American College of Trial Lawyers

REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE

MARCH 3, 1989

American College of Trial Lawyers

REPORT ON PUNITIVE DAMAGES
OF THE
COMMITTEE ON SPECIAL PROBLEMS
IN THE ADMINISTRATION OF JUSTICE

Approved by the Board of Regents
March 3, 1989

American College of Trial Lawyers

CHANCELLOR-FOUNDER

HON. EMIL GUMPERT
(1895-1982)

OFFICERS

PHILIP W. TONE, *President*
RALPH I. LANCASTER, JR. *President-Elect*
WILLIAM T. EGAN, Secretary
CHARLES E. HANGER, *Treasurer*
MORRIS HARRELL, *Immediate Past President*

BOARD OF REGENTS

SAMUEL ADAMS
Boston, Massachusetts

JOHN A. BECK
Washington, D.C.

F. LEE CAMPBELL
Seattle, Washington

GEORGE J. COTSIRILOS
Chicago, Illinois

WILLIAM T. EGAN
Minneapolis, Minnesota

ROBERT B. FISKE, JR.
New York, New York

HUBERT W. GREEN
San Antonio, Texas

FULTON HAIGHT
Santa Monica, California

CHARLES E. HANGER
San Francisco, California

MORRIS HARRELL
Dallas, Texas

FRANK C. JONES
Atlanta, Georgia

RALPH I. LANCASTER, JR.
Portland, Maine

HENRY G. MILLER
White Plains, New York

PAUL D. RENNER
Denver, Colorado

PATRICK T. RYAN
Philadelphia, Pennsylvania

ROBERT G. STACHLER
Cincinnati, Ohio

RALPH M. STOCKTON, JR.
Winston-Salem, North Carolina

PHILIP W. TONE
Chicago, Illinois

American College of Trial Lawyers

PAST PRESIDENTS

1950-51	EMIL GUMPERT* Los Angeles, California
1951-52	C. RAY ROBINSON* Merced, California
1952-53	CODY FOWLER* Tampa, Florida
1953-54	E. D. BRONSON* San Francisco, California
1954-55	CODY FOWLER* Tampa, Florida
1955-56	WAYNE E. STICHTER* Toledo, Ohio
1956-57	JESSE E. NICHOLS* Oakland, California
1957-58	LEWIS C. RYAN* Syracuse, New York
1958-59	ALBERT E. JENNER, JR.* Chicago, Illinois
1959-60	SAMUEL P. SEARS* Boston, Massachusetts
1960-61	LON HOCKER Woods Hole, Massachusetts
1961-62	LEON JAWORSKI* Houston, Texas
1962-63	GRANT B. COOPER Studio City, California
1963-64	WHITNEY NORTH SEYMOUR New York, New York
1964-65	BERNARD G. SEGAL Philadelphia, Pennsylvania
1965-66	EDWARD L. WRIGHT* Little Flock, Arkansas
1966-67	FRANK G. RAICHLE* Buffalo, New York
1967-68	JOSEPH A. BALL Long Beach, California
1968-69	ROBERT W. MESERVE Boston, Massachusetts
1969-70	HON. LEWIS F. POWELL, JR. Washington, D.C.
1970-71	BARNABAS F. SEARS* Chicago, Illinois
1971-72	HICKS EPTON* Wewoka, Oklahoma
1972-73	WILLIAM H. MORRISON* Portland, Oregon
1973-74	ROBERT L. CLARE, JR. New York, New York
1974-75	AUSTIN W. LEWIS* New Orleans, Louisiana
1975-76	THOMAS E. DEACY, JR. Kansas City, Missouri
1976-77	SIMON H. RIFKIND New York, New York
1977-78	KRAFT W. EIDMAN* Houston, Texas
1978-79	MARCUS MATTSON Los Angeles, California
1979-80	JAMES E. S. BAKER Chicago, Illinois
1980-81	JOHN C. ELAM Columbus, Ohio
1981-82	ALSTON JENNINGS Little Rock, Arkansas
1982-83	LEON SILVERMAN New York, New York
1983-84	GAEL MAHONY Boston, Massachusetts
1984-85	GENE W. LAFITTE New Orleans, Louisiana
1985-86	GRIFFIN B. BELL Atlanta, Georgia
1986-87	R. HARVEY CHAPPELL, JR. Richmond, Virginia
1987-88	MORRIS HARRELL Dallas, Texas

* Deceased

COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE

CHAIRMAN

CHARLES B. RENFREW
San Francisco, California

MEMBERS

GRIFFIN B. BELL
Atlanta, Georgia

DAVID BERGER
Philadelphia, Pennsylvania

JUDAH BEST
Washington, D.C.

RICHARD R. BOSTWICK
Casper, Wyoming

JOHN J. BOUMA
Phoenix, Arizona

BENJAMIN R. CIVILETTI
Washington, D.C.

THOMAS E. DEACY, JR.
Kansas City, Missouri

WAYNE FISHER
Houston, Texas

ERWIN N. GRISWOLD
Washington, D.C.

JOHN M. HARRINGTON, JR.
Boston, Massachusetts

SETH M. HUFSTEDLER
Los Angeles, California

GENE W. LAFITTE
New Orleans, Louisiana

ROBERT M. LANDIS
Philadelphia, Pennsylvania

ARTHUR L. LIMAN
New York, New York

ROBERT W. MESERVE
Boston, Massachusetts

M. ROLAND NACHMAN, JR.
Montgomery, Alabama

SIMON H. RIFKIND
New York, New York

ASA ROUNTREE
New York, New York

BERNARD G. SEGAL
Philadelphia, Pennsylvania

JOHN C. SHEPHERD
St. Louis, Missouri

LEON SILVERMAN
New York, New York

THOMAS C. UNIS
Dallas, Texas

HENRY G. MILLER
White Plains, New York
Regent Liaison

PROFESSOR ROGER C. HENDERSON, Reporter
University of Arizona
College of Law
Tucson, Arizona

FOREWORD

The Board of Regents of the American College of Trial Lawyers, at its meeting in Boca Raton, Florida, February 27 to March 3, 1989, approved the following Report of the Committee on Special Problems in the Administration of Justice, dated March 3, 1989, and directed that copies be distributed to Fellows of the College and to other interested parties.

Philip W. Tone
President

TABLE OF CONTENTS

AMERICAN COLLEGE OF TRIAL LAWYERS
REPORT OF
COMMITTEE ON SPECIAL PROBLEMS
IN THE ADMINISTRATION OF JUSTICE

I. BACKGROUND

On August 8, 1986 the Board of Regents of the American College of Trial Lawyers approved the Report of the Task Force on Litigation Issues, dated July 22 of the same year. The Task Force Report addressed a number of issues regarding the tort litigation system in America and unanimously concluded that one of the greatest problems with the current tort system is the way punitive damages are handled.[1] Although a few members of the Task Force were prepared to abolish punitive damages, other members, who favored continuation of punitive damages awards, indicated that they might move toward abolition if meaningful reform were not forthcoming.[2]

Subsequent to the American College Task Force Report, the results of two other studies undertaken through the American Bar Association were published. In February of 1987 the American Bar Association House of Delegates approved a report by the Action Commission to Improve the Tort Liability System, chaired by Robert B. McKay, Professor and former Dean of the New York University School of Law. Among other things, the ABA Action Commission recognized that the current situation with regard to awards of punitive damages in the civil justice system presented some serious concerns[3] and made a number of general recommendations for reform.[4] In the meantime, the American Bar Association Section of Litigation had undertaken a study of the problems through a Special Committee on Punitive Damages. Recognizing the relative dearth of statistical data on the subject, the Special Committee commissioned an empirical study by the Institute for Civil Justice, a section of the Rand

1. American College of Trial Lawyers, *Report of the Task Force on Litigation Issues* 4 (1986) (hereinafter referred to as ACTL Task Force Report).
2. *Id.*
3. A.B.A., *Report of the American Bar Association Action Commission to Improve the Tort Liability System* 15-18 (1987),
4. *Id.* at 18-20. The Report supported the continued award of punitive damages in appropriate cases, but recommended that the scope be narrowed in five ways:
   i. The standard of proof for the award of punitive damages should be tightened to limit such awards to cases warranting special sanctions and should not be commonplace,
   ii. Various suggestions to the courts are advanced as a means of judicial limitation of inappropriate or excessive awards,
   iii. Appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.
   iv. Legislatures and courts should be sensitive to adopting appropriate safeguards to protect the master or principal from vicarious liability for unauthorized acts of non-managerial servants or agents,
   v. In carefully selected cases, courts should be authorized to award some portion of a punitive damages award to public purposes, always being mindful that the plaintiff and counsel are reasonably compensated for bringing the action and prosecuting the punitive damages claim.

   McKay, *Rethinking The Tort Liability System: A Report From The ABA Action Commission,* 32 Villanova L. Rev. 1219, 1230-31 (1987).

Corporation in Santa Monica, California.[5] The Rand report, published in 1987,[6] served is a basis for the ABA Section of Litigation study. Although the latter also concluded hat there were a number of problems with civil awards of punitive damages,[7] the Section of Litigation did not conclude that the problems, with one exception,[8] were sufficiently acute as to require legislative solutions. However, a careful analysis of the land study shows support for the opposite conclusion.[9]

Because of strong interest in the subject of punitive damages, the Board of Regents of the American College of Trial Lawyers gave approval for the Committee on Special

5. Rand Is a private, nonprofit institution, incorporated in 194B, which engages in nonpartisan research and analysis on problems of national security and public welfare. The Institute for Civil Justice, established within the Rand Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.
6. M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings,* Rand, The Institute for Civil Justice(1987).
7. *Punitive Damages: A Constructive Examination,* 1986 A.B.A. Sec. Litigation, Special Comm. On Punitive Damages 87-89 (hereinafter cited as A.B.A. Sec, Litigation Report).
8. The Litigation Section Special Committee found that a genuine problem exists regarding the potential for multiple punitive damages awards to be made against a defendant for essentially the same conduct. The Committee concluded that federal legislation would be required to solve the problem, *id.* at 72, and recommended that Congress enact a law creating a national class action which would allow the consolidation of all similar claims in one federal district court. *Id.* at 78-81.
9. The Rand study demonstrates that some major changes have occurred in punitive damage awards in specific areas of litigation in the25 year period from 1960 through 1984 in the jurisdictions studied — San Francisco, California and Cook County, Illinois. The most dramatic increases occurred in the area of business and contract cases which have come to be subject to the tort of "bad faith." However, products liability and medical malpractice also showed increases in the number and rate of punitive awards. As a general proposition, the frequency of awards has increased relative to the number of cases filed and to the number of cases In which compensatory awards are made, as well as in absolute terms. When this is coupled with the rather dramatic Increases in the median and average amounts awarded in all types of cases, one could easily conclude that punitive awards are playing a larger role in the civil justice system than in the past. However, if one merely focuses on the statistics in the aggregate for all types of torts one could conclude there has not been any significant change.

