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The Case Against Punitive Damages

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History

Punitive damages are defined as "damages awarded to a plaintiff over and above the amount needed to compensate him for his loss or injury, as a punishment to the defendant." While the punitory purpose is primary, the imposition of punitive damages also is intended to serve a deterrent function.

Punitive damages are awarded when the defendant's conduct was somehow "wanton, reckless, malicious or oppressive." Mere negligence will not support an award of punitive damages.

Various theories are proposed as to the origin of the doctrine of punitive damages. One such theory grounds the development of punitive damages in the refusal of courts to grant new trials by reason of excessive damages in cases where the verdicts were greatly in excess of any possible pecuniary loss but the injury was attended with malice, oppression, gross fraud or reckless and wanton misconduct.[1] Motions for a new trial based on excessive damages were generally overruled on the ground that the jury could impose damages in excess of compensation in order to punish the wrongdoer and deter potential wrongdoers. This early reluctance to grant new trials by reason of excessive damages can best be understood by reference to the nature and function of the early English juries. Inasmuch as the early English juries were composed of local citizens, intimately familiar with the dispute, the courts were reluctant to interfere with the jury determination of damages, believing it to be the better course to defer to the expertise of jury members. Even after the development of standards for the measurement of compensatory damages, which process was not completed until the end of the 18th century, courts continued to demonstrate a reluctance to interfere with a jury determination of damages, even though such damages exceeded the plaintiff's pecuniary loss. Thus, it has been asserted that the need to justify awards of damages in excess of the plaintiff's tangible harm accounts for the development of punitive damages. With the refinement of our rules for remittitur and additur, and judge control of verdicts, the need for punitive damages no longer exists.

A second theory asserts that punitive damages arose because of the failure by the courts to recognize many things which ought to have been classed as injuries and which should

[1]Earl v. Tupper, 45 Vt. 275 (1873).

have figured in the computation of compensatory damages.[2] Owing to the inherent difficulty of fixing damages for such things as mental anguish and physical pain and suffering with any mathematical certainty, courts were exceedingly reluctant to allow awards of damages for such injuries on a compensation theory. Inasmuch as the concept of compensatory damages now embraces mental anguish and other non-physical injuries, it must be recognized that this theory offers no compelling justification for punitive damages.

A third theory attributes the development of punitive damages to the need for a means of reimbursing the plaintiff for certain legally non-compensable elements of damages such as wounded feelings or the expenses of litigation.[3] This theory that punitive damages are compensation for the incompensable has remained the English justification for the doctrine in modern times. The hit and miss result of this method is as out-moded as trial by ordeal.

Present Status of Punitive Damages

All but four states presently allow punitive damages; those states which have rejected the doctrine are Louisiana, Massachusetts, Nebraska and Washington.[4] While a slight minority of courts recognize a compensatory basis for the imposition of punitive damages, the majority of courts define punitive damages as damages which are given as an enhancement of compensatory damages because of the wanton, reckless, malicious or oppressive character of the conduct complained of and as a punishment to the defendant, which punishment functions both as a sanction expressing societal disapproval and as a deterrent to potential wrongdoers.

In those jurisdictions which have abolished punitive damages, it has been recognized that it is the policy of the law in tort actions to award only those damages which will fairly and adequately *compensate* the injured party and to limit the obligation of the defendant to full indemnification of the plaintiff, sufficient to place him in the position he would have occupied had the injury not been inflicted upon him. Arguing that the public can have no defensible interest in exacting the pound of flesh within the context of damages, these courts have recommended that damages be precisely commensurate with the injury, neither more nor less, in fulfillment of the purpose of the civil law.

In light of the fact that the concept of compensatory damages has been expanded to include such items of damage as mental and physical pain and suffering, hurt feelings and wounded dignity, the only viable justification for the punitive damage award has been superseded. Stated

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[2]Stuart v. Western Union Tel. Co., 18 S.W. 351 (Tex. 1855).
[3]Fay v. Parker, 53 N.H. 342, 16 Am. R. 270 (1873).
[4]Vincent v. Morgan's La. & Tex. R.R. & S.S. Co., 140 La. 1027, 74 So. 541 (1917); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Boyer v. Barr, 8 Neb. 68 (1878); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891).

simply, the purpose for which punitive damages were created no longer exists.

