1976

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THE IMPORTANCE OF THE EXEMPLARY AWARD ISSUE IN AVIATION LITIGATION

DANIEL DONNELLY*

THE GENERAL issue of exemplary awards' today is an arena of escalating debate, significant not only because of its potentially devastating impact on defendants and insurers, but more importantly, because it is so inextricably intertwined with the larger issue of liability with fault (or no fault). It is a battlefront involving skirmishes not only between the plaintiff and the defense bar, but between the insurer disclaiming and the insured claiming coverage.

In recent years the impact on aviation litigation has been pronounced, and the indicators are that the trend toward such claims

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1 In this paper the terms "punitive damages," "exemplary damages," "vindictive damages" will not be utilized except when material using such misnomers is quoted. The author of this article will eschew such terms because (with minor exceptions discussed in the text) such awards are not "damages" as that term is generally recognized, that is, to compensate for some loss. Moreover, the term "exemplary" will be used to characterize the award inasmuch as exemplary best connotes the primary and soundest rationale underlying the award, that is, deterrence of the defendant tort-feasor and similarly situated potential tort-feasors.


3 It has been noted that the long-term consequences of judicial failure "to equitably balance the interest of the consumer with that of the manufacturer will result in either protective legislation (that is, restrictive to the consumer) to insure needed technological and economic progress, or will result in drastic changes in the entire adversary system of compensation for product-induced injuries that would not be in the consuming public's interest." Haskell, The Aircraft Manufacturer's Liability for Design and Punitive Damages—The Insurance Policy and The Public Policy, 40 J. AIR L. & COM. 595, 612-13 (1974).

and awards will increase. This trend is especially ominous for the operators and manufacturers of the so-called “jumbo” aircraft and those aviation manufacturers whose questionable design and manufacture have found their way into hundreds and, in some cases, thousands of aircraft which are being scrutinized by an increasingly sophisticated plaintiffs' aviation trial bar.

The trend toward seeking such awards has its genesis both in motives pure and not so pure, depending on which critic speaks. The plaintiffs' bar quite properly points to the Federal Aviation Administration's apparent inability to effectively scrutinize large segments of the aviation industry and the industry's inability to police itself. Plaintiffs' counsel observe that claims for exemplary awards originate frequently as a reaction to defense counsels' intransigent resistance to realistically evaluating meritorious claims and expeditiously disposing of them to the benefit, not only of plaintiffs, but defense counsels' clients who continually subsidize unwarranted and lengthy litigious excursions. Plaintiffs' counsel point out that such excursions, even when successful, cost the client more than would have been needed to buy peace with the plaintiff in the first place.

On the other hand, plaintiffs' counsel are castigated for their avarice and their attempts to force settlements for compensatory damages by utilizing the wedge of claims for exemplary awards. These ascribed motives emerge in legal literature as debates concerning whether the historical antecedents for exemplary awards and the rationale underlying such awards justify the doctrine's continued existence; whether the doctrine is constitutional; whether it ought to be applied to employers based solely on respondeat superior; or whether public policy forbids or allows indemnification for such claims through insurance and myriad other issues.

Not unmindful of the human factors which may contribute to

416 (1974) (A jury awarded punitive damages totaling $17,250,000.00. This award was set aside, not on the grounds that the conduct of Beech did not warrant the imposition of this payment, but on the grounds that section 377 of the California Code of Civil Procedure [a wrongful death statute] precluded an award of punitive damages and that section 573 of the California Probate Code [a survival statute] allowed the recovery of punitive damages only where the decedent had survived the destruction of his personal property, which had not occurred in the Pease case.)

this controversy, let us examine some of these arguments. This examination will lead to the conclusion that exemplary awards are here to stay and have a place in our civil law of torts, albeit not without modification.

I. THE GENERAL ACCEPTANCE OF THE DOCTRINE OF EXEMPLARY AWARDS AND THE DOCTRINE'S UNDERLYING RATIONALE

The doctrine of exemplary awards has received almost universal acceptance either as a doctrine of the common law or as a creature of legislative resolve. Despite its detractors, the doctrine has been

