PUNITIVE DAMAGES: HISTORY, FUNCTION AND EXCESSIVENESS

Hirofumi ITO

１９９０年３月
愛知大学大学院
愛知論叢第48号抜刷

PUNITIVE DAMAGES: HISTORY, FUNCTION AND EXCESSIVENESS

Hirofumi ITO

Table of Contents

I. Introduction

Punitive damages are a very controversial legal implement which has survived in common law for hundreds of years. Punitive damages have carried as many problems as their functions. In spite of a crucial movement that punitive damages should be abolished in the field of remedies or compensation because they carry many unsolvable problems, punitive damages have survived to date and occupied an important place in the law of tort. As the long history of punitive damages shows us their justification in our compensation system, they have played a significant role in the field of damages.[1]

The purpose of this paper is to examine the institution of punitive damages, specifically, their historical development, their functions and one of their contemporary issues, excessiveness of the punitive award, and to offer proposals for their optimal utilization. It also seeks to assess the efficacy of punitive damages through a study of their development, their practical functions and their own place in modern compensation system.

In any event, I must give my answer to an inevitable question: Should punitive damages be abolished? My answer is NO. Because it seems to be impossible to abrogate them completely in our compensation system, and still necessary for them to function there in order to enforce the guarantee of the right of a private person. If so, then the second question: How do you manage such a problematic implement? There are, I think, two methods to control punitive damages. The first is a restrictive approach to punitive damages, that is, to restrict the cases where punitive damages can

---

1. *See generally*, Dobbs, *Handbook on the Law of Remedies*, at 204–221 (1973); Dobbs, *Torts and Compensation*, at 673–6 (1985); Bauer, *Essential of the Law of Damages*, at 117–135 (1919); Hale, *Hand Book on the Law of Damages* [2nd Ed.], at 301–309 (1912); Laycock, *Modern American Remedies: Cases and Materials*, at 587–625 (1985); Hilliard, *The Law of Remedies For Torts* [2d Ed.] Chapter V, at 595–609 (1873); Joyce & Joyce, *A Treatise on Damages*, sec. 111–146 (1903); Keeton & Widiss, *Insurance Law: A Guide To Fundamental Principles, Legal Doctrines, and Commercial Practices*, at 494–497 (1988); Sutherland, *A Treatise on the Law of Damages* [3rd Ed.] sec. 390–399 (1930); Stoll, *Consequence of Liability: Remedies* International Encyclopedia of Comparative Law vol. XI Torts Chap. 8 at 99–106 (1972).

be awarded[2], and the second is to avoid the excessiveness of punitive damages, recognizing the discretion of punitive award by the trier of fact. In other words, it is to cap the excessive award of punitive damages by a certain reasonable standard[3]. My conclusion is the latter is better.

II. Characterization of Punitive Damages

It is possible to characterize punitive damages in reference to their plural functions[4]. Therefore, we find several definitions of punitive damages because of the huge quantity of materials, articles and books on the subject. At the beginning of an examination of punitive damages, we should characterize the concept and meaning of punitive damages as possible.

A. Terminology: "Punitive" and "Exemplary" Damages

The terms "retributory", "aggravated", "penal", "vindictive", "punitive" or "exemplary" damages and "smart–money" have been interchangeably applied to a class of money damages awarded in tort actions beyond what is needed to compensate the plainfiff for his injuries[5]. In the United States, after the transplant of the doctrine of punitive damages from England, as recently as within the last few decades, the term "punitive" has come to be preferred to "exemplary". Since then, through the interchangeable usage of the terminology, the terms "punitive" and "examplary" have survived to label the damages awarded beyond compensatory damages. Although the history shows that the doctrine of punitive damages was transplanted from England to the U.S. in the 18 th century[6] and we may well assume that there is no difference of the

---

2. *See* at 12 *infra*.
3. *See* at 33–36 *infra*. *See also* Annotation, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 35 A.L.R. 4th 538; Annotation, *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 35 A.L.R. 4th 441.
4. *See* Owen, *Punitive Damages in Product Liability Litigation*, 74 Mich. L. Rev. 1257.
5. Note, *Exemplary Damages in the Law of Torts*, 70Harv. L. Rev. 517
6. Redden, *Punitive Damages*, at 24 (1980).

terminology between the two jurisdictions, the courts of England now make the most of the terminology "exemplary" from "punitive".

For instance, on the terminology, Lord Hailsham stated a reason for the preference of the term "exemplary" in *Broome v. Cassell & Co.* (H. L. (E.))[7] in 1972:

> In my view it is desirable to drop the use of the phrase "vindictive" damages altogether, despite its use by the county court judge in Williams v. Settle [1960] 1 W.L.R. 1072. Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment. In awarding "aggravated" damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the counduct exciting the indignation, demands a more generous solatium.
>
> Likewise the use of "retributory" is objectionable because it is ambiguous. It can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example.
>
> As between "punitive" or "exemplary", one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer "exemplary", not because "punitive" is necessarily inaccurate, but "exemplary" better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that "tort does not pay" by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.

The difference in terminology used in England and the U.S. does not necessarily suggest a difference of concept between "punitive" damages in the U.S. and "exemplary" damages in England. Indeed there we can not find any significant differences of the concept of punitive damages between them, because in both jurisdictions "punitive" and "exemplary" damages seem to serve their functions in the same way.

Rather, on the other hand, a dispersive usage of terminology may suggest an essential moot point of punitive damages. It demonstrates that

---

7. [1972] A.C. 1027, at 1073.

punitive damages have had plural functions, some of which disappeared through the process of their evolution. The fact that in the language of the modern courts in our era the term "vindictive" has already vanished, instructs us that "punitive" or "exemplary" damages are not for vengeance, but preferably for another purposes which punitive damages acquired in the prosess of the evolution. As many descriptions of punitive damages in the recent materials and texts show, punitive damages operate to punish and set an example that will deter similar conduct in the future. Therefore, the terms "exemplary" and "punitive" have survived through the change of their functions. Whether punitive damages, which are called so in the U.S., are damages to punish the defendant, or damages to exemplify the defendant's treatment, in other words, whether "a class of pecuniary damages awarded in tort actions beyond compensatory damages" can be labeled "exemplary" or "punitive" damages, the terminology always changes in reflection of evolution of their functions.

Accordingly, for convenience sake, here and throughout, I employ the term "punitive" damages, except in the description of the law of England, in order to give a generic name to damages awarded in addition to compensatory damages in the case of malicious or outrageous conduct on the part of the defendant.

B. Concept of Punitive Damages

Here, in order to state the concept of punitive damages, it is necessary to characterize the nature of punitive damages.

Restatement of Torts second[8] defines punitive damages as follows: "(1) Punitive Damages are damages, other than compensatory or nominal 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. (2) Punitive Damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended

8. American Law Institute, *Restatement (Second) of Torts* Sec. 908.

to cause and the wealth of the defendant."

We can learn from the definition in the *Restatement* that punitive damages are damages awarded in addition to compensatory damages in the case where the defendant's conduct is outrageous, and one of the three types of damages and can be characterized by the distinction from the other two damages, nominal damages and compensatory damages. It is thus necessary to compare punitive damages with nominal damages and compensatory damages in order to clarify their concept.

1. Punitive Damages and Nominal Damages

As it is possible to characterize punitive damages by comparison with nominal damages, we should scrutinize the meaning of nominal damages. The *Restatement* defines nominal damages as follows:[9] "Nominal Damages are a trivial sum of money awarded to a litigant who has established a cause of action but not established that he is entitled to compensatory damages." Accordingly, nominal damages have, to some extent, the same character as punitive damages do. It is possible to consider nominal damages as the damages awarded beyond compensatory damages, because they are entitled to the plaintiff even in the case where no compensatory damages were recognized. In this sense, why are not nominal damages, like punitive damages, criticized as a punishment in civil liability? Perhaps, it is because the award of nominal damages is a triveal sum. If punitive damages are to be a trivial sum of money, they would not be criticized as harshly as they are. But here, in fact, it is theoretically inconsistent with the major premise that civil liability should rest in only compensation equivalent to the damages on the plaintiff caused by the defendant[10], because nominal damages are, of course, one of the damages recognized in civil litigations. Then it naturally follows that we should consider nominal damages as anomalous and fictitious damages that common law recognizes in civil litigations, or that the major premise would be doubtful. If we choose the former, we should conclude that nominal damages should also be abolished in our language as punitive damages are so criticized.

---

9. *Restatement* Sec. 907.
10. *Restatement* Sec. 901 Comment a.

2. Punitive Damages and Compensatory Damages

The *Restatement* defines[11] compensatory damages as "the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him". The *Restatement* also defines Damages as "a sum of money awarded to a person injured by the tort of another."[12] Compensatory damages are awarded as compensation, indemnity or restitution, in other words, "where there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed."[13]

Theoretically we can be satisfied with the explanation. But practically not. If we are satisfied with such a plausible definition of compensatory damages that compensatory damages are the difference between the plaintiff's positions before and after the defendant's tortious conduct, we would fall into a maze. For instance, the theory, of course, works well in the case where a plaintiff suffered bodily injuries through a tortious conduct of a defendant and had to pay for medical treatments before he received the judgment. It is, in this case, no wonder that the medical expense will be the compensatory damages entitled to the plaintiff in the judgment, because he had to pay the cost of the treatment out of his pocket. But if he suffered emotional distress, mental anguish, loss of his earning capacity, or so–called intangible loss, how will this theory answer these questions satisfactorily: What are the damages in this case? How does it calculate them? Can money make up for his wounded mind? Probably, this problem derives from the ambiguty of the concept of "damages" itself.[14] And it may also be due to the potential incompetence of pecuniary remedies as to compensate the damages in the way the law thinks desirable.

---

11. *Restatement* Sec. 903.
12. *Restatement* Sec. 902.
13. *Restatement* Sec. 903 Comment a.
14. Dobbs, *Remedies*, at 208.

3. *Corpus humanum non recipit estimationem*[15]

The concept of "damages" itself is an ambiguous and vague fiction that the law created in order to resolve a social conflict as a legal issue. While compensatory damages gradually evolved in their own process expanding their recoverable scope from tangible property damages to intangible personal injuries, the concept of damages did happen to fall into a maze when the theory of compensation started to recognize the evaluation of human integrity into monetary quantity.

Even an approach from Law & Economics school recognizes it: "Against trying to correct this deficiency in the law of tort damages it can be argued that there is no way to determine what the utility of a person's life is. Perhaps that utility cannot be measured even in principle. If you asked someone how much money he would demand to give up his life, he probably would answer that no finite amount of money would be enough. Yet we know that people do not really set an infinite value on their lives. If they did, they would invest much more in avoiding physical dangers than they do."[16]

If we conclude, in comparison between compensatory and punitive damages, that the concept of compensatory damages is too ambiguous and fictitious to define punitive damages because punitive damages are damages awarded in addition to compensatory damages, no explicit definition of punitive damages would be possible. Furthermore, in focusing the functions of these damages, it is not always possible to separate clearly punitive damages from compensatory damages. In some instances, punitive damages sometimes operate as compensation, and compensatory damages often do as punishment, because of the ambiguity of their concept and the lack of their definite articulation. We can separate one from the other by its quality but by its quantity.[17]

---

15. *Corpus humanum non recipit estimationem* means that a human body is not susceptible of appraisement.
16. Landes & Posner, *The Economic Structure of Tort Law*, at 187 (1987); *See* Medicus, *Schuldrecht II Besonderer Teil* 2 Auflage ss. 25–26 (1985).

C. Subordination of Punitive Damages to Actual Damages

The rule that punitive damages may not be recovered in the absence of a proven actual loss or damage by the plaintiff[18], necessarily requires the existence of actual damages, which are here mainly compensatory damages or sometimes nominal damages, prior to recognition of punitive damages. This means that the rule can also apply to preclude punitive damages in the situation where no cause of action of any kind exists in favor of the plaintiff. In this sense, though punitive damages do form an independent heading of damages, they can not avoid influence from compensatory damages awarded. The rule also has an effect for the trier of fact to assess the award of punitive damages.

D. Ambiguity of the Concept of Punitive Damages

Two factors stated above, ambiguity of the concept of compensatory damages and subordination of punitive damages to compensatory damages, necessarily bring ambiguity into the concept of punitive damages. As far as the existence of compensatory damages awarded is a prerequisite for awarding punitive damages, they can neither be independent nor avoid ambiguity of the concept, because punitive damages are awarded in addition to compensatory damages.

In any event, it can be conclude here that the concept of punitive damages has a propensity to change itself easily in relation to that of compensatory damages, because the concept of compensatory damages as a base to award punitive damages is often so ambiguous.

---

17. The inevitable ambiguity of the concept of damages always impedes their explicit definition. Once we put a clear and absolute definition on them, the concept will start to be so eternal and unbounded that it confines us to too constrained a situation to respond the social changes flexibly, though the real substance will soon change itself.
18. *See* Dobbs, *Remedies* at 208.

III. The Historical Dvelopment of Punitive Damages

A. Origin

In a retrospective view surveying from the contemporary form of punitive damages to the prototype of punitive damages, it is necessary to note that we are unconsciously observing the issue through our own perspective. Therefore, when we go back in the history to find the origin of punitive damages, it is meaningless to trace the history in relation to the modern concept of punitive damages, i. e. the same terminology, or a similar function, otherwise the history of punitive damages will be a history of law itself.

Here, in the first place, I should state the distinction between punitive damages and multiple damages. In focusing on the function of punitive damages, it would be possible to consider multiple damages as one type of punitive damages. But we should not confuse the concept of punitive damages with multiple damages —— double damages, treble damages. While multiple damages are awarded by the statutes that prescribe their award of double or triple of the actual damages for the purpose of deterrence against the violation of the law, they are awarded irrespective of the moral culpability of the defendant. Punitive damages, on the other hand, are based on common law with no limit to the amount and awarded only in cases where the defendant is morally culpable.

Hence, "[o]nce it is recognized that multiple damages are merely one statutory form of punitive damages, the depth of the historical foundation underlying punitive damages becomes astounding. Multiple damages were provided for Babylonian law nearly 4000 years ago in the Code of Hammurabi, the earliest known legal code. . . . They were provided for in the Hebrew Covenant Code of Mosaic law of about 1200 B.C. . . . The Hindu Code of Manu of about 200 B.C. also provided for multiple damages in at least one case."[19]

This description would be useful only to strengthen the rationale of

19. Owen, *supra* note 4 at 1262 n. 17; Redden, *supra* note 6 at 24; Belli, *Punitive Damages: A Historical Perspective*, 40–44 Trial 0, 13: 40.

punitive damages in the history of law. But it is, in examining punitive damages in history, meaningless to seek the rationale in the ancient history of law, because their basic concept changed to be quite different from the contemporary one. There we can find no significant similarities in their functions between the damages awarded in the ancient codes and punitive damages which can be recognized in civil cases. Preferably, it may be thought that the history of punitive damages started in common law in England.

