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## SHOULD PUNITIVE DAMAGES BE ABOLISHED?— A STATEMENT FOR THE AFFIRMATIVE

By

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The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excretion, deforming the symmetry and body of the law.<sup>1</sup>

Thus spoke the venerable Justice Foster of the New Hampshire Supreme Court over ninety years ago in an attempt to rid punitive damages from his state's jurisprudence. Unfortunately, however, that landmark opinion is noted today more for its prodigiously scholarly analysis of the origin and development of the concept of punitive damages, and for its lyrical language, than for successful leadership in the revolt against the "monstrous heresy." Despite nearly uniform condemnation by scholars,<sup>2</sup> and in spite of criticism from many courts,<sup>3</sup> all states but four<sup>4</sup> allow "punitive," "vindictive," "smart," or "exemplary" damages to be awarded by a civil jury, over and above compensation for every conceivable form of actual damage suffered by the plaintiff.

Because of the dubious basis for punitive damages, the controversy surrounding this doctrine has never dulled. Recent developments in the tort field have intensified efforts to purge this type of award from American law.

### VARIOUSLY DESCRIBED

Punitive damages are generally defined as damages which are given in enhancement of ordinary or compensatory damages on the basis of the wanton, reckless, malicious, or oppressive character of the acts of defendant. These damages awarded to the plaintiff go beyond the actual damages suffered by him. For that reason they have been described as "speculative," "imaginary," "presumptive," or "added" damages.<sup>5</sup>

<sup>1</sup> Faye v. Parker, 53 N.H. 323, 382, 16 Am. Rep. 270, 320 (1873).

<sup>2</sup> See Hale, Damages, secs. 87, 88 (2d ed. 1912); Willis, "Measure of Damages When Property is Wrongfully Taken By a Private Individual," 22 Harv. L. Rev. 419 (1909); 2 Greenleaf, Evidence, sec. 253, p. 250 n. 2 (15th ed. 1892).

<sup>3</sup> See Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582 (1878); Boetcher v. Staples, 27 Minn. 308, 7 N.W. 263 (1880); Stewart v. Maddox, 63 Ind. 51 (1878); and Faye v. Parker, *supra* note 1.

<sup>4</sup> Louisiana: Vincent v. Morgan La. & Tex. R. R., 140 La. 1027, 74 So. 541 (1917); Trenchard v. Central Laundry, 154 La. 1003, 98 So. 558 (1923); Massachusetts: Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Boott Mills v. Boston R. R., 218 Mass. 582, 106 N.E. 680 (1940); Nebraska: Boyer v. Barr, 8 Neb. 68 (1878); Reeve v. McCormick, 11 Neb. 261, 9 N.W. 88 (1881); Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960); and Washington: Spokane Truck & Dray Co. v. Hoeter, 2 Wash. 45, 25 Pac. 1072 (1891).

<sup>5</sup> 15 Am. Jur. Damages sec. 265, p. 699 (1962).

### UNKNOWN TO THE CIVIL LAW

Exemplary damages are indigenous only to the Common Law of the English speaking countries and are unknown to the Civil Law, that body of laws based upon the Napoleonic Code and in force on the European continent.<sup>6</sup>

### CONFLICTING THEORIES AS TO ORIGIN

Various theories are proposed as to the origin of the doctrine of punitive damages. One is that it grew out of the refusal of courts to grant new trials on account of excessive damages in cases where the injury was attended with malice, oppression, gross fraud, or negligence.<sup>7</sup> Another theory is that the doctrine arose because of a failure by the courts to recognize many things which ought to be classed as injuries and which should enter into a proper measurement of damages.<sup>8</sup> Decisions have stated that the doctrine was developed as a means of reimbursing the plaintiff for elements of damage which were not legally compensable, such as his wounded feelings or the expenses of suit.<sup>9</sup>

