REVISITING THE UNITED STATES APPLICATION OF PUNITIVE DAMAGES: SEPARATING MYTH FROM REALITY

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I. ABSTRACT

The application of punitive damages in the United States is widely misunderstood by European jurists. The case of the "pet in the microwave" appears to be entirely fictional, yet it is often cited as an example of United States jurisprudence. Likewise, the McDonald's "coffee spill case" is often cited, even though it was reduced significantly upon appeal and later settled in a private out-of-court agreement between the parties. Neither case is satisfactory as an example of United States punitive damages in application, and neither has legal relevance or precedence in United States jurisprudence. This article discusses several sources of misunderstanding with respect to these "cases." As an alternative, the author proposes that his European colleagues review the legal standards set forth in the United States Supreme Court case *BMW v. Gore*.[1] This is a real case, with binding legal precedence. *Gore* sets forth standards for the application of punitive damages and shows that punitive damages are in fact rational and understandable within the context of established legal standards and guidelines.

Most recently, the United States Supreme Court reviewed the application of punitive damages in the April 7, 2003 decision *State Farm Mutual Automobile Insurance Company v. Campbell*. In *Campbell*, the Supreme Court overturned a punitive damages verdict of $145 million because of an insurer's bad-faith failure to settle. The Supreme Court said that punitive damages were applicable to the case, but, after applying the *Gore* test, it found that the ratio of punitive damages to compensatory damages was excessive. *Campbell* provided further clarification on the application of punitive damages in the United States.

II. INTRODUCTION

American lawyers who live in Europe often find themselves in the line of fire of their continental[2] colleagues who expect them to explain and justify the

1. BMW of N. Am. v. Gore, 116 U.S. 559, 568 (1996).

2. Here, "continental" refers to the European continent, i.e., Europe without England. The effect is to distinguish civil law from common law, since England is the only European country with a common law system.

sometimes bizarre twists of law and politics in the United States. Some favorite topics that arise from these discussions include the use of juries in the judicial process, death penalties, lawyers' contingency fees, and punitive damages. This article deals with one of those matters—punitive damages.

Admittedly, United States laws that allow for punitive damages are far from perfect. Still, the system, if properly understood, is not without merit. Unfortunately, the system is widely misunderstood. It is the author's proposition that much of the misunderstanding in Europe can be traced to instances in which the continental press takes highly publicized trial-level decisions, extrapolates from them, and incorrectly interprets them as a full function of United States law. This phenomenon is not unlike the many "urban legends" which have recently given rise to many popular books and Web sites on urban legends.[3]

III. THE UNFORTUNATE TENDENCY TO BELIEVE URBAN LEGENDS

It is tempting to focus on fictional "urban legends"—and even legitimate cases—in which the outcome seems bizarre and silly. Doing so is easy and entertaining. But without a deeper analysis into outcomes and an understanding as to the law and policy behind the underlying premises, such discussions have little value. In the context of anecdotes and stories, one commentator has suggested that the legal education system needs reform.[4] The author applauds this proposition and believes this is particularly applicable in the context of United States law as it is taught in Europe.

One must look no further than the often discussed "case" in which a woman was allegedly awarded damages for an unsuccessful attempt to dry her pet in her new microwave (hereinafter referred to as the *pet in microwave* "case").[5] If a plaintiff victory in the *pet in the microwave* "case" ever existed—which is highly doubtful—it would almost certainly be reversed at the appellate

3. *See, e.g.*, ROLF WILHELM BREDNICK, DIE SPINNE IN DER YUCCA-PALME, (C.H. Beck, 1999). Additional references to books and websites are provided in footnotes below. Note that many of the comments and references are to German speaking sources, since the author has previously worked and studied in Germany and therefore has selected mostly German speaking sources for examples and citation.

4. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327 (2002) (Professor Rhode also notes at p. 1348 that the *coffee spill case* and the *pet in the microwave case* as not useful anecdotes although they "sell better than statistics").

5. *See also* http://www.snopes.com/horrors/techno/micropet.htm (last visited Nov. 25, 2002), which states that the pet in the microwave case is a hoax and notes other perverse variants of the hoax and other "cooked to death" legends. There are countless other sites in the UNITED STATES similar to www.snopes.com which directly state that the *pet in the microwave* case is a fabrication. *See* http://www.stellaawards.com/bogus.html (last visited Nov. 26, 2002). A German website for "urban legends" also exists: http://www.kuwest.de/joke/ul.html (last visited Nov. 26, 2002), although as of this date, the German website does not mention the pet case.

level. In a more likely scenario, the plaintiff would be prosecuted for a crime.[6] Unfortunate as it may be, the author and many of his European colleagues have heard even well-respected European professors discuss the non-existent *pet in the microwave* "case" as an example of how far United States courts are willing to go. This "case" and others have taken on a life of their own, and as a result, the image of punitive damages has, perhaps, been perhaps irreparably harmed.

The United States has a full legal system with courts of various instances, including, obviously, courts of appeal. As will be illustrated, one must review the *full process* of the court system (i.e., beyond the first instance) to understand the functioning of punitive damages. Through a discussion of two cases, first, the legendary McDonald's *coffee spill case* (hereinafter called the "*coffee spill case*") and secondly, the more relevant United States Supreme Court decision in *Gore*,[7] the article hopes to achieve two objectives. The first is to explain, from an American perspective, how the United States system of punitive damages works and to assist the author's European colleagues in understanding the policy behind it. This article is not intended to provide unconditional support for the punitive damages system in the United States, but rather to point out some of its strengths, outline the review procedure and guidelines, and identify areas in which punitive damages may have been misunderstood. The second objective of this article is to show that, for numerous reasons, the *coffee spill case* is a poor example to be used for academic purposes. While the *coffee spill case* is perhaps a good example for litigation strategy, it should not be used as an example of United States tort law.[8]

IV. THE PET IN THE MICROWAVE

The author hopes to quickly and effectively discredit the *pet in microwave* "case" so as to convince the reader that it not useful for serious discussion. It is of course impossible to prove the non-existence of something. There is even some evidence that the story has European, not American origins.[9] In any event, the lack of positive evidence of the case's existence should be sufficient

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6. The only similar case that the author could find was *State v. Tweedie*, 444 A.2d 855 (R.I. 1982), a criminal case in which the defendant was criminally convicted under Rhode Island statute for "cruelly killing" a cat that defendant placed in the microwave.

7. *Supra* note 1, at 568.

8. See Friedman Kiethe, *American Law Introductory Courses 2001*, 3 GERMAN L.J. 5 (May 1, 2002), www.germanlawjournal.com (noting that an extension from the University of Michigan teaches the *coffee spill case* during a summer course in Germany) (last visited Oct. 13, 2003).

