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Punitive Damages - Strict Products Liability - *Erie* Doctrine

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PUNITIVE DAMAGES—STRICT PRODUCTS LIABILITY—*Erie* DOCTRINE—The Pennsylvania Supreme Court has affirmed that punitive damages are not available to a plaintiff in a strict products liability action in Pennsylvania, raising an *Erie* doctrine conflict with decisions by Federal District Courts sitting in Pennsylvania.

Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1088 (1985).

Joseph Edward Martin was employed by Industrial Furnace Supplies, Inc., for thirty-nine years; during that time, he installed asbestos thermal insulation.[1] On August 16, 1978,[2] Martin filed a complaint against his employer and eleven asbestos insulation manufacturers for compensatory and punitive damages for asbestosis and related injuries he claimed developed while installing the products made and distributed by the various defendants.[3]

The jury awarded Martin $67,000.00 in compensatory damages.[4] However, the trial court determined that the evidence Martin offered at trial was insufficient to support his request for punitive damages, and on its own discretion, removed the issue of punitive damages from the jury's consideration.[5] After the trial, Martin's motion for a new trial was denied. Martin appealed, claiming error in the rejection of his motions for a new trial.[6] The Superior Court reversed and remanded for a new trial limited to the issue of damages, for, among other reasons, refusing to submit his claim for punitive damages to the jury.[7] The Superior Court held that the evidence was sufficient to show the defendant's outrageous conduct,[8]

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1. Martin v. Johns-Manville Corp., 508 Pa 154, 166, 494 A.2d 1088, 1095 (1985).
2. *Id.* at 162, 494 A.2d at 1092. Martin died August 1, 1982. *Id.* at n.3.
3. *Id.* at 162, 494 A.2d at 1092.
4. *Id.*
5. *Id.*
6. *Id.* Martin argued that the trial court erred in: (1) excluding evidence that he might develop bronchogenic (lung) cancer as a result of his exposure; (2) instructing the jury that it could reduce its award of damages to reflect the amount of harm attributed to his cigarette smoking; (3) refusing to submit the issue of punitive damages to the jury; and (4) refusing to admit certain medical exhibits into evidence. 322 Pa. Super. 348, 353, 469 A.2d 655, 657 (1983).
7. 508 Pa. at 162, 494 A.2d at 1093.
8. Outrageous conduct is a necessary requirement of punitive damages. *See* Chambers v. Montgomery, 411 Pa. 339, 344, 192 A.2d 355, 358 (1963).

In *Chambers*, the plaintiff broke his hip while attempting to avoid an assault by the defendant. The jury awarded the plaintiff punitive damages. The Pennsylvania Supreme

and therefore, the issue of punitive damages was improperly kept from the jury's consideration.[9]

The defendant manufacturers appealed to the Supreme Court of Pennsylvania. The Supreme Court upheld the trial court's ruling that the evidence did not prove the recklessly indifferent conduct which would permit a jury to award punitive damages.[10] As such, it was not necessary to decide whether Martin could seek punitive damages in a products liability action premised solely on a strict liability theory.[11]

Justice Hutchinson, writing for the majority, began his analysis with a discussion as to the evidence that was introduced by Martin at the trial court level. The testimony proffered by Martin at the trial court level showed that there was a general risk of harm wherever asbestos was used; however, this risk was proven to be minimal to those persons who installed finished asbestos products in direct contrast to production personnel who worked with raw asbestos in manufacturing situations.[12]

Justice Hutchinson then considered the standards for awarding punitive damages, and the propriety of such an award under the facts of the principle case. Under Pennsylvania law, punitive damages are awarded to punish and to deter outrageous conduct, such as acts committed with reckless disregard for the rights of others.[13]

Court held that the plaintiff was not entitled to punitive damages, as the injuries were caused by a freak accident rather than the intention of the defendant to inflict bodily injury. *Id.* at 345, 192 A.2d at 355.

9. 508 Pa. at 162, 494 A.2d at 1093.

10. *Id.* at 162, 494 A.2d at 1092 *citing* RESTATEMENT (SECOND) OF TORTS § 402A (1979). Pennsylvania adopted § 402A in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966).

Section 908 of the Restatement states that punitive damages may be awarded only where the defendant's conduct is outrageous. The defendant must act with gross negligence or reckless indifference to the rights of others, to be outrageous.

Under § 402A, strict liability is imposed on certain classes of defendants when they have acted *without* negligence. As long as the plaintiff was injured, the defendant is strictly liable. Punitive damages, however, may be imposed only if the defendant was recklessly negligent. Since strict liability precludes negligence, punitive damages are not available under such claims.

11. 508 Pa. at 165-66, 494 A.2d at 1094. The product manufacturers argued two other issues which are not discussed in this Note. They were that the trial judge properly excluded testimony by experts regarding the likelihood of Martin's contracting lung cancer, and that if this evidence was improperly withheld from the jury's consideration, the case should be remanded for a new trial on all issues. The Supreme Court ruled that the expert testimony was properly excluded, which rendered the defendant's request for a new trial on all the issues moot.

12. *Id.* at 175 n.15, 494 A.2d at 1100 n.15.

13. *Id.* at 169, 494 A.2d at 1096. The quality of the evidence did not warrant the court's consideration of "either the broad policy arguments or the legal theory. . .for or

As applied by Pennsylvania courts, punitive damages need not be awarded for acts of negligence, such as "inadvertance, mistake or errors of judgment,"[14] nor where the defendant is grossly negligent.[15]

Pennsylvania courts diverge from the Restatement (Second) of Torts as to what actions constitute reckless disregard for the rights of others. The Restatement describes two situations which warrant a finding of recklessness: (1) when the actor knows that his actions, if carried out in conscious disregard or indifference to a known risk, will probably lead to the injury of another; and (2) when the actor has knowledge but does not appreciate or realize the risk of his actions, although a reasonable man would have appreciated or realized such risks.[16] The *Martin* court concluded, however, that only the former situation would support an award of punitive damages in Pennsylvania because the latter situation does not demonstrate the necessary degree of culpability.[17] As conduct amounting to reckless disregard with respect to another's rights cannot be found where an actor fails to appreciate the high degree of risk associated with such conduct, an award of punitive damages was not justified in the principle case, wherein the actor's conduct amounted only to gross negligence.[18]

Justice Hutchinson then discussed two federal diversity cases relied upon by Martin in support of his punitive damages claim. The first case considered, *Neal v. Carey Canadian Mines, Inc.*,[19] was held by the *Martin* court to be distinguishable on the facts.[20] In

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against the allowance of punitive damages in litigation involving mass marketed products." *Id.* at 166, 494 A.2d at 1094.

