

## PUNITIVE DAMAGES: PUBLIC WRONG OR EGREGIOUS CONDUCT?

### A SURVEY OF NEW YORK LAW

*John M. Leventhal\* & Thomas A. Dickerson\*\**

#### I. INTRODUCTION

New York's punitive damages jurisprudence has oftentimes been confusing. Courts have at times required plaintiffs to establish a public wrong in order to award punitive damages.<sup>1</sup> At other times, courts have required plaintiffs to establish egregious conduct.<sup>2</sup> This article provides a historical perspective of punitive damages and the rationales for their imposition. This article then references relevant case law to examine legal determinations of punitive damage awards in tort, fraud, breach of contract, breach of fiduciary duty, and General Business Law ("GBL") section 349 causes of actions,

---

\* John M. Leventhal, M.S., J.D., is an Associate Justice of the Appellate Division of the New York State Supreme Court, Second Judicial Department. He presided over the nation's first dedicated felony Domestic Violence Court, from June 1996 to January 2008. He is a frequent lecturer on evidence, elder abuse, guardianship, domestic violence and other criminal law issues before bar associations, law schools, civic groups, court administrators and governmental agencies and has written extensively on these topics.

\*\* Thomas A. Dickerson, M.B.A., J.D., is also an Associate Justice of the Appellate Division of the New York State Supreme Court, Second Judicial Department. He is the author of CLASS ACTIONS: THE LAW OF 50 STATES (Law Journal Press 2011); *Consumer Protection in 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* ch. 98 (Robert L. Haig, et al., eds., 3d ed. 2012) [hereinafter *Consumer Protection*]; JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE CPLR §§ 901–909 (David L. Ferstendig 2d. ed. 2012), CONSUMER LAW 2012: THE JUDGE'S GUIDE TO FEDERAL AND NEW YORK STATE CONSUMER PROTECTION STATUTES, available at [http://www.courts.state.ny.us/courts/9jd/TacCert\\_pdfs/Dickerson\\_Docs/CONSUMERLAW2012.pdf](http://www.courts.state.ny.us/courts/9jd/TacCert_pdfs/Dickerson_Docs/CONSUMERLAW2012.pdf), and *New York State Class Actions: Make it Work—Fulfill The Promise*, 74 ALB. L. REV. 711 (2011).

We wish to thank Rebecca Bielski and Emily Erstling for their invaluable assistance in the research of this article. We would also like to thank Ben Darvil, Jr., Esq., Daniel Kaplan, and Benjamin Warach for their assistance in editing this article.

The views expressed in this article are solely those of the authors and not of the Appellate Division of the New York State Supreme Court, Second Department.

<sup>1</sup> *Thorenson v. Penthouse Int'l., Ltd.*, 80 N.Y.2d 490, 497, 606 N.E.2d 1369, 1371–72, 591 N.Y.S.2d 978, 980–81 (1992) (citing *Reynolds v. Pegler*, 123 F. Supp. 36, 38 (S.D.N.Y. 1954)).

<sup>2</sup> *Rocanova v. Equitable Life*, 83 N.Y.2d 603, 613, 634 N.E.2d 940, 943–44, 612 N.Y.S.2d 339, 342–43 (1994).

particularly when a public wrong is required to warrant such an award.

## II. HISTORICAL DEVELOPMENT OF THE DOCTRINE OF PUNITIVE DAMAGES

The concept of punitive damages was present in the oldest recorded legal systems: Babylonian law in the Code of Hammurabi, Hittite Laws of approximately 1400 B.C., the Hebrew Covenant Code of Mosaic Law c. 1200 B.C., and the Hindu Code of Manu c. 200 B.C.<sup>3</sup> Anglo-Saxon law included a related practice which required wrongdoers to pay money damages for almost every type of crime, including homicide.<sup>4</sup> For example, in many enumerated crimes in the Laws of Wihtred,<sup>5</sup> the wrongdoer was subject to either a physical punishment or a fine payable to the victim.<sup>6</sup> If the wrongdoer killed another man, he was bound to pay the man's family a certain price, which was his *wergild*, or "man-payment," based upon the deceased's social rank.<sup>7</sup> The purpose of the payment was compensatory, rather than penal, and also served to maintain the peace in a society where revenge feuds were common.<sup>8</sup> These payments differed from the modern concept of punitive damages because they did not consider the egregiousness of the wrongdoing, but rather the nature of the injury.<sup>9</sup> Nevertheless, courts

---

<sup>3</sup> See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 490–91 (2008) (citing Code of Hammurabi § 8, p. 13 (Robert Francis Harper ed. & trans., 2d ed. 1904) (ca. 1750 B.C.E.); Statute of Gloucester, 1278, 6 Edw. I, ch. 5, 1 Stat. at Large 66)) ("Awarding damages beyond the compensatory was not, however, a wholly novel idea even then, legal codes from ancient times through the Middle Ages having called for multiple damages for certain especially harmful acts."); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262–63 n.17 (1976).

<sup>4</sup> *Wise v. Teerpenning*, 2 Edm. Sel. Cas. 112, 116 (N.Y. Sup. Ct. Ulster County 1849) (tracing the possible origins of the doctrine of punitive damages to Anglo-Saxon regulations).

<sup>5</sup> King Wihtred ruled over the Kingdom of Kent, the southeastern portion of the British Isle, from around 690 to 725 and in 695, he issued a code of laws. ENGLISH HISTORICAL DOCUMENTS c. 500–1042, at 361 (DOROTHY WHITELOCK ed., 1968); see also KEVIN CROSSLEY-HOLLAND, *THE ANGLO-SAXON WORLD: AN ANTHOLOGY* 26–28 (Oxford University Press 1999).

<sup>6</sup> See CROSSLEY-HOLLAND, *supra* note 5, at 27 (stating that slaves who ate on fast days or worshiped devils could pay six shillings or be flogged).

<sup>7</sup> BRUCE MITCHELL, *AN INVITATION TO OLD-ENGLISH AND ANGLO-SAXON ENGLAND* § 241 (2000); *Wise*, 2 Edm. Sel. Cas. at 116 ("The *weregild* (wergildus) was the price of homicide paid for killing a man . . .").

<sup>8</sup> *Wise*, 2 Edm. Sel. Cas. at 118 ("These regulations among our Saxon ancestors . . . had their origin in the desire to regulate and restrain the gratification of private revenge . . . and to curb the principle of retaliation which naturally produced violent and deadly feuds . . .").

<sup>9</sup> *Wise*, 2 Edm. Sel. Cas. at 117 ("The object of these laws was to repair the fault, rather than to punish the offender. There was therefore no distinction made between things done with deliberate malice, and those done in the heat of passion, or by inadvertence . . .").

sometimes considered the circumstances behind the crime when determining whether or not to impose *wergild* payments on a wrongdoer.<sup>10</sup>

Early English law codified a court's common law ability to impose punitive damages.<sup>11</sup> The first of such statutes appeared in 1275<sup>12</sup> and was followed by many others until 1753.<sup>13</sup> The first English cases awarding punitive damages are purported to be *Wilkes v. Wood*<sup>14</sup> and *Huckle v. Money*.<sup>15</sup> In *Huckle*, the court awarded exemplary damages (to make an example of the wrongdoer) to a man who was unlawfully detained on governmental orders, even though he suffered neither physical injury nor economic loss, because the action was "worse than the Spanish Inquisition."<sup>16</sup> In addition, it is believed that juries had often awarded punitive damages even before this remedy was officially codified.<sup>17</sup>

The first reported case awarding punitive damages in the United States was *Genay v. Norris*,<sup>18</sup> in which a plaintiff was awarded exemplary damages after a physician spiked his drink following their altercation.<sup>19</sup> In 1851, in *Day v. Woodworth*,<sup>20</sup> the Supreme Court first acknowledged the states' past practices of awarding

<sup>10</sup> See CROSSLEY-HOLLAND, *supra* note 5, at 28 ("If anyone kill a man who is in the act of thieving, he is to lie without *wergild*." (emphasis added)).

<sup>11</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–81 (1996).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 581 n.33 ("One English statute, for example, provides that officers arresting persons out of their jurisdiction shall pay double damages. 3 Edw., I., ch. 35. Another directs that in an action for forcible entry or detainer, the plaintiff shall recover treble damages. 8 Hen. VI, ch. 9, § 6."); Owen, *supra* note 3, at 1263 n.18 ("The first English statutory provision for multiple damages appears to have been enacted by Parliament in 1275. 'Trespassers against religious persons, shall yield double damages.' Including this first statute, Parliament enacted a total of sixty-five separate provisions for double, treble, and quadruple damages between 1275 and 1753." (citations omitted)).

<sup>14</sup> *Wilkes v. Wood*, 98 Eng. Rep. 489, 490 (K.B. 1763); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) ("Punitive damages have long been a part of traditional state tort law." (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (internal quotation marks omitted))).

<sup>15</sup> *Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763); see JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES*, § 4:1 (2d ed. 1991); Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 213 (1977).

<sup>16</sup> *Huckle*, 95 Eng. Rep. at 768–69.

<sup>17</sup> See 1 THEODORE SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* § 348 (Arthur G. Sedgwick & Joseph H. Beale eds., Baker, Voorhis & Co. 9th ed. 1920) (1891).

<sup>18</sup> *Genay v. Norris*, 1 S.C.L. 6 (1 Bay 1784); see *Pac. Mut. Life Ins. Co.*, 499 U.S. at 15.

<sup>19</sup> *Genay*, 1 S.C.L. at 6–7; see also *Coryell v. Colbaugh*, 1 N.J.L. 90, 91 (N.J. 1791) (holding that damages in action alleging breach of promise of marriage should be exemplary and not to be measured by defendant's poverty).

<sup>20</sup> *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851); see also Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1010 n.238 (2007) (acknowledging the Supreme Court's holding in 1851).

punitive damages.<sup>21</sup>

As early as 1817, New York cases referred to extra-compensatory damages as “smart-money.”<sup>22</sup> This term referred to the manner in which courts awarded extra-compensatory damages as “consideration in amends for the pain which [the victim] has unjustly suffered.”<sup>23</sup> In other words, courts awarded damages that did more than compensate an injured party, because the defendant caused an injury that hurt or “smarted.” In this way, early “smart-money” resembled the modern-day concept of compensatory damages for pain and suffering.<sup>24</sup>

Eventually, the term “smart-money” took on a more punitive connotation.<sup>25</sup> “Smart-money” referred to the pain or “smart” caused to the defendant who was required to pay above and beyond compensation.<sup>26</sup> In New York, “smart-money” has become synonymous with “vindictive damages,”<sup>27</sup> “exemplary damages,”<sup>28</sup> and “punitive damages,”<sup>29</sup> as articulated in *Fry v. Bennett*,<sup>30</sup> smart-money awards “are given in consequence of the wantonness of the wrong, and not merely on account of the suffering, discomfort and disgrace caused by them to the plaintiff.”<sup>31</sup>

### III. RATIONALES BEHIND PUNITIVE DAMAGES IN NEW YORK

Although they exist in the civil system, New York has historically viewed punitive damages as somewhat penal in nature.<sup>32</sup> Punitive

---

<sup>21</sup> *Day*, 54 U.S. at 371.

<sup>22</sup> *See* *Wort v. Jenkins*, 14 Johns. 352, 352 (N.Y. Sup. Ct. 1817); *see also* *Tillotson v. Cheetham*, 3 Johns. 56, 64–65 (N.Y. Sup. Ct. 1808) (awarding punitive damages for publication of a libelous and defamatory statement against a government officer in order to make an example of the defendant’s actions); *see also* *De Severinus v. Press Pub. Co.* 147 A.D. 161, 163, 132 N.Y.S. 80, 82 (App. Div. 2d Dep’t 1911) (using the term “smart money” as late as 1911).

<sup>23</sup> 1 MARJORIE M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 520 (1937) (quoting THOMAS RUTHERFORD, *INSTITUTES OF NATURAL LAW* 207 (2d Am. Ed. 1832)) (internal quotation marks omitted).

<sup>24</sup> *See infra* notes 34–37 and accompanying text.

<sup>25</sup> *See infra* notes 26–31 and accompanying text.

<sup>26</sup> *See* *Fay v. Parker*, 53 N.H. 342, 355 (1873) (“And it is interesting as well as instructive to observe, that one hundred and twenty years ago the term *smart money* was employed in a manner entirely different from the modern signification which it has obtained, being then used as indicating compensation for the smarts of the injured person, and not, as now, money required by way of punishment, and to make the wrong-doer smart.”).

<sup>27</sup> *See* *Fry v. Bennett*, 1 Abb. Pr. 289, 298 (N.Y. Sup. Ct. 1855).

<sup>28</sup> *See id.* at 302 (using exemplary and vindictive damages interchangeably).

<sup>29</sup> *See id.* at 299.

<sup>30</sup> *Id.* at 289.

<sup>31</sup> *Id.* at 299.

<sup>32</sup> *Cook v. Ellis*, 6 Hill 466, 467–68 (N.Y. Sup. Ct. 1844) (holding that smart-money

damages were at first not assessed separately, but were imposed as part of compensation to victims for non-objectively valued injuries like physical pain and suffering, or false imprisonment.<sup>33</sup> Once New York courts began to allow compensatory recovery for physical pain and suffering, punitive damages were often justified on the grounds that a plaintiff should be able to recover for emotional pain and suffering, and offense to the plaintiff's character.<sup>34</sup> As the court said in *Goines v. Pennsylvania Railroad Co.*,<sup>35</sup> punitive damages are partially "intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation."<sup>36</sup> Nevertheless, New York courts differentiated punitive damages from damages based on mental pain and suffering.<sup>37</sup>

Critics have argued that punitive damages should be dispensed

---

imposed by a jury was penal and compensatory, and did not preclude additional criminal prosecution for the same conduct).

<sup>33</sup> See *Voltz v. Blackmar*, 64 N.Y. 440, 444 (1876) ("In actions for assault or for false imprisonment, the damages are, from the nature of the injury claimed, incapable of exact ascertainment."); see also *Cook*, 6 Hill at 466–67 (finding that smart-money was partially compensatory in an action for assault with intent to have carnal connection with a woman).

<sup>34</sup> See *Lane v. Wilcox*, 55 Barb. 615, 617–18 (N.Y. Sup. Ct. 1864). Exemplary damages can be awarded for certain conduct "committed against the persons, characters and feelings of those upon whom they are perpetrated, and no accurate measure of actual damages, whether to person, character or feelings, can ever be applied in such cases." *Id.* at 618; see *Fry*, 1 Abb. Pr. at 298–99 (holding that if "mental suffering" is not included in the usual compensatory damages for a particular personal injury, it may be considered for purposes of punitive damages); *Morse v. Auburn & Syracuse R.R. Co.*, 10 Barb. 621, 621–22, 625 (N.Y. Sup. Ct. 1851) (stating that damages for physical pain, or for "loss of time and money" are not "exemplary, or punitive" but "the mental suffering, the injured feelings, the sense of injustice, of wrong, or insult" felt by the injured person can be considered in the assessment of punitive damages).

<sup>35</sup> *Goines v. Pennsylvania R.R. Co.*, 208 Misc. 103, 143 N.Y.S.2d 576 (Sup. Ct. N.Y. County 1955), *rev'd on other grounds*, 3 A.D.2d 307, 160 N.Y.S.2d 39 (App. Div. 1st Dep't 1957).

<sup>36</sup> *Id.* at 111, 143 N.Y.S.2d at 583.

<sup>37</sup> See *Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary*, 262 N.Y. 320, 324, 186 N.E. 798, 800 (1933) ("Punitive damages and damages for wounded feelings, though similar, are not the same."); *Pickle v. Page*, 252 N.Y. 474, 479, 169 N.E. 650, 652 (1930) (stating that for certain instances of loss of service, such as in the seduction of a child, a parent can receive compensatory damages for services lost, as well as punitive damages for the outrage caused, even if the loss of service is a legal fiction); *De Wolf v. Ford*, 193 N.Y. 397, 406, 86 N.E. 527, 531 (1908) (holding that damages for emotional suffering caused by an innkeeper's failure to ensure that his employees treat all guests with due respect are compensatory and not punitive); *Gillespie v. Brooklyn Heights R.R. Co.*, 178 N.Y. 347, 359, 70 N.E. 857, 861 (1904) (holding that a passenger who is treated rudely by a common carrier can collect compensatory, not exemplary, damages, for "humiliation and injury to her feelings."); *Oehlhof v. Solomon*, 73 A.D. 329, 333–34, 76 N.Y.S. 716, 719 (App. Div. 1st Dep't 1902) ("[I]n torts affecting personal rights and causing humiliation or indignity to one's feelings, damages for such injuries are recoverable and are deemed compensatory. . . . [P]unitive . . . damages are also recoverable [in specific actions] as a vindication to the indignity of the party whose feelings have been outraged."); see also Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 249–50 (2009) (providing historical information on the evolution of punitive damages).

with since emotional pain and suffering has now been incorporated into the calculation for compensatory damages.<sup>38</sup> These critics further assert that while punitive damages are a form of punishment, they do not include the constitutional safeguards and limits guaranteed to criminal defendants.<sup>39</sup> It is questionable however, whether punitive damages violate the constitutional prohibition against “double jeopardy,” for a person may be criminally sanctioned and made to pay punitive damages for the same conduct.<sup>40</sup> That contention is especially questionable considering that such a penalty is not criminal in nature.<sup>41</sup> Moreover, some critics have further noted that even if a wrongdoer should be fined to make an example of his conduct, the plaintiff does not deserve to reap a windfall.<sup>42</sup>

---

<sup>38</sup> See *Oehlhof*, 73 A.D. at 334, 76 N.Y.S. at 719 (stating that injury to dignity and feelings are to be paid through compensatory damages).

<sup>39</sup> See Markel, *supra* note 37, at 252; CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77 (1935) (explicating on the common criticisms of punitive damages).

<sup>40</sup> See *Cook v. Ellis*, 6 Hill 466, 467 (N.Y. Sup. Ct. 1844); MCCORMICK, *supra* note 39, at 278–79. Cf. *Hudson v. United States*, 522 U.S. 93, 95–96 (1997) (holding that administrative monetary penalties did not bar subsequent criminal prosecution for violating federal banking statutes because administrative proceedings were civil), *abrogating* *United States v. Halper*, 490 U.S. 435 (1989); *United States v. Ursery*, 518 U.S. 267, 292 (1996) (holding that civil *in rem* forfeitures are not punishment for purposes of the double jeopardy clause). *But see* *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding that a tax imposed for growing and selling marijuana was a punishment for the purpose of double jeopardy analysis); *People v. Arnold*, 174 Misc. 2d 585, 593, 664 N.Y.S.2d 1008, 1013 (Sup. Ct. Kings County 1997) (finding that a sanction under a civil family court law may be sufficiently similar to a penal crime to invoke double jeopardy).

