

# Punitive Damages in Commercial Transportation:

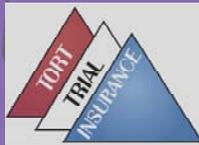
A State by State Summary

Edited by:

Edgar M. Elliott, IV

&

Andrew T. Stephenson



*...Bringing Together Plaintiffs' Attorneys, Defense Attorneys  
and Insurance and Corporate Counsel for the  
Exchange of Information and Ideas*

**Tort Trial & Insurance Practice Section**  
**a section of the American Bar Association**

© 2007 American Bar Association.

Produced by the Tort Trial & Insurance Practice Section, Commercial Transportation Committee, 321 N. Clark St, Chicago, IL 60610.

Cover design produced by Wanda G. Workman.

## **INTRODUCTION**

The Commercial Transportation Litigation Committee of the American Bar Association is pleased to provide with you with this Punitive Damages Compendium for the Fifty States and the District of Columbia. The purpose of the Compendium is to provide an easy reference for industry members, insurance representatives, adjusters, and attorneys, to the general threshold test for awarding punitive damages in every jurisdiction.

Each article will provide you with a summary description of that general test for each State. At times, where relevant and space limitations allowed, our authors have also addressed other issues pertinent to the topic of punitive damages. The summaries are just that, summaries only, and they are not intended to provide an exhaustive analysis of the issue.

The authors are attorneys and claims people who practice in the respective jurisdictions. Each author is designated at the bottom of each summary and you are encouraged to follow up with them directly for additional information or a more in depth analysis, should that be required. We hope this Compendium is helpful to you in your work or practice. As always, for specific legal advice on a specific matter, please contact your attorney. No effort is made here to provide such advice.

For further information about the Commercial Transportation Litigation Committee, please visit our website at [www.abanet.org/tips/commercial/home](http://www.abanet.org/tips/commercial/home).

**ALABAMA**  
**By Edgar M. Elliott, IV**

The recovery of punitive damages against a trucking company or its driver is primarily governed by statute in Alabama. To recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice.” Ala. Code §6-11-20(a) 1975.

The statute defines wantonness as “conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.” Ala. Code §6-11-20(b). Case law defines wantonness as the conscious doing of some act or the omission of some duty by one who has knowledge of existing conditions and who is conscious that from the doing of such act or omission that injury will likely or probably result.” Rommell v. Automobile Racing Club of Am., Inc., 964 F.2d 1090 (11<sup>th</sup> Cir. 1992). Negligence and wantonness are qualitatively different tort concepts.” Id. Implicit in wanton, willful, or reckless misconduct is an acting, with knowledge of danger, or with consciousness, that the doing or not doing of some act will likely result in injury.” Abston v. Kelley Brothers Contractors, 990 F. Supp. 1392 (M.D. Ala. 1998).

Alabama statutory law limits the recovery of punitive damages against the trucking company based on its vicarious liability for the conduct of the employee truck driver to those circumstances where the trucking company (1) negligently employed or continued to employ the driver; (2) participated in, authorized or ratified such misconduct; or (3) received some benefit from the misconduct. Abston v. Kelley Brothers Contractors, 990 F.Supp. at 1394; Ala. Code §6-11-27 (1975 & Supp. 1991).

Alabama has statutory caps on punitive damages. By statute, awards for punitive damages in civil actions involving claims for physical injury cannot exceed three times the compensatory award or \$1,500,000.00, whichever is greater. Ala. Code §6-11-21(d) (1975 & Supp. 1991). These limitations do not apply to the recovery of punitive damages for wrongful death.

Punitive damages are the only damages recoverable in an action for Wrongful Death in Alabama. Ala. Code §6-5-410 (1975 & Supp. 1991). In such an action, punitive damages may be awarded based on negligent conduct only. Alabama Power Co. v. Turner, 575 So. 2d 551 (Ala. 1991). The punitive damages recoverable are determined by the gravity of the wrong, the propriety of punishing the wrongdoer, and the need for deterring others from committing the same wrongful conduct. Estes Health Care v. Bannerman, 411 So. 2d 109, 113 (Ala. 1982).

**Author:** Edgar M. Elliott, IV is a partner with the firm Christian & Small, LLC, 505 20<sup>th</sup> Street North, Suite 1800, Birmingham, Alabama 35203. [www.csattorneys.com](http://www.csattorneys.com). He can be reached at (205) 250-6603 and [emelliott@csattorneys.com](mailto:emelliott@csattorneys.com).

**ALASKA**  
**By James F. Whitehead**

Alaska law permits recovery of punitive damages under some circumstances (AS 09.17.020), including cases involving motor vehicle accidents. See Fleegel v. Estate of Boyles, 61 P.3d 1267 (Alaska 2002); Laidlaw Transit, Inc. v. Crouse, 53 P.3d 1093 (Alaska 2002)(school bus rollover accident where driver tested positive for marijuana). Awards of punitive damages require proof, by clear and convincing evidence, of outrageous conduct, including acts done with malice or bad motives, or conduct involving reckless indifference to the interest of another person. The Supreme Court of Alaska has stated that the central purpose of punitive damages “is to punish the wrongdoer and to deter him from future misconduct.” Jane Doe v. Colligan, 753 P.2d 144, 146 (Alaska 1988). See also, Laidlaw. The applicable statute sets forth a number of factors that may be considered in determining the amount to be awarded. AS 09.17.020(c).

Tort reform legislation enacted in 1997, and modified in 2003, provides that half of any punitive damage award is to be paid into the State treasury. In the context in which a claim might be expected to arise in a trucking accident case, the amount of punitive damages is generally limited to the greater of three times the amount of compensatory damages awarded to the plaintiff or the sum of \$500,000 (much greater, however, if the conduct was motivated by financial gain with actual knowledge by the wrongdoer of the adverse consequences of the conduct).

A section added to the statute in 2003 provides that in a civil action in which an employer is determined to be vicariously liable for the act or omission of an employee, punitive damages will not be awarded against the employer, except in several prescribed circumstances, such as where the employer or its managerial agent authorized or ratified the conduct or where the employer acted recklessly in employing or retaining the employee. AS 09.17.020(k).

**Author: James F. Whitehead, Holmes Weddle & Barcott, 999 Third Avenue, Suite 2600, Seattle, WA 98104. [www.hwb-law.com](http://www.hwb-law.com). Holmes Weddle & Barcott has offices in Anchorage, Alaska, and Seattle, Washington. Mr. Whitehead resides in Seattle and works out of the Seattle office, although he is licensed to practice in Alaska as well as Washington. He can be contacted at (206) 292-8008. [jwhitehead@hwb-law.com](mailto:jwhitehead@hwb-law.com).**

**ARIZONA**  
**By Rae Richardson**

To be awarded punitive damages in Arizona, the plaintiff must prove by clear and convincing evidence that a defendant's wrongful conduct was guided by evil motives or willful or wanton disregard of the interests of others. Saucedo v. Salvation Army, 200 Ariz. 179, 182, 24 P.3d 1274, 1277 (App. 2001).

Clear and convincing evidence is the highest burden of proof in a civil case. Thompson v. Better Bilt Aluminum Products, 171 Ariz. 550, 557, 832 P.2d 203, 210 (1980) (clear and convincing evidence is "more onerous than a simple preponderance of the evidence"). Clear and convincing evidence is evidence that makes the truth of the contention "highly probable." State v. King, 158 Ariz. 419, 422, 763 P.2d 239, 242 (1988).

The "evil mind" standard is met only if plaintiffs prove: (1) facts showing that the defendant intended to cause injury; (2) facts demonstrating that the defendant's wrongful conduct was motivated by spite or ill will; or (3) facts showing that the defendant acted to serve his own interests, having reason to know and consciously disregarding a substantial risk that his conduct might significantly injure the rights of others." Bradshaw v. State Farm Mut. Auto. Ins. Co., 157 Ariz. 414, 422, 758 P.2d 1313, 1324 (1988).

It is the defendant's motivation - its state of mind - that is the crucial consideration. Gurule v. Illinois Mut. Life and Cas. Co., 152 Ariz. 600, 602, 734 P.2d 85, 87. Moreover, the acts complained of must have been reprehensible and outrageous acts of misconduct to permit punitive damages. Linthicum, 150 Ariz. 326, 331, 723 P.2d 675, 680.

**Author:** Rae Richardson is an attorney with Holloway, Odegard, Forrest, Kelly & Kasperek, P.C., 3101 North Central Avenue, Suite 1200, Phoenix, Arizona 85012, [www.hofkklaw.com](http://www.hofkklaw.com). She can be contacted at (602)240-6670 and [r Richardson@hofkklaw.com](mailto:r Richardson@hofkklaw.com).

## **ARKANSAS**

**By Lee L. Piovarcy and J. Lewis Wardlaw**

Arkansas courts may allow punitive damages only if the erring party “likely knew or ought to have known, in the light of the surrounding circumstances, that his conduct would naturally or probably result in injury.” D’Arbonne Constr. Co., Inc. v. Foster, 91 S.W.3d 540, 542 (Ark. Ct. App. 2002). “There must be some element of wantonness or such a conscious indifference to the consequences that malice might be inferred.” Id. at 543. Negligence alone, “however severe,” will never sustain an award of punitive damages. McLaughlin Reliable Truck Bros., Inc. v. Cox, 922 S.W.2d 327, 333 (Ark. 1996); *and see*, National By-Products, Inc. v. Searcy House Moving Co., Inc., 731 S.W.2d 194, 196 (Ark. 1987) (“Gross Negligence is not sufficient to justify punitive damages.”).

A person acts wantonly when, “notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, he proceeds into the presence of danger, with indifference to consequences and with absence of care.” National By-Products, Inc., 731 S.W.2d at 195. “Whether a vehicle is being operated in such a manner as to amount to wanton or willful conduct in disregard of the rights of others must be determined by the facts and circumstances of each individual case.” D’Arbonne Constr. Co., Inc., 91 S.W.3d at 543 (Upholding the award of punitive damages in a fatal logging truck accident where “there was not only evidence of gross negligence in the failure to maintain the braking and control systems of the truck . . . but there was also evidence that the brakes were intentionally disabled so that the truck could continue to operate, after a fashion, despite the lack of maintenance.” Id. at 546).

**Authors:** Lee L. Piovarcy is a shareholder with Martin, Tate, Morrow & Marston, P.C., International Place, Tower II, 6410 Poplar, Suite 1000, Memphis, Tennessee 38119. Martin, Tate, Morrow & Marston, P.C. has offices in Tennessee, Mississippi and Arkansas. [www.martintate.com](http://www.martintate.com). J. Lewis Wardlaw is an associate with Martin, Tate, Morrow & Marston, P.C. They can be reached at (901) 522-9000. Mr. Piovarcy can be reached at [lpiovarcy@martintate.com](mailto:lpiovarcy@martintate.com). Mr. Wardlaw can be reached at [lwardlaw@martintate.com](mailto:lwardlaw@martintate.com).

**CALIFORNIA**  
**By Kevin D. Smith**

In California it is difficult to meet the burden required to recover punitive damages. California Civil Code section 3294(a) permits the award of punitive or exemplary damages for actions not based on a contract only when the plaintiff has proven by clear and convincing evidence that "defendant has been guilty of oppression, fraud or malice."

Oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." California Civil Code section 3294. Despicable conduct is further defined as "conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." Tomaselli v. Transamerica Ins. Co., 25 Cal. App. 4th 1269, 1287 (1994) (citing BAJI No. 14.72.1 (1989 rev.)). Fraud is defined as "intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." In Ebaugh v. Rabkin, 22 Cal. App. 3d 891 (1972), the court stated that malice under section 3294 requires an intentional act, accompanied by aggravating circumstances.

The ability of a jury to award punitive damages is limited by subsection (b), which prevents employers from being held liable for the acts of an employee unless the employer had advance knowledge of the "unfitness of the employee" or ratified the wrongful conduct for which damages are being sought. Corporate employers are liable only if the ratification or advance knowledge was on the part of a corporate officer.

Punitive or exemplary damages are not awarded as a matter of right. See, Bille v. Manning, 94 Cal. App. 2d 142 (1949) (stating that a plaintiff is not awarded punitive damages as a matter of right and that the grant or withholding of punitive damages is within the jury's discretion). In the absence of an independent tort, punitive damages are never recoverable for breach of contract, despite malicious or willful conduct. See, Tomaselli, 25 Cal. App. 4th at 1286.

**Author: Kevin D. Smith is a senior partner of Wood, Smith, Henning & Berman, 505 N. Brand Blvd., Suite 1100, Glendale, California 91203-3804. [www.wshblaw.com](http://www.wshblaw.com). They have offices in California, Arizona and Nevada. Mr. Smith can be reached at (818)551-6001 and [ksmith@wshblaw.com](mailto:ksmith@wshblaw.com).**

**COLORADO**  
**By Tamara Cook and Courtney A. Fligeltaub**

In Colorado, punitive damages are available pursuant to statutory authority. Seward Construction Co. Inc. v. Bradley, 817 P.2d 971, 973 (Col. 1991); Col. Rev. Stat. Ann. 13-21-102.

Colorado's punitive damages statute states that in civil actions, "when damages are assessed by a jury for a wrong done to the person or to personal or real property and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages". Col. Rev. Stat. Ann. 13-21-102 (1)(a).

Reasonable exemplary damages are defined as an amount that does not exceed the amount of actual damages awarded to the injured party. Id. Evidence of the income or net worth of the defendant may not be considered in determining the award. Col. Rev. Stat. Ann. 13-21-102 (6). However, a court may increase the punitive damage award to a maximum of three times the amount of actual damages if the behavior of the defendant continued in a willful and wanton manner or the defendant knowingly behaved in a way that the damages were aggravated during the pendency of the case. Col. Rev. Stat. Ann. 13-21-102 (3)(a) and (b). The court may reduce or disallow the award to the extent that "the deterrent effect of the damages has been accomplished, the conduct which resulted in the award has ceased, or the purpose of the damages has otherwise been served. Col. Rev. Stat. Ann. 13-21-102 (2). Excessive awards of punitive damages are set aside if it appears to the reviewing court that the "jurors were impermissibly motivated by passion or prejudice." Ortinez v. Davis, 902 P.2d 905, 911 (Col. App. 1996).

