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doer. However, experience shows that fault is not always in one individual; in fact, it is usually shared. In such circumstances financial losses ought also to be shared. This could be done by allowing contribution in all cases where there is concurrent negligence. Necessarily such action would have to be taken by the Legislature because the existing statute allowing contribution has been so narrowly construed.[8] In the instant case the sub-contractor's negligence was the immediate cause of the injury to the infant plaintiff. The failure of the infant plaintiff to join the sub-contractor defeated any possibility of contractor's obtaining contribution, and the Court's determination that contractor was actively negligent made indemnification impossible. Thus one of the primary wrongdoers escaped, undamaged financially. The need for a broader contribution statute is painfully apparent. Contribution closely approaches a distribution of losses according to fault, and this ought to be the goal of any legal system.

R. J. D.

EXEMPLARY DAMAGES AWARDED IN FRAUD AND DECEIT ACTION

Although it has long been the rule in New York State that punitive damages will not lie in cases of "ordinary" fraud and deceit, a recent Court of Appeals decision has opened the door to such damages in cases where the public in general has been the victim of illegitimate enterprises based upon fraud and deception. As a result, the argument has been raised that the old rule has been extended in a direction not supported by precedent, or within the traditional role of the judiciary. The question arises in *Walker v. Sheldon*,[1] an action against a publishing firm and its officers.

Plaintiff wished to publish a book of children's stories written by her mother, a non-professional writer. She was offered a contract wherein the defendants promised to print 2,400 copies of the book and promote their sale through the use of their alleged advertising and sales staff. The sum of $1,380 was to be paid by plaintiff for the printing, but it was represented that as a result of the promised promotional scheme, "liberal" royalties would result in the plaintiff recouping this amount. The complaint alleged that in fact the defendant never intended to publish the book in the sense represented by the contract or that understood among professional writers. Instead, the defendants intended to and did publish no more than a handful of the books to meet a minimal demand for them by plaintiff's friends and relatives, and the copies were sold in book shops in plaintiff's neighborhood only, with "advertising" limited to a token listing in an obscure local newspaper. It was further alleged that the defendants calculated their profit from the contract on this minimal

8. See 1952 N.Y. Law Rev. Comm. Report 21; 1941 N.Y. Law Rev. Comm. Report 17; 1939 N.Y. Law Rev. Comm. Report 67; 1936 N.Y. Law Rev. Comm. Report 699. The Commission in vain recommended to the Legislature a broadening of the right of contribution.

1. 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).

effort, not on the sale of the books as promised, and that their representations were wantonly and recklessly made in order to defraud the plaintiff as others had been similarly defrauded, and that such was the basis of the defendant's business and in its regular course. Plaintiff therefore sought $75,000 punitive damages in addition to compensatory damages of $1,380.

The defendants moved to strike those paragraphs of the complaint alleging that the representations were made in its regular course of business, and as its basis, and that other members of the general public had been similarly defrauded in the past. The Supreme Court, New York County, Special Term, denied this motion and the Appellate Division affirmed.[2] The allegations in the complaint relating to punitive damages were allowed to stand. Defendants appealed by permission upon certification of questions whether the Appellate Division acted properly as a matter of law.

The majority of the Court of Appeals, concurring in the opinion of Judge Fuld, agreed with the conclusion of the Appellate Division that a jury would be justified in granting punitive damages to the plaintiff on the theory of wanton and malicious conduct if the defendants were found to be carrying on a "virtually larcenous scheme to trap generally the unwary."[3] It has been the practice in New York to confine damages in fraud and deceit actions to a compensatory rather than an exemplary assessment. The case of *Oehlhof v. Solomon*[4] is illustrative of this rule which has refused punitive damages in "ordinary" fraud and deceit cases. In that case plaintiff was induced to purchase defendant's business through misrepresentations made by the defendant, but the Court expressly found that there was "nothing to indicate malice toward the plaintiff,"[5] an element that has always been necessary for the awarding of punitive damages generally.[6] The Court in *Oehlhof* may be said to have had in contemplation just such a situation as that presented by the instant case, when it declared that the "rule" should be adhered to except perhaps where the wrong involves some violation of duty springing from a relation of trust or confidence, or presents other *extraordinary or exceptional circumstances, clearly indicating malice and calling for an extension of the doctrine.*"[7] (Emphasis added.)

The majority has not sought to change the rule as it has been applied to "ordinary" fraud and deceit actions in New York, but has merely distinguished the instant case from these and specifically held that "there may be a recovery of exemplary damages in fraud and deceit actions where the fraud, aimed at the public generally, is gross and involves high moral culpability."[8]

2. 12 A.D.2d 456, 207 N.Y.S.2d 176 (1st Dep't 1960).
3. Walker v. Sheldon, supra note 1, at 404, 179 N.E.2d 498, 223 N.Y.S.2d at 490.
4. 73 App. Div. 329, 76 N.Y. Supp. 716 (1st Dep't 1902).
5. Id. at 335, 76 N.Y. Supp. at 720.
6. 1 Clark, New York Law of Damages § 51 (1925); McCormack, Damages § 79 (1935).
7. Oehlhof v. Solomon, supra note 4, at 334, 76 N.Y. Supp. at 720.
8. Walker v. Sheldon, supra note 1, at 405, 179 N.E.2d 499, 223 N.Y.S.2d at 491.

