UIC Law Review

Volume 17 | Issue 3 Article 4

Summer 1984

Froud v. Celotex Corp.: Rebirth of an Adage, 17 J. Marshall L. Rev. 781 (1984)

Thomas F. Londrigan

Froud v. Celotex Corp.: Rebirth of an Adage

THOMAS F. LONDRIGAN*

INTRODUCTION

In June of 1982, the First District Appellate Court of Illinois appeared to put an end to the old adage: "[A]s far as liability for punitive damages is concerned, it continued to be cheaper to kill people rather than to merely injure them."[1] In *Froud v. Celotex Corp.*,[2] the appellate court concluded that the Survival Act[3] was a "neutral vehicle" and did not authorize or prohibit the award of punitive damages.[4] Justice Lorenz, writing for the majority, interpreted the Survival Act to provide that common law actions that establish the right to a punitive damage award survived the death of the injured person.[5] In another 1982 decision, *Howe v. Clark Equipment Co.*,[6] the appellate court for the fourth district also construed the Survival Act as a "conduit" and allowed recovery of punitive damages.[7] The Illinois Supreme Court, however, granted the petition for leave to appeal in the *Froud* case

---

* L.L.B., University of Illinois, 1962. Mr. Londrigan is presently a partner of the law firm Londrigan, Potter & Randle, P.C., Springfield, Illinois, specializing in civil trial and appellate practice. He has served as Chairman of the Civil Practice and Procedure Council of the Illinois State Bar Association and Co-chairman of the Uniform Circuit Court Rules Committee. He is the immediate past President of the Illinois Trial Lawyers Association.

1. Froud v. Celotex Corp., 107 Ill. App. 3d 654, 657, 437 N.E.2d 910, 912 (1982), *rev'd*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983).

2. 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982), *rev'd*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983).

3. Illinois Probate Act § 27-6, ILL. REV. STAT. ch. 110-1/2, § 27-6 (1983) provides:

> [I]n addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, 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."

4. *Froud*, 107 Ill. App. 3d at 658, 437 N.E.2d at 913.

5. *Id.*

6. 104 Ill. App. 3d 45, 432 N.E.2d 621 (1982).

7. *Id.* at 50, 432 N.E.2d at 625. The *Howe* court commented that "the Survival Act is only a conduit whereby any causes of action possessed by the decedent may be prosecuted by his personal representative . . . ." *Id.*

and reversed the appellate court.[8] In the year and a half interim, the law in Illinois appeared to be the statutory construction placed upon the Survival Act by the appellate court decisions in *Froud* and *Howe*.

On behalf of a unanimous supreme court, Justice Simon reconciled several recent cases that appeared to express divergent interpretations of the Survival Act.[9] The court acknowledged the applicability of the "cheaper to kill" adage and accorded recognition to the persuasiveness of the arguments against it. The court determined, however, that as "[p]ersuasive as these arguments sound, we believe they are better addressed to the General Assembly than to this court. . . ."[10]

The *Froud* decision was based solely on principles of statutory construction. Justice Simon marshalled strong and cogent arguments to reconcile prior cases construing the Wrongful Death Act,[11] the Survival Act and the Public Utilities Act.[12] One of the cases distinguished was *National Bank of Bloomington v. Norfolk & Western Railway Co.*,[13] which allowed the plaintiff to use the Survival Act to preserve a statutory cause of action for punitive damages expressly provided for in the Public Utilities Act.[14] The *Froud* court noted that the rationale of the *National Bank of Bloomington* decision was based upon a "comprehensive regulatory scheme" enacted by the legislature and, therefore, not subject to the common law rule of abatement by death.[15] The court in *National Bank of Bloomington*, determined that to construe the Public Utilities Act in any other man-

8. Froud v. Celotex Corp., 98 Ill. 2d 324, 456 N.E.2d 131 (1983). It is interesting to note that the court held the *Froud* petition in abeyance for several terms.

9. *Froud*, 98 Ill. 2d at 330-33, 456 N.E.2d at 133-35.

10. *Id.* at 335, 456 N.E.2d at 136.

11. Illinois Wrongful Death Act §1, ILL. REV. STAT. ch. 70, § 1 (1983) provides:

> [W]henever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages. . . .

12. ILL. REV. STAT. ch. 24, § 11-117-1 (1983); *id.* ch. 111 2/3, § 1-808 (1983).

13. 73 Ill. 2d 160, 383 N.E.2d 919 (1978).

14. *Id.* at 174, 383 N.E.2d at 924.

15. *Froud*, 98 Ill. 2d at 334, 456 N.E.2d at 135. The court commented that:

> That claim is an integral component of the regulatory scheme and of the remedy which is available under it: it can no more be diminished by *common law doctrines such as abatement* than a statutory limitations period can be eroded by such equitable doctrines as tolling. [citations omitted] The Public Utilities Act is a regulatory statute, and the punitive damages provision is part and parcel of the Act.