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6 The common law in the following jurisdictions, however, does not recognize the doctrine of exemplary awards: Louisiana—Passitt v. United T.V. Rental, Inc., 297 So. 2d 283 (La. App. 1974); Boutte v. Hargrove, 277 So. 2d 757 (La. App. 1973) (Under Louisiana law, however, compensatory damages may include awards for mental anguish and embarrassment caused by the intentional violation of property rights, even if the violation causes no pecuniary damage. Loeblich v. Garnier, 113 So. 2d 95 (La. App. 1959)); Massachusetts—Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968), cert. denied, 393 U.S. 940 (1968); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 47 N.E.2d 265 (1943); Nebraska—Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975); Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960); New Hampshire—Vratsenes v. N.H. Auto, Inc., 289 A.2d 66 (N.H. 1972); Fay v. Parker, 53 N.H. 342 (1873) (However, under New Hampshire law "when the act involved is wanton, malicious, or oppressive, the compensatory damages awarded may reflect the aggravating circumstances. . . . In fixing the amount of damages consideration is to be given to the result of the act itself, and the circumstances surrounding it, among which are motive and the presence or absence of provocation." Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 68 (1972)); Puerto Rico—Ganapolsky v. Park Gardens Development Corp., 439 F.2d 844 (1st Cir. 1971); Santoses v. Rossi, 64 P.R.R. 683 (P.R. 1945); Washington—Steele v. Johnson, 458 P.2d 889 (Wash. 1969); Maki v. Aluminum Bldg. Prods., 73 Wash. 2d 23, 436 P.2d 186 (1968).

7 An enlightening dissertation on the origin and development of the doctrine can be found in Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931). Its origin may have been biblical since in the 21st Chapter of Exodus, 37th verse, we read "when a man steals an ox or a sheep, and slaughterers or sells it, he shall restore five oxen for the one ox and four sheep for the one sheep." Its judicial origins seem to trace back to the mid-eighteenth century to Huckle v. Money, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763). According to Sedgwick, the doctrine, as such, arose with the practice of charging juries they might award damages in excess of actual damages to punish defendants and to deter others of like mind as the defendant, even though juries, in fact, already had been doing that on their own. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES §§ 348 et seq. (9th ed. 1912). See also Hodel, The Doctrine of Exemplary Damages in Oregon, 44 Ore. L. Rev. 175, 177-78 (1965). Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517 (1957).

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8 See, e.g., CAL. CIV. CODE ANN. art. 3, § 3294 (1905); COLO. REV. STAT. § 13-21-102 (1963); D.C. CODE ENCYCL. § 28:1-106 (1963); GA. CODE ANN. §§
aptly recognized as "a worthy legacy of our common law"\textsuperscript{9} and its salubrious function in modern jurisprudence acknowledged.\textsuperscript{10} Like any doctrine of the common law, it has its origins in history\textsuperscript{11} but is not dependent on its historical antecedents for its present justification.

The doctrine of exemplary awards relies not on any single rationale. Indeed, it has been observed that the doctrine is "like the chameleon, changing hue and color against the different backdrops of varying legal issues."\textsuperscript{12} The doctrine has been viewed as one of punishment,\textsuperscript{13} punishment and deterrence,\textsuperscript{14} and deterrence alone.\textsuperscript{15}

\textsuperscript{9}Herald Company v. Harper, 410 F.2d 125, 128 (8th Cir. 1969).

\textsuperscript{10}"In nearly all states punitive damages are recognized to be recoverable. They are no longer looked upon as monstrous, but are awarded to vindicate wrongs arising from antisocial behavior." Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 531 (Fla. 1975).

\textsuperscript{11}See note 7 supra.


As a doctrine of deterrence, it is not only the defendant-tort-feasor whom the exemplary award seeks to inhibit from tortious conduct but also other potential tort-feasors. Some courts view the doctrine as one of revenge vindicating the rights of the injured party and others as providing an inducement to bring suit against antisocial conduct; still others view it as rewarding an individual for public service in bringing a wrongdoer to account. A small minority of jurisdictions have apparently rejected any justification for the doctrine apart from its affording a means of compensating a victim over and above actual damages caused by conduct more aggravated than ordinary negligence above.


Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So. 2d 226 (1962).

Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967); Op- penhuizen v. Wanersten, 2 Mich. App. 288, 139 N.W.2d 765 (1966); McFadden v. Tate, 350 Mich. 84, 85 N.W.2d 181 (1957); Bixby v. Dunlap, 56 N.H. 456 (1876). Many jurisdictions have expressly rejected compensation as the rationale justifying such awards. See, e.g., Ahmed v. Collins, 23 Ariz. App. 54, 530 P.2d 900 (1975); Walczak v. Healey, 280 A.2d 728 (Del. Super. Ct. 1971); Capitol Dodge, Inc. v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972); Grefe v. Ross, 231 N.W.2d 863 (Iowa 1975); Brewer v. Home-Stake Production Co., 200 Kan. 96, 434 P.2d 828 (1967); Belinski v. Goodman, 139 N.J. Super. 351, 354 A.2d 92 (1976). Those jurisdictions which view the rationale for such awards as compensation do so to reimburse the plaintiff for certain legally non-compensable elements. Fay v. Parker, 53 N.H. 342 (1873); Earl v. Tupper, 45 Vt. 275 (1873). In regard to the concept of compensation being the rationale for these awards, it has been observed that many of the earlier forms of compensatory damages which were not recognized in common law are now recoverable as actual damages (e.g., mental anguish). Metro Chrysler-Plymouth, Inc. v. Pearce, 121 Ga. App. 835, 175 S.E.2d 910 (1970). Therefore, even in those jurisdictions which
In virtually every instance exemplary awards punish, deter, vindicate, revenge, reward, compensate and provide an inducement to move against anti-social conduct. The doctrine's underlying justification is best viewed, however, from the standpoint of the tort-feasor or prospective tort-feasor, and, as such, should be limited to punishment and through punishment, or the spectre of punishment, to deterrence. Vindication, revenge, reward and compensation are not justifications for the doctrine but are benefits devolving to the victim from the doctrine's application.

