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CONSTITUTIONAL LAW—DEATH—DENIAL OF PUNITIVE DAMAGES FOR WRONGFUL DEATH VIOLATES EQUAL PROTECTION.

On March 3, 1974, shortly after takeoff from Paris, France, a Douglas DC-10 passenger airplane owned and operated by Turkish Air Lines crashed, killing all on board.¹ As a result, 203 law suits involving 337 decedents were pending in California federal district court² seeking compensatory and punitive damages for wrongful death. California state courts, however, have repeatedly denied punitive damages in wrongful death actions.³ Because federal jurisdiction was based on diversity of citizenship, as well as on other grounds,⁴ the federal district court would have had to apply California state law and thus deny punitive damages.⁵ Three of the four defendants⁶ agreed to settle out of court if the punitive damages claim was waived,⁷ but the claimants brought a pretrial motion to challenge the constitutional validity of denying such punitive damages. Plaintiffs argued that allowing punitive damages for all other tort actions but not for the wrongful death of a human being was contrary to the uniform application of the laws required by the state constitution as well as by the equal protection provisions of the federal constitution.⁸ The federal district court held that deny-

1. The 346 killed included 13 crew members. *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 735 (C.D. Cal. 1975).

2. Of these suits, 191 were initiated in the Central District of California, while 10 were transferred from other districts for a multi-district litigation permitted by 28 U.S.C. § 1407 (1970). 399 F. Supp. at 736. The two other suits involved property damage.

3. See *Tarasoff v. Regents of the Univ. of Calif.*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976); *Pease v. Beach Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); *Doak v. Superior Court*, 257 Cal. App. 2d 825, 65 Cal. Rptr. 193 (1968); *Fox v. Oakland Con. St. Ry.*, 118 Cal. 55, 50 P. 25 (1897); *Lange v. Schoettler*, 115 Cal. 388, 47 P. 139 (1896).

4. The United States District Court claimed jurisdiction because of its overriding interest in the design and manufacture of aircraft and because all of the acts or failures to act were claimed to have occurred in California. California law governed under 28 U.S.C. § 1652 (1970). *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 749 (C.D. Cal. 1975).

5. A federal court basing its jurisdiction upon diversity of citizenship must apply the law of the forum state as interpreted by the appellate courts of that state. *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938).

6. The three defendants were McDonnell Douglas Corp., Turk Hava Yallari A.O., and General Dynamics, Inc. The claims against them were based upon products liability. The United States was the fourth defendant. Its alleged liability was based on issuing a certificate of airworthiness. *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975).

7. Plaintiffs who would not waive them would have to litigate both liability and damages. Such a litigation would necessarily involve the United States as one of the defendants, against whom no punitive damages could be recovered. *Id.* at 738. Because of little progress in settlement, the trial judge granted separate trials under Fed. R. Civ. P. 42 for suits against McDonnell Douglas and General Dynamics, and ordered that products liability issues be consolidated and that pre-trial discovery be commenced on the issue of punitive damages. *In re Paris Air Crash of March 3, 1974*, 69 F.R.D. 310 (1975).

8. *In re Paris Air Crash of March 3, 1974*, 410 F. Supp. 326 (C.D. Cal. 1976). Approximately one half of the claimants had by this time arrived at an agreed settlement figure for compensatory damages, having waived all claims for punitive damages. The trial judge, for reasons of comity with the California courts, where the constitutional questions were being raised for the first time in *Rosendin v. Avco Corp.*, No. 32999 (Ct. App. Cal., filed March 25, 1976), deferred any ruling until the state court had an opportunity to rule on the question then pending before it. 410 F. Supp. at 329. Furthermore, the judge held

ing punitive damages in actions for wrongful death had no rational basis and thus violated the equal protection provisions of both the California and United States Constitutions. *In re Paris Air Crash of March 3, 1974*, 427 F. Supp. 701 (C.D. Cal. 1977).

