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Journal of Legislation

Volume 14 | Issue 2 Article 12

5-1-1987

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David J. Gilmartin

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Recommended Citation

Gilmartin, David J. (1987) "Status and Trends in State Product Liability Law: Punitive Damages;Symposium on Product Liability: Note," *Journal of Legislation*: Vol. 14: Iss. 2, Article 12.
Available at: http://scholarship.law.nd.edu/jleg/vol14/iss2/12

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STATUS AND TRENDS IN STATE PRODUCT LIABILITY LAW: PUNITIVE DAMAGES

INTRODUCTION

Punitive damages are awarded to punish for outrageous conduct or to deter future similar conduct.[1] Damages are based on "the defendant's evil motive or his reckless indifference" toward others, the nature and extent of harm and the wealth of the defendant.[2] Punitive damages have their roots in English common law.[3]

Several theories explain the development of punitive damages. First, appellate courts are reluctant to grant new trials when excessive damages are awarded at trial.[4] The desire to compensate a plaintiff for otherwise uncompensable injuries is another factor.[5] Punitive damages have also been characterized as a judicial attempt to fill gaps in the criminal law.[6]

Although punitive damages developed primarily in the area of intentional torts, they have been extended to the product liability area.[7] Almost every jurisdiction allows punitive damage awards.[8] Today, along with many other aspects of the tort and insurance systems, states are reevaluating the effectiveness of punitive damage awards in the product liability

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1. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1979); 5 M. MINZER, J. NATES, C. KIMBALL & D. AXELROD, DAMAGES IN TORT ACTIONS § 40.12(1) (1986).
2. M. MINZER, J. NATES, C. KIMBALL & D. AXELROD, *supra* note 1, at 40.12(1).
3. One of the earliest cases awarding punitive damages was based on illegal entry for which the jury went beyond compensatory purposes to show public outrage at such a daring attack. Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763). Other rationales were articulated as the concept of punitive damages developed. *See, e.g.*, Tullidge v. Wade, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (1769) (compensating for uncompensable injuries). For general historical development, *see* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1262-68, (1976); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 642-43 (1980).
4. Courts look for a justification in permitting such high awards. *See* Mallor & Roberts, *supra* note 3, at 642.
5. What was originally uncompensable, such as pain and suffering, is now included in compensatory awards. *Id.*
6. Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 449 (1980) ("Suffice it to say that whatever shortcomings the award of punitive damages may have, nevertheless, it must be remembered that it has the effect of bringing to punishment types of conduct that though oppressive and hurtful to the individual almost invariably go unpunished by the public prosecutor.").
7. *See* AM. BAR ASS'N, REPORT OF THE ABA ACTION COMM'N TO IMPROVE THE TORT LIABILITY SYSTEM (1987) at 16 [hereinafter cited as ABA REPORT].
8. Only five states forbid punitive damages: Louisiana, Massachusetts, Nebraska, New Hampshire and Washington. Colorado, Florida and Oklahoma have capped punitive damages, while Minnesota restricted filings for punitive damages. *The Impact of Tort Reform*, BUS. INS., May 11, 1987, at 1. *See, e.g.*, Ricard v. State, 390 So. 2d 882, 884 (La. 1980); City of Lowell v. Massachusetts Bonding & Ins. Co., 313 Mass. 257, 269-70, 47 N.E.2d 265, 272 (1943); Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (1975); Kammerer v. Western Gear Corp., 27 Wash. App. 512, 521-22, 618 P.2d 1330, 1337 (1980) (no punitive damages in absence of statutory authorization).

area and are attempting to control them through case law and legislation.[9] Some advocates of punitive damages have reformulated their opinions.[10] Interest groups have taken sides concerning the need for product liability reform.[11] This section presents the policies for and against punitive damages and various solutions proposed and adopted by states to deal with distrust of the current system.

POLICIES SUPPORTING PUNITIVE DAMAGES

The key functions of punitive damages in the U.S. tort system are deterrence and punishment.[12] Public policy has determined certain conduct to be so reprehensible that ordinary damages are not sufficient to prevent the conduct from recurring.[13] One primary objective of the deterrent function is to prevent businesses from treating compensatory damages as a cost of doing business.[14] The deterrent nature of punitive damages also encourages manufacturers to take affirmative steps in product safety.[15]

Punitive damages achieve retribution for the plaintiff by encouraging private law enforcement and compensating the plaintiff for litigation expenses.[16] Not only do punitive damages have the direct effect of pun-

