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EXEMPLARY DAMAGES A DEFORMITY IN OUR LAW.

The doctrine of exemplary damages is strikingly out of line with the principles of our jurisprudence and yet this doctrine is adhered to by our Wisconsin court and many other jurisdictions which fail to set forth any logical reasons for this "deformity" in our law, but adhere to it on the ground of stare decisis. This is all the more striking when we realize that the decisions in which the doctrine was first supposed to have been established did not, in fact, establish any such principle of law.

The doctrine was introduced into our Wisconsin law in the case of *McWilliams vs. Bragg*, 3 Wis. 424, decided in 1854. Here the court, in an action for assault and battery, upheld the following charge: "If the offense is committed wilfully, the jury have a right to give damages as a punishment to the defendant for the purpose of making an example and as a warning to him and others in addition to their damages, which are as a compensation for the plaintiff's injuries," and sustained a verdict of \$650 for the plaintiff. In the opinion the court set forth several early English cases which it contended established the doctrine of exemplary damages and on which, together with several early American cases, it based its decision.

The first of these cases cited is *Huckle vs. Money*, 2 Wils. 205, decided by the English Court of Common Pleas in 1763. In this case a general warrant was granted by the Secretary of State to seize the publishers of a paper without any information or charge laid before the Secretary of State, prior to its issuance, and without naming any person whatsoever in the warrant. Acting under the warrant, the defendant took the plaintiff into custody for about six hours. The jury rendered a verdict for £300 as damages in a civil suit against the defendant for the unlawful seizure. On motion for a new trial for excessive damages the court sustained the verdict and refused a new trial. The following quotation from the opinion of Pratt, Lord Chief Justice, shows that the verdict was allowed to stand not in order to

punish the defendant, but in order that the plaintiff might be compensated for his outraged feelings and the indignity he suffered for which our law allows compensation as well as for physical injury in such actions as those for alienation of affections, assault and battery, and negligence.

"* * * but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom by insisting upon the legality of this general warrant before them; they heard the king's counsel, and saw the Solicitor of the Treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages; to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. I thought that the 29th Chapter of the Magna Charta, * * * which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages, against the Solicitor-General's argument. Upon the whole, I am of opinion the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages."

This case of *Huckle vs. Money*, relied on so extensively by those upholding the doctrine of exemplary damages, merely holds that the court would not upset a verdict that was not so large as to be outrageous in view of the serious injury done to the plaintiff. The fact that the court used the word "exemplary" does not mean that it was intended to be used as meaning that damages by way of example were granted, for at that time the word "exemplary" was used with two distinct meanings, (one) "by way of example", (two) "very great", and it is very probable that from the facts of the case the court here meant "very great damages" rather than damages "by way of example".

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The Wisconsin court next cites the English case of *Grey vs. Grant*, 2 Wils. 252, in which case of assault and battery the court held that the jury were the proper judges of damages and that when the defendant gave the plaintiff a blow which might have brought forth a challenge from which death might have ensued, the jury had done right in giving exemplary damages. Here, too, we may safely assume that the court meant "very great damages" when we recall that in case of assault and battery damages for indignity inflicted upon the plaintiff are allowed as compensatory and not as punitive damages.

The English case of *Fabrigas vs. Mostyn*, 2 W. Black 929, is quoted from as follows in the Wisconsin case: "In this case Chief Justice De Gray said: 'In the present case the injury was very great, and the jury (not the court) are to estimate the adequate satisfaction.'"

Certainly there is nothing in the above language on which to base the giving of punitive damages but it simply states a well-known proposition of law.

The English case of *Merest vs. Harvey*, 5 Taunt. 442, though cited by the Wisconsin court as upholding the doctrine of exemplary damages, does not do so, as is shown by the following quotation therefrom set forth in the Wisconsin case.

"Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'here is a half penny for you which is the full extent of the mischief which I have done.' Would that be a compensation? I cannot say that it would be."

It can readily be seen that a half penny is not adequate compensatory damage for such annoying and insulting conduct of the defendant, and to give the plaintiff adequate damages we need not adopt the "heretic" rule of exemplary damages, but we simply should allow him damages for his injured feelings as is done in many cases where no exemplary damages are given. To rely on exemplary damages to compensate the plaintiff for his injury is inadequate in this case, as such damages are given not as a matter of right, but in the discretion of the court and jury. as will be shown later in this article.