The common law did not recognize a wrongfully inflicted death as giving rise to a civil action to recover damages. Such a personal right of action was said to have died with the person.⁹ That was changed in the mid-nineteenth century by what is now commonly known as Lord Campbell's Act.¹⁰ That Act created a cause of action in favor of the personal representative of the deceased for the benefit of a certain class of persons for loss sustained by them through such wrongful death under circumstances which would have supported an action by the deceased, had he survived.¹¹ Today every American state has a statutory remedy for wrongful death.¹² Most of the states have modeled their statutes after Lord Campbell's Act.¹³ The remaining states have provided a remedy for wrongful death through their survival statutes.¹⁴

The measure of damages for wrongfully causing a person's death depends solely on the interpretation of the statute granting the wrongful death remedy.¹⁵ Among the statutes modeled after Lord Campbell's Act, there is a general consensus that the damages recoverable by decedent's beneficiaries are measured by their pecuniary loss as a result of his death.¹⁶ Because punitive damages are generally not

that deciding the question then was unnecessary, because there had not yet been a factual finding of oppression, fraud, or malice. *Id.*

After renewed motions, and after it became apparent that the constitutional issues would not be decided by the California courts, the federal district court considered itself compelled to decide the issues brought before it. *In re Paris Air Crash of March 3, 1974*, 427 F. Supp. 701 (C.D. Cal. 1977).

9. *E.g.*, *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). See also F. HARPER, LAW OF TORTS § 279 (1933); W. PROSSER, LAW OF TORTS § 127 (4th ed. 1971).

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

11. See F. HARPER, LAW OF TORTS § 279 (1933). Upon decedent's death, wrongful death statutes create a new cause of action, the purpose of which is to compensate the heirs of a decedent for losses they have sustained as a result of the decedent's death. Survival statutes, on the other hand, do not create a new cause of action. They continue the decedent's cause of action in order to allow recovery by the personal representative for the benefit of the decedent's estate of damages the decedent himself might have recovered had he survived. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 14.1 (1966).

12. W. PROSSER, LAW OF TORTS § 127 (4th ed. 1971).

13. See, *e.g.*, MINN. STAT. ANN. § 573.02 (West 1947), as amended, (West Cum. Supp. 1976); MONT. REV. CODES ANN. § 93-2810 (1964); N.D. CENT. CODE §§ 32-21-01 to 03 (1976); WIS. STAT. ANN. §§ 895.03-.04 (West 1966), as amended, (West Cum. Supp. 1977).

14. Those statutes, which preserve the cause of action which resulted from the death at the moment of the wrong, and include the damages which resulted from the death, are as follows: CONN. GEN. STAT. ANN. § 52-555 (West 1960), as amended, (West Cum. Supp. 1976); IOWA CODE ANN. § 611.20 (West 1950); N.H. REV. STAT. ANN. §§ 556:12-.14 (1974); S.C. CODE §§ 10-1951 to 10-1954 (1962); TENN. CODE ANN. § 20-607 (1955), as amended, (Cum. Supp. 1976).

15. RESTATEMENT OF TORTS § 925 (1939).

16. See F. TIFFANY, DEATH BY WRONGFUL ACT (2nd ed. 1893). The California court had construed its wrongful death statute to provide for only three basic elements of damages:

- (1) The present value of future contributions from the decedent to his surviving heirs;
- (2) the value of any personal service, advice or training that probably would have been given; and
- (3) the value of the decedent's society and companionship.

Carr v. Pac. Tel. Co., 26 Cal. App. 3d 537, 545; 103 Cal. Rptr. 120, 126 (1972). For a

designed to compensate a pecuniary loss, but are awarded over and above compensatory damages,¹⁷ it has commonly been held that they may not be recovered in wrongful death actions.¹⁸

While an increasing number of jurisdictions now allow the recovery of punitive damages in wrongful death cases, either by express statutory language¹⁹ or by judicial interpretation of their statutes,²⁰ the majority of states continue to deny the recovery of punitive damages in wrongful death actions while allowing them in other tort actions.²¹ One rationale employed by the proponents of this latter position is that because no right to recover for wrongful death ex-

discussion of the damages available under wrongful death statutes throughout the United States, see Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. Rev. 462 (1966).

