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PUNITIVE DAMAGES: A CRITICAL ANALYSIS: KINK V. COMBS

By DAVID L. WALThER,* AND THOMAS A. PLEIN**

In Kink v. Combs1 the Wisconsin Supreme Court reaffirmed adherence to the doctrine of punitive damages.

The purpose of this article is to analyze the doctrine and inquire into its historical and theoretical antecedents, with primary emphasis on Wisconsin law.

HISTORICAL DEVELOPMENT

Punitive damages has been known in the common law by name for only two hundred years.2 However, the use of private damages as punishment is as old as man made law. The Mosaic law provided a system of fines as damages. For example:

When a man steals an ox or a sheep and slayters or sells it, he shall restore five oxen for the one ox, and four sheep for the one sheep.3

When men have a fight and hurt a pregnant woman, so that she suffers a miscarriage, but no further injury, the guilty one shall be fined as much as the woman's husband demands of him, and he shall pay in the presence of the judges.4

By Plato's time, however, compensation was distinguished from punishment.

When any one commits any injustice, small or great, the law will admonish and compel him either never at all to do the like again, or never voluntarily, or at any rate in a far less degree; and he must in addition pay for the hurt.5

Although the doctrine of punitive damages was unknown to the Roman law6 and thus to the French civil law,7 in Anglo-American common law jurisprudence punitive damages apparently developed with the jury trial,8 although its development is somewhat obscure.

It has been argued that punitive damages were used as a means

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1 Kink v. Combs, 28 Wis. 2d 65, 135 N.W. 2d 789 (1965).
2 Huckle v. Money, 2 Wils. 205 (K.B. 1763).
3 Exodus 21:37.
4 Exodus 21:22.
5 Plato, The Laws IX page 606.
8 C.J.S. Damages §117 (1941).
of justifying excessive verdicts. Prior to the mid-seventeenth century, jury determinations of damages were not reviewable by courts of appeal. The writ of attaint was used to prevent a jury from deciding a case perversely. If the jury were proven to have decided the question of liability or damages wrongly, the jurymen were subject to punishment under the writ. Thus, a rule of law which could allow damage verdicts to be conclusively presumed to be correct was a valuable adjunct to the jury system.

An exception to this rule developed in mayhem cases. In a mayhem case the injuries of the plaintiff could be exhibited to the reviewing court, which could thereby compare first hand the extent of the injuries with the size of the award. In 1655 an appellate court was the first known court to set aside a verdict as excessive.

However, courts were conservative and did not readily accept the new power to set aside verdicts; they were anxious to find an excuse to sustain the damage verdict. It has been argued that the concept of punitive damages was born in the search for such an excuse.

Some writers have said that the exemplary damage concept was an outgrowth of the refusal of the law to recognize a cause of action unless the plaintiff could fit his fact situation into the confines of one of the original writs. The jury could give damages for the full injury sustained if the plaintiff could get into court on the basis of a collateral issue. Thus, substantial damages were awarded in early cases in which the plaintiff suffered no apparent physical or financial loss from the recognized wrong.

Other writers believe that punitive damages were conceived as a “just compensation” for such intangibles as hurt feelings, wounded dignity, and embarrassment. In the early history of the common law these intangibles were not recognized as factors to consider in an

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10 Fay v. Parker supra note 6; SEDGWICK, Measure of Damages §§348-350 (9th ed. 1912).
15 Note 9 supra.
award of actual damages. The theory that punitive damages are "compensation" for the incompensable has remained the English justification for the doctrine in modern times.

Another theory proposed as the basis of the doctrine of punitive damages is that at early common law the criminal was punished more severely for infractions involving property than for invasions of one's personal rights, and that the civil courts took it upon themselves to punish torts involving personal rights in order to strike a balance.

For whatever combination of reasons the doctrine of punitive damages was developed in the common law. The doctrine had been given its name in England by 1763.

When the concept of punitive damages arrived in America in 1791, the American courts abandoned the "compensation" theory, and recognized punitive damages as a means to castigate the defendant for his malicious and cruel motives. With same exceptions, the American law has continued to offer "punishment" as the main purpose and justification for the doctrine.

The Wisconsin Supreme Court accepted the doctrine in McWilliams v. Bragg decided in 1854. In that case plaintiff sued for assault and battery. The trial court instructed the jury that if the offense is committed willfully, the jury has the right to give damages as a punishment for the purpose of making an example, and as a warning to him and others. After an exhaustive consideration of the authorities pro and con, the court held that exemplary or punitory damages might properly be awarded.

We have selected and referred to the foregoing cases, out of a large array of adjudications of similar import to be found in the English reports, and we have done so for the purpose of showing, that in the English courts, the rule or measure of damages

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19 McCormick, Some Phases of the Doctrine of Exemplary Damages, 8 N.C. L. Rev. 129 at 132 where it is said that only in America have compensatory damages been separated from punitives and only in America has the doctrine been criticized; Cole, supra note 17.
20 Freefield, The Rationale of Punitive Damages, 1 Ohio St. L. J. 5, 7 (1935).
21 Huckle v. Money supra note 2.
22 McCormick supra note 19 at page 132.
25 3 Wis. 424 (1854).
26 Ibid.
in actions for willful torts, and especially for personal injuries, is not confined to mere compensation for the injury sustained by the plaintiff, whether on his person or to his feelings, but may extend to and embrace whatever the jury may consider a suitable satisfaction as against the defendant, so as to operate not only as an example, but to some extent as a punishment, provided their decision or verdict be not influenced by passion or mere prejudice, and be not unreasonable.\textsuperscript{27}

