

## THE ILLINOIS WRONGFUL DEATH ACT AND THE COMMON LAW

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Legal scholars have long been critical of the common law rule that the wrongful death of a human being could not be complained of as an injury. Today, all fifty states have wrongful death acts. Most acts are viewed as providing a remedy, contrary to the common law; Illinois courts have viewed the Illinois Wrongful Death Act as creating the exclusive right of recovery. However, decisions by the Supreme Court of Illinois in recent years have created remedies in the modern common law that go beyond those specifically granted in the Act. Those decisions, by piecemeal approach, have left considerable confusion as to what remedies are currently available.

### I. HISTORIC ORIGIN OF THE RULE

Historically, the case of *Baker v. Bolton* has been credited with the origination of the common law rule that the death of a human being could not be complained of as an injury. The 1808 opinion by Lord Ellenborough was, in fact, the decision of a *nisi prius* court, the English trial court. Curiously, it has been cited for over 150 years and accepted as a correct statement of law as if it were a court of appeals. One would expect a decision of the trial court receiving such respect to be an extensive, well-reasoned and logical opinion outlining the policy used and prior precedent. The entire case is reprinted in the footnote below, and it is obvious that Lord Ellenborough's opinion was none of these. As W. S. Holdsworth wrote, commenting on the *Baker* decision,

It has been upheld in all the reported cases, not by reasoning based upon a discussion of the question of its policy or impolicy, not by any sufficient technical or historical reasons, but by the assertion that it is a rule of the common law which must be followed. If a broad legal principle, not manifestly just, is thus laid down as a rule of the common law, we should expect that some sufficient reasons, historical or technical, or both would be adduced for it. But none of the cases adduce any such reasons.

#### A. *Background of the Rule in Baker v. Bolton*

Lord Ellenborough's decision that "[i]n a civil Court, the death of a human being could not be complained of as an injury" covered two different and distinct applications. First, it denied the representative of a deceased victim of a tort his right to bring an action in a representative capacity. Secondly, it extinguished the remedies the injured plaintiff would have had for pain, disability and monetary loss had the injury not resulted in death.

Two hundred years prior to the decision in *Baker v. Bolton*, the English court in *Higgins v. Butcher* ruled that a husband who lost his wife as a result of an assault could not sue for her death. Because of the criminal or felonious nature of the assault, the court stated,

If a man beats the servant (of another) so that he dies of the battery, the master shall not have an action against the other for battery and loss of the service, because of the servant's dying

of the extremity of battery, has now become an offense to the Crown, being converted into felony, and that drowns the particular offense and private wrong offered to the master before, his action is thereby lost.

It is uncertain whether the court in *Higgins* was indicating that an action in tort as a result of the felonious death was totally lost or was merely suspended until such time as the criminal prosecution had been completed. Such a subtlety was of little concern and merely academic to English legal scholars at that time, since conviction from a felonious death of another was punishable by death and forfeiture of the felon's entire estate to the Crown. Thus, there was nothing left for those damaged by the victim's death to receive by way of compensation.

Since criminal charges were not initiated by the Crown, but rather by individuals, it is speculated that many potential plaintiffs threatened to prosecute the felon to procure compensation. While they would get no damages from the criminal prosecution of the felon, the felon might be desirous of paying compensation for his felonious and tortious act to avoid the prosecution. Such conduct has been considered to be the criminal offense of compounding a crime.

Legal scholars have viewed the Roman law concerning slavery and the English felony merger doctrine as two possible sources for Lord Ellenborough's ruling in *Baker v. Bolton*. Although it is not considered the primary source, most agree that the influence of the Roman law had some impact upon the development of the rule. However, the Roman rule developed from a society which consisted of two distinct social classes, the freeman and the slave, who was considered an item of property. In an endeavor to maintain the distinction between the classes, the Roman law held that no value could be placed on the life of a freeman upon his death. This emphasized the difference between a freeman and a slave, who could be bought and sold as property for a price. The rule was inappropriate to the English social structure since it did not recognize slavery nor the body of law that concerned the injury or killing of another's slave. The doctrine of Roman law was inapplicable to English society and the impact of the felony merger doctrine was of greater influence and significance.