17. Punitive damages, also known as exemplary damages, smart money, or vindictive damages, are awarded to a plaintiff on a finding of malicious, fraudulent, willful, wanton, or reckless conduct by a defendant, and generally for the purpose of punishing the defendant and deterring others from following his example. H. OLECK, *DAMAGES TO PERSONS AND PROPERTY* § 29 (1961); C. MCCORMICK, *DAMAGES* § 77 (1935).

There has been some criticism that punitive damages accomplish their theoretical goals of punishment and deterrence badly. See, e.g., Willis, *The Measure of Damages When Property is Taken by a Private Individual*, 22 HARV. L. REV. 419 (1909); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. Rev. 1158 (1966).

18. See note 21 *infra*, and cases cited therein. This continues to be the majority position. Although punitive damages are usually not awarded under wrongful death acts, they are commonly available under survival statutes. E.g., *Atlas Properties, Inc. v. Didich*, 226 So. 2d 684 (Fla. 1969); *Kern v. Kogan*, 93 N.J. Super. 459, 226 A.2d 186 (1967).

19. Those wrongful death statutes which expressly allow for punitive damages are as follows: KY. REV. STAT. ANN. § 411.130[6] (Baldwin 1977); MASS. GEN. LAWS ANN. ch. 229, § 2C (West 1958), as amended, (West Cum. Supp. 1977); MO. ANN. STAT. § 537.080 (Vernon 1953), as amended, (Vernon Cum. Supp. 1976); NEV. REV. STAT. § 41.080 (1973); N.M. STAT. ANN. § 22-20-1 (1954); N.C. GEN. STAT. § 28A-18-2 (1966), as amended, (Cum. Supp. 1975); S.C. CODE § 10-1951 (1962); TEX. REV. CIV. STAT. ANN. art. 4671 (Vernon Cum. Supp. 1976)

20. The following decisions have allowed punitive damages in wrongful death actions: *Blount Bros. Constr. Co. v. Rose*, 274 Ala. 429, 149 So. 2d 821 (1962). (all damages based upon degree of culpability of wrongdoer); *Boies v. Cole*, 99 ARIZ. 198, 407 P.2d 917 (1965); *Mode v. Barnett*, 235 Ark. 641, 361 S.W.2d 525 (1962); *Broughel v. S. New England Tel. Co.*, 73 Conn. 614, —, 48 A. 751, 753 (1901) (dictum); *Illinois Cent. R. Co. v. Fuller*, 106 Miss. 65, 63 So. 265 (1913); *Olsen v. Montana Ore Purchasing Co.*, 35 Mont. 400, 89 P. 731 (1907); *Moberg v. Scott*, 42 S.D. 372, 175 N.W. 559 (1919); *Pratt v. Duck*, 28 Tenn. App. 502, 191 S.W.2d 562 (1945); *Turner v. Norfolk & W.R. Co.*, 40 W. Va. 675, 22 S.E. 83 (1895).

21. Louisiana, Massachusetts, Nebraska, and Washington reject punitive damages in all tort actions unless granted by the statute. C. MCCORMICK, *DAMAGES* § 78 (1935). Thus an equal protection argument would not be applicable in those states. See notes 44 and 48 *infra*, and text accompanying.