B. Development in England

1. England before and after 1964

While punitive damages spontaneously developed from the early common law of England, the doctrine of punitive damages did not receive its first explicit articulation until 1763, in the decision of *Huckle v. Money*[20]. Since then, punitive damages gradually evolved into their contemporary form. But it was not until after the decision of *Rookes v. Barnard*[21] in 1964 that the first full-scale probe into the theoretical issue of punitive damages was tried by the courts of England.

a. *Rookes v. Barnard*: A Restrictive Approach to Exemplary Damages

In 1964, an epoch-making case concerning exemplary damages was decided by the House of Lords. The House of Lords in *Rookes v. Barnard* took the position where punitive damages can not be awarded except only in three very limited categories, because they are an "anomaly" in common law confusing the distinction between criminal and civil liability. The House of Lords held[22]:

---

20. 2 Wils 205 (K.B.1763); *See*, Redden, *supra* at 26.
21. [1964] A.C. 1129; Tanaka, Hideo, *Chobatsuteki-baisho ni kansuru igirisu-hou no saikinno ugoki (The Recent Movement of the Law of England toward Exemplary Damages)*, Gendai Igirisu-Hou: Essays in honor of the 70th anniversary of Prof. Rikizo Uchida's birth, at 245-282 (1979).
22. [1964] A.C. 1129 at 1131.

> [A]llowing the defendant's cross-appeal and ordering a new trial in the question of damages, that exemplary damages could be awarded in cases (i) of oppressive, arbitrary or unconstitutional acts by government servants; (ii) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; (iii) where expressly authorized by statute.

In the judgment, Lord Devlin stated the position of the House toward exemplary damages[23].

> Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and your Lordship therefore have to consider whether it is open to the House to remove an anomaly from the law of England.

After examining the precedents of the House of Lords, Lord Devlin stated his theory that exemplary damages can be awarded in three limited cases, as stated above; 1. in the case of oppressive, arbitrary or unconstitutional acts by government servants; 2. where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; 3. where expressly authorized by statute.

Rookes v. Barnard, which modified the traditional doctrine of exemplary damages in the common law of England, did not create a sensation for three years. In fact, some courts followed the Lord Devlin's theory and denied the motion for exemplary damages, in 1964, *McCarey v. Associated News Papers, Ltd.* (No.2)[24], in 1965, *Broadway Approvals Ltd. v. Odhams Press Ltd.* (No.2)[25], in 1967 *Fielding v. Variety, Inc,.*[26]

But soon after that, several rebellions against *Rookes v. Barnard* occurred in the Commonwealth countries and also in the Court of Appeal in England.

---

23. [1964] A.C. 1129 at 1131.
24. [1965] 2 Q.B. 86 (1964).
25. [1965] 1 W.L.R. 805 (C.A.).
26. [1967] 2 Q.B. 841 (C.A.).

2. Reaction to *Rookes v. Barnard*

a. Rebellion No. 1 —— Australia

The first rebellion was triggered by the High Court of Australia, which is usually to pay deference to the decision of the House of Lords in England.

In 1966, the High Court of Australia decided the case *Uren v. John Fairfax & Sons Pty. Limited*[27]. There the court stated, "The limitation expressed *in Rookes v. Barnard* of the classes of cases in which exemplary damages for defamation may be awarded should not be followed in Australia."

Judge Taylor also stated his opinion, criticizing the Lord Devlin's theory on exemplary damages[28]:

> I agree that there was, perhaps, some room for a more precise definition of the circumstaces in which exemplary damages might be awarded. But with great respect, I do not feel as Lord Devlin did, that such a far-reaching reform as he proposed, and in which the other Lords of Appeal engaged in the case agreed, was justified by asserting that punishment was a matter for the criminal law. No doubt the criminal law prescribes penalties for wrongs which are also crimes but it prescribes no penalty for wrongs which are not at one and the same time crimes, and in both types of cases the courts of this country, and I venture to suggest the courts of England, had admitted the principle of exemplary damages as, in effect, a penalty for a wrong committed in such circumstances or in such manner as to warrant the court's signal disapproval of the defendant's conduct.
>
> To my mind —— and I say this with the greatest respect —— the attempt, expressly made *in Rookes v. Barnard* "to remove an anomaly from the law" did not achieve this result. Nor, in my view, was such an attempt justified by the assertion that it was not the function of the civil law to permit the award of damages by way of penalty. Indeed, the statement of the categories in which exemplary damages may be awarded concedes that, in some cases, at least, it is the function of the civil law to permit an award of damages by way of punishment.
>
> It is a broad principle which I think has been acted upon for a century and upwards, it has been part of the law of this country for many years, the limitation of the application of the principle to the categories specified in *Rookes v. Barnard*

27. (1966) 117 C.L.R. 118.
28. (1966) 117 C.L.R. 118, at 131, 137.

> is not, in my view, justified either upon principle or upon authority, and the adoption of those categories would not remove the suggested anomaly, but on the contrary, introduce others. In these circumstances, I am firmly of the opinion that the observations in *Rookes v. Barnard* do not express the law of this country and that they should not be followed.

As expected, this case was appealed to the Privy Council in England, the Judicial Committee of the Privy Council which acts as an ultimate court of appeals from the Commonwealth countries.

b. Approval from the Privy Council

The Privy Council approved the judgment of the High Court of Australia which did not follow *Rookes v. Barnard.* In 1967, the Privy Council judged *Australian Consolidated Press Ltd. v. Uren.*[29] In it, the Privy Council stated:

> The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processed of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v. Barnard* compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.

This judgment naturally encouraged the other rebellions in the Commonwealth countries.

c. Rebellion No. 2 —— New Zealand

In 1967, the Supreme Court of New Zealand stated in *Fogg v. McKnight*[30], that it did not agree with *Rookes v. Barnard.* Judge McGregor stated[31]:

> It is clear that the present case does not fall within any of these categories,

---

29. [1969] 1 A.C. 590 (1967) (P.C.) at 644.

and if the judgment of Lord Devlin is applicable, no exemplary damages can be awarded. . . . It seems to me that this aspect can be taken into account in the present case. . . . The New Zealand Courts are not bound by Lord Devlin's decision.

d. Rebellion No. 3 —— Canada

Rebellions continued. In 1967, the Supreme Court of Canada also disagreed with *Rookes v. Barnard.* In the case *McElroy v. Cowper–Smith and Woodman*[32], Judge Spence stated:

> Moreover, I am of the opinion that in Canada the jurisdiction to award punitive damages in tort actions is not so limited as Lord Devlin outlined in *Rookes v. Barnard.*

Another rebellion followed in Alberta Supreme Court in 1968. In *McKinnon v. F.W. Woolworth Co. Ltd,*[33] Judge Johnson stated:

> There can be no doubt *Rookes v. Barnard* substantially reduced, as far as English law is concerned, the number of instaces in which exemplary damages can be given. In *Australian Consolidated Press, Ltd. v. Uren* [1967] 3 All E.R. 523, the Privy Council refused to apply these limits to Australia where the Courts of this country had applied the wider ones of the earlier English law.

In 1969, the British Columbia Supreme Court denied the applicability of *Rookes v. Barnard* in Canada. In the case of *Bahner v. Marwest Hotel Co. Ltd.*[34], Judge Wilson, C.J.S.C. stated:

> The effect of these two opinions given in a case which did not fit into any of the classes defined by Lord Devlin in *Rookes v. Barnard* must be that *Rookes v. Barnard,* in so for as it deals with the law as to punitive damages, is not applicable in Canada.

---

30. [1968] N.Z.L.R. 330; After this case, in spite of *Broome v. Cassell & Co.* in the House of Lords in 1972, some New Zealand courts still recognize punitive damages, even though New Zealand adopted the Accident Compensation Scheme in 1972. e. g. *Donselaar v. Donselaar* [1982] 1 NZLR 97 (C.A.). The issue is still controversial. *See* Hodge & Allin, *Torts in New Zealand Cases and Materials*, at 126–32 (1988).
31. [1968] N.Z.L.R. 330, at 332, 333.
32. 62 D.L.R. (2d) 65 (1967).
33. 70 D.L.R. (2d) 65 (Alberta 1968).
34. 6 D.L.R. (3d) 322 (B.C. 1969).

e. Rebellion No. 4 —— Court of Appeal in England

Finally, in 1971 in England, the Court of Appeal came to sharply criticize, in *Broome v. Cassell & Co.* (C.A.)[35], the theory of exemplary damages stated in *Rookes v. Barnard.* Even though, in the hierarchy of the courts of England, it is not permissible for a lower court to challenge the decision of a higher court, the final and most crucial rebellion against the highest court of England, the House of Lords, was risen by the lower court, the Court of Appeal. The Court of Appeal in *Broome v. Cassell & Co.* expressly criticized *Rookes v. Barnard* in an aggressive tone, holding that *Rookes v. Barnard* was a decision given *per incuriam* without examining the previous cases in which the House of Lords clearly approved the award of exemplary damages in accordance with the settled doctrine of the common law and therefore should not be followed.

Lord Denning M.R. (substantially the Chief Justice: Master of the Rolls) stated his opinion[36] with discontent for the opinion of Lord Devlin in *Rookes v. Barnard.*

> Yet when the House came to deliver their speeches, Lord Devlin threw over all that we ever knew about exemplary damages. He knocked down the common law as it had existed for centuries. He laid down a new doctrine about exemplary damages. He said that they could only be awarded in three very limited categories, but in no other category: and all the other lords agreed with him. This new doctrine has up till now been assumed in this court as a doctrine to be applied: . . . . . But it has not been accepted in the countries of the Commonwealth. . . . . The courts of the United States of America know nothing of this new doctrine. They go by the settled doctrine of the common law as to punitive damages and would not dream of changing it. It is well stated in the *Restatement of the Law of Torts*, Vol. III, para. 908.
>
> This wholesale condemnation justifies us, I think, in examining this new doctrine for ourselves: and I make so bold as to say that it should not be followed any longer in this country. . . . . Finally I say that the new doctrine is hopelessly illogical and inconsistent.
>
> All this leads me to the couclusion that, if ever there was a decision of the House of Lords given *per incuriam*, this was it. The explanation is that the

35. [1971] 2 Q.B. 354 (C.A.).
36. [1971] 2 Q.B. 354 (C.A.) at 380–82.

House, as a matter of legal theory, thought that exemplary damages had no place in the civil code, and ought to be eliminated from it; but as they could not be eliminated altogether, they ought to be confined within the strictest possible limits, no matter how illogical those limits were. Yet I am conscious that, in all that I have said I may myself be at fault. Some will say that it is our duty to follow the House of Lords and not to question their decision. We are not to reason why. Ours is but to do and die. If this be so, then I turn to consider the case on the footing that we are bound by *Rookes v. Barnard.*

In examining the rationale of Lord Devlin's doctrine of exemplary damages, Lord Denning concluded[37]:

In the result I would hold that, even if *Rookes v. Barnard* [1964] A.C. 1129, is binding on us, we should so construe it as not to invalidate the verdict in this case. This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by *Rookes v. Barnard* are so great that the judges should direct the juries in accordance with the law as it was understood before *Rookes v. Barnard.* Any attempt to follow *Rookes v. Barnard* is bound to lead to confusion.

Another judge Salmon L.J., agreeing with Lord Denning, criticized *Rookes v. Barnard* and pointed out a theoretical defect of the case[38]:

Nor in the course of the argument were any of these categories suggested by any member of the House to counsel for their observations. It follows that counsel for the plaintiff had no opportunity of addressing the House upon a radical change in the law which had the effect of depriving their client of the right to the damages which the jury had awarded him. In this country what is sometimes called the adversary system rather than the inquisitorial system of administering justice is normally adopted. As a rule no point, certainly no important point, is decided by our courts without counsel on both sides having the fullest opportunity of being heard upon it.

Furthermore, Judge Phillimore L.J. criticized that Lord Devlin's argument that there is no decision of this House approving an award of exemplary damages as was "in truth built upon sand."[39]

---

37. [1971] 2 Q.B. 354 (C.A.) at 384.
38. [1971] 2 Q.B. 354 (C.A.) at 385.
39. [1971] 2 Q.B. 354 (C.A.) at 397.

These exhaustive criticism against the Lord Devlin's theory in *Rookes v. Barnard*, as a matter of course, resulted in an appeal to the House of Lords.

f. Counterattack from the House of Lords

Against a series of rebellions, in 1972, the House of Lords counterattacked, in *Broome v. Cassell & Co.*[40] (H. L. (E.)), an appeal from Court of Appeal, and reaffirmed the restrictive approach to exemplary damages articulated in *Rookes v. Barnard*, holding that the dicision in *Rookes v. Barnard* was not arrived at *per incuriam*, that in the hierarchical system of the English courts it was not, in any event, open to the Court of Appeal to direct judges of first instance to ignore a decision of the House, and further that *Rookes v. Barnard* was not inconsistent with any earlier decision of the House of Lords.

Lord Hailsham of St. Marylebone L.C. stated his opinion[41]:

> Damages remain a civil, not a criminal remedy even where and exemplary award is appropriate. . . . . I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided *"per incuriam"* or "unworkable" they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable.
>
> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.
>
> The true explanation of *Rookes v. Barnard* is to be found in the fact that, where damages for loss of reputaion are concerned, or where a simple outrage to the individual or to property is concerned, aggravated damaged in the sense I have explained can, and should in every case lying outside the categories, take care of the exemplary element, and the jury should neither be encouraged nor allowed to look beyond as generous a solatium as is required for the injuria

40. [1972] A.C. 1027; *See* Denning, *What Next In The Law: Exemplary Damages Before and After 1964*, at 196–207 (1982).
41. [1972] A.C. 1027 at 1054.

simply in order to give effect to feelings of indignation. It is not that the exemplary element is excluded in such cases. It is precisely because in the nature of things it is, and should be, included in every such case that the jury should neither be encouraged nor allowed to look for it outside the solatium and then to add to the sum awarded another sum by way of penalty additional to the solatium. To do so would be to inflict a double penalty for the same offence.[42]

I confess I am quite unable to see why such a veiw of the matter is "unworkable." As I have already pointed out, it has been worked in fact for nearly eight years. On the contrary, by insisting on a single sum being awarded for outrageous behaviour in nearly every case of tort, and allowing the jury full vent to their ligitimate feelings within the proportions set by the injury involved, it seems to me that judge and jury are set an inherently less difficult task than if they were told first to take into account the aggravating factors, and then to impose an additional "fine" for the size of which they have neither the qualifications nor any measure by which they can limit their discretion, particularly since neither counsel nor the judge can mention particular figures which can have any relevance to the actual case. The difficulty consists, not in working the system of aggravated and purely compensatory damages, where they apply, as they do in almost every case of contumelious conduct under Lord Devlin's opinion, but in working a system of punitive damages alongside the system of aggravated and compensatory damage. This difficulty exists whether Lord Devlin's limitation to the categories be right or wrong and, if it were wrong, would exist in every case, and not only in a small minority of cases. The difficulty resides in the fact that the thinking underlying the two systems is as incompatible as oil and vinegar, the one based on what the plaintiff ought to receive, the other based on what 12 reasonable, but otherwise uninstructed, men and women think the defendant ought to pay.[43]

Lord Reid who joined in the decision of *Rookes v. Barnard* stated his opinion[44] in support of the Lord Devlin's theory:

Exemplary damages are anomalous in confusing the function of the civil law, which is to compensate, with that of the criminal law to inflict deterrent and punitive ponalties; accordingly, the anomaly should not be permitted in any class of case where its use was not covered by authority.

