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## Punitive Damages in Arkansas -- Expanded? Restricted?

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# Punitive Damages in Arkansas — Expanded? Restricted?

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Punitive damages are wonderful. They make front page headlines; juries assess penalties; clients receive a windfall; attorneys grow rich; the workload of bankruptcy courts expands; and the legal literature grows. In recent years not only has the size of punitive damages awards exploded, but so has the availability of punitive damages. With that expansion, and the financial impact upon the parties, both defendants and the courts have devoted more attention to procedural fairness and the guidelines connected with punitive damages.

## I. Expansion of the Substantive Law

In contrast with compensatory damages, punitive damages are not intended to compensate an injured party for the wrongs suffered, but are instead a penalty inflicted by the law on a guilty party.<sup>1</sup> The objective of punitive damages is to punish the wrongdoer<sup>2</sup> and to serve as an example to other potential wrongdoers.<sup>3</sup> The award of punitive damages to the plaintiff may very well be a windfall to him personally, but may still be

appropriate within the dual purposes of punitive damages.<sup>4</sup> As they are to serve as an example to others, they are also described as exemplary damages.<sup>5</sup>

Because punitive damages are not a favorite of the law,<sup>6</sup> significant limits are placed on their award. Punitive damages do not depend upon the underlying theory or cause of action, but instead rest upon the defendant's conduct. Punitive damages may be imposed when the defendant acted with malice.<sup>7</sup> Malice is not equated with personal hate, but is defined as an intent and disposition to do a wrongful act greatly injurious to another.<sup>8</sup>

Punitive damages may also be imposed if the defendant acted with such willfulness, wantonness, or conscious indifference to consequences that malice could be inferred.<sup>9</sup> Similarly punitive damages may be imposed when the tortfeasor demonstrated a reckless disregard for the rights and safety of others.<sup>10</sup> Exemplary damages are proper where the defendant has intentionally violated another's rights to his property.<sup>11</sup>

### A. Intentional Torts

Intentional torts present few problems in the

award of punitive damages. Both AMI 2217 and the case law provide for punitive damages when the defendant intentionally pursued a course of conduct for the purpose of causing injury or damages.<sup>12</sup> The injury may be physical or emotional; the damage may be to personal or real property. Accordingly, punitive damages have been awarded in substantive cases of assault and battery,<sup>13</sup> trespass,<sup>14</sup> defamation,<sup>15</sup> conversion,<sup>16</sup> the intentional infliction of mental distress,<sup>17</sup> the wrongful dishonor of checks,<sup>18</sup> malicious prosecution,<sup>19</sup> the intentional destruction of crops,<sup>20</sup> expulsion from a common carrier,<sup>21</sup> and wrongful alteration of a medical prescription.<sup>22</sup>

### B. Negligence

Negligence alone, no matter how gross, is never enough to support punitive damages.<sup>23</sup> Gross negligence, which may only indicate a careless disregard of the rights of others, cannot be equated with the requisite malice or intent.<sup>24</sup> The added element of intentional wrong or its equivalent must be present. Malice may be inferred from the continuation of conduct, with knowledge that the conduct would likely inflict injury and with conscious indifference to those consequences.<sup>25</sup>

The motive of the defendant is material in determining whether he acted with mere negligence, indifference, or careless disregard of the rights of others, or whether his acts evinced an intent and disposition to do a wrongful act greatly injurious to another.<sup>26</sup> For example, a negligent driver who, after causing an accident, flees the scene is not liable for punitive damages without evidence of wantonness or conscious indifference in the accident itself.<sup>27</sup> On the other hand, the operation of a motor vehicle while intoxicated will support an award of punitive damages,<sup>28</sup> and driving at an illegal rate of speed is a factor to be evaluated in the determination of willful and wanton conduct.<sup>29</sup>

The rule in negligence cases is best illustrated by a comparison of two cases. *National By-Products, Inc. v. Searcy House Moving Company, Inc.*<sup>30</sup> is a graphic demonstration of the need for and purpose of punitive damages. In a collision between a tractor-trailer and house moving trailer, two persons were killed. The jury awarded compensatory and punitive damages

against the owner of the tractor-trailer rig. The evidence in support of punitive damages seemed compelling: (1) The rig was in excess of the legal weight limit, and expert testimony showed that the excess weight was a contributing cause of the accident. (2) Just prior to the accident, the driver was speeding at perhaps 70 miles per hour. (3) The driver was "tailgating" while going downhill. (4) Evidence supported a conclusion that the brakes were seriously deficient, and had not been properly maintained or adjusted. (5) The driver had not attempted to slow down or stop when approaching highway congestion. (6) The driver had received prior citations for violation of the weight limits. The citations had been paid by the owner, who, despite an internal disciplinary policy, had not disciplined or cautioned the driver.

To the citizen-in-the-street, the facts probably would present a classic case of the need for punitive damages. The owner needs to be punished. Such owners and operators need to be deterred from such conduct. Accordingly, the jury, acting as representatives of the public, awarded punitive damages.

But to the Supreme Court of Arkansas, these elements were not sufficient. Punitive damages requires evidence that the defendant acted wantonly in causing the injury. In turn, wantonness is an attitude of mind approaching a "disposition of perversity." Alternatively, although a defendant in a negligence case does not intentionally intend to injure the plaintiff, a defendant who acts with conscious indifference to or reckless disregard of the consequences when the natural and probable consequence of his action was injury to the plaintiff may be subjected to punitive damages. Even then, the defendant is subject to punitive damages only if he was aware of the dangerous situation and continued in his course of conduct.

Applying those principles to *National By-Products*, the court found proof of gross negligence, but insufficient evidence to support the award of punitive damages. The driver was aware that he was speeding and tailgating, but the evidence did not show that he continued in his course of conduct with knowledge that his acts were about to cause injury. Nor did the owner of the rig intentionally act in such a way that the natural and probable consequence of his acts was to cause

injury. Accordingly, by a 5-2 decision, the Court struck down the award of punitive damages.

In sharp contrast is the subsequent federal case of *Potts v. Benjamin*.<sup>31</sup> A tractor truck, with two other trucks piggy-backed on it, started a chain reaction collision on an interstate highway in Little Rock. From a car containing Mrs. Potts and her three young children, the collision threw the two-year-old son onto the highway where he was run over by the truck. The primary defendant was the Memphis firm who owned the tractor truck and had, the morning of the tragedy, loaded the other trucks onto the back of the tractor truck. The jury's award was \$300,000 to each parent in compensatory damages and \$200,000 each to the 3-year-old sister and the 5-year-old brother in compensatory damages. In addition, the jury awarded one million dollars in punitive damages.

