

Unrepentant Subsequent Conduct Means Punitive Damages

by Stephen C. Kaufman, Editor

I have a products liability case in which my client suffered brain damage following use of the defendant's product. For the last two days I have been reviewing documents produced by the corporate defendant, and I have just come across a revealing interoffice memorandum. This memorandum concerns a conversation between the defendant's chief executive officer and one of the corporation's vice presidents. They are talking about whether the corporation should offer to pay \$25,000 or \$50,000 to the reviewer of an article submitted for publication in a prestigious medical journal in return for the reviewer's recommending rejection of the article. Of course, the article describes a study which found a causal relationship between use of the defendant's product and brain damage. I am already counting the money the defendant will be paying in satisfaction of the punitive damage award. Then I see that the date of the memorandum is May 12, 1983. My client used the defendant's product on April 3, 1980. Since both the conversation and the proposed bribe occurred three years after my client's use of the product, I see that the memorandum is neither relevant nor the conduct causally related to my client's injuries. Besides, the memorandum is evidence of a subsequent remedial measure which is inadmissible pursuant to Rule 407 of both the Colorado and Federal Rules of Evidence. My heart starts palpitating and my face becomes red with frustration and anger. I grab the memorandum and tear it into pieces. Mistake! That memorandum would be admissible on the issue of punitive damages.

THE MEMORANDUM IS ADMISSIBLE PURSUANT TO RULE 407

Rule 407 of both the Colorado and Federal *Rules of Evidence* reads as follows:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admis-

"... the corporate memorandum and the subsequent warning may be admissible to prove strict liability"

sible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility or precautionary measures, if controverted, or impeachment.

In the first place, Rule 407 does not even apply to my set facts. The corporation's attempt at bribery is a subsequent measure, but it is not a subsequent remedial measure; it is not a measure "which, if taken previously, would have made the event less likely to occur." But suppose we were talking about a warning that the corporations issued subsequent to my client's unfortunate use of its product and suppose that the warning was required by the FDA. Let me add that the warning issued by the corporation was in such a form, in terms of language used and placement, that it significantly reduced the impact that the FDA intended it to have. Clearly, we now have a subsequent measure "which, if taken previously, would have made the event less likely to occur." However, Rule 407 still would not bar its admissibility.

Rule 407 is limited by its express terms so that it excludes subsequent measures only if offered "to prove negligence or culpable conduct in connection with the event." Rule 407 "does not require the exclusion of evidence when offered for another purpose." Rule 407 contains specific examples of when subsequent measures will be admissible, but the 10th Circuit has held that admissibility of subsequent measures will not be limited to "proving ownership, control, or feasibility of precautionary

measures if controverted, or impeachment." In the case of *Rimkus v. Northwest Colorado Ski Corp.*, 706 F.2d 1060 (1983), the 10th Circuit ruled that evidence of subsequent remedial measures was not barred by Rule 407 when offered to rebut allegations of comparative negligence. Similarly, both the corporate memorandum and the watered-down warning would be offered on the issue of punitive damages. Thus, both the memorandum and the warning would be admissible due to the express language of Rule 407 and the *Rimkus* decision.

Furthermore, the corporate memorandum and the subsequent warning may be admissible to prove strict liability. The warning would be relevant to issues of causation and whether the product was defective and unreasonably dangerous. *Robbins v. Farmers Union Grain Terminal Ass'n.*, 552 F.2d 788 (8th Cir. 1977); *Farmer v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977).

Well, I can see I am now over the first hurdle; Rule 407 will not bar admissibility of the corporate memorandum. However, establishing the relevancy of a memorandum having no causal connection to the injury-producing incident and offered on the issue of punitive damages looms as an even more formidable task.

THE MEMORANDUM IS RELEVANT TO THE ISSUE OF PUNITIVE DAMAGES

Now we have come to the portion of this article which prompted my writing this month. A claim for punitive damages derives from *C.R.S.* 13-21-102 which provides:

In all civil actions in which damages are assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.

As you can see, before punitive damages may be awarded, the injury must have been "attended by" the conduct giving rise to such an award. The statute does not require that such conduct "cause" the injury, and there is no appellate case law which has defined the term "attended" so as to limit it to conduct which is causally related. Punitive damages are designed to punish a defendant because of the defendant's wrongful attitude in such a way so as to ensure that the injury-causing conduct does not continue to recur. With this in mind, it should make no difference whether a defendant's wrongful attitude is exhibited prior or subsequent to the injury complained of. Therefore, to give the term "attended" an expansive definition, which would include subsequent conduct, would be in keeping with the rationale underlying Colorado's punitive damage statute.

