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Punitive Damages in Minnesota: The Common Law and Developments Under Section 549.20 of the Minnesota Statutes

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PUNITIVE DAMAGES IN MINNESOTA: THE COMMON LAW AND DEVELOPMENTS UNDER SECTION 549.20 OF THE MINNESOTA STATUTES

GARY J. HAUGEN† & HOWARD B. TARKOW††

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I. INTRODUCTION

The general rule of civil damages in Minnesota is that an injured party may recover only compensation for the actual injury suffered. The policy is to award a sum of money to the plaintiff in an amount equal to his loss or injury, "no more and no less." By focusing on the plaintiff's injury and the proximate and natural consequences of the wrongful act, the law recognizes that a defendant who violates another person's legal right should make that person whole.

In certain areas, however, the conduct of a person or corporation violating another's legal right is so offensive and repugnant that, in a sense, the defendant becomes liable to the public. Where the defendant's conduct or state of mind breaches this larger duty, the law of damages departs from the general rule of compensation and permits the jury to assess punitive damages. Punitive damages are monetary penalties imposed in excess of the compensation necessary to make the plaintiff whole. Punitive

1. Larson v. Chase, 47 Minn. 307, 310, 50 N.W. 238, 239 (1891).
2. Poppen v. Wadleigh, 235 Minn. 400, 404, 51 N.W.2d 75, 78 (1952) (citing Hewson-Herzog Supply Co. v. Minnesota Brick Co., 55 Minn. 530, 534, 57 N.W. 129, 130 (1893)).
3. See Larson, 47 Minn. at 310-11, 50 N.W. at 239-40.
4. See Lynd v. Picket, 7 Minn. 184, 200 (Gil. 128, 142) (1862).
5. Id. Minnesota courts historically have used the words "vindictive" and "exemplary" synonymously with the word "punitive" to describe damages that are assessed against the defendant in addition to compensatory damages. See, e.g., Johnson v. Wolf, 142 Minn. 352, 355, 172 N.W. 216, 217 (1919) (award of exemplary damages upheld); Shaber v. St. Paul, M. & M. Ry., 28 Minn. 103, 107, 9 N.W. 575, 577 (1881) (vindictive damages denied). This Article does not distinguish these various words which embody the concept of punitive damages.
6. See W.P. KEETON, D. DOBBS, R. KEETON & D. OEN, PROSSER & KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON]. The court has described the remedy of punitive damages as follows:

Where a man does a wrong to another and does it oppressively, does it maliciously, does it with a bad motive, does it with a disregard of the other man's rights, he then subjects himself to exemplary damages . . . [and the jury may assess what] . . . they think that his conduct deserves, and which will operate as a deterrent to other people not to do or act in the same manner.

Johnson, 142 Minn. at 355, 172 N.W. at 217 (quoting trial court).
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damages are an exception to the rule of civil damages limiting the plaintiff's recovery to an amount necessary to compensate for a loss. 7

The United States Supreme Court and state courts recognized the doctrine of punitive damages by the middle of the nineteenth century. 8 Thus, when the Minnesota Supreme Court first affirmed an award of punitive damages in 1862, 9 the court acknowledged that the principles of punitive damages were "based upon sound reason, and recognized by too numerous and weighty authorities to be now disturbed." 10 The Minnesota Supreme Court considered the law so firmly established that it regularly shrugged its figurative shoulders 11 and continued to affirm awards. 12 The supreme court has demanded, however, that trial judges closely control the imposition and assessment of punitive damages 13 be-

9. Lynd, 7 Minn. 184 (Gil. 128).
10. Id. at 201 (Gil. at 143).
11. See, e.g., Schmidt v. Minor, 150 Minn. 236, 240, 184 N.W. 964, 966 (1921) (doctrine of punitive damages is too deeply implanted in the law to be uprooted); Baumgartner v. Hodgdon, 105 Minn. 22, 24, 116 N.W. 1030, 1031 (1908) (rule is too deeply settled as the law of this state to justify a discussion of the general question of allowing punitive damages in addition to compensation for injuries suffered); McCarthy v. Niskern, 22 Minn. 90, 91 (1875) (doctrine of punitive damages is so firmly rooted in common law that only an act of the legislature can overturn it).
12. See Bronson Steel Arch Shoe Co. v. T.K. Kelly Inv. Co., 183 Minn. 135, 139, 236 N.W. 204, 206 (1931) (punitive damages are an award in excess of actual damages, and not intended to be compensatory); Yencho v. Kruly, 558 Minn. 408, 410, 197 N.W. 752, 753 (1924) (primary object in action for slander is to obtain a verdict that will compensate plaintiff for an injury, operate as an example or deterrent to others, and serve as a punishment of defendant); Schmidt, 100 Minn. at 240, 184 N.W. at 965-66 (punitive damages in any case is an anomaly in the law with no sound reason behind it, "a hybrid between a display of ethical indignation and the imposition of a fine"); Anderson v. International Harvester Co. of Am., 104 Minn. 49, 51, 116 N.W. 101, 102 (1908) (punitive damages are an additional sum that in jury's discretion was proper for purpose of deterring others from the commission of similar acts in the future); Berg v. St. Paul City Ry., 96 Minn. 513, 515, 105 N.W. 191, 192 (1905) (jury may award amount of punitive damages in addition to compensatory damages if defendant's action is shown to be wanton with a reckless disregard of plaintiff's rights); Boetcher v. Staples, 27 Minn. 308, 308, 7 N.W. 263, 263 (1880) (punitive damages in tort action go beyond plaintiff's pecuniary loss and punish the defendant for the wrong done, and serve as an example to deter others from similar acts); McCarthy, 22 Minn. at 91 (punitive damages go beyond compensation for actual injury and assess damages in the nature of a fine upon defendant).
cause the punitive damages award provides a powerful "quasi-criminal law" remedy for civil wrongs.\textsuperscript{14}

In 1978, the Minnesota Legislature codified many of the principles of punitive damages law.\textsuperscript{15} The important provisions of section 549.20 of the Minnesota Statutes include evidentiary standards which plaintiffs must meet,\textsuperscript{16} guidelines for factfinders to follow in determining the amount of a punitive damages award,\textsuperscript{17} and a definition of misconduct which plaintiffs must prove in order to recover a punitive award.\textsuperscript{18}

This Article discusses the dual purposes of punitive damages: punishment and deterrence. The Article looks to recent Minnesota case law to determine whether the focus of punitive damages is shifting from the defendant's conduct to the nature of the plaintiff's injury. The Article analyzes the common law in light of Minnesota Statutes section 549.20 by reviewing five topics: "jurisdiction" over punitive damages; the standard of proof that a plaintiff must meet; standards of conduct that the defendant must be shown to have violated; factors considered in determining the amount of punitive damages, particularly in products liability actions; and a principal's liability for the acts of his agent. The Article concludes that punitive damages in Minnesota provide a quasi-criminal remedy, punishing the defendant and rewarding the plaintiff.

\section*{II. Purposes of Punitive Damages}

The two primary purposes of punitive or exemplary damages are, as the names suggest, to punish defendants in appropriate cases and to set an example which will deter others from similar conduct.\textsuperscript{19} The Minnesota Supreme Court recognized these dual purposes of punishment and deterrence in \textit{Lynd v. Pickett},\textsuperscript{20} its first case involving punitive damages.

In \textit{Lynd}, a creditor obtained a writ of attachment knowing that

\begin{itemize}
  \item \textsuperscript{14} See infra notes 27-38 and accompanying text.
  \item \textsuperscript{15} Act of Apr. 5, 1978, ch. 738, § 4, 1978 Minn. Laws 836, 838 (codified at MINN. STAT. § 549.20 (1982)).
  \item \textsuperscript{16} MINN. STAT. § 549.20, subd. 1 (1982).
  \item \textsuperscript{17} Id., subd. 3.
  \item \textsuperscript{18} Id., subd. 1.
  \item \textsuperscript{19} These purposes are incorporated in the punitive damages provisions of the Minnesota Statutes. See id. § 549.20.
  \item \textsuperscript{20} 7 Minn. 184, 200-01 (Gil. 128, 142-43) (1862).
\end{itemize}
the debtor's property was exempt.\textsuperscript{21} The supreme court concluded that the creditor's knowledge that the property was exempt ascribed a "malicious motive" to the act, done for the purpose of harassing and oppressing the debtor.\textsuperscript{22} This element of knowledge converted a case of simple trespass against the debtor into an offense against society that the "law does not tolerate, and justly allows damages by way of punishment and example."\textsuperscript{23}

\textbf{A. Punishment}

Punishment of defendants is a fundamental purpose of punitive damages.\textsuperscript{24} The jury has virtually unfettered discretion to award an amount of punitive damages\textsuperscript{25} expressing society's "ethical indignation" for the acts of a defendant in a given case.\textsuperscript{26} Plaintiffs realize the immediate tangible benefit of damages exceeding those necessary to compensate for a loss, and the public presumably realizes a sense of satisfaction in punishing the defendant through his pocketbook.

\textbf{1. Resemblance to Criminal Sanctions}

Society's imposition of punitive damages resembles the imposition of criminal sanctions. The Minnesota Supreme Court has likened the award of punitive damages to the imposition of a fine, requiring the defendant to have a guilty intention.\textsuperscript{27} As the court noted in an action for punitive damages involving assault and battery, punitive damages would be appropriate if the act was committed with "criminal indifference to civil obligations."\textsuperscript{28} In an action for assault in the foreclosure of a chattel mortgage, the court stated that the jury would have discretion to impose punitive damages if the defendant's purpose was "unlawful," or lawful but achieved by "unlawful means."\textsuperscript{29}

\textsuperscript{21} Id. at 190-91 (Gil. at 132).
\textsuperscript{22} Id. at 201 (Gil. at 144).
\textsuperscript{23} Id. (emphasis added).
\textsuperscript{24} The punishment of a tortfeasor is a function of the defendant's state of mind. An act committed maliciously, willfully, with a reckless disregard for the plaintiff's rights, or defined with similar words, justifies an award of punitive damages. For an analysis of the requisite state of mind, see infra notes 167-99 and accompanying text.
\textsuperscript{25} For a discussion of the important role of the jury in punitive damages cases, see infra notes 203-31 and accompanying text.
\textsuperscript{26} Schmidt, 150 Minn. at 240, 184 N.W. at 966.
\textsuperscript{27} Id. at 239-40, 184 N.W. at 965-66.
\textsuperscript{28} Baumgartner, 105 Minn. at 24, 116 N.W. at 1031.
\textsuperscript{29} Anderson, 104 Minn. at 53, 116 N.W. at 103.
The role of the jury in evaluating the evidence regarding punitive damages, and awarding such damages as it sees fit, suggests a trial by peers similar to that in criminal actions. 30 To avoid a civil law version of "cruel and unusual punishment," 31 the trial court may reduce an award of punitive damages 32 which appears to be activated by "passion or prejudice." 33 To further protect the defendant, an appellate court may review 34 punitive damages awards and reverse those that it deems excessively large. 35

The jury’s focus on the defendant’s conduct, rather than the plaintiff’s injury, 36 supports the view that punitive damages are implicitly criminal in nature. Just as criminal law focuses on the defendant’s behavior, punitive damages are awarded based on the defendant’s intentional and deliberate attitude in violating the

