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Punitive Damages in Products Liability Cases

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PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES

INTRODUCTION

Richardson-Merrell, Inc., developed and marketed in the late 1950's a drug known as MER/29 to help reduce blood cholesterol, then thought to be a major cause of hardening of the arteries, eventually leading to a heart attack. As the use of the drug became widespread, doctors and health officials noticed side effects which they attributed to the drug, although Richardson-Merrell had not disclosed that any such consequences could result from using the drug. The most serious side effect was the appearance of cataracts on the eyes of some users, a condition which led to partial loss of sight in a few cases. Investigation by plaintiffs' attorneys and the Food and Drug Administration of Richardson-Merrell's conduct in producing and marketing MER/29 revealed records and tests had been falsified and a report to the FDA, necessary in order to market a new drug, contained false information as to the drug's safety. Well over 1000 personal injury claims were eventually filed against the manufacturer of MER/29, many seeking punitive damages in addition to compensatory damages.[1]

The MER/29 litigation clearly brought to focus for the first time the issue of whether punitive damages should and could be allowed in products liability cases.[2] At first glance, the MER/29 litigation appears to present the perfect situation for allowing punitive awards. A California court was satisfied that deliberate falsification of safety information justified applica-

1. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 116-18 (1968) [hereinafter cited as Rheingold]. The conduct of Richardson-Merrell may not have been as bad as Rheingold's description implies since the court did not discuss punitive damages or even find the company liable in Lewis v. Baker, 243 Ore. 317, 413 P.2d 400 (1966) (overruled on the issue of adequacy of warning to find liability in McEwen v. Ortho Pharmaceutical Corp., 528 P.2d 522, 534 (Ore. 1974)).

2. *See, e.g.*, Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). In Standard Oil Co. v. Gunn, 234 Ala. 598, 176 So. 332 (1937), injury resulted from a defective product but the issue of punitive damages was considered as a problem in contracts. *See* Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972) [hereinafter cited as Tozer]; Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972) [hereinafter cited as Note, *Punitive Damages*].

tion of the doctrine of punitive damages.[3] However, a federal court in New York concluded that allowing punitive damages in a products case created problems which courts could not effectively resolve and therefore did not allow such damages. Those problems emerge, that court explained, because the circumstances presented by a products case are necessarily different than those presented by cases which have traditionally allowed punitive damages.[4]

This comment will explore the function and application of punitive damages and consider the circumstances of products liability cases. From that, this comment will advance the thesis that products liability cases are unlikely ever to be appropriate for punitive damage awards within the traditional doctrine. To the extent that courts should punish or deter commercial callousness toward consumer safety, the doctrine of punitive damages must be modified. Any modification, however, will confront the courts with problems which they cannot effectively resolve. The legislature, not the courts, should act to deter and punish manufacturers for marketing products in disregard of consumer safety.

THEORETICAL BASIS OF PUNITIVE DAMAGES DOCTRINE

Punitive Damages Theory Generally

Punitive damages have been allowed since 1763 as punishment for a defendant's outrageous conduct,[5] a practice developed and sustained in part by the inability of courts at that time to set aside excessive jury awards.[6] Although courts now have the power to limit excessive awards, the doctrine has become rooted in our system of law and the great majority of states allow punitive damages.[7]

As a doctrine based on punishment, exemplary damages have been criticized as an anomaly in the civil law, "the sole object [of which] is to return full monetary compensation for

3. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

4. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840-41 (2d Cir. 1967).

5. Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763); *see* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957) [hereinafter cited as Note, *Exemplary Damages*].

6. W. HALE, DAMAGES 302 (2d ed. 1912) [hereinafter cited as HALE]; Note, *Exemplary Damages*, *supra* note 5, at 518-20.

7. Note, *Exemplary Damages*, *supra* note 5, at 517-18.

a legal wrong . . . ."[8] The New Hampshire Supreme Court wrote in 1873,

> What is a civil remedy but . . . compensation for damage sustained by the plaintiff? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy, . . . deforming the symmetry of the body of the law.[9]

Professor Morris, in an often cited article on punitive damages, was less critical of the doctrine. He believed that punishment is a part of every compensatory damage award, and thus a proper concern in civil cases. The plaintiff, it is true, is compensated because he is injured but the defendant is made to pay that compensation because he is at fault in causing the injury. Any payment by the defendant, therefore, serves to punish him and admonish him and others not to cause injury.[10] The idea of compensation, however, is so ingrained in the notion of damages that one tends to forget this admonitory function.[11] Professor Morris concluded that "the scope of the use of punitive damages would be framed in terms of the needs and efficacy of admonition . . . ."[12] But where they cannot be so framed, he conceded, punitive damages serve no effective function.[13]

Recognition of the punitive aspect of compensatory damages, however, does not establish in them a punitive purpose. Otherwise, punitive damages could be claimed in any situation where the defendant was at fault. The civil law developed principles of fault to establish who should sustain the loss caused by an injury, not to determine whether the tortfeasor should be

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8. Davis v. Hearst, 160 Cal. 143, 162, 116 P. 530, 539 (1911); HALE, *supra* note 6, at §§ 87-88; C. MCCORMICK, DAMAGES 275 (1935) [hereinafter cited as MCCORMICK]; Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished,* in THE CASE AGAINST PUNITIVE DAMAGES 4 (Defense Research Institute 1969).

9. Fay v. Parker, 53 N.H. 342, 382 (1873).

10. Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173, 1174, 1177, 1182 (1931) [hereinafter cited as Morris]; Note, *Exemplary Damages, supra* note 5, at 522-23.

11. Morris, *supra* note 10, at 1187-88.

12. *Id.* at 1191.

13. *Id.* at 1192-95.

punished. The civil law, in its concern for punishment, focuses on the defendant's state of mind in causing an injury[14] and has formulated a doctrine that attaches to intentional misconduct.

The necessary prerequisite for punitive damages, according to Professor McCormick, is "a positive element of conscious wrongdoing."[15] It is not enough that the defendant was at fault in causing the injury—there also must be the aggravated circumstance of the defendant having a culpable mind in causing the injury.[16] This state of mind can exist in two situations where the injury is intentional.

The most easily recognized situation is where the injury is deliberately caused by the defendant's ill will toward the plaintiff or by some evil motive.[17] In the second situation, the injury can be said to be intentional, thus indicating a culpable mind, without the presence of ill will. Where the defendant acts, knowing that his conduct will result in an injury, the law can presume that the injury was intended.[18] The aggravating circumstance is the consciousness that injury will result from the conduct.

A third situation is occasionally but incorrectly considered appropriate for punitive damages. This is the case where the defendant realizes that his conduct poses a risk of injury. Where there is a possibility that an injury will not result from certain conduct, the law cannot presume that the injury was intentional. Therefore, unless the risk was prompted by ill will or evil motive, there is no culpable mind. At most, the defendant is guilty of gross negligence which could be characterized as recklessness. A fine line separates intentional infliction of injury from gross negligence, but it must be distinguished.[19] Although the former justifies punitive damages, the latter does not.[20]

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14. D. DOBBS, REMEDIES 205 (1973) [hereinafter cited as DOBBS]; *see, e.g.*, G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

15. MCCORMICK, *supra* note 8, at 280. *See also* W. PROSSER, THE LAW OF TORTS 9-10 (4th ed. 1971) [hereinafter cited as PROSSER].

