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Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change

Timothy J. Sullivan*

I. INTRODUCTION

Punitive damages traditionally have been awarded in a variety of tort actions, but it has long been presumed that punitive damages are not available in the standard action for breach of contract. Recently, however, commentators have perceived an increase in the number of contract cases in which punitive damages have been awarded, and have attempted to elucidate the reasons for this purported shift in the law. Some suggest that the greater availability of punitive damages is aimed at punishing abusive conduct against plaintiffs with relatively weak bargaining power by defendants possessing greater economic leverage. Professor Gilmore contends that approval of punitive damage awards in contract actions is a particular illustration of a more general phenomenon; the reabsorption of contract law into the

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1. Punitive damages, sometimes called exemplary damages or "smart money" have been defined as a sum not designed principally to compensate the plaintiff for pecuniary loss, but rather to punish the defendant for willful and malicious conduct and to serve as a deterrent to other potential tortfeasors. C. McCormick, THE LAW OF DAMAGES § 77, at 275-76 (1935).


3. 5 A. Corbin, CONTRACTS, § 1077 (1964).


main body of tort law from which contract principles emerged more than a century ago.6

This Article will evaluate the assertion that punitive damages for breach of contract are more readily available now than in the past. This requires an inquiry into the history of punitive damages and the reasoning of older cases which were decided in accordance with traditional rules that discouraged such awards in contract actions. A broader but related question will also be addressed: do decided contract cases in which punitive damages have been awarded produce results consistent with the general aims of contract damage law?

II. HISTORICAL ORIGINS OF PUNITIVE DAMAGES

A. ENGLAND

The historical origins of punitive damages are best understood in connection with the development of the jury as a judicial institution and the evolution of damage law as a part of the English legal system. While this is not a place for a lengthy historical treatment of legal institutions whose origins and development have been ably described elsewhere,7 some attention to the historical perspective is necessary to an accurate evaluation of the modern cases treating punitive damages in contract law.

The award of pecuniary damages came late in the development of the common law; rules for controlling the assessment of damages came even later.8 Most suits in the early royal courts were proprietary in character; that is, the plaintiff's objective was not to receive a judgment for some pecuniary sum but rather to obtain a judicial declaration establishing his entitlement to the return of some species of property of which he had been deprived.9 Although there were some actions resulting in what modern lawyers might call damage awards before the thirteenth century,10 the rise of trespass at the beginning of that century

created the conditions that would ultimately make award of pecuniary compensation commonplace in Anglo-American law.\textsuperscript{11}

Acceptance of the idea that litigants should be entitled to an award of damages gave rise to the perplexing problems of determining how such damages should be measured and by whom. There were two alternatives: damages could be measured by a pre-determined scale, or assessed according to the discretion of some tribunal.\textsuperscript{12} There was certainly tradition to support a system which measured damages by a fixed schedule. Early Anglo-Saxon law had developed a detailed system of fixed tariffs aimed at compensating the victim of acts that would be classed as tortious or criminal under modern law.\textsuperscript{18} Yet despite such precedent, the King's courts rejected the fixed tariff approach to the assessment of damages. The judges of the time, seeking to relieve themselves of as many difficult problems of damage law as possible,\textsuperscript{14} turned instead to the jury.\textsuperscript{15}

Once the power to assess damages had been broadly committed to the discretion of the jury, there was, of course, no need for lawyers or judges to concern themselves with elaborating standards by which to measure the quantum of damages. It is rare to find an English court discussing substantive principles of

\begin{enumerate}
\item Modern concepts of civil liability grew from actions in trespass. McCormick, supra note 1, § 5, at 23 (1935). See also Milsom, supra note 7, at 244.
\item Washington, supra note 8, at 345.
\item These fixed tariffs were called wer, bot, and wite. The sum payable to the victim was strictly prescribed. 2 Pollock & Maitland, supra note 10, at 457-58. Aspects of the Anglo-Saxon law survived well into the Norman period. Plucknett, supra note 7, at 9.
\item The jury might have been considered little more than a body of witnesses had the judges of the thirteenth century remained, like Bracton, conversant with canon or civil law. 1 Holdsworth, supra note 7, at 318. In the thirteenth century, however, judges were increasingly drawn from practitioners before the royal courts. These men, lacking much breadth of learning, Milson, supra note 7, at 29-30, were more willing to commit what we would consider judicial functions to the jury: "Roper, in his life of More, tells us that More said of the judges, 'They see, that they may, by the verdict of the jury, cast off all quarrels from themselves upon them, which they account their chief defence.'" 1 Holdsworth, supra note 7, at 318 n.2.
\item With the decline of the ancient methods of rendering judgments —trial by ordeal or trial by battle—the jury assumed greater importance in the early English legal system. Since the jury became a substitute for the ancient methods of trial whose results were thought to be divinely ordained, the jury's verdict at first "inherited the inscrutability of the judgments of God." 1 Holdsworth, supra note 7, at 317. At first, the jury was composed of neighbors of the parties who either had personal knowledge of the facts or who might have the means to ascertain the facts. Thus, early juries had a function not unlike that of witnesses.
\end{enumerate}
damage law until very near the end of the eighteenth century.\textsuperscript{16} Because juries were capable of rendering verdicts that were either obviously excessive or grossly inadequate, however, the courts had to devise some means of controlling and reviewing jury verdicts.\textsuperscript{17} Thus, the evolution of English damage law must for some centuries be traced in judicial decisions that focus upon the proper procedural means of controlling jury verdicts rendered in the absence of any significant substantive law of damages.

The writ of attaint\textsuperscript{18} was the first and, for a time, a most effective means of setting aside an erroneous verdict and punishing the members of a jury which had rendered a false verdict.\textsuperscript{19} The origin of attaint is obscure,\textsuperscript{20} but it is reasonably certain that attaint became available for an improper assessment of damages as early as 1275.\textsuperscript{21} In particular cases, attaint offered the defendant some protection against a runaway jury. Infirmities in the procedural incidents of attaint, however, made it an unlikely vehicle for the creation of a rational damage rule structure. First, the jury of attaint was an ad hoc body. Its impermanence made it unlikely that any consistent rules of damage law would emerge from its deliberations.\textsuperscript{22} Second, as long as the petty jury retained a vestige of its witnessing functions, the jury of attaint was forbidden to consider any evidence not before the petty jury whose work it was reviewing.\textsuperscript{23} These deficiencies as well as the extreme severity of the penalty\textsuperscript{24} attendant upon a finding by the...
jury of attaint that the petty jury had rendered a false verdict, made attaint obsolete by the sixteenth century. 25

With the decline of attaint, other doctrines of control evolved and courts began gradually to assert the authority to revise a jury's verdict. In its early stages, the judicial prerogative was exercised cautiously and confined to a very narrow range of cases. 26 As long as a jury retained some of its witnessing functions, no court could with confidence alter a jury's verdict, since such a verdict was based, partially at least, upon knowledge peculiarly that of individual jurors. 27 Only when the court had certainty of information concerning the nature of an injury would it presume to modify a jury damage award. Presumably in cases brought on the writ of debt, the test of certainty of information had been met, and a court could act to revise the verdict. 28 In cases which modern lawyers would classify as tort actions, however, requests for judicial revision of jury verdicts were rejected on the ground that the court lacked the necessary certainty of information. 29 Thus at the beginning of the seventeenth century, although judges had asserted some revisory powers, the authority of the jury effectively to render a final verdict in most cases remained essentially intact.

The obsolescence of attaint and the timidity of common law judges in asserting any general power of jury control produced, if not a crisis in the legal system, at least a growing sensitivity to the need for reform. Not for the first time in English history, and they themselves forever thenceforward be esteemed in the eye of the law infamous. Quoted in PLUCKNETT, supra note 9, at 31. There is some evidence that despite the severity of the prescribed penalties some attainted jurors escaped with modest fines, 2 POLLOCK & MAITLAND, supra note 10, at 542.

25. 1 HOLDSWORTH, supra note 7, at 341-42.
26. Some authority for the proposition that judges had the power to reverse jury verdicts could be found in the established practice of courts to assess damages in cases where judgment had been given on default, demurrer, or confession. Washington, supra note 8, at 351. The development of legal doctrines increasing the court's power to revise jury verdicts was influenced by the parallel evolution of rules governing the scope of judicial power to fix damages when a case was resolved short of a submission to the jury.
27. 1 HOLDSWORTH, supra note 7, at 346.
29. In Bonham v. Sturton, 73 Eng. Rep. 230 (K.B. 1554), the court refused to reduce damages in a slander action. The court indicated that the decision would have been otherwise had the plaintiff brought, for example, an action in mayhem. In such a case the court could view the damage and determine its extent with certainty.
equity intervened. The chancellor began to order new trials at law as a means of correcting improper jury verdicts. The response of the law judges was predictable: they also began to grant new trials. In Bright v. Eynon, Lord Mansfield reviewed the reasons for the change in policy:

Indeed, for a good while . . . the granting of new trials was holden to a degree of strictness, so intolerable, that it drove the parties into a Court of Equity, to have, in effect, a new trial at law, of a mere legal question; because the verdict, in justice, under all the circumstances, ought not to conclude . . . . And therefore of late years, the Courts of Law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases.

It was not until 1655 in Wood v. Gunston, however, that a new trial was granted simply on the ground of an improper damage award. The plaintiff in an action for slander had obtained a judgment below for 1500 pounds. In opposing the defendant's motion for a new trial, plaintiff's counsel argued that there were no precedents on the books for granting a new trial simply on account of "the greatness of the damages." The court, while conceding that judicial power to grant new trials must be exercised sparingly, nonetheless ordered a new trial at the next term. With the decision in Wood, although the road ahead was not always smooth, the courts' power to order new trials on the ground of an excessive damage award was established.

In exercising the power to set aside jury verdicts, however, judges continued to distinguish between tort and contract cases, manifesting a greater reluctance to set aside verdicts in tort cases. An eighteenth century judge explained the differing treatment of tort and contract cases in this fashion:

The utmost that can be said is, and very truly, that the same rule does not prevail upon questions of tort, as of contract. In contract the measure of damages is generally matter of account,
and the damages given may be demonstrated to be right or wrong. But in torts a greater latitude is allowed to the jury: and the damages must be excessive and outrageous to require or warrant a new trial.37

It was against this background of judicial disinclination to meddle with jury verdicts in tort cases that the doctrine of punitive damages emerged.

