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Punitive Damages in Survival Actions:
Froud v. Celotex Corp.

INTRODUCTION

At common law, the death of either the victim or the tortfeasor extinguished any cause of action accruing prior to the victim’s death.\(^1\) Recognizing the injustice inherent in this rule,\(^2\) the Illinois legislature enacted the Illinois Survival Act (“Survival Act”).\(^3\) The Survival Act enables the decedent’s representative to continue the victim’s claim after his death.\(^4\) By the same token, if the wrongdoer dies, his estate remains responsible for his torts.\(^5\)

Initially, courts interpreted the Survival Act narrowly, refusing to allow a decedent’s estate to utilize the remedies which would have been available to the victim had he lived.\(^6\) Eventually, courts abandoned many of these early restrictions, and, in 1974, the Illinois Supreme Court declared that the Survival Act

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2. The common law abatement rule is the source of the old adage that it is cheaper to kill a person rather than to merely injure him. Mattyasovsky v. West Towns Bus Co., 61 Ill. 2d 31, 35, 330 N.E.2d 509, 513 (1975). See also McDaniel v. Bullard, 34 Ill. 2d at 494, 216 N.E.2d at 144, wherein the Illinois Supreme Court declared that “there is no reason why an estate that has been injured or depleted by the wrong of another should not be compensated whether the injured is living or not.” Id.


6. See, e.g., Jones v. Barmm, 217 Ill. 381, 382, 75 N.E. 505, 506 (1905) (an action for tortious interference of a business not allowed under the Survival Act); Holton v. Daly, 106 Ill. 131, 141 (1882) (damages for pain and suffering not recoverable after the victim’s death).
does provide full recovery to the victim's estate for all damages suffered by the victim.\textsuperscript{7}

In \textit{Mattyasovsky v. West Towns Bus Co.},\textsuperscript{8} the Illinois Supreme Court further interpreted the Survival Act as being solely compensatory in nature, therefore precluding recovery of punitive damages. The court did allow punitive damages, however, in a subsequent case brought under the Survival Act, \textit{National Bank of Bloomington v. Norfolk & Western Railway}.\textsuperscript{9} In this case, the defendant had violated a statute which specifically authorized recovery of punitive damages. The court stated that its prior denial of punitive damages in common law claims did not prevent a plaintiff from recovering such damages when the claim was based on a statute allowing punitive damages.\textsuperscript{10} In addition, in apparent retreat from its earlier holding in \textit{Mattyasovsky}, the court stated that the Survival Act neither authorizes nor prohibits punitive damages.\textsuperscript{11}

In \textit{Froud v. Celotex Corp.},\textsuperscript{12} the Illinois Supreme Court considered whether to extend its holding in \textit{National Bank} to allow punitive damages in common law actions brought under the Survival Act. The court held that \textit{Mattyasovsky} continued as controlling precedent for the denial of punitive damages in common law claims after the victim's death,\textsuperscript{13} and that such damages are recoverable only under certain statutory causes of action, such as the one involved in \textit{National Bank}.\textsuperscript{14}

This note will examine the history of the Survival Act, tracing the development of the Illinois Supreme Court's earlier, more restrictive interpretations of the statute to the modern view that the Survival Act provides nearly full recovery to a decedent's estate. Next considered is the court's decision to exclude punitive damages from this recovery. \textit{Froud v. Celotex Corp.} will be analyzed in light of the Survival Act, the court's distinction between

\begin{itemize}
\item \textsuperscript{7} Murphy v. Martin Oil Co., 56 Ill. 2d. 423, 308 N.E.2d 583 (1974). See infra notes 39-42 and accompanying text.
\item \textsuperscript{8} 61 Ill. 2d 31, 330 N.E.2d 509 (1975). See infra notes 46-49 and accompanying text.
\item \textsuperscript{9} 73 Ill. 2d 60, 383 N.E.2d 919 (1978). In this case, the defendant violated the Illinois Public Utilities Act, which authorizes punitive damages for willful and wanton conduct. See Ill. Rev. Stat. ch. 111-213, ¶ 7 (1981). See infra notes 50-57 and accompanying text.
\item \textsuperscript{10} 73 Ill. 2d at 65, 383 N.E.2d at 924.
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} 98 Ill. 2d 324, 456 N.E.2d 131 (1983).
\item \textsuperscript{13} \textit{Id.} at 335, 456 N.E.2d at 136.
\item \textsuperscript{14} \textit{Id.}
statutory and common law claims, and courts' objectives in awarding punitive damages. Finally, this note will discuss the possible impact of Froud on Illinois tort law.

BACKGROUND

The Illinois Survival Act

At common law, the death of either the victim or the tortfeasor extinguished all tort liability, thereby precluding successful litigation under any cause of action accruing prior to the victim's death. Courts reasoned that a tort action was a personal right which died with the victim, rationalizing the abatement of the action on the grounds that one key purpose of tort law, punishment of the defendant, could no longer be accomplished once the defendant had died.

Allowing the death of a party to extinguish a valid cause of action eventually came to be viewed as both harsh and illogical. In 1872, the Illinois legislature responded to these criticisms by adopting the Illinois Survival Act, which allows claims to continue after a party's death. If a victim dies, his estate may assert any cause of action which accrued prior to his death.

