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Kentucky Law Survey: Remedies

Judith K. Jones
University of Kentucky

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Remedies

BY JUDITH K. JONES*

INTRODUCTION

During this survey period¹ Kentucky courts faced a number of challenges to punitive damage awards. This Survey addresses the propriety of punitive damages in both gross negligence and intentional tort cases; the assessment criteria used to fix the award; an employer's vicarious liability for punitive damages; and the propriety of punitive damages in first party bad faith actions. The author hopes that the variety of decisions discussed below will provide the reader with an instructive overview of punitive damage law in Kentucky.

I. PROPRIETY OF A PUNITIVE DAMAGE AWARD

A. *The Threshold Issue: Are Punitive Damages Warranted?*

Kentucky, in accordance with most jurisdictions,² characterizes the function of punitive damages as a punishment of the defendant for some "outrageous"³ conduct and as a deterrent to defendant and others from engaging in similar future misconduct.⁴ Conduct considered "outrageous" involves more than the

* J.D. Candidate, University of Kentucky, 1986. The author expresses her appreciation to Kenneth B. Germain, Professor of Law, for his assistance in the preparation of this Survey.

¹ The survey period comprises July 1, 1983 through July 31, 1985.

² See 1 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 4.14 (1984).

³ See *Ashland Dry Goods Co. v. Wages*, 195 S.W.2d 312, 315 (Ky. 1946).

⁴ See *id.*, cited in, *Hensley v. Paul Miller Ford*, 508 S.W.2d 759, 762 (Ky. 1974). Earlier Kentucky cases contemplated a compensatory function for punitive damages. See generally, Comment, *Zen and the Art of Exemplary Damages Assessment*, 72 KY. L.J. 897, 903-07 (1983-84), for a discussion of the purposes advanced by Kentucky courts for assessing punitive damages.

commission of a wrongful act.⁵ Such an act must be committed willfully, maliciously, or in such a manner as to indicate a wanton or reckless disregard for the injured plaintiff's rights.⁶ Thus, the threshold issue in determining the propriety of granting a punitive damage award is ascertaining whether the aggravated circumstances exist that merit this remedy.⁷ Elucidating specific standards on this issue has proved troublesome for Kentucky courts "because the misconduct involved cuts across the spectrum of tort litigation, rather than being restricted to one type of tort or . . . injury."⁸

1. *Punitive Damages for Gross Negligence*

Mere negligence does not provide a sufficient basis for imposing punitive damages.⁹ Even gross negligence, absent a culpable mental state, has been held insufficient to justify a punitive award.¹⁰ A negligent act that warrants the sting of punitive

⁵ See 508 S.W.2d at 762 ("[T]here must be more than a wrong resulting in damages.").

⁶ See *Holloway Constr. Co. v. Smith*, 683 S.W.2d 248, 250 (Ky. 1984); *Bisset v. Goss*, 481 S.W.2d 71, 73 (Ky. 1972); 195 S.W.2d at 315; *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339, 347 (Ky. Ct. App. 1982).

⁷ See *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382, 389 (Ky. 1985); *Fowler v. Mantooth*, 683 S.W.2d 250, 252 (Ky. 1984).

⁸ 683 S.W.2d at 252. See also 690 S.W.2d at 388; 508 S.W.2d at 762.

⁹ See *Keller v. Morehead*, 247 S.W.2d 218, 220 (Ky. 1952) (refusal to give jury instruction authorizing punitive damages was proper where evidence only established issue of ordinary negligence).

¹⁰ See *Cadle v. McHargue*, 60 S.W.2d 973, 974-75 (Ky. 1933) (Punitive damages cannot be assessed for gross negligence defined as failure to exercise slight care.); *W.T. Sistrunk & Co. v. Meisenheimer*, 265 S.W. 467, 468 (Ky. 1924) (Punitive damages cannot be assessed for gross negligence defined as failure to exercise slight care.). Thus, at one time, the Kentucky Court differentiated two types of gross negligence.

One may fail to exercise slight, or any care, resulting in an accident, which will not make him liable for punitive damages; but in order to justify the assessment of such damages there must be the element . . . of malice or willfulness, of such an utter and wanton disregard of the rights of others as from which it may be assumed he was acting either maliciously or willfully.

60 S.W.2d at 974. See also *Marye v. Commonwealth*, 240 S.W.2d 852, 855 (Ky. 1951) (Willful or wanton conduct "is clearly distinguishable from negligence or from gross negligence, the difference being one of kind and not merely of degree.") (citing 65 C.J.S., *Negligence*, § 9 (1966)). The standard of gross negligence defined as failure to use slight care has fallen into disuse by the Kentucky courts. See note 11 *infra* and accompanying text.

damages is usually expressed as negligence so gross as to indicate a wanton or reckless disregard of the plaintiff's rights or safety.¹¹ "Wanton" and "reckless disregard" are amorphous terms, however, which are not susceptible of precise definition.¹² In some cases, the degree of negligence to which the terms "wanton" or "reckless" are applied involves evidence of a defendant's conscious indifference to some known or probable harm.¹³ Thus, punitive damages are warranted because the defendant's act is accompanied by the bad mental state that justifies the award. In contrast, when there is no direct evidence of a bad mental state and it must be inferred from evidence of substandard conduct alone, the issue of whether punitives are warranted is inherently problematic for the courts. A recent Kentucky case illustrates this difficulty.

In *Horton v. Union Light, Heat & Power Co.*,¹⁴ the plaintiffs' home was destroyed by an explosion resulting from natural gas leaking into the home from a break in the line at the street. A gas company customer representative, who responded to the plaintiffs' complaint of an odor of gas in the house, discovered the line break, checked the plaintiffs' home, and smelled the gas on the main floor. He did not, however, use an available explosive meter device that is specifically designed to detect gas and its point of entry in an enclosure.¹⁵ The gas company's policy did not mandate use of the device in an emergency leak situation,

¹¹ This definition of gross negligence is used exclusively in modern Kentucky cases. See, e.g., *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d at 389-90; *Holloway Constr. Co. v. Smith*, 683 S.W.2d at 250; *Hensley v. Paul Miller Ford*, 508 S.W.2d at 762; *Bisset v. Goss*, 481 S.W.2d at 73; *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d at 347.

¹² See, e.g., 481 S.W.2d at 73 (citing *Louisville & N.R.R. v. Jones' Adm'r*, 180 S.W.2d 555, 558 (Ky. 1944)). The terms "wanton," and "reckless" are used synonymously with "oppressively, or with malice as implies a spirit of mischief or criminal indifference to civil obligations." *Id.* See also *Louisville & N.R.R. v. George*, 129 S.W.2d 986, 989 (Ky. 1939) (citing *Higbee Co. v. Jackson*, 128 N.E. 61, 65 (Ohio 1920)) ("A complete indifference to consequences distinguishes wrongs caused by wantonness and recklessness from torts arising from negligence.").

¹³ See 683 S.W.2d at 250 (construction contractor continued blasting on highway project after receiving notice of ensuing damage to plaintiff's property); 644 S.W.2d at 347 (strip mining operator continued underground blasting after receiving complaints of damage).

¹⁴ 690 S.W.2d 382 (Ky. 1985).

¹⁵ *Id.* at 386.

leaving this decision to the employee's own judgment.¹⁶ The customer representative erroneously concluded that the gas emanating from the break outside was entering the house through the chimney and instructed the plaintiffs to close the damper.¹⁷ At trial, the employee testified that, subsequently, the gas odor dissipated.¹⁸ He also suggested that the kitchen exhaust fan be kept running under his mistaken assumption that the fan vented to the outside. The fan actually vented into the attic. After telephoning a repair crew, the customer representative departed, telling the plaintiffs their home was safe. He did not reenter the home. The field crew supervisor who arrived to repair the break never checked the house, nor did he cut off the gas or evacuate the plaintiffs, which he had authority to do.¹⁹ There was conflicting testimony at trial on whether the supervisor was told gas had been detected in the house.²⁰ Twenty minutes after the field crew arrived, the house exploded, apparently due to continued accumulation of gas inside the house.²¹

The plaintiffs sued the gas company alleging negligence and gross negligence by the company and its employees.²² After a three week jury trial,²³ the plaintiffs recovered \$109,254 in compensatory damages and \$520,000 in punitive damages.²⁴ The gas company, although conceding its employees' negligence,²⁵ appealed the punitive damage award arguing that the evidence was insufficient to submit the issue of gross negligence to the jury.²⁶ The court of appeals, in a unanimous panel decision, agreed

¹⁶ See *id.* at 387.

