Defending the Long-Term Care Punitive Damages Claim from Day One

J. Richard Moore

Alford Clausen & McDonald, LLC

One St. Louis Centre, Suite 5000
Mobile, Alabama 36602
(251) 415-9389
(251) 432-1700 [fax]
jrm@alfordclausen.com

Return to course materials table of contents

J. Richard Moore is a partner at Alford Clausen & McDonald in Mobile, Alabama. His practice includes defense of physicians, hospitals, nurses, nursing homes and long-term care professionals in civil litigation and regulatory matters. Mr. Moore is licensed to practice law in Alabama, Tennessee and Indiana, and he has participated in the defense of nursing home, ALF, hospice and physician malpractice cases in those states as well as in Mississippi, Georgia, Florida, North Carolina, South Carolina, Kentucky and West Virginia.

Defending the Long-Term Care Punitive Damages Claim from Day One

Table of Contents

Defending the Long-Term Care Punitive Damages Claim from Day One

I. Introduction

In a trial against a nursing home or another provider of long-term health care, the plaintiff's lethal weapon is fear. Underlying the facts at issue are the conscious and subconscious fears of the jury:

1) Fear of disease and physical deterioration;
2) Fear of the loss of cognition and memory;
3) Fear of abandonment;
4) Fear of helplessness in the face of neglect or mistreatment; and, of course,
5) Fear of death.

The plaintiff's mission is to galvanize those fears and translate them into anger against the defendant facility and caregivers.

Actually asking the jury to put itself in the place of the plaintiff or the plaintiff's family violates the "golden rule." However, it is unavoidable that each juror in a long-term care trial sees her mother, his father, or another beloved friend or family member as the patient in the nursing home bed, and each juror is motivated by the emotion—the fear—that is generated by such transposition. In the case of a bad outcome to the patient, which includes nearly every long-term care claim, the practical effect is that the jury looks to the defendant to *disprove* negligent care related to the outcome, as opposed to properly applying the burden of proof against the plaintiff.

Fear and emotion also make nursing home and other long-term care lawsuits subject to extreme, and extremely disparate, punitive damage awards. A brief survey of verdicts from just this year, 2010, shows a $5 million verdict in March in a non-death claim against a nursing home in Philadelphia, including a $1.5 million punitive component; a $12 million verdict in March against a Santa Clarita, California nursing home in a sexual assault case, including a $6 million punitive component; a $2.5 million verdict in March in a non-death claim against a hospice service in Alabama, including a $2.1 million punitive component; and a $29.1 million verdict in May in a wrongful death claim against a Sacramento nursing home, including a $28 million punitive component.

Nearly every case involves some fact, occurrence or less-than-likeable witness that potentially raises the threat of punitive damages in jurisdictions that allow such damages. Even where punitive damages are not allowed, compensatory awards may be driven upward by a jury's desire to "send a message." The goal behind this article and the accompanying presentation is to encourage defense attorneys to take seriously at the outset of each claim or lawsuit the threat of punitive damages, and to take advantage at each phase of litigation opportunities and legal tools which can enable us to preclude or limit such damages, and/or to cool down an angry enflamed jury in a difficult, emotional case.

II. Separate the Punitive Case from the Medical Liability Case

The majority of jurisdictions in the United States require a showing of conduct more culpable than "mere negligence" to justify the imposition of punitive or exemplary damages upon a defendant in a civil action. According to the *Restatement (Second) of Torts*, punitive damages may be awarded only for conduct "that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others," and are not awarded for "mere inadvertence, mistake, errors in judgment and the like, which constitute ordinary negligence." *Restatement (Second) of Torts* §908(2).

