25. Punitive Damages

"Punishment is justice for the unjust."

– Saint Augustine

The Basics of Punitive Damages

Punitive damages – frequently called "exemplary damages" – are damages awarded for the purpose of punishing the defendant. This is in contrast to compensatory damages, which are meant to compensate the plaintiff.

The difference between compensatory damages and punitive damages can be conceptualized by imagining which way the jury is looking when awarding them. With compensatory damages, the jury is looking squarely at the plaintiff: How has the plaintiff been injured? What loss has the plaintiff suffered?

By contrast, with punitive damages, the jury's gaze is fixed firmly on the defendant: What did the defendant do that was wrong? What was the defendant thinking? What is the defendant's attitude? How much money does the defendant have? And, how much money would have to be awarded to really get the defendant's attention?

In seeking to punish the defendant, punitive damages serve at least two purposes: deterrence and retribution. These goals may be familiar to you if you have already taken a course in criminal law. The point of deterrence is to have the defendant and other potential defendants choose not to undertake a similar action in the future, since doing so leads to judgments that make the conduct not worth engaging in. The idea of retribution is to serve the plaintiff's thirst for seeing a wrongdoer, after having made the plaintiff suffer, be caused to endure suffering of its own. In other words: tit for tat, or getting what you have coming. A more subtle account was made by Professor Dan Markel: "To not punish when we reasonably could is to signal that we do not care about the actions of the offender or the rights and interests underlying the rule the offender breached, or the

integrity of our democratic decision-making structure." Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction,* 94 CORNELL L. REV. 239, 242 (2009).

To be awarded punitive damages, a plaintiff must do much more than prove the elements of the prima facie case and defeat any affirmative defenses. Simply prevailing on a cause of action is not enough to warrant punitive damages. For punitives to be warranted, there must be some special culpability on the part of the defendant – culpability that greatly exceeds simple negligence. Courts have different words they use to express the threshold culpability for punitive damages, including phrases such as "flagrant misconduct," "malice," "in conscious disregard," "willful, wanton, or reckless," and "wantonly reckless or malicious." The formulations vary. But there is an essence they all share of pointing beyond mere blame to reprehensibility.

Case: *Mathias v. Accor Economy Lodging*

This case presents a contemporary example of a claim for punitive damages in a consumer context.

Mathias v. Accor Economy Lodging

United States Court of Appeals for the Seventh Circuit
October 21, 2003

347 F.3d 672. Burl MATHIAS and Desiree Matthias, Plaintiffs-Appellees/Cross-Appellants, v. ACCOR ECONOMY LODGING, INC. and Motel 6 Operating L.P., Defendants-Appellants/Cross-Appellees. Nos. 03-1010, 03-1078. Before POSNER, KANNE, and EVANS, Circuit Judges.

Circuit Judge RICHARD A. POSNER:

The plaintiffs brought this diversity suit governed by Illinois law against affiliated entities (which the parties treat as a single entity, as shall we) that own and operate the "Motel 6" chain of hotels and motels. One of these hotels (now a "Red Roof Inn," though still owned by the defendant) is in downtown Chicago. The plaintiffs, a brother and sister, were guests there and were bitten by bedbugs, which are making a comeback in the U.S. as a

consequence of more conservative use of pesticides. The plaintiffs claim that in allowing guests to be attacked by bedbugs in a motel that charges upwards of $100 a day for a room and would not like to be mistaken for a flophouse, the defendant was guilty of "willful and wanton conduct" and thus under Illinois law is liable for punitive as well as compensatory damages. The jury agreed and awarded each plaintiff $186,000 in punitive damages though only $5,000 in compensatory damages. The defendant appeals, complaining primarily about the punitive-damages award. It also complains about some of the judge's evidentiary rulings, but these complaints are frivolous and require no discussion. The plaintiffs cross-appeal, complaining about the dismissal of a count of the complaint in which they alleged a violation of an Illinois consumer protection law. But they do not seek any additional damages, and so, provided we sustain the jury's verdict, we need not address the cross-appeal.

The defendant argues that at worst it is guilty of simple negligence, and if this is right the plaintiffs were not entitled by Illinois law to any award of punitive damages. It also complains that the award was excessive-indeed that any award in excess of $20,000 to each plaintiff would deprive the defendant of its property without due process of law. The first complaint has no possible merit, as the evidence of gross negligence, indeed of recklessness in the strong sense of an unjustifiable failure to avoid a known risk, was amply shown. In 1998, EcoLab, the extermination service that the motel used, discovered bedbugs in several rooms in the motel and recommended that it be hired to spray every room, for which it would charge the motel only $500; the motel refused. The next year, bedbugs were again discovered in a room but EcoLab was asked to spray just that room. The motel tried to negotiate "a building sweep [by EcoLab] free of charge," but, not surprisingly, the negotiation failed. By the spring of 2000, the motel's manager "started noticing that there were refunds being given by my desk clerks and reports coming back from the guests that there were ticks in the rooms and bugs in the rooms that were biting." She looked in some of the rooms and discovered bedbugs. The defendant

asks us to disregard her testimony as that of a disgruntled ex-employee, but of course her credibility was for the jury, not the defendant, to determine.

Further incidents of guests being bitten by insects and demanding and receiving refunds led the manager to recommend to her superior in the company that the motel be closed while every room was sprayed, but this was refused. This superior, a district manager, was a management-level employee of the defendant, and his knowledge of the risk and failure to take effective steps either to eliminate it or to warn the motel's guests are imputed to his employer for purposes of determining whether the employer should be liable for punitive damages. The employer's liability for compensatory damages is of course automatic on the basis of the principle of respondeat superior, since the district manager was acting within the scope of his employment.

The infestation continued and began to reach farcical proportions, as when a guest, after complaining of having been bitten repeatedly by insects while asleep in his room in the hotel, was moved to another room only to discover insects there; and within 18 minutes of being moved to a third room he discovered insects in that room as well and had to be moved still again. (Odd that at that point he didn't flee the motel.) By July, the motel's management was acknowledging to EcoLab that there was a "major problem with bed bugs" and that all that was being done about it was "chasing them from room to room." Desk clerks were instructed to call the "bedbugs" "ticks," apparently on the theory that customers would be less alarmed, though in fact ticks are more dangerous than bedbugs because they spread Lyme Disease and Rocky Mountain Spotted Fever. Rooms that the motel had placed on "Do not rent, bugs in room" status nevertheless were rented.

