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6-1-1953

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### Recommended Citation

Arthur J. Franza, *Factors Affecting Punitive Damages*, 7 U. Miami L. Rev. 517 (1953)

Available at: <http://repository.law.miami.edu/umlr/vol7/iss4/7>

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the mistake was inexcusable.<sup>54</sup> The fact that the trial court overlooked the error did not release the attorney from responsibility to his client.

Not only is the attorney liable for his own lack of skill and negligence but, under the general rules of partnership and agency, he is liable also for that of his partners<sup>55</sup> and of his clerks.<sup>56</sup> If a member of a firm of attorneys is acting within the scope of his employment, the partners are jointly and severally liable for his acts<sup>57</sup> with or without their knowledge of participation.<sup>58</sup> It is obvious, therefore, that the attorney should use extraordinary care in selecting his partners and clerks.

The standards set by the legal profession are high. It is apparent from this discussion that the courts will not hesitate to hold the attorney liable for failure to maintain these standards. While preparing this paper the problems herein were discussed with several young attorneys and law students. The general consensus of opinion was to the effect that the problem would be adequately solved by insurance coverage. True, this would protect both the client and the attorney from financial loss, and, by all means, the client's interest should be so protected. But the immediate financial loss is not the only problem involved. No insurance can pay for the public humiliation suffered by the attorney nor repair his ruined reputation. It cannot replace the loss of dignity to the profession as a whole caused by the negligence of a few of its members. While the field of preventative law has not progressed as far as the field of preventative medicine, the interests of the client, the attorney and the profession would be greatly advanced if the individual attorney would practice preventative law on himself.

NICHOLAS A. CRANE

## FACTORS AFFECTING PUNITIVE DAMAGES

### INTRODUCTION

The doctrine of punitive damages is so well settled that a dissertation on its *raison d'etre* would be of little value. Briefly, however, exemplary or punitive damages are generally awarded when the wrong has been committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation or with reckless indifference for the rights of others.<sup>1</sup> Punitive damages have been awarded in contract actions, but such awards are relatively rare. Generally, punitive damages are not recoverable in a breach of

54. *Armstrong v. Adams*, 102 Cal. App. 677, 283 Pac. 871 (1929).

55. *CRANE ON PARTNERSHIPS* § 54 (2d ed. 1952); 3 *SHEARMAN AND REDFIELD ON NEGLIGENCE* § 586 (Rev. ed. 1941).

56. *Armstrong v. Adams*, 102 Cal. App. 677, 283 Pac. 871 (1929).

57. *Rouse v. Pollard*, 130 N.J. Eq. 204, 21 A.2d 801 (Ct. Err. & App. 1941); *Riley v. Larocque*, 163 Misc. 423, 297 N.Y. Supp. 756 (Sup. Ct. 1937).

58. *Priddy v. MacKenzie*, 205 Mo. 181, 103 S.W. 968 (1907); *Model Building and Loan Ass'n v. Reeves*, 201 App. Div. 329, 194 N.Y. Supp. 383 (1st Dep't 1922). *But cf. Wildermann v. Wachtell*, 149 Misc. 623, 267 N.Y. Supp. 840 (Sup. Ct. 1933).

1. *Dr. P. Phillips & Sons v. Kilgore*, 152 Fla. 578, 12 So.2d 465 (1943).

contract action unless the act or omission constituting the breach also amounts to a tort.<sup>2</sup> Theoretically, punitive damages are awarded in tort over and above the actual or compensatory damages.<sup>3</sup>

#### JUSTIFICATION

The theories upon which the doctrine of punitive damages has been sustained are varied and conflicting. The majority view is well expressed in a leading Florida case, *Smith v. Bagwell*, wherein it was said that "exemplary damages are such as blend together the interests of society and of the aggrieved individual," and not only recompense plaintiff but also punish and deter the offender and act as an example and warning to the community.<sup>4</sup> An Alabama case<sup>5</sup> qualifies this somewhat in opining that punitive damages act as punishment and as a restraint on the transgressor for the benefit of society rather than as a deterrent to the actual offender.

Other jurisdictions hold that punitive damages are not punitive at all,<sup>6</sup> but rather are compensatory in nature; and that they are given for non-pecuniary losses such as injured feelings, damaged reputations, humiliation and shame. Damages are increased because the injury is aggravated by the added humiliation. Acts of indignity to an individual which damage his reputation give an added "smart" to the injury,<sup>7</sup> and for this reason punitive damages are sometimes referred to as "smart money".

