Legal Backgrounder

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SUPREME COURT SHOULD EVALUATE IMPACT OF PUNITIVE DAMAGES ON ENTIRE TRIAL PROCESS

by

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To paraphrase the late comedian Rodney Dangerfield, the U.S. Supreme Court don't get no respect — for its punitive damages jurisprudence, at any rate.

Many lower courts have conscientiously struggled to apply what is admittedly an open-textured set of due process principles governing punitive damages that the Supreme Court established in a series of decisions over the past fourteen years. Other courts, though, seem to have given the back of their hand to the idea that the Due Process Clause sets significant limits on state awards of punitive damages.

One prominent example is the Utah Supreme Court's decision on remand from the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell.* Although Justice Kennedy's opinion for the majority in *State Farm* held — or at least strongly implied — that $1 million would be the greatest amount of punitive damages that could be awarded,[1] the Utah Supreme Court on remand imposed $9 million. Along the way, the Utah Court described the Supreme Court's holding as "plausible" but then simply disagreed with it.[2] To put the icing on State Farm's cake, the U.S. Supreme Court declined to review the Utah Court's decision. There's definitely a Rodney Dangerfield factor here.

One important problem is that the Supreme Court's punitive damages jurisprudence, ever since the leading case of *Pacific Mutual Life Insurance Co. v. Haslip*[3] in 1991, has focused on the *post*-verdict review of the amount awarded as punitive damages. Since *Haslip*, the Court has avoided any application of due process principles that are specific to punitive damages to the trial and pre-trial procedures which generate punitive damages verdicts in the first place.

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[1]538 U.S. 408, 429 (2003) (noting that "the facts of this case . . . likely would justify a punitive award at or near the amount of compensatory damages [*i.e.*, $1 million]" but recognizing that "[t]he proper calculation of punitive damages . . . should be resolved, in the first instance, by the Utah courts").

[2]98 P.3d 409, 414, 417 (Utah 2004) (on remand from U.S. Supreme Court, awarding $9 million in punitive damages, on grounds that U.S. Supreme Court did not hold plaintiffs' injuries were purely "economic" — since that Court had used only the phrase "economic realm" — and that U.S. Supreme Court's holding that compensatory award included punitive components, "though plausible as an abstract proposition," was wrong), *cert. denied,* 125 S. Ct. 114 (Oct. 4, 2004).

[3]499 U.S. 1 (1991).

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When a jury returns a verdict, of course, the mindset of American jurisprudence generally is that the verdict stands, absent some solid reason for undoing it. After all, a major complaint of our Founding Fathers' complaints in the Declaration of Independence was that King George III's government had been taking liberties with our juries,[4] and so we're certainly not backing down now.

Compounding this mindset is the Supreme Court's perhaps deliberate lack of clarity as to how, or whether, the post-verdict principles announced in the Court's modern punitive damages decisions should mesh with the trial court's instructions to the jury and the other aspects of state punitive damages law at the rough-and-tumble stage of actually trying a lawsuit to a jury. It is remarkable, for example, that there is no guidance from the Supreme Court on whether the famous "guideposts" first adopted in *BMW of North America, Inc. v. Gore*[5] eight years ago should figure in the trial court's instructions to the jury and, if so, how those guideposts fit into state law on punitive damages.

This many years after *BMW*, there are probably enough defense lawyers to fill a small hotel ballroom who have unsuccessfully argued to trial courts that the jury should be instructed on the guideposts, only to hear in response from the bench that there's nothing in *BMW* to suggest the jury should hear about them, and in any event the state's model jury instructions (which likely were last revised some years before *BMW*) do not mention the guideposts.

