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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY LOU HESTON and ROBERT H. HESTON, individually, and MISTY KASTNER, as the personal representative of ROBERT C. HESTON, deceased,

Plaintiffs,

v.

CITY OF SALINAS, SALINAS POLICE DEPARTMENT, MICHAEL DOMINICI, JAMES GODWIN, LEK LIVINGSTON, JUAN RUIZ and TASER INTERNATIONAL, INC.,

Defendants.

Case No. C 05-03658 JW

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TASER'S RENEWED AND SUPPLEMENTAL MOTION FOR JUDGMENT AS A MATTER OF LAW (JMOL) OR REDUCTION IN PUNITIVE DAMAGES

Trial:

Date Commenced: May 13, 2008

Date of Verdict: June 6, 2008

Post-Trial Telephonic Conference:

September 17, 2008 at 9:00 a.m.

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I. INTRODUCTION

After four weeks of hotly contested trial, the Court instructed the jury thoroughly, there were extended deliberations, and the jury returned a mixed verdict, finding against defendant TASER International, Inc., (TASER) for negligently failing to warn about the risks of its product, the M26 ECD, and against plaintiffs on all other claims. The jury awarded compensatory damages of $21,000.00 to the estate of Robert C. Heston, and $1,000,000.00 to his parents, Robert H. Heston and Betty Lou Heston, for their wrongful-death damages. The jury apportioned fault 85 % to the decedent and 15% to TASER. Finally, the jury assessed punitive damages of $5,200,000.00 against TASER.

TASER now renews and supplements its Rule 50 Motion for Judgment as a Matter of Law.[1] The motion asserts, essentially, that the jury lacked any basis for finding TASER liable for the death resulting from its unreasonable failure to warn about the risk of its product, or for the award of punitive damages for recklessly placing such a product into commerce under the motto, "Saving lives every day." TASER also contends that the Court should reduce or even vacate altogether the jury's award of punitive damages.

Plaintiffs acknowledge that because they prevailed only on a state-law theory, the general damages awarded to the estate do not survive and the compensatory damages should be reduced to $1,189.30, the amount of economic loss (burial expenses). That sum, and the compensatory damages awarded on the wrongful death claim, are subject to an 85% reduction based on the decedent's fault, bringing the estate's total compensatory damages to $178.43, and the parents' award to $150,000.00. For the following reasons, however, judgment should be entered in the full amount of $5.2 million for punitive damages, plus costs.

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[1] Plaintiffs' opposition to TASER's Rule 59 new trial motion, and the arguments raised therein, is set forth in a separate memorandum filed herewith. There is significant overlap between the two motions. This memorandum tracks TASER's JMOL Memorandum section by section.

The verdict against TASER was amply supported by the evidence, which showed the danger of acidosis from repeated or prolonged ECD applications was theorized in the literature prior to TASER's marketing the more powerful Model M26 ECD. The jury was properly instructed on the applicable law, which required them to determine, based on "clear and convincing evidence," whether TASER's failure to test and warn for acidosis constituted "a conscious disregard of the probability of injury to others."

The testimony of TASER CEO Patrick Smith demonstrated that TASER unreasonably failed to test its new product's effect on acidosis, and recklessly marketed the product to police agencies for use on human beings, including some suffering from mental illness or the acute effects of drug intoxication, without first gathering the "scientific knowledge" necessary to evaluate its grandiose claims of safety, regardless of the number or duration of applications.

TASER did not "act[] promptly to provide warnings to its customers of the scientific information that . . . repeated shocks by a TASER ECD might cause acidosis." But see TASER's Supplemental JMOL Memorandum at 4:6-8. The firm's overriding concern for sales over safety was demonstrated by its burying a potential life saving warning on a single slide in a power point presentation which the City of Salinas did not timely receive, and which failed to reach the involved officers before the Heston incident.

TASER's reckless marketing of the M26, in conscious disregard for the lives of persons shot by the device, is among the scenarios for which California law expressly authorizes punitive damages. The award is only about one-half the ratio to compensatory damages authorized under the Court's instructions. The award is less than the U.S. Government's statistical value of a human life (recently reduced to $6.9 million). The award is only five percent of TASER's 2007 annual revenues ($100.7 million), and 4.3 percent of its current net worth ($120.6 million).

JMOL should be denied, the verdict affirmed, and judgment entered.

II. THE EVIDENCE SUPPORTS THE JURY'S VERDICT

TASER's contention that "the jury's findings do not support its conclusions," TASER's Supplemental JMOL Memorandum at 5:21-6:5, is based solely on a three-paragraph argument that the punitive damages are purportedly disproportionate to the compensatory damages – but only after the Court makes the reduction for comparative fault.

The jury returned a general verdict on special questions, and made no "findings." The issue is whether the evidence supports the jury's verdict, not whether "findings," which do not exist, support the jury's "conclusions."

The record demonstrates that the jury followed the Court's instructions to a "T" regarding proportionality of punitive and compensatory damages. The jury was first instructed not to reduce the amount of compensatory damages by the percentage of fault, Closing Instructions at 19:18-20, and then was told that "punitive damages may be no more than 10 times the amount of compensatory damages, but can be as little in amount as the jury decides." Id. at 20:10-11.