It was in November that the plaintiffs checked into the motel. They were given Room 504, even though the motel had classified the room as "DO NOT RENT UNTIL TREATED," and it had not been treated. Indeed, that night 190 of the hotel's 191 rooms were occupied, even though a number of them had

been placed on the same don't-rent status as Room 504. One of the defendant's motions in limine that the judge denied was to exclude evidence concerning all other rooms-a good example of the frivolous character of the motions and of the defendant's pertinacious defense of them on appeal.

Although bedbug bites are not as serious as the bites of some other insects, they are painful and unsightly. Motel 6 could not have rented any rooms at the prices it charged had it informed guests that the risk of being bitten by bedbugs was appreciable. Its failure either to warn guests or to take effective measures to eliminate the bedbugs amounted to fraud and probably to battery as well, as in the famous case of *Garratt v. Dailey*, 46 Wash.2d 197, (1955), appeal after remand, 49 Wash.2d 499, (1956), which held that the defendant would be guilty of battery if he knew with substantial certainty that when he moved a chair the plaintiff would try to sit down where the chair had been and would land on the floor instead. There was, in short, sufficient evidence of "willful and wanton conduct" within the meaning that the Illinois courts assign to the term to permit an award of punitive damages in this case.

But in what amount? In arguing that $20,000 was the maximum amount of punitive damages that a jury could constitutionally have awarded each plaintiff, the defendant points to the U.S. Supreme Court's recent statement that "few awards [of punitive damages] exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, (2003). The Court went on to suggest that "four times the amount of compensatory damages might be close to the line of constitutional impropriety." Hence the defendant's proposed ceiling in this case of $20,000, four times the compensatory damages awarded to each plaintiff. The ratio of punitive to compensatory damages determined by the jury was, in contrast, 37.2 to 1.

The Supreme Court did not, however, lay down a 4-to-1 or single-digit-ratio rule – it said merely that "there is a presumption against an award that has a 145-to-1 ratio," – and it

would be unreasonable to do so. We must consider why punitive damages are awarded and why the Court has decided that due process requires that such awards be limited. The second question is easier to answer than the first. The term "punitive damages" implies punishment, and a standard principle of penal theory is that "the punishment should fit the crime" in the sense of being proportional to the wrongfulness of the defendant's action, though the principle is modified when the probability of detection is very low (a familiar example is the heavy fines for littering) or the crime is potentially lucrative (as in the case of trafficking in illegal drugs). Hence, with these qualifications, which in fact will figure in our analysis of this case, punitive damages should be proportional to the wrongfulness of the defendant's actions.

Another penal precept is that a defendant should have reasonable notice of the sanction for unlawful acts, so that he can make a rational determination of how to act; and so there have to be reasonably clear standards for determining the amount of punitive damages for particular wrongs.

And a third precept, the core of the Aristotelian notion of corrective justice, and more broadly of the principle of the rule of law, is that sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he does, not for who he is, even if the who is a huge corporation.

What follows from these principles, however, is that punitive damages should be admeasured by standards or rules rather than in a completely ad hoc manner, and this does not tell us what the maximum ratio of punitive to compensatory damages should be in a particular case. To determine that, we have to consider why punitive damages are awarded in the first place.

England's common law courts first confirmed their authority to award punitive damages in the eighteenth century, at a time when the institutional structure of criminal law enforcement was primitive and it made sense to leave certain minor crimes to be dealt with by the civil law. And still today one function of punitive-damages awards is to relieve the pressures on an

overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. An example is deliberately spitting in a person's face, a criminal assault but because minor readily deterrable by the levying of what amounts to a civil fine through a suit for damages for the tort of battery. Compensatory damages would not do the trick in such a case, and this for three reasons: because they are difficult to determine in the case of acts that inflict largely dignitary harms; because in the spitting case they would be too slight to give the victim an incentive to sue, and he might decide instead to respond with violence-and an age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury-and because to limit the plaintiff to compensatory damages would enable the defendant to commit the offensive act with impunity provided that he was willing to pay, and again there would be a danger that his act would incite a breach of the peace by his victim.

When punitive damages are sought for billion-dollar oil spills and other huge economic injuries, the considerations that we have just canvassed fade. As the Court emphasized in Campbell, the fact that the plaintiffs in that case had been awarded very substantial compensatory damages – $1 million for a dispute over insurance coverage-greatly reduced the need for giving them a huge award of punitive damages ($145 million) as well in order to provide an effective remedy. Our case is closer to the spitting case. The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel's misconduct. The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private)

prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

Finally, if the total stakes in the case were capped at $50,000 (2 x [$5,000 + $20,000]), the plaintiffs might well have had difficulty financing this lawsuit. It is here that the defendant's aggregate net worth of $1.6 billion becomes relevant. A defendant's wealth is not a sufficient basis for awarding punitive damages. That would be discriminatory and would violate the rule of law, as we explained earlier, by making punishment depend on status rather than conduct. Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee.

In other words, the defendant is investing in developing a reputation intended to deter plaintiffs. It is difficult otherwise to explain the great stubborness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included.

As a detail (the parties having made nothing of the point), we note that "net worth" is not the correct measure of a corporation's resources. It is an accounting artifact that reflects the allocation of ownership between equity and debt claimants. A firm financed largely by equity investors has a large "net worth" (= the value of the equity claims), while the identical firm financed largely by debt may have only a small net worth because accountants treat debt as a liability.

All things considered, we cannot say that the award of punitive damages was excessive, albeit the precise number chosen by the jury was arbitrary. It is probably not a coincidence that $5,000 + $186,000 = $191,000/191 = $1,000: i.e., $1,000 per room in the hotel. But as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is

inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary. (Which is perhaps why the plaintiffs' lawyer did not suggest a number to the jury.) The judicial function is to police a range, not a point.

But it would have been helpful had the parties presented evidence concerning the regulatory or criminal penalties to which the defendant exposed itself by deliberately exposing its customers to a substantial risk of being bitten by bedbugs. That is an inquiry recommended by the Supreme Court. But we do not think its omission invalidates the award. We can take judicial notice that deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to the punitive damage award in this case.

