Punitive Damages: Recovery of Compensatory Damages as a Prerequisite: Tucker v. Marcus, 142 Wis. 2d 425, 418 N.W.2d 818 (1988)

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NOTE

PUNITIVE DAMAGES — Recovery of Compensatory Damages as a Pre-requisite — Tucker v. Marcus, 142 Wis. 2d 425, 418 N.W.2d 818 (1988)

I. INTRODUCTION

Should punitive damages be recoverable if a comparative negligence statute bars recovery of compensatory damages? In Tucker v. Marcus, the Supreme Court of Wisconsin held that an award of $50,000 in punitive damages could not be awarded because Section 895.045 of the Wisconsin Statutes barred the recovery of compensatory damages.

In so ruling, the court acknowledged that the recovery of compensatory damages is a prerequisite for punitive damages. Pivotal to the court’s decision was its reliance on Hanson v. Valdivia and Widemshek v. Fale. The court indicated that if there exists a cause of action, but the action is not one for which the recovery of compensatory damages is justified, punitive damages cannot be awarded.

This Note begins with a brief synopsis of the facts in Tucker v. Marcus. A discussion of the pertinent history and rationale behind punitive damages, as well as a review of the comparative negligence statute in Wisconsin, will follow. A discussion of the Wisconsin Supreme Court’s opinion in Tucker v. Marcus will then be presented, and this Note will conclude with an assessment of the decision and its impact on future cases involving the recovery of punitive damages.

II. STATEMENT OF THE CASE

On April 9, 1983, fourteen-year-old Nathaniel Tucker drowned in a swimming pool at the MGM Health Club in Madison, Wisconsin. Two

1. 142 Wis. 2d 425, 418 N.W.2d 818 (1988).
3. Tucker, 142 Wis. 2d at 454, 418 N.W.2d at 829.
4. Id. at 438, 418 N.W.2d at 823.
5. 51 Wis. 2d 466, 187 N.W.2d 151 (1971).
6. 17 Wis. 2d 337, 117 N.W.2d 275 (1962).
7. Tucker, 142 Wis. 2d at 443, 418 N.W.2d at 825.
8. See infra notes 12-18 and accompanying text.
9. See infra notes 19-45 and accompanying text.
10. See infra notes 46-67 and accompanying text.
11. See infra notes 68-100 and accompanying text.
years after Nathaniel's death, his mother, Carol Tucker, filed suit in the Circuit Court of Dane County seeking compensatory and punitive damages in a wrongful death and survival action. During the trial, evidence was presented which established two possible causes for the drowning. One possible cause was Nathaniel's inexperience as a swimmer and his underdeveloped swimming skills. Another possibility was that the condition of the water in the pool unnecessarily delayed the attempted rescue. Testimony at trial established that the pool had been improperly chlorinated and the filtration system had been consistently clogged. Consequently, the would-be rescuers' ability to save Nathaniel had been hindered by their inability to see him clearly, except at close range.

At the close of the trial, the jury apportioned seventy percent of the causal negligence to Nathaniel, twenty percent to Nathaniel's adult supervisor and ten percent to the owner of the club, Marvin Marcus. The jury then awarded both compensatory and punitive damages to Carol Tucker in the wrongful death action and to Nathaniel's estate in the survival action. The jury determined that Nathaniel's estate was entitled to $50,000 in punitive damages. The trial court found insignificant the fact that Carol Tucker did not actually receive compensatory damages and stated that "punitive damages . . . are not effected [sic] by the attribution of fault." The Supreme Court of Wisconsin reversed the trial court decision, holding that punitive damages were only available if actual damages had been awarded and recovered.

13. Nathaniel was at the pool on the day of the drowning incident with his two minor sisters and an adult supervisor. See id. at 429-30, 418 N.W.2d at 819.
14. The indoor pool area was dirty, with large earthworms crawling in the area. Also, visibility was reduced by fog. The foggy conditions persisted despite frequent instructions from the city pool inspector to keep the air heaters turned on. Id. at 461, 418 N.W.2d at 832.
15. This again was due to cloudy water. The pool was also improperly chlorinated and the filtration system itself was often clogged with the byproducts of human grease, sweat, and urine. Id. at 461-62, 418 N.W.2d at 832.
16. Since the decedent's negligence was in excess of 50%, the compensatory damages were unavailable under Wis. Stat. § 895.045 (1987-88). Tucker, 142 Wis. 2d at 430-31, 418 N.W.2d at 819.
17. Id. at 431, 418 N.W.2d at 820.
18. Id.
III. BACKGROUND ON THE LAW OF PUNITIVE DAMAGES: ENGLISH COURTS, AMERICAN COURTS AND WISCONSIN COURTS

A. English Courts

Punitive damages developed from excessive awards of compensatory damages. In the eighteenth century, English juries, in effect, granted punitive sums since the compensatory damages awarded were far in excess of the injury to the plaintiff. Early English courts were reluctant to set aside these excessive awards, choosing instead to defer to the judgment of the jury. As English courts began to recognize that sums awarded in excess of the plaintiff's actual injury were punitive in nature, the judiciary focused on both the defendant's conduct and the resulting injury to the plaintiff.


