

No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions

by Andrew L. Frey

All has not been well in punitive damages land, where the landscape has been dotted with startling jury verdicts—occasionally in the billions of dollars and not infrequently in the tens or hundreds of millions—that reflect a system that is too often out of control, a system in which one jury might find no punishable misconduct while the next imposes an eight- or nine-digit sanction for the same product design defect or allegedly deceptive corporate marketing practice. I write from the perspective of an observer of and active participant in the punitive damages wars, having argued on behalf of defendants in three Supreme Court cases on the subject—*BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); and *Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)—and having filed an amicus curiae brief on behalf of the U.S. Chamber of Commerce in last term's landmark punitive damages case, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).

In this article I suggest that the time has come for a significant overhaul of model or pattern jury instructions, in an effort to ensure that juries are better informed of the considerations that are to guide their punishment-setting function. I then highlight some of the major substantive criteria that the Supreme Court has now identified as shaping the punishment-setting function. Finally, I set forth my idea of what pattern jury instructions on the subject should contain.

There is little that jurors are tasked with doing for which they are less qualified by knowledge and experience than setting an appropriate amount of punitive damages. Almost invariably they have had no prior contact with the administration of judicial punishments and have been given no numerical frame of reference within which to make their decision. Contrast this to the decision of a sentencing judge who not only knows of the statutory maximum punishment applicable

to the offense but also is able, in setting the sentence, to draw upon extensive information about the sentencing of other offenders for the same or similar crimes.

It is not surprising, therefore, that recent empirical studies have disclosed that, although different mock juries reach fairly consistent rankings of the comparative reprehensibility of various types of misconduct, it is another matter entirely when those same juries are asked to select a punishment based on a given set of facts. Here, vast disparities emerge that demonstrate the extent to which the current process engenders arbitrary and capricious results, as jurors wander aimlessly through the unfamiliar terrain of punishment setting. See Sunstein et al., *Punitive Damages: How Juries Decide* (2002). These results highlight the challenges facing efforts to reform the process and eliminate the all-too-frequent recourse of jurors to whim or caprice.

Although it is not clear to what extent improved instructions can or will succeed in bringing satisfactory coherence to punishment setting by juries, it is crystal clear that the current vague and incomplete instructions given to juries in many states virtually ensure capricious outcomes. And although there are as many different approaches as there are different states that permit punitive damages, few, if any, provide jurors with an adequate overview of the governing legal principles. The current Illinois pattern instruction on punitive damages, “covering” both liability and amount, is one of the worst examples but by no means is alone in its gross inadequacy. In its entirety, it reads:

If you find that the defendant's conduct was willful and wanton and proximately caused injury to the plaintiff, and if you believe that justice and the public good require it, you may, in addition to any other damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter the defendant and others from similar conduct.

Illinois Pattern Jury Instructions—Civ. 35.01 (2000 ed.).

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There was a time when the Supreme Court might have found this to pass constitutional muster, at least if accompanied by searching post-verdict judicial review. *See Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 15, 19-20 (1991). In *State Farm v. Campbell*, however, the Court manifested far greater concern about the inadequacy of current jury instructions:

Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. We have admonished that “[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts . . . Vague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or merely inflammatory.

123 S. Ct. at 1520. *See also BMW*, 517 U.S. at 587 (Breyer, J., concurring) (“Requiring the application of law, rather than a decisionmaker’s caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.”).

These observations make plain the importance—more, suggest the constitutional necessity—of providing jurors materially greater guidance than they currently receive. Indeed, the Court’s ruling in *State Farm* that “a jury *must be instructed* . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred,” 123 S. Ct. at 1522-23 (emphasis added), confirms the Court’s view that the Constitution requires that juries be informed about the key legal principles that should guide their deliberations. In sum, because standardless decision making is the antithesis of fair procedure and because so much can be at stake for the parties, it is essential to provide the best possible guidance to jurors tasked with assessing a fair and lawful punitive damages award.

State Farm reached the Court in the context of judicial excessiveness review, and the opinion in fact endorses “[e]xacting appellate review” to “ensure[] that an award of punitive damages is based upon an ‘application of law, rather than a decisionmaker’s caprice.’” *Id.* at 1520-21 (citation omitted). Nevertheless, post-verdict excessiveness review is not a substitute for an adequately instructed jury; in most jurisdictions a finding of excessiveness leads the reviewing court to remit only to the *highest* amount that state law and the Constitution permit. A properly instructed jury, however, might choose a materially lesser exaction, if only it had better guidance as to the principles governing its task.

