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## Punitive Damages in Wrongful Death

Gary N. Holthus\*

**I**F A FATHER AND HIS three year-old daughter were walking to church one bright Sunday morning, and another man wilfully drove his automobile into them, causing the death of the child, the majority of American jurisdictions yet would allow merely compensatory damages under their applicable statutes for wrongful death. But it patently is unfair to let one who willfully kills another go unpunished. Since exemplary damages are awarded in other actions at law in order to punish willful acts, it seems reasonable that exemplary damages should be allowed in wrongful death actions in an attempt to deter such willful acts, and in order to do justice in the eyes of the public.

*Punitive* damages, also known as *exemplary* damages, *smart money* or *vindictive* damages,<sup>1</sup> are damages awarded to a plaintiff on a finding of malicious, fraudulent, willful, wanton, or reckless conduct by a defendant, indifferent to the rights and safety of others.<sup>2</sup> The purpose of exemplary damages is to protect the public from reckless, willful acts and to punish the wrongdoer.<sup>3</sup>

Historically there was a distinction between wrongful death and survival statutes. The former created a new cause of action in the beneficiaries to compensate them for the loss of the decedent.<sup>4</sup> Under the latter, the decedent's personal representative had the right to carry on any cause of action the decedent started.<sup>5</sup> In effect, the personal representative stepped into the shoes of the decedent.

Today the distinction between wrongful death and survival statutes still exists in theory. In fact most states have, as a result of "inadequate drafting on the part of state legislatures,"<sup>6</sup> a "hybrid" survival death statute.<sup>7</sup> Although the distinction in modern wrongful death and sur-

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<sup>1</sup> Oleck, *Damages to Persons and Property* § 269 (rev. ed. 1961); *Liberty Mutual Ins. Co. v. Stevenson*, 212 Tenn. 178, 368 S.W. 2d 760 (1963); McCormick, *Damages*, c. 10 (1935).

<sup>2</sup> *Mode v. Barnett*, 235 Ark. 675, 361 S.W. 2d 525 (1962).

<sup>3</sup> *Lubbock Bail Bond v. Joshua*, 416 S.W. 2d 523 (Tex. Civ. App. 1967); *Templeton Feed and Grain v. Ralston Purina Co.*, 72 Cal. Rptr. 334, 446 P. 2d 152 (1968).

<sup>4</sup> *Fornaro v. Jill Bros. Inc.*, 42 Misc. 2d 1031, 249 N.Y.S. 2d 833 (1964).

<sup>5</sup> *Bell v. Cincinnati Transit Co.*, 108 Ohio App. 229, 155 N.E. 2d 698 (1958), *Vassallo v. Nederl-Americk Stoomv Matts Holland*, 337 S.W. 2d 309 (Tex. Civ. App. 1960).

<sup>6</sup> Speiser, *Recovery for Wrongful Death* § 14:1 (Lawyers Co-op, Rochester, N.Y. 1966).

<sup>7</sup> The survival-death statutes vary widely from the true survival statute and for that matter from one another. For example the statutes in Connecticut, Iowa, New Hampshire and Tennessee provide for recovery for wrongful death but the action must be brought under their enlarged survival-death statute often referred to as "death acts." *Carolina, C. & O. Ry. v. Shewalter*, 128 Tenn. 363, 161 S.W. 1136 (1913).

vival statutes seemingly has been obliterated, some states hold to the traditional distinction between them.<sup>8</sup>

Punitive damages under a wrongful death or survival statute are not a matter of right but are given only where there is statutory law that permits them.<sup>9</sup> When punitive damages are sought in a wrongful death action, the decedent's beneficiaries or personal representative must prove that the defendant was acting wilfully or wantonly when he inflicted the fatal blow.

Most states require that the plaintiff be entitled to actual damages before he has the right to exemplary damages.<sup>10</sup> However, the District of Columbia<sup>11</sup> and New York<sup>12</sup> have allowed punitive damages where the jury found no actual damages. It is the rule in some states that when the death of the wrongdoer is instantaneous the decedent's beneficiaries have no right to recover exemplary damages. The rationale is that the decedent did not live long enough to acquire any cause of action that could survive to his personal representative.<sup>13</sup>

The rule in those relatively few states that allow exemplary damages under their wrongful death, survival or "hybrid" statute is to punish the wrongdoer's willful act, thereby making an example of him.<sup>14</sup> Alabama goes so far as to base the awarding of exemplary damages on the degree of the wrongdoer's culpability.<sup>15</sup> In carrying this doctrine to its logical end, a defendant of slight culpability causing the decedent's beneficiaries a tremendous loss would face less liability than a highly culpable defendant doing only slight pecuniary harm.<sup>16</sup>

Ohio also requires that willful or wanton acts be done by the wrongdoer<sup>17</sup> before it will award to the decedent's beneficiaries exemplary damages to punish the culprit.<sup>18</sup> However, Ohio<sup>19</sup> as well as thirty-three other states, generally has not allowed exemplary damages in a

<sup>8</sup> Frankel v. Burke's Excavating Inc., 223 F. Supp. 945 (E.D. Pa. 1963).

<sup>9</sup> Tex. Rev. Civ. St. Ann. Art. 4673 (1952).

