

Dust in the Wind: Can Missouri's \$4 Billion Talc Verdict Survive Fourteenth Amendment Scrutiny?

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In December 2018, St. Louis Circuit Court Judge Rex Burlison denied Johnson & Johnson's and Johnson & Johnson Consumer Inc.'s (collectively, J&J) motion for new trials on damages or, in the alternative, remittitur in the *Ingham v. Johnson & Johnson* case.¹ Judge Burlison refused to vacate or remit the \$4.69 billion verdict in favor of 22 women in a trial over claims that J&J's talc-based products, including baby powder, were contaminated with asbestos that caused the plaintiffs' ovarian cancer. J&J's motion included arguments regarding the excessiveness of the compensatory damages awarded (\$25 million per plaintiff), but the gravamen of J&J's argument focused on the punitive damages award that totaled \$4.14 billion. J&J's principal contention was that the punitive award violated J&J's right to due process under the Fourteenth Amendment to the U.S. Constitution.

The *Ingham* verdict rendered in July 2018 was one of a several of verdicts across the country since 2013 in which plaintiffs have alleged a link between J&J's talc-based products and cancer. The plaintiff's claims against J&J were initially based on the theory that pure talc, in and of itself, is a cause of ovarian cancer. As the plaintiff's theories "matured," later cases alleged that J&J's talc was contaminated with asbestos, which caused mesothelioma, a tumor of the lining of the lungs. *Ingham* was the first trial of a case based on the theory that asbestos-contaminated talc causes ovarian cancer.²

Several of the talc verdicts rendered since 2013 have been overturned on a number of grounds. In *Ristesund v. Johnson & Johnson*,³ the Missouri Court of Appeals overturned a \$55 million award in an ovarian-cancer case based on a lack of personal jurisdiction. In *Estate of Fox v. Johnson & Johnson*,⁴ the Missouri Court of Appeals also overturned a \$72 million award in an ovarian-cancer case for lack of personal jurisdiction. In California, a trial judge reversed a \$417 million verdict in *Echeverria v. Johnson & Johnson*,⁵ finding that the plaintiff did not adequately establish that

talc causes ovarian cancer. Other verdicts are still on appeal, such as *Lanzo v. Imerys Talc America Inc.*,⁶ in which a New Jersey jury awarded a mesothelioma plaintiff a total of \$117 million against J&J and its talc supplier, as well as *Slemp v. Johnson & Johnson*⁷ and *Giannecchini v. Johnson & Johnson*,⁸ where St. Louis juries returned verdicts of \$110 million and \$70 million, respectively, against J&J and its talc supplier.

The *Ingham* verdict is by far the largest of its kind to date. The staggering size of the award—\$25 million in compensatory damages to each of the plaintiffs and another \$4.14 billion in punitive damages—begs the question: Can an award of this size possibly survive a constitutional challenge on due process grounds? According to Judge Burlison, due process requirements were met and the punitive damages award of \$4.14 billion will stand.⁹ At least for now, J&J has vowed to appeal any verdict¹⁰ against the company and almost certainly will do so here.¹¹ One important argument that J&J will make is that the punitive-damages awarded cannot withstand scrutiny under the Fourteenth Amendment, which prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.¹²

J&J's Grounds for Appeal

There are multiple bases on which to appeal the *Ingham* verdict. For example, J&J is likely to seek reversal based on: (1) lack of personal jurisdiction because only five of the 22 plaintiffs are from Missouri¹³ and, pursuant to recent Supreme Court decisions including *Daimler*¹⁴ and *Bristol-Myers Squibb*,¹⁵ the plaintiffs should not have been allowed to sue New Jersey-based J&J in St. Louis; (2) lack of causation since scientific studies show talc itself is safe and the company's talc-based products never contained asbestos¹⁶; (3) violation of due process under Article I § 10 of the Missouri Constitution, which closely mirrors its federal counterpart; and (4) most importantly to this analysis, the punitive-damages award violates J&J's right to due process under the Fourteenth Amendment to the U.S.

Constitution. While each of the aforementioned grounds has merit, this review will focus on J&J's argument that the punitive damages award violated J&J's constitutional right to due process.

