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Is Evidence of the Defendant's Wealth Admissable When Punitive Damages Are Awarded in New York?

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view long held in some quarters that businessmen often would rather combine to attain risk-free profits than to chance the uncertainties of competition.[34] It would be far too simple for would-be monopolists and price fixers to utilize the *General Electric* doctrine as a "dodge" to enable them to do through the abuse of patent rights what the Antitrust laws prohibit directly.[35] Price-fixing in a license agreement is not necessary in order to insure a normal and reasonable "pecuniary reward" to the patentee. The reservation of a fair royalty by the licensor should be enough to satisfy all but the monopoly-minded businessman.

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IS EVIDENCE OF THE DEFENDANT'S WEALTH ADMISSIBLE WHEN PUNITIVE DAMAGES ARE AWARDED IN NEW YORK?

I

In a tort action that warrants an award of punitive damages, should evidence of the financial status of the defendant be admitted to enable the jury to determine the amount of the judgment? It is conceded that in assessing compensatory damages the wealth of the defendant should play no part,[1] for by their very nature they are given simply to make good or replace the loss caused by the wrong and to compensate for the injuries sustained, nothing more.[2] The

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[34] "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." 1 SMITH, WEALTH OF NATIONS (Rogers' ed. 1869) 135, 136.

[35] *See* United States v. Masonite Corp., 316 U. S. 265, 278, 86 L. ed. 1461, 1475 (1942), where the Court, keeping in mind the fact that the patent grant is primarily for the public benefit, said that this must be the point of departure for decision on the facts of antitrust cases involving patents "lest the limited patent privilege be enlarged by private agreements so as to by-pass the Sherman Act." *See also* Mr. Justice Story's statement in Pennock v. Dialogue, 2 Pet. 1, 19, 7 L. ed. 327, 333 (U. S. 1829), that the promotion of the progress of science and the useful arts is the main objective of the patent laws and that the reward of inventors is secondary and merely a means to that end; and Mr. Justice Daniel's statement in Kendall v. Winsor, 21 How. 322, 329, 16 L. ed. 165, 168 (U. S. 1858), that "Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these."

[1] Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679 (1899).

[2] Reid v. Terwilliger, 116 N. Y. 530, 22 N. E. 1091 (1889).

plaintiff's loss can in no way be increased or diminished by the ability of the defendant to pay.

However, punitive damages are not awarded for compensation, but to punish the defendant for his evil behavior or to make an example of him where the wrong done to the injured party was aggravated by circumstances of violence, oppression, malice, fraud or wanton and wicked conduct.[3] Where a case has been made that warrants exemplary damages, the majority of the courts allow the pecuniary status of the defendant to be admitted so that the jury may arrive at a verdict which will punish him. These courts take the position that the object of the law is to punish the defendant in addition to compelling him to compensate the plaintiff. The Missouri Court reasons that, "As the extent of a man's means enters largely into one's judgment in fixing upon a sum which would punish him, his wealth may be shown, that the jury may consider what sum would be a punishment to him; it being readily seen that $1,000 would not be any more punishment to some than $100 would be to others of less financial worth." [4] On the other hand the minority of the courts fear that in admitting such evidence instead of aiding the jury to assess a proper verdict may prejudice them against the defendant and prevent an impartial judgment not only in the size of the verdict, but in deciding who shall win the case.[5]

II

In 1885, New York first took a stand on the issue in the case of *Fry v. Bennett* [6] in which the court ruled that the evidence of the defendant's financial status should be admitted in determining the size of the award. Based on this decision, Clark in his treatise on the New York Law of Damages [7] stated as a general rule that where a case has been proven which would authorize the award of exemplary damages, the financial condition of the defendant then becomes a material consideration in fixing the amount of such damages and evidence to the effect that the defendant is wealthy is properly admitted.

A short time afterward, in the case of *Palmer v. Haskins,*[8] having reviewed the authorities but neglecting to consider the *Fry* case the court stated, "The evidence is not admissible for the purpose of showing the ability of the defendant to pay, or for the purpose

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[3] *Ibid.*

[4] Leavell v. Leavell, 144 Mo. App. 24, 89 S. W. 55, 57 (1905).

