Punitive Damages and the Supreme Court: A Tragedy in Five Acts

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Tort Law and Private Ordering

First, I want to situate Tort law in a way that allows us to understand punitive damages and to imagine the role they should play in tort law. Political legal philosophers conventionally distinguish between aspects of law that regulate *private ordering* and aspects of law that regulate *public ordering*.[1]

Private ordering describes the juridical relations between citizens: so Property Law, Contracts, Torts, and Family Law essentially regulate this ordering. These are the rules we need to self-determine, in a way, to live our lives as free and responsible human beings.

Public Ordering describes the juridical relations between a citizen and the State. Criminal law, administrative law, tax law, and welfare law are all part of public ordering. Public ordering is the *only* kind of legal order in totalitarian societies: there's no such thing as *property*, as we know it – rather, there's just a grant from the state, returnable to the state; there's no *contract* between consenting adults, because that would allow some people to advance more than others; and there's no *tort* law – there's no such thing as a private wrong, only the state can be wronged, and if you do something wrong it's criminal law that takes over.

So tort law is an essential component of freedom, seen this way. It's regulation of non-contractual behavior among humans, wherein citizens make good the harm they have wrongfully caused others. All this takes place without the intervention of prisons and the police, which are components of public ordering.

When property becomes a loan from the state, when all contracts are with the state only (contract law disappearing to be replaced by administrative law), when tort law (horizontal) gives way to criminal law (vertical), then private ordering will have been dissolved, defiled, and only public ordering remains. A monopoly of public ordering is simply incompatible with a society of free and responsible individuals.

Introduction to Tort damages in general, punitive damages in particular

The foundation and best explanation of tort law is *corrective justice*. When a man wrongs someone, he must make that wrong good. He must correct the private injustice.

Without a wrong there is no corrective justice requirement. An efficient businessman who, through acceptable competitive techniques, out-competes his competitor owes that competitor nothing as a matter of corrective justice, even though the competitor has suffered a loss. It is not the causing of a loss, but the *wrongful* causing of a loss that creates the corrective justice requirement of compensation.

Wrongful behavior *without damages* likewise creates no corrective justice requirement. Driving home while drunk is negligent, and exposes others on the road to undue danger. Nonetheless, if a drunk driver makes it home without hitting anyone, he has no tort liability toward anyone. Note that he may have committed a *crime* – but that is a matter for public ordering, with all the protections provided when the power of the state is involved (constitutional protection against self-incrimination, double jeopardy rule, strong presumption of innocence). The drunk who makes it home safe owes compensation to no one, because his conduct, though wrongful, did not harm anyone.

It is the precise *conjunction of wrongfulness and harm caused thereby* that creates the tort obligation. Typically, that tort obligation consists of compensation, of righting the wrong and making good the loss - no more, no less.

Compensation, moreover, has to be full. This is a definitional requirement of corrective justice, and a fundamental proposition of the common law of tort.

Thus a man who negligently burns down a house worth $50,000 is liable in tort to pay $50,000 to make the home-owner whole. If the house and its contents were worth $1 million dollars, then he is liable in tort to pay $1 million to make the home-owner whole. This is not because tort favors the rich, but because tort *equally respects* poor and rich. All must be returned to their former state - that far but no further - when they are wrongfully harmed.

Punitive damages do not fit the scheme of tort law because, by definition, punitive damages are overcompensatory.

Nevertheless, in one superficial and one real form, punitive damages were present at the conception of tort law. Both of these forms can be usefully summarized here:

Superficial - In medieval days criminal and tort trials were held at the same time. For what we today call *intentional torts*, such as battery and trespass, there was at the same time a crime committed and a tort suffered, and both of these were adjudicated in the same judicial proceeding. So, a battery may have caused $10 in harm, payable to the plaintiff, but in the days before police forces and criminal tribunals the plaintiff could also pursue the equivalent of a criminal fine. He was in a sense the private attorney general, prosecuting the criminal case, and the fine went into his coffers.

Today we have our own attorneys general and county prosecutors, and fines are collected solely in a criminal setting. Those fines are subject to cherished American constitutional protections such as:

- Double jeopardy prohibition of more than one fine for the same offense;
- 5th amendment protection against self-incrimination;
- 8th amendment protection against excessive fines.

