

**1707.1 PUNITIVE DAMAGES: NONPRODUCTS LIABILITY**

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

A person's acts are malicious when they are the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury is intended.

A person acts in an intentional disregard of the rights of the plaintiff if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Before you can find an intentional disregard of the rights of the plaintiff, you must be satisfied that the defendant's act or course of conduct was:

- (1) deliberate;
- (2) an actual disregard of the plaintiff's right to safety, health, or life, a property right, or some other right; and
- (3) sufficiently aggravated to warrant punishment by punitive damages.

A defendant's conduct giving rise to punitive damages need not be directed at the plaintiff seeking punitive damages. There is no requirement that (defendant) intended to cause harm or injury to (plaintiff).

The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously

or in an intentional disregard of the plaintiff's rights, you do not have to award punitive damages. Punitive damages may be awarded or withheld at your discretion. You may not, however, award punitive damages unless you have awarded compensatory damages.

If you determine that punitive damages should be awarded, you should determine the amount you believe will accomplish the purpose of punishing or deterring wrongful conduct. Factors you should consider in answering question \_\_\_\_\_ include:

1. the grievousness of the defendant's acts,
2. the degree of malice involved,
3. the potential damage which might have been done by such acts as well as the actual damage, and
4. the defendant's ability to pay. You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.

[The law provides that punitive damage may not exceed twice the amount of compensatory damages you have awarded the plaintiff or \$200,000.00, whichever is greater. These dollar limitations are not a measure of damages, but a limit on recovery. You should determine the amount, if any, you believe should be awarded in punitive damages.]<sup>1</sup>

**(Burden of Proof, Middle Burden, use Wis JI-Civil 205)**

**SPECIAL VERDICT**

If you answered "yes" to question \_\_\_\_,\* answer this question:

Did (defendant) act maliciously toward (plaintiff) or in an intentional disregard of the rights of (plaintiff)?

Answer: \_\_\_\_\_

Yes or No

\*[Note: This blank refers to the question(s) to which a "yes" answer would support an award of punitive damages.]

If you answered the preceding question "yes," answer this question:

What sum, if any, do you award against (defendant) as punitive damages?

Answer:\$ \_\_\_\_\_

[Note: See Note 2 below if the claim involves operation of a vehicle while under the influence.]<sup>2</sup>

**NOTE**

<sup>1</sup> **Punitive Damages Cap.** Wis. Stat. 895.043(6) provides that punitive damages "may not exceed twice the amount of any compensatory damages recovered by the plaintiff or \$200,000, whichever is greater." In general, the jury should not be advised of the cap on damages. Guzman v. St. Francis Hospital, Inc., 240 Wis.2d 559, 580-582 (2001).

The court can advise the jury of the cap on punitive damages if improper argument is made. Improper argument occurs when counsel would have the jury load-up on punitive damages with the hope that this would bleed money from the compensatory damages. An instruction on the cap is provided for use when improper argument occurs. See also Peot v. Ferraro, 83 Wis.2d 727 (1978). In cases in which the judge has instructed before closing arguments, the judge can give a supplemental instruction on the cap.

<sup>2</sup> **Operation of a Vehicle While Under the Influence; Cap on Punitive Damages.** There are no limitations (caps) on punitive damages where the claim involves operation of a vehicle "while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle." If the court exercises its gatekeeping function in favor of a punitive damages question in an OAWI vehicle case, the jury should be asked the following questions.

If you awarded any punitive damages in answer to the previous question, then answer this question:

Did (defendant) operate (his) ( her) vehicle while under the influence of an intoxicant?

Answer \_\_\_\_\_  
(Yes or No)

Give Wis JI-Criminal 2663A or 2663B

If you answered question \_\_\_\_\_ "yes," then answer the question:

Did the defendant's intoxication render (defendant) incapable of the safe operation of (his) (her) vehicle?

Answer \_\_\_\_\_  
(Yes or No)

## COMMENT

This instruction and comment were approved in 1995 and revised in 2005 and 2011. The comment was updated in 1996, 1997, 1998, 2002, 2004, 2005, 2006, 2009, 2011, 2012, 2015, and 2018.

**Punitive Damages Cap.** Wis. Stat. 895.043(6) provides that punitive damages "may not exceed twice the amount of any compensatory damages recovered by the plaintiff or \$200,000, whichever is greater." In general, the jury should not be advised of the cap on damages. Guzman v. St. Francis Hospital, Inc., 240 Wis.2d 559, 580-582 (2001).

