

IN THE SUPREME COURT OF TEXAS

No. 96-0287

OWENS-CORNING FIBERGLAS CORPORATION, PETITIONER

v.

ROY MALONE ET AL., RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

- consolidated for oral argument with -

No. 96-0512

OWENS-CORNING FIBERGLAS CORPORATION, PETITIONER

v.

BARBARA WASIAK, ET AL., RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued on November 21, 1996

JUSTICE HECHT, concurring in the judgment.

My most serious reservation about the Court's opinion is its conclusion that evidence of pending and future claims and unpaid punitive damage awards should never be admissible.

Comment e to Section 908 of the *Restatement (Second) of Torts* reaches the opposite conclusion:

Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with

greater weight being given to the prior awards.¹

My initial concern is that the Court's rejection of comment e is entirely gratuitous. The evidence of future punitive damages awards offered in these cases is not such that the judgments would be affected under the Court's opinion. Rather than rejecting comment e out of hand, the Court could just as easily argue that even if comment e were followed, the result in these cases would be no different. The Court must go out of its way to disavow comment e's application, not only in the present cases where it makes no difference, but in any cases, ever. In these the first cases in which the subject has been raised, I find it hard to understand how a categorical rejection of a rule the respected *Restatement* has endorsed for almost two decades can be justified.

The Court gives two reasons for rejecting the *Restatement* position. One is that "many punitive damage awards are reduced after trial, reversed on appeal, or settled at a discount."² That is true, of course, but the same can be said for any litigated liability. The mere fact that future liabilities are uncertain does not excuse their being reported and estimated routinely in financial statements. Something is wrong with the argument that juries who must determine past and future mental anguish damages on very little solid evidence cannot even hear evidence of potential punitive damage exposure. To the question, can a jury hear evidence of possible future suffering in determining future mental anguish, the Court would unhesitatingly answer yes. To the question, can a jury hear evidence of lost future earning capacity based on how long a plaintiff is likely to live and work, the Court's answer would likewise be unequivocally affirmative. To the question, can a jury hear evidence of potential punitive damages exposure based on experience to date, the Court answers no. If any principle joins these positions, it is stretched far too thin to be visible.

While I certainly do not argue for the admission of speculative evidence in these or any other cases, it seems to me that the *Restatement* is exactly right in suggesting that evidence of a future risk of punitive damages *can be* definite enough to be submitted to the jury. When a party has defended

¹ RESTATEMENT (SECOND) OF TORTS § 908, cmt e (1979).

² *Ante* at ____.

multiple lawsuits arising out of the same subject matter, a sufficient pattern of awards and payments may develop for future liability to be estimated with reasonable reliability. In such instances I see no reason why a jury should be kept any more ignorant of the evidence than, say, the defendant's potential investors or lenders. Indeed, it would be improper to exclude such evidence. If it is essential that potential investors in a public company know its risks of liability for punitive damages (as well as actual damages), why is that same information irrelevant to a jury in assessing punitive damages? On the other hand, I can just as easily conceive of circumstances in which the risk of potential punitive or speculative that the probative value of any evidence the jury could be given would be far outweighed by its likely prejudicial effect. Comment e does not prohibit exclusion of evidence of future punitive damages awards; it only allows admission of such evidence. That the risk of punitive damages liability may sometimes be uncertain is reason to exclude particular evidence, but no reason to abolish the rule allowing it in other circumstances.

The second reason that the Court gives for rejecting the *Restatement* position is that others have. Again, that is true, but those who have are in a distinct minority. The weight of authority, not surprisingly, supports the *Restatement*.

The Model Uniform Products Liability Act recognizes a defendant's potential exposure to other claims for punitive damages and other sanctions among the factors to be considered by the court in fixing the amount of punitive damages. The Act calls for consideration of "the *total effect* of other punishment imposed or likely to be imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of criminal penalties to which the product seller has been or may be subjected".³ As the accompanying analysis explains,⁴ the Act draws from an earlier Minnesota statute,⁵ which in turn

³ MODEL UNIFORM PRODUCT LIABILITY ACT § 120(B)(7) (1979) (reprinted in 44 FED. REG. 62714, 62748 (1979)(emphasis added)).

⁴ 44 FED. REG. at 62748-62749.

⁵ MINN. STAT. ANN. § 549.20(3) (West Supp. 1978).

drew upon the factors suggested by Professor David G. Owen in 1976.⁶ At least Kansas,⁷ Oregon,⁸ Minnesota,⁹ Mississippi,¹⁰ and Montana¹¹ all have similar statutory language.