A tort trial offers none of those protections (compulsory discovery is self-incrimination, one tort committed against many people leads to many lawsuits, etc.).

So in this superficial form, punitive damages are an anachronism with no place in tort today, having been replaced by public ordering via criminal law with all its apparatus.

Concrete - Punitives were granted as symbolic damages when there was deliberate wrongdoing but *de minimis* damages.

If A slandered B, but B could not prove that she had lost business because of the slander, A might be condemned to pay B $1.

If A deliberately and flagrantly trespassed on B's land, but didn't trample any of B's crops, B could still sue A for nominal, symbolic damages.

The damages in this case were symbolic – they recognized that one party was in the right, had been wronged by the other party, and won the suit.

Suits like this might be filed both to vindicate one's self and one's rights, and because a 'loser-pays rule' (in effect outside America) means that the tortfeasor would have to pay his victim's lawyer's costs. It would not cost much to vindicate one's rights in this way.

Thus punitives classically were either disguised criminal fines (before the state criminal apparatus was organized), or small symbolic sums meant to vindicate inconsequential violations of a plaintiff's rights. Since criminal fines require constitutional protections, all that should logically remain are the small symbolic vindication sums.

The survival of large punitive awards is a product of confusion between private and public ordering. That is why four states' supreme courts (Louisiana, Nebraska, Washington and Massachusetts) have declared that their common law of tort does not permit punitive damages today.[2] A fifth state (New Hampshire) has abolished punitives by statute.[3] Any state in the union could abolish punitive damages if it chose to, without any federal constitutional impediment.

The Supreme Court and Punitive Damages: A Play in Five Parts (so far…)

States vary tremendously in their rules about punitive damages. A handful have no punitives at all. Quite a few other states, like Virginia, allow punitive damages for intentional torts and gross negligence, but have a statutory cap on punitive damages.[4] Other states have other kinds of caps, some of which may be unconstitutional.[5] Finally, many states have no limitation on punitives at all. Yet in all states punitive damages were not really a problem, in that they were mostly symbolic until the great torts explosion of the 1980s.

Up to 1976, the highest punitive damages award in the entire country was $250,000, a sobering observation in light of recent billion-dollar judgments.

Starting in the late 1980s, some enormous punitive awards started coming down the pike, amounts unheard of ever before, and defendants started for the first time claiming that their constitutional rights had been abridged by these awards. After all, these awards held them liable for amounts that did not correspond to the harm they had wrongfully caused; they could be held liable for these penalties over and over again for the same action if multiple persons sued them; they had to produce self-incriminating evidence in the form of discovery; the burden of proof was "preponderance of the evidence," not "beyond a reasonable doubt;" and there seemed to be no limit on the amount that juries could assess as a punitive award. Of course, we can imagine a criminal law in which violations are punishable by a fine the amount of which will be determined by the King, at his total discretion. If such a criminal law might lead us to dump tea in the nearest harbor, these developments are certainly shocking and contrary to the basic nature of tort law.

Losing defendants started taking their suits to the highest constitutional court in the land. Obviously, every time one of these challenges happened, by definition the complaining party was usually a pretty bad guy – not an "attractive client," as lawyers say…

Anyway, our Supreme Court play begins in 1989, with the case of *Browning-Ferris Industries*.[6]

1. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.* (Vermont 1989)

Browning-Ferris Industries (BFI) was a large company that operated a nationwide commercial waste-collection and disposal business. In 1973 BFI entered the Burlington, Vermont area trash-collection market, and in 1976 began to offer roll-off collection services, which had not previously been available in the Burlington area. Until 1980 BFI was the sole provider of such services in the Burlington area. That year respondent Joseph Kelley, who, since 1973, had been BFI's local district manager, went into business for himself, starting Kelco Disposal, Inc. Within a year Kelco obtained nearly 40% of the Burlington roll-off market. During 1982 BFI reacted to this new competition by attempting to drive Kelco out of business, first by offering to buy Kelco Disposal and then, when Kelley refused to sell his company, by cutting BFI's prices by 40% or more on new business for approximately six months. The orders given to the Burlington BFI office by its regional vice president were clear: one memo read, "Put [Kelco] out of business....if it mean[s] giv[ing] the [service] away, give it away."[7]

Of course in most American jurisdictions, in England, and in economic theory, price competition is not a tort. So-called "predatory pricing" cannot succeed in the long run, as a matter of economic theory, and it didn't work in Burlington, either. BFI kept losing market share, as Kelco matched its prices, and BFI ended up throwing in the towel when Kelco increased its market share to 56%. BFI left the Vermont market. Then to turn the knife in the wound Kelco sued BFI for the tort of unfair competition. A Vermont jury awarded Kelco $51,000 in lost profits from BFI.

