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THE EMERGENCE OF PUNITIVE DAMAGES IN PRODUCT LIABILITY ACTIONS: A FURTHER ASSAULT ON THE CITADEL

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I. Historical Perspective and Analysis

The terms punitive, exemplary, vindictive, or punitory damages are all synonymous with and represent those damages which are awarded separately from compensatory damages because of the malicious or oppressive character of the acts perpetrated by another. Punitive damage awards are often referred to as "smart money." The punitive concept has its roots in the earliest recorded history of the law.[1] It was originally formulated to more adequately compensate an injured person for injury produced by the antisocial conduct of others.

Punitive damage constitutes a monetary award to an injured party over and above that which is necessary to compensate for

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1. *See* G. Driver & J. Miles, The Babylonian Laws 500 (1952). The concept of damages as a form of punishment traces its historical antecedents to the Babylonian law 4000 years earlier in the Code of Hammurabi. *See id.* at 500-01. The Hebrew Code of Mosaic Law 3200 years earlier recognized the punitive aspect of damage awards. *See Exodus* 22:7.

actual loss.[2] Punitive damages are awarded not as a matter of right, but rather are dependent on and rest soley within the discretion of a jury or the trier of fact.[3] These punitory damages provide both punishment for past egregious antisocial conduct and deterrence against the tortfeasor and others similarly situated from engaging in parallel outrageous and impermissible conduct.[4] As a prerequisite to the award of exemplary damages, actual or compensatory damages must be awarded.[5] Consequently, actual damages must be pleaded, proven, and awarded antecedent to the submission of any issue on punitive damages.[6] This requirement is

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2. *See* Bennett v. Howard, 141 Tex. 101, 109, 170 S.W.2d 709, 713 (1943); Piper v. Duncan, 131 S.W.2d 397, 398 (Tex. Civ. App.-Dallas 1939, writ ref'd). The Restatement (Second) of Torts specifically delineates punitive damages as being something other than compensatory or nominal damages. *See* RESTATEMENT (SECOND) OF TORTS § 908(1) (1979).

3. *See, e.g.*, Winn-Dixie Montgomery, Inc. v. Henderson, 395 So. 2d 475, 477 (Ala. 1981) (exemplary damages discretionary with jury); Poulsen v. Russell, 300 N.W.2d 289, 296 (Iowa 1981) (amount of punitive award to be determined by jury); Southwestern Inv. Co. v. Neeley, 452 S.W.2d 705, 708 (Tex. 1970) (extent of punitive damages within discretion of jurors); *see also* Berding v. Thada, 243 N.W.2d 857, 862 (Iowa 1976) (punitive damages not awarded as matter of right). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 13 (4th ed. 1971) (exemplary damages not given as matter of right, but rest within jury's discretion).

4. *See, e.g.*, Campbell Estates, Inc. v. Bates, 517 P.2d 515, 521 (Ariz. Ct. App. 1974) (punitive award intended to punish wrongdoer); Jolley v. Puregro Co., 496 P.2d 939, 945 (Idaho 1972) (exemplary damages designed to discourage misconduct); RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) (purpose of punitive damages to punish and deter future wrongdoing). The earliest decision in Texas focused on punishment and deterrence as the basis for punitive damages. *See* Cole v. Tucker, 6 Tex. 133, 134 (1851). One well known commentator has stated that "[t]he primary purposes of the doctrine are usually said to be the punishment of the defendant and the deterrence of similar wrongdoing in the future." *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1277 (1976). This doctrinal basis for awarding punitive damages in Texas has been reaffirmed by the United States Court of Appeals for the Fifth Circuit. *See* Maxey v. Freightliner Corp., 665 F.2d 1367, 1378 (5th Cir. 1982).

5. *See, e.g.*, City Prod. Corp. v. Berman, 610 S.W.2d 446, 450 (Tex. 1980) (plaintiff required to show actual damages in order to recover exemplary award); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 149-50, 70 S.W.2d 397, 409 (1934) (punitive damages cannot be awarded absent showing of actual injury); O'Brien v. Snow, 210 S.E.2d 165, 167 (Va. 1974) (compensatory damages must be found in order to award punitive damages); *see also* Berding v. Thada, 243 N.W.2d 857, 862 (Iowa 1976) (actual loss prerequisite to allowing exemplary damages). Texas is one of only two jurisdictions which have implied that an award of nominal damages will not support a punitive damages finding by the jury. *See* Whittington v. Grand Valley Lakes, Inc., 547 S.W.2d 241, 243 (Tenn. 1977); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 150, 70 S.W.2d 397, 409 (1934). *See generally* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 5.37, at 5-108 (1981) (only Texas and Tennessee infer exemplary damages cannot be predicated on nominal award).

6. *See, e.g.*, Rubeck v. Huffman, 374 N.E.2d 411, 414 (Ohio 1978) (plaintiff failed to

designed to preclude a party from pursuing an action merely to inflict punishment upon another in the absence of some injury precipitated by another's outrageous conduct.[7]

Punitive damages have been an integral part of the common law for several centuries.[8] The use of damages as punishment, however, is as old as antiquity itself. Although the concept of punitive damages was not recognized by the Roman Civil Law,[9] Anglo-American common law early recognized and applied damages as a means of punishment.[10]

The genesis of punitive or exemplary damages has been attributed to at least three different historical antecedents. Originally, it was postulated that punitive damages developed as a means of jus-

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prove actual loss so punitive award improper); Bell v. Ott, 606 S.W.2d 942, 954 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (award of actual damages prerequisite to punitive damages); Stafford v. Powell, 148 S.W.2d 965, 968 (Tex. Civ. App.—Eastland 1941, no writ) (exemplary damages cannot be awarded because pleading showed no right to actual damages).

7. *See* Stacy v. Portland Pub. Co., 68 Me. 279, 287-88 (1878). The court noted that the plaintiff had been awarded nominal damages in the sum of one dollar. *See id.* at 287. This was interpreted to mean that there was no malice demonstrated by the defendant's actions. *See id.* at 287. The court went on to state:

> There is no room for punitive damages here. There is no foundation for them to attach to or rest upon. It is said, in vindication of the theory of punitive damages, that the interests of the individual injured and of society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest, society can have none. Such damages are to be awarded against a defendant for punishment. But, if all the individual injury is merely technical and theoretical, what is the punishment to be inflicted for?

See id. at 287-88; *see also* Ennis v. Brawley, 41 S.E.2d 680, 683 (W. Va. 1946) (nominal award shows defendant not engaged in malicious conduct and no need to punish by exemplary damages). *See generally* Comment, *The Relationship of Punitive Damages and Compensatory Damages in Tort Actions*, 75 DICK. L. REV. 585, 594-96 (1971) (discussion of jurisdictions requiring more than nominal damages to support punitive award).

8. *See* Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763). *See generally* Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369, 371 (1965) (punitive damage concept accepted at common law). The term "exemplary damages" was utilized in 1763 in Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763). The basis for the award was the "daring public attack made upon the liberty of the subject" through entry and imprisonment pursuant to a nameless warrant. *See id.* at 769.

9. *See* Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369, 369 (1965). Some commentators dispute this fact and assert that the basis of Roman Civil Law was punitive in nature. *See* W. BUCKLAND & A. MCNAIR, ROMAN LAW AND COMMON LAW 344-45 (2d ed. 1965).

10. The historical evolution and use of punitive awards in civil matters is extensively discussed in an article by David G. Owen. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1262-68 (1976).

tifying excessive verdicts.[11] In medieval England, during the mid-seventeenth century, a jury award of damages was not reviewable by an appellate court.[12] A litigant against whom a large damage amount was assessed was entitled to pursue his grievance directly against the jury by Writ of Attaint.[13] If it was determined that the issue of liability was wrongly decided or the award of damages was deemed excessive, then the members of the jury were punishable under the writ.[14] The development of exemplary damages to punish outrageous conduct enabled the appellate courts to accord a presumption of correctness to jury awards. This in turn encouraged development of the jury system by removing concern for personal liability.

Another perspective for the rise of punitive damages contemplated that an award beyond mere actual compensation provided remuneration for intangibles such as hurt feelings, wounded dignity, and embarrassment.[15] During the formative stages of the common law, elements such as mental anguish, embarrassment, and personal indignities were not compensable. Punitive damages, therefore, provided "compensation" for aspects of personal harm that otherwise were not recoverable.[16]

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11. *See* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.02, at 1-3 (1981); *see also* 22 AM. JUR. 2D *Damages* § 236, at 323 (1965) (exemplary award concept arose out of reluctance to grant new trial).

12. *See* 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 347, at 687-89 (A. Sedgwick & J. Beale 9th ed. 1913).

13. *See* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.02, at 1-4 (1981). *See generally* Comment, *Damages in Contract at Common Law*, 47 LAW REV. Q. 345, 346-47 (1931) (writ of attaint would subject jurors to liability).

14. *See* Roe v. Hawkes, 83 Eng. Rep. 316, 316 (K.B. 1663); J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 1.02, at 1-4 (1981).

15. *See* Hink v. Sherman, 129 N.W. 732, 734 (Mich. 1911); Fay v. Parker, 53 N.H. 342, 380 (1873). Some jurisdictions continue to view punitive damages as a means of additional compensation. *See, e.g.*, Kewin v. Massachusetts Mut. Life Ins. Co., 295 N.W.2d 50, 55 (Mich. 1980) (punitive award represents compensation, not punishment); Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 67-68 (N.H. 1972) (exemplary damages not allowed, but compensatory damages increased in cases of aggravated conduct); Perry v. Melton, 299 S.E.2d 8, 12 (W. Va. 1982) (punitive damages given as extra compensation). *See generally* Hensley v. Erie Ins. Co., 283 S.E.2d 227, 233 & nn.14 & 15 (W. Va. 1981) (other reasons behind punishment support award of exemplary damages).

16. *See* Stuart v. Western Union Tel. Co., 66 Tex. 580, 586, 18 S.W. 351, 353 (1885). The *Stuart* court opined that "the whole doctrine of punitory or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation." *Id.* at 586, 18 S.W. at 353. *See generally* Annot., 123 A.L.R. 1115, 1121 (1939) (puni-

Another basis supporting adoption of punitive damages was the disparity created by the criminal law. The criminal law punished more severely for infractions involving property damage than for invasions of personal rights.[17] Consequently, the civil courts adopted the concept of punitive damages as a vehicle by which to more adequately punish torts causing personal harm.[18] This served to strike a more equitable balance between the criminal and civil law.

II. History of Punitive Damages in Texas Generally

The adoption of punitive awards as an element of damages for personal injuries in the United States was not predicated on any of these historical rationales. Rather, the concept of punitive damages was adopted as an effective method to punish willful and wanton actions and to deter tortfeasors and others similarly situated from engaging in similar outrageous conduct in the future.[19]

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tive award to compensate for harm that cannot be estimated).

17. *See* Freifield, *The Rationale of Punitive Damages,* 1 Ohio St. L.J. 5, 7 (1935); Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs,* 49 Marq. L. Rev. 369, 371 (1965).

18. *See* Hopkins v. Atlantic & St. L. R.R., 36 N.H. 2, 18 (1857); *see also* McCormick, *Some Phases of the Doctrine of Exemplary Damages,* 8 N.C.L. Rev. 129, 130 (1929) (exemplary award brings punishment to cases ignored by criminal prosecutors).

19. *See* Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851); *cf.* Genay v. Norris, 1 S.C. 6, 7 (1784) ("wanton outrage" entitled plaintiff to "very exemplary damages"). *Genay* represents the first reported American decision authorizing punitive damages. *See* Genay v. Norris, 1 S.C. 6, 7 (1784); *see also* Owen, *Punitive Damages in Products Liability Litigation,* 74 Mich. L. Rev. 1258, 1263 n. 20 (1976) (*Genay* first exemplary damages case reported in United States). Because the theory of exemplary damages was unsettled in England at the time it was adopted in the United States, courts initially laid down divergent views as to the purpose of punitive awards. *Compare* Coryell v. Colbaugh, 1 N.J.L. 90, 91 (1791) (punitive damages given as example to deter similar actions) *and* Cole v. Tucker, 6 Tex. 133, 134 (1851) (punitory award given to punish defendant) *with* Stuart v. Western Union Tel. Co., 66 Tex. 580, 586, 18 S.W.351, 353 (1885) (exemplary damages based upon failure to allow damages for invasion of intangible interests). *See generally* Comment, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality,* 9 Cum. L. Rev. 487, 489 (1978) (courts cited contrary purposes behind exemplary damages). Gradually, however, the theory of exemplary damages progressed until virtually all jurisdictions now recognize that such damages are meant to punish the wrongdoer and prevent future misconduct. *See, e.g.,* Trahan v. Cook, 265 So. 2d 125, 130 (Ala. 1972) (exemplary damages awarded as punishment); Courtesy Pontiac, Inc. v. Ragsdale, 532 S.W.2d 118, 122 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (punitive award meant to punish defendant); Waters v. Brand, 497 P.2d 875, 878 (Wyo. 1972) (punishment of defendant and protection of society reasons behind exemplary damages). *See generally* 22 Am. Jur. 2d *Damages* § 237, at 323 (1965) (punitive damages sanctioned by most states to punish and deter wrongful actions). It should be noted that

The concept of punitive damages is well established in Texas law. In fact, in 1869, the exemplary damage doctrine for wrongful death actions was incorporated into the Texas Constitution.[20] This concept as a general principle of law was judicially addressed very early in the jurisprudence of our law.[21]

In *Smith v. Sherwood*,[22] plaintiff instituted suit seeking damages for the conversion of corn. The jury awarded the plaintiff an amount double the value of the corn. The excessiveness of the damage award was vigorously contested because of the absence of any evidence of fraudulent conduct, wanton violence, or malicious outrage. Concluding that the verdict was excessive, the court observed that in cases of civil injury or breach of contract in which there is no element of fraud, willful negligence, or malice, the measure of damages is simple compensation for the actual loss sustained.[23] The court further noted, however, that in matters involving trespass or tort in conjunction with duress, fraud, or negligence so severe as to give rise to an inference of malice, the jury has discretion to award vindictive damages in order to punish the wrongdoer.[24]

The term "gross neglect," as the basis for exemplary damages under the constitution and decisional law, has been defined in a variety of fashions. The fluctuating and remarkably imprecise definition and application of "gross neglect" or "gross negligence" ostensibly corresponds to distinct periods in the evolution of the pu-

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punitive damages have not been allowed for breach of contract unaccompanied by a tort. *See* A. L. Carter Lumber Co. v. Saide, 140 Tex. 523, 526, 168 S.W.2d 629, 631 (1943). *See generally* Annot., 84 A.L.R. 1345, 1346 (1933) (majority of decisions indicate exemplary award unavailable in breach of contract action).

20. *See* TEX. CONST. art. XVI, § 26, interp. commentary (Vernon 1955). The current constitutional article provides "[e]very person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be . . . ." *See* TEX. CONST. art. XVI, § 26.

21. *See, e.g.*, Missouri Pac. Ry. v. Mitchell, 72 Tex. 171, 175, 10 S.W. 411, 414 (1888) (charge regarding exemplary damages erroneous); Tex. & Pac. Ry. v. De Milley, 60 Tex. 194, 198-99 (1883) (evidence concerning road condition and knowledge of defendant relevant to issue of punitive damages); Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600 (1880) ("entire want of care" raising inference of conscious indifference to resulting harm sufficient ground for punitive award).

22. 2 Tex. 461 (1847).

23. *See id.* at 463-64.

24. *See id.* at 464.

nitive damage concept in Texas jurisprudence. The Texas Supreme Court in *Burk Royalty Co. v. Walls*[25] recounted the evolution of punitive damages through these distinct and unique transitional periods and the nature of the cases being litigated during each of these transitional periods.

The use of punitive damages by the courts was initially developed during the period when litigation focused primarily on railroad accidents involving fatalities. At common law, a cause of action predicated on personal injuries producing death was abrogated by the death of either party to the suit.[26] Texas countered the harsh effect of the common law by legislatively declaring that specified beneficiaries were entitled to initiate suit for actual damages if caused by "the negligence or carelessness of the proprietor, or proprietors, owners, charterer or hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence or carelessness of their servants or agents."[27] Since the majority of cases instituted under the statute initially involved lawsuits seeking damages for wrongful death arising from railroad accidents, this time frame came to be referred to as the "railroad statute period." It was during this period that the Texas Supreme Court undertook to provide definition to the term "gross negligence." In *Missouri Pacific Ry. v. Shuford*,[28] the court formulated a definition of gross negligence that has weathered the passage of time.[29] In *Shuford* the supreme court declared:

> While, in a given case, "ordinary care" may not exist, yet there may exist at least slight care. Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or

25. 616 S.W.2d 911 (Tex. 1981).

