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Volume 15
Issue 2 *Revolution in Law Practice*
(Symposium)


Article

1966

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Recommended Citation

David H. Hines, *Municipal Liability for Exemplary Damages*, 15 *Clev.-Marshall L. Rev.* 304 (1966)

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Municipal Liability for Exemplary Damages

David H. Hines*

ALTHOUGH THE LAW is not altogether free from doubt¹ on the subject of municipal liability for exemplary damages,² it is a settled principle that exemplary damages may not be recovered against a municipal corporation,³ nor a state,⁴ in the absence of statutory authority.⁵

Exemplary Damages and Private Corporations

Exemplary damages, whether called punitive damages, vindictive damages, or "smart money,"⁶ are awarded primarily as a punishment to the offender and as a deterrent to others.⁷ They also are given for revenge⁸ and are a reason to prosecute a claim which otherwise would not be worth while.⁹ They are allowed over and above that amount which normally will compensate the injured party,¹⁰ and before they may be allowed some actual damages must be proved.¹¹ Exemplary damages are allowed

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¹ *Raplee v. City of Corning*, 6 App. Div. 2d 230, 176 N. Y. S. 2d 162 (1958).

² Annot., 22 Am. Jur. 2d, sec. 255 (1965).

³ *Fisher v. City of Miami*, 172 So. 2d 455 (Fla. 1965); *Clarke v. City of Greer*, 231 S. C. 327, 98 S. E. 2d 751 (1957); *Rascoe v. Town of Farmington*, 62 N. M. 51, 304 P. 2d 575 (1956); 18 McQuillin, *Law of Municipal Corporations*, sec. 53.62 at 286 (3d ed. 1963).

⁴ *McCandless v. State*, 6 Misc. 2d 391, 166 N. Y. S. 2d 272 (Ct. of Claims 1956).

⁵ *Michaud v. City of Bangor*, 160 Me. 285, 203 A. 2d 687 (1964); *Brown v. Village of Deming*, 56 N. M. 302, 243 P. 2d 609 (1952); *Desforge v. City of West St. Paul*, 231 Minn. 205, 42 N. W. 2d 633, 19 A. L. R. 2d 898 (1950); *Town of Newton v. Wilson*, 128 Miss. 726, 91 So. 419 (1922); Annot., 19 A. L. R. 2d 903 (1950); 63 C. J. S., 495 (1950).

⁶ Oleck, *Damages to Persons and Property*, sec. 269 (rev. ed. 1961).

⁷ *Fisher v. City of Miami*, *supra* note 3; McCormick, *Handbook on the Law of Damages*, sec. 77 (1935); Oleck, *op. cit. supra* note 6.

⁸ Oleck, *op. cit. supra* note 6 at sec. 275A; Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957).

⁹ Note, *Damages—Right to Exemplary Damages in Fraud and Deceit Actions*, 8 N. Y. L. F. 431 (1962).

¹⁰ *Florida East Coast Ry. Co. v. McRoberts*, 111 Fla. 278, 149 So. 631, 94 A. L. R. 376 (1933); *Pendleton v. Norfolk and Western Ry. Co.*, 82 W. Va. 270, 95 S. E. 941 (1918).

¹¹ Annot., 19 A. L. R. 2d 903 (1950).

only where there has been willfulness, fraud, oppression, insult, gross negligence,¹² or actual malice. Implied malice normally is not cause enough.¹³ These damages are not awarded by right, as are compensatory damages,¹⁴ but are subject to the discretion of the jury.¹⁵

A corporation can be liable for exemplary damages for the torts of its employees¹⁶ acting in the course and scope of their employment.¹⁷ Such liability, however, exists only where the employee himself would be liable to a claim for these damages.¹⁸ While in some jurisdictions the corporation may be liable under the doctrine of *respondeat superior*,¹⁹ most courts hold that the corporation must authorize or ratify the wrongful act in order for the plaintiff to sustain a claim for exemplary damages.²⁰ It retains or employs the tortfeasor known to be unfit or incompetent,²¹ or when the employee is its managerial agent a corporation may be liable for exemplary damages.²² The corporation escapes liability for exemplary damages when it has neither authorized nor ratified an employee's act because there is no justification for punishing the employer for an act for which the servant alone is guilty.²³ The main purpose in holding the corporation liable in those cases where it authorizes, ratifies, or participates in the wrongful act is to punish it, deter others from doing likewise, and prevent similar conduct in the future.²⁴

¹² Oleck, *op. cit. supra* note 6.