The court then held:

We believe that the great weight of authority in the American courts is in favor of permitting juries in actions of this character, not only to take into consideration the actual injury sustained by the plaintiff, but, where that injury is inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness and malice; but in view of all such circumstances, to impose what is sometimes termed exemplary, and sometimes punitive damages, in addition to the actual damages.\textsuperscript{28} . . . Our own statute, in providing that actions for assault and battery, etc., shall survive, evidently contemplates the correctness of allowing vindictive or exemplary damages in such cases, because it declares that the plaintiff shall not be entitled to such damages, when the action is prosecuted to judgment against the executor or administrator.\textsuperscript{29}

\textbf{Elements of Doctrine}

The Wisconsin court has held that compensatory damages covers all loss recoverable as a matter of right.\textsuperscript{30} Pecuniary loss is an actual damage; so is bodily pain and suffering.\textsuperscript{31}

Nominal damages is a small sum of money awarded to a plaintiff who has established a cause of action, by a complaint by which the law presumes damage to exist, but where he has not proven that he is entitled to compensatory damages.\textsuperscript{32}

Exemplary damages are defined by Oleck as:

\ldots 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.\textsuperscript{33}

They are awarded to a plaintiff in order to punish a defendant for

\textsuperscript{27} Id. at 428-429.
\textsuperscript{28} Id. at 431.
\textsuperscript{29} Ibid.
\textsuperscript{30} Malco v. Midwest Aluminum Sales, 14 Wis. 2d 57, 66, 109 N.W. 2d 516 (1960); GHIARDI, PERSONAL INJURY DAMAGES IN WISCONSIN, §1.02 (Callaghan & Co., Current Law Series 1964).
\textsuperscript{31} Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900).
\textsuperscript{32} Oleck, DAMAGES TO PERSONS AND PROPERTY §45 (1961); GHIARDI, \textit{op. cit. supra} note 30 at §1.06; Polebitzke v. John Week Lumber Co., 173 Wis. 509, 181 N.W. 730 (1921).
\textsuperscript{33} Oleck, \textit{op. cit. supra} note 32, §29, citing Zedd v. Jenkins, 194 Va. 704, 74 S.E. 2d 791. Oleck lists 'presumptive damages,' 'vindictive damages,' 'smart money' and 'added or imaginary damages' as synonyms for punitive damages. See also Lavery v. Crooke, 52 Wis. 612, 9 N.W. 599 (1881).
PUNITIVE DAMAGES

his evil intent and maliciousness, to make an example of him, and to deter him and others from like conduct.

proper instructions of the court. They are not available as a matter of right to any plaintiff.

Malice is a necessary element. As stated in McWilliams v. Bragg

34 Barber v. Kilbourn, 16 Wis. 511 (1863); Grace v. McArthur, 76 Wis. 641, 45 N.W. 518 (1890); Lamb v. Stone, 95 Wis. 254, 70 N.W. 72 (1897); Morse v. Modern Woodmen of America, 166 Wis. 194, 164 N.W. 829 (1917); Delaney v. Kael et al, 81 Wis. 153, 51 N.W. 559 (1892); Vassau v. The Madison Electric R. Co., 106 Wis. 301, 82 N.W. 152 (1900); Mowry v. Wood, 12 Wis. 413 (1860); Rogers v. Henry, 32 Wis. 327 (1873); Wilson v. Noonan, 35 Wis. 321 (1874); Sorenson v. Dundas, 50 Wis. 335, 7 N.W. 259 (1880); Beveridge v. Welch, 7 Wis. 394 (1859); Fuchs v. Kupper, 22 Wis. 2d 107, 125 N.W. 2d 360 (1963).

35 Klewin v. Bauman, 53 Wis. 244, 10 N.W. 398 (1881); Eviston v. Cramer, 57 Wis. 570, 15 N.W. 760 (1883); Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N.W. 554 (1910); Grace v. McArthur supra note 34; Malco v. Midwest Aluminum Sales, 14 Wis. 2d 57, 109 N.W. 2d 516 (1961); Gladfelter v. Doemet, 2d 635, 87 N.W. 2d 490 (1958).

36 Asplund v. Palmer, 258 Wis. 34, 44 N.W. 2d 624 (1950). The Court stated at 258 Wis. 38-39 "While the allowance of exemplary damages has been a much debated question, it is settled in this state that in actions for personal torts ... a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of the offense, rather than the measure of compensation to the plaintiff. This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.' (Citations omitted.) While the jury are not at liberty to award any amount, regardless of how large it may be, and their verdict in some instances may be subject to review by the court, it is considered that in this case there was no occasion to disturb the finding of the jury, because the amount is not so large as to satisfy the trial court or this court that it was not the result of an honest exercise of judgment. Robubsib v. Superior Rapid Transit R. Co., 94 Wis. 345, 68 N.W. 961 (1886). Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N.W. 554 (1910). Haberman v. Gasser, 104 Wis. 98, 80 N.W. 105 (1899); DiBenedetto v. Milwaukee Elec. Ry. and Light Co., 149 Wis. 566, 136 N.W. 282 (1912) citing Topolewski v. Plankinton Packing Co., supra note 35. See also, Ws. J.L.—Civ. 1707 Where the approved jury instruction on punitive damages is set forth as follows: "If you find from the evidence that the defendant, , (struck the plaintiff and that such striking was not justified) and further find that the defendant acted maliciously, vindictively, wantonly, or under circumstances of aggravation or insult, you may, if you see fit, but you are not obliged to do so, award, in addition to compensatory damage, such sum as punitive damages as you may think proper under the circumstances of the case, by way of example or punishment, in order to deter the defendant and others from offending in like manner in the future. You may also consider the seriousness of the offense committed, in reaching your answer.

