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Nicola Sabato Tancredi

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DENIAL OF PUNITIVE DAMAGES UNDER THE ILLINOIS SURVIVAL ACT—*MATTYASOVSKY V. WEST TOWNS BUS COMPANY*

Matyas Mattyasovszky, a 12-year-old boy, was run over and killed while attempting to re-enter a bus owned and operated by the West Towns Bus Company. Plaintiff, decedent's father as administrator, brought actions under the Wrongful Death Act¹ and the Survival Act,² charging the defendant bus company with ordinary negligence and wilful and wanton misconduct. The evidence indicated that the bus company was negligent in the establishment and enforcement of adequate safety procedures. The jury found the decedent free from contributory negligence, found the defendant guilty of wilful and wanton misconduct, and awarded plaintiff \$75,000 in pecuniary damages and \$50,000 in punitive damages. The Illinois Appellate Court vacated the award of punitive damages, holding that recovery under the Survival Act is limited to compensatory damages.³ The Illinois Supreme Court affirmed

1. Illinois Wrongful Death Act, ILL. REV. STAT. ch. 70, §1 (1973) states in part: [W]henever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. Illinois Probate Act, ILL. REV. STAT. ch. 3, §339 (1973), states in relevant part: [I]n 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"

3. *Mattyasovszky v. West Towns Bus Co.*, 21 Ill.App.3d 46, 313 N.E.2d 496 (2d Dist. 1974), reviewed in 2 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* 409-10 (2d ed. 1975) and Kiely, *Damages, Equity, and Restitution — Illinois Remedial Options*, 24 DEPAUL L. REV. 274 (1975).

The plaintiff originally had recovered on the wrongful death action, at the trial level. On appeal the defendant contended that a recovery of punitive damages was improper in a wrongful death action. Plaintiff conceded and amended his complaint to include additional counts; one seeking recovery under the Survival Act and the other seeking recognition of a common law action for wrongful death including exemplary damages. In keeping with previous Illinois case law, both the appellate and supreme courts denied appellant's motion for recognition of the common law count for wrongful death and exemplary damages. *Baird v. Chicago, B. & Q.R.R. Co.*, 11 Ill.App.3d 264, 296 N.E.2d 365 (4th Dist. 1973).

this holding in *Mattyasovszky v. West Towns Bus Co.*⁴ This Note will discuss the significance of the court's interpretation of the Survival Act as it relates to future litigation under the Act and the problems raised by the appellate and supreme court decisions.

The right to bring a cause of action after the death of a party has existed in Illinois since 1829,⁵ when the Survival Act was first adopted. Except for a modification in 1872, when the legislature expanded the scope of the statute to include actions to recover damages for injuries to the person, except slander and libel,⁶ and later, actions to include Dram Shop awards,⁷ the statute in effect today is identical to the one enacted over a century ago.⁸

In 1882, the Illinois Supreme Court in *Holton v. Daly*⁹ explained the important distinctions between the Survival and Wrongful Death Acts for the first time. The court held that the Wrongful Death Act limits recovery to pecuniary damages for negligent acts resulting in death and that such damages are to be awarded for the benefit of the decedent's survivors. In contrast, the Survival Act permits the decedent's estate to bring certain types of actions which would otherwise abate at death under the common law. The court added that the Wrongful Death Act provides the exclusive remedy for personal injuries which caused the decedent's death. Thus, the Survival Act was interpreted to permit

The plaintiff urged the court to recognize the latter action, citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) and *Gaudette v. Webb*, 284 N.E.2d 222 (Mass. 1972). The Illinois Supreme Court distinguished *Moragne* on the facts, since the victim in that case would have been denied all compensation had equitable discretion not been exercised, 61 Ill.2d at 34-35, 330 N.E.2d at 511. *Gaudette* was distinguished as merely adjusting the statute of limitations of Massachusetts's wrongful death statute for similar equitable considerations. Neither of these considerations were present in *Mattyasovszky* since the victim had already received compensatory damages. The appellant's motions were also denied on policy grounds. See text accompanying note 25 *infra*.

4. 61 Ill.2d 31, 330 N.E.2d 509 (1975).