"A person who causes bodily harm to or endangers the bodily safety of an individual by any means, commits reckless conduct if he performs recklessly the acts which cause the harm or endanger safety, whether they otherwise are lawful or unlawful." 720 ILCS 5/12-5(a). This is a misdemeanor, punishable by up to a year's imprisonment or a fine of $2,500, or both. 720 ILCS 5/12-5(b); 730 ILCS 5/5-8-3(a)(1), 5/5-9-1(a)(2). Of course a corporation cannot be sent to prison, and $2,500 is obviously much less than the $186,000 awarded to each plaintiff in this case as punitive damages. But this is just the beginning. Other guests of the hotel were endangered besides these two plaintiffs. And, what is much more important, a Chicago hotel that permits unsanitary conditions to exist is subject to revocation of its license, without which it cannot operate. Chi. Munic. Code §§ 4-4-280, 4-208-020, 050, 060, 110. We are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license.

AFFIRMED.

Arguing for Punitive Damages

Because the point of punitive damages is to punish, that necessarily means giving the defendant pecuniary pain. And the bigger the

defendant is, the larger the punitive damage figure may need to be. In other words, a $100,000 punitive judgment might be a seismic source of financial hurt for you or me. But to a multinational oil company, $100,000 is less than a rounding error on the corporate balance sheet. Because of this, plaintiffs can present evidence on corporate financials to the jury, and they can then use that as a basis for suggesting how much the jury should assess in punitive damages. It is also permissible for the attorney to argue about the significance of the defendant's conduct on society as a whole.

Case: *Silkwood v. Kerr-McGee*

We encountered part of the closing argument of Gerry Spence in *Silkwood v. Kerr-McGee* in the materials relating to strict liability. Here is more of that closing argument, in which Spence argues the issue of punitive damages to the jury.

Silkwood v. Kerr-McGee

United States District Court for the Western District of Oklahoma
1979

Bill M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased, Plaintiff, v. Kerr-McGee CORPORATION et al., Defendants. Civ. A. No. 76-0888-Theis. In the United States District Court for the Western District of Oklahoma. Hon. Judge Frank G. Theis, U.S. District Judge, District of Kansas, sitting by designation.

The FACTS:

In the early 1970s, Karen Silkwood worked at Kerr-McGee Corporation's Cimarron Fuel Fabrication Site, which made plutonium fuel pellets to be used in nuclear reactors. Silkwood was active with her union, and she uncovered serious health and safety violations at the plant, which she reported to government authorities.

Silkwood became contaminated with plutonium under suspicious circumstances: She was found to have traces of plutonium on her hands, even though the gloves she was using

inside of a sealed "glove box" work area had no leaks. Later, more plutonium was found on Silkwood, including from swipes of her nostrils, urine samples, and a fecal sample. No source for the contamination was found until health physicists went with her to her apartment, where substantial plutonium contamination was found in the kitchen and bathroom. Subsequently, Silkwood agreed to meet with a reporter from the New York Times to provide documentation of plant safety violations. On the way to the meeting, she was killed in a strange one-car accident. Many believed Silkwood was murdered.

Gerry L. Spence of Jackson Hole, Wyoming represented the Silkwood estate. William G. Paul of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick of Oklahoma City represented Kerr-McGee.

(A more detailed recitation of the facts can be found with the portion of the case appearing in the Strict Liability chapter, supra.)

GERRY L. SPENCE, Esq., delivered the plaintiff's CLOSING ARGUMENT:

Thank you, Your Honor. Well, here we are. Every good closing argument has to start with "Ladies and gentlemen of the jury," so let me start that way with you.

I actually thought we were going to grow old together. I thought we would just kind of go down to Sun City, and get us a nice complex there and sort of live out our lives. It looked like that was the way it was going to happen. I had an image in my mind with the judge at the head block, and then the six jurors with nice little houses beside each – and I hadn't made up my mind whether I was going to ask Mr. Paul to come down or not – but I didn't think this case was ever going to get over and I know you didn't think so, either. And, as a matter of fact, as Mr. Paul kept calling witnesses and calling witnesses, I sort of got the impression that he's fallen in love with us over here and just didn't want to quit calling witnesses.

Ladies and gentlemen, it was winter in Jackson, Wyoming, when I came here, and there was four feet of snow at Jackson. We've spent a season here together. I haven't been home to Jackson

for two and a half months. And, although I'm a full-fledged Oklahoman now, and have been for over a month and a half, nevertheless I'm homesick. And I'm sure you're homesick, too. I'm sure this has been a tough one on you. Well, I know lots of you have had to do extra work, and I know you've had to work at night, and I know you've had to drive long distances. Every morning – now, I'm a jury watcher – you watch me watching you every morning, and I'd look at you to see if my jury was all right, and see if they were feeling okay. Sometimes they weren't feeling too good, but mostly we made it through this matter together, and I'm pretty proud of that.

It's the longest case in Oklahoma history, they tell me. And, before the case is over, you will know, as you probably already know, that this is probably the most important case, as well. Well, ladies and gentlemen, I want you to know that I don't know how – excepting because Bill Silkwood happened to want me – a country lawyer from Wyoming got out to Oklahoma. It sort of seems that if anything good comes out of this trial that it was providence, and it's the most important case of my career. I'm standing here talking to you now about the most important things that I have ever said in my life. And, I have a sense that I have spent a lifetime, 50 years, to be exact, preparing somehow for this moment with you.

And, so, I'm proud to be here with you, and I'm awed, and I'm a little frightened, and I know that's hard for you to believe because I don't look frightened. But, I've been frightened from time to time throughout this trial. I've learned how to cover that up pretty well. And, what I am setting out to do today is frightening to me. I hope I have the intelligence, the insight, and the spirit, and the ability, and just the plain old guts to get to you what I have to get to you. What I need to do is to have you understand what needs to be understood. And, I think I'll get some help from you. My greatest fear in my whole life has been that when I would get to this important case – whatever it was – I would stand here in front of the jury and be called upon to make my final argument and suddenly you know, I'd just open my mouth and nothing would come out. I'd just sort of stand

there and maybe just wet my pants, or something. But I feel the juices – they're going, and I'm going to be all right.~

Now, what is this case about? What is the $70 million claim about? I want to talk about it, because my purpose here is to do some changes that has to do with stopping some things. I don't want to see workers in America cheated out of their lives. I'm going to talk to you about that a lot. It hurts me. It hurts me. I don't want to see people deprived of the truth – the cover-ups. It's ugly. I want to stop it, with your help, the exposing of the public to the hidden dangers, and operating grossly, and negligently, and willfully, and recklessly, and callously. Those are words that you have heard from world experts that you respect – that you believe. I want to stop the misrepresentation to the workers, and to the public, and to the government, and I want to stop it to the juries, and I want to stop it having been made to you.

