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The Case of Punitive Damages v. Democracy

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Join me for a cup of coffee and a slice of pizza as we contemplate the workings of democracy. I'm afraid the coffee's tepid, though, the pizza won't be here for a while, and democracy is headed for trouble. McDonald's has lowered the temperature of its coffee because powerful government policy makers have ruled that "the coffee is too hot out there," and Domino's has canceled its 30-minute delivery guarantee because those same decision makers have concluded it causes too many accidents. Vote the bums out, you say? Sorry, the policy makers here were unelected, unaccountable, temporary tyrants: juries imposing often staggering punitive damages.

Put to one side the host of other arguments about punitive damages, and consider a more fundamental issue: their impact on the way we govern ourselves.

While punitive damages date back at least to the 18th century, until recently the awards were small and rarely even sought. But as Justice Sandra Day O'Connor has noted, "Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards." What was once a very limited legal tool used in cases of intentional torts like battery and slander has become, in the words of the president of the California Trial Lawyers Association, a means "to deter despicable acts by corporate America."

Consistent with this view, jurors across the country are regularly urged to impose punitive damages large enough to "send a message" to the

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defendant and others similarly situated. Consider the following jury instruction, approved in 15 states: "[I]f you believe that justice and the public good require it, you may . . . award an amount which will serve to punish the defendant and to deter others from the commission of like offenses." Elsewhere, the same message is conveyed by plaintiffs' lawyers in their jury arguments.

Interviews with jurors in case after case reveal that they have taken these admonitions to heart and have imposed punitive damages to "teach 'em a lesson" or "send a message." (See related editorial: "REVIEW & OUTLOOK (Editorial): Junk Science Junked" -- *WSJ* Jan. 19, 1995) The message juries send is basically "Stop." Implicit in this is a judgment that the conduct in question is not merely tortious, meaning that those engaging in it should pay compensation when someone gets injured, but so wrongful that it should be abandoned altogether.

There is an important difference. When juries award compensatory damages, they force manufacturers to internalize the cost to society of their activities; the price of the product may go up, but it will generally still be available to those willing to pay the higher price. Using punitive damages to demand that a product be taken off the market altogether, or changed in ways that will make it less useful, reflects a judgment that the benefits derived by those who use the product don't justify the risk of injury.

Of course, we make judgments like these all the time, but normally we do so through legislation or regulation. Having such judgments made by juries, in the emotion-laden atmosphere of personal injury trials, raises issues that deserve careful exploration.

- Legislators are popularly elected and represent a variety of geographic and other interests. The political process ensures that those making important policy decisions at least roughly reflect the views of those who will be bound by them. By contrast, it is often very difficult to tell the policy views of jurors until they actually render a verdict; any group of six or 12 individuals may have views wholly unrepresentative of the community at large.

- Legislative judgments are made in a public arena and are subject to political checks. If a legislature were considering whether to prohibit restaurants from selling coffee hotter than 160 degrees, all concerned—coffee-machine vendors, coffee distributors, restaurant operators and the coffee-drinking public—could provide input.

Trials are much different. Only the parties before the court are allowed to present their views; jurors are instructed to disregard input from newspapers or outside parties—including parties that may have a legitimate interest in the outcome. Jury deliberations are kept secret

until after the verdict, so it's difficult to tell what factors--legitimate or not--influenced the decision.

- Legislators are repeat players in the political process, so no single vote determines the degree of influence they will exercise. An unsuccessful legislative initiative can be taken up again in future years. Jurors are brought together to consider only the issues raised by a single case. If they fail to act, their influence is forever lost. The pressure to over-legislate, or to legislate based on incomplete information, is great. While most juries will resist the pressure, it only takes a single runaway jury to send shock waves through an entire industry.

- Legislative judgments are geographically bounded. If New Mexico limits coffee temperatures to 160 degrees, coffee-drinkers in New York can still get their java piping hot. It is a strength of our federal system that states can serve as laboratories for experimenting with various legislative judgments. Over time, we can compare the experience of states and see whether the reduction in burns merits forcing consumers to suffer lukewarm coffee. Punitive damage awards know no borders: As the McDonald's coffee case illustrates, jurors are encouraged to base the punitive damages award on the defendant's nationwide revenues for an activity, a measure obviously designed to force a change in policy well beyond the locality or state where the lawsuit is brought.

