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SOME PHASES OF THE DOCTRINE OF EXEMPLARY DAMAGES*

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THE BASIS FOR THE ALLOWANCE OF EXEMPLARY DAMAGES

The practice of awarding exemplary damages, known also as vindictive or punitive damages and sometimes as "smart money," constitutes an exception to the rule that damages are aimed at compensation. Exemplary damages are assessed for the avowed purpose of visiting a punishment upon the defendant and not as a measure of any loss or detriment to the plaintiff. To many judges and commentators the doctrine which sanctions such punishment has seemed a discordant strain disturbing the harmonious symphony of the law of damages of which the central theme is compensation.[1] Some of their more forcible criticisms[2] may be mentioned. In the first place, it is alleged that to subject the defendant both to criminal prosecution and to punishment in the form of civil punitive damages for the same act (usually an act which is criminally punishable) exposes the defendant to "double jeopardy" in violation of the spirit if not the letter of the constitutional prohibitions against punishing a man twice for the same offense.[3] Similarly, it is objected that the jury is permitted to assess a punishment under a procedure which deprives the person punished of the safe-guards traditionally regarded as necessary, in criminal trials, such as the rule which requires

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[1] It is to be observed, however, that some eminent jurists contend that an important and proper aim of the law in assessing damages generally is that of punishment, and not merely compensation alone. SALMOND, JURISPRUDENCE (7th ed. 1924) 132, 424, 441; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 477 (1906); Compare HOLMES, THE COMMON LAW 41, 44.

[2] For criticisms of the doctrine, see H. E. Willis, *Measure of Damages When Property Is Wrongfully Taken by a Private Individual* (1909), 22 HARV. L. REV. 419, 420; Fay v. Parker, 53 N. H. 342; 16 Am. Rep. 270 (1872) opinion by Foster, J.; Spokane Truck and Dray Co. v. Hoefer, 2 Wash. 45, 11 L. R. A. 689, 26 Am. St. Rep. 842 (1891); Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366 (1884); GREENLEAF, EVIDENCE (14th ed.), Sec. 253, 273; HALE, DAMAGES, (2nd ed. 1912), 301-307.

[3] U. S. Const., Fifth Amendment (". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .") and similar provisions in the State Constitutions.

the wrong to be established beyond a reasonable doubt, and that which exempts the accused from being forced to take the stand as a witness. Again, it is urged that while fines in criminal cases are limited by statutes, exemplary damages are limited only by the caprice of the jurors, subject to a review by the judges only in the rare case where the judge can find impropriety of motive or gross disproportion, and that this want of a guiding measure leads to excess and injustice. Furthermore, it is suggested that it is basically unsound to award this amount which the defendant is condemned to pay as punishment, to the plaintiff who has already been made whole by the actual damages. Finally, say the critics, the granting of exemplary damages is wholly unjustifiable upon any theory of the inadequacy of the measure of actual damages which, in a proper case, may include compensation not merely for physical injury and money loss, but for pain, mental suffering, humiliation, indignity, and loss of reputation. It is probable that in the framing of a model code of damages today for use in a country unhampered by legal tradition, the doctrine of exemplary damages would find no place.

Nevertheless, it is not without its defenders[4] and, as part of an existing system, there are points in its favor. Perhaps the principal advantage is that it does tend to bring to punishment a type of cases of oppressive conduct, such as slanders, assaults, minor oppressions and cruelties, which is theoretically criminally punishable, but which in actual practice goes unnoticed by prosecutors occupied with more serious crimes. Liability for *actual* damages in these cases is large and vague, it is true, and this liability is itself a great deterrent to wrongdoing but the danger of the addition of punitive damages seems calculated to increase decidedly the deterrent value of the verdict. The self-interest of the plaintiff leads to the active prosecution of the claim for punitive damages, where the same motive would often lead him to refrain from the trouble incident to appearing against the wrongdoer in criminal proceedings. The desirability of affording this stimulus to civil punitive action is seen in the statutes which give rights of action for penalties to be collected by the party aggrieved against the wrongdoer,[5] or those which award double or triple

[4] See, for example, SEDGWICK, DAMAGES (9th ed. 1920), Sec. 354; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906), Ch. XXXII; Day v. Woodworth, 13 How. 371, L. ed. (1851).

[5] For example, the Massachusetts statute allowing the recovery of a penalty of from $500 to $10,000, to be assessed with reference to the degree of defendant's culpability (R. L. c. 171 as amended by L. 1907 c. 171 Sec. 2) enforced in Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918).

damages,[6] in which cases the excess over the actual damages is clearly punitive. That the consolidation of proceedings for punishment and for compensation in the same action is not necessarily undesirable is indicated by the approval which has been given to the French practice[7] which permits the injured party to join with the criminal proceedings a claim for damages or restitution. The allowance of exemplary damages, likewise, offers an opportunity to relax the common law's rather stringent requirements of certainty as regards pecuniary damages, in cases of gross and outrageous wrongs.[8] Another substantial argument for exemplary damages in the present American procedural system, is that the award of such damages remedies, though crudely and in only a limited class of cases, one of the glaring defects in our system, which is the denial of compensation for actual expenses of litigation, such as counsel fees,[9] to one who has been forced by a wrongdoer to establish by litigation the justice of his claims.

Moreover, in answer to the attacks mentioned above, it may well be asserted that while the constitutional immunity from double jeopardy is not literally limited to danger to "life or limb,"[10] yet the language of the constitution seems clearly aimed at criminal proceedings and not civil.[11] Furthermore, the prohibition against double jeopardy was taken from the English law, which had before the adoption of the Federal Constitution approved also the allowance of exemplary damages.[12] As to the deprivation of the safe-guards peculiar to criminal procedure, the tendency of the times is in the direction of relaxing those safe-guards even in criminal cases, and it is probable that the protection accorded by the rules of civil trial procedure is sufficient to meet the requirements of fairness so far as can be ensured by mere rules of procedure. The danger, mentioned

[6] Triple damages may be recovered in actions for patent infringements (U. S. C. A. title 35 Sec. 67) and for violation of the Sherman Anti-trust Act (U. S. C. A. title 15 Sec. 15).

[7] Millar, *Modernization of Criminal Procedure* (1926), 9 JOUR. AM. JUD. SOC. 135, 137. This practice obtains in the Philippines as an inheritance from the Napoleonic Code.

[8] See note 123, *infra.*

[9] Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43 (1872); Parker v. Realty Co. 195 N. C. 644, 143 S. E. 254 (1928). As to English procedure which allows counsel fees as costs, see A. L. Goodhart, *"Costs,"* (1929) 38 YALE L. J. 856-8.

[10] Thus it is clear that it protects against the assessment of a fine as a second punishment. Ex. p. Lange 18 Wall 163, 21 L. ed. 872 (1873).

[11] BURDICK, TORTS (4th ed. 1926), Sec. 196 discusses the applicability of "double jeopardy" to exemplary damages. Similarly it is not "double jeopardy" to punish criminally and to assess a civil penalty for the same wrongful act. People v. Stevens, 13 Wend. (N. Y.) 341 (1834).

[12] Huckle v. Money, 2 Wils. 205 (C. P. 1763).

above, of immoderate verdicts is certainly a real one, and the criterion to be applied by the judge in setting aside or reducing the amount is concededly a vague and subjective one. Nevertheless the verdict may be twice submitted by the complaining defendant to the common-sense of trained judicial minds, once on motion for new trial, and again on appeal, and it must be a rare instance when an unjustifiable award escapes correction. Finally, the seeming inconsistency of assessing the exemplary damages as a punishment, and awarding the benefit of them to the plaintiff and not to the state, may be justified by considerations already mentioned, namely, the advantage of furnishing an incentive for this sort of private prosecution of wrongs which the public prosecutor would ignore, and by the fact that exemplary damages are likely to approximate recompense for the expenses of litigation (over and above taxable costs) for which the plaintiff would otherwise not be reimbursed.

