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PUNITIVE DAMAGES IN MISSOURI

I. INTRODUCTION

Punitive damages have been described as additive, punitory, exemplary, vindictive, imaginary damages, or smart money. The practice of allowing such damages is centuries old. Some early cases used the doctrine as a means of justifying excessive damage awards.¹ Others allowed large jury verdicts in aggravated cases as compensation to the plaintiff for wounded dignity and mental suffering.² Modern cases justify punitive damage awards as serving the public interest by punishing wrongdoers and deterring others from like conduct. Despite vehement denunciations of the practice of permitting such damages by many courts and commentators,³ only a few states have rejected the doctrine.⁴

This article will explore several procedural and substantive aspects of the law of exemplary damages in Missouri. The focus will be on the justifications for various rules in light of the functions that exemplary damages are intended to serve.

II. THE FUNCTIONS OF PUNITIVE DAMAGES

The law of damages has both a reparative and an admonitory function.⁵ Its reparative or compensatory function is manifested in giving money to a plaintiff as a substitute for his losses, thereby putting him in the position he would have occupied had the injury not been inflicted upon him. Although punitive damages are considered by some courts to compensate for mental distress and indignity arising out of a malicious wrong, the reparative function is usually served adequately through the actual damages award. Punitive damages primarily perform an admonitory function by punishing the defendant and deterring conduct which leads to injury.⁶

1. Lord Townsend v. Hughes, 2 Mod. 150, 86 Eng. Rep. 994 (1677); Duberley v. Gunning, 4 TR 652, 100 Eng. Rep. 1226 (1792).

2. Huckle v. Money, 2 Wils. 205 (K.B. 1763); Wilkes v. Wood, 1 Lofft. 1 (C.P. 1763).

3. Fay v. Parker, 53 N.H. 342 (1873); T. SEDGWICK, MEASURE OF DAMAGES 527 (5th ed. 1869); Ghiardi, *The Case Against Punitive Damages*, 8 FORUM 411 (1972).

4. McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383 (1932); City of Lowell v. Massachusetts Bonding and Ins. Co., 313 Mass. 257, 47 N.E.2d 265 (1943); Hall v. Rice, 117 Neb. 813, 223 N.W. 4 (1929); Anderson v. Dalton, 40 Wash. 2d 894, 246 P.2d 853 (1952).

5. See Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931).

6. Punitive damages may also fulfill a pacificatory function by discouraging the plaintiff's retaliatory and vindictive spirit. Alcorn v. Mitchell, 63 Ill. 553 (1872). This is a less valid justification for awarding punitive damages than it once was.

Punitive damages are awarded only when the mental state of the defendant is more culpable than a mere failure to use ordinary care. He is punished for conduct which might otherwise go unpunished.⁷ This purpose has been criticized as an encroachment by the civil law into an area traditionally reserved for the criminal law. It is argued that punitive damages should not be allowed in civil suits since safeguards such as proof beyond a reasonable doubt, the privilege against self-incrimination, and the rule against double jeopardy are not available. In 1867, Judge Holmes in *McKeon v. Citizens' Railway Company*,⁸ suggested that the principle of administering punishment belongs to criminal rather than civil jurisprudence. Holmes believed that damages for punishment may not be given in any civil action.⁹ However, it is now clear in Missouri that punitive damages may be assessed in civil suits.

Deterrence is the most often cited rationale for the authorization of punitive damages.¹⁰ Conduct which is "willful," "wanton," "malicious," or in "conscious disregard for the safety of others" is required to support a punitive damage award. This is highly undesirable behavior. The threat of punitive damages provides an incentive to the defendant and others to refrain from such conduct in the future.¹¹ However, the manner of accomplishing this purpose is subject to criticism. The jury is instructed that they may award exemplary damages to punish the defendant and to discourage like offenses but they are given little assistance in deciding the size of the verdict which will best serve the admonitory function. Furthermore, their decision is subject to narrow review on appeal. However, the jury's discretion is not without limitations.¹²

III. THE DISCRETION OF THE JURY AND ITS LIMITATIONS

Even if the facts of the case make the allowance of punitive damages proper, awarding such damages is peculiarly and purely within the prov-

7. This is particularly so when it is desirable to admonish the defendant, but the plaintiff's loss is so limited that it would not be worthwhile to sue for compensatory damages only.

8. 42 Mo. 79 (1867).

9. Judge Wagner dissented as to the issue of damages. Eight years later, with Judge Holmes not on the court, Judge Wagner indicated that punitive damages may be awarded. *Klingman v. Holmes*, 54 Mo. 304 (1873).

10. For a discussion of the justifications for punitive damages see Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

11. Money judgments limited to reparation are often inadequate for this purpose, especially in situations where it is more profitable for the defendant to pay the compensatory damages and continue the wrongful activity. Punitive damages may be the only way to force the defendant to stop his activities.

12. Other arguments against punitive damages include the fact that often it is a burden on the defendant's family and creditors, which may be interests more significant than the need for deterrence. In addition, the plaintiff gets a windfall which may serve the outdated compensatory and revenge functions of punitive damages, but not the punishment and deterrence functions.

ince of the jury.¹³ Because the amount of damages necessary to effect punishment and deterrence cannot be measured with mathematical precision,¹⁴ the jury is left with broad discretion in making the decision. However, the jury is not completely free to assess punitive damages. They are subject to several limitations.

One limitation is that an award of actual damages is a prerequisite to the recovery of punitive damages.¹⁵ The plaintiff must have a cause of action independent of any exemplary damages assessed. He will not be permitted to maintain an action solely to punish the defendant for wrongful conduct.¹⁶ However, it is well established in Missouri that mere nominal damages are sufficient to support the assessment of punitive damages.¹⁷

A second limitation is the doctrine that the punitive damages award must bear some relation to the injury inflicted and the cause thereof.¹⁸ The jury should consider the degree of the defendant's culpability, the financial condition of the defendant, the age, sex, health, and character of the plaintiff, the nature of the injury inflicted, and any other aggravating or mitigating circumstances attending the defendant's conduct.¹⁹ On appeal, the jury's decision will be disturbed only when it plainly appears that the jury has abused its discretion. It is important to note that there is no fixed relation between the amount of damages allowed by way of compensation and the amount of punitive damages which may be awarded.²⁰ If the amount of punitive damages were restricted by some mathematical ratio relating punitive damages to compensatory damages, the deterrence function would be undermined.²¹ Therefore, an abuse of the jury's discretion will be found only where it appears that the amount of punitive damages bears no reasonable relationship to the injury inflicted or where the award

13. *Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479 (Mo. 1972); *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, 70 S.W. 878 (1902). Note that MO. APPROVED INSTR. NOS. 10.01 and 10.02 (1969) state that the jury "may" award exemplary damages.

14. *Pisha v. Sears Roebuck & Co.*, 496 S.W.2d 280 (Mo. App., D.K.C. 1973).

15. *Compton v. Williams Bros. Pipeline Co.*, 499 S.W.2d 795 (Mo. 1973).

16. *Landum v. Livingston*, 394 S.W.2d 573 (K.C. Mo. App. 1965); *Hoagland v. Forest Park Highlands Amusement Co.*, 170 Mo. 335, 70 S.W. 878 (1902).

17. *Compton v. Williams Bros. Pipeline Co.*, 499 S.W.2d 795 (Mo. 1973); *Edwards v. Nulsen*, 347 Mo. 1077, 152 S.W.2d 28 (1941); *State ex rel. St. Joseph Belt Ry. v. Shain*, 341 Mo. 733, 108 S.W.2d 351 (1937); *Keller v. Summers*, 262 Mo. 324, 171 S.W. 336 (1914).

18. *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *State ex rel. St. Joseph Belt Ry. v. Shain*, 341 Mo. 733, 108 S.W.2d 351 (1937).

