

BMW of North America, Inc. v. Gore:

An Explanation of Standards or A Mere Examination of the Constitutional Boundaries of Punitive Damage Awards

by Donnie E. Martin

I. FACTS AND HISTORY OF THE DISPUTE

BMW of North America (BMW) appealed the conditional affirmance by the Alabama Supreme Court of punitive damages awarded to Dr. Ira Gore, Jr. in the amount of \$2,000,000.¹ The United States Supreme Court granted certiorari in an effort to “illuminate” the standards to identify unconstitutionally excessive punitive damage awards.² This comment will address whether the Supreme Court has adequately addressed the constitutional boundaries of punitive damage awards and also whether the Court has established a sufficient standard which can be properly applied by courts in future cases.

This dispute arose between Dr. Gore and BMW following Gore's 1990 purchase of a black BMW 535i sports sedan from a Birmingham, Alabama dealership.³ Upon learning from a car detailer that the automobile had been repainted, Dr. Gore brought suit against BMW of North America alleging that the failure to disclose such fact constituted statutory fraud.⁴ BMW, the American distributor of BMW automobiles, acknowledged that the company had a nationwide policy of repairing damage which did not exceed 3 percent of the car's suggested retail price without informing the dealers, and hence the purchasers.⁵ The damage to Dr. Gore's car was only 1.5 percent of the retail price, or \$601.37.⁶ However, Dr. Gore asserted that his repainted car was worth \$4,000 less since it had been refinished⁷ and his complaint asked for \$500,000 in compensatory and punitive damages for BMW's failure to disclose this alleged material fact.⁸ BMW defended its disclosure policy alleging

that it was under no duty to disclose the minor repairs and that a good-faith belief that the value of the car was not impaired made a punitive damage award inappropriate.⁹

The jury returned a verdict in the trial court finding BMW liable for \$4,000 in compensatory damages and \$4,000,000 in punitive damages for its “fraudulent” conduct.¹⁰ The trial judge denied BMW's post-trial motion to set aside the punitive damages award on the basis that the award was not excessive.¹¹ In light of prior U.S. Supreme Court and Alabama Supreme Court decisions regarding punitive damage evaluations, the Alabama Supreme Court performed an extensive excessiveness inquiry and, only after “thoroughly and painstakingly reviewing” the jury decision, conditionally affirmed the trial court by reducing the punitive damages from \$4 million to \$2 million.¹² The Alabama Supreme Court decided to reduce the punitive damage amount based upon the jury's incorrect computation of the award.¹³ Following their own comprehensive examination of prior decisions and concentrating primarily on a three-prong analysis,¹⁴ the Supreme Court reversed the Alabama judgment holding that even the reduced award of \$2,000,000 was “grossly excessive” and “transcends the constitutional limit.”¹⁵

II. HISTORY OF THE CONSTITUTIONAL BOUNDARIES OF PUNITIVE DAMAGES

During the last ten years, the American judicial system has struggled with the concept of the constitutionality of punitive damage awards.¹⁶ Punitive damages essentially serve two func-

Footnotes

1. BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).
2. *Id.* at 568.
3. BMW of North America, Inc. v. Gore, 646 So.2d 619 (Ala. 1994).
4. *Id.* at 622.
5. BMW of North America, 517 U.S. at 564.
6. *Id.*
7. *Id.*
8. *Id.* at 563.
9. *Id.* at 564.
10. *Id.* at 565.
11. *Id.* at 566.
12. *Id.* at 559.
13. *Id.* at 567.

14. *Id.* at 575-85. The court emphasized the following three factors: the defendant's degree of reprehensibility, the ratio of the punitive damage award to the actual damages incurred, and the available sanctions for comparable misconduct. See, *infra* notes 61-72.
15. *Id.* at 585-86.
16. This can be ascertained by the Supreme Court's extensive review of five cases since 1989 dealing primarily with the constitutionality of a punitive damage award. See cases cited *infra*, notes 23, 27, 46 and 59 and accompanying text. In addition to the cases cited herein, the Supreme Court also reviewed the constitutionality of another punitive damages award in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (Supreme Court reversed and remanded because Oregon provided for no judicial review of punitive award).

