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RECOVERY OF PUNITIVE DAMAGES IN OHIO WRONGFUL DEATH ACTIONS: A PREFERRED APPROACH

James J. Ross*

I. INTRODUCTION

Punitive damages in tort law, awarded to the plaintiff in addition to full compensation for injuries, are said to punish the defendant, to restrain him from committing the same act again, and to deter others from following his example.¹ Nevertheless, "[s]omething more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, . . . or such a conscious and deliberate disregard of the interests of others that [the defendant's] conduct may be called wilful or wanton."²

An anomalous area exists in the awarding of punitive damages. Under the general rule, punitive damages cannot be awarded in a wrongful death action unless the governing provision expressly or by clear implication confers the right to such damages.³ The reason given for this rule is that punitive damages are mere incidents to the cause of action, a windfall to the decedent's representative who suffered no personal injury.⁴ American courts have universally accepted the rule that a civil action for wrongful death was not recognized at common law and that no such cause of action may be maintained except under statute.⁵ Furthermore, the statutes creating such a cause of action have been construed as not authorizing the imposition of exemplary damages.⁶

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1. W. PROSSER, *THE LAW OF TORTS* 9 (4th ed. 1971) [hereinafter cited as W. PROSSER].

2. *Id.* at 9-10.

3. *Wallace v. Ener*, 521 F.2d 215 (5th Cir. 1975); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rep. 14 (1976); *Kern v. Kogan*, 93 N.J. Super. 459, 226 A.2d 186 (1967); *Kollin v. Shaff*, 79 Misc. 2d 49, 359 N.Y.S.2d 515 (Sup. Ct. 1974); *Greene v. Nichols*, 274 N.C. 18, 161 S.E.2d 521 (1968); *Rubeck v. Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978).

4. See W. PROSSER, *supra* note 1, at 13.

5. *Malone, The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1044 (1965) [hereinafter cited as *Malone*].

6. See generally 61 A.L.R.3d 906-14 (1975). The greatest common obstacle to recognition of the common law right of recovery today seems to lie in the fact that

As a result of this construction, it may be cheaper for the defendant to kill, rather than injure, the victim. A defendant who wilfully or wantonly *injures* a victim may be forced to pay punitive damages in addition to compensating the victim for any injury incurred; whereas, a defendant who *kills* a victim while engaged in the same wilful or wanton act will not be required to pay punitive damages.

This anomaly will be examined by focusing specifically upon Ohio law. The historical setting of wrongful death actions must first be analyzed, however, because the present status of punitive damages in wrongful death actions can be properly understood only in light of past developments. An explanation of the Ohio approach to this area will follow. Additionally, current trends in this area will be examined in order to compare and contrast the Ohio position and to develop grounds for liberalization and reform. Finally, a preferred approach to the area will be offered: an approach that appears more logical considering the purposes behind an award of punitive damages.

HISTORICAL PERSPECTIVE

"In a sense [a wrongful death action] is a novel of the nineteenth century, a story of the new swarming into crowded cities, the travail of the factory. . . ."⁷ Until the nineteenth century, unnatural or wrongful death meant primarily death by murder.⁸ The assailant was incarcerated or executed as a result of his unlawful deeds. In this setting, no right of action existed in favor of the heirs, the distributees, or the personal representatives of the deceased person for damages from the wrongful death.⁹ Any cause of action available to the injured person, abated with his death.¹⁰ Case law precedent for this rule was establish-

legislatures have almost universally enacted statutes which are regarded by the courts as occupying the field. In general, the restrictions under such statutes limit the person who may maintain an action, the beneficiaries and the amounts and elements of damages recoverable.