What is the case not about? The case is not about being against the nuclear industry. You will never hear me say that I stand here against the nuclear industry – I do not. But it is about being responsible, about responsible progress~. And without the truth, the progress that we all need, and want, can't be had. It is that simple. That is what the case is not about.

But it is about the power of truth, that you have to use in this case somehow, because it has been revealed to you now – you know it – and if there is only one thing that can come from this case, I will go home and sleep for two solid weeks, and rest and catch up, and I will feel that I have done my life's work in one case, and I hope that you would, too – and that if this case makes it so expensive to lie, and to cover up, and to cheat, and not to tell the truth, and to play number games, that it makes it so expensive for industry – this industry – to do that, that the biggest bargain in life, the biggest bargain for those companies is the truth.

You know, I was amazed to hear that Kerr-McGee has 11,000 employees. That's more than most of the towns in the state that I live in – that it is in, 35 states. Well, I guarantee that corporation does not speak "South." It doesn't speak "Okie." It

doesn't speak "Western." It doesn't speak "New York." And it is in~ five countries. It doesn't speak any foreign language. It speaks one language universally. It speaks the language of money.

That is the only language that it speaks – the only language that it understands – and that is why the case becomes what it is. That's why we have to talk back to that corporation in money.

I want to talk about the design of that plant very quickly. It was designed by Mr. Utnage. He never designed any kind of a plant. He never designed any plant, plutonium or otherwise. And I confronted him with scores of problems – you remember those 574 reports of contaminations – they were that thick – in two volumes – you remember them. They were paraded out in front of you a number of times. Page after page of them are based upon equipment failure, design failure, equipment failure, design failure, equipment failure, equipment went wrong, design went wrong. Look at them yourself. I asked him about a leak detection system. "We do not need a leak detection system," he said. "What do we need a leak detection system for? We can see it. We can see it."

Here is the man who told you that as long as you can't see it, you're safe. And we know that the amount of plutonium, a half a gram of plutonium, will contaminate the whole state of Oklahoma, and you can't see it. They let it flop down into the rooms, and Jim Smith said one time it was in the room a foot thick on the floor. Do you remember the testimony? He said he designed a safe plant. And he believed the company lie that plutonium doesn't cause cancer. He sat there on that stand under his oath and looked at every one of you under his oath, and he said plutonium has never been known to cause cancer. Well, now either he lied, or he bought the company lie and didn't know. But he was the man who designed the plant.

You wouldn't have to design a very good plant if you didn't think plutonium caused cancer, it wouldn't bother you. You wouldn't work very hard.~ [T]hat is why we are talking about exemplary and punitive damages, to stop those kind of lies, to stop that kind of action.

Right today, sitting out there at that plant are the trailers with the waste in them. They are not covered by any kind of a vault. They are full of radioactivity. All you have to have is a good strong wind to hit one of those trailers that are sitting there today at this moment as my words come out of my mouth, and pollute the whole countryside. I talked about negligent construction of the plant – that is one of our claims. Can you imagine? Do you remember young Apperson sitting there? You remember his open face – I liked him a lot – an open, honest boy – blond, curly hair – you remember him, two and a half months ago? He said, "Thirty percent of the pipes weren't welded when I came, when the plant was opened. Thirty percent of the pipes were welded after the plant was in operation, and I was there and I saw those old welds." And he wasn't a certified welder himself, and he was teaching people in an hour or two to be welders themselves – not a certified welder on the job. "There was things leaking everywhere," he said. You remember how he was describing how he was there welding the pipe and they jerked the oxygen out, and he had to gasp for air – the contamination – to survive the moment? Jim Smith talked about the valves breaking up from the acid. So much for the design of the plant.

What about the attitude of the management that followed? You know, you can have a gun – most of us in my country know about guns – we use guns – we use guns to go hunting, and it's just a tradition in the West. They probably are for many of us folks. Now, a gun is safe in the hands of somebody that believes it is dangerous. If you do not believe it is dangerous, it isn't safe – if you don't understand a gun – if you don't respect it. Now, what about management? The first manager out there said, "Sure, you can breathe in a pollen-size particle of plutonium and it won't even hurt you." You heard the experts say that a pollen-size of plutonium is lethal. Hammock, the highway patrolman, was talking about how they shoveled up the contamination in the dirt, threw it over the fence, and how the rocks and dirt contaminated – how they played with the uranium, threw it around. One person was telling us about how they took it home and gave it to one of their children. Would $70 million stop

that? Is it enough? Is two weeks' pay enough to dock them for that? Plowman [one of the plant managers] said, you could give $500 million if you think that is right.

Plowman said that he resigned his job because of his concern for the plant operations. Here's a quote: "The major factor was that I didn't like the way the plant was running. I felt that the plutonium plant program was going the same way the uranium plant program was going. I just didn't think I could take much more of it. It seems like things were going from one emergency to another. Nothing was right. I hardly knew where to begin. Contamination was everywhere. The equipment leaked. There was no real effort to control it."

No real effort to control it.

Can you hear their witness saying, "Containment is the name of the game. The men were so contaminated on their arms and hands that you couldn't get it off without peeling their hides. They went home like this nearly every night."? And then he stopped them taking the truck to town, because they always washed it in the car wash, and it would contaminate the town, and the sewer system in the town.

Well, I look at Zitting [a Kerr-McGee manager]. He was the man over everybody. He was an adverse, hostile witness – and I called him in my case. Why would anybody do something that silly? Well, I wanted you to see with your own eyes and hear with your own ears what that man knew, who was in charge of this whole lashup. The buck stopped with him. He's like the commander-in-chief, like our president. Now, the president doesn't need to know everything, but when he sends a bomb, he knows it. When he sends the troops, he knows it. When he's involved with the lives of thousands of people, he knows it, because the buck stops with him, and he's the one with all the ultimate responsibility. And so was Mr. Zitting, who didn't know a damn thing about that plant, or what was going on. He said repeatedly, "I don't recall." I showed him 574 worker contamination reports – 574 were marched up and dumped right here on this stand, and I said, "What about those?"

And do you know what he said to me – you remember? "This is the first time I have ever seen those," in this courtroom.

That is the kind of management, that is the kind of caring. I asked him about the truck that was leaking, that they buried parts of. He said he never heard of it before.

Is there any wonder that Mr. Keppler of the AEC [Atomic Energy Commission, a federal regulatory body] – poor Mr. Keppler – I probably pushed him a little further than I should have. I hope you don't hold that against me, but I wanted to shake out the last bit of information I could from him so you could see it. Poor Mr. Keppler said, "I was of the opinion I couldn't find anybody knowledgeable enough in management who knew anything about it, or who cared."

