

29. Thresholds of Life

“I liked being a person. I wanted to keep at it.”

— John Green, *The Fault in Our Stars*, 2012

Introduction

Like the parent of a preschooler, tort law has displayed great unease when confronted with the topics of sex, pregnancy, and death. Historically, tort law largely refused to deal with these subjects at all.

For instance, under the traditional English common law, death was not considered a compensable injury. Tort causes of action were said to die with the plaintiff. If you have already taken your property course, you might find this surprising. Under the common law, the dead can exercise exquisite control over the ownership of real property. (For example, the “fee tail” can forever limit what future generations may do with a family estate.) By contrast, the common law courts believed that tort law was exclusively for the living.

Today’s tort law deals head-on with sex, pregnancy, and death. But the doctrine bears the marks of a legacy of discomfiture. In fact, much of the modern law in this area has been created by statute rather than through evolution of judge-made law.

To deal with tortiously caused death, legislatures everywhere have created post-mortem causes of action known as **wrongful death** and **survival claims**. These can be brought by the decedent’s loved ones whether the death was caused negligently, intentionally, or in a situation in which strict liability applies.

When the tortfeasor’s victim is still alive but left disabled, loved ones can sue for **loss of consortium**, a way of claiming damages for the loss of an essential part of life that two people once shared – intimacy, companionship, and the like. Again, it can be used where the underlying theory of recovery is based in negligence, intentional torts, or strict liability.

Then there are questions about how negligence and other torts should apply in the context of pregnancy. For instance, can an injury suffered in utero vest as a tort claim upon birth? While advances in medicine have forced courts to confront these sorts of cases increasingly frequently, not all courts have responded in the same way.

As you explore this area, you may notice that none of the jurisprudence in this area is very far from the squirminess that all of us feel – judges included – upon confronting the fragility of our own lives.

Wrongful Death

The common law allows no cause of action to an estate where the alleged harm is death. This is astonishing to many people, but it is nonetheless true. If the defendant injures and maims a person, then the defendant might be on the hook for a fortune. But if the defendant goes just a little bit further and actually kills the person? Under the traditional common law, the defendant is off the hook entirely. Zero balance due.

For a brief time in America's early years, some courts experimented with departing from English precedent to hold that fatalities could be tortious. But by the middle 1800s, all American courts had returned to the original rule. The seeming absurdity of the common law on this point eventually led legislatures in all states to pass wrongful death statutes.

This statutory arrangement is reflected in lawsuit pleadings. The complaint in a lawsuit over a fatality will often use the label "wrongful death" to describe the relevant cause of action. And as technical matter, wrongful death is its own tort. In practice, however, wrongful death functions as an attachment to existing theories of recovery in the common-law. After all, alleging a claim for wrongful death means alleging that the death is "wrongful." That, in turn, usually means pursuing an underlying theory of negligence, strict liability, or intentional tort.

Damages for wrongful death can be measured in a couple of different ways. Under one theory, dependents of the decedent can recover the value of lost pecuniary support in the form of food, shelter, clothing, and the like that the decedent would have provided through earnings. Another theory takes the perspective of the decedent's estate, figuring that the defendant owes the estate whatever the decedent would have earned had she or he stayed alive. Some jurisdictions allow recovery for grief and anguish as well.

Case: Benally v. Navajo Nation

This case presents a fascinating look at wrongful death from a fresh perspective – that of a tribal court. Tribal courts in the United States apply their own law, which is separate from the Anglo-American common law. Here, the plaintiff estate is asking for the court to do what the Anglo-American courts have not – recognize a common-law cause of action where the injury is death.

Benally v. Navajo Nation

District Court of the Navajo Nation,
Judicial District of Window Rock
April 15, 1986

5 Nav. R. 209 (W.R. Dist. Ct. 1986). FERN ANN BENALLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF MONICA LULA BENALLY, PLAINTIFF, v. THE NAVAJO NATION, ET AL., DEFENDANTS.. No. WR-CV-430-84.