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15. See Davis v. Moore, 103 Ill. 445 (1882); Brown v. Parker, 15 Ill. 307 (1853). See also supra note 1.

16. See Gilmer v. Eubank, 13 Ill. 271 (1851). Blackstone justified the rule on the ground that the executor of a plaintiff has not suffered any manner of wrong or injury. 3 W. BLACKSTONE, COMMENTARIES *302. This rationale has been severely criticized. While tort actions abated at common law, contract actions, which are often equally personal in nature, were held to survive the death of either party. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 126, at 898 (4th ed. 1971). Examples of contract actions which survived the death of a party at common law include Foreman State Trust & Sav. Bank v. Tauber, 348 Ill. 280, 180 N.E. 827 (1931) (allowing a claim on an antenuptial agreement to survive the husband's death); Dodd v. Rotterman, 330 Ill. 362, 161 N.E. 756 (1928) (allowing an action for specific performance to convey land to survive the death of the grantor).


18. See supra note 2.

19. Illinois has had a survival statute since 1829, but the cause of action has had application to personal injuries only since 1872. With but a single modification covering dram shop actions, the survival statute remains today in the form it took nearly 100 years ago. ILL. ANN. STAT. ch. 110-1/2, § 27-6 historical note (Smith-Hurd 1976). The Survival Act provides:

In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to
and any damages recovered are part of the decedent's probate estate. If the wrongdoer dies, his estate is responsible for torts committed prior to his death. Illinois was one of the first states to adopt a survival statute; today all jurisdictions have abandoned the abatement doctrine to some extent.

The Survival Act should not be confused with the Illinois Wrongful Death Act. If a tortfeasor causes the victim's death, the Wrongful Death Act provides a cause of action for the victim's next of kin to recover pecuniary damages such as funeral expenses and monetary contributions which they might have expected to receive if the victim's death had not intervened. The Survival Act enables the victim's cause of action to continue after his death through the administrator of his estate in order to recover damages suffered by the victim before his death. The Wrongful Death Act provides the victim's next of kin with a means of recovery, whereas the Survival Act continues the victim's own cause of action.

The enactment of the Survival Act has not resulted in a complete abandonment of the common law abatement doctrine in Illinois. Several causes of action still die with the victim or tort-

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feasor. For example, the Survival Act specifically prohibits suits for libel and slander. The courts have also limited the scope of the Survival Act by holding that entirely personal torts, such as malicious prosecution and false imprisonment, still abate upon death.

The recent trend among Illinois courts, however, is not to restrict, but to expand the remedies available under the Survival Act. For example, early Illinois decisions limited property damages to injuries to goods and chattels, excluding intangible property interests. Later courts rejected this narrow construction, and actions to recover damages to intangible property such as wrongful death actions, attorney malpractice, and breach of fiduciary duty, all survive.

Courts also have prohibited actions under the Survival Act if the victim has died as a result of the defendant's tortious conduct. This prohibition resulted from the courts' interpretation of the Survival Act and the Wrongful Death Act as mutually exclusive remedies. Although a victim may have a cause of action for damages he incurred prior to his death, such as loss of wages or pain and suffering, the Illinois Supreme Court, in Hol-

29. See Jones v. Siesonnop, 55 Ill. App. 2d 1037, 1041, 371 N.E.2d 892, 895 (1977). (Survival Act is remedial in nature, and should be liberally construed). Illinois' expansion of its Survival Act is consistent with the broad reading given survival acts in other jurisdictions. See, e.g., Ivey v. Wiggins, 276 Ala. 106, 159 So. 2d 618 (1964) (action for alienation of affections survives the death of the plaintiff). According to Prosser,

[The modern trend is definitely toward the view that tort causes of action and liabilities are as fairly part of the estate of either the plaintiff or defendant as contract debts, and that the question is rather one of why a fortuitous event such as death should extinguish a valid action. Accordingly, survival statutes gradually are being extended; and it may be expected that ultimately all tort actions will survive to the same extent as those founded on contract.

W. Prosser, supra note 16, § 126.
30. See, e.g., Shedd v. Patterson, 312 Ill. 371, 144 N.E. 5 (1923); Jones v. Barmm, 217 Ill. 381, 75 N.E. 505 (1905).
31. See McDaniel v. Bullard, 34 Ill. 2d at 494, 216 N.E.2d at 144.
32. See Jones v. Siesonnop, 55 Ill. 2d at 1042, 371 N.E.2d at 896.
34. See Wilcox v. International Harvester, 278 Ill. 465, 116 N.E. 141 (1917); Holton v. Daly, 106 Ill. 131 (1882).
35. Holton v. Daly, 106 Ill. at 140. See supra notes 24-25. See also W. Prosser, supra note 16, §§ 126, 127.
ton v. Daly,\textsuperscript{36} held that actions for these damages abated upon the victim’s death, leaving actions for wrongful death by the decedent’s dependents as the exclusive remedy.\textsuperscript{37}

Recently, the Illinois Supreme Court overruled Holton v. Daly in Murphy v. Martin Oil Co.,\textsuperscript{38} stating that the remedy provided by Holton was “grievously incomplete.”\textsuperscript{39} In order to provide full and complete recovery, the court declared that damages for pain and suffering and loss of wages incurred by the victim prior to his death pass to his estate under the Survival Act.\textsuperscript{40} The court also stated that it was an obvious injustice to shield a defendant from a portion of the damages he caused when it was his conduct which resulted in the death of the victim.\textsuperscript{41} In this circumstance, a defendant could be faced with an action under the Survival Act by the decedent’s estate, as well as a wrongful death action by the decedent’s beneficiaries.\textsuperscript{42}