In addressing one's self to the viability of the doctrine of exemplary awards, one must examine the rationale justifying the doctrine and not apply the litmus paper to the collateral benefits the victim may receive from the doctrine's application. Inasmuch as criticisms of the doctrine directed at the benefits the victim derives (such as vindication, revenge, reward, compensation or "a windfall") fail to tackle the rationale which justifies the doctrine.

View compensation as a rationale for punitive damages, it must be recognized that this theory offers no compelling justification for such awards. Ghiardi, The Case Against Punitive Damages, 8 FORUM 411, 412 (1972). At best, this criticism is only partially well-founded. An incisive dissection of the compensatory rationale may be found in Hodel, The Doctrine of Exemplary Damages in Oregon, 44 ORE. L. REV. 175, 178-79 (1965) wherein it was observed that "if compensation for such expenses is desirable, it would be more appropriate simply to recognize them as proper items for compensatory damages." Id. at 178.

Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517 (1957). This article recognized that justification for the doctrine lay not in its vindicative function but in its function of punishment and deterrence: "The compensatory and vindictive functions seem insufficient in themselves to justify the continued existence of exemplary damages; the justification must be sought in the functions of punishment and deterrence." Id. at 522.

Hodel, The Doctrine of Exemplary Damages in Oregon, 44 ORE. L. REV. 175, 179 (1965). Although revenge is not an appropriate rational justifying the existence of the doctrine, judicial control of the means of revenge, a human emotion which may loom large in a given case, is clearly desirable. Therefore, it has been observed that "punitive damages have helped to maintain the public tranquility by permitting the wronged plaintiff to take his revenge in the courtroom and not by self-help." Campbell v. Government Employees Ins. Co., 306 So. 2d 525, 531 (Fla. 1975). It has also been stated that "a modern legal system can hardly be based on revenge, but insofar as self-help is discouraged by satisfying a plaintiff's vindictive spirit a useful purpose is served by awarding exemplary damages." Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517, 522 (1957).

Duffy, Punitive Damages: A Doctrine Which Should be Abolished, DEFENSE RESEARCH INSTITUTE MONOGRAPH: THE CASE AGAINST PUNITIVE DAMAGES 4, 8 (1969). Would that the criticism of the doctrine were always so benign. The criticism has frequently been intemperate ("a monstrous heresy . . . an unhealthy excrescence, deforming the symmetry of the body of the law.") Fay v. Parker, 53 N.H. 342, 382 (1873); intellectually hysterical
trine, they have little value in any meaningful debate of the doctrine's viability. In any event, in a case involving the crash of an aircraft with its accompanying tragic aftermath, vindication of the rights of the injured party and revenge tend to be minimal factors from the viewpoint of the victims or those left to grieve.

The punishment-deterrence rationale is particularly appropriate in those aviation cases where the conduct of the tort-feasor has gone beyond mere negligence and involves a calculated decision

("Those who benefit from a government error in a check or in a government bond, for amounts larger than are proper, are not entitled to any ill-gotten gains; and if there is resistance of any kind, they are in custody. The farmer who would cash a check erroneously issued to him for an amount beyond his proper loan would find the Federal Bureau of Investigation breathing down his neck, and he would settle up without the necessity of any legal action. . . . But, insofar as exemplary damages are concerned, there is a Robin Hood attitude on the part of the courts and juries that should be discarded.")

Mooney, A Proposal to Abolish Exemplary, Punitive and Vindictive Damages, Ins. L.J. 254 (1961); myopic ("The doctrine of punitive damages is a vestige of the past which has no logical place in modern tort law.") Duffy, Punitive Damages: A Doctrine Which Should be Abolished, DEFENSE RESEARCH INSTITUTE MONOGRAPH: THE CASE AGAINST PUNITIVE DAMAGES 3 (1969); and invidiously simplistic ("Air carriers and manufacturers are closely regulated by governmental authorities and are thus already exposed to civil administrative penalties as well as criminal penalties. The stacking of civil penalties is unlikely to serve any further legitimate function. . . .") Carsey, The Case Against Punitive Damages: an Annotated Argumentative Outline, 11 FORUM 57, 60 (1975).

on the part of the tort-feasor to indulge in a course of conduct to achieve a profit or avoid or minimize an otherwise certain loss at the expense of the safety of others. Such conduct occurs when, for instance, an air carrier continues to operate aircraft into a high revenue producing airport when the capability of the airport to continuously accept such aircraft safely is compromised by inadequate runways or approach aids. Such conduct also occurs when a manufacturer allows its aircraft or component to continue in use after it has discovered a serious defect, carrying with it the potential for disaster, which would involve the manufacturer in a costly modification or retrofitting program.

