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Richard S. Fields

Case Notes

Punitive Damages: An Exception to the Right of Privacy?
Coy v. Superior Court

For many years California has allowed the admission of evidence concerning the wealth of defendants in civil cases where punitive damages were in issue. Such information has been compelled in discovery proceedings by the California Supreme Court. In *Coy v. Superior Court*,[1] an action for abuse of process, the plaintiff sought compensatory punitive damages. The defendants refused to respond to interrogatories requesting information concerning their personal assets. The trial court denied a motion to order further response, thus resulting in the instant case, a proceeding to review, by writ of mandate, the denial of that motion. The supreme court, in holding that disclosure of a defendant's wealth could, in fact, be compelled where punitive damages were in issue, emphasized that such information is both admissible at trial as well as being proper material for pretrial discovery.[2]

Punitive damages are authorized in California by statute[3] and evidence of a defendant's wealth has long been held a proper factor in determining the actual amount of such damages. A plethora of judicial decisions, beginning with *Barkley v. Cope-*

1. 58 Cal. 2d 210, 373 P. 2d 457, 23 Cal. Rptr. 393 (1962).
2. 58 Cal. 2d at 223, 373 P. 2d at 463, 23 Cal. Rptr. at 399.
3. "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of an example and by way of punishing the defendant." CAL. CIV. CODE § 3294 (West 1970).

land in 1887, has firmly established this rule in California.[4] Although California has uniformly followed this rule, other jurisdictions have rejected it in whole or in part. The rationale of the earlier cases rejecting this point of view was characterized primarily by a distaste for the very concept of punitive damages.

> There can be no reason why twelve men wholly irresponsible should be allowed to go beyond the issue between the parties litigating, and after indemnifying the plaintiff for the injury sustained by him proceed as conservators of the public morals to punish the defendant in a private action for an offense against society. If the jury have the right to impose a fine by way of example, the plaintiff has no possible claim to it, nor ought the court to interfere and set it aside, however excessive it might be.[5]

> To measure punitive or exemplary damages by the wealth of the defendant seems far fetched. As well might the state impose a fine in a criminal case in accordance with a defendant's ability to pay.[6]

Subsequent New York cases have produced varied results, some admitting such evidence,[7] others rejecting the requirements of such disclosure.[8] Rather than examining specific factors, those courts rejecting such disclosures have done so primarily due to their disdain for the imposition of punitive damages in general.[9] To bar such disclosures, recent cases have focused on such rights of the defendant as that of privacy.[10] In each of these cases the court has upheld an admission of the defendant's financial status as relevant to the setting of punitive damages, but has required such disclosure only *after* the return of a special verdict awarding punitive damages. Only then was the information admissible to facilitate the jury's setting the amount of damages. The courts have enunciated two purposes for preferring this bifurcated trial procedure. The first, and probably most significant, is the protection of the defendant's right of privacy:

> It is unthinkable that a court should sanction such broad and unlimited search and report of a defendant's personal holdings on the mere

4. Barkley v. Copeland, 74 Cal. 1, 15 P. 307 (1887), Greenberg v. Western Turf Assn., 140 Cal. 357, 73 P. 1050 (1903), Marriott v. Williams, 152 Cal. 705, 93 P. 875 (1908); see also, 27 A.L.R. 3d 1377.

5. Dain v. Wycoff, 7 N.Y. 191, 193 (1852).

6. Brown v. Smallwood, 83 N.Y.S. 415, 419 (1903).

7. Fry v. Bennett, 1 Abb. Pr. 289 (N.Y. 1855), Klauber v. S.K.E. Operating Co., Ltd., 296 N.Y.S. 701 (Super. Ct. 1937), 1 CLARK: NEW YORK LAW OF DAMAGES § 54.

8. Brown v. Smallwood, 83 N.Y.S. 415 (1903), Wilson v. Onandaga Radio Broadcasting Corp., 23 N.Y.S. 2d 654 (1940); Austin v. Bacon, 3 N.Y.S. 587 (1888).

9. *See* notes 5, 6 *supra*.

10. Rupert v. Sellers, 368 N.Y.S. 2d 904 (1975), Vollertsen Associates v. Nothnagle, 369 N.Y.S. 2d 267 (1975), and Gierman v. Toman, 77 N.J. Super. 18, 185 A. 2d 241 (1962), a New Jersey case based on *Klauber*, *supra* note 7.

> basis of demand of punitive damages. . . . The concept of the right of privacy in our society rises higher than the needs of this plaintiff.[11]

The second, related more to the assurance of a fair and equitable trial, stems from a fear that the defendant's financial status might have a prejudicial effect on the jury, thereby inducing verdicts based on spurious or perhaps emotional responses rather than on the relevant facts of the case. Keeping such knowledge from the jury until such time as it has a need to know should preclude this occurrence.