Lack of Consistency or Guidelines

Courts almost universally agree that punitive damages are a windfall to the plaintiff, i.e., they are not a matter of right and are awarded or withheld at the discretion of the jury. Although the majority of courts require actual compensatory damages as a prerequisite to punitive damages and although it is frequently urged that the amount of punitive damages must bear some reasonable proportion to actual damages, the awards do not indicate that such guidelines are adhered to. The windfall nature of punitive damages has been absurdly exemplified in several recent cases. In a case involving libel,[5] the jury returned a verdict which awarded the plaintiff $60,000 in general damages and $3 million in punitive damages (reduced by the trial court to $400,000 in punitive damages). In another libel action,[6] the jury awarded the plaintiff $2.5 million in punitive damages (reduced by the Trial Court to $150,000). In a recent case in which a double amputee brought suit seeking to recover for injuries sustained in the crash of a light plane in which he was a passenger, the jury made an aggregate compensatory and punitive damage award of $14,387,674.[7] The award of $10,500,000 in punitive damages in the *Rosendin* case suggests very clearly the dangers inherent in our system of civil punishment and the more than adequate award.

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Equally significant are those instances in which a single defendant is subjected to multiple civil actions and exposed to multiple claims for punitive damages. In this regard, the experience of Richardson-Merrell, Inc. in developing and marketing a drug named MER/29 is quite informative. As a result of its production and distribution of MER/29, Richardson-Merrell Inc. was exposed to well over 1000 claims for compensatory and punitive damages. Over 95 percent of the MER/29 cases were settled between 1962 and 1967. Settlements over this five-year period gradually increased in size. In the typical MER/29 case—good medical proof of cata-

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[5]Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
[6]Faulk v. Aware, Inc., 19 App. Div. 2d 464, 244 N.Y.S.2d 259 (1963), *cert. denied*, 380 U.S. 916 (1965).
[7]Rosendin v. Avco-Lycoming Corp., The Bendix Corp. Superior Court, Santa Clara County, California, March 8, 1972.

racts and hair and skin change in a man under 60 but with no wage loss and only small medical expenses—settlements grew from approximately $25,000 in the early period to $125,000 near the end. Eleven cases were tried to a jury verdict, two resulted in a hung jury and six were settled in the course of trial. Four cases reached the appellate level and resulted in a finding of no liability under any theory.[8] Two cases reached the appellate level and resulted in a finding of liability but differed as to the permissibility of a punitive damages award. In *Toole v. Richardson,*[9] the jury awarded the plaintiff $175,000 general damages and $500,000 punitive damages. The trial court granted defendant's motion for a new trial on the issue of punitive damages unless plaintiff agreed to remit $250,000 of the punitive damage award. The plaintiff consented but defendant appealed. In sustaining the award of punitive damages and affirming the trial court's exercise of the remittitur power, the appellate court found that the defendant had acted recklessly and in wanton disregard of possible harm to others in marketing MER/29 in view of its knowledge of the toxic effect of the drug and that consequently the jury might properly award punitive damages.

A different result was reached in *Roginsky v. Richardson-Merrell, Inc.*[10] In this case, a three-judge panel concluded, one judge dissenting, that there was no basis in the record sufficient to warrant submitting the case to the jury on the issue of punitive damages. The court nullified the trial court award of punitive damages on the basis of certain public policy considerations among which were (1) that such awards are ultimately borne by the public through increased insurance charges for the manufacturers, the cost of which is ultimately passed on to the consumer and (2) that to allow such damages in such a situation might stifle the initiative of such manufacturers to develop and market new drugs.

