

Punitive Damages and *BMW v. Gore*

Overview

In this lesson, students will learn about the practice of awarding punitive damages, with a particular focus on the role of the jury in the American justice system. Students will view a documentary on a Supreme Court case addressing these issues, *BMW v. Gore*, and apply what they have learned in a jury simulation exercise. Students will also critique the practice of awarding punitive damages, as well as study the concept of due process under the 14th Amendment.

Grades

10-11

NC Essential Standards for Civics and Economics

- CE.C&G.2.1: Analyze the structures of national, state and local governments in terms of ways they are organized to maintain order, security, welfare of the public and the protection of citizens.
- CE.C&G.2.3: Evaluate the U.S. Constitution as a “living Constitution” in terms of how the words in the Constitution and Bill of Rights have been interpreted and applied throughout their existence
- CE.C&G.2.7: Analyze contemporary issues and governmental responses at the local, state, and national levels in terms of how they promote the public interest and/or general welfare
- CE.C&G.3.4: Explain how individual rights are protected by varieties of law
- CE.C&G.3.7: Summarize the importance of the right to due process of law for individuals accused of crimes
- CE.C&G.5.2: Analyze state and federal courts by outlining their jurisdictions and the adversarial nature of the judicial process

NC Essential Standards for American History II

- AH2.H.2.1: Analyze key political, economic, and social turning points since the end of Reconstruction in terms of causes and effects (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).
- AH2.H.2.2: Evaluate key turning points since the end of Reconstruction in terms of their lasting impact (e.g., conflicts, legislation, elections, innovations, leadership, movements, Supreme Court decisions, etc.).

Essential Questions

- How do state and local governments impact the lives of individuals?
- What are similarities and differences in procedures for deciding criminal and civil cases?
- How do laws impact people’s lives?
- How can an individual’s choices affect the liberty and happiness of others?
- What is a tort, and how can a civil trial provide a remedy for it?
- What are the basic differences between standards of evidence in a civil versus a criminal case?
- What is the role of the jury in the American justice system?
- How difficult or easy is it to work as a “sequestered” jury to render a unanimous decision?

- What is due process under the 14th Amendment, and how does it relate to punitive damages?
- How are American law and culture likely to affect punitive damage awards?
- What are the arguments for and against awarding punitive damages?
- What options exist to reform the punitive damage inquiry?
- How does the appeals process work with regard to a punitive damages award?

Materials

- Image of iPhone, attached
- Voices of American Law Documentary of *BMW v. Gore*
 - DVD available at www.voicesofamericanlaw.org
- Television and DVD player
- McDonald's Reading and Questions, attached
- Glossary, attached
- *BMW v. Gore* Viewer's Guide and Answers, attached
- *BMW v. Gore* opinion, attached
- North Carolina General Assembly Chapter on Punitive Damages, attached
- Optional *Eastwood v. Durhame Dirty Dairy* Reading and Questions, attached

Duration

1 block period

Procedure

Warm-Up: Seeking Monetary Damages

1. As a warm-up, tell the students to imagine that they have just bought a new iPhone. Project an image of the phone on the board (such as the one attached) to strengthen imagination. Tell them that they had to stand in line all morning to get the phone and paid \$250 for the phone, but it seemed to be worth it. Explain that upon getting the phone, they show their family and friends how neat it is. However, one friend points out that occasionally when you touch one area of the screen, another area is activated. There is something defective with your brand new, expensive iPhone! Tell the students to consider the following questions:
 - How do you feel when a friend points out that your new phone is defective?
 - If you took the phone back and the company replaced it, would everything be fine?
 - What if the company knew there might be a defect, but sold you the phone anyway? How would you feel then?
 - Do you think the cost of replacing your one phone would discourage a company as big as Apple from selling other phones that might be defective?
 - If not, how much money do you think it would have to cost Apple in order for the company to change its policy?
2. Explain to students that what the class has been discussing for the last several minutes is called **punitive damages**, and explain how they differ from **compensatory damages**. Pass out the "glossary," attached, and ask students to focus on those two definitions. Ask students if they can think of any famous cases when such damages were awarded.

