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EXEMPLARY DAMAGES IN INDIANA

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I

Quite frequently the jury renders a startling verdict. The average individual cannot perceive why a sum of such magnitude can be recovered when the actual injury suffered appears to be so trifling. The answer to this mystery is solved when we find that the jury, in many instances, allows a large amount as exemplary damages. For this reason, the writer has been interested in the doctrine of exemplary damages. Furthermore, this interest has been augmented by the peculiar theory of this kind of damage. While it is not the purpose of this short article to attempt a complete analysis of the entire field of exemplary damages, an effort will be made to cover the general principles in this anomalous doctrine of our substantive law, and to compare the position of our Indiana courts with the prevailing views of other jurisdictions.[1] Moreover, it is not the intent of the writer to indulge in any lengthy discussions regarding some of the controverted points involved in this topic because that phase of the subject has been thoroughly handled by several of our most eminent text book writers.

II

Stated as a general rule, motive is immaterial in the law of damages and full compensation may be recovered although the wrong was not inflicted intentionally or with any culpable purpose. Or, in other words, if a wrong has been committed, the jury may award the injured party indemnity for his losses without any inquiry as to the wrongdoer's frame of mind or method of inflicting the injury. However, when a question of exemplary damages arises, the mental state of the defendant, and the method used in causing the injury become highly important factors. Exemplary damages have been defined as damages given to an injured party when a tort is accompanied by malice, oppressiveness, fraud, or reckless disregard of the rights of others on the part of the wrongdoer.[2] Many of the courts call these damages punitive damages; in fact the terms are often used interchangeably.[3] While a few courts, at one time, attempted to distinguish between the two, it seems well settled now that they mean the same thing.

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[1] The writer is indebted to Professor Hugh E. Willis, of the Indiana University Law School faculty, for many helpful suggestions.

[2] Citizens Street Ry. Co. v. Willoely, 134 Ind. 563; State v. Stevens, 103 Ind. 55.

[3] State v. Stevens, ibid.

You will also find others calling them "vindicative" damages and sometimes "smart money."[4] As a general proposition, they are confined solely to tort actions, although there are a few exceptions to this rule which will be discussed later.

III

A brief examination of the authorities divulges that there are two principal theories of exemplary damages. One line of cases hold that they are given as a warning to other wrongdoers, and as a punishment to the defendant.[5] Or, in other words, they are more in the nature of a penalty, given in addition to the compensatory damages. This theory is unquestionably followed by the majority of the courts. The other view is that these damages are compensatory in nature, the theory apparently being that the bad motive and conduct of the wrongdoer increases the actual damage suffered.[6] For the most part this is the viewpoint championed by Professor Greenleaf. His argument was that damages should always be precisely commensurate with the injury, but that the wilfulness of the defendant's conduct should always be shown so that the jury might include in their assessment of damages the mental agony, indignity, and so forth suffered by the plaintiff.[7] Indiana is definitely aligned with the majority view. In State v. Stevens, the Court says:

"Exemplary or punitive damages are damages allowed as a punishment, or by way of example, to deter others from the like offenses, for torts committed with accompanying fraud, malice, or oppression."[8]

IV

Whenever a tort is accompanied by circumstances of aggravation, the majority of jurisdictions allow the recovery of exemplary damages. The doctrine seems to have made its appearance in England in the famous case of Huckle v. Money,[9] and has been adopted in practically all of our states as a part of the common law. However, there are a few jurisdictions which deny their recovery altogether.[10] In these jurisdictions, it is argued, that as a matter of logic, the whole doctrine is unsound. And it is submitted that when viewed from this standpoint alone, their reasoning is quite convincing. For instance, they point out that the whole theory of damages is that of compensation to the injured person, and that it is illogical and senseless to allow as damages any amount beyond reparation to the injured. Also they reason that it is unfair to the defendant to leave the matter of punishment solely in the hands of the jury. This last argument, however, doesn't carry much weight because all damages in a tort action if the injuries are non-pecuniary are, for the most part, left in the uncontrolled hands of the jury. This situation is exemplified in Indiana as the courts have been very

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4 Farman v. Lauman, 73 Ind. 568.

5 Cady v. Case, 45 Kan. 733, 26 Pac. 448; Day v. Woodworth, 13 How. 363, 14 L. ed. 181; Phila. Traction Co. v. Orbann, 119 Pa. 37, 12 Atl. 816; Bergmann v. Jones, 94 N. Y. 51; see also Sedgwick on Damages (9th Ed.), Vol. 1, Sec. 360.

