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Exemplary Damages And Joint Tortfeasors The

the decision appears to be a departure from the well accepted rules and doctrines of both the common law and the other Congressional legislation dealing with common carriers, its basic effect it to confuse rather than enlighten.

It is therefore felt that the court's decision, that an admitted common carrier by water cannot also operate as a contract carrier on the same ship as to particular unusual commodities, is neither justified by the law nor the facts of the situation. Courts should not strain either logic or law to uphold an administrative agency's decision. The law cannot operate in a vacuum, but must bear a close relationship to precedent and the basic facts of the particular case. As Judge Moore stated in his dissent:

> "There are certain laws which the Board cannot change by order. The order will not enlarge the compartment space, it will not avoid the shipside loading, it will not change the ripening habits of the banana. *The inexorable laws of economics and nature will not yield even to the Board.*"[62]

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EXEMPLARY DAMAGES AND JOINT TORTFEASORS

The field of damages is a vague, uncertain area in which many attorneys deal but lightly to the prejudice of their clients and themselves. Unfortunately court opinions do not always clarify this area. This is particularly true of exemplary damages where attorneys and courts will oftentimes, through erroneous assumptions or inadequate preparation, go astray. When, in addition to the claim for exemplary damages, there are joint defendants and some evidence of the financial condition of one or more of them, the likelihood is especially great that an inconsistent and unrealistic result will be reached.

In the Arkansas case of *Dunaway v. Troutt*[1] the plaintiff-appellee obtained judgment of $100,000 in a libel action wherein he introduced evidence of the financial condition of two of the three defendants. The verdict included $50,000 as compensatory damages and $50,000 as exemplary damages.[2] On appeal the Arkansas Supreme Court reduced

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[62]280 F.2d at 799. (Emphasis added.)

[1]339 S.W.2d 613 (Ark. 1960).

[2]Usually, where exemplary damages are allowable it is held to be discretionary with the court whether to instruct the jury to separate the exemplary from the compensatory damages. Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003, 1008 (1900). Absent a specific request for separate verdicts, and absent a court instruction re-

the verdict by the amount of the exemplary damages stating the rule to be that "the plaintiff waives the right to punitive damages when more than one party is made defendant in a case where ordinarily punitive damages would be assessable."[3]

In arriving at this conclusion the court evidently was misled by two distinct and independent problems. The first involves the recovery of exemplary damages against joint defendants, and the second concerns the use of evidence of the financial condition of one joint defendant in determining the award of exemplary damages against all of the joint defendants. Not realizing the independent nature of this latter problem, the court employed and relied on precedent cases dealing with it in attempting to find a solution to the first and separate problem. The two problems often become intermixed in determining whether exemplary damages are assessable against joint defendants; but, a decision as to the admissibility of the financial condition of one joint tortfeasor is not determinative of whether exemplary damages should be awarded against the other joint tortfeasors in the first instance.

Where exemplary damages are assessable against defendants jointly liable, there are basically two approaches. Some states permit the jury to award exemplary damages in differing amounts against the various defendants depending upon its findings of individual culpability.[4] Other jurisdictions do not allow such apportionment[5] and

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quiring such, the jury in rendering a verdict need not specify the proportional amounts attributable to compensatory and exemplary damages respectively. Chesapeake & O.R.R. v. Johns, 155 Ky. 264, 159 S.W. 822, 825 (1913); Pine v. Duncan, 179 Okla. 336, 65 P.2d 492, 494 (1937); Heiligmann v. Rose, 81 Tex. 222, 16 S.W. 931 (1891).

[3]399 S.W.2d at 620. The elimination of the portion of damages representing exemplary damages was apparently accomplished under the authority of Ark. Stat. Ann. § 27-2144 (1947). The Supreme Court may reverse, affirm or modify the judgment or order appealed from in whole or in part and as to any or all parties. Hodges v. Smith, 175 Ark. 101, 298 S.W. 1023 (1927). However, where compensatory and exemplary damages are separately stated and it is determined that exemplary damages were improperly awarded, there is authority that the plaintiff should be given an election between the deduction and having a new trial. McAllister v. Kimberly-Clark Co., 169 Wis. 473, 173 N.W. 216, 217 (1919); Annot., 135 A.L.R. 1186, 1192 (1941).