14. *Id.* at 170, 494 A.2d at 1097. Martin relied principally on the testimony of Jerome F. Wiot, M.D., a radiology specialist, and of Thomas F. Mancuso, M.D., an expert in occupational health.

15. *Id.* at 170-71, 494 A.2d at 1097.

16. *Id.* at 171, 494 A.2d at 1097. These principles are set forth in § 908(2) of the Restatement. The Restatement reads as follows:

> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

RESTATEMENT (SECOND) OF TORTS § 908 (1979).

17. 508 Pa. at 171, 494 A.2d at 1097, *citing* RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979).

18. *Id.* at 172, 494 A.2d at 1098.

19. 548 F. Supp. 357 (E.D. Pa. 1982).

20. 508 Pa. at 174-75, 494 A.2d at 1099-1100. Section 500 of the Restatement describes reckless conduct as occurring in situations:

Neal, the plaintiff's expert witness had presented well-documented evidence concerning the adverse effects of prolonged exposure to raw asbestos on workers in manufacturing situations.[21] In *Martin*, however, the same expert witness testified that the health risks to installers of finished asbestos products, while less substantiated, appeared to be much less serious.[22] Justice Hutchinson concluded that the employer's failure to warn his employees of the risks incident to their employment in *Neal* was an act of reckless disregard in the face of a known danger. However, since Martin's employer had no knowledge as to how prolonged exposure to finished asbestos products would affect an installer's health, there was no act done which could rise to the level of reckless indifference, and no punitive damages were justified.[23]

The second case relied upon by Martin was *Hoffman v. Sterling Drug, Inc.*[24] In *Hoffman*, the defendant marketed a drug used to control the buildup of cholesterol in blood.[25] During testing of the drug, the defendant manufacturer discovered that short term use would cause users to suffer cataracts and eventual blindness.[26] This adverse side effect was purposely hidden from the Food and Drug Administration (hereinafter FDA), as well as the physicians who tested the drug, during the FDA's approval process.[27] The defendant placed the drug on the market, representing that the drug was

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(1) where the "actor knows or has reason to know,. . .of facts which create a high degree of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk"; and

(2) where the "actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so."

RESTATEMENT (SECOND) OF TORTS § 500 (1965).

21. 548 F. Supp. 357 (E.D. Pa. 1982). In *Neal*, twenty-four former employees of Carey sued the corporation, a manufacturing and mining concern, for failure to warn of the dangers of inhaling raw asbestos fibers. The plaintiffs claimed that this led to their developing asbestosis (a form of lung cancer). The manufacturer had been warned by Dr. Mancuso that prolonged exposure could cause cancer, but the defendant took no action in response to the recommendation. 508 Pa. at 174-75, 494 A.2d at 1099.

22. 508 Pa. at 175 n.15, 494 A.2d at 1099 n.15.

23. *Id.* at 175, 494 A.2d at 1099-1100.

24. 485 F.2d 132 (3d Cir. 1973).

25. *Id.*

26. *Id.* The duty to warn about an inherently dangerous product extends to all who use the product, according to § 402A of the Restatement. RESTATEMENT (SECOND) OF TORTS § 402A (1982). This duty arises, however, only when the inherent dangerousness of the product is known. Since Dr. Mancuso testified in *Martin* that the dangers were *unknown*, the defendants had no duty under § 402A. Therefore § 402A was inapplicable.

27. *Id.*

safe.[28] Because of this active misrepresentation, the *Hoffman* court held there was sufficient evidence to allow the jury to hear the punitive damages issue.[29] Justice Hutchinson held that Martin's evidence was insufficient to support giving the issue of punitive damages to the jury.[30] Martin, unlike the plaintiff in *Hoffman*, neither argued nor offered evidence that his employer knew of the dangers that "asbestos insulation workers faced and, nevertheless, acted or failed to act in flagrant disregard of their safety."[31]

In a concurring opinion, Justice McDermott indicated his belief that Pennsylvania followed Section 500 of the Restatement (Second) of Torts in its entirety.[32]

In support of the proposition that punitive damages may be awarded even when an actor proceeds without realizing the magnitude of the risk of harm incident to such conduct, Justice McDermott cited *Fugagli v. Camasi*,[33] wherein the Pennsylvania Supreme Court held that wanton misconduct exists where an actor failed to realize the dangerous nature of a particular situation, though a reasonable man would have realized such danger, yet acted in the face of the unknown danger.[34] *Fugagli* was relied on to impose punitive damages in *Focht v. Rabada*,[35] wherein a defendant was held liable for injuries proximately caused by his drunk driving.[36] The judgment and the punitive damages awarded by the jury in *Focht* were upheld by the Superior Court, based upon the reasoning that the possibility of risk and the probability of harm were so great "that

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28. *Id.*

29. *Id.*

30. 508 Pa. at 177, 494 A.2d at 1100.

31. *Id.* at 176, 494 A.2d at 1100.

32. *Id.* at 178, 494 A.2d at 1101 (McDermott, J., concurring).

33. 426 Pa. 1, 229 A.2d 735 (1967).

