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STATUTES, GAPS, AND VALUES IN TORT LAW

ROBERT E. KEETON*

Note: The Journal of Air Law & Commerce is proud to publish the first annual Roy Robert Ray Lecture, delivered by Dean Robert E. Keeton to the Southern Methodist University School of Law. Dean Keeton's thoughts on problems of statutory construction in torts cases should be of great interest to persons involved in various areas of the law, including the heavily regulated field of aviation. The question of availability of punitive damages for wrongful death can, of course, be of crucial importance in aviation litigation. See, most notably, In Re Paris Air Crash of March 3, 1974, 427 F. Supp. 701 (C.D. Cal. 1977) (holding that denial of punitive damages for wrongful death under California law would constitute a deprivation of equal protection of the laws).

—The Editors

I.

AT THE beginning of the 20th Century, and still at mid-century, tort law was overwhelmingly common law—law made in the courts through the common law process of case-by-case decisional development. In occasional instances a controlling rule was fixed by statute, as in survival acts and wrongful death acts abrogating, among other rules, that rule of the common law under which death of the injured person terminated all rights of recovery for tortious bodily injuries. Also, statutes proscribing conduct and fixing criminal penalties occasionally had an impact on tort actions, through negligence per se doctrine or in some other way. All the occasional instances together, however, add up to a small percentage of tort litigation. This was the picture in 1900, and in 1950 as well.

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What will a picture of the relative impact on tort law of judicial decisions and statutes be likely to show in the year 2000?

One difference will be a marked increase in the number and scope of enactments explicitly directed at changing tort law. The increase has been substantial in the decades of the 1960's and 1970's, and unfulfilled demands for law reform through legislation have grown even more rapidly. Also, the demands have become more diversified. Contrary to the earlier tendencies of tort law "reforms" to expand liabilities and compensation, "reform" proposals of the 1970's are as likely to aim for reduced liabilities and cost control as to aim for better protection of victims. Thus, the activists range across the spectrum of political, social, and economic philosophy, and their numbers increase. It seems reasonable, then, to expect that the number and scope of statutes bearing on tort law will continue to increase. This foreseeable development is good reason for tort lawyers, teachers, and judges to examine with renewed intensity the many issues of legal process that emerge when statutes and judicial decisions are interwoven to produce a single, comprehensive tort law.

How, if at all, will foreseeable increases in the number and scope of relevant statutes affect judicial responsibility in tort cases? Although the present article does not directly undertake an assessment of the potential impact on the workload of the courts, the particular implications of increased legislation that are examined here provide scarcely any basis for inferring that these new statutes will reduce that workload. These developments will, however, cause a shift of emphasis—a change in the nature of the issues presented in tort cases in the courts. Already, in the decades of the 1960's and 1970's, we have observed a shift toward increasingly frequent—or at least less infrequent—focus on problems concerning the judicial role in lawmaking, as well as the substantive law issues at stake in the case at hand. As statutes increase in number and scope, it seems likely that courts will more often address, directly and openly, issues of legal process that interact with the substantive law issues at stake.

The present article considers key issues of legal process incident to the presence of gaps in statutes. No statute answers all questions in the area it affects. All statutes have gaps. How do and should courts act in relation to statutory gaps?

II.

As a basic case for testing ideas that may be suggested, assume the following facts.¹ A 12-year-old boy alighted from the rear door of a bus operated by Defendant Bus Company. When barely out of the bus he realized that he was at the wrong stop. He tried to re-enter the closing rear door; his foot was caught in the door with his body outside. The bus driver, disregarding protests of passengers who observed the boy's predicament, started the bus in motion. The boy fell under the wheels and was killed.

Assume that the evidence is sufficient to sustain a finding that the bus driver's conduct was willful or wanton in relation to the 12-year-old boy.

Assume, second, that the evidence is sufficient to sustain a finding that the driver acted as he did because of a threat of discipline if he failed to adhere to his schedule. The Defendant Bus Company had been severely criticized because its buses had not operated on schedule. Responding to this criticism, the management had issued an order to drivers: "If you have trouble with slow and uncooperative passengers, close the doors and move on. You are personally responsible if you don't make your schedule."

III.

How would you answer these questions about what the substantive law *should* be?

Question One. On evidence such as is assumed in the case stated above, should the jury be allowed to return a verdict of punitive damages against the Bus Company?

Question Two. Should the law regarding punitive damages against the Bus Company be the same in a case in which the boy was severely injured and survived as in a case in which he was killed?

Question Three. Should the law regarding punitive damages against the Bus Company be the same in a case in which the

¹Adapted from *Mattyasovsky v. West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1973). I have taken some liberties in stating assumptions here, with the result that this hypothetical case may be distinguished from *Mattyasovszky*. In particular, I ask the reader to assume a case in which clearly punitive damages would have been allowable against the Bus Company if the boy had lived. One may infer that on the record in *Mattyasovszky* the majority of the Court would not have described that case in this way. See Part VII, *infra*.

alighting passenger was a very elderly person, survived by adult sons and daughters, as in a case in which the alighting passenger was a boy, survived by his parents?