[4]Thomson v. Catalina, 205 Cal. 402, 271 Pac. 198, 200 (1928); Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P.2d 637, 640 (1933). Also, the jury may award exemplary damages as against some of the defendants but not as against others. Nelson v. Halvorson, 117 Minn. 255, 135 N.W. 818, 819 (1912); McCurdy v. Hughes, 63 N.D. 235, 248 N.W. 512, 521 (1933); Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152, 155 (1903). A typical statement of the proposition is that a plaintiff may recover exemplary damages "against either or all of said defendants in such sum as the jury may believe should be assessed against the said defendants or either

do not permit the award of exemplary damages against any of the defendants unless all of them are liable therefor.[6] Where the defendants are found jointly liable, the exemplary damages may be assessed according to the culpability of the most innocent,[7] or according to the culpability of the most guilty,[8] depending upon the jurisdiction in which the case arises.

Where there is but a single defendant, the large majority of cases permit the plaintiff to show the defendant's wealth, whether the defendant is an individual or a corporation.[9] This is allowed in order that the jury may decide what will be an adequate punishment relative to the individual's financial position.[10] But, where there is more

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of them. It is not necessary, as in the case of actual damages recovered, that all of the defendants should be subjected to the same verdict because some of the defendants may have acted without malice, but in combination with others, and as to such defendants there would be no right to recover exemplary damages." St. Louis & S.W. Ry. v. Thompson, 102 Tex. 89, 113 S.W. 144, 147 (1908).

See also Browand v. Scott Lumber Co., 125 Cal. App. 68, 269 P.2d 891, 895 (Dist. Ct. App. 1954), where the court recognized the distinction between the joint tortfeasor and the master-servant relationship, but held that the above proposition is equally applicable to the respondeat superior case. Compare the majority and dissenting opinions in Johnson v. Atlantic Coast Line R.R., 142 S.C. 125, 140 S.E. 443 (1927), for an excellent discussion of this as well as the issue of the defendants' financial condition.

[5]Washington Gas Light Co. v. Landsden, 172 U.S. 534, 552 (1899); Gill v. Selling, 125 Ore. 587, 267 Pac. 812, 815 (1928); Moore v. Duke, 84 Vt. 401, 80 Atl. 194, 197 (1911).

[6]Lane v. Schilling, 130 Ore. 119, 279 Pac. 267, 270 (1929); McCarthy v. De Armit, 99 Pa. 63, 72 (1881); Moore v. Duke, 84 Vt. 401, 80 Atl. 194, 197 (1911).

[7]McCarthy v. De Armit, 99 Pa. 63, 72 (1881); Parker v. Roberts, 99 Vt. 219 131 Atl. 21, 24 (1925).

[8]Interstate Co. v. Garnett, 154 Miss 325, 122 So. 756 (1929). This rule appears to be limited to Mississippi; it also permits evidence of the defendants' financial condition to be offered. In support of this proposition the Mississippi court cites its prior decision in Bell v. Morrison, 27 Miss. 68, 86 (1854), where this holding was first enunciated. Cited as authority in the Bell case is 2 Greenleaf, Evidence § 277 which propounds this rule as to compensatory damages only. Thus, this very minority holding is built upon an erroneous foundation and is a good example of the misapplication of precedents in this area. It is uncerstain what position a state following this approach would take if some of the several defendants were not liable for examplary damages. The finding that some of the defendants were liable for exemplary damages might well be held to bind the other defendants not expressly found so liable. Thompson v. Johnson, 180 F.2d 431, 434 (5th Cir. 1950).

