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Punitive Damages: A Primer for Utah, *Crookston v. Fire Insurance Exchange*

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Punitive Damages: A Primer for Utah, 
*Crookston v. Fire Insurance Exchange*

I. INTRODUCTION

The subject of punitive damages has always been controversial. Some have considered punitive damages unbecoming of the law.\(^1\) Others have recognized that they serve important purposes in deterring misconduct of entities otherwise beyond the reach of punishment.\(^2\)

The Utah Supreme Court recently reviewed the issues involved with punitive damages and adopted a standard of review in *Crookston v. Fire Insurance Exchange*.\(^3\) *Crookston stands for the premise that although there are some limits to punitive damage liability, these limits are not so precise as to allow the threat of their imposition to become a calculable amount, “thus diminishing the deterrent effect of punitive damages.”\(^4\)

This note examines failed constitutional attacks on punitive damages under the excessive fines and due process clauses of the United States Constitution, and then outlines the considerations that must be met before punitive damage awards will be upheld in Utah. Finally, the punitive damage issues that still await decision in Utah will be noted.

II. THE FACTS OF CROOKSTON

*Crookston arose when a home under construction collapsed. The home was an ‘earth house,’ a structure designed to be partially covered with soil to take advantage of the*

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1. See, e.g., Fay v. Parker, 53 N.H. 342, 382 (1872), *cited in* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1038 n.4 (1991), where punitive damages were described as a “wrong . . . a monstrous heresy . . . an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.”

2. See, e.g., Luther v. Shaw, 147 N.W. 18, 19-20 (Wis. 1914), *cited in* Haslip, 111 S. Ct. at 1038 n.4.

The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible institute of government, discourage private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law.

*Id.*


4. *Id.* at 809.
earth's natural heating and cooling. The house was nearly complete when it collapsed. The structure was so completely destroyed that the contractor who eventually purchased the lot and wreckage testified that very little of the original construction material could be salvaged.

Fire Insurance Exchange insured the Crookstons for this type of loss, with the financing bank as the sole loss payee under the terms of the contract. The original insurance company adjuster received two bids for the reconstruction of the house, one for $50,951 and the other for $49,600. After examining these bids the insurance company's regional office extended settlement authority in the amount of $49,443.

Soon thereafter an adjuster with more experience was assigned to the case. He commissioned an engineering report, limited to structural damage, and used this as the basis for obtaining an estimate from an inexperienced contractor for $27,830.60. It was revealed at trial that this contractor was the son of an agent of the insurance company, and that the bid did not include substantial amounts of work that would have been needed to fully rehabilitate the dwelling.

Based on this bid, the new adjuster settled with the bank for a little more than $32,000, without notice to the Crookstons or mention of the higher bids. Because the settlement was insufficient to cover the construction loan, the Crookstons were unable to financially recover from the loss, were forced to deed the home back to the bank in lieu of foreclosure, and eventually had to seek protection from creditors in bankruptcy.

Justice Stewart pointed out that the trial court had before it additional factors that justified the imposition of
punitive damages. He noted that the second adjustor used what the company termed in its defense, "sound business practices." Other employees of the company testified that they felt the Crookstons had been treated fairly. Finally, the adjuster, who had a reputation of improving company profits, received two promotions between the incident and the trial.

The Crookstons sued the bank for breach of the covenant of good faith and fair dealing, breach of fiduciary duty, misrepresentation and fraud, and intentional infliction of emotional distress. They sued the insurance company for breach of contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and misrepresentation and fraud.

The bank settled just before trial. Fire Insurance Exchange went to trial. The jury, having heard the above, awarded $815,826 in compensatory damages, and $4 million in punitive damages. The insurance company's motions for judgment notwithstanding the verdict, new trial and remittitur were all denied.

III. ATTACKS ON THE CONSTITUTIONALITY OF PUNITIVE DAMAGES

On appeal, Fire Insurance Exchange argued that the jury award violated federal and state constitutional due process guarantees and prohibitions of excessive fines.

While the Utah Supreme Court was considering Crookston, the United States Supreme Court made two important decisions in regard to the federal constitutionality of punitive damages. These decisions, Browning-Ferris Indus-

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15. Id. at 816 (Stewart, J., concurring in part and dissenting in part).
16. Id.
17. Id.
18. Id.
19. Id. at 795.
20. Id.
21. Id.
22. Id.
23. Id.
25. Id. at 31.
26. Prior to these two decisions, commentators had written extensively on the subject of the constitutionality of punitive damages awards, see, e.g., Symposium,
tries v. Kelco Disposal, Inc., 27 and Pacific Mutual Life Insurance Co. v. Haslip, 28 make it clear that punitive damages can be imposed without violating federal constitutional guarantees of due process 29 and protection against excessive fines. 30

The Utah Constitution’s due process guarantee 31 and prohibition against excessive fines 32 are virtually identical to the federal clauses. Although the Utah Constitution has been interpreted to provide protections beyond those of the federal Constitution, 33 Crookston was not reviewed under the state constitutional standards as these issues were not raised below. 34

IV. REVIEW OF PUNITIVE DAMAGES IN UTAH

Although the Utah Supreme Court declined to review the Crookston damage awards for either state or federal constitutional infirmities, it did review the award in light of

Punitive Damages, 40 ALA. L. REV. 687 (1989), and many believed that they were not constitutional as imposed, see, e.g., Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 VA. L. REV. 269 (1983).