A party making a punitive damages claim must prove their claim beyond a reasonable doubt. Coors v. Security Life of Denver Ins. Co., 112 P.3d 59, 65 (Col. 2005); Col. Rev. Stat. Ann. 13-25-127. If the wrongdoer is "conscious of his conduct and the existing conditions and knew or should have known that injury would result, the statutory requirements are met." Coors, 112 P.3d at 66. Furthermore, prejudgment interest does not apply to an award of punitive damages. Seward Construction Co. Inc., 817 P.2d at 979. Punitive damages are not subject to reduction by Colorado's comparative negligence statute. Lira v. Davis, 832 P.2d 240, 243 (Col. 1992). However, in the comparative negligence context, the amount of damages that a plaintiff may recover is "measured by the amount of compensatory damages after reduction for comparative negligence and pro rata liability." Id. at 246.

**Authors:** Tamara N. Cook and Courtney A. Fligeltaub are attorneys with Renaud Cook Drury Mesaros, P.A., Phelps Dodge Tower, One North Central, Suite 900, Phoenix, Arizona, 85004. Ms. Cook can be reached at (602) 256-3055 and [tcook@rcdmlaw.com](mailto:tcook@rcdmlaw.com). Ms. Fligeltaub can be reached at (602) 256-3061 and [cfligeltaub@rcdmlaw.com](mailto:cfligeltaub@rcdmlaw.com).

**CONNECTICUT**  
**By Brian Del Gatto**

Under Connecticut law, the measure of punitive damages rests in the sound discretion of the trier of fact. Freeman v. Alamo Management Co., 221 Conn. 674 (1992). In order to award punitive or exemplary damages, the evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. The basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence. A plaintiff may recover punitive damages even if he does not specifically plead them in the body of the complaint or the claims for relief. Chapman Lumber, Inc. v. Clifford L. Tager, Conn. Super. 2005 LEXIS 863.

Preponderance of the evidence is the standard of proof required for a punitive damages award. Freeman v. Alamo Management Co., 221 Conn. 674 (1992). Punitive damages are available for almost any cause of action pled and proved.

Punitive damages are not generally insurable. In Tedesco v. Maryland Casualty Co., 127 Conn. 533 (1941), it was held that a tortfeasor may not protect himself from liability by seeking indemnity from his insurer for punitive damages that were imposed on him for his own intentional or reckless wrongdoing. See also, Bodner v. United Services Automobile Ass'n., 222 Conn. 480 (1992); Laudette v. Peerless Ins. Co., 2000 Conn. Super. Lexis 1750.

There is no specific case law or statutory relationship between punitive and compensatory damages. Punitive damages are limited to the costs of litigation, less taxable costs. Purcell v. Vogt, 2003 Conn. Super. Lexis 1339. However, there are statutory exceptions to the rule that punitive damages are limited to litigation expenses in excess of taxable costs. Freeman v. Alamo Management Co., 221 Conn. 674. For example, Conn. Gen. Stat. § 47a-46 states that double damages are allowed in a civil action if the defendant has entered into the land, tenement or dwelling unit by force or after entry held the same by force or otherwise injured the party aggrieved in the manner described in § 47a-43.

Punitive damages are taxable and payable to the plaintiff. 26 U.S.C.S. § 104(a)(2) states that gross income includes the amount of punitive damages; see also, O'Gilvie v. U.S., 519 U.S. 79 (1996), where the court held that punitive damages were not excluded from income taxation because they were not received on account of personal injuries.

**Author:** Brian Del Gatto is an attorney with WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, 177 Broad Street, 6<sup>th</sup> Floor, Stamford, Connecticut, 06901. [www.wilsonelser.com](http://www.wilsonelser.com). He can be reached at (203) 388-9100 and [Brian.Delgatto@wilsonelser.com](mailto:Brian.Delgatto@wilsonelser.com).

**DELAWARE**  
**By Delia A. Clark**

Under Delaware law, punitive damages are awarded to either deter or punish the defendant's conduct, not to make the plaintiff whole. Jardel Co. v. Hughes, 523 A.2d 518, 528 (Del. 1987). Punitive damages are recoverable if the defendant's actions were wanton or in willful disregard for the safety of others. In effect, punitive damage awards are civil penalties which require evidence of "egregious conduct of an intentional or reckless nature."

Wanton conduct was defined by the Delaware Supreme Court as "conscious indifference" to the consequences and circumstances where the probability of harm is reasonably apparent. However, the harm does not have to be intentional. McHugh v. Brown, 125 A. 2d 583 (Del. 1956). Essentially it is an "I don't care attitude" that is the crux of reckless indifference mentality that is required to allow punitive damages.

A plea of guilty to Reckless Driving Alcohol Related has been sufficient to establish a minimum threshold to allow the issue of punitive damages to be submitted to the jury. Short v. Drewes, 03C-08-026 (Judge Carpenter, June 21, 2006).

If there is evidence submitted of the defendant's conduct which arguably meets this standard, whether to award punitive damages becomes an issue of fact to be determined by the jury. Punitive damages are recoverable for acts accompanied by malice. Jardel Co., Inc. v. Hughes, 523 A.2d 518 (Del. Supr. 1987).

Generally, punitive damages are insurable in Delaware, Whalen v. On-Deck, Inc., 514 A.2d 1072 (Del. 1986); Transamerica Corp. v. Reliance Ins. Co. Of Ill., 94C-10-221, 1996 WL 659014 (Del. Super. 8/30/96), but an exclusion of punitive damages is permissible and will be deemed valid.

**Author: Delia A. Clark, Esquire, is of Counsel to Rawle & Henderson, LLP, 300 Delaware Avenue, Suite 1015, Wilmington, Delaware 19801. [www.rawle.com](http://www.rawle.com). They have offices located in Delaware, Pennsylvania, New Jersey and New York. Ms. Clark can be (302) 778-1200 or [dclark@rawle.com](mailto:dclark@rawle.com).**

## **DISTRICT OF COLUMBIA**

**By John A. C. Cartner and Richard P. Fiske**

Punitive damages are available in civil cases in the District of Columbia. In 1952 the court found that an instruction to the jury on punitive damages would be warranted only if the operator of a streetcar was “deliberately setting out to inflict an intentional injury.” Darrin v. Capital Transit Co., 90 A.2d 823 (D.C. 1952).

Under current case law, an award of punitive damages requires a showing by a preponderance of the evidence that the defendant committed a tortuous act and a showing by clear and convincing evidence that “the act was accompanied by conduct and a state of mind evincing malice or its equivalent.” Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 938 (D.C. 1995).

The amount of punitive damages which can be awarded by the jury is limited. “Because the purpose of punitive damages is to punish a tortfeasor and deter future conduct, the amount of such damages should be enough to inflict punishment, while not so great as to exceed the boundaries of punishment and lead to bankruptcy.” Id. at 941.

Finally, there are limitations on when punitive damages can be awarded against a principal based on the actions of an agent. “When the defendant is a corporation, it must appear that the act was authorized or ratified by the corporation rather than merely by an employee of the corporation.” Wright v. Crown Co., 267 A.2d 347, 350 (D.C. 1970) cited in Franklin Investment Co. v. Smith, 383 A.2d 255 (D.C. 1978).

**Authors: John A. C. Cartner and Richard P. Fiske are attorneys with Cartner & Fiske, 1717 K Street, N.W., Suite 600, Washington, D.C. 20036. They can be reached at (202) 429-2500 and [jacc@cartnerfiske.com](mailto:jacc@cartnerfiske.com) and [rpf@cartnerfiske.com](mailto:rpf@cartnerfiske.com).**

**FLORIDA**  
**By Eugene G. Beckham**

Section 768.72(2), Florida Statutes (2005) holds a defendant liable for punitive damages if he was personally guilty of intentional misconduct or gross negligence. §768.72(3) holds an employer, principle, corporation or other legal entity liable for punitive damages if the conduct of an employee or agent was intentional or rose to the level of gross negligence ***and*** the employer actively and knowingly participated or knowingly condoned, ratified or consented to the conduct; or, engaged in conduct rising to the level of gross negligence that contributed to the injury or loss. §768.725, Florida Statutes (2005) establishes Plaintiff's burden to prove entitlement to punitive damages by clear and convincing evidence and the amount must be proved by the greater weight of the evidence. §768.73.

Florida Statutes (2005) generally limits punitive damages to three times compensatory damages or \$500,000, unless the Plaintiff can demonstrate by clear and convincing evidence that the award is not excessive. If the finder of fact determines that the wrongful conduct was motivated solely by unreasonable financial motives then punitive damages of up to four times the compensatory damages or \$2 million can be awarded. If the Defendant intended to damage the Plaintiff, there is no cap.

Pursuant to § 768.72 a party is not subject to a punitive damages claim and financial worth discovery "until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages" and a plaintiff must provide the trial court with a reasonable basis for punitive damages before the court may allow such a claim. Globe Newspaper Co. v. King, 658 So. 2d 518, 519 (Fla. 1995).

In order for an employer to be held vicariously liable for punitive damages under the doctrine of respondeat superior, there must be some fault on his part which foreseeably contributed to the Plaintiff's injury, though it is not necessary that the "fault" be willful and wanton. Mercury Motors Express v. Smith, 393 So. 2d 545 (Fla. 1981). Wrongful conduct by a managing agent or a primary owner can cause direct punitive damages liability. Schropp v. Crown Euro Cars, Inc., 654 So. 2d, 1158 (Fla. 1995).

Florida public policy prohibits liability insurance coverage for punitive damages assessed against a person because of his own wrongful conduct. US Concrete Pipe Company v Boulder, 437 So. 2d 1061 (Fla.1983).

**Author: Eugene G. Beckham, is an attorney with BECKHAM & BECKHAM, PA, 1550 N.E. Miami Gardens Drive, Suite 504, Miami, Florida 33179. [www.beckhamlaw.com](http://www.beckhamlaw.com). He can be reached at (305)957-3900 or [egb@beckhamlaw.com](mailto:egb@beckhamlaw.com).**

## GEORGIA

**By Hall McKinley, III and Michael Miller**

O.C.G.A. §51-12-5 governs Georgia punitive damages law. The Code provides that punitive damages may be awarded only where there is evidence that the defendant's actions demonstrated "willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. §51-12-5.1(b)(2006). Thus, negligence, even gross negligence, is not sufficient to support a punitive damages award. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, cert. denied, 204 Ga. App. 922, 423 S.E.2d 257 (1992); Bartja v. National Union Fire Ins. Co., 218 Ga. App. 815, 463 S.E. 2d 358 (1995). Where there is no evidence of malice, fraud or oppression, the plaintiff must prove willful misconduct, conscious indifference or wantonness for the court to impose punitive damages. Id. at 949.

Georgia case law defines "conscious indifference" as "an intentional disregard of the rights of another, knowingly or willfully disregarding such rights." Hutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir. 1993) quoting Gilman Paper v. James, 235 Ga. 348, 219 S.E. 2d 447 (1975).

Intent is indicated by a person's desire to cause the consequences of his actions, or the belief that the consequences of his actions are substantially certain to result from it. Restatement, Torts 2d. §8A (1965). However, "mere knowledge and appreciation of the risk, short of a substantial certainty, is not the equivalent of intent." Eubanks v. Nationwide Ins. Co., 195 Ga. App. 359, 393 S.E. 2d 452 (1990).

The standard of proof for punitive claims is clear and convincing evidence. O.C.G.A. §51-12-5.1(g) (2006).

O.C.G.A. §51-12-5 imposes a cap of \$250,000.00 on punitive damages per plaintiff and per defendant. O.C.G.A. §51-12-5.1(g) (2006). The cap can be stacked if there are multiple plaintiffs or multiple defendants. This cap is waived with regard to torts where the defendant acted or failed to act with a specific intent to injure or while under the influence of alcohol or drugs. Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003).

**Authors:** Hall McKinley, III and Michael Miller are attorneys with Drew, Eckl, & Farnham, LLP, 880 West Peachtree Street, Atlanta, Georgia, 30357. [www.deflaw.com](http://www.deflaw.com). Mr. McKinley can be reached at (404) 885-6320 and [hmckinley@deflaw.com](mailto:hmckinley@deflaw.com). Mr. Miller can be reached at (404) 885-6421 and [mmiller@deflaw.com](mailto:mmiller@deflaw.com).

**HAWAII**  
**By Tracy G. Chinen**

The law in Hawai'i requires that "punitive damages may be awarded only in cases where the wrongdoer 'has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations'; or where there has been 'some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.'" Kang v. Harrington, 59 Haw. 652, 660-61, 587 P.2d 285, 291 (1978); see also Quedding v. Arisumi Brothers, Inc., 66 Haw. 335, 340, 661 P.2d 706, 710 (1983) (Conduct amounting to "wanton, oppressive, malicious, or reckless behavior" is required for the imposition of punitive damages.) The mere commission of a tort is insufficient to justify the imposition of punitive damages. Masaki v. General Motors Corp., 71 Haw. 1, 12, 780 P.2d 566, 573 (1989). Punitive damages are not awarded for mere inadvertence, mistake or errors of judgment; "something more" is required. Id.

It is also well settled in Hawai'i that a stricter degree of proof than mere preponderance of the evidence is required for punitive damages to be awarded. Evidence for the imposition of punitive damages must be proved by clear and convincing evidence. Punitive damages "are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate. . ." Id., 71 Haw. at 16-17, 780 P.2d at 575

The "proper measurement of punitive damages should be '[t]he degree of malice, oppression, or gross negligence which forms the basis for the award and the amount of money required to punish the defendant . . ." Kang, 59 Haw. at 663, 587 P.2d at 291 (quoting Howell v. Associated Hotels, 40 Haw. 492, 501 (1954)).

**Author:** Tracy G. Chinen is an attorney with the firm Rush Moore, LLP, Pacific Guardian Center, Suite 2400, Mauka Tower, 737 Bishop Street, Honolulu, Hawaii, 96813. [www.rmhawaii.com](http://www.rmhawaii.com). He can be reached at (808) 521-0400 or [Tchinen@rmhawaii.com](mailto:Tchinen@rmhawaii.com).

