1-1-1996

Punitive Damages in Ancient Roman and Contemporary American Tort Law

Esther Julia Sonntag
University of Georgia School of Law

PUNITIVE DAMAGES IN ANCIENT ROMAN AND CONTEMPORARY AMERICAN TORT LAW

Esther Julia Sonntag

The University of Georgia

Alexander Campbell King Law Library

PUNITIVE DAMAGES

IN ANCIENT ROMAN AND CONTEMPORARY AMERICAN

TORT LAW

by

ESTHER JULIA SONNTAG

Approved:

Al Wan Date 7 12 96
Major Professor

Thomas A. Eaton Date 7/12/96
Chairman, Reading Committee

Approved:

Fordham L. Patel
Graduate Dean

July 22, 1996
Date

TABLE OF CONTENTS

I. INTRODUCTION:

Both the ancient Roman and the contemporary American Tort Law know a type of damages that is not intended to compensate plaintiffs for the harm they suffered but serves as a punishment to the tortfeasor.

In American law, the courts can award two distinct amounts of money: First, compensatory damages as a redress for the plaintiff's actual loss,[1] and additionally, in cases of aggravated circumstances, punitive damages as punishment and deterrence.[2] The ancient Roman Law knew even more extreme forms of remedies.

Can one track a trend to *abolish* punitive damages in both ancient Roman law and contemporary American law? In both legal systems there is (was) a trend to *restrict* them, most obviously in the United States with the discussions whether punitive damages were "A relic that has outlived its origins,"[3] the states' efforts in the 1980s to put caps on punitive damages and to enhance the requirements for awarding punitive damages and recent efforts on federal level to restrict them at least in product liability cases.

---

[1] including medical expenses, loss of earning capacity and pain and suffering.

[2] 22 AM. JUR. 2D *Damages* §733 (1988)

[3] James B. Sales and Kenneth B. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV 1117 (1984).

Does that mean that - as a rule - legal systems tend to provide harsh and strict remedies in their earlier stages? And that they abolish them in favor of mere compensation when they reach a "more civilized" stage?

If it turns out that the punitive element vanished in both systems when they reached a more developed stage, the conclusion may be permissible that this is necessarily so, that it has to be so in all cultures, even *because* those two systems are so different from each other.

I will conclude that this is not so, that in both legal systems there are trends to restrict the punitive element but that it has not been totally abolished in Roman Law and that U.S. cases show that the notion of punishment and deterrence plays an important role in the reasoning of courts when dealing with punitive damages in practice.

II. ROMAN LAW PART:

A. Basic question:

When examining the Roman Law, my basic question is: Can one track a development from blood-feud to talionic punishment as a remedy for torts and from talionic punishment to the payment of an amount of money, first punitive and later merely compensatory? To avoid confusion I will first define these terms.

B. Definitions:

a) Blood Revenge:

Blood revenge is a type of self-help. An injury is reacted upon by "beating back", taking revenge. This is not necessarily restricted to the two persons that initially are involved into the event. For example, if *Mr. David* beats *Mr. Goliath* and *Mr. Goliath* beats back, it may well be that next time, when *Mr. David* has his whole family with him when he meets *Mr. Goliath*, the whole family will beat up *Mr. Goliath*, whose family might in turn take revenge to the whole David family.

The characteristics of blood-feud can be summarized as follows:

- There is no recourse to legal proceedings.
- The whole occurrence is potentially limitless. More people than the original actors might be drawn into the process;

very likely no settlement will ever be reached.

- Mr. Goliath's initial injury is not made good.[4]

b) Talio:

The word "talio" derives from "*talis*", "of the same kind". The notion is known from the Bible: "An eye for an eye, a tooth for a tooth."[5] The injury to the victim is mirrored in the punishment of the tortfeasor.

- There can be, but need not be, a recourse to legal proceedings.

- The remedy is restricted to the tortfeasor and it is restricted as to its extent.

- Like with blood-feud, victims are not compensated for their injuries.[6]

---

[4] One might object that the social position of the Goliath family might eventually be weakened by a permanent injury to Mr. Goliath and that the revenge would therefore serve the purpose of restoring the balance of power between the two families. But even if the injuries sustained by both sides by chance are of the same extent, one has to distinguish two injuries here: First, the physical injury itself and second the consequential damages to the power status of the victim's family. The latter one may by chance (though not necessarily) have been made good by the revenge, but the first one still is uncompensated.
Likewise, the "satisfaction of having taken revenge" is not a genuine compensation as with monetary compensation. In the case of monetary compensation, the plaintiff 's loss is, as far as possible, offset by an affirmative financial benefit and additionally the plaintiff might be satisfied that the tortfeasor suffered a loss by the payment, whereas in the case of revenge this satisfaction is the only thing the plaintiff gets for the physical injury.

[5] Lev. 24:17-21, *see* also Exodus 21:24-25.

[6] *See supra* note 4.

c) Payment of Damages:

In contrast, if law provides for the payment of damages, the victim of a tort gets an affirmative financial benefit. This benefit constitutes at the same time a loss to the tort-feasor.

If the damages merely offset the disadvantages to the victim by the tort they are compensatory. This is so even in the case of damages for pain and suffering, though unlike with out-of-pocket expenses we can not create a *status quo ante*. But the increase in wealth can offset the emotional harm as far as it is possible to compensate for emotional harm at all.

If a part of the damages exceeds the amount of the harm done, this part is punitive. Punitive damages are awarded in cases of aggravated circumstances, if the conduct of the tortfeasor was "outrageous" or "in conscious disregard of the interests of others,"[7] "malicious,"[8] "willful or wanton,"[9] that is, in situations, in which there is a special need for punishment and deterrence.

This can be summarized as follows:

blood-revenge -------- merely punitive, unlimited

talio---------- merely punitive, limited

payment of damages --- with a punitive element

payment of damages --- solely/ mainly compensatory

---

7 RESTATEMENT (SECOND) OF TORTS § 908(1) and (2)(1977).

8 Cherry-Burrell Co. v. Thatcher, 107 F.2d 65 (9th Cir. 1940).

9 Bull v. McCuskey, 615 P.2d 957 (Nev. 1980); Sebastian v. Wood, 66 N.W.2d 841 (Iowa 1954).

C. Is there Evidence for Blood Revenge?

Since written evidence about the time before the Twelve Tables is very rare, we have no direct evidence about blood-revenge. But it might be possible to draw conclusions from later concepts of law which contain an element of self-help. Self-help is the solution of a conflict without recourse to legal proceedings. Unlike in situations of self-defense or necessity in which there is not sufficient time to get protection by the courts, self-help denotes situations in which there is no emergency, but the actors do not try to recur to legal proceedings, either because an authority to supervise the process does not yet exist or for other reasons.

a) Philosophical Background:

It is disputed whether there ever was a time in which no legal authority existed. Some assume that, originally, conflicts were dealt with by violence of all individuals against each other and that later the state gradually took over the monopoly of exercising force. This reminds of notions of the 18th and 19th century of a social contract. Others claim that rules necessarily developed as soon as individuals gathered in social groups.

The proponents of the first category argue that in early Rome the *gentes* revenged harm done to one of their

members and thus solved conflicts by self-help.[10] According to them, the state later took over that authority and did not allow the exercise of force unless the courts had recognized by a formal rite[11] that the party exercising force had a right to do so. They emphasize elements in the legal proceedings of a later time which they view as remains of self-help such as the fact that the execution of judgments was done by the plaintiff until at least the 2nd century B.C.[12]

The proponents of the other theory argue that legal rules existed from the moment in which social groups emerged.[13] Such rules first regulated conflicts within the group and later were transferred to conflicts between the *gentes*.[14] According to this theory, the groups abided by those rules because they were convinced that a divine power had imposed them.[15] The outcome of a conflict was not regarded as a settlement because it reflected the current

---

10 WOLFGANG KUNKEL, UNTERSUCHUNGEN ZUR ENTWICKLUNG DES ROEMISCHEN KRIMINALVERFAHRENS IN VORSULLANISCHER ZEIT 42 (1962); Giuseppe Luzzatto, *Von der Selbsthilfe zum roemischen Prozess*, 73 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FUER RECHTSGESCHICHTE, ROMANISTISCHE ABTEILUNG (SZ) 29, 32, 38-39 (1956); HERBERT HAUSMANINGER & WALTER SELB, ROEMISCHES PRIVATRECHT 331 (3d ed. 1985); Dietrich V. Simon, *Begriff und Tatbestand der Iniuria*, 82 SZ 132, 145-46 and 159 (1965).

11 Luzzatto, *supra* note 10, at 50.

12 KUNKEL, *supra* note 10, at 131-33; Simon, *supra* note 10, at 145-46 and 159; that both is a remnant of self-help is admitted even by one of the opponents of this theory: Max Kaser, *Praetor und iudex im roemischen Zivilprozess*, 32 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS (TR) 329, 361 (1964) [hereinafter Kaser TR].

13 MAX KASER, DAS ROEMISCHE PRIVATRECHT, Erster Abschnitt (vol. I), § 4 II, at 21 (1955) [hereinafter Kaser RP]; MAX KASER, DAS ROEMISCHE ZIVILPROZESSRECHT, § 3 III, at 21-22 (1966)[hereinafter Kaser ZP]; Kaser TR, *supra* note 12, at 337-40.

14 Gerardo Broggini, *Vindex und Iudex*, 76 SZ 113, 130-31 (1959).

15 *Id.* at 132; *see* Kaser TR, *supra* note 12, at 336-37.

balance of power between the parties but because the contest of the parties was decided by a kind of ordeal.[16] They view the ordeal and the oracle as the earliest way of finding law and claim that more rational ways of finding law were invented only later.[17] Therefore, the oath in the *legis actio sacramento* is, according to them, a remainder of the earliest roots of law-making and not an anomaly. Apart from other, more convincing explanations of the role of the oath in legal proceedings,[18] I doubt that "the fact that the authority is not embodied in a person" or a court "does not mean that there is no authority."[19] Why should the stronger party abide by the law if there is no authority that will immediately answer misconduct by a sanction? Can we assume from our own experiences with mankind that the divine law will always be followed?

Even Kaser - inconsistently with his own theory - mentions that a king who imposed a death penalty upon a citizen would have had to fear the revenge of the *gens* of the convict.[20] So the dispute seems to boil down to the question whether blood-revenge was the rule or the exception, and does not need to be dealt with in detail.[21]

---

16 Broggini, *supra* note 14, at 131-32; for further discussion see Kaser RP and Kaser ZP, *supra* note 13.

17 Kaser TR, *supra* note 12, at 337-38.

18 As a means to achieve a desired result by way of a "dodge" when the existing system allows no other way to achieve it. Alan Watson: *Curses, Oaths, Ordeals, and Trials of Animals*, unpublished.

19 Broggini, *supra* note 14, at 132.

20 Kaser TR, *supra* note 12, 339-40.

21 For a further discussion see Kaser ZP, *supra* note 13, § 3 II 3, at 19-21.

b) Remedy for the Killing of a Person:

Traces of an old concept of self-help seem to have remained in the remedy for the killing of a person. Two rules have been passed down to us from the time of the roman kings: "*Qui hominem liberum dolo sciens morti duit, parricidas esto*"[22] and "*si telum manu fugit magis quam iecit, aries subicitur.*"[23] According to *Kunkel*, the meaning of "*parricidas*" is not restricted to the murderer of a relative but means every murderer.[24] *Kunkel* views the *parricidas* clause as a provision restricting the application of the remedy for murder to intentional murder, whereas in the case of accidental murder a ram had to be surrendered to the *agnates*[25] of the deceased. In the *parricidas* clause, it was not necessary to mention the remedy because it was known to everybody. As to this remedy, *Kunkel* draws conclusions from the remedy for accidental killing: The "*si telum*" clause provides that the ram shall "*subicitur,*" "be given as a

---

22 Sexti Pompei Festi de Verborum Significatu quae supersunt cum Pauli Epitome (Wallace M. Lindsay ed., 1913) (hereinafter: Festus//page of Lindsay-edition//keyword), Festus 221 (parricida), translation: The one who intentionally kills a freeman, shall be a murderer.

23 XII T. 8,24a, in: FONTES IURIS ROMANI ANTEIUSTINIANI (S. Riccobono et al. eds., 1968), translation: "If a weapon sped accidentally from one's hand, rather than if one has aimed and hurled it, to atone for the deed a ram is substituted as a peace offering to prevent blood-revenge."(this is a quite free translation in: ANCIENT ROMAN STATUTES (Allan C. Johnson ed. and transl., 1961). As to the date of origin see Kunkel, *supra* note 10, at 39 & n.137. *Similarly* Servius, *In Vergilii Eclogas*, 4,43 *in* FONTES IURIS ROMANI ANTEIUSTINIANI, *supra*, at 13-14: *"In Numae legibus cautum est, ut, si quis imprudens ocidisset hominem, pro capite occisi agnatis eius in contione (in the original: cautione) offerret arietem.*

24 KUNKEL, *supra* note 10, at 39-40 (because one can not assume that the *quaestores parricidii* which are mentioned in the Twelve Tables were merely in charge of convicting murders of relatives).

25 Male blood relations on the father's side.

substitute." This is confirmed by *Festus:*[26] *"[I]n eodem libro Antistius ait dare arietem, qui pro se agatur, caedatur."*

The ram was a substitute for the tortfeasor himself. The blood-revenge was done to the ram instead of the tortfeasor.[27]

Others tried to explain the ram as a kind of *wergild*, as a compensation for the death of the deceased like that one known to the ancient Germans.[28] But the flaw of this explanation is that the value of the ram would have been insufficient as a compensation.[29]

Likewise, it can not be regarded as a sacrifice to reconcile the gods, who were offended by the murder.[30] Such a sacrifice would have been sacrificed directly to the gods by the tortfeasor instead of been surrendered to the *agnates*.[31]

---

26 Festus, 476 (subigere arietem).

27 KUNKEL, *supra* note 10, at 41; *id.* at 129: even an obligation of the heir to take revenge, otherwise not allowed to inherit: D.29,5,9; WITTMANN, DIE KOERPERVERLETZUNG AN FREIEN IM KLASSISCHEN ROEMISCHEN RECHT, at 20 (1972).

28 Alfred Heuss, *Zur Entwicklung des Imperiums der roemischen Oberbeamten*, 64 ZS 57, 98 (1944); more information about wergild: Ernst Mayer, *Germanische Wergelder sowie Weiderechte und roemische Multa*, 8 TR 1.

29 KUNKEL, *supra* note 10, at 41.

30 Cincius, cited by Festus, 470 (subici aries); MAX KASER, ALTROEMISCHES IUS 50 (1949); E. Wieacker, *Zwoelftafelprobleme*, REV. INT. DES DROITS DE L'ANTIQUITE, 3. Ser., 3 (1956) 459, 480-81; *see also* Genesis 22:13 (vicarious sacrifice).

31 Kunkel, *supra* note 10, at 41; Wittmann, *supra* note 27, at 20.

c) Manifest Theft at Night, XII T. 8, 12/13:

A thief who commits a theft by night may be killed by the owner if the thief defends himself by a weapon and after the owner has shouted and summoned the neighbors.[32] But a thief who commits theft by night may be killed lawfully by the owner in any case,[33] that is, even if there is no self-defense situation. The mere fact that the theft occurs by night - and therefore is regarded as more dangerous - is sufficient. The owner is allowed to enforce the law without recourse to legal proceedings.[34] This evidences that a means of self-help actually was in use.

One might object that this was a provision without practical relevance. We have no evidence that it ever happened. It might be comparable to sentences for multiple life-imprisonment in contemporary U.S. law.

---

[32] XII T. 8,13; "*Luci... si telo defendit... endoque plorato.*"; Cicero, *M. Tulli Ciceronis pro M. Tullio oratio, in*: M. TULLI CICERONIS ORATIONES (Oxonii e typographeo Clarendoniano ed., reprinted 1956) vol. 6 (hereinafter Cic. pro Tullio) 20,47 : "*Atque ille legem mihi se XII tab. recitavit, quae permittit, ut furem noctu liceat occidere et luce, si se telo defendat.*" Cic. pro Tullio 21,50 : " *Furem... luce occidi vetant XII tab. .. nisi se telo defendit, inquit; etiamsi cum telo venerit, nisi utetur telo eo ac repugnabit, non occides; quod si repugnat,* 'endoplorato', hoc est, conclamato, ut aliqui audiant et conveniant." (*emphasis added*).

