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Punitive Damages after *BMW v. Gore* (1996)

Fred W. Morgan and Karl A. Boedecker

The U.S. Supreme Court handed down its decision in BMW v. Gore (1996) in May. This decision triggered another round of discussions regarding restraints on punitive damages as a part of the overall reform of the U.S. tort system. Here, the authors review the BMW decision and its immediate predecessors to illustrate the essential public policy issues that are associated with proposed limits on punitive damages.

Punitive damages generally are levied against defendants who recklessly or flagrantly violate victims' rights. Punitive damages originated to punish perpetrators of intentional torts and therefore have a hybrid orientation that falls between civil cases involving only compensatory damages and criminal cases (McKown 1995, p. 423). Product liability commentators have disagreed about the applicability of punitive damages because of this quasi-criminal flavor. In addition, because strict liability[1] is often the basis for a product liability claim, experts have suggested that punitive damages are difficult to determine, if not altogether inappropriate (ALR 4th 1996).

Over the past decade the U.S. Supreme Court has reviewed several cases involving contested punitive damages awards (*Browning-Ferris Industries v. Kelco Disposal* 1989; *Honda Motor v. Oberg* 1994; *Pacific Mutual Life Insurance v. Haslip* 1991; *TXO Products v. Alliance Resources* 1993). The Court has declined to set specific limits on punitive damages, either an absolute amount or relative to compensatory awards. Commentators have reviewed these decisions, often disagreeing strongly with the reasoning and implications of the Court's rulings (see, e.g., Cutter 1995; Dragutsky 1994; Schwartz and Behrens 1993). In May 1996, in *BMW of North America v. Gore* (1996), the Court had another opportunity to develop clear standards to guide the application of punitive damages. Once again, the Court chose to leave these decisions at the state level.

Our purpose is to examine primary public policy issues surrounding the appropriateness of punitive damages awards. We first provide a historical perspective on the role of punitive damages. We then offer an assessment of the scope of punitive damages in U.S. product liability litigation. We next review recent U.S. Supreme Court decisions that have dealt with policy issues surrounding punitive damages. We then analyze these issues in detail, adding our own views of how punitive damages should be handled by courts and legislatures.

[1]Strict liability is a public policy liability theory, which is based on insurance concepts of risk-spreading and placing the burden of liability on the seller who is better able to bear and spread the costs of consumers' injuries. Strict liability does not require negligent behavior by the defendant; hence, behaviorally based punitive damages awards could be conceptually inappropriate.

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History and Role of Punitive Damages

We now look at the origins of punitive damages and trace their evolution to the present.

Evolution of Punitive Damages

Early Origins

The doctrine of punitive damages has deep roots in Anglo-American law, and its origins can be traced to Mosaic law, which specifies payment by wrongdoers beyond the amount necessary to compensate their victims for direct losses. Therefore, when someone wrongfully took the animal of another and converted it to his own use, the rule was clear (*The Jerusalem Bible* 1971, Exodus 21:37): "If a man steals an ox or a sheep and then slaughters or sells it, he must pay five oxen for the ox, four sheep for the sheep."

Similarly, a payment to the wronged person would serve as both compensation and punishment in situations in which difficulty might occur in fixing actual damages for a civil violation (*The Jerusalem Bible* 1971, Exodus 22:15):

> If a man seduces a virgin who is not betrothed and sleeps with her, he must pay her price [*mohar*, the "bride price" paid by a betrothed man to the family of his future wife] and make her his wife. If her father absolutely refuses to let him have her, the seducer must pay a sum of money equal to the price fixed for a virgin.

The ancient Greeks recognized the use of payment by wrongdoers to victims, in addition to other legal admonitions (Walther and Plein 1965, p. 377, citing Plato, *The Laws* IX, p. 106):

> When any one commits any injustice, small or great, the law will admonish and compel him either never at all to do the like again, or never voluntarily, or at any rate in a far less degree; and he must in addition pay for the hurt.

English Origins

Statutory provisions for punitive damages, in the form of double or treble damages in civil suits in which a tenant allows avoidable harm to real property, can be traced as far back as *The Statute of Gloucester* (1278, p. c5) in medieval England. A series of eighteenth century common law decisions established the principle that juries could assess damages in excess of actual losses when it was necessary to punish the defendant and deter such conduct in the future. In a widely cited case, *Wilkes v. Wood* (1763), the court upheld an exemplary damage award in which little actual harm had occurred. Lord Halifax, Secretary of State to King George II, issued an improper warrant to suppress publication of *The North Briton.* British officials searched the house of John Wilkes, the publisher, who then sued for "large and exemplary" damages as a means of deterring such conduct. The court awarded 1,000 pounds to Wilkes, which Massey (1995) equates to $1.5 million in 1995.

Huckle v. Money (1763) arose from the same series of events. A journeyman printer employed by Wilkes was arrested and confined under the same improper warrant. He received damages of 300 pounds (nearly 300 times his weekly earnings) in his action for trespass and false imprisonment. In response to the defendant's vigorous protest about the size of the award even though no actual injury occurred, the court declared (*Huckle v. Money* 1763):

> I think they [the jury] have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Other cases from the same era provided large awards to plaintiffs who had suffered little actual harm (Note 1957) from instances of slander (*Hawkins v. Sciet* 1622), malicious prosecution (*Leith v. Pope* 1780), criminal conversion (*Duberley v. Gunning* 1792), seduction (*Tullidge v. Wade* 1769), and battery (*Benson v. Frederick* 1766).

By the early nineteenth century, English common law allowed a jury to award far greater than the actual money damages to deter improper conduct. Therefore, a court upheld a jury verdict of 500 pounds for trespass. The defendant had been "treading upon plaintiff's grass and hunting for game," though no actual harm occurred. The court observed that "in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?" (*Merest v. Harvey* 1814).

American Origins

The development of the punitive damages doctrine in the United States followed the English experience. By 1791, an American court instructed the jury prior to its deliberations "not to estimate the damages by any particular proof of suffering, or actual loss, but *to give damages for example's sake, to prevent such offenses in the future* [emphasis added]" (*Coreyell v. Colbaugh* 1791; see, also, *Genay v. Norris* 1784).

