Punitive Damages Claims and the Illinois Survival Act

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Abstract: Under the common law, which is the law of Illinois unless modified by the legislature, all claims abated on the death of the claimant. The Illinois legislature chose to enact limited modifications of the common law, allowing only compensatory and not punitive damages in survival and wrongful death actions. The Illinois Supreme Court has repeatedly interpreted the terms of the Survival Act and Wrongful Death Act as authorizing only compensatory damage claims. By reenacting the statutes subsequent to this judicial interpretation, and by rejecting amendments to allow punitive damages, the legislature has confirmed and ratified the Illinois Supreme Court’s interpretation. There is no question that the legislature was free to make this legislative choice. Nevertheless, lower Illinois courts have created exceptions without any statutory basis, awarding punitive damages in Survival Act claims when they find it “equitable” to do so. By recognizing such exceptions, the lower courts have illegitimately substituted their judgment for the legislature’s.

The Illinois Supreme Court has repeatedly held that only compensatory damages, and not punitive damages, may be awarded in a claim under the Illinois Survival Act, unless punitive damages are an essential part of a comprehensive statutory scheme independent of the Survival Act. At common law, the court has reasoned, no tort claim at all survived the death of the claimant; alteration of the common-law no-survival rule is a matter of statute and extends only so far as the statute’s terms; and the Survival Act’s terms allow only compensatory damages claims, and not punitive damages claims, to

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Some lower Illinois courts, however, have invoked “equitable considerations” to create exceptions to the statute, in order to permit punitive awards under the Survival Act when they disagree with the legislative choice. Most recently, the Circuit Court of Cook County allowed a jury to consider a punitive damage claim in a survival action, and upheld the jury’s record-breaking $25 million punitive damage verdict, in a case now on appeal to the Illinois Appellate Court, First District.5

This article examines whether it is proper to allow punitive damages awards in survival actions based on “equitable considerations.” The issues posed by this question are of broader importance, however, for they involve fundamental issues concerning the legislative process and the legislative-judicial relationship, including the process by which the legislature amends the common law, the nature of judicial interpretation, the relationship between the legislature and the courts in the development of the common law, presumptions concerning legislative intent arising from that relationship, and the deference due to legislative policy choices.

Part I of this article discusses the common-law rule that all claims abate upon death; the Illinois legislature’s modification of the common-law rule in the Survival and Wrongful Death Acts; the Illinois Supreme Court’s interpretation of the legislation as limited to compensatory damages (unless a separate substantive statute allows punitives); and the legislature’s ratification of this judicial interpretation. Part II discusses the


5 See Marston v. Walgreen Co., No. 02 L 13158 (Cir. Ct., Cook Co.) (judgment dated Oct. 12, 2006; order denying defendant’s post-trial motion dated Dec. 20, 2006), app. pending, No. 07-0209 (Ill. App. 1st Dist.).
validity of the legislature’s choice to enact only a limited modification of the common law, extending to compensatory damages but not punitive damages. Part III discusses lower Illinois courts’ unjustified creation of an “equitable considerations” exception to the statutory rule. The article concludes that the courts must respect the legislature’s limited modification of the common law, especially when the legislature has acquiesced in the Illinois Supreme Court’s interpretation of the Survival Act’s terms as excluding punitive damages.

I. Common Law, Legislative Modification, Judicial Interpretation, and Legislative Ratification.

A. The Common Law Abatement Rule.

At common law, virtually all tort actions abated on the death of either the plaintiff or the defendant.6 The common law recognized neither a survival action (i.e., an action by the representative of a decedent’s estate for claims of injury the decedent owned before death) nor any remedy for wrongful death (i.e., an action by a decedent’s heirs for their own injuries caused by the decedent’s death).7 These common-law principles

6 See, e.g., Wilcox v. Bierd, 330 Ill. 571, 583, 162 N.E. 170 (1928) (“At common law, actions founded on tort did not survive. . . . Under the common-law rule the death of either party at any stage of the proceedings abated the action. . . . The general rule of the common law that actions ex delicto abated on the death of either party was modified by the statute of 4 Edward III, c. 7, so as to give an action in favor of a personal representative for injury to personal property. That statute became a part of the common law of this state, which changed the common law only so far as it related to injury to personal property.”) (citations omitted), overruled in part on other grounds, McDaniel v. Bullard, 34 Ill.2d 487, 216 N.E.2d 140 (1966).

7 See, e.g., Reed v. Peoria & O.R.R., 18 Ill. 403, 403-04 (1857) (“At common law, causes of action for trespasses to person or to property did not survive either in favor of or against personal representatives or heirs. The statute of 4 Edw. III. ch. 7, and which is in force in this state, is held to have changed the common law only so far as relates to injuries to personal property . . . [Unless a plaintiff’s claim arises from trespass to personal property,] he can not recover for the consequences or incidents, as an assault and ( . . . continued)
constitute Illinois law unless amended by statute. As the Illinois Common Law Act specifically provides, “the common law of England . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.”

