All of the factors discussed in this article have, at one time or another, appeared to be pivotal and thus, any attempt by this writer to single out the "most important" factors would be counterproductive. It is crucial to note, however, that the importance of the factors discussed lies in their effect on the ability of the company to exercise control over the agent. The key word throughout is control.

1401(a). The court discusses many of the factors to be weighed in determining whether an agent is an employee or an independent contractor. In finding the agent to be an independent contractor, the court noted the following facts:

(1) the agent's contract was terminable for cause or upon three months written notice;
(2) the agent was designated as an independent contractor;
(3) compensation was predominantly in the form of commissions;
(4) the agent maintained his own office;
(5) supplies and equipment were purchased by the agent without reimbursement by the company;
(6) the agent employed his own secretary and determined the terms and conditions of her employment;
(7) the agent was free to solicit customers throughout the state in which he was licensed;
(8) the agent set his own office hours;
(9) the agent took vacations without the company's prior approval;
(10) the agent was not required to attend sales meetings;
(11) sales leads were not provided;
(12) no regular reports were required except policy application reports;
(13) the agent was free to adopt his own methods and style in soliciting insurance.

PUNITIVE DAMAGES: AN UNSETTLED DOCTRINE*

John D. Long†

An important question facing the courts, the insurance industry, and the insuring public is whether liability insurance covers punitive damages. The question, specifically, is whether a liability insurer is obliged to defend its insured against punitive damages claims and to pay resulting punitive awards. A substantial body of case law on the question leaves the issue open.[1] Several distinct and conflicting decision patterns among the jurisdictions where litigation has occurred have increased rather than reduced the uncertainty as to insurability. The insurability of punitive damages has also been discussed at length by numerous commentators who, more often than not, considered the issue in the context of some specific case. On balance, the commentators seem no more in agreement than the courts on whether liability policies should and do cover punitive damages awarded against those insured by such policies.[2]

To make matters still more difficult, the insurance industry itself is divided on the issue.[3] Some insurers take the position that liability policies definitely cover punitive damages arising out of non-intentional injuries unless (1) punitive damages are specifically excluded in the insurance contract or (2) a court with jurisdiction has ruled that such insurance is violative of public policy.

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1. *See* Annot., 20 A.L.R.3d 343 (1968) for a discussion of numerous cases. Many cases directly or indirectly supportive of insurance coverage of punitive damages are not included in the A.L.R.3d annotation. *E.g.*, General Cas. Co. v. Woodby, 238 F.2d 452 (6th Cir. 1956) (as to vicarious liability); State v. Farm Mut. Auto. Ins. Co. v. Hamilton, 326 F. Supp. 931 (D.S.C. 1971); Continental Ins. Co. v. Hancock, 507 S.W.2d 146 (Ky. 1973); Malanga v. Manufacturers Cas. Ins. Co., 28 N.J. 220, 146 A.2d 105 (1958) (as to vicarious liability); Wolff v. General Cas. Co. of America, 68 N.M. 292, 361 P.2d 330 (1961); Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (Ct. App. 1971); Maryland Cas. Co. v. Seidenberg, Civ. No. 7890 (N.M. Dist. Ct. 1970). Two cases squarely in opposition to insurance coverage of punitive damages and not among the A.L.R.3d citations are *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327 (1973) and *Padavan v. Clemente*, 43 App. Div. 2d 729, 350 N.Y.S.2d 694 (1973). Another case indirectly in opposition is *General Insurance Corp. v. Harris*, 327 S.W.2d 651 (Tex. Civ. App. 1959). Also not included in the A.L.R.3d citations are: a collaterally related case, *Laird v. Nationwide Insurance Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964), where the court ruled that an automobile insurer was not liable under an uninsured motorist (not a liability) coverage for punitive damages the insurer's own insured was entitled to receive from the uninsured motorist; and *Touchette v. Bould*, 324 S.2d 707 (Fla. App. 1975) where the court remanded the case for a new trial on all issues including punitive damages awarded vicariously against the insured employer.

2. A selected bibliography of these commentaries is included as an appendix to this paper.

3. The author reports in a separate paper some of the attitudes and practices of large insurers in regard to third-party punitive damages claims under various liability coverages. "Should Punitive Damages Be Insured," accepted by the *Journal of Risk and Insurance* for publication.

Other insurers routinely deny punitive damages claims on the grounds that such claims do not fall within the customary language of liability policies. This customary language restricts coverage to "damages *because of*" bodily injury or destruction of property. These insurers regard punitive damages claims as arising because of penalties imposed by the civil law rather than because of bodily injury or destruction of property. Still other insurers seem to be ambivalent on the issue, paying or resisting punitive claims as circumstances warrant.

One reason for so much confusion on the part of courts, commentators, and insurers as to insurance of punitive damages is the complexity of punitive damages themselves. The punitive damages doctrine, reasonably identifiable at its core, is highly nebulous at its margins. The immense amount of case law and related literature serve only to compound the issue.

This article leaves the insurance question in abeyance. It focuses, rather, on the punitive damages doctrine itself and provides a fairly succinct review of this doctrine. The purpose of this review is to enable readers to refresh themselves on various aspects of the doctrine and thereby place themselves in a position to pass better judgment on the question of whether punitive damages should be covered in liability insurance policies. Attention is given to (I) a brief background comment, (II) an old and a recent example of punitive awards, (III) identification of states that have rejected the punitive damages doctrine, (IV) rationales used to support punitive awards, (V) types of conduct deemed sufficiently antisocial to evoke punitive awards, (VI) characteristics of punitive damages, and (VII) common objections raised against punitive damages. A value judgment about the doctrine and speculation about its tenacity is then offered.

I. Background Comment

In the English legal system punitive damages (also called exemplary or vindictive damages) found their way into jury awards in the 1760's, if not earlier.[4] Since their early use, punitive awards have been a fertile source of controversy. The growing propensity of courts in numerous jurisdictions to award huge punitive damages has fanned the controversy significantly. Various defense attorney groups, insurance associations, and others are at work to expunge punitive damages from the law by judicial reform or by legislation.[5] Certain other attorneys, meanwhile, are schooling their colleagues on successful techniques for extraction of more and larger punitive awards.[6]

The controversy has serious implications for the public at large. If punitive damages are covered by liability insurance, the economic costs are spread

4. *See* Huckle v. Money, 95 Eng. Rep. 768 (1763).

5. For example, the Defense Research Institute has drafted a model bill for abolishing punitive damages. Defense Research Institute, The Case Against Punitive Damages 28 (1969) [hereinafter cited as The Case Against Punitive Damages].