20. See Huckle v. Money, 95 Eng. Rep. 768, 769 (C.P. 1763)(suit for wrongful detention, trespass, and assault based on an invalid general warrant). The defendant alleged that the damages were "most outrageous," to which the court responded:

The personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 [pounds] damages would have been thought damages sufficient... they saw a magistrate over all the King's subjects exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant.... These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. Id. at 768-69; see also Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.U. L. Rev. 1158, 1160 (1966)(after jury award of excessive damages, court affirmed grant setting forth concept of punitive damages as a statement of societal disapproval). The Huckle decision was the first to articulate punitive damages. See id.


In order to understand the granting of excessive awards by English juries and the courts' reluctance to override excessive awards, it is important to first understand the composition of English juries. Id. English juries in the eighteenth century were comprised of local citizens who acted as both witnesses and jurors due to their familiarity with the disputed issue. See K. Redden, supra note 19, § 2.2(A)(2), at 26. Based on the jurors' familiarity with the dispute, the court not only deferred to the jury, but was reluctant to review excessive awards. See Note, supra note 20, at 1159-60.

22. See, e.g., Merest v. Harvey, 128 Eng. Rep. 761, 761 (C.P. 1814)(court sustained excessive award stating worse conduct could not be conceived); Leith, 96 Eng. Rep. at 778 (court approved...
Judgments awarding excessive damages were sustained to punish the defendant’s misconduct and to compensate the plaintiff for intangible, yet egregious, injuries.  

B. American Courts

Early American courts awarded punitive damages for compensation and punishment. These early courts considered punitive and compensatory damages as two separate and distinct types of awards. Punitive damages could only be awarded incident to an independent cause of action. This concept led to the general rule that actual damages are a prerequisite.

23. See Bruce v. Rawlins, 95 Eng. Rep. 934, 934-35 (C.P. 1770) (since plaintiff’s home and family were disturbed, court refused to reduce damages); Tullidge, 95 Eng. Rep. at 909 (plaintiff was insulted in his own home and court refused to overrule damages). For a discussion of the historical development of punitive damages in England and America, see Note, Exemplary Damages in the Law of Torts, 70 HARV. L. REV. 517, 518-20 (1957).


25. See Bruce, 95 Eng. Rep. at 934 (where plaintiff’s reputation was injured by defendant’s actions, court sustained a large damage award); Huckle, 95 Eng. Rep. at 769 (court recognized that harm to plaintiff was small, but upheld excessive award due to indignity suffered by plaintiff); see also Note, supra note 23, at 519 (English courts permitted excessive damages in aggravated cases for injuries to plaintiff’s dignity, feeling and mental suffering). See generally Redden, supra note 19, § 2.2(C), at 28 (punitive damages were developed to compensate for intangible injuries to victim not recoverable at common law).

26. Compare Bixby v. Dunlop, 56 N.H. 456, 464 (1876) (where malice is involved, plaintiff is entitled to compensation) and Fay v. Parker, 53 N.H. 342, 356 (1873) (punitive damages compensatory in nature) with Hawk v. Ridgway, 33 Ill. 473, 476 (1864) (court authorized award to plaintiff of damages beyond actual injury as punishment for defendant’s willful and wanton misconduct) and McNamara v. King, 7 Ill. 432, 437 (1845) (excessive damages upheld to punish defendant).

27. See Kerschbaum v. Lowrey, 165 Minn. 233, 236, 206 N.W. 171, 183 (1925) (punitive damages awarded at discretion of jury, not as a matter of right); Gill v. Selling, 125 Or. 587, 591, 267 P. 812, 814 (1928) (plaintiff must be satisfied with complete compensation, since punitive damages are awarded only in appropriate cases); see also W. Prosser & W.P. Keeton, THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (punitive damages awarded to plaintiff over and above actual damages).

28. See, e.g., Schippel v. Norton, 38 Kan. 567, 571, 16 P. 804, 807 (1888) (cause of action cannot be based on punitive damages); Ganssly v. Perkins, 30 Mich. 492, 494-95 (1874) (if plaintiff has injury, punitive damages are recoverable); Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 377, 381, 70 S.W. 878, 880 (1902) (punitive damages incident to actual damages cannot form basis for cause of action).
to the granting of punitive damages. Although most courts have adhered to the general rule requiring actual damages before allowing punitive awards, the rule's requirement is subject to varying interpretations.

Today, punitive damages are awarded for purposes of punishment and deterrence. The defendant's improper actions are the focus of the punitive damages determination. Typically, punitive damages are awarded if a defendant acts willfully or wantonly, or in a malicious, reckless or oppressive manner. If the wrongful conduct can be established, punitive damages will be assessed to punish the defendant's behavior and to deter the

29. See, e.g., Hubbard v. Superior Court of Maricopa County, 111 Ariz. 585, 589, 535 P.2d 1302, 1303 (1975) (before punitive damages are recovered, actual damages must be established); Armijo v. Ward Transp., 134 Col. 275, 281, 302 P.2d 517, 519 (1956) (proof of actual damages needed before punitive damages awarded); Smith v. Krutar, 153 Mont. 325, 336, 457 P.2d 459, 464 (1969) (plaintiff must show entitlement to actual damages before punitive damages are recoverable).