Punitive damages for wrongful death actions have been barred by the following decisions: *Linge's Adm'r. v. Alaska Treadwell Co.*, 3 Alaska 9 (1906); *Moffit v. Tenney*, 17 Colo. 189, 30 P. 348 (1892); *Reynolds v. Willis*, 209 A.2d 760 (Del. 1965); Fla. E. Coast Ry. Co. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933); *Baird v. Chicago, Burlington & Quincy R.R. Co.*, 11 Ill. App. 3d 264, 296 N.E.2d 365 (1973); *Armbruster v. Chicago, R.I. & P. Ry. Co. v. Townsend*, 71 Kan. 524, 81 P. 205 (1905); *McKay v. New England Dredging Co.*, 92 Me. 454, 43 A. 29 (1899); *London Guar. & Accident Co. v. Balgowan S.S. Co.*, 161 Md. 145, 155 A. 334 (1931); *Currie v. Fiting*, 375 Mich. 440, 134 N.W.2d 611 (1965); *Hutchins v. St. Paul, M. & M. Ry. Co.*, 44 Minn. 5, 46 N.W. 79 (1890); *Kern v. Kogan*, 93 N.J. Super. 459, 226 A.2d 186 (1967); *Barret v. State*, 85 Misc. 2d 456, 378 N.Y.S.2d 946 (1976); *Hytti v. Smith*, 67 N.D. 425, 272 N.W. 747 (1937); *Cincinnati St. Ry. Co. v. Altemeier*, 60 Ohio St. 10, 53 N.E. 300 (1899); *Crossett v. Andrews*, 277 P.2d 117 (Okla. 1954); *Holmes v. Ore. & Cal. Ry. Co.*, 5 F. 523 (D. Ore. 1881); *Palmer v. Philadelphia, B. & W.R. Co.*, 218 Pa. 114, 66 A. 1127 (1907); *Platis v. United States*, 288 F. Supp. 254 (D. Utah 1968), *aff'd* 409 F.2d 1009 (10th Cir. 1969); *Wilson v. Whittaker*, 207 Va. 1032, 154 S.E.2d 124 (1967); *Prange v. Rognstad*, 205 Wis. 62, 236 N.W. 650 (1931).

Two wrongful death statutes expressly deny punitive damages. IDAHO CODE § 5-327 (1948), as amended, (Cum. Supp. 1977); R.I. GEN. LAWS § 9-1-8 (1970).

isted at common law, the right being purely statutory, the statutory language is subject to strict construction. Thus no damages may be recovered which are not provided for by the statute.²² Some jurisdictions that deny the recovery of punitive damages have used the rationale that because a new cause of action is created, the personal right of action for punitive damages terminates at death.²³ Other jurisdictions have denied the recovery of punitive damages in wrongful death cases on the ground that it is not the purpose of their wrongful death statute to punish the wrongdoer.²⁴

The *Paris Air Crash* court was the first court to consider the constitutional validity of denying the recovery of punitive damages in wrongful death actions.²⁵ Because California's wrongful death statute does not deny punitive damages on its face,²⁶ it was the interpretation given the statute by the courts which was challenged on state and federal equal protection grounds.²⁷

Stated generally, equal protection under the law guarantees that legislation will affect all equally, unless there is a valid state purpose in treating one class of persons unequally, and the classification furthers that purpose to some degree.²⁸

In determining whether a particular state action denies the right to equal protection under the law, both state and federal courts have generally adhered to a two-tiered system of review.²⁹ Statutory classifications infringing on so-called "fundamental" rights,³⁰ or dis-

22. Comment, *Punitive Damages in Wrongful Death*, 20 CLEV. ST. L. REV. 301, 304 (1917). *E.g.*, *Estrow v. Wilson*, 30 App. Div. 2d 646, 291 N.Y.S.2d 46 (1968).

23. Comment, *Punitive Damages in Wrongful Death*, 20 CLEV. ST. L. REV. 301, 304 (1971).

24. *Id.* at 304-05.

25. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 704 (C.D. Cal. 1977). It also appears that this is the first case in the United States to consider such an argument. At least one legal commentator, however, had suggested the constitutional aspects of the issue. See McClelland & Truett, *Punitive Damages in Wrongful Death Actions*, 8 U.S.F.L. REV. 585 (1974).

26. CAL. CIV. PROC. § 377 (West 1973) provides in part as follows:

When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs, and his dependent parents, if any, who are not heirs, or personal representatives on their behalf may maintain an action . . . under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under section 573 of the Probate Code. . . .