The principal case to which the origin of punitive damages is traced is Huckle v. Money.38 Pursuant to an illegal warrant, the plaintiff, a journeyman printer, had been wrongfully seized by an agent of the King. Although while in custody he had been "used very civilly" so that, in the court's opinion, only a small personal injury had been done, the court, emphasizing that the government's conduct had been outrageous—comparable even to the Spanish Inquisition—held that the jury had been right in awarding "exemplary damages." The court granted a new trial, however, because the amount of the award was excessive, but cautioned that in light of the government's culpable conduct, "it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages."39

In Tullidge v. Wade,40 the judges of the King's Bench reaf­firmed their endorsement of the doctrine of punitive damages. A large jury award to the plaintiff, whose unmarried daughter had become pregnant by the defendant, was appealed. Chief Justice Wilmot, in sustaining the verdict below, observed:

Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages . . . if much greater damages had been given, we should not have been dissatisfied therewith; the plain­tiff having received this insult in his own house . . .41

Other early English cases applied similar reasoning in sustai­ning an award of punitive damages. In Merest v. Harvey,42 for example, the defendant, while drunk, had attempted to join in a private hunting party on plaintiff's land. The plaintiff refused to permit the defendant to hunt with him. The defendant, undeterred, proceeded to fire off a number of rounds, even asking the plaintiff to supply him additional ammunition. The plaintiff

39. Id. at 769.
41. Id.
42. 128 Eng. Rep. 761 (C.P. 1814).
was awarded 500 pounds. To the argument of defendant’s counsel that the damages were excessive and should be set aside, the court replied:

I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the Plaintiff may sustain.43

The early decisions show that the acceptance of punitive damages in English law was not the product of any deliberate judicial design. Some courts simply observed that in tort actions large verdicts would be sustained because the character of tort rules allowed greater jury discretion.44 Only in the later cases such as Merest45 did courts begin to justify large tort awards which had no pecuniary basis by reference to the defendant’s egregious conduct or the principle that such judgments might serve as warning symbols to potential tortfeasors. By the early nineteenth century, then, the English law concept of punitive damages had become a doctrine whose contours would be recognizable by twentieth century lawyers.

B. THE UNITED STATES

Cases in which punitive damages were awarded are found very early in the American reports. In Coryell v. Colbaugh,46 decided in the late eighteenth century, the New Jersey supreme court sanctioned the award of punitive damages in an action for a breach of promise to marry.47 In sustaining the correctness of the trial judge’s charge to the jury, the court emphasized the exemplary nature of such awards:

He [the trial judge] told the jury that they were not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for example’s sake, to prevent such offences in future . . . . [He] told the jury they were bound to no certain damages, but might give such a sum as would mark their disapprobation, and be an example to others.48

43. Id.
46. 1 N.J.L. 90 (Sup. Ct. 1791).
47. Although punitive damages were not readily awarded for breach of contract, the breach of a contract to marry has been traditionally treated as an exception to the general rule. See notes 90-94 infra and accompanying text.
By the middle of the nineteenth century the award of punitive damages in tort was a well-established part of the American legal system. From the beginning there was some confusion as to whether punitive damages had any genuinely compensatory function or whether they were designed solely to punish the defendant and to serve as an example to others. Although most nineteenth century courts agreed in emphasizing the predominantly punitive character of exemplary damages, some decisions stressed their compensatory character. In *Magee v. Holland*, for example, the New Jersey supreme court permitted the recovery of punitive damages as compensation for the wounded feelings of a father whose children had been abducted. With the increasing willingness of courts to permit separate recovery in tort actions for injury to feelings, efforts to characterize punitive damages as even partially compensatory began to disappear. By 1891, a leading treatise on damages concluded:

> The allowance of exemplary damages gave rise for a time to the notion that mental suffering was not a subject for compensatory damages. This notion has been generally abandoned...

Despite the general acceptance of the award of punitive damages in tort actions in a large majority of American jurisdictions, there was a flurry of judicial criticism of the doctrine after 1850. This general and sometimes critical reconsideration of the role of punitive damages in the remedial rule structure was caused principally by a conflict of opinion between two of the major treatise writers of the era. Most judicial opinions on the subject did not argue against punitive damages per se, but were concerned with determining the precise sort of injuries punitive

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49. See, e.g., Hendrickson v. Kingsbury, 21 Iowa 379 (1866); Bell v. Morrison, 27 Miss. 68 (1854); McWilliams v. Bragg, 3 Wis. 377 (1854).


51. See, e.g., Barlow v. Lowder, 35 Ark. 492 (1880); Stoneseifer v. Sheble, 81 Mo. 243 (1880); Dibble v. Morris, 26 Conn. 415 (1857); Smith v. Sherwood, 2 Tex. 400 (1847); Duncan v. Stalcup, 18 N.C. 440 (1836).

52. See, e.g., Ously v. Hardin, 23 Ill. 352 (1866); McNamara v. King, 7 Ill. 432 (1849); Brown v. Swineford, 44 Wis. 282 (1878).

53. *27 N.J.L. 88 (Sup. Ct. 1858).*

54. 2 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 356 (8th ed. 1891).

55. The writers were Greenleaf and Sedgwick. The question which divided them was whether damage law could properly serve any function other than compensation. Greenleaf argued that the law of damages must serve a purely compensatory function. See, e.g., S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 259, at 242 n.1 (2d ed. 1846). Sedgwick believed that damages might appropriately supply non-compensatory
damages were properly intended to measure.\textsuperscript{56} This debate over the nature of punitive damages was long and tedious.\textsuperscript{57} Some courts expressed a measure of hostility toward a broadly based role for punitive damages in American law, but most of the decisions upheld, at least in some form, the validity of such damages in selected tort actions.\textsuperscript{58} In only a few instances were punitive damages flatly prohibited,\textsuperscript{59} and some courts which had narrowly defined the appropriate scope of punitive damages shortly overruled themselves by defining the reach of the doctrine more broadly.\textsuperscript{60} In sum, at the end of the nineteenth century the vast majority of American jurisdictions recognized the doctrine of punitive damages in some form.\textsuperscript{61}

\section{III. DIVERGENT ASSUMPTIONS IN TORT AND CONTRACT DAMAGE LAW}

We have traced the remote historical origins and the more recent development of the concept of punitive damages in English and American law. We have still to consider the disparate philosophical assumptions which underlie damages in tort and damages in contract. To some extent, the different rules which govern tort and contract damage awards may be explained as accidents of history. Yet the differences between these rules were

\begin{quote}
\textsuperscript{56} See, e.g., Hendrickson v. Kingsbury, 21 Iowa 379, 387 (1866).
\textsuperscript{57} The court's opinion in Fay v. Parker, 53 N.H. 342 (1873), for example, is 54 pages long. The court cites authorities as varied as Gros-tius, Pufendorf, and the Greek myth of Pelion and Ossa on Olympus.
\textsuperscript{58} See, e.g., Dougherty v. Shown, 48 Tenn. 302 (1870). The court in Dougherty declared that punitive damages were wrong in theory, but that Tennessee precedents established the legitimacy of the doctrine. Id. at 306.
\textsuperscript{59} Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891).
\end{quote}
also the product of conscious policy choices made by scholars, lawyers, and judges. These choices and their consequences must be understood before the judicial treatment of punitive damages in contract cases may be fully appreciated.

A partial explanation for the continued legitimacy of punitive damages in tort law may be found in the historical nexus between tort and criminal law. Holmes remarked their common origins:62 the draftsmen of the Restatement of Torts note that "... unlike the law of contracts or of restitution, the law of torts, which was once scarcely separable from the criminal law, has within it elements of punishment or deterrence."63 The persistence of punitive damages in tort law cannot, however, be ascribed wholly to the historical truth that the criminal law, with its emphasis on punishment, shared common roots with the law of tort.64 Despite the occasional contention that the function of tort damages—absent an award of punitive damages—is purely compensatory,65 the fact is that the distinction between punitive and compensatory damages in tort law is illusory.66 So long as our tort law is fault-centered and liability is dependent upon a demonstration of fault, even so-called compensatory damages will have a punitive character.67 Absent the need to discourage culpable behavior, there is no compelling reason to extract compensation for the plaintiff's injury from the defendant.

The argument of compensation explains what the plaintiff in a tort action receives. It does not explain why the defendant pays. The compensatory theory of tort law also fails to explain why a plaintiff injured through the "fault" of a defendant is compensated while other plaintiffs are not.68

Thus, the existence of punitive damages in the law of tort is not simply an illogical anomaly in a larger body of damage rules otherwise grounded in notions of mere pecuniary compensation. Punitive damages are but a more explicit recognition of the mani-

63. RESTATEMENT OF TORTS, Explanatory Notes § 901, comment a, at 538 (1939).
64. See generally Hall, Interrelations of Criminal Law and Torts, 43 Colo. L. Rev. 753, 907 (1943).
65. Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Taber v. Hutson, 5 Ind. 332 (1854).
66. Demogue, Validity of the Theory of Compensatory Damages, 27 Yale L.J. 583, 591-93 (1918); Note, supra note 50, at 522.
68. Note, supra note 50, at 523 (footnote omitted).
fold role of punishment in a system of liability for civil wrongs which turns upon the concept of fault. 69

In contrast to the multiple purposes that damages in tort are designed to serve, the object of contract damage law is compensation for pecuniary loss. The Restatement of Contracts, for example, declares flatly that punitive damages are not recoverable for breach of contract, 70 and defines the measure of damages available to a successful plaintiff as "the net amount of the losses caused and gains prevented by the defendant's breach [of contract], in excess of savings made possible . . . ." 71 Similarly, the standard expressed in the cases is that the aggrieved plaintiff is only to be put in as good a position as performance would have placed him. 72 There seems to be no room in such a formulation for non-compensatory recoveries.

Why should punitive damages be considered appropriate in tort and inappropriate in contract? One commentator has suggested that the law of contract developed as a necessary incident of commercial life and speculated that non-compensatory punitive damages may have no place in commercial transactions. 73 The traditional unavailability of punitive damages may be considered simply an accident of historical development. 74 A part of

69. Viewed in a larger perspective, punitive damages may be considered a part of the law of restitution in that they serve to protect against the unjust enrichment of the defendant. See McElwain v. Georgia-Pacific Corp., 245 Ore. 247, 421 P.2d 957 (1966). The defendant company in McElwain had failed to install available pollution control equipment in its manufacturing plant. Presumably, the cost of paying compensatory damages would be less than the cost of available equipment. The court held that on these facts punitive damages were appropriate. The cited case is one in which the loss to the plaintiff was less than the gain derived by the defendant from its tortious conduct. In such a case punitive damages serve to prevent the unjust enrichment of the tortfeasor. See generally Morris, supra note 67, at 1185-88.

70. RESTATEMENT OF CONTRACTS § 342 (1932). Section 341 of the RESTATEMENT does permit recovery for mental suffering in specific kinds of contract actions. To this extent, the draftsmen of the RESTATEMENT recognize the legitimacy of non-pecuniary compensation in breach of contract actions. It is interesting to note, however, that the draftsmen categorize this item of damage as close to the law of tort as possible. See id. § 341, comment a.

71. Id. § 329.


73. Simpson, supra note 4, at 284.

74. Washington, supra note 8, at 351-66. Since the amount of plaintiff's loss in a contract action could be assessed with greater cer-
the explanation may also lie in the fact that parties to a contract create contractual obligations by an exercise of will; unlike the commission of a tortious act, failure to discharge these self-imposed obligations does not inevitably violate objective standards of societal conduct. Since breach of contract usually abuses no external standard of acceptable conduct, contract damages may be thought to have no punitive function.