Normally this would merely be a legally questionable and economically silly decision, of which there are many. What distinguished it, however, was that Kelco's attorney urged the jury to return an award of punitive damages, asking the jurors to "*deliver a message to Houston* [BFI's headquarters]."[8] Kelco also stressed BFI's world revenues of $1.3 billion in the previous year, noting that this figure broke down to $25 million a week. BFI urged that punitive damages were not appropriate at all (of course, it believed *no* damages, even compensatory, were due), but after a few hours deliberating the Vermont jury socked it to this Texas company that had already left the state — $6 million in punitive damages.[9]

BFI, shell-shocked, appealed this decision to the Vermont Supreme Court, and from there to the United States Supreme Court. At every level BFI claimed that this was an absurd penalty, an excessive fine for the degree of wrongdoing (which it claimed was zero), and that therefore the award was unconstitutionally imposed in violation of its Eighth Amendment right to be free of excessive fines. The Supreme Court, in an 8-1 decision, cavalierly rejected BFI's claim. Because the $6 million went to Mr. Kelley and not to the State of Vermont, it was not a fine, the majority ruled, and since it was not a fine it could not be an *excessive* fine.

Since BFI had not made a timely Fourteenth Amendment claim, the Supreme Court expressly reserved ruling on the due process argument. In fact, Justices Brennan and Marshall hinted strongly that they thought this kind of punitive award *did* violate due process. But these Justices would soon leave the court.

Justice O'Connor's dissent in this case detailed the history of fines, and showed how substantial punitive damages had in fact always been treated as fines.

The plaintiff nevertheless prevailed. Price competition cost BFI $6 million dollars, over and above any loss that it had caused, even though BFI was convicted of no offense and never had notice that its behavior would subject it to any fine.

Subsequent to the BFI decision, several states modified their statutes to provide that a certain percentage of punitive damages (up to 60% in some instances) must henceforth be payable to the state government, not to the plaintiffs.[9.1] This is how Illinois just got a share of a $3 billion punitive award against Philip Morris in a recent class action tobacco fiasco decision from Madison County.

This makes the state an explicit accomplice in the increasing acceleration of punitive awards, and puts the lie to the claim that punitives are not fines.

So, act 1 of our play ends with a crushing defeat for those who, like me, claimed that tort law prohibits large punitive awards, since they cross the line to become public ordering and are therefore excessive fines.

But the BFI case did hold out the hope that punitives might violate due process of Law, because they are not accompanied by the procedural guarantees of public ordering.

This set the stage for act 2:

2. *Pacific Mutual Life Ins. Co. v. Haslip* (Alabama 1991)[10]

Lemmie Ruffin (I am *not* making that up, Lemmie Ruffin was his name,) was an insurance agent. He worked for a lot of insurance companies, including Pacific Mutual Life.

As a Pacific Mutual agent, Lemmie sold "major medical" health insurance policies to a group of female civic employees in Alabama. They paid monthly premiums to Lemmie, and he was to forward these premiums to the company. The employees thought they had health insurance. In reality, Lemmie stopped sending money to Pacific Mutual Life, and kept the money for himself. So the insurance company gave Lemmie warning letters to give to the women (to pay their overdue premiums or have their policies cancelled) – of course Lemmie never transmitted those letters, he just kept deceiving the insurance company and the employees. Finally the women's policies lapsed, and when one got very sick, she found she was not covered anymore. Needless to say, she sued Pacific Mutual Insurance for its "bad faith."