¹⁷ *Id.* at 386.

¹⁸ See *Union Light, Heat & Power Co. v. Horton*, No. 82-CA-1280-MR, slip op. at 3 (Ky. Ct. App. Jan. 6, 1984).

¹⁹ 690 S.W.2d at 386.

²⁰ See *id.* The field supervisor testified that he would have checked every room in the house with the explosive meter and would have continually monitored the house had he known there was gas in the house. The gas company records introduced at trial indicated that the first gas company employee had informed the field supervisor of the presence of gas. See *id.*

²¹ *Id.*

²² See *id.* at 384.

²³ See No. 82-CA-1280-MR, slip op. at 4.

²⁴ See 690 S.W.2d at 384.

²⁵ See *id.* at 387.

²⁶ See No. 82-CA-1280-MR, slip op. at 1.

with the gas company and reversed the award, ruling that the gas company's employees' conduct did not amount to "wanton and reckless indifference for [the plaintiffs'] lives and property."²⁷ Although the court conceded that "very poor judgment"²⁸ was exercised and that "serious errors in judgment"²⁹ were made, it distinguished the "failure to use slight care" standard of gross negligence, which does not warrant punitive damages, from conduct that does warrant punitive damages.³⁰ That court attributed the employees' cumulative negligent acts to the "single"³¹ erroneous assumption that the gas entered the home through the chimney and that closing the damper averted any danger.³²

In response to the plaintiffs' assertion that the gas company itself was negligent by failing to require the explosive meter's use, the court stated that no law or regulation mandated such a procedure at the time of the explosion.³³

On further appeal, the Kentucky Supreme Court upheld the trial verdict and judgment and accused the intermediate court of usurping the jury's role in this case.³⁴ The Court criticized the appellate court's conclusion that the evidence was insufficient

²⁷ *Id.* slip op. at 6.

²⁸ *Id.* slip op. at 5.

²⁹ *Id.* slip op. at 6.

³⁰ *See id.* slip op. at 5. "[I]f an injury results from a tortfeasor's negligence, punitive damages are recoverable only if the negligent act is so outrageous as to indicate a wanton and reckless disregard for the interests, safety, and life of the plaintiff. [Citations omitted]. Further, even a failure to exercise slight care is insufficient."

³¹ *Id.* Specifically, the court attributed the employees' failure to use the explosive meter, the failure to ascertain the accumulation of gas in the attic, the failure to dissipate the gas in the house, and the failure to warn the plaintiffs to take precautionary measures against an explosion, to the employee's belief that the open damper was the source of the problem.

³² *See id.*

³³ *See id.* slip op. at 6.

³⁴ *See* 690 S.W.2d at 385.

The more judges take cases away from juries, the more the concepts of reasonable conduct, negligence and gross negligence become synonymous with the view of the judge or judges on that court. . . .

. . . .

The role of the appellate court when deciding negligence issues of this sort is limited to viewing the evidence from a standpoint most favorable to the prevailing party.

to support a finding of wanton and reckless disregard for the plaintiffs' safety and further chastised the court for engaging in its own fact finding to reach such a conclusion.³⁵

The Supreme Court found, from the facts of the case, that "the jury could conclude . . . that the employees were aware that gas had escaped into the Horton house, was probably still there and still leaking into the house."³⁶ This conclusion, if supported by the evidence, would indicate a conscious wrongdoing—a conscious disregard of probable harm, which would justify liability for punitive damages. How the Court drew this conclusion is unclear. It cited no evidence that would indicate that the *employees* acted in conscious disregard of some known danger, but permitted the jury to make this inference on the basis of conduct alone. Indeed, according to the *Horton* dissenters, facts that would reasonably support this conclusion were not discernible from the record.³⁷

Nevertheless, the gross negligence *vel non* of the employees was not dispositive in this case. A substantial portion of the opinion dealt with the Court's criticism of the gas company's training policies and procedures³⁸ (which, however, apparently complied with all safety regulations of the Public Service Commission).³⁹ In particular, the Court relied on the testimony of one Mr. Murphy, then the Chief Utility Inspector for the Kentucky Public Service Commission, as "the most damaging evidence"⁴⁰ on the issue of the propriety of the punitive award. During the four months prior to the explosion, Murphy had urged the gas company to adopt a model emergency plan he had personally developed.⁴¹ The plan specifically required that the explosive meter be used in emergency gas leak situations.⁴² More-

³⁵ *See id.*

³⁶ *Id.* at 387.

³⁷ *See id.* at 391 (Stephenson, J., dissenting); *id.* at 392 (Vance, J., dissenting) ("[T]here is nothing to suggest . . . that the circumstances were such that he must have known, but just didn't care, about the danger to others.").

³⁸ *See id.* at 387-88.

³⁹ *See id.* at 391 (Stephenson, J., dissenting) ("According to the record the company was in compliance with all pertinent safety rules and regulations of the Public Service Commission.").

⁴⁰ *Id.* at 387.

⁴¹ *See id.*

⁴² *See id.*

over, the Court referred to evidence offered at trial that the gas company resented Murphy's "nit-picking"⁴³ attempts to improve safety procedures and misrepresented to the Public Service Commission the training its employees received.⁴⁴ On the basis of his testimony, the Court drew the startling conclusion that implementation of the model plan "would have prevented the explosion."⁴⁵ The Court took the view that under a "totality of circumstances,"⁴⁶ the evidence "viewed cumulatively"⁴⁷ supported the jury's finding of "wanton or reckless disregard for the lives, safety or property of other persons."⁴⁸

In reaching its decision, the Court emphatically stressed that the employees' actions and the company's actions must be viewed together.⁴⁹ In support of its position, the Court adopted a statement (from the plaintiffs' brief)⁵⁰ by the Wyoming Supreme Court:⁵¹ "Even where a single act of negligence might not constitute gross negligence, gross negligence may result from the several acts."⁵²

As Justice Stephenson pointed out in his dissent, *Brown v. Riner*, quoted above, is totally inapposite to the facts in *Horton*. In *Brown*, the Wyoming Court was referring to several simultaneous factors that together supported a finding of gross negligence, determined for purposes other than a decision on punitive damages.⁵³ Justice Stephenson condemned the majority view as

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ *Id.* The *Horton* majority engaged in its own fact-finding by drawing this conclusion. In their brief to the Supreme Court, plaintiffs went only so far as to assert a probability that the explosion would not have occurred. Brief for Movants, at 7, *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985).

⁴⁶ See 690 S.W.2d at 387.

⁴⁷ *Id.*

⁴⁸ *Id.* at 387-88.

⁴⁹ See *id.* at 387, 388, 390. The Court stated that although it was "reasonably arguable" that the employees' acts were grossly negligent, the "evidence regarding policies and procedures of the company must also be considered." *Id.* at 388.

⁵⁰ Brief for Movants, at 25, 690 S.W.2d 382.

⁵¹ *Brown v. Riner*, 500 P.2d 524 (Wyo. 1972).

⁵² *Id.* at 528.