6. *See* J. McCarthy, Successful Techniques in Cases for Punitive Damages and Bad Faith (1973) as cited and discussed in DuBois, *The Spectre of Punitive Damages in First Party Actions—Part II*, 42 Ins. Counsel J. 242, 244-245 (1975).

to the insuring public. If punitive damages are not subject to insurance, they may still be indirectly diffused to the public at large. For example, punitive awards against private or public enterprises[7] are likely to be reflected in higher prices, higher taxes, lower returns on capital or other ways.

II. An Old Example And A Recent Example

Placing an old case and a recent case in juxtaposition is useful in showing what has happened in the interim in respect to punitive damages.

A. *An Old Case*

Huckle v. Money[8] could have been the first case in which any sort of special name was applied to these damages. The expression "exemplary damages" appears in the record of that case.

Huckle was a journey-man printer who was taken into custody by a messenger of the King and held for about six hours. Lord Halifax, as representative of the Crown, had granted a general type of warrant (not restricted to named individuals) to four messengers to "apprehend and seize the printers and publishers of a paper called the *North Briton*, Number 45." Huckle was identified as a journey-man of one Leech, who was thought to have printed the paper, which apparently contained passages giving offense to Lord Halifax or others. In a trial before a jury the arrest and confinement of Huckle was deemed to have been a tortious act. Huckle was awarded damages of 300 pounds.

The King's Counsel, in a separate action, asked Lord Chief Justice Pratt (later known as Lord Camden) to grant a new trial on the grounds that the award was excessive. The King's Counsel pointed to the "inconsiderableness of his [Huckle's] station and rank in life" and to the fact that the detainers had "used him very civilly by treating him with beefsteaks and beer, so that he suffered very little or no damages."[9] The Lord Chief Justice was not swayed by the pleas of the King's Counsel. Rather, he was acutely sensitive to the danger of illegal search and seizure in the use of a dubious, blanket-type warrant that invited abuse. Referring to the jury, he said, "I think they have done right in giving exemplary damages."[10] He refused to grant a new trial or otherwise alter the award.

7. In *Ranells v. Cleveland*, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975), the court disallowed an award of punitive damages against a municipality that had been made by the trial court. The appellate court said that municipal corporations were to be distinguished from for-profit corporations, the former being engaged in administering governmental services for the public good. The court reasoned that a punitive award ultimately would be imposed on the taxpayers.
8. 95 Eng. Rep. 768 (1763).
9. Huckle v. Money, 95 Eng. Rep. 768 (1763).
10. *Id.* at 769.

Whether Lord Chief Justice Pratt or someone else named this doctrine is not material. The importance lies in the profound influence of the doctrine of punitive damages on common and statutory law in this country.

B. *A Recent Case*

The immensity of this influence can be seen in a recent award made by a circuit court in Montgomery County, Maryland. Punitive damages of $11,000,000 in favor of a surviving husband were awarded against the owner-developer of the El Dorado Towers apartment complex in White Oak, Maryland.[11] The husband's 30-year old wife, who was the mother of two young children, was brutally raped and murdered by a member of a furniture-moving crew who had forced his way into her apartment. The crew was employed by a subsidiary of a firm with whom the corporate owner of the complex had contracted for servicing of the apartment buildings.

One reason for the large size of the award apparently was a charge by plaintiff's counsel that the owner and the servicing firm, both named as defendants, had "lulled the tenants . . . into a false sense of security" in causing them to believe that the buildings were a safe place to live.[12] Although attorneys for the two defendants asked that the award be reduced, the trial judge allowed the award to stand and refused a request for a new trial.[13]

C. *Changes Over Time*

In the early and middle 1700's in England and North America it was difficult for juries to award damages for intangibles such as pain, impairment, embarrassment, inconvenience, and the like without the awards being challenged as excessive. The exemplary damages concept enunciated by Lord Chief Justice Pratt afforded juries a convenient and fairly reliable vehicle to help the plaintiff assuage the "smart" caused by the injury. In fact, these damages were often referred to as "smart money" to pay for the "hurt" not otherwise placated. "Smart money" was awarded not just for the intangible consequences of bodily injury but also for the indignities associated with seduction, deceit in inducing marriage, alienation of affection, and other improprieties. One maxim was that "[t]he jingle of the guinea soothes the hurt that honor feels."[14]

Over time the concept of compensatory damages in tort law was broadened to include compensation for pain, loss of limbs, impairment of bodily functions,

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11. Blum v. Investors Funding Corp., No. 37669 (Cir. Ct., Montgomery County, Md., Jan. 25, 1974). Some details are reported in *Business Insurance,* Feb. 10, 1975, at 35. Compensatory damages of $2,335,000 were also awarded against the apartment-complex owner and the service firm whose subsidiary employed the moving crew.

12. *Id.*

13. Bus. Ins., March 24, 1975, at 15. Steps reportedly were being taken to appeal the issue to the Maryland Court of Special Appeals, but as of October 1, 1976, no record of an appellate decision could be found.

14. C. McCormick, Damages § 81 at 287 (1935) [hereinafter cited as McCormick].

and a multitude of other types of human sufferings and detriments.[15] As a result, punitive damages tended to duplicate this compensation.

III. States Rejecting The Punitive Damages Doctrine

This redundance in punitive awards in conjunction with other reasons has been sufficiently persuasive to cause a tiny minority of states to repudiate, or never to embrace, the punitive damages doctrine.

Depending on who makes the tally, from four to six states do not allow punitive damages in civil actions. One authority, who compiled an annotated summary as of 1961, lists Massachusetts, Nebraska, New Hampshire, and Washington as generally in the "not allowed" category. These laws are all subject to important exceptions, but no two of them are subject to the same set of exceptions.[16] Illinois is also reported as "allowing" but "criticizing" punitive awards and Louisiana as having "rejected" the doctrine but as permitting "multiple damages."[17]

McCormick says categorically that four states, namely, Louisiana, Massachusetts, Nebraska, and Washington "definitely reject the doctrine altogether."[18] In a now out-dated classification, Sutherland considered Massachusetts, Nebraska, New Hampshire, Washington, and West Virginia as not allowing punitive damages.[19] Sedgwick in his ninth edition listed six states as generally disallowing punitive damages, but he offered numerous qualifications to his classification.[20] Modern commentators appear generally to list Louisiana, Massachusetts, Nebraska, and Washington as "not allowing" punitive damages.[21]

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15. As used in this paper, "compensatory damages" include (a) "special" damages that are often thought of as lost earnings, medical expenses, and other measurable economic detriment, and (b) "general" damages that go beyond measurable economic loss and include the intangibles mentioned above. Black's Law Dictionary 468-469 (4th ed. 1968).

