

PUNITIVE DAMAGES--Issue of Whether to Make Award and Amount.  
(Special Cases)

NOTE WELL: Use this instruction in conjunction with all claims for relief arising prior to January 1, 1996. Claims for relief arising on or after January 1, 1996 are governed by N.C.G.S. § 1D-1 et seq., effective January 1, 1996. For such cases, use N.C.P.I.--Civil 810.98.

Caveat: This instruction should not be used except in those infrequent cases where special evidentiary<sup>1</sup> or procedural<sup>2</sup> considerations make it prudent to do so.

The (state number) issue reads:

"What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?"

You are to answer this issue only if you have answered (identify issues and specify answers necessary for a consideration of this issue).

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<sup>1</sup>N.C.P.I.--Civil 810.93 will suffice in most instances. However, in some special cases (e.g., complex tort litigation), the trial judge may wish to consider a more detailed instruction after implementing special procedural safeguards. For example, one of the parties may seek to introduce evidence which, although probative of a "rational relationship" or "reasonable limits," is nonetheless highly prejudicial to the other party on the liability or compensatory damage issue. The purpose of this instruction is to provide the trial judge with a guide for instructing the jury in such isolated instances.

<sup>2</sup>In cases where punitive damages are sought, the trial court should, as a part of the pretrial process, determine whether any special procedures should be invoked. For example, if a party so requests, and upon a showing of good cause, the trial court, in its discretion, may try the punitive damage issues separately from the liability and compensatory damage issues by bifurcating the trial. N.C.G.S. 1A-1, Rule 42(b) gives the trial court broad discretion to bifurcate a trial, particularly "where separate submission of the issues avoids confusion and promotes a logical presentation to the jury." *In re Will of Hester*, 320 N.C. 738, 743, 360 S.E.2d 801, 804 (1987).

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Whether to award punitive damages is a matter within the sound discretion of the jury.<sup>3</sup> Punitive damages are not awarded for the purpose of compensating the plaintiff for *his* [injury] [damage], nor are they awarded as a matter of right. In deciding whether to award punitive damages, you must determine that there is a need to punish the defendant for *his* conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant.

Furthermore, if you decide, in your discretion, to award punitive damages, any amount you award must bear a rational

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<sup>3</sup>Punitive damages are for the jury to award. *Rogers v. T.J.X. Companies, Inc.*, 329 N.C. 226, 230-231, 404 S.E.2d 664, 667 (1991). Neither the trial court nor the appellate courts can substitute their own judgment for that of the jury; however, the courts have historically exercised their inherent power to set aside excessive or disproportionate awards. *Harris v. Queen City Coach Co.*, 220 N.C. 67, 69, 16 S.E.2d 464, 465 (1941). See also, *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 516, 23 S.E.2d 894, 896 (1943). However, in the post-*Haslip* era this standard of review is no longer applicable. See *infra* note 4. The new standard of review applicable to such awards is whether the evidence before the jury permits an inference that a *rational relationship* exists between the amount awarded and the sum reasonably needed to punish the defendant, or to deter the defendant or others from similar conduct or to make an example out of the defendant. In any event, Article I, Section 25 of the North Carolina Constitution in all probability precludes a post-trial review process which considers evidence not put before the jury.

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relationship<sup>4</sup> to the sum reasonably needed to punish the defendant for *his* conduct, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant. In determining such amount, you may consider such of the following factors as are supported by the evidence:<sup>5</sup>

NOTE WELL: *Either plaintiff or defendant may produce evidence as to factors 1 through 10;<sup>6</sup> factors 11 and 12 are mitigating factors as to which only the defendant should be allowed to produce evidence.*

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<sup>4</sup>To meet due process requirements, jury discretion must be exercised "within reasonable constraints." *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 20 (1991). North Carolina's law meets this standard. "[I]t has been uniformly held with us that punitive damages may be awarded in the sound discretion of the jury and within reasonable limits...". *Swinton v. Savoy Realty Co.*, 236 N.C. 723, 725, 73 S.E.2d 785, 787 (1953) (emphasis added), partly overruled on other grounds, *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976); *Blackwood v. Cates*, 297 N.C. 163, 167, 254 S.E.2d 7, 10 (1979) (quoting *Swinton*); *Oestreicher v. American National Stores*, 290 N.C. 118, 133, 225 S.E.2d 797, 807 (1976) (quoting *Swinton*); *Baker v. Winslow*, 184 N.C. 1, 5, 113 S.E. 570, 572 (1922).

<sup>5</sup>It would appear that the burden of proof as to these factors is on the plaintiff. There is as yet no known post-*Haslip* authority which allocates the burden of proof between the plaintiff and the defendant. Indeed, there may be none, even though several of the factors could involve contested issues of fact which would seem to necessitate that the burden of proof be allocated.

Where the evidence as to the existence or non-existence of facts probative of a particular factor is in conflict, the trial judge may instruct the jury as follows: "The burden of proof as to facts which would support the existence of one or more of these factors is on the party trying to establish them. This means that such party must prove, by the greater weight of the evidence, the facts which support the existence of the factor(s) that party is trying to establish."

<sup>6</sup>Any reference to the "costs of litigation" as a factor has been intentionally omitted because of its potential to undermine North Carolina public policy.

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[(1) the [injury] [damage] which occurred from the  
defendant's conduct]

[(2) the [injury] [damage] which could have occurred from  
the defendant's conduct]

[(3) the degree of reprehensibility of the defendant's  
conduct]

[(4) the duration of the defendant's conduct]

[(5) the defendant's awareness of the nature and character  
of *his* conduct]

[(6) the defendant's awareness of the probable consequences  
of *his* conduct]

[(7) any concealment by the defendant of the facts or  
consequences of *his* conduct]

[(8) the existence and frequency of any similar past conduct  
by the defendant]

[(9) whether or not the defendant profited from *his* conduct  
and, if so, whether that profit should be taken away]

[(10) the financial status or position of the defendant]<sup>7</sup>

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<sup>7</sup>Evidence of the financial condition of the defendant is admissible.  
See *Carawan v. Tate*, 53 N.C. App. 161, 165, 280 S.E.2d 528, 532 (1981),  
modified, 304 N.C. 696, 286 S.E.2d 99 (1982). But see *Pacific Mutual Life  
Insurance Co. v. Haslip*, 499 U.S. at 22. ("[T]he fact finder must be guided  
by more than the defendant's net worth.")

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[(11) whether the defendant has already been punished, in whole or in part, by criminal sanctions]

[(12) whether the defendant has already been punished or is likely to be punished through other civil actions involving the same or similar conduct].

You may consider such other factors as arise logically and fairly from the evidence presented.

Finally, if you determine, in your discretion, to award punitive damages, then, considering those factors which are supported by the evidence, you may award to the plaintiff an amount which bears a rational relationship to the sum reasonably needed to punish the defendant, or to deter the defendant or others from engaging in this or similar conduct in the future, or to make an example out of the defendant. That amount should be written in the space provided on the verdict sheet.

If, on the other hand, you determine, in your discretion, not to award the plaintiff any amount, then you should write the word "None" in the space provided on the verdict sheet.

