

# CPLR 8701: New York Legislature Adopts a Statute Allocating Twenty Percent of Punitive Damage Awards to the State General Fund

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## CIVIL PRACTICE LAW AND RULES

*CPLR 8701: New York Legislature adopts a statute allocating twenty percent of punitive damage awards to the state general fund*

Punitive or exemplary damages are constitutionally sanctioned<sup>1</sup> remedies available to aggrieved plaintiffs<sup>2</sup> as “punishment for gross misbehavior.”<sup>3</sup> These damages are imposed to serve the

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<sup>1</sup> See *Walker v. Sheldon*, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961); *Home Ins. Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 204, 550 N.E.2d 930, 935, 551 N.Y.S.2d 481, 486 (1990). The New York Court of Appeals affirmed that the “concept of punitive damages has been sanctioned under New York law.” *Id.* at 204, 550 N.E.2d at 935, 551 N.Y.S.2d at 486.

The federal courts have traditionally found punitive damages constitutionally acceptable. See *The Amiable Nancy*, 16 U.S. 546, 558 (1818) (exemplary damages applicable in cases of gross and wanton outrage to punish wrongdoer); *Day v. Woodworth*, 54 U.S. 363, 371 (1852) (exemplary, punitive, or vindictive damages are acceptable forms of awards to punish malicious conduct). Since 1986, the constitutionality of punitive damages has been subject to many more intensive challenges than in the past. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (unsuccessfully challenging punitive damages awarded under Eighth Amendment); see also *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1035 (1991) (unsuccessfully challenging punitive damage award under Fourteenth Amendment). See generally RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 3.1 (1991). “The constitutionality of punitive damage awards is likely to be the subject of heated debates for many years to come.” *Id.* The vast majority of states permit recovery of punitive damages on various grounds. *Id.* § 3.2. In fact, only four states, Michigan, Nebraska, New Hampshire, and Washington, do not permit punitive damages. *Id.* However, in Michigan and New Hampshire, the jury is able to include non-economic elements in a compensatory damage award, and such a remedy may very well include a punitive component. *Id.*

<sup>2</sup> See *Hubbell v. Trans World Life Ins. Co.*, 50 N.Y.2d 899, 901, 408 N.E.2d 918, 919, 430 N.Y.S.2d 589, 590 (1980) (valid cause of action for compensatory damages is predicate to punitive damage demand); see also *Beck v. General Tire & Rubber Co.*, 98 A.D.2d 756, 757, 469 N.Y.S.2d 785, 786 (2d Dep’t 1983) (improper to interpose claim for punitive damages as separate cause of action).

<sup>3</sup> *Home Ins.*, 75 N.Y.2d at 203, 550 N.E.2d at 934, 551 N.Y.S.2d at 485 (citations omitted). In *Home Ins.*, the New York Court of Appeals explained that the “nature of the conduct which justifies an award of punitive damages . . . is conduct having a high degree of moral culpability.” *Id.* The conduct does not have to be “intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness.” *Id.* at 204, 550 N.E.2d at 934, 551 N.Y.S.2d at 485. The standard requires the defendant’s conduct to be more egregious than gross negligence, but does not require a showing of malice. See *Walker*, 10 N.Y.2d at 405, 179 N.E.2d at 499, 223 N.Y.S.2d at 491 (granting punitive damages for high degree of moral turpitude and wanton dishonesty); see also *Hartford Accident & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 227, 397 N.E.2d 737, 743, 422

dual functions of punishing defendants for their wrongdoing and deterring future misconduct.<sup>4</sup> Traditionally, states have directed the full payment of these awards to the successful plaintiff based on the rationale that they received a vested "property interest" in the award.<sup>5</sup> A growing minority of jurisdictions, however, feel that because exemplary awards are permitted as a matter of "public

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N.Y.S.2d 47, 53 (1979) (permitting punitive damages for conduct so reckless that it amounts to conscious disregard); *Welch v. Mr. Christmas Inc.*, 57 N.Y.2d 143, 150, 440 N.E.2d 1317, 1321, 454 N.Y.S.2d 971, 975 (1982) (exemplary damage awards ordinarily require showing of conscious disregard).

