

## Civ. J.I. 13.1827 Punitive damages; direct and vicarious liability.

### 13-1827. Punitive damages; direct and vicarious liability.

Statute text

#### (Introduction)

In this case, \_\_\_\_\_ (name of party making claim for punitive damages) seeks to recover punitive damages from \_\_\_\_\_ (name of party against whom punitive damages are sought, either directly or vicariously). You may consider punitive damages only if you find that \_\_\_\_\_ (party making claim) should recover compensatory [or nominal] damages.

#### (Direct Liability)

If you find that the conduct of \_\_\_\_\_ (name of party against whom direct liability for punitive damages is asserted) was [malicious], [willful], [reckless], [wanton], [fraudulent] [or] [in bad faith], then you may award punitive damages against [him] [her] [it].

#### (Vicarious Liability)

Additionally, if you find that the conduct of \_\_\_\_\_ (name of agent or employee of party on whose conduct vicarious claim for punitive damages is based) was [malicious], [willful], [reckless], [wanton], [fraudulent] [or] [in bad faith], you may award punitive damages against \_\_\_\_\_ (name of party against whom vicarious liability for punitive damages is asserted) if:

(A) \_\_\_\_\_ (name of agent or employee) was acting in the scope of [his] [her] employment by \_\_\_\_\_ (name of party) and had sufficient discretionary or policy-making authority to speak and act for [him] [her] [it] with regard to the conduct at issue, independently of higher authority; [or if]

(B) \_\_\_\_\_ (name of party) in some [other] way [authorized,] [participated in] [or] [ratified] the conduct of \_\_\_\_\_ (name of agent/employee).

#### (Definitions)

Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was

wrongful.

Willful conduct is the intentional doing of an act with knowledge that harm may result.

Reckless conduct is the intentional doing of an act with utter indifference to the consequences.

Wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person's [rights] [safety].

#### (Conclusion)

Punitive damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount awarded, if any, must be reasonably related to the injury and to any damages given as compensation and not disproportionate to the circumstances.

#### DIRECTIONS FOR USE

This instruction provides a general framework for a punitive damage instruction usable in any civil action involving direct or vicarious claims for punitive damages. Some other chapters of UJI Civil contain punitive damage instructions specifically applicable to particular causes of action which should be used where appropriate. See, e.g., UJI 13-861 (contracts and UCC sales) and 13-1718 (insurance bad faith).

This instruction is divided into sections by italicized headers for ease of reference in these directions for use. The headers should not be included in the instruction as given to the jury. Within each section, bracketed language should be selected as appropriate.

The sections labeled Introduction and Conclusion should always be given. UJI 13-1832 must be given following this instruction if the bracketed reference to nominal damages is included in the "Introduction". Where the case includes a claim for punitive damages on a theory of direct liability, the section labeled "Direct liability" should be given. Where the case includes a claim for punitive damages on a theory of vicarious liability, the section labeled "Vicarious liability" should be given. Depending on the facts and pleadings, both direct and vicarious claims may be included in the same case, against the same or different parties. Subparagraphs A and B of the Vicarious Liability section should be given as appropriate, unless the court determines that the

elements addressed in these subparagraphs (scope of authority and managerial capacity, or authorization, participation, ratification) have been established as a matter of law. Appropriate entries from the "Definitions" section should be given depending on whether the offending conduct is alleged to be malicious, willful, etc.

Separate verdicts must be used for punitive damages when there is more than one party against whom punitive damages are sought.

In an unusual or complex case, it may be appropriate to modify this general form of instruction to instruct the jury clearly and correctly on the law. *See* Committee Comment.

#### History

[Adopted, effective November 1, 1991; as amended, effective July 1, 1998.]

#### Annotations

**Committee commentary.** - Punitive damages cannot be recovered without a recovery of compensatory or nominal damages. *Sanchez v. Clayton*, 117 N.M. 761, 767, 877 P.2d 567, 673 (1994); *Hudson v. Otero*, 80 N.M. 668, 459 P.2d 830 (1969); *Montoya v. Moore*, 77 N.M. 326, 422 P.2d 363 (1967); *Crawford v. Taylor*, 58 N.M. 340, 270 P.2d 978 (1954).