[33] XII T. 8,12: " *Si nox furtum faxsit, si im occisit, iure caesus esto.*" Gaius D. 9.2.4.1: "*Lex duodecim tabularum furem noctu deprehensum occidere permittit (ut tamen id ipsum cum clamore testificetur): interdiu autem deprehensum ita permittit occidere, si is se telo defendat, ut tamen aeque cum clamore testificetur.*"

[34] only an *addictio* by the *praetor* was required: AULUS GELLIUS, NOCTES ATTICAE (P.K. Marshall ed., 1968) (hereinafter Gell.) 11,18,8; GAIUS, INSTITUTIONES (E.A. Whittuck ed., Edward Poste transl., 1991) (hereinafter G. Inst.) G. Inst. 3.189.

On the other hand, the putting to death of a thief is repeatedly mentioned by Roman authors which makes it more likely that it actually was in practice.

Cicero:"*[U]t furem noctu liceat occidere . . .*"[35]

Gaius: "*Lex duodecim tabularum furem noctu deprehensum occidere permittit . . . .*"[36]

Ulpian: "*Proinde si furem nocturnum, quem lex duodecim tabularum omnimodo permittit occidere . . . .*"[37]

Gellius: "*XII tabulis scripserunt . . . . Nam furem, qui manifesto furto prensus esset, tum demum occidi permiserunt, si aut, cum faceret furtum, nox esset, aut interdiu se, cum prenderetur, defenderet.*"[38]

There also is another text which just mentions that the fur manifestus was assigned to the creditor. It is questionable if this disproves the theory that the thief was killed.

"*Poena manifesti furti ex lege XII tabularum capitalis erat. Nam liber verberatus addicebatur ei qui furtum fecerat. Utrum autem servus efficeretur ex addictione, an adiudicati loco constitueretur, veteres quaerebant . . . . Sed postea inprobata est asperitas poenae et tam ex servi*

---

35 Cic. pro Tullio, *supra* note 32.

36 Gai. D. 9.2.4.1 *supra* note 33 "The law of the XII Tables permits one to kill a thief caught in the night . . ."

37 In: COLLATIO LEGUM ROMANARUM ET MOSAICARUM (Moses Hyamson ed. and transl., 1913) (hereinafter Collatio) 7,3,2 and 3: translation: "If then, a thief coming by night has been killed, as is allowed by the law of the Twelve Tables in all circumstances . . . ."

38 Gellius 11,18,7.

persona quam ex liberi quadrupli actio praetoris edicto constituta est."[39]

At the first glance it seems to prove that there was only slavery or debt-servitude. But it talks only about *furtum manifestum* in general. But there is also a further Gellius-passage: *"Nisi duram esse legem putas, quae . . . furem manifestum ei, cui furtum factum est, in servitutem tradit, nocturnum autem furem ius occidendi tribuit."*[40] The manifest thief is given into slavery but the one at night is permitted to be killed. When talking about the *"fur manifestus"* Gellius apparently means the ordinary thief by day and does not include the thief caught by night whom one could consider as "manifest" as well.[41] This makes it more likely that the Gaius-passage above either deals with the ordinary theft during the day and the thief caught by *quaestio lance et licio,*[42] especially because otherwise the two Gaius-fragments above would be inconsistent with each other.

---

[39] G. Inst. 3.189: "The punishment provided by the law of the Twelve Tables for manifest theft was capital; a freeman was first scourged and then assigned, by judgment of the magistrate, to the person from whom he had stolen (whether made his slave by the assignment or reduced to the condition of an insolvent judgment debtor, was a subject of controversy among the republican lawyers). . . . But later ages disapproved of the severity of the punishment, and theft, whether by a slave or by a freeman, was punished by the praetorian edict with fourfold damages."

[40] Gell. 20,1,7.

[41] *Similarly* ALAN WATSON, THE LAW OF OBLIGATIONS 231-33 (1965)[hereinafter Watson, Obligations]; ALAN WATSON, THE LAW OF ANCIENT ROME 76 (1970) [hereinafter Watson, Ancient Rome]; ALAN WATSON, ROMAN PRIVATE LAW AROUND 200 B.C. at 150 & n.7 (1971)[hereinafter Watson, 200 B.C.].

[42] XII T. 8,15b; G. Inst. 3.192; as to a thief caught by *quaestio lance et licio* see David Daube, *Some Comparative Law: Furtum Conceptum*, 15 TR 48, 68-71 and 74.

Besides, unlike executing multiple life sentences, it is feasible to kill a tortfeasor.

It is therefore more likely that the death penalty actually was practical, at least in ancient times. The later, more lenient line will be discussed infra, in chapter F, a).

d) Execution of Judgments in the Legisaction Procedure:

Besides, the fact that even in cases in which a judgment was necessary the *execution* of the judgment was done by the plaintiff supports the theory that at some earlier point of time self-help was a common means of solving conflicts. The state apparently took over the monopoly of exercising force only gradually, first requiring legal proceedings before the self-help could be executed and later, with the emerging of the *iucicia publica*,[43] taking over the monopoly completely.

aa) Provisions about the execution regarding the payment of an amount of money, XII T. 3,1-6:

While with actions *in rem* the creditor could take hold of the object informally,[44] with the actions *in personam* the debtor had a deadline of thirty days to settle the matter by payment or by composition.[45] When the deadline had expired the creditor was to be led into court for the *legis actio per manus iniectionem*, in which the creditor lays his hand

---

43 Kunkel, *supra* note 10, at 96-97 and 134.
44 Kaser ZP, *supra* note 13, § 20 I, at 94.
45 XII T. 3,1.

on some part of the debtor's body and speaks the formula: *"Quod tu mihi i[u]dicatus (sive "damnatus") es sestertium decem milia, quandoc non solvisti, ob eam rem ego tibi sestertium decem milium iudicati manum inicio."*[46] When the *praetor* had checked that all prerequisites had been met and if the debtor did not satisfy the judgment or somebody acted as a *vindex* to help him[47] the *praetor* gave the creditor the *addictio*[48] and the creditor led the debtor away. Within a 60-day period, the debtor was held in bonds by the creditor and the amount for which he could be redeemed was made public.[49] If the debtor was not redeemed and the parties did not make a settlement he was put to death or sold into slavery across the Tiber River.[50]

But this can not serve as an example for punitive elements in Roman Tort Law. Since the Twelve Tables provided for this kind of execution not only for delictual but also for contractual claims it can not be regarded as a punishment for the initial wrongdoing.[51]

Besides, the execution of judgments takes place on a secondary stage. Punitive elements have to be looked for in the initial remedy, not in the execution threatened if the

---

46 G. Inst. 4.21.

47 XII T. 3,3.

48 Only Gell. 20,1,44 reports that an addictio had to be given.

49 XII T. 3,3-5. The Twelve Tables even specify the weight of the fetters and the food which the debtor could claim.

50 XII T. 3,5.

51 It is disputed whether it was a punishment for the failure to pay. It seems to have been rather a means to make the debtor pay, though Gellius 20,1,47-48 speaks of "*capitis poena*", *see* Kaser ZP, *supra* note 13, § 20 I, at 94, and for a further discussion *see* references in Kaser RP, *supra* note 13, § 39, at 128-131.

debtor does not comply with the judgment. It is relevant only because it contains traces of self-help reflecting an earlier stage of development.

Since we do not have any evidence that the debtor was put to death or sold into slavery, it is possible that it did not occur.[52] But we have evidence[53] that debtors had to work off the sum as private prisoners, debt-serfs, of the creditor.[54]

The relevant aspect is that XII T. 3, 1-6 are evidence that the execution of judgments was done by the creditor privately. The fact that force was exercised by the creditor and not by the state intimates that originally it was for the party which was wronged to obtain justice by themselves.

Besides, in that context, it is interesting that with the legis actions *in personam* the creditor was allowed to take hold of the debtor physically, not only of his assets. It was not until the introduction of the formulary procedure that an execution into the assets[55] was possible as an alternative to the personal execution.[56] Traces of

---

52 *See* Alan Watson, ROME OF THE XII TABLES 123 (1975); Kaser ZP, *supra* note 13, § 20 VIII 1, at 102.

53 TITUS LIVIUS, AB URBE CONDITA LIBRI (W. Weissenborn et al. eds., 1963) (hereinafter Liv.) 2,23,6; 2,35,1; 6,14,3/4/10; 6,15,9; 6,20,5/6; 6,27,6-8; DIONYSIUS OF HALICARNASSUS, ANTIQUITATES ROMANAE (Carolus Jacobi ed., 1885) 6,26; 6,29; 6,58-59; 6,82; 16,5.

54 Though the death penalty might reflect a practice of a period of time prior to the written evidence handed down to us, and Livy and Dionysius might refer to a practice which later came to be used.

55 into all the assets by way of bankruptcy proceedings.

56 Kaser ZP, *supra* note 13, § 20 VIII 2, at 104 & n. 87; Kaser RP, *supra* note 13, § 56 I, IV, at 296-97 and 300.

self-help are more obvious in the physical seizure of the creditor than in the execution into the assets.

bb) execution of judgments in general:

XII T. 3, 3 and 5 presuppose an adjudged amount of money. But the Twelve Tables also provide for different remedies such as the death penalty for the tortfeasor[57] or talio[58] for the execution of which the provisions of XII T. 3,1-6 do not make sense. It can be assumed that no 30 day's grace was given to the tortfeasors in these situations.[59]

Who executed the remedy in those cases? *Gaius*[60] reports that the fur manifestus at once was turned over by *addictio*[61] to the one against whom the theft was committed for being scourged and put to death. Again, the execution was done by the person who originally was wronged. Kunkel proposes that in the time of the Twelve Tables there was not yet a distinction between criminal law and private (tort) law[62] and that the remedy generally[63] was executed by the party which was wronged.

He therefore calls the type of proceedings "private criminal proceedings" and views the role of the courts as

---

57 XII T. 8,24b; 8,12/13.
58 XII T. 8,2.
59 For the *fur manifestus*: Kaser ZP, *supra* note 13, § 20 IV, at 97.
60 3,189.
61 *See* also Gell. 11,18,8.
62 *Supra* note 10, at 130-31 (based upon a text by Livy); there were genuine criminal proceedings only for treason and breach of official duty, at 130; at 114: The first table of the Twelve Tables contains provisions about procedural law without distinguishing between types of proceedings.
63 With few exceptions, *see* Kunkel, *supra* note 10, at 43.

that of an institution which merely checks and confirms that there is a situation justifying self-help by the plaintiff.[64] Kunkel regards it as likely that a system of private revenge supervised by the courts was in use up to the times of the second Punic War. According to *Livy*, after the battle of Cannae (216 B.C.), the dictator M. Junius Pera needed troops and promised the "*pecuniae iudicati*," the debt-serfs, to make their masters release them from the debt-servitude if they would serve as soldiers in the army.[65] Kunkel proposes that not until the *iudicia publica*, a rough equivalent to contemporary criminal proceedings,[66] became more common during the 2nd century B.C.[67] the state took over the task of executing judgments.

Similarly, others claim that the execution of judgments was up to the end of the classical period a private action by the plaintiff which was merely supervised by the courts.[68]

---

64 Kunkel, *supra* note 10, at 132; *see also* Kunkel's theory that the *legis actio sacramento* was used for criminal matters as well, *id.* at 102-103 and 106.

65 Kunkel, *supra* note 10, at 104-106 & n. 380; reference to Liv. 23,14,2-3. Besides, from a Cato-reference in Festus/ 466/"sacramento" he draws the conclusion that the XII table provisions were valid law up to the first decade of the second century B.C..

66 *See* August F. v. Pauly, 4 PAULY'S REALENCYCLOPAEDIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFTEN (Georg Wissowa, ed., 1901) *Crimen*, column 1712-1728 and *Delictum*, column 2438-2439.

67 Kunkel, *supra* note 10, at 96-97 and 134, the introduction of numerous permanent *quaestiones* was not possible before the *lex Sempronia iudicaria* (by C. Gracchus, 122 B.C.), which allowed the *equites* to become judges, a function which previously was restricted to the then-existing number of 300 senators.

68 Kaser ZP, *supra* note 13, § 1 IV 2, at 8; Simon, *supra* note 10, at 159; *similarly* LEAGE'S ROMAN PRIVATE LAW 394 (A.M. Prichard ed., 3rd ed. 1961).

e) Summary: Evidence for blood-revenge:

From all these examples, the delivery of a ram to the *agnates*, the right to kill the *fur manifestus*, and the role of the plaintiff in the execution of judgments in the *legisaction* system[69] can serve as indirect evidence of an earlier stage of self-help, the remains of which are reflected in those provisions dating from a later time which were discussed above.

D. Talio in the XII Tables:

Besides, there are two express provisions about talio in the Twelve Tables.[70] Though talio is already a restriction when compared to blood-revenge, it nevertheless is based upon the principle of self-help.

a) As a Remedy for Physical Injury:

XII T.8,2 provides: "If anyone has broken another's limb[71] there shall be retaliation in kind, unless he compounds for compensation with him."[72]

---

69 the formal legal procedure named "actions of the law," "*legis actiones*."

70 A third one could be XII T. 8,24b.

71 There are different views as to what *membrum ruptum* means:
1. Severing of a limb
2. Same as "corrumpere": to injure
3. Serious injuries which lead to permanent damage to the limb, disability.

For a discussion see Wittmann, *supra* note 27, at 3-4.

72 in: ANCIENT ROMAN STATUTES (Allan C. Johnson ed. and transl., 1961).

b) As a Remedy for Burning a Building:

XII T. 8,10 provides: "Whoever destroys by burning a building or stack of grain placed besides a house...shall be bound, scourged and *burned* to death." (*emphasis added*).[73] The harm is mirrored in the punishment.

Watson objects[74] that there was no evidence that talio ever was in practice. He views the provision as a mere threat to make the defendant more willing to compromise and work off the amount.

On the other hand, for a threat to be effective, it has to be at least probable to the defendant that the threatened sanction will actually be carried out. Besides, several authors cite the XII-table provision, treating it either as valid law or as historically valid law:

Priscian:[75] "*Si quis membrum rupit aut os fregit, talione proximus cognatus ulciscitur.*"

Gaius:[76] "*Poena autem iniuriarum ex lege XII tab. propter membrum quidem ruptum talio* erat."*(emphasis added)* (treating it as historical law)

---

[73] Translation *see supra* note 69; this is the remedy applicable to an intentional act; as to the accidental burning of a building see the continuing text of XII T. 8,10.

[74] *Supra* note 52, at 123-24; Alan Watson, *Personal Injuries in the XII Tables*, 43 TR 213, 219 (1975) (though admitting that the Gellius passage 20,1,38 which reports that the punishment was limited to a fine "is best taken not to refer to the XII tables but to a subsequent age" at 219); *see also* Simon, *supra* note 10, at 176-77 with reference to Gell. 16,10,18.

[75] PRISCIAN, INSTITUTIO DE ARTE GRAMMATICA (Henricus Keil ed., 1961) vol. 2, at 6,13,69.

[76] G. Inst. 3.223.

Cato:[77] *"Si quis membrum rupit aut os fregit, talione proximus cognatus ulciscitur."*
This makes it unlikely that the provision was not practical and was a failure[78] by the decemviri.

Since the Twelve Tables also contain provisions about payment of damages it is questionable whether one can draw the conclusion that those remedies occurred in a sequence or whether they could have been in use contemporaneously.

E. Provisions about Damages in the Twelve Tables:

"Manu fustive si os fregit libero, CCC, si servo, CL poenam subit sestertiorum."[79]
"Si iniuriam (alteri) faxsit, viginti quinque poenae sunto."[80]

This creates the confusing picture that the maiming of a limb at least potentially was punished by talio, whereas the breaking of a bone was fined by 300 asses, and all other injuries by only 25 *asses* though the breaking of a bone can be equally serious as *membrum rumpere* in the sense of "*corrumpere*[81] ."[82] One explanation which might be given is that the *membrum ruptum* clause is a remnant from a more

---

77 CATO, ORIGINES IV, in: CATON, LES ORIGINES (Martine Chassignet ed. and transl., 1986) = VI,5 in the Jordan-edition.
78 Watson, *supra* note 52, at 124.
79 XII T. 8,3
80 XII T.8,4
81 *See supra* note 68.
82 for a discussion of these problems see Wittmann, *supra* note 27, at 4; Watson, *supra* note 73, at 213-22; Elemer Polay, *Iniuria-Tatbestaende im archaischen Zeitalter des antiken Rom*, 101 SZ 142, 153-55 and 160-62 (1984).

primitive stage of development which does not fit into the system of remedies of later times.[83]

But examples from other cultures show that severe and less severe remedies take turns.[84] The Laws of Lipit-Istar, king of Isin in the 19th century B.C., knew talionic punishment.[85] Later, the Laws of Esnunna (about 18th century B.C.) punished bodily injuries to freemen by imposing a fine.[86] This fine recurs in the Code of Hammurabi (in the 17th century B.C.): One *mina* of silver for putting out an eye[87] and 1/3 *mina* for knocking out a tooth.[88] But the difference is that it applies only to the injury of a member of a lower class of the population, to a *muskenum*.[89] Injuries to freemen of a higher rank (*awilum*) are punished by talio.