An Alabama jury found bad faith and inadequate supervision of Lemmie by the (out-of-state…) insurance company. The jury held that Pacific Mutual Life had to pay Ms. Haslip $230,000 to cover her hospital bills. But Ms. Haslip was not yet done with Pacific Mutual – she asked for punitive damages. Alabama's punitive damages scheme gave a jury virtually complete discretion: it merely required a jury to make two distinct decisions: (1) whether or not to impose punitive damages against the defendant, and (2) if so, in what amount. It provided no standard for decision (1), and no method of calculation for decision (2). On the threshold question of whether to impose punitive damages, the trial court instructed the jury as follows: "Imposition of punitive damages is *entirely discretionary* with the jury, that means you don't have to award it unless this jury *feels* that you should do so."[11] There was absolutely no law there.

The jury condemned Pacific Mutual to $1 million in punitives.[12] The company appealed all the way to the US Supreme Court, on the grounds that it was deprived of due process by the standardless discretion invested in the hometown jury, and by the huge amount of punitives when clearly the company had had no malice whatsoever – it was just as defrauded by Lemmie Ruffin as the plaintiff had been.

Pacific Mutual lost its appeal, 7-1. Again only Justice O'Connor dissented. The due process claim that everyone had thought so promising after the BFI case flubbed, as the two Justices who had espoused it had left the court. The vague Alabama jury instruction was deemed precise enough that the jury would have legal guidance about what to do.[13] The punitive award of 4 times compensatory damages was not so exorbitant as to violate due process standards, said the majority.[14] They did say it was "close to the line," however.[15]

Note that, to the average person, Pacific Mutual did nothing terribly wrong. It had no knowledge of the actions of Ruffin, who was not even its legal employee in any traditional sense. Its tort was to trust Lemmie.

Defendants were reeling after this case. Local juries seemed to have unfettered discretion to whack out-of-state corporations for the most minor transgression, though it was felt that the Supreme Court would henceforth at least require some legal standard for the calculation of punitives.

But the darkest hour had not yet been reached. It would come, in 1993. That is act 3.

3. *TXO Production Corp. v. Alliance Resources Corp*. (West Virginia,1993)[16]

BFI and *Haslip* pale before *TXO Production v. Alliance Resources*, out of West Virginia.

TXO and Alliance were engaged in a complex series of negotiations so that TXO could get oil and gas rights to land owned by Alliance. They were bickering back and forth over what royalty rate would be paid to Alliance. During these negotiations, a third party claimed that it owned the rights to Alliance's land by virtue of an obscure deed. TXO expressed concern that any title it might get to the oil and gas rights was vulnerable; because of this it asked for a reduction in its royalty rate to cover itself from possible claims by this third party. After more complex and ambiguous declarations on both sides, TXO claimed that a deal had been reached, but Alliance denied it. TXO sought a declaratory judgment from the West Virginia Circuit Court that it had, through all these negotiations, acquired the resource rights over the land. Alliance defended against this claim, and countersued for what Alliance called "slander of title," (an old English tort that had never once been recognized in West Virginia's entire history), asserting that TXO was falsely diminishing public belief that Alliance had full property rights. At bottom, this suit was little more than an episode in rather hardball contractual dispute about royalty rates.

That is, until the West Virginia courts got through with it. The trial judge rejected TXO's claim that a deal had been reached. The judge let a jury decide whether Alliance's title had been slandered. The jury accepted Alliance's slander of title suit, and condemned TXO to pay $19,000 to Alliance for damages, which represented its lawyer's costs in defending against the declaratory suit by TXO. Alliance had no other losses.[17]

So far, this sounds unexceptional – the case was a close call in a hardball dispute, TXO lost, and the equivalent of a loser-pays rule was in effect. I have not mentioned that Alliance was a local West Virginia company, while TXO was a fully-owned subsidiary of U.S. Steel. That explains, perhaps, why the jury also condemned TXO to *ten million dollars* in punitive damages, or 526 times the compensatory award.[18]

TXO appealed, and had great confidence in the appeal. In *Haslip* the punitives were "only" 4 times punitives and the court said that was "close to the line."[19] Moreover, West Virginia's instructions to the jury on punitives were so totally devoid of standards as to make a mockery of the Supreme Court's command in *Haslip* to guide the jury with some precision. Here was the standard as stated by the West Virginia Supreme Court, when it heard the appeal: we know we are now compelled by the United States Supreme Court to set punitive damages standards if our decision is to pass constitutional scrutiny, so we hereby distinguish between the "really mean" defendant and the "really stupid" defendant.[20] For the really *stupid* defendant, punitives can be 10 times compensatories. For the really *mean* defendant, punitives can be 500 times compensatories. Since this defendant "failed to conduct [itself] as a gentleman", the "really mean" standard applies, and 526 times punitives is close enough to 500, so we uphold the award.[21]

