

PUNITIVE DAMAGES IN PERSONAL INJURY CASES

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The avowed purpose of awards in personal injury cases is to compensate victims of negligence for financial losses and pain and suffering. When, however, a defendant is guilty of misconduct worse than negligence, he may incur an additional liability—for punitive damages to discourage repetition of his misconduct and to make an example of him. Most American courts will allow juries to award punitive damages in two kind of cases: (1) against defendants guilty of outrageous or oppressive intentional misconduct; and (2) against those guilty of reckless or wanton disregard of safety or rights.

A recent spectacular example of deserved civil punishment is *Bucher v. Krause*.¹ The plaintiff, an Oklahoman in Chicago to be married, was relaxing in a bar after his trip. Police detectives in search of a suspect impulsively seized the plaintiff; one officer thought plaintiff was reaching for a gun and shot him in the buttocks. His papers revealed the mistake; nevertheless, he was arrested, questioned, “booked” for resisting arrest, and released on bail. When he appeared for trial he was approached by a police confederate who purported to be a lawyer and who talked the plaintiff into signing a release. Since citizenship was diverse, a federal court entertained the suit, and entered judgment for 100,000 dollars. The defendants objected to allowing the jury to award punitive damages. The appellate court said no error had been committed because Illinois law permits a punitive damage award when wrongful acts are done with reckless disregard for others’ rights and in any event the cover-up activities were malicious. In reply to the defendants’ attack on the size of the verdict the court said that though most of the award was punitive damages, the jurors were entitled to consider that police officers were charged with atrocious conduct and intentional cover-up.

The major problem facing the court was discouragement of this sort of outrage. Liability for punitive damages seems to be a politic addition to other disciplinary forces in such cases as this.²

Not all punitive damage awards are so soundly merited. Mulcting a master in punitive damages for his servant’s tort is sometimes insup-

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¹ 200 F.2d 576 (7th Cir. 1952).

² See also *Suzore v. Rutherford*, 35 Tenn. App. 678, 251 S.W.2d 129 (1952). (Poacher awarded \$10,000 punitive damages against a landowner who shot him and left him in a remote place). Was the New Jersey court wise in *Mazzili v. Selger*, 23 N.J. Super. 496, 93 A.2d 216 (1952) to approve a \$5,000 punitive damage award against a nine-year-old boy who was also held liable for \$20,000 compensatory damages for shooting the claimant?

portable. For example in *Belcher Lumber Co. v. Harrell*³ a lumber company's drunken truck driver drove too fast and on the wrong side of the road and collided with a car carrying the plaintiff. The company was not implicated in their driver's drinking. Nevertheless, the jury was charged that if they found the driver wanton they could add punitive damages to an award against the lumber company. The plaintiff incurred a broken arm, permanent facial scars, and six years after the accident was still enduring severe headaches and impaired use of both hands. The jury's 7500 dollar award may have included little by way of punitive damages; the verdict may have been more sensible than was the charge.⁴ If this suit were against the driver, rather than his employer, an award of punitive damages would have been well deserved. But what reason supports a judgment which makes his employer do more than fully compensate the plaintiff?⁵ The lumber company probably did not pay these punitive damages out of its own funds. If it was insured and if the loss was not greater than its policy limits, its loss was paid by an insurer whose rates are based on "experience."⁶ Such punitive damages are, then, likely to be paid ultimately by the insuring public. If the lumber company was not insured, or the loss exceeded its limits, then its stockholders, creditors, or customers were eventual losers. None of these results seems very happy.

Fortunately juries are never *required* to give punitive damages; even when they may properly award them, they must be charged that if they are so-minded they can withhold them entirely.⁷ So defense

³ 252 Ala. 392, 41 So. 2d 385 (1949).

⁴ In *Southwestern Greyhound Lines, Inc. v. Rodgers*, 267 P.2d 572 (Okla. 1954) the jury was not so sensible; a bus driver recklessly and disastrously exposed his passengers to flood waters; a jury added \$4,000 punitive damages to a \$7,000 compensatory verdict against the bus company; the appellate court reduced punitive damages to \$500. *But see* *Hairston v. Atlantic Greyhound Corp.* 220 N.C. 642, 18 S.E.2d 166 (1942). In several cases the appellate courts have affirmed without discussion punitive damage awards against corporate employers of reckless drivers: *Knoblock v. Morris*, 169 Kan. 540, 220 P.2d 171 (1953); *Bush v. Watkins*, 224 Miss. 238, 80 So.2d 19 (1955); *Planters Wholesale Grocery v. Kincade*, 210 Miss. 712, 50 So. 2d 578 (1950); *Teche Lines, Inc. v. Pope*, 175 Miss. 393, 166 So. 539 (1936); *Dickson v. Inter-Carolinas Motor Bus Co.*, 161 S.C. 297, 159 S.E. 625 (1931).