<sup>4</sup> See *Walker*, 10 N.Y.2d at 404, 179 N.E.2d at 498, 223 N.Y.S.2d at 490; see also *Pacific Mut.*, 111 S. Ct. at 1044 (jury must consider degree of wrongful conduct to determine punitive damages). "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar misconduct in the future." RESTATEMENT (SECOND) OF TORTS § 908.1 (1979). These remedies are similar to criminal fines except that the plaintiff, rather than the state, is entitled to the money. *Id.* § 908 cmt. a. A punitive award does not prevent criminal conviction for the same act, nor are punitive awards precluded due to criminal conviction. *Id.* Punitive damages are intended to serve as an additional deterrent to that provided through criminal prosecution. See CHARLES T. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77 (1935) (explaining punitive damages purpose is to deter beyond deterrence of criminal punishment); see also Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520-22 (1957) (purpose of punitive damages include compensation, revenge, punishment and deterrence). Exemplary damages have been strongly criticized on the grounds that they put a person in jeopardy twice for the same offense. See Hugh E. Willis, *Measures of Damages When Property is Wrongfully Taken by Private Individuals*, 22 HARV. L. REV. 419, 420-21 (1909). Another criticism is that a person assessed with punitive damages is "punished for a criminal offense without the safeguards of a criminal trial." *Id.* at 421.

<sup>5</sup> See *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 267 (Colo. 1991). In *Kirk*, the Supreme Court of Colorado reasoned that "[if] the term 'property' also includes a 'legal right to damage for an injury,' it necessarily follows that the term 'property' also includes the judgment itself." *Id.* (quoting *Rosane v. Sengar*, 149 P.2d 372, 375 (1944)). See, e.g., *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1573 (M.D. Ga. 1990) (rejecting argument that plaintiffs have "no vested right to punitive damages").

In New York, the jury determines the amount of the punitive damages independent of the compensatory award. See, e.g., *Walker*, 10 N.Y.2d at 405, 179 N.E.2d at 499, 223 N.Y.S.2d at 491 (jury has right to give punitive awards); *Toomey v. Farley*, 2 N.Y.2d 71, 83, 138 N.E.2d 221, 228, 156 N.Y.S.2d 843, 849 (1956) (holding that question of amount is wholly for jury). The fact that compensatory damages make the victim whole has not precluded the plaintiff from being entitled to full recovery of the punitive award. See *Home Ins.*, 75 N.Y.2d at 200, 550 N.E.2d at 932, 551 N.Y.S.2d at 483. In *Home Ins.*, the Court of Appeals maintained that "[p]unitive damages are allowed on ground of public policy and not because the plaintiff has suffered any monetary damages . . . the award goes to him simply because it is assessed in his particular suit." *Id.* at 203. However, at least one New York court has found it "wholly immaterial" to determine if the plaintiff has a vested property interest in punitive damages. See *Micari v. Mann*, 126 Misc. 2d 422, 428, 481 N.Y.S.2d 967, 971 (Sup. Ct. N. Y. County 1984); see also *infra* notes 39-43 and accompanying text (describing *Micari v. Mann*).

policy," they can be directed in part to the government.<sup>6</sup> These jurisdictions have enacted statutes allocating a portion of punitive damage awards to the state.<sup>7</sup> Recently, the New York Legislature enacted its own punitive damage impoundment statute,<sup>8</sup> whereby a twenty percent share of punitive damages shall be payable to the state.<sup>9</sup>

This statute, Article 87, an amendment to the CPLR, was included as one component of a 1992 revenue raising bill.<sup>10</sup> Under

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<sup>6</sup> See, e.g., *Gordon v. State*, 585 So. 2d 1033, 1035 (Fla. Dist. Ct. App. 1991), *aff'd*, 608 So. 2d 800 (Fla. 1992), *cert. denied*, 113 S.Ct. 1647 (1993). The court concluded that a plaintiff "has no cognizable, protectable right to the recovery of punitive damages at all." *Id.* Accordingly, the right to such damages is always subject to legislative policy determinations. *Id.* The court did recognize a vested right to a punitive claim once a judgment is rendered. *Id.* at 1036; see also *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (plaintiff has no "vested right to such damages prior to entry of judgment").