On the other hand, in most jurisdictions, claims alleging improper skilled nursing care are governed under professional malpractice standards. These standards in turn typically require a plaintiff to establish that an individual health care professional engaged in conduct that falls below the exercise of that "reasonable and ordinary degree of learning, skill and care commonly possessed and exercised by reputable physicians practicing in the same community." *E.g.*, Harney, *Medical Malpractice*, §21.2 (3d ed. 1993). This typically requires that liability be established through a properly-qualified expert witness, as opposed to the presentation of lay testimony intended to establish liability on the part of the long-term care facility. In addition, some jurisdictions have damages limits and restrictions that apply specifically to medical malpractice cases. *E.g.*, Colorado Statutes §§13-21-102.5, 13-64-302; 735 Illinois Combined Statutes 5/2-1115; Indiana Code §§34-51-3-4, 34-18-14-3; New Mexico Statutes §41-5-6; Texas Civil Practice and Remedies §74.310 *et seq.*

A third related concept here is *respondeat superior*. Typically long-term care claims assert a right to recover against one or more corporate entities, including the entity that "owns and operates" the facility and/or additional corporate parents and management companies. However, to establish liability on the part of the defendant facility for a breach of the duty owed by the facility and its staff to the patient, *i.e.*, the duty to provide the level of nursing care commensurate with the facility's licensure and the patient's needs, the plaintiff must establish that one or more individual caregivers, in the course and scope of their employment with the facility, engaged in acts or omissions constituting a breach of that duty of care.

In light of the separate legal thresholds for medical negligence and punitive damages, a potentially successful strategy for excluding or limiting a punitive damage claim is to distinguish and de-link the medical liability claim from the punitive damage claim. The plaintiff hopes to convince the jury that the care the patient received was all bad, every day, all day. Pressing the plaintiff to articulate, with specificity, the facts that may give rise to legal liability, and to identify the specific individuals and specific harm associated with those facts, can pave the way for exclusion of general bad evidence or collateral problematic facts that are not specifically related to harm to the patient. This, in turn, reduces the evidentiary platform for a punitive damage claim.

A. Written Discovery

A typical long-term care complaint will contain a litany of allegations of insufficient care and bad results. Interrogatories may be used to force the plaintiff to either disgorge its position with respect to each item of harm alleged, or to demonstrate in response that there is little in the way of evidence on many of the allegations. Consider serving the following in a complaint that alleges skin breakdown, dehydration and sepsis:

1) For each and every instance in which you claim that acts or omissions of any agent or employee of Facility, Inc. caused patient to experience pressure sores on the breast, knee, ankle and/or toes, as alleged in Paragraph X of your Complaint, state:
    a) the date of the instance;
    b) what occurred, including a description of every act or omission you contend caused pressure sores and/or every intervention or action that you allege should have been taken but was not;
    c) how you contend those acts or omissions caused the pressure sores;
    d) the name and address of each agent or employee of Facility whom you allege was negligent, wanton and/or willful in each occurrence;
    e) the name and address of each and every witness to each occurrence; and
    f) please set forth by date, author, signatory, Bates number, and subject matter each and every document or thing which you claim supports your allegations regarding each occurrence.

2) For each and every instance in which you claim that acts or omissions of any agent or employee of Facility caused patient to experience dehydration, as alleged in Paragraph Y of your Complaint, state:
    a) the date of the instance;
    b) what occurred, including a description of every act or omission you contend caused dehydration and/or every intervention or action that you allege should have been taken but was not;
    c) how you contend those acts or omissions caused dehydration;
    d) the name and address of each agent or employee of Facility whom you allege was negligent, wanton and/or willful in each occurrence;
    e) the name and address of each and every witness to each occurrence; and
    f) please set forth by date, author, signatory, Bates number, and subject matter each and every document or thing which you claim supports your allegations regarding each occurrence.
3) For each and every instance in which you claim that acts or omissions of any agent or employee of Facility caused patient to experience sepsis, as alleged in Paragraph Z of your Complaint, state:
    a) the date of the instance;
    b) what occurred, including a description of every act or admission you contend caused sepsis and/or every intervention or action that you allege should have been taken but was not;
    c) how you contend those acts or omissions caused sepsis;
    d) the name and address of each agent or employee of Facility whom you allege was negligent, wanton and/or willful in each occurrence;
    e) the name and address of each and every witness to each occurrence; and
    f) please set forth by date, author, signatory, Bates number, and subject matter each and every document or thing which you claim supports your allegations regarding each occurrence.

