# The Punitive Damages Cap

by Burton Craige

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In 1995, under intense pressure from the "tort reform" lobby, the North Carolina General Assembly enacted the punitive damages statute.[1] This statute includes a provision capping all punitive awards at $250,000 or three times the award of compensatory damages.[2]

However, the "problem" that the cap purportedly addresses—excessive awards of punitive damages—has never existed in North Carolina. And by arbitrarily limiting damages to $250,000, regardless of the wealth of the defendant or the egregiousness of the defendant's misconduct, the cap fundamentally undermines the purposes of punitive damages. In fact, the cap benefits only wealthy tortfeasors that have engaged in outrageous misconduct, and it harms North Carolina's most vulnerable citizens. Nor can the cap be justified as a preventive measure: multiple safeguards, apart from the cap, protect defendants from excessive punitive damage awards.

For more than 200 years, North Carolina juries exercised their responsibility under common law to assess punitive damages in cases of extreme misconduct by tortfeasors. One would think that the legislature would have refrained from jettisoning two centuries of common law tradition unless there had been powerful evidence that juries had abused their power and the judicial system had failed to correct those abuses. In fact, proponents of the legislation were unable to cite a single improper award of punitive damages in North Carolina history. They were forced to rely on exaggerated anecdotes from other jurisdictions, because there was no record of excessive punitive damages in North Carolina.[3] The General Assembly slashed citizens' constitutional rights to cure a "problem" that existed only in the fevered imaginations of corporate lobbyists.

### *Meaningful Punishment Depends on Defendant's Wealth*

Under North Carolina's statute, punitive damages may be awarded for two purposes: "to *punish* a defendant for egregiously wrongful acts and to *deter* the defendant and others from committing similar wrongful acts."[4] When the defendant is wealthy, the cap on damages radically undermines the statute's purposes.

The amount required to impose meaningful punishment on a tortfeasor and to deter it from committing future acts of misconduct obviously depends on the wealth of the defendant. As the North Carolina Supreme Court recognized 150 years ago, "[a] thousand dollars may be a less punishment to one man than a hundred dollars to another."[5] Under the statute, the jury may consider "[t]he defendant's ability to pay punitive damages, as evidenced by its revenues or net worth" in determining the amount of punitive damages.[6] Yet, the statute then nullifies the jury's considered judgment by capping the award at an amount that bears no relationship to the defendant's financial condition.

Like the North Carolina Supreme Court, the United States Supreme Court recognizes that the amount of the punitive damage award should be tailored to the financial condition of the defendant.[7] In *TXO Production Corp. v. Alliance Resources Corp.,* the jury awarded $19,000 in compensatory damages and $10 million in punitive damages.[8] The Supreme Court rejected the defendant's argument that the disparity between the punitive and compensatory awards violated due process.[9] The Court noted that the jury properly considered the defendant's "impressive net worth."[10] TXO had a net worth between $2.2 billion and $2.5 billion.[11] Those "vast financial resources" supported the jury's $10 million punitive damage award.[12]

A case challenging the cap on punitive damages is now pending in the North Carolina Court of Appeals. In *Rhyne v. K-Mart*, K-Mart's security officers assaulted Dan and Alice Rhyne in the company's parking lot. The company then maliciously directed that Mr. Rhyne be prosecuted for charges that it knew were false to cover up its own misconduct.

At trial, the plaintiffs proved their entitlement to punitive damages by clear and convincing evidence. The jury then considered evidence of K-Mart's financial condition. K-Mart's revenue in 1999 was $33,674,000,000, and it had assets of $14,166,000,000 and a net worth of $8,539,300,000. Properly instructed about the purposes of punitive damages, the jury awarded each plaintiff $11.5 million in punitive damages, an amount it deemed necessary to punish K-Mart and to deter it from engaging in similar outrageous conduct. Although the trial judge explicitly found that the evidence supported the verdicts, he was compelled by the cap to cut the verdicts to $250,000.

Reducing the awards to $250,000 utterly defeats the purposes of punitive damages. The reduced award is approximately .003 percent of K-Mart's net worth, or less than .0007 percent of its revenue in 1999. The ineffectiveness of such a trivial sanction is apparent if we consider a comparable award against an individual; a $250,000 punitive damage award against K-Mart, with its net worth of $8,539,300,000, is equivalent to an award of $14.64 against an individual with a net worth of $500,000—less than the cost of a ticket for double-parking in Raleigh. A comparable punishment against an individual with an annual income of $100,000 (as compared with K-Mart's annual revenue of $33,674,000,000) would be a fine of seventy-three cents—less than the difference in price between one and two scoops of ice cream at Baskin-Robbins. By reducing the jury's award to the vanishing point, the statutory cap eliminates the incentive for corporations like K-Mart to correct their abusive practices.