Careful analysis, however, suggests that damages in tort and contract are similar in several respects. Professor Corbin, for example, explicitly recognizes the multiple purposes that are served by the contract damage scheme, noting that contract damages not only compensate for pecuniary loss, but also operate as a substitute for personal vengeance and act to deter other contract breaches. The functional purposes of contract damages, however, are obscured by a thick overlay of judicial decisions and scholarly commentary which uncritically recite that the object of damages in contract is solely to compensate for pecuniary loss. Reliance on that shibboleth obscures the process of contract damage measurement and disguises the multiple purposes such damage awards are intended to further. What is compensation in a particular case? How can we know the true quantum of the plaintiff’s loss? The invocation of a pecuniary compensation standard does not transform the inexact process of judicial inquiry into high science. In truth, the award of money damages in contract frequently constitutes nothing more than the calculation of a sum based upon uncertain speculation. Such damage
tainty, courts were more willing to set aside as “excessive,” jury awards in such suits. It was judicial reluctance to abrogate large awards in tort actions, where the losses were often less tangible, which set the stage for the development of later principles of punitive damages. See notes 28-29 supra and accompanying text.

75. See Hall, supra note 66, at 755.
77. 5 CORBIN, supra note 3, § 1002. Tort recovery is also intended to substitute legal action for personal vengeance and to provide incentive to avoid wrongdoing in the future. PROSSER, supra note 2, § 4 at 17, § 5 at 23.
78. It is informed by a practical consideration of the probable in life as the equivalent of the certain. If a crop is destroyed before its maturity by the fault of a person, it is natural to presume that the crop, properly cared for, would have been harvested by its owner. . . . In practice, life imposes the necessity of considering as true that which is probable. . . . Demogue, supra note 66, at 588-89 (footnote omitted). The fact that we have chosen to make specific performance an exceptional remedy in our scheme of contract damages means that we are forced to the hazardous
awards may have no avowedly punitive character, but since the precise extent of plaintiff's loss is often uncertain, can we say that damages in contract serve no purpose beyond recompense for pecuniary loss?9

The careful, comparative analysis of damages in tort and contract has a curious effect. The once clear lines between punitive and compensatory damages seem to blur and, occasionally, to disappear. The black letter rules which distinguish sharply between contract and tort damages sometimes obscure more than they reveal. We know that punitive damages are said to be alien to contract law; yet at a functional level contract damages may have a punitive effect. This is not to say that a contract damage award which gives more than a compensatory recovery is punitive in the strict tort law sense. It is true, however, that every dollar recovered in a contract action in excess of actual pecuniary loss is inconsistent with the stated aim of contract damage law. From the defendant's perspective the difficulty of measuring precise pecuniary loss can mean a judgment that is theoretically improper in a contract suit. The law's sanctioning such a recovery may not be intentionally punitive, but from the defendant's point of view, it is punitive in effect.

IV. PUNITIVE DAMAGES IN THE LAW OF CONTRACT: THE CASES

A. SOME EARLY EXCEPTIONS TO THE GENERAL RULE

The reports yield a multitude of cases which lend support to the general rule that punitive damages may not be recovered in contract. Abundant citations, both old80 and new,81 support that


80 The draftsmen of the RESTATEMENT OF CONTRACTS were sensitive to the fact that so-called compensatory awards may not always be exact approximations of actual loss. The draftsmen observe, however, that "[t]he fact that damages are sometimes awarded in spite of uncertainty in the extent of the harm does not make them punitive." RESTATEMENT OF CONTRACTS § 342, comment b (1932). The discomfort of the draftsmen is understandable in light of the RESTATEMENT's position that punitive damages are not available in contract. Id. § 342. The problem is not resolved by comment b. The purpose of the damage award that exceeds compensation may not be punitive, but its effect is surely punitive.

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black letter proposition. It is nonetheless wrong to assume that the law of punitive damages in contract is settled. It is doubtful that the barriers to recovery of such damages in contract were ever as insurmountable as some of the treatises and many of the cases suggest. 82 Within the last decade, however, the pace of change in punitive damages rules has accelerated significantly. While the impact of this change has not touched every jurisdiction with equal force, enough new law has been made by a sufficient number of courts that the broad outlines of a new body of rules are discernible.

Although the doctrine of punitive damages is part of the larger body of remedial rules, one of the principal impediments to analysis of contract cases treating the question of punitive damages is the consistent absence, particularly in the early cases, of any meaningful judicial discussion of the philosophy of damage law. This may be because many judges are by nature not philosophers of the law; it may be a reflection of the fact that damage rules developed late in the history of the common law. 83 Whatever the explanation, we must begin without any firm idea of why, beyond adherence to traditional English standards, American courts have held, as a general rule, that punitive damages should not be awarded for breach of contract.

Many of the older decisions that rejected the award of punitive damages in contract and troubled to cite any authority at all made summary reference to the treatises then popular. 84 An examination of the treatise cited is likely to produce no more enlightenment than the opinion which invoked its authority. 85 Perhaps part of the difficulty is suggested by the decision of

82. See 11 WILLISTON, supra note 4, § 1340.
83. Washington, supra note 8.
85. See, e.g., 1 SEDGWICK, supra note 54, § 370. It has been suggested that the development of English contract law in the nineteenth century owed much to the exertions of treatise writers of the period who themselves borrowed heavily but discreetly from continental sources. Simp-
the Texas supreme court in *Houston & T.C. R.R. Co. v. Shirley*, in which the court rejected the award of punitive damages in contract, stating:

The exclusion of such issues [punitive damages] in suits on contract may be justified on the policy of limiting the uncertainties and asperities attending litigation of such issues, to that class of cases in which the nature of the wrong complained of renders those issues and evils to some extent unavoidable.

The court may have intended to say that difficulty in assigning a value to the personal interests litigated in torts justifies non-compensatory recoveries, while the typical contracts case, arising in a commercial context where the amount of loss is more easily fixed, does not invite the imposition of such damages. The court's meaning is unclear, but it attempted, at least, to treat the policy questions underlying the problem of punitive damages in contract.

The modern decisions, commonly citing without discussion the earlier cases decided in the jurisdiction, are of little more help. All of this is not mere scholarly discontent with unreflective courts. The absence of clearly articulated reasons for a rule makes any attempt to explicate the relationships among the cases which purport to apply that rule doubly difficult. Some courts, in their more candid moments, have conceded as much.

Even stated in its most unqualified form, the rule that punitive damages are not recoverable in a contract action was never thought to apply without exception. Perhaps the earliest and most widely recognized exception to the general rule is found in actions for breach of contract to marry. Although it was not a universal practice, many courts sustained the award of punitive damages are not recoverable in a contract action was never thought to apply without exception. Perhaps the earliest and most widely recognized exception to the general rule is found in actions for breach of contract to marry. Although it was not a universal practice, many courts sustained the award of punitive damages in contract law. No similar study of the influence of treatise writers on the development of American contract law has been produced. In view of the frequent citations to treatises by nineteenth century courts in the area of damage law under study here, the possibility of an American phenomenon equivalent to that described by Professor Simpson in England is very real.

86. 54 Tex. 125 (1880).
87. Id. at 142.
tive damages in such cases. The justification for permitting these awards rests mainly upon the peculiar nature of the interests invaded by breach of a contract to marry. Because the damage suffered by the plaintiff is often uniquely personal, the character of the interest abused frequently has much more in common with a typical tort action than with the standard contract action. Courts have been sensitive to the fact that injuries suffered by a plaintiff in such cases are difficult if not impossible to measure and have committed the question of damage assessment to the jury without clear instructions regarding the standards to be applied in computing the amount of the recovery.

Although the special nature of contracts to marry has furnished the justification for relaxing the prohibition against award of punitive damages, courts do not agree on the standard of wrongdoing that must be established before punitive damages may be awarded in such a case. Some courts seem to require a showing of fraudulent conduct or intent; others insist upon proof of malice; a few permit recovery if the defendant has acted ruthlessly.

Another early and widely recognized exception to the general rule that punitive damages are not available in contract was based on judicial acceptance of the notion that public service companies may be answerable in exemplary damages for failure to discharge their obligations to the public. While the origin of this exception to the general rule may be traced back into distant English history, it is sufficient to note that English law early

92. See Klitzke v. Davis, 172 Wis. 425, 179 N.W. 586 (1920).
94. Tamke v. Vangness, 72 Minn. 256, 75 N.W. 217 (1898); Ferguson v. Moore, 98 Tenn. 342, 39 S.W. 341 (1897).
96. Jacoby v. Stark, 205 Ill. 34, 68 N.E. 557 (1903); Osmun v. Winters, 30 Ore. 177, 46 P. 780 (1896).
97. Sneve v. Lunder, 100 Minn. 5, 110 N.W. 99 (1907); Dupont v. McAdow, 6 Mont. 226, 9 P. 925 (1886). Careful distinctions among concepts as amorphous as fraud, malice, and ruthlessness are, of course, difficult if not impossible to maintain. Many courts do not insist upon maintaining such artificial distinctions. See, e.g., Smith v. Hawkins, 120 Kan. 518, 243 P. 1018 (1926).
recognized that those engaged in public or common callings\(^{99}\) had an obligation to serve all applicants for their services. In addition to this primary obligation, early English law also imposed certain supplemental duties, such as the requirement that service or treatment be reasonably adequate and provided on reasonable terms.\(^{100}\) Legal rules governing the common callings were shaped by the need to protect the public against exploitation or oppression by the providers of important public services. These legal duties were imposed because, under the economic conditions then prevailing, the innkeeper, surgeon, or smith engaged in a common calling very likely enjoyed a monopoly position within the community.\(^{101}\)

In modern society, it is not the barber or tailor but the common carrier or public utility that enjoys monopoly or quasi-monopoly power. Thus, the rules governing the availability of a modern plaintiff's cause of action against a public utility or common carrier are an outgrowth of the English law of common callings. A typical earlier American case might have involved the purchaser of a railroad ticket who was not transported to the proper station.\(^{102}\) Such plaintiffs would frequently seek an award of punitive damages. The defendant's principal defense was likely to be that its issuance of a ticket to the plaintiff created a contractual duty for the breach of which punitive damages could not be recovered. The judicial response to that defense was usually to point to the plaintiff's right, at his election, to bring an action in contract or in tort:

> It is therefore necessary to consider whether the action is one arising ex contractu or ex delicto. . . . The contract is stated as an inducement to the action, as the foundation of plaintiff's right to be on the train, to show that the plaintiff was lawfully there. It next charges that without consent of plaintiff the railroad company willfully and wrongfully, and with disregard of its duty to plaintiff, failed and refused to stop its train . . . and carried plaintiff beyond his destination. . . . Here is not only a breach of contract and a violation of public duty by the plain-

\(^{99}\) Among common callings recognized in the fifteenth century were the trades of barber, surgeon, smith, tailor, innkeeper, victualler, carrier, and ferryman. \(\text{Id. at 160.}\) The modern law of public service monopolies may be traced to the legal rules which emerged from the regulation of those engaged in common callings.

