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PUNITIVE DAMAGES

SUPREME COURT

The U.S. Supreme Court's five-factor test for determining punitive damages by assessing the reprehensibility of a defendant's conduct is a poor fit for product liability cases, defense attorneys Diane Flannery, Mitchell K. Morris and Annie Cai say. As many as four of the five factors, as set forth in State Farm v. Campbell, are inherent in every product liability case where punitive damages are recoverable and thus don't assess *relative* reprehensibility, the authors say.

The Supreme Court's Reprehensibility Factors Don't Work in Product Liability Cases



By Diane Flannery, Mitchell K. Morris and Annie Cai

Despite tort reform, 2015 proved to be another significant year for punitive damages in the product liability field. In May 2015, a Delaware jury awarded $75 million in punitive damages (later reduced to $7.5 million by the trial court) for allegedly defective pelvic mesh. *See Barba v. Boston Scientific Corp.*, No. N11C-08-050 MMJ (Del. Superior Ct. 2015). Also in May, a pharmaceutical company was ordered to pay $23 million in punitive damages to a girl whose family blamed the company's epilepsy drug for causing her birth defects. *See Schmidt v. Abbott,* No. 1222CC0247901 (Mo. Cir. Ct. 2015). In November, a federal jury awarded $10 million in punitive damages—ten times the amount of compensatory damages—in the first bellwether trial in multidistrict litigation over an allegedly defective metal hip implant. *See Christiansen v. Wright Med. Tech., Inc.*, Civil Action No. 1:13-cv-297-WSD (N.D. Ga.).

And in December, a California jury awarded $70 million in punitive damages for an allegedly defective surgical instrument. *See Kuhlmann v. J&J Healthcare Systems*, Case No. 13675753 in the (Cal. Sup. Ct.).

Meanwhile, a federal judge upheld a jury's earlier award of punitive damages seven times the amount of compensatory damages in the first federal bellwether trial over allegedly defective pelvic mesh, reaffirming his prior exclusion from trial of evidence concerning the manufacturer's regulatory compliance. *See Cisson v. C.R. Bard, Inc.*, No. 2:11-CV-00195 (S.D.W. Va. Jan.

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Reprehensibility Factors in Punitive Damages Assessments from *BMW of North America v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)

Factor	Inherent in Product Liability Actions Where Punitive Damages Recoverable	Varies by Facts
Conduct caused physical, not economic harm	✓	
Conduct showed indifference to the safety of others	✓	
Plaintiff was financially vulnerable	✓	
Defendant engaged in similar conduct on other occasions	✓	
Defendant acted intentionally		✓

20, 2015) *aff'd sub nom. In re C.R. Bard, Inc., MDL. No. 2187, Pelvic Repair Sys. Products Liab. Litig.*, 810 F.3d, 2016 BL 9908 (4th Cir. Jan. 14, 2016).

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court held that due process forbids imposing ''grossly excessive or arbitrary'' punitive damages, and that courts and juries should determine excessiveness by comparing a punitive damages award's ratio to the amount of compensatory damages, ''comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct,'' and analyzing ''reprehensibility'' factors. As the Court noted in *State Farm*, reprehensibility is ''the most important indicium'' in assessing a punitive damages award's excessiveness. *Id.* at 419.

The Court identified five factors to guide lower courts and juries assessing the reprehensibility of a defendant's conduct: (1) whether the harm caused was physical, as opposed to merely economic; (2) whether the conduct showed an indifference to or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct was repetitive or was an isolated incident; and (5) whether the harm resulted from a defendant's intentional misconduct. *State Farm*, 538 U.S. at 419. A year after *State Farm*, the Court clarified that a jury may also consider harm to third parties in determining a defendant's reprehensibility. *Philip Morris USA v. Williams*, 549 U.S. 346, 357 (2007). Since this line of cases, the Supreme Court has not provided further clarification on the application of these factors.

The *State Farm* Court (and the *BMW* Court before it) set forth these five factors, however, in the context of cases involving economic torts. As a group, the factors provide a relatively poor framework for assisting juries and courts with assessing reprehensibility in product liability cases because these factors are typically found in many product liability actions. Consequently, they fail to distinguish between degrees of reprehensibility. Indeed, depending on how you define the terms, as many of four of the five *State Farm* factors are inherent in every product liability case where punitive damages are recoverable. Thus, they do not assess *relative* reprehensibility.

First, product liability cases almost always involve *physical injuries* rather than economic harm, so the first reprehensibility factor is satisfied in virtually all products liability cases. The same is true for the second factor—in personal injury actions at least, most states require that a defendant's conduct be found to have exhibited, at a minimum, an indifference to or reckless disregard for health or safety before punitive damages may be imposed in any amount. *See, e.g.*, Restatement (Second) of Torts 908(2) (1977).