B. **Legislative Modification of the Common Law.**

The Illinois legislature has enacted limited modifications of these common-law rules. Initially, the legislature simply provided a mechanism to pursue claims that already survived under the common law. For example, the 1826 Abatement Act provided that if a plaintiff died during the pendency of an action that survived at common law, his executor/administrator or any co-plaintiff could, upon filing a suggestion of death, battery of his person, or injuries to his personal property therein.”); *Murphy v. McGrath*, 79 Ill. 594, 595 (1875) (plaintiff’s action for trespass assault and battery would have abated under common law upon his death, but survived under 1872 survival statute); *Holton v. Daly*, 106 Ill. 131, 136, 139 (1882) (“The common law rule was, that actions merely personal, arising *ex delicto*, died with the person, and did not survive to the representatives. Thus, Blackstone says, ‘And in actions merely personal, arising *ex delicto*, for wrongs done or committed by the defendant, as trespass, battery and slander, the rule is, that *actio personalis moritur cum personā* [a personal action dies with the person],’” but the Illinois legislature changed the common law by enacting a wrongful death statute in 1853 and a survival statute in 1872), *overruled in part on other grounds, Murphy v. Martin Oil Co.*, 56 Ill. 2d 423, 308 N.E.2d 583 (1974).

8 The Common Law Act, 5 ILCS 50/1 (2007), provides in full:

That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.
proceed with the action.\(^9\) The 1829 Wills Act simply confirmed that certain actions — not tort actions — survived under the common law.\(^10\)

In 1853 the legislature first enacted the Wrongful Death Act, providing a decedent’s surviving spouse and next of kin a right to “compensation” for the “pecuniary injuries” they suffered as a result of the decedent’s death.\(^11\) Until the legislature enacted


Sec. 4. When any action shall be pending in any of the courts of this state, and the plaintiff, before final judgment, shall die, the same shall not abate, if it might originally have been prosecuted by his executor or administrator; and in such case the executor or administrator may suggest such death on the record, and enter his, her or their names in the suit, and prosecute the same. . . .

Sec. 5. In any action pending before any court, if there be two or more plaintiffs or defendants, and one or more of them die before final judgment, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not abate, but such death being suggested on the record, the action shall proceed.

\(^{10}\) Ill. Rev. Code of Laws, p. 233, § 127 (1829):

Actions of trover, detinue, or replevin, shall survive for and against executors or administrators, and may be maintained in the same manner and with the same effect as such actions could be for or against their testator or intestate, if living.

\(^{11}\) 1853 Ill. Laws p. 97, §§ 1-2 (current version at 740 ILCS 180/2 (2007)):

Section 1. When the death of a person shall be caused by a 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 (. . . continued)
the Survival Act in 1872, actions for personal injuries suffered by the decedent before death continued to abate. The 1872 Survival Act for the first time provided the decedent’s estate a right to bring an action “to recover damages for an injury to the person” of the decedent.

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.

§ 2. Every such action shall be brought by and in the names of the personal representative of the deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in the relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: Provided, that every such action shall be commenced within two years after the death of such person.

12 1871 Ill. Laws p. 108, § 123:

In addition to the actions which survive by the common law, the following shall 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 detention or conversion of personal property, and actions against officers for misfeasance, malfeasance or non-feasance of themselves or their deputies, and all actions for fraud or deceit.

13 See n.7 supra.

14 The Survival Act, substantially unchanged since 1872, is now codified at 755 ILCS 5/27-6 (2007):

( . . . continued)
Between the Wrongful Death Act and the Survival Act, there is a complete compensatory remedy for injury causing death. As the Illinois Supreme Court noted in *Murphy v. Martin Oil Co.*, “[t]he usual method of dealing with the two causes of action . . . is to allocate conscious pain and suffering, expenses and loss of earnings of the decedent up to the date of death to the survival statute, and to allocate the loss of benefits of the survivors to the action for wrongful death.”

C. The Illinois Supreme Court’s Statutory Interpretation.

The Illinois Supreme Court has consistently interpreted the Wrongful Death Act and Survival Act as providing only for compensatory damages, and not for punitive damages. In *Murphy v. Martin Oil Co.*, the court emphasized that, while the common-law rule of abatement is now obsolete, damages under these statutes “are recognized as compensatory rather than punitive.”

The Illinois Supreme Court first directly addressed whether punitive damages could be awarded in survival or wrongful death actions in *Mattyasovszky v. West Towns*

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Actions which survive. 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, nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 6-21 of “An Act relating to alcoholic liquors.”


16 *Id.* at 428, 308 N.E.2d at 585.
Bus Co., a case involving the death of a boy who was struck by a bus. In Mattyasovszky, the court considered two issues: (1) whether punitive damages are recoverable under the Survival Act, and (2) whether (since the Wrongful Death Act is expressly limited to “pecuniary injuries”) there is an additional common-law action for wrongful death that might include punitive damages. The court answered both questions “no.”

With regard to the Survival Act, the court could not have been more blunt:

This statute has never been thought to authorize the award of punitive damages. The plaintiff’s contention that it should now be construed to do so rests largely upon the recent decision of this court in Murphy v. Martin Oil Co. . . ., which authorized recovery for a decedent’s pain and suffering during the interval between injury and death, as well as for pecuniary loss. But nothing in that opinion was intended to or did authorize the recovery of punitive damages. [Murphy] emphasized the compensatory nature of damages authorized under the Survival Act. We find nothing in the Murphy case which suggests a change in the law of this State which for more than a hundred years has limited recovery under the Survival Act to compensatory damages.

. . . The actions which survive under our statute are ‘actions to recover damages for an injury to the person,’ and [our decisions] have emphasized the compensatory nature of the recovery it authorizes.19

With regard to wrongful death, Mattyasovszky held that there was no reason to recognize any common-law cause of action in addition to the statutory Wrongful Death Act cause of action, much less to recognize an action including punitive damages. There

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18 Id. at 33, 330 N.E.2d at 510.
19 Id. at 33-34, 330 N.E.2d at 510.
was no reason to recognize any common-law cause of action, because the statutes already provided the plaintiff a remedy: “The single occurrence involved in the case before us already gives rise to two distinct statutory actions: in one [the Survival Act action] the damages recovered go to the decedent’s estate, . . . and in the other [the Wrongful Death Act action] the damages recovered go to the surviving spouse and next of kin of the deceased.”