27. 492 U.S. 257 (1989). In regard to the excessive fines clause, the Court said, “Whatever the outer confines of the Clause’s reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.” Id. at 263-64.

28. 111 S. Ct. 1032 (1991). In considering the amount of punitive damages in a case the Court said:

One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and unacceptable that would fit every case.

Id. at 1043 (citation omitted).

29. U.S. CONST. amend. XIV, § 1, “[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .”

30. U.S. CONST. amend. VIII, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

31. UTAH CONST. art. 1, § 7, “No person shall be deprived of life, liberty or property, without due process of law.”

32. UTAH CONST. art. 1, § 9, “Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted.”

33. See, e.g., State v. Larocco, 794 P.2d 460 (Utah 1990) (opening unlocked car door to examine a vehicle identification number, although permissible under federal law, a violation of state constitutional guarantees); State v. Bobo, 803 P.2d 1268, 1272 (Utah Ct. App. 1990) (“[A]ttorneys [need to] heed the call of the appellate courts of this state to more fully brief and argue the applicability of the state constitution . . . .”).

Utah's Rules of Civil Procedure. The rules provide, *inter alia*, that: "[A] new trial may be granted . . . for any of the following causes: . . . (5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice. (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law."35

The compensatory and punitive damage awards were reviewed separately by the court. The compensatory damages were upheld because the trial judge gave specific consideration, on the record, to the appropriateness of the award.36 The trial judge did not properly consider the punitive damages aspect of the award, however.37

The two part inquiry established by the court38 requires the trial court, in reviewing punitive damages to determine: (1) that they were appropriate at all,39 and (2) that the amount is neither excessive nor inadequate.40 In this case the trial court properly established that punitive damages were appropriate,41 stating:

> During the course of the ten or so days that we tried the case, it was my observation that indeed we were dealing here with conduct which was pernicious, pernicious not merely in the sense of the defendant's having taken undue advantage of the insureds, the Crookstons, in treating their claim in a high handed fashion, but pernicious further in the sense that clear, unequivocal misrepresentations were made by agents of the defendant to the plaintiffs and to their counsel, and as if that were not sufficient, pernicious in the form of conduct, which, while it may not have been geared to create emotional harm and suffering to the plaintiffs, was, at the very least, in reck-

37. *Id.* at 807-08.
38. *Id.* at 807.
39. The evidence must be "sufficient to support a lawful jury finding of defendant's requisite mental state." *Id.* (citing *Utah R. Civ. P.* 59(a)(6); Elkington v. Foust, 618 P.2d 37, 41 (Utah 1980); Kesler v. Rogers, 542 P.2d 354, 359-60, (Utah 1975); Prince v. Peterson, 538 P.2d 1325, 1329 (Utah 1975)).
40. *Crookston*, 817 P.2d at 807, (citing *Utah R. Civ. P.* 59(a)(5)) (stating that the amount must not appear to have been given under the influence of passion or prejudice).
41. *Crookston*, 817 P.2d at 807.
less disregard of their rights by dealing *sub rosa* with the bank and thereafter closing the file . . . .

However, as to the second part of the punitive damages inquiry, the trial court did not consider the distinct factors that apply to punitive damage awards. These factors are reflections of the special punitive damage goals of punishment and deterrence. The factors, outlined in Utah in *Bundy v. Century Equipment Co.* are:

(i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiffs and others; (v) the probability of the future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of the actual damages awarded.

The *Crookston* jury had these factors before it, but the trial judge did not review them in considering the motion.

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42. *Id.* at 806 (alterations in original).

43. 692 P.2d 754 (Utah 1984); see also *Von Hake v. Thomas*, 705 P.2d 766 (Utah 1985).

44. *Crookston*, 817 P.2d at 808.

45. Jury instruction number 33 stated that after determining to award punitive damages the jury should consider the following in calculating the amount:

[Such sum as in your best judgement would be reasonable and proper as a punishment to Fire Insurance Exchange for such wrongs, and as a wholesome warning to others not to offend in a like manner. If such punitive damages are given, you should award them with caution and you should keep in mind they are only for the purpose just mentioned and not the measure of compensatory damages.]