In the Wake of *State Farm*

In addition to reaffirming the crucial importance of accurate and sufficient jury instructions in the punitive damages context, *State Farm* alters the substantive legal landscape in a

number of ways that jury instructions should reflect. Most notable among these are the following:

Conduct affecting non-parties. When the plaintiff claims injury arising from an action, policy, or decision that also affected many other people, juries typically have been urged by plaintiff’s counsel to punish the defendant for that entire course of conduct or range of injuries. This creates a risk of excessive, multiple punishments as jury after jury is invited to punish the defendant for the same transgression affecting the same universe of victims, a problem that heretofore has often been brushed off on the ground that it can be dealt with by giving credit in future cases for punishments already suffered for the same conduct. (I note parenthetically that this approach has numerous problems. To begin with, the finding of punitive liability in the particular case may be aberrational; other juries confronted with the same allegations may exonerate the defendant, with the unfortunate result that severe punishment has been imposed in the case of a single plaintiff for conduct widely deemed not to merit any punishment at all. Second, there is no assurance that courts in other jurisdictions would, in fact, give credit for earlier verdicts. Finally, many states allow credits for past punishments only if they have been (a) paid and (b) placed in evidence before the jury. These limitations can confront the defendant with a severe and unfair tactical dilemma at trial and fail to make adequate allowance for the slow pace of appeals.)

Be that as it may, the Supreme Court has now made clear that a defendant may be punished only for harms suffered by the plaintiff(s) themselves, not for causing harms to non-parties:

Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. at 1523. Thus, although there may be circumstances in which it is permissible to place evidence of impacts on non-parties before the jury because such evidence illuminates the defendant’s state of mind, cf. Fed. R. Evid. 404(b), in such cases the jury should be instructed on the limited purpose of such evidence and be told that it is to impose punishment only for the harm suffered by the plaintiff.

No doubt the distinction between “considering” such evidence insofar as it bears on the degree of reprehensibility of the conduct that actually injured the plaintiff and directly “punishing” for the extraterritorial impacts or “other acts” will be a difficult one for jurors to grasp. It is nevertheless the law, and it is the duty of courts, in cases where such evidence has been adduced, to attempt in the clearest and most understandable terms to convey the distinction to the jury.

Extraterritorial conduct. One subset of conduct affecting non-parties that received separate attention in *State Farm* is so-called “extraterritorial” conduct—conduct that occurred, produced harms, or had effects only in other states. In *State Farm* the Court ruled unequivocally, “A State cannot punish a

defendant for conduct that may have been lawful where it occurred Nor, as a general rule, does a state have a legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the state's jurisdiction." *Id.* at 1522 (emphasis added). As with other types of conduct directed at non-parties, evidence of extraterritorial conduct will generally be irrelevant and inadmissible. In the rare case where such evidence is admitted—that is, where the conduct in question was both (1) unlawful in the state in which it took place and (2) closely related to the conduct that harmed the plaintiff—the jury must be told that it cannot punish the defendant for that conduct.

Relationship between punitive damages and harm suffered by the plaintiff. Courts long have recognized that the ratio of punitive damages to the harm suffered by the plaintiff—typically measured by the amount of compensatory damages—is an important factor in setting a reasonable punitive award, and indeed it was one of the three guidelines identified in *BMW of North America*. See 517 U.S. at 582. What ratio might be “reasonable” was a subject of much controversy in the lower courts in the wake of *BMW*.

Although the *State Farm* Court also declined “to impose a bright-line ratio which a punitive damages award cannot exceed,” 123 S. Ct. at 1524, it did shed considerable light on the question of what constitutes a reasonable ratio of punitive to compensatory damages. It began by announcing “Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* To bolster this point, it referred to the 4:1 ratio that it deemed to be “close to the line of constitutional impropriety” in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), as well as to the “long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages [i.e., 1:1, 2:1, or 3:1] to deter and punish.” 123 S. Ct. at 1524.