19. *Pisha v. Sears Roebuck & Co.*, 496 S.W.2d 280 (Mo. App., D.K.C. 1973); *Peak v. W.T. Grant Co.*, 386 S.W.2d 685 (K.C. Mo. App. 1964); *Hunter v. Kansas City Ry.*, 213 Mo. App. 233, 248 S.W. 998 (K.C. Ct. App. 1923).

20. *Mitchell v. Pla-Mor, Inc.*, 361 Mo. 946, 237 S.W.2d 189 (1951); *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666 (K.C. Mo. App. 1971); *Wehrman v. Liberty Petroleum Co.*, 382 S.W.2d 56 (St. L. Mo. App. 1964); *Patrick v. Employers Mut. Liab. Ins. Co.*, 118 S.W.2d 116 (K.C. Mo. App. 1938).

21. A ratio rule would also conflict with the rule that the punitive damages award may properly vary with the defendant's financial circumstances.

is the result of improper motives or a clear absence of an honest exercise of judgment.²² Indeed, this narrow standard of review has been demonstrated in several cases which upheld substantial punitive damage awards where only minor compensatory damages were assessed.²³

A more successful tactic for a defendant attacking the size of a punitive damage award may be through a motion for a new trial. The trial judge can weigh the evidence and is not restricted to the narrow standard of appellate review.²⁴ Moreover, the trial court may infer bias from the size of the verdict alone.²⁵ Should the trial judge order a remittitur of part of the punitive damages, his decision will be given great deference on appeal.²⁶ The evidence will be viewed in the light most favorable to the trial judge since he observed the proceedings and heard the evidence. If the evidence affords reasonable and substantial support for the propriety of his order his action will be sustained.²⁷

IV. PLEADINGS, DISCOVERY AND EVIDENCE

In actions where punitive damages are recoverable, Supreme Court Rule 55.19 requires the petition to state separately the amount of such damages sought to be recovered.²⁸ It is not necessary to allege wantonness, willfulness, or malice specifically. However, it must appear from the complaint, either by direct averment or from necessary inference, that the act occasioning the damage was done maliciously or with reckless indifference to the rights of others.²⁹ It is necessary for the plaintiff to set forth such ultimate facts which indicate that the defendant had the mental state that justifies a punitive damages award. The mere conclusion of the pleader that the acts were done with malice, without supporting factual allegations, will be disregarded in determining whether the petition states a claim.³⁰

Ordinarily, the financial conditions of the parties to a suit have no bearing on the issues and thus are not discoverable or admissible in evi-

22. *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666 (K.C. Mo. App. 1971).

23. *See Schmidt v. Central Hardware Co.*, 516 S.W.2d 556 (Mo. App., D. St. L. 1974); *Wehrman v. Liberty Petroleum Co.*, 382 S.W.2d 56 (St. L. Mo. App. 1964) (\$100 actual damages, \$7500 punitive damages). *See also Woods v. Standard Personal Loan Plan, Inc.*, 420 S.W.2d 380 (St. L. Mo. App. 1967) where the court said that the general statement that the amount of punitive damages awarded should bear some reasonable proportion to the injury sustained is of little value as a guide.

24. *Reynolds v. Arnold*, 443 S.W.2d 793 (Mo. 1969); *Mitchell v. Pla-mor, Inc.*, 361 Mo. 946, 237 S.W.2d 189 (1951).

25. *Dougherty v. Smith*, 480 S.W.2d 519 (Mo. App., D.K.C. 1972).

26. *Price v. Ford Motor Credit Co.*, 530 S.W.2d 249 (Mo. App., D.K.C. 1975).

27. *Mitchell v. Pla-Mor, Inc.*, 361 Mo. 946, 237 S.W.2d 189 (1951); *Pisha v. Sears Roebuck & Co.*, 496 S.W.2d 280 (Mo. App., D.K.C. 1973).

28. Missouri cases on setting out the claim for punitive damages in a separate count are summarized in *Eoff v. Senter*, 317 S.W.2d 666 (St. L. Mo. App. 1958); *But see Brown v. Payne*, 264 S.W.2d 341 (Mo. 1954).

29. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

30. MO. R. CIV. P. 55.05. *See Tolliver v. Standard Oil Co.*, 431 S.W.2d 159 (Mo. 1968); *Miller v. Ste. Genevieve County*, 358 S.W.2d 28 (Mo. 1962).

dence.³¹ However, since one of the purposes of giving punitive damages is punishment, the assets and liabilities of the defendant are relevant in suits where such damages are sought. Clearly, a penalty which would be sufficient to reform a poor man is likely to make little impression on a wealthy man.³² Therefore, it is generally held that where punitive damages are claimed the financial condition of the defendant is discoverable³³ and is properly admissible in evidence at trial.³⁴ While such evidence is arguably necessary to aid the jury in making a proper assessment of punitive damages, it is potentially prejudicial to the defendant. Since the plaintiff profits from the punitive damage award, he may attempt to introduce evidence which might secure a high award rather than one which would appropriately fulfill the admonitory function. Moreover, the prejudicial nature of this evidence may influence the jury as to the merits of the case.³⁵ Despite these possible problems, there is very little authority completely denying discovery and admissibility of the defendant's wealth when punitive damages are claimed.³⁶

The defendant may wish to resist disclosure of his personal finances at least until the plaintiff has presented prima facie proof of the right to recover punitive damages. This is particularly true since information sought at the discovery stage need not be admissible evidence as long as it might lead to admissible evidence. In *State ex rel. Kubatzky v. Holt*³⁷ the defendant secured a protective order whereby his answers to interrogatories relating to earnings, income tax returns, and net worth were sealed until a submissible case was made on the issue of punitive damages.³⁸ The plaintiff then sought a writ of prohibition forbidding the trial judge from continuing the order.³⁹ The Court of Appeals, St. Louis District, ruled that since the purpose of Missouri discovery practice is to aid litigants prior to trial as to the facts, the trial court exceeded its jurisdiction in sealing the answers to the interrogatories. The plaintiff's counsel was entitled to examine the financial data prior to trial.⁴⁰

31. *Lewis v. Hubert*, 532 S.W.2d 860 (Mo. App., D.K.C. 1975).

32. *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666 (Mo. App., D.K.C. 1971).

33. *State ex rel. Boswell v. Curtis*, 334 S.W.2d 757 (Spr. Mo. App. 1960); See Annot., 27 A.L.R. 3d 1375 (1969).

34. *McMillin v. Sears Roebuck & Co.*, 523 S.W.2d 111 (Mo. App., D. St. L. 1975); *Peak v. W.T. Grant Co.*, 336 S.W.2d 685 (K.C. Mo. App. 1964).

35. *State ex rel. Kubatzky v. Holt*, 483 S.W.2d 799 (Mo. App., D. St. L. 1972); *McMillen v. Elder*, 160 Mo. App. 399, 140 S.W. 917 (Spr. Ct. App. 1911).

36. *Wilson v. Onondaga Radio Broadcasting Corp.*, 175 Misc. 389, 23 N.Y.S.2d 654 (1940) is one of the few cases denying discovery of the defendant's wealth.

37. 483 S.W.2d 799 (Mo. App., D. St. L. 1972).

38. MO. R. CIV. P. 56.01(c) provides that the court may make any order "which justice requires to protect the party or witness from annoyance, embarrassment, or undue expense, oppression"

39. See *Bock, Prohibition—To Prevent Discovery Proceedings*, 35 MO. L. REV. 533 (1970).

40. 483 S.W.2d at 804. See also *State ex rel. Boswell v. Curtis*, 334 S.W.2d 757 (Spr. Mo. App. 1960) where the court allowed discovery of the defendant's tax

The effect of *Kubatzky* may have been limited in *State ex rel. Caloia v. Weinstein*.⁴¹ In *Caloia* the issue raised was whether the constitutional privilege against self-incrimination is available at the discovery stage to prevent the production of copies of income tax returns in a civil case. The appellate court stated the general rule that if an answer to a question propounded to a witness may disclose a fact which forms a necessary and essential link in the chain of testimony which would convict the witness of any crime, then he is not bound to answer it.⁴² The court held that this rule is applicable at the discovery stage in civil proceedings. If the ability to invoke the privilege against self-incrimination extends to other financial statements as well, defendants will have an effective weapon to prevent discovery of their wealth by plaintiffs seeking punitive damages if the information sought is potentially incriminating.