30. See Wilson v. City of Eagan, 297 N.W.2d 146, 150 (Minn. 1980); see also infra notes 203-31 and accompanying text.
31. The eighth amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
32. Bronson Steel Arch Shoe Co., 183 Minn. at 139, 236 N.W. at 206.
33. Sweeney v. Meyers, 199 Minn. 21, 24, 270 N.W. 906, 907 (1937); see also infra notes 206-16 and accompanying text.
34. See MacInnis v. National Herald Printing Co., 140 Minn. 171, 175, 167 N.W. 550, 551 (1918).
35. See Ward v. National Car Rental Sys., 290 N.W.2d 441, 443 (Minn. 1980) (reversing award of punitive damages for lack of evidence that defendant knew his conduct was wrong and unlawful).
36. See Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 312 (Minn. 1983) (as modified on denial of rehearing) (defendant therapist’s knowledge of the rules of his profession proscribing sexual activity with patients tends to establish liability for punitive damages as a result of sexual encounters with patient); Furlev Sales & Assocs., Inc. v. North Am. Automotive Warehouse, Inc., 325 N.W.2d 20, 25-26 (Minn. 1982) (wrongful interference with contract, including the defendant’s knowledge of contract and intentional procurement of breach, which lacked justification, warranted allowance of punitive damages); Utecht v. Shopko Dep’t Store, 324 N.W.2d 652, 654 (Minn. 1982) (punitive damages statute requires clear and convincing evidence that defendant’s acts showed willful indifference to rights and safety of others); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 260 (Minn. 1980) (punitive damages are properly awarded in defamation action); Wilson, 297 N.W.2d at 150 (punitive damages are allowed only if harm complained of is result of malicious conduct); Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232, 237 (Minn. 1980) (as amended on denial of rehearing) (punitive damages are awarded only where harm results from conduct “done with malicious, willful, or reckless disregard of the rights of others”); Huebsch v. Larson, 291 Minn. 361, 363, 191 N.W.2d 433, 434-35 (1971) (quoting Vine v. Casmey, 86 Minn. 74, 76, 90 N.W. 158, 158-59 (1902)) (complaint for punitive damages must allege as ultimate fact that defendant’s purpose or intent was to do the alleged wrongful act); Benson Coop. Creamery Ass’n, 276 Minn. at 528-30, 151 N.W.2d at 427-28 (award of punitive damages is justified if wrongful act was done with malice); Hammer v. Forde, 125 Minn. 146, 148-49, 145 N.W. 810, 812 (1914) (corporation is liable for punitive damages attributable to the animus or bad faith misconduct of its agent).
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The analogy between an award of punitive damages and a criminal sentence should not, however, be given too much weight. Fundamental distinctions exist between the two. A criminal action threatens to deprive a defendant of his most precious rights: life and liberty. Civil actions for punitive damages threaten only loss of money. Because the amount of a punitive damages award is based in part on the defendant’s ability to pay, liability will never place the defendant in an impossible financial position. Thus, the two penalties differ in kind, not in degree.

2. Defendant’s Ability to Pay

The punishment function of punitive damages is best served when the jury receives evidence of the defendant’s financial condition. The rule that the jury may consider the defendant’s financial condition in assessing punitive damages is well-settled. Without evidence of the defendant’s pecuniary circumstances, “the jury could not determine what would be an adequate sum to assess as a punishment; for what to a man of wealth might be a trifle, for a poor man might be excessive and cruel punishment.”

In Melina v. Chaplin, the court almost apologetically refused to reduce an award of punitive damages that the defendant claimed was excessive because he presented no evidence of his inability to pay. The court reasoned, “The purpose of punitive damages is to both punish and deter according to the gravity of the act giving rise to the punitive damages award, but an award should not exceed the level necessary to properly punish and deter.” If the

37. See Prosser & Keeton, supra note 6, § 2, at 9.
38. Minnesota does not treat petty misdemeanors as crimes because the defendant cannot be imprisoned for their violation. Minn. R. Crim. P. 23.06. However, the defendant must still be proven guilty beyond a reasonable doubt. Id. 23.05, subd. 3. This requirement probably exists because the police power of the state is brought to bear on the defendant.
39. See Peck v. Small, 35 Minn. 465, 466, 29 N.W. 69, 70 (1886) (citing McCarthy v. Niskern, 22 Minn. 90 (1875)) (wealth of defendant may be proved in action for punitive damages in personal tort); Johnson v. Travis, 33 Minn. 231, 232-33, 22 N.W. 624, 624-25 (1885) (in action for breach of marriage contract, court may instruct jury to consider defendant’s financial condition).
40. McCarthy v. Niskern, 22 Minn. 90, 91 (1875).
41. 327 N.W.2d 19 (Minn. 1982).
42. Id. at 20 & n.1. The jury had found the defendant liable for assault. Id. at 20. Some of the justices expressed concern that the verdict of $2000 in compensatory damages and $35,000 in punitive damages was excessive. Id. at 20 n.1.
43. Id. at 20 n.1 (citing Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 928, 529 P.2d 980,
trial court record had contained any evidence of the defendant's financial condition, the court apparently would have considered granting a new trial or remittitur to adjust the punitive damages award to conform with the compensatory damages.44

Conduct and ability to pay, the two key factors in a punitive damages award, were both present in Minnesota's largest recorded state punitive damages case, Gyc v. Dayton-Hudson Corp.45 In Gyc, the supreme court upheld a one million dollar punitive damages award against the manufacturer of a highly flammable fabric used in children's pajamas.46 The product, "flannelette," met only minimal standards of product flammability as determined by the federal Flammable Fabrics Act,47 and those standards were determined by the court to be invalid.48 Consumers unfamiliar with the flammability characteristics of textiles, and particularly flannelette, had no knowledge of the inherent danger.49 The manufacturer was therefore uniquely aware of flannelette's flammable characteristics.50 In rejecting the manufacturer's argument that the punitive damages award was excessive, the court stated, "[The defendant] is a multi-million dollar corporation which reaped substantial profits through the sale of its highly flammable cotton

990, 148 Cal. Rptr. 389, 399 (1978)); see also Jensen v. Peterson, 264 N.W.2d 139, 145 (Minn. 1978) (punitive damages depend primarily on defendant's conduct and ability to pay).

44. See Melina, 327 N.W.2d at 20. The court noted that no testimony was offered concerning the defendant's ability to pay. Id.

45. 297 N.W.2d 727, 741 (Minn.), cert. denied sub nom. Riegel Textile Corp. v. Gyc, 449 U.S. 921 (1980). See generally Comment, Punitive Damages in Products Liability Actions: A Look at a Newly Extended Doctrine, 7 WM. MITCHELL L. REV. 185 (1981) (analyzing Gyc and concluding that although the court's analysis may have been lacking, Gyc was "an extreme case clearly warranting an award of punitive damages"); 4 HAMLIN L. REV. 351 (1981) (analyzing Gyc and concluding that while punitive damages are appropriate in products liability actions, Gyc was an inappropriate case).

46. 297 N.W.2d at 729, 741. The court held that the defendant created a substantial danger to the public by marketing its highly flammable cotton flannelette. Id. at 741.


48. 297 N.W.2d at 733-34. The flannelette product was untreated for flammability although the manufacturer knew that several inexpensive flame-retardant products and processes were available to greatly increase the safety of the pajamas without affecting their appearance or marketability. Id. at 739.

49. See id. at 741.

50. Id. at 740. An internal memorandum of the manufacturer pointed out that several clothing fires had occurred, and that the company was sitting on a "powder keg" with respect to the flammability of flannelette. Id.
flannelette. We, therefore, do not find that the punitive damages award was excessive as a matter of law." 51 Thus, Gryc demonstrates that the defendant's financial condition will be seriously considered by the jury in determining the size of an award necessary to properly punish the defendant, especially when the defendant profited from its misconduct.

B. Deterrence

The second purpose of Minnesota's punitive damages law is to deter the defendant and others from committing similar willful acts in the future. 52 The deterrence function of punitive damages is more extensive than the punishment function. As a punishment, punitive damages affect only a particular defendant. As a deterrent, punitive damages indicate society's expectation of proper conduct, warning the defendant and others against misbehavior.

The Minnesota Supreme Court has expressed the important purpose a punitive damages award serves in deterring future misconduct. In Gryc, 53 the defendant-manufacturer argued that an assessment of one million dollars in punitive damages was inappropriate because it had ceased its willful misconduct. 54 The defendant argued that this factor, combined with its contention that it had suffered financial losses and a damaged reputation, sufficiently deterred any future misconduct and negated any need for punitive damages. 55 The supreme court disagreed:

This argument ignores the fact that [the defendant] was shown to have acted in reckless disregard of the public for purely economic reasons in the past. A punitive damages award serves to deter [the defendant] from acting in a similar manner with respect to other products manufactured by it in the future. 56

51. Id. at 741. The court noted the defendant continued to market flannelette even though there were economically feasible measures which could have been taken to reduce the danger of fire to an acceptable level. Id.

52. See, e.g., Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 259 (Minn. 1980) (main purpose of punitive damages in slander action is to deter false, malicious, and provocative attacks upon a person's character); Loftsgaarden v. Reiling, 267 Minn. 181, 182-83, 126 N.W.2d 154, 154-55 (reason for punitive damages in libel action is to deter malicious attacks upon a plaintiff's reputation), cert. denied, 379 U.S. 845 (1964).

53. 297 N.W.2d 727.

54. Id. at 741. The defendant had stopped manufacturing the flannelette product, and claimed that its previous conduct had been proper since it was complying with federal standards for children's sleepware that had become more stringent over time. Id.

55. Id.

56. Id. The court stated that "the potential of compensatory damages awards and loss of sales and reputation did not serve to deter [the manufacturer] in the past." Id. The
One case suggests that juries also consider deterrence to be the most important purpose of punitive damages. In Schoenecke v. Ronningen, the plaintiff brought an action for compensatory and punitive damages for alienation of affections. Before trial, the Minnesota Legislature repealed the statute giving rise to the claim for relief. The jury interrupted its deliberations and expressed concern that punitive damages would not serve a purpose in the case because the defendant's conduct was no longer illegal. The judge instructed the jury that an award of punitive damages remained in its discretion.

Although the Minnesota Supreme Court has held repeatedly that the purpose of punitive damages is to deter both the defendant and others from engaging in misconduct, it has recently departed from that rule. In Thompson v. Estate of Petroff, the court held that the plaintiff could not recover punitive damages from the estate of a dead tortfeasor. Although the court noted that the decedent's act was "particularly brutal," and that the plaintiff probably would have recovered punitive damages if the decedent was alive, it concluded that punitive damages would serve no purpose. The court reasoned, "the purpose of punitive damages is to punish the tortfeasor where the act is malicious or wilful, and to deter him from repeating the wrongful act." The court rejected the argument that others will be deterred from wrongful conduct.

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defendant could not, therefore, argue that these considerations would act as an adequate deterrent to the defendant in the future. Id. The defendant overlooked the fact that one of the functions of a punitive damages award is to punish past conduct. Id. 57. 315 N.W.2d 612 (Minn. 1982).

58. Id. at 614. The plaintiff claimed the defendant had been having an affair with the plaintiff's wife, and that this caused the breakup of the plaintiff's marriage. The complaint alleged two counts: alienation of affection and criminal conversion. Each count requested $50,000 in compensatory damages and $100,000 in punitive damages. Id. The trial court dismissed the claim for criminal conversion. Id. The jury awarded the plaintiff $122,000 in general damages, but refused to award punitive damages. Id.

