Punitive Damages Awards in Strict Products Liability Litigation: The Doctrine, the Debate, the Defenses

I. INTRODUCTION

In our complex society consumers increasingly rely upon the expertise of the manufacturers and retailers of consumer goods. This reliance has in part led to the adoption in many jurisdictions of some form of strict products liability.[1] In a growing number of jurisdictions this heightened liability of manufacturers has been coupled with the application of the doctrine of punitive damages.[2] The award of punitive damages in strict products liability cases has raised a chorus of protests from the industrial community, legal commentators,[3] and defense attorneys. Many important theoretical and policy issues have been raised, but unfortunately the reported cases have not always thoroughly examined the relevant issues. Two recent state supreme court opinions offer excellent vehicles for a discussion of the issues that arise when an award of punitive damages is requested in a strict products liability case. In *Wangen v. Ford Motor Co.*[4] and *Gryc v. Dayton-Hudson Corp.*,[5] the Wisconsin and Minnesota Supreme Courts respectively held that punitive damages could be awarded in strict products liability cases.

This Comment will examine the functions of a punitive damages award, the theoretical and practical problems of awarding punitive damages in strict liability cases, and the standard of culpability that must be shown before punitive damages will be imposed. Attention will also be given to defenses that defendants have attempted to raise when threatened with the prospect of punitive damages. The Comment will suggest that punitive damages awards play a proper and an important role in strict products liability litigation. The Comment will acknowledge, however, that changes are needed in the application of the doctrine in order to achieve the goals the doctrine of punitive damages is designed to advance.

II. THE DOCTRINE

A. *Historical Background*

The doctrine of punitive damages[6] is an ancient one with historical origins predating the English common law.[7] Punitive damages were recog-

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1. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 98 (4th ed. 1971).

2. *See* appendix for a list of those jurisdictions that have addressed the issue of allowing punitive damages awards in strict products liability cases.

3. *See, e.g.*, Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972).

4. 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

5. ____ Minn. ____, 297 N.W.2d 727, *cert. denied sub nom.* Riegel Textile Corp. v. Gryc, 449 U.S. 941 (1980).

6. The term "punitive damages" will be used throughout this paper. The labels of "exemplary," "vindictive," and "smart money" have also been used to describe these damage awards. *See* K. REDDEN, PUNITIVE DAMAGES § 2.1 (1980).

7. Mosaic Law recognized multiple or punitive type damages. One example of punitive damages would be: "If a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep." *Exodus* 22:1 (King James).

nized in England as early as 1278 with the enactment of the Statute of Gloucester,[8] which awarded treble damages to an injured party for waste. The term "exemplary damages" was first used in the case of *Huckle v. Money*.[9] In that case punitive damages were allowed because of the need to take into account the "most daring public attack made upon the liberty of the subject" through entry and imprisonment pursuant to a nameless warrant.[10] Blackstone made numerous references to the award of punitive damages in situations that required special deterrents.[11]

From England the doctrine of punitive damages was transported to America.[12] Later cases articulated numerous rationales for allowing punitive damages, including compensating for the cost of deserving litigation when only small compensatory damages could be expected,[13] redressing affronts to personal feelings that are not susceptible of measurement,[14] satisfying the desire for revenge in order to help preserve the public peace by offering an attractive alternative to self-help,[15] and serving as punishment for and deterrence of socially disapproved conduct.[16] By 1851 the doctrine of punitive damages had become so established and accepted in the United States that the United States Supreme Court even noted in dicta that it could not be argued that punitive damages awards were improper.[17] Today, however, numerous commentators are questioning the application of this doctrine to strict products liability cases on the basis of theoretical and policy considerations.[18]

B. *Legal Standard of Liability*

Punitive damages can be awarded only if a plaintiff is first able to show that the defendant is liable for compensatory damages.[19] In the strict products liability context this normally means that the elements of Section 402A of the *Restatement (Second) of Torts* have been proved.[20] Once this burden is

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8. 6 Edw. I, c.5 (1278).

9. 95 Eng. Rep. 768 (C.P. 1763).

10. *Id.*

11. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88–89, 118–19, 146–47, 210–11 (1st ed. 1768).

12. *See* Genay v. Norris, 1 S.C.L. (1 Bay) 3 (1784) (the first reported punitive damages decision in the United States). *See also* Day v. Woodworth, 54 U.S. (13 How.) 362, 371 (1851) (dictum).

13. *E.g.*, New Orleans, J. & G.N.R.R. v. Allbritton, 38 Miss. 242, 272–73 (1859). *See generally* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931); Morris, *Rough Justice and Some Utopian Ideas*, 24 ILL. L. REV. 730 (1930).

14. *See* Tullidge v. Wade, 95 Eng. Rep. 909 (1769).

15. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522–23 (1957).

16. *E.g.*, Scott v. Donald, 165 U.S. 58 (1896); Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Gostkowski v. Roman Catholic Church, 262 N.Y. 320, 186 N.E. 798 (1933).

17. Day v. Woodworth, 54 U.S. (13 How.) 362, 371 (1851).

18. *See* note 3 *supra*.

19. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971).

20. Section 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

met, the plaintiff must still show that there has been something more than the mere commission of a tort.[21] Exactly what conduct must be shown is not always clear. A brief discussion of the legal standard of liability and the type of conduct generally found in strict products liability cases that have awarded punitive damages should give some order to the confusion.

To recover an award of punitive damages, a plaintiff must prove that "the defendant's misconduct was so flagrant as to require a more severe monetary imposition than would result from an award of nominal or compensatory damages alone."[22] The focus of this inquiry is on the mental state of the defendant.[23] Jurisdictions differ in the language used to describe the legal standard of culpability needed to justify an award of punitive damages. In California it must be shown that the defendant was guilty of oppression, fraud, or malice, express or implied.[24] Michigan requires that the defendant's act be "wanton, willful, malicious, oppressive, very grossly negligent, vindictive, aggravated, or in reckless disregard of the rights or safety of the plaintiff."[25] Minnesota awards punitive damages when the plaintiff shows by "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others."[26]

The Model Uniform Products Liability Act summarizes the various terminology employed by the different jurisdictions. Section 129(A) states: "Punitive damages may be awarded to the claimant if the claimant proves by clear and convincing evidence that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers, or others who might be harmed by the product."[27] The term "reckless disregard" is defined as "a conscious indifference to the safety of persons or entities that might be harmed by a product."[28] This term denotes aggravated conduct that represents a major departure from ordinary negligence.[29]

In accord with the agency relationship implicit in strict products liability cases, the majority of jurisdictions hold that "a corporation is liable for punitive damages for the wanton misconduct of all employees who are acting within the general scope of their employment."[30] This standard has become

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(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

21. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971).

22. K. REDDEN, PUNITIVE DAMAGES § 3.1(A) (1980).

23. *Id.*

24. CAL. CIV. CODE § 3294 (West Supp. 1981).

25. K. REDDEN, PUNITIVE DAMAGES § 5.2(A) (22) (1980).

26. MINN. STAT. ANN. § 549.20 (West Supp. 1981).

27. 44 Fed. Reg. 62,714, 62,748 (1979).

28. *Id.* at 62,717–18.

29. *Id.* at 62,720.

30. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971); K. REDDEN, PUNITIVE DAMAGES § 4.14 (1980).

known as the "vicarious liability rule."[31] An additional showing is required in a number of jurisdictions that have adopted the "complicity rule,"[32] under which corporations are liable for punitive damages only when it has been shown that a highly placed employee ordered, participated in, or ratified the misconduct claimed to have been in reckless disregard of the plaintiff's rights.

