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PUNITIVE DAMAGES IN ILLINOIS: REVIEW AND REAPPRAISAL

Brian R. McKillip*

Despite an unfavorable judicial attitude toward the doctrine of punitive damages, it has remained a viable element of tort actions in Illinois. In this Article, Mr. McKillip considers the development of the doctrine in Illinois and its application in specific areas of tort law. Since an award of punitive damages does not always serve its intended purposes, the author concludes that its inherent defects warrant a limitation in its application, if not complete abandonment of the doctrine.

"Punitive," "exemplary" or "vindictive" damages are almost universally recognized in the United States.¹ Although the practice of awarding damages in excess of full compensation has been subject to criticism, both on and off the bench,² it retains its position as the sole exception to the compensatory nature of tort damages. As early as 1872, an Illinois court concluded that the concept of punitive damages was "too firmly rooted in our jurisprudence to be disturbed."³ However, Illinois courts have continued to display an unfavorable attitude toward punitive damages, thereby enhancing the possibility that one day a wholesale reevaluation will take place.

I. PUNITIVE DAMAGES IN ILLINOIS: AN OVERVIEW

A. *Common Law Principles*

Commentators have traced the origin of punitive damages to Eighteenth Century England, when the doctrine first was used to

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1. Four states do not allow recovery of punitive damages. Louisiana: *Vincent v. Morgan's Louisiana & Texas R.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917); Massachusetts: *Boott Mills v. Boston & Maine R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); Nebraska: *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960); Washington: *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 25 P. 1072 (1891). England has, except in certain specific instances, abolished punitive damages. *Rookes v. Barnard*, (1964) A.C. 1129.

2. *See, e.g., Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 330 N.E. 2d 509 (1975); *Holmes v. Holmes*, 64 Ill. 294 (1872); *Fay v. Parker*, 53 N.H. 342, 16 Am. Rep. 270 (1873). The court expressed its dissatisfaction in no uncertain terms. "It is an unsightly and unhealthy excrescence, deforming the symmetry and the body of the law." *Id.* at 382, 16 Am. Rep. at 320. *See generally*, Ghiardi, *Should Punitive Damages Be Abolished—A Statement for the Affirmative*, 1964-65 A.B.A. SECTION ON INS., NEGLIGENCE & COMPENSATION LAW 282; Willis, *Measure of Damages When Property Is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419 (1909).

3. *Holmes v. Holmes*, 64 Ill. 294, 298 (1872).

justify jury verdicts in excess of the plaintiff's actual harm.⁴ By this means, the plaintiff was "compensated" for elements of damage not then recoverable at common law. Eventually, however, recoverable damages were expanded to embrace intangibles, such as pain and suffering. As a result, the void that punitive damages originally were intended to fill had been satisfied.

Evidence of the doctrine's transformation is apparent in a comparison of early Illinois cases dealing with the doctrine. In 1845, the Illinois Supreme Court in *McNamara v. King*⁵ sustained an award of exemplary damages in order "not only to compensate the plaintiff but to punish the defendant."⁶ By 1921, however, the supreme court in *Eshelman v. Rawalt*⁷ made no allusion to any compensatory function to be served by the doctrine, offering punishment and deterrence as the sole purposes of punitive awards.⁸ Thus, although the original purpose for punitive damages had been served by other means, the doctrine remained, adopting as its sole justification what had originally been merely a convenient rationale.

Today, even though it is well-settled that punishment and deterrence are the objectives of the punitive damages,⁹ the circumstances which will warrant the application of this doctrine are less clear. In general, the plaintiff may recover punitive damages if the defendant is guilty of "willful and wanton" misconduct. The jury is instructed as follows:

If you find that defendant was guilty of willful and wanton conduct which proximately caused injury to the plaintiff and if you believe that justice and the public good require it, you may, in addition to any damages to which you find plaintiff entitled, award plaintiff an amount which will serve to punish the defendant and to deter others from the commission of like offenses.¹⁰

Willful and wanton misconduct is defined for the jury as "a course of action which shows actual or deliberate intention to harm or which, if not intentional, shows an utter indifference to or conscious disregard of a person's own safety and the safety of others."¹¹

4. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, (1957); Note, *Punitive Damages - Mattyasovszky v. West Towns Bus Co. - Punitive Damages Nonrecoverable Under the Illinois Survival Act*, 7 LOY. CHI. L.J. 811 (1976).

5. 7 Ill. 432, 2 Gilman 432 (1845).

6. *Id.* at 436.

7. 298 Ill. 192, 131 N.E. 675 (1921).

8. *Id.* at 197, 131 N.E. at 677.

9. *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 35, 330 N.E.2d 509, 511 (1975).