[9]Annot., 123 A.L.R. 1115, 1136 (1939); Annot., 16 A.L.R. 771, 838 (1922). But the financial worth of the defendant should not be contained in the plaintiff's allegation; it is an allegation of evidence rather than an ultimate fact of substance and such an allegation would be prejudicial to the defendant should the evidence be insufficient to permit recovery of exemplary damages. Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393, 397 (1956).

[10]Kirven v. Kirven, 162 S.C. 162, 160 S.E. 432, 434 (1931). The wealth of the defendant at the time of the trial, not at the time the wrong was committed, is the relevant evidence. Marriott v. Williams, 152 Cal. 705, 93 Pac. 875, 877 (1908).

than one defendant, the majority do not permit the admission of the financial condition of any of the defendants as a basis for assessing exemplary damages.[11] Because the majority holding would be illogical if applied in a jurisdiction where exemplary damages are apportionable, it is questionable whether this really would be the controlling rule under such circumstances.[12]

Conversely, where there are joint defendants, a minority of courts permit evidence of one defendant's financial condition to be used as a basis for determining exemplary damages,[13] without regard to whether separate or joint judgments are required. The leading case

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[11]Washington Gas Light Co. v. Lansden, 172 U.S. 534 (1899); Spelina v. Sporry, 279 Ill. App. 376, 385 (1935); Dawes v. Starrett, 336 Mo. 897, 82 S.W.2d 43, 60 (1935); Lenhner v. Berlin Pub. Co., 211 Wis. 119, 246 N.W. 579, 583 (1933). See Annot., 63 A.L.R. 1405 (1929). In Phelan v. Beswick, 213 Ore. 612, 326 P.2d 1034, 1036 (1958), decided under the majority approach, the plaintiff brought a slander action against two defendants. The case involved separate suits consolidated upon stipulation of the parties; two verdicts were returned, one against each of the defendants. The court considered the admissibility of the evidence of the financial condition of the defendants as though only a single defendant was involved; thus, the case is inconclusive as to the rule in Oregon where joint tortfeasors are sued together in a single suit. In Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S.E. 320, 325-26 (1906), the Virginia court cited the cases following the majority approach, supra, in sustaining the defendants' exception to the trial court's instruction permitting the jury to consider without qualification "the wealth, if any, of the defendants."

Vermont has modified the majority approach and admits evidence of the financial condition of the least wealthy. Woodhouse v. Woodhouse, 99 Vt. 91, 130 Atl. 758, 788 (1925).

"If a plaintiff in such action makes a case for exemplary damages against one of two defendants and not against the other, he may dismiss as to the latter, and have his recovery for exemplary damages against the other." Pardridge v. Brady, 7 Ill. App. 639, 644 (1880).

[12]"We recognize the rule that no such apportionment exists among joint tortfeasors in so far as compensatory damages are concerned, but hold that the jury in an action against joint tort-feasors may make awards for exemplary damages in different amounts, depending upon what the evidence shows and the jury finds to be the differing degrees of culpability among the several defendants.... The jury may take into consideration the difference in financial condition of the defendants and impose different amounts as punishment upon them in case the conclusion is reached that both ought to be penalized." Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P.2d 637, 640 (1933). See Nelson v. Halvorson, 117 Minn. 255, 135 N.W. 818 (1912): "The difference in financial condition of the two defendants would alone justify the jury in imposing different amounts as punishment upon them, in case the conclusion was reached that both ought to be penalized." 135 N.W. at 819.

