Getting Away With Murder: How California State Law Determined Recovery in First Roundup Cancer Case Johnson V. Monsato Co.

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GETTING AWAY WITH MURDER: HOW CALIFORNIA STATE LAW DETERMINED RECOVERY IN FIRST ROUNDUP CANCER CASE JOHNSON V. MONSANTO CO.

I. A Matter of Life and Death?: An Introduction to the Roundup Debate

In 1974, the agrochemical giant Monsanto Company (Monsanto) introduced the herbicide, Roundup, into the market. Over the years, Roundup’s popularity has grown, thereby increasing the United States’ use of the herbicide. In June of 2018, Monsanto was bought out by one of the largest pharmaceutical companies in the world, Bayer AG. The active ingredient in Roundup is the chemical glyphosate. Glyphosate is a broad-spectrum herbicide commonly used in agriculture, landscaping, and other settings to combat burdensome weeds. Roundup’s popularity is due, in part, to Monsanto’s introduction of ‘Roundup Ready’ crop seeds, which are genetically modified to withstand the glyphosate chemical, allowing it to be sprayed freely. These genetically modified crops are convenient for the farming industry, but the widespread and


3. Ruth Bender, How Bayer-Monsanto Became One of the Worst Corporate Deals—in 12 Charts, Wall St. J. (Aug. 28, 2019, 11:12 AM), https://www.wsj.com/articles/how-bayer-monsanto-became-one-of-the-worst-corporate-deals-in-12-charts-11567001577 (discussing Bayer AG’s attempt to become world’s largest crop-science business). For the purposes of clarification, Bayer AG is now the parent company and owner. Monsanto is no longer the company name, although it was used in court and will be used throughout this Note. See id. (defining Bayer AG relationship to Monsanto).

4. See Heiling, supra note 1 (stating Roundup consists of forty-one percent glyphosate).


frequent use of Roundup may be cause for concern. Researchers have uncovered evidence that, overall, Roundup is detrimental to the environment. As a result of its widespread use, traces of glyphosate have been found in animals, water, soil, and even humans.

While an extremely effective and popular product, Roundup is at the forefront of an ongoing debate concerning whether glyphosate is carcinogenic. According to the Environmental Protection Agency (EPA), however, glyphosate likely is not a human carcinogen. The EPA conducts registration reviews every fifteen years in order to reassess the safety of all registered herbicides. As of January 2020, the EPA stands by its assertion that glyphosate poses no risk to human health as long as it is used as directed on the label. In contrast, the International Agency for Research on Cancer (IARC) found that there is “strong evidence for genotoxicity” in glyphosate, demonstrating its possible cancer causing ability through gene mutation. Based on limited evidence of cancer in humans and sufficient evidence of cancer in animals, IARC categorized glyphosate as a “probable carcinogen.” This is IARC’s least common classification, only given to about ten percent of substances assessed. These diametrically opposed conclusions, from...
two of the largest scientific bodies in the world, illustrate the divide among experts and the resulting uncertainty regarding glyphosate’s potential link to cancer.\footnote{17}{See Stacy Malkan, \textit{Glyphosate Fact Sheet: Cancer and Other Health Concerns}, U.S. RIGHT TO KNOW (Oct. 1, 2020), https://usrtk.org/pesticides/glyphosate-health-concerns/ (noting effects of conflicting conclusions).}

This issue has gained significant attention due to upwards of forty-two thousand lawsuits filed against Monsanto.\footnote{18}{See id. (acknowledging numerous lawsuits filed against Monsanto).} The pending lawsuits claim that Roundup caused users to develop cancer, specifically non-Hodgkin’s lymphoma.\footnote{19}{Id. (explaining claims of over 42,000 lawsuits filed against Monsanto).} The first of these Roundup cancer lawsuits to proceed to trial was \textit{Johnson v. Monsanto Co.}\footnote{20}{52 Cal. App. 5th 434 (Cal. Ct. App. 2020) (summarizing California lawsuit against Monsanto regarding Roundup pesticide’s alleged cancerous effects).}

This Note explores the environmental and legislative issues surrounding \textit{Johnson}, as well as the implications of the groundbreaking victory over such a powerful and controversial corporation.\footnote{21}{For a discussion of the legislative and environmental issues in \textit{Johnson} and their consequential effects on Roundup use around the world, see \textit{infra} notes 84-114 and accompanying text.} Part II of this Note outlines the important facts of \textit{Johnson}, the procedural history of the case, and the appellate court’s holding.\footnote{22}{For a discussion of the facts, procedural history, and holding of \textit{Johnson}, see \textit{infra} notes 27-49 and accompanying text.} Part III provides background information regarding California state law, punitive and compensatory damage awards, the debate concerning whether glyphosate is a carcinogen, and the ongoing environmental studies.\footnote{23}{For a further discussion of opposing opinions surrounding glyphosate and background of California state law regarding damage awards, see \textit{infra} notes 50-109 and accompanying text.} Part IV outlines the California Court of Appeal First Appellate District’s opinion in \textit{Johnson}.\footnote{24}{For a summary of the appellate court’s reasoning, see \textit{infra} notes 110-47 and accompanying text.} A review and analysis of the court’s decision is found in Part V of this Note.\footnote{25}{For a critical analysis of the appellate court’s reasoning in \textit{Johnson}, see \textit{infra} notes 148-80 and accompanying text.} Finally, Part VI discusses the potential impact of \textit{Johnson} on a multitude of similar cases, as well as glyphosate use in general.\footnote{26}{For a discussion on the potential impact of \textit{Johnson}, see \textit{infra} notes 181-200 and accompanying text.}
II. Knocking on Death’s Door: Facts of Johnson v. Monsanto Co.