> Defendant's worth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty of malice thus entitling plaintiff to punitive damages. To avoid such abuse we conclude that the split trial procedure should be used. . .[12]

Conducting the trial in this manner will therefore preclude the plaintiff from forcing public disclosure of the defendant's personal affairs to his possible disadvantage. This is true whether the disadvantage is one of privacy or one of fairness.

Subsequent to the *Coy* decision several changes occurred in the law relating to privacy. The California Constitution was amended in 1974 making privacy an "inalienable right."[13] The right of privacy, first so named by Warren and Brandeis in the Harvard Law Review, has subsequently been ". . . recognized and enforced in California and in most states throughout the country."[14] Prosser has described four distinct ways in which this right is invaded: an appropriation of one's name or likeness, an intrusion upon one's physical seclusion, a placing of one in a false light in the public eye, and a public disclosure of private facts, that with which *Coy* deals.[15] This aspect of the right deals with public disclosure of admittedly accurate private information, which, although not actionable as defamation, has nevertheless been held to constitute an impermissible and actionable invasion of privacy.[16] The rationale for such an action

11. Gierman v. Toman, 77 N.J. Super. 18, 22, 185 A. 2d 241, 245 (1962).
12. Rupert v. Sellers, 368 N.Y.S. 2d 904 (1975).
13. CAL. CONST. art. 1 §1: All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.
14. *See also*, PROSSER, TORTS 802 (4th ed. 1971); and Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931).
15. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
16. Brents v. Morgan, 221 Ky. 765, 299 S.W. 867 (1927) dealing with disclosure of financial matters: nonpayment of a debt.

is that a definite injury is produced when one's personal affairs are aired to the public regardless of the accuracy of the information. Each person has a right to protect certain aspects of his affairs from public scrutiny. A breach of this protection has been recognized as actionable unless perpetrated by the state.

In 1965 the United States Supreme Court elevated the right of privacy to a constitutional level. In *Griswold v. Connecticut*,[17] the Court, basing its decision on the penumbral right of privacy derived from the First, Third, Fourth, Fifth, and Ninth Amendments, held a Connecticut statute proscribing the use of birth control material as unconstitutional. Privacy, whose invasion had theretofore been recognized only as a tort,[18] and only alluded to in a constitutional sense,[19] had finally become a fully protected constitutional right. *Griswold* and its progeny thus mandate that the state may no more deprive its citizens of privacy without due process of law than may an individual.

The exercise of this right has also been applied to the disclosure of private financial affairs. In *City of Carmel-by-the-Sea v. Young*, the California Supreme Court applied the principles of *Griswold* to the state ordered disclosure of personal financial affairs of public employees.[20] The California legislature enacted legislation intended to disclose any actual or potential conflicts of interest regarding public officials and candidates for public office. This series of statutes[21] required disclosure by such persons of information concerning all investments owned by themselves, their spouses or minor children that exceeded $10,000. An exception existed for personally used homes or recreational properties. Faced with mass resignation by its public officials, the plaintiff city filed for declaratory relief. Although the trial court upheld the statutes, the supreme court reversed, holding the statutes to be ". . . an overbroad intrusion into the right of privacy . . . ."[22] The court's analysis recognized three major factors: the interest of the state in revealing conflict of interest in public officials, the right of the individual to seek and hold public office and the right of the individual to protect his private affairs from public disclosure. In its discussion of the last factor, the court stated that:

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17. 381 U.S. 479 (1965).
18. *See* note 15 *supra*.
19. Mapp v. Ohio, 367 U.S. 643, 656 (1961) creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." Griswold v. Connecticut, 381 U.S. 479 (1965).
20. 2 Cal. 3d 259, 466 P. 2d 225, 85 Cal. Rptr. 1 (1970).
21. CAL. GOVT. CODE §§3600-3704 (West 1972).
22. 2 Cal. 3d at 262; 466 P.2d at 227; 85 Cal. Rptr. at 3.

> . . . the right of privacy concerns one's feelings and one's own peace of mind (citation omitted) and certainly one's personal financial affairs are an essential element of such peace of mind. . . . In any event we are satisfied that the protection of one's personal financial affairs . . . against compulsory public disclosure is an asepct of the zone of privacy which is protected by the Fourth Amendment and which also falls within the penumbra of constitutional rights into which the government may not intrude absent a showing of compelling need and that the intrusion is not overly broad.[23]

In its balance of the three competing interests, the court found the value of privacy to weigh heavily. Despite the strong state interest in having honest and credible public officials in government, the court, for constitutional reasons, decided in favor of individual privacy. The court leaves little doubt that it considers privacy with respect to one's personal financial matters to be a "fundamental right," a basic value "implicit in the concept of ordered liberty,"[24] and among "basic civil rights of man."[25]

Reconsidered in light of this subsequent law, can *Coy* maintain its viability or is it a likely subject for reevaluation in this sensitive area of law? Whatever the trend, it is clear that the wealth of the defendant cannot be compelled in an action for compensatory damages alone:

> [I]t has been the theory of our government and a cardinal principle of our jurisprudence, that the rich and poor stand alike in courts of justice, and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law. Evidence of the wealth of a party is never admissible, directly or otherwise, unless in those exceptional cases where position or wealth is necessarily involved in determining the damages sustained.[26] In our opinion the pretrial disclosure of such financial information would be contrary to the public interest and would not be consistent with the policy of the . . . . to hold otherwise would open a Pandora's Box. . .[27]

In considering punitive damages, however, there is a strong legal policy to make the responsibility appropriate to the circumstances of the individual to be burdened:

> The object of exemplary damages is to make the punishment fit the offense (Thomson v. Catalina, 205 Cal. 402, 405-406, 271 P. 198 (62 A.L.R. 235), and in determining the amount necessary to impose the

23. *Id.* at 268, 466 P. 2d at 231, 85 Cal. Rptr. at 7.
24. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
25. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
26. Laidlaw v. Sage, 158 N.Y. 73, 103, 52 N.E. 679, 690 (1899).
27. Doak v. Superior Court, 257 Cal. App. 2d 825, 832, 838, 65 Cal. Rptr. 193, 198, 201 (1968).

> appropriate punitive effect the jury was entitled to consider the wealth of the defendant.[28]

The policy of punishing the wrongdoer has, in the past, been balanced against the right of the defendant and found not violative of his constitutional rights.[29] With the "fundamental rights" concept, however, a much more rigorous standard is demanded, as in *Carmel* where the necessity of showing both a compelling need and absence of overbreadth are prerequisites when attempting to abridge these rights.[30] In applying these criteria to *Coy*, the issues can be narrowed to two: is the disclosure of the defendant's wealth necessary to accomplish the legitimate objectives of the courts, and, is the disclosure requirement, as applied in California, drawn with sufficient precision and specificity so as to restrict the right of privacy only to such a degree as necessary to accomplish a legitimate end?

A majority of jurisdictions recognize and accept the rationale for punitive damages, that of punishing persons who have committed wrongful acts with malicious intent.[31] The question of specificity, however, is another matter. Under *Coy*, disclosure can be compelled by simply pleading a prima facie case for punitive damages with no factual evaluation or judgement of any kind being required. If the jury finds unanimously for the defendant, his full financial status has already been made public in the absence of any fault other than the passive act of being named a defendant! It seems unlikely that such an arbitrary invasion of privacy would be upheld today in view of the amendment of Article 1, section 1 of the California Consitution, *Griswold*, its progeny and especially *Carmel*:

> the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary. . . .[32]

Griswold and *Carmel* require a compelling need to justify an invasion of privacy by the state. Whether the courts will find punitive damages in a civil lawsuit between private citizens a compelling state interest is a question yet to be resolved. Unquestionably the state has some interest in punishing malicious acts beyond the actual damage inflicted, but that interest may not reach the degree of importance necessary to take prece-

28. Mac Donald v. Joslyn, 275 Cal. App. 2d 282, 293, 79 Cal. Rptr. 707 (1969), *as cited in*, Wetherbee v. United Insurance Co. of America, 18 Cal. App. 3d 266, 270, 271, 95 Cal. Rptr. 678, 681 (1971).

29. 23 CAL. JUR. 3d *Damages* § 116 (1975).

30. 2 Cal. 3d 259, 268, 466 P. 2d. 225, 230, 85 Cal. Rptr. 1, 7 (1970).

31. 23 CAL JUR. 3d *Damages* §116 (1975).

32. 2 Cal. 3d at 265, 466 P. 2d at 229, 85 Cal. Rptr. at 5.

dence over a fundamental right. Even if such an interest were found, disclosure based on mere allegation is more than is required to satisfy the goal of appropriateness of punishment.

The bifurcated trial concept offers an attractive alternative. This approach, adopted in several cases hereinbefore cited,[33] advantageously graduates the penalty in accordance with the burden it places on the defendant, and yet, at the same time protects the defendant's privacy until such time he has been found liable. In operation, the jury is sent out to consider the question of whether punitive damages should be awarded. If they return with a special verdict to the effect that such damages are appropriate, only then is evidence of defendant's wealth admissible. Although this procedure results in some delay and inconvenience, such drawbacks must be weighed against the protection of a right of constitutional magnitude. It is doubtful that a court would hold such inconvenience as outweighing the right of privacy. Were a case like *Coy* to be decided in the future, the California Supreme Court would do well to reverse the *Coy* approach and adopt the bifurcated trial concept. Perhaps this issue, with its fundamental implications, should be resolved by the legislature rather than waiting for a court decision. A statute which would bar the disclosure of personal financial information until *after* an award of punitive damages has been made would mandate a bifurcated trial procedure and thus protect the defendant from an unnecessary invasion of his privacy where punitive damages are alleged.

RICHARD S. FIELDS

33. *See* note 10, *supra*.