1984

Zen and the Art of Exemplary Damages Assessment

Theodore Emens Cowen

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Legal Remedies Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation


Available at: https://uknowledge.uky.edu/klj/vol72/iss4/7

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Comments

Zen and the Art of Exemplary Damages Assessment

Several years ago, I was a plodding jogger—no style, head always bent forward looking at the pavement. My spouse, ever helpful, bought me a copy of The Zen of Running, a beautiful book which extolled the virtues of running with head erect to enable the deep, fluid breathing of the perfectly functioning human machine. The next day—filled with Zen—I left for my morning run. Head erect and breathing deeply, I began to understand the potential runner's satori. Moments later I lay asprawl on the sidewalk, only then remembering that I had always before run with my head bowed to watch out for the cracks in the sidewalk pavement.*

INTRODUCTION

“A single blow with practically no injury resulting, however wrong the blow may have been, cannot, we believe, result in a $20,000 [exemplary damages]1 award in absence of passion and prejudice on the part of the jury.”2 This conclusion,

* A personal interlude. Sometimes stories exist just to be enjoyed. Usually, they tell us about the foibles of human life (or at least of the teller). One senses that, although courts and juries might enjoy the freedom of an apparently unbridled approach to assessing exemplary damages, having a verdict overturned as excessive leaves both wondering why no one bothered to point out the pitfalls of assessment. Perhaps, it is time for the Court to devise and prescribe a heads-down, plodding approach to the assessment of exemplary damages in Kentucky.

1 Although Kentucky courts generally use the term “punitive damages,” “exemplary damages” is used throughout this Comment in place of “punitive damages.” Although “punitive” and “exemplary” are synonyms, “exemplary damages” will be used as a term of art to refer to those damages—which have historically been denoted as “punitive damages,” “exemplary damages,” and “vindictive damages”—awarded in addition to compensatory damages. This terminology convention is helpful since the discussion of exemplary damages often focuses on the non-punitive purposes of those damages.

2 Mantooth v. Fowler, No. 82-CA-2527-MR, slip op. at 4 (Ky. Ct. App. July 29,
in an unpublished opinion of the Kentucky Court of Appeals, applied to litigation evolving out of a dispute between two ex-professional football players.\(^3\) A single blow by the defendant resulted in a compensatory damages award of $2,210 to the plaintiff, with exemplary damages in the amount of $20,000.\(^4\) The court upheld the compensatory damages but found that "[t]here [was] simply not a sufficient relationship between the [exemplary] damage award, the injuries sustained, and the acts causing them."\(^5\) In remanding the case for a new trial on the amount of exemplary damages, the court failed to articulate the criteria a jury\(^6\) should use to fairly assess exemplary damages.\(^7\)

The Kentucky Court, like many other courts,\(^8\) has relied upon a standard of appellate review that is predominantly visceral.\(^9\) While such a standard of review offers the advantage of

---

\(^3\) Id., slip op. at 1-2. The court of appeals opinion met with predictable notoriety in the media which capitalized on the human interest aspects of the litigation. See \textit{Punch Not Worth $20,000, Court Decides}, Lexington Herald-Leader, July 30, 1983, at B1, col. 1.

\(^4\) Mantooth v. Fowler, No. 82-CA-2527-MR, slip op. at 3.

\(^5\) Id., slip op. at 4.

\(^6\) For convenience of expression, "jury" is used to refer to the fact finder, whether court or jury.

\(^7\) The jury in \textit{Fowler v. Mantooth} awarded $210 for medical expenses, $2,000 for pain and suffering and $20,000 punitive damages. The jury instructions, based on the complaint, permitted awards of up to $210 for medical expenses, $5,000 for pain and suffering and $50,000 in punitive damages. The instructions, thus, contained an obvious 10 to 1 ratio between the intangible damages—"pain and suffering" and "punitive damages." The ratio between the highest permitted awards for compensatory damages (a total of $5,210 for medical expenses and pain and suffering) and punitive damages ($50,000) also approximates 10 to 1. The jury verdict maintained the 10 to 1 ratio between intangible damages and continued an approximate 10 to 1 ratio between compensatory damages and punitive damages. It appears that the jury was simply applying, with discretion, what it perceived to be the court's guidelines. The court of appeals' labelling of the jury's decision as motivated by passion and prejudice fails to address what likely occurred and fails to offer future assistance to the jury.

\(^8\) See \textit{K. REDDEN, PUNITIVE DAMAGES §§ 3.6(B)-(C) (1980)}. \textit{See also Morris, PUNITIVE DAMAGES in Tort Cases, 44 HARV. L. REV. 1173, 1180 (1930-31)} (judicial tests devised to review an exemplary damages verdict are often skewed to support "the judge's view of the verdict, formulated before the test is thought of").

\(^9\) See, e.g., \textit{Hensley v. Paul Miller Ford, Inc.}, 508 S.W.2d 759 (Ky. 1974), in which the court stated:

\begin{quote}
After our having carefully considered all of the facts and having determined that there was not a sufficient relationship of the punitive damages to the
\end{quote}
EXEMPLARY DAMAGES ASSESSMENT

deferring to the creativity and wisdom of the jury, it also results in a dearth of meaningful guidance to juries and the parties who appear before them.