"Punitive damages are never a matter of right, but, when allowable, may be awarded or withheld in the discretion of the jury. Punitive damages may not be awarded unless the acts of the defendant in question were done maliciously, as I have explained malice to you, and, even if malicious, you may withhold or allow them as you see fit." And if there is but one defendant the following is added: "If you award punitive damages, you may consider the defendant's wealth so far as it appears from the evidence, because such damages, to accomplish their purpose, may be proportionate in some general way to the defendant's ability to respond."


38 Johansson v. Borchenisu, 35 Wis. 131 (1874); Prindle v. Faht, 83 Wis. 50, 52 N.W. 1134 (1892); Born v. Rosenow, 84 Wis. 650, 54 N.W. 1059 (1893);
the injury to the plaintiff must have been sustained "under circumstances of aggravation, insult or cruelty, with vindictiveness and malice." The requisite malice may be inferred from the conduct of the defendant but it may not be implied in law, except for cases of malicious prosecution, where actual maliciousness is an element of the particular tort.

Punitive damages are solely in the discretion of the jury upon malicious prosecution, where actual maliciousness is an element of the particular tort.

Actual malice also need not be shown where defendant has acted in wanton disregard of plaintiff's rights, or where his conduct is intentional and deliberate and has the character of outrage frequently associated with crime. Thus actual malice need not be shown for punitive damages in a seduction action.

In Bielski v. Schulze the Wisconsin court abolished the concept of gross negligence in civil actions. Because gross negligence involved a willful and wanton disregard of the rights of the plaintiff, one could argue that since the concept of gross negligence has been abolished, punitive damages can no longer be recovered in negligence cases. In the Bielski decision the Court used language to this effect. Although the court set forth the classic argument against punitive damages therein, it is unlikely that the court intended to restrict punitive damages to intentional torts exclusively. It is likely that punitive damages are still available in negligence cases where defendant's conduct was willful and wanton.

If the pleading alleges malice, evidence will be admitted to show it as a fact. The defendant may introduce evidence of his good faith and general absence of malice.

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39 Kloth v. Hess, 126 Wis. 587, 106 N.W. 251 (1906); Vassau v. The Madison Electric R. Co. supra note 34.

38 3 Wis. 424, 431 (1854).

40 Chiaridi, op. cit. supra note 32, §2.04 page 12.

41 Id. at §2.02 page 10.

42 Ibid.

43 Wickham, The Rule of Exemplary Damages in Wisconsin, 2 Wis. L. Rev. 129 (1923).

44 Kink v. Combs, supra note 1.

45 Klopfer v. Bromme, 26 Wis. 372, 374 (1870); Luther v. Shaw, 157 Wis. 234, 147 N.W. 18 (1914).

46 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).

47 Id. at page 18 where the court says, "We recognize the abolition of gross negligence does away with the basis for punitive damages in negligence cases. But punitive damages are given, not to compensate the plaintiff for his injury, but to punish and deter the tortfeasor, and were acquired by gross negligence as accoutrements of intentional torts."

48 Ibid. "The protection of the public from such conduct or from reckless, wanton, or willful conduct is best served by the criminal laws of the state."

49 Vassau v. The Madison Electric R. Co., 106 Wis. 301, 305, 82 N.W. 152 (1900). Compare: Grisim v. Milwaukee City Ry. Co., 84 Wis. 19, 54 N.W. 104 (1893) where the plaintiff was not allowed to offer evidence of malice because only compensatory damages were sought. See also, Lowe v. Ring, 123 Wis. 107, 101 N.W. 381 (1904).

50 In Prindle v. Haight, 83 Wis. 50, 52, 52 N.W. 1134 (1892) the court held,
Mitigating circumstances may be shown by the defendant to diminish the punitive damage award. In *Maxwell v. Kennedy* the court said:

Punitive damages are the last to be assessed in the elements to be considered by a jury, and should be the first to be rejected by facts in mitigation.

The bad reputation of the plaintiff has been held to be a mitigating factor to be considered by the jury in deciding whether to award exemplary damages. Intoxication at the time the defendant perpetrates the wrongful act is a mitigating factor to be considered by the jury in awarding punitive damages if the intoxication in any manner deprives the defendant of his reason or responsibility. If the intoxication does not deprive the defendant of his resposnbility, the intoxication is probably an aggravating, rather than a mitigating factor.

Because the purpose of punitive damages is punishment, evidence will be received relating to the wealth or poverty of the defendant. The evidence of wealth, however, is not binding on the jury, but merely a circumstance for them to consider in their decision.

"If the assault was malicious, the jury may award exemplary damages. Hence defendant must be allowed to allege and prove any facts which tend to rebute the existence of malice on his part. Proof that he committed the assault under stress of recent provocation would tend to rebut malice." *Scheer v. Kriesel*, 109 Wis. 125, 128, 85 N.W. 138 (1901); *Hamlin v. Spaulding*, 27 Wis. 360, 363, 364 (1870).