\(^{100}\) Burdick, \textit{The Origin of the Peculiar Duties of Public Service Companies}, 11 \textit{Colum. L. Rev.} 514, 616, 743, 515 (1911).


tiff in error as a common carrier, but a willful, deliberate, con-
sscious wrong.\textsuperscript{103}

It was thus the railroad's breach of duty to the public and not
its failure to discharge obligations assumed by private contract
which justified the award of punitive damages. By characteriz-
ing the plaintiff's action as one for tortious breach of a public
duty, the courts were able to permit these recoveries without
seeming insult to the general rule that such awards were not
appropriate in contract actions.\textsuperscript{104}

The careful distinction drawn by numerous courts between
actions in tort and actions in contract has not always been easy
to maintain. The facts of many cases are not subject to ready
classification; the "border land" between tort and contract is
treacherous territory for even the ablest courts and commenta-
tors.\textsuperscript{105} A court which insists upon drawing a bright line be-
tween the two actions occasionally produces an opinion of un-
common obscurity.\textsuperscript{106} In the common carrier cases, especially
when the injury alleged could only be categorized as basically
contractual, additional reasons were needed to buttress the award
of punitive damages. Sometimes, surprisingly, those reasons
were found in the candid appraisal of the special legal responsi-
bilities that great political and economic power imposed upon a
major monopoly enterprise:

\textsuperscript{103} Ft. Smith & W. Ry. v. Ford, 34 Okla. 575, 578, 126 P. 745, 746
(1912).
\textsuperscript{104} See Carmichael v. Bell Tel. Co., 157 N.C. 21, 72 S.E. 619 (1911);
Davis v. Atl. Coast Line R.R., 104 S.C. 63, 88 S.E. 273 (1916); Southwestern
\textsuperscript{105} But see Goins v. Western R.R. of Ala., 68 Ga. 190 (1881); DeWolf v. Ford,
193 N.Y. 397, 86 N.E. 527 (1908). Some of the early cases which denied
recovery of punitive damages in public service cases may be more read-
ily explained on the grounds that defendant's conduct was not suffi-
ciently malicious or willful to entitle plaintiff to recovery of punitive
damages even in a conventional tort case. See Thomas v. Peterson, 24
\textsuperscript{106} The exceptional difficulties inherent in the process of classifying
an action as tort or contract have been perceived by great figures in each
of these two legal fields. See 5 CORBIN, supra note 3, § 1077; PROSSER,
The Borderland of Tort and Contract, in SELECTED TOPICS ON THE LAW
of Torts 390 (1953).

\textsuperscript{107} A good example of judicial gymnastics may be found in Trout
136, 140 (1910), where the court observes, in discussing the liabilities of
common carriers:

In such circumstances the breach of contract gives rise to the
tort; not, however, because it was wrong to breach the contract,
but only because the law laid an obligation upon the carrier to
perform his duty ... and he had breached the obligation im-
posed by law which, in the particular instance, arose from the
relation created by contract. In such cases, where there is an
obligation imposed both by contract and by law upon the carrier
Many of the great railway systems of the country were built with the aid of government . . . subsidies. . . . Also, it is with money collected from the public that the railroad companies are enabled to pay high salaries and compensation to officers, attorneys, political agents, and other talented and skillful men to manage the business of the railroad companies. . . . 107

At bottom, then, the fundamental justification for the award of punitive damages in public service corporation cases has been the desire to both punish and protect against the abuse of economic power.

Certain distinctive elements in both promise to marry and public service cases help explain why they were exceptions to the general rule. 108 In both types of cases, the courts have made room for punitive damages by casting their decisions more in the language of tort than of contract. In actions for breach of promise to marry this is possible because the interest invaded is typically highly personal; in public service corporation cases, a long and respectable historical usage permits a finding that there has been a breach of duty independent of contractual relations. Moreover, in the public service cases the defendant has usually been guilty of conduct which constitutes the abuse of economic power independent of the defendant’s status as a party to a contract. 109

These early cases, which might appear to have but a restricted relevance to the development of modern law, are the source of ideas which have begun the transformation of the role of punitive damages in the modern law of contract.

B. BREACH OF A FIDUCIARY DUTY

A number of courts have awarded punitive damages in actions involving breach of contract when the relationship between the parties is of a fiduciary character. In these cases, as in the public service cases, it is the breach of duty created by the relationship rather than the contract which is said to permit the recovery of punitive damages. Analyzed in this fashion, the

and the breach of the contract operates a tort though entailing as well a breach of the obligation imposed by law, it is sometimes said the tort, though independent of, is, in a measure, dependent upon, the contract.


108. There were other minor, early exceptions to the general rule: Some courts intimated that if the condition of a bond given in accordance with statutory mandate is broken, punitive damages may be recoverable. See, e.g., Floyd v. Hamilton, 33 Ala. 235 (1858); Richmond v. Schickler, 57 Iowa 486, 10 N.W. 882 (1881).

109. See 5 CORBIN, supra note 3, § 1077.
fiduciary duty cases are no more than innocent exceptions to the general rule. Yet it remains a fact—not often emphasized in the cases—that the relationship which established the duty was essentially the product of contractual agreement. The necessary inquiry is to determine why, in a particular case, a court will emphasize the existence of a fiduciary duty and award punitive damages for the egregious breach of the duty.

The decision of the District of Columbia Circuit in Brown v. Coates\(^{110}\) presents a typical fact pattern in which punitive damages for breach of a fiduciary duty growing out of contract were held to be recoverable. The plaintiff was a homeowner who contracted with the defendant real estate broker to exchange a home owned by the plaintiff for one listed with the defendant. The defendant was to sell the plaintiff's home and apply the plaintiff's equity realized on the sale to the purchase price of the plaintiff's new home. After selling the plaintiff's home, the defendant denied that he had agreed to apply the net proceeds from the sale to the purchase price of the new home. The trial court awarded compensatory and punitive damages to the plaintiff.

The court of appeals affirmed the judgment of the trial court. In an opinion by Judge (now Chief Justice) Burger, the court acknowledged that punitive damages for the breach of an ordinary contract are not favored in the law, but justified the award on the ground that real estate brokers assume fiduciary obligations toward their clients. The court pointedly refused, however, to adopt "any single, particular formula in upholding an award of punitive damages against a faithless agent,"\(^{111}\) but went on to state that

> once it has been shown that one trained and experienced holds himself out to the public as worthy to be trusted for hire . . . and those so invited do place their trust and confidence, and that trust is intentionally and consciously disregarded, and exploited for unwarranted gain, community protection, as well as that of the victim, warrants the imposition of punitive damages.\(^{112}\)

Although the court characterized the test it had framed as a narrow one,\(^{113}\) the language quoted above is certainly susceptible of flexible application.

\(^{110}\) 253 F.2d 36 (D.C. Cir. 1958).
\(^{111}\) Id. at 40.
\(^{112}\) Id.
\(^{113}\) Id.
The reach of Brown and other decisions that adopt similar reasoning is difficult to gauge. Rarely do courts attempt to define the scope of the fiduciary duty which was allegedly violated. Instead, attention is focused narrowly on the facts at hand. Few of the decisions which permit the recovery of punitive damages for breach of fiduciary duty or a duty of trust reflect sensitivity to the potential reach of the exception thus sanctioned.

A contrary line of decisions, not factually distinguishable from the more liberal decisions typified by Brown, reflects a narrow view of the right to recover punitive damages for breach of a fiduciary duty that is rooted in contract. Courts that take a hard line against the award of punitive damages for breach of fiduciary duty often justify their holdings as necessary to uphold the established principle that non-compensatory recoveries are inimical to the principles underlying standard contract damage rules.

Typical of the cases which adopt a restrictive approach is Ranco Fertiservice, Inc. v. Laursen. In Ranco the plaintiff, a distributor of tractors, sued defendant, a retail dealer in equipment supplied by plaintiff, for compensatory and punitive damages. Plaintiff argued its entitlement to punitive damages on the grounds that defendant had wrongfully misrepresented the number of tractors he had sold and had withheld sums rightfully belonging to plaintiff. The court conceded that the defendant had breached a relationship of trust, but declared that since plaintiff's action was in essence contractual the award of punitive damages was improper.

The Ranco decision and others like it may be pejoratively classified as wooden. The clear-cut categories of tort and con-


116. 458 F.2d 988 (8th Cir. 1972).

117. Id. at 991.
tract which the Ranco court professed to protect by its decision are often illusory. If decisions such as Ranco treat legal abstractions as the whole of reality, however, courts such as Brown, which take a more flexible view, may be fairly charged with judicial sleight of hand. It is disingenuous to treat cases which present breach of fiduciary duty in the contractual context as wholly distinct from ordinary contract actions. To speak of “narrow tests” as does Judge Burger in Brown suggests that phrases such as “fiduciary relationships” and “relations of trust”\textsuperscript{118} have an objective content. In reality such terms are almost as flexible as a court wishes to make them.\textsuperscript{119} Certainly a rational opinion might have been written in the Brown case which denied a right to recover punitive damages on the ground that plaintiff’s complaint raised issues that were essentially contractual.

Thus, while Judge Burger chose to label plaintiff’s claim as one for breach of a fiduciary duty, the choice thus made was not compelled by the immutable demands of some objectively comprehensible legal doctrine. The cases in this area of the law are impossible to reconcile because the question in each is why a particular judge held that particular facts implied or did not imply the existence of a fiduciary duty.\textsuperscript{120} Such questions go to the heart of the judicial process and answers require insight into forces more fundamental than the uncertain power of formal legal logic.

C. CONTRACT BREACH ACCOMPANIED BY FRAUDULENT CONDUCT

The right to recover punitive damages for breach of contract when the defendant’s conduct is deemed concurrently fraudulent is recognized in a number of jurisdictions as another exception to the general rule.\textsuperscript{121} Since fraudulent conduct may cut across


\textsuperscript{119} Phrases such as fiduciary relationship, relationship of trust, and confidential relationship are used interchangeably by the courts; the definition of these terms is also vague, haphazard, and fragmentary. Bogert, \textit{Confidential Relations and Unenforceable Express Trusts}, 13 \textit{Cornell L.Q.} 237 (1928).

\textsuperscript{120} Attempts to harmonize results in this field almost always end in failure. Even within the same jurisdiction conflicts are common. Compare Boyd v. Bevilacqua, 247 Cal. App. 2d 272, 52 Cal. Rptr. 610 (1967), with Crogan v. Metz, 47 Cal. 2d 398, 303 P.2d 1029 (1956).

the whole range of contractual relations, this exception to the
general rule is of greater significance than the exceptional treatment accorded the breach of specialized contracts such as those discussed in preceding sections. The rule permitting recovery of punitive damages for fraudulent breach of contract is sometimes easier to state than to explain. This is partly the product of legal history and partly the consequence of a tendency in our legal system to rely on terms that are superficially precise but flexible enough to permit differing results without the too-obvious appearance of inconsistency.