The standard for an award of punitive damages vicariously against an employer or principal is addressed in *Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*, 118 N.M. 140, 879 P.2d 772 (1994), *Brashear v. Baker Packers*, 118 N.M. 581, 883 P.2d 1278 (1994), and *Rhein v. ADT Automotive, Inc.*, 122 N.M. 646, 930 P.2d 783 (1996).

The bracketed phrases of this instruction which describe the types of conduct giving rise to punitive damages are disjunctive; if, for example, a defendant acts recklessly, it is unnecessary to show intentional misconduct. *Greentree Acceptance, Inc. v. Layton*, 108 N.M. 171, 173, 769 P.2d 84, 86 (1989); *State Farm Gen. Ins. Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974); *see also Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 628, 776 P.2d 1244, 1247 (1989). The New Mexico Supreme Court in *Paiz v. State Farm Fire & Casualty Co.*, 118 N.M. 203, 213, 880 P.2d 300, 310 (1994) eliminated gross negligence as a basis for an award of punitive damages for contract claims. Following the decision in *Paiz*, the committee recommended that gross negligence be removed as a basis for punitive damages in both contract and tort cases. This recommendation was adopted by the New Mexico Supreme Court in 1998.

The Supreme Court indicated in *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 881 P.2d 11 (1994), that the risk of danger posed by the product or the tortfeasor's conduct is a valid consideration in determining whether the conduct

risks to the level of recklessness necessary to show a culpable mental state. Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to establish the requisite culpable mental state to support an award of punitive damages.

Punitive damages against more than one party must be separately stated. *Vickrey v. Dunivan*, 59 N.M. 90, 279 P.2d 853 (1955).

In some cases it may be appropriate to modify this general form of instruction to instruct the jury clearly and correctly on the law. For instance, it may be necessary to specify the kind of conduct allegedly giving rise to direct or vicarious punitive damages liability against various parties - *e.g.*: "If you find that the conduct of Truck Driver in his driving of the vehicle leading up to the accident was reckless or wanton, then you may award punitive damages against him. If you find that the conduct of Trucking Company in connection with its screening and hiring of Truck Driver was reckless or wanton, then you may award punitive damages against it. Additionally, if you find that the conduct of Truck Driver was reckless or wanton, you may award punitive damages against Trucking Company if ...."

#### COMPILER'S ANNOTATIONS

**The 1998 amendment**, effective for cases filed on and after July 1, 1998, rewrote this instruction.

**Compiler's notes.** - Pursuant to a supreme court order dated July 17, 1991, former UJI 13-1827, relating to exemplary or punitive damages, is withdrawn, and the above instruction is adopted, effective November 1, 1991.

**When punitive damages awarded.** - Punitive damages may be awarded only when the wrongdoer's conduct may be said to be maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the plaintiff's rights. These words are to be taken as used in the disjunctive. *Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 769 P.2d 84 (1989).

Punitive damages may be awarded against wrongdoer in contract action when his conduct is maliciously intentional, fraudulent, oppressive or committed recklessly or with a wanton disregard of the wronged party's rights. *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), *rev'd on other grounds*, 89 N.M. 187, 548 P.2d 865 (1976).

Punitive damages are to be awarded when actual or nominal damages are inadequate to satisfy the wrong committed. *Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 769 P.2d 84 (1989).

**Alternative bases for punitive damages award.** - When the jury instructions provide two alternative bases for awarding punitive damages, the jury verdict will be

upheld if there is substantial evidence in the record to support either. *Atler v. Murphy Enterprises, Inc.*, 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. granted, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 579, cert. quashed, 2005-NMCERT-008, \_\_\_ N.M. \_\_\_, \_\_\_ P.3d \_\_\_.