Similarly, requests for admissions may be used to identify the actual caregivers whose hands-on care is alleged to have been deficient is crucial. One strategy that has been approved in at least one jurisdiction, Mississippi, is to identify each caregiver who provided care to the resident and request plaintiff to admit that the caregiver complied with all applicable standards of care can serve that purpose nicely. *Estate of Finley ex rel. Jordan v. Beverly Health and Rehabilitation Services, Inc.*, 933 So. 2d 1026 (Miss. 2006). For each denial, a follow-up interrogatory seeking complete information on the allegations against that caregiver should be served. The goal here is to limit the potential bases for liability to the acts or omissions of specifically-identified individuals.

The overall purpose of such written discovery is to focus on the medical liability component of the claim, to press the plaintiff to sufficiently articulate that part of the claim, and to de-link medical liability from general "bad facts." The plaintiff would like to establish a lot of smoke in the hope of convincing the jury that there is a fire. Given the human factors involved, a nursing home chart is likely to contain a number of "innocent" errors or omissions, which the plaintiff may use to suggest that care was routinely mis-charted and most likely, therefore, not provided. Keeping the focus on the plaintiff's obligation to link each deficiency with specific caregivers *and* specific harm can help take the air out of such collateral unfavorable facts.

B. Expert Discovery

A similar approach may be implemented in deposing the plaintiff's experts. Requiring the plaintiff's experts to identify the specific acts or omissions they deem to constitute deviations from standards of care by time, date and caregiver lays the groundwork for formal motions restricting the scope of claims and evidence to

be presented at trial. Plaintiff's standard of care expert should be required to identify each and every caregiver involved in each and every alleged deviation. Where the expert states that he or she is unable to identify the particular caregiver or caregivers involved, the expert should nonetheless be required identify every instance in which the standard of care was not met.

The question of "intent" may also be addressed during the deposition of the plaintiff's expert. A typical argument made by plaintiffs is that although the actual hands-on, "front-line" caregivers may not have provided care as they should have, it was not really their fault because they are lowly, poorly-paid pawns in the profits-over-people game who are not provided with sufficient co-employee assistance. This may be posited as the culpable metal state justifying a punitive award.

To combat such an argument, the plaintiff's standard of care expert should be pressed to point out real deficiencies in hands-on care, irrespective of the alleged motives of management or corporate parents. It can also be helpful to have the expert affirmatively acknowledge that he or she has not reviewed any information about facility management, ownership, corporate structure, financial operations or financial performance. Such testimony can assist in responding to a rather subtle argument that plaintiffs often make: That the full import of the deviations from standards of care identified in case at hand cannot be fully appreciated by the jury without reference to the "profits over people" corporate motivation at the management level. A responsive argument is that the plaintiff's standard-of-care expert was able to articulate opinions regarding the sufficiency of care without reference to or reliance upon corporate or financial policy. Here again, the goal is to exclude or minimize the impact of bad evidence not specifically related to harm to the patient in question.

III. But, Do Not Ignore the Punitive Damages Claims

Drawing the focus on proving medical liability, and minimizing the punitive damages case, puts the defense in the position to teach the jury medical facts and engage in a relatively dispassionate demonstration showing that the alleged insufficiency—a missed medication dosage, missing activity charting, a shift with too few nurse aides—was not in truth medical negligence, and/or did not proximately cause harm to the resident as a matter of medical science. We are most comfortable when conducting such objectively-founded advocacy.

However, it is impossible to shield the jury from the plaintiff's emotion and suspicion. While the medical experts are important, the jury will probably be more closely assessing the testimony and demeanor of the plaintiff and family, and evaluating the facility caregivers whose care we are defending. This makes focusing on understanding and developing these witnesses' testimony similarly crucial.

A. Plaintiff Depositions

In deposing plaintiffs, we should not shy away from exploring their anger, their fear, and the things that really bother them about their loved one's care. Most times, those complaints have little to do with the "medical liability" side of the case. However, those concerns should not be ignored or minimized in preparing a defense. If grooming was a major source of frustration for the family, having a witness prepared to address why grooming might have been unsatisfactory at times—even where no "bad medical outcome" resulted—may be helpful at trial or during caregiver depositions.