5. Law of July 1, 1829, §127 Ill.Laws [1829] 233. As first enacted, the statute allowed actions of trover, detinue or replevin to survive for and against executors and administrators. For a detailed history of the Illinois Survival Act see Hurley, *A Matter of Life and Death*, 60 ILL. B. J. 472 (1972). See *Mattyasovszky v. West Towns Bus Co.* 21 Ill.App.3d at 52-53, 313 N.E.2d at 500-01; ILL. ANN. STAT. ch. 3 §339 (Smith-Hurd 1961) (historical notes); Note, *Death of the Abatement Doctrine - Murphy v. Martin Oil Co.*, 24 DEPAUL L. REV. 608 (1975).

6. Law of July 1, 1872, §123 Ill.Laws [1871-72] 108-9; *Devine v. Healy*, 241 Ill. 34, 89 N.E. 251 (1909), *rev'g*, 141 Ill.App.290 (1908); *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N.E. 553 (1898).

7. ILL. REV. STAT. ch. 3, §339 (1973). This provision was originally enacted in 1934.

8. ILL. ANN. STAT. ch. 3 §339 (Smith-Hurd 1961) (historical notes).

9. 106 Ill. 131 (1882).

recovery for injuries sustained by the decedent only if those injuries did not directly cause the death.¹⁰

The latter distinction was abolished in *Murphy v. Martin Oil Co.*¹¹ in which the Illinois Supreme Court expressly overruled *Holton*, holding that both the heirs and the estate may sue for injuries directly related to the decedent's death.¹² The heirs, as before, may bring suit under the Wrongful Death Act and recovery is limited to pecuniary damages. The estate may also bring an action under the Survival Act to recover damages for injury to the person, pain and suffering, and damage to the decedent's property. *Murphy*, however, left unanswered whether punitive damages were also recoverable under the Survival Act.¹³ The question was resolved in *Mattyasovszky* by the court's holding that recovery under the Survival Act is limited to compensatory damages.¹⁴

The *Mattyasovszky* decision results in a significant limitation on the range of recoverable damages that were potentially available under

10. *Id.* at 139-41; *accord*, *Susemihl v. Red River Lumber Co.*, 376 Ill. 138, 33 N.E.2d 211 (1941) (declared any change in interpretation of the two statutes would have to come via legislative action); *Shedd v. Patterson*, 312 Ill. 371 (1924); *Wilcox v. Int'l Harvester Co.*, 278 Ill. 465, 116 N.E. 151 (1917); *Ohnesorge v. Chicago City Ry. Co.*, 259 Ill. 424, 102 N.E. 819 (1913); *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N.E. 553 (1898); *Chicago & E. Ill. R.R. v. O'Connor*, 119 Ill. 586, 9 N.E. 263 (1886); *Hurley*, *supra* note 5, at 378; *Kiely*, *supra* note 3, at 278; *Note*, *supra* note 5, at 612-13. *But see* *Graul v. Adrian*, 32 Ill.2d 345, 205 N.E.2d 444 (1965); *Saunders v. Schultz*, 20 Ill.2d 310, 170 N.E.2d 163 (1960); *Chidster v. Cagwin*, 76 Ill.App.2d 477, 222 N.E.2d 274 (2d Dist. 1966).

11. 56 Ill.2d 423, 308 N.E.2d 583 (1974).

12. *Id.* at 432, 308 N.E.2d at 587. *See* *Mattyasovszky v. West Towns Bus Co.*, 21 Ill.App.3d 52-53, 313 N.E.2d 501 (2d Dist. 1974); *SPEISER*, *supra* note 3, at 409, 430; *Kiely*, *supra* note 3, at 278-80; *Note*, *supra* note 5. A majority of jurisdictions interpret their survival statutes to allow recovery for injuries resulting in death. *See* *Greene v. Teixeira*, 54 Hawaii 231, 505 P.2d 1169 (1973); *Rohlfing v. Moses Akiona, Ltd.*, 45 Hawaii 373, 369 P.2d 96 (1961) *rev'd on other grounds*; *Metrinko v. Witherell*, 134 Me. 483, 188 A. 213 (1936); *Thorton v. Ins. Co. of No. Am.*, 287 So.2d 262 (Miss. 1973); *Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33 (Tex. 1963). For a comprehensive list of all the relevant statutes in each state *see* *SPEISER*, *supra* note 3, Appendix A, at 643-787.