<sup>10</sup> Stephenson v. Collins, 210 S. 2d 733 (Fla. 1968); Weider v. Hoffman, 238 F. Supp. 437 (D.C. Pa. 1965).

<sup>11</sup> First Nat'l Realty Co. v. Weathers, 154 A. 2d 548 (Mun. Ct. of App. D.C. 1959).

<sup>12</sup> Cherno v. Bank of Babylon, 54 Misc. 2d 277, 282 N.Y.S. 2d 114 (1967).

<sup>13</sup> Turcol v. Junkins, 49 Del. 596, 122 A. 2d 224 (1956).

<sup>14</sup> Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W. 2d 1 (1964).

<sup>15</sup> Blount Bros. Constr. Co. v. Rose, 274 Ala. 429, 149 S. 2d 821 (1962).

<sup>16</sup> Speiser, *supra* n. 6 at § 3:3.

<sup>17</sup> Levin v. Elyria Sign Co., 1 Ohio App. 2d 542, 206 N.E. 2d 38 (1965).

<sup>18</sup> Curry v. Big Bears Store Co., 75 Ohio L. Abs. 148, 142 N.E. 2d 684 (1956).

<sup>19</sup> Ollier v. Lake Cent. Airlines, Inc., 423 F. 2d 554 (6th Cir. 1970).

wrongful death action.<sup>20</sup> Likewise, several federal statutes do not allow punitive damages for a decedent's wrongful death.<sup>21</sup>

In effect, what these state and federal statutes are saying is that when a person is wrongfully killed, his appointed representatives' or beneficiaries' right, as well as the public's right, to punish the culprit terminates. It is true that any right in a wrongful death action is statutory, the right not having been originally recognized at common law.<sup>22</sup>

Notwithstanding the view that most jurisdictions refrain from allowing punitive damages where the decedent is wrongfully killed by another, sixteen states hold to the contrary.<sup>23</sup> There is much diversity amongst these states as to the statutory provisions allowing punitive damages under the applicable wrongful death, survival or "hybrid" statute, but at least the interested parties' right as well as the public's right to punish the culprit is preserved.<sup>24</sup>

### Development of Statutory Rights in Wrongful Death

The first reported case denying any recovery for the wrongful death of another was the case of *Baker v. Bolton*,<sup>25</sup> wherein Lord Ellenborough denied the plaintiff's action for recovery of damages for his wife's wrongful death. With some reluctance, the American courts followed the rule of *Baker v. Bolton*.<sup>26</sup> In 1846 *Lord Campbell's Act*, entitled "An Act for Compensating the Families of Persons Killed by Accidents," was passed.<sup>27</sup> It was the first legislation that allowed damages for the life of a decedent who was wrongfully killed, and the forerunner of today's statutory law on wrongful death.

In addition to the courts reasoning through the injustice worked by the rule in *Baker's* case,<sup>28</sup> Lord Campbell's Act gave the American courts a more reasonable law to deal with the interested parties' loss of

<sup>20</sup> States not allowing exemplary damages: Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Utah, Vermont, Virginia, Virgin Islands, Washington, Wisconsin and Wyoming.

<sup>21</sup> Federal Tort Claims Act, 28 U.S.C.A. § 2674 (1969). See also, *Platis v. United States*, 288 F. Supp. 254 (Utah, 1968).

<sup>22</sup> *Marmon v. Mustang Aviation, Inc.*, 430 S.W. 2d 182 (Tex. 1968).

<sup>23</sup> Alabama, Arizona, Delaware, Florida, Kentucky, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Mexico, Pennsylvania, South Carolina, Tennessee, Texas and West Virginia allow punitive damages for wrongful death.

<sup>24</sup> *Supra* n. 18.

<sup>25</sup> *Baker v. Bolton*, 1 Campb. 493, 170 Eng. Reprint 1033 (1808) as cited by Speiser, *supra* n. 6 at 2.

<sup>26</sup> *Baltimore & O. R.R. v. Chamber*, 73 Ohio St. 16, 76 N.E. 91 (1905); *Carey v. Berkshire R.R.*, 55 Mass. 475 (1848).

<sup>27</sup> *Lord Campbell's Act*, 9&10 Vict. ch. 93 (1846) as cited by Speiser, *supra* n. 6 at § 1:7.

<sup>28</sup> *Baltimore & O. R.R. v. Chamber*, *supra* n. 26.

loved ones by the wrongful act of another. After New York passed the first wrongful death statute in 1847, the majority of the other states passed similar legislation affording rights for the wrongful death of a person.