Mattyasovszky regarded two cases from other jurisdictions, which the plaintiff had urged as authority to recognize a common-law wrongful death action, as inapposite. Neither case involved punitive damage claims in addition to compensatory claims. In *Moragne v. States Marine Lines, Inc.*, the United States Supreme Court interpreted maritime law as providing a common-law action for wrongful death of a longshoreman in coastal waters, only because the claim unintentionally fell through the cracks (since the Death on the High Seas Act did not apply to coastal waters, the Jones Act applied only to seamen, and state law provided no remedy for unseaworthiness) and there would otherwise be no remedy at all. In *Gaudette v. Webb*, the Massachusetts Supreme Judicial Court simply applied common-law equitable tolling of the statute of limitation to allow minor children to assert a statutory wrongful death claim.

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20 *Id.* at 37, 330 N.E.2d at 512.


23 *Cf.* *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132, 71 L. Ed. 2d 234, 243 (1982) (limitation period in civil rights statute is subject to equitable tolling; rejecting the notion that the time limitation period is an inflexible “jurisdictional” limitation on the statutory claim). *Gaudette* noted that under the ( . . . continued)
Mattyasovszky observed that Moragne “suppl[ied] a remedy for a unique situation that somehow remained uncovered in the midst of a cluster of State and Federal statutes relating to injuries and deaths of seamen, longshoremen and others,” and Gaudette simply tolled the limitation for innocent minors whose guardian failed to act in time, but otherwise did not “disturb[] the statutory wrongful death action.”24 Mattyasovszky further observed that “the strong equitable considerations that were present in the Moragne and Gaudette cases are lacking in the case before us.”25 As the court held, “unlike Moragne, we do not deal here with a unique situation in which, inexplicably, there is no remedy” since both the Survival Act and the Wrongful Death Act supplied compensatory damages remedies.26 The court’s “equitable considerations” remark concerned plaintiffs who otherwise had no statutory remedy for wrongful death. Mattyasovszky never suggested that a court may use “equitable considerations” to allow punitive damages under the Survival Act, in addition to the statutory compensatory remedy.

Mattyasovszky therefore refused to recognize any common-law wrongful death action (even for compensatory damages) in addition to the statutory Wrongful Death Act action. But it also discussed why punitive damages in particular were uncalled for. It noted that “[t]he objectives of an award of punitive damages are the same as those which

Massachusetts wrongful death statute, damages had historically been “computed with reference to the degree of culpability of the defendant” rather than with reference to the survivors’ monetary loss (362 Mass. at 66 n.4, 284 N.E.2d at 226 n.4), but the issue in the case was whether the decedent’s children could assert a statutory wrongful death claim at all, not whether they could seek both compensatory and punitive damages.

24 Mattyasovszky, 61 Ill. 2d at 34, 330 N.E.2d at 511.

25 Id. at 37, 330 N.E.2d at 512.

26 Id.
motivate the criminal law — punishment and deterrence," 27 yet punitive damages would fail to meet a criminal standard in several ways: Criminal law demands clear definitions, which are lacking when punitive damages are based on “willful and wanton conduct,” a standard that “shades imperceptibly into simple negligence.” 28 Unlike a criminal fine, a punitive award may become “a windfall for the plaintiff.” 29 And the punishment and deterrence justifications for punitive damages are “sharply diminished in those cases in which liability is imposed vicariously,” as when a company is held liable for an employee’s conduct. 30

The next case in which the Illinois Supreme Court considered punitive damages and the Survival Act was National Bank of Bloomington v. Norfolk & Western Railway Co. 31 The plaintiff, the representative of the estate of a decedent killed at an unguarded railroad crossing with an obstructed view, brought a claim not only under the Wrongful Death Act, but also under the Public Utilities Act, which provides for both compensatory and punitive damages, and was awarded punitive damages. The court held that the punitive award was proper because it was based directly on the Public Utilities Act, under which punitive damages are an important part of the statutory scheme. 32

27 Id. at 35, 330 N.E.2d at 511.
28 Id. at 35-36, 330 N.E.2d at 511.
29 Id. at 36, 330 N.E.2d at 511.
30 Id. at 36, 330 N.E.2d at 512.
32 Id. at 173-74, 383 N.E.2d at 924.
Act, the court held, was “merely the vehicle by which the cause of action, created by the Public Utilities Act, survives.” The court did not suggest that punitive damages are available under the Survival Act in the absence of such an independent statutory right.

In *Froud v. Celotex Corp.*, a case involving death caused by asbestos exposure, the court reaffirmed the holding of *Mattyasovszky* that recovery under the Survival Act is limited to compensatory damages. It further clarified that *National Bank* stands only for the proposition that when a punitive claim is “an integral component” of “a comprehensive regulatory scheme” like the Public Utilities Act, the “punitive claim survives because of the Public Utilities Act itself,” independently of the Survival Act. As the court stated,

> The Survival Act affords relief in the instances specified in the Act from the common law rule of nonsurvival. . . . The Survival Act shields from abatement only those claims which are specifically set forth in it; which claims abate and which survive is the result of legislative judgment to which this court is not free “to annex new provisions or substitute different ones” or provide exceptions, limitations or conditions which are different than the plain meaning of the statute. . . . Our conclusion in this case depends on the scope of the Survival Act unaided by a statutory regulatory scheme such as that contained in the Public Utilities Act, and this court is not free to read into the Survival Act its own views of the type of claims which should be permitted to survive. . . . Because there is no statutory basis for the award of punitive damages in these cases comparable to the provisions of the Public Utilities Act referred to in *National Bank*, we must regard *Mattyasovszky* as the controlling precedent. Under *Mattyasovszky* the plaintiffs’ claims cannot survive the death of the injured persons.

