Punitive Damages After Death: Can Tort Law Create Heaven and Hell?

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PUNITIVE DAMAGES AFTER DEATH—CAN TORT LAW CREATE HEAVEN AND HELL?

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Punitive or exemplary damages, which Oklahoma and most states allow in tort cases as a means of punishing a defendant whose conduct has been particularly malicious or reckless, have long been a subject of controversy. Not surprisingly in a period when there is considerable pressure to lessen the importance of fault in tort liability, this controversy continues today. Increasingly, compensation of injured parties is urged as the chief—perhaps the exclusive—goal of personal injury suits; punitive damages are not aimed at this goal. On the other hand, it is unlikely that fault will be entirely abandoned as a relevant tort concept in the foreseeable future, and it can be argued that so long as this is true, punitive damages are simply one of a number of means of varying monetary awards to make them serve functions of admonition and retribution.1 It has been suggested that such damages may serve a valuable purpose in discouraging acts of private revenge,2 and are a necessary supplement to the criminal law because of the numerous situations in which criminal punishment may be inappropriate or difficult to obtain.3 Whatever other uses and justifications may be suggested for punitive damages, Oklahoma and other jurisdictions agree that they are primarily to punish or make an example of a defendant by hitting him in the pocketbook,4 that they come to the plaintiff as a pure windfall and never as a matter of right,5 and that they are to be

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1 Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931). Cf. Morris, Rough Justice and Some Utopian Ideas, 24 Ill. L. Rev. 730 (1930), suggesting that tort law seeks two diverse aims—to compensate plaintiff and punish defendant. The author notes that one goal or the other often must suffer and suggests that separate development of the two would be more satisfactory.

2 Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1198-99 (1931).


awarded only where defendant’s conduct amounts at least to a wanton disregard of the rights of others.6

A problem little dealt with by most texts is whether punitive damages should be awarded where the injured party has died prior to collecting his judgment. Is the estate then entitled to the damages that would ordinarily be designed partly to soothe the injured feelings and mitigate the humiliation of the deceased plaintiff? Still less discussed is the question of whether punitive damages can be assessed against and/or collected from the estate of a deceased defendant. Should the law, rather like Captain Bligh flogging a dead man, attempt to make an example of a decedent and thus in actuality punish his heirs?

The problem of this nature on which there is the most authority, though not necessarily the best reasoning, is the awarding of punitive damages in wrongful death actions—that is, those situations in which defendant’s allegedly wrongful conduct caused the death of a person, for which loss the decedent’s relatives (or personal representative on behalf of the estate) are suing. Since the wrongful death action did not exist at common law and is purely a creature of statute in each jurisdiction, whether or not punitive damages may be awarded depends on the terms of the applicable wrongful death statute.7 Most such statutes limit the award to compensatory damages, which are given those who sustained a pecuniary loss by reason of the death. While “compensatory” has in recent years often

6 Mayo Hotel Co. v. Danciger, 143 Okla. 196, 288 P. 309 (1930) (gross negligence does not suffice; conduct must amount to wanton disregard of rights of others). But dicta in some Oklahoma cases indicate that “gross negligence” suffices for exemplary damages. Oden v. Russell, 207 Okla. 570, 251 P.2d 184 (1953); Kurn v. Radenic, 193 Okla. 126, 141 P.2d 580 (1943); Firebaugh v. Gunther, 106 Okla. 131, 233 P. 460 (1925). Probably such cases are using the term as equivalent to a reckless disregard of the rights of others. See Pure Oil Co. v. Quarles, 183 Okla. 418, 82 P.2d 970 (1930). The relevant Oklahoma statute is 23 OKLA. STAT. § 9 (1971), which provides for exemplary damages where there is oppression, fraud, or malice. See generally Annots., 62 A.L.R.2d 813 & 839 (1958) concerning punitive damages in automobile accident cases.

