

Why Campbell Doesn't Necessarily Mean We're In The Soup

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A. Introduction.

On April 7, 2003, the U.S. Supreme Court published *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. ____ (2003), its latest pronouncement on punitive damages as viewed through the lens of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Campbell reversed a jury's \$145 million punitive damage award that had previously been upheld by the Utah Supreme Court. The punitive award was based in large part upon evidence of State Farm's misconduct in not just Utah, but also across the entire United States.

Observing that the \$1 million compensatory component of the jury verdict (reduced from \$2.6 million by Utah's intermediate appellate court) resulted in a compensatory/punitive damage ratio of 145-to-1, the high court applied a three-pronged analysis first announced in *BMW of North America v. Gore*, 517 U.S. 559 (1996).

The test required examining: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. Slip Op. at 7.

Writing for the 5-3 majority, Justice Kennedy found infirmities under all three Gore "guideposts." What's more, in reaching its holding, the majority announced, "We decline again to impose a bright-line ratio which a punitive damage award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Slip Op. at 14.

So the question presents itself. What practical effect does Campbell present for a California product liability practitioner?

To learn the answer, we probably need delve no further than *Romo v. Ford Motor Co.*, 99 Cal. App. 4th 1115, 122 Cal. Rptr. 2d 139 (2002).

The Romo opinion upholds a \$290 million punitive damage award against Ford in a Bronco II rollover case, where the compensatory damages were \$4,935,709.10 (reduced from just over \$6.2 million by the trial court), a roughly 58-to-1 ratio. Finding that the punitive award squared with federal due process under Gore, the Fifth District of the California Court of Appeal engaged in an analysis similar to that in Campbell, excepting of course, the result.

After failing in efforts for hearing by the California Supreme Court or for de-publication of Romo, Ford filed a petition for certiorari to the U.S. Supreme Court, which is currently pending. 71 U.S.L.W. 3519 (Jan. 21, 2003).

Since Campbell discusses punitive damages in an insurance bad faith context involving essentially pure emotional distress damages, while Romo involved both death and serious personal injuries, we may well see the high court weighing in yet again on punitive damages in the near term, only this time in the product liability arena. Even so, using the Campbell rationale as our guide, practitioners should not lose heart. At least from an initial vantage point, it may well be safe to say that all in all, not that much has changed.

B. Fourteen Years of Punitive Damage Jurisprudence.

During the past fourteen years or so, the U.S. Supreme Court has busied itself in reexamining punitive damages and how they apply in civil cases. The high court's interest was fueled by a conservative concern that juries acting out of "arbitrariness, caprice, passion, bias, and even malice" were responsible for punitive damage verdicts that had "run wild." See, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 474-476 (1993) (J.O'Connor, dissenting).

The critical journey began with *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), which held that neither the Excessive Fines Clause of the Eighth Amendment nor federal common law circumscribe punitive damage awards in civil cases between private parties.

Following were *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

In each, the high court has continually reexamined how punitive damages apply in civil actions and what, if any limits, the U.S. Constitution places on punitive awards.

While the detailed parameters of each decision leading up to Campbell are beyond the scope of this article, in each opinion, the majority declined to announce any specific formula for what constituted an upper limit of a punitive award under the Federal Constitution. Indeed, one important constraint over the years was the healthy conservative notion that, so far as punitive damages represent legitimate exercise of state police power, any potential limitations on such awards are properly reserved to the several states.

Then came Campbell.

The decision caused something of a stir upon publication, largely because it seemed as if the high court was applying some sort of fixed arithmetic formula for the first time to impose due process limits on punitive awards. As Justice Kennedy wrote:

We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

Slip Op. at 14.

So, where does Campbell leave the practitioner evaluating an action involving dangerous products?

C. Why Campbell isn't a Product Liability Decision.

Campbell involved an insurance bad faith action in which a Utah jury awarded \$145 million in punitive damages based upon a failure to settle by State Farm.

While the Supreme Court agreed that "State Farm's handling of the claims against the Campbells merits no praise," it took issue with an 145-to-1 compensatory/punitive ratio in what it viewed as essentially a pure emotional distress matter.

The compensatory award in this case was substantial; the Campbells were awarded \$1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the [bad faith] complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them.

Slip Op. at 15-16.

True, the majority, in their haste to justify their arbitrary limit, came to some questionable conclusions. For example, Justice Kennedy wrote:

The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

Slip Op. at 16.