The word “fraud,” for example, is a catch-all term which includes, depending upon the jurisdiction, a variety of actions whose gravamen rests upon misrepresentation in some form. The historical evolution of fraud is complex and confusing; in the hands of a creative court a “fraud” action may assume any one of a bewildering array of different legal and equitable personalities. In order to preserve the maximum freedom to deal with an alleged fraud-feasor, courts sometimes have refused to define the term:

Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court...

122. See text accompanying note 108 supra. It is a mistake, however, to denigrate too much the role of punitive damages in cases of contracts to marry and contracts with public service companies as merely a specialized backwater of historical interest. In fact, many of the most recent cases which carve out a new role for punitive damages in contract are very similar in their approach to the ideas expressed in the older cases. Some recent articles on punitive damages in contract only summarily treat these important areas. See, e.g., Note, supra note 5, at 677-78.

123. For purposes of this Article the phrases “fraudulent breach of contract” and “breach of contract accompanied by a fraudulent act” will be used interchangeably. These are circumstances in which the two terms may have significantly different legal effects, however, particularly if the phrase “breach of contract accompanied by a fraudulent act” is determined to be an action in contract. See, e.g., Bourne v. Maryland Cas. Co., 158 S.C. 1, 192 S.E. 626 (1937).


125. The historical development of actions for misrepresentation—breach of warranty, deceit, and negligent misrepresentation—are treated in 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 375-92 (1906), and Williston, Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415, 416-17 (1911).

126. See Green, Deceit, 16 Va. L. Rev. 749, 752 (1930).

127. Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189, 190 (1921) (quoting 12 R.C.L., Fraud and Deceit, § 2, at 229 (1916)).
The judicial freedom derived from a definition of fraud couched in obscure terms exacts an important price: it makes the prediction of results in future cases, always a hazardous undertaking, especially treacherous. Yet because punitive damages usually will be awarded in contract actions only upon a satisfactory showing of fraudulent conduct, some analysis of the cases in which fraudulent conduct is alleged as a basis for the recovery of punitive damages is required.

The landmark case in this field is Welborn v. Dixon, in which the South Carolina supreme court permitted the recovery of what it labeled punitive damages for the fraudulent breach of contract. The plaintiff had borrowed money from the defendant and, as security for the debt, had conveyed to him certain parcels of land. The parties made a concurrent agreement by which defendant promised to reconvey the property upon timely repayment of the debt. The defendant, however, violated the contract and conveyed the property to a third party bona fide purchaser. Thereupon, the plaintiff brought an action seeking both compensatory and punitive damages. The South Carolina court declared:

There is no doubt as to the general principle, that in an action for breach of contract the motives of the wrongdoer are not to be considered in estimating the amount of damages . . . . When, however, the breach of the contract is accompanied with a fraudulent act, the rule is well settled . . . that the defendant may be made to respond in punitive as well as in compensatory damages.

The Welborn holding has been applied in a large number of subsequent cases, but any attempt to follow a common thread

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129. Id. at 115, 49 S.E. at 234. There is some question as to the validity of the court's assertion that the award of punitive damages for fraudulent breach was well established in South Carolina. The court relied principally upon the authority of Rose & Rogers v. Beattie, 2 Nott & McC. 538 (S.C. 1820). In that case the plaintiff had purchased a lot of water packed cotton from the defendant in South Carolina. The plaintiff had shipped the cotton to England where it was sold. Upon discovering the fraud, the English buyer returned the cotton to the plaintiff's English agent, who resold the cotton at a reduced price. The question was whether the plaintiff was entitled to recover only the price paid for the cotton in South Carolina or whether he could recover the difference in the two sale prices in England, plus incidental damages. The court awarded the plaintiff damages according to the latter formula. It is arguable that the result in Beattie is well within the rule of Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1845). See Welborn v. Dixon, 70 S.C. 108, 120-22, 49 S.E. 232, 236-37 (1904) (Woods, J., dissenting).
through the decisions is likely to prove frustrating\textsuperscript{131} because the concept of fraud is so hazy. Many cases could be cited which illustrate the difficulty, but several from two jurisdictions will suffice.

In \textit{Holland v. Spartanburg Herald-Journal Co.},\textsuperscript{132} the plaintiff and one other person had owned all of the stock of the defendant. The plaintiff sold his stock and controlling interest in the corporation to a third person under the terms of an agreement which required that the plaintiff be retained as business manager of the defendant for at least three years. The board of directors of the defendant agreed to continue the plaintiff's employment for three years. The defendant, in violation of the agreement, discharged the plaintiff well before the expiration of his three year term. The Supreme Court of South Carolina sustained a denial of punitive damages on the ground that no fraudulent act had been shown and that mere evil intent does not establish a right to punitive damages for fraudulent breach.\textsuperscript{133}

In \textit{Sullivan v. Calhoun},\textsuperscript{134} the plaintiff and the defendant entered into a sharecropping agreement. Before the plaintiff could harvest the crops, the defendant "ran the plaintiff off said premises, gathered the crop, and refused to make an account to the plaintiff of his part thereof."\textsuperscript{135} The South Carolina court rejected the defendant's contention that the plaintiff had shown no fraudulent act accompanying the breach and held that the award of punitive damages was proper.\textsuperscript{136}

How can the award of punitive damages in \textit{Sullivan} and the denial in \textit{Holland} be explained? Both defendants acted in violation of their contractual obligations. In \textit{Holland}, the plaintiff

\begin{thebibliography}{99}
\bibitem{132. 166 S.C. 454, 165 S.E. 203 (1932).} 166 S.C. 454, 165 S.E. 203 (1932).
\bibitem{133. Id. at 468-69, 165 S.E. at 207-08.} Id. at 468-69, 165 S.E. at 207-08.
\bibitem{135. Id. at 138, 108 S.E. at 189.} Id. at 138, 108 S.E. at 189.
\bibitem{136. Id. at 138, 108 S.E. at 189.} Id. at 138, 108 S.E. at 189.
\end{thebibliography}
was evicted from his office and ordered to remove his personal effects immediately; his salary was also abruptly terminated. In *Sullivan*, defendants, in some unspecified way, forced the plaintiff to leave land which he had an absolute legal right to occupy. Why were the acts of one defendant considered merely wrongful and the acts of the other specifically found to be fraudulent? It is true that some South Carolina cases suggest that mere failure to perform a contract, for example, by withholding money due, does not constitute fraud. But the defendants in *Holland* and *Sullivan* both took affirmative steps to breach their contracts. Perhaps defendant's conduct in *Sullivan* may have edged closer to violence or coercion, but the report does not so indicate, and even if true, are coercion or violence necessary ingredients of fraudulent conduct? We are left to speculate as to the legal basis for distinguishing the cases; the court in neither *Holland* nor *Sullivan* seemed moved to explain what the term "fraudulent conduct" meant within the context of the action brought or of the relief sought.

The confusion in the South Carolina cases has its analogue in other jurisdictions that have adopted variant versions of the rule permitting the recovery of punitive damages for breach of contract accompanied by a fraudulent act. The problem may be conveniently illustrated by comparing two relatively recent California cases, *Contractor's Safety Association v. California Compensation Insurance Co.* and *Sharp v. Automobile Club of Southern California*.

In *Contractor's*, the defendant insurance company had represented to prospective customers that it would pay dividends according to an established scale provided the customer maintained a loss-premium ratio below an agreed level. When the plaintiff filed a claim for a dividend payment according to the published scale, the defendant refused to pay. The defendant cited a secret resolution of its board of directors adopted prior to the time plaintiff purchased insurance from the defendant which provided that no dividends would be paid until approved by further action of the board. The plaintiff sought punitive damages on the ground that the defendant's conduct was "fraudulent," "malicious," and "oppressive."

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The supreme court rejected the plaintiff's claim, holding:
"The third count though phrased in the language of fraud is clearly based upon breach of contract. The injury thus complained of is the refusal of the defendant to perform the contract." 140

In *Sharp*, the plaintiff, before renewing his automobile insurance with the defendant, sought and received assurances from the defendant that the medical payment provisions of the policy were payable without regard to whether plaintiff received reimbursement from a collateral source. At the time these representations were made, it was not the defendant's policy to pay medical claims for which reimbursement had been received. Plaintiff subsequently filed a claim for medical expenses with the defendant. The defendant refused to pay the claim on the ground that plaintiff had received payment from his medical insurer. The plaintiff recovered punitive damages in the trial court.

The court of appeals sustained the award of punitive damages. The opinion does not raise the question of whether the contractual origin of plaintiff's claim made the recovery improper; the court clearly considered this an action in fraud. 141 No reference was made to the opinion of the supreme court in *Contractor's* or to the obstacle the holding in that case might present to the recovery of punitive damages in *Sharp*.

Attempts to reconcile the results in these California cases generate the same confusion as did similar efforts with regard to the South Carolina cases. While the relevant rule of law applicable to the cases is not stated in precisely the same form in both states, the focus of the judicial inquiry is essentially the same. The South Carolina decisions do not explicitly consider whether the defendant's wrongful conduct partakes more of the character of tort or contract; the principal task is the identification of a specific fraudulent act. In California, perhaps because of a statute which ostensibly precludes the recovery of punitive damages in contract, 142 there is less emphasis upon specific fraud-

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141. 225 Cal. App. 2d 648, 652-54, 37 Cal. Rptr. 585, 588-89 (1964). Although the *Sharp* court did not specifically discuss the question of whether it considered plaintiff's claim chiefly tortious or contractual, later California decisions on similar facts have held such to be actions in tort for which punitive damages are recoverable. Wetherbee v. United Ins. Co. of America, 288 Cal. App. 2d 921, 71 Cal. Rptr. 764 (1968).
ulent acts and more reliance on a generalized inquiry into whether the plaintiff's claim is principally contractual or whether it is a tort claim which only incidentally involves contract breach. In both California and South Carolina, however, the success of the plaintiff in recovering punitive damages depends upon whether he can convince the court that enough facts have been proven to push his action over the line between contract and tort into a clear delictual category.

The four cases treated above seem hopelessly contradictory; a wider reading of additional relevant cases in both jurisdictions does not diminish the confusion. While many of the cases in this area make little sense because the rule which courts purport to apply is partly an illusion, this is not to say that every case in which punitive damages are allowed because the defendant committed a fraudulent act concurrent with contract breach is mystifying. Courts understandably may deny a non-compensatory award when the defendant is guilty of nothing more than a bare failure to perform the contract. Many cases, however, such as the four we have discussed, fall into an uncertain twilight zone between "mere" breach and obvious tort. It is the decisions in this zone that mock pretensions to logical precision. Confusion in this area of the law is perhaps inevitable, for it is surely difficult to apply consistently a rule whose cardinal concept (fraud) many courts have persistently defined in the most sweeping and general terms. In California, the difficulty is aggravated because in that state the outcome depends not only on the meaning of fraud, but also on whether the defendant's tort is incidental to the breach of contract or whether the contract breach is incidental to the tort. A rule composed of concepts

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143. In South Carolina, for example, consider why the court in Hutcherson v. Pilgrim Health & Life Ins. Co., 227 S.C. 239, 87 S.E.2d 685 (1955), found a fraudulent failure to act; and in Branham v. Wilson Motor Co., 188 S.C. 1, 198 S.E. 417 (1938), found that no fraudulent failure to act had been established.

