January 2002

# Renegade Conduct and Punitive Damages in Tort

M. Stuart Madden
*Pace Law School*

# RENEGADE CONDUCT AND PUNITIVE DAMAGES IN TORT

M. STUART MADDEN*



## I. INTRODUCTION

Within tort law's last two decades, few subjects have bedeviled more commentators and animated more advocates than has the venerable institution of punitive damages.[1] Proponents of unfettered access to exemplary awards in instances of egregious misconduct assert that punitive damages are an essential incentive to important accident litigation. Their argument is that without access to such awards, or with availability limited by a diverse array of limitations, injured parties seeking justice will face an imposing hurdle in securing counsel willing to subsidize the costs associated with bringing complex litigation.

---

* Charles A. Freaueff Professor and Distinguished Professor of Law, Pace University School of Law.

1. *See generally* RICHARD A. EPSTEIN, TORTS 458 (1999).

Opponents of punitive damages, whose proposals range from damage caps or restrictive formulae to outright elimination, describe punitive damages as an unruly doctrinal foundling, capable of outrageous and wanton excess, and incapable of placement in any traditional tort structure. The distillate of such arguments is that unmediated punitive damages have no *ad valolam* effect in accident law, serve no progressive contemporary tort objective, preserve the specter of ungoverned overdeterrence, and "appear to be an anomaly, a hybrid in search of a rationale."[2]

This Essay reviews the common law matrix in which punitive damages have been placed and the current availability of such awards in the several states. It continues by discussing the two most conspicuous doctrinal evaluative tools: (1) Corrective Justice/Morality; and (2) Economic Efficiency, examining the value of each of these in responding to avoidable and tortious harm. The Essay describes why neither corrective justice nor efficiency provides a satisfactory rationale for imposition of punitive damages. However, and perhaps ironically, these very limitations form part of the rationale for the availability of exemplary awards against actors whose conduct is extreme.

This Essay then treats the United States Supreme Court's substantial and repeated recent forays into the subject, including it's gloss on the Due Process, Excessive Fines, and Review Clauses. In conclusion, this Essay asserts that the independent but related state legislative and Supreme Court efforts to domesticate punitive damages have been largely successful in creating a favorable, albeit ungainly, fair, and rational position for punitive damages.

## II. EXEMPLARY DAMAGES, ACCIDENT LAW, AND TORT NORMS

### *A. A Classical Treatment of Remedies for Accidental Injuries*

At early common law, an injury or loss having its immediate and uninterrupted cause attributable to the direct application of force by another could trigger an indemnificatory obligation in the actor. The earliest tort remedy for money reparations was made available to those suffering injury to their person or property caused by the actors' intentional (although not criminally malicious) and *direct* application of force.[3] As so many accidental injuries involved causal sequences in which temporal or other variables relegated the actor's conduct to a more remote, but still causally premier role, the orthodox trespass restriction operated to deny many worthy claimants of a remedy, while leaving an equivalent number of wrongdoers undeterred from continuation of the

---

2. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1393 (1993).

3. *See generally* C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 44 (1949). "Mayhem and battery were at first claimed as the ancestors of Trespass, but a later preference has been indicated for robbery, as suggestive both of trespass to the person and of trespass to goods." *Id.* (citations omitted).

risk-elevating conduct.[4] English courts therefore created leave to petition for a remedy termed "trespass on the special case," permitting an action-by-action evaluation.[5] Thus, in actions in "special case," recovery was permitted to those injured in more elaborate causal sequences, such as when the actor's dereliction put into motion, or left uncorrected, a force or a circumstance that would later cause the claimant harm or loss.

The nomenclature "trespass on the special case" adequately described courts' amenability to examine the particular circumstances of a loss to determine if compensation was just. Put another way, as a large proportion of such suits arose from scenarios in which the injury was occasioned by the actor's careless, rather than deliberate (though not purposefully harmful) actions, actions in "special case" created a remedy in monetary liability for the multitude of actions in which the injury arose not by the actor's direct application of force, but rather by a sequence of causal factors.

Courts limited this enlargement of tort liability by adding the requirement that save in limited circumstances,[6] the plaintiff's prima facie case needed proof that the defendant not only caused the injury, but that he was also in some degree at fault.[7] This cause of action therefore accommodated a more nuanced causation proof, but at the same time, it elevated the plaintiff's burden by requiring a showing of fault. Thus, the standard developed was the direct precursor to negligence liability.

The negligence regimen, with important sculpting in the products liability domain and elsewhere, has withstood time's test as a largely adequate set of rules for ordering liability and risk reduction in the modern marketplace. As tort doctrine serves as a moral and cultural bellwether of social expectations, values, and objectives, the negligence rules governing or at least influencing accident law generally, and products liability in particular, have provided a sturdy legal proxy for this nation's sentiment that reducing avoidable injuries inures to the public welfare.