9. The earliest citation of the *pet in the microwave* legend that the author could find was in Paul Smith's, THE BOOK OF NASTY LEGENDS, (T.J. Press Ltd.) (1983). The book dispels the *pet in the microwave* case as false (at p. 65). The author also noted that the "pet" has been described variously a cat and a dog, and even as a baby. Paul Smith has also traced origins of the story back to pre-microwave technology where the owner tried to dry her pet in a regular oven or wood stove.

for the sophisticated reader. Notwithstanding, it may be understandably difficult for many Europeans to "unlearn" the non-existent *pet in the microwave* "case." It seems to appear in many different forms, both at the University as well as in the press.

The *pet in the microwave* "case" has found its way into a (otherwise excellent) German Doctoral Dissertation as a footnote reference.[10] This is not the only example in academia: an Austrian university lecturer appears to use the fictional "case" as a teaching example for his courses—or at least, he has used it in a newspaper article that makes a failed attempt to explain the United States punitive damages system.[11] Note that here the lecturer's victim is a dog. In a similar article many years earlier in France, *Le Monde* discussed the fictional victory of the fictional plaintiff in the *pet in microwave* case as a real, non-fiction example of United States absurdity.[12] But for *Le Monde*, the victim was a cat. Again, *Le Monde* provided no basis, citation, or reference of any kind to the underlying court proceeding. Even so, for *Le Monde*, the "case" served as a prime example as to why the United States system should be reformed. To cite the *pet in the microwave* case as an example of the need for United States punitive damage reform, as *Der Standard* and *Le Monde* have done, is in the author's view, just as absurd as it would be to cite an episode of "The Simpson's" as legally binding precedent.

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10. See, for example the case reported in the German press, whereby the user of a microwave oven used the device to warm up his cold pet, and successfully obtained damages from the manufacturer, who neglected to advise him that the microwave device was not appropriate for this use.

11. Christian Hausmaninger, *Schadenersatzprozesse in den USA: das grosse Geld für Pechvögel.* DER STANDARD, Sept. 9, 1997. With no citation of the underlying "case," Dr. Hausmaninger highlights the *pet in the microwave* (he seems to think it is a dog) as an example of the failures in the United States system. To wit:

> It is often the case where the intentions of compassionate jurors grant exorbitant damages, particularly for dubious damages claims in the order of millions against deep-pocket companies. The case of a dog owner, who dried his dog in the microwave and then sued the manufacturer because there was not a warning regarding the drying of pets, is just one of many examples.

12. LE MONDE, *La 'société contentieuse'—Aux États-Unis, hommes d'affaires et médecins dénoncent la multiplication des procès en tout genre*, Aug. 18, 1992. Quoting from article:

> . . . [t]his litigoious explosion is directly responsible for the disappointments of the American light aircraft industry, or manufacturers of ladders and scaffolding, and has created a multiplication of lawsuits between people who have insurance and the insurance companies that insure them. Totally frustrated with this, the latter point out the case of a manufacturer who lost a lawsuit from a homemaker who inopportunely attempted to dry her cat in a microwave . . .

V. PUNITIVE DAMAGES: THE UNDERLYING POLICY

Punitive damages, also commonly called in English *exemplary damages*,[13] are designed to punish, not to compensate. In general, punitive damages are awarded for socially deplorable conduct, such as fraud or malicious, reckless, or abusive action. Since the early 1900s, punitive damages have been available only for tort but not for contract damages,[14] with some exceptions.[15] Punitive damages are discretionary and are never given as a matter of right. Although viewed as a United States law phenomenon, punitive damages can be traced back to the Old Testament,[16] and their attraction has given rise to attempts by some European tort victims to seek recovery in an American forum. This was the case for the German train accident in Eschede.[17] This was also the case in the wake of the Concorde aircraft[18] accident in Paris, in which damages were statutorily limited. One German commentator has described the limitations on damages as "a deficit in German tort law."[19]

A. The Punishing and Deterrent Functions of Punitive Damages

The "punishing" function of punitive damages is a source of great criticism by civil law proponents. In Germany, for example, public policy equates all punishing functions—including fines—with criminal law, an area in which the state enjoys a constitutional monopoly.[20] The argument in support of this view is that punitive damages should be rejected due to their criminal or quasi-criminal nature.[21] After all, the purpose of a civil action, particularly in tort law, is to restore the plaintiff to the position in which he would have been if the

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13. BLACK'S LAW DICTIONARY 396 (7th ed. 1999). Other variants of the term, *exemplary damages*, include: *punitive damages, presumptive damages, added damages, aggravated damages, speculative damages, imaginary damages, smart money, and punies.*

14. *See* Trammel v. Vaughan, 59 S.W. 79 (Mo. 1900).

15. *See, e.g.*, Given v. Field, 484 S.E.2d 647 (W. Va. 1997).

16. *See* Exodus 22:1 ("If a man shall steal an ox or sheep and kill it, he shall restore five oxen for an ox, and four sheep for a sheep.").

17. *Europäer zieht es verstärkt an amerikanische Gerichte*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 3, 2001, at Nr. 204, 14.

18. Dr. Ronald Schmid, *Wenn die bösen Buben locken ... Überlegungen zum Concorde-Unfall*, DER ANWALT, Heft 7/2001 (Beilage zu NJW 2001).

19. General comment: For readability, original quoted text will not be provided in the footnotes. Should the reader wish to review quotations for accuracy, he/she is asked to review the text from the underlying citation.

20. BGH, IX ZR 149/91, NJW 92, 3096 (1992): (Only the state, not a private person, can punish, and in order to do so, the state must adhere to strict legal procedures designed to protect the defendant it is prosecuting).

21. *See* Christian E. Schlegel, *Is a Federal Cap on Punitive Damages in our Best Interest?: A Consideration of H.R. 956 in Light of Tennessee's Experience*, 69 TENN. L. REV. 677, 682-88 (2002).

tort did not occur.[22] Indeed, United States lawmakers[23] do not entirely disagree with this view. United States courts also believe that punitive damages are similar to criminal punishment. However, while many continental European courts (such as those in Germany) generally reject punitive damages outright, United States courts will allow them where appropriate substantive and procedural safeguards are used to minimize risk of unjust punishment.

There is little dispute that punitive damages are designed to punish, not to compensate. By punishing, punitive damages are said to have a *deterring effect* within society itself.[24] According to that theory, the deterring effect depends, in part, on a *broadcasting effect,* so that punitive damages serve as a lesson to others in a similar situation. Few would argue with the proposition that awarding punitive damages has a "broadcasting effect," although whether punitive damages actually deter and whether they are fair is a separate matter.

Convincing arguments have been advanced by American commentators that punitive damages have spun out of control and that they should be stopped.[25] This is particularly true as applied to juries, which are generally the grantors of exaggerated awards. As stated by one commentator: "It is usually much easier to arouse a jury's emotion or anger than it is to persuade a judge to abandon her comparatively detached and balanced view of a pending case."[26] Others have said that punitive damages create legal uncertainty and discourage new product innovation and introduction into the market.[27] These arguments all make sense. On the other hand, tort reform measures[28] and state action are under way to correct an upward trend in awards.[29]

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22. KEETON ET. AL., CASES AND MATERIALS ON TORTS, AND ACCIDENT LAW (West Publishing Co. 1983).

