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# PUNITIVE DAMAGE AWARDS — AN EXPANDED JUDICIAL ROLE

JAMES D. GHIARDI\*

## I. INTRODUCTION

Juries are often asked to award punitive damages with very limited guidance from the courts.<sup>1</sup> As a result, the punitive award, in a particular instance, may be “capricious, undeserved and unrestrained.”<sup>2</sup> When allegedly excessive punitive damage awards become the focus of judicial scrutiny, courts grapple with the propriety of reducing those awards, as well as with the question of to what extent they should be reduced.<sup>3</sup>

## II. ROLE OF THE TRIAL JUDGE

### A. *Is the Case an Appropriate One for Punitive Damages?*

It is the responsibility of the trial judge, in the first instance, to determine whether the case is appropriate for punitive damages, i.e. whether the question of punitive damages will be submitted to the jury.<sup>4</sup> The main focus of that determination is the nature of the defendant's conduct. The trial judge looks for evidence that the defendant acted intentionally, outrageously, recklessly or with conscious disregard for the rights of others. Such conduct is generally deemed sufficiently egregious to warrant the imposition of punitive damages. If the facts can support such a finding, the punitive damage issue is allowed to go to the jury.<sup>5</sup> Once the question has been submitted to the jury, the generally accepted rule is that the jury, in its sole, unfettered discretion, determines whether to award punitive damages and in what amount.<sup>6</sup> “It is the long settled and uniformly adhered to rule in our jurisprudence that the amount of punitive or exemplary damages is solely within the discretion of the jury, and, no matter what the sum of their

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1. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 49-50 (1983).

2. Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart Out of “Smart Money,”* 40 U. MIAMI L. REV. 979, 997 (1986).

3. See *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987).

4. 2 J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 18.04, at 13 (1987).

5. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

6. 2 J. GHIARDI & J. KIRCHER, *supra* note 4, § 18.04, at 13 n.1.

finding might be, interference therewith, *unless for exceptional causes*, is discouraged."<sup>7</sup>

### B. *Instructing the Jury*

In most jurisdictions,<sup>8</sup> the jury is instructed, when deciding whether to award punitive damages, that the purpose behind an award of punitive damages is to punish the wrongdoer and to deter the wrongdoer and others from engaging in similar conduct in the future.<sup>9</sup> For example, the Wisconsin Jury Instruction on punitive damages reads in part: "The purpose of punitive damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Punitive damages are not awarded to compensate the plaintiff for any loss he has sustained."<sup>10</sup> The award should serve those purposes — punishment and deterrence. If it does not, or will not, an award of punitive damages is inappropriate.<sup>11</sup>

### C. *What Amount of Money Will It Take to Punish and Deter?*

The jury is the sole judge of what amount is necessary to punish the defendant.<sup>12</sup> Once the jury has decided to award punitive damages, the question becomes, how much money will it take to punish this defendant and deter him and others from engaging in similar tortious conduct in the future?<sup>13</sup>

The jury receives little guidance in determining a proper amount since the instructions are usually quite general. Although the jury is instructed as to the *purpose* of the punitive award, the instructions in most instances provide no further information or suggestion as to the amount of money neces-

7. *Collins v. Black*, 380 So. 2d 241, 244 (Miss. 1980) (emphasis added).

8. In Connecticut, Georgia, Michigan and New Hampshire, the purpose of punitive damages is not to punish, but to further compensate the injured plaintiff. 1 J. GHIARDI & J. KIRCHER, *supra* note 4, § 4.02-4.06 (1987).

9. For a review of jury instructions from various jurisdictions, see generally 1 J. GHIARDI & J. KIRCHER, *supra* note 4, at ch. 11.

10. Wis. J.I. - Civil § 1707.

11. These issues arise where, for instance, multiple punitive damage awards are imposed for the same conduct. If the defendant has already been punished by the imposition of punitive damages in a previous case arising out of the same tortious conduct, will not the imposition of another award be superfluous, or as some have argued, constitute "overkill"? See, e.g., *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, \_\_\_, 738 P.2d 1210, 1241-44 (1987); see also *Brown v. Farkas*, 158 Ill. App. 3d 772, \_\_\_, 511 N.W.2d 1143, 1147-48 (1987); *Wangen*, 97 Wis. 2d at 303, 294 N.W.2d at 459-60.

12. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1449 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 2014 (1988); *William Wilson Enter., Inc. v. Napier*, 395 So. 2d 89 (Ala. Civ. App. 1981); *Commodore Corp. v. Bailey*, 393 So. 2d 467, 471 (Miss. 1981).

13. 1 J. GHIARDI & J. KIRCHER, *supra* note 4, § 5.38, at 57 and § 11.18, at 14-15.

sary to punish the defendant's conduct.<sup>14</sup> Most instructions provide only that the jury may consider the wealth of the defendant, the character of his conduct, and the harm the plaintiff suffered in arriving at an appropriate figure.<sup>15</sup>

#### D. Post-Trial Review

If the jury makes an award of punitive damages, that award is reviewable by the trial court on a post-trial motion. The Restatement (Second) of Torts relies upon judicial control to avoid excessive punitive awards. "The excessiveness of punitive damages in a case in which they are allowable may be ground for reversal, for a new trial, or for a remittitur under the usual rules by which the court controls the jury's award of compensatory damages."<sup>16</sup>

The authority of the court (trial or appellate) to alter the award based on excessiveness is extremely limited and "should be exercised with great caution."<sup>17</sup> The court cannot alter the jury's award of punitive damages simply because it is of the opinion that the jury awarded too much or too little,<sup>18</sup> and, in fact, has no authority to exercise its additur powers in most jurisdictions.<sup>19</sup>

As a general rule, an award of punitive damages will not be set aside or changed unless the court finds that: (1) it was based on prejudice, passion

14. In criminal cases, where the judge determines the punishment, the legislatures have enacted guidelines for sentencing. See Grass, *The Penal Dimensions of Punitive Damages*, 12 HASTINGS CONST. L.Q. 241 (1985).

15. See *supra* note 9.

16. RESTATEMENT (SECOND) OF TORTS § 908 comment d (1979).

17. *Ford Motor Credit Co. v. Washington*, 420 So. 2d 14, 18 (1982) (quoting *Carlisle v. Miller*, 275 Ala. 440, 444, 150 So. 2d 689, 692 (1963)).

18. *Id.* But see *Johnston v. Brown*, 290 S.C. 141, —, 348 S.E.2d 391, 394 (Ct. App. 1986) (holding that it is enough if the judge deems the verdict to indicate undue liberality on the part of the jury (citing *Gray v. Davis*, 247 S.C. 536, 148 S.E.2d 682 (1966))).

19. 2 J. GHIARDI & J. KIRCHER, *supra* note 4, § 18.01, at 3 n.10. But see *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278-79 (Miss. 1985) (citing *Standard Life Ins. Co. v. Veal*, 354 So. 2d 239, 249 (Miss. 1977) (rule impliedly recognized)); MO. REV. STAT. § 510.263(6) (1987) (doctrines of remittitur and additur shall apply to punitive damage awards).

Courts have said that the award should be enough to "smart," and is "properly denominated 'smart money'. . . designed to hurt in order to punish and deter." *Cieslewicz v. Mutual Serv. Casualty Co.*, 84 Wis. 2d 91, 102, 267 N.W.2d 595, 601 (1978). Consequently, the wealthier the defendant, the greater the sum of money necessary and appropriate to accomplish that purpose. See also *Brink's, Inc. v. City of New York*, 546 F. Supp. 403, 413 (S.D.N.Y. 1982).

or bias;<sup>20</sup> (2) it was based on a mistake of law or fact;<sup>21</sup> (3) it lacked evidentiary support;<sup>22</sup> or (4) it shocked the judicial conscience.<sup>23</sup>

If a new trial is not warranted as a matter of right and the trial court finds the verdict to be excessive, it may choose to exercise its remittitur power.<sup>24</sup> Only when the jury has abused its discretion by granting an award that is clearly excessive may the court use that power.<sup>25</sup> In choosing remittitur, the trial court must present the plaintiff with the option of either submitting to a new trial, usually on the issue of damages only, or of remitting that part of the award that the court deems to have made it excessive.<sup>26</sup> This choice is within the trial court's discretion and will not be reversed on appeal unless there is an abuse of discretion.<sup>27</sup>