By 1851, the U.S. Supreme Court observed that exemplary, punitive, or vindictive damages were a well-established common law principle in tort cases that would allow the plaintiff to recover more than compensatory damages alone (*Day v. Woodworth* 1851). In 1886, that court reaffirmed the principle that tort damages could include not only compensation for direct losses, but also a sum that serves as a "remedy for the greater wrong and injury involved in the apprehension of its repetition" (*Barry v. Edmunds* 1886).

In addition to these primary objectives of punitive damage awards, courts occasionally have cited other purposes for them. Such damages sometimes are used to dampen a plaintiff's desire to seek revenge, as in *Alcorn v. Mitchell* (1872), in which the defendant publicly spit in the plaintiff's face. The court noted that, notwithstanding the minimal degree of actual harm, the act was "one of the greatest indignity, highly provocative of retaliation by force." Liberal damages in such circumstances would preserve "public tranquillity ... [by] ... saving the necessity of resort to personal violence" (*Alcorn v. Mitchell* 1872).

Other courts have noted that punitive damage awards encourage persons to serve as private attorneys general, protecting society's interest in discouraging serious misconduct by making an example of wrongdoers. The opportunity to obtain such a reward offers an incentive to private parties to pursue the offenders, "especially when the prospective compensatory recovery is low or the expected cost of litigation is high" (*Tuttle v. Raymond* 1985).

One commentator expanded on this view to characterize punitive damages as a "populist weapon" that historically has served to redress the imbalance of power between monarch and subject, railroad and passenger, or corporation and consumer. He points to consumer fraud and product liability cases as examples of wrongs that otherwise might go unpunished, because the recovery of actual damages alone often would not offset litigation expenses (Massey 1995, p. 18).

A closely related purpose is to avoid the situation in which compensatory damages alone might serve as a "license" for a defendant to engage in deliberately harmful acts. In *Funk v. Kerbaugh* (1908) the defendant used unreasonably heavy explosive charges during railroad construction, knowing they would cause harm to the plaintiff's house and barn. Despite the plaintiff's request that he use lighter charges so as not to continue the harm, the defendant persisted, knowing that it would be cheaper to pay compensatory damages than to delay construction. A punitive damage award prevented the defendant from benefiting by his deliberately wrongful act.

Contemporary Role of Punitive Damages

Punitive damages serve two primary purposes in contemporary society: to punish wrongdoers and deter similar behavior in the future. The punishment function is obvious in that the defendant is required to pay moneys beyond what is necessary to compensate the victim for the damages he or she suffered. The punitive award must be large enough to cause financial pain to the defendant; hence, the award is likely to vary depending on the wealth of the defendant. The deterrence function comes about because of the example set by the punitive award. This defendant, as well as others who might be considering the same behavior, are presumably deterred by the knowledge that they too will be punished severely if they behave like the defendant. Most jurisdictions mention both rationales when imposing punitive awards (Dragutsky 1994, p. 919).

Punitive damages originated in response to intentional misconduct: behavior known in advance to be wrong and harmful. With the use of punitive damages in product liability litigation, the standard has changed to include gross negligence and maliciousness. Therefore, the intent-to-harm component is no longer required. In addition, punitive damages are now awarded in mass tort litigation; hence; one defendant can be liable for punitive damages many times for the same offense. Punitive damages even are awarded occasionally in contract cases (Schwartz and Behrens 1993, p. 1369).

American tort law in most states embraces the idea that punitive damages can be used in a civil suit to punish wrongdoers and deter them and others from repeating such actions. Therefore, the *Restatement (Second) of Torts* (1979, §908(1)) provides that punitive damages are

> damages, other than compensatory or nominal damages, 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.

Owen (1976, p. 1329; see also Rustad and Koenig 1993, p. 1311) categorized behaviors deserving punitive damages 20 years ago in a list that is still widely cited:

1. Fraudulent-type misconduct—where the defendant misrepresents research data or supplies false or incomplete information to consumers.
2. Knowing violation of safety standards—where the defendant chooses to ignore known regulations related to the product.
3. Inadequate testing and manufacturing procedures—where the defendant's testing and quality control are inadequate to the extent that consumers are exposed to unreasonable risks.
4. Failures to warn of known dangers before marketing—where the seller knows of a danger prior to sale, but does not warn or otherwise convey this information to consumers.
5. Post-marketing failures to remedy known dangers—where the seller learns about dangers that were unknown prior to sale but does not warn or otherwise convey this information to consumers.

Commentators have noted that though punitive damages still are awarded occasionally for manufacturing defects, most contemporary cases are based on product design defects or failure to warn (Butler 1996, p. 2170; Rustad and Koenig 1993, p. 1312). Therefore, marketing's role in punitive damages litigation continues to be critical and must be scrutinized carefully by firms.

Scope of Punitive Damages in Product Liability Litigation

The use of punitive damages in product liability litigation in the United States dates back approximately 30 years to two drug product cases involving falsified data and misrepresentations about product safety (*Roginsky v. Richardson-Merrell* 1967; *Toole v. Richardson-Merrell* 1967). The introduction of punitive damages into the product liability arena followed closely the arrival of strict liability as a theory of recovery in *Greenman v. Yuba Power Products* (1963).

Rustad (1992, p. 10) notes that punitive damages in product liability came under attack shortly after the *Greenman* decision. The Defense Research Institute distributed a monograph urging that punitive damages should be abolished (Duffy 1969). The Federal Interagency Task Force on Product Liability drafted a model product liability law in 1979 (Rustad 1992, p. 11). Some sort of product liability act has been reintroduced into Congress every year since 1982, but no determinative action has been taken.

Rhetoric about the punitive damages situation abounds; however, much of the data quoted in the popular press are without foundation or are traded back and forth among publications. Galanter (1992) asserts that some of the cited statistics are contrived. He states that the $300 billion allegedly spent on tort litigation is speculation by people trying to support predetermined positions (Galanter 1992, p. 28). Most of the growth in product liability litigation reported by the General Accounting Office (GAO) can be attributed to mass tort litigation (e.g., asbestos, Benedectin, Dalkon Shield cases), admittedly a tort problem area (GAO 1989)

Groups, particularly defense attorneys and trade associations, have urged that the United States reform its tort system because of, among other reasons, the growing number of punitive damages settlements. Experts claim that product development is inhibited because of the specter of punitive damages when innovative products turn out to have unforeseen side effects (*Drug Topics* 1996). President Clinton, like his predecessors, has found himself under scrutiny for his views on product liability, particularly given his recent veto of a federal bill that would have limited punitive damages (*Home Office Computing* 1996; Johnson 1996; Wharton 1996).

