

PUNITIVE DAMAGES

Research Paper 89-1

Jennifer Stern

Deputy Legislative Counsel

Legal Division

Legislative Counsel Bureau

TABLE OF CONTENTS

	<u>Page</u>
PUNITIVE DAMAGES	
I Introduction	1
II Conduct Justifying Punitive Damages	1
III Cases In Which Punitive Damages May Be Awarded	2
A. Intent to Cause Harm	2
B. Reckless Conduct Causing Harm	2
C. Contract Action	2
D. Torts Related to Contracts.....	3
1. Construction Contracts	3
2. Insurance Contracts	3
3. Products Liability Actions	4
E. Wrongful Death Actions	4
F. Wrongful Termination Actions	5
IV Determining the Amount of Punitive Damages	6
A. Wealth of the Defendant	6
B. Insurance Against Punitive Damages	7
C. Compensatory Damages Prerequisite to Recovery	7
D. Judicial Control Over Punitive Damage Awards	7
V Status in the United States	9
A. Prohibition Against Punitive Damages.....	9
B. Limitation on the Amount of Punitive Damages.....	9

C. Other Restrictions on Punitive Damages	10
1. Clear and Convincing Evidence Standard	10
2. Bifurcated Trial.....	10
3. Punitive Damages to the State	11
VI Status in Nevada	11
A. Nevada Revised Statutes 42.010	11
B. Reckless Disregard Constitutes Actual Malice	11
C. Vicarious Liability	11
D. Types of Conduct Justifying Punitive Damages.....	12
E. Types of Conduct Not Justifying Punitive Damages	13
VII Constitutional Issues Relating to Punitive Damages.....	14
A. Punitive Damages as Quasi-Criminal Sanctions	14
1. Double Jeopardy	14
2. Proof Beyond a Reasonable Doubt	14
3. Self-Incrimination	15
4. Rejection of Criminal Procedural Safeguards.....	15
B. Punitive Damages as a Violation of Due Process.....	15
1. Void for Vagueness	15
2. Multiple Awards	16
3. Single Award.....	16
C. Punitive Damages as a Violation of Freedom of Speech.....	17

D. Punitive Damages as a Violation of Equal Protection.....	17
1. Wrongful Death Actions.....	17
2. Limitations on the Amount of Punitive Damages.....	18
E. Punitive Damages as Cruel and Unusual Punishment.....	18
VIII Conclusion.....	19
IX References	20
X Appendix 1.....	24
XI Appendix 2.....	30

PUNITIVE DAMAGES

I

INTRODUCTION

Punitive damages, also known as vindictive or exemplary damages, may be awarded to plaintiffs who prove themselves victims of a wilful, wanton, reckless, malicious or oppressive act. The manner or intention with which an act is committed is crucial. In almost all jurisdictions where punitive damages are available, their purpose is not to compensate the victim, but to punish the wrongdoer and to deter the wrongdoer and others from similar conduct.

II

CONDUCT JUSTIFYING PUNITIVE DAMAGES

Punitive damages are quite unique from other forms of damages which are compensatory in nature. In determining whether an award of punitive damages is justified, the focus of attention is directed at the nature or character of the conduct of the defendant and not at the nature or extent of the harm sustained by the plaintiff.

The conduct of the defendant, in order to sustain an award of punitive damages, must be something more than the mere commission of a tort. There must be circumstances of aggravation, outrage, spite, malice, fraudulent or evil motive, or conscious and deliberate disregard of the interests of others to the extent that the conduct may be called wilful or wanton. ¹

In each jurisdiction in which punitive damages are intended to punish or deter, or both, the legislature or the judiciary has defined the nature of conduct on the part of the defendant which the trier of fact must find in order to justify a punitive damage award. *See* Appendix. The conduct is generally of two types:

1.) The defendant desires to cause the harm sustained by the plaintiff, or believes that the harm is substantially certain to follow the conduct. ²

2.) The defendant knows, or should have reason to know, not only that the 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, proceeds with the conduct in reckless or conscious disregard of the consequences.³

III

CASES IN WHICH PUNITIVE DAMAGES MAY BE AWARDED

The following surveys the classes of cases in which punitive damages may be awarded. It touches upon the most common situations and is not intended to be exhaustive of all conceivable circumstances that may justify punitive damages.

A. INTENT TO CAUSE HARM

An example of the type of situation in which the defendant intends to cause the harm sustained by the plaintiff, or believes that the harm is substantially certain to follow the conduct is the intentional tort of battery. In one case, an Alabama court was presented with a dispute between adjoining property owners which led to one of them being pistol whipped by the other. The court affirmed the award of punitive damages against the defendant and found that it was well settled that in an action for assault, or assault and battery, the jury may award punitive damages when it has been pleaded and proved that the defendant's act was wrongful and attended with other circumstances of aggression.⁴

B. RECKLESS CONDUCT CAUSING HARM

The operation of a motor vehicle after voluntary intoxication presents a good example of reckless conduct for which punitive damages may be awarded. In a California case, the court held that one who voluntarily continues to consume alcoholic beverages to the point of intoxication, while knowing that a motor vehicle will later be operated, may be held to have exhibited conscious disregard for the safety of others.⁵

Nevada provides, by statute, for the award of punitive damages where the defendant causes an injury by operating a motor vehicle under the influence of alcohol or drugs if the defendant wilfully consumed the alcohol or drugs knowing that he would thereafter operate a motor vehicle.⁶

C. CONTRACT ACTION

The general rule is that punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.⁷

Nevada has codified this general rule in NRS 42.010 allowing the award of punitive damages "in an action for the breach of an obligation not arising from contract." However, in *Bernard v. Rockhill Development Co.*, 103 Nev. 132, 734 P. 2d 1238 (1987), the Supreme Court of Nevada held that a defendant has a duty, independent of the contract not to fraudulently misrepresent his intention to perform under the contract. If the defendant does engage in malicious fraudulent misrepresentation, punitive damages may be awarded.

D. TORTS RELATED TO CONTRACTS

Tortious conduct may arise in relation to contracts. The failure to perform a contract generally will not be considered a tort, but improper performance of contract obligations may give rise to tort liability.⁸

1. Construction Contracts

Punitive damages have been awarded in actions where a breach of contract is accompanied by fraud, wilfull violations of building codes, and intentional variance from contract specifications.⁹ The intentional use of inferior building materials and the inferior quality of work have justified the imposition of punitive damages.¹⁰

2. Insurance Contracts

Courts have held that there is implied in every contract of insurance a duty of good faith and fair dealing and that the breach of that duty is a tort. Actions have arisen in relation to third party insurance contracts in cases in which an insured, covered under a liability insurance policy, finds fault with the manner in which his insurer handles the claim of a third person. They have also arisen in cases in which the insured faults the manner in which his own claim for policy benefits was handled by his insurer. Tort action by insureds against their own insurers are referred to as "bad faith" actions.

The Supreme Court of Nevada recently reinstated an award of \$5,939,500 in punitive damages against an insurer who denied the insured's claim without justification or any investigation. The insured suffered a stroke during the administration of an angiogram. The insured's wife attempted to collect benefits for the insured under two accident policies. Four claims were filed, all of which were denied by the insurer without adequate investigation. The insureds were in desperate need of funds, the insurer had reason to know of their dire circumstances; yet, the insurer consciously disregarded the rights of its insured. The court held that the insurer's "obstinate and unjustified refusal to pay...constitutes oppression as contemplated by the statute [NRS 42.010]."¹²

3. Products Liability Actions

Another area in which tort has a relationship to contract includes products liability actions. In most jurisdictions the plaintiff may allege three possible theories of liability against the manufacturer or seller of the product: negligence, breach of warranty (express or implied) or strict liability in tort.¹³

Two elements are present in each case awarding punitive damages in a products liability suit: (a) knowledge possessed by the defendant, and (b) fault on the part of the defendant. The "knowledge" element consists of whether the defendant knew of the defect in its product and of the potential harm which that defect posed to its consumers. The "fault" element consists of a defendant failing to take some action: inadequate testing, defective quality control, insufficient warnings or inadequate remedial procedures such as product recalls or postmarketing warnings.¹⁴

Examples of product liability cases include *Fischer v. Johns-Manville Corp.*, 472 A. 2d. 577 (N. J. 1984) where the New Jersey court upheld a \$300,000 punitive damage award to a man who suffered permanent lung damage as a result of exposure to asbestos. *Grimshaw v. Ford Motor Co.*, P. 2d. (Cal. 19) is the famous Ford Pinto case where the jury found that Ford improperly designed the Pinto's fuel assembly system which caused the gas tank to rupture upon impact. The cost to redesign the fuel system would have been no more than \$8 per car, but Ford Motor Company consciously and callously disregarded public safety in continuing to market the car in order to maximize corporate profits. Although the jury awarded \$125 million in punitive damages, the court reduced the award to \$3.5 million.