23. For the purposes of this article, "lawmakers" is defined as both the legislature and the law-creation function of the common law system.

24. JAMES M. FISCHER, UNDERSTANDING REMEDIES 695 (Matthew Bender & Co., Inc. 1999).

25. For a good balancing of arguments, *see* Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 104-06 (2002).

26. Graham C. Lilly, *The Decline of the American Jury*, U. COLO. L. REV. 53, 56 (2001).

27. Richard Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, SCIENCE, Dec. 15, 1999, at 1395.

28. *See* Schlegel, *supra* note 21, at 677.

29. For an analysis of data that shows the increase in award trends, *see* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1113-115 (1996).

B. A Delicate Balance: Weighing "Enormity" of the Offense against the Wealth of the Defendant

In a punitive damages award, it is generally the plaintiff, not the state, who is the beneficiary of the award.[30] The calculation is based on the degree of misconduct or "moral retribution" of the defendant.[31] As explained by Justice Thomas in the United States Supreme Court decision *Molzof v. United States*, a jury may award punitive damages against a defendant based on "the enormity of his offense rather than the measure of compensation to the plaintiff."[32] As a check and balance to make sure that juries do not overly punish, the United States Supreme Court requires that the "enormity" factor be carefully reviewed. In application, some courts require a showing of wealth of the defendant in order to determine whether the amount of damages exceeds the level necessary to properly punish and deter.[33] Other courts may not have a firm requirement to show the wealth of the defendant, but they may encourage it.[34] As Judge Posner explains, "to a very rich person, the pain of having to pay a heavy award of damages may be a mere pinprick and so not deter him (or people like him) from continuing to engage in the same type of wrongdoing."[35]

Appellate courts in the United States are constantly reviewing the policies of balancing punishment against the wealth of the punishee, and of balancing punishment by the gravity of the tort. As will be demonstrated below in discussion of the *BMW v. Gore* decision, the Supreme Court has determined that under certain conditions, punitive damages can be excessive and violate the Due Process guarantee of the Fourteenth Amendment in the United States Constitution. Review by higher courts is available to all parties and is a key element to the full functioning of the legal system.

VI. THE MCDONALD'S CASE IN THE EUROPEAN PRESS

For the press to announce definitively that jury awards at the trial level are the end-all of a full legal process would be to call the winner of a football match after the first few minutes of play and to ignore the rest of the match. True, there are many exaggerations that arise from United States juries, but there are also many built-in checks and balances. Unfortunately, the checks and balances

30. The plaintiff does not necessarily *always* receive the punitive award. Damages may instead, upon agreement of the parties, go to charitable organizations, or third parties. *See* Dardinger v. Anthem Blue Cross & Blue Shield, 781 N.E.2d 121 (Ohio 2002) (Ohio Supreme Court requiring that one-third of a $30,000,000.00 punitive damages award go to a charity).

31. *See* Mgmt. Computer. Servs., Inc. v. Hawkins, 557 N.W.2d 67 (Wis. 1996).

32. 502 U.S. 301, 306 (1992), *quoting* Day v. Woodworth, 54 U.S. 363, 371 (1851).

33. *See* Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992).

34. *See* Adams v. Murakami, 813 P.2d 1348 (Cal. 1991).

35. Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996).

do not make headlines. This was the case in *Die Zeit's* discussion of the *coffee spill case*:[36]

> In a sensational case in the early nineties an elderly woman successfully sued McDonald's. She had ordered a coffee in the drive-through and while driving out she put it in between her legs. When she braked, the cup was crushed and the woman burned herself on her thighs. The jurors awarded *punitive damages* of just under one million dollars. They based this on a finding that McDonald's should have warned its customers of the danger. Since this time McDonald's prints the warning: "Warning, contents hot." Incidentally, the elderly woman did not receive much from her victory—her lawyers' bills were so high that she only ended up with a bit more than one thousand dollars.

Die Zeit misstated the facts of the case in almost every possible way. First, the punitive damages that were initially awarded were $2.7 million,[37] not $1 million, and the award was later reduced upon appeal by more than 75%, from $2.7 million to $480,000.[38] Also, the comment on what was left for plaintiff Liebeck after attorney fees is curious; there is no public information available on that topic since the case between Liebeck and McDonald's was confidentially settled after the 75% reduction in the award.[39] "The elderly woman" (Mrs. Liebeck) was not driving, but was a passenger in the car.[40] Furthermore, as will be noted below, the issue in question was not the warning on the cup, but the fact that McDonald's had received over 700 complaints in the past resulting from similar accidents.

It is no wonder that the *coffee spill case* is misunderstood: other well-known German newspapers have also been careless in their reporting on the case. In 1996, the *Frankfurter Allgemeine Zeitung*,[41] incorrectly reported total damages of $2.3 million, without reference to the reduction by the appellate

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36. Michael Schweilen, *Anwalt Grenzenlos*, DIEZEIT, week 35, 2001, *available at* http://www.zeit.de/2001/35/Politik/200135_witti.html (last visited Oct. 11, 2003).

37. *See* Liebeck v. McDonald's Rests., P.T.S., Inc., 1994 WL 360309, at *1 (N.M. Dist. Aug. 18, 1994).

38. *McDonald's Coffee Award Reduced 75% by Judge*, WALL STREET JOURNAL, Sept. 15, 1994, at A4. (Note that the total award, as reduced, was $640,000.00, consisting of $480,000.00 in punitive damages and $160,000.00 in actual damages).

39. *McDonald's Settles Lawsuit Over Burn From Coffee*, WALL STREET JOURNAL, Dec. 2, 1994, at B6.

40. For description of case facts, *see* Washington State Trial Lawyers Association, www.consumerrights.net/mcdonalds.html (last visited Nov. 11, 2002).

41. Carol Kaps, *Die Schufte vor Gericht*, FRANKFURTER ALL GEMEINE ZEITUNG, Sept. 6. 1996, at 15.

court and final outcome of the case. The appellate reduction and the subsequent settlement were of course well known for over two years prior to publishing the article. The *Frankfurter Allgemeine Zeitung* also incorrectly stated that punitive damages are allowed "in all 50 states."[42] They are not.[43] Even *Handlesblatt* has recently (May 2003) cited the *Coffee Spill* case as an example of the functioning of the law in the United States within the context of recent tobacco judgments.[44] It is hard to understand why a respectable paper such as the *Handlesblatt* would cite this as a *real* case when in fact it was reversed, privately settled, and has absolutely no legal or jurisprudential value in the United States.

