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Are Small Compensatory Damages Merely Nominal

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ARE SMALL COMPENSATORY DAMAGES MERELY NOMINAL?*

The usual case in which nominal damages are awarded is one wherein there is a mere invasion of a legal right, with no actual damage, or wherein there is an invasion of a legal right, with no proof as to the amount of the actual damage. In some instances, very small compensatory damages, assessed for the invasion of a legal right, with inappreciable, slight, trifling, or comparatively small actual damage, have been judicially called nominal damages, or have been treated as if they were only nominal damages. It is this doubtful zone of very small damages that this article attempts to treat.

The question squarely arises whether very small damages and nominal damages are the same thing, in two types of cases: first, cases in which the question is raised whether the damages awarded for actual damage are sufficient to constitute a basis for the assessment of exemplary damages, in jurisdictions where exemplary damages cannot be assessed without first showing actual damage in which true compensatory damages are grounded; and, second, cases wherein the appellate court finds it necessary to determine whether the damages that should have been assessed and were not assessed below were merely nominal, so as not to give the plaintiff a right to have the judgment reversed, or were compensatory and therefore representative of actual damage, so as to give him a right to a reversal in order that compensatory damages may be assessed.

Damages judically denominated "nominal" have been awarded in the following classes of cases: first, where there

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is a mere invasion of a legal right, with no actual damage;[1] second, where there is an invasion of a legal right, with trifling, slight, or even comparatively small actual damage;[2] and third, where there is an invasion of a legal right, with no proof as to the amount of the actual damage. Cases of the third class naturally fall into two divisions: namely, those where proof of the measure of damages is, from the nature of the case, impossible;[3] and those wherein proof of the measure of damages is possible but has not been made on the trial.[4]

The second of the above classes includes the cases in which courts often call the damages "nominal" merely because they are very small, although there has been, in a few cases, a sincere attempt to adhere to the strictly logical distinction between small compensatory and merely nominal damages.

In *Cady v. Fairchild*[5] the plaintiff, lessee for one year, removed from the leased apartment before the end of the

1 Cady v. Fairchild, 18 Johns. (N. Y.) 129 (1820).

"The term 'nominal damages,' like 'exemplary damages,' is purely relative, and carries with it no suggestion of certainty as to amount. This is shown by the definition given the expression in the recognized authorities. In 2 Bouv. Law Dict. 504, it is defined as 'a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.' 'Nominal damages' have also been described as 'a trivial sum awarded where a mere breach of duty or infraction of right is shown, with no serious loss sustained.' And. Law Dict. 307. It is apparent that this 'trivial sum' might, according to the circumstances of each particlar case, vary almost indefinitely. In some cases, a very small amount might constitute the trivial sum contemplated by the term 'nominal damages'; in others, a much larger amount might measure down to the same standard of triviality. It would depend largely upon the vastness of the amount involved what sum would be considered trivial." Sellers v. Mann, 113 Ga. 643, 39 S. E. 11, 12 (1901) (Quoted and followed in Western Union Telegraph Co. v. Glenn, 8 Ga. App. 168, 68 S. E. 881 (1919)). Probably many would question whether "a trivial sum" could thus "vary almost indefinitely."

2 White v. Stanbro, 73 Ill. 575 (1874); Gordon v. McLearn, 123 Ark. 496, 185 S. W. 803, Ann. Cas. 1918A, 482 (1916); Bartolini v. Grays Harbor Ry. & Light Co., 88 Wash. 341, 153 Pac. 4 (1915); Southern Ry. Co. v. Cartledge, 73 S. E. 703 (Ga. App. 1912).

3 Lampert v. Judge & Dolph Drug Co., 238 Mo. 409, 141 S. W. 1095, 37 L. R. A. (N. S.) 533 (1911), using the expression, "nominal actual damages." Ashby v. White, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1703).

4 Peek v. Northern Pacific Ry. Co., 51 Mont. 295, 152 Pac. 421 (1915); State ex rel. Lowery v. Davis, 117 Ind. 307, 20 N. E. 159 (1889).

5 *Op. cit. supra* note 1.

term, leaving in the apartment a few articles of little value. Defendants put these articles out of the house, left them out for a few days, and then put them back, without their receiving any material injury. Verdict and judgment in the court below were erroneously given for the defendants; but the upper court said:

"This is strictly a verdict contrary to evidence; but as no more than nominal damages ought to have been given, no material injustice has been done; and we ought to apply the rule which has been settled in regard to new trials. In *Burton v. Thompson*[6] Lord Mansfield said, 'It does not follow, by necessary consequence, that there must be a new trial granted in all cases whatsoever, where the verdict is contrary to the evidence;' as, 'where there is no real damage, and where the injury is so trivial as not to deserve above half a crown compensation;' and a new trial was denied in that case, though it was admitted that the verdict was directly contrary to evidence."