16. DOBBS, *supra* note 14, at 205; HALE, *supra* note 6, at 200; MCCORMICK, *supra* note 8, at 280.

17. PROSSER, *supra* note 15, at 9-10.

18. Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 922 & n.10, 523 P.2d 662, 671 & n.10, 114 Cal. Rptr. 622, 631 & n.10 (1974).

19. Prosser referred to gross negligence as that "unhappy term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages." PROSSER, *supra* note 15, at 10.

20. *See, e.g.*, Gombos v. Ashe, 158 Cal. App. 2d 517, 527, 322 P.2d 933, 939

Professor Morris cited an example[21] to illustrate a nondeliberate injury that is presumed to be intentional.[22] Suppose that a man deliberately shoots a gun into a crowded train. Even assuming he had no evil motive, he must have known that somebody certainly would be injured. There is a presumption of intent to injure based on the circumstances. A less clear example, which illustrates the difficulty of distinguishing between gross negligence and conscious wrongdoing associated with a culpable mind, was considered by Judge Friendly.[23] Suppose that a man, who knows that he is drunk, drives his automobile. The man is unconscious of his victim and nondeliberately causes an accident. Judge Friendly considered this to be a proper situation in which to award punitive damages.[24] The rationale for allowing punitive damages here is best understood by considering this to be a situation where the risk of injury was so high as to create a certainty that injury would result and therefore an inference that the injury was intentional. California, on the contrary, has consistently refused to allow punitive damages in this type of case,[25] although the force of that position has recently been undermined.

In addition to punishment, punitive damages have also been awarded as a method of deterring undesirable conduct.[26] The functions of punishment and deterrence are closely connected and thus, as with the punitive function, punitive damages are not used to deter every act of misconduct, but only intentional acts. Although the efficacy of the deterrent function has been criticized,[27] there are situations where intentional injuries can best be prevented by the use of punitive damages. For example, where a defendant has sold worthless bonds, a return of the victim's purchase price (by way of compensatory

(1958), where the court wrote that "[m]ere negligence, even gross negligence is not sufficient to justify such an award."

21. Morris, *supra* note 10, at 1181.

22. Injury may be nondeliberate in the sense that it was not planned by the defendant and yet still be intentional in the sense that defendant knew that his conduct would cause injury. *Compare* G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 30, 122 Cal. Rptr. 218, 223 (1975), *with* Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 922, 523 P.2d 662, 671, 114 Cal. Rptr. 622, 631 (1974).

23. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838 (2d Cir. 1967).

24. *See, e.g.*, PROSSER, *supra* note 15, at 10 n.6.

25. *See, e.g.*, Gombos v. Ashe, 158 Cal. App. 2d 517, 527-28, 322 P.2d 933, 940 (1958).

26. Note, *Exemplary Damages*, *supra* note 5, at 522.

27. *See* DOBBS, *supra* note 14, at 219-20 & n.88.

damages) will not cause the defendant to suffer any loss.[28] In other situations the defendant might even be willing to suffer what would appear to be a loss by paying compensatory damages if that was less expensive than refraining from causing an injury.[29] A defendant might even go so far as to consider compensatory damages a routine cost of business, payment of which would still leave him better off than changing his method.[30] In this situation, compensatory damages would not even serve to admonish him. Punitive damages, by adding to the cost of causing an injury, can force a defendant to avoid inflicting injury.

A few courts have also considered compensation for losses or costs not recoverable by ordinary damages to be a sufficient foundation for awarding punitive damages.[31] Additionally, conduct which is deserving of punishment might continue unabated or go unpunished if the public prosecutors do not act and the compensatory recovery for the plaintiff is not sufficient to justify the cost of proving the defendant was at fault.[32] These rationales are less valid today since actual damages may include allowance for pain and suffering;[33] further, the develop-

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28. This was recognized in Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 492 (1961), where the court wrote:

> Exemplary damages are more likely to serve their desired purpose of deterring similar conduct in a fraud case . . . than in any other area of tort. . . . A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff.

29. Funk v. H.S. Kerbaugh, Inc., 222 Pa. 18, 70 A. 953 (1908). In this case, the defendant continued blasting rock despite the plaintiff's complaint that his property was being damaged as a result. Apparently the defendant thought that paying for the property damage was cheaper than using some other method of removing the rock.

30. The doctrine of strict liability recognizes that some products inevitably will be injurious. Since manufacturers confront a constant risk of injury, the cost of compensating injured consumers can be included as a cost of doing business. However, this is not the same as including the compensation for *avoidable* injuries in the cost of doing business. *See generally* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965) [hereinafter cited as Traynor].

31. MCCORMICK, *supra* note 8, at 277; Note, *Exemplary Damages*, *supra* note 5, at 520. Three states have expressly recognized this justification: Doroszka v. Lavine, 11 Conn. 575, 150 A. 692 (1930); Wise v. Daniel, 221 Mich. 220, 190 N.W. 746 (1922); Fay v. Parker, 53 N.H. 342 (1873).

32. DOBBS, *supra* note 14, at 205; MCCORMICK, *supra* note 8, at 276; *cf.* Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307 (1969).

33. DOBBS, *supra* note 14, at 136. A general rule throughout the United States is that a successful litigant may not recover his attorney's fees from the losing party. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974). This rule is codified in CAL. CIV. PRO. CODE § 1021 (West 1955).

ment of concepts of liability without fault makes the cost of prosecuting a tortfeasor less expensive since liability is much easier to establish. At least with respect to products liability cases, therefore, these justifications cannot easily be accepted.[34]

The argument that conduct might go unpunished without the allowance of punitive damages applies only to the situation where the defendant was reckless but could not be said to have intended the injury, since punitive damages already apply to more outrageous conduct. As noted above it is questionable whether any conduct is really deserving of civil law punishment when the misconduct only amounts to recklessness. Certainly there is no standard by which a potential defendant could know when his conduct will be punished. One must remember that compensatory damages have a punitive aspect and to the extent that that is not adequate punishment, the civil law is not concerned unless the conduct intentionally causes injury. An award of punitive damages represents a windfall to the plaintiff which, in fairness, the defendant should not have to pay unless he is being punished for his intentional misconduct.[35]

California's Punitive Damages Doctrine

As the discussion above illustrates, punitive damages are awarded for deliberate injuries or nondeliberate injuries under circumstances where the defendant knew that injury would result from his conduct. In the latter case, the intentional infliction of injury is presumed because of the certainty of injury. Initially, however, California took the position that a plaintiff could recover punitive damages only where he was injured deliberately.[36]

California has codified the award of punitive damages in section 3294 of the Civil Code, which permits punitive damages

34. *See* Tozer, *supra* note 2, at 304.

35. Punitive damages also represent a windfall to plaintiffs' attorneys who may have the strongest interest in expanding the application of punitive damages. Two recent bills in the California Legislature (S.B. 2011 and S.B. 1870) would require the court to set attorney's fees with respect to any punitive damage award and would prohibit such awards except for *deliberate* injuries. These bills have been strongly opposed only by the California Trial Lawyers Association. CTLA NEWS, June, 1976, at 1.

36. *See, e.g.*, Wolfsen v. Hathaway, 32 Cal. 2d 632, 198 P.2d 1 (1948) (overruled on an issue not relevant here in Flores v. Arroyo, 56 Cal. 2d 492, 364 P.2d 263, 15 Cal. Rptr. 87 (1961)); Gombos v. Ashe, 158 Cal. App. 2d 517, 322 P.2d 933 (1958).

