not substantially out of harmony with the surrounding residences, the decision may not be in error. In recent years planners have come to criticize zoning on the basis of exclusive residential use districts. Zoning of this type invites abusive variances and amendments by arbitrarily excluding industrial and commercial uses from areas in which they might properly and beneficially be allowed, provided they can be made compatible with existing surroundings.

Corrective proposals have sometimes taken the form of a zoning ordinance drafted in terms of performance standards. For example, even an industrial facility could be allowed adjacent to a developing residential area, provided the plant met certain requirements as to setback, landscaping, parking, soot and noise control, and the like.[63] In developed areas the performance standard might be a more acceptable answer to the problem of the nonconforming use than spot amendments and variances that tend to wreck the underlying zoning ordinance. Nuisance cases that allow the continuation of an industrial or commercial use, provided it is modified so as not to annoy residential neighbors, have already accomplished performance controls judicially.[64]

However, the validity of performance standards rests on the aesthetic to a certain degree, and requires a sympathetic view of the aims that can properly be accomplished by the zoning power.[65] A judicial attitude that considers the zoning ordinance as a levy of an uncompensated burden whenever it does more than ratify existing land uses or eliminate common law nuisances would not appear receptive to municipal legislation of the performance standard variety.[66] Iowa municipalities have already been serious-

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[63] HORACK, *Performance Standards in Residential Zoning in American Society of Planning Officials*, in PLANNING 1952, 153 (Proceedings of the National Conference 1952). Locating industrial facilities near residential areas will add necessary industrial property in the suburban tax base and will help reduce commutation distances from home to work. For a review of several performance standard ordinances see AMERICAN SOCIETY OF PLANNING OFFICIALS, INDUSTRIAL ZONING STANDARDS (Planning Advisory Service, Information Report No. 78, September 1955).

[64] *E.g.*, Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151 (Iowa 1957); Higgins v. Decorah Produce Co., 214 Iowa 276, 242 N.W. 109 (1932).

[65] A performance standards ordinance applicable to industrial uses was upheld in Newark Milk and Cream Co. v. Parsippany-Troy Hills, 47 N.J. Super. 306, 135 A.2d 682 (1957). The court sustained the ordinance in general on the grounds that the attraction of industry to provide sufficient revenue for municipal services was a proper exercise of the police power. But a provision giving the planning board the power to approve or disapprove a site plan, in view of such matters as design and off-street parking, was struck down because it permitted an unwarranted intrusion of aesthetic considerations.

[66] Similar constitutional difficulties might be faced by an ordinance which set minimum house sizes in newly developed areas. In order to preserve amenities and insure proper community development. See Nolan and Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

ly restricted in dealing with the nonconforming use. Hopefully, they will be accorded greater freedom in the evolution of newer techniques to deal with the zoning problems that are ever present in the exploding metropolis.

THE THEORY AND APPLICATION OF PUNITIVE DAMAGES IN IOWA

The purpose of this article is to examine the theory and application of punitive (or "exemplary") damages in Iowa, with regard to some of the problems facing Iowa courts in this area. Of first consideration are the reasons for granting damages of this nature and the type of cases in which such damages have been awarded. Of particular concern in this connection is the granting of punitive damages for breach of contract or for negligent conduct. Attention will then be directed toward the pleading necessary to support an award of punitive damages, proper instruction of the jury, and what action may be taken if the amount awarded by the jury seems to be excessive.

I. THE BASIC CONCEPTS

A. Punishment

The term "punitive damages" is connotative of punishment, and this is the basic approach taken by the Iowa Supreme Court. Several times the Court has set forth the fundamental concept that an award of exemplary damages is made to punish the wrongdoer for his act.[1] Following this line of thought, the Court has made it clear that actual damages include such elements as pain and suffering, leaving any amount to be awarded as punitive damages to serve a punishing rather than a compensatory function.[2] This was emphasized in a case[3] in which a guardian brought action upon several promissory notes held by his ward and the defendant,

[1] Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); Kuiken v. Garrett, 243 Iowa 785, 51 N.W.2d 149 (1952); Gregory v. Sorenson, 214 Iowa 1374, 242 N.W. 91 (1932); Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917). Only one deviation from this concept was noted. In an assault and battery case, *Brause v. Brause*, 190 Iowa 329, 177 N.W. 65 (1920), the Court said that the common concept of punitive damages is not wholly punitive but is also taken by some to mean an increased award due to aggravation of injury by a wanton act. To that extent a compensatory attitude was expressed.

[2] Wildeboer v. Petersen, 182 Iowa 1185, 166 N.W. 464 (1918); Young v. Gormley, 120 Iowa 372, 94 N.W. 922 (1903); Davis v. Seeley, 91 Iowa 583, 60 N.W. 183 (1894); Parkhurst v. Masteller, 57 Iowa 474, 10 N.W. 864 (1881). However, in Alexander v. Staley, 110 Iowa 607, 81 N.W. 803 (1900), the Court permitted a jury to consider probable attorney's fees in its estimate of punitive damages, thus allowing exemplary damages which were partially compensatory.

[3] Shriver v. Frawley, 167 Iowa 419, 149 N.W. 510 (1914).

counterclaiming for wrongful attachment, sought punitive damages. The Court held that punitive damages could not be granted, for they would be paid out of property belonging to the ward who was in no way responsible for the wrongful act of his guardian.[4] From this case, one sees that the purpose of punitive damages is to punish the person who did the wrongful act and is not to allow him to pass this punishment off upon someone else. It would seem to follow from this that punitive damages should not be awarded against a person who is only vicariously liable for an act done by another. Although courts in some jurisdictions hold otherwise,[5] the Iowa Court seems to have adopted the approach that punitive damages are not to be awarded against a principal for the acts of its agent unless the particular acts were authorized or ratified.[6] The theory behind such a holding might well be carried into cases involving liability arising out of the automobile owner's liability statute.[7]

With such an emphasis on punishment, the question of double jeopardy arose quite early in Iowa's judicial history. In *Hendrickson v. Kingsbury*[8] the issue was: since assault and battery is punishable by a criminal proceeding, can the defendant be punished as well in a civil suit? The Court held that punitive damages are for the wrong done to the individual and not for the wrong done to the public; therefore the public may also prosecute without the wrongdoer being punished twice in a double-jeopardy sense. This conclusion was sustained in later discussions.[9]

While the term "punitive" is an apt one, the term "damages" may be a misnomer. As punitive damages are not intended to reimburse the plaintiff, he cannot claim them as a matter of right.

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[4] There was no mention of the possibility of an action being brought against the guardian personally. Had the defendant done that rather than bringing his action by way of counterclaim, perhaps he would have been able to recover punitive damages.

[5] OLECK, DAMAGES TO PERSONS AND PROPERTY § 271 (1957).

[6] White v. International Textbook Co., 173 Iowa 192, 155 N.W. 298 (1916); Dunshee v. Standard Oil Co., 165 Iowa 625, 146 N.W. 830 (1914).

[7] The importance of this area of the discussion will be evident when punitive damages for negligent conduct is discussed subsequently.

One other problem is raised in this connection. That is, whether or not by suing the owner separately the plaintiff loses the opportunity to recover punitive damages. As will be discussed presently, punitive damages are not awarded in favor of the plaintiff as a matter of right. Therefore, it is very doubtful that an action against the driver for punitive damages alone would be sustained, for it could not be based upon any right to recover. See Stricklen v. Pearson Construction Co., 185 Iowa 95, 169 N.W. 628 (1918), which would seem to sustain this position.

Also, should the owner and driver be joined as defendants, the innocence of the owner might result in no punitive damages being allowed. (See text supporting note 118, *infra*.)

[8] 21 Iowa 379 (1866).

[9] Hauser v. Griffith, 102 Iowa 215, 71 N.W. 223 (1897) (defendant had been criminally prosecuted first, but still had to pay punitive damages awarded in the civil action); Root v. Sturdivant, 70 Iowa 55, 29 N.W. 802 (1886); Ward v. Ward, 41 Iowa 686 (1875); Guengerich v. Smith, 36 Iowa 587 (1873); Garland v. Wholeham, 26 Iowa 185 (1868). See also IOWA CODE § 611.21 (1958).

Therefore, the refusal of a jury to award exemplary damages is not a ground for appeal.[10] The Court has gone so far as to call an award of punitive damages a mere gratuity to the plaintiff after actual damages are granted.[11] As punitive damages are not the plaintiff's as a matter of right, no interest is charged upon them.[12]

B. Survival of the Action for Punitive Damages

Where the wrongdoer dies before return of judgment, there is felt to be little point in punishing his estate, and punitive damages have not been allowed.[13] But where the injured party has died, does his claim for punitive damages survive?

