South Carolina Law Review

Volume 49
Issue 5 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 19

Summer 1998

Balancing Act: Public Policy and Punitive Damages Caps

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NOTES

BALANCING ACT: PUBLIC POLICY AND PUNITIVE DAMAGES CAPS

I. INTRODUCTION

On October 8, 1997, a federal court jury in Charleston, South Carolina, awarded $262.5 million in damages to the parents of a six-year-old boy who died when the rear latch on a Chrysler minivan failed in a crash, causing the child to be thrown from the vehicle.[1] The award consisted of $12.5 million in actual damages and $250 million in punitive damages.[2] It was the largest verdict ever returned against an automobile manufacturer,[3] and may also be the largest verdict in South Carolina's history.[4] The verdict comes at a time when a bill that would cap punitive damages at the greater of $250,000 or three times actual damages is stalled in the South Carolina House of Representatives.[5]

For supporters of the bill, the Charleston verdict is a dream come true, demonstrating that punitive damages really are out of control. A spokesman for Chrysler called the verdict "outrageously large."[6] Opponents respond that it is Chrysler's conduct that is outrageous. At least thirty-seven people have already died due to the defective rear latches on Chrysler minivans.[7] Rather than recalling the minivans, Chrysler instituted a "service campaign" to replace the defective latches.[8] Yet, in the first fifteen months of the campaign, Chrysler replaced less than half of the defective latches.[9]

And so the debate rages on. This Note analyzes the punitive damages bill now pending in the South Carolina General Assembly. Part II gives a brief overview of the history of punitive damages in South Carolina and compares the bill to current law. Part III discusses the policies behind imposing punitive damages and some of the arguments that have been used to challenge their propriety, and then summarizes

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1. *Verdict in S.C. Boy's Death Shocks Chrysler*, THE STATE (Columbia, S.C.), Oct. 9, 1997, at A1. The plaintiffs contended that the child was thrown from the rear hatch; Chrysler contended that the unrestrained child was thrown through a side window. *Id.*

2. *Id.* "The punitive damage verdict accounts for just over 2% of the profits Chrysler Corporation made on the minivan. . . . Chrysler made almost $250,000,000 in profits just during the five weeks that we tried this case." Letter from Mark C. Joye, attorney for the plaintiffs (Dec. 18, 1997) (on file with author).

3. THE STATE, *supra* note 1.

4. *Id.* (citing Columbia, South Carolina, attorney David Fedor).

5. H.R. 3019, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

6. THE STATE, *supra* note 1 (quoting Mike Aberlich).

7. *Id.* (citing National Highway Traffic Safety Administration Records).

8. *Id.*

9. *Id.*

the empirical data on the size and frequency of such verdicts. Part IV discusses the effects of tort reform legislation and argues that the General Assembly should not enact the bill.

II. BACKGROUND

Punitive damages have been around for a long time.[10] In 1784, South Carolina became one of the first American states to recognize punitive damages. In the seminal case of *Genay v. Norris*,[11] the defendant, a physician, put poison into another man's wine glass as a joke, causing the man to become seriously ill. The defendant called it a "drunken frolic," but the court called it an "outrage" and ruled that the plaintiff was entitled to exemplary damages.[12] This case is particularly noteworthy for two reasons. First, the defendant's actions fell somewhere between negligent and intentional conduct—the court described it as "wanton."[13] Second, the court held, not that the defendant deserved to pay exemplary damages (although that was certainly implicit), but more precisely that the plaintiff was "entitled" to them.[14] Any discussion of the policies behind punitive damages in South Carolina must take these two points into consideration.

In the two centuries since *Genay*, the law of punitive damages in this state has been refined, but the underlying principles remain unchanged. Punitive damages are "warranted only when the defendant's conduct is shown to be willful, wanton, or in reckless disregard of the rights of others"[15] and will not be awarded for mere negligence, "whether simple or 'gross.'"[16] The test is whether the act was "'committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights.'"[17] Thus, South Carolina explicitly prohibits the imposition of punitive damages in cases of strict liability.[18] Moreover, in order to award punitive

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10. As long as four thousand years ago, the Code of Hammurabi, the earliest known legal code, provided for punitive damages. In England, statutes calling for multiple damages appeared as early as 1275. *See generally* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform* 39 VILL. L. REV. 363, 368 (1994) [hereinafter *Overview*](giving the history of punitive damages).

11. 1 S.C.L. (1 Bay) 6 (1784).

12. *Id.* Although the court referred to the damages as "exemplary," a commentator in a headnote to the case referred to the remedy as "vindictive damages." *Id.* at 6.

13. *Id.*

14. *Id.*

15. South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 324 S.C. 149, 478 S.E.2d 57, 58 (1996).

16. F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 582 (2d ed. 1997).

17. Fennell v. Littlejohn, 240 S.C. 189, 199, 125 S.E.2d 408, 413-14 (1962) (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958)).

18. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989).

damages, the jury must first find actual damages,[19] although nominal damages are sufficient.[20]

Punitive damages are awarded "'in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.'"[21] Because *Genay* is still good law in this state,[22] punitive damages are also awarded "as vindication of [a] private right."[23] For this reason, plaintiffs in South Carolina are "entitled" to punitive damages when they prove a "wanton, willful, or malicious violation of [their] rights."[24] When the defendant's conduct meets this test, the jury *must* award punitive damages.[25]

Several new developments in the law of punitive damages have taken place in this state in recent years. Most notably, in *Gamble v. Stevenson*[26] the Supreme Court of South Carolina held that trial judges must conduct post-trial reviews of all punitive damage awards.[27] The court established eight factors that a trial court may consider in its review:

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely

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19. Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991).

20. Cook v. Atlantic CoastLine R.R., 183 S.C. 279, 283, 190 S.E. 923, 925 (1937); Save Charleston Found. v. Murray, 286 S.C. 170, 178, 333 S.E.2d 60, 65 (Ct. App. 1985) (permitting punitive damages based on nominal damages only when it is clearly shown that a legal right has been willfully or recklessly invaded and that nominal actual damages were merged in the verdict for punitive damages).