Punitive Damages and Due Process

Compensatory damages are intended to redress a plaintiff's concrete loss, while punitive damages are aimed at deterrence and retribution.¹⁷ The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the imposition of grossly excessive or arbitrary punishment on a tortfeasor.¹⁸ The reason for this limitation is that elementary notions of fairness enshrined in constitutional jurisprudence dictate that a person receive fair notice, not only of the conduct that will subject him or her to punishment, but also of the severity of the penalty that a state may impose.¹⁹

In *BMW of North American Inc. v. Gore*,²⁰ the U.S. Supreme Court instructed lower courts to consider three "guideposts" when reviewing punitive damages awards: (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.²¹ The Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*²² clarified the three *Gore* guideposts by placing the greatest consequence on the first two factors: reprehensibility of a defendant's conduct and the disparity between compensatory and punitive awards.

As to the latter factor, the acceptable punitive to compensatory damages ratio, the Supreme Court has not provided and "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula" for punitive damages.²³ Notwithstanding, the Court, declining to impose a bright-line ratio that a punitive damages award cannot exceed, concedes that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."²⁴ The Court, however, has indicated that in rare circumstances punitive damages in excess of a single-digit multiplier are justified where "a particular egregious act has resulted in only a small amount of economic damages."²⁵ Moreover, in cases where the plaintiffs are awarded "substantial" compensatory damages, which the Supreme Court has characterized in *Campbell* as \$1 million, punitive damages should not greatly exceed the amount of the compensatory award.²⁶ In other words, for cases with multimillion-dollar compensatory awards, punitive damages should be consistent with the compensatory verdict.

Under Supreme Court Jurisprudence, the Ingham Punitive Award Should Be Reduced

As indicated in J&J's motion for new trials on damages or, in the alternative, a remittitur, J&J will argue that the *Ingham* jury's punitive-damages award was so excessive as to violate J&J's constitutional right to due process of law. J&J argued in its motion to the Missouri state court, and will likely also argue on appeal, that the punitive award is unconstitutional based on the impermissible evidence of conduct involving nonparties.²⁷ J&J specifically points to what has been dubbed the "Todd True" email shown to the jury, which purports to estimate that talc is a \$70 million business for J&J. J&J argues the jury used this information in the email as a benchmark in calculating its punitive damages award by multiply-

ing \$70 million by the alleged "43 years it's been since the company claimed the baby powder did not contain asbestos."²⁸ The Supreme Court has explained that the "Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties."²⁹ J&J will also argue on appeal, as it did in its motion for new trials on damages, that "the mammoth \$4.14 billion aggregate punitive damages award far exceeds any reasonable relationship to compensatory damages. Indeed, under *Campbell*, only a roughly 1:1 ratio between punitive and compensatory damages awards would remotely pass constitutional muster, even if compensatory awards were substantially reduced."³⁰ As explained above, in evaluating the reasonableness of a punitive damages award, courts consider three guideposts: (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 similar cases.³¹

The first *Gore* "guidepost" is the degree of reprehensibility. It is considered "the most important indicium of the reasonableness of a punitive damages award."³² Courts generally consider the financial vulnerability of the plaintiff; whether the harm was physical as opposed to economic; whether the defendant acted with indifference or a reckless disregard for the health and safety of others; and whether the harm was the result of intentional malice, trickery, or deceit.³³ In the instant case, J&J will continue to argue that its conduct was not reprehensible because J&J tested its talc extensively using the most sophisticated methods on a weekly, biweekly, and quarterly basis to ensure that it was not contaminated with asbestos. J&J will also argue that independent testing repeatedly found no asbestos in the talc and that it complied with industry standards.³⁴ All of these facts weigh against "reprehensibility." However, Judge Burlison disagrees, stating that there was substantial evidence at trial of "particularly reprehensible conduct on the part of the defendants, including that defendants knew of the presence of asbestos in products that they knowingly targeted for sale to mothers and babies" and misrepresented the dangers for years.³⁵ J&J disagrees with Judge Burlison's position, stating that "the same judge has denied similar motions on prior verdicts in his court that were ultimately overturned by the appellate courts."³⁶