6 Stevens v. Friedman, 58 W. Va. 78. 51 S. E. 132; Quigley v. Central Ry., 11 Nev. 350; Union Pacific Ry. v. House, 1 Wyo. 27.

7 Vol. 2, Greenleaf, Evidence (16th Ed.), Secs. 266 and 267.

8 103 Ind. 55.

9 2 Wills 205, 95 Eng. Reprint 768.

10 Fay v. Parker, 53 N. H. 342; Woodhouse v. Powles, 43 Wash. 617, 86 Pac. 1063; Bee Publishing Co. v. World Publishing Co., 59 Neb. 713, 82 N. W. 28; Murphy v. Hobbs, 7 Colo. 541; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1.

reluctant to reverse a verdict because of excessive damages.[11] Further, the latter argument is weak in that it presupposes that a jury is not as competent to inflict punishment as is the legislature. Although these few states refuse to sanction the doctrine of exemplary damages, there is at least one of them which allows the motive of a tort to be shown as tending to prove mental suffering.[12] It is submitted that as a practical result, the award in such a case may be as large as if exemplary damages themselves were allowed.

There are also a few states which allow the recovery of exemplary damages which are in fact compensatory.[13] That is, the damages, which they call exemplary, are those sometimes called non-pecuniary in character, such as damages for pain, mental suffering, and loss of reputation.

Indiana has always followed the common law rule with reference to this type of damage, subject to the conditions to be discussed later.[14]

V

(a) *Not Recoverable Without Actual Loss*

While the majority of the courts allow exemplary damages, the almost universal rule seems to be that the plaintiff must suffer some actual injury before he is entitled to recover them.[15] In other words, an individual can't maintain an action simply to inflict punishment. This rule is obviously sound because bad motive, in itself, does not constitute a cause of action. There must be a legal wrong committed before a person is entitled to any kind of damages. However, it is difficult to understand why an award of nominal damages will not justify the allowance of an additional amount as exemplary damages if the plaintiff's right has been invaded in a vicious manner. The theory of exemplary damages is punishment. Why should it make any difference whether a substantial or trivial injury was suffered if the purpose of their allowance is to punish the offender for his bad motive? A right has been invaded and therefore the fact that no serious injury resulted should be immaterial. The tendency of such conduct is that serious injury usually results, and the mere fact that it didn't so happen in a particular case seems unimportant. Of course, if the theory is that such damages are given as additional compensation, the result is clearly sound, but as has been pointed out, this is not the theory in most jurisdictions. In this connection it is important to notice that a few states sanction their recovery where nominal damages only are shown.[16] The writer has been unable to find any Indiana cases touching this point.

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[12] Hawes v. Knowles, 114 Mass. 518. In this case Chief Justice Gray said, "In an action of tort for a wilful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages; for when the merely physical injury is the same, it may be more aggravated in its effect upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff, than if it is the result of mere carelessness."

[13] Vol. I, Sedgwick, Damages (9th Ed.), Sec. 359.

[14] Farman v. Lauman, 73 Ind. 568; Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268.

[15] Hanewacker v. Ferman, 152 Ill. 321, 38 N. E. 924; Kuhn v. Chicago, etc., Ry. Co., 74 Iowa 137, 37 N. W. 116; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804; Maxwell v. Kennedy, 50 Wis. 648, 7 N. W. 657; McConathy v. Deck, 34 Colo. 461, 83 Pac. 135, 4 L. R. A. (N. S.) 358.

[16] Doster v. Western Union Telegraph Co., 77 S. C. 56, 57 S. E. 671; Prince v. Brooklyn Dailey Eagle, 37 N. Y. S. 250; Wilson v. Vaughn, 23 Fed. 229; Upchurch v. Robertson, 127 N. C. 127, 37 S. E. 157.

[11] Chgo. I. & L. Ry. Co. v. Stierwalt, 87 Ind. App. 478; City of Columbus v. Allen, 40 Ind. App. 257.