### *B. Remedies for More Aggravated Tortious Misconduct*

Early on, however, it was recognized that the law of negligence was only capable of responding to "off the shelf" examples of substandard conduct and consequent harm. Its optimal suitability was effectuating justice between the injured plaintiff and the negligent tortfeasor, by providing indemnification for the plaintiff's proved loss, and reinstating, insofar as money damages could do so, the plaintiff in the position he enjoyed prior to the harm.

---

4. Commentators often noted the trespass doctrine's incapacity to provide a remedy for the accident in which the defendant, who was constructing a home along a road, accidentally left a beam of wood in the road, which hours later caused the plaintiff's nocturnal carriage accident. However, the "action on the case" cause of action allowed the court to examine such a situation to make an individualized determination of liability.

5. *See generally* FIFOOT, *supra* note 4, at 66-92 (using the heading "The Development of Actions on the Case").

6. For example, liability for abnormally dangerous activities and defamation.

7. Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850); *see* ROBERT L. RABIN, PERSPECTIVES ON TORT LAW 14 n.2 (4th ed. 1995).

What, though, of particularly egregious conduct? Was a more draconian mechanism appropriate or necessary to respond to a defendant whose conduct exceeded ordinary ignorant or incautious carelessness, and could instead be described as willful, wanton, or even purposeful? Ought there not be a punishment (albeit civil) that was more severe for the actor whose conduct was more outrageous and willful than that of the actor whose tort might be nothing more than an unknowing mistake?

The common law recognized that such aggravated misconduct warranted a more vigorous tort remedy for application by the civil justice system. Such a response, it followed, must necessarily go beyond ordinary indemnification and impose additional penalties that would serve to punish the actor, to make an example of him, and to more publicly pronounce to others that such conduct was intolerable.

Frederick Pollack noted that the nineteenth century "English law" typography of "Personal Wrongs," which included "[w]rongs affecting safety and freedom of the person," contemplated a type of wrong that was "willful or wanton."[8] According to Pollack, such a special or aggravated wrong was either "intended to do harm, or, being an act evidently likely to cause harm [and] is done with reckless indifference to what may befall by reason of it."[9] In the context of intentional torts, Pollack's characterization hearkened of the same outrageousness that is noted today as sufficient to stimulate community outrage. Pollack concluded that such wrongs where "there is [either] deliberate injury, or there is something like the self-seeking indulgence of passion, in contempt of another man's rights and dignity," ought be considered not only "legal wrongs" but also wrongs that are properly "the subject of strong moral condemnation."[10]

The approach of justice administered with an eye towards such "public condemnation" is a primary tenet of the modern law of punitive damages, as embraced in one form or another in the majority of American jurisdictions. The laws of Great Britain, where punitive damages were founded, provides punitive damage awards for particular forms and qualities of risk-creating behavior. Civil Justice Rule 7(D) provides: "Damages are essentially compensatory in nature. In certain circumstances damages may not be compensatory." The commentary to the rule explains, in pertinent part: "Damages may be contemptuous, nominal, exemplary or (aggravated) punitive." In research collected by Professors Khan, Robson, and Smith,[11] one learns that British tribunals award "exemplary" damages "to teach the defendant a lesson," including circumstances in which "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the claimant."[12]

---

8. FREDERICK POLLACK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 9 (Stevens & Sons, Ltd., 2d ed. 1890).

9. *Id.* In this regard, Pollack's classification was, concededly, confined to the intentional torts of "[a]ssault, battery, false imprisonment." *Id.* at 7.

10. *Id.* at 9. He concludes in language explicit in its Greco Roman and Judeo-Christian affinities, "If anyone desires to be satisfied of this, he may open Homer or the Psalter at random." *Id.*

11. MALCOLM KHAN ETAL., CLINICAL NEGLIGENCE (2d ed. 2002)

12. *Id.* at 290-291.

Whether it is realistic to attribute to punitive damages success in achieving the goals of punishment, and deterrence, has been questioned by at least two arguments. First, punitive damages will not necessarily punish the wrongdoer, who will simply internalize the cost by raising the prices of its goods or services and pass them along to the consumer. Second, the insurer's duty to defend and duty to indemnify under the conventional Comprehensive General Liability Policy transfers both the cost of litigation and the responsibility to pay damages to the defendant's insurance carrier.[13]

As to the argument that the cost of any judgment will simply be passed along to the consumer, a Wisconsin appellate court explained that this attempt at expediency would not be invariably available to the defendant in a vehicular design lawsuit:

> It does not follow under economic logic that a punitive damage award will be passed on in whole or in part as a cost of doing business. It may or may not, depending upon Ford's price standing in relation to its competitors and its own financial condition. It could mean lower profits for Ford. It could result in stockholder complaints about a lower profit margin because of punitive damage awards for unsafe cars, thereby spurring Ford on to exercise more care in the safe design of its automobiles. It could result in a greater scrutiny by Ford's management of its auto design from the safety standpoint. All of these changes, with the exception of lower profits or higher costs, if they were to take place, would benefit the public as a whole.[14]