The last reported case dealing with this subject was *Ostopowitz v. William S. Merrell Co.*[11] Although an appeal was docketed under the name of *Ostopowitz v. Richardson-Merrell, Inc.* (App. Div., 2 Dept., Apr. 26, 1967), no further report of the case appears. Following the precedent of the earlier *Roginsky* case, the trial court in *Ostopowitz* reduced an award of $850,000 punitive damages to $100,000. While the final result of the protracted struggle between the consumers and producers of MER/29 is difficult to assess because of the nature of settlement agreements, it can be stated that the availability and the

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[8]Blum v. Richardson-Merrell, Inc., 268 F. Supp. 906 (D. Md. 1965); McLeod v. W. S. Merrell Co. 174 So.2d 736 (Fla. 1965); Lewis v. Baker, 243 Ore. 317, 413 P.2d 400 (1966); Cudmore v. Richardson-Merrell, Inc., 398 S.W.2d 640 (1965).
[9]60 Cal. Rptr. (Cal. App. 1967).
[10]378 F.2d 832 (2d Cir. 1966).
[11]N.Y.L.J. Jan. 11, 1967, at 21, col. 3 (Sup. Ct. Westchester County, N.Y.), *appeal docketed sub. nom.,* Ostopowitz v. Richardson-Merrell, Inc., (App. Div., 2d Dept., Apr. 26, 1967).

potentiality of the punitive damages sanction played a significant role in the computation of a settlement figure. When this is analyzed together with the reported instances of punitive damages awards by juries, it becomes apparent that the single defendant-multiple action-multiple punitive damages awards problem presents the inherent anomaly of punitive damages with startling clarity.

Expansion of Area of Liability

Despite the general rule that punitive damages are not available in actions for breach of contract even if the breach is willful, fraudulent, or coupled with evil intent, the courts are increasingly finding such conduct to be a tort and allowing punitive damages. See, *California: Fletcher v. Western National Life,* 89 Cal. Rpt. 78 (1970)-(Intentional infliction of mental distress); also 39 INS. COUNSEL J 335 (July 1972);

Arizona: State Farm v. St. Joseph's Hospital, 489 P.2d 837 (Ariz. 1971). Attorney allowed to recover punitive damages because insurer's claim superintendent wrongfully interfered with his contingent fee contract;

D.C.: Washington Post, July 3, 1972 (Lawyer ordered to pay $50,000 to stockholders as punitive damages for "gross and willful misconduct" in handling their investments).

Courts are liberally construing the requirements of "willful, reckless or malicious acts" to allow an expansion of the cases into areas not traditionally one for punitive damages. In *Johnson v. Radde,* 196 N.W.2d 478 (Minn. 1972,) an action was brought against a real estate agent for unlawfully inducing an alleged breach of contract. The court denied liability but stated:

> As a general rule, damages for breach of contract are limited to the pecuniary loss sustained . . . however, where the breach results from an independent or willful tort, exemplary damages may be recovered. . . . The element of *malice*—a necessary component of the wrong which will support exemplary damages—has been defined in numerous ways. As a requisite of liability for inducing breach of contract, malice denotes the intentional doing of a harmful act without *legal justification*. . . .
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> . . . nothing more than the intentional doing of a wrongful act without legal justification or excuse, or otherwise stated the willful violation of a known right. Whether a wrongdoer's motive in interfering is to benefit himself, or to gratify his spite by working mischief to another, is immaterial, malice in the sense of ill-will or spite not being essential.
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> Justification is the most common affirmative defense to an action for interference. It is employed to denote the presence of exceptional circumstances which show that no tort was in fact committed and lawful excuse which excludes actual or legal malice. The standard for determining whether the defense of justification is fully established is the reasonableness of the defendant's conduct under all the circumstances of the case. . . .

Thus, punitive damages will be allowed in practically every case approaching recklessness—i.e., something more than mere negligence.

It is interesting to note that claimants' counsel have now realized that in products cases, punitive damages, has no place where strict liability ap-

plies, thus they seek to show some fault in order to recover punitive damages.

On the other hand, some courts are restricting the attempt to expand liability for punitive damages to every case involving a breach of contract and also limiting and controlling punitive damages. See, *Jones v. Fisher,* 42 Wis.2d 209,166 N.W.2d 175 (1969), where the Wisconsin Court held that where no actual malice is shown, the character of the offense must have the outrageousness associated with serious crime to support an award of punitive damages. Another encouraging limitation is seen in the *FELA* cases.