(b) *Circumstances of Aggravation a Prerequisite*

As has been heretofore mentioned, this type of damage is usually given where a tort is accompanied by the elements of malice, wilfulness, fraud, or oppression. The basis of their allowance rests upon some fact of aggravation, and if none exists, they cannot be recovered. A concrete example of this is found in the Indiana case of Moore v. Cross.[17] In that case, recovery was sought for an alleged trespass. It appeared from the evidence that the defendant honestly believed he had a legal right to commit the wrong. For this reason, the court held that the plaintiff was restricted to compensatory damages. However, malice, as used here, doesn't mean actual hatred towards the wrongdoer; it simply means a deliberate intention to do a wrong without any justification or legal excuse.[18] So also, fraud, as used in this connection, doesn't mean that an actual intent to deceive must be shown; if the representations are in fact false, and made with utter disregard of facts ascertainable by the use of due care, it is sufficient.[19]

When the tort complained of is simply negligence on the part of the defendant, exemplary damages cannot be recovered.[20] The reason for this is obvious. It is the element of wilfulness or wantonness for which the law inflicts punishment, and since in the tort of negligence these elements are lacking, recovery is denied. However, in many opinions, it is often said, that if the defendant is guilty of "gross" negligence towards the plaintiff, he may recover exemplary damages.[21] But here the language of the courts is confusing. As far as actual damage is concerned, it is immaterial what kind of negligence it is; if a person is negligent in any degree, he is liable for actual damages. In fact, the modern tendency is to abolish all degrees of negligence. What then do the courts mean when then they use the term "gross negligence"? A careful analysis of the opinions in which the term is used clearly shows that it is not used to describe negligence at all. What it actually means is that type of conduct generally known as "utter disregard for the rights of others." In tort law, this kind of conduct is something more than negligence although it does not mean the same thing as an intentional wrong. It is similar to intentional conduct, however, in that contributory negligence on the part of the plaintiff does not preclude him from recovering. It is frequently described as wantonness. In Indiana, however, an allegation of gross negligence would not entitle the injured person to recover exemplary damages. This position is taken by the court in the case of Louisville, New Albany & Chicago Ry. Co. v. Shanks.[22] In that case, the tort complained of was negligence on the part of the defendant in overloading a truck, causing the truck to fall upon the plaintiff. The lower court instructed the jury that if the defendant were guilty of gross negligence the contributory negligence on the part of the plaintiff would not bar recovery. The Supreme Court held that the instruction was erroneous, saying that in this class of cases there are no degrees of negligence and that gross negligence is no more than mere negligence. A second instruction told the jury that they might add exemplary damages in addition

17 43 Ind. 30.

18 Vol. II, Sutherland, Damages (3rd Ed.), Sec. 394.

19 Wheatcraft v. Myers, 57 Ind. App. 371, 107 N. E. 81.

20 Spencer v. San Francisco Brick Co., 4 Cal. App. 265, 89 Pac. 851; Chicago v. Martin, 49 Ill. 241; Birmingham Ry. L. & P. Co. v. Wise, 149 Ala. 492, 42 So. 821. See also 8 R. C. L., Sec. 133.

21 U. S. v. Taylor, 35 Fed. 484; Linsley v. Bushnell, 15 Conn. 225; Ry. v. Roberts, 88 Miss. 80, 40 So. 481; Caldwell v. N. J. S. B. Co., 47 N. Y. 282; Keystone L. & I. Co. v. McGrath, 21 So. 301.

22 94 Ind. 598.

to the compensatory damages. This instruction was also held erroneous, the court saying that wilfulness is not charged nor shown by the evidence and that for mere negligence, compensatory damages only, are allowable. Thus our court does not ascribe to the term, gross negligence, the meaning many do when discussing liability for exemplary damages.

(c) *Legal Wrongs for Which They Are Recoverable*

Exemplary damages are usually only recoverable in actions of tort and consequently motive is immaterial when the wrong complained of is breach of contract.[23] The reason for their denial in a contract action is not altogether clear. A breach of contract is a wrong as much as a tort. If the purpose of exemplary damages is to prevent and punish, why wouldn't the doctrine be equally applicable in contract cases? Of course, this is true; in a tort action, while motive doesn't make a wrong more wrongful, it often may make the consequences more serious, whereas the loss occasioned by breach of contract would seem to be the same in most cases, regardless of motive. So also, if we adopt Mr. Sedgwick's theory as to the origin of exemplary damages, the question can be solved. In the learned author's treatise on the law of damages, he shows that originally the jury had arbitrary power in determining damages. He further shows that this unlimited power was gradually curbed, and that by the end of the eighteenth century the present law as to the measure of damages in contract was established. However, in cases of tort, this arbitrary power still remained, and from it the doctrine of exemplary damages has originated.[24] Thus, with the doctrine growing out of tort damages only, it is clear that none can be recovered in a contract action. There is, however, one well recognized exception to the rule as to contract, viz., that of breach of contract of marriage. Practically all jurisdictions allow an assessment of exemplary damages in this type of case.[25] In this case, though, the exception is more apparent than real for the simple reason that a breach of promise action is in many respects more like a tort action than a contract action.[26]