From 2012 to 2016, Dewayne Johnson worked as the integrated pest manager at a school in the Benicia Unified School District in California. As part of his job requirements, Johnson frequently used Monsanto products — Roundup and Ranger Pro — and received certification for their safe application. In April 2014, when Johnson was applying Ranger Pro, the hose burst and soaked Johnson through his protective gear. After this exposure, Johnson began to develop a skin condition and six months later, his doctors diagnosed him with non-Hodgkin’s lymphoma. Johnson called Monsanto’s hotline on two separate occasions to inquire as to whether his diagnosis could be connected to his exposure to Roundup and Ranger Pro at work. The hotline representative informed Johnson that someone from Monsanto would return his call, but he never received any such communication. After his quality of life began to decrease, Johnson filed a product liability lawsuit against Monsanto in 2016, which reached trial in 2018.

At trial, Johnson sought recovery based on theories of design defect and Monsanto’s lack of adequate warning regarding Roundup’s potential danger. In August 2018, Johnson became the first plaintiff to succeed on these claims at trial against Monsanto. A unanimous jury awarded Johnson $289.25 million in total, consisting of $39.3 million in compensatory damages and $250 million in punitive damages. Monsanto filed a motion for a new

28. Id. at 438 (emphasizing Johnson’s training in Monsanto products’ correct usages).
29. Id. (describing Roundup incident details at Johnson’s workplace). During the incident, Johnson’s “skin, face, neck, and head” were saturated with Ranger Pro. Id. (noting extent of exposure).
30. Id. at 439 (stating Johnson’s diagnosis from his doctor).
31. Id. (discussing Johnson’s multiple attempts to get in touch with Monsanto).
32. Johnson, 52 Cal. App. 5th at 439 (emphasizing lack of communication from Monsanto).
33. Id. at 440 (connecting Johnson’s injury to lawsuit against Monsanto).
34. Id. (outlining Johnson’s theories of strict liability and negligent failure to warn).
35. See id. at 444, 448 (ruling in favor of Johnson on all liability theories).
36. Id. at 444 (stating Johnson’s damages awarded by jury). The compensatory damage award consisted of four million dollars for past noneconomic losses and thirty-three million dollars for future noneconomic losses based on Johnson’s argument that he should receive one million dollars for every year, up to the maxi-
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The company also filed a motion for judgment notwithstanding the verdict, asserting no reasonable jury would have reached the same conclusion and that Johnson should not receive any punitive damages. The trial court denied Monsanto’s motion for judgment notwithstanding the verdict, finding the jury’s conclusion reasonable and sufficient to support an award of punitive damage. Accordingly, the trial court upheld the jury’s conclusion that Monsanto showed malice by marketing a product with a potential link to non-Hodgkin’s lymphoma.

The court did, however, find the amount of punitive damages the jury awarded could not exceed the compensatory damages. Otherwise, the damages would be excessive and violate Monsanto’s constitutional due process rights. The trial court consequently reduced the punitive damages to match the compensatory damages, which lowered Johnson’s total award to seventy-eight million dollars. Monsanto appealed again, still unsatisfied with the size of the award, which allowed Johnson to cross-appeal, challenging the reduction of punitive damages. The court expedited the process and granted Johnson’s motion for calendar preference due to his doctors’ statement that the cancer had progressed so significantly

least average estimated life expectancy for a forty-six year old male. Id. at 447-48 (detailing breakdown of compensatory damage award).

37. See Johnson, 52 Cal. App. 5th at 444 (explaining Monsanto’s motion for new trial).

38. Id. (discussing Monsanto’s second motion arguing against punitive damages).

39. See id. (explaining trial court’s reason for rejecting Monsanto’s first motion).

40. Id. (summarizing jury’s conclusion of corporate malice).


42. See Johnson, 52 Cal. App. 5th at 445 (discussing trial court concerns over excessive penalty).

43. Johnson, 52 Cal. App. 5th at 449 (reducing Plaintiff’s damages); see also Carey Gillam, Monsanto Roundup & Dicamba Trial Tracker, U.S. RIGHT TO KNOW https://usrtk.org/monsanto-roundup-trial-tracker-index/ (last updated March 10, 2021) (stating trial court’s total damage award amount after reduction). The trial court also denied Monsanto’s motion for a new trial, as long as Johnson agreed to accept the reduced award. Johnson, 52 Cal. App. 5th at 445 (explaining trial court’s reasoning for rejecting Monsanto’s second motion).

44. Johnson, 52 Cal. App. 5th at 445 (describing aftermath of trial court’s decision).
that he may not live for more than two years to see the trial through.\footnote{See id. at 445, 448 (granting Johnson calendar preference due to life expectancy). Calendar preference allows for an expedited appeal schedule in California. \textit{Motion for Calendar Preference and Proposed Briefing Schedule, U.S. RIGHT TO KNOW,} \url{https://usrtk.org/wp-content/uploads/2018/12/Johnson-motion-for-calendar-preference.pdf} (last visited Sept. 28, 2020) (defining calendar preference).}

On July 20, 2020, the California Court of Appeal First Appellate District ruled in favor of Johnson.\footnote{See Johnson, 52 Cal. App. 5th at 436 (stating appellate court’s decision).} Based on evidence of his shortened life expectancy, however, it reduced the amount of the future noneconomic damages portion of his compensatory damages from thirty-three million to four million dollars.\footnote{Id. at 454 (noting appellate court’s reasoning for further reducing compensatory damage award).} The appellate court also found that Johnson was entitled to punitive damages, but the court again reduced the amount to match the compensatory damage award to protect Monsanto’s constitutional due process rights.\footnote{Id. at 455 (finding court must further reduce punitive damages to comply with fourteenth amendment).} This slashed both the compensatory and punitive damage awards to $10.25 million each, totaling about $20.5 million, a small fraction of his original $289.25 million dollar award.\footnote{See id. at 463 (concluding total amount of damages). Total compensatory damages came to a total of $10.25 million based on four million dollars for future noneconomic losses, four million dollars for past noneconomic losses, $819,883 for past economic losses, and $1.43 million for future economic losses. \textit{Id.} at 446-48 (breaking down compensatory damages).}

