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ARTICLES

PUNITIVE DAMAGES AND THE TORT SYSTEM

*Griffin B. Bell**
*Perry E. Pearce***

This article is based on the Emmanuel Emroch Lecture Series address delivered by the Honorable Griffin B. Bell on April 8, 1987 at the T. C. Williams School of Law. Each year the Emmanuel Emroch Lecture Series features practitioners and academicians who are authorities on a particular area of the law. The University of Richmond Law Review applauds Mr. Emroch's commitment to excellence in legal education and his continued support of the T. C. Williams School of Law.

I. INTRODUCTION

From 1763, when the doctrine of punitive damages was first articulated,¹ the concept has become almost commonplace in jury awards.² Not only have punitive damage awards grown commonplace, they have also grown excessive. All too frequently we read

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1. *Wilkes v. Wood*, 2 Wils. K.B. 204, 95 Eng. Rep. 767 (C.P. 1763). Wilkes brought a successful action for trespass after his house was searched and property seized because he had published a pamphlet that allegedly libeled the King. Punitive damages were also awarded in 1763 in the case of *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763).

2. TORT POLICY WORKING GROUP, DEP'T OF JUSTICE, AN UPDATE ON THE LIABILITY CRISIS 47-52 (1987) [hereinafter UPDATE]. For example, a study conducted by the Institute for Civil Justice showed that one out of every seven jury verdicts in the San Francisco area from 1980 to 1984 included a punitive damage award. *Id.* at 48-49 (citing M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 9 (1987)).

about large punitive damage awards bearing no reasonable relationship to the actual damages. For example, in Georgia this year, a jury awarded a construction company \$5 million in punitive damages for \$53,000 of property damage to a bulldozer where the bulldozer merely hit a petroleum line that was not buried deep enough!³ Such awards have given rise to the criticism that punitive damages are one of the major problems in tort law.

Reforming the doctrine of punitive damages is necessary if our tort system is to remain viable. One possible reform is a cap on punitive damages. The cap could be based on a reasonable relationship to the compensatory damage award, such as a 2-to-1 ratio, or on the amount of the fine for the most comparable crime in the penal code. Another approach is to allow the jury to award actual damages and to find whether the plaintiff has proved malice. The court would then set the amount of punitive damages. A third possibility for reform is to require the defendant to pay all or a percentage of the punitive damage award to the federal or state governments, depending on whether the award comes from a federal or state court.

Until such reform is enacted into law, judges should not hesitate to use their remittitur power if they find that the punitive damages awarded by the jury are excessive. Recently, in *Kemp v. Ervin*,⁴ the court ordered a remittitur and reduced a \$2.3 million jury award of punitive damages to \$400,000, finding the original award "shockingly excessive."⁵ The court explained that it did not want to financially destroy the two defendants and determined that a reasonable amount of punitive damages was twice the amount of damages awarded by the jury for mental anguish.⁶ If judges used their remittitur power more often to insure that a punitive damage award bears a reasonable relationship to the award of actual damages, there would be less criticism of punitive damages.

3. This case involved one of the authors' clients; out of respect for the client's privacy, the authors have requested that a citation to this case not be provided. *Eds.*

4. 651 F. Supp. 495 (N.D. Ga. 1986). The case, which drew much media attention, involved a section 1983 claim brought by English professor Dr. Jan Kemp against two administrators of the University of Georgia. Kemp claimed that she had been fired for speaking out about the poor academic records of several graduating student athletes.

5. *Id.* at 498.

6. *Id.* at 509.

II. THE EVOLUTION OF PUNITIVE DAMAGES

Punitive damages evolved from the statutory remedy of awarding multiple damages. The first recorded legal system to allow the award of civil punitive damages was the Code of Hammurabi in 2000 B.C.⁷ Similar forms of damages also appeared in the Hindu Code of Manu in 200 B.C. and in the Hittite law in 1400 B.C.⁸ The Old Testament also contains several examples of multiple damage remedies such as for theft, adultery, and usury.⁹ Commentators disagree on whether Roman civil law ever recognized the concept of punitive damages.¹⁰

In England, the notion of exemplary or punitive damages first appeared in the 1700's to justify jury verdicts in excess of actual physical damage.¹¹ The concept of punitive damages was first articulated by an English court in *Wilkes v. Wood*.¹² The court referred to these additional damages as "exemplary damages," which were awarded to compensate the injured plaintiff for non-physical injuries, and to punish the wrongdoer. The doctrine of punitive damages was criticized as it developed in England. By 1964, the English courts were regularly awarding compensatory damages for non-physical injuries, thus severely limiting the need for punitive awards because the compensatory function was no longer necessary.¹³

One of the earliest American cases to discuss the doctrine of punitive damages was *Coryell v. Colbaugh*,¹⁴ an action brought in New Jersey in 1791 for breach of promise to marry. The court charged the jury in this case "not to estimate the damage by any particular proof of suffering or actual loss; but to give damages for

7. K. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1) (1980); Sales & Cole, *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984).