Despite these advances in protecting the victim’s legal rights, punitive damages may not be awarded under the Survival Act after the tortfeasor’s death.\textsuperscript{43} While the purpose of punitive damages is to punish the defendant and to deter him and others from committing these acts in the future,\textsuperscript{44} little punishment or deter-

\textsuperscript{36} 106 Ill. 131 (1882).
\textsuperscript{37} Id. at 141. The supreme court’s construction of the Survival Act and the Wrongful Death Act as mutually exclusively remedies persisted for more than 80 years. \textit{E.g.}, Susemihl v. Red River Lumber Co., 376 Ill. 138, 33 N.E.2d 211 (1941); Wilcox v. International Harvester, 278 Ill. 465, 116 N.E. 151 (1917).
\textsuperscript{38} 56 Ill. 2d 427, 308 N.E.2d 583 (1974).
\textsuperscript{39} Id. at 431, 308 N.E.2d at 587. In Murphy, the plaintiff’s decedent was burned while having his truck filled with gasoline, and died nine days later from the injury. The decedent’s widow brought an action under the Wrongful Death Act for loss of wages, and under the Survival Act for the pain and suffering of her husband during the nine day period from his injury to death.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. For an analysis of Murphy v. Martin Oil Co., see Note, \textit{supra} note 25, at 608. For a discussion of allocating damages when both a survival action and wrongful death action are brought, see W. Prosser, \textit{supra} note 16, § 127.
\textsuperscript{43} Although punitive damages have been denied under the Survival Act for more than 100 years, the origin of this proposition is somewhat unclear. The earliest Supreme Court decision citing this rule is Conant v. Griffin, 48 Ill. 410 (1868), a case which did not involve a verdict awarding punitive damages.
rence can be achieved by imposing punitive damages on the defendant's estate. Therefore, an overwhelming majority of jurisdictions deny punitive damages in survival actions brought after the tortfeasor's death.\textsuperscript{45}

Illinois, however, has gone one step further. In \textit{Mattyasovsky v. West Towns Bus Co.},\textsuperscript{46} the Illinois Supreme Court held that if the victim dies, his estate may not recover punitive damages in a common law tort action. The court reasoned that the Survival Act was solely compensatory in nature, and thus provided recovery only for the actual physical and mental injury suffered by the victim prior to his death.\textsuperscript{47} The court labeled punitive damages a "windfall to the plaintiff."\textsuperscript{48} Since the Survival Act was exclusively remedial in nature, the court concluded that punitive damages could not be recovered after the victim's death.\textsuperscript{49}

The court allowed punitive damages, however, in a statutory cause of action brought under the Survival Act in \textit{National Bank of Bloomington v. Norfolk & Western Railway.}\textsuperscript{50} The court rea-

\begin{footnotesize}
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\item The court viewed the statute's language allowing actions for "an injury to the person" as pertaining only to compensatory damages, and excluding punitive damages. 61 Ill. 2d at 34, 330 N.E.2d at 510. For a discussion of this interpretation, see Note, supra note 25, at 608.
\item 61 Ill. 2d at 36, 330 N.E.2d at 512. The supreme court also expressed a reluctance to impose punitive damages on the defendant, since the defendant did not personally injure the victim but was being held responsible on grounds of vicarious liability. \textit{Id.} at 32, 34, 330 N.E.2d at 510, 512.
\item \textit{Id.} at 37, 330 N.E.2d at 512. The majority's holding was sharply criticized by Justice Goldenhersh, who stated in his dissent that
\begin{quote}
[A] construction of our survival statute which did not preclude recovery of punitive damages would once and for all put to rest the old adage that it is cheaper to kill your victim than to leave him maimed. In addition to deterring others from willful and wanton misconduct, it would bring death actions into complete harmony with the general body of law governing other types of tortious conduct.
\end{quote}
\textit{Id.} at 35, 330 N.E. at 513 (Goldhersh, J., dissenting).
\end{enumerate}
\end{footnotesize}
sioned that its previous decision in *Mattyasovsky* to deny punitive damages in a *common law* claim did not abate a defendant's *statutory* liability for punitive damages.\(^{51}\) In *National Bank*, the defendant railroad had violated the Public Utilities Act, which expressly authorizes the recovery of punitive damages.\(^{52}\) Even though the administrator of the victim's estate brought the action after the victim's death, the court reasoned that punitive damages should be awarded in order to fulfill the regulatory scheme of the Public Utilities Act.\(^{53}\)

The *National Bank* court did not address the issue of whether its holding should be extended to allow punitive damages in common law actions under the Survival Act.\(^{54}\) It did, however, appear to retreat from its earlier interpretation in *Mattyasovsky* that the Survival Act was purely compensatory in nature.\(^{55}\) The *National Bank* court stated that the Survival Act itself neither authorizes nor prohibits punitive damages; it is merely the vehicle by which the cause of action survives the death of the injured person when the action would otherwise have abated at common law.\(^{56}\) The court further stated that punitive damages should not be affected by the subsequent death of the injured person.\(^{57}\)

Because the court limited its holding in *National Bank* to statutory actions, however, Illinois courts, as well as federal courts applying Illinois law, continued to follow *Mattyasovsky* in denying punitive damages in common law tort actions.\(^{58}\) The broad language of the supreme court in *National Bank* that the act

\(^{51}\) 73 Ill. 2d at 173, 383 N.E.2d at 924.