Fela and Punitive Damages

By way of contemporary up-date, it is interesting to note the recent developments concerning the question of whether punitive damages can be recovered under the Federal Employers Liability Act.[12]

In *Kozar v. Chesapeake and O. Ry.*,[13] a foreman employed by the defendant, an interstate carrier, was killed by a railway car which fell from a malfunctioning crane. Although the maintenance department and the superintendent in charge of the section in which the deceased was employed were aware of the condition of the crane, the railroad had failed to repair it. The administratrix of the deceased initiated a civil action against the railroad in federal district court under the FELA. The jury found that defendant acting through its agents, had negligently caused the decedent's death and that the railroad's "officers, agents and employees were guilty of willful, wanton, reckless disregard for the safety" of the deceased. They further found that the defendant railroad had "participated in, authorized, or confirmed" this misconduct and was therefore liable for punitive damages. As a result, punitive ($70,000) as well as compensatory damages ($120,045) were assessed against the defendant—the first instance of punitive damages being awarded in an action arising under the FELA.

Prior to *Kozar,* federal courts had permitted plaintiffs in FELA suits to be reimbursed only for their actual losses. In deciding to allow the matter of punitive damages to be submitted to the jury, the *Kozar* court had to make two threshold determinations: (1) whether the Act precluded the common law remedy; and (2) whether prior case law denying punitive damages in FELA suits had established that a punitive award was inappropriate in FELA cases. As to the first question, the court determined that the absence of specific statutory authorization did not in itself bar punitive damages but rather constituted an indication that Congress did not intend to deprive federal employers of the common law remedy of punitive damages. As to the second question, the court determined that all prior cases denying recovery of punitive damages were distinguishable and furthermore that

[12]*See,* 10 A.L.R. Fed. 511 (1972).
[13]320 F. Supp. 335 (W.D. Mich. 1970).

recent cases actually stood as authority for the proposition that punitive damage could be awarded given the right factual context.[14]

On appeal, the court affirmed the awards of compensatory damages except that the $5000 award to the two adult daughters for loss of services and the $30,000 award to the infant son for loss of services were vacated. The court also vacated the award of $70,000 punitive damages, holding that punitive damages are not recoverable under the FELA.[15]

The court reasoned that while the legislative history of the Act shows that its provisions were not intended to limit or take away any remedy available at common law to an injured employee, the district court was mistaken in characterizing the right to recover punitive damages as a common law remedy. The court stressed the distinction between remedy (the means employed to enforce a right or redress an injury) and damages (the indemnity recoverable by a person who has sustained an injury). The court stated that however correct the district court's proposition be that the purpose of the FELA was "to place such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of men in their dangerous employment," it cannot stand as the law in light of a clear line of precedent from the U.S. Supreme Court holding that damages recoverable under the Act are compensatory only.[16]

Arguments Against Retention of Punitive Damages

Litigation Expenses

Plaintiffs' lawyers understandably favor the escalation of damage awards through the mechanism of punitive damages and frequently attempt to justify their position on the theory that our American civil procedure ought to afford the opportunity to recover litigation expenses. Assuming, arguendo, that present procedural rules are incomplete in not providing for litigation expenses, the logical remedy would be to amend and improve the rules of procedure, not tamper with the compensatory function of tort damages. Procedural reform is the proper remedy rather than allowing the virtually unchecked caprice of juries to provide some relief. In addition, procedural reform would apply to all civil litigation.

Redress for Petty Injury

One of the frequently cited arguments favoring the retention of punitive damages is that they serve as an incentive for a person who has suffered only slight damages to bring an action when he otherwise would not, due to the limited nature of his loss.[17]

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[14]*See,* Coin v. Southern Ry., 199 F. 211 (C.C.E.D. Tenn. 1911); United States Steel Corp. v. Fuhrman, 407 F.2d 1143, (6th Cir. 1969), *cert. denied,* 398 U.S. 958 (1970); Gummup v. Warner, 43 F.R.D. 365 (E.D. Pa. 1968); Helsel v. Penn. R.R., 84 F. Supp. 296 (E.D. N.Y. 1946); Missouri K.T.R.R. v. Ridgeway, 191 F.2d 363 (8th Cir. 1951).
[15]Kozar v. Chesapeake and Ohio Ry. Co. 449 F.2d 1238 (1971).
[16]Gulf, Colorado and Santa Fe Ry. Co. v. McGinnis, 228 U.S. 173 (1913).
[17]PROCEEDINGS, ABA SEC. ON INS. NEG. & COMP. LAW, 292, 294 (1965).