26. *See* Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 598-99 (1880). The *Burk Royalty* case contains a further discussion of this rule. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 916 (Tex. 1981).

27. 1860 Tex. Gen. Laws, ch. 35, § 1, at 32, 4 H. GAMMEL, LAWS OF TEXAS 1394 (1898).

28. 72 Tex. 165, 10 S.W. 408 (1888).

29. *See id.* at 170, 10 S.W. at 411. The *Shuford* definition was reaffirmed by the Texas Supreme Court in *Burk Royalty Co. v. Walls* and by the Fifth Circuit in *Maxey v. Freightliner Corp. See* Maxey v. Freightliner Corp., 665 F.2d 1367, 1374 (5th Cir. 1982) (following Texas substantive law); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981).

persons to be affected by it.[30]

During the second stage in the evolution of gross negligence, numerous cases sought recovery of punitive damages for the death of workmen arising from accidents covered under the worker's compensation statute. This phase of the evolutionary process was particularly important because it was during this period that the "some care" rebuttal to gross negligence was accorded controlling significance.[31] In *Sheffield Division, Armco Steel Corp. v. Jones*,[32] the Texas Supreme Court, in refining the *Shuford* definition, concluded that a gross negligence finding was entirely dependent on evidence that the defendant acted with an entire want of care such that his conduct exhibited "a fixed purpose to bring about the injury of which the plaintiff complains."[33] Consequently, evidence that the defendant acted with "some care" foreclosed a finding that the defendant's acts were willful or wanton.[34] The effect, of course, was to severely restrict the application of punitive damages.

The final phase in the evolution of exemplary damages involved cases arising under the "guest statute."[35] During this phase, the

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30. Missouri Pac. Ry. v. Shuford, 72 Tex. 165, 170, 10 S.W. 408, 411 (1888); *see also* Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600 (1880) ("entire want of care" indicating conscious indifference constitutes basis for punitory damages).

31. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 918 (Tex. 1981). Utilizing the "some care" element of the *Shuford* standard, the court determined that some care necessarily rebutted the absence of an entire want of care. *See* Woolard v. Mobil Pipe Line Co., 479 F.2d 557, 565-66 (5th Cir. 1973) (applying Texas law); Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825, 832 (Tex. 1964), *overruled*, Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981); Loyd Elec. Co. v. De Hoyos, 409 S.W.2d 893, 897 (Tex. Civ. App.—San Antonio 1966, writ ref'd), *overruled*, Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981).

32. 376 S.W.2d 825 (Tex. 1964), *overruled*, Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981).

33. *See id.* at 828 (quoting 13 TEX. JUR. *Damages* § 215, at 379 (1955)).

34. *Id.* at 832. This rationale was reviewed in depth by the Texas Supreme Court in the *Burk Royalty* decision as a prelude to significantly altering the test for gross negligence. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920-22 (Tex. 1981).

35. *See, e.g.*, McPhearson v. Sullivan, 463 S.W.2d 174, 174 (Tex. 1971) ("guest statute" asserted as defense to gross negligence action); Harbin v. Seale, 461 S.W.2d 591, 591-92 (Tex. 1970) (defendant utilized "guest statute" to rebut claim of gross negligence); Fancher v. Cadwell, 159 Tex. 8, 10-11, 314 S.W.2d 820, 820 (1958) ("guest statute" case involving gross negligence); *see also* Burt v. Lochausen, 151 Tex. 289, 292-93, 249 S.W.2d 194, 196 (1952) (case concerned gross negligence charge and "guest statute"). *See generally* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 919-20 (Tex. 1981) (examination of "Guest Statute" development period).

Texas Supreme Court rejected the controlling effect of the "some care" test.[36] As a result, the evaluation of a tortfeasor's outrageous conduct was assessed on the basis of all the evidence relating to the purported willful and wanton conduct.[37] The earlier "some care" test which, practically speaking, conclusively rebutted the absence of "an entire want of care" was relegated to a subservient role in the evaluation process.[38]

III. PUNITIVE DAMAGES IN TEXAS—CIRCA 1981

Exemplary or punitive damages in Texas have undergone dramatic changes in the past two years. A trilogy of recent decisions has achieved a complete retrenchment in Texas of this most controversial area of the law.

In *Burk Royalty Co. v. Walls*,[39] plaintiff instituted suit against the decedent's employer and its superintendent for gross negligence. Plaintiff alleged that both defendants were grossly negligent in failing to: (1) provide rules and regulations for the safety of its employees; (2) furnish safe machinery and instrumentalities; (3) provide a safe place to work; and (4) select careful and competent fellow workers.[40] The threshold issue involved whether there was "some evidence" to support the jury's findings that Burk Royalty's vice principal was grossly negligent in failing to follow certain safety procedures. Secondary issues focused on the definition of gross negligence and the standard of review for jury findings of gross negligence. The trial court instructed the jury:

> You are instructed in connection with the foregoing Special Issue that "gross negligence" is the exercise of so little care as to justify the belief that such action was a heedless and reckless disregard to the safety of Jeffrey Paul Walls and others.

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36. *See* McPhearson v. Sullivan, 463 S.W.2d 174, 176 (Tex. 1971); Harbin v. Seale, 461 S.W.2d 591, 594 (Tex. 1970).

37. *See* McPhearson v. Sullivan, 463 S.W.2d 174, 176 (Tex. 1971); Harbin v. Seale, 461 S.W.2d 591, 594 (Tex. 1970). As noted by the Texas Supreme Court: "[T]he meaning of gross negligence in guest statute cases was accomplished by examining the record for some evidence of an entire want of care, looking to all of the surrounding facts and circumstances, not just individual elements or facts." Burk Royalty Co. v. Walls, 616 S.W.2d 911, 919 (Tex. 1981).

38. The operative effect of the change was noted and applied in Maxey v. Freightliner Corp., 665 F.2d 1367, 1373-74 (5th Cir. 1982).

39. 616 S.W.2d 911 (Tex. 1981).

40. *See id.* at 913, 922-23.

> Heedless and reckless disregard means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it.[41]

The defendants urged that the uncontroverted evidence of some care necessarily rebutted evidence of an entire want of care.[42] The supreme court reaffirmed the definition first approved in *Missouri Pacific Ry. v. Shuford* that "[g]ross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons affected by it."[43]

In a gross negligence case, the plaintiff is obligated to prove that the defendant was grossly negligent. In rebutting gross negligence, the defendant, prior to *Burk Royalty,* was obligated to introduce evidence of "some care." The court in *Burk Royalty* determined that application of the "some care" standard improperly reversed the burden of proof.[44] As the "some care" test had been applied, the defendant, instead of proving that there was no evidence to support the verdict, needed only to prove there were facts demonstrating a degree of care. The plaintiff was then thrust in the position of negating the existence of defendant's exercise of "some care." This latter test, according to the supreme court, imposed a difficult burden on the plaintiff.[45] Rejecting the some care standard, the supreme court concluded:

> When there is *some* evidence of defendant's entire want of care and also *some* evidence of "some care" by the defendant, the jury finding of gross negligence through entire want of care resolves the issue, and the appellate court is bound by the finding in testing for legal insufficiency.[46]

The supreme court further observed that the phrase "entire want of care" is not a directive to the jury that gross negligence

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41. *Id.* at 915.
42. *See id.* at 915.
43. *Id.* at 920; Missouri Pac. Ry. v. Shuford, 72 Tex. 165, 170, 10 S.W. 408, 411 (1888).
44. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920-21 (Tex. 1981).
45. *See id.* at 921.
46. *See id.* at 921.

must be predicated on the exercise of absolutely "no care" by the defendant. What the jury must find is such a total lack of care that it demonstrates the act or failure to act was due to conscious indifference.[47] Ordinary negligence is ostensibly metamorphosed into gross negligence by the mental attitude of the defendant. Essentially, plaintiff must demonstrate that the defendant consciously and knowingly acted with indifference to his rights, welfare, and safety, or, stated differently, the defendant knew of the peril and his acts or omissions demonstrated a total lack of concern.[48] On appellate review of the gross negligence finding, the court then views all the evidence in ascertaining the merits of the punitive award. The supreme court stated:

> [T]he existence of gross negligence need not rest upon a single act or omission, but may result from a combination of negligent acts or omissions . . . . A mental state may be inferred from actions. All actions indicating a state of mind amounting to a conscious indifference must be examined in deciding if there is some evidence of gross negligence.
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> In making this determination, all evidence must be considered in a light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in such party's favor.[49]

Three members of the court registered a vigorous dissent. The dissent correctly noted that by changing the standard for appellate review, the court effectively redefined the standard for gross negligence.[50] Using the traditional standard of disregarding all evidence contrary to the verdict of the jury, the court necessarily disregards all evidence of the care exercised by the defendant. Consequently, punitive awards are judicially sanctioned for conduct that is unquestionably less than the *Shuford* "entire want of care." Contrary to the disclaimers of the majority, a change in the standard for review has effectuated a significant alteration of the criteria for establishing gross negligence.[51]

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47. *Id.* at 922.

48. As declared by the court: "What lifts *ordinary* negligence into *gross* negligence is the mental attitude of the defendant . . . ." Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981).

49. *Id.* at 922.

50. *See id.* at 927 (McGee, J., dissenting).

51. *See id.* at 927-28 (McGee, J., dissenting).

Contemporaneous with *Burk Royalty*, the supreme court also decided *Putman v. Missouri Valley, Inc.*[52] Plaintiff's decedent, a pipefitter on a construction project, was fatally injured when he stepped into an unguarded opening in the floor of the building and fell fifty feet to his death. Plaintiff alleged that the employer was grossly negligent in failing to provide a safe place to work, in allowing the subcontractor to remove the barriers around the hole in the floor of the building, and in leaving this dangerous area of construction unbarricaded and unattended. The supreme court concluded that a jury finding of gross negligence was supported by the evidence.[53] The court reaffirmed its earlier unqualified repudiation of the "some care" test in evaluating gross negligence.[54]

The supreme court outlined the evidence supporting the jury's finding that Missouri Valley was grossly negligent: (1) the rope surrounding the opening was intentionally taken down in order to raise machinery from a lower level; (2) after removing the rope barrier, the foreman allowed the hole to remain unprotected; (3) the corporation's safety regulations failed to provide for such temporary openings in the floor; and (4) although the company trained employees regarding safety procedures, it did not engage in safety testing.[55] Although this evidence certainly constituted some evidence of negligence, it appears notably deficient to sustain a gross negligence finding. In reality, the court dramatically altered the evidentiary basis necessary to raise the issue of gross negligence as well as the test for sustaining that finding on appeal.

The last case in the trilogy is *Schwartz v. Sears, Roebuck & Co.*[56] The plaintiff was injured in a collision with defendant's wrecker. Plaintiff alleged that defendant's driver was grossly negligent in designing a defective tow truck. The tow truck was designed by a Sears automotive employee who possessed no formal education in engineering or vehicle design. The evidence demonstrated that the tow truck was designed without consideration of factors which are normally taken into account on professionally designed tow trucks. The jury found the defendant liable for the

52. 616 S.W.2d 930 (Tex. 1981).
53. *See id.* at 931.
54. *See id.* at 931.
55. *See id.* at 931.
56. 669 F.2d 1091 (5th Cir. 1982).

driver's negligence and gross negligence in designing the tow truck. The Fifth Circuit affirmed the trial court judgment assessing punitive damages against the defendant.[57] The court relied on the Texas Supreme Court's abandonment of the "some care" test. One of the problems that confronted the court was whether the abandonment of the "some care" test constituted a substantive or a procedural change in the law.[58] The court deferred resolution of this issue on the basis that the defendant was grossly negligent under the literal definition of gross negligence.[59]

IV. PUNITIVE DAMAGES IN OTHER JURISDICTIONS

The jurisdictions are divided on the applicability of punitive damages in civil actions. Even jurisdictions recognizing the concept of punitive awards vary in the approach utilized to impose such awards. A number of jurisdictions either totally or partially proscribe the use of punitive awards in civil cases.[60] A similar number of other jurisdictions severally limit the scope and application of punitive awards.[61] Generally, these jurisdictions view the concept of punitive awards as unfairly injecting a form of criminal punishment into a civil case without the procedural safeguards accorded criminal proceedings.[62] Moreover, since civil actions are designed

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57. *See id.* at 1093-94.

58. *See id.* at 1093.

59. *See id.* at 1093.

60. These jurisdictions include Indiana, Louisiana, Massachusetts, Nebraska, and Washington. *See, e.g.*, Glissman v. Rutt, 372 N.E.2d 1188, 1189 (Ind. Ct. App. 1978) (criminal prosecution bars imposition of exemplary damages); Killebrew v. Abbott Laboratories, 359 So. 2d 1275, 1278 (La. 1978) (exemplary award not allowed unless provided by statute); City of Lowell v. Massachusetts Bonding & Ins. Co., 47 N.E.2d 265, 272 (Mass. 1943) (punitive damages unavailable unless statutorily authorized); *see also* Miller v. Kingsley, 230 N.W.2d 472, 474 (Neb. 1975) (vindictive damages not recoverable); Stanard v. Bolin, 565 P.2d 94, 98 (Wash. 1977) (punitory award not permitted absent allowance by statute). *See generally* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 4.07, at 4-8 (1981) (discussion of states which prohibit exemplary damages).

61. These states include Connecticut, Georgia, Michigan, and New Hampshire. *See, e.g.*, Collens v. New Canaan Water Co., 234 A.2d 825, 831-32 (Conn. 1967) (exemplary award limited to costs of suit less taxable expenses); Westview Cemetery, Inc. v. Blanchard, 216 S.E.2d 776, 778-81 (Ga. 1975) (award under section 105-2003 includes "punitive damages" and precludes finding of aggravated damages); Wise v. Daniel, 190 N.W. 746, 747 (Mich. 1922) (exemplary damages not awarded as separate sum, but compensatory damages may be increased); *see also* Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 68 (N.H. 1972) (punitive damages not allowed, but compensatory award enlarged in cases of malicious conduct).

62. *See, e.g.*, Boyer v. Barr, 8 Neb. 68, 74-75 (1878) (punitive damages not permitted

to compensate parties for injuries attributable to the tortious conduct of others, the use of punitive awards is incompatible with the reparations objective of the civil tort system.[63]

A significant number of other jurisdictions have adopted the common law approach of imposing punitive awards in civil actions for outrageous, socially contemptible, or wanton, heedless, and oppressive conduct.[64] Generally, jurisdictions that authorize punitive awards employ the concept for punishment and deterrence of malicious conduct.[65] A few jurisdictions limit the rationale of punitive damages solely as a means of deterring future outrageous conduct by the offending party or others similarly situated.[66] Apparently, only Delaware imposes punitive awards in civil actions solely for the purpose of punishment.[67]

The degree of offending conduct that warrants the imposition of

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where defendant subject to criminal punishment); Fay v. Parker, 53 N.H. 342, 382 (1873) (punishment confined to field of criminal law); Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074 (Wash. 1891) (criminal law to punish, not civil law).

63. *See* Fay v. Parker, 53 N.H. 342, 382 (1873); Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1074 (Wash. 1891).

64. *See, e.g.*, Trahan v. Cook, 265 So. 2d 125, 130 (Ala. 1972); Nielson v. Flashberg, 419 P.2d 514, 520 (Ariz. 1966); Lauer v. Y.M.C.A., 557 P.2d 1334, 1342 (Hawaii 1976); *see also* Jolley v. Puregro Co., 496 P.2d 939, 945 (Idaho 1972); Newton v. Hornblower, Inc., 582 P.2d 1136, 1150 (Kan. 1978); Christman v. Voyer, 595 P.2d 410, 412 (N.M. Ct. App. 1979); Hicks v. Herring, 144 S.E.2d 151, 155 (S.C. 1965); Nash v. Craigco, Inc., 585 P.2d 775, 778 (Utah 1978); Spencer v. Steinbrecher, 164 S.E.2d 710, 716 (W. Va. 1968); Danculovich v. Brown, 593 P.2d 187, 191 (Wyo. 1979).

65. *See, e.g.*, Ray Dodge, Inc. v. Moore, 479 S.W.2d 518, 523 (Ark. 1972); Beebe v. Pierce, 521 P.2d 1263, 1264 (Colo. 1974); Newton v. Hornblower, Inc., 582 P.2d 1136, 1150 (Kan. 1978); *see also* Leimgruber v. Claridge Assoc., Ltd., 375 A.2d 652, 654 (N.J. 1977); Christman v. Voyer, 595 P.2d 410, 412, (N.M. Ct. App. 1979); Huckeby v. Spangler, 563 S.W.2d 555, 558-59 (Tenn. 1978). *See generally* 3 L. FRUMER, R. BENOIT, & M. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 2.02, at 21 (1965) (vindictive award given to punish reckless acts and deter similar conduct). It has been stated that deterrence serves as an example to others rather than just to the offending party. *See* Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 816 (6th Cir. 1982).