[13]"Proof of the financial worth of one of the joint defendants, when there are two or more joint defendants, may be considered by the jury in determining the amount of punitive damages to be awarded in such case." Tipps Tool Co. v. Holifield, 218 Miss., 670, 67 So. 2d 609, 616 (1953). But see Oskamp v. Oskamp, 20 Ohio App. 349, 152 N.E. 208, 210 (1925); Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 Pac. 255, 278 (1925) "These latter two cases make no distinction between a single defendant and joint defendants in the consideration of financial condition."

of *Bell v. Morrison* holds: "Whatever, therefore, would be competent evidence with that view [*i.e.*, the assessment of exemplary damages] as to one, would be competent as to all of the defendants."[14] This result is usually achieved through the doubtful rationale that holding otherwise would allow a rich defendant to escape a fair and an adequate assessment of exemplary damages by having a defendant of little means joined with him.[15] However, there is but little authority for this view. The majority approach seems preferable to the extent that it prohibits the consideration of one joint defendant's financial condition in the assessment of the exemplary damages to be borne or shared by the other defendants.[16]

The Arkansas court in its unique holding in *Dunaway* was apparently following the view that unless the plaintiff showed all the defendants to be liable for exemplary damages, none of them may be found liable. However, to fit the facts of *Dunaway* within this rule required the court to equate the plaintiff's failure to show the financial condition of one of the defendants to the nonliability on the part of this defendant for exemplary damages. It is obvious, however, that financial condition and liability for exemplary damages are not synonymous. In support of its holding the court quoted from *Washington Gas Light Co. v. Lansden*,[17] the leading case propounding the majority rule:

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[14]27 Miss. 68, 86 (1854).

[15]This reasoning is irrational since under the majority approach if the defendant did join with him one of little means, the plaintiff would dismiss the suit as to this latter defendant in order to enhance his claim to exemplary damages by showing the financial condition of the wealthier defendant. Pardridge v. Brady, 7 Ill. App. 639, 644 (1880). In White v. White, 140 Wis. 538, 122 N.W. 1051 (1909), although the award was not based on evidence of the financial condition of the wealthier defendant, the court went on to state: "The claim that punitory damages are not proper in view of the fact that one of the defendants is without property, and that another defendant is possessed of considerable means, is not well founded." 122 N.W. at 1054. Of course, this problem is entirely avoided where the practice of apportioning exemplary damages prevails since the particular defendant's financial condition is considered only in assessing exemplary damages against him.

[16]Exemplary damages are "awarded as a punishment to the defendant and as a warning and example to deter him and others from committing like offences in the future." 15 Am. Jur. Damages § 266 (1938). To the extent that exemplary damages exceed these purposes, as would be the case if the financial condition of the wealthiest defendant was a proper element in their assessment, such damages are unwarranted. "Yet, it would, quite evidently, defeat the theory and object of punitive damages, in addition to the injustice that it would cause, to let evidence of one defendant be the measure of punishment imposed upon others." Johnson v. Atlantic Coast Line R.R., 142 S.C. 125, 140 S.E. 443, 454 (1927).

[17]172 U.S. 534 (1899).

> "It seems to be plain that, when a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, *founded upon evidence of the ability of one of the several defendants to pay them.*"[18]

But, there is no authority in this and the other cases cited[19] for the view that the "plaintiff waives the right to punitive damages when more than one party is made defendant."[20] The present majority view, more correctly stated, is as follows:

> "When a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them. *This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined.*"[21]

The concurring opinion in *Dunaway* pertinently observes the unrealistic result of the court's opinion: "It must be conceded that the plaintiff can recover punitive damages against one person and then in a separate suit likewise recover against another person."[22] The concurrence then notes this procedure involves a multiplicity of suits[23]

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[18]339 S.W.2d at 619. (Emphasis added.)