   It is submitted that to view the figures In the aggregate is erroneous because certain types of tortious conduct inherently do not give rise to punitive awards. To include figures for this conduct, such as automobile negligence cases, with the more egregious forms of conduct tends to "water down" the results. The same is true if one includes figures regarding traditional intentional torts because there is little change over time in the frequency of punitive awards in these cases. Thus, the Committee on Special Problems believes that the Rand study shows that the problems regarding punitive awards in the civil justice system are more acute for specific areas of tort litigation than indicated in the A.B.A. Sec. Litigation Report.

   The Rand Corporation has recently published a follow-up report pointing out that some commentators are misinterpreting an earlier study regarding trends in tort litigation by using aggregate figures on the assumption there is a single tort system. The follow-up report shows that there are different types of tort litigation and that each must be viewed separately in order to accurately determine any changes and trends. The use of aggregate figures tends to mask the real situation. See D. Hensler, M. Vaiana, J. Kakalik, & M. Peterson, *Trends In Tort Litigation: The Story Behind the Statistics,* Rand, The Institute for Civil Justice (1987). The same may be said for the subject of punitive damages and any analysis of the Rand study on that subject should take this point into account.

Problems in the Administration of Justice to conduct an independent review of punitive awards in the civil justice system in the United States, including a review of the prior studies and other information on the subject.

To assist the Committee in this effort, the services of Professor Roger C. Henderson of the College of Law at the University of Arizona in Tucson were engaged. Professor Henderson is a former dean of the law school and presently is a Commissioner on Uniform State Laws. He prepared a background paper which was reviewed and discussed by the Committee on Special Problems on March 6,1988 during the Spring Meeting of the American College in Palm Desert, California.[10] During the Spring Meeting the Committee assisted in presenting one of the main programs, which consisted of a panel on the question of whether punitive damages in the modern civil justice system constituted an anomaly which was in need of change. Subsequently, an issue paper[11] prepared by Professor Henderson was distributed to the Committee members and discussed at a special meeting on June 10, 1988. Thereafter a draft report dealing with punitive damages was the subject of a meeting of the Committee on August 6, 1988 at the Annual Meeting of the College during the American Bar Association meeting in Toronto, Canada. The Committee met again on November 11, 1988 and January 9, 1989 in New York City to discuss subsequent drafts of the report.

After deliberation and study, the Committee on Special Problems has come to certain conclusions with regard to punitive awards in the modern civil justice system and has fashioned recommendations for improvements. Initially, however, a brief review of why this study was warranted is appropriate in view of the prior efforts on the subject.

II. THE NEED FOR THE COLLEGE REVIEW

In the 1986 Report of the Task Force on Litigation Issues, serious concern was expressed regarding the role of punitive awards in the civil justice system. It was noted that awards often bear no relation to deterrence and merely reflect a jury's dissatisfaction with a defendant and a desire to punish, often without regard to the true harm threatened by a defendant's conduct.[12] The Report also noted that there was a general feeling that punitive awards should be more difficult to obtain and that the amounts of such awards should be subject to more control than was being exercised at that time.[13] The Report went on to recommend that there be some limit, either by a cap or some general formula, to the amount of punitive damages that may be recovered.[14] In addition, it was recommended that some means should be found to prevent a defendant from being subjected to duplicative punitive awards for a single act or course of conduct.[15] Finally, there were recommendations that serious consideration should be

10. This paper, entitled "Punitive Damages in the Modern Civil Justice System: An Anomaly in Need of Change?", is on file at the National Headquarters, American College of Trial Lawyers, 10866 Wilshire Blvd., Los Angeles, California, 90024.
11. This paper also is on file at the National Headquarters. See *supra* n. 10.
12. ACTL Task Force Report *supra* n. 1, at 4.
13. *Id.*
14. *Id.*
15. *Id.*

given to raising the standard of proof, to developing better jury instructions and to greater judicial supervision concerning punitive damage awards.'[6] In sum, the Task force Report expressed certain expectations concerning improvements that should be made in the system. Moreover, as noted, some members indicated that they might be willing to support the abolition of punitive awards in the civil system if these improvements were not made.[17]

Following the Report of the Task Force and its approval by the College Board of Regents, the A.B.A. Action Commission to Improve the Tort Liability System and Section of Litigation reported similar concerns and made recommendations for changes in the system.[18] In addition to these reports, there has been a plethora of articles and comments in legal periodicals concerning the situation generally, the overwhelming majority of which call for some change in the process by which punitive damages are awarded.[19]

16. *Id.*
17. *Id.* As previously noted, a few members of the Task Force were in favor of abolition as the exclusive reform effort. See text at n. 2.
18. See supra text at nn. 3-4 and 7-8.
19. For articles arguing for:

    (1) *abolition,* see Carsey, The Case Against Punitive Damages: An Annotated Argumentative Outline, 11 Forum 57 (1975); Dubois, Punitive Damages: Bonanza or Disaster, 3 Litigation 35 (Fall 1976); Ghiardi, The Case Against Punitive Damages, 8 Forum 411 (1972); Ghiardi, Should Punitive Damages Be Abolished? — A Statement for the Affirmative, 1965 A.B.A, Sec. Ins., Negl. & Comp. L. Proc. 282; Long, Punitive Damages: An Unsettled Doctrine, 25 Drake L. Rev. 870 (1976); and Sales & Cole, Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vanderbilt L. Rev. 1117(1984):

    (2) *modification,* see Barrett & Merriman, Legislative Remedies for Punitive Damages; 28 Federation of Ins. Counsel Q. 339 (1978); Bell & Pearce, Punitive Damages and the Tort System, 22 U. Richmond L. Rev. 1 (1987); Cooler, Economic Analysis of Punitive Damages, 56 S.Cal. L. Rev. 79 (1982); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Calif. L. Rev. 1 (1982); Johnston, Punitive Liability: A New Paradigm of Efficiency in Tort Law, 87 Columbia L. Rev. 1385 (1987); Launie, The Incidence and Burden of Punitive Damages, 53 Ins. Counsel J. 46 (Jan. 1986); Levit, Punitive Damages: Yesterday, Today and Tomorrow, 1980 Ins. L.J. 257; Mallor & Roberts, Punitive Damages: Toward a Principled Approach, 31 Hastings LJ. 639 (1980); Martin, The Relation of Exemplary Damages to Compensatory Damages, 22 Texas L. Rev. 235 (1944); McCormick, Some Phases of the Doctrine of Exemplary Damages, 8 North Carolina L. Rev. 129 (1930); Morris, Punitive Damages in Tort Cases, 44 Harvard L. Rev. 1173 (1931); Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103 (1982); Phillips, The Punitive Damage Class Action: A Solution to the Problem of Multiple Punishment, 1984 U. Illinois L.F. 153 (1984); Priest, Punitive Damages and Enterprise Liability, 56 S, Cal. L. Rev. 123 (1982); Riley, Punitive Damages: The Doctrine of Just Enrichment, 27 Drake L. Rev. 195 (1977-78); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedure, 69 Va. L. Rev. 269 (1983); and Woodbury, Limiting Discovery of a Defendant's Wealth When Punitive Damages Are Alleged, 23 Duquesne L. Rev. 349 (1985) and 34 Defense L.J. 675 (19B5);

    (3) the status *quo,* see Bedell, Punitive Damages in Arbitration, 21 J. Marshall L. Rev. 21 (1987); Belli, Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society, 49 UMKC L. Rev. 1 (1980); Corboy, Are Punitive Damages Getting Out of Control? The Existing Controls Are Effective, 70 A.B.A, J. 16 (Dec. 1984); Courtney & Cavico, Punitive Damages: When Are They Justifiable?, 18 Trial 52 (Aug. 1982); Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797 (1987); and Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal, L. Rev. 133 (1982).

As a result of the widespread concern regarding the problems associated with punitive damages, there has been a spate of state court[20] and legislative[21] activity across the nation on this subject. Unfortunately, no clear pattern has emerged in the main, although there has been a trend in some areas which may eventually result in more uniformity among the states. For example, of those states that have addressed problems regarding punitive damages, most now require that the plaintiff meet the burden of proving by clear and convincing evidence that punitive damages should be awarded.[22]

20. See, e.g., Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986) (addressing standard for culpability); Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326,723 P.2d 675 (1986) (addressing burden of proof); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Ca. Rptr. 348(1981) (addressing, *inter alia,* various constitutional issues); Tuttle v. Raymond, 494 A.2d 1353 (Maine 1985) (addressing burden of proof); and Anderson v. Continental Insurance Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978) (addressing standard for culpability).