(d) *Where the Tort Is Also a Crime*

The fact that the wrong committed is also punishable as a crime, is immaterial according to the majority of the courts, and exemplary damages may be recovered in such a case.[27] However, there is a small minority which adheres to the view that if the tort is also a crime, there can be no recovery for these damages.[28] The chief argument of the majority is that the criminal prosecution is to redress the grievance of the public, while the civil remedy is for private redress. The minority, on the other hand, point

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[23] Secs. 98, 99, Sutherland.

[24] Vol. I, Sedgwick, Damages (9th Ed.), Sec. 349.

[25] Kurtz v. Frank, 76 Ind. 594. See also 9 C. J. 381.

[26] The whole doctrine of damages in a breach of promise suit is peculiar. For instance, damages for mental suffering may be recovered. This type of damage is generally confined to tort actions. So evidence of an offer to remarry, after breach, is admissible in mitigation of damages. And ill motive, on the part of the defendant, as shown by pleadings, may increase the damages.

[27] Roach v. Caldbeck, 64 Vt. 593, 24 Atl. 989; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Boetcher v. Staples, 27 Minn. 308, 7 N. W. 263; Brown v. Evans, 17 Fed. 912; Roberts v. Mason, 10 Ohio St. 277; Jackson v. Wells, 13 Texas Civ. App. 275, 35 S. W. 528; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 406; Brown v. Evans, (U. S.) 8 Sawy. 488; Cook v. Ellios, 6 Hill (N. Y.) 466.

[28] Murphy v. Hobbs, 7 Colo. 541; Cherry v. McCall, 23 Ga. 193.

out that exemplary damages only commence at the point where full private or compensatory damages end, and that an allowance in such a case would result in double punishment for the defendant.

Indiana, at an early date, adopted the rule of the minority, and subsequent cases have clearly established the rule.[29] The argument of the Indiana courts is the same as that of the others following this rule, that is, that such a recovery would subject the offender to double punishment. In the earliest Indiana case, that of Taber v. Huston,[30] it is said, "Taber may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The Constitution declares that 'no person shall be twice put in jeopardy for the same offense,' and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle incalculated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more."

It will be noticed from the part of the opinion quoted above that the court didn't expressly hold that such would be unconstitutional. It went no further than to decide that such was contrary to the "spirit" of the Constitution. However, in the subsequent case of Koerner v. Oberly,[31] the court is more explicit. Involved in that case was the validity of a statute permitting a wife to recover exemplary damages in a civil action against one selling intoxicating liquors to her husband. This conduct on the part of the vendor had previously been made a crime by the legislature. The court, in the course of its opinion, expressly decided that the provision as to exemplary damages was unconstitutional as it violated the fundamental principle embodied in the "Bill of Rights," that no person shall be put in jeopardy twice for the same offense.

In the later case, that of State v. Stevens,[32] the same line of reasoning is followed. In this case, the validity of a statute as to illegal fees charged or taken by an officer was involved. The statute, in question, in addition to making it a misdemeanor for an officer to charge, demand, or take an illegal fee, provided that he be liable on his official bond to the party injured for five times the illegal fee. The court discusses at length the Koerner case, and definitely affirms the reasoning of that case. However, in this case, the legislation was upheld on the theory that the so-called penalty was in fact compensatory in nature. The fact that the damages were definite seems to have been the chief reason for the ultimate conclusion. For this reason, the result seems inconclusive as the actual damage would appear to be the amount of the illegal fee charged. Or in other words, part of the damages provided for were actually in the nature of punishment to prevent public officers from committing breaches of their duties.[33] Aside from the inaccuracy of the conclusion, the case is important because Judge Elliot in a separate concurring opinion disagrees with the reasoning of the Koerner case. He reasons that the question is simply one of legislative power, and that the legislature may provide for exemplary damages even

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[29] Taber v. Hutson, 5 Ind. 322; Humphries v. Johnson, 20 Ind. 190; Wabash Printing Co. v. Crumrine, 123 Ind. 89; Borkenstein v. Schrack, 31 Ind. App. 220; Skufakiss v. Duray, 85 Ind. App. 426.

[30] 5 Ind. 322.

[31] 56 Ind. 284.

[32] 103 Ind. 55.