10. ILL. PATTERN JURY INSTR. § 35.01 (2d ed. 1971).

11. *Id.* § 14.01 Willful and wanton conduct is also at issue (1) where the plaintiff seeks to recover in spite of his own contributory negligence based upon willful and wanton conduct by

On numerous occasions Illinois courts have attempted to define those circumstances which justify an award of punitive damages. The variety of descriptions used illustrates the difficulty encountered in attempting to define culpable conduct. Definitions include: "wanton acts and malice,"¹² "aggravating circumstances such as wantonness, willfulness, malice, fraud or violence,"¹³ "willfulness, wantonness or recklessness,"¹⁴ "wantonness, malice, oppression or circumstances of aggravation,"¹⁵ and "wanton disregard of the plaintiff's rights."¹⁶ These descriptions are imprecise and vary according to the circumstances of each case. Accordingly, courts and juries have broad discretion in defining and penalizing "wanton" conduct, and that discretion is restricted in only two respects. First, the court may rule as a question of law upon the propriety of an award.¹⁷ Secondly, punitive damages may not be awarded absent actual or nominal damages.¹⁸ Nevertheless, once actual damages are established, the jury is accorded great latitude in determining the size of the award.¹⁹

Illinois courts have refused to limit punitive damages to an amount proportional to the actual damages sustained.²⁰ Although the Third District Appellate Court noted in an 1894 decision²¹ that punitive damages could well be proportioned to the harm *intended* by the defendant rather than the harm *actually done*,²² this principle has not found additional support in Illinois case law. Additional factors which may be considered include expenses and attorney's fees incurred by the plaintiff in prosecuting the action,²³ and the wealth of the defend-

the defendant, *Green v. Keenan*, 10 Ill. App.2d 53, 134 N.E.2d 115 (2d Dist. 1956); (2) where the plaintiff is a trespasser or a social guest, *Briney v. Illinois Cent. R.R. Co.*, 401 Ill. 181, 81 N.E.2d 866 (1948); *Ciaglo v. Ciaglo*, 20 Ill. App.2d 360, 156 N.E.2d 376 (1st Dist. 1959); or (3) where a student seeks damages from a teacher or school for injuries sustained in school activities, *Kobylanski v. Chicago Bd. of Educ.*, 63 Ill.2d 165, 347 N.E.2d 705 (1976).

12. *Kimes v. Trapp*, 52 Ill. App.2d 442, 202 N.E.2d 42, 45 (3d Dist. 1964).

13. *City of Chicago v. Shayne*, 46 Ill. App.2d 33, 38, 196 N.E.2d 521, 524 (1st Dist. 1964).

14. *Cunningham v. Brown*, 22 Ill.2d 23, 29, 174 N.E.2d 153, 156 (1961).

15. *Knierim v. Izzo*, 22 Ill.2d 73, 87, 174 N.E.2d 157, 165 (1961).

16. *Zokoych v. Spalding*, 36 Ill. App.3d 654, 671, 344 N.E.2d 805, 819 (1st Dist. 1976).

17. *Knierim v. Izzo*, 22 Ill.2d 73, 174 N.E.2d 157 (1961); *Delano v. Collins*, 49 Ill. App.3d 791, 364 N.E.2d 716 (4th Dist. 1977).

18. *Tonchen v. All-Steel Equip., Inc.*, 13 Ill. App.3d 454, 300 N.E.2d 616 (2d Dist. 1973).

19. *Eshelman v. Rawalt*, 298 Ill. 192, 131 N.E. 675 (1921).

20. *Hannigan v. Sears, Roebuck & Co.*, 410 F.2d 285 (7th Cir. 1969); *Gass v. Gamble-Skogmo, Inc.*, 357 F.2d 215 (7th Cir. 1966). *But see Selimos v. Christ*, 331 Ill. App. 412, 73 N.E.2d 152 (1st Dist. 1947).

21. *Hildreth v. Hancock*, 55 Ill. App. 572, 574 (3d Dist. 1894), *aff'd*, 156 Ill. 618, 41 N.E. 155 (1895).

22. *Id.* at 574-75. (emphasis added).

23. *Ritter v. Ritter*, 381 Ill. 549, 46 N.E.2d 41 (1943); *Smith v. Dunaway*, 77 Ill. App.2d 1, 221 N.E.2d 665 (5th Dist. 1966).

ant.²⁴ In practical terms, the jury is asked to make a subjective or even emotional evaluation of the defendant's conduct. Therefore, unstated factors are also inherent in these jury awards.

B. Statutory Recoveries

While it is unclear whether punitive damages "have always been recoverable at common law,"²⁵ (as one appellate court has asserted) they are now generally recoverable in most common law actions.²⁶ However, this is not true of statutory actions. Because statutory remedies typically are enacted in derogation of the common law, they must be construed strictly. Thus, a court is without power to imply additional conditions or terms in the statute.²⁷ Absent clear legislative intent to authorize such damages, they remain outside the purview of the statute and the plaintiff's lawsuit.

