IN THE COURT OF APPEALS OF MARYLAND

NO. 81

September Term, 1996

SAMUEL DAVID BOWDEN

V.

CALDOR, INC. et al.

Bell, C.J.,
Eldridge
Rodowsky
Chasanow
*Karwacki
Raker
Murphy, Robert C. (Retired, specially assigned)

JJ.

Dissenting and Concurring Opinion by Bell,C.J.

FILED: June 2, 1998

* Karwacki, J., now retired, participated in the hearing of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the adoption of this opinion.

I am in total agreement with the majority opinion insofar as it reverses the judgment of the trial court and the Court of Special Appeals, both holding that the punitive damages award in the second trial could not exceed the award in the first trial. I agree that neither North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), nor our opinion and mandate in Bowden v. Caldor, 343 Md. 745, 684 A.2d 836 (1996) requires that result. Nor do I quarrel with the right of the trial court to review a jury award for excessiveness or even this Court's review of the trial court's decision on review for abuse. My principal quarrel is with Part IV of the opinion, permitting the remittitur of the award without giving the plaintiff the option of a new trial. I am also concerned that the list of factors enumerated by the majority is not complete. Indeed, a factor that ought to be given considerable deference, the decision of the jury rendered on proper instructions, is not even mentioned. Moreover, the interpretation the majority gives some of the factors it does identify to inform the decision with regard to the amount of punitive damages is so restrictive as to unduly limit the jury in that decision or will insure that the trial courts will be able to reassess the jury's determination under the guise of the excessiveness review.

I

In concluding that the trial court did not err in finding the punitive damages award at issue excessive and in substantially reducing it, the majority opined:

> "As heinous as it was, however, Caldor's malicious and wrongful conduct was not life threatening or the type of conduct which would likely lead to permanent physical injuries. There was no evidence in the record that the plaintiff has suffered any serious lasting effects from the events. There was also no evidence that Caldor personnel had previously or have subsequently engaged in similar wrongful conduct.

> "The $9,000,000 punitive damages award is nine times higher than the greatest criminal fine authorized by the Maryland Legislature. It is about thirteen times higher than the largest punitive damages award ever upheld by this Court. It is one hundred and fifty times higher than the compensatory damages awarded in the case. Finally, although Caldor was liable for three separate torts, there was only one course of conduct. Montgomery Ward & Co. v. Cliser, supra."

[Slip op. at 37-38].

While heinousness is an appropriate factor and it must bear a reasonable relationship to the amount of the damages awarded, I do not agree that to justify substantial punitive damages, even approaching those awarded in this case, the malicious and wrongful conduct must be life threatening or be such as would likely lead to permanent injuries. I note, in this regard, that no citation for that proposition has been provided.

The conduct in this case was extremely outrageous. It also was racist and very blatantly and unapologetically so. Just how bad the conduct was is indicated by the characterization of it in the majority opinion:

> "Caldor's conduct towards the plaintiff in this case was highly reprehensible and fully warranted punitive damages. Viewing the evidence most favorably for the plaintiff, as the juries did, Caldor's officials, without any basis, accused a young man of theft, falsely imprisoned him for several hours, lied about the evidence which they allegedly possessed, would not allow the plaintiff to call his parents, coerced him to sign a false confession, falsely arrested him on the following day, and caused his juvenile prosecution without any evidence against him. Moreover, the juries likely and reasonably concluded that the Caldor officials involved in this matter were motivated by racial hatred."

[Slip op. at 37]. The author of the majority opinion, in dissent, when this case was last in this Court was even more graphic when discussing the effect that the Caldor conduct had on

the plaintiff:

> "The incident greatly upset Samuel. He felt 'defaced.' people who had been friendly with him before the incident had seen him in handcuffs; several people refused to speak with Samuel after the incident. This, he said, 'hurt a lot.' His feelings were deep; he said that the hurt 'really sunk in.' After the incident, Samuel lost interest in the people and activities which he had enjoyed before. For example, according to Samuel's statements described in the psychologist's report, Samuel had 'previously . . . been socially active, into sports, including the baseball team at his high-school and as having a very active life. He now stays by himself, goes to his room and shuts the door . . . . His life is much more involved in daydreaming rather than an actual participation . . . .' He isolated himself from others because he was embarrassed by the incident and feared that other people would talk about him. Samuel worried that, even though he had been acquitted of any wrongdoing, he had lost some of the trust his parents had in him. He began to lose weight and had trouble sleeping. These feelings persisted for over a year. Finally, Samuel decided that he wanted to talk the situation over with a professional, to try and determine why he was still disturbed so long afterwards.
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> "Although by the time of trial Samuel had managed to work through most of his feelings, the incident still haunted him. When applying for jobs, he had to disclose on the applications that he had been arrested. Samuel aspires to become a police officer. When he applied to a law enforcement agency for employment, he was subjected to a polygraph test because of the arrest on his record."