This is the man who said, when I asked him, "Were you ever" – here is an actual question – "Were you ever advised by anybody that employees were of the opinion that any amount of plutonium could be taken out of that plant?" He said, "No, I never heard of it." Was production put over safety? What did they do with a contaminated room? Did they ever stop production? Is there any evidence that they even once stopped production? If they did stop production for a contaminated room, don't you think they would have brought somebody in, in five years? Not once.

They painted it – one hundred gallons of paint, and – "It is chipping off today" – to this very day. Dr. Morgan [plaintiff's expert witness] called that reckless. You know why it is reckless? Because as it chips of, it comes down in a fine powder form and can be breathed into your lungs. "How big a piece do you breathe into your lungs?" "Nobody knows." "Do you know when you breathe it into your lungs?" "No. Nobody knows if you breathe it. It is too late after you breathe it, and once you get it from the air sample, by the time you get it in the air sample, it is 24 hours too late, or longer now." By the time you understand you have been poisoned, the poisoning has already happened.

That is why it is negligence. That is why it is callous. That is why Dr. Morgan said, "It is worse than reckless." Documented doctored X-rays. They were always behind. Always behind. They denied that, but they were always behind. Finally Zitting admitted, when I took him through the monthly reports – you remember that – "Yes, they were behind."

And Hammock said they were shipping defective pins. It just turns my guts. They were shipping defective pins to a breeder reactor knowing they were defective, to Washington where people – the state of Washington – where people are going to somehow be subjected to the first breeder reactor in this country. Here is the actual testimony of Hammock. Now, hear this: He said, "The rods were defective because they had a bad weld, or too large a weld sealing in the plutonium pellets." This is an exact quote: "Even though we rejected them, we would go ahead and ship them because we were too far behind in production. The workers, on orders from the supervisors, would simply sand down the welds, which weakened them."

Now, I want to tell you something. That evidence is before you. It is uncontradicted. If that wasn't true, they would have brought somebody here to tell differently.

Now, here we are next on training. I talked a good bit about that. I was satisfied, I will admit I was satisfied with my $10 million request – which the judge now says the sky is the limit – I was satisfied with that $10 million request until I heard about the training. I almost didn't come out for the next round after that. I couldn't get over it. I couldn't sleep. I couldn't believe what I had heard.

I don't know how it affected you. Maybe you get so numb after awhile. I guess people just stand and say, "Exposure, exposure, exposure, exposure, exposure, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer, cancer," until you don't hear it anymore. Maybe that is what happens to us.

I tell you, if it is throbbing in your breast, if cancer is eating at your guts, or it's eating at your lungs, or it's gnawing away at

your gonads, and you're losing your life, and your manhood, and your womanhood, and your child, or your children, it then has meaning. They are not just words. You multiply it by hundreds of workers, and thousands of workers, that is why this case is the most important case, maybe, in the history of man. That is why I'm so proud to be here with you. That's why I'm so glad you're on this jury and that we are apart of this thing together.

It wasn't until I read this document – that came to me almost like it was divinely given – and, you know, I don't know how you feel about things like that, but I reached out my hand, and that man had it, that man right there, Mr. Paul, put it in my hand. This is the '59 data that you saw, that Mr. Valentine [an expert witness for the defense] had in his possession. Now, Dr. Morgan told you there were thousands of articles written, available to people that wanted to read them, about the danger of plutonium. Thousands. This is the one, the only one that their expert, Valentine, could tell us he read, and he had it clutched in his own little hand, and it was this document, from which he had put together this infamous manual, the manual that hides, and is full of gobbledygook so that workers who took that home in their hands and sat down at the table with their children, ladies and gentlemen, as they sat down at the table with their family around, and they said we should read this, and here it is. [*Indicating the exhibit.*] That infamous piece of junk said nothing about cancer of the lungs, it said nothing about anything excepting once a word about – the fancy word "malignancy" – and with respect to the respiratory problems and of the lungs, it said nothing. And I read it to you, and you heard it, and you will have it in your jury room, and you can read it to yourselves and see if it told you anything. And this is the document that told him about the radium workers clear back in '59 and the uranium workers clear back in the 1800s that were dying like flies from alpha particles and they knew it. That man knew it.

It is the most dastardly crime in the history of man, to cheat workers of their right to live, of their right to make a free choice. How would you like it if somebody wanted your body for $3.50 a lousy hour, and to get it, told you – like those books told you –

like the big man told them, "that the nuclear industry is probably the safest industry ever developed."

I wish I could just tell you how bad that makes me feel. I wish I could just express to you how dastardly a trick that is.

It would be one thing, you know, if they said to workers, "Listen, we've known for years that uranium people have died like flies, we know that radium dial people have died from alpha particles just like in the plutonium business. Here is a picture, ladies and gentlemen, my dear workers, people that are going to give your lives to my company – here is a picture of a particle, an alpha particle – millions of those will be in your lungs if you breathe any, and we don't know how much it takes to cause cancer. You have the right to know that is the danger you're exposed to."

If you're working with electricity, nobody goes around and says, you know, "There isn't any danger in electricity if you grab that wire – it won't hurt you." If you're working with a structure where men's lives are involved, you don't tell them it is safe if it is not safe. You tell them the truth.

It was that night, ladies and gentlemen, that I woke up the next morning, after a fitful night's sleep, and decided that I was going to ask you to make this case meaningful, and I increased my request for a prayer from 10 to 70 million – two weeks' wages. I hope it is enough. I leave it to your good judgment.

How does this all tie in with Karen Silkwood? Well the court says that they're liable if the lion got away, even if they used the utmost care. If the lion got away, they have to pay – they have to pay for what happened to her. If it is willful, wanton, and gross negligence, they have to pay such sum as you feel is correct, even if it is half a billion – even if it is 500 million. The assessment of the damages is left for you.

I want to quote an instruction that you will hear. It is the basis of punitive damages – that's the $70 million to punish. Punitive. To exemplify. Exemplary. So that the rest of the uranium, plutonium, and the nuclear industries in this country will have to tell the truth.

The basis of punitive and exemplary damages rests upon the principle that they are allowed as punishment of the offender for the general benefit of society, both as a restraint upon the transgressor – restraint upon the transgressor – that is against Kerr-McGee, so they won't do it anymore, and a meaningful warning and example – to deter the commission of like offenses in the future. If the defendants are grossly or wantonly negligent – listen to this language in the court's instructions – you may allow exemplary or punitive damages, and you may consider the financial worth. I didn't bring that out to try to have you be prejudiced against a large corporation, I brought it out because what is fair punishment for one isn't for another.