Another example of a products liability case is *Palmer v. A. H. Robins, Co.*, 684 P. 2d. 187 (Colo. 1984) where the court found that A. H. Robins inadequately tested the "Dalkon Shield" intrauterine device prior to placing the product on the market. Robins misrepresented the efficiency of the product in preventing pregnancy and fraudulently concealed the propensity of the device to cause septic abortions and bacterial injuries. A 24 year old woman became pregnant after being fitted with the Dalkon Shield. At three months gestation, she suffered a spontaneous abortion and a total hysterectomy was performed in order to save her life.

E. WRONGFUL DEATH ACTIONS

A wrongful death action is a suit by a survivor(s) of a person who allegedly died due to a defendant's conduct. These actions were not recognized at

common law and are purely statutory in origin.¹⁵ As a result, the statutes which create the remedy may also limit the damages available to the plaintiff as to the type and amount of damages recoverable.

The majority of wrongful death statutes have been construed to not allow the recovery of punitive damages, and instead limit recovery to compensatory damages.¹⁶ A number of wrongful death statutes either specifically provide, or have been judicially construed to provide, for the recovery of punitive as well as compensatory damages. Nevada is one of these jurisdictions.

In the case of *Porter v. Funkhouser*, 79 Nev. 273, 382 P. 2d 216 (1963), the Supreme Court of Nevada upheld a verdict of \$35,000 compensatory damages and \$5,000 punitive damages under the wrongful death statute, former NRS 41.090 (cf. NRS 41.085), awarded to the adult children of a woman killed by an intoxicated motorist. In *Allen v. Anderson*, 93 Nev. 204, 562 P. 2d 487 (1977), however, the court held where the defendant tortfeasor dies, the punitive damage claims do not survive and cannot be sought from the tortfeasor's estate. Since punitive damages are to punish the tortfeasor, the court found that the rationale for awarding punitive damages cannot be served if the tortfeasor is dead.

F. WRONGFUL TERMINATION ACTIONS

The general rule at common law regarding employer-employee relationships is that employers may dismiss their employees at will for good cause, for no cause, or even for cause morally wrong.¹⁷ Exceptions are being carved to the general rule.

The public policy exception states that:

The theory is that even if an employer has a general right to discharge without cause or justification, a discharge is wrongful and actionable if it is motivated by the fact that the employee did something that public policy encourages or that he refused to do something that public policy forbids or condemns.¹⁸

This theory has been adopted in a number of jurisdictions, but is generally limited to situations where the public policy is expressed in legislation.¹⁹

In *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984), the Supreme Court of Nevada recognized the presence of tort liability in at-will employment situations "founded upon strong public policy." The tort committed in the *Hansen* case, which offended public policy, was the tort for retaliatory discharge of an employee dismissed for filing a workmen's compensation

claim. The Supreme Court of Nevada held that the failure of the Legislature to enact a statute expressly forbidding retaliatory discharge for filing workmen's compensation claims does not preclude the court from providing a remedy for such tortious behavior. Although not awarded in *Hansen*, punitive damages are available for public policy torts in wrongful discharge cases.

The Supreme Court of Nevada distinguished the public policy tort of *Hansen* from the facts set forth in another wrongful termination case recently decided by the court. In *K Mart v. Ponsock*, 103 Nev. 39, 732 P.2d 1364 (1987), K Mart discharged an employee who had worked for the company for nine and one half years, just six months away from 100 percent vesting of his retirement benefits, which were paid in full by K Mart. The employee was fined for applying grey primer spray paint to the battery cover of the forklift which he operated. The employee had retrieved a damaged can of spray paint, retail value eighty-nine cents, from the salvage area and had applied it to the battery cover of his forklift which was "sticky and gunky." He was terminated without an opportunity to defend his actions, and was characterized by K Mart as having misappropriated merchandise and having defaced company property. Also important to the court was the fact that when the terminated employee and his counsel toured the distribution center, K Mart attempted to hide a forklift that may have been evidence in the case. The court labelled the *K Mart* case as a "bad faith discharge" giving rise to tort liability.²⁰ In the absence of statutory declaration, the court recognized a bad faith discharge case for the improper motive of defeating contractual retirement benefits. It upheld an award of \$50,000 in punitive damages against K Mart since there was proof that "(1) K Mart breached its duty of good faith and fair dealing and (2) that it was guilty of 'actual oppression, fraud or malice'."

IV

DETERMINING THE AMOUNT OF PUNITIVE DAMAGES

A. WEALTH OF THE DEFENDANT

The general rule followed by nearly all jurisdictions is that if other evidence in the case supports the submission of the issue of punitive damages to the jury, then evidence regarding the wealth or financial status of the defendant is admissible. The rationale behind this rule is that evidence of the financial situation of the defendant is important so that the jury may determine the amount of damages adequate to punish the defendant and deter similar conduct in the future.²¹ This rule has been followed in Nevada, as reported in the case of *Southern Pacific Co. v. Watkins*, 83 Nev. 471, 435 P.2d 498 (1967).

B. INSURANCE AGAINST PUNITIVE DAMAGE

Generally, in Nevada, insurance against punitive damages is neither affordable nor available. Consequently, awards against corporate defendants must be paid from the company's own resources. When insurance is available, two legal issues have arisen.

Where the plaintiff seeks punitive damages, an issue arises as to whether the plaintiff may present evidence of the extent to which the defendant is protected by liability insurance. This would allow the jury to take into account the amount of liability insurance coverage in determining the net worth of the defendant. Courts have refused to allow reference to the insurance coverage of the defendant.²²

Another issue relating to insurance coverage of punitive damages is that if the insurance policy is construed as covering punitive damages, does it violate public policy to require the insurer to pay the punitive damage award rather than the tortfeasor. The primary argument in favor of denying coverage on public policy grounds is that if the purpose of punitive damages is to punish the wrongdoer and deter others, the punishment should be suffered by the wrongdoer rather than the insurer.²³ The primary argument in favor of allowing insurance coverage is that the insurance contract is that an insurance contract is a private contract between the defendant and the insurer. The defendant paid for and relied upon the insurance coverage to protect him against both compensatory and punitive damages. The insurer, in drafting the provisions of the insurance contract, may contractually provide for a separate premium for punitive damages or may completely exclude coverage for punitive damages.²⁴

C. COMPENSATORY DAMAGES PREREQUISITE TO RECOVERY

Actual damages must be found before a plaintiff will be entitled to recover punitive damages. The Supreme Court of Nevada has espoused this rule in *City of Reno v. Silver State Flying Service, Inc.* 84 Nev. 170, 438 P.2d 257 (1968). Nominal damages, however, are usually sufficient to support or award of punitive damages.²⁵

D. JUDICIAL CONTROL OVER PUNITIVE DAMAGE AWARDS

Once the court determines that the evidence merits submitting the punitive damage issue to the jury, the decision to award punitive damages and a determination of the amount of such an award rests with the discretion of the jury.²⁶ Since the purpose of punitive damages is to punish or deter, it would be expected that the jury not consider its compensatory award in determining the amount of the punitive award. However, in reviewing punitive damage

awards, appellate courts often look to whether the amount of the punitive damages awarded bears a "reasonable relation" to the amount of the actual damages awarded.²⁷

After trials in which the jury awards punitive damages, defendants regularly file motions requesting that the judge lower or reverse the award. Courts will reverse or modify an award of punitive damages if the jury was influenced by "passion and prejudice", or if the amount of the award "shocks the conscience" of the court or "financially annihilates" the defendant.