59. Id.

60. Id.

61. Id. The trial judge responded to the jury's request for additional instructions by saying, "Well, I would just have to leave that to your judgment and—to determine whether you believe justice requires it then. And that's at your option." Id. The jury subsequently awarded no punitive damages. Id.

62. See, e.g., Vine v. Casmey, 86 Minn. 74, 75-76, 90 N.W. 158, 158 (1902); Boetcher v. Staples, 27 Minn. 308, 308, 7 N.W. 263, 263 (1880) (punitive damages are intended as an example to deter defendant and others from similar acts).

63. 319 N.W.2d 400 (Minn. 1982).

64. Id. at 408.

65. Id.

66. Id. (emphasis added).
knowing that their estates would be liable for punitive damages if they died before judgment. Instead, the court concluded, "[The tortfeasor] is dead; to punish his estate instead would be to ignore the entire purpose of punitive damages." 68

Whether a tortfeasor would be deterred by an award of punitive damages against his own estate is not certain. The Petroff court failed, however, to explain how the ironically fortuitous death of the tortfeasor mitigated society's need to deter such conduct. What Petroff does suggest is that the dual purposes of punishment and deterrence must be served to justify an award of punitive damages in a particular case.

C. Eisert: A Change in Emphasis?

The Minnesota Supreme Court's analysis of punitive damages in the 1982 case of Eisert v. Greenberg Roofing & Sheet Metal Co. 69 departs startlingly from the traditional functions of punitive damages. 70 It is not clear whether the decision is an aberration, or a change in emphasis on the factors necessary to prove a case of punitive damages.

In Eisert, two students died in a fire that started in the auto body shop at their vocational school and spread throughout the building. 71 The plaintiff trustees for the heirs of the deceased brought a wrongful death cause of action, and the plaintiff school district sought damages for property loss under products liability. 72 The plaintiffs alleged that the toxic smoke and fuel which sustained the fire was caused by burning foam insulation and paint applied to the building. 73 They also alleged that the defendant manufacturers and sellers represented these products to be self-extinguishing and fire-retardant. 74

At the time Eisert was decided, Minnesota's wrongful death statute was interpreted by the court as proscribing punitive damages. 75 The supreme court therefore affirmed the trial court's

67. Id.
68. Id.
69. 314 N.W.2d 226 (Minn. 1982).
70. See infra notes 114-21 and accompanying text (review of Eisert pursuant to Minnesota's punitive damages statute).
71. 314 N.W.2d at 227.
72. Id.
73. Id.
74. Id.
75. See infra notes 122-26 and accompanying text (discussing wrongful death actions as judicial exception to punitive damages awards).
decision granting the defendants' motion to dismiss the trustees' punitive damages claim. The court also denied the school district's motion for leave to amend its complaint to claim punitive damages for property loss arising from the destruction of the building. 76

In denying the school district's motion, the Ezseri court considered only the nature of the plaintiff's loss, not the defendants' conduct. It held that the plaintiff's loss is not always considered in determining whether to assess punitive damages, 77 but "it may reasonably be taken into account in deciding whether punitive damages will be allowed." 78 The court concluded:

Where [the] injury is limited to property damage, the public interest in punishment and deterrence is largely satisfied by the plaintiff's recovery of compensatory damages. Punitive damages represent an extraordinary measure of deterrence. Denying their imposition in this case, after allowing punitive damages in strict liability actions for personal injury, reflects the higher value our society places on the safety of persons than it does on the security of property. 79

The court's focus on the nature of the plaintiff's injury, rather than on the conduct of the defendant, ignores the 120-year-old law of punitive damages. Prior to Ezseri, the nature of the plaintiff's injury was not a legal consideration in determining punitive damages. 80 Several years earlier, the court stated, contrary to Ezseri, that evidence of the plaintiff's condition is obviously not relevant unless the defendant takes special advantage of that condition. 81

Conduct amounting to gross negligence, malice, fraud, and oppression is punishable by punitive damages. By focusing only on

76. Id. at 228. Both the trustees and the school district appealed. Id.; see infra notes 109-21 and accompanying text (discussion of punitive damages in cases limited to claims for property damages).

77. 314 N.W.2d at 229 (citing MINN. STAT. § 549.20, subd. 3 (1980)).

78. Id.

79. Id.

80. See supra notes 19-68 and accompanying text (discussing policy of punishment and deterrence).

81. Accord Jensen v. Peterson, 264 N.W.2d 139, 145 (Minn. 1978); cf. Caspersen v. Webber, 298 Minn. 93, 213 N.W.2d 327 (1973) (examining defendant's intentional conduct). This focus on defendant's conduct has important implications for assessing liability for punitive damages against the appropriate party. In Caspersen, the court held that an insurance company was not required to reimburse its insured for a punitive damages judgment. The court stated that the insurer's obligation to insure for actual damages does not extend to damages assessed for punishment of willful conduct. Id. at 99-100, 213 N.W.2d at 331.
the plaintiff's injury, however, the Eiserl court ignored conduct alleged to be willful, wanton, and malicious. The defendants escaped liability because nobody still living was hurt. Fortunately for the defendants, in terms of their liability, the only persons who were trapped in the burning building died in the fire. The defendants had no guarantee, however, that the fire in the auto body shop would not cause injury. Thus, the court ignored its own interpretation of the law as set forth in Gryc. "[T]he state punitive damages remedy concerns the vital state interest of protecting persons against personal injury. It seeks to protect state citizens from the willful, wanton, and reckless manufacture [of a defective product]."

Other decisions by the Minnesota Supreme Court suggest that Eiserl represents a departure from the settled principles of punitive damages. Unless the punitive damages remedy is accepted judiciously as more than a form of civil punishment and expression of society's disapproval of unacceptable conduct, the supreme court should reaffirm that punishment and deterrence of unacceptable conduct are the exclusive focus of the law of punitive damages.

III. MINNESOTA'S PUNITIVE DAMAGES STATUTE

In 1978, as part of comprehensive tort reform legislation, the Minnesota Legislature enacted the state's first statute governing the standards to be used in awarding punitive damages. The statute applies to actions commenced on or after April 15, 1978. Id. § 11, 1978 Minn. Laws at 842. The statute provides:

Subdivision 1. Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seri-
Minnesota Supreme Court has applied the statute so as to suggest that recovery of punitive damages will now be increasingly difficult.85

The statute codifies five separate aspects of punitive damages developed in the common law:

(a) the "jurisdiction" over punitive damages;
(b) the standard of proof that a plaintiff must meet;
(c) the standards of conduct that the defendant has violated;
(d) the factors determining an amount of punitive damages, particularly in products liability actions; and
(e) a principal's liability for the acts of his agent.86

While the legislature previously had allowed punitive damage awards in certain actions87 and limited them in others,88 the new

85. See Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46, 52-53 (Minn. 1983) (no punitive damages in a contract action); Ulecht, 324 N.W.2d at 654 (trial court did not err in refusing to allow amendment for punitive damages); Eisert, 314 N.W.2d at 228-29 (punitive damages are not available in wrongful death action or in action for strict liability for plaintiff's property loss); Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 309-11 (Minn. 1980) (no punitive damages in a contract action).

86. See MINN. STAT. § 549.20.

87. The Worker's Compensation Act provides for the recovery of punitive damages by the state treasurer against a non-insured employer, in an amount not to exceed 50% of all amounts paid out. Id. § 176.183, subd. 1 (Supp. 1983). Minnesota's Privacy of Communications Act provides for punitive damages in civil actions against any person who violates the Act. Id. § 626A.13(c) (1982). Subdivision 2 of the Minnesota Human Rights Act allows for the award of punitive damages in an amount of no more than $6000 to an aggrieved party who has suffered discrimination. Id. § 363.071, subd. 2 (Supp. 1983). A person or governmental body injured by a person littering from a vehicle may recover punitive damages in an amount not to exceed one hundred dollars. Id. § 169.421, subd. 4 (1982). The Minnesota Truth in Repairs Act provides in part for punitive damages to a customer aggrieved by a violation of the Act in an amount not to exceed three times the total repair charges. Id. § 325F.63, subd. 1 (1982).

88. Minnesota Statutes § 3.736, subd. 3 (1982) provides, "The state will not pay punitive damages" in tort claims against the state. See also id. § 466.04, subd. 1 (Supp. 1983) ("No award for damages on such claim [against a municipality’s officers or employees] shall include punitive damages").
PUNITIVE DAMAGES

statute is its first attempt to govern the standards for awarding punitive damages in all civil actions.

In drafting section 549.20, the legislature recognized that punitive damages are not universally accepted. Judges and commentators who historically have criticized the doctrine of punitive damages have relied on various grounds, including: (1) that such damages unjustly enrich the plaintiff; (2) that compensatory damages fully serve the stated purposes of punitive damages; (3) that the lack of an objective basis to guide an award of punitive damages invites abuse and overly severe sanctions against defendants; and (4) that punitive damages usurp a function of the criminal law, without providing the defendant with the proper criminal procedural safeguards. Section 549.20 was drafted responsively to such criticisms. The statute clarifies the limits of punitive damages and provides direction for their award.

A. Jurisdiction

I. Generally

Subdivision one of section 549.20 contains a jurisdictional statement, and provides an evidentiary standard for proving claims of punitive damages. The subdivision states, “Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.” This language suggests that the legislature intended plaintiffs to be able to bring their claims for punitive damages in any action, unless the trial judge cannot be convinced that the case warrants punitive damages. Subdivision one of section 549.20 is a rational approach to the issue if the punitive damages

89. See generally Coccia & Morrissey, Punitive Damages in Products Liability Cases Should Not Be Allowed, 22 TRIAL LAW. GUIDE 46 (1978). The authors note that four states, Massachusetts, Louisiana, Nebraska, and Washington, have rejected the doctrine of punitive damages. Id. at 55; see Moore v. Blanchard, 216 La. 254, 252, 43 So. 2d 599, 601 (1949); Boot Mills v. Boston & Me. R.R., 218 Mass. 582, 589, 106 N.E. 680, 683 (1914); Wilfong v. Omaha & C.B.S. Ry., 129 Neb. 600, 607, 262 N.W. 537, 540 (1935); Anderson v. Dalton, 40 Wash. 2d 894, 898, 246 P.2d 853, 855 (1952) (“except when explicitly allowed by statute”). Coccia and Morrissey also note that in England, punitive damages are very restricted and may be awarded only: (a) where there is “oppressive, arbitrary, or unconstitutional action by the servants of the government”; (b) where “the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff”; or (c) where punitive damages “are expressly [authorized] by statute.” Coccia & Morrissey, supra, at 56 (quoting Rookes v. Barnard, 1964 A.C. 1129, 1226-27).

90. MINN. STAT. § 549.20, subd. 1 (1982).

91. Id.
remedy is to be "action blind"; regardless of the injury the plaintiff has suffered, the defendant's conduct is a separate substantive issue. The plaintiff should also be required to meet the stiff evidentiary burden because of the quasi-criminal nature of the award, and the potentially harsh economic consequences punitive damages pose for the defendant.

The Minnesota Supreme Court has established, however, that plaintiffs will continue to be precluded from recovering punitive damages in certain civil actions. Common law prior and subsequent to the enactment of the statute has excepted certain substantive areas of the law from awards of punitive damages.

