

The big drop

The jury's out on why, but punitive awards took a nosedive in 2003.

By David Hechler
STAFF REPORTER

NO REVIEW OF the year's largest jury verdicts can avoid punitive damages, so common among the largest awards.

Last year provided another reason to focus on the subject. In April, the U.S. Supreme Court issued a landmark decision warning that "few awards exceeding a single-digit ratio between punitive and compensatory damages...will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513.

Did lawyers temper their demands? Were juries inspired to exercise restraint?

It is too soon to answer these questions, but *The National Law Journal's* annual review of the 100 largest jury verdicts (compiled by NLJ affiliate VerdictSearch) did show that awards—and especially punitives—dropped dramatically in 2003.

Among the top 50 verdicts, the median ratio of punitive to compensatory damages was 3-to-1 in 2001, 4.4-to-1 in 2002 and 1.6-to-1 last year. Breaking that down, it turns out that the median punitive award dropped by 60% last year, while compensatories rose by about 12%. The median punitive (adjusted for inflation) was \$65.5 million in 2001, \$100.4 million in 2002 and \$40 million last year. The median compensatory, by contrast, rose from \$21.8 million to \$22.6 million to \$25.2 million (see the graph at right).

For all 100 verdicts, the median awards, adjusted for inflation, rose from \$45.7 million in 2001 to \$51.1 million in 2002, only to drop last year to \$34.7 million (see top graph). In 2002, it took a \$22.5 million verdict to make the list; in 2003, \$18.5 million.

Though it's unlikely that many jurors were aware of the high court's pronouncements in *State Farm*, talk about "tort reform"—and highly publicized efforts to advance it—may have influenced jury behavior.

Rick Fuentes, a partner in the Atlanta office of the jury consulting firm RandD Strategic Solutions, thinks it has. Fuentes, who consulted for plaintiffs in the case that yielded the largest verdict of 2003 (see article on Page 1), said he finds that jurors are increasingly "savvy about the process."

Television shows like those on CourtTV have educated them, Fuentes said. Jurors are also well aware of large awards that have drawn criticism, like the McDonald's spilled-coffee case—widely regarded as the quintessential frivolous suit, he said.

On the other hand, he continued, jurors also want punitive awards that are commensurate with wrongdoing. And they want them to withstand judicial review. During mock jury exercises, Fuentes has watched jurors voice concern about judges' slashing or tossing verdicts—and he's seen them tailor awards accordingly.

Theodore Eisenberg, a professor at Cornell Law School, agrees that publicity about tort reform "has had an effect" on verdicts. But he doubts *State Farm* will add to it. After the last landmark Supreme Court decision on punitives, *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996), Eisenberg studied all the punitive awards he could find from a year before through a year after, and discerned no effect on the ratios.

If any practice area was affected by tort reform last year, the most likely candidate was medical malpractice, given the media attention it received. And verdicts were, in fact, down from 2002 (see story on Page 11).

By contrast, juries awarded plaintiffs in intellectual property cases 9% more money for nine cases compared to 10 in 2002. The big loser was Microsoft Corp., which was hit for nearly 80% of the \$743 million total (see the story at right).

Lawyers were more likely last year to find themselves trying breach of contract cases in U.S. courts over business disputes that reached



outside national borders. These cases sometimes stretched judicial resources, not to mention lawyers' skills.

Likewise, difficult circumstances sometimes inspired lawyers to seek unusual solutions, as in a defamation suit in which a Chicago firm was forced to rely on the depositions of absent witnesses. Rather than bore the jury with hours of dry recitations, the firm hired actors to bring the testimony to life.

This is the NLJ's 15th annual review of the year's largest jury verdicts, and the third consecutive year the paper has compiled a Top 100 list.

The amounts are those actually awarded by jurors, independent of post-trial enhancements or reductions. When a verdict is trebled by law, we report the larger amount. When a jury has awarded damages for more than one cause but has been informed in advance that these will not be combined, only the highest award appears. Attorney fees and costs are included only when specifically awarded by juries.

If something about this list looks a little odd, it may be the absence of a tobacco case at the top. This is the first time in four years that a billion-dollar tobacco verdict did not lead the way.