Id. (emphasis added).

ner than upholding the punitive damages provision, would frustrate the Act's intention. The other interpretation, in the eyes of the court, would allow reprehensible conduct to be isolated from punitive liability merely because it was so severe that it resulted in death.[16]

In *Froud*, the rationale of the unanimous opinion was the court's judicial duty to consistently interpret separate statutes in view of the common law doctrine of abatement. These statutes, the Wrongful Death Act and the Survival Act, are legislative enactments designed to mitigate the recognized inequity of the common law rule of abatement by death.[17] The *Froud* court acknowledged the inequity of common law abatement but seemed to suggest that existing statutes may have preempted common law solutions.[18] According to the court, one such statute is the Survival Act. This act affords the party relief in instances where the common law rule of nonsurvival would have denied recovery.[19] The *Froud* court determined that this relief was limited to those areas specified in the Act.[20] The court declined " 'to annex new provisions or substitute different ones, or provide exceptions, limitations or conditions which are different than the plain meaning of the statute.' "[21] Therefore, the inequity created by common law abatement has been only partially eliminated by the legislature.

The purpose of this article is to examine parallel lines of Illinois Supreme Court decisions dealing with death damages; one line of cases deals with statutory construction and the other deals with the common law rule of abatement by death. In cases of statutory construction, the Illinois Supreme Court has repeatedly rejected judicial expansion of legislative remedies. In cases brought at common law, however, the court has often reversed precedent inconsistent with contemporary principles of justice. This article addresses the unanswered issues of the continued viability of the common law rule of abatement by death and the right to recover punitive damages when appended to an independent common law action for family expenses recognized

16. *National Bank of Bloomingdale*, 73 Ill. 2d at 174, 383 N.E.2d at 924.

17. The appellate court in *Froud* noted that common law abatement was the source of the adage when the court commented: "The common law rule is that actions for 'personal torts' abate at the death of the injured person. [citations omitted]. This common law rule is the source of the old adage that it was cheaper to kill people rather than to merely injure them." *Froud*, 107 Ill. App. 3d at 657, 437 N.E.2d at 912.

18. *Froud*, 98 Ill. 2d at 335-36, 456 N.E.2d at 136-37.

19. *See supra* note 3.

20. *Froud*, 98 Ill. 2d at 334-35, 456 N.E.2d at 136.

21. *Id.* at 334, 456 N.E.2d at 136.

by our supreme court in *Saunders v. Schultz*.[22]

INTERPRETATION OF THE SURVIVAL ACT

The scope of damages recoverable under these remedial statutes has been subject to repeated court interpretations dating back to the 1882 decision of *Holton v. Daly*.[23] Ten years ago, the Illinois Supreme Court traced the history of damages recoverable under the Survival Act in *Murphy v. Martin Oil Co.*[24] In *Murphy*, the supreme court allowed recovery under the Survival Act for "pain and suffering."[25] The *Murphy* court expressed its disfavor of the common law rule of abatement and noted that the modern trend maintained that a tort cause of action was not extinguished at death.[26] The *Murphy* court then expressly overruled the rule in *Holton*[27] which proclaimed that the Survival Act allowed survival of an action only when death resulted from a cause other than the act which caused the original injury.[28] The court determined that it did not have to blindly follow prior decisions when to do so would require the court to ignore public policy and social needs.[29]

In *Murphy*, the court dealt directly with the inequity created by the common law doctrine of abatement by death and the rule of law that the Wrongful Death Act was "an exclusive remedy." In *Froud*, the court simply construed the express terms of the Survival Act. *Froud* was concerned with the failure of the legislature to amend either the Wrongful Death or Survival Act to allow the recovery of punitive damages. In *Froud*, the court juxtaposed the appellate and supreme court decisions in the case of *Mattyasovszky v. West Towns Bus Co*.[30] with the legislative history of the Survival Act.[31]

After the appellate court in *Mattyasovszky* refused to grant punitive damages,[32] a bill was introduced in the General Assem-

22. 20 Ill. 2d 301, 170 N.E.2d 163 (1960).

23. 106 Ill. 131 (1882).

24. 56 Ill. 2d 423, 308 N.E.2d 583 (1974).

25. *Id.* at 432, 308 N.E.2d at 587.

26. *Id.* at 428-29, 308 N.E.2d at 585.

27. *Id.* at 430-31, 308 N.E.2d at 586-87. Actually, *Holton* had been overruled in Saunders v. Schultz, 20 Ill. 2d 301, 170 N.E.2d 163 (1960) (funeral and medical expenses recovered under the Survival Act).

28. Holton v. Daly, 106 Ill. 131, 137 (1882).

29. The court noted that it is more important to be correct on reconsideration of various principles of law than to be consistent with previous declarations. *Murphy*, 56 Ill. 2d at 431, 308 N.E.2d at 587.

30. 21 Ill. App. 3d 46, 313 N.E.2d 496 (1974), *aff'd*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975).

31. *Froud*, 98 Ill. 2d at 335-36, 456 N.E.2d at 136-37 (1983).