This language leaves it open to speculation as to whether the high court was implying in its decision that juries uniformly ignore instructions specifically deleting punitive damages from a compensatory damage verdict.

Of course, in California, "Jurors ordinarily are presumed to have followed the court's instructions." *Romo v. Ford Motor Co.*, 99 Cal. App. 4th 1115, 1131, 122 Cal. Rptr. 2d 139, 150 (2002). During the usual trial bifurcated on compensatory and punitive damages, BAJI 14.61 instructs: "Do not include as damages any amount that you might add for the purpose of punishing or making an example of the defendant for the public good or to prevent other accidents. Those damages would be punitive and they are not authorized

in this action.” So, the comment about compensatory damages having a punitive component must apply to Utah only, or at least, cannot apply to California.

Even so, in discussing the Campbell rationale, it is critical to observe that the decision is distinguishable where personal injuries or death are the subject of a punitive award.

D. Following Campbell, Personal Injury Justifies a High Compensatory/Punitive Ratio.

The majority appeared to carve out personal injury claims from its discussion, perhaps in order to save them for another day. Even so, Campbell is consistent with prior U.S. Supreme Court and California authority standing for the proposition that injury to persons cannot be fairly compared with economic injury.

The notion that wrongful conduct causing injury to another person is always of greater consequence than economic injury was a substantial basis for the result in Gore, where a 500-to-1 ratio between the damage suffered (cost of repair to a defectively painted BMW automobile) and punitive award (\$2 million, reduced from \$4 million by the Alabama Supreme Court) was held as exceeding constitutional limits. Campbell sticks with that notion, acknowledging that unlawful conduct that injures or kills is more reprehensible than economic injury as a matter of law.

“[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. [Citations omitted.]

Slip Op. at 8 (quoting Gore, supra, 517 U.S., at 575-577).

By way of contrast, it was Ford’s “institutional mentality . . . shown to be one of callous indifference to public safety” that formed the basis for supporting a punitive damage award in the seminal Ford Pinto burn case, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). The notion that injuring a person or taking human life justifies an enhanced punitive award has carried forward in California decisional law, most recently in Romo.

As noted . . . the ultimate question is whether the award is grossly excessive in relation to the interests the state seeks to protect through the award. As we have already discussed, defendant’s conduct was grossly reprehensible. While defendant did not intend the death to the victims, the award here cannot be compared to cases “involving a business fraud resulting only in economic harm.” [Citations omitted.] Romo, supra, 99 Cal. App. 4th at 1150, 122 Cal. Rptr. 2d at 165.

The Court of Appeal in Romo noted that Ford’s conduct in marketing an unstable, inherently dangerous vehicle like the Bronco II, while failing to warn of its dangerous propensities, constituted conduct likely to cause human injury and death wherever Ford marketed the vehicle. “[Unlike Gore], where the

defendant's conduct was not even unlawful in all states and involved only economic consequences, the conduct here placed tens of thousand of lives at risk and actually claimed three lives in the present case."

Since the Campbell punitive award substantially rested on State Farm's national claims handling practices, some of which was not illegal in states other than Utah, this becomes an important basis for distinguishing Campbell in product actions.

Just as important, where punitive damages are justified in product liability actions, there is often substantial evidence of a long history of repeated, knowing, wrongdoing. The high court in Campbell noted that a higher compensatory/punitive ratio is generally justified by evidence of repeated wrongful conduct by a corporate defendant.

Although "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions. [Citations omitted.]

Slip Op. at 13 (quoting Gore, supra, at 577).

Again, this provides a significant basis to distinguish Campbell in product actions.

E. Conclusion.

At the end of the day, so far as punitive damages and product liability is concerned, it really doesn't appear that much has changed.

After all, in the 1981 seminal Pinto exploding gas tank case, Grimshaw, the trial court reduced a jury's \$125 million punitive award, reasoning that a 44-to-1 compensatory/punitive ratio was excessive as a matter of law. The reduction was to \$3.5 million, a 1.4-to-1 ratio. Since under Campbell, it takes a 10-to-1 ratio or better before a punitive award is "suspect," had Grimshaw been decided today, the trial court might well have felt more free to increase the number it allowed.

The U.S. Supreme Court, of course, will have the opportunity to weigh in on this discussion should it hear Romo. Even so, take heart. Just because we now have Campbell, doesn't mean we're in the soup.

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