OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HONDA MOTOR CO., LTD., ET AL., Petitioners v.

KARL L. OBERG

CASE NO: No. 93-644

PLACE: Washington, D.C.

DATE: Wednesday, April 20, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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HONDA MOTOR CO., LTD., ET AL., :

Petitioners :

v. : No. 93-644

KARL L. OBERG :

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Washington, D.C.

Wednesday, April 20, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

ANDREW F. FREY, ESQ., Washington, D.C.; on behalf of the Petitioners.

LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on behalf of the Respondent.

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PROCEEDINGS

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 93-644, Honda Motor Company v. Karl Oberg. Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY

ON BEHALF OF THE PETITIONERS

MR. FREY: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the supreme court of Oregon to decide whether a defendant in a civil case has a right to any judicial review of a jury verdict alleged to be excessive under applicable State or Federal substantive damages law, or indeed, a plaintiff claiming that a verdict is insufficient.

In the Texaco Pennzoil case a punitive verdict of $3 billion was returned by the jury, and it was reduced on judicial review by $2 billion. In Grimshaw v. Ford Motor Company, a $125 million punitive verdict was reduced to $3-1/2 million. In Proctor v. Upjohn, a $125 million verdict was reduced by the Court to $35 million.

QUESTION: These are State court decisions you're referring to?

MR. FREY: These are State court decisions.

QUESTION: What standard is it that those courts

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use in assessing punitive damages?

MR. FREY: Well, there's a lot of debate about what the standard -- you mean in determining whether a --

QUESTION: Yes.

MR. FREY: -- punitive verdict is excessive?

The standards may vary. They are a matter of the State substantive law of damages, the State substantive law of punitive damages, which will set up a structure for determining the amount of damages not in any liquidated or definite sense, but in some general sense.

It will identify factors that are relevant, it may call for proportionality review with other verdicts, it may limit --

QUESTION: Well, what were the standards employed in the cases you were reciting?

MR. FREY: Well, I'm not certain what the standards were, but I don't think it matters for the purposes of this Court's decision. The only point that I wanted to make is that if those verdicts had been returned in Oregon, the Court would have lacked the power to consider whether they conform to the law of Oregon.

QUESTION: Well, what standard are you asserting is constitutionally mandated, Mr. Frey?

MR. FREY: Well, I think it's very important in

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understanding this question to distinguish between the procedural due process requirement -- that is, what procedures must be provided, which is what we're talking about this morning, and the substantive law of damages, which is to say, what law determines how much is an acceptable range of damages on a given set of facts?

We are not saying in this case that the State of Oregon, or that the other States in those cases, have to have any particular substantive law of damages.

QUESTION: Mr. Frey, would it be sufficient for a State to say, as long as the award is not the product of passion or prejudice, it is not excessive?

MR. FREY: I doubt that. The question -- if you're asking for passion or prejudice -- if you are saying to me -- I guess I want to give a two-part answer to that question, if I may.

The first is, passion or prejudice means different things. In our view, the term is ordinarily used as a rubric for actually conducting excessiveness review, but it could be the reverse.

That is, you could look at the size of the verdict and say it's a product of passion and prejudice, or you could say, we will not look at the size of the verdict at all, but if we see other evidence, such as an improper jury argument or some other extraneous evidence

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that might cause passion and prejudice.

QUESTION: The thing about punitive damages review, it seems to me, is that if you're reviewing a verdict for actual damages and talk about passion or prejudice or the weight of it, you've got some fairly concrete things to hang on to -- the amount of the medicals, the amount of -- cost of maintaining someone who's disabled -- but the punitive damage is much, much harder to pin down.

MR. FREY: Well, it may be much harder to pin down, and that suggests that there is a difference between liquidated kinds of damages inquiry and the kind of unliquidated inquiry where you're asking how much pain and suffering the plaintiff experienced as a result of his or her injury, or how much is an appropriate amount of punishment.

But State law says, for example, deterrence is relevant. State law may say comparative review is important. That is, the verdict should not be disproportionate to other verdicts that have been returned in the State.

Now, I'm not saying the Federal Constitution requires the State to have such a rule, but I am saying, if the State does have such a rule, we have a right to have that rule applied to the verdict in the case by a

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judge to determine whether the verdict comports with the State's substantive law of damages.

The State's substantive law of damages may be that damages are disfavored and should be small in product liability cases, because they affect the -- punitive damages, let's say, because they affect the cost of goods to consumers.

QUESTION: Mr. Frey, what are the, then -- you said you're not talking about substantive limits today. What are the procedural limits?

You have not answered whether passion and prejudice -- maybe you want to continue that. I would be interested in knowing whether you think a remittitur device is constitutionally required, whether you think it's compatible with due process to have a new trial limited to the punitive damages only, or whether you'd have to have an entire trial. What exactly are the components of this due process for which you're arguing?

MR. FREY: Okay, well, let me see if I can take those in order, and forgive me if I forget some of them, but to start out, I do want to complete the answer to Justice Stevens.

I think passion and prejudice is not enough, because even a well meaning jury not inflamed by passion and prejudice can make a mistake. They can misunderstand

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the legal constraints. They can come up in good faith with an aberrant verdict which violates the State law, substantive law of damages.

QUESTION: How could we ever tell that if it comports with the, sort of the ultimate substantive standard of bearing at least a reasonable relationship to the facts of the case?

MR. FREY: You would never have to tell that.

QUESTION: Pardon me?

MR. FREY: You would never have to tell that. That is, the Supreme Court would not be asked that question.

The State supreme court -- there is a State law of damages. If you had -- imagine a bench trial in which the judge has to determine the amount of damages. State law, which may not be very articulated or detailed in the form of a code, but it exists. There are principles that guide his or her selection of damages.

For instance, to take compensatory damages for pain and suffering, the amount is supposed to be the amount that would appropriately compensate the plaintiff for injury. Now, I understand that there is a range within which reasonable people could disagree, and it may be a very substantial range, and any verdict that is within that range by a jury, or any judgment returned by a

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judge within that range, is acceptable, but -- and therefore not subject to being set aside.

QUESTION: Well, then, with respect to punitive damages, why isn't any verdict acceptable if it bears the -- if it can be said to bear a reasonable relationship to those facts in evidence which would indicate that punitive damages were appropriate?

MR. FREY: Because State law may impose greater constraints than that on punitive damages. State law may have a whole set of rules, and often does.

QUESTION: Well, but your argument -- then, maybe I'm missing something. Your argument at this point seems to be boiling down to this: whatever State law provides, we ought to get.

MR. FREY: Whatever State law provides --

QUESTION: And State law doesn't provide anything, apparently, for you here.

