AFTER *PHILIP MORRIS V. WILLIAMS*: WHAT IS LEFT OF THE "SINGLE-DIGIT" RATIO?

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I. INTRODUCTION

The modern American practice of awarding punitive damages in the context of a civil trial is unique among developed legal systems around the world. Traces of the practice still exist in other common law nations, such as Canada and Australia. Certain European nations, namely France, have begun introducing exemplary damages into their civil code. But the practice of allowing private citizens to use the courts to punish other private citizens for acting in ways not necessarily proven to be criminal is pervasive and important only in the American legal system.

A jurisprudence of punitive damages could encompass a range of questions. It could ask, most generally, about the rationale or justification for punitive damages. It might ask, substantively: What conduct warrants civil punishment? It might ask, procedurally: Who decides whether punitive damages ought to be awarded and how should that decision be made? Interestingly, most of the academic scholarship in the United States has focused on the last question.

Why should this be? It is not the case that law reviews lack articles on punitive damages theory. There are also some judicial opinions that examine the substantive ground for punitive

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damages awards. For example, *National By-Products, Inc. v. Searcy House Moving Co.* is a 1987 Arkansas Supreme Court decision that considers the question of whether driving a truck downhill at seventy miles per hour with the intent to cross a single-lane bridge designed to accommodate two-way traffic was wanton, therefore permitting a jury to award punitive damages to the plaintiff.[1] I think the court arrived at the wrong result—that the conduct could not be considered wanton[2]—but at least the case engages the substantive ground for a punitive damages award at a reasonably detailed level.

National By-Products is the exception. Most of the leading punitive damages cases are discussed by scholars and the practicing bar with two procedural restrictions: (1) the sort of evidence that a factfinder can hear when deciding the scale of punitive damages, or (2) whether a court should review the factfinder's decision about how much to award in punitive damages with a defeasible assumption that the punitive damages awards should not exceed the underlying compensatory award by a certain known and fixed ratio. The reason for this, I believe, is that these are the questions that the United States Supreme Court has asked about punitive damages over the past twenty years—and the Supreme Court's choice of focus is very influential.

In this short essay, I want to illustrate the pitfalls of the focus on process over substance by examining the quick rise and fall of the "putative ratio rule" announced by the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[3]

II. THE ORIGINS OF "THE RATIO"

As many courts and scholars have noted, the history of punitive damages reflects a multitude of rationales and purposes for punitive damages in both England and the United States.[4]

1. Nat'l By-Products, Inc. v. Searcy House Moving Co., 731 S.W.2d 194 (Ark. 1987).

2. *Id*. at 195.

3. State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003).

4. *See* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-

Generally speaking, punitive damages have been justified for their retributive, deterrent, and expressive functions. How a court might address these justifications would inform its conclusion with regard to questions concerning the substantive law of punitive damages—for example, whether punitive damages could be awarded against a master for the actions of his servant under the doctrine of *respondeat superior*, or whether punitive damages could be awarded against an intoxicated motorist. It is only quite recently, however, that courts and commentators have been concerned exclusively with the size of a punitive damages award, as opposed to its underlying rationale or justification.

The concern over scale (as opposed to rationale) is traceable back to Judge Friendly's perceptive analysis in *Roginsky v. Richardson-Merrell, Inc.* of the (then) new problems raised by allowing punitive damages in mass tort cases.[5] Judge Friendly's ultimate concern was that multiple punitive damages awards for the same wrong would lead to "over-punishment"—offending our sense of fairness—and might have the practical effect of "over-deterring" socially desirable conduct.[6]

Since *Roginsky*, there has been a concerted effort on the part of those concerned with the growth of punitive damages to limit scale by means of some fixed "hard" cap. The most common expression of this effort has been the adoption of legislative caps on damages, especially in medical malpractice litigation.[7] The other expression of this effort has been to try to convince courts that punitive damages should be tethered to a fixed ratio, similar to the 3:1 ratio found in antitrust and racketeering statutes. In an amicus brief on behalf of the defendants in the 1992 case *TXO Production Corp. v. Alliance Resources Corp.*,[8] the American Tort

KENT L. REV. 163 (2003).

5. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-39 (2d Cir. 1967) (reversing punitive damages award in products liability action against manufacturer of anti-cholesterol drug).

6. *Id.* at 838-42.