21. *Gamble*, 305 S.C. at 110, 406 S.E.2d at 354 (quoting Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)).

22. *See, e.g.*, South Carolina Farm Bureau Mutual Insurance Co. v. Love Chevrolet, Inc., 324 S.C. 149, 151, 478 S.E.2d 57, 58 (1996) (citing *Genay* for the longstanding availability of punitive damages in South Carolina); Rogers v. Florence Printing Co., 233 S.C. 567, 573, 106 S.E.2d 258, 261 (1958) (same).

23. Davenport v. Woodside Cotton Mills Co., 225 S.C. 52, 60, 80 S.E.2d 740, 743 (1954).

24. *Id.*, 80 S.E.2d at 744.

25. *Id.* ("[W]hen under proper allegations a plaintiff proves a wilful, wanton, reckless, or malicious violation of his rights, it is not only the right but the duty of the jury to award punitive damages."); *see also* Gilbert v. Duke Power Co., 255 S.C. 495, 500, 179 S.E.2d 720, 723 (1971) (stating that plaintiffs are entitled to punitive damages upon proof of the requisite culpability); HUBBARD & FELIX, *supra* note 16, at 582-83 (same).

26. 305 S.C. 104, 406 S.E.2d 350 (1991). The post-trial review established in *Gamble* was instituted in response to *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), to ensure that punitive damages awarded in South Carolina could withstand due process challenges. However, appellate review is limited to the abuse of discretion standard. *Gamble*, 305 S.C. at 112, 406 S.E.2d at 355; *see also* Fennell v. Littlejohn, 240 S.C. 189, 200, 125 S.E.2d 408, 414 (1962) ("[I]t is well settled that the granting of a new trial on the ground that the verdict is so excessive as to indicate caprice, passion or prejudice on the part of the jury is in the discretion of the trial judge and his decision thereon will not be disturbed unless abuse of discretion is shown.").

27. *Gamble*, 305 S.C. at 111, 406 S.E.2d at 354.

> to result from such conduct; (7) defendant's ability to pay; and finally (8) . . . "other factors" deemed appropriate.[28]

While *Gamble* did not expressly require that these factors be charged to the jury, later cases have indicated the propriety of such a charge.[29] Additionally, in 1988 the South Carolina General Assembly raised the standard of proof in punitive damages cases. A plaintiff must now prove by "clear and convincing evidence" that the defendant's conduct was reckless or wanton.[30]

If enacted, House Bill 3019 would dramatically change the law of this state. The bill begins as a codification of much of the basic common-law principles governing punitive damages: "Punitive damages may be awarded in a civil action, subject to the provisions of this chapter, to punish a defendant for wilful, wanton, or reckless conduct and to deter the defendant and others from committing similar wrongful acts."[31] The bill defines "wilful, wanton, or reckless conduct" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know are reasonably likely to result in injury, damage, or other harm."[32] The conduct must constitute "more than gross negligence."[33]

At first blush, nothing in these initial provisions appears to change the common law standard of conduct necessary to impose punitive damages. But even this initial paragraph changes current law in two major respects. First, the objectives of punitive damages are limited to punishment and deterrence. The bill does not recognize vindication of a private right as a valid reason to impose punitive damages. Second, the bill provides that punitive damages "may" be awarded.[34] Under this bill, punitive damages would no longer be a right to which the plaintiff is entitled when the defendant's conduct meets the requisite degree of culpability.

The bill would make numerous additional substantive and procedural changes in South Carolina law, including abolition of punitive damages for vicarious liability, trial bifurcation, and shifting of attorneys' fees for malicious or frivolous claims or defenses involving punitive damages.[35] In addition, the bill codifies the *Gamble* factors for jury consideration, with some minor changes. Most notably, the bill eliminates the discretionary "other factors deemed appropriate."[36] However, the

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28. *Id.* at 111-12, 406 S.E.2d at 354.

29. *See, e.g.*, Miller v. City of West Columbia, 322 S.C. 224, 232, 471 S.E.2d 683, 688 (1996) ("After careful review of the record, we conclude that not only did the trial judge appropriately charge the jury with the *Gamble* factors, but he also reviewed these factors during the post[-]trial motions hearing to ensure that the punitive damage award was appropriate and necessary.").

30. S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1997).

31. H.R. 3019, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

most ambitious change contained in the bill, and the focus of this Note, is a cap on punitive damages at the greater of three times the amount of compensatory damages or $250,000.[37]

III. THE DEBATE: POLICY RATIONALES, CRITICISMS, AND EMPIRICAL DATA

Public policy justifies imposing punitive damages. The most commonly cited reasons for punitive damages are punishment of the defendant and deterrence of the defendant and others from similar misbehavior.[38] Although these are the only justifications for punitive damages included in the pending bill,[39] other theories supporting punitive damages include preserving the peace (i.e. preventing injured parties from taking the law into their own hands); providing an incentive for private civil law enforcement, sometimes referred to as encouraging private attorneys general; and compensating victims for otherwise noncompensable losses, such as attorneys' fees.[40] As discussed above, South Carolina puts its own spin on the issue and allows punitive damages as a vindication of a private right.[41] Despite being well-established, punitive damages have been the subject of furious debate. Punitive damages have been criticized as a windfall to the plaintiff.[42] At least in South Carolina, this is not necessarily true. Professor David G. Owen suggests that a moral principle underlying punitive damages is an individual's right not to be violated by a tortfeasor.[43] In that sense at least, punitive damages *are* compensatory because they compensate plaintiffs for the freedom that was "stolen" from them.[44] This theory has long underpinned the law in South Carolina, as evidenced by *Genay* and subsequent cases.[45] The policy of awarding punitive damages as vindication of

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37. H.R. 3019, 112th Gen. Assembly, 1st Sess. (S.C. 1997). The bill provides for only one exception: the cap does not apply if the defendant's actions would subject him to prosecution for driving under the influence.