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been given an increasingly broad meaning, so as to include even loss of society and companionship,\(^8\) the term by definition usually, and in Oklahoma, has been held to rule out any award of punitive damages.\(^9\) It may be questioned whether, assuming the general usefulness of punitive damages, this is the better rule. If it is desirable to punish defendant for certain wrongful conduct, this becomes no less desirable, and no more difficult, because defendant’s victim dies as a result of the harm suffered. It does perhaps become more likely that defendant will be subject to criminal liability for his actions; but if this type of “double jeopardy” is considered undesirable as leading to possibly excessive punishment, the Indiana solution of disallowing punitive damages where criminal liability may occur seems far more appropriate.\(^10\) To the extent that punitive damages are intended to prevent private revenge, the need seems no less great where death has occurred; friends and relatives of a deceased are quite likely to take the law into their own hands. It may, as in non-death cases, be questioned whether money would keep them from doing this; but the additional possible punishment of defendant could arguably have some effect. Of course, punitive damages may also be allowed by the law in order to en-

\(^8\) Goodyear Yellow Pine Co. v. Anderson, 171 Miss. 530, 157 So. 700 (1934); Carraco Oil Co. v. Morhain, 380 P.2d 957 (Okla. 1963). On what is “pecuniary loss,” see Note, Pecuniary Loss Under Death Statute, 28 Bost. U.L. Rev. 368, 369 (1948): “A pecuniary loss has been defined as a loss of money or of something by which money or something of money value may be acquired. It is a deprivation which can be measured by a money standard.” See generally 22 Am. Jur. 2d Death § 123, at 692 (1965). See also Martin v. Mansfeldt, 100 Cal. App. 2d 327, 223 P.2d 501 (1st Dist. Ct. App. 1950) (general competency of deceased wife should be considered); Thoirs v. Pounsford, 210 Minn. 462, 299 N.W. 16 (1941) (deceased’s calling, income, health, age, probable duration of life, and amount of past aid to beneficiaries all to be considered); Venable v. Burton, 363 P.2d 224 (Okla. 1961) (sufficient to show reasonable expectation that daughter would have contributed to mother’s support); Stevens v. Schickendanz, 316 P.2d 1111 (Okla. 1957) (at least nominal damage to parent from death of child). Where a child sues for death of a parent, damages may include loss of care and protection. Belford v. Allen, 183 Okla. 256, 80 P.2d 671 (1938).


\(^10\) See Aldridge, The Indiana Doctrine of Exemplary Damages and Double Jeopardy, 20 Ind. L.J. 123 (1945). Other jurisdictions allow both punitive damages and criminal prosecution for the same act (though occasionally allowing criminal punishment to be considered in mitigation of punitive damages), and it is generally agreed there is no technical “double jeopardy.” But cf. Note, 44 N. Car. L. Rev. 402, 421 (1966): “There is no logical reason for awarding punitive damages not based on any loss to beneficiaries of the deceased. Any punishment necessary for a wrongful killing can be meted out in the criminal courts.”
courage people to bring civil suits based on extremely antisocial conduct in situations where the monetary reward would otherwise be slight and not worth the effort. Though substantial pecuniary loss is sometimes hard to establish in death cases, the tendency of courts to wink at large awards even for the death of persons whose monetary worth was slight indicates that this litigation-producing rationale of punitive damages is less relevant in death cases. But in a time of overburdened courts and long judicial delays, this whole rationale may be of questionable desirability. It also may be that the judicial winks at large "compensatory" awards have been partly an effort to offset the impossibility of obtaining punitive damages in these cases.

Occasionally death statutes do permit exemplary damages in death actions, or are so interpreted by the courts. The general rule against such damages seems to have some effect even in such jurisdictions, and strict construction of the provisions on when these damages are allowable may occur. The matter is thus one that the courts have felt compelled to leave to the legislature, but it can at least be said that no discernible policy of great weight underlies the rule against punitive damages.

In addition to wrongful death statutes, survival statutes have today greatly modified the common-law rule that a tort action died with either party. It is well to keep the two types of statutes clearly separate for a number of reasons. (1) Where it is the defendant who has died, the survival statute is relevant, but the wrongful death statute has no significance in that case. (2) The same is true if plaintiff in a particular case dies of causes unrelated to the tortious conduct on which the suit is based. (3) If plaintiff dies instantaneously from the allegedly tortious conduct, the wrongful death statute is of the greatest importance, but damages under the survival statute are likely to be slight or nonexistent.


12 This seems the situation in Texas, where exemplary damages are recoverable in death cases based on willful wrongs or gross negligence, but awards of such damages are seldom sustained. See Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825 (Tex. 1964). See also Note, 19 S. Car. L. Rev. 220 (1967), concluding that South Carolina death awards have been rather conservative even though by law they may cover a large number of harms (mental shock, wounded feelings, grief, loss of companionship, etc.) and may include punitive damages.

