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COMMENTS ON *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*

Michael Wells*

Professor Elliott begins his Article by proclaiming that “a fundamental revolution has reshaped the intellectual underpinnings of tort law.”¹ He maintains that torts has shifted “[f]rom a system for punishing wrongdoers and compensating victims . . . [to] a system that aspires to regulate safety in all aspects of our lives.”² What are the implications of this change in emphasis for the place of punitive damages in contemporary accident law? They “stand out as a good candidate for rejection as a ‘relic’ that does not fit the new paradigm.”³ Why? Because they are not an effective deterrent to corporate misconduct.⁴ Their imposition is insufficiently swift and too uncertain, and their magnitude is too small.⁵

While Elliott’s Article sets forth an interesting and provocative argument, I believe it is vulnerable to attack on three grounds:

(1) The Article offers little plausible evidence to support the empirical claim that punitive damages do not deter corporate misconduct. Elliott cites a RAND study showing that punitive damages have increased in recent years,⁶ and reasons that if punitives were a good deterrent, “one might expect to find a corresponding decrease in corporate misbehavior in response to the increase in punitive damages liability.”⁷ But Elliott has no evidence one way or the other on this vital point. He concludes with a lame rhetorical question: “Does anyone believe that there is less

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1. Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1054 (1989).

2. *Id.* at 1054.

3. *Id.*

4. *Id.* at 1056.

5. *Id.* at 1062.

6. *Id.* at 1060 (citing M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS iii (RAND, The Institute for Civil Justice, 1987)).

7. *Id.* at 1061.

corporate misbehavior around today than in the past as a result of the increase in punitive damages?"⁸

This is not exactly a fully developed argument. But let us assume, for the sake of pursuing the question, that there is indeed as much or more "corporate misbehavior" today as in the past. If this is so, it is not inconsistent with the proposition that punitive damages deter. Perhaps there would be even more misbehavior without them. Furthermore, the level of "corporate misbehavior" depends partly on how we define "misbehavior." Our standards have gone up. By today's standards, there was probably far more corporate misbehavior fifty or a hundred years ago than there is today. By yesterday's standards, today's firms would likely be viewed as models of corporate responsibility.

Elliott next discusses a poll of corporate officers "about the effect of product liability awards on their decisions,"⁹ which found that such suits "made only 'a minor dent on the economics and organization of individual large firms.'"¹⁰ His use of this study is problematic in two respects. First, Elliott draws conclusions about corporate decisionmaking on the basis of a poll of officers. This seems a rather unreliable way of determining what corporations actually do and why. Second, suppose the poll does indeed yield accurate information. It is not about the deterrent effect of punitive damages, but deals with tort liability in general, and so it cannot advance his argument very far. Since the poll concerns product liability suits, where strict liability is often the rule, the conclusion that liability may not greatly alter behavior is hardly surprising. Under strict liability, actors may be liable even when there is no cost-justified precaution available to them.

(2) Assume that Elliott is right in asserting that punitive damages do not effectively deter corporate misconduct. He runs into further difficulties when he explains why this is so. The efficacy of a deterrent depends on its swiftness, certainty, and magnitude, and "[p]unitive damages against corporations in tort cases are deficient as a deterrence mechanism on all three counts."¹¹

8. *Id.*

9. *Id.* (citing N. WEBER, *PRODUCT LIABILITY: THE CORPORATE RESPONSE 2* (The Conference Board 1987)).

10. *Id.* (quoting N. WEBER, *PRODUCT LIABILITY: THE CORPORATE RESPONSE 2* (1987)).

11. *Id.* at 1062.

Consider first Elliott's arguments regarding swiftness and certainty. (I will return to the concern he expresses about the magnitude of punitive damages in (3) below.) Elliott complains that the sanction comes long after the wrongful act,¹² and that courts and juries reach dramatically different conclusions as to tort liability, and as to punitive damages in particular.¹³ Punitives, like other tort damage awards, do not give the actor specific information about what conduct is impermissible, but a general signal that liability may, or may not, be imposed for a certain class of activity.¹⁴ Moreover, punitive damages are typically awarded against corporations rather than the individuals responsible for corporate decisions, a practice that "imposes a buffer that protects the individual from the incentives that are supposedly intended to affect his or her decisions."¹⁵

As Elliott recognizes, all of these problems are endemic to tort liability as a means of affecting behavior.¹⁶ The economic analysis of tort suggests that, by raising prices and reducing the amount of dangerous conduct, "general" deterrence¹⁷ will lower accident costs. Delays, uncertainty, and vicarious liability may, in this view, blunt the incentive effects of liability rules, but do not fatally undermine tort as a mechanism for encouraging cost-effective accident reduction. Perhaps Elliott is right and the tort system fails. His quarrel is not so much with the deterrent effect of punitives, but with the efficacy of the common law of torts as a mechanism for achieving cost-justified precautions.