Next, pass out the attached reading on the famous McDonalds case, in which McDonald's continued to serve extremely hot coffee to its customers without a warning, even though the

company knew customers had been severely burned in the past. Have students answer the questions at the end of the reading. Once the class is finished, further discuss:

- If you were on the McDonald's jury, would you have awarded punitive damages? Why or why not?
 - If yes, how much would you have awarded? How did you arrive at your number?
 - Punishment and deterrence of conduct that might otherwise happen again and again over time are reasons given for the use of punitive damages. Should the courts play a role in dealing with recurring bad conduct? What other branches or sections of government might handle such a problem?
 - The American justice system is rare both in its use of a jury for civil cases and its allowance of punitive damages. Why should juries get to decide these issues? Do you think a jury should play such a role and have such powers?
3. Explain to students that the endurance of these two ideas is often credited to a particular sense of American identity—a populist preference for the individual over the large corporation; a strong dislike of government interference; and a sense that Americans believe bad actors should “pay for what they do.” Poll students or ask them to discuss whether they also feel strongly about these principles.
4. Explain to students that judges have the power to reduce the amount of damages a jury awards (**remittitur**). Mention that in the McDonald's case, the judge reduced the amount given from \$2.7 million to \$480,000.
- Do you think a judge should have these kinds of powers? Why or why not?
 - Is this power consistent with your understanding of the role of a judge and jury?

Documentary: *BMW v. Gore*

5. Tell students that they will be learning about a punitive damages case by watching a documentary on the Supreme Court case *BMW v. Gore*. Teachers should determine which of the viewing options below they will use. While a synopsis of the case is provided for teacher reference, students need no further introduction to the film.

- **Teacher Reference - Synopsis of the Case**

The case of *BMW v. Gore* begins when Dr. Ira Gore is told by his repairs shop that his brand new BMW appears to have been repainted. Upon further investigation, it becomes clear that this is true. BMW has a policy of repainting cars that suffer minimal damage when transported or manufactured before sale. Provided the necessary repairs cost less than three percent of the suggested retail price, the car is sold as new and the damage is not disclosed—as was the case for Dr. Gore's car. Dr. Gore claims this is fraud. The trial court jury agreed, awarding \$4,000 in compensatory damages and \$4 million in punitive damages. The Supreme Court of Alabama took the case and granted remittitur, reducing the punitive damages award to \$2 million. BMW appealed, and the Supreme Court of the United States granted review.

- **Viewing Options**

There are several ways you can choose to have the class view the documentary.

- You may choose to have the class watch the video with no pauses and have students work on the attached Viewer's Guide while watching.

- *Suggested Viewing:* You may choose to pause the video at the times outlined below and ask the class to discuss the questions listed. Students may complete the questions below in addition to or instead of the questions on the Viewer’s Guide.
 - **Discussion Point #1:** (*Pause at 2:03, where the narrator notes “Dr. Gore was disturbed by the news that his car had been repainted”*) Ask students how they would feel if they discovered their new BMW had been repainted (i.e. would they be offended, talk to a lawyer, not care whatsoever, etc.)?
 - **Discussion Point #2:** (*Pause at 6:38, just after Cordero says “We weren’t concerned about our process or about our disclosure policy because we thought our disclosure policy was the best in the industry,”*) Ask students to comment on whether they find this to be a reasonable policy or not and why.
 - **Discussion Point #3/Activity:** (*Pause at 15:37, when the narrator remarks that “Dr. Gore had gone back to work while the jury deliberated. He soon got the call that the jury had reached its verdict,”*) Tell students they are going to be assuming the roles of the jury.
 - ❖ Divide the class into jury teams of six people each:
 - Appoint a jury foreman who will present the jury’s finding to the class. Tell the jury foreman that he or she cannot express his or her opinion to the group until every other juror has first shared their thoughts.
 - Ask the teams to deliberate on whether and how much to award Dr. Gore in punitive damages, and remind them that they must come to a unanimous decision regarding the monetary amount. Each juror must, at the close of the session, verbally confirm that he or she agrees with the result.
 - Do not allow students to read any papers or notes while they deliberate.
 - Explain that this scenario is quite similar to a real jury scenario. Real juries in a civil trial are also usually comprised of 6 people, with a foreman who announces the jury’s findings. Real juries also are not permitted to take notes during a trial.
 - ❖ Reconvene to discuss the amounts awarded by the various juries:
 - How did you arrive at your group’s number, and how difficult or easy it was to compromise and work together as a jury?
 - Did any juries decide simply to average the numbers of each juror to come to a solution? (Explain to students that amounts arrived at in this way are called “**quotient verdicts**” and that jurors are not supposed to come to a decision in this way. Discouraging quotient verdicts is motivated by a concern that such an approach will prevent the jury from engaging in a full discussion and in some cases result in a number that does not actually reflect the desires of most jurors.) Do you think quotient verdicts should be discouraged?
 - What good purposes are served by awarding punitive damages?
 - What are the downsides to awarding punitive damages?
 - Can you imagine reform options to the punitive damage system? That is, are there other ways we might go about awarding worthy plaintiffs in addition to compensatory damages?
 - ❖ Have students brainstorm arguments for and against punitive damage on the Punitive Damages + - Δ Chart. Discuss possible responses using attached answers. When finished, continue viewing the documentary.