Were the jury to have done what TASER now contends it should have done – reduced the compensatory damages by the percentage of decedent's fault before calculating punitive damages – it would have violated the Court's instructions.

TASER is seeking an end run around the rule that the jury's comparative fault determination does not reduce the punitive damages. See Anno., Effect of Plaintiff's Comparative Negligence in Reducing Punitive Damages Recoverable, 27 A.L.R.4th 318 (1984), and the cases cited therein. It should not be allowed to do so.

The jury awarded punitive damages equal to about five times the compensatory damages. That considered judgment of the jury, which was almost $5 million less than the maximum amount the Court's instructions authorized, should stand.

III. THE COURT SHOULD NOT VACATE OR REDUCE THE AMOUNT OF PUNITIVE DAMAGES; IT SHOULD ENTER JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST TASER ON THE NEGLIGENT PRODUCTS LIABILITY CLAIM.

TASER does not cite the applicable legal standard. A trial court can overturn the jury and grant a post-trial Rule 50 JMOL motion "only if, under the governing law, there can be but one reasonable conclusion as to the verdict. In other words, the motion should be granted only if 'there is no legally sufficient basis for a reasonable jury to find for that party on that issue.'" Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276, 1283 (9th Cir. 2001) (citing Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 149,(2000) and quoting Rule 50(a)).

> In ruling on a motion for JMOL, the court is not to make credibility determinations or weigh the evidence and should view all inferences in the light most favorable to the nonmoving party. Reeves, 530 U.S. at 150 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 255, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986)). "The court must accept the jury's credibility findings consistent with the verdict." Bilbrey by Bilbrey v. Brown, 738 F.2d 1462, 1468 n. 8 (9th Cir. 1984). It "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves, 530 U.S. at 151. The court "may not substitute its view of the evidence for that of the jury." Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222, 1227 (9th Cir. 2001).

Id. Missing from TASER's moving papers is any attempt to analyze the evidence or to demonstrate how, under these most stringent of legal standards, the jury could not have returned the verdict it did.

As explained in the following sections, there was ample evidence for the jury to conclude that TASER unreasonably failed to perform the necessary testing on the effect of repeated or prolonged shocks on blood acid before manufacturing and marketing its

new high powered ECDs to police agencies throughout California and the United States. Even after the necessary scientific knowledge was established by Dr. James Jauchem at the U.S. Air Force laboratory, his important results were buried in a training power point so as not to affect TASER's sales, which are based in large part on its exaggerated safety claims.

TASER also asserts it is entitled to the "reduc[tion of a] constitutionally excessive punitive damage award." TASER Supplemental JMOL Memorandum at 6:17-18. For reasons explained below, the award is not constitutionally excessive and should not be reduced on that basis.

Finally, although a trial court may have discretion to reduce a punitive damage award under appropriate circumstances, the "jury's award of punitive damages is not to be lightly disturbed. See Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 707 n.3 (9th Cir. 1990). Reflecting our general deference to jury verdicts, we have never required the district court to adjust a jury's punitive damages verdict so that it is proportional, in the court's view, to the defendant's wickedness. Such proportional adjustments are left to the jury itself." Caudle v. Bristow Optical Co., 224 F.3d 1014, 1028 (9th Cir. 2000) (footnote omitted).

TASER cites out-of-circuit authority, Johansen v. Combustion Engineering, Inc., 170 F.3d 1320, 1331-32 (11th Cir. 1999), for the proposition that the Court may reduce the jury's award of punitive damages without "offering plaintiff the option of a new trial." TASER's Supplemental JMOL Memorandum at 6:18-19. The rule in the Ninth Circuit is different. Where a district court decides – after considering factors such as the need for deterrence and for compensation of the private attorneys who prosecute such actions – "that the award should be reduced a remittitur with the option of a new trial would be required." Boyle v. Lorimar Products, 13 F.3d 1357, 1361 (9th Cir. 1994) (citing Morgan v. Woessner, 997 F.2d 1244, 1258-59 (9th Cir. 1993)).

Regardless, the jury's award should be affirmed.

IV. THE AWARD OF PUNITIVE DAMAGES IS AMPLY SUPPORTED BY LAW AND FACT

A. Punitive Damages Are Available for Negligent Failure to Warn About the Risks of Products.

California courts have long held that punitive damages are recoverable in product-liability actions because of important public policy. The term "malice" as used in California Civil Code section 3294 is not limited to conduct undertaken with an intent to vex, annoy or injure, but also encompasses "conduct evincing callous and conscious disregard of public safety by those who manufacture and market mass produced articles." Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 810 (1981).

> In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but in commerce-related torts, the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than remedy the defect. . . . Deterrence of such "objectionable corporate policies" serves one of the principal purposes of Civil Code section 3294 . . . . Punitive damages [are] the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable.

Id.

Two "failure to warn" theories are recognized in product-liability actions — negligent failure to warn and strict liability failure to warn. To establish negligent failure to warn, plaintiff must prove that the manufacturer's conduct "fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." Strict liability, instead of looking to the defendant's conduct, focuses on "scientific and medical knowledge available at the time of

manufacture and distribution." Carlin v. Superior Court, 13 Cal.4th 1104, 1112 (1996). Here, the jury logically found TASER's failure to test for the danger of acidosis and warn against it to be unreasonable and "below the acceptable standard of care." The jury found no strict liability precisely because TASER's negligent failure to conduct pre-release testing of its product did not generate the "scientific and medical knowledge" necessary to assess accurately the risk of acidosis from repeated or prolonged ECD applications.