MR. FREY: No, no, no. What State law doesn't provide -- there is an Oregon law of damages. I'm not sure what it is. I'm not here today to argue whether it was rightly or wrongly applied, because Article VII, section 3 of the Oregon constitution deprives the Oregon courts of the right to apply that law of damages to the verdict in any particular case.

QUESTION: Your point would be applicable in a

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compensatory damages review, too?

MR. FREY: Absolutely.

QUESTION: You contend that that constitutional provision prevents the Oregon courts from even applying passion and prejudice review, don't you --

MR. FREY: We -- that --

QUESTION: -- and although you don't assert that passion or prejudice review will suffice for purposes of constitutional sufficiency, you deny that there was even passion or prejudice --

MR. FREY: That's correct.

QUESTION: -- review here, don't you?

MR. FREY: That is correct.

QUESTION: But you don't deny, I take it, that there was at least the possibility of review for that -- we'll say that ultimate substantive threshold --

MR. FREY: There is no possibility --

QUESTION: -- which is required by the Supremacy Clause.

MR. FREY: No, I don't -- this gets into -- this is not the main point in our argument. We believe that we are entitled to have the verdict reviewed for its compliance with both State and Federal substantive law of damages, whatever that law is, and in the case of the Due Process Clause --

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QUESTION: I take it, however, that Oregon has not denied you, at least in terms, any substantive -- any review under a substantive Federal standard that you claim is applicable.

MR. FREY: We believe the Oregon courts are without jurisdiction under State law to conduct such review, and we believe we were deprived of that review.

QUESTION: Have they ever come out and said, there is a Federal standard constitutionally applicable to us, but our constitution forbids us to entertain an appeal on that ground?

MR. FREY: They haven't come out and said it, but they have come out and said that verdicts that are excessive, they lack the jurisdiction, the power, to set aside. They lack the power to review and consider a claim that a verdict was excessive.

QUESTION: Can you tell us what is this constitutionally minimal procedure? What process are you due? I feel a little nebulous about that. You say, some process. What is that process?

MR. FREY: The process that we say -- well, let's start off with what we get, which is, when a verdict is returned, we get no judge to examine whether the verdict conforms with the substantive law that regulates the size of verdicts. We do not get that review, in our

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opinion. There's a debate about whether we do or we don't, but we think it's clear that we don't. Our position --

QUESTION: But you do get a review for no evidence, and you get a review if the judge thinks that the instructions were not adequate.

MR. FREY: All right, I have two -- we get a review for no evidence, which means a review for liability. That is, whether punitive liability is established, and I might say that I think the no evidence standard is not constitutionally acceptable itself, and Jackson v. Virginia provides some support for that.

It rejects the no-evidence standard in favor of taking the facts in the light most favorable to the verdict, could any reasonable jury define the standard, but that's not the main point.

We say that giving instructions to the jury does not cure the unfairness of being unable to correct an aberrational jury verdict that violates the State law of damages, or the Federal law of damages, and we say that part of the right to which we are entitled, which is a right that has existed for centuries in the common law system, which is a right that exists every place else in the United States, is to have a judge look at that verdict and ask himself or herself, does it comport with the law.

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That is the procedure.

QUESTION: Suppose the judge looks at the amount of the prayer in the complaint before the issue is submitted to the jury, and concludes that on this evidence, that maximum amount would be a sustainable award. Does it have to be a retrospective assessment?

MR. FREY: I guess I have two things to say about that. The first is that there are two kinds of questions you can ask about the State procedural system in determining whether it's sufficiently fair.

The first question is whether some ingredient is an indispensable element such as an unbiased decisionmaker, or we say some form of judicial review wherever the jury is given substantial discretion.

You can also ask a question whether the overall system, which is what the Oregon court asks, whether the overall system is fair enough, taking into account various other protections.

Now, we don't think Oregon has -- certainly we had no notice that this is the procedure by which you could do it. I think it would be better than nothing to have that happen.

QUESTION: I wonder, would it be constitutionally sufficient?

MR. FREY: I think it would depend on the rest

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of the system, but I suppose if the judge actually sat down -- well, it depends on the case, I think is the answer, because the judge can't know in advance what the jury's findings are going to be. You may have a variety of theories. The jury may come back with verdicts that tell you that they only found some of the things and not others, so the inquiry for the judge would be an extraordinarily --

QUESTION: But this verdict was a general verdict, wasn't it? They didn't find the existence of malice and wealth on the part of the defendant. They didn't make any special findings.

MR. FREY: Right. In fact, we asked for a special verdict and were denied one.

QUESTION: I'm curious to know how far your theory extends, Mr. Frey. The State of Arizona has a provision in its constitution that the issue of contributory negligence and the issue of assumption of risk shall always be questions for the jury, and the courts can't review jury findings on those. Now, would that be unconstitutional under your theory?

MR. FREY: Well, that raises an interesting question, because we're dealing with an affirmative defense, and that may be different from the elements of the case, but I think I have -- if the State substantive

law is that you are not liable to pay damages to a plaintiff who was contributorily negligent, I have difficulty with the proposition that a fair system provides no judicial review.

So I would have my doubts, although I think our case is a substantially stronger case than that, but I would doubt whether that would be constitutionally sufficient. I understand there's a case from 1919 that held that, but we have made the point that it hasn't been cited for over 60 years, and that it's inconsistent, we think, with the Court's modern procedural due process doctrine.

QUESTION: Mr. Frey, why should the constitutionally mandated review be any more than is required in a criminal case, for example?

MR. FREY: I don't know that we're asking for any more than is required in a criminal case.

QUESTION: Well, what do you think that standard is, the Jackson standard? If any reasonable juror could have reached a conclusion it's okay?

MR. FREY: Well, we've spent a lot of time talking about -- I think that might be an acceptable standard. The question that's before the Court is whether a judge applying some standard has to determine whether the verdict conformed with the law. Now, I think that

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that --

QUESTION: Is there any justification for requiring more than would be required on review in a criminal case in a punitive damages case?

MR. FREY: No. I don't think we're suggesting that more would be required, but it may depend on what the State law is. I don't think we are suggesting that any more is required, but I have to say that I doubt that in a criminal case you could irrevocably commit to the jury's discretion the question whether the evidence is sufficient, no matter how well instructed the jury is.

QUESTION: Well, I would have thought the standard was the one I mentioned in Jackson.