8. See K. REDDEN, *supra* note 7, at § 2.2(A)(1).

9. See *id.*

10. See Sales & Cole, *supra* note 7, at 1119; Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369, 369 (1965); see also Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351, 353-54 (1983).

11. See *supra* note 1.

12. 2 Wils. K.B. 204, 95 Eng. Rep. 767 (C.P. 1763).

13. See *Rookes v. Barnard*, 1 All E.R. 367 (1964) (limiting punitive damages to cases involving unconstitutional actions by government employees and cases wherein defendant's profits exceeded the plaintiff's damages).

14. 1 N.J.L. 90 (Sup. Ct. 1791).

example's sake, to prevent such offenses in [the] future."¹⁵ The court instructed further that the damages should be "such a sum as would mark [the jury's] disapprobation, and be an example to others."¹⁶ Although other courts began allowing punitive damages awards to deter wrongful conduct, still others criticized the award of damages in excess of the actual damage to the injured party because there was no legal basis for such awards in civil cases.¹⁷

Early American decisions justified the award of punitive damages on the dual theories of compensation and punishment. In the early 1800's, the courts broadened the concept of actual damages to include intangible harm. As a result, the original function of exemplary damages to compensate for such items as pain and suffering came to be served by actual damages, and the award of exemplary damages for such injuries was superfluous. After the 1830's, the increasing number of actual damage awards for mental anguish led courts to focus on the deterrence and penal functions of exemplary damages.¹⁸

III. CRITICISM OF THE CONCEPT OF PUNITIVE DAMAGES

A. *Punishment versus Deterrence*

The concept of punitive damages has been criticized since its inception. The overwhelming majority of jurisdictions that authorize the recovery of punitive damages espouse the theory that punitive damages serve two functions: (1) to punish past wrongful conduct; and (2) to deter future wrongful conduct.¹⁹ Both theories of pun-

15. *Id.* at 91.

16. *Id.*

17. *See, e.g.,* *Fay v. Parker*, 53 N.H. 342 (1872); *McKeon v. Citizens Ry.*, 42 Mo. 79 (1867).

18. *See* K. REDDEN, *supra* note 7, at § 2.3(B).

19. *See, e.g.,* *Macon-Bibb County Water and Sewerage Auth. v. Tuttle/White Constructors*, 530 F. Supp. 1048 (M.D. Ga. 1981); *Roberson v. Ammons*, 477 So. 2d 957 (Ala. 1985); *Linthicum v. Nationwide Life Ins. Co.* 150 Ariz. 326, 723 P.2d 675 (1986); *Castaic Clay Mfg. Co. v. Dedes*, 167 Cal. App. 3d 1106, 213 Cal. Rptr. 759 (1985); *Coale v. Dow Chem. Co.*, 701 P.2d 885 (Colo. Ct. App. 1985); *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986); *Smith v. United Technologies*, 240 Kan. 562, 731 P.2d 871 (1987); *Bankers Life and Cas. Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), *prob. juris. noted*, 107 S. Ct. 1367 (1987); *Wunderman v. J.O. Lively Constr. Co.*, 602 S.W.2d 215 (Mo. Ct. App. 1980); *Gonzales v. Sansoy*, 103 N.M. 127, 703 P.2d 904 (Ct. App. 1984); *Micari v. Mann*, 126 Misc. 2d 422, 481 N.Y.S.2d 967 (Sup. Ct. 1984); *Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (1981); *Floyd v. Dodson*, 692 P.2d 77 (Okla. Ct. App. 1984); *Lane County v. Wood*, 298 Or. 191, 691 P. 2d

ishment and deterrence are criticized for being inconsistent with each other and for being inconsistently applied by the courts in particular cases.

Historically, the objective of civil law has been not to confer a profit or a windfall upon an injured party, but rather to make the injured party whole. Payment of punitive damage awards to the state or federal government rather than to the plaintiff seems a more sensible way of accomplishing the deterrence or punishment function, while at the same time remaining true to the basic objective of the law of damages.

B. *Double Jeopardy*

Some commentators charge that the award of punitive damages violates the rule against double jeopardy by imposing a double punishment for the same crime.²⁰ This criticism arises from the situation where the defendant can be assessed punitive damages in a civil action for the same acts for which he can be fined in a criminal action. The punishment inflicted in both cases may exceed what is sufficient to deter or punish the defendant.