34. The *Martin* court concluded that the insufficiency of Martin's evidence was again the differentiating factor. Martin, unlike Hoffman, never argued nor offered evidence that the defendants *knew* the dangers "asbestos insulation workers faced, and, nevertheless, acted or failed to act in flagrant disregard of their safety." 508 Pa. at 176, 494 A.2d at 1100. The court then vacated the judgment of the superior court, and remanded for its determination of whether the trial court's jury instructions properly instructed the jury that it could consider Martin's cigarette smoking as a contributing factor to his illness which could reduce his damages award. *Id.* at 177-78, 494 A.2d 1101.

35. 217 Pa. Super. 35, 268 A.2d 147 (1970).

36. In *Fugagli*, the plaintiff's decedent was killed when thrown from the defendant's car when the defendant lost control of his vehicle on a curve. Evidence showed that the defendant was driving while intoxicated at over 90 mph when the accident occurred. The Supreme Court of Pennsylvania held that wanton misconduct occurs when an actor intentionally proceeds in an unreasonable manner, in disregard of a risk which was known, or should have been, and that the risk was so great that it was "highly probable that harm would follow." 426 Pa. at 3, 329 A.2d at 736.

outrageous misconduct [was] established without reference to motive or intent."[37]

Justice McDermott criticized the majority's decision in *Martin* as being a direct contradiction of the Court's holding in *Feld v. Merriam.*[38] In *Feld*, the court held that punitive damages are "based on conduct which is 'malicious' 'wanton' 'reckless' 'willful' or 'oppressive'."[39] Since Justice McDermott believed that the *Martin* decision held that wanton conduct would not support a punitive damages claim, he concurred in the result only.[40]

The awarding of punitive damages in strict liability actions is a recent development in this country. In *Toole v. Richardon-Merrill, Inc.*,[41] the plaintiff brought suit to recover damages caused by the defendant's product, a prescription drug known as triparanol.[42] The plaintiff developed cataracts in both eyes, which eventually required the removal of the lenses from the plaintiff's eyes. In addition, the plaintiff was rendered highly susceptible to detached retinas, which increased the plaintiff's risk of blindness.[43] The plaintiff brought suit under four alternative theories of recovery: fraud and deceit; breach of express warranty; failure to warn under strict liability principles; and failure to properly prepare, a second strict liability theory.[44] The trial court found that sufficient evidence was introduced to justify giving the issue of punitive damages to the jury.[45] In his appeal to the California Court of Appeals, the defendant in *Toole* asserted that the punitive damages claim should have been dismissed,[46] and that the doctrine of strict liability was inapplicable to the sale of unadulterated and uncontami-

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37. *Id.*

> It is not necessary for the tortfeasor to have actual knowledge of the other person's peril to constitute wanton misconduct. Such exists if he has knowledge of sufficient facts to cause a reasonable man to realize the existing danger for a sufficient period of time beforehand to give him a reasonable opportunity to take means to avoid the danger and, despite this knowledge, he recklessly ignores the other person's peril.

Id.

38. 506 Pa. 383, 485 A.2d 742 (1984).

39. *Id.* at 395, 485 A.2d at 747-48.

40. 508 Pa. at 179, 494 A.2d at 1102 (McDermott, J., concurring).

41. 251 Cal. App.2d 689, 60 Cal. Rptr. 398 (1967).

42. *Id.* at 695, 60 Cal. Rptr. at 403. Triparanol is a drug used to inhibit cholesterol production in the blood stream. It was believed to aid in the prevention of heart attacks and strokes caused by arteriosclerosis, commonly known as hardening of the arteries.

43. *Id.* The plaintiff also suffered minor side effects such as hair loss and skin rashes.

44. *Id.* at 703, 60 Cal. Rptr. at 408.

45. *Id.* at 696, 60 Cal. Rptr at 403. The jury awarded $175,000.00 compensatory damages and $500,000.00 punitive damages.

46. *Id.*

nated prescription drugs.[47] Citing comment k of section 402A of the Restatement (Second) of Torts (hereinafter Restatement), which discusses unavoidably unsafe products, the defendant argued that properly prepared products, accompanied by proper labels and warnings, cannot warrant the imposition of strict liability standards.[48]

The *Toole* court, in an opinion written by Judge Saloman, held that the Restatement did not apply because the evidence showed that the product had not been ". . . properly labeled in that it did not give adequate warning of its inherent danger."[49] The failure to warn the FDA that long-term use of the drug could lead to severe eye problems was held to support the court's ruling.[50] In support of its reasoning, the *Toole* court relied on *Gottsdanker v. Cutter Laboratories*[51] as authority for holding the defendant liable under strict liability standards. In *Gottsdanker*, the defendant was held strictly liable because the vaccine manufactured by the defendant was improperly manufactured, as the vaccine caused the very disease (polio) that it was specifically designed to prevent.[52]

In California, as in Pennsylvania, punitive damages are permissi-

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47. 251 Cal. App.2d at 708, 60 Cal. Rptr. at 412.

48. *Id.* Comment (k) discusses unavoidably unsafe products. It reads:

> (k) *Unavoidably unsafe products.* There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk they involve. Such a product, properly prepared, and accompanied by proper warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

RESTATEMENT (SECOND) OF TORTS § 402A comment k (1979).

49. *Id.* at 709, 60 Cal. Rptr. at 413.

50. *Id.*

51. 182 Cal. App.2d 602, 6 Cal. Rptr. 320 (1960).