Consistent with these principles, Illinois courts permit recovery of punitive damages in the common law actions of assault and battery,²⁸ products liability,²⁹ and libel and slander.³⁰ However, such damages are not recoverable under the Structural Work Act,³¹ which limits recovery to actual damages sustained by reason of a willful³² violation of its provisions.³³ On the other hand, a prior version of the Dram

24. *But cf.*, Toledo, N & W.R. Co. v. Smith, 51 Ill. 517 (1871); Chicago City R. Co. v. Henry, 62 Ill. 142 (1871); Smith v. Wunderlich, 70 Ill. 426 (1873).

25. *See* Madison v. Wigal, 18 Ill. App.2d 564, 571, 153 N.E.2d 90, 94 (2d Dist. 1958).

26. Mattyasovszky v. West Towns Bus Co., 21 Ill. App.3d 46, 51 313 N.E.2d 496, 499 (2d Dist. 1974). *But see* Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961).

27. Baird v. Chicago, Burlington & Quincy R.R. Co., 11 Ill. App.3d 264, 296 N.E.2d 365 (4th Dist. 1973).

28. *See, e.g.*, Spence v. Staras, 507 F.2d 554, 558 (7th Cir. 1974).

29. Moore v. Jewel Tea Co., 116 Ill. App.2d 109, 253 N.E.2d 636 (1st Dist. 1969), *aff'd* 46 Ill.2d 288, 263 N.E.2d 103 (1970).

30. *See, e.g.*, Gasbarra v. Park-Ohio, Inc., 382 F. Supp. 399, 403 (N.D. Ill. 1974).

31. ILL. REV. STAT. ch. 48 § 69 (1975).

32. Note, however, that "willful" as used in the Structural Work Act is not equivalent to "willful" for purposes of punitive damages. "Under the [Structural Work] Act, 'wilful' refers to a situation where the defendant actually had knowledge or should have had knowledge." *Assise v. Dawe's Laboratories, Inc.*, 7 Ill. App.3d 1045, 1047-48, 288 N.E.2d 641, 643 (1st Dist. 1972). *See also* ILL. REV. STAT. ch. 93 § 10.07 (1975) creating a similar cause of action for violation of the Mine Safety Act.

33. ILL. REV. STAT. ch. 48 § 69 (1975) provides that "a right of action shall accrue to the party injured, for any direct damages sustained . . ." This statute has not been interpreted to sanction awards for punitive damages. *Baird v. Chicago, Burlington & Quincy R.R. Co.*, 11 Ill. App.3d 264, 296 N.E.2d 365 (4th Dist. 1973). Moreover the supreme court's practice of strict statutory interpretation makes such an expansion of the "direct damages" language unlikely.

Shop Act³⁴ supported awards of punitive damages, because of express language contained in the Act.³⁵

Survival acts³⁶ also preclude the recovery of punitive damages. At common law a cause of action for injury died with the person. No suit could be maintained by his heirs or estate, even for the recovery of purely compensatory damages.³⁷ However, survival acts have abrogated this doctrine of abatement to a great extent. Nevertheless, since survival acts are in derogation of the common law, strict interpretation prohibits recovery of punitive damages.³⁸ Similarly, at common law, the survivors of the decedent did not have a cause of action for their losses occasioned by the decedent's wrongful death. The Wrongful Death Act,³⁹ first adopted in Illinois in 1853, established such a cause of action. But as in the case of the survival acts, the rules of statutory construction prevent recovery of punitive damages.⁴⁰

II. PUNITIVE DAMAGES IN THREE TORT CONTEXTS: THE PRINCIPAL-AGENT RELATIONSHIP, INSURANCE AND DEATH

At present, punitive damages are intended to serve two purposes: punishment of the wrongdoer and deterrence of similar conduct. However, these purposes are not achieved if punitive damages are imposed upon someone other than the wrongdoer. Moreover, they are frustrated when a wrongdoer is excused from responding in punitive damages solely by reason of his victim's death.

Accordingly, any application of punitive damages requires careful analysis, with special concern that the doctrine's objectives be met. Review of Illinois decisions in the areas of principal-agent relation-

34. An Act Relating to Alcoholic Liquors, § 14, Art. 6, 1934 ILL. LAWS. "Every . . . person, who shall be injured . . . shall have a right of action . . . for all damages sustained, and for exemplary damages." *Id.* The existing provisions of the Act do not contain any reference to exemplary damages, but do contain limitations on the amount recoverable. ILL. REV. STAT. ch. 43, § 135 (1975). Such limitations preclude a common law action in tort to recover punitive damages, even if the award is within the statutory limits. *See* *Cunningham v. Brown*, 22 Ill.2d 23, 29, 174 N.E.2d 153, 157 (1961). *See also* The Public Utilities Act, ILL. REV. STAT., ch. 111-2/3, § 77 (1975), *Churchill v. Norfolk & Western Ry. Co.*, 46 Ill. App.3d 781, 789, 362 N.E.2d 356, 363 (4th Dist. 1977) (a person who is "affected" by a violation of the Public Utilities Act may recover punitive damages).

