

DAMAGE CONTROL: A GLIMPSE INTO PUNITIVE DAMAGE REFORM

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Since injury law became subject to reform during the nineteenth century the issuance of damages has been a heavily debated and highly contentious topic. Punitive damages drastically increased the cost of litigation for those sued, because courts would not only award compensatory damages for the person(s) who filed the suit to cover their injuries or losses, but would also award punitive damages to the plaintiff in hopes of deterring the defendant (and potential defendants in the future) from committing similar transgressions. This paper focuses on the successes and failures of placing caps on punitive damage compensation over the past twenty years and subsequent fallout from this method of reform. The Constitutionality of punitive damage awards and precedence established by the Supreme Court, whether or not individual states have the right to receive percentages of punitive damage awards, and current reform ideas, including eliminating juries from the awards process and sliding scale payouts, are all topics discussed throughout the course of this analysis.

INTRODUCTION

Of the multitude of aspects dealt with by American tort law, one of the most interesting and contentious is how we, as a society, prevent, justify, and punish those who harm us. Compensatory damages, a staple of contract and tort law, is augmented by punitive damages in certain types of tort cases in order to punish the defendant for engaging in intolerable conduct and to deter the defendant and others from engaging in similar conduct in the future.¹ Proponents in favor of draconian overhauls to the entire tort system often address punitive damages as one of the grossly unfair aspects of tort law in most need of substantial reforms. Reform advocates blindly contend that even with many reforms already in place,

¹ Jennifer Robbennolt and Christina A. Studebaker, "Anchoring in the Courtroom: The Effects of Caps on Punitive Damages," *Law and Human Behavior* 23, no. 3 (1999): 353.

the awarding of punitive damages in the United States continues to spiral out of control, reaching epic proportions almost daily. They hold that punitive damages require uniform policies that transcend state borders, are harmful to the corporate interests of our nation, and are an unnecessary burden on the legal system and the public taxpayers who finance our court systems. Opponents fervently counter that the American tort system, especially punitive damages, has already undergone considerable reform over the past two decades. They feel further attempts for reform by courts, the state, or Congress to place restrictions on the system will severely undermine the ability of punitive damages to penalize wrongdoers, thus making the purpose of punitive damage obsolete and placing American consumers in great peril.

Importantly, an investigation of the history of punitive damage reforms provides some evidence that desire for reform has existed in an omnipresent fashion for some time. Exploration into the first state-enacted policies pertaining to punitive damages provides analytical insight as to how damage caps, ratios (multipliers), and similar restrictions have significantly limited people's abilities to hold corporations and individuals accountable for gross transgressions, human misery and suffering, and to deter them from future wrongdoing. Such an inquiry also provides some awareness as to who is responsible for and whose interests are served by these sweeping reforms. Inspection of five decisive Supreme Court rulings that scrutinized the Constitutionality of and laid the foundation for continued reforms to punitive damages is essential to framing and understanding the gravity of the issues involved. These Supreme Court cases, coupled with the thorny issues pertaining to states' rights versus federal preemption and potentially overriding reform bills emanating from Congress, further complicate an already morass of issues. The Supreme Court's decisions have also had grave reverberations on our jury system, jeopardizing an individual's right to a jury trial in which punitive damages may be awarded. Those who favor significant reforms of our tort laws have convinced many Americans into believing that juries arbitrarily award punitive damages, often basing decisions simply on sympathy for the plaintiffs or wealth of the defendant while providing no rhyme or reason for the damage awards they grant. A final thread demanding consideration is determining if our society still benefits from awarding punitive damages as a deterrent for wanton behavior and, if not, determining what new measures might be required.

THE HISTORY OF PUNITIVE DAMAGES

The concept of punitive damages originated in England as a "remedy to punish abuses of power by the crown."² Initially, punitive damages in the

² Thomas Koeing and Michael Rustad, *In Defense of Tort Law* (New York: New York University Press, 2001), 26.

United States were assessed for the intentional torts of assault and battery, libel and slander, deceit, malicious prosecution, and intentional interference with property, essentially mirroring the English common law system that had been so well adopted by its young scion. The Supreme Court ruled in 1875 that “punitive damages were too well settled now to be shaken, [and] that exemplary (punitive) damages may in certain cases be assessed.”³ Throughout the nineteenth and early twentieth centuries, the primary targets of punitive damages were railroad, industrial, and other large corporate interests. While actual punitive damages levied were rare, large awards were granted and challenges to the system arose. Several reform proponents arduously supported the position that “if punitive damages were to be permitted at all, the award should go directly into the state’s treasury since it had been given to advance public interest.”⁴ Not surprisingly, this refrain is echoed by some reformers today. Although there was minor controversy surrounding the necessity for punitive damages, mainly emanating from those corporations afflicted, on a national scale, challenges to the system remained minute and relatively nonexistent. In fact, only glacial change occurred until the 1960’s when America found itself engulfed in a social revolution firestorm and redefinition of popular culture.