In the same vein, the Court has suggested several times that due process is violated when a defendant's "net worth" or financial condition is considered in determining the proper amount of punitive damages.[6] As Professor Clarence Morris said seventy-four years ago about punitive damages, "[i]t is a good guess that rich men do not fare well before juries, and the more emphasis placed upon their riches, the less well they fare."[7] The same is perhaps even more true now than then, but the law in most states continues to permit, or even require, evidence at trial of a defendant's wealth to assist the jury in setting the quantum of punitive damages. The Supreme Court has yet to come to grips with this fundamental issue of whether a jury, consistent with due process, may consider a defendant's status — that is, a defendant's wealth — in setting the amount of punitive damages.

This leaves trial courts at the post-verdict stage, and appellate courts later on, with the unappetizing task of taking jury verdicts that awarded punitive damages under a state law regime and reviewing those verdicts under an increasingly federal due process regime — and to do so with essentially no guidance on how these two quite different regimes are to intersect. It is no help to say the obvious — that federal due process trumps the state law issues. Instead, our current punitive damages process resembles taking a decision by a French magistrate under the Code Napoleon and having that decision reviewed on appeal, not by the *Cour de Cassation*, but by the House of Lords at Westminster.

The root of this problem is *Haslip* itself, which was the Supreme Court's first modern decision applying due process principles to state-law awards of punitive damages. There, an Alabama jury in the mid-1980's returned a general verdict against the defendant insurance company for $1.04 million — an amount that today would not even make the very bottom of *The Wall Street Journal*'s front-page "What's

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[4]THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("For depriving us in many cases of the benefits of Trial by Jury"); *cf.* U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the common law.").

[5]517 U.S. 559 (1996).

[6]*E.g.*, *State Farm*, 538 U.S. at 427-28 (implying that defendant's corporate wealth "bear[s] no relation to the [punitive] award's reasonableness or proportionality to the harm").

[7]Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931).

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News" column. It wasn't even clear whether there was a punitive component to this general verdict and, if so, how much.[8]

The majority in *Haslip* — which affirmed the verdict — made the fundamental mistake of endorsing Alabama's system of awarding punitive damages. It took this step primarily because of its perception that punitive damages have long been accepted in American law. In addition, the Court was persuaded that the system of post-verdict review, adopted by the Alabama Supreme Court for punitive damage awards, gave defendants adequate protection.

Unfortunately, neither of these conclusions rests on any adequate foundation.

It is true that damages called "punitive" or "exemplary" have long been awarded in American law. Only a law office historian, however, could see any resemblance between the modern engine for funding a plaintiffs' bar plutocracy of private jets and yachts that we call "punitive damages," and the very rare imposition of punitive damages under the far more limited regime of general tort damages in the nineteenth century and before. It is like saying that since the horse-drawn buggy from 1850, and the 400-horsepower Jaguar sports car on sale today both have wheels, they both should be governed by the same traffic laws.

In his early 1950's book, *Modern Trials* — now forgotten but enormously influential on the then-young lawyers who later became the giants of the plaintiffs' bar — Melvin Belli complained that plaintiffs' lawyers seemed to regard punitive damages as an "anomaly" and rarely, if ever, sought them in personal injury cases. Belli's view was that plaintiffs should almost *always* seek punitive damages, and this was a lesson that the plaintiffs' bar took to heart. Today, not even the most supine apologist for the contemporary tort system denies that plaintiffs now assert claims for punitive damages in most personal injury tort complaints, as well as in most serious commercial disputes, and that the number of final judgments awarding punitive damages — even when controlled for the growth of litigation generally — is an order-of-magnitude greater than it was, say, four decades ago.

This backdrop shows that the relaxed acceptance in *Haslip* of a law office history, which accorded punitive damages a historical status practically on par with *habeas corpus,* was unfortunate. The Court would have done better to evaluate the contemporary reality of punitive damages under the Due Process Clause.

The second misstep in *Haslip* was the Court's almost grateful acceptance of the Alabama Supreme Court's proffered post-verdict system for reviewing punitive damages verdicts. It was only when, several years later, the genuinely crazy punitive verdict in *BMW* survived the Alabama system, that the U.S. Supreme Court, clearly piqued, struck back. True, the Alabama Supreme Court had cut the punitive verdict in half, but when "half" is $2 million for the paint on the rear fender of a BMW sedan owned by a physician, even the U.S. Supreme Court gets down to business. The Court made an enigmatic observation that a defendant should have "fair notice" of the amount of punitive damages a jury might impose, adopted the famous "guideposts," and reversed the award of punitive damages.