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9. More than half the states have acted on tort reform in 1985 and 1986 on issues of pain and suffering and punitive damages. *See* McKay, *ABA House to Review Tort Report,* NAT'L L.J., Feb. 16, 1987, at 17.
10. In 1976, Professor Owen strongly supported punitive damages as a necessary tool in tort litigation. *See* Owen, *supra* note 3. Six years later, Professor Owen updated his analysis of punitive damages, arguing for strong controls. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U. CHI. L. REV. 1 (1982).
11. The newly formed American Tort Reform Association—a business, trade and professional coalition—is advocating caps on damage awards and limiting the "deep pocket." On the other side, the American Trial Lawyers Association lobbies for curbing tort reform. *See* Strasser, *1987 Focus on States: Both Sides Brace for Tort Battle,* NAT'L L.J., Feb. 16, 1987, at 1. The American Bar Association recently reported its recommendations; ABA REPORT, *supra* note 7, at 16.
12. *See, e.g.,* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 382-3 (1981) (citing CAL. CIV. CODE § 3294 (West 1970)); Hammond v. North American Asbestos Corp., 97 Ill. 2d 195, 454 N.E.2d 210, 219 (1983); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 217-18 (Colo. 1984). *See also* Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation,* 74 KY. L.J. 1, 38-92 (1985); Owen, *supra* note 3, at 1277, 1279-87; Mallor & Roberts, *supra* note 3, at 648-50.
13. One court has described this level of conduct as an evil intent or "special ill-will or wanton disregard of duty or gross or outrageous conduct." Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 443 (1980). For discussion of conduct, see *infra* notes 55-65 and accompanying text.
14. Although compensatory damages may reach large amounts, alone they are often insufficient as a deterrent. Entrepreneurs may continue to market a dangerous product as long as the projected compensatory damages remain less than the cost of remedying the defect. *See, e.g.,* Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 376 (1982) (compensatory and punitive damages awarded for exposure to asbestos).
15. *See* Arnold, *Punitive Damages in Products Liability Litigation: Redirecting the Windfall,* 6 J. PROD. LIAB. 367, 370 (1983).
16. Where only small compensatory damages are appropriate, punitive damages act as an incentive (or reward) to bring a suit where otherwise it would not financially be worthwhile; thus it keeps a check on manufacturers' conduct. Part of this incentive is that plaintiffs can cover their attorneys' fees (that part of the recovery that is paid as part of the contingency fee system—

ishment, deterrence and retribution, but they may indirectly encourage settlement.[17] In a more general sense, punitive damages act as a cost-spreading device.[18]

PROBLEMS CREATED BY PUNITIVE DAMAGES

Although punitive damages are important in controlling conduct, they can produce unintended consequences.[19] The severity of these consequences must be weighed against the policies for punitive damages in order to determine whether to eliminate or modify punitive damages.

Preventing manufacturers from treating damages as a cost of doing business and encouraging product safety are laudatory goals, but their implementation can conflict with the manufacturer's traditional cost-benefit analysis.[20] The court may encounter problems by becoming too involved in the manufacturer's economic business decisions. The complexity of product manufacturing and continuous product improvement make judging safety standards difficult.

Because product manufacturing and distribution is so complex and on a nationwide scale, it often is argued that a problem with one product could result in thousands of suits.[21] The fear of multiple damages has

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allowing the plaintiff to receive a full compensatory award) and other litigation expenses. *See* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 383 (1981). *See also* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 449 (1980) (the court noted in its earlier holding that the self-interest of the plaintiff also benefited society by bringing to trial an action that ordinarily would escape criminal prosecution).

17. Because the amount of a jury award for punitive damages remains uncertain, the manufacturer may be willing to pay a substantial settlement, rather than risk a crippling award. Thus, the plaintiff may avoid the time and expense of trial.

18. Rather than burdening one litigant with the financial costs, punitive damages can disperse these costs through insurance and through corporate price setting. *See* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 452 (1980).

19. The problems most commonly associated with punitive damages include multiple awards, adverse impact on innocent third parties, constitutionality, lack of deterrent effect, insurability, empassioned jurors, incompatibility with strict liability, impeded investigation of claims, effect on settlement value and improper windfall. *See generally* Ausness, *supra* note 12; Owen, *supra* note 3; Note, *The Dubious Extension of Punitive Damage Recovery in Pennsylvania Products Liability Law*, 23 DUQ. L. REV. 681 (1985).

20. At some point, adding safety features to a product may become cost prohibitive. When a product reaches its optimal safety level because of prohibitive cost or incovenience, and the public will accept this level, higher standards should not be required. Management should be able to maintain reasonable discretion. *See* Note, *Punitive Damages in Products Liability Cases*, 16 SANTA CLARA L. REV. 895, 910 (1976); Owen, *supra* note 10 at 41-42 (discussing the safety standards set by statute and regulation; bare minimum standards below which a violation is criminal versus carefully researched standards "close to the line of feasible technology"). *See, e.g.*, Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980).

21. Asbestos litigation is a good example. Thousands of people were injured from inhalation of asbestos over many years. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 757 F.2d 506 (5th Cir. 1984), *vacated in part*, 750 F.2d 1314 (5th Cir. 1985). The multiplicity problem also has been considered in the context of other tort suits. *See, e.g.*, Roginsky v. Richardson-Merrell Inc., 378 F.2d 832 (2d Cir. 1967) (reversing a punitive award where the drug MER/29 had resulted in many injuries because the court did not find sufficient evidence of management misconduct); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (the faulty design of the gas tank in the Ford Pinto led to numerous suits). *See also* Owen, *supra* note 3, at 1322-25 (critiquing the arguments surrounding multiple awards).