Notably, the substantial alterations which enveloped the American tort system during the 1960’s permanently transformed processes of civil litigation, resulting in a cascade of lawsuits. The invention of mass tort litigation increased punitive damage claims against manufacturers. Product liability reform began occurring in the late 1960’s as juries held manufacturers accountable “for products defectively designed or marketed with inadequate instruction.”⁵ Household items, including cleaning chemicals, lawn mowers, televisions and other electronic devices, as well as other such potentially hazardous products fell victim to punitive damage awards and were either removed from the market or altered to comply with increasing safety standards. Punitive damages then, as now, were instituted to protect the individual. The tort system experienced rapid expansion throughout the 1970’s and early 1980’s as lawsuits in product liability cases, medical malpractice, automotive safety, and fraudulent insurance claims poured into the civil court system resulting in both the size and frequency of punitive damage awards increasing throughout this era.⁶

Significantly, the mid-1980’s marked a sweeping shift in tort reform policy as both Congressional representatives and various state-legislatures enacted a plethora of statutes designed to protect defendants (i.e. large

3 Ibid, 27.

4 Koeing and Rustad, *In Defense of Tort Law*, 41.

5 Ibid, 51.

6 American Tort Reform Association, “Punitive Damages Reform,” *American Tort Reform Association Issues*. <<http://www.atra.org/show/7343>>.

corporations), including the capping of punitive damages. The shifting soil of tort reform and the capping of punitive damages awards dangerously constrict the legal system's ability and capacity to respond to continually arising societal dilemmas as has been done over the past 150 years. Reforms from the last twenty years will be discussed throughout the remainder of the paper.

IMPLEMENTING REFORM: DAMAGE CAPS

Over the last twenty years, nineteen states have enacted policies restricting the maximum amount of punitive damages that a plaintiff can recover. These "damage caps," as they are often referred to, vary greatly from state to state. Damage caps may have a maximum cap, such as in Virginia where punitive damages may not exceed \$350,000, or may be more sophisticated and include both a maximum cap and a ratio or multiplier clause, such as in Nevada where damages are limited to \$300,000 in cases in which compensatory damages are less than \$100,000 and to three times compensatory damages in cases of \$100,000 or more.⁷ Six states ban punitive damages outright, only allowing compensatory damages to be awarded in lawsuits.

Unfortunately, assessing the implementation of punitive damages caps is rather difficult. The RAND Institute's extensive study on punitive damages discovered that, in the localities examined (California, New York, Cook County, Harris County, and St. Louis), had punitive damages been capped at the amount of compensatory damages awarded (as some states have done) "60 percent of all punitive awards would have been affected and the total amount of punitive damages awarded in these cases would have been reduced by roughly 65 percent."⁸ Furthermore, had a ratio of 3 to 1 been used as several states have done, 34 percent of punitive awards would have been affected and the aggregate punitive award would have decreased by 40 percent.⁹ While it is obvious that the caps have successfully limited award collection to the limits imposed, evidence pertaining to whether or not the caps have deterred the filing of frivolous lawsuits is much vaguer. Tort reform proponents contend that without caps, punitive damages are far too costly because corporations or individuals are coerced to reach settlements on non or semi-meritorious claims in fear of being forced to pay more substantial punitive awards if the suit makes it to court.

While caps are enacted to benefit corporations by reducing their litigation costs and legal exposure, placing caps on damage awards have

7 U.S. Supreme Court, *State Farm Mutual Automobile Insurance Co. v. Campbell et al* (01-1289), 583 U.S. 408, 2003.

8 Rand Institute for Civil Justice, *Punitive Damages in Financial Injury Verdicts* (Santa Monica: RAND, 1997), 12.

9 *Ibid*, 12.

detrimental effects on the very people punitive damages were designed to protect. For example, Colorado's statute that punitive damages may not exceed compensatory damages resulted in a federal court reducing a million dollar non-economic damages award in a case where an infant was permanently disabled due to medical negligence in delivery to \$500,000 in order to comply with the state's tort reform statute.¹⁰ This child was not close to being fairly compensated for the anticipated lifetime of struggle that he will be forced to endure due to the negligent actions of the defendant. Heartbreaking cases like this are the best argument in favor of not capping punitive damages. While abuse to the tort system does exist (as such abuse occurs in every system), for every absurd damage award given out (which, importantly, can be reduced by the judge or on appeal), cases on the other end of the spectrum that are confined by damage multipliers and caps occur too frequently with the plaintiff coming up short and the defendant all too often profiting in the aggregate from his wrongdoing.