The argument that the deterrence rationale for exemplary awards is not valid because prospective tort-feasors probably are unaware of the existence of the doctrine has little merit in an aviation case. Most segments of the aviation industry are aware of the potential impact of the doctrine on their conduct; that a small segment may be nescient of the doctrine does not warrant its abolition but, more appropriately, highlights the obligation of insurers and counsel to educate their insureds and clients. Certainly little of a constructive nature is achieved by keeping them in the dark.

While it is true that deterrence may be achieved through punishment and that punishment has traditionally been the province of penal law, it cannot be said that exemplary awards, to the extent

indifference to the right or welfare of the persons to be affected by it, FWA Drilling Co. v. Lambert, 418 S.W.2d 878, 883 (Tex. Civ. App.—El Paso 1967); "wanton misconduct," Badgett v. McDonald, 304 So. 2d 228, 229 (Ala. Civ. App. 1974); "deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences," Berg v. Reaction Motors Div., Thioko Chemical Corp., 181 A.2d 487, 496 (N.J. 1962). Conduct which may not warrant the imposition of an exemplary award because only ordinary care was required of a tort-feasor may, however, warrant such an award against another tort-feasor where the degree of care required is higher—for example, in the case of an air carrier. Cf., Soucy v. Greyhound Corp., 27 App. Div. 2d 112, 276 N.Y.S.2d 173 (1976).

For a discussion of the justification of exemplary awards in such circumstances, see Hodel, The Doctrine of Exemplary Damages in Oregon, 44 ORE. L. REV. 175, 183-84 (1965).

It has been observed that the "rationalization of deterrence is strictly a fiction. Few persons have any knowledge and understanding of what punitive damages are, yet they are quite aware of criminal sanctions against acts for which they also could be held liable in punitive damages." Duffy, Punitive Damages, A Doctrine Which Should be Abolished, DEFENSE RESEARCH INSTITUTE MONOGRAPH: THE CASE AGAINST PUNITIVE DAMAGES 4, 11 (1969).
that they use punishment as a means to achieve deterrence, have no place in the civil law which, by tradition, is oriented to compensating victims.\footnote{Such argument has been made. In referring to the punishment rationale for exemplary awards, it has been urged: This argument is directly contrary to the long history of jurisprudence which has never failed to recognize the separate and distinct natures of criminal and civil jurisprudence. The punishment of a wrongdoer has traditionally been a function of criminal law, and nowhere else has a criminal law concept such as punishment been allowed to enter tort law. \textit{Id.} at 9. See also Ghiardi, \textit{The Case Against Punitive Damages}, 8 \textit{Forum} 411, 418 (1972); Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Fay v. Parker, 53 N.H. 342 (1873).}

Compensatory damages, after all, are awarded in a punitive manner; that is, it is the tort-feasor and no other who is singled out to make the victim whole. Moreover, the obligation to pay compensatory damages arises only after the tort-feasor has been shown to be at fault. The civil law, then, while its function is compensatory, utilizes means which involve the imposition of punishment on the tort-feasor.

It has been aptly observed in this regard that:

the argument that tort law is intended solely to recompense the injured plaintiff does not explain why compensation is at the expense of the defendant rather than at the expense of the public treasury or a system of insurance. The argument of compensation explains what the plaintiff in a tort action receives. It does not explain why the defendant pays. The compensatory theory of tort law also fails to explain why a plaintiff injured through the ‘fault’ of a defendant is compensated while other plaintiffs are not.\footnote{Note, \textit{Exemplary Damages in the Law of Torts}, 70 \textit{Harv. L. Rev.} 517, 523 (1957). In this article it was further observed that: Neither the compensatory nor the punitive theory offers a complete explanation of the law of torts; a full explanation requires reference to both. Normally the amount of damages is measured by the harm to the plaintiff—the compensatory theory explains this fact. But if only compensatory damages are permitted the punitive function of tort law may not be served. . . . Thus, exemplary damages promote one of the two primary purposes of tort law by allowing additional flexibility for admonition, so that the punishment may be roughly adjusted to the offender. \textit{Id.} at 524.}

Even were punishment and deterrence traditionally the sole prerogatives of the criminal law (which they are not), the civil law should be sufficiently dynamic to punish when the criminal law fails to because a statute does not exist or the prosecutor does not
prosecute. The contention that the failure of the criminal law to punish when it ought to should be remedied by improving the administration of criminal justice rather than by providing 'bounties' at the expense of the tort-feasor is sheer sophistry. Moreover, it overlooks the verity that corporate entities cannot be jailed and that the rigidity inherent in the maximum fine which might be imposed by the criminal law is ill-tailored to achieve effective deterrence.

