

Municipal Corporations Are Immune from Exemplary Damages Under 42 U.S.C. § 1983: *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981).

In 1975, Fact Concerts, Inc., a concert promoter, entered into a written contract with the city of Newport to present several summer concerts.¹ Pursuant to the contract, Fact Concerts retained control of the choice of performers and the type of music, while the city reserved the right to cancel without liability in the interest of public safety.² In scheduling performers, Fact Concerts substituted a rock band for a previously scheduled jazz ensemble.³ The city objected to the substitution and ostensibly cancelled the concert because the plaintiff-promoter failed to provide certain safety precautions pursuant to the contract.⁴ Fact Concerts obtained a restraining order in state court enjoining the city from interfering with the concert.⁵

The plaintiff later filed suit under 42 U.S.C. § 1983⁶ in United States district court against the city, the mayor, and members of the city council, alleging that the cancellation of the concert by the city constituted “content-based” censorship.⁷ Fact Concerts also contended that its constitutional right to free speech and due process had been denied under “color of state law.”⁸ In so contending, Fact Concerts sought compensatory and punitive damages against the defendants pursuant to section 1983.⁹ After a jury trial, the court held that the defendants, including the city, had violated

1. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748, 2751 (1981).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 2752.

6. 42 U.S.C. § 1983 (1976) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748, 2752 (1981).

8. *Id.*

9. *Id.*

section 1983 by cancelling the promoter's license and awarded the plaintiff both compensatory and punitive damages.¹⁰

The city of Newport moved for a new trial arguing that punitive damages cannot be awarded against a municipality under section 1983.¹¹ Upon rehearing, the district court held that, in appropriate circumstances, municipalities are liable for punitive damages under section 1983.¹² On appeal, the First Circuit Court of Appeals affirmed¹³ and the Supreme Court subsequently granted a writ of certiorari.¹⁴ The Supreme Court held that a municipality was immune from punitive damages under 42 U.S.C. § 1983.¹⁵

I. MUNICIPAL IMMUNITY FROM EXEMPLARY DAMAGES

A. *Two Considerations*

Traditionally, municipal liability for exemplary damages has been grounded on two distinct considerations: (1) the status of the defendant as a municipality¹⁶ and (2) the presence of gross negligence or malice in the municipality's actions.¹⁷ The first consideration examined whether there was some characteristic inherent in municipalities that precluded the award of punitive damages,¹⁸ and

10. *Id.* The jury awarded compensatory damages of \$72,910 and punitive damages of \$275,000; of the punitive damages, \$75,000 was spread among the seven individual officials, and \$200,000 was awarded against the city. *Id.*

11. *Id.*

12. *Id.* at 2753.

13. *City of Newport v. Fact Concerts, Inc.*, 626 F.2d 1060 (1st Cir. 1980), *vacated and remanded*, 101 S. Ct. 2748 (1981).

14. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 782 (1980).

15. *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748, 2762 (1981).

16. *Kansas City v. Lemen*, 57 F. 905, 907-09 (8th Cir. 1893); *Doyle v. City of Sandpoint*, 18 Idaho 654, —, 112 P. 204, 205-06 (1910). *See also* Annot., 19 A.L.R.2d 903, 908 (1951).

17. *Wallace v. City of New York*, 18 How. Pr. 69 (N.Y. 1859). *See also* Annot., 19 A.L.R.2d 903, 914 (1951).

18. *Hannon v. County of St. Louis*, 62 Mo. 313, 316 (1876); *Eastman v. Meredith*, 36 N.H. 284, 291-92 (1858); 18 E. McQUILLIN, *LAW OF MUNICIPAL CORPORATIONS* § 53.04 (3d rev. ed. 1977). This inquiry raised the governmental-proprietary dichotomy. Municipalities have a dual personality; one for governmental or public functions, and another for proprietary or private functions. In performance of its governmental functions, a municipal corporation enjoys the sovereign immunity of a state. When performing a proprietary function, it is liable as a person or a corporation for compensatory damages. The question of exemplary damages arises only in those cases where the municipality does not have governmental immunity because liability for exemplary damages will not lie in the absence of compensatory

the second consideration identified the presence of willfulness, malice, or gross negligence as justification for holding a municipality liable for exemplary damages.¹⁹

B. *Development of the "Status as a Municipality" Standard to 1950*

The "status as a municipality" standard evolved from the dual governmental-proprietary role of municipal corporations. The nature of a municipality characterized by immunity when performing governmental functions and liability when performing proprietary functions²⁰ compelled most courts to deny exemplary damages in the absence of express statutory authority.²¹ In *Newcastle Products, Inc. v. School District of Blair Township*,²² for example, the district court denied exemplary damages against the school district for conversion of plaintiff's building materials.²³ School board members ordered building materials from plaintiff without authority to do so.²⁴ In holding for the defendant-school district, the court observed that the actions of school officials were governmental and, therefore, the liability of the quasi-municipal corporation was limited to compensatory damages.²⁵

Illustrating the necessity of statutory authority, the Iowa Supreme Court, in *Bennett v. City of Marion*,²⁶ denied exemplary damages because there was no statute authorizing punitive damages against a municipality.²⁷ In a prior suit against the city, the plaintiff had recovered compensatory damages for the injury incurred when a broken sewer polluted a stream on plaintiff's land.²⁸ A second suit was brought to recover exemplary damages because the city failed to repair the sewer and, thus, further polluted plain-

damages. *Id.*

19. *City of Decatur v. Fisher*, 53 Ill. 407, 408 (1870).

