

## PUNITIVE DAMAGES IN AVIATION LITIGATION

By:  
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### INTRODUCTION

Though claims for punitive damages are sometimes alleged against defendants in aviation cases, punitive damages are often unavailable or limited. Only the most exceptional facts will warrant a punitive damages award due to the typical requirement of malice, willful or wanton misconduct, or reckless disregard for the safety of others. When aviation disasters occur on the high seas, the Death on the High Seas Act (“DOHSA”) governs, and prohibits an award for punitive damages.

When aviation disasters occur on international flights, the Warsaw Convention, as succeeded by the Montreal Convention of 1999, controls and prohibits an award of punitive damages against the air carrier. Further, many state statutes enabling wrongful death suits prohibit an award for punitive damages, or severely limit such an award. When punitive damages can actually be recovered, they must withstand the 14<sup>th</sup> Amendment prohibition against grossly excessive or arbitrary punishments, and bear a reasonable ratio to compensatory damages to comport with the Supreme Court’s holdings in *Gore* and *Campbell*.

### DIFFICULTY FOR PLAINTIFFS IN MEETING THE BURDEN OF PROOF FOR PUNITIVE DAMAGES

While standards vary from state to state, plaintiffs must generally establish malice, wanton or willful misconduct, or reckless disregard for the safety of others in order to recover punitive

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damages.<sup>2</sup> Many states hold that gross negligence, is not enough to warrant punitive damages. While the defendant's conduct need not be intentional, the requirement of wanton, willful, or reckless disregard has generally been interpreted to require that plaintiffs show that the defendant had specific knowledge of a particular defect or danger, and took conscious action in disregard of the rights of others.

An examination of aviation cases over the last 15 years evidences the difficulties plaintiffs face in meeting their burden of proof for punitive damages, especially in instances of pilot or crew error. Indeed, the majority of claims for punitive damages were dismissed by summary judgment, although the courts in two cases denied defendants' motions for summary judgment on the issue of punitive damages. The one case identified in the author's research that went to the jury was reversed on appeal.

Applying North Carolina law, which requires a showing of "maliciousness, willful or wanton injury, or gross negligence", the court in *Air Crash Near Morrisville*<sup>3</sup> granted defendant's motion for summary judgment regarding the issue of punitive damages. Although the pilot failed to follow company procedures for engine failure, stall, avoidance or recovery, once the aircraft entered a stall, the crew made every effort to recover from the stall and survive.<sup>4</sup> "The crew knew their own lives were at stake, and the crew had every motivation to see that the flight arrived safely at its destination." The court concluded that there was no evidence that the crew recognized a specific danger and then intentionally and consciously disregarded it.<sup>5</sup>

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<sup>2</sup> See *Infra* for a more in depth discussion of state standards allowing punitive damages.

<sup>3</sup> *In re Air Crash Near Morrisville*, No. 1:95MD1084, 1997 U.S. Dist. LEXIS 21827 at \*22-23 (M.D.N.C. 1997)

<sup>4</sup> *Id.* at \*23-24.

<sup>5</sup> *Id.* at \*24-25.

Similarly, in *Aircraft Accident at Little Rock*, the court concluded that the pilots' decision to land in a thunderstorm, and their failure to deploy the spoilers upon landing, was not sufficient to support a claim for punitive damages.<sup>6</sup> The court reasoned that it was clear from the cockpit voice recorder that the pilots were consistently guided by a motivation to avoid dangerous weather conditions and land the aircraft safely. Rather than exhibiting a "conscious indifference" or "reckless disregard" of the risks they faced in landing the aircraft, the crew frequently considered the various circumstances and made choices. In the process, they made several affirmative, conscious decisions aimed at increasing the likelihood of a safe landing. It was apparent that they were acting with the motivation of lessening risk and protecting the physical well-being of themselves and the passengers on board the aircraft.<sup>7</sup>

Likewise, in *Cappello v. Duncan Aircraft*,<sup>8</sup> the 6<sup>th</sup> Circuit affirmed the district court's refusal to submit the question of punitive damages to the jury where the accident occurred because the pilot had become disoriented during a nighttime take-off and flew into a mountain. Tennessee law was applied, which no longer permitted punitive damages in cases of gross negligence.<sup>9</sup> The court reasoned that the most likely explanation for the pilot's error was fatigue and a lack of self-awareness regarding his impaired mental state and physical alertness. While the pilot may have been grossly negligent, his own inability to understand his tiredness and lack of responsiveness was not consistent with the malice or type of "conscious" disregard of the danger required by Tennessee law.<sup>10</sup>

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<sup>6</sup> *In re Aircraft Accident at Little Rock*, 351 F. 3d 874, 882 (8th Cir. 2003).