While the exact terminology may differ from case to case, as a general rule, punitive damages will be awarded in a strict products liability case only when there has been a showing of malice or willful, wanton, or reckless action in disregard of the rights of others.[33]

Four factors consistently appear in the reported cases that have addressed the question of punitive damages in strict products liability actions. First, the cases generally find some corporate knowledge of the danger posed by the design of the product.[34] Second, the cases reveal knowledge by corporate agents that the defect has caused injuries to persons other than the person involved in the present litigation.[35] Third, there is generally some sort of procrastination on the part of the corporation in remedying the defect or in warning the public of the defect.[36] Finally, a number of cases note that alternative designs would have been economically feasible.[37] In addition to these factors, a number of the reported cases have involved fraudulent behavior on the part of the defendants.[38] For courts to find that a particular defendant's behavior satisfies the legal standards of liability set out above, however, combinations of two or more of these factors must be present.

While the terminology employed by the courts lacks precision, the awards of punitive damages have been restricted to cases in which the defendant's conduct has clearly fallen into the category of disapproved behavior. Manufacturers who have not engaged in the types of conduct described and who do not intend to engage in such activity have no legitimate reason for fearing possible punitive liability.

C. *The Functions of a Punitive Damages Award*

As noted earlier, numerous theories have historically been used to justify the awarding of punitive damages. Early cases often sought to characterize punitive damages as some form of compensation. Mental suffering, because of the difficulty of setting a monetary award, was cited as one injury that punitive damages could compensate.[39] Punitive damages were also seen as

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31. *See* note 30 *supra.*

32. Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 221 (1960).

33. *E.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979); Gryc v. Dayton-Hudson Corp., ____ Minn. ____, 297 N.W.2d 727 (1980).

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

35. *E.g.*, Gryc v. Dayton-Hudson Corp., ____ Minn. ____, 297 N.W.2d 727 (1980).

36. *Id. See also* Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. App. 1978).

37. *E.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979).

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

39. *See* Stuart v. Western Union Telegraph Co., 66 Tex. 580, 586, 18 S.W. 351, 353 (1885).

compensation for indignities forced upon the plaintiff,[40] insults, and other noncompensable injuries.[41]

A second early theory used to justify punitive damages awards posited that they served to punish the defendant for his outrageous behavior.[42] This function of punitive damages was deemed appropriate when no criminal remedy was available,[43] when the criminal remedy was inadequate,[44] or when punishment was deemed necessary to quench the individual plaintiff's or society's thirst for revenge.[45]

There was also an early recognition that punitive damages awards served as a means of deterring the wrongdoer and others from behaving in the same manner in the future.[46] This deterrent function was eloquently illustrated by the court in *Goddard v. Grand Trunk Railway*:[47]

> A corporation is an imaginary being. . . . All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands. . . . [U]nder cover of its name and authority, there is in fact as . . . much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped or put in the stocks,—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. . . . [I]f the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached, they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolvent agents, better men will take their places, and not before.[48]

The functions of punitive damages awards in strict products liability litigation are generally described as punishment and deterrence.[49] While not mentioned in the reported cases dealing with punitive damages in strict products liability litigation, Professor Owen forcefully argues that punitive

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40. Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763).

41. *See* K. REDDEN, PUNITIVE DAMAGES § 2.2(C) (1980); Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 7 (1935).

42. Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 6–7 (1935). *See also* Simpson v. McCaffrey, 13 Ohio St. 509, 522 (1844).

43. *See* Hopkins v. Atlantic & St. Lawrence R.R., 36 N.H. 2, 9 (1857); Atlantic & Great W. Ry. v. Dunn, 19 Ohio St. 162, 172 (1869); Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 7–8 (1935).

44. K. REDDEN, PUNITIVE DAMAGES § 2.2(E) (1980); Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5, 9 (1935).

45. K. REDDEN, PUNITIVE DAMAGES § 2.2(F) (1980).

46. Merest v. Harvey, 128 Eng. Rep. 761 (C.P. 1814); Tullidge v. Wade, 95 Eng. Rep. 909 (C.P. 1769); K. REDDEN, PUNITIVE DAMAGES § 2.2(D) (1980).

47. 57 Me. 202 (1869).

48. *Id.* at 223–24.

49. *E.g.*, Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 47 (Alaska 1979); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

damages also serve a valuable compensatory function in products liability cases.[50]

A fourth function of punitive damages in products liability litigation has been termed law enforcement.[51] Professor Owen argues that the prospects of a large punitive damages award may induce a plaintiff to act as a private attorney general, thus exposing the manufacturer's misconduct.[52] Professor Owen also sees the punitive damages award as a way of implementing the rules of substantive law that society for various reasons would be unable to enforce.[53] This law enforcement function appears to be in part an extension of the deterrence function and has been implicitly recognized by some courts.[54]

Finally, the threat of punitive damages awards is often used as a settlement tool in products liability litigation.[55] This tactical function has been described in attorneys' practice manuals[56] and is well known to products liability and personal injury litigators.

III. THE DEBATE

A. *Two Factual Frameworks*

1. Wangen v. Ford Motor Co.

On July 1, 1975, Robin DuVall was driving a 1967 Ford Mustang. While she was stopped at an intersection, a second car ran into the rear end of her Mustang, pushing it into the opposite lane of travel. The Mustang was then struck by another car and the Mustang's fuel tank ruptured. A fire ensued, and Robin and her three passengers were severely injured. Two of the passengers eventually died as a result of their injuries.[57]

Lawsuits were commenced against a number of defendants, including Ford Motor Company (hereinafter Ford). Both compensatory and punitive damages were sought against Ford. The claim for compensatory damages against Ford was based on Ford's alleged negligence in design, manufacture, assembly, sale, and distribution of the 1967 Mustang. The claim was also based on the theory of Ford's strict liability in tort for the sale of the 1967 Mustang in a defective condition unreasonably dangerous to the users.[58]

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50. Owen, *Punitive Damages in the Products Liability Litigation*, 74 MICH. L. REV. 1257, 1295–99 (1976). He believes that the costs of bringing a lawsuit not covered by compensatory damages would be covered by a punitive damages award.

51. *Id.* at 1287. *See also* Abramson, *Punitive Damages in Aircraft Accident Cases—A Debate*, 11 FORUM 50, 51–52 (1975).

52. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1287–88 (1976).

53. *Id.* at 1288–95.

54. *E.g.*, Gryc v. Dayton-Hudson Corp., ___ Minn. ___, ___, 297 N.W.2d 727, 733 (1980).

55. *See* DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. COUNSEL J. 344, 350 (1976).

56. *See* C. ROBBINS, ATTORNEY'S MASTER GUIDE TO EXPEDITING TOP-DOLLAR CASE SETTLEMENTS 223–25, 716 (1975).

57. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 263, 294 N.W.2d 437, 440 (1980).

58. *Id.*

Plaintiffs' claim for punitive damages was based on allegations that

> Ford knew that the fuel tanks on this and other 1967 Mustangs were dangerously defective before and after the manufacture of the car in question; that corrective design changes were made in [later] models . . .; that Ford failed to warn users of the car of the potential danger . . .; that Ford failed to recall, repair or modify the defective vehicles . . . in order to avoid [expenses and lost sales]; and that Ford's conduct . . . constituted intentional, deliberate, reckless, willful, wanton, gross, callous, malicious and fraudulent disregard for the safety of users of Ford's product.[59]

Ford moved to dismiss all allegations relating to punitive damages on the grounds that the complaints for punitive damages failed to state a claim against the defendant upon which relief could be granted. The trial court denied Ford's motion. On review the court of appeals, in an unpublished decision, concluded that punitive damages could be recovered under some of the plaintiffs' complaints but not under others.[60]

The Supreme Court of Wisconsin held:

> [T]he complaints state a claim for (1) punitive damages in the products liability action predicated on negligence or strict liability in tort; (2) punitive damages in the action which survives the death of the injured person; (3) punitive damages in the actions by the parents for damages for loss of society and companionship of a child and for loss of the minor's earning capacity and medical expenses. We further hold that the complaints fail to state a claim for punitive damages in the wrongful death action.[61]

The case was then remanded to the circuit court, where Ford will have to defend against the punitive damages claims when the case comes to trial.