20. C. RHYNE, *MUNICIPAL LAW* §§ 30-2, 30-4, at 732-35, 735-37 (1957).

21. Annot., 19 A.L.R.2d 903, 906 (1951); see 18 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.18a (3d rev. ed. 1977).

22. 18 F. Supp. 335 (W.D. Pa. 1936).

23. *Id.* at 336.

24. *Id.*

25. *Id.* at 337.

26. 102 Iowa 425, 71 N.W. 360 (1897).

27. *Id.* at —, 71 N.W. at 360.

28. *Id.*

tiff's land in "wanton" disregard for his rights.²⁹ The court, in holding for the defendant-municipality, observed that such damages were proper, if the defendant is not a municipality, but except where a statute permits, only compensatory damages may be recovered against a municipal corporation.³⁰

Other cases, conversely, denied recovery of exemplary damages against a municipality without relying on a statute as justification for the denial.³¹ For instance, in *Wilson v. City of Wheeling*,³² plaintiff sued the city of Wheeling for damages received when he fell into an unlighted culvert in the highway.³³ The court agreed that plaintiff was entitled to compensatory damages, but held a jury instruction allowing vindictive damages erroneous.³⁴ The court reasoned that recovery of damages against a municipality was not governed solely by the jury's discretion but rather by the measure of actual damages suffered by plaintiff.³⁵

Courts, in some cases, argued that awarding exemplary damages against a municipality contravened public policy because the parties who bore the financial burden of the punishment were also the taxpayers who benefitted from punishing the wrongdoer.³⁶ For example, in *M'Gary v. President & Council of Lafayette*,³⁷ the Louisiana Supreme Court held that the city of Lafayette was not liable for exemplary damages even though its officials willfully and maliciously destroyed plaintiff's house.³⁸ The court explained that the city was obligated to repair the injury resulting from the negligent or wrongful acts of its officials; however, the official alone was

29. *Id.*

30. *Id.*

31. *E.g.*, *City of Chicago v. Langlass*, 52 Ill. 256, 259 (1869) (A new trial was ordered because the size of the jury's award indicated that exemplary damages had been granted against the municipality.); *City Council v. Gilmer & Taylor*, 33 Ala. 116, 122, 132 (1858) (Evidence was excluded that might have proven malicious motives of individual corporation members to defeat a proposition to repair city streets. The court stated that no principle existed upon which the municipal corporation would be responsible to the plaintiff for the malice of its officers.).

32. 19 W. Va. 323 (1882).

33. *Id.* at 326.

34. *Id.* at 350.

35. *Id.* at 350-51. The court remarked, "The city is not a spoiler and should not be visited by vindictive or punitive damages." *Id.* at 350.

36. See generally Comment, *Municipal Liability for Exemplary Damages*, 15 CLEV.-MAR. L. REV. 304, 310 (1966).

37. 12 Rob. 674 (La. 1846).

38. *Id.* at 676-77.

liable for his malicious conduct.³⁹

A second argument against holding cities liable for punitive damages is that a municipality acts through its agents who are not controlled by the public.⁴⁰ The members of the public, according to this argument, as passive wrongdoers, should not be liable for exemplary damages incurred by municipal agents.⁴¹ In *Town of Newton v. Wilson*,⁴² therefore, the Mississippi Supreme Court denied vindictive damages against the appellant city because its agent terminated appellee's water supply without cause.⁴³ The court, in so denying, awarded actual damages but reasoned that municipalities function in the public interest and, therefore, are not liable for punitive damages for the willful conduct of their servants.⁴⁴

An exception to the rule that public policy bars the recovery of exemplary damages against a municipality is when a municipality ratifies the wrongful acts of its agents.⁴⁵ In *St. John's Gas Co.*

39. *Id.* at 676. The court stated:

Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case, admitting that she was entitled to recover any from the defendants, being evidently vindictive, cannot in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient, for her indemnification.

Id. at 677.

40. *Costich v. City of Rochester*, 68 A.D. 623, 73 N.Y.S. 835 (1902). In *Costich*, the court stated that it would be difficult to conceive of a case where exemplary damages could be recovered against a municipality. Public policy barred recovery since the members of a municipal corporation have no control over its agents and are powerless to act where the agents act maliciously or in bad faith. *Id.* at ___, 73 N.Y.S. at 837, 841-42.

41. *Herfurth v. Corporation of Wash.*, 6 D.C. (1 Mackey) 288, 293 (1868). In *Herfurth*, Judge Olin stated:

The whole doctrine of exemplary damages as applied to an agent has no solid foundation. Such a case as this is not a case for exemplary damages. The corporation of Washington is an agent of the people. The people are bound for their negligence, but they are not insurers of every wayfarer on the streets.

Id.

42. 128 Miss. 726, 91 So. 419 (1922).

43. *Id.* at ___, 91 So. at 419-20.