2. Judicially Created Exceptions

The Minnesota Supreme Court has held that the plaintiff is limited to compensatory damages for the actual injury suffered in three areas of substantive law: contracts, strict liability for property damage, and wrongful death. Although the Minnesota Legislature has overruled the exception for wrongful death,92 the common law exception provides an important historical perspective for understanding the wrongful death statute.

a. Contracts

Plaintiffs are not entitled to punitive damages in breach of contract actions93 even if the defendant had a malicious motive for breaching the contract,94 consciously and deliberately breached

92. See id. § 573.02 (Supp. 1983) (In an action for wrongful death, "Punitive damages may be awarded as provided in section 549.20").

93. See Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46, 52 (Minn. 1983) (bond contract); Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297, 309-10 (Minn. 1980) (contract); Cherne Indus. Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81, 95 (Minn. 1979) (covenant not to compete); Haagenson v. National Farmers Union Property & Casualty Co., 277 N.W.2d 648, 652 (Minn. 1979) (insurance policy); Olson v. Rugloski, 277 N.W.2d 385, 388 (Minn. 1979) (insurance policy); Moore v. John E. Blomquist, Inc., 256 N.W.2d 518, 518 (Minn. 1977) (lease); Francis v. Western Union Tel. Co., 58 Minn. 252, 264, 59 N.W. 1078, 1081 (1894) (failure of telegraph company to send telegraph). Excluded from this discussion are the cases dealing with the antiquated tort action for breach of marriage contract. See Sneve v. Lunder, 100 Minn. 5, 6, 110 N.W. 99, 100 (1907) ("In an action of this character the jury may, in its discretion, allow punitive damages if the evidence shows that the conduct of the defendant was wanton and ruthless and of such a character as to manifest an intention unnecessarily to wound her feelings, injure her reputation, and destroy her future prospects"); Clement v. Brown, 57 Minn. 314, 315-16, 59 N.W. 198, 198-99 (1894); Johnson v. Travis, 33 Minn. 231, 232, 22 N.W. 624, 624 (1885).

94. See Barr/Nelson, Inc., 336 N.W.2d at 52-53. "Unless the willful and malicious con-
the contract,\textsuperscript{95} or breached the contract in bad faith.\textsuperscript{96} A plaintiff may only recover punitive damages in a contract case if the breach was accompanied by an independent tort such as fraud.\textsuperscript{97} The cases denying punitive damages in contract actions lack justification for the exception. Theoretically, the malice, bad faith, or willful indifference of a tort defendant should be as unacceptable in contract law. Yet, the Minnesota Supreme Court concluded in 1920, "The motives prompting the breach of a contract are immaterial, so far as the rule of damages is concerned, and, however malicious or wrongful, the measure of compensation remains the same."\textsuperscript{98}

In 1983, the Minnesota Supreme Court reaffirmed the rule barring punitive damages in contract cases. In \textit{Barr/Nelson, Inc. v. Tonto's, Inc.},\textsuperscript{99} the court distinguished between the defendant's malicious motive and a malicious breach of contract action. The court held that "malicious motive goes only to determining whether a material breach has occurred, but is immaterial insofar as damages for contract breach are concerned."\textsuperscript{100}

The rule excluding punitive damages in contract cases often affects disputes between insurance companies and their insureds. Typically, the insurer balks at paying a claim that the insured believes is valid. The insured then must sue the insurer, and if the insured believes the insurer acted maliciously or in bad faith in refusing to pay the claim, the action will include a request for punitive damages. Under Minnesota law, the insurance policy is a contract, and the defendant's refusal to pay a valid claim is merely a breach of contract, not entitling the plaintiff to punitive damages.\textsuperscript{101}

A better rule would treat an egregious breach of contract as a separate actionable tort entitling the plaintiff to seek punitive

\textsuperscript{95} See \textit{Minnesota-Iowa Television Co.}, 294 N.W.2d at 309.

\textsuperscript{96} See \textit{Moore}, 256 N.W.2d at 518; \textit{Wild v. Rarig}, 302 Minn. 419, 441-42, 234 N.W.2d 775, 790 (1975) (bad faith termination is not an independent tort), \textit{appeal dismissed}, 424 U.S. 902 (1976).

\textsuperscript{97} See \textit{Toshoku Am., Inc. v. Fidelity Bank & Trust Co.}, Civil No. 4-79-339 (D. Minn. Sept. 18, 1981).

\textsuperscript{98} \textit{Independent Grocery Co. v. Sun Ins. Co.}, 146 Minn. 214, 217, 178 N.W. 582, 583 (1920), \textit{overruled on other grounds in Olson v. Rugloski}, 277 N.W.2d 385, 388 (Minn. 1979).

\textsuperscript{99} 336 N.W.2d 46 (Minn. 1983).

\textsuperscript{100} \textit{Id.} at 52-53.

\textsuperscript{101} See \textit{Haagenson}, 277 N.W.2d at 652; \textit{Olson}, 277 N.W.2d at 387-88; \textit{Independent Grocery Co.}, 146 Minn. at 217, 178 N.W. at 583.
damages. The dual functions of punitive damages, punishment and deterrence, would be particularly well-served in these cases since bad faith conduct by an insurer has undoubtedly compounded a trauma experienced by the insured. In *Mize v. Harford Insurance Co.*,\(^{102}\) a federal court applying the law of Virginia held that where a breach of contract imposes hardship on the plaintiff, the damages award should be "governed by the same standard as are punitive damages in any tort case."\(^{103}\)

As noted, subdivision one of section 549.20 allows punitive damages in civil actions.\(^{104}\) Although this language does not distinguish tort from contract actions, the Minnesota Supreme Court has reaffirmed the well-settled exception for contract cases since the statute's enactment.

In *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Association*,\(^{105}\) the supreme court reasoned that the legislature enacted the statute because of concerns about the frequency and size of punitive damages awards in products liability cases.\(^{106}\) Thus, the court concluded that the legislature did not intend the statute to extend to a new line of cases.\(^{107}\) "We believe that if the legislature had intended to overrule the line of cases prohibiting punitive damages in contract cases, it would have specifically provided for such awards in the statute."\(^{108}\)

### b. Property Loss

Strict liability actions in which the plaintiff's compensatory damages are limited to his property loss provide the second narrow exception to the availability of punitive damages. Interpretation of strict liability law supports the exception.\(^{109}\)

The Minnesota Supreme Court first recognized the doctrine of

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103. *Id.* at 555. In *Mize*, an insurance company refused to pay a homeowner's claim following a fire. *Id.* at 551. The company demanded that the homeowner take a polygraph test to prove that she was not the arsonist, but she refused to take the test. *Id.* at 552. Although the company knew that fire officials had ceased their investigations, and despite the fact that its adjuster recommended that the claim be paid, the company refused to do so. *Id.* at 554.
104. *See supra* notes 90-91 and accompanying text.
105. 294 N.W.2d 297 (Minn. 1980).
106. *Id.* at 310.
107. *Id.* at 311.
108. *Id.*; *see also* Barr/Nelson, Inc., 336 N.W.2d at 52 (citing with approval *Minnesota-Iowa Television Co.*, 294 N.W.2d at 311) ("unlikely that the legislature intended to extend [punitive] damage awards to contract actions").
strict liability in *McCormack v. Hanksraft Co.* The plaintiff based her products liability action on only negligence and warranty theories, but the court enlarged the defendant manufacturer's liability to encompass a strict liability standard. The extension of liability was based on fairness to the plaintiffs, not unacceptability of the defendant's conduct.

Subjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.

This emphasis on the product, rather than on the defendant's conduct, is reflected in the four elements of a prima facie case of strict liability: (1) the plaintiff was injured; (2) the defendant's product caused the injury; (3) the injury occurred because the defendant's product was defective; and (4) the defect was present in the product when the defendant sold it. Thus, in strict liability actions, the defendant's conduct or knowledge is not relevant to liability. It follows that punitive damages serve no purpose in actions based solely on strict liability.

The strict liability exception was enunciated in *Eiser.* If the *Eisert* court had based its opinion on strict liability law alone, the result would have been consistent with the dual functions of punitive damages. Instead, the court denied punitive damages based on the nature of the plaintiff's injury, and departed from the well-settled rule that punitive damages are intended to punish and deter defendants and others. The legislature codified the principles of punishment and deterrence in the punitive damages statute four years prior to *Eisert.* Whether the injury is personal

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110. 278 Minn. 322, 154 N.W.2d 488 (1967).
111. *Id.* at 338, 154 N.W.2d at 500.
112. *Id.*
115. *See supra* notes 24-51 and accompanying text.
116. *See supra* notes 52-68 and accompanying text.
117. *MINN. STAT. § 549.20*, subd. 3 (1982) (listing only factors pertaining to the defendant's conduct, knowledge, remorse or lack thereof, and financial condition in measuring an award of punitive damages).
harm or loss of property should not be relevant.

One recent supreme court opinion, if read with *Eisert*, suggests that *Eisert* will continue to apply only to property damage actions in strict liability. In *Wilson v. City of Eagan*, the supreme court upheld an award of punitive damages against a municipal animal warden for negligently destroying the plaintiff's pet cat in violation of state law. The court concluded that the warden did not act with malice toward the plaintiff since he did not know who owned the cat. "Nevertheless, the award of punitive damages was appropriate because [the warden's] conduct in killing the cat within hours of its impoundment evinces a willful disregard for both the law and the property rights of private citizens." Wilson therefore properly focuses the factfinder's attention on the defendant's conduct without regard to the nature of the plaintiff's injuries.

*Eisert*'s unfortunate effect is that defendants may move the court to ignore allegations of a malicious and reprehensible course of conduct, and to dismiss a claim for punitive damages solely because the plaintiff suffered only property damage. If a defective and unreasonably dangerous product causes a fire that leads to the destruction of a building, the manufacturer whose conduct is proven to be willfully indifferent to the safety of others should not be allowed to escape liability for punitive damages solely because of the good fortune that nobody was injured. Punitive damages should be awarded in order to deter the defendant and similarly situated persons from engaging in similar reprehensible conduct.

*Eisert* is in need of clarification to reaffirm that the principles of punitive damages apply in all civil actions involving willful misconduct by defendants, regardless of whether the plaintiff suffers personal injury or property damage.

c. *Wrongful Death Actions*

The third judicial exception applied to wrongful death actions. Until June 1983, Minnesota's wrongful death act limited the next-of-kin's recovery to their "proportionate" pecuniary loss. A common law proscription of punitive damages in wrongful death cases and the supreme court's equally narrow interpretation of the

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118. 297 N.W.2d 146 (Minn. 1980).
119. *Id.* at 151.
120. *Id.*
121. *Id.* (emphasis added).
122. MINN. STAT. § 573.02, subd. 1 (1982).
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wrongful death statute were inconsistent with the purposes of punitive damages. The unavailability of punitive damages in wrongful death cases prevented the next-of-kin from sharing in the proceeds of a lawsuit that the decedent, had he lived, presumably could have brought and won.\textsuperscript{123} Whether the decedent’s heirs, or the plaintiff who survives to sue, benefits from a judgment, punitive damages should be assessed if the defendant’s conduct warrants punishment or deterrence.