It comes as almost no surprise that those pushing hardest for punitive damage reform are Republicans. Throughout the twentieth century, often the ties of corporate America have been tied to the coffers of Congressional representatives. The most substantial reforms of punitive damages have occurred in Republican controlled states.¹¹ Continuing the long trend of Republican support and compliance with the desires of big business, corporate executives and pro-business lawmakers took action to deter persons from bringing forth potentially unmeritorious claims through the practice of capping award payout. While there are states that hold democratic majorities that have enacted punitive damage reforms, such as New Jersey, these instances are less likely. Punitive damages are supposed to function as an essential mechanism for maintaining proper conduct throughout society. Unfortunately, certain groups place personal interest above public safety, allowing the passing of legislation that protects corporate interests. We will revisit this issue later on when discussing the actions of the Senate.

Capping tort recoveries makes it possible for a corporate entity to accurately predict its punishment in advance and to incorporate that cost into the price of the consumer product or practice.¹² Unpredictability and deterrence are quintessential aspects of punitive damage awards because they force businesses to carefully assess placing products on the market that have undergone insufficient testing or possess the potential to inflict harm on the consumer. Importantly, these factors of unpredictability and deterrence extend far beyond the realm of product liability torts to fraudulent insurance claims, medical malpractice, corporate defamation, environmental dumping,

10 Koeing and Rustad, *In Defense of Tort Law*, 214.

11 *Ibid.*, 65.

12 Koeing and Rustad, *In Defense of Tort Law*, 67.

and so on. Fear of facing punitive damages forces corporations to be more stringent with actions they take because they are fully aware of the economic ramifications that can be levied through punitive damage awards. The likelihood of accidents resulting from companies who might be guilty of prematurely releasing products for consumption, industries culpable for environmental harm, instances where a corporation's gross negligence results in horrific bodily injuries are greatly diminished because of the inherent fear of punitive damages.

Opponents of punitive damage reform vehemently maintain that damage caps and multipliers (ratios) may actually provide egregious defendants a "free pass" by limiting the damages they have to pay out if held liable for willful negligence.¹³ Companies with net revenues in the hundreds of millions or billions of dollars will be more apt to engage in wanton, cost cutting activities that endanger human lives, thus boosting their profits. For example, in the seminal *Grimshaw v. Ford Motor Co.*,¹⁴ Ford Motor Company had hurriedly developed a compact car to compete against small foreign cars. Prior to production on the Pinto, design engineers discovered a fatal flaw in the placement of the car's fuel tank. Ford's safety studies revealed that at least one hundred and eighty people would die from exploding gas tanks in rear-end collisions and countless others would suffer horrific burns. Ford could have corrected this design flaw for a mere eleven dollars per car, costing the company around \$137.5 million to install the safer tanks during production.¹⁵ Based on a purely economic model, Ford deliberately chose not to spend the eleven dollars for modification and instead, prepared to pay the estimated \$49.5 million dollars its internal risk management studies showed it would be liable for in deaths, injuries, and property damages.¹⁶ Ford would save almost one hundred million dollars by choosing to not fix the gas tank design. From a simple cost/benefit standpoint, Ford's decision to pay the potential compensatory damages for injuries made economic sense. However, Ford neglected to factor in the prospect of its internal cost benefit analysis being discovered by plaintiffs' attorneys and the resulting outrage that juries felt for deceased burn victims when the jurors discovered that Ford placed so low a value on human life. Moreover, the fact that Ford could have saved so many lives and prevented so many individuals from horrific burns but chose to maximize profits instead resulted in millions of dollars per accident victim being awarded

13 Robbenolt and Studebaker, "Anchoring in the Courtroom," 355.

14 *Grimshaw v. Ford Motor Co.*, 19 Cal.App.3d 757, Rptr. 348 (1981).

15 W. Kip Viscusi, "Corporate Risk Analysis: A Reckless Act?," *Stanford Law Review* 52, no. 3 (2000), 570.

16 Viscusi, "Corporate Risk Analysis," 570.

against the car company. Ford ultimately lost hundreds of millions of dollars more than anticipated because of the punishment and deterrent nature of punitive damages. Any reform directed by corporate America and conservative representatives will inject further dereliction into the tort system and allow large companies to act “maliciously,” thus harming the very individuals the tort law system was designed to protect from wrongdoing.