Since the action for wrongful death was not allowed at common law, it was purely a creature of statute<sup>29</sup> and must be strictly construed.<sup>30</sup> Many of the states not allowing exemplary damages for a wrongful death base their reasoning on this strict rule of interpreting their applicable statute.<sup>31</sup> However, it is highly questionable how long public policy will allow defendants who caused the willful, malicious death of another to be released by strict interpretation. The public wants to see a willful wrongdoer punished.<sup>32</sup> It will not approve the courts' refusal to view these statutes as remedial when, in fact, some courts are taking the more liberal view to meet the demands of justice.<sup>33</sup>

### **Most States Do Not Allow Punitive Damages in Wrongful Death Actions**

"It is the general rule in this country that punitive or punitive damages for death are not recoverable under statutes modeled after Lord Campbell's Act, or under any form of statute which does not expressly or by clear implication confer a right to such damages."<sup>34</sup> The rationale for the majority of those states not allowing punitive damages under a wrongful death, survival or "hybrid" statute may be summarized as follows: (1) Many of those states not allowing exemplary damages under their applicable legislation do not do so because the right to recover damages for a wrongful death did not exist at common law and is purely a creature of statute<sup>35</sup> and must be strictly construed.<sup>36</sup> Therefore, where the right to exemplary damages is not expressly set forth, no right is construed to exist; (2) Some states interpret their statutory provisions on wrongful death as creating a new cause of action in the beneficiaries. Thus, any personal right of action the decedent would have experienced had he lived terminated with his death<sup>37</sup>; (3) A portion of the states feels that the purpose of their wrongful death, survival or "hybrid" statute is not to punish the wrong-

<sup>29</sup> *Schmoll v. Creecy*, 54 N.J. 194, 254 A. 2d 202 (1962).

<sup>30</sup> *Limbaugh v. Woodall*, 121 Ga. App. 638, 175 S.E. 2d 135 (1970).

<sup>31</sup> *Frazier v. Oil Chem. Co.*, 407 Pa. 78, 179 A. 2d 202 (1962).

<sup>32</sup> *Supra* n. 18.

<sup>33</sup> *Hunter v. Dampsk A/S Flint*, 279 F. Supp. 701 (E.D. Mich. 1967).

<sup>34</sup> *Meehan v. Cent. R.R. of New Jersey*, 181 F. Supp. 594, 598 (S.D.N.Y. 1960); See also 94 A.L.R. 384, 386 (1935).

<sup>35</sup> *Supra* n. 29.

<sup>36</sup> *Estrow v. Wilson*, 30 App. Div. 2d 646, 291 N.Y.S. 2d 46 (1968).

<sup>37</sup> *Wilson v. Whittaker*, 207 Va. 1032, 154 S.E. 2d 124 (1967).

doer.<sup>38</sup> The awarding of punitive damages is contrary to the judicial theory of these states; (4) Other states not ordinarily allowing exemplary damages for wrongful death construe their statutes remedially<sup>39</sup> when justice or public policy requires the wrongdoer to be punished or where a special statutory provision provides for exemplary damages.<sup>40</sup>

It appears from the cases and statutory law of several jurisdictions that they have beaten an old horse into the ground in that the old maxim of statutory construction has been followed blindly!<sup>41</sup> The common law is the foundation of our Anglo-American system of jurisprudence, and traditionally when statutory laws were enacted, they were looked upon with suspicion by the courts which were reluctant to go beyond their explicit language.<sup>42</sup> The body of statutory law today is so vast that the prior justification for strict construction seems unreasonable if it does not produce a just result.

The present trend of the courts is to harmonize all justified rights under the common law with laws that are in derogation of it.<sup>43</sup> Furthermore, it is the duty of the court to construe the law not only as black and white, but also with an interpretation that interweaves new statutory law with our inherited body of common law principles.<sup>44</sup>

Certainly the legislative intent is of uppermost concern to the court in construing a wrongful death, survival or "hybrid" statute. In *Breckon v. Franklin*<sup>45</sup> the court stated, "the legislative intent has been designated the vital part, heart, soul and essence of the law," but it is unreasonable to think that the legislature's intent was to allow a malicious, willful, wanton act to go unpunished.

Virginia takes a unique stand to buttress their tendency to deny exemplary damages in a wrongful death action. Their position asserts that since a wrongful death statute creates a new cause of action in the beneficiaries it would be unjust to give the beneficiaries the de-

<sup>38</sup> *Dahl v. N. Am. Creameries Inc.*, 61 N.W. 2d 916 (Sup. Ct. of N. Dak., 1953).

<sup>39</sup> N.J. Stat. Ann. § 2A:31-1 (1952); *Turon v. J. & L. Constr. Co.*, 8 N.J. 543, 86 A. 2d 192 (1952).

<sup>40</sup> *Archer v. Bowling*, 166 Ky. 139, 179 S.W. 15 (1915).

<sup>41</sup> The following are not in accord with allowing exemplary damages in wrongful death in that they follow the strict construction doctrine: *Engle v. Finch*, 37 Ga. App. 452, 140 S.E. 632 (1927); *Wilson v. Tromly*, 404 Ill. 307, 89 N.E. 2d (1949); *De Moss v. Walker*, 242 Ia. 911, 48 N.W. 2d 811 (1951); *Currie v. Fiting*, 375 Mich. 440, 134 N.W. 2d 611 (1965); *Estrow v. Wilson*, 30 App. Div. 2d 646, 291 N.Y.S. 2d (1968); *Greene v. Nichols*, 274 N.C. 18, 161 S.E. 2d 521 (1968); *Mathies v. Kittrell*, 350 P. 2d 951 (Sup. Ct. of Okla., 1960); *Holmes v. Oregon & California Ry. Co.*, 5 F. 523 (D.C. Ore. 1881); *Platis v. United States*, 409 F. 2d 1009 (10th Cir. 1969); Wyoming: *Bostwick* article, 2 Land & Water L. Rev. 405 (1967).