been expressed in dicta,[22] but no court has expressly accepted this argument to set aside punitive damages.[23] Some courts have, however, recognized the need for mitigation of the often harsh results of multiple punitive damage awards.[24] Businesses fear that this multiplicity of awards ultimately will drive them to bankruptcy.[25] The policy argument supporting this fear relies on the adverse economic impact of bankruptcy on third parties. Critics argue that not only does bankruptcy remove a company and its products from the market,[26] but it harms workers,[27] shareholders,[28]

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22. Roginsky v. Richardson-Merrell Inc., 378 F.2d 832, 839 (2d Cir. 1967) ("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."); Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 526 (5th Cir. 1984), *vacated in part*, 750 F.2d 1314 (5th Cir. 1985) (holding punitive damages inappropriate in asbestos litigation, the court said "[t]he anticipation of multiple litigation for compensation damages serves in this instance as an effective deterrent to future illicit conduct"); Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 55 (1983) (concluding that at some point punishment becomes overkill).
23. *See, e.g.*, Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 376 (1982) (noting this was the first award against Johns-Manville Sales Corp. in the asbestos litigation, the court rejected arguments concerning future claimants); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 383 (1981) (refusing to set aside punitive damages, the court noted that, "[f]ollowed to its logical conclusion, [the argument] would mean that punitive damages could never be assessed against a manufacturer of a mass-produced article"); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 740-41 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980) (the mere possibility of future litigation is not a reason to dismiss damages in a present case).
24. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 384 (1981) (court noted that the "multiplicity of awards may present a problem" and suggested that Ford raise the issue of previous awards in any later litigation for the same conduct).
25. The combination of many punitive recoveries and large awards on top of compensatory damages could exhaust the resources of less financially sound companies. *See* Brotherton v. Celotex Corp., 202 N.J. Super. 148, 493 A.2d 1337, 1343-44 (1985) (allowing punitive recovery in asbestos litigation, but suggesting that such awards should not cause financial ruin); *but see* Jackson v. Johns-Manville Sales Corp., 757 F.2d 506, 520-21 (5th Cir. 1984), *vacated in part*, 750 F.2d 1314 (5th Cir. 1985) (under Mississippi law, the court disallowed punitive damages so the businesses could remain viable in order to effectuate loss distribution); Fischer v. Johns-Manville Sales Corp., 193 N.J. Super. 113, 128, 472 A.2d 577, 586 (App. Div. 1984), *aff'd*, 103 N.J. 643, 512 A.2d 466 (1986) (threat of insolvency from punitive damages exaggerated); Owen, *supra* note 3, at 1324-25 ("more theoretical than real").
26. "[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 . . . ." Roginsky v. Richardson-Merrell Inc., 378 F.2d 832, 841 (2d Cir. 1967) (reversing a punitive award from the sale of MER/29). The court also stated that public policy could suggest that the enforcement of punitive damages might do more harm than good because the manufacturer provides a necessary and socially beneficial product. Because the government regulates the drug industry, the manufacturer needs no additional punishment to indicate social disapproval. *Id.*

    Evidence from a study of 232 large corporations showed that, of the 25% that have taken products off the market because of liability concerns, the income lost was very small when compared with sales income. N. WEBER, PRODUCTS LIABILITY: THE CORPORATE RESPONSE 15 (1987). *See also* Sales, *The Emergence of Punitive Damages in Products Liability Actions: A Further Assault on the Citadel*, 14 ST. MARY'S L.J. 351, 397-401 (1983).
27. Employees have no part in the decision process and, thus, no individual moral responsibility. Employees and other third parties feel the ripple effect of punitive damages. *See* Note, *supra* note 19, at 700-01 (concluding that the unfairness of affecting third parties justifies reappraisal and reform in punitive damages); Owen, *supra* note 10, at 15-16. *But see* N. WEBER, *supra* note

consumers[29] and downstream plaintiffs.[30] Corporate bankruptcy is tantamount to human death, and some courts have declared that "punitive damages should sting, not kill."[31] Courts must consider the conflicting interests, the company's interest in remaining viable, other human interests represented by the corporation, the plaintiff's interest in maximizing his award and future plaintiffs' interest in having something left from which to collect.

The prospect of excessive damages, as well as multiple damages, has brought criticism of punitive damages in the product liability area.[32] Much of the criticism surrounds juries' wide discretion in awarding damages.[33] Proponents of punitive damages note the numerous protective devices controlling punitive awards,[34] including judicial controls through remittitur at the trial and appellate levels.[35] Other noted consequences of punitive

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26, at 15 (indicating that less than six percent of the corporations studied laid off employees within three years of product liability problems).

28. Reductions in the company's earnings or injury to the company's competitive position directly affect shareholders. *See* Roginsky v. Richardson-Merrell Inc., 378 F.2d 832, 841 (2d Cir. 1967) (shareholders suffer "extinction of their investments for a single management sin"). Most courts have rejected this argument on the ground that the investors elect the board of directors and, thus, knowingly accept the risk. *See, e.g.*, Martin v. Johns-Manville Sales Corp., 322 Pa. Super. 348, 469 A.2d 655, 664-65 (1983) (upholding punitive damages in asbestos litigation, the court suggested that the shareholders are not "innocent"); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 453 (1980) ("investors should not enjoy ill-gotten gains"). *But see* Note, *supra* note 19, at 700 (in large corporations only those investors with large blocks of stock have say in management, but the small investor is equally punished).