This view is in substantial agreement with the weight of case authority in the United States[9] and the text writers,[10] and the Court has pointed out that punitive damages have been given in New York in a fraud and deceit action where the malicious conduct of the defendant has shown a reprehensible degree of moral turpitude and a callous, almost criminal, indifference to civil obligations.[11]

In a dissenting opinion by Judge Van Voorhis, in which Judges Froessel and Foster concurred, it was vigorously argued that the awarding of punitive damages should not be extended to fraud and deceit actions. A "time honored" rule was noted that confined such damages to the actual pecuniary loss sustained by the plaintiff;[12] and the majority has pointed out that this is indeed the rule, and remains as such, in cases involving "ordinary" fraud. In none of the cases cited by the minority did the facts involve wanton or malicious conduct directed not only at the plaintiff, but as alleged in the instant case, the public generally, and the case of *Oehlhof v. Solomon*, cited by the minority in support of this "time-honored" rule, clearly indicates that an extension of this rule, or more properly perhaps in the instant case, an exception to that rule, was foreseen when the elements of malice and wanton conduct warranted it.

It is difficult to justify the apprehension of the minority. Underlying the reasons given for this uneasiness is a fear of excessive and arbitrary awards that may be "obtained by a plaintiff by inflaming the passions of the jury."[13] Yet such awards, while in the "sound discretion" of the jury, do not go unchecked by the courts, but are, as the majority opinion notes, subject to court review. The difficulty in formulating a rule or doctrine allowing punitive damages in fraud and deceit actions is apparent at first glance, but the holding in the instant case is a narrow one and should not, when applied, admit of the confusion and arbitrariness which the minority fears. In addition to requiring the elements of malice and wanton conduct, the majority clearly limits its holding to a fact situation which involves fraud and deceit upon the public generally by a defendant whose business is based upon such deception. Wisely distinguished is the "isolated transaction incident to an otherwise legitimate business."[14]

9. See, e.g., Bell v. Preferred Life Soc., 320 U.S. 238 (1943); Day v. Woodworth, 54 U.S. 362 (1851); Greene v. Keithley, 86 F.2d 238 (8th Cir. 1936); Laughlin v. Hopkinson, 292 Ill. 80, 126 N.E. 591 (1920); Whitehead v. Allen, 63 N.M. 63, 313 P.2d 335 (1957); Saberton v. Greenwald, 146 Ohio St. 414, 66 N.E.2d 224 (1946); Craig v. Spitzer Motors, 109 Ohio App. 376, 160 N.E.2d 537 (1959).

10. 1 Clark, New York Law of Damages § 62 (1925); McCormick, Damages § 78 (1935); Prosser, Torts § 2 (1st ed. 1941).

11. See Kujek v. Goldman, 150 N.Y. 176, 44 N.E. 773 (1896), where the plaintiff was induced to marry a domestic in the employ of the defendant's family who had been represented by the defendant to be a "virtuous and respectable woman." Undisclosed, however, was the fact that she had been made pregnant by the defendant. See, also, Hamilton v. Third Ave. R.R. Co., 53 N.Y. 25 (1873).

12. Sager v. Friedman, 270 N.Y. 472, 1 N.E.2d 971 (1936); Reno v. Bull, 226 N.Y. 546, 124 N.E. 144 (1919).

13. Walker v. Sheldon, supra note 1, at 408, 179 N.E.2d 501, 223 N.Y.S.2d 494.

14. Id. at 406, 179 N.E.2d 500, 223 N.Y.S.2d 492.

It would seem that a more steadfast faith in the ability of those who sit in judgment of the facts in civil cases, and in the judicial safeguards erected to insure the equality of such verdicts, would work to dispel at least some of the misgivings of the minority. There is no doubt that the awarding of punitive damages in a fraud and deceit action such as the instant case takes on an aura of criminal punishment being meted out in a civil court. There is the further possibility that the defendant may yet have another day in court, this time criminal, in which further penalties may be exacted. But this possibility may well be risked if the interests of both parties to an action such as the instant case are weighed with equal vigor, as the majority has done. It is decidedly less likely that grave injustice would be done to a defendant in the present situation if he were in fact subjected to monetary damages in excess of the actual amount realized by his fraudulent scheme, than if a plaintiff similar to the one in the instant case were rendered a sum equal to the amount actually parted with, but which in view of the expenses necessary to realize such a verdict could well be considered to be something less than "compensatory" in practical terms. The majority has recognized the value in providing such a plaintiff with a realistic measure of self-interest in order to induce him to initiate a claim which otherwise might be neglected. The net result of this view would seem to be a just one, fraught as it may be with some risk of dual punishment for the defendant or a judicial encroachment upon a legislative function (the imposition of punishment to deter crime). Clearly, then, the majority has struck a balance which is not as unworkable as might be feared.

A dutiful consideration of the public welfare recommends this holding which provides a powerful deterrent to any illegitimate enterprise based upon fraud and deception, which could otherwise afford to suffer its occasional day in court if only compensatory damages were to be involved in the few civil actions likely to be brought against it. Equally important and not to be overlooked, is the very real opportunity of creating a more favorable climate for the legitimate business community through the resultant removal of such enterprises.

J. P. M.

GRATUITOUS MEDICAL AID NOT COMPENSABLE AS TORT DAMAGES

Plaintiff is a practicing physician. In July, 1957, the auto driven by him was struck from the rear by an auto operated by defendant. For the resulting cervical whiplash injury, plaintiff received medical services from professional colleagues and physiotherapy by his nurse, in each instance without out-of-pocket expense. On appeal, it was held, affirmed, that the value of medical and nursing care and treatment rendered to the injured physician gratuitously was not recoverable as special damages irrespective of any moral obligation on