Regarding the second potential that insurance would vitiate any punitive impact of such awards, many states provide that insurance against punitive damages is void as inconsistent with public policy.[15]

## III. EVALUATION OF THE *BONA FIDES* OF PUNITIVE DAMAGES

### *A. Generally*

Skepticism about the value, governability, or both of exemplary damages has been debated among academicians since the nineteenth century.[16] Some commentators focused on the perceived incongruity between the exemplary damage

---

13. This nomenclature does not distort the recognition that punitive damages are not rectificatory or indemnificatory, as such goals are satisfied through the award of compensatory damages. Rather, the indemnification described here, should it be available, is the insurance carrier's duty to indemnify the insured for the payment of any judgement, even though, in the ordinary course of such transactions, it is not the actor that satisfies the judgment to the successful plaintiff, but rather the carrier.

14. Wangen v. Ford Motor Co., 294 N.W.2d 437, 452 (Wis. 1980) (quoting from Judge Barland in *Barager v. Ford Motor Co.*, 293 N.W.2d 924 (Wis. 1980)).

15. *See, e.g.*, Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 442 (5th Cir. 1962) (finding that "public policy forbids an insurer and an insured to enter into an insurance contract covering punitive damages"); *see generally* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 336 n.6 (2d ed. 1993) (collecting authority).

16. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORTS LAW 41 (2001).

penalty as inconsistent with tort law's compensatory goal, even going so far as to suggest that punitive damage awards should escheat to the state.[17]

In our modern setting, the final verdict on the value of punitive damages certainly must be interpreted through the societal expectations of personal integrity and general welfare as expressed through the law of torts. Over time, accident law has developed distinctive liability doctrines with the dual objectives of deterring risk-elevating behavior and encouraging more societally beneficial conduct. In pursuing these objectives, the Corrective Justice/Morality (Corrective Justice)[18] approach and the Law and Economics/Economic Efficiency (Economic Efficiency)[19] approaches have dramatically affected legal education and scholarship as well as the common law and statutory development of the law governing money damages for accidental injuries.

### *B. Corrective Justice/Morality*

The older of the two principal approaches is commonly termed Corrective Justice, and its influential group of scholars hew to the position that the original and still primary goal of tort law, including the law of products liability, is righting wrongs caused by tortious behavior. With its strong overlay of moral obligation, and the annulment of a wrongdoer's unjust enrichment, the Corrective Justice approach posits that tort law's principal *raison d'être* is to return parties suffering physical injury or property damage due to another's tortious conduct to the *status quo ante*, at least insofar as money damages can so do.[20] Notwithstanding the occasional argument of the Economic Efficiency supporters which herald that efficiency precepts explain most purely the deterrence effects of tort liability rules, a corollary to the Corrective Justice thesis has always been that in addition to its rectificatory goal, the Corrective Justice model also advances the societal objective of reducing the occurrence of

---

17. *Id.*

18. *See generally* Robert E. Litan et al., *The U.S. Liability System: Background and Trends*, *in* LIABILITY: PERSPECTIVES AND POLICY 1 (Robert E. Litan & Clifford Winston eds. 1988).

> Injuries pose three different and potentially conflicting challenges for all societies. One is efficiently to *deter* behavior that causes injuries. A second and related objective is to exact *retribution* against those responsible.... The third challenge is to *compensate* victims for their injuries.... *Tort law*—rules allowing accident victims to seek compensation through the judicial system from the parties responsible—can be considered a mechanism for meeting all three of these challenges.

*Id.* at 3.

19. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed.1986).

20. Jules L. Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed. 1995). "[C]orrective justice is the principle that those who are responsible for the wrongful losses of others have a duty to repair them, and that the core of tort law embodies this conception of corrective justice." *Id.*; *see* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997). "Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties." *Id.*

similar wrongs in the future.[21]

### C. *Economic Efficiency*

The more recently developed approach is one of Economic Efficiency, an evaluation that seeks to demonstrate that the appropriate measure of the success or failure of any law, including tort law, ought to proceed under an economic analysis. Ordinary economic rationales have also described the role of compensatory damages as an effective means of discouraging substandard or risk-creating conduct injuring an unconsenting third party and thus bypassing the market. It is better, theoretically at least, to pressure the actor into bargaining with any willing and knowing person for the right to expose him to a risk.[22]

The conspicuous deterrence objective of punitive damages is seemingly endorsed by the *Restatement (Second) of Torts*' standard that exemplary damages should be "awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[23] The deterrence objective of punitive damages is so strong that some authority exists for the appropriateness of awards even when the actor has died, on the theory that even in the absence of a punishment dedicated to a living person, such an award is warranted in that it will deter other similarly situated living actors from pursuing the same course of conduct.