That knowledge was forthcoming only as the result of the Jauchem and Dennis independent testing performed long after the product was put on the market. TASER's warning based on those belated results was too little, too late to be of any help to Robert C. Heston.

TASER argues that a cause of action for negligent failure to warn cannot, as a matter of law, support an award of punitive damages. TASER's Supplemental JMOL Memorandum at 3:20-23, 7:1-8:5. TASER is incorrect. While evidence of simple negligence generally does not support punitive damages, a negligence cause of action justifies such an award where the evidence also shows malice, especially in products liability.

In Nolin v. National Convenience Stores, Inc., 95 Cal.App.3d 279 (1979), the plaintiff was severely injured when oil and gasoline on the ground near defendant's s gas pumps caused her to slip and fall. Plaintiff alleged negligence, but also sought to recover punitive damages on the ground that defendant's conduct was so egregious that it constituted a callous and conscious disregard for her safety. The jury awarded substantial compensatory and punitive damages, and the appellate court affirmed the judgment.

In a section of the appellate opinion entitled "The Right to Recover Punitive Damages in an Action Founded on Negligence," id., at 284, the court held that unintentional carelessness does not necessarily support an award of punitive damages, but that "a non-intentional tort can have the characteristics of an intentional tort to the

extent of embracing the concept of malice as used in Civil Code section 3294." Id., at 286. The Court of Appeal noted that such malice is established by proof of a conscious disregard for the rights or safety of others, and held the evidence in that case sufficient to justify the jury's finding of malice and to support its award of punitive damages. Id., at 286, 288.

The California Supreme Court addressed the same issue in Taylor v. Superior Court, 24 Cal.3d 890 (1979), a personal injury action arising from an automobile accident. The complaint alleged not only that the defendant was intoxicated, but also that he was an alcoholic; that he had previously caused a serious accident while driving drunk; that he had been arrested for and convicted of drunk driving on numerous prior occasions; that he had recently completed a period of probation after a drunk driving conviction; that at the time of the accident another criminal drunk driving charge was pending against him, and so forth. Based on these allegations, the plaintiff sought punitive damages. The defendant demurred, contending that punitive damages could not be assessed against a negligent driver, at least in the absence of an allegation that defendant actually intended to harm the plaintiff. The trial court sustained the demurrer as to punitive damages, but the state Supreme Court reversed, holding that the plaintiff's allegations were sufficient because a conscious disregard for the safety of others constitutes "malice" within the meaning of Civil Code section 3294. Id., at 895.

The foregoing rule – that a negligence cause of action will support an award of punitive damages if the plaintiff alleges and proves not just carelessness but a conscious disregard for the safety of other – was applied to products liability in Hilliard v. A.H. Robbins Co., 148 Cal.App.3d 374 (1983). The plaintiff sued the manufacturer of an intrauterine birth control device for injuries she suffered, asserting a variety of theories including negligence and strict liability. The trial court bifurcated the issue of punitive damages, and after a 19-week trial the jury returned a verdict awarding plaintiff $600,000 in compensatory damages. The trial court then granted the defendant's motion for a directed verdict on the issue of punitive damages, apparently in the belief

that evidence of defendant's disregard for the safety of its product could not establish malice. The appellate court reversed the directed verdict, citing Grimshaw and Taylor, holding specifically that punitive damages were recoverable on both the negligence and strict liability causes of action. Id., at 394-95.

TASER cites two cases to support its argument that punitive damages cannot be recovered in a negligent-failure-to-warn, products-liability case. The first is Ebaugh v. Rabkin, 22 Cal.App.3d 891 (1972), a 36-year-old medical malpractice decision not involving products liability or a failure to warn. Ebaugh states that for conduct to constitute malice under Civil Code section 3294 "[t]here must be an intent to vex, annoy or injure," Id., at 894 (emphasis in original), the very holding the California Supreme Court later rejected in Taylor.

In the second case, Carlin v. Superior Court, the issue was whether a plaintiff injured by a prescription drug can state a claim against the manufacturer for strict liability failure to warn, as opposed to negligent failure to warn. TASER relies on a single sentence in a concurring and dissenting opinion by Court of Appeal Justice Paul Turner (sitting by special assignment) stating that "a failure to warn of a knowable risk [in the prescription drug context] is subject to traditional negligence principles including the unavailability of punitive damages." Id., 13 Cal.4th at 1136 (quoted in TASER's Supplemental JMOL Memorandum, at 7:17-19). This statement, insofar as it refers to punitive damages, is dicta, as the case presented no such issue, and there is no other reference to punitive damages anywhere in the majority, concurring and dissenting, or dissenting opinions. The statement is made without citation to authority or analysis of any kind. It is accurate to the extent that punitive damages are unavailable in cases where the evidence shows only simple negligence without malice, but it is not authority that punitive damages are never available in negligence-based products-liability cases, given decisions specifically addressing the issue conclude otherwise.