7. Malone, *supra* note 5, at 1043.

8. *Id.*

9. Craig, *Damages Recoverable For Wrongful Death*, 5 U. RICH. L. REV. 213 (1971) [hereinafter cited as Craig].

10. The notion that claims for injuries to the person did not survive the death of the victim harmonized with the attitude that prevailed in early English history. The subordinates at common law, wife and children, had no property interests concurrent with or equal to the superior, husband and father. Therefore, these inferiors never enjoyed any recognized right in either the safety or the life of the superior. Other probable origins of the rule denying a cause of action at common law were: (1) the civil cause of action were merged into the criminal wrong when a cause of action disclosed the commission of a felony and (2) the supposed aversion by common law courts to the placing of a crude monetary value upon the sacred life of a human being. See Malone, *supra* note 5, at 1044-53.

ed in the 1808 English case of *Baker v. Bolton*.¹¹ Dicta in *Baker* supplied the precedent for the rule that the death of a human being could not be complained of as an injury.¹² The rule of *Baker* became the law in England and later became firmly entrenched in the United States.

"Then, suddenly at mid-century society faced up in panic to a virtually new phenomenon—accidental death through corporate enterprise."¹³ Spurred by this new development, the English Parliament adopted the Fatal Accidents Act of 1846, otherwise known as Lord Campbell's Act.¹⁴ This act, which created a statutory cause of action, marked the first recognition of a cause of action for damages for wrongful death.¹⁵ "Recovery was limited to designated beneficiaries and damages were awarded based upon the pecuniary loss to those surviving. The jury was permitted to give such damages as they [believed] proportionate to the injury."¹⁶

Lord Campbell's Act provided the model for a majority of the "death acts" that now exist in the United States.¹⁷ Following their English counterparts American courts have recognized that a cause of action for wrongful death did not exist at common law and that no action could be maintained except under statute. Furthermore, American courts have generally adhered to a strict interpretation of the statutes and awarded no more than the statutes permit.

THE OHIO APPROACH

Every state now provides a statutory remedy for wrongful death.¹⁸ The majority of states have statutes modeled after Lord Campbell's Act which create "a new cause of action for the death in favor of the decedent's personal representative for the benefit of certain designated persons."¹⁹ These "death acts" essentially serve to create a new cause of action in the beneficiaries to compensate them for the loss of the

11. 170 Eng. Rep. 1033 (Nisi Prius 1808).

12. In *Baker v. Bolton*, the bereaved husband had lost his wife in a stagecoach accident and subsequently brought suit to recover his loss. In the *Baker* opinion, Lord Ellenborough held, without citing controlling authority or precedent, that a husband had no cause of action for the loss of his wife's services. Craig, *supra* note 9, at 215.

13. Malone, *supra* note 5, at 1043.

14. Craig, *supra* note 9, at 216.

15. W. PROSSER, *supra* note 1, at 902. The statute created a new cause of action for the death in favor of the decedent's personal representative for the benefit of certain designated persons.

16. Craig, *supra* note 9, at 216. Only those persons designated as permissible beneficiaries under the Act could recover.

17. 22 AM. JUR. 2d *Death* § 2 (1965).

18. W. PROSSER, *supra*, note 1, at 902.

19. *Id.*

pecuniary benefit of the decedent.²⁰ A minority of states have survival statutes, "which proceed upon the theory of preserving the cause of action vested in the decedent at the moment of his death and enlarging it to include the damages resulting from his death."²¹ Under the survival statutes, the decedent's personal representative has the right to carry on any cause of action which the decedent had the right to commence. One commentator²² suggests that the distinction between modern wrongful death statutes and survival statutes has been obliterated. Many states, however, still adhere to the traditional distinction noted above.