44. *Id.* at ___, 91 So. at 419. The court stated, "The wanton agent may become liable individually, perhaps on his bond if he have any; but to hold that the public can be visited with punishment for the willful and malicious acts of its servants would be to contravene sound public policy." *Id.* at ___, 91 So. at 419-20.

45. *City of Lawton v. Johnstone*, 123 Okla. 145, 252 P. 393 (1926); *Willett v. Village of*

v. San Juan,⁴⁶ for example, the city was liable for punitive damages when its officers trespassed on private property.⁴⁷ In *St. John's Gas Co.* the mayor took possession of a private corporation's property for a considerable length of time.⁴⁸ The court found that the property was retained long enough to establish that the city ratified the mayor's action.⁴⁹ In so finding, the court concluded that the city was liable for exemplary damages because it ratified the wanton trespass on plaintiff's property.⁵⁰

Because of public policy considerations, statutes authorizing punitive damages against a municipality have been strictly construed.⁵¹ Courts have held that a statute authorizing exemplary damages must clearly express an intent to award punitive damages against a municipality and that ambiguous language within the statute is insufficient to support an award of exemplary damages.⁵² In *Hunt v. City of Boonville*,⁵³ for example, the Supreme Court of Missouri held that a municipal corporation was not liable for exemplary damages under a statute allowing treble damages against "any person" quarrying rocks without permission.⁵⁴ The statute created liability for willful and malicious acts of corporate employees; however, the court held that a municipal corporation could not commit a willful, malicious wrong and, therefore, it was not within the purview of the statute.⁵⁵

Another case concerning strict statutory construction in the area of punitive damages was *Board of Commissioners v. Baxter*.⁵⁶

St. Albans, 69 Vt. 220, ___, 38 A. 72, 74-75 (1897).

46. 1 P.R. Fed. 160 (1902).

47. *Id.* at ___.

48. *Id.* at ___.

49. *Id.* at ___.

50. *Id.* at ___.

51. *See, e.g.,* *Order of Hermits of St. Augustine v. County of Philadelphia*, 4 Clark 120, Brightly N.P. 116, 7 Pa. L.J.R. 124 (1847). In *Order of Hermits*, the court held that a statute permitting suit against the county for the destruction of private property by mob violence would have been sufficient to allow recovery of exemplary damages against the individual rioters but was not sufficient against the municipality. The court implied that public policy inclined against the award of exemplary damages against a municipality. *See id.* at 122, 123, Brightly N.P. at 118, 119, 7 Pa. L.J.R. at 126, 127. The jury awarded compensatory damages of more than \$47,000.

52. Annot., 19 A.L.R.2d 903, 912 (1951).

53. 65 Mo. 620 (1877).

54. *Id.* at 624-25.

55. *Id.*

56. 113 Okla. 280, 241 P. 752 (1925).

In *Baxter* treble damages were denied against the county for forcibly ejecting Baxter from his property.⁵⁷ Although the statute authorized recovery of punitive damages, the court analyzed policy considerations and held that the suit against the county did not benefit society because, in reality, the burden of punishment fell upon the taxpayers and, therefore, would not deter future violations by municipal officials.⁵⁸

In *Desforge v. City of West St. Paul*,⁵⁹ on the other hand, the Supreme Court of Minnesota held that authority to award exemplary damages against a city did not arise from a statute containing penal and civil remedies for trespass.⁶⁰ In *Desforge* the plaintiff sued the city for trespass arising from the wrongful removal of sand, dirt, and gravel from his property.⁶¹ In the penal section of the statute, trespass was defined as a misdemeanor, but the civil section of the act permitted punitive damages only when the conduct and punishment was not specially prescribed by the statute.⁶² The court, in holding for the city, stated that exemplary damages were only recoverable against a municipality when expressly authorized by statute.⁶³ In *Desforge* the court found that no authority existed to impose punitive damages on the city because, although the defendant-municipality's acts were specially described in the penal section of the statute, the punishment arose from the general statutory penalty for misdemeanors.⁶⁴ The court's strict construction of the statute eliminated the civil section as a statutory basis for imposing treble damages on the city.⁶⁵

By 1950 the development of the "status of a municipality" standard for awarding exemplary damages against a municipal corporation was well established. The "status as a municipality" standard emphasized statutory authority, policy considerations, and history as justifications for awarding exemplary damages against municipalities. Only where the municipality ratified the acts of its agents, according to the courts, was the award of exemplary dam-

57. *Id.* at ___, 241 P. at 757-58.

58. *Id. Accord*, *Longfellow v. City of Seattle*, 76 Wash. 509, ___, 136 P. 855, 858 (1913).

59. 231 Minn. 205, 42 N.W.2d 633 (1950).

60. *Id.* at ___, 42 N.W.2d at 635.

61. *Id.* at ___, 42 N.W.2d at 633-34.

62. *Id.* at ___, 42 N.W.2d at 635.

63. *Id.* at ___, 42 N.W.2d at 634-35.

64. *Id.* at ___, 42 N.W.2d at 635.

65. *Id.*

ages justified.

