mental distress arising from friction in business transactions where feelings frequently run high, since such a view does not take proper account of the give and take necessary in business. But in the collection cases, even though there was no showing that the defendants were aware of the plaintiff's peculiar susceptibility to fright, courts have permitted redress where abusive methods caused emotional and the resulting physical disturbances.[7] *A fortiori*, it would seem that in the instant case liability was properly imposed since the defendant's agents were aware of the plaintiff's susceptibility.

Whether the usual notions of *respondeat superior* should include the assessment of punitive damages without fault on the part of the principal is a problem upon which the courts are not in accord.[8] If the basis of punitive damages is as the court stated, to punish the offender, there is slight reason for assessing the principal for willful conduct when the servant alone is the transgressor, since the ultimate loss, here, falls on the innocent stockholder, and if the foundation is to prevent a repetition of like conduct, it would seem that the imposition of compensatory damages alone would suffice to assure extra-legal punishment of the servant.

The instant case is, however, squarely in line with Oklahoma authority, which arbitrarily inflicts punitory liability on the corporate principal without proof of fault.[9] As to the individual principal, proof of fault is essential.[10] The distinction[11] seems to have no foundation and merely gives the plaintiff an unmerited windfall if the defendant is a corporation.

Torts—Libel—Affirmative Duty to Prevent Publication—[English].—The defendants were directors of a proprietory club of which the plaintiff was a member. On complaint to police, slot machines popular with the members were removed from the premises. A doggerel verse implying that the plaintiff, Byrne, disloyally made the complaint was posted on bulletin board over which the defendants had supervision:

> For many years upon this spot
> You heard the sound of a merry bell;
> Those who were rash and those who were not
> Lost and made a spot of cash;
> But he who gave the game away
> May he Byrne in hell and rue the day.

[7] Barnett v. Collection Service, 214 Iowa 1303, 242 N.W. 25 (1932); La Salle Extension Univ. v. Fogarty, 126 Neb. 457, 253 N.W. 424 (1934). See also, Janvier v. Sweeny, [1919] 2 K. B. 316.

[8] *Fault necessary:* Lake Shore & Michigan So. Ry. v. Prentice, 147 U.S. 101 (1893); Columbus Light Co. v. Harrison, 109 Ohio St. 526, 143 N.E. 32 (1924); Craven v. Bloomingdale, 171 N.Y. 439, 64 N.E. 169 (1902).

Fault unnecessary: Goddard v. Grand Trunk Ry., 57 Me. 202 (1869); Perkins v. Mo. R.R., 55 Mo. 201 (1874); Forrester v. S. Pac. R.R., 36 Nev. 247, 134 Pac. 753 (1913); Johnson v. Atlantic Coast Line R. R., 142 S.C. 125, 140 S.E. 443 (1927).

[9] Fort Smith & Western R.R. v. Ford, 34 Okla. 575, 126 Pac. 745 (1912); Federal Nat. Bank v. McDonald, 129 Okla. 75, 263 Pac. 105 (1927).

[10] Aaronson v. Peyton, 110 Okla. 114, 236 Pac. 586 (1925); Colby v. Daniels, 151 Okla. 89, 1 P. (2d) 693 (1931).

[11] See Sedgwick, Damages § 380 (9th ed. 1912) for decisions of other states making the same distinction.

On appeal by the defendants, *held*, the verses were not defamatory. However, if they had been, the defendant proprietors, who did not themselves write or post the lampoon, would be liable as parties to its publication. *Byrne v. Dean.*[1]

The assertion that passive participation is sufficient to create liability for publication is in line with the modern expansion of the law of defamation.[2] Today the action, particularly with respect to the element of publication, has become so stringent that inadvertent or unintentional publication is no longer a defense.[3] In *Fogg v. Boston & Lowell R.R.*,[4] where the defendant's station agent merely allowed a newspaper clipping libelous of the plaintiff to remain in a conspicuous place, the court found that there was evidence of a ratification of the original publication. In the instant case, however, Lord Justice Greene based responsibility for publication not on the ratification of a breach of a negative duty but simply on the breach of an affirmative obligation. The court suggested, as a yardstick for determining when the obligation arose, the amount of effort the removal of the defamatory matter would have occasioned the defendant.

The reasoning employed in the principal case reflects the time-worn problem whether moral dictates shall cause the law to impose affirmative duties. Aside from contract, only within the limited province of family[5] or fiduciary relationship, certain occupational relationships,[6] and property tenure,[7] has the law imposed affirmative obligations.[8] In the main, therefore, "the law does not compel active benevolence between man and man;[9] it is left to one's conscience whether he will be the good Samaritan or not."[10]

[1] [1937] 1 K.B. 818.

[2] For early development see 1 Street, Foundations of Legal Liability pp. 284–300 (1906); for modern treatment see Odgers, Libel and Slander, c. VI (6th ed. 1929).

[3] Newell, Slander and Libel § 197 (4th ed. 1924). [4] 148 Mass. 513, 20 N.E. 109 (1889).

[5] Stehr v. State, 92 Neb. 755, 139 N.W. 676 (1913). *Cf.* People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907) where it was held a paramour relationship was not such as to impose affirmative duty to obtain medical attention.