<sup>41</sup> See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 7 (1991); *id.* at 25–27 (Scalia, J., concurring) (reviewing the history of punitive damages procedures and awards in light of the long-enduring debate about their propriety); *Fay v. Parker*, 53 N.H. 342, 397 (1872); *Walker v. Sheldon*, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 492 (1961) (holding that the plaintiff in a fraud and deceit action could recover punitive damages); *Dain v. Wycoff*, 7 N.Y. 191, 193–94 (1852) (awarding punitive or vindictive damages to plaintiff in a civil action); *Kendall v. Stone*, 5 N.Y. 14 (1851) (“[Punitive damages] disregard[] the legal meaning of the term damages, which import[] merely a *compensation* or *recompense* for an injury . . . by allowing the plaintiff to recover that to which he has *no legal right* . . . [and] confounds the distinction between *public* and *private* remedies. [Punitive damages] arrogate[] the right to punish what the law has not made a *public offence* . . . [leaving the remedy to] the arbitrary will of the jury [] without any rule or limit, except their own caprice.” (citations omitted) (citing appellant’s counsel’s notes)).

<sup>42</sup> See *Walker*, 10 N.Y.2d 401, 408–09, 179 N.E.2d 497, 501, 223 N.Y.S.2d 488, 494 (1961) (Van Voorhis, J. dissenting) (arguing that it is an “injustice” for the plaintiff to be compensated for more than the damages he actually sustained); *Dain*, 7 N.Y. at 193 (“If the jury have the right to impose a fine, by way of example, the plaintiff has no possible claim to it.”).

#### IV. GENERAL OBSERVATIONS ABOUT PUNITIVE DAMAGES IN NEW YORK

Despite these long-running criticisms, New York courts have consistently awarded punitive damages.<sup>43</sup> New York currently adopts a rationale for punitive damages that embodies the retributive, specific, and general deterrent elements of criminal punishment.<sup>44</sup> Additionally, New York courts have observed that punitive damages are justified because the prospect of such an award may induce a plaintiff to sue a wrongdoer when the plaintiff might not want to be involved in criminal proceedings.<sup>45</sup> Moreover, scholars often employ economic arguments regarding the deterrent effects of punitive damages in support of the remedy.<sup>46</sup> Finally, New York courts have suggested that punitive damages are justified

---

<sup>43</sup> See *Loucks v. Standard Oil Co. of N.Y.*, 224 N.Y. 99, 112, 120 N.E. 198, 202 (1918) (Cardozo, J.) (noting that nothing in New York's public policy prevents the award of punitive damages); *Buteau v. Naegeli*, 124 Misc. 470, 471, 208 N.Y.S. 504, 505 (Sup. Ct. N.Y. County 1925) (acknowledging that while the dispute over punitive damages exists due to their "illogical and unsatisfactory character," New York courts have nevertheless definitively awarded them).

<sup>44</sup> See *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489, 868 N.E.2d 189, 196, 836 N.Y.S.2d 509, 516 (2007) ("Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future." (citations omitted)); *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 335, 437 N.E.2d 1104, 1105, 452 N.Y.S.2d 347, 348 (1982) ("Punitive or 'exemplary' damages, sometimes known as 'smart money', and thus seemingly attuned to the criminal rather than the civil side of the law, are not intended to compensate the injured party but to punish the tort-feasor for his conduct and to deter him and others like him from similar action in the future." (citations omitted)); *Walker*, 10 N.Y.2d at 406, 179 N.E.2d at 499, 223 N.Y.S.2d at 491 (awarding punitive damages in a fraud and deceit action against a publisher); see also *In re Rothko's Estate*, 43 N.Y.2d 305, 322, 372 N.E.2d 291, 298, 401 N.Y.S.2d 449, 456 (1977) (stating that appreciation damages are not considered punitive because they serve to make the plaintiff whole while acknowledging that they do serve the purposes of deterrence by making an example of the defendant).

<sup>45</sup> *Faulk v. Aware, Inc.*, 19 A.D.2d 464, 471, 244 N.Y.S.2d 259, 266 (App. Div. 1st Dep't 1963) ("[T]he sanctioning of such damages 'leads to the actual prosecution of the claim for punitive damages, where the same motive would often lead him to refrain from the trouble incident to appearing against the wrongdoer in criminal proceedings.'" (quoting MCCORMICK, *supra* note 39, at 277)).

<sup>46</sup> See also HENRY N. BUTLER, *ECONOMIC ANALYSIS FOR LAWYERS* 644 (1998) ("The fundamental economic consequences of criminal law and tort law are the same—deterrence of activities considered to be wrong."). See generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 896–901 (1998) (examining how rational parties respond to the threat of punitive damages and whether their response promotes, or fails to promote, social welfare); Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 80–91 (1982) (using economic theory to develop clear standards for deciding when punitive damages are appropriate and for computing their magnitude when awarded). But see *Sebok*, *supra* note 20, at 1015–23 (arguing that private retribution is a better fitting theory for punitive damages); *Markel*, *supra* note 37, at 275–79 (2009) (arguing that punitive damages should also serve as an intermediate retributive sanction apart from a theory of optimal deterrence).

as an expression of public condemnation of wrongful conduct.<sup>47</sup>

### V. INSURING AGAINST PUNITIVE DAMAGES

Punitive damages may be awarded in tort cases where the wrongdoer's action rises to a sufficiently high level of moral turpitude—often to a level associated with a criminal indifference to civil obligations.<sup>48</sup> Accordingly, insurers in New York are forbidden from indemnifying policyholders against punitive damages awards.<sup>49</sup> Insurance coverage against punitive damage awards would nullify New York's public policy that punitive damages may be assessed to punish a tortfeasor for acts of moral turpitude or criminally indifferent conduct.<sup>50</sup> To allow such insurance coverage would remove the deterrent effect against similar conduct.<sup>51</sup>

### VI. AS A CAUSE OF ACTION/PLEADING

Punitive damages are not required to be pled as a separate cause of action in New York.<sup>52</sup> Although case law has described punitive damage claims as “parasitic”<sup>53</sup>—in that they depend on an underlying cause of action—they nonetheless require an additional showing of wantonness or malice.<sup>54</sup> Moreover, public policy considerations—rather than personal compensatory

---

<sup>47</sup> See *Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 497, 606 N.E.2d 1369, 1371–72, 591 N.Y.S.2d 978, 980–81 (1992) (“[Punitive] damages may be considered expressive of the community attitude towards one who willfully [sic] and wantonly causes hurt or injury to another.” (internal quotation marks omitted) (quoting *Reynolds v. Pegler*, 123 F. Supp. 36, 38 (S.D.N.Y. 1954))); *Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary*, 262 N.Y. 320, 324–25, 186 N.E. 798, 800 (1933).

<sup>48</sup> See *Ross*, 8 N.Y.3d at 489, 868 N.E.2d at 196, 836 N.Y.S.2d at 516; *Prozeralik v. Capital Cities Commc'ns, Inc.*, 82 N.Y.2d 466, 479, 626 N.E.2d 34, 41–42, 605 N.Y.S.2d 218, 225–26 (1993); *Craven v. Bloomingdale*, 171 N.Y. 439, 447, 64 N.E. 169, 171 (1902).

<sup>49</sup> See *Hartford Accident & Indem. Co. v. Vill. of Hempstead*, 48 N.Y.2d 218, 228, 397 N.E.2d 737, 744, 442 N.Y.S.2d 47, 53–54 (1979).

<sup>50</sup> See *id.* (“[T]he rule to be applied with respect to a punitive damage award . . . is that coverage is proscribed as a matter of public policy. We reach that conclusion primarily because to allow insurance coverage is totally to defeat the purpose of punitive damages. . . .”).

<sup>51</sup> See *Home Ins. Co. v. Am. Home Prod. Corp.*, 75 N.Y.2d 196, 203, 550 N.E.2d 930, 934, 551 N.Y.S.2d 481, 485 (1990).

<sup>52</sup> *Weir Metro Ambu-Serv., Inc. v. Turner*, 57 N.Y.2d 911, 912, 442 N.E.2d 1268, 1268, 456 N.Y.S.2d 757, 757 (1982) (“[P]unitive damages may not be sought as a separate cause of action.”).

<sup>53</sup> *Rocanova v. Equitable Life Assurance Soc'y*, 83 N.Y.2d 603, 616, 634 N.E.2d 940, 945, 612 N.Y.S.2d 339, 344 (1994).

<sup>54</sup> *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489, 868 N.E.2d 189, 196, 836 N.Y.S.2d 509, 516 (2007).

considerations—justify awards of punitive damages.<sup>55</sup>

## VII. IMMUNITY AND INDEMNIFICATION

New York State and its political subdivisions are immune from punitive damages, unless the state expressly waives immunity.<sup>56</sup> New York State does not expressly waive its immunity to punitive damages by, for example, allowing plaintiffs to name it as a defendant in tort actions.<sup>57</sup> Similarly, other New York legislative enactments retain the state's immunity from punitive damages.<sup>58</sup> Awarding punitive damages against the State would not advance the goals of this remedy—the taxpayers who fund the award are the same people who are supposed to benefit from the deterrence.<sup>59</sup>

New York has historically afforded immunity to parties involved in master-servant suits.<sup>60</sup> For example, New York State law has immunized third parties, who wrongfully injured an employee, from punitive damage liability if the employer sued them for lost services.<sup>61</sup> Instead, the master could only receive compensatory damages for the value of the lost services.<sup>62</sup> Similarly, as the doctrine of *respondeat superior* did not apply to punitive damages, courts could grant only compensatory damages against a master

---

<sup>55</sup> *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 151, 862 N.Y.S.2d 487, 491 (App. Div. 3d Dep't 2008) ("Although punitive damages claims depend upon the existence of an underlying cause of action for compensatory relief, and are for that reason described as parasitic, they are nonetheless distinct claims, seeking relief upon a vastly different evidentiary predicate than that which would suffice to support a claim for personal injury, and are justified as a matter of policy for public ends essentially removed from the redress of private harm." (citations omitted)).

<sup>56</sup> *See Krohn v. N.Y.C. Police Dep't*, 2 N.Y.3d 329, 335, 811 N.E.2d 8, 11, 778 N.Y.S.2d 746, 749 (2004); *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 338–39, 437 N.E.2d 1104, 1107, 452 N.Y.S.2d 347, 350 (1982) ("[T]he twin justifications for punitive damages—punishment and deterrence—are hardly advanced when applied to a governmental unit. . . . [I]t would be anomalous to have 'the persons who [] bear the burden of punishment, i.e., the taxpayers and citizens', constitute 'the self-same group who are expected to benefit from the public example which the granting of such damages supposedly makes of the wrongdoer.'" (quoting *Sharapata v. Town of Islip*, 82 A.D.2d 350, 364, 441 N.Y.S.2d 275, 283 (App. Div. 2d Dep't 1981))); *Spano v. Kings Park Cent. Sch. Dist.*, 61 A.D.3d 666, 672, 877 N.Y.S.2d 163, 168 (App. Div. 2d Dep't 2009); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) ("Damages awarded for *punitive* purposes . . . are not sensibly assessed against the governmental entity itself.").

<sup>57</sup> *See Sharapata*, 56 N.Y.2d at 334, 437 N.E.2d at 1105, 452 N.Y.S.2d at 348.

<sup>58</sup> *See id.* at 338, 437 N.E.2d at 1107, 452 N.Y.S.2d at 350.

<sup>59</sup> *See id.*

<sup>60</sup> *See, e.g., Roberts v. Gagnon*, 1 A.D.2d 297, 301, 149 N.Y.S.2d 743, 748 (App. Div. 3d Dep't 1956).

<sup>61</sup> N.Y. WORKERS' COMP. LAW § 11 (McKinney 2013).

<sup>62</sup> *See, e.g., Whitney v. Hitchcock*, 4 Denio 461, 463 (N.Y. Sup. Ct. 1847).

whose servant had committed a tort.<sup>63</sup> In later cases, courts allowed vicarious liability as a basis for punitive damages.<sup>64</sup> More recently, New York courts have allowed punitive damages to be assessed against a company resulting from torts committed by its employees when management is complicit to the tortious conduct.<sup>65</sup>

In *Zurich Insurance Co. v. Shearson Lehman Hutton, Inc.*,<sup>66</sup> the New York Court of Appeals addressed the problematic consequences of allowing insurance providers to indemnify companies for punitive damages incurred from the acts of their employees.<sup>67</sup> Thus, a director may not be indemnified by the corporate board for an award of punitive damages as a matter of public policy if the director acted in bad faith, notwithstanding sections 721 and 722 of the Business Corporation Law.<sup>68</sup>

---

<sup>63</sup> See, e.g., *Craven v. Bloomingdale*, 171 N.Y. 439, 445, 64 N.E. 169, 170 (1902).

<sup>64</sup> See *Guion v. Associated Dry Goods Corp.*, 43 N.Y.2d 876, 877–78, 374 N.E.2d 364, 364, 403 N.Y.S.2d 465, 466 (1978) (explaining that punitive damages could be awarded against supervisor's failure, if his conduct had risen to the requisite level of wantonness or maliciousness). *But cf.* *Gillespie v. Brooklyn Heights R.R. Co.*, 178 N.Y. 347, 363, 70 N.E. 857, 858 (1904) (holding that railroad company is liable for servant's conduct in compensatory damages, but not punitive damages).

<sup>65</sup> See *Loughry v. Lincoln First Bank, N.A.*, 67 N.Y.2d 369, 378, 494 N.E.2d 70, 74–75, 502 N.Y.S.2d 965, 969–70 (1986); *1 Mott St. Inc. v. Con Edison*, 33 A.D.3d 531, 532, 823 N.Y.S.2d 375, 376 (App. Div. 1st Dep't 2006) (“[P]unitive damages can be imposed on an employer for the intentional wrongdoing of its employees only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages or deliberately retained the unfit servant, or the wrong was in pursuance of a recognized business system of the entity.” (quoting *Loughry*, 67 N.Y.2d at 378, 494 N.E.2d at 74–75, 502 N.Y.S.2d at 969–70) (internal quotation marks omitted)).

<sup>66</sup> *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 319, 642 N.E.2d 1065, 618 N.Y.S.2d 609 (1994).

<sup>67</sup> See *id.* at 320, 642 N.E.2d at 1070, 618 N.Y.S.2d at 614 (finding that New York public policy would not preclude indemnification for punitive damages awarded in the underlying action, as under then Georgia law, a punitive damage award including both punitive and compensatory elements supported such an award; but that New York public policy did preclude punitive damage award under then Texas law, which allowed insurance coverage for purely punitive damages).

<sup>68</sup> See N.Y. BUS. CORP. LAW §§ 721–22 (McKinney 2012); *Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d 659, 666, 731 N.E.2d 577, 580–81, 709 N.Y.S.2d 861, 864–65 (2000) (“Reading [Business Corporation Law] sections 721 and 722 together and applying them harmoniously and consistently as we are required to do, we hold that the key to indemnification is a director's good faith *toward the corporation* and that a judgment against the director, standing alone, may not be dispositive of whether the director acted in good faith. However, we conclude, as a matter of law, that in this case it *is* dispositive. Based on the entire record before us, nothing in Biondi's conduct can be construed as being undertaken in good faith, for a purpose ‘reasonably believed’ to be in the best interests of Beekman. By intentionally denying the Broomes' sublease application on the basis of race, Biondi knowingly exposed Beekman to liability under the civil rights laws. Indeed, a Beekman board member warned Biondi that he felt ‘uneasy because Mr. Broome is black, we will be sued.’ Biondi's willful racial discrimination cannot be considered an act in the corporation's best interest.”).

## VIII. AMOUNTS OF AWARDS

Historically, New York courts have held that punitive damages were not strictly quantifiable, but should bear a reasonable relation to the harm done.<sup>69</sup> Also, the fact-finder was permitted to consider the defendant's wealth when assessing a damage award.<sup>70</sup> Nevertheless, a fact-finder's discretion was not absolute and the court retained the power to overrule a fact-finder's damage award if the amount was so great that it shocked the conscience or suggested passion or prejudice.<sup>71</sup> Moreover, the award of punitive damages could always be statutorily barred<sup>72</sup> or limited.<sup>73</sup>

Recent Supreme Court decisions have examined the propriety of the amount of punitive damages awarded in relation to the amount of compensatory damages.<sup>74</sup> For example in *BMW of North*

---

<sup>69</sup> See *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 194, 886 N.E.2d 127, 131, 856 N.Y.S.2d 505, 509 (2008); *Tillotson v. Cheetham*, 3 Johns. 56, 64 (N.Y. Sup. Ct. 1808).

<sup>70</sup> *Fry v. Bennett*, 1 Abb. Pr. 289, 304 (N.Y. Sup. Ct. 1855); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17; 22 (1991) (stating that punitive damages do not per se violate the Due Process Clause of the Fourteenth Amendment and defendant's wealth may be taken into account). Compare *Rose v. Brown & Williamson Tobacco Corp.*, 10 Misc. 3d 680, 713, 809 N.Y.S.2d 784, 808 (Sup. Ct. New York County 2005) (allowing defendant-corporation's financial position to be considered by the jury when awarding punitive damages), with *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

<sup>71</sup> *Nardelli v. Stamberg*, 44 N.Y.2d 500, 504, 377 N.E.2d 975, 977, 406 N.Y.S.2d 443, 445 (1978); *Leombruno v. Julian*, 264 A.D. 981, 981, 37 N.Y.S.2d 202, 203 (App. Div. 3d Dep't 1942) (Heffernan, JJ., dissenting) (arguing that award of damages should not be reversed since it did not appear that the jury's verdict was the result of passion or prejudice); *De Severinus v. Press Pub. Co.*, 147 A.D. 161, 163, 132 N.Y.S. 80, 82 (App. Div. 2d Dep't 1911); *Chellis v. Chapman*, 125 N.Y. 214, 219, 26 N.E. 308, 309 (1891); *Coleman v. Southwick*, 9 Johns. 45, 51 (N.Y. Sup. Ct. 1812).

<sup>72</sup> See *Auchmuty v. Ham*, 1 Denio 495, 501 (N.Y. Sup. Ct. 1845); see also *Ross v. Louise Wise Servs. Inc.*, 8 N.Y.3d 478, 490–91, 868 N.E.2d 189, 197, 836 N.Y.S.2d 509, 517 (2007) (holding that New York will not award punitive damages in fraud cases if a statute has been enacted since the time of the alleged fraud, which explicitly outlaws the supposed fraudulent activity, because the statute will serve the deterrent purpose and punitive damages are no longer necessary).