**IDAHO**  
**By Raymond D. Powers**

Punitive damages in Idaho are governed by Idaho Code Section 6-1604. This code section renders punitive damages unavailable in many civil actions as it requires a claimant to prove “oppressive, fraudulent, malicious or outrageous conduct” by clear and convincing evidence in order to recover punitive damages. Idaho Code § 6-1604(1).

Courts in Idaho have stated that punitive damages are not favored in the law and should only be awarded in the most “unusual and compelling” circumstances. Cheney v. Palos Verdes Inv. Corp., 104 Idaho 897, 904 – 05, 665 P.2d 661, 668 – 69 (1983); O’Neal v. Vasseur, 118 Idaho 257, 265, 796 P.2d 134, 142 (Ct. App. 1990). The policy behind awarding punitive damages in Idaho is focused on deterrence, rather than punishment. Soria v. Sierra Pacific Airlines, Inc., 111 Idaho 594, 610, 726 P.2d 706, 722 (1986). Punitive damages can only be pled with Court approval following a motion to amend with an appropriate showing of facts sufficient to support an award.

Idaho Code Section 6-1604 was modified by the State Legislature in 2003 in a manner favorable to defendants. Specifically, the burden of proof on the party seeking punitive damages was raised from a mere preponderance of evidence to the more stringent clear and convincing standard. Idaho H. 92, 57th Leg., 1st Sess. (March 26, 2003). In addition, the legislature imposed a statutory cap limiting punitive damages to the greater of \$250,000 or an amount which is three (3) times the compensatory damages awarded. Id.

**Author: Raymond D. Powers, Esq., is a partner with the firm Hall, Farley, Oberrecht & Blanton, P.A., Key Financial Center, 702 West Idaho Street, Suite 700, Boise, Idaho 83701-1271. [www.halfarley.com](http://www.halfarley.com). Mr. Powers can be reached at (208) 395-8500 or at [rdp@halfarley.com](mailto:rdp@halfarley.com).**

**ILLINOIS**  
**By Marshall Seeder**

In Illinois, the initial decision as to whether punitive damages may be imposed in a particular case is a matter of law reserved to the trial judge. Loitz v. Remington Arms Co., 138 Ill. 2d 404, 414, 563 N.E.2d 397, 401 (1990). Because of their penal nature, punitive damages are not favored. Id. The conduct complained of must involve “some element of outrage similar to that usually found in crime.” Id. at 415, 563 N.E.2d at 402 (quotations omitted). “The conduct must be outrageous, either because the defendant’s acts are done with evil motive or because they are done with reckless indifference to the rights of others.” Id. at 415-16, 563 N.E.2d at 402 (quotations omitted). As the Illinois Supreme Court has observed:

It has long been established in this State that punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.

Stojkovich, 281 Ill. App. 3d at 743, 666 N.E.2d at 712 (quoting Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186, 384 N.E.2d 353, 359 (1978)); see also Franz, 352 Ill. App. 3d 1129, 818 N.E.2d at 366 (punitive damages are available “only in cases where the wrongful act complained of is characterized by wantonness, malice, oppression, willfulness, or other circumstances of aggravation.”).

Under the applicable case law, “willful and wanton” misconduct sufficient to support a punitive damages award “approaches the degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it.” Loitz, 138 Ill. 2d at 416, 563 N.E.2d at 402 (citation omitted); see also Obermaier v. Obermaier, 128 Ill. App. 3d 602, 610, 470 N.E.2d 1047, 1054 (1st Dist. 1984) (“Punitive damages are appropriate to punish and deter conduct where the defendant is guilty of ... an intentional breach of fiduciary duty”) (emphasis added).

In this vein, if the defendant’s misconduct is not “above and beyond” the conduct need to establish the underlying cause of action, punitive damages should not be awarded. Petty v. Chrysler Corp., 343 Ill. App. 3d 815, 828, 799 N.E.2d 432, 444 (1st Dist. 2003) (quoting Canel and Hale, Ltd. v. Tobin, 304 Ill. App. 3d 906, 920, 710 N.E.2d 861, 873 (1st Dist. 1999)); see also Cress v. Recreation Servs., Inc., 341 Ill. App. 3d 149, 183, 795 N.E.2d 817, 849 (2d Dist. 2003) (reversing award of punitive damages because “plaintiff did not prove any acts of [the defendant] that exceeded what was necessary to prove the tort itself”).

**Author: Marshall Seeder is an attorney with the Chicago firm of Sachnoff & Weaver, Ltd., 10 South Wacker Drive, 40<sup>th</sup> Floor, Chicago, Illinois 60606. [www.sachnoff.com](http://www.sachnoff.com). He can be contacted at (312) 207-6537 or [mseeder@sachnoff.com](mailto:mseeder@sachnoff.com).**

## INDIANA

**By Lew Bricker and Carolyn E. Kang**

In Indiana, punitive damages are imposed to deter and punish wrongful activity and require a different showing than that required for an award of compensatory damages. Cheatham v. Pohle, 789 N.E.2d 467, 471 (Ind. 2003). A plaintiff must prove the facts supporting punitive damages by clear and convincing evidence. Ind. Code § 34-51-3-2.

To recover punitive damages, the plaintiff must show, by clear and convincing evidence, that the defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing. Erie Ins. Co. v. Hickman, 622 N.E.2d 515 (Ind. 1993); Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135 (Ind. 1988).

Some Indiana courts have used "gross negligence" or "wanton and willful" conduct as a basis for an award for punitive damages. The Indiana Supreme Court has defined gross negligence as "a conscious, voluntary act or omission in reckless disregard of . . . the consequences to another party." N.Ind. Pub. Serv. Co. v. Sharp, 790 N.E.2d 462, 465 (Ind. 2003); see also, Westray v. Wright, 834 N.E.2d 173, 181 (Ind. Ct. App. 2005) (holding that there was no clear and convincing evidence that the semi-truck driver's behavior exceeded mere negligence and the jury's award of punitive damages was improper). Willful and wanton conduct has been considered in determining if punitive damages are appropriate. See Wohlwend v. Edwards, 796 N.E.2d 781 (Ind. Ct. App. 2003). Willful and wanton conduct has been held to include an intentional act done with reckless disregard of the natural and probable consequences of injury to a known person under the circumstances known to the actor at the time. Davidson v. Bailey, 826 N.E.2d 80 (Ind. Ct. App. 2005); Witham v. Norfolk & Western Ry. Co., 561 N.E.2d 484 (Ind. 1990).

Punitive damages are not recoverable under Indiana's Wrongful Death statute. Ind. Code § 34-23-1-1; Durham ex rel. Estate of Wade v. U-Haul Int'l, 745 N.E.2d 755, 761 (Ind. 2001). On the other hand, the decedent's estate may seek punitive damages under Indiana's Survival Statute. Ind. Code § 34-9-3-4; Foster v. Evergreen Healthcare, Inc., 716 N.E.2d 19, 28 (Ind. Ct. App. 1999).

**Authors:** Lew Bricker is a partner in the firm of SmithAmundsen LLC, 150 North Michigan Avenue, Suite 3300, Chicago, Illinois 60601. [www.salawus.com](http://www.salawus.com). He can be reached at (312) 894-3200 or [lbricker@salawus.com](mailto:lbricker@salawus.com). Carolyn E. Kang is an attorney with the Chicago office of SmithAmundsen LLC. Ms. Kang can be reached at (312) 894-3200 or [ckang@salawus.com](mailto:ckang@salawus.com).

**IOWA**  
**By Patrick D. Smith**

In Iowa, punitive damages are governed by Iowa Code § 668A. Section 668A.1(a) permits the court or jury to assess punitive damages if, “by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.” Id.

“Willful and wanton” conduct means:

[T]he actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

Mercer v. Pittway Corp., 616 N.W.2d 602, 617 (Iowa 2000); Kuta v. Newberg, 600 N.W.2d 280, 288 (Iowa 1999).

The Iowa Supreme Court has adopted the so-called “complicity rule” contained in the Restatement of Torts (Second) § 909, which permits punitive damages to be assessed against an employer because of an employee’s conduct. Punitive damages can be awarded against an employer if: a) the employer authorized the doing and the manner of the act; b) the employee was unfit and the employer was reckless in employing him; c) the employee was employed in a managerial capacity and was acting in the scope of his employment; d) the employer or the managerial agent of the principal ratified or approved the act.

The two Iowa cases that have addressed punitive damages under the “complicity rule” arose out of trucking accidents. See, Seraji v. Perket, 452 N.W.2d 399, 401 (Iowa 1990)(reversing a judgment for punitive damages against trucking company based upon its hiring and retention of an unfit driver); Briner v. Hyslop, 337 N.W.2d 858, 867 (Iowa 1983) (holding that evidence of a trucking company’s lack of supervision of its driver who was intoxicated and asleep at the wheel was sufficient to generate a jury question on punitive damages).

**Author: Patrick D. Smith is an attorney with Bradshaw, Fowler, Proctor & Fairgrave, P.C., 801 Grand, Suite 3700, Des Moines, Iowa 50309-8004. [www.bradshawlaw.com](http://www.bradshawlaw.com). He can be reached at (515) 246-5891 or [smith.patrick@bradshawlaw.com](mailto:smith.patrick@bradshawlaw.com).**

## **KANSAS**

**By Michael Matteuzzi, Kenneth Abbarno & Bradley J. Barmen**

Under Kansas statutory law, in order to obtain punitive damages, the plaintiff must prove, by clear and convincing evidence, that the defendant's actions were willful, wanton, fraudulent, or malicious. K.S.A. § 60-3701(c) (2005) (emphasis added); Reeves v. Carlson & Holland, 969 P.2d 252 (Kan. 1998). Wanton conduct is defined as that conduct performed with the realization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the action. K.S.A. § 60-3401(f). Plaintiff's evidence of such conduct must be presented during the initial phase of trial. Id. at § 60-3701(a) and (c). At the end of this phase, the trier of fact determines whether the plaintiff is entitled to recover punitive damages. Id. at § 60-3701(a). If so, the amount of such damages is then determined by the court in a separate proceeding. Id.

At the second proceeding, the court may consider the following factors in determining the amount of recovery: (1) the likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct; (2) the degree of the defendant's awareness of that likelihood; (3) the profitability of the defendant's misconduct; (4) the duration of the misconduct and any intentional concealment of it; (5) the attitude and conduct of the defendant upon discovery of the misconduct; (6) the financial condition of the defendant; and (7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected. K.S.A. § 60-3701 (b)(1)-(7) (2005).

Kansas law sets two key limitations on a plaintiff's potential to recover punitive damages. First, unless the misconduct was authorized, Kansas law exempts both employers and certain business entities from punitive damages based on the misconduct of their agents. K.S.A. § 60-3701(d) (2005). Second, Kansas caps the amount of punitive damages at the lesser of defendant's annual gross income earned or 5 million dollars. Id. at § 60-3701(e). The exception to this cap is where the defendant has gained or will gain profits based on their misconduct which exceed those amounts. In those cases the amount awarded is one and one-half times the amount of profit defendant has or expects to gain. Id. at § 60-3701(f).

**Authors:** Michael Matteuzzi is an attorney with the firm Waldeck, Matteuzzi, & Sloan, 1118 Overbrook Road, Suite 200, Leawood, Kansas, 66211. [www.wmskc.com](http://www.wmskc.com). He can be reached at (913) 253-2510, [mmatteuzzi@wmskc.com](mailto:mmatteuzzi@wmskc.com). Kenneth Abbarno and Bradley J. Barmen are attorneys with the firm Reminger & Reminger in their offices in Youngstown and Cleveland, Ohio. [www.reminger.com](http://www.reminger.com). The Youngstown office's address is 11 Federal Plaza Central, Suite 300, Youngstown, OH 44503. They can be reached at (216)687-1311, [kabbarno@reminger.com](mailto:kabbarno@reminger.com), and [bbarmen@reminger.com](mailto:bbarmen@reminger.com).

**KENTUCKY**  
**By Nancy Barrett Loucks**

Under Kentucky law, punitive damages can be assessed in any motor vehicle accident, including truck accidents, if the plaintiff can prove gross negligence. Gross negligence is defined as (1) wanton or reckless disregard for the lives, safety or property of other persons, or (2) conduct so outrageous that malice could be implied from the facts of the situation. Phelps v. Louisville Water Company, 103 S.W.3d 46, 52 (Ky. 2003).

In 1988, the Kentucky legislature attempted to codify the punitive damages standard into Kentucky Revised Statute §411.184, which provided that a plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud, or malice. KRS §411.184(2). The constitutionality of the definition of “malice,” however, was challenged in Williams v. Wilson, 972 S.W.2d 260, 269 (Ky. 1998), and the following section was deleted: “Malice means either 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.” KRS 411.184(1)(c).

In applying the gross negligence standard to motor vehicle accidents, Kentucky courts have traditionally required more than simply evidence of poor judgment. In all cases of driver error, intoxication has been a factor. See, e.g., Kinney v. Butcher, 131 S.W.3d 357 (Ky. App. 2004), Stewart v. Estate of Cooper, 102 S.W.3d 913 (Ky. 2003), and Shortridge v. Rice, 929 S.W.2d 194 (Ky. App. 1996). In Horn v. Hancock, 700 S.W.2d 419 (Ky. App. 1985), a simple violation of transportation regulations by a truck driver was found to be insufficient to justify punitive damages. Id. at 421.

Currently pending in the Kentucky Supreme Court is a truck accident case where the flatbed load was allegedly improperly secured, and the lost load fell onto other motorists, causing injury and death. Steel Technologies, Inc. v. Congleton, No. 2005-SC-000551DG, In Congleton, the Kentucky Supreme Court will be determining, among other issues, whether it was appropriate to award punitive damages to Steel Technologies for vicarious liability, when the actions of the employee driver were unauthorized.