66. Among these jurisdictions are Alaska, Georgia, Idaho, Maine, Oregon, Rhode Island, and Utah. *See* Alaska Placer Co. v. Lee, 553 P.2d 54, 61 (Alaska 1976); Westview Cemetery, Inc. v. Blanchard, 216 S.E.2d 776, 779 (Ga. 1975); Jolley v. Puregro Co., 496 P.2d 939, 945-46 (Idaho 1972); Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973); Lewis v. Devil's Lake Rock Crushing Co., 545 P.2d 1374, 1378 (Or. 1976); Norel v. Grochowski, 155 A. 357, 358 (R.I. 1931); Nash v. Craigco, Inc., 585 P.2d 775, 778 (Utah 1978). At least one jurisdiction utilizes punitive awards to provide additional compensation to an injured party. *See* Perry v. Melton, 299 S.E.2d 8, 12 (W. Va. 1982).

67. *See* Riegel v. Aastad, 272 A.2d 715, 718 (Del. 1970). *But see* Pitts v. Kee, 511 F. Supp. 497, 504 (D. Del. 1981) (exemplary award designed to punish and deter).

punitive damages among the jurisdictions corresponds to the varying rationales articulated to support application of the concept. Some jurisdictions require a showing of fraud, malice, or oppression.[68] Others impose punitive damages for willful, wanton, or reckless conduct.[69] Yet others require a form of outrageous conduct evidencing an evil or bad motive.[70] Irrespective of the standards adopted by a particular jurisdiction, the basis for punitive awards rests squarely on the inappropriate and outrageous conduct of a tortfeasor. Socially unacceptable conduct that significantly exceeds mere negligence is the quintessential element. Punishment premised on socioeconomic considerations rather than egregious personal conduct is simply without historical precedent.

V. General Parameters Governing Punitive Damages

Actual damages are a prerequisite to an award of punitive damages.[71] A judgment for compensatory damages that is insupportable likewise nullifies any award of punitive damages.[72] An individ-

68. *See, e.g.*, Silberg. v. California Life Ins. Co., 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974) (oppression, fraud, or malice must be proven to impose punitory award); Randall v. Ganz, 537 P.2d 65, 67 (Idaho 1975) (exemplary damages available in cases of malice, fraud, or gross neglect); Newton v. Hornblower, Inc., 582 P.2d 1136, 1150 (Kan. 1978) (vindictive damages allowed on showing of fraud, malice, oppression, or gross neglect).

69. *See, e.g.*, McClellan v. Highland Sales & Inv. Co., 484 S.W.2d 239, 242 (Mo. 1972) (willful, wanton, or reckless conduct justifies award of exemplary damages); Sherman v. McDermott, 329 A.2d 195, 197 (R.I. 1974) (punitive award supported by maliciousness and wantonness of defendant's acts); Jeffers v. Nysse, 297 N.W.2d 495, 497 (Wis. 1980) (demonstration of willful, wanton, or reckless actions supports vindictive damages); *see also* Petsch v. Florom, 538 P.2d 1011, 1013 (Wyo. 1975) (malicious, willful, or wanton conduct required to impose punitive damages).

70. *See, e.g.*, Satterfield v. Rebsamen Ford, Inc., 485 S.W.2d 192, 195 (Ark. 1972) (punitive damages permitted when defendant acts with malice); King v. Allstate Ins. Co., 251 S.E.2d 194, 196 (S.C. 1979) (quoting Cox v. Coleman, 200 S.E. 762, 764 (S.C. 1939)) (ill will required to award exemplary damages); Shortle v. Central Vt. Pub. Serv. Corp., 399 A.2d 517, 518 (Vt. 1979) (showing of malice prerequisite to imposition of punitive damages).

71. *See, e.g.*, Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 149-50, 70 S.W.2d 397, 409 (1934) (proof of actual damage prerequisite to punitive award); Flanagan v. Womack, 54 Tex. 45, 50 (1880) (vindictive damages not recoverable absent showing of actual injury); Cherry v. Turner, 560 S.W.2d 794, 795 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (actual loss must be established in order to award exemplary damages). *See generally* W. Prosser, Handbook Of The Law Of Torts § 2, at 13-14 (4th ed. 1971) (punitory award predicated on proof of actual damage in most jurisdictions).

72. *See, e.g.*, City Prod. Corp. v. Berman, 610 S.W.2d 446, 450 (Tex. 1980) (punitory award reversed in absence of actual injury); Cherry v. Turner, 560 S.W.2d 794, 796 (Tex. Civ. App.—Austin 1978, wrif ref'd n.r.e.) (exemplary damages denied in absence of actual

ual is not entitled to maintain an action merely for the purpose of inflicting punishment upon another in the absence of actual damage.[73]

Punitive damages must bear a reasonable ratio to the actual damages awarded.[74] Although no precise ratio of punitive to actual damages has been established, "the amount of exemplary damages should be reasonably proportioned to the actual damages found."[75] The Texas Supreme Court in *Alamo National Bank v. Kraus*[76] articulated five factors to measure the proportional reasonableness of punitive to actual damages: (1) the character of the wrong; (2) the type of conduct engaged in by the defendant; (3) the extent of blameworthiness of the defendant; (4) the circumstances and sensibilities of the persons involved; and (5) the degree to which such actions run contrary to public notions of fairness and propriety.[77]

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loss); Prudential Corp. v. Bazaman, 512 S.W.2d 85, 95 (Tex. Civ. App.—Corpus Christi 1974, no writ) (punitive damages finding reversed because of failure to show actual injury).

73. *See* Stacy v. Portland Pub. Co., 68 Me. 279, 287-88 (1878); Pederson v. Dillon, 623 S.W.2d 696, 698-99 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ). *See generally* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 528-29 (1957) (independent ground of recovery required to award vindictive damages to prevent action to merely punish defendant).

74. It is not required that a punitive award be reasonably related to a compensatory award in some states. *See, e.g.*, Pinckard v. Dunnavant, 206 So. 2d 340, 344 (Ala. 1968) (exemplary award need not be mathematically related to compensatory award); Ray Dodge, Inc. v. Moore, 479 S.W.2d 518, 524 (Ark. 1972) (other factors besides ratio of punitive damages and actual damages to be considered); Lassitter v. International Union of Operating Eng'rs, 349 So. 2d 622, 626 (Fla. 1976) (punitive damages not required to be proportionate to compensatory damages). *See generally* Leimgruber v. Claridge Assoc., Ltd., 375 A.2d 652, 656-57 (N.J. 1977) (discussing split among jurisdictions regarding "ratio" rule).

75. Southwestern Inv. Co. v. Neeley, 452 S.W.2d 705, 707 (Tex. 1970). *Accord* Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1279 (3d Cir. 1979) (applying Pennsylvania law); Oakes v. McCarthy Co., 73 Cal. Rptr. 127, 147 (Ct. App. 1968); McCarthy v. Cullen & Son Corp., 199 N.W.2d 362, 368 (Iowa 1972); Spencer v. Steinbrecher, 164 S.E.2d 710, 716 (W. Va. 1968); *cf.* Miley v. Oppenheimer & Co., 637 F.2d 318, 331 (5th Cir. 1981) (Texas courts examine ratio between punitive award and compensatory award); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (vindictive award to be proportionate to compensatory award); Moore's, Inc. v. Garcia, 604 S.W.2d 261, 266 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (punitive damages to be reasonably related to actual damages); Pace v. McEwen, 574 S.W.2d 792, 801 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (punitory damages must bear reasonable ratio to actual damages). *See generally* Annot., 17 A.L.R.2d 527, 548 (1951) (number of courts maintain exemplary damages to be proportionate to compensatory damages).

76. 616 S.W.2d 908 (Tex. 1981).

77. *See id.* at 910. These same factors were emphasized by the United States Court of Appeals for the Fifth Circuit in Miley v. Oppenheimer & Co., 637 F.2d 318, 331 (5th Cir.

Despite the requirement of reasonableness, the court has rejected any predetermined ratio between punitive and exemplary damages.[78] Reasonableness, it seems, is in the eye of the upholder.[79]

Corporate responsibility, as distinguished from individual liability, for punitive damages is predicated on the so-called complicity rule. Under this rule a corporation may be liable for punitive damages only upon establishing that a vice principal ordered, participated in, or ratified the outrageous conduct. Under the Restatement, punitive awards are permissible against the principal or master when: (a) The action was authorized by the principal; (b) the principal recklessly employed an unqualified agent; (c) the agent functioned as and occupied the status of manager; or (d) the principal adopted the action as his own.[80] The Texas Supreme Court in *Fort Worth Elevators Co. v. Russell*[81] established the parameters for imposing punitive damages on corporate entities. The acts constituting gross negligence must be committed by: (a) Officials of the corporation; (b) individuals empowered to hire, supervise, and discharge company employees; (c) persons performing nondelegable projects of the corporation; or (d) managers of a complete department or unit composing the corporation.[82] Conse-

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78. *See* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981); *see also* Tynberg v. Cohen, 76 Tex. 409, 416, 13 S.W. 315, 316 (1890) (no rule that punitive damages have fixed ratio to actual damages); Cain v. Fontana, 423 S.W.2d 134, 139 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) (punitive award not required to be in set proportion to compensatory award). *See generally* Comment, *Required Ratio of Actual to Exemplary Damage*, 25 BAYLOR L. REV. 127, 128 (1973) (no specific relationship between exemplary damages and actual damages established).

79. This uncertain aspect of the "ratio" rule has been identified as one of its major drawbacks. *See* Leimgruber v. Claridge Assoc., Ltd., 375 A.2d 652, 656 (N.J. 1977). *See generally* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1180-82 (1931) (criticism of "ratio" rule).

80. *See* RESTATEMENT (SECOND) OF TORTS § 909 (1979). *See generally* Jenkins v. Whittaker Corp., 551 F. Supp. 110, 112 (D. Hawaii 1982) (discussing recovery of exemplary damages against corporate entity).

81. 123 Tex. 128, 70 S.W.2d 397 (1934).

82. *See id.* at 145, 70 S.W.2d at 406; *see also* Hernandez v. Smith, 552 F.2d 142, 146 (5th Cir. 1977) (corporate entity liable if act committed by officer, manager, person with power to hire or fire, or person performing nondelegable task); King v. McGuff, 149 Tex. 432, 434-35, 234 S.W.2d 403, 405 (1950) (punitive award allowable if principal authorized or approved act, recklessly hired agent, or agent functioned as manager); Valencia v. Western Compress & Storage Co., 238 S.W.2d 591, 594 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.) (vindictive damages imposed if principal ordered or sanctioned conduct, negligently employed unfit agent, or agent employed in managerial capacity). Other jurisdictions utilize

quently, the punitive award against a corporate entity rests on a showing that the conduct of a vice principal of the corporation satisfies the requisite animus.[83]

Punitive damages in wrongful death cases are specifically authorized by the Texas Constitution.[84] Only eighteen jurisdictions sanction recovery of punitive damages either by constitutional or statutory authority.[85] This means, of course, that the majority of jurisdictions prohibit punitive damage awards in wrongful death cases.[86] Despite constitutional attacks, the courts have determined that prohibiting punitive awards in wrongful death cases while permitting such awards in injury cases is not unconstitutional.[87]

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a similar approach. *See, e.g.*, Frick v. Abell, 602 P.2d 852, 856 (Colo. 1979); Openshaw v. Oregon Auto Ins. Co., 487 P.2d 929, 932 (Idaho 1971); Mattyasovszky v. West Town Bus Co., 330 N.E.2d 509, 512 (Ill. 1975). A more liberal test has been adopted in other states and allows exemplary damages if the agent's act furthered the principal's interests and was within the scope of the agent's employment. *See, e.g.*, Hibschman Pontiac, Inc. v. Batchelor, 362 N.E.2d 845, 848 (Ind. 1977); Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 859 (Iowa 1973); Stroud v. Denny's Restaurant, Inc., 532 P.2d 790, 793 (Or. 1975). Recently, in Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357, 391 (E.D. Pa. 1982), a successor corporation was deemed liable for punitive damages on the basis of acts committed by its predecessor.

83. *See* Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 146, 70 S.W.2d 397, 407 (1934); *see also* Shortle v. Central Vt. Pub. Serv. Corp., 399 A.2d 517, 518 (Vt. 1979) (corporate officer did not supervise or ratify malicious act and corporation cannot be held liable).

84. *See* TEX. CONST. art. XVI, § 26. The court in *Heil Co. v. Grant* relied entirely on the constitutional principle as the basis for authorizing punitive damages in a strict liability case. *See* Heil Co. v. Grant, 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). Significantly, the Texas Constitution predicates punitive damages solely on conduct, i.e., "willful act, or omission, or gross neglect." *See* TEX. CONST. art. XVI, § 26. A strict liability action involves none of this prohibited conduct. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A comment a (1965) (manufacturer liable regardless of care exercised).

85. A discussion of this disparity among the various jurisdictions is contained in 8 CUM. L. REV. 567, 574-75 & n.55 (1977).

86. *See id.* at 574 & n.54.

87. *See, e.g., In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 608 (7th Cir. 1981) (statutes prohibiting punitive awards in wrongful death actions constitutional); *In re* Paris Air Crash, 622 F.2d 1315, 1320 (9th Cir. 1980) (California statute denying exemplary damages in wrongful death suit valid under Constitution); Huff v. White Motor Corp., 609 F.2d 286, 298 (7th Cir. 1979) (Indiana law precluding punitory damages in cases of wrongful death not violative of Constitution); *cf.* Pease v. Beech Aircraft Corp., 113 Cal. Rptr. 416, 424 (Ct. App. 1974) (heirs prohibited from recovering vindictive damages in wrongful death action); Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226, 228 (Minn. 1982) (wrongful death statute bars award of exemplary damages). The denial of vindictive damages is a logical means of shielding defendants against imposition of exorbitant damages. *See In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981); *In re* Paris Air Crash, 622 F.2d 1315, 1319 (9th Cir. 1980).

VI. Punitive Damages in Product Liability Cases Generally

Punitive damages have only recently emerged as a significant issue in the product liability arena.[88] Prior to 1977 only three cases had considered and upheld punitive awards in a product liability context.[89] In just five short years, the concept of punitive awards has assumed a prominent and highly controversial profile in strict tort liability litigation.

The unique aspects of punitive damages in product liability litigation as distinguished from other causes of action are multifaceted. First, the very underpinning of strict tort liability is the *condition* of the product and not the conduct of the supplier.[90] On

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88. *See, e.g.*, Maxey v. Freightliner Corp., 665 F.2d 1367, 1378 (5th Cir. 1982) (applying Texas law); Dorsey v. Honda Motor Co., 655 F.2d 650, 657 (5th Cir. 1981) (applying Florida law); Gillham v. Admiral Corp., 523 F.2d 102, 109 (6th Cir. 1975) (applying Ohio law), *cert. denied*, 424 U.S. 913 (1976); *see also In re* Related Asbestos Cases, 543 F. Supp. 1152, 1157 (N.D. Cal. 1982); Vollert v. Summa Corp., 389 F. Supp. 1348, 1350 (D. Hawaii 1975); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46-47 (1979), *on rehearing*, 615 P.2d 621 (Alaska 1980); Airco, Inc. v. Simmons First Nat'l Bank, 638 S.W.2d 660, 663 (Ark. 1982); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 380 (Ct. App. 1981); Froud v. Celotex Corp., 437 N.E.2d 910, 913-14 (Ill. App. Ct. 1982); Stambaugh v. International Harvester Co., 435 N.E.2d 729, 746-47 (Ill. App. Ct. 1982); Rinker v. Ford Motor Co., 567 S.W.2d 655, 668-69 (Mo. Ct. App. 1978); Wangen v. Ford Motor Co., 294 N.W.2d 437, 444 (Wis. 1980). *But cf.* Fleet v. Hollenkemp, 52 Ky. 175, 181 (1852) (druggist subject to exemplary damages since he "is bound to know that [his products] are sound and wholesome, at his peril"). *See generally* Fulton, *Punitive Damages in Product Liability Cases*, 15 Forum 117, 117 (1979) ("paucity" of decisions regarding exemplary award in strict liability actions); Ghiardi & Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 Marq. L. Rev. 1, 12 (1981) (1967 marks beginning of contemporary debate over punitory damages in product liablity matters); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 3 (1982) (considerable activity involving vindictive damages in product liablity suits in recent years); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1260 (1976) (noting absence of decisions dealing with punitive damages in product liability cases); Tozer, *Punitive Damages and Products Liability*, 39 Ins. Couns. J. 300, 301 (1972) (plaintiff's bar concentrating on product liability within last ten years).