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51 *Schultz v. Frankfort*, 151 Wis. 537, 139 N.W. 386 (1913) a slander action holding evidence in mitigation may be admitted but mitigation is not a defense to the action. *Corcoran v. Harran*, 55 Wis. 120, 122, 12 N.W. 468 (1882) citing *Fenelon v. Butts*, 53 Wis. 344, 10 N.W. 501 (1881), to the effect that proof of defendant's good faith is admissible to mitigate punitive damages but it cannot be considered to mitigate compensatory damages, including those allowed for injury to the feelings. *Bonesteel v. Bonesteel*, 30 Wis. 511 (1872) a false imprisonment action, held that erroneous advice of counsel ought to save from all presumptions of malice. See also, *Rogers v. Henry*, 32 Wis. 327 (1873) a slander action, where the words were uttered without malice, but in the heat of the moment and provoked by the plaintiff who had used abusive language as well.

52 *Scheer v. Kriesel* supra note 51; *Schultz v. Frankfort*, 151 Wis. 537, 139 N.W. 386 (1913).

53 *Schmidt v. Pfeil*, 24 Wis. 452 (1869).

54 See note 24 supra.

55 Thomas v. Williams, 139 Wis. 467, 121 N.W. 148 (1909); *Gilman v. Brown*, 115 Wis. 1, 91 N.W. 227 (1902); *Spear v. Sweeney*, 88 Wis. 545, 60 N.W. 1060 (1894); *Draper v. Baker*, 61 Wis. 450, 21 N.W. 527 (1884); *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6 (1875).

56 *Draper v. Baker* supra note 55, where the court stated at 61 Wis. 453, 454, "But the case does not decide that the plaintiff may not in such case show the reputed wealth of the defendant to enhance the exemplary damages; but it does hold that when no evidence is given on the subject, and, impliedly, that when such evidence is given, the defendant may answer it by showing his real financial condition."

57 *Ogodziski v. Gara*, 173 Wis. 371, 181 N.W. 227; 173 Wis. 380, 181 N.W. 231 (1921); *Thomas v. Williams* supra note 60 where the supreme court held at 139 Wis. 470, "The proper form of expression is that the jury may consider the defendant's wealth so far as appears from the evidence in a case otherwise proper for allowance of exemplary damages."
However, the reputed wealth of a defendant will not be admitted into evidence where there are joint tortfeasors. In such instance the financial ability of one defendant would affect the amount of punitory damages assessed against all, because all joint tortfeasors are equally liable.62

Even in a case involving maliciousness on the part of a very rich defendant, the jury may award little or no punitive damages. An appellate tribunal will not reverse on the ground that the defendant was not sufficiently punished.63 In the absence of passion or prejudice the punitive damage award is left to the sole discretion of the jury. Even though the defendant may be fined in criminal proceedings, or have punitive damages awarded against him in another action involving the same tortious conduct, he may be punished further by an award of exemplary damages.

Malice does not create a cause of action where none existed but merely aggravates an existing cause of action. Some actual damages must be shown in order for punitive damages to be given. Where


61 See cases cited note 59 supra.


63 See notes 35 and 36 supra.

64 Ibid.

65 Ibid.

66 Klopf er v. Bromme, 26 Wis. 372 (1870), where the court said at page 377, "That the defendant might possibly be prosecuted criminally for the seduction, or for procuring the abortion, was not a matter which the jury were to consider for the purpose of reducing exemplary damages. In Cook v. Ellis, 6 Hill 466, the court, in considering this question, says: 'Nor are we prepared to concede that either a fine, an imprisonment, or both, should be received in evidence to mitigate damages.' If a fine actually imposed, or imprisonment really endured, are not admissible in evidence to reduce exemplary damages in a civil action, it is obvious that the fact that a party is barely liable to punishment in this manner ought not to be considered by the jury for any such purpose."

67 Luther v. Shaw, 157 Wis. 234, 147 N.W. 18 (1914).


69 OLECK, op. cit. supra note 32, §45 page 31 where it is said, "'Nominal damages' are any trifling amount of money awarded to a party in recognition of the technical correctness of his claim. Usually such an award is made when no real injury can be proved, or when the amount of such injury is insignificant, or purely conjectural and vague." See also, Maxwell v. Kennedy, 50 Wis. 645, 649, 7 N.W. 657, 658 (1880) quoting Stacy v. Portland Pub. Co., 68 Me., 279 to have said, 'There is no room for punitive damages here. There is no foundation for them to attach or rest upon. It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest, society can have none. Such damages are to be awarded against a defendant for punishment. But, if all of the individual injury is merely technical and theoretical, what
mere nominal damages have been awarded, the injury is only technical and theoretical; as the defendant has caused no actual harm he should not be punished.\textsuperscript{70} It is difficult for a reviewing court to determine whether the jury has assessed the proper sum as punitive damages. In a number of jurisdictions there must be a positive correlation between the amount of the actual damages and punitives.\textsuperscript{71}

At an early date the Wisconsin court held:

\textquote{... [T]he compensatory and punitive damages are inseparably blended, and the punitive damages are dependent upon the compensatory, and must be proportional, and mitigation applies equally to both.\textsuperscript{72}}

This rule is restricted to cases of slander, where proof of bad character or reputation bears directly, both on malice, and the extent of the injury.\textsuperscript{73} However, in \textit{Malco v. Midwest Aluminum Sales}\textsuperscript{74} the court held that an award of punitory damages is tested against the \textit{Powers} rule of reasonableness.\textsuperscript{75}

In Wisconsin, a principal is not liable for exemplary damages awarded because of the maliciousness of his employee, unless the tortious act is authorized or ratified by the principal, or the principal has conspired to cause the harm.\textsuperscript{76} Other jurisdictions have reached an opposite result.\textsuperscript{77}

The majority of American states apply the doctrine of punitive

\textsuperscript{70} Maxwell v. Kennedy \textit{supra} note 69.