"for the sake of example and by way of punishing the defendant" where he is guilty of "oppression, fraud or malice."[37] Oppression exists where one party dominates another so as to subject him to cruel and unjust hardships.[38] An action for fraud arises when "a material and knowingly false representation, made with intent to induce action, causes reasonable and detrimental reliance."[39] Finally, "[m]alice in fact . . . denotes ill will on the part of the defendant . . . ."[40]

If products liability cases are held separate, there is a common denominator in fraud cases which have allowed punitive damages, which may indicate a limitation of punitive damages to certain types of fraud cases. This common factor is that the injury sued upon is the same injury intended to result from the fraud.[41] Where the gain from the fraud is equal to or greater than the injury, as when the fraud causes the sale of an item for twice its true value, compensatory damages or restitution will not deter the defendant and punitive damages thus become necessary.[42] In *Mahon v. Berg,* for example, the defendants tried to sell real property by misrepresenting the income it could produce. The court recognized that limiting damages to compensation meant the defendant "risked only the fruits of his fraud."[43]

The concept of malice as a basis for punitive damages was first set out in California in *Davis v. Hearst.*[44] The court distinguished between malice in fact and malice implied in law; only

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37. CAL. CIV. CODE § 3294 (West 1970).

38. *E.g.*, G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 27, 122 Cal. Rptr. 218, 221 (1975); Roth v. Shell Oil Co., 185 Cal. App. 2d 676, 681-82, 8 Cal. Rptr. 514, 517-18 (1960). Since products liability cases involve parties who are not in close contact, the domination which characterizes oppression will not exist in these types of cases.

39. Block v. Tobin, 45 Cal. App. 3d 214, 219, 119 Cal. Rptr. 288, 290 (1975); *See* CAL. CIV. CODE §§ 1709-11 (West 1973).

40. Gombos v. Ashe, 158 Cal. App. 2d 517, 527, 322 P.2d 933, 940 (1958). *But see* Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 922, 523 P.2d 662, 671, 114 Cal. Rptr. 622, 631 (1974).

41. *Compare* Mohon v. Berg, 267 Cal. App. 2d 588, 73 Cal. Rptr. 356 (1968), *with* Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961). This point is more difficult to perceive in Block v. Tobin, 45 Cal. App. 3d 214, 119 Cal. Rptr. 288 (1975), since the defendant did not directly benefit from plaintiff's injury. Nevertheless, the injury was a necessary part of defendant's scheme and it was intentional, in the sense that the defendant knew the injury would result.

42. *See* Block v. Tobin, 45 Cal. App. 3d 214, 220, 119 Cal. Rptr. 288, 290-91 (1975).

43. 267 Cal. App. 2d 588, 590, 73 Cal. Rptr. 356, 357 (1968); *see* Ward v. Taggart, 51 Cal. 2d 736, 743, 336 P.2d 534, 538 (1959).

44. 160 Cal. 143, 116 P. 530 (1911).

the former was sufficient.[45] The controlling and essential factor in malice in fact, according to the court, was the evil motive of the defendant in causing the injury.[46] What the court meant by malice in fact was that the injury was deliberate, although proof of that could be implied from the evidence. However, a nondeliberate injury, which could be presumed to have been intentional, was not a sufficient basis for punitive damages.

The California Supreme Court elaborated its view of malice in *Wolfsen v. Hathaway*.[47] To establish malice in fact, the court required a showing of defendant's *personal intent* to injure the plaintiff[48]—that is, that the defendant deliberately injured the plaintiff. In *Wolfsen*, the plaintiff and the defendant had quarreled on a few occasions before the defendant plowed up the plaintiff's pasture and mysterious fires occurred on the plaintiff's land. Although the defendant knew the land belonged to someone else, he did not know the plaintiff had leased the land. Therefore, according to the court, the defendant could not have had a personal intent to injure the plaintiff. That the defendant knew that he was causing injury to someone, since he knew he didn't own the land, might support the presumption of intentional injury but would not establish malice in fact.

Gombos v. Ashe[49] followed the *Davis-Wolfsen* line of reasoning when it denied punitive damages where the plaintiff alleged the defendant knowingly drove his automobile after becoming too intoxicated to drive. That allegation did not satisfy the evil motive requirement since it showed only a consciousness of risk.[50] The act causing the injury must be "conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure . . . . [and a] desire to do harm for the mere satisfaction of doing it."[51] From this reasoning it is

45. *Id.* at 162, 116 P. at 539.

46. *Id.* at 164, 116 P. at 540; *see* G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 30, 122 Cal. Rptr. 218, 223 (1975).

47. 32 Cal. 2d 632, 198 P.2d 1 (1948) (overruled on an issue not relevant here in Flores v. Arroyo, 56 Cal. 2d 492, 364 P.2d 263, 15 Cal. Rptr. 87 (1961)).

48. 32 Cal. 2d at 651, 198 P.2d at 12: "An award of punitive damages may not be based upon mere speculation, but rather such penalty depends upon a definite showing of a . . . wrongful personal intention to injure."

49. 158 Cal. App. 2d 517, 322 P.2d 933 (1958).

50. *Id.* at 527-28, 322 P.2d at 940.

51. *Id.* at 527, 322 P.2d at 939. Similarly, in Ebaugh v. Raskin, 22 Cal. App. 3d 891, 895-96, 99 Cal. Rptr. 706, 709 (1972), although the defendant physician performed

clear that the California punitive damages doctrine is more restrictive than the general doctrine.

Other California courts, however, have not always applied the doctrine uniformly. By using phrases such as "reckless and willful disregard" to describe the aggravated conduct that evokes punitive damages, there is an indication that something less than personal intent to injure will justify the award. How much less is not clear, however. Although the *Gombos* opinion cited *McDonnell v. American Trust Co.*,[52] that case viewed recklessness as grounds for punitive damages. If so, this would represent a shift toward the general rule: punitive damages are permitted where the injury is nondeliberate if, under the circumstances, the defendant must have known that injury would result from his conduct.

The *McDonnell* plaintiff alleged that the defendant knew of the defective condition of his roof and drains and of the possibility that the plaintiff could be injured. At the minimum, taking the allegation as true, the defendant was negligent and perhaps grossly negligent; the court refused to consider the alleged facts sufficient to allow punitive damages. They did "not spell an intentional tort (a conscious, deliberate intent to injure the plaintiffs)."[53] That much is consistent with the *Davis-Wolfsen* approach. However, the *McDonnell* court denied punitive damages on the further ground that the conduct was not "so recklessly disregardful of the rights of others (sometimes characterized as wanton or wilful misconduct) as would show the 'malice' *in fact* which the statute" requires.[54] While "reckless disregard" often refers to gross negligence, the meaning here must refer to a disregard of the certainty of injury. This follows from the court's denial of punitive damages although the defendant was aware of some risk of injury.

The California Supreme Court in two recent cases[55] has departed from the *Davis-Wolfsen* line of reasoning. In *Silberg v. California Life Insurance Co.*,[56] although the court refused to allow punitive damages, it appeared to construe the doctrine

surgery on the wrong person, the court maintained there could be no evil motive since the doctor did not realize the plaintiff was the wrong patient.

52. 130 Cal. App. 2d 296, 279 P.2d 138 (1955).

53. *Id.* at 299, 279 P.2d at 140.

54. *Id.*

55. Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974); Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

56. 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

much as the *McDonnell* court had. Consistent with earlier cases, the court noted that the defendant must be shown to have acted "with the requisite intent to injure plaintiff,"[57] although the court was not clear whether it meant a deliberate act was still required. The court went on to state that a defendant "must act with the intent to vex, injure or annoy, or with a conscious disregard of plaintiff's rights,"[58] clearly requiring less than a deliberate, personal intent to injure. Unless the court is allowing punitive damages even for simple negligence where the defendant is aware of a risk, "conscious disregard" must relate to conduct from which an intent to injure can be presumed.