As the data in Table 1 indicate, punitive damages claims grew in popularity throughout the 1960s, 1970s, and early 1980s. Although the past ten years have witnessed numerous calls for punitive damages reform (see, e.g., Allen 1987; Boutrous 1996; *Business Week* 1989; Duncan 1995), the number of punitive damages claims has remained relatively steady.

Empirical studies of punitive damages also suggest that the problem is not as serious as some commentators imply (Gordon 1992). Saks (1992, p. 1254), in a review of the literature on punitive damages, concludes that "every empirical study of the [punitive damages] question has reached conclusions that, to say the least, fail to support these beliefs [that the problem is serious]." Rustad (1992) came to this conclusion after reviewing the same and other studies.

The Rand Institute for Civil Justice studied two locations, Chicago and San Francisco, between 1960 and 1984. This study concluded that "punitive damages ... in personal injury cases has changed very little in 25 years" (Peterson 1987, p. 122; see also Peterson, Sarma, and Shanley 1987). The American Bar Foundation sponsored a study of more than 25,000 jury verdicts that were drawn from across the United States. Researchers encountered 967 product liability verdicts, 34 of which awarded punitive damages (Daniels and Martin 1988). They concluded that the awards were "quite proportionate to the actual damages" (Rustad 1992, p. 27).

The GAO (1989) studied two years' worth of trials in five states and also interviewed attorneys after the trials were completed. The GAO opined that punitive awards "were neither routine nor excessively large" (Rustad 1992, p. 28). The GAO also found that punitive awards were reduced substantially in settlement conferences and because of post-trial appeals. Landes and Posner (1986) examined two years of reported product liability cases at the trial and federal appellate court levels and found that punitive damages were granted in 10 of 172 cases. The punitive awards survived intact in 1 case, were reduced in 3 others, and were reversed and remanded in the remaining 6 cases (Landes and Posner 1986, p. 35).

In the context of the controversy surrounding punitive damages, the U.S. Supreme Court has dealt with this topic several times in the past decade. We now review the five significant punitive damages decisions rendered by the

Table 1. Punitive Damages in Product Liability Cases

	Search 1			Search 2		
Year	Federal	State	Total	Federal	State	Total
1996	101	79	180	112	81	193
1995	95	72	167	100	82	182
1994	87	70	157	79	69	148
1993	96	88	184	102	95	197
1992	100	78	178	99	89	188
1991	93	74	167	97	87	184
1990	67	64	131	93	64	157
1989	86	71	157	79	71	150
1988	70	61	131	85	57	142
1987	65	60	125	66	57	123
1986	90	61	151	93	59	152
1985	68	65	133	81	68	149
1984	56	71	127	62	58	120
1983	41	47	88	55	48	103
1982	39	48	87	43	36	79
1981	29	28	57	25	29	54
1980	15	25	40	24	23	47
1979	13	28	41	15	20	35
1978	10	16	26	10	9	19
1977	9	14	23	6	16	22
1976	10	16	26	12	8	20
1975	10	14	24	13	7	20
1974	6	8	14	9	7	16
1973	6	6	12	5	2	7
1972	0	3	3	0	3	3
1971	0	3	3	1	4	5
1970	2	3	5	2	2	4
1969	1	1	2	2	3	5
1968	1	2	3	1	2	3
1967	1	2	3	1	1	2
1966	1	1	1	0	1	1

Data are derived from a 1/2/97 search of the Lexis (1997) database of reported cases. The Search 1 phrase is "punitive damage(s) (within 255 words of) product liability or strict liability" for each year. The Search 2 phrase is "product liability and (punitive or exemplary) (within 2 words of) damage(s)" for each year. These data somewhat overstate the incidence of punitive awards in recent years because not every case including the search phrases involves a punitive award. In some cases the court could be discussing a prior verdict whose central feature was a dispute over punitive damages. In any event, the percentage of cases discussing punitive damages is quite small. For example, in 1995 punitive damages were mentioned in 2253 out of more than 70,000 reported federal cases. Of the 2253, only 168 involved product liability or strict liability.

Supreme Court since this topic was last examined in detail in the marketing literature (see Morgan 1989). Table 2 contains a summary of the punitive damages issues in these cases.

Recent Supreme Court Decisions Involving Punitive Damages

We provide greater detail in our discussion of the *BMW* case because the others have been analyzed in considerable detail in the legal and business periodical literature.

Browning-Ferris Industries v. Kelco Disposal (1989)

Browning-Ferris Industries (BFI) supplied roll-off waste collection services in Burlington, Vt., and surrounding areas. A former BFI employee started Kelco Disposal in 1980 to compete with BFI. BFI offered to buy Kelco in 1982 in response to its capturing 43% of the market. Kelco declined, and BFI dropped its prices to drive Kelco out of business. BFI did not respond to Kelco's legal threats and continued its reduced price policy. In spite of these tactics, Kelco gained 56% of the market by 1985, which resulted in BFI selling out to another firm.

Kelco sued BFI in 1984 in federal district court in Vermont, alleging that BFI violated the Sherman Act by trying to monopolize the market and that BFI had interfered intentionally with Kelco's contractual relations, a state law tort claim. In a jury trial, Kelco prevailed on both claims. At a second trial for damages, the jury awarded $51,146 in compensatory damages and $6 million in punitive damages. The court "awarded Kelco $153,438 in treble damages and $212,500 in attorney's fees and costs on the federal antitrust claim, or, in the alternative, $6,066,082.74 in compensatory and punitive damages on the state-law claim" (*Browning-Ferris Industries v. Kelco Disposal* 1989, p. 2913). This outcome was affirmed by the Second Circuit Court of Appeals.