Some states, including Ohio,²³ have both wrongful death and survival statutes. In these states, two causes of action exist which may be prosecuted concurrently. If both actions are successful, recovery for "pain and suffering, expenses and loss of earnings of the decedent up to the date of his death"²⁴ is allocated to the survival action and, consequently, to the decedent's estate. Recovery for the loss of benefits to the survivors, on the other hand, is allocated to the action for wrongful death, and thus to the beneficiaries.²⁵

The first Ohio statute providing an action for wrongful death was passed in 1851.²⁶ Before that date, Ohio courts would not entertain such an action.²⁷ Since then the Ohio decisions have maintained a patent consistency on the issue of permissible damage awards in wrongful death actions. In one of the earlier and more significant cases, *Kennedy v. Byers*,²⁸ the Ohio State Supreme Court held that the rights conferred by the Ohio wrongful death statute are accompanied by the limitations imposed by that statute. More specifically, the court stated

20. "Under rather less than one-third of the death acts, the discretion of the jury is at least partly controlled by a maximum limit of recovery on behalf of all beneficiaries for a single death." *Id.* at 910.

21. *Id.* at 902.

22. Comment, *Punitive Damages In Wrongful Death*, 20 CLEV. ST. L. REV. 301, 301-02 (1971) [hereinafter cited as *Punitive Damages In Wrongful Death*] The author asserts that there was a historic distinction between wrongful death and survival actions in that a wrongful death action created a new cause of action in the beneficiaries to compensate them for pecuniary loss as a result of the death, while a survival action gave the decedent's personal representative the right to carry on any cause of action which the decedent started. Without citing authority or giving his reasons in detail, the author contends that the distinction is no longer important.

23. See OHIO REV. CODE ANN. § 2125.01 (Page 1976) & § 2305.21 (Page 1954).

24. W. PROSSER, *supra* note 1, at 905.

25. *Id.*

26. An Act Requiring Compensation For Causing Death by Wrongful, Neglect on Default, 49 Ohio Laws 117 (1851).

27. *Karr v. Sixt*, 146 Ohio St. 527, 532, 67 N.E.2d 331, 334 (1946).

28. 107 Ohio St. 90, 140 N.E. 630 (1923).

that "[w]here the word 'damages' is limited by statute by the word 'pecuniary' the award cannot go beyond the pecuniary or money loss sustained by the beneficiaries."²⁹

In deciding *Kennedy*, the Ohio Supreme Court deferred to a United States Supreme Court decision, *American R.R. Co. of Puerto Rico v. Didricksen*,³⁰ as controlling authority. In *Didricksen*, the Supreme Court stated:

The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained.³¹

A more recent Ohio Supreme Court case, *Karr v. Sixt*,³² reaffirmed the rationale set forth in *Kennedy* and *Didricksen* by strictly construing the statute governing wrongful death actions.³³

In the most recent major case in this area, *Rubeck v. Huffman*,³⁴ the Ohio Supreme Court did nothing to undermine or to deviate from this precedent. *Rubeck* involved a motor vehicle accident between Clair B. Rubeck, deceased, and George V. Huffman, defendant. Huffman was traveling west on the east-bound lane of a state highway when he collided head-on with Rubeck's vehicle. The injuries to Rubeck were fatal; consequently, an action for wrongful death was instituted by Paul Rubeck, as executor of Clair Rubeck's estate. At trial, the plaintiff produced evidence showing that the defendant was inebriated at the time of the accident. The trial court gave judgment for, and the court of appeals upheld, awards of compensatory and punitive damages. On an appeal to certify the record, the Ohio Supreme Court

29. *Id.* at 93, 140 N.E. at 632.

30. 227 U.S. 145 (1913). In *Didrickson*, the plaintiffs, surviving parents of Pedro Didrickson, brought an action under the Federal Employer's Liability Act of April 22, 1908, ch. 149, 35 Stat. 65, to recover for the loss of their son, who died from an injury sustained while employed by the American Railroad Co. of Puerto Rico.

31. 227 U.S. at 149.

32. 146 Ohio St. 526, 67 N.E.2d 331 (1946).

33. The court noted that a wrongful death action is for the exclusive benefit of the surviving spouse, children and other next of kin to compensate them for pecuniary injury resulting from the death and, further, that pecuniary loss does not comprehend such injury as bereavement or mental pain and suffering. *Id.* at 532-37, 67 N.E.2d at 335-36.

