House Workgroup on Punitive Damages

FINAL REPORT

Annapolis, Maryland
February 2017

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THE MARYLAND GENERAL ASSEMBLY
ANNAPOLIS, MARYLAND 21401-1991

February 24, 2017

The Honorable Thomas V. Mike Miller, Jr., President of the Senate
The Honorable Michael E. Busch, Speaker of the House of Delegates
Members of the Maryland General Assembly

Ladies and Gentlemen:

The House Workgroup on Punitive Damages respectfully submits its final report. The workgroup met three times during the 2016 interim to review the current structure for awarding punitive damages under Maryland law, examine other states' punitive damages schemes, and consider the possible implications of expanding or contracting the use of punitive damages in Maryland – including the likely impact on insurance consumers in the State. Because of the complexity of the issues, there was no consensus as to a recommendation. Nevertheless, we hope that the information in this report will be of assistance to the General Assembly as it considers future bills on the subject of punitive damages.

On behalf of the workgroup, I wish to thank the many individuals who contributed their time and expertise during this process; the information and perspectives they provided were invaluable. I also wish to thank the Department of Legislative Services and committee staff for their continued support.

Sincerely,

Kathleen M. Dumais
Chair

cc: Mr. Warren G. Deschenaux

House Workgroup on Punitive Damages
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Introduction

Introduction

Actual damages, also known as compensatory damages, are intended to make a plaintiff whole by returning the plaintiff to the position he or she was in prior to the alleged harm caused by the defendant. Actual damages include both economic damages – compensation for things like lost wages, medical expenses, and costs to repair or replace property – and noneconomic damages – compensation for things like pain, suffering, inconvenience, physical impairment, loss of consortium, or other nonpecuniary injury.

In contrast to actual damages, punitive damages do not compensate plaintiffs for their losses. Rather, punitive damages are designed to punish and deter blameworthy behavior. Under Maryland law, punitive damages are available only in a narrow category of cases – either where explicitly authorized by statute, or where the defendant's conduct rises to the level of "actual malice."

In recent years, the General Assembly has considered several bills that would have expanded the use of punitive damages in Maryland, particularly in cases involving drunk driving. House leadership created the House Workgroup on Punitive Damages in response to these bills and to the perceived need to take a broader, more holistic look at punitive damages in the State. The workgroup included members of the Economic Matters, Health and Government Operations, and Judiciary committees, as well as private individuals from the plaintiff and defense bar and the insurance and health care worlds. The workgroup's mandate was to (1) review the current structure of awarding punitive damages under Maryland tort law and determine whether the array of covered actions should be expanded or limited; (2) examine other states' punitive damages schemes to determine whether there are best practices that Maryland should adopt; (3) review the opportunities for treble damages and compensatory damages under Maryland law; and (4) determine what impact any expansion or contraction of punitive damages and treble damages would have on insurance consumers in the State.

The workgroup met three times during the 2016 interim, on November 10, December 6, and December 20. The first meeting focused on the evolution of Maryland case law on punitive damages, Maryland statutes authorizing punitive and treble damages, and how Maryland law compares with other states on this issue of punitive damages. The second meeting focused on insurance issues, including questions relating to the insurability of punitive damage awards and the possible impact that expanding the use of punitive damages in Maryland would have on the affordability and availability of insurance in the State. At the third and final meeting, members of the workgroup discussed their perspectives and considered recommendations.

Ultimately, the workgroup unanimously agreed that there was no consensus because of the complexity of the issues. The workgroup instead decided to issue this report summarizing the

information it had gathered over the course of its meetings. The following sections provide an overview of punitive damages in Maryland, punitive damages in other states, and the insurability of punitive damages. Additional materials submitted to the workgroup have been included as appendixes.

Punitive Damages in Maryland

Maryland Case Law

In the 1940s, the Maryland Court of Appeals set a high bar for the recovery of punitive damages in negligence actions:

> The basic rule for the entitlement of punitive or exemplary damages is that there must be actual malice. That is, there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act. *Philadelphia, W.&B. R.R. Co. v. Hoeflich*, 62 Md. 300, 307, quoted in *Davis v. Gordon*, 183 Md. 129, 133 (1944).

The above cited rule held fast in Maryland until the Court of Appeals' decision in *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149 (1972). In *Smith*, the court, for the first time, fashioned a gross negligence standard for the award of punitive damages in a motor vehicle case. Defining "gross negligence" as a "wanton or reckless disregard for human life" (*Id.* at 167), the Court stated, "We regard 'a wanton or reckless disregard for human life' in the operation of a motor vehicle, with the known dangers and risks attendant to such conduct, as the legal equivalent of malice." *Id.* at 168.

In *Nast v. Lockett*, 312 Md. 343 (1988), the Court of Appeals considered the application of the *Smith* decision to automobile tort cases involving intoxication. The Court held that evidence that the defendant was driving while intoxicated could support the conclusion that the defendant had a wanton or reckless disregard for human life. Therefore, such evidence could be weighed by the trier of fact on the issue of punitive damages.

After the gradual expansion of the use of punitive damages in negligence actions in the 1970s and 80s, the Court of Appeals reversed course. In *Owens-Illinois v. Zenobia*, 325 Md. 420 (1992), the Court expressly overruled the *Smith* and *Nast* decisions, holding that, in a nonintentional tort action, the trier of fact may not award punitive damages unless the plaintiff establishes that the defendant's conduct was characterized by "actual malice," meaning evil motive, intent to injure, ill will, or fraud. The Court expanded on this decision in *Komornik v. Sparks*, 331, Md. 720 (1993), specifically holding that evidence of the defendant's driving while intoxicated was insufficient to support a finding of actual malice.

Maryland Statutes

Punitive damages are also available under more than 40 Maryland statutes. These statutes generally apply to legislatively created causes of action based on intentional misconduct. Nearly

half of the statutes are intended to protect consumers. Usually, the statutes place a limit on the amount of the punitive damages that may be recovered in the form of a multiple of the actual damages. **Appendix 1** contains a list of Maryland statutes that authorize punitive damage awards.

Punitive Damages in Other States

Introduction

In the United States, 47 states, including Maryland, authorize the award of punitive damages in at least some cases. Of these 47, 4 states (Louisiana, Massachusetts, New Hampshire, and South Dakota) award punitive damages only where expressly authorized by statute. Three states (Michigan, Nebraska, and Washington) prohibit the award of punitive damages outright. **Exhibit 1** summarizes the availability of punitive damages across the country.

Exhibit 1
Punitive Damages Across the Country

Availability of Punitive Damages	Number of States
Generally available	43
Available only when expressly authorized by statute	4
Prohibited	3

Source: Wilson Elser

This section provides a broad overview of the treatment of punitive damages in the states that allow them.

Standards of Conduct

Punitive damages are intended to punish conduct that is particularly culpable or egregious. In general, it is not enough that a defendant acted negligently. Rather, the defendant must have acted with a specific state of mind, such as (1) "actual malice"; (2) "conscious disregard" of the likely consequences of his or her actions; (3) "reckless indifference" to the likely consequence of his or her actions; or (4) "gross negligence." **Exhibit 2** summarizes the standards of conduct in the 43 states where punitive damages are generally available.[1]

[1] In Louisiana, Massachusetts, New Hampshire, and South Dakota, the conduct required to obtain an award of punitive damages is set for each cause of action by the statute authorizing the award of punitive damages. This report does not address the standards of conduct in these states.

Exhibit 2
Standard of Conduct Where Punitive Damages are Available

Standard of Conduct	Number of States
Actual malice (express or implied)	9
Conscious disregard	7
Reckless indifference	13
Gross negligence	5
Other	9

Source: Wilson Elser

In general, a defendant acts with "actual malice" if he or she actually intends to cause harm. However, some jurisdictions further distinguish between "express malice" and "implied malice." Express malice exits where the defendant's tortious conduct is motivated by ill will (*i.e.*, hatred, spite, or similar motive toward the plaintiff.) Implied malice exists where the defendant's conduct, although not necessarily motivated by ill will, is so outrageous that the court may infer malice on the part of the defendant. Maryland and North Dakota appear to be the only states to require proof of express malice to obtain punitive damages.[2] Seven other states apply a more flexible implied malice standard, including:

- California (CAL. CIVIL CODE § 3294)[3] ;
- Kentucky (KY. REV. STAT. § 411.184)[4];
- Maine (*St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.29 995 (Me. 2003))[5];

[2] There is a possible exception to the express malice requirement in Maryland. In product liability cases, Maryland courts have found that the "actual malice" necessary to support an award of punitive damages is actual knowledge of a defect and deliberate disregard of the consequences. (*AC and S v. Godwin*, 667 A.2d 116 (Md. 1995)). This is essentially an implied malice standard.

[3] In California, punitive damages may be awarded only if the defendant is guilty of "oppression, fraud, or malice." "Malice" is defined to include both conduct that is intended to cause harm and "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others."

[4] In Kentucky, punitive damages may be awarded only where the defendant acted towards the plaintiff with "oppression, fraud, or malice." "Malice" is defined as "conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm."

[5] In Maine, punitive damages may be awarded in cases involving implied malice. Implied malice arises where "deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied." *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985).

- Montana (MONT. CODE ANN. § 27-1-221)[6];
- Nevada (NEV. REV. STAT. § 42.005);[7]
- Ohio (OHIO REV. CODE ANN. § 2315.21); and[8]
- Virginia (*Lee v. Southland Corp.*, 244 S.E.2d 756 (Va. 1978)).[9]

A defendant acts with "conscious disregard" if he or she is consciously aware that his or her actions will probably injure another. The defendant does not necessarily intend to injure the plaintiff, but he or she has actual knowledge of the likely consequences of his or her actions and deliberately proceeds despite this knowledge. States that require proof of conscious disregard before awarding punitive damages include:

- Arizona (*Rawlings v. Apodaca*, 726 P.2d 565 (Ariz. 1986));
- Georgia (GA. CODE ANN. § 51-12-5.1);
- Iowa (IOWA CODE § 668A.1);
- Minnesota (MINN. STAT. § 549.20);
- New Jersey (N.J.S.A. § 2A:15-5.12);
- Utah (UTAH CODE ANN. § 78B-8-201); and
- Wisconsin (WIS. STAT. ANN. § 895.043).

A defendant acts with "reckless indifference" if he or she knows or should know that his or her actions will probably injure another. The defendant does not intend to cause injury, but he or she acts without concern for the likely consequences of his or her actions. States that authorize punitive damage awards based on a finding of reckless indifference include:

- Alabama (ALA. CODE ANN. § 6-11-20);
- Alaska (ALASKA STAT. § 09.17.020);
- Arkansas (ARK. CODE ANN. § 16-55-206);

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[6] In Montana, punitive damages may be awarded only if the defendant is guilty of "actual fraud or actual malice." A defendant is guilty of actual malice "if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and: (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff or (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff." MONT. CODE ANN. § 27-1-221.

[7] In Nevada, punitive damages are available where the defendant is guilty of oppression, fraud, or malice, express or implied." NEV. REV. STAT. § 42.005. "Malice, express or implied" is defined as "conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." NEV. REV. STAT. § 42.001.

[8] Although Ohio's punitive damages statute requires proof of "malice, aggravated or egregious fraud, oppression or insult," Ohio courts have defined malice to include a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Malone v. Courtyard by Marriott P'ship*, 659 N.E.2d 1242, 1259 (Ohio, 1996).

[9] In Virginia, actual malice may be shown where the defendant's action exhibit "ill will, violence, grudge, spite, wicked intention or a conscious disregard of the rights of another." *Lee v. Southland Corp.*, 244 S.E.2d 756 (Va. 1978).

- Colorado (COLO. REV. STAT. § 13-21-102);
- Connecticut (*Chapman Lumber, Inc. v. Clifford L. Tager*, Conn. Super. 2005);
- Delaware (*Eby v. Thompson*, 2005 Del. Super. LEXIS 63 (Feb. 8 2005));
- Florida (FLA. STAT. ANN. § 768.72);
- Mississippi (MISS. CODE ANN. § 11-1-65);
- New Mexico (*Gonzalez v. Surgidev. Corp.*, 899 P.2d 594 (N.M. 1995));
- New York (*Martin v. Group Health Inc.*, 767 N.Y.S. 2d 803 (N.Y. App. Div. 2003));
- Oklahoma (OKLA. STAT. ANN. tit. 23, § 9.1);
- Pennsylvania (*Feld v. Merriam*, 485 A.2d 742 (Pa. 1984)); and
- South Carolina (*Nesbitt v. Lewis*, 517 S.E.2d 11 (S.C. 1999)).

Several states allow imposition of punitive damages if the plaintiff proves that the defendant acted in a grossly negligent manner. West's Encyclopedia of American Law defines "gross negligence" as "a conscious and voluntary disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both." States that allow imposition of punitive damages for gross negligence include:

- Idaho (*Curtis v. Firth*, 850 P.2d 749 (Idaho 1993));
- Illinois (*Ainsworth v. Century Supply Co.*, 693 N.E.2d 510 (Ill. App. Ct. 1998));
- Indiana (*Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. Ct. App. 1993));
- Missouri (*Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo. Ct. App. 1998)); and
- Texas (TEX. CIV. PRAC. & REM. CODE § 41.003).

Standards of conduct do not always fit neatly into the categories described above. The following states have formulated various standards requiring behavior that amounts to less than express malice but more than gross negligence for the imposition of punitive damages:

- Hawaii (*Kang v. Harrington*, 587 P.2d 285 (Haw. 1978));
- Kansas (KAN. STAT. ANN. § 60-3702; *Reeves v. Carlson*, 969 P.2d 252 (Kan. 1988));
- North Carolina (N.C. GEN. STAT. § 1D-15);
- Oregon (OR. REV. STAT. § 31.730);
- Rhode Island (*Johnson v. Johnson*, 654 A.2d 1212 (R.I. 1995));
- Tennessee (*Hodges v. S.C. Tool & Co.*, 833 S.W.2d 896 (Tenn. 1992));
- Vermont (*Mc.Cormick v. McCormick*, 621 A.2d 238 (Vt. 1993));
- West Virginia (*Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895)); and
- Wyoming (*Alexander v. Meduna*, 47 P.3d. 206 (Wyo. 2002)).

Standards of Proof

Because punitive damages are intended to punish quasi-criminal behavior, a vast majority of jurisdictions, including Maryland, require punitive damages to be proved by "clear and convincing" evidence. One state (Colorado) has established an even higher "beyond a reasonable doubt" standard for punitive damages. Eight states (Connecticut, Illinois, Louisiana, Massachusetts, New Mexico, Vermont, Virginia, and West Virginia) apply the preponderance of the evidence standard generally applicable to civil cases. There is no clear standard in New Hampshire, New York, or Wyoming. **Exhibit 3** summarizes standards of proof across the country.

Exhibit 3
Standards of Proof

Standard of Proof	Number of States
Preponderance of the evidence	8
Clear and convincing	35
Beyond a reasonable doubt	1
Undetermined/no clear standard	3

Source: Wilson Elser

Caps and Limitations

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court held that "grossly excessive" punitive damage awards violate the due process clause of the Fourteenth Amendment of the U.S. Constitution. Additionally, 27 states (not including Maryland) have enacted specific statutory limitations on the amount of punitive damages that may be awarded. **Exhibit 4** summarizes these statutory caps and limitations.

Exhibit 4

Limitations on Punitive Damages

State	Limitation	Notes
Alabama	$500,000 or 3 x compensatory damages	Nonphysical injury only.
	$1,500,000 or 3 x compensatory damages	Physical injury only.
Alaska	$500,000 or 3 x compensatory damages	Subject to exceptions – under certain circumstances, recovery up to $7 million may be allowed.
Arkansas	$250,000 or 3 x compensatory damages	Punitive award may not exceed $1 million.
Colorado	1x compensatory damages	May be increased to 3x compensatory damages under certain circumstances.
Connecticut	Costs of litigation less taxable costs	Subject to statutory exceptions.
Florida	$500,000 or 3 x compensatory damages	General cap.
	$2,000,000 or 4 x compensatory damages	Wrongful conduct motivated by unreasonable financial gain or defendant knew likelihood of harm.
Georgia	$250,000	Does not apply in product liability cases.
Idaho	$250,000 or 3 x compensatory damages	General cap.
Indiana	$50,000 or 3 x compensatory damages	General cap.
Iowa	3 x clean-up costs	Applies only in environmental cases.
Kansas	$5,000,000	Award may not exceed defendant's annual gross income or 1.5x the profit that the defendant gained or is expected to gain as a result of the misconduct.
Maine	$75,000	Applies only in wrongful death actions.
Massachusetts	$100,000 or as otherwise specified in statute	Caps appear in statutes authorizing punitive damage awards.
Mississippi	$20,000,000	In general, cap is tied to the defendant's net worth; cap does not apply in certain cases.

State	Limitation	Notes
Missouri	$500,000 or 5 x compensatory damages	General cap.
Montana	$10,000,000	Generally, cap may not exceed 3% of the defendant's net worth; cap does not apply in certain cases.
Nevada	$300,000 or 3 x compensatory damages	Does not apply to insurer bad faith claims or certain other cases.
New Jersey	$350,000 or 5 x compensatory damages	Does not apply in certain cases.
North Carolina	$250,000 or 3 x compensatory damages	Does not apply to actions under "driving while impaired" statute.
North Dakota	$250,000 or 2 x compensatory	General cap.
Ohio	10% or defendant's net worth or 2 x compensatory damages	Award may not exceed $350,000.
Oklahoma	$100,000 or 1 x compensatory damages	"Category I" cases.
	$500,000 or 2 x compensatory damages	"Category II" cases.
	No cap	"Category III" cases.
Oregon	4 x compensatory damages	Applies only in cases where harm is purely economic.
Rhode Island	2 x compensatory damages	Applies only in willful and malicious misappropriation of trade secrets cases.
Texas	$200,000 or 2 x (economic damages + noneconomic damages up to $750,000)	General cap.
Utah	3 x compensatory damages	General cap.
Virginia	$350,000	General cap.

Source: Wilson Elser

Awards Against the State

In a vast majority of jurisdictions, including Maryland, punitive damages may not be awarded against the state. However, in some jurisdictions this prohibition is subject to certain exceptions. For example, Colorado allows public entities to defend, pay, or otherwise settle punitive damage claims against a public employee, but only after adoption of a general resolution at an open, public meeting.