16. H. Oleck, Damages to Persons and Property § 269 (1961) [hereinafter cited as Oleck].

17. *Id.* An example of a multiple damages award is found where, for example, three times the compensatory damages are awarded if the offensive act involves a violation of some particular statute. One can find treble damages, for instance, in the context of federal antitrust laws. *See* Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. Rev. 263 (1970).

18. McCormick, *supra* note 14, at § 78. He classifies New Hampshire (along with two other states) as allowing punitive damages by name but regarding them as merely extensions of compensatory damages. This point is pursued in part IV-A *infra*. McCormick does not isolate Illinois from the bulk of the states honoring the doctrine.

19. Sutherland, Law of Damages §§ 396-398, 400 (2d ed. 1893) [hereinafter cited as Sutherland]. Since the date of this publication, West Virginia changed its posture and upheld the doctrine. Mayer v. Frobe, 40 W. Va. 246, 22 S.E. 58 (1895).

20. T. Sedgwick, Measure of Damages § 358 (9th ed. 1920) [hereinafter cited as Sedgwick].

21. *See, e.g.*, Note, *Insurer's Liability for Aggravated Misconduct—Punitive Damages*, 1 Willamette L.J. 640, 641 n.6 (1961). In this Note case law is cited and the comment is made that no state has rejected the doctrine by statute, only by judicial decision. On the other hand, as reported in Oleck, *supra* note 16, some 17 states appear to have given the doctrine some type of statutory recognition, the others relying on judicial decision.

IV. Rationales Used To Support Punitive Damages

Punitive damages proved much too popular in most states to be discarded on grounds of mere redundance. At least four rationales have been used to justify punitive awards.

A. *Compensation*

One rationale advanced to support punitive damages, strangely enough, is compensation. A few states take the position that punitive damages are exclusively compensatory in purpose and are needed to supplement compensatory damages. Precisely why the supplement is needed and why the awards are still labeled as "punitive" are among the inscrutible matters of the law.

Oleck indicates that Connecticut and Kentucky view punitive damages as purely compensatory;[22] McCormick lists Connecticut, Michigan, and New Hampshire.[23] At least some of the recent commentators seem to have relied upon McCormick.[24] In Connecticut punitive damages, per se, are limited to the expenses of litigation less taxable costs.[25]

Beyond these states where compensation is the exclusive, or at least the overriding, function of punitive awards, several other states include compensation as one of the major functions. For example, the opinion in a Texas case brings out (1) that punitive damages include losses "too remote to be considered under a claim of actual damages, such as injury to feelings, loss of business, mental suffering, and other similar losses," and (2) that the "amount of such damages is within [the] sound discretion of [the] jury."[26]

One recent commentator says, in effect, that the Idaho supreme court has undergone a judicial revolution that makes compensation the primary purpose of punitive damages awards in Idaho.[27] Another commentator has observed that the Oregon courts have found a compensatory purpose in punitive damages.[28] As a reminder, however, that the compensatory purpose of puni-

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22. Oleck, *supra* note 16, at § 269.
23. McCormick, *supra* note 14, at § 77.
24. Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 520-21 n.32 (1957); *Insurance—Punitive Damages Must Be Excluded from Liability Coverage*, 16 Vand. L. Rev. 435, 436 n.11 (1963). However, Note, *Insurance Coverage and the Punitive Award in the Automobile Accident Suit*, 19 U. Pitt. L. Rev. 144, 146 (1957), lists only Connecticut and Michigan. Perhaps the failure of able writers to agree even on the states in which punitive awards are expressly compensatory is indicative of the elusive character of the doctrine. The reason for the omission of Kentucky by these commentators is puzzling, given the specific statutory basis cited in Oleck, *supra* note 16.
25. McCormick, *supra* note 14, at 77. Connecticut, however, also has a multiple-damages type statute relating to violations of automobile traffic regulations. Part of it reads as follows: "Each person who, by neglecting to conform to any provision of sections 14-230 to 14-242, inclusive, or section 14-245, 14-246, 14-247 or 14-293, causes any injury to the person or property of another, shall be liable to the party injured in double or treble damages if, in the discretion of the court in which any action is pending, double or treble damages are just, with the costs of such action." Conn. Gen. Stat. Ann. § 14-295 (1958).
26. Wright Titus, Inc. v. Swafford, 133 S.W.2d 287 (Tex. Civ. App. 1939).
27. Comment, *Insurance Coverage of Punitive Damages*, 10 Idaho L. Rev. 263, 272 (1974).
28. Note, *Coverage of Punitive Damages by a Liability Insurance Policy*, 39 N.D.L.

tive awards is not new, one need only observe a frequently quoted extract from *Smith v. Bagwell,*[29] decided in 1882: "[Punitive damages] blend together the interests of society and of the aggrieved individual, and are not only a recompense to the sufferer but a punishment to the offender and an example to the community."[30] This statement is a reminder of the *Huckle v. Money* concept of punitive damages.

B. *Punishment and Deterrence*

In the majority of jurisdictions the principal purpose of punitive damages is to punish flagrant wrongdoers and to deter them and others from engaging in flagrant conduct in the future. The theory of punishment and deterrence is explained by Prosser as follows:

> The idea of punishment, or of discouraging other offenses, usually does not enter into tort law, except in so far as it may lead the courts to weight the scales somewhat in favor of the plaintiff's interests in determining that a tort has been committed in the first place. In one rather anomalous respect, however, the ideas underlying criminal law have invaded the field of torts. Where the defendant's wrongdoing has been intentional and deliberate,[31] and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages . . . . Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.[32]

The punishment aspect of this concept was embellished in an 1851 opinion of the United States Supreme Court. The case involved a question of whether the plaintiff had built a mill dam higher than protection of his own interests required and to the detriment of the defendant, an upstream millowner, who had partially torn down the plaintiff's dam after alleging that the back-up of water was injurious to his activities.[33] The lower court jury awarded the plaintiff damages in excess of an amount sufficient to make him whole. The high court affirmed the award, stating:

> It is a well-established principle of the common law, that . . . a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff . . . . By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured.[34]

REV. 332, 334 (1963).

29. 19 Fla. 117 (1882).
30. Smith v. Bagwell, 19 Fla. 117, 121 (1882).
31. As observed, *infra* Division V, not all jurisdictions require intent and deliberateness as prerequisites for punitive damages.
32. PROSSER, THE LAW OF TORTS, § 2, at 9 (4th ed. 1971).
33. Day v. Woodworth, 54 U.S. (13 How.) 363 (1851).
34. *Id.* at 371.

