

**AN AWARD OF PUNITIVE DAMAGES AGAINST A
TOBACCO COMPANY, SEVENTEEN TIMES
EXCEEDING COMPENSATORY DAMAGES, VIOLATES
FEDERAL CONSTITUTIONAL CONSTRAINTS**

Being able to foresee the extent of one's exposure to punitive damages is important for an adequate evaluation of one's case. After all, fundamental notions of fairness, which are rooted in our federal constitution, dictate that a person must receive a fair notice not only of the conduct that subjects him to punishment, but also of the severity of the penalty that may be imposed against him. *State Farm Mut. Auto Ins. Co. v. Campbell*. Due to a significant risk of arbitrary punishments without a fair notice in the field of civil punitive damages, the U.S. Supreme Court by its opinion in *Campbell* constitutionalized the field by introducing a number of guideposts for consideration prior to assessing the amount of punitive damages. These guideposts are: (1) the reprehensibility of defendant's conduct, (2) the ratio between the punitive damages and the harm to the victim caused by defendant's actions, and (3) the sanctions imposed in other cases for comparable misconduct.

In the famous case of *Patricia Henley v. Phillip Morris, Inc.*, a fifty-two year-old woman, after having smoked two to three packs of "Marlboro" cigarettes per day for 37 years, was diagnosed with lung cancer. She claimed, among other things, that defendant, Phillip Morris, Inc., conspired with other cigarette manufacturers to counter mounting scientific evidence about the health risks of cigarette smoking, engaged in saturation advertising, targeted teenage audiences, and adulterated the cigarettes plaintiff smoked with additives that exposed her to dangers not inherent in cigarette smoking. The trial court found against the defendant and awarded plaintiff \$1.5 million in compensatory and \$50 million in punitive damages. The punitive damages were later reduced to \$25 million. However, after the California Supreme Court twice remanded the case to the Court of Appeal for reconsideration (the second time

in light of *Campbell*), the Court of Appeal held that the award of \$25 million, exceeding compensatory damages by 17 times, could not pass constitutional muster.

The principle issues addressed by the court were how big an award of punitive damages could be constitutionally justified and under what circumstances. In other words, what can a wealthy defendant, like Phillip Morris Inc., who faces liability in a personal injury suit, expect in punitive damages exposure?

The California Court of Appeal, applying the *Campbell* guideposts to the facts of *Henley*, modified the award of punitive damages, primarily relying on the proportionality between the size of the compensatory and punitive damages. Even though the U.S. Supreme Court in *Campbell* refused to impose a bright-line ratio which a punitive damages award cannot exceed, it stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." The court in *Campbell* went on to say that even a "4-to-1 ratio" may typically be

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“close to the line of constitutional impropriety.” The Court of Appeal, nonetheless, awarded punitive damages with a 6-to-1 ratio to the substantial award of compensatory damages. The court justified its decision of going over the line of “constitutional impropriety” by the egregiousness of the defendant, tobacco company’s conduct of knowingly advertising a toxic substance to minors and preventing them from appreciating its true effects. After all, the U.S. Supreme Court in *Campbell* left a possibility that higher ratios may be appropriate where a particularly egregious conduct resulted in only a small amount of economic damages. The difficulty the Court of Appeal was facing in *Henley* was that the compensatory damages award was \$1.5 million, which may have already reflected the plaintiff’s pain, suffering and outrage, thus possibly duplicating the punitive damages award.

Analyzing the new award of \$9 million in light of the third *Campbell* guidepost - comparable sanctions imposed for similar misconduct in other cases - it becomes clear that the Court of Appeal analogized defendant’s conduct to the furnishing of tobacco to minors under California Business and Professions Code, civil penalties for which range from \$200.00 to \$600.00. Similarly, the penal fines for such a violation range from \$200.00 to \$1,000.00. Additionally, violations of the 1969 Public Health Cigarette Smoking Act, prohibiting advertising of cigarettes on any medium of electronic communication, carry a penalty of \$10,000.00 per violation. The court then surmised that if defendant was furnishing plaintiff cigarettes every day for three years before she reached 18, defendant would have made 1,100 violations of the two California statutes and 1,100 violations of the federal statute. Translating this into maximum civil state and federal penalties of \$6,000 and \$10,000 respectively, the court arrived at the maximum state penalty of \$6.6 million and a maximum federal penalty of some \$11 million. Apparently, the \$9 million figure was reached by splitting the difference between the amounts of the state and federal penalties.