38. *See Overview*, *supra* note 10, at 373 ("Although most courts refer only to 'punishment' and 'deterrence' as rationales for such damages, this masks the variety of specific functions that punitive damages actually serve.") (citing Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) and the RESTATEMENT (SECOND) OF TORTS § 908(1) (1977)).

39. H.R. 3019, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

40. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982).

41. *See supra* note 23 and accompanying text.

42. This criticism is often used to justify reform statutes calling for remission to the state of a portion of all punitive damage awards. *See* Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 196 (1994). However, this concern is at least partially addressed by recent federal legislation making punitive damages subject to income tax. I.R.C. § 104 (West Supp. 1996).

43. David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 708-13 (1989).

44. *Id.*

45. *See supra* text accompanying notes 11-14; *see also* Hughey v. Ausborn, 249 S.C. 470, 481, 154 S.E.2d 839, 844 (1967) (Bussey, J., dissenting) ("The rendition of punitive damages under such circumstances is part of the established public policy of this state and such damages involve a com-

a private right is also consistent with deterring injured parties from taking the law into their own hands, while still making restitution for the personal violation that has occurred.

Tort reform proponents also criticize the vague guidelines for imposing punitives damages and the social and economic harm caused by "overdeterrence." Critics assert that punitive damages are harmful to the economy. Fear of punitive damages may inhibit innovation in the development of new and potentially useful products and may keep useful products off the market entirely. Punitive damages may impair American competitiveness in the world market by increasing the cost of manufacturing and selling products.[46]

In addition to policy criticisms, punitive damages have faced constitutional challenges on several grounds. One theory is that punitive damages are quasi-criminal punishment, yet defendants are not afforded the procedural due process protections that criminal defendants enjoy.[47] Another theory is that repetitive punitive damages may violate the Eighth Amendment's protection against excessive fines.[48] This latter argument was rejected by the United States Supreme Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*[49] However, the Court's decision was rooted in the assumption that the state did not share in the recovery.[50] Therefore, this argument is sure to resurface in jurisdictions enacting reform measures requiring a portion of punitive awards to be paid to the state.[51]

One constitutional attack finally succeeded in the Supreme Court. In a series of cases, the Supreme Court indicated that excessive punitive damages may constitute a violation of defendants' substantive due process rights, and indeed, invited such a challenge.[52] In *Haslip*, the Court stated: "[W]e cannot say that the

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pensatory aspect."); Hicks v. Herring, 246 S.C. 429, 437, 144 S.E.2d 151, 155 (1965) ("[S]uch damages involve a compensatory aspect which we have long recognized."); Watts v. South Bound R.R., 60 S.C. 67, 73, 38 S.E. 240, 242 (1901) ("[S]uch damages in a measure compensate or satisfy for the wilfulness with which the private right was invaded . . . .").

46. *See* 138 CONG. REC. S13149 (daily ed. Sept. 10, 1992) (statement of Sen. Rockefeller). *See generally* Philip Shuchman, *It Isn't that the Tort Lawyers Are So Right, It's Just that the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485, 486-87 (1997) (listing "claimed bad effects" of the American tort system).

47. *See, e.g.*, Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (arguing that civil defendants subject to punitive damages claims should have many of the same procedural protections provided to criminal defendants).

48. *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986).

49. 492 U.S. 257 (1989).

50. *See id.* at 264 ("[The Excessive Fines Clause of the Eighth Amendment] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.").

51. *See Overview*, *supra* note 10, at 401. In any event, the federal government has already found a way of getting its share of punitive awards. Punitive damages are now subject to income tax. I.R.C. § 104 (West Supp. 1996).

52. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); *Browning-Ferris*, 492 U.S. at 276-77 (issue not preserved); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 76 (1988) (declined to

common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional."[53] Yet, "[i]t would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional."[54] Until 1996, the Court never found any award excessive, not even a punitive damages award that was 526 times the plaintiff's actual damages.[55]

In 1996, the Court for the first time in history reversed a punitive damages award in *BMW of North America, Inc. v. Gore*.[56] Dr. Ira Gore purchased a new $40,000 BMW that he later discovered had been damaged and then repainted prior to sale.[57] Gore sued the manufacturer for fraud, and the jury awarded him $4000 in actual damages (the reduced value of the car) and $4 million in punitive damages.[58] The Supreme Court of Alabama cut the punitive damages award in half,[59] but the United States Supreme Court found even $2 million "grossly excessive,"[60] and remanded the case for determination of a more appropriate award.[61] Stating that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose," the Court found that BMW "did not receive adequate notice of the magnitude of the sanction that Alabama might impose" for failing to disclose that Dr. Gore's car had been repainted prior to sale.[62]

Significantly, *Gore* was a fraud case involving purely economic injury. While *Gore* has been widely cited by federal courts to reduce punitive damages awards, "[s]everal state supreme courts have declined to use the ruling to overturn punitive awards in personal injury cases."[63] The facts of *Gore* make it easy to distinguish on other bases as well. The South Carolina Court of Appeals recently upheld a punitive damages award twenty-three times the compensatory award in a case that, like

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reach issue); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828-29 (1986) (case disposed of on other grounds); Fein v. Permanente Med. Group, 474 U.S. 892, 894-95 (1985) (White, J., dissenting from denial of petition for certiorari) ("Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States.").

53. *Haslip*, 499 U.S. at 17.

54. *Id.* at 18.

55. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993).

56. 116 S. Ct. 1589 (1996).

57. *Id.* at 1593.

58. *Id.* at 1593-94.

59. *Id.* at 1595.

60. *Id.* at 1598.

61. *Id.* at 1604.

62. *Gore*, 116 S. Ct. at 1598.