<sup>7</sup> *Id.* at 881-882.

<sup>8</sup> *Cappello v. Duncan Aircraft Sales*, 79 F. 3d 1465, 1474-75 (6th Cir. 1996).

<sup>9</sup> *Id.* at 1475.

<sup>10</sup> *Id.* See also *Ridge v. Cessna Aircraft Co.*, 117 F. 3d 126, 132 (4th Cir. 1997) (As Cessna's conduct did not meet the Virginia standard of willful or wanton conduct, or recklessness that evinces disregard for the safety of others, the district court's failure to submit the issue of punitive damages to the jury was not error).

The only two relatively recent aviation cases identified in the author's research, wherein the courts permitted the jury to consider the issues of punitive damages, were product defect cases. In *Farley v. Cessna*,<sup>11</sup> the court applied Pennsylvania law, which allows punitive damages to punish or deter behavior that constitutes "outrageous conduct" or "acts done with bad motive or reckless indifference to the interests of others."<sup>12</sup> In April 1993, Farley sustained serious injuries as a result of the crash of a 1946 Cessna Model C-140.<sup>13</sup> Farley contended that Cessna had known about the defective design of the C-140 for dozens of years, but failed to do anything to correct the defects until late 1992.

Farley also contended that the corrective measures taken by Cessna in 1992 were inadequate because the safety bulletins issued by Cessna did not require or recommend that the aircraft owners take immediate action to correct the defects.<sup>14</sup> Deciding that there were "simply too many genuine issues of material fact" for the court to conclude that Cessna either did or did not act "outrageously" or with "reckless disregard to the rights of others," the court denied defendant's motion for summary judgment regarding punitive damages.<sup>15</sup>

In *Shurr v. A.R. Siegler*,<sup>16</sup> the court partially denied defendant's motion for summary judgment regarding punitive damages. According to Wisconsin law, the plaintiffs were required to prove malice, vindictiveness, ill-will, or wanton, willful or reckless disregard of plaintiff's rights in order to recover punitive damages.<sup>17</sup> Six people were killed when a KC-135R tanker aircraft exploded as they inspected its fuel system.

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<sup>11</sup> *Farley v. Cessna Aircraft Co.*, No. 93-6948, 1995 U.S. Dist. LEXIS 5734 at \*5 (E.D. Pa. Apr. 26, 1995).

<sup>12</sup> *Id.* at \*3-4.

<sup>13</sup> *Id.* at \*1.

<sup>14</sup> *Id.* at \*4-5.

<sup>15</sup> *Id.* at \*5.

<sup>16</sup> *Shurr v. A.R. Siegler*, 70 F. Supp. 2d 900, 940 (E.D. Wisc. 1999).

<sup>17</sup> *Id.* at 937.

Plaintiffs alleged that a fuel pump, installed in the aircraft six days before the explosion, was defectively designed and manufactured due to insufficient explosion-proof testing and the possibility of burrs on the inside of the pump abrading the motor lead wires.<sup>18</sup> The court granted the defendant's motion for summary judgment with respect to the motor lead wires because a document prepared by defendants established that they knew of the dangers and took affirmative steps to reduce them. Though their remedial actions may not have prevented a finding of negligence, the court found that because defendants took remedial actions, they did not act with "reckless indifference or disregard of the rights of others." Thus, punitive damages were not warranted based on that claim.<sup>19</sup>

However, as to the allegedly inadequate explosion-proof testing, the court found that the defendants knew their explosion-proof testing was defective and deliberately concealed that knowledge in their safety reports. Consequently, defendant's motion for summary judgment on punitive damages was denied regarding the explosion-proof testing because a reasonable jury could find that the defendants acted with conscious or reckless disregard for the rights of others.<sup>20</sup>

In sum, very few "recent" aviation cases have even permitted the jury to consider the issue of punitive damages. Moreover, other significant limitations and restrictions also exist in this context.

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<sup>18</sup> *Id.* at 908, 937.

<sup>19</sup> *Id.* at 937.