#### B. *Influence of the Felony Merger Doctrine*

Lord Ellenborough's ruling primarily resulted from confusion of the significance of the felony merger doctrine. The Crown considered the tort of less significance than the punishment of the felony. Since the punishment for the felony was the death of a felon and the forfeiture of his property to the Crown, nothing remained for a recovery. This did not speak to the situations which encompassed a tort resulting in death but were not felonies. It is at this point that Lord Ellenborough confused the felony merger doctrine with the facts of *Baker v. Bolton*, wherein the death of the plaintiff's wife resulted when a stagecoach overturned. Even if Lord Ellenborough considered the death to be that of a felonious act, the development of punishment that did not take the life and property of the felon challenged the validity of the felony merger doctrine in those instances.

It has been suggested that the 1607 opinion of *Higgins v. Butcher* was viewed, not as a situation wherein the cause of action for death was lost, but rather not suspended. This speculation is enhanced by

certain statutes passed in the sixteenth century of England providing that the punishment of a clergyable felon was the burning of his hand and the forfeiture of goods he owned at the time of conviction. This did not prevent him from buying property and accumulating wealth following his punishment.

Lord Ellenborough's ruling inappropriately applied the felony merger doctrine to a situation that was only a tort. As Holdsworth concludes in his work on the history of English law.

The rule as laid down by Lord Ellenborough is obviously unjust; it is technically unsound because as we have seen, it is based upon a misreading of legal history; and yet it is the law of England today for it was upheld by the House of Lords in 1917 in the case of *The Amerika*. The House of Lords attempted to justify its decision by an appeal to legal history. But the display of historical knowledge which was made on this occasion is an object lesson both in the dangers of hastily acquiring such knowledge for a special occasion, and in the consequences of the neglect of this branch of legal learning.

## II. EARLY LEGISLATIVE CHANGES OF THE COMMON LAW RULE

In an effort to avoid the harsh consequences of this rule, England adopted, in 1846, a statute called the Fatal Accidents Act, commonly known as Lord Campbell's Act. The expansion of railways had led to an increase in the number of accidents, both fatal and nonfatal, and the change in the common law was required. That Act, however, took a limited and narrow approach to the damages that resulted from a wrongful death. Instead of abrogating the common law rule, the Act provided only for compensation to the next of kin. Except for that compensation, the law failed to admit that others had an interest in the life of the deceased. Examples of such failure would be an insurance company unable to sue the tortfeasor for a premature payment on the deceased, an employer unable to sue for the loss suffered by his employee's death, and a church unable to sue for the loss of financial support a wealthy member might have provided. The class of beneficiaries was limited to interests directly connected to the family.

Even with the passage of Lord Campbell's Act, the English courts refused recognition of damages resulting from death beyond those specifically allowed by the Act. In 1873, the court in *Osborn v. Gillett* declared that a master could not recover special damages for the loss of his servant's services and burial expenses; and, in 1917, the House of Lords, in *Admiralty Commissioners v. S.S. Amerika*, held that the government commission which had paid annuities to the families of crew members on a submarine could not recover or subrogate its interest even though the steamship *Amerika* was negligent in causing the collision of the submarine. The majority in each opinion contended that the rule laid out in *Baker v. Bolton* was well-recognized because no one had chosen to challenge it, a poor justification of its continuance.

## III. ORIGIN OF THE AMERICAN RULE

Why this aspect of the common law crossed the Atlantic and became embedded in every state recognizing the English common law is a mystery. As Justice Story said in *Van Ness v. Pacard*, "Our ancestors brought with them [the] general principles [of the common law], and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

However, the American courts simply adopted the rule that had been criticized by English

commentators. The states of Kentucky, Connecticut and Michigan expressly adopted the rule, all prior to the re-enforcing decision in England of *Osborn v. Gillett*. It does not speak well for the adopting states that an 1808 opinion of an English trial court was the only basis for such an inequitable rule, particularly in light of the fact that none of the reasons used in England to substantiate the rule existed in the United States.