29. Consumers lose the benefits of products lost or products not put into the market. *See supra* note 26 and accompanying text.

30. Multiple awards present the problem of limited defendants' funds from which current and potential plaintiffs may recover. In the Dalkon Shield litigation, for example, A.H. Robins was faced with compensatory claims of more than $500 million and punitive claims of more than $2.3 billion, but it had net worth of only $280 million. This raised "the unconscionable possibility that large numbers of plaintiffs who [were] not first in line at the courthouse door will be deprived of a practical means of redress." In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 893 (N.D. Cal. 1981).

31. *Id.* at 899.

32. *See* Note, *supra* note 19, at 709. *But see* Daniels, *Punitive Damages: The Real Story*, A.B.A. J., Aug. 1986, at 60, 63 (most punitive damages claims are unsuccessful).

33. *See* Note, *supra* note 19, at 709 (wide jury discretion is more "appropriate in one-on-one torts" than in product liability cases). *See also* Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 219-20 (Colo. 1984) (the court denied Robins' claims that a $6.2 million award was excessive and that economic status was not proper for the jury to consider; the court held the award not "a product of passion and prejudice" by the jury and noted various controls preventing excessive awards).

In the ABA's report on tort reform, the committee noted the great discretion given to juries and generally advocated more rigorous procedures for determining punitive damages. *See* ABA REPORT, *supra* note 7, at 17-18.

34. Various methods have been applied and proposed in exerting some control over punitive awards: post-judgment mitigation, consideration of past and future punitive awards, consideration of wealth, direct limits on awards, reasonable relation to compensatory damages and condition precedent of actual damages. *See infra* notes 72-78 and accompanying text.

35. *See, e.g.*, Sturm, Ruger & Co., Inc. v. Day, 615 P.2d 621, 624 (Alaska 1980) (the appellate court found error at the trial level where the trial judge did not rule on the question of remittitur; appellate court reduced $2.9 million award to $500,000, modifying a previous reduction to $250,000), *cert. denied*, 454 U.S. 84 (1980); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (the court reduced a $125 million award to $3.5 million).

damages are their disruptive effect on settlement,[36] their hindrance of investigations[37] and their effect on third parties.[38] Opponents of punitive damages argue that manufacturers avoid the deterrent objective of punitive awards by passing costs to consumers who should not bear the burden of the company's mistake.[39] Opponents similarly cite insurance as a limit to deterrence.[40]

Manufacturers and commentators continue to argue that excessive and multiple damage awards render punitive damages unconstitutional, although the argument has yet to succeed.[41] The arguments concerning multiple damages center on fifth and fourteenth amendment violations of double jeopardy[42] and fundamental fairness.[43] Recently, large punitive

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36. Critics argue that the unpredictability in even occasional high awards will distort the settlement process. The defendant is forced to settle at an inflated amount for fear of a rare multi-million dollar award. ABA REPORT, *supra* note 7, at 17.
37. The fear of such awards may cause companies to destroy any information surrounding a product, even trivial records, notwithstanding criminal laws designed to deal with obstruction of justice. *See, e.g.*, Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108, 1110 (Fla. Dist. Ct. App. 1983) (in a product liability action for a defective airplane door, evidence reflected that management ordered the test pilot to destroy any records in his possession concerning problems with the plane).
38. Even though an award does not result in bankruptcy, the extreme effect of multiple and excessive awards, such awards still negatively affect third parties. *See supra* notes 26-30 and accompanying text.
39. The company can avoid the deterrence and punishment by increasing prices to consumers, thus, the consumer shoulders the burden that was intended for its protection. Unlike shareholders, consumers have not agreed to accept this risk. *See, e.g.*, Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482, 484 (D.N.J. 1982) (the court, applying New Jersey law, would not extend punitive damages to a strict liability action, reasoning that the cost of poor management decisions should not be pushed on to consumers). *But see* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 452 (1980) (the court reasoned that passing on costs to consumers served the purpose of risk distribution and noted that, due to the risk of losing reputation and competitive position, the defendant could not necessarily pass on all its costs). *See generally* Note, *supra* note 19, at 696-700.
40. Advocates of punitive damages argue that probable increases in insurance premiums, combined with possible injury to the manufacturer's market position, can prevent a company from passing on these costs to consumers. Martin v. Johns-Manville Sales Corp., 322 Pa. Super. 348, 469 A.2d 655, 663-64 (1983). The insurability of punitive damages is discussed in *infra* notes 49-52 and accompanying text.
41. *See, e.g.*, Sturm, Ruger & Co., Inc. v. Day, 615 P.2d 621 (Alaska 1980) (the court rejected claims that punitive damages violated due process guarantees because of inadequate standards for the jury); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 383 (1981) (Ford argued without success that the California statute allowing punitive damages permitted "an unlawful delegation of legislative power because it fail[ed] to provide sufficient guidance to the judge and jury"); Brotherton v. Celotex Corp., 202 N.J. Super. 148, 493 A.2d 1337, 1344 (1985) (finding no supporting case law, the court rejected arguments that punitive damages violated the Commerce Clause and due process and constituted criminal punishment requiring constitutional guarantees); *see generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 VA. L. REV. 139 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures,* 69 VA. L. REV. 269 (1983); West, *Mass Product Litigation Tests Tort System,* LITIGATION NEWS, Summer 1984, at 3.
42. Defendants claim that the potential for multiple punitive awards is equivalent to multiple punishment for the same conduct. In refuting these arguments, courts do not construe the actions as multiple awards for the same tort but as separate awards for different torts. *See, e.g.*, Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 377-78 (1982) (the conduct of the

