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Liability of an Intoxicated Driver for Punitive Damages

LIABILITY OF AN INTOXICATED DRIVER FOR PUNITIVE DAMAGES

INTRODUCTION

The hazard presented by the intoxicated motorist is concededly a serious one. While his liability for damages of a compensatory nature is generally unquestioned, little has been said of an imposition of punitive damages against him. The right of an individual to be compensated for harm unjustly inflicted by another is fundamental to natural justice. Since the birth of civil litigation the injured have sought redress against those who have wronged them and the volume of these claims has steadily increased until today local court calendars for tort jury cases are overcrowded.[1] In addition to being compensated some plaintiffs find themselves the beneficiaries of a supplemental windfall in the form of exemplary damages. Also known variously as punitive or vindictive damages or smart money, the propriety of their award is based on the outrageous conduct of the defendant.[2] Though occasionally criticized,[3] the doctrine of exemplary damages is well established in most jurisdictions of the United States[4] and in England[5] with one author finding its roots in the Old Testament.[6]

Various theories have been suggested in an effort to discover its possible origin, notably the right of a jury to grant an award for items of damage which defied pecuniary estimate.[7] Now considered as a punishment imposed upon the defendant,[8] exemplary damages differ from criminal fines in that they are paid to the aggrieved individual rather than the state. Functionally, they also serve as a deterrent to the defendant and others with like tendencies, to warn against a similar course of conduct in the future.[9] The question of liability for these additional damages is, in a proper case, for the jury, who may consider both the character of the act and the extent of harm done.[10] The majority of jurisdictions do not demand that there be any exact proportion between compensatory and punitive damages[11] nor is the fact of concurrent criminal liability

1. Judicial Council of the State of New York, Twenty-First Annual Report 25 (1955).

2. Restatement, Torts § 908 (1939).

3. Fay v. Parker, 53 N.H. 342 (1873); Dain v. Wycoff, 7 N.Y. 191 (1852).

4. 2 Sutherland, Damages § 392 (4th ed. 1916); McCormick, Damages § 78 (1935).

5. Loudon v. Ryder [1953], 2 Q.B. 202 (C.A.); Merest v. Harvey, 5 Taun. 442, 128 Eng. Rep. 761 (K.B. 1814).

6. 2 Sutherland, Damages § 391 n. 8 (4th ed. 1916).

7. Fay v. Parker, 53 N.H. 342 (1873).

8. Restatement, Torts § 908 (1939); Powers v. Manhattan Ry., 120 N.Y. 178, 24 N.E. 295 (1890); DeMarasse v. Wolf, — Misc. —, 140 N.Y.S.2d 235 (Sup. Ct. 1955).

9. Gill v. Selling, 125 Or. 587, 267 Pac. 812, aff'd on rehearing, 126 Or. 584, 270 Pac. 411 (1928); Smith v. Myers, 188 N.C. 551, 125 S.E. 178 (1924).

10. Restatement, Torts § 908 (1939). New York, however, seems to reject the idea of admitting evidence of defendant's wealth. Stewart v. Mutual Clothing Co., 195 Misc. 244, 91 N.Y.S.2d 338 (County Ct. 1949); Wilson v. Onondaga Radio Broadcasting Corp., 175 Misc. 389, 23 N.Y.S.2d 654 (Sup. Ct. 1940).

11. Reynolds v. Pegler, 123 F. Supp. 36 (S.D.N.Y. 1954), aff'd, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955); Taylor v. Williamson, 197 Iowa 88, 196 N.W. 713 (1924); Sherwood v. Jackson, 126 Cal. App. 441, 14 P.2d 861 (1932).

considered a bar to such an award.[12]

