19\) As for the second rule, until the middle of the nineteenth century, there was little cause for concern that the law granted no remedy to persons still alive for the death of the victim of the tort. Death was usually the work of a quasi-criminal type who was incarcerated and whose resources were insufficient to compensate the bereaved family, even if there were such an action.

Then, suddenly at mid-century society faced up in panic to a virtually new phenomenon—accidental death through corporate enterprise. Tragedy as a result of indifference and neglect was suddenly upon us in the factory, on the city streets, and on the rails. Nor was the principal villain of the piece any longer the impecunious felon. In his place stood the prospering corporation with abundant assets to meet the needs of widows and orphans.\(^20\)

Further, this was a wrongdoer who did not die.

The response of the English law on the issue of remedy for the death of the victim which caused harm to living persons, or "wrongful death," was a statute—the Fatal Accidents Act of 1846,\(^21\) more popularly known as Lord Campbell's Act. This statute granted a remedy for wrongful death in favor of certain named beneficiaries, without limitation on the amount of damages recoverable, in those cases in which the deceased might have recovered damages if he had lived. The substance of Lord Campbell's Act is significant, since it served as a model for many of the statutes now in force in every American jurisdiction.\(^22\)

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19. 27 & 28 Vict., c. 95 (1864).
21. 9 & 10 Vict., c. 93 (1846): "... whenssoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. ... And be it enacted, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; ...".
Louisiana law providing for these two problems is found, of course, in Article 2315 of the Civil Code and the jurisprudence interpreting it. The Louisiana statute reflects the same dichotomy of remedies: (1) a "survival action, which is a remedy for those damages suffered by the deceased prior to his death which he could have recovered had he lived, brought now through a representative;" and (2) a "wrongful death" action, arising at the death of the victim, in favor of designated beneficiaries, for the damages which they have suffered as a result of his death. The first is properly the victim's action for his damages, brought now through a legal representative only because the victim's death makes it impossible for the victim to assert that action. The second is the beneficiaries' action, based, it is true, on the death of the victim; but centering on the damages which they have suffered because of that death.

This might have become clear in time if the various amendments to Article 2315 had not made the beneficiaries of the second action the representatives for the first. This superficial linking of the two actions has made it appear, incorrectly, that the wrongful death action does not exist when a survival action does not exist, and that there was only one cause of action created by the article. Confusion of the two remedies has been frequent.

Parsing the article more carefully might have eliminated the confusion,

23. "... The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1)...; (2)...; and (3)..." La. Civ. Code art. 2315 does not specify whether actions such as defamation also survive. Such a tort is, of course, a highly personal one by nature, and it is said that only six or seven states permit such an action to survive the death of the victim. Prosser, at 898-901; See Ariz. Rev. Stat. § 14-3110 (1974). The issue does not appear to have been litigated in Louisiana. Cf. McBeth v. United Press Int'l, Inc., 505 F.2d 959 (5th Cir. 1974); Shaw v. Garrison, 391 F. Supp. 1353 (E.D. La. 1975); La. Code Civ. P. art. 428. But since Article 2315 does not include the possibility, presumably such an action does survive.

24. "... The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. ..." La. Civ. Code art. 2315.

25. See, for example, the language in Reed v. Warren, 172 La. 1082, 136 So. 59 (1931): "Having come to the conclusion that the right of action given by the act of 1884 is not independent of, but dependent upon, the right of action given by the act of 1855, we have no doubt that, when the right of action is vested in two or more survivors of the deceased injured person, the defendant ... has the right to insist that all parties ... shall be made parties to the one suit." Id. at 1092, 136 So. at 62.

separating the "survival" language (which also names the representatives-beneficiaries) from the single sentence which grants an action for wrongful death to the same persons. Perhaps the simplest solution now is the one suggested at the close of this article: separating the two remedies legislatively into two different statutes.

One other difficulty which the Louisiana courts have had with Article 2315 may be traced to English history. Like all statutes, Lord Campbell's Act was strictly construed by the common law courts, since it was in derogation of the common law. Article 2315 is not in derogation of the common law; it is not in derogation of anything. There was no reason at all to adopt the common law maxim of strict interpretation of statutes which departed from the common law. And yet, for years and years, the Louisiana jurisprudence has confidently concluded that the article has to be strictly construed, when in fact there is no reason to interpret the article in a different fashion from any other article or statute.

THE NATURE OF THE REMEDY: ONE CAUSE OF ACTION OR TWO?

A considerable amount of heat and very little light has been generated over the years by the argument about the nature of the remedy under Article 2315. Is there one cause of action, or two? One right of action, or two?

27. For an early statement of the rule, see Ash v. Abdy, 36 Eng. Rep. 1014, (Ch., 1678). Though often criticized, the rule has had considerable impact. Brunswick Terminal Co. v. National Bank, 192 U.S. 386 (1904).

28. See, e.g., Kerner v. Trans-Mississippi Terminal R. Co., 158 La. 853, 104 So. 740 (1925); Chatman v. Martin, 245 So. 2d 423 (La. App. 2d Cir. 1971), and the authorities there collected.

29. It is most unfortunate that the Code of Civil Procedure offers no definition of the term "cause of action." The comment to Article 421 recalls that the word "action" under the Code of Practice of 1870 had a double meaning—both the "instituted action" itself and the "right to institute the action." The Code of Civil Procedure chose only the first meaning in using the word "action." But Article 927 of the same Code authorizes dismissal of an "action" on a peremptory exception of "no cause of action." From practice under that article and its predecessor, it is clear that such an exception must be granted, even though everything alleged might eventually be proven true, and even though the plaintiff would be the proper party to complain, in those instances in which the law does not recognize a remedy for the harm revealed by the pleadings. This is the meaning attached to the phrase in this discussion. LA. CODE CIV. P. arts. 421, comment (a); 927.

30. Again, the Code of Civil Procedure contains no definition of the phrase "right of action." LA. CODE CIV. P. art. 927, however, authorizes the dismissal of an action on the basis of no right of action, "or no interest in the plaintiff to institute the suit." This is the meaning attributed to it in this discussion: the law grants a remedy for the harm revealed by the pleadings, but the plaintiff in question is not the person recognized by the law to assert it.
Where there are multiple beneficiaries, are there multiple causes of action and multiple rights of actions? A portion of the blame for this confusion may be placed upon the article itself, which in fact creates both a cause of action and a right of action by the same language.

Probably the opening round of the jurisprudential consideration of this problem was the decision of the Louisiana Supreme Court in Reed v. Warren, an opinion as wholly unsatisfying as it is enduring. In Reed, five children brought separate suits for the wrongful death of their mother, and requested as well recovery for “suffering” by the mother, which could only be classified as a “survival” action. In one of these suits, the defendant interposed an exception of “want of necessary parties,” since the others were not joined. The trial court sustained the exception, but the appellate court reversed and remanded. The supreme court reinstated the ruling of the trial court, sustaining the exception, effectively requiring joinder of all possible claimants in one action, suggesting the citing of recalcitrant beneficiaries as defendants if they refused to join the litigation.

The court concluded that the legislature did not intend, by inserting the “wrongful death” sentence in Article 2315, to give the beneficiaries the right to bring two separate suits. Its intention was to give the survivors who brought the survival suit the right to claim, in that same suit, damages which they might have suffered due to the death. Otherwise, the court worried, a defendant might be put to the inconvenience and expense of defending five or ten suits on the same issues which might have been, at the time, appealed to different courts. Focusing on judicial economy and convenience of the parties, it is difficult to fault the court’s reasoning. In this context, the

31. This is an entirely separate question from the first two, and has several overtones of judicial economy rather than merely the characterization of the remedy.
32. Suppose a tort victim dies, survived by a mother and a brother. Both the mother and the brother bring suit, and it is clear that the mother excludes the brother from any remedy. But should the defendant, in opposing the brother’s suit, file an exception of no cause of action or of no right of action? The effect of the article is to provide a remedy (for wrongful death) in instances in which the law did not previously provide it, thereby creating a cause of action. But the same language creates that remedy only in certain persons, thereby giving them the right of action as well. All others are excluded from both a cause of action and a right of action. The practical solution for the defendant is to file an exception of “no cause and/or no right of action,” conceptually distressing but in this instance the best of a bad situation.
33. 172 La. 1082, 136 So. 59 (1931).
34. 132 So. 250 (La. App. Orl. Cir. 1931).
35. 172 La. at 1095-99, 136 So. at 64, 65.
36. 172 La. at 1093-95, 136 So. at 63.
holding in Reed v. Warren could simply be that there is one cause of action for “wrongful death” and one for “survival,” and that where both exist, they must be brought in the same suit. If this is the holding, and it may be, no issue is taken with it here.

But the court did not stop there. It considered the separate question of whether, when there are multiple beneficiaries under Article 2315, all of these beneficiaries must join these two actions in a single suit. That question also could have been disposed of on judicial economy grounds, but the court apparently had other ideas:

Even if no damages were claimed for the suffering endured by the deceased, Mrs. Reed, and if her sons and daughters were claiming damages only for the loss of her companionship and affection, the total amount of the damages suffered by all of them ought to be fixed in one suit and apportioned among the plaintiffs according to the loss sustained by each of them. The reason for that is that the damages, in that respect, are claimed for one tort—for the killing of one person—and hence there is only one cause of action, in which the right of each and every plaintiff to recover, though not the amount which each may recover, is dependent upon the same relevant facts and is subject to the same defenses.

It is clear from the context in which the court makes that remark that it is talking only of a wrongful death action. That statement is not authority for the proposition that “survival” and “wrongful death” together constitute a single cause of action. And yet, that is the proposition for which the case has been continually cited and is the origin of the supposedly firm rule that only one cause of action arises as a result of a tort which results in the death of the victim.


38. 136 So. at 63 (Emphasis added).


40. See Survival of Actions, supra note 7 at 335-36, where the rule is stated with some forcefulness. The author insists that only one cause of action arises from a “wrongful death,” but that two separate and distinct “rights of action” arise from it—the victim’s right of action and the beneficiaries’ right of action. This confuses the issue. Surely only one cause of action arises from the wrongful death—that of
But parallel to the cases holding that there is only one cause of action under Article 2315 is an interesting line of jurisprudence stating precisely the opposite conclusion:

"It is our understanding that LSA-CC 2315 contemplates two separate and distinct causes of action: one, the survival of an action for damages that an injured person would have had, had he lived, in favor of certain designated persons; and two, a wrongful death action, in favor of those same persons, for the damage that they sustained as a result of the death . . . ."\(^4\)

The supposed rule that there is only one cause of action has not in fact been followed in the jurisprudence when the issue had any real importance. Consider for example a case in which the victim compromises the "survival" action and then dies. If there is only one cause of action, it can theoretically only be compromised once. And yet, a compromise by the victim of the "survival" action has been held not to bar a wrongful death action by the beneficiaries.\(^4\)\(^2\) Surely this is not consistent with a one-cause-of-action theory.

If, according to Reed, the one cause of action is "subject to the same defenses"\(^4\)\(^3\) as to the right of each plaintiff to recover, then the contributory negligence of one beneficiary should bar the cause of action for all,\(^4\) but this

the beneficiaries for the damages which they have suffered thereby. Another cause of action, created by injury to the victim, survives to the named beneficiaries, not by wrongful death but by any death. Strictly speaking, there is no cause of action created in the victim or for him by virtue of his own death, as opposed to injury to him.

\(^4\)\(^1\) Succession of Roux, 182 So. 2d 109, 111 (La. App. 4th Cir.), cert. denied, 248 La. 1106, 184 So. 2d 27 (1966) (dicta). \textit{See also} LeBlanc v. United Irrigation & Rice Milling Co., 129 La. 196, 55 So. 761 (1911) (each parent has a cause of action for wrongful death of their son); Eichorn v. New Orleans & C.R., Light & Power Co., 112 La. 236, 36 So. 335 (1904) (possibly dicta); Dumas v. United States Fidelity & Guar. Co., 125 So. 2d 12 (La. App. 3d Cir. 1960), rev'd on other grounds, 241 La. 1096, 134 So. 2d 45 (1961); Kaough v. Hadley, 165 So. 748, 753 (La. App. 1st Cir. 1936) (related but not consolidated cases in which father with custody of child received final award of $3,500 and mother received $2,500).


\(^4\)\(^3\) 136 So. at 63.

\(^4\)\(^4\) In \textit{Granier v. Aetna Ins. Co.}, 209 So. 2d 132 (La. App. 4th Cir. 1968), the court obviously concludes that the contributory negligence of one beneficiary does not bar the rest. A wife was permitted to sue her husband's insurer and recover for their son's wrongful death, even though the husband, also a member of the class, was barred by his own negligence.
has not been the case.  

Again, suppose the victim is injured and lives 14 months without filing a suit. His death is clearly a result of his injuries. No one seriously asserts that there is no wrongful death action in his beneficiaries, but it appears that his “survival” action is prescribed, even as to the beneficiaries. How can this “one cause of action” be at once prescribed and not prescribed?

The matter necessarily was presented in the case of Callais v. Allstate Insurance Company. A husband and wife were killed in a one-car accident through the negligence of the husband, and were survived by an infant child. Suit on behalf of the child for the damages she suffered due to the negligence of the father was countered in part by the argument that there was only one cause of action, and since the husband’s survival action was clearly barred by his own negligence, so was the child’s wrongful death action.

Faced with this characterization, the court was compelled to deal with the issue on original hearing:

“...It is clearly erroneous to characterize the ‘survived action’ and the wrongful death action as a single cause of action. ... It is true that the same operative facts giving rise to the survivors’ right to recover on behalf of the deceased also entitled them to recover on their own behalf. However, the injury done and the parties damaged are different. Each party injured by the death has a separate cause of action for a different amount, depending upon the particular injury done to him as a result of the death. Likewise, each of these causes of action is entirely separate from the cause of action belonging to the deceased before his death for his own damages, which passes to the survivors by

45. One might also theorize that, if there is only one cause of action, the contributory negligence of one of several beneficiaries might at least diminish the amount recoverable in the “survival” action. But no case has so held, and it is unlikely that one will. See Westerfield v. Levis, 43 La. Ann. 63, 9 So. 52 (1891) (distinguishes the issue of negligence of the persons bringing the survival action from their negligence as an issue in the wrongful death action). See also Austrum v. City of Baton Rouge, 282 So. 2d 434 (La. 1973), in which a wife was injured through the combined negligence of her husband and defendant city. His own recovery was barred, but upon her death during the pendency of her suit, her husband and seven children were substituted as parties plaintiff and shared equally a $9,000 award for her injuries, without reduction because of the negligence of one member of the class.

46. See discussion at notes 155-62, infra.

47. 334 So. 2d 692 (La. 1976).

48. This argument is made in the Original Brief on Behalf of Defendant-Appellee at 3-4. The contrary was, of course, asserted in the Original Brief on Behalf of Plaintiff-Appellant at 12-13.
virtue of the operation of article 2315. Thus . . . the ‘survived action’ and the wrongful death action are entirely separate and independent of one another.”

These remarks were made, of course, in the context of an opinion granting the relief which the plaintiff wanted: a cause of action for the death of her father caused by his own negligence. The separate nature of the claims under Article 2315 was a step to that conclusion.