On appeal the defendant<sup>32</sup> argued that, as the Eighth Circuit was compelled by the *Erie* doctrine to follow *National By-Products*, it should set aside the judgment for punitive damages. But the Eighth Circuit, perhaps expressing its displeasure with or disapproval of the strictness of *National By-Products*, identified three factors to support the award of punitive damages. (1) The evidence would support a jury finding that the defendants never inspected the brakes on any trucks that they sold. (2) With regard to the two "piggy-backed" trucks, a reasonable person could decide that the defendants knowingly rendered the brakes inoperative. (3) The testimony presented would support a conclusion that the defendants did not care whether the brakes on the two trucks were operative or not. Putting these elements together, the jury could find that the defendants should have known that placing such a unit onto the highway could naturally and probably result in injury, and that, despite that knowledge, they proceeded with a reckless disregard of the consequences.

Are there principled differences between the two cases? If anything, *National By-Products* with its virtually undisputed evidence of speeding, reckless driving, weight violations and failure to slow down in a congested area presents an even clearer case for punitive damages. Perhaps the object lesson of these two cases is that a plaintiff's attorney should try to create diversity jurisdiction and bring the case in federal court.

Provided that the standard of *National By-Products* is satisfied, punitive damages may be awarded in wrongful death,<sup>33</sup> medical malpractice,<sup>34</sup> and legal malpractice actions.<sup>35</sup>

### C. Fraud

In fraud cases, Arkansas law indicates that punitive damages are allowed only where the fraud is aggravated, that is, where it is malicious, deliberate, gross, or wanton.<sup>36</sup> The language in AMI 2217 most appropriate to a fraud case is that the defendant "intentionally pursued a course of conduct for the purpose of causing injury or damage." That language suggests that the defendant's action must have been motivated by an attempt to harm the plaintiff. However, in most fraudulent transactions the goal of the defendant is to enrich himself.<sup>37</sup> To that extent the model instruction is misleading.

Despite the instruction, the cases generally support the conclusion that punitive damages may be awarded upon a simple showing of the elements of common-law fraud, without specific intent or an intent to cause harm.<sup>38</sup> The intent requirement of common-law fraud is that the defendant has intended to induce the plaintiff to either act or refrain from acting in reliance upon the representation.<sup>39</sup> Punitive damages may also be awarded in fraud cases when the wrong involves violation of a duty springing from a relationship of trust and confidence.<sup>40</sup> Punitive damages have been awarded in fraud actions against both the seller<sup>41</sup> and the buyer of land.<sup>42</sup>

### D. Punitive Damages

Punitive damages may be awarded in products liability cases.<sup>43</sup> Such awards may prevent reckless manufacturers from gaining unfair advantages over competitors, encourage product improvement, and deter defendants from electing to tolerate numerous small claims or actions.<sup>44</sup> The court has not yet addressed the question of whether a manufacturer can be punished for a single defective product in separate lawsuits by unrelated plaintiffs, perhaps even in different jurisdictions. Arguably, multiple punitive damages awards that may economically threaten the survival of the manufacturer have constitutional ramifications.

### E. Breach of Contract

Punitive damages are not generally recoverable

for breach of contract actions.<sup>45</sup> That rule applies even if the breach is intentional and in bad faith. Traditionally the common law only permitted punitive damages for breach of a promise to marry, breach of a fiduciary duty, and failure of a public service carrier or monopoly to fulfill its duties.<sup>46</sup>

This unwillingness to permit punitive damages in breach of contract actions flows in part from the attitude that a party to a contract has the option of breaking the contract and paying damages, limited to those contemplated by the parties.<sup>47</sup> This reluctance may also reflect the more limited role of a jury in contract actions; a fear that the formation of contracts might be hindered; the absence of resentment, mental suffering, or physical discomfort from breached contracts; and the occasional economic advantage to be gained from broken contracts in a free market system.<sup>48</sup>

In some instances the facts may support either a contract action or a tort action. For example, an employer may breach an employment contract or commit the tort of outrage.<sup>49</sup> Likewise, a party may breach a contract or engage in tortious interference with the contractual relations of another.<sup>50</sup> In such situations the court presumes that the action is in contract, and punitive damages are not recoverable. To overcome that presumption, the plaintiff must specifically plead and prove a tortious cause of action.<sup>51</sup> Under liberalized pleading rules, the plaintiff may plead in the alternative,<sup>52</sup> subject to the limitations of the election of remedies doctrine.<sup>53</sup>

To support a claim for punitive damages, a willful or malicious act must exist in connection with a contract. A bare allegation of fraud causing monetary loss is not sufficient.<sup>54</sup> Accordingly, the court reversed an award of punitive damages based on the defendant's failure to obtain the insurance coverage promised to the plaintiff.<sup>55</sup> The majority concluded that the defendant had been sufficiently punished by the award of compensatory damages and the loss of his insurance license. In addition, the court concluded that the award of punitive damages would not deliver a message of deterrence to other insurance agents and therefore could not be supported under the alternative basis for punitive damages. The dissent argued that the acts of the defendant, as established by the trial court, were sufficiently willful and malicious to support

an award of punitive damages, even if viewed as contractual in nature.

Outside Arkansas the trend has been to weaken or abandon the rule that punitive damages are not available in breach of contract actions.<sup>56</sup> These decisions have rested upon such concepts as a quasi-independent tort, including an implied duty of good faith and fair dealing, the duty to perform expeditiously a contract, and the duties imposed by a special relationship of the parties; breach, accompanied by a intertwined or commingled tort; and breach, accompanied by malice or outrageous conduct.<sup>57</sup>

However, despite the long standing rule, contrary developments are present in Arkansas. In a rescission action based upon fraud, the plaintiff may obtain punitive damages, as well as the return of the contract price.<sup>58</sup> Punitive damages may be awarded in connection with the tort of intentional interference with one's contractual rights.<sup>59</sup> The Supreme Court has affirmed an award of punitive damages against a bank for its wrongful dishonor of a customer's check.<sup>60</sup> Although bad faith claims in other contractual disputes do not permit exemplary damages,<sup>61</sup> such damages are available on a bad faith insurance claim.<sup>62</sup> The lack of a timely objection to punitive damages may permit a jury to award punitive damages in a breach of contract action.<sup>63</sup> Finally, a landlord who sued for rent due under a lease was permitted to recover, in addition to compensatory property damages, punitive damages based on the tenant's acquiescence in his friends' destruction of the property,<sup>64</sup> despite the dissenting position that punitive damages are not appropriate for failure to act in connection with a breach of contract. While the basic rule that punitive damages are not available in a breach of contract action still stands, decisions in Arkansas and other jurisdictions continue to chisel away at the breadth of that rule as the availability of punitive damages expands.