The deterrence aspect of the theory can be clearly seen in an opinion delivered in the 1850's by the Tennessee supreme court.[35] This tragic case involved the mob lynching of a slave who had been charged with rape and murder and who was in jail in manacles, awaiting trial. The owner of the slave sued the mob leaders for damages in the loss of the slave, asking not only for compensatory but also for punitive damages. The jury in the trial court awarded compensatory damages of one cent on the ground that, even before the lynching, the slave's doom had already been sealed by the gravity of the charges against him. His market value, consequently, was regarded as zero. No punitive damages were awarded. The supreme court reversed the trial court and ordered a new trial:

> We think his honor [the trial judge] . . . erred in holding that this was not a case in which the jury might go beyond the actual value, and give exemplary and vindicative damages . . . . The damages should be such as not only to remunerate or compensate the plaintiff, but to operate as a punishment of defendant(s), and an example to deter others from like offenses. This principle is everywhere regarded as one of the most salutary influence [*sic*] in the administration of justice, tending to prevent wrongs by the double operation of punishment and example.[36]

C. *Revenge*

The fact that punitive damages are also known as vindictive damages gives hint of still another rationale used to support the doctrine. Such awards are said to offer an element of revenge both to the injured party and to society as a whole.[37] The theory is that the punitive damages award will cool the wrath and heal the wounded sense of honor of the injured party and, hopefully, dissuade him from taking justice into his own hand.[38]

Under this rationale the revenge is not purely private. It also has a public dimension. Punitive damages permit the public to extract its proverbial pound of flesh from one whose conduct grossly offends the public taste. An illustration can be found in *Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus and Mary*.[39] No punitive damages were awarded in this case; but the point is that there could have been a punitive award.

Gostkowski bought a burial plot in a Catholic church cemetery and buried his deceased wife, a parishioner, in the plot. Without his knowledge the cemetery officials moved her body to another plot in the cemetery, the first plot having been sold to another before it was mistakenly allotted to Gostkow-

35. Polk, Wilson & Co. v. Fancher, 38 Tenn. 336 (1858).
36. *Id.* at 340-41.
37. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522 n.40 (1957), cites three old sources in which this rationale is fully articulated.
38. In an 1814 English case Mr. Justice Heath said, "It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages." Merest v. Harvey, 5 Taunt. 442 (1814) as discussed in Fay v. Parker, 53 N.H. 342, 345 (1872).
39. 262 N.Y. 320, 186 N.E. 798 (1933).

ski. Gostkowski discovered the mix-up only when he returned to visit his wife's grave. In response to his suit, the trial court instructed the jury that, should the jury feel so inclined, it could award punitive as well as compensatory damages because of this affront to proper conduct. Although the jury did not see fit to make a punitive award, the New York Court of Appeals confirmed the propriety of such an instruction. The court regarded as abhorrent the disturbing of rest of one who sleeps in death. It sanctioned public censure for such disturbance and the resulting anguish to the survivors.

D. *Promotion of Justice*

Courts have also based punitive awards on the promotion of justice where justice otherwise might not be served. This rationale presumes that the availability of punitive damages will promote justice in at least two ways:

1. Availability of punitive damages may make it worthwhile for plaintiffs to sue defendants who should be sued but who, in the absence of punitive awards, would not be, because of the trifling nature of the actual damages suffered by the plaintiff. The public interest requires these defendants to be admonished. The prospect of punitive damages encourages the plaintiff to seek the admonishment.[40] This motive for bringing suit is sometimes discussed under the rubric of the "bounty" or the "private attorney general" theory.[41] A hypothetical example illustrates its operations: When Y thoughtlessly drives his automobile into a crowded pedestrian area, X is only slightly injured. No one else is hurt. The results could, and normally would, have been tragic. Providentially, they were only trivial in this case. The prospect of punitive damages could induce X to sue Y, who should be held responsible for his dangerous conduct. Without the prospect of punitive damages, X would not be able to collect a large enough judgment to make the suit worthwhile.
2. Availability of punitive damages may also bring about proper admonishment of a wrongdoer where compensatory damages alone would not suffice. A case which illustrates the possible insufficiency of compensatory damages is *Funk v. Kevbaugh*.[42] The plaintiff sued because the defendant had damaged the plaintiff's house and barn by sustained blasting preparatory to construction of a railroad. The de-

40. This rationale is evaluated in detail but is hardly given a passing grade by Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1183-88 (1931). Morris distinguishes among several types of cases and entertains several reservations about this rationale, implying that in some situations the cure may be worse than the original malady.

41. D. Dobbs, Handbook on the Law of Remedies § 3.9, at 205 (1973) [hereinafter cited as Dobbs].

42. 222 Pa. 18, 70 A. 953 (1908), *discussed in* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1185-86 (1931). Comment, *Factors Affecting Punitive Damages*, 7 Miami L.Q. 517, 523 (1953), argues that the remedy in this situation should be sought in equity. Dobbs, *supra* note 41, § 3.9, at 211-12 discusses the reluctance of equity courts to entertain pleas for punitive damages.

fendant could have used lighter blasting charges and not damaged the house or barn. The lighter charges, however, would have slowed the work and increased the expenses. The defendant realized that he could use the heavier charges, pay the compensatory damages should blasting damages occur, and still be financially ahead compared to his likely financial status were he to have used the lighter, less efficient blasting charges. The court, however, awarded the plaintiff punitive as well as compensatory damages and thus dealt effectively with the defendant who was heedless of the legitimate interests of the plaintiff.

V. Conduct Warranting Punitive Damages

Attention is now turned to the types of conduct that provoke juries to award punitive damages. A scattering of the statutes and cases on the subject are reported, enough to permit the reader to see considerable diversity among the states.

A. *Examples of State Statutes*

The *California Civil Code* provides as follows:

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.[43]

In a recent opinion interpreting the California statute, the court observed that any act warranting punitive damages has to be intentional and accompanied by malice:

> The malice required implies an act conceived in a spirit of mischief or with criminal indifference toward the obligation owed to others. *There must be an intent to vex, annoy, or injure.* Mere spite or ill will is not sufficient; and mere negligence, *even gross negligence is not sufficient to justify an award of punitive damages.*[44]

The North Dakota statute is quite similar to that of California.[45] The South Dakota statute also is similar, except that it adds that punitive damages can be awarded "in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity . . . ."[46] The Colorado statutory approach is somewhat different in omitting "oppression" and substituting "insult" and "a wanton and reckless disregard of the injured party's rights and feelings."[47]

43. Cal. Civ. Code § 3294 (West 1970), *as amended*, (Supp. 1976).

44. Ebaugh v. Rabkin, 22 Cal. App. 3d 891, 894, 99 Cal. Rptr. 706, 708 (Ct. App. 1972). The case involved a suit against a doctor and a hospital for compensatory and punitive damages alleged to have resulted from two patients being inadvertently switched and one of them being subjected to surgery prescribed for the other. The higher court reversed a lower court's award of punitive damages.