31. See, e.g., Acheson v. Shafter, 107 Ariz. 576, 578, 490 P.2d 832, 834 (1971) (punitive damages awarded to punish and deter wrongdoer); Motor Equip. Co. v. McLaughlin, 156 Kan. 258, 275, 133 P.2d 149, 159 (1943) (purpose of punitive damages is to punish and restrain defendant from further wrongful acts and deter others); Main v. Levine, 109 Okla. 564, 570, 118 P.2d 252, 255 (1941) (punitive damages designed to punish, warn, and deter transgressor); see also Sales & Cole, supra note 19, at 1117, 1124-25 (1984) (majority of commentators acknowledge that the purpose of punitive damages is to punish and deter). But see Doroszka v. Lavine, 111 Conn. 575, 578, 150 A. 692, 693 (1930) (purpose of punitive damages is compensation of plaintiff for injuries); Wise v. Daniel, 221 Mich. 229, 231, 190 N.W. 746, 747 (1922) (punitive damages not considered punishment, but used to enlarge compensatory damages).

32. See, e.g., Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979), rev'd on other grounds, Dura Corp. v. Harned, 703 P.2d 396, 405 (Alaska 1979) (punitive damages recoverable when defendant's conduct outrageous); Satterfield v. Rebsamen Ford, Inc., 253 Ark. 181, 189, 485 S.W.2d 192, 195 (1972) (malicious conduct by defendant will support award of punitive damages); Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970) (when tortfeasor commits wrongful act willfully or wantonly, punitive damages are recoverable); see also 1 J. GHIARDI & J. KIRCHER, supra note 21, § 5.01, at 2 (focus of punitive damages is on defendant's conduct).


34. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9-10 (4th ed. 1971). Professor Prosser asserts:
defendant from further misconduct. Punishing the defendant also serves as a general deterrent by providing an example to others who might engage in similar misconduct.

C. Wisconsin Courts

Wisconsin first adopted a system of comparative negligence in 1931. Until 1971, that system prohibited "recovery of damages for negligence if the injured person's negligence was 'as great as' that of the wrongdoer." The comparative negligence law was changed in 1971 to one permitting recovery unless the injured person's negligence was 'greater than' the negligence of the person against whom recovery was sought. Regardless of the revision, the statute's "damages for negligence" language remained the same. Case law predating 1971 interpreted "damages for negligence" to mean ordinary negligence.

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice" or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.

Id. at 9-10; see also C. McCormick, supra note 24, § 79, at 280. Professor McCormick states:

Since these damages are assessed for punishment and not for reparation, a positive element of conscious wrongdoing is always required. It must be shown either that the defendant was activated by ill-will, malice, or evil motive (which may appear by direct evidence of such nature, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called "circumstances of aggravation"), or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard of the rights of others.

Id.


36. See, e.g., F.B.C. Stores v. Duncan, 198 S.E.2d 595, 599 (Va. 1973)(punishment of defendant to serve as example to others who would engage in such conduct); John Mohr & Sons v. Jahnke, 55 Wis. 2d 402, 411, 198 N.W.2d 363, 368 (1972)(punitive damages to punish and deter defendant and others); Danculovich v. Brown, 593 P.2d 187, 191 (Wyo. 1979)(since punitive damages punish defendant, others are warned and deterred).


39. Id.


41. Tucker, 142 Wis. 2d at 434-35, 418 N.W.2d at 821; see also Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). Gross negligence was not compared to ordinary negligence under the comparative negligence statute. Additionally, punitive damages were available only for conduct amounting to gross negligence. As such, any conduct for which punitive damages might be awarded would not be subject to the comparative negligence law. The Supreme Court of Wiscon-
Long-standing principles of Wisconsin law indicate that there is no independent cause of action for punitive damages. In order to support a punitive award, the plaintiff must prove the existence of actual harm caused by the wrongful conduct of the defendant.

Wisconsin courts have sustained awards of punitive damages when compensatory damages were available under the comparative negligence statute. When comparing Wisconsin to other jurisdictions, the key is to determine whether "actual damages" should be construed in a broad sense to refer only to harm that is capable of measurement in terms of compensatory damages.

IV. THE TUCKER OPINIONS

A. The Ceci Majority

Justice Ceci, writing for the majority in *Tucker v. Marcus*, acknowledged that compensatory damages were not available under Section 895.045 of the Wisconsin Statutes due to the apportionment of negligence. He indicated that the relationship between compensatory and punitive damages under the Wisconsin comparative negligence statute, dictates the inclusion of punitive damages within the phrase "damages for negligence." The majority held that punitive damages may not be recovered where actual damages are unavailable due to the operation of the comparative negligence statute.

In finding that the phrase "damages for negligence" does not include punitive damages, the court first relied upon well-recognized principles of

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42. Tucker, 142 Wis. 2d at 434-35, 418 N.W.2d at 821; see also Brown v. Maxey, 124 Wis. 2d 426, 432, 369 N.W.2d 677, 681 (1985), reconsideration denied, 126 Wis. 2d 40, 373 N.W.2d 672 (1985). The availability of punitive damages in a negligence case depends upon whether the plaintiff proves all of the elements constituting a cause of action. Punitive damages "do not rise from negligence." Wangen, 97 Wis. 2d at 275, 294 N.W.2d at 446.

