

PROVING PUNITIVE DAMAGES AGAINST A RAILROAD

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I. Introduction

Punitive damages, the common law sword bestowed upon the victim of willful and wanton conduct by Anglo-American Law, is an endangered species. Relentless attempts by insurance, industry, and archconservative political groups have resulted in massive changes to state statutes regulating punitive damages that are almost uniformly restrictive, if not directly prohibitive.¹ At the same time, the courts, and particularly the United States Supreme Court, have relentlessly whittled down the right to recover for punitive damages in the traditional corporate setting.

Against this setting, the quest for punitive damages against a railroad is daunting, although as will be shown, it is not only possible but appropriate in the right setting with the right facts. What follows is the saga of one case against CSX Transportation, which was tried for six months, was affirmed by the appellate court and then by the Florida Supreme Court, and then ultimately traveled to the United States Supreme Court, where certiorari was denied. *CSX Transportation, Inc. v. Palank*, 743 So. 2d 556 (Fla. 4th Dist. Ct. App. 1999), *rev. denied*, 760 So. 2d 946 (Fla. 2000), *cert. denied*, 531 U.S. 822, 121 S. Ct. 65 (2000).

In the 1990s, an Amtrak Silver Star passenger train traveling on CSX tracks from Miami to Washington, D.C. derailed at a switch outside of the small town of Lugoff, South Carolina. The Amtrak Silver Star was traveling at 79 mph at the time. The ensuing derailment was catastrophic. Eight people were killed and well over eighty were injured. Among the dead was a Miami police sergeant named Paul Palank. He was survived by his wife and two young children. A wrongful death case was commenced, and after discovery, a motion to amend to assert punitive damages was permitted by the court.² The heart of the case was that CSX had cut its maintenance of way manpower, including track and switch inspectors, severely for the ten years before the derailment. This was done to save money. There was evidence that over two billion dollars had been saved by maintenance of way cutbacks in that time. Inspectors and the maintenance of way workers, as well as the union, had repeatedly asked for more resources, including more manpower to inspect track, but despite those requests, cutbacks continued. The maintenance of way inspectors were therefore forced to meet inspection requirements with falsified inspection reports, and the resulting shoddy, improper maintenance made it inevitable that a deadly derailment would occur, although nobody knew when or where.

The switch that caused the derailment had a metal part, a cross pin, which had broken and was buried under ballast and mud for over seven and a half months before the derailment. During that time, the switch was difficult to throw and the integrity of the switch was hanging on by a thread only because of a backup safety plan. This precarious situation gave way when the Silver Star roared over the switch one dark summer night.

II. Legal Standard

1. Regardless of the state or court in which an action for punitive damages against a railroad is prosecuted, punitive conduct on the part of the corporation itself is a critical element, both legally and practically. Willful and wanton conduct on the part of a lowly railroad employee, absent more, is just not enough to invoke punitive liability against a major railroad. And, even if such conduct could pass muster under a state's punitive damages framework, the case would not hold much promise in terms of a jury verdict because the five major railroads have literally thousands of employees each.
2. In order to make the case worthwhile, both legally and practically, either the railroad itself, or at the very least a managing agent, needs to be involved and guilty of punitive conduct. If the corporate culture is such as to promote profits over safety, as was the case with CSX, and that culture results in a catastrophe, then there may be fertile ground for a punitive damages case.
3. At lower levels, the road master must be considered to be a managing agent for purposes of implicating the corporation. A road master is a manager who is responsible for a section of track and all of the switches and all of the workers associated with that section of track. Usually, a number of workers will work under his or her supervision, and the scope of the job will include maintenance of track switches, inspection of track and switches, reporting to the Federal Railway Administration, and reporting to the railroad itself. Prior corporate knowledge, if not legally required, is of significant importance in the proof of the wanton and reckless conduct. Inevitability of injury based on corporate conduct is the single connected theme that makes these cases.
4. Most states require reckless conduct, meaning conduct so reckless that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to the conduct. For example, see Florida Statute § 768.72.

III. Discovery

Discovery in a railroad punitive damages case is the linchpin of the case. For most cases, there either has to have been a past history of wanton conduct and a failure to act, or a corporate culture where safety was so recklessly disregarded because profits were put above all else, that a tragedy was inevitable at some point.

1. Government Reports and Documents

- a. With the major railroads such as CSX, there are reporting requirements to the Federal Railway Administration. Reports to the FRA are mandatory according to federal regulations, not optional. In the *Palank* case, these safety and inspection reports were often falsified. If inspection reports are falsified, and falsification can be proven, that falsification is arguably intentional misconduct, which means a substantial legal hurdle has been overcome. Inspection reports filed with the FRA are public documents and obtained most easily through a Freedom of Information Act request. A subpoena will do the same thing. This should of course be followed by discovery requests from the defendant railroad for its own copies of such reports. They should then be compared for inconsistencies.
- b. There was testimony in the case from former and current employees of CSX that for many years safety inspection reports had been falsified or exaggerated. For example, there was testimony that the road master and inspectors would often sit in their offices and claim to have inspected track when they actually had done nothing of the sort. There was also testimony that, when added, indicated that for the section of track involved it would have taken eighteen hours to inspect the track and switches appropriately, but in fact inspections were done in four or five hours. Finally, from the railroad's own pay records, there was evidence that inspection reports were filed in the road master's name when he was actually away on vacation.