In several cases, the Minnesota Supreme Court interpreted the statute as an expression of legislative intent to preclude punitive damages in wrongful death actions.\textsuperscript{124} In deciding \textit{Eisert} in 1982, the supreme court recognized that the rule was illogical because malicious tortfeasors benefited from having the potential plaintiffs die. “Although the disparate treatment of the tortfeasor who injures and the tortfeasor who causes death may appear inequitable, any change in the recovery for wrongful death that is not permitted by fair interpretation of the statute is for the legislature to make.”\textsuperscript{125} In 1983, the legislature overruled these cases by amending the wrongful death statute as follows: “Punitive damages may be awarded as provided in section 549.20.”\textsuperscript{126}

B. Standard of Proof

Subdivision one of the punitive damages statute provides that a plaintiff may recover punitive damages only upon a showing of “clear and convincing evidence.”\textsuperscript{127} Minnesota courts have defined clear and convincing as a standard falling between “a preponderance of the evidence” and “beyond a reasonable doubt.”\textsuperscript{128}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{123} Gunderson v. Northwestern Elevator Co., 47 Minn. 161, 164, 49 N.W. 694, 695 (1891); Hutchins v. St. Paul, M. & M. Ry., 44 Minn. 5, 6, 46 N.W. 79, 80 (1890).
\item\textsuperscript{124} See Eisert, 314 N.W.2d at 228; Gunderson, 47 Minn. at 164, 49 N.W. at 695; Hutchins, 44 Minn. at 9, 46 N.W. at 81.
\item\textsuperscript{125} Eisert, 314 N.W.2d at 228.
\item\textsuperscript{126} Act of June 14, 1983, ch. 347, § 2, 1983 Minn. Laws 2397-98 (codified at MINN. STAT. § 573.02, subd. 1 (Supp. 1983)). This amendment to the wrongful death statute does not appear to overrule the supreme court’s decision in Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982), proscribing claims for punitive damages against the estate of a deceased tortfeasor.
\item\textsuperscript{127} MINN. STAT. § 549.20, subd. 1 (1982).
\item\textsuperscript{128} See Benson v. LaBatte, 288 N.W.2d 684, 686 (Minn. 1979) (in a paternity action, Minnesota Statutes §§ 257.251-31 require clear and convincing proof); see also Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1979) (paternity case stating that clear and convincing proof “means exactly what is suggested by the ordinary meaning of the terms making up the phrase”); Kavanagh v. Golden Rule, 226 Minn. 510, 516, 33 N.W.2d 697, 701 (1948) (clear and convincing evidence needed to prove parol modification of written
\end{itemize}
\end{footnotesize}
The clear and convincing standard is a change from the common law, where the plaintiff was required to meet only the preponderance of the evidence standard normally required in civil litigation. The legislature recognized the quasi-criminal nature of punitive damages,\textsuperscript{129} and attempted to provide additional safeguards for defendants.\textsuperscript{130}

1. Pleading

Since the plaintiff cannot recover punitive damages as a matter of right,\textsuperscript{131} it follows that the court will demand some evidence of unacceptable conduct by the defendant before allowing the jury to consider whether to award punitive damages. It is increasingly difficult for plaintiffs to have claims for punitive damages submitted to the jury.

To commence an action claiming punitive damages, the plaintiff's complaint need comply only with the minimal requirements of notice pleading. In \textit{Huebsch v. Larson},\textsuperscript{132} the jury awarded the plaintiff punitive damages even though he had not specifically claimed punitive damages or pled facts necessary to establish such a claim.\textsuperscript{133} The plaintiff had alleged as an ultimate fact that the defendant intended the alleged wrongful act, and did it wantonly, maliciously, or with the purpose of oppressing or insulting him.\textsuperscript{134} The trial court granted the defendants judgment notwithstanding

\textsuperscript{129.} The Senate author of Minnesota's punitive damages statute, MINN. STAT. § 549.20, was Senator Jack Davies. In discussing the appropriateness of requiring a higher standard of proof in awarding punitive damages, Senator Davies noted the quasi-criminal nature of punitive damages. \textit{See Meeting on H.F. 338 Before the Minnesota Senate Judiciary Committee, 70th Minn. Legis., 1978 Sess., Feb. 22, 1978} (audio tape).


\textsuperscript{131.} \textit{See Comment, supra note 45, at 186 & n.5.}

\textsuperscript{132.} 291 Minn. 361, 191 N.W.2d 433 (1971). Plaintiff's calves had wandered onto defendant's land, and defendant made only a minimal effort to locate their owner. Despite knowing that the cattle were not his own, defendant sold them and kept the proceeds. \textit{Id.}

\textsuperscript{133.} \textit{Id.} at 363, 191 N.W.2d at 434-35.

\textsuperscript{134.} \textit{Id.}
the verdict on the punitive damages claim. The supreme court reversed, holding that the liberal construction of pleadings notified the defendant that the plaintiff was seeking punitive damages. The court reasoned that notice pleadings need only give the defendant fair warning that punitive damages will be litigated.

2. Getting to the Jury

Pleading a case for punitive damages is easier than persuading a judge to submit the question to the jury. Courts have allowed claims for punitive damages to go to the jury "if any evidence" warranted the allowance of an award. This relatively minimal standard requires the plaintiff to make some showing of unacceptable conduct by the defendant to get a claim for punitive damages to the jury.

Courts have not hesitated to dismiss the plaintiff's claim for punitive damages under the "any evidence" standard. In Benson Cooperative Creamery Association v. First District Association, the supreme court reversed the dismissal of the plaintiff's action for wrongful expulsion from a cooperative association, but affirmed the summary dismissal of its claim for punitive damages. The defendant, an association of dairy cooperatives, expelled the plaintiff and cancelled the plaintiff's ownership shares after the plaintiff joined a competing organization. Although the court ordered a trial on whether the plaintiff had been wrongfully expelled, it held that an unlawful action, if proved, would not support an award of punitive damages. "The pretrial depositions establish conclusively that the [defendant association] acted in good faith, believing it had a right to expel Benson . . . . In as much as the [defendant] acted in good faith . . . there is no ground for assessing punitive damages."

135. Id. at 362, 191 N.W.2d at 434.
136. Id. at 363, 191 N.W.2d at 435.
137. Id. The defendant had adequate notice of the punitive damages claim because plaintiff had asked for an instruction on punitive damages and because the trial court had overruled defendant's objections to questions about his assets. Id.; see also supra notes 39-51 and accompanying text (evidence of wealth).
139. 276 Minn. 520, 151 N.W.2d 422 (1967).
140. Id. at 528, 151 N.W.2d at 427.
141. Id. at 524, 151 N.W.2d at 425.
142. Id. at 528-29, 151 N.W.2d at 427-28.
143. Id. at 529, 151 N.W.2d at 428.
Under the Minnesota punitive damages statute,144 which became effective eleven years after *Benson*, the evidentiary standard for submitting a claim for punitive damages to the jury is more difficult from the plaintiff's point of view. While many cases decided after the statute became effective do not cite the statute, the courts have summarily dismissed claims for punitive damages when the plaintiffs did not convincingly prove that the defendants should be punished.145

The Minnesota Supreme Court and the Eighth Circuit Court of Appeals applying Minnesota law have held that the defendant who acts wrongfully but in good faith cannot be liable for punitive damages because his conduct, by definition, is not malicious. Consequently, in *Roworth v. Minnesota Mutual Life Insurance Co.*,146 the Eighth Circuit upheld summary judgment on a claim for punitive damages against a plaintiff wrongfully denied a disability benefit check.147 The plaintiff had not contested that the defendant followed a well-established routine in processing the check or that he in good faith did not qualify for the funds.148 The court held that even when considering the evidence in favor of the plaintiff, no grounds existed for submitting the issue of punitive damages to the jury.149

144. MINN. STAT. § 549.20.
145. *See*, e.g., *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226, 229 (Minn. 1982) (judges should exercise close control over the imposition and assessment of punitive damages).
146. 674 F.2d 756 (8th Cir. 1982).
147. *Id.* at 759.
148. *Id.*
149. *Id.* In *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232 (Minn. 1980) (as amended on denial of rehearing), the supreme court refused to assess punitive damages against a finance company that wrongfully repossessed plaintiff's truck based on a "good faith reasonable interpretation" of § 9-503 of the Minnesota Uniform Commercial Code, MINN. STAT. § 336.9-503 (1982). *Id.* at 237-38.

In *Ward v. National Car Rental Sys.*, 290 N.W.2d 441, 443 (Minn. 1980), the supreme court reversed an award of punitive damages, holding that the trial court improperly submitted the issue to the jury. Plaintiff was unlawfully arrested when defendant's agent thought plaintiff had stolen a rented car. *Id.* at 442-43. Plaintiff thought he had properly rented the car and took the keys from the unattended rental booth. *Id.* at 442. The agent, however, had left a note asking to be called before plaintiff took the car. *Id.* The court said:

There is no evidence from which it can be inferred that [the rental agent] knew his conduct was wrong and unlawful nor does the record show aggravating circumstances from which malice might be inferred. In the absence of such evidence, the issue of punitive damages was improperly submitted to the jury and the award for such damages must be reversed.

*Id.* at 443.
The increasing reluctance of the courts to submit claims for punitive damages to the jury is also reflected in stricter scrutiny of plaintiffs' requests for leave to amend their pleadings to claim punitive damages. In *Uecht v. Shopko Department Store*, the plaintiff sued for defamation after learning that a sign was posted on the defendant's cash registers warning its clerks not to accept the plaintiff's credit card. The defendant posted the signs after the plaintiff's wife told him that she had lost her checkbook and credit cards. The plaintiff was angered by what he perceived to be a smear against his reputation. The trial court dismissed the plaintiff's defamation action and denied his motion for leave to amend his complaint to assert a claim for punitive damages. The supreme court ordered a trial on the defamation issue, but granted summary judgment against the plaintiff's prayer for punitive damages. The evidence indicated that the defendant may have been negligent at most in posting the signs as worded, and that mere negligence does not support a punitive damages award. The court stated that the trial court did not abuse its discretion in denying the amendment to the complaint because Minnesota's punitive damages statute requires clear and convincing evidence of willful acts by the defendant.

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150. 324 N.W.2d 652 (Minn. 1982).
151. *Id.* at 653.
152. *Id.* (Shopko had posted signs on cash registers in check-out lanes stating "Shopper's Charge—Robert Utech—Do Not Accept").
153. *Id.*
154. *See id.*
155. *Id.* at 652.
156. *Id.* at 654.
157. *Id.; see also Cobb, 295 N.W.2d at 237 (statute does not permit recovery of punitive damages for mere negligence).*
158. *See Uecht, 324 N.W.2d at 654. Minnesota Statutes § 549.20 allows punitive damages in civil actions "only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." *Minn. Stat.* § 549.20, subd. 1 (1982).

In *Abel v. J.C. Penney Co.*, 488 F. Supp. 891 (D. Minn. 1980), *aff'd*, 660 F.2d 720 (8th Cir. 1981), the court stayed plaintiffs' pretrial motion to submit their claim for punitive damages to the jury. Plaintiffs sued the manufacturers and retailer of a flannel nightgown their daughter was wearing when it caught fire. *Id.* at 893, 660 F.2d at 721. The daughter's grandmother had purchased a Simplicity pattern and flannel fabric manufactured by Lowenstein from the J.C. Penney Company. *Id.* at 893, 660 F.2d at 720. The grandmother, an experienced seamstress, knew the difference between untreated fabric and flame-retardant fabric, but testified that she preferred untreated fabric because of its texture and unobjectionable smell. 660 F.2d at 720. Plaintiffs argued that defendant was aware of similar fires in children's flannel nightgowns, and that it knew of commercially feasible, flame-retardant processes for treating such garments. 488 F. Supp. at 895-96. The court held that plaintiffs must prove that the defendant acted "willfully, wantonly or
The Utecht court was therefore able to accomplish the perceived legislative goal of controlling punitive damages awards. The court focused on the defendant's conduct and the plaintiff's insufficient evidence, rather than on the nature of the plaintiff's injury.