tions in society: the punishment and deterrence of wrongdoing.¹⁷ “The punishment function penalizes the conduct of a particular defendant, while the deterrent function discourages the defendant from repeating the same conduct in the future and makes an example of the defendant for others similarly situated.”¹⁸

American courts employ a traditional common-law approach to determine the amount of punitive damages. Under this approach “[t]he amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury’s determination is then reviewed by trial and appellate courts to ensure that it is reasonable.”¹⁹ The validity of an award is evaluated to determine whether it is violative “either because its amount is excessive or because it is the product of an unfair procedure.”²⁰ Every American court to critique the common-law method of assessing and reviewing punitive damages has held that the common-law method does not procedurally violate due process.²¹ On the contrary, the aspect which currently troubles the judiciary is whether a punitive damage award substantively is unconstitutional in violation of the Due Process Clause.²²

The first case in the recent series of decisions reviewing awards of punitive damages was *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, which was decided in 1989.²³ A majority of the Court held that “on the basis of the history and purpose of the Eighth Amendment,...its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.”²⁴ Additionally, the Court noted that an excessiveness claim under the Fourteenth Amendment’s Due Process Clause was not properly preserved for appeal and thus was not considered by the Court.²⁵ The Court declared that “[t]hat inquiry must await another day.”²⁶

Two years later, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Supreme Court stated “the Fourteenth Amendment due process challenge is here once again.”²⁷ Pacific Mutual chal-

lenged an award of punitive damages imposed upon the company, which emanated from the fraudulent acts of their insurance agent.²⁸ The primary challenge by Pacific Mutual, premised on procedural grounds, was that the award was “the product of unbridled jury discretion and..violative of its due process rights.”²⁹ The Supreme Court proceeded to complete a detailed examination of the procedures carried out by the Alabama judiciary during their course of review.³⁰ The Court set forth specific guidelines followed by the Alabama Supreme Court during their review of the case, including the “Hammond criteria” used in Alabama to evaluate the relation of the punitive damage award to the state’s goals of retribution and deterrence.³¹ The Court rejected Pacific Mutual’s challenge, holding that the Alabama review procedures satisfied due process.³² In addition, the Court stated,

Every ... court to critique the common-law method of assessing ... punitive damages has held that [it] does not procedurally violate due process.

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.³³

Justice O’Connor criticized the majority’s conclusion in her dissent by attacking their failure to apply the due process test set out in *Mathews v. Eldridge* for determining whether a set of procedures was constitutionally adequate.³⁴ Moreover,

17. Tamara Elayne MacLeod, *Excessiveness Review: Giving Substance to a Standardless Tool*, 31 WILLIAMETTE L. REV. 789 (1995).

18. *Id.* (citations omitted).

19. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991).

20. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 446 (1993).

21. *Haslip*, 499 U.S. at 17.

22. *See, e.g., Id.* at 18; *TXO Production Corp.*, 509 U.S. at 446.

23. 492 U.S. 257 (1989).

24. *Id.* at 260.

25. *Id.* at 276-77.

26. *Id.* at 277.

27. *Haslip*, 499 U.S. at 12.

28. *Id.* at 4-7.

29. *Id.* at 7.

30. *Id.* at 19-24.

31. *Id.* at 21-22. The Court noted that the Alabama Supreme Court had announced seven factors to be used in the post-trial review of a punitive damage award. These criteria were established in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and later approved in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989). The criteria to be taken into consideration included: (a) 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; (b) 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; (c) 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; (d) the “financial position” of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

32. *Haslip*, 499 U.S. at 22-24.

33. *Id.* at 18.

34. *Id.* at 53 (O’Connor, J., dissenting). O’Connor noted three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) the private interest at stake; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that the additional procedural safeguards can effect a cure; and (3) the governmental interest in avoiding these additional procedures.

Numerous jurisdictions took notice of ... *Haslip* and patterned their review process after that used by Alabama courts.