State impoundment of punitive damages has also found support with members of the current United States Supreme Court. See *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries - but no more. Even assuming that a punitive "fine" should be imposed after a civil trial, the penalty should go to the state, not to the plaintiff - who by hypothesis is fully compensated.

*Id.* Other legal commentators have articulated similar support for state allocation. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 2, at 11 (5th ed. 1984). Punitive damages "have been condemned as undue compensation beyond the plaintiff's just desserts, in the form of a criminal fine which should be paid to the state . . ." *Id.* (footnotes omitted).

<sup>7</sup> See COLO. REV. STAT. § 13-21-102(4) (1987) (directing one-third of all punitive damages payable to state general fund); FLA. STAT. ANN. § 768.73(2) (West 1986) (allocating 60% of punitive damage awards either to state general fund, or Public Medical Assistance Trust); GA. CODE ANN. § 51-12-5.1(e)(2) (1987) (providing for 75% state share of punitive damage awards in products liability action); ILL. ANN. STAT. ch. 110, para. 2-1207 (Smith-Hurd 1983) (granting judge discretion to allocate punitive award among plaintiff, plaintiff's attorney, and State of Illinois Department of Rehabilitation Services); IOWA CODE ANN. § 668A.1(2)(b) (West 1987) (entitling plaintiff to an amount not to exceed 25% of exemplary damages); KAN. STAT. ANN. § 60-3402(e) (1991) (directing 50% of exemplary damage recovery to state treasurer); MO. ANN. STAT. § 537.675(2) (Vernon 1988) (rendering 50% of punitive damages in favor of the state); OR. REV. STAT. § 18.540 (1991) (making 50% of punitive award payable to Criminal Injuries Compensation Account). The Georgia and Colorado statutes have, however, been adjudicated as unconstitutional. See *McBride*, 737 F. Supp. at 1578 (Ga.); *Kirk*, 818 P.2d at 267 (Colo.); see also *infra* notes 26-28 and accompanying text (discussing unconstitutionality of punitive damage statutes).

<sup>8</sup> See Ch. 55, § 393, [1992] N.Y. Laws 323.

<sup>9</sup> CPLR 8701(1) (West 1992).

<sup>10</sup> See Memorandum of State Executive Department, *reprinted in* [1992] N.Y. Laws A-1. "The revenue actions contained in this bill are necessary to complete the Legislature's action on the 1992-1993 Executive State Budget. Given the low growth in State receipts these actions are required to provide needed State spending." *Id.*; see also Bruce Frankel,

this temporary statute,<sup>11</sup> twenty percent of a punitive damages award received by a "private party"<sup>12</sup> in "any civil action"<sup>13</sup> is payable to the state.<sup>14</sup> The attorney general is responsible for collecting the state's share<sup>15</sup> for deposit in the state's general fund.<sup>16</sup> The state's share is collectable "upon expiration of the time to appeal or the exhaustion of available appeals."<sup>17</sup> After a losing defendant exhausts all appeals, the state acquires the rights in the judgment "due a judgment creditor" and retains these rights until the judgment is satisfied.<sup>18</sup> This revenue, however, cannot be collected "until costs, compensatory damages, and attorney's fees have been paid."<sup>19</sup> The statute seemingly would not apply to pre-judgment settlements,<sup>20</sup> and leaves open the question as to whether a jury

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*Cuomo Proposes Job Program*, USA TODAY, Jan. 9, 1992, at 3a. New York State Governor Mario Cuomo addressed the economic crisis awaiting New York for the 1992 fiscal year in his tenth annual State of the State address on Jan. 8, 1992. *Id.* Governor Cuomo called on the New York Legislature "to serve as the guiding light to a nation seeking to be led out of the darkness." *Id.* The plea came at a time when experts contend that New York is "experiencing its severest economic downturn since World War II." *Id.* Economic experts project the 1992-93 deficit to be more than four billion dollars, and statewide unemployment stood at 8.0% in Nov. 1991. *Id.* Subsequently, to close the deficit, the New York Legislature passed the extensive revenue raising measure which the Governor signed into law on April 10, 1992. *See supra* notes 8-10 and accompanying text.