2. Gryc v. Dayton-Hudson Corp.

Lee Ann Gryc, a four year old, was wearing pajamas made from a cotton material manufactured by Riegel Textile Corporation. Lee Ann heard the stove timer and walked to the kitchen to turn it off. As she reached across the stove her pajama top came in contact with a lighted burner and ignited. The pajama top was immediately engulfed in flames and burned for eight to twelve seconds before Lee Ann's mother could extinguish the flames. Lee Ann was severely burned and suffered permanent disfigurement.[62]

The type of fabric manufactured by the defendant was the fabric predominantly used in children's winter sleepwear at the time of the accident. The fabric was not treated with any flame retardant, even though products were available that could reduce the flammability of the fabric. Although the flammable characteristics of the fabric were well known to the defendant, no

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59. *Id.* at 263–64, 294 N.W.2d at 440.
60. *Id.* at 264, 294 N.W.2d at 441.
61. *Id.* at 319, 294 N.W.2d at 466–67.
62. Gryc v. Dayton-Hudson Corp., ___ Minn. ___, ___, 297 N.W.2d 727, 729–30 (1980), *cert. denied sub nom.*, Riegel Textile Corp. v. Gryc, 449 U.S. 921 (1980).

warning was given of these characteristics to either the retailers or the ultimate consumers of the product.[63]

The evidence adduced at trial established that (1) thousands of people had died from or had been seriously injured by clothing fires involving highly flammable fabrics; (2) the defendant knew of the flammability hazard, six cases having been brought against it for accidents involving the same fabric; and (3) the defendant's efforts in the flame retardant field were minimal, considering that it spent less than ten percent of its research funds on the development of nonflammable products.[64] Evidence also showed that a national standard for determining fabric flammability had been promulgated and that the defendant's fabric passed this test. It was also shown at trial that the textile industry had been instrumental in having so weak a federal flammability standard adopted.[65]

The jury found the defendant manufacturer liable on a theory of strict liability and awarded Lee Ann $750,000 in compensatory damages and $1,000,000 in punitive damages. On appeal the Supreme Court of Minnesota affirmed the awards. The court held that punitive damages may be awarded in an appropriate strict liability case.[66] The court also determined that the defendant's compliance with an applicable federal safety standard did not preclude a punitive damages award as a matter of law.[67]

Both the *Wangen* court and the *Gryc* court joined the growing number of courts expressly recognizing that punitive damages may be awarded in a strict products liability case. Unlike so many of the other courts, the *Wangen* court thoroughly addressed the arguments against allowing punitive damages in the strict products liability context. The *Gryc* court, however, chose to rely upon the fact that several jurisdictions have upheld punitive awards in strict products liability cases,[68] and that the purposes of punitive damages could be realized in a strict products liability case.[69] These bootstrap references to other decisions offer no support for the *Gryc* court's own position. An objective, thoughtful analysis should not rely upon the number of courts that have allowed or disallowed punitive damages. Instead, each court should review for itself the validity of the policies behind punitive damages awards and the theoretical and practical ramifications of allowing punitive awards. Only when the issue is approached in that manner can the arguments against awarding punitive damages in strict products liability cases be countered.[70] Fortunately, the *Wangen* court took such an approach.

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63. *Id.* at ____, 297 N.W.2d at 730–31.
64. *Id.* at ____, 297 N.W.2d at 739–40.
65. *Id.* at ____, 297 N.W.2d at 733–34.
66. *Id.* at ____, 297 N.W.2d at 733.
67. *Id.* at ____, 297 N.W.2d at 733–35.
68. *Id.* at ____, 297 N.W.2d at 732.
69. *Id.* at ____, 297 N.W.2d at 733.
70. *See, e.g.*, Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967) (dictum).

The attacks leveled upon punitive damages in strict products liability cases have basically fallen into three categories:[71] (1) arguments that the doctrine of punitive damages itself is an anomaly in the civil law and that its functions should be left to the criminal law;[72] (2) arguments that the no-fault doctrine of strict liability is theoretically incompatible with the fault-based punitive damages doctrine;[73] and (3) arguments that policy considerations weigh heavily against punitive damages in the strict products liability context.[74] Each of these categories of arguments will be considered in turn.

B. *Punitive Damages as an Infringement on the Criminal Law*

The two most widely accepted functions of punitive damages, punishment and deterrence, are also two of the functions underlying the criminal law.[75] It is argued that the punishment function of the criminal law is the characteristic that most distinguishes it from civil law.[76] Applying the doctrine of punitive damages in strict products liability cases, or in any civil case, is said to "corrupt the distinction between the civil and criminal law while permitting a lesser burden of proof for imposing the penalties."[77] If the defendant is prosecuted under criminal sanctions for his conduct, he would be subjected to a form of double jeopardy.[78] Additionally, the doctrine of punitive damages does not provide the defendant with other constitutional safeguards afforded in criminal proceedings.[79]

In *Fay v. Parker*,[80] an early New Hampshire case, Justice Foster expressed reservations about imposing punitive damages liability in civil cases:

> 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 a civil remedy for the plaintiff is the punish-

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71. A fourth category involves challenges that argue that the imposition of punitive damages violates constitutional due process guarantees in that there are no adequate standards for awarding punitive damages and that the doctrine is arbitrarily applied. Thus, the defendant is denied fair warning. Similar arguments have been used against the negligence doctrine and have been rejected. While the standard could be made more concrete, this argument is no basis upon which to repudiate the doctrine of punitive damages. *See* Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46 (Alaska 1979); K. REDDEN, PUNITIVE DAMAGES § 7.2(B) (1980).

72. *See, e.g.*, Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

73. *See, e.g.*, Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages—The Insurance Policy and the Public Policy*, 40 J. AIR L. & COM. 595 (1974); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972).

74. *See* note 73 *supra*. *See also* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838–50 (2d Cir. 1967); Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 886 (1976).

75. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 17–61 (1968).

76. *Id.*

77. Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57, 58 (1975).

78. *Id. See also* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 413–17 (1967).

79. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 330, 294 N.W.2d 437, 472 (1980) (Coffey, J., dissenting opinion); Fulton, *Punitive Damages in Product Liability Cases*, 15 FORUM 117 (1979).

80. 53 N.H. 342 (1873).

> ment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law.[81]

The answer to these valid arguments is threefold. First, punishment and deterrence are not historically unique functions of the criminal law. English common law has long recognized that punishment may be inflicted in the course of civil actions.[82] Second, because the consequences of tort actions and of criminal actions are not completely parallel, i.e., no loss of liberty and no social stigma is involved in tort liability, many of the procedural safeguards provided criminal defendants are not afforded tort defendants. Third, the law enforcement function of punitive damages[83] tends to supplement and support the criminal law. This position was taken in *Wangen v. Ford Motor Co.*, in reference to which the court stated:

> The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It . . . encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law. The latter law must be uniform as to persons and acts, must fix a maximum and minimum punishment on this basis, and cannot always be adjusted to particular circumstances of atrocity which occasionally occur.[84]

The *Wangen* court went on and quoted language in *Kink v. Combs*[85] as reflective of the court's belief that punitive damages are a valuable and effective tool in the control of human conduct and an aid to the criminal law.