### NOW RATIONALIZED AS PUNISHMENT AND DETERRENT

Today, most jurisdictions allow exemplary damages on the rationale of punishing the defendant and of giving him a warning and example to deter him and others from committing like offenses in the future.<sup>10</sup> By this theory such damages are allowed on grounds of public policy, not as compensatory damages, but rather in addition to such damages.<sup>11</sup> However, a few states have held that exemplary damages are not awarded by way of punishment to the defendant, but as compensation for the wrong suffered, although incidentally they may, and do, operate by way of punishment.<sup>12</sup>

### COURTS REGRET ADOPTION OF RULE

The concept of exemplary damages which was solidly entrenched in early English law was brought over to this country and adopted as part of the Common Law by most of the states here. Recognition of the doctrine in the formative stage of American Law was steeped in controversy. Many courts later expressed regret that their state had adopted such an anomalous rule.

"I have always regretted," stated Chief Justice Ryan of the Wisconsin

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<sup>6</sup> *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, 46 Am. Rep. 366 (1884); and *Faye v. Parker*, *supra* note 1. See *Butterworth v. Butterworth* [1920] Prob. (Eng.) 126, 10 B. R. C. 352.

<sup>7</sup> Annotation, 12 Am. Rep. 199 (1912).

<sup>8</sup> *Stuart v. Western U. Teleg. Co.*, 66 Tex. 580, 18 S.W. 351, 59 Am. Rep. 623 (1885).

<sup>9</sup> *Faye v. Parker*, *supra* note 1.

<sup>10</sup> For cases in jurisdictions allowing punitive damages in one form or another, see 15 Am. Jur. *Damages* sec. 266, p. 700 (1962).

<sup>11</sup> *Id.* at p. 701.

<sup>12</sup> Annotation, 16 A. L. R. 793 (1922).

Supreme Court in 1877, "that this court adopted the rule of punitive damages in actions of tort. In the controversy between Prof. Greenleaf and Mr. Sedgwick, I cannot but think that the former was right in principle, though the weight of authority may be with the latter."<sup>13</sup>

Chief Justice Ryan explained the reasons underlying his objection to the doctrine:

It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor 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 damage sanctioned by this court. . . .<sup>14</sup>

### COURTS LEFT CHANGE TO LEGISLATURE

As is the case with many of the antiquated rules of the Common Law adopted by early courts, later courts felt that they had to follow the rule of punitive damages regardless of the fact that it had outlived whatever questionable purposes it had had. Statements of Chief Justice Ryan typify such judicial attitudes. "But the rule [of punitive damages] was adopted as long ago as 1854," he stated, "and has been repeatedly affirmed since. It is therefore too late to overturn it by judicial decision. That could well be done now by legislative enactment only."<sup>15</sup>

The doctrine of punitive damages as a court rule does not, however, require legislative reversal. In this light, consider the meritorious argument of Mr. Willis that "The doctrine is altogether inconsistent with sound legal principles and it is unfortunate that it ever found lodgment in the law, and we look with admiration upon any court brave enough to disown and abandon it."<sup>16</sup> Courts which have overturned other long established doctrines without legislative enactment should not hesitate in this area. The trend to judicial abolishment of charitable, municipal and parental immunity, the abrogation of defenses such as assumption of risk and the abandonment of the "lex loci" theory in tort are vivid examples of the authority of the court to act where the reason for the rule no longer exists.

### WINDFALL FOR PLAINTIFF

Courts generally agree that punitive damages are a windfall to the

<sup>13</sup> *Bass v. The Chicago & Northwestern R'y Co.*, 42 Wis. 654 (1877). For other decisions criticizing the doctrine see: *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366 (1884); *Hanna v. Sweeny*, 78 Conn. 492, 62 Atl. 785, 4 L. R. A. (N.S.) 907 (1906); *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12 (1882); *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590 (1868); *State ex rel. Scobey v. Stevens*, 103 Ind. 55, 2 N.E. 214, 53 Am. Rep. 482 (1885); *Goddard v. Grand Truck R. Co.*, 57 Me. 202, 2 Am. Rep. 39 (1869); *Sullivan v. Oregon R. & Nav. Co.*, 12 Ore. 392, 7 Pac. 508, 53 Am. Rep. 364 (1885); *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152 (1882); and *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582 (1878).