Similarly, where the Laws of Esnunna 42 impose a penalty of ten *shekels* of silver for a slap into the face of a freeman, the Code of Hammurabi § 204 provides for ten *shekels* only if a *muskenum* slaps a *muskenum*. In all other cases, if an *awilum* slaps his peer[90] or if a *muskenum* slaps

---

83 *See* P.B.H. Birks, *The Early History of Iniuria*, 37 TR 163,179-81 (1969): ("the retention of talio"); *id.* at 208: ("the outdated provisions for membrum rumpere and os frangere").

84 Reuven Yaron, *Enquire now about Hammurabi, Ruler of Babylon*, 59 TR 223-38 (1991).

85 Yaron, *id.*, at 230.

86 Laws of Esnunna 42, *see* Yaron, *supra* note 83, at 230.

87 CODE OF HAMMURABI § 198, in: THE BABYLONIAN LAWS 77 (Godfrey R. Driver et al. eds. and transls., 1955, reprinted 1960) (hereinafter CH).

88 CH § 201.

89 *See* transcription in Driver-edition, *supra* note 86: "MAS.EN.KAK" = "*muskenum*". As to the meaning of the term *muskenum see* Yaron, *supra* note 83, at 228.

90 CH § 203.

a higher-ranking person, an *awilum*,[91] there is a penalty of one *mina* (sixty *shekels*) of silver, respectively sixty stripes with a whip of ox-hide. Yaron points out that this is, in case of § 203, the sixfold amount compared to the Laws of Esnunna, and in the case of § 204, the punishment could even cause the death of the tortfeasor.[92]

A further example is the remedy for the concealment of a fugitive slave, a delict which is comparable to theft. In the Laws of Lipit-Istar 12, the tortfeasor had to furnish a further slave[93] while in the case of ordinary theft the culprit was put to death.[94] According to the Laws of Esnunna 49, the concealer of a fugitive slave had to furnish a further slave.[95] But Hammurabi in §§ 16 and 19 provided for the death of the concealer.

There are even two strikingly similar provisions about the theft of a boat and of a pig.

One is a text in Sumerian, FLP 1287:[96]

FLP iii 10-12: "If (a man) has stolen a boat, he shall double (its value) as compensation.

13-15 If (a man) has stolen a pig, he shall double (its value) as compensation."

The same situation shows up later in the Code of Hammurabi § 8: "If a man has stolen an ox or a sheep or an ass *or a pig*

---

91 CH § 202.
92 Yaron, *supra* note 83, at 230-31.
93 Yaron, *supra* note 83, at 230.
94 THE BABYLONIAN LAWS, *supra* note 86, at 306.
95 Yaron, *supra* note 83, at 229.
96 *See* Yaron, *supra* note 83, at 229.

or a boat: . . . (ii) if (property) of a muskenum[97] he shall replace tenfold. (iii) If the thief has not (the amount) to be given, he shall be put to death." (*emphasis added*)

Identical as the regulated situation is, the punishment is, without doubt, much more severe.

But the ancient orient also knew more severe as well as more lenient remedies. Provisions in the Hittite Code, which is generally acknowledged to date from the 14th century B.C.[98] deal with physical injuries and theft as well: The knocking out of a tooth or the blinding of a freeman is sanctioned by twenty half-*shekels* of silver. The provision expressly mentions that the earlier remedy was payment of one pound of silver.[99]

For theft, there are flexible remedies: "If he steal much, they shall impose on him much; if he steal little, they shall impose on him little, . . ."[100] As a guideline, § 94 gives twelve half-*shekels* of silver. On the other hand, a thief of an oxen has to give fifteen oxen (formerly even thirty).[101] Severe and less severe remedies are found even within the same code.

---

97 In the sense of "anybody," because *muskenum* is not opposed to *awilum* here, *see* Yaron, *supra* note 83, at 230.

98 *See* J.M. POWIS SMITH, THE ORIGIN AND HISTORY OF THE HEBREW LAW, appendix IV, at 246 (Arnold Walther transl., 1931); as to the date of origin, *see id.* at 274.

99 § 7.

100 § 94.

101 § 57.

The Bible regulates the remedies for physical injuries as well: If the injury does not have permanent consequences, the tortfeasor merely has to compensate the injured for not being able to work. If there is a permanent injury, Exodus 21:18-20 provide for talio.

These provisions show that the punishment by Hammurabi was in many cases more serious than that of his predecessors, though his code was composed within basically the same cultural environment.[102] Later times followed partially a more lenient and partially a more severe line.[103]

The conclusion that can be drawn from that for the Roman law is that the *membrum ruptum* clause in XII T. 8,2 does not necessarily have to be classified as a remnant from a more primitive stage. Talio and damages, maybe even various forms of self-help could have existed contemporaneously in Roman Law.

The problem of the alleged inconsistency in the system of remedies of the Twelve Tables has to be solved otherwise. Here is not the place to discuss this issue in detail. One of the possible explanations is that *membrum rumpere* means the severing of a limb (which does not necessarily cause disability, for example in the case of knocking out a tooth). Thus, there would be special provisions for this and for the breaking of a bone, whereas the *iniuria*-povision

---

102 *See* Yaron, *supra* note 83, at 229.

103 If the Hittite laws, drafted in an admittedly different culture, may be taken as an example.

would be applicable to all other physical injuries.[104] At least in the ordinary course of matters, the severing of a limb would be more serious than the breaking of a bone and these two injuries would be more serious than those regulated by the *iniuria*-provision.

F. Later Development and the Lex Aquilia:

a) furtum manifestum:

The former death penalty for the manifest thief later was replaced by payment of quadruple damages[105] when the praetor created the *actio furti manifesti*.

b) execution of judgments:

The *lex Poetelia*[106] did not abolish the death penalty or slavery for the insolvent debtor but only prohibited to put people other than criminals into fetters.[107] It was intended to mitigate the plight of debtors.

c) Talio for *membrum ruptum*:

Even in earlier times the tortfeasor apparently was given some protection by the *praetor* who could refuse to give the *addictio* for the execution of the talio if he thought that

---

104 Polay, *supra* note 81, at 160-62; for a thorough discussion see references in note 79.

105 G. Inst. 3.189 - text *see* chapter C, *c*, translation *see* note 39; Gell. 11,18,10: "*Sed nunc a lege illa decemvirali discessum est. Nam si qui super manifesto furto iure et ordine experiri velit, actio in quadruplum datur*"; as to the date of origin of this provision see Kaser ZP, *supra* note 13, § 20 II 3, at 96.

106 Liv. 8,28,8.

107 Kaser ZP, *supra* note 13, § 20 VIII 2, at 103.

the plaintiff demanded an overly high amount.[108] Subsequently to the XII tables, the praetor introduced the "*edictum...de aestimandis iniuriis*"[109] which allowed him to estimate the penalty by himself and to render a judgment about it.

Therefore, the wronged party could only execute the talio if the tortfeasor chose[110] this option (or had no money).

d) Examples of Damages in the Lex Aquilia - Punitive Elements in the Calculation of Damages:

The First Chapter of the lex Aquilia provides:

"*Ut qui*[111] *servum servamque alienum alienamve quadrupedem vel*[112] *pecudem iniuria occiderit, quanti id in eo anno plurimi fuerit, tantum aes dare domino damnas esto.*"[113]

Third Chapter according to D. 9.2.27.5:

"*Ceterarum rerum, praeter hominem et pecudem occisos,*[114] *si*

---

108 *see* Gell. 20,1,36-38; Wittmann, *supra* note 27, at 5-6 & n.18.

109 Gell. 20,1,37/38.

110 Gell. 20,1,36.

111 Other version: "*si quis*".

112 Other version: "*quadrupedemve.*"

113 D. 9.2.2 in THE DIGEST OF JUSTINIAN (Latin text: Theodor Mommsen ed., translation: Alan Watson ed., 1985)[hereinafter Watson-Digest]: "If anyone kills unlawfully a slave or servant-girl belonging to someone else or a four-footed beast of the class of cattle, let him be condemned to pay the owner the highest value that the property had attained in the preceding year."

114 *This first part is interpolated*: ULRICH V. LUEBTOW, UNTERSUCHUNGEN ZUR LEX AQUILIA DE DAMNO INIURIA DATO at 21 & n.6, (1970); David Daube, *On The Third Chapter of the Lex Aquilia*, 52 LAW Q. REV. 253, 261 n.26 (1936); O. Lenel, Review of H.F. Jolowicz, 43 ZS 575, 575 (1922); F.H. LAWSON & B.S. MARKESINIS, TORTIOUS LIABLITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW 5-6 (1982).

quis alteri damnum faxit, quod usserit fregerit ruperit iniuria, quanti ea res erit[115] *in diebus triginta proximis, tantum aes domino dare damnas esto."*[116]

As to the first chapter, it is obvious that the highest value within the preceding year is not necessarily but can be punitive. The baseline is the compensation for the actual harm which the plaintiff suffered, but if the chattel had a higher value within the given period of time he could recover more than that in which case the calculation of damages would contain a punitive element.[117]

It has been subject to much dispute what the original wording of the third chapter was and whether the remedy was punitive. One view is that originally it read "*fuerit*" and provided that the tortfeasor had to compensate the owner for value which the chattel (*res*) had in the thirty days *preceding* the damaging.[118] Luebtow explains the difference to chapter one as to the relevant period of time by the fact that a greater extent of punishment was appropriate for killing because it was a greater wrong than the damaging.[119]

---

115 Other version: "*fuerit;*" *see* HERBERT HAUSMANINGER, DAS SCHADENERSATZRECHT DER LEX AQUILIA, at 7 n.6 (1987).

116 Translation in Watson-Digest, supra note 112: "In the case of all other things apart from slaves or cattle that have been killed, if anyone does damage to another by wrongfully burning, breaking or spoiling his property, let him be condemned to pay to the owner whatever the damage shall prove to be worth in the next thirty days."

117 G. Inst. 3.214.

118 Luebtow, *supra* note 113, at 120-21.

119 Luebtow, *supra* note 113, at 120

It is not disputed that the compensation was not confined to the mere market value but that certain disadvantages were taken into account (*causae corpori cohaerentes*[120]). There are several passages proving this, for example Neraz[121] held that if a slave was designated as heir but killed before he could enter upon the inheritance, the owner could recover not only the market value of the slave but also the value of the inheritance.[122] Ulpian[123] gives a situation in which a slave working as accountant fraudulently tampered with the records and subsequently was killed. The owner could recover for his interest in detecting the fraud as well as for the market value of the slave.[124]

But there is considerable controversy if the highest market value was the basis of the calculation and the inclusion of other disadvantages an exception or if the owner originally was compensated for all the difference in his assets resulting from the injury to his property.

If one agrees with Luebtow that "*fuerit*" was the original wording one has to assume that the "*quanti ea res fuerit*" referred to the market value of the property since

---

120 Paul. D. 9.2.22.1.
121 in Ulpian D. 9.2.23.pr..
122 *See also* G. Inst. 3.212.
123 D. 9.2.23.4: "*[Q]uanti mea interest fraudes servi per eum commissas detegi.*"
124 But those fragments concern the first chapter and one can not necessarily draw conclusions for the third one.

previous to the injury there is not yet a difference in the assets which could be regarded.[125]

On the other hand, Daube suggested that "*erit*" was the original wording and that it made sense to give the owner the value which the matter (*res*) would have within thirty days after the infliction of the injury because the lex Aquilia originally dealt only with slaves and animals and not with inanimate property.[126] When animals or humans are wounded, it usually turns out only after some time if the injury will be permanent and how much the medical expenses and all other consequential costs will be. The meaning of the provision would have been that the owner would have been compensated for all the difference in his assets which the event caused and which became apparent within thirty days (i.e. for the *interesse*). This would be merely compensatory, not punitive.

According to Daube, the scope of the provision was widened in the second half of the first century B.C. to comprise inanimate property as well.[127] Due to this change of interpretation, it made sense to change the wording to "*fuerit*" because one did not need to wait and see how the damage developed in the next thirty days if inanimate property was affected. This meant a change form the calculation of *interesse* to the calculation of market value. If Daube is right, the first chapter would have been

---

125 Luebtow, *supra* note 113, at 121.
126 Daube, *supra* note 113, at 256.
127 Daube, *supra* note 113, at 259-261.

(potentially) punitive while the third chapter would originally have been compensatory with a subsequent change to a punitive element, to the highest value within the preceding thirty days.

Luebtow's basic argument for the authenticity of "*fuerit*" and the market value calculation has been mentioned above. But his opponents seem to have more convincing ones. The mentioning of both *frangere* and *rumpere* makes sense only in relation to animate property.[128]

Besides, it is remarkable that the third chapter does not contain a "*plurimi*" as the first chapter did. This has already been noticed by the ancient jurists: Ulpian[129] and Gaius[130] suggest that the "*quanti ea res erit (/fuerit)*" should nevertheless be regarded as referring to the *highest* value within the thirty-day period. Had the original wording of the third chapter indeed been "*fuerit*" there would have been no reason why the drafters should not have included the "*plurimi*" as in the first chapter. The missing of this word can be explained by assuming that the original wording was "*erit*" in which case a "*plurimi*" would not have been necessary and would not even have made sense.[131] It was not until the inclusion of inanimate property, until the change from "*erit*" to "*fuerit*" and the change from the *interesse-*

---

128 Daube, *supra* note 113, at 255.
129 D. 9.2.29.8.
130 3,218.
131 Daube, *supra* note 113, at 262-63; Hausmaninger, *supra note* 114, at 7 and 29; Watson, Obligations, *supra* note 41, at 234-35; *see also* Lawson, *supra* note 113, at 8.

calculation to the calculation of value that this problem emerged.[132]

A further argument for the *interesse*-calculation is that otherwise the tortfeasor would have had to pay the whole value of the property even if it was only slightly damaged.[133]

Finally, Daube's suggestion is consistent with the Digest's passages mentioned above and the other texts we have. As to the two above-mentioned Ulpian-fragments, it is plausible that the *interesse*-principle could have influenced the interpretation of the first chapter.[134] It could even be possible that it continued to be relevant for the third chapter in cases of mere damaging after the change to the value-calculation had taken place.[135]

The fragments Gaius 3,218 and Ulpian D. 9.2.29.8 probably reflect the time after the change from "*erit*" to "*fuerit*".

Besides, two *doublet* fragments adduced by Luebtow as support for his theory that the *interesse*-calculation was not introduced before Justinian's compilers interpolated the texts[136] are well consistent with Daube's theory that there was a later swing back to the *interesse*-calculation.

---

132 Daube, *supra* note 113, at 263-64; Hausmaninger, *supra* note 114, at 29-30.

133 Daube, *supra* note 113, at 264.

134 Daube, *supra* note 113, at 264.

135 Daube, *supra* note 113, at 264; this is supported by Paul. D. 9.2.29.8, dealing with a situation covered by the third chapter and talking about an estimation of the wound of the slave, not about the slave's value.

136 Luebtow, *supra* note 113, 127-29.

Luebtow compares Ulpian in Collatio 2,4,1 and in D. 9.2.27.17, dealing with a situation in which the injury of a slave did not cause a decline of his value. The only disadvantage to the owner consists in the medical expenses. The question is whether he can get compensation for them. In the Collatio-fragment medical expenses are recoverable only as an annex to a recovery of the decline of the value, therefore the owner could not make a case based on the lex Aquilia. This reflects the state after the change to the value-calculation. In the Digest-fragment, there are some additions explaining the character of the *actio legis Aquiliae* and answering the questions about the medical expenses in the affirmative. This shows that Justinian's compilers again brought about a change towards an *interesse*-calculation in the third chapter.[137]

While the first chapter's remedy was based upon the potentially punitive value-calculation and only later was complemented by *interesse* notions the third chapter underwent a change from the merely compensatory *interesse*-calculation to a value-calculation and, in Justinian's times, a swing back to the *interesse*-calculation.