52. *Id.* at 605, 6 Cal. Rptr. at 322. The vaccine was not wholesome as it contained *live* and active poliomyelitis virus.

ble where there is a showing that the defendant's negligent act was willful, intentional and done in reckless disregard of the act's possible consequences.[53] The *Toole* court dismissed the defendant's claim that a showing must be made that the defendant intended to harm a specific plaintiff, stating that malice in fact can be proved by showing that the defendant acted in reckless disregard of the rights of others.[54] If the evidence supports this, malice in fact may be found by the jury.[55] The *Toole* court found the requisite maliciousness in the marketing of the drug with the knowledge of its serious side effects, the intentional misrepresentation to the FDA and prescribing physicians that the drug was safe, and the disregard of outside evidence that the drug was causing blindness in test animals and humans.[56]

Although the evidence in *Toole* was held to warrant the imposition of punitive damages, the decision should not be applied as approval for the proposition that punitive damages may be awarded in an action premised solely on strict liability. In *Gottsdanker*, the request for punitive damages was never raised by the plaintiff. The only damages received were pecuniary damages for breach of implied warranty, a strict liability claim.[57] In addition, a special interrogatory to the jury showed that the Gottsdanker plaintiff was not *negligent*: "The jury drew a thoughtful and careful statement . . . and had from a preponderance of the evidence concluded that the defendant . . . was not negligent."[58]

To be sure, the *Toole* court was well-versed in the facts and decision of *Gottsdanker*. As *Gottsdanker* did not allow punitive damages, it seems apparent that if the *Toole* court concluded that the jury's imposition of punitive damages was based on either of the two strict liability theories presented at trial, the court would have had to either overrule *Gottsdanker* or overturn the jury's award of punitive damages. The *Toole* court did neither, which implies that the court concluded that the punitive damages arose from either of the negligence claims.

This rejection of *Toole* as authority for granting punitive damages in a strict products liability action is strengthened by the fact that Justice Saloman's opinion states that "[i]t was made clear to

53. 251 Cal. App.2d at 711, 60 Cal. Rptr. at 415.
54. *Id.*
55. *Id.*
56. *Id.* at 713, 60 Cal. Rptr. at 416.
57. 182 Cal. App.2d at 606, 6 Cal. Rptr. at 322.
58. *Id.*

the jury that the plaintiff in the action had the burden of proof with regard to punitive damages on such issues as fraud . . . and malice."[59] This statement reinforces the fact that the court believed that the punitive damages were awarded on negligence theories. Finally, it is important to note that the verdict in *Gottsdanker* was general, and that no interrogatories were given to the jury to explain their decision. This is inferred from Justice Saloman's statement that "since the jury was instructed only on malice as a foundation for an award of punitive damages . . . we must *presume* they found malice in fact."[60] Since California adheres to section 908 of the Restatement, and punitive damages "may be awarded because of . . . reckless indifference . . . or malice, . . . and are not awarded for. . . ordinary negligence,"[61] it is safe to assume that punitive damages were not awarded in *Toole* because of a breach of strict products liability standards. Therefore, *Toole* should not be seriously entertained as authority for awarding punitive damages as such.

The Court of Appeals for the Third Circuit, applying Pennsylvania law, has recently begun to allow the award of punitive damages in products liability actions. This matter was first addressed in *Hoffman v. Sterling Drugs, Inc.*[62] In *Hoffman,* the plaintiff was prescribed the drug chloroquine phosphate by several physicians over an eight year period.[63] The physicians were familiar with the fact that chloroquine-based compounds sometimes produced blurred vision, but that this side effect resided whenever treatment was suspended; however, none knew that the damage suffered by the plaintiff was possible.[64] In 1965, after eight years of treatment,

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59. *Id.* at 716, 60 Cal. Rptr. at 417.

60. *Id.* at 715, 60 Cal. Rptr. at 416.

61. RESTATEMENT (SECOND) OF TORTS § 908 comment b (1979).

62. 485 F.2d 132 (3d Cir. 1973).

63. *Id.* at 135. This was done to control the plaintiff's illness known as lupus erythematosis. Lupus is a serious, often fatal, disease accompanied by various lesions (injuries) in the viscera (organs), skin eruptions, fever, and other symptoms. Pathologically it is characterized by abnormal changes in the connective tissues, especially of the arterioles (small arteries). The organs and tissues primarily involved are the kidneys, the spleen, and the endocardium (the inner lining of the heart). The condition is also marked by the presence of lupus erythematosus cells, abnormal leukocytes containing ingested nuclei of other cells that have been damaged. These cells are found in the blood and bone marrow, and their presence (detected by laboratory procedures) is helpful in the diagnosis of the disease. The outstanding clinical signs include weakness, fatigability, arthritis resembling rheumatoid arthritis, redness of the skin in patches (on the face, neck and arms), pericarditis, pleurisy, swelling of the lymph nodes, anemia, etc. The familiar butterfly patch may or may not be present. *Attorneys' Dictionary of Medicine,* vol. 2, pg. L-121 (1983).

64. 485 F.2d at 135.

the plaintiff's eyesight deteriorated until the plaintiff was legally blind in both eyes.[65] It was discovered that the plaintiff was suffering from chloroquine retinopathy[66] from the prolonged use of the drug. The evidence at trial showed that chloroquine was introduced in the mid-1940's as a cure for malaria. By 1953, it was established that chloroquine, used in greater quantity than required for malaria treatment, was successful in controlling arthritis and lupus as well.[67] The defendant filed a supplemental application with the FDA for approval to sell chloroquine as a treatment for lupus; the application was conditionally approved three weeks later.[68] By 1957, it was suspected that chloroquine sulfate, which was not manufactured by the defendant, could cause permanent eye damage taken in the higher doses lupus required. A 1959 report concluded that chloroquine *phosphate*, which the defendant manufactured, had not been tested; therefore, there was no proof of the comparative toxity levels of the two compounds.[69] The defendants did, however, send letters and information to physicians warning them of the severe "ocular complications from [prolonged] use [of chloroquine phosphate] . . . and of the need for . . . periodic examinations."[70]

In filing a four-count complaint, the plaintiff in *Hoffman* charged the defendant with: negligent failure to properly test the drug prior to marketing, strict liability in tort under section 402A of the Restatement (Second) of Torts, reckless fraud and misrepresentation, and breach of express and implied warranties.[71] During the trial, the plaintiff moved to include the issue of punitive dam-

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65. *Id.* Pennsylvania law defines legally blind as 10/200 uncorrected vision. *Id.*

66. *Id.* Chloroquine retinopathy is a non-inflammatory eye disease affecting the retina, marked by degenerative wasting of the retina, caused from overdoses of chloroquine-based drugs. *Attorney's Dictionary of Medicine*, vol. 3, pg. R-160 (1983).