- **Discussion Point # 4:** (*Pause at 17:47, where Cordero says that he feels the large punitive damage award meant that “Alabama was being punished for actions outside of its own borders.”*) Ask students whether or not it seems fair (given that BMW is an international company), to hold a trial in Alabama. Explain that there is an argument that this would violate the 14th Amendment. (See Teacher’s Guide: Arguments Against Punitive Damages for details.)

Court’s Opinion: *BMW v. Gore*

6. Discuss the Supreme Court’s opinion in the case with students using one of the following options:
 - **Option 1:** Cut up the attached opinion into its three sections: Degree of Reprehensibility, Ratio, and Sanctions for Comparable Misconduct. Divide the class into groups of three and have each member read one section of the opinion. Each student will then present his/her section to the other two group members. Each group will then write a combined summary after sharing the important information from their reading.
 - **Option 2:** Pass out the summary of the holding to read as a class. Allow students to express their opinions on whether they agree or disagree with the Court’s holding and why.
 - **Option 3:** Summarize and explain the Court’s opinion to the class and discuss.

North Carolina’s Punitive Damage Law

7. Tell students they are going to take a look at the punitive damage laws that are in place in their own state. Distribute the attached North Carolina Punitive Damage Law: § 1D. (Teachers can also pass out only the section on “§ 1D 25: Limitation of amount of recovery and § 1D 26: Driving while impaired; exemption from cap.”) Read the section together and ask students what they think of this limit and the exception to the limit. For further explanation, ask students to partner or divide into groups. Tell them to act as members of a North Carolina legislative committee and to write five other exceptions to a cap on punitive damages that might be appropriate.
8. Tell the students that there is a recent trend called **tort reform**, essentially a movement which seeks to change the current judicial system’s response to civil wrongs. It does this by making it more difficult for plaintiffs to bring suit and preventing them from recovering heavily when they do. This means that many states, like North Carolina, have chosen to cap damages at a certain amount, or otherwise limit monetary awards. Ask students the following questions:
 - Should changes in the political and/or social climate have these kinds of effects on the ways laws are made and the way courts decide cases? Why or why not?
 - What do you think of capping punitive damages?
 - Who would benefit from capping punitive damages? How so?
 - Who would be hurt by tort reform? How so?
 - Should North Carolina cap punitive damages? Why or why not?

Additional Activity

Assign the attached short-answer questions on a hypothetical case involving the potential for punitive damages, “Short-Answer Questions: EASTWOOD V. DURHAME DIRTY DAIRY.” Question #1 can easily be converted into a “Persuasive” essay for purposes of preparing for the Tenth Grade Writing Test by asking students to write persuasively either for the plaintiff or defendant.

Differentiation

Students with Special Needs

- Ensure that students are placed in mixed ability groups.
- Students may have more difficulty with reading related to Jigsaw activities. Access brief descriptions of each case at www.oyez.org. Enter case name in the search bar.

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- Allow students to create their own role play scenarios after watching the movie.
- Assign students the optional essay requiring students to author a majority opinion for *BMW v. Gore* based on the Jigsaw activity and class discussion.
- Ask students to read and discern the holding of the opinion for *Gore v. BMW* in their jury teams. (For a discussion of holdings, see the general legal vocabulary provided in the overview.)
- Ask students to read North Carolina Punitive Damages Law and discuss any particularly relevant section of the law. What aspects of the law do you find interesting? Troubling? Why?