Judge ROBERT YAZZIE:

I. Findings Of Fact

This case involves a claim for the wrongful death of a minor child. The allegations are that on May 7, 1984, Defendant Phillip Lee, in the course of employment with the Navajo Nation, while driving a Navajo tribal vehicle, struck and ran over a three year old child, Monica Lula Benally, who was at the time crossing a dirt road (commonly referred to as Bureau of Indian Affairs Route No. 36) located about six miles west of the Nenahnezad Boarding School within the Navajo Reservation. It is further alleged that as a result of this accident, the minor child died

about one (1) hour later at the Shiprock Public Health Service Hospital, Shiprock, New Mexico.

ISSUE I: WHAT IS THE NAVAJO LAW FOR WRONGFUL
DEATH ACTIONS, INVOLVING THE DEATH OF A
MINOR

A wrongful death action is a lawsuit brought by or on behalf of a deceased person's beneficiaries (e.g. spouse, parent, children, etc.), alleging that death was caused by the willful or negligent act of another. See Black's Law Dictionary (5th Ed.). Under Anglo common law, "the death of a human being could not be complained of as an injury." *Baker v. Barton*, 1 Campbell 493, 170 Eng. Reprint 1033 (1808); see also Prosser On Torts, p. 902. This rule was later altered by state statutes. Most states have allowed civil actions for wrongful death and/or survival actions by statute, allowing a decedent's heirs or personal representative to make claims for the loss of the decedent; they also sometimes allow the representative to bring claims that the decedent might have brought. The neighboring states of New Mexico, Arizona, and Utah have enacted wrongful death statutes. Although the Navajo Nation has never formally adopted either a statute to create a cause of action for wrongful death, or a survival statute, a claim for the wrongful death of a tribal member has, however, been long recognized by Navajo common law. See *Estate of Boyd Apache*, 4 Nav. R. 178, 179-180 (Window Rock D. Ct. 1983) (defining Navajo common law to include custom, case law and matters commonly known or easily verified in recognized works on Navajo common law.).

The Anglo common law, as stated by *Baker v. Barton*, and Prosser, does not allow a wrongful death action, unless enacted by legislation. The Courts of the Navajo Nation are not bound by this rule of Anglo common law.

7 N.T.C. Section 204~ provides that:

- (a) In all civil cases the Court of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any

ordinance or customs of the Tribe, not prohibited by such Federal laws.

(b) Where any doubt arises as to the customs and usages of the Tribe, the court may request the advice of counselors familiar with these customs and usages.

(c) Any matters that are not covered by the traditional customs and usages of the Tribe, or by applicable Federal laws and regulations, shall be decided by the Court of the Navajo Tribe according to the laws of the state in which the matter in dispute may lie.

By the clear terms of Section 204(a), if there is an existing custom, then that customary law should be applied, and state law does not have application. Thus, defendant is correct that under 204(a), custom, where it exists, is held to be superior to the common law of the states.

This Court finds that Navajo common law recognizes a wrongful death action. The Navajo experts who testified about the Navajo concepts of tort, especially recovery of damages for wrongful death said that:

When a Navajo dies from the careless conduct of another, the person responsible for the death pays the immediate family livestock and silver jewelry.

Defendant referred to a written source, which explained:

... [W]hat is expected in all cases of injuries that arise between traditional Navajos is that the person who did the injury will make a symbolic material payment for the loss that he has caused" (See "Torts in Tribal Courts" by Barry K. Berkson, Esq., A presentation for the National American Indian Court Judges Association in Reno, Nevada, January 28, 1970).

Plaintiff's complaint in the instant case alleges that the death of her minor child was caused by the negligence of the defendant. Under the current Navajo case law, negligence is defined as the failure to exercise the duty of care owed to the injured party,

thereby proximately causing injury. *Mann v. Navajo Tribe*, 4 Nav. R. 83 (1983). Plaintiff has urged that Defendant Phillip Lee was required to meet a higher than ordinary standard of care when operating a vehicle on Navajo roads. *Navajo Tribe of Indians v. Littleman*, 1 Nav. R. 33 (1971). This Court agrees. The Littleman case was a criminal appeal, in which the Court of Appeals took judicial notice of the state of Navajo roads, and the need for extra care while driving, and recommended certain action be taken regarding certain safety measures in places where there are apt to be children near roadways. The defendant, therein, was found guilty for failing to exercise due care while driving a vehicle upon a roadway, after striking and killing a six year old who was crossing the highway immediately in front of defendant's truck at the time. The Court of Appeals acquitted defendant, because of insufficient evidence to sustain a finding of guilt beyond a reasonable doubt.