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33 Id. at 174, 383 N.E.2d at 924.


35 Id. at 331-33, 456 N.E.2d at 134-35.
We are unwilling to accept the plaintiffs’ invitation to overrule Mattyasovszky and add to the scope of the Survival Act by including within it common law claims for punitive damages based upon an injury to the person.\textsuperscript{36}

Finally, the Illinois Supreme Court again applied this principle in \textit{Ballweg v. City of Springfield}.\textsuperscript{37} In unambiguous terms, the court reaffirmed its earlier holdings and overturned a punitive damages award, stating, “In \textit{Froud}, this court reaffirmed its earlier decisions that punitive damages are not recoverable under the Survival Act. . . . Illinois law is clear that punitive damages are not recoverable under the Survival Act.”\textsuperscript{38}

\textbf{D. Legislative Ratification of the Illinois Supreme Court’s Interpretation.}

The Illinois legislature has acquiesced in the Illinois Supreme Court’s conclusion that the terms of the Survival Act and Wrongful Death Act are limited to compensatory damages. The legislature’s reenactment of the statutes in the face of the judicial interpretation, and its failure to amend the statutes despite having opportunities to do so, constitute ratification of the judicial interpretation under well-established principles of statutory construction.

\textbf{1. Legal Principles Regarding Ratification.}

It is an “axiomatic” principle of Illinois law that when “a statute has been judicially construed and the construction has not evoked an amendment,” it is “presumed that the legislature has acquiesced in the court’s exposition of the legislative intent.”\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{36} \textit{Id.} at 334-35, 456 N.E.2d at 136 (citations omitted).
\item \textsuperscript{37} \textit{Ballweg v. City of Springfield}, 114 Ill. 2d 107, 499 N.E.2d 1373 (1986).
\item \textsuperscript{38} \textit{Id.} at 117, 499 N.E.2d at 1377.
\end{itemize}
The presumption of acquiescence is particularly strong when the judicial construction has been consistent and the statute has been reenacted and amended without a suggestion of disagreement with the construction.40

This presumption of acquiescence is potent when the legislature reenacts a statute without altering its judicially-construed terms.41 But when the legislature has considered but not adopted a proposed amendment to modify the judicial construction, the presumption of acquiescence is overwhelming. In that circumstance, the judicial construction is confirmed as the law. The Illinois Supreme Court so held in *Independent Voters of Illinois v. Illinois Commerce Commission*:

Either of [two] legislative proposals would, if enacted, have amended the Act differently from the construction given by this court in [a prior decision]. The legislature’s reenactment of a statute, which has been judicially construed, should be viewed as an adoption of that particular construction. . . . “The construction this court has placed upon the Act has in effect become a part of the Act, and a change in the construction by this court would amount to amending the statute. The power to accomplish

40 See, e.g., *People v. Hickman*, 163 Ill. 2d 250, 262, 644 N.E.2d 1147, 1153 (1994) (when legislature re-uses previously-construed statutory language, “it must be presumed that the legislature acted with knowledge of the prevailing case law”); *Harris Trust & Sav. Bank v. Village of Barrington Hills*, 133 Ill. 2d 146, 155, 549 N.E.2d 578, 581 (1989) (“When a statute has been judicially considered, the sections that have been construed by the court keep their same meaning in any subsequent amendments, absent a clear legislative intent to the contrary.”); *Union Elec. Co. v. Illinois Commerce Comm’n*, 77 Ill. 2d 364, 380-81, 396 N.E.2d 510, 518 (1979) (“reenactment of a statute that has been judicially construed is in effect an adoption of that construction by the legislature”).

41 See, e.g., *Dennis E. v. O’Malley*, 256 Ill. App. 3d 334, 344, 628 N.E.2d 362, 370 (1st Dist. 1993) (“It is a cardinal rule of statutory construction that where the legislature re-enacts a statute which has been judicially construed, that body will be deemed to have tacitly approved of such construction if it uses virtually the same words as in the previous enactment.”).
this does not lie in the courts."\textsuperscript{42}

As the court stated in \textit{Knierim v. Izzo}, once the legislature has acquiesced in a judicial interpretation of a statute, a “court cannot, under the guise of statutory construction, enlarge the classification of actionable injuries under the act” because that “would be doing what the legislature has not seen fit to do in the numerous amendments to the act since [the judicial construction] was rendered.”\textsuperscript{43}

2. \textbf{Application of Ratification Principles Here.}

Under these principles, the Illinois legislature plainly ratified the Illinois Supreme Court’s interpretation of the Survival and Wrongful Death Acts as allowing only compensatory, and not punitive, damages. In 1975, Justice Schaefer noted in \textit{Mattyasovszky} that “the law of this State . . . for more than a hundred years has limited recovery under the Survival Act to compensatory damages.”\textsuperscript{44} During that period, the Act was repeatedly reenacted without changing the scope of available recovery.\textsuperscript{45} Indeed, in 1975 the Survival Act was reenacted without alteration even while the Probate Act, of which the Survival Act is a part, underwent major substantive revisions.\textsuperscript{46}

Even more significantly, in the wake of the Illinois Appellate Court’s decision in


\textsuperscript{43} \textit{Knierim v. Izzo}, 22 Ill. 2d 73, 80, 174 N.E.2d 157, 161 (1961).