<sup>73</sup> See *Wagner v. H. Clausen & Son Brewing Co.*, 146 A.D. 70, 73, 130 N.Y.S. 584, 586 (App. Div. 1st Dep't 1911); e.g., N.Y. EXEC. LAW § 297(4)(c)(iv) (McKinney 2012) (limiting punitive damage awards in housing discrimination cases to \$10,000 per plaintiff). But see *Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763) (holding that the damages were not excessive and damages must be outrageous in a tort for a judge to grant a new trial).

<sup>74</sup> See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457–58 (1993) (finding that grossly excessive punitive damages awards may violate the Due Process Clause of the Fourteenth Amendment, but no numerical ratio test is applied); *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent. . . ."); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 506 (2008) (quantifying limits on punitive damages as necessary to eliminate unpredictability in the legal system).

*America, Inc. v. Gore*,<sup>75</sup> the Supreme Court held that a 500:1 ratio of punitive damages to compensatory damages is grossly excessive.<sup>76</sup> There, the Court reviewed a punitive damages award against the defendant national automobile distributor, which had failed to disclose to the purchaser that it had repainted the car plaintiff bought.<sup>77</sup> The Court found that where the plaintiff had only suffered \$4,000 worth of actual damages, a \$2 million punitive damage award was grossly excessive and violated the Due Process Clause of the Fourteenth Amendment.<sup>78</sup> Moreover, the Court set three guideposts to determine whether an award violates due process: “the degree of reprehensibility of the [conduct in question]; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damage award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”<sup>79</sup>

Following the precedent in *Gore*, the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>80</sup> similarly held that a punitive damages award higher than a single-digit ratio to compensatory damages may violate the Due Process Clause of the Fourteenth Amendment.<sup>81</sup> There, after deciding to pass six vans and travel on the wrong side of the road, plaintiff caused the death of one man and the permanent disability of another.<sup>82</sup> Plaintiff’s insurance company, State Farm,

ignored the advice of one of its own investigators [to settle] and [instead] took the case to trial, assuring the Campbells that “their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.”<sup>83</sup>

Nevertheless, “a jury determined that Campbell was 100 percent at fault, and a judgment was returned for \$185,849; far more than the amount offered in settlement.”<sup>84</sup>

State Farm initially refused to cover the excess liability.<sup>85</sup>

---

<sup>75</sup> *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>76</sup> *Id.* at 582–83.

<sup>77</sup> *Id.* at 562–63.

<sup>78</sup> *Id.* at 559, 582, 585–86.

<sup>79</sup> *Id.* at 575.

<sup>80</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>81</sup> *Id.* at 425.

<sup>82</sup> *Id.* at 412–13.

<sup>83</sup> *Id.* at 413 (internal citation omitted).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Furthermore, plaintiff discovered “evidence that State Farm’s decision to take the case to trial was a result of a [fraudulent] national scheme to meet corporate fiscal goals by capping payouts on claims company-wide.”<sup>86</sup> The trial court determined that State Farm’s policy ‘was indeed intentional and sufficiently egregious to warrant punitive damages.’<sup>87</sup> Plaintiff was awarded \$145 million in punitive damages, but only \$2.6 million in compensatory damages.<sup>88</sup>

The Supreme Court reversed the award of punitive damages, holding that such an amount is excessive and in violation of the Due Process Clause of the Fourteenth Amendment.<sup>89</sup> The Court applied the *Gore* factors and found a justification of a punitive damages award at or near the compensatory damages amount, but stated:

[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio.<sup>90</sup>

New York courts seem to be following suit. For example, in *Frankson v. Brown & Williamson Tobacco Corp.*,<sup>91</sup> the deceased plaintiff began smoking at age thirteen and smoked continuously for forty years until his death.<sup>92</sup> Decedent’s widow sued the tobacco company—as well as a nonprofit trade organization and a tobacco-company-sponsored research organization—

[seeking] damages on theories . . . that the defendants had fraudulently concealed the health risks of smoking prior to 1969, and had conspired to fraudulently conceal these risks. The plaintiff also asserted several defective design claims against the defendants. After a four-week trial . . . the jury returned a verdict finding [the tobacco manufacturer] liable for having fraudulently concealed the health risks of smoking prior to 1969, and all of the defendants liable for conspiracy to fraudulently conceal these risks.<sup>93</sup>

The jury awarded compensatory damages in the sum of \$350,000 and “expressly found that the defendants’ conduct was so wanton,

---

<sup>86</sup> *Id.* at 415.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 429.

<sup>90</sup> *Id.* at 426.

<sup>91</sup> *Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213, 886 N.Y.S.2d 714 (App. Div. 2d Dep’t 2009).

<sup>92</sup> *Id.* at 215, 886 N.Y.S.2d at 716.

<sup>93</sup> *Id.*

reckless, or malicious as to warrant the imposition of punitive damages.”<sup>94</sup> After a trial on the issue of punitive damages, the jury awarded the plaintiff the sum of \$20 million in punitive damages.<sup>95</sup>

Afterwards, the defendants moved for a new trial and requested that the court “either strike the punitive damages award or reduce the amount of that award to comport with due process.”<sup>96</sup> Defendants argued “that the amount of the award exceeded the constitutionally permissible ratio between compensatory and punitive damages.”<sup>97</sup> The trial court granted the defendants’ motion for a new trial and the plaintiff agreed to stipulate to reduce the punitive damages award to \$5 million.<sup>98</sup>

The defendants then appealed, and the appellate division ultimately set aside the punitive damages award and remitted for a new trial, in order to ensure that the award complied with the due process limits set by the Supreme Court.<sup>99</sup> The court stated, “the United States Supreme Court has emphasized that there are constitutional limitations on such awards, and that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments upon a tortfeasor,”<sup>100</sup> and went on to discuss *BMW of North America, Inc. v. Gore*<sup>101</sup> and *State Farm Mutual Auto Insurance Co. v. Campbell*.<sup>102</sup>

Next, the *Frankson* court discussed *Philip Morris USA v. Williams*,<sup>103</sup> a Supreme Court case which expanded upon the rationale of *State Farm*. In *Philip Morris*:

[T]he widow of a smoker who died of lung cancer sued the tobacco company which had manufactured the brand of cigarettes he smoked, alleging that her late husband smoked because he thought it was safe to do so, and that the tobacco company had knowingly and falsely led him to believe that this was so. A jury found that [plaintiff’s] death had been caused by smoking, and that [the manufacturer] was negligent and had engaged in deceit. With respect to the deceit claim, the jury awarded compensatory damages in the

---

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 216, 886 N.Y.S.2d at 717.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 222, 886 N.Y.S.2d at 722.

<sup>100</sup> *Id.* at 219, 886 N.Y.S.2d at 719 (citations omitted).

<sup>101</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>102</sup> *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>103</sup> *Philip Morris USA v. Williams* 549 U.S. 346, 350 (2007).

sum of \$821,000, and punitive damages in the sum of \$79.5 million.<sup>104</sup>

Notably, “plaintiff’s attorney had told the jury to ‘think about how many other [plaintiffs] in the last 40 years in the State of Oregon there have been . . . Cigarettes . . . are going to kill ten [of every hundred].”<sup>105</sup> The Supreme Court, in *Philip Morris*, ultimately held that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.”<sup>106</sup> The *Frankson* Court further elaborated on the *Philip Morris* rationale by stating that, “to permit punishment for injuring a nonparty victim would add a near standard-less dimension to the punitive damages equation by allowing the jury to speculate as to matters such as how many other victims existed, and how seriously those victims had been injured.”<sup>107</sup>

Although the Supreme Court concluded that punitive damages could not be used to punish a defendant directly for harm inflicted on nonparties, it can be an important factor in determining the reprehensibility of the defendant’s conduct. The court in *Frankson* asserted, “[s]ince conduct that risks harm to many is likely to be more reprehensible than conduct that risks harm to only a few, the [Supreme] Court concluded that a jury may take this fact into account in determining reprehensibility.”<sup>108</sup> Accordingly, the *Frankson* Court relied on the Supreme Court’s rationale in *Philip Morris* in holding that while the plaintiff’s counsel made repeated references during the liability and compensatory damages phase of the trial to the fact that thousands of people die each year from lung cancer, “[counsel] did not clearly signal to the jury that it should consider the death of thousands of others *only* in assessing the reprehensibility of the defendants’ conduct.”<sup>109</sup>

Thus, the court concluded that “the jury could have mistakenly understood the plaintiff’s argument that the defendants’ conduct resulted in the death of thousands of people to justify taking those

---

<sup>104</sup> *Frankson*, 67 A.D.3d at 219–20, 886 N.Y.S.2d at 720 (citing *Philip Morris*, 549 U.S. at 349–50).

<sup>105</sup> *Frankson*, 67 A.D.3d at 219–20, 886 N.Y.S.2d at 720 (quoting *Philip Morris*, 549 U.S. at 350).

<sup>106</sup> *Philip Morris*, 549 U.S. at 353.

<sup>107</sup> *Frankson*, 67 A.D.3d at 220–21, 886 N.Y.S.2d at 721 (quoting *Philip Morris*, 549 U.S. at 354) (internal quotation marks omitted).

<sup>108</sup> *Frankson*, 67 A.D.3d at 221, 886 N.Y.S.2d at 721.

<sup>109</sup> *Id.* (emphasis added).

other deaths . . . in calculating the amount of damages warranted to punish the defendants' reprehensible conduct."<sup>110</sup> Therefore, the court set aside the award for punitive damages and ordered a new trial in accordance with Due Process standards.<sup>111</sup>

## IX. TORT ACTIONS

New York courts have repeatedly held that tort actions, unlike mere breach of contract actions, may warrant punitive damages even in the absence of a public harm.<sup>112</sup> Specific torts for which New York courts have historically awarded punitive damages include loss of consortium,<sup>113</sup> libel,<sup>114</sup> malicious prosecution,<sup>115</sup> false imprisonment,<sup>116</sup> desecration of a grave,<sup>117</sup> abduction of a minor,<sup>118</sup> assault,<sup>119</sup> beating a horse to death,<sup>120</sup> bringing a frivolous lawsuit,<sup>121</sup> knowingly keeping a dog who bites sheep,<sup>122</sup> failure to warn in products liability,<sup>123</sup> seduction,<sup>124</sup> forcible taking of property but not trover,<sup>125</sup> and trespass.<sup>126</sup>

### A. *Loss of Consortium*

In *Fabiano v. Philip Morris Inc.*,<sup>127</sup> a punitive damages claim was brought by decedent's spouse and estate against tobacco companies, related to the companies' marketing directly to young people, after

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 222, 886 N.Y.S.2d at 722.

<sup>112</sup> See cases cited *infra* notes 113–26 and accompanying text.

<sup>113</sup> *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 862 N.Y.S.2d 487 (App. Div. 1st Dep't 2008).

<sup>114</sup> *Toomey v. Farley*, 2 N.Y.2d 71, 138 N.E.2d 221, 156 N.Y.S.2d 840 (1956); *Tillotson v. Cheetham*, 3 Johns. 56 (N.Y. Sup. Ct. 1808).

<sup>115</sup> *Nardelli v. Stamberg*, 44 N.Y.2d 500, 377 N.E.2d 975, 406 N.Y.S.2d 443 (1978).

<sup>116</sup> *Voltz v. Blackmar*, 64 N.Y. 440 (1876); *Craven v. Bloomingdale*, 171 N.Y. 439, 64 N.E. 169 (1902).

<sup>117</sup> *Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary*, 262 N.Y. 320, 186 N.E. 798 (1933).

<sup>118</sup> *Pickle v. Page*, 252 N.Y. 474, 169 N.E. 650 (1930).

<sup>119</sup> *Falcaro v. Kessman*, 215 A.D.2d 432, 627 N.Y.S.2d 562 (App. Div. 2d Dep't 1995).

<sup>120</sup> *Wort v. Jenkins*, 14 Johns. 352 (N.Y. Sup. Ct. 1817).

<sup>121</sup> *Cable, Fitch & Losee v. Dakin & Dakin*, 20 Wend. 172 (N.Y. Sup. Ct. 1838).

<sup>122</sup> *Auchmuty v. Ham*, 1 Denio 495 (N.Y. Sup. Ct. 1845).

<sup>123</sup> *Home Ins. Co. v. Am. Home Products Corp.*, 75 N.Y.2d 196, 550 N.E.2d 930, 551 N.Y.S.2d 481 (1990).

<sup>124</sup> *Whitney v. Hitchcock*, 4 Denio 461 (N.Y. Sup. Ct. 1847).

<sup>125</sup> *Butts v. Collins*, 13 Wend. 139 (N.Y. 1834).

<sup>126</sup> *Warm v. State*, 308 A.D.2d 534, 764 N.Y.S.2d 483 (App. Div. 2d Dep't 2003).

<sup>127</sup> *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 862 N.Y.S.2d 487 (App. Div. 1st Dep't 2008).

decedent used their products over the course of several decades.<sup>128</sup>

Although the loss of consortium<sup>129</sup> damages requested by the spouse of the decedent were denied due to *res judicata*,<sup>130</sup> the court nevertheless provided helpful feedback as to why punitive damages would have been applicable in this case by suggesting that plaintiffs rightfully sought “[p]unitive and exemplary damages for the . . . acts of the Defendants who demonstrated a complete disregard . . . [for] the safety and welfare of the general public.”<sup>131</sup> The court also analyzed the goals of punitive damages, namely to “punish defendants and to deter future unlawful conduct.”<sup>132</sup>

### B. Libel

Punitive damages were awarded in cases of libel as early as 1808.<sup>133</sup> Accordingly, in *Toomey v. Farley*,<sup>134</sup> the plaintiff was awarded punitive damages as a result of being charged with communist affiliations.<sup>135</sup> The Court of Appeals held that awarding punitive damages would be important in order to prevent defamers from benefitting from “unassailable reputation[s] and so escap[ing] punishment” when compensatory damages are inappropriate “simply because of the excellent reputation of the defamed.”<sup>136</sup> Thus, the defamer would benefit from the plaintiff’s unassailable reputation and escape punishment. Moreover, such a result would be consistent with the purposes of punitive damages:

Punitive or exemplary damages are intended to act as a

---

<sup>128</sup> *Id.* at 147–48, 862 N.Y.S.2d at 488–89.

<sup>129</sup> *Buckley v. Nat’l Freight, Inc.*, 90 N.Y.2d 210, 214, 681 N.E.2d 1287, 1289, 659 N.Y.S.2d 841, 843 (1997) (“[Loss of c]onsortium represents the marital partners’ interest in the continuance of the marital relationship as it existed at its inception.” (quoting *Anderson v. Lilly & Co.*, 79 N.Y.2d 797, 798, 588 N.E.2d 66, 67–68, 580 N.Y.S.2d 168, 169–70 (1991))).

<sup>130</sup> *Fabiano*, 54 A.D.3d at 149, 862 N.Y.S. at 489 (“Under the doctrine of *res judicata*, ‘once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.’” (quoting *O’Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 1159, 445 N.Y.S.2d 687, 688 (1981))).

<sup>131</sup> *Fabiano*, 54 A.D.3d at 150–51, 862 N.Y.S. at 491 (quoting the relief sought by the plaintiffs in their complaint).

<sup>132</sup> *Id.* at 148, 862 N.Y.S. at 489.

<sup>133</sup> See *Tillotson v. Cheetham*, 3 Johns. 56, 66–67 (N.Y. Sup. Ct. 1808) (“In vindictive actions . . . it is always given in charge to the jury, that they are to inflict damages for example’s sake, and by way of punishing the defendant. In the present case, the chief justice, in charging the jury, inculcated the doctrine of giving exemplary damages, as a protection to public officers.” (emphasis added)).

<sup>134</sup> *Toomey v. Farley*, 2 N.Y.2d 71, 138 N.E.2d 221, 156 N.Y.S.2d 840 (1956).

<sup>135</sup> *Id.* at 76–78, 128 N.E.2d at 224, 156 N.Y.S.2d at 843–44.

<sup>136</sup> *Id.* at 83–84, 128 N.E.2d at 228, 156 N.Y.S.2d at 849 (quoting *Reynolds v. Pegler*, 123 F. Supp 36, 38 (S.D.N.Y. 1954)).

deterrent upon the libelor so that he will not repeat the offense, and to serve as a warning to others. They are intended as punishment for gross misbehavior for the good of the public and have been referred to as ‘a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine.’ Punitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement; the award goes to him simply because it is assessed in his particular suit. The damages may be considered expressive of the community attitude towards one who wilfully [sic] and wantonly causes hurt or injury to another.<sup>137</sup>

### C. *Malicious Prosecution*

Defendants found liable for torts requiring actual malice may find it difficult to avoid punitive damages, given the improper behavior inherent in actual malice. Actual malice is necessary to support an action for malicious prosecution; the defendant must have commenced the criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served.<sup>138</sup> In *Nardelli v. Stamberg*, the Court of Appeals established that

a finding of liability for malicious prosecution precludes a determination as a matter of law that punitive damages are improper . . . [because the] . . . “improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages.”<sup>139</sup>

Thus, the Court of Appeals concluded that the appellate division, as a matter of law, incorrectly held that the plaintiff had no claim for punitive damages.<sup>140</sup>

---

<sup>137</sup> *Toomey*, 2 N.Y.2d at 83, 138 N.E.2d at 228, 156 N.Y.S.2d at 849.

<sup>138</sup> *Nardelli v. Stamberg*, 44 N.Y.2d 500, 502–03, 377 N.E.2d 975, 976, 406 N.Y.S.2d 443, 444 (1978) (citing RESTATEMENT OF TORTS, § 668 (1938); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 119, 847–49 (4th ed. 1971)).

<sup>139</sup> *Nardelli*, 44 N.Y.2d at 503, 377 N.E.2d at 976–77, 406 N.Y.S.2d at 445 (quoting RESTATEMENT OF TORTS § 908 (1939)).

<sup>140</sup> *Nardelli v. Stamberg*, 55 A.D.2d 929, 929–30, 390 N.Y.S.2d 640, 641 (App. Div. 2d Dep’t 1977), *rev’d*, 44 N.Y.2d 500, 377 N.E.2d 975, 406 N.Y.S.2d 443 (1978).