**Conduct Necessary to Support Punitive Damages.** In 2005, the Wisconsin Supreme Court issued decisions in two cases involving punitive damage claims. Strenke v. Hogner, 2005 WI 25, and Patricia Wischer, et al. v. Mitsubishi Heavy Industries America, Inc., et al., 2005 WI 26. In Strenke, the court of appeals affirmed the jury award of punitive damages. The case was remanded to the court of appeals on the question of whether the jury's punitive damage award was excessive. In Wischer, the supreme court reversed the court of appeals' decision that the case was not appropriate for punitive damages. The case was remanded to the court of appeals as to the constitutionality of the amount of the trial court's punitive damages award.

Strenke v. Hogner. The Strenke case was decided first by the supreme court. Strenke v. Hogner expressly overruled the court of appeals' decision in Wischer. Some of the rulings made in Strenke v. Hogner were:

1. The court of appeals' decision in Wischer is erroneous and overruled. The correct interpretation of Wis. Stat. § 895.85(3) (now § 895.043(3)) is:

- There is no requirement of intent to injure or cause harm in a jury instruction. Rather the focus is on a disregard of rights.

- The legislature did not intend an intentional disregard of the rights of the plaintiff to require intent to cause injury to the plaintiff.

2. The defendant's conduct giving rise to punitive damages need not be directed at the specific plaintiff seeking punitive damages to recover under Wis. Stat. § 895.85 (now § 895.043).

3. The court in Strenke agreed that the legislature tried to make it harder to recover punitive damages by enacting Wis. Stat. § 895.85(3) (now § 895.043(3)). According to the court's opinion, indifference on the person's part to the consequences of his or her actions is no longer sufficient. The statute requires an "intentional disregard of rights" as defined by Wisconsin Jury Instruction-Civil 1707.1. In Paragraph 37 of the Strenke decision, the supreme court states that the court's analysis is consistent with that of the Civil Jury Instructions Committee. The court concludes:

Thus, in response to the first question certified by the Court of Appeals, we conclude that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. This will require that an act or course of conduct be deliberate. Additionally, the act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, a property right, or some other right. Finally, the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages. (Paragraph 38)

4. Strenke also dictates that trial judges serve as "gatekeepers" before sending a question on punitive damages to the jury. A punitive damages question is not to be sent to the jury in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite conduct. The middle burden of proof must be met. According to Justice Bradley's opinion,

"punitive damages are not recoverable for mere negligence. Furthermore, not every drunk driving case will give rise to punitive damages. Only when the conduct is so aggravated that it meets the elevated standard of an 'intentional disregard of rights' should a circuit court send the issue to the jury."

Little guidance is given in the Strenke opinion concerning the standard the trial judge is to apply in exercising this gatekeeping function. For two recent decisions involving the trial court's gatekeeping role as to punitive damages, see Berner Cheese Corp. v. Krug, 2008 WI 95, 312 Wis.2d 251, 752 N.W.2d 800 and Henrikson v. Strapon, 2008 WI App 145, 314 Wis.2d 225, 758 N.W.2d 205.

5. Last, the supreme court concluded in Strenke that the defendant's conduct was sufficiently aggravated to warrant punishment by punitive damages. The court could not agree, however, whether the punitive damages of \$225,000.00 was excessive. The court remanded this issue to the court of appeals.

Wischer v. Mitsubishi Heavy Industries America. The supreme court's decision in Wischer reviewed the court of appeals' decision. This decision was overruled by Strenke v. Hogner. The question accepted for review in Wischer was "what proof was required for a plaintiff to recover punitive damages under the phrase 'in an intentional disregard of the rights of the plaintiff' as provided in Wis. Stat. § 895.85(3) (now § 895.043(3))." A supplemental briefing was done on the issue of whether the punitive damages award was unconstitutional.

The supreme court affirmed the trial court's decision to submit the question of punitive damages to the jury.