To be fair, the German press is not alone in careless reporting of punitive damages. In 1997, long after the *coffee spill case* was reduced by the appellate courts and then settled for an unknown sum, the *Neue Zürcher Zeitung* incorrectly reported that Mrs. Liebeck "earned herself millions of dollars."[45] This was, as in the other examples, reported well after the case was reduced and then settled for an undisclosed sum. However, for the *Neue Zürcher Zeitung,* the case conveniently served as a key example in a series of reports brazenly entitled "Lawsuits as a National Sport in the U.S.A."[46]

On the one hand, the United States system is perhaps one that encourages frivolous lawsuits. Indeed, at the writing of this article, a class-action lawsuit was filed against McDonald's claiming numerous damages, including punitive damages. It alleges that McDonald's burgers and fries make kids fat, provoke

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42. *Id.*

43. Five states do not permit punitive damages to be awarded: New Hampshire, by statute, and Louisiana, Massachusetts, Nebraska, Washington, by common law. *See* Scirica, Gottschalk & Weiner, *Debate: Punitive Damages*, N.Y.L. SCH. L. REV. 577, 586 (1977); *see also* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 9-10 (1992).

44. Gerhard Maurerer, "Ein Teil der Angst Löst sich in Rauch auf" HANDLESBLATT, May 28, 2003, at 29, Nr. 102m. ("One only needs to remember the McDonald's case where a purchaser of hot coffee burned herself upon opening the cup and received punitive damages of $2.7 million.").

45. U. Schmid, *Klagen als Volkssport in den USA*, NEUE ZÜRCHER ZEITUNG, Apr. 11, 1997, at 7. Although perhaps the NEUE ZÜRCHER ZEITUNG should be congratulated for publishing a letter to the editor the following week by a reader who, in response to the article, brought the editor's attention to the incorrect statement and noted that the *coffee spill case* was reduced on appeal and ultimately settled, NEUE ZÜRCHER ZEITUNG, Apr. 25, 1997, at 77. Over the years, the NEUE ZÜRCHER ZEITUNG has been inconsistent in its reporting of the *coffee spill case.* Three years earlier, the NEUE ZÜRCHER ZEITUNG had properly noted the damages in the case in an article calling for reform in the United States. In the earlier article, however, the newspaper provided no discussion at all regarding the relevant facts of the case for punitive damages. The only facts provided were that Mrs. Liebeck poured coffee on herself and received third degree burns. If those were truly the only facts to the case, Mrs. Liebeck would probably have received nothing!; *See* Reinhard Meier, *Der Fall O.J. Simpson und andere Beispiele Zweivel an Amerikas Geschworengerichten Inflationen massloser Schadenersatz-Verdikte*, NEUE ZÜRCHER ZEITUNG, Oct. 15, 1994, at 9.

46. U. Schmid, *Klagen als Volkssport in den USA*, NEUE ZÜRCHER ZEITUNG, Apr. 11, 1997, at 7.

diabetes, and cause high blood pressure.[47] As a worldwide actor and a "deep pocket" defendant, McDonald's has been the target of other lawsuits, including one that led to a recent settlement due to its use of meat products in its allegedly "vegetarian" french fries.[48] The United States system—like any legal system—is indeed prone to aberrations. Notwithstanding, the fundamental distinction between lawsuits that are allowed and those that are not allowed cannot be overstated,[49] particularly in understanding the full functioning of United States law. Although lawsuits alone may have strategic value, it is only the final outcome of a case at the appellate or Supreme Court level that becomes integrated into the United States common law system through the doctrine of *stare decisis*.

With respect to the *coffee spill case*, sensationalism has unfortunately twisted it in such a way that the true outcome is either ignored or not known. It is, in fact, very close to impossible to fully set the record straight on the *coffee spill case*. The case is not reported or published, which means that under United States law it cannot be considered as valid precedent for any legal purpose. Westlaw[50] has a simple one-page "unpublished"[51] version available as part of its database service.[52] LEXIS-NEXIS has no record of the case. Regarding the appeal, there is nothing, either in published, unpublished, or any other unofficial or official form. Consequently, in order to find out what truly happened, one is required to review many different sources that discuss the topic. Sources include consumer-biased Web sites, personal Web sites, newspaper articles, and a few law review articles.[53] This article uses all these sources to ascertain the details on the case. The reader is advised that his or her own research may yield different results, which again supports the proposition that the *coffee spill case* is really not a "case" at all.

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47. Wolfgang Koydl, *Fette Aussichten für Dicke*, SÜDDEUTSCHE ZEITUNG, Nov. 23, 2002, at 12.

48. FRANKFURTER ALLGEMEINE ZEITUNG, June 7, 2002, at 9, Nr. 129.

49. The "McDonald's makes kids fat" lawsuit has recently been dismissed. *See* Pelman v. McDonald's Corp., 2003 WL 22052778, at *1 (S.D.N.Y. Sept. 3, 2003), *available at* http://news.findlaw.com/cnn/docs/mcdonalds/plmnmcdl2203opn.pdf. (last visited Oct. 11, 2003).

50. Westlaw and Lexis-Nexis are the two largest subscriber-based database services in the U.S. for legal research. *See* www.westlaw.com and www.lexis.com.

51. "Unpublished" opinions are provided by some databases as an additional customer service, but they have no effect as legal precedence.

52. *See Liebeck*, 1994 WL 360309.

53. *See generally supra* note 43. *See also* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996).

A. McDonald's: The Facts

Plaintiff Liebeck was sitting in the passenger seat of her grandson's car holding a coffee that she purchased from a drive-through window of a McDonald's (in Europe this is often referred to as a "McDrive"). When Liebeck opened the lid of her coffee to add cream and sugar, she spilled the coffee on herself. The coffee cups were made of Styrofoam and were not particularly sturdy.

The sweatpants that Liebeck was wearing absorbed the coffee and held it next to her skin. A vascular surgeon determined that Liebeck suffered third-degree burns over 6% of her body, including her inner thighs, groin, buttocks, and genital areas. She was hospitalized for eight days, during which time she underwent skin grafting.[54] As a result of the burns and surgery, Liebeck had permanent scarring on more than 16% of her body.[55]

Plaintiff Liebeck initially contacted McDonald's for reimbursement of the medical charges, which at that time totaled $11,000. McDonald's countered with an offer of $800.[56] After her medical treatment was completed, Liebeck had $20,000 of medical bills and decided to hire a lawyer. As part of the trial process, the case went to a mediator for attempted resolution. The mediator recommended the parties settle for $225,000. McDonald's refused and the case continued to trial.[57]

B. McDonald's: The New Mexico Trial Court Ruling

Evidence submitted by Liebeck indicates that McDonald's kept its coffee at 165-170 degrees Fahrenheit, which is apparently hotter than at other fast-food chains.[58] Although the cups are marked with the warning "Caution, contents are hot," Liebeck advanced the proposition that McDonald's customers should be in a position to reasonably expect that "hot" means "hot" relative to other fast-food vendors. Liebeck did not contest the axiom that coffee was hot, nor that coffee can cause burns; Liebeck argued, however, that the full circumstances must be taken into account. In this context Liebeck argued that

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54. *See* Consumer Attorneys of California, *Know the Facts: The McDonald's Coffee Case, at* http://www.caoc.com/facts.htm (last visited Nov. 15, 2002) (providing description of the case facts).

