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Rules and Principles

Division 13 - Remedies

Chapter 47 - Damages

Topic 1 - General Statements

Restat 2d of Torts, § 908

§ 908 Punitive Damages

**(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.**

**(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.**

**COMMENTS & ILLUSTRATIONS: Comment:**

*a. Purpose.* The purposes of awarding punitive damages, or "exemplary" damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future. Although the purposes are the same, the effect of a civil judgment for punitive damages is not the same as that of a fine imposed after a conviction of a crime, since the successful plaintiff and not the state is entitled to the money required to be paid by the defendant. The awarding of punitive damages is not prevented by a prior criminal conviction for the same act, which is relevant only to the amount of the award; nor does the granting of punitive damages prevent a subsequent criminal conviction.

Punitive damages are not awarded against the representatives of a deceased tortfeasor nor, ordinarily, in an action under a death statute. (See §§ 900 and 925).

In many states statutes have been enacted with reference to certain types of conduct, such as intentional trespass to land under the terms of which double or treble damages or designated amounts can be recovered. Punitive damages are to be distinguished from *qui tam* awards and civil penalties or forfeitures.

*b. Character of defendant's conduct.* Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these

damages can be awarded only for conduct for which this remedy is appropriate -- which is to say, conduct involving some element of outrage similar to that usually found in crime. The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others. Although a defendant has inflicted no harm, punitive damages may be awarded because of, and measured by, his wrongful purpose or intent, as when he unsuccessfully makes a murderous assault upon the plaintiff, who suffers only a momentary apprehension. In all these cases, however, a cause of action for the particular tort must exist, at least for nominal damages. Reckless indifference to the rights of others and conscious action in deliberate disregard of them (see § 500) may provide the necessary state of mind to justify punitive damages.

Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence. And they are not permitted merely for a breach of contract. When, however, the plaintiff has a right in the alternative to sue for a breach of contract or for a tort, the fact that his act or omission amounts to a breach of contract does not preclude the award of punitive damages if the action is brought for the tort and the tort is one for which punitive damages are proper.

*c. Extent and nature of harm.* In the earliest cases in which punitive damages were allowed, the plaintiffs suffered no substantial harm, or at least no physical or financial harm appeared. These were cases in which public officials were guilty of outrageously oppressive conduct. Punitive damages are today awarded when there is substantial harm and when there is none. Although as stated in Comment e, the extent of the harm may be considered in determining their amount, it is not essential to the recovery of punitive damages that the plaintiff should have suffered any harm, either pecuniary or physical.

Thus an award of nominal damages (see § 907) is enough to support a further award of punitive damages, when a tort, such as a trespass to land, is committed for an outrageous purpose, but no significant harm has resulted.

Compensatory damages in a trifling amount and substantial punitive damages in the same verdict are not necessarily inconsistent. It is essential, however, that facts be established that, apart from punitive damages, are sufficient to maintain a cause of action. Thus a nonharmful unauthorized dealing with another's chattel, if not amounting to a dispossession, does not give rise to a cause of action and the fact that it was done with a bad motive is immaterial. On the other hand, in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages.

In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.

*d. Function of jury.* Whether to award punitive damages and the determination of the amount are within the sound discretion of the trier of fact, whether judge or jury. It is error, however, for the trier of fact to award punitive damages if there has been no bad motive or wanton indifference. An instruction that the jury can award punitive damages in such a case followed by a verdict that indicates from its size that punitive damages have been awarded is ground for a new trial. On the other hand, the trier of fact is not required to award punitive damages in a case in which they are permissible, and it is error for a trial judge to instruct the jury that punitive damages must be given. The excessiveness of punitive damages in a case in which they are allowable may be ground for reversal, for a new trial, or for a remittitur under the usual rules by which the court controls the jury's award of compensatory damages.

*e. Amount of damages.* In determining the amount of punitive damages, as well as in deciding whether they should be given at all, the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer, the relations between the parties and the provocation or want of provocation for the act. (See § 921). In addition, the extent of harm to the injured person can be considered by analogy to the doctrine of the criminal law by which the seriousness of a crime may depend upon the harm done, as when a battery with intent to kill results in mayhem or murder. Included in the harm to the plaintiff may be considered the fact that the plaintiff has been put to trouble and expense in the protection of his interests, as by legal proceedings in this or in other suits. (See § 914). The wealth of the defendant is also relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.

Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards. In a class action involving all claims, full assessment of the punitive damages can be made.

*f. Criticisms and restrictions.* The entire concept of punitive damages has been subjected to attack from some sources. Some states decline to award these damages in the absence of a statutory provision. Others insist that there must be significant compensatory damages in order to warrant their award and still others hold that they must be proportioned to compensatory damages in some appropriate ratio. In many states there has been a tightening of control by the appellate courts over discretion of the trier of fact.

Restrictive rules of substantive law have also developed in some states. Thus punitive damages are sometimes disallowed unless the defendant's conduct was "aimed at the public generally," and certain types of defendants, such as a governmental unit, may not be subject to them. Sometimes they are limited to the amount of counsel fees. Sometimes procedural techniques are utilized to prevent abuse of a claim for punitive damages when it becomes apparent that they are not warranted and the claim was made for the purpose of introducing prejudicial evidence that would otherwise not be admissible.

**REPORTERS NOTES:** This Section has been changed by adding the last clause in Subsection (1) and the first sentence in Subsection (2).

*Comment a:* Purpose. See generally, Johnson v. Husky Industries, 536 F.2d 645 (6th Cir. 1976); Ellis v. Zuck, 546 F.2d 643 (5th Cir. 1977); Knipper v. Ford Motor Co., 546 F.2d 993 (D.C.Cir. 1976); Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976), cert. denied, 429 U.S. 1097, 97 S.Ct. 1115, 51 L.Ed.2d 544 (1977), reh'g denied, 430 U.S. 960, 97 S.Ct. 1612, 51 L.Ed.2d 812 (1977); Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), mod'f, 615 P.2d 621 (1980); Anglo-American General Agents v. Jackson Nat'l Life Ins. Co., 83 F.R.D. 41 (N.D.Cal.1979); Hutchison v. Pyburn, 567 S.W.2d 762 (Tenn.App.1978).

*Comment b:* Character of defendant's conduct. See Johnson v. Husky Indus. Inc., 536 F.2d 645 (6th Cir. 1976); Birmingham Waterworks Co. v. Brooks, 16 Ala.App. 209, 76 So. 515 (1917), cert. denied, 200 Ala. 697, 76 So. 995 (1917); Eshelman v. Rawalt, 298 Ill. 192, 131 N.E. 675 (1921); Hintz v. Roberts, 98 N.J.L. 768, 121 A. 711 (1923); Cobb v. Atlantic Coast Line R. Co., 175 N.C. 130, 95 S.E. 92 (1918); Gamble v. Keyes, 39 S.D. 592, 166 N.W. 134 (1917); Prince v. State Mut. Life Ins. Co., 77 S.C. 187, 57 S.E. 766 (1907) (fraudulent purpose).

On wilful or wanton conduct, see Dunn v. Koehring Co., 546 F.2d 1193 (5th Cir. 1977), mod'f on other grounds, 551 F.2d 73 (1977); Harris Lumber Co. v. Morris, 80 Ark. 260, 96 S.W.

1067 (1906); Sistrunk & Co. v. Meisenheimer, 205 Ky. 254, 265 S.W. 467 (1924); Buford v. Hopewell, 140 Ky. 666, 131 S.W. 502 (1912); Illinois Cent. R. Co. v. Owens, 95 So. 833 (Miss.1923); Reel v. Consolidated Inv. Co., 236 S.W. 43 (Mo.1921). A good opinion on this is Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); see also Allman v. Bird, 186 Kan. 802, 353 P.2d 216 (1960).

Gross negligence, in the sense merely of an extreme departure from ordinary care, is not enough. Moore v. Wilson, 180 Ark. 41, 20 S.W.2d 310 (1929). Cf. Rugg v. Tolman, 39 Utah 295, 117 P. 54 (1911).