It plausibly can be argued that the availability of punitive damages is a necessary, but not by itself sufficient, component to discourage wanton harmful conduct. As to the arguable necessity of such damages in some form, there is a continued value for punitive damages, be they in mediated or unmediated form. Put another way, the imposition of conventional Corrective Justice measures, resulting upon proper proof in the compensation of the plaintiff for his proved loss, will concededly instill some hesitance in the actor to perpetuate the same conduct again. However, the majority of states continue to conclude that more than simple compensatory damages is necessary to discourage misbehavior at its extreme. Thus, for example, in the influential decision handed down by the Wisconsin Supreme Court in *Wangen v.*

---

21. The corrective justice objective of deterrence is evidenced in scholarly writings dating back to the nineteenth century. In 1890, one academic author wrote about the goals of the negligence action: "The really important matter is to adjust the dispute between the parties by a rule of conduct which shall do justice if possible in the particular case, but which shall also be suitable to the needs of the community, and tend to prevent like accidents from happening in [the] future." William Schofield, Davies v. Mann*: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 269 (1890); *accord* Barrett v. Superior Court, 272 Cal. Rptr. 304, 308 (Ct. App. 1990). The *Barrett* court commented further that by choosing not to limit the measure of damages, "California has chosen 'to strengthen the deterrent aspect of the civil sanction: "the sting of unlimited recovery . . . more effectively penalize[s] the culpable defendant and deter[s] it and others similarly situated from such future conduct" . . . rather than to protect defendants from excessive financial burdens." *Id.* at 308 (alteration in original) (citations omitted); *see also* Pierce v. Pac. Gas & Elec. Co., 212 Cal. Rptr. 283, 291 (Ct. App. 1985) (stating one principal purpose of strict liability was "to provide an economic incentive for improved product safety").

22. Today one cannot help but think of the newest "trash" TV shows "Fear Factor" and "The Chair" and derivatives thereof.

23. RESTATEMENT (SECOND) OF TORTS § 908 (1979).

*Ford Motor Co.*,[24] Ford argued that the magnitude of potential compensatory damages in a serious injury case was itself sufficient incentive to the bringing of lawsuits to redress injuries.[25] The court responded that Ford was only partly correct and that punitive damages were a necessary gear in the machinery of tort law incentives for a large number of actions that might not otherwise be filed.[26] The court wrote that "Ford may be right [that the prospect of significant compensatory damages will provide sufficient incentive for the bringing of claims] where injuries are very severe, but it is probably wrong . . . where injuries are moderate or minor."[27] The court buttressed its conclusion that punitive damages may be appropriate in such latter instances by proposing that "even if the injury to each individual is not severe, there is a public need to deter the production of unreasonably [un]safe products, and the availability of punitive damages increases the likelihood that the injured customer will sue for recovery."[28]

It is difficult to maintain that simple responsibility in indemnification sends a strong message to others similarly situated to discontinue such egregious conduct, particularly in circumstances in which the actual penalty may be incurred not by the actor, but rather by its insurance carrier. Additionally, simple compensatory awards fail to satisfy the long recognized, if not uniformly respected, community wish to make an example of those whose conduct has gone beyond simple carelessness into the realm of wantonness and its fellow traveler, immorality.

Additionally, while the Economic Efficiency model for tort liability may provide an adequate rationale for compensatory damages, its inherent limitations point to the need for the extraordinary remedy of punitive damages. The Economic Efficiency approach to explaining ordinary compensatory damage awards has been illustrated by Judge Posner, enlisting the law of battery—the common law rule concerning liability for harmful or offensive touching. Quite apart from the Corrective Justice, morality, and fairness attributes of tort law for battery, the law and economics argument is that the doctrine should "dete[r] persons from engaging in activities that a reasonable person would view ahead of time to be socially wasteful."[29] Posner illustrates this proposition with the decision in *Garratt v. Dailey*.[30] *Garratt* is remembered as the case in which the five-year-old Dailey pulled away the lawn chair as his, until that point, affectionate aunt was in the process of sitting down.[31] Proponents of the Economic Efficiency model would argue that tort liability in battery would serve the efficiency objective, irrespective of whether Dailey received any psychological or material benefit from the act. If the harm to his aunt exceeded any benefits to Dailey, a simple utilitarian analysis would support the imposition of

---

24. 294 N.W.2d 437 (Wis. 1980).
25. *Id.* at 441
26. *Id.* at 448.
27. *Id.* at 452.
28. *Id.* at 452-53.
29. *See* JAMES A. HENDERON, JR. ET AL., THE TORTS PROCESS 29 (4th ed. 1994) (discussing POSNER, *supra* note 19, at 206-11.
30. 279 P.2d 1091 (Wash. 1955).
31. *Id.* at 1092.

liability. On the other hand, if Dailey derived benefits that exceeded any physical or emotional injury to his aunt, pulling the chair out was wasteful or inefficient. Why wasteful? Because the transaction—the act and the harm—without the aunt's consent could generate sizeable accident costs, not the least of the costs being substantial litigation costs. In Posner's words, such torts