Prior to the recent case of *Fitzgerald v. Hale*[14] the Court held that if the plaintiff died while the suit was pending, his executors or administrators could recover punitive damages under the Iowa survival of actions statute.[15] However, if the injured party should die before the action was commenced, his executors or administrators could not be awarded punitive damages.[16] In 1951, in *DeMoss v. Walker*,[17] the Court sustained this position, saying:

> Such [survival and wrongful death] statutes are not punitive, and they do not permit recovery on the mere proof of culpability of the defendant in a suit for wrongful or negligent death—unless the statute so states.[18]

But, in 1956, in the *Fitzgerald* case, the Court reexamined its position as to the nature of the statute, reversed its earlier view, and said it was in agreement with a Pennsylvania decision which stated that:

> the act . . . clearly indicates that the actions thus commenced by executors or administrators are the *same* actions which their decedent might have commenced and prosecuted, and being the *same* actions they must, in the absence of legislative mandate to the contrary, be governed by the *same measure of damages*.[19] [Emphasis added.]

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[10] Stricklen v. Pearson Construction Co., 185 Iowa 95, 169 N.W. 628 (1918). This is not to say, however, that a party may not be entitled to a jury instruction which at least presents the issue of exemplary damages to the jury for their consideration and at their discretion.

[11] Morrow v. Scoville, 206 Iowa 1134, 221 N.W. 802 (1928).

Three important exceptions to this rule are found in IOWA CODE § 129.2 (Dram Shop Act; § 610.15 (deceit by an attorney; and § 639.14 (action on a bond for wrongful attachment). Each of these statutes states that upon sustaining certain proof the plaintiff is *entitled* to exemplary damages. Thill v. Pohlman, 76 Iowa 638, 41 N.W. 385 (1889), supports this position as to the Dram Shop Act. For other statutes which allow punitive damages as a matter of right, see note 77, *infra*.

[12] Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1911).

[13] Sheik v. Hobson, 64 Iowa 146, 19 N.W. 875 (1884).

[14] 247 Iowa 1194, 78 N.W.2d 509 (1956).

[15] Union Mill Co. v. Prenzler, 100 Iowa 540, 69 N.W. 876 (1897). The statute is now IOWA CODE §§ 611.20, 611.22 (1958).

[16] Boyle v. Bornholtz, 224 Iowa 90, 275 N.W. 479 (1937); Armbruster v. Chicago, R.I. & P. Ry., 166 Iowa 155, 147 N.W. 337 (1914).

[17] 242 Iowa 911, 48 N.W.2d 811 (1951).

[18] *Id.* at 915, 48 N.W.2d at 813.

[19] 247 Iowa at 1199, 78 N.W.2d at 512, quoting from Pezzuli v. D'Ambrosia, 344 Pa. 643, 648, 26 A.2d 659, 661 (1942). For an expansion of

Therefore section 611.20 is a true survival act. It does not create a new cause of action in the executors or administrators; it allows the original action of the decedent to carry over to them and merely enlarges this to include the decedent's death.

As the Iowa Court had been interpreting the survival statutes as not a true survival act, the *DeMoss* decision was in keeping with the prior line of cases. But in view of the *Fitzgerald* decision two very recent Iowa decisions stand seemingly in opposition to each other. Since the purpose of exemplary damages is to punish the wrongdoer, does it make any difference that the person who was injured by his act is dead? Should the wrongdoer be punished only if the injured party lives, and be allowed to escape civil punishment if his wrongful act should cause a death? *Fitzgerald v. Hale* gives the Court an excellent opportunity to apply the reasoning found there to a situation involving punitive damages as well. Although granting such damages would require a reversal of the position taken in *DeMoss*, it is suggested that this might be the logical course of action.

II. CAUSES OF ACTION WHERE PUNITIVE DAMAGES HAVE BEEN AWARDED

A. Nonnegligent Tort Actions

Punitive damages have been awarded in Iowa in the following nonnegligent tort causes of action:

1. Abuse of process;[20]
2. Alienation of affection;[21]
3. Assault and Battery;[22]
4. Civil Rights Statute violations;[23]
5. Causing continuance of case;[24]
6. Conversion;[25]
7. Deceit by attorney;[26]

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this concept, See Gardner, *Measuring Damages to the Estate in Wrongful Death Cases*, 5 DRAKE L. REV. 98 (1956).

[20] Sokolowske v. Wilson, 211 Iowa 1112, 235 N.W. 80 (1931) (by implication).

[21] Boom v. Boom, 206 Iowa 70, 220 N.W. 17 (1928).

[22] Heerde v. Kinkade, 85 N.W.2d 908 (Iowa 1957); Schultz v. Enlow, 201 Iowa 1083, 205 N.W. 972 (1926); Taylor v. Williamson, 197 Iowa 88, 196 N.W. 713 (1924); Brause v. Brause, 190 Iowa 329, 177 N.W. 65 (1920); Reizenstein v. Clark, 104 Iowa 287, 73 N.W. 588 (1897); Hauser v. Griffith, 102 Iowa 215, 71 N.W. 215 (1897); Redfield v. Redfield, 75 Iowa 435, 39 N.W. 688 (1888); Root v. Sturdivant, 70 Iowa 55, 29 N.W. 802 (1886); Reddin v. Gates, 52 Iowa 210, 2 N.W. 1079 (1879); Ward v. Ward, 41 Iowa 686 (1875); Guengerich v. Smith, 36 Iowa 587 (1873); Hendrickson v. Kingsbury, 21 Iowa 379 (1866).

[23] Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Iowa 1953).

[24] Chadima v. Kovar, 168 Iowa 385, 150 N.W. 691 (1915).

[25] Mendenhall v. Struck, 207 Iowa 1094, 224 N.W. 95 (1929); Casey v. Ballou Banking Co., 98 Iowa 107, 67 N.W. 98 (1896); Garland v. Wholeham, 26 Iowa 185 (1868).

[26] IOWA CODE § 610.15 (1958) allows treble damages against an attorney who has practiced deceit. The only case arising under this statute held that treble damages are punitive but refused to allow them because plaintiff suffered no actual damage. Clark Bros. v. Ander-

8. Dog bite;[27]
9. Dram Shop Act causes of action;[28]
10. Malicious prosecution;[29]
11. Rape;[30]
12. Seduction and breach of promise;[31]
13. Slander;[32]
14. Trespass;[33]
15. Unfair competition;[34]
16. Causing withholding of wages for an obligation already already satisfied;[35]
17. Wrongful attachment;[36] and
18. Wrongful ejectment.[37]

There are two major tort areas for which no cases in Iowa establish the right to punitive damages—false imprisonment and fraud. However, in the case of *Sergeant v. Watson Bros. Trans-*

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son & Perry, 211 Iowa 920, 234 N.W. 844 (1931). For a discussion of the requirement of actual damages, see text supporting note 121, *infra*.

[27] Cameron v. Bryan, 89 Iowa 214, 56 N.W. 434 (1893).

[28] Thill v. Pohlman, 76 Iowa 638, 41 N.W. 385 (1889); Fox v. Wunderlich, 64 Iowa 187, 20 N.W. 7 (1884); Gustafson v. Wind, 62 Iowa 281, 17 N.W. 583 (1883); Goodenough v. McGrew, 44 Iowa 670 (1876).

[29] Kness v. Kommes, 207 Iowa 137, 222 N.W. 436 (1928); Connelly v. White, 122 Iowa 391, 98 N.W. 144 (1904); Flam v. Lee, 116 Iowa 289, 90 N.W. 70 (1902); Parkhurst v. Masteller, 57 Iowa 474, 10 N.W. 864 (1881).

[30] Wildeboer v. Petersen, 182 Iowa 1185, 166 N.W. 464 (1918).

[31] Morgan v. Muench, 181 Iowa 719, 156 N.W. 819 (1917); Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917); Verwers v. Carpenter, 166 Iowa 273, 147 N.W. 742 (1914); Stevenson v. Belknap, 6 Iowa 96 (1858).

[32] Ballinger v. Democrat Co., 207 Iowa 576, 223 N.W. 575 (1929); Plecker v. Knottnerus, 201 Iowa 550, 207 N.W. 574 (1926); Manning v. Meade, 180 Iowa 932, 164 N.W. 113 (1917); Andreas v. Hinson, 157 Iowa 43, 137 N.W. 1004 (1912); Dahl v. Hansen, 152 Iowa 555, 132 N.W. 965 (1911); Thompson v. Rake, 140 Iowa 232, 118 N.W. 279 (1908); Emerson v. Miller, 115 Iowa 315, 88 N.W. 803 (1902); Denslow v. Van Horn, 16 Iowa 476 (1864).

[33] Gregory v. Sorenson, 214 Iowa 1374, 242 N.W. 91 (1932); Brown v. Allen, 35 Iowa 306 (1872).

[34] Roggensack v. Winona Monument Co., 211 Iowa 1307, 233 N.W. 493 (1932); Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1911).

[35] Bishop v. Baird & Baird, 238 Iowa 871, 29 N.W. 2d 201 (1947).