In sum, TASER takes the elementary rule that simple negligence cannot support an award of punitive damages and attempts to convert it into a rule that a cause of

action grounded in negligence can never support an award of punitive damages, even where the evidence proves a defendant acted with conscious disregard for public health and safety. TASER's contention is particularly incorrect in a product-liability action, where California Supreme Court authority recognizes the public policy in favor of punitive damages.

B. Plaintiffs Proved by Clear and Convincing Evidence That TASER's Conduct Was Wilful, Intentional, and Done in Reckless Disregard of the Probability of Injury to Others.

(i) The Verdict was Based on Clear and Convincing Evidence.

TASER contends "that plaintiffs did not prove by clear and convincing evidence that TASER's conduct was willful, intentional, or done in reckless disregard of its possible results." TASER's Supplemental JMOL Memorandum at 8:12-16. TASER does not base its argument on the record, but on the contention that "although the 'clear and convincing' and 'conscious disregard' language were included in the Closing Instructions, the Court failed to include either standard" in its verdict form. Id. at 9:7-12.

TASER cites no authority for its proposition that the absence of these questions on the general verdict form constitutes a "defect," much less grounds "for vacating the punitive damages award." Id. at 8:16-17. A party requesting special findings by the jury must present the proposed questions of fact to the judge before submission to the jury. Pau v. Yosemite Park & Curry Co., 928 F.2d 880, 891 (9th Cir. 1991) (citing Burgess v. Premier Corp., 727 F.2d 826, 831 (9th Cir. 1984). TASER's proposed verdict form, filed May 29, 2008, had no such questions.

Moreover, TASER had an obligation to object timely to the form submitted to the jury, and its failure to do so waived any objections. United States v. Parsons Corp., 1 F.3d 944, 945 (9th Cir. 1993). Even had a request by TASER for such questions on the verdict form been denied, or its objections to the form been made and overruled, the correct law stated in the instructions made any error harmless.

> Failure to give requested jury interrogatories may not be error, or if error may be harmless, where the jury verdict itself, viewed in the light of the jury instructions, and any interrogatories that were answered by the jury, indicate without doubt what the answers to the refused interrogatories would have been, or make the answers to the refused interrogatories irrelevant.

Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002).

Here, there can be no question that the jury gave considerable thought to the matter before finding a negligent failure to warn and assessing TASER with $5.2 million in punitive damages. There is no reason to believe the jury disregarded the correct instructions that it must do so on "clear and convincing" evidence that TASER acted with "conscious disregard."

Accordingly, the motion should be denied.

(ii) The Jury Had a Factual Basis for Awarding Punitive Damages.

What is absent from TASER's moving papers is any attempt to analyse the evidence in the light most favorable to the jury verdict.

Through their scientific expert, Mark D. Myers, M.D., plaintiffs established that muscle contractions cause increases in blood acid, measured as a decrease in blood pH, that a buildup of too much blood acid too quickly can cause a cardiac arrest, and that people in an agitated state, such as Mr. Heston, are already acidotic, and therefore more vulnerable to acidosis-induced cardiac arrests.

Dr. Myers then reviewed the results of three very important independent studies. The first by Dr. Jauchem for the U.S. Air Force established dramatic increases in the blood acid of pigs resulting from repeated TASER applications. The second by Dr. Dennis for Cook County Hospital, found similar results from prolonged TASER

applications.[2] The third, by Dr. Vilke for the University of California San Diego, found that the pH response to a single TASER shock in human beings was the same as that observed in pigs.

These test results, Dr. Myers explained to the jury, provided a firm scientific foundation for his medical opinion that the decedent suffered cardiac arrest from acidosis induced by repeated TASER applications. Unfortunately, this scientific knowledge did not exist at the time the M26s were manufactured and sold because TASER had unreasonably failed to perform the testing.

Essential to plaintiffs' negligent products-liability claim against TASER was the testimony of Patrick Smith, which was presented in their case in chief through his videotaped deposition.

Q. You've said things like this several times, I think: Primary risks associated with TASER use include fall-related injuries and injuries associated with strong muscle contractions, which are similar to strenuous athletic exertion.

Right?

A. Correct

Q. And has that been your view since the TASER M26 was put on the market?

A. Yes.

Q. And that's still your view today?

A. Yes.

. . . .

Q. And is muscle – do muscles produce lactate when they're contracted?

A. Yes.

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[2] Patrick Smith testified incorrectly that the Dennis study was funded by a TASER competitor.

Q. And would that be true whether they're contracted voluntarily, let's say by the brain when you were weight-lifting this morning, or when they're contracted involuntarily by application of a TASER current?

A. Yes.

Q. And is it true as a general scientific principle, as your understanding, that the more the muscle is contracted, the more lactate it will produce?

A. Generally my understanding would be the longer time duration it's contracted, the more lactate it would produce.

. . . .

Q. Any acidosis from sustained muscle contraction will at first be localized to muscle, and would affect systemic pH only if lactate production were prolonged and massive, such as might occur with stimulus durations much greater than the five seconds, even without impaired respiration.

Do you agree with that?

A. In general, yes.

. . . .

Q. Now, the next sentence: When acidosis becomes severe, confusion, irritability, or lethargy can occur, followed by [syncope] and if unresolved, can be fatal.