If you are uncomfortable about answering any of these questions without more information, or more time for reflection, or both, you are asked just to answer on the basis of which way you lean, and only then to look at the footnote below for information about how others have answered.³

IV.

The three questions stated immediately above are value questions. Although you might have consciously or subconsciously made some assumptions about a legal context, you might instead have taken the questions as pure value questions, free of the constraints of a particular legal context. In contrast, if you are confronted with any of these questions within a legal context, you are never free to answer simply on the basis of a personal preference for what the substantive law should be. If you are a judge, you must take account of statutes and constitutional provisions, among other sources of direction and guidance. If you are a legislator, you must take account of constitutional constraints. Even if you are voting on a proposed constitutional provision, as a citizen or as a member of a constitutional convention, you may be constrained by attachment to the principle that questions like these three ought not to be answered in the constitution but instead should be left to legislatures or to courts.

V.

Moving to one of the more complex questions confronted when we consider these three questions in a specific legal context, let us first assume a legal context unlike that in Texas but like that in many other states.

In addition to the assumptions stated in Part II, assume, third, that this incident occurred in a state where a wrongful death act and a survival act were first enacted, respectively, in 1853 and

³ Members of the audience for the lecture in which these questions were stated were rather closely divided on the first question, though a majority answered YES. All persons responding answered YES to the second question, and all but two answered YES to the third.

1872. The wrongful death act authorizes recovery of "pecuniary harm" sustained by survivors of a person whose death was caused by the wrongful act or neglect of another. The survival act provides for the survival of "actions to recover damages for an injury to the person (except slander and libel), and actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property." Common law rules terminating rights of recovery at death were in effect in this jurisdiction before these statutes were enacted.

Assume, fourth, that judicial decisions of the state rendered before 1850 had allowed recovery of punitive damages for willful or wanton wrong of the defendant.

Assume, fifth, that decisions of the 20th century have repeatedly allowed damages against the master, as well as the servant, for the willful or wanton wrong of the servant, committed in the scope of employment, causing personal injury.

Question Four. Are the boy's parents, in an action against the Bus Company, entitled to an instruction to the jury that upon specified findings they may award punitive damages against the Bus Company in addition to other damages allowable under the survival act and the wrongful death act?

At a time when neither the wrongful death act nor the survival act had been enacted, the plaintiffs in facts otherwise like the hypothetical case would not have been able to recover punitive damages; they had no cause of action at all.

How would you frame the issue about punitive damages in a case that arises after the legislature has acted? Would you ask: [1] Does either of the statutes authorize an award of punitive damages in cases such as this?

Or, would you ask: [2] Do judicial precedents authorize an award of punitive damages in cases such as this?

Or, would you ask: [3] Does either of the statutes or any judicial precedent either authorize or forbid punitive damages in cases such as this, and, if not, what answer should now be given?

Or would you frame the issue in a way different from any of these?

Here, as in other contexts, if you are allowed to state the issue in the way you choose, you may exert a strong influence toward the outcome you prefer.

The first way of framing the issue points toward a conclusion that punitive damages are not allowable when the victim has died. Neither statute says anything explicitly about punitive damages. Both statutes explicitly authorize recovery of damages for stated elements of harm. Thus, it can be said that the only explicit authorization is for compensatory damages.

Is the second way of framing the issue, if not clearly conducive to allowing punitive damages, at least less conducive to denying them? One may not fairly say that there was precedent for allowing punitive damages for a willful or wanton wrong causing death, since no such award had ever been approved. But one may say, more generally, that judicial precedents had sustained awards of punitive damages for willful or wanton wrongs. True, before the statutes were enacted, this rule had never been applied after death of the victim, but that outcome was due to another rule that denied any recovery whatsoever after death of the victim. That obstacle was removed by enactment of the statutes. The statutes neither forbade nor authorized punitive damages.

The third way of stating the question is more nearly neutral.

Trying still to be neutral, and observing the body of law, statutes and decisions to which a judge faced with the hypothetical case might look for direction and guidance, we might formulate a fourth way of framing the issue: [4] Given the enactment of the survival and wrongful death acts, given both the explicit terms and the general nature of the provisions on damages appearing in those acts, and given the precedents allowing punitive damages for willful or wanton wrongs not causing death, what direction or guidance does a judge have with respect to allowance of punitive damages for willful or wanton wrongs causing death?

