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Cover Page Footnote
18-1

THE LATEST WORD FROM THE SUPREME COURT ON PUNITIVE DAMAGES

Honorable Leon D. Lazer[1]

The first case I will be discussing is *Cooper Industries v. Leatherman*.[2] It dealt with punitive damages, and it has rather important local and statewide import because of the large number of punitive damage claims in New York.[3]

In *Cooper Industries*, the punitive damages claim was based on the premise that the conduct precipitating the principal cause of action was so bad it warranted punitive damages.[4] In New York, under Pattern Jury Instructions 2:278, the judge instructs the jury that punitive damages can be awarded if the act was wanton and reckless or malicious.[5] The Pattern Jury Charge goes on further to say:

> There is no exact rule by which to decide the amount of punitive damages. The amount that you award as punitive damages need not have any particular ratio or relationship to the amount you award to compensate the plaintiff for (his, her) injuries. If you find that the defendant's act was (wanton and reckless, malicious), you may award

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.[1] The Honorable Leon D. Lazer is a graduate of the City College of New York, and received his LL.B from New York University Law School. Judge Lazer served as an Associate Justice of the Appellate Division, Second Department, from 1979 to 1986 and was a New York State Supreme Court judge from 1973 to 1986. He was a partner in the New York law firm of Shea & Gould; Town Attorney for the Town of Huntington, New York; member of the Temporary State Commission to Study Governmental Costs in Nassau and Suffolk Counties; Chair of Pattern Jury Instructions Committee of the New York State Association of Supreme Court Justices; author of many published judicial opinions; member of the American Law Institute; member of the American and New York State Bar Associations and the Association of Supreme Court Justices of New York State. Judge Lazer retired from the bench in 1986.

[2] 532 U.S. 424 (2001).

[3] *Id.*

[4] *Id.*

[5] N.Y. PATTERN JURY INSTR., CIVIL 2:278 (3d ed. 2000).

> such amount as in your sound judgment and discretion you find will punish the defendant and discourage the defendant or other (people, companies) from acting in a similar way in the future.[6]

This Pattern Jury Instruction is largely based on New York Court of Appeals holdings.[7]

Punitive damages claims do not constitute a separate cause of action, but simply consist of another allegation added to an existing cause of action. If the jury finds that there is liability for punitive damages, then evidence may be submitted as to the financial status of the defendant.[8] In New York, the trial is bifurcated.[9] If the jury returns and finds, in response to a written question, that the defendant's conduct was reckless and malicious, then the second phase of the trial begins and the financial status of the defendant can be offered.[10] Considering that this occurs in the midst of trial, the plaintiff may be provided with only one or two days of discovery to establish the financial capacity and wealth of the defendant.[11] I am unsure of how this actually works in practice.

The New York Court of Appeals has held that a punitive damage award should not be disturbed unless it is so grossly excessive as to warrant the conclusion that it was "actuated by passion."[12] However, for a long time the United States Supreme

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[6] *Id.*

[7] *See, e.g.*, Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary, 262 N.Y. 320, 323-25 (1933) (setting forth the definition of "wanton" used in the New York pattern jury charge). *See also* Lamb v. S. Cheney & Son, 227 N.Y. 418, 422 (1920) (delineating the definition of "malicious" used in the New York pattern jury charge).

[8] *See* Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363, 374 (2d Cir. 1988) (stating that after the jury finds in favor of the claimant on the issues of liability and compensatory damages then evidence on the financial condition of the defendant may be presented).

[9] DAVID D. SIEGEL, NEW YORK PRACTICE § 130 (3d ed. 1999).

[10] Suozzi v. Parente, 161 A.D.2d 232, 554 N.Y.S.2d 617 (1st Dep't 1990).

[11] *Id.*

[12] Nardelli v. Stamberg, 44 N.Y.2d 500, 406 N.Y.S.2d 443 (1978).

Court refrained from getting involved in the area of punitive damages or the constitutionality of such awards. But within the last fifteen years or so, substantial interest in the area became apparent,[13] ultimately leading to the *Cooper Industries* decision last May.[14]

In *Cooper Industries*, the Supreme Court worked a very significant change on the punitive damage scene.[15] The Court decided by an eight-to-one vote that appellate review of punitive damage verdicts requires *de novo*, rather than abuse of discretion, review.[16] The significance of this decision stems from the fact that abuse of discretion review is a deferential review with deference given to the findings of the jury.[17] However, *de novo* review does not provide such deference. The entire case is reviewed on the record, and the appellate court determines the suitability of the damage award.[18] When this decision came down, tort reformers commented that juries will not be deciding punitive damages, rather, judges will.

