

PERSPECTIVES ON THE LAW

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Punitive Damages in Oregon A Reluctant Court Struggles with Limitations

— by Rudy R. Lachenmeier

On September 10, 2003, the Oregon Court of Appeals, in response to a mandate from the U.S. Supreme Court, held that a 1994 punitive damages verdict by an Oregon jury was unconstitutional. In a breath of fresh air for defense counsel the court took a giant step towards reigning in runaway punitive damage awards. Specifically, they held that awarding \$22.5 million in punitive damages in a case, where the same jury awarded only \$500,000.00 in compensatory damages, violated the due process clause of the 14th Amendment of the U.S. Constitution. *See Bocci v. Key Pharmaceuticals, Inc., et al.*, 189 Or. App. 349 (2003). Receiving the case directly on remand from the U.S. Supreme Court, the Oregon Court of Appeals applied new criteria to a case in which it had twice before upheld the very same punitive damages award. This was the third, and likely final, chapter in the Bocci case. The Court of Appeals' three Bocci opinions, spread out over nearly a decade since the jury verdict, embody the tug-of-war between the state and federal courts over the criteria for, and constitutionality of, punitive damages awards.

The search for boundaries on punitive damages awards in Oregon has been a long and torturous one. The Oregon Constitution, Article 7, Section 3, prohibits any "fact tried by a jury" from being "re-examined in any Court of this State" unless there is no evidence to support the verdict. For a long time, this included the amount of a jury's award of punitive damages. *See*

Van Lom v. Schneiderman, 187 Or 89, 210 P2d 461 (1949). As a result, between 1910 and 1995, the State of Oregon was the only state that did not have some form of post-verdict judicial review of punitive damages awards.

The underlying facts in the Bocci case were that Paul R. Bocci, Jr., was a longtime user of defendant Key Pharmaceutical, Inc.'s, asthma medication. In October 1990 he was prescribed an antibiotic for an unrelated problem. The new drug prescribed reacted adversely with the asthma medication he had been taking, causing him to become ill. He went to an urgent care center for treatment. Not realizing that the asthma medication *could* adversely interact with the antibiotic, Bocci's treating physician, Dr. Frederick Edwards, sent him home. Later that evening, Bocci began having seizures because of the drug interaction and was admitted to a hospital emergency room. The seizures caused severe brain damage.

Bocci sued Key and Edwards for economic and punitive damages alleging that Key intentionally did not tell either the FDA or the medical community about severe health risks created by its asthma medication, of which it was aware; and alleging that Dr. Edwards misdiagnosed him. Edwards, in turn, sued Key for economic and punitive damages for failing to provide adequate information concerning dangerous toxicity problems caused by its product. The jury returned verdicts against Key, awarding

Bocci \$5 million in compensatory and \$35 million in punitive damages, and awarding Edwards \$500,000.00 in compensatory and \$22.5 million in punitive damages.

Key appealed both verdicts, but settled Bocci's brain damage claims before the Court of Appeals heard the appeal (Bocci I). At that point, the Court of Appeals, applying existing Oregon law, had no problem sustaining the punitive damages award, but split over an evidentiary issue. The Oregon Supreme court accepted review and then remanded the case, however, to have the Court of Appeals revisit the punitive damages issue in light of the U.S. Supreme Court's newest rulings on the requirements of federal due process. One of those rulings was in another Oregon case, Honda Motor Company v. Oberg, 512 US 415 (1994), in which the U.S. Supreme Court held that the due process clause of the 14th Amendment of the Constitution requires that post-verdict judicial review of punitive damages awards be available. The result of this decision is that state courts are now required not only to look at the facts surrounding a punitive damages award, but also must look at the amount awarded.

The U.S. Supreme Court in Oberg, did not dictate a specific mathematical formula for making this determination, but did give general guidelines. On remand, the Oregon Supreme Court, trying to find a way to balance the requirements of both constitutions, held that "[a] jury's award of punitive damages shall not be disturbed when it is in the range that a rational juror would be entitled to award in light of the record as a whole." Honda Motor Company v. Oberg, 320 Or 544, 549 (1996).

In a further attempt to reconcile the conflict between the federal and state constitutions and resulting case law, the Oregon Supreme Court, in Parrott v. Carr Chevrolet, held:

“Although the federal requirement of judicial review

for excessiveness directly conflicts with the reexamination clause of Article VII, section 3 of the Oregon Constitution, that requirement has not altered the parties' right, under Article I, section 17, of the Oregon Constitution, to a trial by jury regarding a claim for punitive damages. As is true in other contexts, the proper response of an Oregon court to the overlapping and potentially conflicting requirements of federal and state constitutional law is to give effect, to the greatest extent possible, to *all* pertinent constitutional requirements.