*Comment c:* Extent and nature of harm. Many courts say that there must be compensatory damages to support an award of punitive damages. Aubertin v. Board of City Comm'rs, 588 F.2d 781 (10th Cir. 1978); Weider v. Hoffman, 238 F.Supp. 437 (M.D. Pa.1965); Stoner v. Houston, 265 Ark. 928, 582 S.W.2d 28 (1979); Brewer v. Second Baptist Church, 32 Cal.2d 791, 197 P.2d 713 (1948); Vice v. Automobile Club, 241 Cal.App.2d 759, 50 Cal.Rptr. 837 (1966); Miami Nat. Bank v. Sobel, 198 So.2d 841 (Fla.App. 1967); Syester v. Banta, 257 Iowa 613, 133 N.W.2d 666 (1965); Reeder v. Guaranteed Foods, Inc., 194 Kan. 386, 399 P. 2d 822 (1965); Stacy v. Portland Pub. Co., 68 Me. 279 (1878); Mississippi Power Co. v. Jones, 369 So.2d 1381 (Miss.1979); Scheid v. Pickham, 395 S.W.2d 166 (Mo.1965); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); cf. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3rd Cir. 1979).

Some courts, insisting that there is a cause of action when there is actual injury but only nominal damages have been awarded, allow recovery of the punitive damages. Kelite Products, Inc. v. Binzel, 224 F.2d 131 (5th Cir. 1955); Wilson v. Vaughn, 23 F. 229 (10th Cir. 1885); Alabama G. S. R. Co. v. Sellers, 93 Ala. 9, 9 So. 375 (1890); Muller v. Reagh, 150 Cal.App.2d 99, 309 P.2d 826 (1957); Sterling Drug Co. v. Benatar, 99 Cal.App.2d 393, 221 P.2d 965 (1950); Werschull v. United California Bank, 85 Cal. App.3d 981, 149 Cal.Rptr. 829 (1978); Copeland v. Dunehoo, 36 Ga.App. 817, 138 S.E. 267 (1927); Crystal Dome Oil & Gas Co. v. Savic, 51 Idaho 409, 6 P.2d 155 (1931); Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979); State ex rel. St. Joseph Belt R. Co. v. Shain, 341 Mo. 733, 108 S.W.2d 351 (1937); Crawford v. Taylor, 58 N.M. 340, 270 P.2d 978 (1954); Underwriter's Laboratories, Inc. v. Smith, 41 Misc.2d 756, 246 N. Y.S.2d 436 (1964); Snyder v. Fatherly, 158 Va. 335, 163 S.E. 358 (1931).

*Comment d:* Function of jury. See Kelite Products, Inc. v. Binzel, 224 F.2d 131 (5 Cir. 1965); Collins v. Brown, 268 F.Supp. 198 (D.D.C.1967); Alabama Power Co. v. Rembert, 282 Ala. 5, 208 So.2d 205 (1968); Lindgren Plumbing Co. v. Doral Country Club, Inc., 196 So.2d 242 (Fla. App.1967); National Ass'n for A. C. P. v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965); Sebastian v. Wood, 246 Iowa 94, 66 N. W.2d 841 (1954); State ex rel. St. Joseph Belt R. Co. v. Shain, 341 Mo. 733, 108 S.W.2d 351 (1937).

On review of jury award, see Butcher v. Petranek, Mont. , 593 P.2d 743 (1979); Kraus v. Alamo Nat'l Bank of San Antonio, 586 S.W.2d 202 (Tex.Civ. App.1979); Malco v. Midwest Aluminum Sales, 14 Wis.2d 57, 109 N.W.2d 516 (1961).

On elements to be taken into consideration by the trier of fact in determining the measure of punitive damages, see Michael v. Cole, 122 Ariz. 450, 595 P.2d 995 (1979); Walker v. Signal Companies, Inc., 84 Cal.App.3d 982, 149 Cal.Rptr. 119 (1978); Arnold v. Sharpe, 37 N.C.App. 506, 246 S. E.2d 556 (1978) rev'd, 296 N.C. 533, 251 S.E.2d 452 (1979); Cooper v. Mosillo, 39 Or.App. 443, 592 P.2d 1034 (effect of previous criminal punishment); Kraus v. Alamo Nat'l Bank of San Antonio, 586 S.W.2d 202 (Tex.Civ.App.1979).