13. 21 Ill.App.3d at 53, 313 N.E.2d at 501. The majority of jurisdictions do not permit recovery of punitive damages. *See* *Meehan v. Central R.R.Co. of N.J.*, 181 F. Supp. 594 (S.D.N.Y. 1960); *Atchison, T.&S.F.Ry.Co. v. Townsend*, 71 Kan. 524, 81 P. 205 (1905); *Wilson v. Whittaker*, 207 Va. 1032, 154 S.E.2d 124 (1967). For a list of all the relevant statutes in each state *see* *SPEISER*, *supra* note 3, Appendix A, at 643-787.

Some jurisdictions follow the general rule that punitive damages are not recoverable under any statute that does not expressly or by clear implication confer a right to such damages. *Meehan v. Central R.R. Co. of N.J.*, 181 F.Supp. 594, 598 (S.D.N.Y. 1960). There is no mention of this rule, however, in the supreme court opinion. There is also no definite indication that the court considered this rule in arriving at its decision in *Mattyasovszky*.

14. 61 Ill. 2d at 34, 330 N.E.2d at 510.

Murphy. The decision also greatly restricts the liability which may be imposed upon wilful and wanton tortfeasors who cause the death of their victims. The impact of these limitations is clearly illustrated in *Mattyasovszky* where denial of punitive damages reduced plaintiff's recovery and defendant's liability by 40%.¹⁵

In addition, *Mattyasovszky* holds that wilful and wanton tortfeasors who cause the death of victims will be exempt from punitive damages, while those who merely injure their victims will not. This result is somewhat incongruous since Illinois does allow recovery of punitive damages in tort cases not brought under the Wrongful Death or Survival Acts. A case in point is *Moore v. Jewel Tea Co.*¹⁶ involving a personal injury action for damages caused by the explosion of a can of drain opener which blinded the plaintiff. The court awarded punitive damages to the plaintiff based on the defendant's conduct. This dichotomy in judicial treatment, between those wilful and wanton tortfeasors who cause the death of their victims and those who do not, has existed in Illinois as a result of the *Holton* rule.¹⁷ Following *Murphy*, the court in *Mattyasovszky* had the opportunity to eliminate this dichotomy, but instead chose to continue the double standard and perpetuate the old adage that "it is cheaper to kill your victim than to maim him."¹⁸

The lack of logic of this double standard, providing preferential treatment for those who cause the death of their victims, has been sharply criticized. Justice Goldenhersh, the sole dissenter in *Mattyasovszky*, urged that the preference be eliminated adding that precedent should not stand as an insurmountable obstacle to change.¹⁹

15. Plaintiff had been awarded a total of \$125,000 at the trial court level, but this was reduced to \$75,000 by the appellate court and affirmed by the supreme court.

16. 116 Ill.App.2d 109, 253 N.E.2d 636 (1st Dist. 1969), *aff'd*, 46 Ill.2d 288, 263 N.E.2d 103 (1970). See *Madison v. Wigal*, 18 Ill.App.2d, 564, 153 N.E.2d 90 (2d Dist. 1958); *Kimes v. Trapp*, 52 Ill.App.2d 442, 202 N.E.2d 42 (3d Dist. 1964); *Wetmore v. Ladies of Loretto*, 73 Ill.App.2d 33, 196 N.E.2d 521 (2d Dist. 1964).

17. *Holton v. Daly*, 106 Ill. 131 (1882), *overruled*, *Murphy v. Martin Oil Co.*, 56 Ill.2d 423, 308 N.E.2d 583 (1974).

18. W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 902 (4th ed. 1971).

19. 61 Ill.2d at 38-39, 330 N.E.2d at 513. Goldenhersh quoting from *Murphy* stated: "What this court observed in *Molitor v. Kaneland Community Unit Dist. No. 302* (1959), 18 Ill.2d 11, 26, may appropriately be said again:

"We have repeatedly held that the doctrine of *stare decisis* is not an inflexible rule requiring this court to blindly follow precedents and adhere to prior decisions, and that when it appears that public policy and social needs require a departure from prior decisions, it is our duty as a court of last resort to overrule those decisions and establish a rule consonant with our present day concepts of right and justice."