Considering the traffic, the road condition, and the fact that pedestrians many times walk the Navajo roads without notice, in the case at hand, Phillip Lee was under a duty to use a higher degree of care while operating the vehicle at the time.

ISSUE II: WHAT IS THE MEASURE OF DAMAGES IN A WRONGFUL DEATH OF A MINOR UNDER NAVAJO COMMON LAW

In the instant case, Plaintiff Fern Ann Benally, in her complaint for the wrongful death of her minor child, is seeking recovery for the following damages against the defendants:

1. General damages for the negligent act of defendant.
2. Special damages for funeral and burial expenses.
3. The monetary worth of the life of the deceased minor (including loss of earnings and financial support).
4. Compensation for the loss of affection, love and companionship of her deceased minor child.

5. Damages for pain and suffering experienced by the deceased minor between the time of her injury and death.

This Court does not agree with the defendant's contention that a wrongful death action is foreign to the custom and tradition of the Navajo people. Compensation for wrongful death of a human being is and always has been recognized at Navajo common law. The Navajo experts in testimony before this Court, on the issue of whether human loss from a wrongful act is compensable, agreed with the following:

When a Navajo dies from the careless conduct of another, the person responsible for the death pays the immediate family livestock and silver jewelry.

If a person dies in a wrongful death situation, the closer relative would be given sheep to relieve that person from loneliness. How many sheep will be given varies depending upon what will fix the victim's mind. One at fault will say, "I will give this for payment."

In other situations, where there is wrongful death, survivors get together and discuss what compensation should be given to make up for the wrongdoing. When a settlement is reached among the survivors and the one at fault, payment may be made by giving sheep, a belt, or even one strand of beads. Sometimes, survivors may object and demand that more should be given.

Whatever property of value is given for the wrong doing, the paying back, *nályééh* would make the person in sorrow get better, feel better, regain strength, and be able to go forth again in this life.

Finally, the *nályééh* (a paying back of restitution), seems to be used today mostly in connection with what would be considered civil matters, but in the past this symbolic restitution was usually all that would be required of the person who committed a criminal act, as well. Nalyeeh, traditionally, has the power to correct wrongs of any kind ... The law of the People-Dine 'Bibee Haz'a' nii; Volumes I-IV, Ramah High School, Ramah, New Mexico, 1972, Dan Vicenti, et al.

Regarding the wrongful death of a minor child, the expert testimony added that:

If a child died as a result of wrongful death in a situation where the minor was run over by a car, payment for funeral expenses would be expected by the immediate family.

Children are highly valued by Navajo families. Parents depend upon their children. They are resourceful in terms of future financial support and education. Youth should have full life to gain money, property and good life.

Defendants contend that the principle of Navajo torts does not result in an “intolerable burden upon all human activity” because the damages sought are not a direct monetary repayment for the loss and all of its ramifications, but only token. Human loss cannot be fully compensated for by money. This is certainly not the case in today’s Navajo world. The value and expectation of the Navajo people with respect to money have changed. For example, the value of dollars and cents, for pain and suffering of a person disabled by an accident, has become a significant consideration for damage recovery, even to a traditional Navajo person.

To be sure, money cannot replace the life of a child who dies from an accident. The Navajo experts stated what all Navajos know; compensation for loss is part of our way. It is true that the payback nályééh in the past may have been adequate if it was three horses, ten head of sheep, a belt or strand of beads. The value of such compensation may have been high yesterday. Times have changed. More Navajos work for money today. The concepts of payment have changed. The law of Navajo tort has also changed. Yesterday, wrongful death resulting from automobile accidents was unheard of. Today, deaths caused by automobile accidents are not only real, but there are numerous incidents of highway fatalities.