Notwithstanding the importance of essentially visceral decisions to the resolution of disputes in uncharted areas of the law, the needs of litigants for more effective and economical litigation, and the needs of juries for guidance, mandate the articulation, insofar as possible, of clear and well reasoned criteria for the assessment of exemplary damages. Since any such criteria are necessarily related to the court's understanding of the purposes of these awards, this Comment will first delineate the purposes of exemplary damages and then consider assessment criteria which advance those purposes. Finally, procedural mechanisms to insure appropriate integration of these criteria into the trial process will be suggested.

I. THE PURPOSES OF EXEMPLARY DAMAGES

The common law origin of exemplary damages is a bit un-
certain. Commentators generally point to *Huckle v. Money* as the first reported "exemplary damages" opinion, but the impetus for the development of the doctrine remains in doubt. Among the theories advanced for the genesis of exemplary damages are: a reluctance to set aside excessive jury verdicts, compensation for intangible harms and punishment of the wrongdoer. Whatever the original purposes of the damages may have been, only the theories of compensa-

12 K. Redden, supra note 8, at § 2.2(A)(2).
13 95 Eng. Rep. 768 (C.P. 1763). The court refused to set aside a 300 pound sterling verdict in an action against an agent of the King for trespass, assault and false imprisonment under a general warrant. Despite the absence of physical injury, the Lord Chief Justice remarked:
[I think the jury has] done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition, a law under which no Englishman would wish to live an hour, it was a most daring attack made upon the liberty of the subject.

14 See 1 T. Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 348, at 687 (9th ed. 1920); Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870, 872 (1975-76); Note, Punitive Damages and the Admissibility of Evidence of Wealth, 29 Ala. L. Rev. 564, 568 (1977-78). A companion case, Wilkes v. Wood, 98 Eng. Rep. 489 (1763), may be the first explicit common law reference to a punitive function for damages: "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself." Id. at 498-99.

16 See id.; K. Redden, supra note 8, at § 2.2(A)(2) (observing that jury members were at one time subject to imprisonment and confiscation of their property if their verdict was deemed excessive and set aside); T. Sedgwick, supra note 14, at §§ 349-50 (observing that, historically, juries had power to set damages without interference).

17 See J. Ghiardi & J. Kircher, supra note 15, § 1.02, at 4-7; K. Redden, supra note 8, at §§ 2.2(B)-(C).
18 See K. Redden, supra note 8, at §§ 2.2(D)-(F) (discussing deterrence, the need for more severe punishment for physical injury to the person, and revenge as rationales).

19 Isolating such a purpose is not critical. "The functional autonomy of motives" is a psychological principle used to explain the phenomenon that the verbalized justification for behavior often adapts to criticism and changing circumstances while the behavior itself simply persists. This principle, charitably construed, suggests that individuals (and courts) often make good decisions without being able to articulate clearly their reasons and later gradually evolve thoughtful and reasonable justifications for their decisions. See note 56 infra and accompanying text.
tion and punishment are found in Kentucky law. Arguably, both are relevant to the assessment of exemplary damages.

A. The Evolution of Kentucky's Understanding of Exemplary Damages

The evolution of the Kentucky Supreme Court's understanding of exemplary damages reflects the ambiguity of purpose in the common law genesis of the doctrine. Some early Kentucky opinions advocated a compensatory rationale for exemplary damages. Other contemporaneous Kentucky decisions indicated a punitive purpose for the award.

Chiles v. Drake, an 1859 decision, settled the issue for several years. The Court considered a defendant's contention that, where the alleged tortious conduct subjected the defendant to criminal liability, an award of exemplary damages based on that conduct was a violation of Kentucky's constitutional prohibition against double jeopardy. At the time of

---

20 See, e.g., Hawkins & Co. v. Riley, 56 Ky. (17 B. Mon.) 80, 88 (1856) (punitive); Major v. Pulliam, 33 Ky. (3 Dana) 582, 584 (1835) (compensatory). While deferential to jury verdicts, the Kentucky Supreme Court views the setting aside of excessive jury verdicts as one of its "highest duties." See Hensley v. Paul Miller Ford, Inc., 508 S.W.2d 759, 763 (1974).
21 See notes 12-19 supra and accompanying text.
22 See, e.g., Major v. Pulliam, 33 Ky. (3 Dana) at 584 ("The chief reason why the owner of the mare was entitled to damages considerably exceeding the value of the property, is because his sensibilities were awakened, and his peace and quietude disturbed, by the provoking malice and peculiar cruelty evinced by the manner of killing a favorite domestic animal.
23 See, e.g., Hawkins & Co. v. Riley, 56 Ky. (17 B. Mon.) at 88 ("To exempt the [defendant] from any liability beyond the actual injury in such cases, would, in many cases, deprive the traveling public of any protection.
24 Tyson v. Ewing, 26 Ky. (3 J.J. Marsh.) 186, 187 (1830) ("If trespass were bound to pay in damages no more than the exact value of the property, forcibly taken and converted by them, there would be no motive created by the operation of the law, to induce them to desist and abstain from invading the rights of others.").
25 Id. at 151. Kentucky's double jeopardy proscription provides: "No person shall, for the same offense, be twice put in jeopardy of his life or limb.
26 See Commonwealth v. Prall, 142 S.W. 202, 205 (Ky. 1912). In Prall,
this decision, nineteenth century scholars were locked in de-
bate as to whether the proper purpose of exemplary damages
should be compensatory or punitive.\(^2\) Drawing on the distinc-
tions advanced by these scholars, the Court finessed the con-
stitutional issue by declaring that exemplary damages are “al-
lowed as compensatory for the private injury complained of in
the action.”\(^2\) The Court observed that every damages award,
whether exemplary or compensatory, has a punitive effect.\(^2\)
The greater amount of an award including exemplary dam-
ages was justified, “because the injury has been increased by
the manner [in which] it was inflicted.”\(^2\) Thus, the Court rec-
ognized that an injury caused maliciously or recklessly is
likely to result in greater intangible harm than the same in-
jury caused negligently. Larger awards, while clearly having
an adverse effect on the defendant, were intended only to in-
sure full compensation of the injured plaintiff.