56 Ill.2d 423, 308 N.E.2d 583 (1974).

One commentator, Stuart M. Speiser, has also criticized this double standard, presently applied in other jurisdictions, noting

[I]t makes no sense for a state that allows punitive damages for a wilful, wanton, malicious, reckless, or grossly negligent tort that results in personal injury, emotional anguish, or property damages, to deny such punitive damages where the injury victim happens to die. Death is, after all, the final injury—the ultimate insult. Such a result defies logic and distorts symmetry in the law.²⁰

Even the appellate court, which denied the punitive damages, criticized the dual standard. The court reluctantly based its decision on its interpretation of the *mandatory* legislative intent of the Survival Act and expressed regret at the perpetuation of the double standard. The appellate court stated:

In addition to deterring others from wilful and wanton misconduct, [awarding punitive damages] would bring death actions into complete harmony with the general body of law governing other types of tortious conduct. Logically, it would seem that punitive damages should be allowed to the estate of the decedent under the survival statute.

Despite our highest desires, however, law is not always based upon logical rationale.²¹

The court also discussed plaintiff's motion for recognition of a common law action for wrongful death to include punitive damages.²² In its discussion,²³ the court agreed with the appellate decision that the purpose of punitive damages is the same as that which motivates the criminal law—to punish and deter. However, the supreme court stated that the justification for awarding such damages was significantly diminished in *Mattyasovszky*. The bus driver, who was primarily responsible for the injury, had been dismissed as a party by the plaintiff before the case went to the jury. Thus, if punitive damages were to be imposed, they would not deter actual misconduct but rather punish the bus company for mere vicarious liability. The supreme court also objected to awarding punitive damages because the cause of action was for wilful and wanton conduct, which it described as "a characterization that shades imperceptibly into simple negligence."²⁴ Unlike conduct

20. SPEISER, *supra* note 3. He recommends a model uniform survival act including a provision for the survival of such punitive damage claims as may have been awarded had the victim lived. For a general discussion of punitive damages in survival actions *see id.* at 423.

21. 21 Ill.App.3d at 54, 313 N.E.2d at 502.

22. *See* note 3 *supra*.

23. 61 Ill.2d at 35, 330 N.E.2d at 511.

24. *Id.*

which merits criminal sanction, this wilful and wanton conduct lacked specific definition, and the court therefore was unwilling to impose additional liability. Further, referring to civil cases, the court noted that the amount of the judgment is determined by the jury for the benefit of the plaintiff whereas in criminal cases the fine is set by statute and the money is awarded to the state.²⁵ Thus, an award of punitive damages is a windfall to the plaintiff, being neither for the compensation of the victim nor for the benefit of the state.

The reasoning used by the supreme court in formulating this policy is subject to criticism. There is no conclusive indication that the liability imposed upon the defendant West Towns Bus Company was vicarious. As the court mentioned, the bus driver was dropped as a party *before* the case went to the jury. The jury then found the defendant West Towns Bus Company guilty of wilful and wanton misconduct. There were two possible grounds for this verdict. Either the bus company was vicariously responsible because of the misconduct of its driver or the bus company was guilty by its own acts or omissions. There was evidence that the defendant West Towns Bus Company had improperly maintained the vehicle involved in the accident, and had, in addition, failed to establish and enforce adequate safety procedures.²⁶ Thus, it is conceivable that the jury did not find purely vicarious liability but rather determined liability based upon the wilful and wanton misconduct of the bus company itself.

Even if one assumes that the jury did impose liability vicariously, it is not necessary to conclude that the award of punitive damages was improper. Both section 217C of the Restatement (Second) of Agency and section 909 of the Restatement (Second) of Torts discuss punitive damages as follows:

Punitive damages can properly be awarded against a master or other

25. *Id.* The court's discussion of the desirability of awarding punitive damages under the facts of *Mattyasovszky* occurred in its consideration of plaintiff's motion for recognition of a common law action for wrongful death including exemplary damages. See note 3 *supra*. While the court may have been influenced by these considerations, there is no conclusive indication that these policy considerations formed the basis of the court's statutory interpretation as is suggested in another article on this case. See Blanco, *Recent Decisions*, 64 ILL. B. J. 196 (1975).

