
ON THE PROPER MAGNITUDE OF PUNITIVE DAMAGES:
MATHIAS V. ACCOR ECONOMY LODGING, INC.

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I know Judge Posner mainly as a scholar — from his extraordinary and truly novel economically oriented writing on law and from our many interchanges over the years about economic analysis of legal issues. But I am aware that he also leads another full professional life in the judicial arena, in which he is one of our country's most influential appeals court judges. It is not hard to understand why. He delivers both quantity and quality. Judge Posner is prolific, having authored more published opinions than any other appellate judge in the federal system in recent years.¹ And Judge Posner's opinions are marked by his ability to go quickly to the core of matters, by the importance he attaches to satisfying the underlying purposes of the law, by his command of language, and even by his ironic sense of humor. I illustrate some of these qualities — in particular, the second — here through a commentary on a recent opinion of his concerning punitive damages.

The case in question, *Mathias v. Accor Economy Lodging, Inc.*,² is piquant. The plaintiffs, a brother and a sister, were bitten by bedbugs during their stay at a Motel 6 in downtown Chicago.³ They sued for compensatory and punitive damages, arguing that the motel was guilty of willful and wanton conduct, having failed to alleviate a known risk:

In 1998, EcoLab, the extermination service that the motel used, discovered bedbugs in several rooms in the motel and recommended that it be hired to spray every room, for which it would charge the motel only \$500; the

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¹ See Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 40–67 (2004) [hereinafter Choi & Gulati, *Empirical Ranking*] (examining the productivity, opinion quality, and judicial independence of federal appeals court judges for the years 1998 to 2000). Specifically, Professors Choi and Gulati found that Judge Posner ranked first in published opinions, *id.* at 44 tbl.2, and that he also ranked first in citations from outside his circuit, Supreme Court citations, and citations in law reviews, *id.* at 50 tbl.4; see also Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 N.Y.U. ANN. SURV. AM. L. 19, 23, 28 (2005) (analyzing the statistics in Choi & Gulati, *Empirical Ranking*, *supra*, to assess Judge Posner's qualifications for the Supreme Court); William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 288 tbl.2A, 298 tbl.2C (1998) (evaluating the influence of individual federal courts of appeals judges by tallying citations of published opinions).

² 347 F.3d 672 (7th Cir. 2003).

³ *Id.* at 673. The defendants own and operate the Motel 6 chain of motels. *Id.*

motel refused. The next year, bedbugs were again discovered in a room but EcoLab was asked to spray just that room. The motel tried to negotiate “a building sweep [by EcoLab] free of charge,” but, not surprisingly, the negotiation failed. By the spring of 2000, the motel’s manager “started noticing that there were refunds being given by [the] desk clerks and reports coming back from the guests that there were ticks in the rooms and bugs in the rooms that were biting.” She looked in some of the rooms and discovered bedbugs. . . .

Further incidents of guests being bitten by insects and demanding and receiving refunds led the manager to recommend to her superior in the company that the motel be closed while every room was sprayed, but this was refused.⁴

The problem grew, and at a certain point “began to reach farcical proportions Desk clerks were instructed to call the ‘bedbugs’ ‘ticks,’ apparently on the theory that customers would be less alarmed, though in fact ticks are more dangerous than bedbugs because they spread Lyme Disease and Rocky Mountain Spotted Fever.”⁵

The jury awarded each of the two plaintiffs \$5000 in compensatory damages and \$186,000 in punitive damages, which is 37.2 times compensatory damages. Motel 6 appealed, objecting primarily to the magnitude of punitive damages.⁶

Characteristically, Judge Posner stated that to answer the legal question at issue — here, the proper quantum of punitive damages — the court had to proceed from the basic purposes of the law — here, “why punitive damages are awarded in the first place.”⁷ The purpose most important to Judge Posner’s reasoning was the achievement of deterrence; specifically, “limiting the defendant’s ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is ‘caught’ only half the time . . . , then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.”⁸ In other words, Judge Posner’s logic was that punitive damages may be required as a corrective measure to accomplish proper deterrence; otherwise, Motel 6 might not have had to pay for all the harm it did.⁹

⁴ *Id.* at 674 (first alteration in original).