The felony merger rule arose in England as a result of the felon forfeiting his property to the Crown. The United States has never included forfeiture of property as punishment for a felony conviction and has never considered the indictment of a felon a bar to civil action. While the remnants of Roman law were almost nonexistent in the United States, some American courts did find the concept of placing damages on the wrongful death of a human speculative and repugnant. However, the evaluation of dependency on the deceased and the monetary loss resulting from his wrongful death are no more difficult to assess than the damages in injuries which do not result in death.

#### IV. ILLINOIS WRONGFUL DEATH ACT.

The State of Illinois passed its Injuries Act in 1853, allowing for the recovery by the next of kin of the injured party for the pecuniary loss suffered by his death if the injured party would have been entitled to maintain an action had death not ensued. The Illinois Act was a copy of the statute passed in New York in 1847. Both the Illinois and New York Acts were substantially a copy of Lord Campbell's Act, previously referred to.

A review of court opinions in Illinois discloses no decisions concerning the wrongful death of a person prior to the enactment of the Wrongful Death Act in 1853. The earliest opinion states,

This is a new cause of action given by this statute, and unknown to the common law, and should not be extended beyond the fair import of the language used; but this it would be difficult to do, for the language is very broad and comprehensive, embracing, in direct and positive terms, all cases where, if death had not ensued, the injured party could have maintained an action for the injury.

But were the Illinois Wrongful Death Act and Lord Campbell's Act of England really so encompassing and broad, providing comprehensive actions of damages resulting from an individual's death? The Illinois Act did establish the mechanics for representative action for the pecuniary loss suffered; that particular action was unknown at common law. However, those entitled to benefit under the action were limited to the next of kin, and the sums to be recovered were limited (in 1853) to \$5,000. There is no language within the Act that implies it is to be the exclusive remedy resulting from the death of an individual. Until recently, it has, however, been interpreted as such. The root of that interpretation is the common law. The Wrongful Death Act falls far short of providing compensation that is available in common law actions when death does not ensue.

#### V. LIMITATIONS OF THE ILLINOIS WRONGFUL DEATH ACT

The legislative repeal of the common law rule would have been a far broader and more sweeping action than the adoption of the Illinois Wrongful Death Act. While the Wrongful Death Act did not allow compensation for the pecuniary loss of the next of kin, court interpretations of the Act rejected actions for

the loss of support or damages by those who were not classified as the next of kin, such as employers, business entities, churches and friends of the deceased that were not related by blood. Furthermore, unlike actions for injuries, the Act provided for a ceiling on the maximum recovery for wrongful death starting at the meager \$5,000 limit in 1853 and gradually rising to \$30,000 in 1957 until the eventual elimination of the ceiling in 1967. Since that Wrongful Death Act was viewed as creating the right to recover for a death rather than simply providing a remedy, bringing the action within the period of limitations was viewed as a condition precedent to the right of action itself. The limitation period of one year as originally provided in the Act, and two years as amended in 1935, was interpreted to be substantive rather than procedural. Therefore, the provisions of the Limitation Act tolling the running of the statute by minority or competency or the reviving of a claim after the statute had run by the filing of a suit by the opposing party were not permissible. Nor would the time be extended if the last day fell on a Sunday or holiday. While the Wrongful Death Act was interpreted to allow actions involving breaches of implied contracts that resulted in death, it was interpreted as preventing recovery for loss of consortium or claims for the destruction of a family unit, failing to permit punitive damages when death resulted from the injuries and providing for no recovery when the next of kin did not survive the deceased. Also disallowed under the Act was the recovery of last medical and burial expenses except to a limited amount provided within the Act, and damages for pain and suffering and lost earnings which the deceased incurred during the period of time between the injury and resulting death. But the Survival Act permitted recovery after death if the decedent's injury was from a cause different from that which caused his death. The court refused to use the Wrongful Death Act and Survival Act in conjunction with each other.

The drastic difference between the common law remedies available when injury does not result in death and the remedies permitted by the Illinois Injuries Act become obvious upon reviewing the above actions not allowed by early interpretations of the Illinois courts involving the Wrongful Death Act.