89. *See* Gillham v. Admiral Corp., 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398, 416 (Ct. App. 1967); Moore v. Jewel Tea Co., 253 N.E.2d 636, 648 (Ill. App. Ct. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970).

90. *See, e.g.*, Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979) (defect central to establish product liability claim); Gonzales v. Caterpillar Tractor Co., 571 S.W.2d 867, 871 (Tex. 1978) (strict liability concentrates on product and care exercised by supplier irrelevant); Pittsburg Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546, 548 (Tex. 1969) (product flaw essential to proof of product liability action); *see also* Restatement (Second) of Torts § 402A (1965) (supplier of defective product strictly liable regardless of care exercised). The condition of the product as the basis of strict tort liability was emphasized in

the other hand, the basis for imposing a punitive damage award is the outrageous and highly antisocial *conduct* of a tortfeasor.[91] Secondly, strict tort liability has been construed to encompass, in addition to flawed products, products that are deemed defective by reason of design and/or marketing.[92] Inherent in this extension of the doctrine is recognition that literally millions of products of an identical design or marketing line that are deemed defective potentially will produce repeated punitive awards.[93] Consequently, the application of punitive damages in the product liability context does not punish for injuries caused by a single event or occurrence; rather, it sanctions repeated and unfettered punishment for each product of a particular design line.[94]

Punitive damages evolved and have emerged today as a judicial sanction designed to punish prior outrageous behavior and to deter further similar antisocial conduct. Punishment and deterrence focus solely on conduct. Yet strict tort liability in the products area was formulated to compensate individuals injured by a defective condition in a product—it is not related to any wrongdoing or tortious conduct by the product supplier. The very foundation of strict tort liability rests on the socioeconomic concept of risk dis-

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Jenkins v. Whittaker Corp., 551 F. Supp. 110, 114 (D. Hawaii 1982).

91. *See* 5 M. MINZER, J. NATES, C. KIMBALL, & D. AXELROD, DAMAGES IN TORT ACTIONS § 40.11, at 40-8 (1982); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9-10 (4th ed. 1971).

92. *See* Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979); *see also* Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972) (failure to warn basis to impose liability); Pizza Inn, Inc. v. Tiffany, 454 S.W.2d 420, 424 (Tex. Civ. App.—Waco 1970, no writ) (strict liability applies to claims of defective design). *See generally* Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L.J. 521, 523 (1982) (defect may be in marketing process); Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 551 (1980) (product actionable if defectively designed).

93. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 13 (4th ed. 1971) ("mass disaster" litigation raises problems involving punitive damages).

94. *Cf. In re*: Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981) (exemplary award not to bankrupt defendant); Campus Sweater & Sportswear Co. v. M.B. Kahn Const. Co., 515 F. Supp. 64, 106 (D.S.C. 1979) (punitive damages not designed to bankrupt accused party), *aff'd*, 644 F.2d 877 (4th Cir. 1981); Wynn Oil Co. v. Purolator Chem. Corp., 403 F. Supp. 226, 233 (M.D. Fla. 1974) (punitive award to hurt, not bankrupt); Hoy v. Poyner, 305 So. 2d 306, 307 (Fla. Dist. Ct. App. 1974) (punitive damages to punish, not to bankrupt); Nevada Cement Co. v. Lember, 514 P.2d 1180, 1183 (Nev. 1973) (vindictive damages intended as punishment, not financial annihilation).

tribution.[95] If liability is imposed on the social concept of distributing the risk to innocent consumers, then punitive awards designed to punish egregious or outrageous conduct are inherently incompatible with the doctrine of strict tort liability.[96] Unfortunately, there has been entirely too little analysis and much too cavalier an attitude in addressing these issues that now place product suppliers in harm's way.[97]

To understand the approach utilized by the courts, it is critically important to analyze the recent decisions according legitimacy to punitive damages in strict tort liability actions. It is interesting to note that the policy reasons that provide the underlying basis for strict liability in product cases have essentially been ignored in integrating gross negligence into a concept that eschews the conduct of the product supplier.

One of the earliest cases to consider exemplary damages in a strict tort liability environment was *Toole v. Richardson-Merrell, Inc.*[98] Plaintiff used the drug triparanol which was manufactured and marketed as a treatment for arteriosclerosis and was adver-

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95. *See* Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 81 (N.J. 1960). *See generally* Address by Page Keeton, Proceedings of the Judicial Conference of the Sixth Judicial Circuit of the United States (May 21, 1970), *reprinted in* 50 F.R.D. 338, 339 (courts moving toward system in which producer spreads costs among public). The genesis of strict tort liability emanates from Justice Traynor's famous declaration in *Escola v. Coca Cola Bottling Co.* and later adopted by the California Supreme Court in the *Greenman* decision. *See* Greenman v. Yuba Power Prod., Inc., 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring). The social concept of risk distribution as the basis of imposing liablity on product suppliers for injuries arising from use of defective products was memorialized in the Restatement (Second) Of Torts § 402A (1965).

96. *See* Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. COUNS. J. 402, 406-07 (1977).

97. Professor Owen, who ignited the recent emergence of punitive claims in product litigation, recently sounded a note of alarm. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1981). Professor Owen pointed out that "[l]arge assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future stability of American industry." *See id.* at 6; *cf.* Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357, 387-88 (E.D. Pa. 1982) (evidence of 9500 suits against defendant which could threaten financial health rejected). *See generally* Froud v. Celotex Corp., 437 N.E.2d 910, 913-14 (Ill. App. Ct. 1982) (discussing punitive award in context of "mass disaster" case and noting possible resolution).

98. 60 Cal. Rptr. 398 (Ct. App. 1967).

tised as being entirely safe and free of adverse side effects. During the course of treatment, plaintiff developed ichthyosis and suffered hair loss on his body. After ceasing use of MER/29, the conditions reversed, but the plaintiff developed cataracts that resulted in distorted vision, a sensitivity to light, and the possibility of developing a detached retina. The plaintiff was awarded both general and punitive damages.[99] On appeal, the punitive damage award was sustained because the evidence indicated that responsible management of the corporation participated in the falsification and concealment of test results on the drug that demonstrated harmful side effects.[100] The evidence indicated that development of the drug was accomplished in a manner indicating that information regarding the drug's harmful side effects was withheld from the government, the medical profession, and the general public. It was further demonstrated that the defendant was cognizant of the drug's problems and did nothing to halt production or warn of its adverse effects until the drug was voluntarily taken off the market several years later. The court rejected the argument that there was no deliberate intent by the defendant to perpetrate harm sufficient to justify the award of punitive damages.[101] The court emphasized that defendant's conduct was reckless in disregarding the drug's injurious side effects and that malice was established by conduct that was willful, intentional, and in reckless disregard of its consequences.[102]

Almost contemporaneously, the Second Circuit was deciding the case of *Roginsky v. Richardson-Merrell, Inc.*[103] This case was strikingly similar to *Toole,* involving essentially the same issues. The court speculated that punitive damages were inappropriate because drug manufacturers were already subject to a maze of government regulations.[104] Moreover, since such damages were similar to a criminal fine, "clear and convincing" proof of oppressive conduct was required to justify a punitive award.[105] The *Roginsky*

99. *See id.* at 403.
100. *See id.* at 415, 418.
101. *See id.* at 416.
102. *See id.* at 416.
103. 378 F.2d 832 (2d Cir. 1967).
104. *See id.* at 840-41.
105. *See id.* at 850-51.

court held that the plaintiff failed to meet this burden.[106] Significantly, the court felt that it was inherently wrong to subject a party to the potential of repeated punitive awards for the same product.[107] Judge Friendly, addressing the issue posed by punitive awards in product liability cases, stated:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering . . . . 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.[108]

Despite the concern and alarm expressed by the Second Circuit, an increasing number of jurisdictions have only recently begun to address the punitive award issue. Unfortunately, the courts have entered a thicket which promises to generate problems of a type and magnitude unsurpassed in the eighteen years that strict liability has played center stage in our judicial system.

In *Gryc v. Dayton-Hudson Corp.*,[109] plaintiff was injured when pajamas made from material manufactured by Riegel ignited, causing severe burns. Plaintiff was awarded both compensatory and punitive damages.[110] On appeal, the manufacturer urged that: (1) exemplary damages were inappropriate in a product liability action; (2) compliance with applicable federal safety minimums prevented imposition of punitive damages; (3) the trial court applied an improper legal standard to measure punitive damages; and (4) policy considerations militated against exemplary damages in a product liability case.[111]

The court declared, without significant analysis, that punitive damages were appropriate in a strict liability action. In essence, the court adopted the rationale advanced by Professor Owen that

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106. *See id.* at 851.

107. *See id.* at 839.

108. *Id.* at 839. But one court expressly denigrated Justice Friendly's perceptive analysis and simply suggested that if change is needed, let it emanate from the legislature. *See* Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 817 (6th Cir. 1982).

109. 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

110. *See id.* at 729.

111. *See id.* at 732. Interestingly, the Minnesota Supreme Court later conceded that strict tort liability actions seeking injury solely for property did not merit extension of the controversial remedy of punitive damages. *See* Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226, 228-29 (Minn. 1982).

punitive damages were indeed proper in product liability cases.[112] The defendant further argued that compliance with federal safety standards, as a matter of law, foreclosed a finding of the requisite mental state essential for gross negligence. This argument was also rejected because the court believed that the federal standards were not valid to determine flammability and, moreover, the defendant was fully aware that the federal standards were inadequate.[113] The punitive damage award was deemed proper because defendant's actions in manufacturing flammable materials demonstrated a conscious disregard of the rights of others.[114] The trial court instructed the jury that in determining the issue of punitive damages they should consider: (1) the presence and extent of the danger to the public created by the product; (2) the expense and practicality of lessening the danger to a tolerable level; (3) the producer's knowledge of the degree of product danger and availability of a practical solution; (4) the length of time and the reasons underlying the supplier's failure to take measures to discover and remedy the product danger; (5) the degree to which the producer intentionally created the danger; (6) the degree to which federal safety guidelines regulated the defendant manufacturer; (7) the likelihood that actual damages might be imposed against producers in other actions; and, lastly, (8) the time that has lapsed between the instant case and the conduct sought to be discouraged.[115] These factors were adjudged an appropriate test to determine whether a manufacturer acted in willful and reckless disregard of a product user's rights.[116]

The defendant further urged that the award of punitive damages contravened the policy of strict liability in product litigation. Essentially, the defendant argued that in product liability litigation the manufacturer of large product lines potentially faces economic ruin if punitive damages are awarded for each injury attributable to the same product.[117] This concern for overkill or economic destruction which was perceptively recogized by Judge Friendly in

112. *See* Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 732-33 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

113. *See id.* at 734.

114. *See id.* at 739.

115. *See id.* at 739.

116. *See id.* at 739.

117. *See id.* at 740.

Roginsky was perfunctorily rejected by the court.[118] The court apparently was fully persuaded and completely enraptured by the pronouncements of several academicians that punitive awards posed no genuine destructive threat.[119]

Punitive damages in a product liability action were again considered in *Rinker v. Ford Motor Co.*[120] Plaintiff was involved in a collision when her 1969 Ford continued to accelerate after she attempted to brake. Evidence demonstrated that Ford possessed knowledge that some vehicles of the same product line manifested similar problems as did the Rinker vehicle.[121] The defendant claimed that its conduct clearly was not of the "aggravated character indispensible to an award of punitive damages."[122] Notwithstanding acknowledgement that a punitive damage award presented problems, the appellate court observed that the jury possessed the right to measure Ford's failure to act against the existing hazard and could easily decide that Ford knowingly chose to ignore the serious chance of danger.[123] The court simply ignored any real analysis of the conceptually incongruous issue that strict liability is premised on the condition of the product only and not the conduct of the supplier and the policy consideration that repetition of punitive awards against a product of a particular design or marketing line is tantamount to potential business destruction.

Recently in *Wangen v. Ford Motor Co.*,[124] the plaintiffs sought punitive damages from Ford for alleged defective design and manufacture of a 1967 Mustang. In support of his claim for punitive damages, plaintiff alleged that Ford knew that the gasoline tanks on its 1967 Mustangs were dangerously defective previous to and subsequent to production of the vehicle, remedial design changes were implemented in other types of cars before the date of this accident, the company failed to notify drivers of the car of possible hazard after Ford became aware of the danger and after design modifications had been made to lessen the danger, and the com-

118. *See id.* at 749. The court merely noted that this thesis had been rejected by other courts and commentators who had addressed this point. *See id.* at 740.

119. *See id.* at 740-41.

120. 567 S.W.2d 655 (Mo. Ct. App. 1978).

121. *See id.* at 667.

122. *Id.* at 667.

123. *See id.* at 668.

124. 294 N.W.2d 437 (Wis. 1980).

pany failed to recall, fix, or alter the defective autos to avoid the costs and to prevent negative publicity from causing reduced sales.[125] Ford urged that the award of punitive damages was inappropriate because: (1) punitive damages traditionally are awarded in tort actions in which compensatory damages are premised on negligent conduct while compensatory damages in strict tort liability are premised solely on the condition of the product; (2) the concept of gross negligence was not recognized in Wisconsin; (3) punitive damages are not necessary in product liability cases to punish and deter; and (4) punitive damages in product liability cases produce economically and socially undesirable results.[126]

The Wisconsin Supreme Court summarily rejected the argument that punitive damages were applicable only when compensatory damages were predicated on negligent conduct. Punitive damages, noted the court, were not dependent on the underlying theory supporting the award of compensatory damages.[127] Significantly, the court failed to distinguish the cases involving liability based on prohibited conduct from liability based solely on social policy not involving prohibited conduct. In addressing the argument that an award of punitive damages for punishment and deterrence was inapplicable in the product liability context, the Wisconsin court stated:

> [B]ecause apparently some businesses have found it in their interests to operate with reckless disregard to consumer safety, this court cannot, in good conscience, prohibit punitive damages in all product liability cases unless there is a strong showing that such prohibition is in the public interest.[128]

Ford further argued that compensatory damages constituted a substantial punishment and deterrence against the manufacture and distribution of unreasonably unsafe products and that punitive damages were unnecessary since product manufacturers already confronted exposure, without fault, from hundreds or

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125. *See id.* at 440.

126. *See id.* at 441, 444, 447, 453.

127. *See id.* at 443-44.

128. *Id.* at 450. The Wisconsin court declared, however, that a "higher burden of proof, i.e., to a reasonable certainty by evidence that is clear, satisfactory and convincing" governs the burden of proving outrageous conduct sufficent to sustain a punitive award. *Id.* at 457-58.

thousands of potential compensatory awards for the same product. The court simply noted that the mere payment of large compensatory damages might not constitute sufficient punishment and deterrence.[129] Implicit in its opinion is a recognition that the threat of business destruction by repeated punitive awards may be an acceptable risk.[130]

Similarly, in *Grimshaw v. Ford Motor Co.*,[131] plaintiffs were passengers in a Pinto automobile when it was rear-ended and burst into flames. Plaintiff Gray died as a result of the burns she suffered and plaintiff Grimshaw suffered severe burns to his entire body. Grimshaw was awarded $2,516,000 in compensatory damages and $125 million dollars in punitive damages.[132] Ford vigorously urged that a punitive damage award was statutorily unauthorized and constitutionally impermissible in a design defect action and that there was no evidence of malice or company responsibility for malice.[133] The trial court had defined the basis for punitive damages to embrace "where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."[134] The malice contemplated by this definition, argued Ford, required *animus malus* or evil motive; in other words, an intent to harm the person injured. The court rejected Ford's contention, observing that the definition of the term malice as used in the applicable California statute included conduct demonstrating "a conscious disregard of the

129. *See id.* at 451.

130. *Cf. id.* at 451 (vindictive damages needed since actual damages inadequate to discourage future misconduct). In fact, the court acknowledged that "the potential danger of multiple punitive and damages awards does exist." *Id.* at 456. In *Oregon ex rel. Young v. Crookham*, the Oregon Supreme Court stated "[t]otal elimination of punitive damages in these cases is too strong a cure for the much feared, but as yet unrealized, problem of 'overkill' in mass litigation." Oregon *ex rel.* Young v. Crookham, 618 P.2d 1268, 1272 (Or. 1980). In *Airco, Inc. v. Simmons First National Bank*, however, the court approved an award of punitive damages against a manufacturer for marketing an optional, but lethal, selector valve for a respirator because the valve was so deadly it should not have been marketed. *See* Airco, Inc. v. Simmons First Nat'l Bank, 638 S.W.2d 660, 663 (Ark. 1982). This case would probably sanction punishment to economic destruction under its rationale. *Cf. id.* at 663 (component deadly and should never have been sold).