KRS §411.184(3) expressly forbids the assessment of punitive damages upon an employer for the actions of an employee, unless the actions were authorized, ratified, or should have been anticipated. Berrier v. Bizer, 57 S.W3d 271, 283 (Ky. 2001).

**Author:** Nancy Barrett Loucks, is a member of Frost Brown Todd, LLC, 400 West Market Street, 32<sup>nd</sup> Floor, Louisville, Kentucky 40202. [www.frostbrowntodd.com](http://www.frostbrowntodd.com). Ms. Loucks can be reached at (502) 589-5400 and [nloucks@fbtlaw.com](mailto:nloucks@fbtlaw.com).

**LOUISIANA**  
**By William Ryan Acomb**

In the Civil Law State of Louisiana, bad faith damages are only available if specifically allowed by Statute, and cannot be created by court decisions. While Louisiana bad faith statutes provide that a claimant may be entitled to *penalties and/or attorney's fees*, there is no provision for unlimited punitive or exemplary damages. There are two key Louisiana statutes that impose duties on insurers and both contain penalty provisions – LSA-R.S. 22:658 and LSA-R.S. 22:1220. McDill v. Utica Mutual Ins. Co., 475 So.2d 1085 (La. 1985); Hart v. Allstate Ins. Co., 437 So.2d 823 (La. 1983). LSA R.S. 658 is the general penalty provision in the Louisiana Insurance Statutes that requires to pay any claim by an *insured* within thirty (30) days of receipt of “satisfactory proof of loss”, and imposes a penalty if the insurer’s failure is “found to be arbitrary, capricious or without probable cause.” “Satisfactory proof of loss” means that which is sufficient to fully apprise the insurer of the insured’s claim. *See, Hart v. Allstate Ins. Co.*, 437 So.2d 823 (La. 1983). Once the insurer has the satisfactory proof of loss, the insurer must make an unconditional tender of the amount not in dispute. McDill v. Utica Mutual Ins. Co., 475 So.2d 1085 (La. 1985).

LSA-R.S. 22:1220, commonly known as “The Unfair Claims Practices Act”, imposes penalties if an insurer does any of the following:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
- (2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
- (3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.
- (4) Misleading a claimant as to the applicable prescriptive period.
- (5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.

LSA-R.S. 22:1220 does create a right of action in favor of third party claimants.

Theriot v. Midland Risk Insurance Company, 95-2895 (La. 5/20/97), 694 So.2d, 184, on rehearing.

**Author:** William Ryan Acomb is an attorney with Porteous, Hainkel and Johnson, LLP, 704 Carondelet Street; New Orleans, LA, 70115. [www.phjlaw.com](http://www.phjlaw.com). He can be reached at (504) 581-3838 and [racomb@phjlaw.com](mailto:racomb@phjlaw.com).

**MAINE**  
**By Blair A. Jones**

Punitive damages in trucking cases are recoverable in Maine if the plaintiff demonstrates, by clear and convincing evidence, that the defendant committed a tort with actual or implied malice. Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985).

Actual malice “[e]xists where the defendant's tortious conduct is motivated by ill will toward the plaintiff.” Id. at 1361. Implied malice will be found “[w]here 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.” Id. A defendant’s reckless disregard of the circumstances will *not* be considered to be implied malice; it must exceed recklessness. Id.

Plaintiff must prove the conduct by clear and convincing evidence, a higher standard than the typical preponderance in a civil case. Laliberte v. Mead, 628 A.2d 1050 (Me. 1993).

Punitive damages may not be awarded against municipal corporations and governmental agencies. Foss v. Maine Turnpike Authority, 309 A.2d 339 (Me. 1973).

The amount of punitive damages under Maine law is in part determined by its deterrent effect and must therefore bear some relationship to the actual wealth of the defendant. Braley v. Berkshire Mutual Insurance Co., 440 A.2d 359 (Me. 1982); Hanover Insurance Co. v. Hayward, 464 A.2d 156 (Me. 1983)

Maine courts have not, yet, addressed the question of whether punitive damages are insurable.

**Author: Blair A. Jones is an attorney with Friedman, Gaythwaite, Wolf & Leavitt, 6 City Center, Portland, Maine 04122. [www.fgwl-law.com](http://www.fgwl-law.com). He can be reached at (207)761-0900 and [bjones@fgwl-law.com](mailto:bjones@fgwl-law.com).**

**MARYLAND**  
**By Andrew T. Stephenson**

Punitive damages are almost never claimed as they are almost never available in civil cases in Maryland involving tractor trailer accidents. To uphold an award of punitive damages, a plaintiff must show, by clear and convincing evidence, actual malice on the part of the defendant. See, Ellerin v. Fairfax Savings F.S.B., 337 Md. 216, 652 A.2d 1118 (1995); Owens-Illinois v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992). Actual malice is defined as evil motive, intent to injure, ill will, or fraud. As an aside, public policy does not preclude insurance coverage for punitive damages, and it is not against public policy for the insurer to pay the punitive damages award assessed against an insured. See, First Nat'l Bank of St. Mary's v. Fidelity and Deposit Co., 283 Md. 228, 389 A.2d 359 (1978).

**Author: Andrew T. Stephenson is an attorney with Franklin & Prokopik, The B & O Building, 2 North Charles Street, Suite 600, Baltimore, Maryland 21201. [www.fandpnet.com](http://www.fandpnet.com). Mr. Stephenson can be reached at (410) 230-3638 or [astephenson@fandpnet.com](mailto:astephenson@fandpnet.com).**

**MASSACHUSETTS**  
**By Russell X. Pollock and Scott Heidor**

Punitive damages are not available in Massachusetts, unless authorized by statute. In personal injury matters, punitive damages are only permitted in Wrongful Death cases. Under the Massachusetts Wrongful Death Statute, M.G.L. Ch. 229, § 2, punitive damages may be awarded by the finder of fact when a death was caused by a defendant's malicious, willful, wanton or reckless conduct or by the gross negligence of the defendant.

Massachusetts allows the trial judge to award double or treble damages, attorney's fees and costs for a violation of the Massachusetts Consumer Protection Statute, M.G.L. Ch. 93A, §§ 1–11, which forbids willful or knowingly unfair or deceptive acts or practices. Beyond the conduct specifically deemed an unfair or deceptive act or practice by the statute, M.G.L. Ch. 93A also allows the Attorney General to promulgate regulations interpreting what amounts to unfair or deceptive acts or practices under specific circumstances. M.G.L. Ch. 93A, § 2(c).

The Attorney General has promulgated regulations providing *inter alia* that an act or practice is a violation of M.G.L. Ch. 93A if it is oppressive or otherwise unconscionable in any respect or if it fails to comply with existing statutes, rules, regulations or laws meant for the protection of the public's health, safety, or welfare. 940 C.M.R. 3.16. Thus, a defendant whose conduct is determined to be oppressive or otherwise unconscionable, or whose conduct fails to comply with a statute, rule, regulation or law meant for the protection of public health, safety, or welfare can be found to have violated Chapter 93A and may be liable for double or treble damages, plus attorney's fees and costs.

An insurer may also be found to have violated M.G.L. Ch. 93A and be liable for double or treble damages, attorney's fees and costs, if it has committed unfair methods of competition or unfair or deceptive acts or practices under M.G.L. Ch. 176D, §§ 1-14. Unfair and deceptive acts by an insurer include unfair settlement practices such as the failure to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." M.G.L. Ch. 176D, § 3(9)(f). Although Chapter 176D does not expressly provide for a private cause of action, a violation of Chapter 176D may be brought in an action alleging a violation of M.G.L. Ch. 93A. Van Dyke v. St. Paul Fire and Marine Ins. Co., 388 Mass. 671, 674-675 (1983).

**Authors:** Russell X. Pollock, Esq. and Scott Heidorn, Esq. are attorneys with the law firm of Campbell Campbell Edwards & Conroy, P.C., One Constitution Center, Third Floor, Boston, Massachusetts, 02129. [www.campbell-trial-lawyers.com](http://www.campbell-trial-lawyers.com). Mr. Pollock can be reached at (617) 241-3050 or [rpollock@campbell-trial-lawyers.com](mailto:rpollock@campbell-trial-lawyers.com). Mr. Heidorn can be reached at (617) 241-3172 or [sheidorn@campbell-trial-lawyers.com](mailto:sheidorn@campbell-trial-lawyers.com).

**MICHIGAN**  
**By Anthony A. Agosta**

Punitive damages, those designed to punish the defendant, are not awardable under Michigan law absent a statute specifically allowing them. McAuley v GMC, 457 Mich. 513, 519–520, 578 N.W.2d 282 (1998); Kewin v Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 295 N.W.2d 50 (1980); Association Research & Dev. Corp. v CNA Fin. Corp., 123 Mich. App. 162, 333 N.W.2d 206 (1983).

While exemplary damages and punitive damages are often used interchangeably, Michigan does recognize a distinction. In Michigan, the purpose of exemplary damages has not been to punish the defendant, but to render the plaintiff whole by compensating for the plaintiff's mental injury in a limited class of cases where such mental injury is the result of outrageous conduct. Jackson Printing Co v Mitani, 169 Mich. App. 334, 341, 425 N.W.2d 791 (1988). Exemplary damages are awarded to compensate mental anguish, humiliation, outrage, or increased injury to the plaintiff's feelings that he/she suffers due to the defendant's willful, malicious, or wanton conduct or reckless disregard for the plaintiff's rights. See, McPeak v McPeak, 233 Mich. App. 483, 487, 593 N.W.2d 180 (1999). See also, Veselenak v Smith, 414 Mich. 567, 575, 327 N.W.2d 261 (1982).

**Author: Anthony A. Agosta is a lawyer with the firm Clark Hill, PLC, 500 Woodward Avenue, Suite 3500, Detroit, Michigan, 48226-3435. [www.clarkhill.com](http://www.clarkhill.com). He can be reached at (313) 965-8523 and [aagosta@clarkhill.com](mailto:aagosta@clarkhill.com).**

**MINNESOTA**  
**By John R. Crawford**

Under Minnesota law, punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant showed deliberate disregard for the rights or safety of others. Minn. Stat. §549.20, subd. 1(a). A defendant acts with deliberate disregard for the rights or safety of others if the defendant knows or intentionally disregards facts that create a high probability of injury and proceeds with intentional disregard or indifference to the high probability of injury to others. Minn. Stat. §549.20, subd. 1(b).

Punitive damages can be awarded against a master or principal for acts of an agent, but only if: 1) the principal authorized the doing and the manner of the act, or 2) the agent was unfit and the principal disregarded a high probability the agent was unfit, or 3) the agent was acting in the scope of his or her managerial capacity to establish policy and planning level decisions, or 4) the principal approved the act while knowing of its character and probable consequences. Minn. Stat. §549.20, subd. 2.

Any award of punitive damages must be measured by the following factors: 1) the seriousness of hazard to the public, 2) the profitability of the misconduct, 3) the duration of the misconduct, 4) any concealment of the misconduct, 5) the degree of the defendant's awareness of the hazard and of its excessiveness, 6) the attitude and conduct of the defendant upon discovery of the misconduct, 7) the number and level of employees involved in causing or concealing the misconduct, 8) the financial condition of the defendant, and 9) the total effect of other punishment likely to be imposed upon the defendant. Minn. Stat. §549.20, subd. 3.

A jury may award punitive damages in a civil action involving a motor vehicle accident if there is evidence that the accident was caused by a driver with an alcohol concentration of 0.08 or more or was under the influence of a controlled substance. Minn. Stat. §169A.76.

Minnesota law allows insurance coverage for vicarious liability for punitive and exemplary damages. Minn. Stat. §60A.06, subd. 4.

**Author: John R. Crawford is an attorney with Johnson & Lindberg, P.A., 7900 International Drive, Suite 960, Minneapolis, Minnesota 55425-1582. [www.johnsonlindberg.com](http://www.johnsonlindberg.com). He can be reached at (952) 851-0700 and [jcrawford@johnsonlindberg.com](mailto:jcrawford@johnsonlindberg.com).**

## **MISSISSIPPI**

**By W. Scott Welch, III and Jason R. Bush**

Under Mississippi law, "[p]unitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud." Miss. Code §11-1-65(1)(a). For cases filed after January 1, 2003, Miss. Code § 11-1-65 places caps on punitive damage awards based on the net worth of the defendant.

While punitive damages are sometimes requested in transportation cases they are not often awarded, and when awarded, not often upheld on appeal. See, e.g. Irby v. Travis, -- So. 2d -- 2006 WL 1431237 (Miss. May 25, 2006) (holding that trial court did not abuse its discretion when it declined to submit the issue of punitive damages to the jury); Illinois Cent. R. Co. v. Hawkins, 830 So.2d 1162 (Miss. 2002) (reversing punitive damages award).

The Mississippi Supreme Court has held that it is not against public policy for an insurance policy to cover punitive damages. Anthony v. Frith, 394 So. 2d 867 (Miss. 1981). Mississippi law also does not prohibit an insurer from excluding coverage for punitive damages. Shelter Mut. Ins. Co. v. Dale, 914 So. 2d 698 (Miss. 2005).

**Authors: W. Scott Welch, III and Jason R. Bush are attorneys with Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, 4268 I-55 North, Jackson, Mississippi, 39211. [www.bakerdonelson.com](http://www.bakerdonelson.com). They can be contacted at (601) 351.2400, [swelch@bakerdonelson.com](mailto:swelch@bakerdonelson.com) and [jbush@bakerdonelson.com](mailto:jbush@bakerdonelson.com).**

**MISSOURI**  
**By Alexander B. Robb**

To recover punitive damages in Missouri, a plaintiff must prove, by clear and convincing evidence, “that the defendant’s conduct was outrageous because of evil motive or reckless indifference.” Lopez-Vizcaino v. Action Bail Bonds, Inc., 3 S.W.3d 891, 893 (Mo. Ct. App. W.D. 1999).

Punitive damages are not recoverable unless actual damages are awarded. Koenig v. Skaggs, 400 S.W.2d 63, 68 (Mo. 1966). Punitive damages are “a remedy so extraordinary or harsh” that they should only be awarded “sparingly.” Perkins v. Dean Machinery Co., 132 S.W.3d 295, 299 (Mo. App. 2004).