Before *Cooper Industries*, there was a long, national tradition associated with the idea that juries were relatively unconstrained in fixing punitive damages.[19] In 1851, the Supreme Court decided *Day v. Woodworth*[20] and declared that it was a well-established common law principle that a jury can impose punitive damages and the question does not admit argument.[21] The Seventh Amendment protects the right to a jury

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[13] Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

[14] *Cooper Industries*, 532 U.S. at 424.

[15] *Id.* (Ginsburg, J., dissenting).

[16] *Id.* at 431.

[17] *Id.* at 436.

[18] *Id.*

[19] *See* Barry v. Edmunds, 116 U.S. 550, 565 (1886) (noting that it is the function of the jury to determine the amount of the verdict as no precise rule of law fixes recoverable damages).

[20] 54 U.S. 363, 371 (1851).

[21] *Id.* at 371.

trial in any matter where there was such a right at common law,[22] but the Seventh Amendment does not apply to the appellate stage, so the Supreme Court was free to establish an appellate rule.[23]

What has happened in the last fifteen years in the Supreme Court is due, to some degree, to the tort reform movement and the fact that more conservative Justices were in the position to work their will. Nevertheless, two of the most conservative Justices, Justice Scalia and Thomas were simply opposed to any restraints on punitive damages.[24] When Justice Scalia visited Touro about five or six years ago, he had lunch with the faculty and was asked a question about punitive damages. In the course of responding, he observed that "when those guys come in to argue against punitive damages"—of course this is not an exact quote by any means—"you can smell the wealth in the room and see the expensive suits and tasseled shoes." A pretty strong comment by a judge, but he has been consistent on this issue.[25]

It is about fifteen years since the due process issues started to bubble in punitive damages cases.[26] The question was whether the defendant had the benefit of due process when a jury was permitted to levy almost any amount of money in damages without relation to the amount awarded for compensatory damages.[27] In *Santosky v. Kramer*,[28] a 1982 case, the Court spoke for the first time of requiring some intermediate standard

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[22] U.S. CONST. amend. VII states in pertinent part: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[23] *See, e.g., Cooper*, 532 U.S. at 437 (finding that as the jury's award of punitive damages does not constitute a finding of "fact," appellate review of the District Court's determination that an award is consistent with due process does not implicate the Seventh Amendment).

[24] *See, e.g., TXO*, 509 U.S. at 470. (Scalia, J. and Thomas, J. concurring) (finding it difficult to imagine that substantive due process contains the right to not be subjected to excessive punitive damages).

[25] *Id.*

[26] *See, e.g., Id.* at 457.

[27] *Id.*

[28] 455 U.S. 745, 756 (1982).

of proof where the defendant showed detrimental loss beyond money, such as damage to his or her reputation. [29]

In 1986, the Court heard *Aetna Life Insurance Co. v. Lavoie*,[30] involving a $3.5 million punitive damage verdict.[31] Although the case was decided on other grounds, the Court noted that the defendant's constitutional arguments raised issues that, in a proper setting, must be resolved.[32] Then, in the 1991 case of *Pacific Mutual Life Ins. Co. v. Haslip*,[33] involving insurance fraud, the Court sustained an eight hundred thousand dollar punitive damages verdict, which was four times the amount of the compensatory damages.[34] Furthermore, the amount awarded far-exceeded Alabama's fines for insurance fraud.[35] Writing for the Court, Justice Blackmun declared that it was not *per se* unconstitutional to assess punitive damages by the common law method.[36] Justice O'Connor dissented and paraphrased the judge's instruction to the jury as follows: "Think about how much you hate what the defendants did and teach them a lesson."[37] Incidentally, in *Haslip*, Justice O'Connor laid out a whole series of standards that the Alabama Supreme Court had utilized relative to what a jury should be charged in such a case.[38] Justice Blackmun, who wrote the majority decision, did say that while the majority had affirmed the judgment, such unfettered

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[29] *Id.*

[30] 475 U.S. 813 (1986).

[31] *Id*

[32] *Id.* at 828-29.