Without the prospect of an award of damages measured in other than actual monetary loss or special damage, there is small incentive for a plaintiff to invoke the law or force the wrongdoer to make formal reparations in civil damages for his actions. The practical difficulty with this argument is that although punitive damages proponents claim that a limitation exists which prevents unwarranted application of the doctrine, citing the rule that punitive damages must bear some reasonable proportion to the compensatory damages found, the fact of the matter is that this rule is ignored. Frequently, punitive damage awards bear no relation to the actual damages. The following examples are illustrative: $1 actual damages and $25,000 punitive damages; $750 actual damages and $10,000 punitive; nominal actual damages and $175,000 punitive.

It is also argued that punitive damages serve the socially useful function of offering an incentive for a slightly injured person to seek a judicial remedy where a criminal prosecutor will not act because of the petty nature of the damage involved. Once again, however, if the criminal law does not protect society by failing to provide for diligent prosecution of such offenses, the deficiency is most properly remedied by improving the administration of criminal justice and not leaving it to whim and caprice.

Deterrence

It is claimed that the civil law remedy of punitive damages serves as a warning to deter others from engaging in conduct similar to that for which the defendant is being punished. This rationalization of deterrence is a fiction. Few persons have any knowledge and understanding of what punitive damages are, yet they are quite aware of criminal sanctions against acts for which they could also be held liable in punitive damages. Compensatory damages alone are sufficient to deter individuals from such acts. Compensatory damages impose a tangible pecuniary burden on a tortfeasor which acts to deter him and others from similar conduct in the future. The serious consequence of compensatory damage awards supplements the threat posed by criminal sanctions in deterring future wrongful conduct, thus obviating the need for further deterrence in the form of punitive damages.

Punishment

It is argued that punitive damages serve a valid purpose in the civil law because they provide punishment for conduct that might otherwise go unpunished. The difficulty with this argument is that it runs directly contrary to the long history of jurisprudence which has recognized the distinct natures of criminal and civil law. Punishment has traditionally been a function of the criminal law. The civil law is directed at compensating an injured party by way of indemnity. Thus, the anomalous character of punitive damages is not difficult to perceive.[18] Punitive damages are damages which exceed the amount neces-

[18]PROSSER, LAW OF TORTS, § 2 at 9 (3d ed. 1964).

sary to compensate the plaintiff for his injury, imposed in the form of a criminal fine. However, they are not given to the public in whose behalf the defendant is being punished.[19] The amount is fixed only by the discretion of the jury and imposed without the usual safeguards attendant upon a criminal proceeding, such as proof beyond a reasonable doubt, the privilege against self-incrimination, and even the rule against double jeopardy, since the defendant may still be prosecuted for the crime after he has been "punished" in the tort action.

The elements of a criminal sanction are inherent components of an award of punitive damages.[20] However, the defendant against whom punitive damages are sought is not provided the procedural safeguards in a civil action involving punitive damages that have been held to be essential in a criminal prosecution.[21]

In certain instances (e.g., MER/29 cases) a defendant may be exposed to multiple civil actions and multiple claims for punitive damages. Serious constitutional questions are raised by this process.[22]

In the criminal law, neither the jury nor the judge is given free reign to assess the punishment for the crime. Sanctions are established by legislatures to suit the nature of the crime. Further, an award of punitive damages may bear no reasonable relationship to the criminal penalty for the same act. See, *Brooks v. Wootton,*[23] where punitive damages of $6500 for causing an accident by an intoxicated driver were awarded while the criminal penalty was $25 and loss of drivers license.

If the defendant's actions do amount to a crime, then the criminal court is obviously the area wherein society's vindication best lies. If the actions of the defendant do not constitute a crime, then he simply should not suffer punishment. Thus, if the defendant's conduct has not been of such character as to evoke society's criminal sanctions, if the community has not previously seen fit to call for punishment of such acts, then there is clearly no reason why a jury may enact and enforce punitive measures on an ad hoc basis.