45. N.D. Cent. Code § 32-03-07 (1961).

46. S.D. Code § 21-3-2 (1967).

47. Colo. Rev. Stat. Ann. § 13-21-102 (1973). It also specifies that it applies to

B. *Examples of Court Decisions*

Attention is given now to a few of the decisions describing conduct that warrants punitive damages.

1. Idaho appears to use a standard quite similar to those in the statutes cited above: "They [exemplary or punitive damages] cannot be recovered unless the evidence shows clearly that the action of the wrongdoer is wanton, malicious, or gross and outrageous, or where the facts are such as to imply malice and oppression . . . ."[48]
2. In Illinois punitive damages "are allowed . . . where a wrongful act is characterized by circumstances of aggravation, such as willfulness, wantonness, malice, or oppression . . . ."[49]
3. Arkansas holds that "negligence alone, however gross, is not sufficient, and that there must be an added element of intentional wrong, or what is its equivalent, conscious indifference in the face of discovered peril, from which malice may be inferred."[50]
4. In Iowa "punitive damages are not allowed as a matter of right . . . . When malice is shown or when a defendant acted with wanton and reckless disregard of the rights of others, punitive damages may be allowed as punishment to the defendant and as a deterrent to others."[51]
5. South Carolina imposes on the jury not merely an option but a *duty* to award punitive damages "when under proper allegations a plaintiff proves a willful, wanton, reckless, or malicious violation of his rights . . . ."[52]
6. Arizona allows punitive damages "for gross, wanton, and culpable negligence . . . ."[53]
7. In Missouri, "wantonness and recklessness" furnish a basis for punitive awards.[54]
8. A Pennsylvania case stipulates that "Punitive damages will be allowed for torts committed wilfully, maliciously, or so carelessly as to indicate wanton disregard of the rights of the party injured."[55]

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a "wrong done to the person, or to personal or real property." OLECK, *supra* note 16, at § 269, in referring to the 1953 edition (41-2-2) indicated that Colorado allowed punitive damages for "mere recklessness."

48. Harrington v. Hadden, 69 Idaho 22, 24-25, 202 P.2d 236, 237 (1949).
49. Eshelman v. Rawalt, 298 Ill. 192, 196-97, 131 N.E. 675, 677 (1921).
50. St. Louis Southwestern Ry. v. Evens, 104 Ark. 89, 93, 148 S.W. 264, 265 (1912).
51. Katko v. Briney, 183 N.W.2d 657, 662 (Iowa 1971).
52. Sample v. Gulf Refining Co., 183 S.C. 399, 410, 191 S.E. 209, 214 (1937) (not awarded for "mere negligence"). *See also* S.C. CODE ANN. § 46-750.31(4) (Supp. 1975) ("The term '*damages*' shall include both actual and punitive damages.").
53. Ross v. Clark, 35 Ariz. 60, 68, 274 P. 639, 642 (1929).
54. Jennings v. Cooper, 230 S.W. 325, 328 (Mo. Ct. App. 1921). In this Kansas City Court of Appeals case, presumably *both* elements are required.
55. Thompson v. Swank, 317 Pa. 158, 159, 176 A. 211 (1934).

9. West Virginia's guideline, as enunciated in a relatively recent case, provides that "a person who comes to court and obtains redress of his personal grievances by way of substantial recovery of actual damages—mental, physical, or otherwise—will be permitted to mulct the defendant if he establishes that his injuries were inflicted in wanton disregard of his rights."[56]
10. North Carolina allows punitive damages "when there is an element of fraud, malice, such a degree of negligence, as indicates reckless indifference to consequences, oppression, insult, rudeness, mere caprice, willfulness, or some other element of aggravation in the act or omission causing the injury."[57]

C. *Some Observations*

Several observations can be made about these guidelines. First, they span an astounding range of conduct from "oppression, fraud, or malice" on the one extreme to "rudeness" or "mere caprice" on the other. Second, they are inconsistent as to whether gross negligence will support punitive awards. Apparently, the answer is negative in Arkansas but positive in the other states for which common law was cited, except possibly Illinois. Third, the guidelines are ambiguous at best and susceptible of conflicting interpretations. It is ironic that California, with its rigorously worded statute for punitive damages, recently has been a spectacular site of punitive awards.

Perhaps a fourth observation is permissible: that virtually any punitive damages guidelines can be construed to fit the pleasure of the judges and the juries called upon to administer the justice. If so, the conclusion follows that the conduct deemed sufficiently antisocial to warrant punitive damages cannot necessarily be identified in advance of a punitive award.

VI. General Characteristics Of Punitive Damages

As the result of the prodigious litigation involving punitive damages since *Huckle v. Money*, the doctrine has acquired considerable judicial trappings. These trappings, however, are somewhat unstable and not necessarily consistent from one jurisdiction to another.

A few of the general characteristics of punitive damages are enumerated below:

1. One proposition is that punitive damages are awardable only where the plaintiff can prove actual loss. However, the apparent simplicity of this proposition is deceiving.[58] The chief inconsistency

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56. Ennis v. Brawley, 129 W. Va. 621, 625-26, 41 S.E.2d 680, 683 (1946).
57. Holmes v. Atlantic Coast Line R.R., 181 N.C. 497, 499, 106 S.E. 567, 568 (1921).
58. Dobbs, *supra* note 41, § 3.9, at 208.

among the jurisdictions has to do with nominal damages. In some situations a plaintiff cannot show any measurable injury to support compensatory damages but the court on general principles wishes to show its empathy with the plaintiff. Nominal damages of, say, one dollar may be awarded. The court may then want to add punitive damages. An unsettled question is whether punitive damages can be supported by nominal (or token) actual damages.[59] Dobbs, in his *Handbook on the Law of Remedies*, suggests that the weight of authority is affirmative but that a substantial number of jurisdictions hold otherwise.[60]