awards have been challenged as excessive fines under the eighth and fourteenth amendments.[44] Even though these amendments normally offer protection to criminal defendants, the award of punitive damages has been called quasi-criminal punishment and, thus, deserving of the protections applied in criminal cases.[45]

Opponents of punitive damages call such awards a windfall to the plaintiff[46] that serve no deterrent function.[47] Courts and commentators note, however, that plaintiffs use punitive damages to compensate for attorneys fees and as a reward for bringing otherwise unprofitable suits.[48] Punitive damages also have been labeled as one of the major reasons for the enormous increase in insurance premiums.[49] Critics of punitive damages claim that insurability of these awards will prevent deterrence.[50] The crux

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tortfeasor must be viewed with respect to each plaintiff); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 217 (Colo. 1984) (the amendments are applicable only to criminal proceedings).

43. *See, e.g.*, In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("A defendant in a civil action has a right to be protected against double recoveries not because they violate 'double jeopardy' but simply because overlapping damage awards violate that sense of 'fundamental fairness' . . . ."); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 214 (Colo. 1984) (Colorado statute was not facially vague so as to violate due process).

44. In *Palmer v. A.H. Robins, Co., Inc.*, 684 P.2d 187, 217 (Colo. 1984), Robins argued that the punitive damages statute fails to limit potential or pending awards on the same conduct in other cases and thus, violates the constitutional prohibition against cruel and unusual punishment and excessive fines. The court held that the constitutional protections argued by Robins did not extend to civil cases. *Id.*

45. These arguments have yet to be accepted. *See* Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 216 (Colo. 1984) (the court concluded that "the nature and purposes of punitive damages" did not justify the need for the safeguards applied in criminal cases).

46. *See generally* Arnold, *supra* note 15 (discussing the appropriateness of awarding punitive damages to a fully compensated plaintiff).

47. *Id.* at 369-70 (the deterrent value of a punitive award depends on removing money from the defendant, regardless of who receives the amount).

48. *See, e.g.*, Wangen v. Ford Motor Co., Wis. 2d 260, 294 N.W.2d 437, 449-54 (1980) (punitive damages as a practical matter cover attorneys' fees and litigation expenses, as well as "motivat[e] reluctant plaintiffs" to bring claims); Owen, *supra* note 3, at 1287-99.

One study found that an average of 35% of tort awards end up in the attorney's pocket. U.S. DEPT. OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY: FINAL REPORT (1977), *reprinted in* 5 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY, at App. 1078 (1986). *See also* Arnold, *supra* note 15, at 371-72 (arguing that compensatory awards should be enlarged to make the plaintiff whole, rather than applying punitive damages haphazardly); Mallor & Roberts, *supra* note 3, at 649-50.

49. Insurance companies, which normally depend on comprehensive loss records to set rates, claim that uncertainty in the size of punitive awards prevents accurate prediction of loss exposure. *See* Arnold, *supra* note 15, at 370. A recent study indicated that one in four companies paid less than $50,000 in premiums in 1982 for primary coverage, whereas in 1986, the number dropped to one in 10. In 1982, one in seven companies paid $500,000 or more in premiums, compared with one in three in 1986. N. WEBER, *supra* note 26, at 4.

50. One commentator stated: "If the insured is permitted to shift his penal burden to an insurance company, punitive damages would then clearly serve no useful purpose . . . . There is, of course, no point in punishing the insurance company as it has not wronged the plaintiff or society." Snyman, *The Validity of Punitive Damages in Products Liability Cases,* 44 INS. COUNSEL J. 402, 405 (1977). *See also* Arnold, *supra* note 15, at 370. *But see* Roginsky v. Richardson-Merrell Inc., 378 F.2d 832, 841 (2d Cir. 1967) (imposition of damages, though insurable, still deters through higher rates or damage to reputation).

of the dispute on punitive damages in product liability lies in whether triers of fact should award punitive damages in strict product liability actions. Those opposing such awards argue that, because of the lack of fault necessary in strict liability, the punitive damage rationale is inconsistent with the notion of strict liability.[51] At least one court has suggested that even if a showing of fault were required, the initial determination of liability might "bleed over" and prejudice or confuse the jury.[52] Most courts permit punitive damages in strict liability actions.[53]