67. 485 F.2d at 136.

68. *Id.* Final approval was obtained on October 2, 1957.

69. Chloroquine was introduced in the late 1940's as a treatment for malaria. While causing mild side effects, these disappeared after use was discontinued. In the middle 1950's, it was discovered that the drug, given in significantly larger doses, could be successfully used to treat rheumatoid arthritis and lupus erythematosus. In 1959, it was documented that chloroquine *sulfate* would cause severe eye damage similar to that suffered by the plaintiff. Sterling Drugs, however, was marketing chloroquine *phosphate*, a drug untested in the 1959 report. The report noted, significantly, that chloroquine *phosphate* "might have an entirely different toxity than chloroquine *sulfate*." 485 F.2d at 136. (*quoting* Hobbs, Sordy and Freedman, *Retinopathy Following Chloroquine Treatment*, LANCET Vol. 1, pgs. 478-80 (1959)).

70. 485 F.2d at 137.

71. *Id.* at 134-35. The trial court dismissed the breach of warranty claim prior to trial, and it was not a subject of the appeal. *Id.* at 135 n.3.

ages for the jury's consideration; the motion was denied.[72] The jury, charged only on the plaintiff's negligence and strict liability claims, awarded compensatory damages; the defendant's motion for a new trial, and the plaintiff's motion for a new trial restricted to the issue of punitive damages, were denied.[73]

On appeal, Judge Biggs presented the opinion of the Court of Appeals for the Third Circuit.[74] Discussing the punitive damages claim, Judge Biggs held that the plaintiff's motion to amend his complaint to include punitive damages should have been allowed.[75] In assessing the evidence, the court concluded that "Count IV . . . if proven, would support such an award."[76] Count IV alleged fraud and misrepresentation in concealing the knowledge of the drug's safety. In reasoning that the evidence was sufficient to support such an award, the *Hoffman* court held that the jury "should have been allowed to decide whether the warnings issued were so inadequate as to constitute a reckless disregard of the danger to the public of irreversible retinal damage."[77] The fact that there was appropriate information available to the defendant, prior to the plaintiff's treatment, was sufficient to support Hoffman's claim that the manufacturer knew that the drug, in large doses, caused retinal damage, and failed to warn against this possibility strongly enough, if at all.[78] Therefore, the case was remanded for a new trial on the issue of punitive damages.

The *Hoffman* decision formed the Third Circuit's basis for allowing punitive damages in a strict liability action. In *Thomas v. American Cystoscope Makers, Inc.*,[79] a federal district court applying Pennsylvania law again had the opportunity to consider whether an award of punitive damages should be allowed in a

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72. *Id.* at 135.

73. *Id.*

74. The court began by holding that there was sufficient evidence to submit the issue of negligence to the jury. Interpreting *Incollingo v. Ewing*, 444 Pa. 263, 283 A.2d 206 (1971), the *Hoffman* court dismissed the defendant's claim that there is no duty to warn "treating" physicians of a drug's dangers, as opposed to "prescribing" physicians. Judge Biggs contended that *Incollingo* required a warning to the physician community in general, and buttressed this opinion with the holding in *Thomas v. Arvon Products Co.*, 424 Pa. 365, 370, 227 A.2d 897, 900 (1967), where the court ruled that "every reasonable precaution" ought to be taken to warn consumers of a drug's danger, and that this required a warning to all physicians in general. 485 F.2d at 142.

75. *Id.* at 145.

76. *Id.* at 144.

77. *Id.* at 146.

78. *Id.*

79. 414 F. Supp. 255 (E.D. Pa. 1976).

strict products liability action.[80] In *Thomas*, the plaintiff, a physician, was injured when a cystoscope he was using in performing surgery short-circuited and burned his right cornea.[81] The cystoscope was sold with two eyepieces; an insulated eyepiece for viewing with the naked eye, and an uninsulated eyepiece specifically designed for use with photographic equipment. The plaintiff was using the uninsulated eyepiece when the accident occurred.[82] The plaintiff noticed during the operation that the cystoscope was becoming warm, and was emitting mild electrical shocks. Despite the fact that the warming effect was something that the plaintiff had never experienced before, he continued using the equipment. An electrical current passed from the eyepiece into the plaintiff's eye, causing the injury.[83]

The action in *Thomas* was tried solely on a theory of strict product liability under section 402A of the Restatement (Second) of Torts. The gravamen of the complaint was that the product was unreasonably unsafe, and should have been designed with an insulated photographic eyepiece. The plaintiff's reasoning was that the defendant should have foreseen the type of misuse of the product which caused the plaintiff's injury.[84] Alternatively, the plaintiff claimed that the unreasonable dangerousness of the product should have required the defendant to warn consumers against foreseeable hazards.[85] The jury awarded the plaintiff compensatory and punitive damages. The defendant's motion for judgment n.o.v. on the issue of punitive damages was granted.[86] Judge Davis, writing for the district court, confirmed the general availability of punitive damages in Pennsylvania, citing *Chambers v. Montgomery*[87] and *Hoffman* as authority for the proposition that punitive damages are available in a strict product liability action under Pennsylvania law.[88]

In examining the evidence, the *Thomas* court concluded that

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80. *Id.* at 259.

81. *Id.* A cystoscope is an electrical fiber-optic microscope used to view inside the body through a very small incision. *Id.*

82. *Id.* at 259.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 267.

87. *Id.* at 261, *citing* Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355 (1963). *See supra* note 8 and accompanying text.