Nevada has declined to follow the rules of "reasonable relation", "passion and prejudice", "shock the conscience" or "annihilation". Instead, in *Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987) the Supreme Court of Nevada set forth the following standard for evaluating excessive punitive damage awards:

Punitive damages are legally excessive when the amount of damages awarded is clearly disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.

In the *Kahn* case, the Supreme Court of Nevada set forth the factors to be taken into account in determining whether an award of punitive damages is excessive. Those factors are "the financial position of the defendant, culpability and blameworthiness of the tortfeasor, vulnerability and injury suffered by the offended party, the extent to which the punished conduct offends the public's sense of justice and propriety, and the means which are judged necessary to deter future misconduct of this kind."²⁸ Applying the factors to the controversy in the *Kahn* case, which the court characterized as a "simple business transaction", the court concluded the punitive damage award was clearly excessive and disproportionate as a matter of law, and reduced the total award from \$800,000 to \$400,000.

Not only do courts have available the use of additur or remittitur (adding to or subtracting from the amount of the verdict) to directly control the amount of a punitive damage award, but the court may also use other procedural rules to indirectly control the proceedings. For example, in cases involving multiple plaintiffs the court may allow a class action or order consolidation of all pending actions against a defendant into a single litigation thereby alleviating the potential for multiple damage awards.²⁹ Bifurcation of the punitive damage portion of the trial, may be ordered "in furtherance of convenience or

to avoid prejudices or when . . . conducive to expedition or economy".³⁰ However, where the issue of liability and damages are so interwoven the United States Court of Appeals, Ninth Circuit, in *United Airlines, Inc. v. Weiner*, 286 F. 2d 309 (CA 9, 1961) cert. den. 366 U.S. 924 (1961), held that bifurcation would violate the right to a trial by jury afforded by the Seventh Amendment to the United States Constitution.

V

STATUS IN THE UNITED STATES

The vast majority of jurisdictions allow the award of punitive damages by a jury in order to punish or deter a defendant who has engaged in wilful, wanton, malicious, oppressive or reckless conduct.

A. PROHIBITION AGAINST PUNITIVE DAMAGES

A minority of jurisdictions prohibit the imposition of punitive damages. Connecticut and Michigan, although the terms punitive or exemplary damages are used in their statutes, treat punitive damages as compensatory in nature. Four states, Louisiana, Massachusetts, New Hampshire and Washington prohibit the imposition of punitive damages unless they are allowed by statute. Nebraska prohibits the award of punitive damages due to the judicial construction of a provision in the Nebraska Constitution which mandates that all fines and penalties be collected and used for school purposes. Except in certain situations, Indiana law does not permit the recovery of punitive damages if the defendant in a civil action is also subject to criminal prosecution for the same act.³¹

B. LIMITATION ON THE AMOUNT OF PUNITIVE DAMAGES

During the last few years the following states statutorily limited the amount of punitive damages that could be recovered in certain cases:

1. Alabama in 1987 provided a cap on punitive damages at \$250,000 unless the action is premised upon libel, slander, defamation, actual malice or a pattern of intentional, wrongful conduct. The statute does not apply to wrongful death actions. Alabama Statutes § 6-11-21.

2. Colorado in 1986 placed a cap on punitive awards in personal injury actions, not to exceed the amount of any compensatory damage award or \$25,000. Colorado Revised Statutes § 13-21-102.

3. Florida in 1986 limited the amount of punitive damages recoverable in a commercial civil action to three times the amount of compensatory damages awarded. Florida Statutes § 768.73.

4. Georgia in 1987 capped punitive damages at \$250,000, but provided an exception for products liability cases. Georgia Code § 51-12-5.1.

5. Kansas in 1988 limited the award of punitive damages to either 25 percent of the annual gross income of the defendant or \$5 million dollars, whichever is less. Kansas Statutes § 60-3701.

6. Oklahoma in 1986 provided that punitive damages may not exceed the amount of actual damages, unless the court finds clear and convincing evidence that the defendant was guilty of wanton or reckless disregard for the rights of another, oppression, fraud or malice. Oklahoma Statutes § 23-9.

7. Texas in 1987 capped punitive damage awards at \$200,000 or up to four times the amount of actual damages except in cases of malicious or intentional torts. Punitive damages were prohibited where only nominal damages were awarded. Texas Codes §§ 41.004, 41.007 and 41.008.

8. Virginia in 1987 limited punitive damages to \$350,000 in all actions. Virginia Code § 8.01-38.1

Other states which considered limiting the amount of punitive damage awards, but did not enact such legislation include California, Delaware, Hawaii, Indiana, Maine, New York, Ohio, Oregon, Pennsylvania, Tennessee and Vermont.

C. OTHER RESTRICTIONS ON PUNITIVE DAMAGES

1. Clear and Convincing Evidence Standard

In 1986, 1987 and 1988, fifteen states considered requiring a higher burden of proof for the plaintiff to prevail in establishing punitive damages. Ten of those states, Alabama, Alaska, Georgia, Iowa, Kansas, Kentucky, Montana, North Dakota, South Dakota and Oregon, adopted legislation requiring the plaintiff to prove by "clear and convincing evidence" that the defendant engaged in conduct which would warrant the award of punitive damages.

2. Bifurcated Trial

Seven states considered legislation requiring punitive damages to be proved in a trial separate from the trial establishing liability and compensatory damages. Three states enacted such legislation: Georgia, Kansas and Missouri.

3. Punitive Damages to the State

In the last few years fourteen state legislatures have considered bills which would require a portion of punitive damage awards to be contributed to certain state funds. The rationale behind such legislation is to eliminate a windfall to the plaintiff and to redress the public for the outrageous conduct of the defendant, which is analogous to the theory behind the imposition of criminal fines. Six states, Colorado, Florida, Illinois, Iowa, Kansas and Oregon, enacted legislation providing that a portion of punitive damage awards be contributed to certain state funds.

VI

STATUS IN NEVADA

A. NEVADA REVISED STATUTES 42.010

Nevada has statutorily provided for punitive damages in NRS 42.010:

"In any action for the breach of an obligation not arising from contract where the defendant:

1. Has been guilty of oppression, fraud or malice, express or implied; or

2. Caused an injury by the operation of a motor vehicle in violation of NRS 484.379 or 484.3795 after wilfully consuming or using alcohol or another substance, knowing that he would thereafter operate the motor vehicle,

the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

B. RECKLESS DISREGARD CONSTITUTES ACTUAL MALICE

The Supreme Court of Nevada has interpreted NRS 42.010 in the case of *Nevada Credit Rating Bureau Inc. v. Williams*, 88 Nev. 601, 503 P. 2d 9 (1972), to allow recovery of punitive damages when the conduct of defendant was wilful, intentional and done in reckless disregard of its possible results. In that case, the credit rating company intentionally destroyed Mr. William's reputation and his business. The court awarded Mr. Williams \$32,002 in compensatory damages and \$1,750 in punitive damages.

C. VICARIOUS LIABILITY

The Supreme Court of Nevada has refused to hold a father liable for punitive damages accruing from the wrongful conduct of his son. ³² Principals,

however, are held responsible for the acts of their agents under the doctrine of *respondeat superior*. Even if the agent subsequently dies, the principal may be held liable for the acts of the agent if the principal was benefitted by the acts and the principal had knowledge of those acts.³³ But, if an agent deliberately withholds information from a principal, which if the principal had known the principal could have prevented the wrongful conduct, the principal may not be held liable for the acts of his agent.³⁴

D. TYPES OF CONDUCT JUSTIFYING PUNITIVE DAMAGES

The following are selected cases, other than the cases already mentioned in the text of this paper, in which the Supreme Court of Nevada has found that the defendant's conduct justified the award of punitive damages:

1. *Bull v. McCuskey*, 96 Nev. 706, 615 P. 2d 957 (1980) the court affirmed an award of \$35,000 compensatory and \$50,000 punitive damages against an attorney who brought a frivolous lawsuit alleging malpractice against a doctor. The malpractice suit was instituted against the doctor for the ulterior purpose of causing a nuisance settlement when the attorney knew that there was no basis for the claim of malpractice.