Glossary

Tort: a civil wrong for which the court provides a remedy.

Compensatory damages: money awarded to compensate the plaintiff or make him whole; covers such grievances as physical injury and pain and suffering.

Punitive damages: money awarded to punish the defendant for the reprehensible conduct that caused the plaintiff's injuries and to deter the defendant from continuing such conduct. Often used where there is a fear that bad conduct may recur in the absence of a more stringent penalty. Punitive damages can only be awarded in a civil—not criminal—trial. In a civil trial, however, a jury usually need only find a defendant liable (not guilty) by a preponderance of the evidence (that is, it is more likely than not that the defendant is responsible for the plaintiff's injuries) or by clear and convincing evidence (a higher standard, but still less than beyond a reasonable doubt). Sometimes also called exemplary damages.

Evidentiary standard: degree of certainty a jury must have in order to hold a defendant legally responsible for the plaintiff's injuries. Kinds of standards include preponderance of the evidence (that it is more likely than not that defendant is responsible for plaintiff's injuries); clear and convincing (a higher standard than preponderance); and beyond a reasonable doubt (generally the criminal standard, rarely used in a civil trial with punitive damages).

Cap: a limit to the amount of punitive damages recoverable.

Judicial review: general process in which a higher court rehears a case on appeal to determine whether the lower court's ruling was correct. Appellate courts may review district court cases and the Supreme Court of the United States may review appellate court cases. Also, in the context of punitive damages, a judge may review a jury's award of punitive damages and either affirm the award or perform remittitur: the process in which a judge reduces the amount of a jury award that "shocks the conscience."

Remittitur: a judge may reduce the amount of punitive damages a jury awards if he finds that the amount given "shocks the conscience."

American identity: We are one of few countries that allow for the jury to decide punitive damages. This is indicative of a more general preference in the United States for private litigation as opposed to government-led lawsuits, and an enduring belief in the jury to make crucial decisions.

Name: _____



The McDonald's HOT Coffee Case

The "McDonald's hot coffee case" has become a notorious example of excessive punitive damages in the popular imagination. The facts are these: 79-year-old Stella Liebeck bought a cup of coffee at the drive-through window of an Albuquerque McDonald's, while she was a passenger in her grandson's car. While the car was parked, she attempted to remove the cup's lid and accidentally spilled the coffee into her lap and suffered severe burns. She sued McDonald's to recover her medical costs, and a jury awarded her \$160,000 in compensatory damages. What surprised the company was that the jury also awarded Mrs. Liebeck \$2.7 million in punitive damages - an amount equal to two days' profits on coffee sales.

How could a cup of hot coffee be worth so much money? To begin with, McDonald's served its coffee at 180 degrees, hot enough to cause third-degree burns, and Mrs. Liebeck's lawyers introduced evidence that other chains' coffee was up to 20 degrees cooler. McDonald's own documents showed that the company had more than 700 reports of burns caused by its coffee and had settled many of them for large sums of money. Yet the company had not changed its policy of serving extremely hot coffee. The jury was also impressed by graphic photos of Mrs. Liebeck's burns on her groin, inner thighs, and buttocks.

McDonald's appealed the verdict, and the punitive damages were reduced to \$480,000. The company appealed again, and the case was ultimately settled for an undisclosed amount.

Source: <http://www.social.mtu.edu/faculty/speters/WrightsMcDonaldsfacts.htm>

Was \$2.7 million too much for hot coffee? Consider the following questions:

1. Should Mrs. Liebeck have known that coffee might spill in the car and burn her?
2. Did McDonald's act wantonly or maliciously by continuing to serve its coffee extremely hot, even after hundreds of reports of burns?
3. Would a smaller punitive damage award have been a significant "punishment" to such a large corporation?
4. Would a smaller punitive damage award have deterred McDonald's or other companies from serving hot coffee in the future?
5. What would be a reasonable ratio between compensatory and punitive damages under the circumstances?