Louisiana, South Dakota, and Vermont allow punitive damages to be awarded against the state, subject to certain conditions and restrictions such as damage caps and insurance requirements. Kentucky appears to be the only state that places no limitations on punitive damage awards against the state. **Exhibit 5** summarizes the availability of punitive damage awards in actions against state governments.

Exhibit 5
Availability of Punitive Damages Against States

Availability of Punitive Damages in Actions Against State	Number of States
Generally not available	42
Available subject to damage caps or other limitations	3
Generally available	1
Unclear / no information	1

Source: Wilson Elser

Payment of Awards

In general, punitive damages are paid to the plaintiff. However, because punitive damages are not intended to compensate the plaintiff for his or her losses, some jurisdictions require a certain percentage of every punitive damages award to be paid to the state. **Exhibit 6** summarizes the allocation of punitive damages in these jurisdictions.

Exhibit 6
Allocation of Punitive Damages

State	Allocation of Punitive Damages
Alaska	50% paid to state, deposited into general fund.
Georgia	75% paid to state, deposited into general fund.
Illinois	Trial court has discretion (rarely used in practice) to apportion punitive damages among the plaintiff, the plaintiff's attorney, and the State of Illinois Department of Human Services.
Indiana	75% paid to state, deposited into the Violent Crime Victims' Compensation Fund.
Iowa	Where conduct was not directed specifically at the plaintiff, at least 75% paid to state, deposited into a civil reparations trust fund administered by the State Court Administer.
Missouri	50% paid to state, deposited into the Tort Victims' Compensation Fund.
Oregon	60% paid to state, deposited into the Criminal Injuries Compensation Account.
Pennsylvania	In medical malpractice cases only, 25% paid to state, deposited into the Medical Care Availability and Reduction of Error (MCARE) Fund.
Utah	50% of punitive damages in excess of $20,000 (after attorney's fees and costs) paid to state, deposited into general fund.

Source: Wilson Elser

Categories of Cases

The availability of punitive damages in different types of cases varies widely from state to state. These variations have their basis in both case law and statute. **Exhibit 7** summarizes the availability of punitive damages in three types of cases: (1) products liability; (2) medical malpractice; and (3) wrongful death. In Maryland, punitive damages are available in products liability and medical malpractice cases, but not in wrongful death cases.

Exhibit 7
Availability of Punitive Damages

Availability of Punitive Damages	Number of States
Products Liability	
Available	43
Not available	3
No information	1
Medical Malpractice	
Available	39
Not available	6
No information	2
Wrongful Death	
Available	10
Not available	5
No information	32

Sources: Wilson Elser; Congressional Research Service

Insurability of Punitive Damages

Overview

As a mechanism to manage risk of loss, insurance is generally available to anticipate and manage the effects of losses that are foreseeable and capable of estimation, such as compensatory damages for losses in tort or contract. Punitive damages are another variety of damage assessed as the result of loss, principally to punish the person for inflicting the loss, or to make the person an example to others. As noted earlier in this report, punitive damages are widely but not universally available in the United States, they are generally available in 43 states, available only by statute in 4, and entirely prohibited in 3. In addition, punitive damages may be authorized, or prohibited, under a federal statute for an action that also gives rise to potential punitive damages under state law.

Where available, punitive damages may be assessed against a tortfeasor or other violator for a variety of reasons, often to punish the violator beyond merely making the injured party whole, either because compensatory damages are nominal or because they are inadequate to address nonmonetary aspects of the injury sustained. Another principal purpose of punitive damages is to make the violator an example, so that others who might otherwise risk an action will think twice, based on the level of punitive damages assessed. When assessed against the violator for the violator's own intended or negligent action, the damages are "directly assessed." In the case of a violator in the employ or under the control of a third party, punitive damages may be assessed against the third party as "vicariously assessed" punitive damages.

Where punitive damages may be awarded, they may or may not be insurable. Factors vary considerably from state to state, such as whether the underlying injury arises purely out of contract or whether some tortious conduct is required to make the damages insurable. In some jurisdictions, directly assessed punitive damages for intentional or willful conduct are not insurable, even if such damages are insurable when arising from gross negligence. In a number of jurisdictions, public policy prohibits the insurability of directly assessed punitive damages, but allows vicariously assessed damages to be insured.

An overview of the insurability of directly assessed and vicariously assessed in domestic jurisdictions is shown below in **Exhibit 8**, as prepared by McCullough, Campbell and Lane, Chicago. In general, where directly assessed are insurable, vicariously assessed damages are assumed to be so as well. According to the chart, 31 jurisdictions allow the insurability of directly assessed punitive damages. Of these, 9 disallow insurability of punitive damages assessed for intentional conduct. In 16 jurisdictions, directly assessed punitive damages are not insurable. Out of these 16, 10 allow for insurability of vicariously assessed punitive damages, and 2 further prohibit insurability of vicarious liability. In the remaining jurisdictions, the insurability of either directly or vicariously assessed punitive damages is undecided.

The chart is only a guide, however, and must be reviewed in light of state-specific interpretation of statutes and case law. Comparing the chart to a similar listing in Wilson Elser's *Punitive Damages Review, 50-State Survey* (2014 Edition) shows minor discrepancies arising from nuances in interpreting state-specific matters. In addition, the insurance law of the various states may allow an insurer to specifically exclude coverage for punitive damages even if the insurer does provide coverage for compensatory damages arising from the same situation.

Exhibit 8
Punitive Damages by State

Jurisdiction	Directly Assessed Punitive Damages	Vicariously Assessed Punitive Damages
Alabama	Insurable	Insurable
Alaska	Insurable	Insurable
Arizona	Insurable	Insurable
Arkansas	Insurable*	Insurable
California	Not Insurable	Insurable
Colorado	Not Insurable	Undecided
Connecticut	Not Insurable	Insurable
Delaware	Insurable	Insurable
District of Columbia	Undecided	Undecided
Florida	Not Insurable	Insurable
Georgia	Insurable	Insurable
Hawaii	Insurable	Insurable
Idaho	Insurable	Insurable
Illinois	Not Insurable	Insurable
Indiana	Not Insurable	Insurable
Iowa	Insurable	Insurable
Kansas	Not Insurable	Insurable
Kentucky	Insurable*	Insurable
Louisiana	Insurable*	Insurable
Maine	Not Insurable	Undecided
Maryland	Insurable	Insurable
Massachusetts	Not Insurable	Undecided
Michigan	Insurable	Insurable
Minnesota	Not Insurable	Insurable
Mississippi	Insurable	Insurable
Missouri	Insurable	Insurable
Montana	Insurable*	Insurable
Nebraska[2]	Not Applicable	Not Applicable
Nevada	Insurable*	Insurable
New Hampshire	Insurable	Insurable
New Jersey	Not Insurable	Insurable
New Mexico	Insurable	Insurable
New York	Not Insurable	Not Insurable
North Carolina	Insurable	Insurable

Jurisdiction	Directly Assessed Punitive Damages	Vicariously Assessed Punitive Damages
North Dakota	Insurable*	Insurable
Ohio	Insurable	Insurable
Oklahoma	Not Insurable	Insurable
Oregon	Insurable*	Insurable
Pennsylvania	Not Insurable	Insurable
Rhode Island	Not Insurable	Undecided
South Carolina	Insurable	Insurable
South Dakota	Undecided	Undecided
Tennessee	Insurable*	Insurable
Texas	Undecided	Insurable
Utah	Not Insurable	Not Insurable
Vermont	Insurable	Insurable
Virginia[3]	Insurable*	Not Applicable
Washington	Insurable	Insurable
West Virginia	Insurable	Insurable
Wisconsin	Insurable	Insurable
Wyoming	Insurable	Insurable

[1]In states without specific authority, the table assumes that vicariously assessed punitive damages are insurable if directly assessed punitive damages are insurable.
[2]Nebraska does not recognize punitive damages in any form.
[3]Virginia does not recognize the vicarious imposition of punitive damages.
*Punitive damages are insurable unless awarded for intentional conduct.

Source: McCullough, Campbell & Lane LLP

Insurability of Punitive Damages in Maryland

In Maryland, the situation is fairly straightforward. Public policy does not preclude insurance against the risk of enhanced damages in most instances. The damages may be termed punitive or exemplary, without distinction. When these damages are directly assessed, they are generally insurable. *First Nat'l Bank v. Fid. & Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978); *accord Medical Mut. Liability Ins. Society of Maryland v. Miller*, 52 Md. App. 602, 451 A.2d 930 (1982); *Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co.*, 716 F. Supp. 1541 (D. Md. 1989). However, punitive damages are not generally available in the State for *pure* breach of contract. *Food Fair Stores, Inc. v. Hevey*, 275 Md. 50, 338 A.2d 43 (1975); *Siegman v. Equitable Trust Co.*, 267 Md. 309, 297 A.2d 758 (1972); *but see, Carter v. Aramark Sports & Ent't Svces*, 153 Md.App. 210, 835 A.2d 262 (2003)(actual malice). But this does not preclude such damages for a tort action arising out of contract, or from those damages being insurable.

There is no reason to assume that vicariously imposed punitive damages may not be insured in the State.

Conclusion

At the conclusion of the workgroup, several important questions remained unanswered.

- **What deterrent effect do punitive damages have on bad actors?** Some workgroup members argued that expanding the use of punitive damages could help to discourage harmful behavior such as drunk driving or medical malpractice. Additionally, some workgroup members saw punitive damages as an important tool for combating corporate misconduct, noting that criminal prosecutions of corporate officers are rare. However, other workgroup members raised questions about the value of punitive damages as a deterrent, noting that the State already has strong laws and regulations to prohibit and punish bad behavior. Moreover, the workgroup received no data to suggest that misconduct is less common in states where punitive damages are applied more broadly.

- **How might changing the standard of conduct for punitive damage awards affect the affordability and availability of insurance in Maryland?** Some workgroup members, particularly those involved in the insurance and health care industries, worried that expanding the use of punitive damages would result in less predictability and larger settlements, causing insurance rates to rise (*e.g.*, **Appendix 2** for one version of this argument). However, it is difficult to predict the exact impact such a change would have. Comparisons between states with different punitive damage standards are unhelpful because insurance rates are affected by so many variables.

- **If the General Assembly were to change the standard of conduct for punitive damages in Maryland, what should the new standard be?** Some workgroup members argued for a standard that more broadly encompasses "reprehensible behavior" and that takes into account factors like the probable ill effects of a defendant's behavior and the defendant's ability to prevent those ill effects (*e.g.*, **Appendix 3** for the American College of Trial Lawyers' suggestions on how punitive damages should be applied). Others argued that such a standard would be inherently vague and subjective, leading to more costly litigation and inconsistent results.

Because of the complexity of these issues, the workgroup unanimously agreed that there was no consensus on a recommendation.

Appendix I.

Maryland Statutes Authorizing Punitive or Exemplary Damages

The following is a brief description of each statute that authorizes an award of punitive or exemplary damages:

Charitable Solicitations: A person who willfully fails to comply with a requirement concerning charitable solicitations is liable to the donor of the charitable contribution for punitive damages not exceeding three times the actual damages. (BR, § 6-509(b)(2))

Returnable Containers and Returnable Textiles: In an action brought by the owner of a returnable container or returnable textile, the owner may recover up to three times the value of the actual damages for a violation of this subtitle. (BR, § 19-302(b)(2))

Defamation by Television or Radio Station or Network: An owner, licensee, or operator of a television or radio station or network and an agent or employee is liable for punitive damages for a defamatory statement published or uttered with actual malice over the facilities of the station or network by a candidate for public office as to a person other than the candidate's opponent. (CJ, § 3-504(b))

Unlawful Wiretapping and Electronic Surveillance: A person whose communication is intercepted, disclosed, or used in violation of this subtitle may recover punitive damages. (CJ, § 10-410(a)(2))

Foreign Discriminatory Boycotts Act: A person who is injured by a violation of this Act may recover three times the amount of actual damages which result from the violation. (CL, § 11-109(b)(4))

Bad Faith Assertion of Patent Infringement: A target of a bad faith assertion of patent infringement may be awarded exemplary damages not exceeding the greater of $50,000 or three times the total of actual damages, costs, and fees. (CL, § 11-605(b)(2))

Hulls of Vessels: A person who is injured in the person's business by virtue of a violation of this subtitle may recover three times the amount of the damages incurred. (CL, § 11-1001(d)(1))

Maryland Uniform Trade Secrets Act: A complainant may be awarded exemplary damages not exceeding twice the damages caused by the misappropriation of a trade secret. (CL, § 11-1203(d))

Interest and Usury: A person who willfully requires a borrower to make a false or misleading statement that a loan is a commercial loan shall forfeit to the borrower three times the amount of interest and charges contracted for or collected in excess of that permitted by law. (CL § 12-106.1 (b)). A person who violates the usury provisions of this subtitle shall forfeit to the

borrower the greater of three times the amount of interest and charges collected in excess of that authorized by this subtitle or $500. (CL, § 12-114(a))

Maryland Consumer Loan Law: A lender is liable to the borrower for an amount equal to three times the excess amount. (CL, § 12-313(b))

Secondary Mortgage Loans – Credit Provisions: A lender who knowingly violates any provision of this subtitle shall forfeit to the borrower three times the amount of interest and charges collected in excess of that authorized by law. (CL, § 12-413)

Equal Credit Opportunity Act: A creditor who fails to comply with the Act is liable for punitive damages not exceeding $10,000 to an individual applicant and not exceeding the lesser of $100,000 or 1 percent of the net worth of the creditor in a class action. (CL, § 12-707(b) and (c))

Loans – Finder's Fees: A mortgage broker who violates any provision of this subtitle shall forfeit to the borrower the greater of $500 or three times the amount of the finder's fee collected. (CL, § 12-807)

Creditor Grantor Revolving Credit Provisions: A credit grantor who knowingly violates any provision of this subtitle shall forfeit to the borrower three times the amount of interest, fees, and charges collected in excess of that authorized by this subtitle. (CL, § 12-918(b))

Creditor Grantor Closed End Credit Provisions: A credit grantor that knowingly violates any provision of this subtitle shall forfeit to the borrower three times the amount of interest, fees, and charges collected in excess of that authorized by this subtitle. (CL, § 12-1018(b))

Consumer Credit Reporting Agencies: A consumer reporting agency or user of information which willfully fails to comply with a statutory requirement with respect to a consumer is liable for punitive damages allowed by the court. (CL, § 14-213(a)(2))

Fine Prints: A person who sells a fine print in willful violation of this subtitle is liable to the purchaser for an amount equal to three times the sum of the purchase price and interest. (CL, § 14-505(b))

Layaway Sales Act: A seller who makes a layaway sale in willful violation of this Act is liable to the buyer for an amount equal to three times the amount paid by the buyer under the layaway agreement. (CL, § 14-1109(b))

Maryland Credit Services Businesses Act: A credit services business which willfully fails to comply with a requirement of this subtitle with respect to a consumer is liable to that consumer for a monetary award in an amount equal to three times the total amount collected from the consumer and such amount of punitive damages as the court may allow. (CL, § 14-1912(a))

Consumer Motor Vehicle Leasing Contracts: A lessor who knowingly violates any provision of this subtitle shall be liable to the lessee for three times the amount of fees and charges collected in excess of that authorized by this subtitle. (CL, § 14-2007(f)(4))

Maryland Immigration Consultant Act: An immigration consultant who violates this subtitle is liable for an award equal to three times the amount of the damages. (CL, § 14-3306(c))

Dishonored Checks and Other Instruments: If a check or other instrument has not been paid within 30 days after the holder has sent notice of dishonor, the maker or drawer of the check or other instrument shall be liable for the amount of the check or other instrument, a collection fee of $35, and an amount up to two times the amount of the check or instrument, but not more than $1,000. (CL, § 15-802(b))

Unlawful Picketing and Assembly: A court may award punitive damages if a person intentionally assembles with another in a manner that disrupts a person's right to tranquility in the person's home. (CR, § 3-904(e)(2))

Controlled Hazardous Substances: A responsible person who fails without sufficient cause to comply with a final order issued under the Controlled Hazardous Substances Act is subject to punitive damages not exceeding three times the amount of the costs incurred by the State. (EN, § 7-266.1(a))

Check Cashing Services: A court may award a prevailing plaintiff who is injured by a violation of this subtitle up to three times the amount of actual damages. (FI, § 127(b)(1))

False Claims against State or County – Prohibitions: A person who violates the prohibitions against false claims is liable to the governmental entity for not more than three times the amount of damages sustained. (GP, § 8-102(c))

False Claims against State or County – Retaliatory Action: An employee, a contractor, or a grantee may be awarded punitive damages if a person takes a retaliatory action against the employee, contractor, or grantee. (GP, § 8-107(b)(2)(vi))

False Claims against State Health Plans and State Health Programs – Prohibitions: A person who violates the prohibitions against false claims is liable to the governmental entity for not more than three times the damages sustained. (HG, § 2-602(b))

False Claims against State Health Plans and State Health Programs – Retaliatory Action: An employee, a contractor, or a grantee may be awarded punitive damages if a person takes a retaliatory action against the employee, contractor, or grantee. (HG, § 2-607(b)(2)(vi))

Developmental Disabilities Law – Disclosure of Records: A custodian of a record who unlawfully discloses the record is liable to the individual whose record is disclosed for punitive damages not exceeding $500. (HG, § 7-1103(b))

Rescission of Continuing Care Agreement: A subscriber is entitled to treble damages for extensive injuries arising from a violation of the subscriber's right to rescind a continuing care agreement. (HS, § 10-446(d))

Wage Payment and Collection: If a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding three times the wage. (LE, §§ 3-507(b) and 3-507.2(b))

Wholesale Sales Representatives: A sales representative may bring an action against the principal to recover up to three times the amount of all commissions that the principal owes. (LE, § 3-605(a)(1))

Healthy Retail Employee Act: If an employer fails to comply with an order issued for a subsequent violation against the same employee within three years, the employee may be entitled to three times the value of the employee's hourly wage for each shift break violation. (LE, § 3-710(d)(8))

Workplace Fraud: A court or administrative agency may order an employer who knowingly fails to properly classify an employee to pay the employee up to three times the amount of restitution to which the employee is entitled. (LE, § 3-909(c)) An employee is entitled to up to three times the amount of any economic damages awarded in a civil action. (LE, § 3-911(c)(2))

Aquaculture-Liability for Trespass: A person who willfully, negligently, wrongfully, or maliciously enters an area leased to another person to harvest, damage, or transfer shellfish or to alter, damage, or remove any markings or equipment is liable to the leaseholder for damages up to three times the value of the shellfish harvested, damaged, or transferred. (NR, § 4-11A-16.1(a)(1))

Protection of Homeowners in Foreclosure Act: If a court finds that the defendant willfully or knowingly violated this Act, the court may award the homeowner damages equal to three times the amount of actual damages. (RP, § 7-320(c))

Maryland Mortgage Fraud Protection Act: If a court finds that the defendant violated this Act, the court may award damages equal to three times the amount of actual damages. (RP, § 7-406(c))

Maryland Mortgage Assistance Relief Services Act: If a court finds that the defendant violated this Act, the court may award damages equal to three times the amount of actual damages. (RP, § 7-507(c)).