## VI. JUDICIAL EXPANSION OF REMEDIES FOR WRONGFUL DEATH IN ILLINOIS

Prior to 1961, it could be said that the Act was basically the exclusive remedy when the injuries resulted in death. However, the court has recently liberalized its attitude. Various opinions of the Supreme Court of Illinois have eroded the rule and have recognized limited actions beyond that of the Wrongful Death Act. These opinions appear to be a gradual rejection of the common law ruling of *Baker v. Bolton*.

In 1961 the Supreme Court of Illinois, in *Saunders v. Schultz*, established a common law right for the spouse to recover funeral and last medical expenses from the defendant in addition to those remedies provided by the Wrongful Death Act. Twenty years earlier the court had invited the legislature to act; *Saunders* is the result of the legislature's failure to correct the situation. The court reasoned that, since the spouse was injured in property because of the obligation created by the family expense act for funeral and last medical expenses of the victim's death, the spouse could, independent of the Wrongful Death Act, request damages from the defendant. However, the court used a rather technical approach by involving the family expense act. The court was hesitant to admit it created a remedy in common law beyond that provided by the Wrongful Death Act.

Then, in 1974, the Supreme Court of Illinois in *Murphy v. Martin Oil Company* overruled the 1882 holding of *Holton v. Daly* and allowed an action for the pain and suffering, property damage, and lost wages that occurred between the injury and death resulting from the conduct of the defendant. The court noted that, under the Survival Act, certain actions the decedent had at his death passed on to his estate and there were no just or logical reasons to prohibit the plaintiff's estate from recovering his lost wages, stating:

There may be a substantial loss of earnings, medical expenses, prolonged pain and suffering, as well as property damage sustained, before an injured person may succumb to his injuries. T  
say that there can be recovery only for his wrongful death, is to provide an obviously inadequate justice. Too, the result in such a case is that the wrongdoer will have to answer for only a portion of damages he caused. Incongruously, if the injury caused is so severe that death results, the wrongdoer's liability for the damages before death will be extinguished. It is obvious that in order to have a full liability and a full recovery, there must be an action allowed for damages up to the time of death, as well as thereafter.

More recently, in the cases of *Churchill v. Norfolk & Western Railway Company* and *National Bank v. Norfolk & Western Railway Company*, punitive damages were assessed against the defendant railroad as a result of a violation of the Public Utilities Act. The court allowed punitive damages for the first time when the basic injury complained of in each instance was the death of a driver of an automobile. While the reasoning in each case was parallel, the specific justifications differed. In *Churchill*, the deceased was killed instantly and an action for his wrongful death was brought under the Public Utilities Act, as well as an action by his spouse requesting damages for recovery of his medical and funeral expenses. The Public Utilities Act contains a provision allowing the assessment of punitive damages against a utility when it omits or fails to follow a rule or regulation provided in the Act. In the face of a recent decision in *Mattyasovszky v. West Towns Bus Company* denying a wrongful death action for punitive damages, the *Churchill* court allowed \$600,000 in punitive damages to the wife. In *Churchill*, the court further reasoned that the widow incurred property damage by being obligated for the payment of funeral and medical expenses for her deceased husband and was therefore a person injured by the defendant railroad under the theory initiated in *Saunders v. Schultz*. The court noted that the Public Utilities Act did not require that the persons affected by the violation of a regulation be physically injured. Thus, the wife's property damage was sufficient to allow the assessment of the damages.

*National Bank* turned on a slightly different basis, utilizing the opinion in *Murphy v. Martin Oil Company*. In *National Bank*, the deceased was the operator of an automobile struck by a freight train. He died seven days after the collision. Again, utilizing the legislative language of the Public Utilities Act, the court held that the decedent's personal injuries survived his death, allowing the assessment of a \$300,000 punitive damage verdict against the railroad for its willful violation of regulations.