2. *Caple v. Raynel Campers, Inc.*, 90 Nev. 341, 526 P. 2d 334 (1976) *Nevada National Bank v. Billy Huff*, 94 Nev. 506, 582 P. 2d 364 (1978) and *Wickliffe v. Fletcher Jones*, 99 Nev. 353, 661 P. 2d 1295 (1983) the court allowed awards of punitive damages against the defendants for wrongfully repossessing property that did not belong to them.

3. *Hale v. Riverboat Casino, Inc.*, 100 Nev. 299, 682 P. 2d 190 (1984) a university professor found a wallet on the floor of a casino and attempted to turn it over to security guards. The guards refused to give him any assurance that the wallet would be returned to the owner and, therefore, the professor refused to turn it over. The guards arrested the professor, caused him bodily injury and transported him to the police department where he was stripped, body searched, sprayed for lice, fingerprinted, photographed and placed in a holding cell. In addition to the bodily injury, the professor suffered humiliation and injury to his reputation. The court affirmed an award of \$97,900 in punitive damages which amounted to less than 1.5 percent of the casino's annual net profit and less than 1/2 percent of its net worth.

4. *Leslie v. Jones Chemical Co.*, 92 Nev. 391, 551 P. 2d 234 (1976) the jury awarded plaintiffs punitive damages totalling \$250,000 due to the defendant's conscious disregard of known safety procedures regarding the handling of chlorine gas cylinders which caused the plaintiff to sustain injuries from inhaling the chlorine gas. The Supreme Court of Nevada affirmed the trial court's reduction of the punitive damage award from \$250,000 to \$170,000.

5. *Kellar v. Brown*, 101 Nev. 273, 701 P. 2d. 359 (1985), the defendants induced the plaintiff to buy a home infested with termites by producing a favorable inspection report that the defendants had reason to know was false. The jury awarded \$40,000 in punitive damages but the court reduced the award to \$7,500 since when the plaintiff initially complained to the defendants about the presence of termites, the defendants suggested the prospect of rescission. The court stated that "a punitive award of more than five times [the] actual damages is disproportionate and unnecessary to deter the [defendants] from like wrongdoing in the future."

E. TYPES OF CONDUCT NOT JUSTIFYING PUNITIVE DAMAGES

1. *Village Development Co. v. Felice*, 90 Nev. 305, 526 P. 2d 83 (1974), the defendant corporation sold a residential building lot to the plaintiffs and subsequently approved their building plans without warning them that the portion of the lot upon which they planned to build was situated in the flood plain of a mountain stream. The Supreme Court of Nevada reversed the award of \$50,000 punitive damages.

2. *Fuller v. Incopero*, 97 Nev. 448, 634 P. 2d 452 (1981) the court reversed the award of \$12,500 in punitive damages where the defendants had misrepresented the dimensions of residential property.

3. *Jeep Corporation v. Murray*, 101 Nev. 640, 708 P. 2d 297 (1985), a 21 year old college forestry student was rendered paraplegic after a single car accident where the jeep he was driving swerved off the road and rolled over. The plaintiffs alleged strict liability in tort for the manufacture and sale of a defective product claiming it was inherently uncontrollable and unstable. The court refused to instruct the jury on punitive damages.

4. *American Excess Insurance Co. v. MGM.*, 102 Nev. 601, 729 P. 2d 1352 (1986), an insurer brought an action seeking the court to declare that it was not obligated to pay defense costs and legal expenses until all liability claims were resolved. The insured counterclaimed for breach of good faith and abuse of process. The court held that the insurer had a reasonable basis for denial of payment and the assessment of punitive damages against the insurer was improper.

5. *United States Fidelity v. Peterson*, 91 Nev. 617, 540 P. 2d 1070 (1975), an insured brought an action against insurer because of the insurer's bad-faith refusal to pay for damage while the insured was engaged in the construction business. The insurer's refusal to pay caused the insured to lose his business and his credit. The court upheld an award of consequential damages and affirmed the trial court's refusal to instruct the jury on punitive damages

finding that the conduct of the defendant did not amount to the prerequisite actual malice necessary to support an award of punitive damages.

VII

CONSTITUTIONAL ISSUES RELATING TO PUNITIVE DAMAGES

The doctrine of punitive damages has been subjected to a variety of constitutional attacks. Not all of the arguments regarding the constitutionality of punitive damages have been made by the defendants against whom damages have been imposed. In some cases, constitutional violations have been alleged by plaintiffs who have been denied the ability to recover punitive damages.

A. PUNITIVE DAMAGES AS QUASI-CRIMINAL SANCTIONS

The majority of jurisdictions allow the imposition of punitive damages in a civil action where the defendant is also subject to criminal punishment. Since punitive damages are awarded to punish and deter the defendant, it has been argued that the constitutional protections afforded a criminal defendant should be applied to a defendant who may be subjected to an award of punitive damages. Certain civil actions, such as the torts of assault and battery, may also be prosecuted as crimes. Thus a person may be subjected to both civil and criminal liability as a result of the same act. Yet, persons subjected to punitive damages in a civil suit are not afforded the constitutional protections afforded a criminal defendant.

1. Double Jeopardy

A constitutional argument may be raised by the defendant that being subjected to punishment in the form of punitive damages as well as a criminal sanction violates the constitutional prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution. The prohibition against double jeopardy has been applied only to criminal prosecutions; therefore, only a subsequent criminal action against a defendant who has already been criminally prosecuted for the same offense will be precluded.³⁵ Rejection of the double jeopardy argument is premised upon the theory that a criminal offense is an offense against the public, whereas the imposition of punitive damages in a civil action is based upon an offense against a private individual.³⁶

2. Proof Beyond a Reasonable Doubt

Criminal acts must be proved beyond a reasonable doubt; yet, in most jurisdictions punitive damages may be imposed with a lesser quantum of proof,

a preponderance of the evidence.³⁷ As stated earlier, a number of states have recently raised the burden of proof to clear and convincing evidence in proving punitive damages.

3. Self-Incrimination

A criminal defendant cannot be compelled to testify against himself, whereas a civil defendant, in most cases, can be compelled to testify. The policy reasons behind the right against self-incrimination do not support extension of the privilege to civil actions which contemplate punitive damages. Most of the policy concerns are based upon the fear of government abusing its power through the criminal process.³⁸

4. Rejection of Criminal Procedural Safeguards

Application of the criminal procedural safeguards has been rejected in relation to punitive damages on the ground that constitutional guarantees are not applicable in purely civil actions in which punitive damages are sought.³⁹ Rulings have been based upon the following United States Supreme Court cases.

In *United States v. Zucker*, 161 U.S. 475, 40 L. Ed. 777 (1896) the United States Supreme Court held that the Sixth Amendment right to be confronted by witnesses does not extend to civil proceedings. The court in *United States v. Regan*, 232 U.S. 37, 34 S. Ct. 213, 58 L. Ed. 494 (1914), a civil action to recover a penalty for the commission of a public offense, held that the burden of proof in a proceeding to recover a pecuniary penalty is "a reasonable preponderance of the evidence" rather than a burden of "proof beyond a reasonable doubt."