MR. FREY: Well, I'm perfectly willing to accept -- I mean, I think the standard on how you assess the facts is you take the facts in the light most favorable to the verdict, and you ask whether any reasonable juror, or any reasonable jury, in light of those facts, could -- applying the law to those facts, could come to the conclusion they came to. I have no problem with that standard. That's what we would like to see the Court supply. Now --

QUESTION: And you would be satisfied with that -- a procedure that provided for that review in this case?

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MR. FREY: Well, we didn't get that review. We say that that's what we need.

QUESTION: Well, I know, but would you be satisfied with that, because I understood that to be --

MR. FREY: Well --

QUESTION: -- the implication of what you were just saying.

MR. FREY: -- that is the least we feel we are entitled to. Now, if you ask me would I be satisfied with that, in the Haslip case, what the Court did was, it looked at the system that Alabama had, and it said this overall system is a procedurally fair system in part because the Alabama courts give a kind of review which clearly is more than the Constitution would require if you looked at that element standing alone.

But the Alabama system was marginal at best in the quality of the jury instructions that were given, and the Court looked at the overall system, so I'm reluctant to say that the overall Oregon system is a fair enough system for administering punitive damages.

But what we are asking for today is that we have, at a minimum, a judge apply something like the Jackson standard.

QUESTION: Okay, but as I understand it, you have not attacked anything but what you deemed to be the

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procedural deficiency in review of the verdict that comes in. You have not attacked any other aspect of the Oregon system, e.g., the adequacy of its instructions, and so on.

MR. FREY: That's correct.

QUESTION: Okay.

MR. FREY: That's correct. So --

QUESTION: We've got to take the case on the assumption, I presume, that the remainder of the Oregon system is constitutionally adequate.

MR. FREY: We -- I believe you could fully discharge your duty by saying that it's inadequate in this respect and remanding it.

QUESTION: So you're not saying that the other accoutrements that sometimes operate as checks on juries are necessary. You wouldn't have to have a remittitur, just as long as you have a judge look it over.

MR. FREY: A remittitur is a device to which defendants object, because it is a substitute for a new trial, which defendants want. I don't think a remittitur is constitutionally required, but it is actually a pro-plaintiff device, because historically it evolved as a substitute for a new trial.

QUESTION: All right, so you're striking out the remittitur, and you could have -- if the judge thinks that the -- there should be another jury you could have just

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limited to damages, that would be all right, too.

MR. FREY: Nothing that we say here today raises that problem. I don't want to be taken to be conceding when we get back to the Oregon court that the rest of the system is sufficient, but for purposes of this Court's review, the only question we present is whether Oregon is obligated to have a judge examine this verdict in light of the Federal and State substantive law of damages and ask whether the verdict is excessive or not under that law.

QUESTION: And you say that in light of some history that there was a time when the jury even decided questions of law, when at least in some places jury verdicts --

MR. FREY: Yes.

QUESTION: -- were not reviewable?

MR. FREY: We say that that was an incident of the right of jury nullification. It was not true in civil cases at common law or in civil cases generally, I don't believe.

QUESTION: What are the best cases you have, Mr. Frey, for the proposition that some judicial review beyond passion and prejudice review was traditional in the American system, or in the English system at the time of the founding? What are the best cases you have?

MR. FREY: Well, many of the cases don't refer

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to passion and prejudice. They refer to whether the verdict is outrageously excessive, or grossly excessive, or I think the formulation --

QUESTION: Okay, I'll say -- or anything beyond. I'm saying that --

MR. FREY: Well, if you look at the --

QUESTION: -- I want cases that go beyond passion and prejudice, and that's what you're giving me.

MR. FREY: Well, I mean -- there are -- well, the courts don't, I think, analyze the matter that way. They characterize the verdict in explaining why they set it aside.

Sometimes they say the verdict is the product of passion and prejudice, or it's so large that it must be the product of passion and prejudice. Sometimes they say it's excessive.

Now, it may be excessive with respect to some liquidated or clear provision of law, like not more than three times the compensatories, or something like that, or it may be excessive in the abuse of discretion sense, that whoever was the fact-finder, whoever returned the verdict, had a broad range of discretion, but this is so far outside the range of discretion.

Now, when the --

QUESTION: Give me your best cases, Mr. Frey,

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whatever you think they say. What are your very best ones?

MR. FREY: Well, there's your opinion in TXO. Now, it doesn't discuss passion and prejudice, but what it says --

QUESTION: It doesn't discuss prior cases, either, and it's dictum, and I might have been wrong.

(Laughter.)

MR. FREY: You might have been, but I think you were pretty clearly right.

QUESTION: To be specific, Mr. Frey, there was a brief -- one of the briefs in this case that suggested that maybe this Court was wrong about what the common law was. There was a mixed picture. There were some decisions that sounded like, particularly in tort cases, the jury has the last word.

MR. FREY: I don't -- I don't think that that is -- it is clear that as the institution of the jury evolved in the 17th and 18th Centuries, one of the essential incidents of that institution was to have judicial review, the power of the judge to send the case to a new jury when the case was -- when the decision was --

QUESTION: But there were at least some decisions made noises the other way.

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QUESTION: I mean, some of the cases -- you cited contract cases, where you do have -- it's almost a question of law whether these damages are proper damages or not, but tort cases, where it's pain and suffering, where the damages are unliquidated --

MR. FREY: Well --

QUESTION: And especially where the damages are punitive, and therefore very hard to say --

MR. FREY: May I can approach --

QUESTION: Are you going to give me your best cases?

MR. FREY: No, I don't think --

QUESTION: You're not going to give me your best cases.

MR. FREY: No. I can't -- I can't -- our brief -- I think our brief covers it. I'm not prepared --

QUESTION: You're not willing to select among them just a couple that you think are the tops? Okay.

MR. FREY: I don't think I'm -- I don't think --

QUESTION: That's your prerogative.

QUESTION: You also don't think that this Court is subject to issue preclusion because in a prior case -- one of the things you seem to say in your reply brief was that this Court had said there was court review of a jury verdict, that was the traditional common law approach, and

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the Court has already decided that. Is not -- the Court is fallible, is it not?

MR. FREY: Yes, the Court could revisit questions --

QUESTION: So there's no issue preclusion on that point.

MR. FREY: I'm not -- well, stare decisis I suppose would be the question. I'm not saying that the Court is bound, but I'm saying that if you revisit it, and even if you didn't revisit it, cases like Jackson I think make clear that there is an obligation.

In the Fowler case in the Oregon supreme court in 1954, they said, if this court were authorized to exercise its common law powers we would unhesitatingly hold that the award of $35,000 as punitive damages was excessive, but they say under Article VII, section 3 we are without power to consider whether or not the punitive damages were excessive.