Exemplary damages are generally allowed in intentional tort actions[13] such as libel[14] and assault.[15] Negligence, too, when attended by aggravating circumstances can justify their award[16] but difficulty at once arises in the application of this rule. How far may a defendant stray from the accepted standard of care before condemning himself to this form of civil punishment? Words such as 'gross', 'wanton', 'wilful', 'reckless', 'criminal' and the like have been employed to define the proscribed conduct.[17] At times used interchangeably, they serve best to illustrate the difficulty inherent in any attempt to differentiate between various degrees and kinds of negligence.[18] All agree that in addition to the simple negligence sufficient to justify compensation there must be present, when punitive damages are sought, the additional element of aggravation generally referred to as malice. The measure of malice needed varies from state to state. Some demand a consciousness that a particular mode of conduct will probably result in injury.[19] This misconduct differs in quality and kind from ordinary lack of care.[20] Other jurisdictions require not a state of conscious ill-will but rather a reckless disregard of the law and of the rights of others.[21] Commonly called gross negligence it differs only in degree from negligence.[22] The lack of clear-cut distinctions in most jurisdictions has drawn comment to the effect that there is little difference in practice between the two[23] and that the obscurity is due basically to a difference of definitions rather than one of conflicting principles.[24]

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12. Zick v. Smith, 95 N.J.L. 388, 112 Atl. 846 (Sup. Ct. 1921), aff'd, 97 N.J.L. 351, 116 Atl. 927 (1922); Cook v. Ellis, 6 Hill 466 (N.Y. 1844); Taylor v. Church, 8 N.Y. 452 (1853). Contra, Strauss v. Buckley, 20 Cal. App. 2d 7, 65 P.2d 1352 (1937).

13. 15 Am. Jur., Damages § 274 (1938).

14. Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920); Warner v. Press Publishing Co., 132 N.Y. 181, 30 N.E. 393 (1892).

15. Friedman v. Jordan, 166 Va. 65, 184 S.E. 186 (1936); Beavers v. Calloway, 61 N.Y.S.2d 804 (Sup. Ct.), aff'd, 271 App. Div. 820, 66 N.Y.S.2d 613 (1st Dep't 1946).

16. Powers v. Manhattan Ry., 120 N.Y. 178, 24 N.E. 295 (1890); 17, 18 Huddy, Cyclopedia of Automobile Law § 271 (9th ed. 1931); See also De Marasse v. Wolf, — Misc. —, 140 N.Y.S.2d 235 (Sup. Ct. 1955).

17. McDonald v. Moore, 159 Miss. 326, 131 So. 824 (1931); Kearns v. Widman, 194 Conn. 257, 108 Atl. 661 (1919); Atchison, T. & S.F. Ry. v. Ringle, 71 Kan. 839, 80 Pac. 43 (1905). The tests applied in other states are listed in 98 A.L.R. 267 (1935).

18. Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956).

19. Eatley v. Mayer, 9 N.J. Misc. 918, 154 Atl. 10 (Cir. Ct. 1931), aff'd, 10 N.J. Misc. 219, 158 Atl. 411 (Sup. Ct. 1932); State v. Diamond, 16 N.J. Super. 26, 83 A.2d 799 (App. Div. 1951).

20. Prosser, Torts § 33 (2d ed. 1955).

21. 2 Sutherland, Damages § 394 (4th ed. 1916); De Marasse v. Wolf,——Misc.——, 140 N.Y.S.2d 235 (Sup. Ct. 1955).

22. See note 21 supra.

23. Ibid.

24. 8 Ruling Case Law, Damages § 133 (1929).

ELEMENTS OF MALICE IN AUTOMOBILE ACCIDENT CASES

Once it is determined what test of aggravated negligence is applied in a particular jurisdiction, the problem then becomes one of proof. What facts are relevant to and will support a demand for punitive damages? In answer to this question one authority has said: "To enable a jury to exercise their discretion wisely for the purposes for which such damages are allowable all facts and circumstances which belong to the principal transaction and tend to develop its character should be submitted to them. There need not be positive proof of malice or oppression if the transactions or the facts shown in connection therewith fairly imply its existence, and it is left to the jury to look at all the circumstances in order to see whether there was anything in the conduct of the defendant to aggravate the damages."[25] Not only does the plaintiff enjoy this latitude of presentation, but the defendant also may show that he acted under a belief that what he did was justified or the result of sudden passion or fear.[26] Applying this theory, courts have permitted juries to consider, in automobile accident cases, excessive speed,[27] unlighted vehicles,[28] driving on the wrong side of the road, failure to give warning signals and general atmospheric conditions.[29] The conduct of the defendant after the accident, too, has occasionally been considered as relevant to his state of mind. Failure to stop after an accident, while insufficient of itself, has been submitted to the jury,[30] as have a refusal to render assistance and the use of abusive language.[31]

THE INTOXICATED DRIVER

The element of intoxication is perhaps the most striking in a given situation but it is one on which there is surprisingly little authority.[32] That it is not a mitigating circumstance which would preclude the formation of intent by the defendant has been established.[33] If not a tool of the defendant, to what extent if any may it be used by the plaintiff?