C. *Development of the "Gross Negligence" Standard to 1950*

The gross negligence standard required that certain circumstances exist before exemplary damages could be awarded against a municipal corporation.⁶⁶ Willfulness, wantonness, malice, gross negligence, recklessness, oppression, indignity, outrageous conduct, insult, or gross fraud by a municipality justified an award of punitive damages under the gross negligence standard.⁶⁷ Although exemplary damages could be recovered under the standard of gross negligence, the trier of fact retained absolute discretion in awarding punitive damages.⁶⁸

Courts, in past cases, denied exemplary damages against a defendant-municipality because the gross negligence standard could not be reached.⁶⁹ In *City of Chicago v. Martin*,⁷⁰ for example, the city failed to repair a defect in a street, and plaintiff was subsequently injured.⁷¹ The court, in *Martin*, held that the failure to repair the street was "mere negligence" and, therefore, the city was not guilty of gross negligence, which finding precluded recovery of exemplary damages.⁷²

Even where circumstances constituting gross negligence existed, early courts refused to award exemplary damages against a municipality where only a general statute referring to liability for highway defects applied.⁷³ In *Burr v. Town of Plymouth*,⁷⁴ the driver of a mule team sued the city under a general statute establishing a duty to maintain highways in a safe condition.⁷⁵ Because the road was snow-covered, the plaintiff was forced to drive on

66. *City of Chicago v. Kelly*, 69 Ill. 475, 477 (1873). See also *Kansas Pac. Ry. v. Kessler*, 18 Kan. 523, 524-25 (1877); Annot., 19 A.L.R.2d 903, 914 (1951).

67. *Wilson v. Town of Granby*, 47 Conn. 59, 75 (1879). See also *Linsley v. Bushnell*, 15 Conn. 225, 236 (1842); Annot., 19 A.L.R.2d 903, 911 (1951).

68. *First Nat'l Bank v. Stewart*, 204 Ala. 199, —, 85 So. 529, 530 (1920). See also 22 AM. JUR. 2D *Damages* § 240 (1965).

69. See *City of Parsons v. Lindsay*, 26 Kan. 426, 434 (1881).

70. 49 Ill. 241 (1868).

71. *Id.* at 242.

72. *Id.* at 244-45.

73. *Burr v. Town of Plymouth*, 48 Conn. 460 (1881); see Annot., 19 A.L.R.2d 903, 919 (1951).

74. 48 Conn. 460 (1881).

75. *Id.* at 461.

land adjacent to the road, which resulted in his injury.⁷⁶ The court held that only compensatory damages were recoverable because the statute's objective was not punitive but only remedial.⁷⁷ Although a town had a duty to repair the road, according to the court, failure to do so did not constitute wanton or malicious misconduct, justifying the recovery of punitive damages.⁷⁸

In *Whipple v. Walpole*,⁷⁹ on the other hand, the New Hampshire Supreme Court held that exemplary damages were recoverable against a city for gross negligence.⁸⁰ In *Whipple* the plaintiff sued to recover damages arising from the loss of his horse caused by a defect in a town bridge.⁸¹ In holding for the plaintiff, the court reasoned that because towns were bound by statute to repair bridges, a duty was created.⁸² While punitive damages were not recoverable against the city for ordinary neglect, the court held that the showing of gross negligence in breaching the statutory duty gave rise to an award of exemplary damages.⁸³

In *Woodman v. Nottingham*,⁸⁴ the New Hampshire Supreme Court, expressly overruling *Whipple*,⁸⁵ held that while a town had a statutory duty⁸⁶ to maintain roads and bridges, the legislature

76. *Id.* at 462.

77. *Id.* at 473. The court remarked:

But even if punitive [*sic*] or vindictive damages are to be given there should be some limit to them, and no case in our courts has gone further than allowing the plaintiff, in addition to compensation for his personal injury and suffering or loss of property, the expenses of his suit, not including the taxable costs.

Id.

78. *Id.* at 472-73.

79. 10 N.H. 130 (1839), *overruled*, *Woodman v. Nottingham*, 49 N.H. 387 (1870).

80. *Id.* at 132-33.

81. *Id.* at 130.

82. *Id.* at 132-33.

83. *Id.* at 130. The court stated:

In this very case, in consequence of the neglect of the defendants, three individuals were suddenly destroyed, and others exposed to most imminent peril. If, then, the defendants had been guilty of *gross negligence*, we think the jury were not bound to be very exact in estimating the amount of damages; and that they might, in their discretion, give the plaintiff exemplary damages.

Id. at 132-33 (emphasis in original). *Contra*, *Woodman v. Nottingham*, 49 N.H. 387 (1870) (expressly overruling *Whipple v. Walpole*).

84. 49 N.H. 387 (1870).

85. *Id.* at 394.