⁵³ The case involved an automobile accident in which the driver crashed into a traffic light pole located in the center of an intersection. The injured plaintiff brought suit against the deceased driver's estate. The Wyoming Supreme Court found that the issue of gross negligence should have been submitted to the jury where there was evidence

inventing a new standard for gross negligence—"adding together several ordinary negligent factors to make out a case of gross negligence."⁵⁴ He further cautioned that "a multitude of cases not ordinarily thought of as gross negligence cases will qualify."⁵⁵

Justice Vance dissented separately, arguing that the employees' conduct did not justify punitive damages.⁵⁶ According to Justice Vance, punitive damages are appropriate only when there is evidence of conscious wrongdoing—" (1) intentional wrongdoing, or (2) conduct which is so inherently dangerous to the lives and safety of others that the actor is bound to have known . . . the likelihood of such harm but nevertheless engaged in the conduct without regard for its consequences."⁵⁷ In Justice Vance's view, there was no conscious wrongdoing by the employees. Rather, they "proceed[ed] ahead entirely oblivious of any danger."⁵⁸

Both Justice Vance and Justice Stephenson concluded that Murphy's testimony was irrelevant since the gas company had not violated any pertinent rule or regulation.⁵⁹

The *Horton* majority also addressed the defendant's argument that punitive damages should be abolished in gross negligence cases. Noting that the propriety of punitive damages does

that the driver had been drinking, was exceeding the speed limit and had struck a plainly visible pole. The issue of punitive damages was not before the *Brown* court. Whether the damages requested included punitives is not stated. The issue of gross negligence was crucial in *Brown* because under a pertinent guest statute, plaintiff could not recover any damages unless gross negligence was proved. *See id.* at 525, 527 n.2. The majority's reliance on the *Brown* rationale is not persuasive in this case, nor was the *Brown* proposition necessary to grasp the majority's meaning, i.e., the employees' acts had to be evaluated with reference to the company's procedures. The issues of the employees' negligence and alleged lack of training were inextricably linked.

⁵⁴ 690 S.W.2d at 391.

⁵⁵ *Id.* at 392.

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.* at 391 (Stephenson, J., dissenting); *id.* at 392 (Vance, J., dissenting).

The court of appeals never reached the issue of whether Murphy's evidence was competent. It did, however, conclude that "while the evidence as to the commission's plan may have been relevant to the issue of whether [the gas company] negligently evaluated the danger in regard to the gas leak at [plaintiff's] home, . . . it was not evidence which justified the giving of an instruction on punitive damages." No. 82-CA-1280-MR, slip op. at 6-7.

not turn on whether an act is intentional or negligent,⁶⁰ the Court reiterated that the threshold for the award is “whether the misconduct ‘has the character of outrage.’ ”⁶¹

[N]egligence when gross has the same character of outrage justifying punitive damages as does willful and malicious misconduct in torts where the injury is intentionally inflicted. . . . [W]anton or reckless disregard for the lives and safety of others [may] be implied from the nature of the misconduct.⁶²

How one interprets the gross negligence standard of “wanton or reckless disregard,” which was submitted to the jury in this case,⁶³ may explain the differences of opinion exemplified in *Horton*. The court of appeals and the *Horton* dissenters, who felt that the employees’ actions alone were determinative, were not satisfied from the evidence that the employees exhibited a conscious indifference to potential harm.⁶⁴ The majority’s view does not expressly require a finding of *conscious* wrongdoing (although the majority stretched the evidence to conclude that a jury could have found that the employees were *aware* that gas was still leaking into the house). Yet, permitting a jury to infer a culpable mental state, absent such a finding, suggests an extreme result alone always will provide the basis for a punitive award. This, however, negates the idea that punitive damages focus on the actor’s mental state. Admittedly, not every case in which punitive damages are warranted will manifest direct evidence of conscious wrongdoing. However, a jury should not be permitted to imply a culpable mental state unless it may be reasonably inferred from the evidence that a defendant acted with conscious indifference to the plaintiff’s rights.⁶⁵

Nevertheless, the gas company’s complicity amply justifies the result in *Horton*. Some of the employees’ errors can be

⁶⁰ See 690 S.W.2d at 389. Thus, even an intentional act, such as assault or false arrest, will not justify punitive damages absent aggravating circumstances such as “evil motive” or “reckless indifference.” The court construed these terms as “synonymous” on the issue of the propriety of punitive damages. See *id.*

⁶¹ *Id.* (citing 508 S.W.2d at 762).

⁶² 690 S.W.2d at 389.

⁶³ See *id.* at 387-88.

⁶⁴ See *id.* at 391 (Stephenson, J., dissenting); *id.* at 392 (Vance, J., dissenting); No. 82-CA-1280-MR, slip op. at 5.

⁶⁵ See text accompanying notes 74-83 *infra*.

attributed to the company's alleged failures to provide adequate training. In view of the hazardous nature of gas, and the dire consequences of an explosion (referred to by the *Horton* majority),⁶⁶ the public utility's apparent refusal to adopt feasible safety procedures does indicate a conscious indifference to the safety of its customers. Punishing the company by a substantial punitive award will likely influence its future conduct (and that of its employees) as well as the conduct of other companies. Thus the function of punitive damages arguably is well-served in this case.

2. *Punitive Damages for Intentional Torts*

The Kentucky Supreme Court also considered the propriety of awarding punitive damages in an intentional tort case in *Fowler v. Mantoath*,⁶⁷ decided prior to *Horton*. *Fowler*, which is treated more thoroughly in the next section of this Survey,⁶⁸ involved a civil suit for assault and battery.⁶⁹ The *Fowler* Court reasoned that while an intentional tort may not in and of itself justify punitive damages, such an allowance is appropriate when the tortious act is committed willfully or maliciously.⁷⁰ A jury is permitted to imply malice from the nature of the conduct—"so long as the conduct is sufficient to evidence conscious wrongdoing."⁷¹ Thus, even an assault will not justify imposition of punitive damages absent a bad mental state, as when provocation existed for the assault.⁷² This view is entirely consistent with prior cases that established that the existence of a bad mental state, and not the wrongful act itself, controls the issue of whether punitive damages are authorized.⁷³

Fowler is inconsistent, however, with the Court's later decision in *Horton*⁷⁴ where the Court did not apply the threshold

⁶⁶ 690 S.W.2d at 387.

⁶⁷ 683 S.W.2d 250 (Ky. 1984).

⁶⁸ See text accompanying notes 84-109 *infra*.

⁶⁹ See 683 S.W. 2d at 251.

⁷⁰ See *id.*

⁷¹ *Id.*

⁷² See note 60 *supra*. See also KY. REV. STAT. ANN. § 411.010 (Bobbs-Merrill 1970) (Provocation may be pled as a defense to, or to mitigate, a claim for punitive damages in a civil assault or assault and battery action.)

⁷³ See notes 5-7 *supra* and accompanying text.

⁷⁴ 690 S.W.2d 382 (Ky. 1985), discussed fully at text accompanying notes 14-66, *supra*.

requirement of conduct evincing a conscious wrongdoing.⁷⁵ *Fowler* cited *Hensley v. Paul Miller Ford*⁷⁶ to support its position that only conscious wrongdoing justifies punitive damages.⁷⁷ *Hensley* involved negligent conduct,⁷⁸ as did *Horton*.⁷⁹ Consequently, the type of tort at issue presumably does not alter the threshold requirement for imposing punitive damages. The *Horton* Court, however, approved a jury instruction in a gross negligence case which permits the jury to infer a culpable mental state without regard to whether the evidence supported a finding of conscious wrongdoing.⁸⁰ As noted previously, the *Horton* decision may well turn on the evidence of the gas company's alleged abuses.⁸¹ Keeping in mind the function of punitive damages,⁸² there is no logical reason to require an element of conscious wrongdoing in an intentional tort case and to ignore such a requirement in a case that involves negligent conduct.⁸³

B. Assessment Factors

1. Seriousness of Injury

After punitive damages are determined to be appropriate, a second but related inquiry concerns the factors used to fix the award. The factors governing measurement of a punitive award

⁷⁵ The *Horton* Court distinguished the instructions given in an intentional tort case and a gross negligence case. See *id.* at 389.