<sup>20</sup> *Id.* at 938. But see *Cessna Aircraft Co. v. Trzcinski*, 682 So. 2d 17, 18-21 (Ala. 1996) (reversing a verdict \$500,000 in punitive damages because there was no clear and convincing evidence that the defendant consciously or deliberately engaged in wantonness; although defendant's seamstress had forgotten to sew the required double row of stitching on plaintiff's defective shoulder harness, defendant's visual inspection and random testing process for shoulder harnesses did not exhibit recklessness or conscious disregard for the safety of others).

### DOHSA'S PROHIBITION OF PUNITIVE DAMAGES

The Death on the High Seas Act (“DOHSA”) was first enacted in 1920, and provides the substantive law of the United States for any death occurring on the “high seas.”<sup>21</sup> The “high seas” are defined as the area twelve or more nautical miles from the shore of any state, the District of Columbia, or the territories or dependencies of the United States.<sup>22</sup>

The original language of DOHSA allowed a personal representative of the decedent to maintain a suit for damages in a federal district court for the exclusive benefit of the decedent’s wife, husband, parents, children or dependent relatives. The recovery of damages was to be “fair and just compensation for the pecuniary loss” sustained by the persons for whose benefit the suit was brought. DOHSA was silent as to recovery for non-pecuniary and punitive damages. Following a great deal of litigation and disagreement among courts regarding the availability of non-pecuniary and punitive damages under DOHSA, the United States Supreme Court finally settled the matter in 1998 with its holding in *Dooley v. Korean Air Lines Co.*<sup>23</sup>

In *Dooley*, the jury awarded \$50 million in punitive damages when it concluded that the death of 269 people on a flight shot down in the former Soviet Union’s airspace was the result of the defendant’s willful misconduct. The court of appeals reversed the punitive damages award on grounds unrelated to DOHSA. The Supreme Court granted *certiorari*, and affirmed the reversal of the punitive damages award on the ground that punitive damages were not specifically allowed under DOHSA. The plaintiffs contended that DOHSA was merely a wrongful death statute, and thus

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<sup>21</sup> 46 U.S.C.S. App. § 761 (a) (2006).

<sup>22</sup> 46 U.S.C.S. App. § 761 (b) (2006); See also, *In re Air Crash Near Peggy’s Cove*, 210 F. Supp. 2d 570, 586 (E.D. Pa. 2002) (holding that DOHSA also applies to aviation incidents in foreign territorial waters).

<sup>23</sup> *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 (1998).

non-pecuniary damages could be awarded under a general maritime survival cause of action.

The Court disagreed, and held that DOHSA is not independent of survival actions; Congress has “simply chosen to adopt a more limited survival provision.”<sup>24</sup> “Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements.”<sup>25</sup>

In apparent response to the Supreme Court’s decision, Congress clarified the issue in the 2000 amendments to DOHSA. DOHSA now explicitly states that non-pecuniary damages, defined as those for loss of care, comfort and companionship are recoverable.<sup>26</sup> Punitive damages are specifically excluded.<sup>27</sup>

PROHIBITION OF PUNITIVE DAMAGES BY THE MONTREAL  
CONVENTION OF 1999

Since the enactment of the Warsaw Convention in 1929, air carriers’ liability for accidents occurring on international flights has been limited. Interpreting the original language of the Warsaw Convention, courts were split as to the availability of punitive damages, though the majority of courts held that they were not available. The matter was essentially settled in 1999 with the Supreme Court’s holding in *Tseng v. El Al Israeli Airlines*.<sup>28</sup>

The Court held that the Warsaw Convention provided the exclusive recourse for injuries within its coverage. As the Warsaw Convention did not include an express provision stating that punitive damages were available, *Tseng* virtually ensured that punitive damages would not be available in any aviation disasters covered by the Warsaw Convention.

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<sup>24</sup> *Id.* at 123-24.

<sup>25</sup> *Id.*

<sup>26</sup> 46 U.S.C.S. App. § 762 (b) (2006).

<sup>27</sup> *Id.*

<sup>28</sup> *El Al Isr. Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999).

The Warsaw Convention has since been replaced by the Montreal Convention of 1999. Ratified by the United States in 2003, the Montreal Convention of 1999 explicitly states that punitive damages are not available against air carriers for international flights. Article 29 states, “in any action for damages. .. punitive, exemplary or other non-compensatory damages shall not be recoverable.”<sup>29</sup> Thus, plaintiffs suing air carriers are prohibited from recovering punitive damages when an aviation disaster occurs on an international flight.