⁵ *Id.* at 675.

⁶ *Id.* at 674.

⁷ *Id.* at 676.

⁸ *Id.* at 677.

⁹ As Judge Posner said, one of his previous opinions reflected this line of thought. *See id.* at 676 (citing *Kemezy v. Peters*, 79 F.3d 33, 34–35 (7th Cir. 1996) (listing the underdeterrence provided by compensatory damages as a reason for punitive damages)); *see also* *Zazú Designs v. L’Oréal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.) (noting that punitive damages are appropriate to deter prohibited conduct that sometimes escapes detection); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149–66 (1989) (explaining that punitive damages are the only way to deter injurers whose conduct is otherwise

How likely was it that Motel 6 would escape liability for its guests' bedbug bites, and how important was the call for punitive damages to induce Motel 6 and similar actors to prevent harms such as those from bedbugs in the future? Judge Posner suggested that lawsuits were not probable because Motel 6 concealed its bedbug infestation. He also pointed out that, concealment aside, a lawsuit might be financially unattractive without punitive damages because the compensable harm from a bedbug bite is modest and because Motel 6 was willing to invest significantly in litigation defense in order to discourage plaintiffs.¹⁰ But he noted as well a factor working in the opposite direction; namely, that Motel 6 might have faced regulatory or criminal penalties for deliberately exposing its customers to a substantial risk of being bitten by bedbugs.¹¹ All told, Judge Posner's view was that he could not say that the punitive damages award of 37.2 times compensatory damages was excessive.¹²

As Judge Posner recognized, some might find approval of this ratio to be in tension with recent Supreme Court opinions.¹³ The Supreme Court has stated that "few awards [of punitive damages] exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."¹⁴ In particular, the Court "suggest[ed] that 'four times the amount of compensatory damages might be close to the line of constitutional impropriety.'"¹⁵ But as explained above, Judge Posner found that the requirements of deterrence, which has always been seen as a purpose of punitive damages, could justify the ratio of 37.2 in the circumstances of *Mathias*. It is interesting, too, to observe that Judge Posner's endorsement of such a high ratio in *Mathias* has been cited by the plaintiff in *Philip Morris USA v. Williams*,¹⁶ in which punitive damages of about 97 times compensatory damages were awarded.¹⁷ The Supreme Court has granted certiorari in that case.¹⁸

profitable); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 25-26 (1982) (noting that punitive damages bring the expected liability in line with the expected loss); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887-96 (1998) (defining appropriate damages as the harm caused multiplied by the reciprocal of the probability of detection).

¹⁰ See *Mathias*, 347 F.3d at 677.

¹¹ See *id.* at 678.

¹² See *id.*

¹³ See *id.* at 675-76.

¹⁴ *Id.* at 675 (alteration in original) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)) (internal quotation marks omitted).

¹⁵ *Id.* at 676 (quoting *State Farm*, 538 U.S. at 425).

¹⁶ No. 05-1256 (U.S. argued Oct. 31, 2006).

¹⁷ See Brief for Respondent at 23, 27, 28, 33, *Williams* (No. 05-1256), 2006 WL 2668158.

¹⁸ 126 S. Ct. 2329 (2006); see also Amicus Curiae Brief of A. Mitchell Polinsky, Steven Shavell, and the Cato Inst. in Support of Petitioner, *Williams* (No. 05-1256), 2006 WL 2153766.

I find myself wondering about Judge Posner's conclusion that the unlikelihood of suit could reasonably justify a multiplier of 37.2. Concealment of the bedbug infestation might not greatly reduce the probability of suit if a guest were bitten and harmed because bedbug bites often become immediately apparent or leave telltale signs, implying that victimized guests would realize that they were bitten at the Motel 6.¹⁹ Also, it is not clear that damages of \$382,000 — \$191,000 for each plaintiff — are needed to induce suit when a person is bitten by bedbugs at a motel (although perhaps winning might not have been easy).