144. In Barber v. Industrial Life & Health Ins. Co., 189 S.C. 108, 200 S.E. 102 (1938), defendant's agent changed the number on a payment receipt book from a straight life policy for $250 to a health and accident policy with a death benefit of only $50. The court had no difficulty in finding a fraudulent act sufficient to sustain the award of punitive damages.


so obscure can be described as a governing legal doctrine only by a long leap of faith.

If the rule permitting recovery of punitive damages for fraudulent breach of contract rests upon deceptive concepts, why did the courts not discard it long ago? Partly because lawyers and judges find rules, however ghostly, comforting presences, and partly because the rule in this instance provides convenient camouflage for otherwise legally indefensible decisions. If it were confessed that the rule permitting the recovery of punitive damages for fraudulent breach is largely a legal chimera, it would follow that courts that award punitive damages by invoking the rule are permitting non-compensatory recovery for breaches of contract that are merely malicious or oppressive as distinguished from fraudulent. Such results come perilously close to making the aggravated breach of contract the equivalent of a tort. Few courts are willing to openly acknowledge the destruction of established doctrines of conventional damage law, finding it much simpler to apply the “rule” by searching the evidence for tell-tale signs of fraudulent conduct rather than to confess that the rule they invoke is largely devoid of meaning.  

D. Bbreach of Contract Accompanied by an Independent Tort

Similar to the exception for fraudulent breach of contract is the rule that punitive damages may be recovered when the breach of contract is accompanied by an act that is independently and willfully tortious. Courts recognizing this rule apparently believe that since the basis for awarding punitive damages is the defendant’s independent, willful tort, there can be no


149. “Generally, punitive damages are not recoverable for breach of contract; but where the acts constituting a breach of contract also amount to a cause of action in tort, there may be recovery of exemplary damages upon proper allegations and proof of intentional wrong, insult, abuse or gross negligence constituting an independent tort.” Country Club Corp. v. McDaniel, 310 So. 2d 436, 437 (Fla. Dist. Ct. App. 1975). See also National Homes Corp. v. Lester Indus., Inc., 336 F. Supp. 644 (W.D. Va. 1972); Hess v. Jarboe, 201 Kan. 705, 443 P.2d 294 (1968); D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So. 2d 770 (1944); Williams v. Kansas City Pub. Serv. Co., 294 S.W.2d 36 (Mo. 1956); A.L. Carter Lumber Co. v. Salde, 149 Tex. 923, 188 S.W.2d 629 (1945).
conflict with the general rule merely because the parties' relationship fortuitously rests on a contract. Such an argument may be superficially persuasive, but it is essentially specious. It assumes too casually that the line between contract and tort may be precisely drawn; yet marking that boundary line has been acknowledged by some of our ablest scholars to be among the most perplexing challenges in the law. Recourse to legal history only exacerbates the difficulty. At early common law, distinctions between tort and contract were not made because the forms of action, which controlled plaintiff's right to recovery, recognized no such categories. Only gradually, and with much uncertainty, did the law begin to separate and identify concepts which modern lawyers would recognize as tort and contract. Even today, this process of historical evolution is not fully understood.

Courts frequently recognize that distinctions between tort and contract are difficult to maintain. Yet so deeply ingrained is the attachment to established categories that the emphasis in many opinions is on the development of a test which will allow the court to separate a mere breach of contract from a contract breach that also constitutes a tort. The principal test depends upon the distinction between misfeasance and nonfeasance. Under this test, complete non-performance of a contractual duty amounts to no more than a breach of contract; on the other hand, a defective attempted performance may rise to the level of a tort. While the misfeasance-nonfeasance test is not without its defenders, the difficulty of establishing what is misfeasance and nonfeasance in a particular case has limited the utility of these

150. See generally, 5 CORBIN, supra note 3, § 1077.

151. See MILSON, supra note 7, at 316.

152. See generally id. at 244-45. See also P. WINFIELD, THE PROVINCE OF THE LAW OF TORTS 116 (1931).

153. See, e.g., Peitzman v. City of Ilm, 141 F.2d 956 (8th Cir. 1944); Frega v. Northern N.J. Mortgage Ass'n, 51 N.J. Super. 331, 143 A.2d 885 (1958); International Printing Pressmen & Assistants Union v. Smith, 145 Tex. 399, 198 S.W.2d 729 (1946).


155. Dean Prosser maintains that, "[m]uch scorn has been poured on the distinction, but it does draw a valid line between the complete non-performance of a promise, which in the ordinary case is a breach of contract only, and a defective performance, which may also be a matter of tort." PROSSER, supra note 2, at 614.

156. Southern Ry. Co. v. Grizzle, 124 Ga. 735, 53 S.E. 244 (1906);
concepts in drawing boundary lines between tort and contract and in establishing the scope of a defendant's potential liability. In attempting to determine whether the plaintiff has established an independent, willful tort in addition to a simple breach of contract, the limited value of the misfeasance-nonfeasance distinction or, for that matter, of any other consistently applied test, is reflected in the way opinions are written. Generally, appellate courts content themselves with statements to the effect that mere evil intent does not constitute an independent tort justifying the recovery of punitive damages in a breach of contract action. Occasionally, a judge will write a more detailed and carefully reasoned opinion which attempts to explain the distinction between conduct by the contract breaker which is merely oppressive and actions that are independently tortious. The more typical decisions, however, consist of a summary statement of facts to which the court's conclusion is appended.

Courts frequently acknowledge that a plaintiff's cause of action may be an inextricable mix of tort and contract elements. Because the facts in such cases do not lend themselves to ready classification, there is a discernible tendency on the part of some courts to relax the requirement that a plaintiff prove the existence of an independent, willful tort as a condition to recovery of punitive damages. The test in this modified form commonly requires only that the plaintiff establish that the defendant's conduct was oppressive or malicious. If such a standard were


Kinnare v. Chicago, 70 Ill. App. 106 (1897), aff'd, 171 Ill. 332, 49 N.E. 536 (1898); Obanhein v. Arbuckle, 80 App. Div. 465, 81 N.Y.S. 133 (1903).


Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974); Kirk v. Safeco
widely applied or consistently endorsed, it would substantially increase the availability of punitive damages for breach of contract. While terms such as "malicious or oppressive breach" are perhaps fully as vague as the concept of a willful, independent tort, they are not technical legal doctrines trailing behind them a long and confusing history that inhibits innovative applications. Until quite recently, however, few, if any, jurisdictions had explicitly adopted a statement of the rule permitting recovery of punitive damages under a liberalized standard that requires a showing only of malicious or oppressive breach. Opinions that seem to state such a definition are frequently treated in subsequent decisions as aberrant examples of sloppy judicial craftsmanship which, with careful analysis, may be harmonized with the general rule that a willful, independent tort must be shown. 164

The pattern that emerges from the cases applying the willful tort exception to the general rule should be familiar by now. Because the distinction between tort and contract is sometimes elusive, decisions which turn upon that distinction are difficult to reconcile; 165 result-oriented judicial manipulation is not uncommon. A handful of recent courts have refused to continue writing opinions which maintain the fiction that the tort-contract distinction is either easy to draw or is of surpassing significance in determining the appropriateness of punitive damages. The decision of the Supreme Court of Idaho in Boise Dodge, Inc. v. Clark 166 is illustrative of this innovative and more candid attitude. The facts in the case are simple. The plaintiff had purchased a "new" automobile from the defendant. The "new" automobile was, in fact, a well-used demonstrator on which the odometer had been turned back. The plaintiff recovered a judg-

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164. The opinion of the court in McDonough v. Zamora, 338 S.W.2d 507, 513 (Tex. Civ. App. 1960), is typical: It has been said that punitive damages are permitted when a breach is accompanied by "willful acts of violence, malicious or oppressive conduct." . . . However, it is suggested that those descriptive words may be symptoms of an independent tort, and that there must be something more than a malicious and oppressive breach of contract, for even an intentional breach of contract is not punishable by punitive damages. (citations omitted.)


ment which included an award of punitive damages. On appeal, the defendant argued that since the plaintiff's action was in contract, punitive damages were improperly awarded. In rejecting defendant's contention, the court said:

In any event, from the legal point of view of the imposition of punitive damages in this case, it does not matter whether respondent's counter claim technically sounded in contract or tort. The rule . . . is that punitive damages may be assessed in contract actions where there is fraud, malice, oppression or other sufficient reason for doing so. The rule recognizes that in certain cases elements of tort, for which punitive damages have always been recoverable upon a showing of malice, may be inextricably mixed with elements of contract in which punitive damages generally are not recoverable.\(^{167}\)

The forthright reasoning used by the court in Boise Dodge cuts through many of the conceptual illusions with which we have been struggling. It is a judicial admission—in direct terms—that punitive damages should be, and perhaps have been, more broadly available than the black letter rules suggest. The important question for the future of the law is whether decisions like those in Boise Dodge are harbingers of fundamental legal change or whether they are isolated examples of judicial candor destined to be overridden by subsequent declarations of fidelity to the orthodox rule.

E. RECENT CASES: THE BEGINNING OF CHANGE?

A number of commentators in recent years have professed to discern potentially significant changes in the rules which have hitherto restricted the availability of punitive damages for breach of contract.\(^{168}\) It should be clear from the preceding analysis of the so-called orthodox cases that punitive damages have in fact been more readily recoverable for breach of contract than many have supposed. This wider availability of punitive damages over a long period has been largely unnoticed\(^ {169}\) because the exceptions to the general rule prohibiting punitive damages are based on legal concepts of unusual flexibility. This conceptual flexibil-

\(^{167}\) Id. at 556 (emphasis supplied) (footnote omitted). For a different result, on similar facts, using the conventional contract-tort test, see Treadwell Ford, Inc. v. Leek, 272 Ala. 544, 133 So. 2d 24 (1961).

\(^{168}\) Gilmore, supra note 6, at 86; Note, supra note 5; Note, Exemplary Damages in Contract Cases, 7 Williamette L.J. 137 (1971).

\(^{169}\) Some commentators have sensed that the availability of punitive damages for breach of contract has been greater than the bare repetition of the black letter rules might indicate. See Simpson, supra note 4.
ity has allowed courts so disposed to sanction the recovery of punitive damages without seeming to impair the continued validity of the general rule. Certainly there have been variations among jurisdictions in the liberality with which exceptions to the general rule have been allowed. Yet enough states have been surveyed to permit the conclusion that the phenomenon just described is broadly based. The aim here is not to detract from the significance of the cases discussed below, or to suggest that they do not—taken as a whole—represent important steps toward increasing the availability of punitive damages for breach of contract. Historical perspective is necessary, however, if we are to judge wisely whether the recent cases are the vanguard of significant change or merely evidence a modest, incremental movement forward that is clearly predictable through a careful reading of earlier decisions.

