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Punitive Damages - *Mattyasovszky v. West Towns Bus Co.* - Punitive Damages Nonrecoverable Under the Illinois Survival Act

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PUNITIVE DAMAGES—Mattyasovszky v. West Towns Bus Co.—Punitive Damages Nonrecoverable Under the Illinois Survival Act

As twelve year old Mattyas Mattyasovaszky Jr. left the bus's rear door, he realized that he had exited at the wrong stop. Attempting to re-enter the bus, he grasped the closing doors and wedged his foot between them. The bus lacked an outside right rearview mirror through which the driver could see the struggling boy. Even more dangerous, the alarm bell which normally sounded to warn the driver when the rear doors were not fully closed was inoperable due to corrosion. The driver started to move the vehicle; passengers shouted for him to stop; he turned his head and slowed, but the bus moved forward. Though the boy, in the meantime, had freed himself from the door, he slipped beneath the rear wheels to his death.

The boy's father instituted a wrongful death action against the driver and the West Towns Bus Company seeking both compensatory and punitive damages for the alleged negligence and willful and wanton misconduct in the operation of the bus. At the close of the plaintiff's case in chief, the driver was dismissed from the action. Finding the boy free from contributory negligence and the bus company vicariously liable, the jury awarded the plaintiff $75,000 in pecuniary damages and $50,000 in punitive damages. Three months after the trial, the plaintiff was permitted to amend his complaint to include a cause of action under the Illinois Survival Act, as well as a common law cause of action for wrongful death.

On appeal, the Appellate Court for the Second District affirmed the plaintiff's recovery of pecuniary damages under the Illinois Wrongful Death Act, but denied any recovery for punitive damages under either the Wrongful Death or Survival Acts, and found no basis for a common law action for wrongful death.

Relying on the recent decision of Baird v. Chicago, Burlington and Quincy R.R. Co., the court held that under the Wrongful Death Act punitive damages are not recoverable. The appellate court also determined that the Survival Act's authorization of recovery of damages for an

3. 21 Ill. App. 3d at 48, 313 N.E.2d at 498.
4. Id. at 52, 313 N.E.2d at 503.
6. 21 Ill. App. 3d at 55, 313 N.E.2d at 502.
injury to the person "clearly and unequivocally mean[t] damages of a physical character" and since punitive damages are assessed only to punish and deter the defendant's conduct, the court reasoned that punitive damages cannot be recovered in an action under the Survival Act.\(^7\)

The Illinois Supreme Court affirmed the appellate court, but on different grounds.\(^8\) First, the court disposed of the appellant's claim for punitive damages under the Survival Act by curtly noting that the Survival Act had never before been thought to authorize an award of punitive damages. The court then reiterated the appellate court's determination that no common law action for wrongful death exists in Illinois. Finally, the court supported its decision by devoting a major portion of its opinion to a discussion of the intrinsic shortcomings of punitive damages.

Due to the interplay between punitive damages and the Illinois Survival Act, the net effect of the supreme court's decision in Mattyasovszky has been to make it "cheaper to kill your victim than to leave him maimed."\(^9\) This article will examine the roles which punitive damages and the Survival Act play in Illinois tort law. It will demonstrate that the appellate court's refusal to permit the recovery of punitive damages in an action brought under the Survival Act rests upon a faulty construction of that Act. And finally, it will show that the Illinois Supreme Court's affirmance stands neither in law nor sound policy.

**PUNITIVE DAMAGES**

**English Developments**

Punitive damages were first awarded in England in 1763 as a result of outrage over the Crown's efforts to suppress the publication of a paper called the *North Briton*.\(^10\) By nameless warrants, the Secretary of State, Lord Halifax, directed government messengers to seize the *North Briton*'s printers and publishers. Though the plaintiff in *Huckle v. Money*\(^11\) was noted as having been treated "very civilly with beef steakes and beer" during his six hour captivity, Lord Justice Wilmot allowed an award of exemplary damages because the actions of the King's men in entering a man's house by

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7. Id.
9. 21 Ill. App. 3d at 54, 313 N.E.2d at 502.
a nameless warrant were a "daring public attack . . . upon the liberty of a subject. . . .""12 In an action brought by another victim of the Crown's attack on the North Briton, Lord Chief Justice Pratt explained the rationale for the awards:

Damages are designed not only as a satisfaction for the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action [of the defendant] itself.13

By the end of the 1760's, awards of punitive damages had been made in cases of non-governmental tortious conduct and the concept of awarding a sum beyond mere compensation to punish and deter a tortfeasor's outrageous conduct became firmly established in English law.14