---

137 *See* Luebtow, *supra* note 113, at 129 and 131.

e) Other Punitive Elements in the Lex Aquilia:

aa) Attachment of liability to the person:

Though the action survived if the wronged party died[138] there was no survival of action when the tortfeasor died.[139] The damages were regarded as punishment and the dead can not be punished any more.

bb) noxal liability:

But the punitive character of the Lex Aquilia becomes most obvious in situations in which the tort is committed by the son[140] or the slave of a *paterfamilias*. Generally, the *paterfamilias* is vicariously liable unless he surrenders the wrongdoer to the wronged party (*noxae deditio*).[141] But usually he can free himself of the liability by the noxal surrender even when he was aware of the delict.[142]

---

138 Ulp. D. 9.2.23.8: *"Hanc actionem et heredi ceterisque successoribus dari constat: sed in heredem vel ceteros haec actio non dabitur, cum sit poenalis, nisi forte ex damno locupletior heres factus sit." "in heredem"* = against the heir.

139 G. Inst. 4.112: *"Non omnes actiones . . . etiam in heredem aeque conpetunt aut dari solent. Est enim certissima iuris regula, ex maleficiis poenales actiones in heredem nec conpetere, nec dari solere, veluti furti . . . ."* *See* also Ulpian, *supra* note 137.

140 *See* Gerhard Beseler, *Romanistische Studien*, 46 ZS 83, 108 (1926); *contra*: Watson, Obligations, *supra* note 41, at 277-78 (*the son is never explicitly mentioned in the texts*)

141 G. Inst. 4.76: *"Constitutae sunt autem noxales actiones . . . legibus, velut furti lege XII tabularum, damni iniuria lege Aquilia; . . . ."* *see* Watson, Obligations, *supra* note 41, at 274; Luebtow, *supra* note 113, at 41; Cels. in Ulp. D. 9.4.2.1: "Celsus, however, draws a distinction between the lex Aquilia and the Law of the Twelve Tables; for under the old law, he says, if a slave committed theft or some other damage with his master's knowledge there is a noxal action on the slave's account and the master is not liable in his own name. But under the lex Aquilia, he says, the master is liable on his own account, not that of the slave." (translation in Watson-Digest, *supra* note 112).

142 Cels. in Ulp. D. 9.4.2.1 *supra* note 140; *see* Watson, Obligations, *supra* note 41, at 278.

But the Lex Aquilia contained special provisions about the noxal liability of the *paterfamilias*. The noxal surrender was not possible if the paterfamilias ordered the tortfeasor to act or knew of the tort being committed and was able to prevent it from being committed.[143]

cc) Multiple Recovery when Several Tortfeasors:

If several people beat a slave and it is unclear which of them hit the fatal blow, not only are all of them liable but the owner can recover the full amount from each of them.[144] Ulpian explains this by the penal nature of the *actio legis Aquiliae*.[145]

dd) Cumulation of Actions Resting on Different Theories of Recovery:

If several actions can be cumulated so that the plaintiff can collect multiple damages or other benefits from the

---

[143] Ulp. D. 9.4.2.pr. and 9.2.44.1: " Whenever a slave does a wounding or killing with his master's knowledge, the master is without doubt liable to the aquilian action." (translation in Watson-Digest, *supra* note 112); Paul. D. 9.2.45.pr. ; Cels. in Ulp. D. 9.4.2.1.

[144] Ulp. D. 9.2.11.2: " *Sed si plures servum percusserint, utrum omnes quasi occiderint teneantur, videamus. Et si quidem apparet cuius ictu perierit, ille quasi occiderit tenetur: quod si non apparet, omnes quasi occiderint teneri Iulianus ait, et si cum uno agatur, ceteri non liberantur: nam ex lege Aquiliae quod alius praestitit, alium non relevat, cum sit poena.*" "But if several people do a slave to death, let us see whether they are all liable as for killing. If it is clear from whose blow he perished, that person is liable for killing; but if it is not clear, Julian says that the assailants are liable as if they had all killed; and if the action is brought against only one of them, the others are not released from liability; for under the lex Aquilia what one pays does not lessen what is due from another, *as it is a penal law.*" *See also* Julian D. 9.2.15.1 ; Paul. D. 47.2.21.9.; *see* Hausmaninger, *supra* note 114, at 17; Luebtow, *supra* note 113, at 57-59.

[145] Ulp. D. 9.2.11.2; *similarly* Ulp. D. 9.2.11.4; Julian D. 9.2.51.2.

defendant, the advantages accruing to him from the lawsuit exceed the harm suffered and the remedy is therefore punitive.

There are three possibilities: Either there is a genuine cumulation in a way that the plaintiff can collect from both claims. Or he can sue resting on both judgment but the amount from the first judgment is offset from the second one so that the plaintiff can only claim the difference in the second lawsuit. Or both claims can only exist alternatively.

There was controversy among the ancient jurists as to the possibility of a cumulation of delictual actions with the *actio legis Aquiliae*. Some assumed that the *actio iniuriarum* could be cumulated with the *actio legis Aquiliae*, for example, if a slave was intentionally injured.[146] Paulus, on the other hand, offset the first judgment from the second one and even mentioned other jurists who granted the two actions only alternatively.[147]

Some seem to have allowed a genuine cumulation of the *actio furti* and the *actio legis Aquiliae* if a document was stolen and defaced.[148] Paulus denied this if the destroying did not happen right after the theft but later.[149]

---

146 Labeo in Ulp. D. 47.10.15.46; Papinian D. 48.5.6.pr.; Ulp. D. 9.2.51.
147 D. 44.7.34.pr..
148 Ulp. D. 47.2.27.3.
149 D. 47.2.28.

Actions based upon the first and the third chapter could be cumulated.[150] But Julian gave the second action only if the plaintiff waived the right to obtain satisfaction from the first judgment.[151] Since it was disputed among the ancient jurists to what extent a cumulation with delictual actions was possible no clear statement can be made about how the punitive character of the lex Aquilia was reflected in the cumulation with (delictual) actions.

But the cumulation with contractual actions is more difficult. the rule is that purely penal actions can be cumulated with purely reipersecutory ones[152] and there is controversy as to whether the *actio legis Aquiliae* was purely penal or mixed (penal as well as reipersecutory).

Gaius[153] regards the *actio legis Aquiliae* as a mixed one. This is being followed by the majority of authorities[154] but a minority of scholars views the *actio legis Aquiliae* as a purely penal action.[155]

---

150 Gai. D. 9.2.32.1; Ulp. D. 9.2.46.

151 D. 9.2.47.

152 Hausmaninger, *supra* note 114, at 37.

153 4,6-9: § 6: "We sue sometimes only to obtain property, sometimes only for a penalty, sometimes both for property and for a penalty. § 7: . . . . § 8 : "We sue, for instance, only for a penalty in the action of theft . . . ; for we may obtain restitution on account of the thing itself either by vindicatio or condictio. § 9: We sue, for instance, both for property and for a penalty in those actions where a defendant who denies his liability is condemned to pay double, as in the actions . . . to recover damages for injury to property under the lex Aquilia, and . . . ." (translation by Poste *supra* note 34) ; on the other hand, Ulpian mentions in different context that the action was penal: *supra* note 143.

154 *See* e.g. Luebtow, *supra* note 113, at 36 with further references.

155 *E.g.* Gerhard Beseler, *Romanistische Studien* , 47 ZS 53, 65 (1927)(Gaius 4,9 is interpolated).

But there are many passages in the Digest which give the *actio legis Aquiliae* only alternatively to the contractual action,[156] give an action only if the plaintiff waives the other claim[157] or have the first judgment offset from the second one.[158] Unless one chooses to regard Gaius 4,6-9 and all the Digest-fragments as interpolated,[159] one has to assume that the *actio legis Aquiliae* was a mixed one and a genuine cumulation with contractual actions was not possible.[160]

G. Development up to Justinian:

a) Physical injuries to Freemen and the Lex Aquilia:

It is disputed whether the Lex Aquilia was applicable to the injury afflicted to freemen.[161] If this was so, this might have been a more lenient punishment in most cases.

The lex Aquilia deals only with damage to property and its wording therefore is not applicable to freemen. But since there are two fragments in the Digest, one by Ulpian[162] and one an Ulpian-fragment citing Julian[163] giving an action based upon the lex Aquilia in a situation in which a shoemaker intended to punish his apprentice, the son of a freeman, but accidentally put out his eye, it is

---

156 Gai. D. 13.6.18.1; Alf. D. 19.2.30.2.
157 Paul. D. 9.2.18; 17.2.50; 19.2.43.
158 Ulp. D. 13.6.7; Paul. D. 44.7.34.2.
159 As Luebtow, *supra* note 113, at 36-37 and 66-88 does.
160 *See* Watson, Obligations, *supra* note 41 at 146; Hausmaninger, *supra* note 114, at 37-38.
161 Luebtow, *supra* note 113, at 116.
162 D. 9.2.5.3.
163 D. 19.2.13.4.

disputed whether an aquilian actio was possible after Ulpian and Julian as an *actio utilis*, an analogous action.[164] If this was so this would mean an even more lenient remedy than the estimation of damages according to the *edictum de aestimandis iniuriis* with its threat of talio in the case of failure to pay.

But the difficulty with this is that the lex Aquilia provides for the payment of the value that the chattel had in the preceding year, respectively month. This could not be applied to freemen since they have no market value.[165] Therefore I agree with the suggestion that these Ulpian-fragments[166] were interpolated by Justinian's compilers and that they originally dealt with the action by the father of the apprentice against the shoemaker based upon the contract of apprenticeship.[167] For the same reason, I can not agree with Wittmann's theory that an *actio legis Aquiliae utilis* was given in classical times at least for the *bona fide serviens*[168] who was injured.[169] Later, the compilers

---

164 assumed by S. Riccobono, *Formulae Ficticiae A Normal Means of Creating New Law*, 9 TR 1, 52 (1929); WIEACKER, TEXTSTUFEN KLASSISCHER JURISTEN 262 (1960); HEINRICH HONSELL & THEO MAYER-MALY et al., ROEMISCHES RECHT 367 (1987).

165 Luebtow, *supra* note 113, at 118.

166 As well as D. 9.2.3.pr..

167 Luebtow, *supra* note 113, at 117-18 (and at 119-20 regarding D. 9.2.3.pr.); Kaser RP, *supra* note 13, § 144 II, at 520 n. 19; Max Kaser, *Review of Thomas*, 84 SZ 546, 554 (1967); Franz Haymann, *Textkritische Studien zum roemischen Obligationenrecht*, 40 SZ 44, 50-61 n.1 (1920).

168 And maybe even for other freemen: Wittmann, *supra* note 27, at 104.

169 Wittmann, *supra* note 27, at 76-83.

changed these texts in order to make an *actio legis Aquiliae utilis* applicable.[170]

b) Self-help Eliminated from Earlier Texts:

Luzzatto points out that the elements of self-help which existed in the earlier Roman Law later were eliminated from the texts.[171] While in Ulpian D. 47.8.2.18 self-help was still allowed, Institutiones 4,21 was changed[172] in order to make it consistent with the new theory.[173] Originally, the text dealt with the problem whether an action for theft lay if the robber by mistake thought that he was the owner of the item he took away. The text reported that an ignorance as to facts originally relieved the actor of the responsibility but that later this was changed in order not to give him a pretext to steal things without being accountable. An *ignorantia iuris*, an ignorance as to the law, later was added to the *ignorantia facti*. The new version provided that it was unlawful for somebody who mistakenly regarded himself as the owner and mistakenly thought that the law authorized the self-help by an owner, to take away the chattel.

---

170 As to interpolations in further fragments, see Luebtow, *supra* note 113, at 120; *see also* Ulp. D. 9.2.52.1 (shopkeeper tries to recover a lantern from a thief, a scuffle develops and the eye of the thief is put out).

171 Giuseppe Luzzatto, *supra* note 10, at 36-38 & n.6.

172 Eduardo Volterra, *Osservazioni sull' ignorantia iuris nel diritto penale Romano*, BULLETINO DELL' ISTITUTO DI DIRITTO ROMANO (BIDR) 1930, 75, 91-92.

173 Luzzatto, *supra* note 10, at 37.

The inclusion of the *ignorantia iuris* changed the underlying premise from the statement that self-help was permitted for the owner, to the statement that it was an error to think that self-help was allowed.[174]

While the XII T. 8,13 made the *endoplorare* a prerequisite to the "emergency trial," the self-help which was executed immediately after having caught the thief in the act, the compilers of the Digest often omitted the *endoplorare*.[175] This is a further indication that the compilers did not view the "emergency trial" as the point of the passage but instead changed its meaning into a text about self-defense.

Similarly, in other texts, we find the emphasis shifted from the self-help to the problem of self-defense.[176] Ulpian in Collatio 7,3,2 and 3 talks about the thief at night and discusses a controversy whether self-help is allowed.[177]

"*(2) . . . [P]roinde, si furem nocturnum, quem lex duodecim tabularum omnimodo permittit occidere . . . (3) Et si qui noctu furem occiderit, non dubitamus quin lege Aquiliae (non) teneatur: sin autem, cum posset adprehendere, maluit occidere, magis est, ut iniuria fecisse videatur; ergo etiam lege Cornelia tenebitur.*"[178]

---

174 Luzzatto, *supra* note 10, at 37.
175 D. 9.2.4.1; D. 47.2.55.2.
176 Luzzatto, *supra* note 10, at 37.
177 As to the actio for quadruple damages instead of killing the thief, see *supra* F, a).
178 "(2) If, then, a thief coming by night has been killed, as is allowed by the XII tables in all circumstances . . . .(3) In the case of

The same passage shows up in Ulpian D. 9.2.5.pr. but the situation given has changed from a theft by night to a situation that the thief attacks the owner.

The new rule of law is reflected in other fragments as well which emphasize that self-help is forbidden and that one may use force now only to defend oneself.[179]

c) But Punitive Elements of the Lex Aquilia Preserved to a Large Extent:

aa) Calculation of Damages:

As explained in chapter F, d), the remedy of the first chapter of the lex Aquilia, the payment of the highest value in the preceding year was (potentially) punitive and only later complemented by (compensatory) notions of *interesse*. The original wording and therefore, the character, of the third chapter is disputed. I agree with the view that it originally was based upon notions of *interesse* and therefore compensatory. Later, with the inclusion of inanimate property into the scope of the *lex Aquilia* the wording and the meaning were changed to a value-calculation which was potentially punitive. Later this was changed again in favor of an *interesse*-calculation.

---

a thief killed by night, we have no doubt that the killer is not liable under the lex Aquilia. But if he chose to kill the thief when he might have arrested him, the better opinion is that it should be regarded as a wrongful act. He will therefore be liable under the lex Cornelia."

[179] Ulp. 48,8,9; J. INST. 4.3.2; *see* Luzzatto, *supra* note 10, at 37-38.

bb) Other Punitive Elements:

But since Justinian did not eliminate the other punitive elements (which were discussed above, F, e) the penal character was to some extent preserved.

H. Conclusion for the Roman Law Part:

How can we summarize this issue? There is indirect evidence of blood-feud and direct evidence of talio in the Twelve Tables and earlier provisions. But we can not exclude the possibility that these remedies were not in use contemporaneously with damages.

In the times from which our written evidence dates, blood-feud apparently had come out of use and after the introduction of the praetorian edict de *aestimandis iniuriis* talio must have become more and more seldom and later was abolished by the compilers who made the lex Aquilia applicable to injuries to a freeman.

The lex Aquilia contains a considerable number of punitive elements which were later reduced but never abolished altogether, even after the iudicia publica developed and a distinction between private and criminal proceedings was made.

Though the remedy for furtum manifestum became more lenient, it continued to be penal (quadruple damages).

Therefore, we can conclude that there was a trend towards more lenient remedies,[180] but even at the peak of its development, Roman Law never completely abolished the punitive element in tort damages.

---

[180] quadruple damages - even if this leads to debt-servitude of an insolvent tortfeasor - are certainly more lenient than immediate death. Though it is arguable that talio (maiming the limb of the tortfeasor) is not necessarily more lenient than the obligation of an insolvent tortfeasor to pay damages, the tortfeasor will in most situations have preferred to serve temporarily as a slave/prisoner than to be free but without that limb.

III. AMERICAN LAW PART:

A: Scope of the Examination:

a) Basic Question:

The history of punitive damages in the Anglo-American law originates in the 18th century. One of the earliest English cases is *Wilkes v. Wood*.[181] As commentators remarked, most of the early English cases seem to have been concerned with the prevention of self-help.[182] They involved situations in which the honor of the victim was affected, such as "slander, seduction, assault and battery in humiliating circumstances, . . . , malicious prosecution, . . . , trespass onto private land in an offensive manner, and false imprisonment."[183] An offense to the honor of a person is most likely to make the victim look for satisfaction by revenge if the law does not provide a "valve" for the feelings of anger and humiliation.[184] Soon afterwards, punitive damages were recognized in American law as well and were usually based on willful and wanton conduct.[185]

---

181 98 Eng. Rep. 489 (K.B. 1763).