THE EXTENT OF THE ACCEPTANCE OF THE DOCTRINE

In England where exemplary damages had their origin it is still not entirely clear whether the accepted theory is that they are a distinct and strictly punitive element of the recovery, or that they are merely a swollen or "aggravated" allowance of compensatory damages permitted in cases of outrage.[13] It is only in America that the cases have clearly separated exemplary from compensatory damages and it is only here that the doctrine, thus definitely isolated, has been attacked and criticised. In view of the fierceness of the attack, it is remarkable how nearly universally the doctrine has held, and even extended, its ground. In forty states[14] and in the Federal courts[15]

[13] Compare POLLOCK, TORTS (12th ed., 1923) 189-191 with CLERK AND LINDSELL, TORTS (7th ed., 1921) 141-143; Butterworth v. Butterworth, 89 L. J., P. 151, [1920] P. 126, 122 Law T. N. S. 804, [1920] W. N. 96, 36 T. L. R. 265, 10 B. R. C. 352, with note.

[14] Louisville and N. R. Co. v. Scott, 122 So. 184 (Ala. 1929); Ross v. Clark, 274 Pac. 639 (Ariz. 1929); St. Louis & M. and S. R. Co. v. Jackson, 118 Ark. 391, 177 S. W. 33, L. R. A. 1915E 668 (1915); Livesley v. Stock, 281 Pac. 70 (Cal. 1929), Civil Code Sec. 3294; Clark v. Small, 80 Colo. 227, 250 Pac. 385 (1926), C. L. Sec. 6307; Stein v. Diamond, 146 Atl. 737 (Del. Super. 1929); Webb v. Brown, 63 Fla. 306, 58 So. 27 (1912); Charleston and W. C. Ry. Co. v. McElmurray, 16 Ga. App. 504, 85 S. E. 804 (1915), Georgia Code Anno. (Michie 1926) Sec. 4504; Unfried v. Libert, 20 Idaho 708, 119 Pac. 885 (1911); Eshelman v. Rawalt, 298 Ill. 192, 131 N. E. 675, 16 A. L. R. 1311 (1921); Taylor v. Williamson, 197 Iowa 88, 196 N. W. 713 (1924); Williams v. Benson, 87 Kan. 421, 124 Pac. 531 (1912); Ohio Drug Co. v. Howard, 201 Ky. 346, 256 S. W. 705, 31 A. L. R. 1355 (1923); Allen v. Rosi, 146 Atl. 695 (Me. 1929); Groh v. South, 121 Md. 639, 89 Atl. 321 (1912); Kirschbaum v. Lowrey, 165 Minn. 233, 206 N. W. 171 (1925); Neal v. Newburger, 123 So. 861 (Miss.

it is fully recognized. In one, Indiana, it is recognized but limited in range by the rule which forbids their allowance where the defendant's conduct is also punishable criminally.[16] In Connecticut, they are allowed but limited in amount to the expense of litigation.[17] New Hampshire and Michigan approximate the English view, and allow "exemplary damages" but regard them not as punishment but as extra compensation for injured feelings or sense of outrage.[18] Only four states, Louisiana, Massachusetts, Nebraska, and Washington, definitely reject the doctrine altogether.[19]

The Defendant's Conduct Must Have Been Willful or Wanton

In the case of most torts, ill-will, evil motive, or consciousness of wrong-doing on the part of the tort-feasor are not at all essential to

1929); Hunter v. Kansas City Rys. Co., 213 Mo. App. 233, 248 S. W. 998 (1923); Ramsbacher v. Hohman, 80 Mont. 480, 261 Pac. 273 (1927); Forrester v. Southern Pac. Co., 36 Nev. 247, 134 Pac. 753, 48 L. R. A. (N.S.) 1 (1913); Hintz v. Roberts, 98 N. J. L. 768, 121 Atl. 711 (1923); Colbert v. Journal Pub. Co., 19 N. M. 156, 142 Pac. 146 (1914); Pickle v. Page, 225 App. Div. 454, 233 N. Y. S. 461 (Sup. Ct. 1929); Cotton v. Fisheries Products Co., 181 N. C. 151, 106 S. E. 487 (1921); Voves v. Great Northern Ry. Co., 26 N. D. 110, 143 N. W. 760, 48 L. R. A. (N.S.) 30 (1913), N. D. Compiled Laws Ann. (1913) §7145; Nappi v. Wilson, 22 Ohio App. 520, 155 N. E. 151 (1927); Federal National Bank v. McDonald, 129 Okla. 75, 263 Pac. 105 (1927), Comp. Okla. St. Anno., 1921, § 5975; Gill v. Selling, 125 Ore. 587, 267 Pac. 812 (1928); Mitchell v. Randal, 288 Pa. 518, 137 Atl. 171 (1927); Hargraves v. Ballou, 47 R. I. 186, 131 Atl. 643 (1926); Johnson v. A. C. L. Ry. Co., 142 S. C. 125, 140 S. E. 443 (1927); Leggett v. Dinneen, 40 S. D. 336, 167 N. W. 235 (1918); Memphis St. Ry. Co. v. Stratton, 131 Tenn. 620, 176 S. W. 105, L. R. A. 1915E 704 (1915); Foster v. Bourgeois, 253 S. W. 880 (Tex. Civ. App. 1923); Talkenberg v. Neff, 269 Pac. 1008 (Utah 1928); Anchor Co. v. Adams, 139 Va. 388, 124 S. E. 438 (1924); Woodhouse v. Woodhouse, 99 Vt. 91, 130 Atl. 758 (1925); Fisher v. Fisher, 89 W. Va. 199, 108 S. E. 812 (1921) (awarded only where compensatory damages not sufficient to punish defendant); Mesbane v. Second St. Co., 197 Wis. 382, 222 N. W. 320 (1929); Hall Oil Co. v. Barguin, 33 Wyo. 92, 237 Pac. 255 (1925).

[15] Scott v. Donald, 165 U. S. 58, 77, 41 L. ed. 632, 17 Sup. Ct. 205 (1896).

[16] See cases cited under note 79, herein.

[17] Craney v. Donovan, 92 Conn. 236, 102 Atl. 640 (1917) and see note 108, herein.

[18] Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475 (1876); Wise v. Daniels, 221 Mich. 229, 190 N. W. 746 (1922); Hasted v. Van Wagmen, 243 Mich. 360, 220 N. W. 562 (1926).

[19] Boots Mill. v. B. and M. R. R. Co., 218 Mass. 588, 106 N. E. 680 (1914) (punitive damages never allowed in Mass. except where specifically authorized by statute; R. L. c. 171, §2, as amended by L. 1907, c. 375, allowing damages for wrongful death, held a punitive statute, and, as there was no evidence of malice, damages reduced); Riewe v. McCormick, 11 Neb. 261, 9 N. W. 88 (1881); Vincent v. Morgan, La. and Tex. R. R. and Steamship Co., 140 La. 1027, 74 So. 541 (1917); Wilson v. Sun Pub. Co., 85 Wash. 503, 148 Pac. 774 (1915).

render the conduct actionable, that is, to render him responsible for damages, actual or nominal.[20] Usually it need only appear that the defendant intended to do what he did without any showing that he intended to injure anyone. If fault is required, usually it need go no further than a failure to comply with the standard of care which would be exercised by an ordinary prudent man, and if harm result from such failure the defendant, however innocent of desire to harm, must make compensation. As to the recovery of exemplary damages, however, the situation is quite different, and it is this difference that constitutes the most important distinctive feature of this kind of damages. Since these damages are assessed for punishment and not for reparation, a positive element of conscious wrong-doing is always required. It must be shown either that the defendant was actuated by ill-will, malice, or evil motive,[21] (which may appear by direct evidence of such motive, or from the inherent character of the tort itself,[22] or from the defendant's oppressive or insolent demeanor, sometimes called "circumstances of aggravation"[23]) or by fraudulent purposes,[24] or that he was so wanton and reckless as to evince a conscious disregard of the rights of others.[25] "Gross negligence" is a somewhat ambiguous expression. In the sense of extreme carelessness merely, it would probably not suffice, but only when it goes further and amounts to conscious indifference to harmful consequences.[26] Thus where a money-lender who had an assignment of

[20] A few exceptions exist where ill-will is necessary, such as malicious prosecution, malicious interference with another's business, defamation where the publication is conditionally privileged, and deceit. In all these cases, the showing of wrong motive necessary for the establishment of a cause of action at all, satisfies the requirement of "malice" essential to the recovery of exemplary damages.