### III. PUNISHMENT & DETERRENCE — FACT OR FICTION

The problem inherent in allowing a jury, in its discretion, to award punitive damages is that the award is not always reflective of the amount necessary to punish and deter a particular defendant for a particular type of conduct.<sup>28</sup> The circumstances of each case must be considered to determine whether the award in the particular instance serves the purposes of punitive damages.<sup>29</sup> "An award which is more than necessary to serve its purposes (punishment and deterrence) or which inflicts a penalty or burden on the defendant which is disproportionate to the wrongdoing is excessive and is contrary to public policy."<sup>30</sup>

20. See, e.g., *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 220 (Colo. 1984). In some states, if the trial court finds that the excessive verdict is the product of passion or prejudice, the right to exercise remittitur may be precluded and a new trial ordered. *Fahrenberg v. Tengel*, 96 Wis. 2d 211, 223, 291 N.W.2d 516, 522 (1980).

21. See, e.g., *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38 (Alaska 1979), *modified on reh'g*, 615 P.2d 621 (Alaska 1980), *cert. denied*, 454 U.S. 894 (1981).

22. See, e.g., *Gilmer v. Playboy Club of Denver, Inc.*, 513 P.2d 1065 (Colo. App. 1973).

23. See *O'Gilvie*, 821 F.2d at 1448; *Brink's*, 546 F. Supp. 403; *Binyon v. Nesseth*, 231 Kan. 381, 646 P.2d 1043 (1982).

24. See generally 2 J. GHIARDI & J. KIRCHER, *supra* note 4, § 18.02, at 6.

25. *Id.* § 18.04, at 14; see also *West v. Western Casualty and Sur. Co.*, 846 F.2d 387, 399 (7th Cir. 1988).

26. See 2 J. GHIARDI & J. KIRCHER, *supra* note 4, § 18.04, at 7.

27. See *Ford Motor Credit Co. v. Washington*, 420 So. 2d 14, 17-18 (Ala. 1982); *Carter-Glogau Laboratories, Inc. v. Construction, Prod. & Maintenance Laborers' Local 383*, 153 Ariz. 351, 736 P.2d 1163, 1170 (Ct. App. 1986); *Olson v. Siordia*, 25 Wis. 2d 274, 284-85, 130 N.W.2d 827, 833 (1964).

28. See generally Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982).

29. *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 302, 294 N.W.2d 437, 459 (1980).

30. *Id.* at 303, 294 N.W.2d at 459.

Punitive damage awards are increasingly becoming the focus of judicial scrutiny. This indicates that the basis used by juries in determining the award may be flawed, and merits reconsideration. The problem is exacerbated by the lack of any uniform consensus for testing the excessiveness of a punitive award. In the first instance, it is difficult to set an appropriate award to punish and deter, and on review, “. . . [i]t is difficult, if not impossible, to lay down precise rules of law to determine whether an award of punitive damages is excessive.”<sup>31</sup>

#### A. Judicial Review — Application of Traditional Standards

Most courts confine their review of the excessiveness of a punitive award to: (1) whether the amount of the award “shocks the judicial conscience,” or (2) reflects “passion or prejudice” on the part of the jury. These broad parameters may allow an award which may not reflect the appropriate amount necessary for punishment and deterrence.

A recent report indicates that there are different types of tort litigation, each with its own distinct class of litigants, attorneys and legal dynamics.<sup>32</sup> These same dynamics affect punitive damage awards. Large damage awards are becoming increasingly common in commercial,<sup>33</sup> civil rights,<sup>34</sup> defamation<sup>35</sup> and insurance bad faith cases.<sup>36</sup> For courts, particularly with respect to contract-related cases, this means that the excessiveness issue has moved outside the area of personal injury, where according to one court, “there is justification for imposition of substantial punitive damage awards,”<sup>37</sup> to cases involving contract-related disputes like fraud and tortious interference with contract.

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31. *Tetuan v. A.H. Robins*, 241 Kan. 441, \_\_\_, 738 P.2d 1210, 1238 (1987).

32. D. HENSLER, *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* (1987) (Rand, The Institute for Civil Justice) (Special Report R-3583-ICJ).

33. *Dees v. Allied Fidelity Ins. Co.*, 655 F. Supp. 10 (E.D. Ark. 1985); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987).

34. *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987).

35. *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983) (jury award of \$1.3 million remitted to \$150,000 by appellate court).