182 Dorsey D. Ellis, *Fairness and Efficiency in the Law of Damages*, 56 S. CAL. L. REV 1, 15 and 17-18 (1982), with further references; *similarly* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1291 (1993); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198-99 (1931).

183 Ellis, *supra* note 181, at 15, with references to English cases.

184 Ellis, *supra* note 181, at 17.

185 One of the earliest cases was Coryell v. Colbaugh, 1 N.J.L. 77 (1791); more references in Rustad & Koenig, *supra* note 181, at 1291-92;

It has already been mentioned in chapter II B,c) that in contemporary American law punitive damages are awarded in situations of aggravated circumstances, when tortfeasors act maliciously, willfully or wantonly or in conscious disregard of the interests of others.[186] In such cases, there is a special need for punishment and deterrence. Accordingly, a majority of courts acknowledges punishment and deterrence as the basic policy underlying the doctrine of punitive damages, whereas a minority views the purpose of punitive damages as merely compensatory. If there is a situation of aggravated circumstances, the plaintiffs are exposed to a special insult, "mental distress,"[187] "vexation"[188] or injury to their feelings.[189] According to the minority, punitive damages serve the purpose to compensate the plaintiffs for the hurt feelings which arise form the fact that they have been treated outrageously or maliciously, they are a kind of "augmented compensation."[190]

The concept of punitive damages has been much criticized. One of the arguments against them is that in a developed society, punishment and deterrence should be left to the Criminal Law and that therefore, punitive damages

---

some courts still mention the role of punitive damages as a substitute for private revenge, *see e.g.* Perry v. Melton, 299 S.E.2d 8, 13 (W.Va. 1982).

186 *See supra* note 9.

187 Kewin v. Massachusetts Mut. Life Ins., Co., 295 N.W.2d 50, 55 and 62 (Mich. 1980).

188 Id. at 55 and 62.

189 McChesney v. Wilson, 93 N.W. 627 (Mich. 1903).

190 Rustad & Koenig, *supra* note 181, at 1321-22.

should be eliminated from Private Law.[191] A typical example for the polemic style in which the debate is led is the statement "[i]s not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies?"[192]

The notion of punishment depends on moral theory and its validity can not be tested empirically.[193] But the statement that punitive damages are outdated and have to vanish in a civilized society *is* suitable to be tested empirically. It is possible that one merely wants to get rid of some unfortunate economical consequences of punitive damages but that the notion of punishment and deterrence is still being acknowledged. If so, it would be sufficient to limit punitive damages but there would be no need to abolish them altogether.

In the light of the conclusion for the Roman Law chapter, I will examine if there is a trend in the decisions of the majority of courts away from the punitive element. If those courts which state that punishment and deterrence are the basis of punitive damages do not apply their own theory consistently when dealing in practice with problems involving punitive damages this would be an indication that the concept actually is on the wane in modern times.

---

191 Sales & Cole, *supra* note 3.
192 Sales & Cole, *supra* note 3, at 1159, citing Fay v. Parker, 53 N.H. 342, 382 (1873).
193 Ellis, supra note 181, at 4.

I will examine what role notions of punishment and of compensation play in the reasoning of courts. If there is a situation in which the punishment purpose of punitive damages can not be achieved - if the only remaining purpose could be compensation - how do the courts deal with that situation? Or if there is a conflict between the punishment purpose and the compensation purpose of damages, which one prevails?

After screening out the states which do not allow punitive damages, those which adhere to the view that punitive damages were compensatory and those in which a statute states the purpose of punitive damages so that there is nothing left for the courts to determine, I will give a brief overview over the arguments against and in favor of punitive damages and over some examples of measures taken against punitive damages, and will finally single out some situations which can serve as indicators whether the majority of courts lets the punishment purpose prevail as a matter of practice.

b) States which do not Recognize Punitive Damages

Louisiana[194] (does not recognize punitive damages unless authorized by statute. Therefore, there are no genuine common law damages in Louisiana. And if the courts deal with punitive damages based on statute their decisions

---

194 McCoy v. Arkansas Natural Gas C., 143 So. 383, 386 (La. 1932); Harvester Credit Corp. v. Seale, 518 So.2d 1039 (La. 1988).

rather reflect the attitude of the legislature towards punitive damages than that of the judiciary. Since the purpose of this thesis is to find out to what extent the courts are committed to preserving the punitive element in tort law, states which do not recognize common law punitive damages are outside the scope of this thesis.)

Massachusetts,[195] *South Dakota*[196] and *Washington*[197] (adhere to the same rule as Louisiana.)

Colorado[198] (in the last century decided that punitive damages can not be awarded under common law. In reaction to this decision, a statute was adopted as stated in *Mailloux v. Bradley*.[199] Today, punitive damages are allowable only if provided for in a statute.[200] Therefore, Colorado falls into basically the same category as Louisiana.)

Nebraska[201] (recognizes only compensatory damages).

Connecticut[202] (limits the "punitive" damages recoverable to the costs of litigation.)

Michigan[203] and *New Hampshire*[204] courts do not allow a separate amount for punishment although they view it as

---

195 City of Lowell v. Massachusetts Bonding & Ins. Co., 47 N.E.2d 265, 272 (Mass. 1943).
196 Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419 (S.D. 1993) and S.D. CODIFIED LAWS ANN. §21-1-4 (1987) (no punitive damages unless expressly authorized by statute).
197 Kammerer v. Western Gear Corp., 635 P.2d 708, 711 (Wash. 1981); Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074-75 (Wash. 1891).
198 Murphy v. Hobbs 5 P. 119 (Colo. 1884).
199 643 P.2d 797, 799 (Colo. App. 1982).
200 Ballow v. Phico Ins. Co., 878 P.2d 672 (Colo. 1994).
201 Abel v. Conover, 104 N.W.2d 684, 688 (Neb. 1960).
202 Kelsey v. Connecticut State Employees Ass'n, 427 A.2d 420, 425 (Conn. 1980).
203 Wise v. Daniel, 190 N.W. 746, 747 (Mich. 1922).

permissible to increase the amount of compensatory damages in aggravated cases. This seems to be a form of punishment as well, but since the two states prefer to label it otherwise and since therefore the nature of the award is unclear, Michigan and *New Hampshire* can be screened out, as well.

c)States which view punitive damages as compensation for hurt feelings:

Connecticut,[205] *Michigan*,[206] and *New Hampshire*[207] view the nature of punitive damages as compensatory, since they permit punitive damages only for the expenses of litigation or permit only an enhancement of compensatory damages.[208]

d) States in which Statutory Provisions Determine the Nature of Punitive Damages:

Georgia provides in GA. CODE ANN. § 51-12-5.1(c) (Supp. 1995) that punitive damages are awarded for punishment and deterrence. Since the legislature has already regulated the issue, the courts decisions rather reflect the view of the legislature about punitive damages than their own view. Since the basic question is whether those courts which state that the purpose of punitive damages is to punish and deter

---

204 Vratsenes v. New Hampshire Auto, Inc., 289 A.2d 66, 68 (N.H. 1972), same as in Michigan.
205 Bodner v. Limited Services Auto Ass'n, 610 A.2d 1212 (Conn. 1992).
206 Yamaha Motor Corp., U.S.A. v. Tri-City Motors and Sports, Inc., 429 N.W.2d 871 (Mich. 1988); *see* also the reference supra note 202.
207 Bixby v. Dunlap, 56 N.H. 456 (N.H. 1976).
208 *See supra* note 201-203 and accompanying text.

apply their theories consistently, the states in which the purpose is determined by statute are less suitable to be examined.

Montana has a similar provision in MONT. CODE ANN. § 27-1-220(1) (1994).

In *Nevada*, punitive damages are awarded "for the sake of example and by way of punishing the defendant," NEV. REV. STAT. § 42.005 (1) (1993).

North Carolina regulates punitive damages in N.C. GEN. STAT. § 1D-1 (1995): the policy is "to punish a defendant for egregiously wrongful acts and to deter the defendants and others from committing similar wrongful acts."

North Dakota's N.D. CENT. CODE § 32-03.2-11(1) (Supp. 1995) contains a provision similar to the one in North Carolina.

e) The Remaining States which recognize the Punishment Purpose are:

Alabama,[209] Alaska,[210] Arizona,[211] Arkansas,[212] California,[213] Delaware,[214] District of Columbia,[215]

---

209 Schwertfeger v. Moorehouse, 569 So.2d 322 (Ala. 1990); Reserve Nat. Ins. Co. v. Crowell, 614 So.2d 1005 (Ala. 1993), *cert. denied*, 114 S.Ct. 84, 126 L.Ed.2d 52 (1993).

210 Barber v. National Bank of Alaska, 815 P.2d 857 (Alaska 1991).

211 Volz v. Coleman Co., Inc., 748 P.2d 1191 (Ariz. 1987).

212 Wheeler Motor Co., Inc. v. Roth, 867 S.W.2d 446 (Ark. 1993); Cater v. Cater, 846 S.W.2d 173 (Ark. 1993).

213 Adams v. Murakami, 813 P.2d 1348 (Cal. 1991).

214 Strauss v. Briggs, 525 A.2d 992 (Del. 1987).

215 Nepera Chemical, Inc. v. Sea-Land Service, Inc., 794 F.2d 688, 253 U.S. App. D.C. 394 (D.C. Cir. 1986).

Florida,[216] Hawaii,[217] Idaho,[218] Illinois,[219] Indiana,[220] Iowa,[221] Kansas,[222] Kentucky,[223] Maine,[224] Maryland,[225] Minnesota,[226] Mississippi,[227] Missouri,[228] New Jersey,[229] New Mexico,[230] New York,[231] Ohio,[232] Oklahoma,[233] Oregon,[234] Pennsylvania,[235] Rhode Island,[236] Tennessee,[237] Texas,[238] Utah,[239] Vermont,[240] Virginia[241] West Virginia,[242] Wisconsin,[243] and Wyoming.[244]

---

216 Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352 (Fla. 1994).
217 Kuhnert v. Allison, 868 P.2d 457 (Haw. 1994); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989).
218 Curtis v. Firth, 850 P.2d 749 (Idaho 1993).
219 Loitz v. Remington Arms Co., Inc., 563 N.E.2d 397 (Ill. 1990).
220 Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019 (Ind. 1986), *disagreed with by multiple cases on other grounds* as stated in Obremski v. Henderson, 487 N.E.2d 827 (Ind. App. 1 Dist., 1986), *transf. to* 497 N.E.2d 909 (Ind. 1986).
221 Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641 (Iowa 1995).
222 Cerretti v. Flint Hills Rural Elec. Co-op. Ass'n, 837 P.2d 330 (Kans. 1992).
223 Harrod v. Fraley, 289 S.W.2d 203 (Ky. 1956).
224 Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973).
225 ACandS, Inc. v. Godwin, 667 A.2d 116 (Md. 1995); Ellerin v. Fairfax Savings, F.S.B., 652 A.2d 1117 (Md. 1995).
226 Rosenbloom v. Flygare, 501 N.W.2d 597 (Minn. 1993).
227 James W. Sessums Timber Co., Inc. v. McDaniel, 635 So.2d 875 (Miss. 1994).
228 Boyer v. Grandview Manor Care Center, Inc., 759 S.W.2d 230 (Mo. Ct. App. 1988), *on remand* 805 S.W.2d 187, *reh'g, transfer denied.*
229 Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986)
230 Albuquerque Concrete Coring Co., Inc. v. Pan Am World Services, Inc., 879 P.2d 772 (N.M. 1994); Clay v. Ferrellgas, Inc., 881 P.2d 11 (N.M. 1994), *cert. denied*, 115 S.Ct. 1102, 130 L.Ed.2d 1069.
231 Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 642 N.E.2d 1065 (N.Y. 1994).
232 Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331 (Ohio 1994).
233 Wagner v. Bennett, 814 P.2d 476 (Okla. 1991).
234 Huffman and Wright Logging Co. v. Wade, 857 P.2d 101 (Or. 1993).
235 Rizzo v. Haines, 555 A.2d 58 (Pa. 1989); Schecter v. Watkins, 577 A.2d 585, 395 Pa. Super 363 (1990), *appeal denied*, 584 A.2d 320.
236 Picard v. Barry Pontiac-Buick, Inc., 654 A.2d 690 (R.I. 1995); Soares v. Ann & Hope of Rhode Island, Inc., 637 A.2d 339 (R.I. 1994).
237 Liberty Mutual Ins. Co. v. Stevenson, 368 S.W.2d 760 (Tenn. 1963).
238 George Grubbs Enterprises, Inc. v. Blien, 900 S.W.2d 337 (Tex. 1995); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994).

These 36 states recognize a pure form of punitive damages. Additionally, the five states enumerated in the previous chapter[245] recognize a form of common law punitive damages which is only partially regulated by statute. In other words, 41 out of 50 jurisdictions appear to recognize some punitive component to tort remedies. The examination will focus on the 36 states with the purest form of common law punitive damages.

B: Criticism about Punitive Damages:

Rationales given to justify punitive damages are that they punish the defendants and deter them and others from similar conduct in the future, and thus benefit the society.[246] Besides, courts still mention their role as a substitute for private revenge.[247] Other justifications are that they induce private law enforcement by providing an incentive for plaintiffs to sue. This is particularly necessary where

---

239 Terry v. Zions Co-op. Mercantile Institution, 605 P.2d 314, *on rehearing* 617 P.2d 700 (Utah 1980), *overruled on other grounds*, 678 P.2d 298 (1984).

240 d'Arc Turcotte v. Estate of LaRose, 569 A.2d 1086 (1989).

241 Hamilton Development Co. v. Broad Rock Club, Inc., 445 S.E.2d 140 (Va. 1994).

242 Shrewsberry v. Aztec Sales & Service Co., Inc., 445 S.E.2d 253 (W.Va. 1994), (punishment); Perry v. Melton, 299 S.E.2d 8 (W.Va. 1982), (primarily punishment and deterrence, but as a side-effect also additional compensation); C.W. Development, Inc. v. Structures, Inc. of West Virginia, 408 S.E.2d 41 (W.Va. 1991).

243 Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 539 N.W.2d 111 (Wis. Ct. App. 1995), *review granted*, 546 N.W.2d 468 (1996).

244 Parker v. Artery, 889 P.2d 520 (Wyo. 1995).

245 Chapter III A,d).

246 Ellis, *supra* note 181, at 4-9; Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 7-8 (1990).

247 Perry v. Melton, 299 S.E.2d 8, 13 (W.Va. 1982).

there are "gaps" in the criminal law,[248] or where a comparatively minor harm is done to a large number of people and where the expenses of litigation otherwise would prevent the victims from suing.[249] It also has been noted that the busy government agencies and attorneys general have not been very efficient in preventing harm done by faulty products.[250] Having such "private law enforcement" is preferable to having a huge costly government bureaucracy.[251]

On the other hand, punitive damages have been criticized as being unconstitutional for imposing a "double jeopardy" on defendants who are prosecuted criminally as well, for violating the excessive fines clause of U.S. CONST. amend. VIII or for denying the defendant the due process right protected by the U.S. CONST. amend. XIV.

The double jeopardy argument has been rejected by the U.S. Supreme Court in *United States v. Halper*[252] because the fifth amendment is not applicable if a private party seeks a remedy. In *TXO Products Corp.*[253] it upheld an award under the fifth and eighth amendment although the punitive damages award was 526 times the actual damages.

---

248 Rustad & Koenig, *supra* note 181, at 1323-25.
249 Rustad & Koenig, *supra* note 181, at 1324.
250 Rustad & Koenig, *supra* note 181, at 1325-26 and 1329 n. 299: for example none of the asbestos manufacturers whose products caused lung diseases in thousands of people have been prosecuted criminally for concealing the dangers of exposure to asbestos.
251 Rustad & Koenig, *supra* note 181, at 1325.
252 490 U.S. 435, 450, 109 S.Ct. 1892, 1903 (1989).
253 TXO Products Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711 (1993).

Two other Supreme Court decisions dealt with the due process argument. In *Haslip*,[254] the Supreme Court held that an amount of punitive damages which was four times the amount of compensatory damages did not violate the due process clause. But in a recent decision, *BMW of North America, Inc. v. Gore*[255] it held that extremely disproportionate amounts such as punitive damages 500 times the amount of compensatory damages can violate the due process clause. These two decisions will be discussed in the context of the requirement of a ratio between punitive and compensatory damages.[256]

Others criticize punitive damages from a fairness viewpoint. They argue that punitive damages are not just punishment because the standards for awarding them and for determining the appropriate amount were too unclear and the verdicts therefore were unpredictable, arbitrary and often violating the right to equal treatment if tortfeasors were assessed different amounts of damages for a comparable misconduct.[257]

Apart from criticism about awarding punitive damages in particular situations[258] the concept of punitive damages itself has frequently been criticized as creating a "tort

---

254 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 133 L.Ed.2d 1, 111 S.Ct. 1032 (1991).

