2. Pennsylvania's State Interest in Punitive Damages

[50] [51] [52] [53] Punitive damages serve an important state interest in our constitutional system of government, namely, "to deter and punish egregious behavior." ***Martin v. Johns–Manville Corp.***, 508 Pa. 154, 494 A.2d 1088, 1096 (1985). They are "an enhancement of compensatory damages because of the wanton, reckless, malicious, or oppressive character of the acts forming the basis of the complaint." 22 AM. JUR. 2d Damages § 731 (2003). The factfinder may impose them for "torts that are committed willfully, maliciously, or so carelessly as to indicate wanton disregard of the rights of the party injured. Punitive damages are not awarded as additional compensation but are purely penal in nature." ***G.J.D. by G.J.D. v. Johnson***, 552 Pa. 169, 713 A.2d 1127, 1129 (1998).

To better understand the constitutional issue at hand, we examine the historical context of punitive damages generally and how various courts have approached this due process question.

Punitive damages are "of ancient origin." John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 395 (2004). Punitive damages evolved out of government's need ***120** to offer tort victims a path to retribution in lieu of self-help, blood feuds, conscripting a tortfeasor into indentured servitude, or simply killing him. ***See*** Esther Julia Sonngtag, *Punitive Damages in Ancient Roman Law and Contemporary American Tort Law*, U. of Ga. LLM Theses and Essays, 189 (1999).

A right to recover unspecified punitive damages first appeared in Ancient Rome, after inflation dulled the teeth of the statutory compensatory damages for battery under The XII Tables.[9] Around 100 B.C., knowing he could easily afford those compensatory damages, Lucius Veratius decided to walk around the Forum with a slave, who carried a large purse. Whenever Veratius met people whom he disliked, he slapped them across the face and had his slave immediately pay them the statutory fine. Thus, Veratius treated the compensatory damages as transactional – a free-market cost for misconduct – rather than as a penalty or condemnation for wrongs. Veratius's victims sought further justice. Their lawsuits prompted the Roman jurists to devise "an action not for a fixed penalty, but for damages at large." Jason Taliadoros, *The Roots of* ***Punitive*** ***Damages*** *at Common Law: A Longer* ***History***, 64 Clev. St. L. Rev. 251, 269 (2016) (citing DIG. 47.10.15.26; Ulpian, *Ad Edictum* 67 (ca. 220 A.D.)). And so, the Western legal process of determining punitive damages *post delicti*[10] was born.

By setting the penalty for deliberate misconduct after a wrong is committed, the State may fashion a penalty that is proportionate to the purse of the wrongdoer. This is a strong deterrent, because persons cannot decide ahead of time whether they can afford to break the law.

3. Recent Federal Intervention into States' Punitive-Damage Awards

Roughly 2000 years after Veratius, the United States ratified the Fourteenth Amendment. It provides, in relevant part, "No State shall ... deprive any person of life, liberty, or property, without due process of law ..." U.S. Const. amd. XIV, § 1. When originally adopted, this provision had no relation to the States' historical power to impose punitive damages against tortfeasors. ***See*** ***State Farm***, 538 U.S. at 429-31, 123 S.Ct. 1513 (Scalia, J.; Thomas, J.; and Ginsberg, J. dissenting separately). During Reconstruction, "it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved." ***BMW of N. Am., Inc. v. Gore***, 517 U.S. 559, 600, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (Scalia, J. dissenting).

By the late 20th century, however, concern for exorbitant jury verdicts reached federal heights, and the Supreme Court of the United States found a connection between punitive damages and substantive due process in ***Pacific Mutual Life Ins. v. Haslip***, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).[11] The High Court determined that the Fourteenth Amendment limits punitive damages based on "general ***121** concerns of reasonableness and adequate guidance from the court." ***Id.*** at 18, 111 S.Ct. 1032. However, ***Haslip*** did not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." ***Id.*** at 18-19, 111 S.Ct. 1032.

Notably, in ***TXO Production Corp. v. Alliance Resources Corp.***, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), the Court later affirmed punitive damages that

exceeded the compensatory award by ***526 times***. There, the two companies disputed oil-and-natural-gas rights, and TXO had acted in bad faith by abusing the deed-recordation process to force Alliance into renegotiating the parties' extraction contract. TXO previously engaged in similar deceptive conduct. The jury awarded $19,000 in compensatory and $10,000,000 in punitive damages.