Name: _____

BMW v. Gore Viewer's Guide

1. What did Leonard Slick tell Dr. Gore had happened to his car? What did Slick advise Gore to do?
2. Who was A.W. Bolt representing before he took Dr. Gore's case? What was the nature of that case?
3. Why was this lawsuit so important to BMW?
4. BMW adopted a written policy in 1983. The policy noted that any damage below a certain percentage of the car's total value would not be disclosed, and the car would still be sold as new. What percentage was that?
5. BMW based this policy on what?
6. What made BMW so nervous about a trial in an Alabama state court?
7. What was Gore's legal theory based upon?
8. How much in compensatory damages was Yates awarded? How much in punitive?
9. What did Bolt decide to change about his approach in trying Dr. Gore's case?
10. What analogy did Bolt use in Gore's trial to explain to the jury what had been done to his car?
11. How much did Gore's attorneys seek from the jury in punitive damages?
12. How much compensatory damages did the jury award? Punitive damages?
13. What was the basis of BMW's appeal?

BMW v. Gore Viewer's Guide- ANSWER KEY

1. What did Leonard Slick tell Dr. Gore had happened to his car? What did Slick advise Gore to do?
Slick told Gore his car had been repainted. Slick advised him to sue.
2. Who was A.W. Bolt representing before he took Dr. Gore's case? What was the nature of that case?
Yates. Same reason, essentially: a repainted BMW.
3. Why was this lawsuit so important to BMW?
BMW felt its reputation, policies, and processes were at stake.
4. BMW adopted a written policy in 1983. The policy noted that any damage below a certain percentage of the car's total value would not be disclosed, and the car would still be sold as new. What percentage was that?
3%
5. BMW based this policy on what?
The most stringent of the state consumer protection statutes (California's).
6. What made BMW so nervous about a trial in an Alabama state court?
Alabama had a reputation for awarding high punitive damages.
7. What was Gore's legal theory based upon?
Fraud, suppression of a material fact.
8. How much in compensatory damages was Yates awarded? How much in punitive?
\$4,000; \$0.
9. What did Bolt decide to change about his approach in trying Dr. Gore's case?
Decided to drop the paint expert he had used in the Yates trial.
10. What analogy did Bolt use in Gore's trial to explain to the jury what had been done to his car?
Outlet mall: imperfect products should be sold at a discount.
11. How much did Gore's attorneys seek from the jury in punitive damages?
\$4 million.
12. How much compensatory damages did the jury award? Punitive damages?
\$4,000; \$4 million.
13. What was the basis of BMW's appeal?
That the award of punitive damages was so high as to "shock the conscience," and that Alabama was being punished for actions outside its own borders.

Name: _____

Punitive Damages + - Δ Chart

Complete the chart below based on the documentary and discussion from class.

+ Arguments in Support of Punitive Damages	- Arguments Against Punitive Damages	Δ Suggestions for Change
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1. Could you think of more reasons supporting punitive damages or arguments against punitive damages?
2. Do you think punitive damages are an effective way to discourage individuals and businesses from repeating dangerous behaviors?
3. How large do you think punitive damages would have to be in order to change the actions of a multi-national corporation?

Punitive Damages + - Δ Chart- ANSWER KEY

+ (Arguments for Punitive Damages)

- Punishes and deters truly bad actors
- Achieves these goals especially where compensatory damages are small
- Vindicates American ideals of punishment for bad acts and respect for the jury
- Allows for an expression of public outrage
- Running the risk of injury—should a company choose to do so by engaging in bad conduct—is a cost of doing business for which companies should be forced to pay. That is, punitive damages prevents a company from engaging in behavior that is economically sound but is the kind of behavior we want to deter.
- Even if the amount of damages does not actually deter the bad actor (especially if the bad actor is a multi-billion dollar company that can spare the cost of punitive damages), the bad publicity surrounding the award of such damages may serve those purposes.

- (Arguments against Punitive Damages)

- Does not actually punish or deter, especially where defendants are multi-million dollar companies, who can easily pay a million-dollar sum
- Unfairly penalizes an actor for simply making an economically efficient choice (in the absence of punitive damages)—to run the risk of injury and pay as necessary.
- May so hurt big business over time as to negatively affect the economy overall.
- Gives too much power to a jury, which may award high damages where conduct is not truly reprehensible or be swayed by other elements of the trial (a persuasive and likeable advocate, for example) that has nothing to do with the behavior of the defendant.
- *The constitutional argument is perhaps the most complex and the most essential. Those who oppose punitive damages often claim that it violates the Due Process Clause of the 14th Amendment, which requires that “No State shall deprive any person of life, liberty, or property, without due process of law...” By making defendants pay large and unpredictable sums of money, defendants are given no notice of the punishments that may result from their actions. They are deprived of property—money—without due process due to lack of notice. That is, defendants are given no fair warning as to the penalty for their actions—Alabama may award \$4 million and Massachusetts nothing. You may choose to explain this concept by writing the amendment on the board and going over it in detail, or presenting it briefly as another argument against punitive damages.