A line of cases, originating in California, has sustained the award of punitive damages in actions originating in the alleged breach of an insurance contract. Perhaps the most significant of these cases is Gruenberg v. Aetna Insurance Co., in which the plaintiff insured's claim to punitive damages for the bad faith failure of defendant insurer to pay fire insurance claims was rejected by the trial court. The California supreme court reversed the decision of the trial court on the ground that "there is an implied covenant of good faith and fair dealing in every contract . . . that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." The court thus sanctioned the award of punitive damages in an action growing out of contract. The court did not, however, acknowledge that it was permitting the recovery of punitive damages for breach of contract. Rather it insisted that

liability is imposed . . . not for a bad faith breach of contract but for failure to meet the duty to accept reasonable settlements. . . . That responsibility is not the requirement mandated by the terms of the policy itself—to defend, settle, or pay. It is the obligation, deemed to be imposed by the law . . . [w]here in so doing, it fails to deal fairly and in good faith with its insured.

170. See, e.g., notes 110-17 supra and accompanying text.
172. Id. at 573, 108 Cal. Rptr. at 484, 510 P.2d at 1036 (quoting Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958)).
The holding in Gruenberg, that in every contract there is an implied covenant of good faith or fair dealing, is fully supported by an earlier line of California cases.\textsuperscript{174} Gruenberg itself has been cited in an unusually large number of later California decisions.\textsuperscript{175} It has also been relied upon by the courts of other states as an aid in establishing an implied duty of good faith as a condition for awarding punitive damages in an action growing out of contract.\textsuperscript{176} It is especially significant that reliance upon Gruenberg by non-California courts has occurred in some jurisdictions which have traditionally been firmly against the award of punitive damages in actions arising in contract.\textsuperscript{177} In sum, although the Gruenberg rationale has not been uniformly adopted,\textsuperscript{178} its reception has been predominantly favorable.\textsuperscript{179}

How significant are the cases both in and outside California that have adopted the Gruenberg rationale as a basis for awarding punitive damages in a breach of contract action? Viewed from one perspective, the Gruenberg decision is supported by a large body of existing case law; the \textit{deus ex machina} employed by the Gruenberg court to permit recovery of punitive damages has made appearances before. The judicial implication of a good faith duty to perform contractual obligations is similar to the duty of good faith accompanying a fiduciary relationship. Similarly, we may trace the lineage of the Gruenberg doctrine to those venerable cases in which punitive damages were awarded


\textsuperscript{178} See MacDonald v. Pennsylvania Mut. Life Ins. Co., 278 So. 2d 232 (Fla. Dist. Ct. App. 1973). The Florida court read the California cases as mere restatements of the traditional exception that punitive damages for breach of contract are available if breach is accompanied by an independent, willful tort.

\textsuperscript{179} \textit{See cases cited at notes 175-76 supra.}
against public service companies. In those cases, the award of punitive damages was justified despite the existence of a contractual relationship between the parties because of the incidental, non-contractual relationship between a public service company and its customer. It was the breach of that non-contractual duty, so the reasoning went, that allowed the recovery of punitive damages.

Depending upon the extent to which courts are willing to impose a duty to perform in good faith on the parties to every contract, the Gruenberg decision may have a substantially broader precedential significance than either the fiduciary duty or public service company cases. Thus far, the Gruenberg rationale has been applied only to actions involving the breach of contracts of insurance, which traditionally have received special treatment in the law. If, however, as recent scholarship maintains, there is a duty of good faith “at every stage of the contractual process, from preliminary negotiation through performance to discharge, and in nearly all kinds of contracts,” the Gruenberg rationale may reach very far indeed.

Because Gruenberg itself is hardly four years old, however, it is difficult to judge the significance of its reasoning as a device for allowing recovery of punitive damages for breach of contract. The greatest source of uncertainty is the peculiar character of implied duties of good faith. The greatest legal scholars, Holmes among them, have recognized the difficulty of understanding why the law recognizes implied duties in certain kinds of cases. Attempting to explicate the forces which move judges to find implied duties or obligations is a most frustrating exercise. Lawyers are trained to believe that the use of legal logic and the application of established dogma to particular facts will yield predictable results. The wisest scholars and judges, however, have understood that the formulation of legal policy is not inevitably an exercise in logic as lawyers understand that term, but the product of many forces, some grasped quite clearly and others only dimly understood, which intermingle to produce a decision in

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180. See notes 98-107 supra and accompanying text.
a particular case. Good faith has no definite meaning; the reasons for its invocation in a particular case are not always clear. We cannot really know why the Gruenberg court and others that have adopted that decision have chosen to find a duty. Because this is so, we cannot honestly predict whether Gruenberg represents the beginning of a new treatment of punitive damages in the law of contracts. As Professor Leon Green wrote so perceptively many years ago:

How does the stating of the problem in terms of duties enable a judge to pass judgment? Where shall he find the source of duties? Do judges find them ready made? ... Do they create them? ... We are clearly dealing with the very processes by which law is generated. And doubtless the questions as to the paternity of these duties brought forth in case after case is embarrassing enough at best. Even if the Gruenberg decision should become a powerful progenitor of legal change, it will only serve to mark a transitional point in the law. The decision, depending heavily on the distinction between a breach of the contract itself, for which punitive damages are not recoverable, and the tortious breach of an implied duty of good faith, which subjects the contract breaker to liability for punitive damages, is susceptible to the same criticisms as the more general exception for independent torts. As an attempt to maintain, in theory at least, the traditionally sharp distinction between damages recoverable in contract and in tort, the line drawn in Gruenberg and later decisions is of dubious validity. So long as courts continue to act on the apparent belief that it is important to distinguish between remedies available for breach of contract and for tort, however, and are content to write opinions indicating that there is a meaningful distinction between a mere breach of contract and tortious violation of a duty of good faith performance, the law of punitive damages in contract will continue to be shifting and ill-defined.

184. See Green, The Duty Problem in Negligence Cases, 28 Colum. L. Rev. 1014 (1928).
185. Summers, supra note 182, at 201.
186. See Green, supra note 184, at 1024.
187. See notes 148-67 supra and accompanying text.
188. It is surprising how frequently attempts to break down the barriers between tort and contract are resisted. Even Dean Prosser, who clearly recognized the difficulty in distinguishing between tort and contract, wrote:

The first question which arises in this curious dichotomy is when a breach of contract is also a tort. It is obvious that this cannot be true in every case, or there would be no distinction left at all; and that the more or less inevitable efforts of lawyers to turn the one into the other must somewhere be brought to a halt.
Recent decisions, however, have sustained the award of punitive damages in a contract action on grounds which go beyond the Gruenberg rationale. The holdings in these cases are not based on the alleged breach of an implied duty of good faith; rather it is the breach of the contract itself which is said to constitute the tortious act for which punitive damages are recoverable. The decision of the Indiana court of appeals in Vernon Fire and Cas­uality Insurance Co. v. Sharp is an important example. In Vernon, the defendant insurer refused to pay the plaintiff's legitimate claim for property and equipment fire losses incurred at plaintiff's factory. The defendant could offer no reasonable explanation for its refusal. The trial court's award of punitive damages was sustained on appeal. The appellate court held that "the evidence was sufficient to allow the jury to find that the insurer's conduct amounted to heedless disregard of the consequences, malice, gross fraud or oppressive conduct." It is particularly significant that, as authority for its holding, the court cited, without comment, cases in which punitive damages were awarded but in which no contract was at issue. In short, the Vernon opinion can be read as eliminating any basis for treating the award of punitive damages in a contract action as subject to a materially different standard than that used in the ordinary tort case. The Vernon opinion is not an isolated example of advanced judicial thinking. A number of other recent cases, not limited to suits in which an insurance company is a defendant, have been reported in which punitive damages have been awarded in contract actions on similar grounds.

Prosser, supra note 105, at 387. More recently, some scholars have expressed the view that perhaps there is no reason why breach of contract should not simply be a species of tort. See Poulton, Tort or Contract, 82 Law Q. Rev. 346, 350-51 (1966).


190. Id. at 384.

191. Id. Among other cases, the court cites True Temper Corp. v. Moore, 290 N.E.2d 844 (Ind. Ct. App. 1973).

192. See note 194 infra.

The significance of the development represented by decisions like *Vernon* is difficult to judge. Viewed independently of the judicial environment from which they evolved, these cases seem to be of undeniably great significance as straightforward statements by various courts that the breach of a contract itself can justify the award of punitive damages without need to resort to any of the established exceptions to the general rule. Such judicial declarations come quite close to making every breach of contract a species of tort.194 Yet in assessing the impact of cases like *Vernon*, it is especially important that they not be viewed in isolation either from the accumulated body of past decisions or from the ongoing process of contemporary decision making. The majority of contemporary courts continue to render decisions consistent with the traditional rule that punitive damages may not be recovered for breach of contract.195 Indeed, in a few jurisdictions which have traditionally adhered to a somewhat more liberal standard in the award of punitive damages, there is evidence of a retreat to more orthodox territory.196 In sum, it seems fair to say that the law is in the midst of a potentially significant change, but that the reach and durability of that change are uncertain.

Moreover, the conclusion that *Vernon* and its companion cases represent a change of immense significance is undermined by examination of earlier cases which suggest that the general rule denying punitive damages in contract cases has never really been the impenetrable barrier it has appeared to be. Many of the

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194. To observe that every breach of contract may be considered a tort is not to say that punitive damages are recoverable for every breach of contract. The implication of the *Vernon* decision and others like it is that punitive damages will be available for breach of contract on essentially the same grounds that they are now recoverable in tort. Punitive damages in tort are generally recoverable only upon a showing of aggravated or reckless conduct. *Prosser*, supra note 2, at 9-10. That same limitation will doubtless apply to all attempted recoveries of punitive damages for breach of contract. 195. See, e.g., *Davis Cattle Co., Inc. v. Great Western Sugar Co.*, 393 F. Supp. 1185 (D. Col. 1975); *Liberty Mutual Ins. Co. v. Cobum*, 209 S.E.2d 955, 132 Ga. App. 859 (1978); *Tax v. Overton*, 534 P.2d 679 (Okla. 1974); *White v. Rob Roy Dairy, Inc.*, 524 S.W.2d 329 (Tex. 1974).

196. In Texas, a state that has been considered more liberal than some others in the award of punitive damages for breach of contract, recent cases manifest an intention to apply a more strict standard to plaintiffs seeking punitive damages. See *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973); *White v. Rob Roy Dairy, Inc.*, 534 S.W.2d 329 (Tex. Ct. App. 1974); *Boswell v. Hughes*, 491 S.W.2d 762 (Tex. Ct. App. 1973). Chief Justice Ramsey's dissenting opinion in *Boswell* is of special note. Id. at 764.
so-called established exceptions to the general rule simply have afforded traditional courts more latitude in escaping the strictures of the rule without seeming to violate it. In some jurisdictions, the so-called exceptions have been construed broadly enough to raise doubts as to the continuing viability of the rule. Then, too, there has long existed a small body of cases which reflect a sporadic and largely unremarked judicial inclination to award punitive damages on quite liberal grounds. These earlier cases suggest that decisions like Vernon really represent an outgrowth of a heretofore camouflaged doctrine rather than the announcement of any startlingly new legal principles. Against this background, the much heralded recent cases seem less significant as exemplars of legal change.