> [W]hatever shortcomings the award of punitive damages may have, . . . it has the effect of bringing to punishment types of conduct that . . . almost invariably go unpunished by the public prosecutor. . . . Certainly, the criminal law seldom reaches an assault and battery case. By allowing punitive damages the self-interest of the plaintiff will lead to prosecution of the claim, while the same self-interest of the plaintiff would lead him to refrain from instituting a criminal action at his own expense. Punitive damages serve not only the aggrieved victim of an assault, but also society, for by this device, a quasi-criminal action is prosecuted, when ordinarily it would not be prosecuted at all. The multiple-damage suits countenanced by our statutes recognize the principle that certain types of violations will not be prosecuted unless the injured parties' judgment is fattened by the equivalent of punitive damages. These are civil actions (*e.g.*, antitrust suits) where the public interest is served by the incentive given to private litigation.[86]

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81. *Id.* at 382.

82. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 278, 294 N.W.2d 437, 448 (1980); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 522 (2d ed. 1899); K. REDDEN, PUNITIVE DAMAGES § 2.2, at 27 (1980).

83. *See* text accompanying notes 51–54 *supra.*

84. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 280, 294 N.W.2d 437, 448 (1980) (quoting Luther v. Shaw, 157 Wis. 234, 238–39, 147 N.W. 18, 20 (1914)).

85. 28 Wis. 2d 65, 80–81, 135 N.W.2d 789, 798 (1965).

86. 97 Wis. 2d 260, 280, 294 N.W.2d 437, 449 (1980).

C. *Theoretical Incompatibility*

A second line of attack on the allowance of damages in strict products liability cases argues that the two doctrines are theoretically incompatible. Some commentators have argued that strict liability and punitive damages will not mix since a punitive damages claim is based on allegations of a high level of misconduct on the part of the defendant, while a strict products liability claim is not concerned with the manufacturer's actions but instead focuses on a product's defectiveness.[87]

One problem with the incompatibility theory is that in a strict liability action the plaintiff's burden of proving fault has been eliminated for the purpose of establishing liability for compensatory damages. Fault, however, remains an integral part of the strict products liability action in the sense that fault is implicit in the notion of a defective product.[88] Put differently, the manufacturer or seller is "at fault" for placing into the stream of commerce a product that, by reason of its defectiveness, does not satisfy the standards of safety and quality that society deems acceptable.[89] Fault then is defined as failure to meet a standard imposed by society. "As a liability doctrine designed to compensate product accident victims for their actual losses, strict tort theory has never purported to delimit the remedies that might be appropriate if a plaintiff's accident is attributable to some aggravated fault of the manufacturer."[90]

A second weakness of the incompatibility argument is that once the plaintiff has made out a prima facie case for his strict liability claim, it would be a simple matter to allow him to make a supplementary showing of the aggravating conduct necessary to justify an award of punitive damages.[91] Thus, a two-tiered inquiry is required: first, the plaintiff must prove that the product is defective; second, the plaintiff must independently show that the defendant engaged in conduct sufficiently culpable to give rise to liability for punitive damages. Until the plaintiff can establish that the defendant is liable for compensatory damages caused by an unreasonably dangerous product, there can be no award of punitive damages.[92]

Finally, the incompatibility argument fails to take into account that punitive damages have been allowed in cases involving causes of action based on strict principles of liability such as nuisance, negligence per se, defamation,

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87. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1268 (1976) (Professor Owen addresses and effectively refutes this argument); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972). This argument will hereinafter be called the "incompatibility argument."

88. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971). *See also* Comment, *Comparative Negligence and Strict Products Liability:* Butaud v. Suburban Marine & Sporting Goods, Inc., 38 OHIO ST. L.J. 883, 887 (1977).

89. *See* Comment, *Comparative Negligence and Strict Products Liability:* Butaud v. Suburban Marine & Sporting Goods, Inc., 38 OHIO ST. L.J. 883, 887-88 (1977).

90. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1269 (1976).

91. *See* Drake v. Wham-O Mfg. Co., 373 F. Supp. 608 (E.D. Wis. 1974).

92. Igoe, *Punitive Damages: An Analytical Perspective*, TRIAL, Nov. 1978, at 48, 52.

and implied warranty in the sale of drugs.[93] Thus, there is no sound basis upon which to argue that punitive damages are inherently incompatible with the doctrine of strict products liability.[94]

D. *Policy Issues*

While there may not be an inherent incompatibility between the doctrine of punitive damages and strict products liability, mere compatibility is not a compelling justification for allowing punitive damages awards. Because of the distinctive characteristics of the doctrines of strict products liability and punitive damages,[95] the practical consequences of the commingling of the two doctrines have caused great concern to many commentators.[96] The beneficial effects of punitive damages must outweigh any negative effects before use of the doctrine in the strict liability context would be justified.[97]

The policy arguments generally mustered by defendants break down into four categories: (1) the punishment and deterrence functions of the punitive damages doctrine are not needed in the strict products liability context; (2) those functions would not be effective in this area; (3) potential multiple punitive damages awards would cause undesirable economic damage to defendant manufacturers; and (4) undesirable social consequences would follow from mixing the doctrines. Each of these arguments deserves consideration.

1. *Functions of Doctrine Unneeded*

Two factors are generally cited in support of the argument that the punishment and deterrence functions of punitive damages are not needed in products liability cases. First, compensatory damages are said to fulfill those functions. Because large numbers of plaintiffs may potentially recover compensatory damages under strict liability actions, and since compensatory awards have grown larger, manufacturers argue that the costs of paying these claims or insurance premiums will deter them from engaging in culpable conduct.[98]

Although there is some truth to this argument, it does not follow that all manufacturers will be deterred. Any manufacturer who believes that his or her profits will outweigh the expenses of litigation and claims payments will not be deterred. "Some [manufacturers] may think it cheaper to pay damages or a forfeiture than to change a business practice."[99] For those entities, the

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93. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1270–71 (1976).

94. *Contra*, Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. COUNSEL J. 402 (1977).

95. The doctrine of strict products liability is normally invoked by an individual and there is often the potential of numerous plaintiffs. The doctrine of punitive damages often involves large monetary claims and is most often invoked in cases in which the defendants have engaged in outrageous behavior.

96. *See, e.g.*, Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972).

97. *See generally* Gryc v. Dayton-Hudson Corp., ___ Minn. ___, ___, 297 N.W.2d 727, 740–41 (1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 283–98, 294 N.W.2d 437, 450–57 (1980).

98. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 285–86, 294 N.W.2d 437, 451 (1980).

99. *Id.*

prospect of paying punitive damages might well deter them, since they lose the profitability of their misconduct.[100]

The second aspect of the argument that punitive damages are not needed is based on the existence of state and federal regulation of product quality. It is argued that because of this regulation and the threat of statutory civil or criminal penalties, manufacturers are already deterred from engaging in the type of behavior upon which liability for punitive damages is based.[101] Three basic weaknesses cripple this line of attack. First, as the *Wangen* court noted, not all manufacturers are subject to the extensive regulation that this argument assumes.[102] Second, the present political climate portends an era of deregulation. If such deregulation occurs, there would be no effective deterrent beyond the good faith of the manufacturers. Third, the argument assumes that governmental agencies will zealously and vigorously enforce regulations and pursue violators. As noted earlier, governmental bodies are often hindered by economic, political, and practical restraints in enforcing the laws and regulations of society.[103] Furthermore, emphasis on such vigorous enforcement of regulations could lead to greater harm to innocent manufacturers because of constant harassment for minor noncompliance. Finally, this argument fails to take into account the breakdown of the deterrent effect on those manufacturers that consciously weigh the cost of noncompliance and find that the potential profit far outweighs the potential sanctions.