### Compensatory and Punitive Damages Need Not Always Correlate

The statute limits punitive damages awards to $250,000 or three times the award of compensatory damages. The tort reform lobby argues that the $250,000 cap should be upheld because plaintiffs with large compensatory damage awards can potentially recover punitive damages greater than $250,000. In some cases, however, a large award of punitive damages is necessary, even when compensatory damages are relatively small. Consider the following examples.

### Abuse and Neglect of Nursing Home Patients

If a nursing home resident dies because of the home's willful or wanton neglect, her estate can make no claim for lost income. If she was elderly and infirm, her life expectancy would have been short, reducing damages for loss of society and companionship. If her mental status was impaired, proving damages for pain and suffering would be difficult. It is precisely these qualities—lack of financial resources, physical weakness, and impaired mental status—that make nursing home residents particularly vulnerable to abuse and neglect. The cap on punitive damages deprives nursing home residents and their families of the only remedy capable of deterring future egregious misconduct.

In *Lutz v. Brian Center Nursing Care/ Hickory, Inc.,* a 73-year-old woman suffered a stroke and was admitted to a long-term nursing care facility.[13] During her three-and-a-half months in the facility, the staff ignored her physician's written orders, overdosed her with Coumadin for thirty-five days, ignored multiple signs of internal bleeding, ceased providing nursing care when the patient's Medicare insurance expired, and failed to transfer her to the hospital when her condition became critical.

The decedent's estate filed suit before the effective date of the new punitive damages statute. When the case was tried in 1997, a jury awarded $250,000 in compensatory damages and $2,000,000 in punitive damages. In response to the defendant's post-trial motions, the trial court carefully reviewed the punitive damage award and concluded that the verdict was "supported by evidence, is not excessive, is not the product of passion or prejudice; and comports with due process of law."

In a unanimous decision, the N.C. Court of Appeals affirmed. The court noted that the defendant admitted negligence and presented no expert witnesses. By contrast, the plaintiff's experts—two directors of nursing from North Carolina nursing homes and a physician—identified a total of 142 negligent acts that occurred during the patient's stay at the Brian Center, all of which were causally related to her death. The court of appeals held that:

> There was evidence that at a time when Mrs. Lutz's condition was acute and required additional monitoring and charting, defendant failed to properly monitor Mrs. Lutz due to her Medicare benefits expiring. A jury could reasonably have determined that defendant, by this deliberate action, exhibited a reckless indifference to the rights and welfare of Mrs. Lutz which led to her death.

The court of appeals considered the amount of the jury's award in light of the factors articulated by the United States Supreme Court in *BMW of North America, Inc. v. Gore* and concluded that the jury's award was not excessive.[14]

*Lutz* illustrates the proper allocation of responsibility between jury, trial judge and appellate court. The facts in Lutz, carefully reviewed in the court of appeals' opinion, evidence a pattern of outrageous neglect of a helpless, desperately ill patient. As the trial judge and court of appeals recognized, the jury's award of punitive damages was a rational and measured judgment properly designed to effectuate the purposes of punitive damages. Yet, if Lutz had been tried under the current statute, the jury's award of punitive damages would have been arbitrarily slashed by $1,250,000, without regard to the reprehensibility of the conduct or the financial condition of the defendant.

### Abuse and Neglect of Persons with Disabilities

Similar considerations reduce the potential for compensatory damages for persons with disabilities. For example, a mentally retarded adult in an institution is particularly vulnerable to substandard care, neglect and abuse.

Assume for a moment that a mentally retarded man in a private psychiatric hospital is subjected to repeated acts of sexual

abuse by members of the hospital staff. Assume that, because of public relations concerns, the for-profit national chain that owns the hospital instructed the hospital administration to ignore previous reports of similar abuse and to cover up the abuse in this case.