63. Mark Thompson, *Applying the Brakes to Punitives: But Is There Anything to Slow Down?*, A.B.A. J., Sept. 1997, at 68, 71.

Gore, involved fraud and purely economic injury.[64] The court distinguished *Gore* by pointing out that in contrast to the conduct in *Gore*, *Lister* involved intentional fraudulent conduct. As a result, "the imposition of punitive damages was not 'grossly out of proportion to the severity of the offense.'"[65]

From the plaintiff's perspective, caps may violate state constitutional rights. Many states, including South Carolina, have "open courts" provisions in their constitutions.[66] Several state supreme courts have invalidated statutes capping damages based on an open courts provision or other state constitutional grounds.[67] The South Carolina Supreme Court addressed—and rejected—the open courts argument in *Wright v. Colleton County School District*.[68] The court found that the open courts provision was "not a guarantee of full compensation to all injured persons."[69] Moreover, because the legislature provided the statutory remedy, the legislature could establish its outer limits.[70] However, because *Wright* concerned the statutory cap on damages contained in the South Carolina Tort Claims Act[71] the constitutionality of any cap on the common-law remedy of punitive damages remains open to question.

In the final analysis, the grand constitutional questions that so occupy the courts probably have little to do with the tort reform movement, driven not by passion for individual liberty, but by economics. The tort reform movement is fueled by certain assumptions about the nature, size, and frequency of punitive damages. In a nutshell, these assumptions are that punitive damages awards are common, unduly large, and capricious.[72]

Several recent studies indicate that these beliefs may be patently false. A study sponsored by the American Bar Foundation analyzed 25,627 civil jury verdicts

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64. Lister v. Avis Rent A Car Sys., Inc., No. 2754, Davis Adv. Sh. No. 32 at 80, 1997 WL 723056 (S.C. Ct. App. Nov. 17, 1997) (petition for rehearing filed).

65. *Id.* at 92, 1997 WL 723056 at *10 (quoting *Gore*, 116 S. Ct. at 1599).

66. *See, e.g.*, S.C. CONST. art. I, § 9 ("All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.").

67. *See, e.g.*, Lucas v. United States, 757 S.W.2d 687, 689 (Tex. 1988) (overview of various state decisions); *see also* Jill Oliverio, Comment, *To Cap or Not to Cap Damage Awards: That is the Constitutional Question*, 91 W. VA. L. REV. 519 (1989) (same).

68. 301 S.C. 282, 391 S.E.2d 564 (1990) (involving the Tort Claims Act's limitation on damages).

69. *Id.* at 291, 391 S.E.2d at 570.

70. *Id.* at 290, 391 S.E.2d at 569.

71. S.C. CODE ANN. § 15-78-120 (Law. Co-op. Supp. 1997).

72. *See, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting) ("The explosion in the frequency and size of punitive damages awards has exposed the constitutional defects that inhere in the common-law system."); Editorial, *Trial Lawyers' Triumph*, WASH. POST, Mar. 19, 1996, at A16 ("[P]unitive damages are wildly unpredictable, so arbitrary as to be unfair and are awarded without any guidance to juries, which simply pick numbers out of the air."). *See generally* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 4 (1990) (citing four such perceptions: "punitive damages are routinely awarded; they are awarded in large amounts; the frequency and size of those awards have been rapidly increasing; and these phenomena are national in scope").

between 1981 and 1985 and found that punitive damages were awarded in only 4.9% of cases involving money damages.[73] Data collected directly from court clerks' offices by the Civil Trial Court Network, a project of the National Center for State Courts and the Bureau of Justice Statistics, indicate that punitive damages were awarded in only about 3% of jury trials.[74] A mere 4% of that 3%, or 0.12%, were products liability and medical malpractice cases, the areas that have been the subject of the greatest calls for reform.[75] Other studies have confirmed these results. A sweeping 1992 study of products liability cases in both state and federal courts found only 355 punitive damage verdicts in the entire twenty-five-year period studied.[76] More than a quarter of those awards involved a single product: asbestos.[77] A federal study performed by the General Accounting Office and a study conducted by the Rand Corporation's Institute for Civil Justice arrived at similar conclusions.[78]

Punitive damages in medical malpractice cases are even more rare. Daniels and Martin found that punitive damages are awarded in a minuscule number of medical malpractice cases. They report that plaintiffs won only 32.4% of medical malpractice cases.[79] Moreover, of those successful cases, only 2.9%, or 0.94% of the total cases, resulted in punitive damages.[80] The most common areas for punitive damages awards are intentional torts and business or contract suits[81]—certainly not the areas that most often come up in discussions of the punitive damages "crisis." Professor Eisenberg and his colleagues analyzed the prior studies and found a "consistent picture," demonstrating that "[e]xcept in the 'business/contract' cases,

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73. Daniels & Martin, *supra* note 72, at 31. The verdicts were culled from forty-seven counties in eleven states, chosen for regional balance and availability of data. *Id.* at 29. The study focused on the early 1980s because the period is often cited as a time of "crisis" in the tort system. *Id.* at 28.

74. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 632-33 (1997).

75. *Id.* at 633.

76. Michael Rustad & Thomas Koenig, *Punitive Damages in Products Liability: A Research Report*, 3 PROD. LIAB. L.J. 85, 89 (1992) [hereinafter *Research Report*].

77. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 38 (1992). In fact, if asbestos litigation is factored out, the number of punitive products liability verdicts actually *fell* during the 1980s. *Research Report*, *supra* note 76, at 89.

78. Deborah Hensler & Erik Moller, *Trends in Punitive Damages: Preliminary Data from Cook County, Illinois and San Francisco, California* (RAND Inst. for Civil Justice, Santa Monica, Cal.), Mar. 1995, at 2 (providing statistics consistent with the other studies discussed); GENERAL ACCOUNTING OFFICE, *Product Liability: Verdicts and Case Resolution in Five States* 2 (Sept. 1989) [hereinafter *Verdicts and Case Resolution*] ("GAO found that in general damage awards were not erratic or excessive. . . . [F]ew punitive damage awards in the cases GAO studied would have exceeded these caps had they been applicable.").