If stating the issue in the form of question [4] seems loaded one way or the other, probably it seems so primarily by comparison with one of the first two, or with other formulations of the issue you might imagine. A second way in which it may seem loaded is that you may have a clear view how you would answer question [4], and you therefore find it pointing you to that outcome. But that will be true even of a neutral way of stating the issue, as applied to a case that, in your view, rather clearly should be decided one way or the other. In that instance, perhaps it is your

view of the case rather than the formulation of the issue that is weighted one way or the other.

I submit that formulations [3] and [4] are, if not neutral, at least more nearly neutral than the first two. One reason this is so is that they are less likely to lead to a decision on unstated premises.

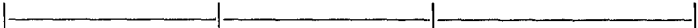
The first way of stating the issue (Does either of the statutes authorize an award of punitive damages?), unless accompanied by a warning that this is only a sub-issue and not the whole issue, is an invitation to accept the unstated premise that when a statute addresses some area of law anything within that area that it does not authorize is forbidden. This is, of course, error as egregious as, and rather closely analogous to, that illustrated by the graffiti placed on the schoolroom blackboard underneath the notice of things forbidden: "Everything not forbidden is compulsory." It is the error of the undistributed middle—the gap.

VI.

Every statute has gaps; it answers some questions, but not others. We need a theory about judging in the context of statutes that candidly takes account of this inescapable fact. It is helpful, I submit, to use a theory that is summarized in the following visual analogies and guidelines for how a court should proceed when a statute is cited and urged as controlling:³

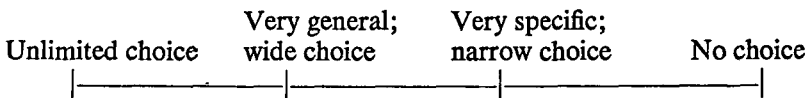
A. VISUAL ANALOGIES TO DISTINCTIONS BEARING ON THE SCOPE OF LEGITIMATE JUDICIAL CHOICE IN APPLYING STATUTES

1. *Statutory Gaps*

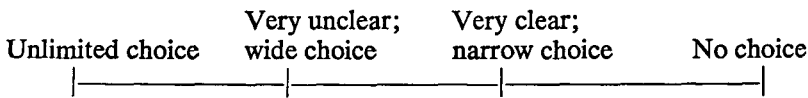
Infinite gaps; unlimited choice	Many gaps; wide choice	Few gaps; narrow choice	No gaps; no choice
			

³ These visual analogies and suggested guidelines are adapted from a memorandum prepared for the Federal Appellate Judges Conference in Phoenix, Arizona, October 29, 1976, based upon views stated in R. KEETON, *VENTURING TO DO JUSTICE* 94-95 (1969). Cf. H. HART & A. SACKS, *THE LEGAL PROCESS* 805-07, 1413-17 (Tent. ed. 1958). See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (Frankfurter, J.), and materials collected in R. ALDISERT, *THE JUDICIAL PROCESS* 170-235 (1976).

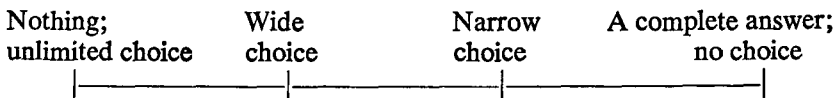
2. Statutory Directive



3. Statutory Purpose



4. What is in the Statute Bearing on the Issue at Hand?



Each of the visual analogies is a continuum. The first analogy pictures the outside limits and key points in between. No valid statute has infinite gaps; it does answer some questions, at least. Every statute has some gaps; it does not answer all questions. Between these outside limits is a spectrum of degrees ranging from almost unlimited choice through wide choice and through narrow choice to almost no choice.

It is not a matter of choice but of necessity that a court fills any gap that must be filled to decide the case at hand. In filling the gap by necessity, however, the court is also by necessity exercising a choice about *how* to fill the gap. To conclude that the court has no choice on an issue is to conclude that there is no gap as to that issue.

The fourth visual analogy makes the point that judicial application of a statute is not limited to determining either (a) that a statute has no bearing on the issue or (b) that it completely answers the issue. These are only the polar possibilities.

Similarly, visual analogies 2 and 3 make the point that an inquiry into the nature of a statutory directive or statutory purpose is not necessarily destined to end in a determination either (a) that the statutory directive is so specific and precise, or the statutory purpose is so clear, that it determines an issue or (b) that the statutory directive is so general, or the statutory purpose is so unclear, that it is of no use in deciding the issue. These are only the polar possibilities.

The courts' role in cases involving the polar possibilities may be quite different from its role in all the cases between the poles.

B. SUGGESTED GUIDELINES FOR COURTS

1. If the statute addressed the issue at hand and answered it, apply the mandate of the statute (absent unconstitutionality).

2. If the issue at hand is one beyond that core area of issues that the statute addressed and answered, defer to the statute's manifestations of principle and policy as far as they can be ascertained and are relevant to the issue at hand.