2. FRA Safety Audits

As part of its regular course of business, the FRA will from time to time audit the safety status of a certain section of track. This audit may come from an unusual number of derailments, or it may come from federal inspectors finding poorly maintained areas. Either way, a safety audit is a significant piece of evidence, particularly if it finds unsafe conditions.

For CSX, the FRA conducted a safety audit four years before the derailment on another division of track. This was known as the Baltimore Audit. It found a number of safety problems, noted underreporting of damage, and most significantly, noted an inadequate maintenance of way and inspection work force. The Baltimore Audit was significant because it followed a series of train derailments and involved approximately five thousand miles of track across six states. It specifically found that there were a number of defective conditions which should have been discovered and reported by CSX inspectors. The audit also noted that CSX supervisors and line employees were inadequately trained in FRA and CSX maintenance standards.

As the appellate court noted, "even though the deficiencies addressed in the audit

were related to a separate division, deficiencies were strikingly similar to those in [the South Carolina area where the derailment occurred].” *Palank*, 743 So. 2d at 560.

The safety audit provided railroad officers with prior knowledge of dangerous and similar conditions within the CSX track system. In addition, the findings about the poor quality of track maintenance and repairs and the inadequate inspections proved to the trial and appellate courts, as well as the jury, that the corporate leadership of CSX had clear notice that its practices were dangerous and that it utterly failed to do anything about them. The motive, of course, was money. Railroad officers were rewarded for increasing profits. Maintenance and inspection of track was a drain on profits.

3. Employees and Former Employees

A list of past and current employees of the area involved must be produced. Then the legwork begins: Current employees need to be deposed and former employees either interviewed or deposed. Maintenance of way employees and inspectors particularly can refute self-serving corporate defenses. Accurate reporting to the FRA can be a critical issue and certainly was in the *Palank* trial. The plea for more help was a constant refrain of everyone from the road master to the lowest rung employee. The rush to finish inspections and to furnish proof of inspections hurriedly done was another common refrain.

Working on the railroad is dangerous, disabling work. Perhaps 50% of the former employees no longer worked for the railroad because they had been disabled during their working lives. Often, this leads to litigation, and that experience leads to a less than favorable impression of the railroad by the former employees. Indeed, expect the railroad to label former employees as “disgruntled” and angry at the railroad for the way it handled their disability claims.

4. Unions

The railroad unions and union counsel can often supply access to needed information. Union attorneys were helpful in locating former employees and in locating documents, including an earlier union report which directly concluded that CSX’s manpower was insufficient to maintain and inspect the railway. Not only was this admissible evidence, it provided for rich cross-examination of corporate officers who, unbelievably, testified that they had not read the union report and had no intention of ever reading it. This led the trial court, in denying CSX’s Motion for Remittur and a new trial, to conclude that CSX had “corporate eyes that did not look, therefore, did not see,” and “corporate ears that did not hear, therefore, were deaf to their worker’s pleas.” Trial Court Order at 10.

5. Railroad Economist

Motive is important in any punitive damage case. In a case against the railroad, the motive is almost always the maximization of profit at the expense of safety. It is one thing to simply claim that a corporation is out to maximize profits, but it is still another to actually prove this to be true. There are economists that specialize in the railroad industry and who are familiar with the way railroads keep financial records. A railroad economist was therefore able to testify that CSX saved approximately \$2.4 billion over ten years by reducing its maintenance of way and inspection staff.

6. Former NTSB and FRA Inspectors

By law, current government employees cannot give expert opinions as to liability. The definition of liability often leads to a carefully orchestrated dance that tests the plaintiff's attorney's ability to get all the information available to the inspector up to the very edge of an opinion about liability. Retired or former inspectors, on the other hand, are a good source of expert testimony. They have a thorough familiarity with the FRA rules and FRA reporting requirements. They also know railroads. Certainly, former government inspectors can provide the vitally important teaching role that is necessary in any technical case.

IV. Common Carrier

In most states, and certainly in Florida, as a common carrier, a railroad is charged with a duty to exercise the highest degree of care in safely maintaining the rail track. *Edwards v. Jacksonville Coach Co.*, 88 So. 2d 543 (Fla. 1956). That means that common carriers have a particular public trust that they must discharge. Citizens have a right to expect that a common carrier will do all that it can to make sure that they arrive safely. Filing false or misleading inspection reports, falsifying inspections, cutting maintenance of way inspectors, and ignoring prior admonitions from government agencies are all actions which violate that public trust. This broken trust also provides rich material for closing argument. (See Exhibit A, a portion of the closing argument in *Palank*, available on the CD-ROM version of these *Reference Materials*.)

