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Punitive Damages in Section 1983 Actions

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PUNITIVE DAMAGES IN SECTION 1983 ACTIONS

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As most plaintiff's lawyers have learned, a million dollars is not what it used to be. That is why I believe that if you are able to establish liability and get past qualified immunity in a § 1983 case, you are entitled to a jury instruction on punitive damages.

The Second Circuit has explicitly held to the contrary in *McCardle v. Haddad*,[2] a case coming from my office. I think the Second Circuit is wrong. *McCardle* is a classic reverse discrimination, false arrest case involving racial profiling. The plaintiff, a white woman, was driving through an African American neighborhood on her way to work when she slowed near a corner known for heavy drug activity.[3] While stopped at a traffic light, a police officer approached her, demanded identification, and searched her car because he firgured she was there to cop drugs.[4] She was not. Subsequently, she brought a suit alleging a violation of her Fourth Amendment[5] protections.[6]

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[2] 131 F.3d 43 (2d Cir. 1997).

[3] *Id.* at 45.

[4] *Id.*

[5] U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[6] *McCardle*, 131 F.3d at 46. Upon instructing her to step out of the car, the officer said to McCardle, "You just copped drugs. Where are the drugs? Where are the needles? You just copped drugs. Nobody stops on Edgewood Avenue unless they're copping drugs." McCardle got in the back of the patrol

The case was most notorious because the jury awarded one dollar in actual damages.[7] We applied for an award of attorneys' fees, and instead of saying no the judge agreed we were entitled to a fair attorney's fee, but cut the award to something that had a reasonable relationship to the damage award. My office was awarded thirty-three cents.[8] What was most significant about the case, however, was that the judge refused to submit the punitive damages claim to the jury.[9] He held that although there was enough evidence for the jury to find a Fourth Amendment violation and there was no qualified immunity, there were no special circumstances, such as malice, meanness, or nastiness, which must be established in order to be eligible for punitive damages.[10]

On appeal, the Second Circuit agreed.[11] One of the interesting things about the Second Circuit's decision in McCardle was that the entire oral argument was about whether the Second Circuit should apply the holding of *Larez v. City of Los Angeles*.[12] *Larez* was a Ninth Circuit decision which explicitly held that if liability is established under §1983 and there is no qualified immunity, the party is entitled to have the punitive damages claim go to the jury as a matter of law.[13] What was

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car as directed and waited there while the officer searched her car. She testified that she watched the officer thrust his head and most of his body into the car, that he looked beneath the seats, and continued to search the vehicle for approximately ten minutes.

[7] *Id.* at 47.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 53.

[11] *Id.* at 52 (affirming the district court's decision not to send the issue of punitive damages to the jury because "the evidence was not sufficient to support a finding that Haddad had acted with malice or any other evil motive.").

[12] 946 F.2d 630 (9th Cir. 1991).

[13] *Id.* at 639. The district court in *Larez* instructed the jury that:

> [I]n its discretion, it could impose punitive damages upon the individual officers once finding liability. It explained that punitive damages would be appropriate only if the jury found the officers' injurious acts were maliciously, wantonly, or oppressively done. The court further emphasized that

interesting was that *Larez* is not cited anywhere in the *McCardle* opinion even though it was the entire focus of the oral argument.

So why was *Larez* right and *McCardle* wrong the day it was decided? If you go back to the granddaddy of all punitive damages cases, *Smith v. Wade,*[14] there are three ways you can get punitive damages. A successful plaintiff in a §1983 case is entitled to an award of punitive damages if he/she proves any one of these three circumstances. The first is the presence of willful malice, otherwise known as traditional common law punitive damages. The second is proof that the defendant acted intentionally and in gross disregard of the plaintiff's constitutional rights. The third is that the defendant acted in reckless disregard of the plaintiff's constitutional rights, regardless of whether his actions violated the plaintiff's rights.[15] That is the minimum you have to show in order to establish liability in any § 1983 action. Therefore, if *Smith v. Wade* is followed, once liability is established and you get past qualified immunity, you are entitled to have the issue of punitive damages sent to the jury.

After *McCardle* was decided, I think the issue was resolved by the United States Supreme Court in *Kolstad v. American Dental Association.*[16] *Kolstad* was a Title VII[17] case involving gender discrimination. In *Kolstad,* it was necessary for the Supreme Court to consider the meaning of the word "reckless" under §1981a of Title 42, under the 1991 amendments to Title VII.[18] This provision limits the punitive damage awards

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punitive damages must be fixed with calm discretion. (internal quotations omitted).

[14] 461 U.S. 30 (1983).

[15] *Id.* at 56.

[16] 527 U.S. 526 (1999).