The family of the patient brings suit against the national chain. Compensatory damages are small: no lost income, few medical expenses, and pain and suffering that are difficult to ascertain and convey because of the patient's retardation. In the punitive damages phase, the jury properly considers the reprehensibility of the sexual abuse, the willful neglect by senior administrators, and the wealth of the defendant, and it awards $50,000 in compensatory damages and $2,500,000 in punitive damages. Under the current statute, the punitive damage award would be reduced to $250,000—an amount that may not even merit a report to the defendant's board of directors. The effect is to deter other patients' families from pursuing meritorious claims of sexual abuse and to reward the defendant for its deliberate misconduct.

***Sexual Harassment***

Sexual harassment remains a common phenomenon in the workplace. The typical victim is a woman whose male supervisor subjects her to a hostile work environment or demands that she provide him with sexual favors. If the employer takes prompt remedial action, the case is usually resolved without litigation. However, if the employer protects the harasser and retaliates against the victim, the victim's only recourse may be a lawsuit against the employer.

Compensatory damages in a sexual harassment case are usually modest. When a secretary earning $24,000 a year is forced to leave one job and find another, lost income is negligible. Even in severe cases of sexual harassment, medical bills for psychological distress rarely exceed $10,000. North Carolina juries typically award damages for emotional distress in the $25,000 to $75,000 range.

Given these constraints on compensatory damages, the new statute severely limits the employer's exposure to punitive damages, even when the plaintiff has been subjected to the most extreme sexual harassment, and the employer has engaged in a deliberate and vicious campaign of retaliation. If the defendant employer is a wealthy corporation, a $250,000 punitive damage award is a trivial sanction that neither punishes nor deters.

***Toxic Torts***

When a manufacturer deliberately dumps toxic waste onto its neighbor's property, compensatory damages are often limited and difficult to quantify. In poor neighborhoods that typically border manufacturing plants, the diminution in property values for a homeowner will rarely exceed $20,000. The health problems resulting from exposure to toxic chemicals are limited in the short run, and speculative in the long run, and the litigation expenses required to pursue a toxic tort claim are notoriously high. A significant punitive damage award may be the only meaningful remedy for those victimized by the discharge of toxic wastes. The cap on punitive damages destroys that remedy, and enables polluters in North Carolina to operate with impunity.

***Multiple Safeguards Already in Place***

If the punitive damages cap is held to be unconstitutional, numerous safeguards protect defendants from excessive awards. Under Chapter 1D, the judge will only submit the punitive damages issue to the jury if the plaintiff establishes his entitlement "by clear and convincing evidence."[15] The trial court instructs the jury that, in determining the amount of the award, it "[m]ay consider only that evidence" that relates to

## *Telling the Story . . .*

In her younger days, Mary Ruth Lutz was a beauty who made an impact on our nation in time of war. A former Miss Tennessee, Mary Ruth posed for a World War II recruiting poster that became famous. It featured her in a sailor's uniform with the caption, "Gee!! I wish I were a man. I'd join the Navy."

More than fifty years later, Mrs. Lutz was living in Hickory after having married, raised a son, and helped to start several successful businesses. In 1993, however, at age 73, she suffered a stroke and went to a nursing home affiliated with a huge national chain.

To lessen the risk of a second stroke, Mrs. Lutz' doctor placed her on a blood thinner and left orders for how frequently it was to be given. But in less than four months, Mrs. Lutz was dead, a victim of repeated overdosing by nursing home nurses until she eventually bled to death internally.

Mrs. Lutz' care was so poor that it prompted a state investigation. The state found nurses repeatedly overdosed Mrs. Lutz on the blood thinner; ignored lab work that showed she was being overdosed; and failed to report large new bruises that were a sign of internal bleeding.

The day before she died, a worker at the home dropped Mrs. Lutz while transferring her to her bed, using only one person for the transfer instead of the two required by doctor's orders. Mrs. Lutz began to vomit

the factors enumerated in the statute.[16]

Once the jury makes an award of punitive damages, the trial court, upon proper motion, has the duty to determine whether the award is excessive and whether it comports with state and federal constitutional standards. That review is guided by the statute, which requires the trial judge to "state in a written opinion its reasons for upholding or disturbing the . . . award," and to "address with specificity the evidence, or lack thereof, as it bears on . . . the amount of punitive damages."[17]

If the defendant challenges the amount of the award on federal due process grounds, the trial court must consider whether the award is excessive in light of the reprehensibility of the conduct, the ratio of actual and potential harm to punitive damages, and comparable sanctions for similar misconduct.[18] The proponents of the statutory cap have failed to offer any evidence that North Carolina trial judges are incapable of performing their duty to review awards of punitive damages.