This problem is exacerbated by the inability of the civil and criminal justice systems to recognize their mutual interest in punishing or deterring the wrongdoer. For instance, in sentencing, the judge in the criminal court may not consider the punitive damages awarded by a civil jury. Similarly, a civil jury may not be told that the defendant has been or could be subjected to criminal prosecution for the same acts. Thus, both courts might punish the defendant for his malice or wrongdoing. In light of this problem, perhaps the civil plaintiff's burden of proof on the issue of malice should be heightened to correspond with that required in the criminal courts. Such a provision might also be effectively coupled with a requirement that punitive damages be related to penal fines.

473 (1984); *Feingold v. Southeastern Pa. Transp. Auth.*, 512 Pa. 567, 517 A.2d 1270 (1986); *Metcalf v. Taylor*, 708 S.W.2d 57 (Tex. Ct. App. 1986); *Cavnar v. Quality Control Parking*, 696 S.W.2d 549 (Tex. 1985); *Wallen v. Allen*, 231 Va. 289, 343 S.E.2d 73 (1986); *Leach v. Biscayne Oil and Gas Co.*, 169 W. Va. 624, 289 S.E.2d 197 (1982).

20. See *Walther & Plein*, *supra* note 10, at 384.

C. *Relation to Compensatory Damages*

The most often repeated criticism of punitive damages is that the jury has unfettered discretion to award any amount of punitive damages even if the amount bears no relationship to the "actual" damages. For example, in *Aetna Life Insurance Co. v. Lavoie*,²¹ an Alabama jury awarded \$3.5 million dollars in punitive damages against an insurance company for its bad faith refusal to pay a \$1,650.22 hospital bill. Although some jurisdictions require a reasonable relationship between the actual and punitive damages,²² the Alabama courts do not require such a correlation.

One of the questions presented to the United States Supreme Court on appeal was whether the award of punitive damages violated the excessive fines clause of the Eighth Amendment.²³ Unfortunately, the Court did not reach this question. Instead, the Court vacated and remanded the case on the grounds that an associate justice of the Alabama Supreme Court should have disqualified himself from participation in the decision because he had filed a similar insurer bad faith claim.²⁴

The Supreme Court recently noted probable jurisdiction in another case raising the issue of whether a punitive damage award violates the excessive fines clause. In *Bankers Life and Casualty Co. v. Crenshaw*,²⁵ the Supreme Court of Mississippi upheld a jury award of punitive damages against an insurance company that had refused to honor a claim. The jury awarded \$1.6 million in punitive damages in addition to \$20,000 actual damages.²⁶ In its appeal to the Supreme Court, the insurance company contended that the punitive damages award violates the excessive fines clause of the Eighth amendment.

The majority of jurisdictions allowing punitive damages require actual or compensatory damages as a prerequisite to an award of punitive damages. However, the amount of actual or compensatory damages required is not specifically defined, and nominal actual damages will often suffice. Factors to be considered in fixing puni-

21. 470 So. 2d 1060 (Ala. 1984), *vacated*, 106 S. Ct. 1580 (1986).

22. *See, e.g.*, *Adams v. Ford Motor Credit Co.*, 556 F.2d 737 (5th Cir. 1977).

23. *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986) (vacating 470 So. 2d 1060 (Ala. 1984)).

24. *Id.* at 1591.

25. 483 So. 2d 254 (Miss. 1985), *prob. juris. noted*, 107 S. Ct. 1367 (1987).

26. 483 So. 2d at 256.

tive damages include: (1) the nature of the defendant's acts; (2) the amount of the compensatory damages awarded; and (3) the wealth of the defendant.²⁷ In addition, some jurisdictions require the amount of exemplary damages to be reasonably related to the amount of actual damages.²⁸ This "reasonable relationship" rule allows an appellate court either to overturn a punitive damage award, or to order remittitur if the court concludes that a reasonable relationship between the compensatory damages and the punitive damages does not exist. Other courts do not require a reasonable relationship between actual and punitive damages but rely instead on the judge's remittitur power to control grossly excessive awards.²⁹ Finally, some courts allow evidence of a defendant's financial net worth so that the jury may set the punitive damages award at a level sufficient to punish or deter.³⁰

Allowing the jury to decide only whether there is sufficient malice to support an award of punitive damages is another way to curtail excessive punitive damages awards. The problems that occur when juries decide the amount of punitive damages to be awarded are revealed by the following jury charge, which was approved on appeal by the Fifth Circuit in *Martin v. Texaco, Inc.*³¹ The trial court instructed the jury on the standard for measuring punitive damages under Texas law as follows:

The appropriate ratio will vary from case to case, depending on such factors as the character of the wrongful conduct, the extent to which the defendant is involved in the conduct, and the extent to

27. See, e.g., *Professional Seminar Consultants v. Sino Am. Technology Exch. Council*, 727 F.2d 1470 (9th Cir. 1984) (applying California law); *TDS, Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520 (11th Cir. 1985) (applying Florida law); *Bemer Aviation v. Hughes Helicopter, Inc.*, 621 F. Supp. 290 (E.D. Pa. 1985), *aff'd*, 802 F.2d 445 (3d Cir. 1986); *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987); *Von Hake v. Thomas*, 705 P.2d 766 (Utah 1985).

