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Foreword: Punitive Damages Today and Tomorrow

*Thomas C. Galligan, Jr.**

One of the great benefits of any symposium is the promise the format provides to stimulate thought and dialogue. That promise becomes reality when one begins with an important and stimulating topic. Then, the style of the symposium paper comes into play. A symposium piece is generally shorter than a traditional law review article. As such, it gets to its point faster and more directly. Its logic is manifest and stripped of the longer article's tendency to painstakingly cover every detail at stake in the material. The symposium piece is a short story or novella rather than a novel. It is *The Great Gatsby* not *Gone with the Wind*. It may persuade but its pithier presentation and style will often provoke.

This Louisiana Law Review punitive damages symposium has all the elements for success. The topic—punitive damages—is critical and controversial. The authors are experts in their fields who take advantage of the symposium format and style to compellingly present their points in thoughtful pieces that will further the national and international dialogue. As the person introducing this symposium, I will seek to briefly do several things herein. First, I will, perhaps unnecessarily, remind the reader just why the topic is so important. Second, I will provide a brief roadmap to each of the pieces. And third, in the spirit of symposia, I will be provoked by the authors. For each of these excellent pieces I will seek to provide readers with a brief comment or question for consideration as they read.

So, why is the topic important? Over the last twenty years, much has been written about punitive damages. Those damages—sometimes called punitive, sometimes called exemplary, sometimes called smart money—are awards above and beyond compensatory damages that are designed to punish and deter the defendant and others like him, her, or it. What are the moral, economic, and historic justifications for punitive damages? Are they still applicable today? Why is it ever appropriate for the civil law of torts to punish; isn't that the purpose of the criminal law? Can juries be consistent in awarding punitive damages? Can appellate judges be consistent when they review punitive damages awards? How does one gauge and compare the value of consistency with the value of flexibility in

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individual cases involving different facts? Is it moral for a plaintiff to recover more than enough to make him or her whole? Is such an increased recovery a windfall? Are punitive damages in civil cases constitutional? Under what circumstances are they unconstitutional? Whatever might be said about using the civil law to punish, are damages in tort suits inadequate to deter from an economic perspective? If so, might there be a role for some type of increased or augmented damages, designed not to punish but to deter?¹ These are just a few of the questions that courts and commentators have considered regarding this controversial area of the law. And, it seems, the more punitive damages cases that courts decide and the more that commentators write about the subject the more there is to be said. This well-conceived and extremely well presented symposium is proof positive that the punitive damages field has much ground that still needs tilling.

The issues presented here are many. Are there Constitutional limits on punitive damages beyond those that the United States Supreme Court has already imposed? What is the proper place for the class action vehicle in punitive damages cases? After two significant recent Supreme Court cases dealing with punitive damages in maritime law, what does the future hold in that area and what impact might those decisions have on admiralty law beyond their holdings? What is and what should be the law concerning vicarious liability for punitive damages? In a global economy and legal environment, consideration of the civil law world's consistent rejection of punitive damages is relevant and may tell us much about the differences between the civil and common law systems—but what? How does Louisiana law treat punitive damages? Has Louisiana's choice to generally follow the civil law trend of denying punitive damages, except where the legislature has so provided, result in a more predictable system? A more arbitrary system? A more coherent system? And, finally, what are some of the forum shopping and conflicts of law issues that punitive damages present? These are just a few of the topics the articles in this symposium present.

1. This is an issue that has fascinated me and that I have addressed. See, e.g., Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691 (2005); Thomas C. Galligan, Jr., *Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment*, 71 TENN. L. REV. 117 (2003) [hereinafter Galligan, *Deterrence and Punishment*]; Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990) [hereinafter Galligan, *Augmented Awards*].

