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NOTE

THE PROPRIETY OF PUNITIVE DAMAGES UNDER COLORADO'S WRONGFUL DEATH STATUTE

Now, the laws keep up their credit not for being just, but because they are laws; 'tis the mystic foundation of their authority; they have no other, and it well answers their purpose.

Montaigne, Essays of Experience

INTRODUCTION

IT has been said that the history of the phases of man's reflections is in great part a history of the confusion of ideas,¹ to which, it may be added, the law is hardly an exception. Not infrequently, the underlying basis of a legal precedent has been rooted in an irrational convenient explanation that bore little relation to an issue when originally faced by a court, but with each successive celebration, the precedent has grown in stature more for being a precedent than for being correct. In Colorado, the issue of whether punitive damages may be recovered in a wrongful death action is an apposite example of what the English legal historian, Holdsworth, warned is "an object lesson both in the dangers of hastily acquiring [historical] knowledge for a special occasion, and in the consequences of the neglect of [the historical] branch of legal learning."² Although it is widely believed by members of the Colorado bar that the question is foreclosed and that punitive damages are never recoverable in an action for wrongful death,³ the purpose of this article is to examine the verity of this position and to suggest some arguments that have yet to be posited with the Colorado Supreme Court.

I. WRONGFUL DEATH: ITS ENGLISH HERITAGE

Recovery for wrongful death boasts a long and somewhat obscure development. Social mores, historical intrigue, and judicial misconception, as well as changes in rationale without corresponding changes in application, produced a pastiche of confusing traditions and unreasonable rules that became crystalized in common law precedent.⁴ This precedent ultimately found its

¹ A. LOVEJOY, *THE GREAT CHAIN OF BEING* (1936).

² 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 336 (3d ed. 1923) [hereinafter cited as *HOLDSWORTH*].

³ See Hall, *Damages for Death — Limited or Unlimited?* 34 *DICTA* 32, 35 (1957).

⁴ See generally Smedley, *Wrongful Death — Bases of the Common Law Rules*, 13 *VAND. L. REV.* 605 (1960); Winfield, *Death as Affecting Liability in Tort*, 29 *COLUM. L. REV.* 239 (1929).

way into statutory language and judicial constructions. Therefore, in order to understand the Colorado wrongful death statute, the historical foundations of the common law must be examined.

A. *Early English History*

No single factor is responsible for the common law rule that death is not an injury compensable in a civil court. However, three protean ingredients have been suggested by various authors as contributing to this early common law conclusion. Prior to the genesis of the common law tradition under Henry II, English society was influenced by tribal status,⁵ and although the first form of redress was personal vengeance,⁶ it was early established that certain minor wrongs were "emendable" by payment of a sum of money referred to as *bot*, or betterment. Recovery for wrongs depended essentially on a victim's position within his own tribe and upon that tribe's relative position with other tribes. Once an offense was "emended," the wrongdoer avoided the pains of being named an outlaw, and blood feuds were avoided. Although at first only minor wrongs were emendable, in time the scope of wrongs grew to include homicide.⁷

⁵ "The custom of the people had from the earliest days consecrated inequality. Every free man had his rights, but the rights differed for different men. The damages that could be claimed for wrongdoing, like the sort of evidence needed to prove wrongdoing, were graded according to social status, varying from Kent to Mercia, from Wessex to the Danelaw. As a writer of Edward's days said: 'People and law went by ranks;' and the difference between the man whose death must be atoned for by twelve hundred shillings, and the 'twy hynd' men whom it only cost two hundred shillings to slay, was a difference that ran through the whole structure of Anglo-Saxon society." H. CAM, ENGLAND BEFORE ELIZABETH 57-8 (1950). See also 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 26 (1895) [hereinafter cited as POLLOCK & MAITLAND].

⁶ E. JENKS, A SHORT HISTORY OF ENGLISH LAW 7 (2d ed. 1922).

⁷ In 1 POLLOCK & MAITLAND 84 the authors illustrate some of the factors that were considered in evaluating the damages in an early wrongful death case.

Let us suppose that a man learned in the law is asked to advise upon a case of homicide. Godwin and Roger met and quarrelled, and Godwin slew Roger. What must be paid; by whom; to whom? Our jurist is not very careful about those psychical elements of the case which might interest us, but on the other hand he requires information about a vast number of particulars which would seem to us trivial. He cannot begin to cast up his sum until he has before him some such statements as this: — Godwin was a free ceorl of the Abbot of Ely; Roger, the son of a Norman father, was born in England of an English mother and was a vavassor of Count Alan: the deed was done on the Monday after Septuagesima, in the county of Cambridge on a road which ran between the land which Gerard a Norman knight held of County Eustace and the land of the Bishop of Lincoln; this road was not one of the king's highways; Godwin was pursued by the neighbours into the county of Huntingdon and arrested on the land of the Abbot of Ramsey; Roger, when the encounter took place, was on his way to the hundred moot; he has left a widow, a paternal uncle and a maternal aunt. As a matter of fact the result will probably be that Godwin, unable

The price of atonement for slaying someone (*bot*) was referred to as *wergild*, a sum based on a man's rank in society.⁸ Hence, it can be seen that even in earliest times the loss of life was looked upon as compensable,⁹ though the basis for setting the amount of compensation may seem irrational by modern standards.