Thus we see that these old English cases on which our Wisconsin court has relied in upholding the doctrine of exemplary

damages, are not really decisions to that effect, for in all of them the words "exemplary damages" may well be taken to mean "very great damages", giving exemplary its secondary meaning. That they are cases for very great damages may be seen from the serious nature of the wrong done to the plaintiff for which he is entitled to compensation for his injured feelings and mental suffering as well as for his physical injury. To allow such damages it is not necessary to adopt the idea of giving damages by way of punishment of the defendant, but they may be given as compensation to the plaintiff. This is shown to be true by the case of *Small vs. M. St. P. & S. S. M. R. Co.*, 156 Wis. 195, at page 202, where our court held that the plaintiff would be allowed damages for mental suffering and injured feelings where her home was wrongfully invaded by agents of the defendant railway company in an attempt to get evidence to convict her son of burglary, though it was not a case for giving exemplary damages because there was no actual malice on the part of the defendant corporation.

On principle there is no reason why any court should give exemplary damages, but there are four fundamental principles of our jurisprudence which should forbid such a practice even though we confine the doctrine of exemplary damages to those cases in which the defendant is himself guilty of wilfully and maliciously injuring the plaintiff.

The first of these is that humane principle of our criminal law which gives to the defendant the benefit of the presumption of innocence until his guilt has been proven beyond a reasonable doubt. This principle is a fundamental safeguard of individual liberty, and yet the doctrine of exemplary damages makes a serious inroad upon it, for such damages are given as a punishment of the defendant, not as compensation to the plaintiff, and the defendant may be subjected to punitive damages greatly in excess of any fine which could be given in a criminal suit on a mere preponderance of the evidence, which would not be sufficient to show his guilt beyond a reasonable doubt so as to sustain a criminal conviction for the same act.

Secondly, the granting of exemplary damages is a deprivation of the constitutional right secured by both federal and state constitutions of immunity against double jeopardy. The defendant may be fined in a criminal suit for an offense, and yet this is no bar to granting punitive damages to the plaintiff in a civil

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suit for the same wrongful act of the defendant, as has been held in the case of *Brown vs. Swineford*, 44 Wis. 282. And, of course, the award of punitive damages in a civil suit would never be considered as a bar to criminal prosecution.

Thirdly, the punishment in a civil suit which is meted out to the defendant for his wrongful conduct is unfair in that he is deprived of the usual safeguards given him in a criminal suit by our criminal procedure. In the criminal suit he could not be forced to testify against himself, and yet in a civil suit the defendant may be forced to testify at the trial, and under section 4096 of our Wisconsin statutes, he may be forced to submit to an examination before the trial. If the defendant is unable to employ counsel in a criminal suit, the state must provide him with one, but in the civil suit the defendant is left to provide his own counsel or go without legal aid. In the criminal suit he has the right to see the witnesses face to face, but in the civil suit the plaintiff may prove his case by the use of depositions. Furthermore, in a criminal suit the court is usually limited by statute as to the amount of the fine which may be given, but in a civil suit the jury are allowed large range in finding what they consider adequate punishment for the defendant's wrongful acts. In criminal prosecutions facts showing the wealth of the defendant are not admissible in evidence, but in many jurisdictions, including our own, the wealth of the defendant may be shown in order to determine what amount of exemplary damages should be given, as is held in the case of *Luther vs. Shaw*, 157 Wis. 234, at page 240. This is most unfair and illogical, as there is no greater injury done the plaintiff or the state by the wrongful act of a wealthy than of a poor defendant.

Fourthly, the giving of exemplary damages is a direct departure from the logical rule of damages in a civil suit, which is that the defendant should compensate the plaintiff for the injury done the plaintiff in his legal rights, with an exact money equivalent so as to make the plaintiff whole by placing him in as good a condition as he was before the injury inflicted on him by the defendant. This is in accord with the rule laid down by the following writers:

Lord Coke defines damages thus: "Damnum in the common law hath a signification for the recompense that is given by the jury to the plaintiff or defendant for the wrong that the defendant hath done to him." (1 Coke Lit., Vol. 3, p. 8.)

Greenleaf in his *Treatise on Evidence*, Vol. 2, p. 244, speaks thus of damages: "They should be precisely commensurate with the injury; neither more nor less; and this whether it be to his person or estate."

Now, in the nature of things, the plaintiff is assumed to be made whole by a sum less than that sum which also includes exemplary damages, for it is held by courts which allow exemplary damages that they are allowed not as a matter of right, but are allowed in the discretion of the court in allowing the jury to give them and it is also discretionary with the jury whether to grant exemplary damages or not, even though the court allows them to do so. This is the law in Wisconsin as is shown by the cases of *Robinson vs. Superior Rapid Transit Co.*, 94 Wis. 345; *Tilton vs. James L. Gates Land Co.*, 140 Wis. 197. If the plaintiff is not allowed exemplary damages as a matter of right, they cannot be compensatory, for the law would not fulfill its purpose if it did not give the plaintiff such a sum as would fully compensate his injury as a matter of right, not of discretion. Now, why in the nature of things, should the plaintiff in a civil suit recover more than enough to fully compensate his loss? It is perfectly proper to fine a defendant in a criminal suit for his wrongful conduct, as it is the purpose of a criminal suit to punish the defendant for a crime against the state, and the fine levied goes to the state as the wronged party. But how can we justify giving the plaintiff punitive damages which the defendant is forced to pay for his anti-social conduct by way of punishment and example when such anti-social conduct has not injured the plaintiff in the least, but is a wrong against the state? Is the plaintiff's injury any greater when the defendant maliciously strikes him a blow than it is when the defendant gives him the same blow negligently and without malice? There is no more reason for giving punitive damages to the plaintiff in a civil suit than there is for giving the fine levied in a criminal suit to the individual injured by the criminal.