Security Deposits for Residential Leases: If a landlord, without a reasonable basis, fails to return any part of a security deposit, within 45 days after termination of a tenancy, the tenant has an action of up to three times the withheld amount. (RP, § 8-203(e)(4))

Procurement – Defrauding the State: A person who, for the purpose of defrauding the State, acts in collusion with another person in connection with the procurement process is liable for damages up to three times the value of the loss to the State. (SF, § 11-205(b))

Violation of Prevailing Wage Rates – Public Works Contracts: An employer who withheld wages or fringe benefits willfully and knowingly or with deliberate ignorance or reckless disregard of the employer's obligations is liable for double or treble damages. (SF, § 17-224(d)(3)) A

contractor or subcontractor who retaliates or discriminates against an employee may be ordered to pay the employee three times the amount of back wages. (SF, § 17-224(h)(3)(ii))

Unlawful Employment Practices: A complainant is entitled to punitive damages, subject to specified monetary limits, if the respondent engaged in an unlawful employment practice with actual malice. (SG, § 20-1013(e))

Discriminatory Housing Practices: A person who is subjected to a discriminatory housing practice may be awarded punitive damages. (SG, § 20-1035(e)(1)(i))

Appendix II.

Why Expanding Punitive Damages Liability Will Not Effectively Deter or Punish Drunk Driving, But Raise Auto Insurance Costs in Maryland

Contents

Executive Summary

The Maryland General Assembly is considering legislation that would expand the availability of punitive damages against individuals who cause injury or death while driving under the influence of alcohol. On first glance, this may seem like a sound proposal that will punish drunk drivers and make others think twice before drinking and driving. As this paper shows, however, criminal penalties, including a real threat of jail time, as well as the loss of driving privileges, provide a much more effective means of accomplishing these goals than the possibility of facing punitive damages through a private civil lawsuit.

This paper begins by discussing the current criminal and administrative penalties imposed on drunk drivers, highlights efforts in the legislature to increase these penalties, and discusses the role of civil lawsuits in providing a remedy to victims. It then explores the purpose of punitive damages and their availability in Maryland, including in cases involving injuries from drunk driving. In areas of tort law where criminal sanctions do not exist, punitive damages liability may be a deterrent to misconduct. Expanding punitive damages liability is not likely to have any significant impact on drunk driving, however, because immediate arrest, loss of driving privileges, and imprisonment—not the possibility of a large civil judgment—motivates conduct. Nor do punitive damages effectively punish drunk drivers, who will already be struggling to pay compensatory damages and legal fees, and face prison time. What lowering the threshold for punitive damages is likely to do is result in higher insurance costs for all Maryland drivers.

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Severe Consequences for Drunk Drivers in Maryland

Individuals who drive while intoxicated in Maryland face severe consequences including loss of their driver's licenses, fines, jail time, and thousands of dollars in legal fees and other expenses.

Maryland law defines driving under the influence (DUI) as a blood alcohol concentration (BAC) of .08 or above.[1] A driver who is found to have this level of intoxication is under the influence of alcohol "per se" and will be arrested.[2] A prosecutor does not need to show any other evidence of drinking or reckless driving to obtain a conviction for a per se violation. A person can also be arrested and convicted of DUI if the alcohol that the person has consumed has "substantially impaired the person's normal coordination." Maryland also subjects those who drive with a BAC of .07 or less to arrest for driving while impaired (DWI) when alcohol consumption "impairs normal coordination to some extent" based on an officer's observations of the driver before the stop and field sobriety tests.[3] Drivers under 21 years of age face Maryland's "zero tolerance" law. Under this law, a driver who's BAC is just .02 faces prosecution for DUI. Commercial drivers also face a lower limit for DUI, .04.

Individuals who drive while intoxicated in Maryland lose their license, which can significantly impact a person's ability to work, complete routine errands, and socialize. It also is likely to result in social stigmatization, as drunk drivers must explain to family, friends, and employers why they are unable to drive, and the expense and stress of finding alternative transportation. Upon arrest for DUI, an officer will immediately confiscate the driver's license, issue a temporary permit good for 45 days (as the driver awaits a hearing), and provide the license and a report to the Maryland Motor Vehicle Administration (MVA).[4]

A person arrested for DUI will need to hire a lawyer at what may be a significant cost.[5] He or she can challenge the suspension before an Administrative Law Judge (ALJ), but faces a steep burden to show the arresting officer did not have probable cause or did not follow proper procedures, or did not present sufficient evidence of intoxication. If the ALJ finds the evidence justifies suspension of the license, then the MVA will spend the license for 45 days for a first offense and 90 days for a second or subsequent offense. These periods double when a driver's BAC was .15 or more. A driver who refuses to take a breathalyzer test receives a 120-day suspension (one-year if it is a second or subsequent offense).[6]

In addition to losing his or her license, a person arrested for DUI faces jail time. A first DUI offense is punishable by up to one year of imprisonment and a $1,000 fine. For a second offense, the maximum sentence increases to two years, with a mandatory minimum of five days in jail, plus a fine of up to $2,000. A third offense is subject to three years imprisonment and a fine of up to $3,000.[7] If children were in the vehicle, these sentences increase.[8]

These punishments apply when a drunk driver is pulled over by police or stopped at a sobriety checkpoint, but has fortunately not injured or killed anyone. When an accident occurs, drunk drivers often face additional criminal charges including negligent driving, reckless driving, failing to obey driving rules, causing a life-threatening injury to another as a result of driving while impaired, criminally negligent manslaughter, or criminally negligent homicide. A conviction for DUI and one or more of these charges can lead to several years in prison.[9]

After DUI conviction, a driver receives 12 points on his or her driving record from the MVA.[10] This is a level that is on par with use of a vehicle in a hit-and-run, to commit a felony, or to flee police.[11] Twelve points results in immediate revocation of a driver's license for at least six, twelve, or eighteen months depending on whether it is a first, second, or third offense, respectively. A second offense may also result in a requirement that a driver install an Ignition Interlock Device, which requires the person to blow into it to show sobriety before being able to start his or her car.[12] Individuals qualify for a restricted license to allow them to drive to work, attend an alcohol treatment program, or obtain medical care only if they did not test above .15 and it was their only DUI/DWI offense in the past five years.[13]

Pending Legislation Would Increase Penalties for Drunk Drivers

The Maryland General Assembly is considering legislation intended to reduce drunk driving and even more severely punish offenders. Several of these bills would increase prison sentences for those who cause injuries or death as a result of drunk driving or repeatedly drinking-and-driving, including:

- **H.B. 47** (Wilson) amends criminal laws to apply to drivers who cause "serious physical injury" to another, rather than "life threatening injury" to another, while under the influence of alcohol.
- **H.B. 157** (Valentino-Smith) establishes subsequent offender penalties for those who cause death or life-threatening injuries as a result of driving in a grossly negligent manner (manslaughter by vehicle).
- **H.B. 612** (Vallario) increases the maximum sentence for causing the death of another while driving in a grossly negligent manner (manslaughter by vehicle) from 10 to 15 years imprisonment.
- **H.B. 735** (Dumais) increases the maximum sentences for causing the death of another while driving:
    - Grossly negligent (manslaughter by vehicle): from 10 to 15 years imprisonment;
    - Negligently operating a motor vehicle while DUI (homicide by motor vehicle): from 5 to 15 years imprisonment; and
    - Negligent driving while impaired by alcohol: from 3 to 10 years imprisonment.
- **H.B. 1306** (Ciliberti) sets a mandatory minimum one-year sentence for a person convicted of a third or subsequent DUI, raising the maximum penalty from 5 to 10 years, and authorizing the state to seize the vehicles of repeat offenders.
- **H.B. 1393** (Glass) provides that a person who commits a DUI within 3 years of being placed on probation for a DUI is subject to a mandatory minimum 3 months' imprisonment and a person who commits a DUI within 3 years of as DUI conviction is subject to a mandatory minimum 6 months' imprisonment.

Other bills expand required breathalyzer testing, increase license suspension periods for drunk driving, and require more people to participate in the Ignition Interlock Device program.

- **H.B. 182** (Valentino-Smith) expands situations in which drivers must submit to drug or alcohol testing to any case in which there is an injury requiring hospitalization (rather than a life-threatening injury) and an officer has reasonable grounds to suspect the person was driving under the influence.
- **H.B. 630** (Vallario) limits the MVA's authority to reinstate the licenses of drivers involved in two alcohol-related incidents during a five-year period.
- **H.B. 974** (Dumais/Kramer) requires the MVA to revoke or refuse to renew the license of a person convicted of manslaughter or homicide while driving under the influence and authorizing MVA to reinstate a license only when subject to strict conditions for at least 3 years and to require such conditions indefinitely.
- **H.B. 1342** (Kramer), known as the Drunk Driving Reduction Act of 2016 or Noah's Law, would significantly increase the suspension periods for a person convicted of DUI and DWI, and require more people to participate in the Ignition Interlock Device program.

Finally, **H.B. 864** (Smith) subjects those who injure people while having a BAC of .08 or more, and who have been convicted of an offense involving driving while intoxicated in the prior five years, to expanded liability for punitive damages in a civil lawsuit.

<u>It is the likely impact of this bill that is closely explored in this report.</u>

The Role of Civil Lawsuits When Injuries are Caused by Drunk Drivers

Personal injury lawsuits are separate from any criminal or administrative charges resulting from driving while intoxicated. A person who is injured by a drunk driver can file a civil lawsuit regardless of whether the driver was prosecuted or found guilty. A guilty plea in a criminal action can be used against the driver in a subsequent civil action.[14]

Civil lawsuits can serve an important role when a person is injured as a result of a drunk driver. A personal injury lawsuit provides a means for an injured person to obtain compensation for past and future medical expenses, property damage, lost earnings, and pain and suffering. When a person is killed by a drunk driver, the victim's family can obtain compensation through a wrongful death lawsuit that is not limited to pecuniary loss, but includes damages for "mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education."[15] These compensatory damages are intended to make the victim whole.

Victims of drunk drivers often receive compensation from their own auto insurer, the drunk driver's auto insurer, or both. Insurers have typically paid claims up to the amount of coverage purchased by the policyholder. Regardless of whether a victim's losses exceed his or her policy limits, the victim can seek additional compensation directly from the driver through a civil lawsuit. If a driver does not have sufficient financial resources to pay the victim following a judgment, then the victim can garnish the defendant's future wages, garnish money in the defendant's bank account, or seize the defendant's personal property or real estate.[16]

Federal law protects victims of drunk drivers by providing that filing a bankruptcy petition does not discharge any debt incurred as a result of a personal injury or death caused by the debtor's operation of a motor vehicle while legally intoxicated.[17] As a result, the judgment will remain with the drunk driver (and the driver's family) for his or her entire life unless paid in full.

Punitive Damages in Maryland

Punitive damages are not intended to compensate a person for an injury. They serve the purpose of punishing the defendant for misconduct and deterring others contemplating similar conduct by the risk of serious monetary liability.[18]

Maryland law reserves punitive damages for the most reprehensible conduct, situations in which there is clear and convincing evidence that a person acted with "actual malice" or committed an intentional tort.[19] The Maryland Court of Appeals has defined "actual malice" as conduct that is characterized by evil motive, intent to injure, ill will, or fraud.[20] This standard applies when a person specifically intended to harm a particular person or actually knew that his or her action would cause harm.[21]

The Court of Appeals required this high level of culpability for punitive damages because it was concerned with the proliferation of claims for punitive damage claims in personal injury cases and the extraordinary size of such awards.[22] It also sought to give juries clear guidance as to when imposing punitive damages is appropriate. A more open-ended standard, such as allowing punitive damages for "gross negligence," "reckless conduct," or "implied malice," the court found, led to inconsistent and unpredictable results.[23] Punitive damages under such amorphous standards were found inappropriate because people cannot predict or choose to avoid the types of behavior sanctioned by a punitive damage award.[24]

While the actual malice standard is high, it has kept Maryland from experiencing the "punitive damage run wild" that has occurred in many other states. When conduct does qualify for a punitive damage award, Maryland law does not place a statutory limit on its amount. By way of contrast, many states that more broadly allow punitive damages limit them to a multiple

of compensatory damages to assure proportionality between the conduct and punishment, or limit punitive damage awards to a fixed dollar amount.[25]

A punitive damages claim against someone who has caused harm as a result of drunk driving is subject to the same standards as any other civil lawsuit. The Court of Appeals has found that it is unsound public policy to dilute the level of culpability require for a punitive damage award in any particular situation, including drunk driving.[26]

Seven Reasons Why Expanding Punitive Damages Will Have No Effect on Drunk Driving, but Result in Higher Insurance Costs

The Maryland General Assembly is considering legislation (H.B. 864 / S.B. 302) that, as introduced, would expand the availability of punitive damages to any situation in which a driver causes personal injury or death while operating a vehicle with a BAC of .08 (.15 as amended in the Senate). A conviction is not required. Punitive damages are available when that driver was previously convicted, entered a plea, or received probation before judgment for a drunk-driving offense (within a 5-year period under the House bill or a 10-year period under the Senate bill). If such conditions are met, the bill provides that the driver "is liable" for punitive damages. No showing of actual malice is required or any other level of culpability. There is no limit on such damages aside from the court's general responsibility to review and remit awards that a judge may view as excessive given the defendant's conduct or the amount of compensatory damages. This proposal is no doubt intended to punish drunk drivers and make others think twice before drinking and driving. There are seven reasons, however, why taking this approach will not achieve these important goals.

1. **Punitive damages have little or no deterrent value with respect to drunk driving.** A person who has been drinking and is considering whether to drive is not likely to be swayed by the highly uncertain and long-off possibility of being sued be someone they injure along with the potential for a punitive damage award. It is the threat of immediate arrest, loss of the ability to drive, and jail time that serves as a true deterrent. These criminal and administrative sanctions apply whether a person is injured or not, and more severe penalties apply when a drunk driver's irresponsibility causes harm. As the Maryland Court of Appeals recognized, "[t]he rules of the road are far more effective than any inflammatory verdicts in making our streets and highways safe for travel. The fear of arrest is more of a deterrent than a verdict in a civil case for damages."[27]

2. **Drunk drivers are already subject to severe punishment.** In addition to the loss of a license and potential jail time, those who drive while intoxicated face thousands of dollars in legal defense and court costs, and extremely high auto insurance rates for years. When they harm another person, drunk drivers will also face a civil suit that subjects them to additional defense costs and a potentially huge judgment to cover the injured person's past and future medical expenses, past and future lost income, and pain and suffering. The driver's wages can be garnished. As noted earlier, a judgment in a case involving drunk driving, unlike other personal injury cases, cannot be avoided by declaring bankruptcy. Even if the victim's medical expenses are fully covered by auto and health insurance, the drunk driver and his or her family will be saddled with debt until the judgment is paid in full.

3. **Punitive damages have value, both as a deterrent and as punishment, in areas of the law where criminal penalties are not available or appropriate.** In areas where tort law has no companion criminal punishment, punitive damages may be appropriate. For example, criminal penalties are typically not available in product liability cases. This is the case because whether a product qualifies as "defective" is a complex decision that lacks the clear standard needed criminalizing behavior. There are also no criminal penalties for intentional, but purely private harms, such as defamation. By way of contrast, drunk-driving

does not need a tort law boost. Such conduct is quite clearly and appropriately subject to criminal prosecution.

4. **Punitive damages will often be uncollectable.** Most drivers are unlikely to have the financial resources to pay a punitive damage award, on top of a substantial compensatory damage award that may be above insurance policy limits. If a drunk driver injures more than one person, there would be a race to the courthouse and the "winner" would receive a punitive damage award that could deplete the resources available for others who were injured to collect compensatory damages above available insurance policy limits.

5. **Expanding the availability of punitive damage awards will increase insurance costs in Maryland.** Punitive damage awards are insurable in Maryland,[28] even if they are assessed as a result of criminal conduct.[29] While auto insurers can exclude punitive damages from coverage, they must clearly and expressly do so in the policy. If there is any ambiguity in the policy language, then, under Maryland law, a court is likely to find that a punitive damage award is covered by insurance. Many states, such as New York, New Jersey, and Pennsylvania, take a different approach and find that insuring punitive damages is against public policy because such coverage transfers the burden of the award from the wrongdoer to innocent premium-paying insureds and undercuts the deterrent value of punitive damages.[30] An amendment to S.B. 302 (adopted February 17, 2016) may address this issue by providing that "[l]iability for punitive damages under this section shall be limited solely to the person operating or attempting to operate the motor vehicle," but its application is unclear.[31] If the intent of that provision is to preclude insurance coverage of punitive damage awards, then the bill should explicitly include such language. No such provision is included in H.B. 864 as introduced. Without such a provision, any increased costs arising from punitive damage awards will be passed on to Maryland drivers.