In determining the amount of punitive damages, you should consider each of the following factors:

1. the relative wealth of the defendant;
2. the nature of the defendants misconduct;
3. the facts and circumstances surrounding the defendant's misconduct;
4. the effect of the defendant's misconduct on the lives of the plaintiffs and others;
5. the probability of future recurrence of the misconduct;
6. the relationship between the parties; and
7. the amount of compensatory damages awarded.

Punitive damages should be more than an inconvenience to the defendant and their amount should be sufficient to discourage the defendant and other companies similarly situated from doing or repeating such misconduct in the future.

PUNITIVE DAMAGES IN UTAH

for a new trial on the amount of punitive damages. The failure to review the factors would not have been fatal of itself. But, because the amount of the punitive damages "exceed[ed] the bounds of the general pattern set by . . . prior decisions," the denial of the motion for new trial on the punitive damages issue was vacated and remanded.

The Utah Supreme Court gave the trial court a generous amount of counsel on how to consider the issues on remand. The court first noted that the factors it provided in Bundy did not give any guidance as to how they should be assessed or their respective weights. The court said that this lack of guidance was a common problem.

One solution to the problem, the imposition of strict limits on the award of punitive damages has been adopted by some legislatures and courts. However, the Utah Supreme Court feared that adoption of an absolute ceiling of whatever type would "diminish[] the deterrent effect of punitive damages" because it would "allow potential defendants to calculate their exposure to liability in advance."

Further, strict ratios would "not provide the flexibility needed to deal adequately with the type of case that involves only minimal actual damages, but where the conduct of the

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46. Crookston, 817 P.2d at 807.
47. Id.
48. Id. at 807-08.
49. Id. at 808.
50. Id., (citing AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 3-7 (1989)).
53. Crookston, 817 P.2d at 809.
54. Id.
defendant is so flagrant as to justify a large punitive award. 55

The court adopted a middle ground between allowing unlimited discretion and selecting a bright-line limitation. 56 The court examined its previous opinions, 57 and observed that:

The general rule . . . appears to be that where the punitive damages are well below $100,000, punitive damage awards beyond a 3 to 1 ratio to actual damages have seldom been upheld and that where the award is in excess of $100,000, we have indicated some inclination to overturn awards having ratios [even] of less than 3 to 1. 58

The court said that in denying a motion for a new trial, the trial court need give no explanation as to the amount of punitive damages awarded if award ratios are within the above ranges. 59 If the award is outside these bounds:

[T]he trial court is not bound to reduce it. However, if such an award is upheld, the trial judge must make a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of the law and the facts. The judge’s articulation should generally be couched in terms of one or more of the seven factors we earlier listed as proper considerations in determining the amount of punitive damages, unless some other factor seems compelling to the trial court. For example, a trial court might conclude that an award should stand, despite a ratio that is higher than that we have generally approved, because the defendant displayed an extremely high degree of malice, e.g., actual intent to harm or a high degree of likelihood of great harm based on the reprehensible nature of the act. 60

55. Id. (citation omitted).
56. Id.
58. Crookston, 817 P.2d at 810.
59. Id. at 811.
60. Id. (citations omitted).
The court stated that the purpose of these standards is to permit effective and reasoned appellate review, with appropriate deference to the position of the trial judge to appraise the witnesses and the evidence, leading to more substantive review of punitive damage awards. 61

V. CONCLUDING THE CROOKSTON CLEAN-UP

The Crookston case was remanded for reconsideration in light of the above standards. 62 The court then went on to consider potential ramifications of its ruling. The court noted, without expressing an opinion as to its appropriateness, that should additur or remittitur be granted in regards to the punitive damages, the grounds for doing so should be explained. 64 In addition, the court warned parties not to try to avoid the considerable deference given to the trial courts in this area by appealing rather than moving for reconsideration. The court said that if a party appeals an award without motion for new trial, appellate courts would assume that a new trial motion was considered sua sponte by the trial court and denied. 65

VI. PUNITIVE DAMAGES BEYOND CROOKSTON

Crookston establishes a framework for the judicial review of punitive damage awards pursuant to the Utah Rules of Civil Procedure. It does not, however, lay to rest the issue of punitive damages in Utah. Both the holding in Crookston and Utah's statutory modification of punitive damage law may be subject to attack on constitutional grounds.

A. Due Process

The United States Supreme Court held that federal due process was not offended in Haslip 66 because: (1) the jury

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61. Id.
62. Id. at 812.
63. See id. at 813-14 (Howe, Associate C.J., concurring with reservations) see also id. at 814 (Stewart, J., concurring in part and dissenting in part).
64. Crookston, 817 P.2d at 811.
65. Id. at 812.
was instructed about the purpose of punitive damages and evidence of defendant’s wealth was excluded, by state law, at the trial; post-trial review procedures were in place that required the trial court to reflect, in the record, why or why not the verdict was adjusted; and appellate review of punitive awards assured reasonableness and rationality in regards to the punitive and deterrent goals of punitive damages.