\textsuperscript{44} \textit{Mattyasovszky}, 61 Ill. 2d at 33, 330 N.E.2d at 510.


Mattyasovszky that punitive damages are not available under the Survival Act,\textsuperscript{47} House Bill 599 was introduced in the Illinois House, proposing to amend the Survival Act to permit recovery of “actual and punitive” damages. The Bill was disapproved by the legislative committee to which it was referred on April 12, 1975, and never came to the House floor.\textsuperscript{48} Indeed, “[d]uring the past couple of decades, the Illinois General Assembly has rejected at least four attempts to amend both the survival statute and the Wrongful Death Act to allow recovery of punitive damages.”\textsuperscript{49} In May 2007, the Wrongful Death Act was amended to allow damages for grief, but the legislature left unchanged the limitation to “compensation.”\textsuperscript{50}

In \textit{Froud}, the Illinois Supreme Court discussed this issue at length, and concluded that the Illinois legislature ratified the no-punitive interpretation of the Survival Act, by reenacting the statute in the face of judicial interpretation and by rejecting a proposed amendment to alter this interpretation:

Between the appellate court decision in \textit{Mattyasovszky}, which disallowed punitive damages and this court’s affirrnance of the appellate court, a bill was introduced in the General Assembly to amend the Survival Act by expressly providing for the survival of “damages, actual and punitive, for an injury to the person.” The bill was defeated by the committee to which it was referred and never went beyond that committee. . . . Prior to this court’s decision in \textit{Mattyasovszky} the Survival Act was reenacted

\textsuperscript{47} \textit{Mattyasovszky v. West Towns Bus Co.}, 21 Ill. App. 3d 46, 313 N.E.2d 496 (2d Dist. 1974), aff’d, 61 Ill. 2d 31, 330 N.E.2d 509 (1975).

\textsuperscript{48} 2 Final Legislative Synopsis and Digest of the 1975 Session of the Seventy-Ninth General Assembly, State of Illinois 1188.

\textsuperscript{49} IICLE, \textit{Wrongful Death and Survival Actions in Illinois} § 2.8 (2007 ed.).

\textsuperscript{50} Public Act 95-3 (eff. May 31, 2007), codified at 740 ILCS 180/2 (2007).
several times without any modification of the provisions on
which the appellate court and this court rested their
conclusions that punitive damages were not recoverable.
. . . Thus, neither the appellate court’s nor this court’s
decision in Mattyasovszky has been altered by any
amendment of the Survival Act even though a legislative
committee considered an amendment which would have
allowed punitive damages. Under these circumstances, the
construction placed upon the Survival Act by
Mattyasovszky should be regarded as having been
incorporated in the Act. . . . A “change in that construction
by this court would amount to amending the statute,” and
this court has acknowledged that “[t]he power to
accomplish this does not lie in the courts.”51

II. Validity of the Legislative Choice.

The Illinois legislature had the power to allow only compensatory damages under
the Survival Act. At common law, there was no survival right at all, and the legislature’s
creation of a right to seek compensatory damages did not oblige it to provide additional
remedies. The Illinois Supreme Court has already so recognized by upholding the limited
survival remedy in Mattyasovszky, Froud, and Ballweg. The United States Supreme
Court has similarly recognized that “Congress, in the exercise of its legislative powers, is
free to say ‘this much and no more’” when it provides limited survival remedies under
maritime law, and that “we are not free to expand remedies at will simply because it
might work to the benefit of seamen and those dependent upon them. Congress has
placed limits on recovery in survival actions that we cannot exceed.”52

51 Froud, 98 Ill. 2d at 335-36, 456 N.E.2d at 136-37 (citations omitted) (quoting
Union Elec. Co., 77 Ill. 2d at 381, 396 N.E.2d at 518).

52 Miles v. Apex Marine Corp., 498 U.S. 19, 24, 36, 111 S. Ct. 317, 321, 327-28,
As Mattyasovszky noted, punitive damages are akin to a criminal penalty. Such matters require balancing competing interests and social policies. The Illinois Supreme Court has expressly and repeatedly recognized that this process and any decision whether or how to modify the common law belong to the legislature, and that it is not for the courts — not even the Illinois Supreme Court — to substitute their judgment for matters within the legislature’s special purview. As discussed above, the Illinois legislature chose to expand the common law regarding survival only so far as compensatory damages, and not punitive damages, as it was free to do.

Other decisions by the Illinois Supreme Court have analyzed in depth the issue of the legislature’s role and the courts’ obligation to respect legislative choices. For example, in Wakulich v. Mraz, the court reaffirmed its earlier decision in Charles v. Seigfried that it could not “recognize a cause of action against social hosts for serving alcoholic beverages to minors who are subsequently injured.” As in Mattyasovsky, the court “rel[ied] on over a century of precedent” that “Illinois has no [such] common law cause of action” and held that “any change in the law . . . should be made by the General

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


57 Wakulich, 203 Ill. 2d at 229, 785 N.E.2d at 847.
The court’s detailed analysis is strikingly pertinent here. It declined to “follow the ‘national trend’ recognizing [such] a cause of action,” since its “decision should be ‘grounded upon the law of Illinois rather than upon contradictory trends elsewhere.’” The court stated that “the common law recognized no [such] cause of action” and “[t]he legislature's adoption of the Dramshop Act . . . created a limited and exclusive statutory cause of action.” The court concluded that it must exercise “judicial restraint” since “the ‘primary expression of Illinois public and social policy should emanate from the legislature,’” explaining:

“The General Assembly, by its very nature, has a superior ability to gather and synthesize data pertinent to the issue. It is free to solicit information and advice from the many public and private organizations that may be impacted. Moreover, it is the only entity with the power to weigh and properly balance the many competing societal, economic, and policy considerations involved. These considerations include such issues as whether sufficient remedies are already available to injured parties . . . . This court, on the other hand, is ill-equipped to fashion a law on this subject that would best serve the people of Illinois.”