This compensatory purpose was reflected in “smart money” terminology used by the Court over the next 100 years.\(^3\) Exemplary damages, or “smart money,” allowed the jury to compensate the plaintiff for the “smarting” nature of the injury, that is, for then otherwise incompensable injuries such as embarrassment, humiliation and outrage.\(^3\) Although

the Court was concerned more with the spirit of the double jeopardy proscription than with its literal wording. See id. Depending upon whether exemplary damages are construed as an “infamous punishment,” Chiles v. Drake may demonstrate judicial reaction to a false issue.

\(^2\) See 2 S. Greenleaf, A Treatise on the Law of Evidence § 253, at 242 n.2 (2d ed. 1848) (criticizing Sedgwick’s view of exemplary damages as punitive); T. Sedgwick, supra note 14, at § 353 (criticizing Greenleaf’s compensatory rationale for exemplary damages). For a description of the conflict between Sedgwick and Greenleaf, see Note, supra note 14, at 571-73.

\(^2\) See id. at 151.

\(^2\) See id. at 152.

\(^3\) See, e.g., Bisset v. Goss, 481 S.W.2d 71, 74 (Ky. 1972).

\(^3\) See Note, supra note 14, at 574-75. In being treated as synonymous with “ex-
emplary damages,” “smart money” was eventually construed to refer to the “smart-
ing” caused to the defendant by the damages award. See id. This evolution in the
meaning of the term reflects the increasing emphasis on the punitive purposes of ex-
progress in the doctrine of compensatory damages gradually lessened the need for exemplary damages to serve as a means of effecting full compensation for the plaintiff,\textsuperscript{32} exemplary damages may yet have validity as a mechanism which permits the jury to compensate the otherwise incompensable.\textsuperscript{33} Without explicitly overruling \textit{Chiles v. Drake}, the Kentucky Court of Appeals in 1908 again confirmed the punitive purpose of exemplary damages\textsuperscript{34} and moved toward the mainstream of American legal thought on the issue.\textsuperscript{35} For a time, the Court also continued to assert a compensatory rationale for exemplary damages.\textsuperscript{36} However, recent Kentucky opinions have recognized only the punitive purposes of an exemplary award.\textsuperscript{37} Possibly, the Kentucky Court never fully abandoned the theory that exemplary damages also have a compensatory purpose and it may be that both purposes remain viable in Kentucky today.\textsuperscript{38}

\textbf{B. Exploring the Purposes of Exemplary Damages}

Although there is considerable debate over whether exemplary damages have any validity,\textsuperscript{39} the doctrine is accepted in

\begin{quote}

Plaintiffs have been able to recover actual damages in tort for mental anguish, pain and suffering, embarrassment and hurt feelings for many years in the United States. Awarding exemplary damages on the same basis is redundant. K. Redden, \textit{supra} note 8, \S\ 2.3(A), at 31.

\textsuperscript{33} See notes 50-61 \textit{infra} and accompanying text.

\textsuperscript{34} See Louisville \& N.R.R. v. Roth, 114 S.W. 264 (Ky. 1908), where the Court stated:

\begin{quote}

\[\text{[I]t is generally considered ... that punitive damages are awarded as a civil punishment inflicted upon the wrongdoer, rather than as indemnity to the injured party, although, as he will be the beneficiary of the punishment inflicted, it might with much propriety be said that they are allowed by way of remuneration for the aggravated wrong done.}
\end{quote}

\textit{Id.} at 266 (citing \textit{Chiles v. Drake}, 59 Ky. (2 Met.) at 146).

\textsuperscript{35} See K. Redden, \textit{supra} note 8, at \S\ 2.3(A).

\textsuperscript{36} See, \textit{e.g.}, Louisville \& N.R.R. v. Ritchel, 147 S.W. 411, 414 (Ky. 1912) ("[P]unitive damages, when allowed, are given as compensation to the plaintiff, and not solely as a punishment of the defendant.").

\textsuperscript{37} See, \textit{e.g.}, Hensley v. Paul Miller Ford, Inc., 508 S.W.2d at 762-63.

\textsuperscript{38} See 25 C.J.S. Damages \S\ 117(1) n.99 (1966) (citing several Kentucky cases as authority for the position that exemplary damages are not punitive).