3. Subject to the first two propositions, aim for resolving the issue at hand so as to produce the best total set of rules, including those within the core area of the statute and other cognate rules of law, whatever their source. Defer to the statute's manifestations of principle and policy, as far as they can be ascertained. Accept the inapplicable statutory mandate as a datum. Accept other statutory directives and judicial precedents as data. Aim for a decision on this issue that will produce an even-handed system for this issue and all the cognate issues that are answered in statutes and other precedents.

4. In determining whether a statute addressed the issue at hand, dispense with contrary-to-fact presumptions about the legislative process; be realistic and be candid. Use legislative history as data; avoid proceeding as if legislative history were a statutory mandate. At most, declarations in legislative history are obiter dicta of the legislative process. If it is necessary to resort to legislative history, paragraphs 2 and 3 apply, not paragraph 1. Also, do not treat failure to enact a mandate as if it were enacting a mandate. "Not speaking" to an issue is not "speaking" to that issue. Rarely, failure to enact legislation is a significant datum, and paragraphs 2 and 3 then apply. But never is it a mandate as in paragraph 1.

C. SUGGESTED OBJECTIVES FOR COURTS

Even though a legislature can act on a problem and its range of potential solutions is broader than that available to courts, nevertheless, when the legislature has not acted (and thus there is no controlling statute), the court should aim for the best solution still available in this context of legislative failure to answer the problem.

VII.

Return, now, to the question stated in Part V. Are the parents entitled to an instruction allowing an award of punitive damages in the hypothetical case?

Applying the guidelines suggested in Part VI, I would classify this case as one not within the core mandate of either statute. Neither statute addresses this issue. Both statutes, however, manifest principles and policies that are relevant.

First, both statutes clearly manifest a policy against treating death as an event conclusive against tort liability. Taking this policy as a guideline, the court should treat the statute as *in this respect* weighing in favor of rather than against a ruling permitting punitive damages in actions involving death of a person injured by tortious conduct.

Second, however, both statutes clearly manifest a policy favoring somewhat limited liability—a policy of caution in opening up a new area of legal accountability. Survival acts have been generally understood as limiting the period for which damages are recoverable to the lifetime of the decedent. The survival act assumed in the hypothetical case, like many of those enacted, is surely not explicit on this point, but it seems clear that courts so construing survival acts have thought they were following a manifested statutory guideline in this respect. The assumed wrongful death act, like most of those enacted, more explicitly manifests a policy of limiting the scope of damages since the only explicit authorization is for damages for “pecuniary harm” sustained by survivors of the person whose death was caused by the wrongful act or neglect of the defendant. Although this wrongful death act (like many others) does not say anything explicitly about punitive damages, the manifestation of a policy in favor of liability more limited than that of the usual measures of damages in tort actions for injury to person weighs against an allowance of any damages other than those explicitly authorized.

Available information about the legislative history of enactments in the states in the 19th century is generally scant, and at best, like all other legislative history, it supports inferences not about statutory mandates but instead about manifestations of principle and policy as the obiter dicta of the legislative process. The history

of more recent unsuccessful efforts to modify survival and wrongful death acts is at most a history of failure to achieve sufficient support for the legislature to speak. Ordinarily the range of potentially applicable explanations for a legislature's not speaking, apart from considered views on a particular issue at stake in litigation, is quite extensive, and efforts to extract considered manifestations of principle and policy are highly speculative at best. Thus, even if we assumed some typical kind of legislative history attending the 19th century enactments and some more recent legislative history of aborted proposals for statutory amendments, we would be left with inconclusive statutory guidelines for decision of the punitive damages question, even with respect to the principal actor—the bus driver. The issues become still more complex in relation to the liability of the bus company and the insurers of the liability of the driver and the company.

Absence of a statutory mandate regarding punitive damages compels the court to look to other sources of guidance. One of those sources is judicial precedent in cases in which one or both of the survival and wrongful death acts were invoked. If recorded precedents reveal no instance in which punitive damages have been awarded for more than a century of survival and wrongful death actions, it may reasonably be asserted, in language borrowed from the Illinois court's opinion in *Mattyasovszky*,⁴ that the statutes have "never been thought to authorize the award of punitive damages" and that a contention that they "should now be construed to do so" is a prayer for "a change in the law of this State which for more than a hundred years has limited recovery under the Survival Act [and the Wrongful Death Act] to compensatory damages."⁵ Note the subtle progression from lack of authorization *in the statute* to prohibition in the *law* as a *construction* of the statute. This line of thought is often supplemented by an assertion (with which I disagree)⁶ that a court is less free to overrule a decision construing a statute (even though the construction is by necessity judicial handiwork) than to overrule judicial precedents generally.

⁴ *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1973).

⁵ The quoted phrases are taken from the majority opinion's discussion of the Survival Act in *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 33, 330 N.E.2d 509, 510 (1973).