Δ (Reform Options)

- Limit punitive damages to a mathematical rule that simply multiplies actual damages by a certain number (however, atrocious conduct that resulted in only nominal actual damages would go essentially unpunished. Consider a trespasser, who drives his car through another’s yard for years, causing minimal actual damage, but clearly showing a severe disrespect for his neighbor.)
- Establish an absolute dollar limit—known as “capping” (however, some research has shown that capping damage amounts may discourage plaintiffs’ attorneys who might otherwise sink substantial resources in trying a case could they hope to recover those costs through punitive damages)
- Award at least a portion of punitive damages to the state or other good cause (though this may increase the money juries are willing to award, and encourages charitable organizations to get involved in legislation)
- Eliminate punitive damages completely so that there is no censure—simply let the market penalize bad actors (though then the public may not learn about the conduct and, as a point of comparison, this is not how we handle criminal conduct)
- Regulation by some predetermined expert or government body (though not clear who or what that would be)

BMW OF NORTH AMERICA, INC. v. GORE

Justice STEVENS delivered the opinion of the Court.

In January 1990, Dr. Ira Gore, Jr. (respondent), purchased a black BMW sports sedan for \$40,750.88 from an authorized BMW dealer in Birmingham, Alabama. After driving the car for approximately nine months, and without noticing any flaws in its appearance, Dr. Gore took the car to "Slick Finish," an independent detailer, to make it look "snazzier than it normally would appear." Mr. Slick, the proprietor, detected evidence that the car had been repainted. Convinced that he had been cheated, Dr. Gore brought suit against petitioner BMW of North America (BMW), the American distributor of BMW automobiles. Dr. Gore alleged, *inter alia*, that the failure to disclose that the car had been repainted constituted suppression of a material fact.

At trial, BMW acknowledged that it had adopted a nationwide policy in 1983 concerning cars that were damaged in the course of manufacture or transportation. * * * If the repair cost did not exceed 3 percent of the suggested retail price. . . the car was sold as new without advising the dealer that any repairs had been made. Because the \$601.37 cost of repainting Dr. Gore's car was only about 1.5 percent of its suggested retail price, BMW did not disclose the damage or repair to the Birmingham dealer.

Dr. Gore asserted that his repainted car was worth less than a car that had not been refinished. To prove his actual damages of \$4,000, he relied on the testimony of a former BMW dealer, who estimated that the value of a repainted BMW was approximately 10 percent less than the value of a new car that had not been damaged and repaired. To support his claim for punitive damages, Dr. Gore introduced evidence that since 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than \$300 per vehicle. Using the actual damage estimate of \$4,000 per vehicle, Dr. Gore argued that a punitive award of \$4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth.

The jury returned a verdict finding BMW liable for compensatory damages of \$4,000. In addition, the jury assessed \$4 million in punitive damages, based on a determination that the nondisclosure policy constituted "gross, oppressive or malicious" fraud. * * * BMW filed a post-trial motion to set aside the punitive damages award. The company introduced evidence to establish that its nondisclosure policy was consistent with the laws of roughly 25 States defining the disclosure obligations of automobile manufacturers, distributors, and dealers. The most stringent of these statutes required disclosure of repairs costing more than 3 percent of the suggested retail price; none mandated disclosure of less costly repairs. Relying on these statutes, BMW contended that its conduct was lawful in these States and therefore could not provide the basis for an award of punitive damages. * * * The trial judge denied BMW's post-trial motion, holding that the award was not excessive. On appeal, the Alabama Supreme Court also rejected BMW's claim that the award exceeded the constitutionally permissible amount. Based on its analysis, the court concluded that BMW's conduct was "reprehensible." The Alabama Supreme Court did, however, rule in BMW's favor on one critical point: The court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions. Having found the verdict tainted, the court held that "a constitutionally reasonable punitive damages award in this case is \$2,000,000," and therefore ordered a remittitur in that amount.