Caldor v. Bowden, 330 Md. 632, 667, 625 A.2d 959, 975-976 (1993) (Eldridge, J., dissenting).

In my opinion, and certainly as far as the jury was concerned, this conduct was such as to require the strongest measure in the interest of deterrence. There is no contention that the jury was improperly instructed or that it acted out of bias or spite. What the verdict reflects is that the jury apparently understands very well the devastation that this conduct can have on a psyche, especially a young one, not yet hardened to the realities of life in this society. That is particularly the case when it is remembered that in this very society not

very long ago, the type of conduct being punished in this case was acceptable conduct in many parts of the country, including Baltimore and the remainder of this State as well, and with devastating and often disastrous effects on its victims. I am far from satisfied that this kind of conduct should be insulated from very substantial punitive damages approaching those determined by the jury in this case to be adequate.

The majority continues in a direction begun in Ellerin v. Fairfax Savings, 337 Md. 216, 242-43 n.13, 652 A.2d 1117, 1130 n.13 (1995), equating punitive damages with civil fines. I, too, continue my protest of that approach. See my dissenting opinion in that case. 337 Md. at 243, 652 A.2d at 1130.

II

The majority holds, "Article 23 of the Declaration of Rights[1] does not require a court, when it reduces a punitive damages award for excessiveness, to give the plaintiff the option

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[1]"Article 23. Jury judges of law and fact; right of trial by jury in civil proceedings.

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

"The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved."

In this past session of the General Assembly, the Legislature enacted House Bill 192, a proposed constitutional amendment, which the Governor signed. See Ch. 322, Laws of 1998. If it receives the approval of the citizenry in the November 1998 General Election, the amount in controversy requirement for a jury trial will be increased to ten thousand dollars.

of a new jury trial." ___ Md. ___, ___ A.2d ___, ___ [slip op. at 44]. Its reasoning to arrive at that holding is instructive. The Court correctly notes that, in Gasperini v. Center For Humanities, Inc., 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), the United States Supreme Court held that the Seventh Amendment[2] to the United States Constitution ordinarily requires the plaintiff be given a new trial option whenever the trial court reduces a jury's compensatory damages award on the basis that it was excessive. Id. at 432-433, 116 S.Ct. at 2222, 135 L.Ed. 2d at 677-78. See also Dimick v. Schiedt, 293 U.S. 474, 480-487, 55 S.Ct. 296, 298-301, 79 L.Ed. 603, 608-611 (1935); Kennon v. Gilmer, 131 U.S. 22, 28-30, 9 S.Ct. 696, 698-699, 33 L.Ed. 110, 113-114 (1889). That holding, the majority points out, was premised on the second clause of the Seventh Amendment, which the Supreme Court has denominated the "re-examination" clause, Gasperini at 432-433, 116 S.Ct. at 2222, 135 L.Ed.2d at 677, rather than the first clause. The significance of that observation is revealed when the Majority then observes that, while Article 23 contains language, in the second paragraph, similar to the first clause of the Seventh Amendment, the Maryland Declaration of Rights contains no provision similar to the "re-examination" clause. ___ Md. at ___, ___ A.2d at ___ [slip op. at 40]. Then, acknowledging that the Supreme Court has not had the occasion to address the issue when punitive damages were at issue, the majority

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[2]The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise examined in any Court of the United States, than according to the rules of the common law."

places heavy reliance on the dissenting opinion, joined by two other justices, the Chief Justice and Mr. Justice Thomas, in which Mr. Justice Scalia drew a sharp distinction between compensatory damages and punitive damages. Id. at ___, ___ A.2d at ___ [slip op. at 40-41] (quoting Gasperini, 518 U.S. at 459, 116 S.Ct. at 2235, 135 L.Ed. 2d at 693 (Scalia, J., dissenting)).