O'Connor noted that she would declare Alabama's common-law scheme for imposing punitive damage awards as "void for vagueness"³⁵ because of the lack of guidance given to juries prior to their deliberations.³⁶ O'Connor explained that the criteria used by Alabama courts during their "post hoc" review of the award are not articulated to the jury and thus "the jury has standardless discretion to impose punitive damages whenever and in whatever amount it wants."³⁷

Justice O'Connor expressed her concern that the Green Oil factors would only be applied on appeal and would not be considered by the jury.³⁸ Furthermore, she noted that Alabama's procedures may be an adequate test to determine if the award is excessive; however, she argued that the focus of the inquiry should be on procedural due process.³⁹ Justice O'Connor identified specific safeguards which were available to provide due process protection, including a heightened evidentiary standard, instructing the jury with specific criteria like those set forth by the Alabama Supreme Court, imposing permissible ranges of punitive damage awards, and bifurcation of the trial into liability and punitive damages stages.⁴⁰

Numerous jurisdictions took notice of the Supreme Court's opinion in *Haslip* and patterned their review process after that used by Alabama courts.⁴¹ For example, the Supreme Court of

Texas, noting that the specificity of Texas's jury instructions on punitive damages contained detailed factors for the jury's evaluation similar to those used for post-verdict review in Alabama, adopted trial bifurcation and a more extensive appellate review process regarding punitive damage awards.⁴² However, the Texas court refused to require a change in the evidentiary standard or to require a more extensive post-verdict review by the trial court.⁴³

The Supreme Court of Oregon also applied the process set forth in *Haslip* to evaluate a punitive damage award. In *Oberg v. Honda Motor Co.*, the Oregon Court held that a heightened evidentiary standard and detailed guidance for jury, even in light of the lack of a post-verdict review of the amount of the award, satisfied due process pursuant to the *Haslip* standards.⁴⁴ Consequently, various interpretations of the Supreme Court's decision in *Haslip* and of Alabama's review process have been taken by several states to constitute a threshold requirement for the constitutionality review of a procedural due process challenge to a punitive damages award.⁴⁵

In 1993, two years after the *Haslip* decision, the Supreme Court had an opportunity to address yet another due process challenge to a punitive damages award. In *TXO Production Corp. v. Alliance Resources Corp.*, the Court evaluated a punitive award which was 526 times greater than the compensatory damages.⁴⁶ The award arose from a counterclaim for slander of title following a claim by TXO concerning rights conveyed by an assignment executed by Alliance.⁴⁷ Both parties proposed guidelines to the Court regarding the proper review process for a punitive damages award.⁴⁸ However, the Court rejected both proposals and refused to set forth a "mathematical bright line" to govern the review of every case.⁴⁹ While noting that the

35. *Id.* at 53. Justice O'Connor stated, "Due Process requires that a State provide meaningful standards to guide the application of its law...A state law that lacks such standards is void for vagueness. The void-for-vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest standardless discretion in the jury to fix a penalty." *Id.* at 44. "Alabama, making no pretensions whatsoever, gives civil juries complete, unfettered, and unchanneled discretion to determine whether or not to impose punitive damages. Not only that, the State tells the jury that it has complete discretion. This is a textbook example of the void-for-vagueness doctrine." *Id.* at 46.

36. *Id.* at 44.

37. *Id.* at 52.

38. The Justice referred to the aforementioned Hammond criteria as the "Green Oil factors." See *supra* note 31.

39. *Id.* at 55-56 (emphasis added).

40. *Id.* at 57-58. Bifurcation is the division of a trial into two separate proceedings to provide for differing instructions and evidentiary standards.

41. See, e.g., *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 32 (Tex. 1994).

42. *Id.* at 27-31.

43. *Id.* at 31-33. The Texas Supreme Court refused to adopt the "clear and convincing" evidence standard in light of the Legislature's rejection of the proposal during its 1987 tort-reform legislation. Consequently, the Court declined to adopt the change reasoning that determining whether the dispute was governed by tort-reform

would be unnecessarily confusing. Additionally, the Court also refused to require trial courts to articulate their reasons for upholding or refusing to uphold a punitive damages award. The Court considered the demands already placed upon Texas trial courts, "which are overworked and understaffed." While noting that such a practice would be meaningful, the Court declined to require such findings as a "prerequisite for a judgment including punitive damages."

44. *Oberg v. Honda Motor Co., Ltd.*, 851 P.2d 1084 (Or. 1993).

45. See *Transportation Ins. Co.*, 879 S.W.2d at 30-33. The Texas Supreme Court provided a detailed listing of jurisdictions which had patterned their trial court and review procedures after Alabama pursuant to the *Haslip* decision.

46. 509 U.S. 443 (1993).

47. *Id.* at 450-51.