[21] Eshelman v. Rawalt, 298 Ill. 192, 131 N. E. 675, 16 A. L. R. 1311 (1921) (criminal conversation); Cobb v. Atlantic C. L. Ry. Co., 175 N. C. 130, 95 S. E. 92 (1918) (blasting); Gamble v. Keyes, 39 S. D. 592, 166 N. W. 134 (1917).

[22] Hintz v. Roberts, 98 N. J. Law 768, 121 Atl. 711 at p. 713 (1923).

[23] Birmingham Waterworks Co. v. Brooks, 16 Ala. App. 209, 76 So. 515 (1917).

[24] Treesh v. Stone, 51 Cal. App. 708, 197 Pac. 425 (1921) (semble, citing Cal. Civ. Code §3294); Prince v. State Mut. Life Ins. Co., 77 S. C. 187, 57 S. E. 766 (1907); 1 SEDGWICK, DAMAGES (1920), §367.

[25] Morgan v. Muench, 181 Iowa 719, 156 N. W. 819 (1916) (breach of promise of marriage); Pullman Co. v. Pulliam, 187 Ky. 213, 218 S. W. 1005 (1920) (assault on passenger by third person); Hintz v. Roberts, 98 N. J. Law 768, 121 Atl. 711 (1923) (automobile collision); Funk v. H. S. Kerbaugh, 222 Pa. 18, 70 Atl. 953, 222 R. A. (N. S.) 296 (1908) (blasting).

[26] Harris Lumber Co. v. Morris, 80 Ark. 260, 96 S. W. 1067 (1906); W. T. Sistrunk & Co. v. Meisenheimer, 205 Ky. 254, 265 S. W. 467 (1924) (automobile collision); Ill. Cent. Ry. Co. v. Owens, 132 Miss. 101, 95 So. 833 (1923); Reel v. Consolidated Inv. Co., 236 S. W. 43 (Mo. 1921) (elevator accident).

wages from a man of the same name as plaintiff, gave notice of the assignment to plaintiff's employer, and twice repeated the notice after being informed by plaintiff of the mistake, this was held to be merely extreme and repeated carelessness and exemplary damages were denied.[27] But one who drove an automobile in a city street at dusk rapidly, without lights or warning and struck a child was held to have shown such conscious recklessness as to warrant exemplary damages.[28]

The word most frequently used to describe this element of conscious wrongdoing is "malice." In the evolution of the common law of torts at one stage certain wrongs were not actionable at all except when shown to have been done with wrong motive, *i.e.* "malice." Later the bounds of liability were extended, as for example, for defamation, to cases where there was no evil intent, but the mere utterance or writing of certain kinds of false charges was made actionable. Unfortunately, this was accomplished by a fictitious device of pleading. The requirement that "malice" be pleaded was retained but it was not required to be proved and was not allowed to be disputed. It was said to be "implied" from the mere doing of the condemned acts.[29] This fiction of "implied malice" has been imperfectly understood in many decisions which have held that this "implied," *i.e.* unproved, malice, is sufficient to sustain the requirement of willfulness or wantonness as a basis for exemplary damages.[30] Clearly the better view is to the contrary and a genuine showing of real and not fictitious ill-will or recklessness is required by most of the later decisions.[31]

While a person of unsound mind is not exempt from liability for actual damage for his torts, yet, if his mental condition were such as to preclude his being capable of wrong motive, the principle under discussion would prevent the assessment of exemplary damages against him.[32]

[27] Rugg v. Tolman, 39 Utah 295, 117 Pac. 54 (1911).

[28] Buford v. Hopewell, 140 Ky. 666, 131 S. W. 502 (1912).

[29] As to "malice" and "malice in law" in defamation, see 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906), 313-318.

[30] Schmisseur v. Kreilich, 92 Ill. 347 (1879) (slander); Coffin v. Brown, 94 Md. 190, 50 Atl. 567 (1901) (libel); McMillen v. Elder, 160 Mo. App. 399, 140 S. W. 917 (1911) (assault & battery); Robbs v. Mo. Pack. Co., 210 Mo. App. 429, 242 S. W. 155 (1922) (shooting of plaintiff by watchman).

[31] Corrigan v. Bobbs-Merrill Co., 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662 (1920) (libel); Fields v. Bynum 156 N. C. 413, 72 S. E. 449 (1911) (slander); Driessel v. Urkart, 147 Wis. 154, 132 N. W. 894, 36 L. R. A. (N. S.) 146 (1911); I. SEDGWICK, DAMAGES (9th ed. 1920), §364.

[32] McIntire v. Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140 (1887) (dictum).

In What Classes of Cases May Exemplary Damages be Assessed?

Obviously, the most appropriate field for the levying of civil punishment upon wrongdoers is the realm of tort actions generally. It is thought that any tortious form of actionable wrong may conceivably have been committed willfully or wantonly, and hence may give rise to liability for punitive damages. Violations of rights of bodily immunity are among the most frequent instances, and such damages are constantly given in cases of assault,[33] personal injury due to "gross" negligence,[34] and false imprisonment.[35] Whether for injuries resulting in death, recovery of exemplary damages may be had, depends on the local statutes, which vary in this particular. The Federal Employment Liability Act denies such recovery[36] as do most of the state statutes,[37] but a few permit it.[38] Recovery is allowed for infractions of interests of personality, such as slander and libel.[39] Less common but well recognized is the liability to this type of relief in violations of pecuniary interests, whether in intangibles as in cases of deceit,[40] malicious interference with business relations,[41] and infringement of trade-marks,[42] or rights in tangible property. Of the last class are actions for the conversions of personal property,[43] and for intrusions upon land,[44] destruction of shade-trees,[45] nuisance,[46] pollution of streams,[47] and interference with easements.[48] Naturally

[33] From a legion of cases, may be instanced: Trogdon v. Terry, 172 N. C. 540, 90 S. E. 583 (1916); Bannister v. Mitchell, 127 Va. 578, 104 S. E. 800 (1920). See note 16 A. L. R. 771.

[34] See note 26, *supra.*

[35] See note 53, *infra.*

[36] U. S. C. A. tit. 45 §51, construed in Cain v. Southern Ry. Co., 199 F. 211 (C. C. E. D. Tenn. 1911).

[37] For example, Consol. Stats. N. C. art. 161 construed in Gray v. Little, 127 N. C. 304, 37 S. E. 270 (1900).

[38] See 17 C. J. 1321, 1322.

[39] For examples see notes 30, 31, *supra.*

[40] Hobbs v. Smith, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N.S.) 697 (1911) (selling hogs infected with cholera).

[41] Sparks v. McCrary, 156 Ala. 382, 47 So. 332, 22 L. R. A. (N.S.) 1224 (1908).

[42] Lampert v. Judge & D. Drug Co., 238 Mo. 409, 141 S. W. 1095, 37 L. R. A. (N. S.) 533 (1911).

[43] Howton v. Matthias, 197 Ala. 457, 73 So. 92 (1916).

[44] Singer Mfg. Co., v. Holdfodt, 86 Ill. 455, 29 Am. Rep. 43 (1877).

[45] Huling v. Henderson, 161 Pa. 553, 29 Atl. 276 (1894).

[46] Yazoo & M. Valley R. Co. v. Sanders, 87 Miss. 607, 40 So. 163, 3 L. R. A. (N.S.) 1119 (1906).

[47] Schumacher v. Shawhan Distillery Co., 178 Mo. App. 361, 165 S. W. 1142 (1914) (pollution continued in evasion of injunction).