[33] 499 U.S. at 1.

[34] *Id.*

[35] *Id.* at 23.

[36] *Id.* at 17.

[37] *Id.* at 49 (O'Connor, J., dissenting).

[38] *Id.* at 51. Judge O'Connor listed seven factors that the Alabama Supreme Court had previously considered relevant to the size of a punitive damages award including that "punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct" and that "the degree of reprehensibility of the defendant's conduct should be considered." Citing Green Oil Co. v. Hornsby, 539 So.2d 218, 223-224 (Ala. 1989), quoting Aetna Life Ins. Co. v. Lavoie, 505 S.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially).

discretion might invite extreme results that jar one's sensibilities.[39]

In 1993, a major decision was rendered in *TXO Production v. Alliance Resource*.[40] There, the plaintiff was awarded nineteen thousand dollars in compensatory damages and ten million dollars in punitive damages, 526 times the amount of compensatory damages.[41] The Court granted certiorari to decide whether in awarding such damages, the lower court had violated the Due Process Clause.[42] The majority decided that the relationship between compensatory and punitive damages was only one factor to be considered, that there was no bright line and each case was unique.[43] Further, the Court found that the defendant's malicious and absolutely fraudulent conduct in trying to deprive the plaintiff of very valuable oil leases—if you read the case what they did was absolutely dreadful—was so fraudulent and malicious, that the punitive damage verdict of ten million dollars was reasonable.[44] Justices Scalia and Thomas were consistent in their point of view that there was no substantive due process right involved in punitive damages, and there was no requirement that punitive damages be reasonable under the Due Process Clause.[45] Justice O'Connor dissented. She called the award monstrous and found that the state procedures for arriving at the award were wholly inadequate.[46]

That brings us to *BMW of North America v. Gore*,[47] decided only a year later. The case concerned a brand new

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[39] *Haslip*, 499 U.S. at 18.

[40] 509 U.S. at 443.

[41] *Id.* at 453.

[42] *Id.*

[43] *Id.* at 458.

[44] *Id.* at 462. After TXO discovered large reserves of oil and gas under a tract of land that Alliance Resources held the oil and gas rights to, in bad faith they tried to advance a claim on the tract, using a worthless quitclaim deed. The Court emphasized the fact that TXO's scheme was part of "a larger pattern of fraud, trickery and deceit" and that millions of dollars had potentially been at stake.

[45] *Id.* at 470.

[46] *TXO*, 509 U.S. at 473. (O'Connor, J., dissenting).

[47] 517 U.S. at 559.

BMW that had been sold to Dr. Gore.[48] When Dr. Gore's vehicle initially had arrived at BMW's vehicle preparation plant, it had some scratches on it and it had to be repainted.[49] However, Dr. Gore was not informed about the repainting, and when he subsequently bought the car and took it to an independent dealer to have some detailing done on it, he was informed that his car had previously been repainted.[50] As a consequence, Dr. Gore sued BMW.[51]

During the course of the trial, it was shown that the cost of repair was six hundred dollars, but Dr. Gore's expert testified that the repainting had reduced the value of the car that he bought by four thousand dollars.[52] So the compensatory damages were four thousand dollars, but the jury also awarded four million dollars in punitive damages.[53] How did they arrive at that figure? Well, they found that BMW had previously done this kind of repainting in approximately one thousand cases.[54] Thus, four thousand dollars multiplied by the one thousand cars gave them the four million-dollar punitive damage verdict.[55] The Alabama Supreme Court subsequently reduced the punitive damage award to two million dollars.[56]

In *BMW*, the Supreme Court really took hold of the due process issue and declared that the amount was grossly excessive and amounted to a severe criminal penalty in violation of the Constitution.[57] Dr. Gore argued that the punitive award was an appropriate penalty for selling one thousand cars for more than they were worth.[58] The Supreme Court's response to that was that no jury can decide to punish legal conduct that takes place in

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[48] *Id.*
[49] *Id.* at 563.
[50] *Id.*
[51] *Id.*
[52] *BMW*, 517 U.S. at 564.
[53] *Id.* at 565.
[54] *Id.* at 564.
[55] *Id.*
[56] BMW of N. Am., Inc. v. Gore, 646 So.2d 619, 629 (Ala. 1994), *reversed and remanded by* BMW of N. Am., Inc. v. Gore, 517 U.S. at 559.
[57] *BMW*, 517 U.S. at 574.
[58] *Id.* at 564.