On rehearing, the court reversed itself on the conclusion, and held that the child’s recovery was barred by the contributory negligence of the victim, her father. The court did not repudiate its language in the original opinion on the one-cause-of-action theory; it was, however, uncharacteristically imprecise in its classification of the remedies:

“Article 2315 provides for two types of death actions. One type, commonly called a survival action, is for the damages sustained by the victim for which he could have recovered had he lived. The other, commonly called a wrongful death action, is for damages to survivors occasioned by the victim’s death. . . .”

It is submitted that the supreme court was right on this issue on original hearing. Reduced to its essentials, a tort is conduct falling below the standard which society imposes upon an actor, for which the law grants a remedy in damages to persons harmed by the conduct. The law grants this remedy under the rubric of “cause of action”; a statement of grievance upon which relief may be granted. If an actor’s sub-standard conduct produces harm to the victim, he certainly has a cause of action to redress it. Harm short of death produces no cause of action in the beneficiaries.

Death from unrelated causes produces no separate cause of action in the beneficiaries. The fact that the victim’s cause of action does not abate at his death but “survives” to the beneficiaries is a matter totally unrelated to their own cause of action, which arises not on death alone, but on “wrongful death.” This of course explains why it is possible to have a “survival” cause of action in the beneficiaries, even without a wrongful death cause of action; if death results from causes unrelated to the actor’s sub-standard

49. 334 So. 2d at 695-96.
50. Id. at 699.
51. Id. at 700.
52. PROSSER at 1-6.
53. See FED. R. CIV. P. 12(b)(6); LA. CODE CIV. P. art. 421.
54. See Payne v. Georgetown Lumber Co., 117 La. 983, 42 So. 475 (1906) (one of the earliest cases standing for this proposition). See, e.g., Dumas v. United States Fidelity & Guar. Co., 241 La. 1096, 134 So. 2d 45 (1961); Thompson v. New Orleans
conduct, there is of course no "wrongful death." But if the actor's conduct results in the death of the victim, then there is a cause of action in the beneficiaries for the damages which they suffered as a result of the death.

In each instance, the sub-standard conduct of the actor produces a legal right of redress which may be enforced by a civil action. One of these remedies is in the victim, and one in the beneficiaries. The fact that the first does not abate on the victim's death and is available to the holders of the second does not somehow make them the same. Could we not just say that there is under Article 2315 one piece of wrongful conduct, which by definition produces harm to the victim and thus a cause of action for its redress; and which may produce harm to the beneficiaries, and if it does, a cause of action in each of them for its redress?

Those Who Have the Remedy: The Classes of Beneficiaries

Unlike statutes in some states making a personal representative the proper party to bring the actions, Article 2315 designates those persons who may bring an action for wrongful death, and in whose favor the victim's action survives. There are three separate classes of beneficiaries, and the wording of the article clearly indicates that each class successively excludes the following class: if the spouse and child or children survive the decedent, no member of class two or class three has an action; if neither spouse nor children survive, but the father and mother, or either of them, then no member of class three has an action. Persons not enumerated in the three classes are simply without a remedy for the death.
The status of the various beneficiaries must be determined as of the moment of the death of the decedent,\textsuperscript{59} and the preferred class must actually be empty before a deferred class is entitled to an action. The fact that the preferred class is occupied at the death of the decedent by a person who survives the decedent only fictionally\textsuperscript{6} or for a short period of time,\textsuperscript{6} or who is barred from bringing the action by his own contributory negligence,\textsuperscript{62} does not make the preferred class "empty" and permit a deferred class member to sue as a beneficiary.\textsuperscript{63}

\textit{First Class: }"... (1) the surviving spouse and child or

merely illustrative rather than exclusive. See also the developing position in some cases outside Louisiana that there might be a recovery for wrongful death other than that specified in a statute: Moragne v. States Marine Lines, 398 U.S. 375 (1970); Gaudette v. Webb, 284 N.E.2d 222 (Mass. 1974). See also an interesting group of cases in which awards were made to persons outside of this group of designated beneficiaries: Caldwell v. United States Cas. Co., 129 So. 2d 813 (La. App. 2d Cir. 1961) (award for pain and suffering prior to death and funeral expenses to administrator of estate); Perot v. United States Cas. Co., 98 So. 2d 584 (La. App. 2d Cir. 1957) (dicta); Horrell v. Gulf & Valley Cotton Oil Co., 131 So. 709 (La. App. Orl. Cir. 1930) (father held to have no claim for expenses of last illness, burial and damages to deceased's automobile, as these belong to his succession representatives or heirs). It does not appear that these three cases can possibly be a correct statement of the law.

59. Johnson v. Travelers Indem. Co., 286 So. 2d 484 (La. App. 1st Cir. 1973), \textit{cert. denied}, 288 So. 2d 645 (La. 1974); McKay v. Southern Farm Bureau Cas. Co., 123 So. 2d 658 (La. App. 1st Cir. 1960); Brock v. Friend, 4 La. App. 723 (1st Cir. 1925) (suit allowed for plaintiff who was decedent's widow at time of his death, but married to another man at the time of suit). \textit{See also} Kerner v. Trans-Mississippi Terminal R. Co., 158 La. 853, 104 So. 740 (1925) (decedent survived by mother and siblings; mother brought suit but died before trial; no cause of action in siblings under Article 2315 as it then read).


61. Wakefield v. Government Employees Ins. Co., 253 So. 2d 667 (La. App. 4th Cir. 1971), \textit{cert. denied}, 260 La. 286, 255 So. 2d 771 (1972) (daughter survived her parents by two hours; parents of her parents thus excluded from actions as beneficiaries by her presence in the preferred class for two hours).

62. Gonzalez v. Succession of Medica, 141 So. 2d 887 (La. App. 2d Cir. 1962) (husband killed wife, then committed suicide; his action for wrongful death of wife barred by his own conduct, but his presence in preferred class excluded any action by the wife's sister).

63. This is not to say that those same persons might not be able to sue in their status as \textit{heirs} of beneficiaries. For an example, see Wakefield v. Government Employees Ins. Co., 253 So. 2d 667 (La. App. 4th Cir. 1971), \textit{cert. denied}, 260 La. 286, 255 So. 2d 771 (1972).
For the most part, the interpretation of the phrase “the surviving spouse” has been predictably strict. Those held to be entitled to bring the actions have included a spouse judicially separated from the victim, a spouse physically separated from the victim and in fact living with another man, a spouse under the laws of the state where the “marriage” took place who would not be a “spouse” under Louisiana law, a spouse who has, since the injury and death of the victim, remarried, a “subsequent spouse”

64. Harris v. Lumbermen’s Mut. Cas. Co., 48 So. 2d 728 (La. App. 1st Cir. 1950). The appellate court so decided in affirming a lower court’s dismissal of the victim’s mother’s suit upon a finding that the victim was separated from, but not divorced from, his spouse. The court held that only the spouse in such an instance could bring the actions. The court’s decision was based upon the language of L.A. Civ. CODE art. 136: “... Separation from bed and board does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again; ...” This decision was reached in spite of plaintiff’s argument that if the victim were still alive and had recovered the amount claimed in the survival action himself, his spouse would have had no share in it because they were judicially separated. See L.A. Civ. CODE arts. 924, 2334.

65. Jones v. Massachusetts Bonding & Ins. Co., 55 So. 2d 88 (La. App. 1st Cir. 1951). Again the issue was presented as the result of an exception of no right of action being sustained to the suit of the children of the decedent, after it was determined that he had never been divorced from his wife, who was then living with another man. The court said simply that Article 2315 made no distinction “between a faithful and unfaithful wife or surviving spouse ...”

66. Chivers v. Couch Motor Lines, Inc., 159 So. 2d 544 (La. App. 3d Cir. 1964) (common-law marriage valid under Florida law). See also Parish v. Minvielle, 217 So. 2d 684 (La. App. 3d Cir. 1969) (common-law marriage valid under Texas law). Cf. Gibbs v. Illinois Cent. R.R. Co., 169 La. 450, 125 So. 445 (1929), in which a case was remanded for the taking of evidence on whether the plaintiff was the common-law spouse of the decedent under Mississippi law. See also Brinson v. Brinson, 233 La. 417, 96 So. 2d 533 (1957), a succession case in which the court establishes a “public policy” exception to the recognition of common-law marriages entered into out of state, when they are commenced in bad faith.

67. Brock v. Friend, 4 La. App. 723 (La. App. 1st Cir. 1925). Plaintiff’s husband was killed August 21, 1923; she remarried December 25, 1923; her suit was instituted May 20, 1924. Defendant objected that she was not the “widow” (as Article 2315 then read) of the decedent when she brought suit. The court held that the right was created in her favor at the time of decedent’s death, and that the article did not provide for a forfeiture of that right upon remarriage.

68. Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 768 (1918). The original plaintiff suffered certain injuries in a fall allegedly caused by defendant’s negligence. He filed suit for some $25,000 in damages and, during pendency of the suit, married one Ethel Breaux. Two months later, he died of typhoid fever, a tragedy unrelated to the accident sued upon. When the new Mrs. Badie attempted
who married the decedent after the injury, and, now, a putative spouse.\textsuperscript{69}

As for the phrase "child or children," the interpretation has also been strict. The jurisprudence early rejected grandchildren as claimants under the article\textsuperscript{70} and still does,\textsuperscript{71} despite the definition of children contained elsewhere in the Civil Code.\textsuperscript{72} Certainly legitimate children and adopted children are included by the terms of the article itself,\textsuperscript{73} as well as duly legitimated children.\textsuperscript{74} It had been the consistent position of the jurisprudence to substitute herself in the pending action, she was met with the objection that she was not his spouse at the time of the injury. To this the court responded that she was suing only for such damages as her husband had suffered, and the right of action was a survival action, "not affected by the fact that the present plaintiff was not married to the person injured at the time of the injury." \textit{Id.} at 855-58, 77 So. at 769. This holding would hardly be extraordinary today, given the language of \textit{La. Code Civ. P. art. 428} to the effect that an action does not abate upon the death of a party. Decedent was a party, and this was merely a question of substitution of a proper party in the existing action, rather than the survival of the right to bring the action. Presumably the holding in \textit{Badie} would also apply to a wrongful death action brought by one not the spouse at the time of injury, but subsequently married to the victim prior to the victim's death.

\textsuperscript{69} King v. Cancienne, 316 So. 2d 366 (La. 1975), 
\textit{overruling} Vaughn v. Dalton-Lard Lumber Co., 119 La. 61, 43 So. 926 (1907). The court cited numerous holdings in other cases "liberally construing the rights of putative spouses" and relied upon \textit{La. Code Civ. art. 428} in reversing the decision of the two lower courts that the putative spouse could not recover for the death of the other spouse. In defense of the earlier decision in \textit{Vaughn}, it might be noted that the defendant had settled a claim for the death of the decedent with the lawful wife and pleaded the compromise in defense of the putative wife's claim, in addition to the defense that a putative spouse had no right under Article 2315.

\textsuperscript{70} Walker v. Vicksburg, S. & Pac. Ry. Co., 110 La. 718, 34 So. 749 (1903). The case was a difficult one. The record reflected that the two grandchildren, both minors, were orphans and dependent upon the grandfather for support. One of the reasons for the court's decision was that Article 2315 at the time granted the actions to "minor children" and the court felt that if it used the definition of children under Article 2315 of the Civil Code, it would have to extend the right to all grandchildren, major and minor. Now, of course, Article 2315 does not specify "minor" children.


\textsuperscript{72} \textit{La. Civ. Code art. 3556(8)}: "Children—Under this name are comprehended, not only the children of the first degree, but the grandchildren, great-grandchildren, and all other descendants in the direct line. . . ."

\textsuperscript{73} Adopted children were first included in the amendments contained in \textit{La. Acts 1932}, No. 159. \textit{See also} \textit{La. Civ. Code art. 214}. Whether or not the child has been adopted is, of course, a question to be determined under the substantive law of adoption. Bertrand v. State Farm Fire & Cas. Co., 333 So. 2d 322 (La. App. 3d Cir. 1976).

\textsuperscript{74} \textit{La. Civ. Code arts. 199, 200}.
dence that illegitimate children were not included in the definition until the
decision in *Levy v. Louisiana*, in which the United States Supreme Court
held that the statutory distinction between legitimate and illegitimate
children as claimants was "invidious discrimination" and unconstitutional
under the fourteenth amendment. It has even been held that a child who is
the legitimate child of one man under the presumption of paternity articles of
the Civil Code Nonetheless has an action for the wrongful death of a man
determined to be his biological father.

Article 2315 does not specify what the ultimate disposition of the funds
obtained in a survival action should be, and in the absence of such
specification, it has been held that the fund should be divided equally among
all the members of the class, not one-half to the spouse and one-half to the
children. Any wrongful death recovery, of course, would be personal to
each beneficiary and would vary according to the loss he was able to prove.

75. 391 U.S. 68 (1968). The specific holding was that illegitimate children
cannot constitutionally be denied the right to sue for their *mother's* death, and a
considerable amount of emphasis was put upon the biological and psychological
relationship between a mother and a child, legitimate or illegitimate. Presumably the
same would hold true for the relationship between a father and a child, but an
interesting argument to the contrary might be framed. *But see* Moore v. Thunder-
bird, Inc., 331 So. 2d 555 (La. App. 1st Cir. 1976), which approves a suit by the
biological *father* for the wrongful death of his illegitimate child.

76. LA. CIV. CODE arts. 184-92. *See also* Spaht and Shaw, *The Strongest
Presumption Challenged: Speculations on Warren v. Richard and Succession of

77. Warren v. Richard, 296 So. 2d 813 (La. 1974). The court specifically
recognized that this unusual situation meant that the natural child might have the
right to sue for the death of two fathers—one biological, one legitimate—but felt the
decision was compelled by *Levy v. Louisiana*, 391 U.S. 68 (1968). The court also
noted that it could be said that the natural child would enjoy more rights than the
legitimate child, but pointed to the status of adopted children, who may inherit both
from blood parents and adoptive parents. LA. CIV. CODE art. 214.

78. Austrum v. City of Baton Rouge, 282 So. 2d 434 (La. 1973). Mr. and Mrs.
Austrum were involved in an accident resulting partly from the negligence of
defendant. Each was injured, and each sought recovery for those injuries. Prior to
judgment, Mrs. Austrum died of unrelated causes. The trial court rendered
judgment dividing the $9,000 award for Mrs. Austrum's injuries, one-half to the
husband and one-half to the seven children of a previous marriage, all of whom had
been substituted as parties plaintiff. The appellate court divided the fund eight
ways, and the supreme court expressly approved that division, citing *McFarland v.
Illinois Cent. R.R. Co.*, 122 So. 2d 845 (La. App. 1st Cir. 1960), *modified on other

79. In *Austrum*, the victim was the wife, and any damages which would have
been awarded to her if she had lived would have been her separate property. LA.
CIV. CODE art. 2334. *Cf.* LA. CIV. CODE art. 2402: " . . . provided where the
Second Class: " . . . (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving;

Certainly this class includes the legitimate parents of the victim. Their remedy extends to injuries inflicted upon a child *en ventre de sa mere* allegedly causing the death of the child within a few days of birth.80

By the terms of the article, adoptive parents are also within this class. There appears to be no case in which both adoptive parents and blood parents have attempted to sue for the wrongful death of a child, and such an effort by the blood parents would arguably be barred by the statement in Article 214 of the Civil Code that upon adoption, they are "divested of all of their legal rights with regard to the adopted person, including the right of inheritance from the adopted person and his lawful descendents." It is interesting to contrast the treatment of the blood parents in this regard vis-à-vis the adoptive parents with the treatment given to a blood parent vis-à-vis a presumed legitimate parent.81 It is now established that the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws." By its terms, this provision would not apply to the victim's action which survives to the beneficiaries under Art. 2315. However, if the victim is the husband, the damages which would have been awarded to him if he had lived would be community property, unless he is living separate and apart from his wife, by reason of fault on her part sufficient for separation or divorce. *La. Civ. Code* art. 2334. Thus it might plausibly be argued, reading Article 2334 with Article 2315, that nothing in the articles indicates that the status of these damages should change because of the death of the husband, and, like any other community asset, this fund should be divided one-half to the wife and one-half to the children.