Now, I am saying that a provision that deprives them of the power to reverse a verdict that they would unhesitatingly say is excessive under State law is not consistent with fundamental fairness.

QUESTION: Mr. Frey, let me ask just one question. You said you are entitled to have the State law rule, substantive rule, a procedure available to have a

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judge determine whether the State's substantive law was applied.

MR. FREY: That's correct.

QUESTION: What State rule of substantive law are you arguing was not applied?

MR. FREY: Well, we are arguing that the State -- we argued below that the verdict, both the compensatory and the punitive were excessive, but we argued for --

QUESTION: But is it a State rule of law that the damages award may not be excessive as long as it complies with the instructions and the various criteria that they describe?

MR. FREY: I think the correct way to think of it is that is a State rule. I don't know if that's a rule of substantive law or not, that the damages may not be excessive.

I think it is a rule. It is a rule that the courts of Oregon are without power to apply in jury trials, but if you had a bench trial --

QUESTION: But you're begging the question. I mean, you're saying, as you put it, you said, even if the Oregon supreme court finds that the damages are excessive under State law, the constitutional provision says that they cannot review it for that excessiveness.

Another way to view the constitutional provision is as saying, in effect, there is no such thing as excessiveness of damages for purposes of Oregon substantive law.

MR. FREY: You could -- you could --

QUESTION: There is no such thing.

MR. FREY: You could, but they have never said that.

They have clearly said that there are verdicts that are ex -- in the Van Lom case, they said they were of the opinion that the verdict was excessive, but they lacked the power to set it aside.

In a bench trial, it's clear that there would be law that would govern this, and they could review it in a bench trial.

QUESTION: Well, they said it was excessive, but they didn't say it violated the law of Oregon.

MR. FREY: Well --

QUESTION: In other words, they -- isn't it consistent -- isn't it a reading of what they said simply that if we were writing on a clean slate we'd probably have a thirteenth juror rule that says -- that would in fact overturn this verdict, but we don't have a clean slate, and we do not have the authority -- i.e., the law of Oregon does not give us the authority or provide a

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standard for review?

MR. FREY: No, but that's not what they said. First of all, we're not talking about thirteenth juror review, and in my opinion, when they say that the judgment is manifestly excessive and they would set it aside, they are saying that it is unlawful, under Oregon law. I believe that is what they are saying. I think it's clear that that's what they're saying.

QUESTION: Are they saying --

MR. FREY: Now, where did the power --

QUESTION: -- that it was an error for the trial judge to submit the case to the jury on the state of the complaint where an award up to $5 million could be returned by the jury?

MR. FREY: I guess if you asked the question at that time, and if you were going to spend the time in every case for the one case in 50 or 100 where a question actually arises.

This is not the procedure of Oregon. I think we can confidently say that the judge would not have undertaken any inquiry --

QUESTION: A judge must submit to the jury any punitive damages request that the plaintiff cooks up in the complaint? I thought the result was -- the rule was quite the opposite.

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MR. FREY: The rule is that it can't exceed the amount in the complaint. It can't exceed the amount sought in --

QUESTION: But the complaint can exceed --

MR. FREY: $50 million or $500 million.

QUESTION: The complaint can exceed an amount of what the evidence would justify?

MR. FREY: Well, the complaint is the complaint. Then you have the evidence.

If the judge undertook -- I agree that it is theoretically possible, although I don't believe that Oregon has such a procedure, to ask the judge in every case ahead of time to determine the limit of the damages that would be allowable, but I don't think we have to use that procedure, and I don't think Oregon has that procedure.

If it wanted to adopt such a cumbersome and burdensome and time-consuming and resource-consuming procedure, maybe that procedure would be good enough to satisfy the Constitution, but I don't think it has that procedure, and I don't think we can be held to have defaulted in this case for not employing this -- or certainly the Oregon supreme court didn't suggest that that was why we were not getting review.

I would like to reserve the balance of my time.

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QUESTION: Very well, Mr. Frey.

Mr. Tribe, we'll hear from you.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE RESPONDENT

MR. TRIBE: Thank you, Mr. Chief Justice, and may it please the Court:

I think I might begin with, I think a crucial question that Justice Kennedy has been pressing, because I was rather surprised by the answer.

It seems to us that really no argument whatever has been offered by Honda, either historical or functional, for the peculiar thing they say they have a right to as a matter of procedural due process, namely, review by a judge after the verdict -- and I underline the phrase, after the verdict -- to assure compliance with State law.

Now, apart from the proposition which I think has been explored by Justice Souter and Justice Scalia of how circular their claim is -- I mean, State law doesn't give them what they say they have a right to -- and apart from the decisions of this Court, summarized in a footnote in our brief, holding that there is no Federal right to make sure you get everything the State promises, outside the very limited context of Cleveland v. Loudermill and entitlement theory, apart from that, the fact is that

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Oregon has precisely the procedure about which Justice Kennedy asked, and it's not that different from Federal practice, although it's in a damages context.

The leading case, indeed, their brief reads as though this Court granted cert to review it 44 years out of time, is Van Lom, in Oregon, in 1949, and Van Lom very carefully, at page 467 of 210 Pacific 2nd, reviews a series of cases -- Lyons, McDaniels, Weatherspoon, British Empire -- all explicitly holding that it is legal error, reversible notwithstanding Article VII, section 3, which just prevents reexamination of a jury verdict based on evidence, legal error for a judge not to cap the damages at the highest level the judge believes would be sustainable under the evidence.

That, in a sense, disposes of this case.

QUESTION: Well, Mr. Tribe, you and your colleague differ very much about what Oregon allows under these cases in the way of review of punitive damages.

MR. TRIBE: Not on this issue, Mr. Chief Justice. I -- their brief says nothing about this. We discussed it in our brief. There's no response.

This is an undisputed point about Oregon law. We do differ on other aspects, you're right.

QUESTION: I would have thought you differed on this point, too --

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MR. TRIBE: I don't think so.

QUESTION: -- having read all the briefs, and what if after duly deliberating --

MR. TRIBE: Right.

QUESTION: -- we simply cannot decide which of you is right as to the nature of the review Oregon affords?

MR. TRIBE: I think, Mr. Chief Justice, if that were the case, then one would affirm this judgment, because there is no showing that Oregon violates anything that is comprehensible as procedural due process, since Oregon -- I mean, I suppose you could say -- it depends on what you were unsure of.