The instructions in an intentional tort case define [outrageous conduct] . . . as . . . "willful, malicious, and without justification," with the understanding that "[m]alice may be implied so long as the conduct is sufficient to evidence conscious wrongdoing." [citing *Fowler*]. The instructions in a gross negligence case properly define [outrageous conduct] . . . as . . . misconduct of a character evidencing "a wanton or reckless disregard for . . . other persons." [quoting the trial court].

Id.

⁷⁶ 508 S.W.2d 759, 761 (Ky. 1974).

⁷⁷ See 683 S.W.2d at 252.

⁷⁸ See 508 S.W.2d at 762.

⁷⁹ See 690 S.W.2d at 384.

⁸⁰ See note 75 *supra*.

⁸¹ See text accompanying notes 38-49, 66 *supra*.

⁸² See text accompanying notes 3-4 *supra*.

⁸³ See C. McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 79, at 280 (1935).

"Since these damages are assessed for punishment . . . a positive element of conscious wrongdoing is always required." See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 205-06 (1973).

comprised the central issue in *Fowler v. Mantooth*.⁸⁴ *Fowler* involved an assault and battery⁸⁵ upon a health club employee by a customer. Both parties were ex-football players "of exceptional size and strength."⁸⁶ At trial, the plaintiff, who had been knocked unconscious by a single, unprovoked punch,⁸⁷ recovered compensatory damages of \$2,210 and punitive damages of \$20,000. The defendant appealed both awards as excessive.⁸⁸ The court of appeals, in an unpublished opinion,⁸⁹ acknowledged the defendant's culpable mental state but reversed the punitive award on the theory that "[a] single blow with practically no injury . . . however wrong the blow" could not sustain a \$20,000 award.⁹⁰ Prior Kentucky case law had established that in assessing punitive damages, relevant considerations included both the seriousness of the injury and the extent of the defendant's culpability.⁹¹

⁸⁴ 683 S.W.2d 250 (Ky. 1984). Factors employed by the Kentucky courts track the RESTATEMENT (SECOND) OF TORTS § 908(2) (1977), including "the character of the defendant's act" and the seriousness of the plaintiff's injury. See 683 S.W.2d at 253; *Hensley v. Paul Miller Ford*, 508 S.W.2d 759, 763 (Ky. 1974). The third factor expressed in the *Restatement* is the defendant's wealth. "Kentucky does not subscribe to the *Restatement's* third prong." 683 S.W.2d at 253 n.1. Texas and Alabama are the only other jurisdictions that bar such proof. See 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 5.36. The vast majority of jurisdictions considers evidence of the defendant's wealth relevant in assessing punitive damages so that the jury "may determine the sum of damages which will be adequate enough to punish the defendant. . . ." *Id.* See also Comment, *supra* note 4, at 909-13, for a critical discussion of Kentucky's position; the author advocates that evidence of the defendant's wealth be included in the assessment criteria to better effectuate the punishment/deterrence goals of punitive damages. See *id.* at 912. Additionally, the author proposes a bifurcated trial procedure that protects the defendant from the undue influence a jury may give such evidence. See *id.* at 913-15.

⁸⁵ Although the Court identified the cause of action as an assault, it is clear that there was an assault and battery committed. A battery is defined as "any unlawful touching of the person. . . ." *Sigler v. Ralph*, 417 S.W.2d 239, 241 (Ky. 1967) (citing 1 CALDWELL'S KENTUCKY JUDICIAL DICTIONARY 262 (1916)).

⁸⁶ 683 S.W.2d at 251.

⁸⁷ See *id.*

⁸⁸ See *id.* at 252.

⁸⁹ *Mantooth v. Fowler*, No. 82-CA-2527-MR (Ky. Ct. App. July 29, 1983).

⁹⁰ *Id.* slip op. at 4.

⁹¹ See 508 S.W.2d at 763 ("[T]he seriousness of the injury and the culpability of the one causing the injuries" are the relevant considerations in assessing an award.)

2. *Character of the Act*

The Kentucky Supreme Court reversed the intermediate court and upheld both awards in *Fowler*.⁹² Although the high Court disagreed with the court of appeals' conclusion that there was no significant harm,⁹³ the Court found "the character of the act . . . of equal or greater importance" than the seriousness of the injury in assessing punitive damages in this case.⁹⁴

Citing the *Restatement (Second) of Torts*, the Court listed factors bearing on the character of the act: the degree of outrageousness, the extent of culpability, the motives of the wrongdoer, the relationship between the parties, and the existence or absence of provocation.⁹⁵ "To relate excessiveness of the award only in terms of its reasonable relation to the injury sustained, is to tell only half the story."⁹⁶ In fairness to the court of appeals, it must be mentioned that the court did consider both factors and not merely the seriousness of the injury.⁹⁷ In its view, the combination of the injury *and* the act did not warrant the substantial award.⁹⁸

3. *Relationship to Compensatory Damages*

The Supreme Court, in *Fowler*, also reiterated the principle that when actual injury is proved, even nominal damages will support a punitive damage award.⁹⁹ In contrast to some jurisdictions, Kentucky does not require that a punitive award bear

⁹² See 683 S.W.2d at 254.

⁹³ The court of appeals opinion states that there was "practically no injury." The Supreme Court found this conclusion inconsistent with the compensatory award of \$2,210, but did not find this issue determinative. See *id.* at 253. At trial, plaintiff offered proof that he was unconscious for over an hour, incurred medical expenses, lost time from work, incurred physical pain and suffering, and was humiliated. See *id.* at 252.

⁹⁴ *Id.* at 253.

⁹⁵ *Id.* See also RESTATEMENT (SECOND) OF TORTS § 908 comment e (1977).

⁹⁶ 683 S.W.2d at 253.

⁹⁷ See No. 82-CA-2527-MR, slip op. at 4.

⁹⁸ See *id.* "There is simply not a sufficient relationship between the punitive damage award, the injuries sustained, and the acts causing them."

⁹⁹ See 683 S.W.2d at 252.

any relation to the amount of compensatory damages awarded.¹⁰⁰ Since the goals of punishment and deterrence are served through imposition of punitive damages, whereas compensatory damages serve to indemnify the plaintiff for actual losses, there is no logical reason why the size of the awards should correlate.

The Court also rejected the defendant's assertion that the plaintiff's humiliation resulting from the incident could not properly be considered by the jury in assessing the *punitive* award. The argument itself is baffling because the jury instruction authorizing punitive damages made no reference to humiliation.¹⁰¹ Possibly, the defendant's position was that punitive damages are not warranted in a case where the only significant injury is humiliation.¹⁰² Regardless of what was meant, the Court's response was equally baffling.

The Court agreed that if the purpose of punitive damages was compensatory in nature, humiliation might not properly be considered since "compensatory damages . . . arguably, do not include humiliation *per se*."¹⁰³ This observation is totally incom-

¹⁰⁰ Compare *Alamo Nat. Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981) and *Leach v. Biscayne Oil & Gas Co. Inc.*, 289 S.E.2d 197 (W. Va. 1982) (Punitive damages must be reasonably proportioned to compensatory damages.) with 508 S.W.2d at 763 (Punitive damages need not bear a proportional relationship.) In Kentucky, however, punitive damages must bear a relationship to "the injury and its cause complained of." *Great Atlantic & Pacific Tea Co. v. Smith*, 136 S.W.2d 759, 768 (Ky. 1940). See also 683 S.W.2d at 254. It is interesting that, in an early Kentucky case, an award of punitive damages was upheld although no compensatory damages were awarded. See *Louisville & N.R.R. v. Ritchel*, 147 S.W. 411 (Ky. 1912). In *Ritchel*, the plaintiff had "suffered an injury for which compensatory damages might be awarded." *Id.* at 414. Since the *Fowler* Court emphasized that the relative weight to be given the assessment criteria is governed by the facts of each case, *Ritchel* may still be viable in a case where the character of the defendant's act is particularly egregious but the actual damages are *de minimis*. It is suggested, however, that where actual injury is proved, which it must be to sustain a punitive award, a jury will be authorized to award nominal damages as recognition that the plaintiff's rights have been violated. See 683 S.W.2d at 252.