35. *See* note 34 *supra*.

36. *See, e.g.*, ILL. REV. STAT. ch. 3, § 339 (1975).

37. "*Actio personalis moritur cum persona*" (actions in persons deceased die with the person). C. GREGORY & H. KALVEN JR., *CASES AND MATERIALS ON TORTS* 552 (2d ed. 1969).

38. *See* *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 330 N.E.2d 509 (1975).

39. ILL. REV. STAT. ch. 70, § 1 (1975).

40. *See* *Conant v. Griffen*, 48 Ill. 410, 413 (1868).

ship, insurance coverage and death show that Illinois courts have not been consistent in insuring that these objectives be achieved.

A. *Punitive Damages and the Principal-Agent Relationship*

As in many jurisdictions, Illinois courts have experienced difficulty in deciding when punitive damages may be levied against a principal for the willful misconduct of his agent. Most older Illinois decisions held the principal liable in punitive damages under the doctrine of *respondeat superior*.⁴¹ The only aberration appeared in an 1873 decision, *Grund v. Van Vleck*.⁴² In this decision, the supreme court reversed a jury award of punitive damages in a trespass action brought by a tenant against both her landlord and the landlord's agent. The court treated the issue as if it were a matter of first impression,⁴³ and held the landlord liable solely for compensatory damages.⁴⁴ Nevertheless, the *Grund* court avoided a comprehensive analysis of problems created by imposing punitive damages vicariously.

Recently, in *Mattyasovszky v. West Towns Bus Co.*,⁴⁵ the Illinois Supreme Court reexamined the issue. In this case, the plaintiff sought to hold an employer liable for the willful acts of his employee. The plaintiff claimed that punitive damages could be imposed upon the employer under a common law action for wrongful death, even though the interpretation of the existing wrongful death statute precluded such recovery. Although the court found the employer liable, it refused to recognize a common law wrongful death act permitting punitive damages.⁴⁶ Moreover, the court noted that "the punitive and admonitory justifications for the imposition of . . . [such] damages are sharply diminished in those cases in which liability is imposed vicariously."⁴⁷

The supreme court then proceeded, in dictum, to approve the limitations set out in the *Restatement (Second) of Agency*.⁴⁸ The *Restatement* provides that "punitive damages can properly be awarded

41. See, e.g., *Chicago Rock Island & Pac. Ry. v. Herring*, 57 Ill. 59 (1870); *Dinsmoor v. Wolber*, 85 Ill. App. 152 (2d Dist. 1899).

42. 69 Ill. 478 (1873).

43. The court seemed unaware of the precedent it created three years previously in *Chicago, Rock Island & Pac. Ry. v. Herring*, 57 Ill. 59 (1870).

44. 69 Ill. at 481.

45. 61 Ill.2d 31, 330 N.E.2d 509 (1975).

46. See notes 62 & 63 and accompanying text *infra*.

47. 61 Ill.2d at 36, 330 N.E.2d at 512.

48. *Id.*

against a master or other principal because of an act by an agent if, but only if,"⁴⁹ (1) the principal had authorized the act; (2) the principal had been reckless in employing an unfit agent; (3) the agent performed in a managerial capacity and acted within the scope of this employment; or (4) the principal ratified or approved the act.⁵⁰ In so doing, the court urged that vicarious liability of a principal for willful and wanton misconduct of his agent should be of limited scope.

An appellate court decision from the Fifth District further justifies and explains the *Mattyasovszky* rationale. In *Tolle v. Interstate Systems Truck Lines*,⁵¹ the court noted that the deterrent effect of punitive damages is minimal where adjustments in employer supervision will fail to prevent employee misconduct.⁵² The court concluded that, in such cases, it would be unfair to permit punitive awards absent deliberate participation by the principal.⁵³

In light of *Mattyasovszky* and *Tolle*, it appears likely that the Illinois Supreme Court will approve an award of punitive damages only when their imposition will serve to deter the principal's or agent's wrongful conduct.

B. Punitive Damages and the Insurance Policy

An important issue that remains largely unresolved in Illinois concerns the payment of punitive damages under a liability policy. The First District Appellate Court is one of the only Illinois courts to address this problem directly.⁵⁴ In *Scott v. Instant Parking, Inc.*,⁵⁵ the plaintiff had recovered a judgment against the defendant which included an award of \$10,000.00 punitive damages. In a citation proceeding⁵⁶ against the defendant's insurance carrier, the plaintiff sought recovery of the entire judgment. The court held that the policy included coverage for punitive damages assessed for willful and wanton misconduct. Construing language in the defendant's insurance policy, it reasoned that the terms "caused by accident" included events which occurred as a result of "willful and wanton miscon-

49. RESTATEMENT (SECOND) OF AGENCY § 217 C (1957).

50. *Id.*

51. 42 Ill. App.3d 771, 356 N.E.2d 625 (5th Dist. 1976) (automobile accident injury caused by willful and wanton misconduct by defendant's employee truck driver).