CAL. PROB. CODE § 573 (West 1956), as amended, (West Supp. 1977) is addressed to survival of actions and not to exemplary damages as a remedy. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 705 n. 6 (C.D. Cal. 1977). Of those jurisdictions that deny punitive damages in wrongful death actions, only Idaho and Rhode Island have denied them explicitly by statute. *Supra* note 20.

27. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 705 (C.D. Cal. 1977). The state constitutional provisions relied on were CAL. CONST. art. I, § 7(a), which is the general due process and equal protection provision analogous to U.S. CONST. amend. XIV, § 1, and CAL. CONST. art. IV, § 16(a), which provides as follows: "All laws of a general nature have uniform operation." 427 F. Supp. at 708.

28. *Id.* at 707.

29. See generally Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

30. Among those rights recognized as fundamental are the right to vote, the right to interstate travel, and the right to freedom of association. *Id.* at 951.

criminating against a "suspect" class, such as race,³¹ have been subject to the strictest judicial scrutiny. Those classifications must be shown to serve a "compelling state interest" or they will not be allowed to stand.³² All other classification considerations, that is, those dealing with economic or social legislation, have been judged under a "rational basis" standard which merely requires the statutory classification to have some relation to the purpose for which it was enacted.³³ The constitution is offended if the classification rests on grounds wholly irrelevant to the achievement of a valid state objective.³⁴

As a result of its reluctance to declare sex a suspect classification, the United States Supreme Court has created a third equal protection test to accommodate issues involving sex discrimination.³⁵ This test demands less than the strict scrutiny test, but considerably more than the rational basis test. Under this third test, the constitutionality of a classification is determined by looking at whether it "serve[s] important governmental objectives . . . [and is] . . . substantially related to achievement of those objectives."³⁶

The *Paris Air Crash* court stated that the denial of the recovery of punitive damages in wrongful death actions should not be analyzed under the rational basis test, as are economic regulations, simply because such damages are measured in monetary recovery.³⁷ On the other hand, analysis under the strict scrutiny test would not be appropriate because the right to punitive damages is not a recognized fundamental right.³⁸

The court in *Paris Air Crash* noted, however, that the public's right to be free from a recurrence of willful, oppressive, or malicious conduct by a tortfeasor³⁹ is a personal protection, substantially

31. Alienage and national origin have also been recognized as suspect classes. *Id.*

32. *Id.* See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Bd. of Elections*, 383 U.S. 663 (1966)

33. See, e.g., *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency v. N.Y.*, 336 U.S. 106 (1949). Early statements of the basic standard indicated it required a "fair and substantial" relation to a valid state objective, *Royster Guano Co. v. Va.*, 253 U.S. 412 (1920), but modern statements of the test have omitted the phrase "fair and substantial". E.g., *Dandridge v. Williams*, 397 U.S. 471 (1970). But see *Brown v. Merlo*, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973), where the phrase "fair and substantial" was used in striking down a guest statute on both state and federal grounds, even though the rational basis test was used.

34. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). The leniency of this test is illustrated by the fact that not since *Morey v. Doud*, 359 U.S. 457 (1957), has the United States Supreme Court struck down social or economic legislation on equal protection grounds.

35. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Reed v. Reed*, 404 U.S. 71 (1971).

36. *Craig v. Boren*, 426 U.S. 903, —, 97 S. Ct. 451, 457 (1976) (emphasis added).

37. Analogously, the award of damages in a civil rights case would not place the right upon which recovery is based in the area of economic legislation. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 708 (C.D. Cal. 1977).