86. *Id.* at 391, 393. The court quoted the general statute creating the town's duty to maintain and repair roads and bridges. The statute stated, "[T]owns are made liable for damages, happening to any person, his team or carriage, traveling upon a highway, or bridge thereon, by reason of any obstruction, defect, insufficiency or want of repair, which renders

intended to restrict recovery to actual damages.⁸⁷ In *Woodman* plaintiff sued the city to recover for personal injuries and property loss incurred while crossing an unlighted bridge which had no guardrail.⁸⁸ The court, in holding for the defendant-municipality, reasoned that malice is not presumed as a justification for exemplary damages where the statute only generally refers to damages for a defective highway.⁸⁹

Courts, on the other hand, have held that exemplary damages are recoverable against a municipality when expressly authorized by statute. In *Myers v. City of San Francisco*,⁹⁰ for example, the court allowed punitive damages under a statute permitting the jury to "give such damages, pecuniary and exemplary, as they shall deem fair and just."⁹¹ In *Myers* a child was killed by the negligent operation of a municipal steam engine.⁹² The jury determined the death was caused by a city employee's negligence and, consequently, awarded exemplary damages to the plaintiff.⁹³

In *Coffee County v. Parrish*,⁹⁴ the Alabama Supreme Court held that punitive damages were recoverable against a municipality for failure to properly maintain a bridge.⁹⁵ The court, in so holding, reasoned that because punitive damages were recoverable

it unsuitable for travel thereon." *Id.* at 391.

87. *Id.* at 394. The court interpreted *damages* to mean a compensation or satisfaction to a party plaintiff for an "injury actual [*sic*] received by him from the defendant and precisely commensurate with the injury, whether it be to his person or estate." *Id.* at 391-92.

88. *Id.* at 387-89.

89. *Id.* at 394. To support its holding, the court stated:

It appears that the negligence found here is not of that aggravated character, which justifies the allowance of exemplary damages; nor do we believe it to be necessary, or proper in actions generally against towns under our statute, to instruct the jury to allow *vindictive damages eo nomine*; for it cannot be presumed that towns in cases of this kind are influenced by malice when accidents of this nature occur; and if the circumstances of any case show even gross negligence, it appears to us to be enough, for the jury in making up their verdict, to give all the actual damages the plaintiff has suffered, and no more; nor do we think that the legislature ever contemplated anything more than a full indemnity for the injury received to the person or property, by their statute regulating this subject.

Id.

90. 42 Cal. 215 (1871).

91. *Id.* at 217.

92. *Id.* at 216.

93. *Id.* at 216-17.

94. 249 Ala. 226, 30 So. 2d 578 (1947).

95. *Id.* at —, 30 So. 2d at 578.

under a specific statute,⁹⁶ the plaintiff was entitled to recover exemplary damages.⁹⁷

Punitive damages may be imposed against a municipality where "malice in law" appears.⁹⁸ For example, in *Kelly v. City of Cape Girardeau*,⁹⁹ the court allowed a jury instruction authorizing exemplary damages against a municipality because the defendant-municipality had not abated an adjudged nuisance.¹⁰⁰ The court held that the city's intentional wrongdoing without just cause constituted "malice in law" and justified an award of punitive damages.¹⁰¹ In so holding, the court developed a variation of the gross negligence standard.

In *City of Covington v. Faulhaber*,¹⁰² conversely, the Kentucky Court of Appeals held that only compensatory damages were recoverable by a plaintiff whose land was damaged by overflow from a municipal reservoir.¹⁰³ The city, in disregard of an adjudged nuisance, failed to remedy the overflow of the reservoir.¹⁰⁴ The court, in so holding, stated that exemplary damages were not recoverable because the city did not act in a malicious or oppressive manner and in reckless disregard of the plaintiff's rights.¹⁰⁵ Therefore, no "malice in law" occurred to warrant an award of exemplary damages. Adopting the former *Covington* decision, the Kentucky Court of Appeals overruled a motion for rehearing¹⁰⁶ and stated that, because a recurring negligent act was unaccompanied by other reckless or injurious acts, the analysis regarding the municipality's acts as "wanton and willful" was inapplicable.¹⁰⁷ Absent this analysis, according to the court, punitive damages were

96. *Id.* The statute referred to was the Homicide Act, ALA. CODE tit. 7, § 123 (1940), which provided for recovery of exemplary damages for death proximately caused by the negligence or wrongful act of defendant.

97. 249 Ala. at ___, 30 So. 2d at 578. *Accord*, *Wright v. City of Butte*, 64 Mont. 362, ___, 210 P. 78, 79-81 (1922); *Earle v. Greenville County*, 215 S.C. 539, ___, 56 S.E.2d 348, 349 (1949).

98. *Lampert v. Judge & Dolph Drug Co.*, 238 Mo. 409, ___, 141 S.W. 1095, 1098 (1911).

99. 338 Mo. 103, 89 S.W.2d 41 (1935), *rev'g* 228 Mo. App. 865, 72 S.W.2d 880 (1934).

100. *Id.* at ___, 89 S.W.2d at 45.

101. *Id.*

102. 177 Ky. 623, 197 S.W. 1065 (1917).

103. *Id.* at ___, 197 S.W. at 1066.

104. *Id.* at ___, 197 S.W.2d at 1065.

105. *Id.* at ___, 197 S.W.2d at 1066.

106. *City of Covington v. Faulhaber*, 178 Ky. 586, 199 S.W. 32, *denying rehearing* 177 Ky. 623, 197 S.W. 1065 (1917).

107. *Id.* at ___, 199 S.W. at 32-33.

not recoverable.¹⁰⁸

The gross negligence standard for awarding punitive damages against a municipality was rarely reached. The gross negligence standard focused on the wanton and willful nature of a city's actions as justification for awarding punitive damages. Courts granted exemplary damages against a municipality under the gross negligence theory only where express statutory authority existed.