The key appeals issue for the Supreme Court was the constitutionality of the punitive award under the Excessive Fines Clause of the Eighth Amendment (see, e.g., Liv-

Table 2. Policy Issues Raised in Recent Supreme Court Punitive Damages Cases

Case	Policy Issues
Browning-Ferris Industries v. Kelco Disposal (1989)	Excessive Fines Clause of the Eighth Amendment does not limit punitive damages in civil cases between private parties. May be different if the government has a role in the litigation, either as a party or a beneficiary.
Pacific Mutual Life Insurance v. Haslip (1991)	Due Process Clause of the Fourteenth Amendment applies to private litigants. The procedures were acceptable in this instance, resulting in a 4:1 punitive to compensatory ratio.
TXO Products v. Alliance Resources (1993)	Due Process Clause again applies. Outcome was not grossly excessive, and procedures were not unfair. A 526:1 punitive to compensatory ratio is allowed to stand.
Honda Motor v. Oberg (1994)	Due Process Clause again applies. Oregon's prohibition of post-trial judicial review of punitive awards is unconstitutional. Other Oregon procedures allowed to stand without comment.
BMW v. Gore (1996)	Due Process Clause prohibits a grossly excessive punishment. The plaintiff suffered only noneconomic damages, and the defendant's conduct was not sufficiently egregious to justify the punitive amount.

ingston 1990; Sneiderman 1990; Yarab 1990). The Court determined that neither the Eighth Amendment nor common law provided any justification for overturning the trial court results. The Court decided that the Excessive Fines Clause was not applicable when the litigants were private parties (not government entities). The original intent of this clause was to limit the possible abuse of governmental prosecutorial power. The Court thus upheld the jury's decision.

Pacific Mutual Life Insurance v. Haslip (1991)

An insurance agent, selling Pacific Mutual's and other firms' products, proposed a group health insurance program to cover employees of an Alabama city employing Haslip. The agent sent the initial premiums to the insurers, but kept all additional premiums. The companies sent notice of cancellation to the city through the agent, who did not forward them. When Haslip was hospitalized and attempted to use her insurance, she learned the circumstances surrounding her lack of coverage. She sued the agent and the insuring company, Pacific Mutual. The jury found for the plaintiff, awarding her $200,000 in compensatory damages and $840,000 in punitive damages. The Supreme Court of Alabama reviewed this decision and specifically upheld the punitive damages amount. The U.S. Supreme Court agreed.

The essence of Pacific Mutual's appeal was the Due Process Clause of the Fourteenth Amendment (see, e.g., Breslo 1992; Richards 1992). The Court ruled that the jury had been fair in its deliberations that resulted in the punitive award and that juries long had been given the latitude to award punitive damages under common law. Therefore, the defendant's rights had not been violated under the Constitution. Among other interpretations, the *Haslip* decision suggested that the Court had implied a limit on the punitive to compensatory ratio of approximately 4:1.

TXO Products v. Alliance Resources (1993)

TXO contracted with Alliance for the oil and gas development rights on a parcel of land leased by Alliance from another company. After learning that another party, Signairo, had a potential claim on these rights, TXO tried to contract with Signairo without informing Alliance. TXO then engaged in several tactics to break the contract with Alliance, including bringing a frivolous legal action to try to reduce the agreed-upon royalty payments. The jury awarded Alliance $19,000 in compensatory damages, its costs of defending the lawsuit, and $10 million in punitive damages based on TXO's bad faith, size, and connections with a larger firm. The West Virginia Supreme Court of Appeals upheld the trial court's determination.

TXO appealed this decision, arguing that the punitive award violated the Due Process Clause of the Fourteenth Amendment on two levels: the sum being grossly excessive (526 times the compensatory amount) and based on an unfair procedure. The Supreme Court affirmed the award, rejecting both of TXO's assertions. The Court did not offer its own criteria and once again noted that the outcome of a fair and reasonable process was entitled to a strong presumption of validity.

In *TXO* the Court essentially passed on an opportunity to develop clear and convincing guidelines for assessing whether punitive damages were assessed according to acceptable procedures (see, e.g., Sperow 1994; Stuart 1994). The Court implicitly found that the procedural due process from *Haslip*—that is, proper jury instructions, adequate trial court review, and adequate appellate court review—should govern states' systems of determining punitive damages. The Court also indicated that the *Haslip* procedures were not minimum acceptable levels because the Court approved less restrictive due process procedures in *TXO*. The punitive to compensatory ratio of 526:1 convincingly surpassed the 4:1 *Haslip* ratio.

Honda Motor v. Oberg (1994)

Here the plaintiff was riding a three-wheeled all-terrain (ATV) vehicle produced and sold by the defendant. While driving up a steep hill, the plaintiff was severely and permanently injured when the ATV overturned onto him. Oberg sued Honda, arguing that it should have known that the ATV was unreasonably and inherently dangerous. The jury found for the plaintiff and awarded him $5 million in punitive damages and $939,390 in compensatory damages, the latter reduced 20% because of the plaintiff's contributory negligence.

Honda appealed, arguing that its rights under the Due

Process Clause of the Fourteenth Amendment had been violated and that the punitive award was excessive. An Oregon appellate court rejected these appeals, stating that the jury exercised reasonable power within the bounds of Oregon law. The Oregon Supreme Court affirmed this decision, agreeing that the jury conformed reasonably with Oregon law.

The Supreme Court agreed with Honda in part, thus reversing and remanding the case (see, e.g., Alliker 1995; Macario 1995; Toney 1994). The key issue was an amendment to the Oregon Constitution that prohibits post-trial judicial review and correction of excessive punitive awards. The Court found that this denial of review violated the Fourteenth Amendment. The Court did not go on to comment about or ratify the other elements of Oregon's review. The Oregon Supreme Court subsequently reviewed the decision and affirmed the appellate and trial courts' decisions (*Oberg v. Honda Motor* 1996), reinstating the $5 million punitive award as well as the compensatory amount.

BMW v. Gore (1996)

Ira Gore bought a black BMW sedan in January 1990 from an authorized BMW dealer in Birmingham, Ala. He drove the car for about nine months before taking it to a car detailer in order to improve its appearance. Slick, the detailer, noticed signs that the car had been repainted and mentioned this to Gore. Parts of the vehicle—quarter panels, top, hood, and trunk—had been repainted at BMW's facility in Georgia. Hearing this, Gore believed he had been cheated and sued BMW of North America, the American distributor of BMW automobiles, the German manufacturer, and the local dealership. Gore claimed that BMW's failure to tell him that the car had been repainted constituted fraud—that is, suppression of a material fact.