**Evidence justified award of punitive damages.** - Where a review of the record leads to the conclusion that there was substantial evidence from which the jury could conclude that defendants demonstrated an utter indifference to the consequences or a conscious disregard for public safety when they failed to conduct the required inspections and abdicated their responsibility to operate the ride at the New Mexico State Fair in a safe manner, there was evidence to support a finding that defendants' conduct was reckless or wanton, justifying an award of punitive damages. *Atler v. Murphy Enterprises, Inc.*, 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. granted, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 579, cert. quashed, 2005-NMCERT-008, \_\_\_ N.M. \_\_\_, \_\_\_ P.3d \_\_\_.

**Cause of action required.** - Punitive damage awards must be supported by an established cause of action. *Sanchez v. Clayton*, 117 N.M. 761, 877 P.2d 567 (1994).

**Requirements for awarding punitive damages.** - For punitive damages to be imposed on an employer for the misconduct of an employee, a plaintiff must prove (1) employer authorization, participation, or ratification and (2) that the employee's conduct satisfied the general requirements for the imposition of punitive damages. *Campbell v. Bartlett*, 975 F.2d 1569 (10th Cir. 1992).

Where plaintiff introduced no documentation or evidence to show that safety problems arose from or reflected a reckless indifference, a culpable mind, actual malice, or a conscious disregard for workers' safety, or evidence that defendant simply disregarded applicable safety features and practices, the plaintiff has not produced evidence sufficient to show the culpable mental state necessary to support an award of punitive damages. *Couch v. Astec Indus., Inc.*, 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, cert. denied, 132 N.M. 551, 52 P.3d 411 (2002).

**Summary judgment improper when authorization in issue.** - Where there is a material issue of fact whether a corporation, through its policies and tariffs, authorized the actions of its employees, summary judgment on punitive damages is improper. *Templin v. Mountain Bell Tel. Co.*, 97 N.M. 699, 643 P.2d 263 (Ct. App. 1982).

**Factors to be weighed in assessing punitive damages** are the enormity and nature of the wrong and any aggravating circumstances. *Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 769 P.2d 84 (1989).

**Requires more than gross negligence.** - The limited purpose of punitive damages is to punish and deter

persons from conduct manifesting a "culpable mental state". Thus, the proposition that in a contract case, including one involving an insurance contract, punitive damages may be predicated solely on gross negligence is disavowed. Now, in addition to, or in lieu of, such negligence there must be evidence of an "evil motive" or a "culpable mental state." *Paiz v. State Farm Fire & Cas. Co.*, 118 N.M. 203, 880 P.2d 300 (1994).

**Punitive damages may be apportioned among several wrongdoers** according to the degree of culpability or according to the existence or nonexistence of the requisite state of mind for such damages in the several defendants. *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 187, 548 P.2d 865 (1976).

**Punitive damage award must be related to injury and actual damages proven.** - The amount of an award of punitive damages must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice. *Chavez-Rey v. Miller*, 99 N.M. 377, 658 P.2d 452 (Ct. App. 1982).

Punitive damages do not have to be in reasonable proportion to the actual damages, but they must not be so unrelated to the injury as to plainly manifest passion and prejudice rather than reason and justice. *Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 769 P.2d 84 (1989).

**Damages related to degree of negligence.** - Whether under a theory of contract or tort, the submission of the issue of punitive damages should be in language of either gross negligence or reckless disregard for the interests of the insured and is especially appropriate when the evidence shows the insurer utterly failed to exercise care for the interests of the insured in denying or delaying payment on an insurance policy. *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244 (1989).

Although the agent of the insurance company incorrectly advised the plaintiff that the policy it bought covered on-the-job injuries and that it was not necessary to buy a separate worker's compensation policy, the conduct of the insurer's agent, who never read the Worker's Compensation Act, did not amount to gross negligence, as the policy language was ambiguous and was later clarified by the company. Thus, punitive damages were not recoverable. *Charter Servs., Inc. v. Principal Mut. Life Ins. Co.*, 117 N.M. 82, 868 P.2d 1307 (Ct. App. 1994).

**Gross negligence still sound basis for punitive damages.** - A finding of gross negligence is still a sound basis for awarding punitive damages, even though the concept of gross negligence is abolished as a defense against contributory negligence. *Ruiz v. Southern Pac.*

Transp. Co., 97 N.M. 194, 638 P.2d 406 (Ct. App. 1981).