[17] 42 U.S.C. § 2000e *et. seq.* (1994 & Supp. 2001).

[18] 42 U.S.C. § 1981a (1994 & Supp. 2001). The statute states in relevant part:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with

in employment cases to those cases in which the employer has acted with malice or reckless indifference to the plaintiff's federally protected rights.[19] The Court stated in *Kolstad* that to determine the meaning of the terms "malice" and "reckless indifference", we must go back to *Smith v. Wade*.[20] *Smith* held that "reckless indifference" means a conscious indifference to the rights of the plaintiff,[21] or a perceived risk that the defendant's actions will violate federal law in Title VII and § 1983 cases.[22]

In reality, what the Court's decision did was limit punitive damage awards under §1981a to those cases in which the law that prohibited the conduct in question is clear. Under the language of *Kolstad*, which is not a §1983 decision, it seems impossible to get around the proposition that if one establishes liability and survives the qualified immunity test, they will have a right to make an argument to the jury on punitive damages. Of course, that does not mean punitive damages will be awarded in every case, since punitive damages are discretionary with the jury. But you do have a right to make the argument to the jury and to have the jury charged with the "reckless indifference" language from *Smith* and *Kolstad*.

So, is malice a necessary precondition to an award of punitive damages? According to *McCardle*, the answer is definitely not.[23] This does not mean malice should not be proven. Obviously, you want to make the best case you possibly

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malice or with reckless indifference to the federally protected rights of an aggrieved individual.

[19] *Id.*

[20] *Kolstad*, 527 U.S. at 535-36 (citing *Smith*, 461 U.S. at 56).

[21] *Smith*, 461 U.S. at 37.

[22] *Kolstad*, 527 U.S. at 536.

[23] *McCardle*, 131 F.3d at 52. The court stated:

> A jury may be permitted to award punitive damages in a § 1983 action when it finds that the defendant's violation of federal law was intentional, *see, e.g.*, [*Smith*, 461 U.S. at 51], or 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'

(citing *Smith*, 461 U.S. at 56).

can. As a matter of tactics you should demonize the defendant. We all know that in cases like this the reality is that the plaintiff who wins is the one who has the good fortune to have had his or her rights violated by somebody who does not look good in court, whether due to arrogance, physical appearance, or because the person falls apart on cross-examination. Winning is achieved by successfully demonizing your opponent. It is much more important to have an unattractive defendant than an attractive plaintiff. So you should always try to show malice.

The problem with a ruling like *McCardle* is that it allows the trial judge to substitute his or her judgment on the issue of malice for that of the jury. There are different approaches from the two sectors. A jury is going to determine malice by deciding whether or not the person is a creep, whereas the judge is more inclined to use a sophisticated analysis. I feel it is very important to get away from an approach where the judge makes this determination.

Assuming that you get to the point where punitive damages can be presented to the jury, what kind of evidence can you present to enhance your punitive damages award? Conversely, for the defense, what evidence can you present to back up your position that if punitive damages are awarded, they should be small? Both positions go to the issue of the depth of the pocket of the payor. In most jurisdictions this rarely arises because indemnification exists. If that is the case the defendant does not want to talk about it. In my experience, most municipal police departments do indemnify punitive damages awards. It is typically the absence of a practice of indemnification that lies behind the majority of cases in which the plaintiff's lawyer elects to bring a municipal defendant into the action, despite the enormous burden such an undertaking requires. A plaintiff will bring a municipal defendant into the action for fear that the defendant will be unable to pay any resulting judgment. I think in most jurisdictions today, however, there is indemnification.

The fact that indemnification exists for compensatory awards, however, does not necessarily mean that there will be indemnification for punitive damages. A defendant always has the right to put on affirmative evidence to show his or her lack of

financial assets. Of course, the jury would be instructed that this evidence should be considered only with regard to punitive damages, not compensatory damages. In a case where you anticipate there will be such evidence, it is likely that the plaintiff will seek bifurcation on the issues of liability, compensatory damages and punitive damages. I cannot imagine any other way this evidence would not have a spillover effect on compensatory damages. Typically, bifurcation motions come from the defense because they fear that the plaintiff will be putting on deep-pocket evidence and they are worried about the implications of that evidence on a compensatory damage award.

When it comes to the emotional distress component of the case, however, juries will evaluate that component as they wish. There is nothing to prevent the jury from deciding the amount of emotional distress a plaintiff has suffered. This can be worth an awful lot of money. There is no way of going back later and checking the amount awarded for emotional distress, except under some comparable kind of language.