This, then, begs the question of how subsequent conduct is relevant to the issue of punitive damages. First, it is relevant in determining the degree of punishment, in the form of punitive damages, that a defendant should receive. Once it has been determined that a defendant has committed an act subjecting it to punitive damages, evidence of subsequent measures that the defendant has taken is relevant to determine the extent to which it should be punished. This is especially true when noting that one of the major goals underlying punitive damages is the desire to deter the particular defendant from committing similar acts in the future. If the defendant, subsequent to the incident complained of, takes measures to correct the situation and evinces an attitude of repentance, there is not the need to punish him to the same extent as a defendant who goes right on doing what he had been doing or who attempts to conceal his wrongful conduct. Second, in the event a defendant has not terminated his wrongful conduct with respect to persons other than the plaintiff, the defendant's subsequent conduct is admissible so that a jury can have the opportunity to return a punitive damage award significant enough to ensure that the defendant's wrongful conduct stops. "Courts often state that such an award should be sufficient to deter continuation or repetition of the offending conduct." *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, 500 F.Supp. 984 (D.Ore. 1980).

Case law has held that evidence of subsequent conduct is admissible on

the issue of punitive damages. In *Ray Jones Inc. v. Cowan*, 139 Ga.App. 811, 299 S.E.2d 669, 670 (1976), the court declined to award punitive damages because the defendant, by way of his subsequent conduct, evinced concern over the damage he had caused and initiated action to prevent further damage. The case of *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980), involved a plaintiff injured in a motor vehicle collision when the fuel tank exploded. There, as in our case, the defendant was faced with multiple lawsuits. The court held that the following criteria were relevant for purposes of determining punitive damages: (1) "the [defendant's] attitude and conduct on discovery of the misconduct;" (2) "the duration of both the improper behavior and its concealment;" and (3) whether the wrongful conduct has been terminated. *Id.* at 460. Also see *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1257 (1976); *Model Uniform Product Liability Act*, 44 Fed. Register No. 212, §120[B] at 62748-62749 (Oct. 31, 1979).

Similarly, in *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, 500 F.Supp. 984 (D.Ore. 1980), the Oregon District Court took the defendant's subsequent conduct into consideration in determining the amount of punitive damages which should be awarded. The court observed that it would not have decided to award punitive damages had the defendant "cooperated fully" subsequent to the incident in ascertaining the harm caused, eliminating the chances of harm in future situations, and compensating for harm done. *Id.* at 1024. However, the court ruled that certain of defendant's subsequent conduct would mitigate an award of punitive damages.

Such conduct is strong evidence that the company was attempting to fulfill its societal obligations by accounting for the damages its operations were causing to its neighbors. Though laudable, this conduct does not entirely shield the company from punitive damages liability, for it came about after some eight years of the plant's operation and after the company was faced with numerous lawsuits claiming damages. *Id.*, at 1023.

In ruling as it did, the Oregon District Court recognized that it should

take into consideration the defendant's subsequent conduct, not only as it related to the plaintiff, but as it related to others.

As the court in determining the propriety of a punitive damage award may consider evidence of harm by the defendant's conduct to persons other than the plaintiff, see *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*, No. 73-3080, slip op. at 1-2 (9th Cir. June 23, 1975), so should the court take note of the defendant's efforts to neutralize that harm by voluntary payment of compensation, even though this compensation did not extend to the damage for which the injury in this case made a compensatory award.

In my case, the interoffice memorandum shows that the defendant has shown neither repentance nor a willingness to terminate its wrongful conduct. Rather than attempt to lessen the damage done, the defendant has acted to magnify it by bribing members of the scientific community so that the public will not be alerted to the dangers associated with use of the product. The defendant has acted to conceal the defect in its product so that it could continue to do business as usual at the expense of the public's health and safety. Accordingly, the memorandum should be admissible as relevant to determining the extent to which the defendant should be punished and to ensure that the punishment is severe enough that the defendant will stop marketing its product, alter the product to make it safer, or warn of the danger associated with use of the product.

CONCLUSION

I feel much better. I now realize that Rule 407 is not absolute and that subsequent conduct is relevant to the issue of punitive damages. I can begin again to count the money the jury will be awarding in punitive damages — assuming I can tape the torn pieces of the memorandum back together. Justice has triumphed. But wait! I can hear the shredding machines starting to roll.

Those wishing to submit articles for publication in the Civil Procedure and Evidence Section of Trial Talk should send them to Stephen C. Kaufman, Kidneigh, Hughes, Pelz, Leach & Clikeman, P.C., 4155 East Jewell Avenue, Suite 500, Denver, Colorado 80222.