A SURVEY OF STATE STANDARDS FOR PUNITIVE DAMAGES AND  
STATE WRONGFUL DEATH STATUTES

While the standard of conduct necessary to justify an award of punitive damages varies among states, proof of “malice” is sufficient in all states. The typical language found in many states requires the plaintiff to prove that the defendant must act “maliciously, willfully and wantonly, or with a reckless disregard for the rights of others.”<sup>30</sup> In a minority of states, reckless disregard for the rights of others does not rise to the level of conduct necessary to sustain an award of punitive damages.<sup>31</sup>

Approximately one third of the states have held that fraud or oppression is also sufficient to justify a punitive damages

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<sup>29</sup> Montreal Convention of 1999, Article 29.

<sup>30</sup> See, e.g., *Douglas v. Humble Oil & Refining Co.*, 445 P. 2d 590, 592 (Or. 1968); *Erwin v. Milligan*, 188 Ark. 658, 662-4 (1934); *Lock Ridge Constr. Co. v. Barra*, 291 Ala. 312, 320 (1973).

<sup>31</sup> See, e.g., *Tuttle v. Raymond*, 494 A. 2d 1353, 1360-1 (Me. 1985); *Pollack v. Brown*, 569 S.W. 2d 724, 733 (Mo. 1978); *Mahanna v. Westland Oil Co.*, 107 N.W. 2d 353, 358 (N.D. 1960).

award.<sup>32</sup> Arizona requires an “evil minded” conduct,<sup>33</sup> and North Carolina allows for punitive damages under “circumstances of rudeness.”<sup>34</sup> Maine recently reversed its view that gross negligence is sufficient for punitive damages, but a few states still hold that gross negligence is adequate.<sup>35</sup> For example, in Delaware, negligent acts that are so gross in nature will support an award of punitive damages.<sup>36</sup> Florida, Kansas and Vermont also permit an award of punitive damages under circumstances of gross negligence.<sup>37</sup>

In Oklahoma, by statute, punitive damages against defendants who act in “reckless disregard for the rights of others” are capped at actual damages or \$100,000, while punitive damages against defendants who act “intentionally and with malice” are capped at two times the actual damages, \$500,000, or the financial benefit conferred upon the defendant.<sup>38</sup>

Wrongful death statutes frequently prohibit or severely limit the recovery of punitive damages. Nineteen states and the District of Columbia prohibit the recovery of punitive damages under their wrongful death statutes.<sup>39</sup> The law of Alabama is

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<sup>32</sup> See, e.g., Cal. Civ. Code § 3294 (2006); *Winn and Lovett Grocery Co. v. Archer*, 126 Fla. 308, 327 (1936); *Gilman Paper Co. v. James*, 235 Ga. 348, 351 (1975); *Watkins v. Layton*, 182 Kan. 702, 704 (1958); Nev. Rev. Stat. Ann. § 42.005 (2006); *Mahanna v. Westland Oil Co.*, 107 N.W. 2d 353, 358 (N.D. 1960); *Walsh v. Segale*, 70 F. 2d 698, 699 (2nd Cir. 1934).

<sup>33</sup> *Gurule v. Ill. Mut. Life & Cas. Co.*, 152 Ariz. 600, 601 (1987).

<sup>34</sup> *Hardy v. Toler*, 288 N.C. 303, 306-7 (1975).

<sup>35</sup> *Tuttle v. Raymond*, 494 A. 2d 1353, 1360-1 (Me. 1985).

<sup>36</sup> *Stein v. Diamond State Tel. Co.*, 34 Del. 185, 192-3 (Super. Ct. 1929).

<sup>37</sup> See, *Winn and Lovett Grocery Co. v. Archer*, 126 Fla. 308, 327 (1936); *Watkins v. Layton*, 182 Kan. 702, 704 (1958); *Walsh v. Segale*, 70 F. 2d 698, 699 (2nd Cir. 1934).

<sup>38</sup> 23 Okla. St. § 9.1 (2005).