26. Evidence revealed that the defendant's bus lacked an outside, right rear view mirror; that the bus' rear door safety device was inoperable due to the corrosion of the contact points in the bell housing; and that the driver was not required to check the rear door safety device prior to each run, although such a check required only a matter of minutes. Based on this evidence, the appellate court specifically stated that the verdict finding the defendant guilty of wilful and wanton misconduct was not against the manifest weight of the evidence. 21 Ill.App.3d at 50, 313 N.E.2d at 499.

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.²⁷

The supreme court cites this section to support its position. One could, however, also cite this section to permit the imposition of punitive damages in *Mattyasovszky*. The defendant West Towns Bus Company did authorize the "doing and manner" of maintaining the bus involved. The defendant's failure to properly maintain the bus and to establish and enforce adequate safety procedures establishes that it was not personally innocent. Further, it may be argued that the West Towns Bus Company was reckless in employing its agent bus driver.²⁸ The Comments to Restatement (Second) of Torts express approval for the use of punitive damages, as a deterrent to the employment of unfit persons in important positions provided that such damages are not used to punish innocent parties.²⁹

In lieu of further explanation of its position, the court suggested a comparison between *Toole v. Richardson-Merrell, Inc.*³⁰ and *Roginsky v. Richardson-Merrell, Inc.*³¹ Both cases dealt with injuries resulting from an improperly prepared drug. In *Toole* a California court awarded punitive damages upon a finding that defendant's officers and directors deliberately falsified reports and suppressed evidence concerning the possible toxicity of the drug. In *Roginsky*, a later case involving the same drug and the same defendant, a federal court interpreted New York law to deny an award of punitive damages. The court found that under New York law, a corporation may be held liable for punitive damages only when superior officers order, participate in, or ratify outrageous conduct.³² Concerning punitive damages and vicarious liability, it found

27. RESTATEMENT (SECOND) OF AGENCY § 217C (1975); RESTATEMENT (SECOND) OF TORTS § 909 (Tent. Draft No. 19, 1973).

28. The unfitness of the bus driver was indicated by his conduct. Prior to the accident, he turned off the stop-signal bell and did not call out the bus stops. After the victim became entrapped, he drove on despite shouts from passengers inside and pounding of pedestrians outside the bus.

29. RESTATEMENT (SECOND) OF TORTS §909, comment b (Tent. Draft No. 19, 1973).

30. 251 Cal.App.2d 689, 60 Cal. Rptr. 398 (1967).

31. 378 F.2d 832 (2d Cir. 1967).

32. *Id.* at 842.

that where punitive damages are sought, evidence of misconduct by subordinate employees may be so widespread as to support a finding that management authorized it or pursued a policy of deliberately closing its eyes, but evidence here was not sufficient to warrant such a finding.³³

The *Roginsky* court addressed itself to one narrow issue of vicarious liability, that is, whether widespread evidence of misconduct by subordinate employees results in a corporate ratification of the misconduct. That is not the issue of vicarious liability presented in *Mattyasovszky*. Here, if vicarious liability was indeed imposed, it can be argued that it was done under agency principles in that the defendant corporation authorized the "doing and manner" of providing inadequate safety and maintenance procedures and that it recklessly hired an unfit driver.³⁴ Moreover, the court in *Roginsky* denied punitive damages primarily because it judged Richardson-Merrell, Inc., to be merely reckless and *not guilty* of wilful and wanton conduct. This was not the case in *Mattyasovszky*. Also the court in *Roginsky* was presented with a "disaster" situation where multiple suits were being brought against the same defendant. *Mattyasovszky* involves but one victim and one possible recovery.

One can easily argue against the court's contention that the standard of wilful and wanton conduct is insufficiently defined to merit punitive damages. In fact, wilful and wanton conduct is well established and widely utilized as a ground for the imposition of punitive damages.³⁵ As previously mentioned, *Roginsky*, cited by the court to support its position, denied punitive damages specifically because it deemed the defendant's conduct *not* to be wilful and wanton.³⁶

The court also stated that the amount of an award of punitive damages is set by a jury rather than regulated by statute as are criminal fines. It thus implied that there is no protection against the imposition of exorbitant punitive damages. This is not the case. Punitive damages must have some reasonable relationship to the motives and acts of the defendant and ordinarily to the injury inflicted.³⁷ Moreover, awards of

33. *Id.* at 843-44. See notes 27-28 and accompanying text *supra*.

