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# Punitive Damages in Product Liability Cases

MARK P. ROBINSON, JR.\*  
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## I. INTRODUCTION

Today, failure to try to prevent injuries to employees is indefensible.

The practical and moral aspects of accident prevention are interrelated, because accidents result both in waste of manpower and resources, and in physical and mental anguish.<sup>1</sup>

Imagine that the largest amusement park in the world, in planning a roller coaster ride, decided to forego all safety fail safe equipment, as well as daily safety inspections, at a savings per year of five million dollars because their actuaries told them that such an expenditure was only *certain* to save three lives per year, and that the park's insurance would cover these losses at a cost in

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1. NATIONAL SAFETY COUNCIL, ACCIDENT PREVENTION MANUAL FOR INDUSTRIAL OPERATIONS 2 (7th ed. 1974).

premiums of far less than five million. Would compensatory damages be a sufficient tool to handle this kind of conduct? Plainly not.

The punitive remedy in the civil setting is society's only effective control over the mentality just described. It towers over the criminal and bureaucratic sanctions as a means of curbing the profit motive and compelling corporate planners to heed the demands of public morality in making decisions which effect the safety of consumers of their products.

The purpose of punitive damages was succinctly stated in the landmark case of *Luther v. Shaw*:<sup>2</sup>

The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished by, the criminal law.<sup>3</sup>

Today, the punitive remedy in civil cases is being attacked on several fronts. Some detractors claim that the remedy should not lie where the defendant is a corporate manufacturer injecting mass-produced products into the market place. Others claim the civil punitive remedy is unconstitutional. Another group complains about the potential excessiveness of the punitive damage award in a mass consumer setting. California, long in the vanguard of the law of consumer protection, rejects these challenges to this important remedy and points the way for the courts of other states.

## II. DISCUSSION

### A. *Punitive Damages Are Appropriate In Products Liability Cases.*

Manufacturers challenging the punitive damages sanction in multiple plaintiff products liability situations received a favorable decision in *Roginsky v. Richardson-Merrell, Inc.*,<sup>4</sup> where an award of punitive damages was held inappropriate on the basis that (1) such damages would only punish innocent shareholders of the defendant drug company; (2) manufacturers such as the defendant would escape the deterrent effect of such awards through insurance; and (3) multiple awards of punitive damages to multiple

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2. 157 Wis. 234, 147 N.W. 18 (1914).

3. *Id.* at 238, 147 N.W. at 20.

4. 378 F.2d 832 (2d Cir. 1967), where a plaintiff-consumer brought an action for personal injuries (cataract formation) resulting from the use of a drug (MER/29) which was developed by the defendant for lowering blood cholesterol levels.

plaintiffs affected by the same defect in a widely marketed product might excessively punish or even bankrupt the manufacturer.<sup>5</sup>

Such considerations were rejected, however, in the California case of *Toole v. Richardson-Merrell*,<sup>6</sup> a case involving the same defective drug, the same defendant and, virtually, the same facts. The *Toole* court expressly indicated its disagreement with *Roginsky*;<sup>7</sup> and since the California Supreme Court refused to review *Toole*, *Roginsky* cannot be said to possess any authority in California.

Other California cases in agreement with the *Toole* reasoning include *Pease v. Beech Aircraft Corp.*,<sup>8</sup> where, although an award of punitive damages was overturned on other grounds, the contention that punitive damages should not be awarded against a corporation was summarily rejected; *G.D. Searle & Co. v. Superior Court*,<sup>9</sup> where, although allegations of malice were held insufficient to avoid demurrer, it was also held that a products liability action may furnish the occasion for an award of exemplary damages; and *Barth v. B.F. Goodrich Tire Co.*,<sup>10</sup> where, although there was no verdict on punitive damages, a punitive damages instruction was held proper. This application was recently reaffirmed by the California Supreme Court in *Neal v. Farmers Insurance Exchange*.<sup>11</sup>

Wholly apart from contrary authority, the concerns voiced in the *Roginsky* decision carry little weight when balanced against the considerations favoring imposition of punitive damages in products liability cases. As pointed out in an excellent law review article,<sup>12</sup> the need for punitive damages awards in the area of products liability is particularly strong where a manufacturer knowingly mass produces and mass markets a hazardous product.<sup>13</sup>

5. *Id.* at 838-50.

6. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) *rehearing denied*.