<sup>39</sup> States that do not allow the recovery of punitive damages under their wrongful death statutes include: California, Delaware, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Dakota, Washington and Wisconsin. See, Cal. Code Civ. Pro. § 377.61 (2006); *Sterner v.*

unique because its courts have held that punitive damages are only available to plaintiffs suing for wrongful death.<sup>40</sup>

Thirty-one states allow for the recovery of punitive damages in wrongful death cases.<sup>41</sup> Some of the states that allow

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*Wesley Coll., Inc.*, 747 F. Supp. 263, 268-9 (D. Del. 1990); *Runyon v. District of Columbia*, 463 F. 2d 1319, 1322 (Ct. App. D.C. 1972), *Engle v. Finch*, 165 Ga. 131, 134 (1927); *Ozaki v. Ass'n of Apartment Owners*, 87 Haw. 273, 289-90 (Ct. App. 1998); *Winter v. Schneider Tank Lines, Inc.*, 107 Ill. App. 3d 767, 769 (1982); *Durham v. U-Haul Int'l*, 745 N.E. 2d 755, 757 (Ind. 2001); *Smith v. Printup*, 254 Kan. 315, 333-4 (1993); *Cohen v. Rubin*, La. Civ. Code Ann. art. 2315.2 (2006); 55 Md. App. 83, 101-2 (1983); *Currie v. Fiting*, 375 Mich. 440, 455-6 (1965); *Müller v. Kingsley*, 194 Neb. 123, 124 (1975); N.H. Rev. Stat. Ann. § 556:12 (2006); N.H. Rev. Stat. Ann. § 507:16 (2006); *Smith v. Whitaker*, 160 N.J. 221, 248-9 (1999); *Rubeck v. Huffman*, 54 Ohio St. 2d 20, 23 (1978); *Harvey v. Hassinger*, 315 Pa. Super. 97, 100-1 (1983); *Simeone v. Charron*, 762 A. 2d 442, 443 (R.I. 2000); *Bethel v. Janis*, 597 F. Supp. 56, 59 (D.S.D. 1984); *Shoemaker v. Pang*, No. 47242-9-I, 2001 Wash. App. LEXIS 362 at \*1-2 (Feb. 26, 2001); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 315 (1980).

<sup>40</sup> *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1987).

<sup>41</sup> States that allow for the recovery of punitive damages under their wrongful death statutes include: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Idaho, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. See, *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1987); *Portwood v. Copper Valley Elec. Ass'n*, 785 P. 2d 541, 543 (Alaska 1990); *Bryant v. Silverman*, 146 Ariz. 41, 47 (1985); *Vickery v. Ballentine*, 293 Ark. 54, 56-7 (1987); Colo. Rev. Stat. § 13-21-203 (2005); *Gionfriddo v. Avis Rent A Car Sys.*, 192 Conn. 280, 291 (1984); *Martin v. United Sec. Services, Inc.*, 314 So. 2d 765, 772 (Fla. 1975); *Gavica v. Hanson*, 101 Idaho 58, 63 (1980); *Briner v. Hyslop*, 337 N.W. 2d 858, 870 (Iowa 1983); Ky. Rev. Stat. Ann. § 411.130 (2006); Me. Rev. Stat. Ann. tit. 18A, § 2-804(B) (2005); Mass. Gen. Laws Ann. ch. 229, § 2 (2006); Minn. Stat. § 573.02 (2005); *Thornton v. Ins. Co. of N. Am.*, 287 So. 2d 262, 265 (Miss. 1973); Mo. Rev. Stat. § 537.090 (2006); Mont. Code Ann. § 27-1-220 (2005); Mont. Code Ann. § 27-1-513 (2005); Nev. Rev. Stat. Ann. § 41.085 (2006); N.M. Stat. Ann. § 41-2-3 (2006); N.Y. Est. Powers & Trusts Law § 5-4.3 (2006); N.C. Gen. Stat. § 28A-18-2 (2006); *Puppe v. A.C. & S., Inc.*, 733 F. Supp. 1355, 1359 (D.N.D. 1990); 12 Okla. St. § 1053 (2005); Or. Rev. Stat. § 30.020 (2006); *Adams v. Hunter*, 343 F. Supp. 1284, 1291 (D.S.C. 1972); *Coakley v. Daniels*, 840

punitive damages limit the amount recoverable, with limits ranging from \$50,000 to \$350,000.<sup>42</sup> Other states mandate specific ratios between punitive and compensatory damages which cannot be exceeded.<sup>43</sup> Missouri is unique in that punitive damages are recoverable, but half of the amount of punitive damages recovered, less attorneys' fees and costs, must be paid to a Tort Victim's Compensation Fund.<sup>44</sup>

PUNITIVE DAMAGES MUST BEAR A REASONABLE RATIO TO  
COMPENSATORY DAMAGES

Relatively recent limits placed on the recovery of punitive damages by the Supreme Court, though not unique to aviation cases, bear mention in this context. The Supreme Court addressed limits on punitive damages in *BMW v. Gore*.<sup>45</sup> In *Gore*, the plaintiff discovered that his ostensibly new car had been damaged, repainted, and sold to him as brand new. The jury awarded plaintiff \$4,000 in compensatory damages, the depreciated value of the car, and \$4 million in punitive damages. The Alabama supreme court reduced the punitive award to \$2 million, still resulting in a 1 to 500 ratio of compensatory to punitive damages.