Most recently, in the opinion of *Wilbon v. D.F. Bast Company, Inc.*, the supreme court allowed a minor heir to bring a claim under the Wrongful Death Act, even though the two-year limitation period had expired. It had, of course, been previously held that filing the claim within the statute of limitations was a condition precedent to the right to bring an action and that failure to do so violated a substantive requirement of the Act. In an opinion that is highly critical of the notion that wrongful death is strictly a creature of statute unknown to the common law, the court alluded to the history of the development of that rule, discussed its

inequities and concluded with the statement,

We are confronted here with a choice whether, because of a much criticized concept stemming from a questionable antecedents, to hold that the two-year limitation is a condition of the existence of the claim of these infant plaintiffs or whether they are to following the teaching of *McDonald v. City of Spring Valley*. . . that “[a] child with a meritorious cause of action but incapable of initiating any proceeding for its enforcement will not be left to the whim or mercy of some self-constituted next friend to enforce its rights”. . . and hold “that a minor should not be precluded from enforcing his rights unless clearly debarred from so doing by some statute or constitutional provision. . . .”

After reviewing the legislative history of the Wrongful Death Act and noting that the negligence of one beneficiary would not bar the recovery by other beneficiaries in a death situation, the court concluded that the legislative intent was to allow a minor beneficiary to bring his claim after the expiration of the two-year limitation period. This holding resulted even after the court found the 1977 amending to the Act which allowed minority to toll the two-year time period to be prospective in application only. The opinion in *Wilbon* seems to fall short of the recognition of a common law action for wrongful death. While the opinion is highly critical of the rule, it bases its ultimate decision upon its construction of legislative intent. This manner of reaching the ultimate result is unlike the method followed by two other courts in similar situations.

## VII. JUDICIAL RECOGNITION OF COMMON LAW WRONGFUL DEATH ACTIONS

Leaving no doubt as to the effects of their opinions, the United States Supreme Court and the Supreme Judicial Court of the Commonwealth of Massachusetts specifically recognized wrongful death as a common law action. The Supreme Court in *Moragne v. State marine Lines, Inc.*, in 1970 filled the void that existed in the area of maritime law. The deceased was killed while working aboard a vessel in the navigable waters of Florida and recovery for wrongful death was not permitted within Florida’s territorial waters by statute. After considering the history of the rule and tracing it to the opinion of Lord Ellenborough in *Baker v. Bolton*, the Court indicated an expectation that a review of the sources for the common law rule should find a clear and compelling justification for this rule’s unusual departures from the basic elements of the common law remedies. The court found nothing to justify the loss of action simply because the injury was fatal. Noting that the felony merger doctrine had no application in American law that the felony merger doctrine had no application in American law and that early state court opinions appeared to rest on either no authority or the authority of *Baker v. Bolton*, the Court indicated that the most likely reason the English rule was adopted in the United States without much question was simply that it had the blessing of age. Furthermore, Congress had enacted a number of statutes which contained remedies for injuries resulting in death, which, when taken as a group, made it plain that there were no public policy preventing recovery for wrongful death. The Court rejected the notion that it was an area for exclusive legislative action, holding:

The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases, the scope of a statute may reflect nothing more than the dimensions of a particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the same mischief is identical.

Find that Congress had made no affirmative indication of an intention to preclude the common law recovery for wrongful death in that particular situation, the Court allowed the claim.

In an opinion following *Morange*, the Supreme Judicial Court of Massachusetts, in 1972, also recognized a common law wrongful death action. The facts in *Gaudette v. Webb* were very similar to the Illinois case of *Wilbon v. D.F. Bast Company, Inc.* In *Gaudette*, three minor children and the spouse of the deceased brought an action under the Massachusetts Wrongful Death Act after the two-year limitation period had been exhausted. The court barred recovery for the widow, but held that the minority of the three children tolled the running of the statute of limitations. In reaching that conclusion, the Massachusetts court expressly rejected the concept that the timely filing of the claim was a condition precedent to the right to initiate a wrongful death action. Again, noting that the history of *Baker v. Bolton* probably originated with the felony merger doctrine, the court concluded:

Upon consideration of the *Morange* decision and the sound reasoning upon which it is based, we are convinced that the law in this Commonwealth has also evolved to the point where it may now be held that the right to recovery for wrongful death is of common law origin, and we so hold.