<sup>11</sup> See Ch. 55, § 427(dd), [1992] N.Y. Laws 343. This statute provides that Article 87 is applicable to verdicts entered thirty days after the Act is passed. *Id.* The article "shall expire and be deemed repealed on April 1, 1994." *Id.*

<sup>12</sup> CPLR 8701(1) (McKinney Supp. 1993).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* 8702. It is the Clerk of the Court's responsibility to "provide a copy of such judgment, order or other pertinent document to the attorney general" within "twenty days of issuance or filing." *Id.* Thereafter, "it shall be the duty of the attorney general to collect . . . all payments which are due the state." *Id.* 8704(1). In pursuing this responsibility "the attorney general may . . . make settlements . . . as he or she deems appropriate." *Id.*

<sup>16</sup> *Id.* 8704(1). The attorney general shall "remit such payments to the comptroller." *Id.* Accordingly, the comptroller will "deposit such payment into the state general fund." *Id.* at 8704(2).

<sup>17</sup> *Id.* 8701(1)

<sup>18</sup> *Id.* 8701(2)

<sup>19</sup> *Id.* 8703. When the full amount of the judgement cannot be collected, the state is only entitled to twenty percent of the total amount collected by all parties. *Id.*

<sup>20</sup> See CPLR 8701 commentary at 64 (McKinney Supp. 1993). In his commentary to Article 87, Professor Vincent C. Alexander concluded that this measure apparently would not apply to a pre-verdict settlement. *Id.* Professor Alexander asserts:

By its terms, CPLR 8701 is limited to a "civil action resulting in an award of punitive damages" (emphasis added). The result should be the same in a bifurcated trial in which a liability verdict leads to a settlement prior to the trial on damages. Here again, the settlement will have preceded any "award" of damages. The state's right vests, however, once an award of punitive damages has been

should be informed of the allocation.<sup>21</sup>

Courts in other jurisdictions have divided on the constitutionality of punitive damage allocation measures.<sup>22</sup> The constitutionality of these measures seems to turn on the particular state's characterization of punitive damage awards and on the point at which the state views an award as being vested. Those jurisdictions upholding punitive damage sharing measures generally treat the plaintiff as a "fortuitous beneficiary" of awards that are primarily intended to benefit the public.<sup>23</sup> The rationale of these decisions is that the plaintiff is made whole through compensatory remedies and has no vested property right to a punitive claim.<sup>24</sup> The property right does not accrue until after payment of the judgment, therefore, sharing measures cannot amount to an unconstitutional taking of private property.<sup>25</sup>

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made.

*Id.*

<sup>21</sup> See *id.* Professor Alexander states that "the ultimate disposition of the award is irrelevant" to the punishment and deterrence of the defendant. *Id.* Alexander reasons that "[a]ny interest in educating the jury is outweighed by the potential for prejudice." *Id.* This rationale finds support in other jurisdictions. See, e.g., FLA. STAT. ANN. § 768.73(8) (West 1992) (instructing that jury shall not be informed of allocation provision); see also *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1022 (Or. 1990) (instructing jury of distribution measure allowed jury to consider improper factors). However, in New York, the judiciary has adopted the policy of informing the jury of all tax consequences of damage awards in order to avoid jury speculation. See *Lanzano v. City of New York*, 71 N.Y.2d 208, 212, 519 N.E.2d 331, 333, 524 N.Y.S.2d 420, 422 (1988) (allowing jury to be advised that personal injury damage awards are not taxable in order to avoid speculation).

<sup>22</sup> See, e.g., *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1577 (M.D. Ga. 1990) (finding state allocation violative of state and federal Constitutions); *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 273 (Colo. 1991) (requiring party receiving exemplary damages to pay one-third to state was unconstitutional taking); *Gordon v. State*, 585 So. 2d 1033, 1035 (Fla. Dist. Ct. App. 1991) (allocation of exemplary award not "taking" without due process); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991) (finding punitive damages allocation constitutional because plaintiff without property right).

<sup>23</sup> *Shepherd*, 473 N.W.2d at 619. The Supreme Court of Iowa indicated that punitive damages are not intended to compensate the plaintiff. *Id.* Instead, the plaintiff receives the award "because there is no one else to receive it." *Id.* Similarly, the Florida District Court of Appeals concluded that exemplary damages do not embody the same vested right to recovery as compensatory awards. *Gordon*, 585 So. 2d at 1035. In fact, the Florida court maintained that the legislature has complete control over a plaintiff's ability to receive these punitive awards and is empowered to abolish them altogether. *Id.* at 1035-36.