The practice of awarding punitive damages continued in England until 1964 when the House of Lords determined that, but for a few exceptions, it was no longer permissible to award punitive damages against a defendant, no matter how outrageous his conduct.15 Noting that the cases failed to disclose whether punitive or compensatory aims had triumphed, their Lordships ruled that henceforth the punitive damages cases should be viewed as cases of aggravated damages in which the plaintiff was awarded extra compensation for the injury to his feelings and dignity.16 Punitive damages may not be awarded except where expressly authorized by statute;17 in cases of oppressive conduct by government servants;18 and in cases where a defendant's conduct was calculated by the defendant to make a profit for himself exceeding compensatory damages to the plaintiff.19

Punitive Damages in Illinois

In Illinois, the function of punitive damages has been variously explained. The Illinois Supreme Court, in 1845, permitted a six hundred and fifty dollar award of exemplary damages against the client of an A. Lincoln "not only to compensate the plaintiff, but to punish the defendant."20 While this formulation equalizes the

12. Id.
16. Id. at 1221.
17. McGregor, supra note 10, at 222.
19. Id.
20. McNamara v. King, 7 Ill. (2 Gilm.) 432 (1845).
compensatory and punitive functions of the doctrine, one commentator explains the development of the doctrine

as a means of reimbursing the plaintiff for elements of damage
which were not legally compensable, such as wounded feelings or
the expenses of suit.21

With the broadening of the concept of actual damage to include
intangible harm not previously compensable,22 the Illinois Supreme
Court in 1864 determined that in instances of wanton or willful
conduct the jury might give an amount of damages "beyond the
injury sustained, as a punishment, and to preserve the public tran-
quility."23 Thus, after initially characterizing punitive damages as
partially compensatory, the Illinois Supreme Court adopted the
theory of awarding punitive damages solely to punish and deter the
defendant and others from committing like offenses in the future.

Punitive damages are awarded only for certain kinds of tortious
conduct. Not only must the defendant be guilty of some wrongful
conduct, but the "wrongful act must be characterized by circum-
stances of aggravation . . . ."24 On a scale ranging from simple
passive negligence to malicious intentional acts, punitive damage
liability is currently imposed in Illinois only for tortfeasor conduct
which can be characterized as at least "willful and wanton."25

Despite its salutory purposes of punishment and deterrence, the
concept of punitive damages has always been a burr under the judi-
cial saddle. As Chief Justice Ryan of the Wisconsin Supreme Court
stated in 1877:

It is difficult on principle to understand why, when the sufferer by
a tort has been fully compensated for his suffering, he should re-
cover anything more. And it is equally difficult to understand why,
if the tortfeasor is to be punished by exemplary damages, they
should go to the compensated sufferer, and not to the public in
whose behalf he is punished. The reasons against punitive dam-
ages are peculiarly applicable in this state [because of] the just
and broad rule of compensatory damage sanctioned by this
court. . . .26

21. J. Ghiardi, Should Punitive Damages be Abolished?—A Statement for the Affirma-
tive, [1964-65] ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW PROCEEDINGS
282, 283 (1965) [hereinafter cited as Ghiardi].
25. 61 Ill. 2d at 35, 330 N.E. 2d at 511.
Similar expressions of regret over the adoption of punitive damages can be found in Illinois cases dating back to 1872. Over the years, the arguments lodged against punitive damage awards have included: the superiority of the criminal system to impose punishment; the undeserved windfall to the plaintiff; the financial interest of the plaintiff in the highest, but not necessarily the most appropriate award; the role of the inexperienced jury in the delicate task of assessing punitive damages; the anachronistic and anomalistic aspects of the punitive damages concept; and the lack of understanding of the economic impact of damage awards in general. Despite these criticisms, the Illinois Supreme Court has sustained the doctrine of punitive damages because it is "too firmly rooted in our jurisprudence to be disturbed." As the court noted more than a century ago, any initiative to unearth this firmly rooted doctrine must come from the legislature.

DEVELOPMENT OF THE ILLINOIS SURVIVAL ACT

Like the doctrine of punitive damages, the Illinois Survival Act traces its roots to the English common law. Dating from at least the 17th century, the common law rule of abatement held that "personal actions die with the person." Under this rule, not only the claims of a person against others, but also the claims of others against him abate upon his death. Though the original justification has disappeared into the mists of history, one explanation for the