52. *Id.* at 773, 356 N.E.2d at 627.

53. *Id.* at 774, 356 N.E.2d at 627-28.

54. See also *Hawthorne v. Frost*, 348 Ill. App. 279, 108 N.E.2d 816 (1st Dist. 1952) (liability of cab company for damages caused by taxi driver's unprovoked assault on a motorist).

55. 105 Ill. App.2d 133, 245 N.E.2d 124 (1st Dist. 1969).

56. ILL. REV. STAT. ch. 110, § 72 (1975).

duct.”⁵⁷ The court also held that coverage was not contrary to public policy, for the defendant had not insured against his own acts but against those of his employees.

It must be noted that the employer in *Scott* was liable for punitive damages by reason of vicarious liability rather than for its own willful or wanton act. The *Scott* court thereby permitted Illinois employers to insure against losses occasioned by culpable acts of their employees. However, the court did not address the larger issue of whether an employer or anyone else may insure against punitive damages for their own misconduct. The modern trend⁵⁸ is to conclude that coverage of punitive damages by an insurance policy is contrary to public policy, even if within the terms of the policy.

One prominent author has argued that automobile liability insurance should provide coverage for punitive damages except where the defendant's conduct is “grossly violative of public policy.”⁵⁹ The basis for this position appears to be that the insurer has not specifically excluded coverage and the insured expects all damages to be paid on his behalf. While this argument may have validity in reference to compensatory damages imposed for the wanton acts of an insured, it cannot “apply with equal force to punitive damages,”⁶⁰ for it ignores the purpose for awarding such damages. If punitive damages are to accomplish the stated objectives of punishment and deterrence, they must effect a hardship on the guilty party. Insurance coverage leaves the defendant unscathed, imposes the loss on innocent policyholders, and accomplishes merely a windfall recovery for the plaintiff.

Adherence to the objectives of punitive damages also indicates that even the limited holding in *Scott* is ill-advised. If justification exists to impose punishment on an employer for the conduct of his employee, the punishment should be borne by the employer rather than his insurance company. The argument that the employer is innocent of wrongdoing is grounds to preclude an award of punitive damages against the employer initially, but not to shift the burden of punishment to an equally innocent insurance company.

57. 105 Ill. App.2d at 137, 245 N.E.2d at 126.

58. Annot., 20 A.L.R.3d 343 (1968); Haskell, *Punitive Damages: The Public Policy and the Insurance Policy*, 58 ILL. B.J. 780 (1970). See, e.g., *Northwestern Nat'l Cas. v. McNulty*, 307 F.2d 432 (1962).

59. J. APPLEMAN, 7 INSURANCE LAW AND PRACTICE § 4312 (Cum. Supp. 1977). See also Appleman, 58 ILL. B.J. 857 (1969-70) (letter to the editor).

60. *Id.*

C. Death and Punitive Damages

No reported Illinois case has ruled on the issue of whether punitive damages may be recovered in the event that the tortfeasor dies prior to judgment. However, the basic objectives of punitive damages would seem to compel an Illinois court to follow the majority rule and to deny recovery of punitive damages against the decedent's estate.⁶¹ Since punitive damages are not intended to compensate the plaintiff but are imposed only in the interests of society, abatement of the right to recover such damages upon the defendant's death does not operate as a hardship on the plaintiff. Moreover, the death of the defendant renders the punitive effect of the doctrine unnecessary and undesirable. To assess punitive damages against the tortfeasor's estate would impose the punishment upon the innocent heirs of the tortfeasor.

On the other hand, the death of the victim raises entirely different considerations but affects similar, if incongruous, results. Recent decisions have expanded the allowable recovery under the Survival Act, permitting, for example, an award for conscious pain and suffering of the decedent.⁶² Yet the Illinois Supreme Court in *Mattyasovszky* found nothing to warrant "a change in the law of this State which for more than a hundred years has limited recovery under the Survival Act to compensatory damages."⁶³ Moreover, the court also rejected the opportunity to establish a common law action for wrongful death which would have included punitive damages within the scope of potential recovery.⁶⁴

The court's rulings were founded primarily on principles of statutory construction, principles whose very application is made necessary by reason of efforts to cure deficiencies in the development of the common law.⁶⁵ Nevertheless, permitting punishment of the defendant who injures his victim but not of the defendant who kills his victim is an anomaly which defies logic.

Analysis of Illinois law within the areas discussed illustrates two important considerations in future development of the doctrine. First, the dual purposes of punishment and deterrence must be the primary

61. C.J.S. *Damages* § 125(3) (1966).

62. See *Murphy v. Martin Oil Co.*, 56 Ill.2d 423, 308 N.E.2d 583 (1974).

63. *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 33, 330 N.E.2d 509, 510 (1975).

64. *Id.* at 34-37, 330 N.E.2d at 510-11.