32. *Mattyasovszky*, 21 Ill. App. 3d 46, 55, 313 N.E.2d 496, 502 (1974).

bly to amend the Survival Act. The bill proposed that a punitive damages award be included in the damages that survive the death of the party.[33] The committee it was referred to defeated the bill. Accordingly, *Froud* relied heavily upon *stare decisis* as a basis of resolving the question of statutory construction. Contrary to the rationale expressed in *Murphy*,[34] the *Froud* court determined that it was not free to abandon its own earlier statutory interpretations. The court declared that "[c]onsiderations of *stare decisis* weigh more heavily in the area of statutory construction. . .."[35] The predicate for the statutory interpretation in *Froud* was *Mattyasovszky v. West Towns Bus Co.*[36] *Mattyasovszky* was decided only one year after *Murphy* and clearly rejected a statutory interpretation of the Survival Act to include punitive damages. The court in *Mattyasovszky* determined that the earlier case of *Murphy* did not indicate any basis for a change in the law which had been present in Illinois for more than a hundred years.[37] *Mattyasovszky* also rejected creation of a separate common law wrongful death action which could serve as a vehicle to include punitive damages. In light of the remedial action taken by the legislature in the Survival Act and the Wrongful Death Act, the court found there was no need to create an additional common law action for "wrongful death."[38] It is interesting to note that since 1975, the Illinois General Assembly has not shown an inclination to address the "cheaper to kill" adage or change the inherent common law inequity of abatement by death with which Illinois reviewing courts have struggled over the past century.

Froud And Statutory Construction

It is now clear that the supreme court has rejected the "neutral vehicle" or "conduit" concepts of the Survival Act adopted by the appellate courts in *Froud v. Celotex Corp.*[39] and *Howe v.*

---

33. *See Froud*, 98 Ill. 2d at 335-36, 456 N.E.2d at 136-37.

34. *See supra* notes 24-29 and accompanying text.

35. *Froud*, 98 Ill. 2d at 336, 456 N.E.2d at 137.

36. 61 Ill. 2d 31, 330 N.E.2d 509 (1975).

37. *Id.* at 33, 330 N.E.2d at 510.

38. *Id.* at 37, 330 N.E.2d at 512. The court noted:

> The single occurrence involved in the case before us already gives rise to two distinct statutory actions: in one the damages recovered go to the decedent's estate, and so are available to the claims of creditors, and in the other the damages recovered go to the surviving spouse and next of kin of the deceased.

Id.

39. 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982), *rev'd*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983).

Clark Equipment Co.[40] While several issues have now been conclusively resolved, others have yet to be addressed. First, *Froud* clearly reaffirmed *Mattyasovszky*'s holding that the Survival Act does not preserve a common law claim for punitive damages against abatement by death and also rejected the invitation to create a separate common law action for wrongful death.[41] Second, *Froud* reconciled *National Bank of Bloomington* and *Mattyasovszky* by holding that existing statutory actions providing for recovery of punitive damages, such as the Public Utilities Act, were preserved against common law abatement by death.[42] Third, *Froud* recognized the desirability of a uniform application of punitive damages regardless of whether the victim is injured, or later dies as a result of the injuries, but left resolution of that issue to the Illinois General Assembly.[43] *Froud*, however, failed to address the issue of whether to abrogate the remaining vestiges of the common law rule of abatement by death. Since the Survival Act was pleaded as a statutory vehicle or conduit to recover punitive damages, rules of statutory construction dictated the result.

The Illinois Supreme Court has struggled for several generations with the competing philosophies of conforming the common law to basic notions of equality and fairness in light of contemporary values, as opposed to judicial recognition that the legislature is the basic formulator of public policy as expressed through statutory enactment. The Illinois Supreme Court in *Froud* clearly concluded that the legislature has enacted death statutes which fail to provide for punitive damages. Despite this obvious inequity, *Froud* concluded that the court is powerless to amend these statutes by judicial interpretation.[44] The basic rea-

40. 104 Ill. App. 3d 45, 432 N.E.2d 621 (1982).

41. *Froud*, 98 Ill. 2d at 336, 456 N.E.2d at 136-37.

42. *Id.* at 334-35, 456 N.E.2d at 136.

43. *Id.* at 335, 456 N.E.2d at 137.

44. *Id.* The Illinois Supreme Court has expressed divergent views with respect to *stare decisis* in cases involving the common law as compared to cases of statutory construction. *Compare* Murphy v. Martin Oil Co., 56 Ill. 2d 423, 431-32, 308 N.E.2d 583, 587 (1974) (the doctrine of *stare decisis* retains the flexibility needed to respond to the dictates of public policy and social need)and Saunders v. Schultz, 20 Ill. 2d 301, 311, 170 N.E.2d 163, 169 (1960) (permitted common law suit for funeral and medical expenses)and Molitor v. Kaneland Comm. Unit Dist. No. 302, 18 Ill. 2d 11, 26, 163 N.E.2d 89, 96 (1959), (moral, economic and social welfare of people can be grounds for deviating from strict adherence to *stare decisis*), *cert. denied*, 362 U.S. 968 (1962), *with* Susemiehl v. Red River Lumber Co., 376 Ill. 138, 140, 33 N.E.2d 211, 212 (1941) (policy expressed through a long standing rule can only be changed through legislative enactment)and Mattyasovszky v. West Towns Bus Co., 21 Ill. App. 3d 46, 52, 313 N.E.2d 496, 501 (1974) (distinguished *Saunders* while strictly following common law).

son for this inequity,the common law rule of abatement by death, however, was not addressed.