255 116 S.Ct. 1589 (May 20, 1996).

256 In chapter III D,b).

257 Ellis, *supra* note 181, at 7.

258 For example in the vicarious liability context, *see* Sales & Cole, *supra* note 3, at 1154-57; or in the strict liability context which allegedly leads to overdeterrence, *see* Sales & Cole, *supra* note 3, at 1140-41.

crisis," increasing litigation costs and costs of products and discouraging manufacturers to put beneficial products on the market.[259] But others objected that the debate has been highly politicized, focusing on a few spectacular tort cases without ever giving any reliable data as to how often and in what amounts punitive damages actually are awarded.[260] They advocate a more skeptical approach and argue that one has to obtain more data before one can judge whether there actually is a crisis.[261]

Absent these empirical data, one can not yet argue what ought to be done. But the question whether some of the rationales underlying punitive damages, the rationales of punishment and deterrence, are still regarded as valid is suitable to be tested empirically.

C: Measures taken against Punitive Damages:

a) On State Level:

In the 1980s, many states enacted tort reform statutes. Since giving full account of the various ways to restrict punitive damages exceeds the limits of a thesis, I will give only a few examples.[262]

---

259 Sales & Cole, *supra* note 3, at 1154-57; see also references in Daniels & Martin, *supra* note 245, at 4.

260 Daniels & Martin, *supra* note 245, at 2-3; *see also id.* at 9-27 which analyzes the tactics of the opponents of punitive damages when presenting "reliable data" and when dealing with the press.

261 Thomas A. Eaton & Susette Talarico, TOWARD INFORMED POLICY MAKING: SOCIAL SCIENCE AND DATA COLLECTION - A PROPOSAL FOR GEORGIA, 1-3 and 51-55 (unpublished); Daniels & Martin, *supra* note 245, at 1-4.

262 For a (non-exhaustive) summary, see Eaton & Talarico, *supra* note 260, Appendix A, page A-1 to A-357.

Some states put caps on the amount of damages.[263]

Another way to limit punitive damages is to enhance the procedural prerequisites for awarding them: Some states provide for a bifurcated trial for compensatory and punitive damages,[264] others define prerequisites as "clear and convincing" evidence or "malice" more narrowly.[265] Some impose time-based restrictions by modifying statutes of limitations and statutes of repose or provide for a compulsory pre-filing screening.[266]

Another indirect restriction reduces the incentive to sue by providing that a certain percentage of punitive damages has to be paid to state funds.[267] All these reforms are aimed at restricting punitive damages but do not eliminate them. This indicates that the states are committed to continuing a punitive element in tort law.

b) Recent Efforts on the Federal Level:

On February 15, 1995, House bill 965 was introduced,[268] which originally was intended as a total overhaul of the civil litigation system. But the House dropped this idea in favor of a mere product liability reform, because the

---

263 *See e.g.* OKLA. STAT. ANN. tit. 23 § 9.1 (Suppl. 1996) (depending on the degree of culpabilty punitive damages may not exceed the greater of either the amount of compensatory damages or $100,000 or $500,000).

264 *See e.g.* MO. ANN. STAT. §510.263(1) (Vernon Supp. 1992).

265 *See e.g.* TEX. CIV. PRAC. & REM. CODE ANN. §41.001(2) and (7) (Supp. 1996).

266 See e.g. ALA. CODE §6-5-551 (Supp. 1996).

267 See e.g. FLA. STAT. ANN. ch. 768.73(2) (1994) (split recovery statute).

268 H.R. 965, 104th Cong., 1st session (1996).

broader measure was opposed by the Senate.[269] A compromise bill was drafted which limited punitive damages in cases involving faulty products, regardless of whether the lawsuit is brought in a federal or a state court, while preserving the possibility to obtain compensatory damages.

The bill contains, amongst others, provisions abolishing joint and several liability for non-economic loss, provisions about the statute of limitations and statute of repose, and about limits on awards of punitive damages. Section 108(b) limits awards against large businesses to the greater of two times the total of economic and non-economic damages or $250,000. Awards against small businesses are limited to the lesser of the two limits. The judge can award an additional amount if the original amount is "insufficient to *punish* the egregious conduct of the defendant" (emphasis added). The criteria which determine if additional punitive damages are warranted[270] are related to the degree of culpability or to the degree to which deterrence is necessary.

This legislation was vetoed by the president on May 2, 1996.[271] On May 9, 1996, the House upheld the veto of the

---

269 N.Y. TIMES, *House G.O.P. Quits Tort Reform Plan*, A1, (March 7, 1996).

270 Sec. 108(b)3(B): "[T]he extent to which the defendant acted with actual malice" - "the likelihood that serious harm would arise" - "the attitude and conduct of the defendant upon the discovery of the misconduct . . ." - "the cumulative deterrent effect of other losses . . . suffered by the defendant as a result of the misconduct . . ."

271 54 CONGRESSIONAL QUARTERLY, WEEKLY REPORT, No.18, at 1220 (May 4, 1996); text of the veto, *see id.* at 1253.

bill[272] "confirming that such legislation is dead for the year."[273]

The bill did not try to abolish punitive damages completely. At present, one apparently can not expect more than a political consensus to limit them. Moreover, this unsuccessful attempt to impose restrictions upon them clearly reflected notions of punishment and deterrence. This intimates that the legislature did value the punitive and deterrent effect of exemplary damages and that the reform rather was directed against some of the unwanted consequences of punitive damages than against the concept itself.

D: The Purposes of Punishment and Deterrence in the Courts' Decisions:

a) Do Courts Permit Insurance Coverage of Punitive Damages?

A tortfeasor who can shift the burden of an award of punitive damages to his insurer does not feel the sanction - apart from increased insurance premiums which is an indirect sanction and, compared to the award itself, a minor burden. Instead, the loss is spread amongst the insured. This means that the punitive and deterrent effect of punitive damages is considerably reduced, if not eliminated.

The jurisdictions which view the primary purpose of punitive damages as punishment and deterrence are about

---

272 With a 258-163 vote, which was 23 votes short of the two-thirds majority required for an override, *see id.*, No.19, at 1294 (May 11, 1996).

273 54 CONGRESSIONAL QUARTERLY, *supra* note 245, No.19, at 1294 (May 11, 1996).

equally split as to whether an insurance contract covering punitive damages[274] is void as violating public policy. But it is worth a closer look at what rationales the courts give for their decisions.

There is a broad consensus that an insurance policy does not require the insurer to pay damages for the *intentional* conduct of the insured[275] because the insured "may not acquire a license to engage in" wrongful activity.[276] But there is controversy as to whether public policy should preclude coverage of punitive damages founded upon gross or wanton negligence or reckless conduct. Arizona,[277] Arkansas,[278] Idaho,[279] Kansas,[280] Maryland,[281]

---

274 The question of the construction of insurance policies is outside the scope of the examination.

275 *See e.g.* Southern Farm Bureau Casualty Ins. Co. v. Daniel, 440 S.W.2d 582, 584 (Ark. 1969); Continental Ins. Cos. v. Hancock, 507 S.W.2d 146, 151 (Ky. 1973); Harrell v. Travelers Indem. Co., 567 P.2d 1013, at 1016 (Or. 1977); Aetna Casualty & Sur. Co. v. Roe, 650 A.2d 94 100 (Pa. Super. Ct. 1994); Continental Casualty Co. v. Fibreboard Corp., 762 F.Supp. 1368, 1374-75 (N.D. Cal. 1991) (applying Texas law), *appeal dismissed and remanded*, 4 F.3d 777 (9th Cir. Ca. 1993); Hensley v. Erie Ins. Co., 283 S.E.2d 227, 230 (W.Va. 1981); the only exception is Kansas: Golf Course Superintendents Ass'n v. Underwriters at Lloyd's, London, 761 F.Supp. 1485, 1491 (D.C. Kan. 1991) (applying Kansas law) (mentioning that KAN. STAT. ANN. § 40-2,115 became effective in 1984, stating that it was not against public policy to obtain insurance covering liability for punitive damages arising out of intentional conduct).

276 Norfolk v. Western Ry. Co. v. Hartford Accident & Indem. Co., 420 F.Supp. 92, 95 (N.D. Ind. 1976) (applying Indiana and Mississippi law).

277 Price v. Hartford Accident & Indem. Co., 502 P.2d 522 (Ariz. 1972).

278 Southern Farm, 440 S.W.2d 582; California Union Ins. Co. v. Arkansas Louisiana Gas Co., 572 S.W.2d 393 (Ark. 1978).

279 Abbie Uriguen Oldsmobile Buick, Inc. v United States Fire Ins. Co., 511 P.2d 783 (Idaho 1973).

280 Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co., 618 P.2d 1195, (Kan. 1980), *disapproved of in part on appeal after remand, on other grounds*, 652 P.2d 665 (1982); Golf Course Superintendents Ass'n v. Underwriters at Lloyd's, London, 761 F.Supp. 1485 (D.C. Kan. 1991) (applying Kansas law) (issue is regulated by statute).

b) Do Punitive Damages Have to Bear a Particular Relationship to the Amount of Compensatory Damages?

In order to allow the defendants to calculate their exposure to risks and in order to give them a fair warning beforehand, some limits have to be placed onto the amount of punitive damages. The permissible amount can be limited in several ways. First, one could set up a fixed amount as a ceiling; or one could require that the amount of punitive damages must bear a specified relationship to the degree of outrageousness or to the wealth of the wrongdoer or that the punitive damages award be some multiple of the compensatory damages.

The advantage of the first option is that it provides the highest degree of certainty. But the disadvantage is that it might prevent courts from adequately punishing extremely outrageous conduct or from making an extremely wealthy defendant feel the sanction.

The second option best advances the goal of punishment and deterrence because the more outrageous the conduct of the wrongdoer the higher the culpability, and the wealthier the defendant is the higher the award against him has to be in order to deter him. But it is difficult to measure the culpability of the conduct in terms of money.

It is easier to take the amount of compensatory damages as a guideline because both punitive damages and compensatory damages are amounts of money and can be compared easily. On the other hand, a tortfeasor can cause great harm

when acting only slightly culpable or can act extremely malicious and nevertheless cause only little harm. The harm caused - in other words: the amount of compensatory damages - is not necessarily related to the culpability and the need for punishment.

Courts which require punitive damages to bear a relationship to compensatory damages do not completely frustrate the purpose of punitive damages. But adopting a ratio rule indicates that they do not value punishment and deterrence very high. Possibly they even want to provide a victim which suffered much with some additional compensation.

Therefore, determining how many courts adhere to a ratio rule can be an indicator how serious the courts take the theories about the nature of punitive damages which they themselves adopted.

The U.S. Supreme Court in *Browning-Ferris*[318] refused to "craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, . . ., these are matters of state, and not federal, common law."[319] In *Haslip*[320] it viewed an award of punitive damages which was four times the amount of compensatory damages as not violating the due process clause of U.S. CONST. amend. XIV.

---

318 Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219, (1989), *cert. denied*, 487 U.S. 1236.

319 Browning-Ferris at 492 U.S. 257, 279; 109 S.Ct. 2909, 2922.

320 Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 133 L.Ed.2d 1, 111 S.Ct. 1032 (1991).

In a more recent case, *BMW of North America, Inc. v. Gore*[321] the U.S. Supreme Court struck down a punitive damages award by an Alabama court as excessive and violating the due process clause. The purchaser of a car sued the automobile manufacturer, BMW, for fraud. The car had been damaged prior to delivery and was repainted by BMW. According to the plaintiff's expert, this reduced the value of the car by approximately ten percent. BMW had, following its nationwide policy, not disclosed the fact that the car had been repainted. In other jurisdictions this conduct was viewed as lawful. The plaintiff was awarded $4,000 in compensatory and $4 million in punitive damages but the award was reduced by the Alabama Supreme Court to $2 million. In a 5:4 decision, the U.S. Supreme Court found that the amount was grossly excessive and violated the due process clause of the U.S. CONST. amend. XIV.

One argument for the excessiveness was the 500 to 1 ratio of punitive to compensatory damages.[322]
The court set up three factors which determined whether the defendant was given the due fair notice as to the severity of the penalty which it had to expect. The first factor is the relationship between the punitive damages and the harm done.[323] The second is that there may not be a gross disparity to other civil and criminal penalties for

---

321 116 S.Ct. 1589 (May 20, 1996).
322 *Id.* at 1602.
323 *Id.* at 1601-1602.

right[348] and "over-punish"[349] him. Another problem is that awarding punitive damages to the first plaintiff could mean to exhaust the funds by which subsequent plaintiffs can be compensated.[350]

Commentators have proposed remedies all of which have their flaws:

Statutory caps on punitive damages providing that punitive damages may not exceed a certain amount or a certain percentage of compensatory damages;[351] more frequent use of the procedural mechanisms of *remittitur* and the motion for new trial[352] and class action certification which determines the number of claims arising from the misconduct of the defendant and deals with them in a single action which allows the court to make a full assessment of the total of punitive damages to be awarded.[353]

Some courts stated that under the present law they see no way to achieve a satisfactory result.[354] When a court

---

348 Juzwin v. Amtorg Trading Corp., 718 F.Supp. 1233, 1234-35 (D. N.J. 1989); *In re* Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F.Supp. 887, 899 (N.D. Cal. 1981), *vacated on other grounds,* 693 F.2d 847 (9th Cir. Cal. 1982), *cert. denied,* A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983); *contra:* Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1571 (6th Cir. Tenn. 1985), *cert. denied,* 487 U.S. 1021 (1986).

349 N. Todd. Leishman, *Juzwin v. Amtorg Trading Corp.: Toward Due Process Limitations on Multiple Awards of Punitive Damages in Mass Tort Litigation,* 1990 UTAH L. REV. 439, 440 (1990).

350 Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1569 (6th Cir. Tenn. 1985).

351 Leishman, *supra* note 348, at 448-49. The disadvantages have been discussed in the previous chapter, III D b).

352 Leishman, *supra* note 348, at 450-52.

353 Leishman, *supra* note 348, at 452-57: But the problem is that the prerequisites for a class certification are not always met.

354 Maxey v. Freightliner Corp. 450 F.Supp. 955, 962 (N.D. Tex. 1978), *aff'd* 632 F.2d 395 (5th Cir. Tex. 1980), *reh'g granted* 634 F.2d 1008

awards punitive damages it does not yet know how many other lawsuits are pending in other courts and how many will be filed, how many of them will result in judgments in favor of the plaintiff and, if so, what the amount awarded will be. So it can not adjust its own award accordingly. Besides, the courts are unable to "prohibit subsequent awards in other courts" against the same defendant if the amount has reached dangerous dimensions.[355] In most cases, the court has to chose between preventing the present plaintiffs from recovering punitive damages in the lawsuit at stake or to potentially put the defendant in danger of facing bankruptcy. The first option is feasible because it is agreed that plaintiffs do not have a right to punitive damages,[356] but this would mean to incur the risk that the defendant will not be punished as severe as he (it) deserves, or will not be punished at all.[357] The second option means to potentially exhaust the available funds so that subsequent plaintiffs will not even get compensatory damages.

Some states have taken legislative measures against the threat of bankruptcy. Kansas provides that punitive damages may not exceed the lesser of either the annual gross

---

(5th Cir. Tex. 1980) (applying Texas law); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-40 (2nd Cir. N.Y. 1987) (applying N.Y. law); *see also* Leishman, *supra* note 316, at 444.

355 Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-40 (2nd Cir. N.Y. 1987) (applying N.Y. law); Juzwin v. Amtorg Trading Corp., 718 F.Supp. 1233, 1236 (D. N.J. 1989).

356 For references, *see* 22 AM. JUR. 2D *Damages* §739 (1988).

357 apart from compensatory damages which are some form of sanction as well.

income of the defendant or $5 million,[358] Missouri provides that a defendant may file a motion asking the court to credit the award of punitive damages with amounts of punitive damages previously paid for the same misconduct except for enumerated intentional torts[359] and Texas limits of punitive damages to the greater of twice the amount of economic damages, plus the amount of non-economic damages or $200,000, unless the act is at the same time one of the enumerated felonies.[360]

But very few courts have solved the dilemma by sacrificing the punishment of the defendant to the compensation of future plaintiffs by denying punitive damages awards in mass litigation cases.[361]

---

358 Unless the amount is inadequate to penalize the defendant or the profitability exceeds the punishment, KAN. STAT. ANN. §60-3702(e) (Supp. 1991), the provision does not mention if the total amount of punitive damages is meant or amount for each individual plaintiff, but §60-3702 (b) (7) provides that other awards of punitive damages have to be taken into account.