---

42. [1972] A.C. 1027 at 1076.
43. [1972] A.C. 1027 at 1077.
44. [1972] A.C. 1027 at 1029 and 1086.

Although the appealed case was reversed by the House of Lords, the opinion of Lords were not unanimous. For instance, Lord Wilberforce was not in favor of *Rookes v. Barnard*, rather he was against the restrictive theory on exemplary damages. He stated:[45]

> It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories: it may have been wiser than it knew.
>
> I must confess to sympathy with the Court of Appeal's preference of the older system and with the objections to the new stated by Taylor J. in *Uren's* case, the weight of which clearly impressed the Privy Council. Their validity has been endorsed by cases post-*Rookes v. Barnard* in Australia, Canada and New Zealand. I share their doubt whether we have yet arrived at a viable substitute.

3. Some Lessons from England

The dispute over *Rookes v. Barnard* instructs that the House of Lords could not wipe away an anomaly in common law, that is, could not abolish exemplary damages completely in the arena of the civil law. As the House of Lords finally supported Lord Devlin's doctrine that exemplary damages may be awarded in very limited categories, it is not easy to predict the next movement concerning exemplary damages in England.[46] I think that as far as the restrictive approach to exemplary damages in *Rookes v. Barnard* is supported, the courts of England and the Commonwealth countries would try to follow the decision with construing it as to expand the limited categories in which exemplary damages can be awarded. It is very likely that another substantial quasi-rebellion would rise somewhere in common

---

45. [1972] A.C. 1027 at 1114 and 1121.
46. *See* Salmond, *Law of Torts* [16th Ed.], at 546–549 (1973); McGregor, *On Damages* Chap. 11 *Exemplary Damages*, at 218–233 (1972); Dias & Markeinis, *Tort Law* [2nd. Ed.] at 525 (1989).

law countries. It can be said that the House of Lords could not put a period to the issue of exemplary damages and the issue is still controversial. The history convinces me that efficacy of the restrictive approach toward punitive damages is doubtful.

C. Development in the U.S.A.

The very first reported decision awarding punitive damages in the U.S. was *Genay v. Norris*[47], in 1784. In *Genay*, the plaintiff became ill after consuming a glass of wine containing a large quantity of Spanish fly that the defendant had added as a practical joke. The court awarded 400*l* as exemplary damages because of the wanton and outrageous nature of the defendant's conduct. The purpose of awarding punitive damages in this case was not to compensate the plaintiff but to punish the morally outrageous conduct of the defendant.

Soon after the transplant, it seems that the doctrine of punitive dagmages spread among most of the states rapidly.[48]

1. Selective Abolition of Punitive Damages

Only three states, Massachusetts (*Burt v. Advertiser Newspaper Co.* [49], (1891)), Nebraska (*Boyer v. Barr*[50] (1878)) and Washington (*Spokane*

---

47. 1 S.C. 3, 1 Bay 6 (1784).
48. The following sentences are useful to understand the history. "The question whether damages could properly serve a function other than compensation was debated by Professors Greenleaf and Sedgwick in their treaties in the mid–nineteenth century. . . . The question whether exemplary damages should be recognized was presented to most American courts between 1850 and 1900, and many courts relied heavily on the arguments of either Greenleaf or Sedgwick in deciding the question." Note, *supra* note 5 518 "Sedgwick develops the theory that the doctrine appeared as soon as the practice of charging juries on the measure of damages became part of the common–law practice, and that punitive damages were given by juries without instructions before this time." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 at 1176; *See* Sedgwick, *A Treatise on the Measure of Damages* [9th Ed.], at 686–756 (1912); Greenleaf, *A Treatise on the Law of Evidence vol. 2* [7th Ed.] at 276–293 (1858).
49. 154 Mass. 238, 245, 28 N.E. 1, 5 (1891).
50. 8 Neb. 68 (1878).

Truck and Dray Co. v. Hoefer[51], (1891)) have, by judicial decision, completely rejected punitive damages. It is interesting to examine the approach of Louisiana. Louisiana court had never recognized the award of punitive damages (*Vincent v. Morgan's La. & Tex. R.R.*[52], (1917)). But now under its law, punitive dagmages are allowed only when specifically authorized by statute (*Richard v. State of Louisiana*[53], (1980)), So Louisiana, "while giving lip–service to the rule against the imposition of punitive damages, does, in effect, impose a statutory penalty of a similar nature named punitive damages."[54]

2. General Acceptance of Punitive Damages

Decisions in three states, Connecticut, Michigan and New Hampshire, limit punitive damages to compensation for special elements of damage and have assigned to punitive damages a compensatory function. Connecticut law states that the purpose of punitive damages is "not to punish the defendant for his offense, but to compensate the plaintiff for his injuries, and so–called punitive or exemplary damages cannot exceed the amount of the plaintiff's expense of litigation, less taxable costs"[55]. Michigan[56] and New Hampshire[57] have determined that wounded feeling and injured dignity enhance the amount of compensation available through punitive damages. And Indiana permits punitive damages only where the offense is not also a crime[58].

In other jurisdictions, punitive damages are awarded for punitive purposes when wanton, oppressive, malicious, or reckless conduct is present. In the early decisions where punitive damages were awarded,

---

51. 36. 2 Wash. 45, 2Pac. 1072 (1891).
52. 140 La. 1027, 74So. 541 (1917).
53. 390 So. 2d 882 (La 1980). *See* Schoeb, Blatt, Hammesfahr and Nugent, *Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States of America and its Territories*, at 149 (1988).
54. Magarick, *Excess Liability Duties and Responsibilities of the Insurer* [2d Ed.] n4 at 279 (1982); Louisiana Civil Code Art. 2315.1 (1976), 2315.3 (1984), 2315.4 (1984), Louisiana Revised Statute Sec. 1312 A (2).
55. *Doroszka v. Lavine*, 111 Conn., 575, 578 150 A. 629–93 (1930).
56. *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922).
57. *Fay v. Parker*, 53 N.H. 342 (1873).
58. *Taber v. Hutson*, 5 Ind. 322 (1854).

many courts awarded them, stressing the outrageous character of the defendant's conduct. They, accordingly, awarded punitive damages for the purpose of punishment or vindictiveness.

Many jurisdictions adopted the doctrine of punitive damages from various reasons, punishment, compensation, or vengeance. These various approaches were due to the diversity of the doctrine of punitive damages and the evolution of compensatory damages. Subordination of punitive damages to compensatory damages can explain the phenomenon. The scope of recoverable damages under common law was so limited that the damages caused from only emotional distress were not recognized when the doctrine of punitive damages was inroduced. On this point, the *Restatement* explains: "Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone. It is only within recent years that the rule stated in this Section has been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to another tort, such as assault, battery, false imprisonment, trespass to land, or the like."[59]

It can be observed that until the availability of compensatory damages in tort for mental anguish, wounded feelings, indignity and embarrassment was recognized, to award punitive damages for the purpose of compensation was only way to sufficiently compensate the plaintiff.

D. Distinction between Criminal and Civil Liability

It could be argued that punitive damages evolved from confusion of civil and criminal liability. But it is *vice versa*. Punitive damages had already evolved in history before the separation of civil and criminal liability. The history of punitive damages already started in the early common law. In ancient laws, there was no definite separation between civil and criminal liability. It is our contemporary conceptual dogma that requires an explicit separation between them. If the dogma would be

---

59. *Restatement Tort Second Section* 46 Comment b.

universally and eternally correct, punitive damages should have considered as "anomaly" and been abolished from the arena of civil law. But, in spite of such a critique, majority of jurisdictions in common law countries still recognizes the doctrine of punitive damages as the history shows.

IV. Function of Punitive Damages

Punitive damages serve a variety of functions for both the individual plaintiff and society.[60] Through the process of evolution in their long history, punitive damages have acquired various functions as the change of their generic names in their history shows us.

The function of punitive damages is five fold: they are 1. Revenge or Appeasement, 2. Punishment, 3. Compensation, 4. Deterrence, and 5. Law Enforcement. It is important to note here that these functions serve simultaneously through a legal transaction in which the law obliges the defendant to pay the judgment to the plaintiff. In other words, each function does not operate independently. When one function operates, another does at the same time like its side effects produced by the operation.

A. Revenge and Appeasement

Punitive damages function as a plaintiff's revenge against a defendant like their old names "vindictive" and "retributory" imply. Many plaintiffs seeking punitive damages are motivated to some extent by a desire to revenge the defendant.[61] Justification of awarding punitive damages is to some extent based upon a recognition that satisfaction of the revengeful impulse would help preserve the peace by preventing reckless self-help and duel. Even though in our contemporary society it be no longer practical to

60. Owen, *supra* note 4 at 1277; *See* Love, *Punishment and Deterrence: A Comparative Study of Tort Liability For Punitive Damages Under No-Fault Compensation Legislation*, 16 U.C. Davis 231; Note, *supra* note 5 at 520; Cooter, *Economic Analysis of Punitive Damages*, 56 S. Calif. L. Rev. 79-101; Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Calif. L. Rev. 1-78.

61. Note, *supra* note 5 at 521.

take such a factor into consideration as to discourage self–help or duel, appeasement of the victim's feeling is still important. "Punitive damages may also constitute a kind of public revenge by reflecting the jury's indignation at the defendant's conduct. A modern legal system can hardly be based on revenge, but in so far as self–help is discouraged by satisfying a plaintiff's vindictive spirit, awarding punitive damages seems a useful purpose."[62]

In spite of the disappearance of the term "vindictive" in our language, the function of revenge and appeasement residing in punitive damages can not be completely wiped away. Law should not neglect the victim's vindictive feelings, rather it must respond as possible in order to keep his or her reliance on law.

B. Punishment

The second function of punitive damages operates to compel the wrongdoer to atone for his offense.[63] The punitive function of punitive damages may be more significant than that of compensatory damages, because the awarding punitive damages in addition to compensatory damages brings necessarily a strong financial impact on the defendant.

But, there is a crucial issue on the punitive function of punitive damages in civil case. One of the typical criticism of punitive damages is that punitive damages are "an inconsistent and incongruous legal hybrid descriptive of both the criminal and the civil law."[64] It also states: "it is often said that criminal law punishes a defendant while tort law recompenses an injured plaintiff. The argument made is that a clear separation should be maintained between the two branches of the law to preserve their individual integrity."[65]

Criminal liability is considered a response of society toward an antisocial conduct. Therefore the confrontation form of criminal liability is always "Public" v. "Private". On the other hand, civil liability (especially

---

62. *Id.* at 522.
63. Note, *supra* note 5 at 522.
64. Ford, *The Constitutionality of Punitive Damges*, The case Against Punitive Damages at 15 (1969).
65. Note. *supra* note 5 at 522.

tort liability) operates to recompense loss or damages of a victim in support of peaceful autonomy among citizens. The confrontation form is usually "Private" v. "Private". Such a rigid distinction as to separate criminal from civil liability seems to be not always essential and is an old-fashioned and pre-modern concept of the law.[66] In contemporary litigations, it is not a rare case where the defendant is a state or the government in a civil case. The myth "*King can do no wrong*" was already tumbled down.[67] "Private" v. "Public" in a civil case does no longer astonish us.

It is also doubtful that to sanction an antisocial conduct should be exclusively confined to criminal liability. While the modern criminology has a propensity to retrench infliction of a punishment in spite of increase of crime rate caused by the intricacy of society, unsanctioned antisocial conduct by criminal law is increasing in number. The number of criminal cases is not increasing as rapidly as that of civil cases is in spite of the intricacy of society (see LIST 3 attached at the end of this paper).

Hence, as a rigid distinction between criminal and civil liability is no longer an absolute incantation, both criminal and civil liability should cooperate each other, and furthermore, civil liability should make good the deficiency of the criminal liability.

C. Compensation

The third function of punitive damages is compensation. The law of torts attempts primarily to put an injured person in a position as nearly equivalent as possible to his position prior to the tortious conduct.[68] Although compensatory damages are to be evaluated on such a basis, they sometimes leave the plaintiff undercompensated because of the subtraction of various costs from the judgment.[69]

Punitive damages sometimes operate as a complete compensation for

---

66. Tanaka & Takeuchim, *The Role of Private Persons in the Enforcement of A Comparative Study of Japanese and American Law*, 7Law in Japan at 34-50 (1974).
67. Steiner, *Moral Argument and Social Vision in the Courts*, at 24 (1987).
68. Note, *supra* note 5 at 522; *Restatement*, *supra* note 8 at sec. 903 Comment a.
69. *Id.* at 521.

the undercompensated plaintiff. Additionally, punitive damages can be viewed as compensatory, in the limited sense that they may provide reimbursement for the wounded feelings of the plaintiff.[70] Even if compensatory damages are fully awarded, the plaintiff would return only to the position, *status quo ante* where he used to be had no tort been committed. Strictly speaking, he is not in the same situation before the tort was committed, because he lost something more than compensatory damages, i. e. time, opportunity, or aggrieved feelings. Compensatory damages do not always cover them all.

While the scope of coverage of compensatory damages is gradually expanding its territory, they still leave the plaintiff, to some extent, undercompented, because ambiguity of the concept of compensatory damages often functions negatively to extend its recoverable scope to the damages which were never recognized before. Therefore, punitive damages should function as a remedy for the undercompensated plaintiff.

D. Deterrence

The fourth function is deterrence. Deterrence can be separated into two categories. One is specific daterrence which operates to punish the dafendant himself and deter him to repeat the similar conduct sanctioned by the law. The other is general daterrence which operates to prevent the general public from repeating the similar conduct in the future by setting an example of the sanctions by the law[71]. Deterrent effect of punitive damages functions as both special and general daterrence. A large amount of punitive damages has a strong deterrenct effect both to an individual defendant and to general public.