> involve . . . a coerced transfer of wealth to the defendant in a setting of low transaction costs. Such conduct is inefficient because it violates the principle that where market transaction costs are low, people should be required to use the market if they can and to desist from the conduct if they can't.[32]

Thus, in this simplified paradigm of the application of the efficiency model to the classic tort of battery, plaintiff's loss serves as a proxy for the calculation of what waste or avoidable accident costs the defendant's inefficient conduct has occasioned. However, the mere description of the efficiency rationale betrays its incapacity to satisfactorily deal with risk-creating behavior of the most extreme type. An award of compensatory damages, be it thought of in terms of simple Corrective Justice or as a proxy for accident costs incurred by the defendant's inefficient behavior, meets its limitation in settings involving extreme conduct characteristic of punitive damages. Economic Efficiency proponents assert that the actor is properly punished for failing to resort to the market to seek contractual authorization for his conduct. However, the existence of a market for such agreement predicates this assumption. Persons do, of course, bargain away degrees of safety—witness the popularity of thrill rides at theme parks and the accompanying purported waivers of liability. Yet, in the context of willful, wanton, or deliberate risk-creating behavior, which often translates into injury, severe or otherwise, to many persons, one is unlikely to find any lucid person or group of persons prepared to bargain away their relative safety.

## IV. MODERN LEGISLATIVE CONTROL AND CONSTITUTIONAL SUPERVISION

### *A. Generally*

Modern legislative reform has taken several approaches. To name only a few, many jurisdictions require that punitive damages may be awarded only on proof by "clear and convincing evidence" of the defalcation.[33] Three states allow the jury to determine the availability of punitive damages, but place the decision as to the amount of the award in the hands of the court.[34] Other initiatives to limit jury

---

32. POSNER, *supra* note 19, at 208.

33. *See, e.g.*, MINN. STAT. ANN. § 549.20(1)(a) (West 2000) (applying the "clear and convincing" standard). The several variations of state law reform are summarized at EPSTEIN, *supra* note 1, at 464-65.

34. CONN. GEN. STAT. ANN. § 52-240b (West 1991); KAN. STAT. ANN. § 60-3701(a) (1991); OHIO REV. CODE. ANN. § 2307.80(B) (Anderson 2001); *see generally* DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, 2 MADDEN & OWEN ON PRODUCTS LIABILITY § 18:6 (3d ed. 2000) [hereinafter

discretion in punitive damages decisions include confining such awards to multiples of the compensatory damages awarded.[35]

To moderate the phenomenon of punitive damages, a remarkably interested Supreme Court has accepted the invitation to examine state punitive damages law under the lenses of the Due Process, the Excessive Fines, and the No Review Clauses.

### *B. The Supreme Court's Intervention*

In three influential decisions between 1991 and 1996 the Supreme Court answered important questions about the Fourteenth Amendment's substantive due process limitations on the prerogatives of state court juries to award punitive damages. In these three decisions, *Pacific Mutual Life Insurance Co. v. Haslip*,[36] *TXO Productions Corp. v. Alliance Resources Corp.*,[37] and *BMW of North America, Inc. v. Gore.*,[38] the Court established that neither the Due Process Clause nor the Eighth Amendment's Excessive Fines Clause would be violated if exemplary awards were imposed pursuant to reasonably intelligible jury instructions, upheld on the basis of rational standards, and were not "clearly excessive."

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[39] the Court, in the context of its three prior holdings, squared the box by establishing the standard for federal appellate courts reviewing punitive awards.[40] The *Cooper* Court held that a combination of due process, jury function, and trial and appellate court expertise considerations commended *de novo* review of jury punitive damage judgements.[41] Although both the majority[42] and the dissenting[43] opinions conceded that the issue might have more philosophical effect than practical consequence, members of the defense and the plaintiffs' bar have suggested that the decision exhibits the Court's pro-business orientation. Regardless, *Cooper* stands as a marvelous tutorial in the role of punitive damage awards in American civil litigation.[44]

The Supreme Court has visited core punitive damage issues with a devotion accorded few other constitutional issues, and with an emphasis, at least prior to *Cooper,* upon substantive due process limitations that should be imposed upon jury

---

MADDEN & OWEN ON PRODUCTS LIABILITY] (discussing legislative reform pertaining to punitive damages).

35. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West 1997) (stating punitive damages may not exceed compensatory damages); *see also* 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 36, § 18:6, at 308 (listing states with statutory cap on punitive damages such as Connecticut, North Dakota and Texas (two times compensatory damages); Florida and Nevada (three times); Maryland legislative proposal (four times); and New Jersey (greater of five times or $350,000)).

36. 499 U.S. 1 (1991).

37. 509 U.S. 443 (1993) (plurality opinion).

38. 517 U.S. 559 (1996).

39. 532 U.S. 424 (2001).

40. *Id.* at 443.

41. *Id.* at 437-40.

42. *Id.* at 441.

43. *Id.* at 448 (Ginsburg, J., dissenting).