38. See *supra* note 30.

39. See note 44 *infra.*, and text accompanying, for the purposes of allowing the recovery of punitive damages.

within the protection accorded fundamental rights.⁴⁰ The court, therefore, relied on the more recent equal protection test applied in sex discrimination cases.⁴¹

The *Paris Air Crash* court noted that wrongful death claimants constitute a class which is denied the right to recover punitive damages, while the right to recover punitive damages is granted by statute to all other tort claimants.⁴² The state objectives put forth in defense of the unequal treatment were that it protects against excessive recoveries, discourages marginal litigation, and encourages realistic settlements.⁴³

The purposes of allowing the recovery of punitive damages are to punish the tortfeasor and to deter others from similar outrageous conduct.⁴⁴ The recovery of punitive damages turns on the gravity of the tortfeasor's conduct rather than on the right to compensation. Thus, punitive damages should be recovered on the basis of malicious conduct alone, not the nature of the resulting harm.⁴⁵ If punitive

40. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 708 (C.D. Cal. 1977). The personal right of such protection belongs to the wrongful death claimant as a member of the public, which is separate and distinct from the decedent's rights and privileges. *Id.* at n. 14.

41. *Id.* at 708.

42. CAL. CIV. CODE § 3294 (West 1970) (emphasis added) provides as follows:

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

North Dakota has a similar statute, derived from the California provision, which provides for punitive damages in order to punish the defendant and to provide an example. N.D. CENT. CODE § 32-03-07 (1976).

43. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 705-06 (C.D. Cal. 1977).

44. *Id.* at 706. See *supra* note 42, and statute quoted therein. This is the position taken by the RESTATEMENT OF TORTS § 908 (1939), and is also the majority view. See 22 AM. JUR. 2d, *Damages* § 237 (1965). Damages for loss of companionship, solatium, and mental suffering are denied in wrongful death actions in various jurisdictions. They are different from punitive damages because they are compensatory, and thus vary according to the injury. Such damages could be excessive in death cases. Therefore, this equal protection argument is applicable only to punitive damages which are awarded solely as punishment and deterrence, not compensation. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 706 n. 10 (C.D. Cal. 1977).

Of those jurisdictions which deny punitive damages in wrongful death actions, and allow them in other tort actions, only Michigan and Georgia base the recovery of punitive damages on a theory of compensation, or mixed compensation and deterrence. See, e.g., *Oppenhuizen v. Wennersten*, 2 Mich. App. 288, 139 N.W.2d 765 (1966); GA. CODE ANN. § 105-2002 (1968).

45. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 707 (C.D. Cal. 1977).

An example used by the court, as quoted from *In re Paris Air Crash* of March 3, 1974, 410 F. Supp. 326 (C.D. Cal. 1976), illustrates the irrationality of denying exemplary damages in wrongful death actions.

Assume a 14-year-old boy was taking his goat to the county fair to win a prize, in a brand new station wagon, driven by his father, in which his mother was also riding; assume further that at an intersection with a green light in their favor, a car driven by a man who was being followed by the police, who had given him the signal to stop, willfully, wantonly, and maliciously drove through the red light at 80 miles an hour, hit the station wagon broadside, killing the father and the mother, breaking all four legs of the goat, completely demolishing the station wagon, and cutting off two fingers of one of the boy's hands.

Id. at 328.

In most jurisdictions, punitive damages would be allowed for all the injuries except for the death of the boy's parents, even though the same reckless conduct caused all

damages are to serve their purpose, their recovery should be allowed in all tort actions where malicious conduct is involved. Denying the recovery of punitive damages in wrongful death actions where the death is the result of malicious conduct does not in any way further the state's purposes in allowing the recovery of punitive damages in general, the punishment of the tortfeasor and the deterrence of similar conduct.⁴⁶

The *Paris Air Crash* court found no evidence that allowing the recovery of punitive damages in wrongful death actions would result in more excessive recoveries than in personal injury or property actions.⁴⁷ The recovery of punitive damages, being based upon outrageous conduct, varies in amount according to the degree of severity of the conduct, not the degree of compensation which should be awarded to wrongful death claimants.⁴⁸ In this particular case, total verdicts may be large because of the many deaths, not because the actions brought were wrongful death actions. "Any measure of punitive damages must be made by comparison of one death to one personal injury. The balance must involve defendants of equal wealth and guilty of identical oppression, fraud, or malice. So measured, the rationality of the discriminatory classification attempted here disappears."⁴⁹

In determining whether the denial of punitive damages violates the United States Constitution, it is apparent that there is no substantial relationship between denying the recovery of punitive damages in wrongful death cases and avoiding excessive recoveries.⁵⁰

the injuries, including the deaths. *Id.* This is so despite the fact that it is the oppressive conduct which is to be punished regardless of the type of compensation sought by the plaintiff. See *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 707 (C.D. Cal. 1977).

46. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 707 (C.D. Cal. 1977).

47. *Id.* This is not to say that the theory of punitive damages is without flaw. See *supra* note 17. However, even though one can perhaps validly argue that punitive damages serve as little more than a windfall to the plaintiff, the court said only that once they have been allowed for other tort actions, no more harm will be done by allowing them for wrongful death. 427 F. Supp. at 705.

48. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 709 (C.D. Cal. 1977). Many jurisdictions, however, require a showing of actual damages before punitive damages may be awarded, e.g., *McCurdy v. Hughes*, 63 N.D. 435, 248 N.W. 512 (1933), and some require that punitive damages have some relation to the amount of compensatory damages. See Annot., 17 A.L.R.2d 527 (1951). This would appear to mean not that the punitive damages are aimed to compensate, but that they insure that the punishment bears some relation to the harm done. And generally the harm done is indicative of how outrageous the conduct was. Therefore if punitive damages were larger when the result was death, rather than only property damage, it does not mean the damages would be excessive, nor that they were compensating for the death. It would mean only that conduct resulting in death is more serious than conduct resulting in property damage, and thus is deserving of greater punishment. See, e.g., *Coats v. Constr. and Gen. Laborer's Local No. 185*, 15 Cal. App. 3d 908, 916, 93 Cal. Rptr. 639, 643 (1971), where the court said as follows: "[I]n assessing . . . [punitive] . . . damages, . . . [the jury] . . . can properly consider . . . the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause. . . ."

49. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 708 (C.D. Cal. 1977).

50. *Id.* Had empirical data been presented to show that verdicts are or would be more excessive in wrongful death cases than personal injury or property actions, a rational basis for denying punitive damages would have been established, and probably a different result would have been reached. Absent any such evidence, the court looked only at the

Such damages would be no more excessive when wrongful death claimants are seeking compensation for their pecuniary loss than if the victim were seeking compensation for personal injury, if both losses were caused by the same tortious conduct.⁵¹ Yet punitive damages would be allowed for the personal injury action, but not for wrongful death.⁵²

There is also no substantial relationship between the denial of recovery of punitive damages and the discouragement of marginal litigations. The mere possibility of fraudulent litigation is not sufficient reason to deny the recovery of punitive damages in all wrongful death actions, for claimants in both meritorious and groundless actions would be denied recovery.⁵³

The argument that denying the recovery of punitive damages in wrongful death cases is a denial of equal protection may be even stronger under a state constitutional equal protection provision than under the federal constitution.⁵⁴ It has been held in several jurisdictions that a state equal protection provision may require a more stringent analysis than that required by the federal rational basis test.⁵⁵ Thus it is possible for a state action to comply with minimum federal standards, but still be ruled unconstitutional under the state equal protection provisions.⁵⁶

North Dakota's wrongful death statute is similar to the California statute interpreted by the court in *Paris Air Crash*.⁵⁷ The damages provision, as in the California statute, does not expressly deny punitive damages.⁵⁸ The North Dakota courts, however, has interpreted the statute to allow the jury, in estimating damages, to consider only the pecuniary loss sustained by the decedent's kindred, thus denying the recovery of punitive damages.⁵⁹ Yet North Dakota provides by

legislative purpose of punitive damages. *Id.* at 707.