36. *See Dependable Ins. Co. v. Kirkpatrick*, 514 So. 2d 804 (Ala. 1987); *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050 (Ala. 1987); *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981); *Life Ins. Co. v. Allen*, 518 So. 2d 1189 (Miss. 1987).

37. *Brink's, Inc. v. City of New York*, 546 F. Supp. 403, 414 (S.D.N.Y. 1982); *see also M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES - EMPIRICAL FINDINGS* (1987) (Rand, The Institute for Civil Justice) (R-3331-ICJ). The authors found that personal injury cases were less likely to result in punitive awards than contract disputes and intentional tort suits, and that the awards in personal injury cases were modest. *Id.*

The excessiveness of the punitive damage award was the focus of judicial scrutiny in *Hawkins v. Allstate Insurance Co.*<sup>38</sup> In this case, the jury awarded \$3.5 million for the insurer's first party bad faith. The insurance company had refused to replace its insured's car with one of comparable value after the insured's auto had been destroyed. The court found that \$3.5 million in punitive damages was neither excessive nor unreasonable, in light of the circumstances, so as to show the influence of "passion or prejudice."<sup>39</sup> It reasoned that since the jury could have concluded that the company had engaged in this type of deceptive claims practice for up to eighteen years, and since the amount of the award was not disproportionate to the company's financial position, the verdict was reasonable.<sup>40</sup>

Similarly, in the case of *Banker's Life and Casualty Co. v. Crenshaw*,<sup>41</sup> a jury assessed \$1.6 million in punitive damages against a health and accident insurer for failure to pay a \$20,000 claim for the accidental loss of a right leg. The court stated:

While no hard and fast rule may be laid down with regard to the maximum amount of punitive damages which may be awarded in a given case, it is difficult to imagine that . . . the judicial conscience could be shocked by a punitive damage assessment which is less than one percent of the financial net worth of the defendant.<sup>42</sup>

The emphasis in both cases was primarily on economic aspects, including the wealth of the defendant. The question of whether the award was appropriate for the punishment and deterrence of the defendant was not even considered.

### B. Product Liability Cases

To further complicate the excessiveness issue, courts are often faced with product liability cases involving a large number of injured persons giving rise to the potential for multiple punitive awards.<sup>43</sup> An excellent example of this situation arose in the case of *Grimshaw v. Ford Motor Co.*,<sup>44</sup> where the jury awarded \$125 million in punitive damages for the defective design of a Ford Pinto. The trial judge reduced this award to \$3.5 million.

In cases such as these, juries are in a poor position to effectuate the dual purposes of punitive damages and judges are hampered as well. The case of

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38. 733 P.2d 1073 (Ariz. 1987).

39. *Id.* at 1084.

40. *Id.* at 1085.

41. 483 So. 2d 254 (1985), *aff'd*, 108 S.Ct. 1645 (1988).

42. *Id.* at 279.

43. See generally Seltzer, *supra* note 1.

44. 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981).

*O'Gilvie v. International Playtex, Inc.*<sup>45</sup> illustrates this point. *O'Gilvie* was a toxic shock syndrome case in which the jury awarded \$10 million in punitive damages. Under both federal and Kansas law, remittitur is not proper unless the amount of damages awarded is so excessive that it "shocks the judicial conscience."<sup>46</sup> The trial judge stated on the record that the amount of the punitive award did not shock his conscience or raise any inference of passion or prejudice, but that he would consider the defendant's post-verdict conduct as a factor.<sup>47</sup> The court ordered a remittitur on what the appellate court stated to be a totally improper basis from outside the record.<sup>48</sup> On appeal, given the trial judge's comments, the court had no other choice than to reinstate the verdict.<sup>49</sup>

[W]e are compelled to point out that the court's order subverts the goals of punishment and deterrence that underlie the assessment of punitive damages in Kansas. Far from punishing Playtex, the trial court here rewarded the company for continuing its tortious conduct long enough to use it as a bargaining chip in the remittitur proceedings.<sup>50</sup>

The issue of the propriety of granting a remittitur also arose in the case of *Tetuan v. A.H. Robins Co.*<sup>51</sup> *Tetuan* was another product liability case involving the much litigated Dalkon Shield. The inter-uterine device caused the plaintiff to contract pelvic inflammatory disease and become sterile. The evidence showed that A.H. Robins Co. knew of the danger of its product, but fraudulently concealed those defects. The jury found for the plaintiff and awarded compensatory damages in the sum of \$1.75 million and \$7.5 million in punitive damages.<sup>52</sup> In the light of the evidence and the financial status of the defendant, the appellate court found that the award did not "shock the collective conscience" of the court.<sup>53</sup>

The question is, was this the appropriate amount to punish and deter the defendant, or had A.H. Robins Co. already been "punished enough"? A.H. Robins Co. raised this issue on appeal and argued that its potential liability for punitive damages in similar cases should have been considered

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45. 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 2014 (1988).