80. Cooper v. Blanck, 39 So. 2d 352 (La. App. Orl. Cir. 1923) (decided in 1923, furnished by the court for publication March, 1949). If the child is stillborn, the result is less clear. The opinion in *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. App. Orl. Cir. 1951), appears to hold that there is a remedy for the death of a stillborn child, if it is proven that the defendant's conduct caused the death—something not proven in that case. *See also* Sibley v. Wilcox, 125 So. 2d 49 (La. App. 1st Cir. 1960) and Johnson v. South New Orleans Light and Traction Co., (Orl. App. No. 9048, 1923) (unreported) which would appear to support a recovery. Consideration should also be given to *La. Civ. Code* arts. 28, 29 and 954. *But see Youman v. McConnell & McConnell, Inc.*, 7 La. App. 315 (2d Cir. 1927), apparently holding the contrary. In *Youman*, there were serious doubts that the defendant's conduct caused the child to be stillborn. *See also* Survival of Actions, *supra* note 7 at 337-39. Though the present jurisprudence concerns only parents of legitimate children, there is no reason not to extend the concept to parents of non-legitimate offspring.

81. This phrase is intended to describe the person who is, under Articles 184 and following of the Civil Code, considered to be the "father of all children conceived during the marriage," they in turn being his legitimate children.
natural mother\textsuperscript{82} or father\textsuperscript{83} of a child must be permitted to bring a wrongful death action, and it must be inferred from \textit{Warren v. Richard} that both a blood parent and a "legitimate" parent might bring a suit for the wrongful death of a child.\textsuperscript{85} Might the blood parent argue that Louisiana law invidiously discriminates against him by permitting him to sue for the wrongful death of a child when the child is the legitimate child of someone else under the law, but refusing his suit when the child is the adopted child of someone else?

It has been held that this class does not include the step-parent of the victim,\textsuperscript{86} a decision which might speak in favor of adoption of the child by the step-parent, clearly making the action then available. The class does not include grandparents,\textsuperscript{87} but one decision did require the defendant to reimburse a grandfather for the hospital, medical and funeral expenses he incurred as a result of the injury and death of his grandson, who was wholly dependent upon him.\textsuperscript{88}

\textsuperscript{82} Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968). Emphasis was again placed upon the biological relationship between the mother and the child, and upon the idea that invidious discrimination against natural mothers would occur, in violation of the fourteenth amendment to the United States Constitution, if legitimate mothers could sue but natural mothers could not.

\textsuperscript{83} Moore v. Thunderbird, Inc., 331 So. 2d 555 (La. App. 1st Cir. 1976).

\textsuperscript{84} 296 So. 2d 813 (La. 1974).

\textsuperscript{85} The holding in \textit{Warren v. Richard} was that the mother of the victim could not sustain an action against the defendant when a settlement had been effected with a child who was the \textit{biological} child of the victim, but conclusively presumed to be the \textit{legitimate} child of another man. The court recognized that this would permit such a child to sue for the wrongful death of two different "fathers," but felt the decision compelled by \textit{Levy v. Louisiana}, 391 U.S. 68 (1968). Given also the decision in \textit{Glona v. American Guar. & Liab. Ins. Co.}, 391 U.S. 73 (1968), that a natural mother must be given the right to sue for the death of her natural child, it seems hard to escape the conclusion that both the "biological" parent and the "legitimate" parent would have the right to sue for the death of their "child," since the child has the converse right to sue for the death of each parent. \textit{See Cosey v. Allen}, 316 So. 2d 513 (La. App. 1st Cir. 1975) (presumed but not actual father permitted to sue for wrongful death of two minor children).

\textsuperscript{86} Palmer v. American Gen. Ins. Co., 126 So. 2d 777 (La. App. 1st Cir. 1960). Adoption of the step-child in the Palmer case might have produced a more just result. The blood father had seen the child only once between her birth in 1944 and her death in 1959, and the child had apparently been living with her mother and step-father for some time.


\textsuperscript{88} Sutton v. Rogers, 222 So. 2d 504 (La. App. 2d Cir. 1969). The court's decision was based upon \textit{La. Civ. Code} art. 229, which required relatives in the direct ascending line to "maintain their needy descendents." The boy's parents had abandoned him at birth. The decision is clearly not one authorizing a general
When more than one parent is within the class, the recovery in a wrongful death action is individual in favor of each parent, each receiving the amount of damages which he is able to prove. Thus if the parents are separated, physically or judicially, or divorced, each has an action, but the parent without custody generally receives a lower award. The recovery in the victim's action which survives to the parents is shared equally between them.

In the light of the current jurisprudential position that the existence of an illegitimate child would preclude an action by a parent, it would appear that the parent or parents have not stated a cause of action for wrongful death unless their petition alleges that the deceased died leaving neither spouse nor child, legitimate, adopted, natural or illegitimate.

Third Class: “... (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving.”

There are only a few cases interpreting the meaning of this final phrase of the beneficiary list. Certainly legitimate siblings of the deceased are within the class. Illegitimate siblings have thus far been excluded, but no wrongful death recovery; it approves only the reimbursement of expenses which the grandfather incurred because of the negligence of the defendant.

90. Kaough v. Hadley, 165 So. 748 (La. App. 1st Cir. 1936); Kaough v. Hadley, 165 So. 753 (La. App. 1st Cir. 1936) (father with custody received final award of $3,500; mother received $2,500). See also Cosey v. Allen, 316 So. 2d 513 (La. App. 1st Cir. 1975) (presumed but not actual father permitted to sue for wrongful death of two small children, but no damages awarded); Palmer v. American Gen. Ins. Co., 126 So. 2d 777 (La. App. 1st Cir. 1960) (mother with custody received $12,500; father received $500). The court said: “While the law compels the conclusion that [plaintiff] is the legal father of these children, it does not compel the conclusion that he was damaged by their deaths.” 316 So. 2d at 517.
93. Or perhaps no right of action. See discussion at notes 29-55, supra.
94. Rogers v. State Farm Ins. Co., 261 So. 2d 320 (La. App. 1st Cir. 1972); Abraham v. Connecticut Fire Ins., 177 So. 2d 295 (La. App. 1st Cir. 1965). It had been suggested that, in the light of Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), such decisions would be overruled. See Survival of Actions, supra note 7 at 343. However, the court in Rogers distinguished those cases by noting their emphasis on the biological relationship between a parent and a child, and the economic dependency normally present in that relationship, and holding that the sibling relationship was "one step removed" from that. 261 So. 2d at 322. An illegitimate step-brother and step-sister, also included among the plaintiffs, were felt to be even beyond the sibling relationship. And further, the Louisiana Civil Code does not require that the siblings support one another, as it requires between those in the direct line of relationship. LA. CIV. CODE art. 229.
case dealing with the position of legitimate half-brothers and half-sisters
seems to have been decided. It has been suggested that when such siblings
share the class with full-blood siblings, they should receive a proportionate
half share of the recovery which would have been the victim’s, and an
award for wrongful death equal to one-half of what a full-blood sibling
either receives or would receive. This seems equitable, but granting the
action to half-siblings in the first place runs counter to the oft-repeated
jurisprudential statement that Article 2315 must be strictly construed.
If, despite strict construction, the action is granted, the suggested division of
the fund which would have been the victim’s is needlessly inconsistent with
the division which will be made of other funds under the law of succes-
sions. Further, as to wrongful death recovery, there is no reason arbitrarily
to limit a half-sibling’s recovery to one half that of a full-blood sibling; each
should be entitled to prove the damages he actually suffered by the death.

Heirs of beneficiaries

Prior to 1961, there was no provision in Article 2315 governing a
situation in which a beneficiary entitled to bring an action died either before
instituting the action or before a final judgment. It had thus been held in
Chivers v. Roger that if a beneficiary brought an action for wrongful
death and died prior to rendition of judgment, the action abated. Similarly, it

95. See Survival of Actions, supra note 7 at 344, posing the situation of three
blood brothers and one half-brother sharing a fund of $14,000 which the victim
would have received if he had lived, and proposing that each full brother receive
$4,000, and the half brother $2,000.
96. Id.
97. See cases cited in note 28, supra.
98. LA. CIV. CODE art. 913.
99. In the other classes, status as a surviving spouse or child or parent is not the
deciding factor in the amount of damages suffered; closeness of relationship and
resulting loss, either emotional or financial, is much more important. There is no
reason to deny that same treatment to siblings of the half-blood. Their status as
half-blood siblings should not automatically reduce their recovery by one-half.
100. 50 La. Ann. 57, 23 So. 100 (1898). This decision was not slavishly followed.
In Castelluccio v. Cloverland Dairy Products Co., 165 La. 606, 113 So. 796 (1927), it
was held that an action did not abate when it had proceeded to judgment and was on
appeal. The court cited language from Chivers v. Roger which noted with approval
the decision of the court in Vincent v. Sharp, 9 La. Ann. 463 (1854), that an action
did not abate when a jury verdict had been had and a judgment rendered, and death
occurred during appeal. See also Foy v. Little, 197 So. 313 (La. App. 2d Cir. 1940),
cert. denied (judgment in favor of beneficiary rendered in trial court was reversed
on appeal, but rehearing had been granted when the beneficiary died; court held
that the action did not abate).
was held in *Kerner v. Trans-Mississippi Terminal Railroad Company* that a survival action brought by a beneficiary who died prior to trial abated upon the death of the beneficiary, and there was no action for members of a deferred class.

When the Code of Civil Procedure was enacted, effective January 1, 1961, a two-pronged effort to overrule these decisions was undertaken. Article 428 provided:

An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal.

Amendments to Article 2315 of the Civil Code further provided the "right to recover damages" granted to a beneficiary under Article 2315 is a "property right" which, on the death of the beneficiary, is "inherited by his legal, instituted or irregular heirs, whether suit has been instituted thereon by the survivor or not."

The attempt was obviously to provide for all possible situations. If the action is pending, it does not abate unless it is strictly personal; Article 2315 makes it clear that the action is not strictly personal, but heritable. If the action has not yet been brought, the "right to recover damages" nonetheless is inherited by the beneficiary's heirs under the clear authority of Article 2315 as amended.

The 1961 amendments interpose a third layer of possible plaintiffs: heirs of beneficiaries. It should be kept in mind that the rights of the beneficiaries named in Article 2315 arise by virtue of the language of that

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101. 158 La. 853, 104 So. 740 (1925). See comment (d)(4) to LA. CODE CIV. P. art. 428, which incorrectly characterizes *Kerner* as a case in which the beneficiary died before instituting suit.

102. See LA. CODE CIV. P. art. 428, comment (d).

103. La. Act 30 of 1960, § 1, now appearing as LA. CIV. CODE art. 2315(3). It has been held that when a beneficiary dies, the right goes to the heirs of his separate property "as any damages recoverable" by the beneficiary "would have been his separate property." Crockett v. United States Fidelity & Guar. Co., 229 So. 2d 169 (La. App. 1st Cir. 1969), cert. denied, 255 La. 286, 230 So. 2d 589 (1970). This conclusion was reached without authority in a case in which the beneficiary's heirs under the clear authority of Article 2315 as amended.

104. LA. CIV. CODE art. 2315(3); see also LA. CIV. CODE art. 1997.
article; they do not, properly speaking, "inherit" these rights and they are not regulated by succession law. The heirs of beneficiaries on the other hand do receive their rights by inheritance, a distinction which will be of importance in the matter of time limitations within which to bring an action under Article 2315.

**Beneficiaries of Property Damage Claims**

The 1961 amendments to Article 2315 also overruled a series of cases holding that the right to recover damage to the property of the victim survived only in favor of the beneficiaries designated by the article. The amended article treats "damages to property" in a separate paragraph and provides that the right to recover such damages, upon the death of the victim, is "inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse." It is clear from this wording that the right to recover damages to the property of the victim after his death is no longer a matter of tort law, strictly speaking, but rather of succession law; and that the specific time limitations of the rest of Article 2315 do not apply to property damage claims.

**Applicability of the Presumptions of Survivorship**

Like the French Civil Code and the Civil Code of Quebec, the Louisiana Civil Code contains provisions which arbitrarily presume the survival of one person when several persons "respectively entitled to inherit from one another" perish "in the same event." The provisions are found in the title on successions and offer no hint as to whether they might be

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106. See text at note 178, infra.
108. LA. CIV. CODE art. 2315(2).
109. See discussion at notes 148-49, infra.
110. FRENCH CIV. CODE arts. 720-22.
111. QUEBEC CIV. CODE arts. 600-03.
112. LA. CIV. CODE art. 936: "If several persons respectively entitled to inherit from one another, happen to perish in the same event, such as a wreck, a battle, or a conflagration, without any possibility of ascertaining who died first, the presumption of survivorship is determined by the circumstances of the fact." LA. CIV. CODE art. 937: "In the absence of circumstances of the fact, the determination must be guided by the probabilities resulting from the strength, age, and difference of sex, according to the following rules."
applicable in matters arising under Article 2315. In fact, only one reported Louisiana decision has applied the provisions in a succession context;\textsuperscript{113} three others have discussed the provisions in cases arising under Article 2315.\textsuperscript{114}

However, the jurisprudence as reflected in those three decisions is far from consistent. \textit{Doucet v. Travelers Insurance Company},\textsuperscript{115} a federal district court decision in 1950, appears to have been the first to address the question of the applicability of these presumptions to Article 2315. A newlywed husband and wife, ages 25 and 17 respectively, were passengers in a vehicle which collided with a truck; they were killed instantly. The parents of each brought a wrongful death action against the insurers of the two drivers who were involved in the collision.\textsuperscript{116} The suit by the parents of the husband was met by a motion for summary judgment on the ground that, under the survivorship presumptions, the wife was presumed to survive the husband, and therefore, he having died with a spouse surviving him, the parents had no "right of action."

Without citing any authority, the court applied the presumption of survivorship articles to the death action and held that the parents had no

\textsuperscript{113} Succession of Langles, 105 La. 39, 29 So. 739 (1900). In this rather famous decision, a mother and daughter wrote wills prior to their departure on an overseas steamer trip on which they apparently met tragic deaths after their ship collided with another. There were no circumstances from which one might determine which died first. Each will named the other as universal legatee, if the legatee survived the testatrix; if not, a number of other legacies were made. Litigation ensued over the disposition of the estate, with the legatees under the daughter's will claiming that the daughter had "survived" the mother under the presumptions of survivorship, and therefore had become the universal legatee under the mother's will. Following this argument, all other legacies in the mother's will lapsed, as did the legacy to the mother in the daughter's will; thus the estate of the daughter, which now included the inherited estate of the mother, went to the legatees under the daughter's will. The objection to this argument was that since the succession was a testate one, the presumption of survivorship did not apply. The court held that the presumption applied to testamentary as well as intestate successions.