<sup>24</sup> See *Gordon*, 585 So. 2d at 1036 ("[U]ntil a judgment is rendered, there is no vested right in a claim for punitive damages.") (quoting *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950)); see also *Shepherd*, 473 N.W.2d at 619 (denying plaintiff's vested right in punitive damages). In *Shepherd*, the Iowa Supreme Court asserted that punitive damages are not at all intended to compensate the plaintiff. *Id.*

<sup>25</sup> See *Gordon*, 585 So. 2d at 1036 (quoting *Ross*, 48 So. 2d at 414). In *Gordon*, the court

Other jurisdictions have reached a different result based on the opposing premise that a plaintiff's property interest in an exemplary damage award accrues on the date of the injury.<sup>26</sup> Because the plaintiff has a vested, pre-award interest in the judgment, some courts have held that conferring on the state a judgment creditor status converts this measure from a private judgment into a fine for public use.<sup>27</sup> Therefore, sharing statutes are interpreted as constituting a public taking of private property for public use without just compensation, thereby violating the Fourteenth Amendment to the United States Constitution and analogous provisions of state constitutions.<sup>28</sup> Once characterized as a fine, the allocation of the award to the state may also be subject to scrutiny under the Excessive Fine Clause of the Eighth Amendment.<sup>29</sup>

Historically, New York has liberally authorized punitive dam-

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refused to recognize a property interest in punitive damages. *Id.* Accordingly, the court concluded that a 60% allocation to the state could not qualify as an unconstitutional taking. *Id.* Similarly, the Supreme Court of Iowa adopted the premise that no property right to punitive awards exists. *See Shepherd*, 473 N.W.2d at 619; *see also supra* note 23 and accompanying text (Iowa and Florida courts do not recognize vested property rights in punitive damages awards). Hence, an allocation of the award "does not violate plaintiff's constitutional rights." *Shepherd*, 473 N.W.2d at 619; *cf. Louisville & Nashville R.R. v. Street*, 51 So. 306, 307 (Ala. 1909) (holding that court can decrease exemplary award because plaintiff has no rights to it); *Ross*, 48 So. 2d at 414 (ruling that court could decrease punitive award under rationale that until judgment, there is no right to claim).

<sup>26</sup> *See, e.g., McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1573 (M.D. Ga. 1990); *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 267 (Colo. 1991). In *Kirk*, the Supreme Court of Colorado concluded that under their state law, punitive damages constituted a property interest. *Id.* In similar litigation, the United States District Court for the Middle District of Georgia declined to accept the assertion that the plaintiff has "no vested right to punitive damages." *McBride*, 737 F. Supp. at 1573. However, in *McBride*, the court did agree that no property right accrued until the punitive claims are reduced to a judgment. *Id.*

<sup>27</sup> *See McBride*, 737 F. Supp. at 1578. The *McBride* court reasoned that when Georgia took on the status of a judgment creditor the "civil nature action" was converted into a fine for the benefit of the state. *Id.* The court further concluded that the Excessive Fine Clause of the Eighth Amendment was applicable in cases of state allocation of the award because the award was no longer punitive damages solely between private parties. *Id.* This holding is not inconsistent with United States Supreme Court precedent. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260, 263-64 (1989). In *Browning-Ferris*, the Supreme Court left open the question whether the Excessive Fine Clause might apply when the government is allowed some recovery in the litigation. *Id.* at 263-64, 268.

Note that the New York statute declares that the "state shall have all rights due a judgment creditor." CPLR 8701(2) (McKinney 1993).

<sup>28</sup> *See McBride*, 737 F. Supp. at 1578 (finding allocation measure contrary to the Fifth Amendment to the Constitution of United States, and Article 3 of the Georgia Constitution); *see also Kirk*, 818 P.2d at 267 (holding that allocation measure constituted taking without just compensation thereby violating federal and state constitutions).