46. *Id.* at 1448.

47. *Id.*

48. *Id.* The court assured counsel for Playtex that substantial modification or complete remittitur would be forthcoming if Playtex should decide to remove its superabsorbent tampons from the market. *Id.*

49. *Id.* at 1450.

50. *Id.*

51. 241 Kan. 441, 738 P.2d 1210 (1987).

52. *Id.* at \_\_\_, 738 P.2d at 1215.

53. *Id.* at \_\_\_, 738 P.2d at 1240.



in reducing the punitive award in *Tetuan*.<sup>54</sup> While recognizing that other punitive damage claims constitute relevant evidence which may be introduced at trial, the appellate court found that since A.H. Robins Co. made a "calculated tactical decision" not to introduce that evidence at trial, it would not consider it on appeal.<sup>55</sup>

The court noted that there are other protections, such as bifurcated trials, to avoid the prejudicial effect of offering evidence of exposure to other punitive awards in a trial with liability potential of this magnitude.<sup>56</sup> The court, caught up in procedural technicalities, failed to evaluate the punishment and deterrent functions of the award in light of the totality of the circumstances of the case. Thus, although the award in a particular case may be appropriate and reasonable, problems will arise if courts and jurors fail to keep in perspective the goals of a punitive damage award.

### C. *Refocusing Attention on the Purposes of Punitive Damages*

At post-trial or on appeal, the court must be able to point to some blatant abuse in order to justify amending the jury verdict, but the standards for finding abuse are at times meaningless.<sup>57</sup> The Nevada Supreme Court reviewed this issue in the context of an \$800,000 punitive award against the sellers of a car rental business for breach of contract and fraud.<sup>58</sup> The court addressed solely the issue of the excessiveness of punitive damages and reached the conclusion that the award was clearly disproportionate to the guilt and culpability of the tortfeasor.<sup>59</sup>

In so doing, the court criticized the traditional standards for judging the reasonableness of punitive damage awards, noting with particularity that the "proper end of punitive damages is to punish and deter culpable conduct."<sup>60</sup> In an effort to determine the excessiveness of this award, the court found the "shock the conscience" and "passion or prejudice" tests wholly inadequate.<sup>61</sup>

No effort has ever been made to define the judicial conscience nor to describe how or under what circumstances it might be shocked . . . [W]e seek to formulate a more intelligible and less esoteric standard

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54. *Id.* at \_\_\_, 738 P.2d at 1241.

55. *Id.* at \_\_\_, 738 P.2d at 1244.

56. *Id.* at \_\_\_, 738 P.2d at 1242-44 (citing *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (1984) and *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) (discussing punitive damages overkill)).

57. *Ace Truck and Equip. Rentals, Inc. v. Kahn*, 746 P.2d 132 (Nev. 1987).

58. *Id.* at 133.

59. *Id.* at 137-38.

60. *Id.* at 134.

61. *Id.* at 135.

than one derived from a judicial manifestation of that indistinct little voice, the inward monitor of right and wrong known as conscience.<sup>62</sup>

The court then adopted a standard based on reasonableness and fairness, stating:

Punitive damages are legally excessive when the amount of damages awarded is *clearly* disproportionate to the degree of blameworthiness and harmfulness inherent in the oppressive, fraudulent or malicious misconduct of the tortfeasor under the circumstances of a given case. If the awarding jury or judge assesses more in punitive damages than is reasonably necessary and fairly deserved in order to punish the offender and deter others from similar conduct, then the award must be set aside as excessive.<sup>63</sup>