In a landmark case, *Fay v. Parker*,<sup>8</sup> it was held that punitive damages were actually given for mental anguish and pain, not because of the questionable punitive deterrent but rather because mental suffering was not included in computing compensatory damages.

Still other jurisdictions allow punitive damages only insofar as it benefits the public interest and not for the purpose of enriching the injured party.<sup>9</sup> In a novel case punitive damages were given as a *reward* for public service in bringing the wrongdoer to justice.<sup>10</sup>

Some states do not favor punitive damages except where allowed by statute<sup>11</sup> — alienation of spouse's affection being one of the grounds enumerated.<sup>12</sup> Others do not recognize punitive damages in any sense. Following the Code Law of France, Louisiana does not allow infliction of vindictive, punitive or exemplary damages in civil cases.<sup>13</sup> Massachusetts,<sup>14</sup> Nebras-

2. *Hood v. Moffet*, 109 Miss. 757, 69 So. 664 (1915).

3. *Ross v. Gore*, 48 So.2d 412 (Fla. 1950).

4. *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12, 14 (1882).

5. *Bowles v. Lowery*, 51 Ala. App. 555, 59 So. 696 (1912).

6. *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668 (1875).

7. *Haveland v. Chase*, 116 Mich. 214, 72 Am. St. Rep. 519 (1898).

8. *Fay v. Parker*, 53 N.H. 342, 16 Am. Rep. 270 (1872).

9. *Yazoo & M.V. R.R. v. Hardie*, 100 Miss. 132, 55 So. 967 (1911).

10. *Neal v. Newberger Co.*, 154 Miss. 691, 123 So. 861 (1929).

11. *Pegram v. Stortz*, 31 W. Va. 220, 6 S.E. 485 (1888).

12. *Moellur v. Moellur*, 55 Mont. 30, 173 Pac. 419 (1918).

13. *Moore v. Blanchard*, 216 La. 253, 43 So.2d 599 (1949); *Gugert v. New Orleans Independent Laundries*, 181 So. 653 (La. App. 1938); *Vincent v. Morgan's Louisiana & T. R.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917).

14. *Lowell v. Massachusetts Bonding Ins. Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943).

ka<sup>15</sup> and Washington<sup>16</sup> subscribe to the Louisiana view, declaring that there is no justification for punitive damages and they are, therefore, unsound in principle and dangerous in practice. Why exact a vindictive pound of flesh when compensatory damages make plaintiff whole?<sup>17</sup>

The Federal courts follow the majority view in assessing punitive damages;<sup>18</sup> but under the Federal Tort Claims Act,<sup>19</sup> although the United States is liable in the same manner and to the same extent as an individual, this waiver of immunity does not extend to and include punitive damages.<sup>20</sup>

The courts have difficulty in labeling that type of act for which punitive damages are assessable. Abstractions such as wantonness, malice and gross negligence have frequently been used.<sup>21</sup> An Alabama case said, "To authorize punitive damages there must be gross negligence, an entire want of care,"<sup>22</sup> while an earlier case said the act need not be wanton as long as it aggravates the plaintiff.<sup>23</sup>

An early Florida case held that gross negligence not amounting to wanton indifference will not warrant exemplary damages. However, a later case seemed to dispense with the necessity of a label and held that the character or type of negligence needed to sustain a verdict of punitive damages is that negligence which is sufficiently culpable *under the circumstances* to permit such an award.<sup>24</sup> To those who accept punitive damages that, at least, seems to be a step forward (albeit in the wrong direction).<sup>25</sup> Another Florida case held that malice was a necessary ingredient in a tort committed under a mistaken supposed right before punitive damages could be awarded.<sup>26</sup> *Query*: Can you be mistakenly malicious since the terms are diametrically opposed?

Punitive damages, unlike compensatory damages, are not given as a matter of right,<sup>27</sup> but only in the discretion of the jury.<sup>28</sup> Such discretion must be reasonably used and not abused.<sup>29</sup>

#### RELATION BETWEEN COMPENSATORY AND PUNITIVE DAMAGES

The courts are confusingly divergent as to what relation punitive dam-

15. Winkler v. Roeder, 23 Neb. 706, 8 Am. St. Rep. 155 (1888).

16. Walker v. Gilman, 25 Wash.2d 557, 171 P.2d 797 (1946); Spokane Truck and Dray Co. v. Hoefler, 2 Wash. 45, 25 Pac. 107 (1891).

17. *Ibid.*

18. Washington Gaslight Co. v. Lansden, 172 U.S. 534 (1898); Scalise v. National Utility Service, 120 F.2d 938 (5th Cir. 1941).