The Missouri cases also allow evidence of the *plaintiff's* financial condition in cases where punitive damages are justified.⁴³ Such a rule seems entirely inappropriate in light of the functions of punitive damages. The imposition of punitive damages is not designed to supplement the plaintiff's compensatory damages but rather to punish the defendant. The plaintiff's wealth has nothing to do with what is a proper punishment for the defendant.

Since the mental state of the defendant is critical in punitive damages cases, many items of evidence concerning the circumstances surrounding and accompanying the wrongful act will be admissible. Thus, proof of abusive language, prior relations between the plaintiff and defendant, and other evidence which might otherwise be irrelevant become admissible to show that the act was conceived in a spirit of maliciousness or indifference to the safety of the plaintiff and others.⁴⁴

V. THE MENTAL STATE

A showing that the defendant had the requisite mental state when he performed the wrongful act is the most critical step in establishing that punitive damages are warranted. The mental state required to support a punitive damages award is considered socially undesirable and should be discouraged and punished.⁴⁵ However, there is much confusion in the cases in describing the necessary mental state. Courts generally use shorthand labels to describe different types of culpability instead of carefully

returns even though it was filed jointly with his wife. The court found that the need for discovery overbalanced the effect on the wife of the exposure of her private affairs.

41. 525 S.W.2d 779 (Mo. App., D. St. L. 1975).

42. 525 S.W.2d at 780.

43. *Utlaut v. Glick Real Estate Co.* 246 S.W.2d 760 (Mo. 1952); *Beck v. Dowell*, 111 Mo. 506, 20 S.W. 209 (1892); *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666 (K.C. Mo. App. 1971).

44. *Charles F. Curry & Co. v. Hedrick*, 378 S.W.2d 522 (Mo. 1964); *Mitchell v. Pla-Mor, Inc.*, 361 Mo. 946, 237 S.W.2d 189 (1951).

45. *Wingate v. Burton*, 193 Mo. App. 470, 186 S.W. 32 (K.C. Ct. App. 1916).

defining the words they use and applying the definition to the factual situation before them. The general idea which courts wish to convey is that the degree of culpability must transcend simple negligence and be deserving of punishment.

The conduct of the defendant justifying an award of punitive damages has been variously characterized as maliciousness,⁴⁶ wantonness,⁴⁷ willfulness,⁴⁸ recklessness,⁴⁹ indignity and contumely,⁵⁰ and insult.⁵¹ Missouri Approved Jury Instructions (hereinafter M.A.I.)⁵² 10.01 and 10.02 allow for the assessment of exemplary damages where the defendant's conduct is "willful, wanton, or malicious" or "shows a complete indifference to or conscious disregard for the safety of others." The definition of malice in M.A.I. 16.01 follows the case law in distinguishing between actual and legal malice. *Actual* malice exists when a person is motivated by spite or ill will.⁵³ However, such motivation is *not* necessary in order for an act to be "malicious."⁵⁴ The presence of *legal* malice, the intentional doing of a wrongful act without just cause or excuse, is sufficient in Missouri.⁵⁵ Legal malice means that the defendant not only intended to do the wrongful act but knew it was wrongful when he did it⁵⁶ or acted with such disregard of others that a conscious wrongdoing is implied.⁵⁷ Thus, a good faith mistake is a defense to what would otherwise be malicious misconduct⁵⁸ even if the defendant is mistaken as to the legality of his act.⁵⁹ Furthermore, evidence

46. *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950).

47. *Eoff v. Senter*, 317 S.W.2d 666 (St. L. Mo. App. 1958); *Crews v. Sikeston Coca-Cola Bottling Co.*, 225 S.W.2d 812 (Spr. Mo. App. 1949).

48. *Rhyn v. Thompson*, 284 S.W.2d 553 (Mo. 1956); *Ervin v. Coleman*, 454 S.W.2d 289 (Spr. Mo. App. 1970), *overruled on other grounds*, *Sharp v. Robberson*, 495 S.W.2d 394 (Mo. En Banc 1973).

49. *Brisboise v. Kansas City Pub. Serv. Co.* 303 S.W.2d 619 (Mo. 1957).

50. *Hussey v. Ellerman*, 215 S.W.2d 38 (St. L. Mo. App. 1948).

51. *Giffin v. Petree*, 226 Mo. App. 718, 46 S.W.2d 609 (K.C. Ct. App. 1932).

52. All references to Missouri Approved Jury Instruction are to the Second Edition (1969).

53. *Heuer v. John R. Thompson Co.*, 251 S.W.2d 980 (St. L. Mo. App. 1952).

54. *Beshears v. S-H-S Motor Sales Corp.*, 433 S.W.2d 66 (K.C. Mo. App. 1968).

55. *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Schmidt v. Central Hardware Co.*, 516 S.W.2d 556 (Mo. App., D. St. L. 1974); *Spitzengel v. Greenlease Motor Car Co.*, 234 Mo. App. 962, 136 S.W.2d 100 (K.C. Ct. App. 1940). If the defendant acts with malice toward one person but mistakenly injures the plaintiff, he will be held to have acted with malice toward the plaintiff. *Fordyce v. Montgomery*, 424 S.W.2d 746 (Spr. Mo. App. 1968).

56. *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Commercial Credit Corp. v. Blau*, 393 S.W.2d 558 (Mo. 1965); *Price v. Ford Motor Credit Co.*, 530 S.W.2d 249 (Mo. App., D.K.C. 1975).

57. *Gerharter v. Mitchellhill Seed Co.*, 157 S.W.2d 577 (K.C. Mo. App. 1941).

58. *Thomas v. Commercial Credit Corp.*, 335 S.W.2d 703 (K.C. Mo. App. 1960).

59. *Lampert v. Judge & Dolph Drug Co.*, 238 Mo. 409, 141 S.W. 1095 (1911); *Booth v. Quality Dairy Co.*, 393 S.W.2d 845 (St. L. Mo. App. 1965); *Walker v.*

that the plaintiff provoked the defendant may mitigate damages and may often be sufficient to negate the existence of malice on the defendant's part.⁶⁰

A willful act implies intentional wrongdoing.⁶¹ A person with a design or intent to do wrong and inflict injury acts willfully.⁶² Wantonness exists when a person is conscious of his conduct and, although he has no intent to injure, he is conscious from his knowledge of existing circumstances and conditions that his conduct will naturally and probably result in injury.⁶³ Conduct displaying a "complete indifference or conscious disregard for the safety of others" is often referred to as "reckless" conduct.⁶⁴ A defendant's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the defendant's conduct not only creates an unreasonable risk of harm but also involves a high probability that substantial harm will result.⁶⁵ This is a more culpable mental state than negligence, which is a mere failure to exercise the degree of care due under the particular circumstances.⁶⁶ It is important for the courts to recognize the differences between these various types of conduct. Only when the evidence supports the existence of "willful, wanton, or malicious" conduct or "a complete indifference to or conscious disregard for the safety of others" may a punitive damages instruction be submitted to the jury.⁶⁷ If the evidence only supports the existence of negligence the submission of a punitive damages instruction is reversible error.

VI. CASES ALLOWING PUNITIVE DAMAGES

A. *Tort Actions in General*

Punitive damages have been awarded for a wide variety of legal wrongs in Missouri. As a general rule, such damages are recoverable in all actions based upon tortious conduct which involves willful, wanton, or

Huddleston, 261 S.W.2d 502 (K.C. Mo. App. 1953). *Contra*, Stephens v. Lever Bros. Co., 155 S.W.2d 540 (K.C. Mo. App. 1941). *See also* Duensing v. Huscher, 431 S.W.2d 169 (Mo. 1968).