6. **Even if punitive damage awards are not covered by insurance, as a practical matter, the increased availability of such awards will result in higher insurance costs for all Maryland drivers.** An insurer has a legal duty to act in good faith and negotiate a claim to protect its insured against a judgment, even if the potential judgment may exceed the amount of coverage purchased by the driver. If an insurer does not fulfill its obligations or acts in "bad faith," the insurer can be subject to liability for the full amount of any judgment awarded against the insured. Expanding the availability of punitive damages will increase the pressure on insurers to enter settlements that are not justified by the actual injuries or damage suffered by a plaintiff when a policyholder was in an accident while intoxicated in order to protect their policyholder and avoid the possibility of a bad faith claim. This is especially true if the plaintiff's injuries are relatively minor.

7. **Expanding punitive damage liability will complicate settlement and result in more litigation.** Under current law, lawsuits involving drunk drivers often settle before trial. When a lawsuit cannot be resolved, an insurer representing a policyholder will often admit liability before trial, allowing the trial to focus solely on quickly resolving the appropriate amount of compensatory damages. Expanding the availability of punitive damages complicates the ability of the parties to reach a settlement. Since some plaintiffs may believe they have a chance of receiving a jackpot verdict, they will be more likely to go to trial. In addition, expanding punitive damages liability will make litigation involving an intoxicated driver lengthier and more complex. Because the stakes are higher, defendants may be more likely to vigorously fight liability. For example, a defendant can argue that his or her driving did not cause the accident or that the plaintiff's negligent driving contributed to it. Without liability, there can be no punitive damages awarded.

Recommendations

Adding punitive damages to the existing mix of criminal, administrative, and other consequences placed on drunk drivers will not deter drunk driving or make the public safer. While expanding punitive damages liability looks attractive on the surface, the law of unintended adverse consequences will prevail. In the practical world, the net effect of expanding punitive damage liability will be increased litigation and inflated settlements, which will raise the cost of auto insurance for all Maryland policyholders. Increasing punitive damage liability is not needed and its undesirable results outweigh any nominal benefit.

Drunk driving can be prevented through requiring those who are found to have driven while intoxicated to use interlock devices or participate in alcohol abuse programs, or through revoking, suspending, or placing restrictions on their driver's licenses. The General Assembly should closely consider where legislation is needed to strengthen these safeguards. Punishing irresponsible individuals who seriously injury or kill people as a result of drunk driving is best addressed through Maryland's criminal law, not civil suits seeking punitive damages. If existing criminal penalties are viewed as insufficient, then the General Assembly should consider adopting harsher sanctions – such as the pending legislation discussed above

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Endnotes

[1] Md. Transp. Code § 11-174.1.

[2] *Id*.

[3] Md. Transp. Code § 21-902.

[4] Md. Transp. Code § 16-205.1(b)(2).

[5] A Maryland attorney estimates that a drunk-driving charge can cost a Maryland driver between $5,000 and $20,000, depending on the severity of the charges, including legal fees, court and administrative hearing costs, an ignition interlock device, and a higher auto insurance rate. *See* Seth Okin, Price Benowitz LLP, *What are the Costs of a Maryland Drunk Driving Charge*, *at* http://criminallawyermaryland.net/dui/costs-of-md-dui-charges.html. Those without means can obtain representation through a public defender, however, pursing punitive damages against individuals who qualify for public defender service would be futile since they have no resources to pay a judgment.

[6] Md. Transp. Code § 16-205.1(b)(1)(i).

[7] Md. Transp. Code § 27-101(k)(1).

[8] Md. Transp. Code §§ 21-902(a)(3), 27-101(q)(1).

[9] *See, e.g., Brumbley v. State*, No. 1106, 2016 WL 197194 (Md. Ct. Spec. App. Jan. 16, 2016) (affirming five-year sentence for DUI resulting in death).

[10] Md. Transp. Code § 16.402(a)(37).

[11] *Id*. § 16.402(33), (38), (39).

[12] Md. Transp. Code § 16-404.1.

[13] Md. Transp. Code § 16-205.1(n).

[14] *See Crane v. Dunn*, 854 A.2d 1180, 1183 (Md. 2004).

[15] Md. Cts. & Jud. Proc. Code. § 3-904(d).

[16] *See generally* District Court of Maryland, Post-Judgment Collection: How to Collect Your Judgment in the District Court of Maryland (2011), *at* http://www.courts.state.md.us/district/forms/civil/dccv060br.pdf.

[17] 11 U.S.C. § 523(a)(9) (enacted in 1984).

[18] *Owens-Ill., Inc. v. Zenobia*, 601 A.2d 633, 649-50 (Md. 1992).

[19] *Id. at* 652. Examples of intentional torts include assault, defamation, false imprisonment, trespass, international infliction of emotional distress, and fraud.

[20] *Id*. at 652 n.20.

[21] *See id*. at 653.

[22] *Id.* at 648-49.

[23] *Id*. at 651.

[24] *Id*. at 650.

[25] States with statutory limits on punitive damages include Alabama, Alaska, Colorado, Connecticut (product liability only), Florida, Georgia, Idaho, Indiana, Kansas, Maine (wrongful death cases only), Mississippi, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

[26] *See Komornik v. Sparks*, 629 A.2d 721, 728 (Md. 1993).

[27] *Id.* at 730 (quoting *Davis v. Gordon*, 36 A.2d 699, 701 (Md. 1944)). As one Maryland law firm that represents criminal defendants advertises, "DUI/DWI? Your license and your freedom are on the line. We can protect both." Internet Advertisement, The Law Offices of Robinson & Associates, Baltimore, Maryland (viewed Feb. 18, 2016).

[28] *See First Nat'l Bank v. Fid. & Deposit Co*., 389 A.2d 359 (Md. 1978).

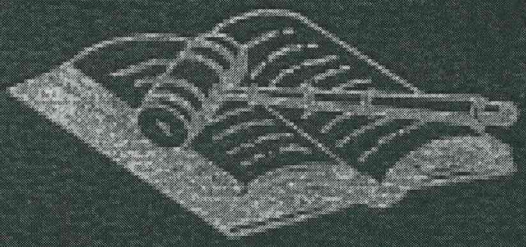
[29] *See Med. Mut. Liab. Ins. Soc. v. Miller*, 451 A.2d 930 (Md. Ct. Spec. App. 1982).

[30] *See, e.g*., *Pennbank v. St. Paul Fire & Marine Ins. Co*., 669 F. Supp. 122, 125 (W.D. Pa. 1987) ("[P]ublic policy does not permit a tortfeasor who is personally guilty of wanton misconduct to shift the burden of punitive damages to his insurer" (quoting *Esmond v. Liscio*, 224 A.2d 793 (Pa. 1966)); *Johnson & Johnson v. Aetna Cas*., 667 A.2d 1087, 1091 (N.J. Super. Ct. 1995) ("If [the party actually responsible for the wrong] were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose."); *Public Service Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 814 (N.Y. 1981) ("[T]o allow insurance coverage . . . is totally to defeat the purpose of punitive damages") (internal quotation omitted).

[31] For example, courts could interpret this language as precluding application of the statute's expansion of punitive damages liability to an employer whose employee drives while intoxicated or a person who serves alcohol to another, rather than precluding insurance coverage of punitive damages.

Appendix III.

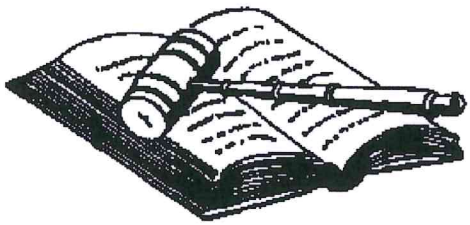
American College of Trial Lawyers



REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE

MARCH 3, 1989

American College of Trial Lawyers



REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE

Approved by the Board of Regents
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FOREWORD

The Board of Regents of the American College of Trial Lawyers, at its meeting in Boca Raton, Florida, February 27 to March 3, 1989, approved the following Report of the Committee on Special Problems in the Administration of Justice, dated March 3, 1989, and directed that copies be distributed to Fellows of the College and to other interested parties.

Philip W. Tone
President

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COMMITTEE ON SPECIAL PROBLEMS
IN THE ADMINISTRATION OF JUSTICE

I. BACKGROUND

On August 8, 1986 the Board of Regents of the American College of Trial Lawyers approved the Report of the Task Force on Litigation Issues, dated July 22 of the same year. The Task Force Report addressed a number of issues regarding the tort litigation system in America and unanimously concluded that one of the greatest problems with the current tort system is the way punitive damages are handled.[1] Although a few members of the Task Force were prepared to abolish punitive damages, other members, who favored continuation of punitive damages awards, indicated that they might move toward abolition if meaningful reform were not forthcoming.[2]

Subsequent to the American College Task Force Report, the results of two other studies undertaken through the American Bar Association were published. In February of 1987 the American Bar Association House of Delegates approved a report by the Action Commission to Improve the Tort Liability System, chaired by Robert B. McKay, Professor and former Dean of the New York University School of Law. Among other things, the ABA Action Commission recognized that the current situation with regard to awards of punitive damages in the civil justice system presented some serious concerns[3] and made a number of general recommendations for reform.[4] In the meantime, the American Bar Association Section of Litigation had undertaken a study of the problems through a Special Committee on Punitive Damages. Recognizing the relative dearth of statistical data on the subject, the Special Committee commissioned an empirical study by the Institute for Civil Justice, a section of the Rand

1. American College of Trial Lawyers, *Report of the Task Force on Litigation Issues* 4 (1986) (hereinafter referred to as ACTL Task Force Report).
2. *Id.*
3. A.B.A., *Report of the American Bar Association Action Commission to Improve the Tort Liability System* 15-18 (1987),
4. *Id.* at 18-20. The Report supported the continued award of punitive damages in appropriate cases, but recommended that the scope be narrowed in five ways:
   i. The standard of proof for the award of punitive damages should be tightened to limit such awards to cases warranting special sanctions and should not be commonplace,
   ii. Various suggestions to the courts are advanced as a means of judicial limitation of inappropriate or excessive awards,
   iii. Appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.
   iv. Legislatures and courts should be sensitive to adopting appropriate safeguards to protect the master or principal from vicarious liability for unauthorized acts of non-managerial servants or agents,
   v. In carefully selected cases, courts should be authorized to award some portion of a punitive damages award to public purposes, always being mindful that the plaintiff and counsel are reasonably compensated for bringing the action and prosecuting the punitive damages claim.

   McKay, *Rethinking The Tort Liability System: A Report From The ABA Action Commission*, 32 Villanova L. Rev. 1219, 1230-31 (1987).

Corporation in Santa Monica, California.[5] The Rand report, published in 1987,[6] served is a basis for the ABA Section of Litigation study. Although the latter also concluded hat there were a number of problems with civil awards of punitive damages,[7] the Section of Litigation did not conclude that the problems, with one exception,[8] were sufficiently acute as to require legislative solutions. However, a careful analysis of the land study shows support for the opposite conclusion.[9]

Because of strong interest in the subject of punitive damages, the Board of Regents of the American College of Trial Lawyers gave approval for the Committee on Special

5. Rand Is a private, nonprofit institution, incorporated in 194B, which engages in nonpartisan research and analysis on problems of national security and public welfare. The Institute for Civil Justice, established within the Rand Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.
6. M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings,* Rand, The Institute for Civil Justice (1987).
7. *Punitive Damages: A Constructive Examination,* 1986 A.B.A. Sec. Litigation, Special Comm. On Punitive Damages 87-89 (hereinafter cited as A.B.A. Sec, Litigation Report).
8. The Litigation Section Special Committee found that a genuine problem exists regarding the potential for multiple punitive damages awards to be made against a defendant for essentially the same conduct. The Committee concluded that federal legislation would be required to solve the problem, *id.* at 72, and recommended that Congress enact a law creating a national class action which would allow the consolidation of all similar claims in one federal district court. *Id.* at 78-81.
9. The Rand study demonstrates that some major changes have occurred in punitive damage awards in specific areas of litigation in the 25 year period from 1960 through 1984 in the jurisdictions studied — San Francisco, California and Cook County, Illinois. The most dramatic increases occurred in the area of business and contract cases which have come to be subject to the tort of "bad faith." However, products liability and medical malpractice also showed increases in the number and rate of punitive awards. As a general proposition, the frequency of awards has increased relative to the number of cases filed and to the number of cases In which compensatory awards are made, as well as in absolute terms. When this is coupled with the rather dramatic Increases in the median and average amounts awarded in all types of cases, one could easily conclude that punitive awards are playing a larger role in the civil justice system than in the past. However, if one merely focuses on the statistics in the aggregate for all types of torts one could conclude there has not been any significant change.

   It is submitted that to view the figures In the aggregate is erroneous because certain types of tortious conduct inherently do not give rise to punitive awards. To include figures for this conduct, such as automobile negligence cases, with the more egregious forms of conduct tends to "water down" the results. The same is true if one includes figures regarding traditional intentional torts because there is little change over time in the frequency of punitive awards in these cases. Thus, the Committee on Special Problems believes that the Rand study shows that the problems regarding punitive awards in the civil justice system are more acute for specific areas of tort litigation than indicated in the A.B.A. Sec. Litigation Report.

   The Rand Corporation has recently published a follow-up report pointing out that some commentators are misinterpreting an earlier study regarding trends in tort litigation by using aggregate figures on the assumption there is a single tort system. The follow-up report shows that there are different types of tort litigation and that each must be viewed separately in order to accurately determine any changes and trends. The use of aggregate figures tends to mask the real situation. See D. Hensler, M. Vaiana, J. Kakalik, & M. Peterson, *Trends In Tort Litigation: The Story Behind the Statistics,* Rand, The Institute for Civil Justice (1987). The same may be said for the subject of punitive damages and any analysis of the Rand study on that subject should take this point into account.

Problems in the Administration of Justice to conduct an independent review of punitive awards in the civil justice system in the United States, including a review of the prior studies and other information on the subject.

To assist the Committee in this effort, the services of Professor Roger C. Henderson of the College of Law at the University of Arizona in Tucson were engaged. Professor Henderson is a former dean of the law school and presently is a Commissioner on Uniform State Laws. He prepared a background paper which was reviewed and discussed by the Committee on Special Problems on March 6,1988 during the Spring Meeting of the American College in Palm Desert, California.[10] During the Spring Meeting the Committee assisted in presenting one of the main programs, which consisted of a panel on the question of whether punitive damages in the modern civil justice system constituted an anomaly which was in need of change. Subsequently, an issue paper[11] prepared by Professor Henderson was distributed to the Committee members and discussed at a special meeting on June 10, 1988. Thereafter a draft report dealing with punitive damages was the subject of a meeting of the Committee on August 6, 1988 at the Annual Meeting of the College during the American Bar Association meeting in Toronto, Canada. The Committee met again on November 11, 1988 and January 9, 1989 in New York City to discuss subsequent drafts of the report.

After deliberation and study, the Committee on Special Problems has come to certain conclusions with regard to punitive awards in the modern civil justice system and has fashioned recommendations for improvements. Initially, however, a brief review of why this study was warranted is appropriate in view of the prior efforts on the subject.

II. THE NEED FOR THE COLLEGE REVIEW

In the 1986 Report of the Task Force on Litigation Issues, serious concern was expressed regarding the role of punitive awards in the civil justice system. It was noted that awards often bear no relation to deterrence and merely reflect a jury's dissatisfaction with a defendant and a desire to punish, often without regard to the true harm threatened by a defendant's conduct.[12] The Report also noted that there was a general feeling that punitive awards should be more difficult to obtain and that the amounts of such awards should be subject to more control than was being exercised at that time.[13] The Report went on to recommend that there be some limit, either by a cap or some general formula, to the amount of punitive damages that may be recovered.[14] In addition, it was recommended that some means should be found to prevent a defendant from being subjected to duplicative punitive awards for a single act or course of conduct.[15] Finally, there were recommendations that serious consideration should be

10. This paper, entitled "Punitive Damages in the Modern Civil Justice System: An Anomaly in Need of Change?", is on file at the National Headquarters, American College of Trial Lawyers, 10866 Wilshire Blvd.. Los Angeles. California. 90024.
11. This paper also is on file at the National Headquarters. See *supra* n. 10.
12. ACTL Task Force Report *supra* n. 1, at 4.
13. *Id.*
14. *Id.*
15. *Id.*

given to raising the standard of proof, to developing better jury instructions and to greater judicial supervision concerning punitive damage awards."[16] In sum, the Task force Report expressed certain expectations concerning improvements that should be made in the system. Moreover, as noted, some members indicated that they might be willing to support the abolition of punitive awards in the civil system if these improvements were not made.[17]

Following the Report of the Task Force and its approval by the College Board of Regents, the A.B.A. Action Commission to Improve the Tort Liability System and Section of Litigation reported similar concerns and made recommendations for changes in the system.[18] In addition to these reports, there has been a plethora of articles and comments in legal periodicals concerning the situation generally, the overwhelming majority of which call for some change in the process by which punitive damages are awarded.[19]

16. *Id.*
17. *Id.* As previously noted, a few members of the Task Force were in favor of abolition as the exclusive reform effort. See text at n. 2.
18. See supra text at nn. 3-4 and 7-8.
19. For articles arguing for:

    (1) *abolition,* see Carsey, The Case Against Punitive Damages: An Annotated Argumentative Outline, 11 Forum 57 (1975); Dubois, Punitive Damages: Bonanza or Disaster, 3 Litigation 35 (Fall 1976); Ghiardi, The Case Against Punitive Damages, 8 Forum 411 (1972); Ghiardi, Should Punitive Damages Be Abolished? — A Statement for the Affirmative, 1965 A.B.A, Sec. Ins., Negl. & Comp. L. Proc. 282; Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870 (1976); and Sales & Cole, Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vanderbilt L. Rev. 1117 (1984):

    (2) *modification,* see Barrett & Merriman, Legislative Remedies for Punitive Damages; 28 Federation of Ins. Counsel Q. 339 (1978); Bell & Pearce, Punitive Damages and the Tort System, 22 U. Richmond L. Rev. 1 (1987); Cooler, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79 (1982); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Calif. L. Rev. 1 (1982); Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 Columbia L. Rev. 1385 (1987); Launie, The Incidence and Burden of Punitive Damages, 53 Ins. Counsel J. 46 (Jan. 1986); Levit, Punitive Damages: Yesterday, Today and Tomorrow, 1980 Ins. L.J. 257; Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings LJ. 639 (1980); Martin, The Relation of Exemplary Damages to Compensatory Damages, 22 Texas L. Rev. 235 (1944); McCormick, Some Phases of the Doctrine of Exemplary Damages, 8 North Cardina L. Rev. 129 (1930); Morris, Punitive Damages in Tort Cases, 44 Harvard L. Rev. 1173 (1931); Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103 (1982); Phillips, The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment, 1984 U. Illinois L.F. 153 (1984); Priest, Punitive Damages and Enterprise Liability, 56 S, Cal. L. Rev. 123 (1982); Riley, Punitive Damages: The Doctrine of Just Enrichment, 27 Drake L. Rev. 195 (1977-78); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedure, 69 Va. L. Rev. 269 (1983); and Woodbury, Limiting Discovery of a Defendant's Wealth When Punitive Damages Are Alleged, 23 Duquesne L. Rev. 349 (1985) and 34 Defense L.J. 675 (19B5);

    (3) the status *quo,* see Bedell, Punitive Damages in Arbitration, 21 J. Marshall L. Rev. 21 (1987); Belli, Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society, 49 UMKC L. Rev. 1 (1980); Corboy, Are Punitive Damages Getting Out of Control? The Existing Controls Are Effective, 70 A.B.A, J. 16 (Dec. 1984); Courtney & Cavico, Punitive Damages: When Are They Justifiable?, 18 Trial 52 (Aug. 1982); Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797 (1987); and Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal, L. Rev. 133 (1982).