\textsuperscript{115} 91 F. Supp. 864 (W.D. La. 1950).

\textsuperscript{116} The discussion in the case is about the action brought by the parents of the husband, since a presumption that the younger wife survived would bar their action. There is no discussion of the claim brought by the parents of the wife, who would have had an action whether the presumption applied or not.
action for the death of their son, since he was "survived" by his wife. The court did not address itself specifically to the question of whether the spouses were "respectively entitled to inherit from one another."

Subsequently, in Hoy v. Stuyvesant Insurance Company, a father and two unmarried sons were involved in a collision between the vehicle driven by the father and another vehicle. The court found the collision to have been caused solely by the father's negligence. One son was apparently killed instantly; the second son and the father were found alive outside the wreckage, but were dead on arrival at the hospital. An action for the death of the two sons was brought by their siblings. The trial court held that the father had actually survived the first son, and therefore excluded the siblings from any action; at his death, under the language of Article 2315 at the time of the death, that action abated. But the trial court found no circumstances from which it could conclude whether the father or the second son died first, and applied the presumption of survivorship without citing Doucet. The result of this application was a finding that the second son survived the father, and that at his death, the siblings were the proper beneficiaries of the wrongful death action, the other two classes of beneficiaries being empty. The appellate court affirmed the trial court's decision in all respects.

Finally, in consolidated cases bearing the name Collins v. Becnel,

117. Under Article 2315 as it then read, any action which the wife as a beneficiary might have had for the death of her husband if she "survived" him in the legal sense would have abated at her death. There was no provision, as there is now, for the inheritance of her action by her heirs. The result in Doucet was that no one had an action for the death of the young husband, even though a beneficiary (the wife) had "survived" him.

118. This phrase in L.A. Civ. Code art. 936 is a translation of the French phrase "respectivement appelés [appelées] à la succession l'une de l'autre," which might better have been rendered "respectively called to the succession of each other" which would at once be consistent with language used elsewhere in the successions title of the Civil Code, notably Article 888, and would also reflect the principle that those dying together must actually be "called" to the succession of the other, creating an uncertainty in disposition of property which must be resolved. The court in Succession of Langles, 105 La. 39, 29 So. 739 (1900), without emphasizing the point, does cite the 1825 French text of Article 936. Id. at 60-62, 29 So. 747.

119. 141 So. 2d 908 (La. App. 2d Cir. 1962).

120. As it now reads, Article 2315 permits the heirs of a beneficiary to inherit the "right to recover damages." This principle now presents the question, yet unanswered, of whether the negligence of the beneficiary which would bar his action will also bar any action by his heirs, who receive the right as a matter of inheritance rather than tort law. Dicta in Gonzales v. Succession of Medica, 141 So. 2d 887 (La. App. 2d Cir. 1962), seems to suggest that the heirs of the beneficiary would be barred by the beneficiary's negligence.

121. 297 So. 2d 506 (La. App. 4th Cir. 1974) and 297 So. 2d 510 (La. App. 4th
the actions arose out of an accident in which a Mrs. Collins and her only
daughter were killed instantly, and counsel stipulated that there was no
evidence to indicate that the deaths were other than simultaneous. Mrs.
Collins was not survived by a spouse or parents, and her siblings brought an
action for her wrongful death. The same plaintiffs, as heirs of the daughter,
brought an action allegedly inherited from her for the damages she suffered
as a result of the death of her mother as well as the death of her husband, who
also died instantly in the accident.

It was argued in opposition to the first action that the presumption of
survivorship was applicable, and the daughter was presumed to survive the
mother. In that event, the siblings, being in the third group of beneficiaries,
were excluded by the daughter. On that basis, defendants were granted a
summary judgment by the trial court. In the second action, plaintiffs had
argued that the presumption of survivorship was applicable, and that the
daughter had “survived” both her mother and her husband, so that her
actions for their deaths was inherited by them. In that action, the trial court
also granted defendants’ motion for summary judgment.

The appellate court, without even mentioning Hoy, held that the
presumption of survivorship articles were restricted to successions and
did not apply to actions under Article 2315. It therefore concluded that the
daughter had not arbitrarily “survived” the mother, and set aside and
remanded the summary judgment against the siblings of the
mother.122 It
also concluded that, since the daughter had not arbitrarily “survived” her
husband and her mother, she never received any right of action for their
deaths to be inherited by her aunts and uncles, the plaintiffs in the second
action. Accordingly, it affirmed the summary judgment in defendants’
favor in the second action.123

It thus appears that in answer to the question whether the presump-
tion of survivorship provisions apply to actions under Article 2315, one can
only say the issue is undecided. In one case, the provisions were applied to
defeat any recovery;124 in another, they were applied to permit recovery;125
and in the third, their applicability was denied, thus permitting one

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122. 297 So. 2d at 509.
123. 297 So. 2d at 512.
The purpose of the presumption of survivorship is clearly to facilitate the transfer of property at death, and the strong public interest in certainty of titles to property requires that some decision be reached in the case of simultaneous deaths of persons who are called to each other’s succession. The same principle is not operative in actions under Article 2315. The purpose of Article 2315 is to compensate parties damaged through the fault of another. There is no overriding reason to apply the presumption, and in some instances its application might defeat the purpose of Article 2315.  

On balance, defendants would probably prefer that the presumptions be applicable, since this would permit a “survivor” through his negligence to bar other beneficiaries, and probably his heirs; and it would produce a situation such as the one described above in Collins v. Becnel, in which the “inherited” claim might be worthless. The position to be taken by plaintiffs, of course, will depend upon the source of their rights, but it seems that ordinarily they would be better off without the presumptions.

A 1972 amendment to Article 1521 of the Civil Code permits a testator to negate the presumptions of survivorship and provide that in the event of simultaneous death of a donee, heir or legatee and the testator, the testator shall be presumed to survive.

128. This was recognized by the court in Collins v. Becnel, 297 So. 2d 506 (La. App. 4th Cir. 1974): “Were we to hold that the presumptions . . . determine the beneficiaries . . . under C.C. art. 2315, we would in this case allow a presumptive millisecond of fictitious survival of a primary class beneficiary to exclude recovery of damages by a secondary class beneficiary who actually survived the victim and actually sustained damages through the victim’s wrongful death.” Id. at 508.
129. This would have been the situation, for example, if the son in Hoy had been driving the vehicle negligently, and would have been presumed to survive the father. An action for the father’s death brought by the father’s brothers and sisters, for example, when no spouse, children or parents of the father actually survived, would be barred by the presumed “survival” of the negligent son in the first class of beneficiaries. See Gonzales v. Succession of Medica, 141 So. 2d 887 (La. App. 2d Cir. 1962) (husband killed wife and committed suicide; sister’s action for death of wife barred by existence of husband in first class of beneficiaries at wife’s death, even though he was barred by his own negligence).
130. Plaintiffs who are merely heirs of a beneficiary who is “presumed” to survive would of necessity have to argue for the presumption or be left without any action whatsoever. Most often, plaintiffs would probably be in the situation of the siblings of the mother in Collins, arguing that the presumption does not apply, and they are therefore not excluded by a presumed “survivor” in a higher class.
131. LA. CIV. CODE art. 1521: “ . . . That a testator may alter or negate the
apply to actions under Article 2315, it will be interesting to see the effect which might be given to such a clause in a testament. Suppose, in the Doucet situation, that the older husband should negate the presumptions and provide that he shall be presumed to survive the wife. Could he, by that unilateral action, accord his parents an action against a negligent defendant for their damages at his death, since he would then not be "survived" by a spouse? Could the defendant object to having to compensate the parents because their son took advantage of his legal rights when he would not have to if the son had not done so? Would it then be advisable for all careful presumptions of survivorship contained in Articles 936-939 of this code to provide that when a disposition of property to a donee, heir or legatee depends upon priority of death, and there is no sufficient evidence that the parties have died otherwise than simultaneously, the property of the testator so disposed shall devolve as if the testator has survived. The effect of this provision is to permit the testator to write a vulgar substitution, making a legacy to X if X survives him, but to Y if the testator and X died in a common disaster, regardless of the presumptions of survivorship. For an excellent article explaining the need for the provision, see Nathan, Common Disasters and Common Sense in Louisiana, 41 Tul. L. Rev. 33 (1966).

132. It may be argued that the amendment to LA. CIV. CODE art. 1521 does not apply to actions under LA. CIV. CODE art. 2315. To this, several responses may be made. First, the amendment uses the word "heir" in addition to the words "donee" and "legatee," perhaps indicating some application beyond a testament, since dispositions in a testament would by definition produce legatees and not heirs. See LA. CIV. CODE art. 1605 et seq. Second, the amendment states that "when a disposition of property to a donee, heir or legatee depends upon priority of death," the testator may provide that the property is to devolve as if he had survived. Article 2315 describes the right to recover damages under the article as a "property right." It could be argued that the disposition of this "property right" depends upon priority of death. Finally, a testator might bequeath a certain asset to a legatee, but negate the presumptions of survivorship as to that legatee if they die in a common disaster, which would be perfectly valid. In the not impossible situation in which that legatee was also a possible beneficiary under Article 2315, should the negation operate only for purposes of that legacy, thus compelling the conclusion that the legatee "survived" for one purpose but not another? Suppose for example that a husband aged 21 and a wife aged 19, childless, die in a common disaster. The husband makes his wife his universal legatee by testament, but provides that in the event of their simultaneous death, his parents are his universal legatees, to avoid having his estate fall into the hands of his wife's parents. Would it be consistent in that situation to apply the presumptions of survivorship to the actions under Article 2315 and hold that the wife "survived" for purposes of that article, and her survival barred his parents from any action for his death? Perhaps the answer to this argument is to say that the beneficiaries under Article 2315 are sui generis, neither donees, heirs or legatees, and therefore Article 1521 cannot be used to alter actions under Article 2315. But in that event, one still reaches the peculiar conclusion that the husband fictitiously "survives" the wife for one purpose (succession), while the wife fictitiously "survives" the husband for another purpose (tort).

133. Theoretically, if he makes no such provision, the wife "survives" and has the action, then inherited by her parents, but probably has no damage since she is
estate planners to consider the ages and family situations of testators and include a negation of survivorship presumptions where justified?

ERRATA

Page 29—First full paragraph should begin.

It is probably much more sensible just to hold, or to legislate,¹³⁴ that the presumptions do not apply to actions under article 2315, and simply determine which persons in fact survived the decedent, and require proof of that fact in the ordinary fashion.

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TIME LIMITATIONS

Article 2315 contains a time limitation for bringing the actions which it authorizes, but the commencement, duration and even the proper name of this time limitation are the subject of considerable dispute. A part of the explanation lies in the troubled history of the article. The first amendment to the article provided for the “survival” of the victim’s action in the event of his death “for the space of one year from the death.”¹³⁶ When the wrongful death action was authorized by the addition of a single sentence in 1884, no separate time period was given. It was simply provided that “the survivors above mentioned may also recover the damages” which they sustained by the death.¹³⁷ The only reasonable conclusion was the one reached by the jurisprudence: the death action must be brought within a year of the death of the deceased.¹³⁸

not actually deprived of any support, and has no conscious loss of love and affection at her husband’s death.

¹³４. See text at notes 266-73, infra.
¹³５. This would be consistent with the principle announced in LA. CIV CODE art. 76: “Whoever shall claim a right accruing to a person whose existence is not known, shall be bound to prove that such person existed at the time when the right in question accrued, and until this be proved, his demand shall not be admitted.” Their rights would depend upon the daughter actually surviving the mother, and they should have to prove that.
¹³６. La. Acts 1855, No. 223.
¹³８. Stephenson v New Orleans Ry & Light Co., 165 La. 132, 115 So. 412 (1928) (suit brought almost three years after death by brothers and sisters for damages they allegedly suffered held prescribed). It is interesting that in this case,
The 1961 amendment to the article changed the language of these sections slightly, probably without intent to change the meaning. It was provided that the right to recover damages to the victim in the event of his death "shall survive for a period of one year from the death of the deceased" in favor of the named beneficiaries; and that "the survivors in whose favor this right of action survives may also recover the damages which they sustained" because of the death. Again, no specific time limitation was given for the wrongful death action; and again, the interpretation has been that the action must be instituted by the proper beneficiaries within one year of the death.

The 1961 amendments also separated suits for damages to the property of the victim from suits for his personal injury and wrongful death actions, and provided that such actions in the event of the victim's death were the property of his heirs, not the beneficiaries designated by Article 2315. Finally, the 1961 amendments provided for the inheritance of the beneficiary's action, in the event of his death, by his heirs.

The 1961 amendments to Article 2315 and certain provisions of the Code of Civil Procedure appear to establish a dichotomy in resolving the supreme court's reasoning is that the wrongful death action is one resulting from an offense or quasi offense and is subject to the ordinary prescription rules of L.A. CIV. CODE art. 3536. But there was not unanimity on the point. See Miller v. American Mut. Liab. Ins. Co., 42 So. 2d 328 (La. App. Ist Cir. 1949) (calls the period for the survival action one of peremption, citing as authority a law review comment on chattel mortgages and a group of cases, none of which are survival or wrongful death cases).


140. While the one-year period for institution is well established, the characterization certainly is not. Trahan v. Liberty Mut. Ins. Co., 314 So. 2d 350 (La. 1975) (prescriptive period); Succession of Roux v. Guidry, 182 So. 2d 109, 110 (La. App. 4th Cir.), cert. denied, 248 La. 1106, 184 So. 2d 27 (1966) (peremption); Wick v. Sellers, 309 So. 2d 909, 913 (La. App. 3d Cir. 1975) ("prescriptive or peremptive period"). From time to time, it appeared that the courts might settle on calling the period for the survival action a peremption, and the period for the wrongful death action a prescription governed by Article 3536, but the distinction has never become established.

141. La. Acts 1960, No. 30, now appearing as L.A. CIV. CODE art. 2315(2): "... The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse."

142. La. Acts 1960, No. 30, now appearing as L.A. CIV. CODE art. 2315(3): "... A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not."

time limitation problems. Article 2315 speaks in terms of "the right to recover damages," a phrase apparently intended to apply only to actions not yet instituted.\textsuperscript{144} When an action has been timely instituted, the question becomes one of timely substitution of parties under the provisions of the Code of Civil Procedure.\textsuperscript{145} It is not clear that this was the intention of the drafters,\textsuperscript{146} but it appears to be the only logical conclusion.

All of this has produced multiple time limitation problems, but there are at least a few clear answers.