55. *See* Stella Award Subscriptions, *Opportunists and Self-Described Victims, Plaintiffs v. Any Available Deep Pockets and the United States Justice System, Defendants, at* http://www.stellaawards.com/stella.html (last visited Nov. 17, 2002) (stating that although there are discrepancies in the reporting of how much of Mrs. Liebeck's body was burned, sources seem to agree that burns covered between six percent and sixteen percent of her body).

56. *See supra* note 40.

57. Gregory Nathan Hoole, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 471 (1996).

58. LIABILITY WEEK, Vol. 12, No. 38, Sept. 29, 1997.

it is relevant to consider the following: (a) whether the coffee is hotter than coffee served by similar restaurants, (b) whether the cups are fragile and adequate for handling hot material, (c) if the cups and lids work well in a drive-through setting, and (d) if the operator is aware that its product has caused damage to other consumers.

The last criterion proved to be one of the most relevant facts in the award of punitive damages. During the trial, the plaintiff demonstrated that McDonald's had already ignored *more than 700 similar claims of coffee burns.*[59] The company even ignored a written request from the Shriners Burn Institute in Cincinnati to reduce the temperature of its coffee.[60] Harry J. Gaynor, president of the National Burn Victim Foundation, had said the temperatures for McDonald's coffee were "[m]uch too hot for human consumption and extremely dangerous."[61] Mr. Gaynor pointed out that coffee and other hot drinks are not deemed "shippable" until they cool to 154 degrees.[62] Indeed, Liebeck advanced proof that the coffee was between 165 and 170 degrees when it spilled, compared to home-brewed coffee, which is usually between 135 to 140 degrees.[63]

With respect to other claims, McDonald's representatives initially misled the court and jury about the existence of other claims and complaints. Liebeck produced evidence of nearly 700 prior complaints against McDonald's. Furthermore, the plaintiffs showed that McDonald's had paid out-of-court settlements to other victims for similar burns and injuries. Liebeck's evidence demonstrated that McDonald's total payouts for hospital fees and actual damages in similar injuries totaled more than $500,000. Yet McDonald's still had not changed its coffee temperature or serving method. McDonald's own testimony in court by one of its executives, Mr. Appleton, demonstrated that McDonald's knew that consumers had suffered burns, but the company had no interest in changing its policy.[64] In a particularly callous statement, a McDonald's representative testified to the court that the number of injuries were "statistically insignificant" when compared to the billion cups of coffee McDonald's sells annually.[65]

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59. Andrea Gerlin, *A Matter of Degree: How a Jury Decided that Coffee Spill is Worth 2.9 Million —McDonald's Callousness Was Real Issue, Jurors Say, In Case of Burned Woman,—How Hot Do You Like It?*, WALL STREET JOURNAL, Sept. 1, 1994, at A1.

60. *See supra* note 40.

61. Dan Shaw, *Coffee, Tea, or Ouch?*, N. Y. Times, Oct. 12, 1994, at C1.

62. *Id.*

63. Gerlin, *supra* note 59.

64. *Id.*

65. Saunders & Schmeiler, P.C., *Liability Exposure of Owners & Operators of Malls, Retail Establishments & Commercial Enterprises, at* http://www.sslawfirm.com/pub_premises.htm (last visited Oct. 7, 2003).

Based on evidence produced by Liebeck, it would be difficult to argue that the decision of the New Mexico jury in favor of Liebeck was irrational. The amount of the award, however, is another story.

C. Calculation of Damages

As has been discussed earlier, punitive damages are intended to create an incentive for a company to change policy and behavior. To do this, punitive damage calculations will often be based on the strength of the company as a whole.[66] The jury found that McDonald's had engaged in willful, reckless, malicious, or wanton conduct, which is the standard used for the awarding of punitive damages. Ms. Liebeck's attorney provided evidence that McDonald's made $1.35 million per day from coffee sales alone. As a measure of punitive damages, the attorney's recommendation was that the jury award one or two days of revenue coffee sales as punitive damages.[67] The trial court award was the equivalent of two days of worldwide coffee sales, totaling $2.7 million.

With respect to actual damages for medical bills, attorneys' fees, and compensation for loss, Liebeck was awarded $200,000. However, the jury determined that Liebeck was also at fault in the way she handled the coffee. On this point, the jury determined that Liebeck was 20% at fault, which automatically reduced the $200,000 award by 20% to $160,000.[68]

D. McDonald's: The New Mexico Appeals Court Ruling & Settlement

The punitive damages award became the main issue upon appeal. As previously noted, an appeals judge later reduced the $2.7 million jury award in punitive damages to $480,000, which, when added to the $160,000 compensatory damage claim, totaled $640,000. Liebeck then threatened to take the case to another level of appeal; however, the parties quickly settled the case for an undisclosed amount, requiring that the deal be kept sealed.[69] According to some sources, the final total amount (compensatory and punitive) was less than $600,000.[70] Based on the emerging case law, such as the Supreme Court Case of *BMW v. Gore*, it is unlikely that the plaintiff would have been able to do any better upon appeal.

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66. *See Adams*, 813 P.2d at 110 (noting that evidence of the defendant's wealth is necessary to enable the court to determine "whether the amount of damages exceeds the level necessary to properly punish and deter").

67. Gerlin, *supra* note 59.

68. *Liebeck*, 1994 WL 360309 at 5. This is known in United States law as the *comparative negligence doctrine*, whereby a plaintiff's recovery is reduced proportionally to the plaintiff's degree of fault in causing the damage.

69. WALL STREET JOURNAL, *supra* note 39, at B6.

70. *See Liebeck*, 1994 WL 360309 at 1.

VII. BMM v. GORE: THE FACTS AND THE ALABAMA TRIAL COURT RULING

BMW v. Gore[71] serves as an excellent example of reduction of punitive damages in practice. Also, it is interesting for the context of this article as it is "international" in the sense that it involves the repainting in the United States of cars ordered from a German manufacturer.

The facts of the case are as follows.[72] The plaintiff, Dr. Ira Gore Jr., bought a new 1990 BMW 535i automobile from an Alabama dealership for approximately $40,000. At the time of the sale, Dr. Gore signed an "Acknowledgement of Disclosure" in which he acknowledged that the automobile might have sustained damage at some point prior to his purchase. The disclosure form also stated that Dr. Gore had inspected the automobile and had agreed to accept it. This disclosure form did not list the repair that is the subject of the case, and Dr. Gore did not know that he ought to specifically check the quality of the painting process.

Dr. Gore drove the car for approximately nine months before taking it to "Slick Finish," an independent automobile detailing shop, to make the car look "snazzier than it normally would appear." Prior to taking the car to "Slick Finish," Mr. Gore was not unsatisfied with the car's appearance and had not noticed any flaws in the finish on the car. Yet Dr. Gore's assumption had been that since the car was new, it had never been damaged.