V. Railroad Defenses

In a punitive damages case, expect the railroad to fight vigorously. As with most large corporations, the railroad has enormous resources, which it will readily use to crush all but the most prepared and financially able plaintiffs' law firms. A punitive damages verdict against a railroad is a financial threat even with the customary indemnity agreement with Amtrak.³

1. CSX is a safe railroad that has won safety awards.

CSX argued that it was a safe railroad that in fact won the "coveted" Averill Harriman Safety Award. The problem with this argument is that there are only five major railroads, and they take turns giving the award to each other. Besides, the basis for the safety award is dependant upon the reports that were sent in to the FRA, which were shown to be falsified. An award based upon falsified records is not much of an award.

2. CSX mechanized its rail operations and modernized its operations.

The argument was that this was a reasonable business decision, and that mechanization is what enabled CSX to cut its maintenance of way and inspection work force rather than a corporate policy of greed. The problem with this defense is that according to the testimony of all of the maintenance of way workers, including the road master himself, mechanization did not affect inspections. In other words, inspections still needed to be made by human beings physically looking and physically making repairs if necessary. In fact, a slick videotape demonstration for the jury that showed modern railroad machinery boomeranged on CSX because the CSX employees, both former and present, all testified that they had never seen any of the sleek equipment shown in the videotape.

3. This was an unexpected and extraordinary failure.

CSX noted that its inspection reports showed that the crosspin that fractured was working and in place as late as the day before the derailment. This would have been an effective defense in a punitive damages case except for the fact that the inspection reports, or at least many of them, were proven to have been falsified. In addition, a metallurgist obtained by us and a metallurgist from the NTSB confirmed corrosion on the crosspin and confirmed that the crosspin had been buried. The inspection reports therefore had to be false.

4. If there were failures, the railroad did not know about them.

This is the wayward employee's defense. The problem for CSX was the Baltimore Safety Audit, which had found many of the same failings in terms of maintenance of way, inaccurate inspection reports, and inadequate and unsafe

track and switch conditions—the same conditions that existed in South Carolina, and the same conditions that caused the derailment.

5. The maintenance of way work force was sufficient.

CSX contended that there was ample time within which to conduct proper inspections and that a sufficient number of inspectors and maintenance workers were available. This was the party line for the corporate officers, but from the road master on down, the workers on the line all testified that there were repeated requests for additional help over the years, all of which had been denied. In view of the prior findings of the Baltimore Safety Audit and the deplorable conditions of the track and switch, the jury and the appellate courts had little trouble finding the credibility of the workers to ring true.

6. CSX's safety statistics are good.

The reports on which the safety statistics were compiled were cooked. But even more, an examination of the way in which the railroad treated the derailment on which the case is based was telling. In this case, where there was catastrophic derailment, the derailment itself was not reported to the FRA as a chargeable derailment, which is of course the problem with self-reported statistics. The General Accounting Office found substantial underreporting in statistics furnished by railroads to the FRA. In fact, the road master testified that when it came to derailment damage—and there were many derailments at low speed—they did not report them for the most part. Instead, they tried to charge the damage off to some other category so they would not have to report a derailment or property damage.

7. Government inspectors missed problems on the switch.

South Carolina had one government inspector for the entire state, that is, his responsibility was for every single mile of track in the state of South Carolina. It was impossible for him to make any kind of detailed inspection. The FRA inspector looked at the switch about a month before the derailment but had no recollection of the kind of inspection he made at all. But, it was no defense to CSX if the government inspectors missed a defective switch, because CSX had a duty required by federal regulation to inspect and maintain its own track and switches.

VI. Conclusion

At the damages portion of the punitive damages trial—which in Florida meant a second short trial immediately following the first because the case was trifurcated—the message was that because of the tremendous savings realized by CSX in reducing its maintenance of way staff, it would take an extremely significant verdict to even the scale. The jury got the point and even made a note about safety on the jury verdict form. (See Exhibit B, the jury verdict form, available on the CD-ROM version of these *Reference Materials*.)

Endnotes

¹The Florida Statutes are illustrative. Florida went from a state with some restrictions but no caps, to significant restrictions with caps at different levels unless one can demonstrate specific intent to harm, which means that reckless disregard cases are for all intents and purposes capped. FLA. STAT. §§ 768.72-768.73 (1999).

²This is a vagary of Florida law; Florida Statute § 768.72(1) requires evidentiary proof to show a reasonable basis for pleading punitive conduct.

³CSX, in this and in other derailment cases handled by my law firm, had an indemnity agreement that provided for the payment of punitive damages, as well as compensatory damages, by Amtrak. Indeed, CSX argued that because of the indemnity agreement, evidence of CSX's profits and net worth should never have been allowed into evidence. The courts made short shrift of this argument, but it was later in fact determined that Amtrak did indemnify CSX for all compensatory and punitive damages, including interest and costs.