The court, however, declined to address the issue of the constitutionality of the amount of the punitive damages award because of numerous unresolved issues. The court remanded those issues for review by the court of appeals under Trinity Evangelical Lutheran Church v. Tower Ins. Co., 261 Wis.2d 333 (2003); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003) and, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

The Wischer decision contains an extensive analysis of the evidence. The court concluded:

To sum up, we are satisfied that the evidence about MHIA's failure to determine and factor in the wind speed, if believed, was, under the circumstances of the present case, in and of itself sufficient evidence, that MHIA was aware that its conduct was substantially certain to result in the plaintiffs' rights being disregarded. (Paragraph 58)

Chief Justice Abrahamson's decision reaffirms the Strenke language that:

A defendant's act or course of conduct must be deliberate. A defendant must be aware that his or her conduct is substantially certain to result in the plaintiff's rights being disregarded-the rights of the plaintiffs to safety, health, or life, a property right, or some other right. Furthermore, the course of conduct must actually disregard the rights of the plaintiff. Finally, the act or course of conduct must be sufficiently aggravated to warrant punishment by a punitive damages award. (Paragraph 30)

According to Chief Justice Abrahamson, the interpretation of the statute by the supreme court in Strenke v. Hogner is consistent with the explanation of the statute set forth in Wisconsin Jury Instructions-Civil 1707.1.

See also Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797 which discusses and applies the Strenke and Wischer decisions.

**Gatekeeping Function of the Trial Judge.** The trial court must initially determine whether the evidence establishes a proper case for the potential allowance of punitive damages and for the submission of the issue of punitive damages to the jury. As Justice Bradley notes in Strenke v. Hogner:

Punitive damages are not recoverable for mere negligence. Furthermore, not every drunk driving case will give rise to punitive damages. Only when conduct is so aggravated that it meets the elevated standard of 'intentional disregard of rights' should the circuit court send the issue to the jury. Additionally, the trial court will need to make this determination of the propriety of a punitive damages issue before evidence of wealth of the defendant is admitted.

For recent cases involving the "gatekeeping" function of the trial judge, see Kimble v. Land Concepts, Inc., 2014 WI 21, 353 Wis.2d 377, 845 N.W.2d 395; Henrikson v. Strapon, 2008 WI App 145, 314 Wis.2d 225, 758 N.W.2d 205; and Berner Cheese Corp. v. Krug, 2008 WI 95, 312 Wis.2d 251, 752 N.W.2d 800.

Henrikson v. Strapon, 314 Wis.2d 225 (2008), provides some guidance on the gatekeeping standards in a drunk driving case. In Henrikson, the court of appeals affirmed a dismissal of a punitive damages claim because the blood alcohol content (.11) was not sufficient to infer that the defendant's driving was substantially certain to result in a disregard of plaintiff's rights.

The Henrikson court focused on several factors:

- 1) The driving was run of the mill and not aggravated;
- 2) The level of intoxication was not excessively over the legal limit;
- 3) The defendant had no prior OAWI convictions;
- 4) No evidence of consumption of alcohol was in the record;
- 5) The prosecution reduced the OAWI charge to reckless driving and said it couldn't prove the OAWI charge beyond a reasonable doubt.

Absent a showing of intent, the standard that defendant's acts are practically certain to result in plaintiff's rights being violated is a high standard. See also Berner Cheese Corp v. Krug, 312 Wis.2d 251 (2008).

**Constitutional Review.** Following remand from the Wisconsin Supreme Court, the court of appeals in Strenke held that the award of punitive damages was not grossly excessive and not unconstitutional. Strenke v. Hogner, 2005 WI App. 194, 287 Wis.2d 135, 704 N.W.2d 309.

The United States Supreme Court has stated that: "the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive punishment on a tortfeasor." BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1592 (1996). The Court overturned a \$2,000,000 punitive damage award wherein \$4,000 in compensatory damages were awarded. BMW had failed to apprise a new car purchaser that his automobile had been repainted following damage in shipment. Recognizing the states' legitimate interest in punishing unlawful conduct and deterring its repetition, the Court refused to adopt any bright line mathematical formula in determining when punitive damages are excessive. However, the Court did say that a "general concern of reasonableness. . . properly enters into the constitutional calculus." BMW at 1602, quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993). The Court in BMW stated that punitive damages in state courts are limited to vindicating that state's (as opposed to other states' or the nation's) interest in punishment and deterrence. Evidence of a tortfeasor's out of state conduct may nevertheless be relevant but only on the issue of the reprehensibility of the defendant's conduct. BMW, at 1594, 1598. The trial judge may want to include a limiting instruction if out of state conduct is admitted in the record.