Demonstrating that such a holding is not as radical and drastic as its critics might contend, the court went on to note:

Consequently, our wrongful death statutes will no longer be regarded as “creating the right” to recovery for wrongful death. They will be viewed rather as: (a) requiring that damages recoverable for wrongful death be based upon the degree of the defendant’s culpability; (b) prescribing the range of the damages recoverable against each defendant; (c) requiring that any action for wrongful death be brought by a personal representative on behalf of the designated categories of beneficiaries; and (d) requiring that the action be commenced within the specified period of time, as a limitation on the remedy and not upon the right. We further hold that statutes limiting the period for bringing actions for death are to be construed in the same manner as the limitations contained in . . . the general statute of limitations, and that in appropriate cases they may be tolled by the various provisions [of that statute].

## VIII. MODERN APPROACH TO WRONGFUL DEATH ACTIONS

The United States Supreme Court and the Supreme Judicial Court of Massachusetts squarely faced the unjust remnants of the common law rule concerning wrongful death. Each court took the bold step necessary to bring this portion of the common law in tune with modern times. The Supreme Court of Illinois appears to have chosen not to be as frank and has, by piecemeal methods, carved additional remedies which are beyond the statutory benefits of the Illinois Act. However, the court has failed to take the steps necessary to place the Illinois common law in step with logic and modern times concerning the wrongful death of an individual. The Illinois court’s failure to follow the path of the Supreme Court and the Supreme Judicial Court of Massachusetts has led to situations wherein bootstrapping has been necessary to reach the

desired conclusion and, at the same time, to void the abrogation of the common law rule concerning wrongful death. This is why, in *Saunders v. Schultz*, it was necessary to tie the decision to the family expense act when allowing for funeral and medical expenses of the deceased. Common law has always recognized that a tortfeasor is responsible for the full extent of the damages he causes. The rejection of the rule established in *Baker v. Bolton* would simply put situations involving death in line with identical situations in which the injury does not result in death.

The Illinois court's first bold step in that direction came in the opinion of *Murphy v. Martin Oil Company*, allowing recovery for pain, lost wages and property damages prior to death. However, the hopes and expectations stirred by *Murphy v. Martin Oil Company* were quickly shattered by the opinion of the Supreme Court of Illinois in *Mattyasovszky v. West Towns Bus Company*. Just Schaefer, writing the majority opinion of the court, summarily denied a wrongful death action for punitive damages. Rejecting the contention that *Moragne*, *Gaudette* and *Murphy* extended the common law remedies to situations involving punitive damages, Justice Schaefer refused to overrule a long line of authority.

In that light, one would not have expected the opinion in *Churchill* and *National Bank* from the same court. With two dissenting opinions in each case, the court allowed punitive damages to be recovered when the tort resulted in death to the victim.

Although the results and rationale in *Churchill* and *National Bank* were desirable and consistent with the public policy pronounced within the Public Utilities Act, it is difficult to understand why punitive damages would be rejected when the death resulted by virtue of some outrageous common law tort which was not specifically condemned by statute. Similarly questionable is why the Survival Act is a sufficient mechanism for preserving the statutory punitive damages claim when death results, but is not sufficient to permit survival of a common law punitive damages claim. That distinction appears to be the holding of the court, as it is stated in *National Bank*:

Here, in contrast to *Mattyasovszky*, punitive recovery was sought, not under the common law, but directly under the Public Utilities Act, which expressly provides that, "if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example by way of punishment."

Clearly, the court's failure to overrule *Mattyasovszky* in *Churchill* and *National Bank* creates a situation in which distinctions without substantial meaning determine whether punitive damages are recoverable in wrongful death actions. Surely the distinction between statutory allowances of punitive damages and common law allowances of punitive damages is not sufficient to justify the refusal of the Survival Act to preserve the common law right to punitive damages.

Most confusing is the situation in *Wilbon*. The court was faced with an opportunity to explicitly recognize the common law right for an action involving wrongful death in a factual situation identical to that of *Gaudette*. The court extensively criticized the common law rule, but based its ruling on the interpretation of legislative intent. The decision is curious in light of the fact that, at the time the court made its ruling, the Illinois legislature had made provisions for the minority of an heir to toll the statute as it runs against that heir. This opinion makes no broad sweeping changes to protect the rights of minors. That had been

accomplished by the amendment to the Wrongful Death Act. Justice Ryan noted in his dissenting opinion: This decision affects only the minors in this case, but by making a special accommodation to them, it substantially weakens the concept that the Wrongful Death Act is solely the creature of the legislature and that the time limitation is not a statute of limitations but a substantive provision of the Act itself which must be observed in all events.