7. *Id.* at 715 n.3, 60 Cal. Rptr. at 416-17.

8. 38 Cal. App. 3d 450, 466, 113 Cal. Rptr. 416, 427 (1974).

9. 49 Cal. App. 3d 22, 26, 122 Cal. Rptr. 218, 221 (1975).

10. 265 Cal. App. 2d 228, 240-41, 71 Cal. Rptr. 306, 313 (1968).

11. No. 208360 (Cal. Sup. Ct., filed Aug. 25, 1978).

12. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1277, 1279-87 (1976) [hereinafter cited as Owen].

13. The strict liability theory of modern products liability law explicitly addressed the loss distribution problems that arise when an injury is caused by a defective product marketed by an "innocent" manufacturer,

The primary functions of punitive damages are punishment of the defendant and deterrence of similar wrongdoing by that defendant and others similarly situated.<sup>14</sup> The manufacturer's main reasons for marketing dangerous products are the reduction of costs and the maximization of profits, powerful motives indeed when the manufacturer is a large one and sells millions of units. The manufacturer can, with some confidence, predict that of the number of those harmed by its defective product, only a fraction will be able to identify the defect as the cause of their injuries, that fewer still will sue and that even fewer will have the stamina and wherewithal to prosecute to judgment a difficult and expensive lawsuit. Weighing the likely cost of resisting claims and paying an occasional compensatory damages award (as to which it is, in any event, likely to have insured itself) against the much larger savings that result from cutting corners on safety, an unconscionable manufacturer will inevitably tend to opt in favor of selling the dangerous product. That is to say, the defendant manufacturer (and other like manufacturers) will not be deterred by the occasional assessment of compensatory damages, nor will the manufacturer or the public perceive such damages as a punishment for the callous disregard of consumer safety. Thus, only by eliminating the illicit profit derived from such conduct and by placing such a manufacturer in a worse position than he would have occupied had he not cheated on safety can the twin goals of punishment and deterrence be realized.<sup>15</sup>

Two further purposes of punitive damages are to induce private persons to enforce the laws by bringing malefactors to justice, and to compensate victims whose actual losses exceed those for which the law of compensatory damages allows recovery.<sup>16</sup> Judges and lawyers sometimes forget that a lawsuit is a psychological ordeal to an individual whose contact with the law is infrequent. The unpleasantness of the litigation process, in which a flesh and blood plaintiff who takes on a corporate defendant soon

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since liability is imposed even though the manufacturer has exercised due care. But the principles of strict liability are ill-equipped to deal with problems at the other end of the culpability scale where an injury results when a manufacturer markets its products in intentional or reckless disregard for consumer safety. Nor has the criminal law filled this void. A legal tool is needed that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool.

Owen, *supra* note 12, at 1259-60.

14. See CAL. CIV. CODE § 3924 (West 1973); Owen, *supra* note 12, at 1277, 1279-87; Fletcher v. Western National Life Ins. Co., 10 Cal. App. 3d 376, 409, 89 Cal. Rptr. 78, 99 (1970); RESTATEMENT OF TORTS § 908, Comment a at 554 (1939).

15. See, Owen, *supra* note 12, at 1279-89.

16. *Id.* at 1278.

comes to wonder whether he is himself the defendant, provides a powerful incentive to many persons with rightful claims to settle cheaply or to drop their lawsuits altogether. Moreover, the costs of products liability litigation are extraordinarily high, and like attorneys' fees, cannot usually be recovered from the defendant.<sup>17</sup>

Measured against the foregoing considerations, the concerns expressed in *Roginsky* carry little weight. First of all, supposedly "innocent" shareholders conjure up an image of powerless widows and orphans whose pitifully small nest eggs will be endangered by punitive damage awards. In fact, however, the major corporate shareholders are large institutions with diversified holdings, not individuals.

Furthermore, it is precisely on behalf of their "innocent" shareholders that corporate manufacturers seek to maximize profit at the expense of public safety, and it is the shareholders who ultimately enjoy the rewards of such conduct. Shareholders of errant corporations are thus hardly more "innocent" than the absentee slaveholder who hires an overseer to drive his slaves and to forward resulting profits, but who claims "innocence" because he has not himself wielded the whip. In addition, to the extent that punitive damage awards deprive "innocent" shareholders of profits derived from antisocial corporate activity, such awards simply recoup an unjust enrichment which has fallen to these shareholders.<sup>18</sup> California law allows such recoupment in other contexts from parties who are largely or entirely free of moral blame,<sup>19</sup> thus no reason exists to exempt "innocent" shareholders.