44. There is much evidence that the bark of potential punitive damage liability is greater than its bite, but that examination is beyond present purposes.

discretion in such awards. In the first of the three most important of these decisions, *Pacific Mutual Life Insurance Co. v. Haslip*,[45] the Court described such awards as performing a "quasi-criminal"[46] function intended as "private fines"[47] that would punish the defendant and deter future wrongful conduct.[48] In *Haslip*, the Court considered an Alabama jury's punitive damages award of $800,000 that had been rendered against an insurance agent and his employer for the agent's fraud in collecting and keeping insurance premiums even after the plaintiffs' policies had been cancelled.[49] The award was approximately four times the plaintiffs' proved loss.[50] Examining the award against the backdrop of Alabama jury instructions, and in view of that state's established standards for appellate review of exemplary awards, the Court stated that while the award might be "close to the [constitutional] line," it was not so large as to violate due process.[51] The Court paid particular attention to that jurisdiction's three levels of procedural safeguards: jury instructions, post-verdict review by the trial court, and appellate review.[52] The jury's instructions afforded "significant" but not "unlimited" discretion, in that they set forth the purposes for such awards—deterrence and punishment.[53] Similarly, the Court found the post-verdict review procedure sufficient because trial courts were required "to reflect in the record the reasons for interfering with the a jury verdict, or refusing to do so, on grounds of excessiveness of the damages."[54] Finally, it considered the appellate review which, pursuant to decisions of the Alabama Supreme Court, required consideration of numerous factors relating to the relationship between the compensatory and the punitive awards, the reprehensibility of the defendant's conduct, the profitability of the conduct, and the defendant's financial position.[55]

In *TXO Productions Corp. v. Alliance Resources Corp.*,[56] the Court affirmed a $10 million punitive damages award following trial of a dispute over oil and gas development rights in West Virginia.[57] TXO had sought a declaratory judgment regarding the rights, following which Allied brought a counterclaim for slander of title.[58] Finding in favor of Alliance, the jury had awarded $19,000 in actual damages.[59] Applying a "grossly excessive" standard, the Court took particular note of TXO's misconduct, and wrote:

---

45. 499 U.S. 1 (1991).
46. *Id.* at 19.
47. *Id.* at 47 (O'Connor, J., dissenting) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)).
48. *Id.* at 19.
49. *Id.* at 4-7.
50. *Haslip*, 499 U.S. at 23.
51. *Id.* at 23-24.
52. *Id.* at 19-23.
53. *Id.* at 19.
54. *Id.* at 20.
55. *Id.* at 20-22.
56. 509 U.S. 443 (1993).
57. *Id.* at 443.
58. *Id.* at 447.
59. *Id.* at 451.

> [We] do not consider the dramatic disparity between actual damages and the punitive award controlling in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages in this case [are] certainly large, but in light of the money potentially at stake, the bad faith of [TXO], the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the states to allow.[60]

*BMW of North America, Inc. v. Gore*,[61] evolved from plaintiff's damage action which he brought upon learning that his vehicle, purchased as "new," had actually been partially repainted after being damaged in transit by acid rain.[62] The jury awarded him $4,000 in compensatory damages, and $4 million in punitive damages.[63] The Alabama Supreme Court reduced the punitive award to $2 million.[64] The United States Supreme Court began its analysis by acknowledging that a state may employ punitive damages to punish and deter misconduct.[65] Then, reiterating a "grossly excessive" standard of review, the Court continued: "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."[66] The Court held that a principal flaw in the *Gore* verdict was that the evidence admitted and considered by the jury had included each of the approximately 1000 instances in which BMW had sold such similarly repaired vehicles nationwide, including sales in states in which such sales violated no consumer protection laws.[67] The reach of the verdict contemplated the erroneously-perceived interests of other states, potentially violating interstate comity that could "infring[e] on the policy choices of other States."[68] Thus, the Supreme Court found that when only Alabama's punishment and deterrence interests were taken into account, the $2 million award was "clearly excessive."[69] The *Gore* Court continued by identifying three guideposts for determining if a punitive award was "grossly excessive": (1) the degree of reprehensibility of the defendant's misconduct, (2) the reasonableness of the relationship (the "ratio") of the punitive award to the compensatory award, and (3) a

---

60. *Id.* at 462.
61. 517 U.S. 559 (1996).
62. *Id.* at 563.
63. *Id.* at 565.
64. *Id.* at 567.
65. *Id.* at 568.
66. *Id.* at 568 (citing *TXO Prods. Corp.*, 509 U.S. at 456).
67. *Gore*, 517 U.S. at 570-72.
68. *Id.* at 572.
69. *Id.* at 574.

comparison with the other civil and criminal penalties imposed or authorized in such cases.[70]