2. *The Doctrine's Goals Are Unachievable in the Products Liability Cases*

The opponents of punitive damages in a products liability case have also contended that the functions of punishment and deterrence cannot be achieved because the costs will simply be covered by insurance or passed on to the public.[104] The first assumption of this argument, that insurance can be purchased to cover any punitive liability, may be at least partially invalid—a number of insurers now decline to permit such coverage.[105] In addition, a number of states have refused to allow such coverage on the grounds that it would be against public policy.[106]

A second weakness of this argument is its failure to deal with the compensatory and law enforcement functions served by punitive damages. The prospect of a sizable punitive damages award may entice a plaintiff to sue when he otherwise would have been discouraged because his probable compensatory damages would be outweighed by litigation expenses. Thus, products that cause minor damages to numerous victims can be exposed and forced from the market.[107]

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100. *Id.*
101. *Id.*
102. *Id.*
103. *See* text accompanying notes 51–54 *supra.*
104. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 285, 294 N.W.2d 437, 451 (1980).
105. MODEL UNIFORM PRODUCTS LIABILITY ACT, Analysis § 120, 44 Fed. Reg. 62,714, 62,748 (1979).
106. *Id. See also* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 287 n.13, 294 N.W.2d 437, 452 n.13 (1980).
107. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 288, 294 N.W.2d 437, 452 (1980).

Economic reality also conflicts with the second assumption of this argument—that costs will simply be passed on to the public. No doubt some costs will be passed on to the public. However, in our competitive free market system, any company that consistently increases the price of its products to offset punitive damages liability would eventually price itself out of the market. More responsible manufacturers would be able to keep costs down since they would not be faced with soaring insurance rates or payment of large punitive damages awards.[108]

Finally, the deterrent effect of potential punitive damages is demonstrated daily. The recent actions by Proctor & Gamble, Inc., to withdraw a highly successful product from the market and to issue warnings and recall orders may stem in some measure from a desire to avoid punitive damages.[109] Other such examples, though less publicized, support the position that punitive damage awards may be a deterrent.[110]

3. *Undesired Economic Impact*

Judge Friendly vividly articulated the third major policy attack. His dictum in *Roginsky v. Richardson-Merrell, Inc.*[111] has become the rallying point for the opponents of punitive damages awards in products liability cases. He stated in part:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into tens of millions. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill. . . .
>
> [A] sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future.[112]

Thus, Judge Friendly's dictum has led to dire predictions of economic ruin for manufacturers hit with punitive damage liability.

At present it appears that Judge Friendly is a much better jurist than prophet. Professor Owen has stated that "the threat of bankrupting a manufacturer with punitive damages awards in mass disaster litigation appears to be more theoretical than real."[113] Since Professor Owen's research, other studies have documented his conclusion. The Interagency Task Force on

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108. Because the size of a punitive damages award should be based upon the amount of money needed to meet the goals of the punitive damages doctrine, the award should be large enough to make the defendant's activity unprofitable.

109. In addition to removing the Rely Tampon from the marketplace, the manufacturer ran a media campaign to educate the public to the potential danger. New York Times, Sept. 23, 1980, at 1, col. 3.

110. Note the recent recall of cribs by Bassett Furniture Industries. Bassett voluntarily agreed to modify crib models that allegedly had caused the strangulation deaths of six infants. 7 CPSLR 933 (1979).

111. 378 F.2d 832 (2d Cir. 1967).

112. *Id.* at 839, 841.

113. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1324-25 (1976).

Product Liability has noted that there have been few cases with punitive damages awards.[114] Additionally, a spokesman for the Insurance Services Office (ISO) has stated, "The overall amount of punitive damages has not been sufficiently significant to warrant rate adjustments as a result."[115] Finally, the Analysis to Section 120 of the Model Uniform Products Liability Act states: "While many product sellers have expressed great concern about the economic impact of punitive damages, the 'ISO Closed Claims Survey' suggests that the number of cases in which such damages are imposed is insubstantial."[116] The *Wangen* court also took note of the lack of substantiation of manufacturers' dire predictions.[117]

Should the manufacturers' predictions prove true, judicial controls presently exist that can avert the crippling effects of a multiplicity of huge punitive damage awards. Courts seem willing to use the tool of remittitur,[118] and evidence of prior awarded claims could be submitted to show that there is no need for a large punitive award.[119]

4. *Undesirable Social Consequences*

Two additional consequences of punitive damage awards, also articulated by Judge Friendly,[120] have been offered as reasons to prohibit punitive awards. First, it is contended that punitive damages awards will serve to punish only innocent shareholders. The *Wangen* court quickly dispensed with this argument by noting:

> [T]he loss of investment and the decline in value of investments are risks which investors knowingly undertake, and investors should not enjoy ill-gotten gains. There is a public interest in encouraging shareholders and corporate management to exercise closer control over the operations of the entity, and the imposition of punitive damages may serve this [purpose].[121]

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114. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT VII-77 (1977).

115. *Id.* (quoting an Insurance Services Office Press Release, Aug. 17, 1977, that called for the exclusion of punitive damages from liability policies).

116. 44 Fed. Reg. 62,714, 62,748 (1979) (citing *ISO Closed Claims Survey* at 183).

117. 97 Wis. 2d 260, 294–96, 294 N.W.2d 437, 455–56 (1980).

118. *E.g.*, Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979). *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1320–21 (1976).

119. This approach has been adopted by the MODEL UNIFORM PRODUCTS LIABILITY ACT § 120(B)(7), 44 Fed. Reg. 62714, 62748 (1979), which states:

> (B) If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of those damages. In making this determination, the court shall consider: . . .
>
> (7) The total effect of other punishment imposed or likely to be imposed upon the product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of criminal penalties to which the product seller has been or may be subjected.

See also Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1319 (1976).

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

121. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 291, 294 N.W.2d 437, 453–54 (1980). *But see* Jones, *Corporate Governance: Who Controls the Large Corporation?*, 30 HASTINGS L.J. 1261 (1979) (pointing out the divorce of shareholder ownership from control and the marked trend toward management control).

The second undesirable consequence is that punitive damages are a windfall to the plaintiff and that the first plaintiffs to be awarded judgments may reap huge awards while later plaintiffs may come up empty-handed. Yet a first plaintiff is the one who should receive large punitive damages awards in most cases because he takes the greatest risk—that is, of being unable to establish that the defendant manufactured or sold a product that was unreasonably dangerous. Should he win, however, those who come after the first plaintiff can build on his success. Moreover, because he is first, the first plaintiff perforce incurs the greatest transaction costs. Thus, the punitive damages award would fulfill its compensatory function by reimbursing the first plaintiff for the increased costs of litigation and would fulfill its law enforcement function by operating as an incentive to bring private actions.[122] Additionally, plaintiffs generally have no right to punitive damages,[123] and who receives the awards is irrelevant to fulfilling the punishment and deterrent functions of the punitive damages doctrine.[124]

IV. THE DEFENSES

As more jurisdictions expressly recognize the compatibility of the punitive damages doctrine and the strict products liability doctrine, pressure will mount for recognition of per se defenses to punitive damages awards. Three such "defenses" have already surfaced in the few reported cases dealing with punitive damages awards in strict products liability cases.[125] For purposes of discussion these asserted defenses will be labeled the "compliance" defense, the "industry custom" defense, and the "corporate acquisition" defense.

A. *Compliance with Federal Standards as a Per Se Defense*

In recent cases defendants have argued that compliance with a federal regulatory or safety standard precludes an award of punitive damages.[126] The compliance defense is based on two theories, and defendants argue that either theory affords a complete defense to punitive damages liability. First, because the defendant has complied with the applicable regulation or standard, it is contended that he could not have been acting with reckless disregard of the rights of others. Compliance thus precludes, as a matter of law, "a finding of that guilty state of mind which is a necessary prerequisite to a punitive damages award."[127] Second, if the defendant complied with a federal standard or regulation, it is argued that the imposition of punitive damages would constitute an inconsistent state law that has been preempted by the federal

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122. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 289–93, 294 N.W.2d 437, 453–54 (1980). *See* text accompanying notes 49–54 *supra*.