From the foregoing, the majority concludes:

> "Assuming arguendo that, under Article 23 of the Declaration of Rights, a court ordinarily may not reduce, on the ground of excessiveness, a jury's compensatory damages award without giving the plaintiff the option of a new trial, it would not follow that the same limitation is applicable to a jury's punitive damages award. As pointed out by Justice Scalia, Gasperini v. Center for Humanities, Inc., supra, 518 U.S. at 459, 116 S.Ct. at 2235, 135 L.Ed.2d at 693 (Scalia, J., dissenting), the measure of compensatory damages suffered is essentially 'a question of historical or predictive fact,' whereas 'the level of punitive damages is not . . . .' The factors limiting the size of punitive damages awards, discussed in part III of this opinion, are principles of law. The limits imposed upon awards of punitive damages, whether by Maryland common law or by federal constitutional law, are legal limits similar to statutory limitations or caps upon damages. See Murphy v. Edmonds, supra, 325 Md. at 371, 601 A.2d at 116, where this Court, in upholding a legal limitation upon noneconomic damages, stated (emphasis added):
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> > 'As the wording of Article 23 itself indicates, the jury trial right in civil cases relates to "'issues of fact"' in legal actions. It does not extend to issues of law, equitable issues, or matters which historically were resolved by the judge rather than the jury.'
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> "It is true that the limits imposed upon punitive damages involve the weighing of several legal principles, and thus are not as fixed as a statutory cap on a particular type of damages. Nevertheless the court, in applying legal principles to reduce a jury's punitive damages award, is performing a legal function and not acting as a second trier of fact. Although the function also

> involves the evidence in the case, it is similar to the legal function of granting a judgment notwithstanding a verdict."

___ Md. at ___, ___ A.2d at ___ [slip op. at 43-44]. With those conclusions, I totally disagree.

Gasperini was a diversity action in which the question presented involved "the standard a federal court uses to measure the alleged excessiveness of a jury's verdict in an action for [compensatory] damages based on state law." Gasperini, 518 U.S. at 422, 116 S.Ct at 2217 , 135 L.Ed.2d at 670. As the majority notes, the Supreme Court held inter alia that the Seventh Amendment did not preclude a federal appellate court's review, under an abuse of discretion standard, of a federal trial court's refusal to set aside as excessive a jury's award. More important, however, the Court directed the federal trial court to revisit its ruling on the new trial, using the state standard governing such matters. At issue were a New York statute, N.Y Civ. Prac. Law and Rules §5501 9(c) (McKinney 1995), governing the review of money judgments alleged to be excessive and the effect on federal diversity jurisdiction cases when that law is applied to the review of judgments rendered by the federal court. See Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed.2d 1188 (1938), requiring that federal courts sitting in diversity apply state substantive law and federal procedural law. The New York statute, which the Court characterized as the codification of a new standard that requires closer court review than the previously used common law "shock the conscience" test, Gasperini, 518 U.S. at 429, 116 S.Ct. at 2220, 135 L.Ed 2d at 675, provided:

> "The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court a county court or an appellate term determining an appeal. In reviewing a money judgment in an action in which the itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."

Addressing the appropriate standard for reviewing the federal trial court's denial of the appellee's motion for new trial, the Court "recognized that when New York substantive law governs a claim for relief, New York law and decisions guide the allowable damages." Gasperini, 518 U.S. at 437, 116 S.Ct. at 2224, 135 L.Ed.2d at 680. This is consistent with the Court's earlier recognition that "New York's 'deviates materially' standard ... is outcome-affective in this sense: Would 'application of the [standard] ... have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court.?'" Id. at 428 , 116 S.Ct. at 2220, 135 L.Ed.2d at 674, citing and quoting Hanna v. Plummer, 380 U.S. 460, 468, n.9, 85 S.Ct. 1136, 1142, n.9, 14 L.Ed2d 8, n.9 (1965). In the course of the discussion, the Court commented on "[a]n essential characteristic of the [federal-court] system." Id. at 431, 116 S.Ct. at 2221, 135 L.Ed.2d at 676, quoting Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537, 78 S.Ct. 893, 901, 2 L.Ed.2d 953, 962 (1958). The Byrd court explained that characteristic as follows:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence - if not the command - of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