*Cooper Industries, Inc. v. Leatherman Tool Group., Inc.*[71] involved two manufacturers of multifunction hand tools, both seeking to improve the venerable Swiss army knife.[72] Leatherman's tool enjoyed the dominant market position at the time Cooper undertook to introduce its new product.[73] In the course of promoting its new product, but before commencing its actual production and sale, Cooper used in its advertising materials photographs of a modification of the Leatherman product.[74] Leatherman filed trade-dress infringement, unfair competition, and false advertising claims under the Lanham Act,[75] and common law claims of unfair competition.[76] The jury awarded $50,000 in actual damages and entered a $4.5 million punitive damage verdict as well.[77] The trial court rejected Cooper's post-trial claims that the punitive damage award was "grossly excessive,"[78] and the Ninth Circuit Court of Appeals affirmed the punitive damages award, finding that the trial court had not "abuse[d] its discretion in declining to reduce the amount."[79]

The Supreme Court granted *certiorari* on the single issue of whether the appellate court's application of an "abuse of discretion" standard in its review was proper, as contrasted with review on a *de novo* basis.[80] Reversing and remanding, the Court held that in matters of appellate review of punitive damage awards, federal appeals courts should employ *de novo* review.[81] In so doing, the Court principally focused on three considerations: (1) the departure of punitive damage awards from ordinary "findings of fact" associated with awards of compensatory damages; (2) the respective capacities of the trial and appellate courts to apply the indicia established in *BMW of North America, Inc. v. Gore.*;[82] and (3) the virtues of appellate court *de novo* review in the achievement of a semblance of uniformity and predictability in allowable exemplary damage awards.[83]

---

70. *Id.* at 574-75; *see generally* 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 36, §18:7, at 324-25 (using *Gore* as a primary example for instructing courts on how to use due process to strike down excessive punitive damages awards).

71. 532 U.S. 424 (2001).

72. *Id.* at 427.

73. *Id.*

74. *Id.*

75. 15 U.S.C. § 1125(a) (1994 & Supp. V 1999).

76. *Cooper Indus., Inc.*, 532 U.S. at 428.

77. *Id.* at 429.

78. *Id.*

79. *Id.* at 431 (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., No. CV-96-1346-MA, 1999 WL 1216844, at **2 (9th Cir. Dec. 17, 1999)).

80. *Id.*

81. *Id.*

82. 517 U.S. 559 (1996); *see supra* note 70 and accompanying text.

83. *Cooper Indus., Inc.*, 532 U.S. at 431-42.

### 1. *Exemplary Awards Differ From Compensatory Damage Findings of Fact*

The Seventh Amendment's Re-examination Clause "controls the allocation of authority to review verdicts"[84] and provides that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[85] It has been accepted generally that the Re-examination Clause is not violated by appellate review applying a deferential "clearly erroneous" standard.[86] Central to the Court's analysis in *Cooper* was its conclusion that punitive damage awards differ from ordinary jury findings of fact, and therefore may be subject to appellate review without the constraints of the Re-examination Clause.[87] In the Court's words, "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury."[88] Rather, in the Court's view, awards of exemplary damages are "expression[s] of . . . moral condemnation" intended to "punish reprehensible conduct and to deter its future occurrence."[89]

### 2. *Respective Trial and Appellate Court Capacity*

While the "Jury Trial" and Re-examination Clauses make essential obeisances to the trial court's superior position in evaluating what proof is to be admitted into evidence and whether sufficient support exists for conventional findings of fact, the Court's conclusion that awards of exemplary damages do not constitute conventional findings of fact invited it to consider which vantage point—that of the trial court or that of the appellate court—was superior for application of the *Gore* factors. If the appeals courts were better able to apply the *Gore* factors, such a conclusion would bolster the argument that the "clearly erroneous" standard of review would be less warranted, and hence more support for *de novo* review by the appeals court.

Taking the *Gore* factors *seriatim,* the Court conceded that as to the first *Gore* factor requiring consideration of the degree of reprehensibility of the defendant's conduct, the trial courts "have a somewhat superior vantage over courts of appeals," but added "that the advantage exists primarily with respect to issues turning on witness credibility and demeanor."[90]

As to the second *Gore* factor, relating to "the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damage award," the Court

---

84. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996).

85. U.S. CONST. amend. VII.

86. *Cooper Indus., Inc.*, 532 U.S. at 437-40.

87. *Id.*

88. *Id.* at 437 (quoting *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting) (citation omitted)).

89. *Id.* at 432 (citations omitted).