Deterrence of punitive damages is particularly necessary in some torts, such as conversion, which involve wrongful gains to the defendant, because compensatory damages at most restore the wrongdoer to the *status quo ante*

---

70. *Restatement, supra* note 8 at Sec. 903.
71. Owen, *supra* note 4 at 1282; *See* Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Product Liability Litigation*, 74 Kentucky L. Journal 1–125; Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Calif. L. Rev. 133–153; *See also* Calabresi, *The Cost of Accidents* (1970).

and may even leave him with a profit.[72]

E. Law Enforcement

The final function of punitive damages is Law Enforcement. Punitive damages provide a strong incentive to a plaintiff to sue. Punitive award can be seen as a bounty or as compensation to the plaintiff as a kind of "private attorney general".[73] It would bring a chance for a private individual to enforce his rights against any authority which caused damages to him.

The ultimate function of punitive damages, also a function of tort law itself, is to protect rights of a private person through determination of civil rights. Rights have been produced through a process in which law permits compensation for the damages incurred as the result of an infliction of harm to a legal interest which law recongnizes worth protecting legally. Punitive damages become the most effective legal implement when a private individual tries to have his interest recognized as a legitimate right, letting the court entitle him a large amount of bounty. For a strong incentive to sue brought by punitive damages does let a private person sanction a wrongful conduct in our society. Punitive damages make it possible both to protect civil rights and to sanction unsanctioned conducts which criminal law can not punish.

Therefore, punitive damages function as one of the most effective legal implements in support of Law Enforcement.

Considering these functions of punitive damages, it can be concluded that punitive damages should not be abolished, because they function well in our compensation system and we can not find a better substitute for them.

---

72. Note, *supra* note 5 at 522.
73. Owen, *supra* note 4 at 1288; *Restatement*, *supra* note 8 Sec. 901 Comment b.

V. Excessiveness of Punitive Damages

A. Excessive Fine —— Constitutionality

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[74]

It could be argued that the doctrine of punitive damages should be abolished by the construction of the Eighth Amendment, if the answers to the following two questions be positive: l. a question whether punitive damages are functionally fines, as they inflict monetary penalties on the basis of particularized assessments of fault: 2. a question whether the provision applies to civil or quasi–criminal fines as well as to distinctively criminal punishments.[75]

The answer to the first question should be negative. All the award of punitive damages can not necessarily be excessive fines. Is it true that billions dollar of compensatory damages are not punishment at all but only compensation, and even one dollar of punitive damages should be considered punishment? The answer to the second question should be also negative. The provision should not be applied to civil cases, because the history of the amendment requires it to be confined to criminal fines (*Browning–Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*).[76] The second question is no longer problematic, even if we assert that no explicit distinction between civil and criminal liability is necessary. The issues can be ultimately intergrated into the problem of "excessiveness".

B. Problem of Excessiveness

We often encounter the criticism that the tremendously large amout of

---

74. U. S. Const. Amend. VIII.
75. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139; Roddy, *The Constitutionality of Punitive Damage Awards in Tort Cases*, at 3 Product Liability Trends (1989).
76. *Browning–Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc*, No. 88–556 Argued April 18, 1989 —— Decided June 26, 1989; Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vanderbuilt L. Rev. 1233–1276.

punitive damages awarded recently by many courts is too excessive, so that this excessiveness results in only the insolvency or bankruptcy of the defendants.[77] Thus, it is argued that punitive damages have a propensity to be an explosive award that does not theoretically and practically function at all as expected. Indeed, we should listen to the lament of Justice O'Connor in *Browing–Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*[78].

She stated: "[a]wards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. . . . Since then, awards of more than 30 times as high have been sustained on appeal. . . . The threat of such enormous awards has a detrimental effect on the research and developoment of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introudce a new pill or vaccine into the market. Similarly, designers of airplanes and motorvehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages."

On the other hand, we should also listen to a typical voice from the plaintiff seeking punitive damages: the amount of punitive damages is not as excessive as the defendant and the insurance industry allege. Furthermore, compensatory damages are not sufficient to compensate all the loss suffered by the plaintiff after subtraction of the attorney's fee.

In fact, cases where a large amount of punitive damages can be awarded do not appear so frequently as some opponents allege. The personal injury accident cases where a huge amount of damages may be awarded do not happen very often. This is justified by the conclusion[79], from the survey on 46 punitive damages cases under the common law. It

---

77. Problem of excessiveness is only one of the contemporary problems that punitive damages carry. The others are problems of, double jeopardy, due process, "over–kill", insurability, "windfall", punitive liability of a public entity and so on. *See* Dobbs *Remedies* at 208–221. I think the problem of excessiveness is the most vital issue, because no one would criticize the doctrine of punitive damages whose award is quite reasonable.

78. *Supra* note 76.

79. Landes & Posner, *supra* note 16, at 184.

states that "accident cases in which punitive damages are awarded are probably overrepresented in a sample of appellate cases." The survey indicates that punitive damages are awarded mostly in the case of "deliberate torts such as fraud, retaliatory discharge, libel, and battery", and these cases constitute 72% of the total cases examined. It states that the accident cases were "as expected, a much smaller percentage of all accident cases in the volumes, only 2 percent."

Even though the cases where a large amount of punitive damages was awarded are rare, the problem of excessiveness still remains. At any rate, both assertions are based on their own definition of excessiveness. Thus, we must examine whether punitive damages are really excessive. Then the question is: who judges whether punitive damages are excessive or not, and on what basis?

C. A Case Study: Punitive Damages in Wisconsin
—— An Approach to Excessiveness.

My approach to the question is to isolate and analyze the rule which the courts have stated in judging the propriety of the amount of punitive damages. We need such an objective standard to decide the amount of punitive damages so that both plaintiff and defendant agree with the result. Where is such a standard? I believe that, whether consciously or unconsciously, the courts awarding punitive damages have always stated, in their holdings, a certain standard which affects the amount.

Here, I state my survey of Wisconsin cases on the formula which evaluates punitive damages.

1. Statement of Wisconsin Supreme Court

The Wisconsin Supreme Court has never proposed an absolute and definitive method to evaluate punitive damages. It seems to state that there is no specific formula on which to base a punitive damages award.

First, in *Calero v. Del Chemical Corp.*[80] (1975), the Wisconsin supreme court stated: "this court has set no arbitrary maximum on punitive awards." Later, in *Wangen v. Ford Motor Co.*[81] (1980), the court stated:

> Punitive damages must be decided on a case-by-case basis. The circumstances of each case must be considered to determine whether the award

> under the particular circumstances of that case serves the purposes of punitive damages . . . . an award which is more than necessary to serve its purpose (punishment and deterrence) or which inflicts a penalty or burden on the defendant which is disportionate to the wrongdoing is excessive and is contrary to public policy. . .

What factors does the Wisconsin court consider in determining punitive damages? In *Fahrenberg v. Tengel*[82] (1980), the court stated:

> Factors to be considered in determining the proper amount to be awarded as punitive damages include: the grievousness of the defendant's acts; the degree of malicious intention; the potential damage which might have been done such acts as well as the actual damage; and the defendant's ability to pay. . . .

There we find the 4 factors which are to be considered in determining the award of punitive damages; 1. mode of infliction, 2. malice of defendant, 3. compensatory damages, 4. defendant's wealth. It is not as easy to interpret factors 1 and 2 into quantitative evaluation as factors 3 and 4. Therefore, it would be the best to examine the quantitative relation between punitive damages and compensatory damages and defendant's wealth.

2. Approach to Excessivenss of Punitive Damages
—— *Ratio Rule*

In order to examine the excessiveness of punitive damages, I made a survey of 183 cases where punitive damages were discussed as an issue in Wisconsin courts. These 183 cases are listed on LIST 1 (attached at the end of this paper). Then I picked 39 cases where punitive damages were exactly awarded and the amount of punitive damages could be identified. These 39 cases are listed on LIST 2 (attached at the end of this paper).

---

80. 68 Wis. 2d 487, 228 N. W. 2d 737 (1975); *See generally*, Ghiarde, *Punitive Damages in Wisconsin*, 60 Marq. L. Rev. 753; Ghiardi & Kircher, *Punitive Damages Law and Practice* (1981); Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 Marq. L. Rev. 245; Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 Marq. L. Rev. 396.
81. 97 Wis. 2d 302, 303, 294 N. W. 2d 437 (1980).
82. 96 Wis. 2d 211, 234, 291 N. W. 2d 516 (1980).

a. Relation between Punitive Damages and Compensatory Damages

The final step of my survey of cases where punitive damages are awarded was to explore a relation between punitive damages and compensatory damages. The results are shown in Table 1, which is based on the data (21 cases) extracted from LIST 2. The reason why I sorted the data into the categories of torts is that it is meaningless to put all the data into one single scale, because the characterisitics of each type of torts were shown in the judgments.

Table 1.

type of tort	data	range	average
Alienation of Affection	3	0.300– 1.667	1.07
Assault and Battery	4	1.364– 4.000	2.80
Libel and Slander	7	0.667– 2.000	0.91
Malicious Prosecution	3	1.200– 6.250	2.98
Product Liability	2	0.125– 0.303	0.21
Seduction	2	3.000–10.000	6.50

Analysis No. 1

Although the amount of data is not abundant, it would be possible to deduce the following from Table 1:

i) In the categories of tort where the mode of defendant's tortious conduct was relatively grave or willful, such as Assault and Battery, Malicious Prosecution and Seduction, the court awarded a high amount of punitive damages in relation to compensatory damages. The average of this category of tort is over 2.80.

ii) In Alienation of Affection and Libel and Slander, the average of these is about 1; that is, the amount of punitive damages was almost equal to that of compensatory damages. This is perhaps because the court believed the compensatory damages in these cases were large enough to deter the defendant. Furthermore, it might be difficult to properly estimate compensatory damages as well as punitive damages from the evidence.

iii) In Product Liability, the average is 0.21, the lowest among the

categories. This is because, in product liability cases, compensatory damages are rather high compared to other types of torts. It can be inferred that the court might think that the high amount of compensatory damages would function as daterrence and punishment which are normally associated with punitive damages.

b. Relation between Punitive Damages and Defendant's Wealth

The results of my survey of the cases to explore a relationship between punitive damages and defendant's wealth are shown in Table 2, which is based on the data extracted from LIST 2. In this instance, it is not necessary to sort the data into types of torts, because their dispersion is small.

Table 2.

number of data	7
average	0.19
range	0.03–0.90

Analysis No.2

The average 0.19 indicates that, in awarding punitive damages, the court decided the amount was much less than the defendant's wealth. Also, the range 0.03–0.90 indicates that the courts did not award a higher amount of punitive damages than the defendant's wealth. This fact is proved by the opinion in *Anello v. Savignac*[83]: "If defendant's net worth was the only factor to consider, punitive damages could never be awarded against an indigent."

3. Conclusion of Case Study

It is quite risky to universalize my conclusion as an absolute standard upon which an award of punitive damages can be based. This is due to the fact that my survey contains a limited amount data (number is 21 cases) in

83. 116 Wis 2d 246, 342 N. W. 2d 440. (1983).

one state out of fifty. But, at least, I can assert that: 1. the court, consciously or unconsciously, judges the amount of punitive damages according to the *ratio rule*[84] which relates the amount of punitive damages to that of compensatory damages within each range of tort types, and 2. the amount of punitive damages should not exceed the defendant's wealth (which is introdeced before the court as evidence), because the optimal deterrent effect of punitive damages derives from the relation to the dafendant's wealth. If they were to exceed his wealth, punitive damages would be considered excessive.

VI. Punitive Damages in Compensation System

A. Objectification of Civil Liability

To explain the propensity of objectification of civil liability in tort law, the automobile accident scheme is a good example.[85]

Since the beginning of 1970s, many states adopted No-Fault Insurance scheme for automobile accidents.[86] In the scheme, property damages (furthermore, slight personal injuries) are automatically recoverable irrespective of the subjective factors of the wrongdoer, intentional or unintentional. Assessment of damages is standardized according to a certain kind of tables, and compensation for intangible loss, i. e., pain and suffering or pure economic loss is excluded. In this compensation scheme, deterrence does not function as much as in tort law system. It is due to these facts: unavoidable frequency of traffic accidents caused by indispensable necessity for everyone to drive an automobile; generalization of preparedness to assume an inevitable risk of accidents during diving an automobile; and mitigation of the wrongdoer's

84. Against *ratio rule*, of course, there are several critiques; "Since no precise ratio is ever required, the rule really not a role at all, but only a general idea." "The court is always free to declare that punitive award is excessive, whether the ratio rule is used or not." *See* Dobbs *Remedies* at 210-11.
85. Prosser & Keeton, *On The Law of Torts* [5th ed.], at 606 (1984).
86 *See* Keeton and O'Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*, (1965).

suppression to be obliged to compensate the damage through the payment of the insurance company on behalf of the wrongdoer.

It is considered inefficient to allege such a difficult legal issue as to prove the existence of negligence or the amount of damages in a typical small traffic accident claim. Such a litigation would produce only unnecessary waste of cost and time on the victim's side. The increasing number of traffic litigations necessarily demanded a rapid settlement of a strife and an equal treatment under the law among the similar cases. The formalization of legal settlements produces objectification of civil liability. As a result of the formalization, the traffic accident cases gradually decreased in number (see LIST 5 attached at the end of this paper).

Hence, the objectification of civil liability would finally lose the deterrent effect of civil liability, because it always neglects the subjectivity of a wrongdoer, intention or blameworthiness. The objectification of tort liability would expand in any categories of tort and go toward the final end, standardization of the amount of damages.[87]

B. The Role of Punitive Damages in Compensation System

Evolution of tort liability theories can be characterized as a straight and incessant evolution toward an absolute guarantee of the victims' right.[88] The expansion of the recoverable scope of compensatory damages shows such a tendency.

The justification for awarding punitive damages in our modern compensation system should be extracted from the characterisitics of punitive damages. As they regard the subjective (an outrageous nature of the conduct) of the wrongdoer as important, they function effectively as deterrence. They can produce an optimal amount of damages when they are awarded in addition to compensatory damages which are gradually standardized through the objectification prosess of civil liability.

---

87. *See* Tunc, *Introduction*: International Encyclopedia of Comparative Law vol. XI Torts Chap. 1 at 105 (1974).
88. This is *Théorie de la garantie*. *See* Starck, *Droit civil Obligations* 1972 n° 82, Tunc, *Id.* at 99, 103 (1972).