Third, some courts have interpreted *financial vulnerability* not as *Gore* indicated, i.e., meaning a defendant *targeted* a financially or economically vulnerable plaintiff, but instead as meaning that the defendant had a greater net worth than the injured plaintiff or that the plaintiff's injuries left him or her in a financially vulnerable position. *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594, 604 (6th Cir. 2006) (rejecting trial court's finding that plaintiff was financially vulnerable because he ''was a purchaser of one of Chrysler's vehicles and Chrysler has substantial financial resources''). Other courts have interpreted this factor even more broadly as meaning any ''vulnerability to the specific harm represented by the Defendants' actions[.]'' *In re Actos (Pioglitazone) Products Liab. Litig.*, No. 6:11-MD-2299 (W.D. La. Oct. 27, 2014). Under these expansive—albeit incorrect—definitions, a court or jury will find this factor present in nearly every product liability case because individual consumers almost always have a smaller net worth than product manufacturers, or will otherwise be deemed to have been vulnerable in some way to the harm that befell them. On the other end of the spectrum, some courts have found that financial vulnerability ''has little to no relevance when the plaintiff's injuries are entirely physical,'' and have declined to consider it altogether in the product liability context. *Cisson v. C.R. Bard, Inc.*, No. 2:11-cv-00195 (S.D. W. Va. Jan. 20, 2015). Either way, this factor has not proven particularly helpful to assessing relative reprehensibility in product liability cases.

Fourth, to the extent that courts construe *repetitive conduct* to refer to *continuing to sell a product* rather

  PSLR ISSN 0092-7732

than to discrete, repeated acts in designing or failing to redesign a product, this factor will likewise be present in almost every product liability case because nearly all goods are mass-produced and mass-marketed.

Lower courts have indeed struggled to apply the *State Farm* reprehensibility factors to product liability actions. In *In re Actos (Pioglitazone) Products Liability Litigation*, the District Court for the Western District of Louisiana reduced a $9 billion verdict against pharmaceutical companies Takeda and Eli Lilly & Co. to $37 million.

At trial, the jury found that defendants engaged in wanton and reckless disregard in failing to provide adequate warnings of a risk of bladder cancer associated with Actos®, a diabetes medication. *Id.* In a 50-page memorandum opinion, District Court Judge Doherty began her analysis by noting that the Supreme Court has ''not clarified which facts a Court should focus on in order to determine the relevant degree of reprehensibility of a Defendant's conduct.'' *Id.*

Judge Doherty easily found all five reprehensibility factors present. First, the harm caused by defendants' action was physical, and not ''merely economic'' as plaintiff now suffers from bladder cancer and is at risk of premature death. *Id.* Second, the court opined that defendants acted with a total disregard for the general welfare and the health care system by their failure to warn. *Id.* Third, while acknowledging that the Supreme Court has only discussed the *financial* vulnerability of the plaintiff, the court discussed this factor in terms of the *physical* vulnerability of the plaintiff. *Id*. The court found this factor easily satisfied where the target population of defendants' conduct was a ''particularly fragile and vulnerable one.'' *Id.* Fourth, the court found that defendants engaged in repeated actions when they marketed and sold the product to the public for over a decade. *Id.* Finally, the court explained that defendants acted intentionally, chasing industry profits and market shares instead of providing accurate warning information to the public. *Id.*

Having found all five factors present but troubled by the $9 billion dollar verdict, the court struggled to find a basis for reducing the jury verdict. The court attempted to ''reconcile what. . . seems to be somewhat incompatible prongs of the analysis—reasonableness, which focuses, primarily, on the degree of reprehensibility of Defendants' conduct, and proportionality—which focuses, primarily on the ratio between the Plaintiffs' compensatory damages award and the punitive damages award.'' *Id.* Ultimately, Judge Doherty reduced the award to $37 million based on a proportionality analysis, finding that a ratio of 1:25 of compensatory damages to punitive damages struck the proper balance. *Id.*

Because the reprehensibility factors do not aid courts in products liability cases, what is needed, instead, are factors that meaningfully aid juries and courts to evaluate a particular defendant's conduct along a spectrum from the least to the most reprehensible. Because the *State Farm* factors do not assist a jury or a court to determine whether a defendant in a product liability case is ''more blameworthy than others,'' it is, therefore, appropriate and necessary to develop a list of factors that do.