Payment of material goods alone is no longer adequate. In *Bryant v. Bryant*, 3 Nav. R. 194 (Shiprock D. Ct. 1981), the jury had no problem awarding money damages for the losses caused plaintiffs. There was no talk of sheep or horses in that opinion.

Whether or not the award for the death of the two minors was adequate is a question this Court does not address. The Shiprock jury decided on the evidence before it. The jury in the instant case at hand will do the same.

Navajos today look to their own codes and tribal law to seek fair compensation. The Court acknowledges, as defendant pointed out, the following important point:

The continued importance placed upon the private symbolic renumeration of injured parties as a cornerstone of Navajo justice is a factor that cannot be ignored by judges and law advocates who seriously desire that the legal institutions offer Navajo people a solution to their problems.

The Law of the People-Dine' Bibee Haz' a' nii,
Id.

The Navajo Tribal Council has ensured that an injured party be fairly compensated for the loss he or she has suffered; for the injury inflicted as the result of the act of the person at fault. 7 N.T.C. Section 701(6).

The Court finds that the notion of fair compensation today should include compensation that would be normally available anywhere a person might file a wrongful death action. It is the opinion of this court that the purpose of 7 N.T.C. Section 701(6) in light of Navajo common law discussed above, is to compensate plaintiffs in wrongful death actions for the following damages:

- Special damages, such as funeral and burial expenses, and medical expenses incurred.
- General damages for the negligent act of defendant, including (a) the sorrow, mental anguish, pain and suffering of the plaintiffs; (b) loss of affection, love and companionship of the decedent. – Damages for the pain and suffering of the deceased minor between the time of her injury and death. – Damages for the monetary worth of the life of the deceased minor,

including loss of earnings and financial support. *Bryant v. Bryant*, allowed the jury to determine the value of a child's life based upon their own understanding, taking into account the Navajo culture, the economy of the reservation, the usual ages of marriage, and many other things, to value a life in terms of the loss caused others.

JUDGMENT

IT IS THEREFORE ORDERED that, as a choice of law in the instant case, the Navajo common law of tort in a wrongful death action and the measure of damages based upon the notion of fair compensation under 7 N.T.C. Section 701(b), will be applied as explained in the opinion above.

Questions to Ponder About *Benally v. Navajo Nation*

A. On the question of whether death is a compensable harm, who got it right – Anglo-American courts or the Navajo court? Or did they both get it right? Is it cultural, with no one right answer?

B. What do you think of the court's use of precedent – in particular its reliance on custom and cultural norms? Is this in stark contrast to Anglo-American courts? Do Anglo-American courts do the same thing, perhaps less overtly? If we could trace the roots of the English common law back far enough, do you think we would find a more upfront reliance on societal mores? Or would we find unsupported assertions, in lieu of precedent, that only implicitly rely on cultural understandings?

Survival Actions

Under the traditional common law, persons' causes of action died with them unless legal action had already been commenced. This led to the strange situation in which a plaintiff who sustained fatal injuries could leave her or his heirs an economically substantial legacy by way of a solid tort action – but only if she or he could make it to the courthouse before succumbing. Survival actions, sometimes called *survivor* actions, make it so would-be plaintiffs who die on the roadway are treated equally with those who might first get to the clerk's office.

As with wrongful death claims, survival actions are another way of suing in tort for fatal injury. But they differ in their essential nature. In a wrongful death action, the gravamen of the complaint is death. With survival actions, the essence of the wrong is the decedent's experience prior to death – including pain, fear, and anguish caused by the awareness of one's own imminent demise. Survival actions can also include any lost wages from the time between the injury and death.

Because of the focus on claims accrued between injury and death, it may well be that a person who dies instantaneously will occasion no survival action. On the other hand, the more horrible the death is, the more valuable the survival claim will be. Notably in some jurisdictions, survival actions are allowed for funeral expenses, punitive damages, and other amounts that do not depend on the post-tort/pre-death interstice.