⁵ When the sense of punishing other kinds of defendants fails, courts have ruled that no punitive damages may be levied. *E.g.*, a ward's estate is not liable for punitive damages for a guardian's wrong, *Shiver v. Frawley*, 167 Ia. 419, 149 N.W. 510 (1914); a right to punitive damages dies with the wrongdoer, *Evans v. Gibson*, 220 Calif. 476, 31 P.2d 389 (1934); *Morris v. Duncan*, 126 Ga. 467, 54 S.E. 1045 (1906); *Morris v. Barton*, 200 Okla. 4, 190 P.2d 451 (1947).

⁶ In *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934) the court held such punitive damage awards are covered by an automobile liability policy. See also *Maryland Cas. Co. v. Baker*, 304 Ky. 296, 200 S.W.2d 757 (1947).

⁷ For a recent case so holding, see *Luke v. Mercantile Acceptance Co.*, 111 Cal. App. 2d 431, 244 P.2d 764 (1952).

counsel can argue the injustice of such an award. This tactic is open, however, only to counsel willing to admit, *arguendo*, that the jury may have to calculate damages—an embarrassing assumption when liability is in doubt. Also this argument may be futile when an outrageously guilty servant is party defendant and the jury is faced with the alternative of either awarding punitive damages against both master and servant or against neither.⁸ In some jurisdictions the jury must return a separate award against each defendant mulcted in punitive damages,⁹ and the master is not automatically hit by a penalty fired at his servant.

At times, however, a corporate master should have its responsibilities for its servant's torts augmented by punitive damages. In *Parrott v. Bank of America*¹⁰ the claimant's personal injuries were relatively slight. She was a bank teller. A depositor mistakenly reported that a small sum was handed over to the plaintiff and not credited to her account. The bank's detectives and a branch superior, on flimsy corroboration, confronted the teller, demanded a confession, threatened to report her to the F.B.I., fired her, and charged the missing money against her savings account. The depositor found the money at home and reported the mistake to the bank. The plaintiff's superior exonerated her, and credited the missing amount to her savings account. But the bank refused to reinstate her and falsely told a prospective employer that she had been discharged because she was an inept teller. Her upset impaired her health for a year; she lost seventeen pounds, had fainting spells and required medical attention. She sued both the bank and some of its officers. The trial judge allowed the plaintiff to prove the bank's 284 million dollar surplus and gave the jury a punitive damage instruction. The appellate court affirmed a 30,000 dollar judgment entered on the jury's verdict.

The opinion clearly adverts to the fact that the corporation, as such, was mulcted in punitive damages, but says nothing about policies served by such a holding. Payment of the judgment out of corporate surplus reduced funds available to stockholders and depositors. Surely they deserved no punishment. Nevertheless, the bank's institutional activities had been unpalatable and corporate liability holds some hope of discouraging this kind of oppressive conduct in the future. If liability for punitive damages ran against only the wrongdoing employees the lesson might not be so effective—especially since judgments against them might be both smaller and harder to collect. Their superiors might secretly applaud their misplaced zeal—if it cost the corporation

⁸ Which was the case in *Miller v. Blanton*, 213 Ark. 246, 210 S.W.2d 293 (1948). See also *Martin v. Cambas*, 134 Ore. 257, 293 Pac. 601 (1930).

⁹ See e.g., *Kim v. Chinn*, 56 Cal. App. 2d 857, 133 P.2d 677 (1943). But see *Brown v. Scott Lumber Co.*, 125 Cal. App. 2d 68, 269 P.2d 891 (1954).

¹⁰ 97 Cal. App. 2d 14, 217 P.2d 89 (1950).

nothing this time and might protect its special interests in the future. Perhaps the oppressively zealous employees feel the award's sting even more when they implicate their bank than they do when the punitive award runs only against them personally. Their superiors are more likely to take corrective steps.¹¹

Some courts justify both masters' liability to pay punitive damages in cases like the bank case and masters' non-liability for punitive damages in cases like the lumber-truck-driver case in terms of organizational complicity. When superiors or "vice principals" are implicated, they are said to act for their corporate master in authorizing or ratifying lowlier employees' outrageous misconduct.¹² This theory, however, proves both too much and too little: it is a fictitious "explanation" for stockholders' anomalous burden of liability without fault for punitive damages, and it fails (as the next case will show) to extend corporate responsibility to some cases calling for institutional liability for punitive damages needed to control some instances of overly zealous conduct.