As the influence of the English monarchy waxed, so did that of its courts, which through aggrandizement gradually took jurisdiction of the aggravated wrongs. At the expense of the tort law, the criminal sanctions levied by the crown were swift and complete. Most crimes were punishable by death, and a felon's property generally escheated to the crown. As a practical matter, if not in law, the tort often merged into the crime.¹⁰ This factor of merger eclipsed the concept of emendation and contributed to the common law conclusion that death was not a wrong that could be compensated in a civil action. Once the wrongdoer was executed and his property confiscated, there was nothing left for a claimant suing for wrongful death. Although the doctrine of merger was later supplanted by a practice of suspension, that is, the tort recovery was merely suspended until the criminal tribunal decided a case, the concept of merger lingered in the minds of common law judges long after its statutory demise.¹¹

The third factor affecting recovery in wrongful death actions was the maxim, *actio personalis moritur cum persona*; i.e., a personal right of action dies with the person. The origins of the maxim are unknown, and although it has been said that the rule had its roots in Roman law, such a conclusion has been

to satisfy the various claims to which his deed has given rise, will be hanged or mutilated. This however is but a slovenly, practical solution of the nice problem, and even if he be hanged, there may be a severe struggle over such poor chattels as he had.

⁸ *Id.* at 238-41. Early English law did not clearly distinguish civil injuries from criminal offenses. Besides the *bot* paid to a man's *wer*, the class of persons permitted to share the damages resulting from a wrongful death, the King, or in some instances the deceased's lord, required a payment of *wite*, a revenue raising penalty. See generally *Admiralty Comm'rs v. Owners of S.S. Amerika* [1917] A.C. 38, 56-7.

⁹ 2 POLLOCK & MAITLAND 448-49.

¹⁰ See *Higgins v. Butcher*, 80 Eng. Rep. 61 (K.B. 1607), wherein the court said:

[I]f a man beats the servant of J.S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offense to the Crown, being converted into felony, and that drowns the particular offense, and private wrong offer'd to the master before, and his action is thereby lost

¹¹ 3 HOLDSWORTH 334-35.

disparaged by the leading commentators.¹² Nevertheless, the maxim became a shibboleth on which innumerable decisions have been based.

B. *The Rule in Baker v. Bolton*

Although not explicitly recognized, these three factors obviously contributed to the holding in *Baker v. Bolton*,¹³ the source of the common law rule that death is not compensable. In that early nisi prius case, plaintiff and his wife were passengers on the defendant's stagecoach. As a result of alleged negligence on the part of the defendant's driver, the stagecoach was upset and the plaintiff's wife sustained injuries from which she died shortly thereafter. The husband brought an action in which he sought to recover the loss of his wife's services and the costs of caring for her following the accident but prior to death. The English court rejected the husband's claim for losses sustained as a result of his wife's death, stating that "in a civil court the death of a human being cannot be complained of as an injury."¹⁴

Obviously, this rule, which resembles the maxim *actio personalis moritur cum persona*, was broader than was needed, and the dictum has stirred a great deal of comment. Generally it has been contended that the court confused the maxim *actio personalis moritur cum persona* with the doctrine of merger.¹⁵ Since the plaintiff's wife died she could not maintain an action, and since wrongdoing merged into felony, no one else could sue. On closer inspection it is noted that the plaintiff in *Baker v. Bolton* was suing on his own behalf for damages suffered by him as a result of his wife's injuries and death. Hence the maxim *actio personalis moritur cum persona* was inapplicable. Both plaintiff and defendant were still alive. Moreover, from the point of view of merger, the result under the facts of the case is illogical because it is unlikely that the

¹² *Id.* at 333-35; see Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 435 (1916); Smedley, *Wrongful Death — Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960); 33 L.Q. REV. 107 (1917); *Admiralty Comm'rs v. Owner of S.S. Amerika* [1917] A.C. 38, 60; but see W. BUCKLAND & A MCNAIR, *ROMAN LAW AND COMMON LAW* 418 (2d ed. 1952) wherein the authors state that:

[T]he Roman law allowed no action for the killing of a freeman, and it is a probable conjecture that this is due to the impossibility of valuing a freeman. The evidence is essentially negative: it consists in the existence of many texts giving action for wounding while there is none which gives one for killing. It seems clear that a man's representatives had no action if he was killed and that a *paterfamilias* had no action if his son was killed.

¹³ 170 Eng. Rep. 1033 (1808).

¹⁴ *Id.*

¹⁵ 3 Holdsworth 334-35.

driver's master, the defendant, could have been charged as a felon. An American court added the third dimension to the conjecture surrounding the rule, speculating that:

[T]he reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations, to setting a price upon human life Among barbarous and half civilized nations, it has been common to find a fixed and prescribed standard of value or compensation for human life, which is often found to be carefully graduated by the relative importance of the position in the social scale which the deceased may have occupied.¹⁶

Thus, all three factors previously mentioned probably contributed to the conclusion reached in *Baker v. Bolton*, however irrelevant they may have been to the facts at bar. Despite the weakness of the rationale, however, the rule became firmly entrenched, and no amount of research or argument has succeeded in budging its effects, other than by the enactment of statutes.