[36] Jones v. Van Donselaar, 200 Iowa 176, 204 N.W. 416 (1925); Shippley v. Gremmels, 192 Iowa 801, 185 N.W. 922 (1921); Pricer v. Meisters, 184 Iowa 1121, 169 N.W. 346 (1918); Welsh v. Haleen, 157 Iowa 647, 138 N.W. 502 (1912); International Harvester Co. v. Iowa Hardware Co., 146 Iowa 172, 122 N.W. 951 (1909); Ahrens v .Fenton, 138 Iowa 559, 115 N.W. 233 (1908); Tyler v. Bowen, 124 Iowa 452, 100 N.W. 505 (1904); Smeaton v. Cole, 120 Iowa 368, 94 N.W. 909 (1903); Hooker v. Chittenden, 106 Iowa 321, 76 N.W. 706 (1898); Union Mill Co. v. Prenzler, 100 Iowa 540, 69 N.W. 876 (1897); Byford v. Girton, 90 Iowa 661, 57 N.W. 588 (1894); Wright v. Waddell, 89 Iowa 350, 56 N.W. 650 (1893); Carpenter v. Scott, 86 Iowa 563, 53 N.W. 328 (1892); Hurlbut, Hess & Co. v. Hardenbrook, 85 Iowa 606, 52 N.W. 510 (1892); Nordhaus v. Peterson Bros., 54 Iowa 68, 6 N.W. 77 (1880); Sadler v. Bean, 38 Iowa 684 (1874); Gaddis v. Lord, 10 Iowa 141 (1859); Raver v. Webster, 3 Iowa 502 (1857).

[37] Hartman v. Peterson, 246 Iowa 41, 66 N.W. 2d 849 (1954); Jones v. Marshall, 56 Iowa 739, 10 N.W. 264 (1881).

portation Co.,[38] which involved false imprisonment, the Court intimated that if the plaintiff had been able to prove actual malice rather than mere lack of probable cause the punitive damages awarded would have been sustained. Similarly, in several cases the Court used language to the effect that exemplary damages can be awarded where fraud is present.[39] Also, in *Young v. Main*,[40] a federal case, the court by way of dicta said that exemplary damages may be allowed in actions of deceit. A cursory survey discloses at least seventeen states allowing exemplary damages for fraud.[41]

B. Breach of Contract

In 1952 the Iowa Court seemingly departed from the general rule, and allowed punitive damages for an action based solely upon breach of contract. The authorities are in agreement that punitive damages will not be awarded for a breach of contract unless there is also involved an independent tort; and then in order to be allowed punitive damages the plaintiff must sue on the tort rather than on the contract.[42] Such a situation could arise, for example, if an agent of a public carrier wrongfully and forcibly ejected the plaintiff from the means of conveyance. Here the duty of the carrier is created by contract, and the forcible ejection, while a breach of this contract, will also constitute a separate tort. In order to receive punitive damages for this act, the plaintiff must base his action upon the tort.[43]

Prior to 1952 the only cases in Iowa involving this point were in accord with the general rule as set forth above.[44] But in 1952,

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[38] 244 Iowa 185, 52 N.W.2d 86 (1952).

[39] Most notably; Alexander v. Staley, 110 Iowa 607, 81 N.W. 803 (1900); Jeffries v. Snyder, 110 Iowa 359, 81 N.W. 678 (1900); Williamson v. Western Stage Co., 24 Iowa 171 (1867).

[40] 72 F.2d 640, 643 (8th Cir. 1934).

[41] Alabama, Arizona, California, Connecticut, District of Columbia, Illinois, Indiana, Kansas, Mississippi, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, and Texas.

[42] 5 CORBIN, CONTRACTS § 1077 (1951); 5 WILLISTON, CONTRACTS § 1340 (Rev. ed. 1937); RESTATEMENT, CONTRACTS § 342 (1932); OLECK, DAMAGES TO PERSONS AND PROPERTY § 270 (1957).

[43] CORBIN, CONTRACTS § 1077 (1951), says: "There appears to be no sufficient reason for not allowing the two phases of the defendant's conduct to be dealt with in a single action. There is no impenetrable fence between 'tort' and breach of 'contract'. . . ." It must be pointed out that Corbin here is thinking of procedural matters only, *i.e.*, allowing the plaintiff to join the breach of contract and the tort action together and allow punitive damages on the tort. Corbin is *not* thinking of allowing punitive damages where there is only the breach of contract (no matter how malicious the intent) and no independent tort. The cases of J. J. White, Inc. v. Metropolitan Merchandise Mart, 48 Del. 526, 107 A.2d 892 (1954), and Southwestern Gas & Electric Co. v. Stanley, 45 S.W.2d 671 (Tex. Civ. App. 1932), are excellent examples of this approach, and Corbin cites the latter in support of his position.

[44] Shannon v. Gaar, 234 Iowa 1360, 15 N.W.2d 149 (1944); Lacey v. Straughan, 11 Iowa 258 (1860). In Thompson v. Mutual Benefit Health & Accident Ass'n, 83 F. Supp. 656, at 660 (N.D. Iowa 1949), the court said that the *Lacey* case does not pass squarely on the problem. Yet in the *Lacey* case, the plaintiff sued for a breach of warranty, and the

in *Kuiken v. Garrett*,[45] the Court allowed punitive damages for a breach of contract and announced by the strongest dicta that it would do so in the future as well.[46]

In the *Kuiken* case the plaintiff had made an oral lease with the defendant which contained a covenant for quiet enjoyment. The defendant then served the plaintiff with several notices to quit and sued out several writs of forcible entry and detainer. It is important to note that the plaintiff predicated his action solely upon the breach of the covenant and pleaded that the defendant did these acts maliciously. The Court in its dicta, approving of the award of punitive damages, declared that although punitive damages ordinarily are not allowed for breach of contract,

> this rule does not obtain, however, in those exceptional cases where the breach amounts to an independent, wilful tort, in which event exemplary damages may be recovered under proper allegations of malice, wantonness or oppression.[47]

Although the Court assumed that an "independent, wilful tort" was involved, there is no little difficulty in discerning exactly what this tort was. The actions by the defendant do not amount, in and of themselves, to conversion, fraud, assault and battery, trespass, or, perhaps, not even malicious prosecution. If so, it appears that the tort involved, if it can be called a tort, is the malicious intent (the intent to injure) which the defendant had when he did the acts which constituted a breach of the contract. Is this what the court expresses when, in the *Kuiken* case, it says that: "exemplary damages may be recovered under proper allegations of malice, wantonness, and oppression"?[48]

If this conclusion is correct, does it mean that punitive damages would be allowable for *any* breach of *any* contract *providing* the acts constituting the breach were done maliciously? According to the basic concepts behind punitive damages, it would be perfectly acceptable to punish a person who breaches a contract malic-

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Court held that a jury instruction allowing for punitive damages was prejudicial error and reversed on this ground.

[45] 243 Iowa 785, 51 N.W.2d 1949 (1952).

[46] The defendant appealed, in part, on the ground that punitive damages are not allowable for breach of contract. The plaintiff argued that since the defendant had not raised this objection in the lower court, it was not a proper ground for appeal. The Court sustained plaintiff's argument, but took the occasion to go further and say that even if defendant's position had been urged below, he would nevertheless have failed in his appeal. For the weight of this type of dicta see Thomas, *Contribution Among Joint Tortfeasors as Affected by the* Yerkes *Case*, 6 DRAKE L. REV. 30, 31 (1956).

In this connection, it is of interest to note that defendant's brief on appeal failed to cite not only CORBIN, WILLISTON and the RESTATEMENT OF CONTRACTS, but also the *Lacey* case which seems to be directly in his favor. Defendant did cite CLARK on CONTRACTS, CORPUS JURIS, and the Federal case of *Young v. Main, supra* note 40, which in turn cites only CORPUS JURIS as its authority on this point.

[47] 243 Iowa 785, 800, 51 N.W.2d 149, 158 (1952), quoting 15 AM. JUR., Damages, § 273.

[48] *Ibid.*

iously. If this is to be the position adopted by the Court, then the Court must resolve the question of what constitutes malice in this area. In order for the defendant to be punished for his act, must the plaintiff prove an implied malice on the defendant's part (a malice implied from the nature of the act itself), or must he prove actual malice (actual intent to injure the plaintiff)? As for implied malice in this area, an analogy may be drawn between this action and one for malicious prosecution; for the intent of a person to injure another through the breach of a contract is not significantly different from the intent of a person to injure another through a malicious prosecution.[49] Therefore from this latter area it may be useful to borrow the term "lack of probable cause." To apply that, now, to the *Kuiken* case, the defendant there filed his writs of forcible entry and detainer without an honest belief that he was justified in doing so (or so the jury decided). From the facts the jury might have found actual malice as well.[50] Therefore, there was a "lack of probable cause" for his filing these writs, and this, to complete the analogy, constitutes implied malice. The question then presented is whether or not this implied malice will support an award of punitive damages. The Court intimates that sufficient malice for punitive damages is present if merely a lack of probable cause is shown, saying that the instruction given informed the jury "upon the question of lack of probable cause" and that malice is inseparable from probable cause.[51] But would it be the wiser course to require the plaintiff to go further and prove actual malice, that to injure the plaintiff was a major purpose of the breach? Compensatory, or actual, damages are satisfactory in most actions for breach of contract. However, in the few instances where the defendant was activated by a clear intent to injure, actual malice, and this appears to be his sole or major motivation, then it would appear that the defendant should be subject to punitive damages as punishment for his malicious act. Then, rather than subjecting contracting parties to further danger, punitive damages could afford them added protection.[52]

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[49] Both the breach of contract and the prosecution may be innocent, or both may be done with the intent to injure the other party.