## II. Restrictions on the Procedural Framework

### A. Relationship to Compensatory Damages

Punitive damages cannot be awarded unless the issue of compensatory damages has been first submitted to the jury.<sup>65</sup> The jury must make separate awards of compensatory and punitive damages to

enable an appellate court to determine whether the award of punitive damages is accompanied by the essential award of compensatory damages.<sup>66</sup> Punitive damages, which are viewed as merely incidental to the primary cause of action, are dependent upon an award of actual damages.<sup>67</sup>

Improper submission to the jury of the financial worth of the defendant may taint the jury's evaluation of liability and compensatory damages. Therefore, an appellate finding that the issue of punitive damages should not have been submitted to the jury may also require reversal of the compensatory damages award.<sup>68</sup> However, if the jury did not receive evidence of the financial worth of the defendant, any error as to the issue of punitive damages is only harmless and does not require that the compensatory award be set aside.<sup>69</sup> To avoid reversal of the compensatory award, a plaintiff's attorney might conclude that cautious tactics dictate seeking punitive damages without submitting evidence of the financial condition of the defendant.

The court has not expressly required a reasonable relationship between compensatory and punitive damages. The inference from the cases is that while such a relationship may be one factor in determining the appropriateness of the award, other factors are of equal importance.<sup>70</sup> The court has cited with approval a case which suggested other factors, including the motives influencing the conduct of the defendant, the degree of calculation and forethought in his conduct, and the extent of his disregard of the rights of others.<sup>71</sup> In an older case the court reduced the award of punitive damages from \$1,000 to \$200, when the compensatory damages were only \$25.<sup>72</sup> Although punitive damages may "largely exceed" compensatory damages, the court viewed the disparity as being too great under the circumstances.<sup>73</sup>

Although no reasonable relationship is explicitly required, because of the interrelationship between a compensatory award and a punitive award, a reduction in the compensatory award may result in such a disparity between the adjusted compensatory award and the punitive damages that the entire action must be retried.<sup>74</sup> Such a retrial is required even if there is sufficient evidence to support the punitive damages. Further, the submission of the case to the jury on multiple theories, only some of which permit punitive damages, may require the

setting aside of a verdict for punitive damages if the evidence does not support all the theories.<sup>75</sup> In such a situation the use of special verdicts may be desirable.

The court has affirmed awards of \$5,000 in punitive damages to accompany \$350 in compensatory damages,<sup>76</sup> compensatory of \$5,000 and punitive of \$75,000,<sup>77</sup> compensatory of \$500 and punitive of \$20,000,<sup>78</sup> and compensatory of \$491 and punitive of \$50,000.<sup>79</sup> In the largest reported award in Arkansas, the court affirmed a jury verdict of \$3 million dollars in punitive damages and a compensatory award of slightly over \$1 million.<sup>80</sup>

An award of nominal damages will not support an award of punitive damages.<sup>81</sup> The court has found that awards of \$19<sup>82</sup> and \$10<sup>83</sup> were only nominal and therefore struck the accompanying punitive damages. On the other hand, the refusal to uphold such punitive damages has been criticized by other members of the court.<sup>84</sup> Some states have permitted punitive damages, even if no compensatory damages are awarded, if the cause of action is based on outrageous conduct, intentional actions directed against the plaintiff personally, or similar claims.<sup>85</sup> An alternative suggestion has been that the plaintiff request a jury instruction that punitive damages are not permitted without an award of compensatory damages.<sup>86</sup> The foolish approach would be for the plaintiff to entreat the jury to truly punish the defendant with punitive damages and not to assess compensatory damages.<sup>87</sup>

#### B. Amount of Punitive Damages

In determining the amount of punitive damages, the jury may hear evidence of the financial status of the defendant.<sup>88</sup> AMI 2217 merely instructs the jury to consider "the financial condition of the defendant" in arriving at the amount of punitive damages. This term is sufficiently flexible to include the gross income, net worth, tangible assets and intangible assets of the defendant. The plaintiff is not compelled to offer evidence of the financial status of the defendant. On the other hand, nothing prohibits the defendant from offering evidence as to his own, most likely impoverished, state. Likewise, nothing prohibits a defendant manufacturer from introducing evidence of other awards of punitive damages against

the allegedly defective product, although such evidence might only benefit the plaintiff by revealing how other juries have evaluated the product.

The jury is also instructed that the purpose of punitive damages is to "punish a wrongdoer and to deter others from similar conduct." These guidelines lack an identifiable standard, give no direction to the jury, and arguably violate the due process rights of the defendant. The proposal from the American Bar Association is slightly better: the jury may consider "(1) the character of the defendant's act; (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause; and (3) the defendant's wealth."<sup>89</sup>

Just as in the instance of criminal sentencing,<sup>90</sup> the jury should be given a comprehensive list of factors, both aggravating and mitigating, to consider. The list might include the following:

1. the seriousness of the hazard to the public arising from the defendant's misconduct;
2. the profitability of the misconduct to the defendant;
3. the duration of the misconduct;
4. any concealment of the misconduct;
5. the degree of the defendant's awareness of the hazard;
6. the excessiveness of the hazard;
7. the attitude and conduct of the defendant upon discovery of the misconduct; the demonstration of remorse or lack of remorse;
8. the number and level of employees involved in causing or concealing the misconduct;
9. the financial condition of the defendant;
10. the severity of any criminal penalty to which the defendant might be subject;
11. the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive awards to the plaintiff and to others similarly situated;<sup>91</sup>
12. the motive of the defendant in undertaking the action;
13. the costs of litigation;
14. the degree of reprehensibility on the part of the defendant; and
15. a pattern of similar improper conduct.<sup>92</sup>

Such a list might overwhelm the jury, but it certainly would not lack for guidance.

The jury may fashion the award to punish the

wrongdoer appropriately, regardless of his financial position or status. What would be sufficient punitive damages against one person might be grossly excessive against another. In one instance the Arkansas Supreme Court reduced the punitive damages from \$4,000 to \$2,500, concluding that the latter sum would be proper punishment in light of the defendant's limited financial resources.<sup>93</sup> On the other hand, punitive damages of \$150,000 have been assessed against a major utility following the explosion of a natural gas transmission line.<sup>94</sup> Punitive damages of \$3 million have been affirmed against a corporation with a net worth of \$607 million.<sup>95</sup>

No fixed standards govern the measurement of punitive damages. The amount lies primarily within the discretion of the jury.<sup>96</sup> The amount of punitive damages is entrusted to the jury, provided that the amount is not so great as to shock the conscience of the court or to indicate passion or prejudice upon the part of the jury.<sup>97</sup> The award may also be reduced or set aside if it appears to be the result of improper sympathy or inappropriate remarks or conduct of the plaintiff's attorney.<sup>98</sup> However, the action of a trial judge in setting aside a jury verdict because he was "surprised" at the award of punitive damages was reversible error and required the reinstatement of the award.<sup>99</sup>

In the past the Supreme Court has exercised some review over the amount of punitive damages. For example, in a fraud case the court split on whether to affirm or reduce punitive damages of \$5,000 which accompanied actual damages of \$350.<sup>100</sup> The court reduced a punitive award of \$10,000 to \$5,000, which accompanied compensatory damages of \$10,739 against a drunken driver.<sup>101</sup> However, in recent years the Supreme Court has not exercised this type of review; instead the court has either affirmed the award or reversed it entirely. The burden now rests upon the trial court to review the award of punitive damages, to determine whether the award reflects passion or prejudice or whether it shocks the judicial conscience, and to decide whether to employ the remitter approach.