C. *Lord Campbell's Act and the American Response*

Whatever the rationale of the rule in *Baker v. Bolton*, the enactment of Lord Campbell's Act¹⁷ in 1846 attenuated the effects of the common law rule and removed to a different level some of the illogical vagaries that judicial reasoning had created. The Act, in effect, created a new cause of action permitting recovery for wrongful death. The right of action of the deceased still died with him,¹⁸ but his survivors were no longer barred from maintaining an action in their own behalf for compensatory damages. The significance of the Act was widespread, and as a result the common law rule became crystallized.¹⁹ Without a statute, there could be no recovery for wrongful death. If there remained any question that a plaintiff could recover damages for wrongful death at common law, the Act settled that argument. More important, however, was the Act's recognition that life has value. Although the ambit of recoverable damages was limited severely by the judicially-invented pecuniary loss rule and the denial of punitive damages, the initial step had been taken.²⁰

¹⁶ *Hyatt v. Adams*, 16 Mich. 180, 191 (1867).

¹⁷ Fatal Accidents Act, 9 & 10 Vict. 217, c. 93 (1846).

¹⁸ *Blake v. Midland Ry.*, 118 Eng. Rep. 35 (Q.B. 1852). See generally Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1925).

¹⁹ The Recital to the Fatal Accidents Act, 9 & 10 Vict. 217, c. 93 (1846) stated that "[n]o action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person." Compare *Admiralty Comm'rs v. Owners of S.S. Amerika* [1917] A.C. 38 with *Osborn v. Gillett* [1873] L.R. 8 Ex. 88, 93 (*Bramwell, B.*) and *Clark v. General Omnibus Co.* [1906] 2 K.B. 648, 658-59 (*Lord Alverston*).

²⁰ *Blake v. Midlands Ry.*, 118 Eng. Rep. 35 (Q.B. 1852).

Although there are some early decisions to the contrary, for the most part American jurisdictions adopted the principle of the common law and enacted statutes similar to Lord Campbell's Act.²¹ In some instances even the issues regarding *wergild*,²² merger,²³ and *actio personalis moritur cum persona*²⁴ received de novo consideration; yet the courts reached conclusions consistent with the English precedent. But in doing so, it is quite evident that wrongful death actions became colored by the unknowable, and surmised trappings of the English prejudices. For the most part, the English judicial constructions were followed without examination to limit statutory recovery to compensatory damages. Thus, while clearly recognizing that the death of a human being may be the basis of pecuniary recovery,²⁵ the modern decisions retain shadows of golems of the past even when modern statutes clearly and unambiguously provide for forms of recovery not contemplated by the English and early American wrongful death acts.

II. WRONGFUL DEATH IN COLORADO

Just as the early common law influenced the remedial legislation enacted in England, the early history in Colorado affected the construction of Colorado's wrongful death statute. Accordingly, in order to understand the present state of the law in Colorado, it is not only necessary to appreciate the early developments in England and the United States, but it is also

²¹ See, e.g., *Panama R.R. v. Rock*, 266 U.S. 209 (1924) (wrongful death action depends wholly upon statutory authority). But see 266 U.S. at 216 (dissenting opinion), wherein Justice Holmes states:

[I]t seems to me that courts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering only particular cases may imply a policy different from that of the common law, and therefore may exclude a reference to the common law for the purpose of limiting their scope. [citation] Without going into the reasons for the notion that an action (other than an appeal) does not lie for causing the death of a human being, it is enough to say that they have disappeared. The policy that forbade such an action, if it was more profound than the absence of a remedy when a man's body was hanged and his goods confiscated for the felony, has been shown not to be the policy of present law by statutes of the United States and of most if not all of the States. . . .

Long v. Morrison, 14 Ind. 595 (1860); *Grosso v. Delaware, L. & W.R.R.*, 50 N.J.L. 317, 13 A. 233 (Sup. Ct. 1888); *Green v. Hudson River R.R.*, 28 Barb. 9 (N.Y. 1858).

²² *Hyatt v. Adams*, 16 Mich. 180 (1867) (dictum).

²³ See *White v. Fort*, 10 N.C. 251, 265 (1824) (wherein the court states that the only requirement is that wrongdoing first be heard and disposed of before a criminal tribunal).

²⁴ See *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1913) (wherein the court rejects the maxim).

²⁵ *Panama R.R. v. Rock*, 266 U.S. 209, 216 (1924) (dissenting opinion).

important to understand the origin, history, purposes, and language of Colorado's act.²⁶

A. Origin and History

1. Early Territorial Legislation

In 1872, the territorial legislature of Colorado enacted a wrongful death act which provided for an action brought by a representative of the deceased where such could have been brought by the deceased himself.²⁷ Unlike the English paradigm, the Colorado act did not limit damages by any "just and fair" and "necessary injury" formula.²⁸ In construing this early legislation, the Colorado court, in *Kansas Pacific Railway v. Miller*, stated that:

All else is left to the operations of rules already in existence, for the admeasurement of damages. When a rule is prescribed in a statute, all other methods of computation must be ignored. When none is prescribed, then the statute must be taken to embrace those ordinarily applied to like cases. . . .

. . . whatever is susceptible of *pecuniary computation* enters into the rule, and what cannot be included must be left out. So, too, I apprehend, that *when the injury is the result of wantonness, violence or gross negligence, it is competent for the jury to award punitive damages.* [citing authority]²⁹

In light of the differences between Lord Campbell's Act and the 1872 Colorado act, the language of the court is not startling; for punitive damages had been recognized at common law. But remembering the common law development of wrongful death actions, the decision is remarkable. Based solely on common law principles concerning damages and not upon precedent concerning death, the court concluded that punitive recoveries were permissible when the circumstances surrounding a death were attended by wantonness, violence, or gross negligence.