D. *Emphasis on "Status as a Municipality" Standard after 1950*

After 1950 courts increasingly relied on the "status as a municipality" standard to determine whether exemplary damages should be awarded against a municipal corporation. In *Brown v. Village of Deming*,¹⁰⁹ for example, plaintiff brought suit against the city for alleged breach of warranty and malicious prosecution.¹¹⁰ Plaintiff purchased and took possession of pipe from the defendant-city and later was informed the city could not sell the pipe in breach of a prior agreement.¹¹¹ The city charged Brown with larceny because he failed to return the pipe to the city.¹¹² Brown claimed, however, compensatory and punitive damages for breach of warranty and malicious prosecution.¹¹³ The court held that only compensatory damages were recoverable against the city absent an express statute.¹¹⁴ The court, in analyzing policy factors, reasoned that grant-

108. *Id.* In this case, the court stated:

It is clear that there was no intentional or malicious purpose to injure the property of the plaintiffs, nor was the drainage of the reservoirs carried on in such a way as to exhibit a reckless disregard of their rights. The injury, if any, complained of was due alone to the negligent manner in which the water was permitted to flow from the reservoirs. These reservoirs were cleaned out only once a year, and the city for a number of years had been washing and draining them in practically the same manner, but it does not appear that its conduct in this respect had occasioned any damage theretofore, except to the plaintiffs, and we do not think that the mere recurrence of a negligent act, although it may fall within the description of a nuisance, would authorize the imposition of punitive damages, unless it were accompanied by other acts manifesting a purpose to injure or oppress.

Id. *E.g.*, *Jacksonville v. Lambert*, 62 Ill. 519 (1872).

109. 56 N.M. 302, 243 P.2d 609 (1952).

110. *Id.* at ___, 243 P.2d at 615-16.

111. *Id.* at ___, 243 P.2d at 610-11.

112. *Id.* at ___, 243 P.2d at 616.

113. *Id.* at ___, 243 P.2d at 610-12, 615-16.

114. *Id.* at ___, 243 P.2d at 618.

ing punitive damages against a municipality penalized taxpayers who had not participated in the commission of the wrongdoing.¹¹⁵

Utilizing the policy considerations raised in *Brown*, the Florida Supreme Court held, in *Fisher v. City of Miami*,¹¹⁶ that a municipality was not liable for punitive damages for intentional torts committed by its employees.¹¹⁷ In *Fisher* plaintiff brought suit against the city and its police officers for assault.¹¹⁸ The court reasoned that municipal employees are subject to punitive damages while the municipality is not because the objectives of punishment and deterrence are satisfied with respect to municipalities without imposing punitive damages.¹¹⁹ Public policy, the court noted, militates against punishing innocent taxpayers by imposing punitive damages on a municipality.¹²⁰

In *Smith v. District of Columbia*,¹²¹ the court relied on the absence of a statute and policy considerations to deny exemplary damages against the District of Columbia.¹²² In *Smith* plaintiff sued the District of Columbia for false arrest and assault.¹²³ Plaintiff recovered compensatory damages but was denied a jury instruction on the District's liability for punitive damages.¹²⁴ The court, citing *Fisher v. City of Miami*,¹²⁵ discussed three policy reasons for denial of exemplary damages against municipal corporations.¹²⁶ First, the court stated that public policy is contravened when the citizens who benefit from the punishment also bear the burden of the award.¹²⁷ Second, the court observed that a municipality's taxing power serves as a measure of the amount of punitive damages.¹²⁸ Third, the court concluded that deterrence and pun-

115. *Id.*

116. 172 So. 2d 455 (Fla. 1965).

117. *Id.* at 457. See *Bucher v. Krause*, 200 F.2d 576, 586-88 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953). *Bucher* provides a lengthy discussion of a municipal employee's liability for punitive damages.

118. 172 So. 2d at 455.

119. *Id.* at 457.

120. *Id.*

121. 336 A.2d 831 (D.C. 1975).

122. *Id.* at 832.

123. *Id.*

124. *Id.*

125. 172 So. 2d 455 (Fla. 1965).

126. 336 A.2d at 832.

127. *Id.*

128. *Id.*

ishment of wrongdoers is not achieved by awarding exorbitant punitive awards against the city.¹²⁹ The court concluded that the absence of a statute authorizing recovery of punitive damages against a municipality further supported denial of the award.¹³⁰

After 1950 the courts increasingly focused on express statutory provisions¹³¹ and policy considerations in awarding exemplary damages against a municipality.¹³² Courts reasoned that public policy mandated denial of exemplary damages against a municipal corporation because innocent taxpayers were punished more severely than the municipality,¹³³ the city's wealth was likely to encourage excessive punitive awards,¹³⁴ and wrongdoers were not deterred from future misconduct by punitive damages against the city.¹³⁵

II. PARAMETERS OF MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983

Rendering three decisions, the United States Supreme Court defined the parameters of municipal liability under section 1983. First, in 1978, the Court in *Monell v. Department of Social Services*¹³⁶ held that a local government was a "person" within the meaning of section 1983¹³⁷ and, therefore, could be sued for damages and equitable relief under section 1983 if the unconstitutional action was pursuant to a governmental policy or custom.¹³⁸ Two years later, in *Owen v. City of Independence*,¹³⁹ the Court addressed the issue of qualified immunity under section 1983. In *Owen* the Court held that a municipality does not possess immunity from liability for its constitutional violations under section

129. *Id.* See also *Euge v. Trantina*, 422 F.2d 1070, 1074 (8th Cir. 1970); *Fox v. City of W. Palm Beach*, 383 F.2d 189, 195 (5th Cir. 1967); *Chappell v. City of Springfield*, 423 S.W.2d 810, 813 (Mo. 1968).

