

Punitive Damages in Soft Tissue Auto Cases

— by Tim Heinson

Claimants and their attorneys in soft tissue automobile accident cases sometimes seem to think they have won the lottery when it turns out that your insured was (allegedly) intoxicated at the time of an accident. A review of recent verdicts, however, reveals that punitive damages in such cases, when actually awarded by a jury, can be relatively modest.

Oregon law, in ORS 18.537(1), provides the standard to be used by a jury in deciding whether to award punitive damages:

“Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.”

If the case is in litigation, the complaint may not contain a claim for punitive damages initially. The plaintiff, however, is allowed to file a motion to amend the complaint pursuant to ORS 18.535(3), to add a claim for punitive damages. In such a motion, the plaintiff must “set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion.” The “directed verdict” standard is a very low hurdle, however, and any admissible evidence of intoxication will generally be sufficient to allow the plaintiff to add a claim for puni-

tive damages.

Once a punitive damages claim has been alleged, however, the standard of proof required of the plaintiff is much higher. ORS 18.537(1) requires the plaintiff to prove by “clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.” The “clear and convincing” standard requires a finding that the truth of the facts asserted is “highly probable.” *In re Conduct of Blaylock*, 328 Or 409, 411 (1999). If there is a dispute as to whether your insured was actually intoxicated, therefore, a motion for partial summary judgment should be considered, given the much higher standard of proof required.

Another point to keep in mind is that, in order to support a claim for punitive damages, your insured’s alleged conduct (such as intoxication) must have actually caused the injury complained of by the plaintiff. *Klinicki v. Lundgren*, 298 Or 662, 686 (1985). For instance, it is unlikely that a plaintiff in a car crash case would be entitled to punitive damages solely for being emotionally upset because the accident was caused by a drunk driver. Such emotional distress damages are generally not recoverable without accompanying physical harm.

If all else fails and you end up going to trial, punitive damage awards in automobile accident cases with primarily soft tissue injuries can be relatively modest. A review of recent jury verdicts in Mult-

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nomah, Clackamas, and Washington County courts in cases meeting these criteria, and in which punitive damages were actually awarded, reveals that punitive damages awards averaged about \$5,300, with a high of \$25,000 and a low of \$600. Other than the one for \$25,000, the awards were all under \$10,000. Verdicts exclusive of punitive damages in these cases averaged just under \$40,000. When the injuries were more serious, punitive damages awards increased. In cases involving a shoulder injury requiring surgery, a serious leg fracture, and a ruptured diaphragm, punitive damages of \$75,000, \$126,000 and \$50,000, respectively, were awarded.

It is, of course, preferable to try to settle these cases. Besides the potential award, a factor that should encourage a claimant to agree to a reasonable settlement is that this can put considerably more money in his or her pocket than a punitive damages verdict would. ORS 18.540 requires that only 40% of any punitive damages verdict is paid to the plaintiff, with the plaintiff's attorney being paid from that 40% (up to 20% of the amount awarded as punitive damages). The remaining 60% is paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section.

Punitive damages verdicts can, of course, be considerably higher in other types of cases, most notably product liability cases. In the ordinary automobile accident resulting in the typical strain/sprain injuries, however, verdicts are relatively modest and claimants and their attorneys should be willing to settle accordingly. ❖