²⁶ See *Ellet v. Campbell*, 18 Colo. 510, 518-19, 33 P. 521 (1893), *aff'd on other grounds*, 167 U.S. 116 (1897) (wherein the Colorado court said that in interpreting a statute, the meaning and application are to be ascertained "by considering its origin, its history, its purposes and objects, as well as its subject matter and the language employed").

²⁷ Act of Feb. 8, 1872, [1872] Colo. Terr. Sess. Laws 117-18 (repealed 1877). The Act provided:

When the death of any person is caused by the wrongful act, misconduct, negligence, or omission of another, the personal representatives of the former may maintain an act therefor against the latter, if the former might have maintained an action, had he or she lived, against the latter for the same act, misconduct, negligence, or omission. . . .

See generally Comment, *Wrongful Death in Colorado*, Rocky Mt. L. Rev. 393 (1961).

²⁸ Compare Fatal Accidents Act, 9 & 10 Vict. 217, c. 93 (1846) with Act of Feb. 8, 1872, [1872] Colo. Terr. Sess. Laws 117.

²⁹ 2 Colo. 442, 464, 467 (1874) (emphasis added).

Two years after the *Miller* decision, the court declared that “[a]s a matter of sentiment, life has no pecuniary value.”³⁰ But in the course of the opinion the court said it did not intend, in setting out the often quoted basic pecuniary loss rule, to disturb the rulings in the *Miller* decision. With these decisions then, Colorado law recognized two different bases of damages. Not only would a claimant be entitled to the pecuniary losses he had suffered as a result of a death, but he was also entitled to seek punitive damages when the circumstances warranted.

2. Wrongful Death in the State of Colorado

In 1876 Colorado became a state and the 1872 act, having enjoyed a relatively short life, was repealed in 1877 by a statute undoubtedly adopted from Missouri.³¹ The 1877 statute, which has remained substantially unchanged to this day,³² provided *inter alia* that:

[I]n every [wrongful death] action the jury may give such damages as they may deem fair and just (not exceeding five thousand (\$5,000) dollars) with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default.³³

The first part of the statute is substantially the same as Lord Campbell's Act, but the latter portion, *i.e.*, “and having regard to the mitigating or aggravating circumstances,” is not found in the English model.

Although the question was not raised until 1894, there are dicta in cases prior to that time that are indicative of the changes intended by the 1877 act. Immediately following its enactment, the Colorado Supreme Court recognized that the prior case law was still viable, stating that “the later act recognizes the justice of the former one by re-affirming the right of recovery in all like cases in the future, limiting, how-

³⁰ *Kansas Pac. Ry. v. Lundin*, 3 Colo. 94, 102 (1876). The pecuniary loss rule in *Lundin* subsequently was followed in *Pierce v. Connors*, 20 Colo. 178, 37 P. 721 (1894) (leading case); *accord*, *Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962); *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962); *St. Lukes Hospital Ass'n. v. Long*, 125 Colo. 25, 240 P.2d 917 (1952). *Compare* *Tadlock v. Lloyd*, 65 Colo. 40, 173 P. 200 (1918) *with* *McEntyre v. Jones*, 128 Colo. 461, 263 P.2d 313 (1953) (overruling *Tadlock* in part).

³¹ Act of March 7, 1877, ch. 25, §§ 877-81, [1877] Colo. Gen. Laws 342. *See* *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892) (dictum); F. TRFANY, *DEATH BY WRONGFUL ACT* 46 (2d ed. 1913); Annot., 94 A.L.R. 384 (1935). *Compare* ch. 25, §§ 877-81, Colo. Gen. Laws [1877] *with* ch. 51, [1855] Mo. Rev. Stat.

³² *Compare* ch. 25, §§ 877-81, [1877] Colo. Gen. Laws 342 *with* COLO. REV. STAT. ANN. § 41-1-3 (1963), *as amended*, (Supp. 1969).

³³ Act of March 7, 1877, ch. 25, § 879, [1877], Colo. Gen. Laws 343.

ever, the amount of damages to \$5,000."³⁴ Thus it would be a pejorative reading of this statute's language to say that the 1877 act overruled the prior decisions.³⁵ The language of the later act expressly continued to provide for compensatory damages as well as punitive damages arising from the aggravating circumstances attending the wrongful act. The only limitation was that the two categories of recovery, considered together, were limited to the maximum amount of \$5,000.³⁶

When the source of the 1877 legislation is considered, further credence is lent to the conclusion that the 1877 act was to be construed as consistent with prior Colorado law. As pointed out, Colorado adopted its statute from Missouri. At that time Missouri had already construed its statute to provide for punitive damages.³⁷ Moreover, Colorado had recognized the prevailing rule of statutory construction that, where a statute adopted by the Colorado legislature from another jurisdiction has been construed by that jurisdiction's highest appellate court, there is a presumption that the Colorado legislature intended to adopt that jurisdiction's construction.³⁸ Applying this rule of construction to the 1877 act, coupled with the fact that punitive damages had been recognized under prior Colorado law, the future course of the statute would seem to have been inalterably set. If the legislature had wanted to change the course of Colorado law, it seems reasonable that it would have enacted a statute more readily resembling Lord Campbell's Act. Instead, the legislature followed a state that had a wrongful death act providing for both pecuniary losses and punitive damages.

B. *Purposes of Colorado's 1877 Wrongful Death Statute*

Since at common law it was held that there was no re-

³⁴ *Denver, S.P. & Pac. Ry. v. Woodward*, 4 Colo. 162, 168 (1878).