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TOP 100 VERDICTS OF 2003

Ford knew center rear lap belt was dangerous to children

CASE TYPE: product liability, automobile, seatbelts, failure to warn

CASE: *Karlsson v. Ford Motor Co.* Los Angeles Co., Calif., Super. Ct., No. PC019980

PLAINTIFFS' ATTORNEY: Thomas V. Girardi and David R. Lira, Girardi & Keese, Los Angeles

DEFENSE ATTORNEY: Frank P. Kelly, Shook, Hardy & Bacon, San Francisco

JURY VERDICT: \$45,450,000

FACTS & ALLEGATIONS On Nov. 23, 1996, the plaintiff Karlsson family, including mother, Agneta Karlsson, 34; her children, Erik 8; Isak, 7; Johan, 5; Desiree, 3; Kristina, 1; and brother-in-law Tim Mansfield, 34, who was driving, were traveling on a freeway in a 1996 Ford Windstar. Johan was riding in the center-rear seat, restrained with a lap belt while his siblings were restrained by shoulder harnesses. The van plowed into a 29,000-pound roll of steel that had fallen into the roadway from a Transcontinental Transport truck driven by Michael Savage when he collided with another truck owned by Brad Johnson Trucking.

The Karlssons sued Ford Motor Co., Transcontinental, Savage and Brad Johnson Trucking.

The trucking companies settled for approximately \$10,375,000, of which \$7,825,000 went to Johan, who was left paralyzed after his spine was severed.

Johan's case against Ford, for failing to warn that the center seat lap belt did not provide adequate protection to a child, continued. The plaintiffs alleged that Ford knew about the problem of "jackknife spinal severing" and had begun to install three-point harnesses in cars in Europe and Australia that could have prevented Johan's injuries.

Plaintiffs' attorney Thomas Girardi and his partner, David Lira, looked at thousands of Ford documents going back to the 1960s. Their clash with Ford's attorneys was so sharp that a "discovery referee" was appoint-

ed. The search was productive. At trial, Girardi presented internal Ford memos and crash-test reports allegedly showing the company knew about the flaws in its lap belt for 20 years. The plaintiffs' lawyers showed the jury that Ford's own crash-test results indicated that child-sized dummies restrained in lap belts were nearly split in half upon collision. They claimed that it would cost the company \$15 at the point of manufacture and \$35 as a recall to install three-point restraints in its vehicles. Ford vehicles are still sold with center-rear lap belts.

The discovery referee, retired judge Thomas F. Nuss, filed a report to the court, citing Ford's failure to produce, in a timely fashion, documents and knowledgeable witnesses who could talk about warnings and safety.

"The Referee finds that for approximately two years [opposing party] has been seeking the deposition of Ford's warnings PMK [person most knowledgeable] to cover the issue of why booster seat material was in the 1996 Aerostar Owner's Guide but not in the subject 1996 Windstar Owner's Guide and has been thwarted by the inactions and actions of Ford," Nuss wrote. As a penalty, the referee recommended that the court instruct the jury that the center lap belt had not provided adequate protection and that Ford had failed to warn the plaintiffs of this dangerous condition.

As a result of that instruction, which the court adopted, the defense was not permitted to refute that the lap belt was a dangerous condition.

Ford sought review by filing a writ of mandate to the court of appeals, which made two amendments to the sanctions, but granted Ford no relief. Ford's lawyers were reduced to arguing causation, telling the jury that Ford had not caused the accident. They introduced evidence showing that in severe accidents like this one, more than 90% of victims suffer critical injuries whether or not

they are restrained.

INJURIES/DAMAGES blunt force trauma to the head; discectomy; emotional distress; fracture, L1; fracture, L2; fracture, neck; fracture, talus; fractured kidney; fractured teeth; loss of consortium; neurogenic bowel; rotator cuff injury; severed spine

Johan was the most seriously injured. He was rendered a paraplegic when his spine was severed. He claimed future medical expenses of \$7 million present value and future lost earnings of \$2 million present value.

Agneta Karlsson suffered a fractured talus, fractured teeth, a rotator cuff injury and a discectomy. Her husband, Hans, sought damages for loss of consortium. Erik sustained a fracture at L-2, blunt force trauma to the head and a neurogenic bowel. Isak sustained fractures at L1-2. Desiree and Kristina both sustained blunt force trauma to the head. Tim Mansfield sustained head, neck and chest injuries. His wife sought damages for loss of consortium.

RESULT Prior to trial, Transcontinental settled as follows: Johan \$7,825,000, Erik \$750,000, Isak \$500,000, Desiree \$250,000, Kristina \$50,000, Agneta Karlsson \$750,000, Tim Mansfield

\$140,000, Hans Karlsson \$100,000, and Marie Mansfield \$10,000.

After trial, the jury found for Johan and awarded him \$45.45 million, including \$15 million in punitives against Ford only. The jury found Ford 40% liable and, not knowing that the trucking companies had settled, found their owners 60% liable. The court offset the amount of the pretrial settlement. The suit took seven years to get to a jury, according to Girardi.

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