28. See, e.g., *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 802 (1986); *Smith v. City of Seven Points*, 608 F. Supp. 458 (E.D. Tex. 1985); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 568 F. Supp. 602 (D. Colo. 1983); *Sprague v. Walter*, 357 Pa. Super. —, 516 A.2d 706 (1986), *appeal granted*, 524 A.2d 495 (Pa. 1987).

29. See, e.g., *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir. 1984) (applying Missouri law); *Shimman v. Frank*, 625 F.2d 80 (8th Cir. 1980) (applying Ohio law); *United States v. Snepp*, 595 F.2d 926 (4th Cir. 1979) (applying Virginia law); *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313 (S.D.N.Y. 1986); *Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986); *Appropriate Technology Corp. v. Palma*, 146 Vt. 643, 508 A.2d 724 (1986).

30. See, e.g., *Arab Termite and Pest Control of Florida, Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982); *Zambrano v. Devanesan*, 484 So. 2d 603, 609 (Fla. Dist. Ct. App.), *review denied*, 494 So. 2d 1150 (Fla. 1986).

31. 726 F.2d 207 (5th Cir. 1984).

which that conduct offends the public sense of justice and propriety.

A very recent court decision listed five relevant factors for reviewing a jury's award of punitive damages, as follows:

- (1) the nature of the wrong;
- (2) the character of the conduct involved;
- (3) the degree of culpability of the wrongdoer;
- (4) the situation and sensibility of the parties;
- (5) the extent to which defendant's conduct offends the public sense of justice and propriety.³²

The subjectivity of these factors, which are frequently found in jury instructions, illustrates the advantage of having the trial court fix the amount of punitive damages to be awarded. This would avoid the aberrant jury awards that are increasingly found in the crazy quilt of the tort system.

D. *Mass Tort Cases*

Repeated punitive damage awards against the same defendant in multiple product liability suits are another major problem on the litigation front.³³ Judge Friendly recognized this problem in *Roginsky v. Richardson-Merrell, Inc.*,³⁴ explaining that repetitive punitive damage awards in mass products liability cases would subject a defendant to vastly excessive damage awards when viewed in their entirety.

Large companies are forced into bankruptcy to avoid successive awards of large punitive damages and the prospect of more such awards. Thousands of punitive damage suits have been filed against manufacturers because of a single defective product. A company's total exposure for a product can far exceed any fine for a criminal violation.³⁵

32. *Id.* at 213.

33. See generally Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 141 (1986).

34. 378 F.2d 832 (2d Cir. 1967).

35. The A. H. Robins Pharmaceutical Company in Richmond, Virginia is an excellent example of a business "forced" into bankruptcy as a result of repetitive punitive damage awards for the same defective product. Beginning in the late 1970's, virtually thousands of plaintiffs brought actions against A. H. Robins for injuries sustained from the Dalkon Shield, a contraceptive device manufactured by A. H. Robins. Partly as a consequence of routine and substantial punitive damage awards, the company entered Chapter 11 reorganization. There are currently more than 300,000 claimants waiting to share in the company's assets.

The legal community must find a way to reduce subsequent punitive damage awards by amounts previously paid. This could be accomplished by a jury instruction or by remittitur. The rules of the federal multi-district litigation panel should be amended to permit trials in one or as few federal or state courts as possible in the mass tort cases. A fund could be created in which all claimants would share after compensatory damages have been awarded or settlements made. The current system favors plaintiffs getting judgments before the defendant company enters bankruptcy and encourages a race to the courthouse. Plaintiffs with pending cases or injuries that become apparent much later are deprived of any punitive damages.

In sum, the power vested in juries to assume the public role of imposing the equivalent of the criminal fine may be misplaced. Allowing juries virtually unfettered discretion to make punitive awards on an ad hoc basis smacks of vigilante justice. The jury is transformed into a roving commission to punish and deter wrongdoing by transferring wealth. Putting the net worth of the defendant in evidence to relate the punitive award to the total worth of defendant exacerbates the problem and is an open invitation for outrageous awards against companies with substantial assets.

IV. RECOVERY OF PUNITIVE DAMAGES

A. *Legal Standards*

Punitive damages have been awarded in a myriad of factual situations involving disparate legal theories. Reliance by the courts on various legal bases for punitive awards has resulted in subtle changes in jury instructions and articulations of the burdens of proof. Thus, the jurisdiction in which the plaintiff brings his action often dramatically affects whether and to what extent punitive damages may be awarded.

