

Uldaho Law

Digital Commons @ Uldaho Law

Articles

Faculty Works

2010

Fresh Look at Punitive Damages

Richard Henry Seamon

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#), and the [Legal Remedies Commons](#)

A FRESH LOOK AT PUNITIVE DAMAGES

Richard Seamon
University of Idaho
College of Law

Introduction

The Idaho Supreme Court's recent decision in *Weinstein v. Prudential Property & Casualty Insurance Co.* addresses a difficult, recurring question about punitive damages: When does the U.S. Constitution permit the jury to consider conduct by the defendant that has harmed people other than the plaintiff?¹ The U.S. Supreme Court has addressed that question in several decisions that are discussed in *Weinstein* and that warrant a fresh look in light of *Weinstein*.

This article identifies five situations in which a jury may, consistently with the U.S. Supreme Court precedent, consider the defendant's harmful conduct toward others when assessing punitive damages. The article also identifies an important issue related to the constitutionality of punitive damages that was addressed in *Weinstein* but has yet to be addressed by the U.S. Supreme Court.

U.S. Supreme Court cases

The U.S. Supreme Court has struck down state-court awards of punitive damages three times under the Due Process Clause of the Fourteenth Amendment. In all three cases, the Court held that the jury improperly considered the defendant's harmful conduct toward people other than the plaintiff.

In *BMW v. Gore*, Dr. Gore sued BMW for selling him a car, as new, without telling him that it had been repainted.² In state court, Gore won \$4000 in compensatory damages and \$2 million in punitive damages. The U.S. Supreme Court invalidated the punitive damages award. This was the first time the Court had ever found a punitive damages award unconstitutional³ excessive.³

The Court identified three "guideposts" for assessing the size of a punitive damages award: (1) the reprehensibility of the defendant's conduct; (2) the relationship between the actual or potential harm to the plaintiff and the punitive damages

...[T]he Court in *Philip Morris* said that harm to others can be considered in assessing the reprehensibility of the defendant's conduct toward the plaintiff...

awarded; and (3) a comparison of the punitive damages award to the civil penalties authorized in comparable cases.⁴ Under these guideposts, the \$2 million awarded to Dr. Gore was "grossly excessive."⁵

The Court also held that the jury improperly considered evidence that BMW had sold more than 900 repainted BMWs as new outside of Alabama.⁶ The Court emphasized that BMW's out-of-state conduct was not shown to be unlawful. The Court said, "[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States."⁷

The Court in *BMW v. Gore* did not completely bar consideration of the defendant's out-of-state conduct. The Court said that out-of-state conduct "may be relevant to the ... reprehensibility of the defendant's conduct."⁸ The Court explained:

Evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings [recognize] that a recidivist may be punished more severely than a first offender.⁹

The Court did not find BMW's out-of-state conduct relevant because BMW could reasonably have believed that its conduct was not illegal or tortious in other States.¹⁰

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court again invalidated a punitive damages award that was based partly on evidence of harm to people other than the plaintiff.¹¹ An insured sued State Farm for bad faith. The insured showed that State Farm's shoddy conduct toward the insured was consistent with company practices nationwide.¹² The insured recovered \$1 million in compensatory damages and \$145 million in punitive damages.

The U.S. Supreme Court held that the jury's consideration of State Farm's nationwide practices was improper for two reasons. First, it was not shown to be unlawful under the law of the other states, and its consideration was thus improper under *BMW v. Gore*.¹³ Second, the conduct was too different from State Farm's conduct toward the plaintiff. The Court said: "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."¹⁴ The Court explained, "Lawful out-of-state conduct may ... demonstrate[] the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."¹⁵

In *Philip Morris v. Williams*, a wife sued Philip Morris in Oregon state court for her husband's death from smoking Marlboros.¹⁶ At trial, plaintiff's lawyer told the jury to think about the other people in Oregon who had died and would die from smoking Marlboros. The plaintiff recovered \$500,000 in compensatory damages and \$32 million in punitive damages. The Court invalidated the punitive damages award, holding: "The Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."¹⁷

As in *BMW v. Gore* and *State Farm v. Campbell*, the Court in *Philip Morris* said that harm to others can be considered in assessing the reprehensibility of the defendant's conduct toward the plaintiff:

Evidence of actual harm to nonparties can help show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.¹⁸



Richard Seamon

The *Philip Morris* decision imposed a procedural limitation on using evidence of harm to nonparties. The Court held that States must “provide assurance” that juries are considering the evidence only to assess reprehensibility.¹⁹ This seems to mean that, when the plaintiff puts on evidence of harm to others to show reprehensibility, the defendant is entitled upon request to an instruction telling the jury that they cannot consider that evidence for purposes of punishing the defendant directly for harm to others.