3. Requirement of Actual Damages

In most cases, the plaintiff must prove that he is entitled to actual or compensatory damages before the trial court will allow punitive damages.\(^\text{159}\) The rule requiring proof of actual damages as a prerequisite for punitive damages does not serve the dual purposes of punitive damages. While it is difficult to imagine a situation that would leave the plaintiff without recourse against the defendant solely because he could not prove actual damages, the focus on the plaintiff's compensatory claim is not relevant to the punishment and deterrence of the defendant's misconduct.\(^\text{160}\) Nevertheless, if the trial court fails to give a punitive damages instruction and the jury awards no actual damages, there is no reversible error.\(^\text{161}\)

In one class of cases, however, the Minnesota Supreme Court has expressly eliminated the requirement that the plaintiff first prove actual damages before bringing a valid action for punitive damages. The exception applies to the law of defamation. In defamation actions, the court has reasoned that the plaintiff may suffer intangible harm as a result of the defendant's false and irresponsible accusations.\(^\text{162}\) In the interest of discouraging such conduct and encouraging social harmony, an action for punitive

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\(^{159}\) See, e.g., Meixner v. Buecksler, 216 Minn. 586, 591, 13 N.W.2d 754, 757 (1944).

\(^{160}\) See, e.g., Furlev Sales & Assocs., Inc. v. North Am. Automotive Warehouse, Inc., 325 N.W.2d 20, 25 (Minn. 1982) (elements of action for wrongful interference with contract include damages to plaintiff); Pedersen v. Daly, 307 Minn. 163, 165, 238 N.W.2d 620, 622 (1976) (court concerned about disproportionate amount of punitive damages in relation to size of general verdict); Crea v. Wuellner, 235 Minn. 408, 411, 51 N.W.2d 283, 284-85 (1952) (showing of malicious, willful conduct in assault and battery action allows for reasonable punitive damages in addition to actual damages sustained); Johnson v. Wolf, 142 Minn. 352, 355, 172 N.W. 216, 217 (1919) (jury has discretion to award punitive damages in addition to actual damages if act was "wanton, malicious, or oppressive"); MacInnis v. National Herald Printing Co., 140 Minn. 171, 175, 167 N.W. 550, 551 (1918) (punitive damages properly submitted although actual damages were small).


\(^{162}\) See Loftsgaarden v. Reiling, 267 Minn. 181, 183-84, 126 N.W.2d 154, 155-56 (1964).
damages does not require the plaintiff to prove actual damages.\textsuperscript{163} Whether injured or not, the plaintiff is entitled to recourse against his defamer.\textsuperscript{164} The corollary is that the defendant circulating false charges should "not be the beneficiary of the circumstance that the plaintiff's character is so well established among his business and professional associates as to preclude proof of specific loss springing from communication of libel."\textsuperscript{165}

The supreme court has not expanded the defamation exception to other causes of action. It has stated in dictum, however, that it is prepared to apply the rule in appropriate cases where the plaintiff cannot prove actual damages but the defendant should be liable for willful misconduct.\textsuperscript{166}

\textit{C. Standard of Defendant's Conduct}

Section 549.20 provides a precise standard for measuring the defendant's conduct. Subdivision one requires that "the defendant show a willful indifference to the rights or safety of others" before punitive damages may be awarded.\textsuperscript{167} Courts have employed various standards to gauge a defendant's conduct in determining an award of punitive damages.

Malice is the legal standard courts most often apply. The Minnesota Supreme Court has defined malice in a number of ways, including "willful indifference,"\textsuperscript{168} "reckless disregard for the rights of others,"\textsuperscript{169} "intentional doing of a wrongful act without

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 182-83, 126 N.W.2d at 155.

\textsuperscript{165} Id. at 183, 126 N.W.2d at 155. In Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980), a salesman with a previously good employment record was forced to resign because of a personality conflict with his supervisor. Id. at 255. The supervisor told the employment agency working with plaintiff that he was the worst salesman ever, and the employment agency then refused to place him. Id. The supreme court held that plaintiff could recover punitive damages even if he could not prove actual damages because employees must be protected from malicious conduct by their employers. Id. at 259; see also National Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 741 (Minn. 1982) (proof of actual damages not necessary to recover punitive damages in defamation suit).

\textsuperscript{166} See Caspersen v. Webber, 298 Minn. 93, 100; 213 N.W.2d 327, 331 (1973) (assuming that plaintiff suffered no bodily injuries, defendant may be liable for punitive damages under Lofsgaarden).

\textsuperscript{167} MINN. STAT. § 549.20, subd. 1.

\textsuperscript{168} Utech v. Shopko Dep't Store, 324 N.W.2d 652, 654 (Minn. 1982) (quoting MINN. STAT. § 549.20).

\textsuperscript{169} Wilson v. City of Eagan, 297 N.W.2d 146, 150 (Minn. 1980); Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232, 237 (Minn. 1980); see Ward v. National Car Rental Sys., 290 N.W.2d 441, 443 (Minn. 1980).
legal justification,"170 "wanton, . . . fraudulent, or oppressive,"171 "conscious violation of the rights" of others,172 "ruthless,"173 and "positive bad faith."174 Each definition refers to the defendant’s conduct. Punitive damages may be awarded in Minnesota only if the conduct meets the malice standard.175

The supreme court has reversed and vacated awards of punitive damages, and instructed trial courts not to submit the question to the jury, when the plaintiff has failed to prove malice. In Cobb v. Midwest Recovery Bureau Co.,176 the court reversed an award of punitive damages against a defendant who negligently repossessed a car.177 The defendant in good faith had concluded that it had statutory authority to take the action that it did.178 The court held that even if the defendant was negligent, the conduct did not "rise to the level of willful or reckless disregard for the rights of the plaintiff."179 In fact, in other cases the supreme court has likened


173. Sneve v. Lunder, 100 Minn. 5, 6, 110 N.W. 99, 100 (1907).

174. Peterson v. Western Union Tel. Co., 72 Minn. 41, 46, 74 N.W. 1022, 1023 (1898).

175. See MINN. STAT. § 549.20, subd. 1 (willful indifference). In Anderson, 104 Minn. 49, 116 N.W. 101, the court stated:

It may be that the words 'wilful' and 'unlawful' do not, under all circumstances, imply malice; but, when used by the court in an instruction in connection with a statement of the facts which constitute an assault . . . they designate a wrongful act, done intentionally, without just or reasonable cause, and such as justifies the jury in awarding exemplary damages.

Id. at 53, 116 N.W. at 102.

176. 295 N.W.2d 232 (Minn. 1980) (as amended on denial of rehearing).

177. Id. at 233. The defendant repossession company, acting as an agent for the defendant financial corporation, repossessed after the plaintiff had been late repeatedly in his car payments. Id. Prior to repossession, the financial corporation had repeatedly accepted the plaintiff’s delinquent payments under two extension agreements. Id. at 234. The jury found the repossession wrongful and awarded the plaintiff $3753.74 in compensatory damages and $20,000 in punitive damages. Id. at 233. The supreme court reversed as to punitive damages, holding that the financial corporation was merely negligent due to its good faith interpretation of the controlling statutory provision. Id. at 237-38.

178. Id. at 237. The court noted "a split of authority regarding the interpretation of U.C.C. § 9-503 (Minn. Stat. § 336.9-503 (1978))," the controlling statute. Due to this "good faith dispute over the law," the court held the financial corporation not liable for punitive damages. Id.

179. Id. at 238; see also Ward, 290 N.W.2d at 443 (good faith conduct in instigation of arrest and false imprisonment did not justify punitive damages).
malice to crime,\textsuperscript{180} and has been intolerant of actions for punitive damages that lack any indication of a malicious motive.\textsuperscript{181}

The court has affirmed punitive damages awards if the plaintiff makes the requisite showing of malice, that is, the "intentional doing of a harmful act without legal justification."\textsuperscript{182} In \textit{Huebsch v. Larson},\textsuperscript{183} the jury found the defendants liable for conversion of the plaintiff's calves.\textsuperscript{184} The animals had wandered onto the defendants' land, and the defendants took and sold them knowing that they were lost.\textsuperscript{185} The court held that the defendants' purpose or intent to do the wrongful act justified the jury's award of punitive damages.\textsuperscript{186} The court has extended the rule of malice to actions involving willfully wrongful acts by the defendant who does not even know the plaintiff.\textsuperscript{187}

\begin{itemize}
\item \textsuperscript{180} \textit{See} Muenkel v. Muenkel, 143 Minn. 29, 33, 173 N.W. 184, 186 (1919) (punitive damages awarded against defendants who threw rocks through window of plaintiff's home, one landing near plaintiff's wife and child).
\item \textsuperscript{181} \textit{See, e.g.}, Benson Coop. Creamery Ass'n v. First Dist. Ass'n, 276 Minn. 520, 151 N.W.2d 422 (1967). In \textit{Benson}, the plaintiff was dismissed from defendant dairy product association, a relationship essential to the plaintiff's business interests. The court held, "To justify an award for punitive damages, the wrongful act must have been done with malicious motive. Such damages are intended as punishment for a willfully wrongful act, done with malice." \textit{Id.} at 528-29, 151 N.W.2d at 427 (footnote omitted).
\item \textsuperscript{182} Johnson v. Radde, 293 Minn. 409, 410, 196 N.W.2d 478, 480 (1972) (defining malice).
\item \textsuperscript{183} 291 Minn. 361, 191 N.W.2d 433 (1971).
\item \textsuperscript{184} \textit{Id.} at 361, 191 N.W.2d at 434. The jury awarded $380 in compensatory damages and $750 in punitive damages. The trial court, however, ordered judgment notwithstanding the verdict awarding only compensatory damages. \textit{Id.} at 361-62, 191 N.W.2d at 434.
\item \textsuperscript{185} \textit{Id.} at 362-63, 191 N.W.2d at 434. The defendants cared for the calves for nine days while they contacted at least one of their neighbors in an effort to find the owner. Their efforts to find the rightful owner were not extensive. \textit{Id.}
\item \textsuperscript{186} \textit{Id.} at 364, 191 N.W.2d at 435. "There is a strong policy against conversion of property. The strength of that policy is demonstrated by the fact that punitive damages may be recovered when the conversion is accompanied by a reckless disregard for the rights of others." \textit{Id.}
\item \textsuperscript{187} \textit{See} Wilson v. City of Eagan, 297 N.W.2d 146, 150-51 (Minn. 1980) (animal warden killed plaintiff's cat without impounding the animal for five business days as required by statute).
\end{itemize}
The court has taken varied approaches in actions against joint tortfeasors. In *Nelson v. Halvorson*, the trial court instructed the jury that each of two defendants must be liable for an equal amount of punitive damages. The supreme court held that this instruction was erroneous because the jury was unable to consider whether one of the defendants had acted in good faith. In addition, the court ruled that damages should be assessed separately, because "[t]he difference in financial condition of the two defendants would alone justify the jury in imposing different amounts."

The *Nelson* rule satisfies the punishment and deterrence functions of punitive damages by requiring that the conduct of joint tortfeasors be evaluated separately. Consequently, this approach should apply even when the defendants participate in the same event that harms the plaintiff.