Most jurisdictions focus on outrageous or aggravated conduct by the defendant rather than on the nature or extent of the harm to the plaintiff. Courts usually require "circumstances of aggravation or outrage such as spite or malice or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called will-

ful or wanton."³⁶ Mere negligence is not enough,³⁷ though some courts expand gross negligence to include "conscious indifference to consequences" as a justification for punitive damages.³⁸ At least one jurisdiction has ruled that punitive damages may be recovered for gross negligence where that gross negligence is shown by violation of a statute.³⁹ Another court has ruled that gross negligence will not support an award of punitive damages.⁴⁰

Courts have espoused various standards in analyzing the type of wrongful conduct which will justify punitive awards. For example, a Florida appellate court in *Jacmar Pacific Pizza Corp. v. Huston*,⁴¹ ruled that a plaintiff must establish "that the conduct of the defendant was tantamount to willful, intentional and wanton disregard for others⁴² and that the character of negligence required to support a punitive damages award is the same as that required to support a manslaughter conviction."⁴³ Using somewhat different language, the Supreme Court of Florida held in an earlier case⁴⁴ that the negligent conduct necessary to support an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life" or "which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others"⁴⁵

By comparison, an appellate court in Missouri held in one case⁴⁶ that punitive damages could be awarded "upon a showing of either actual or legal malice."⁴⁷ The test offered by the court was

36. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9-10 (5th ed. 1984) (footnotes omitted) [hereinafter PROSSER].

37. See, e.g., *Clements v. Steele*, 792 F.2d 515 (5th Cir. 1986) (applying Texas law); *Creamer v. Porter*, 754 F.2d 1311 (5th Cir. 1985) (applying Louisiana law); *Dukeminier v. K-Mart Corp.*, 651 F. Supp. 1322 (D. Colo. 1987); *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987).

38. PROSSER, *supra* note 35, at 10; see also *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1947 (1986) (applying Oklahoma law).

39. *Valdez v. Cillessen & Son, Inc.* 105 N.M. 575, 734 P.2d 1258 (1987).

40. *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238 (D.D.C. 1986).

41. 502 So. 2d 91 (Fla. Dist. Ct. App. 1987).

42. *Id.* at 92; see also *McFarland v. Skaggs Co.*, 678 P.2d 298 (Utah 1984) (expressly overruling precedent to now require a finding of "actual malice" or "malice in fact").

43. *Huston*, 502 So. 2d at 92.

44. *American Cyanamid Co. v. Roy*, 498 So. 2d 859 (Fla. 1986).

45. *Id.* at 861-62 (quoting *White Constr. Co. v. Dupont*, 445 So. 2d 1026, 1029 (Fla. 1984)).

46. *Guirl v. Guirl*, 708 S.W.2d 239 (Mo. Ct. App. 1986).

47. *Id.* at 246.

“whether the actor did a wrongful act intentionally without just cause or excuse.”⁴⁸ In another appellate decision, a Missouri court⁴⁹ developed this test more fully, ruling that in order to recover punitive damages the plaintiff must establish that the defendant acted “at the least, with legal malice.”⁵⁰ The court further explained that “[l]egal malice is shown by the intentional, knowing commission of a wrongful act without just cause or excuse, and in contravention of, or reckless disregard for, the rights of others.”⁵¹

B. *Particular Actions*

In addition to the courts' use of different standards and language to support punitive damage awards, there is also a great deal of confusion over which actions will support a punitive award. For example, tort actions for personal injuries arise from a variety of factual situations ranging from automobile accidents to product liability actions. Once again, the jurisdiction where the case is brought is often critical. For example, only eighteen states allow punitive damages in wrongful death actions.⁵² Typically, the rationale is that the legislative intent of wrongful death statutes is compensation, not punishment.

Courts apply different standards in determining whether juries can award punitive damages for assault and battery. For example, in Alabama the courts require that “particularized circumstances of aggravation or insult” be shown before punitive damages will be awarded.⁵³ Other courts hold that punitive damages are justified when there is “implied malice”⁵⁴ or when there is “malice, or oppression, or gross and willful wrong, or a wanton and reckless disregard of plaintiff's rights.”⁵⁵ Nominal damages alone are usually sufficient to support an award of exemplary damages in an assault and battery action.⁵⁶ Some jurisdictions, however, require that ac-

48. *Id.*

49. *Collet v. American Nat'l Stores*, 708 S.W.2d 273 (Mo. Ct. App. 1986).

50. *Id.* at 287.

51. *Id.*

52. Note, *Disallowing Punitive Damages for Wrongful Death*, 8 CUMB. L. REV. 567, 574-75 (1977).

53. *Peete v. Blackwell*, 504 So. 2d 222, 223 (Ala. 1986); see also *Harrison v. Mitchell*, 391 So. 2d 1038 (Ala. Civ. App. 1980).

54. *Fowler v. Mantooth*, 683 S.W.2d 250, 252 (Ky. 1984).