SEARCHING FOR SOLUTIONS: STATE APPROACHES

Proper Standards and Guidelines

As the debate on punitive damages continues, state courts and legislatures search for methods to mitigate the negative consequences of punitive awards and set clearer guidelines and standards.[54] The standard of conduct that allows punitive damages differs among the states in semantics and in application.[55] The common law definitions of the standard of culpable conduct are more broad and vague than the more uniform and more simple statutory definitions.[56] The National Association of Independent Insurers advocates a move to more coherent statutory definitions.[57] The traditional standards include variations of wanton, willful,

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51. *See, e.g.*, Gold v. Johns-Manville Sales Corp., 553 F. Supp. 482, 484 (D.N.J. 1982) (the court held that New Jersey law would not support punitive damages in strict product liability).
52. Maxey v. Freightliner Corp., 450 F. Supp. 955, 961-62 (N.D. Tex. 1978), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *rev'd on other grounds*, 665 F.2d 1367 (5th Cir. 1982) (the court noted that separate trials were possible where there was a high risk of jury confusion).
53. In response to lack of fault arguments, courts argue that the defendant's conduct is the basis for punitive damages even in strict liability; that the fault required rises above mere negligence. Racer v. Utterman, 629 S.W.2d 387, 396 (Mo. App. 1981). The manufacturer's conduct must be sufficiently outrageous to go beyond the compensatory award to punitive damages. *See* Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 443-46 (1980) ("[o]nly where there is proof of malice or willful, wanton, reckless disregard of plaintiff's rights can punitive damages be considered").
54. *See, e.g.*, Fort, Granger, Polston & Wilkes, *Florida's Tort Reform: Response to a Persistent Problem*, 14 FLA. ST. U.L. REV. 505, 521 (1986).
55. Ten states have codified the requisite standard of conduct for punitive damages. CAL. CIV. CODE § 3294 (West Supp. 1987) (oppression, fraud or malice); COLO. REV. STAT. § 13-21-102(1)(a) (Supp. 1986) (fraud, malice or willful and wanton); CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1987) (reckless disregard); IOWA CODE ANN. § 668A. 1 (Supp. 1987); MINN. STAT. ANN. § 594.20 (West Supp. 1987) (willful indifference to the rights or safety of others); MONT. CODE ANN. § 27-1-221(1) (1985) (oppression, fraud, or malice, actual or presumed); N.D. CENT. CODE § 32-03-07 (Supp. 1985) (oppression, fraud, or malice, actual or presumed); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (wanton or reckless disregard, or oppression, fraud or malice, actual or presumed); OR. REV. STAT. § 30.925 (1985) (wanton disregard); S.D. CODIFIED LAWS ANN. § 21-3-2 (1979) (oppression, fraud, or malice, actual or presumed).
56. The National Association of Independent Insurers claims that these vague guidelines and emotional pleas from the plaintiff's counsel can combine to cause "runaway awards." NATIONAL ASS'N OF INDEPENDENT INSURERS, PUNITIVE DAMAGES AND THE CIVIL JUSTICE SYSTEM: THE CASE FOR REFORM AND A PLAN OF ACTION 10 (1985).
57. *See id.*

malicious, conscious or reckless disregard of the rights of others.[58]

Other standards include outrageousness,[59] gross negligence[60] and flagrant indifference.[61] At the very least, conduct should surpass mere negligence, but generally it must exceed "normal bounds."[62] This is the point where the manufacturer decides to play roulette, consciously perceiving the risk of harm to product users and his own risk, weighed against possible profits. In response to difficulties in working with the broad standards, states have begun to tighten the legal standards by presenting specific factors[63] to juries for consideration.[64] The objective is to introduce more consistency, accuracy and fairness into punitive damage decisions.

Further debate revolves around which standard of proof juries must use in weighing the evidence—preponderence of the evidence, clear and convincing evidence or evidence beyond a reasonable doubt.[65] Most jurisdictions follow a preponderance of the evidence standard, and only one state requires the plaintiff to provide proof beyond a reasonable doubt.[66]

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58. *See* Owen, *supra* note 10, at 21 (Owen argues that his proposed "flagrant indifference" standard fits more appropriately in product liability cases).
59. *See, e.g.*, Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 375 (1982) (Pennsylvania follows the standard set out in RESTATEMENT (SECOND) OF TORTS § 908 (1977), which allows punitive damages against a defendant "to punish him for his outrageous conduct . . . .").
60. *See, e.g.*, Stewart A. Stevenson Services, Inc. v. Pickard, 749 F.2d 635, 651 (11th Cir. 1984) (defining gross negligence as "entire want of care as to indicate that the act or omission in question was the result of a conscious indifference to the rights, welfare or the safety of the persons affected by it").
61. *See, e.g.*, Moore v. Remington Arms Co., Inc., 100 Ill. App. 3d 1102, 1115, 427 N.E.2d 608, 617 (1981); Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 815 (6th Cir. 1982).
62. *See, e.g.*, Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 442 (1980) ("proof of aggravating circumstances beyond those supporting compensatory damages"); Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348, 361 (1981) (management went forward with the Pinto, knowing of the gas tank's vulnerability to rupture and of the significant risk of death or injury, and knowing that the risk could be eliminated or reduced at a feasible cost).
63. Owen proposed a list of factors for guidance in product liability cases:
    1. The amount of the plaintiff's litigation expenses;
    2. Seriousness of the hazard to the public;
    3. Profitability of the misconduct;
    4. Attitude and conduct of the enterprise upon discovery;
    5. Degree of the manufacturer's awareness of the hazard and of its excessiveness;
    6. Number and level of employees involved in causing or covering up;
    7. Duration of misconduct and its coverup;
    8. Wealth of defendant and the probable impact of a judgment; and
    9. Total punishment expected from other sources.