[33] Chief Justice Mitchell says that it is certain from the beginning what the consequence of the offense may be and there is therefore no possibility that the penalties may overlap each other. Quare: Does the certainty keep defendant from being punished twice? It would seem immaterial.

though the act is also a crime, if it so desires, and that such is not barred by constitutional limitations. In the still later case of State v. Schoonover,[34] a somewhat similar situation was involved and the court reaches the same conclusion as reached in State v. Stephens. However, the court goes further and indorses the reasoning of Judge Elliot, and holds the statute involved constitutional without any inquiry as to whether the amount allowed by the legislature as damage was compensatory or punitive in character.

At this stage, therefore, the court seemed to have taken a definite stand directly contrary to their original position. But this position was not to remain long, and the last decided case has again left us in a state of confusion. This case was that of State v. Latshaw.[35] The question involved in that case was the validity of the fraudulent marriages act. This act provided that if a man, subject to a criminal prosecution for seduction or bastardy entered into a marriage fraudulently to escape punishment and then subsequently abandoned her, the wife might sue for a penalty (it was called a penalty in the act) of not less than a certain sum. The defense contended that such might result in double punishment. This contention, however, was disapproved by the court. The significant thing though is the method used by the court in arriving at this conclusion. The court examines the nature of the damages stipulated and concludes that they are remedial in character and not punitive. The court says the sole purpose was to create a liability for compensatory damages. Or, in other words, the court goes back to the analysis used in the case of State v. Stephens. Both State v. Stephens and State v. Schoonover are cited in the opinion, although the proposition they are cited for is simply that the legislature may provide for the recovery of damages in a civil action, although the act may subject the defendant to a criminal prosecution. This proposition being so broad, adds nothing to the solution of the problem.

Since there is involved in these cases an important constitutional question, a brief analysis of the problem seems justifiable. The fifth amendment to the Constitution of the United States provides that no person shall be twice put in jeopardy for the same offense. But this amendment has no bearing whatsoever upon the problem under discussion for the reason that this amendment is solely a limitation on the power of the Federal Government. It has long been established that the amendment places no restrictions on the exercise of the state power.[36] There is, however, a similar provision in the "Bill of Rights," of our Indiana constitution.[37] This provision is a limitation on the power of the state. It is this provision which the legislation in question purportedly violates. The question then is: Does the legislature have the power to provide for the allowance of exemplary damages where the act is also a crime? As we have seen, the Indiana cases are in confusion. Upon analysis, however, it is submitted that the legislature should have this power. In the first place, it would seem that the defense of double jeopardy is premature, for the reason that in none of the Indiana cases is there any showing that the defendant has actually been punished criminally. It would appear that there necessarily must be a first jeopardy before there can be a second, and only when a second is sought is the constitutional immunity from double punishment threatened

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[34] 135 Ind. 532.

[35] 156 Ind. 194.

[36] Barron v. City of Baltimore, 7 Pet. (U. S.) 243, 8 L. Ed. 672; U. S. v. Lanya, 260 U. S. 377; McElvaine v. Brush, 142 U. S. 155.

[37] Art. 1, Sec. 14.

to be taken away.[38] In the second place, it is very doubtful whether this provision in the "Bill of Rights" was meant to apply to civil actions at all. In fact, it seems clear that such a constitutional quaranty was incorporated solely to prevent a person from being punished twice for the same criminal offense. And case after case may be found in other jurisdictions where such an interpretation has been placed in this provision.[39] Even in Indiana, the cases dealing with somewhat similar questions would seem to indicate this. For instance, a statute making certain acts criminal and punishable by fine and imprisonment and also providing for a civil remedy by injunction was held to not violate the "double jeopardy" provision.[40] If the defendant violated the injunction might he not be imprisoned twice? So also the great weight of authority in other jurisdictions on the specific question of exemplary damages is contrary to the constitutional rule in Indiana.[41] It is true that if all of these states had the compensation theory of exemplary damages, the position of the Indiana court could be reconciled. However, this is not true, as most of them have the same theory as has been adopted in Indiana, viz., that of punishment. Again it would seem that if punishment by way of exemplary damages is similar to punishment by the criminal law, that in every case where exemplary damages are recovered they necessarily would have to be proven beyond a reasonable doubt and the defendant otherwise guaranteed the protection given to a defendant in a criminal case. In view of all these facts, it seems to the writer that this constitutional provision is wholly inapplicable when a question of exemplary damages is involved.