BMW had implemented a nationwide policy in 1983 of repairing vehicles damaged during manufacture or transport. If the cost of repair was 3% or less of the car's suggested retail price, BMW sold the cars as new without informing its dealers. If repair costs exceeded 3%, the cars were placed in company service for a while and then sold as used. The cost to repair Gore's care was $601.37, approximately 1.5% of its $40,000+ retail price. BMW asserted that the repaired car was as good as a new one. BMW believed a punitive award was improper because of its good-faith belief that it had no duty to disclose this minor repair to Gore.

Gore claimed that having the car repainted lessened its value by approximately 10%; hence, he asked for compensatory damages of $4,000. He also included evidence that BMW had sold 983 refinished cars since 1983 without disclosing that they had been repainted. On the basis of the damage estimate of $4,000 per vehicle, Gore asked for punitive damages of $4 million, the approximate value of the total excess price charged by BMW. The jury in the Alabama state court returned a verdict favoring Gore over BMW of North America in the amount of $4,000 in compensatory damages and $4 million in punitive damages.

BMW filed several post-trial motions, including a claim that its nondisclosure policy was acceptable in more than 20 states. Some states mandated disclosure of repairs exceeding 3% of the suggested retail price, but none required disclosure of lesser repairs (*BMW v. Gore* 1996). BMW also noted that its nondisclosure policy had not been challenged before this lawsuit was filed, thus making punitive damages an overly severe penalty. Before this judgment was delivered, BMW changed its policy to avoid sales of refinished cars in Alabama and two other states. After the verdict, BMW instituted a nationwide policy of full disclosure of all repairs.

The trial court denied all of BMW's motions. The Alabama Supreme Court ruled that the punitive award was not excessive in terms of constitutionally permitted limits. This courts did determine that the trial court was incorrect in calculating punitive damages on the basis of the number of refinished autos sold in jurisdictions other than Alabama. The punitive award was reduced to $2 million, though the court did not present any reasoning for choosing this amount.

The U.S. Supreme Court, using traditional reasoning for invoking punitive damages, declared the $2 million to be grossly excessive in terms of the state's interest in punishment and deterrence. The Court mentioned three guidelines for assessing damages (*BMW v. Gore* 1996):

1. the degree of reprehensibility,
2. the ratio of the punitive damage award to the actual harm inflicted on the plaintiff, and
3. the state's sanctions for comparable misconduct.

This case seemed to have been decided on the first guideline. Gore suffered only minor economic damages because he purchased an automobile that had been refinished. He was not seriously injured or physically harmed in any way. Although this case marks the first time in decades that a punitive award has been overturned, the decision did little to guide legislatures crafting statutes to clarify punitive damages guidelines (Pappas 1996).

Public Policy Issues Emerging from Supreme Court Decisions

Computing the Punitive Award

The basic public policy question is whether punitive damages should be limited in some sense: an absolute amount, in relationship to compensatory damages, or as a percentage of the defendant's financial situation. A related question is whether punitive damages would continue to function as a punishment and deterrent if some limitation is approved.

An absolute dollar limit makes punitive damages predictable for purposes of decision making. A company pondering an unlawful act, for example, concealing known product dangers through failure to warn, will be able to quantify the possible punitive damages exposure. If the profits from the proposed concealment are large enough, the anticipated punitive penalty will not deter the behavior. This outcome defeats the fundamental deterrence purpose of punitive damages (see Partlett 1996).

Tying punitive damages to compensatory damages also diminishes the effectiveness of punitive damages. Proposals of this type have surfaced several times in recent years, typically calling for punitive to compensatory ratios of 2:1 or 3:1 (see, e.g., Diveley 1995). This ratio reasoning emerged from the *Pacific Mutual Life Insurance v. Haslip* (1991, p. 23) decision when the Court noted that the nearly 4:1 ratio was "close to the line." Comparisons like this divert the attention from the defendant's behavior to the plaintiff's injury, essentially "skirting the policies of punitive damages" (Toney 1994, p. 681). Ratios are ineffective when the plaintiff managed to avoid being harmed in spite of the intentional conduct of the defendant or if the plaintiff's injuries are economic only (see, e.g., *TXO Products v. Alliance Resources* 1993).

Several states already have developed limits for punitive awards. Diveley (1995, p. 31) notes that more than a dozen states have enacted legislation to curb punitive damages. The typical statute specifies an absolute limit, usually $250,000 or two or three times the compensatory amount, whichever is less. Alabama, which has a notorious history of punitive awards, has the following:

> §6–11–21. Punitive damages not to exceed $250,000; an award of punitive damages shall not exceed $250,000, unless it is based upon one or more of the following:
>
> 1. A pattern or practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or,
> 2. Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,
> 3. Libel, slander, or defamation (Code of Alabama §6–11–21; cf. Florida Statutes, Ch. 768.73).

Calculating punitive damages on the basis of the defendant's wealth would allow defendants to anticipate punitive awards. Even so, the prospect of a substantial punitive penalty would still act as a deterrent. Allowing the defendant's wealth into the formula for punitive damages is a controversial step (Abraham and Jeffries 1989). The plaintiff's bar generally supports this view, whereas the defense bar opposes it. Commentators have suggested a compromise in that wealth would not be used to establish the punitive award but instead would be used to judge whether the award was excessive after it was set (see, e.g., Kirgis 1993; Schwartz and Behrens 1993). This suggestion seems to overlook both punishment and deterrence goals. Without knowing whether the punitive award actually was going to harm the defendant financially, the jury would not know the appropriate level of punishment. If punitive damages are to be limited in some manner, we support a percentage limit, rather than an absolute limit, on the defendant's wealth.