The law governing the operation of motor vehicles is contained in statutes in the various states and some violations, such as driving while intoxicated, are crimes.[34] In many states a violation also constitutes negligence per se.[35] While

25. 2 Sutherland, Damages § 393 (4th ed. 1916).

26. Voltz v. Blackmar, 64 N.Y. 440 (1876).

27. Kearns v. Widman, 94 Conn. 257, 108 Atl. 661 (1919).

28. Buford v. Hopewell, 140 Ky. 666, 131 S.W. 502 (1910).

29. McKenzie v. Randolph, 238 Mo. 828, 257 S.W. 126 (1923).

30. Hallman v. Cushing, 196 S.C. 402, 13 S.E.2d 498 (1941).

31. Friedman v. Jordan, 166 Va. 65, 184 S.E. 186 (1936).

32. Annotation in 3 A.L.R.2d 212 (1949) notes that as of that time there were four cases. Similar comment in Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956).

33. Schmidt v. Pfeil, 24 Wis. 452 (1869); St. Ores v. McGlashen, 74 Cal. 148, 15 Pac. 452 (1887).

34. N.Y. Vehicle and Traffic Law § 70 (5); Wis. Stat. § 85.13 (1939); Pa. Stat. Ann. tit. 75, § 231 (f) (1951); Okla. Stat. Ann. tit. 47, § 93 (1941).

35. 3, 4 Huddy, Cyclopedia of Automobile Law § 32 (9th ed. 1931); Western States Grocery Co. v. Mirt, 190 Okl. 299, 123 P.2d 266 (1942); Devine v. Bischel, 215 Wis. 331, 254 N.W. 521 (1934); Lincoln Taxicab Co. v. Smith, 88 Misc. 9, 150 N.Y. Supp. 86 (Sup. Ct. 1914).

this alone would not necessarily justify an award of punitive damages, would the fact that the defendant was driving while drunk be competent evidence on the issue at all? If the required wrong be but a greater degree of negligence, then certainly such evidence would militate against the defendant. On the other hand, if the wrong is of a different nature, and the defendant has admitted liability for compensation leaving only the issue of punitive damages, is evidence of intoxication still competent to show the required malice? A comparison to cases involving criminal statutes and their violation may provide the answer. In New York, for example, in a charge of murder in the first degree under section 1044(1) of the Penal Law, findings of intent, premeditation and deliberation are essential to support a conviction. The Penal Law also provides that an act is no less criminal because the person committing it was intoxicated at the time, but where specific intent is an essential element to a particular degree of crime the jury may consider the fact of the defendant's intoxication in determining the existence or non-existence of such intent.[36] Thus the courts have held that if the intoxication of the defendant has precluded the possible existence of premeditation and deliberation the crime is reduced to a lower grade of murder, or if the element of intent is also lacking, then to some degree of manslaughter.[37] The fact of his intoxication, however, ceases to be a defense when the crime charged is manslaughter in the first degree, killing in the heat of passion but in a cruel and unusual manner.[38]

The closest analogy to that negligence necessary to support a civil action for punitive damages is to be found in cases concerned with criminal liability imposed for the culpably negligent operation of a motor vehicle. This culpable negligence is defined as: ". . . something more than the slight negligence necessary to support a civil action for damages. It means disregard of the consequences which may ensue from the act and indifference to the rights of others."[39] An almost identical definition was employed in a later case dealing with the motor vehicle homicide statute.[40] In reversing a judgment of conviction, the Court of Appeals there noted that the only evidence supporting the charge was testimony to the effect that the defendant was speeding. Considered conspicuous was the absence of evidence that the defendant was intoxicated at the time of the accident.[41] A conviction under the same statute was recently sustained by evidence that the defendant was driving on the wrong side of the road at an excessive rate of speed and that he was intoxicated.[42]