#### IX. THE SUPREME COURT OF ILLINOIS SHOULD RECOGNIZE COMMON LAW WRONGFUL DEATH ACTIONS.

Is the piecemeal approach of the Supreme Court of Illinois attacking the rule that a civil death cannot be complained of as an injury advisable? Or are the methods chosen by the United States Supreme Court in *Moragne* and the Supreme Judicial Court of Massachusetts in *Guadette* preferable? I cannot be a matter of precedent. The Supreme Court of Illinois has stated on at least three occasions:

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

It is exclusively the legislature's prerogative to change the Wrongful Death Act as it seems fit, or does the judiciary have an active role in the development of common law with conformity to modern times? Since recovery of wrongful death was prohibited by court rulings originating with *Baker v. Bolton*, it would seem that the judiciary and legislature have equal responsibility in attempting to correct the mistake. Illinois courts have never feared molding remedies when justice required it. Justice Dooley in his concurring opinion in *Renslow v. Mennonite Hospital* stated: "Obviously courts create law. If it were otherwise the common law would be as out of touch with life as is a corpse. Courts must take an active part in the development of the common law, although this may mean creativeness." Courts do adapt to the times as evidenced by the recent recognition by the Supreme Court of Illinois of a new cause of action for the retaliatory dismissal of an employee who filed a workmen's compensation claim. It certainly is not the exclusive prerogative of the legislature to amend rules of common law developed by the judiciary.

Is it the stability of the law and the reliance upon consistency that restrains the judiciary from recognizing common law wrongful death actions? Obviously not, for how can a defendant rely upon a rule that requires him to provide full compensation when his wrongful act results in injuries alone, but relieves him of any common law liability for compensation when his wrongful act results in death? The rule has been stated facetiously to suggest that the first Pullman railroad cars were so constructed that the passengers slept with their heads toward the front of the train so that they would be killed rather than injured in a derailment or other accident. This cruel example demonstrates that if tortfeasors relied upon such a rule to regulate their conduct, the policy behind the rule was wrong as it encouraged grossly inhumane actions. The trust is that tortfeasors recognize their duty to prevent injury to others and there is no reliance placed upon this rule. Its reversal would not shatter the stability of tort law nor create burdens or duties on tortfeasors that do not already exist.

## X. CONFUSION EXISTS IN ILLINOIS

A specific and clear pronouncement by the Supreme Court of Illinois in its most recent opportunity would have clarified what now is a murky area of the law. Are punitive damages permissible in cases other than actions involving the Public Utilities Act for wrongful death? It is uncertain. The logic of *Churchill* and *National Bank* as pointed out in the dissent of each of those cases would certainly suggest that punitive damages are permissible. The majority opinion in *National Bank* suggests that the only reason *Mattysovszky* refused punitive damages was that the bad driver, who committed the willful conduct, had been dismissed from the suit and that public policy did not require punishing his employer. It cannot be said with any certainty whether *Mattysovszky* has been overruled or is still a general rule of law in this state.

Is filing within a proper time limit still considered a condition precedent for an action for wrongful death, or has the opinion in *Wilbon* destroyed the concept that proper filing time is a substantive provision of the law as opposed to procedural? Uncertainty now exists as to whether a counterclaim can be brought after the limitation period has run when the initial suit was filed against the decedent's estate. If the limitation time period is now procedural, it is covered by the limitation statutes and such a situation would reopen the right of the decedent's estate to bring an action for his death. If the time limit is substantive, it would not extend the second anniversary of the death if it occurred on a weekend or holiday, as is the case with other non-statutory torts.

Further, is the statute only tolled by minority or to competency and other disabilities toll it? The *Wilbon* opinion leaves these questions unanswered.

Justice Cardozo wrote:

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.

If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie in helpless submission, the hands of their successors.

Do the nineteenth century mores of Lord Ellenborough still tie our hands in the 1980s?