88. 414 F. Supp. at 264, *citing* Hoffman v. Sterling Drugs, Inc., 485 F.2d 132 (3d Cir. 1973).

there was insufficient evidence to prove the "recklessness" which Pennsylvania, in applying section 500 of the Restatement (Second) of Torts, uses as its standard.[89] Judge Davis stated that the court "[could] not say that the evidence was sufficient to demonstrate that subjective kind of awareness that is the distinguishing element of reckless conduct."[90] The court concluded by noting that "we take it as established, by virtue of the [Pennsylvania courts'] tacit approval of the punitive damage claim on appeal in *Hoffman* . . . that there is no *per se* preclusion against awarding punitive damages where, as here, strict liability under section 402A of the Restatement (Second) of Torts was introduced as the plaintiff's theory of liability."[91]

The *Thomas* court's reliance on *Hoffman* for the proposition that punitive damages may be awarded in a strict liability action is unwarranted. During the new trial on the issue of punitive damages in *Hoffman*, the court discussed the relationship between punitive damages and section 402A of the Restatement.[92] Judge Herman, writing for the *Hoffman II* court, noted that section 402A of the Restatement was meant to protect all consumers from a particular type of harm, whereas section 908 of the Restatement (Second) of Torts limits punitive damages to the particular plaintiff harmed.[93] As section 908 requires that malice or recklessness be directed at one particular plaintiff, the *Hoffman II* court stated that "this court finds it inconceivable that in a products liability case the defendant could be shown to have a single consumer in mind when producing the particular item."[94] Judge Herman concluded that allowing a jury to award punitive damages on a strict product liability theory would be "well beyond the limited confines

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89. 414 F. Supp. at 266.

90. *Id.* at 267.

91. *Id.* at 264 n.13.

92. 374 F. Supp. 850 (M.D. Pa. 1974).

93. *Id.* at 856. Section 908 reads:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

RESTATEMENT (SECOND) OF TORTS § 908 (1979).

94. 374 F. Supp at 856.

of § 402A."[95] As the *Hoffman II* court confirms that awarding punitive damages in a strict product liability action would be contrary to Pennsylvania law, the *Thomas* court's opposite conclusion improperly interprets Pennsylvania law.

The allowing of punitive damages under perceived Pennsylvania law continued in *Neal v. Carey Canadian Mines, Ltd.*,[96] wherein the plaintiffs brought an action against their former employer, and various suppliers of raw asbestos to their employer, for injuries sustained from prolonged asbestos exposure.[97] The plaintiffs' causes of action were in negligence and strict product liability, under sections 388 and 402A of the Restatement (Second) of Torts, for failure to warn about the dangers of the product.[98]

The defendant suppliers claimed their duty to warn was superceded by the manufacturer's knowledge of the dangerous nature of the product.[99] Citing the Pennsylvania case *Berkebile v. Brantley Helicopter Corp.*,[100] the *Neal* court held that under section 402A, the duty to warn the ultimate consumer or user exists to make the inherently dangerous product nondefective, and that the duty to warn was nondelegable.[101] The court also held that by section 388, the plaintiffs in *Neal* were the ultimate consumers of the asbestos products to whom a duty to warn was owed.[102]

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95. *Id.* at 856 and n.4.

96. 548 F. Supp. 357 (E.D. Pa. 1982).

97. *Id.* at 365.

98. *Id.* at 368-69. Section 388 reads:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

RESTATEMENT (SECOND) OF TORTS § 388 (1965).

99. 548 F. Supp. at 368-69.

100. 462 Pa. 83, 337 A.2d 893 (1975).

101. 548 F. Supp. at 368-69. The defendants pointed to *Toppi v. U.S.*, 332 F. Supp. 513 (E.D. Pa. 1971) and *Lockett v. General Electric Co.*, 376 F. Supp. 1201 (E.D. Pa. 1974) as requiring no duty to warn when the employer has independent knowledge of the hazard of the product. *Toppi* and *Lockett* were distinguished by Judge Becktle. He stated that both cases dealt with products where the inherent dangers were readily apparent; thus, no warning was necessary. 548 F. Supp. at 369. In *Neal*, however, asbestos danger was held not readily apparent to the user in the absence of an adequate warning; therefore, by section 388 plaintiffs were entitled to a warning about the dangers of asbestos exposure. *Id.*

102. 548 F. Supp. at 369, *citing* RESTATEMENT (SECOND) OF TORTS § 388 (1965).

The *Neal* case went to the jury under both the strict liability and the negligence claims. Upon a judgment for the plaintiffs awarding compensatory and punitive damages, the defendant suppliers requested judgment n.o.v. on the punitive damages award.[103] They contended that the evidence presented was insufficient to support the punitive damage claim;[104] therefore, the issue should have been withheld from the jury's consideration. The court denied the motion, stating that testimony by one of the defendant supplier's own medical personnel showed that the suppliers knew of the health hazards of asbestos inhalation in the late 1940's, yet failed to place warnings on their products for almost twenty years.[105]

The defendants in *Neal* also contended that punitive damages were incompatible with a strict products liability action because strict products liability looks to the defectiveness of the product while punitive damages look to the defendants' conduct.[106] Judge Bechtle, citing *Thomas*, held that where the conduct of the defendant is outrageous in light of the injuries received by the plaintiff, punitive damages could be awarded.[107]

Finally, the defendants claimed that punitive damages should not be permitted because they would lead to financial ruin for the defendant, by having to pay excessive awards.[108] Judge Bechtle, citing section 908 and the Pennsylvania case *Givens v. W.J. Gilmore Drugs*,[109] stated that corporate entities would be protected from excessive awards, because the award must bear a reasonable relationship to the actual damages suffered by the plaintiff.[110] For these reasons, the motion for judgment n.o.v. was denied.