Weinstein v. Prudential Property & Casualty Insurance Company

The Idaho Supreme Court applied the U.S. Supreme Court’s teaching on punitive damages in *Weinstein v. Prudential Property & Casualty Co.*²⁰ The court in that case upheld a jury verdict finding Prudential and the company that purchased it, Liberty Mutual, liable for bad faith in handling payments to its insureds under the Uninsured Motorist (“UM”) provision of their policy. The Court also upheld an award of \$210,000 in compensatory damages and \$1.89 million in punitive damages. Chief Justice Eismann wrote the majority opinion and Justice Warren Jones dissented. (The majority used “Liberty Mutual” to refer to both insurance companies, and this article does the same.)

The jury heard evidence that Liberty Mutual’s handling of the Weinstains’ claim under the UM provision accorded with company policy nationwide. Liberty Mutual’s policy was not to pay out a dime to an insured under the UM provision until the insured was ready to settle the entire claim. Before then, the company would not make payments even for undisputedly legitimate medical bills and even when -- as in the Weinstains’ case -- Liberty Mutual had established the liability of the uninsured driver.²¹

The Idaho Supreme Court rejected Liberty Mutual’s argument that the jury improperly considered the company’s nationwide policy. The Court held that the trial court properly instructed the jury, “You may not assess an amount of punitive damages against these defendants to punish them for injury they may have inflicted on others who are not party to this lawsuit.”²² The jury instruction and the Idaho Supreme Court’s approval of it are consistent with the U.S. Supreme Court’s decision in *Philip Morris*.

The jury in the *Weinstein* case also heard argument that its decision would affect the way Liberty Mutual and other insurance companies operated in Idaho in the future. The trial judge accordingly

For now, though, the use of punitive damages to deter others is permissible in Idaho under Weinstein.

instructed the jury, “You may assess punitive damages for the purpose of changing the defendants’ or others’ behavior in the State of Idaho, but ... not ... with the intent and purpose of changing defendants’ or others’ conduct in other states or outside the State of Idaho.”²³ This second instruction was also approved by the Idaho Supreme Court.

This second instruction accorded with the U.S. Supreme Court’s decision in *BMW v. Gore* by barring the jury from seeking to deter future wrongful conduct outside of Idaho. The instruction raised an unsettled issue, however, by allowing the jury to consider the need to deter individuals or entities *other than the defendants* from future misconduct.

In 1991, the U.S. Supreme Court seemingly approved a jury instruction that said the purpose of punitive damages is “protecting the public by [detering] the defendant *and others* from doing such wrong in the future.”²⁴ Since 1991, however, the Court has tightened constitutional restraints on punitive damages. In particular, *BMW v. Gore*’s reprehensibility “guideposts” focuses on the wrongfulness -- and corresponding need to deter recurrence -- of only defendant’s wrongful conduct, seeming to leave no room for considering the need to deter wrongful conduct by others.

For now, though, the use of punitive damages to deter others is permissible in Idaho under *Weinstein*.

When due process permits the jury to consider harm to others

It can be hard to determine when, under U.S. Supreme Court precedent, a jury can consider evidence of harm to others in assessing punitive damages. I believe that the Court’s decisions allow such consideration in at least five situations.

Evidence of harm to others as evidence of “recidivism”

The Court in *BMW v. Gore* approved consideration of evidence of defendant’s wrongful conduct towards others as evidence of recidivism that required strong deterrent medicine. Under *State Farm v. Campbell*, though, the conduct by defendant that has harmed others must be the same or highly similar to the conduct that

harmed the plaintiff. In addition, under *BMW v. Gore*, there must be sufficient evidence that defendant knew or should have known that its prior conduct was wrongful.

Suppose, for example, a nationwide carpet cleaning company was shown regularly to charge people for pricier, “environmentally friendly” carpet cleaning jobs when it actually performed the standard, environmentally unfriendly carpet cleaning jobs. The company should know that this fraudulent conduct is wrongful, and evidence of that conduct occurring in other States could show the need for strong deterrent medicine in a lawsuit brought by one particular victim.

Evidence of harm to others to show deliberateness of defendant’s conduct toward the plaintiff

The Court in *State Farm v. Campbell* said that evidence of defendant’s out-of-state conduct could “demonstrate[] the deliberateness” of the defendant’s conduct toward the plaintiff.²⁵ In this situation, evidence of harm to others is used to show that the defendant’s conduct toward the plaintiff was not merely accidental.