QUESTIONING CONSTITUTIONALITY AND THE UNITED STATES SUPREME COURT

In addition to the increasing concern for punitive damage reform reigning in from Congressional leaders and corporate figureheads, the Supreme Court has inexorably become involved in the matter. Often, assiduous reform advocates wishing to see punitive damages either completely eliminated or at least significantly reduced cleverly assert that a multitude of punitive awards are in violation of the excessive fines clause in the Constitution’s Eighth Amendment. In addition to these claims, the Court has also articulated sober concerns about the scope of punitive damage limits, maintaining that the “Due Process Clause of the Fourteenth Amendment imposes both substantive limits on the size of punitive damages awards and procedural limits on when and how punitive damages may be awarded.”¹⁷ The Supreme Court has issued several key verdicts over the past fifteen years that have laid the foundational framework for constitutional punitive damage reform.

Seminal cases pertaining to extensive punitive damages reaching the Supreme Court via the appeals court route were not overturned and effectively became the law of the land. In *Browning-Ferris Industries of Vermont vs. Kelco Disposal, Inc.* (1989),¹⁸ the Supreme Court decided to hear a case pertaining to whether or not an award of \$6 million in punitive damages either violated the Eighth Amendment as excessive or did not comply with the due process clause of the Fourteenth Amendment.¹⁹ The Court held that the excessive fines clause was not violated because the amendment does not apply to private litigants.²⁰ The court did not address the due process clause because it was not overturned on Eighth Amendment grounds. As of 1989, the court fully defended punitive damages. Two years removed from the *Browning-Ferris* decision, the Court heard

17 American Tort Reform Association, “Punitive Damages Reform.”

18 U.S. Supreme Court, *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

19 National Conference of Commissioners on Uniform State Laws, *Model Punitive Damages Act*, Annual Conference of Commissioners on Uniform State Laws, 12 July-19 July 1996, San Antonio, TX.

20 *Ibid.*

Pacific Life Mutual Insurance Co. v. Haslip (1991).²¹ While the \$1.06 million punitive damages award was upheld, the Court's majority opinion found that the size of the award issued was close to violating the due process constraints of the Fourteenth Amendment. These decisions represent a significant shift over just a two year period. Even though the Court still upheld the latter decision, in two short years its ideology had shifted from completely ignoring the due process clause to suggesting a guideline that punitive damages exceeding four times the compensatory amount may violate the Fourteenth Amendment. A final case warranting attention is the decision the Supreme Court reached in *Honda Motor Company vs. Oberg* (1994).²² The Court held that "an Oregon statute that prohibits judicial review of the size of punitive damage awards is unconstitutional."²³ Punitive damages were made subject to review by the court after being awarded by the jury. The Supreme Court's trend of shifting in favor of punitive damage restrictions was nearly complete.

The aftermath of the U.S. Supreme Court's ruling in *BMW v. Gore* 17 U.S. 559 (1996) turned the world of punitive damages on its head and solidified the Supreme Court's shift from pro to anti-punitive damages. In 1990, Dr. Ira Gore sued BMW of North America for \$500,000 in compensatory and punitive damages for failing to reveal that his new 7-series sedan had undergone \$600 in repairs to the paint job after transport from port. Not only did a jury award him \$4,000 in compensatory damages (deemed to be the value the car lost with the new paint) but slapped BMW with \$4 million (later reduced to \$2 million by the Alabama Supreme Court) in punitive damages.²⁴ BMW appealed all the way to the U.S. Supreme Court. In 1996, the Court ruled that the \$2 million award levied against BMW exceeded the due process clause, finding the 500-to-1 ratio of punitive to compensatory damages to be extremely excessive.²⁵ This holding was the first time the Supreme Court struck down a punitive damage award as excessive and established future precedence for courts, both the federal and state levels, to use the new guideposts to decide the constitutionality of future awards. Although the ratio mentioned by the court was still substantial, courts could and did reduce payouts and apply the Supreme Court's direction to verdicts where punitive damages were awarded, reducing them as they saw fit. For corporate interest, the decision was a

21 U.S. Supreme Court, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

22 U.S. Supreme Court, *Honda Motor Co., LTD., et al. v. Oberg*, 512 U.S. 415 (1994).

23 Koeing and Rustad, *In Defense of Tort Law*, 61.

24 U.S. Supreme Court, *North America BMW v. Ira Gore*, 17 U.S. 559 (1996) and Walter Norkin, "Positive Political Theory and Punitive Damages Reform: Congressional Reaction to *BMW of North America v. Gore*," *New York University Law Review* 197.3 (1999-2000): 199.