(1) \textbf{The time limitation running on an action by the victim himself for personal injuries or damage to his property is not governed by Article 2315 at all, but by the provisions of Article 3536 and its interpretations in the jurisprudence: a one-year prescriptive period.}\textsuperscript{147}

(2) \textbf{The time limitation running on an action by the victim's heirs for damage to the property of the victim is not governed by Article 2315 at all, but by the provisions of Article 3536 and its interpretation in the jurisprudence: a one-year prescriptive period running from the time of the damage.}\textsuperscript{148} Since these heirs simply inherit the right from the victim, and no provision of law extends the time period, they have the same period of time which the victim himself would have had.\textsuperscript{149}

(3) \textbf{If the victim dies within a year of the injury without instituting a suit, the applicable time limitation for either a survival action (death from unrelated causes) or a wrongful death action (death as a result of defendant's conduct) is that...}

\textsuperscript{145} LA. CODE CIV. P. art. 801.
\textsuperscript{147} LA. CIV. CODE art. 3536: "The following actions are also prescribed by one year: That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses..."
\textsuperscript{148} There do not appear to be any decisions on point, but it seems clear that the provisions of the third paragraph of Article 2315 do not apply to damage to property, and thus the only time limitation is the one offered by LA. CIV. CODE art. 3536.
\textsuperscript{149} Any other conclusion would mean that the heirs have greater rights than the beneficiary had, and absent specific statutory authority for such a result, no such conclusion should be reached.
granted by Article 2315: *one year from the death*. Should a beneficiary die during that year, his heirs are entitled to no further extension of time, but through their inheritance have the remainder of the time period which the beneficiary would have had.

There is room for some difference of opinion on the conclusions of (3), above. It has been asserted that the Louisiana Supreme Court is of the opinion that the time limitation on the survival action runs from the date of injury to the victim, not the date of his death. But the case cited as authority for that proposition appears to be a wrongful death case and cannot at all be said to express a clear holding on the subject. The simplest reason for the conclusion reached in (3) above is that the language of Article 2315 makes no mention of a time period running from the date of injury. It provides in the plainest terms possible that the right to recover damages for injury to the victim "shall survive for a period of one year" from his death. It is true that if the victim dies eleven months after the injury and has never instituted suit, the defendant in effect is faced with a 23-month prescriptive period; but the article makes no provision for any different result.

(4) If the victim dies more than a year after the injury without instituting the suit, the right to recover damages for his injuries survives to the beneficiaries; but when asserted, it is vulnerable to a plea of prescription. A wrongful death

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150. The victim is injured May 1, 1974 and dies of those injuries April 1, 1975—eleven months later. The conclusion reached here is that the beneficiaries have until April 1, 1976 to assert either the survival action or the wrongful death action. The language of Article 2315 seems clear as to the survival action; the jurisprudence has established the period for the wrongful death action at one year from the death. See authorities collected at notes 138-40, *supra*.

151. *See* n.149, *supra*.


153. *Rady v. Fire Ins. Patrol of New Orleans*, 126 La. 273, 52 So. 491 (1910). Plaintiff was suing "for damages for the death of her son" who died June 25, 1905 of injuries received June 23, 1905. Service on the defendant made June 23, 1906 was deemed of no effect. Subsequent service was made on June 25, 1906. The only holding of the court was that prescription on the action for "the damages on account of the death" began on the date of the death, and the service on June 25, 1906 was timely—exactly one year from the death. There is no holding on the subject of time limitations on a survival action.

154. Perhaps the legislature felt that the confusion ordinarily surrounding a death is a sufficient reason to grant some further time to the beneficiaries to commence an action.

155. The victim is injured May 1, 1974 and dies of those injuries on June 1, 1975—thirteen months later. Nothing in *La. Civ. Code* art. 2315 suggests that the
action, however, is subject to a time limitation of one year from the death.156

Again, there is some room for difference of opinion. If the victim lives more than a year from the injury without instituting suit, it might be argued that there is nothing left to "survive" to the beneficiaries. With regard to the practical matter of actual recovery on the claim, this may be accurate. But it seems more proper to conclude, based on the language of Article 2315, that the "right" to bring the victim's action survives, subject obviously to the same defenses which might have been raised against it if he had brought it. The "survival" of the right, it will be remembered, is nothing more or less than a continuation of the victim's right in the person of certain designated beneficiaries. One of the defenses to which the victim's action is obviously vulnerable is prescription. It of course must be raised by a party, and cannot be noticed by the court on its own motion.157 If the plea is sustained, the obligation sought to be enforced becomes a natural obligation,158 no longer enforceable at law but capable of serving as a sufficient cause for a new agreement.159 In the unlikely event of a new promise to pay the obligation by the tortfeasor, a civil obligation would be formed;160 or in the event of a payment on the natural obligation by the tortfeasor, the amount paid could not be recovered.161 Thus there are some advantages to treating the victim's action as having "survived" to the beneficiaries but being vulnerable to a plea of prescription.162

There appears to be little room for dispute that the time limitation for bringing a wrongful death action in a situation in which the victim dies more than a year after the injury without instituting suit is one year from the death.163 An argument could be made that since the death action is granted to

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156. Since the cause of action for wrongful death accrues only at the death, the time limitation begins to run at that point for one year.
157. LA. CIV. CODE art. 3463; LA. CODE CIV. P. art. 927.
158. LA. CIV. CODE art. 1758(3).
159. LA. CIV. CODE art. 1759(2).
160. LA. CIV. CODE art. 1759(1).
161. Id.
162. This reasoning also has the advantage of avoiding entirely the controversy about whether there has to be a valid survival action in order for a wrongful action to be available, a dispute centering around the phrase in Article 2315, "[t]he survivors in whose favor this right of action survives . . . ." Under this reasoning, the right of action clearly survives, but the remedy may be barred by an appropriate plea of prescription. See Survival of Actions, supra note 7 at 350-51.
163. There appear to be no cases, but see the reasoning in note 156, supra.
the persons "in whose favor" the survival action "survives," no death action can be brought at all when the victim lives longer than a year without bringing suit. The theory would be that since the victim's action does not actually survive, then there are no wrongful death beneficiaries at all. While there appear to be no cases on this point, the argument is seriously discredited if not rejected by the opinion of the supreme court in Callais v. Allstate Insurance Company.\textsuperscript{164}

(5) If the victim timely institutes a suit for his own injury, Article 2315 no longer applies to his action.\textsuperscript{165} Substitution by the beneficiaries in the pending action (survival action) is subject only to the five-year abandonment rule of Article 561 of the Code of Civil Procedure.\textsuperscript{166}

This problem has been the subject of some dispute. Prior to the 1961 amendments, it had often been held that the beneficiaries had only one year from the death of the original plaintiff-victim to substitute themselves.\textsuperscript{167} Even after the 1961 amendments, there was such a holding.\textsuperscript{168} But more recent opinion recognized only the five-year limitation,\textsuperscript{169} and it is submitted that this is more in keeping with the intention of the drafters of the 1961 amendments, and should be approved. It should be recalled that Article 2315 uses exclusively the term "the right to recover damages" and does not employ the term "action" and that the Code of Civil Procedure uses the word "action" with the intent that it be read to mean "the instituted action"

\textsuperscript{164} 334 So. 2d 692 (La. 1976).


\textsuperscript{166} \textit{Id.} On the question of the proper parties to be substituted, Article 2315 is still pertinent; but on the time limitation within which this must be done, the Code of Civil Procedure applies. Article 2315 speaks of the "right to recover damages" and is not meant to apply to an instituted action with reference to time limitations.


\textsuperscript{168} Marvin v. Toye Bros. Yellow Cab Co., 214 So. 2d 196 (La. App. 4th Cir. 1968) (suit timely filed by victims; they died while suit was pending; attempt by beneficiaries to substitute themselves in pending action nineteen months after the deaths held barred), \textit{overruled} in J. Wilton Jones Co. v. Liberty Mut. Ins. Co., 248 So. 2d 878 (La. App. 4th Cir. 1970), \textit{cert. denied}, 259 La. 61, 249 So. 2d 202 (1971).

\textsuperscript{169} J. Wilton Jones Co. v. Liberty Mut. Ins. Co., 248 So. 2d 878 (La. App. 4th Cir. 1970), \textit{cert. denied}, 259 La. 61, 249 So. 2d 202 (1971). A sharply divided court held that the beneficiaries could substitute themselves more than a year after the death in a pending action for damages to the victim, and that the only pertinent time period was the one provided by \textit{La. CODE CIV. P. art. 561} for abatement of actions.
The action, once instituted, becomes subject to the provisions of the Code of Civil Procedure for its prosecution. That code recognizes that the question of the proper parties to be substituted in a survival action is to be resolved in Article 2315, but it makes no exception from its rules on time limitations for substitution for actions under Article 2315. Accordingly, none should be made.

(6) If the victim has timely instituted a suit for his own injury and dies as a result of the defendant’s conduct, it should be held that the beneficiaries have one year from the death to assert a claim for wrongful death.

This question is much closer and, for the moment, apparently open. On the one hand, it can be said that the wrongful death claim is not an instituted action, since the action only accrues upon the victim’s death and could not have been asserted in the pending suit brought by him. If the wrongful death claim has not been instituted, the one-year-from-death limitation should be applicable. The fact that the same persons who may bring the survival action are entitled to bring a wrongful death action, and the fact that the two claims might eventually be consolidated for trial, does not, as seen earlier, make them the same claim nor does it make them subject to the same rules. The action to recover damages to the victim is pending and subject to abatement rules; the action to recover damages to the beneficiaries is not yet instituted and is subject to the rules of Article 2315.

170. LA. CODE CIV. P. art. 421, comment (a).
171. LA. CODE CIV. P. art. 426: "An action to enforce an obligation is the property of the obligee which on his death is transmitted with his estate to his heirs, universal legatees, or legatees under a universal title, except as otherwise provided by law. . . ." (Emphasis added). Id. art. 801:

"When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.

"As used in Articles 801 through 804, ‘legal successor’ means:

(1) The survivors designated in Article 2315 of the Civil Code, if the action survives in their favor; . . . ."

172. The victim is injured May 1, 1974 and timely files suit for his injuries. He dies July 1, 1974. The beneficiaries have only until July 1, 1975 to assert a claim for the damages which they have suffered as a result of the death.

173. J. Wilton Jones Co. v. Liberty Mut. Ins. Co., 248 So. 2d 878 (La. App. 4th Cir. 1970), cert. denied, 259 La. 61, 249 So. 2d 202 (1971), is only authority for survival actions. A wrongful death claim was withdrawn. 248 So. 2d at 880.

174. LA. CODE CIV. P. arts. 461-65, 1561.

175. See discussion at note 55, supra.

176. It could perhaps also be asserted that the beneficiary should not be able to do by substitution something he could not do by separate suit (assert a wrongful death claim more than a year after the victim's death).
On the other hand, it could be argued that no prejudice will be suffered by the defendant in permitting substitution or a separate suit more than one year after the death. He already has notice of the pending suit for damages to the victim; he is familiar with the issues; he has had time to engage in discovery and perpetuate testimony if necessary; he is unlikely to be surprised by the wrongful death claim.

On balance, it is submitted that the importance of maintaining the distinction between actions not yet instituted on the one hand (and prescriptive periods applicable to them, running from the time they accrue) and those already instituted on the other (and abatement rules applicable to them) recommends the adoption of a one-year period from the death as the applicable period to assert a wrongful death claim in this situation.

In situations (4), (5), and (6), should a beneficiary die during the running of a time limitation, the same time limitation period would apply to the heirs who succeed to his rights. There should be neither an extension nor a shortening of any time limitation because of the death of a beneficiary.

Up to this point, a conscious effort has been made to avoid the use of the words prescription or peremption in describing the time period mentioned in Article 2315. The characterization of this time period has caused a considerable amount of discussion and an unnecessary amount of confusion. The problem can probably be traced to the view of the judiciary that, after Hubgh had denied the existence of a cause of action for the death of a human being and La. Act 71 of 1884 had established such a cause of action, the statute permitting the action had to be strictly construed, as if in derogation of the common law. Following that view, it was an easy conclusion to say that when a statute (such as the wrongful death provision) created a cause of action unknown to the common law, and fixed a time within which the action should be brought, bringing the action within the time period was a condition precedent. Such a time period at common law could not properly be deemed a matter of a statute of limitations, since an

177. It is possible that the harshness of this one-year period might be mitigated somewhat by treating the wrongful death claim in the same manner as amendments to the pleadings relating back to the filing of the original pending action. See La. Code Civ. P. art. 1153 and Fed. R. Civ. P. 15(c). If this approach were adopted, there would be less clarity in the time limitation, but perhaps more mercy. See Davis v. Consolidated Underwriters, 14 So. 2d 494 (La. App. 2d Cir. 1943).

178. La. Civ. Code art. 2008: "Heritable obligations and stipulations give to and impose upon heirs, assigns, and other representatives, the same duties and rights that the original parties had were liable to . . . ."

179. See text and material cited at notes 27 & 28, supra.

objection that the time period had elapsed effectively destroyed or perempted the action itself, rather than merely barring its continuance.  

Thus both the common law and Louisiana law have recognized certain "peremptive" periods, which are said to admit of neither suspension nor interruption. That these periods can be neither suspended nor interrupted is really beside the point; one either brings the cause of action granted, within the time period granted, or loses it completely. A period that admits of suspension or interruption cannot properly be called a peremptive period.

The earliest cases in Louisiana dealing with "peremptive" periods dealt with security of interests in property, and this accorded with the practice at common law. The case usually cited for a discussion of the difference was not a survival or wrongful death case at all, but was an action to void a special tax levy to support the construction of a railroad.  

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181. Cooper v. Lyons, 77 Tenn. 596 (Tenn. 1882).
182. See Daggett, The Chattel Mortgage in Louisiana, 13 Tul. L. Rev. 19, 39 n.97 (1938). Whatever the period for survival and wrongful death actions may be, it apparently can be extended by specific legislative act. See Cox v. Louisiana Dep't of Highways, 11 So. 2d 409 (La. App. 2d Cir. 1942). The decedent was killed February 5, 1940; a legislative act authorizing suit against the Department of Highways became effective August 1, 1940, but did not specify a time limit for bringing the action; the suit for wrongful death was brought May 6, 1941, more than a year from the death. It was held that the special act had extended the time for bringing the suit beyond that which would have been fixed by LA. Civ. CODE art. 2315.
183. Hyde v. Bennett, 2 La. Ann. 799 (1847) (re-inscription of mortgage must take place within 10 years and institution of suit during that period does not interrupt "the peremption of the inscription"); McElrath v. Dupuy, 2 La. Ann. 520 (1847) (same, registry of judgment does not interrupt the ten-year period). For some later cases on the same issue of security of property and peremptive periods, see Collier v. Marks, 220 La. 521, 57 So. 2d 43 (1952) and Jackson v. Hanna, 206 So. 2d 779 (La. App. 2d Cir. 1968). For other non-wrongful death peremptions, see Brister v. Wray Dickinson Co., 183 La. 562, 164 So. 415 (1935) (workmen's compensation); and Gilmore v. State, 79 So. 2d 192 (La. App. 1st Cir. 1955) (workmen's compensation statutes), which contains dicta to the effect that the time period under Article 2315 might be a peremptive one rather than prescriptive.
184. "The statute is a positive prescription, which not only affects the remedy, but extinguishes the right. It protects the estate of the decedent against all creditors of the decedent, whether the estate be in the hands of the personal representative, the heir or the distributees . . . . . . . . . it is something more than a statute of limitations, it constitutes a rule of property: . . . . Such a statute, all of our authorities agree, need not be pleaded. The question is not one of remedy but of title: . . . ." Cooper v. Lyons, 77 Tenn. 596 (Tenn. 1882).
cases cited by the Louisiana court in its discussion of the issue were a North Carolina case and a Tennessee case, neither of which so much as mentions peremption.