⁶ See R. KEETON, *VENTURING TO DO JUSTICE* 78-80 (1969).

It may happen, of course, that there is an absence of judicial precedent as well as statutory mandate. The dissenting opinion in *Mattyasovszky* asserts that at most the only judicial expression in point was a *dictum* in 1868, in a case not involving a verdict awarding punitive damages—an expression that was not cited until more than a century later as authority for the proposition that punitive damages may not be recovered in an action for wrongful death.⁷

Whatever the dicta or holdings may be, in any event they are expressions of courts, not the legislature. They are not statutory mandates but instead judicial actions with respect to gaps in the statutes. Moreover, decisions of the 1970's, including *Moragne v. States Marine Lines, Inc.*⁸ and *Gaudette v. Webb*,⁹ have called attention to the possibility of another kind of gap. Survival and wrongful death acts were enacted by legislatures to allow limited recoveries despite common law precedents against any recovery after death of either the tortfeasor or the victim. They did not explicitly mandate that the courts should not overrule the common law precedents and recognize a new common law action, as well as the statutory actions. If the courts should choose to take that step, they might authorize punitive damages as well as compensatory damages.

It does not follow, however, that the court would be writing on a slate as clean as if the legislature had never acted. Even if there is no statutory mandate prohibiting judicial recognition of the new cause of action, clearly there are relevant statutory manifestations that a court should take into account as it considers the competing arguments of principle and policy bearing upon this issue—an issue that, by hypothesis, the statutes did not address. Also, there are powerful policy arguments, concerned with evenhandedness and clarity of the law, against creating multiple causes of action and allowing punitive damages in the court-created cause of action after death of the victim while denying punitive damages in statutory causes of action applicable to the same facts.

This analysis leads to the conclusions, first, that in relation to claims for punitive damages there are gaps in the statutory mandates—gaps that by necessity the courts must fill when the issues

⁷ 61 Ill. 2d at 39, 330 N.E.2d at 513.

⁸ 398 U.S. 375 (1970).

⁹ 362 Mass. 60, 284 N.E.2d 222 (1972).

are presented for decision—and, second, that the manifestations of principle and policy bearing upon claims for punitive damages, though constraining in some degree, nevertheless leave considerable scope for choice by the courts. In preparing to discharge this responsibility for principled choice, the courts should aim for resolving the issue at hand so as to produce the best total set of rules, including those expressed within the core area of the survival and wrongful death acts and other cognate rules of law, whatever their source. In relation to this issue of awards of punitive damages after death of a tort victim, among those cognate rules, and the principles and policies upon which they are based, are all those precedents, principles and policies bearing upon punitive damages, first against primary actors such as the bus driver, second, against vicariously liable employers such as the bus company and, third, against liability insurers of primary actors and their employers. In *Mattyasovszky*, a case in which the facts may have been less supportive of a punitive damages claim than those we have assumed in our hypothetical case, the majority opinion declines to “change the law” and allow punitive damages. After advertent to competing policy considerations bearing upon awards of punitive damages, the majority opinion observes:

Serious questions inevitably arise in a case like the present, in which the driver of the bus, whose conduct was primarily responsible for the injury, is no longer a party defendant because he was dismissed by the plaintiff before the case went to the jury.

It is apparent, we think, that the strong equitable considerations that were present in the *Moragne* and *Gaudette* cases are lacking in the case before us. . . .¹⁰

One way of reading this opinion is that the court is satisfied with, or at least acquiesces in, a set of cognate rules under which punitive damages will be available if the victim survives but not if, on facts otherwise identical, the victim dies. This reading brings the opinion into conflict with views reported earlier in this article about whether the law regarding punitive damages should be the same in death and injury cases.¹¹ Another way of reading the opinion is that the court has reservations about whether it should approve punitive damages on facts like these, whether or not the

¹⁰ 61 Ill. 2d at 37, 330 N.E.2d at 512.

¹¹ See Part III, n.2, *supra*.

victim dies, and is not prepared to "change the law" to do so in this case in which the victim has died; it may be more likely to "change the law" instead, if indeed any change is required, to deny punitive damages in a case like this except that the victim survives.

The hypothetical case stated above (in Parts II and V) might be viewed as distinguishable from *Mattyasovszky*. One difference, related to the preceding discussion, is the omission of any history of judicial pronouncements, whether holding or dicta, about allowing punitive damages in actions after death of the victim. A second difference is the assumption, in the hypothetical, that decisions of the 20th century have repeatedly allowed punitive damages against master and servant for willful or wanton wrong causing personal injury. A third difference is the assumption, in the hypothetical, that the evidence is sufficient to sustain a finding that the bus driver's conduct was willful or wanton in relation to the 12-year-old boy.