<sup>42</sup> *Plunkett, A Concise History of the Common Law* 327 (5th ed. 1956).

<sup>43</sup> *People v. One 1962 Chevrolet Bel Air*, 56 Cal. Rptr. 878 (1967).

<sup>44</sup> *Moragne v. State Marine Lines, Inc.*, 90 S. Ct. 1772, 398 U.S. 375 (1970).

<sup>45</sup> 383 Mich. 251, 174 N.W. 836 (1970).

cedent's personal cause of action. The rationale is based on the fact that the decedent's personal cause of action existed and expired before the beneficiaries had a right of action.<sup>46</sup> Therefore, the heirs are entitled merely to compensatory damages regardless of how willful or wanton the culprit's acts were.

Alaska,<sup>47</sup> Kansas,<sup>48</sup> and South Dakota<sup>49</sup> do not allow exemplary damages in a wrongful death, survival or "hybrid" statute in that "they could not agree that the theory of the law was to punish . . ." <sup>50</sup> However, the Supreme Court of Kansas ruled in 1913 that a plaintiff, who had brought a private action for malicious prosecution, was entitled to punitive damages.<sup>51</sup> In 1969, the same theory was expounded in an assault and battery case.<sup>52</sup> Notwithstanding the fact that neither of these cases were brought under a wrongful death, survival or "hybrid" statute, these decisions seem to indicate the court's consent to award exemplary damages where a gross wrong has been done. Why then does not the willful, wanton killing of another merit exemplary damages?

Although several of the states advocate refraining from reading a right into their statutes where one is not explicitly stated,<sup>53</sup> others will construe the statute remedially where a gross injustice would be worked if punitive damages were denied.<sup>54</sup> Many of the jurisdictions not allowing exemplary damages set a maximum amount for compensatory damages.<sup>55</sup> Others leave the question of damages up to the jury to determine what is a fair and just amount. The terms "fair" and "just" in the Wyoming statute,<sup>56</sup> as in others,<sup>57</sup> suggest that fair play along with justice existed in the minds of the legislature when drafting the said law. The mere plea for damages to punish a willful and wanton act of a wrongdoer, who refused to play by the rules of society, does not seem to contradict that intention.

<sup>46</sup> *Supra* n. 37.

<sup>47</sup> *Linge's Adm'r v. Alaska Treadwell Co.*, 3 Alaska 9 (1906).

<sup>48</sup> *Atchison, T.&S.F. Ry. Co. v. Townsend*, 71 Kan. 524, 81 P. 205 (1905).

<sup>49</sup> *Supra* n. 38.

<sup>50</sup> *Supra* n. 48; at 529.

<sup>51</sup> *Stalker v. Drake*, 91 Kan. 142, 136 P. 912 (1913).

<sup>52</sup> *Rooks v. Brunch*, 202 Kan. 441, 449 P. 2d 580 (1969).

<sup>53</sup> *Supra* n. 41.

<sup>54</sup> *Iowa, Amos v. Prom, Inc.*, 115 F. Supp. 127 (N.D. Iowa 1953); *New Jersey, Kern v. Kogan*, 93 N.J. Super. 186, 226 A. 2d 186 (1967).

<sup>55</sup> Some of the states and their limits are as follows: Ill. Ann. Stat. ch. 70, § 2 (Smith-Hurd 1959) limited to \$30,000.00; Kan. St. Ann. § 60-1903 (1964) limited to \$35,000.00 and costs; Minn. St. Ann. § 573.02 (1947) limited to \$35,000.00; N.H. Rev. St. Ann. § 556.13 (1955) limited to \$20,000.00 if no dependents and \$60,000.00 if dependents; Code of Va. § 8-636 (1957) limited to \$50,000.00.

<sup>56</sup> *Wyo. St. Ann. § 1-1066* (1959).

<sup>57</sup> *Ark. St. Ann. § 27-909* (1962); *N.C. Gen. St. § 28-174* (1966).

### The Ohio Position

Ohio strictly construes its wrongful death<sup>58</sup> and survival statutes.<sup>59</sup> Since neither the wrongful death nor the survival statutes explicitly award exemplary damages, the courts simply have refused to entertain any plea for them. The traditional position of Ohio in regard to wrongful death is set forth in *Klebolte v. Buffon*,<sup>60</sup> where Justice Newman expounded: "If it had been intended that the injured party should have the right to recover exemplary or punitive damages, or any damages other than actual damages, the Legislature would have made such a provision." Yet, in 1971 Ohio applied its "unlimited damages for death" measure in a wrongful death action involving Ohio parties, even though the action arose from an accident in Illinois, which limits death damages.<sup>60a</sup>

If the jury finds that there is a right to damages under the wrongful death statute, two distinct actions are maintainable: (1) One is for the next of kin, (2) the other for the benefit of the estate.<sup>61</sup> The damages allowed under the wrongful death statute are merely compensatory;<sup>62</sup> they do not even allow a father to recover for his son's funeral expenses.<sup>63</sup> If it is any consolation, the amount of pecuniary damages is not limited by the Ohio Constitution.<sup>64</sup>