FROUD AND THE COMMON LAW

One undeniable pattern woven into the text of all Illinois appellate decisions is the inherent unfairness of a rule where punitive damages are abated by death. Recent decisions by Illinois reviewing courts have all commented on the basic injustice of such a rule.[45] In *Churchill v. Norfolk & Western Railway*,[46] the supreme court acknowledged the basic injustice which results from denying punitive damages when the victim of a tort dies. The court noted that "[e]vidence has demonstrated that multiple and varied wrongs result from reducing a claim for compensatory and punitive damages to a claim for compensatory damages only because death has intervened."[47] The court determined that since the cheaper to kill than injure adage was a product of the legislature, it was not the court's function to rewrite it.[48]

The same "adage" and similar judicial comments are found repeatedly in other cases. Justice Moran for the Illinois Appellate Court for the Second District in *Mattyasovszky v. West Towns Bus Co.*,[49] stated that allowing punitive damages "would once and for all put to rest the old adage that it is cheaper to kill your victim than to leave him maimed."[50] Both the appellate and supreme courts in *Froud* noted the presence of the adage. The supreme court concluded that as persuasive as the arguments are against the cheaper to kill theory, it was powerless to judicially amend a legislative enactment.[51]

---

45. Froud v. Celotex Corp., 98 Ill. 2d 324, 456 N.E.2d 131 (1983); Mattyasovszky v. West Towns Bus Co., 61 Ill. 2d 31, 330 N.E.2d 509, 513 (1975) (Goldenhersh, J., dissenting); Froud v. Celotex Corp., 107 Ill. App. 3d 654, 437 N.E.2d 910 (1982); Mattyasovszky v. West Towns Bus Co., 21 Ill. App. 3d 46, 313 N.E.2d 496, 502 (1974).

46. *E.g.*, Churchill v. Norfolk & W. Ry., No. 49421, slip op. at 6 (Ill. Sept. 1977), *rev'd on rehearing*, 73 Ill. 2d 127, 383 N.E.2d 929 (1978).

47. *Id.*

48. *Id.* at 141, 383 NE.2d at 935.

49. 21 Ill. App. 3d 46, 313 N.E.2d 496 (1974), *rev'd*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975).

50. *Id.* at 54, 313 N.E.2d at 502. The dissent in *Mattyasovszky* referred to Justice Moran's statement by commenting: "I agree with the statement of the appellate court that a construction of our survival statute which did not preclude recovery of punitive damages 'would once and for all put to rest the old adage that it is cheaper to kill your victim than to leave him maimed.'" Mattyasovszky v. West Towns Bus Co., 61 Ill. 2d 31, 38, 330 N.E.2d 509, 513 (1975) (Goldenhersh, J., dissenting).

51. Froud v. Celotex Corp., 98 Ill. 2d 334-35, 456 N.E.2d 131, 136 (1983).

While Illinois courts have struggled with reconciling a consistent statutory scheme between the Wrongful Death Act and Survival Act, the supreme court has not experienced the same problem with common law rules which are obviously unfair or illogical. For example, for many years the rule of *Holton v. Daly*[52] held that the Wrongful Death Act and Survival Act were exclusive remedies in the event of a death. In 1941, the Illinois Supreme Court reaffirmed the *Holton* rule in *Susemiehl v. Red River Lumber Co.*,[53] despite strong policy arguments that it should be overruled.[54] The court noted that other jurisdictions had reached a different result,[55] but declined to change the rule. This holding, according to the court, was based on the principle of *stare decisis*. The court declared that the *Holton* rule has been the law for nearly sixty years and that countless Illinois courts had followed it.[56] Therefore, if the rule was to be changed, it must be by legislative enactment.[57]

Nineteen years later the Illinois Supreme Court, however, overruled *Holton* in *Saunders v. Schultz*.[58] The court considered that "[a]lmost a score of years [had] passed since this pronouncement without legislative action in this field. The estate or the spouse . . . are entitled to recover for pecuniary losses suffered by either or both which are not recoverable under the Wrongful Death Act . . . ."[59] The concept of common law abatement in Illinois was strictly limited by the *Saunders* decision and the rule that the Wrongful Death Act was the exclusive statutory remedy for death actions was rejected. The Supreme Court in *Saunders* recognized a direct common law action for death damages not recoverable by statute. The court considered that "[t]he rule denying such recovery originated as a corollary

52. 106 Ill. 131 (1882).

53. 376 Ill. 138, 33 N.E.2d 211 (1941).

54. *Id.* at 140, 33 N.E.2d at 212.

55. *Id.* The court noted that

> [b]eginning with the case of *Holton v. Daly* [citations omitted] and continuing to the present time, this court has been committed to the doctrine that if death results from the injuries sued for, the suit of the injured person abates and cannot be further prosecuted. We have construed the Injuries act to apply to all those cases in which the injuries resulted in death, and the Survival Statute to apply to those cases in which death resulted from some other cause. The appellant argues with much force, and with numerous authorities from other jurisdictions, that the rule of *Holton v. Daly* [citations omitted] should be overruled and that decisions from other jurisdictions having similar statutes should be followed.

Id. at 138, 140, 33 N.E.2d at 212.