34. RESTATEMENT (SECOND) OF AGENCY §217C (1957). See text accompanying note 27 *supra*.

35. See *LaCerra v. Woodrich*, 321 Ill.App.107, 52 N.E.2d 461 (1st Dist. 1943); *Nosko v. O'Donnell*, 260 Ill.App. 544 (1st Dist. 1931); *Kurrus v. Seibert*, 11 Ill.App. 319 (1882). See also *Pepsi-Cola Distrib. v. Barker*, 274 F.2d 372 (4th Cir. 1960); *Meadows v. Vaughan*, 81 Ga.App. 45, 57 S.E.2d 689 (1950); *Sebastian v. Wood*, 246 Iowa 94, 66 N.W.2d 841 (1954).

36. 378 F.2d at 843. While there were other grounds for the court's decision, this was certainly one of the major ones.

37. *Aladdin Mfg. Co. v. Mantle Lamp Co.*, 116 F.2d 708 (1941); *Connett v. Winget*, 310

excessive damages are subject to judicial review and reversal.³⁸ Finally, the argument that an award of punitive damages will result in a windfall to the plaintiff does not by itself present a compelling interest sufficient to supercede the purpose of punitive damages, namely, to punish and deter wilful and wanton tortfeasors.^{38.1}

Analyzing *Mattyasowszky*, one notes that in arriving at its decision, the supreme court reasoned that the Survival Statute has never been interpreted to authorize punitive damages. It did not cite any precedent specifically denying such damages, but stated, however, that the *Murphy* decision implicitly limited recovery to compensatory damages. This interpretation is in direct opposition to the interpretation of the appellate court which had not read *Murphy* as precluding punitive damages.³⁹ Unfortunately, the Illinois Supreme Court in *Mattyasowszky* did not comment on the validity of the appellate court's reasoning. This clouds the implications of *Mattyasowszky*. Can one assume, for example, that the supreme court has affirmed the reasoning of the appellate decision? And if so, what does this mean? It was impossible for the appellate court to interpret the Survival Statute on the basis of the legislative proceedings, as no substantive records of these hearings are preserved. In arriving at its decision the appellate court utilized a three-part syllogism based upon prior Illinois case law. The court began with the language of the Act, "damages for injury to the person," which it interpreted to mean "damages of a physical character,"⁴⁰ and reasoned

Ill.App. 533, 34 N.E.2d 878 (2d Dist. 1941); *Spelina v. Sporry*, 279 Ill.App. 376 (1st Dist. 1935); 15 ILL. L. & PRAC. DAMAGES § 133 (1968).

38. *Burton v. Hitachi America Ltd.*, 504 F.2d 721 (1974); *Burns v. West Chem. Prod., Inc.* 12 Ill.App.3d 947, 299 N.E.2d 455 (1st Dist. 1973); *Wanner v. Kennan*, 22 Ill.App.3d 930, 317 N.E.2d 114 (2d Dist. 1973).

38.1. In deciding *Mattyasowszky*, the supreme court also considered an amicus brief submitted by thirteen railroad companies. They argued that allowing punitive damages under the Survival Act would result in the virtual economic ruin of public transportation systems in Illinois.

This argument, however, is misleading since it is well established in Illinois that awards of excessive damages are subject to judicial review. See *id.*

Furthermore, it may be argued that wilful and wanton corporate tortfeasors may decide that it is more economical to continue to pay mere compensatory damages than to change established corporate practices. Ironically, the plaintiff in *Mattyasowszky* noted in his reply brief that the defendant corporation had not changed its maintenance or safety procedures as of the time of trial. Allowing punitive damages enhances the court's power to deter wilful and wanton misconduct as it increases the ability of the court to make such actions prohibitive due to cost.

39. 21 Ill.App.3d at 54, 313 N.E.2d at 502.