Separate verdicts seem to be imperative if the prerequisite for punitive damages is a finding that the defendant’s actions were malicious or willfully indifferent. Separate verdicts also allow the jury to assess an amount of punitive damages based on the defendant’s ability to pay.

In meetings regarding the statutory standard, the legislators considered the large punitive damages awards in products liability actions. The legislature received testimony expressing concern that the current national trend in products liability actions reflected increases in the frequency and amount of punitive damages awards. The legislature also grappled with problems in attributing intent to a corporate entity for purposes of assessing punitive damages.

188. 117 Minn. 255, 135 N.W. 818 (1912). Plaintiff sued a businessman for wrongful attachment and the constable who served the writ for false arrest. *Id.* at 256, 135 N.W. at 818.

189. *Id.* at 259, 135 N.W. at 819.

190. *Id.* "The actual damages from an unlawful act may not be mitigated, strictly speaking, by showing absence of actual malice. But the rule as to punitive damages is that good faith and a proper purpose shown either lessens or avoids them." *Id.*

191. *Id.* at 260, 135 N.W. at 819.


damages. The author of the statute, Senator Davies, referred in committee to the "Pinto case," and the Richardson-Merrell, Inc. cases, which involved corporate defendants' knowledge of their products' dangerous propensities. The Minnesota statute, like the common law, requires intentional conduct, or at least indifference by the defendant toward the rights of the plaintiff. One author has defined "indifference" to mean:

'Indifference' to the public safety conveys the idea that the manufacturer simply does not care whether or to what extent the public safety may be endangered by its product despite the availability of feasible means to reduce the danger substantially. It implies a basic disrespect and consequent disregard for the interests of others. Since Minnesota's statute apparently requires awareness by the defendant of wrongdoing, the plaintiff likely will be under a more difficult burden of proof as to corporate defendants.

By comparison, in non-products cases the willful indifference standard will not significantly affect the law of punitive damages as it developed at common law. The various terms used to describe the defendant's requisite conduct included malice, willful, wanton, and reckless. The language has changed, but knowledge and intent are still basic elements of recovery under the statute. Essentially, then, the new standard appears to be a codification of common law.

D. Factors Used to Determine the Amount of Punitive Damages

At common law, the discretion to award punitive damages and the amount to be awarded rested with the jury. The original draft version of the punitive damages statute followed the common law by allowing the trier of fact to determine whether punitive damages should be awarded. This draft version, however, pro-

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194. Senator Davies is a Professor of Law at William Mitchell College of Law in Saint Paul, Minnesota.
199. See supra notes 168-75 and accompanying text.
200. See infra notes 203-31 and accompanying text.
vided that the court would determine the amount of those damages. 201 This version was later amended to provide that the amount awarded remains in the discretion of the trier of fact, the court, or a jury. 202

I. The Role of the Jury

Once the plaintiff has made an adequate showing of willful misconduct, the fate of a claim for punitive damages rests with the jury. The jury decides whether to award punitive damages. 203 Additionally, the amount of punitive damages is a matter "emphatically for the jury." 204 As a fact question peculiar to each case, an award of punitive damages is never determinative of what award is proper in another case. 205

The Minnesota Supreme Court has consistently and zealously guarded the jury's discretion to award punitive damages. The court has reversed lower courts for interfering with the jury's reasonable exercise of its discretion. On several occasions, the court has held that it is reversible error for the trial court to direct the jury to award punitive damages. In Kirschbaum v. Lowrey, 206 the

201. Professor Owen's analysis of this rationale is as follows:
First, it would reduce the probability that punitive damages awards might be unduly influenced by emotion, since most judges are presumably more detached in their deliberation and therefore more likely to render objective damages assessments. Additionally, evidence of the defendant's wealth that could prejudice the jury on the issue of liability could then be excluded from jury consideration. Further, judges would be able to call upon their experience in criminal sentencing, unavailable to jurors, in evaluating the need for punishment and deterrence in particular cases. Finally, trial judges usually have a more sophisticated appreciation than jurors of the often far-reaching effects that punitive damages awards may have on the operations of particular corporate defendants.

Owen, supra note 198, at 1320-21.


203. See Marston, 329 N.W.2d at 312 (citing Wilson v. City of Eagan, 297 N.W.2d 146, 150-51 (Minn. 1980)) (whether punitive damages are appropriate under the facts of a particular case is within discretion of the jury, and weight and force given to the evidence is exclusively a jury question); Huebsch v. Larson, 291 Minn. 361, 364, 191 N.W.2d 433, 435 (1971) (whether punitive damages are allowed rests in the discretion of the jury under all circumstances of the case); Crea v. Wuellner, 235 Minn. 408, 411, 51 N.W.2d 283, 284 (1952) (if evidence shows wanton or malicious conduct, question of allowing punitive damages is for the jury in the exercise of its sound discretion); Johnson v. Wolf, 142 Minn. 352, 354, 172 N.W. 216, 217 (1919) (any evidence warranting allowance of punitive damages is considered solely by the jury); Lynd v. Picket, 7 Minn. 184, 200 (Gil. 128, 142-43) (1862) (jury is permitted to award punitive damages).

204. Sweeney v. Meyers, 199 Minn. 21, 24, 270 N.W. 906, 907 (1937) (citing Peck v. Small, 35 Minn. 465, 467, 29 N.W. 69, 70 (1886)).

205. Bronson Steel Arch Shoe Co. v. T.K. Kelly Inv. Co., 183 Minn. 135, 139, 236 N.W. 204, 206 (1931).

206. 165 Minn. 233, 206 N.W. 171 (1925).
trial court directed the jury to award punitive damages if it found that the defendant had willfully and wantonly assaulted the plaintiff.\textsuperscript{207} On appeal, the supreme court held that the trial court had improperly interfered with the jurors' discretion.\textsuperscript{208} The court stated that the jury's "good sense and sound judgment" should determine whether punitive damages should be awarded.\textsuperscript{209}

Similarly, in Sneve v. Lunder,\textsuperscript{210} the supreme court held that instructing the jury that the defendant deserved to be punished was equivalent to directing an award of punitive damages.\textsuperscript{211} According to the Sneve court, the trial court's duty is to explain to the jury the meaning of punitive damages, and to state the circumstances and conditions upon which such damages may be awarded.\textsuperscript{212} The jury may then award punitive damages in its discretion.\textsuperscript{213} The court has also held that it is error not to instruct jurors that awarding punitive damages is within their discretion.\textsuperscript{214}

Once a jury exercises its discretion, Minnesota courts rarely interfere with its findings. An award will be disturbed only when it is so excessive as to be deemed unreasonable.\textsuperscript{215} An unreasonable award is often determined by the trial court to be excessive and the result of passion or prejudice on the part of the jury.\textsuperscript{216}

In Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.,\textsuperscript{217} the Minnesota Supreme Court affirmed the trial court's refusal to disturb a punitive damages award of $50,000.\textsuperscript{218} The court noted that the defendant made no showing of passion or prejudice by the jury; that no prejudicial testimony or comments were heard which would have acted to inflate the size of the damages award; and that sufficient evidence of malice existed to justify an award of

\textsuperscript{207} Id. at 237, 206 N.W. at 173.
\textsuperscript{208} See id. at 236-37, 206 N.W. at 173.
\textsuperscript{209} Id. at 236, 206 N.W. at 173.
\textsuperscript{210} 100 Minn. 5, 110 N.W. 99 (1907).
\textsuperscript{211} Id. at 6, 110 N.W. at 100.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{215} See Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 259 (Minn. 1980) (citing Hammersten v. Reiling, 262 Minn. 200, 209, 115 N.W.2d 259, 266, cert. denied, 371 U.S. 862 (1962)).
\textsuperscript{216} See Hammersten, 262 Minn. at 209, 115 N.W.2d at 265-66; Bronson Steel Arch Shoe Co., 183 Minn. at 139, 236 N.W. at 206.
\textsuperscript{217} 329 N.W.2d 306 (Minn. 1983) (as modified on denial of rehearing).
\textsuperscript{218} Id. at 311-12. The jury assessed the punitive damage award against a therapist for having sex with naive patients in violation of the rules and ethical cannons governing his profession. Id. at 312.
punitive damages. 219

In Melina v. Chaplin, 220 the court left undisturbed a punitive damages award of $35,000 despite serious reservations about the size of the verdict. 221 The court stated that the amount of punitive damages should not exceed that necessary to properly punish and deter. 222 Nevertheless, the court was constrained to deny a new trial because the defendant offered no evidence of his inability to pay. 223 Thus, despite explicit reluctance to affirm an award of punitive damages, judges will do so rather than interfere with the reasonable exercise of the jury's discretion. 224

Where the supreme court has reduced a jury's award of punitive damages, it has done so reluctantly. In Stanger v. Gordon, 225 the court reduced a punitive damages award of $12,900, stating:

Mindful as we are of intruding on a function addressed almost entirely to the trial judge's discretion, we are collectively agreed that the punitive damages should be reduced to $7,500. We do not, as is generally the case, condition this reduction upon plaintiff's consent because we regard a retrial limited to the issue of punitive damages as impractical and a new trial on all issues as realistically unacceptable to plaintiff. 226

The jury's discretion in weighing the evidence and determining the amount of punitive damages is now guided by Minnesota's punitive damages statute. 227 The punitive damages statute does not list the plaintiff's injury as a factor in determining the amount of a punitive damages award. 228 Although the Eisert court ruled that the nature of the plaintiff's injury may be considered in determining punitive damages, 229 Eisert was decided solely on the plaintiff's claim for relief in strict products liability, 230 and may therefore be

219. Id. at 312.
220. 327 N.W.2d 19 (Minn. 1982).
221. Id. at 20 n.1. The jury awarded the plaintiff $2000 in compensatory damages and $35,000 in punitive damages against a police officer who used unnecessary force in making an arrest. Id. at 20.
222. Id. at 20 n.1.
223. Id. at 20.
224. See id.
225. 309 Minn. 215, 244 N.W.2d 628 (1976).
226. Id. at 222, 244 N.W.2d at 632. Two factors peculiar to this case appear to have made the supreme court's decision to reduce the award easier. First, the plaintiff had asked only for $7500 in punitive damages. Second, the court felt that certain comments of the plaintiff's counsel may have improperly influenced the size of the award. See id.
227. MINN. STAT. § 549.20, subd. 3 (1982).
228. See id.
229. Eisert, 314 N.W.2d at 229.
230. Id. at 228.
PUNITIVE DAMAGES

2. Statutory Guidance

Subdivision three of Minnesota Statutes section 549.20 lists factors to be considered in awarding punitive damages. The factors relate to the defendant's conduct, knowledge, remorse or lack thereof, and financial condition. The Minnesota Supreme Court has applied these criteria in one non-products case affirming, but reducing, an award of punitive damages.

Perhaps the most interesting factor in the statute is "the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to the plaintiff and other similarly situated persons." In other words, the factfinder, when determining the amount of punitive damages, is to consider whether the defendant has already been punished and deterred by punitive damages in other actions arising from the same type of misconduct.

This factor raises issues peculiar to products liability actions. Is it fair to allow "the first to the well" to collect an amount of punitive damages that perhaps should be shared among all harmed persons? Is it fair for the first plaintiff in a mass disaster case to "break the bank" by collecting a large punitive damages award?