The detailer at "Slick Finish" informed Dr. Gore that the car had been partially repainted. Dr. Gore later determined that the refinishing had been done because of acid rain damage to the car's paint finish sustained during transit between BMW AG's manufacturing plant in Germany and BMW NA's vehicle preparation center in Brunswick, Georgia. BMW NA, the American distributor of BMW automobiles, had adopted a policy that it would not disclose any damage to dealers or customers if the cost of repairing the damage was less than 3% of the manufacturer's suggested retail price (MSRP). The cost of refinishing Dr. Gore's automobile was $601, less than 3% of the MSRP. Consequently, BMW NA did not disclose to Dr. Gore that the automobile had been refinished prior to purchase. The jury found that the damage devalued the car by $4,000, or approximately 10% of the price paid by Dr. Gore. The devaluation was based on the assertion that the United States paint job was not as good as the "super heating" procedure used by the factory in Germany. The jury found that the paint would fade earlier, reducing the value of the car.

Upon his discovery that the automobile had been refinished, Dr. Gore sued German Auto, BMW AG, and BMW NA, alleging that the failure to disclose

71. BMW of N. Am. v. Gore, 116 U.S. 559, 568 (1996).

72. Unless stated otherwise, the facts are taken from the United States Supreme Court Ruling, in *BMW*, 116 U.S. at 565.

the refinishing constituted fraud, suppression of a material fact, and breach of contract. At trial, Dr. Gore presented evidence that BMW's Executive Board had adopted a policy in 1983 to deliberately and fraudulently conceal from customers and dealers that vehicles had been repainted, regardless of the extent of the damage or cost of repairs. Further evidence showed that a minimum of 983 other cars, each with at least $300 in damage, had been sold to unsuspecting American customers. Dr. Gore attempted to show that these figures, even though impressive, underestimate BMW's program of nationwide fraud.

Dr. Gore's claim was that, by selling damaged cars for more than they were worth, BMW reaped millions of dollars through nationwide consumer fraud. The jury returned a verdict against all three defendants for $4,000 in compensatory damages, and it assessed $4 million in punitive damages against the BMW defendants jointly. The ruling was based on a determination that the BMW defendants had been guilty of gross, malicious, intentional, and wanton fraud. The noteworthy result is that the ratio of actual damages versus punitive damages was 1000:1. The trial court entered a judgment on that verdict and subsequently denied post-judgment motions filed by the BMW defendants. The BMW defendants appealed.

A. BMW v. Gore: The Alabama Supreme Court Ruling

The Alabama Supreme Court agreed with the trial court that BMW's misconduct had been reprehensible and merited punishment. However, the state Supreme Court found that the jury should not have considered the fraudulent acts occurring *outside* Alabama. The Alabama court then considered the fraudulent cases in that state and reduced the punitive award by 50% to $2 million. Said another way, the damages ratio of actual to punitive was reduced from 1000:1 to 500:1. BMW appealed to the United States Supreme Court, which accepted the case through a process in United States law known as *certiorari*.[73]

B. BMW v. Gore: The United States Supreme Court Ruling

The United States Supreme Court vacated the reduced $2 million award and remanded the case to the Alabama Supreme Court, finding the actual harm slight and the misconduct to be minor. The Court noted that "none of the

73. "Certiorari" is a writ of a higher court to a lower court to send all the documents in a case to it so the higher court can review the lower court's decision. Certiorari is most commonly used by the United States Supreme Court, which is selective about which cases it will hear on appeal. To appeal to the Supreme Court one applies to the Supreme Court for a so-called "writ of certiorari," which it grants at its discretion and only when *at least three Justices of the Supreme Court* believe that the case involves a sufficiently significant federal question in the public interest. By denying such a writ the Supreme Court says it will let the lower court decision stand, particularly if it conforms to accepted precedents (previously decided cases).

aggravating factors associated with *particularly reprehensible conduct* is present" (emphasis added).

Justice Stevens, in writing for the Supreme Court,[74] stated at the outset of the case that protections from the United States Constitution apply. In particular, the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a "grossly excessive" punishment on a tortfeasor.[75] If an award can be fairly categorized as "grossly excessive" in relation to legitimate state interests, it enters the so-called "zone of arbitrariness" that violates the Due Process Clause of the Fourteenth Amendment.[76]

To assist lower courts in determining the constitutional boundaries of punitive damages, for this case and future cases, the Court offered three "guideposts" to gauge whether a punitive damages verdict violates substantive due process. The result is a three-factor test that analyzes the following elements: (1) the degree of reprehensibility of the defendant's misconduct; (2) the relationship (or ratio) between the punitive award and the actual harm; (3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in similar cases. Each of these "guideposts" will be briefly discussed below.

1. The First Guidepost: Degree of Reprehensibility

The Supreme Court explained that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[77] In reviewing reprehensibility, the Court noted that reprehensibility included economic torts (which were present in the *BMW v. Gore* case), although it noted that conduct involving a substantial risk of bodily injury will be deemed more serious and more deserving of a sanction than pure economic torts. There was no risk of bodily injury here since painting is purely a cosmetic function.

One of the unique characteristics of United States jurisprudence, particularly in reading Supreme Court cases, is the presence of "majority," "concurring," and "dissenting" opinions. Often, the reader must refer to all three in order to fully "frame" the jurisprudence. The "concurring" portion of the opinion helps provide clarification for the first guidepost. In writing for concurring Justices O'Connor and Souter, Justice Breyer emphasized that the

74. In a United States Supreme Court case, one Justice is appointed by the Chief Justice to write the "majority" opinion. As will be explained later, the other justices may either join the majority opinion, or they may write a separate "concurring" opinion or a "dissenting" opinion.

75. *Gore*, 116 U.S. at 562 (*citing* TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993)).

76. *Id.* at 568.

77. *Id.* at 575.

harm to Dr. Gore was certainly not "*especially* or *unusually* reprehensible enough to warrant $2 million in punitive damages, or a significant portion of that award. To find to the contrary . . . it is to make 'reprehensibility' a concept without constraining force, i.e., to deprive the concept of its constraining power to protect against serious and capricious deprivations" (emphasis in original).[78] As noted above, it is perhaps more likely that risk of bodily harm or physical injury would lead to punitive damages than would pure economic torts.

2. The Second Guidepost: Ratio Between Damages and Actual Harm

The Court emphasized that the primary goal in awarding punitive damages is to punish present conduct, with the further objective of deterring future egregious conduct. However in doing so, the Court emphasized that rationality in awarding damages must prevail. The punitive damages must rationally relate to the award of compensatory damages:

> [W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards if, for example, a particularly egregious act has resulted in only a small amount of economic damages (emphasis in original).[79]

The Court noted that the 500:1 ratio in actual damages to punitive damages awarded in *BMW v. Gore* was "breathtaking."[80] Still, with respect to future cases, the Court refused to rule out the potential for granting high punitive awards even when the damages are low. Legal commentators who have analyzed case law after the *BMW v. Gore* decision have noted that courts have had little difficulty finding large ratios to be excessive, although no hard-and-fast "bright line" rule exists here.[81]

78. *Id.* at 590.

79. *Id.* at 582.

80. *Id.* at 583.