This view of *Silberg* is consistent with the later opinion of *Schroeder v. Auto Driveaway Co.*[59] Without expressly overruling *Wolfsen,* the court rejected the requirement of showing a personal intent to injure by expressly assuming in the opinion that the defendants felt no personal animus toward the plaintiff. Intent, it wrote,

> denotes not only those results the actor desires, but also those consequences which he knows are substantially certain to result from his conduct. . . . The jury in the present case could reasonably infer the defendants acted in callous disregard of plaintiff's rights, knowing that their conduct was substantially certain to vex, annoy and injure plaintiffs.[60]

With *Schroeder,* California has adopted a more liberal policy in favor of punitive damages by no longer requiring a personal ill will toward the plaintiff. Gross negligence is still not sufficient to evoke punitive damages. The defendant must know that his conduct is substantially certain to result in an injury, not that his conduct creates some risk of injury. Whether the injury resulted from a deliberate or nondeliberate

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57. *Id.* at 462, 521 P.2d at 1110, 113 Cal. Rptr. at 718.

58. *Id.*

59. 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974).

60. *Id.* The court of appeal clearly disregarded the *Davis-Wolfsen* line of cases when it concluded in Farmy v. College Housing, Inc., 48 Cal. App. 3d 166, 174, 121 Cal. Rptr. 658, 664 (1975) (emphasis in original): "[T]o prove that a tort was maliciously perpetrated it is not necessary to establish *a specific intent against the person* wronged. Oppression or malice supplying such intent may be established by the conduct of the perpetrator." The test relied on by the court in *Farmy,* taken from the *Schroeder* opinon, established intent on a showing that the defendant knew that his conduct was substantially certain to vex, annoy and injure the plaintiff. *Id.* at 176, 121 Cal. Rptr. at 665.

act, intent to injure must be present. Therefore, courts must be careful to avoid simply characterizing conduct as "reckless" and then assuming that punitive damages are applicable.[61] Although that term could be used, as in the *McDonnell* opinion, to characterize conduct having a substantial certainty of causing injury, it could also characterize gross negligence. Only the first characterization will justify punitive damages.

PRODUCTS LIABILITY DOCTRINE

The concept of products liability is considered to have emerged with *MacPherson v. Buick Motor Co.*,[62] in which the New York court eliminated privity of contract as a barrier to consumer relief when the third party manufacturer was at fault. The court rejected the idea that manufacturers were only liable to an immediate buyer. Since their products were undeniably produced for the ultimate consumer their duty of care should extend to that consumer. Thus, the decision raised "to normal" the manufacturer's standard of care in making of the product.[63]

Concern for consumer safety and for allowing a remedy even when negligence could not be shown led other courts to harness the concept of res ipsa loquitur.[64] This doctrine allowed the inference of negligence when the product causing the accident would not, in the ordinary course of events, have caused injury unless it had been negligently produced and the defect in the product was present when the manufacturer had exclusive control of the product. Some courts also looked to theories of warranty to provide a means of establishing a manufacturer's liability when the consumer was injured.[65] Both of these concepts had limitations which prevented relief for some injured consumers.[66]

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61. Gombos v. Ashe, 158 Cal. App. 2d 517, 529, 322 P.2d 933, 940 (1958).

62. 217 N.Y. 382, 111 N.E. 1050 (1916); *see* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966) [hereinafter cited as Prosser, *Citadel*].

63. *Cf.* Traynor, *supra* note 30, at 364.

64. *See, e.g.*, Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 532, 203 P.2d 522, 533 (1949).

65. *See* PROSSER, *supra* note 15, at 650. In Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, *aff'd on rehearing*, 15 P.2d 1118 (1932), the court concluded that sales literature had warranted that the automobile's windshield was shatterproof. Plaintiff was allowed to recover for an injury suffered after a rock broke the windshield, notwithstanding that technology had not yet reached the point of being able to construct a shatterproof windshield.

66. Prosser, *Citadel*, *supra* note 62, at 801; Traynor, *supra* note 30, at 364-65.

In *Greenman v. Yuba Power Products, Inc.*,[67] the California Supreme Court finally established a theory of strict liability to protect consumers from injuries caused by defective products. Under this theory, regardless of the care used in producing the product or the lack of representations as to the product's fitness, the injured consumer can recover by showing the product was defective when purchased and the injury resulted while using the product in a way it was intended to be used.[68] Although neither the manufacturer nor the consumer may have been negligent, if there is an injury, someone must bear the cost. The court found that the manufacturer who places his products on the market can expect that a few might cause injury and is therefore in a position to accept the cost of compensating an injured consumer by distributing that cost among all of the products sold.[69] The consumer, on the contrary, seldom is able to anticipate an injury and can not act to distribute the loss caused by such injury. In a manner of speaking, strict liability forces the manufacturer to act as an insurer of his products, the cost of which is spread among all consumers as a cost of the product.[70] In addition, imposing such a burden of liability can have the effect of insuring a higher standard of care: the manufacturer, to avoid liability, will attempt to eliminate even those injuries which would result under a "reasonable man" standard of care.[71]

THE APPLICATION OF PUNITIVE DAMAGES TO PRODUCTS LIABILITY CASES

Initially, one should keep in mind that punitive damages developed long before there was any thought of holding a man-

67. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

68. *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

69. Traynor, *supra* note 30, at 366.

70. Justice Traynor wrote in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion):

> Those who suffer injury from defective products are unprepared to meet its consequences. The cost of injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

71. *See* Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1119 (1960) [hereinafter cited as Prosser, *The Assault*].

ufacturer liable for injuries caused by his products to a third party consumer. The doctrine was developed in the context of a one-to-one relationship, as where the defendant assaults the plaintiff. Because that one-to-one relationship does not exist in a products liability case, this type of case may not fit within the developed framework of the punitive damages doctrine. At the very least, to insure that the doctrine is not twisted simply to apply it to a products case, one should view any claim of punitive damages in such a case with a critical eye.

Strict Liability

Strict liability does not depend upon fault. Since fault is the keystone of punitive damages, if a plaintiff must recover in strict liability there is no basis for recovery of punitive damages. The two concepts are mutually exclusive, at least to the extent that the plaintiff must rely on strict liability.[72] Where the defendant cannot show even negligence, he cannot show conduct from which an intent to injure can be established. Although there has been some suggestion that punitive damages could apply in strict liability,[73] that commentator also considered malice to exist. As yet, no cases have allowed punitive damages merely on a showing of strict liability.

Manufacturer Misconduct Resulting in Single Injuries

When products are produced in quantity it is not unreasonable to expect a few defective units to be placed on the market despite the exercise of due care. Only those individual units pose a danger to consumers. Misconduct may also create defective units, but it is not reasonable to believe that the manufacturer would deliberately create a risk in a few specific units when he is mass producing hundreds or thousands of similar units. As a general rule, the fact that the defect was isolated implies that it was not intentionally caused. This view is strengthened by the fact that the manufacturer produces his goods for anonymous consumers.

Although there is not likely to be a deliberate intent to make a few units defective, punitive damages would be nonetheless appropriate where the non-deliberate injury can be pre-

72. Tozer, *supra* note 2, at 301; Note, *Punitive Damages*, *supra* note 2, at 626-27. *But cf.* Drake v. Wham-O Mfg. Co., 373 F. Supp. 608 (E.D. Wis. 1974).