Vicarious Liability

If the true purpose of punitive damages is to punish the wrongdoer, it makes little sense to allow a shifting of the punitive damages from the agent who committed the wrongful act to the principal who did not participate in, direct, or ratify the misconduct. If such a shifting is allowed, the punishment of the wrongdoer is not accomplished and the punitory purpose of punitive damages is frustrated. In the case of *Parris v. St. Johnsburg Trucking Co.,*[24] the court refused to impose liability on the defendant corporation for punitive damages assessed against its employee as a result of the employee's grossly negligent conduct. The court reasoned

[19]Bass v. Chicago and N.W. Ry. Co., 42 Wis. 654, 672 (1877).
[20]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
[21]Boyd v. United States, 116 U.S. 616 (1886).
[22]Hoag v. New Jersey, 356 U.S. 465 (1958).
[23]355 F.2d 177 (2d Cir. 1966).
[24]395 F.2d 543 (2d Cir. 1968).

that to impose liability on a corporation for punitive damages resulting from the unratified acts of its employee performed within the scope of his employment would be inconsistent with the rationale behind the concept of punitive damages. Either as a basis for punishment or for deterrence of wrongdoers, some deliberate corporate participation should be demonstrated before the punitive damages sanction is applied.

A considerable minority of courts have agreed with the position of the court in the *Parris* case.[25] Where the employer has neither authorized nor ratified the conduct of his employee or where there is no deliberate corporate participation in the misconduct of the agent or employee, there is a certain basic injustice about inflicting punishment upon one who has been entirely innocent.[26]

However much might be said in opposition to the extension of the vicarious liability of the employer for acts of the employee within the scope of the employment to punitive damages, the majority of courts *have taken* this position.[27] In support of this position, it has been argued that imposition of vicarious liability for punitive damages serves the purpose of encouraging employers to exercise closer control over their employees and thus has a deterrent effect. Analysis of this argument reveals two basic flaws. First of all, it ignores the necessity of distinguishing between the corporate employer and the individual employer and secondly, the belief that shifting punitive damages to the employer will cause employers to exercise greater care in the selection and supervision of employees is absurd in light of the practicalities of present day employment practices, union contracts, etc.

Insuring Against Punitive Damages

Most of the liability policies generally available, including automobile, comprehensive general liability and personal injury policies do *not* expressly exclude punitive damages as a kind of damage for which the policy will *not* respond.[28] The absence of an express exclusion as to coverage for punitive damages assessed against the insured does not however dictate the conclusion that punitive damages awarded against one who is insured against liability are to be paid by his insurer. The resolution of this issue involves not only a construction of

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[25]Lake Shore and Michigan Southern Ry. Co. v. Prentice, 147 U.S. 101 (1893), Commercial Union Ins. Co. of N.Y. v. Reichard, 262 F. Supp. 275 (S.D. Fla. 1966), *aff'd* 404 F.2d 868 (5th Cir. 1968).

[26]RESTATEMENT OF TORTS, § 909, would permit the awarding of punitive damages against a principal because of an act by an agent or employee only if,

a. the principal authorized the doing and the manner of the act or
b. the agent or employee was unfit and the principal was reckless in employing him, or
c. the agent was employed in a managerial capacity and was acting in the scope of employment, or
d. the employer or a manager of the employer ratified or approved the act.

[27]*Exemplary Damages in the Law of Torts,* 70 HARV. L. REV. 517 (1957).

[28]*See,* Buell, *Punitive Damage Dilemma: A Possible Response,* THE NATIONAL UNDERWRITER 51 (May 5, 1972).

the terms of the contract of insurance (coverage) but also a determination as to whether the purposes of punishment and deterrence underlying punitive damages are frustrated when the insured is permitted to shift the penalty to the insurer. This second consideration has been phrased in terms of whether it is against sound public policy to permit an individual to insure himself against the possibility of punitive damages being awarded against him and thus shift the burden of the punitive damages sanction to an innocent party.[29]