13 Even in instantaneous death cases, there may occasionally be a large survival action
But the two statutes do both have relevance in the situation in which plaintiff is injured by defendant’s tortious conduct; lingers a time alive, experiencing pain, accumulating medical bills, and otherwise incurring the damages for which tort law compensates; then dies as a result of the original tortious conduct or consequences that can be considered legal results thereof. Even so, the remedies are, as in Oklahoma, nearly always based on separate statutes and remain separate actions: one, surviving to plaintiff’s estate, for the injuries plaintiff himself suffered while still alive; the other for the loss to the original plaintiff’s survivors due to his death. Thus, a survivor’s contributory negligence may bar his recovery for the wrongful death of a family member, but as administrator of the family member’s estate, he may nonetheless recover for the estate under the survival statute. It has been suggested that a judgment awarded to or a release obtained from a decedent should bar only a survival action as to

for property damage, and for funeral expenses in those jurisdictions that include this item under the survival statute. See Landers v. B. F. Goodrich Co., 369 S.W.2d 33 (Tex. 1963). On the confused interrelationship of death and survival statutes, see Duffey, The Maldistribution of Damages in Wrongful Death, 19 Okla St. L.J. 264 (1938), urging a conceptual approach based on damaged interests rather than on such labels as “survival” and “new cause of action.” An interesting Oklahoma case dealt with recovery for loss of the clothing decedent wore at the time of death. Mathies v. Kittrell, 354 P.2d 413 (Okla. 1960) (not recoverable in survival action).


The Oklahoma survival statutes are 12 Okla. Stat. §§ 1051-52 (1971) providing that all tort actions survive except libel, slander, and malicious prosecution, which abate on the death of defendant unless there has been a judgment or jury verdict, in which case the action does not abate unless a new trial is ordered. Both survival and wrongful death actions may be maintained in Oklahoma by a foreign administrator the same as if he had been appointed in this state. 58 Okla. Stat. § 262 (1971). See Symposium on Conflicts of Law, Note, 18 Okla. L. Rev. 462, 471-72 (1965).

15 St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648, 658, 35 S.Ct. 704, 706, 59 L.Ed. 1160, 1164 (1915): “Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death.” The separateness of the two actions in Oklahoma is clearly pointed out in Deep Rock Oil Corp. v. Sheridan, 173 F.2d 186 (10th Cir. 1949); L.E. Whitham Constr. Co. v. Remer, 105 F.2d 371 (10th Cir. 1939). Cf. Belt v. St. Louis-S.F. Ry., 195 F.2d 241 (10th Cir. 1952) (pain and suffering of deceased is separate from death action); Crossett v. Andrews, 277 P.2d 117 (Okla. 1954) (suggestion that survival and wrongful death actions should not be joined). See Note, 48 Harv. L. Rev. 1008 (1935). See also Evans, A Comparative Study of the Statutory Survival of Tort Claims, 29 Mich. L. Rev. 969 (1931), summarizing the survival provisions of various states and noting the trend toward allowing survival.

16 Koehler v. Waukesha Milk Co., 190 Wis. 52, 208 N.W. 901 (1926).
the tort involved, not a wrongful death action growing out of that original tort;\textsuperscript{17} and this is the law in a number of jurisdictions.\textsuperscript{18} And it is normally held that a recovery on a personal injury action after the death of the injured person cannot bar a wrongful death recovery, even though death occurred from the same injury.\textsuperscript{19}

The wrongful death and survival statutes do have to be read together in two situations: where the question is whether a wrongful death action (1) survives the death of a beneficiary, or (2) survives the demise of the tortfeasor who caused the original death. Though there is older authority to the contrary, in the first situation most cases now find that the action survives to the estate of a beneficiary.\textsuperscript{20} Unless the death action is consid-

\textsuperscript{17} Note, 44 Harv. L. Rev. 980, 983 (1931).