21. For example, with regard to attempts to limit the amount of punitive awards Alabama has adopted a cap of $250,000 except where there is a practice or pattern of intentional wrongful conduct, actual malice, or defamation. Ala. Code § 6-11-21 (Supp. 1988). Colorado limits the punitive award to an amount equal to actual damages except the court has the power to make an addition up to three times the actual damages in enumerated cases of aggravated conduct. Colo. Rev. Stat. § 13-21-102 (1987). Florida creates a presumption which limits the amount of punitive awards to three times that of the actual damages unless the claimant demonstrates by clear and convincing evidence that any award which is greater than this amount is not excessive. Fla. Stat. § 768.73 (Supp. 1988). Georgia limits such awards to $250,000 except in product liability cases or where the defendant specifically intended to cause harm. Ga. Code Ann. § 105-2002.1 (Supp. 1988). Kansas limits the amount of punitive damages in medical malpractice cases to the lesser of 25% of the defendant's highest gross annual income during the five year period prior to the wrongful act or $3 million. Kan. Stat. Ann. § 60-3402 (Supp. 1987). (This particular provision of the Kansas medical malpractice legislation has not been challenged as of yet on constitutional grounds, but other provisions have been held unconstitutional by the Supreme Court of Kansas. See Kansas Malpractice Victims Coalition v. Bell, _... Kan. ._ 757 P.2d 251 (1988) and Farley v. Engelken, 241 Kan, 663,740 P.2d 1058 (1987). There Is a serious question as to the constitutionality of this particular provision under Kansas law because it limits the right to a jury trial on punitive damages. See Folks v. Kansas Power and Light Co., _____Kan _____, 755 P.2d 1319 (1988).) Oklahoma limits punitive awards to an amount equal to the actual damages except where evidence of the wrongful conduct is clear and convincing. Okla. Stat. Tit. 23, § 9 (1987). Texas limits awards of punitive damages to four times the amount of actual damages or $200,000, whichever is greater, for cases involving "fraud" or "gross negligence," but the limit does not apply to cases Involving "malice" or to intentional torts, the terms In quotes being defined In the statute. Tex. Civ. Proc. & Rem. Code Ann. §§ 41.001-.008 (Vernon Supp. 1988).

22. For cases adopting this standard see, e.g., Linthicum v. Nationwide Life Ins. Co., *supra* n. 20; Travelers Indemnity Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1982); Tuttle v. Raymond, 494 A.2d 1353 (Maine 1985); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980). For statutory adoptions see, e.g., Ala. Code § 6-11-20 (Supp. 1988); Cal. Civil Code § 3294 (Supp. 1988); Minn. Stat. Ann. § 549.20(1) (1988); Mont. Code Ann. § 27-1-221(5) (1987); and Or. Rev. Stat. § 30.925 (1983). See also Colo. Rev. Stat. § 13-25-127(2) (1987) (adopting proof beyond a reasonable doubt). Compare Fla. Stat. § 768.73 (Supp. 1988) (apparently adopting the clear and convincing test only for amounts which exceed the presumptive cap of three times the amount of compensatory damages, but continuing the use of the mere preponderance test for the treble award) and Okla. Stat. Tit. 23, § 9 (1987) (following the same pattern as Florida).

Also, it appears that the law is evolving in many jurisdictions to require that there be some conscious indifference to the rights of others before punitive damages are warranted.[23] However, it is not easy to divine this latter rule from the myriad of adjectives employed in attempting to define the standard of culpability in any particular jurisdiction.[24]

Attempts at reforming other punitive damage problem areas have been anything but satisfactory. For example, there still are serious questions concerning; (1) the standard to be applied by the trier of fact in determining the quantum, and the standard to be applied in appellate review of any punitive award; (2) the vicarious exposure facing employers and others; (3) the "windfall" nature of punitive awards and the question of who should receive the award; (4) the potential abuses in the trial process regarding pleading and discovery; and (5) the possible prejudice to defendants on the compensatory liability issue through introduction of otherwise irrelevant evidence of wealth or financial condition at the stage where that liability issue is being resolved. Moreover, there has yet to be a satisfactory solution to the situation that all agree is a very serious problem — duplicative awards for the same act or course of conduct. In fact, as a result of the recent legislative activity, the legal landscape has now been strewn with a number of pieces of disparate legislation In the various states so that in a very real sense the situation could be described as being as confused and uncertain as before the reform efforts began.[25] Considerable improvements still could be made to bring about more evenhanded treatment of litigants both within a jurisdiction and between jurisdictions. In short, the situation is very much in need of attention and clearly falls within the charge of the Committee on Special Problems, which has the responsibility of promoting improvements in the administration of

23. See, e.g., Rawlings v. Apodaca, *supra* n. 20; Freeman v. Anderson, 279 Ark. 282,651 S.W.2d 450 (1983); Jardel Co. v. Hughes, 523 A.2d 518 (Del. 1987); Tuttle v. Raymond, *supra n.* 22; Preston v. Murty, 32 Ohio St. 3d 334,512 N.E.2d 1174(1987); Enright v. Lubow, 202 N J. Super. 58,493 A.2d 1288 (App. Div. 1985); Ala. Code § 6-11-20 (Supp. 1988); Cal. Civil Code § 3294 (Supp. 1988); Colo. Rev. Stat. § 13-21-102(1) (1987); Ga. Code Ann. § 1005-2002.1(b) (Supp. 1988); Iowa Code Ann. § 668A.1 (1986); Minn. Stat. Ann. § 549.20(1) (1988); Okla. Stat. Ann. Tit. 23, § 9 (1987); Tex. Civ. Proc. & Rem. Code Ann. §§ 41.001-.003 (Supp. 1988).

24. See the discussion in Linthicum v. Nationwide Life Ins. Co., *supra* n. 20. See also 1 J. Ghiardi & J. Kircher, Punitive Damages: Law and Practice § 5.01 (1985).

25. In addition to the different statutory approaches Indicated In n. 21, supra, regarding attempts to limit the amount of punitive awards, a number of states have taken different approaches to the so-called "windfall" problem. For recent legislation In this area, see, e.g., Colo. Rev. Stat. § 13-21-102(4) (1987) (allocating one-third of a punitive award to the state general fund, two-thirds to the plaintiff); Fla. Stat. § 768.73 (Supp. 1988) (40% to the plaintiff and 60% to the state general fund unless the cause of action was based on personal injury or wrongful death, in which event the state's share is to be paid to Public Medical Assistance Trust Fund); Ga. Code. Ann. § 105-2002.1 (Supp. 1988) (three-fourths to the state, one-fourth to the plaintiff); Iowa Code Ann. § 668A.1 (1987) (100% to the plaintiff if the act was directed at the plaintiff; if not, three-fourths of the award goes to a state fund used for indigent civil litigation programs or insurance assistance programs); and Mo. Ann. Stat. § 537.675 (Vernon 1988) (50% of punitive award, after deduction of attorneys' fees and expenses, payable to state of Missouri). Kansas passed medical malpractice legislation which requires that punitive awards in such cases be allocated one-half to the plaintiff and one-half to the state health care maintenance fund (see Kan. Stat. Ann. §60-3402 (1986)), but the constitutionality of this legislation is questionable. See *supra* n. 21.

justice and maintaining proper liaison with others to that end.

Finally, two other matters should be mentioned. First, there has been a movement in the criminal justice system to attempt to standardize penalties. The most notable effort in this regard has taken place at the federal level.[26] The sense that there should be evenhanded treatment of those who are subject to criminal penalties also provides part of the motivation for reform in the civil system. Secondly, a number of constitutional issues that have lain dormant for years have recently been brought to the attention of the courts. The Supreme Court of the United States has granted review to consider constitutional limits on punitive damages awards on three occasions since 1986. In particular, there appears to be concern on the part of some members of the Court as to whether the Eighth Amendment to the United States Constitution guaranteeing that excessive fines shall not be imposed applies to civil punitive awards.

In 1986 in *Aetna Life Ins. Co. v. Lavoie*,[27] the Supreme Court noted that a challenge to punitive damages as excessive under the Eighth and Fourteenth Amendments "raise[d] important issues which, in an appropriate setting, must be resolved."[28] Two years later in the case of *Bankers Life and Casualty Co. v. Crenshaw,*[29] the Court granted *certiorari* and heard oral argument as to whether the Eighth Amendment applies to civil punitive awards and whether the punitive damage award in the case violated the Due Process and the Contract Clauses of the Constitution. Although the Supreme Court declined to decide these issues in *Aetna* and *Bankers Life, as* this report was being finalized the Court again granted *certiorari,* in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,*[30] on the question of whether an award of $6 million in punitive damages, amounting to more than 100 times the plaintiff's actual damages, is excessive under the Eighth Amendment or otherwise. These cases illustrate that there are several potential problems at the constitutional level with the current rules in the various states. It is possible that these constitutional problems could be obviated through responsible reform efforts. It is the judgment of the Committee on Special Problems that this adds Impetus to the need for prompt action. Thus, it is hoped that this Report, which has been approved by the Board of Regents of the American College of Trial Lawyers, will serve to expedite responsible reform efforts so as to achieve improvements in the justice system in this country.

26. The Comprehensive Crime Control Act of 1984 created a United States Sentencing Commission to recommend new sentencing guidelines to go Into effect in federal courts in 1986. One of the main purposes of the legislation is to establish sentencing policies and practices for the Federal criminal justice system that provide certainty and fairness and which avoid unwarranted sentencing disparities among defendants who are similarly situated. See 28 U.S.C. § 991(b)(1) (Supp. 1987). The Supreme Court of the United States upheld the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission against an attack that Congress had delegated excessive legislative power to the Commission and that the legislation violated the separation-of-powers principle. Mistretta v. United States, 109 S. Ct. 647 (1989).
27. 106 S. Ct. 1580.
28. *Id.* at 1589.
29. 108S. Ct. 1645(1988).
30. 845 F.2d 404 (2d Cir. 1988), *cert, granted,* 109 S. Ct. 527 (1988).

III. CONCLUSIONS AND RECOMMENDATIONS

A. Civil Awards of Punitive Damages Should Be Retained, But Only in Carefully Limited Situations.

It has been forcefully argued that punitive awards in the modern civil justice system are an anomaly and should be abolished except where specifically authorized by statute.[31] Originally, such common law awards in large measure served as surrogates for pain and suffering and other noneconomic losses which at the time were yet to be recognized on *a de jure* basis by courts of law.[32] It is contended that now that non-economic losses, such as pain and suffering, are fully recoverable in tort actions in their own right as compensatory damages, there is no basis for permitting punitive awards for any compensatory purpose.[33] Nor should punitive awards serve to reimburse plaintiffs for attorney fees and other litigation expenses in the absence of a specific statute or rule of court providing for such.[34] This is based on the simple proposition that the common law rule in the United States is that each party bears the cost of his or her own attorney fees and litigation expenses. The civil system does not provide the requisite constitutional and procedural safeguards for penal awards and was lever designed to be a system for punishment beyond the admonition which is inherent in compensatory awards.[35] Finally, the argument goes, punishment should be limited to the criminal justice system and otherwise to specific situations expressly set out in legislative enactments, and even there the legislation should provide appropriate safeguards so as to not violate fundamental rights.