81. FISCHER, *supra* note 24, at 709. *See also* Pulla v. Amoco Oil Co., 72 F.3d 648, 661 (8th Cir. 1995) (finding a ratio in the order of 250,000:1 to be excessive); Ace v. Aetna Life Ins. Co., 139 F.3d 1241, 1248 (9th Cir. 1998) (finding that a 13:1 ratio was far beyond what had been previously approved by Alaskan courts).

3. The Third Guidepost: A Review of Sanctions for Comparable Misconduct

The third guidepost in the Supreme Court's analysis in *BMW v. Gore* requires the court to compare "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct."[82] In reviewing excessiveness of punitive damages under this test, a court must "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[83] In *BMW v. Gore,* the Court reviewed the Alabama Supreme Court's $2 million economic sanction against other statutory fines available for such misconduct in Alabama and elsewhere. The Court noted that the maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000.[84] Ratios (borrowed from the "second guidepost") may help here: note that the Alabama Supreme Court's $2 million sanction is a factor of 1000:1. In applying its test to the *BMW v. Gore* case, the Supreme Court found that the sanction imposed—a ratio of 1000:1 versus the legislature's $2,000 violation for deceptive trade practices—was overly drastic. The decision was reversed.

C. BMW v. Gore: Remand to the Alabama Supreme Court

When the United States Supreme Court reverses a lower court's ruling, it will rarely change the award directly. Instead, it will remand the case for reconsideration by the same lower court that issued the previous ruling. In the present case, the Supreme Court remanded the case to the Alabama Supreme Court and required that it analyze the case with an application of the United States Supreme Court's newly established tests. Upon remand, the Alabama Supreme Court applied the United States Supreme Court's test and reduced the punitive damages award to $50,000.[85]

VIII. STATE FARM

Most recently, the United States The Supreme Court reviewed the application of punitive damages in the April 7, 2003 decision *State Farm Mutual Automobile Insurance Company v. Campbell, ("Campbell").*[86] In *Campbell,* the Supreme Court overturned a punitive damages verdict of $145 million because of an insurer's *bad-faith* failure to settle out-of-court. The

82. 116 U.S. at 583.

83. *Id. See also* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989).

84. *BMW,* 116 U.S. at 584.

85. BMW of N. Am., Inc. v. Gore, 701 So. 2d 507, 515 (Ala. 1997).

86. State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1517 (2003).

Supreme Court said that punitive damages were applicable to the case, but the ratio of punitive damages to compensatory damages—here, 145:1—was excessive. The Supreme Court reached this conclusion by applying the criteria of *BMW v. Gore*. Perhaps the most important contribution of *Campbell* to United States jurisprudence is its further clarification of the second *BMW v. Gore* guidepost.

A. Background and Facts

The case took over two decades to resolve, beginning in 1981 and ending in 2003. In 1981, Curtis Campbell ("Campbell") was driving with his wife on a two-lane highway in Utah. Campbell decided to pass six vans traveling ahead of them. Todd Ospital ("Ospital") was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, Ospital swerved off the highway, lost control of his car and collided with another car driven by Robert Slusher ("Slusher"). Ospital was killed, Slusher was permanently disabled, and the Campbells escaped without injury.

Although Campbell initially insisted that he was not at fault, opposite conclusions were reached by early investigations after the accident.[87] The Campbells were insured by the insurance company State Farm. Even State Farm's own internal investigators concluded that Campbell was probably responsible for the accident.[88]

The policy limit that the Campbells purchased from State Farm covered their losses up to $50,000, or $25,000 per claimant. Prior to trial, Slusher and Ospital offered to settle the matter out of court with Campbell for the policy limit of $25,000 each.[89] State Farm, however, refused the offer to settle and insisted on challenging the matter in court, gambling to pay either nothing or less than $50,000. It would be later determined that State Farm altered the records from their own investigation to hide their determination that Campbell was at fault.

When State Farm insisted on litigation, company representatives reassured the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interest, and that they did not need to procure separate counsel."[90] This reassurance equated to an indemnification, since it was State Farm's choice alone to litigate rather than settle at the $50,000 policy limit.

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87. *Id.* at 1517.

88. *Id.* at 1518.

89. *Id.*

90. *Id.*

State Farm proceeded with challenging the matter in court and lost at the court of first instance.[91] The court of first instance determined that Campbell was 100% at fault and awarded damages to Slusher and Ospital of $185,849. This judgment equated to a delta of $135,849 over the Campbells' $50,000 policy limit.

In spite of their earlier promise to indemnify the Campbells, State Farm then *refused* to pay the $135,849 in excess liability. Representatives from State Farm boldly told the Campbells that "you may want to put for sale signs on your property."[92] State Farm further refused to represent Campbell any further through an appeals process and therefore Campbell hired his own lawyer to appeal the judgment.

Eventually, after many months and a series of litigious activity, State Farm decided to pay the $135,849 in excess liability. Still, the Campbells believed that their refusal to settle and their advice (in capacity of their attorney *and* insurer) to sell their home was *bad faith*, and further that they had committed *fraud* and *intentional infliction of emotional distress*.

B. A unique litigation strategy

After many months in the litigation process, Slusher, Ospital and the Campbells—together—made a strategic agreement. They agreed that the activities of State Farm were in bad faith and decided to join together against State Farm on the bad faith, fraud and intentional infliction of emotional distress claims. Slusher and Ospital agreed not to seek payment of their $135,849 claim against the Campbells. In exchange, the Campbells agreed to pursue a "bad faith" lawsuit against State Farm which would hopefully render punitive damages. This would result in a new lawsuit that would be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to participate in *all* major decisions concerning the bad faith lawsuit. For example, no settlement could be concluded without Slusher's and Ospital's approval. Furthermore, Slusher and Ospital would receive 90% of any verdict against State Farm. This new lawsuit would continue under Campbell's name since the bad faith claims against State Farm were vested in Campbell alone.

C. Claims against State Farm

When the new portion of the trial was underway, the Campbells introduced evidence that State Farm's decision not to take the case to trial was the result

91. State Farm Mut. Auto Ins. Co. v. Campbell, 65 P.3d 1134, 1141 (Utah 2001).

92. *Campbell*, 123 S. Ct. at 1518.

of a national scheme to fraudulently limit payouts company wide.[93] In support of this claim, the Campbells introduced extensive expert testimony regarding fraudulent practices by State farm in its nation-wide operations. The Campbells also showed how they altered documents related to their own investigation of Campbell. The Campbells claimed that these *nation-wide* practices were sufficiently egregious to warrant punitive damages.

The Campbells were very successful at the court of first instance in Utah. The jury of the court of first instance awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. However, the judge of first instance partially corrected the verdict, citing the (then recently-decided) *BMW v. Gore* decision. The judge reduced the jury verdict from $2.6 million and $145 million to $1 million and $25 million respectively. Both parties appealed, and the Utah Supreme Court reinstated the jury's $145 million punitive damages decision, but left the $1 million in compensatory damages intact.[94] State Farm then appealed to the United States Supreme Court.