19. 28 U.S.C. § 1346(b) (1946).

20. 28 U.S.C. § 2674 (1946).

21. Dr. P. Phillips & Sons v. Kilgore, 152 Fla. 578, 12 So.2d 465 (1943).

22. Alabama Power Co. v. Dunlap, 240 Ala. 568, 200 So. 617 (1941).

23. Birmingham Waterworks Co. v. Brooks, 16 Ala. App. 209, 76 So. 515 (1917).

24. Russ v. State, 140 Fla. 217, 191 So. 296 (1939).

25. See criticism in conclusion.

26. Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So. 214 (1936).

27. Florida East Coast Ry. v. McRoberts, 111 Fla. 278, 149 So. 631 (1933).

28. Waterworks Co. v. Keiley, 2 Ala. App. 629, 56 So. 838 (1911).

29. Cox v. Birmingham Ry., Light & Power Co., 163 Ala. 170, 50 So. 975 (1909); Coleman v. Pepper, 159 Ala. 310, 49 So. 310 (1909); McDonald v. Stone, 114 Fla. 608, 154 So. 327 (1934).

ages must bear to actual or compensatory damages. Is it proper to award punitive damages where only nominal damages have been won? It has been held that nominal damages are enough to support punitive damages, as long as there has been an invasion of one's right.<sup>30</sup> The right invaded, however, seems to have been refined somewhat. Opprobrious language, such as "go to hell", spoken over the telephone was not enough of an invasion of one's right to support punitive damages although nominal damages were awarded.<sup>31</sup>

Other courts have held that punitive damages will not be allowed if no actual damages are shown.<sup>32</sup> The Florida Supreme Court has so held;<sup>33</sup> but a federal court, in applying Florida law, has held otherwise. The court said that in Florida, as in the federal courts, punitive damages need not bear any relation to, nor be dependant upon, actual damages.<sup>34</sup> Subsequently, the same court said punitive damages must bear *some* relation to actual damages.<sup>35</sup>

Other jurisdictions hold that punitive damages must be in some *proportion* to compensatory damages,<sup>36</sup> and a verdict of \$557.50 actual damages, plus \$5,000.00 punitive damages, was considered excessive and out of proportion.<sup>37</sup> As yet, the courts have been unable to agree as to the proper formula for determining this relationship.

#### MITIGATING FACTORS

##### *Double Jeopardy*

The Constitution of the United States and similar provisions in state constitutions provide that "no person shall be put in jeopardy of life or liberty twice for same offense. . . ."<sup>38</sup> The majority of jurisdictions interpret this section to mean two *criminal* prosecutions. Punitive damages are not precluded merely because the defendant has been prosecuted criminally for the same offense.<sup>39</sup> Punitive damages are given in a civil action for the wrong committed against the individual specifically, while in a criminal proceeding, the state punishes the defendant for the wrong committed against society generally.

An early Florida case held that a verdict of punitive damages for a wrong also punishable as a criminal offense does not subject the defendant to double jeopardy and is, therefore, not unconstitutional.<sup>40</sup> Other courts

30. *Goodson v. Stewart*, 154 Ala. 660, 46 So. 230 (1908).

31. *Western Union Telegraph Co. v. Jennings*, 10 Miss. 673, 70 So. 830 (1916).

32. *Clark v. McClurg*, 215 Cal. 270, 9 P.2d 505 (1931); *Livingston v. Utah-Colo-rado Land & Live Stock Co.*, 106 Colo. 278, 103 P.2d 684 (1940); *McCain v. Cochran*, 153 Miss. 237, 120 So. 823 (1929).

33. *McClain v. Pensacola Coach Corp.* 152 Fla. 876, 13 So.2d 221 (1943).

34. *Scalise v. National Utility Service*, 120 F.2d 938 (5th Cir. 1941).

35. *Crowell-Collier Pub. Co. v. Caldwell*, 170 F.2d 941 (5th Cir. 1948).

36. *Gordon v. McLearn*, 123 Ark. 496, 185 S.W. 803 (1916); *Hunter v. Kansas City Ry.*, 213 Mo. App. 233, 248 S.W. 998 (1923).

37. *Bascom W. Pendleton v. Norfolk & Western Ry.*, 82 W.Va. 270, 95 S.E. 941 (1918).

38. U. S. CONST. AMEND. V.

39. *Brown v. Evans*, 109 U.S. 180 (1883).