7. Nancy L. Zisk, *Limitations of Legislatively Imposed Damages Caps: Proposing a Better Way to Control the Costs of Medical Malpractice*, 30 SEATTLE U. L. REV. 119, 122-23 (2007).

8. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993).

Reform Association suggested that "there is much merit" to a rule that would hold any punitive damages award presumptively excessive if it exceeded a "prescribed multiple" of compensatory damages.[9] The Supreme Court rejected the defendant's argument that due process required "objective" criteria and, taking into account the potential harm that the defendant's actions could have caused the plaintiff, approved a punitive damages award that was 526 times the actual compensatory damages awarded by the jury.[10]

Even in *BMW of North America, Inc. v. Gore*,[11] the first Supreme Court case rejecting a punitive damages award for excessiveness, ratio played an ambiguous role. In *BMW* the court set out a three-part test for evaluating constitutional excessiveness: (1) a punitive damages award had to bear some reasonable relationship to the reprehensibility of the underlying act; (2) there had to be a reasonable relationship between the amount of the compensatory damages and the punitive damages; and (3) the punitive damages award could not be too "much in excess" of the comparable penalties that the state would impose for the same act.[12] It was not until 2003, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[13] that a true hard cap ratio rule emerged from the Supreme Court. The *State Farm* case arose after the plaintiff had caused a fatal multi-car accident. The plaintiff's insurer, State Farm, refused to settle for the $50,000 policy limit. After the plaintiff was found liable in excess of his policy limit, he brought suit against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. Although State Farm ultimately paid the full amount of the judgment against the plaintiff, a jury nevertheless awarded $2.6 million in compensatory damages and $145 million in punitive damages in his suit against State Farm. In reversing the Utah courts, the Supreme Court opined that "few awards

9. Brief for the American Tort Reform Association et al. as Amici Curiae Supporting Petitioner at *33, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) (No. 92-479) (LEXIS, 1992 U.S. Briefs 479).

10. *TXO*, 509 U.S. at 453, 457.

11. BMW of N. Am., Inc. v. Gore, 517 U.S. 560 (1995).

12. *See id*. at 574-85.

13. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[14] This has been taken by many commentators as a *de facto* cap on punitive damages by a "single-digit" ratio.[15]

III. THE FATE OF THE RATIO

The Supreme Court decided against reaffirming the single-digit ratio in *Philip Morris v. Williams*.[16] In *Philip Morris*, the plaintiff's estate sued for the wrongful death of a smoker and won an $821,000 compensatory damages award and a $79.5 million punitive damages award.[17] The Supreme Court reversed the punitive damages in this case, but not because the ratio between the compensatory award and the punitive damages award was constitutionally excessive. It reversed it on completely separate grounds relating to the possibility that the trial judge's instructions impermissibly allowed the jury to punish the defendant tobacco company for having caused death and injury to smokers in the state where the plaintiff lived.[18] The Court did not discuss whether the award was constitutionally suspect because of the ratio between the compensatory and punitive award, which exceeded single digits by a very large degree. More ominously, the decision to reverse was 5-4, with Justice Stevens (the author of *BMW*) voting to affirm the $79.5 million punitive damages award. This result leaves one to wonder whether the ratio prong in the test that he devised possessed much force in cases involving conscious indifference to human life—a factor which played a large role in the reasoning of the lower state

14. *Id.* at 425.

15. A typical example of the way *State Farm* has been received is evidenced in a report published by the law firm Wilson Elser Moskowitz Edelman & Dicker LLP in 2006: "It appears that courts generally are adhering to the single-digit multiplier mandate set forth by the Supreme Court in *State Farm v. Campbell* . . . ." *Punitive Damages Review 2006* at viii, (http://www.travelers.com/businessinsurance/excessCasualty/docs/PunitiveDamages.pdf).

16. Philip Morris v. Williams, 127 S. Ct. 1057 (2007).

17. *Id.* at 1061.

18. *Id.* at 1063.

courts that upheld the award.[19]

It is possible to take the Supreme Court at face value and to assume that they approached the problem of punitive damages in *Philip Morris* with the goal of deciding the case on the narrowest grounds possible. Even if it were possible for the Court to adequately adjudicate the case by using only some of the tests previously developed, it is not clear why it would want to do so. The practicing bar interpreted *State Farm* to set a hard cap. Numerous state courts took this as the message of *State Farm*, even in personal injury cases.[20] One might think that the Supreme Court would take the opportunity to employ a test that it had so recently developed.