[6] Scarff v. Metcalf, 107 N.Y. 211, 13 N.E. 796 (1887); *cf.* King v. Interstate Cons. R.R. Co., 23 R.I. 583, 51 Atl. 301 (1902).

[7] See Bohlen, Studies in Law of Torts 46 ff. (1926); also see Hogle v. H. F. Franklin Mfg. Co., 199 N.Y. 388, 92 N.E. 794 (1910); Hoverson v. Noker, 60 Wis. 511, 19 N.W. 382 (1884).

[8] See Schichowski v. Hoffman, 261 N.Y. 389, 185 N.E. 676 (1933) where the plaintiff, directed by order of attachment to produce certain corporation books in possession of the defendant was jailed when latter, though aware of the plaintiff's predicament, refused to give them up, sued the defendant for damages resulting from the imprisonment, held, the defendant, not having affirmatively caused the plaintiff's imprisonment, broke no legal duty in failing to come to his aid. See note in 33 Col. L. Rev. 927 (1933).

[9] Union Pacific Ry. v. Cappier, 66 Kan. 649, 72 Pac. 281 (1903) (where a trespasser on railroad track was injured without fault on part of servants of the company and it was held there was no duty to aid the injured man because the defendant was legally a stranger to him); Buch v. Amory Mfg. Co., 69 N.H. 257, 44 Atl. 809 (1897); Matthews v. Carolina & Northwestern Ry. Co., 175 N.C. 35, 94 S.E. 714 (1917); Tucker v. Burt, 152 Mich. 68, 115 N.W. 722 (1908) (where the defendant landlord was absolved from liability for expelling and aggravating diseased social guest for whom he did not obtain medical attention). But see Depue v. Flatau, 100 Minn. 299 111 N.W. 1 (1907) where it was held the defendant owed a visiting cattle trader who fell ill on the defendant's premises a duty of care).

[10] Ames Law and Morals, 22 Harv. L. Rev. 97, 112 (1908). See also Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. of Pa. L. Rev. 217, 316, 334–38 (1908); also Union Pacific Ry. v. Cappier, 66 Kan. 649, 653, 72 Pac. 281, 282 (1903).

If, as in the instant case, an affirmative duty is prescribed to prevent a possible defamation, *a fortiori*, the courts should ordain a duty of affirmative action in the preservation of life and limb. By applying what might be called the "exertion test," an affirmative duty to act would arise if in the eyes of the ordinary moral man so to act would not necessitate an effort so arduous or impracticable that it could not reasonably be expected to be undertaken.

Difficulties of determining upon whom the duty ordinarily should devolve, and of ascertaining whether such persons were not incapable of acting will remain.[11] But this is just another instance in law demanding cautious judicial scrutiny.

Workmen's Compensation—Compensable Injuries—Disfigurement—[New Jersey].—The plaintiff's face was badly scarred by acid during the course of his employment, and the workmen's compensation bureau awarded compensation to him for the disfigurement. On *certiorari* to review a judgment of the court of common pleas affirming the order of the bureau, *held*, reversed. Compensable disabilities under the act are only those causing an inability to perform work. Thus disfigurement cannot be the basis of an award. *Everhardt v. Newark Cleaning & Dyeing Co.*[1]

This decision does not seem in accord with the purpose of workmen's compensation acts. The most widely accepted basis for employer's liability in general is the *entrepreneur* theory, that a loss resulting from the hazards of business should be borne by the business, rather than by the individual selected by chance.[2] This item, added to the expense of the business, will ultimately be borne by the consumer who should pay the costs of the business that serves him.

In the application of the *entrepreneur* theory to workmen's compensation, the courts have taken two liberal views on the principle underlying the determination of compensable injuries, neither of which justifies the result in the instant case. Many courts have determined that compensation should be paid to the worker as a wage-earner, that any injury resulting in a loss of earning power is compensable.[3] And the loss of earning power may result from ineligibility to obtain employment as well as from a physical inability to perform work.[4] Other courts have taken the more realistic view that compensation should be paid for physical impairment as such, irrespective of its effect upon earning power or ability to perform work.[5] The New Jersey Supreme Court in *Hercules Powder Co. v. Morris*[6] said, "This impairment may not prove to be so conspicuous in the ability to produce wages, in the industrial world, but there are other

[11] Pound, Law and Morals 72 (1924).

[1] 189 Atl. 926 (N.J. Sup. Ct. 1937).

[2] See Douglas, Vicarious Liability and Administration of Risk I, 38 Yale L. J. 584, 586 (1929); Laski, The Basis of Vicarious Liability, 26 Yale L. J. 105 (1916).

[3] American Knife Co. v. Sweeting, 250 U.S. 596 (1919); Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244 (1914); Ball v. William Hunt & Sons, Ltd., [1912] App. Cas. 496.

[4] Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244 (1914); Superior Mining Co. v. Industrial Comm'n, 309 Ill. 339, 141 N.E. 165 (1923).

[5] Hercules Powder Co. v. Morris, 93 N.J.L. 93, 107 Atl. 433 (1919) (loss of one testicle held compensable); Cameron Coal Co., v. Dunn 85 Okl. 219, 205 Pac. 503 (1922) (permanent injury to finger held compensable, though same job was retained at an increased wage.)

[6] Note 5, *supra*.