40. *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12 (1882).

hold that where a defendant has been punished criminally it ought to at least mitigate punitive damages.<sup>41</sup> Connecticut limits the amount to the actual expenses incurred in maintaining the action.<sup>42</sup> Others, although conceding that punitive damages do not subject an individual to double jeopardy within the meaning of the judicial interpretation of double jeopardy, reason that there is no logical,<sup>43</sup> just,<sup>44</sup> or sufficient basis for allowing them, as such damages are repugnant to every sense of justice.<sup>45</sup> After the defendant has already been criminally punished, another trial, although civil in nature, "is in substance putting the accused in jeopardy twice for the same offense."<sup>46</sup> The State of Indiana proclaims it unconstitutional outright and within the prohibition of the double jeopardy clause.<sup>47</sup> Where a state provides a punishment through criminal prosecution no punitive damages will be awarded, since one violation should logically result in only one punishment.<sup>48</sup>

#### *Economic Status of Defendant*

Since the purpose of punitive damages is to punish, the financial condition of the defendant should be considered to determine what would be a proper punishment for his wrongful act.<sup>49</sup> Punitive damages of \$1,000.00 assessed against a millionaire would hardly be considered punishment, whereas a like amount assessed against another might be intolerable.<sup>50</sup> Inconsistently, the courts have not taken the converse into consideration. The fact that a defendant may not have any property at all has not of itself lessened the amount awarded.

Where there are joint tortfeasors, the wealth of one or more of them has also been taken into consideration.<sup>51</sup> Since punitive damages are assessed against the defendants jointly rather than severally this has led to injustice to those less able to pay, thereby imposing an unjust burden on them.<sup>52</sup> Accordingly, the Supreme Court of the United States has held that the comparative wealth of one or more of the joint tortfeasors shall *not* be taken into account.<sup>53</sup> The wealthy defendant, then, pays less by deliberately associating with joint tortfeasors less affluent. If punishment is actually the basis for punitive damages, why have not the courts imposed exemplary

41. *Saunders v. Gilbert*, 156 N.C. 463, 72 S.E. 610 (1911).

42. *Craney v. Donovan*, 92 Conn. 236, 102 Atl. 640 (1917).

43. *Taber v. Huston*, 5 Ind. 332, 61 Am. Dec. 96 (1854); *Winkler v. Roeder*, 23 Neb. 706, 8 Am. St. Rep. 155 (1888).

44. *Patterson v. New Orleans & C.R. Light & Power Co.*, 110 La. 797, 34 So. 782 (1903).

45. *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072 (1891).

46. 2 SUTHERLAND, DAMAGES, 1116 (3d ed. 1903).

47. *Borkenstein v. Schrach*, 31 Ind. App. 220, 67 N.E. 547 (1903).

48. *Taber v. Huston*, 5 Ind. 332, 61 Am. Dec. 96 (1854).

49. *White v. White*, 76 Kan. 82, 90 Pac. 1087 (1907); *Miller v. Pearce*, 86 Vt. 332, 85 Atl. 620 (1913).

50. *Pelton v. General Motors Accept. Corp.*, 139 Ore. 198, 7 P.2d 263 (1932).

51. *Oskamp v. Oskamp*, 20 Ohio App. 349, 152 N.E. 208 (1925).

52. *Woodhouse v. Woodhouse*, 99 Vt. 91, 130 Atl. 758 (1925).

53. *Washington Gaslight Co. v. Lansden*, 172 U.S. 534 (1898).

damages severally against each joint tortfeasor based upon his ability to pay?

#### *Provocation*

The acts of a plaintiff which provoke the defendant's wrongful act—since the courts recognize the frailty of human passions<sup>54</sup>—can mitigate the amount of punitive damages defendant has to pay.<sup>55</sup> The acts or words of provocation must be reasonably connected with the defendant's acts, however.<sup>56</sup> If enough "cooling time" has elapsed between the provocation and the wrongful act, punitive damages will not be mitigated.<sup>57</sup> One day was held to be sufficient cooling time,<sup>58</sup> and under certain circumstances thirty minutes was sufficient.<sup>59</sup>

#### *Cost of Living*

Although the courts say that compensatory damages supposedly make the plaintiff whole, still, in awarding punitive damages for death actions<sup>60</sup> or permanent personal injuries,<sup>61</sup> the courts take into consideration the changes in cost of living and in the purchasing power of money. The dependents relied on the support of the deceased. Since his wages would reflect the changes so ought the damages, as the loss suffered, theoretically, is the sum total of the deceased's earning power. This type of reasoning pinpoints the fact that the distinction between punitive and compensatory damages may be of slight consequence,<sup>62</sup> or of no consequence whatsoever.