[50] Upon trial of the first writ sued out by defendant, the jury found for the tenant (plaintiff in this action). The last writ was sued out just ten days before the end of the term.

[51] 243 Iowa 785, 796, 51 N.W.2d 149, 156 (1952).

[52] A word of caution is in order. Although the Court makes quite a point of the fact that the action was based only upon the breach of covenant, the plaintiff originally pleaded his cause as one of malicious prosecution. The first trial judge to deal with the case sustained defendant's motion to strike and plaintiff then repleaded for breach of contract. Though the action then was finally pleaded as a breach of contract, and no mention of malicious prosecution was made by the majority, perhaps the Court was influenced somewhat by the nature of the original pleading. For a suggestion of this, see Mr. Justice Mulroney's concurring opinion, 243 Iowa at 807, 51 N.W.2d at 162.

C. Negligent Tort Actions

If punitive damages are awarded to punish a wrongful act (and thereby to deter future wrongdoing), should they be awarded where the tort involved is not an intentional one and the wrongdoer's act, even though willed, resulted in damage-doing consequences he had not anticipated?[53] With the notable exception of manslaughter, conviction for most common-law crimes required the presence of a criminal intent. Does the common law of punitive damages require an intent to do wrong before punishment in that fashion is appropriate?

At first glance it would appear that Iowa has not adopted this requirement, for as early as 1854, in *Frink & Co. v. Coe*,[54] the Court allowed punitive damages in a case involving gross negligence (a cause of action in which *intent* seemingly plays no part). In *Cochran v. Miller*[55] in 1862 punitive damages were allowed in a malpractice suit involving negligent mistreatment. Again in 1867 in *Williamson v. Western Stage Co.*[56] exemplary damages were allowed against a stage coach company for gross negligence. From that date until 1954 there were no cases involving punitive damages for gross negligence before the court. However, on five different occasions during that period the Court by way of dictum reaffirmed that punitive damages were permissible in cases involving recklessness, or willfulness or wantonness.[57] In 1954, citing the *Frink, Cochran,* and *Williamson* cases and the more recent dictum as well, the Court in *Sebastian v. Wood*[58] again held that punitive damages were permissible in an action involving gross negligence.

From the repeated use of the words "willful and wanton" in the *Sebastian* decision, one might believe that the Court meant that punitive damages should be allowed only for willful and wanton misconduct. However, a close examination of the Court's language leads to a different conclusion. In view of the fact that never in the decision does the complete phrase "willful and wanton mis-

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[53] This point is elaborated in Section III, *infra,* involving discussion of jury instructions and the problem of malice. The discussion in the preceding subsection, regarding breaches of contract, suggests that the very same act (such as a breach of contract) may be deserving of punishment in one instance but not in another, and this differentiation may be based upon defendant's intent when he committed the act.

[54] 4 G. Greene 555 (Iowa 1854). Punitive damages were allowed against a proprietor hiring a stage coach driver known to be a drunkard. The reasoning in this case could be applied under IOWA CODE § 321.493 (1958) (owner-liability statute) if the owner knew the driver to whom he entrusted his car was a drunkard.

[55] 13 Iowa 128 (1862).

[56] 24 Iowa 171 (1867).

[57] Stricklen v. Pearson Construction Co., 185 Iowa 95, 169 N.W. 628 (1918); Morgan v. Muench, 181 Iowa 719, 156 N.W. 819 (1917); Verwers v. Carpenter, 166 Iowa 273, 147 N.W. 742 (1914); Jeffries v. Snyder, 110 Iowa 359, 81 N.W. 618 (1900); White v. Spangler, 68 Iowa 222, 26 N.W. 85 (1885).

[58] 246 Iowa 94, 66 N.W.2d 841 (1954) (defendant driving while intoxicated).

conduct" appear, it is possible that the Court might have had some other use in mind for the words "willful and wanton". From the words used in the decision it appears that the Court intends to award punitive damages for a defendant's gross negligence or recklessness.[59] While the Court never defines gross negligence, at one point it seems to quote from the Iowa Code for a definition of recklessness.[60] It is significant that this definition includes the words "willful and wanton". Therefore, could it be said that in all probability the words "willful and wanton" as used by the Court were taken from the statutory definition of recklessness? It is suggested that this may be the explanation for the Court's using these words so frequently.

It should also be noted that the Court seemingly equates recklessness with gross negligence. These two terms are used together constantly while the Court never distinguishes between them. From the language employed by the Court, therefore, one might conclude that recklessness and gross negligence are one and the same. It would appear that the statutory definition of recklessness was used to define the degree of negligence required in order for punitive damages to be permitted. If recklessness and gross negligence are the same, then for the purpose of defining gross negligence, one should be careful always to apply the Section 321.283 definition of recklessness rather than the definition used in Guest Statute cases. The statutory definition of recklessness emphasizes a "willful and wanton" attitude (and, as illustrated, the Court leaned heavily upon these words) while in Guest Statute cases the conduct "may be reckless *without* being 'willful' or

[59] Various illustrative examples appear in the opinion. The Court refers to the defendant's driving as "wanton, reckless and grossly negligent", saying that he violated the law by driving his car "in such a manner as to indicate either a willful or a wanton disregard for the safety of persons or property and was thereby guilty of reckless driving." 246 Iowa at 103, 66 N.W.2d at 846. Referring to punitive damages, the Court says that they may be awarded because of the "Malicious, oppressive, willful, wanton or *reckless* causation" of the injury. 246 Iowa at 101, 66 N.W.2d at 845. [Emphasis added.]
"If it was sound and salutary law in the early days of Iowa to award exemplary damages in the prevention and punishment of gross negligence . . . there should be no relaxation in such enforcement now. . . ." 246 Iowa at 103, 66 N.W.2d at 846. Referring to Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948), a similar case in which punitive damages were allowed for gross negligence, the Court says "We are in full accord with the majority opinion [in that case]." 246 Iowa at 105, 66 N.W.2d at 847. The Court quotes with apparent approval the jury instruction in Cochran v. Miller, *supra* note 55, where punitive damages were allowed for gross negligence. 246 Iowa at 106-7, 66 N.W.2d at 848. The Court says that if the plaintiff had died, defendant would have been chargeable with manslaughter and quotes State v. Kellison, 233 Iowa 1274, 1277, 11 N.W.2d 371, 373 (1943), which says that "Involuntary manslaughter may be committed where death results from drunken driving or from wanton and *reckless* operation of an automobile. (Many courts use the term '*gross* and culpable *negligence*')." 246 Iowa at 108, 66 N.W.2d at 849. [Emphasis of reckless added.]

[60] The first quotation in note 59, *supra*, seems to be taken from IOWA CODE § 321.283 (1954).

'wanton'."[61] It seems that there should be some such attitude of willfulness or wantonness on the part of the defendant before he is subjected to punitive damages, for otherwise his act remains solely one of negligence rather than "intent".

Nevertheless, the question still exists as to whether recklessness and gross negligence are actually one and the same. Or are they to be taken as separate causes of action; or perhaps varying degrees of negligence? Also, will punitive damages be allowed in every case where the defendant could be charged with recklessness under Section 321.283? These are questions to be resolved in the future.[62]

Another area of uncertainty created by the *Sebastian* decision is that concerning gross negligence and intent. Does the Court find an element of intent in the gross negligence of the defendant in the *Sebastian* case? It is taking quite a step to allow punitive damages for an act involving any aspect of negligence. Because punitive damages are based actually and philosophically upon punishment to a wrongdoer, it would seem inconsistent to allow such damages for an act which was purely unintentional (as a negligent act). In *Sebastian* the Court treats gross negligence in such a way that it borders very closely on the intentional tort area. For example, the Court cites the case of *Miller v. Blanton*,[63] a similar case from Arkansas in which punitive damages were allowed. In the *Miller* case the court used this type of language:

> When Miller imbibed alcoholic liquor, he *knew* he was taking into his stomach a substance that would stupefy his senses. . . .
>
> After Miller *voluntarily* rendered himself unfit to operate a car properly, he *undertook* to drive his automobile, a potentially lethal machine, down a well traveled highway.[64] [Emphasis added.]

With this language the Iowa Court was in full agreement.[65] The charge was recklessness in the *Miller* case, and the emphasis was upon the *voluntary* nature of the act. The defendant *knew* that drinking the liquor would render him unfit to operate the automobile and punitive damages could be allowed to punish him for his voluntary (is this virtually the equivalent of intentional?) act. With this approach the Iowa Court was in accord.

It appears, then, that the Court might feel it is punishing a defendant for acts over which he had a good measure of control; acts which, if not labeled "intentional", are going to be treated as

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[61] Siessegar v. Puth, 213 Iowa 164, 182, 239 N.W.46, 54 (1931).