One solution to the possible prejudicial impact of the evidence for punitive damages is to bifurcate the trial. The issues of the availability of and amount of punitive damages could be withheld

until after a finding of the plaintiff's right to compensatory damages.<sup>102</sup> Alternatively, the plaintiff's claim for punitive damages could be determined in connection with the primary claim for compensation, but the amount of punitive damages could be severed.<sup>103</sup> Indeed the court might even delay discovery on the punitive damages issue, as least as to the amount, until a finding on the compensatory damages is concluded.

Arkansas Rule of Civil Procedure 42(b) authorizes the trial court to order a separate trial of any claim or of "any separate issue." The court may sever to avoid prejudice, to promote judicial economy, to further the convenience of the parties and the court, and to serve the needs of justice. Trial judges are authorized, on a case-by-case basis, to bifurcate issues of liability and compensatory damages.<sup>104</sup> The Supreme Court has emphasized that the trial court is to focus upon efficient judicial administration, rather than the wishes of the parties. Its ruling is subject only to the limited abuse of discretion review standard. For example, the trial court may sever the issue of damages if the testimony would consume considerable time and perhaps be unnecessary in light of a possible no liability verdict.<sup>105</sup> Likewise, bifurcation may be appropriate if confusion or prejudice would result from the jury's single evaluation of the distinct claims of different parties.<sup>106</sup> Given these guidelines, the issue of punitive damages could be severed in Arkansas.

But the underlying issue is a fair trial. For example, in an assault and battery case, with intent an element of the cause of action itself, little would be gained by severing the issue of whether punitive damages should be awarded because a separate trial would require the same proof and the same evidence. The only significant factor for the trial court would be whether evidence establishing the size of punitive damages would be prejudicial to the jury's finding of compensatory damages. On the other hand, in a situation where punitive damages are sought against a manufacturer of a defective product or the employer of a tortfeasor, a separate trial might present different evidence, witnesses, legal standards, and even parties. Accordingly, a stronger case can be made that a separate trial is appropriate.

### C. Corporation or Master as Defendant

A corporation may be held liable for punitive damages for the acts of its agents or servants, provided they have acted within the scope of their employment.<sup>107</sup> The master is subject to liability for the servant's intentional tort if "the act was not unexpected in view of the duties of the servant."<sup>108</sup> Even if the master has not expressly ratified or authorized the acts of the servant, the master is liable if the individual acting for himself would have been liable.<sup>109</sup>

Accordingly, an automobile dealership was liable for the acts of its salesman in turning back an odometer.<sup>110</sup> Punitive damages were assessed against an employer when its intoxicated employee had an automobile accident while on a corporate assignment.<sup>111</sup> Corporations have been held liable for allowing a live electric wire to lie across a public street,<sup>112</sup> for improperly expelling a passenger from a bus,<sup>113</sup> and for shooting a passenger on a train.<sup>114</sup>

A corporation may be held liable for punitive damages even though an employee in committing the wrongful act admittedly departed from his line of duty or responsibility.<sup>115</sup> The blamelessness of the corporation is not sufficient to avoid liability.<sup>116</sup> For example, an insurance company was held liable for punitive damages when its collection agent assaulted a customer with a heavy piece of wood.<sup>117</sup>

In contrast with the liability of a corporate master, an individual master is not liable for punitive damages unless he aided or ratified the malicious act of the agent with full knowledge of the facts.<sup>118</sup> However, despite this general rule, the court has affirmed an award of punitive damages against a tenant whose friends vandalized his apartment.<sup>119</sup>

Punitive damages are available in a wrongful death case, but it is unclear whether they may be assessed against the estate of a deceased tortfeasor. Suppose a drunken driver causes an accident and dies himself in the accident,<sup>120</sup> or suppose a tortfeasor, who assaults the victim with a baseball bat, dies a week later of a heart attack? Are punitive damages available? Should the answer hinge upon whether the death was caused by the act or inaction triggering the lawsuit (e.g., the drunken operation of a motor vehicle) or an independent cause (illness) apart from the grounds for the cause of



action? With the death of the tortfeasor, part of the dual objectives underlying punitive damages disappear. The defendant can no longer be punished. Whether the objective of deterrence of potential tortfeasors overcomes the impossibility of direct punishment and the reluctance to punish the survivors for the acts of the decedent is the issue the Arkansas Supreme Court will someday face. The majority of courts which treat punitive damages as non-compensatory, as does Arkansas, have rejected punitive damages against the estate of the tortfeasor.<sup>121</sup>

#### D. Multiple Parties

If multiple parties are involved, the question of punitive damages becomes more complicated. The Arkansas Supreme Court first adopted the view that punitive damages could not be assessed against joint tortfeasors.<sup>122</sup> Regardless of whether evidence of the financial status of either defendant was introduced, punitive damages were waived by virtue of the plaintiff's decision to sue multiple defendants.<sup>123</sup> Following criticism,<sup>124</sup> the court modified its position to bring it in line with the majority of jurisdictions.

The current rule permits joint tortfeasors to be held jointly and severally liable for punitive damages.<sup>125</sup> But evidence of their individual wealth or financial condition is inadmissible.<sup>126</sup> One defendant should not be punished on the basis of another's wealth. Accordingly, it was reversible error for the trial court to admit evidence that the servant had a net worth of \$1,000, while the master had a net worth of \$61 million.<sup>127</sup> The court's concern is with protecting one defendant from unjust punishment.<sup>128</sup> Therefore punitive damages may be awarded when several defendants are joined, but the jury will not have access to any evidence of financial worth.<sup>129</sup> Even if the defendants are adverse to each other, as in the case of a defendant and a third party defendant, evidence of their financial condition is not admissible when the plaintiff seeks punitive damages from both.<sup>130</sup>

The successful plaintiff is, of course, free to collect the entire award, including both compensatory and punitive damages, from the more financially sound defendant, who is then entitled to seek contribution.<sup>131</sup> The obvious flaw is that if punitive damages are assessed jointly without a determination of the degree of wantonness or malice by each

defendant, the underlying purpose of punitive damages will be distorted, for the truly guilty party may not be punished in an appropriate fashion.<sup>132</sup>

An alternative approach would be for the plaintiff to seek compensatory damages from all the defendants, but punitive damages from only one. However, if the wrongful conduct can be equally blamed on all the defendants, the plaintiff waives all claim to punitive damages by attempting to punish only one defendant.<sup>133</sup> If the pleadings allege that all defendants are equally culpable, the plaintiff may not seek punitive damages from one defendant alone. It is more important to protect one defendant from unjust punishment than to grant the plaintiff punitive damages.<sup>134</sup>