60. Bond v. Williams, 279 Mo. 215, 214 S.W. 202 (1919); Fordyce v. Montgomery, 424 S.W.2d 746 (Spr. Mo. App. 1968).

61. Evans v. Illinois Central R.R., 289 Mo. 493, 233 S.W. 397 (En Banc 1921).

62. Harzfeld's, Inc. v. Otis Elevator Co., 116 F. Supp. 512 (W.D. Mo. 1953).

63. Jennings v. Cooper, 230 S.W. 325 (K.C. Mo. App. 1921).

64. O'Brien v. St. Louis Transit Co., 212 Mo. 59, 110 S.W. 705 (En Banc 1908).

65. Brisboise v. Kansas City Pub. Serv. Co. 303 S.W.2d 619 (Mo. 1957); Nichols v. Bresnahan, 357 Mo. 1126, 212 S.W.2d 570 (1948).

66. Harzfeld's, Inc. v. Otis Elevator Co., 116 F. Supp. 512 (W.D. Mo. 1953).

67. Sharp v. Robberson, 495 S.W.2d 394 (Mo. En Banc 1973); Pinkley v. Rombauer, 231 Mo. App. 1233, 87 S.W.2d 1045 (St. L. Ct. App. 1935).

malicious misconduct, or reckless disregard for the safety of others.⁶⁸ Missouri courts have upheld punitive damage awards in cases involving fraud or deceit,⁶⁹ failure to provide service letters as required by section 290.140, RSMO 1969,⁷⁰ assault,⁷¹ trespass,⁷² conversion,⁷³ libel and slander,⁷⁴ malicious prosecution,⁷⁵ false arrest and false imprisonment,⁷⁶ alien-

68. *Genie Mach. Prod., Inc. v. Midwestern Machinery Co.*, 367 F. Supp. 897 (W.D. Mo. 1974).

69. *Tietjens v. General Motors Corp.*, 418 S.W.2d 75 (Mo. 1967); *Ackmann v. Keeney-Toelle Real Estate Co.*, 401 S.W.2d 483 (Mo. En Banc 1966); *Jeck v. O'Meara*, 343 Mo. 559, 122 S.W.2d 897 (1938); *Beshears v. S-H-S Motor Sales Corp.*, 433 S.W.2d 66 (K.C. Mo. App. 1968); *Williams v. Miller Pontiac Co.*, 409 S.W.2d 275 (K.C. Mo. App. 1966); *Wilson v. Murch*, 354 S.W.2d 332 (St. L. Mo. App. 1962); *Dixon v. Burtrum*, 258 S.W.2d 24 (Spr. Mo. App. 1953); *Jones v. West Side Buick Auto Co.*, 231 Mo. App. 187, 93 S.W.2d 1083 (St. L. Ct. App. 1936).

70. *State ex rel. St. Joseph Belt Ry. v. Shain*, 341 Mo. 733, 108 S.W.2d 351 (1937); *Schmidt v. Central Hardware Co.*, 516 S.W.2d 556 (Mo. App., D. St. L. 1974); *Heuer v. John R. Thompson Co.*, 251 S.W.2d 980 (St. L. Mo. App. 1952); *Bourne v. Pratt & Whitney Aircraft Co.*, 207 S.W.2d 533 (K.C. Mo. App. 1948); *Gerharter v. Mitchellhill Seed Co.*, 157 S.W.2d 577 (K.C. Mo. App. 1941); *Van Sickle v. Katz Drug Co.*, 235 Mo. App. 952, 151 S.W.2d 489 (K.C. Ct. App. 1941); *Walker v. St. Joseph Belt Ry.*, 102 S.W.2d 718 (K.C. Mo. App. 1937). When the defendant acts in good faith and with an honest belief that his refusal to furnish a service letter is lawful, punitive damages are precluded. *Booth v. Quality Dairy Co.*, 393 S.W.2d 845 (St. L. Mo. App. 1965). *Contra*, *Stephens v. Lever Bros. Co.*, 155 S.W.2d 540 (K.C. Mo. App. 1941). *See* Baylard, *Missouri Service Letter Statute—The Burden of Establishing Substantial Actual Damages*, 40 MO. L. REV. 679 (1975).

71. *Carnes v. Thompson*, 48 S.W.2d 903 (Mo. 1932); *Fordyce v. Montgomery*, 424 S.W.2d 746 (Spr. Mo. App. 1968); *Hodges v. Schuermann Bldg. & Realty Co.*, 174 S.W.2d 909 (St. L. Mo. App. 1943); *Wingate v. Burton*, 143 Mo. App. 470, 186 S.W. 32 (K.C. Ct. App. 1916).

72. *Reber v. Bell Tel. Co. of Mo.*, 196 Mo. App. 69, 190 S.W. 612 (St. L. Ct. App. 1916).

73. *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966); *Landum v. Livingston*, 394 S.W.2d 573 (K.C. Mo. App. 1965); *Pashalian v. Big-4 Chevrolet Co.*, 348 S.W.2d 628 (St. L. Mo. App. 1961); *Davis v. Nash Central Motors Co.*, 332 S.W.2d 475 (K.C. Mo. App. 1960); *Spitzengel v. Greenlease Motor Car Co.*, 234 Mo. App. 962, 136 S.W.2d 100 (K.C. Ct. App. 1940). *Cf.* *Thomas v. Commercial Credit Corp.*, 335 S.W.2d 703 (K.C. Mo. App. 1960).

74. *Edwards v. Nulsen*, 347 Mo. 1077, 152 S.W.2d 28 (1941); *Seestad v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930); *Greenlake Inv. Co. v. Swarouth*, 161 S.W.2d 697 (St. L. Mo. App. 1942).

75. *Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479 (Mo. 1972); *Polk v. Missouri, K. & T. R.R.*, 351 Mo. 865, 174 S.W.2d 176 (1943); *Randol v. Kline's, Inc.*, 330 Mo. 343, 49 S.W.2d 112 (1932); *Irons v. Am. Ry. Express*, 318 Mo. 318, 300 S.W. 283 (En Banc 1927); *Carp v. Queen Ins. Co.*, 203 Mo. 295, 101 S.W.2d 78 (1907); *McMillin v. Sears Roebuck & Co.*, 523 S.W.2d 111 (Mo. App., D. St. L. 1975); *Boquist v. Montgomery Ward & Co.*, 516 S.W.2d 769 (Mo. App., D.K.C. 1974).

76. *Helming v. Adams*, 509 S.W.2d 159 (Mo. App., D.K.C. 1974); *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666 (K.C. Mo. App. 1971); *Nelson v. R. H. Macy & Co.*, 434 S.W.2d 767 (K.C. Mo. App. 1968); *Peak v. W.T. Grant Co.*, 386 S.W.2d 685 (K.C. Mo. App. 1964); *Wehrman v. Liberty Petroleum Co.*, 382 S.W.2d 56 (St. L. Mo. App. 1964); *McGill v. Walnut Realty Co.*, 148 S.W.2d 131 (K.C. Mo. App. 1941); *Titus v. Montgomery Ward*, 123 S.W.2d 574 (Spr. Mo. App. 1938).

ation of affections,⁷⁷ breach of fiduciary duties,⁷⁸ blasting,⁷⁹ seduction,⁸⁰ and nuisance.⁸¹

In spite of the large amount of automobile accident litigation, there are few cases in Missouri addressing the question of punitive damages in such cases.⁸² The few cases which have reviewed the subject have stated that such damages are recoverable where the defendant's conduct is willful, wanton, or malicious⁸³ or demonstrates reckless indifference to the lives of others.⁸⁴ However, the mere failure to exercise the degree of care due under the particular circumstances will not support punitive damages,⁸⁵ despite the high degree of care that automobile operators must observe.⁸⁶ In *Cox v. Terminal Railroad Association of St. Louis*⁸⁷ the Missouri Supreme Court stated that under the humanitarian rule the failure to exercise ordinary care after discovery of the peril, or after it should have been discovered by the exercise of due care, is wanton, willful, and reckless conduct. In *Gerran v. Minor*⁸⁸ the St. Louis Court of Appeals decided that this language in *Cox* was confined to the particular circumstances of that case. Although *Gerran* involved a case decided under the humanitarian rule, the court found no circumstances from which an inference of willful-

77. *State ex rel. Boswell v. Curtis*, 334 S.W.2d 757 (Spr. Mo. App. 1960); *Leavell v. Leavell*, 114 Mo. App. 24, 89 S.W. 55 (K.C. Ct. App. 1905).