Thus, *Mattyasovszky* itself might be distinguished. In relation to the assumed hypothetical, however, I submit that in making its choices to fill statutory gaps a court should reject any set of rules that denies punitive damages after death but allows punitive damages on facts that are identical except that the injured victim survives. The usefulness of awards of punitive damages is a matter of substantial controversy—and the more so in relation to vicarious liability and insurer liability than in relation to the liability of the primary actor.¹² But, in the company of others apparently,¹³ I am

¹² Policy arguments for punitive damages tend to lose some of their force when applied to hold a "master" vicariously accountable for the conduct of a "servant," and still more when applied in a context in which the payment is made by a liability insurer. Also, practical problems of the extent of availability and use of liability insurance deserve attention. In the 1970's liability insurers have manifested increasing concern about claims for punitive damages. The Insurance Services Office, a service organization for the liability insurance industry, issued a recommended form for a policy provision excluding coverage for punitive and exemplary damages. See, e.g., *The Standard*, THE NORTHEAST'S INSURANCE WEEKLY, Feb. 10, 1978, at 1, 25. This recommendation received only limited acceptance among major liability insurers and state insurance regulators. Predictably it created great concern among insureds who happened to be informed of the development, among brokers, and within the Risk and Insurance Management Society. *Id.* (One of the less obvious reasons for concern is that punitive damages claims may create significant conflicts of interest between insurer and insured even when the insured has coverage for punitive as well as compensatory damages; the likelihood of significant conflicts of interest markedly increases if there is coverage for compensatory but not for punitive damages.) In March, 1978, the Insurance Services Office withdrew its proposed policy provision excluding coverage for

unable to identify any substantive policy argument for denying punitive damages against a tortfeasor who kills the victim while, by hypothesis, allowing punitive damages on facts identical except that the victim survives. Whatever policy reasons one may find for limitations on the scope of awards for punitive damages have no special weight in survival and wrongful death actions; indeed, if a difference were to be decreed, it would seem that it should cut just the other way—toward punishment in cases in which the victim has died. Certainly criminal law—another source of cognate rules regarding punishment—when distinguishing cases in which the victim dies, treats homicide as a basis for greater rather than lesser punishment.

It may be that all, or at least some, of the members of the court who joined in the majority opinion in *Mattiasovszky* would have rejected death of the victim as a critical factor in allowing punitive damages if they had thought that issue was squarely presented for decision. My criticism of the majority opinion is that it would have been better to be more candid and clear. Even this rather mild criticism is tempered, however, by recognition that efforts at clarification might have so divided the court that it would have been impossible to write an opinion explaining the outcome on clearly articulated grounds supported in common by a majority of the court. The policy arguments for clarity and candor in judicial opinions apply even in such cases, I submit, but they are surely less forceful when clarity and candor disclose only lack of guidance rather than guidance for the future.

VIII.

Real-world fact situations can be even more complex than ordinary law school hypotheticals. We began the present inquiry with a hypothetical adapted from the *Mattiasovszky* case, which was before the Supreme Court of Illinois in 1973. Now consider some elements of complexity added by an Illinois statute.

Section 77 of the Illinois Public Utilities Act¹⁴ grants "to the

punitive damages and instead urged legislative reform of the law relating to punitive damages. *The Standard*, THE NORTHEAST'S INSURANCE WEEKLY, March 31, 1978, at 1, 19.

¹³ See Part III, n.2 *supra*.

¹⁴ ILL. ANN. STAT., ch. 111½, § 77 (Smith-Hurd Supp. 1978).

persons . . . affected" by a willful violation of that act a cause of action for punitive damages. In *Churchill v. Norfolk & Western Ry. Co.*¹⁵ the majority of an intermediate appellate court in Illinois held that Section 77 creates "an independent cause of action—neither derivative nor engrafted upon the Wrongful Death or Survival Act."¹⁶ The dissenting judge joined the majority in certifying to the supreme court that the case is sufficiently important to deserve consideration by the higher court,¹⁷ and that is where the matter stands as this article goes to press.

The Illinois Public Utilities Act makes no statement explicitly about survival and death actions. The court's statement that the Public Utilities Act created a cause of action is, of course, the court's conclusion, not a reason. It is the court's choice about how to fill a gap in the statute expressed, however, in the traditional way of speaking, as if the statute had included a mandate on this specific point—as if the legislature had made the choice. Surely it makes sense for the same rule to apply in death actions based on Section 77 as in personal injury actions based on Section 77. The reason, however, is not that the statute says so. Rather, the best reason is one that applies to other injury and death actions as well as to those based on Section 77—the basic objectives of punitive damages apply with at least as great force in death actions as in personal injury actions.

IX.

Assume, now, that the hypothetical case stated in Part II arises in the legal context not of the more common form of wrongful death act, described in Part V, but instead in the more distinctive context of a Texas-style set of constitutional and statutory provisions.