27. See, e.g., Eshelman v. Rawalt, 298 Ill. 192, 131 N.E. 675 (1921); Meidel v. Anthis, 71 Ill. 241 (1874); Holmes v. Holmes, 64 Ill. 294 (1872).
28. See Ghiardi, supra note 21, at 287.
29. 61 Ill. 2d at 36, 330 N.E. 2d at 511.
31. See, e.g., Ghiardi, supra note 21.
32. Id. at 285.
33. See Nordstrom, Damages as Compensation for Loss, 5 N. CAROLINA CENTRAL L.J. 15 (1973) [hereinafter cited as Nordstrom].
34. Holmes v. Holmes, 64 Ill. 294, 298 (1872).
35. Ously v. Hardin, 23 Ill. 352, 354 (1860). However, the Illinois General Assembly has acted to ban punitive damage awards in several specific actions: in actions by an injured party against a local public entity, ILL. REV. STAT. ch. 85, § 2-102 (1975); in an action for alienation of affections, ILL. REV. STAT. ch. 68, § 36 (1975); in an action for breach of promise to marry, ILL. REV. STAT. ch. 89, § 27 (1975); and in an action for criminal conversation, ILL. REV. STAT. ch. 68, § 43 (1975).
rule is that since actions *ex delicto* were thought to be substitutes for private war, they might be thought incapable of continuation on behalf of a decedent who could not be appeased.\(^{38}\)

Today the maxim "personal actions die with the person," expresses two separate common law notions: the original common law idea barring personal actions after a person's death; and the relatively recent idea that the common law does not recognize the death of a human being as giving rise to a cause of action in a third person injured by that death.\(^{39}\)

In Illinois, the common law rule of abatement has been interpreted as calling for the suspension of all proceedings in a suit at law upon the death of the plaintiff.\(^{40}\) Thus, at common law, tort actions, whether created by common law or statute, do not survive a person's death unless they are declared to survive by a statutory provision.\(^{41}\) Exceptions to the common law rule of abatement exist. For example, contract actions have always been thought to survive on the theory that contractual rights are not so personal as to abate upon death.\(^{42}\) Similarly, actions to enforce equitable remedies also survive.\(^{43}\)

In 1872, the Illinois legislative response was to enact a statute creating certain exceptions to the rule of abatement, rather than its outright ban.\(^{44}\) The Illinois 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 real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 of Article VI of "An act relating to alcoholic liquors."\(^{45}\)

Thus, under the Survival Act, only those actions which survive by the common law, such as contract actions and actions to enforce

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40. Davis v. Moore, 103 Ill. 445 (1882).
42. See, e.g., Estate of Rapp v. Phoenix Ins. Co., 113 Ill. 590 (1885); Butterman v. Cham- ales, 73 Ill. App. 2d 399, 220 N.E.2d 81 (1966).
43. Edgerton v. Johnson, 178 F.2d 106 (7th Cir. 1950).
44. For a collection of other states' statutory solutions to the rule of abatement see S. Speiser, Recovery for Wrongful Death (2d ed. 1975).
equitable remedies, and those actions within the seven categories delineated in the statute survive; all other actions are held to abate.\textsuperscript{46}

Though the Illinois legislature unfortunately left no statutory history behind to indicate its intent in enacting the Survival Act, indications of its probable intent can be gathered from the legal context of the rule of abatement and the statute itself. When a person dies, society must deal with the problem of resettling the various economic rights and liabilities which the person acquired in his lifetime.\textsuperscript{47} The common law solution was abatement: all rights of action for and against the person, with few exceptions, were suspended. The Illinois legislature determined in 1872, that at least as to certain of these economic rights and liabilities, abatement was no longer satisfactory. Its solution was the survival of actions: upon the death of a person, particular economic rights and liabilities of the decedent passed to his estate to be exercised or enforced as if he were still alive. In effect, the Illinois Survival Act puts the representative of the deceased into the shoes of the decedent for certain causes of action.

Much confusion flourishes in the legal community regarding the purposes and effects of the Survival Act and the Wrongful Death Act. This confusion was generated when one shorthand expression of the common law rule of abatement, "personal actions die with the person," was used to describe those two distinct common law notions: the first, that upon the death of either party an \textit{ex delicto} cause of action abates; the second, that the death of a human being does not give rise to a cause of action in third persons.\textsuperscript{48} The Illinois legislature enacted the Wrongful Death Act in 1853 to alter the second common law notion by providing a cause of action to the heirs of a decedent for their pecuniary loss resulting from the death. The legislature enacted the Survival Act in 1872 to vary the first common law notion by providing for the continuation, after death, of certain causes of action acquired during a person's life. As the supreme court noted in \textit{Murphy v. Martin Oil Co.}, "[t]he statutes are conceptually separate and different."\textsuperscript{49} While the plaintiff in a

\textsuperscript{46} Prior to the enactment of the Survival Act, the General Assembly enacted the Wrongful Death Act which created a cause of action in designated heirs of the victim for their pecuniary loss suffered as a result of the death. \textit{I.L. Rev. Stat.} ch. 70, §§ 1 \textit{et seq.} (1975).