In the carpet cleaning scenario described above, proof that the company regularly charged customers for the more expensive service without actually performing it could show that the company was acting deliberately when it mischarged the plaintiff.

Evidence of harm to others to show defendant’s awareness of a significant risk to the Plaintiff

The Court in *State Farm* approved evidence of harm to others as proof not only of deliberateness but also of the “culpability” of Defendant’s conduct toward Plaintiff.²⁶ Thus, evidence that defendant’s conduct has harmed others may show that Defendant was highly culpable in disregarding great risk of danger to the plaintiff.

Suppose a company makes portable heaters that, it learns, easily tip over and have caused hundreds of fires. Also suppose that despite the reports of multiple

fires the company decides not to correct the design defect. Its sale of a heater to the plaintiff at this point is arguably more reprehensible than its sale of the first heater with the faulty design.

Evidence of harm to others to show substantial risk to the public

In this situation, evidence that the same conduct that harmed the plaintiff also harmed others is used to show that the defendant's conduct endangered the general public. This use was approved in *Philip Morris*.²⁷

Suppose the defendant is a pizza delivery company that guarantees its pizzas will be delivered in 15 minutes or they're free; that this guarantee causes its drivers to drive dangerously; and that one of these drivers hits another motorist. The jury can consider other injuries caused by the company's drivers as evidence of the broad risk to the public that defendant's conduct posed. The existence of the risk to the public, in turn, bears on the reprehensibility as well as the need for deterrence.

Evidence of harm to others to show defendant has engaged in similar wrongful conduct that is hard to detect

In *BMW v. Gore*, the Court said a higher ratio of punitive damages to compensatory damages "may be justified in cases in which the injury is hard to detect."²⁸ The idea is that when a defendant engages in a pattern of conduct that is hard to detect, punitive damages can take into account the many instances in which the defendant will have engaged in wrongful conduct that did not result in liability.

Recall the carpet cleaning company that charges customers for a pricier service than is actually performed. How many people will be able to tell whether

...[T]he fraudulent scheme makes economic sense even if the company is occasionally caught and held liable. Punitive damages are justified to change that calculus.

their carpet was cleaned by an environmentally friendly method? Indeed, the company may calculate that the fraudulent scheme makes economic sense even if the company is occasionally caught and held liable. Punitive damages are justified to change that calculus.

Summary

This article has reviewed U.S. Supreme Court case law and the Idaho Supreme Court's recent decision in *Weinstein* to identify five situations in which a jury, when assessing punitive damages, may consider the defendant's wrongful conduct toward others. The *Weinstein* decision raises an important, related issue that has not yet been addressed by the U.S. Supreme Court. That is the permissibility of using punitive damages for general deterrence.

About the Author

Richard Seamon is a professor at the University of Idaho College of Law. He teaches and writes about constitutional law, among other subjects. Before becoming a law professor, he practiced law for about 10 years. His practice primarily involved appellate litigation in the federal courts. He has presented oral argument in 15 cases before the U.S. Supreme Court.

Endnotes

¹ --- P.3d ---, No. 34970-2008, 2010 WL 2163391 (Idaho June 1, 2010).

² 517 U.S. 559, 563-567 (1996).

³ *Id.* at 599 (Scalia, J., dissenting).

⁴ *Id.* at 574-575.

⁵ *Id.* at 574.

⁶ *Id.*

⁷ *Id.* at 572.

⁸ *Id.* at 574 n.21.

⁹ *Id.* at 576-577.

¹⁰ *Id.* at 577-578.

¹¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

¹² *Id.* at 413-416.

¹³ *Id.* at 420-422.

¹⁴ *Id.* at 422-423.

¹⁵ *Id.* at 422.

¹⁶ *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

¹⁷ *Id.* at 353.

¹⁸ *Id.* at 355.

¹⁹ *Id.*

²⁰ --- P.3d ---, No. 34970-2008, 2010 WL 2163391 (Idaho June 1, 2010).

²¹ *Id.* at *1, *10-*11.

²² *Id.* at *36.

²³ *Id.* at *37.

²⁴ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (emphasis added).

²⁵ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

²⁶ *Id.* at 422.

²⁷ *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

²⁸ *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996).

Mediation and Arbitration Services

D. Duff McKee

Practice limited to alternative dispute resolution services

Post Office Box 941

Telephone: (208) 381-0060

Boise, Idaho 83701

Facsimile: (208) 381-0083

Email: ddmckee@ddmckee.com



Home of the best Child Support Program

PO Box 44930

(208) 376-7728

Boise, ID 83711

www.idchildsupport.com