

Recent court rulings affect punitive damages

As a result of recent decisions, several troublesome aspects of punitive damage awards have been resolved. The first case, decided by the U.S. Supreme Court one week before a similar ruling by a New Jersey Appellate Division panel, limits consideration of punitive damages to the penal and deterrent effects in the actual controversy between the plaintiff and defendant, rather than consideration of the effects relating to the general public. Another ruling in a Law Division case admitted evidence of defendant's lack of insurance coverage and

In theory and in application, punitive damages payable to individual plaintiffs have only a slight basis in logic, as such damages further reward a plaintiff who, by definition, already has been fully compensated through compensatory damages. Indeed, the act prohibits an award of punitive damages if the jury has only awarded "nominal damages," defined as those not designed to compensate a plaintiff.

Many proposals have been advanced over the years to require damages to be paid to the state, with some small benefit to the plaintiff and the plaintiff's attorney for obtaining the award. Be this as it may, punitive damages are a part of the law and do serve a salutary purpose when they prevent a defendant from engaging in intentional or tortious dangerous conduct despite the risk of anticipated compensatory awards that may not deter the infliction of injury and for which insurance may be available.

Jurists and commentators also have noted the anomaly whereby punitive damages can constitute overkill in multiple successive cases in which each jury seeks to punish the offender for the broader impact of its conduct and resultant injuries nationwide. For example, assume a company is worth \$100 million and by its egregious conduct caused \$2 million in compensatory damages in 10 separate cases. In each case, a jury could impose a \$10 million punitive damages award. The 10 verdicts would put the company out of business. Unfortunately, no New Jersey case mandates the consideration of such multiple verdicts, either by a jury or by judicial review.

Limits imposed

Recently, both the U.S. Supreme Court and an appellate court here reached the same result and imposed limitations on a defendant's exposure to punitive damages. On Feb. 20, the Supreme Court decided *Phillip Morris USA v. Williams*, 127 S. Ct. 1057, in which the trial judge reduced a \$79.5 million verdict in punitives to \$32 million. Although the original verdict was reinstated by the Oregon Appeals Court, after several intermediate appeals the Supreme Court reversed the entire punitive damage award. The court ruled such damages may not be based on the jury's desire to punish defendants for harm to non-parties, which the court



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William A. Dreier
M. Karen Thompson

issued a related jury charge during the punitive damage phase of the trial.

The function of an award of punitive damages is twofold: To punish a defendant for egregious conduct and to deter future similar conduct. Under the Punitive Damages Act, N.J.S.A. 2A:15-5.9 to 5.17, such awards are limited to egregious actions.

The operative terms are defined in N.J.S.A. 2A:15-5.10: " 'Actual malice' means an intentional wrongdoing in the sense of an evil-minded act. 'Wanton and willful disregard' means a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act of omission."

New Jersey has curtailed the scope of punitive damages in the statute. With few exceptions, awards are limited to the higher of five times the compensatory award, or \$350,000.

William A. Dreier, a retired Appellate Division presiding judge, is a member at Norris McLaughlin & Marcus in Bridgewater. M. Karen Thompson, a certified civil trial attorney, also is a member at the firm.

determined would constitute an unconstitutional taking of property without due process. The court did not address, however, whether the punitive damage award relating to the harm to the individual parties was excessive, presumably because the amount would be recomputed after the new trial ordered by the court.

And on Feb. 26, the New Jersey Appellate Division decided *Tarr v. Bob Ciasulli's Mack Auto Mall*, 390 N.J. Super., in which the plaintiff had sued her former employer for sexual harassment. The jury awarded \$25,000 in compensatory damages and \$85,000 in punitives. The court reversed the punitive damage award, concluding the court should not have instructed — and counsel should not have urged — the jury that a purpose of punitive damages was to deter others from engaging in similar wrongful conduct, even though such a consideration could be read into the state's Punitive Damages Act. While recognizing any punitive damage award may generally deter others from similar wrongdoing, the court reasoned that “an award that is enhanced to deter others who could be completely unconnected with plaintiff or with defendant's wrong-doing can be viewed as a windfall for plaintiff and excessively punitive toward defendant.”

Legislative history

The majority carefully considered the law's legislative history, even though by its terms, cases under the Law Against Discrimination are excluded from the statutory cap. (The dissent noted that this statutory exclusion furthers New Jersey's strong public policy against discrimination and accordingly that general deterrence should be considered as an aspect of punitive damages by the jury.)

The statute contains no limitations such as declared in these two cases. Instead, it focuses generally on the defendant's misconduct. The law provides for judicial review by the trial judge who is instructed to focus on punishment and the need to deter the defendant from repeating the conduct. This is the same standard New Jersey case law previously required appellate judges to apply in reviewing such awards.