³⁵ *See, e.g., Mitchell v. The Colorado Milling & Elevator Co.*, 12 Colo. App. 277, 55 P. 736 (1898) (the court recognized that the 1877 Act was a substitute, differing only slightly from the former Act, except that the recovery under the new Act was limited to \$5,000).

³⁶ Although this conclusion is consistent with the Missouri decisions [*See, e.g., Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888)], it could be argued that the \$5,000 limit (now \$45,000) applies only to the first part of the formula for awarding damages, i.e., those damages with reference to the necessary injury. *See, e.g., Law of May 27, 1911*, ch. 113, § 2, [1911] Colo. Sess. Laws 294, 295 now COLO. REV. STAT. ANN. § 80-5-2 (1963).

³⁷ *Owen v. Brockschmidt*, 54 Mo. 285 (1873); accord *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888) (complete statement of Missouri rule); *Morgan v. Durfee*, 69 Mo. 469 (1879) (before instruction proper, there must be evidence showing aggravating circumstances). *See Note, The Missouri Wrongful Death Statute*, 1963 WASH. U.L.Q. 125, 141 n. 107.

³⁸ *Bradbury v. Davis*, 5 Colo. 265 (1880); *Stebbins v. Anthony*, 5 Colo. 348 (1880). *See* 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 5209 (3d ed. 1943). [hereinafter cited as SUTHERLAND]. *But see* *Atchison T. & S.F.R.R. v. Farrow*, 6 Colo. 498 (1883).

covery for wrongful death, statutes following the pattern of Lord Campbell's Act often were characterized as remedial, and, consequently, were construed liberally.³⁹ It was generally concluded that where a statute was remedial in nature, providing a right of action to a class of persons for wrongful conduct, and imposing upon the wrongdoer a duty to pay damages sustained by a plaintiff, only compensatory damages could be recovered. Under penal statutes, on the other hand, both the right of action and extent of damages, deemed to be a form of punishment, were construed strictly.⁴⁰

Admittedly the courts have tended to classify wrongful death statutes either as penal or remedial, which in turn has determined the types of damages recoverable.⁴¹ Yet, there is no basis to conclude that the 1877 Colorado act was not intended to provide for both kinds of awards. Although the Colorado court apparently concluded that the Missouri statute was penal, and therefore was not consistent with the intent of the Colorado legislature to adopt a remedial statute, the evidence is otherwise. Missouri had recognized two bases of recovery, compensatory as well as punitive.⁴² Secondly, the Colorado court arrived at its determination that the Missouri statute was penal in nature, not in cases involving damages, but in cases concerning procedural matters.⁴³ Finally, because the language suggests two grounds of damages, under accepted rules of construction, the statute should be regarded as a whole, and, being both penal and remedial, should be given a reasonable interpretation.⁴⁴

³⁹ 3 SUTHERLAND § 7205.

⁴⁰ *Id.* Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950).

⁴¹ See, e.g., *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892); *Denver, S.P. & Pac. Ry. v. Woodward*, 4 Colo. 162 (1878) (dictum); *Mitchell v. Colorado Milling & Elevator Co.*, 12 Colo. App. 277, 55 P. 736 (1898) (dictum). See Note, *Punitive Damages in Wrongful Death*, 20 CLEV. ST. L. REV. 301 (1971) for a classification of rationales used by the courts to permit or deny punitive recoveries. See generally Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950) (note, however, that the author overlooks canon that penal statutes are to be construed strictly).

⁴² *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888); *Morgan v. Durfee*, 69 Mo. 469 (1879); *Owen v. Brockschmidt*, 54 Mo. 285 (1873). See Note, *The Missouri Wrongful Death Statute*, 1963 WASH. U.L.Q. 125.

⁴³ E.g., *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892) (statute of limitations); *Denver S.P. & Pac. Ry. v. Woodward*, 4 Colo. 162 (1878), (retrospective operation of 1877 Act). Query: Has the Colorado court confused the issues of (1) the right to bring an action and (2) the extent of recovery permissible under the 1877 Wrongful Death Statute? See Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950).

⁴⁴ 3 SUTHERLAND § 7205, citing *Betz v. Kansas City S. Ry.*, 314 Mo. 390, 284 S.W. 455 (1926).

C. *The Language and Syntax of Colorado's 1877 Statute*

Turning to the language of the 1877 statute, the punctuation and actual terms employed shed considerable light on its meaning. Looking at the statute as a whole, it appears to divide into two parts, thusly:

[I]n every [wrongful death] action the jury may give such damages . . . with reference to the necessary injury resulting from such death; . . . *and also* having regard to the mitigating or aggravating circumstances attending any such wrongful act. . . .⁴⁵

The presence of the semicolon and the use of the words, "and also," strongly suggest two elements. The first element of the statute provides for damages in accordance with the pecuniary loss rule. But the second element allows the jury to consider the aggravating circumstances of a killing, if such aggravating circumstances appear.⁴⁶

The term, "aggravating," suggests a form of damages not concerned with compensation. A recent Arizona decision provides direct support for the proposition that the word "aggravating" must be construed to provide for punitive damages. Prior to 1956, Arizona had a statute resembling Lord Campbell's Act. Following a decision in that year which limited recovery under that act to compensatory damages,⁴⁷ the Arizona legislature enacted a statute substantially the same as the 1877 Colorado act.⁴⁸ Under the new statute the Arizona court followed the general rule that punitive damages are awarded on the basis of aggravated, wanton or reckless conduct, and held that the words, "having regard to the mitigating or aggravating circumstances attending the wrongful act . . ." refer to awards of punitive damages.⁴⁹

III. PUNITIVE DAMAGES UNDER COLORADO'S WRONGFUL DEATH ACT

A. *Moffatt v. Tenney: A Lesson in Judicial Sophistry*

Notwithstanding the origins and tenor of the 1877 Wrongful Death Act, in interpreting it the Colorado court avoided

⁴⁵ Ch. 25, § 879 [1877] Colo. Gen. Laws 343 (emphasis added).