It is difficult to ascertain the exact point at which the concept began in Louisiana that the time period in Article 2315 was one of peremption. It may have been in *Matthews v. Kansas City Southern Railway Company*, a case which decided that service of process did not interrupt the time period given in Article 2315, a holding rather quickly overruled by the same court. The cases cited by the *Matthews* court in support of its decision either did not discuss peremption at all or were not wrongful death cases. Nonetheless, it somehow has become an article of faith in the

186. Taylor v. Cranberry Iron and Coal Co., 94 N.C. 525, 526 (1886) (wrongful death claim; "[t]his is not strictly a statute of limitation. It gives a right of action that would not otherwise exist, and the action to enforce it, must be brought within one year after the death of the testator or intestate, else the right of action will be lost").

187. Cooper v. Lyons, 77 Tenn. 596 (Tenn. 1882) (claim against succession administrator).

188. 120 So. 907 (La. App. 2d Cir. 1929). Plaintiff filed her wrongful death action first, timely, in the federal court, which dismissed the suit; defendant was, however, served within the one-year period. She re-filed in state court after the one-year period, and the appellate court eventually held that her first suit had not interrupted the time period, since La. CIV. CODE article 3518 spoke only of interruptions of prescription. The court cited several cases which had nothing to do with Article 2315 and also cited one case which discussed Article 2315 and called the time period a prescription, though non-interruptible. *Goodwin v. Bodcaw Lumber Co.*, 109 La. 1050, 34 So. 74 (1902). Then it simply called the time period "the peremption period of article 2315" without any further authority.

189. Mitchell v. Sklar, 196 So. 392 (La. App. 2d Cir. 1940). Although the *Mitchell* case was one arising under the Workmen's Compensation Act, the court specifically overruled the holding in *Matthews* that peremptive periods were not subject to interruption by service of process. The *Mitchell* court was obviously influenced by the decision in *Brandon v. Kansas City So. Ry. Co.*, 7 F. Supp. 1008 (W.D. La. 1934), in which the court refused to follow *Matthews* and held that a timely suit dismissed for misjoinder of parties interrupted the one-year period for wrongful death actions given by Article 2315. See also Note, 9 TUL. L. REV. 285 (1935).

190. The principal cases relied on by the court seem to have been *Van Amburg v. Vicksburg, Shreveport & Pacific R.R. Co.*, 37 La. Ann. 630 (1885), and related cases which merely stand for the proposition that there was no cause of action in Louisiana for the death of a human being prior to La. Act 71 of 1884; and *Kerner v. Trans-Mississippi Terminal R.R. Co.*, 158 La. 853, 104 So. 740 (1925), which involved the death of a beneficiary who had timely instituted suit for wrongful death; the question was not one of peremption or prescription at all, but of abatement of a pending action.

jurisprudence\(^{192}\) and elsewhere\(^{193}\) that the time period listed in Article 2315 is a peremption rather than a prescription, although there has always been a strong parallel line of jurisprudence calling the time period a prescription.\(^{194}\)

A recent case indicates that if there is a difference, it is one without significance:

The filing of suit by plaintiff against the original defendants interrupted the one year *prescriptive or peremptive period* of Article 2315 as to those now alleged to be solidarily liable.\(^{195}\)

And in any event, that case and others\(^{196}\) have held that whatever the period might be called, it is subject to interruption by suit in a court of competent jurisdiction\(^{197}\) or by service of process.\(^{198}\)

In addition, amendment of *Avoyelles Ry. Co.*, 104 La. 11, 28 So. 899 (1900) (time period to contest special tax levy) and eight decisions from other states, none of which obviously could have had anything to do with *La. Civ. Code* art. 2315.

192. *See* Succession of Roux v. Guidry, 182 So. 2d 109 (La. App. 4th Cir.), *cert. denied*, 248 La. 1106, 184 So. 2d 27 (1966), which cites *Miller v. American Mut. Liab. Ins. Co.*, 42 So. 2d 328 (La. App. 1st Cir. 1949); *Blank v. Chisesi*, 142 So. 2d 45 (La. App. 4th Cir. 1962); *Romero v. Sims*, 68 So. 2d 154 (La. App. 1st Cir. 1953); and *Gabriel v. United Theatres*, 221 La. 219, 59 So. 2d 127 (1952), all of which cite as authority either (a) each other, (b) an article at 13 *Tul. L. Rev.* 19 (1938) which had to do with chattel mortgages in Louisiana, or (c) *Guillory v. Avoyelles Ry. Co.*, 104 La. 11, 28 So. 899 (1900), which, it will be recalled, is a suit involving the time period during which a special tax levy might be contested.

193. See, e.g., *Vernon v. Illinois Cent. R. Co.*, 154 La. 370, 97 So. 493 (1923); *Smith v. Monroe Grocery Co.*, 171 So. 167 (La. App. 2d Cir. 1936); and *Myers v. Gulf Pub. Serv. Comm'n*, 132 So. 416 (La. App. 2d Cir. 1931), all of which obviously view the period as one of prescription, and discuss it as such.


pleadings after the supposed peremption is permitted and whatever the time limitation is, it seems it must be pleaded and cannot be noticed by the court on its own motion. The Code of Civil Procedure also appears to view a peremptive period as being capable of interruption.

The point of all this is to state (1) there is confusion about whether the time period given in Article 2315 refers to both survival actions and wrongful death actions; (2) that the foundation of the supposed rule that on exception of misjoinder of parties; second suit filed more than one year after death held not barred by time limitation of Article 2315). The court seemed to be of the view that the time period for a wrongful death action was the one-year period of L.A. CIV. CODE art. 3536, but did not reach a firm conclusion on the point. See also Thompson v. Gallien, 127 F.2d 664 (5th Cir. 1942) (wrongful death); Harris v. Traders & Gen. Ins. Co., 200 La. 445, 8 So. 2d 289 (1942) (workmen’s compensation); Mitchell v. Sklar, 196 So. 392 (La. App. 2d Cir. 1940). In Wick v. Sellers, 309 So. 2d 909 (La. App. 3d Cir. 1975), it was held that the filing of a wrongful death action as to certain defendants interrupted the period of “prescription or peremption” as to those now claimed to be solidarily liable with the original defendants.


200. See Davies v. Consolidated Underwriters, 14 So. 2d 4994, 498 (La. App. 2d Cir. 1943). It seems inherent in the nature of the true peremptive period that the “destruction” of the cause of action occurs at the end of the period, rather than there being a mere bar to its assertion. Thus it is often said that the period not only affects the remedy but extinguishes the right. See note 184, supra. This notion is akin to the peremptory exception found in L.A. CODE CIV. P. arts. 927 and 928, which may be “pleaded at any stage of the proceedings in the trial court prior to a submission of the case for a decision.” To the contrary, it is well established that a plea of prescription must be specially pleaded and cannot be raised by the court. L.A. CODE CIV. P. art. 927; L.A. CIV. CODE art. 3463. See also the comment by Judge Tate in Gilmore v. State, 79 So. 2d 192 (La. App. 1st Cir. 1955), discussing the difference between peremptive periods and prescriptive periods in a workmen’s compensation context, to the effect that “the plea [of peremption] is not waived if not specially pleaded, as is the case with the ordinary plea of prescription.” This distinction has never been made with the time period under L.A. CIV. CODE art. 2315.

201. L.A. CODE CIV. P. art. 1067: “An incidental demand is not barred by prescription or peremption if it was not barred at the time the main demand was filed and is filed within ninety days of date of service of main demand or in the case of a third party defendant within ninety days from service of process of the third party demand.” It would seem that if the time period at issue were truly one of peremption, it would not merely “bar” the cause of action; it would “extinguish” it, leaving nothing to be extended for this ninety-day period.

202. See text and material cited at notes 138-40, supra.
the time period in Article 2315 is a peremptive period is shaky at best; (3) that jurisprudential treatment of the period, whatever it is called, differs not at all from the treatment of a prescriptive period; and (4) that jurisprudential decision or legislation should eliminate the difference and the confusion at the earliest possible moment.

DEFENSES

Apart from defenses based upon untimely suit, a number of other defenses might be available to a defendant sued under Article 2315. As to both the action for damages to the victim and the wrongful death action, the defendant may raise in an appropriate case contributory negligence, assumption of the risk, compromise and release, prior adjudication, abatement or statutory exclusion.

Contributory Negligence

It will be recalled that Lord Campbell’s Act created a cause of action for the death of a human being in those cases in which the deceased himself might have recovered damages if he had lived. From that provision, the principle evolved that the contributing negligence of the decedent might either diminish the wrongful death recovery or, in some jurisdictions, defeat it completely. Louisiana, of course, is in the latter category.

Thus it has long been held here that the contributory negligence of the deceased bars recovery by the beneficiaries for his death. The first such case apparently arose shortly after the wrongful death action had been authorized in 1884, and the court seemed to entertain no doubt at all about the proposition. Other cases followed, but the one most often cited is Vitale v. Checker Cab Company. A husband died as a result of injuries he

203. See text and material cited at notes 266-73, infra.
204. For a discussion of time limitation problems, see text at notes 136-203, supra.
205. See Voss, supra, note 4 at 205 n.8.
207. Nolan v. Illinois Cent. Ry. Co., 5 La. 484, 82 So. 590 (1919), and authorities cited therein; Nelson v. Texas & Pac. Ry. Co., 140 La. 676, 73 So. 769 (1917); Castile v. O’Keefe, 138 La. 480, 70 So. 481 (1916); Harrison v. Louisiana W. Ry. Co., 132 La. 761, 61 So. 782 (1913); Barnhill v. Texas & Pac. Ry. Co., 109 La. 44, 33 So. 63 (1902). One has to wonder whether the frequency and strength of this rule might have something to do with (a) the economic importance of the railroads; (b) the almost certain death which occurred when pedestrian met train; and (c) the difficulty courts had in believing that the decedent did not hear the train coming in time to react.
208. 166 La. 527, 117 So. 579 (1928).
received in an accident caused by his own negligence and that of defendant's employee. The wife, a passenger in the husband's vehicle, sought recovery for injuries she suffered in the accident as well as damages for the wrongful death of her husband. The court took for granted that a survival action by the widow, had it been brought, would have been barred by the husband's negligence. It also concluded that the negligence of the husband could not properly be imputed to the wife to bar her recovery for her own personal injuries received in the accident.

However, the court found the rule to be different with respect to the wife's action for the wrongful death of her husband; his negligence barred her recovery. Though the court worried about this apparently inconsistent result, it found the rule "too well settled to depart therefrom" and held that the wife's action for wrongful death damages was barred.209

Thereafter there was no dissent from the position and little discussion,210 until Callais v. Allstate Insurance Company.211 It will be recalled that in Callais both a husband and wife were killed through the sole negligence of the husband. A claim brought against the husband's liability insurer on behalf of their infant daughter for the damages which she suffered as a result of the husband's death was held by both lower courts to be barred by the husband's negligence.212 On original hearing, the supreme court concluded that Vitale should be overruled and that the negligence of the victim should not bar recovery by a beneficiary for the damages which the beneficiary suffers as a result of the death.213

209. Id. at 533-35, 117 So. at 582. It was claimed in the original opinion in Callais v. Allstate Ins. Co., 334 So. 2d 692 (La. 1976), that the holding in Vitale was based "entirely on a theory of imputed contributory negligence, long disavowed by the jurisprudence of this state." It seems more proper to say that the Vitale court, whatever the original reason for the rule, found it too well entrenched to be overruled. The earlier cases on which the Vitale court relied did not discuss imputed contributory negligence.


211. 334 So. 2d 692 (La. 1976).

212. Callais v. Allstate Ins. Co., 308 So. 2d 342 (La. App. 1st Cir. 1975). The appellate court, however, affirmed the award of $30,000 on behalf of the child for the wrongful death of the mother, and that award apparently became final.

213. 334 So. 2d at 692. This result would have left Louisiana in the decided minority, if not alone, in the country and the world on this issue. See S. Speiser, Recovery for Wrongful Death 2d 49-77 (1975) and 9 International Encyclopedia of Comparative Law, Chapter 9, Torts: Personal Injury and Death, 9-221 (1971). The court's conclusion was probably based in part on its feeling that the victim's action and the wrongful death action were separate causes of action. The court may also have been impressed with the argument raised by plaintiff's original brief to the effect that if the surviving child had been in the vehicle and
On rehearing, the court reversed itself and held that the beneficiary’s suit should be barred by the contributory negligence of the victim.\textsuperscript{214} Thus, in sum, nothing really changed from the established jurisprudence. However, the court’s struggle with the problem provokes some comments.

It is correct to see the action to recover damages to the victim (which survives to the beneficiaries) and the action to recover damages suffered by the beneficiaries as two separate actions. It is fashionable to condemn "imputed contributory negligence" and argue that the negligence of the victim can have nothing to do with the action by the beneficiaries for the damages which they suffered by his death. However, the fact that the two actions are separate does not compel the conclusion that the negligence of the victim does not bar the action for wrongful death.

Very often, the conclusion by the court that an individual has contributed to his own injury and should not recover therefor is simply another way of saying that the defendant’s duty does not extend to risks which are created in part by careless conduct on the part of the individual.\textsuperscript{215} And if the defendant’s duty does not extend to risks which are so created, then of course the defendant simply is not to be held liable for the plaintiff’s harm. There are various ways of stating his conclusion of non-liability. It could be said simply that the defendant is not negligent; or that the risk produced by a combination of the defendant’s careless conduct and the plaintiff’s careless conduct is beyond the scope of the duty which the law imposes upon him;\textsuperscript{216} or that the plaintiff is contributorily negligent and may not recover. All of these rubrics arrive in exactly the same place: no recovery for the plaintiff, no liability for the defendant.

The rule that the negligence of the victim bars the recovery of the beneficiaries in a wrongful death action may be no more than an expression of policy on the part of our courts that the duty of the defendant does not physically injured by the father’s negligence, there would have been no bar to her recovery. If that is true, plaintiff argued, why should there be no recovery for emotional and pecuniary damage suffered by the child as a result of the father’s negligence? Brief for Plaintiff-Appellant at 22, Callais v. Allstate Ins. Co., No. 56, 120. Unfortunately, no acceptance or even recognition of that argument is reflected in the original opinion.

\textsuperscript{214} 334 So. 2d at 669.

\textsuperscript{215} The writer’s understanding of this concept has been helped immeasurably by numerous conversations with Boyd Professor of Law Emeritus Wex S. Malone, whose assistance is gratefully acknowledged. For an early discussion of this concept in a different context, see Malone, \textit{Contributory Negligence and the Landowner Cases}, 29 MINN. L. REV. 61, 68-69 (1945).

reach so far. The risk that the beneficiaries will be harmed by the conduct of the defendant which produces the death of the victim without any carelessness on the victim's part is included within the duty of the defendant. But the risk that the beneficiaries will be harmed by the conduct of the defendant which combines with the conduct of the victim to produce the victim's death is simply beyond the standard which we choose to apply to the defendant.\footnote{217}{A reading of the old railroad cases collected at note 207, \textit{supra}, will reveal precisely this kind of reasoning.}

If this is in fact the feeling of the courts, it is of course much simpler (and shorter) to say “the negligence of the victim bars the wrongful death action of the beneficiaries.” This statement, however, makes the listener wonder whether there has been some devilish imputation of negligence from the victim to the beneficiaries, and well it might.