55. *Shugar v. Guill*, 304 N.C. 332, —, 283 S.E.2d 507, 509 (1981); see also *Carey v. After the Gold Rush*, 715 P.2d 803 (Colo. Ct. App. 1986).

56. *Peete*, 504 So. 2d at 223; *Carey*, 715 P.2d 803.

tual damages be proven before punitive damages can be awarded.⁵⁷

Punitive damages are awarded in actions for false imprisonment in some jurisdictions where there is malice⁵⁸ or where the wrongdoer acts willfully, wantonly or in a reckless disregard of the rights or safety of others.⁵⁹ The amount of punitive damages for false imprisonment varies widely as evidenced by the store detention cases where store customers have been unlawfully detained on suspicion of shoplifting.⁶⁰

Plaintiffs bringing defamation suits must prove actual damages as well as actual malice or reckless disregard for the truth before punitive damages may be awarded. The United States Supreme Court in *Gertz v. Welch, Inc.*⁶¹ held that the Constitution prohibits awards of punitive damages even to a private figure plaintiff unless he proves actual malice.⁶² The *Gertz* decision also limited "defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury."⁶³

A recent report by the Rand Corporate Institute for Civil Justice⁶⁴ finds that the upward trend in awards of punitive damages springs not from personal injury and products liability cases, but primarily from litigation involving business disputes. The growth of punitive damages in business and contract cases has resulted in part from the evolution of the so-called "bad faith" cases. The verdict in *Pennzoil Co. v. Texaco, Inc.*⁶⁵ is an example of the large punitive damage awards that may be made in this type of litigation. Punitive damages have been awarded for interference with business relations in a variety of situations where aggravated circumstances and malice are shown. The general rule in this country

57. *Daiss v. Woodbury*, 163 Ga. App. 88, 293 S.E.2d 876 (1982).

58. *See, e.g., Kajtazi v. Kajtazi*, 488 F. Supp. 15 (E.D.N.Y. 1978).

59. *Lusby v. TG&Y Stores*, 749 F.2d 1423 (10th Cir. 1984) (applying Oklahoma law), *vacated on other grounds*, 106 S. Ct. 40 (1985); *see also Collins v. Straight, Inc.*, 748 F.2d 916 (4th Cir. 1984) (applying Virginia law); *Adams v. Zayre Corp.*, 148 Ill. App. 3d 704, 499 N.E.2d 678 (1986).

60. *See Johnson v. Schwegmann Bros.*, 397 So. 2d 868 (La. Ct. App. 1981) (awarding \$1,000 to customer); *Moore's, Inc. v. Garcia*, 604 S.W.2d 261 (Tex. Civ. App. 1980) (award of \$25,000 punitive damages to customer was justified). *But see Ward v. National Car Rental Sys.*, 290 N.W.2d 441 (Minn. 1980) (refusing to instruct jury on punitive damages).

61. 418 U.S. 323 (1974).

62. *See also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (requiring public official to prove actual malice before recovering damages for defamation).

63. 418 U.S. at 342.

64. M. PETERSON, S. SARMA & M. SHANLEY, *PUNITIVE DAMAGES* (Rand 1987).

65. 107 S. Ct. 1519 (1987) (judgment in excess of 11 billion dollars upheld).

is that damages for breach of contract are limited to pecuniary loss and punitive damages are not recoverable.⁶⁶ There are exceptions to this general rule, however. For example, in those cases where the complaint alleges that an independent willful tort accompanies or underlies the breach of contract, the plaintiff may recover punitive damages upon proof of malice, wantonness or oppression.⁶⁷

Punitive damages have also been awarded through arbitration. The first case in federal court challenging an award of punitive damages by an arbitration panel arose from a construction contract.⁶⁸ The general contractor cancelled his contract with a subcontractor for the construction of a roof after altering the requirements for the roof. The subcontractor sued for compensatory and punitive damages, alleging breach of contract, fraud, misrepresentation and violation of the requirement of good faith and fair dealing. The general contractor stayed the lawsuit for arbitration pursuant to a contract provision that required arbitration of all disputes arising out of the contract. After the arbitration panel awarded the subcontractor \$108,908 in punitive damages and \$41,091 in compensatory damages, the general contractor argued to the federal district court that the arbitration panel lacked the authority to award punitive damages. The district court rejected this argument and the Eleventh Circuit affirmed.⁶⁹

Injury to property is another area of the law where courts have restricted awards of punitive damages. For example, most jurisdictions allow the recovery of punitive damages in trespass actions only when the defendant's trespass was malicious and willful. Punitive damages may not be recovered when the defendant acted in good faith or without wrongful intent. Punitive damages have been allowed in connection with a wide variety of nuisances. Usually,

66. See, e.g., *Southern Discount Co. v. Kirkland*, 181 Ga. App. 263, 351 S.E.2d 685 (1986); *Cadillac Vending Co. v. Haynes*, 156 Mich. App. 423, 402 N.W.2d 31 (1986), *vacated without opinion*, 406 N.W.2d 830; *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742 (Tex. 1986).