\textsuperscript{48} McClelland and Truett, \textit{supra} note 47, at 585.

\textsuperscript{49} 56 IIl. 2d 423, 431, 308 N.E.2d 583, 586-87 (1974).
wrongful death action sues in his own right to redress the pecuniary injury he has suffered because of the death of another, the plaintiff in an action brought under the Survival Act sues in place of the decedent to redress the injury which the decedent suffered before his death. The Wrongful Death Act creates one cause of action upon death; the Survival Act continues several causes of action after death.

**THE APPELLATE COURT’S DECISION**

In *Mattyasovszky*, the appellate court disallowed the award of punitive damages based upon a statutory construction of the Survival Act. In analyzing the plaintiff’s claim for punitive damages in an action brought under the Survival Act, the court pointed out that to allow 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.”

The court noted that “[d]espite our highest desires . . . law is not always based upon logical rationale,” and determined that the law could not support an award of punitive damages in an action brought under the Survival Act. It seems, however, that the court’s chagrin was needless, because the policies underlying the Survival Act, the cases interpreting it, and the language of the Act itself compel a different conclusion.

The court commenced its analysis of the Survival Act with the observation that

> [t]he survival action for damages for injury to the person is a creature of statute and the intent of the legislature, as expressed in the statute, is controlling.

Thus was planted the seed of a fatal error of statutory construction. The Survival Act does not provide a “survival action for damages” for personal injuries, but rather it permits the survival of “actions to recover damages” for a personal injury. This lilliputian juxtaposition of words causes a herculean shift of legal principle. It erroneously substitutes the theory of the Wrongful Death Act, which created a statutorily prescribed remedy for which the common law provided none, in place of the theory of the Survival Act, which preserves those causes of action that the deceased acquired during his life. The Survival Act does not create any new “creature of

50. 21 Ill. App. 3d at 54, 313 N.E.2d at 502.
51. Id.
52. Id. at 55, 313 N.E.2d at 502.
53. Id. at 54, 313 N.E.2d at 502.
54. ILL. REV. STAT. ch. 3, § 27-6 (1975).
Punitive Damages and the Survival Act

statute" as the court suggests; instead, it preserves those old species with which we are already familiar.

Decisions in Illinois have long recognized that the Survival Act does not create some different cause of action. In an 1887 suit for personal injuries which was brought under the Survival Act, the court stated

there may be a recovery, notwithstanding the death, for precisely the same injuries that the party himself could have recovered for, had he lived until after the final trial.

Surely this can mean nothing other than that the same cause of action for personal injuries which the deceased acquired prior to his death passes through the barrier of abatement erected upon his death. Just as surely, the court's conception that once on the other side of that barrier, the Survival Act somehow transforms the cause of action into something different, is fallacious.

Mistakenly proceeding upon the theory that the Survival Act creates some new action called a "survival action," the court, citing Shedd v. Patterson, determined that

[t]he words "damages for injury to the person" clearly and unequivocally mean damages of a physical character.

The court's rendition of the language suggests a limitation of the remedies which the Survival Act affords. "Clearly and unequivocally," however, the question of the character of damages recoverable in an action brought under the Survival Act is a false issue.

First, the proper version of the statutory language is "damages for an injury to the person." The presence of this article is crucial because it gives the statutory words a different meaning than that given by the court. The court's rendering "damages for injury to the person," as opposed to "damages for an injury to the person," allowed the court to interpret the statute as limiting the character of damages recoverable. While the court's interpretation may be correct in light of its version of the Survival Act, such is not a correct interpretation of the Survival Act drafted by the General Assembly. The Survival Act provides only for the survival of certain causes of

57. 230 Ill. App. 553 (1923), aff'd., 312 Ill. 371, 144 N.E. 5 (1924).
action; it does not attempt to answer the entirely separate question of the measure of compensation provided.\textsuperscript{60}

Secondly, the court’s reference to \textit{Shedd v. Patterson} only magnifies its error. The issue in \textit{Shedd} was whether an action for malicious prosecution was an action “to recover damages for an injury to the person.”\textsuperscript{61} The court in \textit{Shedd} held that an action for damages for an injury to the person contemplates an action involving “damages or injury of a physical character,” and since an action for malicious prosecution does not involve damages or injury of a physical character, an action for malicious prosecution does not survive under the Survival Act.\textsuperscript{62} The \textit{Mattyasovszky} court’s reliance on \textit{Shedd} unknowingly depends upon an ambiguity in the term “damages.” In \textit{Shedd}, “damages” denoted a physical injury, and the court determined only that the injury caused by malicious prosecution is not an injury of a physical character.\textsuperscript{63} Plainly, \textit{Shedd} cannot be cited for the proposition that only certain kinds of money damages are recoverable under the Survival Act. Since the question in \textit{Mattyasovszky} did not involve the nature of the injury, but rather recoverable compensation, the court’s reliance on \textit{Shedd} is misplaced. Indeed, \textit{Shedd}'s determination that “actions to recover damages for an injury to the person” characterizes a certain type of action, precludes the appellate court’s coloration of that same language as a limitation of a remedy.

