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Damages: What Must Be Shown to Justify an Award of Punitive Damages in Assault and Battery Actions

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cause for holding a defendant to answer for a felony would not arise, because if one may be convicted on the uncorroborated testimony of an accomplice it necessarily follows that the uncorroborated testimony of such accomplice is sufficient to establish probable cause for holding a prisoner to answer a criminal charge.

ANTHONY FRANK.

Damages—What Must Be Shown to Justify an Award of Punitive Damages in Assault and Battery Actions.—The plaintiff was standing on the sidewalk in front of a store next to the defendant's tavern, engaged in conversation with one Kostiwi, the owner of a dog then in the custody of the plaintiff and held by a leash attached to her wrist. The plaintiff claimed that the defendant, who was standing nearby, without provocation, seized the dog's tail, and lifting the animal up whirled it in the air and dropped it; that Kostiwi then remonstrated with the defendant and was struck down, and that when the plaintiff protested, the defendant struck her, knocked her down, struck her twice again and then seizing the leash dragged her across the walk. Plaintiff sued for assault, and the jury found that the defendant's acts were wilful, wanton, and malicious. Judgment was entered on a \$2,250 verdict. The defendant contends on appeal that the evidence showed that the incident was an unpremeditated "flare-up" affair, and that no punitive damages should have been allowed.

On appeal, *held*, judgment affirmed. There was no provocation for the assault and battery, and in view of the jury finding that the assault was wilful, wanton, and malicious, the award of punitive damages was proper. An assault need not be premeditated to warrant assessment of punitive damages. *Karpluk v. Danisewicz*, 38 N.E. (2d) 823 (Ill. 1942).

Generally the courts have held that the acts of a defendant for which the plaintiff is awarded punitive or exemplary damages must be characterized by being wanton, wilful, reckless, or malicious. *Pendleton v. Norfolk and W. Ry. Co.*, 82 W.Va. 270, 95 S.E. 941 (1918); *Friedman v. Jordan*, 166 Va. 65, 184 S.E. 186 (1936); *Baltimore Transit Co. v. Faulkner*, 20 Atl. (2d) 485 (Md. 1941); WILLIS, *PRINCIPLES OF THE LAW OF DAMAGES* (1909) p. 28; *Shupack v. Gordon*, 79 Conn. 298, 64 Atl. 740 (1906); *Corn v. Sheppard*, 179 Minn. 490, 229 N.W. 869 (1930); *May v. Baron*, 329 Penn. 65, 196 Atl. 866 (1938).

Along with the principle case a typical fact situation for awarding punitive damages is illustrated in *May v. Baron*, *supra*, where the defendant demanded payment from the plaintiff for a bill. When the plaintiff refused to pay, the defendant immediately struck him in the face, knocked him over in the chair in which he was sitting, and then while he lay unconscious on the floor in a pool of blood, kicked him several times in the abdomen. The plaintiff suffered serious injuries as a result of which he was unable to work more than two or three days a week. Combined damages of \$4,000 were awarded in the lower court, and in reviewing this decision on appeal the appellate court stated that, "In view of the circumstances, the injuries sustained, the pain and suffering endured, the loss of earning power, and the malicious and wilful character of the assault there can be no question that the court below did not abuse its discretion in refusing to grant a new trial."

Wisconsin courts, in their instructions to juries on punitive damages, have dwelled on the actual malice or ill will displayed in the acts of the defendant. *Nichols v. Brabaron*, 94 W. 549, 69 N.W. 342 (1896), is typical. Here a man and a woman related by marriage came to blows. "He struck her so she kicked

him." The trial court instructed the jury that if they found that defendant "was actuated by hatred or ill will toward the plaintiff, and that the assault, if any, was malicious, you may award such damages, as under the evidence, you may think proper, by way of punishment to him for the assault." The appellate court held that this was not error, stating that long harbored ill will or vindictiveness is not necessary to warrant punitive damages. In *Lamb v. Stone*, 95 Wis. 254, 70 N.W. 72 (1897), the appellate court approved a charge that if the jury should find that the assault and battery was inflicted "under circumstances of aggravation or cruelty, with vindictiveness or malice," they could award exemplary damages. In *Di Benedetto v. Milwaukee Elec. Ry. and Light Co.*, 149 Wis. 566, 136 N.W. 282 (1912), the court emphasized the necessity of ill will by saying that "the facts of vindictiveness and malice must expressly appear."