In *Atlantic Greyhound Corp. v. Austin*¹³ a bus driver accused a sick passenger of drunkenness and kept him off of the bus. His illness was aggravated and resulted in minor disability. No proof implicated any employee superior to the driver. Nevertheless, the appellate court approved a punitive damage award against the driver's corporate employer.¹⁴ If the corporation's responsibility were to respond only in

¹¹ *Jones v. West Side Buick Auto. Co.*, 231 Mo. App. 187, 93 S.W.2d 1083 (1936) is a case of clearer need for institutional reform; defendant corporation's shop foreman testified that the company followed the fraudulent practice of setting back used car speedometers; a misled buyer recovered \$150 actual and \$2,000 punitive damages. See also *Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955); *Weeks v. Carolina Power & Light Co.*, 156 S.C. 158, 153 S.E. 119 (1930); *Southwestern Gas & Elec. Co. v. Stanley*, 123 Tex. 157, 70 S.W.2d 413 (1934). *But see Cays v. McDaniel*, 204 Ore. 449, 283 P.2d 658 (1955).

In *Cashin v. Northern P.R.R.*, 96 Mont. 92, 28 P.2d 862 (1933) railway track maintenance workers annually fired dangerous blasts of dynamite and damaged a farmhouse and threatened the farm family's lives and limbs. The railroad paid for the damage to the house for three consecutive years. The fourth year they used an even heavier charge and inflicted personal injuries as well as property damages. It was cheaper to blast and pay compensation for the damage done than to use more arduous and considerate methods. Little wonder that the appellate court refused to disturb an award which added \$750 punitive damages to \$1,250 compensatory damages.

¹² See e.g., *District Motor Co. v. Rodill*, 88 A.2d 489 (D.C. Mun. Ct. 1952). Of course non-corporate masters can participate in servants' serious misconduct and become properly liable in punitive damages for their own misconduct. See e.g., *Favour v. Geltis*, 91 Cal. App. 2d 603, 205 P.2d 424 (1949); *Will v. Hughes*, 172 Kan. 45, 238 P.2d 478 (1951); *Sisco v. McNutt*, 209 F.2d 55 (8th Cir. 1954).

¹³ 72 Ga. App. 289, 33 S.E.2d 718 (1945).

¹⁴ See also *Eaddy v. Greensboro—Fayetteville Bus Lines, Inc.*, 191 S.C. 538, 5 S.E.2d 281 (1939).

compensatory damages for this minor injury, if only the bus driver could be mulcted in punitive damages, few lawyers would press the passenger's claim. The workaday status of the over-zealous (and probably judgment proof) driver enhances the need for a punitive damage award against his corporate master—an award calculated to bolster the institutional decency of bus companies. It would have been unfortunate if a rule of law requiring implication of supervisory personnel had prevented corporate punitive damage liability.

From an over-all viewpoint, then, the rules governing corporate employers' liability for punitive damages for their servants' torts seem to follow two crude patterns. Each of these rules raises different strategic considerations.

1. *The Vicarious Liability Rule.* As we have seen, some courts follow the all-out vicarious liability rule subjecting corporate masters to liability for punitive damages whenever their servants commit outrageous torts within the scope of their employment.¹⁵ This works well enough whenever institutional liability for punitive damages is needed to discourage the kind of tort committed. But it may overload liability insurance rates and corporate loss reserves to over-compensate some claimants in some cases in which punitive damages do not advance the public interest. Bus companies will discipline reckless drivers without being prodded; unless they are prodded, however, they may not discipline high-handed ones. This discrimination can be made in jurisdictions following the full vicarious liability rule only when juries (with the help of counsel) are wise enough to make it. Advocates ought to keep an eye out for cases calling for this discrimination. A plaintiff's lawyer in a high-handed-bus-driver case may advance his client's interest by arguing a need for corporate reform. He should anticipate this argument with proof, if such is the case, that the driver still has his job and has heard no sound of corporate displeasure. Defense counsel should be wary of making this plaintiff's tactic all the more effective by proof tending to show a practice of backing up this and similar misbehaviors.¹⁶ In a drunken-driver case defense counsel (if he has little hope of a verdict for the corporation and wants to

¹⁵ The court in *D. L. Fair v. Weems*, 196 Miss. 201, 16 So. 2d 770 (1943) adopts this view. See also *Sovereign Camp W.O.W. v. Roland*, 232 Ala. 541, 168 So. 576 (1936). In *Hairston v. Atlantic Greyhound Corp.*, 220 N.C. 642, 18 S.E.2d 166 (1942) this court recognizes this vicarious liability rule and also holds that when a carrier's employee willfully exceeds the scope of his employment to injure a passenger (whom the carrier has a non-delegable duty to protect) the carrier, as well as the employee, incurs liability for punitive damages. *Mayo Hotel Co. v. Danciger*, 143 Okla. 196, 288 P. 309 (1930) extends the same liability to innkeepers.

¹⁶ See the defendant's aggravating attitude in *Jones v. West Side Buick Auto Co.*, 231 Mo. App. 187, 93 S.W.2d 1083 (1936).

moderate compensatory damages and minimize a punitive award) can argue the corporate master's lack of complicity; the injustice of going beyond the claimant's needs to make example of a defendant who will, in any event, feel the sting of substantial compensatory damages; the company's willingness to pay reasonable compensatory damages; and the lack of need for improved institutional discipline.¹⁷ Of course he should not adduce proof that the corporation's driver has been disciplined unless he is willing to admit liability.¹⁸ But in a proper case such proof can be protective.