A court must consider the goal of deterrence when analyzing a punitive damages award for excessiveness.³⁷ "Only when an award can fairly be categorized as 'grossly excessive' ... does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."³⁸ In J&J's appeal, it will likely focus on what it calls "the gross disparity between the compensatory awards and the punitive awards," which makes the punitive damages award excessive and therefore fails under constitutional scrutiny. It is true that punitive damages "must bear a reasonable relationship to compensatory damages."³⁹ J&J will point to *Campbell* for support in that, in an average case, "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."⁴⁰ On the other hand, it should be noted that *Campbell* acknowledges that there may be rare circumstances in which "awards exceeding single-digit ratio between punitive and compensatory damages ... will satisfy due process."⁴¹ J&J argues the relevant ratio in *Ingham* should be 1:1, a far cry from the current 7.5:1. In contrast, in *Campbell*, the jury awarded \$2.6 million in compensato-

ry damages (which the trial court remitted to \$1 million) and \$145 million in punitive damages.⁴² However, after review, the Supreme Court struck down the punitive damages award as an “irrational and arbitrary deprivation of the property of the defendant.”⁴³ J&J is seeking similar appellate treatment in *Ingham*.

J&J is relying on cases in which the plaintiffs are awarded “substantial” compensatory damages, and therefore punitive damages should not greatly exceed the amount of the compensatory award, if at all.⁴⁴ J&J relies on *Campbell* and *Lompe*⁴⁵ for guidance on what is considered “substantial” compensatory damages. Each court considers \$1 million and \$2.7 million in compensatory damages, respectively, as “substantial.” According to *Campbell*, “when compensatory damages are substantial ... then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”⁴⁶ The Court determined that a “punitive damages award at or near the amount of compensatory damages ‘likely’ represented the constitutional limit.”⁴⁷ However, courts have found that “the Supreme Court’s guidance on the proper ratio between punitive and compensatory damages is difficult to apply.”⁴⁸ J&J needs to consider lower court cases in which ratios that exceed the 1:1 ratio, including a 7:1 ratio, are found to be permissible.⁴⁹ This may present a challenge to J&J’s ability to convince a Missouri appellate court to reduce the punitive award.

The third guidepost, the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in similar cases, is inapplicable to a review of the *Ingham* verdict. There are no comparable civil penalties because there are no state statutes that provide for monetary sanctions or fines for conduct similar to that found by the jury in this case. In his order denying J&J’s motion for new trials on damages or, in the alternative, remittitur, Judge Burlison cites the Missouri Merchandising Practices Act as authority for imposing significant comparable penalties.⁵⁰ It has been argued that the four recent talc verdicts in Missouri do not support the magnitude of the *Ingham* verdict; two cases have been reversed⁵¹ and two are currently on appeal.⁵² Accordingly, the third *Gore* guidepost is inapplicable to the present inquiry. Based on the first two Supreme Court guideposts, reprehensibility of a defendant’s conduct and the ratio between compensatory and punitive damages, the *Ingham* punitive damages award should be reduced as a violation of J&J’s constitutional right to due process.

Dust in the Wind

While it may well be argued that the \$4.14 billion punitive award in *Ingham* is “clearly excessive,” in the end, “the precise award” of punitive damages “must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”⁵³ The Supreme Court has laid out “guideposts” that rely heavily on a case-by-case, fact-based analysis to review punitive damages awards. Notwithstanding that J&J may ultimately be unable to convince a Missouri appellate court that the *Ingham* award of 7.5:1 violates its constitutional right to due process and chances are remote that the Supreme Court would grant certiorari to hear the case, J&J has a slew of other grounds for appeal, including jurisdictional and causation grounds on which it has prevailed in prior cases.⁵⁴

J&J faces over 10,000 talc cases across the country,⁵⁵ including hundreds of plaintiffs in St. Louis alone.⁵⁶ J&J may continue its impressive record of successfully appealing talc verdicts, and the historic *Ingham* award may very well end up as mere “dust in the

wind.” Given the growing number of cases, however, defense verdicts may be the only escape from the approaching whirlwind. ☉

Endnotes

¹*Ingham v. Johnson & Johnson*, No. 1522-CC10417-01 (Mo. Cir. Ct. Dec. 19, 2018).

²See Tina Bellon, *Jury Clears J&J of Liability in New Jersey Talc Case*, REUTERS (Oct. 11, 2018, 3:19 PM), <https://www.reuters.com/article/us-johnson-johnson-cancer-lawsuit/jury-clears-jj-of-liability-in-new-jersey-talc-cancer-case-idUSKCN1ML2QF>.