¹³ McCormick, *op. cit. supra* note 7 at sec. 79.

¹⁴ Fisher v. City of Miami, *supra* note 3.

¹⁵ Florida East Coast Ry. Co. v. McRoberts, *supra* note 10; 38 Am. Jur. 370 (Supp. 1965).

¹⁶ 22 Am. Jur. 2d, *op. cit. supra* note 2.

¹⁷ 22 Am. Jur. 2d, *op. cit. supra* note 2 at sec. 257.

¹⁸ 25 C. J. S. 1156 (1966).

¹⁹ Note, Exemplary Damages in Law of Torts, *op. cit. supra* note 8; Note, Punitive Damages—Corporation's Liability—Partial Retrial—Wealth of Defendant as Evidence, 13 Fordham L. Rev. 255 (1944).

²⁰ General Motors Acceptance Corp. v. Froelich, 273 F. 2d 92 (D. C. Cir. 1959); Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 S. Ct. 261, 37 L. Ed. 97 (1893); McCormick, *op. cit. supra* note 7 at sec. 80.

²¹ 25 C. J. S. *op. cit. supra* note 18 at 1154.

²² Oleck, *op. cit. supra* note 6 at sec. 271.

²³ McCormick, *op. cit. supra* note 7 at sec. 80.

²⁴ *Ibid.*

Exemplary Damages and Municipal Corporations

The employees of municipal corporations, in addition to compensatory damage liability, may be personally liable for exemplary damages.²⁵

Municipalities are not, under all circumstances, liable in compensatory damages for the torts of their employees. They are generally held to have a dual personality, one for governmental or public functions, and the other for proprietary or private functions.²⁶ In performance of its governmental functions, a municipal corporation enjoys the sovereign immunity of a state.²⁷ When performing a proprietary function, it is liable as a person or corporation.²⁸ The municipality's servant must be acting within the course and scope of his employment,²⁹ and his act must be within the powers of the corporate employer.³⁰ In a series of recent decisions, the Florida courts have abolished the governmental-proprietary dichotomy and have held the municipal corporation liable on the basis of *respondeat superior* alone.³¹ This is not, however, the prevailing view.³² The question of exemplary damages arises only in those cases where the municipality does not have governmental immunity because liability for exemplary damages will not lie in the absence of compensatory damages.

Courts have never favored the recovery of exemplary damages against municipal corporations.³³ A striking example is given in *Costich v. City of Rochester*³⁴ where the court said,

²⁵ *Wrains v. Rose*, 175 So. 2d 75 (Fla. App. 1965); *Clarke v. City of Greer*, *supra* note 3; *Webber v. Town of Jonesville*, 94 S. C. 189, 77 S. E. 857 (1913).

²⁶ Repko, *American Legal Commentary on the Doctrine of Municipal Tort Liability*, 9 Law & Contemp. Prob. 214 (1942).

²⁷ 18 McQuillin, *op. cit. supra* note 3 at sec. 53.04; Blachly and Oatman, *Approaches to Governmental Liability in Tort*, 9 Law & Contemp. Prob. 181 (1942).

²⁸ *Ibid.*

²⁹ 18 McQuillin, *op. cit. supra* note 3 at sec. 53.65.

³⁰ *Ibid.*

³¹ *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965); *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 60 A. L. R. 2d 1193 (Fla. 1957).

³² See also: *Workman v. New York City, Mayor, Alderman and Commonalty*, 179 U. S. 552 (2nd Cir. 1900), 21 S. Ct. 212, 46 L. Ed. 314 (1900) holding that the governmental and proprietary test as a basis for determining liability is not controlling in admiralty courts; and *Fowler, Admx. v. City of Cleveland*, 100 Ohio St. 158, 126 N. E. 72 (1919), overruled by *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 N. E. 164 (1922).

³³ Annot., *op. cit. supra* note 11.

³⁴ 68 App. Div. 623, 73 N. Y. Supp. 835, 837 (1902).

It is not necessary for us to, and we do not, hold that a municipal corporation could never, under any circumstances, become responsible for punitive damages, in an action for trespass or otherwise. But we are prepared to say that the circumstances which would make it liable for such damages must be very extraordinary, and almost impossible to conceive of.

And in *Ostrom v. City of San Antonio*³⁵ the court expressed similar sentiments when it said,

. . . the case would be exceptional, indeed, when vindictive or more than compensatory damages can be recoverable against a municipal corporation.