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. * * * No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But * * * reasonable people may disagree about the value of a full disclosure requirement. * * * We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. Before this Court Dr. Gore argued that the large punitive damages award was necessary to induce BMW to change the nationwide policy that it adopted in 1983. * * * Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

* * * When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent – for reasons that we shall now address – that this award is grossly excessive. * * *



Degree of Reprehensibility: Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. This principle reflects the accepted view that some wrongs are more blameworthy than others.

In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages. * * * That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award. Because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, we are persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a \$2 million exemplary damages award.



Ratio: The second and perhaps most commonly cited indication of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages. Our decisions in [our prior cases] endorsed the proposition that a comparison between the compensatory award and the punitive award is significant.

The \$2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury. Moreover, there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. The disparity in this case is thus dramatically greater than those considered in [prior cases].

Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. * * * When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow."



Sanctions for Comparable Misconduct: Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is \$2,000; other States authorize more severe sanctions, with the maxima ranging from \$5,000 to \$10,000.

* * * While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

We are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit. Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance. The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.



Holding of BMW v. Gore

In determining that there needs to be a reasonable relationship between the gravity of the crime and the amount awarded, the Supreme Court establishes a three-part test:

- consider the degree of reprehensibility of the conduct
- consider the ratio of punitive damages to actual damages
- consider comparable sanctions to similar misconduct that government could have conceivably taken

In this case:

- BMW's conduct was not adequately reprehensible in nature, since it caused Dr. Gore only financial harm and failed to evince a reckless endangering of human life or safety.
- The ratio of punitive to actual damage was a striking 500:1, not within the realm of a reasonable relationship between the two numbers. While a higher ratio may be permissible in some cases, none of those are present here. 500:1 remains a "breathtaking" disparity.
- Sanctions for comparable misconduct would amount to \$2,000 up to \$10,000, another indication of the gross inappropriateness of the \$2 million award.
- The court also takes care to note that the practice of extraterritorial punishment, or awarding damages based on a consideration of the defendant's misconduct in other states, is impermissible. A jury may not impose a punishment for lawful conduct in other jurisdictions, so may not consider the repainting practice followed by BMW in other states when awarding Dr. Gore punitive damages.

North Carolina Punitive Damage Law:

Chapter 1D: Punitive Damages.

§ 1D 1. Purpose of punitive damages.

Punitive damages may be awarded, in an appropriate case and subject to the provisions of this Chapter, to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts. (1995, c. 514, s. 1.)

§ 1D 5. Definitions.

As used in this Chapter:

- (1) "Claimant" means a party, including a plaintiff, counterclaimant, cross claimant, or third party plaintiff, seeking recovery of punitive damages. In a claim for relief in which a party seeks recovery of punitive damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes any party seeking recovery of punitive damages.
- (2) "Compensatory damages" includes nominal damages.
- (3) "Defendant" means a party, including a counterdefendant, cross defendant, or third party defendant, from whom a claimant seeks relief with respect to punitive damages.
- (4) "Fraud" does not include constructive fraud unless an element of intent is present.
- (5) "Malice" means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.
- (6) "Punitive damages" means extracompensatory damages awarded for the purposes set forth in G.S. 1D 1.
- (7) "Willful or wanton conduct" means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. "Willful or wanton conduct" means more than gross negligence. (1995, c. 514, s. 1.)

§ 1D 15. Standards for recovery of punitive damages.

- (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
 - (1) Fraud.
 - (2) Malice.
 - (3) Willful or wanton conduct.
- (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.
- (c) Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

North Carolina Punitive Damage Law:

§ 1D 25. Limitation of amount of recovery.

- (a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.
- (b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.
- (c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury. (1995, c. 514, s. 1)

§ 1D 26. Driving while impaired; exemption from cap.

G.S. 1D 25(b) shall not apply to a claim for punitive damages for injury or harm arising from a defendant's operation of a motor vehicle if the actions of the defendant in operating the motor vehicle would give rise to an offense of driving while impaired under G.S. 20 138.1, 20 138.2, or 20 138.5. (1995, c. 514, s. 1.)