123. K. REDDEN, PUNITIVE DAMAGES § 3.4(A) (1980).

124. *See* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 291–92, 294 N.W.2d 437, 454 (1980).

125. The discussion of these three defenses includes some but not all of the arguments upon which defendants have relied.

126. Gryc v. Dayton-Hudson Corp., ___ Minn. ___, ___, 297 N.W.2d 727, 733–35 (1980).

127. *Id.* at ___, 297 N.W. 2d at 733.

legislation. Thus, imposition of punitive damages would violate the supremacy clause of the United States Constitution.[128]

The *Gryc* court extensively examined the compliance argument and found both of its theories lacking. The same conclusions were also recently reached in *Silkwood v. Kerr-McGee Corp.*[129] In rejecting the first aspect of the compliance defense, these courts pointed to the error in focusing upon the defendant's conduct rather than his mental state.[130] Punitive damages are awarded only when the plaintiff has shown sufficient mental culpability. It is possible to comply with regulatory standards and still be acting in reckless disregard of the rights of others. A defendant may have duties in addition to those prescribed by regulation,[131] and knowing disregard of those duties could constitute the recklessness and indifference to the safety of others that would make a punitive damages award appropriate.[132]

Second, regulations and safety standards are often outdated,[133] invalid,[134] or designed to serve only as minimal standards.[135] Rapidly changing technology makes many regulations obsolete soon after they are promulgated. This is evident from the periodic changes that many regulations undergo.[136] If a plaintiff can introduce evidence to show that a standard is invalid or that a regulation was not intended to cover a specific situation, then compliance should not be a defense.

Finally, allowing manufacturers to rely upon compliance with a regulation as a per se defense to punitive damage liability partakes of the wisdom of allowing the fox to guard the chicken coop. Numerous safety standards and regulations are adopted as a result of industry influence.[137] These standards are often modeled after private safety standards that were designed to protect the industry rather than the public.[138] Thus, the duty of care they embody may be lower than the duty society requires from the industry.[139]

The preemption theory of the compliance defense requires a case by case analysis to determine whether Congress intended to preempt the imposition of punitive damages when the regulation was created.[140] There may be situations in which Congress has used its powers expressly to exclude state laws or to preclude punitive damages awards.[141] In such situations punitive damages

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128. *Id.* at ____, 297 N.W. 2d at 735.
129. 485 F. Supp. 566, 576–87 (W.D. Okla. 1979).
130. *Id.* at 583. *See* Gryc v. Dayton-Hudson Corp., ____ Minn. ____, ____, 297 N.W.2d 727, 733–35 (1980).
131. Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 584 (W.D. Okla. 1979).
132. *Id.*
133. *Id.* at 579–80.
134. Gryc v. Dayton-Hudson Corp., ____ Minn. ____, ____, 297 N.W.2d 727, 734 (1980).
135. *Id.* at ____, 297 N.W.2d at 736.
136. Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 579–80 (W.D. Okla. 1979).
137. Gryc v. Dayton-Hudson Corp., ____ Minn. ____, ____, 297 N.W.2d 727, 734 (1980). *See also* Igoe, *Punitive Damages: An Analytical Perspective*, TRIAL, Nov. 1978, at 48, 52–53.
138. *See* note 137 *supra.*
139. *See* Igoe, *Punitive Damages: An Analytical Perspective*, TRIAL, Nov. 1978, at 48, 52–53.
140. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).
141. *See generally* K. REDDEN, PUNITIVE DAMAGES § 6.2 (1980).

would be prohibited. A punitive damages award would also be precluded if the imposition of punitive damages made it impossible for the defendant to comply with federal legislation.[142] Punitive damages awards, however, do not have such an effect, for punitive damages awards operate as an incentive for a manufacturer to meet or go beyond the standards set in federal legislation. Absent explicit or inevitable conflict, the preemption analysis must proceed to a determination of whether Congress intended to displace coincident state regulation in a given area.[143] Such congressional intent is shown either when the legislation explicitly states that the authority conferred by it is exclusive,[144] or when a preemptive intent is implied. The *Gryc* court quoted *Northern States Power Co. v. Minnesota*[145] for its expression of the key factors to use in determining whether Congress has, by implication, preempted a particular area so as to preclude state attempts at dual regulation. The factors include:

> (1) the aim and intent of Congress as revealed by the statute itself and its legislative history, . . . (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency, . . . (3) the nature of the subject matter regulated and whether it is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests," . . . and ultimately (4) "whether, under the circumstances of [a] particular case [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[146]

Few pieces of congressional product safety legislation would be hampered by allowing punitive damages awards in effect to place a higher duty on a manufacturer. The punitive damages remedy is not the type of inconsistent state law that Congress normally seeks to preempt.[147] Since many federal regulations set minimum standards,[148] it would not be impossible for a manufacturer to take steps both to avoid the possibility of punitive damages and to comply with a federal standard. Many of the major pieces of federal legislation explicitly leave intact the various forms of liability at common law.[149] While the preemption aspect of the compliance defense may be available in a few cases, it appears that in most cases there would be no conflict between federal law and the imposition of punitive damages. Courts accordingly should reject such an argument.

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142. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).
143. Gryc. v. Dayton-Hudson Corp.,____ Minn. ____, ____, 297 N.W.2d 727, 735 (1980).
144. *Id.*
145. 447 F.2d 1143, 1146–47 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).
146. ____ Minn. ____, ____, 297 N.W.2d 727, 735 (1980).
147. *Id.* at ____, 297 N.W.2d at 736.
148. *Id.*
149. *E.g.*, Consumer Product Safety Act, 15 U.S.C.A. §§ 2051–2081 (West 1967 & Supp. 1980). Section 2074(a) states: "Compliance with consumer product safety rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person."

B. *Compliance with Industry Custom*

In *Maxey v. Freightliner Corp.*,[150] the Fifth Circuit, applying Texas law, held that compliance with industry custom in the design of truck fuel systems precluded an award of exemplary damages.[151] The court of appeals affirmed the district court's judgment notwithstanding the verdict, which had struck down the jury's $10,000,000 punitive damages award.[152] The district court had stated that "adopting a design common to all manufacturers and millions of vehicles for over thirty years is a sufficient effort at safety to preclude a finding that Freightliner acted with an intent which approximates a fixed purpose to bring about this injury."[153]

The industry custom defense suffers from two major weaknesses. First, it focuses on the defendant's conduct instead of the defendant's mental state. As noted earlier, it is the mental state of the defendant that is the basis for an award of punitive damages.[154] While a defendant may offer evidence of compliance with industry standards to negate the allegation that his conduct in designing a defective product was accompanied by a culpable mental state, it is the province of the jury to decide if the defendant acted in good faith.[155] As stated by Judge Johnson in his *Maxey* dissent, "The question of whether exemplary damages are ever appropriate against a manufacturer who has complied with industry custom becomes to me the question *whether society will ever be served by deterring manufacturers from complying with industry custom.*"[156]

The second weakness of the industry custom defense is that it could allow "an entire industry to consciously disregard the rights and welfare of others and thereby insulate itself from any liability for exemplary damages."[157] Allowing such a defense serves to defeat all of the goals of the punitive damages doctrine. While the cost of liability for compensatory damages may induce some manufacturers to design safer products, it is more likely that such costs will be figured into the product price throughout the industry. If the manufacturers were subject to punitive damages awards, they would face liability designed to sting and could be prompted to design safer products.[158]

It is too early to determine the extent to which the industry custom

150. 623 F.2d 395 (5th Cir. 1980).

