

# SUPREME COURT OF THE UNITED STATES

No. 92-479

TXO PRODUCTION CORP., PETITIONER v. ALLIANCE  
RESOURCES CORP., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
[June 25, 1993]

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I concur in the plurality's statement of the case and in Part IV of the plurality opinion, in which the plurality holds that the judicial procedures that were followed in awarding punitive damages against TXO fulfilled the constitutional requirement of due process of law. I am not in full agreement, however, with the plurality's discussion of the substantive requirements of the Due Process Clause in Parts II and III, in which it concentrates on whether the punitive damage award was "grossly excessive." *Ante*, at 13, 18. I agree that the approaches proposed by the parties to this case are unsatisfactory, see *ante*, at 11-13, but I do not believe that the plurality's replacement, a general focus on the "reasonableness" of the award, *ante*, at 13, quoting *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U. S. 1, 18 (1991), is a significant improvement. To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it

is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and, in so doing, discourage legislative intervention that might prevent unjust punitive awards.

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As I have suggested before, see *id.*, at 41 (KENNEDY, J., concurring in judgment), a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so. The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award. JUSTICE O'CONNOR is correct in observing that in implementing this principle, courts have often looked to the size of the award as one indication that it resulted from bias, passion, or prejudice, see *post*, at 4-7, but that is not the sole, or even necessarily the most important, sign. Other objective indicia of the type discussed by the plurality, see *ante*, at 10-11, as well as direct evidence from the trial record, are also helpful in ascertaining whether a jury stripped a party of its property in an arbitrary way and not in accordance with the standards of rationality and fairness the Constitution requires.

The plurality suggests that the jury in this case acted in conformance with these standards of rationality in large part on the basis of what it perceives to be the rational relation between the size of the award and the degree of harm threatened by TXO's conduct. See *ante*, at 15-17. I do not agree that this provides a constitutionally adequate foundation for concluding that the punitive damages verdict against TXO was rational. It is a commonplace that a jury verdict must be reviewed in relation to the record before it. See, e.g., *Jackson v.*

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*Virginia*, 443 U. S. 307 (1979). Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing, see, e.g., *Heller v. Doe*, \_\_\_ U. S. \_\_\_, \_\_\_ (1993) (slip op., at 7); *FCC v. Beach Communications, Inc.*, 508 U. S. \_\_\_, \_\_\_ (1993) (slip op., at 7); *Vance v. Bradley*, 440 U. S. 93, 111 (1979), a jury is bound to consider only the evidence presented to it in arriving at a judgment. JUSTICE O'CONNOR demonstrates that the record in this case does not contain evidence, argument, or instructions regarding the potential harm from TXO's conduct and so would not have permitted a reasonable jury to render its verdict on this basis. See *post*, at 13-18. We must therefore look for other explanations of the jury verdict to decide whether it may stand.

On its facts, this case is close and difficult; JUSTICE O'CONNOR makes a plausible argument, based on the record and the trial court's instructions, that the size of the punitive award is explained by the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant. See *post*, at 21-23. There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice. This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court's words, through a "pattern and practice of fraud, trickery and deceit" and employed "unsavory and malicious practices" in the course of its business dealings with respondent. 187 W. Va. 457, 477, 467, 419 S. E. 2d 870, 890, 880 (1992). "[T]he record shows that this was not an isolated incident on TXO's part—a mere excess of zeal

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by poorly supervised, low level employees—but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power.” *Id.*, at 468, 419 S. E. 2d, at 881.

Although in many respects this case represents an odd application of an already unusual tort, it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct in determining that a substantial award was required in order to serve the goals of punishment and deterrence. I confess to feeling a certain degree of disquiet in affirming this award, but the record, when viewed as a whole, makes it probable that the jury's verdict was motivated by a legitimate concern for punishing and deterring TXO, rather than by bias, passion, or prejudice. There was ample evidence of willful and malicious conduct by TXO in this case; the jury heard evidence concerning several prior lawsuits filed against TXO accusing it of similar misdeeds; and respondent's attorneys informed the jury of TXO's vast financial resources and argued that TXO would suffer only as a result of a large judgment. Compared with this evidence and argumentation, which dominates the record of the trial, the subtler and more isolated appeals based on TXO's out-of-state status on which JUSTICE O'CONNOR focuses were of lesser importance. A case involving vicarious liability, negligence, or strict liability might present different issues. But given the record here, I am satisfied that the jury's punitive damages award did not amount to an unfair, arbitrary, or irrational seizure of TXO's property.