25 Norkin, "Positive Political Theory and Punitive Damages Reform," 206.

momentous victory. The Supreme Court now defended what businesses had fervidly complained about since railway companies were the dominant force on the economic landscape—punitive damages were excessive. Unfortunately, anyone now seeking full compensation for egregious actions taken by persons or corporations would have a much more difficult time doing so. In addition to determining that excessive punitive damages were a violation of the Constitution, *BMW v. Gore* helped spur extensive reform attempts by the Senate targeting punitive damages, including the Fairness in Punitive Damages Award Act (which will be addressed shortly).

In 2003, Curtis Campbell sued State Farm Automotive Insurance for bad faith, fraud, and infliction of emotional distress after the company failed to contest Campbell's liability in an automotive accident where he was held responsible. The jury awarded Campbell \$2.6 million in compensatory damages and \$145 million in punitive damages.²⁶ While the trial court significantly reduced these awards to \$1 million and \$25 million respectively, the Utah Supreme Court, citing *Gore v. BMW*, overruled the trial court's reduction and restored the original punitive damage verdict of \$145 million. Later, the U.S. Supreme Court "emphasized the constraining force of ratio as a guide post for evaluating the constitutional propriety of a punitive damages award"²⁷ and made it perspicuously evident that awards which exceed a single-digit ratio of punitive damages to compensatory damages would be postulated as unconstitutional. In the opinion of the Court delivered by Justice Kennedy, he explained that "single-digit multipliers are more likely to comport with due process, while still achieving the state's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 or in this case, of 145 to 1."²⁸ However, critics of the Supreme Court's decision forcefully argue, and rightfully so, that restricting punitive damages to single-digit ratios might disable their effectiveness as a useful and requisite deterrent to grossly negligent behavior engaged in by persons or corporations. Despite the Court's ruling, states lacking punitive damage restrictions have not entirely complied, believing that companies making millions of dollars a day can afford to pay more substantial damages for the human misery they cause.

FEDERAL ACTION VS. STATE'S RIGHTS

One of the core principles that the United States was founded on was

26 U.S. Supreme Court, *State Farm Mutual Automobile Insurance Co. v. Campbell et al (01-128)*, 583 U.S. 408, 2003.

27 Douglas Dunham and Ellen Quakenbos, "Punitive Damages after Campbell: A Mixed Bag Awaiting Definitive Resolution," *Defense Council Journal* 71, no.3 (2004): 228.

28 *Ibid*, 229.

federalism. The Constitution laid out the fabric of which our nation would be comprised at the national level and, in accordance with the Tenth Amendment, “the powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people.”²⁹ Generally, tort law has been maintained at the state level with “legal rules evolving from court decisions over many centuries”³⁰ and state legislatures enacting prescriptions from time to time. Seldom was the federal government involved in any tort decisions. Recently, however, the direction of reform has been migrating toward a more federal approach through means of Supreme Court rulings and federal initiatives. And much like the Tenth Amendment’s protection of state’s rights regarding tort law for the last 300 years, the Constitution, ironically, will now work in reverse as the Supremacy Clause will preempt state enacted legislature and established precedent in favor of the rigid ideological reforms Congress decides to implement on the civil tort system. Much of the Congressional reform focus has centered on punitive damages.

Throughout the mid-1990’s the United States Senate conducted a series of hearings pertaining to the myriad of issues surrounding punitive damages. Senators Orin Hatch and Joe Lieberman were the two primary figures steering The Fairness in Punitive Damage Awards Act, S1554. The bill was designed to “provide for relief from excessive punitive damage awards in cases involving primarily financial loss by establishing rules for proportionality between the amount of punitive damages and the amount of economic loss.”³¹ Numerous business-minded Republicans firmly held that the Supreme Court’s decision in *Gore* was not enough to combat the pending crises presented by punitive damages. Demanding further restrictions be enacted, several hearings were held debating the necessity for and fairness of punitive awards, committees were formed to study the problem, and experts, largely representing pro-business interests, were brought in to thoroughly examine the situation.³² Studies conducted by the RAND Institute revealed that although punitive damages were awarded much more infrequently than was alleged, placing caps and multipliers on the awards could successfully reduce the costs of litigation.³³