[62] Three outstanding cases in this field are: Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293, 3 A.L.R.2d 203 (1948); Ross v. Clark, 35 Ariz. 60, 274 Pac. 639 (1929); and Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 50 S.2d 572 (1951). Also, the test or criterion of gross negligence or other misconduct that will support an award of exemplary damages for bodily injury or death unintentionally inflicted is discussed in Annotation, 98 A.L.R. 267.

[63] 213 Ark. 246, 210 S.W.2d 293 (1948).

[64] *Id.* at 249, 210 S.W.2d 293, 294 (1948).

[65] 246 Iowa 94, 105, 66 N.W.2d 841, 847 (1954).

such. However, in the *Sebastian* decision it is also indicated that, although malice is often an element in the allowance of exemplary damages, it is not essential to every judgment awarding them.[66] Foregoing a discussion as to whether or not the Iowa cases support such a statement, it may be pointed out that perhaps the Court's position on this point is that gross negligence is *not* substantially an intentional wrong but does involve such a degree of moral fault or blameworthiness as to justify civil punishment.

If the Court considers gross negligence to be substantially an intentional wrong rather than merely a high degree of moral fault, this could have direct effects upon two important liability areas: contribution among joint tortfeasors and insurance coverage.

In *Best v. Yerkes*[67] the Court indicated that contribution will be allowed between joint tortfeasors where there is no intentional wrong (or no act of moral terpitude nor any concerted action by the tortfeasors).[68] In the *Yerkes* case the Court quoted with approval from a Pennsylvania case "the rule that no contribution lies between trespassers applies only to cases where the persons have engaged together in doing wantonly or knowingly a wrong."[69] In the *Sebastian* case the Court defined recklessness as a "wanton disregard" and, as suggested above, seemed to treat it as an intentional wrong. As a result, one might conclude that, according to the *Yerkes* case, contribution would not be allowed between joint tortfeasors who were guilty of recklessness under the statute. Of course this would apply to actual as well as punitive damages.

Virtually all automobile liability policies contain an exclusion clause for liability arising from an intentional wrong. From this, one can immediately envision the consequences that could arise if recklessness (or gross negligence) is treated as an intentional tort. The insurance company would be relieved of all liability, for both actual and punitive damages, if its insured was reckless. This would engender situations in which insurance companies might wish to prove that their own insured was reckless in an effort to avoid liability. It would appear that insurance companies should not be allowed to escape liability on this ground. But, if

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[66] 246 Iowa at 106, 66 N.W.2d 841, 848 (1954). Elsewhere in the opinion the Court says that there was no "intent or design to injure". 246 Iowa at 103, 66 N.W.2d at 8..... Therefore the Court evidently feels that gross negligence is an unintentional tort. However, the Court may nevertheless be considering it and treating it in every way as an intentional tort (as the quotations from the *Miller* case strongly suggest). Or if it considers the tort to be unintentional, it might be misapplying the basic concepts behind punitive damages in punishing someone for an act over which the Court itself had declared he has no substantial control. Actual damages fully compensate the injured party; is there any reason to punish a defendant for an unintentional act?

[67] 247 Iowa 800, 77 N.W.2d 23 (1956).

[68] For a thorough analysis of the case, see Thomas, *Contribution Among Joint Tortfeasors as Affected by the* Yerkes *Case*, 6 DRAKE L. REV. 30 (1956).

[69] Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 365, 141 Atl. 231, 235 (1928), quoted at 247 Iowa 800, 809, 77 N.W.2d 23, 29.

insurance companies were held liable for punitive damages, this would allow any person, by paying a premium (and a substantially higher one than at present, it might be added), to contract away any civil punishment to which he might be subjected. This being the case, the entire efficacy and theory behind punitive damages would be defeated, for such damages would no longer punish a wrongdoer nor serve as a deterrent. And these are the only reasons for which punitive damages are ever awarded in the first place. Perhaps, by reasons founded on public policy, insurance companies should remain liable for actual damages caused by their insured's recklessness, but ought not to be held liable for punitive damages arising out of the same act.

III. JURY INSTRUCTIONS AND THE PROBLEM OF MALICE

An important step in obtaining punitive damages is the manner in which the jury is instructed. This involves not only insuring a full understanding on the part of the jury as to the difference between actual and punitive damages, but the instruction should also be concerned with the degrees and types of malice which the jury must find to justify a punitive award. Therefore, this problem of malice goes to the heart of the plaintiff's case, for upon the issue of malice and the proof thereof at trial turns the question of whether or not the Court will be able to instruct the jury as to the permissibility of punitive damages. This discussion will center first on general requirements in this area as to jury instructions, and then it will move to a consideration of the malice required to support a punitive award in the various areas of liability where such an award is allowed.

First, to the fundamentals. As discussed earlier, mental pain and suffering are a part of the actual damages. Punitive damages are awarded over and above all actual damages. An instruction which leaves this rule in doubt in the jury's mind could be grounds for a reversal of the decision awarding punitive damages.[70] Also, it has been pointed out, punitive damages cannot be claimed by the plaintiff as a matter of right. The jury must understand that whether or not punitive damages are to be awarded is entirely to their discretion. In his instructions the trial court must take care that he does not leave the jury with the impression that it must award punitive damages. Phrases such as "You are in-

[70] Wildeboer v. Petersen, 182 Iowa 1185, 166 N.W. 464 (1918). Here the jury instruction was remiss in this respect. The court said that it was essential to know exactly what the awards were for actual and punitive damages in order to apply the "proportion test" (discussed at length in text supported by note 127, *infra*), so that if the jury included pain and suffering in the punitive damage award, this would shift the amounts involved. If the jury is left at all in doubt as to whether or not pain and suffering are to be included in the punitive damages, this may be grounds for a successful appeal by defendant, regardless of the question of excessiveness, for if the instruction has been definite perhaps no punitive damages would have been awarded.

structed to find"[71] and even "You will allow . . . as exemplary damages"[72] have been held grounds for reversal.[73] An exception to this rule would be in cases such as those arising under the Dram Shop Act,[74] or involving deceit by an attorney,[75] or involving a wrongful attachment on a bond,[76] for in each of these situations a statute states specifically that the plaintiff may recover punitive damages. In these cases the plaintiff may request that the jury be instructed that, if the burden of proof is met, the plaintiff is entitled to punitive damages.[77]

Turning to the various causes of action for which punitive damages have been awarded with the purpose of determining what jury instruction should be given, it becomes apparent that malice, its various definitions and applications, will be the key to the instructions to the jury. A careful examination of the language of the Court indicates that the jury must find the defendant activated by actual malice (an intent to injure the plaintiff) rather than an implied malice inferred from the circumstances, in order for an award of punitive damages to be permissible in the following causes of action: abuse of process;[78] conversion;[79] alienation of

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[71] White v. International Text Book Co., 164 Iowa 693, 146 N.W. 829 (1914).

[72] Boom v. Boom, 206 Iowa 70, 220 N.W. 17 (1928).

[73] No definite authority was found, but if there should be an error in the jury instruction regarding punitive damages, it is possible that the entire case must be retried even as to liability for actual damages.

[74] IOWA CODE § 129.2 (1958).

[75] IOWA CODE § 610.15 (1958).

[76] IOWA CODE § 639.15 (1958). From the language of this statute it would appear that the punitive damages as well as the actual damages are to be recovered upon the bond, for it speaks of recovering exemplary damages "in a suit upon the bond". If this is the legislative intent, then surety companies will be liable for punitive damages even where they have not intended to contract for such liability. See CORBIN, CONTRACTS § 803 (1951); see also Philip Carey Co. v. Maryland Casualty Co., 201 Iowa 1063, 207 N.W. 808 (1926). The same public policy argument employed in the automobile liability insurance area, *supra*, is applicable here. If the bonding company is required to accept liability for punitive damages, then the wrongdoer has been permitted to contract away his punishment. Indeed, this would serve to shift punishment to the innocent, to those innocent parties whose bond premiums in effect provided the money used by the insurance company to pay the wrongdoer's punitive damages. See 5 WILLISTON, CONTRACTS § 1340 (Rev. ed. 1937).

[77] Other sections of IOWA CODE (1958) which may entitle a plaintiff to punitive damages as a matter of right are as follows: § 736.2 (blacklisting an employee); § 714.14 (injury to boats or rafts); & 82.126 (coal taken from adjoining land); § 479.17 (common carrier, law voalations); § 479.76 (common carrier, shipper's pass); § 709.14 (conversion of lumber); § 465.19 (drainage ditch injuries); § 455.159 (drainage improvement injuries); § 659.3 (libel and slander); § 478.7 (livestock injury, unfenced right of way); § 714.1 (malicious injury to property); § 740.6 (stirring up quarrels or lawsuits); § 82.112 (failure to pay coal miner's wages); § 646.21 (wanton aggression on real property); §658.1 (waste by guardian or tenant); § 658.9 (waste by tax certificate holder). Cases have arisen under a number of these statutes.