Another, perhaps more important, question is whether *nonlegal* economic incentives significantly reduce the need for punitive damages to achieve deterrence. It seems possible that even in the absence of any suit, the Motel 6 might have been financially better off spraying than not. Allowing bedbugs to inhabit a room may well cause many guests who are bitten to complain and to demand their money back, as we know actually happened. I surmise that the lost revenue from a room, mounting over a succession of guests, would exceed the cost of its fumigation. Moreover, bedbug infestations tend to spread from room to room,²⁰ so failing to address a problem in a particular room has consequences for other rooms. That Motel 6 delayed appropriate fumigation may well have been due to the irrationality or misjudgment of its district manager — the motel's manager *did* want to fumigate — and that problem might have been remedied as a matter of course as the expenses of room refunds rose.

A related thought concerns the reputational interest of Motel 6. Guests bitten at a Motel 6 not only would be likely to demand their money back, but also would be unlikely to stay at any Motel 6 again. They might register their complaints with the Better Business Bureau and might generally spread the bad word about Motel 6. Even a hint in the press of a bedbug problem at a Motel 6 could have very negative consequences for a national hotel corporation whose profitability depends on its reputation for providing comfort and safety to its

¹⁹ Bedbugs feed exclusively on blood. Their bites may result in large wheals, reddening of the skin, blisters, and itchiness. Their presence may also be revealed by bloodstains on sheets. Furthermore, bedbugs are in a resurgence that has been widely noted, suggesting that some victims may be alert to the possibility of bedbug bites — although victims need not know that they were bitten by bedbugs rather than some other pest to have a reason to bring suit. See, e.g., Clive Boase, *Bedbugs — Back from the Brink*, 12 PESTICIDE OUTLOOK 159 (2001); Andrew Jacobs, *Just Try To Sleep Tight. The Bedbugs Are Back.*, N.Y. TIMES, Nov. 27, 2005, § 1, at 1; SUSAN C. JONES, OHIO STATE UNIV. EXTENSION, BED BUGS (2004), <http://ohioline.osu.edu/hyg-fact/2000/pdf/2105.pdf>. Sometimes guests who are bitten by bedbugs may not suffer more than marginally from their bites. In these instances, we might take the view that no harm was done except for emotional harm. Notably, there is no evidence that bedbugs are vectors of disease. See Harvard Sch. of Pub. Health, *Bed Bugs*, <http://www.hsph.harvard.edu/bedbugs> (last visited Feb. 10, 2007).

²⁰ See Boase, *supra* note 19; JONES, *supra* note 19, at 2–3.

guests. (Indeed, the reason that the Motel 6 in *Mathias* chose to call the bedbugs “ticks” might have related to the almost medieval taint of bedbugs; if I were bitten, I would prefer to think that the pest was a tick rather than a bedbug.) Preserving its reputation, then, would seem to me to have been a powerful motivation for Motel 6 to cure its bedbug problem.

This point about the reputational interest of Motel 6 is, in fact, one of general import. The need for punitive damages — and, for that matter, for compensatory damages — to accomplish deterrence is of a much lower order when victims are the customers of a firm than when they are not. Suppose that a firm might pollute the local water supply, harming people who live near it but who are not its customers. In such a context, society relies on lawsuits and regulation to discourage the firm from causing pollution-related harm, and punitive damages might be needed, especially if the harm is difficult to attribute to the firm. Unlike Motel 6, the firm typically will not be worried about losing business should it cause pollution because its customers will not be the ones who suffer from the pollution. The simple distinction between contexts in which victims are customers and those in which they are not is often crucial from an instrumental, economic perspective. Yet to my knowledge, courts generally do not emphasize this distinction when evaluating the propriety and magnitude of punitive damages.

Whatever may be the merits of my observations about this case — especially that nonlegal consequences, such as the expense of customer refunds and the damage to Motel 6’s reputation, might diminish the need for punitive damages — I should emphasize that they were stimulated by Judge Posner’s opinion. His opinion has the great virtue of channeling thinking about punitive damages along rational lines that he connects to the true objectives of the law — here, deterrence of harmful behavior. Judge Posner’s commitment to satisfying the underlying purposes of the law, as exemplified in *Mathias*, distinguishes his hundreds of opinions and their contribution to American jurisprudence.