78. *McKeehan v. Wittels*, 508 S.W.2d 277 (Mo. App., D. St. L. 1974).

79. *Rotert v. Peabody Coal Corp.*, 513 S.W.2d 667 (Mo. App., D.K.C. 1974); *Krebs v. Bambrick Bros. Constr. Co.*, 144 Mo. App. 649, 129 S.W. 425 (Spr. Ct. App. 1910); *Berlin v. Thompson*, 61 Mo. App. 234 (1895).

80. *Mohelsky v. Hortmeister*, 68 Mo. App. 318 (1897).

81. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970); *Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752 (Mo. 1968); *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (K.C. Mo. App. 1935); *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361, 165 S.W. 1142 (K.C. Ct. App. 1914).

82. One explanation for the lack of the punitive damage issue arising in automobile accident cases is that the plaintiff fears pressing the issue since the defendant's liability insurer might claim that it does not insure against acts done with the culpable mental state which supports punitive damages claims. However, in *Crull v. Gleb*, 382 S.W.2d 17 (St. L. Mo. App. 1964), the Missouri Court of Appeals found that wanton and reckless acts of a driver do not amount to intentional acts and do not permit liability insurers to deny coverage for actual damages under policies excluding from coverage injury "intentionally" caused. *See also White v. Smith*, 440 S.W.2d 497 (Spr. Mo. App. 1969).

83. *Medellin v. Yellow Cab Co.*, 99 F. Supp. 107 (W.D. Mo. 1951); *Brown v. Payne*, 264 S.W.2d 341 (Mo. 1954); *Gerran v. Minor*, 192 S.W.2d 57 (St. L. Mo. App. 1946); *Faust v. East Prairie Milling Co.*, 20 S.W.2d 918 (Spr. Mo. App. 1929); *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503 (1877).

84. *McKenzie v. Randolph*, 257 S.W. 126 (Mo. 1923); *Dougherty v. Smith*, 480 S.W.2d 519 (Mo. App., D.K.C. 1972). *See also Hertz v. McDowell*, 358 Mo. 383, 214 S.W.2d 546 (En Banc 1948); *Agee v. Herring*, 221 Mo. App. 1022, 298 S.W. 250 (K.C. Ct. App. 1927).

85. *Gerran v. Minor*, 192 S.W.2d 57 (St. L. Mo. App. 1946). *See Annots.*, 65 A.L.R.3d 656 (1975), 62 A.L.R.2d 813 (1958), 62 A.L.R.2d 839 (1958).

86. MO. APPROVED INSTR. NO. 11.01 (1969).

87. 55 S.W.2d 685 (Mo. 1932).

88. 192 S.W.2d 57 (St. L. Mo. App. 1946).

ness, wantonness, or recklessness could arise. The *Gerran* decision would seem to be in line with Missouri Supreme Court rulings denying punitive damages upon a showing of mere negligence. A defendant could be liable under the humanitarian rule without his conduct reaching the level of culpability needed to support punitive damages.

B. Negligence Cases

The fact that punitive damages are not awarded for mere negligent conduct presents problems when a court is faced with an assertion by the plaintiff that the defendant's conduct was "negligent" and "willful, wanton or malicious."⁸⁹ Negligence, the failure to employ a prescribed standard of care, connotes inadvertence. Willful, wanton, or malicious conduct, on the other hand, connotes intentional injury.⁹⁰ Such conduct is seemingly the antithesis of negligence since an act done intentionally is not inadvertent and an act done inadvertently must not have been done intentionally. It has been held that negligence is one kind of tort and that willful, wanton, or malicious conduct is another kind of tort.⁹¹ Thus, allegations that an act is both negligent and willful and wanton would appear to be a contradiction in terms.⁹² This was the premise expounded in *Ervin v. Coleman*.⁹³ In *Ervin* the plaintiff's one count petition alleged both negligent and willful misconduct. The case was submitted to the jury on M.A.I. 17.02 negligence verdict-directing instruction plus M.A.I. 10.01 which allows the jury to award punitive damages for willful, wanton, or malicious conduct. The Springfield Court of Appeals found that the tort committed was either the tort of negligence or the tort of willful, wanton, or malicious misconduct, but could not be both. The court said that the instructions prejudicially and erroneously commingled inconsistent theories of recovery in that they forced the conclusion that the defendant could be guilty of two incompatible torts which disprove one another. The *Ervin* decision would preclude the submission of M.A.I. 10.01 on punitive damages with a negligence verdict-directing instruction. The opinion indicates that the jury would have to find that the actual damages were occasioned by the same degree of fault as is needed to award punitive damages. Under this rule, the plaintiff is faced with a dilemma. He must elect between a cause of action based

89. See Cook, *Punitive Damages in Missouri Negligence Cases*, 25 K.C.L. REV. 93 (1957).

90. *Nichols v. Bresnahan*, 357 Mo. 1126, 212 S.W.2d 570 (1948); *Evans v. Illinois Central R.R.*, 289 Mo. 493, 233 S.W. 397 (En Banc 1921).

91. *Harzfeld's, Inc. v. Otis Elevator Co.*, 116 F. Supp. 512 (W.D. Mo. 1953); *Nichols v. Bresnahan*, 357 Mo. 1126, 212 S.W.2d 570 (1948); *Greene v. Morse*, 378 S.W.2d 411 (Spr. Mo. App. 1964); *Willard v. Bethurem* 234 S.W.2d 18 (Spr. Mo. App. 1950).

92. *State ex rel. Kurn v. Hughes*, 348 Mo. 177, 153 S.W.2d 46 (1941); *Blunk v. Snider*, 342 Mo. 411, 111 S.W.2d 163 (1937); *Raming v. Metropolitan St. Ry.*, 157 Mo. 477, 57 S.W. 268 (1900); *Voss v. Am. Mut. Liab. Ins. Co.*, 341 S.W.2d 270 (St. L. Mo. App. 1960).

93. 454 S.W.2d 289 (Spr. Mo. App. 1970).

upon negligence or a cause of action based upon the more stringent mental state required to recover punitive damages. If he alleges a mental state which would be sufficient only to recover for negligence, he forfeits the possibility of recovery of punitive damages. However, if he alleges the mental state required to support punitive damages, he will recover neither actual damages nor punitive damages unless he establishes that the defendant had that mental state.