⁴⁶ See *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888); *Boies v. Cole*, 99 Ariz. 198, 407 P.2d 917 (1965).

⁴⁷ *Downs v. Sulphur Springs Valley Elec. Coop.*, 80 Ariz. 286, 297 P.2d 339 (1956).

⁴⁸ ARIZ. REV. STAT. ANN. § 12-613 (1956).

⁴⁹ *Boies v. Cole*, 99 Ariz. 198, 407 P.2d 917 (1965). The *Boies* court went on to state that:

[T]he phrase "mitigating or aggravating circumstances attending the wrongful act . . ." would have to be an element of damages created by the legislature in addition to those considered to be "fair and just". The word "aggravating" modifies the words "wrongful act . . ." and is a clear implication that the element of damages added by the [1956] amendment are punitive damages. *Id.* at 202, 407 P.2d at 921.

the accepted rule of construction concerning a statute adopted from another jurisdiction without comment and imposed a startling construction that has been followed, apparently without question, to the present. In *Moffatt v. Tenney*⁵⁰ the plaintiff sought recovery for the negligent death of her husband. Although there was no claim for punitive damages, the court instructed the jury by reading substantially the entire damages portion of the wrongful death statute, including language which permitted the jury to consider the mitigating or aggravating circumstances attending the alleged death. The jury returned a verdict of \$5,000, the maximum permitted under the statute, and judgment was entered thereon.

On appeal the defendant claimed, *inter alia*, that the verdict was excessive, because the jury had been permitted to award exemplary damages, having regard to aggravating circumstances attending plaintiff's husband's death, even though there was no evidence of gross negligence. In affirming the trial court's decision that the jury's award did not include exemplary damages, the Colorado Supreme Court held that the 1877 Wrongful Death Statute was compensatory in nature, and the language concerning aggravating circumstances referred not to the ambient circumstances of the death but only to the necessary in-

⁵⁰ 17 Colo. 189, 30 P. 348 (1892). Although *Moffatt v. Tenney* is the leading case, it has only been followed in one opinion, decided three weeks after the *Moffatt* case. *Hayes v. Williams*, 17 Colo. 465, 30 P. 353 (1892). The following cases, although citing *Moffatt*, have relied thereon principally as authority for the pecuniary loss rule: *Orman v. Mannix*, 17 Colo. 564, 30 P. 1037 (1892) (dictum); *Mollie Gibson Consol. Mining & Milling Co. v. Sharpe*, 5 Colo. App. 321, 38 P. 850 (1894); *Alcorn v. Erasmus*, 484 P.2d 813 (Colo. Ct. App. 1971) (not selected for official publication).

It is apparent that if the law is confusing or incorrect regarding the propriety of punitive damages in wrongful death actions, it is due to the decision in *Moffatt v. Tenney*. Therefore the latter part of this note will be devoted to an examination of that decision, its reasoning and its ramifications in the current state of the law concerning wrongful death.

For a confusing reference to the *Moffatt* decision, see *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949). There the court was presented with an action wherein both the plaintiff's husband and the defendant were killed in an automobile collision. Plaintiff brought her action under the survival statute and the wrongful death statute. Although the decision concerns the limitations surrounding the maxim *actio personalis moritur cum persona*, the court, citing a note in 48 HARV. L. REV. 1008, 1012 (1935), stated that the "medieval notion that tort actions are punitive has long been abandoned," and therefore concluded that a survival statute should be liberally construed. But, as the commentator in 48 HARV. L. REV. 1008, points out, the reminiscent of the English law concerning the merger of torts into criminal actions, "since the reasons for punishment do not exist after a wrongdoer's death, [such claims] should not survive against his estate." (emphasis added) *Id.* at 1013. It would seem that the *Moffatt* decision was an inapposite authority.

jury resulting from the death.⁵¹ Following the rule of construction in *Kansas Pacific Railway v. Miller*,⁵² the court stated that, unlike its predecessor, the 1877 statute provided a formula by which damages were to be computed. Furthermore, because "necessary losses" are tied inextricably to pecuniary losses, the *Moffatt* court reasoned that punitive damages were thereby precluded, even though the latter part of the statute appeared to compel a conclusion that punitive damages were awardable when the circumstances warranted. The court went on to construe the latter part of the statute:

Since mitigating circumstances relating to the act itself do not justify an assessment of damages less than compensatory, it is not reasonable to suppose that the aggregating [sic] circumstances contemplated by the statute are such as would justify an assessment of damages more than compensatory. Hence, a different idea must have been intended by the antithesis. Taken in connection the with preceding language of the section . . . the words "mitigating and [sic] aggravating circumstances attending such wrongful act," etc., contemplate circumstances, not relating to the wrongful act itself, but such as affect the actual damage suffered by the surviving party entitled to sue, either by way of diminishing or enhancing the same.⁵³

The court concluded that the damages awarded the plaintiff were not punitive — and therefore not excessive.