\textsuperscript{39} A delineation of this controversy is beyond the scope of this Comment. The most forceful attack on the doctrine is that, because of its punitive intent, an exem-

\end{quote}
most states and at the federal level. The central purposes for exemplary damages are punitive and compensatory. Within the punitive rubric, two distinct sub-purposes emerge: deterrence and retribution. The compensatory rationale also contains two sub-purposes: traditional compensation and compensation for loss of equilibrium.

1. The Punitive Rationale

Deterrence reflects society's interest in protecting itself and its members. Deterrence may be either specific or general. Specific deterrence is the use of the sanction to change the conduct of the individual wrongdoer. General deterrence

ploy damages award may violate both constitutional provisions proscribing double jeopardy and constitutional provisions guaranteeing due process of law. For example, some commentators assert that the punitive nature of exemplary damages requires that the defendant's liability be proved "beyond a reasonable doubt." See J. Ghiardi & J. Kircher, supra note 15, at §§ 3.02-.03; K. Redden, supra note 8, at § 7.2; Long, supra note 14, at 884-85; Note, In Defense of Punitive Damages, 55 N.Y.U. L. Rev. 303, 331-37 (1980) [hereinafter cited as In Defense]; Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev. 1158, 1177-84 (1966) [hereinafter cited as The Imposition]; Note, Criminal Safeguards and the Punitive Damages Defendant, 34 U. Chi. L. Rev. 408 (1976).

Five states either ban exemplary damages or make them available only under very limited circumstances. Nebraska appears to be the only state which totally rejects exemplary damages. See Miller v. Kingsley, 230 N.W.2d 472 (Neb. 1975). Louisiana, Massachusetts and Washington allow exemplary damages only as provided by statute. See Killebrew v. Abbott Laboratories, 359 So. 2d 1275 (La. 1978); City of Lowell v. Massachusetts Bonding & Ins. Co., 47 N.E.2d 265 (Mass. 1943); Henriksen v. Lyons, 652 P.2d 18 (Wash. Ct. App. 1982). Indiana generally prohibits the imposition of exemplary damages for conduct which is also subject to criminal sanctions. See Aldridge, The Indiana Doctrine of Exemplary Damages and Double Jeopardy, 20 Ind. L.J. 123 (1945).

See Day v. Woodworth, 54 U.S. (13 How.) 363 (1851). See also City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 266-68 (1981) (while holding exemplary damages unavailable in a § 1983 action against a municipality because such an award only serves to punish the taxpayers, the Court observed that such damages would be available "in 'a proper' § 1983 action").

See Long, supra note 14, at 875. Cf. K. Redden, supra note 8, at § 2.3(A); Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 520-22 (1956-57) ("the unbroken line of judicial authority in all but three states would seem to preclude any argument that exemplary damages 'in theory' retain any major compensatory character").


is the use of the sanction to change the conduct of potential wrongdoers by making an example of the individual wrongdoer. Whether general or specific, the deterrent purpose of exemplary damages is widely recognized.

Unlike deterrence, retribution is the exactment of punishment for punishment’s sake. This vengeful purpose of exemplary damages was aptly characterized by the early labelling of the damages as “vindictive damages.” The damages award, under this theory, serves as a vehicle for venting the outrage felt by the plaintiff and community towards the defendant.

2. The Compensatory Rationale

Compensation may have been the original purpose of exemplary damages. The absence of ordinary tort compensation for humiliation, emotional distress and other intangible harms may have precipitated early awards under this doctrine. Even though the availability of compensatory recovery in tort has expanded dramatically since the inception of exemplary damages, it is doubtful that all intangible harms are now sufficiently recompensed. Moreover, it seems presumptuous to deny juries the opportunity to identify (even if unable to conceptualize) hitherto unarticulated harms and to attempt their appropriate compensation by use of exemplary

---

45 Id. at 23.
46 See RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) (“Punitive damages are damages . . . awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.”). But see note 39 supra.
47 W. LAFAVE & A. SCOTT, supra note 44, at 24.
48 See Chiles v. Drake, 59 Ky. (2 Met.) at 151 (“Punitive, vindictive, and exemplary damages, are all synonymous terms.”).
49 K. REDDEN, supra note 8, at § 2.2(F).
50 See note 17 supra and accompanying text.
51 Id. Clearly, Kentucky accepted this purpose for exemplary damages at one time. See, e.g., Major v. Pulliam, 33 Ky. (3 Dana) at 562-84. See also notes 22-32 supra and accompanying text.
53 See notes 60-61 infra and accompanying text for a discussion of the need to compensate plaintiffs for “loss of equilibrium.”
Some jurisdictions allow exemplary damages as a means of compensating the plaintiff for attorney's fees. This particular rationale is unpersuasive if the purpose of exemplary damages is solely compensatory. However, in combination with punitive purposes for exemplary awards, compensation for litigation expenses may be an incentive for a plaintiff to pursue otherwise nominal causes of action which, because of the malicious intent or recklessness of the actor, could have resulted in serious harm. Some commentators have recognized that this compensatory function is achieved in the traditional choice to award exemplary damages to the plaintiff rather than to the coffers of the state.