56. *Id.*

57. *Id.*

58. 20 Ill. 2d 301, 170 N.E.2d 163 (1960).

59. *Id.* at 311, 170 N.E.2d at 169.

of the archaic common-law rule that there could be no recovery for the death of a human being *which is no longer the law*."[60] Furthermore, the surviving spouse is personally liable for the debts incurred as a result of the death under the Family Expense Statute. This burden, according to the court, should fall upon the tortfeasor which caused the liability, rather than the innocent victim.[61]

The Illinois Supreme Court recently reaffirmed the *Saunders* rationale for an independent common law cause of action in *Churchill v. Norfolk & Western Railway*.[62] Therefore, it is now clear that the rule of *Holton v. Daly*,[63] that the Wrongful Death Act is the exclusive remedy, has been expressly overruled on three separate occasions by the Illinois Supreme Court.[64] It is also clear that *Saunders* created a direct and independent common law recovery of damages, not provided for by the Wrongful Death Act. It is important to note, however, that subsequent opinions have been careful to point out that the supreme court will not create a duplicative common law action for wrongful death which includes the same damages already provided to the next of kin by statute.

The action recognized by *Saunders* was independent of the statutory cause of action provided under the Wrongful Death Act. *Saunders* provided a *common law* recovery for damages separate and distinct from damages already recoverable by statute. The supreme court determined that the plaintiff's claim would not result in a duplication of damages, as the Wrongful Death Act did not provide for recovery of medical or funeral expenses.[65]

The "Norfolk Cases"

National Bank of Bloomington v. Norfolk & Western Railway Co.,[66] and *Churchill v. Norfolk & Western Railway Co.*,[67] are discussed interchangeably as the "Norfolk Cases" by the Seventh Circuit Court of Appeals in *In Re Air Crash Disaster Near Chicago, Ill.*[68] *Churchill* and *National Bank of Blooming-*

60. *Id.* at 310, 170 N.E.2d at 168 (emphasis added).
61. *Id.*
62. 73 Ill. 2d 127, 383 N.E.2d 929 (1978).
63. 106 Ill. 131 (1882).
64. Churchill v. Norfolk & W. Ry., 73 Ill. 2d 127, 383 N.E.2d 929 (1978); Murphy v. Martin Oil Co., 56 Ill. 2d 423, 308 N.E.2d 583 (1974); Saunders v. Schultz, 20 Ill. 2d 301, 170 N.E.2d 163 (1960).
65. *Saunders*, 20 Ill. 2d at 311-12, 170 N.E.2d at 169.
66. 73 Ill. 2d 160, 383 N.E.2d 919 (1978).
67. 73 Ill. 2d 127, 383 N.E.2d 929 (1978).
68. 644 F.2d 594, 605-06 (7th Cir. 1981).

ton, however, were pleaded as entirely different causes of action. *National Bank of Bloomington* alleged an action under the Survival Act for pain and suffering caused before the ensuing death.[69] This action was the same type as in *Murphy*.[70] *Churchill*, although brought pursuant to the Public Utilities Act, alleged the same common law damages for family expenses, as in *Saunders*.[71]

In *Churchill*, the decedent died instantaneously and had no claim for "pain and suffering" under the Survival Act. Therefore, the court based the compensatory damage award on the independent common law action recognized in *Saunders*.[72] The similarity between the "Norfolk" claims was the request for punitive damages for willful violation of the Public Utilities Act.

The basis for recovery of compensatory damages under the two cases was quite distinct. *National Bank of Bloomington* sought damages for pain and suffering under a statute, the Survival Act. *Churchill* sought punitive damages provided under the Public Utilities Act; however, it pleaded the same compensatory damages recoverable at the common law. Recovery of compensatory damages in a *Saunders* claim is separate and apart from damages recoverable under either the Wrongful Death Act or the Survival Act.

The distinction between these two cases was discussed by one commentator contemporaneously with the "Norfolk" decisions. The commentator explained:

> In *Churchill*, where the decedent died instantly, the Court allowed punitive damages on a separate action by the widow which she had filed for hospital, medical and funeral expenses under the theory of *Saunders v. Schultz*. (citations omitted)
>
> According to Thomas F. Londrigan, one of the counsel in the *Churchill* case, "*Churchill* and the *First National Bank* cases leave unanswered the situation where the next of kin has sustained "very real damages" under the Family Expense Statute (as interpreted by *Schultz*), and asserts a right to recover punitive damages in an independent common law tort action. *Mattyasovszky* appears to hold that the administrator has no right to assert such a claim, where the death is "instantaneous," under either the Wrongful Death Act or Survival Statute. However, does a next of kin or administrator have the right to claim funeral expenses and punitive damages in a *Saunders v. Schultz* type action . . .? These types of actions will be determined by common law principles rather than statutory interpretation."[73]

69. *National Bank of Bloomington*, 73 Ill. 2d at 166, 383 N.E.2d at 923.

70. *See supra* notes 24-29 and accompanying text.

71. *Churchill*, 73 Ill. 2d at 133, 383 N.E.2d at 931.

72. *Id.* at 138-39, 383 N.E.2d at 934.

73. 24 TRIAL BRIEF 1, 1-2 (January 1979) (emphasis in original).