The principal case here is typical, in that it treats the mere invasion of a legal right, with no actual damage, as forming a basis for nominal damages only; and Lord Mansfield, in the case herein quoted, goes a step farther, treating trivial damage as a ground for no more than nominal damages.

White v. Stanbro[7] affords an instance in which it seems uncertain whether any actual damage was suffered, and in which, if there was such damage, it was trifling. The opinion, written by the early Illinois justice, Sidney Breese, does not undertake to discriminate between nominal damages and compensatory damages for a trifling injury. It seems that trifling or very small actual damage, even if it had been clearly proved in this case (which it apparently was not), would have made no different result from that which is had where no actual damage is proved at all; for the court, it seems, would have been unwilling to concern itself with trifling or even very small damage. The defendant had erected a mill, which backed up water upon the land of the plaintiff. Mr. Justice Breese said, in part:

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[6] 2 Burr. 664, 97 Eng. Rep. 500 (1758).

[7] *Op. cit. supra* note 2.

"If the fact was clearly established the dam did flow back the water onto appellant's land, the next question raised would be, was appellant injured thereby, and to what extent? On this point we are convinced that, at most, appellant could have recovered only nominal damages. The fact is well established that his land on the north side of the river was always low, boggy and wet land, and not more so since the dam was built. It is also shown that appellant has subjected it to pasture, and by large droves of cattle, which, long continued on such land as his is shown to be, will denude it of herbage and destroy the sod. It is a kind of river bottom, low and marshy, and overflowed by the usual spring freshets. Some witnesses say the land is dryer now than it was before the dam was built. . . . The truth is, this appears to be a very small case, in which, if damages could be recovered at all, they would be so trifling and inconsiderable as to forbid a court to waste time in considering the various objections stated."

In *Gordon v. McLearn*[8] the court speaks of "the comparatively nominal sum allowed as compensatory damages." "Nominal," as here used, seems to mean "small"; but it is to be noticed that it is not coupled directly with the word "damages"; still the whole expression used, together with the context in the case, naturally raises the query whether the court did not mean the same as if it had ventured to say, "only comparatively nominal damages were allowed." Although there is logical objection to treating small compensatory and mere nominal damages as being the same thing, the court would have been supported by some case authorities in treating the two kinds of damages substantially alike, if the question had been squarely before it, which it was not.

An interesting case is *Bartolini v. Grays Harbor Ry. & Light Co.*,[9] in which small actual damage was treated as if it did not exist and was made the basis of a right to nominal damages only. The plaintiffs, husband and wife, started to board defendant's street car with transfers. The wife was ahead, and, as her husband was about to follow her, the conductor refused to let him ride, calling him a "Dago," if plaintiff's testimony was true. The wife followed her hus-

8 *Op. cit. supra* note 2.
9 *Op. cit. supra* note 2.

band off the car, and was caused almost to fall. The husband suffered no physical injury, the wife left the car voluntarily, no mental anguish was shown, and there was no pecuniary loss, except a portion of the small street car fare. The court said:

"There was, in fact, simply a naked violation of a legal right, which would entitle respondents [plaintiffs below] to nothing more than nominal damages."

The difference between the actual damage here inflicted and no damage at all seems to have been regarded as too small for the court to notice and therefore too small to lift proper compensation from the category of mere nominal damages to that of compensatory damages; and so the court goes even so far as to say that there was "simply a naked violation of a legal right."

Another case in which small actual damage is treated as ground for merely nominal damages is *Southern Railway Co. v. Cartledge,*[10] in the decision of which the court makes the following remarks:

"The defendant, having carried the plaintiff beyond the point of his destination, was liable to him in damages. [The court then proceeds to hold that, there being only negligence, with no aggravating circumstances, punitive damages could not be assessed.] The case was one for nominal damages only."

Small compensatory damages are, however, not always treated as a kind of nominal damages. In *Chapin v. Babcock* [11] the Connecticut court said:

"It is urged that a new trial ought not to be granted, because the damages will be small. Small damages, however, and nominal damages do not mean the same thing. Where there is a real right involved, the damages, even if very small, are substantial, and not nominal. To deprive a party of these, by refusing him a new trial because they must be small, would be to do him a great injustice."

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10 *Op. cit. supra* note 2.

11 67 Conn. 255, 34 Atl. 1039 (1896).

"Nominal damages and small damages are not the same thing. Where a legal right has been invaded and real injury done, the damages, though small, are actual rather than nominal." Moore v. Duke, 84 Vt. 401, 408, 80 Atl. 194 (1911).