The decision in *Neal* is a classic example of a federal court decision being incorrectly interpreted with respect to its application of Pennsylvania law. Since *Neal* went to the jury on both negligence and strict liability claims, it is conceivable that the jury awarded punitive damages based on the plaintiff's negligence claim only. The discussion of the case by Judge Bechtle conclusively shows that the punitive damages were awarded, in the court's opinion, for

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103. 548 F. Supp. at 368.
104. *Id.* at 374 and N.T. 23.57.
105. *Id.* at 376.
106. *Id.* at 377.
107. *Id.*
108. *Id.* at 376.
109. 377 Pa. 278, 10 A.2d 12 (1940).
110. 548 F. Supp. at 377.

the defendant's breach of section 388 of the Restatement, which discusses a *negligent* failure to warn about the product's inherently dangerous character. As Judge Bechtle states, "Punitive damages are a recoverable item of relief [if] . . . the defendant [acted] with 'outrageous' and . . . reckless indifference to the rights of that plaintiff."[111] Section 500 of the Restatement discusses reckless indifference in terms of "reasonable" behavior,[112] while section 402A does not even require a showing that the defendant was negligent.[113] It would appear to be inconsistent to allow an award for punitive damages under a section of the Restatement requiring no reckless indifference for it to be violated, while the Restatement specifically requires reckless indifference before punitive damages can be awarded.

In light of the aforementioned analysis, the results reached by the courts in *Toole*, *Hoffman I* and *Thomas* cannot be cited for the proposition that punitive damages may be awarded in an action grounded solely upon strict liability claims. The *Toole* court limited the issue of punitive damages to the plaintiff's negligence claim of fraud and malice. *Hoffman II* dismissed the applicability of punitive damages to a strict liability claim in the court's analysis upon remand. Similarly, in *Thomas*, the strict liability issue was removed from the jury's consideration, precluding the notion that a strict liability claim will support a request for punitive damages. The *Thomas* court admitted that the issue of whether punitive damages could be received in a strict product liability action "appears not to have been raised or ruled upon directly by the Pennsylvania courts or by any court interpreting Pennsylvania law"[114]; even so, the *Thomas* court "[took] it as established by virtue of the court's tacit approval of punitive damages claim in *Hoffman* . . . that there is no *per se* preclusion against awarding punitive damages where, as here, strict liability under section 402A of the Restatement (Second) of Torts was introduced as plaintiff's theory of liability."[115] As previously noted, the *Hoffman II* court specifically stated that punitive damages could not be granted for Hoffman's strict liability claim:

> [T]his court finds it inconceivable that in a products liability case the de-

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111. *Id.*

112. RESTATEMENT (SECOND) OF TORTS § 500 (1965). *See supra* note 20 and accompanying text.

113. RESTATEMENT (SECOND) OF TORTS § 402A (1979).

114. 414 F. Supp. at 264 and n.13.

115. *Id.*

> fendant could be shown to have a single consumer in mind when producing the particular item. To conclude that this particular victim may collect punitive damages . . . is folly. Sterling's intentional wrongdoing, or wanton misconduct, if any, was not done with the plaintiff Hoffman in mind.[116]

Punitive damages have been awarded in Pennsylvania since the eighteenth century.[117] However, no Pennsylvania court has ever, since the adoption of section 402A of the Restatement by the Pennsylvania Supreme Court in *Webb v. Zern*, granted punitive damages to a plaintiff on a strict liability claim.[118] The *Martin* court's opinion by Justice Hutchinson confirms this.[119] While the *Martin* court felt that the quality of the evidence did not warrant a decision on this issue, it does not appear that Pennsylvania would permit the award of punitive damages, based on the Pennsylvania Supreme Court's recent decision in *Feld v. Merriam*.[120]

In *Feld*, the court held that punitive damages could properly be awarded against a landlord for the landlord's failure to protect his tenants from the foreseeable criminal activities of third parties.[121] The *Feld* court emphasized that the actor's state of mind towards the person owed the duty of protection would be the most relevant consideration of a punitive damages claim.[122] As such, the court must determine that "[t]he act, or the failure to act, [was] intentional, reckless or malicious."[123] Under this standard, the *Feld*

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116. 374 F. Supp. at 856.

117. Walker v. Butz, 1 Yeates 574 (1795).

118. Two recent comments confirm that prior to the instant case, no Pennsylvania court has determined whether punitive damages are available to a strict liability plaintiff. *See* Comment, *The Dubious Extension of Punitive Damage Recovery in Pennsylvania Products Liability Law*, 23 Duq. L. Rev. 681, 688 (1985) ("The opinion of the Pennsylvania Superior Court in *Martin v. Johns-Manville Corp.* is the first reported Pennsylvania decision in which an appellate court has held that a plaintiff may collect punitive damages against a manufacturer in a products liability action"); Markham, *The Imposition of Punitive Damages in Product Liability Actions in Pennsylvania*, 57 Temp. L. Q. 203, 210-11 (1984) ("Although commentators have debated the wisdom of permitting punitive damages in product liability suits, a majority of courts that have addressed the issue have permitted such awards. The Pennsylvania Supreme Court has not decided the question. Recently, however, in *Martin v. Johns-Manville Corp.*, the Pennsylvania Superior Court. . .held that punitive damages may be awarded in product liability actions.")

119. 508 Pa. 165-66, 494 A.2d at 1094-95. Justice Hutchinson stated that: "[T]he quality of evidence here presented makes it unnecessary and inappropriate for us to consider either the broad policy arguments or the legal theory the parties present supporting a blanket rule for or against the allowance of punitive damages in litigation involving mass-marketed products." *Id.*

120. 506 Pa. 383, 485 A.2d 742 (1984).

121. *Id.* at 395, 485 A.2d at 747.

122. *Id.* at 396, 485 A.2d at 748.

123. *Id.*

court appears to mirror Judge Herman's opinion in *Hunter II* that punitive damages cannot be awarded where the required reckless indifference is not directed at an individual, or at least a specific group of individuals.

