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## DOUBLE RECOVERY FOR WRONGFUL DEATH BY PUBLIC CARRIER?

MARY ALICE HIGBEE

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In the April, 1951, issue of *Dicta* appears an article by Frances Hickey Schalow of the University of Denver College of Law, bearing the above title, sans italics.<sup>1</sup>

What is Mrs. Schalow's hypothetical Mary Doe, or the very real Mrs. Dodd (plaintiff in No. 2725, Routt County) attempting to recover? It she asserting two causes of action? The answer is that she is not. Mrs. Dodd, or Mary, sues for the recovery of compensatory damages under C.S.A. Ch. 50, Secs. 2 and 3, (1935) and punitive or exemplary damages under Section 1 of Chapter 50. No right to double recovery is asserted, nor is it claimed that there exist two causes of action.

How far are our Colorado courts bound by the Missouri decisions? They are not bound at all, because Colorado has previously refused to follow earlier Missouri constructions of both the penal and compensatory sections. Let us first compare Missouri and Colorado rulings on the penal section, our Section 1. *Frederic vs. D. and R. G. R. R. Co.*,<sup>2</sup> decided April 6, 1914, says:

". . . indeed, the fact that recovery may be had under it (Sec. 1) without proof whatever of damages conclusively establishes that it is penal.

. . . Since we hold the statute penal, it was improper to allow plaintiffs to prove damages because of the loss of services of and support by their son. . . . The amount of recovery depends solely on the degree of culpability of the defendant."

Two years previously, March 6, 1912, the Missouri court decided the case of *Hegberg vs. St. Louis and S. F. R. Co.*<sup>3</sup> and some years prior thereto, the case of *Boyd vs. Ry.*<sup>4</sup> While much of what these cases hold has been overruled by the recent case of *Cooper vs. Kansas City Public Service Co.*<sup>5</sup> the *Hegberg* case and others following it, including the *Cooper* case, approve compensatory damages under the penal section. The *Hegberg* case says:

The decision in the *Boyd* case, supra, declared evidence under the so-called penal section competent to show the amount of compensatory damages the widow had sustained by reason of the wrongful death of her husband. We see no valid reason why the same rule would not apply to beneficiaries under the fourth clause of the Section (Sec. 1) as well as to those under the preceding clauses.

The case thus holds that compensatory damages are recoverable under the penal section by any proper plaintiff.

<sup>1</sup> "Double Recovery for Wrongful Death by Public Carrier?" 28 *Dicta* 131.

<sup>2</sup> 57 Colo. 90, 140 P. 463.

<sup>3</sup> 147 SW 192 (1912).

<sup>4</sup> 236 Mo. 54, 139 SW 561.

<sup>5</sup> 202 SW 2d 42 (1947).

The *Cooper case*<sup>6</sup> holds that a plaintiff may elect to sue under either section, saying:

... we have held (Sec. 1) permits them to take into consideration plaintiff's pecuniary injury. (citing cases) ... The Grier case (Grier vs. K. C. and C. C. and St. J. R. Co., 286 Mo. 523, 228 SW 454, 458) says that in fixing the penalty the jury 'should take into consideration both the facts constituting the negligence or wrongful act, with the attending mitigating and aggravating circumstances, and those showing the pecuniary loss inflicted.' The Treadway case affirmed this and only held that a jury in its discretion might disregard these facts in a penalty case.

It is obvious that Missouri and Colorado regard their nearly identical penal sections as saying two different things: Colorado says that the penal section is wholly penal, that no element of compensation may be allowed to enter into damages recovered under it; Missouri declares that while the statute is penal in form, its purpose is to compensate the plaintiff and plaintiff's pecuniary loss is an issue.

We must now consider whether Colorado and Missouri construe the compensatory sections similarly. The question is whether these sections are purely compensatory, or whether they are both compensatory and punitive. Determinative of the issue is the construction placed upon Section 3:<sup>7</sup>

... and in every such action the jury may give such damages as they may deem fair and just, ... with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; *and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default.* (Italics supplied).

Colorado has said, in *Moffat vs. Tenny*:<sup>8</sup>

Since mitigating circumstances relating to the act itself do not justify an assessment of damages less than compensatory, it is not reasonable to suppose that the aggravating circumstances contemplated by the statute are such as would justify an assessment of damages more than compensatory ... Taken in connection with the preceding language of the section, we are constrained to hold that the words 'mitigating and aggravating circumstances attending such wrongful act' etc., contemplate circumstances not relating to the wrongful act itself, but such as affect the actual damages suffered by the surviving party entitled to sue, either by way of diminishing or enhancing the same. *Hence, the section allows compensatory damages only* (Italics supplied.)

Missouri, however, takes a completely different view of this section. So, in *Gray vs. McDonald*,<sup>9</sup> an earlier case than *Moffat vs. Tenny*,<sup>10</sup> the Missouri court said:

<sup>6</sup> *Ibid.*

<sup>7</sup> C. S. A., Ch. 50, Sec. 3 (1935).

<sup>8</sup> 17 Colo. 189, 30 P. 348 (1892).

<sup>9</sup> 104 Mo. 303, 16 S. W. 398 (1891). See also, 94 ALR 384, 389, notes 12 and 13.

<sup>10</sup> *Supra*, note 8.

The real question is whether exemplary damages are to be allowed in any case where the suit is based upon the before mentioned section . . . Exemplary damages were allowed in many actions of tort before the passage of the statute in question, and aggravating and mitigating circumstances were admitted in evidence as affecting the amount of such damages . . . The expressions aggravating and mitigating circumstances were well known to the law when used by the legislature, so that the statute just quoted must mean that in these actions . . . *the party suing may recover, not only actual, but also exemplary damages.* (Italics supplied).

Missouri, then, in cases decided prior to Colorado decisions on the points, said that in actions under either the penal or the compensatory sections, the plaintiff may recover both actual and punitive damages. Colorado ignored those opinions, and has held that under the penal section, the plaintiff may recover only punitive damages, and the compensatory sections allow only for the recovery of pecuniary loss.

Mrs. Dodd or Mrs. Schalow's Mary sought to recover only what Missouri would permit under either section. Because of Colorado's construction it is necessary to proceed under both in order to recover actual and exemplary damages. Mrs. Schalow, Judge A. M. Gooding of the 14th Judicial District, and I conclude that there is but one cause of action. Judge Gooding and I conclude that under separate statutory authorizations, the plaintiff in an action against a common carrier may recover both compensatory and punitive damages in Colorado.

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#### PERSONALS

Mr. William Stover and Mr. William Allen have formed a partnership for the general practice of law with offices in the Poudre Valley National Bank Building at Fort Collins. Mr. Stover and Mr. Allen were formerly associated with Mr. Herbert Alpert, prominent member of the Larimer County Bar and of the Colorado Bar Association, who passed away recently.

Mr. Paul E. Wencke, former Larimer County Republican chairman and former FBI agent, was appointed County Judge to fill the vacancy created by the resignation of Judge Harry H. Hartman of Larimer County.

Mr. Waldo Riffenburgh and Mr. Ralph Harden announce the formation of a partnership with offices in the Poudre Valley National Bank Building in Fort Collins for the general practice of law.