Whether plaintiff has presented sufficient evidence for the punitive damages claim to be submitted is a question of law. Id. As the jury instruction standards for punitive damages are “necessarily general,” trial courts in Missouri are directed to apply “special judicial scrutiny” before allowing their submission. Alcorn v. Union Pacific R. Co., 50 S.W.3d 226, 248 (Mo. en banc 2001). Any party may request a bifurcated trial where actual and punitive damages will be considered separately. Litchfield v. May Dep’t Stores Co., 845 S.W.2d 596, 599 (Mo. Ct. App. E.D. 1992).

Missouri’s 2005 Tort Reform Act capped punitive damages at the greater of \$500,000 or five times the actual damages. Mo. Rev. Stat. § 510.265 (effective August 28, 2005). One half of all punitive damages awarded are paid to the Missouri Tort Victims Compensation Fund instead of the successful plaintiff. The jury is not told of this payment. Fust v. Attorney General, 947 S.W.2d 424, 427 (Mo. 1997).

Missouri does not treat transportation cases differently than other cases for the purposes of punitive damages. While simple negligence will not support a punitive damages claim, prior conduct or notice can be inferential evidence demonstrating the necessary reckless indifference to support the claim. The jury is instructed that, upon finding negligence, they should determine whether its conduct “created a high degree of probability of injury”, which demonstrates complete indifference or conscious disregard for others’ safety. Alcorn, 50 S.W.3d at 247.

**Author:** Alexander B. (Sandy) Robb is an attorney with the firm, Stinson, Morrison, Hecker, LLP, 1201 Walnut Street, Kansas City, Missouri, 64105. [www.stinsonmoheck.com](http://www.stinsonmoheck.com). He can be reached at (816) 691-2454 and [arobb@stinsonmoheck.com](mailto:arobb@stinsonmoheck.com).

**MONTANA**  
**By Gig Tollefsen**

Punitive damage claims in Montana are governed by statute (Sec. 27-1-220 & 221 MCA). Plaintiff must prove actual fraud or actual malice to recover punitive damages.

The actual fraud element normally does not apply in personal injury transportation actions. In order to recover punitive damages based on an allegation of actual malice, the plaintiff must prove that the defendant had knowledge of facts or intentionally disregarded facts that created a high probability of injury to the plaintiff and either deliberately proceeded to act in conscious or intentional disregard of the high probability of injury to the plaintiff or deliberately proceeded to act with indifference to the high probability of injury to the plaintiff.

These elements must be proven by clear and convincing evidence.

By statute (Sec. 27-1-220 MCA) the punitive damage award may not exceed \$10 million or 3% of the defendant's net worth, whichever is less. The jury's award of punitive damages is also reviewed by the judge in a post-judgment hearing in which the court considers statutory factors to determine if the award is reasonable (Sec. 27-1-221 MCA).

Typically, punitive damage claims are not seen in personal injury transportation claims against the transportation company, unless the company is aware of egregious conduct by its employee and allows such conduct to continue. For instance in Mauer v. Clausen Distr. Co., 275 Mont. 229, 912 P.2d 195 (1996), a beverage distribution company allowed its truck drivers to use their discretion in drinking alcohol while working. It allowed the truck driver in question to do so, even though the company was aware that the driver had 2 DUI citations. The Court allowed the jury to consider punitive damages (which were awarded) when the truck driver, who was intoxicated, struck the plaintiff.

**Author: Gig Tollefsen is an attorney with Berg, Lily, & Tollefsen, P.C. in Bozeman, Montana. He can be contacted at (406) 587-3181 and [gigtollefsen@berglawfirm.com](mailto:gigtollefsen@berglawfirm.com).**

**NEBRASKA**  
**By Stephen G. Olson, II**

The general rule in Nebraska is that punitive damages are generally not available in civil cases because they contravene Article VII, section 5 of the Nebraska Constitution. It has been a fundamental rule of law in Nebraska that punitive, vindictive, or exemplary damages will not be allowed and that the measure of recovery in all civil cases is compensation for the injury sustained. Boyer v. Barr, 8 Neb. 68 (1878); Atkins v. Gladwish, 25 Neb. 390 (1889); Bee Publishing Co. v. World Publishing Co., 59 Neb. 713 (1900); Wilfong v. Omaha & C. B. St. Ry. Co., 129 Neb. 600 (1935).

There is a contrary view that is seen in Abel v. Conover, 170 Neb. 926 (1960). Abel provides that since the Nebraska Constitution requires that “all penalties must go to the benefit of the common schools of the state, a penalty for the benefit of a private person is [unconstitutional].” Id. at 932. Therefore, if there is a penalty or punitive damages, they must be paid into the school fund rather than a private litigant. This interpretation is consistent with the Nebraska Wage Payment and Collection Act which allows double and triple recovery for nonpayment of wages, as the excess “shall be placed in a fund to be distributed to the common school fund of this state.” Neb. Rev. Stat. §48-1232 (Reissue 2004). At various times Plaintiff’s attorneys have tried to seek punitive damages in civil actions citing the court in Abel. To date, this author is not aware of any cases where this argument has been successful. As such, the general rule of no punitive damages prevails throughout the State.

Punitive damages may be allowed in transportation cases, but only if those damages were available under applicable federal law, as under Nebraska State causes of action, they are not allowed. State ex. rel. Cherry v. Burns, 258 Neb. 216 (1999).

**Author: Stephen G. Olson, II, is an attorney with Engles, Ketcham, Olson & Keith, P.C., 1350 Woodmen Tower, 1700 Farnam Street, Omaha, Nebraska, 68102. [www.ekoklawfirm.com](http://www.ekoklawfirm.com). Mr. Olson can be reached at (402) 348-0900 or [solson@ekoklaw.com](mailto:solson@ekoklaw.com).**

**NEVADA**  
**By Jonathan B. Owens**

Punitive damages may be awarded in Nevada civil cases where it is proven by clear and convincing evidence that the defendant was guilty of oppression, fraud or malice, express or implied. Nev. Rev. Stat. Ann. § 42.005. It is the duty of the trial court to determine, as a matter of law, whether the plaintiff has offered substantial evidence of malice in order to support a punitive damage instruction. See Smith's Food & Drug Centers, Inc. v. Argentine Bellegarde, 114 Nev. 602, 958 P.2d 1208 (1998). The district court is therefore responsible for determining whether instructions on punitive damages are warranted. However, despite being instructed, the jury is not required to award punitive damages, even if it finds that a defendant's acts were oppressive or malicious. This is because punitive damage awards lie solely within the discretion of the jury. If in its discretion the jury awards punitive damages, courts will not disturb such an award, unless the trial record lacks substantial evidence to support it. Id. at 606.

With respect to an employer's liability for punitive damages for the acts and omissions of its agents, Nevada embraces the Restatement (Second) of Torts §909. Id. at 610. That section allows for an award of punitive damages against an employer 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. Id. According to the Nevada Supreme Court, the above approach, also known as the "complicity theory," strikes the proper balance between protecting the public and ensuring that punitive damages are awarded because of an employer's own wrongful conduct. Id. at 611.

In most cases, punitive damage awards are limited to the following formulas: (1) three times the amount of compensatory damages awarded to the plaintiff, if the amount of compensatory damages is \$100,000 or more; or (2) three hundred thousand dollars (\$300,000.00) if the amount of compensatory damages awarded to the plaintiff is less than \$100,000. Nev. Rev. Stat. Ann. § 42.005.

**Author: Jonathan B. Owens, is a partner with Alverson Taylor Mortensen & Sanders, 7401 West Charleston Blvd., Las Vegas, Nevada 89117-1401. [www.alversontaylor.com](http://www.alversontaylor.com). Mr. Owens can be reached at (702) 384-7000 or [jowens@alversontaylor.com](mailto:jowens@alversontaylor.com).**

**NEW HAMPSHIRE**  
**By Blair Jones and John Hatch**

Punitive damages, as such, are not available in trucking cases in New Hampshire, but, in the right circumstances, “enhanced compensatory” or “liberal compensatory” damages may be. Generally, New Hampshire does not provide for punitive or exemplary damages. RSA § 507:16 states: “No punitive damages shall be awarded in any action, unless otherwise provided by statute.” “A plaintiff is to be awarded compensatory damages only.” Munson v. Raudonis, 387 A.2d 1174 (N.H. 1978). However, New Hampshire has adopted the concept of “enhanced compensatory damages”, or “liberal compensatory damages”. See Figlioli v. R.J. Moreau Co., Inc., 866 A.2d 962 (N.H. 2005).

“Enhanced compensatory damages allow a fact finder to increase compensatory damages ‘for the resulting material loss . . . to compensate for the vexation and distress caused by the character of defendant’s conduct.’” McKinnon v. Harris, 2005 WL 2335350 (D.N.H. Sept. 21, 2005) (applying New Hampshire law) (quoting Vratsenes v. N.H. Auto, Inc., 289 A.2d 66 (N.H. 1972)).

Enhanced compensatory damages are to be “awarded only in exceptional circumstances, and not even in every case involving an intentional tort.” Figlioli, 866 A.2d at 966. Specifically, such an award is only justified when the act is wanton, malicious or oppressive. Id.; McKinnon, 2005 WL 2335350 (“An award of enhanced compensatory damages for any tort, intentional or unintentional, must be based on an allegation and proof of wanton, malicious, or oppressive conduct.”). In Munson, 387 A.2d at 1177, the Court held, with respect to malice, that “actual malice” is required for an award of enhanced compensatory damages, meaning “[t]here must be ill will, hatred, hostility, or evil motive on the part of the defendant. Without such a showing, the mere commission of a tort will not give rise to the aggravated circumstances necessary for the award of liberal compensatory damages.”

As noted above, RSA 507:16 provides that “[n]o punitive damages shall be awarded in any action, *unless otherwise provided by statute.*” There are no statutes specific to the trucking industry that provide for punitive damages, currently, but a review for updates should always be performed.

**Authors:** Blair A. Jones and John Hatch are attorneys with the firm Friedman, Gaythwaite, Wolf & Leavitt, 6 City Center, Portland, Maine, 04122. [www.fgw-law.com](http://www.fgw-law.com). Blair Jones can be contacted at (201) 761-0900 and [bjones@fgw-law.com](mailto:bjones@fgw-law.com). John Hatch can be contacted at (201) 761-0900 and [jhatch@fgw-law.com](mailto:jhatch@fgw-law.com).

**NEW JERSEY**  
**By Roy Cohen and Jeffrey M. Pypcznski**

Punitive damages in New Jersey are governed by statute. N.J.S.A. 2A:15-5.12 states that punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence, including gross negligence. In determining whether punitive damages are to be awarded, the trier of fact must consider all relevant evidence, including but not limited to, the following: (1) the likelihood, at the relevant time, that serious harm would arise from the defendant's conduct; (2) the defendant's awareness or reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct; (3) the conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of it by the defendant.

With regard to commercial transportation, the New Jersey Appellate Division considered a claim of punitive damages against an oil company for the actions of its driver in the matter of Smith v. Whitaker, Jr., 313 N.J. Super. 165 (App. Div. 1998). In Smith, a truck driver working for defendant oil company was driving on a road when his brakes failed. The truck driver hit the victim's car, killing the victim instantly. Plaintiffs sued for and were awarded punitive damages. In reviewing the damages award on appeal, the appellate court noted that punitive damages must be actuated by an act accompanied by a wanton and willful disregard of the rights of another. This standard may be satisfied by "proof of a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences."

In upholding the jury's verdict, the court relied on, among other things, the following facts: (1) the truck was being operated by a completely inexperienced and virtually untrained driver, who knew nothing about how to adjust air brakes or how the braking system on the truck actually worked; (2) the driver had no commercial driver's license, nor did he ever obtain the commercial driver's manual issued by the State; (3) the driver recorded his truck as being in good working order even though numerous violations were found by the State Police when they inspected the vehicle before the accident; (4) before the accident, the driver had informed management that there were problems with his brakes, but the driver did not know if the brakes had ever been adjusted; (5) the driver testified that the brakes felt weak at the time of the accident, but he had not been trained on what to look for or do if the brakes felt weak and needed adjustment; and, (6) between the time of the police inspection and the accident, there was no indication that repairs were made to the vehicle, rather the evidence suggested that the vehicle was knowingly and deliberately operated "out of service" for several weeks.

**Authors:** Roy Cohen and Jeffrey M. Pypcznski are attorneys with Porzio, Bromberg & Newman, P.C., 100 Southgate Parkway, Morristown, New Jersey, 07962-1997. [www.pbnlaw.com](http://www.pbnlaw.com). They can be reached at (973) 538-4006, [racohen@pbnlaw.com](mailto:racohen@pbnlaw.com) and [jmpypcznski@pbnlaw.com](mailto:jmpypcznski@pbnlaw.com).

## **NEW MEXICO**

**By Tamara N. Cook and Courtney A. Fligeltaub**

In New Mexico, a defendant may be liable for punitive damages if there is “some culpable mental state” and the conduct rises to a “willful, wanton, malicious, reckless, oppressive, or fraudulent level.” Clay v. Ferrellgas Inc., 881 P.2d 11, 14 (N.M. 1994); NMRA Civ. UJI 13-1827. As danger increases in a situation, conduct that would amount to a breach of duty is “more likely to demonstrate a culpable mental state.” Clay, 881 P.2d at 14. A party making a punitive damages claim must prove their claim by a preponderance of the evidence. Campbell v. Bartlett, 975 F.2d 1569, 1577 (10<sup>th</sup> Cir. 1992).

Evidence of a defendant’s wealth may be admitted for the purpose of assessing a punitive damage award. Ruiz v. Southern Pacific Transportation Co., 638 P.2d 406, 414 (N.M. App. 1981). However, while an award of punitive damages is left to the discretion of the fact finder, the award “must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice, rather than reason and justice.” Galindo v. Western States Collection Co., 477 P.2d 325, 331 (N.M. App. 1970).