43. See, e.g., Widenshek v. Fale, 17 Wis. 2d 337, 117 N.W.2d 275 (1962) (no loss was suffered and therefore, plaintiff was not entitled to any recovery).

44. See Malco, Inc. v. Midwest Aluminum Sales, 14 Wis. 2d 57, 109 N.W.2d 516 (1961) (punitive damages equalled fifteen times the compensatory damages given).

45. See, e.g., 1 J. GHARDI & J. KIRCHER, supra note 21, § 3.07.

46. 142 Wis. 2d 425, 418 N.W.2d 818 (1988).
Relying on such case law, the majority determined that the language of the statute did not contemplate anything beyond ordinary negligence. The majority further held, perhaps even more persuasively, that including punitive damages in the phrase "damages for negligence" denies recognition of the punishment and deterrence purposes of punitive damages. Justice Ceci went on to reason that calculating punitive damages by a mathematical formula had been expressly rejected.

In holding that punitive damages cannot be awarded in the absence of actual damages, the majority concluded that the actual damages must be compensatory under the comparative negligence statute. The court reasoned that actual damages "suffered" or "sustained" were not enough for punitive damages to be awarded. The majority also explained that allowing punitive damages where actual damages may have been "suffered" or "sustained" was not intended, and would thus deviate from the modified comparative negligence doctrine enacted in Wisconsin in 1971.

47. Id. at 434, 418 N.W.2d at 821; see also Delvaux v. Vanden Langenberg, 130 Wis. 2d 464, 476, 387 N.W.2d 751, 755 (1986); Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 258, 38 N.W.2d 712, 714 (1949); State v. Hack Barth, 228 Wis. 108, 121, 279 N.W. 687, 693 (1938).

48. The majority also used Lane v. Meserve, 20 Mass. App. Ct. 659, 482 N.E.2d 530, review denied, 396 Mass. 1103, 485 N.E.2d 188 (1985), to show that Massachusetts' identical comparative negligence law was construed to interpret the phrase "damages for negligence" as including compensatory damages only.

49. Tucker, 142 Wis. 2d at 436-37, 418 N.W.2d at 822; see also Fahrenberg v. Tengel, 96 Wis. 2d 211, 234, 291 N.W.2d 516, 527 (1980)(quoting Cieslewicz v. Mutual Serv. Cas. Ins. Co., 84 Wis. 2d 91, 102, 267 N.W.2d 595, 601 (1978))(punitive damages are designed to hurt the defendant in order to punish and deter similar conduct).

50. Tucker, 142 Wis. 2d at 437, 418 N.W.2d at 822. The court focused on the rationale behind comparative negligence and punitive damages to reject such a mathematical formula when determining punitive damages. Id.

51. Wis. Stat. § 895.045 (1987-88) provides as follows:
Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

52. Tucker, 142 Wis. 2d at 431, 418 N.W.2d at 823; see Hanson v. Valdivia, 51 Wis. 2d 466, 474, 187 N.W.2d 151, 155 (1971)(there must be a showing of actual injury, which would justify actual or compensatory damages, before punitive damages may be awarded); Wussow v. Commercial Mechanisms, Inc., 97 Wis. 2d 136, 151, 293 N.W.2d 897, 905 (1980)(compensatory damages are a condition precedent to an award of actual damages).

53. Tucker, 142 Wis. 2d at 441, 418, 441 N.W.2d at 824; see also Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970)(rejection of invitation to adopt a system of pure comparative negligence); Delvaux, 130 Wis. 2d at 476, 387 N.W.2d at 757 (reaffirmation of legislative commitment to modified comparative negligence).
Ceci further indicated that in other jurisdictions, punitive damages are not available absent an award of compensatory damages.\textsuperscript{54}

The majority also discussed the principles utilized to determine the reasonableness of the amount of a punitive award where the propriety of some award is not disputed.\textsuperscript{55} Justice Ceci recognized that the determination of punitive damages should be made on a case-by-case basis with due regard given to the jury.\textsuperscript{56} Finally, the majority reasoned that permitting an award of punitive damages without the recovery of compensatory damages would undermine the court’s commitment to the doctrine of comparative negligence.\textsuperscript{57}

### B. The Heffernan Dissent

Chief Justice Heffernan, in his dissent, agreed with the majority that the phrase “damages for negligence” does not encompass punitive damages.\textsuperscript{58} However, the dissent distinguished itself from the majority by stating that punitive damages should be recoverable even if the compensatory damages are statutorily barred.\textsuperscript{59}