34. 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978).

affirmed the award of compensatory damages, but reversed the lower courts' decisions awarding punitive damages.

In reversing the punitive damage award, the Ohio Supreme Court scrutinized Ohio's wrongful death statute since the right to sue for wrongful death in Ohio is statutorily created.³⁵ The statute limits the type of damages which may be awarded in a wrongful death action under Ohio Revised Code Section 2125.02.³⁶ Punitive damages are considered to be supplemental to that amount necessary to compensate an injured party.³⁷ Therefore, an award of punitive damages conflicts with a statutory provision which limits damages in wrongful death actions to pecuniary loss.

Ranells v. Cleveland,³⁸ was cited in *Rubeck* as controlling authority for the denial of punitive damages. In *Ranells*, the Ohio Supreme Court stated that "[p]unitive damages are assessed over and above the amount adequate to compensate an injured party. As such, they are nothing less than a windfall . . ."³⁹ to the heirs who suffer pecuniary loss, but are not personally wronged by the misconduct.

Justice William Brown's dissent in *Ranells* presents an alternative view to an award of punitives in wrongful death actions. Brown contended that the defendant's acts constituted reckless and wanton conduct in that there was an utter disregard for human safety.⁴⁰ Therefore, to Justice Brown, this was an appropriate case for an award of punitive damages. Brown advocated a liberalization of what he considered to be an antiquated approach—a judgment "requiring a statute expressly authorizing punitive damage awards . . . simply places the cart before the horse."⁴¹ To date, Brown's dissent remains an empty plea in Ohio.

35. See OHIO REV. CODE ANN. § 2125.01 (Page 1976).

36. In accordance with Ohio Revised Code § 2125.02, damages in a wrongful death action are limited to pecuniary loss only.

37. *Ranells v. Cleveland*, 41 Ohio St. 2d 1, 7, 321 N.E.2d 885, 889 (1975).

38. 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975).

39. *Id.* at 10, 321 N.E.2d at 889 (Brown, J., dissenting).

40. *Id.* In *Ranells*, a severe electrical storm cut off power in a pumping station and filtration plant, which were integral parts of the City of Cleveland's Water Department. To prevent damage to the evaporators at the filtration plant, it became necessary to shut off three tanks from which liquid chlorine had been flowing. The chemical house operator entered the darkened chlorine room and attempted to close the valve to each tank "by feel". While doing so, he detected a leak. He waited until power was restored and returned to change a washer. However, he neglected to make sure that the valve was completely closed. As a result of his negligence, a great deal of chlorine gas escaped into the room, forcing the operator to flee. The operator then proceeded to activate a blower, which drew the gas from the chlorine room and into the atmosphere. As a result of chlorine gas inhalation, Richard Ranells, who resided in the residential neighborhood adjoining the plant, died.

41. *Id.* at 10, 321 N.E.2d at 890.

An award of punitive damages is permitted in Ohio under the survival statute if plaintiff can prove that the deceased suffered personal injury or property loss prior to death. "The right to punitive damages continues even when the person so injured has died and the personal injury or property loss claim is pursued by the representative of his estate under Ohio Revised Code Section 2305.21."⁴² Ohio has long recognized that a survival action for personal injury, which survives to the personal representative, and a wrongful death action, are separate and distinct actions brought under different statutory provisions.

They [the two actions] rest primarily upon the same alleged negligence of the defendant and the same absence of contributory negligence of the injured person, but in the revived action the damages are for the personal injuries to the injured person for which an action would lie if death had not ensued, and such damages to enure when recovered to the benefit of the estate, while in the later action the suit is prosecuted in the interest of other parties and the measure of damages is the pecuniary loss they have sustained by death.⁴³

It is therefore necessary for the decedent's representative to prove that the decedent suffered property loss or personal injury before death, as well as the necessary requisites for punitive damages,⁴⁴ in order to recover punitive damages under the survival statute.