The Court mentioned in *BMW*, but did not explicitly rely upon, the decision of another Alabama jury in a separate paint-on-a-BMW case, which had been faced with essentially the same question as the jury in *BMW* but did not award any punitive damages. This may have suggested to the Court that even the vaunted Alabama post-verdict review process may not have been sufficient to wring out the possibility of error from the Alabama punitive damages system.

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[8] 499 U.S. at 6 n.2 ("Although there is controversy about the matter, it is probable that the general verdict for respondent Haslip contained a punitive damages component of not less than $840,000.").

Recently, Professor Erwin Chemerinsky, in a striking article in the *Stanford Law Review*[9] contrasts the Court's modern punitive damages cases with its opinions upholding even the most brutal prison sentences: "the Court's decisions provide that taking away too much money [in the form of punitive damages] is unconstitutional, but too many years in prison is not."[10] Chemerinsky points to the greater role the Court has accorded juries in the fact-finding component of criminal sentencing, while in the punitive damages context the Court has shown "distrust toward jurors."[11] Chemerinsky's characterization, however, misses the point of the Court's acceptance in *Haslip* of the entire pre-verdict process as complying with due process. If the Court does, as Chemerinsky suggests, "distrust" jurors in punitive damages cases, it has so far limited itself to attempting to control them only after they have returned a punitive damages verdict — a peculiar way to show "distrust."

Among the Supreme Court's punitive damages cases handed down over the past decade and a half, the best opinion is Justice Sandra Day O'Connor's dissent in *Haslip.*[12] She would have had the Court take a very different course, which would have focused on whether the trial and pre-trial procedures that generate punitive damages verdicts in the first place are consistent with due process, and she would have held that the Alabama procedures were inadequate to satisfy due process. (Interestingly, of the Justices sitting at the time of *Haslip* — and the same would be true today — Justice O'Connor probably has had the most courtroom trial experience, both as a lawyer and for four years as a Superior Court judge in Arizona.)

From the perspective of fourteen years later, Justice O'Connor was right: her approach would have resulted in a constitutional jurisprudence of punitive damages that would have better meshed the state-law and due process requirements in a way that the lower courts would have at least understood — and even respected.

What should be done to achieve respect for the Supreme Court's punitive damages jurisprudence? There are two steps the Supreme Court should consider:

First, the Court should take certiorari in a *group* of, perhaps, three or even four punitive damages cases that arise in diverse contexts and where the due process challenges to punitive damages have been unequivocally preserved in the lower courts — especially in the trial courts. The Court should hear arguments and write opinions in each case. The Court's focus in the past has been too narrow, and the cases taken for certiorari have been atypical of the run-of-the-mill tort cases in which punitive damages are an everyday problem. This narrow focus has undermined the precedential value of the Court's opinions on punitive damages.

Second, the Court should shift its focus from the post-verdict review of the *amount* awarded as punitive damages — which is a sterile line of constitutional inquiry — to the raw, difficult, fact-bound, messy, but interesting questions that trial judges must answer during the trial of a punitive damages case: how do due process standards for punitive damages mesh with state law jury instructions? How should due process concerns over, *e.g.*, the financial resources of a corporate defendant, be reconciled with state law that seems to disregard those concerns? After all, the Due Process Clause does not suddenly jump into existence once a jury returns to the box, and all eyes are on the slip of paper clutched in the foreperson's fingers.

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[9]Erwin Chemerinsky, *The Constitution & Punishment*, 56 STAN. L. REV. 1049 (2004).

[10]*Id*. at 1062.

[11]*Id*. at 1069.

[12]499 U.S. at 42 (O'Connor, J., dissenting).