A majority of the Committee, while recognizing the force of these arguments, notes hat punitive awards have long been a part of the civil justice system and that they have seen recognized in addition to potential criminal sanctions. Although the early common law did recognize punitive awards in the civil system as a surrogate for non-economic losses, they were not recognized for that purpose exclusively. Punitive awards also were recognized as serving the admonitory goal of the civil system in

31. See, e.g., Ghiardi, supra n. 19 at 423-24 and Sales & Cole, *supra n*. 19 at 1117.
32. Fay v, Parker, 53 N.H. 342 (1873); Stuart *v*. Western Union Telegraph Co., 66 Tex. 580, 18 S.W. 351 (1885). Sea also K. Redden, Punitive Damages 28-29 (1980) and 1 T, Sedgwick, A Treatise on the Measure of Damages 688-89 (9th ed. 1912).
33. Ghiardi, *supra n.* 19 at 423-24 and Sales & Cole, *supra n.* 19 at 1164-65.
34. Ghiardi, *supra* n. 19 at 417.
35. See C. McCormick, Handbook on the Law of Damages 276 (1935). See also 1 J. Ghiardi & J. Kircher, supra n. 24, ch. 3 (1985) and K. Redden, supra n. 32, ch. 7.

deterring and punishing wrongdoers.[36] It also is true that punitive awards in the civil justice system serve to reach certain types of conduct that either are not punishable at all under the criminal system or as a practical matter will not be the subject of a criminal proceeding. As a result, the common law ultimately has come to recognize two types of awards — one mainly to compensate for economic and noneconomic losses and one mainly to punish. Although each is designed to deter, the Committee is convinced that the more severe sanction is still needed. Notwithstanding the general conclusion of the Committee that punitive awards are still justifiable in the civil system today, it also concluded that such awards should be available only in carefully limited

36. In Huckle v. Money [K.B. 1763] 2 Wils. 205,95 Eng. Rep. 768, one of the earliest English cases on record upholding an award of exemplary damages, it is clear that the monetary award was meant to punish and deter. Huckle was illegally taken into custody and he subsequently brought an action for trespass, assault and imprisonment. Although he was not mistreated physically and the confinement was brief, the jury assessed his damages at 300 pounds which was almost three hundred times any pecuniary loss that he could have suffered. The court upheld the award and in doing so the Lord Chief Justice stated:

> [T]he personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 207. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Id. at 206-07, 95 Eng. Rep. at 768-69

Exemplary or punitive damages are still recognized in England today, albeit on a more circumscribed basis than that in the United States. See Rookes v. Barnard [1964] 1 All Eng. Rep. 367 where the House of Lords limited punitive damages to two common law situations: (1) "oppressive, arbitrary or unconstitutional action by servants of the government" and (2) 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." *Id.* at 410. Exemplary damages expressly authorized by statute also are permitted. *Id.* at 411.

Canadian courts have not followed the restrictions enunciated by the English House of Lords in Rookes v. Barnard, but have followed a course that generally resembles that of the courts in the United States. See K. Cooper-Stephenson & I. Saunders, Personal Injury Damages In Canada, ch. 13(1981).

It also is to be noted that both England and Canada distinguish "aggravated damages" from punitive damages, and for that matter, from awards solely to compensate for losses and other harm. Aggravated damages are given to compensate when the harm done to the plaintiff by a wrongful act was aggravated by the manner in which the act was done; punitive damages being reserved to punish and thereby provide moral retribution or deterrence. *Id.* at p. 688.

situations.[37] Those situations and the limitations are discussed below.

B. Punitive Awards Should Not Be a Surrogate for Compensatory Damages.

The civil justice system should not recognize punitive awards for the purpose of compensating successful plaintiffs. The common law over time has recognized new rights and measures for compensation and is fully capable of doing so in the future. Economic and noneconomic losses are compensable today, and a clear distinction ought to be maintained between awards of that nature and those which are imposed solely to punish and deter. The maintenance of this distinction is important In administering the rules because there should be differences in the process for obtaining the two types of awards. For example, it has already been noted that a clear-and-convincing standard for the plaintiff's burden of proof has been adopted by a number of jurisdictions regarding punitive damages.[38] A mere preponderance is the standard for obtaining compensatory damages. As will be seen below, other distinctions arise from the recommendations of the Committee, and they should not be eroded by permitting one type of damage to serve as a surrogate for the other type. Civil punitive awards should be limited to those egregious situations which clearly call for punishment and deterrence beyond that which is inherent in compensatory awards.

C. The Standard for Culpability Should Require a Conscious and Egregious Invasion of the Rights of Others.

The appropriate minimum standard for culpability for punitive awards, recognized in some recent, more analytical decisions,[39] requires a conscious indifference to the rights of others. This test encompasses the traditional intentional torts, such as assault, battery, and false imprisonment, all of which require that the actor know or understand that there is a great degree of certainty that the invasion will take place,[40] as well as torts based on lesser degrees of cognition, such as where the defendant acts in a wilful or wanton manner, or with a certain type of recklessness."[41] This test, however, would not permit punitive awards where the element of consciousness is sufficiently lacking, such as in the case of negligent, or even grossly negligent, conduct.

The Restatement of Torts, Second, distinguishes various types of conduct on the basis of cognition, i.e., the degree to which the actor appreciates or understands that harm will or may result from his or her conduct.[42] The greater the knowledge of harm, the greater the culpability. It is the Committee's position that civil punitive awards can only be justified on the basis of the more serious or egregious conduct. Although there is strong support for this position under recent case law,[43] there still is precedent

37. Bell & Pearce, *supra* n. 19 at 17.
38. See *supra* n. 22.
39. See, e.g., Rawlings v. Apodaca *supra* n. 20.
40. "The word 'intent' is used throughout the Restatement of this subject [intentional torts] to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8A (1965).
41. W. Prosser & W.P. Keeton, Law of Torts 10 and 212 (1984).
42. See Comment to § 8A, Restatement (Second) of Torts (1965).
43. See, e.g., Rawlings v. Apodaca and Anderson v. Continental Insurance Co., *supra* n, 20.

which leaves much to be desired in the way of clarity.[44]

A close examination reveals that much of the confusion arises in the area where mere inadvertent conduct interfaces with the more cognitive forms of conduct. The two types of conduct are most often described as "gross negligence" and "recklessness."[46] It is the overwhelming majority rule that punitive damages are not available for mere negligence, just as it is the rule that they are available for intentional, wilful, wanton or reckless conduct.[46] As for "gross negligence," — a perplexing term at best[47] — some jurisdictions may permit punitive damages for this category of conduct.[48] It is questionable though whether mere extreme carelessness as distinguished from the type of conscious indifference that is explicit in the term intentional and

44. For example, compare City of Gladewater v. Pike, 727 S.W.2d 514 (Tex. 1987) (holding "grossly negligent" conduct sufficient, but such conduct must evidence an outrageous state of mind — one of malicious or "evil" Intent) with Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981) (approving a jury instruction defining "heedless and reckless disregard," which the court stated was synonymous with "gross negligence," to mean "an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the person affected by It").

45. The term "reckless" Is usually expressed as part of the phrase "wilful, wanton and reckless," and all three terms are considered to mean the same thing. W. Prosser & W.P. Keeton, supra n. 41 at 212.

46. See 1 J. Ghiardi & J. Kircher, supra n. 24.

47. "As it [gross negligence] originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring wilful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof — sometimes on the ground that this must necessarily have been the intent of the legislature. But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not In kind. There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or Inattention, but less perhaps than conscious Indifference to the consequences." W. Prosser & W.P. Keeton. supra n. 41 at 211-212.

48. *Id.* at 10.

implicit in the terms wilful, wanton and reckless should suffice.[49]

The Committee believes that punishment over and above that involved in a compensatory award is not warranted for conduct that does not involve a conscious invasion. It is the very element of consciousness or awareness that renders the conduct so morally reprehensible as to call for different treatment. Conduct, extreme as it may be, that lacks cognition of harm more closely resembles inadvertent or negligent conduct than it does the type of conduct which calls for a greater sanction than that inherent in a compensatory damage award. Moreover, permitting punitive awards based merely 3n different degrees of carelessness or inadvertent conduct exacerbates the already difficult problem of articulating a clear standard to be employed by the trier of fact and for review on appeal. Thus, the logical and practical line of demarcation should be drawn at the point where the defendant realizes that his or her conduct will, or that there is a very strong probability that it may, cause the resulting harm. Conduct, such is extreme carelessness, which does not involve this basic element of consciousness should not be the subject of punitive damages. The admonitory function of compensatory damages should suffice to deter these less egregious forms of conduct just as it is supposed to deter negligent conduct.[50]

Bare satisfaction of the conscious indifference standard, however, does not mean hat punitive damages automatically follow. Whether the conduct in question is so aggravated as to justify such an award still should be a matter to be determined by the

49. The comments In the Restatement of Torts, Second, draw a distinction between these forms of conduct based on the knowledge of the actor:

> While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It Is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless Reckless misconduct differs from negligence In several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing art act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which Is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference In the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

§ 500, Comments f and g (1965).

50. See Morris, *supra* n. 19 at 1177.

The position of the Committee is not entirely consistent with the definition of "recklessness" as found in Restatement (Second) of Torts § 500 (1965). The position of the Committee requires that the actor realize, I.e., know or understand, that there Is a strong probability that harm may result. It does not encompass the situation, as does the Restatement, where the actor, from facts which he or she knows, should realize that there is a strong probability that harm may result. See supra n. 49. The latter standard sounds more in negligence and would permit, In the opinion of the Committee, cases to go to the jury without proof of the type of state of mind which may warrant a punitive award.

trier of fact.[51] In addition to requiring knowledge, the instruction to the jury should state that punitive awards are to be made only in those cases in which it is established that the tortfeasor acted in a particularly egregious manner.[52] This element of aggravated conduct is often referred to as the requirement of a bad motive or evil mind,[53] and In some instances is best described by the term "outrageous." Case law is replete with attempts by courts to delineate these more antisocial acts. Such words as "malicious," "evil," "vindictive," "oppressive," "fraudulent," "outrageous" and the like have been employed[54] and should still be employed in jury instructions to require such findings before punitive damages are assessed.[56] Thus, it is recommended that judicial decisions and any legislation on the subject make it clear that punitive awards in the civil justice system may be justified only in cases involving the most egregious forms of conduct. If there is evidence of bad motive, recidivism, or other aggravating conduct, the trier of fact should take this into account in deciding whether to assess punitive damages at all and, if so, the amount.[56]

The Committee also observes that the articulation of a clear minimum standard for culpability should enable a trial judge to withdraw the issue of punitive damages from the jury in those cases in which there is a failure to introduce clear and convincing evidence upon which a jury could find that the defendant's conduct was of the character required for the imposition of punitive damages. In any event, no punitive award should be permitted for conduct that fails to meet the minimum standard.