[48] Damell v. Columbus Show-Case Co., 129 Ga. 62, 58 S. E. 631, 13 L. R. A. (N.S.) 333 (1907).

wherever the emotional aspect of the wrong is prominent, the desire for punishment is to the fore. "The jingle of the guinea soothes the hurt that honor feels." Hence the award of punitive damages in cases of injuries to family relations is frequent, as in cases of seduction,[49] deceit in inducing marriage,[50] and alienation of affection.[51]

In addition to the general tort field where the basis of recovery is the breach by defendant of a duty resting universally upon everyone, are to be considered those cases where the defendant has imposed upon him by law a special public duty. Public officers, and public service enterprises such as railways, telephone companies and the like are among those upon whom rest such special duties to the public. Wrongs committed by those engaged in such public employments may frequently be regarded, in different lights, as being torts *simpliciter*—wrong if done by anyone whomsoever—or as breaches of the defendant's special duty to the public and to the plaintiff as a member thereof, or finally (in the case of carriers and other public service companies) as breaches of the defendant's particular *contract,* of carriage or the like, with the plaintiff.

Historically, oppressive conduct by public officers was the situation where early judges were most prone to sanction exemplary damages, and by which they justified and rationalized the doctrine. Thus in the famous case of *Huckle v. Money*[52] where as a part of the struggle of King George the Third and his ministers to suppress John Wilkes's journal, "The North Briton," a general warrant, naming no person, was issued in an attempt to arrest the printer of the paper, and plaintiff was seized and imprisoned for six hours only under this warrant, a jury allowed plaintiff £300 against the arresting officer. In passing on an application for a new trial, Lord Camden said: ". . . I think they have done right in giving exemplary damages; to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour." This feeling finds its application today in the giving of punitive damages in

[49] Reutkemeier v. Nolte, 179 Iowa 342, 161 N. W. 290, L. R. A. 1917D 273 (1917) (Both father and injured girl may recover).

[50] Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156 (1896).

[51] Cottle v. Johnson, 179 N. C. 426, 102 S. E. 769 (1920) (liability recognized, but judgment for plaintiff reversed because of failure to instruct that the alienation must have been willful to permit recovery of exemplary damages).

[52] 2 Wils. 205 (Common Pleas, 1763), CRANE, CASES ON DAMAGES, 32.

cases of false imprisonment in the name of the law but without lawful authority, whether against officers[53] or, as is more usual today, against the private persons who instigated the arrest,[54] and in cases of malicious prosecution,[55] and wrongful attachment sued out maliciously or oppressively.[56]

From this it is only one step to the case of oppressive conduct by carriers and other public service companies and from early times willful violations of their public duties to the harm of individual patrons have often been the occasion for the award of exemplary damages. From numberless instances, these examples of misconduct justifying such awards may be cited: placing a white passenger in a car for colored people,[57] refusal to stop at a flag station on signal,[58] unreasonable refusal to sell a ticket,[59] carrying a passenger beyond destination,[60] wanton delay in transporting baggage,[61] malicious or willful removal by a telephone company of a subscriber's telephone.[62]

This enumeration of the classes of cases where punitive damages are recoverable has left untouched one important question,—may such damages be recovered in actions for breach of contract? We have seen two types of situations where contracts often enter into the transaction upon which the cause of action is based, and where punitive damages are undoubtedly proper,—first, the case where one by fraudulent representations has caused another to enter into a contract of purchase and to part with value,[63] second, where one has

[53] Beardsley v. Soper, 184 App. Div. 399, 171 N. Y. S. 1043 (1918). Where, however, a public officer acts in good faith in serving process though void on its face, punitive damages are not recoverable. Parker v. Roberts, 99 Vt. 219, 131 Atl. 21, 49 A. L. R. 1382 (1925), with note on liability of officer for exemplary damages for false imprisonment.

[54] Jackson v. American T. & T. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738 (1905).

[55] Western Union Telegraph Co. v. Thomasson, 251 F. 833, 164 C. C. A. 49 (Va. 1918).

[56] International Harvester Co. v. Iowa Hardware Co., 146 Iowa 172, 122 N. W. 951, 29 L. R. A. (N.S.) 272 (1909).

[57] Louisville & N. R. Co. v. Ritchel, 148 Ky. 701, 147 S. W. 411, 41 L. R. A. (N.S.) 458 (1912).

[58] Williams v. Carolina & N. W. R. Co., 144 N. C. 498, 57 S. E. 216, 12 L. R. A. (N.S.) 191 (1907).

[59] Pittsburgh C. & St. L. Ry. Co. v. Lyon, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489 (1889).

[60] Ft. Smith & W. R. Co. v. Ford, 34 Okl. 575, 126 Pac. 745, 41 L. R. A. (N.S.) 745 (1912).

[61] Webb v. Atl. C. L. Ry. Co., 76 S. C. 193, 56 S. E. 954, 9 L. R. A. (N.S.) 1218 (1907).

[62] Carmichael v. So. Bell T. & T. Co., 157 N. C. 21, 72 S. E. 619, 39 L. R. A. (N.S.) 651 (1911).

[63] See note 40, *supra*.

entered into a contract with a carrier or other public servant, and the latter has wantonly breached its duty of service imposed by law.[64] In the former case, the person defrauded may frequently have his choice between suing upon the purely tort basis of an action for fraud and deceit, or he may often sue in contract for breach of warranty, express or implied. If the former theory is chosen, exemplary damages may properly be claimed as in other tort cases where wrong motive is proven,[65] and the fact that a contract was brought about by defendant's wrong is no reason for denying the usual punitive consequences for deliberate wrong.

Similarly, as we have seen, the carrier or other public service enterprise who deliberately or wantonly breaches his public undertaking by refusing properly to serve a passenger, shipper, or patron, is liable in tort for breach of the public undertaking and exemplary damages may undoubtedly be assessed in such actions,[66] notwithstanding the fact that the plaintiff could have elected to base his claim upon his contract with the defendant rather than upon the latter's public duty.[67]

Moreover, whatever our view might be of the propriety of a recovery of exemplary damages in contract actions generally, even if the plaintiff in one of these two types of cases actually based the theory of relief upon a contractual warranty, or upon the contract of carriage or the like, if his complaint actually disclosed facts constituting tortious and conscious deceit on the one hand, or deliberate or wanton breach of the duty to serve the public on the other, then regardless of the theory of relief advanced in the complaint, those courts which adopt the modern and liberal view[68] that any recovery which the *facts* pleaded (rather than plaintiff's *theory*) will support, is justified, should approve the recovery of exemplary damages in those cases.[69] They are actions for damages for *torts*, if the facts pleaded, rather than the forms of pleading, are made the test. Other

[64] See notes, 57 to 62, *supra*.

[65] Thompson v. Modern School of Business and Correspondence, 183 Cal. 112, 190 p. 451 (1920); Laughlin v. Hopkinson, 292 Ill. 80, 126 N. E. 591 (1920).

[66] Reaves v. Western Union Telegraph Co., 110 S. C. 233, 96 S. E. 295 (1918).

[67] As to the choice of remedies, see Causey v. Davis, 185 N. C. 155, 116 S. E. 401 (1923) (failure to transport passenger properly).

[68] See CLARK on CODE PLEADING, 174-179; MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE, 374, 375.

[69] See Williams v. Carolina & N. W. R. Co., *supra* n. 20.

courts which adhere to the traditional view that the plaintiff's theory of his case determines the measure of his relief would treat these cases as actions exclusively on contracts and would give no damages inappropriate as relief for breach of contract.[70]

In actions based solely and necessarily upon breach of contract alone, the overwhelming majority of the decisions deny recovery of exemplary damages.[71] It is true that extreme cases may be encountered where a deliberate, willful, and inexcusable breach of contract may seem as morally culpable and as worthy of punishment, as a willful or wanton tort. Such would be the deliberate refusal by a physician to carry out an agreement to attend a woman in childbirth,[72] or an abrupt and oppressive dismissal of an employee without cause and before the expiration of his term of employment.[73] The denial of recovery in such cases of contract probably flows first, from a desire to restrict the field of exemplary damages, the allowance of which is usually regarded as an anomaly, and second, from a belief that since the vast majority of breaches of contract are due to inability or to erroneous beliefs as to the scope of the obligation, it is of doubtful wisdom to add to the risks imposed on entering into a contract, this liability to an acrimonious contest over whether a breach was malicious or fraudulent, and the danger of a large and undefined recovery of punitive damages.[74] One well-defined exception to this

[70] Trout v. Watkins Livery and Undertaking Co., 148 Mo. App. 21, 130 S. W. 136 (1910); Southwestern T. & T. Co., v. Luckett, 60 Tex. Civ. App. 117, 127 S. W. 856 (1910) (action on contract to furnish telephone service, exemplary damages denied); Ketcham v. Miller, 104 Ohio St. 372, 136 N. E. 145 (1922).