As a result of the widespread concern regarding the problems associated with punitive damages, there has been a spate of state court[20] and legislative[21] activity across the nation on this subject. Unfortunately, no clear pattern has emerged in the main, although there has been a trend in some areas which may eventually result in more uniformity among the states. For example, of those states that have addressed problems regarding punitive damages, most now require that the plaintiff meet the burden of proving by clear and convincing evidence that punitive damages should be awarded.[22]

20. See, e.g., Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986) (addressing standard for culpability); Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326,723 P.2d 675 (1986) (addressing burden of proof); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Ca. Rptr. 348(1981) (addressing, *inter alia,* various constitutional issues); Tuttle v. Raymond, 494 A.2d 1353 (Maine 1985) (addressing burden of proof); and Anderson v. Continental Insurance Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978) (addressing standard for culpability).

21. For example, with regard to attempts to limit the amount of punitive awards Alabama has adopted a cap of $250,000 except where there is a practice or pattern of intentional wrongful conduct, actual malice, or defamation. Ala. Code § 6-11-21 (Supp. 1988). Colorado limits the punitive award to an amount equal to actual damages except the court has the power to make an addition up to three times the actual damages in enumerated cases of aggravated conduct. Colo. Rev. Stat. § 13-21-102 (1987). Florida creates a presumption which limits the amount of punitive awards to three times that of the actual damages unless the claimant demonstrates by clear and convincing evidence that any award which is greater than this amount is not excessive. Fla. Stat. § 768.73 (Supp. 1988). Georgia limits such awards to $250,000 except in product liability cases or where the defendant specifically intended to cause harm. Ga. Code Ann. § 105-2002.1 (Supp. 1988). Kansas limits the amount of punitive damages in medical malpractice cases to the lesser of 25% of the defendant's highest gross annual income during the five year period prior to the wrongful act or $3 million. Kan. Stat. Ann. § 60-3402 (Supp. 1987). (This particular provision of the Kansas medical malpractice legislation has not been challenged as of yet on constitutional grounds, but other provisions have been held unconstitutional by the Supreme Court of Kansas. See Kansas Malpractice Victims Coalition v. Bell, _... Kan. ._ 757 P.2d 251 (1988) and Farley v. Engelken, 241 Kan, 663,740 P.2d 1058 (1987). There Is a serious question as to the constitutionality of this particular provision under Kansas law because it limits the right to a jury trial on punitive damages. See Folks v. Kansas Power and Light Co., _____ Kan _____, 755 P.2d 1319 (1988).) Oklahoma limits punitive awards to an amount equal to the actual damages except where evidence of the wrongful conduct is clear and convincing. Okla. Stat. Tit. 23, § 9 (1987). Texas limits awards of punitive damages to four times the amount of actual damages or $200,000, whichever is greater, for cases involving "fraud" or "gross negligence," but the limit does not apply to cases Involving "malice" or to intentional torts, the terms In quotes being defined In the statute. Tex. Civ. Proc. & Rem. Code Ann. §§ 41.001-.008 (Vernon Supp. 1988).

22. For cases adopting this standard see, e.g., Linthicum v. Nationwide Life Ins. Co., *supra* n. 20; Travelers Indemnity Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Tuttle v. Raymond, 494 A.2d 1353 (Maine 1985); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980). For statutory adoptions see, e.g., Ala. Code § 6-11-20 (Supp. 1988); Cal. Civil Code § 3294 (Supp. 1988); Minn. Stat. Ann. § 549.20(1) (1988); Mont. Code Ann. § 27-1-221(5) (1987); and Or. Rev. Stat. § 30.925 (1983). See also Colo. Rev. Stat. § 13-25-127(2) (1987) (adopting proof beyond a reasonable doubt). Compare Fla. Stat. § 768.73 (Supp. 1988) (apparently adopting the clear and convincing test only for amounts which exceed the presumptive cap of three times the amount of compensatory damages, but continuing the use of the mere preponderance test for the treble award) and Okla. Stat. Tit. 23, § 9 (1987) (following the same pattern as Florida).

Also, it appears that the law is evolving in many jurisdictions to require that there be some conscious indifference to the rights of others before punitive damages are warranted.[23] However, it is not easy to divine this latter rule from the myriad of adjectives employed in attempting to define the standard of culpability in any particular jurisdiction.[24]

Attempts at reforming other punitive damage problem areas have been anything but satisfactory. For example, there still are serious questions concerning; (1) the standard to be applied by the trier of fact in determining the quantum, and the standard to be applied in appellate review of any punitive award; (2) the vicarious exposure facing employers and others; (3) the "windfall" nature of punitive awards and the question of who should receive the award; (4) the potential abuses in the trial process regarding pleading and discovery; and (5) the possible prejudice to defendants on the compensatory liability issue through introduction of otherwise irrelevant evidence of wealth or financial condition at the stage where that liability issue is being resolved. Moreover, there has yet to be a satisfactory solution to the situation that all agree is a very serious problem — duplicative awards for the same act or course of conduct. In fact, as a result of the recent legislative activity, the legal landscape has now been strewn with a number of pieces of disparate legislation In the various states so that in a very real sense the situation could be described as being as confused and uncertain as before the reform efforts began.[25] Considerable improvements still could be made to bring about more evenhanded treatment of litigants both within a jurisdiction and between jurisdictions. In short, the situation is very much in need of attention and clearly falls within the charge of the Committee on Special Problems, which has the responsibility of promoting improvements in the administration of

23. See, e.g., Rawlings v. Apodaca, *supra* n. 20; Freeman v. Anderson, 279 Ark. 282,651 S.W.2d 450 (1983); Jardel Co. v. Hughes, 523 A.2d 518 (Del. 1987); Tuttle v. Raymond, *supra n.* 22; Preston v. Murty, 32 Ohio St. 3d 334,512 N.E.2d 1174(1987); Enright v. Lubow, 202 N J. Super. 58,493 A.2d 1288 (App. Div. 1985); Ala. Code § 6-11-20 (Supp. 1988); Cal. Civil Code § 3294 (Supp. 1988); Colo. Rev. Stat. § 13-21-102(1) (1987); Ga. Code Ann. § 1005-2002.1(b) (Supp. 1988); Iowa Code Ann. § 668A.1 (1986); Minn. Stat. Ann. § 549.20(1) (1988); Okla. Stat. Ann. Tit. 23, § 9 (1987); Tex. Civ. Proc. & Rem. Code Ann. §§ 41.001-.003 (Supp. 1988).

24. See the discussion in Linthicum v. Nationwide Life Ins. Co., *supra* n. 20. See also 1 J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice § 5.01 (1985).

25. In addition to the different statutory approaches Indicated In n. 21, supra, regarding attempts to limit the amount of punitive awards, a number of states have taken different approaches to the so-called "windfall" problem. For recent legislation In this area, see, e.g., Colo. Rev. Stat. § 13-21-102(4) (1987) (allocating one-third of a punitive award to the state general fund, two-thirds to the plaintiff); Fla. Stat. § 768.73 (Supp. 1988) (40% to the plaintiff and 60% to the state general fund unless the cause of action was based on personal injury or wrongful death, in which event the state's share is to be paid to Public Medical Assistance Trust Fund); Ga. Code. Ann. § 105-2002.1 (Supp. 1988) (three-fourths to the state, one-fourth to the plaintiff); Iowa Code Ann. § 668A.1 (1987) (100% to the plaintiff if the act was directed a«he plaintiff; if not, three-fourths of the award goes to a state fund used for indigent civil litigation programs or insurance assistance programs); and Mo. Ann. Stat. § 537.675 (Vernon 1988) (50% of punitive award, after deduction of attorneys' fees and expenses, payable to state of Missouri). Kansas passed medical malpractice legislation which requires that punitive awards in such cases be allocated one-half to the plaintiff and one-half to the state health care maintenance fund (see Kan. Stat. Ann. §60-3402 (1986)), but the constitutionality of this legislation is questionable. See *supra* n. 21.

justice and maintaining proper liaison with others to that end.

Finally, two other matters should be mentioned. First, there has been a movement in the criminal justice system to attempt to standardize penalties. The most notable effort in this regard has taken place at the federal level.[26] The sense that there should be evenhanded treatment of those who are subject to criminal penalties also provides part of the motivation for reform in the civil system. Secondly, a number of constitutional issues that have lain dormant for years have recently been brought to the attention of the courts. The Supreme Court of the United States has granted review to consider constitutional limits on punitive damages awards on three occasions since 1986. In particular, there appears to be concern on the part of some members of the Court as to whether the Eighth Amendment to the United States Constitution guaranteeing that excessive fines shall not be imposed applies to civil punitive awards.

In 1986 in *Aetna Life Ins. Co. v. Lavoie*,[27] the Supreme Court noted that a challenge to punitive damages as excessive under the Eighth and Fourteenth Amendments "raise[d] important issues which, in an appropriate setting, must be resolved."[28] Two years later in the case of *Bankers Life and Casualty Co. v. Crenshaw*,[29] the Court granted *certiorari* and heard oral argument as to whether the Eighth Amendment applies to civil punitive awards and whether the punitive damage award in the case violated the Due Process and the Contract Clauses of the Constitution. Although the Supreme Court declined to decide these issues in *Aetna* and *Bankers Life*, as this report was being finalized the Court again granted *certiorari*, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[30] on the question of whether an award of $6 million in punitive damages, amounting to more than 100 times the plaintiff's actual damages, is excessive under the Eighth Amendment or otherwise. These cases illustrate that there are several potential problems at the constitutional level with the current rules in the various states. It is possible that these constitutional problems could be obviated through responsible reform efforts. It is the judgment of the Committee on Special Problems that this adds Impetus to the need for prompt action. Thus, it is hoped that this Report, which has been approved by the Board of Regents of the American College of Trial Lawyers, will serve to expedite responsible reform efforts so as to achieve improvements in the justice system in this country.

26. The Comprehensive Crime Control Act of 1984 created a United States Sentencing Commission to recommend new sentencing guidelines to go Into effect in federal courts in 1986. One of the main purposes of the legislation is to establish sentencing policies and practices for the Federal criminal justice system that provide certainty and fairness and which avoid unwarranted sentencing disparities among defendants who are similarly situated. See 28 U.S.C. § 991(b)(1) (Supp. 1987). The Supreme Court of the United States upheld the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission against an attack that Congress had delegated excessive legislative power to the Commission and that the legislation violated the separation-of-powers principle. Mistretta v. United States, 109 S. Ct. 647 (1989).
27. 106 S. Ct. 1580.
28. *Id.* at 1589.
29. 108S. Ct. 1645(1988).
30. 845 F.2d 404 (2d Cir. 1988), *cert, granted,* 109 S. Ct. 527 (1988).

III. CONCLUSIONS AND RECOMMENDATIONS

A. Civil Awards of Punitive Damages Should Be Retained, But Only in Carefully Limited Situations.

It has been forcefully argued that punitive awards in the modern civil justice system are an anomaly and should be abolished except where specifically authorized by statute.[31] Originally, such common law awards in large measure served as surrogates for pain and suffering and other noneconomic losses which at the time were yet to be recognized on *a de jure* basis by courts of law.[32] It is contended that now that non-economic losses, such as pain and suffering, are fully recoverable in tort actions in their own right as compensatory damages, there is no basis for permitting punitive awards for any compensatory purpose.[33] Nor should punitive awards serve to reimburse plaintiffs for attorney fees and other litigation expenses in the absence of a specific statute or rule of court providing for such.[34] This is based on the simple proposition that the common law rule in the United States is that each party bears the cost of his or her own attorney fees and litigation expenses. The civil system does not provide the requisite constitutional and procedural safeguards for penal awards and was lever designed to be a system for punishment beyond the admonition which is inherent in compensatory awards.[35] Finally, the argument goes, punishment should be limited to the criminal justice system and otherwise to specific situations expressly set out in legislative enactments, and even there the legislation should provide appropriate safeguards so as to not violate fundamental rights.

A majority of the Committee, while recognizing the force of these arguments, notes hat punitive awards have long been a part of the civil justice system and that they have seen recognized in addition to potential criminal sanctions. Although the early common law did recognize punitive awards in the civil system as a surrogate for non-economic losses, they were not recognized for that purpose exclusively. Punitive awards also were recognized as serving the admonitory goal of the civil system in

31. See, e.g., Ghiardi, supra n. 19 at 423-24 and Sales & Cole, *supra n.* 19 at 1117.
32. Fay v, Parker, 53 N.H. 342 (1873); Stuart *v.* Western Union Telegraph Co., 66 Tex. 580, 18 S.W. 351 (1885). Sea also K. Redden, Punitive Damages 28-29 (1980) and 1 T, Sedgwick, A Treatise on the Measure of Damages 688-89 (9th ed. 1912).
33. Ghiardi, *supra n.* 19 at 423-24 and Sales & Cole, *supra n.* 19 at 1164-65.
34. Ghiardi, *supra* n. 19 at 417.
35. See C. McCormick, Handbook on the Law of Damages 276 (1935). See also 1 J. Ghiardi & J. Kircher, supra n. 24, ch. 3 (1985) and K. Redden, supra n. 32, ch. 7.

deterring and punishing wrongdoers.[36] It also is true that punitive awards in the civil justice system serve to reach certain types of conduct that either are not punishable at all under the criminal system or as a practical matter will not be the subject of a criminal proceeding. As a result, the common law ultimately has come to recognize two types of awards — one mainly to compensate for economic and noneconomic losses and one mainly to punish. Although each is designed to deter, the Committee is convinced that the more severe sanction is still needed. Notwithstanding the general conclusion of the Committee that punitive awards are still justifiable in the civil system today, it also concluded that such awards should be available only in carefully limited

36. In Huckle v. Money [K.B. 1763] 2 Wils. 205,95 Eng. Rep. 768, one of the earliest English cases on record upholding an award of exemplary damages, it is clear that the monetary award was meant to punish and deter. Huckle was illegally taken into custody and he subsequently brought an action for trespass, assault and imprisonment. Although he was not mistreated physically and the confinement was brief, the jury assessed his damages at 300 pounds which was almost three hundred times any pecuniary loss that he could have suffered. The court upheld the award and in doing so the Lord Chief Justice stated:

> [T]he personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 207. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Id. at 206-07, 95 Eng. Rep. at 768-69

Exemplary or punitive damages are still recognized in England today, albeit on a more circumscribed basis than that in the United States. See Rookes v. Barnard [1964] 1 All Eng. Rep. 367 where the House of Lords limited punitive damages to two common law situations: (1) "oppressive, arbitrary or unconstitutional action by servants of the government" and (2) where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." *Id.* at 410. Exemplary damages expressly authorized by statute also are permitted. *Id.* at 411.

Canadian courts have not followed the restrictions enunciated by the English House of Lords in Rookes v. Barnard, but have followed a course that generally resembles that of the courts in the United States. See K. Cooper-Stephenson & I. Saunders, Personal Injury Damages In Canada, ch. 13(1981).

It also is to be noted that both England and Canada distinguish "aggravated damages" from punitive damages, and for that matter, from awards solely to compensate for losses and other harm. Aggravated damages are given to compensate when the harm done to the plaintiff by a wrongful act was aggravated by the manner in which the act was done; punitive damages being reserved to punish and thereby provide moral retribution or deterrence. *Id.* at p. 688.

situations.[37] Those situations and the limitations are discussed below.

B. Punitive Awards Should Not Be a Surrogate for Compensatory Damages.

The civil justice system should not recognize punitive awards for the purpose of compensating successful plaintiffs. The common law over time has recognized new rights and measures for compensation and is fully capable of doing so in the future. Economic and noneconomic losses are compensable today, and a clear distinction ought to be maintained between awards of that nature and those which are imposed solely to punish and deter. The maintenance of this distinction is important In administering the rules because there should be differences in the process for obtaining the two types of awards. For example, it has already been noted that a clear-and-convincing standard for the plaintiff's burden of proof has been adopted by a number of jurisdictions regarding punitive damages.[38] A mere preponderance is the standard for obtaining compensatory damages. As will be seen below, other distinctions arise from the recommendations of the Committee, and they should not be eroded by permitting one type of damage to serve as a surrogate for the other type. Civil punitive awards should be limited to those egregious situations which clearly call for punishment and deterrence beyond that which is inherent in compensatory awards.

C. The Standard for Culpability Should Require a Conscious and Egregious Invasion of the Rights of Others.

The appropriate minimum standard for culpability for punitive awards, recognized in some recent, more analytical decisions,[39] requires a conscious indifference to the rights of others. This test encompasses the traditional intentional torts, such as assault, battery, and false imprisonment, all of which require that the actor know or understand that there is a great degree of certainty that the invasion will take place,[40] as well as torts based on lesser degrees of cognition, such as where the defendant acts in a wilful or wanton manner, or with a certain type of recklessness."[41] This test, however, would not permit punitive awards where the element of consciousness is sufficiently lacking, such as in the case of negligent, or even grossly negligent, conduct.