Wakulich also rejected the plaintiff’s argument “that where, as here, the legislature has failed to act, it is the duty of th[e] court to intervene and develop the common law,” because it “appropriately inferred that the General Assembly had deliberately chosen not to impose such social host liability” when the legislature had

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58 Wakulich, 203 Ill. 2d at 229-30, 785 N.E.2d at 847.

59 Id. at 231, 785 N.E.2d at 848 (quoting Charles, 165 Ill. 2d at 486, 651 N.E.2d at 156).

60 Id.

61 Id. at 232, 785 N.E.2d at 849 (quoting Charles, 165 Ill. 2d at 486, 651 N.E.2d at 156).
considered but rejected proposed amendments.\textsuperscript{62} Citing \textit{Froud}, the court held that the General Assembly’s repeated consideration was no reason to recognize such a cause of action:

\begin{quotation}
We do not view such failed attempts as inaction on the part of the legislature. Rather, we view it as evidence that the legislature continues to debate and consider the merits and contours of any form of social host liability. Moreover, “[i]t is a fundamental principle that ‘[w]here the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent.’” \ldots Although the legislature continues to amend the Dramshop Act in other respects, \ldots the legislature has made no change to the statute indicating that the civil liability provided therefor is not intended to preempt the entire field of alcohol-related liability. To change course now would amount to an amendment of the statute itself.\textsuperscript{63}
\end{quotation}

Illinois jurisprudence therefore amply demonstrates that the kind of decision that the legislature made with regard to the Survival Act — to modify the common law only to a certain extent — was a valid legislative judgment that the courts must respect.

Indeed, the Seventh Circuit has held that Illinois’s legislative decision to allow punitive damages in personal injury cases where the injured party survives, but not in wrongful death cases, was constitutionally proper because the classification was rational and legitimate:

\begin{quotation}
Here, the limitation is the denial of punitive relief; compensatory damages are unaffected. Thus, the limitations themselves are not irrational.

\ldots [T]he purpose of denying punitive damages is to
\end{quotation}

\textsuperscript{62} \textit{Id.} at 232-33, 785 N.E.2d at 849 (emphasis in original).

\textsuperscript{63} \textit{Id.} at 233-34, 785 N.E.2d at 849-50 (citing \textit{Froud}, 98 Ill. 2d at 336, 456 N.E.2d at 136-37).
avoid excessive liability. Such denial represents a legislative determination that a state’s interest in protecting defendants from excessive damages outweighs its interest in punishing or deterring misconduct. . . . The state has legitimate interests in both the amount of damages paid to survivors of persons wrongfully killed and in protection of defendants. The denial of punitive damages is clearly a rational method of limiting damages in wrongful death cases. . . . We also note that in every case of which we are aware, every court which has confronted this question has arrived at this same conclusion.64

A court’s disagreement with the wisdom of the legislature’s choice does not authorize the judicial creation of rules contrary to those chosen by the legislature. Courts may have some power to craft the law in an area where the legislature has not spoken, but they have no power to amend the legislature’s choices. In Mobil Oil Corp. v. Higginbotham, for example, the United States Supreme Court held that Moragne (recognizing a common-law action for wrongful death in coastal waters, for which there was no statutory action at all) did not authorize the courts to graft additional common-law remedies onto the remedies specified by statute for wrongful death outside coastal waters (the Death on the High Seas Act):

There is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries. . . . [W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute.65

64 In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981) (footnotes and citations omitted).

Similarly, in *Dooley v. Korean Air Lines Co.*, the Court held that it could not create a survival cause of action under general maritime law, since the Death on the High Seas Act was the exclusive statutory remedy for death on the high seas, expressing Congress’s judgment to allow only certain surviving relatives to recover damages, and limiting damages to their pecuniary losses.\(^6^6\)

**III. Lower Illinois Courts’ Improper “Equitable Considerations” Decisions.**

None of the Illinois Supreme Court’s decisions recognized any “equitable considerations” exception to the Illinois Survival Act’s compensatory limitation. Nonetheless, some lower Illinois courts have interpreted *Mattyasovszky*’s use of that phrase — in the course of refusing to recognize a common-law wrongful death action in addition to a statutory Wrongful Death Act claim — as an implicit authorization to allow punitive damages in survival claims whenever a court finds “equitable considerations” to do so. The root of the lower courts’ “equitable considerations” exception was a misinterpretation of the Illinois Appellate Court, First District’s discussion in *Raisl v. Elwood Industries, Inc.*\(^6^7\)

In *Raisl* the plaintiff filed an action for retaliatory discharge, but then died, and the issue was whether his claim for punitive damages survived his death. *Raisl* answered ‘yes,” relying on the *National Bank* rationale. As discussed in Part I.C above, *National Bank* held that when punitive damages are an integral part of a comprehensive statutory scheme, the punitive claim survives pursuant to the substantive statute, independently of


\(^6^7\) *Raisl v. Elwood Indus., Inc.*, 134 Ill. App. 3d 170, 479 N.E.2d 1106 (1st Dist. 1985).
the Survival Act. *Raisl* held that this rationale applied to a claim for retaliatory discharge under the Workers’ Compensation Act. It reasoned that the Illinois Supreme Court’s holding in *Kelsay v. Motorola, Inc.* that punitives are an integral part of a retaliatory discharge action—meant that the decedent’s claim for punitive damages survived pursuant to the Workers’ Compensation Act, independently of the Survival Act.