III. \textbf{WORTH MORE ALIVE THAN DEAD: BACKGROUND ON CALCULATION OF DAMAGE AWARDS AND THE SCIENTIFIC BATTLE SURROUNDING Glyphosate}

In cases involving personal injury, the goal of awarding compensatory damages is to make the victim whole by theoretically putting them in the position they were in before an incident occurred.\footnote{Gloria Belgrad, \textit{Compensation for Negligently Shortened Life Expectancy,} 29 Md. L. Rev. 24, 24 (1969) (discussing reasons for awarding compensatory damages to plaintiffs).} California tort law, however, does not allow compensation for a shortened life expectancy.\footnote{See Johnson, 52 Cal. App. 5th at 452 (reiterating inability to recover for shortened life expectancy under California law).} This prohibition is premised on the idea that courts should not compensate victims for future harm they are not guaranteed to suffer.\footnote{Id. at 454 (discussing reasoning behind disallowing recovery for shortened life expectancy). For a discussion of California’s lack of compensation for shortened life expectancy, see infra notes 71-76 and accompanying text.} The purpose behind pu-
nitive damages is to punish the negligent conduct of culpable defendants. The Supreme Court has ruled that for an award of punitive damages to be constitutional, it must not be “grossly excessive.”

A. Fault of Defendant for Punitive Damage Award

California Civil Code 3294 allows a jury to award punitive damages where a plaintiff provides “clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.” In 1985, the California Court of Appeal for the Sixth Appellate District found evidence of malice in *West v. Johnson & Johnson Products, Inc.* The court held that where adequate testing would identify the relationship between use of Johnson & Johnson’s tampon products and toxic shock syndrome, there was substantial evidence that the defendant “acted in conscious disregard of the safety of others.” Two years later, the California legislature redefined the term “malice” as used in California Civil Code § 3294. Malice is currently defined as “despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.”

California case law explored the boundaries of this new definition as it applies to product manufacturers in *Echeverria v. Johnson & Johnson.* In *Echeverria,* a woman developed ovarian cancer after long-term use of baby powder containing talc, wherein the California Court of Appeal for the Second Appellate District held that the manufacturer knew of the possible link between talc and cancer. The court determined malice could not be shown because it was

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54. *Constitutional Limits on Punitive Damages Awards: An Analysis of Supreme Court Precedent,* supra note 41 (exploring Supreme Court decisions awarding punitive damages).
57. *Id.* at 869 (connecting Johnson & Johnson’s inadequate testing to conscious disregard of others’ safety).
58. *Cal. Civ. Code* § 3294(c)(1) (1993); see *Johnson,* 52 Cal. App. 5th at 456 (explaining amendment to malice’s definition in § 3294(c)(1)).
61. *Id.* at 297-98 (concluding manufacturer knew of possible link). Further, the appellate court held that a jury could reasonably find the manufacturer took
“undisputed that there has not been direct, conclusive evidence establishing genital talc use causes ovarian cancer.”

B. Recovery of Future Noneconomic Damages

In the landmark case *Seffert v. Los Angeles Transit Lines*, the Supreme Court of California considered when, if ever, it is appropriate for appellate courts to interfere with the amount of damages awarded by a jury. The plaintiff was involved in a serious accident with a Los Angeles Transit Line (LA Transit) bus, resulting in severe, lifelong injuries. The jury awarded the plaintiff all the claimed damages, and the trial court judge denied LA Transit’s motion for a new trial on a claim of excessive damages. The California Supreme Court held that an appellate court may intervene where a judgment is excessive if the verdict “shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.”

The California Court of Appeal for the Fourth District affirmed this standard in *Buell-Wilson v. Ford Motor Co.* In this case, the plaintiff brought a product liability action against the manufacturer of her Ford SUV after an accident caused her car’s roof to cave in, leaving her paraplegic. The jury award was thirteen times the amount that counsel suggested as fair and reasonable, which the appellate court deemed as compelling evidence that the jury acted out of passion or prejudice. Additionally, the court in *Buell-Wilson* found the damage award excessive even after a reduction,
because the amount was disproportionate to the plaintiff’s remaining years of life.\textsuperscript{71}

To recover future noneconomic damages, a victim must prove they are “reasonably certain to suffer harm.”\textsuperscript{72} In \textit{Bigler-Engler v. Breg, Inc.} \textsuperscript{73} for example, a high school student suffered a serious knee injury resulting from a medical procedure and the jury awarded noneconomic damages.\textsuperscript{74} Although the appellate court acknowledged the plaintiff’s suffering, it noted her health improved significantly by the time of trial.\textsuperscript{75} The court found nothing to suggest she would experience “a significant future disability, shortened life expectancy, inability to succeed professionally, or a distrust of doctors or other fiduciary advisors[,]” so the plaintiff’s award was reduced to match what she was reasonably expected to suffer over the rest of her lifetime.\textsuperscript{76}

C. Ratio for Compensatory and Punitive Damages

The Due Process Clause of the Fourteenth Amendment seeks to bar grossly excessive punishment.\textsuperscript{77} The Supreme Court laid out three factors for determining the constitutional upper limit of punitive damages in \textit{State Farm Mut. Auto. Ins. Co. v. Campbell}.\textsuperscript{78} The first factor is the “degree of reprehensibility of the defendant’s misconduct.”\textsuperscript{79} The second factor is the “disparity between the harm the plaintiff suffered and the punitive damages award.”\textsuperscript{80} The final factor is the “difference between the punitive damages awarded by