If you were unsure whether Oregon provided even judicial review to see that the instructions complied with Federal requirements, if you believed that Oregon, in response to Justice Souter's question, had somehow defied Federal law and said no, we will not apply Haslip, even though we did in this case, if there were some ambiguity -- that is, if looking at this case you couldn't tell whether Oregon is one of those States that is simply defying the Supremacy Clause, I suppose you could vacate and remand, but there is -- if there's uncertainty, it's only about marginal matters, marginal matters that I think are indispensable to establishing a procedural due process

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theory, but not to establishing whether this judgment should be affirmed.

QUESTION: I don't know about that. Don't we have to take our best shot at figuring out what the Oregon -- you certainly wouldn't --

MR. TRIBE: Oh, sure. I would urge that.

QUESTION: I mean, you wouldn't propose in an equal protection or race discrimination case that if we couldn't figure out what the law of the State was we'd just say, well, we can't figure it out, so --

MR. TRIBE: No, no.

QUESTION: -- we have to assume you haven't been -- I mean --

MR. TRIBE: Of course, Justice Scalia, but if it was A or B, and the only thing that might violate the Constitution was C, you wouldn't waste this Court's time figuring out if it's A or B, and that's what I think we have here.

I mean, as I listen to what kind of judicial review --

QUESTION: Mr. Tribe, I'm a little puzzled by that, because the standard for review is no evidence, and according to what you've just told us, you would never have a no-evidence situation, because you can't give the case to the jury in the first place unless the top figure

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is one that is sustainable --

MR. TRIBE: Right, Justice Ginsburg --

QUESTION: -- by the evidence, but no evidence, Mr. Frey suggested -- it could be a scintilla --

MR. TRIBE: Right.

QUESTION: -- and that wouldn't do.

MR. TRIBE: Fowler v. Courtemanche in Oregon, in 1954, which is in our footnote 35, definitively rejects the scintilla rule, says no evidence means no substantial evidence, and the one ambiguity that I've found in Oregon law in this respect is the question whether a trial judge has a sua sponte duty to look at the evidence, even without a request.

That is, suppose it's clear to the judge on the basis of the record that, under State law, the highest award that could have been sustainable here under the no-evidence rule, meaning no substantial evidence, or whatever standard Mr. Frey wants this Court to adopt is, let's say, $2 million, then he has to have some theory of what's the highest that would make sense under Oregon's substantive law. Let's suppose it's $2 million.

The judge who is able to determine that after the jury has spoken is no less able to determine that before submitting it to the jury, and at least some of the cases, like Lyons, suggest that in that circumstance the

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judge has a duty, sua sponte, to set a cap.

In more recent cases, where defense counsel have not taken advantage --

QUESTION: To set a cap in what way, Mr. Tribe?

MR. TRIBE: Well, there --

QUESTION: To instruct --

MR. TRIBE: Yes.

QUESTION: -- the plaintiff's lawyer not to argue for more than $2 million?

MR. TRIBE: No. There are two methods used in Oregon, Mr. Chief Justice. One -- and it was used in the case of Lane v. Kelley in 1982 -- is to strike that part of the complaint that asks for more, and under the Oregon rule that says you can't recover any more than your complaint, that has the necessary result.

The other, which was endorsed in Van Lom, was specifically to instruct the jury that they are to return a verdict of no more than, and then the number is set. In this case, it would be no more than whatever number below $5 million they thought was sustainable.

QUESTION: And these were both punitive -- Van Lom and the other case you're referring to were both punitive damages cases?

MR. TRIBE: No. In those cases, Mr. Chief Justice, after saying that its principles applied equally

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to punitive and compensatory cases, the court discussed these. They were not punitive damage cases. Indeed, they were ones, I would be quick to admit, where it was quite easy to admit, to calculate --

QUESTION: It's a much different picture when you're trying to figure out actual damages on the evidence --

MR. TRIBE: Sure.

QUESTION: -- supporting and then punitive --

MR. TRIBE: Right. It's very different, but it's no more different before the jury speaks than after, that's the point.

Admittedly, it's hard to tell, as you asked, you know, how much is too much? Like, you know, in Amadeus, when the emperor --

QUESTION: Mr. Tribe, let me just ask you if I may --

MR. TRIBE: -- reviews the song and says, too many notes?

QUESTION: Is it not possible that a plaintiff will have alternate theories of liability both for punitive damages and actual damages, and that on one theory $5 million would be appropriate, on another theory, $1 million would be appropriate. What does the judge do there? Does he --

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MR. TRIBE: Well, there have been some Oregon cases, some written by Justice Linde, like Andor v. United Airlines in 1987, which have suggested that alternative instructions could be given in cases of some complexity --

QUESTION: Do you take the position that they are required under Oregon law in that kind of case?

MR. TRIBE: Well, I certainly think that if the request were made Van Lom would be strong precedent for there being required, but no request was made.

For example, in the closing argument to the jury, Honda's counsel said, it's hard to know these things, but I think anything more than $50,000 here would be unjust enrichment. We cite that in note 6 of our brief. But then he did not ask to have a cap on either the compensatory or the punitive damages of $50,000.

Let me turn to the broad question of what it is that this Court is being asked to constitutionalize as a matter --

QUESTION: Could you clarify first to me whether --

MR. TRIBE: Sure.

QUESTION: -- you're saying that there can never be an excessive verdict in Oregon because the district judge before -- the trial judge before ever giving the case to the jury will set an amount -- will make sure that

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the amount that's sought is not excessive?

MR. TRIBE: No, Justice Ginsburg, I'm not saying that judges do that in every case. Van Lom endorsed the proposition that, if asked, they have a duty to do it.

There is contest over whether they ought to do it sua sponte, and because, as the chief justice points out, there are many cases in which it would be very hard to say in advance that a verdict of more than X, where X is less than the ad damnum requested would be excessive, they don't do it.

But it's not easier to say after the jury has spoken, that's the point. You see, whatever --

QUESTION: Mr. Tribe, I dare say that judges of Oregon are not going to thank you for establishing the proposition that they can be asked ex ante, before the trial, to pick a number.

It's one thing after the trial to say, this is too much. It's quite another thing before the trial to pick a number and say --

MR. TRIBE: If --

QUESTION: -- anything more than this is excessive punitive damages, and that's really what you think the Oregon system is?

MR. TRIBE: Well, Justice Scalia, it's not before the trial --

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QUESTION: I'd find it a very difficult system to administer.

MR. TRIBE: Well, (a) it's not before the trial, it's after the record is closed.

(b) In many cases, it will be excruciatingly difficult, and so they will resist it, and they will look for aspects of the law that say, we don't really have to do this, but (c), if it's excruciatingly difficult, and perhaps difficult to the point of being meaningless, what is it that we're being told procedural due process requires them to do after the fact?

That is, after the fact, when you've seen what the jury has done -- that is, in Oregon, you know the range.