356 U.S. at 537, 78 S.Ct. at 901, 2 L.Ed.2d at 962. It was in this context that the Gasperini court addressed the second clause of the Seventh Amendment. Acknowledging that, in addition to the allocation of trial function, the Seventh Amendment also controls the allocation of the authority to review verdicts, the Court noted the historical authority, described as "large," of federal judges to grant new trials. Gasperini, 518 U.S. at 433, 116 S.Ct. at 2222, 135 L.Ed.2d at 677. It recognized, on the other hand, that no such history underlay appellate review of a federal court's denial of a motion to set aside a jury's verdict as excessive. Nevertheless, after reviewing its cases presaging the result, see Grunenthal v. Long Island R. Co., 393 U.S. 156, 159, 89 S.Ct. 331, 333, 21 L.Ed.2d 309, 313 (1968); Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal , Inc., 492 U.S. 257, 279, 109 S.Ct. 2909, 2922, 106 L.Ed.2d 219, 240, 241 (1989),[3] the Court held for the first time what had

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[3]The main issue in this case involved the application of the Eighth Amendment's excessive fines clause to punitive damages; however, the Court was also asked to address whether those damages were excessive as a matter of federal common law. It was in this context that the Court refused directly to review the award and commented:

> "In a diversity action or any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law....
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> "In reviewing an award of punitive damages, the role of the district

only been implicit, that "Nothing in the Seventh Amendment ... precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive." 518 U.S. at 436, 116 S.Ct. at 2224, 135 L.Ed.2d at 679, quoting Grunenthal, 393 U.S. at 164, 89 S.Ct. At 336, 21 L.Ed.2d at 316. (Justice Stewart dissenting).

It is significant, in my view, that the application of the second clause of the Seventh Amendment to the resolution of the issue in Gasperini did not, in any way, implicate, or diminish, the right to a jury trial on damages.[4] Indeed, the premise with which the Court

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> court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard."

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278-79, 109 S. Ct. 2909, 2922-23, 106 L. Ed.2d 219, 240-241(1989).

[4]This may explain the absence of a clause comparable to the second clause of the Seventh Amendment in the Maryland Constitution. Maryland law has long been clear that trial courts may grant a new trial after a jury has rendered a verdict. In Baltimore & Ohio Railroad Co. v. Brydon, 65 Md. 198, 222 (1886), we stated on the subject:

> "By the immemorial practice of the Maryland courts, the jury has an unqualified right to form its judgment on the facts which the court determines to be legally sufficient, without any interference or control on the part of the Judge. After the verdict is rendered, the Judge who tried the case may set it aside and grant a new trial in his discretion, if justice so requires it."

Of course, they are also authorized to deny motions for new trials. See e.g., Cong. School v. Roads Commission, 218 Md. 236, 254, 146 A.2d 558 (1958); Waters v. Waters, 26 Md. 53, 73-74 (1866). Both the decision to grant a new trial and the decision to deny a new trial motion are addressed to the sound discretion of the trial court, I.O.A. Leasing Corp. v. Merle Thomas Corp., 260 Md. 243, 249, 272 A.2d 1 (1971); Leitch v. Anne Arundel County, 248

started was that a jury trial was required to determine the amount, as opposed to the excessiveness, of the damages. And the majority of the Gasperini court, including one of the dissenting justices, Justice Stewart, had no occasion to consider whether there is a difference between the determination required to be made with respect to the measure of compensatory damages and that involved in evaluating the level of punitive damages. Nor am I convinced that the dichotomy drawn by Justice Scalia between the measure of compensatory damages and the level of punitive damages is all that helpful to the majority. What was at issue in Gasperini, it must be remembered, was the authority of the appellate court to review the denial of a motion for new trial in the face of allegations that the jury's verdict was