151. *Id.* at 399.

152. Maxey v. Freightliner Corp., 450 F. Supp. 955, 964 (N.D. Tex. 1978).

153. *Id.* Both the majority opinion and the dissenting opinion in the court of appeals noted that the district court applied an improper standard for the award of exemplary damages. 623 F.2d 395, 405 n.2 (5th Cir. 1980) (Johnson, J., dissenting opinion).

154. K. REDDEN, PUNITIVE DAMAGES § 3.1(A) (1980). *See* text accompanying note 23 *supra*.

155. K. REDDEN, PUNITIVE DAMAGES § 3.1(A) (1980).

156. Maxey v. Freightliner Corp., 623 F.2d 395, 405 (5th Cir. 1980) (Johnson, J., dissenting opinion) (emphasis added).

157. *Id.*

158. *Id. See also* Drayton v. Jiffee Chem. Corp., 591 F.2d 352, 374 (6th Cir. 1978) (Keith, J., dissenting opinion).

defense may be adopted by other courts, but it is evident that it has significant drawbacks. The defense fails to focus on the mental state of the defendant, instead looking to the defendant's conduct, and grants a conclusive defense. No matter how culpable the defendant is, as long as he has complied with the custom of his industry, he will be immune from punitive damages liability. This defense would appear to be available even if the entire industry had intentionally disregarded the rights of the public by continuing to design a dangerous product when economical and safe alternative designs were available.

When viewed in light of the functions of the punitive damages doctrine, the industry custom defense makes little sense. Allowing the defendant to rely upon the misconduct of others as a defense to his own misconduct ignores the goals of punishment and deterrence. If a plaintiff can show that the defendant had known that his product was defectively designed, that it had caused injuries, and that safe alternative designs could have been developed, there may be a real need to deter this defendant and the others in the industry. In such a case the custom of the industry does not conclusively show that the defendant has not intentionally or recklessly disregarded the rights of others. Additionally, in such a case there may be an increased need for the compensatory and law enforcement functions of the punitive damages doctrine. The incentive of a possible windfall recovery may encourage a potential plaintiff to undertake the difficult tasks of proving that the product was unreasonably dangerous. Thus, a better approach, and one that courts will most likely follow, is to make compliance with industry custom merely a factor in the determination of the defendant's mental state.[159]

C. *Change in Corporate Ownership*

In *Drayton v. Jiffee Chemical Corp.*,[160] a possible defense based upon change in corporate ownership began to emerge. One of the key factors noted by both the court of appeals and the district court for denying punitive damages was the fact that the defendant had been acquired by another corporation. It was found that the new owner had demonstrated greater concern for the consuming public and had purged itself of any preexisting misconduct.[161]

The suit in *Drayton* was brought after a child was severely burned when a bottle of Liquid-Plumr spilled over her face. Evidence established that Liquid-Plumr contained a solution of approximately twenty-six percent

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159. *See* Gryc v. Dayton-Hudson Corp., ___ Minn. ___, ___, 297 N.W.2d 727, 731 (1980). The *Gryc* court noted that the textile industry in the United States was not producing flame retardant flannelette at the time defendant produced the material involved in the case. The entire industry could have used flame retardant chemicals, however, "if only the textile mills had so desired." Thus, while the defendant had complied with the custom of the industry, the *Gryc* court did not allow this to preclude an award of punitive damages.

160. 591 F.2d 352 (6th Cir. 1978).

161. *Id.* at 366.

sodium hydroxide, commonly known as lye. Evidently, defendant's product was safer than any other liquid drain cleaner sold at the time, although the industry practice had improved by the time of trial and the defendant's successor had begun producing a safer product.[162]

It was also established that this and like products were widely used throughout the United States at the time of the accident. Liquid-Plumr was advertised as safe and consumers were encouraged to purchase and use the product.[163]

The court of appeals chose to uphold the district judge's finding of compensatory liability on the narrow ground of breach of express warranty. Thus, the court did not address the issue of punitive damages in the context of the strict liability or implied warranty claims. The court acknowledged the trial court's statement that "[a]s a general rule punitive damages are disfavored in the law absent evidence of willful or wanton conduct by the defendant or the clear need for the imposition [of] a deterrent."[164]

The court noted that the trial court, in denying punitive damages, relied upon the evidence of (1) improving industry practices and (2) the fact that the defendant had been acquired by Clorox Corporation. The district court had felt that these factors eliminated any need for a deterrent to future misconduct. The court also noted the district court's conclusion that the Clorox Corporation demonstrated greater concern for the consuming public than had its predecessor and had purged itself of any preexisting misconduct.[165]

The dissenting opinion rejected the majority's conclusion and noted that the acquisition of the defendant corporation by Clorox Corporation should not immunize the successor corporation from punitive damages.[166] Thus, a debate has been initiated over what role the later acquisition of a corporate entity should play in the determination of punitive damages liability.[167] Three

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162. *Id.* at 374.

163. *Id.* at 385.

164. *Id.* at 365.

165. *Id.* at 366. The majority opinion can be read to mean that a corporate acquisition will only be a defense to a punitive damages claim when (1) there is a showing of improving industry practices; and (2) the new corporate owner has purged itself of preexisting misconduct.

166. 591 F.2d 352, 374 (6th Cir. 1978).

167. What effect a later corporate acquisition should have on liability for compensatory damages has led to the development of the "successor corporation" doctrine. This doctrine holds that the corporation purchasing the assets of a dissolved corporation is not liable for any claims against the dissolved corporation. There are exceptions to this rule, and the rule and its exceptions have been stated:

> Where one corporation sells or transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the former unless (1) the purchaser expressly or impliedly agrees to such assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape liability for debts.

Fegan, *Successor Corporations and Strict Liability in Tort—A Convergence of Two Opposing Doctrines*, 69 ILL. B.J. 142, 142 (1980). Courts have had a difficult time wrestling with what effect corporate dissolution should have on strict products liability claims for compensatory damages. Some courts have adhered to the common law rule, while others have either tried to broaden the exceptions or departed from the rule completely. If a court decides that a corporation is not liable under this doctrine for compensatory damages, then that corporation could not be liable for punitive damages. If, however, a corporation is found to fall within one of the exceptions to the rule or if the court abandons the rule, the court must still determine what effect the corporate

possibilities exist: (1) the later acquisition could act as a per se defense to punitive damage claims; (2) it could be held to be irrelevant and excluded entirely from consideration; or (3) it might simply be a factor in determining the amount of the award.

Allowing a later corporate acquisition to act as a per se defense to liability fails to take into account the fact that the punitive damages doctrine focuses on the defendant's mental state at the time of the accident.[168] If the plaintiff can show that the defendant acted in reckless disregard of the rights of others, then the defendant should be liable for punitive damages. Later acts cannot serve to eliminate the culpability that existed at the time of the injury to the plaintiff. Therefore, a later corporate acquisition cannot logically serve as a per se defense to punitive damages claims.

While the above analysis indicates that a later acquisition should not be a factor in determining liability in the first instance, it does not lend support to the position that such a fact is irrelevant and should be excluded from consideration in awarding punitive damages. Instead, a later acquisition should be considered in determining the amount of the punitive damages award. Due regard should be given to the effect of a corporate acquisition on each of the functions of the punitive damages doctrine.[169] The need for the punishment function in this situation is questionable. There could be, however, a great need for the compensatory and law enforcement functions of punitive damages. Likewise, the deterrent function might be needed if the successor corporation has continued to market the unreasonably dangerous product or if other manufacturers are marketing similar products. As stated in the *Drayton* dissent:

> Punitive damages are needed in cases such as this to put lawless corporations on notice that profitable but highly dangerous products cannot be marketed in the expectation that they will cause injuries to a few persons who can be cheaply compensated. It is only when the profit is taken out of the manufacture of hazardous substances that future horrifying injuries such as the one here can be averted.[170]

It is too early to predict whether manufacturers will press the corporate acquisition defense. Because the majority decision in *Drayton* did not rest solely on the corporate acquisition defense, *Drayton* may be construed as weak support for that argument. It can be hoped that courts will choose to allow a corporate acquisition to be simply a factor in determining the amount of the punitive damages award.