Finally, penalizing shareholders is the only practical and effective means of controlling the acts of corporate directors and officers. It is hardly to be expected that institutional shareholders, who have available to them the best legal and financial advice, will idly endure what amounts to corporate mismanagement. As stated in *Pease v. Beech Aircraft Corp.*,<sup>20</sup> "[n]o sufficient reason appears why shareholders should be seen as captive innocent hostages to the inhuman management of a corporate juggernaut."

17. *Id.* at 1287-99.

18. *Id.* at 1304.

19. *See*, 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 28-33, at 45-48 (8th ed. 1973). One prominent example is the liability of an innocent agent who sells goods which his principal has converted. *See*, RESTATEMENT OF RESTITUTION § 128, Comment f at 531-32 (1937).

20. 38 Cal. App. 3d 450, 466, 113 Cal. Rptr. 416, 427 (1974).

As to evading the effects of punitive damages by insurance, that is evidently not a problem in California since in California, as in many states, it appears to be against public policy to insure against such awards.<sup>21</sup>

The concern that to allow punitive damages to the initial plaintiff will deprive later, but equally deserving, plaintiffs of their fair share of such damages is ill placed. The primary focus in imposing punitive damages is upon punishment of the defendant and deterrence of like conduct by the defendant and others similarly situated, not the benefit to the individual plaintiff. In addition, there are many plaintiffs who will never recover the punitive damages to which they might be entitled. For example, some 750 people a year burn to death nationwide in otherwise survivable automobile wrecks. Under California law,<sup>22</sup> which is not unlike the law elsewhere,<sup>23</sup> punitive damages may not be awarded in an action for wrongful death, and the tortfeasor thus escapes all liability for such damages to the heirs of such victims. Also, many litigants fall by the wayside for a variety of reasons and never recover either compensatory or punitive damages.<sup>24</sup> To let a wrongdoer entirely off the hook because others *might* punish him, even though they have not yet done so and may never do so, is to make a mockery of the policies of punishment and deterrence. Finally, it is not entirely true that later plaintiffs are equally "deserving" with earlier plaintiffs. The earlier plaintiffs face much tougher problems in garnering evidence to establish the product defects and thus "deserve" greater reward for persevering, while later plaintiffs enjoy, to an appreciable extent, a free ride at the expense of the earlier plaintiffs.<sup>25</sup>

### *B. Punitive Damages Are Constitutional.*

California courts have repeatedly held that punitive damages do not contravene any provision of the California or United States Constitutions. California Civil Code Section 3294, which authorizes such damages, has been uniformly upheld against a variety of constitutional challenges under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and

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21. CAL. CIV. CODE § 1668 (West 1973); CAL. INS. CODE § 533 (West 1972).

22. *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 461, 113 Cal. Rptr. 416, 424 (1974); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 853, at 3146 (8th ed. 1973).

23. RESTATEMENT OF TORTS § 908, Comment a at 554 (1939) points out that punitive damages are not ordinarily awarded in wrongful death actions. *Accord*, RESTATEMENT OF TORTS § 925, Comment c at 624 (1939).

24. *Owen*, *supra* note 12, at 1293-94.

25. *Id.* at 1325.

Article I, Section 17 of the California Constitution,<sup>26</sup> which prohibits excessive fines and cruel and unusual punishment in criminal cases.

### C. Punitive Damages And Excessiveness.

Routinely, punitive damage awards are challenged on the ground of excessiveness. An analysis of the cases demonstrates that a variety of checks and balances are utilized to prevent runaway exemplary damage verdicts. A number of factors bear upon the question of whether an award of punitive damages is too large.