[71] Cochran v. Hall, 8 F. (2) 984 (C. C. A. Tex. 1924); Am. R. Exp. Co. v. Bailey, 107 So. 761 (Miss. 1926); Hoy v. Grenable, 34 Pa. 9, 75 Am. Dec. 628 (1859). See also decisions collected in notes 3 Ann. Cas. 413, Ann. Cas. 1917E, 412. In South Carolina, however, a breach of contract if committed with fraudulent motive, is ground for exemplary damages. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232, 3 Ann. Cas. 407 (1904) (grantee who agrees to reconvey upon payment of debt, fraudulently conveys the land to a third person). See also Huffman v. Moore, 122 S. C. 220, 115 S. E. 634 (1923) (fraudulent breach of warranty).

[72] Compare Hood v. Moffett, 109 Miss. 757, 69 So. 664, Ann. Cas. 1917E, 410.

[73] Compare Addis v. Gramophone Co., Ltd. (1909) A. C. 488, 3 British Ruling Cases 98.

[74] "In giving compensation for breaches of contract, the utmost that the law undertakes is to place the parties in the financial condition they would have been in if the breach had not occurred. It is true, fraud always merits punishment, but the courts regard it unwise and impracticable to attempt to punish a fraudulent breach of contract by requiring the defaulter to pay to the other party more than he has lost by the breach. The advantage of punishing the fraud would be more than counterbalanced by the disastrous uncertainty in the administration of the law of contracts which would surely result." Woods, J. dissenting in Welborn v. Dixon, *supra*, note 71.

rule, however, does exist. Breaches of promises of marriage stand in this respect as in some other respects, upon a different footing from other breaches of contract, just as the marriage-relation itself is more than a mere contract-obligation and creates a status which the law protects in other ways than it protects ordinary contracts. Where the breach of promise of marriage is wanton or deliberate, exemplary damages may be allowed.[75] Another exception, apparent rather than real, is in the allowance of recovery of exemplary damages against sureties on judicial bonds, or other bonds of indemnity, where the bond has indemnified the plaintiff against damages which may be suffered from wrongful levy of attachment or other process, or from other wrongful acts by the principal. Obviously, if exemplary damages are recovered against the principal, the liability of the surety, if any, is contractual only and the question is purely one of interpretation of the bond—has the surety *promised* to pay exemplary damages recovered against the principal for the principal's tort, or has he promised to pay the actual damages only? Occasionally such bonds are held to include exemplary damages,[76] but more often they are construed as limited to actual damages.[77] Where they do include punitive damages, the recovery of them on the bond is the specific enforcement of the promise to pay the damages, and not the giving of punitive damages for breach of contract.

The Effect of Co-ordinate Criminal Responsibility

The existence of two agencies of punishment, the machinery of criminal prosecution, and the power of assessing punitive damages in civil cases, raises difficult problems of so controlling the remedies as to avoid injustice where the two agencies are set in motion against the same offender for a single act. Some courts as we have seen avoid the dilemma by rejecting outright the doctrine of exemplary damages.[78] A few refuse to allow exemplary damages where the

[75] Drabnich v. Bach, 159 Minn. 258, 198 N. W. 669 (1924). Seduction is a circumstance of aggravation, warranting exemplary damages. Thorn v. Tetrick, 93 W. Va. 455, 116 S. E. 762 (1923).

[76] Floyd v. Hamilton, 33 Ala. 235 (1858) (attachment bond).

[77] Com. v. Magnolia Villa Land Co., 163 Pa. St. 99, 29 Atl. 793 (1894), and other cases cited 3 Ann. Cas. 414. See also Sedgwick, Damages (9th ed. 1920) §370.

[78] *Supra* note 19.

defendant is subject to criminal prosecution for his act,[79] a doctrine which manifestly limits exemplary damages within a very narrow range, and which is rejected by the great majority of courts which sanction exemplary damages.[80]

Probably the most reasonable plan for the adjustment of the two remedies is that of permitting the defendant when pursued in either form of punitive action to prove that he has in fact already been punished by the other method so that present punishment may be avoided or reduced, according as the previous penalty be deemed fully adequate or not. Thus some decisions in actions where exemplary damages are sought permit the defendant to show in mitigation that he has been fined or imprisoned for the same wrong,[81] and it has been stated that in a criminal prosecution the judge should take into account liability for punitive damages in assessing the criminal penalty.[82] However, other and more numerous decisions decline to let the right hand know what the left hand doeth, and refuse to allow the civil defendant to show the criminal punishment even in mitigation.[83]

The criminality of the act, on the other hand, is sometimes sought to be availed of by the civil plaintiff in aid of his plea for exemplary damages. It is held, however, that the plaintiff may not show that defendant has been criminally convicted for his tortious act for the purpose of supporting the claim for punitive damages.[84] It has likewise been decided that the fact that defendant's act is branded as a misdemeanor by the criminal law will not dispense with the usual necessity on plaintiff's part of establishing the actually malicious or wanton character of defendant's conduct.[85]

[79] Indiana seems to be the chief exponent of this doctrine. Montgomery v. Crum 150 N. E. 393 (Ind. App. 1926) collects the cases in that jurisdiction. Other cases to the same effect are cited in a note in 16 A. L. R. at p. 801, but they are chiefly from jurisdictions which in fact reject exemplary damages *in toto*.

[80] See cases cited in note 14, *supra*.

[81] Smithwick v. Ward, 52 N. C. 64, 75 Am. Dec. 453 (1859); Saunders v. Gilbert, 156 N. C. 463, 476, 72 S. E. 610, 38 L. R. A. (N.S.) 404 (1911) (dictum, but an interesting discussion); Wirsing v. Smith, 222 Pa. 8, 70 Atl. 906 (1908); Jackson v. Wells, 13 Tex. Civ. App. 275, 35 S. W. 528 (1896).

[82] Keller v. Taylor, 2 Houst. (Del.) 20 (1858); Cook v. Ellis, 6 Hill (N. Y.) 466, 41 Am. Dec. 757 (1844).

[83] Jefferson v. Adams, 4 Harr. (Del.) 321 (1845); DuBois v. Roby, 84 Vt. 465, 80 Atl. 150 (1911); Reddin v. Gates, 52 Iowa 210, 2 N. W. 1079 (1879); Irby v. Wilde, 155 Ala. 388, 46 So. 454, (1908).

[84] Smith v. Myers, 188 N. C. 551, 125 S. E. 178 (1924) (semble);

[85] Warren v. Coharie Lumber Co., 154 N. C. 34, 69 S. E. 685 (1910) (obstruction of stream, in violation of statutes); Muenkel v. Muenkel, 143 Minn. 29, 173 N. W. 184 (1919).

EXEMPLARY DAMAGES AGAINST A PRINCIPAL FOR THE CONDUCT OF AN AGENT

The principle of agency which fixes upon the employer responsibility for the conduct of the agent in the course of the employment as if the employer had acted personally, when it is sought to be applied to fix upon the master liability for punitive damages, raises difficult problems of policy upon which the courts are ranged into opposing camps.

