

# PUNITIVE DAMAGES REVISITED

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## INTRODUCTION

The doctrine of punitive damages is not a "Johnny come late to the law. It has been known for centuries. It is a doctrine that evolved largely to protect the little person against the wrongs of the economically strong and powerful.

Generally speaking, punitive damages has a twofold purpose: to punish the wrongdoer and to serve as an example to others; in order to discourage others from committing similar wrongful acts. The English call it the "Sting of the shelling." Others call it "Smart money."<sup>1</sup>

The doctrine of punitive damages requires something more than simple misconduct or simple negligence. In order to recover punitive damages most courts require that the misconduct be "wanton and willful and with a conscious indifference to the rights of others" or a variation on these terms. Always punitive damages must be in addition to actual or compensatory damages,<sup>2</sup> and the jury must have the discretion to award punitive damages or not.<sup>3</sup>

Punitive damages are an "Odd creature" in the law. They occupy a strange borderline between the civil and criminal law.<sup>4</sup> Their justification is rooted in the goals of retribution and deterrence, which derives from criminal law while at once they are awarded to plaintiffs as damages in civil lawsuits.<sup>5</sup>

Although the doctrine of punitive damages is firmly established in the law, it has been surrounded with controversy almost from its inception. Especially it is under attack today. A review of its history and a consideration of its present status will be useful if one is to understand and appreciate its impact on society.

## HISTORY

The doctrine of punitive damages was first enunciated in England in the middle of the eighteenth century.<sup>6</sup>

As stated by the U.S. Supreme Court, "punitive damages have long been a part of traditional state tort law."<sup>7</sup> Blackstone took note of their use.<sup>8</sup> They were reported in American case law as early as 1784.<sup>9</sup> The often cited case of Day v. Woodworth in 1852 made it clear that punitive damages were firmly established in American jurisprudence prior to the adoption of the Fourteenth Amendment.<sup>10</sup>

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.

Following the adoption of the Fourteenth Amendment the courts continued to recognize the doctrine. The Supreme Court noted that nothing in the amendments' text or history indicates an intention on the part of the drafters to overturn the prevailing method.<sup>11</sup> As one court said: "The Fourteenth Amendment has not displaced the procedure of the ages."<sup>12</sup>

## CONTROVERSY

Even though punitive damages have long been a part of AngloAmerican law, they have always been controversial. As recently as the mid-nineteenth century, treatise writers have argued over whether they even existed.<sup>13</sup> A noted writer, Theodore Sedgwick, referred to punitive damages as a "Salutary doctrine" where the jury may "at once impose a punishment on the defendant and uphold an example to the community."<sup>14</sup> He noted in 1868 that the doctrine seemed to be settled in England and in this country.<sup>15</sup>

But there was thunder on the left. All were not in agreement. Justice Foster of the New Hampshire Supreme Court called them "a perversion of language and ideas so ancient and so common as to seldom attract attention."<sup>16</sup> Justice Foster further denounced the doctrine with the following spicy language:

Undoubtedly this pernicious doctrine has become so fixed in the law ... that it may be difficult to get rid of it. But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly .... [N]ot reluctantly should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim- 'I have no need of thee.'<sup>17</sup>

The debate continued on. In *Fay v. Parker* it was said:

The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law.<sup>18</sup>

Yet, on the contrary, the Wisconsin court in *Luther v. Shaw* said:

The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourage private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law.<sup>19</sup>

Although the doctrine of punitive damages was roundly criticized, it was firmly established as a part of our law as late as the 1980s.<sup>20</sup> Its constitutionality was subject to question by justices of the Supreme Court up to and including the recent case of *Pacific Mutual Life Insurance Co. v. Haslip*<sup>21</sup> decided in 1991.

#### HASLIP

In the *Haslip* case the Supreme Court met square on the question of whether or not punitive damages violated the "due process clause" of the U. S. Constitution.<sup>22</sup> The Court stated:

One must concede that unlimited jury discretion-or unlimited judicial discretion for that matter-in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.<sup>23</sup>

Thereafter the Court said:

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court ... properly enter into the constitutional calculus.<sup>24</sup>

The Court concluded that the punitive damage award in that case did not "cross the line into the area of constitutional impropriety."<sup>25</sup>

We now see that the common-law method of assessing punitive damages is not per se unconstitutional. Further where they are subjected to proper guidance by the legislature or the courts and fit within the realm of reasonableness they do not violate the due process clause.