The Restatement of Torts, Second, distinguishes various types of conduct on the basis of cognition, i.e., the degree to which the actor appreciates or understands that harm will or may result from his or her conduct.[42] The greater the knowledge of harm, the greater the culpability. It is the Committee's position that civil punitive awards can only be justified on the basis of the more serious or egregious conduct. Although there is strong support for this position under recent case law,[43] there still is precedent

37. Bell & Pearce, *supra* n. 19 at 17.
38. See *supra* n. 22.
39. See, e.g., Rawlings v. Apodaca *supra* n. 20.
40. "The word 'intent' is used throughout the Restatement of this subject [intentional torts] to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8A (1965).
41. W. Prosser & W.P. Keeton, Law of Torts 10 arid 212 (1984).
42. See Comment to § 8A, Restatement (Second) of Torts (1965).
43. See, e.g., Rawlings v. Apodaca and Anderson v. Continental Insurance Co., *supra* n, 20.

which leaves much to be desired in the way of clarity.[44]

A close examination reveals that much of the confusion arises in the area where mere inadvertent conduct interfaces with the more cognitive forms of conduct. The two types of conduct are most often described as "gross negligence" and "recklessness."[46] It is the overwhelming majority rule that punitive damages are not available for mere negligence, just as it is the rule that they are available for intentional, wilful, wanton or reckless conduct.[46] As for "gross negligence," — a perplexing term at best[47] — some jurisdictions may permit punitive damages for this category of conduct.[48] It is questionable though whether mere extreme carelessness as distinguished from the type of conscious indifference that is explicit in the term intentional and

44. For example, compare City of Gladewater v. Pike, 727 S.W.2d 514 (Tex. 1987) (holding "grossly negligent" conduct sufficient, but such conduct must evidence an outrageous state of mind — one of malicious or "evil" intent) with Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981) (approving a jury instruction defining "heedless and reckless disregard," which the court stated was synonymous with "gross negligence," to mean "an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the person affected by it").

45. The term "reckless" is usually expressed as part of the phrase "wilful, wanton and reckless," and all three terms are considered to mean the same thing. W. Prosser & W.P. Keeton, supra n. 41 at 212.

46. See 1 J. Ghiardi & J. Kircher, supra n. 24.

47. "As it [gross negligence] originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring wilful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof — sometimes on the ground that this must necessarily have been the intent of the legislature. But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind. There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences." W. Prosser & W.P. Keeton, supra n. 41 at 211-212.

48. *Id.* at 10.

implicit in the terms wilful, wanton and reckless should suffice.[49]

The Committee believes that punishment over and above that involved in a compensatory award is not warranted for conduct that does not involve a conscious invasion. It is the very element of consciousness or awareness that renders the conduct so morally reprehensible as to call for different treatment. Conduct, extreme as it may be, that lacks cognition of harm more closely resembles inadvertent or negligent conduct than it does the type of conduct which calls for a greater sanction than that inherent in a compensatory damage award. Moreover, permitting punitive awards based merely 3n different degrees of carelessness or inadvertent conduct exacerbates the already difficult problem of articulating a clear standard to be employed by the trier of fact and for review on appeal. Thus, the logical and practical line of demarcation should be drawn at the point where the defendant realizes that his or her conduct will, or that there is a very strong probability that it may, cause the resulting harm. Conduct, such is extreme carelessness, which does not involve this basic element of consciousness should not be the subject of punitive damages. The admonitory function of compensatory damages should suffice to deter these less egregious forms of conduct just as it is supposed to deter negligent conduct.[50]

Bare satisfaction of the conscious indifference standard, however, does not mean hat punitive damages automatically follow. Whether the conduct in question is so aggravated as to justify such an award still should be a matter to be determined by the

49. The comments In the Restatement of Torts, Second, draw a distinction between these forms of conduct based on the knowledge of the actor:

> While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless Reckless misconduct differs from negligence In several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing art act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which Is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference In the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

§ 500, Comments f and g (1965).

50. See Morris, *supra* n. 19 at 1177.

The position of the Committee is not entirely consistent with the definition of "recklessness" as found in Restatement (Second) of Torts § 500 (1965). The position of the Committee requires that the actor realize, I.e., know or understand, that there Is a strong probability that harm may result. It does not encompass the situation, as does the Restatement, where the actor, from facts which he or she knows, should realize that there is a strong probability that harm may result. See supra n. 49. The latter standard sounds more in negligence and would permit, In the opinion of the Committee, cases to go to the jury without proof of the type of state of mind which may warrant a punitive award.

trier of fact.[51] In addition to requiring knowledge, the instruction to the jury should state that punitive awards are to be made only in those cases in which it is established that the tortfeasor acted in a particularly egregious manner.[52] This element of aggravated conduct is often referred to as the requirement of a bad motive or evil mind,[53] and In some instances is best described by the term "outrageous." Case law is replete with attempts by courts to delineate these more antisocial acts. Such words as "malicious," "evil," "vindictive," "oppressive," "fraudulent," "outrageous" and the like have been employed[54] and should still be employed in jury instructions to require such findings before punitive damages are assessed.[56] Thus, it is recommended that judicial decisions and any legislation on the subject make it clear that punitive awards in the civil justice system may be justified only in cases involving the most egregious forms of conduct. If there is evidence of bad motive, recidivism, or other aggravating conduct, the trier of fact should take this into account in deciding whether to assess punitive damages at all and, if so, the amount.[56]

The Committee also observes that the articulation of a clear minimum standard for culpability should enable a trial judge to withdraw the issue of punitive damages from the jury in those cases in which there is a failure to introduce clear and convincing evidence upon which a jury could find that the defendant's conduct was of the character required for the imposition of punitive damages. In any event, no punitive award should be permitted for conduct that fails to meet the minimum standard.

D. The Quantum of Punitive Damages Should Be Limited by a Flexible Formula Based on the Amount of Compensatory Damages.

The Committee is concerned that the current state of the law provides little guidance to the trier of fact regarding the standard for assessing the amount of punitive damages. The case law, again, is replete with references to the egregious nature of the conduct, the wealth or power of the defendant, the relation of the punitive award to the compensatory award, and the like.[57] This all leaves one with a sense of frustration in trying to ascertain whether the punitive award is excessive, particularly on review by the appellate courts.[58] In fact, there is evidence that the current attempts to articulate a standard lead to excessive awards because these definitions fail to provide sufficient

51. See Restatement (Second) of Torts § 908, Comment d (1979); D. Dobbs, Handbook on the Law of Remedies 204 (1973).
52. Restatement (Second) of Torts § 908, Comment d (1979).
53. See Rawlings v. Apodaca, supra n. 20 at 162, 726 P.2d at 578.
54. D. Dobbs, *supra* n. 51 at 205.
55. See Restatement (Second) of Torts §908, Comment b (1979).
56. *Id.*
57. *See K. Redden, supra* n. 32, at § 3.5. See also Restatement (Second) of Torts § 908, Comment e (1979).
58. The appellate courts have resorted to such tests as whether the award is so excessive that it must necessarily be a product of passion, prejudice, or corruption of the jury and whether the punitive award bears a reasonable relationship to the compensatory award. K. Redden, *supra* n. 32 at § 3.6. Whatever the test, it is clear that the tests are more often a rationalization of results than a means of obtaining them. Morris, supra n. 19 at 1180.

guidance to juries.[59] The opportunity for bias and prejudice to operate is too great. It would be unthinkable to use such vague standards to assess punishment in the criminal system, much less to let a jury do it. Consequently, the Committee has concluded that some more definite structure needs to be employed regarding the standard for assessing the amount of damages.

First, the Committee recommends that greater attention be paid to the question of whether the evidence offered is so highly prejudicial as to outweigh its probative value under Federal Rule of Evidence 403 or the equivalent state rule. This concern, which frequently arises in criminal cases, seems to be overlooked in the civil process. Since the civil punitive award serves the same purpose as the criminal sanction, the same considerations should apply. Courts should not permit the "waving of bloody shirts" in civil trials any more than in criminal.

Second, courts should pay particular attention to the jury instructions in defining he burden of proof and standard for culpability. In this vein, the courts should attempt o formulate more precise instructions regarding the methods by which juries assess punitive awards, taking care to inform the jury that it is within their discretion as to whether any punitive award is to be assessed, that the award should not be excessive and that they have to be clearly convinced that the amount is appropriate under the circumstances. A model jury instruction covering these points as well as others is contained in an appendix to this report.

The above recommendations are designed to meet the point of the American College Task Force Report that greater judicial supervision of punitive awards is needed. Although the Committee has concluded that the above suggestions will serve n that way and recommends that they be adopted, it does not feel that these changes will completely solve the problem of excessive awards, because the standards for assessing the quantum are inherently deficient insofar as providing any meaningful guidance to juries and for appellate review. Various techniques were considered in an attempt to regulate jury awards in a fair and reasonable manner. Some members of he Committee favored using a "cap" or maximum limit, while others were opposed to any such method. Even among those favoring a cap, different approaches were advocated. The merits of an absolute dollar cap were advanced, as were those of a

59. The Rand study on punitive damages, mentioned earlier, also attempted to determine what post-trial adjustments might have occurred to punitive awards and developed sufficient data to provide statistically useful information involving 33 percent of the cases in the study. It was learned that punitive awards were frequently reduced by post-trial actions, such as settlements, remittiturs, and appellate decisions. The data showed that jury verdicts were reduced In approximately one-half of the trials reported on and that the larger the award the greater the chance of significant reduction. M. Peterson, S. Sarma & M. Shanley, *supra* n. 6 at 26-30.

Both the Rand study, *id.* at *xi*., and the A.B.A. Litigation Section Report, *supra* n. 7 at 21-22, took a somewhat optimistic view that — even though punitive awards have increased in both absolute and relative terms over the past 25 years —because of post-trial actions, the situation probably is not as dire as some might believe. However, one is equally entitled to take a more negative view — based on the same evidence—that juries exceeded or abused their discretion in many cases and that these predominated in the large awards. One could also observe that the Rand and A.B.A. positions may underestimate the overall impact of the large awards on the civil justice system, just as the latter position may overstate it. The prospect of having a jury go overboard, however, cannot be salutary even if there is the possibility of a later reduction.

formula based on compensatory damages. In the end, however, a substantial majority were in favor of the following approach.

The Committee recommends that the various legislative bodies enact a statute which limits the recovery of any punitive award by a plaintiff in a tort case to twice the amount of the compensatory award or $250,000, whichever is greater. This approach provides for flexibility. The plaintiff that suffers amounts of compensatory harm below $125,000 as the result of outrageous conduct by the defendant would be permitted to recover a substantial punitive award, but the limit of $250,000 would prevent an excessive award. On the other hand, where the compensatory harm exceeds $125,000 the ceiling on any punitive award would rise commensurately with the compensatory harm. There would be no limit in the serious injury cases except for the trebling effect provided by the formula. The Committee believes that this approach is fair to all concerned in that the award would punish and deter and yet not unjustly subject defendants to ruinous liability.

Finally, as a corollary to the proposal regarding the monetary limitation on punitive awards, the Committee recommends that the jury not be informed of the limitations. One reason for this recommendation is obvious — the jury should not be permitted to circumvent the rules by arbitrarily increasing the amount of compensatory damages. A less obvious, but a real concern nevertheless, is that the maximum amount of $250,000 in small compensatory injury cases should not become the rule. The jury should assess the punitive award on the basis of the evidence and the law as contained in the instructions from the court. The monetary limitations, which provide a range similar to that in the criminal system, should be applied by the court where necessary after the verdict has been rendered.

E. The Burden of Proof for Punitive Awards Should Be That of Clear and Convincing Evidence.

The Committee on Special Problems notes that since the Task Force Report, which recommended that the burden of proof for punitive damages should be raised, those jurisdictions which have considered the issue have reaffirmed or moved to a clear-and-convincing standard.[60] One jurisdiction has even adopted the criminal burden, by requiring proof beyond a reasonable doubt.[61]

Although some members of the Committee favored the retention of the mere-preponderance standard and others felt that the criminal standard of beyond a reasonable doubt should be employed, a majority of the Committee recommends that all jurisdictions follow the modern trend and adopt the clear-and-convincing standard. The clear-and-convincing standard, when coupled with the recommendations regarding the standards for determining liability and the rules regarding the quantum of damages, is more in harmony with a system for punishment than the mere-preponderance standard applicable in civil proceedings regarding compensatory damages and similar remedies which merely attempt to restore the *status quo*. While the beyond-a-reasonable-doubt standard is appropriate where life and liberty is literally at stake, the Committee does not feel that the criminal standard is appropriate

60. See *supra* n. 22.
61. Colo. Rev. Stat. § 13-25-127(2) (1987).

where a civil penalty is sought. The intermediate standard, requiring clear and convincing evidence, is the most appropriate, in the opinion of the Committee.

F. Vicarious Responsibility for Punitive Damages Should Only Obtain Where There Is Complicity by the Principal in the Conduct Which Gives Rise to the Punitive Award.

The Committee on Special Problems does not believe that there is any justification or holding a party responsible for an act which gives rise to punitive damages if that person or entity, through its officers or managerial employees or agents, did not commit or otherwise significantly participate in, or in some manner actually control or ratify, the act. The purpose of punitive damages is to punish and deter certain wrongful conduct. If the individual or entity did not engage in that conduct, there is no rational purpose in punishing or attempting to deter the person or entity. This is the position of the American Law Institute as found in the Restatements of Agency and Torts.[62] A number of courts follow the Restatement rule, but there are cases that adopt the so-called "liberal" rule, which imposes punitive damages in some situations merely on the basis of *respondeat superior.*[63] Under this rule, the principal is liable Because of the mere relationship instead of any wrongdoing. Although this may be appropriate for compensatory damages, the Committee fails to see the justification for such a rule where punitive damages are claimed and recommends that the position adopted by the American Law Institute be followed.

G. Pleadings Regarding Punitive Damage Claims Should Not Be Permitted To Contain a Monetary Amount.

At one time, claims for punitive damages were the exception and quite rare, but it has become more common recently for some attorneys to include such counts as a routine matter. This practice often is employed for its *in terrorem* effect. Some observers feel that the mere presence of such a count increases the settlement value of the underlying lawsuit.

A number of jurisdictions have adopted statutes which prohibit plaintiffs from pleading a claim of punitive damages until a *prima facie* showing is made regarding the defendant's potential liability for such an award. For example, Illinois permits a prayer for relief seeking punitive damages only after the plaintiff, upon motion and hearing, establishes a reasonable likelihood of proving facts at trial sufficient to support

62. Restatement (Second) of Agency § 217C (1958); Restatement (Second) of Torts § 909 (1979). These two provisions are identical:

> **Punitive Damages Against a Principal**
> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or a managerial agent was reckless In employing or retaining him, or
> (c) the agent was employed In a managerial capacity and was acting in the scope of employment, or
> (d) the principal or a managerial agent of the principal ratified or approved the act.

63. 2 J. Ghiardi & J. Kircher, supra n. 24, § 24.07; W. Prosser & W,P. Keeton, supra n. 41 at 13.

an award of punitive damages.[64] Florida, Idaho and Minnesota have adopted similar statutes.[65] California, however, has adopted a statute that merely prohibits a plaintiff from including a monetary figure in the pleadings.[66] These procedures are in contrast to those of most states, which continue to permit plaintiffs to include claims for punitive damages and to include monetary figures for such in the original complaint. In those states, the defendant may move to dismiss the claim or may endeavor to limit discovery of wealth or financial condition until later in the proceedings. The various approaches described make clear that the issue essentially is one of placing the initial burden. Should the plaintiff have to make some type of showing that the facts could support an award of punitive damages before being permitted to plead a claim for punitive damages?

The Committee concluded that there was no good reason to put the burden on the plaintiff to make *a prima facie* showing before being permitted to plead a claim for punitive damages, but that the California modification should be followed. The Committee noted the growing tendency for pleadings to include very large monetary amounts, the fact that these figures are arbitrary in many instances, and the unwarranted adverse publicity involved, and found that little purpose was being served by the present system. Thus, the Committee recommends that no monetary figure for punitive damages should be permitted in the petition or complaint. This modification to present practice in no way inhibits a plaintiff from pursuing a claim and obtaining an award for punitive damages, yet it would protect a defendant from needless and unwarranted adverse pretrial publicity.

H. Discovery of Evidence Regarding a Defendant's Wealth or Financial Condition for the Purpose of Proving the Amount of a Punitive Award Should Not Be Permitted Without a *Prima Facie* Showing That There Is a Legal Basis for Such an Award.

The fact that a plaintiff necessarily must engage in efforts to ascertain the facts involved in a case does not mean that all efforts at discovery should be permitted at the outset of a case that might involve a punitive damages issue. Initial efforts at discovering facts regarding liability are clearly necessary and would have to be permitted even in a jurisdiction that prohibits a plaintiff from initially pleading a claim for punitive damages. However, to subject a defendant to unlimited discovery regarding wealth or financial condition at the outset poses great potential for unwarranted invasions of privacy and other abuses.

The Committee on Special Problems recommends that the discovery of evidence regarding a defendant's wealth or financial condition for the purpose of proving the amount of a punitive award should not be permitted without a *prima facie* showing by the plaintiff that there is a reasonable likelihood of proving facts at the trial sufficient to support a determination of liability for such damages. Where it appears from the complaint or upon motion that evidence of wealth or financial condition Is relevant to the issue of liability for punitive damages, the burden of persuading the court to limit discovery

64. Ill. Rev. Stat. eh. 110, para. 2-604.1 (Supp. 1988).
65. Fla. Stat. § 768.72 (Supp. 1988); Idaho Code §6-1604 (Supp. 1987); and Minn. Stat. Ann. §549.191 (West 1988).
66. Cal. Civ. Code § 3295 (Supp. 1988).

should be where it rests in most jurisdictions today. The defendant must move to limit discovery in this situation and convince the court such evidence is not relevant to the liability issue. Where the evidence is only relevant to the amount of the punitive award, the burden should be on the plaintiff to obtain permission from the court to engage in discovery of wealth or financial condition. This would put the burden on the plaintiff to make a *prima facie* showing that there is a plausible case for a punitive award. Defendants would be protected from unwarranted intrusions into their records and private affairs and from being unnecessarily inconvenienced, unnecessary expenses would be avoided by all concerned, and no real impediment or obstacle would be placed in the path of plaintiffs who are entitled to pursue legitimate claims for punitive damages.