In his article, *Punitive Damages and the Constitution*,² Thomas Dupree, a partner with Gibson, Dunn and Crutcher LLP, reviews the due process cases dealing with when the amount of punitive damages awarded may be unconstitutional, and he contends that the Constitution's guarantee of due process goes beyond limiting the amount of a punitive award. Dupree argues that there should be a constitutional limitation on when a court may award punitive damages at all. He relies upon the void for vagueness doctrine as well as what he terms a common law requirement that a person cannot be punished for objectively reasonable conduct. Dupree argues that objectively reasonable conduct might be defined to include the following: compliance with a federal or state statute or regulation in designing a product; compliance with custom or industry standards; or the existence of a real doubt within the relevant community about the propriety of the conduct involved.

As the reader considers Dupree's article she may ask herself whether liability for pain and suffering or mental distress damages would also be susceptible to constitutional attack under Dupree's arguments about notice and vagueness.³ That is, is the award of damages in an amount necessary to compensate an individual plaintiff predictable? Or certain? Of course such an award is designed to compensate not to punish, but the notice and consistency issues seem just as salient with many types of general damages tort law awards. As for Dupree's proposal regarding a constitutional defense based on complying with objectively reasonable conduct, one may wonder how an objectively reasonable actor is ever subject to liability unless that liability is strict liability. And if the liability is strict and not otherwise based on fault—whether intent, recklessness, or negligence—one would have to search long and hard for a jurisdiction that imposes liability for punitive damages based on purely strict liability. However the reader answers these questions, Dupree's article raises considerable questions about punitive damages under the Constitution and provides fodder for further due process challenges to the common law of punitive damages. It is must reading for defense lawyers representing parties in potential punitive damages cases.

Francis McGovern, a law professor at Duke Law School and one of the nation's foremost experts on class actions, tackles the knotty issue of punitive damages and class actions in the aptly

2. 70 LA. L. REV 421 (2010).

3. See, e.g., Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093 (2005).

titled, *Punitive Damages and Class Actions*.⁴ Noting that most courts have been hostile to the class action device in punitive damages cases, he proceeds to consider the factors underlying the Supreme Court's recent punitive damages jurisprudence. McGovern concludes that a class action for punitive damages may be desirable in a case like *Exxon Shipping Co. v. Baker (Baker)*,⁵ where all persons are asserting the same cause of action (i.e., the same legal theory of recovery); the parties have a real and similar relationship; the goal of the class action is to prevent overdeterrence; the defendant is the moving party, the compensatory damages are determined and are economic; the scope of the harm occurred within a single state; all parties are included; the conduct involved was reprehensible; and the class action is a Federal Rule of Civil Procedure 23(b)(1)(B) case. He also notes that the practical desire to resolve claims in one action may be compelling.

McGovern then turns away from the punishment rationale for punitive damages to an economic rationale—avoiding underdeterrence.⁶ That rationale provides that by awarding augmented or increased (I shy away from the word “punitive” here because the purpose of such damages would not be punishment, but deterrence) damages in litigated cases, the court may encourage defendants to take account of all the costs of their activities. Here, McGovern notes the existence of devices available to courts and litigators to assess total damages as societal costs and points out the possibility that there may be ways to also appropriately and fairly distribute the damages among plaintiffs in such a case. One notes that McGovern's notions would fit well in several types of cases; one paradigm case might be where many people suffer some small loss but a loss that is not adequate (in size) to induce any of them to go to the trouble of filing and prosecuting a law suit. Of course, if a class included everyone affected then one might analytically ask whether the award would be augmented or be merely an award of compensatory damages to all concerned. At the end of the day, the reader may ask whether total societal damages to McGovern are different from total available tort damages. If they are not, then the class action is the vehicle that aggregates all claimants, and the award is neither punitive nor augmented; it is compensatory. If societal harm is somehow additional to total tort liability as society currently conceives it, then some further discussion of why those damages

4. 70 LA. L. REV. 435 (2010).

5. 128 S. Ct. 2605 (2008).

6. See *supra* note 3.

should be awarded and recovered seems essential.⁷ That said, I share McGovern's optimism and hope that the class action vehicle might be a most appropriate procedural vehicle in certain types of punitive damages cases.