73. J. COTCHETT & R. CARTWRIGHT, CALIFORNIA PRODUCTS LIABILITY ACTIONS § 9.06[6] (1975); *see* Drake v. Wham-O Mfg. Co., 373 F. Supp. 608 (E.D. Wis. 1974).

sumed to be intentional. Thus, if the manufacturer knows that a few injuries will result from the product, but finds compensating for those to be more economical than producing a safer product, he can be said to have intended the injury. This is the classic instance where punitive damages are necessary to insure that intentional injury is not allowed to continue.[74] The application of punitive damages to the few injuries which result can increase the overall cost of production to the point where the safest product is also the cheapest to produce.

For this situation to exist, however, the manufacturer must know that an injury is substantially certain to result from his conduct. If courts are unable to find this economic motive for allowing injury, there probably will not be any awareness of a certainty of injury. Where the manufacturer foresaw only a risk of injury or just didn't bother to use a better method, without realizing the consequences, there might be gross negligence characterized as recklessness, but there would not be an intent to injure which could justify punitive damages.[75]

In his work on drug product liability, Dixon criticized the fact that "[m]any decisions are made on purely economic grounds."[76] In his example there was a risk of injury and of huge profits if the drug proved beneficial. This is the type of economic gamble, Dixon concluded, which punitive damages should prevent. But this is not the situation discussed above where punitive damages could appropriately and usefully be awarded. While the gamble that profit will exceed losses from a few expected injuries shows an intent to injure, the gamble that a risk will not materialize in an injury shows negligence

74. *See* text accompanying notes 26-30 *supra*.

75. In Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 788, 263 N.E.2d 103 (1970), defendant's misconduct in the manufacture of Drano drain cleaner resulted in a single injury. Plaintiff's injury was caused when a can of Drano exploded due to a build up of gas. The court considered the defendant's failure to test the can's bursting point to be recklessly disregardful of the safety of its customers, since had the bursting point been higher, the cap would have acted as a "safety valve." Although the court found the defendant was aware that gas would be created when Drano came into contact with water and that it was common for manufacturers to test the strength of their cans, there was no finding of sufficient knowledge to imply an intent to injure. No inquiry considered whether the defendant consciously refused safer conduct in order to secure an economic or other advantage. Indeed, there was no showing that the defendant even consciously accepted the risk of injury. The award of punitive damages must have been based on a finding of gross negligence, though even that degree of misconduct is questionable.

76. M. DIXON, DRUG PRODUCT LIABILITY § 9.07[2], at 9-79 (1974) [hereinafter cited as DIXON].

or gross negligence only. This distinction is not simply a matter of semantics. The civil law does not function to punish the defendant except where it can be said that he intended an injury to result. For negligence or gross negligence the plaintiff is fully compensated in a legal sense. If more should be done it is either outside of the civil law or for the legislature to determine.

Using punitive damages to compel the manufacturer to use the safest method of production poses to courts problems which they may not be able to or should not be allowed to settle. Courts will be forced to resolve the extent to which businessmen should not take economic gambles. For example, on one hand, to force all producers to use the most expensive method of production could push the unit price of a product beyond what consumers would be willing to pay. Producers in that event would be forced out of business, at least with regard to that product. While that might appear reasonable when the product is worthless and injures all users, it is less reasonable when the risk of injury is only 1 in 10,000, could be lowered only to 1 in 50,000 and the product is valuable to those who are not injured by it.

If courts decide to apply punitive damages selectively they will be forced to balance a variety of interests which would probably be better left to experts in the field of product safety. Where the risk of injury is low and the possible injury is minor, a court could refuse to apply punitive damages. But when the risk increases or the possible injury is more severe should the courts say the product can no longer be produced? At what point is the risk too high or the injury too severe or the benefit too minimal? These may be questions which the court answers in order to award compensatory damages. But the concern there is much different. An actual loss exists because of the injury, the concern is only who should pay for that loss, not the ultimate worth of the product.

On the other hand, even if the product is not forced off the market, production might be confined to the one or two largest firms which, by their economies of scale, could still produce at a profit using the more expensive method. Although a safer product is then produced, the government would have eliminated competition. This situation might have two effects. First, quality control might lessen since consumers would not be able to turn to another source. In this case punitive damages would have been counter-productive. Second, if competitors went out of business altogether, it is not unlikely that fewer

new products would be developed. For example, laboratories which might otherwise have developed a new drug would not be around to do so and the laboratories still functioning might never make up for that loss.

One might not object to a tendency toward monopoly as a price to pay for a safer product. However, the problem of deciding that a product should be eliminated from the market because the production of a safer product is too expensive can be subjective and may involve many considerations. Courts are not experts in product safety. They cannot say that all economic gambles are undesirable and ought not to be the judge of which economic gambles are bad and which are good.

Misconduct Resulting in Multiple Injuries

The few cases which thus far have considered punitive damages in connection with products liability have largely involved inherently defective products.[77] That is, each unit sold is capable of causing injury to the purchaser as opposed to defects that do not exist in all units of a particular product or would result only in isolated cases of injury. This type of defect is not likely to result from the type of conduct that warrants punitive damages.

Punitive damages would be justified if the defect was deliberately created in the product for an evil motive or from a desire to injure for the sake of injuring. While this may be a theoretical possibility, it is unreasonable to believe that a manufacturer would want to injure hundreds or thousands of anonymous consumers. Punitive damages would also be justified if the defect was allowed to exist even though injury was certain to result. But here again the situation is unlikely to occur. If there was a certainty of widespread injury known to the manufacturer it is more likely that the product would be withdrawn in order to avoid extensive compensatory damages. The more probable situation is that a few injuries were expected to result in order to gain a profit by the sale of the drug. Although punitive damages would apply to this intentional misconduct, the same problems arise here as in the circumstance where only a few injuries result from the misconduct.

Only in California have punitive damages been awarded in a products liability case where the defect was inherent and

77. *E.g.*, Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967). Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

resulted in multiple injuries.[78] To sustain such an award, in relation to misconduct causing multiple injuries, a court could, and in California must find either fraud, malice or oppression. Although these elements of fraud or malice may appear to exist in a products liability case, they are not likely to be available to justify punitive damages.[79]

Fraud. The Third Circuit Court of Appeals, in *Hoffman v. Sterling Drug, Inc.*,[80] ruled that punitive damages could be obtained where the plaintiff alleged that the defendant fraudulently and deceitfully misrepresented the safety of its product. The circumstances of that case led the court to conclude that the defendant could have known that the product would cause serious injury.[81] In fact, the defendant did provide some information about reported injuries in its literature on the drug. Plaintiff's contention, however, was that the warning of serious side effects was insufficient in relation to the risks involved, and that it thus amounted to misrepresentation.

Although the fraud in this case may have reflected an intent to injure the plaintiff as he was in fact injured, the court relied on Pennsylvania cases which permit such awards for gross negligence. Thus if the fraud amounted to gross negligence, it would justify punitive damages. Neither California nor the general doctrine of punitive damages would sustain the award on this showing alone. Rather, the fraud must show an intent to cause the injury upon which the pliantiff sues.

Fraud is an intentional tort, but a subtle distinction must be observed. The misrepresentation may be intentional while the injury sued upon is not. The consumer fraud cases which allow punitive damages are basically different from products liability cases involving fraud, at least where injury was not substantially certain to result.[82] In a typical consumer fraud situation, the defendant often risks only the gain of his deceit and has little, if anything, to lose by paying compensatory damages. Moreover, the injury sued upon was intended to result from the fraud.