For those, however, who dislike the doctrine there is another provision in the state constitution which could possibly be invoked. This is the provision in our bill of rights against cruel and unusual punishments.[42] This limitation on the state's power seems to have been raised in only one case where the question of exemplary damages was involved. That was the case of State v. Latshaw discussed above. In this case, though, as has been previously mentioned, the court decides that the act doesn't provide for punishment at all, but is simply remedial in nature. However, the language of the court seems to leave you with the impression that if it did actually provide for punishment, there might be merit to the argument that such would be cruel and unusual punishment. Again, however, we have the same question as is involved in the "double jeopardy" provision. That is, does this provision apply to punishment in a civil action at all? It would seem that it would not.

In this connection, it is important to notice that there is also a prohibition in the Federal Constitution against cruel and unusual punishment. This provision is contained in the eighth amendment; but inasmuch as this amendment limits solely the power of the Federal Government, it has no

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38 This seems to be the position of our Supreme Court. See Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930. In this case, the validity of a Minnesota statute allowing double damages in an action of trespass, was involved. The tort was also a crime. Mr. Justice Miller said the question of double jeopardy was premature. That there must be a first jeopardy before there can be a second, and only when a second occurs is the constitution violated.

39 Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Chiles v. Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935; Brown v. Swineford, 44 Wisc. 282, 28 Am. Rep. 582; Jockers v. Borgman, 29 Kan. 109, 44 Am. Rep. 625; Stout v. State, 36 Okla. 744, 130 Pac. 553, 45 L. R. A. (N. S.) 884; Corn v. Somerville, 1 Va. Cas. 164, 5 Am. Dec. 514.

40 State v. Roby, 142 Ind. 168.

41 Brown v. Swinford, 44 Wis. 282, 28 Am. Rep. 582. See also 8 R. C. L., Sec. 146.

42 Art. 1, Sec. 16.

application here.[43] However, it might be possible to bring this in under the Fourteenth Amendment to the Federal Constitution. This amendment provides that no state shall deprive a person of life, liberty or property without due process of law. In order to invoke this provision, it would be necessary for the Supreme Court to say that cruel and unusual punishment on the part of a state deprives a person of life or liberty without due process of law. And apparently the Supreme Court has so extended the doctrine of due process.[44] Here, however, it seems that due process as applied to cruel and unusual punishment extends only into the field of criminal prosecution. Again it might be argued that the due process clause would also include double jeopardy. The writer, though, has been unable to find any case in which the doctrine of due process has been so extended by the Supreme Court. There is one case, however, which by inference would seem to indicate that this attitude might be taken by our highest court.[45] This extention of the doctrine of due process has been made by a lower Federal court.[46] Due process, as a matter of procedure, requires notice,[47] an opportunity to be heard,[48] an impartial tribunal,[49] and an orderly course of procedure,[50] and it is more than likely that it will be extended to include double jeopardy. But even if we assume that it might be so extended, there still remains the question of what double jeopardy means. As has been said, it probably would be construed in its usual technical meaning, that of two criminal punishments.

In conclusion, we may safely say that Indiana has definitely taken the position that a court is unwarranted in allowing the recovery of exemplary damages where the wrong is also a crime. As to whether the legislature can provide for their allowance in a civil action seems doubtful, although as we have seen there seems to be no logical reason why it could not. First of all, there is the one case which expressly decides that such is unconstitutional. Secondly, the last decided case was very careful to examine the kind of damages provided for. If the legislature had the power to provide for exemplary damages, this would be unnecessary. On the other hand, we have Judge Elliot's separate opinion in the Stephens case, and the opinion in the Schoonover case. However, in the Stephens case, it was expressly decided that the legislation didn't provide for exemplary damages at all, and in the Schoonover case, the same result might have been reached as a matter of statutory construction.

(e) *Exemplary Damages as a Matter of Right*

While there is some confusion in the cases, the better view seems to be that an injured party has no absolute right to exemplary damages, and it is error for the court to instruct the jury to give them.[51] The question of

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43 See cases cited in footnote 37.

44 McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971; Gulf, etc., Ry. v. United States, 246 U. S. 58, 62 L. ed. 574.

45 In Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, the defense contended that there was double jeopardy and thus the defendant was deprived of his life, liberty and property without due process of law. The court, however, held there was no double jeopardy involved. It did, however, recognize the due process question, but reserved its opinion as to whether double jeopardy would violate the due process clause.

46 Ex parte Ulrich, 42 Fed. 587.

47 Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637.

48 Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 218.