Ohio's survival statute allows the decedent's personal representative to bring an action for mesne profits, deceit, fraud, and injuries to persons or property for the benefit of the decedent's estate.<sup>65</sup> The courts have not allowed punitive damages to the decedent's personal representative under this survival statute.<sup>66</sup> In addition to the previous distinctions made between wrongful death and survival statutes, a recent Ohio case<sup>67</sup> deals with a rather interesting distinction in that if a claim is brought under the wrongful death statute and there are no real parties (next of kin), then the action must die. Under the survival statute, the benefit is for the estate and only a personal representative may sue. Therefore, the representative can proceed with the survival action regardless of whether or not any of the real parties are still available. Notwithstanding the rights available to the heirs, the estate, and

<sup>58</sup> Ohio Rev. Code Ann., § 2125.01 et. seq. (Page's 1968).

<sup>59</sup> *Id.*, § 2305.21 (Page's 1954).

<sup>60</sup> 89 Ohio St. 61, 66, 105 N.E. 192, 193 (1913).

<sup>60a</sup> *Fox v. Morrison Motor Freight, Inc.*, 25 Ohio St. 2d 193 (1971).

<sup>61</sup> *Moss v. Hirzel Canning Co.*, 100 Ohio App. 509, 137 N.E. 2d 440 (1955).

<sup>62</sup> Ohio Rev. Code, *supra* n. 58.

<sup>63</sup> *Caswell v. Harry Miller Excavating Co.*, 20 Ohio Misc. 46, 246 N.E. 2d 921 (1969).

<sup>64</sup> Ohio Const., Art. I, § 19a.

<sup>65</sup> Ohio Rev. Code, *supra* n. 59.

<sup>66</sup> *Supra* n. 19.

<sup>67</sup> *Fisher v. Butler*, 11 Ohio Misc. 116, 224 N.E. 2d 923 (1966).

the personal representative under the present wrongful death and survival statute, the courts of Ohio have not extended these rights to include exemplary damages in a wrongful death action.

### Present Trend

The present trend of some states is to allow punitive damages in a wrongful death action where the decedent met his death as the result of the willful, wanton act of another. Among those states are: Alabama,<sup>68</sup> Arizona,<sup>69</sup> Delaware,<sup>70</sup> Florida,<sup>71</sup> Kentucky,<sup>72</sup> Massachusetts,<sup>73</sup> Mississippi,<sup>74</sup> Missouri,<sup>75</sup> Montana,<sup>76</sup> Nevada,<sup>77</sup> New Mexico,<sup>78</sup> Pennsylvania,<sup>79</sup> South Carolina,<sup>80</sup> Tennessee,<sup>81</sup> Texas,<sup>82</sup> and West Virginia.<sup>83</sup>

The rationale of these states allowing punitive damages in a wrongful death action can be classified as follows: (1) The purpose of the applicable wrongful death, survival or "hybrid" statute is to punish the wrongdoer<sup>84</sup>; (2) To deter individuals from committing willful, malicious acts that result in great bodily harm and death to others because the public has a right to be protected from such outrageous conduct<sup>85</sup>; (3) To construe the state's wrongful death, survival or "hybrid" statute remedially and interpret the legislative intent to be to allow exemplary damages.<sup>86</sup> More specifically:

*Alabama:* This state takes a unique position and treats its wrongful death statute<sup>87</sup> as punitive in nature rather than compensatory. The recovery by the decedent's executors or personal representative is

<sup>68</sup> Lankford v. Mong, 283 Ala. 24, 214 S. 2d 301 (1968).

<sup>69</sup> Bois v. Cole, 99 Ariz. 198, 407 P. 2d 917 (1965).

<sup>70</sup> Reynolds v. Willis, 209 A. 2d 760 (Del. 1965).

<sup>71</sup> Atlas Properties, Inc. v. Didich, 226 S. 2d 684 (Fla. 1969).

<sup>72</sup> Ky. Rev. St. Ann. § 411.150 (1970); *supra* n. 40.

<sup>73</sup> Mass. Ann. Laws ch. 229, § 2 (1955); Bannon v. United States, 293 F. Supp. 1050 (D.R.I. 1968).

<sup>74</sup> Miss. Code Ann. § 1454 (1957); Bush v. Watkins, 224 Miss. 238, 80 S. 2d 19 (1955).

<sup>75</sup> Mo. Ann. St. § 537.080 (1953); May v. Bradford, 369 S.W. 2d 225 (Supt. Ct. of Mo. 1963).

<sup>76</sup> Mont. Rev. Code Ann. § 93-2810 (1964); Gagnier v. Curran Constr. Co., 151 Mont. 468, 443 P. 2d 894 (1968).

<sup>77</sup> Nev. Rev. St. § 41.080 et seq. (1967).

<sup>78</sup> N.M. St. Ann. § 22-20-3 (1953); Baca v. Baca, 472 P. 2d 997 (N.M. 1970).

<sup>79</sup> Hennigan v. Atl. Ref. Co., 282 F. Supp. 667 (E.D. Pa. 1967).