Justice Heffernan asserted that the term “actual damages” means that punitive damages should be recoverable for a “compensable injury.”\textsuperscript{60} The dissent indicated that Nathaniel Tucker suffered the ultimate “compensable

\begin{itemize}
\item \textsuperscript{54} See Tucker, 142 Wis. 2d at 443 n.9, 418 N.W.2d at 825 n.9.
\item \textsuperscript{55} See, e.g., Brown, 124 Wis. 2d at 438, 369 N.W.2d at 684 (an award disproportionate to the wrongdoing was found excessive and contrary to public policy); Wangen, 97 Wis. 2d at 302-03, 294 N.W.2d at 459 (refusal to adopt a mathematical formula for awarding punitive damages); Fahrenberg, 96 Wis. 2d at 235-36, 291 N.W.2d at 527 (punitive damages must bear a reasonable relationship to compensatory damages).
\item \textsuperscript{56} Tucker, 142 Wis. 2d at 448, 418 N.W.2d at 826; see also, e.g., Wangen, 97 Wis. 2d at 301-02, 294 N.W.2d at 459 (reasonable relationship is not a requirement of a fixed ratio).
\item \textsuperscript{57} Tucker, 142 Wis. 2d at 450-52, 418 N.W.2d at 828; see also Vincent, 47 Wis. 2d at 129, 177 N.W.2d at 516 (requirement that compensatory damages must be recovered before punitive damages can be awarded necessitates not only proof of injury, but also proof of causation); Presser v. Siesel Constr. Co., 19 Wis. 2d 54, 66, 119 N.W.2d 405, 411 (1963) (as a matter of public policy Wisconsin has been committed to the doctrine of comparative negligence).
\item \textsuperscript{58} Tucker, 142 Wis. 2d at 455, 418 N.W.2d at 829 (Heffernan, C.J., dissenting). Justice Heffernan agreed with the majority that punitive damages arise from a different rationale than compensatory damages. \textit{Id.}
\item \textsuperscript{59} Tucker, 142 Wis. 2d at 456, 418 N.W.2d at 830. The dissent indicated that the Tucker case was a very different situation from one in which no compensatory award was ever justified in the first place. \textit{Id.}
\item \textsuperscript{60} \textit{Id.}; see also, e.g., Widenshek, 17 Wis. 2d 337, 117 N.W.2d 275 (1962)(plaintiff suffered no loss); Hanson, 51 Wis. 2d 466, 187 N.W.2d 151 (1971)(plaintiff could not have been said to have suffered an injury).
\end{itemize}
injury," death, and therefore the Widenshek and Hanson cases relied on by the majority could be clearly distinguished from the case at bar. 61

The dissent further disputed the majority's analysis of the Wisconsin cases which require punitive damages to bear a reasonable relationship to compensatory damages. 62 The majority read the applicable cases to mean that when compensatory damages are not recoverable, punitive damages may not be awarded. The dissent disagreed, stating that those cases stand for the proposition that a punitive award will be upheld unless it is so greatly disproportionate to the compensatory award that it "shocks the judicial conscience." 63 Justice Heffernan indicated that the $50,000 in punitive damages awarded by the jury would not shock his conscience. 64

The dissent agreed with the majority that no Wisconsin case had squarely answered the question of whether punitive damages could be recovered when the compensatory award is statutorily barred. Justice Heffernan indicated, however, that the dictum in Hanson supported the proposition that no recovery for injury is required, and that Wussow v. Commercial Mechanisms, Inc. 65 supported the position that the disposition of the compensatory claim is irrelevant to the award of punitive damages. 66 Based upon these two precedents, Justice Heffernan would have allowed a recovery of $50,000 in punitive damages.

Finally, the dissent turned from history and precedent to a discussion of the policy and rationale behind punitive damages. Justice Heffernan recognized that punitive damages are designed to punish and deter outrageous conduct and that the behavior of Marcus in running the MGM Health Club was clearly "outrageous." 67 Hence, the dissent stated that punitive damages should be awarded irrespective of the recovery of compensatory damages.

61. Tucker, 142 Wis. 2d at 456, 418 N.W.2d at 830.
62. Id. at 458, 418 N.W.2d at 831.
63. Id.
64. Id. at 459, 418 N.W.2d at 837.
65. 97 Wis. 2d 136, 293 N.W.2d 897 (1980). In holding that a settlement for compensatory damages did not extinguish a claim for punitive damages, the Wussow court concluded that a punitive damage award is justified where the defendant's conduct is "willful, wanton, and reckless." Id. at 153, 293 N.W.2d at 905.
66. Justice Heffernan indicated that according to legislative intent, it is reasonably certain that the comparative negligence statute was not intended to affect awards of punitive damages. Tucker, 142 Wis. 2d at 460, 418 N.W.2d at 832.
67. The dissent pointed out that the majority views punitive damages as a method of enriching the plaintiff, rather than as a punishment to the wrongdoer. Id. at 463, 418 N.W.2d at 833.
V. CRITIQUE

A. Analysis of the Tucker v. Marcus Decision

In *Tucker v. Marcus*, the Supreme Court of Wisconsin followed the trend of other jurisdictions which hold that punitive damages may not be recovered absent an award of compensatory damages. The majority and dissent correctly held that the phrase “damages for negligence” does not include punitive damages because compensatory and punitive damages are based upon different rationales. The decision, however, brings into focus several problems relating to the determination of “actual damages” in future case law. Specifically, the decision highlights the difficulty in determining: (1) whether punitive damages should be allowed when harm has only been “sustained”; (2) whether punitive damages are a completely separate entity from the comparative negligence statute; and (3) whether such damages must bear a reasonable relationship to actual damages.