The Supreme Court affirmed the West Virginia Supreme Court, 6-3, saying that its standard passed constitutional scrutiny. Justices White and Souter joined Justice O'Connor in dissent. On the one hand, O'Connor was no longer alone in thinking that there were *some* punitive damage awards that could not pass constitutional muster. On the other hand, this case looked like the mother of all punitive awards, and if six Justices found *it* constitutional, one wondered what could possibly offend due process.

This was the darkest hour. It was three years before dawn broke, in Act 4.

4. *BMW of North America, Inc. v. Gore* (Alabama 1996)[22]

Mr. Gore purchased a new BMW from an authorized Alabama dealer. He loved his car. But when he took it in for service, he was informed by one of the mechanics that a wing of the car had been repainted. It turned out the car had been scratched during boat transport from Germany to the United States. BMW had followed a nationwide policy of repairing predelivery paint chips and scratches to new cars, so long as the cost of repair did not exceed 3% of the car's suggested retail price. If repairs cost over 3% of the value of the car, it was not sent to the dealer, but was removed from new vehicle inventory and given to the sales team to use as a demonstrator, then sold at auction. This particular paint job cost *way* under the 3% limit, and it was also under the Alabama consumer protection limit, as that law had always been understood.[23] So BMW shipped the car to its Alabama dealer, who sold it new.

Gore brought this suit for compensatory and punitive damages against BMW, alleging, *inter alia*, that his car had a lower resale value because of the repainted part; he considered himself a victim of the tort of fraud. Again, local plaintiff, out-of-state defendant. The jury returned a verdict finding BMW liable for compensatory damages of $4,000, the alleged difference in resale value between a "concourse" car and one that had a repainted part. The jury also assessed $4 million in punitive damages, on the grounds that BMW of North America had likely repainted 1000 cars over the years.[24] Alabama appellate courts reduced the punitive award to $2 million, which they decided was not "grossly excessive" under *TXO Production Corp. v. Alliance Resources* because that amount constituted 500 times compensatories.[25]

Finally, a bare majority of the court had had enough. By a 5-4 margin (Stevens, O'Connor, Souter, Breyer, and Kennedy) the court held that a combination of the lack of real wrongdoing by BMW, the lack of notice that any punitive award was possible or even that its marketing was illegal in Alabama, the consideration of non-Alabama touch-ups which were surely not violations of Alabama law, and the huge discrepancy between compensatories and punitives all combined to make this award unconstitutional. The court didn't give any firm boundaries as to what *would* be a maximum limit, but said *this case* was beyond that limit.

Three dissenters, Chief Justice Rehnquist, Justices Thomas and Ginsburg, essentially held that the federal constitution did not place any limits on states in determining punitives. Justice Scalia denied that due process could ever affect damages, in federal or state court.

There were some procedural decisions following *BMW v. Gore*, but substantively the Supremes did not revisit the issue of punitive damages until this year, when they decided act 5, perhaps the most interesting case of them all.

5. *State Farm Insurance v. Campbell* (Utah 2003)[26]

In 1981, Curtis Campbell was driving with his wife in Cache County, Utah. He decided to pass, all at once, *six* vans traveling ahead of him on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction, at a speed in excess of the speed limit. Campbell did not have enough space to pass all six vans. He was headed right toward Ospital. To avoid a head-on collision with Campbell, Ospital swerved onto the shoulder, lost control of his automobile which came back onto the road, and collided with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed; in fact, they never even collided with anyone – they got back in their lane safe and sound just in the nick of time thanks to Ospital's fatal decision to leave the road.

