

1707 PUNITIVE DAMAGES: NONPRODUCTS LIABILITY [FOR ACTIONS COMMENCED BEFORE MAY 17, 1995]

Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant's conduct was outrageous.

A person's conduct is outrageous if the person acts either maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended. A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on his or her part to the consequences of his or her actions, even though he or she may not intend insult or injury. 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 wanton, willful, or reckless disregard of the plaintiff's rights, you do not have to award punitive damages. Such 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 may then award such sum as will accomplish the purpose of punishing or deterring wrongful conduct.

Factors you should consider in answering this question include:

1. the grievousness of the defendant's acts,

2. the degree of malicious intention of the defendant or the recklessness of the defendant's conduct,
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.]

(Burden of Proof, Middle Burden, use Wis JI-Civil 210.)

SPECIAL VERDICT

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

Was (defendant)'s conduct outrageous?

Answer: _____

Yes or No

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

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

Answer: \$ _____

*This question blank refers to the cause question relating to defendant's negligence.

COMMENT

[**Special Note:** This instruction applies only to actions commenced before May 17, 1995. For actions commenced on or after this date, see JI-Civil 1707.1.]

This instruction was approved in 1989. The instruction was initially approved by the Committee in 1966. It was revised in 1981 following the decision of the Wisconsin Supreme Court in Jeffers v. Nysse, 98 Wis.2d 543, 297 N.W.2d 495 (1980), and again in 1985. The reference in the instruction to Wis JI-Civil 210 was added in 1981 following the decision in Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980). Editorial changes were made in 1992 to address gender references in the instruction. Also, the comment was revised in 1990, 1992, and 1996. An editorial correction was made in 1994.

In 1991, the Committee reviewed JI-Civil 1707 and 1707A to determine if the instructions conform to the guidelines suggested by the United States Supreme Court in Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991). In that decision, the Court upheld the award of punitive damages but suggested that the procedures for awarding punitive damages in some states might violate the due process clause of the United States Constitution.

In upholding the trial court's award of punitive damages, the Supreme Court reviewed the text of the trial court's punitive damage instruction. The Court found that the instruction enlightened the jury as to the punitive damages nature and purpose, identified the damages as punishment for civil wrongdoings of the kind involved, and explained that their imposition was not compulsory. In addition, the Court found that Alabama had established posttrial procedures for reviewing jury awards.

The Committee believes that both JI-Civil 1707 and 1707A conform to the requirements suggested in Haslip and provide adequate guidance in assessing punitive damages. See also comment to Wis JI-Civil 1707.1.

A. Conduct Justifying Punitive Damages

The availability of a punitive damage award is not dependent upon the classification of the underlying cause of action but, rather, upon proof that the conduct of the defendant was "outrageous." Brown v. Maxey, 124 Wis.2d 426, 431, 369 N.W.2d 677 (1985). The element of intent is not a prerequisite to the recovery of punitive damages. Thus, punitive damages may be recovered in tort actions based on negligence, intentional conduct, or strict liability. The court in Brown v. Maxey emphasized that "punitive damages are in the nature of a remedy and should not be confused with the concept of a cause of action." 124 Wis.2d at 431. In Brown v. Maxey, supra, the court specifically rejected the argument that punitive damages are not recoverable in a case of negligence. The court said that if the plaintiff proves only those elements constituting the negligence cause of action, punitive damages would not be available. Brown v. Maxey, supra at 432. However, the court went on to say that the mere fact that the cause of action is based upon negligent conduct does not preclude a punitive damage award if the plaintiff proves the necessary aggravating circumstances beyond ordinary negligence.

In discussing the type of conduct that must be shown to support the award of punitive damages, the court in Lundin v. Shimanski, 124 Wis.2d 175, 368 N.W.2d 676 (1985), and in Brown v. Maxey, supra at 434, cited a treatise on punitive damages written by Professors Ghiardi and Kircher. The authors explain that conduct justifying punitive damages is generally of two distinct types:

The first type is that in which the defendant desires to cause the harm sustained by the plaintiff, or believes that the harm is substantially certain to follow his conduct. With the second type of conduct the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences. Neither form of conduct, therefore, involves mere inadvertence or what, in the traditional tort sense, would be called ordinary negligence. J. Ghiardi and J. Kircher, Punitive Damages Law and Practice, Ch. 5, sec. 5.01.

The intent necessary to maintain an action for an intentional tort is different than the state of mind of the tortfeasor necessary to recover punitive damages. Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978); Meshane v. Second Street Co., 197 Wis. 382, 387, 222 N.W. 320 (1928); see also Mid-Continent Refrigerator Co. v. Straka, 47 Wis.2d 739, 747, 178 N.W.2d 28 (1970).

In Wangen v. Ford Motor Co., supra at 268, the court used the term "outrageous" as an abbreviation for the type of conduct (malicious, or in wanton, willful, or reckless disregard of the plaintiff's rights) which justifies the imposition of punitive damages. If the plaintiff is able to prove the elements of "outrageous" conduct, then according to Wangen, it does not matter how the underlying tort justifying the recovery of compensatory damages is classified.