When a reviewing court assesses a punitive damage award it generally looks to three factors: “the degree of the reprehensibility of the conduct”, “the ratio of the punitive award to the actual harm inflicted on plaintiff”, and “a comparison between the punitive award and other sanctions that might be imposed for comparable misconduct.” Weidler v. Big J. Enterprises Inc., 953 P.2d 1089, 1101 (N.M. App. 1997); Aken v. Plains Electric Generation, 49 P.3d 662, 668-672 (N.M. 2002). Reprehensibility of the conduct is the most important factor to be considered in analyzing the reasonableness of the award. Weidler, 953 P.2d at 1101. When punitive damages are awarded against multiple defendants, the amount of the award “must be separately stated as to each.” Vickery v. Dunivan, 279 P.2d 853, 856 (N.M. 1955).

New Mexico law holds that “a principal may be held liable for punitive damages when the principal has in some way authorized, ratified or participated in the wanton, oppressive, malicious, fraudulent, or criminal acts of its agent.” Weidler, 953 P.2d at 1100. Punitive damages may also be imposed against a principal if the agent held a managerial role and the act occurred while the person was within the scope of his employment. Id.

**Authors:** Tamara N. Cook and Courtney A. Fligeltaub are attorneys with Renaud Cook Drury Mesaros, PA, Phelps Dodge Tower, One North Central, Suite 900, Phoenix, Arizona 85004. [www.rcdmlaw.com](http://www.rcdmlaw.com). They can be reached at (602) 307-9900, [tcook@rcdmlaw.com](mailto:tcook@rcdmlaw.com) and [cfligeltaub@rcdmlaw.com](mailto:cfligeltaub@rcdmlaw.com).

**NEW YORK**  
**By Eric B. Schoenfeld**

Under New York law, punitive damages are awarded in the rare case where the wrong complained of is “morally culpable” or is supported by “evil and reprehensible motives.” Knieriemen v. Bache Halsey Stuart Shields, Inc., 427 N.Y.S.2d 10 (1<sup>st</sup> Dept. 1980). New York courts have stated that punitive damages may be awarded where the wrongful conduct was “so depraved or so gross, wanton, malicious, and culpable as to evince utter recklessness, or where it was actuated by evil, reprehensible or wrongful purposes or motives.” Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d 466 (1993).

New York courts have addressed the issue of awards of punitive damages in connection with civil suits arising out of the operation of a motor vehicle. These cases are highly fact-sensitive and it is clear that evidence of malicious intent must be present to support an award of punitive damages. In Rinaldo v. Mashayekhi, the Supreme Court of New York, Third Department, held that the evidence sufficiently established “wanton negligence and recklessness” on the part of a defendant so as to warrant an award of punitive damages where there was evidence that the defendant was highly intoxicated, was driving at an excessive rate of speed on a heavily congested street, and disregarded the presence of the plaintiff and others on the roadway. 585 N.Y.S.2d 615 (3<sup>rd</sup> Dept. 1992).

In Sweeney v. McCormick, the same court had previously held that evidence of the defendant’s intoxication alone is insufficient to raise a jury question of punitive damages, as there must be a showing of reckless and wanton conduct. 552 N.Y.S.2d707 (3<sup>rd</sup> Dept. 1990). See also, Taylor v. Dyer, 593 N.Y.S.2d 122 (3<sup>rd</sup> Dept.) (evidence that driver was intoxicated at the time of the accident, standing alone, is insufficient to support an award of punitive damages, absent evidence of willful or wanton reckless conduct; further, evidence of leaving the scene of the accident after accident did not proximately cause any injuries also held insufficient to support an award of punitive damages); Eifert v. Bush, 272 N.Y.S.2d 862 (N.Y. Sup. 1966) (punitive damages might be recoverable in action for injuries and death resulting when a vehicle was being pursued by county police officer if shown that county knew police officers had not been trained for pursuit driving and nonetheless entrusted such duties to them).

**Author: Eric B. Schoenfeld, Esq. is a partner with the firm of Schoenfeld, Moreland & Reiter, 140 Broadway, 36<sup>th</sup> Floor, New York, New York, 10005. Mr. Schoenfeld can be reached at (212) 509-0500 and [obs@smrattorneys.com](mailto:obs@smrattorneys.com).**

**NORTH CAROLINA**  
**By Terrence Graves and Celie B. Richardson**

Punitive damages are available in civil actions in North Carolina, including those for motor vehicle negligence. Substantive and procedural requirements for punitive damages are described in Chapter 1D of the General Statutes. By statute, an award of punitive damages requires a finding of fraud, malice, or willful or wanton conduct.

Punitive damages cannot be awarded solely on the basis of vicarious liability or against a corporation in general, unless its officers, directors, or managers participated in or condoned the conduct.

Punitive damages are capped at the greater of \$250,000 or three times the compensatory damages awarded. The cap does not apply where the defendant's actions would give rise to the offense of driving while impaired.

In motor vehicle cases, the typical question is whether the defendant's conduct was willful or wanton. "Conduct is wanton when it is in conscious and intentional disregard of and indifference to the safety of others." Yancey v Lea, 550 S.E.2d 155 (N.C. 2001).

Two commercial vehicle negligence cases with opposite outcomes illustrate the fact-specific application of the standard. The Yancey court held that punitive damages were not warranted where a tractor-trailer passed a car at the same time that the car decided to turn left. The court cited case law that in passing or turning situations, punitive damages can be awarded only if the truck driver was intoxicated, driving at excessive speeds, or racing.

In contrast to the Yancey decision is Boyd v. L.G. Dewitt Trucking Co., Inc., 405 S.E.2d 914 (N.C. App. 1991), where the court affirmed an award of punitive damages against a trucking company based on negligent entrustment claims where the driver had a lengthy record of violations, and against the driver on evidence that he was intoxicated at the time of the accident, exceeding the speed limit, had an unauthorized female passenger, and made no attempt to avoid the accident.

**Authors:** Terrence Graves and Celie B. Richardson are attorneys with Sands Anderson Marks & Miller, 430 Davis Street, Suite 160, Durham, North Carolina 27713. [www.sandsanderson.com](http://www.sandsanderson.com). They can be reached at (919) 933-3300, [tgraves@sandsanderson.com](mailto:tgraves@sandsanderson.com), and [crichardson@sandsanderson.com](mailto:crichardson@sandsanderson.com).

**NORTH DAKOTA**  
**By Brian Wood and Susan E. Hettich**

Under North Dakota law, to uphold an award of punitive damages, a plaintiff must show, by clear and convincing evidence, oppression, fraud, or actual malice. McLean Co. v. Kirby Co., 490 N.W.2d 299, 246 n.3 (N.D. 1992). Malice has been defined as “a wish to vex, annoy, or injure another person or an intent to do a wrongful act.” Falkenstein v. City of Bismarck, 268 N.W.2d 787, 793 (N.D. 1978). Thus, mere negligence does not authorize an award of punitive damages. McLean Co., 490 N.W.2d at 246.

In a motor vehicle accident resulting in bodily injury, it is sufficient for the trier of fact to consider an award of exemplary damages against the driver if clear and convincing evidence indicates that the accident was caused by a driver who, within the five years immediately preceding the accident has been convicted for driving under the influence of drugs or alcohol and who was operating or in physical control of a motor vehicle: (a) with an alcohol concentration of at least ten one-hundredths of one percent by weight; (b) under the influence of a controlled substance unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver; (c) under the influence of alcohol and refused to take a test for intoxication; or (d) under the influence of a volatile chemical. N.D.Cent.Code § 32-03.2-11(9).

Nevertheless, an award of punitive damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater. N.D.Cent.Code § 32-03.2-11(4); see Olmstead v. First Int’l Bank of Fargo, 449 N.W.2d 804, 809-10 (N.D. 1989).

**Authors:** Brian A. Wood, Esquire and Susan E. Hettich, Esquire are attorneys with Lind, Jensen, Sullivan & Peterson, P.A., 150 South 5<sup>th</sup> Street, Suite 1700, Minneapolis, Minnesota 55402. [www.lindjensen.com](http://www.lindjensen.com). They can be reached at (612) 333-3637 or [brian.wood@lindjensen.com](mailto:brian.wood@lindjensen.com) and [susan.hettich@lindjensen.com](mailto:susan.hettich@lindjensen.com).

**OHIO**  
**By Jay B. Eggspuehler**

The following excerpt from the Ohio Jury Instructions provides the standard used to determine whether punitive damages should be awarded:

The purposes of punitive damages are to punish the offending party and to make the offending party an example to discourage others from similar conduct . . . the defendant is liable for punitive damages if [the jury finds] by clear and convincing evidence that (A)(1) the defendant's acts or failure to act demonstrated malice, aggravated, or egregious fraud, oppression, or insult,

(or)

(A)(2) the defendant as (principal) (employer) authorized, participated in, or ratified acts or failures to act of an (agent) (employee) that demonstrate malice, aggravated or egregious fraud, oppression, or insult,

(and)

(B) the plaintiff has presented proof of actual damages that resulted from those acts or failures to act of (the defendant) (an agent of the defendant) (an employee of the defendant).

The Ohio Supreme Court held that actual malice, which is necessary for an award of punitive damages, can be defined as (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. Preston v. Murty 32 Ohio St.3d 334, 336, 512 N.E.2d 1174 (1987). Conscious disregard "requires the party to possess knowledge of the harm that might be caused by his behavior." Id at 335.

Punitive damages are intended to punish and deter conduct resulting from a mental state so callous in its disregard for the rights and safety of others that society deems it intolerable. Calmes v. Goodyear Tire & Rubber Co. 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991). Misconduct greater than mere negligence is required. Thus, in determining whether a defendant's conduct warrants an award of punitive damages, Ohio courts currently use the language "great probability of causing substantial harm," which replaced language from earlier cases such as "outrageous," "flagrant," and "criminal." Id; quoting Preston, 32 Ohio St.3d at 335. Pursuant to Ohio Revised Code § 2315.21, the court shall not enter judgment for punitive damages in excess of two times the amount of compensatory damages awarded to the plaintiff.

**Author: Jay B. Eggspuehler is an attorney with the firm Wiles, Boyle, Burkholder, & Bringardner Co., L.P.A., 300 Spruce Street, Floor One, Columbus, Ohio, 43215-1173. [www.wileslaw.com](http://www.wileslaw.com). He can be reached at (614) 221-5216 and [jeggspuehler@wileslaw.com](mailto:jeggspuehler@wileslaw.com).**

**OKLAHOMA**  
**By Bruce N. Powers**

Oklahoma significantly modified its punitive damages statute in 2002. Under the new statute, which is found at Title 23 of the Oklahoma Statutes, Section 9.1, a jury may award punitive damages in cases not arising from contract under certain circumstances. These circumstances are outlined in the statute as Category 1, Category 2, and Category 3.

Under Category 1, if the jury finds by clear and convincing evidence that the defendant has been guilty of reckless disregard for the rights of others, the jury may award punitive damages in an amount not to exceed the greater of \$100,000 or the amount of actual damages awarded. Under Category 2, if the jury finds by clear and convincing evidence that the defendant has acted intentionally and with malice toward others, the jury may award punitive damages in an amount not to exceed the greater of \$500,000, twice the amount of actual damages awarded, or the increased financial benefit derived by the defendant as a direct result of the conduct causing the injury to the plaintiff. Under Category 3, if the jury finds by clear and convincing evidence that the defendant has acted intentionally and with malice toward others, and the court finds that there is evidence beyond a reasonable doubt that the defendant acted intentionally and with malice and engaged in conduct that is life threatening to humans, the jury may award punitive damages in any amount the jury deems appropriate, without regard to any limitations.

Any punitive damage award made by a jury is in a separate proceeding after the jury has awarded actual damages and made a finding that punitive damages are merited in the case. The statute provides seven factors for the jury to consider in assessing punitive damages, although all of these factors may not be applicable in any given case. These factors include the seriousness of the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any effort to conceal it, the degree of the defendant's awareness of the hazard, the attitude and conduct of the defendant upon the discovery of the misconduct or hazard, the number and the level of employees involved in causing or concealing the misconduct, and the financial condition of the defendant.

As the statute is relatively new, there are not a large number of cases construing it, and no reported cases against the trucking industry. One caveat should be noted, related to the language found in Category 1. Under Category 1, a jury may award the greater of the actual damages awarded or \$100,000. Under Category 2, the jury may award the greater of \$500,000 or twice the actual damages. That being the case, with an actual damages award of \$1 million, even in a Category 1 suit, the jury could award an additional \$1 million in punitive damages since they are allowed to award the greater of \$100,000 or the amount of actual damages awarded.

**Author: Bruce N. Powers, operates the Powers Law Firm, 4867 South Sheridan Road, Suite 501, Tulsa, Oklahoma, 74145. [www.tulsalawyer.net](http://www.tulsalawyer.net). Mr. Powers can be reached at (918) 663-8300 or [powersthatbe@tulsalawyer.net](mailto:powersthatbe@tulsalawyer.net).**

**OREGON**  
**By Brian B. Williams**

Under ORS § 31.730(1), a party seeking punitive damages must prove “by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.”

Punitive damages can be awarded based on the acts of an agent if the principal “with knowledge of the material facts, intended to ratify” the agent's action. Jensen v. Medley, 336 Or. 222, 241, 82 P.3d 149 (2003).

Punitive damages cannot be pled in state court unless the court allows the claim pursuant to a statutory hearings procedure set out in ORS § 31.725; Pruett v. Erickson Air-Crane Company, 183 FRD 248 (D. Or. 1998) (The federal courts do not require this procedure.) Discovery of evidence of a defendant's ability to pay is not permitted until after this procedure is followed. ORS § 31.725(6).

Every punitive damage award undergoes court review to determine whether it is rational, taking into account any other punitive awards against the defendant for the same conduct. ORS § 31.730(2) and (3). If the defendant can show that it has taken reasonable remedial measures, it can make a motion to reduce the amount of any judgment for punitive damages ORS § 31.730(3).