\begin{itemize}
\item \textsuperscript{71} Id. at 550 (giving additional reason for finding damage award excessive).
\item \textsuperscript{72} Judicial Council of California Civil Jury Instruction 3905A (CACI 3905A) (providing jury instruction for determining noneconomic damage amount). There is no fixed standard to determine amount; CACI 3905A states “[t]o recover for future pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress,” the plaintiff must prove that they are “reasonably certain to suffer that harm.” \textit{Id.} (providing jury instruction).
\item \textsuperscript{73} 7 Cal. App. 5th 276, 284 (Cal. Ct. App. 2017) (finding noneconomic future damage award disproportionate to victim’s amount of future suffering).
\item \textsuperscript{74} \textit{Id.} (expressing relevant case facts).
\item \textsuperscript{75} \textit{Id.} at 302 (highlighting plaintiff’s status at time of trial).
\item \textsuperscript{76} \textit{Id.} (discussing plaintiff’s lack of future consequences from injury and court’s adjustment to award).
\item \textsuperscript{77} \textit{Constitutional Limits on Punitive Damages Awards: An Analysis of Supreme Court Precedent, supra} note 41 (emphasizing Due Process Clause prevents excessive punishment).
\item \textsuperscript{78} 538 U.S. 408, 418 (2003) (outlining considerations for punitive damages analysis).
\item \textsuperscript{79} \textit{Id.} at 418 (explaining Supreme Court intended first factor to punish or deter further than compensatory damages for particularly reprehensible conduct).
\item \textsuperscript{80} \textit{Id.} (stating second factor suggests fair ratio to satisfy due process).
\end{itemize}
jury and the awards authorized in comparable cases.”

Although the Court found no firm rule, it held that a single digit ratio between punitive and compensatory damages is generally not a due process violation. The Court determined that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”

D. Glyphosate Studies and Litigation

Since 1974, Americans alone have sprayed 3.5 billion pounds of glyphosate, while people across the world have sprayed 18.9 billion pounds of the chemical. Two-thirds of this total glyphosate usage has occurred since 1996, the year Monsanto introduced modified Roundup Ready crops resistant to glyphosate. This led to much heavier use of the herbicide since it could be used without fear of unintentionally killing all crops it was sprayed on. Monsanto promised these genetically modified crops were environmentally safe and would produce more yield than the standard crop, while causing no harm to humans or animals. A few studies, however, have demonstrated possible toxicity to livestock where glyphosate is sprayed on farmland and feed. These findings are not conclusive, but scientists are conducting more studies concerning effects on both animals and humans, who ingest byproducts from these animals.

81. Id. (providing third factor that Supreme Court determined).
82. Id. at 410 (suggesting single digit ratio comports with due process).
85. See id. (indicating majority of glyphosate spraying resulted from popularity of genetically modified crops).
86. Lindsey Konkel, What’s the world’s most widely used herbicide doing to tiny critters?, EnvTL. HEALTH NEWS (Mar. 18, 2019), https://www.chn.org/whats-the-worlds-most-widely-used-herbicide-doing-to-tiny-critters-2631750527.html (noting reason for increased herbicide usage).
87. See id. (explaining purposes of Monsanto’s Roundup Ready crops).
89. Id. (acknowledging ongoing testing to find effect on animal health).
The overflow from glyphosate-treated farms can also negatively impact nearby ecosystems. The runoff can be problematic for water supply systems and can also contaminate lakes, rivers, and streams. Behavioral changes in some mollusks, insects, and fish may result from the contamination of these aquatic environments as well. Researchers are just beginning to investigate the environmental effects of glyphosate more thoroughly, but many believe the problem lies less in the chemical’s actual toxicity and more with the scale of its use following the introduction of these genetically engineered crops.

As for glyphosate’s effects on human health, the EPA’s regulatory review of the substance concluded it is not likely carcinogenic. Alternatively, the IARC classified glyphosate as a “probable carcinogen to humans.” IARC’s classification lead to the California Office of Environmental Health Hazard Assessment (OEHHA) adding glyphosate to Proposition 65 (Prop 65) as a cancerous chemical. In 2017, plaintiffs — including Monsanto and the National Association of Wheat Growers — challenged this warning under the First Amendment. In Nat’l Ass’n of Wheat Growers v. Becerra, plaintiffs claimed that the warning requirement would force them to make highly controversial “false and misleading”
In 2020, a judge permanently enjoined Prop 65’s warning against glyphosate.\(^{100}\)

Bayer AG has faced thousands of pending lawsuits concerning non-Hodgkin’s lymphoma cases caused by Roundup ever since the Monsanto acquisition.\(^{101}\) After Johnson’s original trial in 2018, juries heard two more cases claiming Roundup caused plaintiffs to develop cancer.\(^{102}\) The first was \textit{Hardeman v. Monsanto Co.}\(^{103}\) In that case, a unanimous jury found that Roundup was a “substantial factor” in causing plaintiff’s non-Hodgkin’s lymphoma and awarded the plaintiff eighty million dollars in damages.\(^{104}\) In July of 2019, the judge upheld the $5.27 million awarded to Hardeman in compensatory damages but reduced punitive damages from seventy-five million dollars to twenty million dollars, finding the ratio was unconstitutional.\(^{105}\) The second case was \textit{Pilliod v. Monsanto Co.},\(^{106}\) concerning a married couple in their seventies, both of whom developed non-Hodgkin’s lymphoma after many years of Roundup use around their three properties.\(^{107}\) A jury found again that Roundup was a substantial factor in causing the couple’s cancer and that Monsanto knew the risks associated with Roundup but failed to warn users of its dangers.\(^{108}\) The jury awarded more than

\(^{99}\) Id. (explaining litigation occurring over glyphosate toxicity debate).
\(^{100}\) \textit{Court Bars CA Prop 65 Glyphosate Warning Requirement, supra note 96} (stating outcome of case).
\(^{101}\) Gillam, \textit{supra} note 43 (discussing Bayer AG’s issue with lawsuits after buying Monsanto Co.).
\(^{103}\) 216 F. Supp. 3d 1037 (N.D. Cal. 2016) (first case after \textit{Johnson} to hold Roundup contributed to plaintiff’s cancer).
\(^{108}\) Id. (stating jury findings).
two billion dollars in punitive damages, which the court later reduced to eighty-seven million dollars to fall within constitutional limits.\textsuperscript{109}