\textsuperscript{71} \textit{Oleck, supra} note 32, \$275 page 560, where it is said, "Most courts require that the punitive award bear some reasonable relation to the actual award; and some relate it to the circumstances and the injury." See also, Annot., 17 A.L.R. 2d 529, (1951).

\textsuperscript{72} Maxwell v. Kennedy, \textit{supra} note 69.

\textsuperscript{73} \textit{Ibid.}; Ghiardi, \textit{op. cit. supra} note 32, \$2.14 page 24.

\textsuperscript{74} Malco v. Midwest Aluminum Sales, 14 Wis. 2d 57, 109 N.W. 2d 516 (1961).

\textsuperscript{75} Powers v. Allstate Ins. Co., 10 Wis. 2d 78, 102 N.W. 2d 393 (1960).

\textsuperscript{76} Craker v. Chicago & N.W. Ry. Co., 36 Wis. 657 (1875); Milwaukee & M.R. Co. v. Jinney 10 Wis. 388 (1860); Vanau v. The Madison Electric Ry. Co., 106 Wis. 301, 82 N.W. 152 (1900); Garcia v. Samson's Inc., 10 Wis. 2d 515, 103 N.W. 2d 565 (1960).

damages in appropriate cases, although the rules which govern punitive damages vary from state to state. Louisiana, Massachusetts, Nebraska, and Washington have expressly rejected the doctrine. Indiana awards punitive damages only where there is no possibility that the defendant might be punished under the criminal law. Those states which have rejected the common law doctrine of punitive damages, however, still apply statutory multiple damages under many circumstances.

In many jurisdictions punitive damages are beyond the powers of an equity court. The reasoning is that an equity court may use its special powers only to aid the plaintiff in obtaining justice.

Although most states offer punishment as the foundation for punitive damages, some jurisdictions justify punitive damages on a theory of quasi-compensation. In Connecticut, exemplary damages may not be greater than the amount of the plaintiff's litigation expenses. Michigan and New Hampshire allow plaintiff to recover exemplary damages for his wounded feelings.

Most jurisdictions do not apply the doctrine to contract cases, unless the breach also amounts to a tort.

Although many jurisdictions award punitive damages where the defendant has been grossly negligent, in Colorado mere recklessness is sufficient. Colorado originally rejected the doctrine of punitive dam-

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78 Oleck, op. cit. supra note 32 §269 page 541.
79 Ibid. Mr. Oleck provides a list of variations in the doctrine of punitive damages as found in a number of jurisdictions.
88 Armstrong v. Dodge, 130 Conn. 516, 26 A. 2d 24 (1944); Doroszka v. Lavine, 111 Conn. 575, 150 A. 692 (1930).
ages by judicial decision, but the legislature subsequently enacted a statute providing that punitive damages may be allowed.93

THEORETICAL CONSIDERATIONS

Punitive damages have been the subject of constant debate since the concept was first developed. The Greenleaf-Sedgwick disagreement concerning the function of damages is probably the most famous, and is noted in the Wisconsin decision of McWilliams v. Bragg.94 Sedgwick argued that:

Whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender.95

We know it is constantly said, in general, that damages are intended for compensation; very loose language, at the best, for no verdict ever compensated for the entire injury; but has it ever been decided or suggested, by any judge of any court, that a jury cannot, in actions ex delicto, give damages by way of punishment beyond the line of compensation?96

Sedgwick claimed that a clear and complete distinction could not be made between injuries to the public and to individuals, but that the interests are blended inseparably.97 Sedgwick took issue with the strict compensation theory of damages, and claimed there could be no standard of measuring damages that would be as strict as the rule.98 Sedgwick questioned how the jury could determine the exact amount of compensation, "... the pound of flesh and not a drop of blood...".99 "As to damages being compensation, the sooner the idea is got out of the head of a practical lawyer the better..."100

Professor Greenleaf argued that the theory of punitive damages was a misconception. He was of the opinion that Sedgwick's case analysis and conclusions were erroneous.101 Greenleaf reviewed each

93 Colo. Laws 1889 at 64: Colo. Rev. Stats. Ann., §41-2-2: "In all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages."
94 3 Wis. 424 1854).
95 SEDGWICK, DAMAGES, app. 666 (3d ed. 1858).
96 Id. at 670.
97 Id. at 670-671.
98 Id. at 671.
99 Ibid.
100 Id. at 672.
101 2 GREENLEAF, EVIDENCE §253 footnote 2 page 244 (3d ed. 1850).
of the early cases, claimed by Sedgwick to support the doctrine of punitive damages, and argued that the doctrine was never really accepted on its merits.\textsuperscript{102} Greenleaf argued that the doctrine of punitive damages was merely an evidentiary rule that the jury could be allowed to consider all the relevant circumstances of the case in determining compensatory damages. Greenleaf argued that the willingness of the courts to allow the jury to weigh mental suffering, wounded dignity and injured feelings of the plaintiff, in order to determine the actual injury, was misinterpreted by Sedgwick as the punitive damage doctrine.\textsuperscript{103} Professor Greenleaf used the very language of the decisions cited by Sedgwick to bolster his position:

But in Tillotson \textit{v. Cheetham}, the learned Chief Justice, in saying that the actual pecuniary damages in actions for tort, are never the sole rule of assessment, probably meant no more than this, that the jury were at liberty to consider all the damages accruing to the plaintiff from the wrong done, without being confined to those which are susceptible of arithmetical computation.\textsuperscript{104}

In \textit{Woert v. Jenkins}, 14 Johns. 352, which was trespass, for beating the plaintiff's horse to death, with circumstances of great barbarity, the Jury were told that they 'had a right to give smart money;' by which nothing more seems to have been meant than that they might take into consideration the circumstance of the cruel act, as enhancing the injury to the plaintiff by the laceration of his feelings.\textsuperscript{105}

It was Greenleaf's thought that a function of compensatory damages was punishment but that damages awarded solely for the purpose of punishing the defendant was without precedent. Professor Greenleaf marshalled Blackstone,\textsuperscript{106} Dr. Rutherford,\textsuperscript{107} and Mr. Hammond \textsuperscript{108} for support in his argument in favor of a strict compensatory theory of damages.