Thus, the most that unequivocally may be said about decisions like Vernon is that they evidence a tendency to decide directly what many earlier courts had been at pains to conceal: there really are no insurmountable theoretical objections to the award of punitive damages for breach of contract on a basis similar to that which governs in the typical tort case, that is, where defendant's conduct is oppressive or malicious. Doubtless there is much to be said for this increase in judicial candor.

Wide adherence to the rationale of the Vernon decision would greatly enhance the clarity of existing doctrine in this area of damage law. More than this, the Vernon court's approach would make the results in many decided cases conform more closely with the courts' explanations for their decisions. The legal principles which constitute the law of punitive damages in contract would thus be more rational and the results produced by the application of those principles more predictable—not insignificant objects of reform.

However significant the nascent changes in this area of the law ultimately may prove to be, we should do more than merely describe the results of cases which trace out the developing pattern of change. It is important that we explore and seek to understand the reasons why, at this time in the development

197. See, e.g., Jones v. Kelly, 208 Cal. 251, 280 P. 942 (1929); Anchor Co. v. Adams, 139 Va. 388, 124 S.E. 438 (1924); Gatzow v. Buening, 106 Wis. 1, 81 N.W. 1003 (1900).

198. It is too early to speculate—as some commentators have—that decisions like Vernon, which appear to liberalize the availability of punitive damages for breach of contract, constitute the irresistible wave of the future. See Note, supra note 5, which assumes, without explanation, that the progress of cases which broaden the availability of punitive damages is inevitable. Id. at 689.
of law, courts have begun to award punitive damages for breach of contract without resort to the doctrinal smoke screen of such traditional exceptions as the separate fraudulent act or an independent, willful tort rule.

The recent cases extending the availability of punitive damages in contract have, of course, increased the scope of a defendant's potential liability, a result consistent with the broader tendencies of modern damage law. Professor Gilmore has characterized this development as "an explosion of liability." A persuasive, but partial, explanation for the expansion of punitive damages in contract cases may be found in changing perceptions of the proper social roles of great economic power and of those who wield it. The corporation is the most typical form through which economic power is exercised, and it is the large and powerful corporation which frequently possesses sufficient economic leverage to exploit the relative weakness of the other party to a contract. In view of this economic reality, it should not be surprising that many of the most important recent cases awarding punitive damages in contract involve an ordinary consumer as plaintiff and a large insurance company as defendant.

It cannot be doubted that contract damage has been shaped historically by prevailing attitudes toward the economic system. Professor Richard Danzig has persuasively argued that the rule in Hadley v. Baxendale was at least partly the result of the perceived need to shelter the corporate entrepreneur from excessive liability in order to promote desired industrial development. The character and the function of the corporation have changed greatly since the mid-nineteenth century. It is axiomatic that the large, modern corporation no longer unites ownership and management in the same hands, and that shareholders of the typical public corporation have little voice in the conduct of corporate affairs. Indeed, some economists argue that the large corporation has grown so powerful that the corporation itself rather than market forces controls what goods will be produced and distributed.

199. Gilmore, supra note 6, at 65.
200. See cases cited at notes 175-76 supra.
202. Danzig, Hadley v. Baxendale: A Study in the Industrialization of the Law, 4 J. LEGAL STUDIES 249 (1975). Professor Danzig does not contend that the rule in Hadley was wholly the product of the economic climate then prevailing. He does suggest that the dominant economic values of the day played some part in the court's decision.
204. Perhaps the dominant recent spokesman for the view that the
The conviction that the modern large corporation controls the market is by no means universally shared. Yet recent developments in damage law sometimes reflect a preoccupation with the conviction that corporate power is often abused and that the corporation's freedom to act is not such an unalloyed good that it should be encouraged at the expense of competing values. Contemporary contract law emphasizes concepts such as unconscionability and the relative bargaining power of parties to agreements. Such doctrines are open-ended and unformed, but they have been used to restrict the power of strong parties to unfairly shape contractual terms to their advantage. The growing availability of punitive damages for breach of contract is consistent with the recent emphasis in substantive contract law on doctrines designed to protect against the abuse of bargaining power because the award of punitive damages increases the severity of sanctions which may be imposed on a contract breaker who has engaged in sufficiently egregious conduct.

There have been surprisingly few attempts to explain the causes of this growing judicial willingness to award punitive damages for breach of contract. The occasional efforts that have been made emphasize the disparity of economic power that may exist between the aggrieved party and the breaching party, arguing that the inquiry must focus on the question of whether the plaintiff is a "big guy" or a "little guy." Presumably, the plaintiff who has been victimized by the defendant's abuse of concentration of corporate power has destroyed the central role of the free market is Professor J.K. Galbraith. His views are set forth at length in J. GALBRAITH, THE NEW INDUSTRIAL STATE (2d ed. rev. 1971).


210. Judicial concern about the abuse of corporate power in the bargaining process has not been confined to the modern era. See note 102 supra and accompanying text.

211. D. DOBBs, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 206-07 (1973). See Note, supra note 5.
superior bargaining power will recover punitive damages, under the rationale of the newer cases. There is evidence to support this thesis. If we consider cases decided even under the traditional exceptions to the general rule, judgments were frequently rendered which may be viewed as attempts to punish the abuse of superior bargaining power. An examination of the newer cases likewise confirms the importance of the parties' bargaining power as a central factor in the decision. Specifically, cases which have adopted the Gruenberg rationale have usually involved corporate defendants who wield much greater market power than the typical consumer-plaintiff. Even in a number of newer cases in which the award of punitive damages was considered but disapproved, the courts' opinions suggest that the relative bargaining power of the parties, as an aspect of the economic context within which the transaction occurred, made some difference in the court's analysis. Finally, in the broader field of modern contract law, recent scholarship indicates that the relative bargaining status of the parties is a useful predictive tool in rationalizing seemingly conflicting results in cases which present similar issues.

Thus, the thesis that disparity in bargaining power explains

212. The public services exception, see text accompanying notes 97-106 supra, is readily explainable as a means of preventing abuse of the monopoly power held by such defendants as railroads or public utilities. Inequality in bargaining power may also be a helpful touchstone in reconciling seeming conflicts among fraudulent breach of contract cases. See text accompanying notes 121-43 supra. Thus in Sullivan v. Calhoun, 117 S.C. 137, 108 S.E. 189 (1921), for example, the successful plaintiff was a sharecropper; the defendant was his landlord. In Sharp v. Automobile Club of Calif., 223 Cal. App. 2d 648, 37 Cal. Rptr. 583 (1964), the winning plaintiff was an ordinary consumer. The unsuccessful plaintiffs in Holland v. Spartanburg Herald-Journal Co., 166 S.C. 454, 165 S.E. 203 (1932), and Contractors Safety Ass'n v. California Comp. Ins. Co., 48 Cal. 2d 71, 307 P.2d 636 (1957), were both experienced in business and both arguably possessed economic leverage that sharecroppers or ordinary consumers would not have. Certainly decisions like those in Gruenberg, Vernon, and their progeny may be seen as aiming at the chastisement of those who have abused great bargaining power.


215. See Childres & Spitz, Status of the Law in Contract, 47 N.Y.U.L. Rev. 1 (1972). Professors Childres and Spitz convincingly demonstrate that in cases applying the parol evidence rule, results are dependent upon the status of the contracting parties.
the increase of punitive damage awards in contract cases is persuasive. But it must be kept in reasonable perspective: the recent cases are too few in number to support any sweeping conclusions as to the cause of the developing trend toward more liberal punitive damage awards. Firm conclusions must await the slow unfolding of the judicial process.

V. CONCLUSION

The title of this Article refers to the reality and the illusion of legal change. A careful analysis of the role of punitive damages in the law of contract suggests the difficulties inherent in determining what meaningful legal change is. It is a relatively simple matter to examine a handful of recent cases and to proclaim that a major doctrinal upheaval is at hand. In assessing the significance of any asserted legal change, it is more useful but more difficult to examine the recent cases within the historical context of which they are an inseparable part.

Recent decisions rendered in a number of jurisdictions justify the conclusion that legal barriers to the award of punitive damages in contract are being lowered. Do these recent decisions represent a significant legal change which lends support to Professor Gilmore's conviction that tort and contract principles are beginning to converge? A fair answer would be a qualified yes. The answer must be qualified because, as we have seen, the traditional rules rigidly proscribing the award of punitive damages in contract have frequently yielded quite surprising results. We have noted, for example, older cases sanctioning the award of punitive damages by the creation of "independent duties" or "fiduciary obligations," the breach of which—in the court's analysis—offered a way out of the dilemma posed by the traditional rule. These older decisions clearly suggest that judicial sympathy for the award of punitive damages in selected contract actions is not altogether newly-minted. While it is true that many of the post-Gruenberg cases may be viewed as a predictable stage in a process of orderly judicial evolution, they are less circumspect and more explicitly innovative in their approach to the award of punitive damages in contract than the older decisions. In sum, Gruenberg and its progeny represent genuine legal change, but a change quite firmly connected to an earlier line of cases that produced similar results by more oblique means.

In assessing the value of the evolving new standard, it should
be clearly understood that punitive damages in contract cannot be considered consistent with the traditional descriptions of the objects of contract damage law. 216 Damages for breach of contract theoretically are aimed at compensating for pecuniary loss, while punitive damages—originating in tort cases—are given to compensate for specifically non-pecuniary injuries. Yet too much can be made of the inconsistency between the theory of punitive damages and the traditional aims of contract damage law. The boundary line between tort and contract is not always clear. It was in cases that resisted easy categorization as either tort or contract that courts began to expand the availability of punitive damages. Some recent decisions sanctioning the award of punitive damages in contract do not manifest much concern as to whether the plaintiff's claim falls on the tort or contract side of the borderline. This judicial attitude may be more casual than calculated, but it suggests that the most important question for future legal scholars may be not whether punitive damage awards are consistent with contract damage principles, but rather, what is the likely effect of the recent cases on the continued integrity of distinctions between contract and tort, and what are the implications of undermining those distinctions.

Legal change is rarely revolutionary. The collapse of the tort-contract distinction is not imminent, but recent decisions liberalizing the availability of punitive damages in contract have contributed to a process of change which has greatly increased the territory occupied by Dean Prosser's shadowy borderland between tort and contract. How rapidly it may proceed and where it will ultimately lead, no careful scholar can confidently predict.

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216. In practice, of course, contract damages are both more speculative and thus more "punitive" than the statements of this traditional rule intimate. See notes 78-79 supra and accompanying text.