90. *Id.* at 440. Contrast the evaluation of Justice Ginsberg, who states that regarding the first *Gore* in dictum the trial courts "have an undeniably superior vantage over courts of appeal" in evaluating the first criterion, that of the reprehensibility of the defendant's conduct, insofar as the trial court views the evidence not as reflected in a "cold paper record" but rather "in the living courtroom context." *Id.* at 445, 448 (Ginsberg, J., dissenting) (citations omitted).

determined that "[t]rial courts and appellate courts seem equally capable of analyzing the second factor."[91] Lastly, the third factor's call for consideration of "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" called, in the Court's view, "for a broad legal comparison . . . more suited to the expertise of appellate courts."[92] Taken in the aggregate, the majority concluded that "[c]onsiderations of institutional competence therefore fail to tip the balance in favor of [the] deferential [clearly erroneous standard of] review."[93]

### 3. *The Value of Uniformity and Predictability*

The Court also highlighted the objectives of bringing uniformity and predictability to review of exemplary damage awards. It stated that "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles."[94] Quoting Justice Breyer's concurrence in *Gore,* the Court emphasized that "[r]equiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions might subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself."[95]

### 4. *Justice Ginsberg's Dissent*

The gravamen of Mrs. Justice Ginsberg's dissent was that the majority erred in finding that awards of punitive damages were not "findings of fact" within the reach of the Re-examination Clause. Adopting the majority's language that a telling characteristic of findings of fact is their character as "historical or predictive fact," Justice Ginsberg conceded that exemplary awards involved a panoply of considerations.[96] However, she continued by urging that while punitive awards differed from compensatory awards in the cluster of considerations that make up the jury verdict, the difference was a matter of degree and not of kind.[97] "[T]here can be no question that a jury's verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings," she wrote, using as examples "the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, [and] whether the defendant behaved negligently, recklessly, or maliciously."[98] Justice Ginsburg asserted that the inexact relation between an award of punitive damages and a compensatory damage award should not vitiate the

---

91. *Id.* at 441.
92. *Cooper Indus., Inc.*, 532 U.S. at 441.
93. *Id.*
94. *Id.* at 436.
95. *Id.* (quoting *Gore,* 517 U.S. at 587 (Breyer, J., concurring)).
96. *Id.* at 446 (Ginsberg, J., dissenting).
97. *Id.*
98. *Cooper Indus., Inc.*, 532 U.S. at 446.

underlying reality that each is tethered to jury findings of fact. Using noneconomic damages (usually pain and suffering) as a basis for comparison, Justice Ginsberg suggested that "[o]ne million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one set of quantification is properly regarded as factfinding, it seems to me that the other should be so regarded as well."[99]

### 5. *What Will Be The Impact of* Cooper?

In anticipatory humility, the *Cooper* majority concurred with the dissent in admitting that the redefined appellate role of *de novo* review "will affect the result of the *Gore* analysis in only a relatively small number of cases[,]"[100] and thus there is reason to surmise that the impact of *Cooper* will not materially change the quantity of punitive damage awards handed down by juries, nor the quantum of the individual awards. Federal trial court judges now have years of experience in applying the *Gore* factors, and there has been no indication that they have failed to execute the Supreme Court's charge in that decision as faithfully as they must any other instruction from the Court, including the gratuitously minimized trial court capacity to evaluate "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[101]

It is delicious, nonetheless, to speculate whether the trial bar will develop special interrogatories for jurors in exemplary award cases in an effort to provide a fact-based underpinning that could move a court to conclude that the award of exemplary damages was indeed a conclusion based upon "historic or predictive fact," and thus akin to conventional compensatory damage awards suited to "clearly erroneous," rather than *de novo*, review.

## V. CONCLUSION

An irony of punitive damages is that the tort remedy intended as a prophylaxis for conduct so aggravated as to require extraordinary, noncompensatory measures for its containment will itself continue to prompt vigorous state and constitutional law restraints—a modern genie in the bottle. While abolishing punitive damages altogether remains an option to state legislatures, most states will almost certainly continue to preserve exemplary awards for truly outrageous conduct as a necessary instrument in correcting the under-deterrence of ordinary compensatory damages. At the same time, states can be expected to experiment with various forms of limitations, or develop new ones, to ameliorate the claimed overdeterrence risks of broad jury discretion in the entry of such awards.

---

99. *Id.* (citations omitted).
100. 121 S. Ct. at 1688.
101. *Id.* at 440.

The Due Process and Excessive Fines Clauses importantly frame the boundaries of permissible awards in terms that hearken to conventional fairness goals of remedies for avoidable accidents. The *Haslip, TXO, Gore*, and *Cooper* decisions establish the Supreme Court's position that while constitutionally lawful, important substantive restrictions and mechanisms for the consistent application of those restrictions are necessary dimensions of the continued application of exemplary awards. In essence, the Supreme Court has imposed a constitutional requirement that punitive damage awards will only pass constitutional muster after successful passage through several fairness checkpoints.

In tort law's lengthy development of governing liability for causing injurious and avoidable accidents, it has been a truism that common law causes of actions and remedies have developed by accretion, with new remedies or limitations advanced upon the presentation of new facts, developing societal expectations, or both. At the same time, state legislatures have not balked at the task of sculpting or placing limitations upon such judicially-created remedies. In no area of tort law is the influence of state legislative and United States constitutional collaboration more focused than in the law of exemplary damages. In a petrie dish in which the these creative and restrictive agents alike have been introduced, each modifying, retarding, or enhancing the other, will be witnessed the continuing evolution of our modern law of punitive damages.