It is fair punishment to take a paper boy who makes five dollars a week~ to take away five dollars from him for not coming home when he was suppose to~. If one of your children lied about something – one of your children lied about something that had to do with the life and health of a brother or sister, and he covered it up, and he lied about it, and he said that the brother and the sister were safe when he knew that he had exposed them to death – I suppose that you might not find it unreasonable to hold him responsible for two weeks, two piddling weeks, allowance in bucks, and leave fifty weeks left for him.

That is what 70 million is to this corporation: Two weeks. Leaving 50 weeks' income.

Maybe it isn't enough, but I was afraid to ask for more. You know why I'm afraid? This case is so important that I'm afraid that if I stand here and ask you what I really think the case is entitled to, you will laugh at me, and I can't have that. I can't have you thinking that I'm silly. I can't have you thinking that I'm ridiculous. Because it is important to me, it is important for what I'm trying to do that you find me credible. And I've tried to retain my credibility with you through this trial.

Now, Dr. Karl Morgan said the plant employees themselves were deceived into entering a lion's cage – it was his language – not even meeting permissible standards. They were sent into a lion's cage – this actually quoting him – being told there were no

animals in the cage. He said they had unqualified people there. He took great exception to the fact they weren't told about cancer, and he said that is willful. "Is it wanton?" "Yes, it is wanton." "Is it reckless?" "Yes, it is reckless." "What would you call it, doctor?" He said: "I would call it callous." He said, and I want to give you a quote from that great man of science – the father of health physics, who has taught the teachers and professors, and he's a fine, old, beautiful man – and if I were a little child wanting to be protected from the great exposures of plutonium I would curl up in his lap and close my eyes and put my hands and my faith in him, and I do. And, he said, "I could not imagine that such a lackadaisical attitude could be developed in an organization toward the health and safety of people. It was callous, willful, and wanton negligence."

I will be back with you after the defendants have concluded their arguments. Thank you.

SPENCE delivered the plaintiff's REBUTTAL CLOSING ARGUMENT:

Thank you, your honor.

Fellow counsel, Mr. Paul,~ ladies and gentlemen:

I, during the recess, wondered about whether there is enough in all of us to do what we have to do.

I'm afraid – I'm afraid of two things.

I'm afraid that you have been worn out, and that there may not be enough left in you to hear, even if you try and I know you will try but I know you are exhausted.

And I've been afraid that there isn't enough left in me, that my mind isn't clear and sharp now, and that I can't say the things quickly that I need to say, and yet it has to be done, and it has to be done well.

I have asked my friends, during the recess – and they are here, I asked my father, my mother, my close friends for strength to do this. I hope that you have been able to do that yourselves, and that you can, with each other, and call upon your own strength and from your own sources, because this is the last time that we,

as living, breathing humans, will talk together about this subject. And it is the last time that anybody will speak for Karen Silkwood. And when your verdict comes out, it will be the last time that anybody will have the opportunity that you have, and so it is important that we have the strength and the power to do what we need to do.

You know history has always at crucial times reached down into the masses and picked ordinary people and gave ordinary people extraordinary power. That is the way it has always been in history and I have no reason to believe that it is any different now.

Ladies and gentlemen, I need to get to the issues – our time is short.~ You know, if all of the leaks, and all of the spills, and the incidents, and all the rest of the 500 things – if all of those violations, some 75 of them – violations – all those weeks, from the testimony of all of those people, wouldn't somehow embarrass them enough, if the fact that they were doctoring – one of the world's great corporations doctoring – now that wouldn't embarrass them enough?

She didn't need to embarrass them. She wasn't trying to embarrass them. She was trying to do something that was important to people. Her words were: "Something has to be done about this."~

I think she was a heroine. I think her name will be one of the names that go down in history along with the great names of women heroines. I think she will be the woman who speaks through you, and may save this industry and this progress and may save, out of that industry hundreds of thousands of lives. But Mr. Paul calls it "despicable."

I think it was the greatest service that was ever conceived. I think she was exactly what the people said she was: "A courageous woman."~

Now, they rest their case on her emotional state. They say – I'm referring to their notes – "This woman was in an emotional state, and therefore because she was in an emotional state she doctored her own urine sample." That is what they said. How

did she get in such an emotional state? How was it that she was almost ready to break? How was it that she was nervous and moody? She couldn't find the contamination. How would you like to come home all clean, go to your bed – cleaned up at the plant – go to your own bed, and come back the next day and find you're dirty again, and be cleaned up again, and come back to go to your own bed, and come back the second day and find you're dirty again? How would you like that? Would it upset you? Would it scare you? Would you say to people, "I don't know why they're doing this. Somebody is contaminating me. I don't know where this is coming from. It must be coming out of my body. It is in my nose. It must be coming out of my lungs. I've been cleaned up. It isn't anywhere else. I go home, and I come back the next day. What is going on, Mr. People of the Management, Mr. Morgan Moore? I gave you my samples, they're hot. You're not doing anything about it. It is coming out of my lungs."

And you know what they do? They accuse her.

They accused her then, and they accuse her now, and they continue to accuse her. They said, "You're unstable. You've lost control." And then Mr. Paul says: "Let's be fair."

I heard him say it over and over. "Let's be fair." She thought she was going to die, and they gave her lawyers – "Let's be fair" – not doctors.~ "Let's be fair." And they continued to blame her.~ They are still blaming her today.~

I would have thought a lot more of them if they had come in and said, "Yes, we let it go. Yes, we had a sloppy operation. Yes, we did it. We're sorry. We will pay the damages. We'll pay the fiddler." I don't think I would be nearly so angry as when they try to slander.

You know what Will Rogers said about slander? Will Rogers said, "Slander is the cheapest defense going."

It doesn't cost anything to slander anybody. I can slander you, and if I say it enough, somebody will start believing it. And, it is pretty hard to defend. You remember when you were a kid in high school, and somebody said you did certain things, and you

didn't do it, but your mother accused you of something and you couldn't prove you didn't do it, or your daddy said you did something and you couldn't prove it. How about when people slander you like this in the most important case in the world, and base their defense upon it? Now stop and think about what I just said. How about it when the slander is in the most important case of this century – maybe of this nation's history – and all the defense is a slander? What about that – how do you feel? How does it make you feel? How do you feel about the kind of corporation that tells Mr. Paul this is what he has to do?