2. *The Complicity Rule.* This rule holds the corporate master liable for punitive damages only when superior officers either order, participate in, or ratify outrageous misconduct.¹⁹ The rule wisely protects corporations from vicarious liability for punitive damages when a properly supervised and disciplined employee acts outrageously; and it wisely allows for punitive damage awards against some corporations whose institutional conscience should be aroused. When low-level operating personnel have been overzealous or highhanded, hope of mulcting their corporate masters in punitive damages lies in proof of "ratification" strong enough to get to a jury. Given a case of nasty high-handedness, once the trial judge submits the ratification issue, plaintiff's counsel is not likely to have trouble in persuading the jury to make a punitive damage award. The psychological clue to effective advocacy on this issue may lie in convincing the trial judge that the case calls for institutional correction not likely to be forthcoming without a punitive damage award. A plaintiff's lawyer may lay a predicate in proof for this conclusion by questioning the misbehaving employee on the witness stand about his report to his superiors and their reactions to it, and by adducing officer admissions of failure to discipline the reporting employee. Defense counsel is well advised if he proves corporate rules and practices showing that the type of behavior with which the employee is charged is not condoned.²⁰

Good advocacy when a private individual may have incurred liability for punitive damages is a complex subject. Claimant's greatest

¹⁷ Tactics of this sort failed to impress the jury in the classic *Lake Shore & M.S.R.R. v. Prentice*, 147 U.S. 101 (1892).

¹⁸ It lies, of course, within the defendant's power to keep out proof of discharge of his injuring employee. *Gillet v. Shaw*, 217 Mass. 59, 104 N.E. 719 (1914); *Rynar v. Lincoln Transit Co.*, 129 N.J.L. 525, 30 A.2d 406 (Ct. Err. & App. 1943); *Engel v. United Traction Co.*, 203 N.Y. 321, 96 N.E. 731 (1911).

¹⁹ The classic statement of this theory is in Gray's opinion in *Lake Shore & M.S.R.R. v. Prentice*, 147 U.S. 101 (1892). See also *Sullivan v. Matt*, 130 Cal. App. 2d 134, 278 P.2d 499 (1955); *Stewart v. Potter*, 44 N.M. 460, 104 P.2d 736 (1940).

²⁰ In *Sullivan v. Matt*, 130 Cal. App. 2d 134, 278 P.2d 499 (1955) the court said that retention of employees who had hard-to-find skills was not proof of ratification.

advantage in most punitive damage cases is admissibility of proof of the defendant's wealth,²¹ a practice bottomed on the theory that a jury can give a more suitable award when it knows how much of a sacrifice the defendant will make in paying it. When the defendant is affluent and the claimant can prove defendant was guilty of intentional, outrageous misconduct, the advantage of praying for punitive damages is clear. For example, in *Suzore v. Rutherford*²² a negro poacher testified that an estate owner irately shot him point blank and left him wounded in remote woods. Proof was adduced of the shooter's lush income. The jury awarded 10,000 dollars punitive damages in addition to 4,000 dollars actual damages.

Sometimes impecunious wrongdoers are covered by liability insurance, and if their insurers must answer for them, substantial claims against them are well worth pursuing. Whether or not a liability insurer must respond for punitive damages has been little litigated, and the law's path in this terrain is not clear. There are, however, a few landmarks and the lay of the land is visible.

A liability insurer need answer for punitive damages only if (1) he has contracted to do so, and if (2) his contract is not against public policy and therefore void.

In *Abbott v. Western National Indemnity Co.*²³ the insurer escaped liability, probably on both of the above grounds. A policy holder was sued for assault and battery and paid a judgment for compensatory and punitive damages recovered by the victim of his drunken fisticuffs. The policy, however, expressly excluded coverage for intentional misconduct without mentioning punitive damages specially, but of course including them by implication. The court held for the insurance company and said the insured's claim was barred by the exclusion. The court was not called on to go any further, and did not clearly state an alternative ground for its holding. It did, however, quote a statute outlawing liability insurance covering penalties incurred by willful injurers.

In such assault and battery cases the victim is lucky when the attacker is able to pay for harm inflicted. The case's reasoning dims the hopes of any battery victim who wants to hold his attacker's insurer. When a liability insurance policy excludes the loss from its coverage, there is no basis for holding the underwriter.

²¹ In some jurisdictions this important advantage may be lost when more than one defendant is sued. See e.g., *Lehner v. Berlin Publishing Co.*, 211 Wis. 119, 246 N.W. 579 (1933). The proof of the most affluent defendant's wealth can, of course, be worth more than the joinder of less affluent defendants.