The primary component of the bill caps punitive damages in civil

29 United States Constitution, The Tenth Amendment.

30 Koeing and Rustad, *In Defense of Tort Law*, 67.

31 U.S. Senate Committee on the Judiciary, *Fairness in Punitive Damage Awards Act* (Washington D.C.: GPO, 1999), 64.

32 U.S. Senate, *Fairness in Punitive Damage Awards Act*.

33 Rand Institute for Civil Justice, *Punitive Damages in Financial Injury Verdicts* (Santa Monica: RAND, 1997), 13.

financial injury cases at three times the amount of compensatory damages or \$250,000, whichever is greater.³⁴ The Senate argues, “there is a need to restore rationality, certainty, and fairness to the award of punitive damages in order to protect against excessive, arbitrary, and uncertain awards”³⁵ by defining a relationship between punitive and compensatory damages. The arbitrariness of awards, not large awards themselves, is the primary target of the Senate’s bill. The bill also raises the standard of proof in punitive damage cases from a preponderance of the evidence to clear and convincing evidence.³⁶ While these conditions resemble those in some of the states that have enacted punitive damage caps and multipliers, states that have not enacted limitations thus far will not have any motivation to adhere to any federal legislation pertaining to punitive damages reform if it were to ever pass. Such states have successfully handled the issue of punitive damages as a civil tort state matter for decades and federal intervention in their minds is not needed now or ever.

The Senate’s attempts to continue placing onerous restraints on punitive damage awards and U.S. Supreme Court rulings play right into the pocket of corporate America, which undoubtedly makes significant contributions to the special interest groups of senators and representatives, and severely undermines the ability of the states to control their state legal systems. The bill had overwhelming and embarrassingly unified support from Republicans but has gotten miniscule support from the other side of the aisle. The bill languished in the Senate Judiciary Committee and was not approved by either the 105th or 106th Congress. While maintaining commonality in punitive damage awards would be easier to do at the national level (which is what businesses want so they do not face varying penalties in different states where they conduct business), doing so would violate 300 years of precedence which has left control of tort law to the states. Obviously, if national legislation is enacted, the Supremacy clause will force opposing states to succumb to the restrictions of Congress, but would serve a severe blow to the ability of the American people to properly right negligent actions deserving considerable economic punishment.

ELIMINATION OF JURIES

A final component holding extreme relevance to continued attempts to reform punitive damages are the disparaging views held against the juries who award punitive damages. Ardent proponents favoring persistent reform

34 U.S. Senate, *Fairness in Punitive Damage Awards Act*, 64.

35 U.S. Senate, *Fairness in Punitive Damage Awards Act*, 67.

36 U.S. Senate, *Fairness in Punitive Damage Awards Act*, 68.

opine that “runaway” juries are the most responsible culprit affecting punitive damages. Juries face unremitting accusations that the punitive damages they award are done so arbitrarily and recklessly. Large sum damage awards are granted to plaintiffs because of personal sympathy and empathy from the jury for the plaintiffs, not because of the facts or the law. Those favoring reform remonstrate that punitive awards handed out by juries have created a new “litigation lottery” where excessive corporate wealth is needlessly disseminated to undeserving individuals and lawyers successfully suing and winning preposterous awards.³⁷ There are those who abuse the system in hopes of getting rich, not to punish corporations or persons for their transgressions. Theodore Olsen, a trial and appellate lawyer from California and Washington who testified several times in front of the Senate Hearing Committee, explains that juries, while capable of making appropriate factual determinations, are ill-equipped and prepared for ruling on major social policy issues of how much a person should pay and how much deterrence might be necessary to prevent others from committing a particular wrong against society.³⁸ Tersely stated, juries are incapable of rightfully, as a matter of sound public policy, assessing defendants’ punitive damages. Thus, the resolute quest of state and federal legislatures is to reform tort law and remove this common law power from the hands of twelve randomly selected people.

Despite the complaints of the supposed inherent inability of trial juries to rationally articulate their punitive damages awards, trial by jury remains a constitutionally protected right. If one were to advance the claim that this jury trial right does not extend beyond the realm of criminal prosecution, arguments must then be made for the common law recognition and precedence of jury trials within the tort system for the past 300 years. The obvious conclusion would be that minor, aberrational, and well-publicized punitive damage excesses need only minor tweaking and not major reform of a system that has served us well for centuries. While reformers shrilly cry that juries award arbitrary and excessive punitive damages, innumerable examples exist to counter this exaggerated claim and reveal that juries most often base awards on calculated contrivance. Jurors take their responsibilities of deciding the factual issues and following the judge’s legal instructions very seriously.