¹⁰¹ See No. 81-CA-2862 (Fayette Cir. Ct. May 24, 1982) *Trial, Jury and Judgment*. The jury instruction authorizing the punitive award provided: "If you believe from the evidence that the assault was willful, malicious, and without justification, you may, in your discretion, award the Plaintiff punitive damages, not exceeding, however, the sum of \$50,000.00, the amount claimed in the Complaint." See also Comment, *supra* note 4, at 907 n.62.

¹⁰² While there were obviously other injuries, see note 93 *supra*, both the court of appeals' and Supreme Court's opinions speak of significant humiliation in this case due to plaintiff's employment circumstances. See 683 S.W.2d at 252; No. 82-CA-2527-MR, slip op. at 3.

¹⁰³ See 683 S.W.2d at 253.

patible with prior Kentucky case law expressly recognizing humiliation and embarrassment as elements of compensatory damages.¹⁰⁴ At one time, the aim of punitive damages was to compensate a plaintiff for such intangible injuries.¹⁰⁵ Increasingly, these and other intangible harms have become elements of recovery for compensatory damages.¹⁰⁶

Even more inexplicable is the Court's subsequent statement that "in an act of this character the jury was authorized to *compensate . . . for such humiliation . . .*"¹⁰⁷ Presumably, the Court was referring to compensation in the form of punitive damages, a contradiction in terms. In support, the Court cited *Mann v. Watson*,¹⁰⁸ an early Kentucky case. The *Mann* Court, however, held that the plaintiff could properly recover for humiliation as an element of compensatory damages.¹⁰⁹ There is no mention of punitive damages in *Mann*. In sum, the Court seemingly rejected *and* accepted a compensatory purpose for punitive damages. The only logical interpretation of the Court's statements is that the humiliation inflicted was relevant to the jury's consideration of the character of the act. In particular, an act designed to humiliate may bear upon the wrongdoer's motives or the outrageousness of the act. This interpretation is consistent with the function punitive damages are designed to serve.

II. VICARIOUS LIABILITY FOR PUNITIVE DAMAGES

A. *The Broad Rule*

From the previous discussion, one may properly conclude that *ordinarily* the threshold for a punitive damage award is the

¹⁰⁴ See *Kiser v. Neumann Co. Contractors*, 426 S.W.2d 935, 938 (Ky. 1967) (compensatory damages awarded in assault case included recovery for "embarrassment, humiliation, shame and dishonor") (dictum).

¹⁰⁵ See 147 S.W. at 414 (Punitive damages may compensate the plaintiff for humiliation.)

¹⁰⁶ See, e.g., *Davis v. Graviss*, 672 S.W.2d 928, 931 (Ky. 1984) (fear of future medical complications resulting from injury is compensable); *Craft v. Rice*, 671 S.W.2d 247, 250 (Ky. 1984) (recognizing cause of action for intentional infliction of emotional distress); *Wilson v. Redken Laboratories, Inc.*, 562 S.W.2d 633, 637 (Ky. 1978) (humiliation and distress are compensable).

¹⁰⁷ 683 S.W.2d at 253 (emphasis added).

¹⁰⁸ 283 S.W. 1052 (Ky. 1926).

¹⁰⁹ See *id.* at 1055. *Mann* was similarly an assault and battery case in which the plaintiff recovered compensatory damages for mental and physical pain and suffering, humiliation, and medical expenses.

existence of some aggravated wrong. At odds with the asserted dual rationale for punitive damages—punishment and deterrence—is the rule followed in Kentucky and the substantial minority¹¹⁰ of other jurisdictions that exposes an innocent employer to punitive damage liability for the act of an employee.¹¹¹

In *Yellow Cab Co. of Louisville, Inc. v. Talley*,¹¹² the court of appeals upheld a punitive damage award against a non-negligent taxi-cab company for “the gross negligence of its non-managerial, subordinate agent.”¹¹³ The court, in a split 2-1 decision,¹¹⁴ held that “vicarious liability may . . . be the sole basis of a punitive damage award.”¹¹⁵ In so holding, the court reaffirmed what it characterized as Kentucky’s “longstanding” adherence to the so-called “broad rule,” which makes a punitive damage award proper under the doctrine of *respondet superior*.¹¹⁶ The “broad rule” imposes employer liability for punitive damages for an employee’s act in the same manner as an employer may be liable for compensatory damages. No finding of employer fault is required. Specifically, the court cited¹¹⁷ *Hawkins & Co. v. Riley*,¹¹⁸ a mid-nineteenth century case that did not follow the “broad rule.” In *Hawkins*, another “taxi” (stage-coach) case, the employer’s liability for an employee’s act was couched in terms of the employer’s own negligence in hiring incompetent drivers.¹¹⁹ Thus, *Hawkins* is not supportive since

¹¹⁰ See 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 5.06 (1985 Supp.).

¹¹¹ See *Kiser v. Neumann Co. Contractors*, 426 S.W.2d 935, 938 (Ky. 1967) (“doctrine of respondeat superior makes the master liable to the same extent as the servant”); *Smith’s Adm’x v. Middleton*, 66 S.W. 388, 389 (Ky. 1902).

¹¹² No. 84-CA-1180-MR (Ky. Ct. App.), 32 KY. L. SUMM. 1, at 9 (Ky. Ct. App. Jan. 18, 1985) [hereinafter cited as KLS].

¹¹³ *Id.* slip op. at 1.

¹¹⁴ Justice Cooper dissented with no opinion.

¹¹⁵ No. 84-CA-1180-MR, slip op. at 1.

¹¹⁶ *Id.* slip op. at 4. The “broad rule” is apparently no longer the majority view although the court of appeals characterized it as such. See 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 5.06 (1985 Supp.). In contrast, the “complicity rule” limits an employer’s liability for punitive damages to instances where fault is established. See No. 84-CA-1180-MR, slip op. at 2.

¹¹⁷ No. 84-CA-1180-MR, slip op. at 3.

¹¹⁸ 56 Ky. (17 B. Mon.) 101 (Ky. 1856).

¹¹⁹ See *id.* at 110.

It is the duty of the proprietors of stage coaches . . . to procure and employ prudent and skillful drivers; and if neglectful of their duty, they

liability was not considered strictly on a vicarious basis. The court also relied heavily on *Smith's Adm'x v. Middleton*,¹²⁰ a 1902 case which, although it makes no mention of a "broad rule," does provide support for the rule espoused in *Talley*. In *Middleton*, an employer was held liable for punitive damages for his employee's gross negligence, even though the employer was innocent of wrongdoing and had exercised due care in hiring his employee.¹²¹ *Middleton's* precedential authority is questionable, however, because the *Middleton* Court relied on *Hawkins*,¹²² which was distinguishable. Lastly, the *Talley* court cited *Continental Insurance Co's. v. Hancock*,¹²³ a 1974 case, which relied on *Middleton*.¹²⁴ However, whether punitive damages are appropriately imposed on an employer solely on a vicarious basis was not directly at issue in *Hancock*.¹²⁵

B. *The Complicity Rule*

As conceded in *Talley*,¹²⁶ the broad rule conflicts with the view espoused in both the *Restatement (Second) of Torts*¹²⁷ and

intrust their vehicles to men unskillful and imprudent, who recklessly, wantonly, or by gross negligence whilst in their employment . . . injure persons or property . . . the employers, as well as the drivers, should be held amenable . . . for the actual injury [and] for such exemplary damages as a jury . . . should deem proper to award.

Id.

¹²⁰ 66 S.W. 388 (Ky. 1902).

¹²¹ *See id.* at 389.

¹²² *See id.*

¹²³ 507 S.W.2d 146 (Ky. 1974).

¹²⁴ *See id.* at 151.