    Owen, *supra* note 3, at 1319. For states generally using the criteria suggested by Owen, see MINN. STAT. ANN. § 549.20(3) (West Supp. 1987); OR. REV. STAT. ANN. § 30.925 (1985); Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38, 48 n.17 (Alaska 1979); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437, 460 (1980).
64. *See* Owen, *supra* note 10, at 58-59.
65. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 775, 174 Cal. Rptr. 348, 387 (1981) (the court rejected Ford's request for a jury instruction on the clear and convincing standard rather than the preponderance standard).
66. In 1986, tort reform in Colorado readjusted the burden of proof from "beyond a reasonable doubt" to "clear and convincing." COLO. REV. STAT. § 13-25-127(2) (1973 & Supp. 1986).

Some states and commentators follow the clear and convincing standard and find that the quasi-criminal nature of punitive damages requires a standard of proof between the civil standard (a mere preponderance) and the criminal standard (beyond a reasonable doubt).[67]

Class Actions

Class actions are among the newer attempts to reduce the effect of multiple awards and to apportion limited funds.[68] Some jurisdictions have admitted evidence of previous damage awards or pending litigation in order to give juries an impression of the possible effect of their award.[69]

Controls on Excessive Verdicts

States have employed a variety of devices to limit potentially excessive punitive awards.[70] Although one major call for reform has been to encourage tighter judicial standards,[71] some jurisdictions have attempted post-judgment modification[72] or permitted evidence of prior judgments.[73] Some state statutes permit evidence of the defendant's wealth to be introduced at trial.[74] Although many of the control devices monitor or

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67. *See, e.g.*, IND. CODE ANN. § 34-45-34-2 (West Supp. 1987); OR. REV. STAT. ANN. § 30.925(1) (1985); MINN. STAT. ANN. § 549.20 (West Supp. 1987); MONT. CODE ANN. § 27-1-221(2) (1985); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (with clear and convincing proof, there is no statutory limit to the punitive award). *See also* Roginsky v. Richardson-Merrell Inc., 378 F.2d 832, 850-51 (2d Cir. 1967) (N.Y. court reasoned that fines were similar to criminal punishment and, therefore required that proof be "clearly established").
68. FED. R. CIV. P. 23 governs class action suits. Through a class action, the litigation can be focused into one manageable group, with one trial, at one time. Ideally, the manufacturer faces a one-time punitive award, while the claimant group has the advantage of combined discovery, reduced expenses, and a proportionate right to share in a limited fund. A class action is limited by the timing of the suit; thus, potential claimants might not be included. The greatest problem the courts face in a class action suit is commonality—the facts and the evidence are just not the same in every case. For a thorough judicial analysis of class actions, see Jenkins v. Raymark Ind., Inc., 782 F.2d 468 (5th Cir. 1986) (the Court of Appeals upheld class certification for 10 plaintiffs as a "mass tort" class).
69. *See, e.g.*, MINN. STAT. ANN. § 549.20(3) (West Supp. 1987); OR. REV. STAT. ANN. § 30.925(3)(g) (1985); RESTATEMENT (SECOND) OF TORTS § 908 comment e (1977) ("It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight given to the prior awards."); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 215-16 (Colo. 1984) (Colorado court suggested that evidence of satisfied and unsatisfied punitive verdicts could be introduced in a bifurcated proceeding or that the jury could be instructed as to past punitive verdicts).
70. *See infra* notes 71-78 and accompanying text and *supra* notes 34-35 and accompanying text.
71. *See supra* note 35 and accompanying text.
72. O'Gilvie v. Int'l Playtex, Inc., 609 F. Supp. 817 (D. Kan. 1985) (after the defendant followed the trial court's instructions to acknowledge the jury's liability finding and to remove the tampons from the market, the court modified the $10 million punitive award to $1.35 million concluding that deterrence was achieved).
73. *See supra* note 69 and accompanying text.
74. *See, e.g.*, Vollert v. Summa Corp., 389 F. Supp. 1348, 1351-52 (D. Hawaii 1975) (wealth gives the jury a point of reference without which the defendant may be prejudiced by speculation); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 219 (Colo. 1984) (the Colorado Supreme Court listed wealth as a legitimate factor, although in this case the defendant failed to object to its omission from the jury instructions). *But see* COLO. REV. STAT. § 13-21-102(6) (wealth not a consideration).

aid juries' determinations, a number of courts and commentators have proposed bifurcated trials, separating the compensatory and punitive issues or assigning the liability determination to juries and requiring judges to determine the amount of any punitive award.[75]