Thirdly, the court’s reasoning that the provisions of the Survival Act limit the remedy which the Act provides in regard to personal injury actions opens a veritable Pandora’s box of Survival Act construction. Since the Survival Act specifies no remedy in survival actions for fraud or replevin or for an officer’s misfeasance, it is fair to say that the question of what remedies were to be made available in these actions brought under the Survival Act is one which never concerned the legislators. And if the question of the remedies available in these actions did not concern the legislators, it is reasonable to assume that the question of the remedies available in actions for injury to person or property did not concern them either. But even if the question of the remedies available in actions for injury to person or property did concern them, then why did the legislators adopt such an ambiguous statutory formulation and contextual locus for these unusual limiting provisions? Could it not simply be

\textsuperscript{60} See generally Geiger v. Merle, 360 Ill. 497, 196 N.E. 497 (1935).
\textsuperscript{61} 230 Ill. App. at 556.
\textsuperscript{62} Id. at 557.
\textsuperscript{63} Shedd v. Patterson, 312 Ill. 371, 374, 144 N.E. 5, 6 (1924).
Punitive Damages and the Survival Act

that the legislators unfortunately mentioned the ambiguous word "damages" only in hopes of avoiding the ambiguity which a provision for the survival of "actions for an injury to the person" would create?

Through the misperception of the theory of the Survival Act, the omission of a statutory word, the equivocation of some case language, and a narrow perspective of the Survival Act's provisions, the appellate court constructed a barrier to the recovery of punitive damages in an action brought under the Survival Act which does not exist. Since the Survival Act contains no proscription on the recovery of punitive damages, it follows that in appropriate circumstances such a recovery should be permitted.

Certainly there are compelling reasons for allowing the recovery of punitive damages in an action brought under the Survival Act. There can be no dispute but that the legislative intent was to terminate the operation of the rule of abatement in the seven actions mentioned in the Act. Moreover, the Act has been described on several occasions as being remedial in character and calling for a liberal construction.\(^4\) Clearly, the appellate court's construction which imposes a partial "abatement" on the remedy cannot be said to be liberal. If the statement that the Act is to be construed liberally is not to be merely an empty formalism, it can only mean that the Act preserves entirely a specified cause of action which the decedent could have maintained had he lived, including the full measure of recovery.

The experience of other states only serves to reinforce the conclusion that no limitation on the recovery of punitive damages can be found in the Survival Act.\(^6\) In 1972, the Maryland Court of Appeals declared

\[\text{the rationale for precluding exemplary damages in wrongful death actions — that the statute creating the cause of action limits the recoverable damages — has no application to an action brought by the personal representative, which is not a new cause}\]

\(64\). See, e.g., Devine v. Healy, 241 Ill. 34, 89 N.E. 251 (1909); Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N.E. 553 (1899).

of action at all, but one which the decedent could have maintained
had he lived.66

If, while alive, a person could have recovered punitive damages
in one of the actions preserved under the Survival Act, it follows
that his representative should be able to recover punitive damages
when that same action is brought under the Act.

THE SUPREME COURT OPINION

The supreme court concurred in the appellate court's determina-
tion that the Survival Act does not authorize the recovery of
punitive damages, but it reached its conclusion on an entirely differ-
ent rationale. In essence, the court reasoned that punitive damages
should not be awarded under the Survival Act because no Illinois
case has ever allowed such an award.67 This rationale is unconvinc-
ing. The unvarnished fact is that the issue of whether punitive dam-
ages may be recovered in an action brought under the Survival Act
has never been decided in any Illinois case. Indeed, it may be said
with equal persuasiveness that in the absence of a judicial prohibi-
tion against the recovery of punitive damages in an action brought
under the Act, the Act imposes no ban on their recovery.