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acquisition will have on punitive damages liability. The scope of this Comment does not permit a detailed examination of the successor corporation doctrine. For further reference *see* Fegan, *Successor Corporations and Strict Liability in Tort—A Convergence of Two Opposing Doctrines*, 69 ILL. B.J. 142 (1980); Annot., *Products Liability: Liability of Successor Corporation for Injury or Damages Caused by Product Issued by Predecessor*, 66 A.L.R.3d 824 (1975).

168. *See* text accompanying note 23 *supra*.

169. *See* text accompanying notes 19–38 *supra*..

170. 591 F.2d 352, 374 (6th Cir. 1978) (Keith, J., dissenting opinion) (citation omitted).

V. CONCLUSION

Each of the arguments advanced for repudiating the doctrine of punitive damages in strict products liability cases can be refuted. Mixing the two doctrines, however, can pose serious problems. Courts must use their inherent powers to protect defendants from the problems caused by a multiplicity of lawsuits. If the courts fail to impose sufficient structural safeguards in this area, legislators will be quick to step in and provide relief.[171]

The defenses advocated thus far, while having inherent appeal, are not adequate substitutes for a case by case analysis of the defendant's culpability. These defenses would at times serve only to defeat the functions of the punitive damages doctrine. Thus, they should not, as a matter of law, be allowed to exculpate the defendant.

Punitive damages awards serve valuable functions. Administered wisely, these awards will serve to benefit society. Courts should embrace the challenge of applying punitive damages awards in strict products liability cases.

Richard D. Schuster

APPENDIX*

STATES CONSIDERING PUNITIVE DAMAGES AWARDS IN STRICT PRODUCTS LIABILITY CASES

Alaska:

Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979). Punitive damages awarded, but on appeal award was reduced to a maximum of $250,000 in this case.

Arizona:

D'Hedouville v. Pioneer Hotel Co., 552 F.2d 886 (9th Cir. 1977). Punitive damages issue was submitted to jury but jury did not award punitive damages. On appeal, the submission of the punitive damages issue to the jury was upheld.

California:

Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). The appellate court upheld a punitive damages award of $250,000. The punitive damages award was not tied to any specific theory of liability.

Barth v. B. F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968). Punitive damages issue was submitted to the jury but jury did not

171. Structural safeguards are needed, especially to deal with situations involving numerous plaintiffs and the possibility of huge awards. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1295–99 (1976).

* Current as of February 1981.

award punitive damages. On appeal, the submission of the punitive damages issue to the jury was upheld.

District of Columbia:

Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976). The court of appeals upheld the directed verdict for the defendant on the issue of punitive damages.

Georgia:

Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980). The court of appeals upheld the judgment notwithstanding the verdict for the defendant on the issue of punitive damages.

Illinois:

Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. 1969). A punitive damages award of $10,000 was upheld.

Kansas:

Boehm v. Fox, 473 F.2d 445 (10th Cir. 1973). The punitive damages award was upheld.

Cantrell v. Amarillo Hardware Co., [1980 Current Decisions Binder] Prod. Liab. Rep. (CCH) ¶ 8583 (Kan. S. Ct., No. 50,140, Dec. 1, 1979). A punitive damages award of $18,500 was upheld.

Minnesota:

Wagner v. International Harvester Co., 611 F.2d 224 (8th Cir. 1979). The court of appeals upheld the trial court's refusal to allow the plaintiff to amend his complaint to raise the issue of punitive damages.

Gryc v. Dayton-Hudson Corp., ____ Minn. ____, 297 N.W.2d 437 (1980). The Minnesota Supreme Court found that compliance with a federal safety standard did not preclude liability for punitive damages and upheld a punitive damages award of $1,000,000.

Abel v. J.C. Penney Co., 488 F. Supp. 891 (D. Minn. 1980). The district court noted that punitive damages could be awarded in a strict products liability case.

Missouri:

McIntyre v. Everest & Jennings, Inc., 575 F.2d 155 (8th Cir. 1978). The trial court vacated a jury's award of punitive damages. The court of appeals refused to reach the punitive damages issue because it held that the plaintiff had failed to make a meritorious case for compensatory damages.

Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. App. 1978). A punitive damages award of $460,000 was upheld on appeal.

New York:

Ostopowity v. William S. Herrell Co., 157 N.Y.L.J. 21 (1967) (N.Y. Sup. Ct. Westchester Co.). A punitive damages award was upheld.

Roginsky v. Richardson-Merrell, Inc. 378 F.2d 832 (2d Cir. 1967). The court of appeals reversed an award of punitive damages due to insufficient evidence.

Hafner v. Guerlain, Inc., 34 A.D.2d 162, 310 N.Y.S.2d 141 (1971). The reversal of a jury's award of punitive damages was affirmed on appeal since the court found that there was insufficient evidence to support even the award of compensatory damages.

Oklahoma:

Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979). The defendant was held strictly liable for damages caused by radioactive material. The defendant was also held liable for punitive damages.

Ohio:

Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975). The court of appeals reversed the trial court's granting of a motion for judgment n.o.v. for the defendant on the issue of punitive damages.

Drayton v. Jiffee Chem. Corp., 591 F.2d 352 (6th Cir. 1978). The court of appeals upheld the district judge's denial of punitive damages in a bench trial.

Pennsylvania:

Thomas v. American Cytoscope Makers, Inc., 414 F. Supp. 255 (E.D. Pa. 1976). The court granted the defendant's motion for a judgment n.o.v. on the issue of punitive damages.

Hoffman v. Sterling Drug, Inc., 485 F.2d 132 (3d Cir. 1973). The court of appeals reversed the district court's refusal to submit the issue of punitive damages to the jury.

Tennessee:

Johnson v. Husky Indus., Inc., 536 F.2d 645 (6th Cir. 1976). The court of appeals reversed an award of punitive damages.

Texas:

Newding v. Kroger Co., 554 S.W.2d 15 (Tex. Civ. App. 1977). The appellate court upheld the trial court's decision to grant the defendant's motion for a judgment n.o.v.

Maxey v. Freightliner Corp., 623 F.2d 395 (5th Cir. 1980). Defendant's compliance with industry practices was a per se defense to a punitive damages claim.

Kritser v. Beech Aircraft Corp., 479 F.2d 1089 (5th Cir. 1973). The court of appeals upheld the district court's refusal to submit the issue of punitive damages to the jury.

Wisconsin:

Drake v. Wham-O Mfg. Co., 373 F. Supp. 608 (E.D. Wis. 1974). The district court denied the defendant's motion to dismiss the plaintiff's claim of punitive damages.

Simmons v. Atlas Vac Mach. Co., 475 F. Supp. 1181 (E.D. Wis. 1979).

The district court held that under Wisconsin law a punitive damages claim should not be dismissed at the pleading stage of the action.

Kirschnik v. Pepsi-Cola Metropolitan Bottling Co., 478 F. Supp. 842 (E.D. Wis. 1976). The district court held that punitive damages are not available in actions based on negligence or strict liability.

Walburn v. Berkel, Inc., 433 F. Supp. 384 (E.D. Wis. 1976). The district court held that punitive damages are not allowed under negligence or strict liability claims in Wisconsin.

Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980). The Wisconsin Supreme Court held that punitive damages could be recovered in a strict products liability action.