I. Bifurcated Trials Should Be Employed To Avoid Prejudice to Defendants Where Evidence of Wealth or Financial Condition Is Admissible Only on Claims for Punitive Damages.

Evidence of wealth or financial condition is ordinarily irrelevant to the liability issues in a case where punitive damages are sought. Normally, such evidence bears only on the amount of money that would adequately punish and deter. In such situations, permitting evidence of wealth or financial worth to be introduced at the stage of the trial where liability is determined needlessly provides an opportunity for bias and prejudice to operate against a defendant. However, the Committee on Special Problems recognizes that there may be some situations where evidence of wealth or financial condition might bear on the punitive damage liability issue even though it has no relevance to liability giving rise to compensatory damages. For example, the fact that the defendant is in a superior economic position and able to exert a certain authority or power over the plaintiff may be relevant to whether the conduct is sufficiently egregious to warrant punitive damages.[67]

Although bifurcation of the trial is an obvious solution to this problem, it is clear that different issues would have to be separated in the two situations described. There may be other situations which would call for still different treatment, such as trifurcation. Recognizing this, the Committee recommends that the defendant be provided an opportunity to move for a division of the trial in a case where punitive damages are claimed, if undue prejudice would result from the introduction of evidence of wealth or financial condition, and that in such a case the issues be separated to afford a fair trial to all concerned.[68] The following is one approach for courts to consider.

In a trial where a punitive award is sought and evidence of wealth or financial condition has no relevance to any liability issues, the court, upon motion by the defendant, should bifurcate the trial on the following basis: During the first phase of the trial, the issues of liability should be determined and evidence of wealth or financial condition should not be permitted. In many instances, it may also be desirable to determine the

67. The Committee recognizes that there are other exceptions. Evidence of wealth or financial condition may bear on liability issues for compensatory damages as well as punitive damages issues. If this is the situation, a division of the trial may not be appropriate.

68. Several Jurisdictions have adopted a bifurcated trial process for cases involving punitive damages. See, e.g., Cal. Civ. Code § 3295 (Supp. 1988), Ga. Code Ann. § 105-2002.1(d) (Supp. 1988), Mo. Ann. Stat. § 510.263 (Vernon Supp. 1988), and Mont. Code Ann. § 27-1-221(7) (1987).

issue of compensatory damages in the first phase. In either event, a special verdict form should be used to determine whether the defendant is liable for compensatory damages only, or in addition is liable for punitive damages. If the jury determines in the first phase that punitive damages also should be awarded, evidence of the appropriate amount, including that of wealth or financial condition where relevant, should be permitted in the second phase. This process would prevent undue prejudice in the situation described, but it would not be appropriate where evidence of wealth or financial condition is relevant to the issue of liability for punitive damages. In the latter case, courts should consider the procedure described below.

If a claimant sues for punitive damages and the defendant moves for a bifurcated trial, the plaintiff should be permitted to show that evidence of wealth or financial condition is relevant to the issue of liability for punitive damages. If the plaintiff prevails on this issue, the court should limit the first phase of the trial to a determination of whether the defendant is liable for compensatory damages and the amount thereof. If the jury finds liability for compensatory damages, the second phase of the trial should address the punitive damage liability issue and the amount of any such award. During the second phase of the trial, evidence of wealth or financial condition, where relevant, may be admissible. If the second type of bifurcation procedure is employed, the jury should be informed during the first phase of the trial that the plaintiff has made a claim for punitive damages, but that this issue may be addressed in a second phase of the trial after the jury has decided the issue of liability for compensatory damages.

The Committee on Special Problems has concluded that a flexible approach is needed to resolve the problem regarding undue prejudice to defendants from the introduction of evidence of wealth or financial condition during the phase of the trial dealing with liability for compensatory damages. The approaches described above will take care of most situations, but, if they do not, the court should divide the trial in other ways, possibly trifurcation, to avoid undue prejudice while, at the same time, protecting the claimant's right to pursue an award of punitive damages where the evidence Would support such a claim.

J. Distribution of Punitive Awards Should Not be Diverted to Persons or Entities Other Than the Plaintiff.

There has been much discussion regarding whether all or part of a civil punitive award should be paid to someone other than the plaintiff[69] and, if so, whether there should be some restriction on the plaintiff's attorney fee. The argument for distributing the award to someone or some entity other than the plaintiff is based upon the fact that a punitive award to the plaintiff is viewed as a windfall, the plaintiff having already been fully compensated for any actual harm suffered. At first glance, the so-called "windfall" argument would seem to have some merit, but on closer examination a number of problems arise from the suggested change.

If the plaintiff Is not entitled to receive any or a substantial part of the award, It Is argued that there will be little incentive to bring an action for punitive damages. This would discourage lawyers from acting as "private attorneys general. "Since the trier of fact might be persuaded to increase the amount of noneconomic loss in the compensatory

69. See the various legislative approaches taken by different states on this subject, *supra n.* 25.

award if not given the opportunity to assess punitive damages, it may be that the proposal to distribute the award to someone other than the plaintiff could be circumvented. If this were to be the case, it might be ethically incumbent upon the plaintiff's attorney to seek only compensatory damages and forgo any personal or public interest in seeking a punitive award.

Assuming that the plaintiff were permitted to share in the punitive award on some substantial basis, problems still arise. How should the award be distributed? Is this to be a legislative determination, or left to the court? Does the fact that a punitive award is a "windfall" of sorts currently cause the jury, on occasion, to limit the award to an amount smaller than might otherwise be awarded? If it is distributed to an authority which levies taxes, will jurors see an opportunity to relieve the taxpayer of a burden? Even were these issues resolved, if punitive awards are limited to an amount which does not exceed twice that of any compensatory award, as recommended in subsection D, there will be fewer situations where an unseemly windfall takes place.

On balance, the Committee has concluded that the common law has long permitted he successful plaintiff to retain the punitive award, and that this is justifiable on the basis that it was the plaintiff who went to the trouble to prosecute the matter in the first place. The Committee does not see any real justification for changing the current situation. Finally, there is no more reason to change the rules with regard to the attorney-client fee arrangements in this situation than in any other area of tort litigation.

IV. THE PROBLEM OF DUPLICATIVE PUNITIVE AWARDS FOR THE SAME ACT OR COURSE OF CONDUCT.

The potential for multiple awards of punitive damages for the same act or course of conduct creates problems both for plaintiffs and defendants. From the defendant's standpoint, there is the very real possibility that the punitive awards will be duplicative and therefore result in punishing the defendant more than once for the same wrongful conduct. This obviously offends basic notions of justice. Conversely, a plaintiff runs the risk that prior punitive awards may exhaust the defendant's resources, and that, not only will there be insufficient funds from which to pay the plaintiff's punitive award, but the funds will be inadequate to pay a compensatory award. Under the current state of affairs, some defendants have resorted to bankruptcy proceedings for protection. Although this may be viewed as a limited form of protection, it is a drastic measure. Moreover, it does not address the problem of duplicative awards against a solvent defendant. In short, existing procedures are inadequate to resolve the problem satisfactorily. Although all agree that the problem needs attention and resolution, a solution is not nearly as evident as the problem.

The Committee on Special Problems has considered a number of approaches to the multiple awards problem. It is clear to the Committee that there is no simple solution. Thus, the Committee has decided that it should set out the various approaches considered, in an attempt to further discussion and facilitate debate in the hope that more efficacious approaches may eventually evolve. The Committee believes it is particularly important to follow this approach, since the American Law Institute is currently engaged in two projects that would seem to encompass the multiple awards

situation. The problem of duplicative awards most frequently arises in the context of the so-called mass tort case and involves multiparties, multiclaims, and multiforums. Both the A.L.I. projects on complex litigation and on compensation and liability for product and process injuries provide vehicles for addressing the multiple awards problem. In addition, Congress has taken some steps to deal with the situation.[70] Since these efforts are still in the initial stages, the deliberations of the Committee may prove helpful in resolving the problem. In any event, the work of the Committee should be recorded for those who come later to the task.

A. State Solutions

At the state level, only two attempts to address the problem of multiple awards for the same act or course of conduct have resulted in legislation. Georgia has adopted a statute prohibiting multiple recoveries against one defendant in product liability actions filed in that state, but it has no effect on actions filed outside of the state.[71] The effect of the Georgia statute Is to allow only one punitive award — the first obtained — in that state. This award is to be deemed as sufficient punishment, regardless of the amount. No other award for punitive damages may be made thereafter in Georgia for the same conduct.

Missouri has adopted a somewhat different approach. The Missouri statute provides for a post-trial hearing wherein a defendant may file a motion "requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based."[72] This approach is broader than the Georgia statute in several respects. The statute is not limited to product liability cases, and it permits evidence of out-of-state awards, as well as evidence of in-state awards, to reduce any award in Missouri. A subsequent proceeding is required to determine any offset.

Both the Georgia and Missouri statutes suffer from a deficiency that presently is inherent in any attempt to resolve the problem at the state level. Although state A may control what goes on within its courts, it cannot control what goes on in the courts of state B.[73] Neither Georgia nor Missouri can control awards that are assessed in other states, even though those awards are based on the same conduct that gave or will give rise to liability in Georgia or Missouri. Only trials or awards in Georgia or Missouri can be affected.

One possible solution to the interstate problem is for the National Conference of

70. A bill to amend title 28, United States Code, containing a number of features that would address some of the aspects of the multiple awards problem, was passed by the United States House of Representatives late in the second session of the 100th Congress, but this part of the bill was not passed by the Senate and did not become law. See Title III(A) of H.R. 4807, 100th Cong., 2d Sess., 134 Cong. Rec. H7443 (Sept. 13, 1988) and 134 Cong. Rec. S16284 (Oct. 14, 1988).
71. Ga. Code Ann. § 105-2002.1(e)(1) (Supp. 1988).
72. Mo. Ann. Stat. § 510.263 (Vernon Supp. 1988).
73. Although a state cannot control what goes on in the federal courts either, under current law a federal court would probably be required to apply the Georgia or Missouri statutes, if otherwise applicable, in diversity cases litigated In the federal courts because the statutes clearly affect substantive rights of the litigants. See 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4508 (1982).

Commissioners on Uniform State Laws to undertake a drafting project for the purpose of achieving uniformity among the states on the subject. However, not only is this approach problematic in terms of achieving uniformity in the near future, if ever, but it nay be complicated by the fact that a somewhat unconventional approach might have to be employed to obtain the desired result. A type of compact or reciprocal arrangement permitting cases to be transferred from one state to another might have to be designed and utilized if there is to be but one trial of all punitive damages claims arising out of the same act or course of conduct. In any event, the state-by-state approach, While holding the possibility of improvement of the present situation, does not appear to afford a complete solution, at least for the near future.

B. Federal Solutions

1. The A.B.A. National Class Action Proposal

The A.B.A. Section of Litigation has recommended that Congress enact legislation necessary to create a national class.[74] This would permit one court to obtain jurisdiction and control over cases which expose a defendant to multiple punitive awards rising out of the same conduct which results in similar injuries. It would be a mandatory lass action, in that one mass federal trial on the punitive damages issue would be binding on all concerned — those who have not sued, including those who may not yet be injured, as well as those who are parties to pending state and federal actions.[75] State court litigants who refuse to join the class would be enjoined from pursuing punitive awards based on the same conduct, but would be included in the distribution of the penal award resulting from the federal litigation.[76] The procedures envisioned could be invoked upon defendant's motion and findings by the court that "there is a reasonable possibility that adequate compensatory damages will not be available if punitive damages are not brought under control."[77] The applicable substantive law would be "federal common law" as the court determines it to be after a full hearing.[78] 'he proposal also addresses Issues as to how the punitive award should be distributed, including the problem regarding unknown future plaintiffs.[79]

Although the Committee on Special Problems is impressed with the careful thought Hat has gone into the A.B.A. Litigation Section proposal and views It as a partial improvement over the present system, it feels that other alternatives should also be explored. The A.B.A. proposal does not appear to address the problem of multiple awards against a solvent defendant, i.e., where the possibility of collecting adequate compensatory damages will not be affected by punitive awards. The unfairness of mulcting a defendant more than once for the same conduct does not diminish with the prospect that there may be sufficient funds to pay all awards. On the contrary, the unfairness is exacerbated. Moreover, consideration should be given to other methods of deciding what law should apply to the substantive issues short of developing federal common-law tort rules.

74. A.B.A. Sec. Litigation Report, supra n. 7 at 78-81.
75. *Id.* at 80.
76. *Id.* at 81.
77. *Id.* at 79.
78. *Id.* at 80.
79. *Id.* at 81.

2. Multidistrict Litigation

The Committee on Special Problems considered two other federal solutions to the multiple awards problem. First, it was suggested that Congress should enact a new statute providing jurisdiction in the federal courts for cases involving personal injury, death or property damage where two or more claims or actions seeking punitive damages are based on the same act or course of conduct of a defendant who is engaged in or affects interstate commerce. As a further jurisdictional requirement, the aggregate total of such claims, exclusive of claims for compensatory damages, should exceed $50,000. The suggestion contemplates that only the individual claims for punitive damages would be removed and consolidated, leaving other claims, including those for compensatory damages, for trial in the courts where originally filed. The authority of Congress to enact such legislation would rest on the powers granted to it under the Commerce Clause[80] and Article III[81] of the United States Constitution.

The procedures for removing cases filed in state courts[82] and the statutes regarding multidistrict litigation in the federal courts[83] would need to be amended to authorize removal and transfer for the limited purpose of consolidating all punitive damage claims, whether originally filed in state or federal courts, for trial in one federal forum. Proceedings to remove, transfer, or consolidate such claims should be initiated by the federal judicial panel on multidistrict litigation upon its own motion or by motion filed with the panel by any party to an action which meets the jurisdictional requirements. The transferee court should be empowered to appoint lead counsel and to implement other measures needed to administer the litigation.

Because the jurisdiction is for multiparty, multiclaim actions, absent a legislatively created standard, the substantive law of several states and perhaps even foreign nations will often apply to different aspects of the litigation. Thus, the legislation should set forth the standards to be applied in determining punitive damages or should at least provide for a single, uniform choice-of-substantive-law procedure for claims subject to the proposed proceeding.[84] The legislation also should be drafted to

80. "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..." U.S. Const. art. I, § 8.

81. "The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ,,." U.S. Const, art. III, § 2,

82. 28 U.S.C. §1441 et seq. (1983).

83. 28 U.S.C. §1407 (1983).

84. Currently choice-of-law questions In so-called mass tort cases In the federal courts are determined under state law. Van Dusen v. Barrack, 376 U.S. 612 (1964); Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See Atwood, The Choice-of-Law Dilemma In Mass Tort Litigation: Kicking Around *Erie, Klaxon,* and I/an *Dusen,* 19 Conn. L. Rev. 9 (1986). It is contemplated that the choice of law provision in the proposed legislation would involve the development and application of a body of substantive federal law. Arguably this could satisfy the requirement that there be a federal question In order to sustain jurisdiction in the federal courts through the "Arising Under" clause of Article III of the United States Constitution. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Osborn v. Bank of United States, 9 Wheat. 738 (1824). The adoption of a federal standard for determining punitive awards would more clearly satisfy this constitutional requirement.

preserve the concept of *forum non conveniens* to avoid attracting cases from all over he world to American courts when such cases would be more appropriately resolved in a foreign forum. There are a number of other matters that would need to be addressed, but this provides an outline of the basic features.

3. Interpleader

The Committee considered an alternative solution to the multiple awards problem Which would require a new federal statute patterned after 28 U.S.C. § 1335, the federal interpleader statute. The proposed legislation would empower a federal district court, upon petition or motion by either a plaintiff who has filed an action seeking a punitive toward or a defendant against whom an action for a punitive award has been filed, to adjudicate the issues involved in the multiple awards problem regardless of the court in which the claim or action was originally filed. The trial of the tort action in which the punitive award is sought would be carried out in the court in which it was originally filed or to which it was otherwise transferred or removed. The trial of the tort case would not be enjoined. However, the federal court in which the interpleader action was filed would have the authority to enjoin[85] the enforcement of any judgment containing an award for punitive damages and to remove or transfer jurisdiction of that part of the judgment to the federal court. Thus, any judgment which contains an award of punitive damages would be the possible subject of interpleader if the jurisdictional criteria exist.

In order for the federal court to exercise jurisdiction, the plaintiff seeking interpleader would be required to allege, by petition or motion, facts which show that there is a reasonable probability that the plaintiff will not be able to satisfy a judgment for the punitive award because the defendant's assets will be depleted by other claims for punitive awards arising out of the same act or course of conduct upon which the plaintiff's claim is based. A defendant against whom an action for a punitive award has been filed also could invoke the jurisdiction of the federal court upon a showing on the same grounds, i.e., that assets are insufficient to pay all claims. In addition, the defendant may invoke the jurisdiction of the federal court by alleging that two or more actions for punitive damages are based on the same act or course of conduct and that any such awards will be duplicative.

The current federal interpleader statute has a very low amount in controversy requirement and only requires minimal diversity of citizenship, i.e., diversity between two adverse parties.[86] These, or similar provisions in the new legislation, would suffice to provide jurisdiction for most cases involving the problems sought to be addressed. Where minimal diversity does not exist because all parties are citizens of the same state, there is a good chance all suits would be filed in the courts of that state and in that event be subject to consolidation or interpleader under the rules of those courts. Where all parties are citizens of one state, but some suits are filed in other states, the defendant could argue *forum non conveniens*.

Even though most cases would fall within diversity-of-citizenship jurisdiction, the

85. This authority should be expressly set out in the legislation so that no question Is raised under the federal Anti Injunction Act, § 28 U.S.C. 2283 (1982).
86. 28 U.S.C. §1335(a) (1983).