\(^{52}\) The Public Utilities Act states, in pertinent part, that "if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment." ILL. REV. STAT. ch 111-2/3, ¶ 77 (1981).

\(^{53}\) 73 Ill. 2d at 174, 383 N.E.2d at 924. The Illinois Public Utilities Act was enacted to secure the public's protection at the intersection of streets and railroads. See Churchill v. Norfolk & W. Ry., 73 Ill. 2d 127, 137, 383 N.E.2d 929, 933 (1978).

\(^{54}\) Justice Ryan, however, found no distinction between common law and statutory claims for punitive damages, stating that "if the language is not broad enough to permit the survival of a cause of action for common law punitive damages, then it is likewise not broad enough to permit the survival of a statutory cause of action for punitive damages." *Id.* at 178, 383 N.E.2d at 926 (Ryan, J., dissenting).

\(^{55}\) See *supra* notes 46-49 and accompanying text.

\(^{56}\) 73 Ill. 2d at 174, 383 N.E. at 924.

\(^{57}\) *Id.*

neither authorizes nor prohibits punitive damages thus made it inevitable that Mattyasovszky would soon be challenged.

FROUD v. CELOTEX CORPORATION

Factual Background

The plaintiff, Froud, contracted cancer from his long on-the-job exposure to asbestos-filled materials.59 His action was based on common law negligence, as well as strict liability in tort. Named as defendants were more than twenty companies that had mined, manufactured, or distributed asbestos or asbestos-filled materials.60

The plaintiff sought both compensatory and punitive damages based upon the defendants' disregard for the health and safety of their workers. The complaint alleged that the defendants had conspired to prevent publication of medical reports and other documents which showed the harmful effects of asbestos.61

Before the case could be tried, the plaintiff died from cancer.62 The complaint was then amended, naming his widow as plaintiff under the Survival Act, and adding counts for wrongful death. Defendants moved to strike the punitive damages counts, contending that such damages were not recoverable after the death of the victim. The trial court, with great reluctance, construed Mattyasovszky63 as binding precedent, and dismissed the punitive damages counts. The judge stated that "as a matter of

61. The plaintiff in Froud contracted a form of cancer known as mesothelioma. Mesothelioma is a form of a malignant tumor of the chest and lungs which may also effect the abdomen. Extraordinarily painful and always fatal, it is a relatively rare form of cancer, whose relationship to asbestos has generally been known by the asbestos industry since the late 1930's. See Borel v. Fibreboard Paper Prods. Corp., 403 F.2d 1076, 1083-85 (5th Cir. 1973), cert. denied, 491 U.S. 869 (1974); Note, Asbestos Litigation: The Dust Has Yet To Settle, 7 FORDHAM URB. L.J. 55, 59-61 (1978).
62. 98 Ill. 2d at 329, 456 N.E.2d at 133.
law what I have done is right. As a matter of justice, what I am doing is wrong."64

On appeal, Froud was consolidated with two other asbestos cases in which punitive damages also had been denied.65 Confronting the appellate court was the issue of whether the supreme court’s allowance of punitive damages in National Bank66 was limited to statutory actions, or whether the holding extended to common law actions as well. The appellate court agreed with the National Bank court’s interpretation of the Survival Act as a neutral vehicle which neither authorizes nor prohibits punitive damages. The appellate court also found no apparent basis for distinguishing between statutory actions and common law claims.67 The court concluded that if the victim’s estate could recover statutory punitive damages, the estate should be able to recover these damages under a common law claim as well.68

The Supreme Court Opinion

In a unanimous decision, the Illinois Supreme Court reversed the appellate court, holding that the Survival Act does not allow common law claims for punitive damages to survive the victim’s death.69 The court declared that its granting of punitive damages in National Bank did not overrule the precedent set forth in Mattyasovsky denying punitive damages in common law claims.70 Since the action in Froud was a common law negligence claim, the court dismissed the count for punitive damages, and remanded the case to the trial court to determine whether the defendants were liable for compensatory damages.71

65. One of the suits had been filed by the victim before his death. The other worker died before filing an action, and his administrator brought an action on behalf of his estate through the Survival Act. Froud, 98 Ill. 2d at 329, 456 N.E.2d at 133.
68. Id. The Fourth District of the Appellate Court of Illinois allowed punitive damages in a common law action under the Survival Act in Howe v. Clark Equip. Co., 104 Ill. App. 3d 45, 432 N.E.2d 621 (1982). In allowing the claim for punitive damages, the court reasoned that if “statutory causes of action for punitive damages survive, by extension of logic there is no bar to similar common law causes of action.” Id. at 49, 432 N.E. 2d at 625.
70. Id. at 330, 456 N.E.2d at 133.
71. Id. at 338, 456 N.E.2d at 137.
The *Froud* court reconciled its previous holdings in *Mattyasosvky* and *National Bank*, citing with approval the language in *Mattyasosvky* emphasizing the compensatory nature of recovery authorized by the Survival Act. Since the statute allows "actions to recover damages for an injury to the person," the court reasoned that recovery could not exceed the physical and mental injuries sustained by the victim. No matter now outrageous a defendant's conduct, punitive damages are not recoverable in common law claims after the victim's death.