Do you agree with that as a scientific principle?

A. Yes.

. . . .

Q. Did you test for changes in pH levels in pigs before you marketed the M26?

A. No.

Plaintiffs' counsel then took advantage of the Court's rule and addressed the jury on plaintiffs' views of the significance of this testimony.

> The important thing about this particular segment is that TASER acknowledged that when it put this device on the market it had no idea what the effect of these prolonged applications such as we've seen in this case are and although acidosis was brought to their attention, that they performed no test. They used anesthetized pigs to see whether or not the direct electrical stimulation from the device caused cardiac arrest, but they didn't measure the changes in pH that were caused by repeated applications.

R.T. May 22, 2008 at 1346. Plaintiffs also introduced into evidence, albeit somewhat later in the trial, Exhibit 151A, a peer-reviewed study that was done at Penn State in 1999 – before the M26 was first marketed and sold – which posited that extended duration shocks from ECDs would cause lethal levels of acidosis. The jury was free to disbelieve Mr. Smith's testimony that TASER was unaware of the study, especially as it came from TASER's own research compendium.

TASER's efforts to repair this damage during its defense only made matters worse, as often happens when a defendant tries to disprove something so logical and true as Dr. Myers' cause-of-death theory. Dr. Jeffrey Ho was exposed on the stand as a TASER functionary who flew around in the company's private jet espousing manipulated test results designed to camouflage dangerous propensities of TASER ECDs, a fact that came out most clearly when he was impeached by deposition testimony showing that he drew blood from his volunteers too soon after TASER ECD exposures to register the changes in pH.

Finally, the jury heard that TASER's motto was "saving lives every day." The company's exaggerated claims of product safety were directly linked to its marketing and sales, and explained its reticence to perform proper testing and issue proper warnings. That would affect TASER's fiscal bottom line by inhibiting use of its products.

With this showing, the jury was justified in concluding, based on clear and convincing evidence, that TASER's actions demonstrated "conscious disregard of the probability of injury to others," in other words, "that TASER International was aware of the probable dangerous consequences of its conduct and deliberately failed to avoid those consequences." Closing Instructions at 20:27-21:3.

V. THE PUNITIVE DAMAGE AWARD OF $5,200,000 IS NOT EXCESSIVE FOR A WRONGFUL DEATH CASE.

A. The Factors for Reviewing a Punitive Damages Award Demonstrate that the $5,200,000 Punitive Damages Award Is Not Excessive.

The United States Supreme Court has set forth three guideposts for determining if an award of punitive damages is excessive: (1) the reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-75 (1996). California law required consideration of the first two factors long before Gore, together with a third – the wealth of the defendant. Neal v. Farmers Ins. Exchange, 21 Cal.3d 910, 928 (1978).

TASER makes no argument based on civil penalties in comparable cases, but it does contend that the punitive damage award is excessive and must be vacated or reduced because of: (1) the supposedly low degree of reprehensibility of its conduct; (2) the supposedly high ratio between the punitive-damage award and the harm suffered; and (3) plaintiffs' purported failure to offer sufficient evidence of TASER's financial condition. TASER further argues that these same factors demonstrate the punitive award to be the result of passion or prejudice. All of TASER's contentions are without merit.

B. TASER's Conduct Was Reprehensible.

The most important factor in assessing the reasonableness of a punitive damage award is the reprehensibility of the defendant's conduct. Gore, 517 U.S. at 575. Reprehensibility is determined "by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

TASER claims that all these factors operate in its favor, TASER's Supplemental JMOL Memorandum at 16:14-15, but the contention is incorrect. First, TASER misrepresents the first factor, construing it to mean that physical harm to a human being is less reprehensible than economic injury. Id. at 16:26 (arguing that the first factor operates in its favor because "the harm experienced was physical, not financial"). The mere making of such an argument alone reveals the TASER mind-set that got this company into so much hot water with the jury, which perhaps thought TASER's motto ought to be "profits before people" rather than "saving lives every day." The law is not so callous; causing economic injury is less reprehensible than injuring or killing someone. See, e.g., Simon v. San Paolo U.S. Holding Co., Inc., 35 Cal.4th 1159, 1180 (2005) (holding first factor operated in the defendant's favor because its tortious acts "caused only economic harm").

Regarding the second factor, TASER asserts that its negligent failure to warn of the risk of prolonged deployment of the TASER ECD did not evince an indifference to or a reckless disregard of the health or safety of others. The jurors concluded otherwise. They were properly instructed on the malice required for an award of punitive damages under California Civil Code section 3294, and they would not have made the large punitive award if they did not conclude that TASER acted with a willful and conscious disregard of the rights or safety of others.

The third factor, whether TASER targeted someone who was financially vulnerable, is irrelevant in the context of this case. It should be noted, however, that to a large extent TASER victims in the field are, like Mr. Heston, irrational and in the throes of a health crisis, rather than voluntary users of the product, as in other products-liability cases.

The fourth factor, whether the conduct involved repeated actions or was an isolated incident, also supports the damages awarded, as TASER continued to market and sell ECDs, even introducing a second model, the X26, without ever conducting the necessary testing on prolonged or multiple shocks. Even after Dr. Jauchem's Air Force study confirmed acidosis, TASER continued to market the device without an adequate warning.