The doctrine of exemplary damages has not escaped adverse criticism by our own courts, as is shown by the statement of Chief Justice Ryan in the case of *Bass vs. C. & N. W. Ry. Co.*, 42 Wis. 654, at page 672:

"I have always regretted that this court adopted the rule of punitive damages in actions of tort. * * * It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering he should

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recover anything more. And it is equally difficult to understand why, if the tort-feasor is to be punished by exemplary damages, they should go to the compensated sufferer and not to the public in whose behalf he is punished. * * * The reasons against punitive damages are peculiarly applicable in this state since the just and broad rule of compensatory damages sanctioned by this court in *Croker vs. Railway Co.*, 36 Wis. 657."

Of like effect is the statement of Justice Marshall in the case of *Topolewski vs. Plankinton Packing Co.*, 143 Wis. 52, at page 70:

"Punitive damages are never allowable in such a case, as matter of right. Regret has been expressed here that the law allowing such damages at all, was incorporated into our jurisprudence. *Bass vs. C. & N. W. Ry. Co.*, 42 Wis. 654. There are indications that the court has been at times, so disposed that, could the matter have been dealt with from an original standpoint, damage in civil actions would now be confined to those of a compensatory nature. *Evison vs. Cramer*, 57 Wis. 570, 15 N. W. 760; *Templeton vs. Graves*, 59 Wis. 95, 17 N. W. 672."

The doctrine of exemplary damages never found any foothold in the civil law of Europe nor in the law of Scotland and it is not found in the writings of such early English writers as Blackstone, Hammond, Comyns or Rutherford and was not found in the early English cases. This doctrine has been totally rejected by the Supreme Courts of Massachusetts (*Spear vs. Hubbard*, 4 Pick. 143), New Hampshire (*Fay vs. Parker*, 53 N. H. 342), and Colorado (*Murphy vs. Hobbs*, 7 Col. 541), though the doctrine has since been established there by statute, while the state of Washington has abolished the doctrine of exemplary damages by statute.

As the doctrine of exemplary damages is one reluctantly followed by our court because of prior decisions upholding it which in turn are based to a considerable extent on a line of English cases, the chief of which is that of *Huckle vs. Money* (*supra*), in which the judges used impassioned language which, judging from the facts of the case, went to show a case for very great compensatory damage rather than exemplary damages by way of punishment, it would be advisable that the bar use its influence to overthrow this doctrine in Wisconsin either by judicial decision or by statute, as there should be no doctrine in our law which allows a plaintiff to have the defendant punished in a civil suit, the sole purpose of which is to compensate the plaintiff. If

the defendant is to be punished, let his sole punishment be meted out to him in a criminal suit, where he may come prepared to meet a specific criminal charge in a sworn indictment, where he will be given the benefit of presumed innocence and where he must be proved to be guilty beyond a reasonable doubt, where he will be free from double jeopardy, where he will be safeguarded by criminal procedure against unfair attack, where he will be sure of the aid of counsel and where his fine will go to the injured public and not to the injured individual who has already been fully compensated in the civil suit for the same act.

HOWARD A. HARTMAN.

THE DEVELOPMENT OF CIVIL GOVERNMENT IN WISCONSIN

Many volumes could be, and actually have been, written on the development of civil government in the state of Wisconsin, and it is not pretended that the present short discussion is in any sense of the word an adequate or complete treatise on the subject. Its scope is limited to a brief résumé of the chief elements which have contributed to the formation of our state government as it exists at the present time. The treatment is for the most part historical,—a bare outline statement of the fundamental facts and influences which have united to produce the governmental system of Wisconsin. If the arrangement is not logical, it is at least chronological.

Broadly speaking, the subject divides itself under two main heads: the first is the period of the *evolution* of Wisconsin government, beginning with the visits of the first French missionaries, and continuing up to 1848, when Wisconsin became a state with a constitution of its own; the second is the period of the *development* of Wisconsin government, beginning with the statehood of Wisconsin, and continuing up to the present.

The period of evolution was one of *instability* and change; the period of development is one of *stability* and change. But the change of evolution was essential—a new building on a new foundation; while the change of development is incidental—a solid structure which is worthy of improvements and able to bear their weight. The first was the government of Wisconsin prior to 1848; the second is the government of Wisconsin since 1848.