49 Tumey v. Ohio, 273 U. S. 510, 71 L. ed. 749.

50 Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543.

51 Vol. I, Sedgwick, Damages (9th Ed.), Sec. 387.

their allowance is one for the jury.[52] Indiana follows the view that they are not a matter of right.[53] In this connection, it would be well to notice that the elements of aggravation do not have to be pleaded. If it is shown by the evidence that the acts were done in an abusive, wanton, or oppressive manner, the jury is justified in allowing their recovery.[54]

VI

Heretofore the discussion has covered only those cases where the actual tort feasor's liability for exemplary damages was in question. Where it is sought to allow these against a corporation or principal for the acts of its servants, some different questions are involved.

(a) *Liability of a Principal*

In general, a principal is not liable for exemplary damages when the wrong is committed by his agent or servant under aggravating circumstances and while acting in the course of employment.[55] There are circumstances however, when it is proper to assess this sort of damage in a suit against the principal. Thus it is generally held that he is so liable if he expressly authorized the act of the agent or servant,[56] or approved or ratified it after it was done.[57] So also he has been held to this liability where he has been negligent in hiring the agent or servant.[58] Or there may be liability when the principal retains the servant, knowing that he is incompetent and liable to act in a reckless manner.[59] The liability, therefore, if any exists, is due to actual fault on the part of the principal or master and does not result simply from the identity of principal and agent as does other damage. The writer has been unable to find any Indiana case discussing this proposition.

(b) *Liability of Corporations*

A majority of the courts apparently have adopted the rule that exemplary damages are recoverable in a suit against a corporation for injury caused by the wanton or malicious acts of its servants or agents, even though the corporation has not ratified or approved the acts, or otherwise been guilty of actual misconduct.[60] The old case of Goddard v. Grand Trunk Ry. is usually cited as the leading authority for this proposition.[61] On the other hand, there are a substantial number of cases which do not permit such a liberal allowance against the corporation. In these jurisdictions, it is usually held that the corporation is only liable when the agent is one of the head

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52 Sedgwick, ibid.

53 Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268.

54 Indianapolis Bleaching Co. v. McMillan, ibid.

55 Wright v. Glen Falls, etc., Ry. Co., 48 N. Y. S. 1026; Davis v. Hearst, (Cal.) 116 Pac. 530; Craven v. Bloomingdale, 171 N. Y. 439, 64 N. E. 169; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139; Mace v. Reed, 89 Wis. 440, 62 N. W. 186; Ristine v. Blocker, 15 Colo. App. 224, 61 Pac. 486; Mead v. Pollock, 99 Ill. App. 151; Patterson v. Waldman, 20 Ky. L. Rep. 514, 46 S. W. 17; Haines v. Schultz, 50 N. J. L. 481, 14 Atl. 488.

56 See note, 48 L. R. A. (N. S.) 35, for a splendid collection of the cases.

57 Note, 48 L. R. A. (N. S.) 35. As to approval by the master, it seems that mere retention of the servant in his employment is not enough. Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139. But retention, after knowledge is evidence of approval. Norfolk & W. Ry. v. Anderson, 90 Va. 1, 17 S. E. 757.

58 L. R. A. (N. S.) 35, note.

59 Maisenbacker v. Society Concordia, 71 Conn. 369, 42 Atl. 67; see also note, 28 Am. St. Rep. 876.

60 8 R. C. L., Sec. 141.

61 57 Me. 202.

men of the corporation so that it might be said his act was the act of the corporation; or the act was authorized or ratified; or the corporation was negligent in employing the agent or servant knowing that he was incompetent.[62] This last mentioned position is untenable, says the Maine court in the Goddard case. Involved there was a question of a railroad's liability to exemplary damages for a malicious insult on a passenger by one of its servants. The court says, "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations, and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will occur. A corporation is an imaginery being. It has no mind, but the mind of its servants; it has no voice but the voice of its servants; it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, is sheer nonsense and only tends to confuse the mind and confound the judgment." The court in a later part of the same opinion answers the objection that it is a terrible hardship to assess these against an innocent corporation by pointing out that it can protect itself by the employment of competent agents and servants. Indiana has always followed the prevailing rule, and it has not been concerned at all with the additional circumstances which are a prerequisite under the minority rule.[63] In fact, our courts have pronounced as silly and metaphysical the argument that a corporation can't act maliciously and has pointed out, that as a practical matter, there is a human intelligence and volition which controls the affairs of a corporation just like those of an individual.[64] It would seem that the Indiana and majority rule is not subject to any very serious objection. There is sound policy behind the rule because corporations will unquestionably be more careful in selecting their agents and servants in view of the fact that juries have a habit of rendering large verdicts against them. Under this rule, however, we have a peculiar situation in Indiana. Suppose a conductor of a railroad commits a willful assault and battery on a passenger. Under our law, no exemplary damages can be recovered against the servant because he is subject to a criminal prosecution and may suffer double punishment. However, they may be assessed against the corporation because it is not subject to a criminal prosecution for the agent's assault upon the passenger.[65] Since the liability of the corporation is due solely to the fact that the actual wrongdoer is its agent, doesn't it seem illogical that it may pay greater damages than the actual tort feasor? Such, however, is the obvious result under our decisions. In one Indiana case, there is language to the effect that a corporation is liable for exemplary damages whenever the agent may be.[66] In view of the above, it is submitted that such a statement is technically inaccurate.