QUESTION: You're asking them to define obscenity instead of recognizing it when they see it.

(Laughter.)

MR. TRIBE: I'm asking them to number the page, and they can number it as well before they have perused it as after. That is, we're talking here about a fairly --

QUESTION: Yes, but that assumes there's only one theory of liability. You can have specific, special interrogatories and all the rest that make a lot of variables in a judge's task.

MR. TRIBE: Well, but Justice Stevens, I really

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want to focus on the main point, which is the before and after point. If there are several --

QUESTION: And you think a judge can do it before -- when he's doing the instructions and everything else, he can figure out the answer because he knows what the jury is going to decide on the merits --

MR. TRIBE: No. He knows in Oregon that they can't give more than $5 million, and he can at least say this: on no theory that is in this case, under Oregon law, would anything more than $4 million be justifiable.

Now, I readily concede it will be a rare judge who would be able to say that before the fact. It is equally a rare judge who would be able to say, hmm, now that I've seen five, I think four would have been better. What standard would be judge apply?

Throughout the briefs below, and I do think this is terribly important, it has been a standard which really says, we can't just look deferentially, Jackson v. Virginia-like, at what the jury did.

In their opening brief, at page 3, they --

QUESTION: May I interrupt with one other question? Do you think the system would be constitutionally inadequate if it did not require the judge to do this?

MR. TRIBE: To do this advance thing?

QUESTION: Yes.

MR. TRIBE: No, certainly not, Justice Stevens. I think that just makes the case a lot easier, but even if that procedure were not available in Oregon, I don't think that there's a demonstrated infirmity.

Let me, if I might, just return to the question of what it is they're asking. If you look at their opening brief at page 3, they talk about reexamining the evidence and setting aside the verdict because --

QUESTION: Where are you reading from, Mr. --

MR. TRIBE: Oh, I'm reading from page 3 of the blue brief, Mr. Chief Justice, about 10 lines down where they're quoting from Van Lom.

They are complaining that Oregon has eliminated the power of a trial court to reexamine the evidence and set aside a verdict because it was excessive, or in any other respect opposed to the weight of the evidence, and in Van Lom, at page 466, the Court states what it is understanding the State constitution to mean.

QUESTION: Well, what you've just read they say is a quote from Van Lom.

MR. TRIBE: That's correct, and that is -- that is the deprivation of judicial review of which they complain.

That is, when they say what it is about the

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Oregon constitution that ties the hands of judges unduly, they quote language about how, under the Oregon constitution, you can't reexamine the evidence and set aside the verdict because it's against the weight of the evidence. That's what they apparently wanted to correct below, throughout the proceedings below.

For example, Justice O'Connor, I believe, asked about their cases, the cases that they thought illustrated the kind of judicial review that ought to be available. Grimshaw was one of them, from California, that Mr Frey mentioned.

And Grimshaw, 174 Cal. Rptr. at page 391, explains what standard they use: "Independent judgment on the evidence." That is, they are asking, or at least have asked throughout the proceedings below -- asked the courts of Oregon not simply to review for the presence of substantial evidence that makes it a lawful verdict, which is the most they could get in a criminal context, they've been asking for an independent reassessment.

QUESTION: Well, that's not what he's saying today, so it seems to me that's kind of a waste of time to debate.

MR. TRIBE: Well, it may be. I can't tell what he's saying today. I don't want to waste my time, but I don't know what he's asking for now.

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If he's asking for Jackson v. Virginia type review, then it's very hard for me to see why that isn't what already is given in Oregon. That's not --

QUESTION: Except for what they say.

MR. TRIBE: -- what would meet his theory.

QUESTION: They say it won't be reviewed for excessiveness or weight of the evidence.

MR. TRIBE: Well, excessive or in any other respect opposed to weight.

QUESTION: I think we could take the supreme court of Oregon at its word here that they don't provide review unless there is no evidence, or for instructions that were given.

MR. TRIBE: Justice O'Connor --

QUESTION: I don't see why we should debate that.

MR. TRIBE: No, I don't intend to. The supreme court of Oregon in this very case, however, did say that if there was insufficient evidence on each of the statutory elements of this product liability scheme, the decision should be set aside. It did not say that the decision should be set aside only if the Federal substantive due process standard was not met.

QUESTION: Mr. Tribe, what about the broader theory of the petitioner's case, that whatever the State

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law provides, there must be a procedure to ensure that the jury's verdict conforms to that rule? I take it that's a fair statement --

MR. TRIBE: I think it is.

QUESTION: -- of Mr. Frey's position.

MR. TRIBE: Whatever State law provides we ought to get, and the problem I have with that, frankly, is, you got what State law provided, to some extent by definition.

QUESTION: What about the underlying theory. Does he -- is that --

MR. TRIBE: Well, I don't think it's sustainable.

QUESTION: -- an acceptable constitutional --

MR. TRIBE: I don't think so, Justice Kennedy. I think what he's trying to do is extrapolate from things like the impairment of contract clause, where there are Federal constitutional principles that can, in certain limited circumstances, bind the State to its word.

He's trying to extrapolate from cases where the State defines the boundary of liberty and property in cases like Arnett v. Kennedy, or Bishop v. Wood, or Cleveland v. Loudermill, and then, this court says, you define the property, now we tell you what is due process.

But if there were a general principle that says that there is a kind of Federal constitutional entitlement

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enforceable by someone called a judge to make sure that the State not only says, we followed our own procedures, but also says, we guarantee you that we haven't made any mistakes, and you're entitled as a matter of Federal law to that kind of State guarantee, it's utterly incoherent, I think, and unprecedented.

QUESTION: What about a Federal guarantee that no reasonable juror could have awarded this sum?

MR. TRIBE: I think that, although it's sometimes put in terms of gross excessiveness, is the Federal substantive due process principle. That is, the proposition --

QUESTION: Yes, except that if you take the Oregon court at its word on the meaning of its constitution, they can't apply even that.

MR. TRIBE: No, I'm sorry, Justice O'Connor, I think that is simply not the case. The Oregon supreme court in this case, in this very case, elaborately at page 20a of the petition and at 28a and 29a in footnotes 10 and 14, went through the process of talking about how reasonable and proportional this judgment was.

Indeed, within the first 2 minutes of the oral argument in the Oregon supreme court, on January 10, 1992 -- I think this Court has the tape. I just listened to it -- counsel for Oregon told the justices of the

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Oregon supreme court that he "invited" --

QUESTION: Who's counsel for Oregon?