[78] Sokolowske v. Wilson, 211 Iowa 1112, 235 N.W. 80 (1931).

[79] Mendenhall v. Struck, 207 Iowa 1094, 224 N.W. 95 (1929); Casey v. Ballou Banking Co., 98 Iowa 107, 67 N.W. 98 (1896); Waller Bros. v. Waller, 76 Iowa 513, 41 N.W. 307 (1889); Wentworth v. Blackman, 71

affections;[80] interference with business;[81] trespass;[82] and wrongful eviction.[83] As noted, for violations of the Dram Shop Act or deceit by an attorney the statutes do not require a finding of malice and therefore the jury should award punitive damages upon a finding that the defendant is guilty of violating the code provision. In cases of rape or seduction there is no mention of malice, but evidently it is felt that the very nature of the act can lead to no other conclusion but that the defendant was activated by actual malice.[84] Nor is there any mention of malice connected with fraud, but some states require some evidence of willfulness or actual malice,[85] while others hold that there is no need to find actual malice.[86]

There remain, however, seven causes of action in which the question of malice seems not fully settled. These require some individual attention here. In the one case involving punitive damages for false imprisonment, the Court refused to allow punitive damages on the grounds that the defendant had a probable cause for believing that the plaintiff was a thief.[87] The Court went on to say: "While probable cause is not material upon the issue of false imprisonment, it is very important upon the issue of exempla-

Iowa 255, 32 N.W. 311 (1887); Inman v. Ball, 65 Iowa 543, 22 N.W. 666 (1885).

[80] Boom v. Boom, 206 Iowa 70, 220 N.W. 17 (1928).

[81] Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1911).

[82] Keirnan v. Heaton, 69 Iowa 136, 28 N.W. 478 (1886); Thomas v. Isett, 1 G. Greene 470 (Iowa 1848).

[83] Hartman v. Peterson, 246 Iowa 41, 66 N.W.2d 849 (1954); Jones v. Marshall, 56 Iowa 739, 10 N.W. 264 (1881).

[84] It should be noted that in a breach of promise suit the plaintiff may give evidence of defendant's financial condition, in order to show the extent to which the plaintiff was injured by the breach of promise of marriage. Milder v. Milder, 180 N.W. 274 (Iowa 1920); McKenzie v. Gray, 143 Iowa 112, 120 N.W. 71 (1909); Geiger v. Payne, 102 Iowa 581; 69 N.W. 554 (1896). In Morgan v. Muench, 181 Iowa 719, 156 N.W. 819 (1917), a case involving seduction and breach of promise, the Court said that it did not have to determine whether the damages awarded were punitive or "aggravated" damages when seduction was present. (It appears that punitive and "aggravated" damages are roughly the same, except that the latter has a compensatory flavor to it.) Whether this award of damages over and above actual damages be called punitive or "aggravated", the fact remains that their amount will undoubtedly be based to a great degree on the defendant's financial status, and since it is permissible to introduce this as evidence where a breach of promise is coupled with the seduction, it would be extremely advantageous for a plaintiff to exploit this situation.

[85] Caffey v. Alabama Machinery & Supply Co., 19 Ala. App. 189, 96 So. 454 (1922); Lutfy v. R. D. Roper & Sons Motor Co., 57 Ariz. 495, 115 P.2d 161 (1941); Sovereign Camp, W.O.W. v. Boykin, 182 Miss. 605, 181 So. 741 (1938); Waters v. Novak, 94 Ohio App. 347, 115 N.E.2d 420 (1953); Cays v. McDaniel, 204 Ore. 449, 283 P.2d 658 (1955).

[86] District Motor Co. v. Rodill, 88 A.2d 489 (1952) (D.C. Mun. App.); Hart v. Goebelt, 350 Ill. App. 325, 112 N.E.2d 726 (1953); Kearns v. Sparks, 360 S.W.2d 353 (Mo. 1953); Weatherford v. Home Finance Co., 82 S.E.2d 196 (S.C. 1954).

[87] Sergeant v. Watson Bros. Transportation Co., 244 Iowa 185, 52 N.W.2d 86 (1952).

ry damages."[88] From this, one might conclude that if there were a lack of probable cause (an implied malice) this would be enough to allow an award of punitive damages. In this area, therefore, it is uncertain whether the jury must find only an implied malice through a lack of probable cause or actual malice from an intent to injure, before it is allowed to grant punitive damages.

This reference to "probable cause" leads to the subject of malicious prosecution. There must be an element of malice necessary to sustain the action of malicious prosecution, but this malice need not be hatred, spite, or an intent to injure. This malice may be implied from a lack of probable cause in the prosecution instigated by the defendant.[89] However, Prosser says that for punitive damages to be awarded in this area there must be more than this implied malice; there must be a personal ill will, or oppressive conduct in the prosecution instigated by the defendant (*i.e.* actual malice).[90] There is, then, a clear distinction between the malice necessary to sustain the action of malicious prosecution and the malice necessary for the jury to award punitive damages, and when the Court speaks of malice it is vital to know in what connection it is using that term. For example, in *Amos v. Prom, Inc.*,[91] a federal case involving an award of punitive damages for a violation of Iowa's Civil Rights Law, the court, in speaking of the malice necessary for an award of punitive damages in that area, traced a history of malice in Iowa and came to the conclusion that "Iowa law permits the award of exemplary damages where the defendant has intentionally committedd an illegal or improper act, without justification"[92] (*i.e.*, upon the basis of implied malice). To support this position the court cited three Iowa cases, all of which are malicious prosecution actions and all of which say that malice need not be personal ill will or hatred, but may be inferred from a lack of probable cause.[93] However, a thorough examination of these decisions reveals that in none of the three cases cited was there any mention of punitive damages. From this it appears that in those cases the Court was referring not to the malice required for an allowance of punitive damages, but rather to the malice required to sustain the action itself. In view of Prosser's comments, and based on two Iowa cases in which punitive damages were definitely in issue,[94] it is suggested that the prevailing view in Iowa is that in order for punitive damages to be awarded

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[88] *Id.* at 200, 52 N.W.2d at 95.
[89] PROSSER, TORTS 658-59 (2d ed. 1955).
[90] *Ibid.*
[91] 115 F. Supp. 127 (N.D. Iowa 1953).
[92] *Id.* at 136.
[93] Schnathorst v. Williams, 240 Iowa 561, 36 N.W.2d 759 (1949); Wilson v. Lapham, 196 Iowa 745, 195 N.W. 235 (1923); Jenkins v. Gilligan, 131 Iowa 176, 108 N.W. 237 (1906).
[94] White v. International Text Book Co., 164 Iowa 693, 146 N.W. 829 (1914); Flam v. Lee, 116 Iowa 289, 90 N.W. 70 (1902).

in a malicious prosecution action, the jury must find that the defendant was activated by actual[95] malice.[96]

The concept of "probable cause" is found also in the action for wrongful attachment (was the attachment writ sued out with or without probable cause?). In an action on an attachment bond the statute[97] makes it clear that something more than implied malice is required in order for a jury to allow exemplary damages. The statute says that a party may bring an action for wrongful attachment if he can show that the attachment was wrongfully sued out and that there was "no reasonable cause to believe the ground upon which the same was issued to be true. . . ." This appears to be implied malice from a lack of probable cause. The Code goes on to say "and if it be shown that such attachment was sued out *maliciously,* he may recover exemplary damages. . . ." [Emphasis added.] From this, it could be concluded that "maliciously" means "with actual malice" since implied malice is referred to earlier. In actions concerned with an attachment bond this rule has been applied. Although one case allows punitive damages to be awarded on an inference of malice,[98] and another intimates that this would have been permitted if the plaintiff could have sustained the proof of implied malice,[99] the great majority of cases hold that the jury must find more than merely implied malice for punitive damages to be permitted; that there must be a showing of intent tantamount to actual malice.[100]

Although one case holds that the malice implied from a slanderous statement which is actionable per se will allow punitive damages to be given,[101] the general rule seems to be that announced in *Kinney v. Cady*[102] that punitive damages would not

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[95] In Connelly v. White, 122 Iowa 391, 98 N.W. 144 (1904), the Court allowed an award of punitive damages on finding of implied malice. However, there was ample evidence of actual malice is well.

[96] In deciding the amount of punitive damages to be awarded, the jury may also take into account the plaintiff's general character. Davis v. Seeley, 91 Iowa 583, 60 N.W. 183 (1894). This appears to violate a basic concept of punitive damages in that they are not intended to serve as compensation. Nor does the fact that the plaintiff may not be of spotless character diminish in any way the reprehensible nature of the defendant's motive.

[97] IOWA CODE §§ 639.14, 639.15 (1958).

[98] Welsh v. Haleen, 157 Iowa 647, 138 N.W. 502 (1912).

[99] Chismore v. Van Roden, 151 Iowa 270, 130 N.W. 1090 (1911).