other states,[59] and that BMW had been deprived of due process by the excessive award.[60]

So what do we do about our punitive damage charges and procedures in New York? BMW was deprived of due process because it had no notice that its conduct may have subjected it to such a severe penalty.[61] Due process requires that a person receive fair notice, not only of the conduct that will subject him or her to punishment, but also of the severity of punishment that a state may impose.[62] Now, how do you do that absent a detailed statute? How do you tell BMW that if it repaints cars and doesn't tell the buyers, it may get hit with a two million-dollar penalty? Accordingly, there is a real problem in applying the *BMW* rule in the absence of a punitive damage statute. Defendants cannot discover at the trial that they may be subject to a two million-dollar penalty; they have to have notice in advance that their conduct subjects them to the possibility of such a penalty.

In *BMW*, the court set up three guideposts for appellate review.[63] The first guidepost for review is the "degree or reprehensibility" of the defendant's conduct.[64] The second guidepost is the disparity between the harm suffered by the plaintiff and the punitive damage award.[65] Well, how do you get from four thousand dollars to two million dollars, or, for that matter, from nineteen thousand dollars to ten million dollars? Therefore, disparity is in the ballpark now and it has to be considered. If it is going to be considered by the appellate court, the jury has to know something about the connection between the harm and the amount of punitive damages. In New York, we have not been telling our juries about that. The third guidepost is "the difference between [the punitive damage award] and the civil penalties authorized or imposed in comparable cases."[66] In other

[59] *Id.* at 573.
[60] *Id.* at 586.
[61] *Id.* at 574.
[62] *BMW*, 517 U.S. at 574.
[63] *Id.* at 559.
[64] *Id.* at 575.
[65] *Id.*
[66] *Id.*

words, what is the civil penalty for selling a car in that condition without telling the buyer? Well, I do not think it can be very much. This type of standard—a comparison with what the legislature may have enacted as a civil penalty for selling a car while withholding the fact that the car was repainted—is not going to provide a basis for upholding a large judgment.[67] Justices Breyer, O'Connor and Souter concurred that there was a denial of due process to BMW because there were no state standards to distinguish between conduct that warranted large or small awards.[68] Justices Thomas and Scalia dissented, declaring that it is none of the Court's business and due process has nothing to do with punitive damages.[69] As a matter of fact, Justice Scalia said the Constitution does not make it any of the Court's business if punitive damages 'run wild,'[70] so the Court should stay out of it.[71] It is state business and has nothing to do with the Federal Constitution.[72] That is what Justice Ginsburg wrote in her dissent as well.[73] She said it is a matter for the states.[74]

All of this brings us to last June's case, *Cooper Industries v. Leatherman*.[75] Leatherman manufactured a sort of a Swiss Army knife with a modification on it, which it called a 'Pocket Survival Tool.'[76] The modification was that you could unfold the Swiss-Army-type device to almost full size pliers.[77] This is an interesting device, and Cooper Industries, a competitor, decided to copy it and to market another multifunctional tool, which they called the "ToolZall."[78] They advertised their tool, which was really the Leatherman tool design, at one of the big trade

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[67] *BMW*, 517 U.S. at 586.
[68] *Id.* (Breyer, J., concurring).
[69] *Id.* at 598 (Scalia, J., dissenting).
[70] *Id.* at 586 (quoting *Haslip*, 499 U.S. at 18).
[71] *BMW*, 517 U.S. at 607.
[72] *Id.*
[73] *Id.* at 607.
[74] *Id.*
[75] *Cooper*, 532 U.S. at 424.
[76] *Id.* at 427.
[77] Leatherman Tool Group v. Cooper Industries, 199 F.3d 1009, 1010 (9th Cir. 1999).
[78] *Cooper*, 532 U.S. at 427.

shows.[79] Many people at the trade show saw a sample of what Cooper Industries represented as the "ToolZall;" but rather, it was a "mock-up" of the Leatherman original tool.[80]