<sup>14</sup> *Bass v. The Chicago & Northwestern R'y Co.*, *supra* note 13.

<sup>15</sup> *Ibid.*

<sup>16</sup> Willis, *supra* note 2.

plaintiff and are not a matter of right.<sup>17</sup> That is, such damages are within the discretion of the jury, and the jury may arbitrarily withhold them or award them. Although courts cannot agree whether actual compensatory damages are a prerequisite to punitive damages, a greater number hold that they are while several courts hold that nominal damages will support a finding of punitive damages.<sup>18</sup> Courts have frequently stated that the amount of punitive damages must bear some reasonable proportion to the actual damages, but such statements are mere lip service because practice has shown that punitive damages greatly in excess of the compensatory damages have been sustained.<sup>19</sup>

A brief look at the punitive damages awards in a few cases points up the ridiculous nature of any attempted compensatory justification. A pet Dachshund and the resulting mental distress of the owner were compensated for at \$2,000 with an additional \$1,000 windfall to plaintiff in punitive damages.<sup>20</sup> \$100,000 seems rather ludicrous compensation for the discomfort of being shot in the buttock and questioned by plainclothesmen in a mistaken identity case.<sup>21</sup> And \$30,000 likewise overcompensates an improperly discharged employee for fainting spells and loss of weight requiring medical attention.<sup>22</sup> Consider plaintiff's windfall in an award of \$675,000 (\$175,000 actual damages and \$500,000 punitive) against the drug manufacturer in an MER/29 case.<sup>23</sup> If deterrence is the prime consideration, it would seem that the compensatory award alone is sufficient to accomplish this result.

### AN ANOMALOUS DOCTRINE

The concept of punishment or of discouraging other offenses does not enter in the field of torts with the exception "in the one rather anomalous

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<sup>17</sup> *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 296 (1882); *Petrey v. Liuzzi*, 76 Ohio App. 19, 61 N.E.2d 158 (1945); *Hodges v. Hall*, 172 N.C. 29, 89 S.E. 802 (1916); and *Louisville & N. R. Co. v. Logan's Adm'x* 178 Ky. 29, 198 S.W. 537 (1917).

<sup>18</sup> Cases holding that there must be actual damages are: *Richard v. Hunter*, 151 Ohio St. 185, 85 N.E.2d 109 (1949); *Kroger Groc. & Bak. Co. v. Reeves*, 210 Ark. 178, 194 S.W.2d 876 (1946); *Martel v. Hall Oil Co.*, 36 Wyo. 166, 253 Pac. 862, rehearing denied, 36 Wyo. 166, 255 Pac. 3 (1927); *Thompson v. Mutual Ben. H. & A. A. Ass'n*, 83 F. Supp. 656 (N.D. Iowa 1949); and *Behymer v. Milgram Good Stores*, 151 Kan. 921, 101 P.2d 912 (1940).

Cases holding that nominal damages will support a finding of punitive damages are: *Scalise v. National Utility Service*, 120 F.2d 938 (5th Cir. Fla. 1941); *Wardman-Justice Motors v. Petrie*, 59 App. D. C. 262, 39 F.2d 512 (1930); and *Lamport v. Judge & Dolph Drug Co.*, 238 Mo. 409, 141 S.W. 1095 (1911).

<sup>19</sup> *Edwards v. Nulsen*, 347 Mo. 1077, 152 S.W.2d 28 (1941) (libel, \$1 actual and \$25,000 punitive); *Livesey v. Stock*, 208 Cal. 315, 281 Pac. 70 (1929) (battery, \$750 actual and \$10,000 punitive); *Seaman v. Dexter*, 96 Conn. 334, 114 Atl. 75 (1921) (\$318 actual and \$5,000 punitive); and *Pelton v. General Motors Acc. Corp.*, 139 Ore. 198, 7 P.2d 263 (1932) (\$225 actual and \$5,000 punitive).

<sup>20</sup> *LaPorte v. Associated Independents, Inc.*, 163 So. 2d 267 (Fla. Dist. Ct. App. 1964).