Another occasion for the awarding of punitive damages in Wisconsin is an act of a type that is insulting. In *Hooker v. Newton*, 24 Wis. 292 (1869), the court stated "if the assault was committed in an insulting manner, wilfully and maliciously, with an intent to injure the plaintiff's feelings and disgrace him in the estimation of the public, the jury not only might, but ought to give punitive damages." This accent on insult is repeated in *Morely and Wife v. Dunbar*, 24 Wis. 183 (1869), and *Brown v. Swineford*, 44 Wis. 282 (1878).

Exemplary damages can be mitigated or vitiated if sufficient provocation is shown on the part of the plaintiff, as evidenced by malicious or provoking language or conduct immediately previous to the assault. *Baltimore Transit Co. v. Faulkner*, *supra*; *Brown v. Swineford*, *supra*.

It is always to be remembered that punitive damages are to be given "not as a matter of right, but in the sound discretion of the jury, by way of punishing the wrongdoer, and for the protection of society and social order." *Kahlegian v. Zakarian*, 123 Me. 469, 123 Atl. 900 (1924); *Pendleton v. Norfolk and W. Ry. Co.*, *supra*; *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N.W. 554 (1910); *Di Benedetto v. Milwaukee Electric Ry. and Light Co.*, *supra*.

Premeditation on the part of the defendant to act as he did is not an essential element for the awarding of punitive damages. However, a review of the decisions will establish that most courts require a finding of malice in the acts of the defendant. *Baker v. Carrington*, 138 Va. 22, 120 S.E. 856 (1924); *Ransom v. McDermott*, 215 Ia. 594, 246 N.W. 266 (1933); *Baltimore Transit Co. v. Faulkner*, *supra*. Malice need not be express. *Shoemaker v. Sonju*, 15 N.D. 518, 108 N.W. 42 (1906); *Baker v. Carrington*, *supra*. In the *Shoemaker* case, *supra*, a sixty-four year old man was engaged in conversation with another person in a hotel when the defendant, without warning, grabbed him and threw him on the floor, injuring him severely. There was no evidence of any drinking. The defendant testified that he had no enemies. In granting exemplary damages the court pointed out that malice which will authorize a recovery of exemplary damages may be actual or presumed. "Malice which is presumed, or malice in law, as distinguished from malice in fact," is not personal hate or ill will of one person toward another; it refers to that state of mind which is reckless of law and of the legal rights of a citizen in a person's conduct toward him.

The Wisconsin court has given much attention to the question of malice. In a case where the agent of a hotel accused a female guest of being immorally present in the room of another man, and where the court was confronted by the problem of what constituted malice for the award of punitive damages, the court concluded that, "An exact or precise definition of the technical term in the law of the 'malice' that must be shown in order that there be a basis for puni-

tory damages in addition to compensatory damages for a breach of some duty by a defendant when such is the proper subject of an action in tort is hard to find and still harder to frame. It is evident, however, from all the authorities that in any particular case, not in and of itself a malicious action, in order that punitive damages may be assessed something must be shown over and above the mere breach of duty for which compensatory damages may be given. That is, a showing of bad intent deserving punishment, or something in the nature of ill will towards the person injured, or a wanton, deliberate disregard of the particular duty then being breached, or that which resembles gross as distinguished from ordinary negligence." *Meshane v. Second Street Co. and others*, 197 Wis. 382, 222 N.W. 320 (1928); See also *Lowe v. Ring*, 123 Wis. 107, 101 N.W. 381 (1904).

Best interests of society often determine what the decision of the court will be in granting exemplary damages, and also govern the amount. Where a conductor on a railroad made indecent proposals and indecently touched a woman passenger the Missouri court allowed the plaintiff \$500 compensatory and \$1,500 punitive damages. *Flynn v. St. Louis Southwestern Ry. Co.*, 190 S.W. 371 (Mo. 1916). The court noted the relationship of passenger and carrier, a conductor's obligation to his passengers, a woman's reluctance to protest and disgrace herself in a car full of strangers, and her inability to help herself, being confined in a car. In the case of *Ransom v. McDermott*, *supra*, the defendant, a married man of eighty years, three times unsuccessfully attacked the plaintiff, a married woman, aged twenty-seven, in an attempt to have intercourse with her. She was pregnant at the time, and offered as much resistance as she could in her condition. There was no measure of physical harm done to her, but the court allowed \$500 actual damages while the punitive damages were assessed at four times the compensatory damages, or \$2,000. Where a defendant was a trained acrobat and grabbed the plaintiff, a woman, by her wrist, and threw her over a stove and onto the floor when she attempted to hold him until the police should arrive, the court awarded exemplary damages, declaring that the assault was wanton and reckless. *Malley v. Lane*, 97 Conn. 133, 115 Atl. 674 (1921).