Case law, too, recognizes the relevance of past and potential exposure to additional awards for the same misconduct as an antidote to overkill concerns, sometimes as part of the review applied by courts, and other times as relevant evidence which could be presented to a jury. High courts in at least seven states — Alaska,¹² Colorado,¹³ Florida,¹⁴ Minnesota,¹⁵ Oregon,¹⁶ West Virginia,¹⁷ and

⁶ David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1324 (1976).

⁷ KAN. STAT. ANN. §§ 60-3701, 60-3702 (West 1988) (factors to be considered by court in fixing amount include “total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected”).

⁸ OR. REV. STAT. § 30.925 (1979) (factors for fact finder include “the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.”).

⁹ MINN. STAT. ANN. § 549.20(3) (West Supp. 1998) (any award of punitive damages is to be measured by factors including “the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject”).

¹⁰ MISS. STAT. ANN. § 11-1-65 (West 1993) (among other factors, jury may consider “any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages” and judge, in reviewing award, may consider “[i]n mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct”).

¹¹ MONT. STAT. § 27-1-221 (West 1997) (including “previous awards of punitive or exemplary damages” and “potential or prior criminal sanctions . . . based upon the same wrongful act”).

¹² *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 n.17 (Alaska 1979), *modified*, 615 P.2d 621, *cert. denied*, 454 U.S. 894 (1981) (approving Professor Owen’s factors in reviewing punitive damage awards).

¹³ *Palmer v. A.H. Robins Co.* 684 P.2d 187, 215-216 (Colo. 1984) (suggesting as a safeguard against “overkill” that a jury in a bifurcated proceeding could consider “the amount of any unsatisfied or satisfied past punitive awards as well as the past and present financial condition of the defendant”).

¹⁴ *W.R. Grace & Co. v. Waters*, 638 So.2d 502, 506 (Fla. 1994) (providing that “evidence of previous punitive awards may be introduced by the defendant” during the second stage of a bifurcated trial).

¹⁵ *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 739, 741 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980) (permitting instructions that allowed the jury to consider “[t]he probability that compensatory damages might be awarded against defendants in other cases” and the degree to which the defendant had already been punished).

¹⁶ *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1272-1274 (Or. 1980) (noting that jury consideration of prior and potential punitive damage awards exists as an alternative solution to the “overkill” problem).

¹⁷ *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564-566 (W.Va. 1992) (accepting comment e but declining to consider “overkill” argument because record was insufficiently developed).

Wisconsin¹⁸ — have noted the significance of such awards. Comment e has also been favorably viewed in numerous intermediate appellate courts.¹⁹ Only a few federal courts have discussed comment e in this context.²⁰

A number of commentators have also discussed the relevance of other claims in determining punitive damages.²¹

The cases cited by the Court are a mixed bag. In *Dunn v. HOVIC*,²² the court rejected OCF's due process challenge, pointing out that OCF at a minimum should have put on evidence showing how much it had actually paid toward the punitive damage verdicts listed in its post-trial affidavits.

¹⁸ *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 459-460 (Wis. 1980) (stating that the “jury may consider compensatory and punitive damages . . . already imposed on the defendant or likely to be imposed on the defendant”).

¹⁹ See *Stevens v. Owens-Corning Fiberglas Corp.*, 57 Cal. Rptr.2d 525, 537-38 (Cal. Ct. App. 1996) (accepting comment e but holding that no evidence to support mitigation was offered); *Farrall v. A.C. & S. Co.*, 558 A.2d 1078, 1082 (Del. Super. Ct. 1989) (stating that “consideration must be given to “the deterrence resulting from the current and prospective suits against defendant”); *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242, 253 (Fla. Dist. Ct. App. 1984) (suggesting that “evidence of the adverse effects . . . caused by the award of punitive damages in this and other pending asbestos cases is admissible in avoidance or mitigation of punitive damages”); *Kochan v. Owens-Corning Fiberglas Corp.*, 610 N.E.2d 683, 694-695, 697 (Ill. App. Ct. 1993) (refusing to mitigate a punitive damage award because the manufacturer failed to present evidence of potential liability in other cases); *Lipke v. Celotex Corp.*, 505 N.E.2d 1213, 1220 (Ill. App. Ct. 1987) (determining that courts are to consider, *inter alia*, defendant's potential liability when reviewing a punitive damage award) (citing *Hazlewood v. Illinois Cent. Gulf R.R.*, 450 N.E.2d 1199, 1209-1208 (Ill. App. Ct. 1983)); *Unified School Dist. No. 490 v. Celotex Corp.*, 629 P.2d 196, 206 (Kan. Ct. App. 1981) (suggesting that comment e provided an alternative solution to prevent “overkill” problem); *Brotherton v. Celotex Corp.*, 493 A.2d 1337, 1344 (N.J. Super. Ct. App. Div. 1985) (stating that “evidence of the effect of punitive recovery [is] admissible to mitigate the size of the award”); *Martin v. Johns-Mansville Corp.*, 469 A.2d 655, 665 n. 17 (Pa. Super. Ct. 1983), *vacated on other grounds*, 494 A.2d 1088 (Pa. 1985) (allowing the jury to “consider the defendant’s past and potential future liability for punitive damages”).