<sup>21</sup> *Bucher v. Krause*, 200 F.2d 576 (7th Cir. 1952).

<sup>22</sup> *Parrott v. Bank of America*, 97 Cal. App.2d 14, 217 P.2d 89 (1950).

<sup>23</sup> *Toole v. Richardson-Merrell, Inc.*, No. 524722, Supr. Ct. San Francisco County, April 27, 1965.

respect" of punitive damages.<sup>24</sup> But for an understanding of the historical development of the practice, it would be totally foreign to any system of justice. Yet such an understanding provides only an explanation for the existence of the practice in the first instance; it is not a reason for its continuance. In the words of Mr. Justice Foster, the idea of punitive damages "has been suffered to lean upon and support itself by the supposed weight of authority rather than to stand upon principle and inherent strength."<sup>25</sup>

So devoid of any basis in reason is the practice that the sole, although somewhat apologetic, defender of the doctrine, Prof. Sedgwick, in his work could say of it only that "it is an exceptional or anomalous doctrine, at variance with the general rule of compensation; hence that, logically, it is wrong."<sup>26</sup>

### AN ANACHRONISM

There now seems to be little doubt that such an award no longer has any resemblance, in theory or practice, to the original purpose. Punitive damages grew out of the fact that at early Common Law actual damages did not include compensation for mental suffering and anguish or other elements of inconvenience that plaintiff had undergone. Justification of the doctrine was based on the fact that emotional damages were not compensable or did not lend themselves to easy ascertainment. When the courts began to recognize their power to reduce or set aside enormously high verdicts, they excused their failure to exercise this power in some cases by referring to the outrage of the case, to the plaintiff's mental suffering, wounded dignity and hurt feelings, often doing so in over-zealous and righteous language. No one engaged in tort litigation today need be reminded that mental anguish and many other formerly unrecognized elements of damage claimed by plaintiff are now awarded in his favor. Intelligent evaluation of plaintiff's claim for damages for emotional distress caused by defendant's conduct is possible today because of the developments in the fields of psychiatry and clinical psychology. As this has evolved into the accepted rule, and the original compensatory role of exemplary damages was thereby filled by actual damage awards, the courts, faced with an uncertain understanding of what they were dealing with, and confused by the careless and intemperate *obiter dicta* of early cases, almost unconsciously began to shift their emphasis in rationalizing exemplary damages to an exclusively punitive theory,<sup>27</sup> where it now rests.

What had started out as a reason for excusing a jury's improper consideration of the plaintiff's mental suffering in awarding damages thus became a rationalization for a result not only intended, but, at first, not even realized. The courts, by refusing to discard the principle of

<sup>24</sup> Prosser, Law of Torts sec. 2, p. 9 (Hornbook series 1955).

<sup>25</sup> Faye v. Parker, *supra* note 1, at 353, 16 Am. Rep. at 284.

<sup>26</sup> Sedgwick, *Damages*, sec. 355, p. 699 (9th ed. 1913).

<sup>27</sup> For examples of this shifting, see *Merest v. Harvey*, 5 Taunt 442, 128 Eng. Rep. 761 (C. P. 1814); and compare *McNamara v. King*, 7 Ill. 432, 2 Gilman 432 (1845) with *Ousley v. Hardin*, 23 Ill. 403 (1860).

punitive damages when the reason for it no longer existed, created the tiger they now so dubiously held by the tail.<sup>28</sup>

### PUBLIC VENGEANCE UNCIVILIZED

Punishing the defendant for his actions is based upon the satisfaction of a public desire for revenge. "But vengeance is a questionable objective for a civilized legal system," one writer recently noted.<sup>29</sup>

The uncivilized nature of punitive damages becomes apparent when the practice is silhouetted against the safeguards granted to the defendant in a criminal proceeding for an act in which punitive damages are awarded. Assume the typical action seeking punitive damages, complete with the usual allegations of "wanton, willful, reckless malice" and the like. What the defendant did, or is alleged to have done, either also constitutes criminal conduct, as proscribed by the jurisdiction's criminal laws, or it does not.