79. Daniels & Martin, *supra* note 72, at 38.

80. *Id.*

81. Hensler & Moller, *supra* note 78.

presumably dominated by fraud and employment law issues, all award rate levels are likely less than 10 percent, and many are less than 5 percent."[82]

Whether the size of an award is excessive is, of course, in the eye of the beholder. In addition, such determinations vary widely based on the nature of the wrong committed and many other factors such as case category, the defendant's wealth, and geographic location, to name a few.[83] Compiling the results of the studies discussed above, Eisenberg's group found that "the median punitive damage award, $50,000, is about the same as the median compensatory award, $49,000."[84] The median punitive damage award in medical malpractice claims between 1963 and 1993 was $228,600, not the multi-million dollar number often assumed.[85] The study revealed that means were significantly higher than medians, indicating a system that is mostly stable, but with a few "extraordinarily high awards."[86]

Contrary to popular opinion, the most recent study indicates that punitive damages awards are actually strikingly predictable, evidencing strong correlations to compensatory damages.[87] These patterns have not been detected by casual observers because they only become apparent when awards are stated in terms of logarithms.[88] Professor Eisenberg and his colleagues found that "[t]he only punitive awards that were significantly higher than the compensatory damages in a case were those with the lowest awards."[89] They concluded that "[t]he hypothesis that punitive damage awards are randomly plucked out of the air, and bear no relation to compensatory damages, can be firmly rejected."[90]

South Carolina appears to be in harmony with the rest of the country. Professor F. Patrick Hubbard conducted a study of civil jury verdicts in South Carolina between 1976 and 1985. He found that the nature and frequency of punitive damages verdicts in South Carolina paralleled that of other states.[91] Professor

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82. Eisenberg et al., *supra* note 74, at 636-37.

83. *Id.* at 627-31.

84. *Id.* at 633.

85. Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters,"* 47 RUTGERS L. REV. 975, 1008 (1995).

86. Debra Cassens Moss, *The Punitive Thunderbolt: How Much Should Courts Curb Extraordinary Awards?*, A.B.A. J., May 1993, at 91, 94. (quoting RAND senior researcher Mark Peterson). Means are averages; medians are the fiftieth percentile. Unlike medians, a mean can be skewed upward by one unusually high award. A stable median therefore "suggests that the typical jury's response to the typical case has remained stable." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1250 n.376 (1992).

87. *See* Eisenberg et al., *supra* note 74, at 637.

88. *Id.* at 659-60. While the existence of correlations may be comforting to many, focusing on the relationship between compensatory and punitive damages ignores the purposes of punitive damages.

89. Thompson, *supra* note 63, at 69.

90. Eisenberg et al., *supra* note 74, at 639.

91. F. Patrick Hubbard, *"Patterns" in Civil Jury Verdicts in the State Circuit Courts of South Carolina: 1976-1985*, 38 S.C. L. REV. 699, 742 (1987).

Hubbard concluded that "punitive awards are not common"[92] and are particularly rare in products liability, medical malpractice, and premises liability cases.[93] Contrary to common perceptions, he also found that "[t]he overall level of civil litigation has not undergone extremely large increases in recent years."[94]

The studies to date all belie the common misconceptions concerning the state of the civil justice system and the need for sweeping reforms. The results of so many different studies are too consistent to be dismissed. However, the rarity of punitive damages awards and the generally strong correlation to actual damages does not settle the question of the need for reform. First, as long as damages are *perceived* as being out of control,[95] this perception may have a "chilling effect" on the communities that fear punitive damages the most: products manufacturers and medical care providers. This "overdeterrence" is a valid concern of reformers and something any meaningful reform measure should address. Moreover, even if runaway juries are an aberration, due process demands efforts to prevent even the rare occurrence of an oppressive award.

The difficulty lies in sorting out which reform measures will effectively rein in the unjustifiably large awards while guaranteeing at least the possibility of adequate punishment and deterrence of wrongdoing. In the debate over tort reform, one can easily lose sight of the reasons for punitive damages. Each reform measure should be analyzed in light of its effects on the paradigm case: an innocent party grievously harmed by another's reckless or wilful act.

IV. LEGISLATIVE REFORM

Under our federal system of government, individual states may experiment with different reforms, allowing other states to see what works and what does not. In the last several years, forty-five state legislatures have enacted some measure of tort reform legislation.[96] None have been more sweeping than Colorado. Beginning in 1986 and continuing over the following six years, the Colorado legislature enacted a total of sixty-eight tort reform measures, including abolition of joint and several

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92. *Id.* at 743.

93. *Id.* at 737.

94. *Id.* at 743-44. Professor Hubbard later conducted a pilot study of a database on civil litigation. *See* F. Patrick Hubbard, *Designing and Implementing an Expanded System for Civil Court Data Collection: A South Carolina Study*, 47 S.C. L. REV. 537 (1996). The study was conducted in Richland County, South Carolina, from July 1989 to May 1993 and Berkeley County, South Carolina, from February 1992 to June 1994. *Id.* at 550. The number of punitive damages awarded in both counties totaled approximately 5% of plaintiffs' verdicts, consistent both with each other and with the larger studies already discussed. *Id.* at 557. In Richland County, plaintiffs were awarded punitive damages six times; two punitive awards were assessed in Berkeley County. *Id.* Professor Hubbard concluded that "[p]unitive awards are rare and, with occasional exceptions, are relatively modest." *Id.* at 558.

95. *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1409, 1515 (1997).