IV. LOOKING DEATH IN THE EYE: THE APPELLATE COURT’S ANALYSIS

In Johnson, the California Court of Appeal First Appellate District upheld the jury’s award of compensatory and punitive damages, but found the law required a reduction of both.\textsuperscript{110} The appellate court heavily focused on the future noneconomic damage award, finding the amount improper in light of Johnson’s shortened life expectancy.\textsuperscript{111} In reaching this decision, the appellate court relied mainly on California case law and the jury instructions given.\textsuperscript{112} The court also reviewed the evidence against Monsanto and found it substantial enough to affirm the jury’s punitive damage award for Johnson, although the amount of the award was reduced further.\textsuperscript{113} This reduction was based on the trial court’s finding that a one-to-one ratio was appropriate.\textsuperscript{114}

A. Punitive Damage Award

In considering whether the punitive damage award was warranted, the California Court of Appeal First Appellate District looked to see if the plaintiff had met the burden of proof by providing “clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.”\textsuperscript{115} In West, adequate testing would have shown a link between tampon use and infection, so the

\textsuperscript{109} Id. (explaining judge’s reduction of punitive damage award). The court additionally decreased the couple’s combined fifty-five million-dollar compensatory damages to seventeen million dollars. Id. (acknowledging judge’s decrease of compensatory damages).


\textsuperscript{111} Id. at 451 (concentrating discussion on future noneconomic damage portion of compensatory award).

\textsuperscript{112} Id. at 450-55 (discussing appellate court’s reasoning against recovery for shortened life expectancy).

\textsuperscript{113} Id. at 455 (highlighting appellate court’s treatment of punitive damage award).

\textsuperscript{114} Id. at 462 (focusing on appellate court’s extension of trial court’s one-to-one ratio).

\textsuperscript{115} Johnson, 52 Cal. App. 5th at 455 (internal quotation omitted) (citing Cal. CIV. CODE § 3294(a) (1993)). The evidence supporting this must be viewed in the light most favorable to the prevailing party. Id. (adhering to standard of review in substantial evidence determination).
company acted in conscious disregard of the safety of others.\textsuperscript{116} Monsanto attempted to distinguish \textit{West} because the definition of “malice” had changed since \textit{West} to include the terms “despicable” and “willful.”\textsuperscript{117} While a plaintiff must now show the defendant willfully and consciously disregarded the dangers a product presents, the appellate court stressed that the jury was instructed on the current definition of “malice” and still found reason to apply it against Monsanto.\textsuperscript{118}

The court found it reasonable for a jury to infer malice based on the evidence Johnson presented at trial.\textsuperscript{119} This was due to Monsanto “discounting legitimate questions surrounding glyphosate’s genotoxic effect and failing to conduct adequate studies.”\textsuperscript{120} Furthermore, Monsanto’s failure to return phone calls from Johnson reinforces the company’s lack of concern for public safety.\textsuperscript{121}

Monsanto also attempted to use the recently decided \textit{Echeverria} case to bolster its argument against punitive damages, but the court rejected the application of that case’s conclusion here.\textsuperscript{122} In \textit{Echeverria}, the manufacturer knew only of a possible link between their product and cancer, which they worked to try and avoid.\textsuperscript{123} Also, the IARC conclusion there found limited evidence of a possi-

\begin{itemize}
\item \textsuperscript{116} West v. Johnson & Johnson Prods., Inc., 174 Cal. App. 3d 831, 869 (Cal. Ct. App. 1985) (reiterating finding of malice in \textit{West}).
\item \textsuperscript{117} Johnson, 52 Cal. App. 5th at 456 (stating change in malice’s definition).
\item \textsuperscript{118} Id. (rejecting Monsanto’s argument).
\item \textsuperscript{119} Id. at 459 (stating reasonableness based on evidence from trial).
\item \textsuperscript{120} Id. at 457 (reaffirming reasonableness of jury’s finding based on evidence presented at trial). Johnson’s counsel presented a 1983 study that showed a link between glyphosate and kidney tumors in mice, resulting in an EPA statement calling glyphosate a possible carcinogen. \textit{Id.} (discussing previous glyphosate study on mice). Monsanto refused to accept this and in reaffirming the data, claimed it found a flaw. \textit{Id.} (stating Monsanto’s refusal to accept EPA statement on glyphosate’s cancer causing ability). EPA recommended a new study be completed but Monsanto never did so. \textit{Id.} (emphasizing Monsanto’s lacking follow up study). Subsequent studies reaffirmed an association between glyphosate and tumors in mice. \textit{Johnson}, 52 Cal. App. 5th at 457 (detailing various testing outcomes). It was suggested Monsanto conduct further testing, but it is disputed whether or not this testing was completed. \textit{Id.} (outlining one issue debated at trial).
\item \textsuperscript{121} Id. at 458 (stating case fact that could contribute to jury’s punitive damage award).
\item \textsuperscript{122} Johnson, 52 Cal. App. 5th at 459-60 (stating appellate court’s refusal to apply \textit{Echeverria}).
\item \textsuperscript{123} Echeverria v. Johnson & Johnson, 37 Cal. App. 5th at 322 (Cal. Ct. App. 2019) (highlighting company’s focus on avoiding conclusion that talc could cause ovarian cancer); \textit{see also} Johnson, 52 Cal. App. 5th at 459-60 (differentiating manufacturer’s knowledge of mere possible link).
\end{itemize}
ble association. The appellate court distinguished *Echeverria* from this case due to evidence that glyphosate increased the risk of cancer and IARC’s conclusion that there is a high probability that glyphosate is cancerous.

Monsanto maintained that independent experts in this field insist that glyphosate does not pose a carcinogenic risk to humans. The appellate court recognized that, outside of IARC’s determination, no regulatory body had found that glyphosate causes cancer. The evidence presented against Monsanto at trial was nevertheless sufficient to establish corporate malice, warranting punitive damages.