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[62] Lake Shore & M. S. Ry. v. Prentice, 147 U. S. 101, 37 L. ed. 97 (usually cited as being the leading case for this position); Great W. Ry. v. Miller, 19 Mich. 305; Magagnos v. Brooklyn Heights Ry., 112 N. Y. S. 637; Peterson v. Middlesex & S. T. Co., 71 N. J. L. 296, 59 Atl. 456.

[63] Jeffersonville Ry. Co. v. Rogers, 38 Ind. 116; Baltimore, etc., R. Co. v. Davis, 44 Ind. App. 375; Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268.

[64] Jeffersonville Ry. Co. v. Rogers, 38 Ind. 116.

[65] Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268.

[66] State v. Stevens, 103 Ind. 55.

VII

From this brief sketch of the subject, it is apparent that there is a great deal of confusion in the decided cases. From a logical standpoint the whole doctrine seems to lack support. The chief weakness of the doctrine is that it is contrary to the established theory of damages that of compensation to the injured person. However, from a legal standpoint the doctrine is well fixed in practically all of the states. While many courts have followed the doctrine more because of precedent than anything else, it nevertheless appears to be a doctrine so well established that it will not readily be done away with. In fact, it is so well established that some courts refuse altogether to discuss it from a logical standpoint, but decide the case on precedent alone.[67] On the other hand there are opinions in which the doctrine has been ridiculed. But even in these cases, the courts have still followed the rule of precedent in the end. Our Indiana courts have several times disagreed with the whole doctrine; and possibly this attitude has been one reason for our unusual rule where the wrong involved is also a crime.[68]

As a practical matter, however, the allowance of this type of damage often times may not be so serious. Take for instance the unlimited power of the jury in assessing damages for injuries to the feelings and other losses not strictly pecuniary in character. The Indiana court has time and again allowed recovery for these; and since they are often indefinite, the jury has unlimited power in assessing them.[69] A Wisconsin case will illustrate that exemplary damages may not always be unjust.[70] The case was tried in the lower court three times; at two of the trials the jury was instructed that exemplary damages could be allowed. At the other trial, they were instructed no exemplary damages could be allowed, but that they might allow an amount for wounded feelings. The significant thing is that the jury returned the same verdict in all three cases. It is just human nature that juries do such things.

It must be admitted that there are strong arguments either for or against the doctrine. In fact, a wealth of material is available for either position. But in spite of all arguments, the doctrine has survived and, in conclusion, we must concede that the doctrine will continue to remain a fixed part of our substantive law.

CLAUSES EXCLUDING AVIATION INJURY AND DEATH AS RISKS NOT ASSUMED IN LIFE OR ACCIDENT INSURANCE POLICY

BYRON K. ELLIOTT*

The risk of death or injury from aeronautics, like the risk incident to underwater navigation, was for many years too indeterminable and costly to be included in the average life, health or accident insurance policy at the regular premiums. Therefore, many insurance companies sought to exclude

67 Day v. Woodworth, 13 How. (U. S.) 371.

68 Western Union Telegraph Co. v. Bierhaus, 8 Ind. App. 563.

69 Moyer v. Gordon, 113 Ind. 282. This case involved an action for forcible entry. The court held that no exemplary damages could be recovered, but that the jury might take into consideration the bodily and mental suffering, injury to pride and social position and the shame and humilitiation at having his wife and family turned out in street. See also Nossaman v. Rickert, 18 Ind. 350.

70 Bass v. Railway Co., 36 Wis. 450, 39 Wis. 636, 42 Wis. 654.

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