In *Sharp v. Robberson*⁹⁴ the Missouri Supreme Court addressed the issue of whether *Ervin* was in conflict with the 1921 decision of *Reel v. Consolidated Investment Company*⁹⁵ concerning punitive damages. In *Sharp* the verdict-directing instruction required a finding of failure to use ordinary care. The jury was also given M.A.I. 10.02 which allows an award of punitive damages upon a finding of "complete indifference to or conscious disregard for the safety of others." Relying on *Ervin*, the defendant contended that this was an erroneous commingling of two antithetical theories of tort law. However, the Missouri Supreme Court recognized that despite the generally accepted rule that mere negligence is not a sufficient basis for an award of punitive damages, there are some cases involving negligent conduct where an award of punitive damages is proper. The *Reel* case was cited for the proposition that an act or omission, though properly characterized as negligent, may manifest such reckless indifference to others that the law will imply that the injury resulting from it was intentionally inflicted. Furthermore, there may be conscious negligence tantamount to intentional wrongdoing as where the person doing the act has no specific intent to injure but must be conscious from his knowledge of the surrounding circumstances that his conduct will naturally or probably result in injury.⁹⁶ Based on *Reel*, the court held that actual damages may be recovered on a finding of negligence and, if the evidence supports it, an M.A.I. 10.02 punitive damages instruction may be submitted.⁹⁷ This is a logical ruling. M.A.I. 10.02 is both verdict-directing and damage-directing in nature. It instructs the jury to refer to the actual damages instruction and determine whether the defendant's conduct displayed a complete indifference to or conscious disregard for the safety of others. If the actual damages instruction would require a finding of complete indifference to or conscious disregard for the safety of others, then the same finding under M.A.I. 10.02 would be repetitive. There is no reason why the jury could not find that the defendant's conduct was negligent under the verdict-directing instruction and further find that it revealed a complete indifference to or conscious disregard for the lives of others under M.A.I. 10.02.⁹⁸

94. 495 S.W.2d 394 (Mo. En Banc 1973).

95. 236 S.W. 43 (Mo. 1921).

96. *Id.* at 46.

97. 49 S.W.2d at 399.

98. Appellant's Amended Brief, *Sharp v. Robberson*, 495 S.W.2d 394 (Mo. En Banc 1973); *Eoff v. Senter*, 317 S.W.2d 666 (St. L. Mo. App. 1958).

The *Sharp* opinion did not specifically state whether it would be proper to submit M.A.I. 10.01 along with a verdict-directing instruction requiring a finding of negligence. The *Ervin* case dealt with M.A.I. 10.01 which allows punitive damages to be awarded for "willful, wanton or malicious conduct," which is different than the "complete indifference to or conscious disregard for the safety of others" required by M.A.I. 10.02. However, *Ervin* had been interpreted to hold that a party cannot recover actual damages predicated on negligence and, at the same time, recover punitive damages under M.A.I. 10.02. To the extent that it so held, it was overruled in *Sharp*.⁹⁹ It is still not clear whether the Missouri Supreme Court will allow the submission of M.A.I. 10.01 if the actual damages instruction is premised on negligence.¹⁰⁰

C. Contracts Actions

Missouri has long recognized the general principle that punitive damages cannot be recovered in an action for breach of contract.¹⁰¹ Damages for breach of contract are limited to the pecuniary loss sustained.¹⁰² However, there are circumstances under which a plaintiff might recover punitive damages when a contract has been breached.

A contractual obligation may give rise to an independent noncontractual obligation or duty imposed by law.¹⁰³ If this separate duty is breached, the plaintiff may have a cause of action in tort even though the breach of duty was also a violation of the terms of the contract.¹⁰⁴ Punitive damages will be permitted if the defendant breached this duty willfully, wantonly, or

99. 495 S.W.2d at 399.

100. The annotation on *Sharp v. Robberson* in the Notes of Decisions under MO. APPROVED INSTR. NOS. 10.01 and 10.02 suggests that *Sharp* stands for the proposition that ordinary negligence is not inconsistent with "complete indifference to or conscious disregard for the safety of others" (MO. APPROVED INSTR. NO. 10.02), but is inconsistent with "willful, wanton or malicious" conduct (MO. APPROVED INSTR. NO. 10.01).

101. *John Deere Co. v. Short*, 378 S.W.2d 496 (Mo. 1964); *Williams v. Kansas City Public Service Co.*, 294 S.W.2d 36 (Mo. 1956); *Kohnle v. Paxton*, 268 Mo. 463, 188 S.W. 155 (1916); *Wallick v. First State Bank of Farmington*, 532 S.W.2d 520 (Mo. App., D. St. L. 1976); *Zweifel v. Lee-Schermen Realty Co.*, 173 S.W.2d 690 (St. L. Mo. App. 1943); *Norris v. Letchworth*, 167 Mo. App. 553, 152 S.W. 421 (K.C. Ct. App. 1912); *Trout v. Watkins Livery & Undertaking Co.*, 148 Mo. App. 621, 130 S.W. 136 (St. L. Ct. App. 1912). See *Simpson, Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959).

102. *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 353 S.W.2d 102 (K.C. Mo. App. 1961).

103. *Harzfeld's, Inc. v. Otis Elevator Co.*, 114 F. Supp. 480 (W.D. Mo. 1953); *John Deere Co. v. Short*, 378 S.W.2d 496 (Mo. 1964); *Helm v. Inter-Ins. Exchange for Auto Club of Mo.*, 354 Mo. 935, 192 S.W.2d 417 (En Banc 1946); *Lowery v. Kansas City*, 337 Mo. 47, 85 S.W.2d 104 (1935).

104. *State ex rel. Cummins Missouri Diesel Sales Corp. v. Eversole*, 332 S.W.2d 53 (St. L. Mo. App. 1960); *Wernick v. St. Louis & S.F.R.R.*, 131 Mo. App. 37, 109 S.W. 1027 (St. L. Ct. App. 1908).

maliciously or with reckless indifference to the safety of others.¹⁰⁵ In order to determine whether the action is *ex contractu* or *ex delicto*, it is necessary to ascertain the source of the duty claimed to have been breached. If the duty is one imposed merely by contract, then the action for breach is necessarily on the contract. On the other hand, if a party sues for breach of a duty prescribed by law as an incident of a relation or status which the parties created by their agreement, the action may be one in tort.¹⁰⁶ For example, causes of action based on a breach of duty by public service companies¹⁰⁷ or by a fiduciary¹⁰⁸ may sound in tort due to the special relationship between the contracting parties.¹⁰⁹

Punitive damages also may be recovered for tortious interference with contractual relations. A defendant who intentionally and unjustifiably induces a person to breach a contract with a third person is accountable in damages to the third person.¹¹⁰ The intent and lack of justification or excuse demonstrate the existence of malice and will support an award of punitive damages.¹¹¹

Finally, the theory of civil conspiracy may provide a basis for the recovery of punitive damages when a contract has been breached. A civil conspiracy is an agreement or understanding between two or more persons to do an unlawful act or to use unlawful means to do an act which is lawful.¹¹² A conspiracy to breach or to induce a breach of a contract is an unlawful conspiracy. When the wrongful breach of the contract occurs, the aggrieved party will have a cause of action against the conspirators.¹¹³ Each

105. Taylor v. Atchison, T. & S.F. Ry., 92 F. Supp. 968 (W.D. Mo. 1950); Wallick v. First State Bank of Farmington, 532 S.W.2d 520 (Mo. App., D. St. L. 1976); Trout v. Watkins Livery and Undertaking Co., 148 Mo. App. 621, 130 S.W. 136 (St. L. Ct. App. 1910).

106. John Deere & Co. v. Short, 378 S.W.2d 496 (Mo. 1964); State *ex rel.* Cummins Missouri Diesel Sales Corp. v. Eversole, 332 S.W.2d 53 (St. L. Mo. App. 1960).

107. Trout v. Watkins Livery & Undertaking Co., 148 Mo. App. 621, 130 S.W. 136 (St. L. Ct. App. 1910); Wernick v. St. Louis & S.F. R.R., 131 Mo. App. 37, 109 S.W. 1027 (St. L. Ct. App. 1908).

108. Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958); Braun v. Riel, 355 Mo. 1046, 40 S.W.2d 621 (1931); McKeehan v. Wittels, 508 S.W.2d 277 (Mo. App., D. St. L. 1974).

109. See also cases involving negligent performance of construction and repair contracts—compare Harzfeld's, Inc. v. Otis Elevator Co., 114 F. Supp. 480 (W.D. Mo. 1953) with Miller v. Am. Ins. Co., 439 S.W.2d 238 (St. L. Mo. App. 1969) and State *ex rel.* Cummins Missouri Diesel Sales Corp. v. Eversole, 332 S.W.2d 53 (St. L. Mo. App. 1960).

