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Damages--Torts--Punitive Denied Against Joint Tort-Feasors

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bodies to lay excess levies. Less than thirty years ago the voters constitutionally limited tax levies. Their disapproval of a liberalizing amendment in 1956 indicated a reluctance to vest additional tax levying powers in governmental units. In the instant case the court squarely points out that the voice of the people must be expressed through constitutional language before the legislature may effect such tax levy increases.

Frederick Luther Davis, Jr.

Damages—Torts—Punitive Damages Denied Against Joint Tort-Feasors

P brought an action for libel against a newspaper publishing company and two individual defendants. During the course of the trial *P* offered evidence which shed light on the financial worth of the individual defendants, but *P* did not show the worth of the publishing company. Two jury verdicts were returned for *P*, one of $50,000 compensatory damages, and one of $50,000 punitive damages. *Held*, although in such a case *P* would ordinarily be able to recover punitive damages, when more than one party is made defendant, *P* waives his right to punitive damages. *Dunaway v. Troutt*, 339 S.W.2d 613 (Ark. 1960).

The principal case adheres to what is called a majority rule in deciding this case. This majority is said to hold that since a judgment for punitive damages against more than one party might actually result in greater punishment for one joint tort-feasor than another who is equally liable, plaintiff waives his right to punitive damages when he sues more than one party. The leading case adhering to this view apparently is *Washington Gas Light Co. v. Lansden*, 172 U.S. 534 (1898), which held in effect that there was no justice in allowing a recovery of punitive damages based on evidence of the ability to pay of only one of a number of defendants. However, the principal case failed to point out the Court's own reservations in the *Lansden* case when it was pointed out that the rule did not prevent the recovery of punitive damages in all cases involving joint defendants. The Court further said: "What the true rule is in such a case is not . . . certain." 172 U.S. 534, 553.

There are courts which unhesitatingly hold in accordance with the views expressed in the principal case, an example being the

Supreme Court of Missouri, which said in *Brown v. Payne,* 264 S.W.2d 341 (Mo. 1954), that it was prejudicial error to allow the recovery of punitive damages against joint tort-feasors.

The principal case cited, among others, *McAlister v. Kimberly-Clark Co.,* 169 Wis. 473, 173 N.W. 216 (1919), as authority for its position. However, the Wisconsin case said that where plaintiff had elected to sue more than one person, any judgment entered would be a judgment against all. Therefore, any *evidence* as to the financial status of one would effect the liability of all. Hence, the Wisconsin court felt that admission of such *evidence* would be prejudicial error. The Wisconsin court did not refuse the assessment of punitive damages against joint tort-feasors, but merely disallowed evidence of their wealth. This appears to be the situation in other cases cited by the Arkansas court in support of its holding. See *Singer Mfg. Co. v. Bryant,* 105 Va. 403, 54 S. E. 320 (1906), and *Smith v. Wunderlich,* 70 Ill. 426 (1873).

Of those states which have considered the precise question in the principal case, there are a number which hold that it is quite proper to return a verdict for punitive damages against joint defendants, and in so doing the jury could consider the ability of different ones to pay, and that what was competent evidence as to one tort-feasor would be competent as to all. *Tipps Tool Co. v. Hatfield,* 218 Miss. 670, 67 So.2d 609 (1953); *Edquest v. Tripp & Dragstedt Co.,* 93 Mont. 446, 19 P.2d 637 (1933); *Johnson v. Atlantic Coast Line Ry.,* 142 S.C. 125, 140 S.E. 443 (1927). In the last mentioned case, the court was very critical of the *Lansden* case, *supra,* which originally arose in South Carolina. The court in the *Johnson* case, *supra,* felt that the latter case created an uncertainty and would lead the jurors to consider defendants' apparent worth and allow a recovery of punitive damages under the guise of more extensive compensatory damages. In order to reach a fairer result, the *Johnson* case allowed an apportionment of punitive damages among the several defendants, a procedure which has been followed in some states. *Browant v. Scott Lumber Co.,* 125 Cal. App. 2d 68, 269 P.2d 891 (1954); *Edquest v. Tripp & Dragstedt Co.,* 93 Mont. 446, 19 P.2d 637 (1933); *Phelan v. Beswick,* 213 Ore. 612, 326 P.2d 1034 (1958).

It is apparent that West Virginia and other jurisdictions have allowed punitive damages against joint tort-feasors simply because

the issue was not raised. In *Hess v. Marinari,* 81 W. Va. 500, 94 S.E. 968 (1918), the West Virginia court said, in a case involving joint defendants, that it was proper to consider the social and pecuniary standing of the parties. *Accord, Pendleton v. Norfolk & Western Ry. Co.,* 82 W. Va. 270, 95 S.E. 941 (1918). See also *Binder v. G.M.A.C.,* 222 N.C. 512, 23 S.E.2d 894 (1943).

In the decision in the principal case, the court acknowledged that a malicious or wanton tort-feasor might go unpunished, but on the other hand the court felt that any other result would bring about an unjust punishment of one joint tort-feasor. The court concluded, in accordance with the well recognized principle of justice, that it is better for several guilty persons to go unpunished than to have one innocent person punished. But, should a wanton tort-feasor be under the classification of 'innocent person'? The principal case, in failing to differentiate between cases refusing evidence of wealth and those refusing recovery of punitive damages, may also not be in accord with the majority, as it purports to be. The better result probably is that reached in those states allowing an apportionment of punitive damages among joint tort-feasors. Such a result seems to solve the conflict between a meting out of punishishment on one hand and an undue punishment on the other.

Lee O'Hanlon Hill

Evidence—Admissibility of Tape Recordings Where Portions Are Inaudible

Appeal from a conviction on two counts of extortion. Appellant assigns as error the introduction into evidence of a recording, portions of which were inaudible. *Held,* where the inaudible portions cannot be deemed so substantial as to render the whole untrustworthy, the admission into evidence of a tape recording, portions of which were unintelligible, is not prejudicial error. *Cape v. United States,* 283 F.2d 430 (9th Cir. 1960).

The instant case is the latest in a field of evidence law which was virtually unknown in the not too distant past. Technical difficulties aside, the problem of partially inaudible recordings has been raised in a number of recent cases with the question of admissibility usually depending upon the amount of the indistinct portion and the trial court's discretion. Annot., 58 A.L.R.2d 1038 (1958). *Cape*