### B. Future Noneconomic Damage Award Reduction

The appellate court considered whether Johnson’s shortened life expectancy allowed for the future noneconomic damage award of thirty-three million dollars. The court, relying on *Seffert*, found that Johnson’s continuous, significant pain and suffering as a result of his cancer was horrifying and overwhelming. The large future noneconomic damage award, therefore, did not shock the conscience according to the court. The appellate court rejected Monsanto’s argument that the award showed the jurors clearly acted with passion, prejudice, or corruption, noting the jury asked...
questions and deliberated for three days before returning a verdict. While the appellate court recognized the punitive damage award was high, the amount was only two-thirds of what Johnson’s counsel had requested, whereas the amount awarded by the jury in Buell-Wilson was thirteen times the amount counsel had asked for.

The appellate court agreed with Monsanto, however, that the future noneconomic damage award was not supported in this case. The court pointed to the jury instruction under CACI 3905A, which was given with no objection at trial. On appeal, Johnson argued that he should be awarded damages for his shortened life expectancy. The court did not accept Johnson’s argument that the instructions given in Buell-Wilson included shortened life expectancy under noneconomic damages, since that language in CACI 3905A is no longer present. Johnson also looked to Bigler-Engler to help his case because the court in that case listed the lack of a shortened life expectancy as a factor used to reduce the damages amount owed to the victim. The appellate court clarified that life expectancy was only used in Bigler-Engler to show that the amount awarded was disproportionate to how much the plaintiff would actually suffer over the course of her remaining life.

The appellate court found issue with other cases relied on by Johnson because they were from states that allowed recovery for “loss of enjoyment of life beyond a plaintiff’s expected shortened life span . . . .” Although the appellate court stated there were valid policy arguments to support it, the court emphasized California law does not allow recovery for a shortened life span. The appellate court concluded one million dollars per year for pain and suffering was adequate, but since there was no concrete evidence of

132. Id. (stating jury deliberation refutes showing of prejudice).
133. Id. at 450-51 (distinguishing case from Buell-Wilson).
134. Johnson, 52 Cal. App. 5th at 451 (agreeing with Monsanto on unwarranted future noneconomic damage award amount).
135. Id. at 454 (noting jury instructions were not objected to at trial).
136. Id. at 455 (stating Johnson’s argument on appeal).
137. Id. at 452 (rejecting Johnson’s reliance on Buell-Wilson).
138. Id. at 453 (stating use of shortened life expectancy in damage calculation).
139. Johnson, 52 Cal. App. 5th at 453 (clarifying court’s proper use of shortened life expectancy to calculate damages).
140. Id. (rejecting similar out of state cases).
141. Id. at 454 (concluding California law precludes recovery for harm not reasonably certain to suffer).
Johnson’s actual life expectancy, the court felt four million dollars was appropriate in this case. 142

C. One-to-One Ratio Supporting Due Process

The appellate court discussed Johnson’s cross-appeal challenging the trial court’s reduction of his punitive damage award. 143 In doing so, it found the trial court acted appropriately in applying the State Farm Mutual Automobile Insurance Co. three-factor test for determining the constitutional upper limit in setting punitive damages. 144 The appellate court accepted the trial court’s rationalization that, particularly in cases where there is “a punitive element to the compensatory damages award, the law supports a one to one ratio for punitive damages.” 145 Although the court also accepted Johnson’s argument that there is no formula that requires a one-to-one ratio to be set by a court, it found no error on the trial court’s part in doing so based on the facts of the case. 146 Since the appellate court found the one-to-one ratio supported constitutional due process requirements, and the court determined the future noneconomic damages award should be reduced, it further reduced Johnson’s punitive award to maintain this ratio. 147

V. KILL OR BE KILLED: A CRITICAL ANALYSIS OF HOW THE APPELLATE COURT SLASHED DAMAGES AND CONTINUED CONFUSION

The California Court of Appeal First Appellate District’s finding for the plaintiff was correct under the circumstances of the case. 148 The court’s acquiescence of California’s state law prohibition on recovery for a shortened life expectancy, however, deprived a dying man of what a jury rightfully awarded him. 149 The appellate

142. Id. (listing appellate court’s reduced damage award amount).
143. Id. at 461 (stating reason for Johnson’s cross-appeal).
144. Johnson, 52 Cal. App. 5th at 462 (internal quotations omitted) (approving of trial court’s constitutional analysis determining punitive damage award cap).
145. Id. (showing agreement with trial court’s rationale).
146. Id. (summarizing appellate court’s basis for upholding one-to-one ratio).
147. Id. (concluding further reduction of damage award amount was required based on trial court’s logic).
court’s insistence on upholding the trial court’s one-to-one ratio for compensatory and punitive damages worked to maintain a constitutional limit, although the size of its reduction was unnecessary.150

The main point of contention for the appellate court concerning Johnson’s jury award was the future noneconomic damage element.151 The jury awarded thirty-three million dollars in future noneconomic damages and the amount was found to be fair by the trial court.152 The appellate court’s reduction was in direct opposition to the California Supreme Court’s ruling in Seffert.153 In finding the future noneconomic damage award did not “shock the conscience or suggest passion, prejudice, or corruption on the part of the jury[,]” the appellate court should have deferred to the jury’s discretion.154 Instead, the court emphasized that economic damages for a shortened life expectancy are not recognized in California, maintaining the jury instruction’s clarity.155

That clarity is questionable when looking at the case law Johnson used in his argument in favor of recovery for a shortened life expectancy.156 The same jury instructions relied on to support the lack of available recovery for shortened life expectancy had previously expressly included shortened life expectancy under noneconomic damages in Buell-Wilson.157 Additionally, in Bigler-Engler, the court listed lack of shortened life expectancy as a factor when reducing plaintiff’s damages.158 Logically, this would support the argument that the opposite is true, meaning a shortened life


