



PUNITIVE PRECISION

by John Gibeaut

From ABA Journal, June 2004.
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Federal Court jurors received little guidance when they considered whether to award punitive damages to a Canadian brother and sister who suffered hundreds of bites from bedbugs as they slept in their Chicago motel room.

All they had in the diversity case was a one-paragraph Illinois pattern jury instruction. Without elaboration, the instruction basically told jurors that they simply had to find the motel owner's conduct "willful and wanton" and to conclude that "justice and the public good require" damages – on top of a compensatory award – in "an amount which will serve to punish the defendant and to deter the defendant and others from similar conduct."

The jurors obliged and handed Burl and Desiree Mathias of Toronto \$372,000 in punitive damages – more than 37 times the accompanying \$10,000 compensatory award – against Accor Economy Lodging Inc., owners of a former Motel 6 in downtown Chicago. Defense lawyers remained silent at the charge conference as the slim outline governing punitive damages became part of the instructions.

"They didn't object to that," recalls plaintiffs lawyer Peter S. Stamatis. Perhaps they should have.

Defense lawyers say a U.S. Supreme Court pronouncement last year on punitive damages is prompting them to take a hard look at the constitutionality of the instructions that are supposed to help jurors decide how much a defendant should pay.

Members of the defense bar, business organizations and tort reform advocates see last year's decision, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, as setting the outer limits on punitives under the 14th Amendment's substantive due process guarantee.

For years, defense lawyers have tried unsuccessfully to get the court to consider how civil juries should punish their clients. Now, they say, the issue has matured because *State Farm* requires the glue of procedural due process – jury instructions – to make the substance stick.

"Those are the next generation of cases," says defense lawyer Evan M. Tager of Washington, D.C. "If they take another one, I think it will be on an instructional issue."

In light of *State Farm*, at least one state court has reduced a punitive award because of faulty instructions, and the issue is percolating in perhaps a half-dozen other cases also getting fresh looks. And spanking-new cases are waiting in the wings.

"That's the root of the problem," says Los Angeles defense lawyer Theodore J. Boutrous Jr., who represents Ford Motor Co. in product liability matters. "We don't allow unlimited punishments in any other context. It is irrational and illogical."

One of Boutrous' cases is *Romo v. Ford Motor Co.*, in which a California jury doled out \$290 million in punitive and \$5 million in compensatory damages in the rollover of a 1978 Bronco that killed three family members and injured three others. After the justices in *State Farm* suggested that punitives exceeding compensatory awards by more than single-digit multipliers likely would be unconstitutional, they sent *Romo* and its 58:1 punitive-to-compensatory ratio back to California.

Applying *State Farm*, the California 5th District Court of Appeal in Fresno held that the standard instruction jurors used unconstitutionally failed to restrict the amount of the punitives. The panel also blamed plaintiffs lawyers for magnifying the problem by asking for \$1 billion. The lawyers argued that the amount would force the automaker to recall all remaining 1978-79 Broncos and "crush them to dust" and generate publicity that "would reach all owners of this model Bronco so that they would know how dangerous this vehicle was." The court reduced the punitives to \$23.7 million. 113 Cal. App. 4th 738 (2003).

In a draft circulated this winter, California rule-makers tinkered with some minor aspects of the state's punitive charge. But they held off proposing any major revisions, noting that other courts of appeal had reached different conclusions on how to apply *State Farm*.

California lawyers, however, soon could get more definitive guidance from their state supreme court. The court in March agreed to hear two punitive cases. One involves a lemon law complaint in which an appeals panel reduced an award to \$53,435 from \$10 million. The other is a real estate fraud case in which a different court let stand \$1.7 million in punitives, though the compensatory damages amounted to only \$5,000.

Meanwhile, members of the plaintiffs bar argue that *State Farm* doesn't provide the silver bullet that defense lawyers say it does against humongous punitive damages, let alone tell state courts how to instruct their jurors. Plaintiffs lawyers doubt the justices are terribly eager to poke their noses any further into state affairs.

"I think they still have enormous respect for the right of the states to run their court systems as they see fit," says Robert S. Peck, president of the Center for Constitutional Litigation in Washington, D.C.

The center is a for-profit law firm spun off in 2001 from the legal affairs department at the Association of Trial Lawyers of America to challenge the constitutionality of tort reform efforts. The center counts among its clients the plaintiff in a Kentucky case ordered reconsidered after *State Farm*. Jury instructions could play a crucial role in that outcome.