A primary consideration is the wealth of the defendant.<sup>27</sup> If the defendant has only modest means, a relatively small award may suffice to punish him and deter similar misconduct in the future, and an award which may bankrupt him will be deemed excessive.<sup>28</sup> On the other hand, "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective."<sup>29</sup>

A second and related factor is the ease with which the defendant may pass the cost along to others. If the defendant is a large manufacturer with a mass market and can split the ordinary costs of wrongdoing among thousands or even millions of consumers, it makes sense that the award of punitive damages be increased to the point where the necessary cost increases place the defendant at a competitive disadvantage. Only in this manner will the onus of the punitive damages award fall upon the corporation itself and ultimately upon its shareholders who will then be motivated to

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26. See, e.g., *Bertero v. National General Corp.*, 13 Cal. 3d 43, 66 n.13, 529 P.2d 608, 625, 118 Cal. Rptr. 184, 201 (1974); *Zhadon v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 489, 136 Cal. Rptr. 132, 136 (1976); *Merlo v. Standard Life and Accident Ins. Co.*, 59 Cal. App. 3d 5, 19-20, 130 Cal. Rptr. 416, 425-26 (1976); *Wetherbee v. United Ins. Co.*, 18 Cal. App. 3d 266, 272, 95 Cal. Rptr. 678, 682 (1971); *Fletcher v. Western National Ins. Co.*, 10 Cal. App. 3d 376, 404-05, 89 Cal. Rptr. 78, 96 (1970); *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 716-17, 60 Cal. Rptr. 398, 417-18 (1967) *rehearing denied*.

27. *Wetherbee v. United Ins. Co.*, 18 Cal. App. 3d 266, 270, 95 Cal. Rptr. 678, 681 (1971). Wealth may be determined by reference to the defendant's net worth, his after tax income, or both. *Little v. Stuyvesant Life Ins. Co.*, 67 Cal. App. 3d 451, 469, 136 Cal. Rptr. 653, 663 (1977); *Wetherbee v. United Ins. Co.*, 18 Cal. App. 3d 266, 271, 95 Cal. Rptr. 678, 681 (1971).

28. *Merlo v. Standard Life and Accident Ins. Co.*, 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416, 425 (1976).

29. *Bertero v. National General Corp.*, 13 Cal. 3d 43, 65, 529 P.2d 608, 624, 118 Cal. Rptr. 184, 200 (1974).

punish or control their corporate officers. That is to say, only thus will the award of punitive damages serve the functions of deterrence and punishment.<sup>30</sup>

A further consideration is whether or not, and to what extent, the conduct in question had a business motive.<sup>31</sup> Presumably, the more the defendant stood to profit from his misconduct, the greater should be the award of punitive damages. Obviously, this factor, like the first two, is related to the punitive and deterrent functions of punitive damages: an award of punitive damages which leaves to the defendant any of his ill-gotten gains cannot be said either to punish or to deter sufficiently. Indeed the Owen article suggests that where the profit motive is implicated, punitive damages awarded ought to consist of a multiple of the defendant's expected profit so that the deterrent effect of the award will be maximized.<sup>32</sup>

A fourth factor is the degree to which the defendant's conduct may be considered outrageous and beyond the bounds of common decency.<sup>33</sup> The more flagrant and immoral the conduct, the larger the award of punitive damages that will be necessary to express society's abhorrence of it.

A fifth consideration is the defendant's amenability to reformation. If the defendant is unrepentant, refuses to acknowledge his responsibility, and seeks to cover up the facts prior to or during the lawsuit, that indicates an excessive concern with profits and reputation at the expense of public safety. On the other hand, if the defendant can show that he voluntarily discontinued his misbehavior, especially if this course of action occurred before the litigation, the need for deterrence is lessened.<sup>34</sup>

It is sometimes said, under California law, that there must be a "reasonable relationship" between the compensatory and punitive damages awarded.<sup>35</sup> No fixed numerical ratio is recognized

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30. See *Neal v. Farmers Ins. Exchange*, No. 208360 (Cal. Sup. Ct., filed Aug. 25, 1978).

31. Owen, *supra* note 12, at 1292.

32. *Id.* at 1316.

33. *Id.* at 1317-18.

34. Measures such as disciplining or discharging employees responsible for the misconduct and substantially improving the relevant operating procedures might also demonstrate a reformed attitude that would similarly reduce the need for specific deterrence. Recalcitrance and cover-up by the manufacturer, on the other hand, either prior to or during the litigation, would indicate an excessive concern with profits and reputation at the expense of the public safety. In the latter case, the deterrent and law enforcement functions of punitive damages require that assessments be tailored to teach the lesson soundly that knowingly or recklessly marketing defective products will not pay.

*Id.* at 1316-17 (footnotes omitted).