The best cited case exhibiting a jury’s responsible damage assessment (although roundly mischaracterized as an example of a “runaway” jury) is probably *Liebeck v. McDonalds Corp* (1995).³⁹ In 1994, Stella Liebeck’s legs

37 American Tort Reform Association, “Punitive Damages Reform.”

38 U.S. Senate Committee on the Judiciary, *Punitive Damages: Tort Reform and FDA Defenses* (Washington D.C.: GPO, 1996), 7.

39 New Mexico District Court, *Liebeck v. McDonalds P.T.S., Inc.* No. D-202 CV-93-02419, 1995 WL 360309, Bernalillo County, N.M., 1994.

were severely burned by a spilled cup of McDonalds' coffee. In the ensuing litigation, a jury awarded her \$160,000 in compensatory damages to cover medical expenses and economic loss and an additional \$2.7 million in punitive damages.⁴⁰ The jury carefully cited the several hundred complaints previously filed against McDonalds for their excessively hot coffee. Yet despite hundreds of complaints, McDonalds willfully continued to serve it at temperatures much higher than the industry standard. McDonalds calculated the profits made from selling such hot coffee against the human injury such coffee might cause and decided that profits were more important than being socially responsible corporate citizens. Since the jury was aware of all of the important competing interests, it felt compelled to punish the company to deter them from future abuse. The \$2.7 million damage award accounted for only two days of worldwide McDonald's coffee sales.

Although this is only one example showing that juries are often quite deliberative in assessing punitive damage awards, hundreds more exist. Admittedly, juries have levied extraordinary sums against companies for the wrong reasons, such as deep pockets or sympathy. However, the RAND Institute's study of punitive damages found that they only awarded such damages in just four percent of all cases and in only about 14 percent of all financial injury cases.⁴¹ Rhetoric suggesting that juries misuse and over award punitive damages is factually inaccurate. Also, "while much of the rhetoric about juries has focused on punitive damage awards...there has been little research specifically examining the potential anchoring and adjustment effects of caps on punitive damages."⁴² While the RAND study has made it clear that the mean award of punitive damages is decreasing due in large part to caps and multipliers put in place by various courts and states, the unintended consequences of such caps on juries' decisions is unknown.

Some studies have extrapolated that it is quite possible in cases where juries would only have awarded punitive damages of \$150,000 they award the maximum cap of \$250,000 simply because they can and because they realize that the next more severely injured plaintiff might not get what he is really entitled. Damage caps present a myriad of problems, are merely akin to a large unnecessary tax break for the wealthy, and should be eliminated. Additionally, even if juries issue what appear to be excessive damages, these awards are frequently, and often substantially, reduced by either the judge or appellate courts. Mechanisms are already in place to protect corporations from

40 Koeing and Rustad, *In Defense of Tort Law*, 7.

41 Rand Institute for Civil Justice, *Punitive Damages in Financial Injury Verdicts*, 1.

42 Robbenolt and Studebaker, "Anchoring in the Courtroom," 356.

tremendous damage awards if either the judge feels they are unwarranted or an appellate court examines the case and draws a different conclusion. Removing juries from the equation of punitive damages will cause unnecessary deviation from the path of tort law and its salutary deterrent policies that have worked reasonably well over the last three centuries.

RECENT REFORM ATTEMPTS

Despite Congress' failure to pass the Fairness in Punitive Damage Awards Act, the tort reform issue is still in the foreground for many representatives. Subsequently, smaller tort reform bills, specifically looking at product liability and medical malpractice, have been passed in recent years. However, nothing as sweeping as the attempt to pass the Fairness in Punitive Damage Awards Act (S1554) in the mid-1990's has been attempted in the dozen or so years since. This oversight is rather surprising given the power of the Republican Party and its dominance over Congress during the conservative Bush administration (even more so because during the latter half of Clinton's second term he threatened to veto any substantial tort reform legislation⁴³). With the Fairness Act's failure, the wishes of tort law reformers to establish more concrete ratios between amounts of punitive damages awarded in comparison to the size of a company's economic loss were not fulfilled.

Individual states have also addressed the need for reform. Alabama and Florida enacted the most recent caps and/or multipliers on punitive damages in 1999. Since then, much of the battle pertaining to necessity and fairness of the awards has taken place in the courts. Although it is still a little too early to determine how the Court's decision in *State Farm v. Campbell* (2003)⁴⁴ will affect punitive awards, states without caps are seeking ways to avoid strictly applying the *Campbell* ratio guidelines by citing physical injury or other factors as grounds for increasing punitive awards.⁴⁵ The *Campbell* ruling has had significant impact on the pending lawsuits against big tobacco companies for the health damages associated with smoking with tobacco lawyers calling for punitive award reduction. Courts have also been looking to determine the reprehensibility of the defendants' conduct against society to supersede the ratio guideline and enact far greater punitive penalties.⁴⁶ Regardless of the

43 Norkin, "Positive Political Theory and Punitive Damages Reform," 199.

44 U.S. Supreme Court, *State Farm v. Campbell*, 583 U.S. 408, 2003.

45 Douglas Dunham and Ellen Quakenbos, "Punitive Damages after Campbell: A Mixed Bag Awaiting Definitive Resolution," *Defense Council Journal* 71, no. 3 (2004): 233.