\textsuperscript{18} This is, however, generally considered the minority view, the majority of courts seeming to worry unnecessarily about possible double recovery. See Schumacher, Rights of Action Under Death and Survival Statutes, 23 Mich. L. Rev. 114 (1924). Until recently, Oklahoma took the minority view in release situations; Hugh Breeding, Inc. v. Daniel, 373 P.2d 75 (Okla. 1962). This view is favored by Note, 5 Okla. L. Rev. 93 (1952), emphasizing that the new cause of action for death should not logically be defeated by an act of the decedent, who did not himself have this action. (The same logic might necessitate allowing the wrongful death action despite decedent's contributory negligence, though this is almost universally agreed not to be the rule.) The majority position has now prevailed in Oklahoma; Haws v. Luethje, 503 P.2d 871 (Okla. 1972), overruling the Hugh Breeding case, supra. This view is supported by language in the wrongful death statute that the action may be maintained only if decedent, had he lived, could have maintained an action; see Note, 16 Okla. L. Rev. 116 (1963).


The most notable recent controversy on such beneficiaries has been over whether illegitimate children must be included on an equal footing with legitimate offspring. Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), struck down on equal protection grounds a wrongful death statute discriminating against illegitimate children; it was said that legitimacy of birth has no relation to the nature of the wrong allegedly inflicted. Cf. Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972) (Louisiana Workmen's Compensation statute unconstitutional because of preference to legitimate children); Weak v. Mounter, 493 P.2d 1307 ( Nev. 1972), finding that "heirs" in a wrongful death statute includes an illegitimate child. See also Sneed v. Henderson, 356 S.W.2d 758 (Tenn. 1963) (illegitimate child may recover for death of mother, though not for death of father). But cf. Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), sustaining a statute denying illegitimate children equal rights of intestate succession. Since some wrongful death statutes provide for benefits to be divided in accord with the terms of the intestate succession law, the
Considered punitive (and with punitive damages being ruled out, it is usually purely nonpunitive), there seems little reason that the action shouldn’t also survive the death of the tortfeasor. Much authority, generally influenced by statutory language, is to the contrary, but the trend seems toward survival.

What then of punitive damages in a survival action? Where it is the plaintiff who has died, Oklahoma courts are among those that, unless the legislature acts, face the impossibility of awarding such damages in a wrongful death action. But the survival action, as we have seen, is really a separate one. Two types of action that may survive plaintiff’s death might well be here distinguished. First, there is the situation in which the original tort is unrelated to plaintiff’s subsequent death. Here, there either is no wrongful death action at all, or if there is, it is based on a different tort. There seems no reason in such cases that punitive damages should not survive to the estate of the deceased plaintiff. The purposes of punishing (or making an example of) defendant and of preventing private retribution are still present. So, indeed, is the purpose (if considered valid) of encouraging suits on torts involving little actual damage but outrageous conduct by defendant. It is true that plaintiff is no longer alive to have his feelings soothed by the award; but the damages are basically a windfall to plaintiff anyway—why not allow a windfall to his estate? There is no problem of circumventing the rule against punitive damages in wrongful death actions since the death action is here irrelevant.

The second situation is presented when the injured party ultimately succumbs as the result of the original tort. Again, there is a wrongful death action, with punitive damages usually excluded. But, at least if death was not simultaneous with the tort, there is also a survival action based on the original wrong. If punitive damages are allowed in this action, the rule against such damages for wrongful death is arguably circumvented. But, as seen, that rule is largely based on historical accident and statutory construction, not on any strong public policy. Thus, it seems the case for punitive damages, though perhaps weaker than in the first situation, should here too prevail.

The question is raised of whether a wrongful death statute might by indirection achieve the discrimination that Levy struck down.


22 Oklahoma once held that the wrongful death action died with the tortfeasor; Burford v. Evans, 191 Okla. 555, 132 P.2d 653 (1942); but the present Oklahoma wrongful death statute, 12 Okla. Stat. § 1053 (1971), definitely avoids this result by allowing suit against the personal representative of the deceased tortfeasor. But cf. Note, 44 N. Car. L. Rev. 402, 405 (1966), stating that the weight of authority still holds that the tortfeasor’s death prior to judgment abates a wrongful death action against him. See generally W. Prosser, Law of Torts 905 & n.71 (4th ed. 1971).
In practice, courts have usually not distinguished these two situations, but have allowed an award of punitive damages despite death of the original plaintiff, whether the action had actually been commenced by him before his death\(^\text{23}\) or the action is not instituted until afterward.\(^\text{24}\) A minority of cases have concluded that such damages are personal and vindictive in nature and cannot survive the original plaintiff,\(^\text{25}\) though it is questionable whether this rule would be applied if the damages had already been assessed though not yet paid. One case\(^\text{26}\) suggests that punitive damages don't survive a plaintiff unless the action was commenced before his death—perhaps indicating a belief that plaintiff could derive some retribution merely from seeking the damages even if he did not live to receive them.