In the ensuing tort suits against Campbell by Ospital's estate (Ospital) and Slusher, Campbell insisted he was not at fault since he never collided with anyone and Ospital was speeding. Campbell's insurance company, State Farm Mutual Automobile Insurance Company (State Farm), decided to contest liability and declined offers by Slusher and Ospital to settle the claims for the policy coverage limit of $50,000 (i.e., $25,000 per plaintiff). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests."[27] To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $185,849, way more than the amount of Campbell's coverage.[28]

At first State Farm refused to cover the $135,849 in excess liability, because Campbell had purchased only $50,000 of coverage. State Farm's lawyer told the Campbells, "You may want to put for sale signs on your property to get things moving."[29] Nor was State Farm willing to post the required bond to allow Campbell to appeal the judgment against him. Campbell thus hired his own lawyer to appeal the verdict. While his appeal was pending, in late 1984, Slusher and Ospital contacted him. The three reached an agreement whereby Slusher and Ospital agreed not to execute their judgment against the Campbells' own property. In exchange the Campbells agreed to pursue a bad faith tort suit against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning the bad faith suit. No settlement between Campbell and State Farm could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict Campbell obtained against State Farm.[30]

In 1989, the Utah Supreme Court denied Campbell's appeal. State Farm then decided to pay the entire $185 thousand. So there were no pecuniary damages for the Campbells.

The Campbells nonetheless filed (as they had promised the Slushers and the Ospitals they would) a complaint against State Farm alleging the torts of fraud and intentional infliction of emotional distress. The trial court initially granted State Farm's motion to dismiss that suit because State Farm for lack of damages, but that ruling was reversed on appeal. Now State Farm had to defend itself. In the first phase the jury determined that State Farm's decision not to settle for $50,000 was unreasonable. The second phase of the trial would determine damages. Remember that there were NO pecuniary damages (because State Farm had paid all the excess award).[31] There *was* arguably emotional distress during the short period when the Campbells thought they were going to lose their home. Emotional distress, however, is not usually recoverable unless it was intentionally inflicted, and no one can seriously claim that State Farm is a sadistic company bent on inflicting emotional distress on its clientele. State Farm argued during phase II of the trial that its decision to take the case to trial was, in retrospect, an 'honest mistake,' and that it certainly did not warrant punitive damages. The Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims.[32]

Just before the second phase of the trial the Supreme Court decided *BMW of North America, Inc. v. Gore*. Based on that decision, State Farm moved for the exclusion of evidence of all out-of-state conduct. The trial court denied State Farm's motion. The jury then, amazingly, found $2.6 *million* dollars in emotional distress for the Campbells, who (to repeat) had not lost one cent. Likely the jury knew that $2,340,000 of this amount was going to the Slusher and Ospital families, and it wanted to give $260,000 in emotional distress damages to the Campbells – but this would be totally illegal if done explicitly, because the other two families had settled their suit and had no cause of action against State Farm. In addition the jury awarded $*145 million* in punitives, to punish State Farm for its aggressive practices throughout the country. The trial court reduced the compensatories to $1 million and the punitives to "only" $25 million, under the *TXO* "really mean" standard. The Utah Supreme Court then reinstated the original $145 million award. State Farm appealed to the Supreme Court.[33]

This time the decision was 6-3. Chief Justice Rehnquist abandoned his previous position and joined the majority, leaving Justices Scalia, Thomas, and Ginsburg alone in dissent.

The majority this time tried to provide an indication that certain trial court activity would no longer be tolerated:

- Don't ever again use legal out-of-state behavior to calculate punitive damages. Out-of-state behavior can be invoked to establish a pattern of bad faith or maliciousness, but in that case it has to be the same behavior as the behavior being impugned.[34]
- Don't ever give more than nine times compensatories as punitive damages, the court said, unless there is a "particularly egregious act that has resulted in only a small amount of economic damages."[35]
- Moreover, in cases like this one, where the compensatory damages adjudged by the jury are extremely generous, do not let punitives exceed compensatories.[36]

Joan Claybrook and Ralph Nader have claimed that *Campbell* is a victory for them. Why? Part of this is spin, but I think Claybrook and Nader are happy that the court has gone up from four times compensatories ("close to the line" in *Haslip*) to nine times compensatories. They are also glad that the court felt it could not touch the compensatories themselves. Surely, there is no way on earth that the Campbells, who cavalierly tried to pass six vehicles at once and drove off into the sunset leaving two devastated families in their wake, had $1 million in pain and suffering inflicted on them because *State Farm* aggressively came to their defense. What is to stop the next jury that wants to sock it to an out-of-state corporation from finding $*50 million* in so-called compensatory pain and suffering?