The test of negligence sufficient to justify punitive damages in New York was established in 1874 when the Court of Appeals said: ". . . something more than ordinary negligence is requisite; it must be reckless and of a criminal nature and

36. N.Y. Penal Law § 1220.

37. People v. Leonardi, 143 N.Y. 360, 38 N.E. 372 (1894).

38. People v. Lee, 300 N.Y. 422, 91 N.E.2d 870 (1950).

39. People v. Angelo, 246 N.Y. 451, 457, 159 N.E. 394, 396 (1927).

40. People v. Bearden, 290 N.Y. 478, 49 N.E.2d 785 (1943).

41. Id. at 482, 49 N.E.2d at 787.

42. People v. Eurich, 278 App. Div. 717, 103 N.Y.S.2d 428 (2d Dep't 1951), aff'd 303 N.Y. 723, 103 N.E.2d 341 (1952).

clearly established."[43] The similarity to the definition used in criminal cases is obvious. Certainly, then, if the relative sobriety of the defendant is pertinent to the issue of his criminal liability it must also have a bearing on his liability for punitive damages. Oddly enough, this question does not seem to have been passed on by the courts of New York but it has been contended that evidence of intoxication was not admitted where the only question was that of punitive damages.[44] A possible cause for the dearth of cases may be a very practical one. In a hypothetical situation, a plaintiff is damaged extensively in person and property by a drunken driver. He sues, alleging that the accident was caused by the wilful and reckless misconduct of the defendant. In an offer of settlement, the defendant concedes liability for compensatory damages and promises prompt payment if, in return, the plaintiff is willing to drop the issue of punitive damages. The plaintiff realizes that any demand over and above compensation is at best a gamble and that if he insists on maintaining it he may have to wait a considerable time before his case comes to trial. He is also without the evidence of technical tests used by the police in proving intoxication. Eager to recoup his loss, the plaintiff accedes and judicial determination of the point is forestalled once again.

Decided cases on the subject in all jurisdictions are few[45] and they are not in harmony.[46] Where the recovery of punitive damages has been denied the reason given is that drunken driving is adequately disposed of in criminal proceedings and any additional punishment would be unjustified.[47] Most of the cases touching the point have considered the award appropriate.[48] There are slight variations within this latter group but in all instances evidence of intoxication has been admitted. In Wisconsin, for example, drunken driving is not of itself gross negligence nor is it even ordinary negligence per se but, upon findings that the defendant was actually negligent and also that he was intoxicated, a jury would be justified in calling him grossly negligent and in returning a verdict for punitive damages.[49] The courts of Arkansas sanction an award of punitive damages under substantially the same circumstances as do those of New York.[50] In commenting upon a particular defendant, the Arkansas court said: "When Miller imbibed alcoholic liquor he knew that he was taking into his stomach a

43. Cleghorn v. N.Y.C. & H.R.R. 56 N.Y. 44, 48 (1874).

44. 136 N.Y.L.J. No. 16, p. 4, col. 3 (correspondence).

45. See note 33 supra.

46. Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948).

47. Strauss v. Buckley, 20 Cal. App. 2d 7, 65 P.2d 1352 (1937); Giddings v. Zellan, 160 F.2d 585 (D.C. Cir.), cert. denied, 332 U.S. 759 (1947).

48. Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956); Ayala v. Farmers Mutual Auto Ins. Co., 272 Wis. 629, 76 N.W.2d 563 (1956); Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841 (1954); Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 50 So. 2d 572 (1951); Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); Ross v. Clark, 35 Ariz. 60, 274 Pac. 639 (1929).

49. Ayala v. Farmers Mutual Auto Ins. Co., 272 Wis. 629, 76 N.W.2d 563 (1956).

50. Compare test in Cleghorn v. N.Y.C. & H.R.R., note 43 supra, with that in Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293, 294 (1948). "In the absence of proof of malice or wilfulness, before punitive damages may be awarded, it must be shown that there was on the part of the tort feasor a 'wanton disregard of the rights and safety of others.' "