Finally, with regard to the fifth factor, TASER's conduct may not have been "intentional," but it was malicious and certainly no accident.

C. The Ratio of Punitive Damages to the Harm Caused Is Not Excessive and Therefore Not Unconstitutional.

TASER compares the punitive and compensatory damages after the latter's reduction by the decedent's percentage of fault, and concludes that the punitive damage award is excessive because the ratio is much more than a single-digit. This analysis is fundamentally flawed in two ways. First, in determining the ratio between punitive and compensatory damages, the relevant figure is the amount determined by the jury, not the amount the plaintiff actually recovers after reduction for comparative fault. Second, the usual single-digit ratio rule does not apply in death cases because the uncompensated harm to the decedent (i.e., losing a life) and the need to punish malicious conduct causing death must be taken into account.

No California court has addressed the issue, but courts across the country uniformly conclude that comparative fault does not apply to punitive damages, that they are not reduced by the proportion of the plaintiff's comparative fault as are compensatory damages. See Anno., Effect of Plaintiff's Comparative Negligence in

Reducing Punitive Damages Recoverable, 27 A.L.R.4th 318 (1984), and the cases cited therein. TASER accepts that this is the law by not arguing to reduce punitive damages by the proportion of Robert Heston's fault. It seeks the same goal, however, by arguing comparison should be with the compensatory damages after reduction for comparative fault rather than, as the jury was instructed, before.

In I-Gotcha, Inc. v. McInnis, 903 S.W.2d 829 (Tex.App. 1995), the jury awarded $450,000 in actual damages and $1,500,000 in punitive damages. The actual damages were reduced by 49% based on comparative negligence. A statute capped punitive damages at four times the amount of actual damages. On appeal, the defendant argued that the punitive damages were excessive because they were more than four times the compensatory damages after reduction for comparative fault. The appellate court rejected the argument. It noted that punitive damages are not reduced under the doctrine of comparative fault because the main purpose of punitive damages is to punish the defendant, not to compensate the plaintiff. Following that reasoning, it concluded that for purposes of the statutory cap the punitive award should be compared to the compensatory award before reduction because "the public policy interests of using punitive damages as punishment rather than as compensation for the plaintiff are best served by having the punitive damages related to the total amount of harm that occurred as reflected by the damages awarded by the jury." Id., at 840. The same is true with respect to the constitutional limit on punitive damages set by the U. S. Supreme Court.

In the present case, when the proper figures are compared, the ratio between punitive and compensatory damages is not excessive. The jury awarded a total of $1,021,000 in compensatory damages and $5,200,000 in punitive damages, for a punitive-compensatory ratio of just greater than 5 to 1.

More importantly, however, this is a death case. In State Farm, the Supreme Court indicated that the amount of compensatory damages awarded is not always the proper figure for comparison with the punitive damages. It spoke of proportionality between punitive damages and the harm or "potential harm" suffered by the plaintiff.

The High Court referred to the relationship between punitive damages and "the amount of harm" as well as "the general damages recovered," recognizing that they are not always identical. In some cases compensatory damages are not the appropriate measure of harm because the injury is hard to detect or the non-economic loss difficult to value. State Farm, 538 U.S. at 424-26. Accordingly, many federal and state courts, in a variety of contexts, have considered uncompensated or potential harm when determining whether punitive damages are excessive. Simon, 35 Cal.4th at 1174 n.3 and accompanying text.

One such case is Romo v. Ford Motor Co., 113 Cal.App.4th 738 (2003). The Romo family was riding in a 1978 Ford Bronco when it rolled over. Three family members were killed, including both parents, and three others severely injured. The survivors brought a products-liability action against the manufacturer individually and on behalf of the estates of the decedents. A jury awarded a total of nearly $5 million in compensatory damages and $290 million in punitive damages. The judgment was affirmed by the Court of Appeal, and a petition for review by the California Supreme Court denied. The U. S. Supreme Court then granted a petition for certiorari, vacated the judgment, and remanded the case to the Court of Appeal for reconsideration of the punitive damages portion of the judgment in light of State Farm.

In considering the "reasonable relationship" factor, the Court of Appeal noted that a decedent loses something of extreme value when he or she loses life, and that there is no award for it in the verdict because such loss does not survive as compensatory damages for the estate. Id., at 760. It further noted, however, that compensation is not the issue because punitive damages are not intended to compensate but to punish and make an example of the defendant. Id., at 760-61.

> [P]ublic policy and legitimate interests of the state in the protection of its people require a mechanism to punish and deter conduct that kills people. It would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure

> a victim. [Citation] Thus, the state has an extremely strong interest in being able to impose sufficiently high punitive damages in malicious-conduct wrongful death actions to deter a "cheaper to kill them" mindset, while still maintaining limits on wrongful death compensation in cases of ordinary negligence. We do not perceive that due process considerations of proportionality between compensatory and punitive damages require a state to establish a system that inadequately punishes and deters malicious conduct that, with reasonable foreseeability, may cause death; we hold that death actions present an example of the type of extraordinary case contemplated by State Farm [citation] in which a single-digit multiplier does not necessarily form an appropriate limitation upon a punitive damages award.
>
> This is not to say that all standards are thrown out in cases brought by personal representatives of the estates of deceased victims. Even among instances of malicious conduct that causes death, some of such conduct will be more or less reprehensible than other instances. We conclude, however, that the proportionality factor has less weight in the context of malicious conduct causing death. Given the unique nature of the compensatory damages arising under [California Code of Civil Procedure] section 377.34, the proportionality inquiry must focus, in any event, on the relationship of punitive damages to the harm to the deceased victim, not merely to compensatory damages awarded.