That, I think, is the next battleground – whether the United States Supreme Court can intervene regarding non-pecuniary compensatory damages. Claybrook, Nader, and the plaintiffs' bar have a base of three Justices to work with here – if they can get back the Chief and one more Justice they are home free. It is quite conceivable that they could pick up two more Justices if the next jury decides to call its punitive award "compensatory." That is why I am not sure *Campbell* is the death knell for runaway awards that much of the press believes it is.

Conclusion

I end where I began – by recalling the purpose of tort law, i.e., true compensation for wrongfully inflicted private losses.

As long as state judges allow juries to punish out-of-state corporate defendants to enrich individual local plaintiffs, tort law will be defiled. As long as that happens, in my opinion, the Supreme Court must continue to intervene. Whether it be by striking down punitive damages or by rejecting standardless "pain and suffering" awards, the Court will have to uphold the fact that private ordering is the domain of civil litigation, while public ordering requires a slew of constitutional protections. The 1989 *BFI* decision denying that punitives are fines is what, in my opinion, has prevented the Court from going down this logical and principled path. I do not think *BFI* is about to be reversed, and that is why I am not sanguine about the future of tort law.

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Footnotes

[1] *See generally* Michael Krauss, *Tort Law and Private Ordering*, 35 St. Louis U.L.J. 623 (1991).

[2] *See, e.g.*, *Int'l Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988); *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566 (Neb. 1989); *Dailey v. North Coast Life Ins. Co.*, 919 P.2d 589 (Wash. 1996); *Fleshner v. Technical Communications Corp.*, 575 N.E.2d 1107 (Mass. 1991).

[3] N.H. Rev. Stat. Ann. § 507:16 (1997).

[4] In Virginia's case, the cap is $350,000. Va. Code Ann. § 8.01-38.1 (Michie 2000).

[5] *See, e.g., Reynolds v Porter*, 760 P.2d 816 (Okla. 1988) [Held, state statute eliminating punitive damages and noneconomic damages recovery in medical malpractice cases violates state constitution.]

[6] 492 U.S. 257 (1989).

[7] *Id.* at 260-61.

[8] *Id.* at 261.

[9] Note the combination of individual, local plaintiff, local jurors, and *out-of-state* corporate defendant with few in-state employees. This turns out to be the common denominator of crazy punitive damages – let's bring some money in-state.

[9.1] Patrick White, *The Practical Effects of Split Recovery Statute and Their Validity as a Tool of Modern Day "Tort Reform".* 50

Drake L. Rev. 593 (2002)

[10] 499 U.S. 1 (1991).

[11] *Id.* at 6n.1

[12] *Id.*

[13] *See id.* at 19-20.

[14] *See id.* at 23-24. The punitives were "much in excess of the fine that could be imposed for insurance fraud" under Alabama criminal law. *Id.* at 23.

[15] *Id.*

[16] 509 U.S. 443 (1993).

[17] *See id.* at 451.

[18] This seemed "quite likely" to Justice O'Connor as well. *Id.* at 489 (O'Connor, J., dissenting).

[19] *Haslip*, 499 U.S. at 23.

[20] *TXO*, 509 U.S. at 452n.15.

[21] *See id.* at 473 (O'Connor, J., dissenting).

[22] 517 U.S. 559 (1996).

[23] *Id.* at 562-64. Specifically, the $601.37 cost of repainting was about 1.5% of the car's suggested retail price. *Id.* at 564.

[24] *Id.* at 564-65.

[25] *See id.* at 567.

[26] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).

[27] *Id.* at 1518.

[28] *Id.*

[29] *Id.*

[30] *Id.* By the way, I am not a Utah expert, but sale of a tort claim is illegal in most states. This was a sale of 90% of a tort suit – former adversaries, all Utah residents, were now in league against the out-of-state corporation.

[31] *Id.*

[32] *Id.* at 1518-19.

[33] *Id.* at 1519.

[34] *See id.* at 1522-23. Interestingly, this part of the *Campbell* ruling undoes much of the *Gore* case – BMW's legal painting of cars in other states, which the court had excluded, would possibly be probative now.

[35] *Id.* at 1524 (citation omitted). "Single-digit multipliers are more likely to comport with due process…than awards with ratios in the range of 500 to 1, or, in this case, of 145 to 1." *Id.* (citation omitted).

[36] *See id.*