Coverage for the Individual Insured

An analysis of the early cases concerning the liability of an insurer for a punitive damages award against its insured reveals that courts were primarily concerned with whether the contract language itself would permit insurance coverage for punitive damages assessed against the insured. While many of the cases are of limited precedential value because of the peculiar wording of specific contract provisions, these courts generally held that an insurance policy covering an insured's legal liability included coverage for both compensatory and punitive damages.[30]

An analysis of the more recent cases, however, reveals that courts have shifted the focus of their inquiry and are now primarily concerned with the question of public policy. Although several earlier cases voiced the objection that it was against public policy to permit insurance coverage for a punitive damages award against an insured, the argument was best formulated and most strongly articulated in the landmark case of *Northwestern Nat'l Cas. Co. v. McNulty.*[31] In this case, the court decided that it was contrary to public policy to permit an insured to shift the liability for punitive damages resulting from his reckless driving to his insurer. Cognizant of the punitory and deterrent functions served by punitive damages, the court ruled that socially irresponsible automobile drivers should not be allowed to escape the personal punishment inherent in punitive damages by shifting the liability to his insurer.

Following the decision in *McNulty,* a Florida appellate court[32] ruled that "a person has no right to expect the law to allow him to place responsibility for his reckless and wanton acts on someone else." In rejecting the argument that an insurer should be liable for a punitive damage award against its insured, the court reasoned that insurance coverage for

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[29]There are statutory prohibitions which could be interpreted as preventing insurance coverage for punitive damages. CAL. INS. CODE § 533: "An insurer is not liable for a loss caused by the willful act of the insured; . . . "

[30]In Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964) and United States Fid. & Guar. Co. v. Janich, 3 F.R.D. 16 (S.D. Cal. 1943), the courts found that punitive damages come within the policy's coverage. Holdings to the contrary are found in Universal Indem. Ins. Co. v. Tenery, 39 P.2d 776 (Colo. 1934) and Crull v. Gleb, 382 S.W.2d 17 (Mo. App. 1964).

[31]307 F.2d 432 (5th Cir. 1962).

[32]Nicholson v. American Fire and Cas. Ins. Co. 177 So.2d 52 (Fla. App. 1965).

punitive damage awards would thwart the retributive and deterrent purposes of punitive damages. A Missouri appellate court provided further support for the position that individuals should not be allowed to shift responsibility for their reckless and wanton misconduct to their insurers and thus defy the sanction of punitive damages.[33]

Proponents of insurance company liability for punitive damage awards received a brief respite when the supreme court of Tennessee decided to reject the rationale of the *McNulty* decision.[34] The court denigrated the deterrent function of punitive damages and decided that it was not contrary to public policy to impose liability on the insurer for punitive damage awards against the insured. The court's rather spurious rejection of the deterrent function of punitive damages was answered in *American Sur. Co. of N.Y. v. Gold,*[35] a case which arose after the Tennessee decision, in the following words:

> The argument seems to miss the mark for we may as well say that criminal sanctions serve no useful purpose just because they are constantly violated. The question is not so much the efficacy of the policy underlying punitive damages; rather it is a question of the implementation of that policy. Permitting the penalty for the misdeed to be levied on one other than he who committed it cannot possibly implement the policy.

The court went on to hold that public policy forbade shifting the liability for punitive damages and the punishment inherent therein to the insurer.

The most recent case concerning this topic was decided this year.[36] The court found that public policy prevents an insurance company from paying an award for punitive damages in an automobile negligence action when the insured is guilty of gross, wanton or reckless misconduct. The court went on to state that the purpose of the Arizona Financial Responsibility Law was compensation of persons injured in automobile accidents and not insulation of reckless drivers from liability for punitive damages.

Notwithstanding two recent cases[37] holding that punitive damages are within the coverage afforded by the insurance policy (cases in which the court never reached the public policy question), the landmark *McNulty* decision represents the hallmark of the present trend opposed to insurance company liability for punitive damage awards. If the purpose of punitive damages is to punish the wrongdoer and deter others from similar conduct, that purpose will not be effectuated by allowing the wrongdoer to escape responsibility by shifting the burden of punitive damages to a liability insurer. If insurance is allowed to cover liability for punitive damages, the insurance buying public is ultimately bearing the punishment.