From the absence of an analysis of the Survival Act and the
presence of criticism of the punitive damages concept, it is clear
that the court's decision was grounded in opposition to the punitive
damages principle itself, rather than any limitation inherent in the
Survival Act. Recognizing that the punitive and deterrent objec-
tives of punitive damages overlap with the objectives of the criminal
law, the supreme court objected to the punitive damages principle
because it contains none of the safeguards of the criminal law which
insure that only punitive and deterrent objectives are achieved.
Where the criminal law insists upon clearly defined conduct, fixed
penalties, and the forfeiture of any fine to the state, the law of
punitive damages permits the imposition of punishment for a rather
unspecified range of conduct, in any amount which the jury opts,
and places the fine into the pocket of the plaintiff. To punish and
to deter, the criminal law, with its experience in dealing with wrong-
doers, its flexibility in sentencing, and its staff of experts is superior
to the civil law's device of punitive damages.68 Furthermore, if the
defendant is to be punished for his conduct he should be accorded

67. 61 Ill. 2d at 36, 330 N.E.2d at 510.
68. Ghiardi, supra note 21, at 287.
the protections which our system gives to those subject to criminal
punishment.69

An objection to punitive damages mentioned by the court in
Mattyasovszky,70 and advanced by Chief Justice Ryan nearly one
hundred years before,71 is that an award of punitive damages ex-
acted from the defendant is nothing more than a windfall to the
plaintiff. Indeed, punitive damages are society's gift to "lucky"
plaintiffs.72 The aim of tort compensation is to compensate the
plaintiff for his loss; yet, fully compensated, the plaintiff in a puni-
tive damages case is allowed to recover an additional sum in the
name of society merely because the effects of the defendant's mis-
conduct were inauspiciously visited upon the plaintiff.

Finally, the court objected to application of the punitive damages
principle where liability is imposed only vicariously.73 Although
punitive damages may be imposed in Illinois when the wrongful act
of the agent is perpetrated while ostensibly discharging duties
within the scope of corporate purposes,74 the practice is questioned
because of the dangers of jury confusion regarding the purposes of
the award.75 Where the employer directly contributes to the em-
ployee's tortious conduct, assessment of punitive damages to punish
the employer and to deter the employer and others is appropriate.
Where the employer is blameless punitive damages obviously can
not serve to punish or deter the employer.76 The danger is that the

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69. One commentator has concluded that most criminal procedural safeguards are unnec-
essary in punitive damages cases, but has recommended the adoption of a higher standard
of proof and a protection against double jeopardy. Note, Criminal Safeguards and the Puni-
70. 61 Ill. 2d at 36, 330 N.E.2d at 511.
72. This is seen by some commentators as a selling point of punitive damages. The
existence of punitive damages provides a suitable incentive for the punishment of minor
criminal acts which are overlooked by a police force already overburdened with the problems
of more serious crime. See, e.g., D. Dobbs, HANDBOOK OF THE LAW OF REMEDIES § 3.9, at 205
(1973).
73. 61 Ill. 2d at 36, 330 N.E.2d at 512.
74. See, e.g., Singer Manufacturing Co. v. Holdfodt, 86 Ill. 455 (1877); Chicago, Rock
Island & Peoria R.R. Co. v. Herring, 57 Ill. 59 (1870).
75. See Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173 (1931)
[hereinafter cited as Morris].
76. RESTATEMENT (SECOND) OF AGENCY § 217 c (1958) provides that:
Punitive damages can properly be awarded against a master or other principal
because of an act by an agent if, but only if:
(a) the principal authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal was reckless in employing him, or
(c) the agent was employed in a managerial capacity and was acting in the
scope of employment, or
(d) the principal or a managerial agent of the principal ratified or approved the
act.
jury is likely to consider not the amount of financial loss, if any, which will cause the employer to control his employees, but rather the amount of such loss which is necessary to punish and deter the employee from his tortious conduct.\textsuperscript{77}

While the supreme court aimed its critique of punitive damages to the overlap between the criminal law and the civil law, the windfall to the plaintiff, and the problem of vicarious liability, the court’s discussion suggests that other unarticulated criticisms of the punitive damages principle may have influenced its decision. The court seems acutely aware of the dangers of the overzealous plaintiff: for the self-interest which initially leads the plaintiff to seek punitive damages in the name of society, may ultimately obscure legitimate societal interests in the evenhanded punishment and deterrence of wrongdoers. As Professor Morris notes:

\begin{quote}
The plaintiff in a punitive damage case not only profits by securing the admonition of the defendant; he profits more by heavy punishment than by light. So it would not be surprising if plaintiffs in punitive damage cases attempted to . . . influence juries to give high awards [having] little or no bearing on the proper admonition of defendants.\textsuperscript{78}
\end{quote}

Tightly reigned, the plaintiff’s self-interest coincides with societal interests in the control of its valuable, but potentially harmful activities; uncontrolled, the plaintiff’s self-interest tends not toward the management of valuable social activities, but toward their annihilation.