The Court reiterated its statement in *BMW* that “ratios greater than those we have previously upheld may comport with due process where a ‘particularly egregious act has resulted in only a small amount of economic damages.’” *Id.* (citation omitted). But it added an important new directive: “The converse is also true When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.*

The foregoing suggests that, depending on the magnitude of the compensatory damages, the character of the defendant's conduct, and perhaps other considerations such as comparable civil penalties, the maximum allowable ratio of punitive to compensatory damages will be 1:1 in many cases, will not normally be greater than 4:1, and will only very rarely exceed single digits. How these principles will be applied by the lower courts to specific types of cases remains to be seen. As far as instructions are concerned, the jury must at a minimum be told that any punitive award must bear a reasonable relationship to the compensatory damages. Of course that

statement, without elaboration, gives little guidance as to what relationship is “reasonable.” In fact, however, the trial court often should be able to determine—especially as the subject is fleshed out in subsequent cases—what the maximum ratio is in the case at hand. The jury should then be advised of this outer limit. There is probably no better way to ensure that the jury exercises its discretion within the limits prescribed by law.

The significant role of compensatory damages. Apart from serving as the denominator of the “reasonable relationship” fraction, it is clear from the foregoing that the size of the compensatory award may have a crucial bearing upon the allowable ratio. For instance, although the Court left room for ratios exceeding single digits on rare occasions, that exception appears to be limited to cases in which compensatory damages are “small”—presumably because in such cases the wrongdoer may expect not to be sued and, therefore, to escape liability. Conversely, when compensatory damages are substantial, low ratios are the order of the day. Compensatory damages assume this significance in the punitive calculus because at the end of the day, it is the imposition of liability, not its label as compensatory or punitive, that primarily determines the strength of the deterrent effect of a judgment.

The proper role of the defendant's financial condition.

The jury should not increase punitive damages merely because the defendant has substantial net worth.

Previous decisions from courts in many jurisdictions have suggested that punishment may properly be enhanced on the basis of a corporate defendant's net worth. The idea that wealth is relevant to deterrence entered the law at a time when most punitive damages claims were brought against individuals for non-economically motivated torts, such as assault or defamation. In such cases assessing the deterrent efficacy of a monetary penalty requires “monetarizing” the subjective value of the misconduct to the individual, which, in turn, would depend on the individual's wealth. The unthinking importation of this principle in recent years to economically motivated torts committed by corporations and other organizational defendants is fallacious because the motivation for such conduct, and hence the deterrence calculus relating thereto, depends on the economics of the underlying transaction, not on the “wealth” of the actor.

Unlike the state courts, the Supreme Court had on several occasions prior to *State Farm* expressed concern about the potential prejudice inhering in undue reliance upon such a factor. See, e.g., *BMW*, 517 U.S. at 585; *Honda*, 512 U.S. at 432

“Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”). The Court went significantly further in *State Farm*, ruling, “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” 123 S. Ct. at 1525. Rather, “courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” *Id.* at 1524. Accordingly, at least in cases involving a defendant that acted out of economic or profit-making motivation, evidence of corporate finances ordinarily should be excluded as irrelevant, and the jury should be instructed that it cannot increase the amount of punitive damages merely because the defendant has substantial revenues, income, or net worth.

The foregoing fundamental changes in and clarifications of the law call for corresponding changes in pattern jury instructions—particularly in light of the importance of accurate and specific instructions in this area of the law. The proposed instructions that follow attempt, without any effort to be comprehensive, to reflect the essential ingredients of sound and adequate jury instructions under both general state law principles governing punitive damages and the constitutional overlay spelled out in *State Farm*.

Model Punitive Damages Instructions

The instructions that follow assume, as is the practice in a majority of states, a bifurcated proceeding in which punitive liability is determined in the first phase and, if such liability is found, punitive amount is decided following a separate phase at which the parties are permitted to adduce evidence bearing upon that subject.

Conduct giving rise to punitive liability. If you have found that the defendant is liable to pay damages to the plaintiff under the instructions that I have just given, you should then consider whether the conduct that gave rise to that liability was of such a character as also to subject the defendant to punitive damages. Liability for punitive damages is assessed under different standards than is liability for compensatory damages. Accordingly, it does not follow from the fact that the defendant engaged in conduct sufficiently wrongful to give rise to liability that it is therefore liable for punitive damages. Rather, such liability can arise only if you find that the conduct of the defendant that proximately caused injury to the plaintiff was willful and wanton (or other appropriate criterion under applicable state law).

The defendant may be subjected to punitive damages only if the defendant is guilty of willful and wanton misconduct. Willful and wanton misconduct is conduct deliberately undertaken with either an intent to cause serious harm to the plaintiff or a conscious, callous, and highly unreasonable indifference to the high probability that the plaintiff or others similarly situated would suffer serious harm. (Comment: This

instruction should clearly convey to the jury that underlying liability is not enough to support liability for punitive damages, and that such liability should be imposed only in cases of aggravated misconduct. The instruction should, in addition, carefully explain the elements of punishable misconduct, be they “willful and wanton” misconduct as in the example given or some other standard.)