What was suggested five years ago was that interpretation of statutory death actions does not answer the remaining dilemma caused by the common law vestiges of abatement by death. The adage "it is cheaper to kill" must ultimately be resolved by judicial re-examination of its source, the common law rule of abatement by death.

The best discussion of the origin and history of the rule of abatement by death is found in Justice Moran's opinion for the appellate court in *Mattyasovszky v. West Towns Bus Co.*[74] According to Justice Moran, there are two common law rules which are pertinent. The first rule is "that a plaintiff may not complain of the death of another as causing injury to him."[75] The basis for this rule is found in the common law which holds that the pecuniary value of a life is unascertainble.[76] Thus, it is impossible to award damages. The second common law rule that Justice Moran considered in *Mattyasovszky* was "that personal actions abate with death of the injured party."[77] The origin of the abatement rule was the early English law.[78] The *Mattyasovszky* court noted that except for the limited action for pecuniary loss in *Saunders*, the common law remains the same.[79] The court then decided *Mattyasovszky* as a case of "statutory construction"[80] and determined that punitive damages were not recoverable.

This decision was reached despite contrary construction placed upon similar statutes in sister states, and judicial recognition that both *logic* and *fairness* required a different result. Justice Moran noted that "[i]n addition to deterring others from wilful and wanton misconduct, it would bring death actions into complete harmony with the general body of law governing other types of tortious conduct."[81] Although the appellate court conceded that logically the estate is entitled to punitive damages,it

74. 21 Ill. App. 3d 46, 313 N.E.2d 496 (1974), *rev'd*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975).

75. *Id.* at 51, 313 N.E.2d at 500. *See also* Crane v. C. & W. I. R. R., 233 Ill. 259, 84 N.E. 222 (1908).

76. Baker v. Bolton, 170 Eng. Rep. 1099 (1808). Lord Ellenborough stated in *Baker* that "[i]n a civil court, the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence." *Id.* *But see* Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 LAW Q. REV. 431 (1916).

77. *Mattyasovszky*, 21 Ill. App. 3d at 51, 313 N.E.2d at 500 (1974). *See also* Murphy v. McGrath, 79 Ill. 594 (1875) (at common law, the action for personal injury would have abated on the death of the plaintiff before final judgment).

78. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1044 (1965).

79. *Mattyasovszky*, 21 Ill. App. 3d at 52, 313 N.E.2d 500 (1974).

80. *Id.* at 53, 313 N.E.2d at 501.

81. *Id.* at 54, 313 N.E.2d at 502.

refused to consider the matter on any grounds other than statutory construction. Justice Moran stated, "[d]espite our highest desires, however, law is not always based upon logical rationale. The survival action for damages for injury to the person is a creature of statute and the intent of the legislature, as expressed in the statute, is controlling."[82] Both the appellate court and the supreme court in *Mattyasovszky*, construed the Survival Act strictly to deny recovery of punitive damages. *Froud v. Celotex Corp.*[83] simply reaffirms *Mattyasovszky* on exactly the same ground, statutory construction.

Progeny of the "Norfolk Cases"

The progeny of *National Bank of Bloomington* have been extinguished by a rule of strict statutory construction of the Survival Act. The fate of the progeny of *Churchill*, however, are still being ruled upon by the lower courts. The progeny of *Churchill* are in reality direct descendants of *Saunders* and the common law. As children of the common law, their fate must be determined by the continued viability of the common law doctrine of abatement by death and not by legislative inaction. It can be argued that abatement by death does not apply in a *Saunders* common law action because the individual asserting the claim does so directly in an individual capacity. *Saunders* created a direct common law cause of action in a person other than the decedent. The *Saunders* court based the cause of action on the right to recover "the very real damages" that the surviving spouse was liable for under the Family Expense Act.[84] Since the plaintiff was personally liable for these "very real damages" as a result of the defendant's conduct,[85] independent standing existed to assert this claim. The plaintiff in *Saunders* was not suing as representative of the estate, but rather directly for his own independent injury.[86]

Churchill v. Norfolk & Western Railway[87] followed the *Saunders* court and treated such damages as separate from the person suffering "physical injury". In *Churchill*, the court refused to hold that the physically injured party was the only person affected by the tortfeasor. According to the court, "a person 'affected' by a wrongful act is one who shows *a direct personal interest* in the matter as opposed to one whose interest is

82. *Id.*
83. 98 Ill. 2d 324, 456 N.E.2d 131 (1983).
84. *Saunders*, 20 Ill. 2d at 310, 170 N.E.2d at 168.
85. *Id.*
86. *Id.*
87. 73 Ill. 2d 127, 383 N.E.2d 929 (1978).

merely in common with that of the general public."[88]

It is important to understand that it was these separate, distinct and direct damages which gave the spouse independent "standing" to assert her claim under the Public Utilities Statute in *Churchill*. A *Saunders* action is direct and personal. Therefore, it is difficult to argue that common law abatement by death should apply since the person damaged has independent standing to institute the lawsuit.