[100] Pricer v. Meisters, 184 Iowa 1121, 161 N.W. 346 (1918); International Harvester Co. v. Iowa Hardware Co., 146 Iowa 172, 122 N.W. 951 (1910); Tyler v. Bowen, 124 Iowa 452, 100 N.W. 505 (1904); Smeaton v. Cole, 120 Iowa 368, 94 N.W. 909 (1903); Byford v. Girton, 90 Iowa 661, 57 N.W. 588 (1894); Wright v. Waddell, 89 Iowa 350, 56 N.W.650 (1893); Hurlbut, Hess & Co. v. Hardenbrook, 85 Iowa 606, 52 N.W. 510 (1892); Nordhaus v. Peterson Bros., 54 Iowa 68, 6 N.W. 77 (1880); Gaddis v. Lord, 10 Iowa 141 (1859); Raver v. Webster, 3 Iowa 502 (1856).

[101] Andreas v. Hinson, 157 Iowa 43, 137 N.W. 1004 (1912).

[102] 232 Iowa 403, 4 N.W.2nd 225 (1942).

be allowed "solely on the basis of the implication of malice which the law attaches to slander per se. . . ."[103]

Where libel is concerned another rule applies. An Iowa statute provides that in the case of libelous matter published in a newspaper, the plaintiff may recover exemplary damages if a retraction is not published. And even though a retraction is published, the plaintiff may recover punitive damages if the defendant cannot prove that the publication was made in good faith and without malice.[104] Therefore, in this situation, not only may the plaintiff rest upon an implied malice, but the burden of proof is shifted to the defendant to show his freedom from malice. Moreover, should the defendant fail to sustain this proof, the plaintiff may demand that punitive damages be awarded as a matter of right!

In the area of assault and battery the relationship of malice and punitive damages is uncertain. While one might think that the very nature and circumstances of the act itself would raise an inference of the malice necessary to permit an award of punitive damages, very little has been decided on the subject and only one case comes to that conclusion,[105] while two other decisions say that the jury must find that the act was done maliciously and wantonly,[106] which leads to a belief that proof of actual malice may be necessary.

Because the award of punitive damages for breach of contract is apparently a departure from the general rule, it would be well to pay particular attention to the jury instructions given in *Kuiken v. Garrett*. Instruction Eight informed the jury that in deciding if the defendant acted with malice, they were to consider the nature of the defendant's acts in serving the notices to quit. Instruction Nine stated, in part:

> punitive damages are allowed to the injured as an increased award in view of the aggravation of the injury to the feelings of the injured party . . . due to the malice of the party causing the injury. It carries also the idea of punishment to the wrongdoer for the wrongful acts and is a protection to the public against the repetition of the wrongful acts by the wrongdoer.[107]

It would seem that these instructions could be improved upon in two important ways. First, although the court says that the jury may consider the defendant's acts to determine whether or not he acted with malice, the Supreme Court said that this was granting punitive damages for breach of contract "under proper allegations of malice, wantonness and oppression".[108] Thus the

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[103] Id. at 412, 4 N.W.2d at 229. See also Cain v. Osler, 168 Iowa 59, 150 N.W. 17 (1914); Morse v. Times-Republican Printing Co., 124 Iowa 707, 100 N.W. 867 (1904).

[104] IOWA CODE § 659.3 (1958).

[105] Reddin v. Gates, 52 Iowa 210, 2 N.W. 1079 (1879).

[106] Shultz v. Enlow, 201 Iowa 1083, 205 N.W. 972 (1926); Irwin v. Yeager, 74 Iowa 174, 37 N.W. 136 (1887).

[107] Transcript 241.

[108] 243 Iowa at 800, 51 N.W.2d 149, 158.

language of the Supreme Court is much stronger than that of the trial court. In view of the Supreme Court's attitude, the defendant in such a case should request that the instructions clearly convey the concept that before the jury can award punitive damages, it must find that the defendant's acts in breaching the contract were "malicious, wanton and oppressive". This would require much more serious thought on the problem than merely "considering the defendant's acts" to determine if he acted maliciously. Also, as the discussion in connection with breach of contract has pointed out, the defendant's acts (according to the decision in the *Kuiken* case) must be the equivalent of an independent tort. So it would appear than any instruction failing to give the jury a clear conception of this idea could be grounds for appeal and perhaps a reversal as well.

Second, by referring to punitive damages as an increased award to the plaintiff "in view of the aggravation of the injury to the injured party", the trial court might have misled the jury into believing that such an award was intended to include mental pain and suffering. Of course, as elaborated above, such is not the case, and any instruction leaving the jury with such an impression may be grounds for appeal and reversal. In fact, in the instruction given in the *Kuiken* case, the punitive aspect of punitive damages was given only secondary importance! In any case where the plaintiff is asking that punitive damages be awarded, the defendant should insist that the jury receive the clear impression that punitive damages are to be awarded above and beyond all other damages.

In the *Sebastian* case, where gross negligence was involved, the Court said that actual malice was not required. It said that:

> If the conduct complained of is wanton or in willful disregard of the plaintiff's rights and therefore *legal malice*, it is immaterial how it is designated, as the conduct, itself, justifies the allowance of punitive damages.[109] [Emphasis added.]

From the nature of the foregoing material, it seems not unreasonable to conclude that punitive damages may be awarded for most acts if the plaintiff can prove that the defendant was activated by an intent to injure (actual malice) which is deserving of punishment. For example, the Court has allowed punitive damages in a dog bite case where the plaintiff proved that the defendant kept the dog maliciously.[110] In other cases, involving ejection from a train,[111] garnishment by creditors,[112] and acts of a

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[109] 246 Iowa at 107, 66 N.W.2d 841, 848. In gross negligence the Court is finding an implied malice or an implied intent to injure. Possibly this may lead to the conclusion that the Court is actually treating gross negligence as an *intentional* tort.

[110] Cameron v. Bryan, 89 Iowa 214, 56 N.W. 434 (1893).

[111] Curl v. Chicago, R.I. & P. Ry., 63 Iowa 417, 19 N.W. 308 (1884).

[112] Long v. Emsley, 57 Iowa 11, 10 N.W. 280 (1881).

constable,[113] the Court refused to allow punitive damages, but only on the ground that sufficient malice had not been proved. So it seems that for most malicious acts punitive damages may be obtained.[114]

IV. PLEADING

It is apparent that malice usually plays the key role in the award of punitive damages. Of primary importance to the pleader is Rule 96 of the Iowa Rules of Civil Procedure, which states that: "A party intending to prove malice to affect damages must aver the same." And two cases hold that if the plaintiff failed to allege malice in his petition, he may not prove malice at the trial.[115]

Although malice must be alleged, punitive damages need not be demanded in the petition (or counterclaim). The trial court may instruct the jury as to the permissibility of punitive damages if the facts as proved warrant such an award, without the plaintiff's prayer that such damages be allowed.[116]

In an action against a corporation, the corporation can be held liable for a malicious act by imputing to it the malice of its agent.[117]

If several defendants are joined in a tort action, then the punitive damages will possibly be assessed according to the malice of the most innocent of the group.[118] Otherwise an innocent party would suffer punishment. However, if the act committed was in itself a malicious act, then if one of the wrongdoers was activated by actual malice, all of the defendants will be subject to such

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[113] Plummer v. Harbut, 5 Iowa 308 (1857).

[114] To complete this discussion of malice, it should be noted that earlier it was said that punitive damages had been awarded against a defendant who caused plaintiff's wages to be withheld for an obligation already satisfied. Bishop v. Baird, *supra* note 35. In that case there was no direct evidence of malice, but the Curt held that merely a lack of probable cause was enough to justify punitive damages. As the sole authority on this point the Court cited a malicious prosecution case, Peters v. Snavely-Ashton, 144 Iowa 147, 120 N.W. 1048 (1909), and a wrongful attachment case, Smeaton v. Cole, 120 Iowa 368, 94 N.W. 909 (1903). In each of these cases it was said that malice may be inferred from a lack of probable cause. But neither case mentions punitive damages, and it appears that the inferred malice being spoken of is merely the malice necessary to sustain the action itself, rather than the malice required to justify awarding punitive damages. It is therefore submitted that the *Bishop* case is not sound in its analysis of the malice necessary to permit an award of punitive damages.

[115] Jones v. Marshall, 56 Iowa 739, 10 N.W. 264 (1881); Johnson v. Chicago, R.I. & P. Ry., 51 Iowa 25, 50 N.W. 543 (1879). However, in the *Sebastian* case, 246 Iowa at 107, 66 N.W.2d 841 at 848, the Court says: "If the conduct complained of is wanton or in wilful disregard of the plaintiff's rights and therefore legal malice, it is immaterial how it is designated, as the conduct itself justifies the allowance of punitive damages." Perhaps this rule would apply not only to cases of recklessness, but also to the type of action discussed in the text supported by note 84, *supra*.

[116] Morrow v. Scoville, 206 Iowa 1134, 221 N.W. 802 (1928); Gustafson v. Wind, 62 Iowa 281, 17 N.W. 523 (1883).

[117] Dunshee v. Standard Oil Co., 165 Iowa 625, 146 N.W. 830 (1914).