48. *Id.* at 455-56. In consideration of each party's proposal, the Court noted that the "parties' desire to formulate a 'test' for determining whether a particular punitive award is 'grossly excessive' is understandable. Nonetheless, we find neither formulation satisfactory. Under respondent's rational basis standard, apparently any award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable. On the other hand, we reject the premise underlying TXO's invocation of a heightened scrutiny." *Id.* at 456.

49. *Id.* at 458 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

analysis should focus on the “reasonableness” of the punitive damage award in relation to the state’s interests in punishment and deterrence, the Court considered a number of specific factors in their analysis.⁵⁰ In holding that the award was neither “grossly excessive” nor a violation of due process, the Court took into account the substantial amount of potential profits which TXO stood to gain from the fraudulent transaction; the bad faith of TXO; the size and wealth of the company; and the fact that this transaction was “part of a larger pattern of fraud, trickery and deceit.”⁵¹

In a concurring opinion, Justice Kennedy criticized the plurality’s focus on the “reasonableness” of the award: “To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what?”⁵² Kennedy advocated an inquiry into the motive for the punitive damage award, not on the amount.⁵³ Additionally, in a substantial dissenting opinion, Justice O’Connor, joined by two justices, again attacked the plurality decision with a concentration on the jury instructions and the lack of guidance offered to the jury by the trial court.⁵⁴ She stated that the Court’s “inability to discern a mathematical formula does not liberate [it] altogether from [its] duty to provide guidance to courts that, unlike this one, must address jury verdicts such as this on a regular basis.”⁵⁵ In another concurring opinion which was joined by Justice Thomas, Justice Scalia declared that federal courts had no business in evaluating the amount of punitive award.⁵⁶ He insisted that the only function for federal courts in this area was to “assure that due process (i.e., traditional procedure) has been observed.”⁵⁷ In addition, Scalia proclaimed that by following the plurality’s standard, “the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that ‘this is no worse than TXO.’”⁵⁸

III. BMW OF NORTH AMERICA, INC. V. GORE

In *BMW v. Gore*, the Supreme Court finally attempted to clarify the confusion associated with prior review of punitive damage awards.⁵⁹ The Court stated, “Only when an award can fairly be categorized as ‘grossly excessive’ in relation to [the state’s interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”⁶⁰ The Court noted that the first consideration in a punitive damages excessiveness review is to determine the state’s interest which the award is designed to serve.⁶¹ After analyzing Alabama’s state interests at issue, the

Court proceeded to identify three “guideposts” to lead the excessiveness critique: the degree of reprehensibility of the defendant’s conduct, the ratio of punitive to actual damages, and other possible sanctions for comparable misconduct.

First, the Court stated that “[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”⁶² The Court compared the facts of the present case to those in *Haslip* and *TXO*, noting that in those cases the parties were engaged in fraudulent activities, acts of affirmative misconduct and concealment of evidence.⁶³ Accordingly, the Court held that “BMW’s conduct was not sufficiently reprehensible to warrant [the] imposition of a \$2 million exemplary damages award.”⁶⁴

Next, the Court explored the ratio of punitive to actual damages,⁶⁵ stating that a comparison between the actual damages or compensatory award and the punitive damages award is “significant”.⁶⁶ The Court clarified the reasonable relationship standard set forth in *Haslip* and relied upon in the *TXO* decision to include the “harm likely to result from the defendant’s conduct as well as the harm that actually has occurred.”⁶⁷ After once again rejecting the notion to mark the constitutional boundary by a simple mathematical formula, “even one that compares actual and potential damages to the punitive award,” the Court declared that the disparity in the present case, based upon the insignificance of any potential additional harm from BMW’s conduct, was much greater than in either *Haslip* or *TXO*.⁶⁸ Accordingly, the Court declared that the award, which was 500 times the amount of Dr. Gore’s actual harm as determined by the jury, did not satisfy this “guidepost” of excessiveness review.⁶⁹

Last, the Court compared the punitive damages with other possible sanctions for comparable misconduct, such as civil or criminal penalties.⁷⁰ In contrast to the potential penalties which could have been imposed in *Haslip*, the Court expressed that the economic sanction exacted against BMW was far in excess of any applicable statutory fine available for similar “malfeasance.”⁷¹ Therefore, the Court noted that the excessive award imposed in this case could not be justified as punish-

... the Court proceeded to identify three “guideposts” to lead the excessiveness critique ...