359 MO. ANN. STAT. §510.263 (Vernon Supp. 1992).

360 TEX. CIV. PRAC. & REM. CODE ANN. §41.008 (Supp. 1996).

361 *In re* Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F.Supp. 887, 899-900 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. Cal. 1982), *cert. denied*, A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983); in Juzwin v. Amtorg Trading Corp., 705 F.Supp. 1053, 1064 (D. N.J. 1989) the court held that multiple awards violated the defendant's due process rights and that the plaintiff's claims for punitive damages would be stricken if the defendant could produce proof of earlier awards paid, but upon reconsideration, 718 F.Supp. 1233, 1235-36 (D.C. N.J. 1989), the court vacated its earlier judgment because "it would not be fair to bar plaintiffs by reason of the conduct of other litigants in other actions . . . and the court is powerless to limit other courts from considering other . . . punitive damages claims against the same defendant" and thus can not protect the defendant's due process rights; *In re* A.H. Robins Co., 89 BR 555, 561-63 (E.D. Va. 1988) (denying all punitive damages claims, not only because the defendant would be over-punished by multiple claims but also under the equity powers of the bankruptcy court in order to give the company a opportunity to reorganize); Sanford v. Celotex Corp., 598 F.Supp. 529, 531 (M.D. Tenn. 1984).

All the other cases examined permitted multiple awards. Some of them allowed a mitigated type of multiple awards, holding that "deterrence resulting from current and prospective suits against the defendant" must be considered as a factor when assessing the amount of punitive damages.[362]

Few resorted to class certification.[363]

The remaining courts either were able to ignore the problems of potential bankruptcy because the statute of limitations had run and "the number of plaintiffs was therefore set,"[364] or they held that the risk of bankruptcy

---

362 Farall v. A.C. & S. Co., 558 A.2d 1078, 1082 (Del. Super. Ct. 1989) (several hundreds of claims had been filed in this asbestos case); Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242, 253 (Fla. Ct. App. 1084), *review denied*, 467 So.2d 999 (1985), *disapproved of on other grounds by* Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986) as stated in 553 So.2d 274 (1990) (asbestos case) (holding that previous and expected punitive damages awards may mitigate instant award); *similarly* Hazelwood v. Illinois Central Gulf R.R., 450 N.E.2d 1199, 1207 (Ill. Ct. App. 1983) (personal injury claim against railroad company which had failed to maintain a crossing in safe condition); Wangen v. Ford Motor Co., 294 N.W.2d 437, 450-60 (Wis. 1980) (defective automobile tank which ruptured and burned causing injuries and deaths of people) ("The danger of excessive multiple punitive damages claims can be avoided . . . because the jury may consider . . . punitive damages . . . already imposed on a defendant or likely to be imposed on the defendant.").

363 *In re* Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F.Supp. 887, 899-900 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. Cal. 1982), *cert. denied*, A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983); Fischer v. Johns-Manville Corp., 512 A.2d 466, 478-79 (N.J. 1986) (asbestos case) (class certification in order to avoid overkill by multiple awards); *In re* "Agent Orange" Products Liab. Litig., 100 F.R.D. 718, 729 (E.D. N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (herbicide spray which injured soldiers in Vietnam); Ouellette v. International Paper Co., 86 F.R.D. 476 (D. Vt. 1980), *aff'd*, 776 F.2d 55 (2d Cir. 1985), *cert. granted*, 475 U.S. 1081 (1986) (discharge of waste).

364 State *ex rel.* Young v. Crookham, 618 P.2d 1268 (Or. 1980) (exposure to bacteria resulting in gastrointestinal illness while visiting a lake lodge) (at 1274: the statute of limitations had run; at 1274: rejecting the "first comer"/ "one bite" theory).

or of depleting the funds for the compensation of subsequent plaintiffs was not a sufficient argument to prohibit awards of punitive damages, and that there was no other way than to accept these risks.[365]

---

365 Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-41 (2nd Cir. N.Y. 1987) (applying N.Y. law) (injuries caused by the drug "MER/29") (holding that it would be unfair to limit recovery to the first comers and to "leave it to the court to put a stop to the award of damages at some unascertained point of time"); Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 407 (5th Cir. Miss. 1986), *cert. denied*, 478 U.S. 1022 (1986) (applying Mississippi law) (asbestos case); Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. Ohio 1982) (applying Ohio law) (asbestos case) ("one bite" theory rejected); Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1570 (6th Cir. Tenn. 1985) (asbestos case) (rejecting overkill doctrine; rejecting the exhaustion of resources argument as a basis for denying punitive damages recovery); Dykes v. Raymark Industries, Inc., 801 F.2d 810, 819 (6th Cir. Tenn. 1986), *cert. denied*, 481 U.S. 1038 (1987), (applying Tennessee law) (asbestos case) (rejecting overkill doctrine which suggests that multiple awards create overkill and threaten recovery of any award by subsequent plaintiffs); Vollert v. Summa Corp., 389 F.Supp. 1348, 1351 (D.C. Hawaii 1975) (applying Hawaii law) (products liability action because of defect in helicopter causing an accident) ("It would require a substantial change in the law to hold that simply because there might be other suits filed against the defendant, punitive damages should not be allowed."); Hoffman v. Sterling Drug, Inc., 374 F.Supp. 850, 856-57 (M.D. Pa. 1974) (applying Pennsylvania law) (involving the drug "Aralen" causing impairment of vision); Maxey v. Freightliner Corp. 450 F.Supp. 955, 962-63 (N.D. Tex. 1978), *aff'd* 632 F.2d 395 (5th Cir. Tex. 1980), *reh'g granted* 634 F.2d 1008 (5th Cir. Tex. 1980) (applying Texas law) (death caused by design defect of a car) (holding that multiple awards were permissible because "present tort law accepts the idea that manufacturers should be checked by deterrent based remedies," at 962; "[i]f a manufacturer's conduct has indeed been so callous, its plight warrants no sympathy," at 963); Delos v. Farmers Ins. Group, Inc., 155 Cal. Rptr. 843, 857-59 (Cal. Ct. App. 1979) (action against insurer for failure to pay an uninsured motorist claim by plaintiff who was insured by the company. Although there were other actions involving identical issues pending against the company multiple awards by several juries were permissible, judicial control in the form of a *remittitur* was held to be sufficient to avoid overkill).

IV. FINAL CONCLUSION:

Taking into account the measures taken against punitive damages, there certainly is a trend to *restrict* them. On the other hand, even the unsuccessful attempt to restrict them by federal statute reflected notions of punishment and deterrence, indicating that the legislature remains committed to preserve the punitive component of punitive damages to some extent.

When looking at decisions of those courts which have declared that the purpose of punitive damages is to punish and deter, one finds that some of them disregard this very statement when dealing with punitive damages in practice.

Though there is a consensus that insurance coverage of punitive damages founded upon intentional conduct of the defendant is void, some jurisdictions allow coverage of punitive damages for reckless or grossly negligent misconduct, thereby reducing the sanction for the tortfeasor to an indirect one. On the other hand, they apparently make this decision in order to remedy some of the uncertainty which the lack of a clear standard for awarding punitive damages has created, while recognizing the concept of punishment and deterrence.

Likewise, some courts act inconsistently with their own theories in using an excessive ratio of punitive damages to

compensatory damages as the basis for overturning a jury's verdict. But they mitigate this deviation by additionally using other, culpability-related factors. The recent Supreme Court decision in *BMW of North America*[366] one the one hand approves this proportionality approach, but on the other hand emphasizes that culpability is to be the most important factor.

In mass tort litigation cases, most courts rather endanger the compensation of future plaintiffs than to sacrifice the punishment and deterrence provided by punitive damages in the instant case. Though they might do that for lack of a mechanism which would allow to take the total amount of punitive damages awarded into account when deciding about an individual verdict, the fact that the scales tip in favor of punishment when punishment and compensation conflict with each other indicates that the notion of punishment and deterrence is still being valued by the courts.

Adopting the statement of *Ellis*[367] that this notion depends on moral theory and can not be tested empirically, I chose as the initial question whether in modern times there was a social consensus to reject the notion as outdated. But though this notion is being criticized, and though the courts do not always apply it consistently, their decisions show by no means a consensus to reject it. Rather one

---

366 *See supra* note 320 and accompanying text.

367 Ellis, *supra* note 181, at 4.

apparently wants to limit some unwanted economical consequences which the concept has created.

Similarly, the Roman Law *modified*, but did not *eliminate*, the punitive element altogether, not even after the distinction between private and criminal proceedings developed. Likewise, it has been discussed that other cultures did not know a linear development from stricter to more lenient remedies.

How will the situation be in 500 years? Will American students in the year 2496 still study punitive damages in their tort classes? We can not tell. The only statement which can be made is that there is no evidence that punitive damages can not play an important role in a developed society.

BIBLIOGRAPHY

A: ARTICLES AND BOOKS:

ANCIENT ROMAN STATUTES (Allan C. Johnson ed. and transl., 1961)

BESELER, Gerhard, Romanistische Studien, 46 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FUER RECHTSGESCHICHTE, ROMANISTISCHE ABTEILUNG (SZ) 83 (1926)

BESELER, Gerhard, Romanistische Studien , 47 SZ 53 (1927)

BIRKS, P.B.H., The Early History of Iniuria, 37 TR 163 (1969)

BROGGINI, Gerardo, Vindex und Iudex, 76 SZ 113 (1959)

CATO, ORIGINES IV, in: CATON, LES ORIGINES (Martine Chassignet ed. and transl., 1986)

CICERO, M. Tulli Ciceronis pro M. Tullio oratio, in: M. TULLI CICERONIS ORATIONES (Oxonii e typographeo Clarendoniano ed., reprinted 1956) vol. 6 [hereinafter Cic. pro Tullio]

COLLATIO LEGUM ROMANARUM ET MOSAICARUM (Moses Hyamson ed. and transl., 1913) [hereinafter Collatio]

54 CONGRESSIONAL QUARTERLY, WEEKLY REPORT, No.18, at 1220 (May 4, 1996)

54 CONGRESSIONAL QUARTERLY, WEEKLY REPORT, No.19, at 1294 (May 11, 1996)

DANIELS, Stephen & MARTIN, Joanne, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990)

DAUBE, David, On The Third Chapter of the Lex Aquilia, 52 LAW Q. REV. 253 (1936)

DAUBE, David, Some Comparative Law: Furtum Conceptum, 15 TR 48

DIONYSIUS OF HALICARNASSUS, ANTIQUITATES ROMANAE (Carolus Jacobi ed., 1885)

EATON, Thomas A. & TALARICO, Susette, TOWARD INFORMED POLICY MAKING: SOCIAL SCIENCE AND DATA COLLECTION - A PROPOSAL FOR GEORGIA (unpublished)

ELLIS, Dorsey D., *Fairness and Efficiency in the Law of Damages*, 56 S. CAL. L. REV 1 (1982)

FONTES IURIS ROMANI ANTEIUSTINIANI (S. Riccobono et al. eds., 1968)

GAIUS, INSTITUTIONES (E.A. Whittuck ed., Edward Poste transl., 1991)

GELLIUS, Aulus, NOCTES ATTICAE (P.K. Marshall ed., 1968) (hereinafter Gell.)

HAUSMANINGER, Herbert, DAS SCHADENERSATZRECHT DER LEX AQUILIA (1987)

HAUSMANINGER Herbert & SELB, Walter, ROEMISCHES PRIVATRECHT (3d ed. 1985)

HAYMANN, Franz, Textkritische Studien zum roemischen Obligationenrecht, 40 SZ 44 (1920)

HEUSS, Alfred, Zur Entwicklung des Imperiums der roemischen Oberbeamten, 64 SZ 57 (1944)

HEUSS, Alfred, Zur Entwicklung des Imperiums der roemischen Oberbeamten, 64 SZ 57 (1944)

KASER, Max, ALTROEMISCHES IUS (1949)

KASER, Max, DAS ROEMISCHE PRIVATRECHT, Erster Abschnitt (vol. I), (1955) [hereinafter Kaser RP]

KASER, Max, DAS ROEMISCHE ZIVILPROZESSRECHT, (1966) [hereinafter Kaser ZP]

KASER, Max, Praetor und iudex im roemischen Zivilprozess, 32 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS (TR) 329 (1964) [hereinafter Kaser TR]

KASER, Max, Review of Thomas, 84 SZ 546 (1967)

KUNKEL, Wolfgang, UNTERSUCHUNGEN ZUR ENTWICKLUNG DES ROEMISCHEN KRIMINALVERFAHRENS IN VORSULLANISCHER ZEIT (1962)

LAWSON, F.H. & MARKESINIS, B.S., TORTIOUS LIABLITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW (1982).

LEAGE'S ROMAN PRIVATE LAW (A.M. Prichard ed., 3rd ed. 1961)

LEISHMAN, N. Todd., *Juzwin v. Amtorg Trading Corp.: Toward Due Process Limitations on Multiple Awards of Punitive Damages in Mass Tort Litigation*, 1990 UTAH L. REV. 439 (1990)

LENEL, O., Review of H.F. Jolowicz, 43 SZ 575 (1922)

LIVIUS, Titus, AB URBE CONDITA LIBRI (W. Weissenborn et al. eds., 1963) [hereinafter Liv.]

LUEBTOW, Ulrich v., UNTERSUCHUNGEN ZUR LEX AQUILIA DE DAMNO INIURIA DATO (1970)

LUZZATTO, Giuseppe, Von der Selbsthilfe zum roemischen Prozess, 73 SZ 29 (1956)

MAYER, Ernst, Germanische Wergelder sowie Weiderechte und roemische Multa, 8 TR 1

MORRIS, Clarence, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931)

N.Y. TIMES, *House G.O.P. Quits Tort Reform Plan*, A1, (March 7, 1996)

N.Y. TIMES, *U.S. Judges Weigh Future of Giant Cigarette Lawsuit*, April 3, 1996, A6

POLAY, Elemer, Iniuria-Tatbestaende im archaischen Zeitalter des antiken Rom, 101 SZ 142 (1984)

PRISCIAN, INSTITUTIO DE ARTE GRAMMATICA (Henricus Keil ed., 1961) vol. 2

RICCOBONO, S., Formulae Ficticiae A Normal Means of Creating New Law, 9 TR 1 (1929)

RUSTAD, Michael & KOENIG, Thomas, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (1993)

SALES, James B., & COLE, Kenneth B., Punitive Damages: A Relic That Has Outlived Its Origins, 37 VAND. L. REV 1117 (1984)

SELTZER, Richard A., *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, (1983)

Sexti Pompei Festi de Verborum Significatu quae supersunt cum Pauli Epitome (Wallace M. Lindsay ed., 1913) [hereinafter: Festus//page of Lindsay-edition//keyword]

SIMON, Dietrich V., Begriff und Tatbestand der Iniuria, 82 SZ 132 (1965)

SMITH, J.M. Powis, THE ORIGIN AND HISTORY OF THE HEBREW LAW, appendix IV (Arnold Walther transl., 1931)

THE DIGEST OF JUSTINIAN (Latin text: Theodor Mommsen ed., translation: Alan Watson ed., 1985) [hereinafter Watson-Digest]

THE BABYLONIAN LAWS (Godfrey R. Driver et al. eds. and transls., 1955, reprinted 1960) [hereinafter CH]

VOLTERRA, Eduardo, Osservazioni sull ignorantia iuris nel diritto penale Romano, BULLETINO DELL ISTITUTO DI DIRITTO ROMANO (BIDR) 1930, 75

WATSON, Alan, Curses, Oaths, Ordeals, and Trials of Animals, unpublished

WATSON, Alan, Personal Injuries in the XII Tables, 43 TR 213 (1975)

WATSON, Alan, ROMAN PRIVATE LAW AROUND 200 B.C. (1971) [hereinafter Watson, 200 B.C.]