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78. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 3d 689, 60 Cal. Rptr. 398 (1967).

79. As noted previously, the element of oppression is not likely to be present in products liability cases. *See* note 38 *supra*.

80. 485 F.2d 132 (3d Cir. 1973). This case involved the use of Aralen which caused damage to the retina after prolonged use.

81. *Id.* at 146.

82. *But see* Note, *Punitive Damages, supra* note 2, at 620-22.

Products liability fraud cases, on the other hand, lack this direct relationship between the injury intended and the injury sued upon. The defendant in such a case might have intentionally misrepresented his product without realizing that any personal injury would result. The injury intended might be simply obtaining the price of the item. In this situation the personal injury sued upon is not the injury intended, and so punitive damages are not applicable. Thus, while fraud may exist in a products case, courts can not assume it to be the type that would evoke punitive damages. Since the application of punitive damages turns on the defendant's intent, this distinction between intentional misrepresentation and intent to cause personal injury must not be overlooked.[83]

Malice. Malice, in the context of punitive damages, refers to an intent to injure and is therefore most easily recognized as a deliberate act.[84] Because of the nature of products liability cases, one must concede, that a deliberate injury, in the sense of a personal intent to injure, will not likely be found. Nondeliberate injury can also be characterized as malicious, but only when the defendant acts knowing that an injury will result from his conduct. Consciousness of risk may show recklessness, but not the malice necessary to warrant punitive damages.

Toole v. Richardson-Merrell, Inc.[85] is the only California case to have purportedly found malice in a products liability case. It is unclear, however, what definition of malice the court

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83. The plaintiff's burden of proof, therefore, should not only be to show the deception, but also to show the defendant knew the injuries were substantially certain to result from use of the product. This distinction between intent to deceive and intent to injure can be illustrated by considering Crocker v. Winthrop Laboratory Div. of Sterling Drug, Inc., 514 S.W.2d 429 (Tex. 1974). The defendant in this case represented that the drug Talwin was safe and free from all dangers of addiction. The manufacturer either knew the representation was false and the drug was dangerous or did not know whether the representation was true or false. In either case, the court considered the defendant guilty of fraud. According to Dixon,

> [i]f the manufacturer, in fact did not know the drug was addictive, it must have been because it did not test the drug. The only alternative is that the drug was known to be addictive and that the manufacturer wantonly and intentionally made representations known to be false.

DIXON, *supra* note 76, § 9.07[1], at 9-66.3. Although the defendant has intentionally deceived the victim in both cases, only in the latter case can there also be an intent to injure, implied from the defendant's knowledge.

84. *See* Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 922, 523 P.2d 662, 671, 114 Cal. Rptr. 622, 631 (1974); Gombos v. Ashe, 158 Cal. App. 2d 517, 527, 322 P.2d 933, 939 (1958).

85. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

used. Although the court explained that deliberate intent to do harm was not a prerequisite to recovery of punitive damages, it went on to maintain that the defendant's conduct had to be "wilful, intentional, and done in reckless disregard of its possible results."[86] This is a disjunctive description of malice: "If conduct is negligent, it is not willful; if it is willful, it is not negligent."[87] Richardson-Merrell intentionally marketed MER/29 and must have known that it posed a risk to consumers. Disregarding potention injuries, risking the safety of consumers who would use the product, can be considered reckless. But all of this goes to the conduct and not to the state of mind in causing the injury. To find malice, the jury must "assess the defendant's actual state of mind; it is not satisfied by characterizing his conduct as unreasonable, negligent, grossly negligent or reckless."[88]

The evidence in *Toole* showed that the defendant disregarded the possibility of injury in its eagerness to market its drug. Not only did the defendant falsify test records to ensure that the FDA would allow the drug on the market, but also it continued to represent the drug as proven safe when it had not been so proven. This might be evidence that Richardson-Merrell realized injury would result from the drug but expected the profit to offset that loss. That would be conduct warranting punitive damages.[89] But the court did not specifically find this. Instead, the overall conclusion was that Richardson-Merrell made a terrible miscalculation rather than that it purposely allowed injuries in order to profit from the sale of the drug.[90]

In *G.D. Searle v. Superior Court,*[91] the court explained that malice, in the context of nondeliberate injury, could exist where the manufacturer is aware of the dangerous potential of

86. *Id.* at 713, 60 Cal. Rptr. at 415.

87. G.D. Searle & Co. v. Superior Court, 49 Cal. App. 3d 22, 31, 122 Cal. Rptr. 218, 224 (1975) *citing* Donnelly v. Southern Pacific Co., 18 Cal. 2d 863, 869, 118 P.2d 465, 468 (1941).

88. *Id.*

89. *See* Schroeder v. Auto Driveaway Co., 11 Cal. 3d 908, 922, 523 P.2d 662, 671, 114 Cal. Rptr. 622, 631 (1974).

90. An executive of Richardson-Merrell stated to the Food and Drug Administration that MER/29 "was the biggest and most important drug in Merrell history . . . ." and the company intended "to defend it at every step . . . ." Toole v. Richardson-Merrell, Inc., 251 Cal. App. 3d 689, 714-15, 60 Cal. Rptr. 398, 416 (1967). While this statement might reflect a sinister economic desire to profit at any cost, it could also indicate a sincere belief that a socially useful drug had been developed. *Cf.* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 845 (2d Cir. 1967).

91. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

its product.[92] A "consciousness of risk," the court maintained, made the conduct more than reckless, adding the evil motive essential for application of punitive damages.[93] This represents a new interpretation of the California punitive damages doctrine, however, since knowledge of a risk is not the same as knowledge that injury is substantially certain to result.

Is a New Formulation Desirable?

Reasons for Modification

The current state of the law presents courts with a dilemma. On the one hand, the punitive damages doctrine as formulated will not sanction punitive damages where the defendant was only negligent or reckless. On the other hand, consumer safety is an important concern which can be furthered by extending liability for recklessness or even negligence beyond compensatory damages.

Failure to resolve this dilemma leads to strained interpretations of the punitive damages doctrine.[94] In *Searle,* for example, the court observed,

> The incessant production of shifting decisional definitions may spring from judicial restlessness with the *Davis v. Hearst* [deliberate intent to injure] formula. Verbalisms coined in a libel action may seem unsuitable for a products liability suit involving claims of commercial callousness in the manufacture, advertisement and nationwide distribution of allegedly dangerous pharmaceuticals.[95]

In the past, a defendant's knowledge that his action or inaction created a risk of injury was not enough to warrant punitive damages.[96] However, commercial torts have been subject to greater concern for potential victims.[97] First the require-

92. *Id.* at 30, 122 Cal. Rptr. at 223.

93. *Id.* at 32, 122 Cal. Rptr. at 225.

94. *Id.* at 30-32, 122 Cal. Rptr. at 223-25.

95. *Id.* at 32, 122 Cal. Rptr. at 224-25.

96. *See, e.g.*, McDonnell v. American Trust Co., 130 Cal. App. 2d 296, 279 P.2d 138 (1955).