If the defendant's actions do amount to a crime, then the criminal court is obviously the arena wherein society's vindication best lies. Whatever the theory of criminal law one selects—punishment, deterrence, rehabilitation—the criminal law with its flexibility in sentencing, the court's vast experience with wrongdoers, and its staff of parole, probation and other experts, is best equipped to achieve society's ends. Moreover, if the allegations are such that the defendant's acts are criminal, he ought to be afforded the historic and constitutional guarantees normally afforded one accused of a crime in this country before he is punished for it. His guilt should be proved beyond a reasonable doubt,<sup>30</sup> rather than by a simple preponderance of the evidence. He should be advised of his right to counsel. He should be able to refuse to aid in his own punishment by being granted the right to remain silent rather than being compelled to give testimony against himself.<sup>31</sup> His punishment should be imposed by someone knowledgeable and experienced rather than by a body which has no experience in fixing penalties. His punishment ought to be guided, or at least limited, by the law, rather than by the whimsy of a jury's discretion.<sup>32</sup> Evidence admitted concerning the defendant's financial position for the purpose of determining effective "punishment," evokes irrational jury prejudices,<sup>33</sup> and the defendant should not be subject to the largely unchecked discretion of the jury due to extremely limited appellate review of such awards.<sup>34</sup> Since punitive damages may be as-

<sup>28</sup> For a detailed examination of the history of punitive damages see Hale, *supra* note 2, and Greenleaf, *supra* note 2.

<sup>29</sup> Note, 70 Yale L. J. 1296, 1298 (1961).

<sup>30</sup> *Spokane Truck & Dray Co. v. Hofer*, *supra* note 4, at 1074.

<sup>31</sup> *Ibid.*

<sup>32</sup> Morris, "Punitive Damages in Tort Cases," 44 Harv. L. Rev. 1179, 1180 (1931).

<sup>33</sup> Most states admit such evidence, 25 C. J. S. sec. 126 (1941). See, e.g., *Wilson v. Oldroyd*, 1 Utah 2d 362, 372, 267 P.2d 758, 766 (1954); *Nelson v. Halvorson*, 117 Minn. 255, 135 N.W. 818 (1912).

<sup>34</sup> The discretion of the jury in awarding exemplary damages is much broader and freer than its discretion in awarding compensatory damages. See, *Thomas v. Mickel*, 214 Miss. 176, 58 So. 2d 494 (1952); *Scott v. Times-Mirror Co.*, 181 Cal. 345, 367, 184 Pac. 672, 681 (1919). See also, *McCormick*, Damages sec. 77 (1935).

essed against a defendant who is also amenable to criminal prosecution, he may be effectively subject to "double jeopardy."<sup>35</sup>

If the actions of the defendant do not constitute a crime, he then simply should not suffer punishment. Thus, if the defendant's conduct has not been of such a character to invoke society's penal sanctions, if the community has not previously seen fit to call for punishment of such acts, then there is clearly no reason why a given jury may (or may not, as their sole discretion dictates) in an emotion-ridden courtroom enact and enforce punitive measures on an *ad hoc* basis. Since compensatory damages themselves have a punitive effect,<sup>36</sup> additional punishment is clearly uncivilized. If the compensatory damages are not sufficient to deter defendant from future actions, plaintiff can go into equity and ask for injunctive relief. Failure to comply with an injunction then signals contempt proceedings and the defendant can be fined or jailed if in the wisdom of the court,<sup>37</sup> it is found necessary.

### DETERRENT EFFECT PURELY FICTIONAL

The last plausible basis advanced for retaining punitive damages is that it has some unknown deterrent effect on the plaintiff and third parties.<sup>38</sup> Yet this rationalization is strictly in the realm of fiction. Few persons, if any, have any knowledge and understanding of what punitive damages are, yet they are quite aware of criminal sanctions against acts for which they could be held liable in punitive damages. In most instances compensatory damages alone are sufficient to deter individuals from such acts.<sup>39</sup>

If comparative studies were conducted in those states which do not recognize punitive damages and in those states which do, findings would not reveal that the former are centers harboring the malicious, the wanton and the grossly negligent. Frequency of occurrence and recidivism would be no greater in Massachusetts, Nebraska, Louisiana and Washington than in the other states of the Union. Thus the vague public policy of granting punitive damages because of its deterrent effect is not supported by any empirical facts.