<sup>29</sup> *See McBride*, 737 F. Supp. at 1578; *see also supra* note 27 (describing *McBride*).

age awards.<sup>30</sup> Existing precedent, however, does not clearly indicate what position New York would take with regard to the constitutionality of state punitive damages-sharing legislation.<sup>31</sup> In *Home Insurance Co. v. American Home Products Corp.*,<sup>32</sup> the Court of Appeals stated that “[p]unitive damages are allowed on the ground of public policy.”<sup>33</sup> This rationale compelled the court to conclude that punitive remedies are not damages awarded to compensate the victim, they are merely “expressive of the community attitude”<sup>34</sup> toward willful and wanton conduct.<sup>35</sup> Such a public policy approach to punitive awards is similarly reflected in the rationale adopted by those jurisdictions upholding punitive sharing measures.<sup>36</sup> Namely, that punitive damages are awarded for the benefit

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<sup>30</sup> See, e.g., *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 396, 425 N.E.2d 810, 812, 442 N.Y.S.2d 422, 424-25 (1981) (permitting punitive damages against insured for sexual abuse); see also EPTL § 5-4.3(b) (McKinney Supp. 1993) (allowing recovery of punitive damages in wrongful death actions); EPTL § 11-3.2(b) (McKinney Supp. 1993) (allowing punitive damages by decedent plaintiff in survival actions). See generally BLATT, *supra* note 1, § 8.42 (stating that punitive damages are generally recoverable under New York law).

Different jurisdictions recognize four distinct categories of conduct that support an award of punitive damages. See BLATT, *supra* note 1, § 3.2. These categories are: 1) malice; 2) conduct exceeding gross negligence but not constituting malice; 3) gross negligence; and 4) various statutory requirements. *Id.* Under New York law, a plaintiff must prove that defendant's conduct exceeded gross negligence. See *Walker v. Sheldon*, 10 N.Y.2d 401, 405, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 491 (1961); see also *supra* note 3 and accompanying text.

In New York, the jury determines the amount of the punitive damages independent of the degree of injury sustained. See *Walker*, 10 N.Y.2d at 405, 179 N.E.2d at 498, 223 N.Y.S.2d at 490; see also *Hartford Accident & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 227, 397 N.E.2d 737, 743, 422 N.Y.S.2d 47, 53 (1979) (explaining that punitive damages need not be proportionate to compensatory damages). However, in determining an award of punitive damages the jury is free to consider a number of variables, including the wealth of the defendant. See *O'Donnell v. K-Mart Corp.*, 100 A.D.2d 488, 492, 474 N.Y.S.2d 344, 348 (4th Dep't 1984) (deterrent effect is dependent upon wealth of defendant).

<sup>31</sup> See *supra* notes 22-28 and accompanying text (discussing property interest and public policy toward punitive awards).

<sup>32</sup> 75 N.Y.2d 196, 550 N.E.2d 930, 551 N.Y.S.2d 481 (1990).

<sup>33</sup> *Id.* at 203, 550 N.E.2d at 934, 551 N.Y.S.2d at 485 (stating punitives are not given to compensate plaintiff, but merely because plaintiff brought suit); see also *Toomey v. Farley*, 2 N.Y.2d 71, 83, 130 N.E.2d 221, 228, 156 N.Y.S.2d 840, 849 (1956) (holding that punitive damages serve “as punishment for gross behavior for the good of the public”); *Brink's Inc. v. City of New York*, 546 F. Supp. 403, 412 (S.D.N.Y. 1982) (stating that under New York law punitive damages are not for benefit of successful litigant, but good of public); *Garnity v. Lyle Stuart Inc.*, 40 N.Y.2d 354, 358, 353 N.E.2d 793, 795, 386 N.Y.S.2d 831, 833 (1976) (explaining that punitive damages are “social exemplary remedy, not a private compensatory remedy”).

<sup>34</sup> *Home Ins.*, 75 N.Y.2d at 203, 550 N.E.2d at 934, 551 N.Y.S.2d at 485.