It is also important to discover to the fullest extent possible the interaction between facility staff and plaintiffs, family members and other visitors. Often plaintiffs will attribute staff members with complaining about the adequacy of staffing or supplies, or about "management" or "corporate." Learning about such statements well in advance of trial will help counsel to prepare the appropriate staff members to deny or amplify them.

B. Preparation of Caregivers

The significance of preparing defense caregivers to testify cannot be overstated. A key corollary is determining which caregivers will testify. The best choice, if available, is the long-term employee front-line caregiver who can credibly convey to the jury that while care may not always be perfect, the patients, including the patient at issue in the lawsuit, are well-cared-for. Also important, as alluded to above, is preparing caregivers to respond not just to the specific facts surrounding the alleged medical negligence, but to the specific complaints of the plaintiff and family members.

IV. Take Advantage of Federal Constitutional Standards

Until reasonably recently, appellate review of punitive damage awards has been guided by individual state law mechanisms and jurisprudence, with review often focusing on whether the standard for allowing a punitive claim to go to the jury had been met, rather than on a wholesale reassessment of the propriety of the amount awarded. That changed with the *BMW v. Gore* case in 1996. After signaling in a number of opinions that excessive punitive damage awards may threaten civil defendants' due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) set forth for the first time standards for review of punitive damage awards that apply in every case, state and federal, in which such an award is made. The facts in the *BMW v. Gore* case are generally familiar to most attorneys: Dr. Gore purchased a new BMW from a dealership in Birmingham, Alabama, only to find out later that his car had been damaged and repainted prior to sale. Upon the evidence that this reduced the value of Dr. Gore's BMW by $4,000, the jury returned a punitive damage verdict of $4 million. The trial court helpfully remitted the punitive award to $2 million. Upon the verdict being upheld by the Alabama Supreme Court, BMW petitioned for writ of certiorari to the United States Supreme Court. The Court granted the petition because it believed that review would help to illuminate "the character of the standard that will identify constitutionally excessive awards." *BMW v. Gore*, 517 U.S. at 568.

The Court in *BMW* went on to set forth three "guideposts" to govern courts' review of punitive damage awards. Those guideposts, as more recently reiterated in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) are:

1) The degree of reprehensibility of the defendant's misconduct;
2) The disparity or ratio between the actual harm or loss suffered by the plaintiff and the punitive damage award; and
3) The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. 408, 418 (2003).

Since *BMW v. Gore*, the United States Supreme Court has issued additional opinions further refining and highlighting these guideposts.

A. The Most Important Guidepost: Reprehensibility of the Defendant's Misconduct

In *BMW v. Gore*, the Court observed that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 575. More recently, in *Exxon v. Baker*, 128 S. Ct. 2605 (2008), the Court further noted, "The prevailing rule in American courts limits punitive damages to cases of...'enormity,' where a defendant's conduct is 'outrageous,' owing to 'gross negligence,' 'willful, wanton, and reckless indifference for the rights of others,' or behavior even more deplorable." *Exxon*, 128 S. Ct. at 2621 [citations omitted]. The Court has further fleshed out how reprehensibility is to be assessed.

1. Reprehensibility Categories

In 2003 in *State Farm,* the Court set forth five categories of conduct to determine reprehensibility:

1) Whether the harm caused was physical as opposed to economic.
2) Whether the tortious conduct "evinced an indifference to or a reckless disregard of the health or safety of others."
3) Whether the target of the conduct had financial vulnerability
4) Whether the conduct involved repeated actions or was an isolated incident.
5) Whether the harm was the result of intentional malice, trickery, or deceit, or "mere accident." 538 U.S. at 419.

Presumably where harm is physical; where the tortious conduct does evidence indifference to others' harm, where the conduct is repeated, and whether the harm is the result of something greater than "accident," a larger punitive award is justified.