B. PUNITIVE DAMAGES AS A VIOLATION OF DUE PROCESS

1. Void for Vagueness

Statutes which have codified the common law of punitive damages have been attacked as constitutionally defective because of their failure to set standards whereby a jury may determine the culpability of the defendant and the amount of punitive damages to be awarded. Whereas criminal statutes set forth a minimum and maximum penalty, the amount of punitive damages is within the discretion of the judge or jury. The failure to set standards has been alleged to render the statute too vague, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.⁴⁰

As a matter of due process, a law is void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its

application." ⁴¹ Usually, the void for vagueness challenge has been applied to criminal statutes; however, the United States Supreme Court has also applied it to civil legislation. ⁴² To date, each time a punitive damages statute has been challenged on void-for-vagueness grounds, the argument has not been successful due primarily to the fact that the statutes amounted to nothing more than a codification of common law. ⁴³

2. Multiple Awards

Defendants in products liability cases who are involved in multiple civil suits claiming punitive damages because of an alleged defect in a mass-produced product, have claimed that the manufacture of numerous units of the product should be viewed as one wrongful act. Separate punitive damage awards to each plaintiff, it is argued, would constitute a violation of due process. ⁴⁴ This argument was not successful. The court found that the act of manufacturing may constitute multiple wrongs and that the manufacturer may be punished for each wrong inflicted. ⁴⁵

3. Single Award

It has been argued to the United States Supreme Court in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1985), that a single award of punitive damages is so large as to violate the due process clause of the Fourteenth Amendment because the award was vastly out of proportion to actual damages, out of proportion to any penalty for deceptive trade practice, and constituted a taking of the defendant's property unjustified by any rational state purpose. The court vacated the decision in the case on other grounds. On remand, the \$3.5 million punitive award was ordered remitted to \$500,000.

Again, in the case of *Bankers Life and Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 100 L. Ed 2d 62 (1988), the United States Supreme Court did not reach a decision on the defendant's claims that the punitive damage award violated the due process, contract and excessive fines clauses of the United States Constitution. In *Bankers Life, supra*, an insurer was assessed \$20,000 actual and \$1,600,000 punitive damages based upon the insurer's bad-faith refusal to pay a claim. Since the insurer failed to explicitly raise the constitutional issues in the state court proceedings, the state court did not have an opportunity to decide the issues; therefore, the United States Supreme Court declined to address the insurer's challenge to the size of the punitive damages award. However, in dicta, the court did state that other more appropriate resolutions exist: the "State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that, the...state courts may choose to resolve the issue by relying on the state constitution or some other adequate and nonfederal ground" ⁴⁶

In the case of *Texaco Inc. v. Pennzoil Co.*, 784 F. 2d 1133 (CA2 1986), the argument that the punitive damage award was so large as to violate due process was successful when, because of the size of the award and the mandatory lien and bond provisions, the right of the defendant to appeal would be severely limited.

C. PUNITIVE DAMAGES AS A VIOLATION OF FREEDOM OF SPEECH

In an action for libel or slander, the defendant might argue that the imposition of punitive damages should be prohibited as it has a chilling effect on the First Amendment right to freedom of speech. However, the United States Supreme Court has held that the award of punitive damages under proper instructions regarding actual malice does not violate the First Amendment.⁴⁷ Justice Harlan concluded in *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 160, 87 S. Ct. 1975, 18 L. Ed 2d 1094 (1967) that the First Amendment rights of a defendant are protected by the use of remittitur against excessive jury verdicts and by other means of judicial supervision.

D. PUNITIVE DAMAGES AS A VIOLATION OF EQUAL PROTECTION

Plaintiffs have raised the claim that failure to award punitive damages in certain cases constitutes a denial of equal protection under the Fourteenth Amendment to the United States Constitution.

1. Wrongful Death Actions

Wrongful death actions were not recognized at common law and are statutorily created. The majority of jurisdictions, although not Nevada, have construed their statutes to allow recovery of compensatory damages and not punitive damages.

It has been argued that to deny the recovery of punitive damages in wrongful death cases, while permitting their recovery in actions for personal injury and property damage, discriminates against wrongful death claimants and thereby denies them equal protection of the laws. Courts have rejected this argument holding that a rational basis exists for the legislative distinction.⁴⁸

A federal court recently held that a Pennsylvania No-Fault Motor Vehicle Insurance Act which barred the recovery of punitive damages to victims of motor vehicle accidents does not violate the equal protection or due process clauses of the United States Constitution. The court stated that there is no constitutionally established fundamental right to recover punitive damages in tort actions.⁴⁹

2. Limitations on the Amount of Punitive Damages

Recently some states have been statutorily limiting the amount of damages recoverable in certain types of cases, particularly in the area of medical malpractice. These statutes have been challenged on the basis of violating equal protection, due process and the right to trial by jury. Courts throughout the country are split as to the constitutionality of a limitation on the amount of medical malpractice damages.⁵⁰ The majority of jurisdictions have upheld constitutional challenges regarding caps on compensatory damages holding that they violate equal protection, due process and the right to trial by jury.⁵¹ However, the few courts that have been faced with statutory limitations on punitive damages have ruled that caps on punitive damage are constitutional and do not violate the equal protection and due process clauses or the separation of powers doctrine.⁵²

E. PUNITIVE DAMAGES AS CRUEL AND UNUSUAL PUNISHMENT

The most recent constitutional attack on the award of punitive damages is on the grounds that the punitive damage award is so excessive and disproportionate to the compensatory damage award that it violates the proscription against excessive fines as set forth in the Eighth Amendment of the United States Constitution.

The United States Supreme Court has granted certiorari in the case of *Kelco Disposal v. Browning-Ferris Industries*, 845 F. 2d 404 (CA2 1988) to decide whether it constitutes cruel and unusual punishment to award \$6 million in punitive damages against a sanitation company that monopolized the market by predatory pricing thereby driving a competitor out of business. The United States Court of Appeals, Second Circuit, held that the punitive damage award was not grossly excessive as it amounted to less than .5 percent of the defendant's revenues, approximately .6 percent of its net worth and less than 5 percent of its net income for fiscal year 1986. The defendant is appealing based upon the fact that the \$6 million punitive award is greatly disproportionate in relation to the amount of the actual damages in the case, \$101,292, that it constitutes cruel and unusual punishment.

Regardless of the outcome of the *Kelco* case, it may not be dispositive of the constitutional issues regarding punitive damages as the decision will be limited to whether the Eighth Amendment applies to punitive damages awards that are grossly disproportionate and limited to the context of an economic tort.

VIII

CONCLUSION

Punitive damages are awarded in the majority of states to punish and deter persons who commit wilful, wanton, reckless, malicious or oppressive acts against others. Judicial control is exercised to prevent juries from returning punitive damages awards which are excessive or grossly disproportionate to the amount of punishment deserved under the circumstances of a particular case. Recently, some state legislatures have enacted laws placing limitations upon the awards of punitive damages. These limitations take the form of caps on the amount of punitive damages awarded in certain types of cases, requiring a higher burden of proof to establish punitive damages, requiring a bifurcated trial on the issue of punitive damages, and requiring a portion of the punitive damage award to be contributed to the state.

IX
REFERENCES

1. Keeton, Prosser & Keeton on Torts, § 2 at 9-10 (5th Ed. 1984).
2. Restatement 2d of Torts § 8A (1965).
3. Restatement 2d of Torts § 500 (1965).
4. *Shelley v. Clark*, 103 So.2d 743 (Ala. 1958).
5. *Taylor v. Superior Court of Los Angeles*, 598 P.2d 854 (Cal. 1979).
6. NRS 42.010 (2).
7. Restatement (Second) of Contracts § 355 (1979).
8. Keeton, Prosser & Keeton on Torts, § 92 at 657-62 (5th Ed. 1984).
9. Annot, *Recovery of Punitive Damages for Breach of Building or Construction Contract*, 40 ALR 4th 110 (1985).
10. *Id.*
11. *Ainsworth v. Combined Ins. Co.*, 104 Nev. Adv. Op. 92 (October 26, 1988).
12. *Id.* at 4.
13. Defense Research Institute Monograph, *Products Liability: Defense of a Products Case* (Dec. 1978).
14. *Id.* at § 6.27.
15. Keeton, Prosser & Keeton on Torts § 127 at 945 (5th Ed. 1984).
16. Punitive Damages L & Prac § 5.19.
17. *See*, Restatement (Second) of Agency.
18. *Percival v. General Motors Corp.*, 539 F.2d 1126, 1129-30 (CA 8, 1976).
19. Punitive Damages L & Prac § 5.31.