Arguments have been advanced in favor and against the doctrine in every state, and nearly every state has accepted the concept of exemplary damages to some degree.\textsuperscript{109}

\textsuperscript{102} Id. at 245-253.
\textsuperscript{103} Id. at 247.
\textsuperscript{104} Id. at 246.
\textsuperscript{105} Ibid.
\textsuperscript{106} Id. at 253, citing 2 Bl. Comm. 438.
\textsuperscript{107} Id. at 253 citing RUTHERFORD, INSTITUTES OF NATURAL LAWS §1 at 385 (Phil. edit. 1799).
\textsuperscript{108} Id. at 253 citing HAMMOND, LAW OF NISI PRIUS, p. 33.
\textsuperscript{109} Pegram \textit{v. Stortz}, 31 W. Va. 220, 6 S.E. 485 (1888) where the court criticises the doctrine of punitive damages in a thorough and scholarly decision which takes note of the Sedgwick-Greenleaf debate. Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119, 122 (1884) where the court says, "Who will undertake to give a valid reason why plaintiff, after having fully paid for all the injury inflicted upon his property, body, reputation, and feelings, should still be compensated, above and beyond, for a wrong committed against the public at large? The idea is inconsistent with sound legal principles, and should
At one time compensation was used as the main theoretical justification for the doctrine.\textsuperscript{110} This theory is seldom offered to justify the doctrine today,\textsuperscript{111} and expressly recognized as the theoretical basis in only a few jurisdictions.\textsuperscript{112} This theory does have merit. There are injuries even today for which there is no redress in the law.\textsuperscript{113} If joined with a legally cognizable cause of action for which punitive damages are available, punitive damages may be awarded by a jury in consideration of all the injuries suffered by the plaintiff, not merely those which are compensable in law.

Interestingly, plaintiffs often plead punitive damage liability, to make admissible evidence of defendant's malice, or wanton and willful state of mind, and defendant's wealth, in the hope that such evidence will improve compensatory damages.

Further, punitive damages give the plaintiff compensation for his litigation expenses.\textsuperscript{114} In this sense punitive damages perform a compensatory function, even though the Wisconsin court has defined never have found a lodgment in the law.” Fay v. Parker, 53 N.H. 342 at page 382 (1873) where the court describes the doctrine of punitive damages in the following words, “How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.” Brown v. Swineford 44 Wis. 282 at 286-288 (1878) the court says, “It certainly appears to be an incongruity, that one may be punished by the public for crime, upon criminal prosecution, by fine limited by statute, and again punished in favor of the sufferer, but in right of the public, for the same act, by purititary damages, with little limit but the discretion of a jury. This is but another illustration of what appears to be the incongruity of the entire rule of exemplary damages... It would have been no subject of regret to the court, if the obligation of the constitution called upon it to abridge the application of the rule. But the court is unable to hold that the constitutional provision has any controlling bearing on the question. ... But the rule so long and so generally established is a sin against sound judicial principle, not against the constitutional.” Cays v. McDaniel, 204 Or. 449, 383 P. 2d 658, 661 (1955) where the court says, “Punitive damages are not a favorite of the law.”

\textsuperscript{110} Cole supra note 17.

\textsuperscript{111} Comment, 70 HARV. L. REV. 517, 521 (1957).

\textsuperscript{112} Doroszka v. Lavine, 111 Conn. 575, 150 Atl. 692 (1930); Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922); Fay v. Parker, 53 N.H. 342 (1873).

\textsuperscript{113} 87 C.J.S. Trademarks §107 (1954) “One cannot, by using his own name as a trademark or trade-name, prevent another person of the same or similar name from using his own name in connection with his goods or business... The necessary and incidental inconvenience or loss thereby occasioned to others is damnum absque injuria...”

\textsuperscript{114} Doroszka v. Lavine, 111 Conn. 575, 150 Atl. 692-693 (1930) where the court said, “... in this state the purpose is not to punish the defendant for his offense but to compensate the plaintiff for his injuries, and so-called punitive or exemplary damages cannot exceed the amount of the plaintiff’s expenses of litigation, less taxable costs.” Kink v. Combs, supra note 1 at p. 80, 135 N.W. 2d at 798; 25 C.J.S. Damages §50 (1941).
punitive damages as damages over and above that which compensates the plaintiff for his injuries.\footnote{115}

Punishment is used most often to justify the doctrine of punitory damages.\footnote{116} The concept of punishment in the law, of course, is an ancient concept. The function of punishment has changed constantly through the centuries, however, with the civilization of man, from sadism, revenge, justice, atonement, purification, discipline, deterrence, example, and reformation.

Punishment is well established in the criminal law. The objective of criminal law is to protect society. The objective of the civil law, however, has been indemnification of the complainant.\footnote{117} The device used to accomplish this end is damages. Consistently, therefore, the function of damages in civil law should be to make the injured party whole,\footnote{118} not to confer upon him a profit at the expense of punishment to the defendant.