Clear and convincing evidence required. I have previously instructed you that the elements of the plaintiff’s case needed to be proved by a preponderance of the evidence. A different and more demanding standard must be satisfied before you may find the defendant liable for punitive damages: The existence of willful and wanton misconduct (or other standard for punishable conduct) must be proved by clear and convincing evidence. That is, the evidence of the defendant’s wrongdoing must be of such convincing force that it demonstrates a high probability of the truth of the facts such evidence is offered to prove. Clear and convincing evidence must leave no substantial doubt as to the wrongful nature of the defendant’s conduct.

Because the burden of proof is greater for punitive than for compensatory liability, it would not be inconsistent for you to find that the defendant acted wrongfully for purposes of requiring the defendant to pay compensatory damages but not for purposes of subjecting the defendant to punitive damages. (Comment: This instruction is applicable only in those jurisdictions that apply the heightened standard; if so, employ the description of that standard already found in existing pattern instructions or in cases addressing the subject.)

Amount of punitive damages. If you find that the defendant engaged in conduct of such a character as to make it subject to punitive damages, your next task will be to decide whether it should be required to pay punitive damages to the plaintiff for that conduct and, if so, in what amount. The instructions that follow are intended to assist you in that task by explaining the purposes for imposing punitive damages and identifying the considerations you should weigh during your deliberations on this subject.

Punitive damages are not a personal right of the plaintiff but rather are imposed to advance the goals of just punishment and deterrence (discouragement) of the defendant and others similarly situated from engaging in similar misconduct in the future. *See State Farm*, 123 S. Ct. at 1519. Accordingly, even if you find that the defendant committed wrongful acts of a kind that would subject the defendant to liability for punitive damages, the decision whether to impose any punitive damages is within your discretion.

Punitive damages and compensatory damages serve very different purposes. You should presume that the plaintiff has been made whole for any injuries by the compensatory damages. Therefore, you may award punitive damages only if you find that the defendant’s wrongful conduct toward the plaintiff is so reprehensible that it warrants the imposition of a further penalty, beyond the amount already awarded as compensatory damages, to achieve just punishment and adequate deterrence. *See State Farm*, 123 S. Ct. at 1519, 1521.

If you decide to award punitive damages, the award should

be no greater than the amount that, in your sound judgment and discretion, you find will be adequate to punish the defendant for its behavior and to deter the defendant and others (people, companies) from acting in a similar way in the future. *See BMW*, 517 U.S. at 568.

Relevance of compensatory damages. The law recognizes that punitive damages are not the only way to punish and deter conduct. Rather, any payments that a defendant must make because of its actions, such as the damages you already awarded to the plaintiff, will also have a deterrent effect for the future and should be considered in determining whether additional liability in the form of punitive damages is necessary and, if so, how much. *See State Farm*, 123 S. Ct. at 1524-25.

Punishment limited to harms suffered by plaintiff(s) in this case. (a) You are not to punish the defendant for harms

Not all conduct that is subject to punishment is equally wrongful or deserving of the same punishment.

suffered by any persons who are not parties to this case, only for the harm to the plaintiff(s) that resulted from the defendant's punishable conduct. *See State Farm*, 123 S. Ct. at 1523. (Comment: This instruction should be given when evidence has been introduced showing that the misconduct that harmed the plaintiff(s) also may have injured non-parties.) (b) You have heard evidence of allegedly wrongful acts of the defendant other than those that proximately caused the plaintiff's injuries. Although you may consider such acts for their bearing, if any, upon the defendant's state of mind in committing the acts that caused the plaintiff's injuries, you are not to punish the defendant for such acts. *See State Farm*, 123 S. Ct. at 1523. (Comment: This instruction should be given when "other acts" evidence has been admitted.)

Relevant punishment-setting factors. In arriving at your decision as to the amount of punitive damages, you should consider the following factors:

- Reprehensibility of the misconduct that caused the plaintiff's harm. This is a matter of degree. Not all conduct that is subject to punishment is equally wrongful or deserving of the same punishment. *See BMW*, 517 U.S. at 575-76. You should consider how blameworthy the defendant's conduct was in deciding how much punishment that conduct deserves, if any. In making that determination, you should consider all of the evidence you have heard. (Comment: In both *BMW* and *State Farm*, the Supreme Court identified a handful of factors it found relevant to the reprehensibility assessment. The significance of these factors will vary from case to case; in any event, they address an aspect of the

inquiry that jurors generally are capable of assessing based on their own values and experiences and the arguments of counsel. Thus, no effort has been made here to categorize the reprehensibility-influencing considerations.)