C. Prediction of Future Trend of Punitive Damages

It is not easy to expect the trend of punitive damages in the future. But I examine a probable direction along which punitive damages will advance, with the conclusions stated above from my case study and a statistics approach. The statistics are shown in LIST 4 and 5 attached at the end of this paper. The basic presuppositions for my prediction are as follows: civil liability is expanding its territory in order to guarantee the victim's rights[89]; an increasing number of lawyers brings a highly competitive market where most legal transactions are completely commercialized[90]; and no statutory restriction will be imposed upon the award and availability of punitive damages.[91]

---

89. *Ibid.* ; See Gilmore, *The Death of Contract*, at 87–103 (1974).
90. In the future, punitive damages will expand their territory in the field of compensation system, because the incessantly increasing number of lawyers and the relative diminution of tort action in civil cases would require the productivity of litigation, that is, the less investment of cost and time, the more income or profit from a litigation. Punitive damages are the most profitable doctrine for a lawyer's income. On the problem of the litigation explosion, *see* Galanter, *Reading the Landscape of Disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society*, 31 UCLA L. Rev. 4.
91. For example, Iowa state copes with the problem of "windfall" of punitive damages by Iowa Code Chapter 668 A. 1 (1986) 2. b.

    In condition of positive determination by the trier of fact that the defendant's conduct exhibit "willful and wanton disregard for the rights or safety of another", if the conduct of the defendant was not directed specifically at the claimant, nor at the person from which the claimant's claim is derived, after payment of all applicable costs and fees, an amount not to exceed 25% of the punitive damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

    Otherwise, if the defendant's conduct was directed specifically at the claimant, or at the person from which the claimant's claim is derived, the full amount of the punitive damages awarded shall be paid to the claimant.

    See Franklin & Rabin, *Tort Law and Alternatives Cases and Materials* [4th Ed.] at 628 (1987).

Here, I predict these trends of punitive damages as follows.

1. Expansion of the Availability of Punitive Damages

Cases where punitive damages can be recognized will increase. Punitive damages will expand their territory not only in torts but also in equity courts and contracts actions.[92] This prediction is based on the following reasons.

1-1. Punitive damages are effective for a lawyer to make a large profit in one litigation. Therefore, punitive damages are a very attractive market for such a lawyer. Many lawyers will have a strong incentive to employ the doctrine of punitive damages in litigation.

1-2. An increase of lawyers and civil cases in number necessarily requires high productivity or profitability in one litigation (see LIST 4 and FIGURE 4–3).

1-3. Tort cases are relatively decreasing in the total of civil cases (see LIST 5). Therefore, the lawyers will have to seek a new field where punitive damages are available.

2. Complication and Pretraction of Punitive Damages litigation

Punitive damages litigation will be much more complicated and protracted than ever. This prediction is based on the following reasons.

2-1. The number of corporate lawyers is increasing relatively in the total number of lawyers (see LIST 4 and FIGURE 4–2). They will elaborate the theory against punitive damages. Lawyers on the defendants' side will spend their energy more than ever in order to avoid the plainfiff's motion for punitive damages.

2-2. Private practicing lawyers are still increasing in number (see LIST 4 and FIGURE 4–1). So they will seek the award of punitive damages regarding them as a more profitable market.

3. Augmentation of An Award of Punitive Damages

The award of punitive damages in one litigation will augment. This prediction is based on the following reasons.

---

92. Woerner, Power of Equity Court to Award Exemplary or Punitive Damages, 48 A.L.R. 2d 947 (1956); Note, *supra* note 5 at 531.

3-1. Complication and protraction of punitive damages litigation will produce a large amount of the award in one litigation.

3-2. Many competent large law firms will seek a "deep-pocket" in order to augment profitability and survive in the highly competitive market.

From all the prediction above, the issues of punitive damages will, I think, focus on the excessiveness of punitive damages. The arguments on them increase more than ever.

VII. Conclusion

I conclude that punitive damages should not be abolished. I base this conclusion not only on my study of their historical development and functions but also on the consideration for the evolution of tort liability which has advanced toward the absolute guarantee of a private person's rights, and accordingly objectification of civil liability. If abolished, tort law would halt in the process of evolution, lose its dynamics and flexibility to social change, and finally barely function. If it is said that civil liability based on tort law must function only for compensation of the damages caused on the victim, I would say that, as to the compensation, a social welfare scheme or an accident compensation scheme is much more efficient than the compensation scheme based on tort law, because these schemes requires no transaction costs of litigations. Then, *raison d'être* of tort law system would reside in its function of deterrence to avoid anti-social conducts in our society. The further objectification of civil liability advances, the more deterrent effect of the tort law system should be stressed than ever.

As to the management of the institution of punitive damages, I think, most of the problems can be integrated into one single problem, excessiveness of the amount of punitive damages. An appropriate use of punitive damages is necessary because punitive damages have, to some extent, a dangerous character. They may rise unlimitedly the amount of the damages which would result in misallocation of resoures.[93] The first

93. Landes & Posner, *supra* note 16 at 162.

strategy to avoid this result is to restrict the sphere of availability. But its efficacy is doubtful as the history shows.[94] The Second is to produce a certain kind of device to make the amount of punitive damages in order to avoid unnecessary excessiveness of the award. The *ratio rule*[95], which requires punitive damages be commensurate to compensatory damages and defendant's wealth, would be useful when courts introduce it in each categorized type of cases where punitive damages are awarded.

94. *See* at 21 *supra*.
95. *See* at 33–36 *supra*; *see also* Dobbs, *Remedies*, at 210.

LIST 1.

LIST OF PUNITIVE DAMAGES CASES

No.	Name of Case	National Rep.	Wisconsin Rep.	year	nature of case	P	C	D's W	P:C	P/C	P/W
1	McWilliams v. Bragg.		1 Wis. 424	1854	assault & battery	*	*	*	650		
2	Birchard v. Booth.		4 Wis. 67	1855	assault & battery	*	*	*	*		
3	Cramer v. Noonan.		4 Wis. 231	1855	libel	*	*	*	2,400		
4	Beveridge v. Welch.		7 Wis. 465	1859	claim and delivery of property	*	*	*	*		
5	Gordon v. Brewster.		7 Wis. 455	1859	breach of contract	denied	*	*	*		
6	Matteson v. Curtis.		11 Wis. 424	1860	trespass	*	*	*	800		
7	Milwaukee & M.R. Co. v. Finney.		10 Wis. 388	1860	principal & agent	*	*	*	*		
8	Noury v. Wood.		12 Wis. 413	1860	trover	*	*	*	*		
9	Barnes v. Martin.		15 Wis. 240	1862	assault & battery	*	*	*	*		
10	Barber v. Kilbourn.		16 Wis. 485	1863	fraudulent representation	*	*	*	*		
11	Pickett v. Crook.		20 Wis. 358	1866	domestic animals	*	*	*	*		
12	Potter v. Chicago & N.W.R. Co..		21 Wis. 372	1867	injuries to minor causing death	*	*	*	*		
13	Hamlin v. Spaulding.		27 Wis. 360	1869	arrest & false imprisonment	*	*	*	100		
14	Hooker v. Newton.		24 Wis. 292	1869	assault & battery	*	*	*	*		
15	Morely v. Dunbar.		24 Wis. 183	1869	assault & battery	*	*	*	*		
16	Schmidt v. Pfeil.		24 Wis. 452	1869	assault & battery	*	*	*	*		
17	Klopfer v. Bromme.		26 Wis. 372	1870	seduction & loss of services	*	*	*	*		
18	Simpson v. Black.		27 Wis. 206	1870	breach of promise to marry	*	*	*	*		
19	Bonesteel v. Bonesteel.		28 Wis. 245	1871	false imprisonment	*	*	*	*		
20	Goodno v. City of Oshkosh.		28 Wis. 300	1871	injury from defective sidewalk	denied	*	*	*		
21	Bonesteel v. Bonesteel.		30 Wis. 511	1872	false imprisonment	*	*	*	*		
22	Spicer v. Chicago & N. W. Ry. Co..		29 Wis. 580	1872	negligence	*	*	*	400		
23	Rogers v. Henry.		32 Wis. 327	1873	slander	*	*	*	*		
24	Johannesson v. Borschenius.		35 Wis. 131	1874	trover	*	*	*	*		
25	Wilson v. Noonan.		35 Wis. 321	1874	libel	*	*	*	*		
26	Craker v. Chicago & N. W. Ry. Co..		36 Wis. 657	1875	master for act of servant	*	*	*	*		
27	Hinckley v. Chicago, M. & St. P. Ry. Co..		38 Wis. 194	1875	ejection of passenger	*	*	*	*		
28	Meibus v. Dodge.		38 Wis. 300	1875	owner for act of ferocious dog	*	*	*	*		
29	Bass v. Chicago and N. W. Ry. Co..		42 Wis. 654	1877	servants' act	2,000	2,500	*	*	0.800	
30	Brown v. Swineford.		44 Wis. 282	1878	assault & battery	*	*	*	*		
31	Sorenson v. Dundas.	7 N.W. 259	50 Wis. 335	1880	false imprisonment	*	*	*	250		
32	Klewin v. Bauman.	10 N.W. 398	53 Wis. 244	1881	slander	*	*	*	*		
33	Lavery v. Crooke.	9 N.W. 599	52 Wis. 612	1881	seduction	*	*	*	1,500		
34	Bierbach v. Goodyear Rubber Co..	14 F. 826		1882	negligence:personal injury	*	*	*	*		
35	Evinston v. Cramer.	15 N.W. 760	57 Wis. 570	1883	libel	*	*	*	*		
36	Templeton v. Graves.	17 N.W. 672	59 Wis. 95	1883	slander	*	*	*	2,000		
37	Spear v. Hiles.	30 N.W. 506	67 Wis. 350	1886	malicious prosecution	*	*	*	5,000		
38	Grace v. Dempsey.	43 N.W. 1127	75 Wis. 313	1889	false imprisonment	2,000	3,000	*	*	0.667	
39	Grace v. McArthur.	45 N.W. 518	76 Wis. 641	1890	libel	*	*	*	3,000		
40	Patry v. Chicago, St. P. M. & O. Ry Co..	46 N.W. 56	77 Wis. 218	1890	ejection of passenger	*	*	*	*		
41	Allen v. New Pub. Co..	50 N.W. 1093	81 Wis. 120	1892	libel	100	150	*	*	0.667	
42	Delaney v. Kaetel.	51 N.W. 559	81 Wis. 353	1892	slander	*	*	*	1,500		
43	Prindle v. Haight.	52 N.W. 1134	83 Wis. 50	1892	assault & battery	*	*	*	*		
44	Born v. Rosenow.	54 N.W. 1089	84 Wis. 620	1893	slander	*	*	*	500		
45	Wace v. Reed.	62 N.W. 186	89 Wis. 440	1895	acts of servant	denied	*	*	*		
46	Nichols v. Brabazon.	69 N.W. 342	94 Wis. 549	1896	assault & battery	*	*	*	*		
47	Robinson v. Superior Rapid-Transit Ry. Co..	68 N.W. 961	94 Wis. 345	1896	wrongful ejection of passenger	*	*	*	*		
48	Lamb v. Stone.	70 N.W. 72	95 Wis. 254	1897	assault & battery	*	*	*	*		
49	Reed v. Keith.	75 N.W. 392	99 Wis. 672	1898	slander	denied	*	*	*		
50	Findlay v. Knickerbocker Ice Co..	80 N.W. 436	104 Wis. 375	1899	trespass	denied	*	*	*		
51	Haberman v. Gasser.	80 N.W. 105	104 Wis. 98	1899	sale of unwholesome food	*	*	*	*		
52	Gatzow v. Buening.	81 N.W. 1003	106 Wis. 1	1900	unlawful conspiracy	*	*	*	*		
53	Vassau v. Madison Elec. Ry. Co..	82 N.W. 152	106 Wis. 301	1900	ejection of passenger	denied	*	*	*		
54	Gaertner v. Bues.	85 N.W. 388	109 Wis. 165	1901	landlord & tenant	denied	*	*	*		
55	Green Bay & M.Canal Co. v. Kaukauna Water Power Co..	87 N.W. 864	112 Wis. 323	1901	use of water power	denied	*	*	*		
56	Scheer v. Kriesel.	85 N.W. 138	109 Wis. 125	1901	trespass	*	*	*	*		

LIST OF PUNITIVE DAMAGES CASES (LIST 1)