2. A Jury May Not Punish for Lawful "out of State" Conduct or Dissimilar Acts" Unrelated to the Plaintiff's Harm

Of particular interest in the *State Farm v. Campbell* case was the admission of, and reliance by the state supreme court upon, conduct engaged in by the defendant nationwide, not limited the jurisdiction in which the lawsuit was filed. In *State Farm*, the defendant insurance company was accused of bad-faith claims handling, and the trial court admitted extensive evidence of conduct on claims in addition to those based in Utah, where the case was filed. In affirming the jury's $145 million punitive damage verdict against the insurer, the Utah Supreme Court specifically stated that in light of the insurer's "massive wealth," it would as a practical matter only be punished on "one out of every 50,000 cases" nationwide. *State Farm v. Campbell*, 438 U.S. at 416.

On review, the United States Supreme Court found that the insurer's conduct "merit[ed] no praise." *Id*. at 419. However, it disapproved the admission of, and the Utah Supreme Court's reliance upon, the extensive evidence of out-of-state conduct by the insurer that was lawful in the state in which it occurred. The Court held,

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the state where it is tortious, but that conduct must have a *nexus to the specific harm suffered by the plaintiff*. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

Id. at 422.

The Court in *State Farm* also disapproved reliance upon dissimilar acts unrelated to the plaintiff's harm to justify a punitive damage award. The Court held,

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis.

Id. at 422-23.

3. The Jury May Not Punish a Defendant for Harming Non-Parties Not before the Court

The United Supreme Court revisited punitive damages again in *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007). The *Phillip Morris* case was a wrongful death claim against the cigarette manufacturer for a single death, in which the jury awarded compensatory damages of $821,000 and punitive damages of $79.5 million. On appeal, Phillip Morris argued in part that the trial court had explicitly permitted the plaintiff attorney to argue that the jury should punish based on the threat of harm to individuals other than the decedent involved in the lawsuit. 549 U.S. at 350-51.

The Supreme Court held that the due process clause forbids a state from using punitive damages to punish a defendant for injuries that it inflicts upon non-parties, or "strangers to the litigation." *Id*. at 354. The Court held that to permit punishment for injuring a nonparty victim would add a "near standardless dimension" to punitive damages awards, thereby magnifying the risk of arbitrariness, uncertainty and lack of notice threatened by excessive awards. *Id*.

4. Application of Reprehensibility Analysis in Long-Term Care Cases

Application of the five components of reprehensibility set out in *State Farm* can provide a path to minimizing punitive damage evidence in long-term care cases. In these cases, the alleged harm is most always physical in nature, and the "target," the patient in need of nursing care, is probably appropriately deemed to be financially vulnerable. However, where the focus of litigation and trial can be directed to the medical liability component of a case, facts supporting "indifference," "recklessness," or intentional harm can be minimized. Similarly, if the defense can hold the plaintiff to the burden of proving up specific acts of medical negligence by specific providers, and exclude or minimize collateral bad evidence, the record will accordingly be deprived of evidence of "repeated actions."

Limiting relevant evidence on punitive damage to "in-state" conduct constituting "similar acts" with some nexus to the harm caused to the patient is also consistent with the strategy of focusing on the medical liability case and arguing the inadmissibility of collateral bad evidence. These limitations have already been followed in a medical liability case with a fact pattern similar a long-term care case. In *Stroud v. Abington Memorial Hospital*, 546 F. Supp. 2d 238 (E.D. Pa. 2008), the decedent's son brought a wrongful death claim against a hospital and doctors who had failed to diagnose a bowel obstruction that ultimately killed his father. Part of the plaintiff's claim was after having learned of their mistaken failure to properly diagnose the obstruction, the defendants attempted to "cover up" their negligence. 546 F. Supp. 2d at 241. The defendants moved to dismiss the plaintiff's punitive damage claim, partially on the grounds that to the extent that it was premised on a "cover-up," such evidence was inadmissible because punitive damages could only be awarded "based on the conduct for which liability on the underlying tort is premised." *Id*. Relying on *State Farm*, the U.S. District Court for the Eastern District of Pennsylvania agreed. *See id*. at 258-59 ("'A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.'" (quoting *State Farm*, 538 U.S. at 422)).