The overzealous plaintiff’s insensitive adversary poses a different problem with regard to an award of punitive damages. Supporters of the punitive damages principle counter criticism that punitive damages verdicts are excessive by pointing out that large punitive awards are sometimes necessary to effectively deal with corporate tortfeasors.\textsuperscript{79} The conclusion which can safely be drawn from both of these observations is that a proper assessment of punitive damages encompasses difficult problems which require skill and detachment for effective solution. Judicial acquaintance with both the delicacy of the punitive damages judgment and the jury’s inexperience in fixing penalties could single-handedly account for the

\textsuperscript{77} See generally Note, The Assessment of Punitive Damages Against an Entrepreneur For The Malicious Torts Of His Employees, 70 YALE L.J. 1296 (1961).
\textsuperscript{78} Morris, supra note 75, at 1178.
\textsuperscript{79} P. Corboy, Should Punitive Damages be Abolished?—A Statement for the Negative, [1964-65], ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW PROCEEDINGS 292, 298 (1965).
judicial observation that "exemplary damages are not a favorite."

Still another factor which may have influenced the supreme court against punitive damages is a recognition that the practice is anachronistic. When punitive damages were first introduced into Illinois, an unspoken justification for such awards was to compensate the plaintiff for injuries which the law did not recognize as a component of actual damages. In later years, the notion of actual damages was expanded to include non-tangible losses such as mental suffering, and consequently, the compensatory function of punitive damages was formally abandoned.81 However, more than one of the Justices on the supreme court may share Lord Devlin's concern that

[when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed.]

Although awarding punitive damages solely to punish and deter has continued in Illinois for over one hundred years, apparently, so have judicial doubts that courtroom theory and juryroom practice are widely disparate.

Another potential source of judicial concern over the punitive damages principle is the notion that the practice is an anomaly. The inexperience of the civil jury in meting out punishment and the emotional atmosphere of the courtroom have led some critics to suggest that for practical reasons, as well as for reasons of conceptual symmetry, the practice of assessing punitive damages should be eliminated.83

A final source of judicial uneasiness regarding punitive damages may be the dearth of critical analysis devoted to the effects of damage awards in general.

Too often lawyers and judges . . . have devoted their time and attention to the substantive rules of liability, leaving the recovery to rest on a myriad of assumptions built on further untested assumptions.84

One can sense from the court's discussion of punitive damages in Mattyasovszky an awareness that the indiscriminate use of punitive damages "can produce arbitrary results in an area where sound economic policy is needed,"85 and a desire to slow the large-scale

81. See, e.g., Prouty v. City of Chicago, 250 Ill. 222 (1911).
83. Ghiardi, supra note 21, at 285.
84. Nordstrom, supra note 33, at 34-35.
85. Id. at 35.
transfer of wealth in punitive damage awards until the impact of such transfers is better understood.

In summary, while it is fair to say that in Illinois today punitive damages are in theory assessed to punish and to deter, it must also be said that judicial uncertainties concerning the ability of the punitive award to achieve either of these goals abound. Certainly, the punishment function of punitive damages can best be effected in the criminal, not the civil courts. The deterrent function, on the other hand, is easily obfuscated by the plaintiff's financial interests. Despite such criticism, punitive damages continue to be awarded in Illinois courts, not on the inherent strength of the punitive damages principle, but on the strength of precedent.

The Need to Abandon the Mattyasovszky Rule

Notwithstanding the many infirmities of the punitive damages principle, the Illinois Supreme Court's refusal to permit the recovery of punitive damages in an action brought under the Survival Act is unsatisfactory. While much may be said against allowing punitive damages in any action, much more may be said against permitting punitive damages in some actions but balkng at such a recovery in those same actions when the victim of the tortious conduct dies. The case against restricting a recovery of punitive damages on the inauspicious death of the victim invokes a litany of error in both legal theory and social policy.

The primary reason such a result is improper is that the Survival Act does not call for the prohibition of punitive damages in an action brought under its provisions. The Survival Act merely calls for the preservation of certain causes of action; it says nothing about the remedial measures available to deal with violated rights. In the absence of a contrary expression of legislative intent, the same types of recovery available in the enumerated actions must be available when those actions are brought under the Survival Act.

A refusal to allow recovery of punitive damages in an action brought under the Survival Act ignores the intent of the legislature in enacting the Survival Act. Plainly, the Illinois General Assembly intended to interrupt the operation of the common law rule of abatement as to certain causes of action. 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.
The court's rationale that the Survival Act has never been thought to authorize an award of punitive damages suggests that the court believed that if the legislature were authorizing punitive damages when it enacted the Survival Act, it would have said so. An examination of the historical context surrounding the enactment of the Survival Act suggests that just the opposite inference should be made. By 1872, the weaknesses of the punitive damages principle were well-known, and at least twelve years earlier, Mr. Justice Breese had put the legislature on notice that despite the flaws of the punitive damages principle, the Illinois Supreme Court would respect it because "[i]f it be a bad rule, or unjust, it is competent for the legislature to change it." Thus, when the legislators enacted a statute calling for the survival of certain kinds of actions, they were fully aware of not only the defects inherent in one of the available remedial measures, but also of the intention of the supreme court to enforce that remedial measure. Since no restriction on the availability of punitive damages was enacted, either generally or specifically in relation to actions brought under the Survival Act, punitive damages cannot be said to have been excluded from the range of remedial measures available in actions preserved under the Act.