Now let me ask you this question: When we walk out of here I ain't going to be able to say another word, and you're going to have to make some decisions, and they are going to be made not just about Karen Silkwood, and not just about those people at that plant, but people involved in this industry and the public that is exposed to this industry.

That is a frightening obligation. You need to trust somebody. You need not to get in mud springs. If you get in there, you're lost forever. If you get down in there and start dealing with the number crunches, and this exhibit and that exhibit, and all the other junk, you get into mud springs. But you don't need to. You need to trust somebody. Who are you going to trust? Are you going to trust Kerr-McGee? Are you going to leave your kids to them? Do you feel safe in that? Are you going to leave your children and their futures to those people, the men in gray? Do you feel safe about that? I'm not saying they are bad men – I'm saying are you going to leave it on those arguments? Do they satisfy you? Can you do it? Is your verdict going to say something about the number-crunching game – that it's got to stop? Is it going to be heard from here around the world? Can you do it? Do you have the power? Are you afraid? If you are, I don't blame you, because I'm afraid, too.

I'm afraid that I haven't the power for you to hear me. I'm afraid that somehow I can't explain my knowledge and my feelings that are in my guts to you. I wish I had the magic to put what I feel in my gut and stomach into the pit of every one of you.

I want to tell you something about me. I have been in courtrooms in Wyoming, little old towns in Wyoming, 5,000 here – I grew up in Riverton, Wyoming – 5,000 people there – Dubois, Rock Springs, I've been all over. I've been the county attorney, and I've prosecuted murderers – eight years I was a prosecutor – and I prosecuted murderers and thieves, and drunk and crazy people, and I've sued careless corporations in my life, and I want to tell you that I have never seen a company who misrepresented to the workers that the workers were cheated out of their lives.

These people that were in charge knew of plutonium. They knew what alpha particles did. They hid the facts, and they confused the facts, and they tried to confuse you, and they tried to cover it, and they tried to get you in the mud springs.

You know and I know what it was all about. It was about a lousy $3.50-an-hour job. And if those people knew they were going to die from cancer 20 or 40 years later, would they have gone to work? The misrepresentations stole their lives. It's sickening, it's willful, it's callous.

Nobody seriously contends Kerr-McGee told these people about cancer. No one said that they heard about cancer.~ They hid it. They hid the fact. It was a trap, surely as deadly as the worst kind of landmines, the worse kind of traps. I tell you, if you were in the army, and your officer said to you to walk down that road, and that it was safe, and they knew it was full of landmines, and the only reason they told you it was safe was because that was the only way they could get you to go down the road, and that they blew you all to hell, what would your feelings be? It's that kind of misconduct that we are talking about in this case, and it is that kind of misconduct relative to the entire training of these people that this case is about. They blame it on something else after it is all over.

Now, I have a vision. It is not a dream – it's a nightmare. It came to me in the middle of the night, and I got up and wrote it down, and I want you to hear it because I wrote it in the middle of the night about a week ago. Twenty years from now – the men are not old, some say they're just in their prime, they're

looking forward to some good things. The men that worked at that plant are good men with families who love them. They are good men, but they are dying – not all of them but they are dying like men die in a plague. Cancer they say, probably from the plutonium plant. He worked there as a young man. They didn't know much about it in those days. He isn't suffering much; but it is just a tragedy. They all loved him. Nobody in top management seemed to care. Those were the days when nobody in management in the plutonium plant could be found, even by the AEC, who knew or cared. They worked the men in respirators. The pipes leaked. The paint dropped from the walls. The stuff was everywhere. Nobody cared very much. The place was run by good money men. They were good money men – good managers. The company, well, it covered things up.~ And the information was kept from them, or they wouldn't have worked.~ The training. Well, it was as bad as telling children that the Kool-Aid, laced with poison, is good for them. A hidden danger – they never knew. Some read about plutonium and cancer in the paper for the first time during a trial – the trial called "The Silkwood Case" – but it was too late for them. Karen Silkwood was dead, the company was trying to convince an Oklahoma jury that she contaminated herself. They took two and a half months for trial. The company had an excuse for everything. Blamed it all on the union. Blamed it all on everybody else – on Karen Silkwood, on the workers, on sabotage, on the AEC. It was a sad time in the history of our country. They said the AEC was tough – 75 violations later they hadn't even been fined once. It was worse than the days of slavery. It was a worse time of infamy than the days of slavery because the owners of the slaves cared about their slaves, and many of them loved their slaves. It was a time of infamy, and a time of deceit, corporate dishonesty. A time when men used men like disposable commodities – like so much expendable property. It was a time when corporations fooled the public, were more concerned with the public image than with the truth. It was a time when the government held hands with these giants, and played footsie with their greatest scientists. At the disposal of the corporation, to testify, to strike down the claims

of people, and it was too late. It was a sad time, the era between '70 and '79 – they called it the Cimarron Syndrome.

What is this case about? It is about Karen Silkwood, who was a brave, ordinary woman who did care. And she risked her life, and she lost it. And she had something to tell the world, and she tried to tell the world. What was it that Karen Silkwood had to tell the world? That has been left to us to say now. It is for you, the jury to say. It is for you, the jury to say it for her. What was she trying to tell the world? Ladies and gentlemen of the jury I wish Karen Silkwood was standing here by me now and could say what she wanted to say. I think she would say, "Brothers and sisters …" I don't think she would say ladies and gentlemen. I think she would say, "Brothers and sisters, they were just 18- and 19-year-olds. They didn't understand. There wasn't any training. They kept the danger a secret. They covered it with word games and number games." And she would say: "Friends, it has to stop here today, here in Oklahoma City today."

Ladies and gentlemen, I've still got half an hour, and I'm not going to use it. I'm going to close my case with you right now I'm going to tell you a story a simple story about a wise old man – and a smart-aleck young boy who wanted to show up the wise old man for a fool. The boy's plan was this: He found a little bird in the forest and captured the little bird. And he had the idea he would go to the wise old man with the bird in his hand and say, "Wise old man, what have I got in my hand?" And the old man would say, "Well, you have a bird, my son." And he would say, "Wise old man, is the bird alive, or is it dead?" And the old man knew if he said, "It is dead" the little boy would open his hand and the bird would fly away. Or if he said, "It is alive," then the boy would take the bird in his hand and crunch it and crunch it, and crunch the life out of it, and then open his hand and say, "See, it is dead." And so the boy went up to the wise old man and he said, "Wise old man, what do I have in my hand?" "The old man said, "Why it is a bird, my son." He said, "Wise old man, is it alive, or is it dead?" And the wise old man said, "The bird is in your hands, my son."