Three considerations enter into the determination of whether an award is "grossly excessive": (1) the degree of reprehensibility of the conduct; (2) the disparity between the actual and potential harm suffered and the amount of the punitive damage award; and (3) the difference between the punitive damage award and any statutorily imposed state civil or criminal punishment for comparable conduct. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). The three State Farm factors were expanded into a six-factor by the Wisconsin Supreme Court in Trinity Evangelical Lutheran Church, *supra*. However, the supreme court in Kimble v. Land Concepts, *supra*, limited its analysis to the 3-factor test under Campbell and not the 6-factor test from Trinity, *supra*.

**Special Verdict.** The instruction and verdict can be modified to fit the facts. If maliciousness is not argued, then the paragraph on maliciousness in the instruction can be deleted and the verdict question shortened.

**Punitive Damages in Trespass Actions; Nominal Damages.** The supreme court has held that when nominal damages are awarded for an intentional trespass to land, punitive damages may be awarded. Jacque v. Steenberg Homes, Inc., 209 Wis.2d 605, 563 N.W.2d 154 (1997). In Jacque, the supreme court said the United States Supreme Court had recently clarified the three factors the court must consider when determining whether a punitive damages award violates the due process clause: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between this remedy and the civil or criminal penalties authorized or imposed in comparable cases. 209 Wis.2d, at 627. The court said the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. Punitive damages should reflect the egregiousness of the offense. In other words, some wrongs are more blameworthy than others and the punishment should fit the crime.

**Subsequent or Unrelated Bad Acts by the Defendant.** If evidence is presented regarding conduct by the defendant that is unrelated to the defendant's conduct causing the plaintiff's injuries, consider giving the following limiting instruction:

Furthermore, the conduct for which you find punitive damages should be assessed must have caused or contributed to the plaintiff's injuries.

The language suggested above is not appropriate in all cases in which punitive damages are sought. However, case law supports the concept that the jury in answering the punitive damages special verdict question must focus on the acts causing the injuries for which compensatory damages are assessed. Kehl v. Economy Fire & Casualty Co., 147 Wis.2d 531, 534-38, 433 N.W.2d 279 (Ct. App. 1988); Lievrow v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

**Harm to Third Parties; Suggested Language.** In February 2007, the United States Supreme Court issued a decision in an Oregon case involving the constitutional procedural limitations on punitive damage awards in state courts. Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. 1057, 166 L.Ed.2d 940 (2007). The court, in a 5-4 decision, held that the Due Process Clause requires state courts to adopt procedures that ensure that juries in tort cases involving punitive damages do not punish defendants for causing injury to individuals not a party to the lawsuit.

The Oregon case involved a claim brought by the widow of a smoker. The jury awarded punitive damages of \$79.5 million, roughly 97 times the amount of compensatory damages. The Supreme Court held that juries cannot punish defendants for harm caused to nonparties, but said that juries can consider harm to nonparties when determining the reprehensibility of the defendant's conduct.

The Supreme Court in Philip Morris USA v. Williams held that a jury may not use a punitive damage award to punish defendants for harm caused to nonparties to the lawsuit. The court did recognize that evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.

The committee recommends instructing the jury as follows in a case involving evidence of harm to nonparties:

You may not use punitive damages to punish (defendant) for harming others. Evidence of actual harm to nonparties may help to show that the (defendant)'s conduct that harmed (plaintiff) also posed a substantial risk to the general public, and so was particularly reprehensible, however, you may not use punitive damages to punish (defendant) directly for harm to those nonparties.

**Defendant's Ability to Pay.** Future earning capacity can be considered when weighing a defendant's ability to pay punitive damages. See Reyes v. Greatway Ins. Co., 220 Wis.2d 285, 582 N.W.2d 480 (Ct. App. 1998).

**Punitive Damages for Battery; Provocation.** In a battery action where punitive damages are sought and the defendant argues that the plaintiff provoked the battery, the following paragraphs may be added to the end of the instruction:

Evidence has been received that (plaintiff) used abusive and insulting language toward (defendant) immediately prior to or at the time of the battery. Although abusive and insulting words cannot justify a battery, you may find that this conduct was a provocation that should mitigate or lessen, in whole or in part, any punitive damage award.

In deciding if (plaintiff)'s conduct provoked the battery, you must determine whether (defendant)'s ability to exercise judgment was so affected by plaintiff's conduct that (defendant) acted in a manner a reasonably prudent person would act under the same circumstances. In other words, you must determine whether the conduct of (plaintiff) was so recent in time and so connected with the battery as to warrant the conclusion that the battery was actually influenced by the conduct.