In \textit{Kink v. Combs},\footnote{119} the Wisconsin supreme court recognized that this “profit motive” could serve the interests of society by

\begin{quote}
. . . bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor.\footnote{120}
\end{quote}

The court noted that the criminal law seldom reaches an assault and battery case, and that self-interest of the plaintiff leads to the prosecution of the defendant.

It would seem, however, that if the criminal law has been deficient in the protection of society from wrongdoers, that this deficiency should more rationally be remedied by improving the administration of criminal justice, rather than providing bounties at the expense of the tortfeasor.\footnote{121}

It has been argued that the law has recognized man’s vengeful propensities, and allows punitive damages to prevent self-help. The solution the French law has worked out for this problem is to allow criminal penalties to be assessed in addition to an award of compensatory damages,\footnote{122} where the civil litigant brings the defendant to trial.

\footnote{115}Oconto County v. Union Mfg., 190 Wis. 44, 208 N.W. 989 (1926); Brown v. Swineford, 44 Wis. 2d 282, 28 Am. Rep. 582 (1878).
\footnote{116}1 STREET, FOUNDATIONS OF LEGAL LIABILITY 477 (1926); Malco Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 109 N.W. 2d 516 (1961); Gladfelter v. Doemel, 2 Wis. 2d 635, 87 N.W. 490 (1958); 25 C.J.S. DAMAGES §117 (1941).
\footnote{117}WILLIS, DAMAGES §6 (1910). See cases cited supra note 109.
\footnote{118}Ibid. But see Hall, Interrelations of Criminal Law and Torts, 43 COLUM. L. REV. 753, 967 (1943) for an outstanding comparative analysis of the function of the civil and criminal law.
\footnote{119}Supra note 1.
\footnote{120}Id. at 80, 135 N.W. 2d 798.
\footnote{121}Comment, 7 HARV. L. REV. 517, 521 (1957). See also 3 POULD, JURISPRUDENCE 245 (1952).
\footnote{122}Id. at 522-523; Millar, Modernization of Criminal Procedure, 9 JOUR. AM. JUD. SOC. 135 (1926).
Deterrence provides a meaningful reason for punishing a tortfeasor where the punishment bears a reasonable relationship to the culpability of the defendants. The necessary element of malice in a punitive damage case insures that the defendant must be culpable or punitive damages could not be awarded. Often, however, the amount of punishment is not correlated with the amount of culpability exhibited. In most jurisdictions an award of actual damages is necessary to sustain a punitive award.\(^\text{123}\) In some states the amount of exemplary damages must bear some relation to the amount of compensatory damages awarded.\(^\text{124}\) Thus, punitive damages are often tied to the harm inflicted, rather than the evil of the wrongdoer.

Whether a civil court should have the power to punish defendants is another difficult jurisprudential question.

It has long been recognized by jurisprudents that the fields of torts and crimes are closely related.\(^\text{125}\) Criminal and tort law have the negative common denominator that both involve noncontractual or nonconsensual wrongs. Many of the general rules and remedies are common to both fields, as well.\(^\text{126}\) The fields of criminal law and torts might be considered as areas branching from the broader concept of actionability resting upon "moral culpability."\(^\text{127}\)

However, there is a substantial distinction between the two fields, viewed from the position of the party injured. A crime is a wrong committed against society.\(^\text{128}\) A tort is a wrong perpetrated solely upon an individual or a group smaller than society.\(^\text{129}\) To be a tortfeasor one must injure someone to his damage. To be a criminal there need be no actual injury or damage but merely an act deemed contrary to the interests of the public. To carry a concealed weapon is a crime, but not a tort. A single act, of course, may be both a crime and a tort, and thus make the actor both a criminal and a tortfeasor.

Blackstone asserted that crimes are a violation of public law and torts of private law. Crimes infringe public rights, torts infringe private rights. Crimes affect the public as a whole; torts are individual and are not the concern of the public. The function of the criminal law is to punish and deter. The function of the civil forum is to compensate.

Austin rejected Blackstone's reasoning and asserted that "All offenses

\(^{122}\) 25 C.J.S. Damages §118 (1941); Wedemhek v. Fale, 17 Wis. 2d 337, 117 N.W. 2d 275 (1962). But see 3 Baylor L. Rev. 591 (1951) and 23 Rocky Mt. L. Rev. 206 (1950).

\(^{123}\) Annot. 17 A.L.R. 2d 529 (1951); Oleck op. cit. supra note 32 §275.

\(^{124}\) Hall, supra note 118.

\(^{125}\) Prosser, Torts §2 page 7 (1964).

\(^{126}\) Hall supra note 118 at 755-759.

\(^{127}\) Perkins, Criminal Law §1 (1957).

\(^{128}\) Prosser, op. cit., supra note 126.

\(^{129}\) Blackstone, Commentaries, Bk. III, 2; Bk. IV, 5.
affect the community, and all offenses affect individuals." Austin argued that the community has an interest in protecting the individual from the tortfeasor.

Those jurisdictions that have accepted the doctrine of punitive damages have not followed the deterrence theory with consistency. The civil courts have assumed the right to punish defendants, but have not recognized a corresponding duty to do so. Whether to award such damages is a question left to the jury, and its decision is conclusively correct, and no appeal may be had on the ground that punitives should have been awarded but were not.

Even if a civil court should take money from the defendant to punish him, why should it award money to the plaintiff?