152. See Johnson, 52 Cal. App. 5th at 449 (assuming trial court found amount fair since it was not reduced).


154. See Johnson, 52 Cal. App. 5th at 450 (emphasizing appellate court’s lack of shock).

155. Id. at 452 (explaining appellate court’s reasoning for decision).

156. See id. at 452-53 (outlining cases relied on by Johnson to support argument).

157. Id. (indicating prior version of jury instructions included term shortened life expectancy).

expectancy should result in a higher award.\textsuperscript{159} Giving little reasoning as to the inapplicability of these prior cases, the court heavily relied on the current language in the jury instructions.\textsuperscript{160} The court recognized valid policy arguments to allow recovery for a shortened life expectancy, but did not explore them further.\textsuperscript{161} These policy arguments are especially relevant in a case like \textit{Johnson}, where Monsanto will pay less money for shortening a man’s life than it would for simply injuring him.\textsuperscript{162} This decision leaves Johnson’s wife and children not only deprived of a husband and father, but also of financial support for the thirty-three years he could have otherwise lived.\textsuperscript{163}

The increasing commonality of states in the twenty-first century allowing recovery for this type of damage strengthens the validity of these policy reasons.\textsuperscript{164} Plaintiffs should be compensated for the loss of enjoyment of their lives, particularly when they are still living at the time of the trial and experiencing the detrimental effects of their injuries.\textsuperscript{165}

In rejecting Monsanto’s argument that \textit{Echeverria} applies here, the court properly distinguished the facts of the present case.\textsuperscript{166} Although the appellate court could have sided with Monsanto and found no “direct, conclusive evidence” of glyphosate causing cancer, it instead found that the existing studies and level of IARC class-
sification made that determination uncertain.\textsuperscript{167} From this finding, the appellate court could have interpreted corporate malice based on the IARC’s determination alone, but it instead emphasized the hesitation of sustaining damages due to the lacking evidence from any other regulatory body.\textsuperscript{168} Regardless, the appellate court found other substantial evidence to show Monsanto acted with corporate malice, thereby deferring to the jury’s punitive damages award.\textsuperscript{169} This finding exemplified the deference that should have been given to the jury’s compensatory award.\textsuperscript{170}

The appellate court unnecessarily reduced Johnson’s punitive damage award in following a one-to-one ratio regarding the reduced compensatory damage award.\textsuperscript{171} This alteration decreased the punitive damages awarded by ninety-six percent, bringing Johnson’s total award from $289.25 million to $20.4 million.\textsuperscript{172} Single digit ratios have generally been upheld as constitutional by the Supreme Court, so this large reduction was not essential.\textsuperscript{173} The appellate court itself stated there is no fixed formula requiring this one-to-one ratio.\textsuperscript{174}

The Supreme Court’s only requirement in reducing damages is the consideration of the three factors set forth in \textit{State Farm}.\textsuperscript{175} Here, the appellate court did not conduct this analysis, directly opposing California case law.\textsuperscript{176} In \textit{Bigler-Engler}, the court reasoned that a reduction of the noneconomic damage award did not automatically call for a reduction of punitive damages; and the court in

\begin{itemize}
\item \textsuperscript{167} \textit{Id.} at 459-60 (internal quotation omitted) (showing more than possible link between glyphosate and cancer).
\item \textsuperscript{168} \textit{See} \textit{id.} at 460 (discussing hesitance for sustaining punitive damage award).
\item \textsuperscript{169} \textit{Id.} (affirming jury finding of malice).
\item \textsuperscript{170} \textit{See} \textit{id.} (emphasizing significant weight given to jury’s punitive damage award not resulting from prejudice or shocking conscience).
\item \textsuperscript{171} \textit{See} Johnson, 52 Cal. App. 5th at 462 (discussing reasoning for punitive damage award reduction).
\item \textsuperscript{172} \textit{Id.} at 463 (emphasizing large damage award reduction). The punitive damage award amount was originally $250 million, was then slashed to $78 million by the trial court, and brought down to about $10.25 million on appeal. \textit{See} Alan Lazarus, \textit{California [Again] Confronts the High Cost of Litigation Uncertainty}, N\textsuperscript{AT}L\textsuperscript{L.} REV. (July 24, 2020), https://www.natlawreview.com/article/california-again-confronts-high-cost-litigation-uncertainty (showing gradual decrease of punitive damage award amount).
\item \textsuperscript{174} Johnson, 52 Cal. App. 5th at 462 (finding one-to-one ratio not required by Constitution).
\item \textsuperscript{175} \textit{State Farm Mut. Auto. Ins. Co.}, 538 U.S. at 410 (detailing factors).
\item \textsuperscript{176} \textit{See} Petition for Review, supra note 164 at 11-12 (indicating appellate court’s lack of independent analysis conflicts with existing California case law).
\end{itemize}
Buell-Wilson upheld a two-to-one ratio based on a separate assessment of the factors from State Farm.177 The Supreme Court stated that a lesser ratio, such as one-to-one, may be the cap on a damage award where the compensatory damages are substantial.178 After the reduction, Johnson’s compensatory award was less substantial than the other Roundup cases that have gone to trial, but the appellate court here was the only court to subject the award to a one-to-one ratio.179 The decision in Johnson exacerbates conflict and inconsistency in this area.180

VI. Scared to Death: Impact on Future Roundup Cases and Glyphosate Use in the United States

Since this was the first case concerning Roundup’s cancer link to proceed to trial, the California Court of Appeal First Appellate District’s analysis was, and continues to be, important for similar plaintiffs awaiting their day in court.181 All three of the Roundup cancer cases that have been tried concluded that Monsanto was at fault.182 Moreover, all three cases ended with substantial damage awards from the juries.183 In all three cases, however, the punitive damage awards have ultimately been decreased to maintain a constitutional limit.184 This serves as an indicator that any extreme ratio in future similar cases will likely result in a reduction of punitive damages, although Johnson has been the only case to go as low as a one-to-one ratio.185


180. See Petition for Review, supra note 164 at 36 (showing result of conflicting case law).

181. See Lazarus, supra note 174 (emphasizing importance of first Roundup case).

182. See Gillam, supra note 101 (finding Monsanto at fault in all three cases).

183. See id. (discussing outcomes of current Roundup litigation).

184. For a discussion of punitive damage reductions in Hardeman, see supra notes 103-05 and accompanying text. For a discussion of punitive damage reductions in Pilliod, see supra notes 106-09 and accompanying text.