The court distinguished *Mattyasosvky* from *National Bank* by explaining that it allowed punitive damages in *National Bank* because this remedy was an "integral component" of the statute which had been violated by the defendant. Thus, to hold that punitive damages abate upon the victim's death would contravene the statute's purpose of deterring willful and wanton conduct and promoting public safety.

The *Froud* court also confronted the potential unfairness of having common law claims for punitive damages hinge solely on whether the victim survives the trial. While acknowledging this inequity, the court concluded that any expansion of the Survival Act is the responsibility of the legislature, and not the courts. The court added that allowing punitive damages in *Froud* would serve as an injustice to the plaintiffs whose claims for punitive damages had been dismissed by courts relying on *Mattyasosvky* as controlling precedent.

72. *Id.* at 330, 456 N.E.2d at 134.
74. 98 Ill. 2d at 330, 456 N.E.2d at 134.
75. *Id.*
76. *Id.* at 331-33, 456 N.E.2d at 134-36. An apparent factor in the *National Bank* court's decision to allow punitive damages was that the statute violated by the defendant contained a clause authorizing this recovery. *National Bank*, 73 Ill. 2d at 174-75, 383 N.E.2d at 924. There are but a few statutes in Illinois which authorize recovery of punitive damages. See, e.g., *ILL. REV. STAT.* ch. 38, ¶ 14-6 (1981) (allows punitive damages to be awarded in eavesdropping cases); *ILL. REV. STAT.* ch. 48, ¶ 138.19(k) (1981) (permits up to an additional 50% of the compensation otherwise available under the Workmen's Compensation Act for "any unreasonable or vexatious delay of payment or intentional underpayment of compensation").
77. 98 Ill. 2d at 332-33, 456 N.E.2d at 134-35.
78. *Id.* at 335-36, 456 N.E.2d at 136-37. In deference to the legislature, the court noted that a bill was introduced in the General Assembly, but defeated in committee, which would have specifically provided punitive damages in actions under the Survival Act. *See 2 FINAL LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1975 SESSION OF THE SEVENTY-NINTH GENERAL ASSEMBLY, STATE OF ILLINOIS* 1188.
79. 98 Ill. 2d at 337, 456 N.E.2d at 137. The court cited the following cases as relying...
ANALYSIS

Interpretation of the Survival Act

The Illinois Supreme Court in Froud interpreted the Survival Act as being purely compensatory in nature, thereby precluding claims for punitive damages. The language of the Survival Act, however, places no express bar on punitive damages. It merely states that the victim's cause of action will continue after his death, and is silent as to the availability of damages. While, in Mattyasovsky, the court construed the Survival Act as implicitly excluding claims for punitive damages, in National Bank the same court acknowledged that the Survival Act neither authorizes nor prohibits punitive damages.


The Mattyasovsky court based its decision on the statute's express statement that "injuries to the person" survive. No legislative history exists interpreting this phrase, but jurisdictions with survival statutes containing similar language have not interpreted this phrase as barring recovery of punitive damages. Most courts have interpreted this language as indicating simply that personal and property actions survive.

When a claim survives the victim's death, it should continue with all the remedies that claim may provide, including punitive damages. The Survival Act operates only as a conduit for passing the decedent's cause of action to his estate; it does not change the substance of that claim. The decedent's representative is still subject to the same statute of limitations as though the victim had lived to pursue the claim. The representative

84. Mattyasovsky, 61 Ill. 2d at 34, 330 N.E. 2d at 510.
85. The Wisconsin survival statute is very similar to the Illinois statute, and states in pertinent part: "In addition to the causes of action which survive at common law the following shall also survive . . . assault and battery, false imprisonment, invasion of privacy . . . or other damage to the person . . . ." Wis. Stat. §§ 895.01 (1976). The Wisconsin Supreme Court found no limitation on punitive damages or any other remedy in Wisconsin's survival act, stating that the language merely described the causes of action which survive. See Wangen v. Ford Motor Co., 97 Wis. 2d 260, 311, 294 N.W.2d 437, 463 (1980). See also Hennigan v. Atlantic Ref. Co., 282 F. Supp. 667 (E.D. Pa. 1967) (refusing to interpret Pennsylvania's survival act as prohibiting punitive damages); Atlas Properties Inc. v. Didich, 226 So. 2d 684 (Fla. 1969) (allowing punitive damages under Florida's survival statute).
With the rule of abatement neutralized as to the causes of action mentioned in the Survival Act, the personal representative steps into the shoes of the deceased and should recover exactly what the deceased would have recovered had he lived. To permit the personal representative to recover compensatory damages while refusing to permit him to recover punitive damages is to permit the personal representative to step into only one of the decedent's shoes.
87. McDaniel v. Johns-Manville Sales Corp., 542 F. Supp. 716 (N.D. Ill. 1982). This case was similar to Froud in that it was also a products liability action filed by the estates of deceased asbestos workers. In interpreting Illinois law, the court held that if the employees knew they were wrongfully injured, the fact that representatives who later filed survival actions may not have had such knowledge did not preclude the running of the statute of limitations. Id. at 717. The court stated that the representatives stood in the shoes of their decedents. Id. at 719. If the "employee's claim would be barred by the two year statute of limitations so would their representatives' actions under the Survival Act." Id. at 720.
must prove the same elements of the claim, and he is subject to any defenses which could have been raised against the decedent.\textsuperscript{88} Similarly, the representative should be able to seek punitive damages if the decedent could have sought this remedy to death.