B. The Most Commonly-Cited Guidepost: Ratio between Compensatory and Punitive Damages

In *BMW v. Gore*, the Court noted that the "most commonly cited indicium" of the unreasonableness of a punitive damage award is its ratio to the "actual harm" inflicted on the plaintiff. *BMW v. Gore*, 517 U.S. at 580. In the wake of *BMW*, this component of the analysis has been expressed in shorthand as the ratio between actual/compensatory damages and punitive damages. In *BMW v. Gore,* the Court noted that a four-to-one ratio between punitive and compensatory damages might be "close to the line," 517 U.S. at 581. In *State Farm*

v. Campbell, the Court opined that "few awards exceeding a single-digit ratio"—*i.e.*, greater than ten-to-one—"between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 426.

Application of the "ratio" analysis is the component of federal analysis perhaps most controlled by state law governing recoverable compensatory damages. It is also the category least impacted by litigation or trial strategy, other than the general goal of minimizing the plaintiff's actual damages so as to drive down the value of the denominator.

C. Sanctions in Comparable Cases

The Court in *BMW v. Gore* held that comparing a punitive damage award to "civil or criminal penalties that could be imposed for comparable misconduct" is a "third indicium" of excessiveness. 517 U.S. at 583. The Court noted that the $2 million punitive damage award before it was "substantially greater" than the statutory fines, ranging from $2,000 to $5,000, that were available in Alabama or other jurisdictions for "similar malfeasance." *Id*. Similarly, in *State Farm v. Campbell*, the Court compared (unfavorably) the $145 million punitive damage award to the statutory fine of $10,000 available against the insurance carrier for the single act of fraud against its insured established at trial. 538 U.S. at 428.

Long-term care facilities are typically subject to regulatory penalties and fines for a range of regulated activities, including patient care. Generally speaking, although fines can be imposed which compound on a daily basis, there are maximum fines that will rarely exceed a punitive damage award that merits review as excessive. Defense counsel should be familiar with the regulations implicated by the allegations of the particular case and assess whether a punitive award compares favorably or unfavorably to the award. It might also be worthwhile to advance testimonial evidence from a state regulator on post-trial motions reviewing the punitive award to establish the nature of the fine that could have been imposed on the wrongdoing proven at trial.

V. Trial Presentation

How to conduct trial so as to eliminate or minimize punitive damages is a rather vast topic. However, assuming that the strategies recommended in these materials are pursued, defense counsel should at least have a good idea of plaintiff's medical liability case and how to focus on defending that case and minimizing other evidence extraneous to it. If so, the trial strategy will flow from the manner in which the issues have been developed in discovery.

As a bookend to the initial observations made herein, the best way to minimize punitive damages is to confront the jury's fears head-on. This can be accomplished by acknowledging at the outset that the case will involve uncomfortable facts and a sympathetic subject (the patient at issue). Being sensitive to the jury's sensitivities is also part of helping the jury confront its fears. Further, trial is typically not the forum to attack the plaintiff or the plaintiff's attorneys (unless there is evidence of overt and pertinent dishonesty). The jury will expect the resident and, more likely than not, the plaintiff to be treated with respect. The jury will be interested in the answers to key questions: Why did the patient die? Why did he or she suffer? Is someone responsible? As advocates, we must argue to the jury that respectfully, the plaintiff is mistaken about the answers to those fearful questions, but that we, the defense, have them.

VI. Conclusion

When trial in a civil action becomes a search for scientific answers to questions based on objective facts and evidence, the defense is an excellent position to either win outright, or limit a verdict motivated by anger, suspicion and fear. When trial is a rearguard defense to a laundry list of omissions and imagery only

inferentially linked to some bad outcome, the defense has reason to worry. As defense attorneys in long-term care cases, our challenge is to assume the burden of disproving that any particular omission resulted in harm to the patient, and to insist that the plaintiff demonstrate specific medical negligence, based on the act or omission of identified caregivers, proximately resulting in a particular harm. Where that can be accomplished, evidence supporting a punitive award will be minimized, or at least, hopefully, manageable. Further, developing the evidence in this fashion will allow us to maximize the protections offered by current federal constitutional jurisprudence. In sum, the best defense to the punitive damage claim is commensurate with the best approach to overall defense: make the plaintiff prove its claim.

Return to course materials table of contents