- Magnitude of the harm suffered by the plaintiff as a result of the defendant's misconduct. The amount of punitive damages must bear a reasonable relationship or proportion to the injury, harm, or damage actually caused to the plaintiff by the defendant's punishable misconduct, as measured by the amount of compensatory damages that you awarded. *See BMW*, 517 U.S. at 580-81. In this case, I instruct you that any award of punitive damages should not exceed (the amount of) (times the amount of) the actual damages you have found the plaintiff to have suffered. *See State Farm*, 123 S. Ct. at 1524-26. (Comment: Although this is an extremely important element and a general exhortation that punitive damages should be "reasonably" related to compensatory damages may be inadequate to provide the jury with an understandable range within which its punishment discretion is to be exercised, the law is not sufficiently developed at this juncture to lend itself to a more concrete general instruction. Where, however, the court is able to determine what the greatest permissible ratio would be—and many cases will fit within the 1:1 limit suggested by the Supreme Court for the *State Farm* case itself (*see* 123 S. Ct. at 1524)—it should so advise the jury.)
- Comparable fines or civil penalties. The following maximum (fines, penalties) are applicable by (statute, regulation, administrative practice) for conduct similar to that which you have found the defendant to have committed: (Describe). Although you are not bound to limit your award of punitive damages to such amounts, you should consider them in setting an appropriate punishment. *See State Farm*, 123 S. Ct. at 1526; *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 442-43 (2001); *BMW*, 517 U.S. at 575. (Comment: This instruction should be given when the court determines that there is a meaningful comparable statutory or administrative penalty covering the defendant's conduct, or highly similar conduct. Note that in some cases, the theoretical maximum penalty is one that would not, in fact, ever be applied. In such instances the court should look to judicial or administrative practice to determine whether a realistic maximum penalty can be identified, failing which, the instruction should be omitted. *See Cooper Industries*, 532 U.S. at 442-43.)
- The defendant's financial condition. Punitive damages are intended to correct, not to destroy. You should consider the defendant's financial condition in order to ensure that any award you impose does not exceed the defendant's ability to pay. However, you may not increase the punitive award above that which is otherwise warranted merely because the defendant has substantial financial resources. *See State Farm*, 123 S. Ct. at 1525; *BMW*, 517 U.S. at 585; *Honda*, 512 U.S. at 432. (Comment: This instruction should be given only when evidence of the defendant's financial condition has been admitted or when it is requested by the

defendant. The principles laid down by the Supreme Court in *State Farm*, although arguably departing from current practice in many states, stand as an important constraint on runaway punitive damages. Emphasis on a corporate defendant's financial data raises many problems: It may encourage juries to impose extremely large punishments, especially upon out-of-state defendants, to satisfy redistributive impulses rather than because such amounts are needed to

advance the goals of deterrence and retribution; it delinks the punitive damages award from the reprehensibility, reasonable relationship, and comparable penalties guideposts, none of which depends on the defendant's financial circumstances; it therefore bears no discernible relationship to the considerations that would actually motivate actors to modify their conduct; it unfairly punishes companies based on the success of past, presumptively lawful operations and for socially beneficial decisions to retain and reinvest earnings rather than to distribute them in the form of dividends; and it produces disproportionately large punishments of large companies, which have more transactions and thus more exposure to potential punitive liability, wholly apart from any wealth-based enhancement.)

The need for overhaul of state pattern jury instructions should be beyond serious dispute in the wake of *State Farm*. Current instructions in many states reflect no serious attempt to provide guidance that might effectively structure and constrain juries' exercise of their punishment power. In other states more extensive instructions already are given, but important gaps exist that need to be filled. For example, an Oregon statute (ORS 30.925(2)) identifies a number of factors to be considered but omits the principle that punitive damages should bear a reasonable relationship to compensatory damages. And, of course, *State Farm* enunciated some constitutional principles that may not have been readily apparent, such as the restriction on punishing for harms suffered by non-parties and the limitation on the allowable use of wealth evidence. These must be conveyed to juries if their deliberations and verdicts are to reflect any fair adherence to the legal principles that govern their task.

The Supreme Court's punitive damages decisions provide a reasonably clear road map of governing legal principles. There is no excuse for keeping juries in the dark about them.

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