Volume 65 | Issue 2 Article 8

February 1963

Damages--Exemplary Damages--Requirements of Exemplary Damages

Eugene Triplett Hague Jr.
West Virginia University College of Law

Damages—Exemplary Damages—Requirements for Exemplary Damages.

P, a trustee in corporate reorganization, brought an action against *D* for attempting, through a subsidiary, to acquire shares of the trustee's corporation through a scheme to defraud. The lower court rendered a judgment against *D,* finding $406,000 compensatory damages and awarding $650,000 as exemplary damages. *Held,* affirmed on the condition that *P* file a remittitur of all the exemplary damages and otherwise reversed for a new trial. The court felt that in view of the evidence the award for exemplary damages was excessive and shocking to the conscience. *Bankers Life & Cas. Co. v. Kirtley,* 307 F.2d 418 (8th Cir. 1962).

The doctrine of exemplary damages originated in the English courts in the eighteenth century as a means of justifying awards of damages in excess of the plaintiff's actual damages. 70 HARV. L. REV. 517 (1956). Exemplary or punitive damages are generally defined as damages which are given in enhancement merely of the ordinary damages due to wanton, reckless, or malicious conduct of the defendant. Such damages go beyond the actual damages suffered in the case and are allowed as a punishment of the defendant and as a deterrent to others. *Pendleton v. Norfolk & Western Ry. Co.,* 82 W. Va. 220, 95 S.E. 941 (1918).

The concept of awarding exemplary damages as a punishment to the defendant is followed by most jurisdictions. West Virginia follows this concept today. The West Virginia court pointed out that the common law definition of the term exemplary damages is damages inflicted by way of a punishment upon a wrongdoer as a warning to him and to others in order to prevent a repetition or commission of similar wrongs. *Mayer v. Frobe,* 40 W. Va. 246, 22 S.E. 58 (1895). The *Mayer* case directly overruled an earlier West Virginia case which held that exemplary damages could not be inflicted as punishment. *Pegram v. Stortz,* 31 W. Va. 220, 6 S.E. 485 (1880). In *Pendleton v. Norfolk & Western Ry. Co., supra,* the court determined that exemplary damages should not be awarded in a case where the amount of compensatory or actual damages is adequate to punish the defendant, and in a case where such compensatory damages are not in the judgment of the jury adequate for the purpose of punishment, only such additional amounts should be awarded as taken together with the compensatory damages will be sufficient for that purpose. It was further stated in the *Pendleton*

case that exemplary damages should not be awarded in any case unless there was evidence from which the jury may conclude that the defendant acted with malice toward the plaintiff or with reckless and wanton disregard of the plaintiff's rights. On the other hand, a few jurisdictions recognize the function of exemplary damages to be compensation and not to be considered punishment. *Doroszka v. Lauine,* 111 Conn. 575, 150 Atl. 629 (1930); *Wise v. Daniel,* 221 Mich. 229, 190 N.W. 746 (1922).

The principal case found that the award for exemplary damages determined by the lower court was excessive and could not be sustained. In determining excessiveness of exemplary damages the court used the "conscionableness test." Although admitting that there was no hard and fast rule to follow, the court determined that the test to be followed was whether the verdict was so large or small, as the case may be, as to shock the conscience.

The court also mentioned that in some instances verdicts have been upset on the basis that the exemplary damages are disproportionate to the actual damages. However, the proportionate test is not a conclusive test but rather one of a number that may be applied according to this decision. This test has, however, been applied by the West Virginia court in determining the question of excessiveness of exemplary damages. It has been held that in a case where it is proper to award exemplary damages the amount of such award must bear some reasonable proportion to the amount of compensatory damages. *Newman v. Robson & Richard,* 86 W. Va. 681, 104 S.E. 127 (1920); *Pendleton v. Norfolk & Western Ry. Co., supra.* In *Turk v. Norfolk & W. Ry.,* 75 W. Va. 623, 84 S.E. 569 (1915), it was held that exemplary damages that were twice as great as the compensatory damages were not considered excessive.