The Court of Appeal concluded that the significance of other traditionally important factors for assessing punitive damages, like (1) the defendant’s financial condition, and (2) the potential for other similar actions in which punitive damages may also be awarded, is now greatly diminished in light of *Campbell* because the

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LEGAL CURIOSITIES

by Paul J. Lipman

◆ **Held: The Devil Can’t Be Sued.** In 1991, in *Mayo v. Satan and His Staff*, 54 F.R.D. 282, the plaintiff tried to sue Satan for having “placed deliberate obstacles in [plaintiff’s] path and caus[ing] his downfall.” The court held that 1) there was no jurisdiction over the devil as “the Complaint contains no allegation of [defendant’s] residence in this District”; 2) the case could not be maintained as a class action, either, because “The class [of similarly aggrieved plaintiffs] is so numerous that Joinder of all members is impracticable”; and 3) the Complaint did not include “the required form of instructions for the U.S. Marshall as to service of process.”

◆ **Judge’s Clerk Gets Revenge?** In *U.S. v. Abner*, 825 F.2d 835, numerous Talking Heads references were worked into the opinion which was otherwise a dry criminal case. The section headings are all Talking Heads works: “Speaking in Tongues,” “True Stories,” “Fear of Music,” and “Remain in Light.” Footnote 16 makes a stretch to compare the defendant’s alleged behavior to “Burning Down the House.” Unless the three-Judge panel from Texas shed their strait-laced demeanor for this one, it looks like the law clerk may have gotten a last laugh that is now part of the law of the land. Law clerks usually do a first draft of the opinion after discussing the case with the judge.

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SUMMARY ADJUDICATION IS FOUND INAPPROPRIATE IN ELDER ABUSE AND MISREPRESENTATION CASE WHERE ONE CONVALESCENT HOME PATIENT ATTACKS ANOTHER

Plaintiff Peter Intrieri was the son of Amalia Intrieri. Prior to Amalia's admission to the defendant's convalescent home, Mr. Intrieri interviewed the admissions director for the home. Mr. Intrieri was advised that the facility was a secure facility for all residents. Specifically, he was advised that the Alzheimer's ward had a keypunch pad access that restricted entry to only doctors, family members and other persons authorized by the defendant to have access to that area.

Mr. Intrieri was persuaded by these representations and had his mother admitted to the Alzheimer's ward. Sometime after the admission, 88 year old Amalia Intrieri heard a disturbance going on in the hallway outside of her Alzheimer's ward room. When she walked into the hall, she was confronted by Janet Lawry, another patient at the convalescent hospital, but not an admittee of the Alzheimer's ward. She had apparently gained access to the Alzheimer's ward by using the code at the keypunch pad access. As it turns out, this access code was designed only to keep Alzheimer's patients in but not to keep other persons out. The defendants had installed a sign directly above the keypad which gave instructions on how to use the keypad code to get access into the Alzheimer's ward. Ms. Lawry had simply read the instructions and let herself in.

Ms. Lawry was in an argument with one of the other Alzheimer's patients when she noticed Ms. Intrieri coming out of her room. Ms. Lawry's immediate response was to yell "get back in your room," and then to shove Ms. Intrieri. Ms. Intrieri fell to the floor and fractured her hip. It was only at this point that the two on duty nurses got up from their station and came to intervene. Ms. Lawry was returned to her ward of the hospital. Ms. Intrieri was put in bed. The fractured hip went undiagnosed for an unspecified period of time. Once it was diagnosed she had hip surgery. After the surgery she was returned to the hospital and began to develop bed sores. This ultimately resulted in amputation of a toe and then amputation of the leg at the knee. Ms. Intrieri ultimately passed away.