MR. TRIBE: I'm sorry, Oberg. I'm sorry, Mr. Chief Justice. Counsel for Oberg said he invited the Oregon court to engage in full scrutiny for reasonableness, proportionality under, as he put it, any applicable Federal test -- he said, go for it. He cited Haslip and said, do it.

The justices proceeded to do it. They did just that. I think it is really an insult to the State of Oregon to say that, although they haven't ever, in response to Justice Souter's question, said, you know, we will interpret Article VII, section 3 of our constitution in such a way as to prevent us from enforcing Federal substantive due process. It's an insult to attribute that to them. They never said it. They didn't say it in Van Lom, and they didn't say it here.

In Van Lom, they were talking about a special problem of -- and a provision very similar to Article VII, and in describing it they said, we simply may not -- and this is page 466. We don't think a court may "substitute its judgment as to the facts for a verdict based on competent evidence returned by a properly instructed jury." They don't want to substitute their judgment.

Now, that does not mean that they are saying, we

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will not ask whether this verdict is grossly excessive, whether it's the product of passion or prejudice, and when Justice Scalia asks what's their best case on whether they are entitled, as a matter of substantive due process, to anything more than passion or prejudice, I think they've had their shot.

QUESTION: Procedural due process, I was talking about.

MR. TRIBE: Procedural -- yes, exactly, procedural due process.

The Beardmore case in 1764, which is cited in the historians' brief, sort of deals with what it regards as their best case. It's a case called Chambers v. Robinson in 1726. It says it's the only one which went beyond passion or prejudice in the 18th Century, and that it's lawless and we disapprove it. It's certainly no solid historical tradition saying that as a matter of procedural due process you're entitled to anything more than a look to see if this jury was in a sense lawless and biased.

QUESTION: Mr. Tribe, could you comment explicitly on something which I think you've been commenting implicitly on all along, and that is language which is clearly troublesome to some members of the Court, and I think on its face to me, in that quotation from page

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3 of the blue brief, in which the Oregon court disclaims the authority to review the evidence as to whether in -- the verdict as to whether in any other respect it is opposed to the weight of the evidence?

It's that phrase, the weight of the evidence. Implicitly in what you're saying is that that phrase, weight of the evidence, refers to a kind of, you might say, a finicky judgment, thirteenth juror kind of review, as opposed to the far broader substantive due process question that you've identified, due process standard that you've identified.

Am I right in saying what I just said? In other words, weight of the evidence is a term of art, and it refers to a kind of thirteenth juror review?

MR. TRIBE: I think that's exactly right, Justice Souter. That is, that quotation and two or three more in the opinion suggest that they don't want to reexamine the evidence. They want to defer to jurors as long as they're acting lawfully supported by substantial evidence. They do not want to substitute their judgment as that of a thirteenth juror.

When Mr. Frey said, imagine a bench trial, I think he put himself in the mindset that the Oregon supreme court said it didn't want to imagine. We don't want to imagine what we as judges would have done here.

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QUESTION: Mr. Tribe, do you -- what is your support for the proposition, which I think you maintain, that Oregon does apply a passion or prejudice standard, meaning by passion or prejudice, passion or prejudice that is evidenced exclusively by the excessiveness of the verdict, and not aliunde by, you know, some conduct in the jury room or --

MR. TRIBE: Well, exclusively by he size of the verdict against the backdrop of the record, that is true.

QUESTION: Yes, against the backdrop.

MR. TRIBE: Because in Lane v. Stewart in 1960, a case that they cite for the proposition that there is no such review, what the Court says is, we find that there was substantial evidence to support this verdict, and we reject the idea that we are free to set it aside because its mere size, I take it independent of that evidence, somehow indicates something wrong.

But the answer to your question, Justice Scalia, what is the evidence for that proposition, is the Foley case in Oregon -- it's dictum, but it's the supreme court of Oregon in 1972 -- the Brewer case in 1983 in the Oregon court of appeals, and quite interestingly, Van Lom itself.

That is, Van Lom said, it's an open question whether this kind of review survives. They didn't exterminate it.

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QUESTION: Mr. Tribe --

MR. TRIBE: It's been in the Oregon law since 1862.

QUESTION: In your -- you've now said it a few times, attributed to the Oregon supreme court the words, substantial evidence, as distinguished from no evidence. In one of those cases that you cited, can you tell us which one uses the phrase, substantial evidence supports the jury's verdict?

MR. TRIBE: In Fowler v. Courtemanche at page 275 the court uses the phrase, substantial evidence, Justice Ginsburg.

Let me answer your question, Justice Scalia, in this additional way. This entire case has been tried since 1989 on the premise that that kind of review is available. If you look at the new trial and JNOV briefs it's absolutely clear what happened there. They were asking for passion or prejudice review. We didn't fight the fact that there was authority to grant it. We answered on the merits.

In their brief, filed below on, I believe it was June 22nd, 1989, they make quite a bit of the fact that Oberg does not dispute the authority of the Oregon courts to engage in passion or prejudice review. We didn't dispute it. We have never disputed it. It's been in this

case. They simply -- there was no indication of it.

QUESTION: There's just some uncertainly about what that means.

MR. TRIBE: Sure. That's right. I mean, precisely what it means, I can't say, but --

QUESTION: Do you think there is reason to believe it means functionally something different from the Federal substantive standard?

MR. TRIBE: I honestly don't. I think the -- as I understand the plurality opinion in TXO, the notion of gross excess, though it's a different verbal formulation, really has to mean excess in relation to something, as Justice Kennedy pointed out in his concurring opinion. Nothing is excessive in itself.

I was earlier remembering this business where the emperor says of Mozart, you know, too many notes. Well, which ones do you want me to remove, your majesty? I mean, too many for what, and the -- I think the test, and we all grapple for verbal formulations of it -- I think the test ultimately, whether it's gross excessiveness, or infection by something other than rational processes reasoning from the evidence, ultimately comes to the same thing, and it's essentially a Federal test.

QUESTION: Mr. Tribe, the Oregon constitution

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has a provision that no other State constitution has. In what respect is Oregon different from any other State? Your argument seems to go to the effect that there is review. It's the same as in the other States.

MR. TRIBE: No, it's less, Justice Ginsburg. It's different in this respect. When the Oregon supreme court said, we occupy a lonely eminence, we were comparing themselves to those States, and they are many, that do weight-of-the-evidence review, not quite thirteenth-juror in every case, but substantial reexamination on whether something was adequately supported in the evidence. It's really a new trial standard with respect to facts.

Oregon won't go that far. That is, the Oregon reexamination bar is more stringent than the Seventh Amendment's reexamination bar in the sense that even though at common law one could undermine a jury verdict by disagreeing with it in effect, in certain limited circumstances, as long as one had made a directed verdict motion first.