[54] Stating that juries' awards of punitive damages are "entitled to a strong presumption of validity," the Supreme Court recognized that "no two cases are truly identical, [thus,] meaningful comparisons of such awards are difficult to make." ***Id.*** at 457, 113 S.Ct. 2711. Again, the Court refused to draw a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." ***Id.*** at 458, 113 S.Ct. 2711. The factfinder may impose punitive damages that have a "reasonable relationship to the harm that is ***likely to occur*** from the defendant's conduct as well as to the harm that actually has occurred." ***Id.*** at 460, 113 S.Ct. 2711 (emphasis added).

Then, in 1996, the Supreme Court in ***Gore***, ***supra***, vacated a jury's punitive-damages award for the first time. Dr. Gore had bought a new car and subsequently learned that BMW had repainted the exterior to conceal body damages from transport. The jury found BMW had a nationwide policy to sell cars without disclosing minor repairs and awarded compensatory damages of $4,000. But it imposed punitive damages of $4,000,000.

The Supreme Court vacated the punitive damages and announced three "guideposts" for determining whether an award is "grossly excessive:" (1) the degree of reprehensibility of defendant's conduct, (2) the relationship of the punitive verdict to the harm or potential harm suffered by the victim, and (3) any sanctions for comparable misconduct in statutory or decisional law. ***Gore***, 517 U.S. at 574, 583, 585, 116 S.Ct. 1589. The Court stated that "the most important indicium of the reasonableness of a punitive award is the degree of reprehensibility of the defendant's conduct," because punitive damages "should reflect the enormity of [an] offense." ***Id.*** at 582, 116 S.Ct. 1589.

Seven years later, in 2003, the Supreme Court applied the guideposts from ***Gore*** in the case of ***State Farm***, ***supra***. Various negligence victims and a descendant's estate sued Mr. Campbell after he caused a car accident. State Farm refused to settle, and a jury returned a verdict against Mr. Campbell for three times his policy limit. Mr. and Mrs. Campbell then sued State Farm for bad faith. During this second trial, the Campbells introduced evidence of State Farm's nationwide practices of lowballing valid claims to increase its profits. The jury awarded $2,600,000 in compensatory damages and $145,000,000 in punitive damages.

[55] This punitive-damages award violated due process, because it bore no legitimate relation to Utah's interests in punishment and deterrence. ***State Farm***, 538 U.S. at 419-20, 123 S.Ct. 1513. The High Court expounded on the first guidepost (degree of reprehensibility) and instructed ***122** courts to consider five factors. Those factors include whether the:

(1) Harm caused was physical as opposed to economic

(2) Tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others

(3) Target of the conduct was vulnerable

(4) Conduct involved repeated actions or was an isolated incident

(5) Harm was the result of intentional malice, trickery, or deceit, or mere accident.

See id. The ***State Farm*** Court concluded that most of those factors pointed to a lower punitive-damages award, rather than one that was ***145 times*** the compensatory damages.

Analyzing the second guidepost, the Court repeated that it would not draw "a bright-line ratio which a punitive damages award cannot exceed." ***Id.*** at 425, 123 S.Ct. 1513. However, it clarified that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." ***Id.*** Under ***Gore*** and ***Haslip***, "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1." ***Id.*** Thus, "an award of more than four times the amount of compensatory damages ***might*** be close to the line of constitutional impropriety." ***Id.*** (emphasis added).

As for the third guidepost, the Court observed that the maximum statutory penalty that State Farm would face for its fraud under Utah statute was a $10,000 fine. The jury's

$145,000,000 punitive-damages award "dwarfed" that statutory fine. ***Id.*** at 428, 123 S.Ct. 1513.

[56] Like any substantive-due-process inquiry then, the issue is whether the jury's award of punitive damages is reasonable under the facts. A punitive-to-compensatory-damages ratio that is unconstitutionally excessive in one case may not even raise constitutional suspicion in the next. Thus, the Supreme Court could affirm a 526-to-one damages ratio in ***TXO*** and then order the reduction of a 145-to-one damages ratio in ***State Farm***.