*Raisl*’s holding was explicitly premised on the *National Bank* rationale that a statutory basis independent of the Survival Act authorized the punitive claim to survive. But *Raisl* further supported that conclusion with a reference to “equitable considerations,” noting that *Kelsay*’s holding that punitives are an essential part of the retaliatory discharge remedy made it equitable for them to survive. The court’s discussion of “equitable considerations,” in the context of the statutory Workers’ Compensation scheme, did not establish an independent rationale for creating exceptions.

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68 *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 187, 384 N.E.2d 353, 359 (1979) (“The imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public policy of this State as announced in the Workmen's Compensation Act. In the absence of other effective means of deterrence, punitive damages must be permitted to prevent the discharging of employees for filing workmen's compensation claims.”). In *Kelsay* itself, however, the Supreme Court overturned the punitive award because “the function of punitive damages is similar to that of a criminal penalty” and “punitive damages should not be awarded where, as here, the cause of action forming the basis for their award is a novel one.” *Id.* at 187-88, 384 N.E.2d at 360.

69 *Raisl*, 134 Ill. App. 3d at 176, 479 N.E.2d at 1111.

70 *Id.*

71 *Id.*
Some later Illinois Appellate Court and trial court decisions have ignored the specific context of the *Raisl* decision and simply seized upon the “equitable considerations” phrase, citing it as support for an independent exception — or a possible exception — to the rule that punitive damages are unavailable under the Survival Act. None of those decisions provides a sound basis to reject the Illinois Supreme Court’s interpretation of the Survival Act as limited to compensatory damages.

The issue in *Grunloh* was whether a claim for punitive damages in a pollution case was assignable. Stating that the same standards govern assignability and survivability, the Fourth District cited *Raisl* for the proposition that whether punitives survive turns on (1) an independent statutory basis, or (2) strong equitable considerations. The court held that the punitive claim was not assignable because punitive damages were not an integral part of a comprehensive statutory scheme.

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72 Indeed, some courts have concluded that *Raisl* was wrongly decided despite its grounding in the Workers’ Compensation Act context. See, e.g., *Burgess v. Clairol, Inc.*, 776 F. Supp. 1278, 1282 n.6 (N.D. Ill. 1991) (“The [*Raisl*] court apparently took the equitable considerations reasoning from the *Mattyasovszky* case, which only applied to determining whether a common law cause of action for wrongful death should be recognized in Illinois, and applied it to whether a claim can survive under the survival statute. The *Froud* court’s examination of *Mattyasovszky* demonstrates that this was erroneous.”) (citations omitted).


74 *Grunloh*, 174 Ill. App. 3d at 518, 528 N.E.2d at 1037.
applicable to the plaintiff’s claims.\textsuperscript{75} It did not further discuss or apply the supposed “equitable considerations” exception, leaving it as undeveloped dictum.

In \textit{Penberthy} the Fifth District leaped further, concluding that a punitive claim could be asserted under the Survival Act based on “equitable considerations” alone. The plaintiff in \textit{Penberthy} was a victim injured in a drunk driving accident, and sought punitive damages against the estate of the drunk driver, who had died in the accident.\textsuperscript{76} \textit{Penberthy} likened the issue whether a punitive claim could be asserted \textit{against} a decedent’s estate to the issue whether a punitive claim could be asserted \textit{by} a decedent’s estate, and relied on three cases to justify its conclusion that the punitive claim was valid.\textsuperscript{77}

One of the three cases was \textit{Howe v. Clark Equipment Co.}, a case decided in 1982, after \textit{National Bank} but before \textit{Froud}.\textsuperscript{78} Howe interpreted \textit{National Bank} as meaning that whenever a claimant had a punitive damage claim, whether based on common law or on a statute, the claim would survive the claimant’s death under the Survival Act (effectively overruling \textit{Mattyasovszky}).\textsuperscript{79} But this interpretation was rejected by the Illinois Supreme

\begin{footnotesize}
\textsuperscript{75} \textit{Id.}

\textsuperscript{76} 281 Ill. App. 3d at 17, 666 N.E.2d at 353.

\textsuperscript{77} \textit{Id.} at 19, 20-21, 666 N.E.2d at 354, 355-56.

\textsuperscript{78} \textit{Howe v. Clark Equip. Co.}, 104 Ill. App. 3d 45, 432 N.E.2d 621 (4th Dist. 1982),

\textsuperscript{79} \textit{Id.} at 50, 432 N.E.2d at 625 (“if statutory causes of action for punitive damages survive, by extension of logic there is no bar to similar common law causes of action”). Howe brushed \textit{Mattyasovszky} aside as having rested only on the ground that punitives were improper when the defendant’s liability was vicarious. \textit{Id.} at 50, 432 N.E.2d at 624-25. That reading of \textit{Mattyasovszky} is seriously incomplete.
\end{footnotesize}
Court the next year in *Froud*, so *Howe* was not valid authority.

The other two cases on which *Penberthy* relied were *Raisl* and *Grunloh*. The court read these cases as holding that a punitive damage claim survives either when there is an independent statutory basis for punitives (as in *National Bank*) or “when strong equitable considerations favor survival.”80 The court acknowledged that no independent statutory basis existed.81 But it held that “equitable considerations” demanded survival, because drunk driving is against public policy.82

This reading — substituting the trial court’s equitable sense for the legislative standard — not only was unfaithful to the statute and binding Illinois Supreme Court precedent, but created an exception that would swallow the rule. It held that punitives should survive whenever the conduct was really bad, but punitives are allowed only when the conduct is really bad,83 so by this standard punitives would always survive.