Despite the ability to recover punitive damages under the Ohio survival statute, an inequity is apparent. It is not always possible to prove that the decedent suffered personal injury or property loss prior to his death; for example, the decedent may die instantly. In such a case, the personal representative is denied punitive damages.⁴⁵ Furthermore, the representative cannot collect them under the wrongful death statute.⁴⁶ This evidences an absence of logic and coherency in the Ohio approach. There is no sound reason for distinguishing a wrongful death action from any other tort proceeding. The present status of the law overlooks wilful and wanton conduct in a wrongful death action, yet permits punishment by punitive damages in a negligence action for a broken leg. It is indeed unfortunate that an award of punitive damages in an Ohio wrongful death action is based upon chance; that is, the

42. *Rubeck v. Huffman*, 54 Ohio St. 2d at 23, 374 N.E.2d at 413. Note that Ohio Revised Code section § 2305.21 is the survival statute and is a cause of action separate from a wrongful death action.

43. *Mahoning Valley Ry. v. Van Alstine*, 77 Ohio St. 395, 414, 83 N.E. 601, 607 (1908).

44. See notes 69 & 70 and accompanying text *infra* for a discussion of the recovery of punitive damages in Ohio.

45. See text accompanying notes 42-44 *supra*.

46. See notes 26-39 and accompanying text *supra*.

personal representative can only hope that the decedent lives long enough after the accident to suffer personal injury or property loss as a result of the defendant's wilful and wanton conduct.

CURRENT TRENDS

Ohio is one of the 34⁴⁷ states which do not allow exemplary damages in wrongful death actions. Also included within this majority are the two most influential jurisdictions, California and New York.⁴⁸ "The California statutes and decisions have been interpreted to bar the recovery of punitive damages in a wrongful death case."⁴⁹ Similarly, in New York, recovery in wrongful death actions is limited by statute to fair and just compensation for the "pecuniary injuries resulting from the decedent's death to the person for whose benefit the action is brought. In all other actions to recover damages for injury to person or property brought on behalf of a decedent, punitive damages shall not be awarded nor penalties adjudged."⁵⁰

A minority of jurisdictions permit an award of punitive damages in wrongful death actions.⁵¹ In these jurisdictions, however, the decedent must have met his death as the result of a wilful or wanton act of the defendant.⁵² Alabama emerges as the most unique jurisdiction in awarding wrongful death damages. While the majority of jurisdictions completely deny punitive damages in wrongful death actions⁵³ and a small minority allow punitive in addition to compensatory damages if the defendant is guilty of wilful or wanton conduct,⁵⁴ all damages recoverable under the Alabama statute are considered punitive damages.⁵⁵ Iowa has enacted a hybrid statute which, unlike Ohio,

47. See *Punitive Damages In Wrongful Death*, *supra* note 22, at 302.

48. California and New York are considered trendsetters in the judicial field. For example, in *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), the California Supreme Court adopted strict products liability. In a short period thereafter many other jurisdictions followed suit by adopting strict products liability. This is but one of many trends whose origins can be attributed to New York or California Supreme Court decisions.

49. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 450, 551 P.2d 334, 353, 131 Cal. Rptr. 14, 33 (1976).

50. *Kollin v. Shaff*, 79 Misc. 2d 49, 50-51, 359 N.Y.S.2d 515, 517 (Sup. Ct. 1974).

51. *Punitive Damages In Wrongful Death*, *supra* note 22, at 308. These states are Alabama, Arizona, Delaware, Florida, Kentucky, Massachusetts, Mississippi, Missouri, Montana, Nevada, Pennsylvania, South Carolina, Tennessee, Texas, and West Virginia.