[19]Smith v. Wunderlich, 70 Ill. 426, 438 (1873) held erroneous an instruction that the jury might consider the financial condition of each individual defendant in determining exemplary damages. In this and the following Illinois decisions the basis of the holding is rooted in similar expressions in other cases regarding compensatory damages, not exemplary damages. Chicago City Ry. v. Henry, 62 Ill. 142, 146 (1871), where the reference was apparently to compensatory damages, held that to allow evidence of the financial condition of the corporation to be used in the assessment of damages against its employee "would operate as great injustice if not oppression to him." Lister v. McKee, 79 Ill. App. 210, 213 (1898), held erroneous the trial court's instruction that in assessing exemplary damages the jury might consider the "circumstances of the defendants or either of them, as to wealth and property, so far as these appear from the evidence." The court in Schafer v. Ostmann, 148 Mo. App. 644, 129 S.W. 63, 65 (1910), held "it is highly unjust that recovery against both shall be expanded because of the wealth of only one." In Leavell v. Leavell, 114 Mo. App. 24, 89 S.W. 55, 58 (1905), the court held "it would be highly unjust to allow a verdict against the poorest and most inoffensive wrongdoing defendant to be measured by the same standard that fixed the punishment of the one richest and most culpable." Both Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S.E. 420 (1906) (note 11 supra), and McAllister v. Kimberly-Clark Co., 169 Wis. 473, 173 N.W. 216 (1919), held the admission of such evidence to be prejudicial error against the other defendant.

[20]339 S.W.2d at 620.

[21]172 U.S. at 553 (Emphasis added).

[22]339 S.W.2d at 621.

[23]Ibid. However, the suggestion that the bringing of several actions "might run afoul of Ark. Stat. ch. 27, § 814, which require a joinder of parties" is not supported by the authorities. The Arkansas cases relate to the settlement of claims

and that there is "no logical or practical reason why separate judgments cannot, in the same case, be rendered against separate defendants."[24]

Thus, following the prevailing view, a plaintiff by bringing a single action against joint tortfeasors does not waive his claim to exemplary damages. The most that the plaintiff waives under such circumstances is the right to introduce evidence relating to the financial condition of the defendants as a determinative of the amount of exemplary damages. Furthermore, in those jurisdictions where no exemplary damages may be awarded unless *all* the defendants are liable therefor, evidence of a defendant's financial condition is not admissible in any case until this overall liability is shown; for in such cases, since there are no exemplary damages, there can be no consideration of a defendant's financial condition. More specifically stated, financial condition may be a factor of consideration in determining the amount of exemplary damages to be assessed, *but it is not a factor in determining if liability for exemplary damages exists.* This is the distinction the Arkansas Supreme Court apparently overlooked.

As the concurrence intimates, the more acceptable and frequently followed procedure is to permit separate verdicts of exemplary damages against each defendant. Following this method, the punitive and deterrent function of exemplary damages would be more adequately and equitably performed since the award of exemplary damages would not be denied by the fortuitous or required joinder of defendants.[25] Recovery would be less expensive and more ex-

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to realty or personalty and not to suits involving joint tortfeasors. Travelers Ins. Co. v. Cargile Motor Co., 229 Ark. 595, 317 S.W.2d 126, 128 (1958); Harrison v. Knott, 219 Ark. 565, 243 S.W.2d 642, 644 (1951); Hunt v. McWilliams, 218 Ark 922, 240 S.W.2d 865, 868 (1950). "The obvious intention of the statute is to require all persons to be made parties to an action who will be necessarily and materially affected by its result, and to forbid the court from determining any controversy between the parties before it, when it cannot be done without prejudice to the rights of others, or by saving their rights." Smith v. Moore, 49 Ark. 100 4 S.W. 282, 283 (1887).

Under federal procedure nonresident joint tortfeasors are not indispensable parties, and the action will not be dismissed owing to the lack of the court's jurisdiction over them. R. P. Farnsworth & Co. v. Globe Marble & Granite Corp., 250 F.2d 636, 637 (5th Cir. 1958) (joint and several liability of principal and surety; principal not an indispensable party); Wyoga Gas & Oil Corp. v. Schrack, 27 F. Supp. 35, 36 (M.D. Pa. 1939).

[24]339 S.W. 2d at 621. "Not only is this permissible, but it tends to simplicity and avoids the multiplicity of actions which otherwise would become necessary." Davis v. Hearst, 160 Cal. 143, 116 Pac. 530, 542 (1911). See cases cited note 4 supra.

[25]Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P.2d 637, 641 (1933).

"It would seem to be a rule of reason that, where the defendants, though joint