#### ARE PUNITIVE DAMAGES NECESSARY?

Some courts, in applying the principle of punitive damages, follow the rule because of precedent but deplore the fact that it is the rule.<sup>63</sup> Others, admitting there is no logical justification for punitive damages, claim that whatever the abstract reason is (implying there is no reason, or if there is, it is beyond common understanding) it must be followed, until the legislature changes it.<sup>64</sup>

The jurisdictions that do not favor punitive damages argue that a principle which permits a plaintiff to be unjustly enriched when he has already been made whole at the expense of the defendant in the guise of warning or punishment is unsound, no matter what the public advantages may be, if any.<sup>65</sup>

Punitive damages were originally given to cover those injuries, which were not included in the computation of actual damages, *i.e.*, mental suffering and anguish. What is the purpose of punitive damages today, where

54. *Keiser v. Smith*, 71 Ala. 481, 46 Am. Rep. 342 (1882).

55. *Bond v. Williams*, 279 Mo. 215, 214 S.W. 202 (1919); *Royer v. Belcher*, 100 W. Va. 694, 131 S.E. 556 (1926).

56. *Webb v. Brown*, 63 Fla. 306, 58 So. 27 (1912).

57. *Davis v. Collins*, 69 S.C. 460, 48 S.E. 469 (1904).

58. *Grovan v. Kukhuch*, 59 Iowa 18, 12 N.W. 748 (1882).

59. *Lovelace v. Miller*, 150 Ala. 422, 43 So. 734 (1907).

60. *O'Meara v. Haiden*, 204 Cal. 354, 268 Pac. 334 (1928).

61. *McCreeedy v. Fournier*, 113 Wash. 351, 194 Pac. 398 (1920).

62. *Bannister v. Mitchell*, 127 Va. 578, 104 S.E. 800 (1920).

63. *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582 (1878).

64. *Boetcher v. Staples*, 27 Minn. 308, 38 Am. Rep. 295 (1880).

65. *Stewart v. Maddox*, 63 Ind. 51 (1878).

these injuries *are* included in awarding compensatory damages?<sup>66</sup> Why punish for punishment's sake?

This is especially true when the defendant has already been punished in a criminal prosecution. Double punishment ought to be allowed only if it serves a justifiable purpose. If the defendant has already been punished in a criminal proceeding it is unfair to punish him again in a civil action. The civil penalty can exceed the maximum criminal penalty imposed by statute,<sup>67</sup> and yet a smaller weight of evidence is required to support punitive damages, since "the doctrine of reasonable doubt is replaced by a preponderance of evidence."<sup>68</sup> Different rules of evidence apply, and the privileges<sup>69</sup> the defendant can invoke in a criminal trial are not available to him in a civil action.

In assessing punitive damages, the rules and formulae of damages are forgotten. The jury has the power to make the law of damages in each case. The impact of emotion and its attendant results seem to indicate that the limit of punitive damages is equal to the limit of a jury's emotion. That, at times, has been limitless. The social and financial position, color, and sex of the parties can determine the extent of the damages. Since logical, objective rules of damages are not applied in computing punitive damages, such damages completely divorced from compensatory damages should not be allowed.

The proponents of punitive damages claim they are necessary where a defendant would rather pay relatively small compensatory damages than discontinue or alleviate his wrongful conduct.<sup>70</sup> These proponents ask how, then, is the aggrieved individual to be protected? The answer lies in equity<sup>71</sup> by injunction. If the defendant persists, he can be held in contempt of court. The court can order either a jail sentence or a fine, which fine goes to *society*. The plaintiff is compensated by the law of damages and is put in the *same* position as if the injury had not occurred, not in a *better* position. Equity has the flexibility to meet specific situations with specific remedies, formulated as the circumstances dictate, and need not fall back upon antiquated doctrines.

The rule of punitive damages is an anachronism. Its use is anachronistic; it is a ghost out of the past. The reason for its being has long since been dead. Why don't we bury it?

ARTHUR J. FRANZA

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66. *Fay v. Parker*, 53 N.H. 342, 16 Am. Rep. 270 (1872).

67. *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 Pac. 1072 (1891).

68. Willis, *Measure of Damages*, 22 HARV. L. REV. 419 (1909).

69. Self-incrimination, refusal to be a witness, etc.

70. *Funk v. H. S. Kerbaugh Inc.*, 222 Pa. 18, 70 Atl. 953 (1908) (defendant paid frequent compensatory damages rather than alter his method of blasting, which would have cost many times more).

71. *Ibid.*