D. The Quantum of Punitive Damages Should Be Limited by a Flexible Formula Based on the Amount of Compensatory Damages.

The Committee is concerned that the current state of the law provides little guidance to the trier of fact regarding the standard for assessing the amount of punitive damages. The case law, again, is replete with references to the egregious nature of the conduct, the wealth or power of the defendant, the relation of the punitive award to the compensatory award, and the like.[57] This all leaves one with a sense of frustration in trying to ascertain whether the punitive award is excessive, particularly on review by the appellate courts.[58] In fact, there is evidence that the current attempts to articulate a standard lead to excessive awards because these definitions fail to provide sufficient

51. See Restatement (Second) of Torts § 908, Comment d (1979); D. Dobbs, Handbook on the Law of Remedies 204 (1973).
52. Restatement (Second) of Torts § 908, Comment d (1979).
53. See Rawlings v. Apodaca, supra n. 20 at 162, 726 P.2d at 578.
54. D. Dobbs, *supra* n. 51 at 205.
55. See Restatement (Second) of Torts §908, Comment b (1979).
56. *Id.*
57. *See K. Redden, supra* n. 32, at § 3.5. See also Restatement (Second) of Torts § 908, Comment e (1979).
58. The appellate courts have resorted to such tests as whether the award is so excessive that it must necessarily be a product of passion, prejudice, or corruption of the jury and whether the punitive award bears a reasonable relationship to the compensatory award. K. Redden, *supra* n. 32 at § 3.6. Whatever the test, it is clear that the tests are more often a rationalization of results than a means of obtaining them. Morris, supra n. 19 at 1180.

guidance to juries.[59] The opportunity for bias and prejudice to operate is too great. It would be unthinkable to use such vague standards to assess punishment in the criminal system, much less to let a jury do it. Consequently, the Committee has concluded that some more definite structure needs to be employed regarding the standard for assessing the amount of damages.

First, the Committee recommends that greater attention be paid to the question of whether the evidence offered is so highly prejudicial as to outweigh its probative value under Federal Rule of Evidence 403 or the equivalent state rule. This concern, which frequently arises in criminal cases, seems to be overlooked in the civil process. Since the civil punitive award serves the same purpose as the criminal sanction, the same considerations should apply. Courts should not permit the "waving of bloody shirts" in civil trials any more than in criminal.

Second, courts should pay particular attention to the jury instructions in defining he burden of proof and standard for culpability. In this vein, the courts should attempt o formulate more precise instructions regarding the methods by which juries assess punitive awards, taking care to inform the jury that it is within their discretion as to whether any punitive award is to be assessed, that the award should not be excessive and that they have to be clearly convinced that the amount is appropriate under the circumstances. A model jury instruction covering these points as well as others is contained in an appendix to this report.

The above recommendations are designed to meet the point of the American College Task Force Report that greater judicial supervision of punitive awards is needed. Although the Committee has concluded that the above suggestions will serve n that way and recommends that they be adopted, it does not feel that these changes will completely solve the problem of excessive awards, because the standards for assessing the quantum are inherently deficient insofar as providing any meaningful guidance to juries and for appellate review. Various techniques were considered in an attempt to regulate jury awards in a fair and reasonable manner. Some members of he Committee favored using a "cap" or maximum limit, while others were opposed to any such method. Even among those favoring a cap, different approaches were advocated. The merits of an absolute dollar cap were advanced, as were those of a

59. The Rand study on punitive damages, mentioned earlier, also attempted to determine what post-trial adjustments might have occurred to punitive awards and developed sufficient data to provide statistically useful information involving 33 percent of the cases in the study. It was learned that punitive awards were frequently reduced by post-trial actions, such as settlements, remittiturs, and appellate decisions. The data showed that jury verdicts were reduced In approximately one-half of the trials reported on and that the larger the award the greater the chance of significant reduction. M. Peterson, S. Sarma & M. Shanley, *supra* n. 6 at 26-30.

Both the Rand study, *id.* at *xi*., and the A.B.A. Litigation Section Report, *supra* n. 7 at 21-22, took a somewhat optimistic view that — even though punitive awards have increased in both absolute and relative terms over the past 25 years —because of post-trial actions, the situation probably is not as dire as some might believe. However, one is equally entitled to take a more negative view — based on the same evidence—that juries exceeded or abused their discretion in many cases and that these predominated in the large awards. One could also observe that the Rand and A.B.A. positions may underestimate the overall impact of the large awards on the civil justice system, just as the latter position may overstate it. The prospect of having a jury go overboard, however, cannot be salutary even if there is the possibility of a later reduction.

formula based on compensatory damages. In the end, however, a substantial majority were in favor of the following approach.

The Committee recommends that the various legislative bodies enact a statute which limits the recovery of any punitive award by a plaintiff in a tort case to twice the amount of the compensatory award or $250,000, whichever is greater. This approach provides for flexibility. The plaintiff that suffers amounts of compensatory harm below $125,000 as the result of outrageous conduct by the defendant would be permitted to recover a substantial punitive award, but the limit of $250,000 would prevent an excessive award. On the other hand, where the compensatory harm exceeds $125,000 the ceiling on any punitive award would rise commensurately with the compensatory harm. There would be no limit in the serious injury cases except for the trebling effect provided by the formula. The Committee believes that this approach is fair to all concerned in that the award would punish and deter and yet not unjustly subject defendants to ruinous liability.

Finally, as a corollary to the proposal regarding the monetary limitation on punitive awards, the Committee recommends that the jury not be informed of the limitations. One reason for this recommendation is obvious — the jury should not be permitted to circumvent the rules by arbitrarily increasing the amount of compensatory damages. A less obvious, but a real concern nevertheless, is that the maximum amount of $250,000 in small compensatory injury cases should not become the rule. The jury should assess the punitive award on the basis of the evidence and the law as contained in the instructions from the court. The monetary limitations, which provide a range similar to that in the criminal system, should be applied by the court where necessary after the verdict has been rendered.

E. The Burden of Proof for Punitive Awards Should Be That of Clear and Convincing Evidence.

The Committee on Special Problems notes that since the Task Force Report, which recommended that the burden of proof for punitive damages should be raised, those jurisdictions which have considered the issue have reaffirmed or moved to a clear-and-convincing standard.[60] One jurisdiction has even adopted the criminal burden, by requiring proof beyond a reasonable doubt.[61]

Although some members of the Committee favored the retention of the mere-preponderance standard and others felt that the criminal standard of beyond a reasonable doubt should be employed, a majority of the Committee recommends that all jurisdictions follow the modern trend and adopt the clear-and-convincing standard. The clear-and-convincing standard, when coupled with the recommendations regarding the standards for determining liability and the rules regarding the quantum of damages, is more in harmony with a system for punishment than the mere-preponderance standard applicable in civil proceedings regarding compensatory damages and similar remedies which merely attempt to restore the *status quo*. While the beyond-a-reasonable-doubt standard is appropriate where life and liberty is literally at stake, the Committee does not feel that the criminal standard is appropriate

60. See *supra* n. 22.
61. Colo. Rev. Stat. § 13-25-127(2) (1987).

where a civil penalty is sought. The intermediate standard, requiring clear and convincing evidence, is the most appropriate, in the opinion of the Committee.

F. Vicarious Responsibility for Punitive Damages Should Only Obtain Where There Is Complicity by the Principal in the Conduct Which Gives Rise to the Punitive Award.

The Committee on Special Problems does not believe that there is any justification or holding a party responsible for an act which gives rise to punitive damages if that person or entity, through its officers or managerial employees or agents, did not commit or otherwise significantly participate in, or in some manner actually control or ratify, the act. The purpose of punitive damages is to punish and deter certain wrongful conduct. If the individual or entity did not engage in that conduct, there is no rational purpose in punishing or attempting to deter the person or entity. This is the position of the American Law Institute as found in the Restatements of Agency and Torts.[62] A number of courts follow the Restatement rule, but there are cases that adopt the so-called "liberal" rule, which imposes punitive damages in some situations merely on the basis of *respondeat superior.*[63] Under this rule, the principal is liable Because of the mere relationship instead of any wrongdoing. Although this may be appropriate for compensatory damages, the Committee fails to see the justification for such a rule where punitive damages are claimed and recommends that the position adopted by the American Law Institute be followed.

G. Pleadings Regarding Punitive Damage Claims Should Not Be Permitted To Contain a Monetary Amount.

At one time, claims for punitive damages were the exception and quite rare, but it has become more common recently for some attorneys to include such counts as a routine matter. This practice often is employed for its *in terrorem* effect. Some observers feel that the mere presence of such a count increases the settlement value of the underlying lawsuit.

A number of jurisdictions have adopted statutes which prohibit plaintiffs from pleading a claim of punitive damages until a *prima facie* showing is made regarding the defendant's potential liability for such an award. For example, Illinois permits a prayer for relief seeking punitive damages only after the plaintiff, upon motion and hearing, establishes a reasonable likelihood of proving facts at trial sufficient to support

62. Restatement (Second) of Agency § 217C (1958); Restatement (Second) of Torts § 909 (1979). These two provisions are identical:

> **Punitive Damages Against a Principal**
> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or a managerial agent was reckless In employing or retaining 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.