Certainly *Churchill* cannot be cited as holding that the supreme court has already recognized a common law claim for punitive damages. Justice Moran, in the recent opinion of *Hammond v. North American Asbestos Corp.*,[89] determined that there was no right to punitive damages in a common law loss of consortium claim because the claim is "indirect" or derivative. In *Hammond*, the supreme court claimed that its opinion in *Churchill* clearly emphasized that the allowance for punitive damages was based solely on the legislative intent of the Public Utilities Act.[90] The *Churchill* opinion therefore, "should not be interpreted as either condemning or advancing recovery of punitive damages in tort cases."[91] According to *Hammond*, the rationale of a loss of consortium award is solely to compensate the spouse for his indirect or derivative injury.

The issue in *Hammond* was decided by the supreme court based upon the common law and not legislative intent. The rule of common law abatement was not an issue in *Hammond* because the plaintiff's spouse was only disabled and, therefore, able to assert a claim for punitive damages. In addition, the court carefully pointed out that the right to common law punitive damages was not an issue in *Churchill* since punitive damages were provided by statute.[92]

In the earlier opinion of *Chidester v. Cagwin*,[93] a unanimous court pointed out that legislative intent is not an issue where the remedy is based upon a "separate and distinct" *Saunders* action provided at common law. After quoting extensively from *Saunders* and later cases, the appellate court in *Chidester* reasoned that where the party asserts a legal liability due to the acts of the tortfeasor, that party has an independent cause of action for the medical and funeral expenses.[94] This action is premised on

88. *Id.* at 139, 383 N.E.2d at 934 (emphasis added).
89. 97 Ill. 2d 195, 454 N.E.2d 210 (1983).
90. *Id.* at 210, 454 N.E.2d at 219.
91. *Id.*
92. *Id.* at 210, 454 N.E.2d at 212.
93. 76 Ill. App. 2d 477, 222 N.E.2d 274 (1966).
94. *Id.* at 483, 222 N.E.2d 278.

the rationale that the burden should fall on the wrongdoer and not the innocent victim. Furthermore, the court asserted that the legislative intent of the act involved was irrelevant as this action was separate and distinct from the statute.[95]

Neither abatement nor punitive damages are favored descendants of the law. The allowance of punitive damages is narrowly limited to intentional or malicious torts and conduct which exhibits a conscious disregard or utter indifference for the rights of the public.[96] Where corporations are defendants, the wrongful conduct of employees is not imputed to the corporation unless the conduct is that of the corporate management.[97]

Common law abatement, however, has also been repeatedly condemned by the Illinois Supreme Court over the past twenty years. According to the court in *McDaniel v. Bullard*,[98] "[t]he rule of abatement has its roots in archaic conceptions of remedy which have long since lost their validity. The reason having ceased the rule is out of place and ought not to be perpetuated."[99] Ten years later, in *Murphy v. Martin Oil*,[100] the supreme court once again condemned the rule of abatement using the same language quoted above in *Bullard*.[101] As recently as 1982, the supreme court, in the unanimous opinion of *Walter v. Board of Education of Quincy School District*,[102] quoted the identical language from *Bullard* and *Murphy* with approval.[103] Abatement by death should be directly challenged by the Illinois bar and finally interred by the supreme court, under the common law.

CONCLUSION

The doctrine of judicial restraint has been asserted by such

95. *Id.*

96. *See, e.g.*, Oakview New Lenox School v. Ford Motor Co., 61 Ill. App. 3d 194, 378 N.E.2d 544 (1978) (to justify an award of punitive damages, positive misconduct or conduct so outrageous as to suggest a total lack of care is required).

97. RESTATEMENT (SECOND) OF TORTS § 1-0 (1977). *See also* Mattyasovszky v. West Towns Bus Co., 61 Ill. 2d 31, 330 N.E.2d 509 (1975) (bus company held liable for its driver's action); Holda v. Kane County, 88 Ill. App. 3d 522, 410 N.E.2d 552 (1980) (county held negligent for acts of its sheriff); Tolle v. Interstate Sys. Truck Lines, Inc., 42 Ill. App. 3d 771, 356 N.E.2d 625 (1976) (truck driver and corporate employer).

98. 34 Ill. 2d 487, 216 N.E.2d 140 (1966).

99. *Id.* at 494, 216 N.E.2d at 144.

100. 56 Ill. 2d 423, 308 N.E.2d 583 (1974).

101. *Id.* at 428-29, 308 N.E.2d at 585.

102. 93 Ill. 2d 101, 442 N.E.2d 870 (1982).

103. *Id.* at 108, 442 N.E.2d at 873.

leading jurists as Justices Frankfurter and Cardozo.[104] According to Justice Frankfurter, regardless of the public policies or interests involved, "a judge must not rewrite a statute, neither to enlarge nor to contract it."[105] The courts are merely "the translators of another's command."[106] Justice Cardozo believed that a court could not rewrite a statute even if the change would yield a more equitable result. A statute, according to Cardozo, must be taken as the court found it.[107]

The *Froud* decision is premised upon and in the mainstream of this time-honored doctrine. Statutory interpretation of the Survival Act, however, does not address the issue of whether the common law should continue to recognize abatement by death. The Survival Act also should not control whether a direct common law action for family expense, already recognized in *Saunders*, can support a common law claim for punitive damages in view of the rule of common law abatement. These two issues have yet to be squarely raised before reviewing courts.