Indeed, there are also additional reasons why *Penberthy* went astray. Most Survival Act cases concern the survival of claims by the estate of a decedent, but the question *Penberthy* posed was whether a punitive claim may be asserted against the estate of a decedent. Other cases universally acknowledge that equity does not favor preserving a punitive claim against the estate of a deceased wrongdoer. Even courts that

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80 *Penberthy*, 281 Ill. App. 3d at 20, 666 N.E.2d at 355.

81 *Id.* at 20-21, 666 N.E.2d at 355-56.

82 *Id.*

83 See, e.g., *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 264, 856 N.E.2d 389, 416 (2006) (“Misconduct for which punitive damages are imposed must be outrageous, because it is committed with an evil motive or a reckless indifference to the rights of others.”).
wrongly posit an “equitable considerations” exception to the Survival Act have rejected Penberthy as unpersuasive on the question whether a punitive claim should persist against a decedent’s estate.\textsuperscript{84} Both Readel and Commerce Bank distinguished Penberthy because there the Survival Act was invoked not \textit{by} the estate of a wrongfully deceased plaintiff, but \textit{against} the estate of a deceased tortfeasor.\textsuperscript{85} And both declined to find that equitable considerations justified survival of punitive damages.\textsuperscript{86}

Penberthy nevertheless continues to exert influence in the lower Illinois courts. Most recently, the Circuit Court of Cook County allowed a jury to consider and to award an unprecedented $25 million in punitive damages in a Survival Act claim, and that award is now on appeal before the Illinois Appellate Court, First District.\textsuperscript{87}

The whole notion of an “equitable considerations” exception to the no-survival-of-punitive-damages rule stems from a twisted and unjustified misreading of Mattyasovszky. Rather than suggesting that punitive claims survive under the Survival Act in addition to compensatory claims when equitable considerations favor it, Mattyasovszky flatly rejected punitive claims under the Survival Act,\textsuperscript{88} rejected the


\textsuperscript{85} Id.

\textsuperscript{86} Readel, 2002 WL 1359417 at *7; Commerce Bank, 2007 WL 496385 at *3. See also Poole, 698 F. Supp. at 1373 (finding no strong equitable considerations to justify survival of punitive damages).

\textsuperscript{87} Marston v. Walgreen Co., No. 02 L 13158 (Cir. Ct., Cook Co.) (judgment dated Oct. 12, 2006; order denying defendant’s post-trial motion dated Dec. 20, 2006), \textit{app. pending}, No. 07-0209 (Ill. App. 1st Dist.).

\textsuperscript{88} 61 Ill. 2d at 33, 330 N.E.2d at 510 (“This statute has never been thought to authorize the award of punitive damages. . . . We find nothing . . . which suggests a ( . . . continued)
creation of any common-law wrongful death claim when statutory survival and wrongful death damages claims already existed, and never even approached the question whether a common-law death claim (if one were proper) would include punitive damages. Mattyasovszky mentioned “equitable considerations” only in holding inapposite two cases from other jurisdictions in which the courts used equitable powers to recognize a claim or toll a statute of limitation, when the plaintiff would otherwise have no compensatory remedy at all.

The lower courts’ decisions to allow punitive damages in Survival Act cases based on “equitable considerations” misapply Illinois Supreme Court precedents and improperly substitute their judgment for the legislature’s. When the legislature has made a legislative choice within its power, as here, the courts’ only proper role is to apply it, and not to create exceptions or modifications. The Illinois Supreme Court so recognized in Belfield v. Coop:

It is a primary rule in the interpretation and construction of statutes that the intention of the legislature should be ascertained and given effect. . . . The only legitimate function of the courts is to declare and enforce the law as enacted by the legislature, to interpret the language used by the legislature where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning. . . . The language of the statute in question is certain and unambiguous and this change in the law of this State which for more than a hundred years has limited recovery under the Survival Act to compensatory damages.”)

89 Id. at 37, 330 N.E.2d at 512 (“[W]e do not deal here with a unique situation in which, inexplicably, there is no remedy. The . . . case before us already gives rise to two distinct statutory actions: in one the damages recovered go to the decedent's estate, . . . and in the other the damages recovered go to the surviving spouse and next of kin of the deceased.”).
court is not warranted in reading into it an exception which the legislature did not see fit to make.90

Because the legislature and the Illinois Supreme Court have so clearly spoken on the issue of punitive damages in Survival Act cases, there was nothing left for the lower courts to interpret or debate.

**Conclusion**

Under the common law, which is the law of Illinois unless modified by the legislature, all claims abated on the death of the claimant. The Illinois legislature chose to enact limited modifications of the common law, allowing only compensatory and not punitive damages in survival and wrongful death actions. The Illinois Supreme Court has repeatedly interpreted the terms of the Survival Act and Wrongful Death Act as authorizing only compensatory damage claims. By reenacting the statutes subsequent to this judicial interpretation, and by rejecting amendments to allow punitive damages, the legislature has confirmed and ratified the Illinois Supreme Court’s interpretation. There is no question that the legislature was free to make this legislative choice. Nevertheless, lower Illinois courts have created exceptions without any statutory basis, awarding punitive damages in Survival Act claims when they find it “equitable” to do so. By recognizing such exceptions, the lower courts have illegitimately substituted their judgment for the legislature’s.

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90 *Belfield v. Coop*, 8 Ill. 2d 293, 306-07, 134 N.E.2d 249, 256 (1956) (citations omitted)
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