²² 35 Tenn. App. 678, 251 S.W.2d 129 (1952).

²³ 165 Cal. App. 302, 331 P.2d 997 (1958).

There are cases, however, in which courts have required a liability insurer to answer for punitive damages. Simplest in this class are cases in which masters, themselves without fault, have been held vicariously liable for their servant's torts. Their liability insurance policies may often be construed to cover their losses, and (since the master deserves no punishment) public policy is not offended. If the law barred these employers from buying insurance protection, it would unwisely expose them to unkind fate. Several cases have held that underwriters have covered and must answer for punitive damages in this kind of case.²⁴

In a few jurisdictions all damages recoverable for wrongful death are measured by the wrongdoer's culpability.²⁵ These damages are not "compensatory" in the sense that no attempt is made to calculate the financial value of the decedent's life; they are, however, paid to his relatives to help them adjust to financial problems that may have resulted from the death. These damages are "punitive" in the sense that they are assessed to discourage wrongdoing; they are not, however, withheld (as punitive damages usually are) unless the defendant has acted outrageously, intentionally, or recklessly; they may be given for simple negligence. If motorists in other states can and should insure themselves against liability for negligently killing someone, liability insurance should not be outlawed in a state in which damages for negligent death vary with the negligent wrongdoer's culpability rather than with the victim's financial value to his family. One court has passed on this problem and allowed a judgment creditor to reach avails of the wrongdoer's liability insurance.²⁶

In two cases, however, underwriters (who by terms of their policies covered punitive damage losses) have been required to answer for punitive damages assessed because of outrageous misconduct of their insureds. Both of these important holdings rest on rickety foundations and merit careful individual analysis.

In *Morrell v. LaLonde*²⁷ a surgeon inflicted unbelievably bad surgery on a patient and outrageously discharged her from his private hospital though she was in desperate need of hospital care. Under Rhode Island procedure, his liability insurer was properly joined with

²⁴ *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58 (8th Cir. 1934). In *Maryland Casualty Co. v. Baker*, 304 Ky. 296, 200 S.W.2d 757 (1947) and *Capital Motor Lines v. Loring*, 238 Ala. 260, 189 So. 897 (1939) common carriers had been required by statute to file bonds or insurance policies to protect third parties; the statutes were interpreted to require the surety or insurer to satisfy punitive damage awards against the carrier; thus, the legislature had settled both the problem of coverage and the public policy issue.

²⁵ Harper & James, *Torts* § 25.18.

²⁶ *American Fid. & Cas. Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935).

²⁷ 45 R.I. 112, 120 Atl. 435 (1923).

the surgeon as an additional defendant. The jury awarded compensatory and punitive damages against both defendants with a vengeance. The insurance company contended that it was improperly held liable for punitive damages. However, the underwriter had specifically agreed to indemnify against loss from liability imposed by law in consequence of malpractice or professional error, and the court could not be persuaded that the loss fell outside of the policy's terms. The court said nothing about the contract's consonance with public policy. An insurance company's agreement to answer for damages assessed as a penalty for the insured's outrageous misconduct is so clearly subversive that this silence is hard to explain. Perhaps the court stood mute and held as it did because under Rhode Island practice the defendants were not entitled to a verdict specifying how much of the award was punitive.²⁸ The insurer could have been excused from responding for punitive damages only by relieving him from paying compensatory damages as well—a result that would have debased all Rhode Island malpractice insurance.

In *General Casualty Co. v. Woodby*²⁹ an irresponsible drunken driver killed one person and injured another. He drove the death car with its owner's permission and so was covered by an "omnibus" clause in the owner's policy. Default judgments for more than 40,000 dollars were taken against the driver. The awards included unspecified amounts of punitive damages. The judgment creditors brought diversity suits in the Federal court against the insurance company. The policy covered "all sums which the insured shall become obligated to pay by reason of the liability . . . imposed upon him by law, for damages . . . sustained . . . by any person." The underwriter contended the policy did not obligate them to pay punitive awards because "they are penalties rather than damages." The court responded, "the punitive damages awarded in these cases are liabilities imposed by law within the meaning of the policy." After satisfying itself that the insurer had contracted to respond for punitive damages this court, too, stands mute on the consonance of such a contract with public policy. But this case does not cry for discussion of the point with the force of the malpractice case. There the surgeon was a party defendant and was not financially irresponsible. When the court required his underwriter to respond for him, his insurance insulated him from the shock of punishment. In the drunken-driver case the insurer's payment of the default judgment did not—as a practical matter—protect the driver from a money penalty that he otherwise would have paid; his irresponsibility already shielded him; he would not have been sued at all if had he

²⁸ *But see* *Madison v. Wigal*, 18 Ill. App. 564, 153 N.E.2d 90 (1958).