Constitutional Issues

Two major constitutional questions have been raised by the cases discussed herein: the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. The Fifth Amendment also can be invoked in those cases in which a defendant finds itself paying punitive damages more than once for a common offense, such as a mass tort (Macchiarola 1996; McKown 1995, p. 459). The initial paragraph of *Browning-Ferris Industries v. Kelco Disposal* (1989, p. 263) deals with the Excessive Fines Clause:

> This Court has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in applying the Eighth Amendment have been with criminal process and with direct actions initiated by government to inflict punishment. Awards of punitive damages do not implicate these concerns. We therefore hold, on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.

The meaning of this citation is clear; however, recent statutory developments are again raising Eighth Amendment issues. Several states are now parties to punitive damages awards (Hurd and Zollers 1994; Stevens 1994). That is, plaintiffs must now share some portion of punitive damages awards in several states. For example, the following wording comes from a 1996 Georgia statute:

> (e)(2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state ... the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages (Official Code of Georgia Annotated, §51–12–5.1).

Such laws have come into being partially in response to the criticism that punitive awards represent an undeserved windfall to plaintiffs and actually could encourage litigation (see, e.g., Schwartz 1988). To better serve the punishment and deterrence goals, society at large should share in the punitive award rather than just the plaintiff who already recovers through compensatory damages. Such statutes also raise certain difficulties, such as when litigants reach a settlement exceeding the compensatory request, but less than the sum of the compensatory plus punitive request. How is the settlement apportioned among attorney fees, compensatory damages, and punitive damages?

The Due Process Clause was addressed in *Pacific Mutual v. Haslip* (1991, p. 18):

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

The Court has not articulated what amounts to proper due process; however, the Court did note that Alabama had developed seven useful criteria to assess the adequacy of a punitive award (*Haslip* 1991, pp. 21–22):

> 1. Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
> 2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
> 3. The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss;

4. The "financial position" of the defendant;
5. All the costs of litigation;
6. The imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and
7. The existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

If we add to this list a mandatory post-trial review of the punitive award by the trial court and a set of jury instructions that explains the role of punitive damages, we have a workable list of due process guarantees. The appeals process provides for another level of review.

Other Procedural Issues

Procedural precaution is the key to preserving punitive damages as a viable punishment and deterrent. The punishment aspect of punitive damages is a criminal concept, and criminal law employs substantial protection of the defendant's due process rights (Forward 1993, p. 1250). Legal experts have suggested two additional areas for improving or safeguarding the punitive damages process: raising the level of proof required for awarding punitive damages and separating the determination of compensatory damages from the assessment of punitive damages.

The *Haslip* (1991, p. 23, note 11) Court noted the strength of a higher standard of proof:

> We have considered the arguments raised by Pacific Mutual and some of its *amici* as to the constitutional necessity of imposing a standard of proof of punitive damages higher than "preponderance of the evidence." There is much to be said in favor of a State's requiring ... a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," as in the criminal context.

In the lexicon of courts, "clear and convincing" falls between "preponderance of the evidence" and "beyond a reasonable doubt," the latter being the criminal standard of proof. Nearly half of the states have gone on to develop statutory language embracing the "clear and convincing" standard. The 1996 Georgia statute, discussed previously, states:

> (b) Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences (Official Code of Georgia Annotated, §51–12–5.1).

Concern for standard of proof has led to recommendations that trials involving punitive damages requests be bifurcated. The first part of the trial would be the determination of the defendant's culpability and the appropriate compensatory award. The second part would deal with the punitive damages question and its related higher level of proof. Experts contend that this approach would prevent evidence related to the punitive award from biasing the jury's overall assessment of guilt and compensatory damages (Comment 1996; Schwartz and Behrens 1996).

Marketing Implications

The guideline, "Do not intentionally harm consumers," captures the essence of proper marketing behavior; however, this standard provides nothing in the way of managerial action implications. Timely communication of information is the key to avoiding situations in which consumers have been injured by faulty products in a manner meriting punitive damages. During the product development process, a product's dangerous propensities should be cataloged and regularly brought to the attention of managers. Knowledge of these hazardous properties arises during in-house design sessions, through marketing testing of prototypes, and eventually from customer feedback about usage situations. Salespeople are another valuable source of safety information because of their regular contact with customers.

A company has two choices in terms of dealing with unsafe features or perilous in-use situations. It can design away the problems or provide warnings to consumers about the potential dangers. Design solutions are clearly superior to warnings because the former eliminate the danger, whereas warnings rely on consumers to read, process, and heed warnings. The use of warnings shifts safety responsibility from marketers to consumers who could ignore (distracted or busy users) or misunderstand (complex language, illiteracy, or language barriers) warnings. We believe that permitting such shifting of responsibility to consumers constitutes unacceptable public policy. Warnings should be used only if dangers cannot be designed out of products or if the dangers are an inherent part of useful products (e.g., hammers, power tools).

Given known dangers, marketers must convey this information to consumers, especially information in the company's possession prior to marketing the product. Conscious failure to warn of known dangers is tantamount to inviting punitive damages claims. The entire communications program should focus on transmitting the seriousness of known dangers. Print and broadcast advertisements should include disclosures about the dangers, though such disclosures can reduce the impact of advertisements. In addition, ad content should not encourage or imply unsafe product use, particularly use that stretches a product to the limits of its design. Likewise, salespeople should not mitigate the impact of warnings by their statements to prospects and customers during sales calls. Salesperson statements that are wrong or intentionally misleading readily could lead to a punitive damages award.

The final step in eliminating punitive awards is to have a recall program in place so that it can be implemented quickly if necessary. Recall programs, by necessity, immediately remove dangerous products from consumers' hands. When the company hears about product users being hurt by a product and then decides to recall the item, it is too late to develop the recall program. An effective, planned recall program is also a signal that a company is concerned about consumer safety, a good position to be in if punitive damages litigation arises.

Conclusion

Although the constitutional arguments have not been debated fully by the Supreme Court, the Court at least has indicated that it is going to examine procedural due process in cases involving disputes about punitive damages. Therefore, over time, the Court's position on due process will evolve, albeit perhaps slowly. States therefore should concentrate on developing concrete laws governing jury instructions about assessing punitive damages, trial court review of jury decisions, appellate review of trial court results, and State Supreme Courts' reviews of appellate adjudication. Developing specific guidelines is well beyond the scope of this analysis; however, the Court clearly has indicated that such procedures are necessary.