63. 2 J. Ghiardi & J. Kircher, supra n. 24, § 24.07; W. Prosser & W,P. Keeton, supra n. 41 at 13.

an award of punitive damages.[64] Florida, Idaho and Minnesota have adopted similar statutes.[65] California, however, has adopted a statute that merely prohibits a plaintiff from including a monetary figure in the pleadings.[66] These procedures are in contrast to those of most states, which continue to permit plaintiffs to include claims for punitive damages and to include monetary figures for such in the original complaint. In those states, the defendant may move to dismiss the claim or may endeavor to limit discovery of wealth or financial condition until later in the proceedings. The various approaches described make clear that the issue essentially is one of placing the initial burden. Should the plaintiff have to make some type of showing that the facts could support an award of punitive damages before being permitted to plead a claim for punitive damages?

The Committee concluded that there was no good reason to put the burden on the plaintiff to make *a prima facie* showing before being permitted to plead a claim for punitive damages, but that the California modification should be followed. The Committee noted the growing tendency for pleadings to include very large monetary amounts, the fact that these figures are arbitrary in many instances, and the unwarranted adverse publicity involved, and found that little purpose was being served by the present system. Thus, the Committee recommends that no monetary figure for punitive damages should be permitted in the petition or complaint. This modification to present practice in no way inhibits a plaintiff from pursuing a claim and obtaining an award for punitive damages, yet it would protect a defendant from needless and unwarranted adverse pretrial publicity.

H. Discovery of Evidence Regarding a Defendant's Wealth or Financial Condition for the Purpose of Proving the Amount of a Punitive Award Should Not Be Permitted Without a *Prima Facie* Showing That There Is a Legal Basis for Such an Award.

The fact that a plaintiff necessarily must engage in efforts to ascertain the facts involved in a case does not mean that all efforts at discovery should be permitted at the outset of a case that might involve a punitive damages issue. Initial efforts at discovering facts regarding liability are clearly necessary and would have to be permitted even in a jurisdiction that prohibits a plaintiff from initially pleading a claim for punitive damages. However, to subject a defendant to unlimited discovery regarding wealth or financial condition at the outset poses great potential for unwarranted invasions of privacy and other abuses.

The Committee on Special Problems recommends that the discovery of evidence regarding a defendant's wealth or financial condition for the purpose of proving the amount of a punitive award should not be permitted without a *prima facie* showing by the plaintiff that there is a reasonable likelihood of proving facts at the trial sufficient to support a determination of liability for such damages. Where it appears from the complaint or upon motion that evidence of wealth or financial condition Is relevant to the issue of liability for punitive damages, the burden of persuading the court to limit discovery

64. Ill. Rev. Stat. eh. 110, para. 2-604.1 (Supp. 1988).
65. Fla. Stat. § 768.72 (Supp. 1988); Idaho Code §6-1604 (Supp. 1987); and Minn. Stat. Ann. §549.191 (West 1988).
66. Cal. Civ. Code § 3295 (Supp. 1988).

should be where it rests in most jurisdictions today. The defendant must move to limit discovery in this situation and convince the court such evidence is not relevant to the liability issue. Where the evidence is only relevant to the amount of the punitive award, the burden should be on the plaintiff to obtain permission from the court to engage in discovery of wealth or financial condition. This would put the burden on the plaintiff to make a *prima facie* showing that there is a plausible case for a punitive award. Defendants would be protected from unwarranted intrusions into their records and private affairs and from being unnecessarily inconvenienced, unnecessary expenses would be avoided by all concerned, and no real impediment or obstacle would be placed in the path of plaintiffs who are entitled to pursue legitimate claims for punitive damages.

I. Bifurcated Trials Should Be Employed To Avoid Prejudice to Defendants Where Evidence of Wealth or Financial Condition Is Admissible Only on Claims for Punitive Damages.

Evidence of wealth or financial condition is ordinarily irrelevant to the liability issues in a case where punitive damages are sought. Normally, such evidence bears only on the amount of money that would adequately punish and deter. In such situations, permitting evidence of wealth or financial worth to be introduced at the stage of the trial where liability is determined needlessly provides an opportunity for bias and prejudice to operate against a defendant. However, the Committee on Special Problems recognizes that there may be some situations where evidence of wealth or financial condition might bear on the punitive damage liability issue even though it has no relevance to liability giving rise to compensatory damages. For example, the fact that the defendant is in a superior economic position and able to exert a certain authority or power over the plaintiff may be relevant to whether the conduct is sufficiently egregious to warrant punitive damages.[67]

Although bifurcation of the trial is an obvious solution to this problem, it is clear that different issues would have to be separated in the two situations described. There may be other situations which would call for still different treatment, such as trifurcation. Recognizing this, the Committee recommends that the defendant be provided an opportunity to move for a division of the trial in a case where punitive damages are claimed, if undue prejudice would result from the introduction of evidence of wealth or financial condition, and that in such a case the issues be separated to afford a fair trial to all concerned.[88] The following is one approach for courts to consider.

In a trial where a punitive award is sought and evidence of wealth or financial condition has no relevance to any liability issues, the court, upon motion by the defendant, should bifurcate the trial on the following basis: During the first phase of the trial, the issues of liability should be determined and evidence of wealth or financial condition should not be permitted. In many instances, it may also be desirable to determine the

67. The Committee recognizes that there are other exceptions. Evidence of wealth or financial condition may bear on liability issues for compensatory damages as well as punitive damages issues. If this is the situation, a division of the trial may not be appropriate.

68. Several Jurisdictions have adopted a bifurcated trial process for cases involving punitive damages. See, e.g., Cal. Civ. Code § 3295 (Supp. 1988), Ga. Code Ann. § 105-2002.1(d) (Supp. 1988), Mo. Ann. Stat. § 510.263 (Vernon Supp. 1988), and Mont. Code Ann. § 27-1-221(7) (1987).

issue of compensatory damages in the first phase. In either event, a special verdict form should be used to determine whether the defendant is liable for compensatory damages only, or in addition is liable for punitive damages. If the jury determines in the first phase that punitive damages also should be awarded, evidence of the appropriate amount, including that of wealth or financial condition where relevant, should be permitted in the second phase. This process would prevent undue prejudice in the situation described, but it would not be appropriate where evidence of wealth or financial condition is relevant to the issue of liability for punitive damages. In the latter case, courts should consider the procedure described below.

If a claimant sues for punitive damages and the defendant moves for a bifurcated trial, the plaintiff should be permitted to show that evidence of wealth or financial condition is relevant to the issue of liability for punitive damages. If the plaintiff prevails on this issue, the court should limit the first phase of the trial to a determination of whether the defendant is liable for compensatory damages and the amount thereof. If the jury finds liability for compensatory damages, the second phase of the trial should address the punitive damage liability issue and the amount of any such award. During the second phase of the trial, evidence of wealth or financial condition, where relevant, may be admissible. If the second type of bifurcation procedure is employed, the jury should be informed during the first phase of the trial that the plaintiff has made a claim for punitive damages, but that this issue may be addressed in a second phase of the trial after the jury has decided the issue of liability for compensatory damages.

The Committee on Special Problems has concluded that a flexible approach is needed to resolve the problem regarding undue prejudice to defendants from the introduction of evidence of wealth or financial condition during the phase of the trial dealing with liability for compensatory damages. The approaches described above will take care of most situations, but, if they do not, the court should divide the trial in other ways, possibly trifurcation, to avoid undue prejudice while, at the same time, protecting the claimant's right to pursue an award of punitive damages where the evidence Would support such a claim.

J. Distribution of Punitive Awards Should Not be Diverted to Persons or Entities Other Than the Plaintiff.

There has been much discussion regarding whether all or part of a civil punitive award should be paid to someone other than the plaintiff[69] and, if so, whether there should be some restriction on the plaintiff's attorney fee. The argument for distributing the award to someone or some entity other than the plaintiff is based upon the fact that a punitive award to the plaintiff is viewed as a windfall, the plaintiff having already been fully compensated for any actual harm suffered. At first glance, the so-called "windfall" argument would seem to have some merit, but on closer examination a number of problems arise from the suggested change.

If the plaintiff Is not entitled to receive any or a substantial part of the award, It Is argued that there will be little incentive to bring an action for punitive damages. This would discourage lawyers from acting as "private attorneys general. "Since the trier of fact might be persuaded to increase the amount of noneconomic loss in the compensatory

69. See the various legislative approaches taken by different states on this subject, *supra n.* 25.

award if not given the opportunity to assess punitive damages, it may be that the proposal to distribute the award to someone other than the plaintiff could be circumvented. If this were to be the case, it might be ethically incumbent upon the plaintiff's attorney to seek only compensatory damages and forgo any personal or public interest in seeking a punitive award.

Assuming that the plaintiff were permitted to share in the punitive award on some substantial basis, problems still arise. How should the award be distributed? Is this to be a legislative determination, or left to the court? Does the fact that a punitive award is a "windfall" of sorts currently cause the jury, on occasion, to limit the award to an amount smaller than might otherwise be awarded? If it is distributed to an authority which levies taxes, will jurors see an opportunity to relieve the taxpayer of a burden? Even were these issues resolved, if punitive awards are limited to an amount which does not exceed twice that of any compensatory award, as recommended in subsection D, there will be fewer situations where an unseemly windfall takes place.

On balance, the Committee has concluded that the common law has long permitted he successful plaintiff to retain the punitive award, and that this is justifiable on the basis that it was the plaintiff who went to the trouble to prosecute the matter in the first place. The Committee does not see any real justification for changing the current situation. Finally, there is no more reason to change the rules with regard to the attorney-client fee arrangements in this situation than in any other area of tort litigation.

IV. THE PROBLEM OF DUPLICATIVE PUNITIVE AWARDS FOR THE SAME ACT OR COURSE OF CONDUCT.

The potential for multiple awards of punitive damages for the same act or course of conduct creates problems both for plaintiffs and defendants. From the defendant's standpoint, there is the very real possibility that the punitive awards will be duplicative and therefore result in punishing the defendant more than once for the same wrongful conduct. This obviously offends basic notions of justice. Conversely, a plaintiff runs the risk that prior punitive awards may exhaust the defendant's resources, and that, not only will there be insufficient funds from which to pay the plaintiff's punitive award, but the funds will be inadequate to pay a compensatory award. Under the current state of affairs, some defendants have resorted to bankruptcy proceedings for protection. Although this may be viewed as a limited form of protection, it is a drastic measure. Moreover, it does not address the problem of duplicative awards against a solvent defendant. In short, existing procedures are inadequate to resolve the problem satisfactorily. Although all agree that the problem needs attention and resolution, a solution is not nearly as evident as the problem.