20. *K Mart Corp. v. Ponsock*, 103 Nev. 39, 47, 732 P.2d 1364 (1987).
21. Punitive Damages L & Prac § 5.36.
22. McCormick, *Evidence*, § 201 at 479 (2nd Ed. 1972) *See also*, *Michael v. Cole*, 595 P.2d 955 (Ariz. 1979).
23. *Northwestern Nat. Co. v. McNulty*, 307 F.2d 432 (CA 5, 1962).
24. *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1, (Tenn. 1964).
25. Punitive Damages L & Prac § 5.37.
26. *Capel v. Raynel Campers, Inc.*, 90 Nev. 341, 526 P.2d 334 (1974).
27. *Neal v. Farmers Ins. Exchange*, 582 P.2d 980 (Cal. 1978).
28. *Ace Truck v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987).
29. Nevada Rules of Civil Procedure Rules (NRCPP) 23 and 42(A).
30. NRCPP 42(b).
31. Punitive Damages L & Prac § 4.01.
32. *Allen v. Anderson*, 93 Nev. 204, 562 P.2d 487 (1977).
33. *Summa Corp. v. Greenspun*, 98 Nev. 528, 655 P.2d 513 (1982).
34. *Austin v. C & L Trucking, Inc.*, 610 F.Supp. 465 (D. Nev. 1985).
35. Punitive Damages L & Prac § 3.02.
36. *Id.*
37. Redden, *Punitive Damages*, § 7.2(A)(3), 1980.
38. *Id.*, § 7.2(A)(4)
39. *Gibson v. Gibson*, 15 Cal.App.3d 943, 93 Cal.Rptr. 617 (1971).
40. *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38 (Alaska 1979); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App.3d 376 (1970).

41. *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926).
42. *Jorden v. DeGeorge*, 341 U.S. 223, 231, 71 S.Ct. 703, 95 L.Ed 886 (1951) (standards used in deportation hearings); *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed 447 (1966) (standards used to impose the costs of unsuccessful criminal prosecutions on acquitted defendants).
43. *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38 (Alaska 1979) (standards supplied by jury instructions); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal.App.3d 376 (1970)(reasonable certainty is all that is required); *Toole v. Richardson-Merrill, Inc.*, 251 Cal.App.2d 689 (1967) (right to punitive damages exists in absence of statute).
44. *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980).
45. *See also, Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (CA 6, 1985) cert. den. 106 S.Ct. 3335, 92 L. Ed.2d 740 (1985).
46. *Bankers Life and Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988).
47. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964).
48. *Georgie Boy Mfg., Inc. v. Superior Court of Los Angeles County*, 115 Cal.App.3d 217 (1981); *Freeman v. World Airways*, 596 F.Supp. 841 (D.C. Mass. 1984).
49. *Mele v. Nutmeg Bakers Supply*, 580 F.Supp. 887 (1984).
50. Courts that have allowed caps on compensatory damages: *Fein v. Permanente Medical Group*, 695 P.2d 665 (Calif. 1985), appeal dismissed, 474 U.S. 892 (1985); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585 (Ind. 1980); *Prendergast v. Nelson*, 256 N.W.2d 657 (Neb. 1977); *Lucas v. United States*, 807 F.2d 414 (CA 5, 1986); *Hoffman v. United States*, 767 F.2d 1431 (CA 9, 1985).
51. Courts that have not allowed caps on compensatory damages: *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984); *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987); *Jones v. State Board of Medicine*, 555 P.2d 399 (Idaho 1976), cert den. 431 U.S. 914 (1977); *Wright v. Central Du. Page Hospital Association*, 347 N.E.2d 736 (Ill. 1976); *Kansas Malpractice Victims v. Bell*, 757 P.2d 251 (Kan. 1988); *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094 (1985); *McGuire v. C & L*

Restaurant, Inc., 346 N.W.2d 605 (Minn. 1984); *Pfost v. State*, 713 P.2d 495 (Mont. 1985); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980); *Simon v. St. Elizabeth Medical Center*, 355 N.E.2d 903 (Ohio, 1976); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988).

52. *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986); *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987).

X

APPENDIX 1 *

STATES WHERE PURPOSE OF PUNITIVE DAMAGES TO
PUNISH OR DETER

Alabama -- "malice, willfulness or wanton and reckless disregard of the rights of others." *Mid-State Homes, Inc. v. Johnson*, 311 So 2d 312, 317 (Ala 1975).

Alaska -- "characterized as outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another." *Alyeska Pipeline Service Co. v. O'Kelley*, 645 P2d 767 (Alaska 1982).

Arizona -- "an 'evil mind' and aggravated and outrageous conduct." *Linthicum v. Nationwide Life Ins. Co.*, 723 P2d 675, 680 (Ariz 1986).

Arkansas -- "when the defendant acts with malice, or with willfulness, wantonness, or conscious indifference to consequences from which malice may be inferred." *Freeman v. Anderson*, 651 SW2d 450, 452 (Ark. 1983).

California -- "the defendant must be guilty of oppression, fraud or malice, He must act with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights." *Silberg v. California Life Ins. Co.*, 521 P2d 1103, 1110 (Cal. 1974). Cal Civ Code § 3294 (1970 and 1986 Supp).

Colorado -- "fraud, malice or wilful and wanton conduct . . . Willful and wanton means conduct purposely committed which the actor must have realized as dangerous, done heedlessly and recklessly without regard to consequences or the rights and safety of others, particularly the plaintiff." Colo Rev State § 13-21-102 (1986)

Delaware -- "when (the defendant's) wrongful act was committed wilfully and wantonly." *Cloroben Chemical Corp. v. Comegys*, 464 A2d 887, 892 (Del 1983).

District of Columbia -- "evidence of actual malice, wanton conduct, or deliberate violence." *Smith v. Executive Club, Ltd.*, 458 A2d 32, 35 (DC App 1983).

* Source: *Punitive Damages L & Prac* § 501

- Florida** -- "gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons . . . , or . . . entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wanton or reckless, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the right of others which is equivalent to an intentional violation of them." *White Const. Co. v. Dupont*, 455 So 2d 1026, 1028-29 (Fla 1984).
- Hawaii** -- "for willful, malicious, wanton or aggravated wrongs where a defendant has acted with a reckless indifference to the rights of another." *Goo v. Continental Cas. Co.*, 473 P2d 563, 566 (Haw. 1970).
- Idaho** -- "the action of the wrongdoer is wanton, malicious or gross and outrageous, or where the facts are such as to imply malice and oppression . . . (or where the facts) show willful malice, fraud, or gross negligence." *Linscott v. Rainier Nat. Life Ins. Co.*, 606 P2d 958, 962 (Id. 1980)
- Illinois** -- "committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willingly, or with such gross negligence as to indicate a wanton disregard of the rights of others." *Kelsay v. Motorola, Inc.*, 384 NE2d 353, 359 (Ill. 1978).
- Indiana** -- "whenever the elements of fraud, malice, gross negligence or oppression mingle in the controversy." *Hibschman Pontiac, Inc. v. Batchelor*, 362 NE2d 845, 847 (Ind. 1977).
- Iowa** -- "willful or wanton disregard for the rights or safety of another." Iowa Code Ann § 668A.1 (1986).
- Kansas** -- "whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy." *Newton v. Hornblower, Inc.*, 582 P2d 1136, 1150 (Kan. 1978).
- Kentucky** -- "on account of the wanton, reckless, malicious, or offensive character of the acts complained of." *Fowler v. Mantooth*, 683 SW2d 250 (Ky 1984); *Harrod v. Fraley*, 289 SW2d 203, 205 (Ky 1956)
- Maine** -- Whether [defendant's conduct] was intentional, wanton, malicious, reckless, or grossly negligent." *Oliver v. Martin*, 460 A2d 594, 595 (ME 1983)