96. *Summary*, TORT REFORM REC. (American Tort Reform Ass'n, Washington, D.C.), June 30, 1997, at 2.

liability,[97] a $250,000 cap on noneconomic damages,[98] and a cap on punitive damages equal to the amount of compensatory damages.[99] Results have been mixed.[100] Commercial insurance premiums have decreased, but much less than tort reformers expected.[101] A reporter for the *Wall Street Journal* found that the big winners in the reform game were the insurance carriers:

> But, in general, the overall impact on the insurance policyholder has not been great. The insurers have benefitted more than individual consumers. Industry losses over the past six years have fallen 30%, while general commercial liability premiums have dropped only 9% overall, according to A.M. Best Co., an independent data gatherer.[102]

Such ambivalent results in themselves would not necessarily counsel against tort reform. On the positive side, the frivolous lawsuits that fueled the tort reform movement in Colorado have been discouraged by reducing the possibility of big payoffs, whether at trial or in a nuisance settlement.[103]

Yet Colorado has also discovered a disconcerting side effect of tort reform: it is the most severely injured plaintiffs harmed by the most culpable defendants who find their awards reduced the most.[104] The net result of these reforms has been the emergence of cases in which plaintiffs horribly injured by a defendant's egregious misconduct have had awards reduced so much that the plaintiffs' take- home recovery does not even cover medical bills.[105] "Because defendants and their insurers are now insulated from huge damages, costs are transferred to state and federally funded health programs when victims' insurance limits run out."[106] In the end, taxpayers, rather than the responsible parties, may bear the unexpected burden of the damages shortfall. While the sweeping reforms enacted in Colorado have

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97. COLO. REV. STAT. § 13-21-111.5 (1997).

98. COLO. REV. STAT. § 13-21-102.5 (1997); *see also* H.R. 3023, 112 Gen. Assembly, 1st Sess. (S.C. 1997) (proposing to cap noneconomic damages in South Carolina at $250,000).

99. COLO. REV. STAT. § 13-21-102 (1997).

100. *See generally* Milo Geyelin, *Tort Reform Test: Overhaul of Civil Law in Colorado Produces Quite Mixed Results*, WALL ST. J., Mar. 3, 1992, at A1 (analyzing the effects of tort reform in Colorado).

101. *Id.*

102. *Id.*

103. *See id.*

104. For example, Roxie Lypps, was horribly burned over 40% of her body in a propane gas explosion. The gas supplier was found to be in violation of over a dozen safety regulations. Yet, Ms. Lypps only took home approximately $316,000 of her $1.5 million jury award after legislatively-required reductions and legal fees. *See id.*

105. For example, Leah Speaks is a seven year old whose medical bills were already being paid by Medicaid less than a year after a drunk driver killed her mother and left her in a permanent coma. *Id.* Although Colorado holds bars and taverns liable for the actions of drunk patrons, liability is limited to $150,000 if the bartender acted willfully. *Id.*; COLO. REV. STAT. § 12-47-801(3)(c) (1997).

106. Geyelin, *supra* note 100.

benefitted some, their overall impact has been ambiguous at best and terribly unfair to injured plaintiffs at worst. Such results should caution South Carolina lawmakers against rushing into reforms that could have incalculable and unintended effects.

Caps have the appeal of simplicity and efficiency in the courtroom. But fairness to injured plaintiffs should not be sacrificed to expediency. The state, as well as the plaintiff, has an "'interest in meaningful *individualized* assessment of appropriate deter[r]ence and retribution.'"[107] Moreover, even if the empirical data is wrong and jury verdicts *are* capricious and unpredictable as reformers assert,[108] it is certainly no improvement to replace jury discretion with an even more arbitrary system that caps damages uniformly without considering all the relevant facts of a particular case. The $250,000 proposed figure bears no relationship to the degree of a defendant's misconduct, or to anything else for that matter![109]

An alternative to caps is a multiplier by which punitive damages are tied to a multiple of actual damages. The bill pending in the South Carolina General Assembly uses a multiplier of three times actual damages.[110] However, this solution is also flawed. A multiplier based on compensatory damages ties punishment solely to the harm caused, *not* to the degree of the defendant's guilt. In cases where the defendant's conduct was egregious but actual damages were fortuitously very small, a multiplier completely fails its purpose.[111] Currently, South Carolina law recognizes this failure and courts examine punitive damage awards in light of "the severity of the offense."[112]

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107. Gamble v. Stevenson, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991)) (emphasis added).

108. *See supra* notes 72-94 and accompanying text.

109. *See generally* Edward Felsenthal, *Why a Medical Award Cap Remains Stuck at $250,000*, WALL ST. J., Nov. 14, 1995, at B1 (describing history of $250,000 cap). The $250,000 figure seems to have first appeared in 1975 in California in the context of a limit on pain-and-suffering awards in medical malpractice cases. *Id.* At the time, most pain-and-suffering awards were under $250,000. The idea was to eliminate wild card damage awards while leaving most jury awards undisturbed. Due to inflation, $250,000 in 1975 is worth only about a third of that today. *Id.* Yet the figure has endured as the "magic number" for damages caps, despite its arbitrary origins. Barry Keene, the former California assemblyman who authored the original bill, admitted, "'[The $250,000 figure] wasn't the product of much scientific appraisal.'" *Id.* Critics point out the inequity of the figure by comparing it to holding doctors' salaries at 1975 levels. *Id.*

110. H.R. 3023, 112 Gen. Assembly, 1st Sess. (S.C. 1997). The bill provides that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater." *Id.*

111. This is why South Carolina law allows an award of punitive damages to be supported by nominal damages. *See supra* note 20 and accompanying text.

112. *Gamble*, 305 S.C. at 112, 406 S.E.2d at 354. Compare this to the United States Supreme Court's "guidepost" of the ratio of punitive damages to actual or potential *harm*. *See* BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1601-02 (1996); *see also* Ellis, *supra* note 40, at 77 ("The principle that punitive damages should bear some relationship to the harm actually caused cannot be reconciled with the fairness principle that the punishment should be proportional to the egregiousness of the act.").

