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recovery where they were incurred by the plaintiff in defending a prior action necessitated by the wrongful act of the defendant.[28] The issue becomes somewhat more unclear when, instead of suing for legal expenses previously incurred in a subsequent litigation, the defendant impleads his indemnitor. However, the court in the instant case did not feel compelled to decide this question, since the jury concluded that the manufacturer was not guilty of any wrongful act.

ARTICLE 30 — REMEDIES AND PLEADING

Punitive Damages: Available where there is gross negligence.

Although negligence cases dealing squarely with punitive damages are few, there is dictum that such damages are recoverable in instances of gross negligence or reckless conduct.[29] Some negligence cases have conceded the propriety of punitive damages while disallowing their actual award on collateral grounds.[30] *Caldwell v. New Jersey Steamboat Co.*,[31] often cited for the proposition that gross negligence justifies punitive damages, held that the facts there did not indicate such a degree of negligence. In all of these cases, the *soundness* of imposing punitive damages has never been the critical issue. The *Caldwell* court avoided an unequivocal endorsement of such an imposition by relying on the failure to meet the vague standard of "gross negligence." The recent decision in *Soucy v. Greyhound Corp.*,[32] apparently the first reported case so holding, foreclosed that avenue of retreat by holding that the plaintiff's allegations of fact,[33] if proven, would meet the standard of gross negligence

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[28] Madison County Constr. Co. v. State, 177 Misc. 777, 31 N.Y.S.2d 883 (Ct. Cl. 1941).

[29] Voltz v. Blackmar, 64 N.Y. 440, 444 (1876) (assault and battery); Noonan v. Luther, 119 App. Div. 701, 703, 104 N.Y. Supp. 684, 686 (3d Dep't 1907) (assault and battery); DeMarrasse v. Wolf, 140 N.Y.S.2d 235, 238 (Sup. Ct. Queens County 1955) (malicious prosecution); Darr v. Cohen, 94 Misc. 471, 478, 158 N.Y. Supp. 324, 328 (Sup. Ct. N.Y. County 1916) (nuisance abatement). See generally 14 N.Y. JUR. *Damages* § 181 (1960).

[30] Powers v. Manhattan Ry., 120 N.Y. 178, 24 N.E. 295 (1890) (jury not apprised of necessity of finding *gross* negligence); Cleghorn v. New York Cent. & Hudson River R.R., 56 N.Y. 44 (1874) (jury not apprised of necessity of finding *gross* negligence); Millard v. Brown, 35 N.Y. 297 (1866) (defendant prevented from proving facts tending to show his negligence was not gross).

[31] 47 N.Y. 282 (1872).

[32] 27 App. Div. 2d 112, 276 N.Y.S.2d 173 (3d Dep't 1967) (motion to amend complaint to ask for punitive damages).

[33] Plaintiff was injured when bus in which she was riding left the road and rolled over. It was alleged that the bus was old, was equipped with

and thus warrant punitive damages. The soundness of the punitive damages policy is now directly in issue since the court, by setting the stage for an actual award of punitive damages, terminated the ambivalence of New York's position.

While this development is significant from the scholar's point of view, it is of lesser import in a practical sense. The scarcity of reported punitive damages cases itself testifies that few such cases have ever reached the courts, probably for practical reasons. Conduct which might possibly be called "gross negligence" unquestionably constitutes ordinary negligence. A defendant guilty of such conduct would probably offer a substantial settlement to avoid potential punitive liability. To a plaintiff, a large immediate settlement would offer an attractive alternative to a recovery, which, though *possibly* larger, would come after years of delay. Furthermore, since most automobile liability insurance policies do not cover punitive damages,[34] such a recovery could be an empty victory. It is doubted, therefore, that the recent case will provide a sufficient incentive to offset these practical considerations and thereby effect a countertrend. However, in the rare case, that does reach court,[35] *Soucy* will provide direct authority for granting punitive damages.

CPLR 3018(b): Amendment allowed to insert an affirmative defense.

CPLR 3018(b) provides that certain matters, "which if not pleaded would be likely to take the adverse party by surprise . . .," must be pleaded as affirmative defenses under penalty of being waived.[36] However, the apparent severity of this section is alleviated by the liberal provisions for amending pleadings in CPLR 3025.

This is illustrated by the recent decision in *Rainone v. France*.[37] There the defendant in a negligence action had failed to include the defense of general release in his original answer because he was unaware that plaintiff had accepted $425 to release defendant's joint tortfeasor. Upon learning of this release four and one-half months later, the defendant applied to the court for permission to amend his answer. Although section 3018(b) specifically applies to the defense of release, the court permitted the amend-

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worn tires, was speeding, had a defective transmission, and had defective windshield wipers.

[34] Logan, *Punitive Damages in Automobile Cases*, 1961 INS. L.J. 27, 30.

[35] *E.g.*, where defendant mistakenly feels he has a debatable affirmative defense such as contributory negligence or assumption of risk.

[36] The section gives several examples of such matters, but expressly provides that those enumerated are not exclusive.

[37] 26 App. Div. 2d 855, 273 N.Y.S.2d 828 (3d Dep't 1966).