Plaintiffs lawyers see *State Farm* merely as an amplification of the substantive due process limits first drawn in the predecessor case of *BMW of North America Inc. v. Gore*. That ruling struck down \$2 million in punitive damages to an Alabama doctor who discovered his new luxury sports car had been clandestinely repainted to hide scratches. 517 U.S. 559 (1996).

They note that the *State Farm* court mentioned jury instructions only twice, and that the issue was not before the court. Thus, they say, both remarks amount to nothing more than dicta.

To be certain, *Gore* and *State Farm* are landmark decisions because the Supreme Court for the first time used a constitutional yardstick to strike down state punitive damage awards as excessive. But how far *State Farm* goes remains fiercely disputed.

"The two references in the *State Farm* decision to jury instructions are not admonitions to the state courts to change anything," says Miami plaintiffs lawyer Larry S. Stewart, a former ATLA president and a member of the committee that drafts Florida's standard jury instructions. The committee last year took no action on a proposal to revise the state's punitive instruction to reflect the outcome in *State Farm*. "The committee ultimately will wait to see what the Florida courts do, and that could take years," Stewart predicts.

GORE'S GUIDEPOSTS

In last year's decision, the U.S. Supreme Court took three guideposts erected in *Gore* to gauge the constitutionality of punitive damages and applied them to the facts presented by *State Farm*, a bad-faith insurance case that yielded a \$1 million compensatory judgment and \$145 million in punitive damages.

Curtis Campbell's case against State Farm arose out of the company's refusal to settle a car accident claim against him, then threatening to stick him with a \$185,000 judgment the victims won against Campbell in Utah state court. Though State Farm eventually coughed up the money, Campbell sued the company and won the punitive damages for bad faith, fraud and intentional infliction of emotional distress.

"This case is neither close nor difficult," Justice Anthony M. Kennedy wrote for the six-member majority. He weighed Campbell's claim against the three *Gore* guideposts:

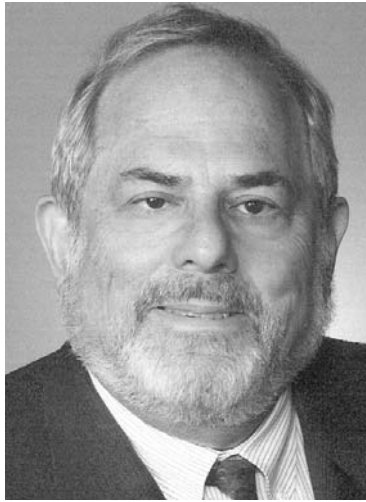
The degree of reprehensibility of the defendant's conduct. Factors to be considered include whether the harm was physical or economic; whether the defendant recklessly disregarded the health and safety of others; whether the victim was financially vulnerable; whether the conduct was repeated or an isolated incident; and whether the harm resulted from malice, trickery or deceit, or was merely accidental.

The disparity between the actual or potential injury and the punitive damages. Here the court suggested that few awards with punitive-to-compensatory ratios exceeding single digits would satisfy due process. The court cautioned, however, that rare cases might arise where the wrong is so egregious that it demands a higher ratio.

The differences between punitives and civil penalties authorized or imposed in comparable cases. Plaintiffs and defense lawyers agree that juries probably can't employ this factor because it requires a legal determination by the trial court.

In wiping out the \$145 million in punitives, Kennedy noted that *State Farm* hadn't physically injured Campbell and caused him only minor economic damage because it did pay the claim. Kennedy suggested that Campbell's punitive award should be at or near the \$1 million he received in compensatory damages.

Members of the defense bar were especially encouraged by the court's condemnation of evidence of other misconduct by State Farm outside Utah that bore little or no resemblance to Campbell's situation. Plaintiffs lawyers discount the evidence admitted against State Farm as extreme and maintain such testimony should continue to come in if it in fact does involve similar conduct in comparable scenarios. (On remand, the Utah Supreme Court on April 23 rejected as dicta Kennedy's suggested \$1 million in punitive damages and instead set the new amount at \$9 million to cover emo-



Andrew Frey says juries need a guide.

tional distress caused by the company, which the state justices said warranted “condemnation in the upper single-digit ratio rather than the 1-to-1 ratio.” No. 981564.)