In *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*,⁸ David Robertson, the W. Page Keeton Chair in Tort Law and University Distinguished Teaching Professor at the University of Texas at Austin, does his characteristically thorough, well-reasoned, clear, and persuasive work in explaining and analyzing recent Supreme Court maritime punitive damages jurisprudence and its relationship to previous decisions. In particular, he discusses *Baker*⁹ (in the interests of full disclosure I was a signatory of an amicus brief in the case urging the Court to respect the punitive damages awarded in the lower court)¹⁰ and *Atlantic Sounding Co. v. Townsend (Townsend)*.¹¹ He aptly points out that both cases expressly recognize the availability of punitive damages in maritime tort cases. Critically, Robertson also analyzes the impact of *Baker* and *Townsend* on *Miles v. Apex Marine Corp.*¹² In *Miles*, the Supreme Court refused to allow a surviving parent to recover loss of society damages for the death of a seaman caused by an unseaworthy condition of the vessel (a bellicose seaman who killed the decedent by repeatedly knifing him) on which the seaman-son served.¹³ Some interpreted *Miles* beyond its holding and contended that it provided a limitation on recovery of various types of nonpecuniary damages in maritime cases, including punitive damages. Robertson calls this a "revisionist" reading of *Miles* and attacks it. Notably, he ably points out that *Baker* and *Townsend* also seem to reject it. In typical Robertson fashion, he raises questions left unanswered after *Townsend* (the later of the two cases). Are punitive damages available in Jones Act cases? Given his historical reading of Federal Employers Liability Act cases, one might conclude Robertson's answer is: they should be. Are punitive damages in cases involving the

7. For how that discussion might proceed, see, e.g., Galligan, *Deterrence and Punishment*, *supra* note 1, at 128-46; Galligan, *Augmented Awards*, *supra* note 1, at 40-58.

8. 70 LA. L. REV. 463 (2010).

9. *Baker*, 128 S. Ct. 2605.

10. Brief for Sociologists, Psychologists, and Law and Economics Scholars as Amici Curiae Supporting Respondents, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (No. 07-219).

11. 129 S. Ct. 2561 (2009).

12. 498 U.S. 19 (1990).

13. The Supreme Court also held that survival action damages for lost earning capacity in a Jones Act case were not available for the period the decedent would have lived but for the tortious act that caused death.

arbitrary and willful failure to pay maintenance and cure subject to *Baker's* one-to-one ratio of punitive to compensatory damages cap? Given the conditional language the Court used in *Baker* about conduct that was not profitable in itself, Exxon's lack of exceptional blameworthiness, and the fact that the compensatory damages in *Baker* were significant, one may conclude that there are strong arguments the one-to-one cap may not apply in some failure to pay maintenance and cure cases. In what other maritime cases might punitive damages be available? And, are attorneys' fees (perhaps in addition to punitive damages) still available for the arbitrary failure to pay maintenance and cure? Robertson clearly says yes.

The reader might also note one point that Robertson does not explicitly make, as it is really tangential to his main themes. Since its decision, as Robertson notes, *Miles* has been the subject of much litigation over its reach, scope, and implications. Those hoping to limit it might argue that *Miles* should be limited to its holding and should not be extended. Those hoping to extend it—and they have been quite successful—might argue that *Miles* expresses a uniformity principle that limits recovery of nonpecuniary damages in maritime cases. Clearly, *Townsend* rejects this uniformity principle insofar as it would disallow recovery of punitive damages in cases involving the arbitrary and willful failure to pay maintenance and cure. However, it is worth noting that *Townsend* is not the first case in which the Supreme Court considered the reach of *Miles*. In *Yamaha Motor Corp., Inc. v. Calhoun*,¹⁴ the Court considered whether the family of a non-seafarer killed in territorial waters could recover loss of society damages under state law and held that they could. In so holding, the Court refused to extend *Miles*. Thus, Robertson's reader might consider that the Supreme Court has twice considered whether to extend *Miles* beyond its holding and has refused to do so both times. This fact should prove particularly advantageous to those who contend that *Miles* should not be extended beyond its holding and who contend that courts that extended *Miles* have misread the Supreme Court's *Miles* tea leaves.