³*Ristesund v. Johnson & Johnson*, 558 S.W.3d 77, 78 (Mo. Ct. App. June 29, 2018).

⁴*Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48, 50 (Mo. Ct. App. 2017).

⁵*Echeverria v. Johnson & Johnson*, No. BC628228, 2017 WL 4232808 (Cal. Super. Ct. Aug. 21, 2017).

⁶*Lanzo v. Imerys Talc Am. Inc.*, No. 1807270019, 2018 WL 3609160 (N.J. Super. Ct. Law Div. Apr. 5, 2018).

⁷*Stemp v. Johnson & Johnson*, No. 1705150043, 2017 WL 2131178 (Mo. Cir. Ct. May 4, 2017).

⁸*Giannecchini v. Johnson & Johnson*, Judgment, No. 1422-CC-09012, 2016 WL 6563023 (Mo. Cir. Oct. 27, 2016).

⁹See Order Denying Johnson & Johnson’s Post-Trial Motions by Judge Rex Burlison, *Ingham*, No. 1522-CC10417-01, slip op. at 9.

¹⁰See *The Talc Lawsuits—What Are They About?*, FACTS ABOUT TALC, <https://www.factsabouttalc.com/en-litigation.html> (last visited Feb. 6, 2019).

¹¹See *Official Company Statement Regarding Today’s Post-Trial Motion in St. Louis*, JOHNSON & JOHNSON (Dec. 19, 2018), <https://www.jnj.com/our-company/official-company-statement-regarding-todays-post-trial-motion-ruling-in-st-louis>.

¹²*Cooper Indus. Inc. v. Leatherman Tool Grp. Inc.*, 532 U.S. 424, 433 (2001).

¹³See *Johnson & Johnson Issues Statement Regarding Verdict in St. Louis, Missouri Court*, JOHNSON & JOHNSON (July 12, 2018), <https://www.jnj.com/our-company/johnson-johnson-issues-statement-regarding-verdict-st-louis-missouri-court> (“Johnson & Johnson is deeply disappointed in the verdict, which was the product of a fundamentally unfair process that allowed plaintiffs to present a group of 22 women, most of whom had no connection to Missouri, in a single case all alleging that they developed ovarian cancer.”); see also Robert Patrick, *How Did Jury Arrive at \$4 Billion Verdict in Talcum Powder Case?*, ST. LOUIS POST-DISPATCH (July 14, 2018), https://www.stltoday.com/news/local/crime-and-courts/how-did-jury-arrive-at-billion-verdict-in-talcum-powder/article_0ea0da33-d4ed-5966-b33f-39fa90c13b20.html (“Only five plaintiffs in Thursday’s case are from Missouri, including one from O’Fallon.”).

¹⁴*Daimler AG v. Bauman*, 571 U.S. 117 (2014).

¹⁵*Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 137 S. Ct. 1773 (2017).

¹⁶As argued in *Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.’s Motion for New Trials on Damages or, in the Alternative, Remittitur, Ingham*, No. 1522-CC10417-01 at 17, <https://images.law.com/contrib/content/uploads/documents/292/35071/Talc-Verdict-Mtn-for-New-Trial-on-Damages.pdf>.

¹⁷Restatement (Second) of Torts § 903, 453-454 (1979); *Cooper Indus.*, 532 U.S. at 432; see also *BMW of N. Am. Inc. v. Gore*, 517

U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a state’s legitimate interests in punishing unlawful conduct and deterring its repetition”); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 191 (1991) (“[P]unitive damages are imposed for purposes of retribution and deterrence”).

¹⁸*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

¹⁹U.S. CONST. amend. XIV; *Campbell*, 538 U.S. at 409; *Cooper Indus.*, 532 U.S. at 433.

²⁰*BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996).

²¹*Gore*, 517 U.S. at 575.

²²*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

²³*Id.* at 424 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993)).

²⁴*Id.* at 425.

²⁵*Gore*, 517 U.S. at 581.

²⁶*Campbell*, 538 U.S. at 425.

²⁷*Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007).