### COLLATERAL CONFUSION

The shallow basis for recognizing the doctrine of punitive damages causes breaches of construction and confused interpretations when it is construed and applied to collateral legal areas. For example, compensatory damages have long been assessed against corporations and other entrepreneurs for the negligent conduct of their employees without regard to the culpability of owners or responsible managerial agents. But the deterrent purpose of the doctrine would exempt the master and

<sup>35</sup> McCormick, *Damages* sec. 77 (1935); Aldridge, "The Indiana Doctrine of Exemplary Damages and Double Jeopardy," 20 Ind. L. J. 124 (1945).

<sup>36</sup> Morris, *supra* note 32, at 1188.

<sup>37</sup> See, *Funk v. H. S. Kerbaugh*, 222 Pa. 18, 70 Atl. 953 (1908).

<sup>38</sup> *Supra* note 29, at 1298.

<sup>39</sup> Morris, *supra* note 36.



the corporation from punitive damages for malicious torts of servants or agents unless in some way the malice of the servant or agent could be attributed to the master or the corporation.<sup>40</sup> There is no justification for extension of liability without fault due to already adequate compensation awards, and since the effect of such liability on deterrence and prevention is, at best, highly uncertain, there is no need for assessment of punitive damages against the nonculpable employer.<sup>41</sup>

The general rule with respect to the vicarious liability of the private employer applies with equal justification to municipalities. An additional basis for rejecting awards of punitive damages against the municipality exists in that the public would be forced to pay a private individual, who has been adequately compensated, a "windfall" simply because of the nature of the municipal employee's act. In this area, as with private business, intra employer-employee relations with respect to deterrence and prevention have no effect on the adequate compensation of plaintiff. By placing this liability on the private business and the municipality, suits would be encouraged whereas if the individual employee alone were liable, lesser awards, more closely related to actual damages, would be the result.

A third area of confusion is in the field of insurance. The initial determination must be made whether the policy provisions exclude coverage, and if not, whether public policy permits coverage. The majority of decisions have held that punitive damages are covered in the typical automobile liability policy.<sup>42</sup> Yet the majority of legal writers seem to espouse the opposite result. "It would seem," states one author, "that insurance against exemplary damages frustrates their purpose and should be considered contrary to public policy."<sup>43</sup> A trend to accept this reasoning by the courts has already begun.<sup>44</sup>

The deterrent effect of punitive damages is negated in large measure upon a determination that for a slight increase in premium coverage can be obtained. It is no answer to say that the risk to the insurer is not oppressive and should be considered a risk of doing business, since the insurer has no part in the acts of the insured and no control over them.

### CURRENT ABUSES IN PRACTICE

Punitive damages are now part of the arsenal of plaintiffs' attorneys to achieve the "more than adequate award."<sup>45</sup> The altruistic and unrealistic purpose of the doctrine is revealed when the punitive damage

<sup>40</sup> Wickem, "The Rule of Exemplary Damages in Wisconsin," 2 Wis. L. Rev. 129, 153 (1923).

<sup>41</sup> 70 Yale L. J. 1296 (1961).

<sup>42</sup> Brin, "Punitive Damages And Liability Insurance," 31 Ins. Counsel J. 265, 269 (1964).

<sup>43</sup> Damages To Persons And Property, sec. 275C, p. 560 (1961).