In Oregon state court, as well as federal courts applying Oregon law, upon entry of a verdict including an award of punitive damages, the Oregon Department of Justice receives 60% of any punitive damage award (and the jury is not informed of this). ORS § 31.735(1)(a); DeMendoza v. Huffman, 334 Or 425, 51 P3d 1232 (2002). The plaintiff receives 40% of the award and plaintiff's counsel is paid out of that amount. ORS § 31.735(1)(a). Attorneys' fees cannot exceed 20% of the amount awarded as punitive damages. ORS § 31.735(1)(a).

**Author:** Brian B. Williams is an attorney with Hitt Hiller Monfils Williams, LLP, 411 S.W. Second Avenue, Suite 400, Portland, Oregon, 97204. [www.hittandhillier.com](http://www.hittandhillier.com). He can be contacted at (503) 228-9106 and [bwilliams@hittandhillier.com](mailto:bwilliams@hittandhillier.com).

**PENNSYLVANIA**  
**By Kandice J. Giurintano**

In Pennsylvania, punitive damages may be imposed for torts that are committed willfully, maliciously, or so carelessly as to indicate wanton disregard of the rights of the party injured. See, G.J.D. v. Johnson, 552 Pa. 169, 172, 713 A.2d 1127, 1129 (1998). Assessment of punitive damages is proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct. See, SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 493, 587 A.2d 702, 704 (1991).

A conscious appreciation of the risk of harm by an individual defendant is necessary for the award of punitive damages. Punitive damages may be imposed only where the defendant is conscious of a high degree of physical harm to a person and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. If the defendant is not shown to have appreciated the risk, punitive damages will not be allowed, even if a reasonable person in the defendant's position would have recognized the danger. See, SHV Coal, Inc., 526 Pa. at 494-495, 587 A.2d at 704-705 (citing § 500, Restatement of Torts, 2d, official comment a).

A corporate defendant, may be subject to punitive damages based upon the actions of an employee, as punitive damages may be awarded on the basis of vicarious liability. The corporate defendant need not direct the improper conduct, nor ratify it, for punitive damages to be imposed. See, Shiner v. Moriarty, 706 A.2d 1228, 1240 (Pa. Super. 1998).

**Author: Kandice J. Giurintano, Esquire, is an attorney with McNees Wallace & Nurick LLC, 100 Pine Street, Harrisburg, Pennsylvania 17108. [www.mwn.com](http://www.mwn.com). Ms. Giurintano can be reached at (717) 237-5452 or [kgiurintano@mwn.com](mailto:kgiurintano@mwn.com).**

**RHODE ISLAND**  
**By Gary N. Stewart**

Punitive Damages are rarely claimed in a motor vehicle case, even one involving a tractor trailer, in Rhode Island. To uphold an award of punitive damages, a plaintiff must show that the defendant's actions were so willful, reckless or wicked that they amounted to criminal acts. Serra v. Ford Motor Credit Company, 463 A.2d. 151 (R.I. 1983). This standard tends to restrict actions for punitive damages to intentional conduct.

Usually, cases in which punitive damages are alleged are severed and thereafter, an evidentiary hearing is held where the plaintiff must show a prima facie case for punitive damages before being able to inquire into the defendant's financial net worth during pretrial discovery. Palmisano v. Toth, 624 A.2d. 314 (R.I. 1993).

**Author: Gary N. Stewart, Esquire is an attorney with Rawle & Henderson LLP, 25 North Front Street, First Floor, Harrisburg, Pennsylvania, 17101. [www.rawle.com](http://www.rawle.com). Mr. Stewart routinely defends the interests of tractor trailer companies and their insurers in Rhode Island. Mr. Stewart can be reached at (717) 234-7700 or [gstewart@rawle.com](mailto:gstewart@rawle.com).**

**SOUTH CAROLINA**  
**By Kurt Rozelsky**

Punitive damages can only be awarded in South Carolina where the plaintiff proves, by clear and convincing evidence, that the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Austin v. Specialty Transp. Servs., 358 S.C. 298, 315, 594 S.E.2d 867, 875 (2004); S.C. Code Ann. § 15-33-135 (1976 & Supp. 2003). A tort is reckless, willful or wanton "if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights. A conscious failure to exercise due care constitutes willfulness." Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). Punitive damages are only awarded upon a finding of actual damages. Id. Even though South Carolina is a modified comparative negligence jurisdiction, punitive damages are not reduced by the comparative negligence of the plaintiff. Clark v. Cantrell, 339 S.C. 369, 381, 529 S.E.2d 528, 535 (2000).

The following factors are used to determine the appropriate amount of a punitive damages award: "(1) the character of the defendant's acts; (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; (3) the defendant's degree of culpability; (4) the punishment that should be imposed; (5) the duration of the conduct; (6) defendant's awareness or concealment; (7) the existence of similar past conduct; (8) the likelihood the award will deter the defendant or others from like conduct; (9) whether the award is reasonably related to the harm likely to result from such conduct; and (10) the defendant's wealth or ability to pay." Austin v. Specialty Transp. Servs., 358 S.C. 298, 315, 594 S.E.2d 867, 875 (S.C. Ct. App. 2004) (citing Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991)). Gamble requires courts to conduct a post trial review of punitive damages "to ensure that a punitive damage award is proper." Gamble, 406 S.E.2d at 354.

In addition to the Gamble factors, South Carolina courts have applied the guideposts set out by the U.S. Supreme Court, which include: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." Frazier v. Badger, 361 S.C. 94, 107, 603 S.E.2d 587, 593 (2004) (citing State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003)). Of note, the South Carolina Supreme Court has construed Campbell as excluding the defendant's ability to pay as a factor in a due process analysis of punitive damages. Frazier, 361 S.C. at 106, 603 S.E.2d at 593.

**Author:** Kurt Rozelsky is an attorney with Leatherwood Walker Todd & Mann, P.C., The Leatherwood Plaza, 300 East McBee Avenue, Suite 500, Greenville, South Carolina, 29601. [www.lwtm.com](http://www.lwtm.com). He can be reached at (864) 242-6440 and [krozelsky@lwtm.com](mailto:krozelsky@lwtm.com).

## SOUTH DAKOTA

By Jay Shultz

In South Dakota, for a punitive damages claim to be submitted to the jury, the claimant must establish by clear and convincing evidence that there is a reasonable basis to believe that a party's conduct was willful, wanton or malicious. Hoas v. Griffiths, 2006 SD 27 ¶ 16, 714 N.W.2d 61, 66. An act "conceived in the spirit of mischief or of criminal indifference to civil obligations" will support an award of punitive damages. Dahl v. Sittner, 474 N.W.2d 897, 900 (S.D. 1991), *quoting* Hannahs v. Noah, 83 S.D. 296, 158 N.W.2d 678, 682 (1968).

Although malice is required, it may be shown by either actual or presumed malice. "Actual malice" is a positive state of mind, evidenced by a positive desire and intention to injure another and motivated by hatred or ill will. "Presumed malice" is present when a person acts willfully or wantonly to the injury of others; it "can be shown by demonstrating a disregard for the rights of others." Biegler v. American Family Mut. Ins. Co., 2001 SD 13, ¶ 45, 621 N.W.2d 592, 605.

Before any discovery relating to a claim for punitive damages may be conducted, and before the claim can be submitted to the jury, the court "shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against." SDCL § 21-1-4.1.

In the context of operating a motor vehicle, willful and wanton misconduct is conduct which partakes of a deliberate and intentional wrong. There must be facts that would show that the defendant intentionally did something in the operation of the motor vehicle which he should not have done or intentionally failed to do something which he should have done under the circumstances that it can be said that he consciously realized that his conduct would in all probability, as distinguished from possibility, produce the precise result which it did produce and would bring harm to the plaintiff. Willful and wanton misconduct demonstrates an affirmative, reckless state of mind or deliberate recklessness on the part of the defendant. Such state of mind is determined by an objective standard rather than the subjective state of mind of the defendant. Tranby v. Brodock, 348 N.W.2d 458, 461 (S.D. 1984).

**Author:** Jay Shultz is an attorney with Lynn, Jackson, Schultz, & Lebrun, P.C., First National Bank Bldg., 909 St. Joseph Street, 9<sup>th</sup> Floor, Rapid City, South Dakota, 57709. [www.lynnjackson.com](http://www.lynnjackson.com). He can be contacted at (605) 342-2592 and [jshultz@lynnjackson.com](mailto:jshultz@lynnjackson.com).

**TENNESSEE**  
**By Charles R. Krivcher**

In Tennessee, the law surrounding punitive damages has been settled since 1992 with the decision by the Tennessee Supreme Court in Hodges v. S.C. Toof & Company, 833 S.W.2d 896 (1992). In Hodges, the Court announced “a new procedure aimed at providing specific criteria...in deciding whether to award punitive damages and, if so, in what amount.” Hodges, at 900. In setting forth such criteria, the Court found that Tennessee was joining “those states that have refined their laws to restrict the awarding of punitive damages to cases involving only the most egregious of wrongs.” Hodges, at 901. These Hodges criteria remain good law in Tennessee at this time, having been cited in a number of subsequent decisions.

The Hodges criteria provide that “a court may henceforth award punitive damages only if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly.” Hodges at 901. Further, the case holds that “a plaintiff must prove the defendant’s intentional, fraudulent, malicious or reckless conduct by clear and convincing evidence. This higher standard of proof is appropriate given the twin purposes of punishment and deterrence.” Hodges at 901. Finally, bifurcation of the trial shall be ordered upon motion of a defendant, thus creating two phases. “During the first phase, the fact finder shall determine (1) liability for, and the amount of, compensatory damages and (2) liability for punitive damages...” Hodges at 901. It is in the second phase that evidence of a defendant’s financial affairs, net worth, etc. becomes admissible.

As a final item of interest, the public policy of Tennessee does not preclude insurance coverage for punitive damages except “in a clear case”, i.e., for injury “intentionally inflicted.” Lazenby v. Universal Underwriters Insurance Company, 383 S.W.2d 1 (Tenn. Sup.Ct. 1964). Note the definition of “intentionally” under Hodges, “A person acts intentionally when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Hodges at 901. Thus, the practical value of the rule as stated in Lazenby might be severely eroded by the more recent Hodges criteria.

**Author: Charles R. Krivcher is Vice President, Director of Claims for Synaxis Group, Inc., 3401 West End Avenue, Suite 600, Nashville, Tennessee 37203. [www.synaxisgroup.com](http://www.synaxisgroup.com). The commercial insurance subsidiary of First Horizon National Corporation (NYSE: FHN). Mr. Krivcher can be reached at (615) 385-8282 or [ckrivcher@synaxisgroup.com](mailto:ckrivcher@synaxisgroup.com).**

**TEXAS**  
**By Daniel P. O'Connor**

Punitive damages are very difficult to maintain upon appellate review in Texas civil cases. Punitive damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of punitive damages results from fraud, malice, or gross negligence. Tex. Civ. Prac. & Rem. Code Ann ¶ 41.003(a) (Vernon 1997).

“Malice” means a specific intent by the defendant to cause substantial injury or harm to the claimant. “Gross negligence” means an act or omission which, when viewed objectively from the standpoint of the actor at the time of its occurrence, involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and of which the actor had actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. Tex. Civ. Prac. & Rem. Code Ann ¶41.001(7) (Vernon 1997).

Punitive damages may not be awarded where it appears that the defendant acted in good faith or without wrongful intention or in the belief that he was exercising his rights. Mayflower Inv. Co. V. Stephens, 345 S.W.2d 786, 793 (Tex. Civ. App. 1961, writ ref'd n.r.e.).

The Texas Supreme Court has not yet decided the issue of whether public policy does or does not preclude insurance coverage for punitive damages, and whether it is or is not against public policy for the insurer to pay the punitive damage award assessed against an insured. See, Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172, 189-91 (Tex. App. - Fort Worth 2004, no pet.). The appellate courts have been divided on the issue. See, Id.

**Author:** Daniel P. O'Connor is an attorney with Shaddox, Compere, Walraven & Good, P.C., 1250 N.E. Loop 410, Suite 725, San Antonio, Texas, 78209. [www.scwqlaw.com](http://www.scwqlaw.com). He can be reached at (210) 822-2018 and [doconnor@scwqlaw.com](mailto:doconnor@scwqlaw.com).

**UTAH**  
**By Heinz J. Mahler**

Punitive damages in the State of Utah are governed by the provisions of Utah Code Annotated § 78-18-1. This statute requires that for punitive damages to be awarded, compensatory or general damages must first be awarded.

Under the statute, the claim for punitive damages must be established by “clear and convincing evidence.”

The acts and omissions of the tortfeasor must be the result of “willful and malicious or intentionally fraudulent conduct or conduct that manifests a knowing and reckless indifference toward and a disregard of the rights of others.”

In Orr v. Brigham Young University, 960 F.Supp. 1522, 1531 (10<sup>th</sup> Cir. 1994), the court held that although actual intent to cause injury is not necessary, a defendant must know or should know that “such conduct would, in a high degree of probability, result in substantial harm to another . . . and the conduct must be highly unreasonable conduct or an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.”

Utah Code Annotated §31A-20-101 prohibits any insurer from insuring against punitive damages.

An interesting case originating in the State of Utah was recently decided by the United States Supreme Court, Campbell v. State Farm, 538 U.S. 408 (2003), in which the U.S. Supreme Court set limits to an award of punitive damages based on a reasonable ratio of punitive damages to general damages.

**Author: Heinz J. Mahler is an attorney with Kipp and Christian, P.C., 10 Exchange Place, 4<sup>th</sup> Floor, Salt Lake City, Utah, 84111. [www.kippandchristian.com](http://www.kippandchristian.com). He can be contacted at (801) 521-3773 and [hjmahler@kippandchristian.com](mailto:hjmahler@kippandchristian.com).**

**VERMONT**  
**By William D. Riley**

Vermont law limits the availability of punitive damages to cases where the evidence shows that the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with a crime. Brueckner v. Norwich Univ., 169 Vt. 118, 129, 730 A.2d 1086, 1095 (1999).

Punitive damages are available only to punish and deter a defendant who acted with actual malice. Id. Actual malice may be shown by conduct manifesting personal ill will or carried out under circumstances evincing insult or oppression, or conduct showing a reckless or wanton disregard to the rights of others. Id.; Bolsta v. Johnson, 176 Vt. 602, 602, 848 A.2d 306, 308 (2004).