#### *D. False Imprisonment*

When a jury decides whether or not to award punitive damages, it is important to consider all the facts and circumstances. In *Voltz v. Blackmar*,<sup>141</sup> the Court of Appeals held that evidence showing the defendant's true motive was admissible to the jury to prove whether he acted maliciously or with an honest belief that he was justified in what he did.<sup>142</sup> Accordingly, in *Craven v. Bloomingdale*,<sup>143</sup> the Court of Appeals held that punitive damages could be awarded in a claim for false imprisonment only after the jury was first confronted with all the facts in order to determine whether the driver was acting within the general scope of his employment when he caused the arrest of the plaintiff.<sup>144</sup>

#### *E. Desecration of a Grave*

*Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus and Mary*<sup>145</sup> did away with the belief that punitive damages could only be recovered in desecration of grave cases where a body has been mutilated or destroyed.<sup>146</sup> There, the priest of the church ordered the body of the plaintiffs' mother/wife to be moved to a new lot without notice to the family, because the wrong lot had been sold to them.<sup>147</sup> The court held that because the priest's "whole conduct showed such conscious indifference to the effect of his acts on the minds of the family of the deceased woman . . . the jury might well have found such acts 'wilful [sic] and malicious and wanton.'"<sup>148</sup> Thus, punitive damages were appropriate if the jury deemed so.

#### *F. Abduction of a Minor*

Until 1930, there was no authority as to whether punitive damages could be awarded in cases of child abduction.<sup>149</sup> However,

---

<sup>141</sup> *Voltz v. Blackmar*, 64 N.Y. 440 (1876).

<sup>142</sup> *Id.* at 445.

<sup>143</sup> *Craven v. Bloomingdale*, 171 N.Y. 439, 64 N.E. 169 (1902).

<sup>144</sup> *Id.* at 450, 64 N.E. at 172.

<sup>145</sup> *Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus & Mary*, 262 N.Y. 320, 186 N.E. 798 (1933).

<sup>146</sup> *Id.* at 324, 186 N.E. at 800.

<sup>147</sup> *Id.* at 323, 186 N.E. at 799.

<sup>148</sup> *Id.* at 323–24, 186 N.E. at 799 (quoting *Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary*, 237 A.D. 640, 643, 262 N.Y.S. 104, 107 (1933), *aff'd*, 262 N.Y. 320, 186 N.E. 798).

<sup>149</sup> *Pickle v. Page*, 252 N.Y. 474, 481–82, 169 N.E. 650, 653 (1930).

that changed in *Pickle v. Page*,<sup>150</sup> where the Court of Appeals awarded punitive damages to the legal adopter of a minor after he was forcefully abducted by the defendant to be delivered to the original birth mother.<sup>151</sup> The court cited several cases that ruled similarly, including a South Carolina case that held that a child abduction action is maintainable without proof or allegation of loss of service.<sup>152</sup> The *Kirkpatrick* court stated:

The true ground of action is the outrage, and deprivation; the injury the father sustains in the loss of his child; the insult offered to his feelings; the heart-rendering agony he must suffer in the destruction of his dearest hopes, and the irreparable loss of that comfort, and society . . . .<sup>153</sup>

The New York Court of Appeals agreed that such agony warrants punitive damages, regardless of whether or not the abducted child rendered services to his parents.<sup>154</sup>

#### *G. Assault*

In *Falcaro v. Kessman*,<sup>155</sup> the appellate division affirmed an award of punitive damages for an assault claim.<sup>156</sup> The court held that the punitive damages award was appropriate because the defendant had a “history of aggressive behavior” and “caus[ed] serious and permanent injuries” to the plaintiff.<sup>157</sup> In a terse opinion, the court stated, “[s]uch intentional and criminal conduct justified an award of punitive damages.”<sup>158</sup>

#### *H. Beating a Horse to Death*

New York has even awarded punitive damages in a case of trespass to chattel where the defendant beat a horse to death. In *Woert v. Jenkins*,<sup>159</sup> the horse was “worth 50 or 60 dollars,” but the judge instructed the jury that the plaintiff was entitled to more if they believed that the defendant had whipped the horse to death,

---

<sup>150</sup> *Id.* at 474, 169 N.E. at 650.

<sup>151</sup> *Id.* at 475–76, 483, 169 N.E. at 650–51, 653.

<sup>152</sup> *Id.* at 480, 169 N.E. at 652 (citing *Kirkpatrick v. Lockhart*, 4 S.C.L. (2 Brev.) 276 (1809)).

<sup>153</sup> *Pickle*, 252 N.Y. at 480, 169 N.E. at 652 (quoting *Kirkpatrick*, 4 S.C.L. at 277).

<sup>154</sup> *Pickle*, 252 N.Y. at 481–82, 169 N.E. at 653.

<sup>155</sup> *Falcaro v. Kessman*, 215 A.D.2d 432, 627 N.Y.S.2d 562 (App. Div. 2d Dep’t 1995).

<sup>156</sup> *Id.* at 432, 627 N.Y.S.2d 562.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Woert v. Jenkins*, 14 Johns. 352 (N.Y. Sup. Ct. 1817).

“there being proof of great and wanton cruelty.”<sup>160</sup> The jury ultimately awarded the plaintiff 75 dollars.<sup>161</sup> The court not only affirmed the jury’s verdict but also stated “we should have been better satisfied with the verdict, if the amount of damages had been greater and more exemplary.”<sup>162</sup>

### I. *Bringing a Frivolous Lawsuit*

As early as 1838, New York allowed punitive damages to be awarded to defendants as a result of a plaintiff bringing frivolous lawsuits. In *Cable, Fitch & Losee v. Dakin & Dakin*,<sup>163</sup> the plaintiffs’ frivolous action for replevin<sup>164</sup> resulted in defendants having to pay expenses, the price of transportation, and required defendants to account for the fall in value of lumber before they were able to forward it to the appropriate market.<sup>165</sup> After the jury awarded punitive damages, the court denied the plaintiffs’ motion to set aside on the ground of the excessiveness, because the plaintiffs initiated a “vexatious and unwarrantable proceeding.”<sup>166</sup>

### J. *Knowingly Keeping a Dog Who Bites Sheep*

Early in our jurisprudence, punitive damages could not be awarded when the owner of a dog had no knowledge of the likelihood that several sheep would be killed by his dog.<sup>167</sup> The court in *Auchmuty v. Ham*<sup>168</sup> stated, “[a] party prosecuted on account of sheep killed or wounded by his dog, of whose mischievous propensities he had no knowledge, is not liable to *exemplary damages*, the statute limiting the recovery to the value of the sheep.”<sup>169</sup> However, the court suggested that it would have held differently if the plaintiff “knew or had notice that the animal was accustomed to such or similar mischief.”<sup>170</sup> Thus, New York was establishing its trend to award punitive damages for reckless or

---

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Cable, Fitch & Losee v. Dakin & Dakin*, 20 Wend. 172 (N.Y. Sup. Ct. 1838).

<sup>164</sup> *See Pangburn v. Patridge*, 7 Johns. 140, 141 (N.Y. Sup. Ct. 1810) (“[R]eplevin lies for a *tortious* or unlawful taking of goods, without reference or limitation to a distress.”).

<sup>165</sup> *See Cable, Fitch & Losee*, 20 Wend. at 173.

<sup>166</sup> *Id.* at 173.

<sup>167</sup> *See Auchmuty v. Ham*, 1 Denio 495, 500–01 (N.Y. 1845).

<sup>168</sup> *Id.* at 495.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 498.

actual knowledge, not mere negligence.<sup>171</sup>

*K. Products Liability: Failure to Warn*

More recently, the Court of Appeals explained that there is “nothing in New York law or public policy [that] would preclude an award of punitive damages” when the defendant is liable for “failure to warn and there is evidence that the failure was wanton or in conscious disregard of the rights of others.”<sup>172</sup> In *Home Insurance Co. v. American Home Products Corp.*,<sup>173</sup> “a judgment for \$9.2 million in compensatory damages and \$13 million in punitive damages, based on a jury verdict, was recovered . . . against [defendant] American Home Products Corp. (AHP),”<sup>174</sup> for “its failure to warn of the risks it knew to be inherent in the administration of the [a] drug . . . in suppository form to children.”<sup>175</sup> The court reasoned that “[t]he damages were awarded for the grave and permanent injuries (including severe impairment of mental function) sustained by . . . a two-year-old boy, as a result of . . . [the] drug, aminophylline . . . .”<sup>176</sup>

The question presented was whether or not Home Insurance Co. (hereinafter “Home”), AHP’s insurer, was required to indemnify AHP for punitive damages.<sup>177</sup> The court held that “to require Home to indemnify AHP for such damages under its excess policy would be contrary to the public policy of this State.”<sup>178</sup> The court then discussed the general rule that “New York public policy precludes

---

<sup>171</sup> See *Petrone v. Fernandez*, 12 N.Y.3d 546, 550–51, 910 N.E.2d 993, 996, 883 N.Y.S.2d 164, 167 (2009) (dismissing a claim for negligence because the owner did not know of the animal’s vicious propensity). The Court of Appeals reiterated the rule that “[w]hen harm is caused by a domestic animal, its owner’s liability is determined *solely* by” whether or not the “owner knows or should have known of the animal’s vicious propensities.” *Id.* at 550, 910 N.E.2d at 996, 883 N.Y.S.2d at 164 (quoting *Bard v. Jahnke*, 6 N.Y.3d 592, 599, 848 N.E.2d 463, 468, 815 N.Y.S.2d 16, 21 (2006)); *Petrone*, 12 N.Y.3d at 550, 910 N.E.2d at 996, 883 N.Y.S.2d at 164 (citing *Collier v. Zambito*, 1 N.Y.3d 444, 446, 807 N.E.2d 254, 256, 775 N.Y.S.2d 205, 207 (2004)). Thus, in modern times, if an owner of a domestic animal does not have such knowledge, any claims for negligence would not survive and the plaintiff would not even receive compensatory damages. See *Petrone*, 12 N.Y.3d at 550–51, 910 N.E.2d at 996, 883 N.Y.S.2d at 167.

<sup>172</sup> *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 204, 550 N.E.2d 930, 935, 551 N.Y.S.2d 481, 486 (1990).

<sup>173</sup> *Id.* at 196, 550 N.E.2d at 930, 551 N.Y.S.2d at 481.

<sup>174</sup> *Id.* at 199, 550 N.E.2d at 931, 551 N.Y.S.2d at 482.

<sup>175</sup> *Id.* at 199, 201, 550 N.E.2d at 931, 933, 551 N.Y.S.2d at 482, 484.

<sup>176</sup> *Id.* at 199, 550 N.E.2d at 931, 551 N.Y.S.2d at 482.

<sup>177</sup> *Id.* at 199, 550 N.E.2d at 932, 551 N.Y.S.2d at 483.

<sup>178</sup> *Id.* at 199–200, 550 N.E.2d at 932, 551 N.Y.S.2d at 483.

insurance indemnification for punitive damage awards.”<sup>179</sup>

The court stated:

“[T]o allow it would defeat ‘the purpose of punitive damages, which is to punish and to deter others from acting similarly, and that allowing coverage serves no useful purpose since such damages are a windfall for the plaintiff who, by hypothesis, has been made whole by the award of compensatory damages.’”<sup>180</sup>

The Court of Appeals further held that such a policy “should apply equally to all conduct which, although *not intentional*, is found to be grossly negligent, or wanton or so reckless as to amount to a conscious disregard of the rights of others.”<sup>181</sup>

### *L. Seduction*

In *Whitney v. Hitchcock*,<sup>182</sup> the defendant sexually assaulted an eleven-year-old female during church.<sup>183</sup> The victim was slightly hurt, and in analyzing damages, the court considered whether or not the household which she served suffered from “loss of service.”<sup>184</sup> Although punitive damages were not awarded because the suit was brought for loss of the services, the court suggested that if the victim herself or her father sued for damages then punitive damages were possible.<sup>185</sup>

### *M. Forcible Taking of Property (Trespass) but not Trover*

In *Butts v. Collins*,<sup>186</sup> the judge instructed the jury to decide

<sup>179</sup> *Id.* at 200, 550 N.E.2d at 932, 551 N.Y.S.2d at 483.

<sup>180</sup> *Id.* (quoting *Hartford Accident & Indem. Co. v. Vill. of Hempstead*, 48 N.Y.2d 218, 226, 397 N.E.2d 737, 743, 422 N.Y.S.2d 47, 53 (1979)); *see also* *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d, 392, 395–96, 400, 425 N.E.2d 810, 812, 814, 442 N.Y.S.2d 422, 424, 426 (1981) (declaring that the insured, a dentist, could not claim reimbursement for any punitive damages that might be awarded in the malpractice case which had been brought against him by a patient who claimed that he had committed sexual abuse).

<sup>181</sup> *Home Ins. Co.*, 75 N.Y.2d at 201, 550 N.E.2d at 933, 551 N.Y.S.2d at 484 (other citations omitted) (citing *Pub. Serv. Mut. Ins. Co.*, 53 N.Y.2d at 400, 425 N.E.2d at 815, 422 N.Y.S.2d at 427).

<sup>182</sup> *Whitney v. Hitchcock*, 4 Denio 461 (N.Y. 1847). *Nota bene*: Seduction has been abolished as a recognized tort in New York. *See* N.Y. CIV. RIGHTS LAW § 80-a (McKinney 2012) (“The right[] of action to recover sums of money as damages for . . . seduction . . . [is] abolished.”).

<sup>183</sup> *Id.* at 461.

<sup>184</sup> *Id.* at 461–62. The victim “stated that for some days she was less serviceable in assisting her mother in the household affairs than she was before.” *Id.* at 462.

<sup>185</sup> *See id.* at 463.

<sup>186</sup> *Butts v. Collins*, 13 Wend. 139 (N.Y. 1834).

whether the defendant was liable for trespass or trover because only trespass, being a willful taking of property, was appropriate for punitive damages.<sup>187</sup> The court instructed:

In the one case a jury would in many instances be justified in awarding smart money, an amount larger than the value of the goods and interest, by way of punishment and an example for a willful wanton violation of right; while, in the other, only the value of the goods and interest from the time of the conversion would be awarded, on the ground that the party came rightfully into the possession.<sup>188</sup>

The court ultimately indicated that what occurred was trover, which would warrant the return of materials manufactured into flannels, but not punitive damages.<sup>189</sup>

#### *N. Trespass*

New York awards punitive damages for trespass only when the trespasser acts “with actual malice involving intentional wrongdoing.”<sup>190</sup> In *Warm v. State*, the defendant State of New York installed a culvert underneath a roadway to protect it by diverting water, but the water flowed downhill onto plaintiff’s property causing erosion problems.<sup>191</sup> The appellate division affirmed the trial court’s denial of punitive damages:

“A party seeking to recover punitive damages for trespass on real property has the burden of proving that the trespasser acted with actual malice involving intentional wrongdoing, or that such conduct amounted to a wanton, willful, or reckless disregard of the party’s right of possession.” The plaintiffs did not meet that burden.<sup>192</sup>

---

<sup>187</sup> *Id.* at 148 (“Trespass is the appropriate remedy, where the taking has been forcible, or tortious, or without the consent of the possessor. Trover is the appropriate remedy, where the party has lost his chattels, and the finder or those holding under him refuse to deliver them . . .”).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 148, 153.

<sup>190</sup> *Warm v. State*, 308 A.D.2d 534, 537, 764 N.Y.S.2d 483, 486 (App. Div. 2d Dep’t 2003) (quoting *Litwin v. Town of Huntington*, 248 A.D.2d 361, 362, 669 N.Y.S.2d 634, 635 (App. Div. 2d Dep’t 1998)).

<sup>191</sup> *Warm*, 308 A.D.2d at 535, 764 N.Y.S.2d at 485.

<sup>192</sup> *Id.* at 537, 764 N.Y.S.2d at 486 (quoting *Litwin*, 248 A.D.2d at 362, 669 N.Y.S.2d at 635).

## X. EGREGIOUS CONDUCT

A showing that a defendant's conduct is egregious is necessary for a New York court to award punitive damages in a tort action.<sup>193</sup> Early New York jurisprudence required that the conduct be morally reprehensible and not just a mere infringement of rights.<sup>194</sup> Thus, there is an element of moral judgment in assessing when conduct is sufficiently blameworthy to merit an award of punitive damages.<sup>195</sup> Although the exact language used to assess whether conduct is sufficiently egregious has rarely been the same from case to case, the alleged conduct is usually required to be either willful, wanton, gross, reckless, evincing a criminal indifference to civil obligations, or a combination of these behaviors.<sup>196</sup> While some New York courts have generally required that the tortfeasor's acts be intentional and deliberate to satisfy the standard of egregious conduct, other New York courts have stated that a wanton or reckless action akin to

---

<sup>193</sup> *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 83 N.Y.2d 603, 613, 634 N.E.2d 940, 943–44, 612 N.Y.S.2d 339, 342–43 (1994).

<sup>194</sup> *See, e.g., Butts v. Collins*, 13 Wend. 139, 148 (N.Y. 1834) (discussing that “smart-money,” in an amount in excess of the goods and interest, is available for an action of trespass, [where defendant affirmatively took plaintiff's property] but not for trover [where defendant came into possession of plaintiff's property after it was lost and now refuses to return it]).

<sup>195</sup> *See, e.g., James v. Powell*, 19 N.Y.2d 249, 259, 225 N.E.2d 741, 746–47, 279 N.Y.S.2d 10, 18 (1967) (discussing that while New York's choice of laws policy required the issues of the case to be analyzed under Puerto Rico law because the property at issue was located there, punitive damages could be assessed under New York law because the moral wrongdoing, if any existed, might greatly affect the interests of New York parties); *see also id.* (“An award of compensatory damages depends upon the *existence* of wrong-doing—in this case, an issue for resolution under the *lex situs* of the property alleged to have been fraudulently conveyed. An award of punitive damages, on the other hand, depends upon the *object or purpose* of the wrongdoing and on this issue we should look to the ‘law of the jurisdiction with the strongest interest in the resolution of the particular issue presented.’” (citations omitted)).

<sup>196</sup> *See, e.g., Prozeralik v. Capital Cities Commc'ns, Inc.*, 82 N.Y.2d 466, 479, 626 N.E.2d 34, 41–42, 605 N.Y.S.2d 218, 225–226 (1993) (“Punitive damages are awarded in tort actions [w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime.” (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* § 2, at 9 (5th ed. 1984))); *Toomey v. Farley*, 2 N.Y.2d 71, 83, 138 N.E.2d 221, 228, 156 N.Y.S.2d 840, 849 (1956) (“They [punitive damages] are intended as punishment for gross misbehavior . . . .”); *Fordham-Coleman v. Nat'l Fuel Gas Distribution Corp.*, 42 A.D.3d 106, 113, 834 N.Y.S.2d 422, 428 (App. Div. 4th Dep't 2007) (“Conduct justifying an award of punitive damages ‘need not be intentionally harmful but may consist of actions which constitute willful or wanton negligence or recklessness.’” (quoting *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 204, 550 N.E.2d 930, 934, 551 N.Y.S.2d 481, 485 (1990))); *Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 23, 756 N.Y.S.2d 26, 29 (App. Div. 1st Dep't 2003) (“[P]laintiff must ‘demonstrate that the wrong to [them] rose to the level of such wanton dishonesty as to imply a criminal indifference to civil obligations.’” (quoting *Zimmerman v. Tarshis*, 289 A.D.2d 230, 231, 734 N.Y.S.2d 462, 463 (App. Div. 2d Dep't 2001))).