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Md. 611, 619, 237 A.2d 748 (1968); Brinand v. Denzik, 226 Md. 287, 292, 173 A.2d 203 (1961); Leizear v. Butler, 226 Md. 171, 178-79, 172 A.2d 518, 521-522(1961); Waters v. Waters, 26 Md. at 73; Walker v. Hall, 34 Md.App. 571, 591, 369 A.2d 105 (1977); Murphy v. Board of County Commissioners, 13 Md.App. 497, 513, 284 A.2d 261 (1971), the exercise of which will not be reviewed on appeal, at least when the trial court has fairly exercised its discretion, Kirsner v. State, 296 Md. 567, 570, 463 A.2d 865, 867 (1983); Martin v. Rossignol, 226 Md. 363, 366-67, 174 A.2d 149 (1961); Colter v. State, 219 Md. 190, 191-92, 148 A.2d 561, 562; Givner v. State, 208 Md. 1, 7, 115 A.2d 714, 717 (1955); Washington, B. & A. R.R. v. Kimmey, 141 Md. 243, 250, 118 A. 648 (1922) Walker v. Hall, 34 Md.App. at 591, 369 A.2d 105; Murphy, 13 Md.App. at 513, 284 A.2d 261, and except under the most extraordinary or compelling circumstances, A.S. Abell Company v. Skeen, 265 Md. 53, 59, 288 A.2d 596 (1972); Conklin v. Schillinger, 255 Md. 50, 69, 257 A.2d 187, 196-197 (1969), Walker v. Hall, 34 Md.App. at 591, 369 A.2d 105; Podolski v. Sibley, 12 Md.App. 642, 647, 280 A.2d 294 (1971); State, Use of Shipley v. Walker, 230 Md. 133, 137, 186 A.2d 472 (1962), or except where some substantial right is denied. Brinand v. Denzik, 226 Md. at 293, 173 A.2d 203; State v. Baltimore Transit Co., 177 Md. 451, 454, 9 A.2d 753 (1939). Thus, Maryland apparently has always allocated the authority, if it did not always encourage its exercise, of the appellate courts to review jury verdicts, including for excessiveness.

excessive and under what standard. The portion of the Scalia dissent quoted in the majority opinion, [slip op. at 41], was offered to refute the Gasperini majority's conclusion that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment." Viewed in this context, it is clear that Justice Scalia's concern was not with a jury determination of punitive damages, but rather the nature of the inquiry into the excessiveness of those damages. That would explain the use of the term, "measure" when discussing actual damages and the very different term, "level," when addressing punitive damages. In any event, unlike his statement that the measure of compensatory damages presents a question of historical or predictive fact, absolutely no support was offered for the proposition that the level of punitive damages is not a fact tried to a jury.

The majority's holding that a jury's punitive damages award may be reduced by a trial court without giving the plaintiff a new trial option rests on two premises: 1) the absence, in Article 23 of the Maryland Declaration of Rights or in the Maryland Constitution of a provision comparable to the second clause of the Seventh Amendment and 2) the distinction Justice Scalia drew in dissent between the measure of compensatory damages and the level of punitive damages.[5] As I have demonstrated, neither basis has merit.[6]

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[5]It is ironic indeed that the majority has to rely on Justice Scalia's dissent for support. Justice Scalia really did dissent, he would have affirmed the trial court's refusal to set aside, as against the weight of the evidence, the civil jury award, on the basis of "a longstanding and well-reasoned line of precedent that has for years prohibited federal appellate courts from reviewing [such] refusals." 518 U.S. at 448-449, 116 S. Ct. at 2230, 135 L.Ed.2d at 687. Thus, Justice Scalia goes much farther than I do. I have no doubt that Maryland precedent, even without a reexamination clause, see n. 4, permits, and has done so for years, review of jury verdicts for excessiveness. Justice Scalia and those justices who joined his

dissent are adamant that the reexamination clause in the Seventh Amendment precludes such review:

> "The Court's only suggestion as to what rationale might underlie approval of abuse-of-discretion review is to be found in a quotation from Dagnello v. Long Island R. Co., 289 F.2d 797 [2nd Cir. 1961], to the effect that review of denial of a new trial motion, if conducted under a sufficiently deferential standard, poses only 'a question of law.'. . . But that is not the test that the Seventh Amendment sets forth. Whether or not it is possible to characterize an appeal of a denial of new trial as raising a 'legal question,' it is not possible to review such a claim without engaging in a 'reexamin[ation]' of the 'facts tried by the jury' in a manner 'otherwise' than allowed at common law. Determining whether a particular award is excessive requires that one first determine the nature and extent of the harm - which undeniably requires reviewing the facts of the case. That the court's review also entails application of a legal standard (whether 'shocks the conscience,' 'deviates materially,' or some other) makes no difference, for what is necessarily also required is reexamination of facts found by the jury."

Id. at 460-461, 116 S.Ct. at 2236, 135 L.Ed.2d at 694.