¹²⁵ *Id.* *Hancock* involved, *inter alia*, the issue of whether an insurer was obligated to pay a punitive damage award assessed against its insured. The insurer had argued that it was against public policy to insure against liability for punitive damages. The public policy implicated is that punitives should only fall upon a wrongdoer and that a wrongdoer should not be able to escape sanctions for misconduct. *See generally* 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 7.13. *See also* Zuger, *Insurance Coverage of Punitive Damages*, 53 N.D.L. Rev. 239 (1976-77). The *Hancock* Court held that public policy is not violated when an insurer is held liable for punitive damages resulting from its insured's gross negligence, as compared with an intentional wrongful act. In reaching its decision, the Court relied on *Middleton*, which had also permitted liability for punitive damages to fall on an innocent party—the employer. 507 S.W.2d at 151-52.

¹²⁶ *See* No. 84-CA-1180-MR, slip op. at 2.

¹²⁷ *See* RESTATEMENT (SECOND) OF TORTS § 909 (1977).

the *Restatement (Second) of Agency*¹²⁸ that it is "improper . . . to award [punitive] damages against one who himself is personally innocent."¹²⁹ Indeed, the justification for awarding punitive damages is greatly diminished where liability is imposed vicariously.¹³⁰ The innocent employer has not engaged in conduct that merits punishment and deterrence. Moreover, even where the employer is entitled to indemnity, the culpable employee may not be able to partially or totally satisfy the judgment.¹³¹ Admittedly, this inequity also exists when an employer is held vicariously liable for compensatory damages. In those circumstances, however, there is a competing public policy that places the burden on the employer, rather than the injured party, to bear the expense for any losses.¹³² This policy consideration is not applicable to damage assessments designed to punish and deter a wrongdoer.

Consequently, the slight majority of jurisdictions¹³³ concurs with the Restatements and applies the "complicity rule" which limits an employer's liability for punitive damages to instances in which the employer has engaged in conduct that justifies the award.¹³⁴ Thus, an employer may be liable when (1) the employer has authorized the employee's act,¹³⁵ (2) the employer was reckless in hiring the employee,¹³⁶ (3) the employer has ratified the employee's act,¹³⁷ or, (4) the employee holds a managerial position and is acting within the scope of his or her duties.¹³⁸

¹²⁸ See RESTATEMENT (SECOND) OF AGENCY § 217 C (1958).

¹²⁹ RESTATEMENT (SECOND) OF TORTS § 909 comment b (1977).

¹³⁰ When punitive damages are imposed on a nonculpable employer, the wrongdoer "is insulated by the simple fact of life that the harmed plaintiff will usually seek the deepest pocket from which to collect his damages." 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 5.06. *But see* Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 219-20 (1960) (Imposing institutional liability may deter employee misconduct.).

¹³¹ See 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 5.06.

¹³² See R. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 2 (5th ed. 1984).

¹³³ See 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 5.07 (1985 Supp.).

¹³⁴ Dobbs attributes the origin of the term, "complicity rule," to Professor Clarence Morris. See D. DOBBS, *supra* note 83, at 214. See generally Morris, *supra* note 130, at 221.

¹³⁵ See RESTATEMENT (SECOND) OF TORTS § 909(a) (1977).

¹³⁶ See *id.* at § 909(b).

¹³⁷ See *id.* at § 909(d).

¹³⁸ See *id.* at § 909(c). While it might be argued that imposing liability in this

C. *Future Vitality of the Broad Rule in Kentucky*

Under *Talley*, an employer may be held liable for punitive damages absent any of the above factors.¹³⁹ Although *Talley* has seemingly clarified Kentucky's current position (on the basis of questionable precedent), a recent Kentucky Supreme Court decision appears less enthusiastic about the future vitality of the "broad rule."¹⁴⁰

In *Horton v. Union Light, Heat & Power Co.*,¹⁴¹ discussed earlier, one of the arguments advanced by the defendant gas company in its appeal of a punitive damage award was that "the punitive damages concept is abused when a corporation as principal is punished for the acts of its employees."¹⁴² In response, the high Court acknowledged that "historically" Kentucky has applied the doctrine of *respondet superior* to impose liability for punitive damages against an employer in the same manner liability for compensatory damages is imposed.¹⁴³ Indeed the Court could have disposed of the defendant's argument on the basis of Kentucky's "historical" position. Nevertheless, it neither rejected the merits of the argument nor reaffirmed this traditional stance.¹⁴⁴ Ultimately it skirted the issue based on evidence that the gas company itself was culpable and that punitive damages were not being assessed solely on a vicarious basis.¹⁴⁵ The opinion suggests, however speculatively,¹⁴⁶ that the Court has

instance does not further the purposes of punitive damages, comment "b" to this section justifies the rule as providing a "deterrent to the employment of unfit persons for important positions." There is no explanation as to why § 909(b) would not accommodate this situation.

¹³⁹ No. 84-CA-1180-MR, slip op. at 4.

¹⁴⁰ *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985).

¹⁴¹ 690 S.W.2d 382 (Ky. 1985). See notes 14-66 *supra* and accompanying text.

¹⁴² See 690 S.W.2d at 390.

¹⁴³ See *id.* Although this portion of the opinion cites no authority, the Court earlier referred to decisions that upheld a punitive damage award vicariously imposed on an employer. See *id.* at 388. Specifically, the Court cited *Louisville & N.R.R. v. Kelly's Adm'x*, 38 S.W. 852 (Ky. 1897) and *Maysville & Lexington R.R. v. Herrick*, 76 Ky. (13 Bush) 122 (1877). It is interesting that in both of these cases, punitive damages were assessed on a gross negligence standard characterized as the failure to use slight care.

¹⁴⁴ See 690 S.W.2d at 390.

¹⁴⁵ See *id.*

¹⁴⁶ The Court merely notes that the facts of *Horton* provide an inappropriate case to begin reconsideration of the rule.

not closed the door to a re-evaluation and potential limitation of the "broad rule" should an appropriate opportunity arise. Consequently, a nonculpable employer, who has been rendered liable for punitive damages due to the act of a nonmanagerial employee, can perhaps successfully argue this issue in a future case.

III. PUNITIVE DAMAGES IN FIRST PARTY BAD FAITH ACTIONS

First party bad faith actions¹⁴⁷ against insurance companies have been a much-debated¹⁴⁸ and often-litigated topic¹⁴⁹ in recent years. These suits are brought by an insured against its insurer, alleging bad faith refusal to pay a valid claim or bad faith delay in processing a claim.¹⁵⁰ The cause of action has been only recently recognized in Kentucky.¹⁵¹ Consequently, it is the subject of only a handful of decisions.

*Feathers v. State Farm Fire and Casualty Co.*¹⁵² was the first Kentucky decision to recognize the tort of first party bad faith. Under this cause of action, a prevailing plaintiff-insured is entitled to damages over and above policy limits, including, potentially, punitive damages.¹⁵³ *Feathers* constituted a dramatic departure from Kentucky's traditional stance, which limited recovery by insured parties to only those amounts due under the insurance policy contract.¹⁵⁴ The sparsity of Kentucky case law

¹⁴⁷ 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 8.08, explains: "The claim of the plaintiff in a first party excess action is premised upon the assertion that the insurer either failed to perform its obligation to pay money when the same was due or that the insurer improperly delayed the processing and payment of a valid claim." First party bad faith imposes tort liability upon an insurer, exposing it to damages beyond those that could be recovered in an action on the contract alone. *See id.* at § 8.11.

¹⁴⁸ *See, e.g.,* Harvey & Wiseman, *First Party Bad Faith: Common Law Remedies and a Proposed Legislative Solution*, 72 KY. L.J. 141 (1983-84); Harman, *An Insurer's Liability for the Tort of Bad Faith*, 42 MONT. L. REV. 67 (1981); Kircher, *Insurer's Mistaken Judgment—A New Tort?*, 59 MARQ. L. REV. 775 (1976).

¹⁴⁹ *See generally* 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 8.11, and cases cited therein.

¹⁵⁰ *See* note 147 *supra*.

¹⁵¹ *See Feathers v. State Farm Fire and Casualty Co.*, 667 S.W.2d 693 (Ky. Ct. App. 1983).