40. *Id.*, citing *Shedd v. Patterson* 230 Ill.App. 553, 557 (1923), *aff'd*, 312 Ill. 371, 144 N.E. 5 (1924).

that punitive damages are not "damages of a physical character."⁴¹ From that analysis, it concluded that the legislature intended to allow the recovery of compensatory damages only.

This is the same type of reasoning employed by the court in *Holton v. Daly* to interpret the statutory intent of the Wrongful Death Act as refusing damages for pain and suffering.⁴² *Holton* exemplifies the court's use of case law to arrive at what it then considered to be the mandatory legislative intent, a rationale which appears to indicate that the court is doing nothing more than creating a non-existent legislative purpose. Later cases noted the basic inequity of this decision.⁴³ Finally, the court in *Murphy* expressly overruled *Holton*, basing its decision on the fundamental unfairness of the prior holding and the lack of logic of the *Holton* court's interpretation of the Wrongful Death Act.⁴⁴

Similarly, in this case, while the supreme court did not specifically adopt the appellate court's interpretation of legislative intent, it may be contended that it at least acquiesced.⁴⁵ It may be assumed, therefore, that the reason the supreme court refused to award punitive damages was because it interpreted the intent of the legislature to preclude such an award.⁴⁶

The unfairness of the *Holton* rule lasted for over ninety years. It is possible, barring legislative action,⁴⁷ that it may take the court another

41. *Eshelman v. Rawalt*, 298 Ill. 192, 197, 131 N.E. 675, 677 (1921) (punitive damages are those assessed in the interest of society to punish the defendant and to warn him and others that such acts are offenses against society).

42. 106 Ill. 131 (1882).

43. See *Saunders v. Schultz*, 20 Ill.2d 301, 107 N.E.2d 163 (1960); *Susemihl v. Red River Lumber Co.*, 376 Ill. 138, 33 N.E.2d 211 (1941).

44. 56 Ill.2d at 431, 308 N.E.2d at 587.

45. There is a contrary argument that silence is not tantamount to acquiescence. However, the court has consistently looked to legislative intent to interpret the Survival Act. It is reasonable to assume, therefore, that had the court interpreted the legislative intent contrary to the appellate court it would have so stated.

46. One commentator has sharply criticized the validity of the reasoning found in the appellate court opinion.

[T]he court gave an unduly restrictive interpretation to the relevant position of the Survival Act, treating it, in effect, as a separate *statutory* cause of action, providing for recovery where none was allowed under any circumstances at common law. The Wrongful Death and Dram Shop Acts are clear examples of the latter type. The Survival Act, on the contrary, does not *create* a cause of action where none existed before, but simply prevents a common law action for injuries, in its full scope, from abating upon death.

Kiely, *supra* note 3, at 281.

47. A lack of legislative action will be interpreted by the court as a ratification of their position.

It is axiomatic that where a statute has been judicially construed and the con-

ninety years to recognize the basic unfairness of its decision in *Mattyasovszky*.⁴⁸

Nicola Sabato Tancredi

struction has not evoked an amendment, it will be presumed that the legislature has acquiesced in the court's exposition of legislative intent.

People v. Hairston, 46 Ill.2d 348, 353, 263 N.E.2d 840, 844-45 (1970), *cert. denied*, 402 U.S. 972 (1971).

48. Assuming one feels that this decision is a correct interpretation of the Survival Act, and further that this result is unjust; it does not seem likely that the legislature will modify the Act. For example, in 1941 the supreme court acknowledged the unfairness of the *Holton* decision in *Susemiehl v. Red River Lumber Co.*, 376 Ill. 138, 33 N.E.2d 211 (1941) but held that any change would have to come from the legislature. Nearly twenty years later in *Saunders v. Schultz*, 20 Ill.2d 301, 170 N.E.2d 163 (1960) the court again commented on the unfairness of the *Holton* doctrine. Noting the absence of any corrective action on the part of the legislature since *Susemiehl*, the supreme court took it upon itself to modify the *Holton* decision by allowing recovery of medical and funeral expenses. Finally, the court in *Murphy v. Martin Oil Co.*, 56 Ill.2d 423, 308 N.E.2d 583 (1974) expressly overruled *Holton*.