\textit{Distinction Between Statutory Claims and Common Law Claims}

In \textit{Froud}, the supreme court indicated that it had allowed punitive damages in \textit{National Bank}, not because of the Survival Act, but because the defendant had violated a statute specifically authorizing such damages.\textsuperscript{89} This reasoning would support recovery of punitive damages in the survival of common law claims as well. Since it is the cause of action rather than the Survival Act which determines whether punitive damages are allowable, this remedy should be recoverable in all common law actions which permit punitive damages.

The \textit{Froud} court, however, treated the survival of common law claims differently than the survival of statutory claims. If a defendant violates a common law cause of action, this remedy is not available after the victim’s death, no matter how egregious the defendant’s conduct.\textsuperscript{90} If a defendant violates a statute which specifically authorizes punitive damages, however, this remedy is available, even if the victim is no longer alive in order to further the legislative intent to punish reprehensible conduct and promote public safety.\textsuperscript{91}

The public policy goals of punitive damages would be served by the survival of punitive damages in common law actions as well. In Illinois, punitive damages are imposed to punish a defendant for his egregious conduct.\textsuperscript{92} It is the defendant’s out-

\textsuperscript{88} Jones v. Siesennop, 55 Ill. App. 3d 1037, 1042, 371 N.E.2d 892, 896 (1977). Since the survival statutes merely continue the decedent’s own cause of action, it is clear that any defenses which could have been raised against the decedent are available, including contributory negligence, release, and spousal immunity. W. PROSSER, supra note 16, § 127, at 910.

\textsuperscript{89} Froud, 98 Ill. 2d at 332-33, 456 N.E.2d at 135.

\textsuperscript{90} Id. at 330, 456 N.E.2d at 134.

\textsuperscript{91} Id. at 332-33, 456 N.E.2d at 135. For examples of statutes specifically allowing punitive damages in Illinois, see supra note 76.

\textsuperscript{92} For a discussion of the purposes of punitive damages in Illinois, see Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186, 384 N.E.2d 353, 359 (1978) (punitive damages punish the wrongdoer and deter the defendant and others from engaging in like conduct in the
rageous acts that justify imposing punitive damages, not the choice of the cause of action. A defendant should not be shielded from liability simply because he was fortunate enough to violate a common law action and to also injure a person who subsequently dies.

Several inequities could result from allowing punitive damages to depend on the cause of action, rather than the culpability of the defendant. For example, the Froud decision would prohibit punitive damage claims from being asserted after the victim’s death in intentional tort suits, since these actions are based on common law. It is unjust to allow an intentional tortfeasor to be free from punitive damage liability, while a defendant whose conduct was merely reckless will be subject to this liability because his acts violated a statute specifically authorizing such damages.

Allowing punitive damages in the survival of common law actions would also promote public safety. By imposing punitive damages, the defendant and others may be deterred from committing the same egregious acts in the future. In National Bank, a primary purpose of the statute violated by the defendant was to protect the public from the outrageous conduct of public

future); Hazelwood v. Illinois Cent. Gulf R.R., 114 Ill. App. 3d 703, 710, 450 NE. 2d 1199, 1206 (1983) (since the goal of punitive damages is to punish the defendant, the size of the award must take into account the egregiousness of the defendant’s act); Tolle v. Interstate Sys. Truck Lines, 42 Ill. App. 3d 771, 773, 356 N.E.2d 625, 627 (1976) (imposing punitive damages on companies for the torts of their employees provides an incentive for greater selectivity and supervision of employees). See also Chapman, Punitive Damages in Illinois and Elsewhere, 64 ILL. B.J. 636 (1976); Note, Punitive Damages in Illinois: Review and Reappraisal, 27 DE PAU L. REV. 571 (1978).


94. This view was expressed by the Florida Supreme Court in its decision to allow punitive damages in actions brought under its survival act. Atlas Properties, Inc. v. Di-dich, 226 So. 2d 684 (Fla. 1969). The court stated: “[I]t is difficult to accept a reasoning that envisions a person can be punished only for his malicious and reckless actions when they maim but not for those despicable actions when they kill the victim.” Id. at 688. See also Hennigan v. Atlantic Ref. Co., 282 F. Supp. 667 (E.D. Pa. 1967), aff’d, 400 F. 2d 857 (3rd Cir. 1968); Leahy v. Morgan, 275 F. Supp. 424 (E.D. Iowa 1967).

utility companies. Allowing punitive damages to survive in common law claims would further serve the legislature's goal of promoting public safety by deterring actual and potential violators of the common law from committing prohibited conduct. Society's interest in deterring outrageous conduct exists whether the violation is of common law or of a statute.

In *Froud*, the court acknowledged that the arguments for allowing punitive damages to survive in common law claims were persuasive. The court nevertheless viewed any authorization of punitive damage recovery in these claims as the legislature's responsibility. In its deference to the legislature, the court noted that a bill which would have authorized recovery of punitive damages in common law survival actions had been defeated in the General Assembly.