Defense lawyers also insist that *State Farm* bolts the door on a defendant’s wealth as a factor in setting punitives, though the court hinted more narrowly that wealth by itself simply wouldn’t rescue an award determined unconstitutional in other respects. Indeed, Judge Richard A. Posner of the 7th U.S. Circuit Court of Appeals in Chicago concluded in affirming the bedbug result that the motel owner’s \$1.6 billion net worth became relevant because it enabled the company to mount an aggressive defense designed to discourage others from suing.

“It is difficult to otherwise explain the great stubbornness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included,” Posner wrote. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (2003).

But while punitive damages aren’t supposed to be arbitrary, the way jurors tabulate them remains largely mysterious. Posner wrote that it probably was no coincidence that the bedbug award totaled \$191,000 per plaintiff in punitive and compensatory damages — \$1,000 for each of the motel’s 191 rooms. The plaintiffs didn’t ask jurors for a specific amount.

“But as there are no punitive damages guidelines corresponding to federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded, whether by a judge or by a jury, will be arbitrary,” Posner wrote.

Though Posner is widely respected as a leader in the conservative school of thought on law and economics emanating from the University of Chicago, defense lawyers part company with him in the bedbug case.

Instead, they’re more likely to embrace the down-to-earth view of dissenting Kentucky Supreme Court Justice William Cooper in condemning a \$20 million punitive award and the jury instructions that went with it. The damages went to the estate of Tommy Smith, a miner killed in 1993 near Mud Lick in eastern Kentucky coal country when the Ford pickup he was unloading slipped into reverse and crushed him. The 2002 decision, under reconsideration after *State Farm*, has become another battleground in the jury-instruction war.

“In its haste to place its imprimatur on this outrageous verdict by a Clay County runaway jury and, presumably, to redistribute the wealth of an out-of-state corporation with the requisite deep pockets to stimulate the economy of eastern Kentucky, the majority opinion ignores the facts of this case, our own longstanding precedents and the due process clause of the 14th Amendment,” Cooper complained. *Sand Hill Energy Inc. v. Ford Motor Co.*, 83 S.W.3d 483.

Plaintiffs and defense lawyers place the “bare bones” Kentucky instructions at issue on the foggiest end of the vagueness scale in

terms of the lack of direction they give jurors. Still, defense lawyers consider them symptomatic of a larger problem, which may explain why the revived case has attracted national law firms and amici, including the Center for Constitutional Litigation and the U.S. Chamber of Commerce.

“There probably are more states that have inadequate instructions than have adequate ones,” Tager says. As co-leader of Mayer, Brown, Rowe & Maw’s punitive damages practice group, Tager filed the Chamber’s amicus brief in *Sand Hill*. The group also has been involved in all of the Supreme Court’s punitive damages cases of the last decade, including *Gore* and *State Farm*, either directly representing defendants or filing amicus briefs for business interests.

From public policy and constitutional standpoints, defense lawyers commonly draw parallels to criminal law in their arguments for more detailed punitive damages instructions on the civil side. They point out that statutes and sentencing guidelines confine courts in punishing criminals. Though about two dozen states impose varying caps on punitives, jurors in others often don’t encounter rigid restraints.

Tort defense lawyers especially like to point to capital cases, where jurors deliberate death sentences after receiving elaborate instructions that must survive constitutional scrutiny. Civil lawyers say jury decisions that could bankrupt also merit such detailed guidance.

Exactly how detailed is another question. Tager’s partner, Andrew L. Frey of Mayer Brown’s New York City office, has proposed intricate model punitive damages instructions that closely track *Gore* and *State Farm*. They appeared in the Summer 2003 issue of *Litigation*, published by the ABA section of the same name. Among the highlights:

Defendant’s conduct. The instruction would tell jurors they can impose punitive damages only for willful and wanton misconduct and that liability alone won’t support punitives. Unlike many pattern instructions, Frey’s version goes on to say the conduct must be deliberate and intended to do either serious harm or display a “conscious, callous and highly unreasonable indifference to the high probability” of such harm.

Purposes of punitive damages. Jurors would be told that punitives “are not a personal right of the plaintiff but rather are imposed to advance the goals of just punishment and deterrence.” They are to presume that the plaintiff already has been made whole by compensatory damages.

Punishment limited to plaintiff’s injuries alone. The instruction would be given when evidence is admitted showing that the defendant also harmed others who were not parties to the case.

Magnitude of harm measured against compensatory damages. Courts generally tell jurors only that punitive awards must be reasonably related to compensatory damages, which Frey says is inadequate. He concedes, however, that the law isn’t developed enough to allow

a more concrete admonition. Still, in cases where trial judges can determine the appropriate relationship, Frey would permit them to restrict jurors by imposing a ratio, such as the 1:1 limit suggested in *State Farm*.