A defendant cannot introduce shallow-pocket evidence if he will not be the party paying the bill.[24] That would be fraud. If the defendant does raise, even by implication, the "I'm just a poor cop, I can't afford these bills" defense, he has effectively opened the door to attack. Once the door has been opened, the plaintiff is entitled to show who is paying the bill, the municipality, an insurance company, etc.[25] In my experience,

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[24] *See* Kemezy v. Peters, 79 F.3d 33, 37 (7th Cir. 1996). The court went on to state:

> The defendant should not be allowed to plead poverty if his employer or an insurance company is going to pick up the tab . . . It is bad enough that insurance or other indemnification reduces the financial incentive to avoid wrongdoing . . . It would be worse if the cost of insurance fell . . . because the insurance company knew that its insured could plead poverty to the jury.

[25] *See* Lawson v. Trowbridge, 153 F.3d 368, 379-80 (7th Cir. 1998) (holding that once a defendant has opened up the area by presenting evidence concerning his financial affairs, the plaintiff has an absolute right to introduce evidence that the defendant will be indemnified, and the exclusion of such evidence is reversible error).

more than ninety-nine percent of the employers pay the punitive damages awards.

This is when you get to the issue of the purpose of punitive damages. The purpose is precisely the same as that of a criminal penalty in a criminal case: deterrence, both specific and general. General deterrence is meant to send a message and to express the outrage of the community as to what has happened.[26] In order for the jury to accomplish these purposes or goals, they need to know what it will take to inflict the appropriate amount of pain. For example, a person earning fifty thousand dollars a year will have a smaller punitive damage award than a municipality with a budget of ten million dollars a year. In assessing both common law and statutory punitive damages for corporate offenders, case law suggests that it is proper to consider the assets and cash flow of the corporation.[27] If the door is opened by the defense, the plaintiff can and should walk through it. Simply because the defendant says he will be paying himself does not necessarily mean it is true. If a particular municipality has a track record of indemnifying punitive damages awards, once the door is open you are entitled to put on that kind of evidence.

The majority of cases have held that the plaintiff cannot initiate the subject of how deep the pockets actually are. It is for the defendant to decide whether or not to exercise his options.[28] Although there have been several cases that have implied that the plaintiff can introduce evidence of the defendant's assets before

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[26] *See Smith*, 461 U.S. at 49. The Court stated, "[D]eterrence of future egregious conduct is a primary purpose of both § 1983 and of punitive damages." Smith went on to say that "[p]unitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future." (citing RESTATEMENT (SECOND) OF TORTS § 908(1) (1979)) (internal quotations omitted).

[27] Because one of the purposes of a punitive damage award is to punish the wrongdoer, it is appropriate for the jury to consider evidence concerning the financial resources of the defendant who will pay the award. *See, e.g.*, Bertero v. National General Co., 118 Cal. Rptr. 184 (1975). *See also* Lenz v. CNA Assurance Co., 9 Conn. L. Rptr. No. 3, 87 (1993).

[28] *See Kemezy*, 79 F.3d at 36.

the defendant does,[29] the weight of authority holds that the plaintiff cannot do so without at least getting an advanced ruling from the trial judge.[30] If this evidence is introduced, you run the risk of a mistrial, sanctions, or losing the opportunity to appeal.

On the other hand, if a defendant has not elected to put on "I'm just a poor cop" evidence, and the verdict is unfavorable to him, it is too late to raise the issue after the verdict is rendered. On the defendant's motion for remitter, he may not argue, "Wow, I can't afford to pay this bill." This issue came up in a Second Circuit case, *Zarcone v. Perry*.[31] During an evening session of traffic court, Judge Perry had a cup of the plaintiff's coffee from his mobile food vending truck.[32] Judge Perry thought the coffee was horrible. The judge had the vendor handcuffed and hauled into his chambers to berate him. He reduced the plaintiff to tears about the quality of his coffee.[33] Judge Perry was sued under §1983 for depriving the plaintiff of his constitutional rights. The plaintiff was awarded a nice jury verdict, including a tremendous sum of money in punitive damages.[34] Judge Perry appealed to the Second Circuit, arguing that he could not afford to pay the award. The court said it was too late, and that Judge Perry should have mentioned that before the jury returned its verdict.[35]

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[29] *See* e.g., Adams v. Murakami, 54 Cal. 3d 105 (1991).

[30] *See e.g.*, Larez v. Holcomb, 16 F.3d 1521 (9th Cir. 1994) (holding that the introduction of evidence on insurance coverage required an advance ruling from the court, and failure to obtain this ruling required reversal of plaintiff's verdict).

[31] 572 F.2d 52 (2d Cir. 1978).

[32] *Id.* at 53.