Peter Intrieri and his father sued the convalescent home alleging various causes of action that included

"willful misconduct," fraud and negligent misrepresentation. The defendant hospital successfully prosecuted a motion for summary adjudication as to all causes of action claiming that the factual information alleged in the complaint did not give rise to any of these three causes of action. The plaintiffs opposed the motion claiming that the "willful misconduct" allegations were actually a cause of action for elder abuse under Welfare & Institutions Code Section 15610, *et seq.* The plaintiffs argued that the factual allegations were sufficiently persuasive that a jury could find by clear and convincing evidence that the defendant nursing home had engaged in elder abuse and misrepresentation. The court granted the motion for summary adjudication, and plaintiffs proceeded on a Writ of Mandate.

The court in *Intrieri v. Superior Court* reversed the trial court after finding triable issues of fact as to all three of the causes of action. The Court of Appeals noted that in order to recover under the Elder Abuse Act, a plaintiff must demonstrate by clear and convincing evidence that the defendant is guilty of something more than mere negligence. The plaintiff must show reckless, oppressive, fraudulent or malicious conduct. On appeal, the defense claimed that while there were failures in their treatment of the plaintiff's decedent, they at most amounted to mere negligence and not the reckless conduct contemplated by the Elder Abuse Act. The Court of Appeals disagreed. As it turns out, Ms. Lawry's medical records showed that in the two weeks before her altercations with Mrs. Intrieri the staff found her to be confused and hostile. In fact, she even stated at one point "I will kill someone to get home." Also, one of the defendant's doctors had noted that Ms. Lawry had become unstable and that she was no longer an appropriate resident for the facility because of her level of functioning and wandering behavior. Additionally, the facts showed that the nurses on duty actually heard Ms. Lawry screaming at the residents of the Alzheimer's unit, yet they failed to respond immediately and remained seated at the nurse's stations until Ms. Intrieri fell.

The court also found that persons had virtually unfettered access to the residents of the Alzheimer's unit

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wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award. Additionally, because the *Campbell* requirement of a nexus between the actual damages and the punitive award necessitates tailoring punitive damages more closely to the harm done to individual plaintiffs, it reduces the risk that the multiple punitive awards will be based on the same facts as in other cases.

Therefore, the third revised opinion of the California Court of Appeal in the matter of *Henley v. Phillip Morris, Inc.*, fixing the punitive damages at \$9 million, will, most likely, end up being final. Even though the award in each individual case depends on the facts of that case, the lessons to learn from the court's reasoning are: (1) the amount of punitive damages must be proportional to the award of compensatory damages, usually exceeding 1-to-4 ratio, unless justified by defendant's egregious conduct, and only in exceptional circumstances can it be a double-digit number; (2) a fairly definite means of evaluating the actual amount of punitive damages is to assess the maximum penalty under similar state or federal statutes, where possible.

- Olga V. Tillman

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by simply reading the code posted over the keypad. In short, nothing stopped Ms. Lawry from entering the Alzheimer's unit and accosting their patients. The initial altercation lasted long enough for Ms. Intrieri to become curious and get up and walk out of her room to see what was going on. Still, the nurses had not left their station to try and break up the situation. Accordingly, the court felt that there was sufficient factual information to create a triable question of fact as to whether or not the conduct in allowing Lawry to enter the Alzheimer's unit and to engage the Alzheimer's patients was tantamount to elder abuse.

With regard to the post altercation treatment, the evidence showed that Ms. Intrieri developed the sores shortly after her return from her hip surgery. They were reported by her son. With no change in the treatment plan, and in light of the fact that the sores were getting worse, Peter Intrieri then hired his own doctor who recommended a different treatment plan. Again, this plan was demonstrably not followed by the defendant. The result was amputation. The court found that there were clearly triable questions of fact as to whether the neglect amounted to elder abuse.

Finally, with respect to the fraud and negligent misrepresentation issues, the Hospital argued that all of the statements made to Peter Intrieri were true and were therefore not misrepresentations. The court disagreed. While having a keypad access might make an area secure, the fact that the hospital freely disseminated the key code and instructions makes this security useless to all but the Alzheimer's patients themselves if they were trying to escape. It was clear that anyone could gain access to the Alzheimer's unit so long as they could read the access code posted over the keypad. Accordingly, a triable issue existed as to whether or not misrepresentations had been made. Therefore, the case was remanded for trial on those three causes of action.

- Thomas E. Martin

Editor

Paul J. Lipman