#### PUNITIVE DAMAGES AND TORT REFORM

The Supreme Court in *Haslip* has taken a giant step in "settling the dust" in connection with punitive damages, yet among scholars, politicians and the media the debate rages on. It is now a focal point of tort reform which is the stepchild of the so-called "litigation crisis." We hear of "run away juries" and the litigation "explosion." It has been said by some that punitive damage awards are "skyrocketing."<sup>26</sup> Former President Bush's Council on Competitiveness was considering abolishing punitive damages in products cases.<sup>27</sup>

Former Vice President Dan Quayle, Chairman of the President's Cabinet-level Council on Competitiveness claimed that "our current products liability system of 50 states' laws generates excessive litigation, inflates insurance costs and creates uncertainties for American business."<sup>28</sup> The Bush administration viewed the reform of punitive damages as top priority.<sup>29</sup> Much of the lawsuit crisis has been blamed on punitive damages which are said to be a drag on the economy. It has been suggested by Former Vice President Quayle and Former President Bush that punitive damages lessen the competitiveness of American businessmen.<sup>30</sup> Former Vice President Dan Quayle has questioned, "Does America really need 70 percent of the world's lawyers?"<sup>31</sup> This is an astonishing statement for two reasons. In the first place the number is largely from the whole cloth and, secondly and more importantly, is there something sinister about being a lawyer?

The assertion is often made that medical malpractice awards are running out of control. Yet consider a recent article by Professor Neil Vidmar of Duke University relating to a study done in North Carolina. He stated that in malpractice cases plaintiffs won only one case in five and when they did the median award was only \$35 '000.<sup>32</sup> He also stated that out of a total of 1,917 medical malpractice cases in which punitive damages were requested, the jury awarded them in only 18 cases, a success rate of less than 1%.<sup>33</sup>

Professor Vidmar concluded that the empirical evidence from multiple sources does not support the claims that medical malpractice juries are constantly pro-plaintiff, incompetent, or unjustifiably generous in determining awards.<sup>34</sup>

It is suggested that one should look at the facts behind the rhetoric that there is a litigation crisis and that punitive damages are skyrocketing and this is the root of the evils of our present day legal system. It is generally assumed that product liability litigation accounts for the transgressions just described.

Yet federal court records from 1985 to 1990 show that personal injury product-liability filings, with the exception of asbestos cases, decreased 40%.<sup>35</sup>

What then are the facts about skyrocketing punitive damage awards? A major study was done by Professors Rustad and Koenig.<sup>36</sup> This study took two years to complete and it tracked punitive damage awards in product liability cases over a 25 year period between 1965 and 1990.<sup>37</sup> The study brought forth some very revealing facts. Only 355 punitive damage verdicts were returned by state and federal court juries during a quarter of a century, an astonishingly low number. One quarter of those awards involved a single product, asbestos.<sup>38</sup>

In more than half of the 276 cases where complete post-trial information was available, punitive damage awards were taken away or reduced by the trial judge or by an appeals court. Plaintiffs received no punitive damages in 111 cases (40.2%), reduced judgments in 39 cases (14.1) and full jury awards in 126 cases (45.7%).<sup>39</sup> Contrary to the contention that punitive damage awards are skyrocketing, the study revealed the median punitive damage award for all products liability cases actually paid since 1965 was \$625,000, slightly above the median compensatory damage award - \$500,100. The aggravating factors leading to these awards were failure to take steps to remedy a known danger.<sup>40</sup>

A federal study of product liability suits in five states conducted by the Government Accounting Office two years ago reached conclusions similar to those of Professors Rustad and Koenig. Plaintiffs won fewer than 50% of the cases. The sizes of jury awards were neither erratic nor excessive, and punitive damages were highly correlated to economic loss.<sup>41</sup>

Controlling for asbestos cases the study of Rustad makes it clear that punitive damage awards in non-asbestos products liability cases decreased between 1986 and 1990.<sup>42</sup>

It is said that punitive damages stifle the ability of American manufacturers to compete with foreigners. Because of them we are losing our ability to compete on the world market.<sup>43</sup> It is submitted that these accusations are groundless for the following reasons:

1. Punitive damages only punish corporations that act with a wilful and wanton disregard for the rights of others and who recklessly and negligently make defective products. Should we expect less?
2. How can it be said that punitive damages make it impossible or difficult for U. S. manufacturers to compete with foreigners, when those very foreigners clamor to compete in this country and thereby subject themselves to the same punitive damages and our same legal system together with all of its so-called shortcomings.

The cry is for federal tort reform; yet Michael Williams, President of the ABA, estimated that state courts hear 99 percent of all court proceedings.<sup>44</sup> This is also in spite of the fact that a new report by the National Center for State Courts reveals that tort filings have leveled off and there is a dramatic increase in cases involving contracts and property disputes,<sup>41</sup> a sign of hard economic times.

The loudest cry for reform comes in the area of medical malpractice. Yet medical malpractice claims peaked in 1985.<sup>46</sup> A Texas study shows that medical malpractice insurance and lawsuits have contributed only slightly to the rapidly rising health-care cost. The study done for the Texas Health Policy Task Force revealed the medical liability cost insurance premiums and damages from lawsuits -make up less than one percent of health care expenditures in Texas and the United States.<sup>47</sup> The report concluded:

The findings indicate that changing the medical professional liability system will have minimal cost savings impact on the overall health care delivery system in Texas.<sup>48</sup>

The report also found that punitive damages were not a major factor in malpractice settlements in Texas.<sup>49</sup> Our legal system may not be perfect, but it is submitted that it is the best in the world. It can and does have a wholesome effect on our society. Our legal system acts as a restraint on the ability of the wealthy to conspire to monopolize and to dominate. It insures that the downtrodden and the afflicted have access to justice just as surely as they were multi-million dollar corporations. Punitive damages as we know them today insures that a reputable, honest, and red-blooded individual or corporation can compete on an equal footing with one that is dishonest, immoral and corrupt and who cares not for the rights or safety of others.