Statutory Caps

The most direct method of limiting punitive damages is to impose a statutory cap.[76] Although few states have elected to impose a cap on punitive awards, many states indirectly cap such awards. In the past, some states have required punitive awards to bear a "reasonable relation" to compensatory awards while others have required a reasonable relation to the conduct justifying the award.[77] Most jurisdictions require the awarding of actual damages as a condition precedent to a punitive award.[78]

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75. *See, e.g.*, Hilliard v. A.H. Robins Co., 148 Cal. App. 3d 374, 196 Cal. Rptr. 117, 129-30 (1983) (the court of appeals upheld the trial court's implementation of a bifurcated trial); Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 215-16 (Colo. 1984) (acknowledging bifurcation as a suitable safeguard of the defendant's due process rights); CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1987) (the trier of fact determines liability while the court determines the size of the award).

76. Statutory caps fall into two categories: a fixed dollar amount, or a fixed ratio to actual damages or net worth. *See, e.g.*, MONT. CODE ANN. § 27-1-221(6)(b) (1985) (cap of $25,000 or one percent of the defendant's net worth, whichever is greater); CONN. GEN. STAT. ANN. § 52-240b (West Supp. 1987) (cap of twice actual damages); COLO. REV. STAT. § 13-21-102(b)(3) (Supp. 1986) (ordinarily, punitive damages are less than or equal to actual damages, but they can be raised up to three times actual damages); FLA. STAT. ANN. § 768.73(1) (West Supp. 1987) (allows punitive damages up to three times compensatory damages—anything greater is presumed excessive—but permits a greater award if plaintiff proves punitive liability by clear and convincing evidence); OKLA. STAT. ANN. tit. 23, § 9 (West 1987) (limited to same amount as actual damages unless proof by clear and convincing evidence).

77. The National Association of Independent Insurers advocates the reasonable relation rule or stricter limits but suggests the states are moving away from the rule. In 1985, 16 states clearly considered the relationship between compensatory and punitive damages. NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *supra* note 56, at 32 (State Chart of Major Issues lists Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Iowa, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Utah, West Virginia and Wyoming). *See, e.g.*, Palmer v. A.H. Robins Co., Inc., 684 P.2d 187, 220 (Colo. 1984) (Colorado law; although warranting close scrutiny, the court upheld the $6.2 million punitive award, a 10:1 ratio); Sturm, Ruger & Co. v. Day, 615 P.2d 621, 624 n.3 (Alaska 1980) (Alaska law; reduced $2.9 million award to $500,000 as excessive, noting the relationship to actual damages as a factor). *But see, e.g.*, Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 106 (D.S.C. 1979) ("One must look to behavior, not to results, to determine the need to admonish . . . ."), *aff'd*, 644 F.2d 877 (4th Cir. 1981). For a more detailed discussion on limiting punitive awards, see Wheeler, *supra* note 41, at 314-320.

78. *See, e.g.*, Oliver v. Raymark Ind., Inc., 799 F.2d 95 (3rd Cir. 1986) (the court held punitive damages precluded in negligence action if compensatory damages not awarded); Wussow v. Commercial Mechanisms, Inc., 90 Wis. 2d 136, 279 N.W.2d503 (1979), *rev'd*, 97 Wis. 2d 136, 293 N.W.2d 897, 898-99 (1980) (Supreme Court of Wisconsin permitted an award of punitive damages where the claim for compensatory damage has previously been settled). *But see, e.g.*, Lindquist v. Ayerst Laboratories, Inc., 227 Kan. 308, 607 P.2d 1339 (1980) (the jury held for the manufacturer on the issue of compensatory damages; thus, the court directed a verdict for the defendant on the punitive damages issue because a compensatory award was prerequisite to receiving a punitive award).

The awarding of punitive damages to plaintiffs has been called a windfall.[79] In response to this criticism, a few states have established state funds into which some or all of a successful plaintiff's punitive damage award is placed.[80]

CONCLUSION

The doctrine of punitive damages is old and recently has expanded into new areas of the law, including product liability, for which it was not created. Problems and controversies have developed with its expansion. In the past several years, more states have begun to reevaluate the doctrine and propose changes. Although punitive damages elicit the potential for abuse, they offer a valuable tool in controlling corporate conduct. Punitive damages should not necessarily be eliminated, but the doctrine needs more of the thorough analysis it is receiving and a fine-tuning to the needs of particular jurisdictions.

*David J. Gilmartin**

79. *See supra* note 15 and accompanying text.
80. *See, e.g.*, COLO. REV. STAT. § 13-21-102(4) (Supp. 1986) (one-third of the award to a state fund (*e.g.*, water resource projects)); FLA. STAT. ANN. § 768.73(2) (West Supp. 1987) (40% to plaintiff and 60% to the Public Medical Assistance Trust Fund if personal injury or wrongful death, otherwise to a general revenue fund); IOWA REV. STAT. § 668A.1 (Supp. 1987) (if conduct is willful and wanton but not directed specifically at plaintiff, then up to 25% distributed to plaintiff and remainder distributed to state fund).

* B.S., University of Illinois, 1984; J.D. Candidate, Notre Dame Law School, 1988.