This should not bar the Illinois Supreme Court from authorizing the recovery of punitive damages. Recently the court adopted comparative negligence in its holding in *Alvis v. Ribar*, even though legislative attempts to adopt this doctrine had failed. In that case, the court had stated that is the imperative duty of the courts to remedy injustices in the common law when the legislature fails to act. The *Froud* court distinguished *Alvis* on the grounds that *Alvis* involved a "judicial pronouncement of a common law doctrine," while *Froud* would have involved a "judicial construction of a statute." The court based this distinction on its view that the judiciary has considerably less power to change a statute than a common law rule.


98. 98 Ill. 2d at 335, 456 N.E.2d at 136.


100. *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). In abolishing contributory negligence, the court noted that in a five year period, six bills which would have abolished the doctrine had failed to pass the General Assembly. *Id.* at 22-23, 421 N.E.2d at 896-97.

101. 85 Ill. 2d at 22-23, 421 N.E.2d at 896-97.

102. 98 Ill. 2d at 336, 456 N.E.2d at 137.

103. *Id.*
This reasoning fails to recognize that the abatement doctrine is a common law rather than a statutory rule.\textsuperscript{104} By allowing punitive damages after a victim's death, the court would further eradicate a doctrine which was originally developed by the courts. It thus would not be a usurpation of legislative power to allow punitive damages in common law survival actions.

The "Silent Rationale" of Froud

On the other hand, perhaps the \textit{Froud} holding does not rest on limitations of the Survival Act, but on the supreme court's desire to find a means of restricting punitive damages. Although well-established in Illinois tort law, punitive damages have always been subject to criticism.\textsuperscript{105} The quasi-criminal nature of punitive damages,\textsuperscript{106} their failure to act as an effective deterrent,\textsuperscript{107} and excessive awards\textsuperscript{108} are all problems believed to be inherent in the award of punitive damages. In recognition of

\textsuperscript{104} See supra notes 1, 2, 15, 16, and accompanying text for a discussion of the common law abatement doctrine.

\textsuperscript{105} Many courts preface an award of punitive damages with the caveat that punitive damages are not a favorite of the law of torts. See, e.g., Aladdin Mfg. Co. v. Mantle Lamp Co., 116 F.2d 708 (7th Cir. 1941); Glass v. Burkett, 64 Ill. App. 3d 676, 381 N.E.2d 821 (1978). Commentators have also treated punitive damages with ambivalence. See, e.g., D. Dobbs, \textit{Handbook on the Law of Remedies} § 3.9 (1973); R. Heuston, \textit{Salmond on the Law of Torts} § 204(4) (14th ed. 1965); W. Prosser, supra note 16, § 2.

\textsuperscript{106} By serving as a punishment, the function of punitive damages is similar to that of a criminal penalty, and must be strictly administered by the courts. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 188, 384 N.E.2d 353, 360 (1978). See generally Mallor & Robert, supra note 95, at 663; Comment, \textit{Criminal Safeguards and the Punitive Damages Defendant}, 34 U. Chi. L. Rev. 408 (1967).

\textsuperscript{107} See McKillip, \textit{Punitive Damages in Illinois: Review and Reappraisal}, 27 De Paul L. Rev. 571, 584 (1978); Owen, supra note 95, at 1257.

\textsuperscript{108} The number of punitive damages awards in civil trial judgments in the courts of Cook County, Ill. during 1978 and 1979 have been estimated as being, respectively, "four and two and one-half times as large as the average annual number of punitive damage judgments from 1959 to 1979." Priest, \textit{Punitive Damages and Enterprise Liability}, 56 S. Cal. L. Rev. 123 (1982). Examples of recent large punitive damage awards in Illinois include: Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), aff'd, 46 Ill. 2d 288, 263 N.E.2d 103 (1970) ($10,000 punitive damage award affirmed); Stambaugh v. International Harvester, 106 Ill. App. 3d, 435 N.E.2d 729 (1982) ($15 million jury verdict reduced by the trial court judge to $7.5 million and further reduced by the appellate court to $650,000). For commentary on excessive punitive damage awards and examples of large awards in other jurisdictions, see Nelson, \textit{Punishment For Profit: An Examination of the Punitive Damage Award in Strict Liability}, 18 U. Ill. L.F. 377 (1983); Owen, \textit{Problems in Assessing Punitive Damages Against Manufacturers of Defective Products}, 49 U. Chi. L. Rev. 1 (1982).
these difficulties, courts have viewed punitive damages with caution and tend increasingly to strictly limit them.  

Although not articulated in the court’s opinion, on appeal, *Froud* became a battleground for determining whether punitive damages should be restricted, or even possibly eliminated, in Illinois. *Froud* presented issues relating to the above criticisms of punitive damages, as well as the propriety of allowing punitive damages in product liability actions. *Froud* provided a tempting forum for reassessing the role of punitive damages, particularly in light of the thousands of asbestos cases filed across the country seeking both compensatory and punitive damages and the financial instability of several of the defend-
Having expressed its dislike for punitive damages in *Mattyasovsky*, the court might have been very receptive to these criticisms when deciding *Froud*. Considering the multitude of cases filed under the Survival Act in Illinois each year, the statute could indeed serve as a very effective limitation on punitive damages.