The punitive function of compensatory damages does not, in itself, however, adequately and consistently provide the deterrence afforded by exemplary awards. In situations where the tort-feasor, in undertaking an unsafe mode of conduct, has factored in the cost of reparations to victims, compensatory damages alone have no deterrent value; only exemplary awards can consistently provide this desired prophylaxis.

II. SOME CRITICISMS OF THE DOCTRINE

Despite the widespread acceptance of the doctrine of exemplary awards and its sound justification as an implement of the civil law, the doctrine has also been criticized as being unconstitutional; as beyond the competence of juries to administer; and as causing calendar congestion.

Its claimed unconstitutionality revolves around arguments that awarding differing amounts, depending upon the wealth of the tort-feasor, violates the equal protection clause of the Fourteenth

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30 Id. at 11.
Amendment;\textsuperscript{34} that such awards violate the due process clauses of the Fifth and Fourteenth Amendments in that the prescribed conduct and sanctions are not clearly defined,\textsuperscript{35} and that the tort-feasor, in violation of these amendments, may be compelled to testify against himself;\textsuperscript{36} that the defendant tort-feasor is deprived of the right to be confronted by his accusers in violation of the Sixth and Fourteenth Amendments;\textsuperscript{37} that such awards are imposed on a mere preponderance of the evidence rather than on proof beyond a reasonable doubt as required by the Sixth and Fourteenth Amendments;\textsuperscript{38} and that exemplary awards may violate the double-jeopardy provision of the Constitution.\textsuperscript{39}

The underlying thesis of these constitutional attacks appears to be that a "definitional identity" and policy similarity between criminal conduct and tortious conduct warranting the imposition of exemplary awards drags the latter within the ambit of the constitutional protections surrounding the former.\textsuperscript{40} The "definitional identity" relied on is the \textit{mens rea} required for criminality and for conduct warranting the imposition of an exemplary award. The thesis is unsound, however, in that the policy considerations which underlie criminal sanctions are not similar to those which underlie exemplary awards. In reviewing these policy considerations, it has been observed:

Basically the criminal proceeding is to punish the defendant for a past offense, whereas in cases of fraud, malice, gross negligence, or oppression, the interest of society and of the aggrieved individual are blended and exemplary damages are allowed as an example or warning to deter them from committing like offenses in the future.\textsuperscript{41}

This salient distinction was observed in \textit{Helvering v. Mitchell}, 303 U.S. 391 (1938). In \textit{Mitchell} a claim was made that a proceeding to collect a tax penalty was barred by the double-jeopardy pro-

\textsuperscript{35} Id. at 21.
\textsuperscript{36} Id. at 18-20.
\textsuperscript{37} Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884).
\textsuperscript{39} Id. at 21-22.
\textsuperscript{40} Id. at 15-18.
\textsuperscript{41} Pratt v. Dock, 28 Tenn. App. 266, 191 S.W.2d 562, 565 (1945).
vision of the Fifth Amendment. The party from whom the penalty was being sought had previously been prosecuted for tax evasion arising out of the same facts as the penalty litigation. The court articulated the standard that: "Unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable." The Mitchell court then went on to observe the proceeding to collect the penalty was remedial and not criminal in nature and, therefore, refused to recognize the constitutional defense.

More than one hundred years ago, in response to a constitutional attack, the Supreme Court set forth language which still appears to be germane today:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive changes upon a defendant, having in view the enormity of his offense rather than the measure of the compensation to the plaintiff. We are aware that the propriety of the doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit argument.

More succinctly, it has been observed "the constitutionality of punitive damages generally is sustained by ample precedent."

Following these constitutional arguments, the contention that the doctrine of exemplary awards is beyond the ability of juries to administer must be considered. Apparently, the reasoning is that juries are devoid of sufficient common sense to measure the quan-
tum of the award to deter anti-social behavior. What has been observed by a court in a similar situation concerning an analogous attack on our jury system applies here as well: "we must assume that a jury will follow the instructions and correctly decide the issues presented." To the extent the jury fails to properly fulfill its function, its findings, like its findings on any other matter, are subject to tempering and correction by appellate review. This, rather than abolition of this "worthy legacy of our common law," seems to be the more reasoned approach.