130. 336 A.2d at 832.

131. See, e.g., *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976); *Lauer v. Young Men's Christian Ass'n*, 57 Hawaii 390, ___, 557 P.2d 1334, 1341 (1976); *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, ___, 321 N.E.2d 885, 888-89 (1975).

132. *Smith v. District of Columbia*, 336 A.2d 831 (D.C. 1975); *Fisher v. City of Miami*, 172 So. 2d 455 (Fla. 1965); *Brown v. Village of Deming*, 56 N.M. 302, 243 P.2d 609 (1952);

133. *Brown v. Village of Deming*, 56 N.M. 302, ___, 243 P.2d 609, 618 (1952).

134. *Smith v. District of Columbia*, 336 A.2d 831, 832 (D.C. 1975).

135. *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965).

136. 436 U.S. 658 (1978).

137. *Id.* at 688-89.

138. *Id.* at 690-91.

139. 445 U.S. 622 (1980).

1983 and may not assert the good faith of its officers as a defense to suit.¹⁴⁰ After these decisions, however, the Court still failed to address the issue of whether municipalities were liable for punitive damages under section 1983.

III. CITY OF NEWPORT V. FACT CONCERTS, INC.

The Court addressed the issue of a city's absolute immunity from punitive damages under section 1983 in *City of Newport v. Fact Concerts, Inc.*¹⁴¹ Fact Concerts filed suit under section 1983 against the city contending that its constitutional right to free speech and due process had been denied under "color of state law."¹⁴² The plaintiff-promoter also alleged that cancellation of the concert by the city constituted "content-based" censorship and sought compensatory and punitive damages.¹⁴³ After the trial court awarded both compensatory and punitive damages against the city, the city argued that under section 1983 an award of punitive damages against a municipality was improper.¹⁴⁴ The Supreme Court, in reversing the trial court, held that a municipality was immune from punitive damages under 42 U.S.C. § 1983.¹⁴⁵

The Court relied on a two-part analysis to justify its conclusion that a municipality should not be exposed to punitive damages for the bad faith of its officials.¹⁴⁶ First, the Court examined the common-law background of municipal immunity,¹⁴⁷ and second, the Court analyzed the purposes of section 1983 within general principles of public policy.¹⁴⁸

The Court stated that municipal immunity from punitive damages was well established at common law prior to the enactment of section 1983.¹⁴⁹ The Court, in so stating, indicated that early case law held municipal corporations liable for compensatory damages arising from tortious activity but unanimously denied awarding punitive damages against a municipality because the

140. *Id.* at 657.

141. 101 S. Ct. 2748 (1981).

142. *Id.* at 2752.

143. *Id.*

144. *Id.*

145. *Id.* at 2762.

146. *Id.* at 2755-56.

147. *Id.* at 2756-59.

148. *Id.* at 2759-62.

149. *Id.* at 2756.

award burdened the taxpayers who were to benefit from the wrongdoer's punishment.¹⁵⁰ Further, the Court reasoned that a distinction existed between compensating for injuries inflicted by a municipality's officers and punishing the bad faith conduct of those officers.¹⁵¹ The Court agreed that a municipality should bear the obligation of compensating a victim but punishment should be borne only by the actual wrongdoers.¹⁵² Because a city was not capable of malice independent of its officials,¹⁵³ the municipality was not an actual wrongdoer and, therefore, was not subject to exemplary damages.¹⁵⁴ The Court concluded that common law denied recovery of punitive damages against a municipality to protect the public from unjust punishment and to protect municipalities from undue fiscal constraints.¹⁵⁵

The Court theorized that if Congress desired to abolish the common-law doctrine denying punitive damages against a municipality, it should have done so¹⁵⁶ when it enacted section 1 of the Civil Rights Act of 1871.¹⁵⁷ However, there is no indication that Congress intended such a result.¹⁵⁸ The Court noted that congressional reluctance to pass section 1 of the Act indicated concern that the award of compensatory damages against a municipality would punish innocent taxpayers and bankrupt local governments.¹⁵⁹ The Court found these reasons analogous to the reasons common-law courts traditionally used to deny punitive damages against a municipality.¹⁶⁰

The Court focused on public policy considerations in the second stage of its analysis.¹⁶¹ The Court stated that assessing punitive damages against a municipality punished innocent taxpayers by increasing taxes or decreasing public services.¹⁶² Further, the Court noted that punitive damages were a windfall to a fully com-

150. *Id.* at 2757.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 2757-58.

155. *Id.*

156. *Id.* at 2758.

157. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1976)).

158. 101 S. Ct. at 2758.