The most obvious effect of this limitation would be the potential financial savings to defendants. Unless a defendant is unfortunate enough to violate a statute specifically authorizing punitive damages, he will be free from this liability if his victim dies. Furthermore, denying punitive damages may be economically advantageous to the state. By prohibiting punitive damages in survival actions, corporations may be more willing to begin doing business in Illinois, or to increase their existing activity.


113. Several of the defendants in *Froud* had filed for bankruptcy: *In re Johns-Manville Corp.*, Nos. 82B11656-82B11676 (Bankr. S.D.N.Y. 1982); *In re UNR Inds.*, Nos. 82B9841-82B9851 (Bankr. N.D. Ill. 1982); *In re Amatex Corp.*, No. 82-05220 (Bankr. E.D. Pa. 1982).

114. The supreme court's dislike for punitive damages has been evident in its other decisions concerning punitive damages. See *Mattyasovsky* v. West Towns Bus Co., 61 Ill. 2d 31, 33, 330 N.E. 2d 509, 511 (1975) (punitive damages are a windfall for the plaintiff); *Kelsay v. Motorola*, Inc., 74 Ill. 2d 172, 187-88, 384 N.E. 2d 358, 360 (1978) (punitive damages are similar to a criminal penalty and must be strictly controlled by the courts).

115. For example, often asbestos workers do not live long enough to file their own claims, which are brought by their estates under the Survival Act. Such claimants are not able to seek punitive damages. See, e.g., *In the Matter of Johns-Manville Asbestosis Cases*, 511 F. Supp. 1235 (N.D. Ill. 1981).

Another recent example of mass tort litigation in Illinois was the 1979 crash of a commercial airliner near Chicago's O'Hare Int'l Airport, where all 271 passengers perished. After the crash, numerous Wrongful Death Act and Survival Act claims were filed. See *In Re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981).

116. Perhaps the importance of the economic aspects of these cases was most candidly stated in *In Re Air Crash Disaster*, in which the court denied punitive damages in actions under the Wrongful Death and Survival Acts resulting form the crash of a commercial airliner:

Because Illinois has such strong interests in promoting public safety, it would have a strong interest in allowing punitive damages to deter corporate misconduct relating to air safety. But because Illinois also has strong interest in having airplanes fly in and out of the state, and having related air transportation companies do business within the state, it would have a strong interest in pro-
Yet, even assuming that punitive damages should be restricted, the Survival Act is neither the most logical nor most equitable means of controlling this remedy. The problems of punitive damages do not arise only after the death of the victim; they exist regardless of whether the victim is dead or alive. If punitive damages do need limitations, they should also be restricted in actions brought by the victim, as well as by his representative after his death.

Furthermore, it is unjust to allow a defendant who consciously disregards the safety of others to escape this liability solely because the victim died before trial. Allowing the availability of punitive damages to hinge on the victim's lifespan could encourage delay tactics by defendants who thus hope to be relieved of this liability. The denial of punitive damages in survival actions would therefore not only reward the defendant for his wrongdoing, but penalize the victim and his estate for delays caused by the defendants and the court system.

CONCLUSION

The Illinois Supreme Court, in Froud v. Celotex Corp., interpreted the Survival Act as being purely compensatory in nature, disallowing punitive damages. 644 F.2d at 615, 616.

117. It has been argued that allowing punitive damages if the victim is alive, but denying this remedy after his death, is so irrational that it violates the equal protection clause of the fourteenth amendment. See Hamrick v. Lewis, 515 F. Supp. 983 (N.D. Ill. 1981). The plaintiff in Hamrick challenged the constitutionality of denying punitive damages in survival and wrongful death actions. The court rejected the challenge, stating that other federal courts have found no equal protection violation. In a California case, In Re Paris Air Crash, 622 F.2d 1315 (9th Cir. 1980), the court also found no equal protection violation in denying punitive damages in wrongful death actions. The court stated that barring punitive damages had a rational relation to the legislature's goal of controlling damages awarded in these actions. Since California had long allowed punitive damages under its survival act, the court did not address the constitutional implications of denying punitive damages in survival actions.

118. The appellate court in Froud recognized the critics of punitive damages in products liability cases, but did not find sufficient justification for denying punitive damages after a victim's death. Instead, the court suggested that backbreaking punitive damage awards could be avoided by the defendants' requesting the trial court to certify a class action of asbestos claimants for the purpose of resolving the issue of punitive damages. Froud v. Celotex Corp., 107 Ill. App. 3d 654, 658, 437 N.E.2d, 910, 914 (1982). See also Justice Sullivan's concurring opinion, in which he urged that the problems of punitive damages be thoroughly examined. Id. at 659-61, 437 N.E.2d at 914-16 (Sullivan, J., concurring).
thereby precluding the recovery of punitive damages. Yet, the Survival Act places no limitations on the damages which may be recovered by the decedent’s estate; it merely acts as a conduit for passing the victim’s cause of action to his estate. If the victim would have recovered punitive damages, then his estate should be entitled to this remedy.

The *Froud* court held that punitive damages can be recovered after the victim’s death only if punitive damages are an integral component of the statute violated by the defendant. There is no sound basis for distinguishing statutory claims from common law claims when determining punitive damage recovery. The purposes of punitive damages, to punish the defendant and promote public safety, can be served by allowing this remedy in the survival of common law claims as well.

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