Meaningfully Assessing Reprehensibility In a Products Liability Case

A jury may assess punitive damages only after awarding compensatory damages. Whether punitive damages are appropriate or constitutional depends on whether imposing them in addition to the compensatory damages that already make a plaintiff whole is necessary either to punish that defendant or to deter conduct in the future. *State Farm*, 538 U.S. at 419 (''It should be presumed that a plaintiff has been made whole for his injury by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.''). This hinges primarily on how reprehensibly a defendant has acted. The more reprehensible a defendant's conduct, the more necessary a financial penalty may become to punish and deter that conduct, while the less reprehensible a defendant's conduct, the less necessary it becomes. ''Some wrongs,'' the Supreme Court has explained, ''are more blameworthy than others.'' *Gore*, 517 U.S. at 575. Reprehensibility is not a black and white proposition to which a court or a jury can simply say ''yes'' or ''no,'' but rather a matter of *degree*. *See, e.g., id.* at 568 (noting a need for ''flexibility in determining the level of punitive damages''). The factors that a jury or a court uses must function as tools to help place a defendant's conduct along a spectrum of reprehensible behavior.

These factors need not be—and *should* not be—static across all torts. For what may be a helpful factor in assessing reprehensibility in an intentional or economic tort may be common to *all* product liability torts and thus of no value in assessing the *degree* of a product liability defendant's reprehensibility. Relying solely on the *State Farm* factors will deny juries and courts access to several helpful yardsticks for evaluating reprehensibility. Importantly, at no point has the Supreme Court ever held that the five *State Farm* factors are the definitive five factors that juries and courts must always apply to assess reprehensibility for any and all purposes and in all cases. To the contrary, the Court in *Gore* observed that it is entirely legitimate for ''the level of punitive damages'' to vary for ''different classes of cases.'' *Id*. at 568.

Moreover, as the Court in *Gore* acknowledged, the *Gore*/*State Farm* factors are primarily ''aggravating'' in nature, i.e., justifications for a *higher* punitive damages award. As a matter of fundamental fairness, court and juries should also be required to consider ''mitigating'' factors that affirmatively warrant *lower* punitive damages. This is particularly true given the ''penal[]'' nature of punitive damages and ''the fundamental due process concerns'' they present. *Williams*, 549 U.S. at 352-54. A defendant should be permitted to introduce, and courts and juries required to consider, any and all evidence tending to show that his or her conduct was less culpable, and, therefore, less reprehensible. *See id.* at 353 (''[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense.'').

To Better Aid Jury, Parties Should Request a Reprehensibility Jury Instruction

The proposed jury instruction should provide the jury guidance for evaluating whether the defendant's conduct in designing and testing the product and responding to post-sale issues was reprehensible, warranting punishment. In evaluating whether a defendant's conduct was reprehensible, the jury should be instructed to consider the following factors:

1. Whether in designing the product, the defendant attempted to comply with applicable government or industry safety standards;

2. Whether the defendant engaged in safety testing;

3. Whether the defendant took steps to warn consumers about possible injury;

4. Whether the defendant affirmatively concealed its knowledge of defects known to cause injury;

5. Whether the defendant implemented a mechanism for receiving customer complaints and monitoring product safety;

6. Whether and how the defendant investigated product-related injuries;

7. Whether the defendant voluntarily took measures to make its product safer or issued new or additional safety warnings.

Indeed, some courts have held that one or some combination of these factors may preclude the imposition of punitive damages altogether. *See Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (''We have repeatedly held that the issue of punitive damages should not go to the jury when a manufacturer takes steps to warn the plaintiff of the potential danger that injured him[.]''); *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 610 (W. Va. 1983) (punitive damages improper when defendant ''had taken steps to warn the public'' even though ''warnings may have been inadequate to fully warn of the hazards''); *Stone Man v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (''[P]unitive damages, the purpose of which is to punish, penalize or deter, are, as a general rule, improper where a defendant has adhered to environmental and safety regulations.''); *Nissan Motor Co., Ltd. v. Maddox*, 2015 BL 309196 (Ky. Sept. 24, 2015) (''[N]o reasonable juror could determine that Nissan's conduct demonstrated a reckless or wanton disregard'' when ''vehicle was subjected to testing requirements that exceeded those mandated by the Federal government.''). At the very least, they should be required considerations when determining a defendant's reprehensibility, and, ultimately, the amount of any punitive damages to impose.

Complying with Industry and Government Safety Standards

A defendant that complies with relevant government safety protocols or industry standards acts in a responsible fashion that does not warrant punishment or deterrent measures. In contrast, when a defendant elects to ignore clearly applicable standards resulting in an injury, it may constitute reprehensible conduct. In most states, compliance or attempted compliance with industry or government standards is typically viewed as weighing against punitive damages. *See, e.g., Richards*, 21 F.3d at 1317.