WATSON, Alan, ROME OF THE XII TABLES (1975)

WATSON, Alan, THE LAW OF ANCIENT ROME (1970) [hereinafter Watson, Ancient Rome]

WATSON, Alan, THE LAW OF OBLIGATIONS (1965) [hereinafter Watson, Obligations]

WIEACKER, TEXTSTUFEN KLASSISCHER JURISTEN (1960)

WIEACKER, E., Zwoelftafelprobleme, REV. INT. DES DROITS DE L'ANTIQUITE, 3. Ser., 3 (1956) 459, 480

WITTMANN, Roland, DIE KOERPERVERLETZUNG AN FREIEN IM KLASSISCHEN ROEMISCHEN RECHT (1972)

YARON, Reuven, Enquire now about Hammurabi, Ruler of Babylon, 59 TR 223 (1991)

B:CASES:

Abbie Uriguen Oldsmobile Buick, Inc. v United States Fire Ins. Co., 511 P.2d 783 (Idaho 1973)

Abel v. Conover, 104 N.W.2d 684 (Neb. 1960)

ACandS, Inc. v. Godwin, 667 A.2d 116 (Md. 1995)

Adams v. Murakami, 813 P.2d 1348 (Cal. 1991)

Aetna Casualty & Sur. Co. v. Roe, 650 A.2d 94 (Pa. Super. Ct. 1994)

Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352 (Fla. 1994)

Alaska Ins. Co. v. Movin' On Constructions, Inc., 718 P.2d 472 (Alaska 1986)

Albuquerque Concrete Coring Co., Inc. v. Pan Am World Services, Inc., 879 P.2d 772 (N.M. 1994)

American Tobacco Co. v. Evans, 508 So.2d 1057 (Miss. 1987)

Anthony v. Frith, 394 So.2d 867 (Miss. 1981)

Ballow v. Phico Ins. Co., 878 P.2d 672 (Colo. 1994)

Barber v. National Bank of Alaska, 815 P.2d 857 (Alaska 1991)

Beaver v. Country Mut. Ins. Co., 420 N.E.2d 1058 (Ill. App. Ct. 1981)

Binyon v. Nesseth, 646 P.2d 1043 (Kan. 1982)

Bixby v. Dunlap, 56 N.H. 456 (N.H. 1976)

BMW of North America, Inc. v. Gore, 116 S.Ct. 1589 (May 20, 1996)

Bodner v. Limited Services Auto Ass'n, 610 A.2d 1212 (Conn. 1992)

Boyer v. Grandview Manor Care Center, Inc., 759 S.W.2d 230 (Mo. Ct. App. 1988), *on remand* 805 S.W.2d 187, *reh'g, transfer denied*

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219, (1989), *cert. denied*, 487 U.S. 1236

Bull v. McCuskey, 615 P.2d 957 (Nev. 1980)

C.W. Development, Inc. v. Structures, Inc. of West Virginia, 408 S.E.2d 41 (W.Va. 1991)

California Union Ins. Co. v. Arkansas Louisiana Gas Co., 572 S.W.2d 393 (Ark. 1978)

Casey v. Calhoun, 531 N.E.2d 1348 (Ohio 1987)

Cater v. Cater, 846 S.W.2d 173 (Ark. 1993)

Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. Tenn. 1985), *cert. denied*, 487 U.S. 1021 (1986)

Cerretti v. Flint Hills Rural Elec. Co-op. Ass'n, 837 P.2d 330 (Kans. 1992)

Certain Underwriters at Lloyd's of London v. Pacific Southwest Airlines, 786 F.Supp. 867 (C.D. Cal. 1992) (applying California law)

Cherry-Burrell Co. v. Thatcher, 107 F.2d 65 (9th Cir. 1940)

City of Lowell v. Massachusetts Bonding & Ins. Co., 47 N.E.2d 265 (Mass. 1943)

City Products Corp. v. Globe Indem. Co., 151 Cal. Rptr. 494 (Cal. Ct. App. 1979)

Clay v. Ferrellgas, Inc., 881 P.2d 11 (N.M. 1994), *cert. denied*, 115 S.Ct. 1102, 130 L.Ed.2d 1069

Continental Casualty Co. v. Fibreboard Corp., 762 F.Supp. 1368 (N.D. Cal. 1991) (applying Texas law), *appeal dismissed and remanded*, 4 F.3d 777 (9th Cir. Ca. 1993)

Continental Ins. Cos. v. Hancock, 507 S.W.2d 146 (Ky. 1973)

Coryell v. Colbaugh, 1 N.J.L. 77 (1791)

Crull v. Gleb, 382 S.W.2d 17 (Mo.Ct. App. 1964)

Curtis v. Firth, 850 P.2d 749 (Idaho 1993)

D.C. Transit System, Inc. v. Brooks, 287 A.2d 251 (Md. 1972)

d'Arc Turcotte v. Estate of LaRose, 569 A.2d 1086 (1989)
Delos v. Farmers Ins. Group, Inc., 155 Cal. Rptr. 843 (Cal. Ct. App. 1979)

Dykes v. Raymark Industries, Inc., 801 F.2d 810 (6th Cir. Tenn. 1986), *cert. denied*, 481 U.S. 1038 (1987), (applying Tennessee law)

Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641 (Iowa 1995)
Ellerin v. Fairfax Savings, F.S.B., 652 A.2d 1117 (Md. 1995)

Farall v. A.C. & S. Co., 558 A.2d 1078 (Del. Super. Ct. 1989)

Feld v. Merriam, 461 A.2d 225 (Pa. Super Ct. 1983), *order reversed on other grounds*, 485 A.2d 742 (1984)

First Nat'l Bank of St. Mary's v. Fidelity & Deposit Co., 389 A.2d 359 (Md. 1978)

First Security Bank, N.A. v. J.B.J. Feedyards, Inc., 653 P.2d 591 (Utah 1982)

Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986)

Ford Motor Co. v. Home Ins. Co., 172 Cal. Rptr. 59 (Cal. Ct. App. 1981)

Foss v. Maine Turnpike Auth., 309 A.2d 339 (Me. 1973)

George Grubbs Enterprises, Inc. v. Blien, 900 S.W.2d 337 (Tex. 1995)

Golf Course Superintendents Ass'n v. Underwriters at Lloyd's, London, 761 F.Supp. 1485 (D.C. Kan. 1991) (applying Kansas law)

Gray v. Allison Div., General Motors Corp., 370 N.E.2d 747 (Ohio Ct. App. 1977)

Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981)

Grinnell v. American Tobacco Co., 883 S.W.2d 791 (Tex. Ct. App. 1994)

Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co., 618 P.2d 1195 (Kan. 1980), *disapproved of in part on appeal after remand, on other grounds*, 652 P.2d 665 (1982)

Hamilton Development Co. v. Broad Rock Club, Inc., 445 S.E.2d 140 (Va. 1994)

Harrell v. Travelers Indem. Co., 567 P.2d 1013 (Or. 1977)

Harrod v. Fraley, 289 S.W.2d 203 (Ky. 1956)Hartford Accident. & Indem. Co. v. Village of Hempstead, 397 N.E.2d 737 (N.Y. 1979)

Harvester Credit Corp. v. Seale, 518 So.2d 1039 (La. 1988)

Hazelwood v. Illinois Cent. Gulf R.R., 450 N.E.2d 1199 (Ill. App. Ct. 1983)
Hensley v. Erie Ins. Co., 283 S.E.2d 227, 230 (W.Va. 1981)

Hensley v. Erie Ins. Co., 283 S.E.2d 227, 230 (W.Va. 1981)

Hensley v. Paul Miller Ford, Inc., 508 S.W.2d 759 (Ky. Ct. App. 1974)

Hobbs v. Watkins, 481 P.2d 746 (Okla. 1971)

Hoene v. Associated Dry Goods Corp., 487 S.W.2d 479 (Mo. 1972), *overruled on other grounds*, 682 S.W.2d 803 (1984)
Hoffman v. Sterling Drug, Inc., 374 F.Supp. 850 (M.D. Pa. 1974) (applying Pennsylvania law)

Huffman and Wright Logging Co. v. Wade, 857 P.2d 101 (Or. 1993)

In re Valley Forge Plaza Association v. Rosen Agency, 113 BR 892, 908 (Bankr. E.D. Pa. 1990), *aff'd in part and rev'd in part, vacated, in part on other grounds*, 120 BR 789 (Bankr. E.D. Pa. 1990) (applying Pa. law)

In re Agent Orange Products Liab. Litig., 100 F.R.D. 718 (E.D. N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988)

In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F.Supp. 887 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. Cal. 1982), *cert. denied*, A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983)

In re A.H. Robins Co., 89 BR 555 (E.D. Va. 1988)

Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. Miss. 1986), *cert. denied*, 478 U.S. 1022 (1986) (applying Mississippi law)
James W. Sessums Timber Co., Inc. v. McDaniel, 635 So.2d 875 (Miss. 1994)

Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla. Ct. App. 1084), *review denied*, 467 So.2d 999 (1985), *disapproved of on other grounds by* Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986) as stated in 553 So.2d 274 (1990)

Juzwin v. Amtorg Trading Corp., 705 F.Supp. 1053 (D. N.J. 1989), *upon reconsideration*, 718 F.Supp. 1233 (D.C. N.J. 1989)

Kammerer v. Western Gear Corp., 635 P.2d 708 (Wash. 1981)

Kelsey v. Connecticut State Employees Ass'n, 427 A.2d 420 (Conn. 1980)

Kewin v. Massachusetts Mut. Life Ins., Co., 295 N.W.2d 50 (Mich. 1980)

Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419 (S.D. 1993)

Kuhnert v. Allison, 868 P.2d 457 (Haw. 1994)

Labrier v. Anheuser Ford ,Inc., 621 S.W.2d 51 (Mo. 1981)

Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976)

Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964)

Leimgruber v. Claridge Associates, Ltd., 375 A.2d 652 (N.J. 1977)

Liberty Mutual Ins. Co. v. Stevenson, 368 S.W.2d 760 (Tenn. 1963)
Loitz v. Remington Arms Co., Inc., 563 N.E.2d 397 (Ill. 1990)

Lou Leventhal Auto Co., Inc. v. Munns, 328 N.E.2d 734 (Ind. Ct. App. 1975)

Lumbermens Mutual Casualty Co. v. S-W Industries, Inc., 39 F.3d 1324 (6th Cir. Ohio 1994)

Magma Copper Co. v. Shuster, 575 P.2d 350 (Ariz. Ct. App. 1977)

Magnum Foods v. Continental Casualty Co., 36 F.3d 1491 (10th Cir. Okla. 1994) (applying Oklahoma law)

Malcolm v. Little, 295 A.2d 711 (Del. 1972)

Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 539 N.W.2d 111 (Wis. Ct. App. 1995), *review granted*, 546 N.W.2d 468 (1996)

Marler v. Allen, 601 P.2d 85 (N.M. Ct. App. 1979)

Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989)

Matthews v. Rogers, 651 S.W.2d 453 (Ark. 1983)

Maxey v. Freightliner Corp. 450 F.Supp. 955 (N.D. Tex. 1978), *aff'd* 632 F.2d 395 (5th Cir. Tex. 1980), *reh'g granted* 634 F.2d 1008 (5th Cir. Tex. 1980) (applying Texas law)

McChesney v. Wilson, 93 N.W. 627 (Mich. 1903)

McCoy v. Arkansas Natural Gas C., 143 So. 383 (La. 1932)

Monter v. Kratzer's Specialty Bread Co., 504 P.2d 40 (Utah 1972)

Moore Ford Co. v. Smith, 604 S.W.2d 943 (Ark. 1980)

Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. Ohio 1982)

Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331 (Ohio 1994)

Murphy v. Hobbs 5 P. 119 (Colo. 1884)

Nepera Chemical, Inc. v. Sea-Land Service, Inc., 794 F.2d 688, 253 U.S. App. D.C. 394 (D.C. Cir. 1986)

Nicholson v. American Fire & Casualty Ins. Co., 177 So.2d 52 (Fla. Dist. Ct. App. 1965)

Nienstedt v. Wetzel, 651 P.2d 876 (Ariz. Ct. App. 1982)

Norfolk v. Western Ry. Co. v. Hartford Accident & Indem. Co., 420 F.Supp. 92 (N.D. Ind. 1976) (applying Indiana and Mississippi law)

Northwestern Nat'l Casualty Co. v McNulty, 307 F.2d 432 (5th Cir. Fla. 1962) (applying Virginia and Florida law), *superseded by statute as stated in* 369 S.E.2d 196 (1988)

Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019 (Ind. 1986), *disagreed with by multiple cases on other grounds* as stated in Obremski v. Henderson, 487 N.E.2d 827 (Ind. App. 1 Dist., 1986), *transf. to* 497 N.E.2d 909 (Ind. 1986)

Ouellette v. International Paper Co., 86 F.R.D. 476 (D. Vt. 1980), *aff'd*, 776 F.2d 55 (2d Cir. 1985), *cert. granted*, 475 U.S. 1081 (1986)

Owens-Ill., Inc. v. United Ins. Co., 625 A.2d 1 (N.J. Super. Ct. App. Div. 1993), *rev'd on other grounds*, 650 A.2d 974 (1994)

Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 133 L.Ed.2d 1, 111 S.Ct. 1032 (1991)

Padavan v. Clemente, N.Y.S.2d 694 (N.Y. App. Div. 1973)

Parker v. Artery, 889 P.2d 520 (Wyo. 1995)

Perry v. Melton, 299 S.E.2d 8 (W.Va. 1982)

Pezzano v. Bonneau, 329 A.2d 659 (Vt. 1974)

Picard v. Barry Pontiac-Buick, Inc., 654 A.2d 690 (R.I. 1995)

Price v. Hartford Accident & Indem. Co., 502 P.2d 522 (Ariz. 1972)

Reserve Nat. Ins. Co. v. Crowell, 614 So.2d 1005 (Ala. 1993), *cert. denied*, 114 S.Ct. 84, 126 L.Ed.2d 52 (1993)
Rizzo v. Haines, 555 A.2d 58 (Pa. 1989)

Rogers v. Reynolds Tobacco Co., 557 N.E.2d 1045 (Ind. Ct. App. 1990)

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2nd Cir. N.Y. 1987) (applying N.Y. law)

Rosenbloom v. Flygare, 501 N.W.2d 597 (Minn. 1993)

Ryan v. Arneson, 422 N.W.2d 491 (Iowa 1988)

Sanford v. Celotex Corp., 598 F.Supp. 529 (M.D. Tenn. 1984)

Schecter v. Watkins, 577 A.2d 585, 395 Pa. Super 363 (1990), *appeal denied*, 584 A.2d 320

Schwertfeger v. Moorehouse, 569 So.2d 322 (Ala. 1990)
Sebastian v. Wood, 66 N.W.2d 841 (Iowa 1954)
Shrewsberry v. Aztec Sales & Service Co., Inc., 445 S.E.2d 253 (W.Va. 1994)

Soares v. Ann & Hope of Rhode Island, Inc., 637 A.2d 339 (R.I. 1994)

Southern Farm Bureau Casualty Ins. Co. v. Daniel, 440 S.W.2d 582 (Ark. 1969)

Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072 (Wash. 1891)

Stambaugh v. International Harvester Co., 435 N.E.2d 729 (Ill. App. Ct. 1982), *reversed on other grounds*, 464 N.E.2d 1011 (1984)

State v. Glens Falls Ins. Co., 404 A.2d 101, 105 (Vt. 1979)

State *ex rel.* Young v. Crookham, 618 P.2d 1268 (Or. 1980)

Strauss v. Briggs, 525 A.2d 992 (Del. 1987)
Terry v. Zions Co-op. Mercantile Institution, 605 P.2d 314, *on rehearing* 617 P.2d 700 (Utah 1980), *overruled on other grounds*, 678 P.2d 298 (1984)

Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994)

TXO Products Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711 (1993)

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989)

United States v. Snepp, 595 F.2d 926 (4th Cir. Va. 1979), *rev'd, in part on other grounds*, 444 U.S. 507 (1980), *on subsequent appeal* 897 F.2d 138 (1990), *cert. denied*, 498 U.S. 816 (1990)

Variety Farms, Inc. v. New Jersey Manufacturers Ins. Co., 410 A.2d 696 (N.J. Super. Ct. App. Div. 1980)

Vollert v. Summa Corp., 389 F.Supp. 1348 (D.C. Hawaii 1975) (applying Hawaii law)

Volz v. Coleman Co., Inc., 748 P.2d 1191 (Ariz. 1987)

Vratsenes v. New Hampshire Auto, Inc., 289 A.2d 66 (N.H. 1972)

Wagner v. Bennett, 814 P.2d 476 (Okla. 1991)

Wangen v. Ford Motor Co., 294 N.W.2d 437 (Wis. 1980)

Warren v. Lemay, 494 N.E.2d 206 (Ill. App. Ct. 1986), *appeal denied* (1986)

Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763)

Wheeler Motor Co., Inc. v. Roth, 867 S.W.2d 446 (Ark. 1993)

Wise v. Daniel, 190 N.W. 746 (Mich. 1922)

Woijciak v. Northern Package Corp., 310 N.W.2d 675, 680 (Minn. 1981)

Wozniak v. United Electrical Radio & Machine Workers of America, 205 N.W.2d 369 (Wis. 1973)

Yamaha Motor Corp., U.S.A. v. Tri-City Motors and Sports, Inc., 429 N.W.2d 871 (Mich. 1988)

Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 642 N.E.2d 1065 (N.Y. 1994)