**Discrimination in Employment.** Prior to the enactment of 2011 Wisconsin Act 219, Wisconsin Statute § 111.397(2) allowed a circuit court to order a defendant to pay to the person discriminated against compensatory damages and punitive damages under § 895.043 in an amount the circuit court or jury found appropriate. Act 219 repealed this provision.

**Bifurcation of Punitive Damages.** In Strenke v. Hogner, 2005 WI 25, the trial judge bifurcated the issues of liability and compensatory damages from the issue of punitive damages. In Strenke, bifurcation meant trying the case in two separate phases to the same jury. In the first phase, the jury awarded the plaintiff \$2,000 in compensatory damages.

In phase two tried to the same jury immediately after phase one, evidence was introduced that defendant Hogner had four previous OAWI convictions, had consumed at least 16-18 12-ounce containers of beer within a five hour span, had a blood alcohol of .269%, and was on his way to another tavern to continue his drinking spree. The jury awarded \$225,000 in punitive damages.

On appeal, one of the questions initially posed was the propriety of the bifurcation mode of trial. The case of Waters v. Pertzborn, 243 Wis.2d 703, was cited for the proposition that bifurcation of issues of negligence and damages under Wis. Stat. § 805.05(2) is not sanctioned. Waters involved bifurcation with two separate juries. The bifurcation issue was withdrawn so no appellate decision was made on the propriety of the trial judge's approach.

Zawistowski v. Kissinger, 160 Wis.2d 292 (1991), involved a defamation case. The trial court bifurcated the trial to first try the issue of whether the defendant made the alleged statements before proceeding to trial on the issue of defamation. The trial court based its bifurcation on Wis. Stat. § 805.05(2). Section 805.05(2) provides:

Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04(2)(b), may order a separate trial of any claim, cross-claim, counterclaim or 3rd party claim, or of any number of claims, always preserving [160 Wis.2d 299] inviolate the right of trial in the mode to which the parties are entitled.

The trial court reasoned that bifurcation was appropriate for trial economy and fairness. The trial court also found that bifurcation would not be an undue burden on either party and would not confuse the jury. The jury found statements were not made and a second trial was unnecessary.

On appeal, the trial court's ruling on bifurcation was affirmed. The court of appeals held that the plain language of section 805.05(2) does not authorize bifurcating individual issues for trial, but neither does it prohibit the trial court from taking such action. The appeals court also concluded that the trial court's bifurcation was authorized by section 906.11. Section 906.11 authorizes control by the trial court of the mode and order of interrogating witnesses and presenting evidence.

Waters v. Pertzborn, 243 Wis.2d 703 (2001), was a negligence action involving a defense of recreational immunity in a sledding accident. A secondary issue was a social guest exception to immunity. Because the case involved permanent and complex damage issues, the trial judge ordered separate trials before different juries.

On interlocutory appeal, the supreme court held that bifurcating issues of liability and damages for separate trials before different juries was not authorized for the following reasons:

1. The legislative history of Wis. Stat. § 805.05(2) clearly indicated that bifurcation of claims was permitted but bifurcation of issues was not (exception made for insurance coverage issues under Wis. Stat. § 803.04(2)(b)).
2. Wis. Stat. § 805.09(2) requires that all questions on the verdict must be agreed to by the same five-sixths of the jury.

The supreme court overruled the Zawistowski opinion stating on page 723:

¶30. In Zawistowski, the court of appeals concluded that while § 805.05(2) does not authorize bifurcating individual issues of trial, "neither does it prohibit the trial court from taking such an action." Id. at 299. This conclusion cannot stand in light of the statements of intent to disallow bifurcation revealed in the statutory history of § 805.05(2) presented above. While it is unclear from the Zawistowski decision whether the circuit court contemplated trials before the same or different juries, to the extent that opinion is inconsistent with today's decision, it is overruled.

¶31. Moreover, while we agree that the evidentiary rule § 906.11(1) provides the circuit court with broad discretion in its control over the presentation of evidence at trial, that discretion is not unfettered. It must give way where the exercise of discretion runs afoul of other statutory provisions that are not discretionary. In the context of bifurcation of issues for trial before different juries, § 805.05(2) and § 805.09(2) limit that discretion.<sup>13</sup> (emphasis supplied)