Finally, the argument that the doctrine of exemplary awards causes crowding of court calendars and should presumably be abolished for this reason must be rejected as being predicated on the erroneous thesis that actions in which exemplary awards are sought in addition to compensatory damages would not have been instituted to recover compensatory damages alone. Surely, actions seeking exemplary awards will add somewhat to the court calendars; so does criminal law. Should both be abolished to truncate calendars?

III. THE LIABILITY OF THE EMPLOYER FOR EXEMPLARY AWARDS DUE TO THE TORTIOUS CONDUCT OF ITS EMPLOYEES

A perplexing problem exists as to whether employers should be vicariously liable for exemplary awards because of tortious conduct of employees and, if so, under what circumstances. At the outset it should be noted this problem involves corporate as well as individual employers, inasmuch as the doctrine of exemplary awards applies equally to both. At one end of the spectrum, it

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46 Price v. Hartford Accident & Indemnity Co., 16 Ariz. App. 511, 494 P.2d 711, 714 (1972). In Price, the court was confronted with the contention that the jury was unable to distinguish between ordinary and gross negligence.

47 See, e.g., Pease v. Beech Aircraft Corp., 38 Cal. App. 2d 450, 113 Cal. Rptr. 416 (1974); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 711, 60 Cal. Rptr. 398 (1967). The doctrine of exemplary awards applied initially solely to individuals but was later extended to corporations. Spellman v. Richmond & D.R. Co., 35 S.C. 475, 477, 14 S.E. 947, 949 (1892). Perhaps slightly overstated, but basically correct, was the attitude of the court in Goddard v. The Grand Trunk Ry. Co., 57 Me. 202 (1869), toward corporations wherein the court said:

Under cover of the [corporate name] and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in stocks . . .
has been urged that employers should be exempt from vicariously imposed exemplary awards and, on the other, that employers should respond merely on evidence establishing the employee was acting within the scope of his employment and nothing more.

Arguments against the vicarious imposition of exemplary awards include the logic that the deterrent effect of exemplary awards will be greatly enhanced if the employer were immune but the employee, director or officer alone were called on to individually satisfy the exemplary award. This logic is faulty, however, in that it overlooks the already existing exposure of the employee to pay any exemplary award even when the employer is similarly vulnerable. It also overlooks the difficulty inherent in attempting to assure that corporate funds, through one device or another, are not channelled to the offending employee to satisfy this obligation, the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. . . . There is but one vulnerable point about . . . corporations; and that is, the pocket of moneyed power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless or indifferent agents, or wreckless and insolent servants, better men will take their places, and not before.

_id_. at 224.

The propriety of imposing exemplary awards, where appropriate, on corporate entities cannot be discredited by the argument that when such awards are imposed on a corporation, they are unjustifiably assessed, in reality, against innocent shareholders whose power over corporate management is both legally and effectively limited. Such argument has indeed been advanced. Silliman, _Punitive Damages Related to Multiple Litigation Against a Corporation_, 16 _Fed. Ins. Counsel_ Q. 91, 92 (1966). Shareholders select management and, therefore, do have effective control over management. Moreover, it is the shareholders who receive the benefits of managerial decisions. It is difficult to understand why, within the framework of the limited liability as shareholders, they should not be held to the maxim _noblesse oblige_.

48 _Notes and Comments, The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of his Employees_, 70 _Yale L.J._ 1296 (1961). In this article an exception was carved out, nevertheless, for the "rare case in which the malicious tort was authorized for the specific purpose of enhancing corporate profits." _Id._ at 1310.


especially where the employee enjoys a position in the corporation's upper echelon.

Another argument against vicarious liability for exemplary awards is that imposition of this sanction on an employer who is not at fault cannot be justified on the theory of spreading loss to the party who can best pay (which is the primary justification for vicariously awarding compensatory damage against an employer). The thrust of this argument is persuasive only if it can be demonstrated no other reasoning equally justifies imposing liability, under these circumstances, on an employer. The most commonly encountered argument for vicariously imposing exemplary awards on employers for employee's acts is the prophylactic one of inducing employers to more carefully screen and supervise employees.\(^\text{3}\) This justification has been criticized, perhaps correctly so, in many cases, however, as being "absurd in light of present day employment practices, union contracts. . . ."\(^\text{3}\)

Mindful that the quintessential justification for imposing exemplary awards is deterrence, the better approach would appear to be to impose such awards on employers only when such deterrence can be effectively brought to bear. Such instances would include occasions when the corporation itself participated in the tortious conduct because of the elevated position of the employee in the employer's organization,\(^\text{3}\) or the employer authorized or