The Crookston ruling is consistent with the requirements of Haslip except in one area—in Crookston the jury was instructed, in accord with Bundy, to consider the wealth of the defendant. The Haslip court did not identify the reason that the exclusion of evidence of the defendant’s wealth was appropriate. The Court simply noted that the issue was excluded at the trial pursuant to Alabama law. In this particular exclusion of evidence, Alabama law is the common law exception rather than the rule, but if the Supreme Court intends to adopt the peculiar Alabama position, the Utah Court’s use of the Bundy criteria would be subject to attack under the federal due process guarantee.

B. The Excessive Fines Clause

In Browning-Ferris Industries v. Kelco Disposal, Inc., the Supreme Court held that between private parties there is no state action in the award of punitive damages that brings the federal excessive fines clause into play. The

67. Id. at 1044. The court stated that the purpose of punitive damages is, "[N]ot to compensate the plaintiff for any injury but ... and for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future." (alterations in original).
68. Id.
69. Id.
70. Id. at 1945.
72. Fire Insurance Exchange, in the year of the Crookston claim, had a net income of $23,000,000 and assets of $723,468,116. Crookston, 817 P.2d at 815-16 (Stewart, J., concurring in part and dissenting in part).
73. Haslip, 111 S. Ct. at 1044, (citing Southern Life & Health Ins. Co. v. Whitman, 358 So. 2d 1025, 1026-27 (Ala. 1978) (liability for damages cannot be based on the economic position of the parties)).
74. See 25 C.J.S. Damages § 126(3) (1966). "While there is authority for the contrary view, as a general rule the financial condition of the defendant may be considered in determining the amount of exemplary damages . . . ." Id.
76. Id. at 263-64. The court stated,"Whatever the outer confines of the
statutory modification of Utah punitive damage law, however, requires remittance to the state treasury of fifty percent of any amount awarded as punitive damages in excess of $20,000 and attorney fees and costs.\textsuperscript{77} As Utah now has a pecuniary interest in the award of punitive damages, the distinction that existed between the award of punitive damages to a private party and the collection of fines by a state that was emphasized in \textit{Browning-Ferris} is blurred. The importance of the distinction was reemphasized by the Court in \textit{Harmelin v. Michigan}.\textsuperscript{78} The Court said:

As we have recognized in the context of other constitution- al provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit. (We relied upon precisely the lack of incentive for abuse in holding that "punitive damages" were not "fines" within the meaning of the Eighth Amendment.)\textsuperscript{79}

\section*{VII. CONCLUSION.}

The proper method for judicial review of punitive damage awards is now set out in Utah by \textit{Crookston}. If punitive damages exceed compensatory damages by more than a three-to-one ratio, the punitive damages must be either reduced or justified; if not, a new trial must be granted.

The issues of due process, implicated by the consideration of the defendant's wealth, and excessive fines, given new life by the statutory levy imposed on punitive damage awards, still must be resolved in regards to both the federal and state Constitutions.

Punitive damages are not popular, and many believe that they are damaging to the economy.\textsuperscript{80} It has been proposed that they be sharply limited.\textsuperscript{81} As noted in \textit{Crookston}, however, punitive damages prevent egregious

\begin{itemize}
  \item \textsuperscript{77} \textit{Id.}.
  \item \textsuperscript{78} \textit{Id.} at 2693 (citations omitted).
  \item \textsuperscript{79} \textit{Id.}
  \item \textsuperscript{80} \textit{David Gergen & Ted Gest, Ruling on Quayle v. Lawyers, U.S. News & World REP., August 26/September 2, 1991, at 44.}
  \item \textsuperscript{81} \textit{Id.}
\end{itemize}
conduct on the part of defendants who are otherwise not subject to meaningful censure.\textsuperscript{82}

\textit{David F. Barrett}

\textsuperscript{82} "A $4,000,000 punitive damage award can certainly have a salubrious effect in inducing the defendant to bring its practices into harmony with common moral conduct and accepted business ethics, to say nothing of the requirements of the law." \textit{Crookston}, 817 P.2d at 816 (Stewart, J. concurring in part and dissenting in part); see also \textit{Grimshaw v. Ford Motor Co.}, 174 Cal. Rptr. 348, 384 (Ct. App. 1981) (finding a design flaw in the fuel system of the Ford Pinto could have been remedied at minimal cost, but "a cost-benefit analysis balancing human lives and limbs against corporate profits" dictated deferral of the correction).