²⁹ 238 F.2d 452 (6th Cir. 1956).

not accidentally happened to be covered by another man's insurance. This is the very situation, then, when insurance puts meat on the bones of a bare claim.³⁰ The hope of an insurance lawyer who wants to attack this case's authority lies in its two weaknesses. First, though the insurance by its terms fortunately is and should be available to compensate the drunken car-borrower's victims, insurance rates should not be loaded to over-compensate them by requiring the underwriter to pay a penalty that the driver should pay. The insurance contract should not be interpreted to afford such coverage, unless the words clearly show it is intended. And even then the court should hesitate to approve such a contract as militating against the public interest. Secondly, the case is decided by a Federal court applying Tennessee law and based on no Tennessee authority.³¹ The only case on which the court relies is quite a different one—a case deciding that the protection of a master's liability insurance extends to punitive damages incurred vicariously for the wrong of his servant.³²

Opposed to these cases is *Tedesco v. Maryland Casualty Company*,³³ another case brought against an automobile liability insurer by a judgment creditor. The insurance was sold to a master whose servant was at the wheel when an accident happened. The claimant sued both master and servant. Against the master the claimant recovered a judgment for full compensatory damages. That amount was doubled for punishment in the judgment rendered against the servant—a practice called for by a Connecticut statute in certain kinds of cases. The servant was an additional insured under an "omnibus coverage" clause. The insurer paid single damages, but refused to pay the punitive doubling. Suit was for the penalty. The court held that even though the policy's terms covered this liability the insurer was not liable. The court said liability insurance covering criminal fines would

³⁰ Though my search has not been exhaustive, I have read a large sample of the modern cases and found only one other comparable to the malpractice and drunken driver cases. It is *Pennsylvania Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957) a federal diversity suit in which a judgment creditor for \$10,000 actual and punitive damages sought to reach the avails of an automobile liability policy. The insurance company contended that since the policy did not cover intentional wrongs, the company should escape *all* liability because the judgment included *some* punitive damages, thus establishing that the insured had acted willfully, rather than negligently. The court answered, in effect, that the policy did cover reckless disregard and that public interest would be poorly served were liability insurance unavailable to compensate the victims of reckless driving. The court does not come to grips with the problems involved in holding the insurance company for the punitive damage part of the award.

³¹ The Thornton case, *supra* note 30, was also a Federal case applying completely unstated local law.

³² *Ohio Cas. Ins. Co. v. Welfare Fin. Co.* 75 F.2d 58 (8th Cir. 1934).

³³ 127 Conn. 533, 18 A.2d 357 (1941).

be against public policy, and the same theory must apply to other coverages of obligations to pay money in no way representing compensation for losses but imposed only as penalties for public wrongs. It could be argued, of course, that the case is authority only on double damages under the Connecticut statute, but that argument reduces the dimensions of wisdom to narrow-mindedness.

The danger that claimant's counsel runs if he puts his faith in the malpractice and drunken-driver cases to collect punitive damages from an insurer of an otherwise irresponsible defendant does not end with a verdict and trial court judgment in his favor. Those two holdings rest upon rulings of law, rather than fact, rulings readily attacked on appeal; a verdict for punitive damages hard-won at the trial will go for naught if an appellate court holds either that punitive damages are not covered by the insurance contract or that such a contract is against public policy.

A plaintiff's attorney who must look to the avails of liability insurance to collect a personal injury judgment does well to consider carefully whether or not he needs a jury charge permitting an award of punitive damages. If he can prove only a small out of pocket loss and only minor pain and suffering, he may need such a charge to get and keep a verdict worth having; the risk is worth running.

On the other hand when claimant can prove impressive pain and suffering, and can also prove that the wrongdoer acted outrageously or recklessly, the verdict is likely to be substantial whether or not words are tucked into a long jury charge permitting an addition of punitive damages to the various items of "compensation" described and discussed. The theory of punitive damages (without the name) is built into the average juror's value system; the latitude permitted in calculating personal injury award is so wide that proof of defendant's outrage will enhance some verdicts without express instruction allowing punitive damages.³⁴ A claimant who asks for punitive damages in such a case may unnecessarily run a risk that the appellate court may disagree with the trial judge granting the request. A claimant whose only hope of enforcing his judgment is to look to an impecunious defendant's liability insurer runs two additional risks if he asks for punitive dam-

³⁴ ". . . if exemplary damages were eliminated many juries would increase the amount of the award for pain and suffering. Thus, one Wisconsin case was tried three times before different juries in different counties, twice with punitive damages allowed and once without; each verdict was for the same total amount." Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 521 (1957). The case referred to is *Bass v. Chicago & N.W.R.R.*, 36 Wis. 450 (1874); 39 Wis. 636 (1876); 42 Wis. 654, 71-2 (1877) a personal injury action in which each of the three verdicts was for \$4,500. Of course, it is rare coincidence that each verdict was exactly the same and not scientific proof. Nevertheless, the point made has some validity.