Thank you very much.

> It's been my pleasure, my God-given pleasure, to be a part of your lives. I mean that. Thank you, your honor.

Incidence and Magnitude of Punitive Damages

Punitive damages are not typical. A U.S. Department of Justice study found that plaintiffs sought punitive damages in about 12% of civil trials. Success in getting such an award is considerably rarer. Of all cases proceeding through trial, punitive damages were awarded about 2% of the time. THOMAS H. COHEN & KYLE HARBACEK, PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005, NCJ 233094 (DOJ Bureau of Justice Statistics, 2011).

Although punitive damages are a permissible remedy for most tort causes of action, they are far more common with certain claims, including intentional torts, defamation, and fraud. The DOJ study found punitive damages were sought in 33% of defamation cases, 32% of fraud cases, and 30% of intentional tort cases (including conversion and other intentional torts). By contrast, in medical malpractice cases, punitives were sought 8% of the time. For auto accidents, the figure was 7%.

The median award of punitive damages was $64,000, and 13% of awards were for amounts of $1 million or more.

Caps and Rakes for Punitive Damages Under State Law

About half the states place caps on punitive damages. Most involve hard dollar amounts or maximum multiples of compensatory damages. Others take a hybrid approach, considering both a hard cap and the mathematical relationship between compensatory and punitive damages. Still other states tie caps to the net worth of the defendant.

A very different limit on punitive damages occurs when states rake off a percentage of punitive damages awarded and deposit those funds into the state treasury. The idea behind such rakes is that since the money awarded is for the purpose of punishing the defendant rather than compensating the plaintiff, the plaintiff has no special claim to it.

A few hops around the map will give you an idea of the variety that's out there.

Among those states with caps, Montana is at the high end. In Montana, punitive damages may be awarded in cases of actual fraud, or when the defendant "deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff," or "deliberately proceeds to act with indifference to the high probability of injury to the plaintiff." Mont. Code 27-1-221. Punitive damages are capped at $10 million or 3% of the defendant's net worth, whichever is less. The cap is not applicable to class actions. Mont. Code § 27-1-220.

Indiana is a state at the stricter end of the spectrum. There, punitive damages are generally allowed where the plaintiff can show, by clear and convincing evidence, that the defendant has a quasi-criminal state of mind or engages in willful or wanton misconduct that the defendant knows is likely to cause injury. When permitted, Ind. Code 34-51-3-3 limits punitive damages to the greater of $50,000 or three times compensatory damages. A defendant paying punitive damages must submit the payment to the clerk of the court, who will remit 25% to the plaintiff and 75% to the state treasury. The jury cannot be advised of the cap on punitive damages, nor can it be told about the state's 75% rake.

In Arkansas, the legislature passed a general cap on punitive damages of the greater of $250,000 or three times compensatory damages up to a hard limit of $1 million. Ark. Code §16-55-208. But in 2011, the Arkansas Supreme Court struck down §16-55-208 as violating the state constitution, which provides that except for workers compensation, "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property." Ark. Const. art. 5, § 32. Notably, the Arkansas decision spurred business leaders to finance the election campaigns of state Supreme Court judges – presumably those likely to vote differently on such issues in the future.

New Hampshire stands alone with how its law treats punitive damages. In the Granite State, punitive damages are not allowed at all

unless they are specifically authorized by statute. The list of torts that have been given a legislative blessing for punitive damages is eclectic. Willful or wanton misappropriation of trade secrets can merit punitive damages. N.H. Rev. Stat. § 350-B:3. And treble damages are permitted against willful removers of gravel, clay, sand, turf, mold, or loam for another's property. N.H. Rev. Stat. § 167:61. One wonders how often this comes up: Owners of sewer systems and sewage disposal plants can obtain treble damages from persons maliciously or wantonly damaging their facilities. N.H. Rev. Stat. § 167:61. One last thing of note – although punitive damages are generally unavailable in New Hampshire, something called "liberal compensatory damages" are allowed as a general matter in egregious cases.

Federal Constitutional Limits on Punitive Damages

While state limits on punitive damages vary, the federal constitution sets an outer bound beyond which punitive damages are not allowed.

The constitutionalization of punitive damages in tort cases is a fairly recent development. The Supreme Court rejected an early attempt to find such an outer boundary in the Excessive Fines Clause of the Eighth Amendment in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989). That case held that the Excessive Fines Clause concerns direct actions by the government to inflict punishment. Since civil trials between private parties fall outside that concern, the Eighth Amendment provides no limit.

A few years later, however, the Supreme Court did find that the Due Process Clause of the Fourteenth Amendment functions to constitutionalize the issue of civil-jury punitive damages. In *BMW of North America, Inc. v. Gore*, 509 U.S. 443 (1993), the buyer of a "new" BMW found out that his car had – before he purchased it – suffered some cosmetic damage that was repaired at an auto-body shop. While the repairs made the car look new again, they provably decreased the market value of the car by $4,000. In the trial court, Gore got his compensatory damages, and then also got punitive damages on top of that to the tune of $4 million. The court found the award constitutionally excessive.

The court revisited the issue of punitive damages more systematically in *State Farm v. Campbell,* 538 U.S. 408 (2003), a case which is reproduced below.

Subsequently, the court held that punitive damages may not be imposed for a defendant's conduct toward persons other than the plaintiff. *Phillip Morris USA v. Williams,* 549 U.S. 346 (2007). The court did say, however, that evidence of harming other persons was relevant as evidence of the reprehensibility of the defendant's conduct toward the plaintiff.

Case: *State Farm v. Campbell*

This case contains the U.S. Supreme Court's most comprehensive statement of the law with regard to the constitutionality of punitive damage awards.

State Farm v. Campbell

Supreme Court of the United States
April 7, 2003

538 U.S. 408. Formally styled as "State Farm Mutual Automobile Insurance Co. v. Campbell." STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner, v. Inez Preece CAMPBELL and Matthew C. Barneck, special administrator and personal representative of the Estate of Curtis B. Campbell. No. 01-1289. KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. SCALIA, J., THOMAS, J., and GINSBURG, J., post, p. 1527, filed dissenting opinions.

Justice ANTHONY KENNEDY delivered the opinion of the Court:

We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of $145 million in punitive damages, where full compensatory damages are $1 million, is excessive and in