\(^{\text{3}}\) Ghiardi, The Case Against Punitive Damages, 8 FORUM 411, 420 (1972); See also Notes and Comments, The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees, 70 YALE L.J. 1296, 1304 (1961); Duffy, Punitive Damages, A Doctrine Which Should Be Abolished, DEFENSE RESEARCH INSTITUTE MONOGRAPH: THE CASE AGAINST PUNITIVE DAMAGES 4, 13 (1969). Other, less persuasive arguments have also been advanced, among them that imposition of vicarious liability for exemplary awards will lead to less care because employees, recognizing that their diligence will go unrewarded, will abstain from policing the employees or merely be content to insurance against this exposure. Notes and Comments, The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees, 70 YALE L.J. 1296, 1301-03 (1961). Certainly, one cannot assume employers will stand idly by any more to the threat of vicariously imposed liability for exemplary damages than they do to the threat of vicariously imposed liability for compensatory damages.

ratified the employee's conduct, or the employer's conduct itself in selecting or retaining the employee warranted the imposition directly on the employer.

IV. INDEMNIFICATION, THROUGH INSURANCE, FOR EXEMPLARY AWARDS

An area of increasing concern for defendants, potential defendants and their insurers is whether the standard liability insurance policy affords indemnification against exemplary awards. This especially sensitive area often pits insured against insurer, oftentimes with the insurer disclaiming coverage for the largest part of the insured's exposure.

The insured's hurdles to assuring it has coverage for exemplary awards are twofold: first, whether such coverage is within the terms of the policy and, second, whether the contract which provides such coverage contravenes public policy and is, therefore, unenforceable. This paper will discuss the latter hurdle and defer to the legal scions of the insurance industry to discourse on the former (as one must assume they will be eager to do.)

As to the public policy hurdle, two situations arise: the first,
where the party seeking indemnification is only vicariously liable, and the second, where the party was the active tort-feasor. In the former situation, where, for example, an employer is liable solely on the basis of *respondeat superior*, it has been held that indemnification does not violate public policy. On the other hand, where the party seeking indemnification is an active tort-feasor, policy arguments regarding indemnification diverge. Some jurisdictions hold that indemnification, under these circumstances, contravenes public policy because it thwarts deterrence and results in the imposition of the award, not on the tort-feasor, but on innocent parties, such as consumers or other insureds to whom the obligation of paying is ultimately distributed through insurance premium costs.


> Since we have permitted punitive damages to be assessed against an employer under the doctrine of *respondeat superior* even in the absence of the employer's knowledge or authorization of the employee's acts, we can perceive of no good reason why an employer should be prohibited from insuring himself against such losses, since the losses are in effect a business loss—i.e. a calculated risk of doing business.


With reference to thwarting the deterrent function of the award, it has been observed "with respect to the remaining states, those holding to the orthodox view that the sole purposes of punitive damages are punishment and deterrence,
The better view, however, is that indemnification does not violate public policy in those few jurisdictions which view the function of such awards as compensatory and may not violate public policy in those jurisdictions which view the function of such awards as deterrence. As to those jurisdictions which view the function as compensatory, it is difficult to see how public policy can be thwarted by assuring a fund to assure compensation.66

With respect to jurisdictions which view deterrence as the primary purpose of exemplary awards, to the extent persons or organizations other than the defendant are deterred by the example of an exemplary award, public policy is not violated but rather is served by the existence of insurance which provided the funds which induced the plaintiff to seek the award. Moreover, it must be kept in mind that payment of an exemplary award is not the only consequence of being sued for such an award. Another consequence is the inconvenience and business disruption incurred by and in no event compensation, the reasoning of Judge Wisdom in McNulty [Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962)] is inescapable." In commenting on the argument that it was doubtful that closing the insurance market on the payment of exemplary awards would actually deter reckless and wanton conduct, the court in American Surety Co. v. Gold, 375 F.2d 523, 527 (10th Cir. 1966), wrote:

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

With reference to the reasoning that a tort-feasor ought not to pass off his obligation to pay an exemplary award by insuring against it, it has been observed that "a person has no right to expect the law to allow him to place responsibility for his wreckless and wanton acts on someone else," Nicholson v. American Fire & Cas. Ins. Co., 177 So. 2d 52, 54 (Fla. Dist. Ct. App. 1965), and it seems only just that the burden of paying punitive damages should rest ultimately, as well as nominally, on the party who actually committed the wrong. If the defendant Gleb was permitted to shift to garnishee the burden of the punitive damage award, then the award would have served no purpose. Plaintiff would have already been made whole through his compensatory damages, and the insurance company, which had done no wrong, would be punished.

Crull v. Gleb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964).