<sup>44</sup> Northwestern National Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

<sup>45</sup> The slogan "more than adequate award" is taken from the words of Mr. Justice Schroeder of the Kansas Supreme Court in Caylor v. Atchison, Topeka & Santa Fe R.R. Co., 190 Kan. 261, 374 P.2d 53 (1962) when he said that the phrase "the more adequate award" is a "synonym, to all but the naive, for 'the more than adequate award'."

practice as it is developing is disclosed. A plaintiff, "doesn't want to know the history of the law or the forms of actions. He wants to know how much he is going to get for his injury, 'How much am I entitled to?' I am entitled to special damages. I am entitled to general damages, and, in an aggravated tort in this country, I am entitled to punitive damages."<sup>46</sup>

In order to satisfy the insatiable appetite for the larger and larger jury verdict, the punitive damage practice opens new doors heretofore unexploited. As summed up by one plaintiff's attorney, "the punitive field has been completely overlooked."<sup>47</sup>

Pleading "wantonness or wilfulness" will allow the plaintiff's attorney to "get rid of contributory negligence" as a defense, and to abolish the defense of "last clear chance."<sup>48</sup>

Another plaintiff's attorney has exposed the trial tactics which are going to be used to fully exploit the practice when he said:

One of the most important parts in alleging facts to warrant punitive damages is that many cases allow you to show financial wealth of the defendant. If you're entitled to go to the jury on damages that are punitive, the courts have held that the wealth of the defendant is material because what might be punishment to a man of modest means would be no punishment at all to one of great wealth.<sup>49</sup>

As early as 1923 Justice Wickem of the Wisconsin Supreme Court recognized possible abuses in this area when he stated: "In theory, the rule permitting the wealth of defendant to be shown as a basis for exemplary damages is correct; in practice, one suspects that evidence that defendant is a person of large property holdings tends unduly to prejudice the jury upon the merits of the case and the amount of compensatory damages."<sup>50</sup>

Consider also the amendment of the *ad damnum* tactic. The effective use of this advice was noted in a case where the original pleading seeking \$350,000 in compensatory damages, was amended to claim an additional \$500,000 in punitive damages. The jury awarded the latter amount in addition to \$175,000 compensatory damages.<sup>51</sup> Maneuvering such as this, with court approval, is effective in convincing the jurors that a finding of a lesser amount than that originally claimed simply would not be justified, even though plaintiff is otherwise adequately compensated.

The plaintiff's attorneys are now using punitive damages expressly for the purpose of building damages for the claimant rather than for the purpose of punishing or deterring the defendant.

The effect of the present day punitive damages theory is to encourage litigation. Plaintiffs bring suit to recover more than compensatory damages, thus giving rise to appeals after the jury's arbitrary determination of the amount of the award. Determination of the amount and the propriety of the award is based on unrelated trivia such as the

<sup>46</sup> Trial and Tort Trends (1962), p. 7.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.* at 57.

<sup>50</sup> Wickem, *supra* note 40, at 155.

<sup>51</sup> *Supra* note 23, 8 A. T. L. A. Newsletter 135.

wealth of the defendant, insurance policy coverage provisions, and non-fault concepts with respect to employers. These considerations have no relationship to compensation of the plaintiff for injury, in effect they merely add to the already adequate compensatory damages.

The general rule appears to be that the court will not set aside as excessive an award of punitive damages except in extreme cases where it appears to be the result of either passion, prejudice, or improper sympathy, or it appears that an injustice has been done.<sup>52</sup> There are few cases in which the court will interfere with a jury's award of punitive damages as excessive.<sup>53</sup> Consider the court's obligation where the jury awarded \$1 actual damages and 1.5 million dollars as punitive damages resulting from plaintiff's exasperation with telephone service.<sup>54</sup>

### CUMULATIVE OBJECTIONS

Each objection to the punitive damages doctrine and practice becomes cumulative. Those criticisms of the concept which were voiced by many jurisdictions when the doctrine was first adopted in this country are as valid now as they were when raised. But as the doctrine developed, more and more serious objections to it became apparent. The use of punitive damages in civil litigation is an outmoded doctrine inimical to the interests of the public and should be interred in the "limbo" of jurisprudence.

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<sup>52</sup> 15 Am. Jur. *Damages* sec. 297, p. 738 (1962).

<sup>53</sup> 62 A.L.R.2d 839, 843 (1960).

<sup>54</sup> News Release, Milwaukee Sentinel, June 23, 1965.