Unquestionably, in so far as the idea of punishment which is the basis for exemplary damages, includes the purpose of vengeance or retribution, there would seem to be little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty. Consequently, in the case of individual, as distinguished from corporate, employers, most courts[86] have declined to permit the principal to be mulcted in exemplary damages, unless he, (or one to whom he has committed his affairs as a vice-principal[87]) has personally participated in the wrongdoing of the servant by ordering or ratifying the tortious conduct, or, presumably, where he has made it possible by wanton neglect in having in his employ an unfit person.

However, at the present day, when the great mercantile, industrial, and transportation enterprises are almost universally conducted by corporations, it is nearly always found that, where exemplary damages are sought against a principal for the acts of an agent, the principal is a corporation.

In such cases the punishment of exemplary damages falls upon the pocket-books of the stock-holders of the corporation, who, in most instances, are even more clearly guiltless of personal wrong than in the case of the non-participating individual employer.[88] The injustice of such a penalty against the innocent has seemed to many courts inconsistent with the rule restricting the infliction of exemplary damages to cases of morally culpable conduct. These courts,

[86] Haines v. Schultz, 50 N. J. Law 481, 14 Atl. 488 (1888); Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169 (1902); 1 SEDGWICK, DAMAGES (9th ed. 1920), §378, n. 217, see 2 MECHEM, AGENCY (2d ed. 1914), §2014. *Contra*: Schmidt v. Minor, 150 Minn. 236, 184 N. W. 964 (1921). An excellent note, "Master's liability to exemplary damages for act of servant" appears in 48 L. R. A. (N.S.) 35.

[87] Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722 (1904).

[88] The problem of corporate responsibility for crime seems closely analogous to the present one. A realistic and searching discussion of that topic is "Corporate Criminal Responsibility" by Professor Henry W. Edgerton, 36 YALE L. J. 827 (1927).

therefore, have adopted as to corporations a rule analogous to that which we have seen prevails in respect to individual employers, *i.e.*, that exemplary damages may not be assessed against a corporation for the willful or wanton acts of a subordinate employee, except where the officers or agents in whom the executive management of its affairs is vested have participated in the wrong,[89] (a) by *ordering* the particular conduct of the agent[90] or by issuing general orders which would naturally produce such wrongdoing,[91] or (b) by wanton carelessness in *selecting or retaining* (before the wrongdoing) an unfit servant,[92] or (c) by *ratifying*[93] the wrongdoing of the agent by approving the culpable conduct, declining to rectify it where it is possible to do so,[94] or keeping in its employ the guilty agent after knowledge of his wrong.[95] This is the rule adopted in a leading case[96] by the Supreme Court of the United States, and since it is held to be a matter of "general law" it is enforced in the Federal courts in all the states, though the local law may be that of unrestricted liability.[97] It is seen at once that the Federal rule limits

[89] Lake Shore & Mich. So. Ry. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. 261 (1893); Cleghorn v. N. Y. Cent. & H. R. R. Co., 56 N. Y. 44, 13 Am. Rep. 375 (1874); Columbus R. P. & L. Co. v. Harrison, 109 Ohio St. 526, 143 N. E. 32 (1924); Voves v. Great No. Ry. Co., 26 N. D. 110, 143 N. W. 760, 48 L. R. A. (N.S.) 30 (1913); Virginia Electric & Power Co. v. Wynne, 149 Va. 882, 141 S. E. 829 (1928); Emmke v. De Silva, 293 F. 17 (C. C. A. Mo. 1923), and comment 8 MINN. L. REV. 444 (1924). See BALLANTINE, CORPORATIONS, (1927), §89.

[90] Denver & Rio Grande Ry. Co. v. Harris, 122 U. S. 597, 610, 30 L. ed. 1146, 7 Sup. Ct. 1286 (1887), where the vice-president and assistant general manager of the corporation commanded an armed attack in force, upon the employees of another railroad.

[91] Pittsburgh C. & St. L. Ry. Co. v. Lyon, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489 (1889).

[92] Cleghorn v. N. Y. Central & H. R. Ry. Co., *supra* note 89, *semble;* and cases cited 48 L. R. A. (N.S.) 53, n. 1.

[93] Bass v. C. & N. W. Ry. Co., 42 Wis. 654, 24 Am. Rep. 437 (1877).

[94] Forrester v. So. Pac. Co., 36 Nev. 247, 134 Pac. 753, 48 L. R. A. (N.S.) 1 (1913). (Railway company's failure to give relief where conductor has wrongfully taken up passenger's ticket and expelled passenger from train.)

[95] Bass v. Chicago & N. W. Ry. Co., 42 Wis. 654, 679, 24 Am. Rep. 347 (1877); Gasway v. Atlanta & W. P. R. Co., 58 Ga. 216 (1877). However, the mere retention of the servant in the face of an accusation of outrageous conduct should not be deemed ratification, as such a rule would force the employer to discharge an employee wherever a serious charge was made against him. It is only where the circumstances known to the employer render it fairly certain that the charges are true, that the retention of the servant could properly be found to amount to a sanction of his misconduct. Toledo, St. L. & W. Ry. Co. v. Gordon, 74 C. C. A. 289, 143 F. 95 (1906); Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631, 8 Am. St. Rep. 512 (1888). Compare Voves v. Gt. Northern R. Co., *supra* note 89.

[96] Lake Shore & M. S. R. Co. v. Prentice, *supra* note 89.

[97] Norfolk & P. Traction Co. v. Miller, 98 C. C. A. 453, 174 F. 607 (1909).

very sharply, as a practical matter, the recovery of exemplary damages against corporate employers, usually the solvent defendants in tort actions. Nevertheless, many states follow the Federal rule.[98]

However, the doctrine just stated has been rejected by a large group of courts, which, as to corporations—whether the same rule would in a given jurisdiction be applied also to individual employers is not always clear—have adopted the simple rule that if the servant's conduct is such that the corporation is responsible for compensatory damages, and is such as to render the servant liable for exemplary damages, then the corporation is liable likewise for the exemplary damages.[99] It simply applies the rule of *respondeat superior* to exemplary damages.

Neither the Federal rule nor the rule of unrestricted liability can be said to be logically superior one to the other. The situation presents a competition between the requirement of personal fault in exemplary damage cases and the doctrine of the legal equivalence of the agent's act and the master's. The solution should be reached on grounds of social and economic policy. In effect, the courts which have adopted the rule of unrestricted liability have looked upon the assessment of punitive damages as being designed not so much for vengeance or retribution, as for the purpose of preventing the repetion in future of similar wanton or outrageous conduct by servants of the corporation. It may be questionable whether this end is not sufficiently attained by the threat of compensatory damages, but if prevention be the purpose of exemplary damages against corporations, the threat and hence the prevention would seem to be lessened substantially by a rule which imposes upon the plaintiff the difficult task of showing wrong-doing by those "higher-up." Likewise, the rule of unrestricted corporate liability has the great merit of workable simplicity.

Seemingly, a receiver of the property of a corporation is liable for punitive damages for misconduct of his servants in operating the property, under any circumstances where the corporation would have been so liable.[100]

[98] See cases cited *supra*, note 89, and in 48 L. R. A. (N.S.) 47, n. 1.

[99] Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39 (1869); Hayes v. Southern R. Co., 141 N. C. 195, 53 S. E. 847 (1906); Beauchamp v. Winnsboro Granite Corp., 113 S. C. 522, 101 S. E. 856 (1920), and cases cited 48 L. R. A. (N.S.) 42-44.

[100] Gardner v. Martin, 123 Miss. 218, 85 So. 182, 10 A. L. R. 1054 (1920); Comstock v. Wells, 259 S. W. 500 (Mo. App. 1924).