35. *Finney v. Lockhart*, 35 Cal. 2d 161, 164, 217 P.2d 19, 21 (1950).

however, and ratios of punitive damages to compensatory damages as high as 2,000 to 1 have been approved on appeal in California.<sup>36</sup> Other decisions have allowed punitive damage awards of \$5,000,<sup>37</sup> \$1,750,<sup>38</sup> and \$3,000,<sup>39</sup> respectively, even though *no* compensatory damages were awarded. Thus, the ratio is *infinite*.

Under California law, the weighing of the foregoing factors lies almost completely within the discretion of the jury, and while subject to limited review on motion for new trial or on appeal, an award of punitive damages is ordinarily not tampered with unless it is clearly the result of passion and prejudice.<sup>40</sup> Due to the jury's broad discretion, each case is judged on appeal or motion for new trial on the basis of its own merits and in light of the record as a whole. The decision is not controlled by what other juries may have awarded to other plaintiffs on the basis of different misconduct in other cases decided upon different evidence.<sup>41</sup>

### III. CONCLUSION

The punitive remedy in a civil setting is as old as the earliest known systems of law. The "multiple damages" concept finds its birth in The Code of Hammurabi in 2,000 B.C.<sup>42</sup> Similar remedies are found in the Hittite Laws (1400 B.C.) and the Hindu Code of Manu in 200 B.C.<sup>43</sup> A reference in the Bible indicates that the Hebrew Covenant Code of Mosaic Law in 1200 B.C. encompassed the exemplary damages concept.<sup>44</sup> In the common law setting, punitive damages date at least to 1763.<sup>45</sup>

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36. *Id.* at 163, 217 P.2d at 21 (ratio of punitive to actual damages was 2000 to 1); Weisenberg v. Molina, 58 Cal. App. 3d 478, 129 Cal. Rptr. 813 (1976) (ratio of forty-five to one); Zhadan v. Downtown L.A. Motors, 66 Cal. App. 3d 481, 498, 136 Cal. Rptr. 132, 141 (1976) (ratio of forty to one approved, but punitive damages award reversed on other grounds).

37. *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505 (1932).

38. *James v. Public Finance Corporation*, 47 Cal. App. 3d 995, 121 Cal. Rptr. 670 (1975).

39. *Contento v. Mitchell*, 28 Cal. App. 356, 104 Cal. Rptr. 591 (1972).

40. "When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act." *Cunningham v. Simpson*, 1 Cal. 3d 301, 308-09, 461 P.2d 39, 43, 81 Cal. Rptr. 855, 859 (1969).

41. *See Bertero v. National General Corp.*, 13 Cal. 3d 43, 65 n.12, 118 Cal. Rptr. 184, 200 n.12 (1974).

42. G. DRIVER & J. MILES, *THE BABYLONIAN LAWS* 500 (1952).

43. M. BELL, *MODERN DAMAGES* § 26, at 75; *id.* § 29, at 84 (1959).

44. *Exodus* 21:29, 22:1, 22:4, 22:7, 22:9.

45. *Huckle v. Money*, 95 Eng. Rep. 768, 2 Wils. K.B. 205 (C.P. 1763).

In the most recent California case on the subject of punitive damages, the California Supreme Court has placed its imprimatur on the punitive damages remedy as it applies to a large corporation.<sup>46</sup> While *Neal* involved a claim for bad faith refusal of insurance benefits, and thus dealt with a mass service, and not a mass product, the case has strong implications for ordinary products liability cases. In addition, it directly addresses several of the arguments often made against awarding punitive damages in products liability cases. For example, in answer to the argument that the large corporation would merely pass on the cost of the punitive verdict to the consumer, the California Supreme Court responded that by doing so, the corporation places itself at a competitive disadvantage. Likewise, despite a claim of excessiveness, the California Supreme Court reinstated the trial court's judgment of \$750,000 indicating that the preconditions for punitive damages had been satisfied.

The very antiquity of the remedy and its appearance in such diverse systems of law at such different periods indicates that the remedy speaks very directly to deeply ingrained notions of fundamental fairness. Nothing in the law of products liability provides any reason for refusing to heed the strong appeal of the remedy where the behavior of a mass manufacturer or marketer otherwise warrants its imposition and every consideration of policy militates in favor of imposing such sanctions where flagrant disregard for the well-being of the consuming public is established.

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46. *Neal v. Farmers Ins. Exchange*, No. 208360 (Cal. Sup. Ct., filed Aug. 25, 1978).