B. *Moffatt v. Tenney: An Analysis*

1. The Effect of the Pecuniary Loss Rule

In 1892, it was beyond argument that the first part of the Colorado statute permitted damages in accordance with the "necessary injury" inuring to a plaintiff.⁵⁴ Consequently it was a truism to conclude that punitive damages were prohibited under that portion of the statute. Punitive awards, as the court correctly observed, had nothing whatever to do with the character of the plaintiff's deceased husband, and, as such, a jury

⁵¹ A plaintiff's injury, so far as the statute undertakes to provide redress, rests upon a pecuniary basis. Plaintiff may suffer as much pecuniary injury where the negligence causing her husband's death is slight as to where it is gross. Her necessary injury depends, not upon the character of the act causing death, but upon the character, ability, and industry of her husband in providing for his family . . . *Id.* at 197, 30 P. at 351.

⁵² 2 Colo. 442 (1874). See note 29 and accompanying text *supra*.

⁵³ 17 Colo. at 197-98, 30 P. at 351. See also *Clune v. Ristine*, 94 F. 745 (8th Cir. 1899) (Colo. dec.) (effect of collateral source rule in wrongful death action). *But cf.* *Hayes v. Williams*, 17 Colo. 465, 474, 30 P. 352, 355 (1892) wherein the court states:

The jury were expressly told to confine the damages to such a sum, not exceeding \$5000, as would compensate plaintiff "in a pecuniary sense for the loss, if any, suffered;" and that "in arriving at this sum" they might take into consideration mitigating circumstances connected with the neglect or injury complained of. (emphasis added).

⁵⁴ See note 20 *supra* and accompanying text.

would not have been obliged to weigh the attending aggravation in arriving at the amount of *pecuniary* losses. Hence, if there was no evidence on which to find "aggravating circumstances," the trial court should not have instructed the jury concerning the latter part of the statute.⁵⁵

As even the court admitted, the latter part of the statute seemed to provide for assessments of a different nature; the jury was permitted to award damages "having regard to aggravating or mitigating circumstances attending any such wrongful act, neglect or default."⁵⁶ The court, on the other hand, stated that aggravating or mitigating circumstances may only be considered by a jury in arriving at the necessary injury, that is, the terms "contemplate circumstances, *not* relating to the wrongful act itself."⁵⁷ In support of what appears to be an egregious misreading, the court suggested that the presence of the antithetical term, "mitigating," compelled a conclusion different from the obvious. Since a defendant may not mitigate compensatory damages arising out of a wrongful death, he may not be held responsible for damages based on the aggravated nature of the wrongdoing. Therefore, concluded the court, the statute provides merely for compensatory recoveries.

2. Pecuniary and Punitive Damages Distinguished

Granting the premise that compensatory damages are limited to pecuniary losses, it is difficult to understand why the court thought punitive damages were inconsistent with compensatory recoveries. Compensatory damages are not dependent on the *degree* of the defendant's negligence. Once negligence is established, a legal conclusion, the extent of compensatory liability is set by looking to the plaintiff's losses, not the defendant's wrongful conduct, be that slight or great. The point is this: mitigating or aggravating circumstances have nothing to do with compensatory recoveries; they concern a second element a jury may consider in awarding damages.

The pecuniary loss rule cannot be said to limit both forms of damages, because each traces from a different source. Pecuniary losses concern the necessary injury resulting from and following a death; punitive damages concern the circumstances surrounding and preceding the death. Pecuniary damages com-

⁵⁵ *Parsons v. Missouri Pac. Ry.*, 94 Mo. 286, 6 S.W. 464 (1888); *Morgan v. Durfee*, 69 Mo. 469 (1879); *Owen v. Brockschmidt*, 54 Mo. 285 (1873). See *Montgomery v. Colorado Springs & I. Ry.*, 50 Colo. 210, 114 P. 659 (1911) (evidence must be introduced before a question is in issue); *Whalen v. Centenary Church*, 62 Mo. 326 (1876).

⁵⁶ Ch. 25, § 879, [1877] Colo. Gen. Laws 343.

⁵⁷ *Moffatt v. Tenney*, 17 Colo. at 198, 30 P. at 351 (emphasis added).

pensate the family of the deceased while punitive damages provide a condign punishment to the defendant, and an example to others designed to deter similar conduct.⁵⁸ Neither recompenses the deceased's representative for grief or solace, because the pecuniary loss rule limits the scope of injuries that are compensable, and the defendant's conduct limits the punitive recovery, if any. Although the deceased's representative may receive a windfall if a death is found to have resulted, for instance, from gross negligence, on the part of the defendant, these damages are not in the nature of payments for grief. They are a form of punishment. As between the two parties, there is no reason why the defendant should have the benefit of a reverse windfall because of the fortuitous death of his victim.