[6]The majority cites Montgomery Ward & Co. V. Cliser, 267 Md. 406, 425, 298 A.2d 16, 27 (1972) and Heinze v. Murphy, 180 Md. 423, 434, 24 A.2d 917, 923 (1942) as examples of cases in which this Court has ordered a reduction of punitive damage awards found to be excessive, without granting a new trial option. In Cliser, the trial court erred in not furnishing guidelines to the jury in its consideration of whether to award punitive damages for each of the three torts, with the result that the jury "pyramided" the claims into a triple recovery of punitive damages on the basis of an episode that was one continuous occurrence. Under those circumstances, we modified the judgment so that there was but one recovery of punitive damages, which correctly reflected the verdict of the jury. Heinze is an example of appellate factfinding, substituting, as it were, the appellate court's judgment for that of the jury:

> "It may well be that a person may not be required to answer questions which would be to their disadvantage, but in so declining it is not at all necessary to assume an antagonistic attitude, and thereby invite the same conduct from an officer. The appellee is not entirely free of unbecoming conduct. It is not a trespass for an officer of the law to go upon another's premises in the line of his duty, although his conduct afterward may make it a trespass. The appellee, by his own conduct, was responsible, in some

The majority also finds solace in the existence of factors limiting the size of punitive damages. It points out that those limiting factors are principles of law, which, "whether imposed by Maryland common law or by federal constitutional law, are legal limits similar to statutory limitations or caps on damages." Although not as fixed and require the weighing of those legal principles that are applicable, the majority asserts that "[n]evertheless the court, in applying legal principles to reduce a jury's punitive damages award, is performing

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measure, for giving, as the officer thought, cause for his arrest.

> "Under the facts of this case, it does not appear to us that there is sufficient evidence to find that the appellant acted wantonly, or with malice and ill will, and in accordance with the rules as above stated, a case justifying punitive damages has not been established.
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> "A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But while the law tolerates no abuse of power, yet, in morals and the eye of the law, there is a vast difference between the criminality of a person acting mistakenly, from a worthy motive, and one committing the same act from a wanton and malicious spirit, and with a corrupt and wicked design. Hence, where damages beyond compensation, to punish the party guilty of a wrongful act, are asked, the evidence must show wanton, or malicious motive, and it must be actual and not constructive or implied. .. .
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> " For the reasons above stated we find the damages allowed in this case to be excessive, and under the procedure authorized by the New General Rules of Practice and Procedure, Part III, 9(c), must modify the judgment as to the award of damages. The judgment shall be for $25 damages."

(Citations omitted).

a legal function and not acting as a second trier of fact. Although the function also involves the evidence in the case, it is similar to the legal function of granting a judgment notwithstanding a verdict." [Slip op. at 44].

To state that proposition does not make it so and, indeed, it is not so. To be sure, permitting the trial court to review the jury's verdict for excessiveness is consistent with Maryland law and, now, the Seventh Amendment. It is one thing to review a verdict for excessiveness, however, and quite another to determine what the verdict ought to be. The former may be akin to the granting of a motion for judgment notwithstanding the verdict, but the latter definitely is not. Reviewing a verdict for excessiveness is a threshold inquiry, involving the determination of whether, using the applicable principles, the award is within the confines of the applicable law. The motion for judgment notwithstanding the verdict, by testing the sufficiency of the evidence, Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc., 283 Md. 296, 326, 389 A.2d 887, 904-905 (1978), serves a similar threshold function.

Determining the amount of punitive damages, like the determination of actual damages, is quite different from those functions, however. It is not simply a threshold evaluation. That process involves the finding of facts and the application to those facts of the principles identified by the trial court in its instructions.

The majority does not dispute that the determination of the amount of punitive damages is, in the first instance, a matter for the jury to decide. See Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 15-16, 111 S.Ct. 1032, 1042-43, 113 L.Ed.2d 1, 18 (1991); Browning-Ferris, 492 U.S. at 278-79, 109 S.Ct. at 2922, 106 L.Ed.2d at 240. It

simply suggests that once that determination is made and challenged as, and found to be, excessive, the court may itself then decide the matter and a jury trial is then no longer required. That flies in the face of Article 23 of the Declaration of Rights. As we have seen, that Article provides that the "right of trial by jury of all issues of fact in Court proceedings . . . shall be inviolably preserved." It thus guarantees to the citizens of this State the right to a jury trial in civil cases. As this Court said in Luppino v. Gray, 336 Md. 194, 201, 647 A.2d 429, 432 (1994):

> "We have held that the reference, in the precursor to Article 23, to jury trial, to which the citizens of Maryland are entitled, is to 'the historical trial by jury, as it existed when the Constitution of the State was first adopted.' Houston v. Lloyd's Consumer Acceptance Corp., 241 Md. 10, 20, 215 A.2d 192, 198 (1965), quoting Knee v. Baltimore City Passenger Ry. Co., 87 Md. 623, 624, 40 A. 890, 891 (1898). Thus, the citizens of Maryland have been guaranteed, since 1776, the right to trial by jury. Moreover, a provision comparable to Article 23 has been in each Constitution, including the Constitution presently in effect, since 1851. Accordingly, it is accurate to say that it is well-settled that Maryland guarantees its civil litigants a right to trial by jury.

In Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935), the United States Supreme Court addressed the propriety of a judgment denying a plaintiff's motion for new trial on the ground of inadequacy of compensatory damages conditioned, however, on the defendant consenting to a specified increase of the damages awarded by the jury. The Fourth Circuit Court of Appeals having reversed the judgment, the Court affirmed. In the course of the opinion, the High Court described the distinction between the court and a jury:

> "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine

> the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of injury by an assessment of the damages. Both are questions of fact."

Dimick, 293 U.S. at 486, 55 S.Ct. at 301, 79 L.Ed at 611. This Court has drawn a similar distinction between the role of the court and the role of a jury.[7] Whitehead v. Safway Steel Prods., Inc., 304 Md. 67, 73-76, 497 A.2d 803, 806-808 (1985); Bernardi v. Roedel, 225 Md. 17, 21, 168 A.2d 886, 887(1961) ("Courts will be careful not to usurp the role of the jury where facts are disputed or where fair minds might draw different conclusions"); Stancliff v. H. B. Davis Co., 208 Md. 191, 197, 117 A.2d 577, 580 (1955); State v. Carroll-Howard Sup. Co., 183 Md. 293, 37 A.2d 330 (1944); Howard County v. Leaf, 177 Md. 82, 94, 8 A.2d 756, 761 (1939); Susquehanna Transmission Co. of Maryland v. Murphy, 131 Md. 340, 343,101 A. 791, 792 (1917) (questions of fact involved the character, value and extent of injury to timber on property that had been burned, the value of the timber before and after the fire, the extent of the fire, and the direction and velocity of the wind at the time plaintiff's property caught fire, questions going to damages and breach of the

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[7]In Maryland, the distinction is defined somewhat differently in criminal cases.

Article 23 of the Maryland Declaration of Rights, as construed by this Court, establishes a dichotomy, with respect to the determination of questions of law, between the jury's authority to decide "the law of the crime" or "the definition of the crime," as well as "the legal effect of the evidence." and the trial judge's authority to decide all other legal issues. Montgomery v. State, 292 Md. 84, 91, 437 A.2d 654, 658 (1981); Stevenson v. State, 289 Md. 167, 178-80, 423 A.2d 558, 564-65 (1980).

standard of care owed by the defendant to the plaintiff). Deford v. State, Use of Keyser, 30 Md. 179, 203 (1869) (as a general rule a jury should determine, as matters of fact, terms and manner of employment; "it being for the court to declare the legal relation that existed between the parties, upon any given state of facts.").

Although by no means identical to compensatory damages and serving a different office, what the Dimick court said with regard to the jury function in the compensatory damages context apply equally well to punitive damages. Just as determining liability for a tortuous injury is a factual issue preliminary to the award of compensatory damages, whether that conduct merits, or is sufficiently blameworthy to warrant, punitive damages is also a necessary factual predicate for the award of punitive damages. Of course, the assessment of the amount of damages is a factual issue common to both. And because these matters are factual questions, like in the case of compensatory damages, they are required to be decided by a jury. That the questions may be reviewed by the trial court for excessiveness and found to be so does not change their essential nature. Nor does such review give the trial court any authority to substitute its judgment for that of the jury.[8]

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[8]In Snyder v. Cearfoss, 186 Md. 360, 368-69, 46 A.2d 607, 610-611 (1946), the Court of Appeals explained why there is no inconsistency between a trial court being permitted to grant a new trial and a plaintiff's right to a jury trial:

> "In granting a new trial, [the Court] does not assume that the verdict is, but that it may be, wrong. It says to the parties, we are strongly apprehensive that the result is not in accordance with the evidence. We think it expedient to submit the case to another jury, and leave it to them to say whether or not our fears are well-founded.... It is settled, then, that the court which tried the cause, may, in a proper case, of which it shall be the judge, set aside the

Having decided that the "level" of the damages is excessive, in the absence of the plaintiff's agreement to a lesser amount,[9] Article 23 requires that a new jury, properly instructed, determine what amount the plaintiff should receive. To hold otherwise is to render Article 23 a nullity insofar as jury determinations of punitive damages is concerned. What the Dimick court said with regard to a trial court ordering an additur without consent of the plaintiff also has relevance to this case:

> "To [affirm that judgment] is obviously to compel the plaintiff to forego his constitutional right to a verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.'"