ages. (1) He may find that the insurer is not liable for punitive damages and lose part of an award that he would have gotten as compensatory damages had he not formally asked for punitive damages. (2) The tactics on proof of defendant's finances reverse, threatening the size of his compensatory award. We are talking about impecunious defendants. Of course claimants would not think of proving their poverty. But should a plaintiff pray for punitive damages in his petition, he invites defense counsel to offer such proof. This seldom exploited opportunity has the approval of three of the four courts that have passed on defendants' offers to prove their financial standing.³⁵ Of course, the defense should carefully couch its proffer: evidence of the modest finances of the defendant should be tendered only in mitigation of punitive damages. But jurors attempting to evaluate justly such amorphous items as pain and suffering and reduced longevity are likely to reduce claimant's compensatory damages after hearing a skillfully designed plea of poverty. In these case, then, claimants' lawyers serve their causes by stressing the heinousness of the defendant's misconduct but praying for only compensatory damages.

A request for a punitive damage instruction can also be bad strategy even when the defendant's affluence rids the claimant of concern about liability of defendant's insurer. In *Davis v. Gordon*,³⁶ for example, a speeding motorist hit and killed a pedestrian and fled the scene of accident. The trial judge granted the claimant a punitive damage charge which was held reversible error. Sometimes a jury gives a claimant no larger total when it is allowed to assess punitive damages than it would have given without such permission; even when actual and punitive verdicts must be separated, jurors may itemize a total they would have awarded as compensatory damages.³⁷

³⁵ The best authority I have found on this point is *Johnson v. Smith*, 64 Me. 553 (1875), an assault and battery case in which "the defendant offered evidence of his property and means, as bearing upon the matter of punitive damages and in mitigation thereof." The plaintiff had offered no proof on the defendant's finances. The trial judge excluded defendant's evidence. This ruling was held to be reversible error. The same result was reached in a slander suit in *Rea v. Harrington*, 38 Vt. 181, 2 Atl. 475 (1886). See also *Edquest v. Tripp & Dragstedt Co.*, 93 Mont. 446, 19 P.2d 637 (1933). *Mullin v. Spangenberg*, 112 Ill. 140 (1884) is a battery-false arrest case in which a defendant policeman offered to show his finances in mitigation of damages. The court held exclusion was correct since the plaintiff had not tried to prove him a man of wealth. This seems anomalous to me. If the jury should know a defendant is wealthy in a punitive damage case, poverty is equally relevant when such is the fact.

³⁶ 183 Md. 129, 36 A.2d 699 (1944).

³⁷ In *Smith v. King*, 239 S.W.2d 955 (Ky. App. 1951), another pedestrian wrongful death case, the jury gave \$10,000 compensatory and \$2,500 punitive damages. Kentucky statutes put no arbitrary limit on compensatory damages for wrongful death. Ky. Rev. Stat. 411.130. The \$2,500 may well have been an itemization, rather than an additional award.

When the jury itemizes punitive damages that should not have been given, an appellate court can eliminate that part of the verdict and thus avoid a new trial.³⁸ So claimant's lawyer who knows the verdict will be itemized runs a lesser risk in asking for punitive damages than is run when the verdict combines punitive and compensatory damages in a lump sum. But itemization entails another risk to claimants rooted in the "ratio rule"; many courts say a punitive damage verdict must bear a reasonable ratio to actual damages and may not be given at all unless actual damages are awarded.³⁹ In *Ennis v. Brawley*,⁴⁰ the defendant, irate because of what the plaintiff said about him in a newspaper article, slapped the plaintiff and pushed him around. The jury returned a verdict for one dollar compensatory and 3,000 dollars punitive damages. The court held that the compensatory verdict did not support the punitive award.⁴¹ This is especially unhappy when jurors (supposing that amounts allotted to each item are unimportant) assess only punitive damages when all or much of their award could have readily and properly been called compensatory.⁴² The ratio rule often outlaws or restricts punitive awards in the very cases in which a heavy penalty would be most politic—viz., instances of serious, oppressive misconduct happening to result in little or no provable financial loss. Fortunately, the courts have started to repudiate the rule.⁴³

When a claimant can prove a serious personal injury, the ratio rule is not likely to thwart or interfere with his claim; jurors finding for him are almost sure to award substantial compensatory damages and judges are even less likely to reduce punitive than actual dam-

³⁸ See e.g., *Chelini v. Nieri*, 32 Cal. App.2d 480, 196 P.2d 915 (1948); *Reyher v. Mayne*, 90 Colo. 586, 10 P.2d 1109 (1932).

³⁹ In *Madison v. Wigal*, 153 N.E.2d 90 (Ill. App. 1958) the reason given for requiring itemization is to make evident whether or not punitive damages are properly based on actual damages.

⁴⁰ 129 W. Va. 621, 41 S.E.2d 680 (1946).