- Maryland** -- "only when there is an element of fraud, malice, evil intent or oppression which enters into and forms a part of the wrongful act." *General Motors Corp. v. Piskor*, 352 A2d 810, 817 (Md. 1976).
- Minnesota** -- "the acts of the defendant show a willful indifference to the rights or safety of others." Minn Stat Ann § 549.20(1) (1978).
- Mississippi** -- "for a willful and intentional wrong, or for such gross negligence and reckless conduct as is equivalent to such a wrong." *Tideway Oil Programs, Inc. v. Serio*, 431 So 2d 454, 465 (Miss 1983).
- Missouri** -- to determine malice the test is "whether defendant did a wrongful act intentionally without just cause or excuse; to be assessed punitive damages, defendant must not only have intended to perform the act which is ascertained to be wrongful, but must have known it was wrongful when he did it." *Stark v. American Bakeries Co.*, 647 SW2d 119, 123 (Mo 1983).
- Montana** -- "where the defendant has been guilty of oppression, fraud, or malice, actual or presumed." Mont Code Ann § 27-1-221 (1985).
- Nevada** -- "where the defendant has been guilty of oppression, fraud or malice, express or implied." Nev Rev Stat § 42.010 (1986).
- New Jersey** -- "actual malice, which is nothing more or less than intentional wrongdoing--an evil-minded act. . .or an act accompanied by a wanton and wilful disregard of the rights of another." *Enright v. Lublow*, 493 A2d 1288, 1297-98 (NJ 1985).
- New Mexico** -- "only when the conduct of the wrongdoer may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiff's rights." *Loucks v. Albuquerque Nat. Bank*, 418 P2d 191, 199 (NM 1966).
- New York** -- "based upon tortious acts which involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of the plaintiff's rights, or other circumstances of aggravation." *LeMistral, Inc. v. Columbia Broadcasting System*, 402 NYS2d 815, 817 (1978).
- North Carolina** -- "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness." *Newton v. Standard Fire Ins. Co.*, 229 SE2d 297, 301 (NC 1976).

North Dakota -- "when the defendant has been guilty of oppression, fraud, or malice, actual or presumed." ND Cent Code § 32-03-07 (1977 Supp).

Ohio -- "caused by intentional, reckless, wanton, willful and gross acts or by malice inferred conduct and surrounding circumstances." *Rebeck v. Huffman*, 374 NE2d 411, 413 (OH 1978).

Oklahoma -- "conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed." Okla Stat Ann Tit 23, § 9 91986).

Oregon -- "where there has been a particularly aggravated disregard of the rights of others and where the violation of societal interests is sufficiently great and of a kind that sanctions would tend to prevent." *Senn v. Bunick*, 594 P2d 837, 842 (OR 1979).

Pennsylvania -- "based on malicious, wanton, reckless, willful or oppressive conduct on the part of defendant." *Chambers v. Montgomery*, 192 A2d 355, 358 (PA 1963).

Rhode Island -- "upon evidence of such willfulness, recklessness or wickedness, on the part of the party a fault, as amounted to criminality." *Sherman v. McDermott*, 329 A2d 195, 196 (RI 1974).

South Carolina -- "must be malice, ill will, a conscious indifference to the rights of others, or a reckless disregard thereof." *King v. Allstate Ins. Co.*, 272 SC 259, 251 SE2d 194, 196 (SC 1979).

South Dakota -- "where the defendant has been guilty of oppression, fraud, or malice, actual or presumed." SD Comp Laws Ann § 21-3-2 (1967 and 1986 Supp).

Tennessee -- "in cases involving fraud, malice, gross negligence or oppression, or where a wrongful act is done with a bad motive or so recklessly as to imply as disregard of societal obligations, or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to consequences." *Inland Container Corp. v. March*, 529 SW2d 43, 45 (Tenn. 1975).

Texas -- "the act complained of not only must be unlawful but also must partake of a wanton and malicious nature, or, as sometimes stated, somewhat of a criminal or wanton nature." *Ogle v. Craig*, 464 SW2d 95, 97 (Tex. 1971).

Utah -- for "willful and malicious" conduct ". . . defendant's conduct must be malicious or in reckless disregard for the rights of others although actual intent to cause injury is not necessary . . . defendant must either 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." *Behrens v. Raleigh Hills Hospital, Inc.*, 675 P2d 1179, 1186-87 (Utah 1983).

Vermont -- "conduct manifesting personal ill will or . . . insult or oppression, or . . . reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service Corp.*, 399 A2d 517, 518 (VT 1974)

Virgin Islands -- "for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others."

Virginia -- "only where there is misconduct or actual malice, or such recklessness or negligence as to evidence as conscious disregard of the rights of others." *Jordan v. Sauve*, 247 SE2d 739, 741 (VA 1978).

West Virginia -- "where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting right of others appear, or where legislative enactment authorizes it." *Cook v. Hekcs, Inc.*, 342 SE2d 453, 461 (W. Va. 1986).

Wisconsin -- "a showing of wanton, willful or reckless disregard of the plaintiff's rights." *Jeffers v. Nysse*, NW2d 495, 498 (Wis. 1980).

Wyoming -- "the act of the defendant was committed maliciously, willfully or wantonly." *Petsch v. Florom*, 538 P2d 1011, 1013 (Wyo. 1975).

STATES WHERE PURPOSE OF PUNITIVE DAMAGES TO COMPENSATE

Connecticut -- "when the evidence shows a reckless indifference to the rights of others or is an intentional and wanton violation of those rights." *Collens v. New Canaan Water Co.*, 234 A2d 825, 832 (Conn. 1967).

Georgia -- "there must be evidence of wilful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *General Refractories Co. v. Rogers*, SE2d 795, 798 (Ga. 1977).

Michigan -- "where the act done is one which from its very nature must be expected to result in mischief, or where there is malice, or willful and

wanton misconduct, carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others." *Smith v. Jones*, 169 NW2d 308, 319 (Mich. 1969).

New Hampshire -- "when the act involved is wanton, malicious, or oppressive." *Munson v. Raudonis*, 387 A2d 1174, 1177 (NH 1978).

XI

APPENDIX 2

OTHER NEVADA STATUTES PROVIDING FOR THE AWARD OF PUNITIVE DAMAGES

31A.120 Prohibition against discharge or discipline of employee as result of notice to withhold; assessment of costs and attorney's fees; effect of employer's refusal to withhold or misrepresentation of income.

1. It is unlawful for an employer to use the withholding of wages and commissions to collect an obligation of support as a basis for discharging the employee or for disciplinary action against him. Any employer who violates this section shall reinstate the employee with no loss of pay or benefits, is liable for any payments of support not withheld, and shall be fined \$1,000. If an employee prevails in an action for reinstatement based on this section, the employer is liable, in an amount not less than \$2,500, for payment of the employee's costs and attorney's fees incurred in that action.

2. If an employer wrongfully refuses to withhold from the wages and commissions of a responsible parent as required in the notice of withholding from the enforcing authority or knowingly misrepresents the income of the employee, he shall pay the amount he refused to withhold to the enforcing authority and may be ordered to pay punitive damages to the person to whom support is owed in an amount not to exceed \$1,000 for each pay period he failed to honor the order of withholding or knowingly misrepresented the income of the employee.

(Added to NRS by 1985, 1427; A 1987, 2246)

40.545 Fraud against financial institution for purpose of obtaining loan secured by lien on real property.

1. As used in this section, "financial institution" means a bank, mortgage company, credit union, thrift company or savings and loan association, or any subsidiary or affiliate of a bank, mortgage company, credit union, thrift company or savings and loan association, which is authorized to transact business in this state and which makes or acquires, in whole or in part, any loan of the kind described in subsection 2.

2. Except as otherwise provided in subsection 5, a person who, for the purpose of obtaining a loan secured by a lien on real property, knowingly conceals a material fact, or makes a false statement concerning a material fact knowing that the statement is false, is liable to any financial institution which relied upon the absence of that concealed fact or on that false statement for any damages it sustains because of the fraud.