It is now clear that both the statute and common law must be reinterpreted to require the jury to focus solely on the relationship between the actual parties to the suit. In at least one case, a federal court, prior to trial in that case, determined it would afford a state an opportunity to amend its punitive damages statute to comply with *Williams*. It denied as premature an application to strike the plaintiff's claim for punitive damages. *Palmer v. Asanco*, 2007 WL 666572.

Practically, these cases should ameliorate some of the problems a defendant faces from multiple awards, intended not only to protect the general public against future conduct, but also to reward the individual plaintiff or to punish the defendant for past conduct. Such multiple astronomical awards bolstered by juries' attempts in successive cases to award total damages to protect the public are now unconstitutional. As a result of these decisions, at least the risk of the overlapping penal aspect of punitive awards should be lessened.

Realistic appraisal

Another aspect of punitive damages involves the information a jury should receive to enable it to make a realistic appraisal of the defendant's financial position and thus the effect the award will have on the defendant. In *Solomon v. Daly*, L13798-04, the trial judge permitted testimony in the punitive damages phase of the trial concerning the defendant's lack of insurance coverage for both compensatory and any potential punitive damages. Although the jury had assessed compensatory damages at \$329,000, it awarded only \$500 in punitive damages.

It has long been the rule that “Evidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct.” Evidence Rule 411. Its rationale is the potential prejudice that can ensue if the jury knows an insurance company will be paying the judgment. Further, in *Johnson & Johnson v. Aetna Casualty*, 285 N.J. Super. 575, the court held that insurance coverage for punitive damage liability was precluded in New Jersey as a matter of public policy. There, the court acknowledged the split in authority nationally, especially if the defendant's liability is vicarious. However, the court did not address whether the jury should be informed of this lack of coverage. Although N.J.S.A. 2A:15-5.12c(4) obligates a jury to consider “the financial condition of the tortfeasor” in assessing the quantum of punitive damages, there is no guidance provided in the act or case law about the admissibility of evidence concerning the existence of insurance. Rule 411 does contemplate the admissibility of evidence of insurance if offered for another purpose than to show a defendant's negligence or wrongful conduct.

In *Solomon*, the trial judge properly excluded all evidence of insurance during the initial phase of the trial in which the jury determined liability and compensatory damages on the assault and battery and sexual harassment claims. Thus, on the issue of “negligence or other wrongful conduct,” there was no breach of Rule 411.

Second hearing

Once the jury awarded compensatory damages, however, the statute required a separate hearing before the same jury to determine liability for punitive damages. During the second hearing, the jury must determine whether punitive damages should be awarded and, if so, it must determine the quantum of damages with additional evidential elements, including the defendant's financial condition. The *Solomon* jurors obviously followed the judge's instruction, as they determined punitive damages should be awarded (notwithstanding having heard evidence of the defendant's uninsured status), but reserved consideration of the insurance issue until the quantum deliberation.

Solomon presented the question of whether it was proper in the quantum stage of punitive damage considerations to inform the jury the defendant was uninsured. This issue had two aspects: the lack of insurance for compensatory damages and the lack of insurance for punitive damages. Since the statute required the jury to consider defendant's financial condition in assessing punitive damages, evidence of the financial impact of the lack of insurance on the compensatory verdict was relevant and properly admitted.

Although it was important for the jury to know defendant lacked insurance for compensatory damages, it could be informed of this only after it had returned the compensatory award. Evidence of the lack of insurance may be a determinative factor in assessing a punitive award, as it obviously was in *Solomon*. The model punitive damage charge should reflect this principle.

New Jersey's public policy prohibiting insurance coverage for any punitive damage award also should be communicated to the jury and should become a required element of the jury charge. Without it, a jury could speculate defendants are insured against the punitive award and be induced to render an award so as to impose a significant impact on defendant's future premium ratings. Absent such evidence, two juries in similar cases could reach opposite conclusions concerning the presence of insurance and impose entirely different assessments despite intending the same results.

Reality check

Our courts have long been open to informing juries of the real effect of their verdicts, except where public policy may dictate otherwise. In comparative-fault cases, courts have long used an “ultimate outcome” charge, which also applies in consumer fraud cases where treble damages may be imposed. *Wanetick v. Gateway Mitsubishi*, 163 N.J. 484. However, Joint Tortfeasor Act cases, *Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, and charitable (and presumably other) immunity cases, *Weiss v. Goldfarb*, 154 N.J. 468, do not apply this principle from a fear that such information might cause an unwarranted shift in result to impose undeserved liability on others. No such harm would result from applying the

full-disclosure principle in punitive damages cases generally, however.

The *Solomon* holding is a sensible ruling, and the Model Civil Charge Committee should consider formulating appropriate charges to make this practice uniform statewide. A recent *New Jersey Law Journal* editorial concurs.

Controversy still surrounds punitive damage awards, including the consideration of the effect of multiple awards and the concept of making punitive damages payable to the state (with suitable recompense to the plaintiff and attorney who secured the award). As a result of these recent decisions, however, fewer issues remain unresolved.