51. *Id.*

52. See *supra* note 42 and text accompanying.

53. See *Dillon v. Legg*, 68 Cal. 2d 728, —, 441 P.2d 912, 923, 69 Cal. Rptr. 72, 83 (1968), cited in, *In re Paris Air Crash of March 3, 1974*, 427 F. Supp. 701, 708 (C.D. Cal. 1977).

54. See *supra* note 27.

55. See, e.g., *Serrano v. Priest*, II, 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 (1976); *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974).

56. *E.g.*, *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974). The state guest statute, seen as an economic regulation, was held to deny equal protection as guaranteed by the state constitution. The court noted that although there is a presumption of constitutionality unless it is clearly shown otherwise, it may be prepared to use a stricter test for equal protection than are the federal courts. *Id.* at 776-77.

57. N.D. CENT. CODE § 32-21-01 (1976), as amended, (Supp. 1977) reads in part as follows:

Whenever the death of a person shall be caused by a wrongful act and the act . . . is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof, then . . . the person who . . . would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tortfeasor. . . .

58. N.D. CENT. CODE § 32-21-02 (1976) provides as follows: "In an action brought under the provisions of this chapter, the jury shall give such damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery."

59. *Hyyti v. Smith*, 67 N.D. 425, 272 N.W. 747 (1937). The court held that nothing

statute for the recovery of punitive damages in all other tort actions, for the express purpose of punishing the defendant.⁶⁰

It thus appears that the court's reasoning in *Paris Air Crash* would be applicable to a similar argument in North Dakota. It does not appear likely, however, that a North Dakota court would strike down the practice of denying punitive damages for wrongful death on federal constitutional grounds.⁶¹ But the North Dakota Supreme Court has stated that although it may not strike down a discriminatory classification on federal grounds, the state constitution may require the application of a stricter equal protection test.⁶² It thus appears that the North Dakota constitution would provide a stronger basis for the result reached in the *Paris Air Crash* case than would the federal constitution.

The court in *Paris Air Crash* may have been incorrect in using the equal protection test it did. It does not appear that the right to punitive damages is akin to a recognized fundamental right to the extent sex is akin to a suspect class.⁶³ Therefore the substantial relationship test, developed as a compromise so that sex would not be viewed as a suspect classification, should not be used in reviewing a classification of considerably less importance. The same result could have been reached by applying the rational basis test. Even though that test presumes a social or economic regulation to be constitutional, the presumption is not conclusive.⁶⁴ An economic or social welfare regulation will not be allowed to stand when there is no realistic relationship between the discriminatory classification and the state objectives alleged.⁶⁵ It is doubtful that a realistic relationship could be shown between denying the recovery of punitive damages in wrongful death actions and the alleged state objectives.

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was to be allowed for mental suffering or solatium, and punitive damages were not recoverable unless given by the statute. *Accord*, *Dahl v. N. Am. Creameries, Inc.*, 61 N.W.2d 916 (N.D. 1953).

60. *See supra* note 42, and statutes cited therein.

61. *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974). The court expressed disagreement with *Brown v. Merlo*, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973), in which the California court struck down their guest statute on state and federal constitutional grounds. The court in *Johnson* felt that the North Dakota guest statute may have complied with minimum federal equal protection standards. *Johnson v. Hassett*, 217 N.W.2d 771, 780 (N.D. 1974).

62. *Johnson v. Hassett*, 217 N.W.2d 771, 776-77 (N.D. 1974).

63. *Frontiero v. Richardson*, 411 U.S. 677 (1973), where a plurality of the Court ruled that classifications based on sex contained all the characteristics of a suspect class so as to be deserving of strict scrutiny. This is the closest the Court has come to designating sex as a suspect class. *See supra* note 35, and text accompanying.

64. *In re Paris Air Crash* of March 3, 1974, 427 F. Supp. 701, 707 n. 12 (C.D. Cal. 1977). *See also* *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955). Although in the above cases, the economic statutes were not struck down, the Court justified its holdings on the ground that valid state objectives were served by the statutes.

65. *See Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). *See generally* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).