The plaintiff does have another option. If punitive damages are sought only from one defendant, and provided the alleged improper conduct is different from, and greater than, the other defendants, the plaintiff retains the right to offer evidence of the financial status of the more culpable defendant.<sup>135</sup> To prevent any prejudicial impact upon the assessment of compensatory damages against the other defendant, the jury must be admonished to consider the financial evidence only on the issue of punitive damages.<sup>136</sup>

If several plaintiffs are permitted to consolidate their separate actions seeking punitive damages against a defendant, excessive emphasis may be placed on the objective of punishment. In such a case, the Arkansas Supreme Court has found the order of consolidation to be an abuse of discretion.<sup>137</sup>

#### E. Insurance

The court has held that an insurance policy by which the insurer agrees to pay "all sums which the insured is legally obligated to pay as damages" does cover punitive damages properly assessed against the insured party.<sup>138</sup> No public policy prevents an insurer from indemnifying its insured against punitive damages.<sup>139</sup> However, more typical policy language permits the insurer to deny coverage for injuries "expected or intended by the insured."<sup>140</sup>

#### F. Courts of Equity

Punitive damages are not awarded by a court of equity.<sup>141</sup> Equity will not ordinarily enforce penalties,<sup>142</sup> which punitive damages are. A plaintiff who

proceeds in equity when he has an adequate remedy at law has waived punitive damages.<sup>143</sup> The unstated reason for this waiver is that the constitutional right to a jury trial on punitive damages must be preserved.<sup>144</sup>

On the other hand, even though the defendant has previously been punished under the criminal laws, he is still subject to both compensatory and punitive damages in a civil action.<sup>145</sup>

### G. Constitutional Issues

The Arkansas Constitution provides that "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property."<sup>146</sup> The case law does not discuss the applicability of this provision to punitive damages. But certainly any statutory attempts to limit the amount of punitive damages would raise serious constitutional questions.

At the federal level, several constitutional challenges to punitive damages have recently been asserted. The United States Supreme Court has held that an award of punitive damages does not violate the excessive fines clause of the Eighth Amendment, for that clause is applicable to the government and not to the award of punitive damages in cases between private parties.<sup>147</sup> The Court has not ruled on the issue of whether the Due Process Clause is applicable to an award of punitive damages in private litigation. One issue is whether awards that are grossly excessive violate the substantive aspect of due process. The parallel issue is whether procedural due process is violated by the failure to give more precise instructions to the jury, by the failure to bifurcate the trial into compensatory damages and punitive damages phases, by the use of *respondeat superior* principles, by the failure to apply constitutional protections for criminal defendants, and by the failure to require a higher standard of proof for punitive damages.<sup>148</sup>

### Conclusion

In response to the scholarly interest, industry concern, and public attention, federal and state legislatures have considered statutes affecting, controlling, or limiting punitive damages. States have required a relationship between compensatory and punitive damages,<sup>149</sup> placed a limit on the amount of punitive damages,<sup>150</sup> barred punitive damages

for certain causes of action,<sup>151</sup> changed the burden of proof for punitive damages,<sup>152</sup> and directed that a portion of the award of punitive damages go to a party or entity other than the plaintiff.<sup>153</sup> Increased awareness of the impact of the bankruptcy laws<sup>154</sup> and the federal income tax<sup>155</sup> has also focused attention on the significance of punitive damages.

Even in the absence of a decision from the United States Supreme Court on the constitutional aspects of punitive damages, the Arkansas courts should re-evaluate the procedures that accompany punitive damages. Their increased availability dictates the need for careful attention to the procedural fairness of their award.

## NOTES

*This article is based in part on Chapter 6 of Brill, Arkansas Law of Damages (2d ed. 1990) © by Harrison Company.*

1. *Holmes v. Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1961).
2. *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969).
3. *Holmes v. Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1961).
4. *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972); *Dunaway v. Troutt*, 232 Ark. 615, 339 S.W.2d 613 (1960).
5. *Vogler v. O'Neal*, 226 Ark. 1007, 295 S.W.2d 629 (1956).
6. *Louisiana and North West R.R. Co. v. Willis*, 289 Ark. 410, 711 S.W.2d 805 (1986).
7. *Satterfield v. Rebsamen Ford*, 253 Ark. 181, 485 S.W.2d 192 (1972).
8. *Chicago, R. I. & P. Ry. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835 (1909).
9. *Wallace v. Dustin*, 284 Ark. 318, 681 S.W.2d 375 (1984); *Satterfield v. Rebsamen Ford*, 253 Ark. 181, 485 S.W.2d 192 (1972).
10. *Dalrymple v. Fields*, 276 Ark. 185, 633 S.W.2d 362 (1982); *Miller v. Blanton*, 213 Ark. 246, 210 S.W.2d 293 (1948).
11. *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979) (conversion of motor vehicles).
12. *Arkansas Model Jury Instruction (Civil 3rd) 2217. See Walt Bennett Ford, Inc. v. Keck*, 298 Ark. 424,