One reason why the Court avoided the ratio rule in *Philip Morris* might be, as suggested above, that at least one Justice who voted in *State Farm* had second thoughts about the durability or strength of the rule, at least when it came to extremely culpable conduct in the context of personal injury litigation. Another reason might be that the Court is beginning to realize that the rule is not really worth defending. One of the most notable features of punitive damages in state and lower federal courts is how malleable the compensatory damages figure is in the hands of a judge intent on producing a ratio that stays within the magic single-digit field.

For example, in just one case in the Third Circuit, the district court[21] and the Court of Appeals[22] found that a $2000 compensatory damages award and a $150,000 punitive damages award in a bad faith insurance claim bore a "single-digit" ratio to one another. In *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, the court looked at the *potential* harm that could have been suffered by the plaintiff had it not spent money to enforce its claim in the face of the bad-faith denial of its

19. *Id.* at 1060-65. Justice Stevens voted with the majority in *State Farm* as well. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

20. *See, e.g.*, Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 798–99 (Ct. App. 2003).

21. Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., No. CIV.A. 00-5481, 2003 WL 21321370 (E.D. Pa. 2003).

22. Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224 (3d Cir. 2005).

insurance coverage.[23] The court argued that the $150,000 punitive damages award ought to be compared to the potential loss of $125,000, for a ratio close to 1:1. On appeal, the Third Circuit rejected this reasoning, holding instead that the proper comparison of the $150,000 punitive damages award was with the legal fees paid by the plaintiff to enforce its rights, which totaled close to $135,000, also for a ratio of 1:1.[24] Other courts have come up with equally creative accounting tricks. In *Seltzer v. Morton*, the Montana Supreme Court rejected the contention that the ratio required by *State Farm* required a comparison of the punitive damages award with the compensatory award.[25] The court held instead that the proper comparison was with the company's net worth.[26] Despite ultimately overturning the punitive damages award of $20 million in a case involving a $1.1 million compensatory award, it insisted on comparing the punitive damages award with the figure of $260 million.[27]

IV. CONCLUSION

It is not clear what purpose or value the ratio rule has at this point. The rule itself has very shallow roots in the history of punitive damages jurisprudence. It is easy to manipulate and does not really provide greater certainty or much of a constraint on a creative judge. It was not defended by the Supreme Court in a case where it could have been invoked easily and crisply. Despite the superficial attraction of the rule, which promised the same swift effects of a legislative cap without the legislation, it seems that the Supreme Court has chosen not to expend its capital defending it. Unless the court chooses to bring it up again in a decision of importance, it is very likely that the ratio rule will be abandoned by the courts, to the point where they will not even need to invent fictions to justify ratios higher than

23. *Willow Inn*, No. CIV.A. 00-5481, 2003 WL 21321370 (E.D. Pa. 2003).

24. *Willow Inn*, 399 F.3d at 235; *see also* Action Marine, Inc. v. Cont'l Carbon Inc., 481 F.3d 1302, 1321 (11th Cir. 2007) (including attorney fees as actual damages in ration calculation).

25. Seltzer v. Morton, 154 P.3d 561, 611 (Mont. 2007).

26. *Id.* at 597-98.

27. *Id.* at 612-14.

single-digits.

V. AFTERWORD

On January 31, 2008, the Oregon Supreme Court issued its opinion in the remand of *Williams v. Philip Morris Inc.*[28] The Oregon Supreme Court upheld the original jury verdict of $79.5 in punitive damages.[29] There was every reason to believe that after the U.S. Supreme Court's decision in *Philip Morris*, the Oregon Supreme Court would remand the case to the trial court for a new trial for damages. It would have been less likely to have ordered a remittitur of the punitive damages as did the Alabama Supreme Court after reversal and remand by the United States Supreme Court in *BMW*.[30] *BMW*, however, unlike *State Farm*, did not pretend to erect a numerical hard cap. It is interesting to note that the Alabama Supreme Court applied the U.S. Supreme Court's three guideposts (plus its own state law guideposts) in awarding an amount which was greater than ten times the compensatory damages awarded ($50,000 v. $4,000).[31]

In any event, the Oregon Supreme Court followed a very different path. It held that that the jury verdict should not be disturbed, notwithstanding the U.S. Supreme Court's endorsement of Philip Morris's arguments that the jury instructions adopted by the trial judge were sufficiently constitutionally suspect and that the jury's award likely violated the due process rights of the defendant.