66 In his article, The Validity of Insurance Coverage for Punitive Damages—An Unresolved Question?, 4 N. Mex. L. Rev. 65, 67-68 (1973), Bruce D. Hall wrote and, quite correctly so, "if compensation is an objective, no public policy is offended by permitting the plaintiff to collect the damages from the tort-feasor's insurer."
a defendant's having to defend against a claim for an exemplary award. This burden is particularly apparent when the insurer has conceded liability and agreed to pay compensatory damages, which would normally dispose of the litigation, but does not dare make such a concession as to claims for exemplary awards. Another aspect, totally separate from payment, is the imposition on a defendant of being compelled to allow plaintiff's counsel to probe the fiscal deterrent factors, all resulting from the fact that plaintiff was proper amount of the exemplary award. These cumulative non-fiscal deterrent factors, all resulting from the fact that plaintiff was induced to seek the exemplary award because it was funded by insurance should not be ignored before pronouncing judgment in the indemnification issue.81

V. SOME CONCLUDING OBSERVATIONS

The vitality of the doctrine of exemplary awards depends not only on its ability to fulfill its deterrent function, but also on its measured restraint. Should overkill be the consistent result of the doctrine's application, legislative intervention may be anticipated. Jurors who are called on to apply the doctrine should be clearly apprised that its only function is deterrence and that punishment and revenge, in themselves, are not its purpose. Moreover, the judiciary should strive to promulgate a clear set of guidelines regarding what evidence is admissible to enable the jury to realize the doctrine's deterrent function and formulate for itself a set of effective rules to enable the doctrine to fulfill this function.82


82 Indeed, it has been aptly observed that:
This problem will be dealt with to the limit of human ingenuity only when the study of actual life as affected by law suits results in the invention (discovery?) of rules which will aid in the satisfactory determination of the severity of punitive damage verdicts. It is believed that the only hope for individualization which will "work," lies in a system based on thought and observation, and expressed in words which make it available for the tort court in action. Without such a system, individualization is at best an opportunity to muddle through complicated situations on unorganized
Inasmuch as any plaintiff who includes a claim for an exemplary award does so seeking to deter anti-social conduct not for himself alone but for the community in general, it seems that proceeds from such awards should be dedicated, at least partially, to the common good. This is particularly true in aviation cases where the altruistic motives of plaintiffs who institute claims for exemplary awards could be given full expression by using portions of the awards to further aviation safety. This is not to suggest, however, that plaintiffs be denied the opportunity of participating in any part of such awards; to countenance such a denial would surely lead to the abandonment of this socially beneficial instrumentation of the common law. That we can ill afford.

Where the single act of a defendant causes multiple injuries or deaths as, for example, in a single air crash, the measure of the defendant should be taken but once and the tort-feasor should not and scanty knowledge, and at worst a potentiality of dealing with each case as the caprice of judge and jury dictates.


Some effort has been made to formulate some rules to tailor the award to the function of the doctrine. For example, some jurisdictions have adopted a rule requiring that some reasonable relationship exist between actual damages and the exemplary award. See, e.g., Luke v. Mercantile Acceptance Corp., 111 Cal. App. 2d 431, 244 P.2d 764 (1952); McNeil v. Allen, 534 P.2d 813 (Colo. Ct. App. 1975); Reynolds v. Willis, Del, 209 A.2d 760 (1965); Wisner v. S.S. Kresge Co., 465 S.W.2d 666 (Mo. Ct. App. 1971); Kesler v. Rogers, 542 P.2d 354 (Utah 1975), and others have adopted a rule requiring that a ratio exist between actual damages and exemplary awards. See, e.g., Johnson Publishing Co. v. Davis, 271 Ala. 474, 124 So. 2d 441 (1960); Malco, Inc. v. Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 109 N.W.2d 516 (1961). Both the reasonable relationship rule and the ration rule are misguided, however. As to the reasonable relationship rule, it has been observed that "any test which requires a relationship between actual damages and punitive damages disregards the obvious fact that the amount of ascertainable injury is no barometer of the degree of malice entertained by the defendant," Jacoby, *The Relationship of Punitive Damages and Compensatory Damages in Tort Actions*, 75 Dickenson L. Rev. 585, 591 (1971), and that "flexibility of admonition should not be vitiated by adhering to a 'reasonable relation' test." Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 531 (1957). The ratio test has drawn similar fire:

The ratio requirement diverts attention from the nature of the defendant's conduct and from the need to discourage similar conduct in the future. By focusing attention on the specific harm that resulted from the defendant's conduct, a ratio requirement points to a false guide for effective punishment and results in an injustice.

be subject to multiple exemplary awards. When, on the other hand, a defendant acts repeatedly in a grossly negligent manner or in a manner evidencing careless disregard for the safety of others, there should be no hesitancy in making award upon award until the message of deterrence has been successfully brought home.

Nor should the fact that there are many victims be used as a reason to avoid making any exemplary award at all. Such was, in essence, the approach taken by the court in Roginsky v. Richardson-Merrell, 378 F.2d 832 (2d Cir. 1967).