- 768 S.W.2d 28 (1988); *Wortman v. Shipman*, 293 Ark. 253, 737 S.W.2d 438 (1987).
13. *Wallace v. Dustin*, 284 Ark. 318, 681 S.W.2d 375 (1984). *See also* *Bruns v. Bruns*, 290 Ark. 347, 719 S.W.2d 691 (1986) (spousal abuse); *Mode v. Barnett*, 235 Ark. 641, 361 S.W.2d 525 (1962) (murder).
14. *Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979).
15. *Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983) (award reversed for insufficient evidence to support award of compensatory damages); *Dunaway v. Troutt*, 232 Ark. 615, 339 S.W.2d 613 (1960).
16. *Deason v. Farmers & Merchant Bank of Rogers*, 299 Ark. 167, 771 S.W.2d 749 (1989) (conversion of certificate of deposit; compensatory damages of \$17,000 and punitive damages of \$10,000); *Walt Bennett Ford, Inc. v. Keck*, 298 Ark. 424, 768 S.W.2d 28 (1989) (conversion by car dealer of plaintiff's automobile; compensatory damages of \$6,337 and punitive damages of \$25,000); *France v. Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987) (conversion of household appliances).
17. *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985).
18. *Twin City Bank v. Isaacs*, 283 Ark. 127, 672 S.W.2d 651 (1984).
19. *Gordon v. McLearn*, 123 Ark. 496, 185 S.W. 803 (1916).
20. *Brown v. Chapman Farms, Inc.*, 289 Ark. 88, 709 S.W.2d 404 (1986) (trespass and destruction of soybeans; compensatory damages of \$26,000 and punitive damages of \$55,000).
21. *Midwest Buslines, Inc. v. Johnson*, 291 Ark. 304, 724 S.W.2d 453 (1987) (wrongful eviction from a bus; compensatory damages of \$500 and punitive damages of \$1,100).
22. *Lou v. Smith*, 285 Ark. 249, 685 S.W.2d 809 (1985).
23. *Louisiana and North West R.R. Co. v. Willis*, 289 Ark. 410, 711 S.W.2d 805 (1986). *See* *Mo. Pac. R.R. Co. v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988) (prejudicial error to submit issue of punitive damages to the jury); *Vickery v. Ballentine*, 293 Ark. 54, 732 S.W.2d 160 (1987) (jury award of punitive damages in vehicle collision reversed).
24. *Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan*, 293 Ark. 576, 740 S.W.2d 127 (1987). *See* *Dongary Holstein Leasing, Inc. v. Covington*, 293 Ark. 112, 732 S.W.2d 465 (1987) (award of punitive damages for negligence in selling diseased cattle reversed).
25. *James v. Bill C. Harris Const. Co.*, 297 Ark. 435, 763 S.W.2d 640 (1989); *Loudermill v. Dow Chemical Co.*, 863 F.2d 566 (8th Cir. 1988) (landowner knew of toxic chemicals on land, but did nothing to prevent injury to individuals coming onto the land; punitive damages affirmed); *Mulligan v. Lederle Laboratories*, 786 F.2d 859 (8th Cir. 1986) (continued distribution of drug despite awareness of adverse effects sufficient to support punitive damages).
26. *C. R. I. & P. Ry. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835 (1909).
27. *Freeman v. Anderson*, 279 Ark. 282, 651 S.W.2d 450 (1983).
28. *Honeycutt v. Walden*, 294 Ark. 440, 743 S.W.2d 809 (1988): "We have held any number of times that malice may be inferred from the operation of a motor vehicle, a potentially lethal machine, by one whose judgment, responses and coordination are impaired by alcohol."
29. *Goodnight v. Richardson*, 286 Ark. 38, 688 S.W.2d 941 (1985).
30. 292 Ark. 491, 731 S.W.2d 194 (1987).
31. 882 F.2d 1320 (8th Cir. 1989).
32. Interestingly, the defendants in both *By-Products* and *Benjamin* were represented by the same law firm.
33. *Vickery v. Ballentine*, 293 Ark. 54, 732 S.W.2d 160 (1987).
34. *HCA Health Services of Midwest, Inc. v. National Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120 (1988).
35. *Welden v. Mercer*, 247 Ark. 999, 448 S.W.2d 952 (1970).
36. *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972).
37. *See* the discussion in *Sexton v. Pre-Paid Legal Services, Inc.*, 710 F. Supp. 1273 (W.D. Ark. 1989).
38. *Petrus Chrysler-Plymouth v. Davis*, 283 Ark. 172, 671 S.W.2d 749 (1984) (sale of used car); *Moore Ford Co. v. Smith*, 270 Ark. 340, 604 S.W.2d 943 (1980) (sale of used car).
39. Brill, *ARKANSAS LAW OF DAMAGES* (2nd ed.), § 35-7.
40. *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972).
41. *Copelin v. Corter*, 291 Ark. 218, 724 S.W.2d 146 (1987). *See also* *McWilliams v. Zedlitz*, 294 Ark. 336, 742 S.W.2d 929 (1988) (fraud as to the need for a survey).
42. *Zimpel v. Trawick*, 679 F. Supp. 1502 (W.D. Ark. 1988) (fraud by the buyer of mineral rights).
43. *Airco, Inc. v. Simmons First Nat. Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982) (defective valve used in artificial breathing machine); *Mulligan v. Lederle Laboratories*, 786 F.2d 859 (8th Cir. 1986) (award of \$50,000 compensatory damages and \$100,000 punitive damages against drug manufacturer).

44. *Forrest City Machine Works, Inc. v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981) (defective grain cart; compensatory damages affirmed, punitive damages reversed for insufficient evidence of the defendant's reckless disregard of the consequences).
45. *Curtis v. Partain*, 272 Ark. 400, 614 S.W.2d 671 (1981). See the discussion in *Medina, Take or Litigate: Enforcing the Plain Meaning of the Take-or-Pay Clause in Natural Gas Contracts*, 40 ARK. L. REV. 185, 208 (1986).
46. Pennington, *Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years*, 42 ARK. L. REV. 31, 34 (1989).
47. *L. L. Cole & Son, Inc. v. Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984); *Delta Rice Mill, Inc. v. General Foods Corp.*, 763 F.2d 1001 (8th Cir. 1985).
48. A breach of contract may occur for several reasons, including inadvertence, disagreement over contract obligations, a conscious decision not to perform, or a malicious decision not to perform. See Pennington, *supra* note 46, at 40.
49. *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988) (punitive damages not available for breach of employment at will contract).
50. *L.L. Cole & Son, Inc. v. Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984).
51. *Id.*
52. See Newbern, *Arkansas Civil Practice & Procedure*, § 8-5, 8-12.
53. See Brill, *The Election of Remedies Doctrine in Arkansas*, 37 ARK. L. REV. 385 (1984).
54. *Dews v. Halliburton Industries, Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986); *Curtis v. Partain*, 272 Ark. 400, 614 S.W.2d 671 (1981).
55. *McClellan v. Brown*, 276 Ark. 28, 632 S.W.2d 406 (1982).
56. The motivation for the change is that non-breaching parties are under-compensated because of limitations on pre-judgment interest, attorneys' fees, contractual limits, and judicial delay. See Pennington, *supra* note 46, at 35.
57. Pennington, *supra* note 46, at 47-90.
58. *Thomas Auto Co., Inc. v. Craft*, 297 Ark. 492, 763 S.W.2d 651 (1989) (fraud in the sale of a used vehicle).
59. *McGee v. Hester*, 815 F.2d 1193 (8th Cir. 1987) (award of compensatory damages of \$1,500 and punitive damages of \$50,000 to Arkansas liquor dealer who alleged interference by Tennessee Alcoholic Beverage employees affirmed); *Shelton v. Shelton*, 296 Ark. 212, 752 S.W.2d 758 (1988) (compensatory damages of \$83,000 and punitive damages of \$17,000).
60. *Twin City Bank v. Isaacs*, 283 Ark. 127, 672 S.W.2d 651 (1984).
61. *Quinn Companies, Inc. v. Herring-Marathon Group, Inc.*, 299 Ark. 431, 773 S.W.2d 94 (1989) (Arkansas does not recognize a cause of action for "tortious breach of contract"); *Delta Rice Mill, Inc. v. General Foods Corp.*, 763 F.2d 1001 (8th Cir. 1985). See Casey, *Bad Faith in First Party Insurance Contracts—What's Next?*, 8 U.A.L.R. L.J. 237, 264 (1985).
62. *Employers Equitable Life Ins. Co. v. Williams*, 282 Ark. 29, 665 S.W.2d 873 (1984) (compensatory damages of \$25,000 and punitive damages of \$75,000).
63. *Mitchell v. Goodall*, 297 Ark. 332, 761 S.W.2d 919 (1988) (breach of contract for use of land).
64. *Olson v. Riddle*, 280 Ark. 535, 659 S.W.2d 759 (1983).
65. *Lake v. Lake*, 262 Ark. 852, 562 S.W.2d 68 (1978).
66. *Id.* A jury award of only punitive damages may result from "an error in the assessment of the amount of recovery," which provides a ground for a new trial. See *Takeya v. Didion*, 294 Ark. 611, 745 S.W.2d 614 (1988) (jury should have awarded compensatory damages, and trial court abused its discretion in failing to order a new trial).
67. *Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 559 (1988); *Wasp Oil, Inc. v. Arkansas Oil and Gas, Inc.*, 280 Ark. 420, 658 S.W.2d 397 (1983).
68. *KARK-TV v. Simon*, 280 Ark. 228, 656 S.W.2d 702 (1983); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 401-B, 653 S.W.2d 128 (1983).
69. *Robinson v. Abbott*, 292 Ark. 630, 731 S.W.2d 782 (1987).
70. *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972).
71. *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972) citing *Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 453 P.2d 531 (1969).
72. *Gordon v. McLearn*, 123 Ark. 496, 185 S.W. 803 (1916).
73. *Id.*
74. *Shepherd v. Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987) (jury award of compensatory damages reduced from \$20,000 to \$2,120; punitive damages of \$10,000 requires complete new trial).
75. *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989).
76. *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972).
77. *First Commercial Bank v. Kremer*, 292 Ark. 82, 728 S.W.2d 172 (1987).
78. *Wortman v. Shipman*, 293 Ark. 253, 737 S.W.2d 438 (1987). See also *Pursley v. Price*, 283 Ark. 33, 670 S.W.2d 448 (1984) (defendant fired at plaintiff's truck; property damages of \$367, mental anguish award of