“criminal indifference to civil obligations” is sufficient.<sup>197</sup> Thus, ordinary negligence is insufficient to warrant punitive damages,<sup>198</sup> while criminal conduct may satisfy the standard of egregiousness.<sup>199</sup>

Although ordinary negligence is insufficient, New York courts have not held that only conduct done with evil motive or in bad faith warrant punitive damages.<sup>200</sup> In *Randi v. Long Island Surgi-Center*,<sup>201</sup> the appellate division supported an award for punitive damages because the defendant’s “conduct amounted to far more than simple carelessness, but rose to the level of recklessness, gross negligence, and callous indifference to the plaintiff’s rights.”<sup>202</sup> There, a nurse breached a patient’s right to privacy and confidentiality when she telephoned the patient’s home and revealed information sufficient to allow the mother to conclude that her daughter had an abortion.<sup>203</sup> The court “decline[d] to hold that . . . the callous, reckless, or grossly negligent disregard of an individual’s right to the privacy and confidentiality of sensitive medical information—a right protected by the declared public policy of this State—cannot be sufficiently reprehensible and morally culpable to support an award of exemplary damages.”<sup>204</sup> The court reasoned that the importance of deterring “wantonly reckless or grossly negligent conduct that tramples on the rights of others or puts their safety at risk” requires that punitive damages not “depend solely on the tortfeasor’s intent or bad faith.”<sup>205</sup>

Similarly, in *Fordham-Coleman v. National Fuel Gas Distribution*

---

<sup>197</sup> See, e.g., *N.Y. Univ. v. Cont’l Ins. Co.*, 87 N.Y.2d 308, 315–16, 662 N.E.2d 763, 767, 639 N.Y.S.2d 283, 287 (1995).

<sup>198</sup> *Heller*, 303 A.D.2d at 23, 756 N.Y.S.2d at 29; *Tim v. Hawes*, 97 Misc. 30, 31–32, 160 N.Y.S. 1096, 1097–98 (App. Div. 1st Dep’t 1916) (explaining that punitive damages are not available for a mere absence of ordinary care).

<sup>199</sup> See, e.g., *Laurie Marie M. v. Jeffrey T. M.*, 159 A.D.2d 52, 59-60, 559 N.Y.S.2d 336, 341 (App. Div. 2d Dep’t 1990). But see *Key Bank of N.Y. v. Diamond*, 203 A.D.2d 896, 897, 611 N.Y.S.2d 382, 383 (App. Div. 4th Dep’t 1994) (pledging worthless stock as collateral for a loan does not reach the high degree of moral culpability required for punitive damages).

<sup>200</sup> See, e.g., *Home Ins. Co.*, 75 N.Y.2d at 201, 550 N.E.2d at 933, 551 N.Y.S.2d at 484; *Giblin v. Murphy*, 73 N.Y.2d 769, 772, 532 N.E.2d 1282, 1284, 536 N.Y.S.2d 54, 56 (1988); *Randi A.J. v. Long Island Surgi-Ctr.*, 46 A.D.3d 74, 81, 842 N.Y.S.2d 558, 564 (App. Div. 2d Dep’t 2007); *Fordham-Coleman*, 42 A.D.3d at 113, 834 N.Y.S.2d at 428; *Guariglia v. Price Chopper Operating Co.*, 38 A.D.3d 1043, 1043, 830 N.Y.S.2d 871, 872–73 (App. Div. 3d Dep’t 2007); *Colombini v. Westchester Cnty. Healthcare Corp.*, 24 A.D.3d 712, 715, 808 N.Y.S.2d 705, 708 (App. Div. 2d Dep’t 2005).

<sup>201</sup> *Randi A.J.*, 46 A.D.3d at 81, 842 N.Y.S.2d at 564.

<sup>202</sup> *Id.* at 82, 842 N.Y.S.2d at 565.

<sup>203</sup> *Id.* at 75–76, 842 N.Y.S.2d at 560.

<sup>204</sup> *Id.* at 82, 82 N.Y.S.2d at 565.

<sup>205</sup> *Id.*

*Corporation*,<sup>206</sup> a woman died from hypothermia after her gas company failed to provide heat.<sup>207</sup> The appellate division refused to grant summary judgment to the gas company to dismiss plaintiff's claim for punitive damages because the gas company failed to discharge its obligation to decedent under the Public Service Law and its own procedures by failing to respond in a timely manner to plaintiff's original request for gas service.<sup>208</sup> Moreover, the gas company "erroneously treated decedent as a new customer rather than a continuing customer," making her activation of gas service contingent on unnecessary payments.<sup>209</sup> The court then stated, "[a]lthough National Fuel is correct that punitive damages generally are not available in cases involving ordinary negligence, such damages may nevertheless be awarded in 'actions based on negligence if such negligence amounts to flagrant misconduct.'"<sup>210</sup> As the alleged conduct of the gas company implicated public health and safety concern, punitive damages could be awarded on the ground of public policy.<sup>211</sup>

By contrast, in *Dupree v. Giugliano*,<sup>212</sup> the Court of Appeals found that the jury should not have been charged to consider punitive damages as a matter of law.<sup>213</sup> In this action to recover damages for medical malpractice, the defendant physician was found to have engaged in a consensual sexual relationship with a married patient as part of his treatment for her depression and stress.<sup>214</sup> During the trial, the plaintiff offered testimony from an expert that her romantic feelings towards the defendant were the result of "eroticized transference," a medical phenomenon wherein the patient experienced "near psychotic attraction" to a treating physician and which the patient was powerless to resist.<sup>215</sup> Although the court determined that the verdict finding that the defendant's conduct constituted medical malpractice was supported by the evidence, the court found that the defendant's conduct did not warrant a charge to the jury on the issue of punitive damages as

---

<sup>206</sup> *Fordham-Coleman v. Nat'l Fuel Gas Distribution Corp.*, 42 A.D.3d 106, 834 N.Y.S.2d 422 (App. Div. 4th Dep't 2007).

<sup>207</sup> *Id.* at 110, 834 N.Y.S.2d at 426.

<sup>208</sup> *Id.* at 113–14, 834 N.Y.S.2d at 428–29.

<sup>209</sup> *Id.* at 113, 834 N.Y.S.2d at 428.

<sup>210</sup> *Id.* (quoting *Soucy v. Greyhound Corp.*, 27 A.D.2d 112, 113, 276 N.Y.S.2d 173, 175 (App. Div. 3d Dep't 1967)).

<sup>211</sup> *Fordham-Coleman*, 42 A.D.3d at 114, 834 N.Y.S.2d at 428–29.

<sup>212</sup> *Dupree v. Giugliano*, 20 N.Y.3d 921, 982 N.E.2d 74, 958 N.Y.S.2d 312 (2012).

<sup>213</sup> *Id.* at 924, 982 N.E.2d at 76, 958 N.Y.S.2d at 314.

<sup>214</sup> *Id.* at 922–23, 982 N.E.2d at 75, 958 N.Y.S.2d at 312.

<sup>215</sup> *Id.* at 923, 982 N.E.2d at 75, 958 N.Y.S.2d 312.

there was no evidence that the defendant willfully caused the plaintiff's transference or harm.<sup>216</sup>

Accordingly, mere carelessness is not enough to warrant punitive damages. For example, in *Guion v. Associated Dry Goods Corp.*,<sup>217</sup> an action for false arrest was brought against a department store.<sup>218</sup> The Court of Appeals held that even if the security officer's failure to inspect the counter was relevant to the false imprisonment cause of action and "while his conduct could be found to be careless, it did not rise to the level of wantonness or maliciousness."<sup>219</sup>

Conduct that rises to the level of criminality will be sufficiently egregious to warrant punitive damages. In *Sabol & Rice, Inc. v. Poughkeepsie Galleria Co.*,<sup>220</sup> a developer of a shopping mall made unauthorized disbursements of \$28 million in trust assets to its partners without satisfying the claims of contractors, subcontractors, and suppliers, in violation of Lien Law section 77, which "creates a statutory trust for funds received by owners, contractors and subcontractors and thereby provides protection to certain parties involved in the improvement of real property, ensuring that they will be properly compensated for their services."<sup>221</sup> The appellate division held, "[s]uch conduct, if established, would constitute larceny punishable under the Penal Law and, thus, would clearly satisfy the high threshold of moral culpability necessary to support a punitive damages award."<sup>222</sup> Similarly, sexually abusing one's eleven year old stepdaughter "is egregious" enough to warrant a jury's award of punitive damages.<sup>223</sup> Thus, "an award of punitive damages must be based on 'quasi-criminal conduct or of such utterly reckless behavior' or a demonstrated 'malicious intent' to injure the plaintiff, or gross, wanton or willful fraud or other morally culpable conduct."<sup>224</sup>

Regular conduct involved in the commission of a fraudulent act, however, does not necessarily rise to the level of egregiousness

---

<sup>216</sup> *Id.* at 924, 982 N.E.2d at 76, 958 N.Y.S.2d 314.

<sup>217</sup> *Guion v. Associated Dry Goods Corp.*, 43 N.Y.2d 876, 374 N.E.2d 364, 403 N.Y.S.2d 465 (1978).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 878, 374 N.E.2d at 364, 403 N.Y.S.2d at 466.

<sup>220</sup> *Sabol & Rice, Inc. v. Poughkeepsie Galleria Co.*, 175 A.D.2d 555, 556-57, 572 N.Y.S.2d 811, 813 (App. Div. 3d Dep't 1991).

<sup>221</sup> *Id.* at 556, 572 N.Y.S.2d at 813.

<sup>222</sup> *Id.* at 556-57, 572 N.Y.S.2d at 813.

<sup>223</sup> *Laurie Marie M. v. Jeffrey T. M.*, 159 A.D.2d 52, 59, 559 N.Y.S.2d 336, 341 (App. Div. 2d Dep't 1990).

<sup>224</sup> *Id.* at 58, 559 N.Y.S.2d at 341 (quoting *Maitrejean v. Levon Props. Corp.*, 87 A.D.2d 605, 605-06, 448 N.Y.S.2d 46, 47 (App. Div. 2d Dep't 1982)).

required for an award of punitive damages.<sup>225</sup> As far back as 1864, punitive damages were unavailable in an ordinary cause of action to recover damages for fraud.<sup>226</sup> Courts arrived at this rule by reasoning that, in the course of business, a defendant is more likely to perpetrate a fraudulent transaction with a purpose to enrich himself, rather than out of a malicious intent toward another.<sup>227</sup> Despite this general rule, an action to recover damages for transactional fraud perpetrated with sufficient malice may warrant an award of punitive damages.<sup>228</sup>

## XI. PUBLIC HARM

Tort actions can acquire punitive damages as long as the conduct is egregious—but some New York courts have required a public harm in order to award punitive damages—whether the case has to do with fraud, breach of contract, or another type of injury.<sup>229</sup> Thus,

---

<sup>225</sup> See, e.g., *Reinah Dev. Corp. v. Kaaterskill Hotel Corp.*, 59 N.Y.2d 482, 487–88, 452 N.E.2d 1238, 1240, 465 N.Y.S.2d 910, 912 (1983) (holding that conduct must be malicious and vindictive or wanton and reckless); *Walker v. Sheldon*, 10 N.Y.2d 401, 405, 179 N.E.2d 497, 498–99, 223 N.Y.S.2d 488, 491 (1961); *Spano v. Kings Park Cent. Sch. Dist.*, 61 A.D.3d 666, 671, 877 N.Y.S.2d 163, 168 (App. Div. 2d Dep’t 2009) (holding that defendant must have acted in a manner that is malicious, vindictive, or reckless); *Key Bank of N.Y. v. Diamond*, 203 A.D.2d 896, 897, 611 N.Y.S.2d 382, 383 (App. Div. 4th Dep’t 1994) (“The question that must be resolved is whether defendant’s acts were ‘gross, wanton, deliberate, evinced a reckless disregard for the plaintiffs’ rights, and, moreover, attained that high degree of moral culpability required to justify an award of punitive damages.” (quoting *V.J.V. Transp. Corp. v. Santiago*, 173 A.D.2d 537, 539, 570 N.Y.S.2d 138, 139 (App. Div. 2d Dep’t 1991))) *Cross v. Zyburo*, 185 A.D.2d 967, 968, 587 N.Y.S.2d 670, 671 (App. Div. 2d Dep’t 1992) (“[T]o sustain a demand for punitive damages for fraud the plaintiff must show that the lawsuit involved allegations ‘of such a high degree of moral turpitude on the part of the defendants as to imply criminal indifference to civil obligations.’” (quoting *J.G.S., Inc. v. Lifetime Cutlery Corp.*, 87 A.D.2d 810, 810, 448 N.Y.S.2d 780, 781 (App. Div. 2d Dep’t 1982))); *Robinson v. Paramount Pictures Corp.*, 122 A.D.2d 32, 34, 504 N.Y.S.2d 472, 474 (App. Div. 2d Dep’t 1986) (holding that the fraud must be gross and involve a high degree of moral culpability).

<sup>226</sup> See e.g., *Lane v. Wilcox*, 55 Barb. 615, 617 (Sup. Ct. N.Y. County 1864) (holding that general actions for fraud in a transaction do not warrant punitive damages, distinguished from actions where malice is proven or implied from the circumstances, such as slander, malicious prosecution, seduction, libel, assault and battery, and false imprisonment).

<sup>227</sup> *Id.* at 618–19 (explaining that a transactional fraud does not entail the malice requisite for an award of punitive damages because it cannot be inferred that it was intended to injure the other parties concerned any further than to the extent that it benefitted himself).

<sup>228</sup> See discussion of fraud actions *infra* Part XI.A. But see *Lane*, 55 Barb. at 618 (“There may be cases of fraud perpetrated under such circumstances as to imply malice, and the rule of damage in such case should be the same as in those mentioned; but . . . none has been cited or found . . .”).

<sup>229</sup> See, e.g., *1 Mott St., Inc. v. Con Edison*, 33 A.D.3d at 532–33, 823 N.Y.S.2d at 376–77 (App. Div. 1st Dep’t 2006) (noting that an unwarranted utility discontinuation resulting in a business loss of revenue does not warrant punitive damages because it is not a harm aimed at the public); *Mom’s Bagels of N.Y., Inc. v. Sig Greenebaum Inc.*, 164 A.D.2d 820, 822–23, 559 N.Y.S.2d 883, 885 (App. Div. 1st Dep’t 1990) (indicating that punitive damages are not

certain courts have allowed punitive damages only when the deterrent nature of the award will have a public benefit or where the injury has a public element.<sup>230</sup> For example, courts have suggested that a jury might properly award punitive damages where a medical practice<sup>231</sup> or a public utility<sup>232</sup> may endanger individuals. Another court justified an award of punitive damages in a case of intra-family child molestation, with no direct public connection, on the theory that the conduct charged portends significant harm to the public interest.<sup>233</sup> Moreover, in breach of contract claims, punitive damages always require a public harm.<sup>234</sup>

Some New York courts have held that punitive damages are only warranted if a link exists between the private harm alleged and a detriment to the public at large.<sup>235</sup> This public/private distinction has its evolution in the valid perception that the penal law is viewed

---

available for a private wrong, a breach of contract, or ordinary fraud); *Luxonomy Cars, Inc. v. Citibank, N.A.*, 65 A.D.2d 549, 549, 551, 408 N.Y.S.2d 951, 953-54 (App. Div. 2d Dep't 1978) (explaining that dishonoring business checks, after applying the balance in its checking account as payment of a loan, does not warrant punitive damages because it is not a harm to the public).

<sup>230</sup> *Compare* *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 150, 862 N.Y.S.2d 487, 490 (App. Div. 1st Dep't 2008) ("A claim for punitive damages may, of course, be in personal injury, but for such a claim to succeed the injury must be shown to be emblematic of much more than individually sustained wrong."), *with* *Suffolk Sports Ctr., Inc. v. Belli Constr. Corp.*, 212 A.D.2d 241, 244, 247-48, 628 N.Y.S.2d 952, 954, 956 (App. Div. 2d Dep't 1995) (holding that punitive damages were appropriate where a landlord blocked access to rented premises and forced tenant company out of business despite no harm to the public and the underlying contractual relationship, because the act was so egregious that punitive damages were appropriate to display public indignation and deter similar conduct).

<sup>231</sup> *Williams v. Halpern*, 25 A.D.3d 467, 468, 808 N.Y.S.2d 68, 69 (App. Div. 1st Dep't 2006) (noting that a jury could possibly find that a doctor's office was responsible for a patient's Hepatitis C infection, which might warrant punitive damages, if the conduct demonstrated a gross indifference to patient care and a danger to the public).

<sup>232</sup> *Fordham-Coleman v. Nat'l Fuel Gas Corp.*, 42 A.D.3d 106, 108, 114, 834 N.Y.S.2d 422, 424, 429 (App. Div. 4th Dep't 2007) (indicating that a jury may award punitive damages where a woman died from hypothermia after a gas company negligently failed to provide service).

<sup>233</sup> *Laurie Marie M. v. Jeffrey T. M.*, 159 A.D.2d 52, 53, 59-61, 559 N.Y.S.2d 336, 337, 341, 343 (App. Div. 2d Dep't 1990) (holding that punitive damages were warranted where a stepfather sexually abused his eleven-year-old daughter, though the jury's award was reduced by the court).

<sup>234</sup> See discussion of breach of contract actions *infra* Part XI.B.