What the exact or the approximate amount of damages would be in this particular case, the report does not say, so that we do not know whether the amount involved was actually trivial; but the opinion refers to an earlier Connecticut case, *Michael v. Curtis*,[12] in support of the rule quoted above. In the latter case, the extent of the liability was the reasonable value of the occupation of certain realty. "The plaintiff claimed more than $500. The testimony offered by the defendant made it not more than $30 or $40. Whatever it was, the plaintiff was entitled to recover. . . . It is said that a new trial ought not to be granted to enable a party to recover nominal damages. This will not be denied. Small damages and nominal damages, however, do not mean the same thing. Nominal damages mean no damages. They exist only in name and not in amount. But where there is a real, legal right involved in a case, the damages, even if very small, are substantial damages, and not nominal." As this holding in *Michael v. Curtis* is in regard to damages in at least the amount of thirty dollars, and not in regard to a truly trifling amount, we can only conjecture whether the same court would have taken the view that damages in the amount of only six cents could ever, if awarded in compensation for damage, be considered as more than merely nominal, so as to give the plaintiff a right to ask a reversal of judgment for the defendant. Besides, the court says that a real, legal right is involved. Therefore, it seems uncertain that the same court would have said that the right to an assessment of damages in the sum of six cents, in order to compensate the plaintiff for a very small actual damage and to vindicate a small and unimportant legal right, was a right to an assessment of compensatory damages—such a right as the plaintiff would be permitted to vindicate by obtaining a reversal and new trial. Maybe the same court would have said in such a case, *"De minimis non curat lex."* Yet, the year before, the Connecticut court had stated the same rule

12 60 Conn. 363, 22 Atl. 949 (1891).

in another case; so that the logical distinction between nominal damages and small compensatory damages seems to be so safely implanted in the law of that state that it would probably be observed there in any event.

Another case noting the difference between these two kinds of damages is *Tri-State Telegraph & Telephone Co. v. Cosgriff*,[13] in which it is held that the damage sustained by the owner of lands abutting on a public highway by the taking of a strip immediately adjoining his property line, for the purpose of constructing thereon a telephone and telegraph line, while it may be small in amount, is not, as a matter of law, merely nominal. In that case, with apparently good reason, the court says:

"Neither are we disposed to hold that the right of the owner of property to compensation under such conditions is merely nominal. The damage to the owner, in view of the existing servitude and the further use to which the telephone company may wish to subject it, may be small even to insignificance; but it is nevertheless substantial in the sense that he is entitled to recover a sum sufficient to duly compensate him for all the damage actually sustained under the conditions."

Where there is no appreciable actual damage, as in *Cady v. Fairchild*,[14] it is clear that the maxim, *"De minimis non curat lex,"* may reasonably be held to apply, because the difference between no damage and the actual damage or between nominal damages and the compensatory damages in the case, is so small that it cannot be said to be reasonable to require that judicial cognizance shall be taken of it. Where the damage is trifling, as in *Burton v. Thompson*[15] and *White v. Stanbro*,[16] the same maxim may reasonably be said to apply. But, where the damage is small, it is not always trivial. On the facts in *Bartolini v. Grays Harbor*

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13 19 N. Dak. 771, 124 N. W. 75, 26 L. R. A. (N. S.) 1171 (1909). See, also, Stanton v. New York & F. Ry. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110 (1890).

14 *Op. cit. supra* note 1.

15 *Op. cit. supra* note 6.

16 *Op. cit. supra* note 2.

Ry. & Light Co.[17] and in *Southern Railway Co. v. Cartledge,*[18] it would seem that the damage, although small, might well have been classified as substantial. It would seem that, in any event, damage more than trifling should be the basis, not of nominal but of compensatory damages.[19]

The distinction stated in the Connecticut cases above mentioned seems logical, and the reasoning in *Michael v. Curtis* seems particularly clear and really indisputable. The difference between nominal and compensatory damages is so fundamental that it should never be overlooked. In the cases in which the distinction has been ignored, it seems hardly certain that the particular result reached in any instance has been satisfactory; and it seems very doubtful whether any such decision, even if seemingly just in the particular case being decided, ever constitutes the basis of a rule that ought to be applied arbitrarily in the adjudication of future cases. All damages assessed to repay the plaintiff for a loss that is more than trivial, are, properly speaking, compensatory. But, as to nominal damages, in the language of the Connecticut court, as above quoted, "Nominal damages mean no damages. They exist only in name and not in fact." The distinction is real and logical. It would seem that the effect of its observance could not be other than reasonable and just.

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17 *Op. cit. supra* note 2.

18 *Op. cit. supra* note 2.

19 ". . . if the amount of the injury be trifling, or in many cases even if no injury can be shown, the plaintiff is still entitled to what are called nominal damages. . ." SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES (2nd ed.) 81.

"Nominal damages—A trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained." BOUVIER'S LAW DICTIONARY (Rawle's 3rd Rev.).

"Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity. . ." Maule, J., in Beaumont v. Greathead, 2 C. B. 494, 499, 135 Eng. Rep. 1039, 1041 (1846) (Quoted in WOOD'S MAYNE ON DAMAGES 6).