But if the question is viewed in terms of how far we wish the defendant's duty to extend in such a case, we can eliminate the spectre of imputed negligence and reach a conclusion on more honest grounds. There is some recognition of all of this in the \textit{Callais} opinion. Of course, in that case, the tortfeasor and the victim are one and the same; the defendant is not an actor but a liability insurer sued under the Direct Action Statute.\footnote{218}{\textit{LA. R.S.} 22:655 (Supp. 1962).}

Nonetheless, the court analyzes the question in terms of the actor's duty:

The duty to drive one's automobile with due care is designed to protect other persons and property on or near the highway . . . . A driver's child at home does not fall within the class of persons protected by his duty as an automobile operator. A parent, likewise, has no general duty to protect a child against the risk of the parent's own death. Hence, as to the daughter, there was no negligence or fault . . . . Since the death was not wrongful within the meaning of Article 2315, it provides no basis for liability.\footnote{219}{334 So. 2d at 701.}

The court's conclusion is that the insurer must respond for the death of one victim (the mother): this is a risk produced wholly by the insured's conduct, and no part at all was played by the victim. The court's further conclusion is that the insurer need not respond for the death of another victim (the father): this is a risk produced, in \textit{Callais}, wholly by the conduct of the victim, who happens to be the insured.

This does not mean that the negligence of the victim should no longer be considered as an issue in determining whether the beneficiaries should recover for wrongful death. It simply means that reducing the issue to a question of whether there is one cause of action or two causes of action or
whether there is an imputation of negligence does nothing to advance the discussion. The real issue to be resolved is whether the rule which requires the defendant to avoid a wrongful killing of the victim includes a killing which is produced in part by the defendant’s conduct and in part by the victim’s conduct. If it does not, then the conclusion will be no liability, and we can expect that the court will express that as often as not by saying simply that the contributory negligence of the victim bars recovery by the beneficiaries.

As for the contributory negligence of a beneficiary, it has been held, probably for a different reason, that the contributory negligence of a beneficiary bars his recovery for the wrongful death of the deceased. However, because the wrongful death recovery is individual for each beneficiary, the contributory negligence of one of multiple beneficiaries will not bar the recovery of the others, nor should it diminish it. Where, however, there is only one beneficiary, and his recovery is barred by his own contributory negligence, it has been held that the class is not empty; and therefore no beneficiary in a succeeding class may sue.

220. It would appear that the reason must be the oft-repeated principle that no person should benefit by his own wrongdoing, rather than some heritage from Lord Campbell’s Act or similar legislation. See Dumas v. United States Fidelity & Guar. Co., 241 La. 1096, 1107-09, 134 So. 2d 45, 49 (1961). Lord Campbell’s Act authorized recovery in those instances in which the defendant’s act “is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, . . . .” Voss, supra, note 4, at 205 n.8. The deceased, if he survived and were not contributorily negligent himself, could certainly recover damages from a negligent defendant despite any negligence on the part of a possible beneficiary.

221. Wise v. Eubanks, 159 So. 161 (La. App. 2d Cir. 1935). Many of the cases in which this rule is announced concern the death of young children, as to which a claim is made that the parents were contributorily negligent in their supervision; and most hold that contributory negligence has not been established.

222. The opinion in Granier v. Aetna Ins. Co., 209 So. 2d 132 (La. App. 4th Cir. 1962), inherently concludes that the negligence of one beneficiary does not bar the others by permitting a wife to sue her husband’s insurer and recover for their son’s wrongful death, even though the husband, also a member of the class, was barred by his own negligence in causing the son’s death.

223. This was the holding in the unusual case of Gonzales v. Succession of Medica, 141 So. 2d 887 (La. App. 2d Cir. 1962). It was alleged that John Medica killed his wife and then committed suicide. Her sister brought an action for wrongful death against Medica’s succession, alleging that the wife died survived only by her spouse, who was “disqualified” from recovery by his own negligence. The court, citing Dumas v. United States Fidelity & Guar. Co., 241 La. 1096, 134 So. 2d 45 (1961), reached the conclusion that “Article 2315 does not validate transmission of the cause of action to the next named beneficiary upon the pretext of disqualification of the prime beneficiary.” 141 So. 2d at 889.
As to the survival action, one understandably finds that the victim’s contributory negligence bars any further action by the designated beneficiaries. Since the victim’s recovery while alive was barred, there is no reason to remove the bar at his death and permit the beneficiaries to recover in his stead. However, one also finds, with somewhat less logical support, that the contributory negligence of a beneficiary will bar his recovery for the victim’s damages. This situation would arise, for example, when two spouses are riding together in an automobile, and one is injured as a result of the negligence of the other. If the injured spouse should die of unrelated injuries, it has been held that the negligent spouse cannot properly substitute as a party plaintiff and recover those damages which the injured spouse would have recovered had he lived. The reasons given for such decisions have been either that no one (negligent spouse) should profit by his own wrongdoing, or that the obligation to repair the damage caused by the tort becomes extinguished by confusion when the tortfeasor spouse substitutes for the injured spouse.

A recent supreme court decision, however, raises some doubt about this jurisprudential rule. In Austrum v. City of Baton Rouge, injuries to a wife occurred through the joint negligence of her husband and another driver. The wife died prior to the trial, and her husband and seven children were substituted in her pending action. The supreme court finally held that the husband was negligent in the premises, but affirmed the appellate court’s division of the award which would have been the wife’s into eight equal parts—one each for the husband and seven children. The clear result is that a negligent “beneficiary” of the survival action is nonetheless permitted to have judgment for a share of the survival fund. No mention was made of the earlier decisions, and in fact, there is no indication that the court was even aware of the problem.

Assumption of the Risk

Assumption of the risk apparently plays much the same role as a defense in survival and wrongful death actions as contributory negli-


gence. Perhaps even more than in a case of contributory negligence, the
defense of assumption of the risk may be viewed as a matter of the
defendant's duty. If the plaintiff has assumed a certain risk by his conduct,
this ordinarily means that he has removed that particular risk from the group
against which the law requires the defendant to protect the plaintiff. In
the context of wrongful death and survival, this means that the defendant will
not be forced to compensate the beneficiaries, either in a survival action or
in a wrongful death action, for a risk which the victim has voluntarily and
knowingly removed from those otherwise within the defendant's duty.

Other defenses, such as self-defense, have also been recognized in
survival and wrongful death cases.

Compromise and Release

It was rather early recognized that the victim's compromise of his
action and release of the defendant does not bar a wrongful death action by
the beneficiaries against the same defendant on the same issues.

Of course, the victim's compromise and release of his own claim
should bar any survival action by the beneficiaries. In all cases, the
instrument claimed to be a compromise and release must be clearly intended
to be so, and understood as such by all parties.

228. Little v. United States, 290 F. Supp. 581 (E.D. La. 1968); Chabert v.
Lumbermen's Mut. Cas. Co., 196 So. 2d 316 (La. App. 1st Cir. 1966). See also Byrd
(5th Cir. 1958) (conduct of driver was called contributory negligence but might just
as well have been termed assumption of the risk).

229. PROSSER at 439-57.

230. See, e.g., Wade v. Gennaro, 8 So. 2d 561 (La. App. Orl. Cir. 1942) (self-
defense).

231. Johnson v. Sundbery, 150 So. 299 (La. App. 1st Cir. 1933). It might be
inquired how this disposition squared with the supposed rule of Reed v. Warren, 172
La. 1082, 136 So. 59 (1931), that there was only one cause of action in such
circumstances. How could it be settled and not settled at the same time? Cf. Mellon
v. Goodyear, 277 U.S. 335 (1928) (opposite result, under Federal Employers'
Liability Act). Results on the issue in other states appear mixed. For an interesting
case in which both the FELA position and the Louisiana position were considered,

232. This is implicit in the decision in Wenholz v. New Amsterdam Cas. Co., 181
So. 222 (La. App. Orl. Cir. 1938). A mother, although not having qualified as tutrix
of the minor, received payment for injuries sustained by her son and executed a full
release. Upon his death from causes unrelated to the accident, she brought a
survival action but it was held barred by her prior release of the claim.

other cases involving compromise and release of wrongful death claims, see
Schiffman v. Service Truck Lines, Inc., 308 So. 2d 824 (La. App. 4th Cir. 1975)
(holding that release of a wrongful death claim by a beneficiary prior to the death of
Prior Adjudication

This defense may be more ephemeral than real. Certainly if the victim brings a suit and recovers an award for his injuries and then dies, the beneficiaries' survival action is merged into the prior judgment.234 The same is no doubt true of an instance in which the victim brings an action for his damages but loses, and then dies. Since the beneficiaries are merely procedural representatives to assert a claim which the victim would have asserted if he were alive, they cannot assert a claim which the victim has already litigated and lost.

The same result does not appear to obtain when a wrongful death action by the beneficiaries is at issue. In a very early case,235 the Supreme Court of Louisiana held that the prior successful judgment in a survival action did not preclude a subsequent wrongful death action, and the issue does not appear to have been re-examined in any subsequent case.236 In that case, the victim brought suit for his own injuries but died shortly after the judgment became final. The amount of judgment was paid to his executor who applied it to succession debts and distributed the balance to the heirs. After his death, the beneficiaries brought a wrongful death action, to which the defendant interposed the objection that the prior judgment precluded such an action.

The court concluded that Article 2315 envisioned two different actions, and that the elements of damages awarded in the action brought by the victim could in no wise be considered the same damages to be awarded in the wrongful death action. Accordingly, there was no reason to preclude the death action because of the judgment in the action brought by the victim.237

235. Id.
236. Mention should be made, however, of Norton v. Crescent City Ice Mfg. Co., 178 La. 150, 150 So. 859 (1933), a companion case to the more famous decision of the same name concerning the one-cause-of-action theory. In the second Norton decision, the wrongful death claim brought by the children of the decedent was dismissed on defendant's "plea in bar or res judicata." The supreme court affirmed that holding, but its reasoning is wholly based on the foundation that there is only one cause of action. Since the children refused to assert their claims in the survival action, the court held that they were barred by the judgment in that suit from asserting any further claims. This decision does not appear to be of great assistance if one agrees that there are actually two separate causes of action when the conduct of the defendant produces the death of the victim.
237. See Sealand Services v. Gaudet, 414 U.S. 573 (1974), which reaches the
No Louisiana case appears to have dealt with the related issue of whether a victim's unsuccessful suit for his own injuries precludes a wrongful death action against the same defendant by the beneficiaries. On the one hand, it could be said that since we do not automatically award judgment to the beneficiaries in a wrongful death action because the victim was successful in his own action, neither should we defeat the beneficiaries' claim merely because the victim lost his own action. There are, in fact, two separate causes of action with different parties and different claims of damage. It is in essence not much different from a bus accident in which two different passengers are injured through the negligence of the driver of the bus. Passenger A has suffered injury to his leg but is unable to establish negligence against the defendant and judgment is rendered for the defendant. Passenger B has suffered injury to his arm and is met in his suit with the objection that the suit of A v. Bus Company has already determined the issue of defendant's negligence contrary to B's claim. The objection, of course, has no merit. B is a separate party with a different injury and cannot be denied the opportunity to litigate that claim.

In a wrongful death context, two different persons have been injured through the defendant's conduct. The victim has suffered injuries to his person and may have litigated that claim and lost. The beneficiary has suffered injury through the death to his relationship with the deceased person, and should be entitled to litigate that claim. 238

Admittedly, the matter is not free of doubt. It might be argued on the other side that the only pertinent issues have been resolved in an unsuccessful action by the victim: was the conduct of the defendant wrongful, and did it produce injury to the victim? If it is adjudged that it was not wrongful, or that it did not produce injury to the victim, should the judicial system be twice vexed with what is essentially the same claim (wrongful conduct producing death rather than injury) by different parties? 239

same result with regard to an unseaworthiness claim brought by the victim which resulted in a jury verdict in his favor. Upon his death, a wrongful death action was brought by his beneficiaries, and it was held that a cause of action for wrongful death was stated despite the successful prior adjudication.

238. There may be constitutional problems as well if the beneficiaries are denied the opportunity to litigate their claim on the ground that the victim has already litigated his own claim. See La. Const. art. 1, § 2: "No person shall be deprived of life, liberty or property, except by due process of law." Id. § 22: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."

239. It does not appear that the Louisiana concept of res judicata can be of much help in this regard. La. Civ. Code art. 2286: "The authority of the thing
The ultimate resolution of this issue is likely to be determined by whether the supreme court finally decides to settle claims of prior adjudication only by reference to the narrow rules of res judicata found in the Civil Code, or whether it opts for principles of collateral estoppel or other preclusion techniques. A full discussion of this controversy is well beyond the scope of this article, but there appears to be some support for either side. If it should be determined that it would be better to permit the beneficiaries to litigate the wrongful death claim despite an unsuccessful action by the victim, one can simply say that the matter is not res judicata under Article 2286 of the Civil Code, and there is no other legislation posing an obstacle to the wrongful death claim.

If it should be determined that it is better to preclude the second action, cases appearing to adopt collateral estoppel in Louisiana will lend support to the decision. The argument for refusing relitigation would be that when the ultimate question of importance—the negligence of the defendant—has been actually litigated and determined by the first judgment, parties in the first action and those who stand in privity with them are precluded from litigating that issue again. There is obviously room for difference of opinion about whether the beneficiaries stand in privity with the victim, but

adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality. This article, strictly construed by the jurisprudence, would not be satisfied by the subsequent wrongful death action, in which the thing demanded is not the same; the demand is not on the same cause of action; and the parties are not the same. For an interesting case in which the court struggled with this question in another context, see Wooten v. Wimberly, 272 So. 2d 303 (La. 1973) and The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations, 34 LA. L. REV. 231 (1974).


See Bordelon v. Landry, 278 So. 2d 173 (La. App. 4th Cir. 1973), which rejects application of collateral estoppel in Louisiana. See also Sliman v. McBee, 311 So. 2d 248 (La. 1975), which casts some doubt on its applicability. It was also said by Mr. Justice Tate doctrinally that judicial estoppel "may or may not apply in Louisiana." The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Civil Procedure, 29 LA. L. REV. 269, 279 (1969).

Fulmer v. Fulmer, 301 So. 2d 622 (La. 1974); California Co. v. Price, 234 LA. 338, 99 So. 2d 743 (1957).

See RESTATEMENT OF JUDGMENTS; §§ 68 & 83 (1942).
there is sufficient plausibility to that notion to support a preclusion of further litigation if the court desires to choose that solution.

Even though there are two separate causes of action, the goal of judicial economy would ordinarily be better served by precluding, by some technique, re-litigation of an issue fairly and finally determined in the action by the victim. But it may be that the law, in granting two separate remedies and announcing no positive bar to the wrongful death action, may simply have to suffer whatever judicial inefficiency results from permitting litigation of both causes of action.