67. See, e.g., *Palmer v. Ted Stevens Honda, Inc.*, 193 Cal. App. 3d 530, 238 Cal. Rptr. 363 (1987); *L.F. Pace & Sons, Inc. v. Travelers Indem. Co.*, 9 Conn. App. 30, 514 A.2d 766, *cert. denied*, 201 Conn. 811, 516 A.2d 886 (1986); *McDaniel v. Bass-Smith Funeral Home, Inc.*, 80 N.C. App. 629, 343 S.E.2d 228 (1986); *Cook Assoc., Inc. v. Warnick*, 664 P.2d 1161 (Utah 1983).

68. *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985).

69. 776 F.2d 269; see also *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), *review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986); *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272 (Ala. 1986).

conduct which could be considered willful, wanton or malicious as well as actual damages must accompany the alleged nuisance before punitive damages can be awarded.⁷⁰

In addition to the torts discussed above, punitive damages have been awarded in cases involving special duty relationships between plaintiffs and telephone, telegraph and utility companies, attorneys, insurance companies, fiduciaries, and landlords.

Although the various tort actions discussed above are based on different legal theories, the usual focus with regard to punitive damages is the defendant's conduct, not the harm to the plaintiff. Unfortunately, the standards incorporated into jury instructions on punitive damages are usually confusing and often do not reflect this focus. Those of us who encourage reform in the area of punitive damages should advocate a more stringent and definite legal basis for allowing such awards. We can begin by drafting clear, understandable and precise jury instructions.

V. THE TASK FORCE REPORT

The American College of Trial Lawyers Task Force on Litigation recently issued a report wherein they unanimously agreed that punitive damage awards are one of the greatest problems in the current tort system.⁷¹ The Task Force recognized that the awards often bear no relationship to their asserted deterrence function, and usually reflect the jury's dissatisfaction with a defendant and their desire to punish him, without regard to the true harm caused by the defendant's conduct.⁷² The Task Force noted a "general feeling" in the legal community that punitive damage awards should be more difficult to obtain and that the amounts of such awards should be controlled much more than they are at present.⁷³

A few members of the Task Force favored abolishing punitive damages altogether.⁷⁴ Those members who favored continuation of punitive damage awards indicated they might consider abolition if reform is unsuccessful. One member advocated paying punitive damages to the state.

70. See, e.g., *Monty v. Hayward*, 451 So. 2d 938 (Fla. Dist. Ct. App. 1984), *review denied*, 461 So. 2d 115 (Fla. 1985).

71. AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT OF THE TASK FORCE ON LITIGATION ISSUES 5 (1986).

72. *Id.*

73. *Id.* at 5-6.

74. *Id.* at 6.

The Task Force found the most important reform to be limiting the amount of punitive damages that may be recovered either by means of a cap or by a formula. Next, the group favored adopting some means of preventing a defendant in mass tort litigation from being driven into bankruptcy by cumulative punitive damage awards for a single act or course of conduct. The Task Force also supported reducing subsequent punitive damage awards by amounts previously paid for punitive damages. A few members of the Task Force expressed interest in creating a federal action in the nature of interpleader specifically to resolve all related punitive damage claims against the defendant in a single proceeding, although they doubted the feasibility of this concept.⁷⁵ The Task Force apparently did not consider amending the federal multi-district panel statute as suggested herein. Significantly, the Task Force also recommended that consideration be given to raising the standard of proof for punitive damages, modifying jury instructions and encouraging greater judicial control over punitive damage awards.⁷⁶

VI. STATUTORY CHANGES

There have been significant legislative changes in the states in the area of tort reform. As one might expect, there has been little uniformity in the methods used to bring punitive damages under control. Colorado has enacted several provisions limiting punitive damages, including a provision that punitive damages cannot exceed the amount of compensatory damages except in certain delimited situations.⁷⁷ One-third of all punitive damage awards goes to Colorado's general revenue fund.⁷⁸

Florida passed legislation requiring that sixty percent of every punitive damage award be paid to the state.⁷⁹ Similarly, Iowa requires that seventy-five percent of a punitive damage award be paid to the state unless the defendant acts with the specific intent

75. *Id.*

76. *Id.*

77. COLO. REV. STAT. § 13-21-102 (Cum. Supp. 1987).

78. *Id.*; see also UPDATE, *supra* note 2, at 70.