The Committee on Special Problems has considered a number of approaches to the multiple awards problem. It is clear to the Committee that there is no simple solution. Thus, the Committee has decided that it should set out the various approaches considered, in an attempt to further discussion and facilitate debate in the hope that more efficacious approaches may eventually evolve. The Committee believes it is particularly important to follow this approach, since the American Law Institute is currently engaged in two projects that would seem to encompass the multiple awards

situation. The problem of duplicative awards most frequently arises in the context of the so-called mass tort case and involves multiparties, multiclaims, and multiforums. Both the A.L.I. projects on complex litigation and on compensation and liability for product and process injuries provide vehicles for addressing the multiple awards problem. In addition, Congress has taken some steps to deal with the situation.[70] Since these efforts are still in the initial stages, the deliberations of the Committee may prove helpful in resolving the problem. In any event, the work of the Committee should be recorded for those who come later to the task.

A. State Solutions

At the state level, only two attempts to address the problem of multiple awards for the same act or course of conduct have resulted in legislation. Georgia has adopted a statute prohibiting multiple recoveries against one defendant in product liability actions filed in that state, but it has no effect on actions filed outside of the state.[71] The effect of the Georgia statute Is to allow only one punitive award — the first obtained — in that state. This award is to be deemed as sufficient punishment, regardless of the amount. No other award for punitive damages may be made thereafter in Georgia for the same conduct.

Missouri has adopted a somewhat different approach. The Missouri statute provides for a post-trial hearing wherein a defendant may file a motion "requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based."[72] This approach is broader than the Georgia statute in several respects. The statute is not limited to product liability cases, and it permits evidence of out-of-state awards, as well as evidence of in-state awards, to reduce any award in Missouri. A subsequent proceeding is required to determine any offset.

Both the Georgia and Missouri statutes suffer from a deficiency that presently is inherent in any attempt to resolve the problem at the state level. Although state A may control what goes on within its courts, it cannot control what goes on in the courts of state B.[73] Neither Georgia nor Missouri can control awards that are assessed in other states, even though those awards are based on the same conduct that gave or will give rise to liability in Georgia or Missouri. Only trials or awards in Georgia or Missouri can be affected.

One possible solution to the interstate problem is for the National Conference of

70. A bill to amend title 28, United States Code, containing a number of features that would address some of the aspects of the multiple awards problem, was passed by the United States House of Representatives late in the second session of the 100th Congress, but this part of the bill was not passed by the Senate and did not become law. See Title III(A) of H.R. 4807, 100th Cong., 2d Sess., 134 Cong. Rec. H7443 (Sept. 13, 1988) and 134 Cong. Rec. S16284 (Oct. 14, 1988).
71. Qa. Code Ann. § 105-2002 1(e)(1) (Supp. 1988),
72. Mo. Ann. Stat. § 510.263 (Vernon Supp. 1988).
73. Although a state cannot control what goes on in the federal courts either, under current law a federal court would probably be required to apply the Georgia or Missouri statutes, if otherwise applicable, in diversity cases litigated In the federal courts because the statutes clearly affect substantive rights of the litigants. See 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4508 (1982).

Commissioners on Uniform State Laws to undertake a drafting project for the purpose of achieving uniformity among the states on the subject. However, not only is this approach problematic in terms of achieving uniformity in the near future, if ever, but it nay be complicated by the fact that a somewhat unconventional approach might have to be employed to obtain the desired result. A type of compact or reciprocal arrangement permitting cases to be transferred from one state to another might have to be designed and utilized if there is to be but one trial of all punitive damages claims arising out of the same act or course of conduct. In any event, the state-by-state approach, While holding the possibility of improvement of the present situation, does not appear to afford a complete solution, at least for the near future.

B. Federal Solutions

1. The A.B.A. National Class Action Proposal

The A.B.A. Section of Litigation has recommended that Congress enact legislation necessary to create a national class.[74] This would permit one court to obtain jurisdiction and control over cases which expose a defendant to multiple punitive awards rising out of the same conduct which results in similar injuries. It would be a mandatory lass action, in that one mass federal trial on the punitive damages issue would be binding on all concerned — those who have not sued, including those who may not yet be injured, as well as those who are parties to pending state and federal actions.[75] State court litigants who refuse to join the class would be enjoined from pursuing punitive awards based on the same conduct, but would be included in the distribution of the penal award resulting from the federal litigation.[76] The procedures envisioned could be invoked upon defendant's motion and findings by the court that "there is a reasonable possibility that adequate compensatory damages will not be available if punitive damages are not brought under control."[77] The applicable substantive law would be "federal common law" as the court determines it to be after a full hearing.[78] 'he proposal also addresses Issues as to how the punitive award should be distributed, including the problem regarding unknown future plaintiffs.[79]

Although the Committee on Special Problems is impressed with the careful thought Hat has gone into the A.B.A. Litigation Section proposal and views It as a partial improvement over the present system, it feels that other alternatives should also be explored. The A.B.A. proposal does not appear to address the problem of multiple awards against a solvent defendant, i.e., where the possibility of collecting adequate compensatory damages will not be affected by punitive awards. The unfairness of mulcting a defendant more than once for the same conduct does not diminish with the prospect that there may be sufficient funds to pay all awards. On the contrary, the unfairness is exacerbated. Moreover, consideration should be given to other methods of deciding what law should apply to the substantive issues short of developing federal common-law tort rules.

74. A.B.A. Sec. Litigation Report, supra n. 7 at 78-81.
75. *Id.* at 80.
76. *Id.* at 81.
77. *Id.* at 79.
78. *Id.* at 80.
79. *Id.* at 81.

2. Multidistrict Litigation

The Committee on Special Problems considered two other federal solutions to the multiple awards problem. First, it was suggested that Congress should enact a new statute providing jurisdiction in the federal courts for cases involving personal injury, death or property damage where two or more claims or actions seeking punitive damages are based on the same act or course of conduct of a defendant who is engaged in or affects interstate commerce. As a further jurisdictional requirement, the aggregate total of such claims, exclusive of claims for compensatory damages, should exceed $50,000. The suggestion contemplates that only the individual claims for punitive damages would be removed and consolidated, leaving other claims, including those for compensatory damages, for trial in the courts where originally filed. The authority of Congress to enact such legislation would rest on the powers granted to it under the Commerce Clause[80] and Article III[81] of the United States Constitution.

The procedures for removing cases filed in state courts[82] and the statutes regarding multidistrict litigation in the federal courts[83] would need to be amended to authorize removal and transfer for the limited purpose of consolidating all punitive damage claims, whether originally filed in state or federal courts, for trial in one federal forum. Proceedings to remove, transfer, or consolidate such claims should be initiated by the federal judicial panel on multidistrict litigation upon its own motion or by motion filed with the panel by any party to an action which meets the jurisdictional requirements. The transferee court should be empowered to appoint lead counsel and to implement other measures needed to administer the litigation.

Because the jurisdiction is for multiparty, multiclaim actions, absent a legislatively created standard, the substantive law of several states and perhaps even foreign nations will often apply to different aspects of the litigation. Thus, the legislation should set forth the standards to be applied in determining punitive damages or should at least provide for a single, uniform choice-of-substantive-law procedure for claims subject to the proposed proceeding.[84] The legislation also should be drafted to

80. "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ..." U.S. Const. art. I, § 8.

81. "The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ,,." U.S. Const, art. III, § 2,

82. 28 U.S.C. §1441 et seq. (1983).

83. 28 U.S.C. §1407 (1983).

84. Currently choice-of-law questions In so-called mass tort cases In the federal courts are determined under state law. Van Dusen v. Barrack, 376 U.S. 612 (1964); Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See Atwood, The Choice-of-Law Dilemma In Mass Tort Litigation: Kicking Around *Erie, Klaxon,* and I/an *Dusen,* 19 Conn. L. Rev. 9 (1986). It is contemplated that the choice of law provision in the proposed legislation would involve the development and application of a body of substantive federal law. Arguably this could satisfy the requirement that there be a federal question In order to sustain jurisdiction in the federal courts through the "Arising Under" clause of Article III of the United States Constitution. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Osborn v. Bank of United States, 9 Wheat. 738 (1824). The adoption of a federal standard for determining punitive awards would more clearly satisfy this constitutional requirement.

preserve the concept of *forum non conveniens* to avoid attracting cases from all over he world to American courts when such cases would be more appropriately resolved in a foreign forum. There are a number of other matters that would need to be addressed, but this provides an outline of the basic features.

3. Interpleader

The Committee considered an alternative solution to the multiple awards problem Which would require a new federal statute patterned after 28 U.S.C. § 1335, the federal interpleader statute. The proposed legislation would empower a federal district court, upon petition or motion by either a plaintiff who has filed an action seeking a punitive toward or a defendant against whom an action for a punitive award has been filed, to adjudicate the issues involved in the multiple awards problem regardless of the court in which the claim or action was originally filed. The trial of the tort action in which the punitive award is sought would be carried out in the court in which it was originally filed or to which it was otherwise transferred or removed. The trial of the tort case would not be enjoined. However, the federal court in which the interpleader action was filed would have the authority to enjoin[85] the enforcement of any judgment containing an award for punitive damages and to remove or transfer jurisdiction of that part of the judgment to the federal court. Thus, any judgment which contains an award of punitive damages would be the possible subject of interpleader if the jurisdictional criteria exist.

In order for the federal court to exercise jurisdiction, the plaintiff seeking interpleader would be required to allege, by petition or motion, facts which show that there is a reasonable probability that the plaintiff will not be able to satisfy a judgment for the punitive award because the defendant's assets will be depleted by other claims for punitive awards arising out of the same act or course of conduct upon which the plaintiff's claim is based. A defendant against whom an action for a punitive award has been filed also could invoke the jurisdiction of the federal court upon a showing on the same grounds, i.e., that assets are insufficient to pay all claims. In addition, the defendant may invoke the jurisdiction of the federal court by alleging that two or more actions for punitive damages are based on the same act or course of conduct and that any such awards will be duplicative.