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North Carolina Punitive Damage Law:

§ 1D 35. Punitive damages awards.

In determining the amount of punitive damages, if any, to be awarded, the trier of fact:

- (1) Shall consider the purposes of punitive damages set forth in G.S. 1D 1; and
- (2) May consider only that evidence that relates to the following:
 - a. The reprehensibility of the defendant's motives and conduct.
 - b. The likelihood, at the relevant time, of serious harm.
 - c. The degree of the defendant's awareness of the probable consequences of its conduct.
 - d. The duration of the defendant's conduct.
 - e. The actual damages suffered by the claimant.
 - f. Any concealment by the defendant of the facts or consequences of its conduct.
 - g. The existence and frequency of any similar past conduct by the defendant.
 - h. Whether the defendant profited from the conduct.
 - i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth. (1995, c. 514, s. 1.)

§ 1D 40. Jury instructions.

In a jury trial, the court shall instruct the jury with regard to subdivisions (1) and (2) of G.S. 1D 35. (1995, c. 514, s. 1.)

§ 1D 50. Judicial review of award.

When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D 15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter. (1995, c. 514, s. 1.)

Name: _____

EASTWOOD V. DURHAME DIRTY DAIRY- Reading

Read the following excerpt and answer the questions below based on the reading.

Bob Eastwood lives in the small town of Durham, New Carolina. Last year, Eastwood's son mysteriously died of leukemia, as did the young children of several of Eastwood's neighbors. In fact, it appeared that many in the otherwise normal town of Durham were being diagnosed with serious illnesses, including leukemia, cancer, and hepatitis. All told, about 25 people of the town's population of 500 have died in one of these mysterious ways. Twenty of the 25 have been children under the age of 15.

Eastwood and many of his fellow neighbors believe that the town's dairy, Durham Dirty Dairy, is to blame. Some of Eastwood's neighbors claim to have seen workers at the Dirty Dairy feeding its cows chemicals taken from hazardous waste materials. These materials somehow have the effect of increasing the cows' size and milk production. The town of Durham's favorite beverage is milk, and children in particular are encouraged by their parents to drink much of the stuff to build strong bones. The townspeople believe this is why children are suffering from these illnesses in especially large numbers. Eastwood and his neighbors have retained a lawyer and intend to sue the Dirty Dairy in a class action lawsuit. Of course, they will seek compensatory as well as punitive damages.

Preliminary research has shown that the Dirty Dairy profits approximately \$1 million per year from the town of Durham alone, but profits statewide in New Carolina at the rate of about \$5 million each year. However, the Dirty Dairy also maintains a small national market, selling to Tennessee, Georgia, and Virginia as well. The Dairy profits at about \$2 million per year in each of those three states. Further research shows that the hazardous waste materials are being fed to the Georgia and Virginia cows, though not to the cows in Tennessee.

Eastwood's lawyer has noticed that there is a federal statute under the FDA (Food and Drug Administration) which would fine a company found to have been committing this kind of conduct \$500,000. Of course, his lawyer would not like to be limited to such a number given how profitable the Dirty Dairy has been. The Dairy owes such success in part to its reputation as an old and well respected company. It accounts for 80% of Durham's jobs and about as much of its economy. Old Mister Pete, who runs the Dairy, is a kind old man, a town favorite, and a state-wide celebrity.

Questions

1. The case first appears before a district court in New Carolina, June Judge presiding. Please discuss the kind of information that might sway a jury (for either Eastwood or Dirty Dairy).
2. The district court awards \$3 million in compensatory damages and \$30 million in punitive damages to Mr. Eastwood. Is June Judge likely to grant a remittitur? Why or why not? If she does grant a remittitur, how much could she award?
3. Assume for this question only that the state of New Carolina has repealed its punitive damages cap. This means that while defendants continue to appeal the jury award, subsequent courts continue to affirm it. The Supreme Court grants certiorari in the case of Eastwood v. Durham Dirty Dairy. (The Supreme Court is reviewing the same numbers granted by the District Court in question #2, that is, \$3 million in compensatory, and \$30 million in punitives). You, Justice Stevens, did such a good job in writing the opinion for BMW v. Gore that you've been asked to write another one. Please write a brief opinion for Eastwood v. Durham Dirty Dairy.