3. The Nonvictim Plaintiff in a Wrongful Death Action: A Distinction Without a Difference

Suppose for instance an action in which it is alleged that the defendant, an owner of a gasoline station, conceals a "spring gun" in one of his automatic fuel pumps during the night-time hours because of recurring larceny. The plaintiff at 2:30 a.m. drives into defendant's station, and when he attempts to remove a hose from a fuel pump he is wounded in his arm by a bullet fired from the "spring gun." In the complaint, the plaintiff alleges both compensatory and punitive damages. During the trial, defendant introduces evidence that he had suffered substantial losses over several months, and the reason he placed the gun in the fuel pump was to deter thefts. Furthermore, he states that plaintiff was wounded not while he was lawfully trying to make a purchase, but, rather, while he was attempting to steal gasoline. He maintains that in light of these circumstances his action was justifiable.⁵⁹ Assuming that liability is established, it is clear that, under these facts, the plaintiff can claim two kinds of awards: one dependent on his actual losses, and one based on the degree of negligence of the defendant. Significantly, even though conceptually the amount of compensatory damages becomes fixed following a finding of negligence, the defendant may be able to reduce the sting of punitive damages by justifying his action with respect to the plaintiff's

⁵⁸ See C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 275 (1935) ("exemplary damages are assessed for the avowed purpose of visiting a punishment upon the defendant and not as a measure of any loss or detriment of the plaintiff"); *Wegner v. Rodeo Cowboys Ass'n*, 290 F. Supp. 369 (D. Colo. 1968), *aff'd*, 417 F.2d 881 (10th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967).

⁵⁹ See *Starkey v. Dameron*, 92 Colo. 420, 21 P.2d 1112 (1933) and concurring opinion by J. Butler, reported at 92 Colo. at 424, 22 P.2d at 640.

alleged conduct. It is with this aspect of damages that the enormity of the defendant's act is put in perspective, the mitigating facts tracking the aggravating circumstances as retaliation follows provocation.

Now suppose that instead of the victim receiving a wound in his arm, he is fatally shot through the chest. In regard to punitive damages should a defendant benefit from wrongfully killing a person rather than simply wounding him? Under Lord Campbell's Act, the answer would be in the affirmative, since that act provided merely for recovery of pecuniary losses. The Colorado act, however, provides for more: it permits a jury to award exemplary damages having regard to the aggravating circumstances attending a wrongful act. The statute explicitly bridges the gap between the nonvictim plaintiff and the defendant. Since punitive damages only concern the conduct of the defendant, the fact that a nonvictim plaintiff will receive a windfall of punitive damages is of no import. Therefore, it is an irrelevant distinction whether the victim was wounded or fatally injured.⁶⁰

C. *Moffatt v. Tenney: Its Effects*

Once the veil of words around the court's logic is removed, the weaknesses inherent in the rationale appear stark and unsupportable. Notwithstanding that the Colorado Wrongful Death Act appears to be divided into two elements, the *Moffatt* court concluded that "aggravating or mitigating" circumstances, if any, only concern the necessary or pecuniary injury suffered by the plaintiff. As pointed out, there is no compelling rationale for such a conclusion, since compensatory and punitive damages generate for different reasons and from different sources; and both sources are, in fact, explicitly articulated in Colorado's statute.

Although the reasoning in *Moffatt v. Tenney* is suspect, the decision has not been seriously questioned. In common parlance it is generally accepted that punitive damages cannot be recovered in wrongful death actions. However, it must be admitted that the law remains confusing. In *Moffatt* there was

⁶⁰ In a claim for punitive damages by a victim of assault and battery, the common law recognized that a defendant may be assessed punitive damages. Moreover, it is generally conceded that the plaintiff should be the recipient of such damages. See, e.g., *Starkey v. Dameron*, 92 Colo. 420, 21 P.2d 1112 (1933). The Colorado Wrongful Death Act not only creates a new cause of action in certain persons, it also explicitly states that punitive damages may be claimed by the plaintiff. The fact that the victim is dead, reminiscent of the misreading of the maxim, *actio personalis moritur cum persona*, and of the doctrine of merger is not dispositive because the act, not the common law, defines the scope of damages inuring to a plaintiff.

no claim for punitive damages; the plaintiff was merely trying to save a compensatory recovery. As a result, the decision is limited to the holding that the *statute*, even though it uses the term, "aggravating," does not admit of punitive awards. The case did not hold that punitive damages are never recoverable in wrongful death actions. In fact it was said, immediately after the *Moffatt* decision, that:

[W]e do not say that punitive damages can never be recovered in [wrongful death actions]. Section 1512, MILLS' ANN. STATUTES, a recent enactment [now COLO. REV. STAT. ANN. § 41-2-2 (1963)], may be broad enough to warrant such recovery. But these damages can only be obtained upon proper averment and proof under this statute.⁶¹

Even if the Colorado court were to adhere to the construction adopted in *Moffatt v. Tenney*, where a proper claim is made under the exemplary damages statute, and evidence is introduced supporting that claim, a plaintiff should be entitled to an instruction on this element of damages.

CONCLUSION

As was illustrated in the common law rule laid down in *Baker v. Bolton*, recognizing historical misconception and logical fallacy are not enough. Courts are wisely reluctant to trammel on precedent, no matter how trenchant the criticism. Rationales flower and die, but the law remains. When a rationale bears no relation either to the rule or to the custom of society, inspection of the precedent should follow. It is submitted that the construction adopted in 1892 in *Moffatt v. Tenney*, and occasionally reiterated by the Colorado court, was unsound at its inception and to this day is incapable of any convincing explanation. Even the court has expressed doubt about the extent of its holding. For although the statute was construed not to permit punitive damages, the court has suggested that such recovery might have been possible under the exemplary damages statute.

It has been suggested that wrongful death acts should be remedial in nature, and therefore not permit punitive recoveries. In construing statutes, the "ought" of the commentator should not be confused with the intent of the legislator. To suggest that all wrongful death acts have the same restrictions, notwithstanding clear changes in the language employed, is to put man above laws, prejudice above reason.

C. Garold Sims

⁶¹ Hayes v. Williams, 17 Colo. 465, 468, 30 P. 352, 355 (1892).