[5] Texas Public Utilities Corporation v. Edwards, 99 S. W. (2d) 420 (Tex. 1936); *accord,* Hudson Ins. Co. v. McKnight, 58 S. W. (2d) 1088 (Tex. 1933); *see* Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173 (1931).

[6] 11 Super. Ct. 247, 1 Abb. Pr. 289 (N. Y. 1855).

[7] 1 CLARK, NEW YORK LAW OF DAMAGES § 54 (1925).

[8] 28 Barb. 90 (N. Y. 1858).

of assisting the jury in measuring out exemplary or vindictive damages." [9] This, therefore, caused a unique situation; two cases, deciding the same issue, resulted in opposite views and the later case inadvertently neither acknowledged nor overruled the earlier.

In 1937, *Klauber v. S. K. E. Operating Co., Ltd.*,[10] was decided. In this case, the plaintiff based his action on Civil Rights Law, Section 51,[11] which permits the awarding of exemplary damages. The complainant alleged that his right of privacy had been violated by the defendant, when the defendant used his photograph without his consent for advertising purposes. The plaintiff submitted evidence to show the extent of the defendant's wealth and the court permitted such evidence to be admitted relying on Clark's New York Law of Damages as authority for such a rule.

However, three years later in a similar action, *Wilson v. Onondaga Radio Broadcasting Co.*,[12] the position taken in the *Klauber* case was not followed although the action came before the same court. Judge Kimball remarked that the statement made in the *Fry* case was in connection with the question as to whether the plaintiff might recover at all and is in some respects *obiter dictum*. The court then based its decision on what has been criticized as a doubtful line of authority [13] and concluded, "Whether we feel that the decision in the *Palmer* case was inadvertent or not that decision has been followed while that of *Fry v. Bennett* has not. On authority, therefore, it is my opinion that the evidence is inadmissible. Furthermore, I think the rule in the *Palmer v. Haskins* case is the correct one. To measure punitive or exemplary damages by the wealth of the defendant seems far fetched. As well might the State impose a fine in a criminal case in accordance with a defendant's ability to pay." [14] This, then, is the latest word on the New York stand pertaining to the admissibility of evidence tending to show the defendant's financial status. The need for a clear, well-defined rule is obvious. In

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[9] *Id.* at 93.

[10] 163 Misc. 418, 295 N. Y. Supp. 701 (Sup. Ct. 1937).

[11] N. Y. CIVIL RIGHTS LAW § 51.

[12] 175 Misc. 389, 23 N. Y. S. (2d) 624 (Sup. Ct. 1940).

[13] *See* Note, 34 A. L. R. 5, 6, 7 (1925); Dain v. Wycoff, 7 N. Y. 191, 193 (1852) in which the court stated, "There can be no reason why twelve men wholly irresponsible should be allowed to go beyond the issue between the parties litigating, and after indemnifying the plaintiff for the injury sustained by him proceed as conservators of the public morals to punish the defendant in a private action for an offense against society. If the jury have the right to impose a fine by way of example, the plaintiff has no possible claim to it, nor ought the court to interfere and set it aside, however excessive it may be."; Enos v. Enos, 58 Hun 45, 11 N. Y. Supp. 415 (1890), *aff'd*, 135 N. Y. 609, 32 N. E. 123 (1892); Austin v. Bacon, 49 Hun 386, 3 N. Y. Supp. 587 (Sup. Ct. 1888); Brown v. Smallwood, 86 App. Div. 76, 83 N. Y. Supp. 415 (4th Dep't 1903); Tymann v. Schwartz, 209 App. Div. 886, 205 N. Y. Supp. 493 (2d Dep't 1924).