The problem here is not merely that Elliott mislabels his criticisms. If the time-consuming and uncertain process of tort litigation does not send strong enough signals, then the premise of Elliott's critique of punitive damages is open to doubt. I refer to the "fundamental revolution which has reshaped the underpinnings of tort law [into] a system that aspires to regulate safety in all aspects of our lives."¹⁸ If tort liability is so slow and uncertain that it does a poor job of regulating safety, then abolishing puni-

12. *Id.*

13. *Id.* at 1064.

14. *Id.* at 1058.

15. *Id.* at 1069.

16. *Id.* at 1061-62.

17. *See id.* at 1058.

18. *Id.* at 1054.

tive damages may not be the appropriate response. Rather than re-examining punitives to see whether they fit the new conception of torts, it would be better to look for other means to pursue efficiency in accident reduction. In that event, we should either abolish the common law of torts or return to the traditional notion that tort liability is justified, not as a means to some utilitarian end, but in terms of doing justice between the parties.

(3) Suppose tort law in general can survive Elliott's criticisms, but current punitive damages law cannot. Perhaps the uncertainty of their imposition is especially great, [p. 18] and their magnitude too small to generate much deterrence of misconduct. Elliott's call for their abolition omits a critical analytical step. At the outset of the Article, he describes "the task now facing us" after the intellectual revolution: We must "re-assess traditional doctrines of tort law to determine which fit the new paradigm; which should be modified by substituting new reasons 'more fitted to the time'; and which should be jettisoned as relics of a bygone era."¹⁹ But he moves too quickly to the conclusion that punitives should be abolished in accident law, never stopping to consider whether the problems they raise may be ameliorated by modifying the rules governing their imposition.

Punitive damages may serve an important function in the economic conception of torts, by inducing actors to take full account of the costs they generate in circumstances where compensatory damages are not sufficient. To see why, it is necessary to recall some fundamental points about the economic analysis of torts. Economic analysis suggests that punitive damages do influence decisionmaking. Rational actors attempt to minimize their costs, and hence will avoid conduct that generates punitive damages. Punitive damages may deter too much, rather than too little. If they were available in every negligence case, actors would perceive accidents as costing more than they actually do and would invest too much in safety.

Even so, economic analysis does endorse a role for punitive damages. Insofar as corporate misconduct is concerned, their function is to see to it that the corporation does not undervalue negligently caused accidents for which the corporation does not pay the full costs in the form of compensatory damages. Suppose

19. *Id.*

many injured persons do not bring suit because the hazards of the litigation are not worth the costs, or because they do not know what is responsible for their suffering, or for some other reason. Say the burden of a precaution is \$6 and the probable loss is \$10, but there is only a fifty percent chance suit will be brought. There is a cost-justified precaution available, but the actor does not take it, for he is only held liable half as often as he should, and he perceives the probable loss as \$5. We need punitive damages to send him the right signals.

In light of the economic case for punitives, doing away with them seems a destructive and irrational response to the problems Elliott identifies. If he is right, and punitive damages as currently administered do not effectively deter, then the answer is not to abandon them, but to find ways to make them more effective. Uncertainty in their application may be remedied by clarifying their role: They are to be imposed only where it appears that many injured persons will fail to file claims, and they should routinely be imposed in cases meeting this criterion. Elliott asserts that their magnitude is too low to do much good, because judges reduce the jury's award,²⁰ and that corporations do not feel their impact, because they can obtain insurance coverage against punitives.²¹ Then we should ask appellate courts to stop cutting back punitive awards and to stop allowing insurance coverage of them, rather than recommending to policy makers that they jettison punitives altogether in accident cases.

20. *Id.* at 1066.

21. *Id.*