*Comment e:* Amount of damage. See Will v. Hughes, 172 Kan. 45, 238 P.2d 478 (1951); Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P.2d 637 (1933); Beggs v. Universal C.I. T. Credit Corp., 409 S.W.2d 719 (Mo.1966); Gerharter v. Mitchell, 157 S.W.2d 577

(Mo.App. 1941); Hughes v. Babcock, 349 Pa. 475, 37 A.2d 551 (1944); Cain v. Fontana, 423 S.W.2d 134 (Tex.Civ.App.1967); Ostertag v. La Mont, 9 Utah 2d 130, 339 P.2d 1022 (1959); Wilson v. Oldroyd, 1 Utah 2d 362, 267 P.2d 759 (1954).

On punitive damages and multiple claims, see Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-40 (2 Cir.1967); Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), mod'f, 615 P.2d 621 (1980); People v. Superior Court, 9 Cal.3d 283, 107 Cal.Rptr. 192, 507 P.2d 1400 (1973).

*Comment f:* Criticisms and restrictions. Punitive damages are not allowed in some states in the absence of statutory provision. See, e. g., Killebrew v. Abbott Labs., 359 So.2d 1275 (La.App. 1978); Boott Mills v. Boston & M.R.R. Co., 218 Mass. 582, 106 N. E. 680 (1914).

On appellate control of the amount, see Jones v. Fisher, 42 Wis.2d 209, 166 N.W.2d 175 (1969).

Punitive damages not allowed unless defendant's conduct aimed at the public generally. James v. Powell, 19 N.Y.2d 249, 279 N.Y. S.2d 10, 225 N.E.2d 714 (1967).

State not liable for punitive damages. McCandless v. State, 6 Misc.2d 391, 166 N.Y.S.2d 272 (1956), modified on other grounds, 3 A.D.2d 600, 162 N.Y. S.2d 570, aff'd, 4 N.Y.2d 797, 173 N.Y.S.2d 30, 149 N.E.2d 530 (1958). On liability of municipal corporation, see Eifert v. Bush, 27 A.D.2d 950, 279 N.Y.S.2d 368 (1967), aff'd, 22 N.Y.2d 681, 291 N.Y.S.2d 372, 238 N.E.2d 759 (1968).

*Law reviews:* See K. Redden, *Punitive Damages* (1980); Hodgin & Veitch, *Punitive Damages Reassessed*, 21 Int. & Comp.L.Q. 119 (1972); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639 (1980); Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173 (1931); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L. Rev. 1257 (1976); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U.Chi.L. Rev. 1 (1982); Notes, 70 Harv. L.Rev. 517 (1957), 55 N.Y.U.L. Rev. 303 (1980).

**CROSS REFERENCES:** ALR Annotations:

Assault: Criminal liability as barring or mitigating recovery of punitive damages. 98 A.L.R.3d 870.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for malicious prosecution. 94 A.L.R.3d 791.

Defendant's state of mind necessary to warrant award of punitive damages in action for false arrest or imprisonment. 93 A.L.R.3d 1109.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 A.L.R.3d 351.

Admissibility on defendant's behalf, as matter in mitigation of punitive damages, or evidence as to his lack of financial resources. 79 A.L.R.3d 1138.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment. 61 A.L.R.3d 984.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status. 61 A.L.R.3d 944.

Requirement of full faith and credit to foreign judgment for punitive damages. 44 A.L.R.3d 960.

Punitive damages in actions based on nuisance. 31 A.L.R.3d 1346.

Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to child. 25 A.L.R.3d 1416.

Apportionment of punitive or exemplary damages as between joint tortfeasors. 20 A.L.R.3d

666.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages. [9 A.L.R.3d 692](#).

Action or claim for punitive damages as surviving death of person wronged. [63 A.L.R.2d 1327](#).

Punitive or exemplary damages for conversion of personalty by one other than chattel mortgagee or conditional seller. [54 A.L.R.2d 1361](#).

Punitive or exemplary damages in action by spouse for alienation of affections or criminal conversation. [31 A.L.R.2d 713](#).

Recovery of exemplary or punitive damages from municipal corporation. [19 A.L.R.2d 903](#).

Actual damages as a necessary predicate of punitive or exemplary damages. [17 A.L.R.2d 527](#).

Punitive damages for wrongful ejection or rejection of guest from hotel or restaurant. [14 A.L.R.2d 715](#).

Punitive damages in actions for violations of Title VII of Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). [43 A.L.R.Fed. 208](#).

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