In Pennsylvania, strict liability cases fall into two main categories: manufacturing defect cases and design defect cases. "Failure to warn" cases have been characterized under Pennsylvania law as design defect cases.[124] Under either type of case, the manufacturer is held to be a guarantor of the product's performance and safety.[125] In a design defect case, Pennsylvania courts apply a risk-utility analysis to determine whether a defendant is liable; liability may be imposed only on proof that the product lacked an element necessary to make the product safe for its intended use.[126] Where the contention is that the product was defective because of the absence of warnings, the plaintiff must show that the absence of warnings rendered the article substantially dangerous.[127]

It is apparent from the foregoing analysis that the focus of a strict liability action is the product itself. As such, punitive damages would never be awarded in a strict liability action under Pennsylvania law. The *Feld* decision highlights the fact that the actor's state of mind should be the focus of any determination as to the necessity of awarding punitive damages, as the acts must be "intentional, reckless or malicious."[128] Further, the *Martin* court reiterates that recklessness can only be found where the actor deliberately acts in the face of a known risk "in conscious disregard of, or indifference to, [the] risk" of harm to others.[129] Clearly, since the focus of each action lie on different planes, it does not seem sound to argue that Pennsylvania will allow punitive damages in a strict liability action in the near future.

The *Martin* court affirms that Pennsylvania law does not, as of yet, allow an award of punitive damages in a strict liability action. Therefore, the *Martin* decision is important because it gives federal courts a proper guideline for the application of Pennsylvania law concerning the awarding of punitive damages in strict liability

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124. Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971) (defect exists because the user was not adequately instructed on the proper usage of the product as the product was designed).

125. Dambacher v. Mallis, 336 Pa. Super. 22, 53, 485 A.2d 408, 426 (1984).

126. Berkebile v. Brantly Helicopter Co., 462 Pa. 83, 94, 337 A.2d 893, 898 (1975).

127. 336 Pa. Super. at 57, 485 A.2d at 427.

128. 506 Pa. at 396, 485 A.2d at 748.

129. 508 Pa. at 171, 494 A.2d at 1097.

actions. This is apparently necessary since the *Thomas* court failed to properly conclude that punitive damages could not be awarded in a strict liability action under Pennsylvania law, while the *Neal* court actually allowed such damages based on its perception of Pennsylvania law.

In *Erie R. Co. v. Tompkins*,[130] the Supreme Court held that federal courts sitting in diversity must adjudicate controversies as would a state court sitting in the forum state.[131] Significantly, district courts sitting in diversity must apply both the statutory *and* the case law of a particular form.[132]

Although it was initially held by the Supreme Court that federal courts sitting in diversity were required to follow *all* judicial decisions of the particular forum state,[133] subsequent cases have taken a more liberal view of the deference to be afforded to state court decision by federal courts sitting in diversity. In *King v. Order of Travelers*,[134] the Supreme Court held that federal courts need not follow the decisions of state trial courts.[135] However, in *Bernhardt v. Polygraphic Co. of America*,[136] the Supreme Court held that the Supreme Court of Vermont's most recent decision on an issue, though forty-five years old, must be followed by a federal court where "there appears to be no confusion in the [state] decisions, no developing line of authorities that cast a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of judges on the question, [and] no legislative development that promises to undermine the judicial rule."[137] The Court did, however, imply that where a state's law is not so settled, a federal district court need not blindly follow the state court decisions.[138]

One of the most recent pronouncements with respect to the def-

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130. 304 U.S. 64 (1938).

131. *Id.*

132. *Id.*

133. Six Companies v. Joint Hwy. Dist., 311 U.S. 180 (1940); West v. A.T.& T. Co., 311 U.S. 223 (1940); Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940); Fidelity Union Trust Co. v. Fields, 311 U.S. 169 (1940).

134. 333 U.S. 153 (1948).

135. *Id.*

136. 350 U.S. 198 (1956).

137. *Id.* at 205. The Court stated:

> [The] case was decided in 1910. But it was agreed on oral argument that there is no later authority from the Vermont courts, that no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and that no legislative movement is under way in Vermont to change the result of those cases.

Id. at 204.

138. *Id.* at 205.

erence to be afforded state court decisions by federal courts sitting in diversity is contained in *Commissioner v. Estate of Bosch.*[139] In *Bosch,* the decedent created a revocable trust under New York law.[140] After the decedent's death, the Commissioner of Internal Revenue determined that the trust did not qualify for the marital deduction under I.R.C. § 2056.[141] The Commissioner determined that the trust was invalid, subsequent to a New York trial court determination that the trust was valid under New York law. The *Bosch* court held that:

> under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. . . . [W]hen the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling . . . [as] the underlying substantive rule involved is based on state law and the state's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the state.[142]

While the *Bosch* decision grants federal courts the power to sit as a state court and predict how a state's highest court would ultimately decide a particular issue, the *Neal, Thomas* and *Hoffman I* courts overstepped this authority. As noted earlier, no Pennsylvania court on any level has addressed the issue of whether punitive damages are available to a strict liability plaintiff.[143] The *Thomas* court even acknowledges that no Pennsylvania court has ever decided the issue.[144] Therefore, the *Bernhardt* decision should be controlling, since there is no developing case law on the issue. The danger of the position taken by the courts in *Neal, Thomas* and *Hoffman I,* is the potentiality for the creation of an environment conducive to forum shopping. In essence, strict liability plaintiffs could recover punitive damages in federal courts sitting in Pennsylvania even though Pennsylvania state courts have specifically denied such awards to strict liability plaintiffs. As the intention of *Erie* and its progeny was to prevent this exact type of forum shopping, a decision to award punitive damages in strict liability actions should be determined by Pennsylvania courts. To hold other-

139. 387 U.S. 456 (1967).
140. *Id.*
141. *Id.* at 458.
142. *Id.* at 465.
143. *See supra* note 118 and accompanying text.
144. 414 F. Supp. at 264 n.13.

wise violates the edict of *Bosch* that a federal court sitting in diversity must act as would a state court of the particular forum.[145] Unless the position taken by the courts in *Neal*, *Thomas* and *Hoffman I* is recanted, the federal courts will be sitting as a superlegislature, which the Constitution forbids.

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145. 387 U.S. 456.