131. 174 Cal. Rptr. 348 (Ct. App. 1981).

132. *See id.* at 358.

133. *See id.* at 380.

134. *Id.* at 380-81.

probability that the actor's conduct will result in injury to others."[135] The court viewed as inconsequential the fact that the statutory provisions did not even contemplate this specie of tort when enacted.[136] The court also rejected the argument that there existed no evidence of malice or corporate responsibility for such malice. The court stated:

> Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits.
>
> Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to members of the consuming public.[137]

Most recently, in *Leichtamer v. American Motors Corp.*,[138] plaintiffs were injured when a Jeep CJ-7 in which they were riding crashed on an off-the-road recreation facility. Plaintiffs conceded the fact that the jeep's driver was driving negligently at the time of the accident and that this negligence was a cause of the accident. Plaintiffs, however, alleged that their injuries were "substantially enhanced, intensified, aggravated, and prolonged" by the improper placement of the jeep's roll-bar.[139] Both actual and punitive damages were assessed against the defendant manufacturer.[140] The court of appeals affirmed the award of punitive damages on the basis of the manufacturer's awareness of the jeep's propensity for a forward pitch-over. The "incitement to reckless conduct" depicted in certain advertisements involving clearly foreseeable risks of forward pitch-overs coupled with a failure to warn the public about the fact that the roll bar was not as safe as it appeared justified an inference of malice.[141]

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135. *Id.* at 381.
136. *See id.* at 382.
137. *Id.* at 384.
138. 424 N.E.2d 568 (Ohio 1981).
139. *See id.* at 572.
140. *See id.* at 573.
141. *See id.* at 579.

The Ohio Supreme Court rejected the premise that commercial representations alone satisfied the requisite degree of malice,[142] but concluded that such evidence in conjunction with evidence of a vehicle roll-over and pitch-over propensity supported a punitive award. The court noted:

> Given the foreseeability of roll-overs and pitch-overs, the failure of appellants to test to determine whether the roll bar "added protection" represents a flagrant indifference to the probability that a user might be exposed to an unreasonble risk of harm. For appellants to have encouraged off-the-road use while providing a roll bar that did little more than add "rugged good looks" is a sufficient basis for an award of punitive damages.[143]

In *Sturm, Ruger & Co. v. Day*,[144] plaintiff was injured when a gun manufactured by defendant accidentally discharged. Plaintiff's cause of action was founded upon strict tort liability and also stated a claim for punitive damages. The jury found the gun to be defective and awarded the plaintiff in excess of $2,000,000 in punitive damages.[145] The defendant urged that punitive damages were incompatible with the "fault-free" underpinnings of strict product liability.[146] The Alaska Supreme Court rejected the contention that punitive damages were inapplicable in a strict liability case. In justifying punitive awards in strict tort liability actions, the court, without resolving the conceptual incongruities between strict tort liability and gross negligence, noted:

> Punitive damages are designed not only to punish the wrongdoer, but also to deter him and others like him from similar wrongdoing in the future. [citation omitted] . . . . [A]s a matter of public policy, punitive damages can serve several useful functions in the products liability area . . . . [P]unitive damages serve a deterrence function

142. *See id.* at 579. The court observed that "[m]ere 'suggestive advertising' does not reach the level of 'anger, hatred, ill-will, hostility . . . or a spirit of revenge' historically required for a finding of punitive damages under our cases." *See id.* at 579-80.

143. *Id.* at 580. The court relied heavily on the analytical discussion in Professor Owen's 1976 law review article to justify punitive awards in product cases. *See id.* at 580. The Sixth Circuit Court of Appeals cited to the law-review-supported statement contained in *Leichtamer* in allowing imposition of exemplary damages against a product defendant. *See* Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 815 (6th Cir. 1982) (applying Ohio law).

144. 594 P.2d 38 (1979), *on rehearing*, 615 P.2d 621 (Alaska 1980).

145. *See id.* at 41.

146. *See id.* at 46.

> in cases in which a product may cause numerous minor injuries . . . or in cases in which it would be cheaper for the manufacturer to pay compensatory damages . . . than it would be to remedy the product's defect. In addition, if punitive damages could not be awarded in the products liability context, a reckless manufacturer might gain an unfair advantage over its more socially responsible competitors. On balance, we find the arguments advanced by appellant in favor of its position to be outweighted by the sound public policy considerations supporting the imposition of punitive damages in appropriate cases.[147]

These decisions demonstrate that an increasing number of jurisdictions are merging the punitive damage award into strict tort liability actions. Despite the trend, few courts have addressed the conceptual impediments and the policy arguments that argue persuasively against the adoption of the punitive concept in product liability actions. As mentioned earlier, strict tort liability and punitive damages are not, conceptually viewed, compatible doctrines. The condition of the product and not the conduct of the supplier governs compensatory damages.[148] Liability under this doctrine rests solely and entirely on the socially mandated policy of risk distribution rather than any tortious or wrongful conduct of the product supplier. Predicating punitive damages on compensatory damages awarded because of strict liability is, simply stated, legally insupportable.

Moreover, the effect of repeated punitive awards in cases involving an entire line of a particular product produces severe potential economic consequences.[149] Although commentators and courts indicate that punitive damages have not yet produced the prophesied doom, it must be remembered that this concept has

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147. *Id.* at 47.

148. The Restatement (Second) of Torts provides that liability applies although "the seller has exercised all possible care in the preparation and sale of his product." RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

149. *See, e.g.*, Airco, Inc. v. Simmons First Nat'l Bank, 638 S.W.2d 660, 663 (Ark. 1982) (upholding award of $3,000,000 in vindictive damages); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 741 (Minn.) (affirming punitive damages in amount of $1,000,000), *cert. denied*, 449 U.S. 921 (1980); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNS. J. 300, 301 (1972) ($20,000,000 in exemplary damages asserted against one product of one supplier). Even more alarming were the jury awards of $125,000,000 in *Grimshaw v. Ford Motor Co.* and $10,000,000 in *Maxey v. Freightliner Corp. See* Maxey v. Freightliner Corp., 665 F.2d 1367, 1369 (5th Cir. 1982); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 358 (Ct. App. 1981).

only recently appeared on the legal horizon.[150] Those who proclaimed that industry-wide litigation would not cause adverse economic effects on business must now view the havoc created in just ten years of asbestos-related litigation.[151] Recently, the largest manufacturer, Johns-Manville, plunged into a Chapter 11 reorganization and other suppliers are similarly perched on the brink.[152] Where will these essential products come from when the business is punished into oblivion? Now the ominous shadow of punitive awards is beginning to impact the business community.

VII. TEXAS AND PUNITIVE DAMAGES IN PRODUCT LIABILITY CASES

Texas, like other jurisdictions, has sanctioned the use of punitive damages in strict tort liability actions.[153] Yet the decisions that have recognized the applicability of punitive awards seemingly have avoided addressing the pivotal legal issues that swirl about the melding of these two doctrines.

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150. The recent nature of this concept in the product arena has been noted by various commentators. *See* Ghiardi & Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 MARQ. L. REV. 1, 13 (1981); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 2-3 (1982); Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. COUNS. J. 402, 402 (1977).

151. It has been observed that "there are over 3,000 asbestos plaintiffs in the Eastern District of Texas alone and between 7,500 and 10,000 asbestos cases pending . . . around the country." *See* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 347 (5th Cir. 1982). *See generally* Peters & Peters, *Asbestos Product Liability*, 4 J. PROD. LIAB. 49, 50 (1981) (asbestos litigation may cost billions and surpass financial capacity of businesses to pay). For general discussions of some of the problems associated with asbestos related litigation, see Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning With the Unreasonable*, 14 ST. MARY'S L.J. 19 (1982); Comment, *Texas Asbestos Claims and Market Share Liability: New Remedy For An Old Tort*, 13 ST. MARY'S L.J. 957 (1982).

152. *See* Rotbart, *Manville Plans to Seek Strict Limit On its Liability for Asbestos Claims*, Wall St. J., Jan. 27, 1983, § 2, at 33, col. 4. The Manville Corporation may be subject to 52,000 asbestos related actions with a potential cost of $2 billion. *See id.* at 33, col. 4. A recent article in the A.B.A. Journal, discussing a successful plaintiff's attorney, noted that "[l]awyers fear that the Manville Corporation's bankruptcy, because of suits over asbestos, will set a precedent for other manufacturers." *See* Appleson, *Champion of the Toxic Tort*, 69 A.B.A. J. 29, 30 (Jan. 1983).

153. *See, e.g.*, Maxey v. Freightliner Corp., 665 F.2d 1367, 1378 (5th Cir. 1982) (under Texas law, evidence inadequate to justify $10,000,000 punitive award); Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435, 441 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.) (affirming imposition of $750,000 in exemplary damages); Heil Co. v. Grant, 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.) (punitive damages available in product liability action for wrongful death).

In *Heil Co. v. Grant*,[154] the deceased was fatally injured when the bed of a dump truck descended while he was performing repairs on the truck. Plaintiff's cause of action was predicated on the strict liability theories of defective design and failure to warn. In addition to compensatory damages, plaintiff sought recovery of punitive damages.[155] The defendant contended that punitive damages were not recoverable in a strict product liability suit for wrongful death. Concluding that these damages were recoverable in a strict liability action for death, the court simply cited the Texas Constitution and several cases from other jurisdictions to justify the applicability of punitive awards.[156]

In *Kritser v. Beech Aircraft Corp.*,[157] the Fifth Circuit considered the issue as it applied under Texas law. Relying on evidence that the manufacturer provided some warning, however inadequate, punitive damages were not authorized. The court did not address the legal theorum involved in the issue.[158]

More recently, and subsequent to *Burk Royalty*, an intermediate appellate court considered punitive damages in *Rawling Sporting Goods Co. v. Daniels*.[159] Plaintiff sustained permanent brain damage when the football helmet he was wearing deformed inward when he collided with another player. The plaintiff alleged that the helmet was defective because, upon impact, it deformed inward 1.5 to 2 inches instead of deflecting the blow. The plaintiff further alleged the manufacturer was liable for punitive damages for failing to warn users and the public of the limitations of its helmet. The jury awarded plaintiff $750,000 actual and $750,000 punitive damages.[160]

The evidence indicated that: (1) the defendant never attempted to warn potential users of the limitations of its helmets; (2) the defendant had known for some time that these helmets did not offer total protection against brain injures; and (3) that despite

154. 534 S.W.2d 916 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

155. *See id.* at 920.

156. *See id.* at 926. Punitive damage recovery was predicated on the prior decisions of Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. Ct. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970) and Drake v. Wham-O Mfg. Co., 373 F. Supp. 608 (E.D. Wis. 1974). *See id.* at 926.

157. 479 F.2d 1089 (5th Cir. 1973).

158. *See id.* at 1096-97.

159. 619 S.W.2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.).

160. *See id.* at 437.

this knowledge and despite the knowledge that the general public believed that helmets protected the head from injury, the manufacturer made a conscious decision not to warn the public that helmets would not protect against any and all head injuries under any and all circumstances.[161] In affirming the award of exemplary damages, the appellate court noted:

> What lifts *ordinary* negligence into *gross* negligence is the mental attitude of the defendant . . . . The plaintiff must show that the defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn't care.[162]

The court determined that the manufacturer was grossly negligent in failing to warn consumers of the dangers and limitations of football helmets.[163] The court neither addressed the issue of the incompatability of a punitive award based on compensatory damages given for a defective helmet nor the policy concern that repeated awards would constitute a form of overkill. More importantly, the evidence outlined by the court was highly suspect to support a finding of simple negligence much less one of gross negligence. Even Professor Owen notes with alarm the increasing abdication of judicial responsibility in controlling highly questionable punitive awards.[164]

In *Maxey v. Freightliner Corp.*,[165] plaintiff's decedents were killed when the tractor trailer rig in which they were riding overturned, causing the saddle tank to puncture and the fuel content to spill and ignite. Plaintiff alleged that the design of the fuel system was unreasonably dangerous, the defendant failed to warn

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161. *See id.* at 440-41.

162. *Id.* at 440 (quoting Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981)).

163. *See id.* at 441.

164. The several elements enumerated by the court as the basis for sustaining the punitive award represent a rather feeble effort to justify its decision. Yet, as pointed out by Professor Owen, "[a]ppellate courts also should subject such awards in products cases to closer scrutiny and reverse them when not supported by the record." *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 57 (1982). Another commentator, although favoring punitive damages, cautions "[n]evertheless, the very power of the remedy demands that judges exercise close control over the imposition and assessment of punitive damages." *See* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 670 (1980).

165. 665 F.2d 1367 (5th Cir. 1982).

users of the danger of this product, and the conduct of the defendant manufacturer in designing, testing, and selling these trucks with a defective fuel system constituted gross indifference to the safety of these consumers. The jury determined that the fuel system was defectively designed and awarded actual damges of $150,000 and punitive damages of $10,000,000.[166] On the basis that the manufacturer's fuel system design complied with industry standards, the trial court concluded there was "some care" exercised and set aside the finding of punitive damages.[167] Relying on *Sheffield Division, Armco Steel Corp. v. Jones,* the court observed that "adopting a design common to all manufacturers and millions of vehicles for over thirty years is a sufficient effort at safety to preclude a finding that Freightliner acted with an intent which approximates a fixed purpose to bring about this injury."[168]

The Fifth Circuit, after the decision in *Burk Royalty,* vacated the decision of the trial court and remanded the case for a further hearing on the propriety of awarding exemplary damages.[169] The Fifth Circuit, in the majority opinion, noted that Texas had now abandoned the "some care" test in evaluating the finding of gross negligence and the award of punitive damages. Significantly, the court observed that compliance with industry custom constituted evidence relevant to negate a claim of conscious indifference, but that the evidence was not conclusive.[170] The court also considered

166. *See id.* at 1370.

167. *See* Maxey v. Freightliner Corp., 450 F. Supp. 955, 963 (N.D. Tex. 1978), *aff'd in part, vacated and remanded in part,* 665 F.2d 1367 (5th Cir. 1982).

168. *Id.* at 964.

169. *See* Maxey v. Freightliner Corp., 665 F.2d 1367, 1379 (5th Cir. 1982). The circuit court affirmed the award of compensatory damages to the Maxeys. *See id.* at 1379.

170. *See id.* at 1376. Other courts have likewise indicated that compliance with industry standards may serve to rebut a finding of "aggravated" conduct sufficient to impose punitive damages, but that this evidence is not conclusive proof of reasonable behavior. *See, e.g.,* Dorsey v. Honda Motor Co., 655 F.2d 650, 656 (5th Cir. 1981) (adherence to federal safety guidelines not binding on jury); Bruce v. Martin-Marietta Corp., 544 F.2d 442, 446 (10th Cir. 1976) (compliance with air-safety standards not conclusive); Salmon v. Parke, Davis & Co., 520 F.2d 1359, 1362 (4th Cir. 1975) (under North Carolina law, meeting federal drug minimums not absolute proof of innocence); *see also* Raymond v. Riegel Textile Corp., 484 F.2d 1025, 1027 (1st Cir. 1973) (court considered, but rejected, defense of compliance with governmental regulations); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 734 (Minn.) (compliance with governmental safety standards not absolute bar to liability), *cert. denied,* 449 U.S. 921 (1980); Turner v. General Motors Corp., 514 S.W.2d 497, 506 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (governmental guidelines supplement rather than displace product liability law). Serious opposition exists to this position. Profes-

the proper ratio between compensatory or actual damages and exemplary damages. Recognizing the governing Texas rule, the court noted that "the amount of exemplary damages should be reasonably proportioned to the actual damages found."[171] Considering that a ratio of sixty-seven times was excessive, the court determined that a critical factor in this calculus was evidence that the safety design features urged by the plaintiff's expert witnesses had not been utilized by other manufacturers of commercial tractor trucks.[172] While the court felt that the manufacturer's degree of culpability was sufficient to sustain an award of gross negligence, it also believed that because no other manufacturer utilized plaintiff's experts' design there was no justification for a punitive award of $10,000,000. The court acknowledged that "a particular defendant may not be required under Texas law to bear the burden of a punitive damage award aimed at punishing a whole industry."[173]

Once again, the court addressed the issue of gross negligence and punitive damages in a strict tort liability action without resolving the conceptual impediments involved in melding the two doctrines. It likewise ignored the policy concern that repeated punitive awards for products of the same design model or line are violative of acceptable social policy. Essentially, the court considered the case as one that simply determined that the manufacturers' conduct was outrageous, and, therefore, subject to severe punishment. It is critically important to note that all of the Texas Supreme Court decisions on punitive damages have involved cases in which the actual or compensatory damages were predicated on a tortfeasor's specific outrageous conduct. This is entirely different from lawsuits seeking recovery of damages based solely on the con-

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sor Owen, in his more recent article, observes: "In a typical case, compliance with a universal industry custom should be held conclusively to establish good faith against a punitive damages claim." Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 40 (1982). Professor Owen went on to remark that, when regulations attempt to define defectiveness for areas in which no firm precedent can be set down, adherence to this guideline should constitute a conclusive defense to an exemplary damages action. *See id.* at 42.