⁴¹ See also *Livingston v. Utah-Colorado Co.*, 106 Colo. 278, 103 P.2d 684 (1940); *Allen v. Melton*, 20 Tenn. App. 387, 99 S.W.2d 219 (1936).

⁴² I suspect this may have happened in *Cook v. Atlantic Coast Line*, 183 S.C. 279, 190 S.E. 923 (1937). An extension of the rule is the source of another tactical risk; in *Hilbert v. Roth*, 395 Pa. 270, 149 A.2d 648 (1959) the court held that satisfaction of the compensatory award by one of two co-tortfeasors extinguishes the claim for punitive damages against the other since that claim is no longer supported by a right to compensatory damages.

⁴³ See *Finney v. Lockhart*, 35 Cal. 2d 161, 217 P.2d 19 (1950) affirming an award of one dollar actual and \$2,000 punitive damages for unfair competition on the theory that the ratio rule is only to guard against excesses; *Edwards v. Nulsen*, 347 Mo. 1077, 152 S.W.2d 28 (1941), affirming a verdict for libel of one dollar actual and \$25,000 punitive damages.

ages.⁴⁴ In some cases the claimant runs little or no risk of an appellate ruling that jurors were improperly allowed to assess punitive damages. In, for example, *Hughes v. Babcock*⁴⁵ an ejector broke an intruder's arm while throwing him out. The ejector was obviously an intentional wrongdoer, and a punitive damage instruction was clearly proper. More touchy are some cases in which the claimant tries to base a punitive damage award on proof that defendant "recklessly disregarded" the claimant's safety; the claimant runs the risk of a reversal of the trial judge's ruling that reasonable jurors could find proof of recklessness.⁴⁶ Sometimes precedents or authorities closely in point eliminate or reduce this risk. For example, once a court holds that driving while drunk is reckless disregard⁴⁷ it is not likely to reverse itself. In several cases plaintiffs' counsel successfully gambled on appellate court approval without precedent or authority closely in point.⁴⁸ In one of these⁴⁹ the damage proof tended to show prolonged disability, teeth knocked out, and need for medical attention; nevertheless, the award totalled only 2,250 dollars—and was perhaps not any larger than it would have been had the risk of reversal not been taken. In another⁵⁰ the gamble may have paid off; the compensatory award was 1,500 dollars and the punitive 7,000 dollars. In the third⁵¹ it is hard to tell whether or not the punitive damage instruction increased the verdict's size.

A mistake in theory threatens some claimants. Most courts permit no punitive damage award in contract cases. In *Chelini v. Nieri*⁵² an undertaker promised to preserve a corpse knowing war shortages would prevent him from doing so. When the customer discovered disintegration, he suffered a cerebral spasm. In an action for breach of contract the trial judge permitted the jury to award punitive damages. The appellate court said that the plaintiff's proof would have sustained a

⁴⁴ *But see* *Hughes v. Babcock*, 349 Pa. 475, 37 A.2d 551 (1944).

⁴⁵ *Ibid.*

⁴⁶ This is similar to the risk a plaintiff runs who asks that a jury be charged that if the defendant was reckless he may not rely on the defense of contributory negligence. See e.g., *Universal Concrete Pipe Co. v. Bassett*, 130 Ohio St. 567, 200 N.E. 843 (1936).

⁴⁷ See e.g., *Sebastian v. Wood*, 246 Ia. 94, 66 N.W.2d 841 (1954); *Madison v. Wigal*, 153 N.E.2d 90 (Ill. App. 1958); *Pratt v. Duck*, 28 Tenn. App. 502, 191 S.W.2d 562 (1945). Note, however, that two of these "precedents" have been set by only intermediate courts and reliance on them may be risky.

⁴⁸ See e.g., *Hadad v. Lockbey*, 176 Miss. 660, 169 So. 691 (1936); *Jeffers v. Hardeman*, 231 S.C. 613, 99 S.E.2d 407 (1957); *Hicks v. McCandlish*, 221 S.C. 410, 70 S.E.2d 629 (1952).

⁴⁹ *Hadad v. Lockbey*, *id.*

⁵⁰ *Hicks v. McCandlish*, *id.*

⁵¹ *Jeffers v. Hardeman*, *id.*

⁵² 32 Cal. 2d 480, 196 P.2d 915 (1948).

tort action for deceit (since the promise was made with knowledge it could not be performed) but that since plaintiff's pleading and argument sounded only in contract an award of punitive damages was improper. Well-known counsel found out, on appeal, that they had used inconsistent theories and had persuaded the trial judge to commit an error. However, the jury couched most of its verdict in an award of 10,000 dollars compensatory damages, and the appellate court struck down only the separate 900 dollar punitive damage award and rendered judgment for the balance. Counsel were indeed fortunate that the jury had not itemized differently and put more of the total into punitive damages.