110. Clark-Lami, Inc., v. Cord, 440 S.W.2d 737 (Mo. 1969); Downey v. United Weatherproofing, Inc., 363 Mo. 852, 253 S.W.2d 976 (1953).

111. Coonis v. Rogers, 429 S.W.2d 709 (Mo. 1968); Mills v. Murray, 472 S.W.2d 6 (K.C. Mo. App. 1971).

112. Royster v. Baker, 365 S.W.2d 496 (Mo. 1963); Shaltupsky v. Brown Shoe Co., 350 Mo. 831, 168 S.W.2d 1083 (1943); Mills v. Murray, 472 S.W.2d 6 (K.C. Mo. App. 1971); McCarty v. Hemker, 4 S.W.2d 1088 (St. L. Mo. App. 1928).

113. Rosen v. Alside, Inc., 248 S.W.2d 638 (Mo. 1952); Dickey v. Johnson, 532 S.W.2d 487 (Mo. App., D.K.C. 1975); Mills v. Murray, 472 S.W.2d 6 (K.C. Mo. App.

conspirator is jointly and severally liable for all damages naturally flowing from the conspiracy.¹¹⁴ Conspirators who breach a contract are liable for actual and punitive damages just as are conspirators who merely induce the breach.¹¹⁵ Thus, by properly pleading¹¹⁶ and proving the existence of a conspiracy as well as the breach of contract, an award of punitive damages is possible.¹¹⁷

D. Equity Cases

There is a split of authority in this country on the question of whether punitive damages may be granted in equity cases.¹¹⁸ In jurisdictions which do not allow punitive damages to be recovered in equity, several reasons have been advanced for the denial. A few courts have found that a court of equity does not have the power to award punitive damages.¹¹⁹ In some jurisdictions an award of punitive damages is said to be incompatible with equitable principles.¹²⁰ Several courts have stated that a litigant waives all claims to punitive damages when he chooses to seek equitable relief.¹²¹

Missouri courts have not decided whether punitive damages may be assessed in equity cases. At least one case has refused to rule out the possibility of awarding punitive damages in equity. In *Bellerive Country Club v. McVey*¹²² the plaintiff sought both an injunction against picketing and actual and punitive damages. The Missouri Supreme Court recognized that it has been generally held that equity courts will not award punitive damages.¹²³ However, the court found no Missouri authority for that proposition. Declining to hold that a court of equity may never award punitive damages,¹²⁴ the court found that such damages were not warrant-

1971); *Contour Chair Lounge Co. v. Aljean Furniture Mfg. Co.*, 403 S.W.2d 922 (St. L. Mo. App. 1966); *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 353 S.W.2d 102 (K.C. Mo. App. 1961).

114. *Wooldridge v. Scott County Milling Co.*, 102 S.W.2d 958 (Spr. Mo. App. 1937).

115. *Mills v. Murray*, 472 S.W.2d 6 (K.C. Mo. App. 1971); *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 353 S.W.2d 102 (K.C. Mo. App. 1961).

116. On pleading civil conspiracy see *Royster v. Baker*, 365 S.W.2d 496 (Mo. 1963); *Gruenewald v. Wintermann*, 360 S.W.2d 678 (Mo. 1962); *Dickey v. Johnson*, 532 S.W.2d 487 (Mo. App., D.K.C. 1975); *Labor Discount Center, Inc. v. State Bank & Trust Co. of Wellston*, 526 S.W.2d 407 (Mo. App., D. St. L. 1975); *McCarty v. Hemker*, 4 S.W.2d 1088 (St. L. Mo. App. 1928).

117. *Hart v. Midkiff*, 321 S.W.2d 500 (Mo. 1959); *Mills v. Murray*, 472 S.W.2d 6 (K.C. Mo. App. 1971); *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 353 S.W.2d 102 (K.C. Mo. App. 1961).

118. *See* Annot., 48 A.L.R.2d 947 (1956).

119. *Santos v. Bogh*, 298 So. 2d 460 (Fla. App. 1974); *Kemp v. Lake Serene Property Owners Ass'n Inc.*, 256 So. 2d 924 (Miss. 1971).

120. *Pedah Co. v. Hunt*, 265 Or. 433, 509 P.2d 1197 (1973).

121. *Superior Constr. Co. v. Elmo*, 204 Md. 1, 104 A.2d 581 (1954).

122. 365 Mo. 477, 284 S.W.2d 492 (En Banc 1955).

123. *Id.* at 493, 284 S.W.2d at 503.

124. In fact, in dictum the court stated that "the allowance of punitive damages is always discretionary in Missouri," citing *Mitchell v. Pla-Mor, Inc.*, 361 Mo. 946,

ed in the case before it.¹²⁵

A strong current of modern decisions recognize the power of courts of equity to award punitive damages.¹²⁶ This is especially true in jurisdictions where the same court administers both legal and equitable relief.¹²⁷ This is a welcome trend since the reasons advanced for the denial of such damages in equity cases are not persuasive. If punitive damages are justified in suits at law, it seems spurious to exclude their recovery simply because the judge is acting as a chancellor. Money judgments which courts of equity have the power to award as incidental to equitable relief should include punitive damages if they are warranted. To say that the plaintiff waives his claim for punitive damages by seeking equitable relief is a conclusion rather than a reason to deny such damages.¹²⁸

VII. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES

A. *Private Employers*

Since one of the functions of the imposition of punitive damages is punishing the wrongdoer, it would seem that only the wrongdoer should be liable for such damages. Requiring the tortfeasor's employer to answer for the malicious acts of his employee by paying exemplary damages may fulfill the deterrence function, but the admonitory function is not served unless the employer participated in the wrongful act.¹²⁹ Nevertheless, Missouri recognizes that an employer may be liable for both the compensatory and the punitive damages resulting from conduct of employees in the scope of their employment.¹³⁰ It is not even necessary to recover punitive

237 S.W.2d 189 (1951). *Mitchell* does not appear to support such a broad proposition. *Mitchell* was a jury-tried case wherein the Missouri Supreme Court stated that while the jury has discretion on whether to award punitive damages and how much to award, their decision was subject to the trial judge's power to weigh the evidence on a motion for a new trial. The opinion does not suggest that the judge or jury has discretion to award punitive damages under *any* circumstances. Indeed, one of the purposes of this comment is to distinguish the situations where punitive damages may be assessed from those where it is improper to award punitive damages.

125. 365 Mo. at 493, 284 S.W.2d at 503. See *Martin v. Swenson*, 335 F. Supp. 765 (W.D. Mo. 1971); *Cirese v. Spitcaufsky*, 265 S.W.2d 753 (K.C. Mo. App. 1954).

126. *Sandler v. Gordon*, 94 Cal. App. 2d 254, 210 P.2d 314 (1949); *Hedworth v. Chapman*, 135 Ind. App. 129, 192 N.E.2d 649 (1963); *Charles v. Epperson & Co.*, 258 Iowa 409, 137 N.W.2d 605 (1965); *Bryson v. Bramlett*, 204 Tenn. 347, 321 S.W.2d 555 (1958); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963).

127. *I.H.P. Corp. v. 210 Central Park South Corp.*, 12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963).

128. D. DOBBS, REMEDIES 211-12 (1973).

129. The employee-tortfeasor may be punished indirectly if the employer imposes sanctions for having been held liable for punitive damages for the employee's conduct.