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[33]Crull v. Gleb, 382 S.W.2d 17 (Mo. App. 1964).
[34]Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964).
[35]375 F.2d 523 (10th Cir. 1966).
[36]Price v. Hartford Acc. and Indemnity Co., 494 P.2d 711 (Ariz. App. 1972). NOTE: Reversed, Supreme Court of Arizona, October 24, 1972, _____ P.2d _____.
[37]Southern Farm Bureau Cas. Ins. v. Daniel, 440 S.W.2d 582 (Ark. 1969), Carroway v. Johnson, 139 S.E.2d 908 (S.C. 1965).

The hardship on the insured is obvious but the answer is not to insure but to abolish or at least, strictly limit the punitive damages doctrine.

Coverage for Vicarious Liability

In contra distinction to the situation where the individual insured is attempting to shift the liability for punitive damages assessed against him to his insurer, the imposition of vicarious liability upon an employer or principal for the misconduct of an employee or agent presents a different problem. Should the employer or principal be able to insure against the possibility that his employee or agent will engage in wanton misconduct sufficient to justify the imposition of punitive damages? Certainly, in those instances in which the principal has directed, participated in or ratified the acts of an agent or in which deliberate corporate participation in the acts of an employee can be found and the conduct of such agent or employee results in the imposition of punitive damages, the same reasoning which militates against allowing an individual to shift the burden of punitive damages to his insurer would apply where the principal is attempting to shift punitive damages to his insurer. The principal is being punished for affirmative acts and not merely by operation of law.[38]

However, where the principal has in no way participated in or ratified the wrongful act of the agent and punitive damages are assessed against the principal purely on the basis of vicarious liability, there is no public policy reason why the principal should not be allowed to insure against those damages.[39]

Only if one asserts that imposition of vicarious liability for punitive damages serves the function of encouraging employers and principals to exercise greater care in the selection and supervision of employees can a case be made for prohibiting employers from insuring against punitive damages. However, the imposition of vicarious liability for punitive damages does *not* really serve to encourage employers to exercise greater care in the selection and supervision of employees. In light of modern employment practices and the practical impossibility of an employer preventing the occurrence of actionable misconduct by employees, employers should be entitled to insure against punitive damages where he has not participated in the employee's wrongful act.

Conclusion

The doctrine of punitive damages is an anachronism in the civil law. It cannot be justified as compensatory in nature. Its only basis lies in the widely recognized purposes of punishment and deterrence. This purpose is foreign to the civil law. Punishment for antisocial conduct belongs under

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[38]Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934), *cert. denied* 295 U.S. 734 (1934).

[39]Northwestern Nat'l Cas. Co. v. McNulty, *supra* note 31; Sterling Ins. Co. v. Hughes, 187 So. 2d 898 (Fla. App. 1966); Commercial Union Insurance Co. of N.Y. v. Reichard 404 F.2d 868 (5th Cir. 1968): Travelers Ins. Co. v. Wilson, 261 So. 2d 545 (Fla. App. 1972).

the criminal law where proper constitutional safeguards are afforded to a defendant.[40] It violates every principle "of ordinary, time-honored, universally-recognized fairness."

Those who support the continuance of the doctrine and claim that civil punishment has its proper place are also those who attempt to have the damages covered by liability insurance or shifted to deeper pockets through vicarious liability. In doing so, the supporters of punitive damages display a fundamentally ambivalent belief regarding the purpose of punitive damages. It might be said that they are not really so much interested in punitive damages as an expression of societal disapproval and punishment but rather see it as a source for the "more than adequate" award.

Since civil law now provides the means to secure full compensation for all damages sustained, whether tangible or intangible, punitive damages become a windfall to the claimant. Insofar as they serve to provide a mechanism for obtaining a more than adequate compensation, they exceed the proper purpose of tort law. The legal doctrine which allows the award of punitive damages should be interred forthwith and remembered only as a rule of damage law that lived too long.[41]

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[40]Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (July 1972).
[41]*See*, THE CASE AGAINST PUNITIVE DAMAGES, MONOGRAPH—THE DEFENSE RESEARCH INSTITUTE, INC., (1969).