Exemplary damages could also be awarded to compensate the plaintiff for the "loss of equilibrium" he experiences as a result of his feelings of anger or vengefulness toward the wrongdoer. Although courts and juries have recognized that humiliation and embarrassment may be debilitating, there is little evidence of a corresponding awareness that feelings of vengefulness and anger may equally disrupt the equilibrium of one's life. Perhaps a plaintiff who is enraged, rather than mortified, by a defendant's malicious and injurious conduct

---

64 The advent and development of exemplary damages clarifies the role of juries in the evolution of the law. See note 16 supra and accompanying text. But cf. Morris, supra note 8, at 1179-80 ("[I]n fixing the amount of punitive damages . . . [i]t is evident that the problems of social control may require more technical skill than [juries] have or can acquire.").

65 See Note, supra note 42, at 521.

66 It remains unclear why, within a purely compensatory scheme, attorney's fees should be recoverable for some harms but not for others. See J. Ghiardi & J. Kircher, supra note 15, at § 2.11.

67 Mallor & Roberts, supra note 43, at 649-50. Compensating the injured plaintiff for litigation expenses is beneficial to society since such compensation increases the likelihood that the wrongdoer will be sued and that similar wrongdoings will be deterred.

68 See id.; Note, supra note 42, at 525-26 ("if exemplary damages were to go to the public treasury, fewer wrongdoers would be punished, since a plaintiff would have no inducement to bring suit if the compensatory damages were likely to be small").

69 Obviously, any injury to the plaintiff can be characterized as a "loss of equilibrium." The term is proposed as a term of art for this discussion to maintain a judgment-free perspective on the plaintiff's feelings of anger and vengefulness.

70 See, e.g., Louisville & N.R.R. v. Ritchel, 147 S.W. at 414 ("the jury . . . might have awarded damages for humiliation and mortification of feeling").
also deserves compensation as an effort to restore him to his former emotional state.

While courts have perceived exemplary damages, in part, as a means of avoiding self-help redress of wrongs, compensation for loss of equilibrium can operate under a different set of assumptions. For example, assuming that the plaintiff is law abiding and will not seek personal revenge, considerable discomfort and debilitation may yet have been experienced as a result of the quite natural vengeful and spiteful feelings aroused by the defendant's conduct. A monetary award cannot replace a lost limb, nor can it always dissipate the urge to take an eye for an eye, but it can be an attempt to restore one to the legal equivalent of his prior condition. Loss of equilibrium could be one of the otherwise incompensable injuries that a jury may recognize and, through exemplary damages, rectify.

Thus, although the Kentucky courts presently stress the punitive purposes of exemplary damages, the compensatory rationale once espoused may yet have vitality. As criteria for the assessment of exemplary damages are developed, both purposes should be kept in mind.

II. CRITERIA FOR THE ASSESSMENT OF EXEMPLARY DAMAGES

The guidelines provided to juries to determine a fair award of exemplary damages should be intrinsically related to the purposes of the damages. Unfortunately, the assessment criteria revealed in Kentucky jury instructions provide the jury with very little judicial conception of the role of the award. This lack of guidance seems largely attributable to

61 K. Redden, supra note 8, at § 2.2(F) (observing that tort law generally is premised on efforts to avoid self-help redress of injury). See, e.g., Hawkins & Co. v. Riley, 56 Ky. (17 B. Mon.) at 88.

62 The punitive damages instruction in Mantooth v. Fowler, No. 82-CA-2527-MR, (Ky. Ct. App. July 29, 1983), is probably typical of such instructions given in Kentucky: "If you believe from the evidence that the assault was willful, malicious, and without justification, you may, in your discretion, award the Plaintiff punitive damages, not exceeding, however, the sum of $50,000.00, the amount claimed in the Complaint." Id. at Trial Court Opinion and Order. Note the similarity to an instruction given 70 years ago:

[If you believe from the evidence that the defendants were guilty of gross
the Court's own historical uncertainty as to the purposes of exemplary damages. 63

A recent opinion, Island Creek Coal Co. v. Rodgers, 64 demonstrates the potentially persisting effects of Kentucky's one time rejection of the punitive rationale for exemplary damages. In Island Creek the Kentucky Court of Appeals affirmed the propriety of the trial judge's instructing the jury that "[exemplary damages] are awarded against a person to punish him for his outrageous conduct and to discourage such person and others from similar conduct in the future." 65 The opinion specifically disregarded a 1900 opinion, Southern Railway v. Barr's Administrator, 66 which had declared it objectionable to define exemplary damages as being intended to punish and deter. 67

Since Southern Railway was a "not to be published" opinion, the Island Creek court found it to be of "questionable binding authority" and upheld the instruction as being clearly useful to the jury. 68 The court appears to have treated the issue in terms of proper jury instructions generally, rather than in terms of the proper rationale for exemplary damages. Southern Railway had been correctly decided during a time when Kentucky applied a purely compensatory rationale for exemplary damages. However, Southern Railway lost its validity in the early part of this century when Kentucky's highest court reaffirmed the punitive rationale for exemplary damages. 69

negligence in causing said injuries, if they did cause them, in addition to compensatory damages find also punitive damages, your whole finding not to exceed, however, the sum of $20,000, the amount claimed in the petition. Standard Oil Co. v. Marlow, 150 S.W. 832, 834 (Ky. 1912). In neither instruction does the jury get appreciable guidance—other than a maximum amount established in the pleadings—as to the proper means of determining a fair amount of exemplary damages.