Caps and multipliers not only make adequate punishment less likely, they also prevent punitive damages from working as a deterrent. If defendants know ahead of time what their maximum liability will be, they may well make a cost-benefit decision to move ahead with the wrongful conduct.[113] Some degree of uncertainty is necessary for the deterrent effect of punitive damages to work.[114] In tension with this need for uncertainty is the United States Supreme Court's holding in *BMW of North America, Inc. v. Gore*[115] that due process requires fair notice of the magnitude of the punishment to which a defendant could be subject.[116] However, the Court did not hold that the common-law system for assessing punitive damages *per se* violated due process—only that BMW *in that case* did not receive adequate notice.[117]

In fact, punitive awards very seldom exceed the proposed caps.[118] Depending on one's perspective, this can mean either caps are not necessary because they are rarely exceeded anyway, or caps should be enacted because they will bring stability to the system by eradicating the very high verdicts while leaving the majority of verdicts intact. The first argument ignores the rare wildcard verdict, while the second argument ignores the cases in which a higher verdict is richly deserved.

The primary problem with caps and multipliers is that, particularly in the case of products liability, punitive damages are the best method that society has to force social responsibility on business. Businesses exist to make profit. Corporate managers "are morally responsible for promoting the private economic interests of the stockholders."[119] In a famous interview, Milton Friedman explained why he would not buy stock in a company that worked to eliminate pollution out of a sense of social responsibility:

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113. *See* Hurd & Zollers, *supra* note 42, at 199; *see also* Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 666 (1980) ("The deterrent effect of punitive damages would be minimized if a person contemplating wrongful conduct could gauge his or her maximum liability in advance.").

114. Under the vindication theory of punitive damages, unlike the punishment and deterrence theories, the plaintiff is compensated for the defendant's violation of the plaintiff's personal freedom. To the degree that punitive damages are awarded as vindication, rather than as punishment or deterrence, caps may be perfectly appropriate. Paradoxically, South Carolina's proposed bill eliminates vindication as a basis for awarding punitive damages. H.R. 3019, 112th Gen. Assembly, 1st Sess. (S.C. 1997).

115. 116 S. Ct. 1589 (1996).

116. *Id.* at 1598.

117. *Id.* On the contrary, the Court has previously stated the opposite: "[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991).

118. Thompson, *supra* note 63, at 72; *see also Verdicts and Case Resolution*, *supra* note 78, at 3 ("[F]ew punitive damage awards in the cases GAO studied would have exceeded these caps had they been applicable.").

119. Richard A. Rodewald, *The Corporate Social Responsibility Debate: Unanswered Questions About the Consequences of Moral Reform*, 25 AM. BUS. L.J. 443, 446 (1987).

> A corporate executive's responsibility is to make as much money for the stockholders as possible, as long as he operates within the rules of the game. When an executive decides to take action for reasons of social responsibility, he is taking money from someone else—from the stockholders, in the form of lower dividends; from the employees, in the form of lower wages; or from the consumer, in the form of higher prices.[120]

The "bottom line" is that many corporations see their primary duty as maximization of profits. Therefore, corporations decide to make safer products in only two circumstances: when it is profitable to do so, as in the case of luxury items,[121] or when it is or might be very *un*profitable *not* to do so, because of the high risk of liability suits.[122]

Punitive damages in products cases should promote unprofitability when a corporation knowingly or recklessly markets unsafe products. The argument that punitive damages impair the competitiveness of American companies misses the point. First, businesses–like individuals–should act appropriately whether or not it is profitable. American companies are also disadvantaged by the Foreign Corrupt Practices Act that prohibits bribing overseas officials,[123] but that does not mean we should sanction bribery. Second, the remedy of punitive damages "keeps the ethical corporation from being at a competitive disadvantage."[124] Professor Robert J. Rafalko addresses the problem of corporate ethics and argues that the system of punishment for corporations must be such that "[a] manager or high-level executive . . . feel[s] free to steer his company in ethical and socially responsible directions without fear of being held accountable for diminished profit margins as a result."[125] Capping punitive damages would make it difficult, if not impossible, for companies that go the extra mile for safety to compete with those that do not.

If punitive damages are capped, corporate managers will simply factor the cost of liability into the cost of doing business and then decide whether it would be more profitable to make the product safer or pay the (now conveniently calculable) potential judgments. Several high-profile products liability cases have involved "smoking gun" documents, proving that corporate executives knew of the products'

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120. *Playboy Interview: Milton Friedman*, PLAYBOY, Feb. 1973, at 59, *reprinted in* ROBERT HAMILTON, CASES AND MATERIALS ON CORPORATIONS 589 (5th ed. 1994).

121. For example, Mercedes Benz Motor Company has long had a reputation for marketing automobiles with extra safety features—and for doing so profitably. But Mercedes are not economy cars, so this does not solve the problem for the average consumer.

122. Roughly 29,000 product-related deaths and 33 million injuries occur *each year*. Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16 JUST. SYS. J. 21, 40 1993) [hereinafter *Quiet Revolution*].

123. 15 U.S.C. § 78dd-1 (1994).

124. *Research Report*, *supra* note 76, at 94.

125. Robert J. Rafalko, *Remaking the Corporation: The 1991 U.S. Sentencing Guidelines*, 13 J. BUS. ETHICS 625, 634 (1994).

dangers yet made a bottom-line decision not to recall the product. For example, in the famous Ford Pinto case, internal documents showed that Ford officials knew the Pinto prototype failed the fuel system integrity crash test, yet they made a financially motivated decision to release the car to the public unchanged.[126] Punitive damages are consumers' best safeguard against this type of unrestricted capitalism.