<sup>35</sup> *Id.*

<sup>36</sup> See *supra* notes 23-25 and accompanying text.

of the public at large.<sup>37</sup>

However, in those jurisdictions that have adjudicated the constitutionality of state punitive allocation measures, judicial attention has also been directed towards the plaintiff's property interest in punitive awards.<sup>38</sup> The New York judiciary has yet to clearly articulate the possessory rights embodied in punitive damage awards. In *Micari v. Mann*,<sup>39</sup> the Supreme Court, New York County, cast uncertainty about the property rights encompassing punitive remedies.<sup>40</sup> When deciding whether a judge may increase the amount of a punitive award,<sup>41</sup> the court found it "wholly immaterial to the court's review of a punitive damage verdict whether or not plaintiff has *any vested property right* in the recovery."<sup>42</sup> Rather, the court ruled that the proper consideration is "the future effect upon the defendant and society."<sup>43</sup> Thus, the court left this critical question unanswered.

It is submitted that New York case law definitively recognizes the public benefit associated with punitive damage awards.<sup>44</sup> Accordingly, directing a percentage of the recovery to the state general fund is certainly an effective way of insuring such public benefit. Thus, the New York State punitive allocation measure merely enhances the present public policy behind punitive damage remedies. Additionally, New York's approach is distinctively less burdensome in size and duration than the measures applied in sister states. A twenty percent allocation places it as one of the smallest in the country,<sup>45</sup> and an expiration date in April, 1994, makes it

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<sup>37</sup> See *supra* note 23 and accompanying text.

<sup>38</sup> See *supra* note 22 and accompanying text.

<sup>39</sup> 126 Misc. 2d 422, 481 N.Y.S.2d 967 (Sup. Ct. New York County 1984).

<sup>40</sup> See *id.* at 428, 481 N.Y.S.2d at 971.

<sup>41</sup> See *id.* at 425, 481 N.Y.S.2d at 970. In *Micari*, students sought compensatory and punitive damages from their teacher, alleging that he sexually abused them. *Id.* at 422, 481 N.Y.S.2d at 968. Although the jury note explained that the award was intended to deter misconduct from the defendant, the jury awarded no punitive damages. *Id.* at 424, 481 N.Y.S.2d at 969. The plaintiffs moved for new trial on issue of punitive damages. *Id.* The judge ordered a new trial unless the defendant agreed to pay \$5,000 in punitive damages to each plaintiff. *Id.* The court concluded that judges have the same power to increase inadequate punitive damage awards as they have to increase inadequate compensatory awards. *Id.* at 428, 481 N.Y.S.2d at 972.

<sup>42</sup> *Id.* at 428, 481 N.Y.S.2d at 972. (emphasis added).

<sup>43</sup> *Id.*

<sup>44</sup> See *supra* notes 32-34 and accompanying text.

<sup>45</sup> Compare the New York statute, *supra* note 8, with the statutes of other states, *supra* note 7. In Illinois, the state's share of an award could be smaller than in New York based on the judge's discretion. *Id.*

the shortest.<sup>46</sup>

New York practitioners should be aware that this legislation exists, and that it has yet to be constitutionally challenged. In other jurisdictions, litigation over similar statutes has hinged on the state's individual assessment of the plaintiffs' property rights in punitive damage awards. Although the New York judiciary has thus far found it immaterial to address this issue, they have repeatedly emphasized the strong public policy considerations for punitive damage awards. Additionally, it is submitted that New York endorses a policy of full disclosure to the jury of laws having an economic impact on a plaintiff's recovery.<sup>47</sup> Thus, the New York judiciary may find it appropriate to include jury instructions on the state allocation of punitive damages. One drawback to this proposal, however, is that it creates a potential conflict of interest. By calculating the amount of a fine imposed for their benefit, jurors would be assessing damages in which they, as state residents, share an indirect interest. This conflict would be accentuated if the legislature were to increase the state share to a more significant percentage.

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<sup>46</sup> See *supra* note 7.

<sup>47</sup> *Lanzano v. City of New York*, 71 N.Y.2d 208, 211, 519 N.E.2d 331,331, 524 N.Y.S.2d 420, 421 (1988). Addressing the issue whether the nontaxability of personal injury awards should be disclosed to the jury, the Court of Appeals stated the following:

Juries should not be allowed to increase or decrease awards based on misconceptions of the law when simple and straightforward instructions of relevant rules are readily available to help them in the truth-finding process.

. . . [T]he process of arriving at fair and correct results is enhanced by treating juries as sensible, intelligent human beings capable of following instructions and of balancing nuances.

*Id.* at 212, 519 N.E.2d at 332, 524 N.Y.S.2d at 422.