Early decisions applied to municipal corporations the rules of exemplary damages applicable to private corporations. Thus, in *Whipple v. Walpole*³⁶ exemplary damages were awarded for the gross negligence of city officials in maintaining a bridge. Other cases held that a city would be liable for exemplary damages only if it refused to repair a street after being informed of its defective condition.³⁷ Furthermore, the city would be liable only if it had directed, participated in, or subsequently approved the misconduct of its employees.³⁸

In *St. Johns Gas Co. v. City of San Juan*³⁹ exemplary damages were given when the Mayor took unlawful possession of private property. The court held that this was ratification sufficient to hold the city liable.

Though the courts originally applied general principles of exemplary damages, their reluctance to fit municipal corporations into that framework soon led legal writers to state that municipal corporations were not liable for exemplary damages.⁴⁰ In 1936 a federal court stated that the liability of municipal corporations should be limited to compensatory damages,⁴¹ and recent cases have held emphatically that in the absence of statutory authority municipal corporations are not liable for ex-

³⁵ 33 Tex. Civ. App. 683, 77 S. W. 829 (1903).

³⁶ 10 N. H. 130 (1839), overruled by *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526 (1870).

³⁷ *City Council of Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562 (1858).

³⁸ *Willett v. Village of St. Albans*, 69 Vt. 330, 38 A. 72 (1897).

³⁹ 1 P. R. Fed. 160 (1902).

⁴⁰ Annot., 62 Am. Dec. 389 (1854); annot., 59 Am. St. Rep. 589, 602 (1896).

⁴¹ *Newcastle Products Inc. v. School Dist. of Blair Township*, 18 F. Supp. 335 (W. D. Penn. 1936).

emplary damages.⁴² Even where exemplary damages are not sought or given, but the actual damages are so great that the jury must have contemplated them, the court will view the award as including them and will reverse as a matter of law.⁴³

Two types of cases deserve special comment: Cases involving willful and malicious acts and cases involving negligent acts and nuisances. There was an early split of authority on allowing exemplary damages against municipal corporations for willful or malicious acts. Although most courts refused liability on the basis that the acts complained of were not sufficiently malicious to fall within the rule, they claimed that those acts that were sufficiently malicious and willful would result in liability.⁴⁴ However, in *McGary v. City of Lafayette*,⁴⁵ where city officials maliciously and willfully destroyed plaintiff's house, the court held that the city was not liable for exemplary damages. More recently a Texas court has said that no issue of exemplary damages would arise unless there was evidence that the act was wanton, willful, or malicious.⁴⁶ A New York court allowed treble damages where the wrongful act of city officials was found willful and deliberate.⁴⁷

In ordinary negligence cases it is the common view that municipal liability should extend to compensatory damages only.^{48 49} Generally, courts have held that municipal corporations are not liable for exemplary damages due to gross negligence,⁵⁰ but in *City of Miami v. McCorkle*⁵¹ where the officers or employees of a municipality so negligently and carelessly

⁴² Notes 3 and 5 *supra*.

⁴³ *Weglarz v. City of New York*, 12 App. Div. 2d 977, 211 N. Y. S. 2d 664 (1961).

⁴⁴ *City of Decatur v. Fisher*, 53 Ill. 407 (1870); *Wallace v. City of New York*, 18 How. Pr. 169 (1859); 64 C. J. S. 179, 189 (1950); Annot., 2 L. R. A. (N. S.) 512, 764 (1909).

⁴⁵ 12 Rob. La. 674, 43 Am. Dec. 239 (La. 1858).

⁴⁶ *Joseph v. City of Austin*, 101 S. W. 2d 381 (Tex. Civ. App. 1936).

⁴⁷ *Macord v. City of New Rochelle*, 179 Misc. 311, 39 N. Y. S. 2d 47 (Sup. Ct. 1942).

⁴⁸ *City of Covington v. Faulhaber*, 177 Ky. 623, 197 S. W. 1065 (1917); *City of Chicago v. Langlass*, 52 Ill. 256, 4 Am. Rep. 603 (1869).

⁴⁹ *City of Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590 (1868); *City of Parsons v. Lindsay*, 26 Kan. 426 (1881); *Herfurth v. Corp. of Washington*, 6 D. C. 288 (1868); *Bennett v. City of Marion*, 102 Ia. 425, 71 N. W. 360 (1897).

⁵⁰ Annot., *op. cit. supra* note 11.