In *Vicarious Liability for Punitive Damages*,¹⁵ Professor Michael Sturley, the Stanley D. and Sandra J. Rosenberg Centennial Professor of Law at the University of Texas at Austin, considers when a principal may be held liable for punitive damages arising out of an agent's tort. Sturley relies particularly on admiralty cases but applies his analysis more broadly. He notes

14. 516 U.S. 199 (1996).

15. 70 LA. L. REV. 501 (2010).

that there are three possibilities for imposing vicarious liability: 1) when the principal has directed, been complicit in, or participated in the wrongful conduct; 2) when the agent is a managerial employee who is acting in the course and scope of employment;¹⁶ or 3) whenever the agent is an employee who is acting in the course and scope of employment. Sturley argues for the first option, particularly in the maritime context. He contends that it is the better rule based on precedent and policy. His starting point is that punitive damages are punishment and therefore must be properly contained and constrained—what he calls a classic liberal argument. Moreover he contends that the history and tradition of the maritime industry counsel the complicity standard because there is a tradition that shipowners are not liable (often even for compensatory damages) for the misconduct of ships' captains and crews when away from the home port.¹⁷ Limiting liability for punitive damages in a particularly dangerous business will foster investment in a large and important industry consistent with other maritime limitations of liability; and maritime commerce is by nature peripatetic. This last fact poses a significant need to create a uniform body of international law, and many jurisdictions do not recognize the right to recover punitive damages. Sturley then notes arguments in favor of more expanded vicarious liability but does not find them persuasive. He goes on to predict how the Supreme Court might decide the maritime vicarious liability for punitive damages issue, identifying Justice Alito as a key vote and positing that Justice Alito is no fan of punitive damages. Finally Sturley ponders the extent to which any new Supreme Court admiralty decision on the reach of vicarious liability for punitive damages might influence the development of the common law.

Sturley's excellent article brings a few thoughts to mind. First, one notes that corporations cannot act except through their agents; so how does a corporation ever direct or participate in conduct except through its agents? To treat some agents in this context differently from others (for purposes of finding the organization complicit through the act of some high-ranking agent) requires an answer to the question why or on what doctrinal basis—other than

16. As Sturley notes, this option is based on *Restatement (Second) of Torts* § 909 (1977) and *Restatement (Second) of Agency* § 217 (1957). The managerial employee basis for vicarious liability is actually one of four that the *Restatements* provide.

17. Sturley here relies on the Carriage of Goods by Sea Act (previously codified at 46 U.S.C. app. §§ 1300–1315 (2000)) and the Harter Act (46 U.S.C. §§ 30701–30707 (2006)). The Limitation of Liability Act also lends credence to his argument since a shipowner who is not in privity or does not have knowledge may limit its liability to the value of the vessel.

a desire to limit liability? As noted, Sturley makes a spirited argument for limiting vicarious liability for punitive damages in admiralty, and he may well be right when he suggests that the Supreme Court might adopt his reasons, given the current make-up of the Court. But what impact should that have on the broader common law? Many of his claims for limited liability are based on particular maritime law concerns; thus one might justifiably ask whether a decision to limit liability based on those arguments should be persuasive outside the field of maritime law.

Professor Michael Wells, a Professor at the University of Georgia School of Law, in *A Common Lawyer's Perspective on the European Perspective on Punitive Damages*,¹⁸ undertakes to answer the question: why did the common law adopt and accept punitive damages while the modern civil law did not? Wells' work conclusively proves the truth of one of his underlying premises—a comparative analysis of any legal problem is insightful, valuable, and expands one's perspective. In many ways, Wells' piece in this symposium in this wonderful law review underscores the incredible benefits of studying, working, and publishing at a law school like Louisiana State University and in a jurisdiction like Louisiana—a civil law jurisdiction in a common law nation (albeit this latter may today be a characterization). The opportunity for comparative analysis is rich. Wells hypothesizes that the fact that common law jurisdictions have embraced punitive damages and civil law jurisdictions have eschewed them is not the result of different cost-benefit analyses concerning the social value of exemplary damages, but rather reveals something deeper. He opines that the civil law may lend itself to a more conceptual, coherent approach to legal analysis in which law is derived from some higher source than the judge—legislature, code, etc.—and that in such a system the deontological distinction between the private law and the public law may be more rigidly preserved than it is at common law. The common law, alternatively, has developed by focusing on the judge deciding an individual case and then finding and applying the governing principle afterward. Wells notes that common law courts may be more responsive to policy arguments in the context of deciding individual cases than civil law judges who seek and apply overarching principles derived from the governing law. Focusing on these systemic developmental differences, Wells then considers how the doctrine of punitive damages developed in the common law and finds that development consistent with his overarching model. The piece is informative and insightful on many levels. Interestingly, today