Note that the terms here are potentially confusing. The word “survival” in this context is ironic – it is, after all, because someone didn't survive that the survival action accrues. The name makes sense, however, if you remember that the survival refers to the *claim*. That is, the claim survives even when the tort-victim does not. But even if we can make sense of the term “survival action,” it seems impossible to make sense of the alternate label used by many courts, “survivor action.” The *survivors* are not the ones who own the claim. Instead, it is the estate that owns the claim. In fact, a decedent without any survivors could have a valuable “survivor action” that escheats to the state.

Survival statutes also work in a completely different way – they can allow a living tort victim to recover from a dead tortfeasor. Under the traditional common law, just as persons' claims died with them, so did their liabilities. Today, survival statutes allow claims against the deceased tortfeasor's estate for torts accrued during the tortfeasor's lifetime.

Loss of Consortium

Loss of consortium claims seek damages that come from not having a person around any more – or at least not around in the same

capacity. In addition to their post-mortem usage, loss of consortium claims can arise for non-fatal injuries. Where a person suffers brain damage or serious physical impairments, a measure of damages may be taken based on what family members lose as a result.

Among the jurisdictions, the widest acceptance of loss of consortium claims is for loss of consortium between spouses. Recovery may be had for “affection, solace, comfort, companionship, society, assistance, and sexual relations.” *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978).

Jurisdictions may also recognize parent/child consortium claims. Children can recover for lost opportunities to receive “counsel” and “advice” from a parent, as well as “loss of affection, comfort, companionship, society, emotional support and love.” *Cannar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 550-51 (Tex. 1985). Many jurisdictions recognize loss of consortium flowing the other way as well, so that parents can bring a consortium claim for the loss of children. Courts tend to be much more hesitant, however, in recognizing any parent/child claim where the child is an adult. Thus, courts commonly refuse to recognize as a compensable injury a parent’s loss of an adult child or an adult child’s loss of a parent.

Problem: Death on Route 12

At 3 a.m. in a sparsely populated rural area, Melida was driving with her friends Felipe and Antone. Texting on a brightly lit cell phone, Melida’s impaired night vision and distraction level caused her to cross the center line and hit an automobile driven by Ronni. Because of the remoteness of the location and its lack of cell coverage, no help arrived at the accident scene for five hours.

The evidence shows that Felipe stayed alive for two hours, immobilized in the twisted wreckage, experiencing intense pain, a fact memorialized in cell phone videos made by Antone. Felipe is survived by his husband and his one-year-old son.

Antone retained consciousness for four hours – as evidenced by his phone logs. He lost consciousness when a carotid embolism severely deprived a large part of his brain of oxygen. He nonetheless stayed

alive. At the hospital, physicians determined that Antone was in a permanent vegetative state. Antone has a wife and an adult child.

Kyle was a hitchhiker riding as a passenger in Ronni's car. Because of the angle of the impact, Kyle received catastrophic head trauma that killed him instantly. Statements by Ronni established that Kyle was sleeping before the accident, and autopsy results showing high levels of opiate pain killers made it more likely than not that he died without any awareness of the accident. Kyle had no family or loved ones who survived him.

As for Ronni, unsent texts on her phone show she was alive for at least 20 minutes, during which she experienced a great deal of pain and fear.

Melida – the tortfeasor at the center of it all – survived long enough to be taken by ambulance to the hospital. She died there several hours later from her injuries. A software engineer with a valuable portfolio of vested stock options, Melida is survived by a husband and two minor children.

What liability will there be for wrongful death, survival actions, and/or loss of consortium?

Unborn Plaintiffs

Issues created by the beginning of life can be just as thorny as end-of-life issues, if not more so. Under the traditional common law, an infant injured in utero had no cause of action. The trend now, however, is toward allowing recovery for pre-natal injuries.

Case: *Dobson v. Dobson*

The next case presents the issue of recovery for pre-natal injuries in a unique circumstance – where the party alleged to have caused the injuries is the mother. Just as *Benally* provided a point of contrast with Anglo-American courts, this case does as well, coming as it does from Canada. Unlike in the United States, where there are more than 50 jurisdictions, each with its own tort law, Canada has a single body of common law, which applies nationally. (Note that Quebec is an exception: In the French legal tradition, Quebec follows a civil code.)