[14] Wilson v. Onondaga Radio Corp., 175 Misc. 389, 391, 23 N. Y. S. (2d) 624 (Sup. Ct. 1940).

a similar problem, the introduction of evidence by the plaintiff to the effect that the defendant has the benefit of insurance, the courts have formulated a rule and followed it religiously. In the leading case on the subject, the court stated, "Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict." [15] Even if reference is made to the defendant's insurance by implication, it has been held to be reversible error.[16] However, where the reference was brought out by cross-examination by the defendant's own counsel it has been held that subsequent reference to it by the plaintiff could not have occasioned any serious injury to the defendant.[17] Therefore, one finds that in respect to admissibility of evidence tending to show that the defendant is, or is not insured, in order to prevent the jury from becoming prejudiced and to prevent them from deciding the issue for the plaintiff merely because the defendant is insured and will not have to pay, the courts have ruled such evidence inadmissible and consistently followed this established and well-defined principle. Unfortunately, such has not been the case on the question of admissibility of evidence as to the defendant's financial condition in tort actions warranting an award of punitive damages. Here, the courts of New York have evaded the issue and as a result no clear-cut rule has ever been established by the Court of Appeals or the Appellate Division.

III

It will be for a high court or the legislature to determine the future policy of the state. Some change is necessary, for the present position strikes at the very foundation of the theory of punitive damages. The answer must be one which will prevent injustice to the defendant caused by prejudice of the jury and yet be punitory in nature. The rule of the majority of the courts at first glance seems to have answered this problem. However, it does not take into consideration that the very evidence which would make the award punitory may result in a verdict by the jury based on the ability to pay rather than who is at fault.

It is submitted that this objective might be attained by a system whereby the jury, after returning a judgment for the plaintiff, containing compensation for the injuries sustained and determining that

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[15] Simpson v. Foundation Co., 201 N. Y. 479, 490, 95 N. E. 10, 15 (1911).

[16] Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854 (1907); Kent v. Lajotte, 103 Misc. 496, 170 N. Y. Supp. 545 (Sup. Ct. 1918).

[17] McTague v. Dowst, 51 App. Div. 206, 64 N. Y. Supp. 949 (2d Dep't 1900).

punitive damages should be awarded, may then be apprised of the financial circumstances of the defendant to enable it to determine what amount would be punishment for this particular defendant and this amount would then be added to the compensatory damages of the first determination.

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CREATION OF AN EQUITABLE ASSIGNMENT

Comprehensively speaking, an assignment is an actual or constructive transfer of some species of property, or interest in property with a clear intent at the time to part with all interest in the thing transferred.[1] This broad definition includes within its scope both legal and equitable assignments. Manifestly, therefore, the general rule is subject to certain refinements and qualifications, since assignments, considered from a remedial standpoint, are classified as either legal or equitable according to whether they are recognized and enforced in a court of law or a court of equity.

It has been said that an equitable assignment is such an assignment as creates in the assignee a title which, although not cognizable at law, a court of equity will recognize and protect.[2] Such an assignment is not cognizable at law because either the legal title to the property or fund assigned has not passed or the thing assigned is not *in esse* at the time.[3] Of course, title does not pass to a thing not *in esse* but there may very well be instances where the subject matter is in existence and yet title has not passed. Such situations will be pointed out a little later on.[4] The title which the equitable

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[1] Hendrick v. Daniel, 119 Ga. 358, 361, 46 S. E. 438, 439 (1904); Griffey v. New York Central Insurance Co., 110 N. Y. 417, 422, 3 N. E. 309, 311 (1885); Ormond v. Connecticut Mutual Life Insurance Co., 145 N. C. 140, 142, 58 S. E. 997, 998 (1907).

[2] Lewis v. Braun, 356 Ill. 467, 191 N. E. 56 (1934); Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233 (1891).

[3] In Central of Georgia Railway Co. v. King Brothers, 137 Ga. 369, 73 S. E. 632 (1912), it was held that where the legal title passes the transaction is not governed by the law of equitable assignments. In Sykes v. First National Bank, 2 S. D. 242, 257, 49 N. W. 1058, 1062 (1891), it was said: "The distinction between legal assignments that may be enforced in an action at law, and an equitable assignment that can only be enforced in an equitable action, seems to be this: That an assignment, to be valid as a legal assignment that can be enforced in an action at law, must be of a debt or fund in existence at the time. . . . But in an equitable assignment . . . it is not an essential element that the debt should have been earned or the fund be *in esse* at the time . . ."

[4] See note 11 *infra*.