<sup>235</sup> See, e.g., *Walker v. Sheldon*, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 492 (1961) (noting that in cases of fraud, a wrongdoer will be deterred from committing the crime if there is the possibility of incurring punitive damages); *Fabiano*, 54 A.D.3d at 151, 862 N.Y.S.2d at 491 (App. Div. 1st Dep't 2008) ("A claim for punitive damages is not . . . merely an appendage to or an element of a claim for personal injury . . ."); *164 Mulberry St. Corp. v. Columbia Univ.*, 4 A.D.3d 49, 60, 771 N.Y.S.2d 16, 25 (App. Div. 1st Dep't 2004) (noting that an academic research project seeking to elicit responses from restaurants was not intended to injure the parties and therefore punitive damages were not warranted).

as public and the civil law as private.<sup>236</sup> This bright-line categorization may deceptively imply that the public and private areas of law are discrete, when in fact a continuum exists between them.<sup>237</sup> Civil law assignment of damages contains certain punitive elements and certain criminal actions affect only private parties.<sup>238</sup> Punitive damages incorporate the elements of retribution and deterrence that the law normally associates with penal or public law into civil or private law and therefore represents a hybrid between civil and criminal consequences.<sup>239</sup> This outcome may have resulted as a vestige of the jury's discretion to award whatever money damages it saw fit prior to the public/private law divide.<sup>240</sup> Although Anglo-Saxon law prescribed fixed prices for most crimes, early English law left much to the discretion of the King's courts.<sup>241</sup> When the old practices of "trial by ordeal or trial by battle" fell out of style, trial by jury gained more prominence.<sup>242</sup>

Early English courts did not expressly assign juries the ability to award punitive damages.<sup>243</sup> However, these courts eventually began to honor jury discretion and to justify large jury awards because of the difficulty of ascertaining actual damages.<sup>244</sup> Moreover, courts also justified high damages as a deterrent to similar conduct.<sup>245</sup> This practice of juries awarding punitive damages became established in England and was imported to the United States.<sup>246</sup>

In the nineteenth century—when American law adopted the public/private distinction to explain the difference between civil and criminal law—many critics saw punitive damages as out of place in the civil system.<sup>247</sup> Critics differed as to the place of punitive damages in the civil system of jurisprudence. The critics who opined that punitive damages should not be awarded in civil matters thought so because of the public aims of punishment and

---

<sup>236</sup> See generally Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1090–99 (1989) (providing a historical background of the public/private distinction); BUTLER, *supra* note 46, at 644–45 (describing the differences in punishment and risk allocation between crimes and torts).

<sup>237</sup> Harris, *supra* note 236, at 1095.

<sup>238</sup> *Id.* at 1100–03.

<sup>239</sup> *Id.* at 1086–87.

<sup>240</sup> *Id.* at 1085.

<sup>241</sup> Sullivan, *supra* note 15, at 209.

<sup>242</sup> *Id.* at 209 n.15.

<sup>243</sup> *Id.* at 208.

<sup>244</sup> *Id.* at 213–14.

<sup>245</sup> *Id.* at 214.

<sup>246</sup> *Id.* at 214–15.

<sup>247</sup> Harris, *supra* note 236, at 1088.

deterrence.<sup>248</sup> This divide was exemplified by the dueling opinions of treatise writers Simon Greenleaf and Theodore Sedgwick.<sup>249</sup> Whereas Greenleaf argues that damages should be purely compensatory, Sedgwick argues that damages could properly be punitive.<sup>250</sup> New York courts quoted both of these commentators in various opinions, evincing early disagreement about punitive damages given the developing legal public/private distinction.<sup>251</sup> In fact, in many early decisions courts awarded punitive damages cited these commentators along with precedent to support the award.<sup>252</sup>

Although not frequently discussed in early cases, New York courts have justified awards of punitive damages with language suggesting that the courts considered public interests.<sup>253</sup> Even the

---

<sup>248</sup> Harris, *supra* note 236, at 1089.

<sup>249</sup> See *infra* notes 246–48 and accompanying text.

<sup>250</sup> Compare 1 SEDGWICK, *supra* note 17, § 35 (“A vast body of decisions exists, in which the recovery could only be *in poenam*; and the inquiry is always made, not as to the effect of the defendant’s malice, but as to its motive.”), with 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 253 (Edward Avery Harriman ed., 16th ed. 1899) (“Damages are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less.”); see also Sullivan, *supra* note 15, at 215–16 n.55.

<sup>251</sup> See *infra* note 248 and accompanying text.

<sup>252</sup> Fry v. Bennett, 1 Abb. Pr. 289, 308–09 (N.Y. Sup. Ct. 1855) (Hoffman, J., concurring) (examining the treatises of both Greenleaf and Sedgwick when determining damages for libel); Chellis v. Chapman, 7 N.Y.S. 78, 84–85 (N.Y. Gen. Term 1889) (referring to Sedgwick’s view that the jury should be allowed wide discretion in assessing the amount of damages in a breach of contract to marry case); Buteau v. Naegeli, 124 Misc. 470, 471, 208 N.Y.S. 504, 505 (Sup. Ct. N.Y. County 1925), *rev’d*, 216 A.D. 833, 215 N.Y.S. 823 (App. Div. 1st Dep’t 1926) (noting that the doctrine of punitive damages has been repudiated by many courts and writers; citing both Greenleaf and Sedgwick); see also Sullivan, *supra* note 15, at 221 (“Although the doctrine of punitive damages is part of the larger body of remedial rules, one of the principal impediments to analysis of contract cases treating the question of punitive damages is the consistent absence, particularly in the early cases, of any meaningful judicial discussion of the philosophy of damage law. This may be because many judges are by nature not philosophers of the law; it may be a reflection of the fact that damage rules developed late in the history of the common law. Whatever the explanation, we must begin without any firm idea of *why*, beyond adherence to traditional English standards, American courts have held, as a general rule, that punitive damages should not be awarded for breach of contract. Many of the older decisions that rejected the award of punitive damages in contract and troubled to cite any authority at all made summary reference to the treatises then popular. An examination of the treatise cited is likely to produce no more enlightenment than the opinion which invoked its authority.”) (footnotes omitted). *But see* Tillotson v. Cheetham, 3 Johns. 56, 66 (N.Y. Sup. Ct. 1808) (Spencer, J., dissenting) (“[I]n vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury, that they are to inflict damages for example’s sake, and by way of punishing the defendant.”).

<sup>253</sup> *E.g.*, Voltz v. Blackmar, 64 N.Y. 440, 444 (1876) (“[T]he jury, in fixing the damages, may disregard the rule of compensation, and beyond that may, as a punishment to the defendant, and as a protection to society against a violation of personal rights and social order, award such additional [punitive] damages . . . .” (citations omitted)); Lane v. Wilcox, 55 Barb. 615, 617–18 (N.Y. Sup. Ct. 1864) (“[J]uries may give exemplary damages . . . to prevent

oldest case known to English jurisprudence that dealt with punitive damages noted that the wrongful conduct on record, though directed at an individual, “was a most daring public attack made upon the liberty of the subject.”<sup>254</sup> Similarly, New York has justified punitive damages in civil suits because they are a form of societal protection.<sup>255</sup> Although a defendant has acted merely against one plaintiff, his action may be so reprehensible that it offends society as a whole.<sup>256</sup> Accordingly, case law suggests that the award of punitive damages serves a purpose beyond retribution and deterrence in that it expresses society’s condemnation of a wrongful act.<sup>257</sup> New York jurisprudence, however, has not definitively established if a public wrong must be proven to afford a plaintiff punitive damages and—if such a showing is required—what the nature of that public wrong must be.

New York courts seem to adopt different standards for punitive damages in fraud, breach of contract, and breach of fiduciary duty

---

the repetition of such offenses against the public morals and the peace and good order of society.”)

<sup>254</sup> *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.) 769.

<sup>255</sup> *E.g.*, *Toomey v. Farley*, 2 N.Y.2d 71, 83, 138 N.E.2d 221, 228, 156 N.Y.S.2d 840, 849 (1956) (“They [punitive damages] are intended as punishment for gross misbehavior *for the good of the public* . . . .” (emphasis added)); *Craven v. Bloomingdale*, 171 N.Y. 439, 448, 64 N.E. 169, 171 (1902) (“In cases where punitive or exemplary damages have been assessed, it has been done . . . for the good of society and warning to the individual . . . .” (quoting *Hagan v. Providence & Worcester R.R. Co.*, 3 R.I. 88, 91 (1854))).

<sup>256</sup> *E.g.*, *Magagnos v. Brooklyn Heights R.R. Co.*, 128 A.D. 182, 183, 112 N.Y.S. 637, 638 (App. Div. 2d Dep’t 1908) (“The jury were not at liberty to give smart money unless such malice existed. Malice is proved in such cases by showing that the tort was committed to gratify some actual grudge or ill will, or by showing that it was committed recklessly or wantonly, *i.e.*, without regard to the rights of the plaintiff, or of people in general.”); *Oehlhof v. Solomon*, 73 A.D. 329, 333–35, 76 N.Y.S. 716, 719–20 (App. Div. 1st Dep’t 1902) (“Vindictive, punitive, or exemplary damages are [also] recoverable . . . as an example for the protection of the public and society . . . [and require] evidence of contempt for the rights of the plaintiff or of society.”); *Goines v. Pa. R.R. Co.*, 208 Misc. 103, 112, 143 N.Y.S.2d 576, 584 (Sup. Ct. N.Y. County 1955), *rev’d on other grounds*, 3 A.D.2d 307, 160 N.Y.S.2d 39 (App. Div. 1st Dep’t 1957) (“The theory of exemplary, punitive, or vindictive damages . . . involves a blending of the interests of society in general with those of the aggrieved individual in particular.” (quoting 6A C.J.S. *Exemplary and Punitive Damages* § 69 (2004)); *Fry*, 1 Abb. Pr. at 301 (“[A] jury could render no more meritorious service to the public than in repressing this enormous evil. It can only be done by visiting with severe damages him who wantonly and falsely assails the character of another through the public papers.” (quoting *King v. Root*, 4 Wend. 114, 134 (N.Y. 1829))).

<sup>257</sup> *See e.g.*, *Thoreson v. Penthouse Int’l, Ltd.*, 80 N.Y.2d 490, 497, 606 N.E.2d 1369, 1371, 591 N.Y.S.2d 978, 980 (1992) (“[Punitive] damages may be considered expressive of the community attitude towards one who willfully and wantonly causes hurt or injury to another.” (quoting *Reynolds v. Pegler*, 123 F. Supp. 36, 38 (S.D.N.Y. 1954))); *Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary*, 262 N.Y. 320, 324–25, 186 N.E. 798, 800 (1933) (“Juries may be allowed to give damages that express indignation at the defendants’ wrong rather than a value set on plaintiff’s loss.” (citing *Voltz*, 64 N.Y. at 444)).

cases.<sup>258</sup> Certain courts have held that the public harm requirement applies only in breach of contract and fraud cases and not in breach of fiduciary duty cases.<sup>259</sup> Other courts have chosen an either/or approach for both fraud cases and breach of contract cases—requiring either harm to the public or a sufficiently high level of egregious conduct—to merit an award of punitive damages.<sup>260</sup>

### A. *Fraud*

Although many New York courts have maintained that harm to the public is required for a punitive damages award, few have clarified what constitutes a sufficient harm.<sup>261</sup> The law is clearer with respect to fraud.<sup>262</sup> For fraud to constitute a public harm it must be aimed at the public, relied upon by the public, and/or have caused an injury to someone other than the plaintiff.<sup>263</sup>

In 1961, the Court of Appeals first imposed the requirement in fraud cases that—in order to warrant punitive damages—the wrongful conduct must have been aimed at the public generally.<sup>264</sup>

---

<sup>258</sup> See discussion of fraud actions *infra* Part XI.A., breach of contract actions *infra* Part XI.B., and breach of fiduciary duty actions *infra* Part XI.C.

<sup>259</sup> *Don Buchwald & Assocs., Inc. v. Rich*, 281 A.D.2d 329, 330, 723 N.Y.S.2d 8, 8–9 (App. Div. 1st Dep't 2001) (concluding punitive damages may be sustainable where employees formed a competitive talent agency while still employed by plaintiff because a public harm is only required in breach of contract cases, not breach of fiduciary duty cases); *Sherry Assocs. v. Sherry-Netherland, Inc.*, 273 A.D.2d 14, 14–15, 708 N.Y.S.2d 105, 106 (App. Div. 1st Dep't 2000) (concluding punitive damages may be sustained in an action by minority shareholders against majority shareholders, because a public harm is only required in breach of contract cases, not breach of fiduciary duty cases).

<sup>260</sup> *Flores-King v. Encompass Ins. Co.*, 29 A.D.3d 627, 627, 818 N.Y.S.2d 221, 222 (App. Div. 2d Dep't 2006) (“The insureds failed to set forth any facts or allegations to support their contention that the defendant insurers’ conduct was egregious or fraudulent, or that it evidenced wanton dishonesty so as to imply criminal indifference to civil obligations directed at the public generally.”); *J.G.S. Inc. v. Lifetime Cutlery Corp.*, 87 A.D.2d 810, 810, 448 N.Y.S.2d 780, 781 (App. Div. 2d Dep't 1982) (“Punitive damages are recoverable in fraud and deceit cases when[:] (a) the fraud is gross, involves high moral culpability and is aimed at the public generally[:] or (b) the defendant’s conduct evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply criminal indifference to civil obligations.”).

<sup>261</sup> See *e.g.*, *Sherry Assocs.*, 273 A.D.2d at 15, 708 N.Y.S.2d at 106 (reinstating plaintiff’s punitive damages request for punitive damages; public harm is required in breach of contract cases, but not for breach of fiduciary duty).

<sup>262</sup> See *infra* notes 259 and accompanying text.

<sup>263</sup> See *Kelly v. Defoe Corp.*, 223 A.D.2d 529, 529–30, 636 N.Y.S.2d 123, 124 (App. Div. 2d Dep't 1996) (concluding a fraudulent inducement to accept an employment offer was not a public harm and so did not warrant punitive damages).

<sup>264</sup> See, *e.g.*, *Walker v. Sheldon*, 10 N.Y.2d 401, 405, 179 N.E.2d 497, 498–99, 223 N.Y.S.2d 488, 491 (1961) (holding that punitive damages may be awarded where fraud is aimed at the public).

In *Walker v. Sheldon*,<sup>265</sup> the Court of Appeals held that in an action to recover damages for fraudulently inducing plaintiff to enter into a publishing contract, the trial court correctly concluded that if a plaintiff was able to prove that the defendant company and its officers “were engaged in carrying on ‘a virtually larcenous scheme to trap generally the unwary,’ a jury would be justified in granting punitive damages.”<sup>266</sup> This was the first time a New York court required a plaintiff to demonstrate a public harm in order to receive an award of punitive damages, as opposed to merely noting the connection between punitive damages and the public sphere.<sup>267</sup>

Since then, New York courts have not dispositively defined what constitutes a sufficient connection to a public harm.<sup>268</sup> Moreover, not all New York courts have strictly adhered to the public harm requirement for punitive damages.<sup>269</sup> While it has been held that a harm to the public is required for a punitive damages award in a fraud case,<sup>270</sup> some courts have not strictly adhered to this requirement.<sup>271</sup> This has created a murky river for litigants to navigate.

---

<sup>265</sup> *Id.* at 401, 179 N.E.2d at 497, 223 N.Y.S.2d at 488.

<sup>266</sup> *Id.* at 404, 179 N.E.2d at 498, 223 N.Y.S.2d at 490.

<sup>267</sup> Search: fraud + punitive damages + public harm (in both Lexis and Westlaw) with the search limited to New York Courts. There were no cases that predated the 1961 *Walker v. Sheldon* case.

<sup>268</sup> 60A N.Y. JUR. 2D FRAUD AND DECEIT § 288 (2012). Compare 164 Mulberry St. Corp. v. Columbia Univ., 4 A.D.3d 49, 55–56, 771 N.Y.S.2d 16, 19, (App. Div. 1st Dep’t 2004), with *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 868 N.E.2d 189, 836 N.Y.S.2d 509 (focusing entirely on the moral turpitude requirement and ignoring the requirement for “public harm” throughout the opinion).

<sup>269</sup> See *infra* note 269 and accompanying text.

<sup>270</sup> See *e.g.*, *James v. Powell*, 19 N.Y.2d 249, 260, 225 N.E.2d 741, 747, 279 N.Y.S.2d 10, 18 (1967) (“[T]here may be a recovery of exemplary damages in fraud and deceit actions where the fraud, aimed at the public generally, is gross and involves high moral culpability” (quoting *Walker*, 10 N.Y.2d at 405, 179 N.E.2d at 499, 223 N.Y.S.2d at 491)); *Diker v. Cathray Constr. Corp.*, 158 A.D.2d 657, 658, 552 N.Y.S.2d 37, 38 (App. Div. 2d Dep’t 1990) (“To recover punitive damages in an action for fraud, it must appear that the fraud was upon the general public, that is, ‘aimed at the public generally, is gross and involves a high degree of moral culpability.’” (quoting *Gale v. Kessler*, 93 A.D.2d 744, 745, 461 N.Y.S.2d 295, 296 (App. Div. 1st Dep’t 1983))); *Marcus v. Marcus*, 92 A.D.2d 887, 887, 459 N.Y.S.2d 873, 874 (App. Div. 2d Dep’t 1983) (“Punitive damages may be awarded in actions for fraud and deceit only where the fraud is gross, involves high moral culpability, and is aimed at the general public.” (citing *Walker*, 10 N.Y.2d at 405, 179 N.E.2d at 499, 223 N.Y.S.2d at 491)).

<sup>271</sup> See *Borkowski v. Borkowski*, 39 N.Y.2d 982, 983, 355 N.E.2d 287, 287, 387 N.Y.S.2d 233, 233 (1976) (“It is not essential . . . that punitive damages be allowed in a fraud case only where the acts had been aimed at the public generally.”); *Key Bank of N.Y. v. Diamond*, 203 A.D.2d 896, 897, 611 N.Y.S.2d 382, 383 (App. Div. 4th Dep’t 1994) (holding that only conduct showing a high degree of moral culpability was required); *Lawlor v. Engley*, 166 A.D.2d 799, 800, 563 N.Y.S.2d 160, 161 (App. Div. 3d Dep’t 1990) (holding that a demand for such damages is properly asserted without any allegation that the alleged fraud was aimed at the public generally).

In *Giblin v. Murphy*,<sup>272</sup> the Court of Appeals held that a breach of fiduciary duty based on fraud warrants punitive damages regardless of whether defendant's actions affected the public, as "long as the very high threshold of moral culpability is satisfied."<sup>273</sup> Nevertheless, most New York courts seem to require a public harm to award punitive damages in fraud cases. For example, common law fraud often requires a harm to the public, and a fraudulent business practice that is imposed on many customers may be considered to be a harm to the public.<sup>274</sup> In *Pludeman v. Northern Leasing Systems, Inc.*,<sup>275</sup> the appellate division held that purposely concealing three pages of a four-page equipment leasing contract for multiple customers is a sufficient harm to the public to warrant a claim for punitive damages.<sup>276</sup>

Similarly, in *Kelly v. Defoe Corp.*,<sup>277</sup> the appellate division required a public harm in order to award punitive damages in a case where employers made fraudulent misrepresentations in order to induce the plaintiff to accept employment.<sup>278</sup> The court asserted, "[p]unitive damages may only be recovered in a fraud action where the fraud is aimed at the public generally, is gross, and involves high moral culpability."<sup>279</sup> Thus, although the plaintiff alleged that the "misrepresentations were repeated to members of the general public, the record [was] devoid of any indication that the alleged misrepresentations were aimed at the public, that any member of the public relied upon these misrepresentations, or that these misrepresentations caused injury to any individual other than the plaintiff."<sup>280</sup> The court, therefore, in determining that the denial of punitive damages was proper due to the absence of public harm,<sup>281</sup> reiterated a higher threshold for awarding punitive damages in fraud cases.