There must be some evidence of bad motive, as mere negligence or even recklessness are not sufficient to show malice and, therefore, do not justify the imposition of punitive damages. Bolsta, 176 Vt. at 602, 848 A.2d at 308.

Willful violation of the law is insufficient evidence of malice, if not accompanied by a showing of bad faith. Bolsta, 176 Vt. at 603, 848 A.2d at 308; Monahan v. GMAC Mortgage Corp., 893 A.2d 298, 317 (2005).

A corporation may be held vicariously liable for punitive damages based on the conduct of its employed driver only where a superior officer has ordered, participated in, or ratified the outrageous conduct. Parris v. St. Johnsbury Trucking Co., 395 F.2d 543, 545 (2d. Cir. 1968) (applying Vermont law); see Brueckner, 169 Vt. at 130, 730 A.2d at 1096.

Punitive damages are insurable under Vermont law. State v. Glens Falls Ins. Co., 137 Vt. 313, 320; 404 A.2d 101, 105 (1979).

**Author: William D. Riley, Esq., is a member of the law firm of Paul Frank & Collins P.C., One Church Street, Burlington, Vermont, 05402. [www.pfclaw.com](http://www.pfclaw.com). Mr. Riley can be reached at 802-658-2311 or [w Riley@pfclaw.com](mailto:w Riley@pfclaw.com).**

## VIRGINIA

**By Candace Blydenburgh and Ashley C. Dobbin**

Punitive damages in Virginia are recoverable for willful or wanton conduct or conduct that shows a conscious disregard for the safety of others. See Va. Code §8.01-52.

A plaintiff must specifically plead a claim for punitive damages.

The total amount of punitive damages recovered against all defendants cannot exceed \$350,000.00. See, Va. Code § 8.01-38. The jury may hear and consider evidence of the defendant's financial standing in determining the amount of punitive damages. See, Smith v. Litten, 256 Va. 573, 578, 507 S.E.2d 77, 80 (1998).

Punitive damages may be awarded if the defendant acted with actual malice toward the plaintiff or acted under circumstances amounting to a willful and wanton disregard of the plaintiff's rights. See, Hamilton Dev. Co. v. Broad Rock Club Inc., 248 Va. 40, 45, 445 S.E.2d 140, 143 (1994).

Punitive damages may not be recovered against a master or principal for the act of his servant or agent, unless the plaintiff proves the act was carried out in the scope of employment, with either actual or implied malice, and the principal expressly authorized, subsequently ratified, or actually participated in the act. See, Hogg v. Plant, 15 Va. 175, 180, 133 S.E. 759, 760 (1926).

Virginia does not permit recovery of punitive damages in ordinary contract actions, but punitive damages may be recoverable in a contract action where the breach of contract amounts to an independent willful tort resulting from malicious, wanton, or oppressive behavior by the breaching party. See, Kamlar Corp. v. Haley, 224 Va. 699, 299 S.E.2d 514 (1983).

Punitive damages are not favored in Virginia because "they are in the nature of a penalty and should be awarded in cases involving the most egregious conduct." Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 144, 413 S.E.2d 630, 639 (1992).

**Authors:** Candace A. Blydenburgh and Ashley C. Dobbin are attorneys with Bowman and Brooke LLP, 901 East Byrd Street, Suite 1500, Richmond, Virginia 23219-4027. [www.bowmanandbrooke.com](http://www.bowmanandbrooke.com). They can be reached at (804) 819-1138. [candace.blydenburgh@ric.bowmanandbrooke.com](mailto:candace.blydenburgh@ric.bowmanandbrooke.com) and [ashley.dobbin@ric.bowmanandbrooke.com](mailto:ashley.dobbin@ric.bowmanandbrooke.com).

**WASHINGTON**  
**By Doug Houser and Toni Anders**

The long-standing rule in Washington is that punitive damages are not allowed unless expressly authorized by the legislature. Christensen v. Royal Sch. Dist. No. 160, 156 Wn.2d 62, 80 n.2, 124 P.3d 283 (2005).

For more than a century, Washington courts have denounced punitive damages as contrary to public policy, Dailey, 129 Wn.2d at 575; Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891), however, despite that fact, the legislature has made narrow exceptions to the rule. Barr, 96 Wn.2d at 699-700 [identifying CPA violations (RCW 19.86.090), usury (RCW 19.52.030), and trespass to trees, shrubs, and timber (RCW 64.12.030) as legislatively enacted exceptions].

The prohibition on punitive damages was pronounced by the Washington Supreme Court in Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P.1072 (1891). Even then, the issue of punitive damages had been widely debated, with older cases favoring the imposition of punitive damages and “modern” courts and writers rejecting punitive damages. Spokane Truck, 2 Wash. at 50-51. The result was “a wonderful diversity of opinion” that the Court was free to accept or reject in its quest to adopt a rule it hoped would “simplify judicial proceedings, and lead to the least embarrassing complications in the administration of the law, and the determination of rights thereunder.” Id at 51. Ultimately, the Court followed the modern rule and rejected punitive damages, calling the doctrine “unsound in principle, and unfair and dangerous in practice. Id at 56.

In rejecting punitive damages, the Court opined that: (1) damages should compensate the injured party for the injury actually sustained, not award a windfall beyond full compensation; Id. at 51; Dailey, 129 Wn.2d at 575; (2) punitive damages impose penalties generally reserved for criminal sanctions; Dailey, 129 Wn.2d at 575; and (3) imposing criminal sanctions in civil actions, where a defendant may be found liable under the lesser standard of proof, i.e., a preponderance of the evidence, would be unfair. Spokane Truck, 2 Wash. at 52. According to the Court, because compensatory damages are “exceedingly liberal towards the injured person,” compensating him for the injury and physical pain and “tenderly inquir[ing] into his mental sufferings” to recompense for “[i]ndignities received, insults borne, sense of shame or humiliation endured, lacerations of feelings, disfiguration, loss of reputation or social position, loss of honor, impairment of credit, and every actual loss, and some which frequently border on the imaginary,” the public “can have no interest in exacting the pound of flesh.” Spokane Truck, 2 Wash. at 52-53.

**Authors:** Doug Houser and Toni Anders are attorneys with the firm Bullivant, Houser & Bailey PC., 888 S.W. Fifth Avenue, Suite 300, Portland, Oregon, 97204. [www.bullivant.com](http://www.bullivant.com). They can be reached at (503) 499-4415, [doug.houser@bullivant.com](mailto:doug.houser@bullivant.com) and [toni.anders@bullivant.com](mailto:toni.anders@bullivant.com).

## WEST VIRGINIA

By George N. Stewart and Dora A. DeCourcy

In West Virginia, punitive damages may be assessed in cases of “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others.” Bowyer v. Hi-Lad, Inc., 216 W.Va. 634, 648, 609 S.E.2d 895, 909, quoting in part Syl. pt. 4, Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895); Stump v. Ashland, Inc., 201 W.Va. 541, 552, 499 S.E.2d 41, 53 (1997).

An employer who knowingly employs a careless and incompetent employee can be held liable for punitive damages resulting from the employee’s wanton, willful or malicious negligence. Syl. pt. 2, Addair v. Huffman, 156 W.Va. 592, 195 S.E.2d 739 (1973).

A jury may not award punitive damages without first finding that the plaintiff is entitled to compensatory damages. Syl. pt. 1, Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991). See also, Syl. pts. 2-6, Boyd v. Goffoli, 216 W.Va. 552, 608 S.E.2d 169 (2004), citing Garnes.

West Virginia courts apply a two-prong analysis to determine whether a particular award of punitive damages is appropriate. The court first inquires into whether the defendant’s conduct warrants any award of punitive damages. Syl. pt. 9, Bowyer v. Hi-Lad, Inc., 216 W.Va. 634, 609 S.E.2d 895 (2004), citing Mayer v. Frobe, *supra*. Second, the court weighs various factors in order to determine whether the size of a punitive damages award is appropriate, including the relationship between the punitive damages and the harm that has actually occurred and is likely to occur from the defendant’s conduct; the reprehensibility of the defendant’s conduct (including the duration of the wrongful conduct, the defendant’s knowledge that the conduct was causing or was likely to cause harm, any attempts by the defendant to conceal the conduct, etc.); any profit the defendant may have derived from the wrongful conduct; and the financial position of the defendant. Syl. pt. 10, Bowyer v. Hi-Lad, Inc., *supra*.

Furthermore, punitive damages must bear a reasonable relationship to compensatory damages. *Id.* While appellate review of most matters in the civil litigation context is discretionary, upon petition for appeal, the West Virginia Supreme Court will review a punitive damages award. Syl. pt. 5, Garnes, *supra*.

West Virginia public policy does not preclude insurance coverage for punitive damages arising from gross, reckless or wanton negligence. State ex rel. State Auto Ins. Co. v. Risovich, 204 W.Va. 87, 93, 511 S.E.2d 498, 504 (1998).

**Authors:** George N. Stewart and Dara A. DeCourcy are attorneys with Zimmer Kunz, PLLC, 206 Spruce Street, Morgantown, West Virginia, 26505. [www.zklaw.com](http://www.zklaw.com). They can be reached at (304) 292-8531, [stewart@zklaw.com](mailto:stewart@zklaw.com) and [decourcy@zklaw.com](mailto:decourcy@zklaw.com).

**WISCONSIN**  
**By Tomislav Z. Kuzmanovic**

Under Wisconsin law, a plaintiff may receive punitive damages if he or she can prove, by clear and convincing evidence that the defendant acted with an intentional disregard of the plaintiff's rights, or that the defendant was substantially certain his or her conduct would result in the plaintiff's rights being disregarded. Wis. Stat. § 895.043(3) (2006) (previously Wis. Stat. § 895.85), Wischer v. Mitsubishi Heavy Industries America, Inc., 279 Wis. 2d 4, 13-14, 694 N.W.2d 320, 325 (Wis. 2005).

Intentional disregard is defined as a purpose or awareness to a substantial certainty. Strenke v. Hogner, 279 Wis. 2d 52, 70, 694 N.W.2d 296, 304 (Wis. 2005) (Supreme Court, in affirming the award of punitive damages against a drunk driver with .269% blood alcohol and four prior driving while intoxicated convictions, stated that only drunk driving cases that are "so aggravated" as to meet the elevated standard are appropriate for punitive damages). Only when the nature of the conduct is so aggravated that it meets the "intentional disregard of rights standard", can the issue of punitive damages be presented to a jury. Strenke v. Hogner, 279 Wis. 2d at 71-72, 694 N.W.2d at 305. However, the defendant's conduct giving rise to punitive damages need not be directed at a specific plaintiff. Strenke v. Hogner, 279 Wis. 2d at 59, 694 N.W.2d at 298-299.

The following factors will be considered when evaluating whether to award punitive damages: (1) the grievousness of the defendant's acts; (2) the degree of the defendant's malicious intent; (3) the relationship of the punitive damages award to the compensatory damages award; (4) the potential damage that might have been caused by the defendants' acts; (5) the ratio of the punitive damages award to any civil or criminal penalties that could be imposed for comparable misconduct; and, (6) the wealth of the wrongdoer. Apex Electronics Corp. v. Gee, 217 Wis.2d 378, 390, 577 N.W.2d 23, 28 (Wis. 1998); See also, Wis. JI-Civil § 1707.1 (2006). The relevance and the seriousness of the above mentioned factors will determine if punitive damages are appropriate and sustainable upon review.

**Author: Tomislav Z. Kuzmanovic is an attorney with Hinshaw & Culbertson, LLP, 100 E. Wisconsin Avenue, Suite 2600, Milwaukee, Wisconsin, 53202. [www.hinshawlaw.com](http://www.hinshawlaw.com). He can be reached at (414) 276-6464 (x204) and [tkuzmanovic@hinshawlaw.com](mailto:tkuzmanovic@hinshawlaw.com).**

**WYOMING**  
**By Greg Greenlee**

In Wyoming, punitive damages are awarded only for conduct involving some element of outrage, similar to that usually found in crime. Punitive damages are not appropriate in circumstances involving inattention, inadvertence, thoughtlessness, mistake, or even gross negligence. Weaver v. Mitchell, 715 P.2d 1361 (Wyo. 1986).

Punitive damages are available only where the misconduct charged is willful and wanton. “Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences, and under circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to another.” Thunder Hawk By and Through Jensen v. Union Pacific R. Co., 844 P.2d 1045, 1051 (Wyo. 1992).

The actor’s state of mind is what distinguishes willful misconduct from ordinary negligence. To prove that one’s conduct was willful, it must be demonstrated that he “acted with a state of mind that approaches intent to do harm.” Bryant v. Hornbuckle, 728 P.2d 1132, 1136 (Wyo. 1986).

Borrowing from BMW of North America v. Gore, 517 U.S. 559 (1996), the Wyoming Supreme Court in Farmers Ins. Exchange v. Shirley, 958 P.2d 1040 (Wyo. 1998), held that the jury’s consideration for an award of punitive damages must include the requirement of a reasonable relationship to the harm that has occurred or may occur from the defendant’s conduct; the financial condition of the defendant; removal of more than the amount of any profit realized from the conduct; consideration of the degree of reprehensibility; the duration of the conduct; the defendant’s awareness and concealment of the conduct; the assessment to the defendant of all costs of the litigation, and mitigation of punitive damages as a result of previously assessed criminal sanctions or prior civil actions against the defendant based upon the same conduct. 958 P.2d at 1052-1053. Although not included in the BMW factors, and not as clearly mandated as it should have been, the Wyoming Supreme Court apparently approved the additional factor that the award must bear a reasonable relationship to the amount of compensatory damages awarded.

**Author: Greg Greenlee is an attorney with the firm Murane & Bostwick, LLC, 508 West 27<sup>th</sup> Street, Cheyenne, Wyoming, 82001. [www.murane.com](http://www.murane.com). The firm has offices in Casper and Cheyenne, Wyoming. Mr. Greenlee can be reached at (307) 634-7500 or [ggg@murane.com](mailto:ggg@murane.com).**