The current federal interpleader statute has a very low amount in controversy requirement and only requires minimal diversity of citizenship, i.e., diversity between two adverse parties.[86] These, or similar provisions in the new legislation, would suffice to provide jurisdiction for most cases involving the problems sought to be addressed. Where minimal diversity does not exist because all parties are citizens of the same state, there is a good chance all suits would be filed in the courts of that state and in that event be subject to consolidation or interpleader under the rules of those courts. Where all parties are citizens of one state, but some suits are filed in other states, the defendant could argue *forum non conveniens.*

Even though most cases would fall within diversity-of-citizenship jurisdiction, the

85. This authority should be expressly set out in the legislation so that no question Is raised under the federal Anti Injunction Act, § 28 U.S.C. 2283 (1982).
86. 28 U.S.C. §1335(a) (1983).

Committee on Special Problems considered whether federal question jurisdiction would be the preferable route, as in the multidistrict proposal.[87] Not only would federal question jurisdiction assure that all cases would be covered, but it would be necessary to set out certain substantive matters in the interpleader legislation in any event. The legislation should prescribe how the federal court shall determine whether multiple awards are duplicative and on what basis and when judgments for punitive awards may be satisfied. The court also should be authorized to hold some funds in reserve or otherwise assure that there will be assets available to satisfy claims of future plaintiffs. The basis for such a determination should be set out in the statute. Arguably, this would provide the basis for federal jurisdiction.[88]

4. Comparing the Federal Solutions

The basic difference between the federal proposals involves the forum of the trial of the punitive damages claims. In the multidistrict approach, there would be one mass trial on the punitive damages claim in one federal court, because all cases could be removed from state courts and consolidated in one federal court. Although the national class action approach of the A.B.A. would leave those who refuse to join the class in the courts that would otherwise have jurisdiction, all would be bound by the result in the federal court. Under the interpleader approach, the trials of the tort actions, including the punitive damages claim would take place in the various courts that would otherwise have jurisdiction. Arguably, there would be much less inconvenience to plaintiffs regarding the trial of the tort cases under the interpleader proposal. Also, there would be no need for federal courts to have to involve themselves in new choice-of-law problems as the federal court would merely enjoin the execution of the punitive portion of the judgment. Since the punitive award does not go to compensate victims, the fact that there may be delays in distributing it should not work any hardship. Plaintiffs could nevertheless proceed to satisfy judgments regarding the compensatory awards. On the other hand, the interpleader approach may require a hearing, if not a trial, to determine whether the various punitive awards resulted from the same act or course of conduct. It may also require a hearing or trial on the Issue of whether the awards are duplicative. Both the multidistrict proposal and the interpleader proposal may avoid the creation of federal common law regarding substantive tort rules whereas the national class action approach, at least as proposed by the A. B. A., contemplates some federalization of tort law. None of the proposals is perfect, but the problems may be resolved through further study,

C. The Preferred Approach

Although the problem of duplicative awards of punitive damages for the same act or course of conduct is a difficult one, the Committee has come to certain conclusions. First, a federal solution would appear to be preferable to a state-by-state enactment of a uniform or model act, because there is no assurance that every state would adopt such an act and, even if every state did, the time period that it would take to achieve near uniformity would far exceed that which Congress would require to act on the matter. Moreover, It Is not clear to the Committee that the problems involved can be effectively addressed at the state level. There does not appear to be any conventional

87. See *supra* n. 84.

88. See *supra* nn. 80 & 81.

mechanism by which the states could cause cases filed in other states or the federal courts to be consolidated in a particular state court. Although the states might enter into some compact or reciprocal agreement that would permit all cases filed in the courts of the participating states to be transferred to a particular court in one of the states, this sort of arrangement would not reach cases filed in the federal courts unless Congress enacted legislation to effect such a result. The Committee believes that if Congress has to act, it might as well opt for a solution that would utilize the federal court system. The federal system already provides an existing structure and rules that are near uniform throughout the country and would appear to provide a better mechanism to handle the problems than *a* wholly new, if not novel, mechanism at the state level.

Of the federal solutions discussed above, the Committee prefers an approach that requires all litigants to appear in the same forum. There should be no opportunity to opt-out this would avoid litigation subsequent to the mass trial to determine if those who opted out should be bound by the results. There would be no question that those who were parties to the multidistrict case would be bound. Any disputes as to who is a proper party should be resolved Initially, not after the trial. The Committee also favors a federal choice-of-law rule, or perhaps even a federal standard, for determining punitive damages in tort cases that would be subject to the mass trial in a federal court. At the very least, the federal court should not be required to apply state choice-of-law rules in this setting.[89]

The Committee concluded that the national class action as proposed by the A.B.A. Section of Litigation could be substantially improved if the jurisdictional basis is expanded to include the situation where a defendant is subject to multiple punitive awards for the same act or course of conduct without regard to any effect on the plaintiffs' ability to collect adequate compensatory damages. This would address the problems of the defendants as well as those of the plaintiffs. At this time, the Committee believes that the interpleader approach, although it may have promise, is more novel and problematic than other approaches, and that the other federal approaches stand a better chance of being perfected and accepted by the Congress. Most, if not all, problems appear to be resolvable through the multidistrict or the national class action approach, and the Committee has concluded that these concepts should be pursued along with any others that hold promise for resolving the multiple awards problem.[90]

89. See Atwood, The Choice-of-Law Dilemma In Mass Tort Litigation, *supra* n. 84,

90. In some situations, Federal Rule of Civil Procedure 23 may provide some relief. See, eg., In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718(E.D.N.Y. 1983) where the trial court permitted the certification of a mandatory class for punitive damages pursuant to Rule 23(b)(1){b). The court, while casting doubt on whether punitive damages would exhaust the defendant's resources so that early claimants might deprive later claimants of the opportunity to recover compensatory damages, Indicated It would be equitable to share whatever punitive damages that were allowed among all plaintiffs who ultimately recover compensatory damages rather than permitting the punitive award to go only to the early claimants. Other aspects of the decision were affirmed on appeal, but since the case was settled, the appellate court specifically refused to address the propriety of the punitive damage class certification under Rule 23(b)(1)(b). In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 167 (2nd Cir. 1987), cert denied, 108S.C1 2899(1988).

V. CONCLUSION

Although there has been a substantial amount of study and discussion which has resulted in some changes with regard to the role of punitive damages in the civil justice system, the Committee on Special Problems in the Administration of Justice has concluded that there still are serious problems that have not been adequately resolved by the courts or the legislatures. This report is intended to facilitate the resolution of the problems by offering specific recommendations on these matters. In offering them, the Committee believes that the recommendations are in the best interest of all that are affected by the civil justice system in America and that the adoption of these recommendations by the various jurisdictions involved will result in definite improvements in the administration of justice in this country.[91]

The Board of Regents of the American College of Trial Lawyers has approved this report and has ordered that it be printed and disseminated to the Fellows of the College, the American Law Institute, the American Bar Association and others interested in the subject of punitive damages.

91. We take this opportunity to express our deep appreciation to Professor Roger Henderson for his assistance in this assignment.

APPENDIX

Model Jury Instructions on Punitive Damages

The plaintiff in this case is seeking to recover punitive damages in addition to those damages that are designed to compensate the plaintiff for any injuries that have resulted in [e.g., lost earnings, medical expenses or conscious pain and suffering]. It is within your discretion whether to award any punitive damages, in determining whether to award punitive damages, you must comply with the following instructions. To justify an award of punitive damages, the plaintiff must persuade you by clear and convincing evidence that:

(1) the defendant either intended to harm the plaintiff or that the defendant realized that there was a strong probability that the plaintiff would be seriously harmed;
(2) the defendant acted with malice or with an evil mind or that the defendant's conduct was outrageous; and
(3) the defendant deserves to be punished, deterred or made an example of because of [his][her] conduct.

Punitive damages are designed to punish and deter a defendant from intentionally or consciously harming others without any good reason or justification. Such awards also are meant to deter others from committing the same acts. The fact that the defendant may have been negligent or even extremely careless is not a sufficient reason for you to award punitive damages. To award punitive damages, you must find that the defendant acted with knowledge that [his][her] conduct would cause harm to the plaintiff or that the defendant realized that there was a strong probability that the plaintiff would be seriously harmed. If you are not persuaded by clear and convincing evidence that the defendant had this knowledge, or realization, then you may not award punitive damages against the defendant.

If you find that punitive damages are to be awarded against the defendant, you must then determine the amount to be awarded. In doing so, you must find the amount that you are persuaded by clear and convincing evidence is fair and reasonable under the circumstances. In making that finding, you may take into consideration one or more of the following factors to the extent you find them relevant:

(1) the nature of defendant's conduct;
(2) the impact of defendant's conduct on the plaintiff;
(3) the relationship between the plaintiff and defendant;
(4) the likelihood that the defendant would repeat the conduct if a punitive award is not made;
(5) the defendant's financial condition; and
(6) any other circumstances shown by the evidence, including any circumstances of mitigation, that bear on the question of the size of any punitive award.

The purpose of punitive damages is to punish and deter, not to vanquish or annihilate the defendant. Although there is no fixed mathematical formula for you to use in determining the amount of a punitive award, you should strive to set the amount of any award at a level that you determine imposes a fair and reasonable punishment for the amount and type of injury that you find that the defendant has caused the plaintiff.

[Vicarious liability of principal or employer.]

[If you have found, under the instructions I have given you, that the conduct of _____ [an employee or agent, including one acting in a managerial capacity for a corporate entity] is such as to warrant an award of punitive damages, you should then consider whether any such award should be made against the defendant _____ [employer, principal or corporation].

If you find from the evidence that the defendant _____[employer, principal or corporation] either authorized, participated in, consented to, acquiesced in, or ratified the actions of [the employee, agent or manager], with knowledge of their wrongful character, you may exercise your discretion to award punitive damages against _____, [employer, principal or corporation] too. [You may also consider such an award if you find from the evidence that the defendant _____ _ [employer, principal or corporation] was reckless in selecting _____ [employee, agent or manager] or in retaining him with knowledge that he would be likely to inflict injury of this nature.]]