65. See notes 36-38 and accompanying text *supra*. Had the common law recognized an action for wrongful death, neither interpretation of a statute nor application of the principles of statutory construction would have been necessary.

goals of any punitive damages award. The Illinois Supreme Court evidenced this concern by its suggested limitations in application of the doctrine in the principal-agent context. Similar caution should be exercised if and when the court addresses the issue of insurance coverage for punitive damages.

Secondly, examination of the court's treatment of the issue of death and punitive damages reveals that the court has given little if any consideration to whether punishment and deterrence would be served by expanding the doctrine to embrace death actions. Instead, it has availed itself of the opportunity to express its reluctance, perhaps even hostility, toward any application of the doctrine of punitive damages.

III. THE SUPREME COURT'S ATTITUDE TOWARD PUNITIVE DAMAGES

Illinois courts long have been disenchanted with the concept of punitive damages. As early as 1872 the supreme court, in *Holmes v. Holmes*,⁶⁶ seriously questioned the validity of the doctrine. Citing Professor Greenleaf's argument, the court stated that "damages should be precisely commensurate with the injury, neither more nor less."⁶⁷ The *Holmes* court also noted that it was inconsistent to mix the "supposed interests of society"⁶⁸ with those of a plaintiff seeking redress for a private injury in a civil damages action.

Recent analysis of the doctrine by the court indicates that little has occurred in the century since the *Holmes* decision to excise the defects of the doctrine. In 1961, the supreme court in *Knierim v. Izzo*⁶⁹ reversed that portion of a trial court's order which had dismissed the plaintiff's complaint seeking actual and punitive damages for the intentional infliction of emotional distress. The defendant allegedly threatened to kill the plaintiff's husband and then proceeded to carry out the threat. The high court adopted the plaintiff's theory of the case and recognized the "new tort" of intentional infliction of emotional distress. In so doing, the court stated that the cause of action would not lie for mere trivial affronts, but only for intentional acts calculated to cause severe emotional disturbance.⁷⁰ Surprisingly, the court also held that the plaintiff could not recover punitive damages in such an action. Conceding that defendant's conduct could be

66. 64 Ill. 294, 298 (1872).

67. *Id.* at 297, quoting 2 GREENLEAF, EVIDENCE § 253, and n.2.

68. *Id.* at 297-98.

69. 22 Ill.2d 73, 174 N.E.2d 317 (1961).

70. *Id.* at 88, 174 N.E.2d at 165.

characterized as wanton, malicious and oppressive, the court nevertheless refused to authorize such damages. It reasoned that "since the outrageous quality of the defendant's conduct forms the basis of the action, the rendition of compensatory damages will be sufficiently punitive."⁷¹

The decision in *Knierim v. Izzo* can be criticized on the grounds that compensatory damages may not punish the defendant sufficiently. Regardless of the merits of its rationale, however, the interesting aspect of the *Knierim* decision is the court's unfavorable treatment of punitive damages. The court refused to extend the doctrine despite the similarities between the new tort and other causes of action for intentional and malicious misconduct.

The court's attitude toward the doctrine was expressed most recently in *Mattyasovszky v. West Towns Bus Co.*⁷² In rejecting the opportunity to extend the doctrine of punitive damages to survival actions and death actions, the court discussed the objectives and operation of the doctrine. The court's commentary was directed toward comparing the punitive and deterrent purposes of the criminal law with the effectiveness of such goals in the civil law doctrine of punitive damages. Its evaluation, while not openly critical, was clearly negative.⁷³ A comprehensive examination of the points raised by the

71. *Id.*

72. 61 Ill.2d 31, 330 N.E.2d 509 (1975).

73. The Illinois Supreme Court has recently addressed the issue of punitive damage awards in death actions. In *Churchill v. Norfolk & Western Ry. Co.*, No. 49421 (Ill. Sup. Ct. 1977), the plaintiff-widow brought suit to recover damages against the defendant railroad for the death of her husband, an automobile passenger killed in an auto-train collision. In addition to the Wrongful Death action, the plaintiff sought both compensatory and punitive damages under the Public Utilities Act. The plaintiff contended that because she had become liable for her husband's funeral expenses, she was a person "affected" by a violation of that Act and, therefore, entitled to recover punitive damages as provided for in the Act. See ILL. REV. STAT. ch. 111²/_s, § 77 (1969).

The lower court rearranged and reinstated jury verdicts of \$45,000.00 in favor of the plaintiff as administratrix under the Wrongful Death Act, \$1,600.00 for the plaintiff individually under the Family Expense Act, and \$600,000.00 punitive damages for the plaintiff individually under the Public Utilities Act. 46 Ill. App.3d 781, 794, 362 N.E.2d 356, 366 (4th Dist. 1977).