231. In Wilson v. City of Eagan, 297 N.W.2d 146 (Minn. 1980), the court reviewed an award of punitive damages based solely on evidence relating to defendant's conduct. See id. at 151. The conduct involved the killing of plaintiff's cat by the defendant animal warden. Id. at 147.

232. MINN. STAT. § 549.20, subd. 3 (1982) states:

Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

233. Id.

234. See Wilson, 297 N.W.2d 146. The Wilson court stated that a court examining the reasonableness of a punitive damages award should consider "among other factors, the degree of malice, intent, or willful disregard, the type of interest invaded, the amount needed to truly deter such conduct in the future, and the cost of bringing the suit." Id. at 151 (citing MINN. STAT. § 549.20 (1978)).

235. MINN. STAT. § 549.20, subd. 3 (1982) (emphasis added).
and for subsequent plaintiffs to recover no punitive damages because the juries were informed of the first plaintiff's large award? The first plaintiff alone receives a windfall because his trial was first in time. Although plaintiffs in Minnesota are not entitled as a matter of right to punitive damages, subsequent plaintiffs may be in a worse position than the first plaintiff who receives adjudication of his claim. Yet, one author suggests that there is some merit to awarding punitive damages to the first plaintiff: "This conception ignores the enormous diligence, imagination, and financial outlay required of initial plaintiffs to uncover and to prove the flagrant misconduct of a product manufacturer. In fact, subsequent plaintiffs will often ride to favorable verdicts and settlements on the coattails of the firstcomers." Plaintiffs' attorneys whose clients do not participate in an initial punitive damages award must develop arguments in support of sharing such awards with the initial plaintiff. Counsel for all parties, however, should benefit from the legislature's codification of the guidelines to determine the amount of a punitive damages award.

E. Principal's Liability for Acts of His Agent

Prior to the enactment of Minnesota Statutes section 549.20, the Minnesota Supreme Court recognized the theory of respondeat superior in assessing punitive damages against a principal or master for the malicious acts of its agent or servant. One commentator suggested, however, that the theory of respondeat superior has no place in the law of punitive damages:

The 'deep pocket' notion, which has as its sole objective the shifting of a loss to one who is financially able to compensate the victim, is inapplicable to damages that are not intended to be compensatory . . . the better risk-spreader notion is flatly inconsistent with the stated purposes of punitive damages, since the spreading of the loss dulls the sting and weakens deterrence.

236. See supra note 131.
238. Owen, supra note 198, at 1325 (footnote omitted).
240. Ellis, supra note 8, at 1038.
Nevertheless, the supreme court followed the rule that "[o]ne who employs another to do an act for his benefit, and who has the choice of the agent, ought to take the risk of injury to third persons by the manner in which he does the business." 241

Minnesota's punitive damages statute codifies the concept of vicarious liability for punitive damages, limiting awardability against a principal to certain situations. To analyze these situations, vicarious liability may be viewed as arising in two contexts: the private corporation and the municipality.

1. Private Corporations

By the turn of the century, Minnesota law was well-settled that a private corporation could be liable for punitive damages attributable to the malicious conduct of its agents or servants acting within the scope of their employment. 242 In the early case of Schmidt v. Minor, 243 the son of a hotel owner started a fight with an employee who had resigned. 244 The supreme court affirmed a punitive damages award against the owner for his son's malicious assault and battery. 245 Although the principal did not ratify the agent's actions, the court held he was liable because the agent's actions were in the performance of his duties and within the scope of his employment. 246 One rationale the court used to support vicarious liability for punitive damages is the selection of agents by the principal and the responsibility principals must accept for the agents' propensity to harm. 247 The rule also recognizes that a business of any size is conducted through agents and servants who have direct contact with others. 248 Finally, the court held that it would "be equivalent to abolishing" punitive damages "for a judgment against an employee is often uncollectable and no punishment to the wrongdoer." 249

Minnesota's punitive damages statute offers the principal more protection than did the common law for the malicious acts of an errant agent. The statute requires the plaintiff to show that the

241. Peterson, 75 Minn. at 373, 77 N.W. at 986.
243. 150 Minn. 236, 184 N.W. 964 (1921).
244. Id. at 238, 184 N.W. at 965.
245. Id. at 240, 184 N.W. at 966.
246. Id. at 239, 184 N.W. at 965.
247. Id. at 240, 184 N.W. at 966.
248. Id.
249. Id.
agent's conduct is attributable to the superior. The statute states in relevant part:

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:
(a) the principal authorized the doing and the manner of the act, or
(b) the agent was unfit and the principal was reckless in employing him, or
(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
(d) the principal or a managerial agent of the principal ratified or approved the act.250

The statute overrules the common law standard that required the plaintiff to show only that he was harmed by an agent engaged in his duties and within the scope of his employment.

Subdivision two is very similar to section 909 of the Restatement of Torts.251 The comments to section 909 state in part:

It is . . . within the general spirit of the rule to make liable an employer who has recklessly employed or retained a servant or employee who was known to be vicious, if the harm resulted from the characteristic. Nor is it unjust that a person on whose account another has acted should be responsible for an outrageous act for which he otherwise would not be if, with full knowledge of the act and the way in which it was done, he ratifies it, or, in cases in which he would be liable for the act but not subject to punitive damages, he expresses approval of it.252

250. Minn. Stat. § 549.20, subd. 2.
251. Restatement (Second) of Torts § 909 (1979).
252. Id., comment b. Illustrations given by this section are as follows:

1. A employs an ejectment company to dispossess a tenant. A knows that the company has a reputation for using undue force in dealing with tenants. An employee of the company, in accordance with its usual methods, commits an unprovoked battery upon B, the wife of the tenant, in order to induce her to leave. In an action by B against A, punitive damages can properly be awarded.

2. A, the owner of a theatre, employs a special policeman to keep order. In ejecting a small boy from the theatre, the policeman cruelly abuses him. Upon learning the facts, A expresses his approval. Punitive damages can properly be awarded against A in an action for the battery.

3. A, a corporation owning a series of retail stores, employs B as operations manager to supervise the management of the units. While visiting a unit B discovers facts that lead him to believe erroneously that one of the clerks has been stealing. He directs the local manager to imprison the clerk. In the ensuing interview he permits the local manager to use outrageous means of intimidation. In the clerk’s action against the corporation, punitive damages can properly be awarded.

Id., illustrations 1-3.
Subdivision 2(c) of section 549.20, requiring the agent to be employed in a managerial capacity and acting in the scope of employment, is more restrictive than the common law. Comment a to section 217C of the Restatement (Second) of Agency\textsuperscript{253} notes, "some courts impose liability upon a master for unauthorized wanton acts of servants who are not managers; others do not."\textsuperscript{254} Minnesota's common law did not limit "scope of employment" liability to managers.\textsuperscript{255} Thus, the Minnesota statute further limits a principal's liability for punitive damages. Nevertheless, "managerial capacity" is not defined, allowing some flexibility for the courts.\textsuperscript{256}

2. Municipalities

Minnesota law prohibits recovery of punitive damages against municipal corporations.\textsuperscript{257} Although the punitive damages law pertaining to employer municipalities is settled, employees of municipalities may be liable for punitive damages.

In \textit{Douglas v. City of Minneapolis},\textsuperscript{258} a citizen challenged the city council's decision to pay punitive damages on behalf of city police officers who were found liable for violating the civil rights of private citizens.\textsuperscript{259} The Minnesota Supreme Court held that the city was empowered to indemnify municipal employees against punitive damages awards under "fitting and proper" circumstances.\textsuperscript{260} The court assumed, however, that the employees' actions leading to the judgment occurred in the performance of duties, and did not arise as a result of "malfeasance in office or wilful or wanton neglect of duty."\textsuperscript{261}

\textsuperscript{253.} \textit{Restatement (Second) of Agency} § 217C (1957). \textit{Restatement (Second) of Torts} § 909 (1979) duplicates \textit{Restatement (Second) of Agency} § 217C (1957).

\textsuperscript{254.} \textit{Restatement (Second) of Agency} § 217C comment a (1957); \textit{see also City of Minneapolis v. Richardson}, 307 Minn. 80, 92 n.14, 239 N.W.2d 197, 205 n.14 (1976).

\textsuperscript{255.} \textit{See id.} at 91-92, 239 N.W.2d at 204 (City of Minneapolis held liable for punitive damages for actions of police officers who violated the Minnesota Human Rights Act); \textit{see also Anderson v. International Harvester Co. of Am.}, 104 Minn. 49, 116 N.W. 101 (1908).

\textsuperscript{256.} The Minnesota Supreme Court has had one opportunity to consider vicarious liability for punitive damages, but did not address the question. In \textit{Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.}, 329 N.W.2d 306 (Minn. 1983) (as modified on denial of rehearing) the court found no evidence in the record to support an award of punitive damages against the employer, and did not address the employer's liability for punitive damages because the issue was not before it on appeal. 329 N.W.2d at 312.

\textsuperscript{257.} \textit{See Minn. Stat.} § 466.04, subd. 1 (1982).

\textsuperscript{258.} 304 Minn. 259, 230 N.W.2d 577 (1975).

\textsuperscript{259.} \textit{Id.} at 265, 230 N.W.2d at 583.

\textsuperscript{260.} \textit{Id.} at 270, 230 N.W.2d at 585.

\textsuperscript{261.} \textit{Id.} at 273-74, 230 N.W.2d at 587.
The city's decision to assume liability for the actions of its agents could be viewed as an incentive to recruit and train better and more dependable employees, particularly those vested with police power. The taxpayer, however, who exercises no control over officials and would not condone illegal acts by them, ultimately pays the judgment.

In *Douglas*, the supreme court encouraged municipalities to carefully scrutinize a decision to indemnify their employees based on the following considerations: whether the employee acted in good faith; whether he acted pursuant to a superior's orders; whether paying or not paying the judgment would affect morale; whether the act was deemed to be in the line of duty; whether the act was the result of malfeasance in office or willful or wanton neglect of duty; and whether it is fitting and proper to pay the judgment based on the public's and the municipality's best interests.\(^{262}\)

The court has also held that the punitive damages statute did not change the law of municipal liability for punitive damages in respondeat superior.\(^{263}\) Thus, municipal employees remain subject to claims for punitive damages, and municipalities in proper cases may indemnify them.

**IV. CONCLUSION**

The punitive damages remedy is quasi-criminal in nature, blending together in a civil action punishment and deterrence of unacceptable conduct with a cash award to the plaintiff. Minnesota courts have applied well-settled principles underlying the law of punitive damages to arrive at just results. The Minnesota Supreme Court has, on occasion, departed from these principles and arrived at results which cannot be fully explained. Nevertheless, the legislature has now codified the punitive damages remedy, establishing jurisdictional and evidentiary requirements for punitive damages awards. The statute emphasizes the conduct of the defendant in measuring awards of punitive damages, and should give the courts guidance in future cases. Even with the additional

\(^{262}\) Id. at 270-71, 230 N.W.2d at 585-86.

\(^{263}\) See Paradise v. City of Minneapolis, 297 N.W.2d 152, 156 n.5 (Minn. 1980) (prohibition against municipal liability for punitive damages does not prohibit such liability of municipal employees and officers); Wilson v. City of Eagan, 297 N.W.2d 146 (Minn. 1980) (interpreting MINN. STAT. § 466.04, subd. 1a (1978) to allow punitive damages against municipal officers and employees).
guidelines provided by the statute, the powerful remedy of punitive damages will require close judicial scrutiny to insure its reasoned application.