Similar to the problem of the responsibility of the principal (corporate or individual) for exemplary damages for acts done by the servant in the scope of the employment, but not quite identical with it, is the question of the principal's liability for such damages where the plaintiff's recovery of compensatory damages is not based upon the doctrine of *respondeat superior*, but upon the principal's failure to carry out some non-delegable duty. For example, a carrier of passengers owes by virtue of the relationship a duty to use reasonable care to protect the passenger against assaults by other persons while in the conveyance. Obviously, this duty is breached if the conductor, or other employee, wholly outside the field of his duties, assaults the passenger for motives of personal sport or revenge,[101] or makes improper advances to a female passenger.[102] This situation has not always been clearly distinguished from the more usual cases of wrongful ejection of the passenger or assault upon him, where the employee is purporting to act in pursuance of his duty to collect, but it seems to rest upon a wholly distinct basis of liability. It is arguable in these cases, where the principal is held solely upon the breach of the duty to protect, and not on any theory of responsibility for the acts of his servants, that the principal ought not be charged with liability for exemplary damages unless wantonness or gross negligence is brought home to the principal personally, or if it is a corporation, to its supervising officers, in failing to furnish proper employees to afford protection.[103] The doctrine of ratification

[101] Hayne v. Union St. Ry. Co., 189 Mass. 551, 76 N. E. 219, 109 Am. St. Rep. 255, 3 L. R. A. (N. S.) 605 (1905) and cases cited 10 C. J. 889, n. 56.

[102] Craker v. Chicago & N. W. Ry. Co., 36 Wis. 657, 17 Am. Rep. 504 (1875).

[103] The result suggested would seem to be supported by the case of Stewart v. Cary Lumber Co., 146 N. C. 47, 59 S. E. 545 (1907). This was an action against the lumber company which operated a logging railway, for the act of the engineer who wantonly and unnecessarily blew the locomotive whistle to make the plaintiff's mule "dance," which purpose was accomplished, to plaintiff's damage. Under the trial judge's instructions, the jury was allowed to assess both actual and vindictive damages. On appeal the recovery of compensatory damages was approved on the ground that one who operates a railway owes a duty to protect the public from harm thus inflicted, even wantonly and outside the scope of the employment, by those to whom the company has entrusted its dangerous instrumentalities, but the assessment of exemplary damages was held improper. Brown, J., with whom a majority of the court concurred, said, "I take it now to be generally accepted law that where the agent of a corporation commits a wanton and malicious tort, when acting for the master in the scope of the agency and in furtherance of his master's business, he acts 'as and for' the corporation, and for the time being is the corporation, so that the criminal intent necessary to warrant the imposition of exemplary damages is thus brought home to the corporation. But where the agent, going out of the line of his duty, beyond the scope of his agency and not in furtherance of his master's business, commits a pure tort on his own account,

would seem not to be applicable since the act was not professedly done on behalf of the principal.[104]

Jury's Discretion as to Giving or Withholding

That the recovery of punitive damages is a wind-fall and not a right, is recognized in the rule accepted almost universally that the jury not only has a wide latitude of discretion as to amount, but has entire discretion to refrain from giving any punitive damages at all even though all the elements of malicious and damaging misconduct may have been fully established.[105] The court's instructions must leave the jury this liberty.[106]

Manner of Determining Amount

A chief criticism, as has been seen, of the doctrine of exemplary damages is the absence of any standard or criterion to guide the jury at arriving at a proper amount. In this respect, punitive damages resemble damages for pain, mental suffering, and humiliation, which in their nature cannot with any accuracy be translated into equivalents in dollars and cents.

It is usually held that the amount of exemplary damages lies within the discretion of the jury, subject to review by the court only in cases of such abuse as indicates the influence of passion or prejudice.[107] Nevertheless, the courts, accustomed ordinarily to giving the jury in the instructions standards or measures for computing damages, seem not entirely satisfied at thus leaving the matter so much at large. Accordingly, in a substantial number of jurisdictions the

the master, whether an individual or a corporation, is never to be held in exemplary damages." This distinction, however, seems not to have been adverted to in the cases dealing with assaults outside the course of the employment by train employees, and most courts seem to have treated them, as regards the liability of the employer for exemplary damages, as they treat cases where the liability is based on the doctrine of respondeat superior. Clark v. Bland, 181 N. C. 110, 109 S. E. 491 (1921) (assault by employee); New Orleans, St. L. & C. Ry. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689 (1876) (assault by fellow passenger, which conductor culpably failed to prevent, exemplary damages allowed against railway company).

[104] Dillingham v. Anthony, 73 Tex. 47, 11 S. W. 139 (1889).

[105] Harrison v. Ely, 120 Ill. 83, 11 N. E. 334 (1887); Bergman v. Jones, 94 N. Y. 51 (1883); Hodges v. Hall, 172 N. C. 29, 89 S. E. 802 (1916); note 19 Ann. Cas. 574. *Contra* Wilcox v. Southern R. Co., 91 S. C. 71, 74 S. E. 122 (1912); Mayer v. Duke, 72 Tex. 445, 10 S. W. 565 (1889).

[106] Louisville & N. R. Co. v. Logan's Adm'x., 178 Ky. 29, 198 S. W. 537 (1917).

[107] Brause v. Brause, 177 N. W. 65, 190 Iowa 329 (1920); Ford v. McAnally, 182 N. C. 419, 109 S. E. 91 (1921); Woodhouse v. Woodhouse, 99 Vt. 91, 130 Atl. 758 (1925).

practice has arisen of giving the jury the aid of one fairly definite factor which they may take into account in fixing the amount. This factor is the plaintiff's expenses of litigation (so far as not covered by taxable costs) including his counsel fees.[108] Though some other courts including the Supreme Court of the United States have disapproved the practice,[109] it seems highly just and reasonable that one who has wantonly or maliciously inflicted a wrong upon plaintiff and by refusal to make satisfactory recompense has forced him to undergo the cost of employing attorneys and other expenses to secure his rights, should reimburse the plaintiff for the outlay. A similar rule obtains in Georgia by statute,[110] and in Connecticut not only do the courts permit the recovery of expense of litigation in the guise of exemplary damages but such expenses constitute the limit to which punitive damages may be given.[111] Much may be said for the practical common sense of this restriction, but so far as discovered, Connecticut stands alone in this view.

Except in these states where the element of plaintiff's cost of litigation may be considered by the jury, the courts offer no standard to the jury but the vague one that they should award such amount as is sufficient to punish the defendant for his conduct.[112] Likewise, the judges themselves in passing, on motion for new trial or appeal, upon the question of the excessiveness of verdicts for exemplary damages, are of course equally without any definite criterion by which to measure the award. As a rule-of-thumb, the device has been adopted of using the award of actual damages (where that is separately found in the verdict or is inferable from the evidence) as

[108] Marshall v. Bitner, 17 Ala. 832 (1850); Craney v. Donovan, 92 Conn. 236, 102 Atl. 640 (1917); Titus v. Corkins, 21 Kan. 722 (1879) (though amount of expenses not proved, jury correctly instructed they might take into consideration the probable expenses; good opinion by Brewer, J.); Yazoo & M. V. R. Co. v. Consumers Ice and Power Co., 109 Miss. 43, 67 S. 657 (1915) (dictum); Popke v. Hoffman, 21 Ohio App. 454, 153 N. E. 248 (1926) (attorney's fees allowed as compensatory damages where plaintiff makes out case for exemplary damages).

[109] Day v. Woodworth, 13 How. 363 (U.S.), 13 L. ed. 181 (1851); Falk v. Waterman, 49 Cal. 224 (1874); Kelly v. Rogers, 21 Minn. 146 (1874); Earl v. Tupper. 45 Vt. 275; Fairbanks v. Witter, 18 Wis. 287, 18 Am. Dec. 765 (1864).

[110] Michie's Code of 1927, §4392 permits the allowance of expenses of litigation where defendant has acted in bad faith, but such award is not classed as exemplary damages, Mosely v. Sanders, 76 Ga. 293 (1886).

[111] Craney v. Donavan, *supra* note 108.

[112] See Alabama Power Co. v. Goodwin, 210 Ala. 657, 99 So. 158 (1924) (jury should consider the character of the wrong, and necessity of preventing similar wrongs): Swiger v. Runnion, 90 W. Va. 322, 111 S. E. 318 (1922) (such amount as added to actual damages would be sufficient to punish the defendant and deter others).

a standard of comparison. The punitive damages given, it is said, must bear some reasonable proportion to the actual damages.[113] As a rough working scale, this is better than nothing. The reported cases offer many interesting instances of startlingly large verdicts for punitive damages,[114] and the function of judicial review of the jury's "rough justice" meted out under its punitive power, must in general be one of considerable difficulty.