171. Maxey v. Freightliner Corp., 665 F.2d 1367, 1377 (5th Cir. 1982) (quoting Southwestern Inv. Co. v. Neeley, 452 S.W.2d 705, 707 (Tex. 1970)).

172. *See id.* at 1378. The court emphasized that "the district court should circumvent a jury's attempt to discipline an entire industry by way of the industry's lone representative in a solitary lawsuit." *See id.* at 1378.

173. *Id.* at 1378.

dition of a product.[174]

The most recent exposition of the law of punitive damages in strict liability is *Ford Motor Co. v. Nowak*.[175] The plaintiff's wife was fatally injured when the transmission jumped from "park" to "reverse" after the decedent had disembarked from the vehicle to close a gate. The jury found the transmission system was defectively designed and awarded actual damages of $400,000. The jury also determined that the manufacturer was grossly negligent in distributing a vehicle with a defective transmission and awarded punitive damages of $4,000,000.[176] In affirming the award of punitive damages, the court enumerated the following factors to support a punitive award:

> In the instant case, the pertinent evidence is as follows: Between 1971 and 1977, Ford received numerous complaints from several people regarding the problem of the FMX transmission self-shifting from Park to Reverse if the vehicle was not properly shifted into Park, i.e., left on the gatepost.
>
> Of the accident reports received by Ford between 1971 and 1977 on automatic transmission passenger cars, 234 accidents appeared to have been caused by an unattended car backing up. Out of those 234 cases, 89 of them resulted in some type of injury to the operator, pedestrians or someone outside the car. There were 728 accidents between 1971 and 1977 that were attributed to the failure of the transmission. Ford did not compile records of similar complaints on trucks with automatic transmissions or standard-shift vehicles.
>
> There were interoffice memos and letters introduced into evidence which showed that Ford was aware of this problem beginning in 1971.
>
> . . . . . .
>
> Mr. Bryant, Ford's manager responsible for the design of the steering column, responded to the above memo on January 13, 1972.
>
> In spite of the urging of Mr. Dixon and the recommendations of Mr. Bryant, Ford did nothing to affirmatively alleviate the dangerous condition which was called to their attention. In fact, it appears that it even rejected the problem sheet of the Chassis Safety Engineering Department and ignored Mr. Dixon's recommendation that rejection of such problem be appealed to a higher management

174. *See* Hoenig, *Products Liability and Punitive Damages*, 687 INS. L.J. 198, 204 (1980).

175. 638 S.W.2d 582 (Tex. Ct. App.—Corpus Christi 1982, writ pending).

176. *See id.* at 585.

level.[177]

In a vigorous dissent, Justice Gonzales totally rejected the finding of punitive damages. Justice Gonzales stated:

> The complaints, documents and incidents relied upon by the appellee to establish that Ford "knew" of "the problem" establish only that Ford knew that its vehicles were subject to the same general risk of mispositioning which is inherent in *all* column mounted shift selector designs (including G. M. & Chrysler). There is no evidence that any Ford engineer was ever consciously aware of the characteristics which appellee contends are unique or unusual.
>
> Although the majority points out that over a six year period there were 728 accidents attributed to the transmission, when this number is put in the proper perspective and considered along with the number of automobiles Ford sold per year and the incalculable number of shifts per year, it becomes insignificant.
>
> The record disclosed that a correspondence between Eastern Airlines and Ford was admitted into evidence with the instruction that it not be considered for the truth of the matters alleged therein. Though paying lip service to this limitation, the majority uses this correspondence as proof that (1) there was a defect; (2) Ford was aware of it; and (3) Ford did nothing about it. Other evidence in the record discloses that the difficulties experienced by Eastern Airlines were the result of neither the general risk inherent in the design nor the unique risk alleged by appellee to exist in the Ford design. Rather, Eastern was experiencing problems with broken and worn parts, or with parts modified by the post-sale builder of Eastern's speciality vehicles.
>
> . . . . . .
>
> A review of the record as a whole leads me to the conclusion that there is no evidence from which the jury could find that the utility of the transmission was outweighed by the likelihood of and the gravity of injury from its use. Further, there is no evidence that Ford was consciously indifferent to appellee's rights, welfare and safety, so as to justify the award of punitive damages.[178]

The majority simply relied on earlier decisions to support the use of punitive damages in a strict tort liability action. The court undertook no analysis of the underlying and rather significant legal problems that attend use of a punitive award in the product liabil-

177. *Id.* at 593-95.

178. *Id.* at 602 (Gonzalez, J., dissenting).

ity arena.

VIII. Factors Militating Against the Use of Punitive Damages in Strict Tort Liability Actions

Essentially, punitive damages in strict tort liability actions are legally inapropos and insupportable.[179] Persuasive logic dictates that the entire concept of punitive damages in traditional civil actions are an anachronism whose time and reason for being have long since ceased to exist.[180] Compensatory damages, as evolved and refined in modern jurisprudence, provide full and total recovery of every conceivable element of damages for which punitive damages were developed.[181] It follows, therefore, that punitive damages simply constitute a windfall that unjustly enrich a plaintiff and his attorney.[182] Neither society nor the economy can sustain the continued luxury of windfalls that sap the vitality of our economic system.

An increasing volume of criticism has developed against the allowance of punitive damages in product liability cases because of a lack of meaningful or predictable application. The absence of uniform application lends significant impetus to the "overkill"[183] and "annihilation"[184] potential of punitive awards.

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179. Numerous commentators have observed the incongruous marriage of strict tort liability with punitive damage awards. *See, e.g.*, Coccia & Morrissey, *Punitive Damages in Product Liability Cases Should Not Be Allowed*, 22 Trial Law. Guide 46, 57-60, 62, 65 (1978); Fulton, *Punitive Damages in Product Liability Cases*, 15 Forum 117, 121 (1979); Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 Marq. L. Rev. 244, 248 (1977); *see also* Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 Ins. Couns. J. 402, 406 (1977); Tozer, *Punitive Damages and Products Liability*, 39 Ins. Couns. J. 300, 301 (1972).

180. *See* P. Magarick, Excess Liability: Duties And Responsibilities Of The Insurer § 16.01, at 278 (2d ed. 1982).

181. *See id.* at 278; *see also* Tozer, *Punitive Damages and Products Liability*, 39 Ins. Couns. J. 300, 303-04 (1972) (all damages included in compensatory award). Justice Sullivan, concurring in *Froud v. Celotex Corp.*, suggests that perhaps the viability of punitive awards should be reevaluated in light of current circumstances to determine whether such awards continue to serve societal needs. *See* Froud v. Celotex Corp., 437 N.E.2d 910, 915 (Ill. App. Ct. 1982) (Sullivan, J., concurring); *cf.* Hoenig, *Products Liability and Punitive Damages*, 687 Ins. L.J. 198, 204-05 (1980) (societal costs resulting from punitive awards in product cases militate against allowance of such damages).

182. *See* Coccia & Morrissey, *Punitive Damages in Product Liability Cases Should Not Be Allowed*, 22 Trial Law. Guide 46, 59 (1978).

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

184. *See* Nevada Cement Co. v. Lemler, 514 P.2d 1180, 1183 (Nev. 1973).

A very persuasive argument against application of punitive damages in product liability cases is the total incompatability between punitive damages and the doctrine of strict liability in tort as formulated by the Restatement.[185] Under the doctrine of strict tort liability, compensatory damages are predicated solely and entirely on the condition of the product. Fault or tortious conduct of the product supplier is wholly immaterial and irrelevant.[186] It is well recognized that in assessing punitive damages the conduct of the actor is not only the sole and ultimate consideration,[187] but, more importantly, the conduct of the actor must attain the level of a consciously wanton, willful, or reckless disregard of the plaintiff's

185. The Restatement (Second) of Torts provides that the reasonable care and conduct of the product suppliers is irrelevant to the imposition of strict tort liability for compensatory damages. *See* RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

186. *See id.* at § 402A. *Compare* Silberg v. California Life Ins. Co., 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974) (oppressive, fraudulent, or malicious acts justify award of vindictive damages) *and* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981) (exemplary award predicated on "entire want of care" indicating conscious indifference to safety of others) *with* Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring) (manufacturer liable regardless of lack of negligence) *and* Gonzales v. Caterpillar Tractor Co., 571 S.W.2d 867, 871 (Tex. 1978) (defect central to product case and conduct irrelevant). At least one court has acknowledged the incompatibility of a punitive damage award based on strict tort liability. *See* Gold v. Johns-Manville Sales Corp., No. 80-2907 (D.N.J. July 16, 1982) (available Feb. 24, 1983, on WESTLAW, Federal Database, FS file); *cf.* Kirschnik v. Pepsi-Cola Metropolitan Bottling Co., 478 F. Supp. 842, 845 (E.D. Wis. 1979) (exemplary damages predicated on conduct and ordinarily unavailable in product action); Walbrun v. Berkel, Inc., 433 F. Supp. 384, 385 (E.D. Wis. 1976) (punitive damage allegations deleted from pleadings in product suit since recovery allowed only for intentional torts).

187. The mere fact that a product supplier could have utilized a different and perhaps safer design or marketing procedure constitutes no basis, in and of itself, of gross negligence. *See* Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825, 827 (Tex. 1964), *overruled on other grounds*, Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981); *see also* Newding v. Kroger Co., 554 S.W.2d 15, 18 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (availability of safer design insufficient to establish gross neglect). Moreover, merely because an act is unlawful furnishes no basis for establishing gross negligence. *See, e.g.*, Atlas Chem. Indus., Inc. v. Anderson, 524 S.W.2d 681, 687 (Tex. 1975); Ogle v. Craig, 464 S.W.2d 95, 97 (Tex. 1971); Ware v. Paxton, 359 S.W.2d 897, 899 (Tex. 1962). As noted by one commentator:

> All we should ask of manufacturers through any legal rule is that all unreasonable dangers be removed from such products, not that all products be made completely safe. A manufacturer thus can be punished fairly only for knowingly leaving in its products dangers that are unreasonable—not for leaving in expected dangers that are too expensive to remove.

Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 24 (1982).

rights.[188] Strict tort liability is a socioeconomic concept of risk distribution designed to provide damages to an injured party without the necessity of establishing tortious, negligent, or wrongful conduct on the part of the product supplier. To achieve this socially mandated objective, totally different and noticeably more liberal rules of discovery, evidence, and legal standards have been devised.[189] Having ameliorated, if not completely eliminated, the much more precise and traditional burdens imposed on the plaintiff relating to discovery, admission of evidence, standards of liability, and the abrogation of meaningful defenses, the courts now permit the plaintiff to take advantage of these amorphous standards to pyramid an award of punitive damages. Essentially, the product supplier is denuded of the usual safeguards imposed on discovery, the admission of evidence, the submission of issues, and defenses that traditionally govern simple negligence actions and then, in the same lawsuit, is subjected to an assault based on gross negligence (minus any safeguards). As an example, contributory negligence constitutes a partial defense to recovery of punitive damages that are predicated on a finding of gross negligence.[190] Yet contributory negligence generally has been repudiated as a defense to a strict tort liability action by the majority of jurisdictions.[191] This incon-

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188. As declared by one jurisdiction recognizing punitive awards, "Unless there is evidence from which a jury could find that the wrongdoer's conduct was 'outrageous,' the trial court should not submit the issue of punitive damages to the jury." Wangen v. Ford Motor Co., 294 N.W.2d 437, 457 (Wis. 1980).

189. *Compare* Kritser v. Beech Aircraft Corp., 479 F.2d 1089, 1096 (5th Cir. 1973) (strict liability action in which evidence of subsequent modification in warning admitted as proof) *and* Ault v. International Harvester Co., 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1974) (evidence of gear box change three years after accident admissible) *with* Smyth v. Upjohn Co., 529 F.2d 803, 805 (2d Cir. 1975) (negligence case in which proof of subsequent warning rejected) *and* FED. R. EVID. 407 (subsequent remedial steps inadmissible to establish "negligence or culpable conduct"). *See generally* Sales & Perdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 62 (1976-1977) (courts liberally applied and changed evidentiary rules in strict liability matters).

190. *See* Pedernales Elec. Coop., Inc. v. Schulz, 583 S.W.2d 882, 885 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1982-1983). Prior to enactment of article 2212a, contributory negligence constituted a total bar to recovery of exemplary damages. *See* Schiller v. Rice, 151 Tex. 116, 129, 246 S.W.2d 607, 615 (1952). *But cf.* Stallworth v. Illinois Cent. Gulf R.R., 690 F.2d 858, 863 (11th Cir. 1982) (contributory negligence no defense to allegation of wanton conduct under Alabama law).

191. *See, e.g.*, Bachner v. Pearson, 479 P.2d 319, 329-30 (Alaska 1970) (contributory negligence not a bar to liability unless plaintiff willingly and knowingly exposes himself to risk); McCown v. International Harvester Co., 342 A.2d 381, 382 (Pa. 1975) (contributorily

gruous situation demonstrates rather vividly the conceptual incompatability of utilizing gross negligence in a strict liability action.

As noted earlier, the concept of imposing punitive awards in strict tort liability actions has emerged as a judicially sanctioned approach within the short span of five years.[192] The concern that is now raised, even by commentators who provided impetus for the punitive award concept in product liability, is that the large awards are becoming commonplace.[193] Although the number and size of punitive damage awards does not yet directly threaten the total destruction of product suppliers, the alarming increase in the number and size of such awards fairly raises concern for the future stability of industry and business.[194] Consequently, repeated puni-

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negligent conduct no defense to strict liability suit); Henderson v. Ford Motor Co., 519 S.W.2d 87, 90 (Tex. 1974) (defense of contributory negligence unavailable in product case), *overruled on other grounds,* Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979); *see also* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[5][f], at 3B-197 (1982) (although confusion exists, courts often deny defense of contributory negligence in strict liability suit); 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4.34, at 735 (1974) (decisions generally assert contributory negligence not a defense in product action). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) (contributorily negligent acts not a defense to action based upon section 402A); Annot., 46 A.L.R.3d 240, 248 (1972) (numerous courts hold contributory negligence no defense in product liability matters).

192. *See, e.g.,* Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 816-17 (6th Cir. 1982); Maxey v. Freightliner Corp., 665 F.2d 1367, 1377-78 (5th Cir. 1982); Dorsey v. Honda Motor Co., 655 F.2d 650, 657-58 (5th Cir. 1981); *see also* Drayton v. Jiffee Chem. Corp., 591 F.2d 352, 365-66 (6th Cir. 1978); Vollert v. Summa Corp., 389 F. Supp. 1348, 1350-51 (D. Hawaii 1975); Sturm, Ruger & Co. v. Day, 594 P.2d 38, 46-47 (1979), *on rehearing,* 615 P.2d 621 (Alaska 1980); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 380-83 (Ct. App. 1981); American Laundry Mach. Indus. v. Horan, 412 A.2d 407, 416-19 (Md. Ct. Spec. App. 1980); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 732-33 (Minn.), *cert. denied,* 449 U.S. 921 (1980); Rinker v. Ford Motor Co., 567 S.W.2d 655, 667-69 (Mo. Ct. App. 1978); Leichtamer v. American Motors Corp., 424 N.E.2d 568, 580 (Ohio 1981); Ford Motor Co. v. Nowak, 638 S.W.2d 582, 593 (Tex. Ct. App.—Corpus Christi 1982, writ pending); Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435, 440-41 (Tex. Civ. App.—Waco 1981, writ ref' n.r.e.); Wangen v. Ford Motor Co., 294 N.W.2d 437, 443-44 (Wis. 1980). *See generally* Annot., 13 A.L.R.4th 52, 57 (1982) (discussing decisions allowing punitive awards in product liability actions).

193. This concern was raised by the court in *Moore v. Remington Arms Co.,* in which it was noted: "The tide has since turned: judgments for punitive damages are now routinely entered across the nation, and staggering sums have been awarded." *See* Moore v. Remington Arms Co., 427 N.E.2d 608, 616-17 (Ill. App. Ct. 1981).

194. This concern has been indirectly noted in several cases. In Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 384 (Ct. App. 1981), the court observed:

> We recognize the fact that multiplicity of awards may present a problem, but the mere possibility of a future award in a different case is not a ground for setting aside

tive awards for identically designed products are foreboding harbingers of further assaults on this country's continued economic viability.