On appeal, the Illinois Supreme Court affirmed the appellate court's decision with respect to the compensatory damage awards and reversed on the issue of punitive damages. However, in considering the issue of punitive damages, the court did not address plaintiff's contention that because she incurred funeral expenses for the death of her husband she was a person "affected" by the Public Utilities Act. Instead, the court interpreted plaintiff's claim for punitive damages as a wrongful death action arising out of a violation of the Public Utilities Act. No. 49421 at 3. As a result, while the court may have correctly determined that the Act does not create a cause of action for a person's death, the court failed to respond to the issue of whether plaintiff was otherwise entitled to recover punitive damages as a person "affected" by a violation of the Act.

Although the court's analysis in this regard is questionable, the ultimate reversal of the punitive damages award is not surprising in light of the earlier Illinois Supreme Court decision in

Mattyasovszky opinion reveals that reform of this doctrine is both possible and warranted in light of the supreme court's attitude.

IV. THE EFFECTIVENESS OF PUNITIVE DAMAGES IN ACHIEVING PUNISHMENT AND DETERRENCE

It cannot be denied that in the absence of insurance coverage, punitive damages achieve the objective of punishing the defendant. Moreover, society clearly has a right, and even a duty, to punish conduct that it deems contrary to the public well-being. Indeed, punishment inflicted for the sole purpose of causing pain may be considered one of the very foundations of our legal system. As noted by Justice Holmes:

It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance. . . .

The statement may be made stronger still, and it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object.⁷⁴

Punishment inflicted upon a wrongdoer through the legal process satisfies, to a great extent, the victim's and society's "desire for revenge" and renders self-help unnecessary.⁷⁵ A base instinct is met in a civilized manner and order is maintained.

However, the punishment and deterrence of wrongdoers generally has been the responsibility of the criminal law, which has developed safeguards to insure that punishment will be fair. These safeguards have not been adopted in civil actions even when the object of that action changes from compensation to punishment.

For example, a fine imposed upon a criminal defendant is carefully circumscribed by statute. By contrast, a civil defendant is subjected to punitive damages in an amount within the discretion of the jury.⁷⁶ The jury is without special training or experience in performing this task, and is given no guidance in determining an appropriate fine. Finally, in determining the amount of the fine, the jury is

Mattyasovszky. Thus, while the court acknowledges the inconsistencies which result from Illinois application of the doctrine, No. 49421 at 6, it is unlikely that the Illinois Supreme Court's unfavorable attitude toward punitive damages will change in the near future.

74. O. HOLMES, *THE COMMON LAW*, 40-41 (1881).

75. Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI L. REV. 408 (1967).

76. See text accompanying notes 10-19 *supra*.

allowed to consider the plaintiff's costs and attorney's fees—factors which are not relevant to the issue of punishment.⁷⁷

Another safeguard of the criminal system requires that the legislature define the specific conduct which will render an individual subject to punishment. Such statutes particularly dictate the requisite mental intent. Punitive damages, on the other hand, may be imposed upon a defendant for "willful and wanton conduct." The meaning of this phrase is less than clear. Other descriptions such as "malicious," "oppressive," and "aggravating" provide additional bases for argument by attorneys and courts, but no better warning of what conduct will be deemed culpable. In addressing this problem, the First District Appellate Court noted:

It is difficult, if not impossible, to lay down a short and simple governing rule on this subject. Much comfort can be found in cases presented by both sides to this issue, because whether an act is willful and wanton is greatly dependent upon the particular circumstances of each case. Valid jury questions of willful and wanton conduct have been presented by as little as misjudging the distance of an approaching automobile, . . . and failing to look before making a left turn. . . ."⁷⁸

The Illinois Supreme Court also has had difficulty defining the conduct punitive damages is intended to punish. It has noted that "situations in which punitive damages become an issue cover a broad spectrum that ranges from the intentional tort which is also a crime, . . . to what we characterize today as 'willful and wanton conduct,' a characterization that shades imperceptibly into simple negligence."⁷⁹

Only when the defendant's act constitutes a crime as well as a tort has society previously deemed that act punishable. Consequently, in most cases willful and wanton conduct is whatever the jury says it is, and the determination is made after the act has been performed. Punishment is imposed for "crimes" established *ex post facto*.

The injustice inherent in this failure to specify conduct deserving of punishment is magnified when applied to acts which do not constitute intentional acts. There exists a qualitative difference between intentional acts and reckless acts. The former occur as a result of a conscious decision to proceed in violation of another's rights. The latter

77. See notes 23 & 24 *supra* and accompanying text.

78. *Moore v. Jewel Tea Co.*, 116 Ill. App.2d 109, 135-36, 253 N.E.2d 636, 648 (1st Dist. 1969), *aff'd* 46 Ill.2d 288, 263 N.E.2d 103 (1970).

79. *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 35, 330 N.E.2d 509, 511 (1975).

results from unintentional lapses, however gross, from the standard of conduct demanded by society. Unlike the intentional tortfeasor, who is aware of his breach as he commits it, the reckless tortfeasor merely has failed to take cognizance of the consequences of his act. While neither tortfeasor may be excused from his conduct, the difference in the nature of their acts should be considered in determining whether their respective conduct should be punished.