D. The United States Supreme Court applies its previous punitive damages judgments to the facts

The majority opinion of the Court in *Campbell* was written by Justice Kennedy, and was joined by Justices Rehnquist, Stevens, O'Connor, Souter and Breyer. Justices Scalia, Thomas and Ginsburg filed dissenting opinions. Kennedy evaluated the facts of *Campbell* against the judgment of *BMW v. Gore,* stating that, under the *BMW v. Gore* principles, the case was "neither close nor difficult."[95]

1. The Supreme Court provides further clarification on the second "ratio" guidepost

The Supreme Court in *Campbell* stated, at the outset, that this was not punitive damages *per se*, but, as in *BMW v. Gore,* the Court reviewed the *amount* of punitive damages. In *Campbell* the punitive damages ratio was 145:1. The issues which gave rise to punitive damages, as stated above, was the fact that State Farm had altered the company's records to make Campbell appear less culpable. Then they promised the Campbells that they would indemnify them and take the matter to court, when it was almost certain that they would lose. When State Farm lost, they reversed their indemnification promise. This harm was amplified by the fact that State Farm told the Campbells that they should put a for-sale sign on their house.

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93. *Id.*

94. *Campbell*, 65 P.3d at 1153.

95. *Campbell*, 123 S. Ct. at 1521.

In applying the *first Gore* guidepost (reprehensibility) the Supreme Court in *Campbell* found that the reprehensibility claimed was related to State Farm's bad faith, fraud, and intentional infliction of emotional distress. Since the claims were not related to damage or risk of bodily injury, the Supreme Court found that the amount of punitive damages should be relatively low.

In applying the *second Gore* guidepost (the ratio of punitive damages to compensatory damages), the Supreme Court provided further clarification on what they believed would be reasonable in cases where reprehensibility is low. As noted above, however, the *Gore* court decided not to apply a mathematical formula. While the Supreme Court still officially maintains this position, in *State Farm* it provided a useful additional guideline, stating that "*[s]ingle-digit multipliers* are more likely to comport with due process, while still achieving the [s]tate's goals of deterrence and retribution, than awards in range of 500:1 [citing *BMW v. Gore*], or in this case, of 145:1" (emphasis in original).[96]

The *third Gore* guidepost (the ratio of punitive damages to statutory criminal fines) received little discussion.

Finally, the Supreme Court emphasized that the application of punitive damages must be limited to harm related to the plaintiff. In *Campbell*, the lower court's punitive damages award was also based on *nation-wide* conduct. This is not allowed, because it would require a calculation of hypothetical damages to other parties' claims in other states. By allowing evidence of nation-wide evidence it infringes on the ability of other states to punish and regulate the same conduct. This, itself, would also infringe the United States Constitution.

E. Dissenting Opinions

Dissenting opinions were filed by Justices Scalia, Thomas and Ginsburg. In *State Farm,* the dissenting opinions of Scalia and Thomas were very short and contained little new interpretive information. Justices Scalia and Thomas regularly dissent whenever the Supreme Court overturns punitive damages. According to Scalia and Thomas, the Constitution should *not* be used to reduce the size of punitive damage awards. Scalia and Thomas would have upheld the $145,000 judgment.

Justice Ginsburg's dissent was somewhat more detailed and speaks to the tort reform movement in the United States. According to Ginsburg, the legislatures, not the courts, should pass laws to limit punitive damages. Ginsburg also extensively reviewed the data and found that the action by State Farm was extremely reprehensible. Consequently, Ginsburg, like Scalia and Thomas, would have let the $145,000 award stand.

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96. *Id.*

IX. CONCLUSIONS

The United States system of punitive damages makes European lawyers nervous for a number of reasons. One of them is predictability and certainty. Civil lawyers, although supported by hybrid systems of jurisprudence, are not comfortable with uncertainties that arise from common law claims for punitive damages. Another reason is the "strategy" factor present in the United States law system, i.e., the fact that United States lawyers can sue and create massive legal costs for their opponents without having to pay for them if they lose.[97] The recently filed "McDonald's makes kids fat" case is an excellent example of this. Another previously noted example is the filing of claims by a German victim of the Eschede train accident in United States courts.

Although the United States system may operate in a manner that is confusing—some may say inefficient—it is not irrational. This is not to say that the United States tort system does not need reform—it does. With respect to who receives the payouts of punitive damage awards, i.e., generally the victim, the author supports a commonly held reform view that punitive damages should be paid to government.[98] Although this view still needs to be reconciled against the *incentive* argument, i.e., that plaintiffs should have an incentive to bring to court cases in which defendant conduct is egregious and against public policy. A trend in tort reform is already in place that requires portions of punitive damages to be given up by the plaintiffs; so far, eight states have enacted laws in this regard.[99] On the whole, however, solid empirical data exist to show that the full review procedure will often assure rational results for tort cases in the end.[100] *BMW v. Gore* is an example of this rationality as a case that emerged from the full functioning of the United States system. The United States Supreme Court's recent *Campbell* decision further secures the rationale and policy, and provides further clarification (particularly the "single digit multiplier" in cases of low reprehensibility).

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97. This is known as the "English Rule," or the "loser-pays rule," which requires the losing litigant pay the winner's costs and attorney's fees. In the United States the so-called "American Rule" prevails, which requires that each litigant must pay its own attorney's fees, regardless of who prevails in the lawsuit. The rule is subject to bad-faith and other statutory and contractual exceptions. BLACK'S LAW DICTIONARY, *supra* note 12, at 82.

98. *See Tort on Stilts*, THE ECONOMIST, (Opinion section) Mar. 22, 2001, at 4.

99. *See* Anthony J. Sebok, *Why the Future of Punitive Damages May Only Grow Brighter*, FindLaw.com, *at* http://www.writ.corporate.findlaw.com/sebok/20030107.html (last visited Oct. 11, 2003); *see also* Dardinger, *supra* note 30, at 105.

100. *See* Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 55 (1983) (noting that when adjusted for population, American court filings are in the same general range as those in Ontario, Australia, England and Denmark).

Although liabilities in the United States common law system may seem "unknown," the system of checks and balances, if properly understood and considered, sets relatively rational limits to damages. A recently published, detailed analysis by three Cornell law professors has shown that the relationships between actual damages and punitive damages is in fact coherent and rational.[101] One may believe that the rational limits of the system are being tested by the ongoing litigation with asbestos and in the tobacco industry. This may be true. However, since many of these cases are still under way, it is perhaps too early to tell. It should never be forgotten that the United States system is a complete one that only *begins* with the trial process. Outrageous damages can and will be reduced by appellate courts if they fall within certain clearly defined criteria. While the United States Supreme Court has still declined to set an absolute constitutional limit on punitive damage awards, its holding in *Campbell* that "single-digit multipliers" are more likely to agree with due process provides the clearest guidance to date concerning the permissible size of punitive damages.

101. Theodore Eisenberg, ET. AL., *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239, 1245 (2002).