52. *Id.*

53. See note 47 and accompanying text *supra*.

54. See notes 51 & 52 and accompanying text *supra*.

55. See *Ellis v. Zuck*, 546 F.2d 643 (5th Cir. 1977); *Geohagon v. General Motors Corp.*, 219 Ala. 151, 279 So. 2d 436 (1973).

combines survival actions and wrongful death actions under one statutory provision.⁵⁶ Under this hybrid statute, the submission of exemplary damages is considered proper.⁵⁷

Many "[c]ommentators are beginning to realize that there is simply no logical reason to extinguish the right to punitives simply because the injury is fatal. Often courts deny punitives because of precedent with no other logical reason."⁵⁸ An Illinois appellate court evidenced this fact in *Mattyasovsky v. West Towns Bus Co.*,⁵⁹ wherein an award of punitive damages was disallowed based upon a statutory interpretation of the Illinois survival statute. In examining the plaintiff's claim for punitive damages in an action brought under the survival act, the court reasoned that allowing an award 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."⁶⁰ The court noted that "[d]espite [its] highest desires . . . law is not always based upon logical rationale."⁶¹ The court concluded that the law could not support an award of punitive damages in an action brought under the statute.

As noted before, punitive damages are intended to serve as a deterrent. Thus, in not allowing punitive awards in wrongful death actions, the courts are permitting the defendant to "get away with murder"⁶² and indirectly encouraging the same conduct by others.

The plea for reform, however, has not gone completely unnoticed. In 1977, the United States District Court for the Central District of California was faced with the issue of whether denial of punitive damages in a wrongful death action is violative of equal protection of the laws guaranteed by United States and California Constitutions.⁶³ "The district court ruled that a state's statute (California) denying punitives in a wrongful death action denies equal protection to wrongful death claimants since only they, unlike property damage and personal injury claimants, are barred from recovering punitives."⁶⁴ The Ninth Circuit, however, reversed the district court and held that the distinction drawn in the California statute was rational. Therefore,

56. See IOWA CODE ANN. § 611.20 (West 1950).

57. See *Koppinger v. Cullen-Schlitz & Assoc.*, 513 F.2d 901 (8th Cir. 1975).

58. Belli, *Punitive Damages: An Historical Approach*, 13 TRIAL 40, 44 (Dec. 1977) [hereinafter cited as Belli].

59. 21 Ill. App. 3d 46, 313 N.E.2d 496 (1974).

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

61. *Id.*

62. Belli, *supra* note 58, at 44.

63. *In re Paris Air Crash of March 3, 1974*, 427 F. Supp. 701 (C.D. Cal. 1977), *rev'd* 622 F.2d 1315 (9th Cir. 1980).

64. Belli, *supra* note 58, at 44.

the statute was constitutional under both the federal and the California equal protection clauses.⁶⁵

A PREFERRED APPROACH

Some courts and commentators now argue that logic and public policy dictate a need for a more liberal interpretation of wrongful death statutes. Thus, it is desirable to offer a preferred approach to an award of punitive damages in a wrongful death action, an approach that is logical in light of the purpose behind punitive damage awards.

A punitive damage award is given to the plaintiff over and above full compensation for his injuries in order to punish the defendant, to restrain the defendant from doing the same thing again, and to deter others from performing such acts.⁶⁶ Mere negligence, however, is not a sufficient basis for a punitive damage award. "There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious disregard of the interests of others that his conduct may be called wilful or wanton."⁶⁷ The defendant's motive and conduct, rather than the particular tort committed, is the determinative factor in awarding punitive damages.

Ohio courts are permitted to award punitive damages in tort cases involving personal injury or property loss.⁶⁸ "In Ohio, in accord with the weight of the authority, punitive damages are allowed as a punishment to the offender, and as an example to deter others from offending in a like manner."⁶⁹ "The Ohio rule allowing a recovery of punitive or exemplary damages is, as the statement of the rule implies, predicated upon the circumstance that the wrong complained of involves ingredients of fraud, malice or insult, or a wanton and reckless disregard of plaintiff's rights."⁷⁰ A close analysis of these established principles reveals that the emphasis in awarding punitive damages is upon the defendant's conduct in committing the tort, rather than upon the result of his conduct. If the defendant recklessly and wantonly disregard's the victim's rights, he should be forced to pay punitive damages as a punishment regardless of whether the victim dies or is only injured. It is indeed illogical to deny a punitive damage award in all Ohio wrongful death actions.