97. Justice Traynor expressed the special concern that exists for the safety of consumer products when he wrote, "It is to the public interest to discourage the marketing of products having defects that are a menace to the public." Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion). Prosser more strongly asserted that "the public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products . . . ." Prosser, *The Assualt, supra* note 71, at 1122.

ment of privity between the manufacturer and the buyer was eliminated in order to extend the manufacturer's duty of care to the actual user of its product.[98] Ultimately, the manufacturer was compelled to compensate the victim without any showing of fault.[99] Strict liability, as Prosser wrote, was intended to "provide a healthy and highly desirable incentive for producers to make their products safe."[100]

This concern for the safety of the general public and the fact that products placed on the market can cause widespread injury permits misconduct by the manufacturer to be more readily termed reprehensible and subject to punishment. According to Dixon, if a product represents a risk of injury, should it fail, and potentially great profit, should it succeed, the corporation is making an economic gamble by marketing it[101]—a gamble which Dixon believes punitive damages could and should prevent.[102]

Courts may find that products liability cases represent an area of law in which concern for the safety of others must be vigorously promoted and lack of concern by manufacturers must be punished. If this is so, extending liability beyond compensatory damages is appropriate. But this should not be attempted by devising new and spurious definitions of malice.[103] Rather, the courts should consider only whether the manufacturer was conscious of a substantial risk involved in marketing the product and yet did so despite the risk. As the court pointed out in *G.D. Searle & Co. v. Superior Court*, the focus in products liability cases is on the commercial callousness of the defendant rather than the intent with which injury was done.[104] That court sought to restate the punitive damages doctrine: "We suggest *conscious disregard of safety* as an appropriate

98. *See* text accompanying note 62 *supra*.

99. *See* text accompanying note 67 *supra*.

100. Prosser, *The Assault*, *supra* note 71, at 1119.

101. DIXON, *supra* note 76, § 9.07[2], at 9-79 to 9-80.

102. *Id.* at 9-80:

> Surely it would appear that public policy should not condone a course of conduct where the company gambles with the help [*sic*] of innocent victims in an attempt to make an enormous profit. Punitive damages should be a part of an economic gamble with the lives of others.

103. The civil law is concerned only with compensating the victim for his loss and not with punishing the defendant, unless the injury was intentional. The special concern for safety of commercial products does not alter this purpose of civil law except in the field of products liability.

104. 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 224-25 (1975).

description of the *animus malus* which may justify an exemplary damage award when nondeliberate injury is alleged."[105]

Reasons for Caution

Even given enhanced concern for consumer safety, courts should give careful consideration to the problems which are created by eliminating the requirement of intent to injure as a prerequisite to allowing punitive damages in products liability cases. The purpose of the civil law is to permit recovery of the victim's loss and it is within that context that rules have been developed to protect the defendant from unfairness. Thus, courts should heed the admonition offered by the court in *Gombos v. Ashe*: punitive damages "are not a favorite of the law and the granting of them should be done with the greatest caution."[106]

Requiring "intent to injure" provides a reliable standard by which to judge whether punitive damages are deserved. If it is to be enough for punitive damages simply that a defendant knew a risk was involved, the courts would be left without a standard. There may always be some risk that an inherent defect in a product will cause an injury and thereby an economic gamble in placing the product on the market. If the product must be risk free, very few products might ever be sold. To what extent is a manufacturer prevented from making an economic gamble, and on what basis will acceptable gambles be distinguished from gambles meriting punishment? Judge Friendly voiced this concern in *Roginsky v. Richardson-Merrell, Inc.*: "[A] court should be careful not to set the scale too low when a discovery of social utility is under review. A strong case of recklessness could have been mounted against Columbus had he returned to Palos with lives lost and nothing found."[107]

Modification of the traditional doctrine also raises questions regarding the need for criminal law safeguards.[108] In *Toole v. Richardson-Merrell, Inc.*, the court expressed the accepted view that an action for punitive damages is purely civil in nature.[109] Therefore, it reasoned, constitutional or statutory

105. *Id.* at 32, 122 Cal. Rptr. at 225 (emphasis in original).
106. 158 Cal. App. 2d 517, 526, 322 P.2d 933, 939 (1958).
107. 378 F.2d 832, 850 (1967).
108. *See, e.g.*, Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).
109. 251 Cal. App. 2d 689, 716-17, 60 Cal. Rptr. 398, 418 (1967).

safeguards applicable to a criminal trial are not mandatory. Although a defendant could not demand these criminal safeguards, he was provided a degree of protection by the egregious nature of the misconduct that had to be shown. Further, a defendant's acts are more nearly criminal where he intends the injury than where he is merely aware of a risk. Such conduct more strongly justifies allowing civil law punishment without criminal law safeguards than does nelgigent conduct.

The approach taken by the courts in *Toole* and *G.D. Searle & Co.* can be viewed as a significant departure from the traditional punitive damages doctrine. As such, in California, in light of the legislature's definition of the standards by which conduct can be considered sufficiently aggravating, courts are encroaching on a function of the legislature when they attempt to rewrite the statute by devising interpretations inconsistent with its terms. By including the requirement of malice in Civil Code section 3294, the legislature expressed its view that an injury must have been intentionally caused to merit punitive damages. The legislature does not appear to have altered its position; two bills have recently passed the California Senate Judiciary Committee which would require a plaintiff to prove not only that the wrongdoer intended to injure him, but also that he was subjected to cruel and unjust hardship.[110]

Even if the traditional doctrine is maintained, however, it is questionable whether punitive damages should ever be allowed in products liability cases which may result in mass litigation;[111] when the defect causing injury is inherent in the product, there exists the possibility of mass litigation and multiple compensatory awards. Surely the prospect of extensive compensatory damages would be as effective a deterrent as punitive damages would be. The court, in *Roginsky v. Richardson-Merrell, Inc.*, thought the compensatory damages paid by Richardson-Merrell would be sufficient to deter similar future conduct.[112]

There is a possibility that insurance would blunt the impact of compensatory damages on the manufacturer, although in the MER/29 litigation, the insurance was not sufficient to

110. SB 2011 and SB 1870 passed out of the Senate Judiciary Committee of the California Legislature on May 11, 1976.

111. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839, 852 (2d Cir. 1967).

112. *Id.* at 841.

pay the extensive compensatory damages.[113] Even so, the *Roginsky* court pointed out that Richardson-Merrell was likely to face higher insurance rates and a loss of reputation among physicians and pharmacists.[114] Dixon even suggested that the cost of obtaining insurance would have a deterrent effect. Although he thought punitive damages would be a further incentive, the possibility of large compensatory damages will prompt insurance companies to investigate the activity of its insured. "Insurance carriers will not blindly insure a company that violates its standards of behavior," according to Dixon.[115] Recalling the caution about awarding punitive damages suggested in *Gombos v. Ashe,*[116] there seems no need to add to the incentive of insurance costs by also allowing punitive damages.[117]

Finally, to allow punitive damages in a products liability case can result in multiple punitive damages claims. The effect could be an "overkill" which is unfair to the defendant.[118] Professor Morris expressed a concern that whenever punitive damages are awarded in more than one case based on the same misconduct the defendant is treated unfairly.[119] In the MER/29 litigation, the total punitive damages claimed exceeded the defendant's net worth.[120] The possibility of multiple punitive damages awards presents a problem which should force courts to defer to the legislature. Courts faced with the specter of multiple punitive damages awards outside of the products liability area have followed the lead of the *Roginsky* court by rejecting the application of such damages.[121]

Possible Judicial Solutions

Judicial solutions to the problem of multiple punitive

113. *See* Rheingold, *supra* note 1, at 139.

114. 378 F.2d at 841.

115. DIXON, *supra* note 76, § 9.07[2], at 9-80.

116. *See* text accompanying note 106 *supra*.