⁵¹ 145 Fla. 109, 199 So. 575 (1941).

operated fire fighting equipment as to endanger people on the streets, the municipality was held liable as an individual. In nuisance cases exemplary damages generally are denied,⁵² but in one case they were allowed where there was a continuing nuisance, on the basis that there was implied malice which justified exemplary damages.⁵³

Where a statute expressly authorizes recovery of exemplary damages, no question of the right of recovery arises.⁵⁴ Since these statutes are in derogation of the common law, they should be strictly construed.⁵⁵ Several South Carolina cases interpreting a statute authorizing exemplary damages against a county where a lynching occurs say, however, that a broad and liberal interpretation must be given.⁵⁶ Statutes authorizing exemplary damages take a variety of forms.

In *Myers v. City and County of San Francisco*,⁵⁷ Plaintiff recovered under a statute authorizing exemplary damages for wrongful death. In at least one other state recovery of exemplary damages is allowed for ordinary negligence resulting in death.⁵⁸ Several statutes permit recovery of double and treble damages against municipal corporations,⁵⁹ and a Montana statute awarding interest from the time of damage was construed to allow exemplary damages.⁶⁰ If the statute is penal in nature, a municipal corporation is not liable for exemplary damages; but if the statute is characterized as remedial exemplary damages will be awarded.⁶¹ The test of penalty is whether redress is of a public wrong or a private wrong.⁶²

⁵² *City of Covington v. Faulhaber*, 178 Ky. 526, 199 S. W. 32 (1917).

⁵³ *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S. W. 2d 41 (1935).

⁵⁴ Annot., *op. cit. supra* note 11.

⁵⁵ 18 McQuillin, *op. cit. supra* note 3, sec. 53.65 at 295.

⁵⁶ *Earle v. Greenville County*, 215 S. C. 539, 56 S. E. 2d 348 (1949); *Green v. Greenville County*, 176 S. C. 433, 180 S. E. 471 (1935); *Kirkland v. Allendale County*, 128 S. C. 541, 123 S. E. 648 (1924); see also *Adams v. City of Salina*, 58 Kan. 246, 48 P. 918 (1897) where exemplary damages were not allowed in a case of lynching.

⁵⁷ 42 Cal. 215 (1871).

⁵⁸ *Coffee County v. Parrish*, 249 Ala. 226, 30 So. 2d 578 (1947).

⁵⁹ *Michaud v. City of Bangor*, *supra* note 5; *McManus v. City of Madison Heights*, 366 Mich. 26, 113 N. W. 2d 889 (1962); *Desforge v. City of West St. Paul*, *supra* note 5.

⁶⁰ *Wright v. City of Butte*, 64 Mont. 362, 210 P. 78 (1922).

⁶¹ *Michaud v. City of Bangor*, *supra* note 5.

⁶² *Ibid.*

Conclusion

Courts offer many reasons for exempting municipal corporations from liability for exemplary damages. These reasons can be classified as: Those concerning taxpayers; those concerning municipal employees; those concerning public funds, and those concerning the municipal function.

The burden of any judgment against a municipality eventually must fall on its taxpayers.⁶³ It is argued that since exemplary damages are awarded to punish the guilty party, allowing them against a municipality would be penalizing taxpayers who had no part in the wrong.⁶⁴ Another reason often advanced is that the people (taxpayers) to be punished by these damages are those who are to benefit from the example the damages should set.⁶⁵ A third argument is that the taxpayers should not be punished because they have little to say about municipal management⁶⁶ by a city government not always of their choice.⁶⁷ All of these arguments overlook one very important fact, which is that the municipal corporation is a legal entity,⁶⁸ as is a private corporation. The taxpayers bear the same relation to the municipal corporation as stockholders do to a private corporation. This legal entity, not the taxpayers, is to be punished; and this punishment is to set the example for other municipal corporations.

The next class of arguments concerns the employment relations of the municipal corporations. It is reasoned that it is unjust to punish a municipal corporation for the torts of its employees because the municipality exercises less dominion and control over its employees than does a private corporation.⁶⁹ Another argument claims that the deterrent element against municipal corporations is ineffective because it is assumed that the city officials *will* discipline the wrongdoing employee anyway,⁷⁰ whereas another argument claims that it is ineffective because the city officials *will not* discipline the employee because

⁶³ *City of Lawton v. Johnstone*, 123 Okla. 145, 252 P. 393 (1926).

⁶⁴ *Brown v. Village of Deming*, *supra* note 5.