1. Should a “Compensable Injury” Suffice as a Proper Foundation for Punitive Damages?

The *Tucker* majority adopted the standard that actual damages must be recoverable under the comparative negligence statute before punitive damages can be awarded. Many jurisdictions, however, state that punitive damages will be allowed when an injury is “sustained” because punishment and deterrence are warranted when any type of harm occurs that results in a “compensable injury.” Certainly Nathaniel Tucker’s death was a “compensable injury,” and punitive damages would serve as a punishment for Marcus’ “outrageous” behavior.

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68. 142 Wis. 2d 425, 418 N.W.2d 818 (1988).
69. *See supra* note 54 and accompanying text.
70. 142 Wis. 2d at 438-39, 418 N.W.2d at 823.
71. *See* Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 55, 477 A.2d 1224, 1232 (1984) (punitive damages may be recovered where plaintiff establishes an intentional tort, even though no actual damages are recovered); *see also* Howell v. Association Hotels, 40 Haw. 492, 497 (1954) (the better rule permits punitive damages when plaintiff establishes cause of action, even though no actual damages are measured or shown); Westfield Centre Serv. v. Cities Serv. Oil, 158 N.J. Super. 455, 480, 386 A.2d 448, 464 (Super. Ct. Ch. Div. 1978) (where court determines that a legal right is invaded, punitive damages are recoverable without recovery of actual damages).
2. Are Compensatory and Punitive Damages Completely Separate Entities?

The rationale behind punitive damages (to punish and deter) predated any comparative negligence statute.\textsuperscript{72} It gives the jury (average members of society) the ability to stop willful, wanton and malicious behavior by deterring that type of conduct through the award of punitive damages.\textsuperscript{73} Hence, the ability to recover damages under the comparative negligence statute should be irrelevant. The \textit{Tucker} majority failed to address the issue of whether the refusal to award punitive damages when compensatory damages are statutorily barred undermines the jury’s basic function which is at the heart of our legal system.\textsuperscript{74}

The majority justified the condition precedent of the recovery of actual damages by discussing Wisconsin’s unwillingness to depart from the modified comparative negligence statute.\textsuperscript{75} Justice Ceci explained that the intent of the legislature was not to create the anomalous result of allowing an award of punitive damages where conduct, although outrageous, was not within the standard articulated by the legislature under the comparative negligence statute.\textsuperscript{76} Nevertheless, the court failed to recognize the important distinction between compensatory and punitive damages.

Wisconsin Statute section 895.045 was adopted to take into consideration the contributory negligence of the plaintiff.\textsuperscript{77} Before the enactment of the comparative negligence statute, contributory negligence was a complete bar to recovery.\textsuperscript{78} The statute now focuses on the plaintiff. An award of punitive damages focuses on the defendant's conduct. Hence, actual and punitive damages are completely separate entities and the recovery of compensatory damages under the statute should not be a prerequisite for the recovery of punitive damages.

\textsuperscript{72} For a discussion of the history of punitive damages, see supra notes 19-36 and accompanying text.
\textsuperscript{73} For a discussion of the requirement of punitive damages, see supra note 22 and accompanying text.
\textsuperscript{74} 50 C.J.S. \textit{Juries} § 2 (1947). The term “jury” refers to a group of people who are called upon to weigh the questions at issue and to pass judgment upon the proof of such facts.
\textsuperscript{75} \textit{Tucker}, 142 Wis. 2d at 441, 418 N.W.2d at 824.
\textsuperscript{76} Id. at 441-42, 418 N.W.2d at 824.
\textsuperscript{77} See supra note 38 and accompanying text.
\textsuperscript{78} See Graass v. Westerlin & Campbell Co., 194 Wis. 470, 216 N.W. 161 (1927); Rusczck v. Chicago & N.W. Ry. Co., 191 Wis. 130, 210 N.W. 361 (1926); Stephan v. Abe, 185 Wis. 78, 200 N.W. 682 (1924).
3. Must Punitive Damages Bear a Reasonable Relationship to Compensatory Damages?

The majority in *Tucker* argued that ascertaining the amount of actual damages is necessary so that punitive damages will bear a reasonable relationship to the actual damages awarded. The purpose of the "reasonable relationship" rule is to avoid excessive punitive awards. The rule has been adopted by a majority of jurisdictions to provide guidelines for jurors in assessing punitive damages, but the application of the rule has varied.

The trend is to assess the reasonableness of the punitive damage award in relation to the defendant's conduct and the injury inflicted on the plaintiff. This variation allows courts to grant punitive damages when the defendant's conduct so warrants, even if no actual damages are found or ascertained. Hence, the "reasonable relationship" requirement mentioned by the majority can be circumvented.

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79. *Tucker*, 142 Wis. 2d at 447, 418 N.W.2d at 826 (rule requiring recovery of actual damages follows from rule requiring punitive damages to be reasonably proportionate to actual damages).

80. See K. Redden, *supra* note 19, § 3.6(c), at 63 (1980)(discussion of reasonable relation rule). "The value of the 'reasonable relation rule' is that it serves as a rough device to allow a court to pare down an excessive award of punitive damages." *Id.* at 64; see also W. Prosser & W.P. Keeton, *supra* note 27, § 2, at 14-15 (punitive and actual damages must bear reasonable relationship so that a small compensatory award will not support a large punitive award).