The United States Supreme Court granted *certiorari*. The Court reasoned that grossly excessive and arbitrary punishments violated the Due Process Clause of the 14<sup>th</sup> Amendment, and held

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S.W. 2d 367, 371 (Ct. App. Tenn. 1992); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W. 2d 916, 923 (Tex. 1993); *Behrens v. Raleigh Hills Hosp.*, 625 P. 2d 1179, 1186 (Utah 1983); Va. Code Ann. § 8.01-52 (2006); *Schmerbauch v. Wright*, No. 2:97-CV-241, 1998 U.S. Dist. LEXIS 17810 at \*21(D. Vt. Sep. 9, 1998); *Bond v. City of Huntington*, 166 W. Va. 581, 593 (1981); Wyo. Stat. Ann. § 1-38-102 (2006).

<sup>42</sup> See, e.g., Ind. Code § 34-51-3-4 (2006); Me. Rev. Stat. Ann. tit. 18A, § 2-804(B) (2005); Va. Code Ann. § 8.01-38.1 (2006).

<sup>43</sup> See, e.g., Fla. Stat. Ann. § 768.73 (2006); Idaho Code § 6-1604 (2006); Ind. Code § 34-51-3-4 (2006).

<sup>44</sup> 44 Mo. Rev. Stat. § 537.675 (2006).

<sup>45</sup> *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

that the punitive damages award in this instance was grossly excessive. The Court set forth the following three guideposts for determining whether a punitive damages award is grossly excessive: (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 and the civil penalties imposed in comparable cases.<sup>46</sup>

The Supreme Court also determined that a court's analysis of the degree of reprehensibility of defendant's conduct is the most important factor in determining whether punitive damages are grossly excessive. When examining reprehensibility, the Supreme Court stated that a court should consider whether: (1) the harm was physical or economic; (2) the conduct evinced indifference or reckless disregard for the health and safety of others; (3) the victim was financially vulnerable; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was a result of intentional malice or deceit as opposed to an accident.<sup>47</sup> The existence of any one of these factors alone may not be sufficient to uphold a punitive damages award, and the absence of all factors makes such award suspect.

The Supreme Court applied and further defined the *Gore* test in *State Farm v. Campbell*.<sup>48</sup> In *Campbell*, the defendant's alleged misconduct involved a bad faith refusal to settle a tort suit against plaintiffs, whom the defendant insured. The plaintiffs had been awarded \$1 million as compensation for approximately 1.5 years of emotional distress and \$145 million in punitive damages. The Supreme Court ruled that the award was grossly excessive and concluded that there was a presumption against a 1 to 145 ratio of compensatory to punitive damages.

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<sup>46</sup> *Id.* at 574-575.

<sup>47</sup> *Id.* at 575-576.

<sup>48</sup> *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

Though the Supreme Court declined to enact a bright-line rule, the Court did state that few awards exceeding a single digit ratio of compensatory to punitive damages would be constitutionally permissible. Larger ratios may be upheld when the defendant's conduct is particularly egregious and the compensatory damages are low. When compensatory damages are substantial, only a lower ratio of damages will pass constitutional muster. Overall, the Supreme Court concluded that whether an award is grossly excessive will always depend on the facts and circumstances in the particular case.<sup>49</sup>

#### CONCLUSION

Punitive damages have seldom been a defining factor in aviation cases and plaintiffs face considerable hurdles to the recovery of such. Decisions during the past 10 years reveal extremely limited success by plaintiffs in being permitted to submit the issue to the jury. Where applicable, DOSHA and the Montreal Convention remove punitive damages from the mix entirely. Even where these limitations do not apply, plaintiffs must overcome stringent standards to establish entitlement to punitive damages, standards which vary from state to state. Moreover, the Supreme Court's recent decisions in *Gore* and *Campbell* have placed significant limits on the quantum of any punitive damages award.

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<sup>49</sup> *Id.* at 424-426.