63 See notes 21-38 supra and accompanying text for a discussion of the evolution of exemplary damages in Kentucky.
64 644 S.W.2d 339 (Ky. Ct. App. 1982).
65 Id. at 347.
66 55 S.W. 900 (Ky. 1900).
67 See 644 S.W.2d at 347.
68 Id. Ky. R. Civ. P. 76.28(4)(c) provides: "Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state."
69 See Louisville & N.R.R. v. Roth, 114 S.W. 264, 266 (Ky. 1908).
Island Creek illustrates the need for courts to actively review the criteria for assessment of such damages in the light of current understandings of the purposes of exemplary damages. This contention is based on the premise that the jury best functions when it is able to apply decisional criteria similar to those which courts will employ during appellate review.70

3. Assessment Criteria Recognized by the Kentucky Courts

Kentucky presently requires that the exemplary damages award “bear some relationship to the injury and the cause thereof.”71 A failure to show injury will result in the disallowance of exemplary damages.72 Likewise, a failure to show a “wanton, malicious or reckless character of the acts complained of” will result in the disallowance of the award.73 There is no requirement that exemplary damages be proportional to compensatory damages74 or even that compensatory damages be awarded.75

As stated, Kentucky’s requirement of “some relationship” to the injury is consistent with both the punitive and the compensatory rationales for exemplary damages. Injury must be present to provide the requisite standing for recovery. The wanton, malicious or reckless character of the conduct causing the injury not only authorizes an exemplary damages award but also plays a major role in its assessment.76 The “some relationship” rule allows the jury considerable flexibility in ad-

70 Cf. Morris, supra note 8, at 1207-08 (courts should give meaningful instructions).
72 Lawrence v. Risen, 598 S.W.2d 474, 475-76 (Ky. Ct. App. 1980) (affirming a defendant’s summary judgment where the plaintiff sought only punitive damages and failed to allege actual injury caused by the conduct for which the damages were sought).
73 See, e.g., Great Atl. & Pac. Tea Co. v. Smith, 136 S.W.2d 759, 768 (Ky. 1939).
74 Hensley v. Paul Miller Ford, Inc., 508 S.W.2d at 763.
75 Louisville & N.R.R. v. Ritchel, 147 S.W. 411, 414 (Ky. 1912).
76 See Harrod v. Fraley, 289 S.W.2d 203, 205 (Ky. 1956) (“Exemplary or punitive damages are generally defined as damages which are given in enhancement merely of the ordinary damages on account of the wanton, reckless, malicious, or offensive character of the acts complained of by the plaintiff. . . .”).
justing the exemplary award to both the severity of the injury and the egregiousness of the defendant's conduct. Although the "some relationship" principle gives the jury considerable freedom to implement the purposes of exemplary damages, there are additional criteria for the assessment of exemplary damages which are consistent with the award's purposes and which would provide the jury with significant guidance if adopted.

B. Proposed Additional Assessment Criteria

1. Wealth of the Defendant

The vast majority of jurisdictions recognize the validity of considering the defendant's wealth in an exemplary damages assessment.\(^7\) The rationale for considering the defendant's wealth is that an award is effectively punitive only if tailored to the financial resources of the defendant.\(^7\) The retributory and deterrent purposes of an award are not realized when the award is inconsequential to the defendant.\(^7\) Likewise, courts are unwilling to uphold an exemplary damages award so severe, given the defendant's financial circumstances, that it "annihilates" the defendant and thereby exceeds the purposes of exemplary damages.\(^8\)

Kentucky initially accepted the relevance of the defendant's wealth to the assessment of exemplary damages.\(^9\)

---

\(^7\) See Note, Evidence of Defendant's Financial Condition is Admissible to Determine the Amount of Punitive Damages to be Awarded Against the Defendant—Hall v. Montgomery Ward & Co. (Iowa 1977), 27 Drake L. Rev. 584, 586 n.18 (1977-78), for a thorough listing of jurisdictions allowing the defendant's wealth to be considered in exemplary damages assessments. Kentucky, Alabama and Texas are the only states in which such evidence is inadmissible for this purpose. Note, supra note 14, at 567.

\(^8\) See, e.g., Suzore v. Rutherford, 251 S.W.2d 129, 131 (Tenn. Ct. App. 1952) ("the financial condition of the defendant . . . is relevant, because what would be 'smart money' to a poor man would not be, and would not serve as a deterrent, to a rich man").

\(^9\) See In Defense, supra note 39, at 342 n.226.

\(^10\) See In Defense, supra note 39, at 342 n.226.

\(^11\) See Louisville, C. & L.R.R. v. Mahony's Adm'x, 70 Ky. (7 Bush) 235, 238 (1870) ("in this as in other cases for the recovery of punitive or exemplary damages it was not improper to allow proof of the pecuniary ability of the defendant"). Cf. Gore v. Chadwick, 36 Ky. (6 Dana) 477, 478 (1838) (plaintiff's proof of defendant's worth
However, in 1900, *Givens v. Berkley* ruled that the "pecuniary condition of the defendant" could not be introduced to affect the size of an exemplary damages award. The Court reasoned that the jury's assessment of exemplary damages should be based on the "enormity or wantonness of the [injury causing] act and that the defendant's lack of financial resources should not affect this assessment." The opinion was perfectly consistent with the then current view of the Court that exemplary damages were solely compensatory. When the purpose of damages is only to restore the plaintiff to the legal equivalent of his pre-injury condition, the financial resources of the defendant are irrelevant. In *Hensley v. Paul Miller Ford, Inc.*, the Court recently reaffirmed the rule announced in *Givens v. Berkley*, but it did so without recognizing that since 1908 Kentucky has also affirmed a punitive purpose for exemplary damages.