18. 70 LA. L. REV. 557 (2010).

those who attack punitive damages do so based on some of the reasons why the civil law has, for the most part, rejected them—punishment is not appropriate in civil cases; punitive damages lack coherence; and punitive damages awards lack true consistency. As one considers Wells’ fine work, one may ask why, if the common law develops jurisdiction by jurisdiction and case by case, do most common law jurisdictions (if not all) allow punitive damages? Why do more not reject punitive damages? If it is because the common law, “in general,” has adopted punitive damages then does that “brooding omnipresence”¹⁹ of the common law impact particular common law decision-makers and judges much the same as the applicable civil code influences the decisions of civil law judges?

John deGravelles, a leading Louisiana practitioner, discusses the Louisiana law of punitive damages in his insightful article, *Louisiana Punitive Damages—A Conflict of Traditions*.²⁰ He thoroughly reviews the history of punitive damages in the civil and common law and then turns to Louisiana in particular. He points out that early in Louisiana’s history punitive damages were recoverable as “smart money” but that since 1917 Louisiana courts have refused recovery of punitive damages unless authorized by statute. The article then reviews the current state of the law involving punitive damages in Louisiana under applicable statutes. Appropriately, the majority of the article is spent on Louisiana Civil Code article 2315.4, which authorizes the recovery of punitive damages for cases involving injury caused by the wanton and reckless disregard of the rights of others by a defendant whose intoxication while operating a motor vehicle is a cause in fact of the plaintiff’s injuries. It then turns to cases arising under Civil Code article 2315.7—punitive damages caused by criminal sexual activity occurring during childhood; Louisiana Revised Statute 15:1312—punitive damages for the interception, disclosure, or use of wire or oral communication; and Louisiana Revised Statute 9:2800.76—punitive damages for the sale, distribution, or marketing of an illegal controlled substance. One question implicitly raised is whether it would be appropriate for Louisiana to reexamine its historical (since 1917) reluctance to impose punitive damages as other civil law jurisdictions increase the availability of punitive damages. One also may ask whether the Louisiana approach is more coherent than the common law. Certainly, there is logic to following the legislature’s lead but turning from the courts to the legislature, but are the categories in

19. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

20. 70 LA. L. REV. 579 (2010).

which punitive damages are available in Louisiana linked by any overarching, rational principle? Are there no other cases to which that principle, if it exists, applies? Or, is Louisiana left with a potpourri of punitive damages statutes connected only by the fact that all are legislatively created and require some conduct beyond mere negligence?

Patrick Borchers, a professor, university vice president for academic affairs, and the former dean at Creighton School of Law thoroughly discusses and analyzes a wide array of conflicts of law punitive damages issues in *Punitive Damages, Forum Shopping, and the Conflict of Laws*.²¹ He considers jurisdiction, venue, forum shopping, enforcement of judgments, and choice of law. After considering the issues raised and their complexity, one wonders whether, as may be true with many conflicts issues, serious litigation of conflicts issues is prone to take place only (or at least more often) when the stakes are high. One may also be curious how the same issues might impact the pretrial procedure and possible settlement of a multi-district litigation case in which many underlying cases from different federal courts are consolidated for pretrial proceedings.

It is now my duty to close, and it is your treat to turn the page and begin what will be compelling, pointed, convincing, and thought-provoking reading. I know you will enjoy these pieces as much as I did.

21. 70 LA. L. REV. 529 (2010).