Article XVI, Section 26, of the Constitution of the State of Texas provides that "[e]very person, corporation, or company, that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible in exemplary damages, to the

¹⁵ 46 Ill. App. 3d 781, 362 N.E.2d 356 (4th Dist. 1977). See also *National Bank of Bloomington v. Norfolk & Western Ry.*, 46 Ill. App. 3d 757, 362 N.E.2d 369 (4th Dist. 1977).

¹⁶ *Id.*

¹⁷ 46 Ill. App. 3d at 794, 362 N.E.2d at 366.

surviving husband, widow, heirs of his or her body, or such of them as there may be, . . .” Article 4671 of the Texas civil statutes¹⁸ provides for wrongful death actions. Article 4673 continues: “[w]hen the death is caused by the wilful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered.”¹⁹ Article 4675 adds that “[a]ctions for damage arising from death shall be for the sole and exclusive benefit of and may be brought by the surviving husband, wife, children, and parents of the person whose death has been caused or by either of them for the benefit of all. . . .”²⁰ Observe that parents are listed in this statute, though omitted from the constitutional listing of protected persons.

Question: In Texas, can the parents recover exemplary damages for death of their child by “homicide” committed by willful act, or omission, or gross neglect of the bus driver? Would the answer be the same if adult sons and daughters were seeking exemplary damages for death of their aged parent?

Certainly the constitution mandates that adult sons and daughters be entitled in appropriate circumstances to recover exemplary damages for the death of their parent. Does it mandate that parents be excluded from those entitled to recover exemplary damages for the death of a child? Or does it leave that question unanswered? I submit that a candid and fair reading of the constitutional provision compels the conclusion that it does not answer the question. To infer that anything not authorized was forbidden is to fall into the error of the undistributed middle.

If the question was not answered by the constitution, is it answered by Articles 4673 and 4675, or is it unanswered there as well, leaving a gap to be filled by courts? This is a more difficult question.

Article 4675 lists parents as well as “children.”²¹ If this does not mandate the same entitlement in parents as in children it surely helps to negate any argument that the statutes disqualify parents.

¹⁸ TEX. STAT. ANN. Art. 4671 (Vernon Supp. 1978).

¹⁹ *Id.*, Art. 4673.

²⁰ *Id.*, Art. 4675.

²¹ Probably “children” should be read as including adult sons and daughters at least, and perhaps grandchildren as well. Any ambiguity in this respect, however, bears little if any relevance to the present inquiry.

This article, however, speaks of actions for "damage," and one might read it as not applying to exemplary damages.²² Article 4673, on the other hand, explicitly authorizes exemplary damages but does not itself say who may recover. Perhaps one may make a respectable argument that the two articles together declare an entitlement for parents to be treated, as well as children, as claimants to exemplary damages, but it seems more likely that these two articles were not consciously designed to answer this question. A judge who takes the view recommended here is, in effect, concluding that this question is beyond the core mandate of the statute; under the guidelines suggested in Part VI, the question must be answered by the court, giving deference to principles and policies manifested in these constitutional and statutory provisions but looking also to other sources for guidance.

The present hypothetical problem differs from the actual problem confronting Texas courts because of the omission from the hypothetical of the history of these constitutional and statutory provisions and the history of judicial precedents that preceded and followed their enactment.²³ This paper does not explore the competing arguments that may be drawn from that history. I do submit one point, however, that should be considered as those competing arguments are evaluated. To attribute to the constitution or to the statutes a distinction—between the treatment of claims of exemplary damages by parents for the death of their child and claims of exemplary damages by sons and daughters for the death of their parent—in the face of a rather overwhelming consensus that we cannot find adequate policy justification for the distinction,²⁴ is a strikingly curious way of manifesting deference and re-

²² "Damage" is often used to mean harm, in contrast with "damages" in the sense of an allowable award of money. Thus, "damage" might be read as meaning that Article 4675, *supra* note 20, concerns actions for compensatory damages for harm, and not actions for exemplary damages. Surely one must have some unease, however, about drawing the inference that "damage" was used so precisely in this statute and with this consequence in view.

²³ See, e.g., *Morton Salt Co. v. Wells*, 123 Tex. 151, 70 S.W.2d 409, 410 (1934); *Winnt v. International & G.N. Ry. Co.*, 74 Tex. 32, 11 S.W. 907 (1889); *Houston & T. C. Ry. v. Baker*, 57 Tex. 419 (1882); *Houston & T. C. Ry. v. Cowser*, 57 Tex. 293 (1882); *Heil Co. v. Grant*, 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); *Scoggins v. Southwestern Elec. Serv. Co.*, 434 S.W.2d 376 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); *Fleming Oil Co. v. Watts*, 193 S.W.2d 979 (Tex. Civ. App.—Texarkana 1946, writ ref'd n.r.e.).