²⁰ *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993); *Neal v. Carey Canadian Mines, Ltd.*, 548 F.Supp. 357 (E.D. Pa. 1982); see also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967).

²¹ See Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 665, 669 (1980) (proposing that judge determine punitive damage award “in view of the total punishment to which the defendant is subject, giving more weight to prior awards”); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1194-1198 (1931); *supra* note 6, at 1319; Tom Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 213, 253 (1978) (suggesting that “evidence of civil fines and punitive damage awards in other cases growing out of the same event should be admissible”); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 58-60 (1983) (arguing that one way to prevent punitive damages overkill would be to “inform each jury of other punitive damages awards already imposed or that may be imposed in future upon a mass tort defendant”). *But see* James D. Ghiardi & John J. Kircher, 1 PUNITIVE DAMAGES: LAW AND PRACTICE §§ 5.42, 6.09 (1990) (opining that juries should “consider prior awards of punitive damages against the defendant as well as the potential for future awards”); Alan Schulkin, Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1800-1801, 1806-1807 (1979) (rejecting idea of informing jury, and advocating instead using past awards as credits); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L.REV. 779, 841-843 (1985) (rejecting approach of informing jury of past and potential punitive damage awards as prejudicial and unworkable).

²² 1 F.3d 1371, 1390-91 (3d Cir.) (en banc), *modified in part*, 13 F.3d 58 (3d Cir. 1993).

The court also concluded that OCF had failed to show that it would be unable to pay future awards of compensatory or punitive damages. The court pointed to an Annual Report suggesting a declining severity in the nature of recent claims, and that OCF ““anticipates achieving a gradual reduction in per case indemnity payments.””²³ Nevertheless, in determining whether to grant remittitur, the court expressly took into consideration *all* of the factors listed in comment e, including the multiplicity of claims.²⁴ Although the trial court had reduced punitive damages from \$25,000,000 to \$2,000,000, the appellate court concluded that insufficient consideration had been given to the effect of successive punitive damages claims. That was the factor, “above all,” that led the appellate court to reduce the award to \$1,000,000.²⁵

The Court’s reliance on *Spaur v. Owens-Corning Fiberglass Corp.*²⁶ is similarly flawed. Citing *Dunn*, the court agreed that “past awards actually paid” should be considered in reviewing punitive damages awards, but the court did not say that that was the sole factor courts should consider. Similarly, the court in *Johnson v. Celotex Corporation*²⁷ concluded that defendant failed to support its due process challenge, observing that defendant had failed to document how much had actually been paid. *Johnson* did not, however, state that this information alone was relevant. Only in *Fischer v. Johns-Manville Corp.*²⁸ may it fairly be implied that the court chose not to include unpaid, past awards, or potential future awards. Again, however, nothing in the court’s opinion prohibited consideration of such evidence in other cases.

Other cases the Court cites are more directly opposite its position. In *Stevens v. Owens-*

²³ *Id.* at 1390.

²⁴ *Id.* at 1391.

²⁵ *Id.*

²⁶ 510 N.W.2d 854, 868 (Iowa 1994).

²⁷ 899 F.2d 1281, 1287-88 (2d Cir. 1990).

²⁸ 512 A.2d 466, 480 (N.J. 1986)

Corning Fiberglas Corp.,²⁹ the court actually cited comment e with approval and concluded that this evidence should have been presented to the jury. And in *Roginsky v. Richardson-Merrell, Inc.*,³⁰ the trial judge instructed the jury to consider the potential number of similar claims, given the potentially wide effect of the defendant's actions.

In sum, case law from other jurisdictions can in no way be said to support the Court's position in the present cases. On the contrary, the overwhelming weight of authority supports comment e.

The Court's rejection of comment e is not only unnecessary; it is ill-founded. Because I cannot join in this aspect of the Court's analysis, I concur only in the Court's judgments in these cases.

Nathan L. Hecht
Justice

Opinion delivered: June 5, 1998

²⁹ 57 Cal. Rptr.2d 525, 536-537 (Cal. Ct. App. 1996).

³⁰ 378 F.2d 832, 839 (2d Cir. 1967).