The Necessity That Plaintiff Should Have Sustained Compensable Damage

A conspicuous amount of confusion and of conflict, some apparent and some real, appears in the decisions on the subject of the necessity of a showing of or a recovery for compensatory damage as a prerequisite to an award of exemplary damages.[115] A recourse to elementary principles will aid in clearing a path through the tangle.

In the first place, it seems to be agreed without dissent that the allowance of exemplary damages does not widen the range of actionable wrongs.[116] In other words, no state of facts exists upon which a claim for exemplary damages could be based, which would not be actionable if the claim for exemplary damages were omitted, or which in general would not be actionable in those jurisdictions where exemplary damages are refused recognition. Consequently, the first inquiry must be, does the complaint state a cause of action if the allegations relied upon solely to support the claim for exemplary damages be disregarded? If it does not, it is insufficient and the claim for exemplary damages collapses with the rest of the case.

As the greater number of tort cases fall within the range of these

[113] Cotton v. Cooper, 209 S. W. 135 (Tex. Comm. App. 1919); Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 Pac. 255 (1925). But the exemplary damages may exceed the actual, and no definite ratio is prescribed. Taylor v. Williamson, 197 Iowa 88, 196 N. W. 713 (1924)). In Pendleton v. Norfolk & W. Ry. Co., 82 W. Va. 270, 95 S. E. 941 (1918) an award of ten times the actual damages was reversed as excessive.

[114] Duncan v. Record Pub. Co., 145 S. C. 196, 143 S. E. 31 (1927) ($50,000 libel verdict seemingly including both compensatory and punitive damages, approved); Livesley v. Stock, 281 Pac. 70 (Calif. 1929) ("actual" damages $750, punitive damages, $33,333.33, where defendant shot plaintiff with bird-shot at 50 yards; punitive award reduced to $10,000); Seaman v. Dexter, 96 Conn. 334, 114 Atl. 75 (1921) (Chauffeur suffered fracture of both legs, one permanently shortened, earning power not decreased, verdict for $318 actual, and $12,650 exemplary damages ordered reduced by $5,000.)

[115] See note, "Actual damages as a necessary Predicate of Punitive or Exemplary Damages" 33 A. L. R. 384, 17 C. J. 974, Decennial Digests, title "Damages" §87 (2).

[116] Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740 (1902).

injuries which are not actionable without a showing of pecuniary damage or bodily harm, it has been natural for the courts to slide from the proposition stated in the previous paragraph that exemplary damages can only be allowed as an incident to an independent cause of action, to the generalization that "actual"[117] damages must be awarded as a prerequisite to the allowance of exemplary damages. Manifestly, the latter proposition restricts the allowance of exemplary damages more severely than the former, since it excludes from the realm of cases where punitive damages may be given, all cases where an independent cause of action for nominal damages is sued on, without a showing of "actual damage." It is not, however, a very serious inroad upon the realm of exemplary damages, because in most of the actual cases where theoretically a cause of action would exist without damage the plaintiff, if he can show malice or recklessness, can and does show "actual" damages also, so that the present question does not arise. Occasionally, however, the question may be material in determining the correctness of an instruction upon damages, or where a jury unfamiliar with the difference between the two types of damages, lumps all of their award under the class of "exemplary" damages in the verdict.[118] Consequently, it seems desirable to recognize the principle that if a cause of action is found to exist by the jury, in a case where "actual" damage is not an essential element of the cause of action, then if the necessary culpability on defendant's part be established, a verdict for exemplary damages is proper, though the award of other damages is nominal,[119] or absent entirely.[120]

In cases where the infliction upon plaintiff of some substantial damage is an essential element of the cause of action, as generally in

[117] Stacy v. Portland Pub. Co., 68 Me. 287 (1878); Gilham v. Devereaux, 67 Mont. 75, 214 p. 606, 33 A. L. R. 381 (1923) (alienation of affections); Shore v. Shore, 111 Kan. 101, 205 Pac. 1027 (1922) (assault); Long v. Davis, 68 Mont. 85, 217 Pac. 667 (1923) (trespass); Martel v. Hall Oil Co., 36 Wyo. 166, 253 Pac. 862 (1927) (trespass).

[118] See Wigginton v. Rickert, 186 Ky. 650, 217 S. W. 933 (1920).

[119] Selman v. Barnett, 4 Ga. App. 375, 61 S. E. 501 (1908) (enticing child away from plaintiff's custody); Buteau v. Nageli, 124 Misc. Rep. 470, 208 N. Y. S. 504 (Super. Ct. 1925) (alienation of wife's affection, verdict "$1.00 for alienation of affection, $5,000 for smart money," approved, good discussion); Press Publishing Co. v. Monroe, 73 F. 196, 51 L. R. A. 353 (C. C. A. N. Y. 1896) (wrongful advance publication of the Ode composed by plaintiff to be delivered at the opening of the Chicago World's Fair); Lampert v. Judge Drug Co., 238 Mo. 409, 141 S. W. 1095, 37 L. R. A. (N.S.) 533, Ann. Cas. 1913A, 351 (1911) (wrongful substitution of defendant's cigars in plaintiff's trade-marked cigar boxes); Saunders v. Gilbert 156 N. C. 464, 479, 72 S. E. 610 (1911).

[120] Wigginton v. Rickart, *supra* note 118.

torts remediable at common law by the action of trespass on the case, this requirement is not altered by the addition of a claim for exemplary damages. Thus, in cases of defamation where the charge is not actionable *per se,* no cause of action is established without proof and finding of special damage,[121] and hence no punitive damages may be awarded, though if the defamation is one which is actionable *per se* no proof of special damage and no recovery of substantial damages are needed to support an award of exemplary damages.[122] It may well be, however, that in a given case the plaintiff has proved the *existence* of substantial pecuniary loss but the evidence fails to fix the *amount* of that loss with sufficient definiteness to meet the law's standard of certainty. Does this establish a cause of action independent of punitive damages? As a matter of practical justice, it would seem to present a situation where, in cases of malice or recklessness, the requirement of certainty might well be relaxed as against a culpable wrongdoer by allowing a substantial recovery in the form of exemplary damages, and several decisions support the view that where the fact of substantial damage is established, though not the amount, punitive damages may be given.[123]

An examination of the cases indicates that the form of verdict usually prevailing is a general one for damages with no indication of how much is allowed as compensatory and how much as punitive damages. In some states, however, the local practice requires that they be separately awarded in the verdict,[124] and in others it is permitted but not required. Where the local rules permit, such a separation seems desirable, as it will often prevent a reversal where exemplary damages have been improperly allowed, as the court can set aside the punitive award without disturbing the verdict for compensatory damages.[125]

[121] Ruhle v. Kirkwood, 125 Ore. 316, 266 Pac. 252 (1928); National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F. (2d) 763 (C. C. A. Mo. 1927).

[122] Prince v. Brooklyn Daily Eagle, 16 Misc. Rep. 186, 37 N. Y. S. 250, 72 N. Y. St. Rep. 752 (1896). The court said: "A person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages. It is in such cases that the rule illustrates its chief value and necessity."

[123] McConathy v. Deck, 34 Colo. 461, 83 Pac. 135, 4 L. R. A. (N.S.) 358, 7 Ann. Cas. 896 (1905) (unnecessary rough treatment of plaintiff by defendant, arresting officer, verdict for exemplary damages alone, approved on ground that "after actual damage is shown, it is unnecessary to show its money extent to sustain a judgment for exemplary damages.")

[124] See for example, Ferguson v. Evening Chronicle Pub. Co., 72 Mo. App. 462 (1897).

[125] As in Tripp v. American Tobacco Co., 193 N. C. 614, 137 S. E. 871 (1927) and in Emmke v. De Silva, 293 F. 17 (C. C. A. Mo. 1923).