Safety Testing

A defendant that engages in product safety testing acts appropriately, not reprehensibly. Conversely, when a defendant ''rush[es] into production'' without pertinent testing or fails to test at all, the conduct may warrant a punitive damages award to punish or deter. *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1253-54 (10th Cir. 2000).

Warning Consumers

Defendants that learn of risks and fail to warn are more likely to warrant punishment and need deterrence than those that warn consumers of possible risks. *See, e.g., In re Actos (Pioglitazone) Products Liab. Litig.* On the other hand, a defendant who warns of risks associated with its product, even if those warnings are ultimately deemed inadequate, exhibits some care towards consumers. *See, e.g., Ilosky*, 307 S.E.2d at 610. Most products are not designed to be completely injury proof, and trying to make them so would often be unreasonable because it would rob them of their intended functionality and utility. A saw is a saw only if it has a sharp blade. With such products, it is entirely reasonable for a defendant to warn against a risk rather than to ameliorate it.

Affirmatively Concealing Injury-Causing Defects

A defendant that, in designing a product, learns that the product has defects that may cause injury and, instead of remedying the defect or warning consumers about the risk, decides instead to conceal the defect to make the product more marketable engages in far more reprehensible conduct than a defendant that takes corrective measures. *See, e.g., Shurr v. A.R. Siegler, Inc.*, 70 F. Supp. 2d 900, 938-39 (E.D. Wis. 1999).

Accepting Customer Feedback and Monitoring Product Safety

A defendant that has set up a system for monitoring customer complaints enables a defendant to react more quickly if post-sale issues arise. The law should encourage these systems and the remedial purposes they serve, and implementing them should weigh against awarding punitive damages. *See Jarvis v. Ford Motor Co.*, 69 F. Supp.2d 582, 606 (S.D.N.Y. 1999), *aff'd in part, vacated in part*, 283 F.3d 33 (2d Cir. 2002).

Investigating Product-Associated Injuries

When a defendant knows of recurring product-associated injuries but consciously decides not to investigate the cause of those injuries, that defendant acts more reprehensibly than a defendant that attempts to ascertain whether its product has a defect that may have contributed to those injuries. The jury's role here is to assess whether a defendant conducted an investigation appropriate to the circumstances: did a defendant react understandably to information and hence less reprehensibly, or inexplicably and callously and hence more reprehensibly. *See, e.g., Lakin v. Senco Prods., Inc.*, 925 P.2d 107, 119 (Or. Ct. App. 1996) (finding punitive damages proper against a nail gun manufacturer when the manufacturer had long known of the gun's tendency to ''double fire'' but did not conduct tests to determine when or how frequently double firing occurred).

  PSLR ISSN 0092-7732

Voluntarily Taking Safety Measure or Issuing New or Additional Warnings

A defendant that voluntarily undertakes to make a product safer, or issues additional safety information, acts less reprehensibly than a defendant that takes no action. *See Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 207-08 (Tenn. Ct. App. 2008) (finding no punitive damages permissible as a matter of law when the defendant voluntarily recalled the product). The law intends to encourage, not punish, voluntary action that makes a product safer, even at the urging of government or industry groups. *In re Exxon Valdez*, 270 F.3d 1215, 1242 (9th Cir. 2001) (''Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.'').

Conclusion

The U.S. Supreme Court's goal of establishing constitutional guidelines for punitive damages awards is not yet complete.

The law particularly needs to resolve the mismatch between the factors that the Court has identified for assessing reprehensibility in economic cases with the typical facts at issue in product liability cases. The work must begin in the lower courts, and litigants must frame the issue for courts' consideration.

In states where juries have the first-line responsibility to ensure that reasonable punitive damages verdicts prevail, trial courts should provide suitable instructions that recast the reprehensibility factors along the lines outlined above.

If juries return verdicts that include punitive damages awards, both trial courts and appellate courts should review those verdicts, taking manufacturers' design and post-design conduct into account. As the Court has observed: ''Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of fair notice of the severity of the penalty that a State may impose [and] threaten arbitrary punishments, i.e., punishments that reflect not an application of law but a decisionmaker's caprice[.]'' *Williams*, 549 U.S. at 352 (internal citations and quotations omitted).

Finally, counsel must attempt to convince courts that they should not reflexively use a set of factors that the Supreme Court never intended as exclusive and applicable to all cases, and which, in product liability cases, at least, are a poor fit.

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