<sup>80</sup> Dawson v. S. Carolina Power Co., 220 S.C. 26, 66 S.E. 2d 322 (1951).

<sup>81</sup> *Supra* n. 14.

<sup>82</sup> FWA Drilling Co. Inc. v. Lambert, 418 S.W. 2d 878 (Tex. Civ. App. 1967).

<sup>83</sup> Turner v. Norfolk & W. R. Co., 40 W. Va. 675, 22 S.E. 83 (1895).

<sup>84</sup> Braun v. Moreno, 11 Ariz. App. 509, 466 P. 2d 60 (1970).

<sup>85</sup> Mo. Ann. St., *supra* n. 75.

<sup>86</sup> *Supra* n. 69.

<sup>87</sup> 7 Ala. Code § 123 (1960).

based on the degree of culpability of the wrongdoer's act.<sup>88</sup> The wrongful death statute creates a new cause of action in the decedent's heirs as long as the action is brought within two years from the time of the decedent's death. Alabama's survival statute<sup>89</sup> allows a personal representative to bring the decedent's personal cause of action in an attempt to punish the wrongdoer and protect the public from willful, wanton acts.

*Arizona:* In *Boies v. Coles*, the Supreme Court of Arizona set forth its position on exemplary damages in wrongful death actions:

The general rule is that the allowance of exemplary or punitive damages is based on aggravated, wanton, reckless or intentional wrongdoing. We hold that the use of the words "aggravated circumstances" as applied to the wrongful death act is a clear implication of legislative intent to allow punitive damages in wrongful death actions.<sup>90</sup>

*Delaware:* The position of this jurisdiction is to punish the wrongdoer for malicious acts. The right to punish the culprit may be sought and had only under the state's survival statute.<sup>91</sup> No action for exemplary damages is allowed under the wrongful death statute since the statute brings forth a new cause of action in the heirs, who have no right to start an action that existed prior to their right of action.

*Florida:* In this jurisdiction both wrongful death and survival statutes are on the books. There is no right to exemplary damages under the wrongful death statute, but there is a right to punish the culprit under the survival statute.<sup>92</sup> The legislative intent is to allow exemplary damages, as demonstrated in a recent state Supreme Court decision in which the father of a young child who drowned because of the defendant's willful misconduct was awarded \$35,000.00 as punitive damages.<sup>93</sup>

*Kentucky:* Section 411.150(4) of the Kentucky Revised Statutes Annotated<sup>94</sup> is titled "Action by widow or child of person killed with deadly weapon," and allows recovery of exemplary damages.

*Massachusetts:* The law here holds that the right to death damages may be punitive, in order to deter willful acts that harm others.<sup>95</sup> The case of *Bannon v. United States*,<sup>96</sup> not only sets forth one solution to the problem that a court faces when the wrongful act occurs in one

<sup>88</sup> *Supra* n. 15.

<sup>89</sup> Ala. Code, *supra* n. 87; at § 150.

<sup>90</sup> *Supra* n. 69 at 921.

<sup>91</sup> 10 Del. Code Ann. § 3701 et seq. (1953); See also *supra* n. 70.

<sup>92</sup> *Fowlkes v. Sinnamon*, 97 S. 2d 626 (Fla. 1957).

<sup>93</sup> *Supra* n. 71.

<sup>94</sup> Ky. Rev. St. Ann., *supra* n. 72.

<sup>95</sup> Mass. Ann. laws, *supra* n. 73.

<sup>96</sup> *Bannon v. U.S.*, *supra* n. 73.

state and the death in another (may apply *lex loci delicti*)<sup>97</sup>, but also firmly establishes the personal representative's right to exemplary damages.

*Mississippi*: Section 1453 of the Mississippi Code Annotated provides to any interested party the right to "recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent . . ." <sup>98</sup> In *Young v. Columbus & G. Ry. Co.*, which aided in securing the right to exemplary damages for a wrongful death in Mississippi, the court left the amount of punitive damages up to the jury, even though actual damages were not proven.<sup>99</sup>

*Missouri*: Section 537.080 et seq. of the Annotated Laws of Missouri<sup>100</sup> allow punitive damages not only where the acts of the wrongdoer were willful and wanton but also where the facts indicate an "aggravating circumstance" created by the defendant.<sup>101</sup>

*Montana*: Section 17-208 of Montana's Code allows awarding of punitive damages in a wrongful death action as long as the breach of duty or obligation does not arise in contract.<sup>102</sup> When a culprit in effect manifests gross contempt for rights of others, punitive damages will be awarded.<sup>103</sup>

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<sup>97</sup> The *lex loci delicti* is a long settled law, that wrongful death actions, being unknown to the common law, derive from statutes only and that the statute which governs such an action is that of the place of the wrong. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (1969); *Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937 (D.S.C. 1969). Speaking in terms of a hypothetical fact situation, if X State had a wrongful death statute with a \$15,000.00 limitation and State Y a limit of \$50,000.00, it is obvious that the decedent's administrator would seek to have the laws of State Y govern his wrongful death action. Under the *lex loci delicti* the administrator would fail if the act happened in State X. Is the mere fact that one was injured in a State other than where he dies a just rationale for denying his estate the higher amount? However, today the courts have become cognizant of the injustice and hardship that this rule of law often created. Recent cases have moved away from strictly applying the *lex loci delicti* theory, in that "our fast changing and moving era with its attendant new social and economic problems, requires a re-evaluation of the choice of law rule. . . . The nice tidy provision of uniformity and simplicity should not prevail over elementary choice influencing considerations, public policy, decency and justice." *Williams v. Texas Kenworth Co.*, 307 F. Supp. 748, 752 (W.D. Okla. 1969).