159. *Id.* at 2759.

160. *Id.*

161. *Id.*

162. *Id.* at 2759-60.

pensated plaintiff.¹⁶³ The Court concluded that the actual wrongdoer should suffer for his unlawful conduct, not innocent taxpayers or a governmental entity incapable of independent malice.¹⁶⁴

The Court concluded by focusing on the purposes and goals of section 1983.¹⁶⁵ The Court recognized retribution and deterrence as primary purposes of section 1983.¹⁶⁶ The Court found that the retributive purpose of section 1983 was not enhanced by imposing punitive damages on municipal corporations, nor was deterrence accomplished because large punitive awards against a city will not prevent future misconduct by municipal officials.¹⁶⁷ Further, the Court reasoned that an award of compensatory damages against a municipality was sufficient to arouse public displeasure and to motivate corrective action at the polls.¹⁶⁸ The Court stated that awarding exemplary damages directly against the wrongdoer was a more effective means of deterrence.¹⁶⁹ With this analysis, the Court noted that state statutes¹⁷⁰ allowing punitive awards against individual municipal officials provided protection from recurrent, purposeful constitutional violations.¹⁷¹

In considering the costs associated with punitive damage awards, the Court concluded that the recently expanded liability under section 1983 poses serious financial risks for municipalities.¹⁷² To further support denial of exemplary damages against municipalities, the Court noted the possible prejudicial effect that knowledge of a city's taxing power might have on the size of a jury award of punitive damages.¹⁷³ The Court reasoned that, due to jury

163. *Id.* at 2760.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 2761.

169. *Id.*

170. Several state statutes requiring municipal corporations to indemnify their employees for adverse judgments rendered as a result of performance of governmental duties specifically exclude indemnification for malicious or willful misconduct by the employees. *E.g.*, CAL. GOV'T CODE § 825 (West 1980); CONN. GEN. STAT. ANN. § 7-465 (West Supp. 1981); NEV. REV. STAT. § 41.0349 (1979); N.Y. GEN. MUN. LAW § 50-K(3) (McKinney Supp. 1980); PA. CONS. STAT. ANN. tit. 42, § 8550 (Purdon Supp. 1981).

171. 101 S. Ct. at 2761 & n.30. *See* *Maine v. Thiboutot*, 448 U.S. 1 (1980). The Court held that the § 1983 damages remedy was available for violations of federal statutory as well as constitutional law. 448 U.S. at 4.

172. 101 S. Ct. at 2761.

173. *Id.*

discretion in setting the amount of the award and jury knowledge of the municipality's wealth, punitive awards against a city were likely to be sizeable and unpredictable, therefore, straining treasuries and reducing public services.¹⁷⁴ The Court, viewing history, policy considerations, and the purposes of section 1983, held that municipal corporations are absolutely immune from punitive damages under section 1983.¹⁷⁵

The Court, adopting the "status as a municipality" standard in its history-policy analysis of municipal immunity under section 1983, relied heavily on policy considerations to justify denial of exemplary damages against a municipality. The Court stated that public policy inclined against awarding punitive damages against a city because innocent taxpayers would be unjustly punished, municipal coffers would be unduly burdened, and only the actual wrongdoer should be punished.¹⁷⁶ In so reasoning, the Court failed to consider the plight of the victim who, although perhaps fully compensated for actual injury, has no means of redress against a city for malicious or bad faith conduct. At least, prior to this decision, if a plaintiff could show that a municipality ratified the wrongful acts of its officials, plaintiff could recover punitive damages against the city. The Court's holding in *City of Newport* closes that door forever. Further, making a municipal corporation absolutely immune from punitive damages may encourage a city to be less vigilant in monitoring the conduct of its officials. Internal municipal safeguards, absent punitive monetary damages against a city, may prove an inadequate deterrent or retributive tool to control active official wrongdoing.

The Court contended that compensatory damages assessed against a municipality were sufficient to arouse public displeasure and action at the polls to remove officials engaged in wrongdoing.¹⁷⁷ However, the public tends to overlook unconstitutional practices when they have not experienced a tax increase or decreased public services to remind them of an official's misconduct. As a result, public apathy at the polls negates the Court's suggestion that voters will remove official wrongdoers from their municipal duties. In fact, absent a punitive damages award against a municipality

174. *Id.* at 2761-62.

175. *Id.* at 2762.

176. *Id.* at 2757-58.

177. *Id.* at 2761.

transferred to citizens via increased taxes, much official misconduct will go unpunished at the polls or otherwise. The Court, in holding that a municipality is immune from exemplary damages, has removed the only effective means of ensuring that official misconduct will be controlled.

While the Court's rationale is sound in many respects, perhaps granting a municipality absolute immunity from exemplary damages was too final, too drastic, in view of countervailing considerations. Certainly history and public policy militates against punishing an innocent party for another's wrongdoing or depleting public coffers. However, an equally strong public policy argument arises where a city may concur in and ratify wrongful official actions knowing no liability in punitive damages will ensue. The Court erred in its failure to consider the exceptional case where a municipality ratifies official misconduct. In promulgating an absolute rule, the Court risked injustice in such a situation. As is often the case where rigid pronouncements are made, the Court may have to rethink its position in the future.

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