The majority view can be bolstered, particularly where the original tort causes the death, by the very nonavailability of punitive damages in the wrongful death action and by the separateness of the two remedies.\(^\text{27}\) The result seems consistent with "the coupling of the admonitory and reparative functions"\(^\text{28}\) now found in tort law, and appears the one that Oklahoma should adopt when the question arises.

What if it is the defendant-tortfeasor who has died before the awarding of punitive damages? Presumably he is now beyond earthly punish-
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ment; and to assess such damages against his estate is to visit the sins of
the father on the sons. If punishment is the primary purpose of punitive
damages, it is difficult to justify them in this situation; indeed, it may be
difficult to justify enforcement of their payment where they have been
assessed but not yet paid, though they are likely to be treated as a debt of
the estate. The prevention-of-revenge purpose is also surely less relevant
here, though Hatfield-McCoy type feuds do occasionally arise in which
revenge is sought against the relatives of a deceased person who was con-
sidered a wrongdoer.

The relatively small amount of authority on this point is split. It has
been held that punitive damages do survive the death of a tortfeasor on the
ground that the award can still be useful in deterring others from such con-
duct. But the great weight of authority has found that defendant's death,
having terminated the possibility of punishment, also terminates the pos-
sibility of an award of exemplary damages. This is the Oklahoma rule.
Whether learning of the lessening of an estate due to the malice or reckless-
ness of the one who left it is likely to deter others from similar conduct is
perhaps a question for the psychologists; certainly the practice of any tax
lawyer indicates a large degree of concern by many people as to not only
how much wealth they have for their own lifetime but how much they
leave behind. And similarly, the sight of another person's after-death estate
depleted by pre-death actions may serve as an effective example—and par-
cularly as a deterrent to the person who, knowing death is near, is
tempted to exercise his frustrations by tortious actions against his enemies.

Thus, if punitive damages are to remain, they need not be eliminated
by death. If they cannot establish Heaven for a deceased plaintiff, they

Mass. 212, 53 N.E. 397 (1899), applying statutory provision that only compensatory damages
survive but expressing doubt this would be true where double damages are specifically provided
by statute creating cause of action. See Note, 18 CALIF. L. Rev. 44, 47 (1939), stating, "Once the
notion of vengeance is put aside it is impossible to see why a wrongdoer's estate should ever
be exempt from making satisfaction for his wrongs." Quaere whether punitive damages should
be considered a part of the "satisfaction."

31 Evans v. Gibson, 220 Cal. 476, 31 P.2d 389 (1934); Hewellette v. George, 68 Miss.
703, 9 So. 885 (1891); McAdams v. Blue, 3 N.C. App. 169, 164 S.E.2d 490 (1968); Marcante
that many of these cases merely state that punitive damages are not recoverable against the
personal representative; but all liability of the estate seems encompassed. Of course, the repre-
sentative should not be personally liable.

32 Morriss v. Barton, 200 Okla. 4, 190 P.2d 451 (1948) (defendant died after commence-
ment of action and before trial).

33 Note the similar reasoning used in cases holding an estate liable for decedent's defama-
can nonetheless, somewhat like Lazarus answering the rich man's request to go warn his brothers, provide aid to the deceased's relatives. The damages will be a windfall to them no more and no less than they would have been to the original party. And if such damages cannot create Hell for a deceased defendant, they can at least make an example of one who, much like a corporation, is now capable of being hurt only through the pocketbook. The amount left in an estate is depleted by a wide variety of acts its deceased owner performed in his lifetime; why not allow depletion to satisfy the public policy of holding to scorn his malicious and reckless acts?

\[34\] A difficult problem concerning punitive damages has been whether they can be assessed against an employer held vicariously liable; the majority of cases now allow such damages, partly on the ground that corporate employers can only be punished in monetary ways. This is the Oklahoma rule. Kurn v. Radencić, 193 Okla. 126, 141 P.2d 580 (1943). See Note, 70 YALE L.J. 1296 (1961).