Although legitimate concerns have been expressed about the potential prejudicial effect of such evidence on the jury's
determination of liability and about the invasion of the defendant's privacy resulting from the introduction of such evidence, adequate procedural protection of the defendant is possible.

The defendant's wealth should therefore be included among the criteria for assessing exemplary damage awards to effectively accomplish the punitive purpose of the award.

2. Criminal Sanctions Imposed on the Defendant

Few jurisdictions have formally considered whether liability for criminal sanctions may be proved to mitigate exemplary damages. The jurisdictions which have considered this as a criterion for exemplary damages assessment are closely divided as to its relevance and admissibility. Although Kentucky defendants have occasionally objected to exemplary damages on the basis of their exposure to criminal sanctions, Kentucky has not squarely addressed whether criminal sanctions should be a factor in determining the amount of exemplary damages. Probably, because of the likelihood that such information would prejudice the jury's determination of liability, defendants have chosen not to offer evidence of their criminal liability for the jury's consideration in assessing exemplary damages.

Although evidence of criminal sanctions would be irrelevant to the compensatory purposes of exemplary damages, the jury should be allowed to consider evidence of such sanc-

---

90 Some commentators have suggested the jury might succumb to the "Robin Hood" syndrome." See Mallor & Roberts, supra note 43, at 665. See also Morris, supra note 8, at 1191.
92 See notes 101-06 infra and accompanying text.
93 See J. GHIARDI & J. KIRCHER, supra note 15, at § 5.34.
94 See id.
95 See Doerhoefer v. Shewmaker, 97 S.W. 7 (Ky. 1906); Chiles v. Drake, 59 Ky. (2 Met.) at 146.
96 Evidence of conviction, except by plea of guilty, may not be introduced against the defendant in Kentucky. See, e.g., Race v. Chappell, 202 S.W.2d 626, 628 (Ky. 1947).
97 The logic is analogous to the lack of relevance of evidence of wealth with regard to compensatory damages. Cf. In Defense, supra note 39, at 342 n.226.
tions in assessing the award necessary to gain the proper amount of deterrence and to inflict the proper amount of retribution. The punitive effect of criminal and civil sanctions is cumulative. Consequently, criminal sanctions may fulfill, at least partially, the purposes of exemplary damages.

III. PROCEDURAL IMPLEMENTATION

The criteria for assessment of punitive damages elaborated above pose the potential for harm, rather than help, if improvidently applied. Procedural safeguards are needed to

---

**Note:**

88 In general, it is likely that the criminal sanctions will be real rather than potential by the time of civil trial. However, when the civil trial occurs before criminal sanctions have been imposed and before the criminal statute of limitations has run, the court is faced with a perplexing problem. Exemplary damages assessed in consideration of potential criminal sanctions may leave the punitive purposes of the award under-achieved if no criminal sanctions are forthcoming. Conversely, exemplary damages assessed without considering potential criminal sanctions may result in excessive punishment if criminal sanctions are later imposed. This dilemma can be resolved by requiring that a defendant submit only actually imposed criminal sanctions in mitigation of exemplary damages and that whichever proceeding occurs second, whether civil or criminal, consider the earlier judgment before imposing additional punitive sanctions. See Morris, supra note 8, at 1197.

89 It has also been suggested that a compensatory damages award has punitive impact on the defendant and should be considered a mitigating factor in the award of exemplary damages. See Morris, supra note 8, at 1175; Note, supra note 42, at 525; In Defense, supra note 39, at 342 n.226; The Imposition, supra note 39, at 1171 n.109. This argument reasonably recognizes that the payment of a sizeable compensatory award will deter the defendant from future culpable behavior. West Virginia has adopted this line of reasoning and requires that the punitive effect of the compensatory award be considered before any further punishment by way of exemplary damages is added. See, e.g., Ennis v. Brawley, 41 S.E.2d 680, 685 (W. Va. 1946).

Although a compensatory award would serve as a deterrent, it is unlikely that it would fulfill the retributive purpose of an exemplary damages award. For example, although a $1,000,000 compensatory damages award would have considerable deterrent effect, it seems unlikely that juries would feel that justice were achieved if the same award were required for identical injuries whether caused through negligence or malice. The retributive purpose of exemplary damages seems to require an award over and beyond even the most deterrent of compensatory awards.

100 Allowing criminal sanctions to mitigate exemplary damages again focuses attention on the constitutional issues alluded to in note 39 supra. Although there is an apparent inconsistency in maintaining that exemplary damages do not expose the defendant to double jeopardy while also suggesting that criminal and civil sanctions are so fungible that the existence of one should be considered when imposing the other, it does not follow that the defendant should be denied the opportunity to offer evidence of criminal liability in an effort to mitigate civil liability. Hopefully, fairness transcends apparent conceptual inconsistencies.
insure that the use of such evidence is limited to proper purposes. Otherwise, such evidence may prejudice the jury's findings of liability.