The largest punitive damage award to date, in the amount of \$3 billion, involved tortious interference with a contract in the case of *Texaco, Inc. v. Pennzoil Co.*<sup>64</sup> With no discussion of "shocked consciences" or "passion or prejudice," a Texas appeals court found that considering the type of action, the conduct involved, and the need for deterrence, the punitive damages were excessive and the trial court abused its discretion in not suggesting a remittitur. The court stated, "[t]here is a point where punitive damages may overstate their purpose and serve to confiscate rather than to deter or punish."<sup>65</sup> The award was remitted to \$2 billion.<sup>66</sup>

Punishment and deterrence were the focus of the court's scrutiny in *Brink's, Inc. v. City of New York*,<sup>67</sup> where the jury made an award of \$5 million in punitive damages. The city sued Brink's for negligence and breach of an agreement to collect coins deposited in the city's parking meters. The court contrasted the case to the product liability type cases and noted that there is little prospect that repetitive conduct will occur and injure others and "the resulting injury, . . . is to property - the loss of money, not death or severe personal injury."<sup>68</sup> The court expressed concern while reducing the award to \$1.5 million: "[T]here are limits beyond which a jury should not be permitted to go. It is the duty of the court to keep a verdict for punitive damages within reasonable bounds considering the purpose to

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62. *Id.*

63. *Id.* at 136-37 (footnote omitted).

64. 729 S.W.2d 768 (Tex. Ct. App. 1987). The case was eventually settled.

65. *Id.* at 866.

66. *Id.*

67. 546 F. Supp. 403 (S.D.N.Y. 1982).

68. *Id.* at 414.

be achieved as well as the *mala fides* of the defendant in the particular case."<sup>69</sup>

The Montana Supreme Court found that a \$5 million punitive award in a bad faith case was "exorbitant" and ordered a remittitur to \$1 million.<sup>70</sup> The court stated: "Punitive damages are an extraordinary remedy, outside of the field of usual redressful remedies, and should be applied with caution, lest gendered by passion and prejudice because of the defendant's wrongdoing, the award becomes unrealistic or unreasonable."<sup>71</sup>

An Illinois appellate court remitted a jury award of \$1 million in punitive damages against a defamation defendant who submitted a false report of suspected child abuse. The court found that where \$50,000 in compensatory damages was awarded, \$50,000 in punitive damages was sufficient to punish the defendant and deter others from committing similar offenses.<sup>72</sup>

The Seventh Circuit Court of Appeals, applying Illinois law, used a three-factor analysis to uphold a \$2 million punitive award where the compensatory damage award was \$3 million: "(1) the nature and enormity of the wrong; (2) the financial status of the defendant; and (3) the potential liability of the defendant resulting from multiple claims."<sup>73</sup> The court stated that in addition to the Illinois factors, federal law required the court to determine if the jury's finding was inconsistent with awards in analogous cases.

These cases reflect a trend among the courts to review the excessiveness issue and to take a more objective look at the purpose of punitive damages. Courts are realizing that juries are making inappropriate or uneducated assessments of the punitive damages amount. There comes a point at which a punitive award is just "too much" to properly serve the purposes of punishment and deterrence.

#### IV. REFORM

Courts, legislatures and commentators are beginning to recognize the need for tighter judicial control over punitive damage awards.<sup>74</sup> As a result, many modifications are being made to the common law rules.

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69. *Id.*

70. *Id.* at 226-27.

71. *Safeco Ins. Co. v. Ellinghouse*, 725 P.2d 217, 226-27 (Mont. 1986).

72. *Brown v. Farkas*, 158 Ill. App. 3d 772, 511 N.E.2d 1143 (1987).

73. *West v. Western Casualty and Sur. Co.*, 846 F.2d 387, 399 (7th Cir. 1988).

74. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Product Liability Litigation*, 74 KY. L.J. 1, 96 (1985-86); Seltzer, *supra* note 1; Comment, *supra* note 2, at 997.