Legislative action is preferred over intermittent Supreme Court decisions. Courts, by the nature of their function, see the specific facts of a case and any precedent brought into the courtroom. Moreover, courts at different levels or circuits could disagree on how to apply Supreme Court decisions to cases involving similar fact situations. Analysis of recent post *BMW* cases suggests that federal courts more than state courts are cutting punitive damage awards (MacLachlan 1997). Legislatures have access to much more information, such as experts on all sides of an issue, reviews of all relevant litigation both within and outside the state, and a sense of the preferences of the citizens. All of this provides a useful backdrop for punitive damages reform that accommodates divergent views.

References

Abraham, Kenneth S. and John C. Jeffries, Jr. (1989), "Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth," *Journal of Legal Studies*, 18 (June), 415–26.

Alcorn v. Mitchell (1872), 63 Ill. 553.

Allen, Richard (1987), "Controlling the Growth of Punitive Damages in Products Liability," *Corporate Practice Commentator*, 29 (Fall), 389–412.

Alliker, E. Benjamin (1995), "Punitive Damage Awards After *Honda Motor Co. v. Oberg*: Analyzing the Triumverate of History, Due Process and the Jury," *Maryland Journal of Contemporary Issues*, 6, 377–404.

ALR 4th (1996), "Annotation: Allowance of Punitive Damages in Products Liability Cases," *Annotated Law Reports 4th*, Vol. 13. New York: Lawyers Co-Operative Publishing Co., 52–125.

Barry v. Edmunds (1886), 116 U.S. 550, 6 S.Ct. 501.

Benson v. Frederick (1766), 97 Eng. Rep. 1130 (K.B.).

BMW of North America, Inc. v. Ira Gore (1996), 116 S.Ct. 1589; 646 So.2d 619 (Ala. 1994).

Boutrous, Theodore J., Jr. (1996), "The Case of the $2 Million Paint Job," *The American Lawyer*, (May), 36+.

Breslo, James A. (1992), "Taking the Punitive Damage Windfall Away from the Plaintiff: An Analysis," *Northwestern University Law Review*, 86 (Summer), 1130–68.

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. (1989), 492 U.S. 257, 109 S.Ct. 2909; *cert. granted*, 109 S.Ct. 527 (1988); 845 F.2d 404 (2d Cir. 1988).

Business Week (1989), "Punitive Damages: How Much Is Too Much?" (March 27), 54, 56.

Butler, Samuel C. (1996), "Some Thoughts on Civil Justice Reform," *Fordham Law Review*, 64 (April), 2149–53.

Comment (1996), "Discovery of Net Worth in Bifurcated Punitive Damages Cases: A Suggested Approach after *Transportation Insurance v. Moriel*," *South Texas Law Review*, 37 (January), 193–229.

Coreyell v. Colbaugh (1791), 1 N.J.L. 77.

Cutter, David F. (1995), "*TXO Production Corp. v. Alliance Resources Corp.*: A Failure to Create True Constitutional Protection Against Excessive Punitive Damages," *Catholic University Law Review*, 42 (Winter), 631–74.

Daniels, Stephen and Joanne Martin (1990), "Myth and Reality in Punitive Damages," *Minnesota Law Review*, 75 (October), 1–64.

Day v. Woodworth (1851), 54 U.S. 363.

Diveley, E. Marie Tucker (1995), "Are Constitutional Challenges to Punitive Damages Still Available?" *Defense Counsel Journal*, 62 (January), 27–32.

Dragutsky, Nancy G. (1994), "Walking the Invisible Line of Punitive Damages: *TXO Production Corp. v. Alliance Resources Corp.*," *Pepperdine Law Review*, 21 (April), 909–74.

Drug Topics (1996), "More Contraceptive Options Needed, Says Medical Panel," 140 (June 10).

Duberley v. Gunning (1792), 100 Eng. Rep. 1226 (K.B.).

Duffy, James E, Jr. (1969), "Punitive Damages: A Doctrine Which Should be Abolished," in *The Case Against Punitive Damages: Practice and Procedures*, Vol. 4, Donald J. Hirsch and James G. Pouros, eds. Chicago: Defense Research Institute, 14–38.

Duncan, Laura (1995), "Painful Decisions: New Business Risks Await Both Plaintiff and Defense Lawyers," *ABA Journal*, 81 (August), 66+.

Forward (1993), "Symposium on Civil Justice Reform," *American University Law Review*, 42 (Summer), 1245–55.

Funk v. Kerbaugh (1908), 70 Atl. 953.

Galanter, Marc (1992), "Pick a Number, Any Number," *Legal Times*, (February 17), 26+.

General Accounting Office (1989), *Product Liability, Verdicts and Case Resolution in Five States, GAO/HRD–89–99*, United States General Accounting Office, Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce, House of Representatives (September).

Genay v. Norris (1784), 1 S.C.L. (1 Bay) 6.

Gordon, Stacy Adler (1992), "Punitive Damage Problem Is Exaggerated," *Business Insurance*, (January 13), 1–2.

Greenman v. Yuba Power Products, Inc. (1963), 59 Cal.2d 57, 377 P.2d 895, 27 Cal.Rptr. 697.

Hawkins v. Sciet (1622), 81 Eng. Rep. 1099 (K.B.).

Home Office Computing (1996), "We Dispute," (July), 28+.

Honda Motor Co., Ltd. v. Oberg (1994), 114 S.Ct. 2331; 108 Ore.App. 43, 814 P.2d 517 (1991).

Huckle v. Money (1763), 95 Eng. Rep. 768.

Hurd, Sandra N. and Frances E. Zollers (1994), "State Punitive Damages Statutes: A Proposed Alternative," *Journal of Legislation*, 20, 191–205.

The Jerusalem Bible (1971). Garden City, NY: Doubleday & Company.

Johnson, John (1996), "Clinton Blocks Product Liability Reform," *Industrial Distribution*, 85 (May), 15+.

Kirgis, Paul F. (1993), "The Constitutionality of State Allocation of Punitive Damage Awards," *Washington & Lee Law Review*, 50, 843–74.

Landes, William M. and Richard R. Posner (1986), "New Light on Punitive Damages," *Regulation*, (October), 33+.