¹⁵² 667 S.W.2d 693 (Ky. Ct. App. 1983). *See Knapp, Survey—Insurance*, 74 KY. L.J. 427, 432 (1985-86).

¹⁵³ *See id.* at 697.

¹⁵⁴ *See Deaton v. Allstate Ins. Co.*, 548 S.W.2d 162, 164 (Ky. Ct. App. 1977).

and the courts' inconsistent language in those few decided cases¹⁵⁵ create some confusion as to (1) the elements that establish the tort, and (2) once the tort is established, the additional facts, if any, required to authorize a punitive damage award.

In *Feathers*, the defendant-insurer refused to pay fire loss damages under a homeowner's policy, asserting a reasonable belief that its insureds had deliberately set fire to their home.¹⁵⁶ Almost a year after the fire, the plaintiffs-insureds sued the insurer to recover their losses. Their complaint alleged, in part, that the insurer breached a duty to act in good faith and requested consequential and punitive damages.¹⁵⁷ The trial court dismissed that portion of the complaint.¹⁵⁸ On appeal as to the validity of the tort claim, the court of appeals held that the plaintiffs had pled a good cause of action if the plaintiffs had substantially complied¹⁵⁹ with the terms of the policy and if there was no "substantial or credible"¹⁶⁰ evidence that the plaintiffs had intentionally set fire to their home. Upon this proof, the court reasoned that the insurer "becomes akin to a fiduciary as to sums that may be owed under the policy."¹⁶¹ "[B]ad manners or mere breakdowns in communications"¹⁶² were explicitly rejected as conduct that would give rise to the tort. In reaching its decision, the *Feathers* court placed some emphasis on the unique nature of a homeowner's fire insurance policy. "The purchaser of a fire insurance policy . . . is usually economically devastated after a fire and may have no source of money . . . other than the proceeds of the insurance policy . . . relied upon."¹⁶³ Under these circumstances, the court continued, an "unjustified" refusal to pay constituted tortious conduct and exposed the insurer to liability for consequential and punitive damages.¹⁶⁴

¹⁵⁵ See note 152 *supra*; notes 166, 185 *infra* and accompanying text.

¹⁵⁶ See 667 S.W.2d at 694.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 695.

¹⁵⁹ See *id.* at 697. "Substantial compliance" is not defined.

¹⁶⁰ *Id.* "Substantial or credible" evidence is not defined.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *id.*

While this language may indicate that punitive damages are only potentially recoverable in a tort action for first party bad faith, it may also be read as authorizing punitive damages every time the tort itself has been sufficiently established.

The *Feathers* court, however, never was required to decide the merits of the case.¹⁶⁵ Its ruling was confined only to the validity of the tort claim. Consequently, the issue of when punitive damages are recoverable was not decided.

The next case to reach the appellate court involving a first party bad faith claim was *Blue Cross and Blue Shield of Kentucky v. Whitaker*.¹⁶⁶ In *Whitaker*, the plaintiff-insured sued its insurer on a claim under a health insurance policy. The defendant had denied the claim based upon a physician's report that erroneously indicated that the health problem had existed prior to the advent of the insured's coverage.¹⁶⁷ The existence of a pre-existing condition precluded recovery under the terms of the policy. It was not until the day before trial that the insurer spoke directly with the physician and discovered the error.¹⁶⁸ At trial, the jury found the insurer liable for bad faith and awarded the amount due under the contract as well as consequential damages for the attorneys fees incurred.¹⁶⁹

¹⁶⁵ The trial court had granted the insurer a summary judgment on the tort claim. The court of appeals' decision in *Feathers* was rendered after the parties settled the case and a full week after the court received notice of the settlement. For a discussion of the unique procedural posture of *Feathers*, see Harvey & Wiseman, *supra* note 148, at 169 n.162.

¹⁶⁶ 687 S.W.2d 557 (Ky. Ct. App. 1985). See Knapp, *Survey—Insurance*, 74 Ky. L.J. 427, 431 (1985-86).

¹⁶⁷ See *id.* at 558.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* The court of appeals reversed the consequential damages award, citing their previous decision holding that attorney fees are not recoverable in Kentucky absent a statute or contract that expressly provides for recovery of such costs. See *id.* (citing *White v. Sullivan*, 667 S.W.2d 385, 389 (Ky. Ct. App. 1983)). In an opinion rendered subsequent to *Whitaker*, the court of appeals granted approval, at least implicitly, to an award of attorney fees in the form of punitive damages. In *Chernick v. Fasig-Tipton, Kentucky, Inc.*, No. 84-CA-1507-MR (Ky. Ct. App.), 33 KLS 2, at 5 (Ky. Ct. App. Jan. 31, 1986), the court upheld a punitive damage award assessed against the seller of a thoroughbred broodmare. The seller was found liable for fraud and misrepresentation. The court did not elaborate on how the award was assessed, stating only that "this court is in complete agreement with the Fayette Circuit Court's findings and conclusions and will not disturb the award of punitive damages." *Id.* slip op. at 6. The trial court, sitting without a jury, had assessed a \$40,000 punitive award, based in part upon "the

On the insurer's appeal, the court of appeals reversed the trial court on the issue of bad faith.¹⁷⁰ The appellate court believed that the facts presented in *Whitaker* reflected a mere "breakdown in communications"¹⁷¹ rather than a bad faith refusal to pay a claim. To clarify its previous decision, the court stated that *Feathers* should not be interpreted "as creating a type of strict liability"¹⁷² every time an insurer incorrectly denies a claim. The court found that the one-day delay in paying the claim, once the insurer was apprised of the error, did not amount to bad faith.¹⁷³ Moreover, the court found that the insurer's investigation of the claim was nothing "more than negligent, if that."¹⁷⁴ Negligence alone, it held, would not provide a sufficient basis to support a claim of first party bad faith.¹⁷⁵ "The term itself implies some intentional wrongful conduct."¹⁷⁶ Nevertheless, the court made a further observation: "Where . . . a *reasonable* basis existed for denying the claim . . . , though ultimately found incorrect, [the insurer] cannot be charged with bad faith."¹⁷⁷ The negative implication, then, is that the lack of a reasonable basis is sufficient to support a claim of bad faith. The "reasonableness" standard indicates that a negligence standard¹⁷⁸ is being applied despite prior language to the con-

expense of litigation and the attorneys fees incurred by reason thereof." No. 83-CI-1365, slip op. at 20 (Fayette Cir. Ct. Apr. 5, 1984). The court of appeals' agreement with the trial court's assessment criteria not only conflicts with their prior position in disallowing attorney fees, but also is a marked departure from Kentucky's treatment of punitive damages as fulfilling punishment/deterrence goals and not compensatory ends.

¹⁷⁰ See 687 S.W.2d at 560.

¹⁷¹ *Id.* at 559 (citing 667 S.W.2d at 696).

¹⁷² 687 S.W.2d at 559 (citing Harvey & Wiseman, *supra* note 148, at 174).

¹⁷³ See 687 S.W.2d at 559 ("delay of one day, upon learning the true facts, [not] so dilatory as to constitute bad faith").

¹⁷⁴ *Id.* The claim was reviewed by Blue Cross, a medical consultant, and an independent Kentucky Medical Association Peer Review Committee. Each denied the claim after a review of all records. "At no time during the investigation . . . did it become apparent that the history taken by [the physician] . . . was a mistake." *Id.*

¹⁷⁵ See *id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 559-60. This statement does clarify some confusion that followed in the wake of *Feathers*, i.e., whether an insurer's incorrect denial of payment, alone, would always expose the insurer to liability for extra-contractual damages based on the tort of first party bad faith. See *Conner v. Shelter Mut. Ins. Co.*, 600 F. Supp. 24, 27 (W.D. Ky. 1984). See also Harvey & Wiseman, *supra* note 148, at 173-74.