### A. Courts

In *Rowlett v. Anheuser Busch, Inc.*,<sup>75</sup> a \$3 million punitive damage verdict was found to be grossly excessive and was reduced on appeal to \$300,000. The court questioned whether the employer's conduct "warranted \$3 million worth of outrage," and expressed concern over the appropriate level of punitive damage awards in general.<sup>76</sup>

The court mandated that in future cases the trial courts should instruct jurors that if they grant punitive damages, in determining the amount to be granted, "they should engage in a balancing test taking into consideration such factors as the grievousness of the conduct, the solvency of the guilty party, and the potential for deterrence of the verdict."<sup>77</sup>

The *Rowlett* case demonstrates one approach to dealing with the problem of excessive or unreasonable punitive damage awards. Excessive verdicts create a dilemma for appellate courts since remand requires a retrial on the punitive damage issue, all of which places a costly burden on the parties and the courts. The *Rowlett* court urged trial courts to exercise greater control over jury verdicts by using the balancing factors cited.<sup>78</sup>

Courts have adopted jury instructions intended to focus on the punishment and deterrence aspects of punitive damage awards. Under the Wisconsin Civil Jury Instructions, in nonproduct cases, the jury is instructed to consider the grievousness of the conduct; the degree of malice or recklessness; the actual and potential damage caused; and the defendant's ability to pay.<sup>79</sup> In product cases, however, the jury is instructed to consider the seriousness of the hazard to the public; the profitability of the misconduct; the defendant's conduct on discovery of the misconduct; the degree of awareness of the hazard; the particular employees involved; the duration of the conduct; concealment if any; the financial condition and the effect of a particular judgment; and finally, the total punishment the defendant will receive from other sources.<sup>80</sup>

The listed factors, particularly in product cases, will give defendants the opportunity to introduce evidence which will better enable the jury to focus on the punishment and deterrence aspects of punitive damages. Similar instructions should be used in bad faith, commercial, contractual and mass tort cases. The problem with this approach is that it allows for the intro-

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75. 832 F.2d 194 (1st. Cir. 1987).

76. *Id.* at 206-07.

77. *Id.* at 207.

78. *Id.*

79. Wis. J.I. - Civil § 1707.

80. Wis. J.I. - Civil § 1707A.

duction of evidence extraneous to the principal focus of the case, to-wit, liability. It places a defendant in the position of proving why he or she should pay less punitive damages, while at the same time defending against punitive damage liability in the first instance.

### B. Legislative Reform

Legislative reform of punitive damages is increasing and many of the reforms are focusing on the control of awards. For instance, the Missouri legislature requires a bifurcated trial before the same jury on the issue of liability and the amount of punitive damages. It has also attempted to avoid the problem that arises with respect to multiple awards. "[A] defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based."<sup>81</sup>

The Connecticut legislature has enacted a statute which requires that once the trier of fact determines that punitive damages should be awarded in a product liability action, the court shall determine the amount, not to exceed twice the damages awarded to the plaintiff.<sup>82</sup>

Some states have chosen to limit punitive damage awards by providing for a maximum amount subject to specified exceptions. Alabama limits punitive damages to \$250,000 unless the award is based on a pattern or practice of intentional wrongful conduct, or conduct involving actual malice other than fraud or bad faith.<sup>83</sup> In Texas, except for damages from malice or intentional torts, the amount of punitive damages may not exceed four times the amount of actual damages or \$200,000, whichever is greater.<sup>84</sup>

Colorado has limited the amount of exemplary damages to an amount equal to the actual damages.<sup>85</sup> Colorado also provides that the court is able to reduce the amount of punitives if the deterrent effect of the damages has already been accomplished, the conduct which resulted in the award has ceased, or the purpose of punitive damages has otherwise been served. In addition, the statute also provides that the court may increase the amount of punitives to three times the amount of actual damages if the plaintiff proves that the defendant has continued the wrongful conduct that is the

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81. MO. REV. STAT. § 510.263(4) (Vernon Supp. 1988).

82. CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1988). Punitive damages in Connecticut are compensatory and may not exceed the expenses of litigation. See 1 J. GHIARDI & J. KIRCHER, *supra* note 4, § 4.03.

83. ALA. CODE § 6-11-21 (Supp. 1988).

84. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1987).

85. COLO. REV. STAT. § 13-21-102 (1987).

subject matter of the punitive damage claim, or that the defendant has acted willfully and wantonly during the pendency of the action.<sup>86</sup>

In Virginia, the total amount of punitive damages shall not exceed \$350,000.<sup>87</sup> In Georgia, the amount of punitive damages is limited to \$250,000 except in product liability or intentional tort claims.<sup>88</sup> Florida has limited punitive damages to three times the amount of compensatory damages awarded to each person.<sup>89</sup> Two exceptions to this limitation are class actions or if, under the particular facts and circumstances of the case, the plaintiff can show by clear and convincing evidence that the award is not excessive.