Furthermore, punitive damages are particularly necessary to protect the "little guy." Many products liability cases involve cheap products, such as the textbook case involving children's nightclothes made from highly flammable "flannelette."[127] Consumers of luxury goods do not always need the same protection. As the Mercedes example illustrates, upper-income consumers can demand and pay for greater safety. Punitive damages put power in the hands of consumers of flannelette nightgowns and Ford Pintos to ensure that their products are safe, too.[128]

In an article published in this volume, three business law professors advocate the use of court-supervised "compliance programs" as an alternative to punitive damages.[129] Their sample plan includes: ongoing monitoring of industry developments; steps to ensure adequate product labeling and instructions; solicitation of feedback from customers, lower-level employees, and others in the industry; firm-wide assignment of responsibility for compliance with government regulations; and adequate training of service personnel.[130] But such compliance programs are not punishment. In fact, these programs should be routine. If corporations would institute—and enforce—such programs as *prevention*, they would eliminate much of their exposure to punitive damages. As punishment, compliance programs suffer from the same fatal flaw as caps on punitive damages: they provide no incentive for corrective action before the fact. If the worst punishment meted out against a corporation is to make it perform as it should have originally, then it will always be more profitable to continue business as usual.

When it comes to medical malpractice, the equities shift. Of course, health care providers are interested in making money, but their primary moral and ethicial obligation is to care for their patients. Doctors should not be exposed to punitive damages unless they recklessly disregard this duty and act with complete

126. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981); *see also* J. Stratton Shartel, *Defense Timelines Plays Key Role in Trial Against GM*, 10 INSIDE LITIG. 1 (1996) (describing plaintiff's use of defendant's internal documents to make the case against the car manufacturer). In a recent case in Alabama, the jury awarded $150 million to a man who was paralyzed when the latch on his Chevrolet Blazer failed during a crash. Internal documents revealed that General Motors was aware of the problem and in fact had estimated that there would be "18,000 door openings each year in crashes involving GM vehicles equipped with Type III door latches." Shartel, *supra*, at 2.

127. Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980).

128. For an interesting discussion of how caps on damages disproportionately impact already disadvantaged groups, see Troy L. Cady, Note, *Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damage Caps*, 25 HOFSTRA L. REV. 1005 (1997).

129. Charles M. Foster, Jr. et al., *Compliance Programs: An Alternative to Punitive Damages for Corporate Defendants*, 49 S.C. L. REV. 247 (1998).

130. *Id.* at 267-68.

indifference to their patients' health. This is the law in South Carolina. "[A] mere mistake in diagnosis or error in judgment alone is insufficient to support a finding of malpractice,"[131] much less an award of punitive damages.

When personal injury is not involved, different factors come into play. Although the vast majority of punitive damages are assessed in business and contract actions,[132] that is not the thrust of the current South Carolina bill. While the bill is not specifically limited to tort actions, tort reform was clearly the motivation behind this and most other bills capping punitive damages.[133]

V. CONCLUSION

The arguments in this article have addressed why uncapped punitive damages are necessary in appropriate cases. It is the inappropriate case, however, that troubles people so much. People are disturbed to learn that the child thrown from a Chrysler minivan may not have been wearing a seatbelt, but the Charleston jury that awarded $262 million to his parents was not provided with that information.[134] People are angered when a rich doctor buys himself a "fancy BMW," and then wins a $4 million verdict because the company failed to inform him that the car was repainted prior to sale.[135]

However, caps are not the solution. If punitive damages are to serve any purpose at all, they must not be legislatively capped at arbitrary levels. Such a drastic reform would eviscerate the remedy, punishing innocent consumers rather than reckless tortfeasors. Instead, the solution is clear guidelines for juries, coupled with rigorous post-trial review—already in effect in South Carolina.[136] The effectiveness of such steps has already been demonstrated. In the year since *Gore*, "[c]ourts have invoked the ruling at least 20 times to slash multimillion-dollar punitive awards."[137] Thus, uncapped liability does not mean limitless liability. Although post-trial review may be less efficient than caps at striking down runaway punitive awards, it ensures fairness to both parties by protecting the defendant's due

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131. McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995).

132. *See supra* note 81 and accompanying text.

133. *See* Al Dozier, *Personal Injury Awards Could Hit Limit*, THE HERALD (Rock Hill, S.C.), Feb. 12, 1996, at A4. Representative Herbert Kirsh, the bill's sponsor, is quoted: "'Everybody you talk to about the McDonald's (hot coffee) case says it's ridiculous . . . . People have to take some responsibility for themselves. I just believe something needs to be done.'" *Id.*

134. Plaintiffs claim that the child was properly secured upon entering the vehicle, but he unbuckled his own seatbelt just as the family drove through the intersection where the fatal crash occurred. Letter from Mark C. Joye, attorney for plaintiffs (Dec. 18, 1997) (on file with author). In any case, Judge Falcon Hawkins ruled the evidence of whether the child was wearing a seatbelt was inadmissable because the child fell under one of the exceptions to South Carolina's mandatory seatbelt law, S.C. CODE ANN. § 56-5-6530 (Law. Co-op. 199). Order dated Sept. 9, 1997 on motions in limine, Jimenez v. Chrysler Corp., No. 2:96-2296-11 at 6.

135. *See supra* notes 56-62 and accompanying text.

136. *See* Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991).

137. Thompson, *supra* note 63, at 71.

process rights without slamming the courtroom door on plaintiffs who have been the victims of egregious misconduct.

The South Carolina General Assembly would be rash to replace post-trial review with sweeping reforms, the full impact of which cannot be calculated. Statistics show that while tort reform may greatly impact the amount of initial awards, the effect on the amounts actually collected is much smaller, suggesting that trial judges are already performing this function on a case-by-case basis.[138] Ultimately, the General Assembly should not make policy decisions based on media reports of a few high-profile cases, not even if one of those cases was decided in South Carolina.

Andrea Moore Hawkins

138. *Quiet Revolution, supra* note 122, at 36. Thus, it is too early to pass judgment on the Chrysler verdict in Charleston, South Carolina until it is clear how much, if any, of the verdict is permitted to stand.