- Legislatures issue relatively precise edicts--for example, "You may not sell coffee hotter than 160 degrees." Jury verdicts are elliptical in the extreme. After the award in the Liebeck case, McDonald's is painfully aware that 180 degrees is too hot, but how can it tell what temperature is OK? Will it be insulated from punitive damages by turning its pots down to 175 degrees, 170, 165? There's no telling. McDonald's isn't safe even if the next jury says 170 is fine, since that jury's verdict isn't binding on future juries.

- It is often devilishly hard to decide whether to ban an activity altogether, or to permit it subject to payment of compensation for those it hurts. The sad reality is that many very useful activities and commodities--airplane and automobile travel, gas and electricity in the home, to name only a few--carry the risk of injury and death for many people. Nevertheless, such activities are allowed, even encouraged, because we as a society have decided that our lives would on the whole be far worse without them. Such "tragic choices," as my colleague on the Second Circuit, Judge Guido Calabresi, calls them, are an inevitable aspect of modern life; legislators and regulators make them on a continuing basis, often adjusting prior judgments in light of new information.

Punitive damage awards, imposed on activities that are permitted --

often approved -- by legislators and regulators, run at cross purposes with those regulatory judgments. Tort litigation in general, and punitive damages in particular, have made unavailable in the U.S. products that regulatory bodies have found safe, such as medicines approved by the Food and Drug Administration and small airplanes approved by the Federal Aviation Administration. Moreover, even when the product isn't entirely prohibited, legislation by juries tends to stifle innovation: Manufacturers are extremely wary of introducing improvements to product designs that have survived a barrage of litigation, lest they invite a new wave of lawsuits.

None of this calls into question the constitutionality of punitive damages--a matter the Supreme Court has taken up on various occasions over the past several years. It does, however, pose serious questions about the workings of our government. Juries can be remarkably efficient at sorting out the often complicated facts presented during the course of a trial, and jury service gives ordinary citizens an opportunity to participate in the administration of justice. However, the emerging trend of empowering juries to act as mini-legislatures is at odds with the central democratic principle that policy questions are decided by the people's elected representatives, while small groups of citizens--drawn essentially at random--apply those judgments to individual cases.

Far from carrying out the will of the people, juries imposing punitive damages may be usurping the role of the legislature, thereby benefiting a few plaintiffs and their lawyers, but denying the large majority of the people goods and services that make life safer, easier and more enjoyable. To those of us who believe that, despite its faults, democracy is the best way to govern ourselves, this should be a matter of profound concern.

The Jurors' Message

- The jury in the McDonald's coffee case awarded Stella Liebeck \$2.7 million (later reduced by the judge to \$480,000) to deliver a message that, as one juror put it, "the coffee's too hot out there."
- The foreman of the jury that assessed the largest punitive damage award ever explained that its \$5 billion for the Exxon Valdez oil spill was "saying to the Exxons of the world, whatever it takes, you're going to clean up your mess and you're going to be punished." He warned, "we're going to be watching you and we don't want it to happen again."
- To send a message to Hilton Hotels Corp., a jury hit Hilton with \$5 million in punitive damages for failing to prevent drunken aviators

from molesting a woman attending the infamous Tailhook Convention.

- According to an article in the Arizona Republic, an Arizona jury stuck a Phoenix bowling alley for \$5.8 million for serving too many beers to a man who then crashed his car into a young woman and killed her. The verdict "was intended to send a clear warning to Arizona tavern operators about the legal perils of serving drinks to intoxicated patrons."

- A San Diego jury awarded \$475,000 in punitive damages for misrepresentations and violations of consumer protection laws, after a car dealership asked a customer to increase the down payment on a used Cadillac because his credit hadn't been approved. According to its foreman, the jury wanted to "get the word out that anyone purchasing an automobile should get a fair shake."

(See related letter: "Letters to the Editor: Societal Cost Control vs. Compassion" -- *WSJ* Feb. 9, 1995)