\$20,000 and punitive damages of \$30,000).

79. *First Nat. Bank of Brinkley v. Frey*, 282 Ark. 339, 668 S.W.2d 533 (1984).

80. *Airco, Inc. v. Simmons First Nat. Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982).

81. *Stoner v. Houston*, 265 Ark. 928, 582 S. W. 28 (1979).

82. *Id.*

83. *Manhattan Credit Co., Inc. v. Skirvin*, 228 Ark. 913, 311 S.W.2d 168 (1958).

84. See the dissent in *Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979).

85. *E.g.*, *Lane County v. Wood*, 691 P.2d 473 (Oregon 1984) (breach of duty by a public official; trespass; right of privacy); *Ault v. Lohr*, 538 So. 2d 454 (Florida 1989) (assault and battery; punitive damages may be awarded even without an award of nominal damages, unless the elements of the cause of action require proof of damages).

86. *Takeya v. Didion*, 294 Ark. 611, 745 S.W.2d 614.

87. At the 1989 Arkansas Judicial Council a trial judge reported such a closing argument. He properly sat silent during the closing argument and then properly entered a JNOV setting aside the award of punitive damages and dismissing the action.

88. *First Commercial Bank v. Kremer*, 292 Ark. 82, 728 S.W.2d 172 (1987); *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983). The trial judge must hold a hearing to determine if a prima facie case for punitive damages has been established before compelling disclosure of financial records of the defendant. *Wortman v. Shipman*, 293 Ark. 253, 737 S.W.2d 438 (1987).

89. A. B. A., Section on Litigation Model Jury Instructions for Business Tort Litigation, 1.07.7 at 40 (1980).

90. See ARK. CODE ANN. § 5-4-301 (thirteen factors to be evaluated by the court in determining suspension or probation); ARK. CODE ANN. § 5-4-603-605 (fourteen aggravating or mitigating factors to be evaluated by the jury in a capital case).

91. Points 1-11 are taken from MINN. STAT. ANN. § 549.20(3).

92. Points 13-15, as well as many others, are suggested by Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association, Punitive Damages: A Constructive Examination 63-64 (1986).

93. *Holmes v. Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1961).

94. *Calif. Union Ins. Co. v. ArkLa. Gas. Co.*, 264 Ark. 449, 572 S.W.2d 393 (1978).

95. *Airco, Inc. v. Simmons First Nat. Bank*, 276 Ark.

486, 638 S.W.2d 660 (1982). The collection of the Airco judgment is reviewed in *Simmons First Nat. Bank v. Liberty Mut. Ins. Co.*, 282 Ark. 194, 667 S.W.2d 648 (1984). See also *Celotex Corp. Inc. v. Lynndale Int., Inc.*, 277 Ark. 242, 640 S.W.2d 792 (1982), where a jury award of three million dollars in punitive damages was settled for slightly over one million dollars prior to appeal.

96. *Vogler v. O'Neal*, 226 Ark. 1009, 295 S.W.2d 629 (1956). Punitive damages may also be awarded by the circuit judge when sitting as fact finder. See *Maxwell v. Walser*, 296 Ark. 70, 751 S.W.2d 351 (1988) (assault and battery action resulted in award of \$190 for medical expenses, \$5,000 in compensatory damages for mental anguish, and \$15,000 for punitive damages).

97. *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983) (assault and battery; compensatory damages of \$39,500 and punitive damages of \$67,000); *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972).

98. *HCA Health Services of Midwest, Inc. v. National Bank of Commerce*, 294 Ark. 525, 745 S.W.2d 120 (1988); *Holmes v. Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1961).

99. *O'Neal Ford, Inc. v. Davie*, 299 Ark. 45, 770 S.W.2d 656 (1989) (fraud in the sale of a wrecked vehicle; compensatory damages of \$4,000 and punitive damages of \$35,000). See also *Shelton v. Shelton*, 296 Ark. 212, 752 S.W.2d 758 (1988) (jury awarded punitive damages of \$25,000 for intentional interference with contractual rights; the trial court's grant of a conditional new trial or remitter was held to be error).

100. *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972) (three members of the court would have reduced the award to \$2,500). See *Moore Ford Co. v. Smith*, 270 Ark. 340, 604 S.W.2d 943 (1980) (compensatory damages of \$1,250 for fraud in the sale of an automobile; punitive damages reduced on appeal from \$15,000 to \$5,000; three justices would have affirmed the full award, and three would have stricken all punitive damages).

101. *Vogler v. O'Neal*, 226 Ark. 1007, 295 S.W.2d 629 (1956).

102. *E.g.*, *Emerick v. U.S. Suzuki Motor Corp.*, 750 F.2d 19 (3rd Cir. 1984); *Chupp v. Henderson*, 134 Ga. App. 808, 216 S.E.2d 366 (1975).

103. *E.g.*, *Rupert v. Sellers*, 48 A.D. 265, 368 N.Y.S.2d 904 (1975).

104. *Hunter v. McDaniel Bros. Const. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

105. *Fletcher v. Duke*, 5 Ark. App. 223, 635 S.W.2d 2 (1982).