The plaintiff in the principal case argued that the wealth of defendant justified the amount of the award for exemplary damages. The court admitted that there was respectable authority to the effect that the wealth of the defendant was a factor to be considered in an award of exemplary damages. West Virginia has followed this reasoning and held that in a case where it is proper for a jury to award exemplary damages it was competent to consider the station of the parties, and particularly the financial and social standing of the defendant in order that it may be determined what would be adequate and sufficient punishment. *Pendleton v. Norfolk & W. Ry. supra.*

After determining that the amount awarded for exemplary damages was excessive, the court in the principal case gave the plaintiff the option of remitting the entire exemplary damages or, recognizing that the plantiff was entitled to exemplary damages for any amount a jury might fix which was not excessive, a new trial upon all issues. In *Clark v. Lee,* 76 W. Va. 144, 85 S.E. 64 (1915), the court said that under no circumstances can the court reduce the amount of a general verdict. If it is excessive and the amount of the excess is ascertainable from data appearing in the evidence, an opportunity should be allowed the party having the verdict to remit such excess and, on his declination to do so, the verdict should be set aside and a new trial ordered.

West Virginia has also adopted another approach to remedy this situation. This solution involves a re-trial on a single issue and not on all the issues as would be required in the principal case. In *Munden v. Johnson,* 102 W. Va. 436, 135 S.E. 832 (1926), it was decided that it would be proper to grant a new trial on a single issue if this issue in question was entirely distinct and separable from the other issues involved. This proposition was applied in an earlier case which held that where there is no error in determining the defendant's liability but there is error in determining the amount of damages, the issues are distinct and separable a new trial would be proper based solely on the amount of damages. *Chafin v. Norfolk & Western Ry. Co.,* 80 W. Va. 703, 99 S.E. 822 (1917). Accord, *Stone v. United Fuel Gas Co.,* 111 W. Va. 569, 163 S.E. 48 (1932). Most of the state and federal courts that have decided this question of re-trial on a single issue have ruled in favor of it. McCormick, Damages § 19 (1935). It has been held, however, that a new trial is the proper solution and not remitter when it is determined that the excessive verdict resulted from prejudice and passion on the part of the jury. *Pauly v. McCarthy,* 109 Utah 431, 184 P.2d 123 (1947).

In a dissent to the principal case it was argued that the purpose of exemplary damages was to punish for misdoing and to deter the defendant from repetition and others from doing likewise. To constitute a punishment, the amount should be measured by the misdeed and tempered by the means of the defendant. If the sum is not adjusted to the wrong doer's ability to pay, it serves little use as a punishment. The dissenting judge also believed that the amount of exemplary damages was in fair proportion to the actual damages.

It would seem, on the basis of the requirements set forth in West Virginia with respect to the concept of punishment, the reasonable relationship between actual damages and exemplary damages, and the consideration of the defendant's wealth, that in principle, at least, we would be in accord with the view of the dissent.

Eugene Triplett Hague, Jr.

Damages—Liability Insurance and Punitive Damages

P brought suit against insured for injuries received in an automobile collision and recovered a judgment consisting of compensatory and punitive damages. Insurer denied liability for the punitive damages. *P* and insurer brought an ancillary garnishment action against insurer to recover on the automobile liability policy. The district court allowed recovery against the insurer for both the compensatory and the punitive damages. *Held,* affirmed as to the compensatory damages; reversed as to the punitive damages. Public policy prohibits construction of an automobile liability policy as covering liability for punitive damages. *Northwestern Nat'l Cas. Co. v. McNulty,* 307 F.2d 432 (5th Cir. 1962).

Since *Mayer v. Frobe,* 40 W. Va. 246, 22 S.E. 58 (1895), West Virginia has upheld the awarding of punitive damages to the plaintiff where the defendant's conduct has warranted punishment. The expressed sole purpose of the court in allowing punitive damages is to punish the defendant and to deter others from committing like offenses. *McCoy v. Price,* 91 W. Va. 10, 112 S.E. 186 (1922); *Hess v. Marinari,* 81 W. Va. 500, 510, 94 S.E. 968, 971 (1918); *Mayer v. Frobe supra.* These damages are not the necessary and natural result of the tort pleaded, nor are they something to which the plaintiff is entitled as compensation, either for any actual loss or any pain suffered. *O'Brien v. Snodgrass,* 123 W. Va. 483, 487, 16 S.E.2d 621, 623 (1941); *Hess v. Marinari, supra* at 503. In order to recover punitive damages in any action, the plaintiff must show that the acts complained of were done maliciously, wantonly, mischievously, or with a reckless disregard of the plaintiff's rights. *Peck v. Bez,* 129 W. Va. 247, 258, 40 S.E. 2d 1, 9 (1946); *McCoy v. Price, supra; Pendleton v. Railway Co.,* 82 W. Va. 270, 95 S.E. 941 (1918).