Such a system will rekindle our desire for the safety and welfare of others. It will encourage and reward our citizens for seeking to achieve higher values and not sacrifice safety on the altar of profits.

#### CONCLUSION

It is popular today to lawyer bash and I am sad to say this includes fellow lawyers such as one-time Vice President Dan Quayle. Those who do so, do so without any real knowledge or appreciation of what the legal profession does. They are unmindful of the fact that our forefathers wrote the Constitution and Bill of Rights. They forget about the giant contributions of the legal profession to our society - in such land-mark decisions as *Malberry v. Materson*, *Palsgraff* and *Brown v. Board of Education*. They forget that our brethren avoided a constitutional crisis and national calamity in the Nixon affair.

I am proud to be a trial lawyer. It is the trial bar that makes up the vanguard of social change. Yet it is the trial bar that nurtures and protects the freedoms that this great nation was founded upon: Freedom of speech; freedom of religion; freedom to our own beliefs; and the right of trial by jury. We are the guardians of the poor, the unfortunate and oppressed. It is our lot to stand at the bar of justice. Whether it be for a large corporation or the poorest individual on earth, our charge is the same: to seek truth and justice with honor. Let us go forward and perform our obligations with courtesy, dignity and due respect to our fellow man to the end that Lady Justice shall prevail.

Finally, I am proud to be a member of this Academy made up of the greatest trial lawyers in the world.

#### FOOTNOTES

1. Prosser and Keeton, *The Law of Torts*, p. 9
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3. *Ibid* 1035.
4. Owen, *The Moral Foundations of Punitive Damages*, 40 *Ala.L.Rev.* 705.
5. *Ibid*.

6. Rustad & Koenig, "Selling the Record Straight About Skyrocketing Punitive Damage Awards in Products Liability. An Empirical Study of the Last Quarter Century of Verdicts"
7. *Silkwood v. Kerr-McGee*, 464 U.S. 238, 255, 104 S.Ct. 615, 625, 878 L.Ed.2d 443 (1984).
8. 3 W Blackstone Commentaries 138.
9. *Genay v. Norris*, 1 S.C. L. (I Bay) 6 1784
10. *Day v. Woodworth*, 13 How. 363,14 L.Ed. 181 (1852).
11. *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 at 1043 (1991).
12. *Ibid*, at 1043.
13. *Ibid*, at 1047.
14. T. Sedgwick, *Measure of Damages* 522 (4th ed. 1898).
15. *Ibid*, at 35.
16. *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (199 1).
17. *Ibid*, at 1047.
18. *Fay v, Parker*, 53 N.H. 342, 382 (1873).
19. *Luther v, Shaw*. 157 Wis. 234, 238, 147 N.W 18, 19-20 (1914).
20. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615 625, 78 L.Ed.2d 443 (1984)
21. *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991).
22. *Ibid*, at 1043.
23. *Ibid*, at 1043.
24. *Ibid*, at 1043.
25. *Ibid*, at 1046.
26. *Browning-fieris Industries v. Kelco*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed. 2d 219 at 242 (1989).
27. L. Gordon Crovitz, "The Litigation Explosion and Quayle's Time Bomb," *The Wall Street Journal*, May 15, 1991 at A1 5.
28. Former Vice President Danford Quayle quoted in Karen Riley, "Administration Backs Revisions in Product Liability Law," *Washington Times*, at D- 10 (December 1, 1989)
29. *Ibid*.

30. Deborah Hensler, Taking Aim at the American Legal System: The Council on Competitiveness Agenda for Legal Reform, *Judicature* p.4, Feb.- March 1992
31. *Ibid*, P. 1.
32. Vidmar, "The Unfair Criticism of Medical Malpractice Juries", *Judicature*, 76:118-124, October-November 1992.
33. *Ibid*.
34. *Ibid*.
35. Newsweek August 26, 199 1.
36. Rustad & Koenig, Setting the Record Straight About Skyrocketing Punitive Damage Awards in Products Liability: An Empirical Study of the Last Quarter Century of Verdicts.
40. Rustad & Koenig, Setting the Record Straight About Skyrocketing Punitive Damage Awards in Products liability. An Empirical Study of the Last Quarter Century of Verdicts. p. 36.
41. General Accounting Office, GAO Report to the Chairman, Subcommittee on Commerce, Consumer Protection and Competitiveness, Committee on Energy and Commerce, House of Representatives, Product Liability: Verdicts and Case Resolution in Five States, 2 (1989).
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43. International Society of Barrister, Vol. 26, No. 3, p. 378.
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46. U. S. Industrial Outlook 1992, Department of Commerce, p. 43-2.
47. "Medical Costs Studied", The Dallas Morning News, July 10, 1992.
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