Even if the civil law were to adopt safeguards from the criminal system, it still is doubtful whether the stated goals of punitive damages ever could be achieved. Admittedly, deterrence constitutes an objective which, if achieved, only can benefit society. Indeed, an ultimate goal of punishment must be deterrence, for punishment in and of itself neither cures a wrong already committed nor prevents future wrongs. However, the effectiveness of punitive damages in achieving that goal is questionable.

There is a noticeable lack of empirical evidence to either confirm or deny the deterrent effect of punitive damages. The criminal law system, charged with primary responsibility for punishment and deterrence and eminently visible to the public, achieves uncertain success at this task at best.⁸⁰ Moreover, if punitive damages has failed in its objective of deterring undesirable conduct, the fault may be ascribed in large part to the inability to specify the conduct sought to be deterred.

Even more basic, however, is whether imposition of punitive damages is ever capable of deterring reckless acts. A defendant guilty of an intentional tort has, at some point, however briefly, made a conscious reflection on his intended act. It is at this time that the deterrent effect of punitive damages will operate, if at all. The reckless actor, however, has failed to consider the immediate consequences of his conduct, much less the more remote possibility of punitive damages. Under this circumstance, deterrence is a legal fiction.

In addition to the issue of effective deterrence, there remains a question as to who should have the responsibility of punishing the wrongdoer. Courts repeatedly have reaffirmed the principle that punishment is imposed in the interests of society. Moreover, society alone should impose penalties for wrongful acts, for a corollary to society's right to punish is society's exclusive possession of that right. Yet, the doctrine of punitive damages allows a private individual to act in society's behalf, and the fine extracted from a defendant in the

80. The continuing debate over the deterrent effect of capital punishment illustrates the difficulty. See Forst, *Deterrent Effect of Capital Punishment*, 61 MINN. L. REV. 743 (1971).

name of society accrues solely to the plaintiff rather than the public. But this aspect of punitive damages seems far less objectionable than the potential for harm which exists by reason of the plaintiff's status as surrogate prosecutor.

The overriding self-interest of the plaintiff in possible recovery of a windfall award, over and above all amounts necessary to fairly compensate him for his damages, inevitably will affect the plaintiff's ability to conduct the action in society's best interest. As noted by one author, the plaintiff's position is analogous to that of a prosecuting attorney whose compensation is based upon the number of convictions obtained.⁸¹ The juxtaposition of the plaintiff's interests in monetary reward and society's interest in fair and just punishment creates a conflict of interest which, in the absence of the court's careful scrutiny, will always be resolved in the plaintiff's favor.

V. A PROPOSAL FOR REFORM

Although there are inherent problems in the doctrine, certain advantages do accrue through the use of punitive damages. The lure of a substantial recovery encourages plaintiffs to bring "to justice" those guilty of crimes who inevitably escape the interest of the public prosecutor. Moreover, certain torts, especially in the business and commercial area, result not only in damage to the plaintiff, but benefit to the defendant. An award of damages which merely is compensatory conceivably may leave the guilty party in as good or better a position than if he had not committed the tort. The law cannot countenance this result. A tool must exist to prevent a guilty party from benefiting by his own tortious act.

Nevertheless, the numerous and serious defects in the area of punitive damages warrant substantial reformation of the doctrine. Some of the defects, such as its questionable capacity to deter, are incapable of being cured. Others, such as the lack of procedural safeguards in the imposition of punishment, may not be corrected without unwarranted and undesirable modifications to the compensatory nature of civil damage actions. A possible solution might be complete abandonment of the doctrine, for the criminal law remains to punish that conduct which society has specifically prohibited.

A less radical solution would be to limit the recovery of punitive damages to intentional torts which constitute crimes or provide ben-

81. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931). Some courts have recognized this potential for abuse. See *Eshelman v. Rawalt*, 298 Ill. 192, 197 (1921).

efits to the defendant. By this means, many of the objectionable features of the doctrine would be obviated and the benefits retained. Criminal conduct normally ignored by prosecutors would be brought before the court and punished appropriately. Moreover, those who seek advantages by interfering with the rights of others, as is the case in business torts, would find their actions frustrated. The *ad hoc* method by which conduct presently is deemed punishable would be exchanged, in many cases, for the certainty of the criminal code. Whatever deterrent effect is provided by punitive damages would be accomplished in the area of intentional acts which society has deemed contrary to the public well-being.

Concededly, this proposal does not provide an ideal solution to the problems presented by the doctrine, for certain defects remain. Moreover, the deterrence of tortious conduct must remain a goal of the law. Nevertheless, the dual interests of society in imposing punishment in a fair and evenhanded manner, and in regulating the conduct of its citizens may best be served by revising the doctrine of punitive damages in Illinois.