No.	Name of Case	National Rep.	Wisconsin Rep.	year	Nature of Case	P	C	D's W	P+C	P/C	P/W
57	Gilman v. Brown,	91 N.W. 227	115 Wis. 1	1902	trespass to the land	*	*	*	325		
58	Eggett v. Allen,	96 N.W. 803	119 Wis. 625	1903	malicious prosecution	*	*	*	*		
59	Keeping v. Chicago & N. W. Ry. Co.,	93 N.W. 843	116 Wis. 625	1903	negligence acts of servant	denied	*	*	*		
60	Lowe v. Ring,	101 N.W. 381	123 Wis. 107	1904	assault & battery	*	*	*	*		
61	Kloths v. Hess,	106 N.W. 251	126 Wis. 587	1906	slander	200	300	*	*	0.667	
62	Deragon v. Sero,	118 N.W. 839	137 Wis. 276	1908	assault & battery	*	*	*	*		
63	Karns v. Allen,	115 N.W. 357	135 Wis. 48	1908	nuisance	500	1,500	*	*	0.333	
64	Pfister v. Milwaukee Free Press Co.,	121 N.W. 938	139 Wis. 627	1909	libel & slander	5,000	10,000	*	*	0.500	
65	Thomas v. Williams,	121 N.W. 148	139 Wis. 467	1909	assault & battery	*	*	*	*		
66	Tilton v. James L. Gates Land Co.,	121 N.W. 331	140 Wis. 197	1909	breach of contract	denied	2160.73	*	*	0.000	
67	White v. White,	122 N.W. 1051	140 Wis. 538	1909	alienation of affection	1,500	5,000	*	*	0.300	
68	Topolewski v. Plankinton Packing Co.,	126 N.W. 554	143 Wis. 52	1910	malicious prosecution	denied	*	*	*		
69	Driessel v. Urkart,	132 N.W. 894	147 Wis. 154	1911	slander	*	*	*	*		
70	Di Benedette v. Milwaukee Electric Railway & Light Co.,	136 N.W. 282	149 Wis. 566	1912	wrongful ejection of passenger	*	*	*	*		
71	Jennings v. Johnnott,	135 N.W. 170	149 Wis. 660	1912	trespass	*	*	*	*		
72	Hess v. Zimmer,	139 N.W. 740	152 Wis. 193	1913	breach of promise of marriage	*	2,000	12,000	*	0.000	0.000
73	Johnson v. Aetna Life Ins. Co.,	147 N.W. 32	158 Wis. 56	1914	discharge of employee	*	*	*	*		
74	Luther v. Shaw,	147 N.W. 18	157 Wis. 234	1914	seduction	1,500	150	*	*	10.000	
75	Wanz v. Klippel,	149 N.W. 375	158 Wis. 557	1914	malicious prosecution	600	500	*	*	1.200	
76	Shall v. Minneapolis, St. P. & S. S. M. Ry. Co.,	145 N.W. 649	156 Wis. 195	1914	unlawful search	denied	*	*	*		
77	Barnard v. Cohen,	162 N.W. 480	165 Wis. 417	1917	libel	denied	*	*	*		
78	Morse v. Modern Woodmen of America,	164 N.W. 829	166 Wis. 194	1917	libel	*	*	*	*		
79	Warlatt v. Western Union Tel. Co.,	167 N.W. 263	167 Wis. 176	1918	telegraph divulging contents	denied	*	*	*		
80	McAllister v. Kimberly-Clark Co.,	173 N.W. 216	169 Wis. 473	1919	malicious prosecution	denied	1,000	*	*	0.000	
81	Gehl v. Hebe Co.,	276 F. 271		1921	trademark infringement	*	*	*	*		
82	Ogodzinski v. Gara,	181 N.W. 231	173 Wis. 380	1921	assault & battery	*	*	*	*		
83	Smithers v. Brunkhorst,	190 N.W. 349	178 Wis. 530	1922	unlawful sale of liquor	*	*	*	3,500		
84	Berghammer v. Mayer,	207 N.W. 289	189 Wis. 197	1926	seduction	3,000	1,000	50,000	*	3.000	0.060
85	Oconto County v. Union Mfg. Co.,	208 N.W. 989	190 Wis. 44	1926	damage caused by flooding	*	*	*	*		
86	Meshane v. Second St. Co.,	222 N.W. 320	197 Wis. 382	1928	unauthorized expulsion of guest	denied	500	*	*	0.000	
87	Christensen v. Schwartz,	222 N.W. 231	198 Wis. 222	1929	alleged conspiracy to defraud	*	*	*	*		
88	W.H. Schwanke, Inc. v. Wisconsin Tel. Co.,	227 N.W. 30	199 Wis. 552	1929	mistake in telephone directory	*	40	*	*	0.000	
89	Manoi v. Moskin Bros., Inc.,	233 N.W. 579	203 Wis. 47	1930	assault by employee	*	*	*	*		
90	Prange v. Rognstad,	236 N.W. 650	205 Wis. 62	1931	negligence:pain & suffering	denied	*	*	*		
91	Lehner v. Berlin Pub. Co.,	246 N.W. 579	211 Wis. 119	1933	libel	*	*	*	*		
92	Kickapoo Development Corp. v. Kickapoo Orchard Co.,	285 N.W. 354	231 Wis. 458	1939	trademark infringement	*	*	*	*		
93	Lechner v. Ebenreiter,	292 N.W. 913	235 Wis. 244	1940	malicious prosecution	*	*	*	*		
94	Kalb v. Luce,	1 N.W.2d 176	239 Wis. 256	1942	conspiracy of dispossess	*	*	*	*		
95	Chrome Plating Co. v. Wisconsin Elec. Power Co.,	6 N.W.2d 692	241 Wis. 554	1943	power supply to plant	*	*	*	*		
96	Hadler v. Rhyner,	12 N.W.2d 693	244 Wis. 448	1944	false imprisonment	15	10	*	*	1.500	
97	Wallin v. Sutherland,	31 N.W.2d 178	252 Wis. 149	1948	breach of marital promise	*	*	65,000	12,000		0.000
98	Asplund v. Palmer,	44 N.W.2d 624	258 Wis. 34	1950	assault & battery	4,000	2,000	*	*	2.000	
99	Besinger v. McLaughlin,	42 N.W.2d 358	257 Wis. 56	1950	constructive eviction	300	200	*	*	1.151	
100	Paulson v. Scott,	50 N.W.2d 376	260 Wis. 141	1952	alienation of affection	2,500	1,500	*	*	1.667	
101	Vieth v. Dorsch,	79 N.W.2d 96	274 Wis. 17	1956	damage for trespass	*	*	*	*		
102	Gladfelter v. Doemel,	87 N.W.2d 490	2 Wis.2d 635	1958	malicious prosecution	6,000	4,000	200,000	*	1.500	0.030
103	Malco, Inc. v. Midwest Aluminum Sales, Inc.,	109 N.W.2d 516	14 Wis.2d 57	1961	injury of business credit	7,500	500	*	*	15.000	
104	Bielski v. Schulze,	114 N.W.2d 105	16 Wis.2d 1	1962	negligence:automobile	*	*	*	*		
105	Re-Trac Corp. v. J.W. Speaker Corp.,	212 F.Supp. 164		1962	conversion of track mirrors	denied	4,325	*	*	0.000	
106	Rische Const. Co., v. May,	112 N.W.2d 165	15 Wis.2d 123	1962	unlawful detainer	*	*	*	*		
107	Widenshek v. Fale,	117 N.W.2d 275	17 Wis.2d 137	1962	attorney & clients	*	*	*	*		
108	Fuchs v. Kupper,	125 N.W.2d 360	22 Wis.2d 107	1963	malicious prosecution	2,500	400	20,000	*	6.250	0.125
109	Goldman v. Home Mut. Ins. Co.,	126 N.W.2d 1	22 Wis.2d 334	1964	attorney & clients	*	*	*	*		
110	Hoffman v. Red Owl Stores, Inc.,	133 N.W.2d 267	26 Wis.2d 683	1965	promissory estoppel	*	*	*	*		
111	Kink v. Combs,	135 N.W.2d 789	28 Wis.2d 65	1965	assault & battery	7,500	5,500	*	*	1.364	
112	Seifert v. Salem,	387 F.2d 925		1967	fraud	45,000	40,000	750,000	*	1.125	0.060
113	White v. Benkowski,	155 N.W.2d 74	37 Wis.2d 285	1967	breach of contract	denied	10	*	*	0.000	
114	F. Strassheim Co. v. Gold Medal Folding Furniture Co.,	294 F.Supp. 788		1968	patent infringement	denied	*	*	*		

LIST OF PUNITIVE DAMAGES CASES (LIST 1)

No.	Name of Case	National Rep.	Wisconsin Rep.	year	Nature of Case	P	C	D's W	P+C	P/C	P/W
115	Lisowski v. Chenenoff,	155 N.W.2d 619	37 Wis.2d 610	1968	libel & slander	10,000	5,000	100,000	*	2.000	0.100
116	Drabek v. Sabley,	142 N.W.2d 798	31 Wis.2d 184	1969	assault & battery	denied	*	*	*		
117	Jones v. Fisher,	166 N.W.2d 175	42 Wis.2d 209	1969	assault & battery	2,000	500	24,000	*	4.000	0.083
118	Entzminger v. Ford Motor Co.,	177 N.W.2d 899	47 Wis.2d 751	1970	breach of contract	denied	5,000	*	*	0.000	
119	Mid-Continent Refrigerator Co. v. Straka,	178 N.W.2d 28	47 Wis.2d 739	1970	fraud	*	*	*	*		
120	Dalton v. Meister,	188 N.W.2d 494	52 Wis.2d 173	1971	libel & slander	75,000	75,000	*	*	1.000	
121	Hanson v. Valdivia,	187 N.W.2d 151	51 Wis.2d 466	1971	wrongful death action	denied	*	*	*		
122	Alaimo v. Schwanz,	201 N.W.2d 604	56 Wis.2d 198	1972	alienation of affection	*	10,000	*	*	0.000	
123	John Mohr & Sons, Inc. v. Jahnke,	198 N.W.2d 363	55 Wis.2d 402	1972	patent infringement	denied	20,000	*	*	0.000	
124	Laurence v. Jewell, Co.,	193 N.W.2d 695	53 Wis.2d 656	1972	defamation	*	*	*	12,000		
125	Polzin v. Helmbrecht,	196 N.W.2d 685	54 Wis.2d 578	1972	libel	*	*	*	*		
126	Kelly Co. v. Kite-Hite Corp.,	353 F.Supp.1053		1973	patent infringement	denied	*	*	*		
127	Meke v. Nicol,	203 N.W.2d 129	56 Wis.2d 654	1973	assalt & battery	*	*	*	*		
128	D.R.W. Corp. v. Cordes,	222 N.W.2d 671	65 Wis.2d 303	1974	fraud	denied	5	*	*	0.000	
129	Drake v. Wham-O Mfg. Co.,	373 F.Supp. 608		1974	wanton disregard for safety	denied	*	*	*		
130	Brown v. Schubert,	389 F.Supp. 281		1975	wrongful transfer of patients	denied	*	*	*		
131	Calero v. Del Chemical Corp.,	228 N.W.2d 737	68 Wis.2d 487	1975	defamation	9,000	10,000	*	*	0.900	
132	Roach v. Keane,	243 N.W.2d 508	73 Wis.2d 524	1976	alienation of affection	2,500	2,000	*	*	1.250	
133	Walbrun v. Berkel, Inc.,	433 F.Supp. 384		1976	product liability	denied	*	*	*		
134	Herrmeyer v. Kleeman,	251 N.W.2d 445	76 Wis.2d 410	1977	unlawful eviction	*	*	*	*		
135	Karp v. North Central Airlines, Inc.,	437 F.Supp. 87		1977	unjust discrimination :airline	2,000	3	*	*	666.667	
136	Paper Converting Mach. Co., Inc. v. F.M.C. Corp.,	432 F.Supp. 907		1977	patent infringement	*	*	*	*		
137	Anderson v. Continental Ins. Co.,	271 N.W.2d 368	85 Wis.2d 675	1978	bad faith in handling claim	*	*	*	*		
138	Cieslewicz v. Mutual Service Cas. Ins. Co.,	267 N.W.2d 595	84 Wis.2d 91	1978	insurability of multiple damages	*	*	*	*		
139	Chuck Wagon Catering, Inc. v. Baduege,	277 N.W.2d 787	88 Wis.2d 740	1979	breach of contract	denied	*	*	*		
140	Kirschbik v. Pepsi-Cola Metropolitan Bottling Co., Inc.,	478 F.Supp. 842		1979	product liability	denied	*	*	*		
141	Simmons v. Atlas Vac Mach. Co.,	475 F.Supp. 1181		1979	strict liability and negligence	*	*	*	*		
142	Wussow v. Commercial Mechanisms, Inc.,	279 N.W.2d 503	90 Wis.2d 136	1979	product liability	denied	*	*	*		
143	Fahrenberg v. Tengel,	291 N.W.2d 516	96 Wis.2d 211	1980	burglary and conversion	125,000	20,000	*	*	6.250	
144	Jeffers v. Nysse,	297 N.W.2d 495	98 Wis.2d 543	1980	fraud, misrepresentaion of fact	*	*	*	*		
145	Wangen v. Ford Motor Co.,	294 N.W.2d 437	97 Wis.2d 260	1980	product liability	*	*	*	*		
146	Wood v. Worachek,	618 F.2d 1225		1980	false imprisonment	denied	*	*	*		
147	Wussow v. Commercial Mechanisms, Inc.,	293 N.W.2d 897	97 Wis.2d 136	1980	product liability	70,000	?	*	*		
148	Bachand v. Connecticut General Life Ins. Co.,	305 N.W.2d 149	101 Wis.2d 617	1981	emotional distress	denied	0	*	*		
149	Benlo Chemicals, Inc. v. Buckman Laboratories,	520 F.Supp. 160		1981	breach of contract	denied	*	*	*		
150	Durham v. Pekrul,	311 N.W.2d 615	104 Wis.2d 339	1981	wrongful detention	2,500	750	*	*	3.333	
151	Benke v. Mukwonago-Vernon Mut. Ins. Co.,	329 N.W.2d 243	110 Wis.2d 356	1982	insurance: bad faith	denied	*	*	*		
152	Huebschen v. Department of Health and Social Services,	547 F.Supp. 1168		1982	sexual harassment	15,000	10,000	*	*	1.500	
153	Ma v. Community Bank,	686 F.2d 459		1982	breach of contract	denied	*	*	*		
154	Anello v. Savignac,	342 N.W.2d 440	116 Wis.2d 246	1983	assault & battery	23,000	6,000	1,000	*	3.833	23.000
155	Badger Bearing, Inc. v. Drives and Bearings, Inc.,	331 N.W.2d 847	111 Wis.2d 659	1983	defamation	10,000	15,000	*	*	0.667	
156	Brockmeyer v. Dun & Bradstreet,	335 N.W.2d 834	113 Wis.2d 561	1983	wrongful discharge	*	*	*	*		
157	Green v. U.S.,	709 F.2d 1158		1983	medical malpractice	*	*	*	*		
158	Klawes v. Firestone Tire & Rubber Co.,	572 F.Supp. 116		1983	wrongful death action	*	*	*	*		
159	Robinson v. Lescrenier,	721 F.2d 1101		1983	slander	10,000	0.06	*	*	166666.667	
160	White v. Ruditys,	343 N.W.2d 421	117 Wis.2d 130	1983	unfair labor practice	*	*	*	*		
161	Burns v. Milwaukee Mut. Ins. Co.,	360 N.W.2d 61	121 Wis.2d 574	1984	automobile accident	*	*	*	*		
162	Collins v. Eli Lilly Co.,	342 N.W.2d 37	116 Wis.2d 166	1984	product liability: DES	denied	*	*	*		
163	Dvorak v. Plumwood Wisconsin, Inc.,	358 N.W.2d 544	121 Wis.2d 218	1984	breach of employment contract	denied	*	*	*		
164	Fehring v. Republic Ins. Co.,	347 N.W.2d 595	118 Wis.2d 299	1984	insurance: bad faith	denied	*	*	*		
165	Hartland Cicero Mut. Ins. Co. v. Elmer,	363 N.W.2d 252	122 Wis.2d 481	1984	insurance: const. of policy	*	*	*	*		
166	Larsen v. Wisconsin Power & Light Co.,	355 N.W.2d 557	120 Wis.2d 508	1984	negligent inspection of hotels	*	*	*	*		
167	Mikaelian v. Woyak,	360 N.W.2d 706	121 Wis.2d 581	1984	automobile accident	*	*	*	*		
168	Otto v. Cornael,	349 N.W.2d 703	119 Wis.2d 4	1984	title to disputed property	1,000	?	*	*		

LIST OF PUNITIVE DAMAGES CASES (LIST 1)

No.	Name of Case	National Rep.	Wisconsin Rep.	year	Nature of Case	P	C	D's W	P÷C	P/C	P/W
169	Poling v. Wisconsin Physicians Service.	357 N.W.2d 293	120 Wis.2d 603	1984	insurance: bad faith	100,000	68,000	*	*	1.471	
170	Walter v. Cessna Aircraft Co..	358 N.W.2d 816	121 Wis.2d 221	1984	product liability	*	*	*	*		
171	White Hen Pantry, Div. Jewel Companies, Inc. v. Johnson,	599 F.Supp. 718		1984	breach of contract	denied	*	*	*		
172	Brown v. Waxey,	369 N.W.2d 677	124 Wis.2d 426	1985	insurance: fire	20,000	?	*	*		
173	Gerol v. Arena.	377 N.W.2d 618	127 Wis.2d 1	1985	libel & slander	*	*	*	*		
174	Lundin v. Shimanski.	368 N.W.2d 676	124 Wis.2d 175	1985	intentional misrepresentation	5,000	1,780	*	*	1.323	
175	Maskrey v. Volkswagenwerk Aktiengesellschaft.	370 N.W.2d 815	125 Wis.2d 145	1985	product liability	denied	*	*	*		
176	Soderbeck v. Burnett Country, Wis..	752 F.2d 285		1985	wrongful discharge of employer	denied	*	*	*		
177	Welty v. Heggy.	369 N.W.2d 763	124 Wis.2d 318	1985	infliction of emotional distress	*	*	*	*		
178	Zeller v. Northrup King Co..	370 N.W.2d 809	125 Wis.2d 31	1985	products misrepresentation	*	*	*	*		
179	Owens v. Meyer Sales Co., Inc..	385 N.W.2d 234	129 Wis.2d 491	1986	breach of warranty	1,000	8,000	*	*	0.125	
180	Autumn Grove Joint Venture v. Rachlin.	405 N.W.2d 759	138 Wis.2d 273	1987	breach of contract	denied	*	*	*		
181	Hagge v. Bauer.	827 F.2d 101		1987	civil right claim	25,000	75,000	27,600	*	0.333	0.906
182	Wheeler v. General Tire and Rubber Co..	419 N.W.2d 331	142 Wis.2d 798	1987	product liability	200,000	660,000	*	*	0.303	
183	Tucker v. Marcus.	418 N.W.2d 818	142 Wis.2d 425	1988	wrongful death action	denied	*	*	*		

LIST 2.