[33] *Id.*

[34] *Id.* The jury awarded Plaintiff $80,000 in compensatory damages and $60,000 in punitive damages.

[35] *Id.* at 56. (holding that, "the decided cases and sound principle require that a defendant carry the burden of showing his modest means . . . if he wants this considered in mitigating damages . . . Appellant chose not to offer such proof, despite his awareness of his potential liability.").

There have been a number of cases placing a cap on the amount of punitive damages.[36] These cases are very fuzzy. They are based on a concept that somewhere out in space there exists a number that is too large for a punitive damage award to survive unscathed. Accordingly, there have been a number of punitive damages cases that have ordered remitter.[37] There was a long opinion by Judge Sotomayor, before she went to the Second Circuit, analyzing the factors that a court should consider in deciding how much is too much.[38] There has been a tendency of some courts to think in terms of a multiple of the compensatory damages award.[39] Some courts say two to one is sufficient, while

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[36] *See, e.g.*, Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (holding that there is a substantive constitutional limit on the size of punitive damage awards, and that due process requires that states afford litigants the opportunity for appellate review of the amount of such awards). *See also* Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993) (holding that courts are instructed to limit the award to the maximum amount "necessary to accomplish the goals of punishment and deterrence..."); BMW of North America Inc. v. Gore, 517 U.S. 559 (1996) (holding that $4,000 compensatory damage award and $4 million dollar punitive damage award must be reduced to $2 million. The Court applied a "grossly excessive punishment" test.).

[37] *See Honda Motor Co.*, 512 U.S. at 415; *BMW of North America, Inc.*, 517 U.S. at 559; *Morgan*, 997 F.2d at 1244.

[38] *See* Greenbaum v. Handelsbanken, 67 F. Supp. 2d 228 (S.D.N.Y. 1999). Judge Sotomayor stated in her opinion: "In reviewing the constitutionality of punitive damage awards under *Gore*, courts must view the evidence in the light most favorable to the nonmoving party and reduce the award only if it 'shocks the judicial conscience." (citing Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 683 (2d Cir. 1993)). Courts undertaking this review should examine three basic indicia: "(1) the degree of reprehensibility of the conduct; (2) the ratio of punitive damages to damages awarded in compensation for any harm suffered; and (3) the disparity between punitive damages awarded and the civil or criminal penalties that could be imposed for comparable conduct." *See Gore*, 517 U.S. at 574-75.

[39] *See e.g.*, TXO Production Co. v. Alliance Resources Co., 509 U.S. 443 (1993) (the Supreme Court sustained an $800,000 punitive damages award that was four times the amount of the compensatory damages); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (the Supreme Court sustained a $10,000,000 punitive damages verdict which was 526 times the compensatory damages award).

others say four to one is okay. In reality, however, those cases do not make much sense.

In *Lee v. Edwards*,[40] another one of my office's cases, the plaintiff was awarded only $1 in compensatory damages, but $200,000 in punitive damages.[41] On appeal, the Second Circuit cut the award back to $75,000.[42] I suppose you could say that *Lee v. Edwards* stands for the proposition that anything higher than $75,000 to one might be too large a ratio, but up to that point is fine. One of the interesting things about *Lee v. Edwards* is that *Edwards* never claimed poverty at trial. Of course, he was indemnified by his employer. Nevertheless, in cutting the award back from $200,000 to $75,000, the Second Circuit decided that he was a cop and could not afford to pay this huge award.

Finally, there was a Second Circuit decision, *Ramirez v. The New York City Off-Track Betting Co.*,[43] written by Judge Calabresi, which discussed the kind of oral argument that is permissible for a plaintiff to make in arguing for punitive damages.[44] The court held, over the defendant's objection, that it is appropriate to argue to the jury that punitive damages may be awarded for the purpose of sending a message to the defendant and the country.[45] *Ramirez* held that this argument "merely suggests that the jury should send a message that this country's civil rights laws are vigorously enforced and the plaintiff should be fully compensated despite the fact that the defendant is a government agency."[46] The court held that this was totally appropriate. Clearly, this is how to prevail and get the big monetary awards for punitive damages in §1983 cases.

In the end, it is about what every trial lawyer learns from the beginning: you have to appeal to the gut of the jury. There are two wild cards that can make a trial attorney's life very comfortable: emotional distress damages and punitive damages.

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[40] 906 F. Supp. 94 (D. Conn. 1995).
[41] *Id.* at 97.
[42] Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996)
[43] 112 F.3d 38 (2d Cir. 1997).
[44] *Id.* at 40.
[45] *Id.*
[46] *Id.*

There are virtually no limits to those types of damages beyond the outrage factor. It is the jury's outrage factor that will give the awards that give the attorney a stable and happy life.

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