2. Punitive damages must bear a reasonable ratio to actual loss suffered. The rub is that reasonableness in this context defies definition and may be interpreted quite differently from one jurisdiction to another. In Texas, for example, the rule is that exemplary damages must be reasonably proportioned to actual damages sustained.[61] In one Texas case where the ratio of punitive to compensatory was 40:1, the court did not find the ratio unreasonable.[62] Whether the reasonable ratio proposition has substance is debatable. It may be vacuous. It certainly is at odds with the use of nominal damages in punitive awards.
3. The plaintiff, as the incidental recipient, generally has no right to punitive damages but rather receives them only if and as they are awarded by the jury (or by the court in the absence of a jury).[63] Here again, the rule is not firm. For example, in South Carolina, according to Oleck, punitive damages are "as of right."[64]
4. Under the usual wrongful-death statutes, punitive damages are not appropriate where an act of the defendant resulted in wrongful death of another. Yet, in a substantial minority of states this characteristic does not apply.[65] In Alabama (and until January 1, 1974, in Massachusetts) all wrongful death damages are (were) regarded as wholly punitive.[66]

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59. In Missouri the answer was definitely yes when the jury awarded actual (or nominal) damages of one dollar and punitive damages of $25,000 in *Edwards v. Nulsen*, 347 Mo. 1077, 152 S.W.2d 28 (1941), a libel suit. In *Toomey v. Farley*, 156 N.Y.S.2d 840, 138 N.E.2d 221 (1956), the court in another libel case affirmed an award of actual damages of six cents and punitive damages of $5,000.

60. DOBBS, *supra* note 41, § 3.9, at 209. *See also* McCORMICK, *supra* note 14, § 83.

61. Comment, *The Reasonable Ratio Between Exemplary and Actual Damages in Texas*, 10 HOUSTON L. REV. 131 (1972). *See also* Comment, *Required Ratio of Actual to Exemplary Damages*, 25 BAYLOR L. REV. 127 (1973) in which numerous cases are cited.

62. Tynberg v. Cohen, 76 Tex. 409, 13 S.W. 315 (1890).

63. PROSSER, THE LAW OF TORTS § 2 (4th ed. 1971).

64. OLECK, *supra* note 16, § 269. *Sample v. Gulf Refining Co.*, 183 S.C. 399, 191 S.E. 209 (1937) seems to bear out this point.

65. McCORMICK, *supra* note 14, § 103. The Supreme Court of Florida recently held that punitive damages are not eliminated by Florida's Wrongful Death Act and may be recovered once for each death in an action under the Act, provided the facts justify imposition of a penalty. Martin v. United Security Services, Inc., 314 So. 2d 765 (1975).

66. McCORMICK, *supra* note 14, § 103, Coombs, *Wrongful Death Recovery Extended to Unborn*, 79 NAT'L UNDERWRITER 30 (1975).

5. Punitive damages, being personal to the defendant, do not usually survive such defendant.[67] This rule seems to be more universal than any of the previously enumerated ones.
6. Punitive damages historically have been awarded only in tort cases. There seems to be a growing tendency, however, to allow punitive damages in actions for breach of contract, especially in Texas and South Carolina.[68]
7. When punitive damages are assessed against each of multiple defendants, the defendants usually but not necessarily are severally and not jointly liable; assignees of the injured party may or may not recover the punitive damages, depending on local rules.[69]
8. Since one purpose of punitive damages is to punish the defendant, the net worth of the defendant is usually admissible evidence in the determination of how large the award need be to truly punish the defendant.[70] In some jurisdictions the financial status of the plaintiff is also admissible evidence. Additionally, in some jurisdictions financial evidence about either is admissible only for holding down the damages but not for supporting the initial plea.[71]
9. A principal, usually an employer, may become vicariously liable for punitive damages under the doctrine of *respondeat superior* for wrongful acts of an agent, usually an employee.[72] Among the jurisdictions, however, the rule admits of many qualifications, restrictions, and exceptions.[73]

Numerous other similarly unsteady characteristics of punitive damages could be identified. Those enumerated suffice to document the tenuousness of almost any generalization about punitive damages. A United States circuit court of appeals judge criticized punitive damages as follows:

> The term [punitive damages] is too loose, vague, indefinite, and uncertain; and its meaning often varies from state to state, court to court, and jury to jury. It is a chameleon of the law—changing its hue to the color of the situation in which it may be used.[74]

VII. Arguments Against Punitive Damages

A formidable array of arguments has been advanced against punitive

67. Sedgwick, *supra* note 20, 362; Oleck, *supra* note 16, at § 272.
68. Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 531-33 (1956). This Note draws on Oleck, *supra* note 16, § 270.
69. Oleck, *supra* note 16, § 272.
70. Dobbs, *supra* note 41, § 3.9, at 218-19. But the Supreme Court of Florida in *Rinaldi v. Aaron*, 314 So. 2d 762 (Fla. 1975) held that such evidence is not a prerequisite to a punitive award.
71. Oleck, *supra* note 16, § 272.
72. *Id.* §§ 271, 275B.
73. *Id.* *See also* Sutherland, *supra* note 19, §§ 408-11 for a discussion of how the law developed.
74. Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 443 (5th Cir. 1962) (Gewin, J., concurring).

damages. One objection is that punitive damages are not really damages at all but penalties that should be removed from the civil and confined to the criminal law. A scathing indictment of punitive damages appeared in an 1873 opinion by Justice Foster of the New Hampshire Supreme Court.[75] Justice Foster wrote in part:

> What is a civil remedy but *reparation* for a wrong inflicted . . . ? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law.[76]

Judge Foster concluded his opinion by recommending that: "Wherefore, not reluctantly should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim,—'I have no need of thee.' "[77] Judge Foster pointed out that a synonym of "damage" is "loss." He said that "damage" comes from "demo" and signifies the lost thing that a person is entitled to have restored to him in order to be made whole again.[78] The argument is that by no stretch of the imagination can something that is "punishment" also necessarily be "damages." The conclusion is that, at the least, punitive damages are dangerously misnamed.[79]

Another frequently cited objection is that the awarding of punitive damages can place a defendant in double jeopardy. Having been forced to pay punitive damages for a particular misconduct, the defendant may also face criminal prosecution for the same act. Neither judgment necessarily has any mitigating effect on the other.[80] Such double jeopardy is said to fly in the face of constitutional rights.[81] Indiana has taken the distinct position that punitive damages are not awardable where double jeopardy could be involved.[82] By and large, the argument of double jeopardy has not been especially effective outside of Indiana.