⁶⁵ *Fisher v. City of Miami*, *supra* note 3; *annot., op. cit. supra* note 11.

⁶⁶ *Morris*, *Punitive Damages in Tort Cases*, 44 *Harv. L. Rev.* 1173 (1931).

⁶⁷ *Costich v. City of Rochester*, *supra* note 34.

⁶⁸ 37 *Am. Jur.* 618 (1941).

⁶⁹ *Costich v. City of Rochester*, *supra* note 34.

⁷⁰ *Fisher v. City of Miami*, *supra* note 3.

of political reasons.⁷¹ All employers, whether they be individuals, private corporations, or municipal corporations are responsible for the activities of their employees in pursuance of their master's business, under *respondet superior*. Were these valid arguments, they would apply to compensatory damages as to exemplary damages. This reasoning also ignores the concept that in order to be liable for exemplary damages, the principal must approve or ratify the wrongful act. Another argument is that an award of exemplary damages against a municipality would not deter other employees from wrongdoing.⁷² But these damages are designed to influence the conduct of employees, not that of other municipal corporations. The employees are personally liable for exemplary damages.

Another class of arguments concerns the public coffers. It is said that since evidence of the wealth of an individual is admissible as evidence in determining exemplary damages, evidence of the unlimited taxing power of the municipality would increase the damage award to infinity.⁷³ It is also stated that the allowance of exemplary damages would place an unbearable burden on small municipalities⁷⁴ and that it would impoverish the public treasuries without serving the admonitory function.⁷⁵ Statistics show that these fears are more theoretical than real.⁷⁶ Actually, the tort burden is smaller per capita in the smaller municipalities than it is in the larger cities.⁷⁷ And to consider the unlimited taxing power of a municipal corporation in fixing exemplary damages is as foolish as considering all the avenues of financing available to a private corporation.

The final class of arguments concerns the status of a municipal corporation in its public role. It is argued that because a municipality is a public corporation organized for political purposes, it should not be treated as a private corporation organized for profit.⁷⁸ It is claimed that any wrongful act by a

⁷¹ Morris, Punitive Damages in Tort Cases, *op. cit. supra* note 66.

⁷² Fisher v. City of Miami, *supra* note 3.

⁷³ *Ibid.*

⁷⁴ Warp, Tort Liability Problems of Small Municipalities, 9 Law & Contemp. Prob. 363 (1942).

⁷⁵ Morris, Punitive Damages in Tort Cases, *op. cit. supra* note 66.

⁷⁶ Warp, *op. cit. supra* note 74.

⁷⁷ *Ibid.*

⁷⁸ Costich v. City of Rochester, *supra* note 34; Hunt v. City of Boonville, 65 Mo. 620, 27 Am. Rep. 299 (1877); 38 Am. Jur. 370 (1941).

municipal employee is *ultra vires* and incapable of ratification by the municipality,⁷⁹ and that a municipality cannot be liable for a willful and malicious wrong.⁸⁰

Experience has shown, however, that the latter is largely a theory, and not always a fact.⁸¹

Any statement that a municipal corporation cannot authorize or ratify the acts of its agents is a fiction.

After all the arguments against holding municipal corporations liable for exemplary damages have been analyzed, it appears that none of them are very persuasive. The same principles that allow the recovery of exemplary damages against private corporations should be applied to municipal corporations.⁸²

. . . tort liability should be imposed upon the city just as upon a private corporation. . . .⁸³

These damages will set an example to all other municipal corporations. They will serve as a warning to them that unless they supervise their employee's activities closely, they may be liable for more than compensatory damages.

. . . it is mainly by means of fearless and independent juries awarding exemplary damages, that the rights of the citizens can be adequately protected, and violence and outrage suppressed.⁸⁴

⁷⁹ McDonald v. Butler, 10 Ga. App. 845, 74 S. E. 573 (1912); Hunt v. City of Boonville, *supra* note 78.

⁸⁰ City of Parsons v. Lindsay, *supra* note 49; Chicago v. Kelly, 69 Ill. 475 (1873).

⁸¹ Doyle v. City of Sandpoint, 18 Ida. 654, 112 P. 204, 32 L. R. A. (N. S.), 34 (1910).

⁸² City of Miami v. McCorkle, *supra* note 51.

⁸³ Albertsworth, Recognition of New Interests in the Law of Torts, 10 Calif. L. Rev. 461, 484 (1922).

⁸⁴ McGary v. City of Lafayette, *supra* note 45.