In some cases the "center of gravity" rule is a more reasonable solution to use in determining the law to apply. The "center of gravity" is determined by the place where the most significant part of the relationship between the parties occurred. *Mitchell v. Craft*, 211 S. 2d 509 (Miss. 1968). This theory ("C.O.G.") creates another tool for the practitioner in that if the State allowing the more money or exemplary damages is the place where the act occurred, then he can argue *lex loci delicti* and, if not, one can argue the substantive relation theory, i.e., "Center of Gravity" and see, *Fox case*, *supra*, n. 60a.

<sup>98</sup> Miss. Code Ann., § 1453 (1957).

<sup>99</sup> 165 Miss. 287, 147 S. 342 (1933).

<sup>100</sup> Mo. Ann. St. § 537.080 et seq. (1953).

<sup>101</sup> Mo. Ann. St., *supra* n. 75.

<sup>102</sup> Mont. Rev. Code Ann. § 17-208 (1967). In any action for breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

<sup>103</sup> *Gagnier v. Curran*, *supra* n. 76.

*Nevada*: Allows punitive damages in a wrongful death action. The legislature went to the trouble to explicitly spell out this right:

The court or jury in every such action may give such damages, pecuniary and exemplary, as it shall deem fair and just. Every person entitled to such action, and every person for whose benefit such action is brought, may prove his respective damages, and the court or jury may award such person that amount of damages to which it considers such person entitled. . . .<sup>104</sup>

*New Mexico*: Under section 22-20-3 of New Mexico Statutes Annotated<sup>105</sup> “. . . the jury in every such action (wrongful death) may give such damages, compensatory and exemplary as they shall deem fair and just. . . .” The purpose is to make reckless, willful acts costly for the wrongdoer.<sup>106</sup>

*Pennsylvania*: The decedent's personal representative, who claims punitive damages, may have the right to them under this state's survival statute.<sup>107</sup> The courts in this jurisdiction take the position that, even though the right to exemplary damages is not explicitly set forth in the survival statute, the right does exist. The rationale is that since punitive damages are recognized in appropriate other cases, reprehensible conduct that results in the death of another is an appropriate case for exemplary damages, saying:

Within the survival act no mention is made of damages per se. We see no reason to read into the act a limitation on the nature or amount of recovery. Certainly the legislature was aware that the courts of Pennsylvania recognize punitive damages in an appropriate case, when they passed the act.<sup>108</sup>

As in several of the other jurisdictions allowing punitive damages, Pennsylvania declares a purpose to punish outrageous conduct<sup>109</sup> and to discourage wrongdoers.

*South Carolina*: The right to punitive damages in death actions exists in South Carolina,<sup>110</sup> and is provided within the statute:

In every such action the jury may give such damages, including exemplary damages when such wrongful act, neglect or default was the result of recklessness, wilfulness or malice, as they may

<sup>104</sup> Nev. Rev. St., *supra* n. 77 at § 41.100.

<sup>105</sup> N.M. St. Ann., *supra* n. 78.

<sup>106</sup> Stang v. Hertz Corp., 81 N.M. 348, 467 P. 2d 14 (1970).

<sup>107</sup> The Pennsylvania statute does not explicitly provide for exemplary damages in wrongful death actions; “All causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants.” 20 Pa. St. Ann., § 320.601 (1950).

<sup>108</sup> *Supra* n. 79 at 683.

<sup>109</sup> *Id.*, citing Restatement of Torts, § 908, comment a (1939).

<sup>110</sup> *Supra* n. 80; Wherein the jury awarded \$10,000.00 exemplary damages to decedent's administrator when defendant drove a passenger bus at high speeds without any horn, brakes and with utter disregard for life.

think proportioned to the injury resulting from such death to the parties respectively for whom and whose benefit such action shall be brought. . . .<sup>111</sup>

*Tennessee*: Allows punitive damages in wrongful death actions when the claimant alleges and proves the defendant's willful, wanton conduct.

Exemplary damages will be allowed where willful misconduct or entire want of care, which would raise the presumption of a conscious indifference to consequences. In such cases the interest of society and other aggrieved individuals are blended and such damages are allowed as punishment for such conduct and as an example or warning to the one so guilty, and others, in order to deter them from committing like offenses in the future.<sup>112</sup>

*Texas*: Provides the right to punitive damages in a wrongful death action by statute, by case law, and by a constitutional provision. The statutory section applies:

When the death is caused by the willful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered.<sup>113</sup>

*Texas* is in accord with those states that award punitive damages in wrongful death actions more for the purpose of punishing the wrongdoer than to benefit the estate.<sup>114</sup> The right of the plaintiff to punitive damages is also provided in the *Texas* constitution:

Every person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body. . . .<sup>115</sup>

*West Virginia*: This jurisdiction is one of the pioneers in the area of awarding punitive damages in a wrongful death action.<sup>116</sup> This state allows punitive damages where the act of the wrongdoer was willful and wanton.