[118] *Ibid.* The Court gives this rule by way of dicta, 165 Iowa at 630, 146 N.W. 830, at 833.

punitive damages as may be assessed.[119] It would seem that if more than one defendant can be proved to have had actual malice, then punitive damages should be assessed against such defendants separately, to be paid by each individually, for only in this way would such damages serve the function of punishment. As a result the plaintiff could receive several awards of punitive damages.[120] Thus the plaintiff may wish to give considerable thought to the possibilities of joinder and non-joinder where punitive damages may be involved.

Finally, it has been consistently held that in order that punitive damages may be awarded, the plaintiff must allege and prove that he has sustained actual damages.[121] The Court has made it clear that nominal damages will not satisfy this requirement.[122] The purpose behind such a rule is not at all apparent. The Court seems to feel that the maliciousness or evil behind a wrongdoer's act should be punished only when this act causes actual damage. It may be argued that in most cases, unless the plaintiff has sustained actual damage, he has no cause of action upon which to ask for punitive damages. While this may be accepted with the realization that the courts are not equipped to handle a volume of business consisting of persons endeavoring to receive only punitive damages from some neighbor they particularly dislike, in a case in which the plaintiff does have a claim for only nominal damages it would seem perfectly reasonable to proceed with an award of punitive damages if the defendant is deserving of punishment.

V. REDUCTION OF DAMAGE AWARD ON APPEAL

As indicated earlier, in most cases it is peculiarly the province of the jury to decide whether or not punitive damages should be awarded. In accordance with this line of thinking there is a line of decisions that the amount of such damages to be awarded is also within the province of the jury. In these cases the Court displays a great reluctance to interfere with such an award even though the Court may feel it is excessive.[123] On the other hand,

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119 Reizenstein v. Clark, 104 Iowa 287, 73 N.W. 588 (1897).

120 The Court may be reluctant to grant so many punitive awards, but by logic and reasoning it should allow such separate punishments.

121 Shannon v. Gaar, 234 Iowa 1360, 15 N.W.2d 257 (1944); Clark Bros. v. Anderson & Perry, 211 Iowa 920, 234 N.W. 844 (1931); Connelly v. White, 122 Iowa 391, 98 N.W. 144 (1904); Kuhn v. Chicago, M. & St. P. Ry., 74 Iowa 137, 37 N.W. 116 (1888); Myers v. Wright, 44 Iowa 38 (1876).

122 Schwartz v. Samuel C. Davis & Co., 90 Iowa 324, 57 N.W. 849 (1894).

123 Heerde v. Kinkade, 85 N.W.2d 908 (Iowa 1957); Hartman v. Peterson, 246 Iowa 41, 66 N.W.2d 849 (1954); Gregory v. Sorenson, 214 Iowa 1374, 242 N.W. 91 (1932); Taylor v. Williamson, 197 Iowa 88, 196 N.W. 713 (1924); Reutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290 (1917); Dahl v. Hansen, 152 Iowa 555, 132 N.W. 965 (1911); Union Mill Co. v. Prenzler, 100 Iowa 540, 69 N.W. 876 (1897); Casey v. Ballou Banking Co., 98 Iowa 107, 67 N.W. 98 (1896); Byford v. Girton, 90 Iowa 661, 57 N.W. 588 (1894); Carpenter v. Scott, 86 Iowa 563, 53 N.W. 328 (1892);

there is a parallel line of cases in which the Court feels completely justified in declaring that the punitive damage award is excessive.[124] To formulate a test by which it may be predetermined whether or not the Court will hold a punitive damage award excessive appears impossible. For example, in a case involving seduction, in which the jury granted five hundred one dollars actual damages and six thousand dollars punitive damages, the Court declared the award not excessive, saying: "It is large. Upon the record before us, we do not feel justified in interfering, finding as we do that exemplary damages are clearly allowable in the case."[125] One year later, in a case involving rape, where one hundred fifty dollars actual damages and five thousand dollars punitive damages were awarded, the Court held that if the actual damage did amount to only one hundred fifty dollars, then the punitive award was disproportionate and therefore excessive.[126]

The latter decision suggests the only possible test that seems to be derivable, which is, that the Court somehow feels that there must be some proportional relationship between actual damages and the punitive award, otherwise there was an element of passion and prejudice in the award. At least this is the import of the language used in several cases where excessiveness of the punitive award was in issue.[127] But the Court never has said exactly what proportions are to be used, and it must be concluded that each case will be decided upon its own facts.[128]

It has been noted that there must be actual damages before punitive damages can be awarded. While the Court seems to be saying that the punishment to be assessed against the wrongdoer should be directly proportional to the amount of actual damage caused by the wrongful act, is it unreasonable that a person committing rape in which only one hundred fifty dollars actual dam-

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Redfield v. Redfield, 75 Iowa 435, 39 N.W. 688 (1888); Hendrickson v. Kingsbury, 21 Iowa 379 (1866).

[124] Sergeant v. Watson Bros Transportation Co., 244 Iowa 185, 52 N.W.2d 86 (1952); Plecker v. Knottnerus, 201 Iowa 550, 207 N.W. 574 (1926); Vowles v. Yakish, 191 Iowa 368, 179 N.W. 117 (1921)); Wildeboer v. Petersen, 182 Iowa 1185, 166 N.W. 464 (1918); Soesbe v. Lines, 180 Iowa 943, 164 N.W. 129 (1917); Manning v. Mead, 180 Iowa 932, 164 N.W. 113 (1917); Cain v. Osler, 168 Iowa 59, 150 N.W. 17 (1914); Waltham Piano Co. v. Freeman, 159 Iowa 567, 141 N.W. 403 (1913); Saunders v. Mullen, 66 Iowa 728, 24 N.W. 529 (1885); Sadler v. Bean, 38 Iowa 684 (1874).

[125] Reutkemeier v. Nolte, 179 Iowa 342, 352, 161 N.W. 290, 294 (1917).

[126] Wildeboer v. Petersen, 182 Iowa 1185, 166 N.W. 464 (1918).

[127] Vowles v. Yakish, 191 Iowa 368, 179 N.W. 117 (1921); Wildeboer v. Petersen, 182 Iowa 1185, 166 N.W. 464 (1818); Union Mill Co. v. Prenzler, 100 Iowa 540, 69 N.W. 876 (1897); Saunders v. Mullen, 66 Iowa 728, 24 N.W. 529 (1885); Sadler v. Bean, 38 Iowa 684 (1874).

[128] "But as the allowance of exemplary damages is wholly within the discretion of the jury in a case where there is a legal basis for such [exemplary] damages, . . . the finding of the jury can only be interfered with on the ground of such error in judgment as to indicate passion and prejudice, and where the allowance is so grossly excessive *under the evidence* that it should not be allowed to stand. . . ." [Emphasis added.] Ahrens v. Fenton, 138 Iowa 559, 562, 115 N.W. 233, ... (1908).

ages were caused may well be deserving of punishment amounting to five thousand dollars? It is suggested that the jury is the body to decide precisely the malevolence behind the defendant's act, rather than an appellate body so remote from the witnesses. If the nature of a defendant's acts should excite the jury, a presumably impartial body, to a degree of passion, perhaps this is highly indicative of the extent to which the wrongdoer should be punished.

If an award of punitive damages is held to be excessive, the case must be reversed rather than the excess merely remitted,[129] for the Court feels that the amount of punishment should be determined by a new jury, rather than by the Court.[130] The only exception to this rule is in a case where punitive damages have been awarded but the Court finds that the plaintiff has not presented sufficient proof to justify such an award. Then a remittitur may be granted as to the entire amount of punitive damages, and the actual damages will not be affected.[131]

J. G. JOHNSON (June, 1959)

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[129] Sergeant v. Watson Bros. Transportation Co., 244 Iowa 185, 52 N.W.2d 86 (1952); Crum v. Walker, 241 Iowa 1173, 44 N.W.2d 701 (1950); Plecker v. Knottnerus, 201 Iowa 550, 207 N.W. 574 (1926); Vowles v. Yakish, 191 Iowa 368, 179 N.W. 117 (1921); Haines v. M. S. Welker & Co., 182 Iowa 431, 165 N.W. 1027 (1918); Cain v. Osler, 168 Iowa 59, 150 N.W. 17 (1914); Waltham Piano Co. v. Freeman, 159 Iowa 567, 141 N.W. 403 (1913); Ahrens v. Fenton, 138 Iowa 559, 115 N.W. 233 (1908). *Contra*, Manning v. Meade, 180 Iowa 932, 164 N.W. 113 (1917).

[130] Although no definite authority can be found, it is possible that should a case be reversed because of an excessive award of punitive damages the entire case must be retried—even as to liability for actual damages.

[131] Struth v. Community Builders, Inc., 248 Iowa 1250, 85 N.W. 2d 1 (1957); Boyle v. Bornholtz, 224 Iowa 90, 275 N.W. 479 (1937); Waller Bros. v. Waller, 76 Iowa 513, 41 N.W. 307 (1889).