---

<sup>272</sup> *Giblin v. Murphy*, 73 N.Y.2d 769, 532 N.E.2d 1282, 536 N.Y.S.2d 54 (1988).

<sup>273</sup> *Id.* at 772, 532 N.E.2d at 1284, 536 N.Y.S.2d at 56 (citations omitted).

<sup>274</sup> See *Pludeman v. N. Leasing Sys., Inc.*, 40 A.D.3d 366, 369, 837 N.Y.S.2d 10, 13 (App. Div. 1st Dep't 2007), *aff'd*, 10 N.Y.3d 486, 890 N.E.2d 184, 860 N.Y.S.2d 422, *cert. of class granted*, 24 Misc. 3d 1206 (A), *modified*, 74 A.D.3d 420, 890 N.Y.S.2d 370, *motion to reargue defendant's motion for summary judgment denied*, 2010 WL 3462147.

<sup>275</sup> *Id.* at 366, 837 N.Y.S.2d at 10.

<sup>276</sup> *Id.* at 367, 837 N.Y.S.2d at 11–12.

<sup>277</sup> *Kelly v. Defoe Corp.*, 223 A.D.2d 529, 636 N.Y.S.2d 123 (App. Div. 1st Dep't. 1996).

<sup>278</sup> *Id.* at 529–30, 636 N.Y.S.2d at 124.

<sup>279</sup> *Id.* at 529, 636 N.Y.S.2d at 124.

<sup>280</sup> *Id.* at 530, 636 N.Y.S.2d at 124.

<sup>281</sup> *Id.*

### B. Breach of Contract Actions

Traditionally, punitive damages were generally not awarded in cases alleging a breach of contract.<sup>282</sup> Typical exceptions to this rule included cases alleging: breach of contract to marry, breach of the implied contract between public service companies and customers, breach of fiduciary duty, breach of contract involving fraud, breach of contract accompanied by an independent tort,<sup>283</sup> and breach of warranty of habitability.<sup>284</sup> An exception to the general rule that punitive damages are not available in breach of contract cases arises where a plaintiff can show a bad faith breach, which reaches a sufficient level of egregiousness.<sup>285</sup>

Various theories have been posited as to why traditional Anglo-American law normally refuses to impose punitive damages for a breach of contract.<sup>286</sup> One theory suggests that breaches of contract do not cause the same type of injury that torts do, and therefore do not warrant the retributive effects of punitive damages.<sup>287</sup> A second theory relates to efficient breaches of contract, which some economists theorize that the law ought to encourage.<sup>288</sup> The theorized outcome of an efficient breach is that society's wealth is maximized.<sup>289</sup> Accordingly, proponents of an efficient breach do not want to punish a breaching party beyond requiring them to pay expectation damages.<sup>290</sup> A third theory contrasts the relative ease by which a court may ascertain actual damages resulting from a contractual breach because of the usual commercial nature of contracts with the difficulty a court encounters in determining

---

<sup>282</sup> Sullivan, *supra* note 15, at 207.

<sup>283</sup> See generally Sullivan, *supra* note 15, at 222–40 (describing the various historical and modern grounds for awarding punitive damages in contracts cases).

<sup>284</sup> See *Minjak Co. v. Randolph*, 140 A.D.2d 245, 249, 528 N.Y.S.2d 554, 557 (App. Div. 1st Dep't 1988) (“Although generally in breach of contract claims the damages to be awarded are compensatory, in certain instances punitive damages may be awarded when to do so would ‘deter morally culpable conduct.’” (quoting *Halpin v. Prudential Ins. Co. of Am.*, 48 N.Y.2d 906, 907, 401 N.E.2d 171, 171, 425 N.Y.S.2d 48, 49 (1979))).

<sup>285</sup> See *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 436–37, 285 N.E.2d 849, 854, 334 N.Y.S.2d 601, 608–09 (1972) (“[B]ad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract.”); *Cross v. Zyburow*, 185 A.D.2d 967, 968, 587 N.Y.S.2d 670, 671 (App. Div. 2d Dep't 1992) (noting that breaching a contract “willfully and without justification” is not enough (quoting *J.G.S., Inc. v. Lifetime Cutlery Corp.*, 87 A.D.2d 810, 810, 448 N.Y.S.2d 780, 781 (App. Div. 2d Dep't 1982))).

<sup>286</sup> *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 63 (2d Cir. 1985).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

compensatory damages for injuries in torts cases.<sup>291</sup> This theory posits that common-law courts were more able to limit the jury's discretion over damage determinations in breach of contract cases.<sup>292</sup>

Some courts have held that there is no right to punitive damages in regular breach of contract cases because contracts only implicate a private right and not a public right.<sup>293</sup> In *New York University v. Continental Insurance Co.*,<sup>294</sup> the Court of Appeals established a four-pronged test to determine the availability of punitive damages in a breach of contract case: "(1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in *Walker v Sheldon*; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally."<sup>295</sup>

Once again, courts have not uniformly adhered to this standard. Subsequent rulings have sometimes adopted this test in full, sometimes in part,<sup>296</sup> or have adopted a different standard altogether.<sup>297</sup> In *Logan v. Empire Blue Cross and Blue Shield*,<sup>298</sup> the appellate division partly adopted the test articulated in *New York University*.<sup>299</sup> There, the insurance company denied plaintiffs' requests to provide coverage for intravenous antibiotic treatment of Lyme disease.<sup>300</sup> The plaintiffs sued for breach of contract, on the grounds that the insurance company acted in bad faith in denying their requests.<sup>301</sup> The plaintiffs sought punitive damages arguing that "health insurance contracts at issue are so affected with the public interest' that Empire's failure to perform its contractual

---

<sup>291</sup> *Id.*

<sup>292</sup> *See id.* at 62–63.

<sup>293</sup> *See* *Trans-State Hay & Feed Corp. v. Faberge, Inc.*, 35 N.Y.2d 669, 669–70, 319 N.E.2d 201, 360 N.Y.S.2d 886 (1974) (mem.) (determining that punitive damages were not available in a claim for breach of contract involving private rights); *Williamson, Picket, Gross, Inc. v. Hirschfeld*, 92 A.D.2d 289, 295, 460 N.Y.S.2d 36, 41 (App. Div. 1st Dep't 198).

<sup>294</sup> *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 662 N.E.2d 763, 639 N.Y.S.2d 283 (1995).

<sup>295</sup> *Id.* at 316, 662 N.E.2d at 767, 639 N.Y.S.2d at 287 (citing *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 83 N.Y.2d 603, 613, 634 N.E.2d 940, 943, 612 N.Y.S.2d 339, 342 (1994)).

<sup>296</sup> *See, e.g., Logan v. Empire Blue Cross & Blue Shield*, 275 A.D.2d 187, 194, 714 N.Y.S.2d 119, 124–25 (App. Div. 2d Dep't 2000) (requiring both a public harm and an independent tort in order to permit an award for punitive damages claims arising out of breach of contract).

<sup>297</sup> *See CBLPath, Inc. v. Lexington Ins. Co.*, 73 A.D.3d 829, 830, 900 N.Y.S.2d 462, 464–65 (App. Div. 2d 2010).

<sup>298</sup> *Logan*, 275 A.D.2d at 187, 714 N.Y.S.2d at 119.

<sup>299</sup> *Id.* at 194, 714 N.Y.S.2d at 124–25.

<sup>300</sup> *Id.* at 189, 714 N.Y.S.2d at 121.

<sup>301</sup> *Id.*

obligations competently can have catastrophic consequences.”<sup>302</sup> The court, however, denied plaintiffs’ claims for punitive damages because the insurance company’s behavior was not an independent tort nor directed at the public.<sup>303</sup> Thus, the court discussed two of the *New York University v. Continental Insurance Co.* factors, but did not consider whether or not the conduct was egregious.<sup>304</sup> It is unclear if the tortious requirement was a threshold requirement that the plaintiffs did not meet, or if the court deliberately chose not to consider the egregiousness of the activity.

Another standard—different from that adopted in *New York University*—allows for an award of punitive damages if a bad faith breach of contract reaches a high level of moral turpitude.<sup>305</sup> This standard does not require harm to the public.<sup>306</sup> In *Spano*, the appellate division affirmed a dismissal of a punitive damages claim for a breach of contract case because there was no showing of “disingenuous or dishonest failure to carry out [the] contract.”<sup>307</sup> The plaintiff was employed by a school district as a temporary custodian for 18 months, and then became a permanent custodian with union benefits.<sup>308</sup> Plaintiff paid the union dues and became aware that the school district would pay a \$13,000 retirement bonus to any employee with ten years of service.<sup>309</sup> Plaintiff subsequently submitted a letter notifying the school district of his intent to retire, but was denied the \$13,000 because the school district decided not to include plaintiff’s eighteen months as a temporary custodian as part of the ten years of service.<sup>310</sup> The union notified plaintiff that they would not oppose the school district’s determination and plaintiff sued, *inter alia*, on causes of action for breach of contract and for breach of the duty of fair representation.<sup>311</sup>

---

<sup>302</sup> *Id.* at 191–92, 714 N.Y.S.2d at 123.

<sup>303</sup> *Id.* at 193–94, 714 N.Y.S.2d at 124 (“[A]ppellants’ injuries are not typical of those arising from tort . . . ‘the action should proceed under a contract theory.’” (quoting *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 552, 593 N.E.2d 1365, 1369, 583 N.Y.S.2d 957, 961 (1992))).

<sup>304</sup> *Id.* at 194, 714 N.Y.S.2d at 124–25.

<sup>305</sup> See *Philips v. Republic Ins. Co.*, 65 N.Y.2d 1000, 484 N.E.2d 664, 494 N.Y.S.2d 301 (1985); *Spano v. Kings Park Cent. Sch. Dist.*, 61 A.D.3d 666, 669, 877 N.Y.S.2d 163, 167 (App. Div. 2d Dep’t 2009); *Lundgren v. Kaufman Astoria Studios*, 261 A.D.2d 513, 514, 690 N.Y.S.2d 609, 610 (App. Div. 2d Dep’t 1999).

<sup>306</sup> *Spano*, 61 A.D.3d at 671–72, 877 N.Y.S.2d at 168 (ignoring any public harm requirement when addressing the standards for the award of punitive damages in fraud and contract causes of action).

<sup>307</sup> *Id.* at 671, 877 N.Y.S.2d at 168 (citations omitted) (internal quotation marks omitted).

<sup>308</sup> *Id.* at 667, 877 N.Y.S.2d at 165.

<sup>309</sup> *Id.* at 667–68, 877 N.Y.S.2d at 165.

<sup>310</sup> *Id.* at 668, 877 N.Y.S.2d at 165.

<sup>311</sup> *Id.*

The appellate division held that there existed “a triable issue of fact as to whether [the union] acted arbitrarily in adopting the position that the plaintiff was not eligible for the retirement bonus, rather than asserting, on the plaintiff’s behalf, that his 18 months as a temporary or substitute custodian counted towards his ‘continuous service.’”<sup>312</sup> However, the court denied punitive damages.<sup>313</sup> The court stated, “[t]o the extent that the . . . cause of action was based upon fraud, punitive damages are not available in the absence of a showing, which the plaintiff cannot make here, that the defendants acted in a malicious, vindictive, or reckless manner.”<sup>314</sup>

Although the court did not award punitive damages, it also did not conduct its calculus by utilizing the rigid four factors established in *New York University*. In fact, it made no mention of public harm whatsoever. Thus, it implicitly established a more flexible standard of awarding punitive damages in breach of contract cases without explicitly disregarding the factors articulated in *New York University*.

Awarding punitive damages on breach of contract cases based on bad faith alone may provide more equitable remedies to victims of contract breaches, while remaining consistent with the goal of deterrence. Perhaps a totality of the circumstances test is the most efficient and clear way to award punitive damages on an equitable basis, rather than mandating a difficult standard to meet: existence of a public harm. One thing is certain—New York courts differ on what standards should apply.<sup>315</sup>

### C. Fiduciary Duty

New York courts typically do not require a public harm in cases involving breach of a fiduciary duty.<sup>316</sup> In fact, the appellate division has said, “[t]he limitation of an award for punitive damages to conduct directed at the general public applies only in breach of contract cases.”<sup>317</sup> For example, in *Don Buchwald & Associates*,

---

<sup>312</sup> *Id.* at 670, 877 N.Y.S.2d at 167.

<sup>313</sup> *Id.* at 671–72, 877 N.Y.S.2d at 168.

<sup>314</sup> *Id.* at 671, 877 N.Y.S.2d at 168.

<sup>315</sup> *Compare* N.Y. Univ. v. Cont’l Ins. Co., 87 N.Y.2d 316, 662 N.E.2d 763, 639 N.Y.S.2d 283 (1995), *with Spano*, 61 A.D.3d at 666, 877 N.Y.S.2d at 163.

<sup>316</sup> *See, e.g., Sherry Assocs. v. Sherry-Netherland, Inc.*, 273 A.D.2d 14, 14–15, 708 N.Y.S.2d 105, 106 (App. Div. 1st Dep’t 2000) (concluding punitive damages may be sustained in an action by minority shareholders against majority shareholders, because a public harm is only required in breach of contract cases, not breach of fiduciary duty cases).

<sup>317</sup> *Don Buchwald & Assocs., Inc. v. Rich*, 281 A.D.2d 329, 330 723 N.Y.S.2d 8, 8 (App. Div.

*Inc., v. Rich*,<sup>318</sup> disloyal employees secretly formed a competitive agency almost a year before they left their employer talent agency.<sup>319</sup> The disloyal employees then stole a number of their former employer's clients.<sup>320</sup> The employees accomplished this by "setting up their own web site, copying confidential files, and surreptitiously adding riders to the contracts" between the former employer and its clients, giving the clients the right to terminate the contract.<sup>321</sup> After establishing that diversion of assets to a secretly created competitive organization constitutes a breach of fiduciary duty, the court put forth the necessary criteria to sustain a claim for punitive damages in tort: "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil, motive, or a conscious act that willfully and wantonly disregards the rights of another."<sup>322</sup> The court held that by secretly executing the riders, the defendants' conduct satisfied the criteria, despite the absence of a public harm.<sup>323</sup>

## XII. GENERAL BUSINESS LAW SECTION 349<sup>324</sup>

Certain New York statutes—such as General Business Law section 349—allow for punitive damages awards, so long as the conduct is consumer oriented.<sup>325</sup> General Business Law section 349 prohibits deceptive and misleading business practices, and its scope is broad indeed.<sup>326</sup> In *Karlin v. IVF America, Inc.*,<sup>327</sup> the Court of Appeals stated that GBL section 349 "on [its] face appl[ies] to

---

1st Dep't 2001).

<sup>318</sup> *Id.* at 329–30, 723 N.Y.S.2d at 8–9.

<sup>319</sup> *Id.* at 329, 723 N.Y.S.2d at 8.

<sup>320</sup> *Id.* at 330, 723 N.Y.S.2d at 8.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 330, 723 N.Y.S.2d at 9 (citing *Swersky v. Dreyer & Traub*, 219 A.D.2d 321, 328, 643 N.Y.S.2d 33, 38 (App. Div. 1st Dep't 1996)).

<sup>323</sup> *Don Buchwald & Assocs., Inc.*, 281 A.D.2d at 330, 723 N.Y.S.2d at 9.

<sup>324</sup> N.Y. GEN. BUS. LAW § 349 (McKinney 2012).

<sup>325</sup> *Id.*

<sup>326</sup> See Thomas A. Dickerson, *New York State Consumer Protection Law and Class Actions in 2007—Part I*, 80 N.Y. ST. B.A. J., FEB. 2008, at 42, 42; Thomas A. Dickerson, *New York State Consumer Protection Law and Class Action in 2007—Part II*, 80 N.Y. ST. B.A. J., MAY 2008, at 39, 39; Thomas A. Dickerson, *New York Consumers Enjoy Statutory Protections Under Both State and Federal Statutes*, 76 N.Y. ST. B.A. J., SEPT. 2004, at 10, 10; Matthew A. Edwards, *The Rebate "Rip-Off": New York's Legislative Responses to Common Consumer Rebate Complaints*, 29 PACE L. REV. 471, 471 (2009). For detailed discussions of GBL section 349, see *Consumer Protection*, *supra* note \*\*, at ch. 98 and WEINSTEIN, KORN & MILLER, *supra* note \*\*, §§ 901–909.

<sup>327</sup> *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 712 N.E.2d 662, 690 N.Y.S.2d 495 (1999) (quoting N.Y. Dep't of Law, Mem. To Governor, *reprinted in* N.Y. State Legislative Annual 1963, at 105) (internal citations omitted).

virtually all economic activity, and [its] application has been correspondingly broad. The reach of [this] statute[] ‘provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State.’”<sup>328</sup> In *Gaidon v. Guardian Life Insurance Co. of America*,<sup>329</sup> the Court of Appeals stated that GBL section 349 encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law.<sup>330</sup> Similarly, in *Food Parade, Inc. v. Office of Consumer Affairs*,<sup>331</sup> Justice Graffe in her dissenting opinion stated that:

This Court has broadly construed general consumer protection laws to effectuate their remedial purposes, applying the state deceptive practices law to a full spectrum of consumer-oriented conduct, from the sale of ‘vanishing premium’ life insurance policies to the provision of infertility services. We have repeatedly emphasized that General Business Law [section] 349 and section 350, its companion . . . . “apply to virtually all economic activity, and their application has been correspondingly broad . . . . The reach of these statutes provide[s] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in our State.”

....

In determining what types of conduct may be deceptive practices under state law, this Court has applied an objective standard which asks whether the “representation or omission [was] likely to mislead a reasonable consumer acting reasonably under the circumstances,” taking into account not only the impact on the “average costumer” but also on “the vast multitude which the statutes were enacted to safeguard—including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general

---

<sup>328</sup> *Id.* at 290–91, 712 N.E.2d at 665, 690 N.Y.S.2d 498.