Id., at 761.

After considering all the relevant factors, the appellate court reduced the total punitive award from $290 million to $23,723,287, which sum included $5 million to the estate of each deceased parent. The $5 million awarded to those estates was respectively 17 and 25 times the compensatory damages awarded them by the jury, and 1,000 times the amount each estate actually recovered after the trial court reduced the

jury awards to reflect comparative negligence adjustments and reductions resulting from a motion for judgment notwithstanding the verdict. Id., at 757, 763.

The Environmental Protection Agency (EPA) calculates the "value of a statistical life" for determining the feasibility of safety measures. According to recent news reports, that amount was lowered from $7.8 million five years ago to $6.9 million today. How to value life? EPA devalues its estimate $900,000 taken off in what critics say is way to weaken pollution rules, Associated Press, www.msnbc.msn.com/id/25626294/. That reflects a less than one-to-one ratio of the punitive damages to the statistical value of the life of Robert C. Heston.

D. Plaintiffs met their burden of proving TASER's financial condition.

Despite the fact that plaintiffs introduced TASER's 2007 financial statements, Exhibit 149A, by stipulation on May 22, 2008, R.T. at 1349-50, TASER argues that the punitive damage award must be vacated because plaintiffs failed to meet their burden of proving TASER's financial condition. TASER does not contend that the report lacks the needed information concerning its financial condition, but only that expert testimony was required to explain it to the jury. This contention lacks merit.

Expert opinion evidence is not required unless "the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen." Miller v. Los Angeles County Flood Control Dist., 8 Cal.3d 689, 702 (1973). TASER suggests, without citing any authority, that "an ordinary layperson could not be expected to interpret TASER's 2007 Annual Report without the assistance of expert testimony," TASER's Supplemental JMOL Memorandum at 19:24-26, but that simply is not the case. A lay person can understand categories such as "net sales," "net income," "revenues," "total assets" and "total liabilities" without expert opinion.

The documents showed TASER had a 2007 income of about $100 million and net worth of about $120 million. The $5.2 punitive damage award would translate to a $5,200.00 "fine" for a worker making $100,000 per year and possessing a net worth of $120,000. That is a restrained, appropriate amount, akin to the financial penalty for a

non-injury, first-offense driving under the influence of alcohol.

E. The Punitive Damage Award Was Not the Result of Passion or Prejudice.

"In deciding whether an award [of punitive damages] is excessive as a matter of law or was so grossly disproportionate as to raise the presumption that it was the product of passion or prejudice, the following factors should be weighed: The degree of reprehensibility of defendant's conduct, the wealth of the defendant, the amount of compensatory damages, and an amount which would serve as a deterrent effect on like conduct by defendant and others who may be so inclined." Grimshaw,119 Cal.App.3d at 819.

The first three factors (reprehensibility, the defendant's wealth, and the amount of compensatory damages) have already been discussed. Contrary to TASER's assertions, the degree of reprehensibility of TASER's conduct was not extremely low, and the ratio of punitive damages to the harm caused is not excessively high. As to TASER's wealth, plaintiffs were required to present evidence of TASER's financial condition and they did so. Regarding the fourth factor (an amount which would serve as a deterrent), TASER states: "The deterrence factor is inapplicable here as TASER's negligent failure to warn was not intentional or malicious." TASER's Supplemental JMOL Memorandum at 20:17-18. Again, the jury disagreed. It was instructed on the issue of malice, and its punitive damage award necessarily indicates that it found TASER guilty of malice.

In short, consideration of the four factors in no way indicates that the punitive damage award was the result of passion or prejudice.

F. The Punitive Damage Award Should Not Be Reduced.

This jury knew exactly what it wanted to do, and utilized the Court's instructions and verdict form to reach what it believed to be the just and fair result. Despite the extreme number of shocks delivered to Mr. Heston by the involved officers, the jury exonerated them, no doubt because the officers all believed that the shocks were not

potential lethal. They thought so because of TASER's reckless assurances of safety and failures to warn.

This jury also wanted to send a message of strong disapproval to the Robert C. Hestons of the world, that it is not acceptable to abuse methamphetamine, especially when a known effect is the triggering of agitated and delirious episodes. That message was made loud and clear by the exceptionally large 85 percent finding on comparative fault, and alone disproves the "passion and prejudice" argument.

Finally, and most important, the jury wanted TASER to understand that its policy of ignoring and misrepresenting the health risks of ECDs to boost sales is not acceptable corporate behavior. The jury wanted to deter such despicable conduct, and to create a fund to compensate the private attorneys who fight to expose it.

For all these reasons, the award was not due to passion or prejudice. The verdict should be affirmed, and the judgment entered.