Both common law abatement and punitive damages are creations of the common law. Their continued application to the private and public rights of citizens of this state must ultimately be defined by the courts. This should be accomplished in light of current public policy and the rationale supporting each.

The Illinois Supreme Court has not been reluctant to re-examine archaic common law doctrines which have no contemporary rationale. In recent years, the supreme court has repeatedly stated that it is willing to review its own rules of law and abandon them if they are unjust or illogical and recognize common law alternatives despite legislative inaction.[108] Time after time the Illinois Supreme Court has commented that the common law rule of abatement by death has no rational basis in modern society and should not be perpetuated.[109] Perhaps the

104. *See, e.g.*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

105. *Id.* at 533.

106. *Id.* at 534.

107. *Id.*

108. *See* Torres v. Walsh, 98 Ill. 2d 338, 456 N.E.2d 601 (1983) (English common law doctrine of *forum non conveneus* adopted by Illinois). In *Torres*, the court noted that: "[W]hile in Illinois we are without any statutory authorization we find that such authorization to transfer a case under the doctrine of forum non conveniens exists at common law, and, therefore, statutory authorization is unnecessary as it only recognizes and codifies a right that previously existed at common law." *Id.* at 347, 456 N.E.2d at 605.

109. *See* Walter v. Board of Educ. of Quincy Sch. Dist., 93 Ill. 2d 101, 442 N.E.2d 870 (1982) (use of mandamas instead of the archaic rule of abatement); Murphy v. Martin Oil Co., 56 Ill. 2d 423, 308 N.E.2d 583 (1974) (non use of abatement with Survival statute); McDaniel v. Bullard, 34 Ill. 2d 487,

trial bar of this state should be faulted for not directly challenging the common law rule of abatement by death rather than employing the strained legal fictions of "neutral vehicles" and "conduits" of statutory law.

Massive toxic tort litigation, similar to that in *Froud*, is a dubious vehicle to raise the issue of equal application of a rule allowing recovery of punitive and exemplary damages. The issue of "equal protection," however, has been raised as a constitutional challenge with regard to several death statutes.[110]

In a special concurring opinion in the *Froud* appellate court decision, Justice Sullivan pointed out the concern for the cumulative application of such damages in mass tort litigation.[111] Other issues regarding common law punitive damages that have not been addressed by Illinois courts were also suggested in Sullivan's concurring opinion.[112] These issues exist whether the victim is only injured or dies as a result of his injuries. Undoubtedly these issues will be resolved in subsequent appeals re-examining common law principles. Hopefully, these important issues will not be determined based upon whether the victim is alive or dead, or whether the General Assembly has continued in its failure to provide for punitive damages under either the Wrongful Death or Survival Acts.

The common law right to punitive damages was directly passed upon by the Wisconsin Supreme Court in the recent decision of *Wangen v. Ford Motor Co.*[113] In *Wangen*, the court ignored the separate or derivative test. In Illinois, a purely derivative cause of action, such as loss of consortium, does not give rise to an independent claim for punitive damages.[114] According to the Wisconsin court, "[t]he objectives of punitive

---

216 N.E.2d 140 (1966) (court rejected to abate action under Wrongful Death Act).

110. *See, e.g., In re* Air Crash Near Chicago, Ill. 644 F.2d 594 (7th Cir.) (statutes which deny punitive damages in wrongful death but allow such damages in other personal injury actions do not run afoul of the federal Constitution), *cert. denied*, 454 U.S. 878 (1981); *In re* Paris Air Crash, 622 F.2d 1315 (9th Cir. 1980) (California's disallowance in wrongful death actions was rational, and thus disallowance of such damages was valid under both the federal and state constitutions), *cert. denied*, 449 U.S. 976 (1980); Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974) (limiting the amount which an estate may recover is not a violation of the federal Constitution where the state legislature made a rational distinction between damages that go to the injured party himself and damages that go to the estate).

111. Froud v. Celotex Corp., 107 Ill. App. 3d 654, 659, 437 N.E.2d 910, 914 (1982) (Sullivan, J., concurring), *rev'd*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983).

112. *Id.* at 661, 437 N.E.2d at 915 (Sullivan, J., concurring).

113. 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (lawsuit brought against car manufacturer and others as a result of automobile accident in which the fuel tank exploded).

114. *See* Churchill v. Norfolk & W. Ry., 73 Ill. 2d 127, 383 N.E.2d 929 (1978).

damages are served by allowing recovery of such damages in connection with both types of claims."[115] The court determined that there were no sound reasons for treating the two claims differently.[116] Under the Illinois rule, a claim for loss of consortium is as clearly derivative as a claim for family expenses is clearly independent and separate.

The acknowledged inequity of the discredited common law rule of abatement has created controversy in the court and legislative assemblies for over a hundred years. The conflict of statutes and interstitial interpretation by the courts have only tended to create exceptions within exceptions to a court- created doctrine whose only reason for existence is its own longevity. According to Justice Holmes, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[117] Once the rule of common law abatement by death is finally and totally interred, the court can establish consistent rules for the uniform application of punitive and exemplary damages.

115. *Wangen*, 97 Wis. 2d at 318, 294 N.W.2d at 465.
116. *Id.*
117. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).