185. For a discussion of punitive damage reduction in Johnson, see supra notes 145-49 and accompanying text.
The appellate court’s refusal to recognize recovery for shortened life expectancy in this case highlights the detrimental effects on plaintiffs that eventually lose their lives at the hands of a defendant.\footnote{186}{See The Measure of Damages for a Shortened Life, supra note 164, at 506 (detailing policy arguments in favor of recovery for shortened life expectancy).} A majority of other states have found ways to resolve this problem, and hopefully the outcome of this case will give California the push it needs to fairly compensate for life lost.\footnote{187}{See Petition for Review, supra note 166, at 34-35 (comparing California’s relevant law with other states’).} Johnson’s counsel affirmed this sentiment stating, “hopefully, when the issue gets before the California Supreme Court, we can change this irrational law.”\footnote{188}{Jury Awards Groundskeeper $289.2 Million in Landmark Monsanto Roundup Verdict, supra note 150 (quoting Johnson’s counsel).}

This appeal also called national attention to one of the most interesting and challenging scientific disputes of the day, stemming from the EPA and IARC studies that produced different results concerning glyphosate.\footnote{189}{See Emily Dixon, Common weed killer glyphosate increases cancer risk by 41%, study says, CNN HEALTH, https://www.cnn.com/2019/02/14/health/us-glyphosate-cancer-study-scli-intl/index.html (last updated Feb. 15, 2019, 2:45 PM) (contrasting EPA study results with IARC study results).} The EPA and IARC looked at many of the same studies, but the EPA relied on “unpublished regulatory studies” that were heavily industry-funded, while IARC primarily looked to peer-reviewed studies.\footnote{190}{See Charles Benbrook, How did the US EPA and IARC reach diametrically opposed conclusions on the genotoxicity of glyphosate-based herbicides, ENVTL. SCI. EUR. (Jan. 14, 2019), https://enveurope.springeropen.com/articles/10.1186/s12302-018-0184-7 (contrasting conclusions of two scientific bodies).}

The permanent enjoinment of Prop 65’s warning against glyphosate, resulting from Nat’l Ass’n of Wheat Growers, directly contradicts the finding that Roundup was a substantial factor in causing the Hardeman and Pilliod plaintiffs’ cancer, adding to the confusion and uncertainty that surrounds glyphosate.\footnote{191}{For a discussion of the litigation concerning glyphosate, see supra notes 97-110 and accompanying text.} The three courts that found against Monsanto in Johnson, Hardeman, and Pilliod are seemingly a step toward establishing glyphosate as a carcinogen, though there is still no clear consensus.\footnote{192}{See Johnson v. Monsanto Co., 52 Cal. App. 5th 434, 456 (Cal. Ct. App. 2020) (discussing lack of unified opinion); see also Hardeman v. Monsanto Co., 216 F. Supp. 3d 1037 (N.D. Cal. 2016) (finding Roundup was substantial factor in causing plaintiff’s cancer); see also Pilliod v. Monsanto Co., No. A158228, 2020 WL 1986599 (Cal. Ct. App. 2020) (declaring Roundup played part in couple’s cancer and Monsanto failed to warn of risk).} All of the information introduced at the Johnson trial could easily lead one to be suspicious
of Monsanto, so it is unsurprising that the jury found against the company. What is surprising is that the United States has yet to manage the widespread repercussions of failing to identify glyphosate as a carcinogen. Roundup continues to be a best-seller despite the thousands of cases claiming the product caused plaintiffs to develop non-Hodgkin’s lymphoma. With the numerous pending lawsuits and possibility of a cancer link, the market value of Bayer AG is declining, and shares have dropped as much as forty percent since the company’s acquisition of Monsanto. In response to the growing concern surrounding glyphosate, the chemical has been banned or restricted in twenty-one countries around the world. Most recently, several United States cities and institutions have imposed similar restrictions. These restrictions may be helpful to combat the aquatic and terrestrial environmental concerns that have risen as a result of excessive glyphosate spraying. With more than forty thousand plaintiffs claiming exposure to glyphosate from Roundup caused their cancer, and the emerging studies finding negative consequences on the environment from extensive use, a ban against glyphosate use in the United States may not be too far off.

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193. Id. at 457-59 (emphasizing existence of substantial evidence to support jury’s finding of malice).
194. See Which Countries and States are Banning Roundup? THE CARLSON L. FIRM (Nov. 19, 2020), https://www.carlsonattorneys.com/news-and-update/banning-roundup (explaining United States slow reaction concerning glyphosate). The federal government has not issued any sort of ban on glyphosate, although every state has created an online petition for state governors to ban the chemical and thousands of lawsuits have been filed to hold Bayer-Monsanto accountable. Id. (discussing private citizen’s actions in fight against glyphosate).
195. See Charles, supra note 10 (stating Roundup’s continued popularity in United States despite claims against Monsanto).
196. Cohen, supra note 102 (discussing effect of glyphosate litigation on Bayer AG).
197. Glyphosate Herbicides Now Banned or Restricted in 21 Countries Worldwide - Sustainable Pulse Research, SUSTAINABLE PULSE (May 28, 2019, 4:00 PM), https://sustainablepulse.com/2019/05/28/glyphosate-herbicides-now-banned-or-restricted-in-17-countries-worldwide-sustainable-pulse-research (listing countries that have ban or restriction on glyphosate).
198. Id. (discussing U.S. locations with glyphosate bans or restrictions).
199. For a discussion of environmental studies concerning glyphosate, see supra notes 84-93 and accompanying text.
200. See Malkan, supra note 17 (noting number of plaintiffs to be impacted by Johnson decision).

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