Defendant's wealth. Jurors would only be able to use the defendant's financial condition to ensure that their award doesn't exceed the defendant's ability to pay. The instruction would bar them from increasing punitives just because the defendant is wealthy. While many states tell jurors that punitives aren't supposed to bankrupt a defendant, they also without explanation allow jurors to use wealth as a factor in their decision.

"Many courts continue to take the position that none of these things should be before the jury – that this is a matter for appellate review, which to me is crazy," Frey says. "It's significant because jurors are at sea as to what to do. They don't know whether it's thousands, millions or billions that they're supposed to be giving."

SORT IT OUT ON APPEAL?

Plaintiffs lawyers say the Supreme Court already had taken a different path before *State Farm* and urged de novo appellate inspection as the best way to overcome vague instructions that result in excessive awards. They say nothing in *State Farm* changes that.

"Not only has the Supreme Court not called for jury instructions, they've gone in a completely different direction," says Miami plaintiffs lawyer Stewart. "You've got to really put blinders on to a lot of other things the Supreme Court has said. Those guideposts are not jury instructions."

And though the court said in a 1991 decision that jurors don't have unlimited discretion in fixing punitive damages, the justices in the same case left unmolested Alabama instructions similar to those that defense lawyers challenge today. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1.

The plaintiffs bar really doesn't like proposals to give instructions on harm to nonparties at the end of the case. Often called similar-fact evidence, jurors can use it for limited purposes to find liability. At the time the evidence is admitted, courts commonly warn jurors against using it for punishment. Defense lawyers contend, however, that a second instruction just before jurors deliberate would go far towards blunting plaintiff closing arguments that try to universalize cases by leaving panels with pleas to "send a message" and similar exhortations.

Questions about similar-fact evidence and the defendant's financial condition are playing out in Oregon, where cigarette-maker Philip Morris Inc. is appealing a pair of verdicts won by the families of smokers killed by lung cancer.

On appeal, Philip Morris is challenging virtually every single line of Oregon's punitive instructions. Though punitives were rare

in Oregon before the smoker cases, state courts consistently had held that a defendant's wealth and harm to others are pertinent.

In Philip Morris' case, the Oregon Court of Appeals so far has been less than accommodating and has reaffirmed both criteria. The court in 2002 reinstated \$79.5 million in punitive damages in the death of Jesse Williams.

First, the court rejected Philip Morris' main beef that the trial judge failed to tell jurors that the punitives should reasonably relate to Jesse Williams' harm, because the company's proposed instruction also would have forbidden jurors from considering misconduct toward possible future plaintiffs. Explaining the significance of wealth, the court said "serious punishment for one defendant could only be a minor inconvenience for another." The court went on to figure that Philip Morris made \$30.7 million a week, so the \$79.5 million in punitives equaled about two-and-a-half weeks' profit.

Williams v. Philip Morris Inc., 48 P.3d 824.

The U.S. Supreme Court shipped *Williams* back to Oregon after *State Farm*, giving Philip Morris another crack at it along with a \$150 million award the family of smoker Michelle Schwarz won in

2002. Portland appeals lawyer Maureen Leonard says Oregon's instructions are solidly entrenched in constitutional ground, including those dealing with wealth and injury to others.

"All that was blessed in *Haslip* and has been part of our instructions ever since," says Leonard, the lead plaintiffs lawyer in the Schwarz appeal.

"This is just churning around and trying to land on something," Leonard says of the tobacco company's massive briefs that also attempt to dissect both trials gavel to gavel. "None of this is going to stick, because our courts aren't going to change until the Supreme Court directly tells us to."

Some companies coming out of the post-*State Farm* round with reduced awards are cutting their potential future losses by dropping their appeals and settling for the lesser amounts. That's what Ford did in *Romo*, the Bronco rollover case. Though it could wind up betting the company, Philip Morris nevertheless wants to start over with clean slates and new trials in Oregon and elsewhere.

"From our perspective as people who get sued, all we want and all we deserve is to know what the rules are and see them applied consistently," says Philip Morris in-house lawyer William S. Ohlemeyer. "Let's get it right the first time. We didn't get a fair trial in these cases."

But even the staunchest advocates for new punitive instructions say they can't promise different outcomes.

Juries never know whether they should give awards of thousands or millions.