It has been argued that punitive damages provide double punishment for the same offense, and thus the rule against double jeopardy is violated. Indiana will not allow a defendant to be punished civilly if he is likely to be sanctioned by the criminal law. It has been argued that even in the absence of a violation of the double jeopardy rule, the sum of the punishment inflicted may be in excess of what is needed to deter the defendant from committing further antisocial acts, or to rehabilitate him. The sentencing judge in the criminal court, however, is not allowed to consider the punishment inflicted by means of punitive damages and the civil jury may not be told that the defendant is, or may be prosecuted criminally for the same offense.

If the civil court is empowered to punish a defendant for his malice, a good argument can be made for increasing the plaintiff’s burden of proof so that it more nearly corresponds with that required in the criminal courts.

In the landmark case of Fay v. Parker the court stated:

Punitive damages are the result of “[I]nstructions prompted by impulses of righteous indignation, swift to administer supposed justice to a guilty defendant, but expressed with too little caution and without pausing to reflect that the court was thus encouraging the jury to give the plaintiff more than he was entitled to,—to give him, in fact, as damages the avails of a fine imposed for

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132 Ibid.
133 Tilton v. Gates Land Co., 140 Wis. 197, 14 N.W. 331 (1909); Robinson v. Superior Rapid Transit R. Co., 94 Wis. 345, 68 N.W. 961 (1896); Asplund v. Palmer, 258 Wis. 34, 44 N.W. 2d 624 (1950).
134 Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931).
135 Taber v. Hutson, 5 Ind. 322 (1854); McClellan, Exemplary Damages in Indiana, 10 Ind. L. J. 275 (1935). See also 3 Kan. L. J. 369 (1900); and 21 Notre Dame Law 206 (1946).
137 25 C.J.S. Damages §122 (1941); Klopfer v. Bromme, 26 Wis. 372 (1870).
138 Willis, DAMAGES §(1910).
139 Fay v. Parker supra note 136.
the vindication of the criminal law, and for the sake of public example.\textsuperscript{140}

Our own court has used similar language.\textsuperscript{141} In \textit{Brown v. Swineford}\textsuperscript{142} the court stated:

It would have been no subject of regret to the court, if the obligation of the constitution called upon it to abridge the application of the rule . . . \textsuperscript{143}

It is unfortunate that damage should ever have been suffered to go beyond actual compensation, under a liberal rule like that given in \textit{Craker v. Railway Co.}, 36 Wis. 657. But the rule so long and so generally established is a sin against sound judicial principle, not against the constitution.\textsuperscript{144}

Again, in \textit{Luther v. Shaw},\textsuperscript{145} the court stated:

From the doctrinaire viewpoint and assuming as premises that damages should never exceed compensation and that every mulct imposed as a punishment or deterrent should go into the public treasury, the award of such damages to the plaintiff in a private prosecution would seem to be illogical.

Speaking for myself only in this paragraph, I am inclined to admit that, assuming these premises, the lack of logic is quite apparent. But it is a commonplace observation that illogical systems of government often achieve better results than those which are strictly logical. The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong influential and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law. The latter law must be uniform as to persons and acts, must fix a maximum and minimum punishment on this basis, and cannot always be adjusted to particular circumstances of atrocity which occasionally occur. The maximum penalty, together with compensatory damages for the wrongful taking of one little ewe lamb, would be quite inadequate and unsatisfactory in the hypothetical case put by Nathan to David. If some American multimillionaire should emulate the antics of Lucius Veratius with reference to personal or property rights, justice might require some deterrent not found

\textsuperscript{140} Id. at 381.

\textsuperscript{141} Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N.W. 554 (1910); Templeton v. Graves, 59 Wis. 95, 17 N.W. 672 (1883) where the court said Citing Bass v. C. & N.W.R. Co., 42 Wis. 654 (1877) that it was too late to overturn the doctrine of punitive damages by judicial decision and that opponents of the doctrine would have to await a legislative enactment to effect its abolition.

\textsuperscript{142} Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582 (1878).

\textsuperscript{143} Id. at 286-287.

\textsuperscript{144} Id. at 288.

\textsuperscript{145} Luther v. Shaw, 157 Wis. 234, 147 N.W. 18, 52 N.R.A. (N.S.) 85 (1914).
in the criminal-law penalties plus compensatory damages. The ordinary case of aggravated newspaper libel where the actual damages are small, or in case of malicious abuse of legal process, will supply more modern instances.\footnote{146}

CONCLUSION

In \textit{Kink v. Combs}\footnote{147} the defendant urged the court to abandon the doctrine of punitive damages. The facts in that case were not particularly calculated to persuade the court that the doctrine should be abandoned. In that case the defendant who was the owner of a well known Madison and Milwaukee restaurant, sexually assaulted the plaintiff, a middle aged married woman, in a public restaurant.

The court reaffirmed the doctrine of punitive damages. Unfortunately, the facts of the case obscured the flaws in the logic of the doctrine. However, logic is not the sole criterion of the value of a legal concept. Punitive damages do provide rough compensation for the costs of litigation, and facilitate the adjudication of controversies which otherwise would be uneconomical to bring into court.

\textit{Bass v. Chicago \& N.W. Ry.}\footnote{148} was tried three times, before different juries in different counties. Twice punitive damages were given and once the award was solely compensatory. The total damage figure was the same in all three cases. If it makes no difference to a jury whether it is instructed on punitive damages or not, perhaps the law should not be unduly concerned with the logical structure of the doctrine. Although the courts have rejected Professor Greenleaf's argument, the practical operation of the doctrine before juries have borne out his analysis.

\footnote{146}Id. at 238-239.  
\footnote{147}\textit{Supra} note 1.  
\footnote{148}Bass v. Chicago \& N.W. Ry., 39 Wis. 636 (1876).