The action was brought under the Lanham Act[81] and on a common law claim, charging unfair competition and trade-dress infringement, and a preliminary injunction was granted.[82] The jury found Cooper guilty of false advertising and unfair competition and awarded fifty thousand dollars in compensatory damages, and $4.5 million in punitive damages.[83] After the verdict, the District Court rejected the argument that the punitive damage were excessive.[84] On appeal, the Court of Appeals for the Ninth Circuit, issuing two separate decisions, set aside the permanent injunction[85] because that was not an issue any more, and affirmed the $4.5 million punitive damage judgment finding that it was necessary to create deterrence and the award was not a violation of Cooper's due process right.[86]

In an 8 to 1 decision, Justice Stevens wrote for the majority, and he declared that compensatory damages "are intended to redress concrete loss that the plaintiff has suffered," while, punitive damages "operate as private fines intended to punish the defendant and deter future wrongdoing."[87] In his view, the jury's compensatory damage award is a factual determination, whereas, "punitive damages [are] an expression of moral condemnation," which does not involve a factual

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[79] *Id.*

[80] *Id.*

[81] 15 U.S.C. § 1125 (2001).

[82] Leatherman Tool Group v. Cooper Industries, 1996 U.S. Dist. LEXIS 21976, at *19 (D. Or. Dec. 18, 1996).

[83] Leatherman Tool Group v. Cooper Industries, 1997 U.S. Dist. LEXIS 22763, at *1 (D. Or. Nov. 17, 1997) (entering judgment based on the jury verdict from Oct. 17, 1997 and ordering a permanent injunction).

[84] *Id.*

[85] *Leatherman Tool Group*, 199 F.3d at 1009 (reversing the permanent injunction issued against Cooper Industries).

[86] Leatherman Tool Group v. Cooper Industries, 205 F.3d 1351 (9th Cir. 1999) (affirming the punitive damages award).

[87] *Cooper*, 532 U.S. at 432.

determination.[88] Stevens further noted that state legislators have broad discretion in fixing criminal penalties and imposing punitive damages, and judicial decisions operating within those frameworks have to be decided on an abuse of discretion basis,[89] but even then, the Due Process Clause of the Fourteenth Amendment imposes a substantial limit on that discretion.[90] The Fourteenth Amendment makes the Eighth Amendment prohibition against excessive fines applicable to this case, and the majority here says that applies to the states.[91]

So what you have at this point is the *BMW* case, holding that excessive punitive damages may violate the Due Process Clause itself.[92] Then you have the *Cooper* case where the Court states that the Due Process Clause implicates the Eighth Amendment.[93] Now you have a prohibition on excessive fines.[94] Two years after the *BMW* decision in 1998, the Supreme Court held in *U.S. v. Bajakajian*,[95] that in viewing the disparity and the proportionality between compensatory and punitive, you must do a *de novo* review.[96]

There were some interesting comments in the *Cooper* case. Justice Stevens made another distinction between compensatory and punitive damages, stating that "actual damages are a question of historical and predictive fact."[97] I guess in more mundane days in our local courthouses we would say past damages and future damages, but punitive damages are not a finding of fact and therefore appellate review of punitive damages does not implicate the Seventh Amendment. So if you can get out from under the Seventh Amendment, you can get away from Justice Ginsburg's dissenting argument that the Seventh

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[88] *Id.*
[89] *Id.* at 432-33.
[90] *Id.* at 433.
[91] *Id.* at 433-34.
[92] *BMW*, 517 U.S. at 582.
[93] *Cooper*, 532 U.S. at 443.
[94] *Id.* at 434.
[95] 524 U.S. 321 (1998).
[96] *Id.* at 337.
[97] *Cooper*, 532 U.S. at 437.

Amendment right to a jury trial is being precluded by the *de novo* review approach.[98] Justice Stevens was of the view that, as to the first of the *BMW* guideposts, only with reprehensibility do the lower court and the trial court have an advantage.[99] As to the third guidepost, which is in comparison to other civil fines for the same kind of conduct, he said that must be for an appellate court.[100]

So now we have from the Supreme Court the ruling that as far as punitive damages are concerned, appellate review is *de novo* and not deferential to what the jury has found.[101] Where does that leave us in New York? Based on *BMW*, I think the New York standards, or the lack of standards, are ripe for a good look by a smart litigant. In the meantime, as tort reformers have said, judges, not juries, will decide the punishment, and pattern jury drafters will have some creating to do.

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[98] *Id.* at 446.
[99] *Id.* at 448.
[100] *Id.* at 435-36.
[101] *Cooper*, 532 U.S. at 443.