Leith v. Pope (1780), 96 Eng. Rep. 777 (C.P.).

Lexis (1996), *LEXIS-NEXIS User's Guide for Educational Programs*. Dayton, OH: Mead Data Central.

Livingston, J.C. (1990), "*Browning-Ferris v. Kelco*: The Excessive Fines Clause of the Eighth Amendment Provides No Federal Standard to Limit Punitive Damages," *Tulane Law Review*, 64 (May), 1271–80.

Macario, Matthew J. (1995), "Punitive Damage Awards and Procedural Due Process in Products Liability Cases—*Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994)," *Temple Law Review*, 68 (1995), 409–62.

Macchiarola, Frank J. (1996), "The Manville Personal Injury Settlement Trust: Lessons for the Future," *Cardozo Law Review*, 17 (January), 583–627.

MacLachlan, Claudia (1997), "BMW Triggers Cuts in Punies," *National Law Journal*, 19 (January 20), 1, 17.

Massey, Jonathan S. (1995), "Why Tradition Supports Punitive Damages and How the Defense Bar Misreads History," *Trial*, 31 (September), 7+.

McKown, James R. (1995), "Punitive Damages: State Trends and Developments," *The Review of Litigation*, 14 (Spring), 419–63.

Merest v. Harvey (1814), 128 Eng. Rep. 761 (C.P.).

Morgan, Fred W. (1989), "The Evolution of Punitive Damages in Product Liability for Unprincipled Marketing Behavior," *Journal of Public Policy & Marketing*, 8, 279–93.

Note (1957), "Exemplary Damages in the Law of Torts," *Harvard Law Review*, 70, 517–40.

Oberg v. Honda Motor Co., Ltd. (1996), 116 S.Ct. 1847, *cert. denied*; 320 Ore. 544 (1995).

Owen, David G. (1976), "Punitive Damages in Products Liability Litigation," *Michigan Law Review*, 74 (June), 1258–371.

Pacific Mutual Life Insurance Co. v. Haslip (1991), 499 U.S. 1, 111 S.Ct. 1032.

Pappas, Nicholas C. (1996), "U.S. Supreme Court Overturns 'Grossly Excessive' Punitive Damage Award," *The Indiana Lawyer*, (August 7), 23+.

Partlett, David F. (1996), "Punitive Damages: Legal Hot Zone," *Louisiana Law Review*, 56 (Summer), 781–824.

Peterson, Mark A. (1987), *Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois: Report R–3466-ICJ*. Santa Monica, CA: RAND Corp.

———, Suam Sarma, and Michael G. Shanley (1987), *Punitive Damages: Empirical Findings: Report R–3311-ICJ*. Santa Monica, CA: RAND Corp.

Restatement (Second) of Torts (1979), American Law Institute.

Richards, R. McKenna, Jr. (1992), "*Pacific Mutual Life Insurance Co. v. Haslip*: Punitive Damages and the Modern Meaning of Procedural Due Process," *North Carolina Law Review*, 70 (April), 1362–88.

Roginsky v. Richardson-Merrell, Inc. (1967), 378 F.2d 832 (2d Cir.).

Rustad, Michael (1992), "In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data," *Iowa Law Review*, 78 (October), 1–88.

——— and Thomas Koenig (1993), "The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers," *American University Law Review*, 42 (Summer), 1269–333.

Saks, Michael J. (1992), "Do We Know Anything about the Behavior of the Tort Litigation System—and Why Not?" *University of Pennsylvania Law Review*, 140 (April), 1147–292.

Schwartz, Alan (1988), "Proposals for Products Liability Reform: A Theoretical Synthesis," *Yale Law Journal*, 97 (February), 353–419.

Schwartz, Victor E. and Mark A. Behrens (1993), "Punitive Damages Reform—States Legislatures Can and Should Meet the Challenge Issued by the Supreme Court in *Haslip*," *American University Law Review*, 42 (Summer), 1365–1390.

——— and ——— (1996), "Federal Product Liability Reform Legislation is Consistent with Virginia Law and Should Be Strongly Supported," *George Mason University Law Review*, 4 (Winter), 279–96.

Sneiderman, Steven N. (1990), "The Future of Punitive Damages After *Browning-Ferris Industries v. Kelco Disposal*," *Ohio State Law Journal*, 51 (Fall), 1031–47.

Sperow. Elizabeth H. (1994), "*TXO Production Corporation v. Alliance Resources Corporation* Ruling Leaves Defendants Who Assert Due Process Challenges to Punitive Damage Awards Still Searching for a Compass," *Oklahoma Law Review*, 47 (Summer), 355–78.

The Statute of Gloucester (1278), 6 Edward I.

Stevens, Clay R. (1994), "Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma," *Pepperdine Law Review*, 21 (April), 857–908.

Stuart, Colbern C. III (1994), "Mean, Stupid Defendants Jarring Our Constitutional Sensibilities: Due Process Limits on Punitive Damages After *TXO Production v. Alliance Resources*," *California Western Law Review*, 30 (Spring), 313–45.

Toney, Bradley D. (1994), "The Chaotic and Uncertain Due Process Challenge to Punitive Damages," *Willamette Law Review*, 30 (Summer), 635–98.

Toole v. Richardson-Merrell, Inc. (1967), 251 Cal.App.2d 689, 60 Cal.Rptr. 398.

Tullidge v. Wade (1769), 95 Eng. Rep. 909 (C.P.).

Tuttle v. Raymond (1985), 494 A.2d 1353 (Me.).

TXO Products Corp. v. Alliance Resources Corp. (1993), 113 S.Ct. 2711.

Walther, David and Thomas Plein (1965), "Punitive Damages: A Critical Analysis," *Marquette Law Review*, 49 (1965), 369–422.

Wharton, Joseph (1996), "Clinton Vows Veto of Tort Reform Bill," *AMA Journal*, 82 (June), 41+.

Wilkes v. Wood (1763), 95 Eng. Rep. 766.

Yarab, Donald S. (1990), "*Browning-Ferris Industries v. Kelco Disposal, Inc.*: The Excessive Fines Clause and Punitive Damages," *Case Western Reserve Law Review*, 40 (1990), 569–80.