The problem is exacerbated in the product liability area because of society's current values regarding safety and corporate responsibility.[195] It may be appropriate to measure a product based on current technology and standards of safety, but it appears to be quite another matter to extract repeated destructive punishment from enterprises based on today's consumer oriented society. This is especially true for design and marketing decisions based upon business practices of times past made by individuals of this earlier era.[196] The zeal to punish deficiencies that are recognizable by today's technology cannot be permitted to ignore the industry standards and acceptable societal risks of another age.[197] This situation

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the award in this case, particularly as reduced by the trial judge. If Ford should be confronted with the possibility of an award in another case for the same conduct, it may raise the issue in that case.

Id. at 384. Similarly, in Wangen v. Ford Motor Co., 294 N.W.2d 437, 455-56 (Wis. 1980), the Wisconsin Supreme Court, although approving the award of punitive damages, issued this caveat:

> Nevertheless, we cannot so easily dismiss the risk of catastrophic punitive damages, and we must recognize that the difficulty of measuring and controlling punitive damages awards which exists in any tort case is compounded in product liability cases which may involve inflammatory fact situations, wealthy corporate defendants and multiple lawsuits. . . . It appears that the existing facts and figures do not justify the manufacturers' concerns and fears about the economic impact of punitive damages. Nevertheless, the potential danger of multiple punitive and damages awards does exist.

Id. at 455-56. Most recently, one commentator remarked that "[l]arge assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future stability of American industry." *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1982).

195. This philosophy was deemed persuasive in Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981). The court commented: "Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable." *See id.* at 383.

196. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1982).

197. Yet many jurisdictions, under the rubric of strict tort liability, determine that a product is defective based on the existing technology and knowledge available at the time that the product was originally designed, manufactured, and sold. *See, e.g.*, Gelsumino v. E.W. Bliss Co., 295 N.E.2d 110, 113 (Ill. App. Ct. 1973) ("state of the art" defense irrelevant in strict liability matter); Racer v. Utterman, 629 S.W.2d 387, 393-95 (Mo. Ct. App. 1981)

occurs, of course, because of the conceptual incongruities of punitive awards injected into a strict liability action for product design and marketing.

As previously noted, punitive damages developed largely as a basis for punishing and deterring outrageous and socially impermissible conduct.[198] The application of punitive awards to complex manufacturing concerns simply is an illogical mating of yesterday's judicial doctrine with today's real world. Complex products necessarily evolve from a multifaceted process. The design of a product involves the complicated marshalling of human judgments made by literally thousands of different individuals involved at different levels of the manufacturing process.[199] Engineers rely upon the research and work of other scientific disciplines and, concomitantly, marketing evaluates factors affecting the financing and distribu-

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(although not possible to make product fire-resistant at time of injury, liability imposed if defendant able to "foresee" danger); Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 546 (N.J. 1982) ("state of the art" claim rejected as defense to product suit). Some jurisdictions, fortunately, recognize that the imposition of liability, even under a concept of strict tort liability, must be based on technological knowledge available at the time of design and manufacture. *See, e.g.,* Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 746 (Tex. 1980) (defect analyzed in terms of scientific knowledge existing at time of manufacture); COLO. REV. STAT. § 13-21-403(1)(a) (Supp. 1982) (presumption product safe if made to "state of the art" standards); KY. REV. STAT. § 411.310(2) (Supp. 1980) (product conforming to "state of the art" norms presumptively safe). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[4][i], at 3B-176.2 (1982) (compliance with "state of the art" technology defense in some states).

198. Punishment and deterrence represent the common refrain of the courts to justify the imposition of punitive awards in strict tort liability actions. *See, e.g.,* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 382 (Ct. App. 1981); Oregon *ex rel.* Young v. Crookham, 618 P.2d 1268, 1270 (Or. 1980); Wangen v. Ford Motor Co., 294 N.W.2d 437, 453 (Wis. 1980). The Restatement (Second) of Torts specifically provides that exemplary awards, as distinguished from actual or nominal damages, are imposed against a defendant "to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1979). Some courts either refuse or fail to discern the distinction between strict tort liability and tortious conduct in a punitive damage context. *See, e.g.,* Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 815-16 (6th Cir. 1982) (punitive award in product case proper since failure to warn amounted to "flagrant indifference"); Neal v. Carey Can. Mines, Ltd., 548 F. Supp. 357, 378 (E.D. Pa. 1982) (exemplary award in strict tort action permissible if claimant proves defendant's "aggravated fault"); Airco, Inc. v. Simmons First Nat'l Bank, 638 S.W.2d 660, 663 (Ark. 1982) (product defendant subject to vindictive damages because manufacturer acted in reckless disregard of consequences). *But see* Gold v. Johns-Manville Sales Corp., No. 80-2907 (D.N.J. July 16, 1982) (available Feb. 24, 1983, on WESTLAW, Federal Database, FS file) (punitive damages, as matter of law, not to be predicated on strict liability theory).

199. *See* R. SCHADEN & V. HELMAN, PRODUCT DESIGN LIABILITY 10 (1982).

tion of the product. This process occurs over a period of years and each individual in the corporate structure makes decisions predicated on individual motives and on different sources of information.[200] Even the executive who certifies the product for marketing and distribution possesses only a limited amount of the total information involved in producing the ultimate product.[201]

The potential for repeated punitive awards is peculiar to product liability cases involving, as they do, literally millions of identically designed or marketed products. Unlike the single act of conduct causing an event meriting deterrence, the design of a product is a unique phenomenon totally dissimilar from outrageous conduct causing an injurious event.[202] Because design of any product necessarily involves a host of factors not present in the usual negligence action, the factors that have been relied upon by the courts in applying the punitive concept to product related cases assume an inappropriate role in providing evidential support for gross negligence. An evaluation and analysis of those factors rather convincingly demonstrates both the total inapplicability of punitive awards in strict tort liability for defective design and marketing and the very real potential for economic destruction due to repeated punitive awards.

It is critically important to focus on the fact that the process of "designing a product" necessarily generates an avalanche of documents that ultimately constitute the incriminating evidence upon which plaintiff's counsel predicates an appeal for exemplary awards.[203] Especially during the initial stage of designing the pro-

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200. Recognition of this process and its effect on evaluating the product supplier's liability both for compensatory and punitive damages is analyzed in depth by Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 15-16 (1982).

201. *See id.* at 15. *See generally* Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347, 364-69 (1980) (discussing complexities of manufacturing process and multitude of decisions involved).

202. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-39 (2d Cir. 1967); *see also* Wangen v. Ford Motor Co., 294 N.W.2d 437, 470 (Wis. 1980) (Coffey, J., dissenting) (effect of punitive awards in multiple lawsuits threatens existence of manufacturer).

203. *See, e.g.*, Gillham v. Admiral Corp., 523 F.2d 102, 105, 107 n.3 (6th Cir. 1975) (test results, "fire hazard" files, and corporate report sufficient evidence to uphold punitive damage claim), *cert. denied*, 424 U.S. 913 (1976); Hoffman v. Sterling Drug, Inc., 485 F.2d 132, 147, 149-52 (3d Cir. 1973) (letters and warning statements issued by defendant adequate proof supporting remand for trial on exemplary damage issue); Gryc v. Dayton-Hudson

totype of a product and later the product itself, the manufacturer obtains information from texts, lab studies, experiments, field tests, prior products, and a myriad of other sources. This information is documented, decisions effectuated, and the documents filed for future reference. In truth, a manufacturer concerned that its products be properly evaluated for efficient, utilitarian, and safe use fosters and encourages self-criticism among its engineering staff.[204]

As an example, products such as automobiles are tested literally to destruction in order to discover the ultimate limits of all components as well as the unit as a whole. As part of this test, vehicles are crash-tested to determine the crush effects of various impacts at different speeds and tests are conducted to determine the safe useful life of tires, shock absorbers, and the multitude of other components that comprise the finished product. Much of this testing is recorded. It is this documentary evidence that is later obtained through the liberal discovery process available in strict liability that returns to haunt the manufacturer.[205] Consequently, the manufacturer striving to determine the weaknesses of its products and seeking to produce ever better products simply creates documentary evidence that later will hang it on its own pitard.[206] As punitive awards increase based on this documentary evidence, manufacturers will be discouraged from searching out evidence of product failures, complaints of users, and recordation of studies of

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Corp., 297 N.W.2d 727, 734 (Minn.) (official memorandum cited as proof of corporate knowledge of product danger), *cert. denied*, 449 U.S. 921 (1980); *see also* Ford Motor Co. v. Nowak, 638 S.W.2d 582, 593-96 (Tex. Ct. App.—Corpus Christi 1982, writ pending) (records of accidents, memoranda, and reliability study established knowledge of defendant regarding defect). *See generally* Williams, *Documents in Products Liability*, PRODUCT LIABILITY OF MANUFACTURERS: PREVENTION AND DEFENSE 1981, at 713 (1981) (records of manufacturer a "two-edged sword" and may be proof of liability).

204. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 17 (1982).

205. For example, in Rimer v. Rockwell Int'l Corp., 641 F.2d 450, 455-56 (6th Cir. 1981), the court concluded that an engineering memo regarding a problem with fuel siphoning in the fuel system of an Aero Commander and the failure of the manufacturer to immediately issue a service bulletin raised an issue for punitive damages.

206. In *Grimshaw v. Ford Motor Co.*, a report suggesting a safety feature for gasoline tanks, a report and a film concerning a crash test conducted with a Ford Pinto, and a report proposing an alternative location for the gasoline tanks on Ford-Mercury autos were admitted as evidence. *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 369-71 (Ct. App. 1981). The appellate court affirmed a punitive award of $3,500,000 against Ford. *See id.* at 358, 391.

accidents to update the engineering design of its product. Consequently, the objectives of punitive awards are perverted. The realistic effect of punitive awards frustrates product suppliers in utilizing all available means to insure the safety of its product.[207]

There is another aspect of the manufacturing and design process that contradicts use of gross negligence and the award of punitive damages. Essentially all products involve degrees of risk. No product ever manufactured has been made accident proof.[208] The most responsible individuals and institutions necessarily accord considerable evaluation to the risk of harm attendant to use of a particular product before design and distribution. It is fundamental in the world in which we live and its unpredicatable future that the product supplier must manufacture products notwithstanding the likelihood of some foreseeable risk, provided the social utility of the product at the time exceeds the magnitude of the risk of harm.[209] This basic doctrine governs virtually all decision making in life. The law merely dictates that product suppliers eliminate the un-

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207. *Cf.* Dorsey v. Honda Motor Co., 655 F.2d 650, 653, 660 (5th Cir. 1981) (crash test results cited as evidence supporting imposition of $5,000,000 punitive award); Rinker v. Ford Motor Co., 567 S.W.2d 655, 663-64, 669 (Mo. Ct. App. 1978) (company report, files regarding complaints of similar accidents, and letter from Ford engineer sufficient proof to uphold $460,000 exemplary damage award); Ford Motor Co. v. Nowak, 638 S.W.2d 582, 593-96 (Tex. Ct. App.—Corpus Christi 1982, writ pending) (accident records, memos, and company study relied upon to affirm $4,000,000 award of punitive damages).

208. *See* Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 858 (1963); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 807 (1966). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965) (numerous products cannot be perfectly safe).

209. As noted by the court in Hagan v. EZ Mfg. Co., 674 F.2d 1047, 1051 (5th Cir. 1982):

> Evidence that a product is defectively designed does not necessarily determine whether a product is unreasonably dangerous. "Safety is not the only criterion a manufacturer considers when designing a product" [citation omitted].
>
> Many products have both utility and danger. A product is unreasonably dangerous if its utility does not outweigh the magnitude of the danger inherent in its introduction into commerce.

Id. at 1051; *accord* Burks v. Firestone Tire & Rubber Co., 633 F.2d 1152, 1155 (5th Cir. 1981); Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1087 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 745-46 (Tex. 1980). *But cf.* Airco, Inc. v. Simmons First Nat'l Bank, 638 S.W.2d 660, 663 (Ark. 1982), holding that a selector valve for a respirator possessed *no* social utility and it posed a *deadly* and *lethal* risk of harm. *See generally* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-38 (1973) (product unreasonably dangerous if benefits outweighed by harm).

reasonable risks of danger from their products.[210] The repetitive punishment of a product supplier based simply on knowingly providing a product that possesses some dangers is both socially unacceptable and insupportable. Punitive awards should not be imposed against the manufacturer for designing and distributing products that possess great social utility but that have some foreseeable dangers which are simply too expensive to eliminate.[211] Product suppliers were never intended to be insurers.[212]

Strict liability merely demands that manufacturers take all reasonable precautions to produce a product that will protect the ultimate user against an unreasonable degree of harm.[213] It is beyond

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210. A product supplier is not required to furnish a failsafe or accident proof product or even one that is the safest possible product that can be made. *See, e.g.,* Hagan v. EZ Mfg. Co., 674 F.2d 1047, 1051 (5th Cir. 1982) (no requirement that good be failsafe); Weakley v. Fischbach & Moore, Inc., 515 F.2d 1260, 1267 (5th Cir. 1975) (not essential that product be designed as safe as possible); Gates v. Ford Motor Co., 494 F.2d 458, 459 (10th Cir. 1974) (supplier under obligation to design "reasonably safe" product); *see also* Stuckey v. Yang Exploration Co., 586 P.2d 726, 731 (Okla. 1978) (product need not be absolutely safe); Henderson v. Ford Motor Co., 519 S.W.2d 87, 93 (Tex. 1974) (availability of better designs insufficient basis on which to hold defendant liable), *overruled on other grounds,* Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). That the product might have been better or more safely designed does not mean that the good is unreasonably dangerous. *See* Daberko v. Heil Co., 681 F.2d 445, 448 (5th Cir. 1982); Henderson v. Ford Motor Co., 519 S.W.2d 87, 93 (Tex. 1974), *overruled on other grounds,* 584 S.W.2d 844, 847 (Tex. 1979). A manufacturer is not obligated to destroy the product's utility to make it safe. *See* Daberko v. Heil Co., 681 F.2d 445, 448 (5th Cir. 1982).

211. The recent decision in Rawlings Sporting Goods Co. v. Daniels, 619 S.W.2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.), represents just such an instance. The defendant supplied football helmets that were used by high school and college players. The product manufacturer was aware that a football helmet, no matter how well made, could not provide total protection against head injuries under all circumstances of contact. *See id.* at 440. Punitive damages were upheld against the product supplier, not because the helmet could have been designed at some inordinate expense to be totally accident proof, but rather for failure to warn users that head injuries were still possible while wearing the helmet. *See id.* at 441. This case epitomizes the unfortunate use of the punitive damage award in strict tort liability.

212. *See, e.g.,* Hagans v. Oliver Mach. Co., 576 F.2d 97, 100 (5th Cir. 1978); Simien v. S.S. Kresge Co., 566 F.2d 551, 559 (5th Cir. 1978); Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 864 (5th Cir. 1967), *cert. denied,* 391 U.S. 913 (1968); *see also* Cuthbertson v. Clark Equip. Co., 448 A.2d 315, 319 (Me. 1982); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779, 785 (Tex. 1967); Mulherin v. Ingersoll-Rand Co., 638 P.2d 1301, 1302 (Utah 1981). *See generally* Traynor, *The Ways and Meanings of Defective Products and Strict Liability,* 32 TENN. L. REV. 363, 366-67 (1965) (supplier not an insurer for harm caused by his products).

213. The extent to which a product supplier or manufacturer must render the product safe against any harm-producing event is reiterated by the courts in varying fashions. *Compare* Barker v. Lull Eng'g Co., 573 P.2d 443, 457-58, 143 Cal. Rptr. 225, 239-40 (1978) (prod-

cavil that the majority of products marketed with unknown or unexpected risks are socially beneficial and should not constitute the basis for subjecting the product supplier to repeated punitive awards. Product suppliers must be protected against repeated punishment for distributing socially desirable products that may possess some risk of harm.[214]

The potential for overkill associated with repetitive punitive awards necessarily argues the logic of its own elimination. To "kill" is defined as the ability to "deprive of life."[215] "Overkill" is defined as "to obliterate . . . with more nuclear force than required."[216] At what point in the imposition of repeated punitive awards has the prospect of overkill occurred to warrant reexamination of the continued use of this concept in a product environment? If the verdict in a particular case produces "overkill" or even "economic destruction," then a rational analysis dictates that the punitive concept

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uct defectively designed if fails to operate as safely as ordinary user expects when used in "intended or reasonably foreseeable manner" or product caused injury and manufacturer unable to show utility outweighs risks) *and* Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1037 (Or. 1974) (product misdesigned if, considering attendant circumstances, reasonably prudent supplier would not have designed good in such manner and sold it knowing of potential harm) *with* Azzarello v. Black Bros. Co., 391 A.2d 1020, 1027 (Pa. 1978) (item defective if introduced into market lacking necessary features making good safe for intended use or possessing characteristic making good unsafe for intended use) *and* Turner v. General Motors Corp., 584 S.W.2d 844, 847 n.1, 851 (Tex. 1979) (product defectively designed if "unreasonably dangerous" based upon consideration of product benefits compared to product dangers).