46 Dunham and Quakenbos, "Punitive Damages after Campbell," 234.

Court's adverse ruling, some states are still attempting to defend an individual's right to punish another's wrongdoings, while others have succumbed to the power of corporate America.

Other states have also attempted to push for reform in different directions. Recently, California has harkened back to concepts reform advocates proposed in the mid-nineteenth century, calling for legislation that "would give the state of California three-quarters of any punitive damage award."⁴⁷ Of all the major punitive damage reform attempts thus far, a measure in this vein might be best. The bill, S.B. 1102, does not restrict the amount of punitive damages that can be levied against a person or company, so the transgressors can still be held accountable for their wanton actions. Accordingly, the public policy rationale of deterrence remains unfettered. The bill only limits how much of an exponentially large award a person can receive. From a societal aspect, such a bill makes sense. Punitive damages are issued to both punish corporate wrongdoing and personal malfeasance and deter similar future actions. The damages awarded are meant to protect society from potential future harm. Logically, then, it seems society should reap some of the benefit when a punitive award is issued.

Although the individual filing suit would lose some economic benefit from bringing lawsuits forward (thus, potentially deterring frivolous litigation) when large awards are issued, they are much better off financially under the proposed California system (ex. $\frac{1}{4}$ of a \$10 million award is \$2.5 million; in states with caps, the award would be reduced to \$500,000 or less). Also, it might be more appropriate to implement some kind of sliding scale where the state cannot receive any portion of a punitive damage award smaller than \$3 million and as the award increases thereafter, the state will receive a larger proportion of the award the greater it becomes (ex. The state could take a third of a \$10 million dollar award, half of a \$25 million award, three-quarters of a \$100 million dollar award, etc.). In all, it was estimated that the state generates anywhere from 200 to 460 million dollars in revenue through new damage reforms.⁴⁸ Policies such as this might provide a happy medium for advocates for and opponents against tort reform. Moreover, such a sliding scale would still provide adequate incentives for private attorneys to take on large corporations with their army of lawyers and the years it takes to reach and execute on a judgment after all appeals are exhausted.

47 Mark Hoffman, "California law lets state gain from punitives," *Business Insurance*, September 6, 2004, 1.

48 Adam Liptak, "Schwarzenegger Sees Money for State in Punitive Damages," *U.S.*, New York Times Online, <<http://query.nytimes.com/gst/fullpage.html?res=9502E0D81E3EF933A05756C0A9629C8B63&sec=&spon=&pagewanted=2>>

CONCLUSION

It is essential to remember what punitive damages are intended to accomplish—punish the defendant for wrongful, unacceptable conduct and deter similar action by others in the future by exacting a monetary penalty. Such awards are a critical justice component in our system of tort law precisely because they protect societal interests in safe products, forcing companies and individuals to do more than perform just a “bean counter” analysis of putting products into the marketplace. Simply paying compensatory damages would put a lot of unsafe products on the market as companies could utilize a cost benefit analysis examining the potential compensatory award payouts versus the costs of using safer, yet more expensive materials in the manufacturing of a given product. Without the threat of punitive damages, these companies could choose to ignore the fact that even though consumers have greater potential of being injured by their product, they will still save money by paying out the potential compensatory awards and not using the safer materials. Punitive damages force this calculation to be reassessed and help to ensure that the market is not flooded with potentially harmful products simply because the extra twenty million needed for metal coating was more expensive than the potential ten to fifteen million that would be paid out in compensatory damage lawsuits.

The ability to “punish” the egregious offender through tort law cannot be understated, nor should it be recklessly or ideologically changed. While proponents of tort reform believe, and rightfully so, that these awards can have severe economic ramifications for persons or companies sued, these transgressors should have taken more prudent actions to prevent personal, emotional, or financial injury to another. In other words, each company has the ability to engage in its own tort reform by not putting itself in a position of engaging in grossly negligent conduct. As they have for centuries, punitive damages continue to provide indispensable yet fundamental protections to millions of Americans. Hopefully, this trend will prevail.

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