Relation of Punitive Damages to Compensatory Damages and Defendant's Wealth

No.	Name of Case	year	nature of case	punitive	compensatory	D's wealth	ratio P/C	ratio P/D'W
67	White v. White,	1900	alienation of affection	1,500	5,000	*	0.300	
100	Paulson v. Scott,	1952	alienation of affection	2,500	1,500	*	1.667	
132	Roach v. Keane,	1976	alienation of affection	2,500	2,000	*	1.250	
98	Asplund v. Palmer,	1950	assault & battery	4,000	2,000	*	2.000	
111	Kink v. Combs,	1965	assault & battery	7,500	5,500	*	1.364	
117	Jones v. Fisher,	1969	assault & battery	2,000	500	24,000	4.000	0.083
154	Anello v. Savignac,	1983	assault & battery	23,000	6,000	1,000	3.833	23.000
103	Walco, Inc. v. Midwest Al.S. Inc.,	1961	injury of business credit	7,500	500	*	15.000	
29	Bass v. Chicago and N. W. Ry. Co.,	1877	carrier	2,000	2,500	*	0.800	
135	Karp v. North Central AL... Inc.,	1977	carrier	2,000	3	*	666.667	
181	Hagge v. Bauer,	1987	civil right claim	25,000	75,000	27,600	0.333	0.906
99	Besinger v. McLaughlin,	1950	constructive eviction	300	200	*	1.153	
143	Fahrenberg v. Tengel,	1980	conversion and burglary	125,000	20,000	*	6.250	
38	Grace v. Dempsey,	1889	false imprisonment	2,000	3,000	*	0.667	
96	Hadler v. Rhyner,	1944	false imprisonment	15	10	*	1.500	
112	Seifert v. Solem,	1967	fraud	45,000	40,000	750,000	1.125	0.060
169	Poling v. Wis. Physicians Serv.,	1984	insurance: bad faith	100,000	68,000	*	1.471	
172	Brown v. Maxey,	1985	insurance: fire	20,000	?	*		
174	Lundin v. Shimanski,	1985	intentional misrepresentation	5,000	3,780	*	1.323	
41	Allen v. New Pub. Co.,	1892	libel & slander	100	150	*	0.667	
61	Kloths v. Hess,	1906	libel & slander	200	300	*	0.667	
64	Pfister v. Milwaukee F. Press Co.,	1909	libel & slander	5,000	10,000	*	0.500	
115	Lisowski v. Chenenoff,	1968	libel & slander	10,000	5,000	100,000	2.000	0.100
120	Dalton v. Meister,	1971	libel & slander	75,000	75,000	*	1.000	
131	Calero v. Del Chemical Corp.,	1975	libel & slander	9,000	10,000	*	0.900	
155	Badger B. Inc. v. D. and B. Inc.,	1983	libel & slander	10,000	15,000	*	0.667	
159	Robinson v. Lescrenier,	1983	libel & slander	10,000	0.06	*	166666.667	
75	Wanz v. Klippel,	1914	malicious prosecution	600	500	*	1.200	
102	Gladfelter v. Doemel,	1958	malicious prosecution	6,000	4,000	200,000	1.500	0.030
108	Fuchs v. Kupper,	1963	malicious prosecution	2,500	400	20,000	6.250	0.125
63	Karns v. Allen,	1908	nuisance	500	1,500	*	0.333	
147	Wussow v. Com. Mechanisms, Inc.,	1980	product liability	70,000	?	*		
179	Owens v. Meyer Sales Co., Inc.,	1986	product liability	1,000	8,000	*	0.125	
182	Wheeler v. G. Tire & Rubber Co.,	1987	product liability	200,000	660,000	*	0.303	
74	Luther v. Shaw,	1914	seduction	1,500	150	*	10.000	
84	Berghammer v. Mayer,	1926	seduction	3,000	1,000	50,000	3.000	0.060
152	Huebschen v. Dep. of H & S Serv.,	1982	sexual harassment	15,000	10,000	*	1.500	
168	Otto v. Cornnel,	1984	title to disputed property	1,000	?	*		
150	Durham v. Pekrul,	1981	wrongful detention	2,500	750	*	3.333	

LIST 3.

CRIMINAL AND CIVIL CASES IN THE U.S. DISTRICT COURTS

Year	Civil Cases Commenced	Civil Cases Terminated	Criminal Cases Commenced	Criminal Cases Disposed	Not Conv.	Convicted	Total Commenced	Civil %	Criminal %
1941	38,477	38,561	31,823	NA	NA	NA	70,300	54.73	45.27
1942	38,140	38,352	33,294	NA	NA	NA	71,434	53.39	46.61
1943	36,789	36,044	36,588	NA	NA	NA	73,377	50.14	49.86
1944	38,499	37,086	39,621	NA	NA	NA	78,120	49.28	50.72
1945	60,965	52,300	39,429	41,653	7,536	34,117	100,394	60.73	39.27
1946	67,835	61,000	33,203	36,482	6,597	29,885	101,038	67.14	32.86
1947	58,956	54,515	33,652	36,635	5,527	31,108	92,608	63.66	36.34
1948	46,725	48,791	32,097	34,242	4,862	29,380	78,822	59.28	40.72
1949	53,421	48,396	34,432	36,264	4,190	32,074	87,853	60.81	39.19
1950	54,622	53,259	36,383	37,675	4,173	33,502	91,005	60.02	39.98
1951	51,600	52,119	38,670	41,066	4,066	37,000	90,270	57.16	42.84
1952	58,428	53,150	37,950	38,622	3,834	34,788	96,378	60.62	39.38
1953	64,001	57,490	37,291	37,762	4,289	33,473	101,292	63.18	36.82
1954	59,461	57,903	41,808	42,989	4,848	38,141	101,269	58.72	41.28
1955	59,375	58,974	35,310	38,990	5,135	33,855	94,685	62.71	37.29
1956	62,394	67,700	28,739	31,811	4,244	27,567	91,133	68.46	31.54
1957	62,380	63,568	28,120	29,725	3,471	26,254	90,500	68.93	31.07
1958	67,115	61,285	28,897	30,469	3,661	26,808	96,012	69.90	30.10
1959	57,800	62,172	28,729	30,729	3,696	27,033	86,529	66.80	33.20
1960	59,284	61,829	28,137	30,512	3,784	26,728	87,421	67.81	32.19
1961	58,293	55,416	28,460	32,671	4,046	28,625	86,753	67.19	32.81
1962	61,836	57,996	37,665	33,110	4,599	28,511	99,501	62.15	37.85
1963	63,630	62,379	39,920	34,845	5,042	29,803	103,550	61.45	38.55
1964	66,930	63,954	30,268	33,381	4,211	29,170	97,198	68.86	31.14
1965	67,678	65,478	33,334	33,718	4,961	28,757	101,012	67.00	33.00
1966	70,906	66,184	31,494	31,975	4,661	27,314	102,400	69.24	30.76
1967	70,961	70,172	32,207	31,535	5,191	26,344	103,168	68.78	31.22
1968	71,449	68,873	32,571	31,843	6,169	25,674	104,020	68.69	31.31
1969	77,193	73,354	35,413	32,796	5,993	26,803	112,606	68.55	31.45
1970	87,321	80,435	39,959	36,356	8,178	28,178	127,280	68.61	31.39
1971	93,396	86,563	43,157	44,615	12,512	32,103	136,553	68.40	31.60
1972	96,173	94,256	47,043	49,516	12,296	37,220	143,216	67.15	32.85
1973	98,560	97,402	40,367	46,724	11,741	34,983	138,927	70.94	29.06
1974	103,530	96,701	36,105	48,014	11,784	36,230	139,635	74.14	25.86
1975	117,320	103,787	41,108	49,212	11,779	37,433	158,428	74.05	25.95
1976	130,597	108,298	39,147	51,612	11,500	40,112	169,744	76.94	23.06
1977	130,567	115,484	39,786	53,188	11,720	41,468	170,353	76.64	23.36
1978	138,770	123,200	34,600	45,900	9,400	36,500	173,370	80.04	19.96
1979	154,666	140,000	31,500	41,200	8,300	32,900	186,166	83.08	16.92
1980	168,789	155,000	28,000	36,600	8,000	28,600	196,789	85.77	14.23
1981	180,576	172,900	30,400	38,100	8,300	29,800	210,976	85.59	14.41
1982	206,193	185,500	31,600	40,500	8,200	32,300	237,793	86.71	13.29
1983	241,842	213,600	34,900	43,300	7,700	35,600	276,742	87.39	12.61
1984	261,485	241,800	35,900	44,500	8,400	36,100	297,385	87.93	12.07
1985	273,670	268,600	38,500	47,400	8,800	38,600	312,170	87.67	12.33
1986	254,828	265,800	40,400	50,000	9,300	40,700	295,228	86.32	13.68
1987									
1988									
Total	4,443,426	4,197,626	1,617,977	1,638,237	286,696	1,351,541	6,061,403	73.31	26.69

FIGURE 3-1

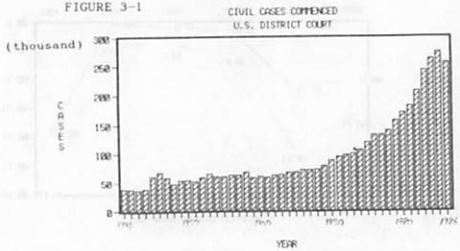


FIGURE 3-2

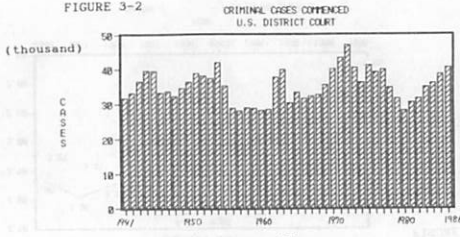
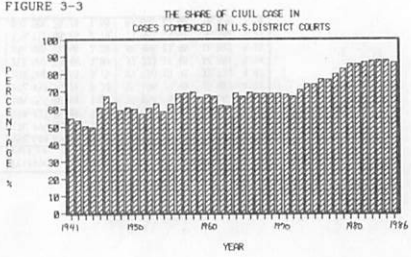


FIGURE 3-3



LIST 4.

POPULATION, LAWYERS, CIVIL CASES

Year	Population (Resident)	Civil Commenced	Lawyers All	Lawyers Ratio reporting L/C	Male	%	Female	%	Covernent	%	Judicial	%	Private practice	%	Ratio L/C	Salaried	%	Inactive or Retire	%
1948	146,730	46,725	NA	171,110	3.66	168,113	98.25	2,997	1.75	14,143	8.27	7,130	4.17	152,649	89.21	3.27	5,555	3.25	6,043	3.53
1951	153,982	51,600	221,605	204,111	3.96	199,052	97.52	5,059	2.48	19,910	9.75	7,471	3.66	176,995	86.72	3.43	12,997	6.37	6,974	3.42
1954	161,884	59,461	241,514	221,600	3.73	216,564	97.73	5,036	2.27	21,279	9.60	7,903	3.57	189,423	85.48	3.19	16,648	7.51	6,581	2.97
1957	171,187	62,380	262,320	235,783	3.78	229,433	97.31	6,350	2.69	24,245	10.28	7,910	3.35	188,955	80.14	3.03	21,054	8.93	7,661	3.25
1960	179,979	59,284	285,933	252,385	4.26	245,897	97.43	6,488	2.57	25,621	10.15	8,180	3.24	192,353	76.21	3.24	25,198	9.98	10,887	4.31
1963	188,483	63,630	296,069	268,782	4.22	261,639	97.34	7,143	2.66	29,314	10.91	8,745	3.25	200,586	74.63	3.15	29,510	10.98	12,024	4.47
1966	195,576	70,906	316,656	289,404	4.08	281,336	97.21	8,068	2.79	31,280	10.81	9,712	3.36	212,662	73.48	3.00	33,222	11.48	14,881	5.14
1970	203,984	87,321	355,242	324,818	3.72	315,715	97.20	9,103	2.80	35,803	11.02	10,349	3.19	236,885	72.68	2.70	40,486	12.46	16,812	5.18
1980	227,255	168,789	542,205	542,204	3.21	498,019	91.85	44,185	8.15	50,490	9.31	19,160	3.53	370,111	68.26	2.19	73,862	13.62	28,582	5.27
1985	238,741	273,670	655,191	655,191	2.39	569,649	86.94	85,542	13.06	53,035	8.09	21,677	3.31	460,206	70.24	1.68	83,843	12.80	36,430	5.56

FIGURE 4-1

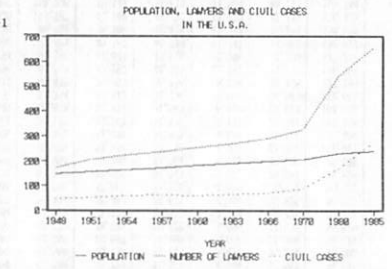


FIGURE 4-2

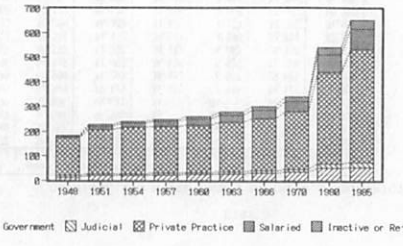


FIGURE 4-3

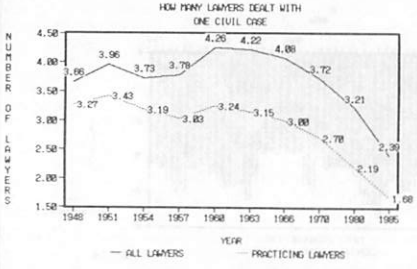
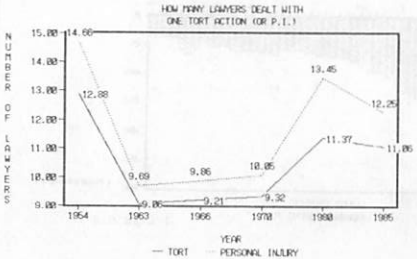


FIGURE 4-4



APPENDIX

LIST 5.