VI. TASER IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' NEGLIGENT FAILURE TO WARN CLAIM BECAUSE THERE WAS NO NEED FOR EXPERT TESTIMONY REGARDING THE STANDARD OF CARE FOR THE WARNING.

TASER final argument is that it is entitled to judgment as a matter of law on plaintiffs' negligent-failure-to-warn claim because plaintiffs failed to put on expert testimony regarding the standard of care for warnings. Plaintiff presented all the expert testimony required, however.

Throughout its argument TASER conflates two separate issues as demonstrated in the following passage: "Plaintiffs' did not prove their negligent failure to warn claim against TASER because they failed to put on a warnings expert to testify that TASER did not take reasonable measures to warn of the potential risks of the TASER ECD which ordinary consumers would not have recognized. Plaintiffs' failure to put on expert evidence of the potential risks of the TASER ECD bars plaintiffs' negligent failure to warn claim as a matter of law." TASER Supplemental JMOL Memorandum

at 21:21-26.

The potential risks of the TASER ECD and whether TASER adequately warned of those risks are two separate issues. To the extent TASER's argument is intended to claim that plaintiffs failed to put on expert testimony regarding the ECD's risks, in other words that repeated or prolonged exposure can cause cardiac arrest, then it is false. Plaintiffs' scientific expert Mark D. Myers, M.D., testified to this effect, and the jury obviously accepted his testimony.

Once the danger or potential danger was established, the question arose as to whether TASER adequately warned of that danger. In TASER's four pages of argument on the subject it repeatedly asserts that plaintiffs should have put on a warnings expert, but it cites no authority whatsoever holding that expert testimony is needed to show the inadequacy of a warning when, as here, no warning was given.

As Bob Dylan once sang, "You don't need a weather man to know which way the wind blows." Subterranean Homesick Blues (1965) TASER never issued a warning about the risk of acidosis from repeated or prolonged exposures.[3] Concerned about hurting its sales pitch about complete safety, three months before the Heston death TASER buried a mealy-mouthed warning about impacting respirations deep in a power point. The lack of efficacy of this "warning" was demonstrated by the fact that none of the defendant officers heard anything about it, and the Salinas Police Department did not receive the power point until after the Heston death. Under such circumstances, expert testimony is unnecessary.

Cases from other jurisdictions illustrates the point. In Black v. Public Service Electric and Gas Co., 265 A.2d 129 (1970), the decedent was working with a high boom crane that came into contact with uninsulated high voltage wires 33 feet above the ground. The defendant utility had not posted any warning signs in the area, and no expert was called to testify that its failure to do so fell below the standard of care. The

[3] This remains true to the present.

court held that such expert testimony was not needed. "We think such persons acting in the capacity of jurors and comprehending the danger presented by the facts in this case, were competent to decide without expert testimony whether the duty to exercise care commensurate with the risk involved was satisfied when the utility failed to post warning signs." Id., at 136.

In Billiar v. Minnesota Mining and Manufacturing Co., 623 F.2d 240 (2d Cir. 1980), the plaintiff was injured by chemicals with which she was working. Plaintiff's employer did not require her to read the warnings printed on the cans containing the chemicals. Although she was provided smocks and rubber gloves, she was not required, instructed or even encouraged to wear them. The employer gave no safety instructions aside from telling plaintiff to wash her hands and not touch her face. The court held that expert testimony was not required to establish failure to adequately warn. "Under New York law, the jury does not need expert testimony to find a warning inadequate, but may use its own judgment considering all the circumstances." Id., at 247.

In Cocco v. Deluxe Systems, Inc., 516 N.E.2d 1171 (Mass. App.1987), the plaintiff was injured by a shredder. The manufacturer knew it would frequently jam, and that workers put their hands into the machine to clear it. The issue was whether operators should have been warned to use a disconnect switch on the wall when clearing the machine, rather than the on-off switch on the shredder, which could be turned back on accidently. The court held that expert testimony was not required. "Even if the technology of the machine was complex, the essential facts relating to the danger were not. Despite the absence of expert testimony that a warning, in the circumstances, was required to make the shredder reasonably safe, lay persons on the jury were competent to make the judgment that the defendants at the time of the sale had that duty." Id., at 1174.

In Marchant v. Dayton Tire & Rubber Co., 836 F.2d 695 (1st Cir. 1988), the defendant distributed to tire dealers a chart that warned not to inflate tires above 40 p.s.i. when mounting, but no such warning was placed on the tire or distributed to every

foreseeable tire mounter. This was consonant with industry-wide practice, and plaintiff offered no expert testimony that the warning was inadequate, but the court held none was needed. "The test is whether the warning is comprehensible to the average user and whether it conveys a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person. [Citation] Few questions are more appropriately left to a common sense lay judgment than that of whether a written warning gets its message across to an average person." Id., at 701.

In the present case, plaintiffs presented expert testimony establishing the danger posed by a TASER ECD. Once that danger was established, the jury was perfectly capable of determining the adequacy of any warning given without the aid of expert testimony, especially given that TASER gave no warning.

VII. CONCLUSION

For the foregoing reasons, the motion of defendant TASER International, Inc., for judgment as a matter of law, or for modification and reduction of the jury's verdict in this case should be denied, and judgment entered accordingly.

DATED: August 25, 2008

Respectfully submitted,

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