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75. Fay v. Parker, 53 N.H. 342 (1873).
76. *Id.* at 382.
77. *Id.* at 397.
78. *Id.* at 342-43.
79. Note, *Can Damages Properly Be Punitive?*, 6 JOHN MARSHALL L.Q. 477 (1941) argues that punitive damages should be called "aggravated damages" and treated as though they were compensatory.
80. MCCORMICK, *supra* note 14, at 82.
81. The fifth amendment to the United States Constitution and similar provisions in state constitutions provide that "no person shall be put in jeopardy of life or liberty twice for the same offense. . . ." Presumably, "liberty" is ultimately affected by having to pay two penalties, one civil and one criminal, for the same offense and possibly being unable to do so.
82. Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 IND. L.J. 123 (1945). Aldridge says the position can be traced back to *Hudson v. Taver*, 5 Ind. 322 (1854).

Still another objection is that, with no meaningful standard available for assessing punitive damages, the size of the award is limited only by the passions and prejudices of the jury and the judicial philosophy of the judges. As observed earlier, the reasonable ratio rule is not necessarily determinative and leaves the trier of the facts with virtually unbounded discretion as to the amount, if any, of a punitive award.[83]

A closely related argument against punitive damages is that the procedural safeguards provided for the defendant in the criminal law are not found in the civil law. A defendant, consequently, is extremely vulnerable in standing before the bar of justice, subject to heavy penalties but without the protection enjoyable had the charge been commission of a crime. For one thing, the "guilty beyond a reasonable doubt" rule gives way to a weaker "weight of evidence" collective judgment by the jury. For another, the amount of the punitive penalty is not fixed in the civil as in the criminal action. For still another, the jury, unlike the judge, is not trained in setting penalties. Moreover, among other differences, the defendant is not protected from self-incrimination in a civil action.[84]

Another objection is that in multiple-defendant suits a punitive award proper for one defendant is highly likely to be improper for another. While a jury theoretically can gauge the financial status of each defendant and assess an award sufficient to punish but not overwhelm any defendant, juries are not wont to act with such finesse. The awards are almost certain to hurt some defendants unduly if they hurt others enough. As a result, the punishment-deterrent goal may not be achieved.[85]

A further argument against punitive damages is that the admissibility of evidence about financial information about the defendant is squarely at odds

83. Yet, as DOBBS, *supra* note 41, § 3.9, at 211, points out, the court in its wisdom can reduce punitive awards, with or without any mention of the reasonable ratio rule. Also, new trials can be ordered as to punitive awards. A dramatic example of a new trial being ordered is found in *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (Ct. App. 1974). The heirs of the occupants of an airplane, along with the owner, sued the manufacturer and were awarded $17,250,000 punitive damages along with about $4,500,000 of compensatory damages. The trial court ordered a new trial on the issue of punitive damages. The court of appeals affirmed the order granting a new trial but confining it to the owner, holding that there could not be an award of punitive damages in favor of the heirs since none of the decedents had a cause of action that survived his death, which was instantaneous with the crash. It is probably fair to say, however, that a good part of the reluctance expressed by Lord Chief Justice Pratt in *Huckle v. Money* to "intermeddle" in the findings of the jury still applies.

84. At least one author argues that the procedural differences are not so pronounced as might initially appear to be the case. Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967). For additional comparison of the civil and criminal procedures, including attention to determination of the amount of punishment, the appellate review process, the constitutionality of punitive damages in terms of procedural due process, the problem of double jeopardy, and the like, see Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158 (1966).

85. DOBBS, *supra* note 41, § 3.9, at 216 indicates that some jurisdictions will permit separate punitive awards against joint tortfeasors and, by implication, several and not joint liability on the part of the tortfeasors for the punitive damages. They are jointly and severally liable for the compensatory damages. He says that a few jurisdictions insist that punitive damages be levied equally or not at all against joint tortfeasors.

with evidence rules in regard to compensatory damages. The aim of compensatory damages is to restore the wounded plaintiff insofar as money will do so. Whether the defendant is rich or poor is not germane to the size of the plaintiff's hurt. The ability of the defendant to pay, then, has traditionally not had any legitimate place in the evidence accepted by the trier of the facts. With the punitive award supposed to be determined by giving consideration to the defendant's ability to pay, an apparently irresolvable conflict of rules of evidence arises. The two conflicting rules cannot be honored simultaneously in the same trial.

Punitive damages are further criticized when awarded vicariously against innocent employers whose employees have engaged in tortious conduct.[86] Opponents of the doctrine find it especially repugnant in its punishing further an employer who is already liable for actual damages caused by an employee and whose own personal culpability is either totally absent or minimal. These opponents feel that this rule is wrong. They feel, moreover, that even when a rule requiring "complicity of the employer" is used the courts are much too ready to find employer complicity[87] when no complicity really exists.[88]

Punitive damages are also condemned as constituting a windfall to and an unjust enrichment of the plaintiff.[89] A frequently quoted observation on this point was made by Chief Justice Ryan of the Wisconsin Supreme Court in 1877:

> It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering, he should recover anything more. And it is equally difficult to understand why, if the tortfeasor is to be punished by exemplary damages, they should go to the compensated sufferer, and not to the public in whose behalf he is punished.[90]

If a punitive award is a punishment by society of the errant defendant, something is to be said for paying the penalty to society rather than to some third party beneficiary. The Defense Research Institute has proposed model legisla-

86. The majority of cases on the point seem to hold that corporate employers are liable for punitive damages growing out of wrongful acts of employees. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 526 (1957). An example could be as follows: As E, a truck-driving employee of a national corporation is about to back a small truck into an on-street parallel parking space, a motorist approaches from the rear and "noses" into the parking space. In frustration, anger, and loss of self-control, E backs the truck into the other vehicle. In most jurisdictions, E's employer probably would be liable not only for compensatory but also for punitive damages awarded to the motorist, assuming E was pursuing the employer's business at the time of the mishap. The fact that E's record might have been spotless prior to this incident might have no bearing on the outcome.

87. Employer complicity may be indicated by not firing the employee.

88. DOBBS, *supra* note 41, § 3.9, at 214 makes the additional point that corporate employers probably succeed in passing on to their customers and/or their stockholders some or all of the punitive awards assessed against the employers. If this is true, culpable employees, aside from any insurance that may be involved, may already be escaping some or all of the penalties for their wrongful acts.

89. To the extent one accepts the "bounty" rationale for punitive damages, this argument becomes less serious because the plaintiff is being rewarded for "hauling the rascal(s) into court."

