

A candidate for state senate campaigned by going door-to-door throughout his community. One day, the candidate visited the home of his wife's childhood friend. The friend was having an in-ground swimming pool installed in her backyard. After digging a deep hole, the pool contractor had temporarily suspended work due to a heavy rainstorm and had left the site without installing safety fencing around the hole.

As the candidate and the friend were talking, they saw the friend's five-year-old child fall into the hole. The candidate ran outside, jumped into the hole, and pushed the child to safety. However, the candidate fell backward into the hole and lay submerged for several minutes in standing water left by the rainstorm. He was rushed to the hospital where he lingered in and out of consciousness for two months and then died. In a statement to the press, the pool contractor falsely asserted that the candidate and the friend were at fault because they were "carrying on an extramarital affair instead of supervising the child."

The personal representative of the candidate's estate has brought a survival action against the pool contractor and seeks to recover damages for the candidate's medical expenses, loss of income, and pain and suffering, as well as for harm to the candidate's reputation as a result of defamation.

For which of the following is the personal representative LEAST likely to recover?

- A. Loss of income.
- B. Medical expenses.
- C. Pain and suffering.
- D. Reputational harm.

## Explanation:

### Civil actions for tortious death

Type of action	Proper plaintiff	Recoverable damages*
<b>Survival</b>	Decedent's personal representative	Damages suffered by decedent prior to death Eg, medical expenses, pain & suffering
<b>Wrongful death</b>	Decedent's spouse, next of kin, or personal representative	Damages suffered by spouse or next of kin as a result of decedent's death (no pain & suffering) Eg, loss of income, loss of companionship

\*If jurisdiction allows both actions, double recovery not permitted.

At common law, a tort action was extinguished upon the death of either the tortfeasor or the victim. But most states today have enacted **survival statutes** that enable the **personal representative** of a decedent's estate to pursue **any claims** the **decedent would have had** at the **time of death**. This includes claims for damages resulting from both personal injury and property damage, such as:

the decedent's **medical expenses** from the time of injury to the time of death (**Choice B**)

the decedent's **loss of income** during this time (**Choice A**) *and*

the **pain and suffering** the decedent experienced as a result of his/her injury (**Choice C**).

However, most states **do not allow** survival of tort actions involving **intangible personal interests**—eg, [defamation](#), [invasion of privacy](#). The reason is that these actions are considered too personal to survive the decedent's death. Therefore, the candidate's personal representative is *least* likely to recover for reputational harm resulting from defamation.

### Educational objective:

The personal representative of a decedent's estate can bring a survival action to pursue claims the decedent would have had at the time of death, including claims for damages resulting from personal injury or property damage. But most states do not allow survival of tort actions involving intangible personal interests (eg, defamation).

### References

Restatement (Second) of Contracts § 926 (Am. Law Inst. 1981) (survival actions in tort).