65. *In re Paris Air Crash of March 3, 1974*, 622 F.2d 1315, 1317 (9th Cir. 1980).

66. See note 1 and accompanying text *supra*.

67. W. PROSSER, *supra* note 1, at 9-10.

68. See *Columbus Fin., Inc. v. Howard*, 42 Ohio St. 2d 178, 183, 327 N.E.2d 654, 658 (1957).

69. *Saberton v. Greenwald*, 146 Ohio St. 414, 425, 66 N.E.2d 224, 229 (1946).

70. *Id.* at 428, 66 N.E.2d at 230.

While the Ohio approach to punitive damages in a wrongful death action appears illogical and antiquated, the Alabama approach (*all* damages recoverable are punitive damages) is no improvement. One may collect punitive damages under the Alabama statute even in the absence of wilful or wanton conduct. What is desirable is a compromise between the Ohio approach and the Alabama approach—an approach that would permit an award of punitive damages if the decedent is killed by the wilful or wanton act of the tortfeasor. A comparison of two cases can best illustrate this preferred approach.

In *Rubeck v. Huffman*,⁷¹ the defendant caused a fatal head-on collision. At trial, the plaintiff established that the defendant was inebriated at the time of the accident; nevertheless, the Ohio Supreme Court denied punitive damages in the ensuing wrongful death action which was instituted by the executor of the decedent's estate. No doubt exists that the defendant's drunken driving constituted a reckless disregard for the safety of others. Therefore, punitive damages should have been awarded as a punishment to the defendant and as an example to deter others from acting in a like manner.⁷² Defendant's conduct constituted more than mere negligence. The circumstances of aggravation and outrage, which are necessary prerequisites for a punitive damage award, were unequivocally present. To deny punitive damages under these circumstances defies our sense of moral decency.

Punitive damages are not, however, warranted in every wrongful death action. In *Karr v. Sixt*,⁷³ the decedent, an eight-year-old boy, lived with his father and brother on a farm. He was killed in a collision with a large tractor-trailer as he was riding a child's wagon on a public highway near his home. Evidence as to the question of negligence was conflicting. In fact, there was a strong possibility of contributory negligence since the decedent was riding the wagon, without lights, on a public highway at night. Furthermore, there was no evidence of wilful or wanton conduct. Obviously, this was not a proper case for the imposition of punitive damages. The defendant's misconduct, if any, constituted mere negligence; and as previously stated, mere negligence is not a sufficient basis for a punitive damage award.

The preferred approach can be succinctly summarized; the rule that applies to awarding punitive damages in tort cases involving personal injury or property loss should also apply to wrongful death actions. That is, if the decedent is killed as a result of a defendant's wilful or wanton conduct, the decedent's personal representative

71. 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978).

72. See note 69 and accompanying text *supra*.

73. 146 Ohio St. 527, 67 N.E.2d 331 (1946).

should be permitted to recover punitive damages. This approach is logical and consistent with the purpose and policy behind punitive damage awards.

CONCLUSION

The present construction of the Ohio wrongful death statute holds that the right to punish a tortfeasor who is guilty of wilful and wanton conduct terminates when a decedent is the victim of a wrongful death. In essence, the Ohio courts have strictly construed the wrongful death statute, and since the statute does not unequivocally provide for punitive damages, the courts have refused to award them. Nevertheless, a new movement is in the offing to usurp this strict construction of wrongful death statutes. The present trend in a small minority of the states is to allow punitives in wrongful death actions. In many other states, the argument is raised that public policy mandates a more liberal interpretation. A logical approach would permit an award of punitive damages in wrongful death actions where the decedent is killed as the result of a wilful or wanton act of another. Perhaps in the not too distant future, Ohio may finally put to rest the proverb that it is cheaper to kill the victim than to injure him.