CONTENT OF CIVIL CASES COMMENCED IN THE U.S. DISTRICT COURTS

Year	Cases	Contract		Real		Tort						Civil		Actions under
							Personal			Property				Statutes
	Total	Actions	%	Property	%	Actions	%	Injury	%	Motor Vehicle	%	Damage	%	Rights	%	%
1941	38,477															
1942	38,140															
1943	36,789															
1944	38,499	4,842	12.58	1,182	3.07	3,967	10.30	2,869	72.32	1,237	31.18	323	8.14	21	0.05	NA
1945	60,965	4,639	7.61	1,218	2.00	3,614	5.93	3,017	83.48	1,293	35.78	289	8.00	29	0.05	NA
1946	67,835															
1947	58,956															
1948	46,725															
1949	53,421	9,971	18.66	1,522	2.85	9,782	18.31	8,139	83.20	4,733	48.38	1,396	14.27	117	0.22	NA
1950	54,622	12,497	22.88	1,825	3.34	10,456	19.14	8,771	83.88	5,060	48.39	1,286	12.30	142	0.26	NA
1951	51,600															
1952	58,428															
1953	64,001															
1954	59,461	16,975	28.55	1,771	2.98	14,709	24.74	12,922	87.85	8,380	56.97	1,428	9.71	162	0.27	NA
1955	59,375	17,563	29.58	2,179	3.67	14,750	24.84	13,055	88.51	8,487	57.54	1,182	8.01	196	0.33	NA
1956	62,394															
1957	62,380															
1958	67,115															
1959	57,800															
1960	59,284															
1961	58,293	16,340	28.03	3,325	5.70	21,205	36.38	19,660	92.71	9,083	42.83	1,545	7.29	296	0.51	13,427 23.03
1962	61,836															
1963	63,630	16,941	26.62	3,836	6.03	22,131	34.78	20,700	93.53	9,439	42.65	1,431	6.47	531	0.83	17,051 26.80
1964	66,930	16,423	24.54	3,490	5.21	22,977	34.33	21,544	93.76	9,798	42.64	1,433	6.24	709	1.06	20,481 30.60
1965	67,678	16,132	23.84	3,344	4.94	23,337	34.48	21,846	93.61	9,952	42.64	1,491	6.39	1,123	1.66	22,036 32.56
1966	70,906	16,976	23.94	4,797	6.77	23,091	32.57	21,566	93.40	9,536	41.30	1,525	6.60	1,295	1.83	23,580 33.26
1967	70,961	15,644	22.05	4,201	5.92	23,197	32.69	21,766	93.83	9,632	41.52	1,431	6.17	1,195	1.68	25,582 36.05
1968	71,449	14,474	20.26	3,969	5.56	23,909	33.46	22,459	93.94	9,679	40.48	1,450	6.06	1,636	2.29	26,635 37.28
1969	77,193	14,951	19.37	3,737	4.84	24,713	32.01	23,217	93.95	9,504	38.46	1,496	6.05	2,453	3.18	31,232 40.46
1970	87,321	17,157	19.65	3,284	3.76	25,320	29.00	23,484	92.75	9,363	36.98	1,836	7.25	3,985	4.56	39,348 45.06
1971	93,396	18,575	19.89	3,608	3.86	25,405	27.20	23,411	92.15	8,779	34.56	1,994	7.85	5,138	5.50	43,750 46.84
1972	96,173	18,977	19.73	3,553	3.69	24,012	24.97	22,044	91.80	7,700	32.07	1,968	8.20	6,133	6.38	47,501 49.39
1973	98,560	19,468	19.75	4,113	4.17	23,105	23.44	20,631	89.29	7,371	31.90	2,474	10.71	7,679	7.79	49,950 50.68
1974	103,538	19,426	18.76	5,098	4.92	24,231	23.40	20,464	84.45	7,398	30.53	3,767	15.55	8,443	8.16	52,960 51.15
1975	117,320	22,905	19.52	6,488	5.53	25,691	21.90	21,221	82.60	6,794	26.45	4,470	17.40	10,392	8.86	60,051 51.19
1976	130,597	23,998	18.38	8,475	6.49	25,736	19.71	21,202	82.38	6,068	23.58	4,534	17.62	12,329	9.44	70,372 53.88
1977	130,567	23,907	18.31	8,378	6.42	26,029	19.94	21,465	82.47	6,036	23.19	4,564	17.53	13,113	10.04	70,847 54.26
1978	138,770	25,728	18.54	12,781	9.21	26,375	19.01	21,946	83.21	5,839	22.14	4,429	16.79	12,829	9.24	73,034 52.63
1979	154,666	36,898	23.86	11,876	7.68	28,901	18.69	23,956	82.89	5,991	20.73	4,945	17.11	13,168	8.51	76,067 49.18
1980	168,789	49,052	29.06	11,067	6.56	32,539	19.28	27,517	84.57	6,321	19.43	5,022	15.43	12,944	7.67	75,574 44.77
1981	180,576	51,159	28.33	8,887	4.92	33,767	18.70	29,320	86.83	6,199	18.36	4,447	13.17	15,419	8.54	86,172 47.72
1982	206,193	67,276	32.63	8,812	4.27	34,218	16.60	30,134	88.06	6,651	19.44	4,084	11.94	17,038	8.26	95,295 46.22
1983	241,842	84,017	34.74	9,667	4.00	36,484	15.09	32,242	88.37	6,413	17.58	4,332	11.87	19,735	8.16	111,101 45.94
1984	261,485	88,231	33.74	9,192	3.52	37,522	14.35	33,473	89.21	6,502	17.33	4,049	10.79	21,219	8.11	125,953 48.17
1985	273,670	102,642	37.51	10,118	3.70	41,593	15.20	37,560	90.30	—	—	4,033	9.70	19,553	7.14	119,160 43.54
1986	254,828	88,352	34.67	10,674	4.19	42,326	16.61	38,248	90.37	—	—	4,078	9.63	20,128	7.90	113,392 44.50
1987																
1988																
Total	3,443,426	952,136	21.43	176,467	3.97	755,092	16.99	669,849		209,238		82,732	10.96	229,150	5.16	1,490,551 33.55

Year	Private practice	Tort Actions	RATIO 1/4'	Personal Injury	RATIO 5/4'
1941					
1942					
1943					
1944		3,967		2,869	
1945		3,614		3,017	
1946					
1947					
1948	152,649				
1949		9,782		8,139	
1950		10,456		8,771	
1951	176,995				
1952					
1953					
1954	189,423	14,709	12.88	12,922	14.66
1955		14,750		13,055	
1956					
1957	188,955				
1958					
1959					
1960	192,353				
1961		21,205		19,660	
1962					
1963	200,586	22,131	9.06	20,700	9.69
1964		22,977		21,544	
1965		23,337		21,846	
1966	212,662	23,091	9.21	21,566	9.86
1967		23,197		21,766	
1968		23,909		22,459	
1969		24,713		23,217	
1970	236,085	25,320	9.32	23,484	10.05
1971		25,405		23,411	
1972		24,012		22,044	
1973		23,105		20,631	
1974		24,231		20,464	
1975		25,691		21,221	
1976		25,736		21,202	
1977		26,029		21,465	
1978		26,375		21,946	
1979		28,901		23,956	
1980	370,111	32,539	11.37	27,517	13.45
1981		33,767		29,320	
1982		34,218		30,134	
1983		36,484		32,242	
1984		37,522		33,473	
1985	400,206	41,593	11.06	37,560	12.25
1986		42,326		38,248	
1987					
1988					
Total		755,092		669,849	

APPENDIX

COMMENT on LIST 1

I. General
> number of data (case): 183
> year range: 1854–1988

II. Column Horizontal
> P: amount of punitive damages awarded by Wisconsin Supreme Court and Federal District Court. unit $
> C: amount of compensatory damages awarded by Wisconsin Supreme Court. unit $
> D's W: defendant's wealth considered in deciding the amount of punitive damages in Wisconsin Supreme Court. unit $
> P+C: total amount of damages when the court did not award punitive damages and compensatory damages separately.
> P/C: ratio of punitive damages divided by compensatory damages.
> P/W: ratio of punitive damages divided by defendant's wealth.
> *: unknown
> nature of case: disputed issue in the case. If one case has more than one issue, more significant issue is chosen.

COMMENT on LIST 2

I. General
> number of data (case): 39
> year range: 1889–1987

II. Column Horizontal
> punitive: amount of punitive damages awarded by Wisconsin Supreme Court. unit $
> compensatory: amount of compensatory damages awarded by Wisconsin Supreme Court. unit $
> D's wealth: defendant's wealth considered in deciding the amount of punitive damages in Wisconsin Supreme Court. unit $
> ratio P/C: ratio of punitive damages divided by compensatory damages.

APPENDIX

> ratio P/D'W: ratio of punitive damages divided by defendant's wealth.
> * : unknown
> No. : case number from LIST OF PUNITIVE DAMAGES CASES (LIST 1)

III. Comment on Some Data

> Case #154 *Anello v. Savignac*:

This case was an assault and battery of a malefic student to his teacher. Although the court stated that the net income of the student, $1000, was considered in deciding punitive damages, the solvency of dafendant's parents was implicitly taken into consideration. Therefore as this datum can be considered abnormal, it is not within my survey.

> Case #135 *Karp v. North Central Al., Inc.,* :

In this case, actual (compensatory) damage was $3, which could be considered as nominal damage. This datum is not relevant to my survey and therefore is not within my survey.

> Case #159 *Robinson v. Lescrenier,* :

In this case, actual (compensatory) damage was 6 cents, which could be considered as nominal damage. This datum is not relevant to my survey and therefore is not within my survey.

COMMENT on LIST 3

CRIMINAL AND CIVIL CASES IN THE U.S. DISTRICT COURTS

I. Source:

> U.S. Department of Commerce, Historical Statistic of the United States. [Bicentennial Edition] Colonial Time to 1970 Part I. [For years ending June 30] Series H 1097–1111.

II. Column Horizontal:

> Civil Cases Commenced: Civil cases commenced in the U.S. District Courts
> Terminated: Civil cases terminated in the U.S. District Courts
> Criminal Cases Commenced: Criminal cases commenced in the U.S. District Courts
> Disposed: Criminal cases disposed in the U.S. District Courts
> Not Conv.: Criminal cases not convicted
> Convicted: Criminal cases convicted

> Total Commenced: Civil cases commenced+Criminal cases commenced
> Civil v. Criminal: Percentages of civil and criminal cases commenced in the Total Commenced
> NA: Not Available

Caveat: The data cover only the cases of The U.S. District Courts. Cases of state courts are not included.

COMMENT on FIGURE 3–1, 3–2 and 3–3

FIGURE 3–1:
> data from LIST 3, Civil cases commenced

FIGURE 3–2:
> data from LIST 3, Criminal cases commenced

FIGURE 3–3:
> data from LIST 3, Percentage of civil cases in Civil v. Criminal

---

COMMENT on LIST 4

POPULATION, LAWYERS, CIVIL CASES

I. Source:
> U.S. Department of Commerce, Historical Statistics of the United States, [Bicentennial Edition] Colonial Times to 1970 Part I. [For years ending June 30] Series H 1097–1111.
> U.S. Department of Commerce, Statistical Abstract of the United States, series 1971–1988, No. 258.
> U.S. Bureau of the Census, Current Population Reports.

II. Column Horizontal:
> Population: Resident population of the United States. (in thousand)
> Civil Commenced: Civil cases commenced in the U.S. District Courts.
> Lawyers ALL: Number of all lawyers
> Lawyers reporting: Number of lawyers reporting
> Ratio L/C: Lawyers reporting divided by Civil cases commenced
> Male: Male lawyers
%: divided by Lawyers reporting

APPENDIX

> Female: Female lawyers
%: divided by Lawyers reporting
> Govement: Government lawyers
%: divided by Lawyers reporting
> Judicial: Judicial lawyers
%: divided by Lawyers reporting
> Private practice: Private practicing lawyers
%: divided by Lawyers reporting
> Ratio L/C: Private practicing lawyers divided by Civil cases commenced.
> Salaried: Salaried lawyers
%: divided by Lawyers reporting
> Inactive or Retire: Inactive or retired lawyers
%: divided by Lawyers reporting

COMMENT on FIGURE 4–1, 4–2, 4–3 and 4–4

FIGURE 4–1:
> data from LIST 4, Population, Lawyers reporting, and Civil cases commenced
FIGURE 4–2:
> data from LIST 4, Lawyers; Government, Judicial, Private practice, Salaried, Inactive or Retired
FIGURE 4–3:
> data from LIST 4, Ratio L/C in the column of Lawyers reporting and Ratio L/C in the column of Private practice.
FIGURE 4–4:
> data from LIST 5, RATIO L/C in the column of Tort Actions and RATIO L/C in the column of Personal injury.

COMMENT on LIST 5

CONTENT OF CIVIL CASES COMMENCED IN THE U.S. DISTRICT COURTS

I. Source:
> U.S. Department of Commerce, Historical Statistics of the United States.

[Bicentennial Edition] Colonial Time to 1970 Part I.
[For years ending June 30] Series H 1097–1111.

> U.S. Department of Commerce, Statistical Abstract of the United States, series 1971–1988.

> Administrative Office of the U.S. Courts, Annual Report of the Director.

II. Column Horizontal:

> Cases total: Civil cases commenced in the U.S. District Courts (see LIST 3).

> Contract Actions %: divided by Cases total.

> Real Property %: divided by Cases total.

> Tort Actions %: divided by Cases total.

> Personal Injury %: divided by Tort Actions.

> Motor Vehicle %: divided by Tort Actions.

> Property Damages %: divided by Tort Actions.

> Civil Rights %: divided by Cases total.

> Actions under Statutes %: divided by Cases total.

> Private practice: Number of private practicing lawyers.

> Tort Actions RATIO L/C: Tort Actions divided by Private practice lawyers.

> Personal Injury RATIO L/C: Personal Injury cases divided by Private practice lawyers.

> NA and —: Not Available.