<sup>329</sup> *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 725 N.E.2d 598, 704 N.Y.S.2d 177 (1999).

<sup>330</sup> *Id.* at 343–44, 725 N.E.2d at 603, 704 N.Y.S.2d at 182; *see also* *New York v. Feldman*, 210 F. Supp.2d 294, 301 (S.D.N.Y. 2002) (“As indicated by the statute’s expansive language, section 349 was intended to be broadly applicable, extending far beyond the reach of common law fraud.”) (internal quotations omitted).

<sup>331</sup> *Food Parade, Inc. v. Office of Consumer Affairs*, 7 N.Y.3d 568, 859 N.E.2d 473, 825 N.Y.S.2d 667 (2006).

impressions.”<sup>332</sup>

#### A. *The Elements of A GBL Section 349 Claim*

Stating a cause of action for a violation of GBL section 349 is fairly straightforward and should identify the misconduct, which is deceptive and materially misleading to a reasonable consumer<sup>333</sup> and which causes actual damages. As stated by the Court of Appeals in *Small v. Lorillard Tobacco Co.*:<sup>334</sup>

To state a claim under the statute, a plaintiff must allege that the defendant has engaged “in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.” Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim. However, proof that “a material deceptive act or practice *caused actual, although not necessarily pecuniary harm*” is required to impose compensatory damages.<sup>335</sup>

#### B. *Consumer Oriented Conduct*

Only where the conduct being complained of is not a private contract dispute as to policy coverage—but instead involves an extensive marketing scheme with a broader impact on consumers at large<sup>336</sup>—will the courts uphold a suit pursuant to GBL section

---

<sup>332</sup> *Id.* at 574–75, 859 N.E.2d at 476–77, 825 N.Y.S.2d at 670–71 (Grafteo, J., dissenting) (internal citations omitted) (quoting *Karlin*, 93 N.Y.2d at 290, 712 N.E.2d at 665, 690 N.Y.S.2d at 498, *Gaidon*, at 344, 725 N.E.2d at 604, 704 N.Y.S.2d at 183, and citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977)).

<sup>333</sup> *See, e.g.*, *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25–26, 647 N.E.2d 741, 744–45, 623 N.Y.S.2d 529, 533–33 (1995); *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 166, 893 N.Y.S.2d 208, 218 (App. Div. 2d Dep’t 2010) (“[W]hether a deceptive practice is likely to mislead a reasonable consumer acting reasonably may be determined as either a question of law or fact, depending upon the circumstances . . . [here,] the reasonableness of the plaintiffs’ belief as to their responsibilities under the contract of insurance is a question of fact, and should be determined by the fact finder.”).

<sup>334</sup> *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 720 N.E.2d 892, 698 N.Y.S.2d 615 (1999).

<sup>335</sup> *Id.* at 55–56, 720 N.E.2d at 897, 698 N.Y.S.2d at 620 (internal citations omitted); *see also Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 611–12, 709 N.Y.S.2d 892, 895–96 (2000) (“A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.”).

<sup>336</sup> *See e.g.*, *Wellsburg Truck & Auto Sales, Inc. v. Peoples State Bank of Wyalusing*, 80 A.D.3d 942, 943, 915 N.Y.S.2d 690, 692 (App. Div. 3d Dep’t 2011) (holding plaintiff failed to state a claim under section 349 because it does not apply to contract disputes between private parties); *Merin v. Precinct Developers LLC*, 74 A.D.3d 688, 689, 902 N.Y.S.2d 821, 821–22 (App. Div. 1st Dep’t 2010) (“The cause of action for deceptive acts and practices (General

349.<sup>337</sup> Thus in *Gaidon v. Guardian Life Insurance Co.*, the Court of Appeals held that the plaintiffs' allegations stated a cause of action for violation of GBL section 349, where the plaintiffs alleged that the defendants had marketed policies by giving misleading assurances that, after a certain amount of time, they would no longer have to pay insurance premiums.<sup>338</sup> These promises of so called "vanishing" premiums implicated "practices of a national scope that have generated industry-wide litigation"<sup>339</sup>

---

Business Law § 349) was properly dismissed since it stemmed from a private contractual dispute between the parties without ramification for the public at large."); *Cooper v. N.Y. Cent. Mut. Fire Ins. Co.*, 72 A.D.3d 1556, 1557, 900 N.Y.S.2d 545, 547 (App. Div. 4th Dep't 2010) (holding dismissal of claim valid because if involved a private contractual dispute that was unique to the parties); *Denenberg v. Rosen*, 71 A.D.3d 187, 194–95, 897 N.Y.S.2d 391, 396 (App. Div. 1st Dep't 2010) (dismissing GBL claim because the transaction between sophisticated parties for professional services is a private dispute among the parties and does not impact the consumer public at large); *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 423, 893 N.Y.S.2d 19, 20 (App. Div. 1st Dep't 2010) ("Plaintiff's allegations of unlawfully deceptive acts and practices under General Business Law § 349 presented only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large."); *Moustakis v. Christie's, Inc.*, 68 A.D.3d 637, 637–38, 892 N.Y.S.2d 83, 83 (App. Div. 1st Dep't 2009) (holding that fraud alleged in sale of Star Trek memorabilia arises from private contract and fails to rise to the level of egregiousness necessary to establish a pattern directed at the public at large); *Emergency Enclosures, Inc. v. Nat'l Fire Adjustment Co.*, 68 A.D.3d 1658, 1661, 893 N.Y.S.2d 414, 417 (App. Div. 4th Dep't 2009) ("The gravamen of the complaint is not consumer injury or harm to the public interest but, rather, harm to plaintiff's business . . ."); *Western Bldg. Restoration Co. v. Lovell Safety Mgmt. Co.*, 61 A.D.3d 1095, 1097–98, 876 N.Y.S.2d 733, 736 (App. Div. 3d Dep't 2009) (dismissing claim under section 349 against workers' compensation policy as private action); *Sentlowitz v. Cardinal Dev., LLC*, 63 A.D.3d 1137, 1138–39, 882 N.Y.S.2d 267, 269 (App. Div. 2d Dep't 2009) (holding that buyer of real property claim against seller who concealed the fact that property contained wetlands failed to state a claim under GBL 349 because lack of broader impact on consumers at large).

<sup>337</sup> *Osuego Laborers'*, 85 N.Y.2d at 25, 647 N.E.2d at 744, 629 N.Y.S.2d at 532 ("[M]ust demonstrate that the acts or practices have a broader impact on consumers at large."); *see also Wilner*, 71 A.D.3d at 164, 893 N.Y.S.2d at 216 ("[T]he plaintiffs allege . . . that the insurance policy, which requires that they protect the defendant's subrogation interest while their claim is being investigated, compelled them to institute a suit against the Village before the statute of limitations expired . . . The plaintiffs allege that this provision is not unique to the plaintiffs, but is contained in every Allstate Deluxe Plus Homeowners' Policy. . . . Therefore, the conduct complained of has a 'broad impact on consumers at large' and is thus consumer-oriented." (citations omitted)).

<sup>338</sup> *Id.* at 350, 725 N.E.2d at 608, 704 N.Y.S.2d at 187.

<sup>339</sup> *Id.* at 342, 725 N.E.2d at 602, 704 N.Y.S.2d at 181; *see also Beller v. William Penn Life Ins. Co.*, 8 A.D.3d 310, 314, 778 N.Y.S.2d 82, 86 (App. Div. 2d Dep't 2004) (complaint stated a cause of action pursuant to GBL 349 where the plaintiff alleged that the defendant had improperly raised insurance rates on its flexible premium life insurance policies because it had failed to consider factors such as improvements in mortality); *Beller v. William Penn Life Ins. Co.*, 37 A.D.3d 747, 748, 830 N.Y.S.2d 759, 760 (App. Div. 2d Dep't 2007) (class certification granted); *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886, 888, 860 N.Y.S.2d 229, 231 (App. Div. 3d Dep't 2008) (allegation that the defendant's practice of not informing its insureds that they had the right to choose an independent counsel states a cause of action under GBL 349 because it "was not an isolated incident, but a routine practice that affected many similarly situated insureds").

### C. Damages

GBL section 349 claims must allege consumer oriented conduct.<sup>340</sup> Under GBL section 349, consumers may recover actual damages in any amount, treble damages under GBL section 349(h) up to \$1,000<sup>341</sup> and punitive damages,<sup>342</sup> so long as the conduct is sufficiently egregious. GBL section 349(h) states:

In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.<sup>343</sup>

Thus, the statute limits treble damages to \$1,000, and case law has interpreted it as such.<sup>344</sup>

Although treble damages are limited to \$1,000, New York courts and the legislature have set no such limit on punitive damages in GBL section 349 claims.<sup>345</sup> For example, in *Wilner v. Allstate Insurance Co.*<sup>346</sup> plaintiffs bought a homeowner's insurance policy from the defendant to insure the real property they owned.<sup>347</sup> A

---

<sup>340</sup> *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25, 647 N.E.2d 741, 744, 623 N.Y.S.2d 529, 532 (1995).

<sup>341</sup> *See, e.g., Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 167, 893 N.Y.S.2d 208, 218 (App. Div. 2d Dep't 2010); *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 147, 630 N.Y.S.2d 769, 773 (App. Div. 2d Dep't 1995); *Hart v. Moore*, 155 Misc. 2d 203, 207, 587 N.Y.S.2d 477, 480 (Sup. Ct. Westchester County 1992).

<sup>342</sup> *See Wilner*, 71 A.D.3d at 167, 893 N.Y.S.2d at 218; *Volt Sys. Dev. Corp. v. Raytheon Co.*, 155 A.D.2d 309, 309, 547 N.Y.S.2d 280, 281 (App. Div. 1st Dep't 1989); *Bianchi v. Hood*, 128 A.D.2d 1007, 1008, 513 N.Y.S.2d 541, 542 (App. Div. 3d Dep't 1987). *But see Moustakis v. Christie's, Inc.*, 68 A.D.3d 637, 638, 892 N.Y.S.2d 83, 84 (App. Div. 1st Dep't 2009) (noting that fraud alleged in sale of Star Trek memorabilia "arises from a private contract, does not resemble the egregious wrongdoing that could be considered part of a pattern directed at the public generally, so as to warrant the imposition of punitive damages").

<sup>343</sup> N.Y. GEN. BUS. LAW § 349(h) (McKinney 2012).

<sup>344</sup> *Rossi v. 21st Century Concepts, Inc.*, 162 Misc. 2d 932, 940, 618 N.Y.S.2d 182, 187 (Sup. Ct. Westchester County 1994).

<sup>345</sup> *Sulner v. Gen. Accident Fire and Life Assurance Corp.*, 122 Misc. 2d 597, 601, 471 N.Y.S.2d 794, 797 (Sup. Ct. N.Y. County 1984).

<sup>346</sup> *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 167, 893 N.Y.S.2d 208, 218 (App. Div. 2d Dep't 2010).

<sup>347</sup> *Id.* at 157, 893 N.Y.S.2d at 211.

storm allegedly caused a hillside on the plaintiffs' property to collapse, destroyed their retaining wall, felled several trees, and caused other damage.<sup>348</sup> The village instituted criminal proceedings against plaintiffs for damage to village property, which resulted from the collapse, and the plaintiffs brought a cause of action against the insurance company alleging that it violated GBL section 349.<sup>349</sup> Plaintiffs alleged that the insurance policy, which required that they protect the defendant's subrogation interest while their claim is being investigated, compelled them to institute a suit against the village before the statute of limitations expired.<sup>350</sup> Plaintiffs further alleged that the insurance company's refusal to reach a timely decision on coverage compelled plaintiffs to comply with that provision and sue the village at their own expense.<sup>351</sup>

In accordance with the statute, the plaintiffs alleged that the defendant's actions "caused injury to plaintiffs, and had the potential to harm the public at large" because all the insurance company's homeowners' policies contain the provision requiring those insured to protect the defendant's right to subrogate.<sup>352</sup> The plaintiffs sought actual damages, punitive damages, and attorney's fees.<sup>353</sup>

The appellate division agreed with plaintiffs stating "[c]onsequently, any consumer holding this policy, whose loss is potentially attributable to a third party, is required to protect the defendant's rights. Therefore, the conduct complained of has a 'broad impact on consumers at large' and was thus consumer-oriented."<sup>354</sup> After discussing how the plaintiffs met the other requirements for a GBL section 349 claim, the court denied defendant's motion to dismiss the plaintiff's demand for punitive damages.<sup>355</sup> The court noted that "[a]n award of punitive damages is warranted where the conduct of the party being held liable 'evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness.'"<sup>356</sup>

---

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 157–58, 893 N.Y.S.2d at 211.

<sup>353</sup> *Id.* at 158, 893 N.Y.S.2d at 211.

<sup>354</sup> *Id.* at 164, 893 N.Y.S.2d at 216 (citing *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d at 320).

<sup>355</sup> *Wilner*, 71 A.D.3d at 167, 893 N.Y.S.2d at 218.

<sup>356</sup> *Id.* (quoting *Pellegrini v. Richmond Cnty. Ambulance Serv., Inc.*, 48 A.D.3d 436, 437, 851 N.Y.S.2d 268, 269 (App. Div. 2d Dep't 2008)).

Thus, if it is true that the defendant intentionally did not reach a final decision on the plaintiffs' claim, so as to force them to commence a suit against the village, such conduct may be considered to be "so flagrant as to transcend mere carelessness."<sup>357</sup> Consequently, the plaintiffs' claim for punitive damages was not dismissed, and unlike the statutory limitation on treble damages, the appellate division set no limit as to what plaintiffs could be awarded in punitive damages.<sup>358</sup>

A relatively large punitive damages award, pursuant to a GBL section 349 claim was given in *Bianchi v. Hood*.<sup>359</sup> The appellate division affirmed a \$5,000 award of punitive damages to a plaintiff who was only awarded \$300 for ejection by unlawful eviction, \$1,000 for pain and suffering, aggravation and mental distress, \$200 for trespass, and \$250 for breach of the warranty of habitability; the court trebled the damages for ejection and pain and suffering pursuant to RPAPL section 853.<sup>360</sup> The court reasoned that a relatively large amount of punitive damages was justified because there was "a flagrant, unlawful interference by defendant with plaintiff's right to enjoy and possess her leased premises . . . [where] [d]efendant moved plaintiff's possessions without her permission from the apartment she had leased to her . . . done contrary to plaintiff's express written instructions to the contrary."<sup>361</sup>

### XIII. NOT A PUBLIC HARM

It is clear from an examination of the case law that it is sometimes difficult to discern what constitutes a harm to the public. Fortunately, courts have more often explained what does *not* constitute a public harm: renting space to a community sports organization and then forcing that organization out of business by blocking access to that space;<sup>362</sup> forcing a restaurant to close by unnecessarily shutting off its utility supply;<sup>363</sup> breaching an insurance contract through failure to pay a claim;<sup>364</sup> and

---

<sup>357</sup> *Wilner*, 71 A.D.3d at 167, 893 N.Y.S.2d at 218.

<sup>358</sup> *Id.*

<sup>359</sup> *Bianchi v. Hood*, 128 A.D.2d 1007, 513 N.Y.S.2d 541 (App. Div. 3d Dep't 1987).

<sup>360</sup> *Id.* at 1007, 513 N.Y.S.2d at 541.

<sup>361</sup> *Id.* at 1008, 513 N.Y.S.2d at 542.

<sup>362</sup> *Suffolk Sports Ctr., Inc. v. Belli Const. Corp.*, 212 A.D.2d 241, 247, 628 N.Y.S.2d 952, 956 (App. Div. 2d Dep't 1995).

<sup>363</sup> *1 Mott St., Inc. v. Con Edison*, 33 A.D.3d 531, 533, 823 N.Y.S.2d 375, 376-77 (App. Div. 1st Dep't 2006).

<sup>364</sup> *Paterra v. Nationwide Mut. Fire Ins. Co.*, 38 A.D.3d 511, 513, 831 N.Y.S.2d 468, 470

misappropriating someone's life story as the basis of a movie.<sup>365</sup> A few other examples that have denied that a wrong constitutes a public harm involve fraudulent inducement in the context of a computer consulting contract;<sup>366</sup> selling a car to a minister with a tax-exemption certificate who transfers title to another corporation;<sup>367</sup> a bank dishonoring business checks after claiming all the funds in the account as repayment of a business loan;<sup>368</sup> fraudulent transfer of marital property;<sup>369</sup> and a car dealer's failure to disclose a pre-sale repair on a new car.<sup>370</sup> With little precedential standard for what constitutes harm to the public, the classification is left mostly to the discretion of the courts.

#### XIV. CONCLUSION

The doctrine of punitive damages is one of the oldest concepts in Western law but nevertheless lacks a uniform requirement under New York case law. In this article we have attempted to provide a historical perspective for punitive damages and to clarify the rationale courts have adopted in its application. Moreover, we have attempted to show the evolution of punitive damages in New York jurisprudence.

New York courts' application of punitive damages is far from uniform, although we have seen that a public harm is often necessary for breach of contract causes of action but not for specific torts actions. Whether or not a public harm is necessary to award punitive damages pursuant to fraud causes of the actions is where many New York courts diverge. Nevertheless, the conduct alleged must be "egregious," whatever that may mean. By examining the origins of punitive damages, we may be able to better understand how New York courts approach the issue, when punitive damages are awarded, and what kind of conduct and harm need to be shown.

---

(App. Div. 2d Dep't 2007).

<sup>365</sup> *Robinson v. Paramount Pictures Corp.*, 122 A.D.2d 32, 34, 504 N.Y.S.2d 472, 474 (App. Div. 2d Dep't 1986).

<sup>366</sup> *RKB Enters. Inc. v. Ernst & Young*, 182 A.D.2d 971, 973, 582 N.Y.S.2d 814, 817 (App. Div. 3d Dep't 1992).

<sup>367</sup> *Ministry of Christ Church v. Mallia*, 129 A.D.2d 922, 923, 514 N.Y.S.2d 563, 565 (App. Div. 3d Dep't 1987).

<sup>368</sup> *Luxonomy Cars, Inc. v. Citibank*, 65 A.D.2d 549, 551, 408 N.Y.S.2d 951, 954 (App. Div. 2d Dep't 1978).

<sup>369</sup> *Marcus v. Marcus*, 92 A.D.2d 887, 887, 459 N.Y.S.2d 873, 874 (App. Div. 2d Dep't 1983).

<sup>370</sup> *Stegich v. Saab Cars USA, Inc.*, 177 Misc. 2d 81, 82, 676 N.Y.S.2d 756, 756 (App. Div. 1st Dep't 1998).