293 U.S. at 487, 55 S. Ct. at 301, 79 L. Ed.2d at 611.

As the majority points out, the cases addressing this issue, both in the federal system under the Seventh Amendment and in the states, under state constitutions, are split, some

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> verdict and grant a new trial, under circumstances which at first blush would seem to trench upon the rights of the jury. It can look through the evidence upon which the jury have [sic] passed, and then consider the verdict. It can compare them, and, if the one is clearly irreconcilable with the other, can so pronounce, and order the case to be submitted to another jury."

[9]Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603, 611 (1935) provides the rationale for allowing the court to condition a new trial on the plaintiff's agreement to a lesser amount:

> "Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess - in that sense that it has been found by the jury - and that the remittitur has the effect of merely lopping off the excrescence."

reaching the conclusion the majority reaches, e.g., Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 207 (1st Cir. 1987); Douglas v. Metro Rental Services, Inc., 827 F.2d 252, 257 (7th Cir. 1987); Bell v. City of Milwaukee, 746 F.2d 1205, 1279 (7th Cir. 1984); Shimman v. Frank, 625 F.2d 80, 102-104 (6th Cir. 1980); Guzman v. Western State Bank of Devils Lake, 540 F.2d 948, 954 (8th Cir. 1976); Airheart v. Green, 267 Ala. 689, 693, 104 So.2d 687, 690 (1958); Byrd v. Dark, 322 Ark. 640, 645, 911 S.W.2d 572, 574 (1995); Reccko v. Criss Cadillac Co., Inc., 610 A.2d 542, 546 (R.I. 1992), and the others agreeing with the result I reach. E.g. , Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 643 (10th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1846, 132 L.Ed.2d 1049 (1997); Morgan v. Woessner, 997 F.2d 1244, 1258-1259 (9th Cir. 1993), cert. dismissed, 510 U.S. 1033, 114 S.Ct. 671, 126 L.Ed.2d 640 (1994); Defender Industries v. Northwestern Mut. Life Ins., 938 F.2d 502, 505-507 (4th Cir. 1991); McKinnon v. City of Berwyn, 750 F.2d 1383, 1391-1392 (7th Cir. 1985); Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 364-365, 497 P.2d 997, 999 (1972); Kang v. Harrington, 59 Haw. 652, 664 n.3, 587 P.2d 285, 293 n.3 (1978); S.C. Farm Bur. Mut. Ins.Co. v. Love Chevrolet, Inc. 478 S.E.2d 57, 59 (S.C. 1996). Not surprising, I suppose, I find the latter to be much more persuasive, perhaps because, for the most part, they address the jury trial issue. As the court in Morgan v. Woesser observes, Rowlett, Shimman, Bell, Douglas, and Guzman do not even consider the Seventh Amendment. 997 F.2d at 1258. Neither do the state courts mention or give indication that they considered the applicable State constitutional provision.

By contrast, in addition to the edifying constitutional discussion in Morgan v. Woesser,

the Fourth Circuit fully and persuasively addressed the constitutional issue in Defender Industries, overruling its prior decision in Shamblin's Ready Mix, Inc. v. Eaton Corp., 873 F.2d 736, 740-42 (4th Cir. 1989). In Shamblin's, the court had held that there was no violation of the Seventh Amendment when the assessment of punitive damages is not done by a jury; however, its result was largely dictated by its conclusion that punitive damages can be equated with civil penalties. Id. at 742.

I repeat, there is considerable difference between determining that a jury award is excessive and determining precisely what it should have been. The former is properly a question for resolution by the court, the latter most assuredly is not, although it is to be informed by the jury instructions propounded by the court. Only by keeping the difference ever in front of us, even in a category of case that this Court has demonstrated since its decision in Owens-Illinois v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992) is not favored, can we hope to preserve inviolate the fundamental right to jury trial, a cornerstone of our system of government and justice.