50. Transportation Insurance Co., 509 U.S. at 459-62.

51. *Id.* at 462.

52. *Id.* at 466 (Kennedy, J., concurring).

53. *Id.* at 467.

54. *Id.* at 474 (O’Connor, J. dissenting).

55. *Id.* at 480.

56. *Id.* at 470 (Scalia, J., concurring).

57. *Id.* at 472.

58. *Id.*

59. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

60. *Id.* at 568.

61. *Id.*

62. *Id.*

63. *Id.* at 579-80.

64. *Id.* at 580.

65. *Id.* at 580-83.

66. *Id.* at 581.

67. *Id.* (citations omitted).

68. *Id.* at 582.

69. *Id.*

70. *Id.* at 583.

71. *Id.* at 583-84.

I ... would advocate detailed instructions for juries with comparable criteria to those applied by ... Alabama ...

ment or to “deter future misconduct” in light of the less drastic remedies available to the state.⁷²

The Court concluded by reiterating a refusal to “draw a bright line marking the limits of a constitutionally acceptable punitive damages award.”⁷³ However, based upon the application of the three “guideposts,” the court found the \$2 million punitive damage award “grossly excessive” and “transcend[ing] the constitutional limit.”⁷⁴ The Court then remanded the judgment to the state court for a rede-

termination of damages.⁷⁵

In a concurring opinion joined by two other justices, Justice Breyer noted that the review process previously applied by the Alabama judiciary, and approved in *Haslip*, realistically imposed little actual restraint when applied by the lower courts.⁷⁶ Justice Scalia again dissented on the basis that the decision was “an unjustified incursion into the province of state governments.”⁷⁷ Justice Ginsberg, joined by the Chief Justice, echoed a similar concern in her dissenting opinion regarding the judiciary’s unwise and unnecessary venture “into territory traditionally within the States’ domain.”⁷⁸

IV. CONCLUSION

The Supreme Court has made an adequate examination of the substantive boundaries of punitive damage awards. However, the Court has failed to effectively “illuminate” a standard to guide lower courts in their review of punitive awards. The Court did not remedy the objection of Justice Kennedy following *TXO*; thus, a reviewing court is essentially left to rely upon nothing more than its own “subjective reaction to a particular punitive damages award.”⁷⁹ Although the Court has recognized the confusion associated with procedural objections, the Court failed to address such concerns in its disposition of this case. Moreover, by reversing the Alabama Supreme Court, whose procedures it had previously approved, the Court has left lower courts without any guidance with which to deal with future procedural challenges.⁸⁰

I am persuaded by the theories set forth by Justice O’Connor in her dissent following the *Haslip* decision.⁸¹ As she noted in

her dissent, guiding the jury with instructions similar to the criteria used for post-verdict review in Alabama would ensure that neither procedural nor substantive due process is violated by the imposition of a punitive damages award.⁸² I agree with Justice O’Connor and would advocate detailed instructions for juries with comparable criteria to those applied by the Alabama judiciary in post-verdict review, an establishment of permissible ranges of awards, and the bifurcation of the liability and punitive damage stages of the trial, with a heightened evidentiary requirement for the punitive damage portion of the proceeding. However, I agree with the Texas Supreme Court in rejecting the requirement of a more extensive post-trial review and detailed articulation by trial courts of the reasons for upholding or refusing to uphold a punitive award due to the extraneous demands already faced by the trial court system.⁸³

Although the Supreme Court has repeatedly declined to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable” punitive damages award,⁸⁴ the opinions presented thus far have failed to adequately offer the guidance needed to ensure the consistent protection of due process of law.



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72. *Id.* at 584.

73. *Id.* at 585.

74. *Id.* at 585-86.

75. *Id.* at 586.

76. *Id.* at 589 (Breyer, J., concurring).

77. *Id.* at 598 (Scalia, J., dissenting).

78. *Id.* at 607 (Ginsberg, J., dissenting).

79. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

80. See *supra* notes 30-32 and accompanying text.

81. See *supra* notes 34-40 and accompanying text.

82. See *supra* note 40 and accompanying text.

83. See *supra* note 41 and accompanying text.

84. See *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).