81. See, e.g., Note, *supra* note 20, at 1170 (reasonable relationship rule attempts to specify standards for imposing punitive damages); Note, *supra* note 23, at 530 (purpose of reasonable relationship method is to limit jury's discretion).

82. Compare Senn v. Manchester Bank of St. Louis, 583 S.W.2d 119, 138 (Mo. 1979)($491,892 actual damages and $737,838 punitive damages calculated by specific formula of a "multiple of one and one-half times actual damages") with Binyon v. Nesseth, 231 Kan. 381, 383-90, 646 P.2d 1043, 1044-47 (1982)(award of $9,326.06 actual damages and $100,000 punitive damages upheld because it did not shock the conscience of the court).

83. See, e.g., Stambaugh v. International Harvester Co., 106 Ill. 3d 1, 26, 435 N.E.2d 729, 746-47 (Ct. App. 1982) (where jury found defendant acted with conscious indifference in regard to safety of product users, punitive damages award was appropriate); Leimgruber v. Claridge Assoc., 73 N.J. 450, 458, 375 A.2d 652, 655 (1977)(in assessing punitive damages, two factors to consider are the nature of defendant's acts and the injury inflicted on the plaintiff); Black v. Gardner, 320 N.W.2d 153, 161 (S.D. 1982)(when determining amount of punitive damages, one should consider the amount of actual damages as well as the wrongdoing's conduct and intent).

B. Implications of the Tucker v. Marcus Decision

As a result of the decision in Tucker, the modified comparative negligence statute adopted in Wisconsin will remain uncontested. The statute was adopted to avoid frivolous litigation. Changing the statute to a pure comparative negligence statute would increase claims and litigation and would be the first step towards a "no fault" system, whereby the wrongdoer is allowed to profit from his own wrongdoing. Allowing plaintiffs of greater fault to recover would burden the general public with a larger premium for insurance and cost for judicial administration.

Adherence to the modified comparative negligence statute, however, diminishes the role of the jury. In fact, punitive damages may eventually be abolished if they are only permitted when compensatory damages have been recovered under the statute. Abolishing punitive damages would not only run counter to many years of history and case law that has developed, but it would also fail to deter conduct that is malicious, wanton, and willful.

A second implication of the decision in Tucker is that punitive damages may be allowed irrespective of the amount of damages that are recovered under the comparative negligence statute. The majority reasoned that actual damages are a prerequisite for punitive damages because "punitive damages may not be imposed in cases of zero compensatory awards." This reasoning, however, will create problems in future cases because the courts will then have to decide whether to permit punitive damage awards when only nominal damages are recovered under the statute. Awarding punitive damages when only nominal damages have been sustained, however, tends to undermine the majority's reliance on Wisconsin case law which states that punitive damages cannot bear a reasonable relationship to zero compensatory damages.

A third implication of the Tucker decision on future case law is that the court will now have to address whether punitive damages can be awarded when equitable relief is granted. A majority of jurisdictions have allowed punitive damages with equitable relief. In White v. Ruditys, the Wisconsin Court of Appeals stated that punitive damages may be awarded with equitable relief. However, it seems inconsistent that punitive damages can be granted with equitable relief when actual damages have not been recov-

85. Tucker, 142 Wis. 2d at 442, 418 N.W.2d at 824.
86. Id.
87. See supra notes 19-36 and accompanying text for history and requisites of punitive damages.
88. Tucker, 142 Wis. 2d at 448, 418 N.W.2d at 827.
89. 117 Wis. 2d 130, 343 N.W.2d 421 (Ct. App. 1983).
90. Id. at 132, 343 N.W.2d at 422.
ered under the comparative negligence statute. Justice Ceci in *Tucker* stated that if punitive damages are awarded when an injury is only "sustained," the comparative negligence statute will be effectively circumvented.91

The modern trend is to allow the recovery of punitive damages in conjunction with equitable relief.92 However, varying rules have emerged in many states as to what criteria must be present before punitive damages can be granted with equitable relief.93 A number of states which allow punitive damages in equitable suits require at least a showing or a finding of actual damages before punitive damages will be granted.94 These courts contend that if the plaintiff provides evidence of an injury suffered, there can be a

91. *Tucker*, 142 Wis. 2d at 440-41, 418 N.W.2d at 823.


93. Compare Smith v. Krutar, 457 P.2d 459, 464 (Mont. 1969)(to recover punitive damages, the plaintiff must show he is first entitled to actual damages) with Wilner v. O'Donnell, 637 S.W.2d 757, 762 (Mo. Ct. App. 1982)(actual damages must be recovered before punitive damages can be granted).