PUNITIVE DAMAGES IN ARKANSAS

106. LLLL Const. Co. v. Mehlburger, Tanner, Renshaw and Associates, Inc., 16 Ark. App. 267, 702 S.W.2d 29 (1982).
107. Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 479 S.W.2d 518 (1972).
108. Life & Cas. Ins. Co. of Tenn. v. Padgett, 241 Ark. 353, 407 S.W.2d 728 (1966).
109. Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948).
110. Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 479 S.W.2d 518 (1972)
111. Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948).
112. Texarkana Gas & E. L. Co. v. Orr, 59 Ark. 215, 27 S.W. 66 (1894).
113. Midwest Buslines, Inc. v. Johnson, 291 Ark. 304, 724 S.W.2d 453 (1987).
114. Pine Bluff & A. R. Ry. Co. v. Washington, 116 Ark. 179, 172 S.W. 872 (1915).
115. St. Louis, I. M. & S. Ry. Co. v. Dowgiallo, 82 Ark. 289, 101 S.W. 412 (1907).
116. Pine Bluff & A. R. Ry. Co. v. Washington, 117 Ark. 179, 172 S.W. 872 (1915).
117. Life & Cas. Ins. Co. of Tenn. v. Padgett, 241 Ark. 353, 407 S.W.2d 728 (1966).
118. Foster v. Pitts, 63 Ark. 387, 38 S.W. 1114 (1897).
119. Olson v. Riddle, 280 Ark. 535, 659 S.W.2d 759 (1983).
120. See Comment, *Punishing the Dead: Whether the Estates of Dead Tortfeasors Should be Responsible for Punitive Damages*, 12 U.A.L.R. L.J. 283 (1989).
121. *Id.* at 295-297: "The logic behind this rule is obvious: a mortal court cannot punish the deceased."
122. Dunaway v. Troutt, 232 Ark. 615, 339 S.W.2d 613 (1960).
123. *Id.*
124. See Notes at 15 ARK. L. REV. 208 (1961) and 19 ARK. L. REV. 189 (1965).
125. Mo. Pac. R. R. Co. v. Ark. Sheriff's Boys' Ranch, 280 Ark. 53, 655 S.W.2d 389 (1983).
126. Life & Cas. Ins. Co. of Tenn. v. Padgett, 241 Ark. 353, 407 S.W.2d 728 (1966).
127. *Id.*
128. See Note, 15 ARK. L. REV. 208 (1961).
129. Life & Cas. Ins. Co. of Tenn. v. Padgett, 241 Ark. 353, 407 S.W.2d 728 (1966).
130. Dalrymple v. Fields, 276 Ark. 185, 633 S.W.2d 362 (1982).
131. ARK. CODE ANN. § 16-61-202(1).
132. See Note, 21 ARK. L. REV. 270 (1968).
133. Curtis v. Partain, 272 Ark. 400, 614 S.W.2d 671 (1981).
134. Mo. Pac. R. R. Co. v. Ark. Sheriff's Boys' Ranch, 280 Ark. 53, 655 S.W.2d 389 (1983) (action against railroad and its employees for negligently starting fire).
135. Berkeley Pump Co. v. Reed-Joseph Land Co., 279 Ark. 384, 401-B, 653 S.W.2d 128 (1983).
136. *Id.*
137. Mo. Pac. R. R. Co. v. Ark. Sheriff's Boys' Ranch, 280 Ark. 53, 655 S.W.2d 389 (1983).
138. Southern Farm Bureau Cas. Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582 (1969).
139. Calif. Union Ins. Co. v. ArkLa. Gas Co., 264 Ark. 449, 572 S.W.2d 393 (1978).
140. *E.g.*, Spears v. State Farm Fire & Cas. Ins., 291 Ark. 465, 725 S.W.2d 835 (1987).
141. C. R. T., Inc. v. Brown, 269 Ark. 114, 602 S.W.2d 409 (1980).
142. Stolz v. Franklin, 258 Ark. 999, 531 S.W.2d 1 (1976). But compare Becker, *The Remedial Side of Contempt When Injunctions Are Disregarded*, 1983 ARK. L. NOTES 5, 8.
143. Toney v. Haskins, 7 Ark. App. 98, 644 S.W.2d 622 (1983).
144. See Note, 18 ARK. L. REV. 171 (1964).
145. Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948).
146. ARK. CONST., art. 5, § 32.
147. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., \_\_\_ U.S. \_\_\_, 109 S. Ct. 2909 (1989). The separate opinions of Justices Brennan and O'Connor, while agreeing that the due process issues were not properly before the Court, set out the primary objections. See also Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 86-89, 108 S. Ct. 1645 (1988) (O'Connor, J. concurring).
148. In Pacific Mutual Life Ins. Co. v. Haslip, 553 So. 2d 537 (Ala. 1989), the Alabama Supreme Court affirmed an award of \$1,000,000 in punitive damages against an insurer company for fraud committed by its soliciting agent. The defendant properly raised due process objections, primarily to the lack of definitive standards underlying the jury's award of punitive damages in a civil case. The United States Supreme Court has granted certiorari. 58 U.S.L.W. 3625 (April 2, 1990).
149. *E.g.*, COL. REV. STAT. § 13-21-102 (punitive damages shall not exceed compensatory damages); FLA. STAT. ANN. § 768.73(1) (punitive damages are limited to triple the amount of compensatory damages).
150. *E.g.*, ALA. CODE § 6-11-21 (\$250,000, with some exceptions); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (\$200,000 or four times actual damages).
151. *E.g.*, CALIF. CIVIL CODE ANN. § 3294 (punitive damages barred for contract actions).
152. *E.g.*, ALA. CODE § 6-11-20 (clear and convinc-

ing evidence). See *Tuttle v. Raymond*, 494 A.2d 1353 (Maine 1985) (clear and convincing). No Arkansas cases suggest any standard other than a preponderance of the evidence to support punitive damages.

153. E.g., COLO. REV. STAT. § 13-21-102(4) (1/3 state general fund); IOWA CODE ANN. § 668A.1 (75% may be allotted to fund for indigent civil litigation).

154. Under Section 523(a)(6) of the Bankruptcy Code, any debt "for willful and malicious injury by the debtor to another entity" is not dischargeable. Therefore, in light of jury instructions, special verdicts, and other procedural indicators, an award of punitive damages may or may not be discharged in bankruptcy. For example, if, following AMI 2217, the jury concludes that the defendant knew or ought to have known that his conduct would naturally and probably result in injury and that he continued the conduct with reckless disregard of the consequences, the award of punitive damages may be

affirmed by an Arkansas appellate court, but still be dischargeable in bankruptcy proceedings.

155. Section 104(a) of the Internal Revenue Code excludes from gross income damages received on account of personal injuries or sickness. A recent statutory amendment clarifies prior law, see Chapman, *No Pain-No Gain? Should Personal Injury Damages Keep Their Tax Exempt Status?*, 9 U.A.L.R. L.J. 407 (1987), and now provides that the exclusion covers punitive damages only if they are awarded in connection with a case involving "physical injury or physical sickness." Revenue Reconciliation Act of 1989 Public Law 101-239, § 7641. Accordingly, compensatory damages for libel would be excluded from gross income, but punitive damages for libel would not be; in contrast, both compensatory and punitive damages awarded for an accident would be excluded.