The *Federal* laws also show a trend towards allowing punitive damages in a wrongful death action. Although no federal statute dealing with wrongful death explicitly allows exemplary damages,<sup>117</sup> there is federal legislation that recognizes the aggrieved parties' right to such

<sup>111</sup> S.C. Code Ann. § 10-1954 (1962).

<sup>112</sup> *Supra* n. 14 at 4.

<sup>113</sup> *Tex. Rev. Civ. St. Ann., supra* n. 9.

<sup>114</sup> *Supra* n. 82.

<sup>115</sup> *Tex. Rev. Civ. St. Ann., supra* n. 9; See, Art. 16 § 26 (1955).

<sup>116</sup> *Supra* n. 83.

<sup>117</sup> Fed. Tort Claims Act, *supra* n. 21; "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . ."

damages.<sup>118</sup> The case of *Braizer v. Cherry*,<sup>119</sup> involving an action by the decedent's representatives against two Georgia police officers who killed the decedent and allegedly violated his civil rights under the Federal Civil Rights Act, held that "Congress adopted as federal law the current effective state law on the general right of survival."<sup>120</sup>

In the words of Justice Cardozo:

Death statutes have their roots in dissatisfaction with the archaisms of the law. . . It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system.<sup>121</sup>

Refusal to award exemplary damages patently encourages gross negligence. It still "pays," in some states, to kill a victim rather than injure him, if a dead man's heirs have no right to punitive damages, while if the victim pulls through he may sue for exemplary damages.<sup>122</sup>

Original statutory laws on wrongful death never allowed exemplary damages, and the rule of strict construction prevented the courts from reading the right to punitive damages into their statutes.<sup>123</sup> Today, logic and public policy indicate a need for a more liberal interpretation of the applicable wrongful death, survival or "hybrid" statute in that today's enormous body of statutory law makes nonsense of the theory behind the strict construction doctrine.<sup>124</sup> The logic behind the majority view of wrongful death,<sup>125</sup> survival or "hybrid" statute has reduced itself to absurdity. An example of the injustice that can result from a wrongful death, survival or "hybrid" statute that does not allow punitive damages is the recent Ohio Common Pleas Court decision of *Ranells v. City of Cleveland*.<sup>126</sup>

In the *Ranells* case the decedents, who were husband and wife, died from inhaling a lethal amount of chlorine gas that had escaped from a water filtration plant maintained by the City. It was alleged and proven

<sup>118</sup> Fed. Civ. Rights Act, 42 U.S.C.A. § 1983, 1988 (1970); *Caperci v. Huntoon*, 397 F. 2d 799 (1st Cir. 1968), cert. denied, 89 S. Ct. 299, 393 U.S. 940 (1968).

<sup>119</sup> 293 F. 2d 401 (5th Cir. 1961).

<sup>120</sup> *Id.*, at 405.

<sup>121</sup> *Van Beeck v. Sabine*, 57 S. Ct. 452, 300 U.S. 342, 350 (1937).

<sup>122</sup> "The public policy underlying exemplary damages is to punish the wrongdoer. Logic dictates that if a wrongdoer may be punished if his victim lives, then surely he should not escape retribution if his wrongful act causes a death." *Leahy v. Morgan*, 275 F. Supp. 424, 425 (D.C.N.D. Iowa 1967).

<sup>123</sup> *Supra* n. 29, 30.

<sup>124</sup> *Supra* n. 43, 44.

<sup>125</sup> *Supra* n. 58.

<sup>126</sup> (No. 874668—Decided October 23, 1970), Common Pleas Court of Cuyahoga County, Cleveland, Ohio (Appeal No. 30780).

by the plaintiff's counsel that the City had knowledge of the repairs necessary and that the dangers were grossly neglected by the City. It was further shown by the plaintiff's counsel that the decedents suffered for a period of time after being affected by the chlorine gas. The fact that the decedents had suffered *before expiring* resulted in a \$1,359,032.50 verdict for the plaintiff, \$750,000.00 of which was awarded as punitive damages. If the decedents had not suffered *before expiring*, then the award of exemplary damages would have totaled zero dollars. It is simply unreasonable that the mere fact that one lives for a moment before his death will afford the right to punish the wrongdoer via punitive damages, while one who dies instantaneously loses this right.

### Conclusion

Punitive damages presently are not allowed in the majority of jurisdictions in the United States. However, the laws should fit the needs of society.<sup>127</sup> The present trend in many states is to allow punitive damages in a wrongful death action, in order to punish the wrongdoer and in order to do justice. It is to be hoped, as Shakespeare said, that "the law hath not been dead, though it hath slept."<sup>128</sup>

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<sup>127</sup> Note, Measure of Damages for the Wrongful Death of the Head of the Family in Iowa, 39 Iowa L. Rev. 494 (1954).

<sup>128</sup> Shakespeare, Measure for Measure (Act 2, Scene 2).