117. It is questionable whether insurance can protect against punitive damages since, in cases where it should be imposed, it would not be a punishment if insurance paid the damages. *See* Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

118. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

119. Morris, *supra* note 10, at 1194-95.

120. Rheingold, *supra* note 1, at 135.

121. In deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1231-32 (10th Cir. 1970), the court concluded that the problems created by multiple punitive damage claims outweighed their doubtful deterrent impact. In Green v. Wolf, 406 F.2d 291, 303 (2d Cir. 1968), the court considered the liability for multiple compensatory damages to be sufficient to fulfill any purpose punitive damages could have.

damages awards are not particularly appealing. One possibility would be to inform the jury of the widespread injury and potential for substantial overall compensatory damages. In theory, the jury could use this information to evaluate what would be an appropriate punitive damages award. In practice, however, it would probably bias the jury against the defendant. Moreover, the full effect of the defendant's misconduct might not be known when the first few claims are litigated. Professor Morris suggested that a judge could suspend determination of the punitive damages issue until the full extent of compensatory damages was determined.[122] While this device might work where the same judge is handling all cases, it is not suited to a products liability situation where suits might be filed in courts all over the country. The MER/29 litigation, for example, involved suits filed in nearly every state in both state and federal courts.[123]

Under circumstances where multiple injuries have a common basis, the United States Judicial Conference can order a consolidation of actions.[124] This was attempted in the MER/29 litigation without success.[125] Particularly in products liability cases, personal or property injuries may not all be manifested at the same time, thus making it difficult to join cases. Judge Friendly was of the opinion that joint litigation, at least in drug products liability, is not feasible without comprehensive legislation.[126]

Courts could fashion arbitrary rules that would limit punitive damages to a certain amount in all cases or would allow punitive damages only once when the same misconduct results in multiple injuries.[127] Unfortunately, either rule requires the cooperation of judges who may not accept them. For example, a judge might not consider it fair for a plaintiff in his jurisdiction to go without punitive damages simply because a suit was tried in some other jurisdiction first.[128] Putting a limit

122. Morris, *supra* note 10, at 1195.

123. Rheingold, *supra* note 1, at 121.

124. 28 U.S.C. § 331 (1964).

125. The Judicial Conference has no control over state courts, where nearly half the MER/29 cases were then pending. Rheingold, *supra* note 1, at 126.

126. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 n.11 (2d Cir. 1967); *cf.* deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1231 (10th Cir. 1970).

127. The latter approach has been rejected by two courts. deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1231 (10th Cir. 1970) (securities fraud); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (products liability).

128. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967).

on the amount of a punitive damages award will not always be workable either since there is no way to know whether a few or all of the punitive damages claims will result in such awards. For example, despite the enormous punitive damages initially sought in the MER/29 litigation, only two cases resulted in punitive damages.[129]

Legislative Initiatives

If concern for consumer safety presents a compelling reason to prevent even the risk of injury, it should be up to the legislature to determine what risk is unreasonable. The legislature can also establish guidelines as to what punishment should be imposed. Growing awareness of the need to promote product safety led Congress, for example, to pass the Consumer Product Safety Act and create the Consumer Product Safety Commission (CPSC) to monitor the safety of products and the conduct of manufacturers in marketing their products.[130] The CPSC can establish consumer product safety standards and can enforce those standards by mandatory testing of a product to ensure compliance.[131] In addition, the CPSC can order hazardous consumer products banned from sale[132] and can seek civil and criminal penalties against manufacturers.[133]

The Consumer Product Safety Act specifically excludes all types of food or drugs;[134] Congress determined that the safety of those types of products was already effectively safeguarded.[135] The Food and Drug Administration has authority to enjoin the sale of unreasonably dangerous foods and drugs[136]

129. After Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), allowed the plaintiff to recover punitive damages and in an effort to avoid high compensatory judgments, Richardson-Merrell settledmost of the cases against it. *See* DIXON, *supra* note 76, § 9.07[2], at 9-81; Rheingold, *supra* note 1, at 134-39.

130. 15 U.S.C. §§ 2051-81 (1974); *see* Collins, *Enforcement of the Federal Hazardous Substance Act by the Consumer Product Safety Commission: Toying with the Product Safety Cycle*, 34 FED. B.J. 139 (1975). The law was designed in part to bring together in a unified manner, the ineffective array of independent agencies handling some aspect of consumer product safety. 1972 U.S. CODE CONG. & AD. NEWS 4575-78.

131. 15 U.S.C. §§ 2056, 2063 (1974).

132. *Id.* § 2057.

133. *Id.* § 2069. Civil fines are restricted to a maximum of $500,000.

134. *Id.* § 2052.

135. 1972 U.S. CODE CONG. & AD. NEWS 4580. The Food, Drug and Cosmetic Act exists in part to promote product safety in the area of food and drugs. This act was established by 21 U.S.C. § 301 *et seq.* (1972). *But cf.* Rheingold, *supra* note 1, at 146-47.

136. 21 U.S.C. § 332 (1972). With regard to MER/29, the FDA did suspend the new drug application to ban the drug from sale. However, Richardson-Merrell had

and can also seek civil and criminal penalties against manufacturers.[137]

Something beyond compensatory damages may be called for to punish or deter manufacturers' misconduct. This added liability is afforded by regulatory bodies, such as the CPSC and the FDA, which at the same time can provide for a comprehensive and uniform system of promoting consumer product safety. To the extent these bodies are effective or indicate a legislative position, punitive damages become less necessary.

CONCLUSION

Punitive damages developed as civil punishment for a defendant who deliberately caused an injury or caused it nondeliberately under circumstances where the defendant must have known an injury was nearly certain to result. This situation is not likely to arise in a products liability case. But to the extent that it does happen, courts should specifically determine that a manufacturer intended to cause an injury. Generally, that will involve a finding that profit was expected even though a few injuries would have to be compensated.

The real concern of courts which have allowed punitive damages, however, is that manufacturers who place products on the market which could cause widespread injury to the public ought to be subject to a higher duty of care than an individual. While intent to injure is the aggravating circumstance that evokes punitive damages when an individual commits a tort, "commercial callousness" ought to be the aggravating circumstance when the tort is by a manufacturer.

Punitive damages are one means of punishing a manufacuturer for its recklessness, but that may not be the best means. There are no standards yet evolved by which to judge when a manufacturer has been too callous. If the manufacturer is not allowed to take any calculated risks, courts may seriously inhibit the development of new products, especially in the pharmaceutical industry. Moreover, the potential for multiple liability not only serves as a deterrent because of the large compensatory damages which might be awarded, but also opens

already withdrawn the drug from the market. Rheingold, *supra* note 1, at 120 & n.15.

137. 21 U.S.C. §§ 333-34. In the MER/29 litigation, Richardson-Merrell pleaded *nolo contendere* to eight counts of making false statements to the FDA and was fined $80,000. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 n.8 (2d Cir. 1967).

the door to punitive damage claims far beyond any appropriate punishment.

The rule that limits punitive damages to intentional infliction of injury is deeply rooted in the civil law and is a primary reason that civil law allows more than compensation to a plaintiff. It is the province of the legislature, therefore, rather than the courts to modify the current doctrine of punitive damages, especially in states where that doctrine has been codified. In this way, too, guidelines and limitations on awards can be imposed so that a manufacturer's insensitivity to safety can be punished without being unfair. A preferable alternative to punitive damages is the development of agencies such as the Consumer Product Safety Commission to protect the public from potentially unsafe products.

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