Committee on Special Problems considered whether federal question jurisdiction would be the preferable route, as in the multidistrict proposal.[87] Not only would federal question jurisdiction assure that all cases would be covered, but it would be necessary to set out certain substantive matters in the interpleader legislation in any event. The legislation should prescribe how the federal court shall determine whether multiple awards are duplicative and on what basis and when judgments for punitive awards may be satisfied. The court also should be authorized to hold some funds in reserve or otherwise assure that there will be assets available to satisfy claims of future plaintiffs. The basis for such a determination should be set out in the statute. Arguably, this would provide the basis for federal jurisdiction.[88]

4. Comparing the Federal Solutions

The basic difference between the federal proposals involves the forum of the trial of the punitive damages claims. In the multidistrict approach, there would be one mass trial on the punitive damages claim in one federal court, because all cases could be removed from state courts and consolidated in one federal court. Although the national class action approach of the A.B.A. would leave those who refuse to join the class in the courts that would otherwise have jurisdiction, all would be bound by the result in the federal court. Under the interpleader approach, the trials of the tort actions, including the punitive damages claim would take place in the various courts that would otherwise have jurisdiction. Arguably, there would be much less inconvenience to plaintiffs regarding the trial of the tort cases under the interpleader proposal. Also, there would be no need for federal courts to have to involve themselves in new choice-of-law problems as the federal court would merely enjoin the execution of the punitive portion of the judgment. Since the punitive award does not go to compensate victims, the fact that there may be delays in distributing it should not work any hardship. Plaintiffs could nevertheless proceed to satisfy judgments regarding the compensatory awards. On the other hand, the interpleader approach may require a hearing, if not a trial, to determine whether the various punitive awards resulted from the same act or course of conduct. It may also require a hearing or trial on the Issue of whether the awards are duplicative. Both the multidistrict proposal and the interpleader proposal may avoid the creation of federal common law regarding substantive tort rules whereas the national class action approach, at least as proposed by the A. B. A., contemplates some federalization of tort law. None of the proposals is perfect, but the problems may be resolved through further study,

C. The Preferred Approach

Although the problem of duplicative awards of punitive damages for the same act or course of conduct is a difficult one, the Committee has come to certain conclusions. First, a federal solution would appear to be preferable to a state-by-state enactment of a uniform or model act, because there is no assurance that every state would adopt such an act and, even if every state did, the time period that it would take to achieve near uniformity would far exceed that which Congress would require to act on the matter. Moreover, It Is not clear to the Committee that the problems involved can be effectively addressed at the state level. There does not appear to be any conventional

87. See *supra* n. 84.

88. See *supra* nn. 80 & 81.

mechanism by which the states could cause cases filed in other states or the federal courts to be consolidated in a particular state court. Although the states might enter into some compact or reciprocal agreement that would permit all cases filed in the courts of the participating states to be transferred to a particular court in one of the states, this sort of arrangement would not reach cases filed in the federal courts unless Congress enacted legislation to effect such a result. The Committee believes that if Congress has to act, it might as well opt for a solution that would utilize the federal court system. The federal system already provides an existing structure and rules that are near uniform throughout the country and would appear to provide a better mechanism to handle the problems than *a* wholly new, if not novel, mechanism at the state level.

Of the federal solutions discussed above, the Committee prefers an approach that requires all litigants to appear in the same forum. There should be no opportunity to opt-out this would avoid litigation subsequent to the mass trial to determine if those who opted out should be bound by the results. There would be no question that those who were parties to the multidistrict case would be bound. Any disputes as to who is a proper party should be resolved Initially, not after the trial. The Committee also favors a federal choice-of-law rule, or perhaps even a federal standard, for determining punitive damages in tort cases that would be subject to the mass trial in a federal court. At the very least, the federal court should not be required to apply state choice-of-law rules in this setting.[89]

The Committee concluded that the national class action as proposed by the A.B.A. Section of Litigation could be substantially improved if the jurisdictional basis is expanded to include the situation where a defendant is subject to multiple punitive awards for the same act or course of conduct without regard to any effect on the plaintiffs' ability to collect adequate compensatory damages. This would address the problems of the defendants as well as those of the plaintiffs. At this time, the Committee believes that the interpleader approach, although it may have promise, is more novel and problematic than other approaches, and that the other federal approaches stand a better chance of being perfected and accepted by the Congress. Most, if not all, problems appear to be resolvable through the multidistrict or the national class action approach, and the Committee has concluded that these concepts should be pursued along with any others that hold promise for resolving the multiple awards problem.[90]

89. See Atwood, The Choice-of-Law Dilemma In Mass Tort Litigation, *supra* n. 84,

90. In some situations, Federal Rule of Civil Procedure 23 may provide some relief. See, eg., In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718(E.D.N.Y. 1983) where the trial court permitted the certification of a mandatory class for punitive damages pursuant to Rule 23(b)(1){b). The court, while casting doubt on whether punitive damages would exhaust the defendant's resources so that early claimants might deprive later claimants of the opportunity to recover compensatory damages, Indicated It would be equitable to share whatever punitive damages that were allowed among all plaintiffs who ultimately recover compensatory damages rather than permitting the punitive award to go only to the early claimants. Other aspects of the decision were affirmed on appeal, but since the case was settled, the appellate court specifically refused to address the propriety of the punitive damage class certification under Rule 23(b)(1)(b). In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 167 (2nd Cir. 1987), cert. denied, 108S.C1 2899(1988).

V. CONCLUSION

Although there has been a substantial amount of study and discussion which has resulted in some changes with regard to the role of punitive damages in the civil justice system, the Committee on Special Problems in the Administration of Justice has concluded that there still are serious problems that have not been adequately resolved by the courts or the legislatures. This report is intended to facilitate the resolution of the problems by offering specific recommendations on these matters. In offering them, the Committee believes that the recommendations are in the best interest of all that are affected by the civil justice system in America and that the adoption of these recommendations by the various jurisdictions involved will result in definite improvements in the administration of justice in this country.[91]

The Board of Regents of the American College of Trial Lawyers has approved this report and has ordered that it be printed and disseminated to the Fellows of the College, the American Law Institute, the American Bar Association and others interested in the subject of punitive damages.

91. We take this opportunity to express our deep appreciation to Professor Roger Henderson for his assistance in this assignment.

APPENDIX

Model Jury Instructions on Punitive Damages

The plaintiff in this case is seeking to recover punitive damages in addition to those damages that are designed to compensate the plaintiff for any injuries that have resulted in [e.g., lost earnings, medical expenses or conscious pain and suffering]. It is within your discretion whether to award any punitive damages, in determining whether to award punitive damages, you must comply with the following instructions. To justify an award of punitive damages, the plaintiff must persuade you by clear and convincing evidence that:

(1) the defendant either intended to harm the plaintiff or that the defendant realized that there was a strong probability that the plaintiff would be seriously harmed;

(2) the defendant acted with malice or with an evil mind or that the defendant's conduct was outrageous; and

(3) the defendant deserves to be punished, deterred or made an example of because of [his][her] conduct.

Punitive damages are designed to punish and deter a defendant from intentionally or consciously harming others without any good reason or justification. Such awards also are meant to deter others from committing the same acts. The fact that the defendant may have been negligent or even extremely careless is not a sufficient reason for you to award punitive damages. To award punitive damages, you must find that the defendant acted with knowledge that [his][her] conduct would cause harm to the plaintiff or that the defendant realized that there was a strong probability that the plaintiff would be seriously harmed. If you are not persuaded by clear and convincing evidence that the defendant had this knowledge, or realization, then you may not award punitive damages against the defendant.

If you find that punitive damages are to be awarded against the defendant, you must then determine the amount to be awarded. In doing so, you must find the amount that you are persuaded by clear and convincing evidence is fair and reasonable under the circumstances. In making that finding, you may take into consideration one or more of the following factors to the extent you find them relevant:

(1) the nature of defendant's conduct;

(2) the impact of defendant's conduct on the plaintiff;

(3) the relationship between the plaintiff and defendant;

(4) the likelihood that the defendant would repeat the conduct if a punitive award is not made;

(5) the defendant's financial condition; and

(6) any other circumstances shown by the evidence, including any circumstances of mitigation, that bear on the question of the size of any punitive award.

The purpose of punitive damages is to punish and deter, not to vanquish or annihilate the defendant. Although there is no fixed mathematical formula for you to use in determining the amount of a punitive award, you should strive to set the amount of any award at a level that you determine imposes a fair and reasonable punishment for the amount and type of injury that you find that the defendant has caused the plaintiff.

[Vicarious liability of principal or employer.]

[If you have found, under the instructions I have given you, that the conduct of _____ [an employee or agent, including one acting in a managerial capacity for a corporate entity] is such as to warrant an award of punitive damages, you should then consider whether any such award should be made against the defendant _____ [employer, principal or corporation].

If you find from the evidence that the defendant _____[employer, principal or corporation] either authorized, participated in, consented to, acquiesced in, or ratified the actions of [the employee, agent or manager], with knowledge of their wrongful character, you may exercise your discretion to award punitive damages against _____, [employer, principal or corporation] too. [You may also consider such an award if you find from the evidence that the defendant _____ [employer, principal or corporation] was reckless in selecting _____ [employee, agent or manager] or in retaining him with knowledge that he would be likely to inflict injury of this nature.]]

Appendix IV.

PRESENTATION TO THE HOUSE OF DELEGATES WORKGROUP ON PUNITIVE DAMAGES

Concept and History of Maryland Punitive Damages Law

November 10, 2016

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FUNDAMENTAL DIFFERENCES BETWEEN COMPENSATORY DAMAGES, PUNITIVE DAMAGES, AND CRIMINAL PUNISHMENT

Compensatory Damages	Punitive Damages	Criminal Punishment
Compensate and deter	Punish and deter	Punish and deter
Must be awarded	Discretionary	Must be imposed
More likely than not proof	Clear and convincing proof	Beyond a reasonable doubt proof
Interested plaintiff; defendant's constitutional rights limited to civil due process	Interested plaintiff; defendant's constitutional rights limited to civil due process	Disinterested prosecutor; right to counsel; right against self-incrimination

Conceptually, punitive damages might be imposed either based on the degree of negligence, or for conduct distinct from negligence.

Grading Negligence:

Was the conduct dumb, really dumb, or really really dumb?

THE STANDARD FOR PUNITIVE DAMAGES: ACTUAL V. IMPLIED MALICE

"In Maryland the criticism [of punitive damages] has been partly fueled and justified because juries are provided with imprecise and uncertain characterizations of the type of conduct which will expose a defendant to a potential award of punitive damages." *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 451 (1992).

In 1972 the Court of Appeals decided *Smith v. Gray Concrete Pipe* by adopting an implied malice standard for punitive damages in auto tort cases. The new standard was "gross negligence," which was defined as a "wanton or reckless disregard for human life." *Zenobia*, 325 Md. at 456.

ZENOBIA RULING

"The gross negligence standard has led to inconsistent results and frustration of the purposes of punitive damages in non-intentional tort cases." *Zenobia*, 325 Md. at 456.

"Gross negligence simply covers too broad and too vague an area of behavior, resulting in an unfair and inefficient use of the doctrine of punitive damages . . . . A similar problem exists with allowing punitive damages based merely upon 'reckless' conduct. To sanction punitive damages solely upon the basis of conduct characterized as heedless disregard of the consequences would be to allow virtually limitless imposition of punitive damages." *Zenobia*, 325 Md. at 457, *quoting Tuttle v. Raymond,* 494 A.2d 1353, 1361 (Me.1985).

ZENOBIA RULING

"The implied malice test adopted in *Smith v. Gray Concrete Pipe Co.* has been overbroad in its application and has resulted in inconsistent jury verdicts involving similar facts. It provides little guidance for individuals and companies to enable them to predict behavior that will either trigger or avoid punitive damages liability, and it undermines the deterrent effect of these awards." *Zenobia*, 325 Md. at 459.

ZENOBIA RULING

"Therefore, we overrule *Smith v. Gray Concrete Pipe Co.* and its progeny .... **In a non-intentional tort action, the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud**, i.e., 'actual malice.'" *Zenobia*, 325 Md. at 460.

INTERPRETATION OF *ZENOBIA*

Zenobia standard applies to **intentional torts** as well as unintentional. *Adams v. Coates*, 331 Md. 1 (1993).

To obtain punitive damages for **common law fraud**, plaintiff must show that the defendant knew its misrepresentation was false, among all the elements of fraud. "'[R]eckless disregard' or 'reckless indifference' concerning the truth of the representation falls short of the *mens rea* which is required to support an award of punitive damages." *Ellerin v. Fairfax Savings, F.S.*, 337 Md. 216, 235 (1995).

"[F]or punitive damages to be allowable in **malicious prosecution** actions, a plaintiff must establish by clear and convincing evidence the defendant's wrongful or improper motive for instigating the prosecution." *Montgomery Ward v. Wilson*, 339 Md. 701, 735 (1995).

INTERPRETATION OF *ZENOBIA*

Punitive damages in **defamation** action require proof of the defendant's actual knowledge of the falsity of his words. *LeMarc's Management Corp. v. Valentin*, 349 Md. 645 (1998).

"Where the defendant converts property with a consciousness of the wrongfulness of that **conversion**, he or she possesses the requisite improper motive to justify the imposition of punitive damages." *Darcars Motors of Silver Spring, Inc., v. Borzym*, 379 Md. 249, 266 (2004).

APPLICATION OF *ZENOBIA*

Young African-American employee was fired for alleged shoplifting, and prosecuted. In juvenile hearing the youth was acquitted. He then successfully sued for defamation, malicious prosecution, and false imprisonment. Compensatory and punitive damages were awarded. Evidence was sufficient for punitive damages, but a new trial was ordered for procedural reasons. *Caldor, Inc. v. Bowden*, 330 Md. 632 (1993).

APPLICATION OF *ZENOBIA*

Defendant had BAC of .19. Defendant had been convicted multiple times of DWI or DUI. Plaintiff was struck from rear by defendant who was obeying the speed limit but failed to stop his vehicle at a stop light. He admitted liability, Circuit Court ruled that punitive damages could not be awarded, and excluded all evidence about defendant driving drunk. The compensatory damages awarded by the jury were limited to economic loss.

The Court found the case "presents no facts from which a jury would be permitted, under *Zenobia*, to infer that Sparks's conduct was characterized by evil motive, intent to injure, ill will, or fraud. Indeed, the proffer reflects that, at the time of the accident, Sparks's state of mind was to the contrary of that required by *Zenobia*. His intent was to avoid injury to those stopped ahead of him. He had not been traveling at an excessive speed, and he was attempting to stop the truck." *Komornik v. Sparks*, 331 Md. 720, 725-726 (1993).

APPLICATION OF *ZENOBIA*

"While the evidence was sufficient to show that Sparks had actual knowledge that he was intoxicated, the evidence also shows that he was not consciously disregarding the consequences of his drunkenness. He was trying to stop the truck which would have been stopped under similar circumstances by a sober driver. Sparks, admittedly, was negligent and liable to compensate the victims of his negligence. For purposes of punitive damages under *Zenobia*, however, characterizing the degree of the negligence is immaterial." *Komornik v. Sparks*, 331 Md. 720, 727 (1993).

APPLICATION OF *ZENOBIA*

In a commercial dispute, the first verdict held defendants liable for more than $40 million in punitive damages on actual damages of about $250,000. After defendants paid the compensatory damages a second jury held defendants liable for $5 million in punitive damages. The Court of Appeals then held there was no evidence that the defendant was motivated by ill will or spite. *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635 (1994).

APPLICATION OF *ZENOBIA*

Plaintiff was lessee of office space from defendant. They also had a consulting agreement. Defendant failed to pay for consulting services. Plaintiff threatened suit, and defendant responsively threatened to litigate in bad faith. Plaintiff filed suit, and when defendant was served he locked plaintiff out of the leased office. Court found evidence of actual malice because the harms defendant caused were in retribution and not in furtherance of any legitimate motive. *Postelle v. McWhite*, 115 Md. App. 721 (1997).

APPLICATION OF *ZENOBIA*

Upon retrial of *Bowden v. Caldor*, the Court noted that the defendant's store manager expressed racial animus to the young employee, and that there was no evidence of theft, much less that the plaintiff committed the alleged theft. On re-trial the jury awarded $9 million in punitive damages. The case was remanded for further proceedings concerning the amount of the punitive damages. *Bowden v. Caldor, Inc.*, 350 Md. 4 (1998).

APPLICATION OF *ZENOBIA*

Defendant converted a car from plaintiff by wrongful repossession. Defendant refused to return the car, the deposit, or plaintiff's personal possessions in the car, and there was evidence of ethnic animus. Jury awarded punitive damages, and the judgment was affirmed. *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249 (2004).

APPLICATION OF *ZENOBIA*

Plaintiffs victimized in a flipping scheme sued for fraud and conspiracy. Punitive damages were dismissed as to some defendants and awarded by the jury as to the other defendants. Dismissal of some punitive damages claim was in error, because the evidence permitted the inference that all defendants acted with the required actually knowledge and intent to economically injure the plaintiffs. *Hoffman v. Stamper*, 385 Md. 1 (2005).

APPLICATION OF *ZENOBIA*

In foreclosure fraud claim, jury awarded compensatory and punitive damages, which were imposed on the employer based on *respondeat superior*. Court held that employer is liable for punitive damages on that basis. *Fidelity First Home Mortgage Co. v. Williams*, 208 Md. App. 180 (2012).

APPLICATION OF *ZENOBIA*

Police officer engaged in hot pursuit of a motorcycle in violation of procedure and orders. After breaking off hot pursuit, squad car accidentally struck motorcycle and rider died. Police officer was liable for civil battery. "The intent required for proof of a battery claim 'requires not a specific desire to bring about a certain result, but rather a general intent to unlawfully invade another's physical well-being through a harmful or offensive contact or an apprehension of such a contact.' This does not equate implicitly or necessarily to actual malice, which requires more than the general intent necessary to prove a civil battery. It requires proof of a specific intent to injure the plaintiff." *Beall v. Holloway–Johnson*, 446 Md. 48, 72-73 (2016).

SUMMARY

Maryland law awards compensatory damages to compensate for harms caused by the breach of tort or contract law, and to deter others from committing similar breaches.

If compensatory damages are awarded, Maryland law also permits punitive damages, where distinctive circumstances warrant. Where ill will or intent to harm motivate a breach of tort duty or contract, punitive damages are justified. In the absence of those distinctive circumstances, however, punitive damages are not justified and they are unconstrained by any principle. Grading the extent of negligence is a rhetorical exercise which Maryland law has learned to avoid.

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