¹⁷⁸ See 1 J. GHIARDI & J. KIRCHER, *supra* note 2, at § 8.11.

trary.¹⁷⁹ The distinction is critical. There is substantially more than a fine line between "intentional wrongful conduct" and an unreasonable belief. Perhaps the court sought to equate "unreasonableness" with recklessness or gross negligence. In any event, insurers are entitled to know the basis for their potential liability.

This lack of clarity poses a further problem concerning punitive damages. It is not discernible from the opinion what difference, if any, exists in the level of culpability required to sustain the underlying tort action and the culpability needed to warrant imposition of punitive damages. The court stated that "we cannot uphold a verdict allowing consequential or punitive damages"¹⁸⁰ absent willful, intentional or reckless conduct. Nevertheless, the court did not distinguish between this level of misconduct and that giving rise to the tort. If liability for the tort may be imposed upon an insurer who acts without a reasonable belief, though innocently, punitive damages are not justified. As discussed earlier in this Survey, it is the defendant's mental state that exposes him to punitive damage liability.¹⁸¹

Most jurisdictions¹⁸² concur that proof of the tort itself does not automatically entitle the insured to punitive damages. To warrant punitive damages, the insurer's breach of his duty to act in good faith must be accompanied by the aggravating circumstances that normally justify punitives, such as fraud or malice.¹⁸³ Kentucky courts have repeatedly maintained that misconduct, even an intentional wrong, does not necessarily warrant punitive damages.¹⁸⁴ If the *Whitaker* court departed from this position regarding first party bad faith actions, it articulated no reason why insurers should be exposed to liability for punitive damages on a different basis than other defendants.

¹⁷⁹ See notes 9-13 *supra* and accompanying text.

¹⁸⁰ 687 S.W.2d at 559.

¹⁸¹ See notes 5-7 *supra* and accompanying text.

¹⁸² See I J. GHIARDI & J. KIRCHER, *supra* note 2, at § 8.14.

¹⁸³ See, e.g., *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981) (allowing recovery of punitive damages only if plaintiff proves "malice, willfulness, or wanton and reckless disregard of the rights of others"); *Anderson v. Continental Ins. Co.*, 271 N.W.2d 368, 379 (Wis. 1978) ("must be a showing of an evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct").

¹⁸⁴ See notes 60-61, 70-72 *supra* and accompanying text.

The most recent Kentucky decision on first party bad faith is *Federal Kemper Ins. Co. v. Hornback*.¹⁸⁵ *Hornback*, like *Feathers*, involved a fire loss claim that the insurer refused to pay. Unlike *Feathers*,¹⁸⁶ the bad faith issue in *Hornback* ultimately was litigated and subsequently appealed to the court of appeals. That the case was tried is important because an awareness of the facts, the resolution of the factual disputes, and the ultimate outcome on appeal should assist the bar in coming to grips with how the Kentucky courts are dealing with first party bad faith issues. Unfortunately, the opinion omitted several instructive facts.¹⁸⁷

In *Hornback*, the plaintiffs purchased a fire insurance policy for their home from the defendant in December, 1983. In January, 1984, the home was destroyed in an intentionally set fire.¹⁸⁸ The plaintiffs filed a timely proof of loss statement, made their bank account records available to one of the defendant's adjusters, and also submitted a sworn statement of loss to the defendant's counsel.¹⁸⁹ The insurer refused to pay the claim, however, on the basis that "the evidence of arson relieved it of its contractual obligations under the policy."¹⁹⁰ The plaintiffs sued and recovered \$50,000 for the loss and \$4,000 in punitive damages.¹⁹¹

The insurer appealed the punitive damage award on two grounds. First, it asserted that the evidence of arson and misrepresentations in the proof of loss form justified its denying the claim.¹⁹² The court disagreed, finding that the plaintiffs' timely claim satisfied the terms and conditions of the policy.¹⁹³ The opinion does not enumerate the misrepresentations that were allegedly made by the plaintiff. Moreover, the court held that although the evidence that the plaintiffs intentionally set the fire

¹⁸⁵ No. 84-CA-2215-MR (Ky. Ct. App.), 32 KLS 9, at 7 (Ky. Ct. App. July 5, 1985), *motion for discretionary rev. filed* 32 KLS 10, at 8 (July 19, 1985).

¹⁸⁶ See note 165 *supra* and accompanying text.

¹⁸⁷ See notes 192-196 *infra* and accompanying text.

¹⁸⁸ See No. 84-CA-2215-MR, slip op. at 2.

¹⁸⁹ See *id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See *id.*

¹⁹³ See *id.* slip op. at 3.

was sufficient to submit this issue to the jury,¹⁹⁴ such proof "does not constitute substantial or credible evidence,"¹⁹⁵ as contemplated in *Feathers*, that would excuse the insurer's withholding the proceeds. "Substantial or credible evidence" is otherwise left undefined. Unfortunately, the opinion fails to explain specifically what evidence was introduced at trial concerning the insureds' alleged complicity. It is particularly unfortunate for insurers who are currently exposed to potential liability for substantial damages. Since the outcome of these cases is peculiarly fact-determinative, the court should have taken pains to enumerate those facts that established bad faith. Otherwise, it is conceivable that insurers will suffer a disincentive to delay payment of a claim, even where a meritorious defense to the claim exists.¹⁹⁶ While the facts in *Hornback* may have amply supported the outcome, a failure to explain those facts acts as a disservice to those relying on the court for guidance. The lack of Kentucky case law on this cause of action emphasizes this need.

The insurer's second challenge to the award argued that "bad faith alone will not support punitive damages absent a showing of malice or fraud."¹⁹⁷ The court could have promptly dismissed this contention by merely pointing to the jury's express finding that the insurer did act with malice in its refusal to pay the claim.¹⁹⁸ Instead, the court held that bad faith alone normally does support an award of punitive damages.¹⁹⁹ In so holding, the court, as it did in *Feathers*, emphasized the "sensitive" nature of an insurance contract and the vulnerability of the insured party when disaster strikes.²⁰⁰

[A]n insurance policy is a uniquely sensitive contract to provide security and relief in the face of a future disaster. Under these

¹⁹⁴ See *id.* "The evidence presented at trial clearly shows that [plaintiffs'] residence was destroyed in a set fire, but there was little or no evidence linking either of them to the crime." *Id.*

¹⁹⁵ See 667 S.W.2d at 696.

¹⁹⁶ "The spectre of seven figure punitive damage awards will no doubt lead insurance carriers to avoid the risk of an adverse verdict, and to forego defense of at least some meritorious claims." Harvey & Wiseman, *supra* note 148, at 175.

¹⁹⁷ No. 84-CA-2215-MR, slip op. at 1.

¹⁹⁸ See *id.* slip op. at 3. In fact, the court subsequently noted the jury's finding but did not decide the issue on this ground. See *id.* slip op. at 3-4.

¹⁹⁹ See *id.* slip op. at 3.

²⁰⁰ See *id.*; 667 S.W.2d at 696.

circumstances, the insurer incurs a duty to act in good faith toward its policy holders and the insured may recover for a simple breach of that duty. [Citation omitted].²⁰¹

Thus, “[i]f the insurer makes no *serious attempt* to settle a valid pending claim until forced into litigation, . . . a jury may find bad faith and may award punitive damages.”²⁰²

Presumably, then, proof of the underlying cause of action, redefined in *Hornback* as a failure to make a “serious attempt” to settle a valid claim, entitles every plaintiff to a concurrent instruction on punitive damages. This places the tort of bad faith in a position inconsistent with other torts in Kentucky.²⁰³ If “bad faith” necessarily included the aggravated circumstances that ordinarily justify punitive damages, assessment would be proper. Conversely, if “bad faith” may be found when there is a failure to act reasonably, and a negligence standard is applied, permitting a punitive award is totally inconsistent with the avowed purposes of imposing punitive damages.

²⁰¹ No. 84-CA-2215-MR, slip op. at 3.

²⁰² *Id.* (emphasis added).

²⁰³ See notes 60-61, 70-72 *supra* and accompanying text.