94. See Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 404 (Iowa 1982)(equitable relief and punitive damages sustained, while actual damages reversed, in suit for interference with lease rights). The court in *Westway* held that although the amount of actual damages could not be ascertained, punitive damages were still recoverable since actual injury was demonstrated. *Id. ; see also* Miller v. Fox, 571 P.2d 804, 808 (Mont. 1977)(award of punitive damages for wrongful attachment). The trial court in *Miller* found that the plaintiff had suffered actual damages due to expenses incurred. See *id.* at 808. The award of punitive damages in *Miller* was sustained by the Montana Supreme Court, which stated that actual damages are a prerequisite to the recovery of punitive damages. *Id.; see also* Barber v. Hohl, 40 N.J. Super. 526, 123 A.2d 785, 789-90 (N.J. Super. Ct. App. Div. 1956)(writ for injunction and actual and punitive damages). Even though the court in *Barber* held that the plaintiff was entitled to a new trial on the issue of actual damages, punitive damages were sustained. *Id.* at 789-90. The *Barber* court found that when an individual is injured as a result of an invasion of a legal right, damages are inferred. *Id.* at 789; see also Hutchison v. Pyburn, 567 S.W.2d 762, 765-66 (Tenn. Ct. App. 1977)(action for rescission of deed and punitive damages). In *Hutchison*, the court held that the plaintiffs were entitled to punitive damages since the plaintiffs proved entitlement to the rescission of the deed, return of the purchase price, and incurred incidental damages. *Id.* at 766.
recovery of punitive damages without recovering actual damages. 95 Other states permit an injured plaintiff to recover punitive damages in an equitable action where only nominal damages are recovered. 96 Further, a small minority of states have allowed recovery of punitive damages when equitable relief is granted, absent a showing of recovery of either actual or nominal damages. 97 Despite these lenient views, some states continue to require an award of actual damages as a prerequisite to an award of punitive damages, even when equitable relief is granted. 98

VI. RECOMMENDATION

A solution to the problem would be to allow punitive damages irrespective of the ability to recover compensatory damages. The concern of excessive punitive awards has been addressed in a different manner by other jurisdictions which instead use several factors to limit punitive damage awards. 99 Those factors include: (1) the nature of the wrong; (2) the char-

95. See Topanga Corp. v. Gentile, 249 Cal. App. 2d 681, 58 Cal. Rptr. 713, 719 (1967)(tortious act needs to be proven to meet requirements of actual damages before punitive damages recoverable); Miller, 571 P.2d at 808 (unnecessary for monetary value to be placed on actual damage award); see also Sterling Drug v. Benatar, 99 Cal. App. 2d 425, 440, 221 P.2d 965, 707 (Ct. App. 1950)(punitive damages sustained although amount of actual damages not ascertainable); cf. Wells v. Smith, 297 S.E.2d 872, 880 (W. Va. 1982)(in suit where equitable relief not sought, court held that when plaintiff establishes injury caused by defendant, an award of actual damages is not necessary to sustain punitive damages).

96. See Onslow Wholesale Plumbing & Elec. Supply, Inc. v. Fisher, 60 N.C. App. 55, 66, 298 S.E.2d 718, 723 (Ct. App. 1982)(in suit for violation of fiduciary duties, punitive damages were denied in absence of recovery of nominal or compensatory damages). The Onslow court held that nominal damages were the minimum requirement that must be met before punitive damages could be granted with an equitable remedy. Id. at 723; see also Civic W. Corp. v. Zila Indus., Inc., 66 Cal. App. 3d 1, 19, 135 Cal. Rptr. 915, 926 (Ct. App. 1977)(in action for injunction and recovery of promissory notes, punitive damages recoverable though actual damages were nominal).

97. See, e.g., Village of Peck v. Denison, 92 Idaho 747, 756-58, 450 P.2d 310, 314-15 (1969)(equitable suit to enjoin interference with water rights sustained award of punitive damages); Capitol Fed. Sav. & Loan Ass'n v. Hohman, 682 P.2d 1309, 1310 (Kan. 1984)(punitive damages recoverable in foreclosure action where no actual damages were awarded); Nash v. Craigco, Inc., 585 P.2d 775, 778 (Utah 1978)(in action for recission of property, punitive damages were determined by considering defendant's conduct, not by whether actual damages were shown). But see Smith, 153 Mont. at 333, 457 P.2d at 464 (in suit to enjoin defendants from use of stream water, punitive damages recoverable though actual damages were not recoverable).


acter of the conduct involved; (3) the degree of culpability of the wrong-
doer; (4) the situation and sensibilities of the parties concerned; and (5) the 
extent to which such conduct offends a public sense of justice and 
propriety.100

VII. CONCLUSION

Tucker v. Marcus101 presented the Supreme Court of Wisconsin with a 
case that forced the court to address the issue of allowing punitive damages 
when compensatory damages are statutorily barred. By using Wisconsin 
case law, the court reached an equitable resolution of the problem, allowing 
punitive damages only when compensatory damages have been recovered 
under the statute.

Although the court recognized the propriety of this requirement, it left 
crucial issues unresolved. The decision did not address the fact that nomi-
nal damages would suffice to meet the requirement necessary to recover 
punitive damages. It also failed to acknowledge that no such requirement 
exists for equitable actions. Further, the Tucker requirement can be cir-
cumvented if Wisconsin were to adopt the factors used in other jurisdictions 
to avoid excessive punitive awards.

JOEL H. SPITZ

City of Eagan, 297 N.W.2d 146 (Minn. 1980); Dahlen v. Landis, 314 N.W.2d 63 (N.D. 1981); 

101. 142 Wis. 2d 425, 418 N.W.2d 818 (1988).