If the jury disregards the court's instructions and awards an excessive amount of punitive damages, and if the trial court fails to discharge its responsibility to order a remittitur or a new trial, the defendant can obtain appellate review of the punitive damage award. The appellate court has an independent responsibility to determine if the trial court abused its discretion in upholding the jury's verdict.[19] The requirement under G.S. § 1D-50 that the trial judge articulate his reasons for upholding the award and specify the evidence supporting the amount of punitive damages ensures that the appellate court will have an adequate basis to review the lower court's decision.

North Carolina's cap on punitive damages is not only bad policy, it is also unconstitutional. The cap violates the North Carolina Constitution's "sacred and inviolable" right to trial by jury (Art. I, § 25), the right to open courts (Art. I, § 18), the separation of powers (Art. 1, § 6 and Art. IV, § 1), and the guarantees of due process and equal protection (Art. I, § 19).[20] The cap cannot withstand constitutional challenge. By declaring the cap unconstitutional, the North Carolina appellate courts can restore our common law heritage and enable juries and judges to discharge their duty to punish and deter outrageous misconduct. ■

[1] G.S. § 1D-1, et seq.
[2] G.S. 1D-25(b).
[3] *See* "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?" 74 N.C.L.Rev. 2174, 2190 (1996) (comprehensive survey of appellate cases and jury verdicts "reveals no apparent abuse of the doctrine of punitive damages").
[4] N.C.G.S. § 1D-1 (emphasis added).
[5] McAulay v. Birkhead, 35 N.C. 28, 1851 WL 1215 (1851). Accord, Pendleton v. Davis, 46 N.C. 98, 1853 WL 1452 (1853).
[6] N.C.G.S. § 1D-35(2)(i).
[7] *See* Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 1045 (1991)(trial court properly instructed jury to consider "financial position" of defendant).
[8] TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711 (1993).
[9] *Id.* at 462, 113 S.Ct. at 2722.
[10] *Id.* at 462 n.28, 113 S. Ct. at 2722 n.28.
[11] TXO, 509 U.S. at 450 n.9, 113 S.Ct. at 2716 n.9.
[12] Id. at 469, 113 S.Ct. at 2726 (Kennedy, J., concurring).
[13] Lutz v. Brian Center Nursing Care/Hickory, Inc., 134 N.C.App. 377, 526 S.E.2d 216, *cert. denied*, 351 N.C. 188, 541 S.E.2d 715 (1999)(unpublished).
[14] BMW of North America, Inc. v. Gore, 516 U.S. 559, 134 L.Ed.2d 809 (1996).
[15] G.S. § 1D-15(b).
[16] G.S. § 1D-35.
[17] G.S. § 1D-50.
[18] BMW v. Gore, 517 U.S. at 574-75, 116 S.Ct. at 1598-99.
[19] *See* Anderson v. Hollifield, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997); Campbell v. Pitt County Memorial Hospital, 321 N.C. 260, 264-65, 362 S.E.2d 273, 275-76 (1987).
[20] For a complete discussion of the constitutional issues, read the plaintiffs' brief in the N.C. Court of Appeals in *Rhyne v. K-Mart*. The brief is available on the Academy Web site at <**www.ncatl.org**>.

blood from internal bleeding because she had been given too much blood thinner, but the doctor was not told. Hours later, when she turned blue and dusky and nurses knew she was dying, records show they waited over an hour before calling an ambulance.

After her death, the state of North Carolina investigated the nursing home, imposed a small fine, and ordered the home to make changes and re-train its nurses. However, the nursing home never made the changes it promised it would institute, did no training, and actually changed its policies to make them more lax about when nurses were required to call a doctor.

After his wife's death, Mr. Lutz sued the nursing home. The company admitted negligence—acknowledging that its errors had killed Mrs. Lutz—but offered only a small amount in settlement, arguing that she was old and had had a stroke. Their attitude was simply business as usual.

Mr. Lutz filed suit and asked for punitive damages to punish the nursing home for its actions. Plaintiff's experts testified that in the 110 days Mrs. Lutz was in the nursing home, more than 140 violations of the standard of care occurred that were related to her death. The jury awarded $250,000 in compensatory damages and $2 million in punitive damages.

Unfortunately, the forceful message sent by that jury—punishing the nursing home company in the only language it understood—could not be sent today. A change in the law now shields companies from punitive damages for the actions of their employees by capping the amount of punitive damages at $250,000 or three times compensatory damages.

*— by Bill Bystrinski*