90. Bass v. Chicago & N.W. Ry., 42 Wis. 654, 672 (1877), as quoted in THE CASE AGAINST PUNITIVE DAMAGES, *supra* note 5, at 8.

tion that would make such penalties payable to the public treasury for the credit of the school fund.[91]

A new argument against punitive awards is that they do not fit into litigation where numerous plaintiffs sue the same defendant for compensatory and punitive damages arising out of one "mass disaster." If the early litigants win substantial punitive as well as compensatory damages, the later, and possibly equally deserving, litigants may not even collect their compensatory awards. The reason is that the defendant by that time may have run out of insurance and corporate assets because of the large number of claims. Justice that awards early comers so bountifully and leaves late comers with only hollow remedies may not be justice at all, the argument runs.

An example of the mass disaster litigation problem as it concerns punitive damages can be seen in the experience of Richardson-Merrell, Inc. in the 1960's. This firm was faced with several hundred suits on the grounds that one of its drugs (triparanol, marketed under the trade name "MER/29") produced serious and undisputed side effects, including loss of hair, dermatitis, and cataracts. The suits charged that some of the officials of the firm knew of the side effects but allowed the drug to be marketed anyway, thereby engaging in fraud and deceit. The major use of MER/29 was in reducing cholesterol. Many of the claimants sought punitive as well as compensatory damages. Some courts granted punitive awards while others did not. At one time 75 such cases were pending in the U. S. District Court for the Southern District of New York, in addition to those pending elsewhere. The United States Court of Appeals refused to affirm the federal district court's award of punitive damages in one case appealed to it. Judge Friendly observed: "[T]he apparent impracticability of imposing an effective ceiling on punitive awards in hundreds of suits in different courts may result in an aggregate which, when piled on large compensatory damages, could reach catastrophic amounts."[92] Alarmed about the prospect of "judicial overkill", the court opted not to affirm the lower court award of punitive damages, despite the fact that other appellate courts had seen fit to uphold punitive awards.[93]

One commentator has urged that in mass litigation because of fraudulent acts in marketing securities some sort of ceiling be placed on all punitive awards that could be made in any one mass disaster. The further recommendation was that the punitive awards be held in escrow by some appropriate agency until the money could be ultimately divided among the successful plaintiffs.[94] The Tenth Circuit Court of Appeals found this arrangement unworkable and refused

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91. THE CASE AGAINST PUNITIVE DAMAGES, *supra* note 5, at 28.
92. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967).
93. For example, the California court of appeals affirmed a trial court's award of $250,000 in punitive damages to a user of MER/29. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (Ct. App. 1967).
94. Gilden, *Punitive Damages in Implied Private Actions for Fraud under the Securities Laws*, 55 CORNELL L. REV. 646, 657 n.77 (1970).

to apply it in a case dealing with securities fraud.[95] Dobbs, writing in 1973, stated that "So far nothing that can be called a rule has developed out of all of this . . . ."[96]

Finally, the argument most strongly voiced is that punitive damages are no longer needed. Critics argue that punitive awards are now strictly redundant and that they represent a great idea "whose time has passed." The doctrine is said to be a legal relic. Some might even say it is a legal derelict. The argument runs that, while punitive awards might once have had a function, the compensatory damages concept was broadened long ago to include total compensation, making punitive damages purely superfluous. The all-encompassing nature of compensatory damages has been described as follows by a supreme court justice of a state that does not countenance punitive damages:

> There is nothing stinted in the rule of compensation. The party is fully compensated for all the injury done his person or his property, and for all losses which he may sustain by reason of the injury, in addition to recompense for physical pain, if any has been inflicted. But it does not stop here; it enters into the domain of feeling, tenderly inquires into his mental sufferings, and pays him for any anguish of mind that he may have experienced. Indignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary, are paid for under the rule of compensatory damages.[97]

VIII. A Value Judgment

A. *The Doctrine Is Indefensible*

To the author's way of thinking the case against punitive damages is overwhelming in its logic. The reasons are as follows:

1. Given the pervasive evolution of compensatory damages, no identifiable losses to the plaintiff are now so remote as to lie beyond the domain of compensation. Punitive damages, therefore, are strictly superfluous in terms of indemnity.
2. To the extent punitive damages fall on private or public enterprises, either directly or vicariously, the economic burden, as noticed above, is highly likely to be passed along to the public. The public, then, is in the peculiar and indefensible position of penalizing itself with the payment going as unjust enrichment to someone for whom the tort law, through the medium of compensatory damages, already fully provides.

95. deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir. 1971) as discussed in Dobbs, *supra* note 41, § 3.9, at 213.
96. Dobbs, *supra* note 41, § 3.9, at 213.
97. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891) as quoted and discussed in The Case Against Punitive Damages, *supra* note 5, at 6.

3. Punishment and deterrence of individuals should be a function of criminal rather than civil law. The criticisms about double jeopardy and lack of due process deal with genuinely fundamental matters. They should not be taken lightly.
4. Vicarious liability for punitive damages, unlike vicarious liability for compensatory damages, flies in the face of common sense. Since the purpose of compensatory damages is to make the injured plaintiff whole, a strong case can be made that payment, if not available from the wrongdoer, should come from an employer, parent, or other related entity. Where restoration of the victim is primary, the source of the payment is secondary. With punitive damages, however, the situation is drastically different. If the primary purpose is to punish the guilty party, it makes no sense to punish an innocent party in addition to or in lieu of punishing the guilty party. By definition, one who is *only vicariously liable* is innocent of culpable behavior. Culpability of any sort could be the basis for direct—not vicarious—liability.
5. The bounty, private attorney-general, and related rationales are seldom applicable. Except in the most unusual circumstances, these theories are simply far-fetched and strained elegancies that do not bear critical scrutiny. Alternative remedies, superior to punitive damages, invariably are available.
6. The doctrine, as Judge Friendly's comments in *Roginsky v. Robinson-Merrell, Inc.* indicate, simply does not fit modern product liability law. For one plaintiff in a mass disaster to collect punitive damages and thereby prevent another who may be equally or more deserving from collecting even compensatory damages is manifestly unjust. None of the makeshift solutions proposed for adapting the punitive damages doctrine to this problem appears workable.

B. *The Doctrine Will Persist*

Despite the lack of apparent logic to support punitive damages, such awards will probably persist. Reality has a logic all its own. The vigor of the plaintiffs' bar, the prevailing sympathetic temperaments of many state and federal judges, the disproportionately heavy representation of plaintiff attorneys in state legislatures and the United States Congress, and the tradition of two hundred years or so will not soon be overcome. Like it or not, punitive damages are virtually certain to remain a long-term fact of life in civil-action litigation.

Ultimately punitive damages may be abolished. In the meantime—which could stretch into years or even decades—employers, insurers, private citizens, and the public at large somehow will have to work out a coexistence with this tenacious anomaly in the law.

APPENDIX

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