* * *

In other words, the reviewing court must resolve all disputes regarding facts and factual inferences in favor of the jury's verdict and then determine, on the facts as the jury was entitled to find them, whether the award violates the legal standard of gross excessiveness. The reviewing court's examination of the 'record as a whole' is limited to the evidence that was before the jury.”

331 Or. 537, 556-57 (2001)(*citations omitted*). Thus, the court concluded that the state courts' role in reviewing punitive damages awards was to limit the jury's award to the “highest amount that a jury could lawfully award,” while still giving effect to the plaintiff's “right to have a jury determine the amount of a punitive damages award.” Id. at 557. If the court then decides to lower a punitive damages award, then the nonmoving party must agree to the entry of an amended judgment. Otherwise, a new trial must be granted. Id. at 558. This was

the first case to be analyzed by the Oregon Supreme Court under the new federal court directive.

Turning back to the Bocci case, and given this background, in 2001, on remand from the Oregon Supreme Court, the Oregon Court of Appeals again reviewed the jury's award and, in Bocci II, once again found it be a constitutional result under the circumstances of the case.

Key again appealed, but this time, the Oregon Supreme Court declined to hear the case. Accordingly, Key appealed to the U. S. Supreme Court, who accepted review on the punitive damages issue, and then remanded the case for review again in light of it's newest due process decision in State Farm Mut. Auto. Ins. Co. v. Campbell, handed down on April 7, 2003. 123 S.Ct. 1513 (2003).

Campbell was a bad faith claim against State Farm that came up through the Utah courts, wherein an award of punitive damages in the amount of \$145 million, where full compensatory damages were only \$1 million, was upheld by the state courts. The U.S. Supreme Court found the punitive damages award to be excessive and in violation of the due process clause of the 14th Amendment. The Supreme Court remanded the case to the Utah courts to determine the appropriate amount for a punitive damages award, but stated that under the facts of the case, only a ratio of 1:1 between the compensatory and punitive damages would likely be found constitutional. Id. at 1526.

This time, the Court reiterated prior guideposts for the state courts to follow when determining the constitutionality of punitive damages awards. The first guidepost that courts are to follow is to review the degree of reprehensibility of defendant's misconduct. This includes

whether the misconduct caused physical or merely economic harm, whether there was evidence of indifference or reckless disregard of the health and safety of others, whether the conduct was an isolated incident or whether the same conduct was repeated over time and whether or not the harm resulted from some sort of malice or deceit as opposed to an accident. Id. at 1521 (citing BMW of N. America, Inc. v. Gore, 517 US 559, 576-77 (1996).

Second, the courts are to look at the disparity between actual or potential harm suffered by the plaintiff and the punitive damages award. This requires that the courts review the ratio between the compensatory damages and punitive damages awarded. This time, the court, apparently fed up with the unwillingness of various state courts to curb punitive damages awards, made it very clear that unless the facts of the case are exceptional, (primarily outrageous conduct that causes relatively small actual damages), the difference between compensatory damages and a punitive damages award cannot be more than a single digit multiplier. Any award outside of that range will very likely be in violation of due process. Id. at 1524-25.

Third, the Supreme Court now unequivocally requires the states to review the ratio between the punitive damages awarded by the jury and the civil penalties awarded in comparable cases to promote the consistency and predictability required by due process. Id. at 1526.

The US Supreme Court then remanded the Bocci case (Bocci III) to the Oregon courts to reconsider their earlier decisions upholding the punitive damages award in light of their decision in Campbell. Now forced to reconsider its prior decisions, the Oregon Court of Appeals decided that a 7:1 ratio between punitive and compensatory damages awards, i.e., \$3.5 million in

punitive damages to a \$500,000 compensatory damages award, was the constitutional upper limit in that case. In making this decision, the Oregon court viewed the facts in Bocci, as found by the jury, and determined that because the damages included severe personal injuries caused by an intentional and reckless disregard for Bocci's safety, and because of the severity of the repercussions that Dr. Edwards ultimately faced, the ratio could exceed 1:1, but that ratio should not be greater than double digits. The Court then settled on a 7:1 ratio. The court ordered that the judgment of the trial court be vacated and remanded with instructions to allow defendant's motion for a new trial unless the plaintiff agrees to a reduction of punitive damages award to \$3.5 million.

Bocci III could still be appealed to the Oregon Supreme court, but given the Campbell case, punitive damages law in Oregon will never be the same. There will be substantive review of punitive damages awards, and in cases where substantial compensatory awards are made the punitive damages will be reduced if the ratio of punitive damages to compensatory damages are too high. What is left to map out is where Oregon will end up on an "average" punitive damages case, but at least, now we know the parameters. ❖

— Other aspects of punitive damages will be addressed in future articles. If you have any questions feel free to contact the author, Rudy R. Lachenmeier by phone at 503-768-9600, or by email at Rudy@lerlaw.com.