Rather, the Oregon Supreme Court's argument was based on the uncontroversial point that a state court decision should

28. Williams v. Philip Morris Inc., No. 9705-03957, 2008 WL 256614 (Or. Jan. 31, 2008). Since this decision was issued shortly before the publication of this article, this Afterword was written after Sections I-IV of this article were submitted to this law review for publication.

29. The unadjusted compensatory damages award was $821,485.50. *Williams*, 2008 WL 256614 at *9.

30. After the U.S. Supreme Court held that the $2 million punitive damages was constitutionally excessive the Alabama Supreme Court remanded to the trial court with orders to offer the plaintiff a choice between accepting a reduction of the punitive damages award to $50,000 or to submit to a new trial on damages. *BMW of N. Am. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997).

31. *Id.*

not be disturbed if, notwithstanding its violation of the federal constitution, there are independent and adequate state grounds to uphold the decision.[32] In this case, the independent and adequate state grounds are that the instructions requested by Philip Morris at trial violated Oregon law.[33] This is an issue that the U.S. Supreme Court did not take up in *Philip Morris*, and one over which they have neither jurisdiction nor competency.

Of course, the U.S. Supreme Court was not only reviewing the jury instructions requested by Philip Morris, it was also reviewing the jury instructions that the trial judge actually gave. One cannot help but think that the Supreme Court thought that it was holding that the instructions that were given were unconstitutional. To be fair, the majority opinion in *Philip Morris* is not as clear as it might have been on this point. Because of the posture of the appeal from the lower court—a point that will be discussed further below—the Supreme Court chose to discuss the Oregon's Supreme Court's rejection of Philip Morris's argument.[34] The Supreme Court explicitly weighed the reasons the Oregon Supreme Court gave; those reasons said nothing about independent and adequate state grounds. Instead, the Oregon Supreme Court stated that the due process clause allowed the punishment of Philip Morris for acts that it had done to non-parties. Since the instructions given to the jury were based on this position, it is difficult to see how a rejection of the Oregon Supreme Court's reasoning was thus not also a declaration by the U.S. Supreme Court that the instructions violated the due process clause of the U.S. Constitution.

In the January 21, 2008 remand opinion, the Oregon Supreme Court did not actually deny that the U.S. Supreme Court said that the instructions that were given to the jury were unconstitutional. Its view is that this conclusion is mere dicta,

32. *Williams,* 2008 WL 256614 at *5 (*citing Osborne v. Ohio*, 495 U.S. 103, 123 (1990).

33. *Williams,* 2008 WL 256614 at *6, *9.

34. *See, e.g.*, "The instruction that Philip Morris said the trial court *should have given* . . . ." *Id.* at *5 (quoting Philip Morris v. Williams, 127 S. Ct. at 1064) (emphasis added).

since that issue was not before the court.[35] It should be obvious that this reading of *Philip Morris*, even if technically correct, is extremely formalistic and will probably come as a surprise to virtually everyone connected with the case, including the Supreme Court Justices who struggled to answer a question which the Oregon Supreme Court now reveals was moot all along. But taking it at face value, does the latest move by the Oregon Supreme Court have any significance for the question posed by this article?

The short answer is: no. The question posed by *Philip Morris* is whether the "hard cap" proposed by the Supreme Court in *State Farm* means what it seemed to say. Regardless of which jury instructions the jury should have received, its verdict—$79.5 million dollars in punitive damages—could have been seen by the Supreme Court to have violated the single-digit ratio indicated by *State Farm*. The Supreme Court's choice not to invalidate the award on those grounds is significant because, according to the Oregon Supreme Court, the question decided by the Supreme Court was not part of the defendant's latest appeal in the state courts. The explicit refusal by the Court to entertain the ratio question is doubly significant, since now it seems that it was the *only* federal question properly raised by Philip Morris.

35. "Defendant did not preserve any issue as to the instructions that the trial court *did give*." *Williams,* 2008 WL 256614 at *5 n.3 (emphasis added).