**Bad faith will support an award for punitive damages.** Boudar v. E.G. & G., Inc., 106 N.M. 279, 742 P.2d 491 (1987).

**Employer's actions establishing liability for punitive damages.** - An employer's knowledge that a polygraph examination which resulted in an employee's termination was defective, and his failure to advise the employee's supervisor of the error, constituted a callous disregard to the rights and interests of the employee and supported a finding of liability for punitive damages. Conant v. Rodriguez, 113 N.M. 513, 828 P.2d 425 (Ct. App. 1992).

**Finding of intentional emotional distress in sexual harassment by employee.** - Where employer received several reports of employee's sexual harassment of his co-workers, but took no action, there was sufficient cause for a finding of intentional emotional distress against plaintiff, so as to warrant punitive damages. Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999.

**Cumulative conduct of employees may demonstrate corporate recklessness.** - Companies should not escape liability because their employees failed to communicate with each other. The culpable mental state of the corporation may be inferred from the very fact that one employee could be ignorant of the acts or omissions of other employees with potentially disastrous consequences. Clay v. Ferrellgas, Inc., 118 N.M. 266, 881 P.2d 11 (1994), cert. denied, 513 U.S. 1151, 115 S. Ct. 1102, 130 L. Ed. 2d 1069 (1995).

**Punitive damages based on employee's culpable state of mind.** - Jury instructions as to punitive damages, which failed to protect defendant from improper jury prejudice based on defendant's employee's culpable state of mind and his dishonesty following the accident, were erroneous. Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197.

**Insurance coverage.** - Punitive damages arising from an automobile accident were covered by defendant's insurance policy, which provided that the insurer pay "damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident." Baker v. Armstrong, 106 N.M. 395, 744 P.2d 170 (1987).

**Discovery sanctions distinguished.** - Since the factual information available to the court and jury at the time of trial did not support sanctions against the defendant, sanctions could not have been included in an award of punitive damages, and an award of sanctions more than two years after the final judgment, based on discovery violations, did not duplicate the award for punitive damages; even if the available information had

been sufficient to sustain sanctions at the time of the trial, the sanctions would not have been subsumed by the award of punitive damages since such damages concern the defendant's misconduct toward the injured party and are noncompensatory, and civil sanctions concern the defendant's conduct toward the tribunal and are compensatory. Gonzales v. Surgidev Corp., 120 N.M. 151, 899 P.2d 594 (1995).

**Law reviews.** - For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 22 Am. Jur. 2d Damages §§ 240, 361, 362.

Principal's liability for punitive damages because of false arrest or imprisonment or malicious prosecution by agent or employee, 93 A.L.R.3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 A.L.R.3d 1109.

Criminal liability as barring or mitigating recovery of punitive damages, 98 A.L.R.3d 870.

Propriety of awarding punitive damages to separate plaintiffs bringing successive actions arising out of common incident or circumstances against common defendant or defendants ("one bite" or "first comer" doctrine), 11 A.L.R.4th 1261.

Allowance of punitive damages in action against attorney for malpractice, 13 A.L.R.4th 95.

Derivative liability of partner for punitive damages for wrongful act of copartner, 14 A.L.R.4th 1335.

Recovery of punitive damages in action by purchasers of real property charging fraud or misrepresentation, 19 A.L.R.4th 801.

Necessity of determination or showing of liability for punitive damages before discovery or reception of evidence of defendant's wealth, 32 A.L.R.4th 432.

Punitive damages: power of equity court to award, 58 A.L.R.4th 844.

Standard of proof as to conduct underlying punitive damage awards - modern status, 58 A.L.R.4th 878.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 A.L.R.5th 242.

Validity, construction and application of statutes requiring that percentage of punitive damages awards be

paid directly to state or court-administered fund, 16  
A.L.R.5th 129.

Intoxication of automobile driver as basis for  
awarding punitive damages, 33 A.L.R.5th 303.

25A C.J.S. Damages § 188.