²⁴ See the expressions reported in Part III, n.2, *supra*.

spect for the constitutional electorate and the legislature. Would it not be more respectful to infer that they did not address this question but instead left it as a gap in the constitutional and statutory mandates to be filled by courts? And if some judges have in the past acted on the premise that they were bound to assume a constitutional or legislative answer, is it not time to reexamine that premise? There are, after all, relevant manifestations of principle and policy in our constitutions, both state and federal, in equal protection clauses. Distinctions that cannot be adequately explained on some policy ground surely violate the spirit at least, and perhaps the letter, of equal protection. A constitution, of all documents, should be interpreted as aiming for compliance with its own injunction of equal protection. It seems appropriate, too, that courts, in answering questions left to them, should be aiming not merely for the minimal evenhandedness and fairness among different persons that equal protection clauses demand, but for the more substantial adherence to evenhandedness and fairness that courts are free to achieve in their own doctrine.

X.

In preceding parts of this article it has been asserted, first, that survival and wrongful death acts and, when they exist, constitutional provisions bearing on death actions, like all other constitutional and statutory provisions have gaps; second, that filling gaps requires judicial choice; third, that in filling gaps the courts should aim for resolving the issue at hand so as to provide the best total set of rules, including those within the core area of the relevant constitutional and statutory provisions and other cognate rules of law, whatever their source; and fourth, that in doing so, the courts should weigh considerations of principle and policy underlying the various rules, as well as the rules themselves. Perhaps a fifth point is implicit in the fourth, but in any event it deserves explicit attention: choices are inevitably value-laden. It is better, I submit, to acknowledge this fact openly and to develop theories and methods for guiding and appropriately limiting these expressions of value than to pretend that judicial choices can be value-free.

The range of choice is not unfettered. Judges are not free to express their own personal values. The obligation of principled

adjudication implies principles that are acceptable more generally than to individuals or even to the group serving as judges at the time and place of decision. It implies an obligation on the part of judges to be guided by the manifestations of principle and policy in authoritative sources—chiefly constitutions, statutes and judicial precedents. Even if those manifestations are incomplete and imperfect, they nevertheless offer substantial guidance. Indeed, the guidance is so compelling that it dictates results in most cases. The law would lack essential certainty—for which, of course, there is compelling support in policy—if this were not so. In those less common cases—the kind that law teachers so often choose to use in casebooks, articles, and lectures—openly acknowledging that courts are engaged in making value-laden choices will contribute to a sharper focus on the policy issues and, in the end, wiser choices. Even though value choices, they also may and should be reasoned choices. When policy choices are thus openly debated, the reasoning in which we engage is not primarily deductive reasoning from assumed authoritative premises—the kind of reasoning in which choice is made first, in the election of authoritative premises, and only then is reason used to derive the outcomes that were implicit in the premises. Instead, the reasoning is primarily informative reasoning—the kind in which reason is used to develop the implications of alternative sets of premises and choice is deferred until it can be informed by a view of the whole array of alternative sets of premises and their consequences.²⁵

When courts are engaged in the inevitable enterprise of filling gaps in statutes, the value choices they make as legitimate representatives of society will be wiser as they are better informed by advocacy addressed explicitly to the competing principles, policies, and values at stake and as they are openly explained in judicial opinions.

Perhaps one who undertakes to evaluate the value choices of others—as we all do when we criticize judicial decisions—should be willing at least to decide the hypothetical case presented for discussion. I do not claim that there is only one “right” or “logical” answer to the hypothetical case stated in Part II. Indeed, the thesis

²⁵ For a more extended statement of this point, see *Entitlement and Obligation*, 46 U. CIN. L. REV. 1, 8-10, 42-43 (1977).

is instead that policy choices are involved and logic alone cannot direct those choices. I do submit, however, that the policy arguments that can be brought to bear upon this hypothetical case weigh heavily in favor of an affirmative answer—the court should approve an instruction allowing punitive damages upon supportable findings of willful or wanton wrong and a relationship appropriate to vicarious liability. Among the sources of support for these policy arguments are the statutory manifestations of a policy against treating death as an event conclusive against tort liability. This is not the end of the inquiry; in a particular legal context one must take account of the history of all the relevant enactments and the judicial precedents. That history should be read, however, in the spirit of the fourth guideline suggested in Part VI—with a realistic and candid view of the legislative process and without contrary-to-fact presumptions that fall into the error of the undistributed middle. It seems likely that in most legal contexts this spirit of examining sources of guidance will lead to the conclusion that only if the court is prepared to reexamine and overturn the precedents allowing punitive damages in like cases involving personal injury rather than death should it deny punitive damages here. For the moment at least—though for how long may be in doubt—it seems unlikely that a judge so inclined would be able to marshal a majority for overturning the well entrenched rule of allowing punitive damages in personal injury actions generally.