In Oklahoma, the punitive damage award may not exceed the amount of actual damages, unless, as the statute provides, "there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice . . . ." <sup>90</sup> Montana allows a reasonable award in cases of actual fraud or actual malice.<sup>91</sup>

In Kansas, exemplary or punitive damages are determined by the court in a separate proceeding after a finding of liability, and are limited to the lesser of the highest annual gross income earned by the defendant over the past five years or five million dollars. However, if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed this limitation, the amount of punitive damages shall be an amount equal to one and one half times the amount of profit which the defendant gained or is expected to gain as a result of the misconduct.<sup>92</sup> In Ohio, the amount of punitive damages is determined by the court in product liability cases.<sup>93</sup>

In Kentucky, the trier of fact is to consider the likelihood of serious harm, the awareness of such likelihood by the defendant, the profitability of the misconduct, the duration of the misconduct, concealment thereof and any actions to remedy the misconduct.<sup>94</sup> Other legislative reforms include requiring a higher standard of proof, allowing a bifurcation of the trial, and awarding part of the amount to some type of state entity.<sup>95</sup>

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86. *Id.*

87. VA. CODE ANN. § 8.01-38.1 (Supp. 1988).

88. GA. CODE ANN. § 51-12-5.1 (1987).

89. FLA. STAT. ANN. § 768.73(1)(c) (West Supp. 1988).

90. OKLA. STAT. ANN. tit. 23, § 9 (West 1987).

91. MONT. CODE ANN. § 27-1-221 (1987).

92. KAN. STAT. ANN. § 60-3701 (Supp. 1987).

93. OHIO REV. CODE ANN. § 2307.80 (Anderson Supp. 1988).

94. KY. REV. STAT. ANN. STATS. § 411.186 (Baldwin 1988).

95. See 1 J. GHIARDI & J. KIRCHER, *supra* note 4, §§ 5.44, 6.38, 9.11, 9.12 and 10.01; Aussen, *supra* note 74.

## V. AN EXPANDED JUDICIAL ROLE

The reforms enacted by the courts and the legislatures will help to produce more equitable and uniform awards, but a more basic reform is required. Allowing the judiciary to exercise complete control over the size of punitive damage awards would work to achieve the dual purpose of punitive damages, and reduce the potential for abuse. Since punitive damages have essentially the same purpose as criminal sanctions — punishment and deterrence — it would be reasonable to allow the judge in a post-trial hearing to set the amount of punitive damages. The judge could, after liability for punitives has been determined by the jury, consider any and all of the factors necessary to tailor an appropriate punishment for a particular defendant in a controlled environment where the parties could introduce any relevant information applicable to the amount of damages to be awarded. Kansas has taken a step in this direction, but the factors to be considered by the court are still too limited.<sup>96</sup>

This approach would allow a judge, who has at his disposal greater experience and knowledge in determining a reasonable amount of money adequate to punish and deter, to make the original assessment of the amount of the award, instead of having to remit it. This approach would also prevent the introduction of potentially prejudicial evidence such as the amount and number of other punitive verdicts, and the wealth of the defendant from influencing the issue of liability. In addition, it would eliminate the wasteful costs of a new trial, and also the problem faced by defendants defending against liability in the first instance, while also having to introduce evidence as to his or her wealth and profitability at the same time.

Legislation that would give the trial court alone the power to determine the amount of a punitive damage award after the jury has determined that the defendant's conduct merits such an award is an idea whose time has come.<sup>97</sup> The issue is one of legislative and judicial policy. A jury finding of the amount of a punitive award is not one of "constitutional dimensions."<sup>98</sup> Shifting the initial responsibility for the amount of punitive damages to the trial court, subject to review by the appellate court as to any abuse of discretion, would make the awards more reflective of their dual purpose — punishment and deterrence.

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96. KAN. STAT. ANN. § 60.3701 (1987).

97. Bell & Pearce, *Punitive Damages and the Tort System*, 22 U. RICH. L. REV. 1 (1987).

98. Prentice, *Reforming Punitive Damages: The Judicial Bargaining Concept*, 7 LITIGATION 113 (1988); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L.REV. 269 (1983).