79. FLA. STAT. ANN. § 768.73(2)(b) (West Cum. Supp. 1987). Interestingly, the sixty percent awarded in personal injury and wrongful death cases goes to Florida's Public Medical Assistance Trust Fund, while in every other case the money goes to the state's general revenue fund.

to injure the plaintiff.⁸⁰ In such a case, the plaintiff collects the full amount of the award.⁸¹ Georgia also recently passed legislation requiring that seventy-five percent of punitive damages awarded in product liability cases shall be paid to the treasury of the state.⁸²

New Hampshire enacted an outright prohibition on punitive damages.⁸³ Oklahoma passed legislation limiting, with some exceptions, the punitive damage award to the amount of the compensatory award.⁸⁴ In Florida, the punitive damages award may not exceed three times the compensatory award.⁸⁵

Georgia has placed a cap of \$250,000 on punitive damages in non-product liability cases, but the cap does not apply in cases where defendant acts with "specific intent" to harm.⁸⁶ Virginia has also recently passed legislation that places a cap of \$350,000 on punitive damage awards.⁸⁷ Several jurisdictions enacted caps on non-economic damages, but did not include punitive damage awards in these caps.

80. IOWA CODE ANN. § 668A.1(2)(b) (West 1987).

81. *Id.* § 668A.1(2)(a).

82. GA. CODE ANN. § 51-12-5.1(e)(2) (Cum. Supp. 1987). The statute also prohibits more than one punitive damage award against the same defendant for the same defective product. Thus, the first products liability plaintiff injured and into a Georgia court pockets twenty-five percent of the sole punitive damage award allowed for that product against the defendant. Since punitive damage awards in products liability cases do not come under the cap, see *infra* note 86 and accompanying text, this may represent a sizeable sum and spur a race to the courthouse.

83. N.H. REV. STAT. ANN. § 507:16 (Cum. Supp. 1986).

84. OKLA. STAT. ANN. tit. 23 § 9 (West 1987). The limit does not apply where the court finds as a matter of law that there is "clear and convincing" evidence of wanton, reckless, oppressive, fraudulent or malicious conduct on the part of the defendant. *Id.*

85. FLA. STAT. ANN. § 768.73(1)(a) (West Cum. Supp. 1987). This section does not apply to class actions. Like the Oklahoma statute, *supra* note 84, Florida will also allow a jury's punitive award in excess of the three times actual damages limit to stand. The verdict is presumed excessive, and the plaintiff must prove to the court that the evidence is clear and convincing as a matter of law that the award is not excessive in light of the facts and circumstances of the case. *Id.* § 768.73(1)(b); see also GA. CODE ANN. § 51-12-5.1(f) (Cum. Supp. 1987).

86. GA. CODE ANN. § 51-12-5.1(g) (Cum. Supp. 1987). A unique feature of this statute is that the jury does not hear evidence of a defendant's net worth for purposes of assessing the proper level of punitive damages until they have first returned a special verdict that malice has been proven. The amount of punitive damages is then separately tried to the same jury. See *id.* § 51-12-5.1(d).

87. VA. CODE ANN. § 8.01-38.1 (Cum. Supp. 1987). A federal district court recently found the cap on medical malpractice awards to be an unconstitutional infringement on the plaintiff's seventh amendment right to a jury trial. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986); see also VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1984).

Finally, Iowa,⁸⁸ South Dakota,⁸⁹ Alaska,⁹⁰ Illinois,⁹¹ Oklahoma,⁹² Georgia⁹³ and Florida⁹⁴ have all enacted legislation that would either raise or more specifically define the standard of proof required for an award of punitive damages.

VII. RECOMMENDATIONS

Excessive punitive damages awards have become a national problem. Legislation by the states providing for caps on punitive awards or requiring a fixed formula or a reasonable relationship between compensatory and punitive damages will help solve the problem. Legislation that would give the trial court alone the power to determine the amount of a punitive damages award after the jury has determined that the defendant's malicious conduct justifies such an award is a better solution. In the interim and pending full legislative solutions, the courts should not hesitate to accomplish this same result by using their remittitur power in appropriate instances.

Abandoning punitive damages altogether is not a sound idea, since there will always be the unusual case where punishment is warranted or deterrence is necessary. But under current law and practice, punitive damages are awarded far too easily, far too often and far too excessively. State legislators and judges alike must recognize the dangers inherent in the current system and take steps to correct what is fast becoming the most serious flaw in our tort system today.

88. IOWA CODE ANN. § 668A.1(1)(a) (West 1987).

89. S.D. CODIFIED LAWS § 21-1-4.1 (1987).

90. ALASKA STAT. § 09.17.020 (Cum. Supp. 1986).

91. ILL. ANN. STAT. ch. 110, § 2-604.1 (West Cum. Supp. 1987).

92. OKLA. STAT. ANN. tit. 23 § 9 (West 1987).

93. GA. CODE ANN. § 51-12-5.1(b) (Cum. Supp. 1987).

94. FLA. STAT. ANN. § 768.73(b) (West Cum. Supp. 1987).