B. Punitive Damages in Survival Actions, Wrongful Death Actions, and Actions by Parents of an Injured Child

In Wangen v. Ford Motor Co., supra, the court made the following holdings regarding recovery of punitive damages in certain types of actions:

1. In a survival action, punitive damages incident to damages for pain and suffering may be awarded to the estate. The court noted that the deterrent and punishment purposes of punitive damages are met if they are allowed against a wrongdoer who survives even if the victim is dead. 97 Wis.2d at 311. The court said this holding was consistent with Wis. Stat. § 895.02 which prohibits the recovery of punitive damages from a deceased wrongdoer's executor or administrator. Punitive damages would serve no purpose after the wrongdoer's death.
2. Punitive damages may not be imposed on the wrongdoer in a wrongful death action. 97 Wis.2d at 315. Such damages are not recoverable under the wrongful death statute. Wis. Stat. §§ 895.03 and 895.04(4) and (5).
3. The parents of an injured minor may also recover punitive damages incident to their claim for loss of their child's services, society, companionship, and pecuniary support. 97 Wis.2d at 315. The court concluded that awarding punitive damages incident to the awards of compensatory damages to both the parents and the child would not constitute "double recovery." Instead, the court said it would punish and deter the tortfeasor for the willful and wanton invasion of the independent rights of each injured person.

C. Recovery Against Manufacturer in Products Liability Action

JI-Civil 1707A should be used in actions where the claim is based on products liability.

In Wangen v. Ford Motor Co., *supra*, the court held that punitive damages may be awarded in products liability cases. See also Collins v. Eli Lilly Co., 116 Wis.2d 166, 201, 342 N.W.2d 37 (1984); Zeller v. Northrup King Co., 125 Wis.2d 31, 370 N.W.2d 809 (Ct. App. 1985). The court, in Wangen, suggested the following factors to guide the jury's determination of the amount of punitive damages to be awarded in a products liability action; 97 Wis.2d at 305:

1. the seriousness of the hazard to the public;
2. the profitability of the misconduct;
3. the attitude and conduct on discovery of the misconduct;
4. the degree of the manufacturer's awareness of the hazard and of its excessiveness;
5. the employees involved in causing or concealing the misconduct;
6. the duration of both the improper behavior and its concealment;
7. the financial condition of the manufacturer and the probable effect thereon of a particular judgment; and
8. the total punishment the manufacturer will probably receive from other sources.

In Collins v. Eli Lilly Co., *supra* at 202, the court discussed "enterprise liability" as it relates to the award of punitive damages. It said "the concept of punitive damages embodies a rule for individualized punishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous." The court found implicit in this concept the notion that it must be certain that the wrongdoer being punished because of his or her conduct actually caused the plaintiff's injuries. The plaintiff in a drug-related products liability action had sued multiple defendants and had stated that she could not prove which defendant had actually caused her injuries. Consequently, the court held that she could not recover punitive damages.

D. Evidence of the Wealth of a Defendant

Evidence of the wealth of the defendant is competent in determining the amount of punitive damages. Dalton v. Meister, 52 Wis.2d 173, 181, 188 N.W.2d 494 (1971); Jones v. Fisher, 42 Wis.2d 209, 220-21, 166 N.W.2d 175 (1969); Fuchs v. Kupper, 22 Wis.2d 107, 113, 125 N.W.2d 360 (1963); Malco v. Midwest Aluminum Sales, 14 Wis.2d 57, 109 N.W.2d 516 (1961); Gladfeldter v. Doemel, 2 Wis.2d 635, 648, 87 N.W.2d 490 (1958); Thomas v. Williams, 139 Wis. 467, 470, 121 N.W. 148 (1909); Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884). See also Ghiardi, Personal Injury Damages in Wisconsin sec. 2.10 (Wis. Current Law Series 1964); Wikhem, The Rule of Exemplary Damages in Wisconsin, 2 Wis. L. Rev. 129, 154 (1923). Failure to show the net worth of the defendant does not invalidate the award of punitive damages but eliminates one factor by which the reasonableness of the award can be gauged. Fahrenberg v. Tengal, 96 Wis.2d 211, 235, 291 N.W.2d 516 (1980).

But, where there are two or more defendants, evidence of the wealth of the defendants is inadmissible. Ogodziski v. Gara, 173 Wis. 380, 181 N.W. 231 (1921); Fahrenberg v. Tengal, 96 Wis.2d 211, 291 N.W.2d 516 (1980); Meke v. Nicol, 56 Wis.2d 654, 664, 203 N.W.2d 129 (1973); McAllister v. Kimberly-Clark Co., 169 Wis. 473, 173 N.W. 216 (1919). Although evidence of the wealth of one joint tortfeasor is not admissible when sought against multiple defendants on joint and several liability, such evidence is properly admissible where the plaintiff seeks punitive damages against a defendant individual. Fahrenberg v. Tengal, *supra* at 225. See also J. Ghiardi and J. Kircher, Punitive Damages Law and Practice, Ch. 9, sec. 9.09.

Thus, the parenthetical paragraph on page two is used only when punitive damages are sought from a defendant individually.

Wealth of Parent. Evidence of the wealth of the parents of a defendant is irrelevant where punitive damages could not be assessed against the parents for their conduct, even in situations in which the parents are obligated by statute to pay compensatory damages. Franz v. Brennan, 150 Wis.2d 1, 440 N.W.2d 562 (1989).

E. Necessity of Compensatory Damages; Application of Comparative Negligence Statute

The Wisconsin Supreme Court has held that in order for punitive damages to be available to a claimant, actual damages must have been awarded. Tucker v. Marcus, 142 Wis.2d 425, 418 N.W.2d 818 (1988). The court said an "award" represents a remedy recoverable in accordance with an order for judgment.

The court in Tucker v. Marcus, supra, also held that punitive damages are not "damages for negligence" under the comparative negligence statute. Wis. Stat. § 895.045. Thus, punitive damages are not subject to proportionate reduction based on plaintiff's comparative negligence.

F. 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).