Although the courts require some finding of the nature considered above before an award of punitive damages will be made, the amount of the award in many cases is governed by considerations such as those expressed in *Pendleton v. W. Ry. Co.*, *supra*. As a result of a fracas between a conductor and a passenger, the passenger was injured when the conductor beat him. The lower court found that the actual damages of the passenger amounted to \$557.50 while the exemplary damages were set at \$5,000. The higher court reversed the decision of the lower court because it thought that punitive damages amounting to approximately ten times the compensatory damages were too much. The court stated that after first establishing the prerequisites for any grant of punitive damages, that is, that the assault made upon the plaintiff be wanton, wilful, reckless, or malicious, the jury should take into account that "The exemplary damage should bear some proportion to the actual damage sustained. . . . The character of the injury inflicted should in some degree be considered by the jury in measuring the punishment to be meted out to the defendants. . . . Other elements enter into the ascertainment of damages, such as the character and reputation of the parties, their social standing in society and their financial ability. The object of such punishment is to deter the defendants from committing like offenses in the future, and this, it may be said, is one of the objects of all punishment, and we recognize that it would require, perhaps, a larger

fine to have this deterrent effect upon one of large means than it would upon one of ordinary means granting that the same malignant spirit was possessed by each."

This inclination of the court to give weight to social standing, wealth or other relationships of the parties is borne out by the case of *Trogden v. Terry*, 172 N.C. 575, 90 S.E. 582 (1916). While the plaintiff was having dinner in a hotel dining room, the defendant came up to him with a written retraction of a statement that plaintiff had previously made, and demanded that the plaintiff sign it. The defendant held his walking cane in a threatening position, and in answer to the plaintiff's question, "What if I don't sign it?", he replied, "I will whip the hell out of you." After the plaintiff signed, the defendant called him a "damned contemptible puppy." For this the plaintiff was awarded \$1,000 for actual damages and \$1,500 as exemplary damages. The court declared that "there was abundant evidence of malice upon which the jury in their discretion were warranted in inflicting punitive damages."

PHILIP W. CROEN.

Executors and Administrators—Grounds for Refusing to Appoint Executor Nominated in a Will.—A testator died and left 3 children; John Svacina, Mrs. Clara Eatman and Ella Svacina. Ella, a resident of Florida, came to Wisconsin and immediately took possession of the decedant's personal property. John and Clara then filed a petition for probate of the will; and upon the same date, Ella, being named in the decedent's will as the sole executrix, filed a petition for her appointment as executrix thereof. Later, the surviving heirs filed objection to the appointment of Ella as executrix on the ground that Ella was not "legally competent" to be appointed by the court as executrix. Upon the petition of John and Clara, the court issued letters of special administration to a trust company. Following this, a hearing was held upon the objections to the appointment of Ella as executrix. The lower court held that there was a discretion in the county court to refuse to appoint a nonresident nominee, by interpretation of Sec 324.35 Wis. STAT. (1941), which permits the removal of a nonresident executor.

It was *held*, on appeal, that mere nonresidence of the executor named in the will does not disqualify him, and that the court must appoint him if all the other requirements are satisfied. The power of the court to remove the executor on the basis of nonresidence applies only to removal, and cannot be used by the court as grounds for refusing to appoint the executor named in the will. *In re Svacina's Estate*, 1 N.W. (2d) 780 (Wis. 1942).

Although the executor is nominated by the will, the executor exists by virtue of the appointment by the court. *Davenport v. Sandeman*, 204 Iowa 927, 216 N.W. 55 (1895). It is generally accepted that the courts have no discretion in issuing letters testamentary to the party named in the will. Unless the nominee is expressly disqualified by statute, or if such discretion is created by statute, the court cannot reject the person named. *Will of Zartner*, 183 Wis. 506, 198 N.W. 363 (1924). The qualifications of an executor are statutory in Wisconsin. "When a will shall have been admitted to probate the court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent, accepts the trust, and gives bond when and as required by law." WIS. STAT. (1941), Sec. 310.12. The power to name an executor to administer an estate is coextensive with the power to devise or bequeath the estate itself. *State ex Rel. Lauridsen v. Superior Court*, 179 Wash. 198, 37 P. (2nd) 209,