**Abatement**

This defense could only properly be raised when the victim has filed an action prior to his death. Abatement simply does not apply to a right to recover damages before filing. If the victim dies survived by a beneficiary or beneficiaries under Article 2315, the action can certainly be brought by them. If the victim dies without leaving a beneficiary under Article 2315, it seems settled that his right to recover damages does not survive, nor is there a wrongful death action.

A slightly different picture may be presented when the victim has commenced an action but dies before it is completed. A recent federal decision indicates the problems. The original plaintiff had filed an action seeking damages for deprivation of certain civil rights guaranteed by federal statutes. He died before the action was completed, but left no beneficiaries under Article 2315. His executor moved to be substituted as party plaintiff, but the defendant contended that the action had abated.

The court felt that under state law, the action would abate, since Article 2315 governed the question of which persons would be permitted to substitute as parties plaintiff in a pending action. Finding this inconsistent with the federal constitution and statutes, however, the court approved the substitution of the executor.

245. Absent an amendment to LA. CIV. CODE art. 2286, it appears that res judicata cannot be that technique.


249. See Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), which may have mandated reference to state law in this instance.

The federal court is probably right about abatement under Louisiana law. Article 428 of the Code of Civil Procedure does provide that an action does not abate on the death of a party, and excepts from that rule only actions to enforce an obligation which is "strictly personal,"251 a characterization which does not appear to fit the victim's action under Article 2315.252 But Article 428 must be read in conjunction with Article 426, which provides that an action "to enforce an obligation is the property of the obligee which on his death is transmitted with his estate to his heirs, universal legatees, or legatees under a universal title, except as otherwise provided by law."253 It appears that this exception is in part254 aimed at excluding from the rule of succession by the heirs the claim for the victim's own personal injuries which is governed by Article 2315.255

This interpretation is consistent with the position taken earlier that while the Code of Civil Procedure establishes rules for the substitution of parties in a pending action, it does not purport to determine, at least for claims arising under Article 2315, who those parties may be.256

Statutory Exclusion

In certain instances, it is possible that another statute might exclude what would otherwise be a valid wrongful death claim. In *Atchison v. May*,257 for example, the employment-related death of an employee provoked a wrongful death action against the employer by the employee's brother and sister. It was alleged that he died without surviving spouse, child or parents, and that the brother and sister were the proper beneficiaries

251. *La. Code Civ. P.* art. 428: "An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal."

252. *La. Civ. Code* art. 2315 clearly provides that the victim's right to recover damages to his property is heritable rather than strictly personal, and that the beneficiary's right to recover damages is heritable rather than strictly personal. It would be passing strange to characterize the victim's right to recover damages for personal injuries as strictly personal in the absence of a specific provision to that effect.

253. Emphasis added.

254. See *La. Code Civ. P.* art. 426, comment (b), which states that the reason for the phrase is to except the strictly personal obligation of *La. Civ. Code* art. 1997, and other obligations which, under the provisions of positive law, only the original obligee might have the right to enforce.

255. See *La. Code Civ. P.* art. 428, comment (b).

256. See text and material cited at note 171, *supra*.

under Article 2315. It was further alleged that since they were not economically dependent upon the deceased, the Louisiana compensation scheme provided no remedy to them for his death. Thus, the exclusive nature of the compensation remedy was no obstacle to their wrongful death action; they had not benefited from the remedy at all.

The court distinguished a group of cases in which the compensation law did not provide coverage for the particular injury which occurred, saying that in Atchison, the injury and the death were covered by the statute. The "mere fact" that the deceased left no dependents who could actually recover for the covered injury was not sufficient to vest those persons with an action under Article 2315 for wrongful death.

The same result was reached some years later in Hawkins v. Employers Casualty Company. In that case, the injured employee died more than two years after a work-related injury. His wife, on her own behalf and on behalf of her children, sought damages for his wrongful death under Article 2315 and in the alternative for death benefits under the compensation statute. Citing a provision of the compensation statute, the court held that there could be no recovery of death benefits under the compensation act if the death occurred more than two years after the injury. Additionally, the court rejected the wrongful death claim on the theory that the widow's exclusive remedy had been in workmen's compensation. The fact that the statute did not actually grant a recovery for the injury made no difference.

260. Boyer v. Crescent Paper Box Factory, 143 La. 368, 78 So. 596 (1918); Clark v. Southern Kraft Corp., 200 So. 489 (La. App. 2d Cir. 1940); Faulkner v. Miller-Fuller Inc., 154 So. 507 (La. App. 2d Cir. 1934). An interesting argument that a wrongful death action should be permitted if no recovery is actually afforded by the compensation statute may be framed on the basis of the Boyer decision. The unfortunate Ms. Boyer was scalped by a piece of equipment on the employer's premises and was disfigured though not disabled. Arguing that the compensation statute had no application to non-disabling injuries, Ms. Boyer won a tort recovery against her employer. The legislature, possibly in response to her injury, attempted to cover such injuries in a paragraph which is now LA. R.S. 23:1221(4)(p). The Clark and Faulkner cases were occupational disease cases, and such cases have also now been brought under the act. Thus in all three cases, some remedy for the work-related injury would be available, although it is now in compensation rather than in tort as it was when the cases were brought. Might it be argued that the legislature's failure to provide any remedy at all in the workmen's compensation statute for situations such as Atchison is a tacit indication that it wished such matters to be resolved in tort?
261. 177 So. 2d 613 (La. App. 3d Cir.), cert. denied, 248 La. 429, 179 So. 2d 272 (1965).
Though this defense is well established\textsuperscript{263} and is shared by other jurisdictions,\textsuperscript{264} there are a few contrary holdings.\textsuperscript{265}

PROPOSALS FOR LEGISLATION

Some suggestions are made here for legislative improvements in the Louisiana survival and wrongful death scheme. They are not intended to be comprehensive, primarily because the effort is to eliminate some of the problems discussed in this article without making major changes in most of the substantive and procedural law familiar to Louisiana lawyers.

The suggestions may be summarized as follows:

(1) Amend Article 2315 of the Civil Code to delete all the language presently in the article except the first sentence: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

(2) Amend Article 426 of the Code of Civil Procedure to make it applicable to actions for damages to the victim which have been or may be brought under Article 2315 of the Civil Code.

(3) Enact a new statute to provide for recovery of damages suffered by certain named beneficiaries through the wrongful death of the victim.

(1)\textit{Amendment to Article 2315}. The obvious purpose of this amendment is to return the article to its original wording and to remove from it the much-amended provisions on the subject of survival and wrongful death. Only in this way can some of the problems which have arisen in the jurisprudence be eliminated. Making the beneficiaries of the wrongful death action the representatives to assert the survival claim has caused considerable confusion, and the apparent dependency of one claim upon the other has added to the problems. A fresh start would appear to be the only answer.

\textsuperscript{263} Breaux v. Hartford Accident & Indem. Co., 238 So. 2d 274 (La. App. 3d Cir.), \textit{cert. denied}, 256 La. 889, 239 So. 2d 543 (1970) (death more than two years after injury); Rhinehart v. T. Smith & Son, 14 So. 2d 287 (La. App. Orl. Cir. 1943) (death covered by Longshoremen and Harbor Workers’ Compensation Act); Williams v. Blodgett Const. Co., 146 La. 841, 84 So. 115 (1920) (according to the court in \textit{Atchison}, death claim made by siblings who were not dependent).


\textsuperscript{265} King v. Viscoloid Co., 219 Mass. 420, 106 N.E. 988 (1914) (based on wording of Massachusetts statute that only the employee’s common law rights are pre-empted by the statute); Roxana Petroleum Co. v. Cope, 132 Okl. 152, 269 P. 1084 (1928). See A. Larson, \textit{Workmen's Compensation} 12-8 (Desk ed. 1972).
Amendment to Article 426 of the Code of Civil Procedure.

Article 426 now reads as follows:

An action to enforce an obligation is the property of the obligee which on his death is transmitted with his estate to his heirs, universal legatees, or legatees under a universal title, except as otherwise provided by law. An action to enforce an obligation is transmitted to the obligee's legatee under a particular title only when it relates to the property disposed of under the particular title.

These rules apply also to a right to enforce an obligation, when no action thereon was commenced prior to the obligee's death.

It is proposed to add to the article the following paragraph:

These rules apply also to a right to enforce or an action to enforce an obligation arising under Article 2315 of the Civil Code, and any damages recovered thereby shall form part of the estate of the injured party and shall be treated in the same manner as other assets of the estate. The right to enforce an obligation arising under Article 2315 of the Civil Code when no action thereon was commenced prior to the obligee's death, prescribes one year from the death of the deceased.

The intention of the amendment is to make the treatment of a right to recover damages under Article 2315, or a pending action to do so, uniform with the treatment of other such obligations. This would change the law to this extent: the right to recover damages to the tort victim would survive to his legal successors, regardless of whether he had instituted suit thereon and regardless of whether those successors fall within the presently enumerated classes of beneficiaries.

No change is intended in the rule that the survival action in the hands of the legal successors would be subject to the same defenses which would have been applicable to the action in the victim's hands. If it is vulnerable to a plea of prescription, or a defense of contributory negligence, or other defenses, these continue to apply. It is not thought to be necessary to specify this principle in the amendment, but if necessary, appropriate language could be drafted. It would also seem to be clear without specific

266. Thus, for example, if the victim died survived only by a cousin, there would be a survival action but no wrongful death action. Under the present provisions, neither action would be permitted. The administrator of the succession is presently not a proper party to bring the survival action. Whittington v. Hopfensitz, 321 So. 2d 836 (La. App. 1st Cir. 1975). In the great majority of cases, a deceased is survived by those persons listed as beneficiaries under La. CIV. CODE art. 2315, and they are also his heirs.
language that the damages recoverable could only be those which the victim suffered prior to his death, and no damages suffered by anyone as a result of his death would be included. The article by its terms only applies to rights or actions belonging to a party now deceased, phraseology which does not include actions for the wrongful death of the decedent by beneficiaries or their heirs.

An action brought or continued under the amended article would of course be subject to the ordinary rules of the Code of Civil Procedure concerning cumulation of actions and consolidation for trial.

Objection might be made to the proposed amendment on the ground that it changes the law on survival of actions and rights to recover damages, and that it does so in the Code of Civil Procedure. To the first objection, it must certainly be said that the law would be changed. The "survival" provisions of Article 2315 first entered the article in 1855 at a time when our procedural system was not as developed as it is now, and it would be foolish to object to changes merely because the law has always been some other way. With the exception of awards for pain and suffering of the victim, the types of damages recoverable in a survival action are usually those which would serve to make the victim's estate whole again: medical and medical-related expenses and property damage. There appears to be no reason why the usual legal successors to the estate of the victim should not be entitled to a recovery which, but for the caprice of death of the victim before final judgment, would have formed a part of the estate.

As to the second objection, there is some merit to the complaint that a substantive law change might be better made somewhere other than in the Code of Civil Procedure. If feelings are ruffled by this attempt, a separate statute could certainly be drafted. In defense of the proposal, it may be said that the present Article 426 contains a provision governing actions not yet instituted, a principle which seems not to be procedural. Additionally, it can be said that the drafters of the Code of Civil Procedure originally proposed language somewhat like that of the proposal, but it was deleted in the final version.

267. LA. CODE CIV. P. arts. 461-65.
268. LA. CODE CIV. P. art. 1561.
269. See a quotation of the proposed article in McMahon, Courts and Judicial Procedure—Survey of 1954 Louisiana Legislation, 15 LA. L. REV. 38, 40-41 (1954): "An action does not abate on the death of a party. The heirs, legatees, administrator, or executor of the deceased party, as the case may be, may be substituted. This rule also applies to action brought under Article 2315 of the Civil Code, unless the action has survived in favor of a survivor designated therein. The
The proposed amendment would necessitate companion amendments to Article 685\textsuperscript{270} of the Code of Civil Procedure to provide that if the action of the victim has not yet been brought, and the succession is not under administration, the heirs or legatees are the proper parties plaintiff to assert the action. If the action has not yet been brought and the succession is under administration, the succession representative is the proper party plaintiff. Amendments to Article 801\textsuperscript{271} of the Code of Civil Procedure should provide that if the action of the victim is pending, and the succession is not under administration, the heirs or legatees may be substituted. If the action of the victim is pending and the succession is under administration, the succession representative may be substituted.

The final sentence of the amendment is intended to retain the present provision of Article 2315 that a survival action, if no action is pending at the death of the victim, must be brought within one year of the victim's death. Although the period could have been classified as a peremption, the word "prescribes" was chosen in an attempt to avoid the kind of confusion which has arisen under the present Article 2315 on the subject of time limitations.

(3) Enact a new statute to provide for wrongful death actions. It is proposed that a new statute be enacted, perhaps to form part of the Civil Code Ancillaries, to read as follows:

\begin{quote}
In the event of the death of a person caused by the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:
\end{quote}

only exceptions to this rule are actions to enforce rights or obligations which are strictly personal, and exceptions provided expressly, or by necessary implication, by statutes adopted hereafter."

270. LA. CODE CIV. P. art. 685 presently reads: "Except as otherwise provided by law, the succession representative appointed by a court of this state is the proper plaintiff to sue to enforce a right of the deceased or of his succession, while the latter is under administration. The heirs or legatees of the deceased, whether present or represented in the state or not, need not be joined as parties, whether the action is personal, real, or mixed."

271. LA. CODE CIV. P. art. 801 presently reads: "When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte motion supported by proof of his quality.

As used in Articles 801 through 804, 'legal successor' means:

(1) The survivors designated in Article 2315 of the Civil Code, if the action survives in their favor; and

(2) Otherwise, it means the succession representative of the deceased appointed by a court of this state, if the succession is under administration therein; or the heirs and legatees of the deceased, if the deceased's succession is not under administration therein."
(1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children;
(2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and
(3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving.

As used in this section, the words child, brother, sister, father, and mother include a child, brother, sister, father and mother by adoption, respectively.

The right of action granted by this section prescribes one year from the death of the deceased.

The right of action granted under this section is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this section.

The presumptions of survivorship in Articles 936-939 of the Civil Code do not apply to this section.

Removal of the wrongful death action from the provisions of Article 2315 in this fashion is not intended to make any changes in the substantive law. Obviously, numerous changes could be suggested, but the attempt here is to clear up some of the problem areas with a statute which should be acceptable to all interested parties.

The use of the words "prescribes one year from the death of the deceased" should obviate any discussion about peremption and prescription. The specific statement that the presumptions of survivorship do not apply would clarify an unsettled question in the jurisprudence. The suggestion in King v. Cancienne that the beneficiaries of a wrongful death action might be an illustrative rather than an exclusive listing is not adopted.

No specific statement is made as to the effect of contributory negligence of the victim on the beneficiaries’ wrongful death action. It may be desirable to declare a position on that issue in the statute, but it is hoped that either (1) prior jurisprudence under Article 2315 would apply, since there is no change in the actual wrongful death provisions; or (2) that the court would consider the negligence of the victim as a factor in the determination of whether the defendant is at "fault" with regard to the beneficiaries.

272. See, for example, the suggestions made in Oppenheim, supra note 7, many of which would now be taken care of by the Code of Civil Procedure.
273. 316 So. 2d 366 (La. 1975).