3. In addition to its actual damages, a financial institution may recover exemplary or punitive damages in an amount not to exceed 50 percent of the actual damages awarded.

4. The cause of action provided by this section:

(a) Is not, for the purposes of NRS 40.430, an action for the recovery of any debt or an action for the enforcement of any right secured by mortgage or lien upon real estate.

(b) Is in addition to and not in substitution for any right of foreclosure existing in favor of the financial institution. Any recovery pursuant to this section does not limit the amount of a judgment awarded pursuant to NRS 40.459, but the financial institution is not entitled to recover actual damages more than once for the same loss.

5. The provisions of this section do not apply to any loan which is secured by a lien on real property used for residential purposes if:

(a) The residence is a single-family dwelling occupied by the person obtaining the loan, as represented by him in connection with his application for the loan; and

(b) The loan is for the principal amount of \$150,000 or less.

(Added to NRS by 1987, 1346)

41.035 Limitation on award for damages in tort actions.

1. An award for damages in an action sounding in tort brought under NRS 41.031 or against a present or former officer or employee of the state or any political subdivision, immune contractor or state legislator arising out of an act or omission within the scope of his public duties or employment may not exceed the sum of \$50,000, exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. An award may not include any amount as exemplary or punitive damages.

2. The limitations of subsection 1 upon the amount and nature of damages which may be awarded apply also to any action sounding in tort and arising from any recreational activity or recreational use of land or water which is brought against:

(a) Any public or quasi-municipal corporation organized under the laws of this state.

(b) Any person with respect to any land or water leased or otherwise made available by that person to any public agency.

(c) Any Indian tribe, band or community whether or not a fee is charged for such activity or use. The provisions of this paragraph do not impair or modify any immunity from liability or action existing on February 26, 1968, or arising after February 26, 1968, in favor of any Indian tribe, band or community.

The legislature declares that the purpose of this subsection is to effectuate the public policy of the State of Nevada by encouraging the recreational use of land, lakes, reservoirs and other waters owned or controlled by any public or

quasi-municipal agency or corporation of this state, wherever such land or water may be situated.

3. The limitations of subsection 1 upon the amount and nature of damages which may be awarded apply also to any action sounding in tort arising out of any act or omission within the scope of the public duties or employment of any present or former officer or employee of the state or of any political subdivision, immune contractor or state legislator.

(Added to NRS by 1965, 1414; A 1968, 44; 1973, 1532; 1977, 985, 1539; 1979, 1736; 1987, 543)

41.365 Action for damages.

1. Subject to the provisions of subsection 2, a person who has suffered injury as the proximate result of perjury or subornation of perjury committed by another may bring an action for the recovery of his actual damages and any punitive damages which the facts may warrant.

2. There is no cause of action under subsection 1 unless the defendant has been convicted of the perjury or subornation of perjury which caused the injury.

3. As used in this section, "injury" includes deprivation of liberty as well as other harm to the person or property of the plaintiff.

(Added to NRS by 1975, 831)

179A.230 Actions for damages: Person who is subject of request for notice of information; child who is victim of sexual offense committed by employee; amount of damages; period of limitation.

1. A person who is the subject of a request for notice of information relating to sexual offenses pursuant to NRS 179A.190 to 179A.240, inclusive, may recover his actual damages in a civil action against:

(a) The central repository for an intentional or grossly negligent:

(1) Dissemination of information relating to sexual offenses not authorized for dissemination; or

(2) Release of information relating to sexual offenses to a person not authorized to receive the information;

(b) The central repository for an intentional or grossly negligent failure to correct any notice of information relating to sexual offenses which was disseminated pursuant to NRS 179A.190 to 179A.240, inclusive; or

(c) An employer, representative of an employer or employee for an intentional or grossly negligent violation of NRS 179A.110. Punitive damages may be awarded against an employer, representative of an employer or employee whose violation of NRS 179A.110 is malicious.

2. An employer, except an employer who is a voluntary organization consisting primarily of persons who provide their services for no remuneration other than reimbursement for actual expenses incurred, is liable to a child served by the employer for damages suffered by the child as a result of a sexual offense committed against the child by an employee hired on or after

January 1, 1988, if, at the time the employer hired the employee, the employee was the subject of information relating to sexual offenses for which notice was available for dissemination to the employer and the employer:

(a) Failed, without good cause, to request notice of the information pursuant to NRS 179A.190 to 179A.240, inclusive; or

(b) Was unable to obtain the information because the employee refused to consent to the search and release of the information, and the employer hired or retained the employee despite this refusal.

The amount of damages for which an employer is liable pursuant to this subsection must be reduced by the amount of damages recovered by the child in an action against the employee for damages sustained as a result of the sexual offense.

3. An action pursuant to this section must be brought within 3 years after:

(a) The occurrence upon which the action is based; or

(b) The date upon which the party bringing the action became aware or reasonably should have become aware of the occurrence, whichever was earlier, if he was not aware of the occurrence at the time of the occurrence.

4. This section does not limit or affect any other rights, claims or causes of action arising by statute or common law.

(Added to NRS by 1987, 1763)

200.690 Penalties.

1. Any person who willfully and knowingly violates NRS 200.620, 200.630, 200.640 or 200.650:

(a) Shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

(b) Is liable to a person whose wire or oral communication is intercepted without his consent for:

(1) Actual damages or liquidated damages of \$100 per day of violation but not less than \$1,000, whichever is greater;

(2) Punitive damages; and

(3) His costs reasonably incurred in the action, including a reasonable attorney's fee, all of which may be recovered by civil action.

2. A good faith reliance by a public utility on a written request for interception by one party to a conversation shall be a complete defense to any civil or criminal action brought against the public utility on account of such interception.

(Added to NRS by 1957, 336; A 1967, 474; 1973, 1749)

482.36423 Action for injunctive relief or civil damages; service of process; time to answer or plead.

1. Whenever it appears that a person has violated or is violating or is threatening to violate any provision of NRS 482.36311 to 482.36425, inclusive, any person aggrieved thereby may apply to the district court in the county where the defendant resides, or in the county where the violation or threat of violation occurs, for injunctive relief to restrain the person from continuing the violation or threat of violation.

2. In addition to any other judicial relief, any dealer or person who assumes the operation of a franchise pursuant to NRS 482.36396 to 482.36414, inclusive, who is injured in his business or property by reason of a violation of NRS 482.36311 to 482.36425, inclusive, may bring an action in the district court in which the dealership is located, and may recover actual damages sustained by him, and the cost of suit, including a reasonable attorney's fee. In an action for money damages, the court or jury may award punitive damages if the defendant acted maliciously. The amount of damages sustained by any dealer, pursuant to subsection 4 of NRS 482.3638, is the fair market value of the franchised dealership at the time of notification of termination, refusal to continue or unilateral modification of a franchise.

3. Any company, firm, partnership, corporation or association created and existing under the laws of any other state, territory, foreign government or the government of the United States, or any person residing outside the state, who grants a franchise to any dealer in this state may be served with any legal process in any action for injunctive relief or civil damages in the following manner:

(a) By delivering a copy of the process to the director; and

(b) By mailing to the last known address of the manufacturer or distributor, by certified mail, return receipt requested, a copy of the summons, a copy of the complaint, together with copies of any petition or order for injunctive relief.

4. The defendant has 30 days, exclusive of the day of service, within which to answer or plead.

5. The method of service provided in this section is cumulative and may be utilized with, after or independently of all other methods of service.

(Added to NRS by 1977, 557; A 1985, 1834)--(Substituted in revision for NRS 482.36411)

598.287 Buyer's action for recovery of damages; attorney's fees; punitive damages. A buyer injured by a violation of NRS 598.282 to 598.286, inclusive, or by a breach by an organization of a contract subject to those sections, may bring an action for recovery of damages. Judgment must be entered for actual damages, but in no case less than the amount paid by the buyer to the organization, plus reasonable attorney's fees and costs. If the court deems it proper, the court may award punitive damages.

(Added to NRS by 1987, 1520)