²⁸See Robert Patrick & Joel Currier, *Talc Cancer Verdict of \$4.6 Billion From St. Louis Jury Sends “Very Powerful Message,”* ST. LOUIS POST-DISPATCH (July 13, 2018), https://www.stltoday.com/news/local/crime-and-courts/talc-cancer-verdict-of-billion-from-st-louis-jury-sends/article_c15e7f98-fce0-5a74-80ee-45371d5e98b1.html.

²⁹*Philip Morris USA* 549 U.S. at 353.

³⁰As argued in *Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.’s Motion for New Trials on Damages or, in the Alternative, Remittitur*, *Ingham*, No. 1522-CC10417-01 at 2.

³¹*Campbell*, 538 U.S. at 418.

³²*Gore*, 517 U.S. at 576.

³³*Campbell*, 538 U.S. at 419.

³⁴As argued in *Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.’s Motion for New Trials on Damages or, in the Alternative, Remittitur*, *Ingham*, No. 1522-CC10417-01 at 17; see also *Drabik v. Stanley-Bostitch Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) (“Compliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind with no knowledge of a dangerous design defect.” (citing *Lane v. Amsted Indus. Inc.*, 779 S.W.2d 754, 759 (Mo. App. 1989))).

³⁵See Order Denying Johnson & Johnson’s Post-Trial Motions by Judge Rex Burlison in *Ingham*, No. 1522-CC10417-01, slip op. at 9.

³⁶See Emily Field, *J&J Can’t Shed \$4.7B Talc Verdict in Missouri*, LAW360 (Dec. 19, 2018, 8:29 PM), <https://www.law360.com/articles/1113397/j-j-can-t-shed-4-7b-talc-verdict-in-missouri>.

³⁷*Deters v. Equifax Credit Info. Servs. Inc.*, 202 F.3d 1262, 1272 (10th Cir. 2000).

³⁸*Gore*, 517 U.S. at 568.

³⁹*Id.* at 580.

⁴⁰*Campbell*, 538 U.S. at 425.

⁴¹*Id.*

⁴²*Id.* at 415.

⁴³*Id.* at 429.

⁴⁴*Id.* at 425.

⁴⁵See *Lompe v. Sunridge Partners LLC*, 818 F.3d 1041, 1068 10th Cir. (2016).

⁴⁶*Campbell*, 538 U.S. at 425.

⁴⁷*Id.* at 429.

⁴⁸*Lompe*, 818 F.3d at 1067.

⁴⁹See *In re C.R. Bard Inc., MDL No. 2187, Pelvic Repair System Products Liability Litigation*, 810 F.3d 913 (2016) (finding that both the compensatory damages and punitive damages against defendant arose from its misconduct that resulted in plaintiff’s injuries and therefore the court refused to overturn the 7:1 ratio based on reprehensibility of the defendant’s conduct).

⁵⁰See Order Denying Johnson & Johnson’s Post-Trial Motions by Judge Rex Burlison in *Ingham et al. v. Johnson & Johnson et al.*, 1522-CC10417-01 at 9 (Mo. Cir. Ct. Dec. 19, 2018).

⁵¹*Ristesund v. Johnson & Johnson*, 558 S.W.3d 77, 78 (Mo. Ct. App. June 29, 2018); *Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48, 50 (Mo. Ct. App. 2017).

⁵²*Slemp v. Johnson & Johnson*, No. 1705150043, 2017 WL 2131178 (Mo. Cir. Ct. May 4, 2017); *Giannecchini v. Johnson & Johnson*, Judgment, No. 1422-CC-09012, 2016 WL 6563023 (Mo. Cir. Oct. 27, 2016).

⁵³*Campbell*, 538 U.S. at 425.

⁵⁴*Ristesund*, 558 S.W.3d at 78; *Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48, 50 (Mo. Ct. App. 2017); *Echeverria v. Johnson & Johnson*, No. BC628228, 2017 WL 4232808 (Cal. Super. Ct. Aug. 21, 2017).

⁵⁵See *supra* note 10.

⁵⁶See Court filing in the United States District Court for the District of New Jersey, *In re: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation*, Civil Action No. 3:16-md-2738-FLW-LHG, Status Report in Lieu of October Case Management Conference, 19, <https://www.bloomberglaw.com/public/desktop/document/JOHNSONJOHNSONTALCUMPOWDERPRODUCTS MARKETINGSALESPRACTICESANDPRODU?1546290169>.