Furthermore, the refusal to allow the recovery of punitive damages in an action brought under the Survival Act frustrates the purposes of awarding punitive damages. As has been demonstrated in this article, punitive damages are in theory assessed because the enormity of the defendant's offense demands punishment and deterrence. In line with this theory, society's concern is only with the wrongdoer's conduct; whether the wrongdoer or his victim subsequently dies is irrelevant to society's asserted goals of punishment and deterrence. Surely, the effectiveness of punitive damages as a means of punishing and deterring the most aggravated tortious conduct is paralyzed when the willful and wanton tortfeasor who injures his victim is mulcted in punitive damages, while the willful and wanton tortfeasor who kills his victim is not.

One factor which may have weighed against allowing the recovery of punitive damages in an action brought under the Survival Act is the belief that to do so might circumvent the recovery limi-

86. See Holmes v. Holmes, 64 Ill. 294 (1872).
88. Damages in a Wrongful Death action are limited to:
   . . . a fair and just compensation with reference to the pecuniary injuries resulting
   from such death. . . .
ILL. REV. STAT. ch. 70, § 2 (1975).
tion imposed by the Wrongful Death Act. Once again, the confusion between the Wrongful Death Act and the Survival Act has obscured the aim of the Survival Act. In a wrongful death action, the claim of the statutorily designated plaintiff is for the pecuniary injury he has suffered as a result of the death. In an action under the Survival Act, the claim of the plaintiff is for the injury which the deceased sustained before his death. Damages under the Wrongful Death Act are measured from the point of death; damages in an action under the Survival Act are measured until the point of death. The only common factor between a Wrongful Death action and an action brought under the Survival Act may be that the death resulted from the same tortious act. The causes of action are entirely different: the suits are brought by legally different persons; and the damages are recovered upon different theories and distributed by different channels. Any recovery of any kind in an action brought under the Survival Act does not circumvent the recovery limitation of the Wrongful Death Act.

Perhaps the supreme court refused to allow recovery of punitive damages in an action brought under the Survival Act for fear that to do so would provoke a flood of punitive damages litigation. Such a fear would be truly groundless for the simple reason that in the great majority of cases, nothing close to the necessary standard of willful and wanton conduct will be demonstrated. And where the willful and wanton conduct of the defendant has been demonstrated, why should the death of one of the parties affect the defendant’s liability for punitive damages?

Finally, the refusal to permit the recovery of punitive damages in an action brought under the Survival Act stalls the modern trend in Illinois toward imposing upon the wrongdoer full liability for his tortious acts, as espoused by the court in *Murphy v. Martin Oil Co.* Although the recovery of punitive damages in an action brought under the Survival Act gives a windfall to the estate of the decedent, refusal to award punitive damages in such a situation brings a windfall savings to the defendant. In a state committed in its constitu-

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89. Prosser, supra note 39, at 906.
90. A recovery under the Wrongful Death Act is distributed directly to the statutorily designated plaintiffs. A recovery under the Survival Act is distributed to the decedent’s estate and is subject to taxes and the claims of the decedent’s creditors, among others, before passing according to the decedent’s will or by the intestate succession provisions. See Ohnesorge v. Chicago City Ry. Co., 259 Ill. 424, 102 N.E. 819 (1913); Prosser, supra note 39, at 905.
tion to "the health, safety, and welfare of the people," to reward willful and wanton conduct resulting in death is simply intolerable.

**Summary**

Faced with the unhappy choice of either extending an unsound legal concept into a logical but hitherto unknown application, or eliminating a powerful, but flawed incentive for the protection of life, the Illinois Supreme Court in *Mattyasovszky v. West Towns Bus Co.* chose the greater of two evils. However badly punitive damages accomplish their theoretical goals of punishment and deterrence, changes in the application of the doctrine are to be made by the General Assembly, as the supreme court itself has long noted. Although the Illinois Supreme Court's well-reasoned and longstanding antipathy towards the punitive damages principle may explain the court's decision in *Mattyasovszky*, it cannot justify that decision. In any action an award of punitive damages suffers from the same flaws. To disallow the recovery of punitive damages merely because the action is brought under the Survival Act is logically inconsistent, statutorily unnecessary, and socially unprotective.

Daniel T. Hartnett

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