214. Unless the product supplier is afforded some latitude in the balancing process, consumers will be denied access to many affordable products. *Cf.* Daberko v. Heil Co., 681 F.2d 445, 448 (5th Cir. 1982) (balancing of utility and risk includes cost considerations); Curtis v. General Motors Corp., 649 F.2d 808, 811 (10th Cir. 1981) (compromise between safety and design alternatives necessary to give consumers choice); Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d 573, 577 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (increase in price to be accounted for when weighing risk against benefit). Safety is not the only consideration when a product is manufactured. *See* Hagan v. EZ Mfg. Co., 674 F.2d 1047, 1051 (5th Cir. 1982); Ward v. Hobard Mfg. Co., 450 F.2d 1176, 1184 (5th Cir. 1971). Strict tort liability was never designed to compel the manufacture of failsafe products. *See* Hagan v. EZ Mfg. Co., 674 F.2d 1047, 1051 (5th Cir. 1982); *see also* Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519, 530 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (product supplier not bound to design safest possible item). Moreover, simply possessing knowledge of a dangerous condition that is not correctable without destroying the utility of the product does not warrant an issue on punitive damages. *See* Turney v. Ford Motor Co., 418 N.E.2d 1079, 1085 (Ill. App. Ct. 1981).

215. MERRIAM-WEBSTER DICTIONARY 391 (1974); *see also* Roth v. Travelers' Protective Ass'n of Am., 102 Tex. 241, 245, 115 S.W. 31, 33 (1909) ("kill" defined as "to destroy life").

216. MERRIAM-WEBSTER DICTIONARY 499 (1974).

has engendered an economically unacceptable result. Further, if "overkill" or "economic destruction" implies repeated awards to a point that a product supplier must seek bankruptcy relief, effectively the supplier has been annihilated. If the supplier has been placed in financial jeopardy by competitive imbalance vis-a-vis other suppliers, is the "overkill" constraint on punitive awards satisfied? It appears rather clear that repeated punitive awards hinge on a grossly imprecise standard that defies either logical or rational administration by the courts.[217] Consequently, unless the courts acknowledge that overkill or economic destruction is a philosophically acceptable judicial doctrine, repeated punitive awards simply are not supportable. Continued economic viability cannot obtain succor from the fact that the courts will not authorize punitive awards to the extent of overkill.

Some suggest that a punitive award may be appropriate against a product supplier in two instances:

> An examination of the cases that have struggled with the issue reveals that punitive damages generally are appropriate in only two types of cases—those involving behavior of a fraudulent character, where the manufacturer purposefully created the danger in an effort to trick consumers into buying the product, and those in which the manufacturer chose to profit from exposing consumers to a high risk of serious injury that it knew could easily be avoided through feasible and economical curative measures. If the facts of the case do not fit into either of these two classifications, punitive damages probably are inappropriate and usually should be stricken from the case.[218]

It is highly questionable that even these two situations should override the policy considerations involved in product cases. The criminal law with its safeguards is the more appropriate course to

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217. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). As one justice phrased it: "The implications for the free enterprise system, and therefore the structure of our economy, are too disturbing to leave a decision of this magnitude to five jurists." Wangen v. Ford Motor Co., 294 N.W.2d 437, 472 (Wis. 1980) (Coffey, J., dissenting).

218. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 27 (1981). *See generally* Note, *Punitive Damages in Strict Products Liability Litigation*, 23 WM. & MARY L. REV. 333, 337-41 (1981) (discussing context in which courts allowed exemplary damages in product cases). In Froud v. Celotex Corp., 437 N.E.2d 910, 915 (Ill. App. Ct. 1982) (Sullivan, J., concurring), the court approved the use of punitive awards in product liability cases, but the concurring opinion of the Presiding Justice suggests the need to reconsider the continued use of punitive awards as a matter of current policy. *See id.* at 915.

address situations that involve a form of evil motive.[219]

Another very real problem involves the evidence utilized by the plaintiff to attack a particular design or marketing technique in strict liability and upon which the punitive award will be predicated. Frequently, a solution to the particular design risk can be implemented by an ostensibly simple and inexpensive alternative.[220] Unfortunately, there are serious deficiencies with the majority of the cases in which punitive awards have been sustained on the basis of this very superficial approach. The mere fact that a design alternative is available which may be both simple and economical does not constitute a basis for imposing a punitive award.[221] Evidence of available safer designs that are simple or inexpensive possess no relevance in supporting a punitive award.[222] In most industries, the design of a product is achieved by many highly qualified engineers while the credentials and design alternatives offered by plaintiff's experts too often mock the "expert" process. The argument that an alternative design could have been used which would only cost pennies or dollars is misleading in the

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219. *See* Bielski v. Schulze, 114 N.W.2d 105, 113 (Wis. 1962); *see also* P. MAGARICK, EXCESS LIABILITY: DUTIES AND RESPONSIBILITIES OF THE INSURER § 16.03, at 283 (2d ed. 1982) (vindictive damages penal in nature and inappropriate in civil law action). *See generally* Fulton, *Punitive Damages in Product Liability Cases*, 15 FORUM 117, 133 (1979) (enforcement of criminal statutes and consumer protection laws proper methods to punish manufacturers of defective products).

220. *See* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1568 (1973).

221. *See, e.g.*, Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255, 266-67 (E.D. Pa. 1976) (punitive damages not permitted even though defendant could have remedied defect with non-conductive material or issued warnings regarding defect); Sheffield Div., Armco Steel Corp. v. Jones, 376 S.W.2d 825, 827 (Tex. 1964) (mere assertion of design alternative does not establish gross negligence), *overruled on other grounds*, Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981); Newding v. Kroger Co., 554 S.W.2d 15, 18 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (fact that better or safer design could have been used insufficient ground to assess punitive damages); *cf.* Daberko v. Heil Co., 681 F.2d 445, 448 (5th Cir. 1982) (availability of better design not determinative of whether product "unreasonably dangerous"); Garst v. General Motors Corp., 484 P.2d 47, 61 (Kan. 1971) (presence of alternate design inadequate to prove product defectively designed).

222. In Newding v. Kroger Co., 554 S.W.2d 15, 18 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ), the court noted that the bottler's failure to use a safer twist-off cap on his product and the temporary malfunction of the inspecting process which would have ordinarily precluded circulation of these improperly capped bottles were insufficient factors, standing alone, to constitute gross negligence. *See id.* at 18. For a general discussion of this issue, see Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 25-26 (1982).

extreme.[223] Most products are highly complex and involve thousands of components of varying designs which are integrated into the total product. Although the cost of any one design change to one component may be small, it must be remembered that each design choice represents but a small factor in the overall design consideration of thousands of components.[224] The overall cost/utility consideration must be tailored to the total product. Trade-offs in achieving a balance between product utility and product risks represent the hallmark of each stage in the evolution of an ultimate product design. The cost of an alternative design of a specific component which may seem small in the abstract does not alter the fact that at the time the product was designed consideration of a particular option constituted only one of thousands of considerations reviewed and about which decisions were made. To characterize the conduct of the manufacturer as willful, wanton, or in reckless disregard of the rights or welfare of another when one decision later proves to be deficient graphically demonstrates the reason punitive damages in product liability cases are a discredited concept.[225]

Perhaps the ultimate problem in permitting punitive awards in strict liability actions is highlighted by the nature of the evidence upon which both trial and appellate courts rely to sustain punitive awards. The courts assert that punitive damages rest within the discretion of the jury and, because of this abstract principle, most

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223. *See* Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 490 (1976); Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1540, 1558, 1569-70 (1973); Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347, 358-59 (1980). The inherent uncertainty in examining the product's final design prompted several commentators to propose a "process defense" in product liability cases. *See* Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347, 358-59 (1980). The thrust of this proposal was that emphasis should be placed on the manufacturer's product development process, i.e., if the safety review procedures are deemed "adequate," the product is presumed to be nondefective. *See id.* at 375. This presumption could only be dispelled by clear and convincing evidence of a defect. *See id.* at 375. Even this suggestion, however, has been questioned as to its manageability in the courts. *See* Henderson, *Should a "Process Defense" Be Recognized in Product Design Cases?*, 56 N.Y.U. L. REV. 585, 590 (1981).

224. *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 15, 24-25 (1982).

225. *Cf. id.* at 27-28 (erroneous "close call" decision does not warrant punitive award).

courts are reluctant to disturb jury awards. With the onslaught of punitive awards since 1977, commentators are beginning to urge stricter judicial review of those decisions awarding punitive damages.[226] The risks of erroneous jury awards of punitive damages in strict liability cases are particularly great. This mandates that the trial and appellate courts carefully scrutinize unwarranted punishment. As one eminent academician observes:

> Appellate courts also should subject such awards in product cases to closer scrutiny and reverse them when not supported by the record. Scrupulous appellate review is especially important because it is a defendant's last hope for reason and calm reflection before the judgment takes effect. On the appeal of such awards, the trial record must be scrutinized with special care for improper evidence, for argument that might have inflamed the jury, and for the sufficiency of the evidence on the whole.[227]

The prognostication of Judge Friendly in *Roginsky* in 1967 that permitting the award of punitive damages in strict tort liability cases will constitute a form of overkill against product suppliers has indeed been prophetic. Although the very real concern of Judge Friendly articulated sixteen years earlier has been decried and ridiculed, the reality of the past five years demonstrates the sagacity of his observations.[228] Punitive awards have been occur-

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226. *See, e.g.*, Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 664 (1980) (judge should determine appropriateness of punitive award); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 50 (1982) (courts to take firmer control over issue of punitive damages in product liability actions); Tasi, *Appellate Arguments Against Extra-Contractual Damages in First Party Insurance Cases*, 47 INS. COUNS. J. 188, 207 (1980) (judiciary should better describe when punitive award available and strictly control amount assessed).

227. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 57-58 (1982). In noting and approving the permissibility of disallowing punitive awards in wrongful death cases, the United States Court of Appeals for the Ninth Circuit observed that "[t]he frequently violent and dramatic circumstances of accidents that lead to wrongful death actions not only would pose this danger of extreme awards, but also might increase the temptation for a jury to award punitive damages even when concrete elements of fraudulent or intentional wrongdoing are absent." *In re* Paris Air Crash, 622 F.2d 1315, 1323 (9th Cir. 1980).

228. *See, e.g.*, Coccia & Morrisey, *Punitive Damages in Product Liability Cases Should Not Be Allowed*, 22 TRIAL LAW. GUIDE 46, 65 (1978) (courts ill-suited to handle punitive claims in context of mass disaster litigation); Fulton, *Punitive Damages in Product Liability Cases*, 15 FORUM 117, 131-32, 135 (1979) (punitive awards in product cases cause practical problems and should not be allowed); Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 MARQ. L. REV. 245, 249-51 (1977) (exemplary damages in strict liability

ring with increasing frequency in cases involving products of a single product line and the amount of such punitive awards is accelerating into extremely large amounts. It may be timely for the courts to reconsider the propriety of the punitive damage concept before such awards create an uncontrollable destructive force.[229]

IX. CONCLUSION

It is time indeed that the courts more precisely address the issues of the conceptual incongruities inherent in allowing punitive awards when the underlying compensatory damages are based on the condition of a product and not the tortious conduct of the product supplier.[230] It is also time that the courts examine the so-

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cases against public policy); Hoenig, *Products Liability and Punitive Damages*, 687 INS. L.J. 198, 202-05 (1980) (punitive awards inappropriate in product liability actions); *see also* Hoenig, *Products Liability Problems and Proposed Reforms*, 651 INS. L.J. 213, 254-55 (1977) (punitive awards pose difficulties in strict liability cases and should be abolished); Snyman, *The Validity of Punitive Damages in Products Liability Cases*, 44 INS. COUNS. J. 402, 406-07 (1977) (vindictive damages predicated on conduct and irreconcilable with theory of strict tort liability); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNS. J. 300, 304 (1972) (punitive damages inappropriate in product case).

229. The denial of punitive awards in wrongful death cases has been predicated on the rational and realistic basis of avoiding excessive liability in cases in which the jury is unusually susceptible to rendering irrational awards. *See In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981); *In re* Paris Air Crash, 622 F.2d 1315, 1319 (9th Cir. 1980); Jackson v. Koninklijke Luchtvaart Maatschappij N.V., 459 F. Supp. 953, 956 (S.D.N.Y. 1978).

230. At least one court has noted the inconsistent theories on which punitive damages and strict tort liability are based. *See* Gold v. Johns-Manville Sales Corp., No. 80-2907 (D.N.J. July 16, 1982) (available Feb. 24, 1983, on WESTLAW, Federal Database, FS file); *cf.* Kirschnik v. Pepsi-Cola Metropolitan Bottling Co., 478 F. Supp. 842, 845 (E.D. Wis. 1979) (vindictive damages predicated on conduct and normally inappropriate in product liability case); Walbrun v. Berkel, Inc., 433 F. Supp. 384, 385 (E.D. Wis. 1976) (punitive damage allegation deleted from pleading in strict tort liability action). In Heil Co. v. Grant, 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.), the allowance of exemplary damages in a product liability suit for wrongful death was based in part on Drake v. Wham-O Mfg. Co., 373 F. Supp. 608 (E.D. Wis. 1974). The *Drake* decision, however, was later denigrated by the same federal district court. *See* Walbrun v. Berkel, Inc., 433 F. Supp. 384, 385 (E.D. Wis. 1976). The *Walbrun* court determined that punitive damages were not recoverable in a product action grounded in negligence and strict liability. *See id.* at 385. The holding implies that punitive damages are predicated upon the plaintiff's underlying theory of recovery and the defendant's conduct. *See id.* at 385. *But see* Maxey v. Freightliner Corp., 450 F. Supp. 955, 961-62 (N.D. Tex. 1978) (actual damages based on strict tort liability and punitive damages based on conduct may be sought in same case), *aff'd in part on other grounds, vacated and remanded in part on other grounds*, 665 F.2d 1367 (5th Cir. 1982); Drake v. Wham-O Mfg. Co., 373 F. Supp. 608, 611 (E.D. Wis. 1974) (exemplary damages represent type of relief, not part of claim); Heil Co. v. Grant, 534 S.W.2d 916, 926 (Tex.

cial undesirability of punitive awards in product liability actions because of the overkill or annihilation effect that ultimately will occur if this doctrine continues to flourish and grow.

Strict liability provides the injured party full and total compensation based on a socially engineered policy that eliminates all traditional common law tort requirements for recovery. The condition of the product and not socially undesirable conduct undergirds this theory of recovery for product-related injuries. It is unfathomable in the extreme to understand or justify the need of providing injured parties scandalously large windfalls for no socially compelling purpose. The punishment and deterrence of potential repeated punitive awards in the context of product liability cases serve no legitimate purpose other than to subject product suppliers to potential economic ruin.[231] If financial ruin is appropriate, then it should be the criminal law with its constitutional and legislative safeguards that accomplishes that fateful objective.

Strict liability for product-related injuries was promulgated as a basis for compensating injured parties unfettered by the traditional common law requirements for burden of proof and liability. Yet in the same breath, the courts, after imposing significant compensatory damages based on a concept unknown to the common law, insist that the ancient and outmoded doctrine of punitive awards must be followed. This bewildering dichotomy bespeaks the need to harmonize the already overburdened law of product liability.

Civ. App.—Tyler 1976, writ ref'd n.r.e.) (punitory award based on facts proved, not theory alleged); Wangen v. Ford Motor Co., 294 N.W.2d 437, 446 (Wis. 1980) (punitive award predicated on wrongdoer's actions, not on character of underlying tort). Subsequent to and consistent with *Walbrun*, in Kirschnik v. Pepsi-Cola Metropolitan Bottling Co., 478 F. Supp. 842, 845 (E.D. Wis. 1979), it was stated that punitive damages may be recoverable in a product action if the complainant could show knowledge and fraudulent intent on the part of the defendant. The court continued, commenting that "[p]unitive damages are not usually appropriate in product liability cases based on negligence or strict liability because there is no requirement of showing that a producer knew a product was defective when made and, therefore, there is no showing of any wrongful action." *Id.* at 845. A general discussion of this *Drake/Walbrun* controversy is contained in Ghiardi & Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 MARQ. L. REV. 1, 55-61 (1981).

231. At least one court has gone so far as to sanction the use of punitive damages in strict tort liability cases involving solely economic loss. *See* Cinnaminson Township Bd. of Educ. v. U.S. Gypsum Co., 552 F. Supp. 855, 857-58 (D.N.J. 1982).