A. Procedural Safeguards

Inviting the jury to consider both the defendant's wealth and his criminal liability for the tortious conduct in question threatens to prejudice the defendant's attempt to avoid liability.\(^{101}\) Kentucky has, however, shown a surprising faith in the ability of the jury to handle unnecessarily prejudicial information about defendants in a criminal trial.\(^{102}\) Perhaps a stern jury instruction against the prejudicial application of such information would suffice.\(^{103}\)

However, many commentators doubt the ability of the jury to avoid being unduly influenced by this additional information in its determination of the defendant's liability per se.\(^{104}\) The better view is for the Court to either order or strongly encourage the bifurcation of civil actions involving exemplary damages.\(^{105}\) Bifurcation would allow the jury to first find liability for exemplary damages.\(^{106}\) Then, the trial would continue with the introduction of evidence on the defendant's liability for criminal sanctions and on the defendant's financial status. At the close of this second portion of the trial, the jury would have the relevant information for a

\(^{101}\) See notes 90-91 & 96 supra and accompanying text.

\(^{102}\) See, e.g., Carver v. Commonwealth, 634 S.W.2d 418, 422 (Ky. 1982) (evidence of prior conviction of a similar crime for which the defendant is being tried is admissible for purposes of sentence enhancement, and bifurcation of the trial is not required).

\(^{103}\) Carver is concerned with the criminal law, and the Court seems to be deferring to the legislature for guidelines in addressing what it views to be a statutory concern. See 634 S.W.2d at 422. Exemplary damages and the tortious conduct which justifies their award are more properly within the domain of the common law and judicial supervision. Thus, Carver may not be precedent in this area.

\(^{104}\) See Mallor & Roberts, supra note 43, at 665; Morris, supra note 8, at 1191; Note, supra note 42, at 528.

\(^{105}\) In its discretion, the trial court may order the bifurcation of a trial pursuant to Ky. R. Civ. P. 42.02: "If the court determines that separate trials will . . . avoid prejudice, or will be conducive to expedition and economy, it shall order a separate trial of any . . . separate issue. . . ." Id. (emphasis added). Appellate review can insure that trial courts use this bifurcation option when needed.

\(^{106}\) The jury would also set routine compensatory damages at this stage.
thorough and more reasoned assessment of exemplary damages against the defendant.

B. A Proper Instruction

The jury works best when properly guided.\textsuperscript{107} What may appear to an appellate court to be a verdict based on "passion and prejudice"\textsuperscript{108} may in fact be a verdict rationally arrived at by a jury with an understanding of the purposes of exemplary damages different from that held by the court.

A proper instruction should carefully consider the purposes of exemplary damages and the assessment criteria which logically follow from those purposes. Assuming liability is already established, an exemplary damages instruction might read:

In your determination of the amount of exemplary damages, you are to consider the following:

(1) Exemplary damages are awarded in part to punish the defendant and to deter him and others from the conduct by which he harmed the plaintiff.

(a) You must first determine what amount of monetary judgment against the defendant, considering the defendant's financial status, will provide the amount of punishment and deterrence needed. To do this you must carefully consider both the plaintiff's injury and the conduct which caused it.

(b) You must then, considering criminal sanctions—both fines and incarceration—actually imposed against the defendant for his conduct, reduce the monetary award appropriately to insure that the total punitive and deterrent effect is no more than you first decided was needed.

(2) Exemplary damages are awarded in part to compensate the plaintiff for the effect of the way in which the injury was inflicted.

(a) You must determine whether the defendant's con-

\textsuperscript{107} See Morris, supra note 8, at 1207-08.

\textsuperscript{108} See, e.g., Hensley v. Paul Miller Ford, Inc., 508 S.W.2d at 763-64 (remanding for a new trial on the amount of exemplary damages).
duct has caused intangible injuries for which the plaintiff should be, but has not been, compensated, and you are to determine a monetary figure, if any, which would compensate the plaintiff for these injuries.\textsuperscript{109}

(3) You are to combine the amounts you reached in (1)(b) and (2)(a) as your total assessment of exemplary damages against the defendant.

While a bit dry and complicated, such an instruction would give the jury a conceptual framework to use in arriving at an exemplary damages award.

CONCLUSION

Kentucky has a rich and interesting history of attempting to make sense out of its doctrine of exemplary damages. No doubt, that history is far from complete.\textsuperscript{110} But the needs of the jury for clear criteria upon which to base an assessment of exemplary damages suggest that the Court should review its current understanding of the purposes of exemplary damages and then begin the process of turning those purposes into assessment criteria which can be incorporated into jury instructions.

Theodore Emens Cowen

\textsuperscript{109} For purposes of this instruction, "loss of equilibrium" is understood to be one of the intangible injuries which the jury might discern. Actually instructing a jury to look for vengeful feelings might lead plaintiffs to nourish such feelings—a socially undesirable result.

\textsuperscript{110} See note 39 supra for a hint of the apparently growing debate over the validity \textit{per se} of exemplary damages.