130. *State ex rel. United Factories, Inc. v. Hostetter*, 344 Mo. 386, 126 S.W.2d 1173 (1939). See *Ohio Casualty Ins. Co. v. Welfare Finance Co.*, 75 F.2d 58 (8th Cir.

damages from the agent or servant in order to sustain an award of such damages against the principal or master.¹³¹ Courts have reasoned that the fact that punitive damage liability may encourage the employer to exercise closer control over employees is enough to justify their imposition. Many states require that the employer either authorize or ratify the malicious act of the employee before he can be liable for exemplary damages.¹³² Early Missouri cases appeared to follow this rule,¹³³ but the law today clearly imposes liability on the employer even though he did not participate in the employee's wrongdoing.¹³⁴

There is authority in Missouri for making a distinction between corporate and non-corporate employers, holding only the former subject to punitive damages for the malicious acts of employees.¹³⁵ However, most cases have rejected this distinction.¹³⁶ In *Johnson v. Allen*¹³⁷ the Kansas City Court of Appeals held that authorization or ratification by the employer need not be found before holding the non-corporate employer liable for punitive damages. The court stated that the form in which the employer did business should not govern whether there is a right to recover punitive damages.

B. *Municipal Employers*

An important exception to this vicarious liability rule is the case of the municipal employer. As long ago as 1877, the Missouri Supreme Court held that even though a private corporation is liable for exemplary damages for the acts of its agents, a municipal corporation cannot be liable for malicious misconduct.¹³⁸ Several rationales have been advanced for this rule.¹³⁹ First, to permit recovery of such damages would contravene public policy. The citizenry would bear the burden of punishment, yet they are supposed to benefit from the public example that punitive damages makes of the wrongdoer. Second, it would be difficult for the jury to set a proper

1934) concerning insurance coverage of an employer's liability for punitive damages.

131. *Tietjens v. G.M.C.*, 418 S.W.2d 75 (Mo. 1967); *Beggs v. Universal C.I.T. Credit Corp.*, 409 S.W.2d 719 (Mo. 1966).

132. *See, e.g., Holland Furnace Co. v. Robson*, 157 Colo. 347, 402 P.2d 628 (1965).

133. *Perkins v. Missouri, K. & T. R.R.*, 55 Mo. 201 (1874); *Rouse v. Metropolitan St. Ry.*, 41 Mo. App. 298 (K.C. Ct. App. 1889).

134. *Johnson v. Allen*, 448 S.W.2d 265 (K.C. Mo. App. 1969).

135. *United Factories, Inc. v. Brigham*, 117 S.W.2d 662 (St. L. Mo. App. 1938).

136. *State ex rel. United Factories, Inc. v. Hostetter*, 344 Mo. 386, 126 S.W.2d 1173 (1939); *McNamara v. St. Louis Transit Co.*, 182 Mo. 676, 81 S.W. 880 (1904); *Haehl v. Wabash R.R.*, 119 Mo. 325, 24 S.W. 737 (1893); *Johnson v. Allen*, 448 S.W.2d 265 (K.C. Mo. App. 1969); *Hinson v. Morris*, 298 S.W. 254 (K.C. Mo. App. 1927).

137. 448 S.W.2d 265 (K.C. Mo. App. 1969). *See Pashalian v. Big-4 Chevrolet Co.*, 348 S.W.2d 628 (St. L. Mo. App. 1961).

138. *Hunt v. City of Boonville*, 65 Mo. 620 (1877).

139. *See Chappell v. City of Springfield*, 423 S.W.2d 810 (Mo. 1968).

award based on the financial condition of the municipality since it has extensive taxing power. Finally, deterrence is not necessary since wrongdoing public servants can be ousted by the electorate or by supervisors.

VIII. MULTIPLE DEFENDANTS

Cases in which punitive damages are claimed against more than one tortfeasor raise questions as to whether damages may be assessed in different amounts against various defendants and whether they can be awarded against some defendants and denied against others. A subsidiary question is to what extent the financial condition of the various tortfeasors is discoverable and admissible in evidence.

By statute in Missouri, compensatory damages may not be apportioned among joint tortfeasors.¹⁴⁰ However, Missouri courts have held that the contribution statute does not apply to punitive damages.¹⁴¹ Thus, exemplary damages may be apportioned among joint tortfeasors depending upon the different degrees of culpability or the existence or nonexistence of malice on the part of each defendant.¹⁴² Similarly, where the evidence justifies recovery of exemplary damages against some of the joint tortfeasors, but not against others, such damages can only be awarded against those who have the requisite culpability.¹⁴³ The sufficiency of the evidence to warrant the assessment of punitive damages is a matter of law for the court. If the evidence indicates that one joint assailant acted with malice but others did not, then the non-culpable defendants are only liable for compensatory damages. The malice of one co-defendant is not automatically imputed to the others.¹⁴⁴

Once proof is adduced as to the mental state of each tortfeasor, questions arise as to the admissibility of the financial conditions of each defendant. It would be improper to consider the wealth of individual defendants if the punitive damage submission is to be a verdict against all jointly for one amount.¹⁴⁵ Such would result in unjust punishment for the less wealthy defendants. The Missouri Supreme Court in *State ex rel. Hall v. Cook*¹⁴⁶ found that in the spirit of rule 71.06, which requires separate verdicts for compensatory damages and punitive damages, the jury may make separate findings fixing the amount of punitive damages against

140. § 537.060, RSMo 1969.

141. *State ex rel. Hall v. Cook*, 400 S.W.2d 39 (Mo. En Banc 1966).

142. *State ex rel. Hall v. Cook*, 400 S.W.2d 39 (Mo. En Banc 1966); *State ex rel. Kubatzky v. Holt*, 483 S.W.2d 799 (Mo. App., D. St. L. 1972); *Fordyce v. Montgomery*, 424 S.W.2d 746 (Spr. No. App. 1968); Annot., 20 A.L.R.3d 666 (1968).

143. *Ford Motor Credit Co. v. Hill*, 245 F. Supp. 796 (W.D. Mo. 1965). See Note, *Apportionment of Punitive Damages Among Joint Tortfeasors*, 34 U.M.K.C.L. Rev. 486 (1966).

144. *Fordyce v. Montgomery*, 424 S.W.2d 746 (Spr. Mo. App. 1968).

145. *Dawes v. Starrett*, 336 Mo. 897, 82 S.W.2d 43 (1935); *Wolfersberger v. Miller*, 327 Mo. 1150, 39 S.W.2d 758 (1931); *Thomas v. Durham Motors, Inc.*, 389 S.W.2d 412 (K.C. Mo. App. 1965).

146. 400 S.W.2d 39 (Mo. En Banc 1966).

each of several defendants. If the evidence supports separate submissions, the pecuniary status of each defendant is admissible.¹⁴⁷ Since separate verdicts are rendered, there is little possibility that evidence respecting the wealth of one joint tortfeasor will prejudice another. The punishment and deterrence functions are served since each defendant must pay according to his means. Moreover, the plaintiff is not deprived of punitive damages just because his injuries were caused by multiple tortfeasors.

IX. CONCLUSION

In spite of the objections to and denunciations of permitting punitive damages, there is a long history of allowing such damages in American jurisprudence. In the final analysis, the justifications for recognizing the punitive damages doctrine probably outweigh the injustices that are occasionally produced. The type of conduct giving rise to punitive damages is a source of danger to the community and must be discouraged. In many cases the criminal law does not provide adequate sanctions, leaving punitive damages as the only remaining vehicle to deter and punish culpable acts. However, the criticisms of the doctrine cannot be overlooked. Many of these faults could be remedied without undermining the purposes for awarding punitive damages. Restrictions on the timing of disclosure of the defendant's wealth would prevent settlements motivated by a desire to keep such information secret. Delays in introduction of such evidence would prevent prejudice to the defendant on the jury's decision as to the merits of the case. Limitations on punitive damage awards where the defendant has been punished under the criminal law would avoid charges of double punishment. Perhaps there should be greater control exercised over the jury's decision as to what is proper to punish and deter. Whatever changes may occur, there is a place for an admonitory function in civil litigation and the doctrine of punitive damages has generally served that function well.

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147. See Annot., 9 A.L.R.3d 692 (1966).