QUESTION: I think your answer suggests a degree of precision among these various doctrines that just doesn't exist. You know, I don't think these various courts have said, well, we see that some States use weight of the evidence, thirteenth juror, we're not going to use it, we're going to use substantial evidence, as if these

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were highly --

MR. TRIBE: Yes.

QUESTION: -- refined notions. I don't think they are.

MR. TRIBE: Mr. Chief Justice, I don't mean to be sort of slicing the salami too fine, but I'm trying to figure out what exactly is it that procedural due process supposedly entitles you to that Oregon won't give you? Oregon --

QUESTION: Let me give you a hypothetical that troubles me. Assume that in TXO we had held that the punitive damage award, that there's a Federal limit, substantive limit on the award, and it can be no more than ten times the actual damage award -- just assume that -- and Oregon gave general instructions as they did here, and the jury returned a verdict where the punitive damages award was eleven times the actual damage award. Would there be any review in Oregon of such a holding?

MR. TRIBE: Absolutely. What the Oregon court would say -- it's said it many times about other provisions of the Oregon constitution -- we interpret that constitutional provision consistent with our obligations under Federal law. Van Lom, which is a decision from 1949, says you can't reexamine facts. The Oregon supreme court I'm sure would say we don't have to --

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QUESTION: Are you saying Oregon would provide review? If Oregon did not provide review in my hypothetical, would their system be constitutional?

MR. TRIBE: If they provided no judicial method of enforcing the Federal Constitution itself --

QUESTION: They wouldn't correct the specific error I identified?

MR. TRIBE: The honest answer, Justice Stevens, is I do not know. I don't think Court has ever held --

QUESTION: That's what we have to decide, isn't it?

MR. TRIBE: Well, no, I don't think so, Justice Stevens, because in this case, the Oregon courts -- the judgment you are reviewing is a judgment in which the Oregon courts purported to say -- they only referred to Article VII, section 3 in one footnote in Van Lom.

They said, it treats damages as a factual matter, and we recognize that, but that does not prevent us from applying Haslip and looking at the reasonableness of this judgment in light of the policies of this rather detailed statute, and they even said that they would implement the statute by requiring substantial evidence of all its elements.

So we do not have a case where the State of Oregon has a constitutional provision that on its face, or

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as construed, says, we will not reverse a verdict that is federally excessive.

Remember what Article VII says. It says, we will not reexamine a fact found by a jury --

QUESTION: No, but I understand them to be saying that if there's evidence that will support some punitive damage award, that's the -- and also if all the right instructions have been given, that's all we're going to look at.

MR. TRIBE: Well, that is --

QUESTION: You think I misread their cases, right?

MR. TRIBE: There's language in Van Lom to that effect. The Roberti's House of Wines case in 1985 --

QUESTION: If that's what they say.

MR. TRIBE: If that's what they say. If they say that we don't care about the amount --

QUESTION: As long as there's some evidence to support some punitive damages.

MR. TRIBE: -- and that we don't care about it even if it is grossly excessive within the meaning of the Federal Constitution. I suppose that would be defiance of the Supremacy Clause. That would be relatively easy.

QUESTION: What if it's grossly excessive under Oregon State law, but we still won't review it? Would

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that be constitutional?

MR. TRIBE: That would be constitutional. I think it would be a matter for Oregon and the allocation of power between judges and juries, rather as you said in the concurring opinion in Cloverleaf. It's a matter of Oregon's governmental structure to decide how it will effectuate principles that are optional with Oregon.

That is, if Oregon gives more than the Federal Constitution requires.

QUESTION: Now, it's not -- in Cloverleaf it was a question of which body would decide it. The question is whether nobody has to decide it in this case.

MR. TRIBE: Well, I suppose if Oregon said, for example, no damages above $10 million are lawful, but we'll allow you to award damages of $11 million, I would say they've rewritten their law. That is, the State is keeping its promise.

QUESTION: Thank you, Mr. Tribe.

MR. TRIBE: Thank you, Mr. Chief Justice.

QUESTION: Your time has expired.

Mr. Frey, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF ANDREW L. FREY

ON BEHALF OF THE PETITIONERS

MR. FREY: Thank you. I'll try to be fast.

Let me just say that I think that Professor

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Tribe's last answer shows there is a confusion between substantive and procedural that's going on here.

Let me give Justice Scalia a case, Blunt v. Little, which is quoted at page 15 of our brief.

Let me come back to this question which Professor Tribe puts so much weight on about the pre-verdict procedure. There is no such procedure in Oregon for unliquidated damages, and somebody asked whether it would be fair for this Court to saddle the Oregon courts with such a procedure.

If the Oregon courts chose to have such a procedure and gave people notice that it was available, that might satisfy the Constitution, but you could not affirm this decision on the ground that such a procedure exists in Oregon. It's up to the Oregon courts to decide how they are going to comply with the requirement that there be some judicial review.

So you would have to say there has to be some, we send it back, and then the Oregon courts would craft something which may or may not be procedurally adequate to assure fundamental fairness.

QUESTION: Why isn't there in effect review when the judge can say, well, my instructions couldn't have been understood. I instructed them absolutely properly, and if they came out with this number, then they weren't

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following my instructions, so I'm going to overturn the judgment on that basis -- the verdict on that basis?

MR. FREY: That cannot be done in Oregon. That cannot be done in Oregon.

QUESTION: I thought if a judge thought his instructions weren't adequate -- oh, you're saying if the judge thinks the jury didn't understand his instructions, he couldn't order a new trial?

MR. FREY: It's too -- it's -- no. The instructions would have to be themselves legally erroneous in order to order a new trial, in which case the Oregon supreme court would have the power to enter whatever judgment it wants.

QUESTION: So if a judge in Oregon thinks --

MR. FREY: It doesn't have to even have a jury.

QUESTION: The judge looked at this jury and said, this jury really didn't understand what I was saying, there would be no power to --

MR. FREY: That's exactly the problem. If they concluded that the verdict is in excess of the amount that would be regarded by all reasonable people as the maximum recovery justified by the evidence, the Oregon supreme court says, too bad, there's nothing that can be done about it.

QUESTION: Even if the judge thinks the flaw is

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that she didn't instruct with sufficient clarity so that the jury comprehended what she was trying to say?

MR. FREY: You couldn't look at what the jury did. You could look at the instructions and ask whether they comply with State law.

CHIEF JUSTICE REHNQUIST: I think that answers the question, Mr. Frey.

MR. FREY: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you. The case is submitted.

(Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.)

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CASE NO.:93-644

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)